EXEMPTION 7

Exemption 7 of the FOIA, as amended both in 1974 and in 1986, protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual."[1]

The threshold requirement for Exemption 7 has been modified by Congress twice since the enactment of the FOIA. In its original form, this exemption simply permitted the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."[2] As such, it was consistently construed to exempt all material contained in an investigatory file, regardless of the status of the underlying investigation or the nature of the documents requested.[3]

In 1974, Congress rejected the application of a "blanket" exemption for investigatory files and narrowed the scope of Exemption 7 by requiring that withholding be justified by one of six specified types of harm.[4] Under this revised Exemption 7 structure, an analysis of whether a record was protected by this exemption involved two steps: First, the record had to qualify as an "investigatory record compiled for law enforcement purposes"; second, its disclosure had to be found to threaten one of the enumerated

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[1] 5 U.S.C. § 552(b)(7) (2000 & Supp. IV 2004).

[2] Pub. L. No. 90-23, 81 Stat. 54, 55 (1967) (subsequently amended).

[3] See, e.g., Weisberg v. U.S. Dep't of Justice, 489 F.2d 1195, 1198-1202 (D.C. Cir. 1973).

[4] Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974) (subsequently amended).

harms of Exemption 7's six subparts.[5]

Congress amended Exemption 7 again in 1986, retaining its basic structure as established by the 1974 FOIA amendments but significantly broadening the protection given to law enforcement records virtually throughout the exemption and its subparts.[6] The Freedom of Information Reform Act of 1986, often referred to as the 1986 FOIA amendments, modified the threshold requirement of Exemption 7 in several distinct respects; it deleted the word "investigatory" and added the words "or information," such that Exemption 7 protections are now potentially available to all "records or information compiled for law enforcement purposes."[7] And, except for Exemption 7(B) and part of Exemption 7(E), it altered the requirement that an agency demonstrate that disclosure "would" cause the harm each subsection seeks to prevent, to the lesser standard that disclosure "could reasonably be expected to" cause the specified harm.[8]

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[5] See FBI v. Abramson, 456 U.S. 615, 622 (1982).

[6] Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989) (recognizing that the shift from "would constitute" standard to "could reasonably be expected to constitute" standard "represents a congressional effort to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7]"); Tax Analysts v. IRS, 294 F.3d 71, 79 (D.C. Cir. 2002) (explaining that 1986 FOIA amendments changed threshold for Exemption 7 to delete "any requirement" that information be investigatory and that exemption therefore can be applied more widely); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989) ("The 1986 amendment[s] broadened the scope of exemption 7's threshold requirement . . . ."); North v. Walsh, 881 F.2d 1088, 1098 n.14 (D.C. Cir. 1989) (stating that Congress in 1986 "changed the threshold requirement for withholding information under exemption 7" so that "it now applies more broadly"); Wash. Post Co. v. U.S. Dep't of Justice, No. 84-3581, 1987 U.S. Dist. LEXIS 14936, at *26 (D.D.C. Sept. 25, 1987) (magistrate's recommendation) (noting that an "[a]gency's burden of proof in this threshold test has been lightened considerably"), adopted (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96 (D.C. Cir. 1988).

[7] § 1802, 100 Stat. at 3207-48; see also Tax Analysts, 294 F.3d at 79 (emphasizing that the "legislative history makes it clear that Congress intended the amended exemption to protect both investigatory and non-investigatory materials, including law enforcement manuals and the like" (citing S. Rep. No. 98-221, at 23 (1983))).

[8] Id.; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 9-13 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum]; cf. NARA v. Favish, 541 U.S. 157, 169 (evincing the Supreme Court's reliance on "the Attorney General's con-

(continued...)

EXEMPTION 7

Exemption 7's expansion to cover "information" compiled for law enforcement purposes extended protection to compilations of information as they are preserved in particular records and also to information within the record itself, so long as that information was compiled for law enforcement purposes.[9] It plainly was designed "to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which [it] is maintained."[10] It was intended to avoid use of any mechanical process for determining the purpose for which a physical record was created and to instead establish a focus on the purpose for which information contained in a record has been generated.[11] In making their determinations of threshold Exemption 7 applicability, agencies should focus on the content and compilation purpose of each item of information involved, regardless of the overall character of the record in which it happens to be maintained.[12]

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[8](...continued)
sistent interpretation of" the FOIA in successive such Attorney General memoranda), reh'g denied, 541 U.S. 1057 (2004).

[9] Attorney General's 1986 Amendments Memorandum at 5.

[10] S. Rep. No. 98-221, at 23 (1983).

[11] See id.

[12] See id.; Abramson, 456 U.S. at 630-32; accord Jefferson v. Dep't of Justice, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (reiterating that "this circuit has long emphasized that the focus is on how and under what circumstances the requested files were compiled"); Melville v. U.S. Dep't of Justice, No. 05-0645, 2006 WL 2927575, at *7 (D.D.C. Oct. 12, 2006) (repeating that to assess "whether records are compiled for law enforcement purposes, the 'focus is on how and under what circumstances the requested files were compiled'" (quoting Jefferson, 284 F.3d at 176-77)); Masters v. ATF, No. 04-2274, slip op. at 12 (D.D.C. Sept. 25, 2006) (explaining that the "'focus is on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding'" (quoting Jefferson, 284 F.3d at 176-77)); Meserve v. U.S. Dep't of Justice, No. 04-1844, 2006 U.S. Dist. LEXIS 56732, at *13 (D.D.C. Aug. 14, 2006) (reiterating that "[i]n assessing whether records are compiled for law enforcement purposes, the 'focus is on how and under what circumstances the required files were compiled'" (quoting Jefferson, 284 F.3d at 176-77)); Deglace v. DEA, No. 05-2276, 2007 WL 521896, at *2 (D.D.C. Feb. 15, 2007) (explaining that records located in DEA's Investigative Reporting and Filing System, Planning and Inspection Division, and Operations Files satisfy threshold because such systems pertain to "misconduct," criminal activity, and "confidential source" information) (appeal pending); see, e.g., Sinsheimer v. DHS, 437 F. Supp. 2d 50, 55 (D.D.C. June 16, 2006) (stressing that "[i]t is the purpose of the record, not the role of the agency, that is determinative"); Living Rivers, Inc. v. U.S. Bureau of
(continued...)

This amendment of Exemption 7 shifted its focus from a "record" to an item of "information," building upon the approach to Exemption 7's threshold that was employed by the Supreme Court in FBI v. Abramson,[13] in which the Court pragmatically focused on the "kind of information" contained in the law enforcement records before it. The amendment essentially codified prior judicial determinations that an item of information originally compiled by an agency for a law enforcement purpose does not lose Exemption 7 protection merely because it is maintained in or recompiled into a non-law enforcement record.[14] This properly places "emphasis on the

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[12](...continued)
Reclamation, 272 F. Supp. 1313, 1319 (D. Utah 2003) (finding that records created to protect dams from terrorism satisfy Exemptions 7's threshold, and reasoning that "the context in which an agency has currently compiled a document . . . determines whether it is 'compiled for law enforcement purposes'" (quoting John Doe Agency v. John Doe Corp., 493 U.S. 146, 153-54 (1989))); Hogan v. Huff, No. 00 Civ. 6753, 2002 WL 1359722, at *11 (S.D.N.Y. June 21, 2002) (declaring that "[d]ue to the nature of the origin" of the documents used to determine a target's "status as a potential unregistered agent for the Cuban government, the documents in question meet the requirement of being gathered for law enforcement purposes"); Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury, 981 F. Supp. 20, 22-23 (D.D.C. 1997) (finding that because reports of gun sales are "starting points for investigations of illegal gun trafficking," such reports are "clearly law enforcement records"); cf. Avondale Indus. v. NLRB, 90 F.3d 955, 962 (5th Cir. 1996) (finding no evidence in the requested record or in case law that union "voting lists were, in any way, compiled for a law enforcement purpose").

[13] 456 U.S. at 626.

[14] See id. at 631-32 ("We hold that information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where that recorded information is reproduced or summarized in a new document for a non-law-enforcement purpose."); Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980) (holding that documents from review of previous FBI surveillance meet threshold); see also Assassination Archives & Research Ctr. v. CIA, 903 F. Supp. 131, 132-33 (D.D.C. 1995) (finding that information from criminal investigations recompiled into administrative file to assist FBI in responding to Senate committee hearings "certainly satisfies" threshold requirement), dismissed without prejudice, No. 94-0655 (D.D.C. May 31, 1996); Exner v. U.S. Dep't of Justice, 902 F. Supp. 240, 242 & n.3 (D.D.C. 1995) (protecting law enforcement document even if copy is maintained in non-law enforcement file), appeal dismissed, No. 95-5411, 1997 WL 68352 (D.C. Cir. Jan. 15, 1997). But cf. Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 811 (9th Cir. 1995) (affirming district court's refusal to apply Abramson principle to documents originally compiled for law enforcement purposes but "channelized" into non-law enforcement files when principle raised as defense for first
(continued...)

contents, and not the physical format of documents."[15]

The scope of Exemption 7 was further expanded by the 1986 FOIA amendments, which removed the requirement that records or information be "investigatory" in character in order to qualify for Exemption 7 protection.[16] Under the former formulations, agencies and courts considering Exemption 7 issues often found themselves struggling with the "investigatory" requirement, which held the potential for disqualifying sensitive law enforcement information from Exemption 7 protection.[17] Courts construing this statutory term generally interpreted it as requiring that the records in question result from specifically focused law enforcement inquiries as opposed to more routine monitoring or oversight of government programs.[18]

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[14](...continued)
time in motion for reconsideration).

[15] Ctr. for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 590 (D.D.C. 1983) (applying Abramson to hold that duplicate copy of congressional record maintained in agency files is not "agency record"); see, e.g., Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 926 (D.C. Cir. 2003) (explaining that although the requested documents are of a type that "have traditionally been public . . . [a]s compiled, they constitute a comprehensive diagram of the law enforcement investigation" and thus are "[c]learly" compiled for law enforcement purposes); Ponder v. Reno, No. 98-3097, slip op. at 4-5 (D.D.C. Jan. 22, 2001) (concluding that "the agency's purpose in compiling the records, not their ultimate use of the documents, determines if they meet the Exemption 7 threshold"); Exner, 902 F. Supp. at 242 n.3 (explaining that documents compiled in the course of an FBI investigation into "underworld/criminal activities" involving federal antiracketeering statutes "clearly constitute records or information compiled for law enforcement purposes" even if "a copy of the documents might also be found in a non-law enforcement file"); ISC Group v. DOD, No. 88-631, 1989 WL 168858, at *5 (D.D.C. May 22, 1989) (failing to protect the investigatory report prepared by a private company expressly for the agency's criminal investigation pursuant to Exemption 7 "would elevate form over substance and frustrate the purpose of the exemption"); cf. In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988) (explaining that law enforcement privilege protects testimony about contents of files which would themselves be protected, because public interest in safeguarding ongoing investigations is identical in both situations); Weinstein v. HHS, 977 F. Supp. 41, 45 (D.D.C. 1997) (applying Abramson to protect sensitive information under Exemption 5).

[16] See Attorney General's 1986 Amendments Memorandum at 6.

[17] See id.

[18] Compare, e.g., Sears, Roebuck & Co. v. GSA, 509 F.2d 527, 529-30 (D.C. Cir. 1974) (deciding that records submitted for mere monitoring of employment discrimination are not "investigatory"), with Ctr. for Nat'l Poli-
(continued...)

The distinction between "investigatory" and "noninvestigatory" law enforcement records, was not always so clear.[19] Moreover, the "investigatory" requirement per se was frequently blurred together with the "law enforcement purposes" aspect of the exemption, so that it sometimes became difficult to distinguish between the two.[20] Law enforcement manuals containing sensitive information about specific procedures and guidelines followed by an agency were held not to qualify as "investigatory records" because they had not originated in connection with any specific investigation, even though they clearly had been compiled for law enforcement purposes.[21]

The 1986 FOIA amendments were a response to such troublesome distinctions, and they broadened the potential sweep of the exemption's coverage considerably.[22] Under those FOIA amendments, the protections of Exemption 7's six subparts were made available to all records or information compiled for "law enforcement purposes."[23] Even records generated pursuant to routine agency activities that previously could not be regarded as "investigatory" now should qualify for Exemption 7 protection when those activities involve a law enforcement purpose; this certainly includes records generated for general law enforcement purposes that do not necessarily relate to specific investigations, although some relatively recent decisions still carelessly contain the pre-1986 FOIA amendment "investigatory" language.[24] Records such as law enforcement manuals, for ex-

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[18](...continued)
cy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974) (ruling that records of agency review of public schools suspected of discriminatory practices are "investigatory").

[19] Compare, e.g., Gregory v. FDIC, 470 F. Supp. 1329, 1334 (D.D.C. 1979) (finding that bank examination report "typifies routine oversight" and thus is not "investigatory"), rev'd on other grounds, 631 F.2d 896 (D.C. Cir. 1980), with Copus v. Rougeau, 504 F. Supp. 534, 538 (D.D.C. 1980) (holding that compliance review forecast report is "clearly" investigative record).

[20] See, e.g., Rural Hous. Alliance v. USDA, 498 F.2d 73, 81 & n.47 (D.C. Cir. 1974).

[21] See Sladek v. Bensinger, 605 F.2d 899, 903 (5th Cir. 1979) (holding Exemption 7 inapplicable to DEA manual that "was not compiled in the course of a specific investigation"); Cox v. U.S. Dep't of Justice, 576 F.2d 1302, 1310 (8th Cir. 1978) (same).

[22] See Attorney General's 1986 Amendments Memorandum at 7.

[23] Id.

[24] See Boyd v. DEA, No. 01-0524, slip op. at 7-8 (D.D.C. Mar. 8, 2002) (finding that agency could withhold highly sensitive research analysis in intelligence report pursuant to Exemption 7(E)); Tran v. U.S. Dep't of Jus-
(continued...)

ample which previously were found unqualified for Exemption 7 protection only because they were not "investigatory" in character,[25] now readily satisfy the exemption's threshold requirement.[26] Of course, all law enforce-

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[24](...continued)
tice, No. 01-0238, 2001 WL 1692570, at *3 (D.D.C. Nov. 20, 2001) (concluding that INS form was properly withheld under Exemption 7(E) because it would reveal law enforcement techniques); see, e.g., Allnutt v. Dep't of Justice, 99 F. Supp. 2d 673, 680 (D. Md. 2000) (stating that the Tax Division records at issue "must generally arise during the course of an investigation" and "must involve the detection or punishment of violations of law" to satisfy the Exemption 7 threshold), renewed motion for summary judgment granted, No. Y-98-901, 2000 WL 852455, at *20-21 (D. Md. Oct. 23, 2000), aff'd sub nom. Allnutt v. Handler, 8 F. App'x 225 (4th Cir. 2001); Morales Cozier v. FBI, No. 1:99-0312, slip op. at 15 (N.D. Ga. Sept. 25, 2000) (finding that records "generated through an investigation" initiated by an invitation to an official of the Cuban government to speak in the United States were compiled for law enforcement purposes).

[25] See, e.g., Sladek, 605 F.2d at 903; Cox, 576 F.2d at 1310.

[26] See Attorney General's 1986 Amendments Memorandum at 7; see, e.g., Tax Analysts, 294 F.3d at 79 (explaining that "the legislative history makes it clear that Congress intended the amended exemption to protect both investigatory and non-investigatory materials, including law enforcement manuals and the like"); PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 249, 251 (D.C. Cir. 1993) (holding portions of FBI's Manual of Investigative Operations and Guidelines properly withheld pursuant to Exemption 7(E)); Peter S. Herrick's Custom & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-0377, 2006 U.S. Dist. LEXIS 44802, at *1, *20-21 (D.D.C. June 30, 2006) (explaining that "if the personnel oversight and investigation procedures [in the agency's forfeiture handbook] concern misconduct that violates the law, then the information may be deemed to meet the threshold requirement of Exemption 7"); Sussman v. U.S. Marshals Serv., No. 03-610, 2005 WL 3213912, at *9 (D.D.C. Oct. 13, 2005) (finding that "administrative and operational guidelines and procedures" that are used to investigate threats against federal court employees satisfy law enforcement requirement), summary judgment granted in pertinent part, No. 06-5085, 2006 U.S. App. LEXIS 26317 (D.C. Cir. Oct. 20, 2006); Mosby v. U.S. Marshals Serv., No. 04-2083, 2005 U.S. Dist. LEXIS, at *13-14 (D.D.C. Sept. 1, 2005) (explaining that "administrative and operational guidelines and procedures" meet the threshold, because "[t]his information facilitates monitoring investigations, the flow and maintenance of investigative records, and aids in detecting and apprehending fugitives"); Ctr. for Nat'l Sec. Studies v. INS, No. 87-2068, 1990 WL 236133, at *6 (D.D.C. Dec. 19, 1990) (reiterating that documents relating to INS's law enforcement procedures meet threshold requirement as "purpose in preparing these documents relat[es] to legitimate concerns that federal immigration laws have been or may be violated"). But see Maydak, 254 F. Supp. 2d 23, 38 (D.D.C. 2003) (finding
(continued...)

ment records found qualified for exemption protection under the pre-1986 language of Exemption 7 undoubtedly remain so.[27]

Thus, the sole issue remaining is the application of the phrase "law enforcement purposes" in the context of Exemption 7 as amended. Courts have held that Exemption 7's law enforcement purpose encompasses a wide variety of records and information, as can be seen in the following examples:

(1) records compiled in the "investigations of crimes";[28]

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[26](...continued)
that Bureau of Prisons failed to satisfy law enforcement threshold for records in its Inmate Central Records System, which it described as concerning day-to-day activities and events occurring during inmates' confinement); Cowsen-El v. U.S. Dep't of Justice, 826 F. Supp. 532, 533 (D.D.C. 1992) (explaining that threshold is not met by Bureau of Prisons guidelines covering how prison officials should count and inspect prisoners).

[27] See Rural Hous., 498 F.2d at 80-82 (finding that threshold of Exemption 7 met if investigation focuses directly on specific illegal acts which could result in civil or criminal penalties); Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (finding that, based upon pre-1986 language, INS Lookout Book used to assist in exclusion of inadmissible aliens satisfies threshold requirement); U.S. News & World Report v. Dep't of the Treasury, No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at *5 (D.D.C. Mar. 26, 1986) (reasoning that records pertaining to acquisition of two armored limousines for President meet threshold test when activities involved investigation of how best to safeguard President); Nader v. ICC, No. 82-1037, slip op. at 10-11 (D.D.C. Nov. 23, 1983) (deciding that disbarment proceedings meet Exemption 7 threshold because they are "quasi-criminal" in nature).

[28] Baez v. FBI, 443 F. Supp. 2d 717, 724 (E.D. Pa. 2006) (declaring that "there is no question" that documents pertaining to "investigation of crimes," were compiled for law enforcement purposes); see, e.g., Associated Press v. DOD, No. 05-5468, 2006 WL 2707395, at *3 (S.D.N.Y. Sept. 20, 2006) (stating that "records of investigations to determine whether to charge U.S. military personnel with misconduct . . . were compiled for law enforcement purposes" (citing Aspin v. DOD, 491 F.2d 24, 26-28 (D.C. Cir. 1973) (explaining that records from an investigation "directed toward discovering and toward obtaining evidence of possible offenses under the Uniform Code of Military Justice" were compiled for law enforcement purposes)); Long v. U.S. Dep't of Justice, No. 00-0211, 2006 WL 2578755, at *17 n.20 (D.D.C. Sept. 8, 2006) (accepting agency's uncontested assertion that records are compiled for law enforcement purposes when government is in role of prosecutor or plaintiff); Maydak v. U.S. Dep't of Justice, No. 00-0562, 2006 U.S. LEXIS 58409, at *8-9 (D.D.C. Aug. 21, 2006) (observing that records concerning fraudulent access device applications and unauthorized
(continued...)

(2) investigatory files and file systems;[29]

(3) audits;[30] and, more generally,

(4) records responsive to a particular type of FOIA request (i.e., given

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[28](...continued)
telecommunications access devices satisfy law enforcement threshold); Ray v. FBI, 441 F. Supp. 2d 27, 33-34 (D.D.C. 2006) (determining that documents generated by FBI efforts to prevent distribution of pornography, combat insurance fraud, and battle drug trafficking meet law enforcement threshold); Watkins Motor Lines, Inc. v. EEOC, No. 8:05-1065, 2006 WL 905518, at *3 (M.D. Fla. Apr. 7, 2006) (stating that because "the records were compiled while the EEOC was investigating an alleged violation of federal law, the records were compiled for law enforcement purposes"); Delta Ltd. v. U.S. Customs & Border Prot., 384 F. Supp. 2d 138, 142-43, 152 (D.D.C. July 26, 2005) (finding "no question" that records created during seizure of merchandise exported from China were compiled for law enforcement purpose); Maydak v. U.S. Dep't of Justice, 362 F. Supp. 2d 316, 323 (D.D.C. 2005) (finding "no dispute" that records involving alleged or actual assaults at federal penitentiary were compiled for law enforcement purposes).

[29] See Deglace, 2007 WL 521896, at *2 (finding that DEA records systems pertaining to personnel misconduct, criminal activity, and confidential sources satisfy threshold); Balderrama v. DHS, No. 04-1616, 2006 WL 889778, at *1, *7-9 (D.D.C. Mar. 30, 2006) (explaining that "Pre-Sentencing Investigation Reports," which are routinely prepared regarding all convicted felons during prosecution process, are part of law enforcement file and thus satisfy law enforcement requirement); Butler v. DEA, No. 05-1798, 2006 WL 398653, at *3 (D.D.C. Feb. 16, 2006) (noting that records maintained in DEA's Investigative Reporting and Filing System and in DEA's Operations File satisfy threshold because they contain information on individuals investigated by agency and identities and details regarding confidential sources); see also Melville, 2006 WL 2927575, at *7 (describing records of investigation and prosecution of narcotics-related activity as being maintained in Criminal Case File System and thus qualifying as "law enforcement records for purposes of Exemption 7"); Antonelli v. ATF, No. 04-1180, 2006 WL 141732, at *4 (D.D.C. Jan. 18, 2006) (stating that records "maintained in the Prisoner Processing and Population Management/Prison Tracking System and in the Warrant Information Network" were complied for ATF's law enforcement purposes of processing and transporting prisoners, executing arrest warrants, and investigating fugitive matters, and that they "therefore satisfy . . . [the] threshold requirement").

[30] Faiella v. IRS, No. 05-CV-238, 2006 WL 2040130, at *4 (D.N.H. July 20, 2006) (observing that "an IRS audit is a law enforcement activity"); cf. Van Mechelen v. U.S. Dep't of the Interior, No. C05-5393, 2005 WL 3007121, at *1, *4 (W.D. Wash. Nov. 9, 2005) (explaining that reports generated by investigation into building leases satisfy law enforcement threshold).

the "nature" of the request).[31]

However, even with such wide latitude, courts do not determine automatically that records involving "wrongdoing" necessarily satisfy the law enforcement threshold.[32] Therefore, agencies in litigation still should describe in some detail the law enforcement purpose behind the compilation of the requested records.[33] (For further discussion of this point, see Litiga-

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[31] Valdez v. U.S. Dep't of Justice, No. 04-0950, 2007 U.S. Dist. LEXIS 10566, at *10 (D.D.C. Feb. 16, 2007) ("Given the nature of plaintiff's FOIA request and the descriptions of the systems of records where responsive records likely would be located, the Court concludes that any responsive records would be law enforcement records."); Boyd v. ATF, No. 05-1096, 2006 U.S. Dist. LEXIS 71857, at *1, *22 (D.D.C. Sept. 29, 2006) (stating that it is "evident from the nature of the . . . requests" for criminal investigative file and policies/procedures on confidential informants that the "relevant records were compiled for law enforcement purposes"); Wilson v. DEA, No. 04-1814, 2006 WL 212138, at *1, *5, *7 (D.D.C. Jan. 27, 2006) (stating that "[g]iven the nature of the request" for conspiracy records and drug laboratory reports, "DEA clearly meets the threshold requirement"); Dipietro v. Executive Office for U.S. Attorneys, 357 F. Supp. 2d 177, 184 (D.D.C. 2004) (declaring that "[g]iven the nature of [the] request" for criminal files including confidential informant records, the requested records satisfy the "law enforcement" threshold), summary judgment granted, 386 F. Supp. 2d 80 (D.D.C. 2005); cf. Hogan, 2002 WL 1359722, at *11 (explaining that the requested records satisfy Exemption 7's threshold "due to the nature of [their] origin").

[32] See, e.g., Cawthon v. U.S. Dep't of Justice, No. 05-0567, 2006 WL 581250, at *4 (D.D.C. Mar. 9, 2006) (explaining that malpractice records for two Bureau of Prison doctors "appear to come from personnel records" and therefore do not meet Exemption 7's law enforcement threshold); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (finding "no evidence that the paralegal names and work numbers" appearing in communications related to monitoring federal elections were "compiled for law enforcement purposes"), motion to amend denied, 421 F. Supp. 2d 104 (D.D.C. 2006); Maydak, 362 F. Supp. 2d at 321-23 (concluding that psychological test maintained in Bureau of Prisons files, documents pertaining to accidents and injuries sustained in recreation department at prison, and list of staff names and titles of prison employees were not compiled for law enforcement purposes); Phillips v. Immigration & Customs Enforcement, 385 F. Supp. 2d 296, 306 (S.D.N.Y. 2005) (finding law enforcement requirement not met for report involving immigration status of two former military officials from El Salvador accused of atrocities, because report "was prepared for Congress").

[33] See, e.g., Cawthon, 2006 WL 581250, at *4 (finding agency's declaration to be insufficient to satisfy threshold); Antonelli v. ATF, No. 04-1180, 2005 U.S. Dist. LEXIS 17089, at *26 (D.D.C. Aug. 16, 2005) (noting that the (continued...)

tion Considerations, Vaughn Index, below.)

For instance, the question of whether the Federal Bureau of Prison's practice of recording telephone calls made by prison inmates to individuals outside the prison facility satisfies the law enforcement threshold arose after the Court of Appeals for the District of Columbia Circuit ruled that such recordings did not qualify for Title III protection[34] and therefore could not be withheld pursuant to Exemption 3 of the FOIA.[35] (This statute -- Title III of the Omnibus Crime Control and Safe Street Act of 1968 -- governs wiretaps and makes it unlawful, except under certain conditions, to intercept wire, oral, or electronic communications; the statute places restrictions on the release of the intercepted information.[36]) The D.C. Circuit in Smith v. United States Department of Justice thus held that telephone recordings of the inmates were "not a product of an 'interception' consensual or otherwise."[37] However, courts in subsequent cases specifically addressing whether the recordings of these telephone calls satisfy Exemption 7's threshold, have found consistently that these recordings were compiled for law enforcement purposes, thus satisfying that requirement and permitting the application of Exemption 7(C) to such records.[38]

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[33](...continued)
defendant agencies "have proffered no evidence from which the Court may find for them on the threshold requirement"); Flores v. U.S. Dep't of Justice, No. 03-2105, slip op. at 4 (D.D.C. Aug. 31, 2004) (finding that while the "description of the records suggests that a criminal investigation was conducted, [the] mere suggestion" is not sufficient to meet the threshold of "law enforcement"), summary judgment granted (D.D.C. Feb. 7, 2005), summary affirmance granted, No. 05-5074, 2005 U.S. App. LEXIS 24159 (D.C. Cir. Nov. 8, 2005), cert. denied, 126 S. Ct. 2316 (2006).

[34] See Smith v. U.S. Dep't of Justice, 251 F.3d 1047, 1049 (D.C. Cir. 2001) (finding that tapes of telephone calls made by inmates are not within of scope of Title III).

[35] 5 U.S.C. § 552(b)(3).

[36] Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§ 2510-2520 (2000 & Supp. IV 2004).

[37] 251 F.3d at 1049.

[38] See, e.g., Swope v. U.S. Dep't of Justice, 439 F. Supp. 2d 1, 6 (D.D.C. July 3, 2006) (stating that "such telephone recordings are the functional equivalent of law enforcement records"); Thomas v. U.S. Dep't of Justice, No. 1:04-112, 2006 WL 722141, at *2 (E.D. Tex. Mar. 15, 2006) (reiterating that telephone calls are monitored "to preserve the security of the institution and to protect the public" and that the recordings thus satisfy the law enforcement requirement); Butler v. Fed. Bureau of Prisons, No. 05-643, 2005 WL 3274573, at *3 (D.D.C. Sept. 27, 2005) (finding that "BOP is a law enforcement agency," and explaining that because inmate telephone calls
(continued...)

Thus, overall, the "law" to be enforced within the meaning of the term "law enforcement purposes" includes both civil[39] and criminal stat-

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[38](...continued)
are monitored to preserve security and orderly management of the institution and to protect the public, "such telephone recordings are the functional equivalent of law enforcement records"); Pendergrass v. U.S. Dep't of Justice, No. 04-112, 2005 WL 1378724, at *4 (D.D.C. June 7, 2005) (explaining that prisons monitor and record telephone calls in order "to preserve the security and orderly management of the institution and to protect the public"; consequently, the recordings are "the functional equivalent of law enforcement"); Jones v. Fed. Bureau of Prisons, No. 03-1647, slip op. at 1 (D.D.C. Oct. 6, 2004) (declaring that "monitoring and taping of inmate telephone calls [do] serve a law enforcement purpose"); Monaco v. Dep't of Justice, No. 02-1843, slip op. at 6 (D.D.C. Sept. 24, 2003) (concluding that BOP tapes of telephone conversations "are law enforcement records for purposes of Exemption 7").

[39] See, e.g., Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 550 (6th Cir. 2001) (explaining that the "Court has adopted a per se rule" that applies not only to criminal enforcement actions, but to "records compiled for civil enforcement purposes as well"); Rural Hous., 498 F.2d at 81 & n.46 (holding that the "character of the statute violated would rarely make a material distinction, because the law enforcement purposes . . . include both civil and criminal purposes"); Morley v. CIA, No. 03-2545, 2006 WL 2806561, at *14 (D.D.C. Sept. 29, 2006) (mentioning that law enforcement "extends to civil investigations and proceedings"); Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 587 (N.D. W. Va. 2005) (reiterating that law enforcement standard includes "civil laws"); Martinez v. EEOC, No. 04-CA-0391, 2004 WL 2359895, at *2 (W.D. Tex. Oct. 19, 2004) (restating that requirement of "law enforcement purpose" is satisfied by both criminal and civil laws); Black & Decker Corp. v. United States, No. 02-2070, 2004 WL 500847, at *3 (D. Md. Feb. 19, 2004) (stating that "law enforcement" includes both civil and criminal matters); Judicial Watch, Inc. v. Rossotti, No. 01-2672, U.S. Dist. 2002 LEXIS 25213, at *19-20 (D. Md. Dec. 16, 2002) (ruling that letters written by citizens concerned about plaintiff's compliance with IRS laws were compiled for "civil law enforcement purposes"), aff'd sub nom. Judicial Watch, Inc. v. United States, 84 F. App'x 335 (4th Cir. 2004); Schiller v. INS, 205 F. Supp. 2d 648, 659 (W.D. Tex. 2002) (stating that "[l]aw enforcement for purposes of the FOIA is not limited strictly to criminal investigations but also includes within its scope civil investigations" (citing Rugiero, 257 F.3d at 550)); Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 728 n.2 (D. Md. 2001) (reasoning that United States Marshals Service forfeiture records satisfy threshold because agency is responsible for "enforcement of civil and criminal seizure and forfeiture laws"); Youngblood v. Comm'r of Internal Revenue, No. 2:99-9253, 2000 WL 852449, at *10 (C.D. Cal. Mar. 7, 2000) (holding that IRS "investigations or proceedings in the civil or criminal context" satisfy the threshold).

utes,[40] as well as those statutes authorizing administrative (i.e., regulatory) proceedings.[41]

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[40] See, e.g., Beard v. Espy, No. 94-16748, 1995 WL 792071, at *1 (9th Cir. Dec. 11,1995) (protecting complaint letter and notes compiled during criminal investigation involving USDA loans); Ortiz v. HHS, 70 F.3d 729, 730 (2d Cir. 1995) (holding that unsigned, unsolicited letter used to launch criminal investigation by Social Security Administration meets threshold for law enforcement purposes, although no charges filed against target); Judicial Watch v. U.S. Dep't of Justice, No. 99-1883, slip op. at 2-3, 11 (D.D.C. June 9, 2005) (finding that information from databases and computer systems created by Civil Rights Division task force members in response to abortion clinic violence satisfies law enforcement threshold, because evidence gathered relates to violations of federal criminal statutes); Oliver v. FBI, No. 02-0012, slip op. at 4 (D.D.C. Mar. 8, 2004) (finding that records compiled during investigation into, and criminal prosecution for, kidnaping and transporting minor across state lines satisfy law enforcement threshold), aff'd per curiam, No. 04-5445, 2005 U.S. App. LEXIS 13991 (D.C. Cir. July 8, 2005); Oguaju v. Executive Office for U.S. Attorneys, No. 00-1930, slip op. at 3 n.2 (D.D.C. Sept. 25, 2003) (finding that threshold requirement was satisfied when information was compiled as part of "criminal investigation, prosecution and conviction" of requester), summary affirmance granted, No. 04-5407, 2005 U.S. App. LEXIS 23891 (D.C. Cir. Nov. 3, 2005); Solar Sources v. United States, No. 96-0772, slip op. at 5 (S.D. Ind. Mar. 10, 1997) (holding that criminal antitrust investigation of explosives industry was "indisputably" compiled for law enforcement purposes), aff'd, 142 F.3d 1033 (7th Cir. 1998); Hoffman v. Brown, No. 1:96-53, slip op. at 4 (W.D.N.C. Nov. 26, 1996) (finding that information compiled by VA police canvassing plaintiff's neighbors regarding "alleged criminal activity of plaintiff at home" meets threshold), aff'd, 145 F.3d 1324 (4th Cir. 1998) (unpublished table decision); Mavadia v. Caplinger, No. 95-3542, 1996 WL 592742, at *2 (E.D. La. Oct. 11, 1996) (finding that both civil and criminal investigations of possible violations of immigration laws satisfy threshold); Cappabianca v. Comm'r. U.S. Customs Serv., 847 F. Supp. 1558, 1565 (M.D. Fla. 1994) (stating that records of internal investigation focusing specifically on alleged acts that could result in civil or criminal sanctions were compiled for law enforcement purposes); Stone v. Def. Investigative Serv., 816 F. Supp. 782, 787 (D.D.C. 1993) (protecting foreign counterintelligence investigation and investigation into possible violation of federal statute), appeal dismissed for failure to prosecute, No. 93-5178 (D.C. Cir. Mar. 11, 1994); Buffalo Evening News, Inc. v. U.S. Border Patrol, 791 F. Supp. 386, 394 (W.D.N.Y. 1992) (reasoning that USBP form meets threshold because it is generated in investigations of violations of federal immigration law).

[41] See, e.g., Jefferson, 284 F.3d at 178 (reiterating that Exemption 7 "'covers investigatory files related to enforcement of all kinds of laws,' including those involving 'adjudicative proceedings'" (quoting Rural Hous., 498 F.2d at 81 n.46)); Ctr. for Nat'l Policy Review, 502 F.2d at 373 (holding that administrative determination has "salient characteristics of 'law enforcement'

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Most significantly, the courts recognize that "law enforcement" within the meaning of Exemption 7 extends beyond these traditional realms into the realms of national security and homeland security-related government activities as well.[42] For example, in Center for National Security Studies v.

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[41](...continued)
contemplated" by Exemption 7 threshold requirement); Envtl. Prot. Servs., 364 F. Supp. 2d at 587 (stating that records compiled in EPA's administrative proceeding satisfy law enforcement threshold, because Exemption 7 applies to "enforcement of civil laws, such as regulations"); Schiller, 205 F. Supp. 2d at 559 (stating that "law enforcement" for purposes of FOIA includes regulatory proceedings (citing Rugiero, 257 F.3d at 550)); Hidalgo v. Bureau of Prisons, No. 00-1229, slip op. at 3 (D.D.C. June 6, 2001) (determining that records compiled during investigation of prisoner for violating institutional rules and regulations satisfy threshold), summary affirmance granted, No. 01-5257, 2002 WL 1997999 (D.C. Cir. Aug. 29, 2002); McErlean v. Dep't of Justice, No. 97-7831, 1999 WL 791680, at *8 (S.D.N.Y. Sept. 30, 1999) (stating that "it is well-settled that documents compiled by the INS in connection with the administrative proceedings authorized by the Immigration and Naturalization Act are documents compiled for 'law enforcement purposes'"); Gen. Elec. Co. v. EPA, 18 F. Supp. 2d 138, 143-44 (D. Mass. 1998) (reasoning that EPA decision to classify a site as contaminated "is not an enforcement action at all but rather ordinary informal rulemaking," which would ordinarily not meet Exemption 7 threshold, though in this case it did because "it is entirely reasonable for the agency to anticipate that enforcement proceedings are in the offing"); Johnson v. DEA, No. 97-2231, 1998 U.S. Dist. LEXIS 9802, at *9 (D.D.C. June 25, 1998) (reiterating that "law being enforced may be . . . regulatory"); Straughter v. HHS, No. 94-0567, slip op. at 4 (S.D. W. Va. Mar. 31, 1995) (magistrate's recommendation) (finding threshold met by records compiled by HHS's Office of Civil Rights in course of investigation of handicap discrimination as violation of Rehabilitation Act), adopted (S.D. W. Va. Apr. 17, 1995); Kay v. FCC, 867 F. Supp. 11, 16-18 (D.D.C. 1994) (explaining that FCC's statutory authority to revoke licenses or deny license applications is qualifying law enforcement purpose); Aircraft Gear Corp. v. NLRB, No. 92-C-6023, slip op. at 10 (N.D. Ill. Mar. 14, 1994) (stating that documents created in connection with NLRB unfair labor practices cases and union representation case meet threshold); Ehringhaus v. FTC, 525 F. Supp. 21, 22-23 (D.D.C. 1980) (deciding that documents prepared as part of FTC investigation into advertising practices of cigarette manufacturers meet threshold); cf. Gordon v. FBI, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (explaining that law enforcement is not limited to criminal law, but can encompass "internal guidelines" (citing Dirksen v. HHS, 803 F.2d 1456, 1459 (9th Cir. 1986)).

[42] See Ctr. for Nat'l Sec. Studies, 331 F.3d at 926 (finding law enforcement threshold met by records compiled in course of investigation into "breach of this nation's security"); Gordon, 388 F. Supp. 2d at 1036 (extending the law enforcement threshold to include memoranda and e-mail messages created by the FBI in its handling of various aviation "watch lists"
(continued...)

United States Department of Justice, the D.C. Circuit recently explained that the names of post-9/11 detainees, found on documents that traditionally have been public, are properly withheld because they were compiled for the law enforcement purpose of pursuing a "heinous violation of federal law as well as a breach of national security."[43] Indeed, in accepting arguments that terrorists could use information previously considered innocuous and safe for public release, courts have shown a new sensitivity to the needs of homeland security by recognizing the law enforcement nexus for certain documents that readily could be used by terrorists to assess the likelihood of detection, to analyze the degree of damage inflicted by striking one particular target instead of another, or even to intimidate witnesses and/or the families of witnesses.[44]

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[42](...continued)
created to "protect the American flying public from terrorists"); Living Rivers, 272 F. Supp. 2d at 1321 (finding that terrorists could make use of downstream flooding projections from agency's dam "inundation maps," and obliquely referring to "a dam failure as [seeking] a 'weapon of mass destruction'"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 964-65 (C.D. Cal. 2003) (ruling that terrorists could use information to avoid detection and to direct "merchandise to vulnerable ports"), reconsideration denied, No. 02-3838, 2002 WL 21507775 (C.D. Cal. June 13, 2003), appeal dismissed voluntarily, No. 03-55833 (9th Cir. Aug. 26, 2003); see also Pratt v. Webster, 673 F.2d 408, 421 (D.C. Cir. 1982) (explaining that "to pass the FOIA Exemption 7 threshold," agencies must establish that their activities are based on a concern that "federal laws have been or may be violated or that national security may be breached" (emphasis added)); cf. Morley, 2006 WL 2806561, at *13 (stretching Exemption 7's law enforcement purpose to include documents "which are the product of a CIA investigatory process"); Lahr v. NTSB, No. 03-8023, 2006 WL 2789870, at *1, *4, *22 (C.D. Cal. Aug. 31, 2006) (extending the law enforcement purpose to cover CIA documents compiled to analyze the mid-air explosion of TWA Flight 800 that could possibly have been result of terrorist activity, because "it was the FBI that compiled" the records).

[43] 331 F.3d at 926, 929.

[44] See id. at 929 ("While the name of any individual detainee may appear innocuous or trivial, it could be of great use to al Qaeda in plotting future terrorist attacks or intimidating witnesses in the present investigation."); Living Rivers, 272 F. Supp. 2d at 1321 (reasoning that terrorists could use "inundation maps" to aid in carrying out attacks on dams both in choosing potential targets and in selecting particular, more vulnerable features of certain dams); Coastal Delivery, 272 F. Supp. 2d at 964, 966 (explaining that information that appears to be "innocuous on its own" could reasonably be used by "potential terrorists and smugglers" to circumvent law enforcement procedures); see also *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (discussing recent case law developments, and advising on the "increasing significance of both information
(continued...)

As another recent example, in Los Angeles Times Communications v. Department of the Army,[45] the District Court for the Central District of California ruled that incident reports from private security contractors in Iraq meet the law enforcement threshold because the purpose of compiling and maintaining such incident reports "falls within a cognizable law enforcement mandate in Iraq [of tracking] insurgent attacks on and other unlawful activities against Coalition forces [and contract employees] to improve intelligence information that will enhance security."[46] Furthermore, in an analysis similar to that of the courts in Center for National Security Studies[47] and Coastal Delivery Corp.,[48] this court significantly went on to uphold the withholding of even the names of the companies mentioned in the reports, pursuant to Exemption 7(F),[49] explaining that "[t]he test is not whether the [contractor] company names alone are sufficient to directly result in a threat to the safety of military and [contractor] personnel," but rather whether or not "'information [that] is not of obvious importance in itself . . . in a mosaic analysis, it could lead to identification of substantive information.'"[50]

In fact, the courts that have uniformly determined that documents related to national or homeland security satisfy Exemption 7's law enforce-

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[44](...continued)
sharing and information safeguarding in connection with sensitive homeland security information"); cf. *FOIA Post*, "Guidance on Homeland Security Information Issued" (posted 3/21/02) (stressing need for safeguarding not only classified records but also "sensitive information related to America's homeland security that might not meet" classification standards).

[45] 442 F. Supp. 2d 880 (C.D. Cal. 2006).

[46] Id. at *13.

[47] 331 F.3d at 926 (explaining that while similar documents have traditionally been public, in the instant case, the names "constitute a comprehensive diagram of the law enforcement investigation").

[48] 272 F. Supp. 2d at 964-65 (explaining that "[w]hile it is true that knowing the rate of examination at different ports may not be the best way" for terrorists and smugglers to avoid detection, arguments that they "could not and would not use the information [to direct activities to vulnerable ports] is unpersuasive," and further explaining that while the information is not of obvious importance, if it were released and combined "'with other known data, in a 'mosaic' analysis, it could lead'" to substantive information (quoting Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1064-65 (3d Cir. 1995))).

[49] L.A. Times, 442 F. Supp. 2d at 898-99 (explaining that to qualify for Exemption 7(F) protection, information must satisfy the threshold and in addition the agency must establish that disclosure "would reasonably be expected to endanger the life or physical safety of any individual").

[50] Id. (quoting Davin, 60 F.3d at 1064-65.

ment requirement have discussed repeatedly that the agencies' mandates to protect society and to prevent violence are key to establishing the threshold's satisfaction[51] -- making "homeland security," as a practicable matter in the post-9/11 world, virtually synonymous with "law enforcement."[52]

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[51] See Ctr. for Nat'l Sec. Studies, 331 F.3d at 926, 928 (explaining that "America faces an enemy" and that the terrorism investigation into this "heinous violation" is one of the Department of Justice's chief law enforcement duties); Gordon, 388 F.2d at 1045 ("[T]he information was compiled in connection with maintaining the watch lists to prevent another terrorist attack on civil aviation. There is nothing in the redacted information that suggests that the FBI's assertion of a law enforcement purpose is pretextual, that is, that the FBI is placing names on the watch lists because of a person's First Amendment activities rather than for a law enforcement purpose."); Living Rivers, 272 F. Supp. 2d at 1320 (concluding that "inundation maps" were compiled for law enforcement purposes because they are used for homeland security as part of the Department of the Interior's "Emergency Action Plans and to protect and alert potentially threatened people"); see also Pratt, 673 F.2d at 410, 422-23 (finding that documents gathered during the investigation of the Black Panther Party, "an allegedly subversive and violent domestic organization," met law enforcement threshold because investigation involved "prevention of violence" on American soil); Ayyad v. U.S. Dep't of Justice, No. 00-960, 2002 WL 654133, at *8-12 (S.D.N.Y. Apr. 17, 2002) (ruling that the information satisfies Exemption 7's threshold, because it "is clearly related to law enforcement proceedings and was compiled by the FBI to investigate" the 1993 World Trade Center bombing); Judicial Watch, Inc. v. Reno, No. 00-0723, slip op. at 21 (D.D.C. Mar. 30, 2001) (stating that "information related to an investigation of possible terrorist threats . . . is sufficient to meet" the threshold); Morales Cozier, No. 99-0312, slip op. at 14-15 (N.D. Ga. Sept. 25, 2000) (explaining that the law enforcement threshold is met by an investigation of activities that "could have presented an interference with United States foreign policy or national security"); cf. Jabara v. Webster, 691 F.2d 272, 279-80 (6th Cir. 1982) (clarifying, in a Privacy Act case, that an investigation encompassing the exercise of First Amendment rights is not barred if it is relevant to an authorized criminal, civil, administrative, or intelligence investigation).

[52] See, e.g., Ctr. for Nat'l Sec. Studies, 331 F.3d at 926 (concluding that investigations of persons detained in the wake of breach of national security by 9/11 terror attack meet law enforcement standard easily); Gordon, 388 F. Supp. 2d at 1036 (concluding that "law enforcement purpose" cannot be read "too narrowly" and that "watch lists" used to protect American flying public from terrorism were created for law enforcement purposes); Living Rivers, 272 F.2d at 1320 (finding that inundation maps meet law enforcement threshold); Coastal Delivery, 272 F. Supp. 2d at 964-65 (reasoning that law enforcement requirement is satisfied by cargo-inspection data at seaports where disclosure could permit terrorists to direct activities to "vulnerable ports"); see also *FOIA Post*, "FOIA Officers Conference Held on

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Furthermore, in this area courts pointedly emphasize the propriety of judicial deference; indeed, in Center for National Security Studies, the D.C. Circuit observed that it was acting fully "in accord with several federal courts that have wisely respected the executive judgments in prosecuting the national response to terrorism" by deferring to the executive on "decisions of national security," especially in establishing the law enforcement purpose and in foreseeing the harm from disclosure.[53] (For further discussions of homeland security-related matters, see Exemption 1, Homeland Security-Related Information, above, and Exemption 2, Homeland Security-Related Information, above.)

In addition to all such matters of federal law enforcement, Exemption

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[52](...continued)
Homeland Security" (posted 7/3/03) (explaining amendments to Executive Order 13292, memorandum pertaining to homeland security, and recent case law); *FOIA Post*, "Guidance on Homeland Security Information Issued" (posted 3/21/02) (discussing recent events concerning safeguarding information); cf. L.A. Times, 442 F. Supp. 2d at 898 (explaining that there is "a cognizable law enforcement mandate in Iraq" of improving intelligence information that will enhance security).

[53] 331 F.3d at 932; see also L.A. Times, 442 F. Supp. 2d at 899 (deferring to agency's predictive judgments and explaining that it is "'well-established that the judiciary owes some measure of deference to the executive in cases implicating national security'" (quoting Ctr. for Nat'l Sec. Studies, 331 F.2d at 926-27)); Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (noting that circumstances of "terrorism" can warrant heightened deference) (non-FOIA case); Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (stating that courts are reluctant to intrude into "national security affairs") (non-FOIA case); cf. N. Jersey Media Group v. Ashcroft, 308 F.3d 198, 200-03 (3d Cir. 2002) (holding that closure of "special interest" deportation hearings involving detainees with alleged connections to terrorism does not violate First Amendment when "open hearings might impair national security" by disclosing potentially sensitive information) (non-FOIA case); Gordon, 388 F. Supp. 2d at 1036, 1045 (admitting that "[i]t is not too difficult to believe" that the release of the requested information would be useful to terrorists, and stressing that "[t]here is nothing in the redacted information that suggests that the FBI's assertion of a law enforcement purpose is pretextual"). But see Lahr, 2006 WL 2789870, at *1, *5, *16 (declaring in a case involving allegations that "the government acted improperly in its investigation of Flight 800," which exploded in mid-air in 1996; stating that there is "a presumption of legitimacy accorded to a government official's conduct," but nevertheless finding that there is evidence "sufficient to permit Plaintiff to proceed based on his claims [that there was a] massive cover-up" by government officials of plaintiff's theorized "fact" that the explosion was caused by an errant missile launched by the United States military).

7 also applies to records compiled to enforce state law,[54] and even foreign law.[55] There is no requirement that the matter culminate in actual adminis-

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[54] See Hopkinson, 866 F.2d at 1222 n.27 (holding that Exemption 7 applies "to FBI laboratory tests conducted at the request of local law enforcement authorities"); Leadership, 404 F. Supp. 2d at 257-58 (determining that "local police arrest reports [and] bail bond information" met threshold); Antonelli, 2005 U.S. Dist. LEXIS 17089, at *12 (declaring that records "compiled during the course of an investigation by a local police department, with ATFE assistance," satisfy threshold); Franklin v. DEA, No. 97-1225, slip op. at 7 (S.D. Fla. June 26, 1998) (stating that documents compiled for "federal or state" law enforcement purposes meet threshold); Code v. FBI, No. 95-1892, 1997 WL 150070, at *5 (D.D.C. Mar. 26, 1997) (finding that documents compiled in connection with FBI's efforts to assist local police in homicide investigations meet threshold); Butler, 888 F. Supp. at 180, 182 (finding that Air Force personnel background report -- requested by local law enforcement agency for its investigation into murder -- was compiled for law enforcement purposes); Kuffel v. Bureau of Prisons, 882 F. Supp. 1116, 1124 (D.D.C. 1995) (ruling that information from state law enforcement agency investigating various state crimes qualifies); Wojtczak v. U.S. Dep't of Justice, 548 F. Supp. 143, 146-48 (E.D. Pa. 1982) ("This Court must therefore interpret the statute as written and concludes that Exemption 7 applies to all law enforcement records, federal, state, or local, that lie within the possession of the federal government"); see also Shaw v. FBI, 749 F.2d 58, 64 (D.C. Cir. 1984) (explaining that authorized federal investigation into commission of state crime constitutes valid criminal law enforcement investigation, which qualifies confidential source-provided information for protection under second half of Exemption 7(D)); Palacio v. U.S. Dep't of Justice, No. 00-1564, 2002 U.S. Dist. LEXIS 2198, at *16 (D.D.C. Feb. 11, 2002) (explaining that records of investigation conducted by city task force were "created or compiled" for law enforcement purposes and thus satisfy threshold), summary affirmance granted, No. 02-5247, 2003 U.S. App. LEXIS 1804 (D.C. Cir. Jan. 31, 2003); Rojem v. U.S. Dep't of Justice, 775 F. Supp. 6, 10 (D.D.C. 1991) (determining that material provided to FBI by state law enforcement agency for assistance in that state agency's criminal investigation is "compiled for law enforcement purposes"), appeal dismissed for failure to timely file, No. 92-5088 (D.C. Cir. Nov. 4, 1992).

[55] See, e.g., Bevis v. Dep't of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986) (finding no distinction between foreign and domestic enforcement purposes in language of statute); Zevallos-Gonzalez v. DEA, No. 97-1720, slip op. at 9 (D.D.C. Sept. 25, 2000) (concluding that documents generated during an investigation conducted under the "authority of Peruvian laws and under the authority granted to the DEA under the Controlled Substance Act to pursue the agency's law enforcement obligations under both United States statutes and international agreements . . . were compiled for law enforcement purposes"); Schwarz v. U.S. Dep't of Justice, No. 95-2162, slip op. at 6 (D.D.C. May 31, 1996) (stating that information compiled by INTERPOL at behest of foreign government meets requirement), summary affirmance

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trative, civil, or criminal enforcement.[56] However, if the agency lacks the authority to pursue a particular law enforcement matter, Exemption 7 protection may not be afforded in certain instances,[57] but may nevertheless

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[55](...continued)
granted, No. 96-5183 (D.C. Cir. Oct. 23, 1996); Donovan v. FBI, 579 F. Supp. 1111, 1119-20 (S.D.N.Y. 1983) (stating that an FBI investigation undertaken and laboratory tests performed in support of a foreign government's efforts to identify and prosecute perpetrators of crimes satisfy threshold, and reasoning that "refusing to apply Exemption 7 to foreign law enforcement might have the practical effect of interfering with cooperation and information sharing"), vacated on other grounds on motion for reconsideration, 579 F. Supp. 1124 (S.D.N.Y.), appeal dismissed as moot, 751 F.2d 368 (2d Cir. 1984); see also FOIA Update, Vol. V, No. 2, at 6-7 (reasoning that records compiled for "nonfederal" investigations satisfy threshold, because "Exemption 7's threshold requirement . . . makes no reference to federal investigations, nor can any such limitation logically be inferred").

[56] See, e.g., Ponder, No. 98-3097, slip op. at 5 (D.D.C. Jan. 22, 2001) (ruling that records were compiled for law enforcement purpose despite fact that subject was never prosecuted); Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at *8-9 (D.D.C. July 29, 1999) (magistrate's recommendation) (determining that investigation of perennial presidential candidate Lyndon LaRouche for possible criminal violations was for legitimate law enforcement purpose even if that investigation "went nowhere"); cf. Wolk v. United States, No. 04-CV-832, 2005 WL 465382, at *4 (E.D. Pa. Feb. 28, 2005) (stating that "[w]e construe the term 'enforcement' to encompass the conducting of a security background check of a federal judicial nominee" even when the process reveals no improprieties, because "[i]t is impossible, ex ante, to determine whether an FBI investigation will reveal troubling information about a specific nominee").

[57] See, e.g., Rosenfeld, 57 F.3d at 808-09 (finding no law enforcement purpose when "documents all support a conclusion that . . . any asserted purpose for compiling these documents was pretextual"); Weissman v. CIA, 565 F.2d 692, 696 (D.C. Cir. 1977) (ruling that the CIA's "full background check within the United States of a citizen who never had any relationship with the CIA is not authorized and the law enforcement exemption is accordingly unavailable"); Taylor v. U.S. Dep't of Justice, 257 F. Supp. 2d 101, 108 (D.D.C. 2003) (stating that investigations must be "'within the agency's law enforcement authority'" (quoting Whittle v. Moschella, 756 F. Supp. 589, 593 (D.D.C. 1991))), reconsideration denied, 268 F. Supp. 2d 34 (D.D.C. 2003), appeal dismissed for failure to prosecute, No. 03-5111, 2003 WL 2205968 (D.C. Cir. Aug. 19, 2003); Enviro Tech Int'l v. EPA, No. 02 C 4650, 2003 U.S. Dist. LEXIS 25493, at *22 (N.D. Ill. Mar. 11, 2003) (describing Exemption 7 as having "hook" that can in some cases restrict its use to "only those documents relating to specifically authorized agency activities"), aff'd, 371 F.3d 370 (7th Cir. 2004) (distinguishing again important differences between "ultra vires" for Exemption 5 and for Exemption 7);
(continued...)

still be afforded in other situations.[58]

Additionally, "[b]ackground security investigations by governmental units which have authority to conduct such functions"[59] have been held by most courts to meet the threshold tests under the succeeding formulations of Exemption 7.[60] And further, personnel investigations of government em-

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[57](...continued)
Miscavige v. IRS, No. 91-3721, slip op. at 2, 5 (C.D. Cal. Dec. 9, 1992) (finding no law enforcement purpose for post-1986 documents because IRS investigation concluded in 1985); cf. Kuzma v. IRS, 775 F.2d 66, 69 (2d Cir. 1985) (declaring that unauthorized or illegal investigative tactics may not be shielded from public by use of FOIA exemptions).

[58] Pratt, 673 F.2d at 422-23 (explaining that "Exemption 7 refers to purposes rather than methods" and that "[w]hile many of the FBI's goals and methods in its COINTELPRO activities against the [Black Panther Party] give us serious pause," such as the goal to prevent "militant black nationalist groups and leaders from gaining respectability by discrediting them," these questionable methods do not defeat the exemption's coverage when law enforcement is the primary purpose because, "[f]rom the record before us, we cannot conclude that [the FBI's concern about violence] was implausible or irrational"); Hrones v. CIA, 685 F.2d 13, 19 (1st Cir. 1982) (legality of agency's actions in national security investigation falls outside scope of judicial review in FOIA action); Dean v. FDIC, 389 F. Supp. 2d 780, 790 (E.D. Ky. 2005) (finding that "a 13-month, overzealous investigation" into a possible conflict of interest that "negatively impacted" an employee's career, yet concluded that no wrongdoing had occurred, was authorized because the Office of Inspector General (OIG) "has the authority and responsibility to investigate even potential criminal violations relating to FDIC programs" and that the "overboard" response by the OIG "does not require the conclusion that the investigation was undertaken in bad faith"); Peltier v. FBI, No. 03-CV-905S, 2005 WL 735964, at *14 (W.D.N.Y. Mar. 31, 2005) (stating that "the rule in this Circuit is that the Government need only show that the records were compiled by a law enforcement agency in the course of a criminal investigation [because t]he legitimacy of the investigation is immaterial"); cf. Mettetal v. U.S. Dep't of Justice, No. 2:04-410, 2006 U.S. Dist. LEXIS 64157, at *11 (E.D. Tenn. Sept. 7, 2006) (explaining that the "Sixth Circuit has adopted a per se rule under which any document compiled by a law enforcement agency" is compiled for a law enforcement purpose) (emphasis added).

[59] S. Conf. Rep. No. 93-1200, at 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6291.

[60] See, e.g., Mittleman v. OPM, 76 F.3d 1240, 1241-43 (D.C. Cir. 1996) (OPM background investigation); Rosenfeld, 57 F.3d at 809 ("FBI government appointment investigations"); Wolk, 2005 WL 465382, at *4 (concluding that "enforcement" encompasses conducting a "security background
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ployees also are compiled for law enforcement purposes if they focus on "specific and potentially unlawful activity by particular employees" of a civil or criminal nature.[61]

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[60](...continued)
check" by reasoning that "'enforcement of the law fairly includes not merely the detection and punishment of violations of law but their prevention'" (quoting Miller v. United States, 630 F. Supp. 347, 349 (E.D.N.Y. 1986)); Pontecorvo v. FBI, No. 00-1511, slip op. at 37-38 (D.D.C. Sept. 30, 2001) (background investigation of potential employee); Melius v. Nat'l Indian Gaming Comm'n, No. 92-2210, 1999 U.S. Dist. LEXIS 17537, at *6, *15 (D.D.C. Nov. 3, 1999) ("suitability investigations" for gaming contracts); Assassination Archives, 903 F. Supp. at 132 (FBI "background investigations"); Bostic v. FBI, No. 1:94 CV 71, slip op. at 2, 11 (W.D. Mich. Dec. 16, 1994) (FBI pre-employment investigation); Doe v. U.S. Dep't of Justice, 790 F. Supp. 17, 20-21 (D.D.C. 1992) (background investigation of individual conditionally offered employment as attorney); Miller, 630 F. Supp. at 349 (USIA background-security investigation of federal job applicant); Koch v. Dep't of Justice, 376 F. Supp. 313, 315 (D.D.C. 1974) (background investigations fall within Exemption 7 because they involve determinations as to whether applicants engaged in criminal conduct that would disqualify them for federal employment); see also FOIA Update, Vol. VI, No. 4, at 6.

[61] Stern v. FBI, 737 F.2d 84, 89 (D.C. Cir. 1984); see Perlman v. U.S. Dep't of Justice, 312 F.3d 100, 103, 105 (2d Cir. 2002) (discussing allegations of preferential treatment and undue access and influence in INS Investor Visa Program by former INS general counsel, and finding that records compiled during investigation into allegations satisfy Exemption 7's threshold, because such acts could subject him to criminal or civil penalties), aff'd, 380 F.3d 110 (2d Cir. 2004); Kimberlin v. Dep't of Justice, 139 F.3d 944, 947-48 (D.C. Cir. 1998) (concluding that an investigation "conducted in response to and focused upon a specific, potentially illegal release of information by a particular, identified official" satisfies the threshold); Strang v. Arms Control & Disarmament Agency, 864 F.2d 859, 862 (D.C. Cir. 1989) (characterizing agency investigation into employee violation of national security laws as law enforcement); O'Keefe v. DOD, 463 F. Supp. 2d 317, 320, 324 (E.D.N.Y. 2006) (finding that report detailing investigation of complaint alleging misconduct by commanding officers on multiple occasions was compiled for law enforcement purposes); Lewis v. United States, No. 02-3249, slip op. at 1, 6 (C.D. Cal. June 2, 2003) (finding that investigation of alleged unauthorized collection action by IRS employees was for law enforcement purposes); Mueller v. Dep't of the Air Force, 63 F. Supp. 2d 738, 742 (E.D. Va. 1999) (holding that the investigation into prosecutorial misconduct was for law enforcement purposes because "'an agency investigation of its own employees is for law enforcement purposes . . . if it focuses directly on specifically alleged illegal acts, illegal acts of a particular identified official, acts which could, if proved, result in civil or criminal sanctions'" (quoting Stern, 737 F.2d at 89)); Hayes v. U.S. Dep't of Labor, No. 96-1149, 1998 U.S. Dist. LEXIS 14120, at *11-12 (S.D. Ala. June 10, 1998) (ex-
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Indeed, in Jefferson v. Department of Justice, the D.C. Circuit Court, in clarifying the mixed-function nature of the Department of Justice's Office of Professional Responsibility (OPR), stated that "OPR conducts both law enforcement and non-law enforcement activities," and it elaborated at length on the difference between the two types of files that "government agencies compile: (1) files in connection with government oversight of the performance of duties by its employees, and (2) files in connection with investigations that focus directly on specific alleged illegal acts which could result in civil or criminal sanction."[62] The D.C. Circuit declined to find that all OPR records were compiled for law enforcement purposes, particularly because the "Department's regulations describe OPR as a mixed-function agency with responsibilities that embrace not only investigations of violations of law and breaches of professional standards that may result in civil liability . . . but breaches of internal Department guidelines that may lead to disciplinary proceedings . . . of such non-law violations."[63] Thus, courts

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[61](...continued)
plaining that records of "internal agency investigations are considered to be compiled for 'law enforcement purposes' when the investigations focus on specifically alleged acts, which, if proved, could amount to violations of civil or criminal law"), adopted (S.D. Ala. Aug. 10, 1998); Lurie v. Dep't of the Army, 970 F. Supp. 19, 36 (D.D.C. 1997) (explaining that threshold met because investigation focused directly on specifically alleged illegal acts of identified officials (citing Rural Hous., 498 F.2d at 81)), appeal dismissed voluntarily, No. 97-5248 (D.C. Cir. Oct. 22, 1997); Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 631847, at *22 (D.D.C. Aug. 22, 1995) ("[D]ocuments compiled for purposes of internal discipline of employees are not compiled for law enforcement purposes . . . [b]ut such internal monitoring of employees may be 'for law enforcement purposes' if the focus of the investigation concerns acts that could result in civil or criminal sanctions." (quoting Stern, 737 F.2d at 89)), appeal dismissed voluntarily, No. 97-5122 (D.C. Cir. July 14, 1997); Housley v. U.S. Dep't of the Treasury, 697 F. Supp. 3, 5 (D.D.C. 1988) (reiterating that investigation concerning misconduct by special agent which, if proved, could have resulted in federal civil or criminal sanctions qualifies as law enforcement); cf. Favish, 541 U.S. at 175 (recognizing realistically that "[a[llegations of government misconduct are 'easy to allege and hard to disprove'" (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998))); In re Dep't of Investigation of N.Y., 856 F.2d 481, 485 (2d Cir. 1988) (explaining that the law enforcement privilege applies in the discovery context when the investigation served the "dual purposes of evaluating conduct in office and enforcing the criminal law") (non-FOIA case).

[62] Jefferson, 284 F.3d at 176-77 (citing Rural Hous., 498 F.2d at 81).

[63] Id. at 179; see also Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1194 (N.D. Cal. 2006) (discussing difference between supervision and law enforcement by explaining that "'[i]f the investigation is for a possible violation of law, then the inquiry is for law enforcement purposes, as distinct from cus-
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continue to distinguish between mere supervision of federal employees for performance of their assigned duties, on one hand, and investigations of federal employees for law enforcement purposes, on the other -- finding repeatedly that "an agency's general monitoring of its own employees to ensure compliance with the agency's statutory mandate and regulations" does not satisfy Exemption 7's threshold requirement.[64]

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[63](...continued)
tomary surveillance of the performance of duties by government employees'" (quoting Jefferson, 284 F.3d at 177)).

[64] Stern, 737 F.2d at 89 (dictum) (reminding that "it is necessary to distinguish between those investigations conducted 'for a law enforcement purpose' and those in which an agency, acting as the employer, simply supervises its own employees"); see also Jefferson, 284 F.3d at 177-78 (ruling that agencies must distinguish between records based on "allegations that could lead to civil or criminal sanctions" and records "maintained in the course of general oversight of government employees"); Patterson v. IRS, 56 F.3d 832, 837-38 (7th Cir. 1995) (holding that the "general citation to an entire body of statutes contained in the United States Code under the heading 'Equal Employment Opportunity statutes'" does not establish a law enforcement purpose, and declaring that the agency must "'distinguish between internal investigations conducted for law enforcement purposes and general agency monitoring'" (quoting Stern, 727 F.2d at 89)); Rural Hous., 498 F.2d at 81 (distinguishing between agency oversight of performance of employees and investigations focusing on specific illegal acts of employees); Wood v. FBI, 312 F. Supp. 2d 328, 345 (D. Conn. 2004) (reiterating that "'an investigation conducted by a federal agency for the purpose of determining whether to discipline employees for activity which does not constitute a violation of law is not for law enforcement purposes under Exemption 7'" (quoting Stern, 737 F.2d at 90)), aff'd in part & rev'd in part on other grounds, 432 F.3d 78 (2d Cir. 2005); Jefferson v. U.S. Dep't of Justice, No. 01-1418, slip op. at 16 (D.D.C. Mar. 31, 2003) (finding that Office of Inspector General records concerning particular federal employee were not oversight records of internal agency monitoring, because they were compiled during investigation into her failure to comply with court order), aff'd, 168 F. App'x 448 (D.C. Cir. 2005); Varville v. Rubin, No. 3:96CV00629, 1998 WL 681438, at *14 (D. Conn. Aug. 18, 1998) (explaining that the threshold was not met by a report discussing possible ethical violations and prohibited personnel practices because the inquiry "more closely resembles an employer supervising its employees than an investigation for law enforcement purposes"); Lurie, 970 F. Supp. at 36 ("The general internal monitoring by an agency of its own employees is not shielded from public scrutiny under Exemption 7, because 'protection of all such internal monitoring under Exemption 7 would devastate FOIA.'" (quoting Stern, 737 F.2d at 89)); Fine v. U.S. Dep't of Energy, 823 F. Supp. 888, 907-08 (D.N.M. 1993) (ruling that threshold met by agency with both administrative and law enforcement functions when documents were compiled during investigation of specific allegations and not as part of routine oversight); Cotton v. Adams, 798 F.
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Thus, while the line between mere employee monitoring and an investigation of an employee that satisfies the threshold requirement of Exemption 7 is narrow, the following examples satisfying the threshold shed useful light on this distinction:

(1) an investigation of an employee's allegations of misconduct and gross incompetence;[65]

(2) an investigation triggered by a complaint letter alleging that particular government prosecutors had withheld certain information during

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[64](...continued)
Supp. 22, 25 (D.D.C. 1992) (holding that agency's internal investigation of its own employees satisfies threshold only if it focuses directly on illegal acts that could result in criminal or civil sanctions; Greenpeace USA, Inc. v. EPA, 735 F. Supp. 13, 15 (D.D.C. 1990) (threshold was not met by internal investigation into whether employee complied with agency conflict-of-interest regulations). But cf. Nagel v. HEW, 725 F.2d 1438, 1441 (D.C. Cir. 1984) (holding that the "employer's determination whether a federal employee is performing his job adequately constitutes an authorized law enforcement activity" within the meaning of subsection (e)(7) of the Privacy Act of 1974, 5 U.S.C. § 552a (2000 & Supp. IV 2004)).

[65] Edmonds v. FBI, 272 F. Supp. 2d 35, 42, 54 (D.D.C. 2003); see also Jefferson v. Dep't of Justice, No. 04-5226, 2005 U.S. App. LEXIS 23360, at *2 (D.C. Cir. Oct. 26, 2005) (affirming district court's ruling that law enforcement threshold is met by investigation concerning Department of Justice attorney accused of official misconduct); Trentadue v. Integrity Comm., No. 2:03-339, 2006 WL 1184636, at *5 (D. Utah May 2, 2006) (finding threshold met by documents prepared in course of investigation of allegations against federal employee); Pagan v. Treasury Inspector Gen. for Tax Admin., No. 04-4179, slip op. at 6 (E.D.N.Y. Jan. 31, 2006) (finding that documents created as result of specific allegations of misuse of government equipment and of conducting personal business while on official duty qualify as law enforcement documents); MacLean v. DOD, No. 04-2425, slip op. at 14 (S.D. Cal. June 2, 2005) (finding that documents created in response to allegations of professional misconduct against prosecutor satisfy law enforcement threshold); Judicial Watch v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 179 (D.D.C. 2004) (finding that investigations of certain agency personnel for possible violations of campaign finance laws and trade mission improprieties qualify as law enforcement); cf. Herrick's Newsletter, 2006 U.S. Dist. LEXIS 44802, at *1, *20-21 (explaining that "if the personnel oversight and investigation procedures concern misconduct that violates the law, then the information may be deemed to meet the threshold requirement of Exemption 7"); Dohse v. Potter, No. 8:04CV355, 2006 WL 398653, at *1, *7 (D. Neb. Feb. 15, 2006) (ruling that investigation by Postal Service of independent contractor for "interpersonal conflicts," including "alleged threats to postal personnel," satisfies law enforcement threshold).

litigation;[66]

(3) an investigation of a particular Assistant United States Attorney for disclosing confidential information about the alleged use of cocaine by a suspect;[67] and

(4) an investigation triggered by an allegation of racial harassment.[68]

On the other hand, examples of matters that do not satisfy the threshold are:

(1) an investigation into whether an employee who spoke at a meeting sponsored by a regulated company violated agency regulations when the case focused on "whether an agency employee has complied with agency regulations";[69]

(2) records concerning an employee who had been disciplined because the agency was participating "as an employer" and not as an "agency enforcing the revenue laws";[70] and

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[66] Ligorner v. Reno, 2 F. Supp. 2d 400, 402-03 (S.D.N.Y. 1998).

[67] Kimberlin, 139 F.3d at 946-47.

[68] Ford v. West, No. 97-1342, 1998 WL 317561, at *1-2 (10th Cir. June 12, 1998); see also Martinez v. EEOC, No. 04-CA-0271, 2005 U.S. Dist. LEXIS 3864, at *2, *11 (W.D. Tex. Mar. 3, 2005) (finding that information compiled in relation to charges of "a racially hostile work environment" meets the law enforcement threshold); cf. Sakamoto, 443 F. Supp. 2d at 1194 (discussing files "compiled by the EPA as part of the internal investigatory or adjudicatory proceedings associated with the EEOC process for complaints of discrimination in accordance with Title VII of the Civil Rights Act," and concluding that the agency "has met its burden" to show that the records were compiled for law enforcement purposes); Sinsheimer, 437 F. Supp 2d at 52, 55 (declaring that investigations into allegations of sexual misconduct in the workplace meet the law enforcement threshold, even when the charges were dropped, because "the investigations were carried out to enforce federal civil rights laws"); Watkins, 2006 WL 905518, at *1-3 (reasoning that records compiled during an investigation into an allegation of employment discrimination -- based on a company's denial of employment to a person convicted of aggravated sexual abuse -- "were compiled for a law enforcement purpose," because the EEOC investigated "a charge that [the company] violated federal law by discriminating"); Martinez, 2004 WL 2359895, at *2 (stating that "investigation into charges of discrimination" met law enforcement threshold).

[69] Greenpeace, 735 F. Supp. at 14-15.

[70] Patterson, 56 F.3d at 837.

(3) an investigation conducted by an Office of Inspector General that the agency merely asserted "must" have been for law enforcement purposes even though the Inspector General "also investigates internal matters concerning agency inefficiency and mismanagement."[71]

The common thread running through all these cases is the one first established in Rural Housing and then reiterated in Stern: It is imperative that an agency articulate the purpose of its actions and, as necessary, "distinguish [between] two types of files relating to government employees."[72] Most especially, as noted above, entities such as an Office of Inspector General and the Department of Justice's Office of Professional Responsibility need to take particular care in describing the different types of personnel investigations that they conduct, because such entities routinely conduct both law enforcement and non-law enforcement investigations of agency employees.[73]

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[71] Cotton, 798 F. Supp. at 25; see also Jefferson, 284 F.3d at 178-79 (stating that oversight of performance, including review of violations of agency rules, does not qualify as "law enforcement" within meaning of Exemption 7); Wood, 312 F. Supp. 2d at 346 (finding that employee conduct at issue involved only "violations of agency policy" and thus did not satisfy threshold).

[72] Rural Hous., 498 F.2d at 82 (stating that the "purpose of the 'investigatory files' is thus the critical factor," and reiterating that an agency must distinguish between its "surveillance of the performance of duties by government employees [and its] inquiry as to an identifiable possible violation of law"); Stern, 737 F.2d at 89 (emphasizing that an agency's "general internal monitoring of its own employees to insure compliance with the agency's statutory mandate and regulations is not protected from public scrutiny under Exemption 7 . . . [and that] an agency's investigation of its own employees is for 'law enforcement purposes' only if it focuses 'directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions'" (quoting Rural Hous., 498 F.2d at 81)).

[73] See, e.g., Jefferson, 284 F.3d at 176 (finding, based upon then-existing regulations, that Department of Justice's Office of Professional Responsibility conducts "both law enforcement and non-law enforcement activities"); Cotton, 798 F. Supp. at 25 (stating that while "the [Office of] Inspector General has the ability to conduct investigations," it also looks into "internal matters concerning agency inefficiency and mismanagement," so its documents "could merely" pertain to an alleged violation of the agency's own rules); Greenpeace, 735 F. Supp. at 15 (finding that documents at issue concerned mere compliance with agency regulations). But see Dean, 389 F. Supp. 2d at 785, 790 (finding that an inquiry into whether an agency employee, who "as a private citizen" violated any ethical standards by developing certain software concepts, satisfied the law enforcement threshold, and explaining that "the Court is of the opinion that the OIG has the authority and responsibility to investigate even potential criminal violations").

Similarly, determining whether a record concerning matters other than an agency's own activities and personnel was "compiled for law enforcement purposes" under Exemption 7, the courts have generally distinguished between agencies with both law enforcement and administrative functions and those whose principal function is criminal law enforcement.[74] An agency whose functions are "mixed" usually has to show that the records at issue involved the enforcement of a statute or regulation within its authority.[75] Courts have additionally required that the records be compiled

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[74] See Attorney General's 1986 Amendments Memorandum at 7; see also Sciba v. Bd. of Governors of the Fed. Reserve Sys., No. 04-1011, 2005 WL 3201206, at *7 (D.D.C. Nov. 4, 2005) (finding that Board is law enforcement agency, because it has responsibility not only to monitor for compliance but also to detect and prosecute crimes and violations of federal statutes within its sphere, including Bank Secrecy Act); Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., No. 6:02-CV-126, 2003 WL 21146674, at *17 (M.D. Fla. May 13, 2003) (reiterating that an agency "with mixed law enforcement and non-law enforcement functions requires the Court to consider the purpose of the investigation and to determine whether the information was gathered as part of an inquiry about a potential violation of the law, rather than in the course of the agency's administrative function of overseeing compliance with its rules and regulations"), remanded on other grounds, 376 F.3d 1270 (11th Cir. 2004), cert. denied, 543 U.S. 1121 (2005); cf. Mayer, Brown, Rowe & Maw v. IRS, No. 04-2187, 2006 U.S. Dist. LEXIS 58410, at *23 (D.D.C. Aug. 21, 2006) (saying that IRS "combines administrative and law enforcement functions").

[75] See Lewis v. IRS, 823 F.2d 375, 379 (9th Cir. 1987) (holding the threshold met when the IRS "had a purpose falling within its sphere of enforcement authority in compiling particular documents"); Birch v. USPS, 803 F.2d 1206, 1210-11 (D.C. Cir. 1986) (explaining that threshold was met because enforcement of laws regarding use of mails falls within statutory authority of Postal Service); Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service for it to show that investigation involved enforcement of statute or regulation within its authority); Irons v. Bell, 596 F.2d 468, 473 (1st Cir. 1979) (determining that mixed-function agency must demonstrate purpose falling within its sphere of enforcement authority); Sutton v. IRS, No. 05-7177, 2007 WL 30547, at *5 (N.D. Ill. Jan. 4, 2007) (stating that "whenever the IRS is enforcing the revenue laws, it is completely obvious that it is proceeding with an enforcement purpose" and adding that here, IRS investigated violations of Internal Revenue Code regarding alimony deduction); see also Cooper Cameron Corp. v. Dep't of Labor, 280 F.3d 539, 545 (5th Cir. 2002) (observing that "Congress obviously intended OSHA inspections to be part of an enforcement program," particularly when the agency is responding to a workplace accident); Coulter v. Reno, No. 98-35170, 1998 WL 658835, at *1 (9th Cir. Sept. 17, 1998) (holding threshold met by records of Navy criminal investigation into allegations of lewd and lascivious conduct by Navy personnel); Church of Scientology Int'l v. IRS, 995 F.2d 916, 919 (9th Cir. 1993)

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for "adjudicative or enforcement purposes."[76]

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("This court has clearly held that the IRS has the 'requisite law enforcement mandate'" through its enforcement provisions of the federal tax code (quoting Lewis, 823 F.2d at 379)); Faiella, 2006 WL 2040130, at *1, *4 (noting that civil audit qualifies as law enforcement activity through IRS's enforcement provisions); Martinez, 2005 U.S. Dist. LEXIS 3864, at *8, *11 (explaining that the "EEOC bears burden of showing that it compiled records for a law enforcement purpose and establishing its entitlement to the exemption"); Carp v. IRS, No. 00-5992, 2002 WL 373448, at *4-5 (D.N.J. Jan. 28, 2002) (determining that IRS investigation targeting individual for possible violation of federal tax law satisfies threshold); Wayne's Mech. & Maint. Contractor, Inc. v. Dep't of Labor, No. 1:00-45, slip op. at 7 n.2 (N.D. Ga. May 7, 2001) (concluding that records compiled by OSHA during investigation of industrial accident were within agency's statutory law enforcement mandate); Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 67 (D.D.C. 1999) (holding that investigative records created in response to specific allegations of Medicare fraud by physicians at a teaching hospital were compiled for law enforcement purposes).

[76] Rural Hous., 498 F.2d at 81; see Pac. Energy Inst. v. IRS, No. 94-36172, 1996 WL 14244, at *1 (9th Cir. Jan. 16, 1996) (accepting that investigations involving enforcement of Internal Revenue Code satisfy threshold); Becker v. IRS, 34 F.3d 398, 407 (7th Cir. 1994) (holding that IRS has "law enforcement purpose in investigating potential illegal tax protester activity"); Church of Scientology, 995 F.2d at 919 (finding that IRS Exempt Organizations Division "performs law enforcement function by enforcing provisions of the federal tax code"); Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, No. 05-0806, 2006 U.S. Dist. LEXIS 89614, at *21-22 (D.D.C. Dec. 12, 2006) (holding that National Indian Gaming Commission's investigation into alleged misuse of tribal gaming revenues satisfied Exemption 7 threshold); Odle v. Dep't of Justice, No. 05-2771, 2006 WL 1344813, at *5-6 (N.D. Cal. May 17, 2006) (explaining that the Department of Justice's Office of Professional Responsibility is a mixed-function agency and thus has "the burden of demonstrating the records in question were compiled 'for adjudicative or enforcement purposes'"; finding that records compiled for an investigation into "misrepresentation to the court, violation of a court order, misrepresentation to defense counsel, subornation of perjury, and failure to correct false testimony" meet the threshold (quoting Church of Scientology, 611 F.2d at 748)); Suzhou Yuanda Enter. Co. v. U.S. Customs & Border Prot., 404 F. Supp. 2d 9, 14 (D.D.C. 2005) (finding law enforcement threshold met by investigation into suspected scheme to import merchandise, because agency is charged with enforcing federal laws regarding proper importation of merchandise); Millhouse v. IRS, No. 03-1418, 2005 U.S. Dist LEXIS 1290, at *6-7 (D.D.C. Jan. 3, 2005) (holding that records compiled during IRS investigation of "money laundering and narcotics trafficking activities" were compiled for law enforcement purposes); Means v. Segal, No. 97-1301, slip op. at 12 (D.D.C. Mar. 18, 1998) (magis-
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However, in two relatively recent cases involving agencies with "mixed" functions, courts have applied the phrase "law enforcement purpose" quite broadly.[77] In Living Rivers, Inc. v. United States Bureau of Reclamation, the court explained that before it could determine if "dam inundation" maps created by the Department of the Interior's Bureau of Reclamation (BOR) were withheld properly pursuant to either Exemption 7(E) or Exemption 7(F), it first had to determine whether Exemption 7's threshold requirement was met.[78] Reiterating the differences between "per se" law enforcement agencies and those with both administrative and law enforcement functions, the court pragmatically acknowledged that "Congress has provided the BOR with express 'law enforcement authority' to 'maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands.'"[79] After endorsing this express grant of law enforcement authority, the court next addressed the "compilation" aspect of the threshold requirement, finding that the "context in which an agency has currently compiled a document, rather than the purpose for which the document was originally created, determines whether it is 'compiled for law enforcement purposes.'"[80] Based upon this pragmatic, post-9/11 analysis, the court ruled that "the inundation maps are presently used and were compiled in direct relation to the BOR's statutory law enforcement mandate. The BOR therefore satisfies the first prong of Exemption 7."[81]

Similarly, in Coastal Delivery v. United States Customs Service, the court recognized readily that "Customs has a law enforcement mandate" regarding the "number of examinations it performed on merchandise arriv-

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[76](...continued)
trate's recommendation) (holding that Federal Labor Relations Authority is charged with statutory responsibility to conduct investigations related to unfair labor practices and records related to this duty meet threshold), adopted (D.D.C. Apr. 15, 1998), aff'd on other grounds, No. 98-5170 (D.C. Cir. Oct. 6, 1998); cf. Reed v. NLRB, 927 F.2d 1249, 1252 (D.C. Cir. 1991) (noting "skepticism" of government's alternative argument regarding application of Exemption 7(C)'s threshold to lists of names and addresses of eligible voters in union representative election compiled for NLRB compliance purposes).

[77] Living Rivers, 272 F. Supp. 2d at 1318-20; Coastal Delivery, 272 F. Supp. 2d at 963.

[78] 272 F. Supp. 2d at 1318.

[79] Id. at 1318-19 (quoting "General Authority of Secretary of the Interior," 43 U.S.C.A. § 373b(a) (2000 & Supp. III 2003), pertaining to law enforcement authority granted to Bureau of Reclamation, specifically regarding public safety).

[80] Id. at 1319-20.

[81] Id. (quoting John Doe Agency, 493 U.S. at 153-54).

ing into the Los Angeles/Long Beach seaport."[82] Accordingly, it found a sufficient Exemption 7 nexus, in support of both Exemption 2 and Exemption 7(E) protection, because the agency's cargo container inspection numbers "allow Customs to track the overall effectiveness of its examination technique, and evaluate both its commercial enforcement strategy and its border security responsibilities."[83]

In the case of criminal law enforcement agencies, the courts have accorded the government varying degrees of special deference when considering whether their particular records meet the threshold requirement of Exemption 7.[84] Indeed, the First, Second, Sixth, Eighth, and Eleventh Circuit Courts of Appeals have adopted a per se rule that qualifies all "investigative" records of criminal law enforcement agencies for protection under Exemption 7.[85] Other courts, while according significant deference to

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[82] 272 F. Supp. 2d at 963; see also Favish, 541 U.S. at 164 (stating succinctly that "[i]t is common ground among the parties that the death-scene photographs in OIC's possession are 'records or information compiled for law enforcement purposes' as that phrase is used in Exemption 7C"); Suzhou, 404 F. Supp. 2d at 14 (declaring that "Customs is a law enforcement agency charged with enforcing federal law regarding the proper entry of merchandise into the United States" and that the agency "properly applied Exemption 7"); cf. Ctr. for Nat'l Sec. Studies, 331 F.3d at 926 (recognizing that the "terrorism investigation [into the events of September 11, 2001] is one of DOJ's chief 'law enforcement duties' at this time," and thereby pragmatically merging national security and homeland security concerns into "law enforcement purposes").

[83] 272 F. Supp at 963.

[84] Compare, e.g., Pratt, 673 F.2d at 418 (declaring that "a court can accept less exacting proof from [a law enforcement agency]"), with Kuehnert v. FBI, 620 F.2d 662, 667 (8th Cir. 1980) (holding that "Exemption 7 extends to all investigative files of a criminal law enforcement agency").

[85] See First Circuit: Curran v. Dep't of Justice, 813 F.2d 473, 475 (1st Cir. 1987) (holding that investigatory records of law enforcement agencies are "inherently" compiled for law enforcement purposes); Irons, 596 F.2d at 474-76 (holding that "investigatory records of law enforcement agencies are inherently records compiled for 'law enforcement purposes' within the meaning of Exemption 7"); Second Circuit: Halpern v. FBI, 181 F.3d 279, 296 (2d Cir. 1999) (applying rule that when records are compiled in course of law enforcement investigation, purpose of investigation is not subject of review by court); Ferguson v. FBI, 957 F.2d 1059, 1070 (2d Cir. 1992) (finding that there is "no room for [a] district court's inquiry into whether the FBI's asserted law enforcement purpose was legitimate"); Williams v. FBI, 730 F.2d 882, 884-85 (2d Cir. 1984) (ruling that records of a law enforcement agency are given "absolute protection" even if "records were compiled in the course of an unwise, meritless or even illegal investigation"); Peltier, 2005 WL

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criminal law enforcement agencies, have held that an agency must demonstrate some specific nexus[86] between the records and a proper law en-

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[85](...continued)
735964, at *14 (explaining that the "legitimacy of the investigation is immaterial [because] the rule in this Circuit is that the Government need only show that the records were compiled by a law enforcement agency in the course of a criminal investigation"); Sixth Circuit: Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 96 (6th Cir. 1996) (holding that "mug shots" are created for law enforcement purpose, and applying per se rule adopted previously in Jones v. FBI, 41 F.3d 238, 246 (6th Cir. 1994) (adopting a per se rule that the FBI is "archetypical" federal law enforcement agency and that "concern about overbroad withholding should therefore be addressed by proper scrutiny of the claimed exemptions themselves and not by use of a blunt instrument at the threshold")); Eighth Circuit: Miller v. USDA, 13 F.3d 260, 263 (8th Cir. 1993) (tardiness in working on case does not eliminate law enforcement purpose); Kuehnert, 620 F.2d at 666 (FBI need not show law enforcement purpose of particular investigation as precondition to invoking Exemption 7); Eleventh Circuit: Robinson v. Dep't of Justice, No. 00-11182, slip op. at 10 (11th Cir. Mar. 15, 2001) (holding that investigative records concerning search and seizure of drug-carrying vessel are "'inherently records compiled for law enforcement purposes'" (quoting Curran, 813 F.2d at 475)); Arenberg v. DEA, 849 F.2d 579, 581 (11th Cir. 1988) (suggesting that courts should be "hesitant" to reexamine law enforcement agency's decision to investigate if there is plausible basis for agency's decision); see also Binion v. U.S. Dep't of Justice, 695 F.2d 1189, 1193-94 (9th Cir. 1983) (holding that "a fortiori" approach is appropriate when FBI pardon investigation was "clearly legitimate").

[86] See, e.g., Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1056 (3d Cir. 1995) (applying "adaptation" of two-pronged rational nexus test and holding FBI's "simple recitation of statutes, orders and public laws" insufficient; agency must describe nexus between "each document" and particular investigation), on remand, No. 92-1122, slip op. at 11-13 (W.D. Pa. Apr. 9, 1998) (finding that government demonstrated connection between target and "potential violation of law or security risk" for each investigation), aff'd, 176 F.3d 471, 471 (3d Cir. 1999) (unpublished table decision); Van Mechelen, 2005 WL 3007121, at *4 (reiterating that the phrase "'law enforcement purpose'" applies to records "created in the course of an investigation 'related to the enforcement of federal laws . . . and that [the] nexus between [the] investigation and [the] agency's law enforcement duties [is] based on information sufficient to support at least a colorable claim of its rationality'" (quoting Pratt, 673 F.2d at 420-21)); Gordon, 388 F.2d at 1035 (finding that because "[t]he FBI 'has a clear law enforcement mandate, [it] need only establish a rational nexus between enforcement of federal law and the document for which [a law enforcement] exemption is claimed'" (quoting Rosenfeld, 57 F.3d at 808)); Wolk, 2005 WL 465382, at *3 (stating that "[t]he Third Circuit has adopted a rational nexus test" requiring the agency to "(1) detail the connection between the individual under investigation and a potential
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forcement purpose.[87]

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[86](...continued)
violation of law or security risk; and (2) show 'that this relationship is based upon information'" sufficient to support a colorable claim of rationality (quoting Davin, 60 F.3d at 1056)); Beneville v. U.S. Dep't of Justice, No. 98-6137, slip op. at 17 (D. Or. June 11, 2003) (declaring that the agency "has established that it is a law enforcement agency" and that it satisfied the threshold requirement by showing a "rational nexus between the enforcement of a federal law and the documents for which the exemption is claimed"); Kern v. FBI, No. 94-0208, slip op. at 9 (C.D. Cal. Sept. 14, 1998) (rejecting FBI's Vaughn Index as inadequate because it did not demonstrate nexus between duty to investigate espionage and documents sought); Franklin, No. 97-1225, slip op. at 7-8 (S.D. Fla. June 26, 1998) (reiterating the need for a "nexus between the records and the enforcement of federal or state law"); Grine v. Coombs, No. 95-342, 1997 U.S. Dist. LEXIS 19578, at *14-18 (W.D. Pa. Oct. 10, 1997) (holding that the "proper test is the 'rational nexus' test," and determining that investigatory reports triggered by complaints of dumping hazardous waste satisfy test), appeal dismissed for failure to prosecute, 98 F. App'x 178 (3d Cir. 2004); Crompton v. DEA, No. 95-8771, slip op. at 12-13 (C.D. Cal. Mar. 25, 1997) (stating that agencies with "clear law enforcement mandate such as the DEA need only establish a 'rational nexus' between enforcement of a federal law and the document for which a law enforcement exemption is claimed," and holding that there is a such nexus between DEA's "law enforcement duties to manage the national narcotics intelligence system" and information withheld). But see Poulsen v. Customs & Border Prot., No. 06-1743, 2006 WL 2788239, at *6 (N.D. Cal. Sept. 26, 2006) (explaining that while Customs "has a clear law enforcement mandate" and need only establish a "'rational nexus between enforcement of a federal law and the document for which an exemption is claimed,'" records that the agency generated in response to a computer virus "were not created as part of an investigation, or in connection with CBP's enforcement of a federal law" and thus did not satisfy the law enforcement threshold (quoting Church of Scientology, 611 F.2d at 748)).

[87] See, e.g., Marriott Employees' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478-A, 1996 WL 33497625, at *4 (E.D. Va. Dec. 24, 1996) (finding that documents compiled by NCUA pursuant to administration of Federal Credit Union Act satisfy standard, because NCUA "is empowered" by Congress to enforce Act by conducting necessary "investigations and litigation"); Blanton v. U.S. Dep't of Justice, No. 93-2398, slip op. at 5-8 (W.D. Tenn. July 14, 1994) (finding that information concerning the validity of plaintiff's counsel's purported license to practice law does not meet the threshold because law licenses are matter of public record and that the government failed to prove that records were "compiled for a law enforcement purpose"); Rosenfeld v. U.S. Dep't of Justice, 761 F. Supp. 1440, 1445-48 (N.D. Cal. 1991) (explaining that FBI investigation of Free Speech Movement "was begun in good faith and with a plausible basis," but ceased to have "colorable claim [of rationality] as the evidence accumulated" and be-
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The Supreme Court in 1990 resolved a conflict in lower court decisions[88] by decisively holding that information not initially obtained or generated for law enforcement purposes may still qualify under Exemption 7 if it is subsequently compiled for a valid law enforcement purpose at any time prior to "when the Government invokes the Exemption."[89] Rejecting

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[87](...continued)
came "a case of routine monitoring . . . for intelligence purposes"; date at which FBI's initial law enforcement-related suspicions were "demonstrably unfounded" was "cut-off point for the scope of a law enforcement purpose" under Exemption 7), aff'd in pertinent part, rev'd in part & remanded, 57 F.3d 803 (9th Cir. 1995); Friedman v. FBI, 605 F. Supp. 306, 321 (N.D. Ga. 1984) (finding that the FBI was "'gathering information with the good faith belief that the subject may violate or has violated federal law' rather than 'merely monitoring the subject for purposes unrelated to enforcement of federal law'" (quoting Lamont v. Department of Justice, 475 F. Supp. 761, 770 (S.D.N.Y. 1979))).

[88] Compare Crowell & Moring v. DOD, 703 F. Supp. 1004, 1009-10 (D.D.C. 1989) (holding that solicitation and contract bids may be protected), and Gould Inc. v. GSA, 688 F. Supp. 688, 691 (D.D.C. 1988) (finding that routine audit reports may be protected), with John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) (ruling that routine audit reports are not protectible), rev'd & remanded, 493 U.S. 146 (1989), and Hatcher v. USPS, 556 F. Supp. 331, 335 (D.D.C. 1982) (holding that routine contract negotiation and oversight material is not protectible).

[89] John Doe Agency, 493 U.S. at 153; see also KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (applying John Doe Agency to hold that information regarding personnel interview conducted before investigation commenced and later recompiled for law enforcement purposes satisfied Exemption 7 threshold); ACLU v. DOD, 389 F. Supp. 2d 547, 570 (S.D.N.Y.) (ruling that photographs taken for "personal use" were compiled for law enforcement purposes, because Army Criminal Investigation Command opened investigation immediately upon receipt of photographs and agents used them to conduct that investigation), reconsideration denied, 396 F. Supp. 2d 459 (S.D.N.Y. 2005); Kansi v. U.S. Dep't of Justice, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (explaining that once documents become assembled for law enforcement purposes, "all [such] documents qualify for protection under Exemption 7 regardless of their original source"); Hayes, 1998 U.S. Dist. LEXIS 14120, at *12 ("Records that are incorporated into investigatory files also qualify . . . even though those records may not have been created originally for law enforcement purposes."); Perdue Farms, Inc. v. NLRB, No. 2:96-27, 1997 U.S. Dist. LEXIS 14579, at *37 (E.D.N.C. Aug. 5, 1997) (magistrate's recommendation) (stating that the language of the statute "contains no requirement that the compilation be effected at a specific time" (citing John Doe Agency, 493 U.S. at 153)), adopted (E.D.N.C. Jan. 20, 1998); Butler v. Dep't of the Air Force, 888 F. Supp. 174, 179-80, 182 (D.D.C. 1995) (holding Air Force personnel background report -- requested by local

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the distinction between documents originally compiled or obtained for law enforcement purposes and those later assembled for such purposes, the Court held that the term "compiled" must be accorded its ordinary meaning -- which includes "materials collected and assembled from various sources or other documents" -- and it found that the plain meaning of the statute contains "no requirement that the compilation be effected at a specific time."[90]

The existing standard for review of criminal law enforcement records in the Court of Appeals for the District of Columbia Circuit is somewhat more stringent than the per se rule discussed above. The D.C. Circuit held in Pratt v. Webster that records generated as part of a counterintelligence program of questionable legality which was part of an otherwise clearly authorized law enforcement investigation met the threshold requirement for Exemption 7 and rejected the per se approach.[91] Instead, it adopted a two-part test for determining whether the threshold for Exemption 7 has been met: (1) whether the agency's investigatory activities that give rise to the documents sought are related to the enforcement of federal laws or to the maintenance of national security; and (2) whether the nexus between the investigation and one of the agency's law enforcement duties is based on information sufficient to support at least a colorable claim of rationality.[92]

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[89](...continued)
law enforcement agency for its investigation into murder -- to be compiled for law enforcement purposes), aff'd per curiam, No. 96-5111 (D.C. Cir. May 6, 1997).

[90] John Doe Agency, 493 U.S. at 153.

[91] 673 F.2d at 416 n.17.

[92] Id. at 420-21; see, e.g., Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 32 (D.C. Cir. 1998) (requiring nexus between agency activities and law enforcement duties, and finding that most FBI files of 1960s investigations of James Baldwin -- believed to be associated with subversive organizations -- meet threshold, but elaborating that law enforcement agency may not simply rely on file names to satisfy threshold); Summers v. U.S. Dep't of Justice, 140 F.3d 1077, 1083 (D.C. Cir. 1998) (to show nexus, FBI must link names redacted from former FBI Director J. Edgar Hoover's telephone logs to law enforcement activities); Quiñon v. FBI, 86 F.3d 1222, 1228-29 (D.C. Cir. 1996) (reiterating that agency's basis for connection between object of investigation and asserted law enforcement duty cannot be pretextual or wholly unbelievable and remanding because FBI's affidavits were insufficient to show that Pratt nexus test satisfied when only specific fact cited is filing of motion; "filing of a non-fraudulent pleading cannot, taken alone, form the basis for a legitimate obstruction of justice investigation"); Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 902, 904 (D.C. Cir. 1996) (investigation into allegations of telecommunications
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Since the removal of the word "investigatory" from the threshold requirement of Exemption 7 in 1986, the D.C. Circuit has had few opportunities to reconsider the Pratt test, a portion of which expressly requires a nexus between requested records and an investigation.[93] In Keys v. United States Department of Justice, however, the D.C. Circuit modified the language of the Pratt test to reflect those amendments and to require that an agency demonstrate the existence of a nexus "between [its] activity" (rather than its investigation) "and its law enforcement duties."[94] Although not

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[92](...continued)
fraud satisfies threshold, as do documents pertaining to police breakup of public meeting of computer hackers club); King v. U.S. Dep't of Justice, 830 F.2d 210, 229 (D.C. Cir. 1987) (supporting Pratt two-part test by stating that agency must identify particular individual/incident as object of its investigation and specify connection between individual/incident and possible security risk or violation of federal law and that agency must then demonstrate that relationship is based on information sufficient to support colorable claim of rationality); Founding Church of Scientology v. Smith, 721 F.2d 828, 829 n.1 (D.C. Cir. 1983) (holding that "Pratt is the law of this circuit insofar as it interprets the threshold requirement of exemption 7"); Wheeler v. U.S. Dep't of Justice, 403 F. Supp. 2d 1, 14 (D.D.C. 2005) (describing how the agency established a nexus when it "clearly identified the particular individual who was the object of its investigation" and stated that it was authorized to conduct investigation and that it "investigated him to see if he were acting on behalf of the Cuban government," thus providing "'information sufficient to support at least a colorable claim of its rationality'" (quoting Pratt, 673 F.2d at 420-21)); Judicial Watch, 337 F. Supp. 2d at 179 ("A 'law enforcement purpose' exists where there is a 'rational nexus' between the compiled document and a law enforcement duty of the agency and where there is 'a connection between an individual or incident and a possible security risk or violation of federal law.'" (quoting Ctr. for Nat'l Sec. Studies, 331 F.3d at 926)); Wichlacz v. U.S. Dep't of Interior, 938 F. Supp. 325, 330 (E.D. Va. 1996) (observing that "investigative activities giving rise to the compilation of the records must be related to the enforcement of federal law, and there must be a rational connection between the investigative activities and the agency's law enforcement duties"), aff'd, 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision); Exner, 902 F. Supp. at 242-43 (finding that investigatory activities were based on legitimate concern that federal laws were being violated and that activities connected rationally to target); cf. CEI, 404 F. Supp. 2d at 178 (describing two-part nexus test and finding that "individuals' A-numbers and FBI numbers" maintained in agency database satisfy nexus requirement).

[93] See, e.g., King, 830 F.2d at 229 n.141 (dictum) (holding that the 1986 FOIA amendments did not "qualif[y] the authority of Pratt" test).

[94] 830 F.2d 337, 340 (D.C. Cir. 1987); see also Rochon v. Dep't of Justice, No. 88-5075, slip op. at 3 (D.C. Cir. Sept. 14, 1988) (holding that agency must demonstrate nexus between its compilation of records and its law
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specifically relying on the amended statutory language, the D.C. Circuit in Keys held that records compiled solely because the subject had a known affiliation with organizations that were strongly suspected of harboring Communists met the Exemption 7 threshold.[95] As no appellate decision has yet employed the modified Pratt test adopted by Keys, the impact of this change in the threshold is not yet fully realized.

Even under the test enunciated in Pratt,[96] significant deference has

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[94](...continued)
enforcement duties); Hall v. U.S. Dep't of Justice, 63 F. Supp. 2d 14, 16 (D.D.C. 1999) (holding that Davin "is not persuasive authority" because "Third Circuit standard is more permissive" than established D.C. Circuit standard (referring to Campbell, 164 F.3d at 32)), reconsideration denied, No. 96-2306, slip op. at 2 (D.D.C. May 29, 2003); Code, 1997 WL 150070, at *4-5 (reiterating requirement for nexus between activities and law enforcement duties); Wickline v. FBI, No. 92-1189, 1994 WL 549756, at *2 (D.D.C. Sept. 30, 1994) (finding that requirement for "nexus between the agency's activity and its law enforcement duties" was met when FBI compiled requested information through its investigation of series of murders involving organized crime); Abdullah v. FBI, No. 92-0356, slip op. at 3 (D.D.C. Aug. 10, 1992) (holding that "law enforcement agencies such as the FBI must show that the records at issue are related to the enforcement of federal laws and that the law enforcement activity was within the law enforcement duty of that agency"); Beck v. U.S. Dep't of Justice, No. 87-3356, slip op. at 26-27 (D.D.C. Nov. 7, 1989) ("[D]efendants must merely establish that the nexus between the agency's activity and its law enforcement duty" is based on a "colorable claim of rationality."). But see Simon v. Dep't of Justice, 980 F.2d 782, 783 (D.C. Cir. 1992) (stating that agency must demonstrate nexus between investigation and one of its law enforcement duties (citing Pratt, 673 F.2d at 420-21)); Reiter v. DEA, No. 96-0378, 1997 WL 470108, at *3 (D.D.C. Aug. 13, 1997) (describing how the nexus "requires an agency to establish a connection between the individual under investigation and a possible violation of a federal law"), summary affirmance granted, No. 97-5246 (D.C. Cir. Mar. 3, 1998); Keenan v. Dep't of Justice, No. 94-1909, slip op. at 12-15 (D.D.C. Mar. 2, 1997) (ruling that the agency had not established the required nexus, because it was "unclear as to whether an investigation was conducted at all"); Assassination Archives & Research Ctr. v. U.S. Dep't of Justice, No. 92-2193, 1993 WL 763547, at *6-7 (D.D.C. Apr. 29, 1993) (declaring that government must establish that investigation related to enforcement of federal law raises colorable claim "rationally related" to one or more of agency's law enforcement duties).

[95] 830 F.2d at 341-42.

[96] 673 F.2d at 421 (A court should be "hesitant to second-guess a law enforcement agency's decision to investigate if there is a plausible basis" for its decision.).

been accorded criminal law enforcement agencies.[97] Nevertheless, the D.C. Circuit has indicated in Pratt and elsewhere that if an investigation is shown to have been in fact conducted for an improper purpose, Exemption 7 may not be applicable to the records of that investigation.[98]

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[97] See, e.g., Rosenfeld, 57 F.3d at 808 (ruling that Pratt's rational nexus test requires "a degree of deference to a law enforcement agency's decision to investigate"); King, 830 F.2d at 230-32 (finding that subject's close association with "individuals and organizations . . . of investigative interest to the FBI" and its consequent investigation of the subject during the McCarthy era for possible violation of national security laws meets the threshold in the absence of evidence supporting the existence of an improper purpose); Campbell v. Dep't of Justice, 193 F. Supp. 2d 29, 39-40 (D.D.C. 2001) (clarifying that law enforcement purpose must be evaluated as of the time that the records are compiled, even if history now questions the legal basis for investigation today); Simon v. U.S. Dep't of Justice, 752 F. Supp. 14, 18 (D.D.C. 1990) (Given the subject's prior pacifist activities, it was not "irrational or implausible for [the FBI] -- operating in the climate existing during the early 1950s -- [to conduct] what appears to have been a brief criminal investigation into the possibility that the plaintiff harbored Communist affiliations."), aff'd on other grounds, 980 F.2d 782 (D.C. Cir. 1992); see also Ctr. for Nat'l Sec. Studies, 331 F.3d at 927-28 (declaring that "[j]ust as we have deferred to the executive when it invokes FOIA Exemptions 1 and 3 in national security cases, we owe the same deference under Exemption 7(A) in appropriate cases"). But see also Jefferson, 284 F.3d at 178 (limiting deference when an agency relies on a "bare assertion to justify invocation of an exemption"); Summers, 140 F.3d at 1082, 1084 (suggesting that deference to agency may be overcome when records, such as J. Edgar Hoover's "official and confidential" (O&C) files, were "not readily available to field agents" and "contain[ed] scandalous material on public figures to be used for political blackmail"), on remand, No. 87-3168, slip op. at 3 & n.4 (D.D.C. Apr. 19, 2000) (finding, after in camera review of 4000 pages of the O&C files, that the FBI "ha[d] adequately established" that Exemption 7's "threshold requirement" was met).

[98] See Pratt, 673 F.2d at 420-21 (reiterating that Exemption 7 is not intended to "include investigatory activities wholly unrelated to law enforcement agencies' legislated functions of preventing risks to the national security and violations of the criminal laws and of apprehending those who do violate the laws"); see also Quiñon, 86 F.3d at 1228-29 (explaining that agency's connection between object of investigation and asserted law enforcement duty cannot be pretextual or wholly unbelievable and holding FBI affidavits insufficient to demonstrate legitimate basis for obstruction of justice charge; "cryptic allusion to 'certain events' is especially problematic" when events "may be nothing more sinister than . . . criticisms"); Shaw, 749 F.2d at 63 (stating that the "mere existence of a plausible criminal investigatory reason to investigate would not protect the files of an inquiry explicitly conducted . . . for purposes of harassment"); Lesar, 636 F.2d at 487 (questioning whether records that were generated after investigation

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EXEMPTION 7

With the broadening of Exemption 7 in the 1986 FOIA amendments, all federal agencies should consider which records of a noninvestigatory character may qualify for protection because they relate sufficiently to a law enforcement mission assigned to the agency.[99] Agencies may now be able to apply Exemption 7 protection, for example, to law enforcement manuals, program oversight reports, and other similar documents because of their relationship to the agency's law enforcement mission.[100] The full effects of these amendments will be realized only upon the case-by-case identification of particular items of noninvestigatory law enforcement information the disclosure of which could cause one of the harms specified in Exemption 7's six subparts.[101]

For example, emerging case law supports the use of Exemption 7 to

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[98](...continued)
"wrongly strayed beyond its original law enforcement scope" would meet threshold test for Exemption 7); Enviro Tech, 2003 U.S. Dist. LEXIS 25493, at *21-22 (discussing the consequences of "ultra vires decisions," and explaining that Exemption 7 has a "hook that might restrict the exemption to only those documents relating to specifically authorized agency activities") (dicta); Warren v. United States, No. 1:99-1317, 2000 WL 1868950, at *6 (N.D. Ohio Oct. 31, 2000) (determining that despite fact that IRS investigator may have aggressively gathered information during civil audit, this had clear law enforcement purpose and was not beyond authority of agency). But see, e.g., Sinito v. U.S. Dep't of Justice, No. 87-0814, 2000 U.S. Dist. LEXIS 22504, at *27 (D.D.C. July 11, 2000) (declaring that plaintiff's "[u]nanswered questions and inflammatory accusations regarding alleged governmental agent corruption . . . do not persuade this Court" that records were not compiled for law enforcement purposes).

[99] See PHE, 983 F.2d at 249, 251, 253 (holding portions of FBI's Manual of Investigative Operations & Guidelines properly withheld pursuant to Exemption 7(E)); Herrick's Newsletter, 2006 U.S. Dist. LEXIS 44802, at *1, *20-21 (ruling that portions of the agency's "Fines, Penalties & Forfeitures Handbook" that concern "possible tampering with and theft of evidence" satisfy the threshold requirement).

[100] See Attorney General's 1986 Amendments Memorandum at 8-9; see also Guerrero v. DEA, No. 93-2006, slip op. at 14-15 (D. Ariz. Feb. 22, 1996) (approving nondisclosure of portions of DEA Agents Manual); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993) (concluding that parts of IRS Law Enforcement Manual were exempt from disclosure pursuant to Exemption 7(E)).

[101] Accord Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (instructing agencies to protect national security and their law enforcement missions by undertaking "full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure").

protect integrated intelligence and law enforcement information -- which might not previously have been categorized as collected for law enforcement purposes -- particularly in situations where agencies have gathered information for purposes of combating terrorism and protecting homeland security.[102] Such case law finds its antecedent in the "national security" framework found in Pratt[103] and logically applies Exemption 7 to protect intelligence data that relates to an agency's law enforcement mission.[104] Indeed, at least three post-9/11 FOIA decisions have recognized this newer "national security" framework and have applied it to protect sensitive, homeland security-related information -- explaining that terrorists could use the information to increase the risk of an attack or to increase the dam-

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[102] See, e.g., Owens v. U.S. Dep't of Justice, No. 04-1701, 2006 WL 3490790, at *5 (D.D.C. Dec. 1, 2006) (noting that "threshold showing has been made" because records were "generated during an investigation into terrorist attacks" and defendant agencies are "statutorily authorized to investigate activities of this type"); Ayyad, WL 654133, at *3 (holding that records concerning the 1993 terrorist bombing of the World Trade Center satisfy the threshold when "the Government may need [information from the requester's file] to use to detect threats to the integrity of the nation's security"); Judicial Watch, Inc. v. FBI, No. 00-745, slip op. at 6-7 (D.D.C. Apr. 20, 2001) (finding that FBI has shown nexus between investigation related to domestic security/terrorism and its assigned law enforcement mission); Judicial Watch, No. 00-0723, slip op. at 21 (D.D.C. Mar. 30, 2001) (finding that records concerning "the investigation of terrorist threats" involved "a legitimate law enforcement duty" and satisfied the threshold). But see also Weissman, 565 F.2d at 695-96 (finding that the CIA's authority was limited by Congress to intelligence matters abroad, and holding that the agency was not authorized to conduct "investigations of private American nationals who had no contact with the CIA, [merely] on the grounds that eventually their activities might threaten the Agency").

[103] Pratt, 673 F.2d at 420 (applying a two-part test, and allowing that the threshold may be satisfied if the agency's investigatory activities "relate[] to the enforcement of federal laws or to the maintenance of national security").

[104] See, e.g., Morales Cozier, No. 99-0312, slip op. at 14-15 (N.D. Ga. Sept. 25, 2000) (stating that the threshold was satisfied under either the "per se" test or the Pratt test because "[p]laintiff's activities in contacting an official of a government with which the United States has no official relations and inviting him to the United States could have presented an interference with United States foreign policy or national security in an area where the FBI has an investigatory or enforcement interest"); cf. White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002), reprinted in *FOIA Post* (posted 3/21/02) (emphasizing need to protect information "that could reasonably be expected to assist" terrorist activity).

age done by an attack.[105]

Nevertheless, agencies should be mindful that while the FOIA's policy goals strongly support protecting intelligence information as part of the preventative law enforcement mission under Exemption 7,[106] courts may require some showing of a rational nexus between such activities and an agency's law enforcement functions.[107] Accordingly, agencies should care-

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[105] See Ctr. for Nat'l Sec. Studies, 331 F.3d at 928-29 (explaining that "disclosure of [post-9/11] detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation [and] could be of great use to al Qaeda in plotting future terrorists attacks or intimidating witnesses"); Living Rivers, 272 F. Supp. 2d at 1321 (stating that terrorists could use "inundation maps" to aid both in target selection and in carrying out terrorist attacks by analyzing downstream harm from projected extent of flooding); Coastal Delivery, 272 F. Supp. 2d at 964 (finding that terrorists could use information about rate of examinations at ports to avoid detection by selecting those ports with relatively low rates of examinations); see also Campbell, 164 F.3d at 31-33 (discussing whether 1960s investigations of subversive organizations believed to be threat to U.S. security meet threshold); Pratt, 673 F.2d at 421 (explaining that investigation into breach of national security qualifies as law enforcement); L.A. Times, 442 F. Supp. 2d at 898 (finding that collection of "intelligence information" was compiled for "cognizable law enforcement purposes" (citing Ctr. for Nat'l Sec. Studies, 331 F.3d at 926)); Simon, 752 F. Supp. at 18 (explaining that given the "climate existing during the early 1950's [the court] cannot conclude that it was irrational or implausible" to take into account "earlier passivist activities" and conduct a "criminal investigation into the possibility that [the subject] harbored Communist affiliations," and therefore finding that the records met the law enforcement threshold); *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (discussing use of FOIA's law enforcement exemptions where necessary to protect homeland security-related information); cf. Maydak v. United States, No. 02-5168, slip op. at 7 (D.C. Cir. Apr. 20, 2004) (reiterating that "[a]lthough the Privacy Act does not define 'law enforcement authority,' we have interpreted the phrase broadly," and given the Bureau of Prison's mandate to preserve prison security, "we have no doubt that examining photographs for conduct that may threaten that security is pertinent to and within the scope of an authorized law enforcement activity").

[106] See Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01) (describing a FOIA policy goal of "safeguarding our national security [and] enhancing the effectiveness of our law enforcement agencies").

[107] See Pratt, 673 F.2d at 420. But see also Ctr. for Nat'l Sec. Studies, 331 F.3d at 921, 926 (seemingly going beyond Pratt for homeland security/terrorism purposes by finding that although names of detainees traditionally are made public, names that were gathered in "response to the terrorist

(continued...)

fully examine their law enforcement purposes in determining that a "sound legal basis" exists for applying Exemption 7 and gaining its broad protections under the six subparts discussed below.[108] And while agencies must establish this "connection" between their activities and their institutional mandates in general, they can be mindful that the courts have properly given deference to agency expertise in this area -- particularly in post-9/11 judicial decisions, which repeatedly advert to the tragic events of that day and to how "American life [has] changed drastically and dramatically."[109]

EXEMPTION 7(A)

The first subpart of Exemption 7, Exemption 7(A), authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with en-

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[107](...continued)
attacks of September 11, 2001 . . . constitute a comprehensive diagram of the law enforcement investigation" and thus were compiled for law enforcement purposes and properly withheld).

[108] Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01).

[109] N.J. Media Group, 308 F.3d at 202-03 (discussing First Amendment rights, and recognizing that the "case arises in the wake of September 11, 2001, a day on which American life changed drastically and dramatically . . . . Since the primary national policy must be self-preservation, it seems elementary that, to the extent open deportation hearings might impair national security," the special interest deportation hearings were properly closed); see Ctr. for Nat'l Sec. Studies, 331 F.3d at 926, 932 (referring to 9/11 terrorism as a "heinous violation," and stating that "the courts must defer to the executive on [such] decisions of national security"); L.A. Times, 442 F. Supp. 2d at 899 (explaining that the "Court defers" to the agency because its position is "reasonably detailed," and that it is "'well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview'" (quoting Ctr. for Nat'l Sec. Studies, 331 F.3d at 926-27)); Coastal Delivery, 272 F. Supp. 2d at 960-61, 964 (pointing to the existence of "new anti-terrorism programs" in approving protection of the type of information released prior to 9/11, and stating that "plaintiff's arguments that potential terrorists and smugglers could not and would not use the information" are simply "unpersuasive" in that context); see also, e.g., Edmonds, 272 F. Supp. at 55 (stating that the "deference that has historically been extended to the executive when it invokes FOIA Exemption 1" must be extended to Exemption 7 in the national security area); cf. Zadvydas, 533 U.S. at 696 (recognizing that terrorism can warrant "heightened deference").