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").

forcement proceedings."[1] The Freedom of Information Reform Act of 1986, often referred to as the 1986 FOIA amendments, lessened the showing of harm required from a demonstration that release "would interfere with" to "could reasonably be expected to interfere with" enforcement proceedings.[2] The courts have recognized repeatedly that the change in the language for this exemption effectively broadens its protection.[3]

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

[2] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 10 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum]; see also NARA v. Favish, 541 U.S. 157, 169 (evincing the Supreme Court's reliance on "the Attorney General's consistent interpretation of" the FOIA in successive such Attorney General memoranda), reh'g denied, 541 U.S. 1057 (2004).

[3] See Robinson v. Dep't of Justice, No. 00-11182, slip op. at 8 n.5 (11th Cir. Mar. 15, 2001) (noting that 1986 FOIA amendments changed the standard from "would" interfere to "could reasonably be expected to" interfere); Manna v. U.S. Dep't of Justice, 51 F.3d 1158, 1164 n.5 (3d Cir. 1995) (stating that Congress amended the statute to "relax significantly the standard for demonstrating interference"); Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 311 n.18 (D.C. Cir. 1988) (treating the lower court's improper reliance on the pre-amendment version of Exemption 7(A) as irrelevant as it simply "required EPA to meet a higher standard than FOIA now demands"); Wright v. OSHA, 822 F.2d 642, 647 (7th Cir. 1987) (explaining that amended language creates broad protection); Curran v. Dep't of Justice, 813 F.2d 473, 474 n.1 (1st Cir. 1987) ("[T]he drift of the changes is to ease -- rather than to increase -- the government's burden in respect to Exemption 7(A)."); In Def. of Animals v. HHS, No. 99-3024, 2001 U.S. Dist. LEXIS, at *9 (D.D.C. Sept. 28, 2001) (reiterating that "'could reasonably' . . . represents a relaxed standard; before 1986, the government had to show that disclosure 'would' interfere with law enforcement"); Gould Inc. v. GSA, 688 F. Supp. 689, 703 n.33 (D.D.C. 1988) (The "1986 amendments relaxed the standard of demonstrating interference with enforcement proceedings."); see also Spannaus v. U.S. Dep't of Justice, 813 F.2d 1285, 1288 (4th Cir. 1987) (explaining that an "agency's showing under the amended statute, which in part replaces 'would' with 'could reasonably be expected to,' is to be measured by a standard of reasonableness, which takes into account the 'lack of certainty in attempting to predict harm'" (quoting S. Rep. No. 98-221, at 24 (1983)); cf. John Doe Agency v. John Doe Corp., 493 U.S. 146, 157 (1989) (taking "practical approach" when confronted with interpretation of FOIA and applying "workable balance" between interests of public in greater access and needs of government to protect certain kinds of information); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 777-78 n.22 (1989) (declaring that Congress intended the identical modification of the language of Exemption 7(C) to provide greater "flexibility in responding to FOIA requests for law enforcement records" and that it replaced "a focus on

(continued...)

Determining the applicability of this Exemption 7 subsection thus requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm.[4] The courts have held that the mere pendency of enforcement pro-

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[3](...continued)
the effect of a particular disclosure" with a "standard of reasonableness" that supports a "categorical" approach to records of similar character).

[4] See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) (holding that the government must show how the records "would interfere with a pending enforcement proceeding"); Manna, 51 F.3d at 1164 ("To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm."); Campbell v. HHS, 682 F.2d 256, 259 (D.C. Cir. 1982) (stating that agency must demonstrate interference with pending enforcement proceeding); Long v. U.S. Dep't of Justice, No. 00-0211, 2006 WL 2578755, at *26 (D.D.C. Sept. 8, 2006) (reiterating that an "agency must demonstrate" that an enforcement proceeding is pending or prospective and that the "disclosure of the information could reasonably be expected to cause some articulable harm to the proceeding"); Beneville v. U.S. Dep't of Justice, No. 98-6137, slip op. at 22 (D. Or. June 11, 2003) (explaining that simply satisfying the law enforcement purpose "does not establish the remainder of the requirement . . . that disclosure of the documents could reasonably be expected to interfere with law enforcement proceedings" (citing Lewis v. IRS, 823 F.2d 375, 379 (9th Cir. 1987))); Judicial Watch v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at *14 (D.D.C. Apr. 20, 2001) ("Once the agency establishes that an enforcement proceeding is pending, the agency must show that release of the withheld documents is likely to cause some distinct harm."); Scheer v. U.S. Dep't of Justice, 35 F. Supp. 2d 9, 13 (D.D.C. 1999) (stating that agency "must first prove" existence of law enforcement proceeding and "must next prove" harm), appeal dismissed per stipulation, No. 99-5317 (D.C. Cir. Nov. 2, 2000); Franklin v. U.S. Dep't of Justice, No. 97-1225, slip op. at 7 (S.D. Fla. June 15, 1998) (magistrate's recommendation) (two-part test), adopted (S.D. Fla. June 26, 1998), aff'd, 189 F.3d 485 (11th Cir. 1999) (unpublished table decision); Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at *25 (M.D. Fla. Oct. 1, 1997) (same); Butler v. Dep't of the Air Force, 888 F. Supp. 174, 183 (D.D.C. 1995) (same), aff'd per curiam, No. 96-5111 (D.C. Cir. May 6, 1997); see also 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) (emphasizing the importance of "enhancing the effectiveness of our law enforcement agencies"); cf. Va. Dep't of State Police v. Wash. Post, No. 04-1375, 2004 WL 2198327, at *5, *9 (4th Cir. 2004) (agreeing with the "general principle that a compelling governmental interest exists in protecting the integrity of an ongoing law enforcement investigation," and explaining that "law enforcement agencies must be able

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ceedings is an inadequate basis for the invocation of Exemption 7(A); the government must also establish that some distinct harm could reasonably be expected to result if the record or information requested were disclosed.[5] For example, the Court of Appeals for the District of Columbia

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[4](...continued)
to investigate crime without the details of the investigation being released to the public in a manner that compromises the investigation") (non-FOIA case).

[5] See, e.g., Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1085 (9th Cir. 2004) [hereinafter Lion I] (stating that the "USDA cannot argue that revealing the information would allow Lion premature access to the evidence" or harm its investigation, because "Lion already has copies of the documents it seeks"); Neill v. Dep't of Justice, No. 93-5292, 1994 WL 88219, at *1 (D.C. Cir. Mar. 9, 1994) (explaining that conclusory affidavit lacked specificity of description necessary to ensure meaningful review of agency's Exemption 7(A) claims); Miller v. USDA, 13 F.3d 260, 263 (8th Cir. 1993) (holding that government must make specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); Crooker v. ATF, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (finding that agency failed to demonstrate that disclosure would interfere with enforcement proceedings); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986) (stating that the "government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding"); Dow Jones Co. v. FERC, 219 F.R.D. 167, 173 (C.D. Cal. 2002) (illustrating that an agency cannot easily demonstrate harm to its proceedings when "the subjects of the investigation . . . have copies" of the record in question); Scheer, 35 F. Supp. 2d at 13-14 (finding that the agency's assertion that disclosure to the requester would harm its investigation "is belied" by the agency's full disclosure to the target of the investigation; therefore, the agency "has not met its burden of offering clear proof that disclosure . . . would have interfered with a law enforcement proceeding within the meaning of FOIA exemption 7(A)"); Jefferson v. Reno, No. 96-1284, 1997 U.S. Dist. LEXIS 3064, at *10 (D.D.C. Mar. 17, 1997) (ruling that neither agency's declaration nor its checklist "describes how the release of any or all responsive documents could reasonably be expected to interfere with these enforcement proceedings"); ACLU Found. v. U.S. Dep't of Justice, 833 F. Supp. 399, 407 (S.D.N.Y. 1993) (explaining that possibility of interference was not so evident when investigations referred to closed or "generalized class" of cases; accordingly, government must provide sufficient information for court to decide whether disclosure will actually threaten similar, ongoing enforcement proceedings); see also *FOIA Post*, "Supreme Court Vacates and Remands in ATF Database Case" (posted 3/25/03) (advising of Supreme Court decision to vacate -- i.e., render "null and void" -- Seventh Circuit's Exemption 7(A) decision in City of Chicago v. U.S. Dep't of the Treasury, 287 F.3d 628 (7th Cir.), amended upon denial of reh'g en banc, 297 F.3d 672 (7th Cir. 2002), vacated & remanded sub nom. U.S. Dep't of Justice v. City of Chicago, 537 U.S. 1229 (2003), in light of new
(continued...)

Circuit has held that the fact that a judge in a criminal trial specifically delayed disclosure of certain documents until the end of the trial is alone insufficient to establish interference with that ongoing proceeding.[6]

It is beyond question that Exemption 7(A) is temporal in nature and is not intended to "endlessly protect material simply because it [is] in an investigatory file."[7] Thus, as a general rule, Exemption 7(A) may be invoked so long as the law enforcement proceeding involved remains pending,[8] or

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[5](...continued)
legislation), vacated & remanded, 432 F.3d 777 (7th Cir. 2005); cf. Lion Raisins Inc. v. USDA, No. 05-0062, 2005 WL 2704879, at *7-9 (E.D. Cal. Oct. 19, 2005) [hereinafter Lion II] (distinguishing Lion I because "[h]ere, the worksheets are not identical" to the ones in Lion's possession, and while agreeing that USDA's litigation strategy has been revealed in its prior actions and that "it is unlikely that Lion will now try to extricate itself from these accusations of fraudulent fabrication by fabricating more documents," nevertheless finding that the falsified document and ongoing proceedings establish that disclosure of "this kind of evidence" would interfere with ongoing law enforcement proceedings).

[6] North v. Walsh, 881 F.2d 1088, 1100 (D.C. Cir. 1989) (stating that the standard is "whether disclosure can reasonably be expected to interfere in a palpable, particular way" with enforcement proceedings); see also Goodman v. U.S. Dep't of Labor, No. CV-01-515-ST, 2001 U.S. Dist. LEXIS 22748, at *13 (D. Or. Dec. 12, 2001) (magistrate's recommendation) (explaining that "the scope of discovery . . . is not the issue," and that the withholding was proper under FOIA standards), adopted (D. Or. Jan. 14, 2002); Warren v. United States, No. 1:99-1317, 2000 U.S. Dist. LEXIS 17660, at *18 (N.D. Ohio Oct. 13, 2000) (explaining that although plaintiffs "will likely be entitled to release of all the documents at issue in this proceeding, through the criminal discovery process, that fact does not prohibit reliance on Exemption 7 in the context of this case").

[7] Robbins Tire, 437 U.S. at 230; see Solar Sources, Inc. v. United States, 142 F.3d 1033, 1037 (7th Cir. 1998) (stating that "Exemption 7(A) does not permit the Government to withhold all information merely because that information was compiled for law enforcement purposes"); Dickerson v. Dep't of Justice, 992 F.2d 1426, 1431 (6th Cir. 1993) (reiterating that when investigation is over and purpose of it has expired, information should be disclosed); Hamilton, 1997 U.S. Dist. LEXIS 18900, at *25-26 (declaring that Exemption 7(A) was enacted "mainly to overrule judicial decisions that prohibited disclosure of investigatory files in 'closed' cases"); cf. Kay v. FCC, 976 F. Supp. 23, 37-38 (D.D.C. 1997) (explaining that an agency "may continue to invoke Exemption 7(A) to withhold the requested documents until . . . [the law enforcement proceeding] comes to a conclusion"), aff'd, 172 F.3d 919 (D.C. Cir. 1998) (unpublished table decision).

[8] See, e.g., Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 886-87 (6th Cir. 1984)
(continued...)

so long as an enforcement proceeding is fairly regarded as prospective[9] or

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[8](...continued)
(finding that NLRB administrative practice of continuing to assert Exemption 7(A) for six-month "buffer period" after termination of proceedings "arbitrary and capricious"); Barney v. IRS, 618 F.2d 1268, 1273-74 (8th Cir. 1980) (explaining that once enforcement proceedings are "either concluded or abandoned, exemption 7(A) will no longer apply"); City of Chicago v. U.S. Dep't of the Treasury, No. 01-C-3835, 2002 WL 370216, at *4 (N.D. Ill. Mar. 8, 2002) (rejecting again, in a second case, the agency's argument that release of the information "would allow members of the general public to 'connect the dots'" in a case in which the agency "does not know whether an investigation is ongoing [but] nevertheless releases the information [routinely] after a fixed period of time"), rev'd & remanded on other grounds, No. 02-2259 (7th Cir. Nov. 29, 2005); W. Journalism Ctr. v. Office of the Indep. Counsel, 926 F. Supp. 189, 192 (D.D.C. 1996) ("By definition until his or her work is completed, an Independent Counsel's activities are ongoing . . . and once the task is completed . . . all the records . . . are required to be turned over to the Archivist and at that time would be subject to FOIA requests."), aff'd, No. 96-5178, 1997 WL 195516 (D.C. Cir. Mar. 11, 1997); Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 417810, at *25 (D.D.C. June 6, 1995) (ruling that Exemption 7(A) is not applicable when there is "no evidence before the Court that any investigation exists"), appeal dismissed voluntarily, No. 97-5122 (D.C. Cir. July 14, 1997); Kilroy v. NLRB, 633 F. Supp. 136, 142-43 (S.D. Ohio 1985) (holding that Exemption 7(A) "applies only when a law enforcement proceeding is pending"), aff'd, 823 F.2d 553 (6th Cir. 1987) (unpublished table decision); Antonsen v. U.S. Dep't of Justice, No. K-82-008, slip op. at 9-10 (D. Alaska Mar. 20, 1984) ("It is difficult to conceive how the disclosure of these materials could have interfered with any enforcement proceedings" after a criminal defendant had been tried and convicted.).

[9] See, e.g., Boyd v. Criminal Div., U.S. Dep't of Justice, No. 05-5142, 2007 WL 328064, at *3 (D.C. Cir. Feb. 6, 2007) (stating that government's identification of targets of investigation satisfies concrete prospective law enforcement proceeding requirement); Manna, 51 F.3d at 1165 (ruling that when "prospective criminal or civil (or both) proceedings are contemplated," information is protected from disclosure); In Def. of Animals, 2001 U.S. Dist. LEXIS 24975, at *8 ("Previous USDA investigations of animal deaths at the Foundation resulted in formal charges . . . and there is no evidence that the agency would treat its most recent investigation differently."); Judicial Watch, 2001 U.S. Dist. LEXIS 25732, at *16 (explaining that "[a]lthough no enforcement proceedings are currently pending, the FBI has represented that such proceedings may become necessary as the investigation progresses"); Gen. Elec. Co. v. EPA, 18 F. Supp. 2d 138, 144 (D. Mass. 1998) (explaining that "it is entirely reasonable for the [a]gency to anticipate that enforcement proceedings are in the offing"); Kay, 976 F. Supp. at 38 ("Moreover, if the proceeding is not pending, an agency may continue to invoke Exemption 7(A) so long as the proceeding is regarded as prospective."); (continued...)

as preventative.[10]

Although Exemption 7(A) is temporal in nature, it nevertheless remains viable throughout the duration of long-term investigations.[11] For ex-

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[9](...continued)
Foster v. U.S. Dep't of Justice, 933 F. Supp. 687, 692 (E.D. Mich. 1996) (holding that disclosure "could impede ongoing government investigation (and prospective prosecution)"); Cudzich v. INS, 886 F. Supp. 101, 106 (D.D.C. 1995) (stating that "where disclosure of information would cause impermissible harm to a concrete prospective law enforcement proceeding, such a situation is also within the protective scope of Exemption 7(A)"); Richman v. U.S. Dep't of Justice, No. 90-C-19, slip op. at 13 (W.D. Wis. Feb. 2, 1994) (finding that files pertaining to "pending and prospective" criminal enforcement proceedings are protected); Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (recognizing that Service Lookout Book, containing "names of violators, alleged violators and suspected violators," is protected as proceedings clearly are at least prospective against each violator); Marzen v. HHS, 632 F. Supp. 785, 805 (N.D. Ill. 1985) (concluding that Exemption 7(A) prohibits disclosure of law enforcement records when their release "would interfere with enforcement proceedings, pending, contemplated, or in the future."), aff'd, 825 F.2d 1148 (7th Cir. 1987).

[10] See, e.g., Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (determining that release of information at issue could allow terrorists to "more easily formulate or revise counter-efforts" and could be of "great use to al Qaeda in plotting future terrorist attacks"); Moorefield v. U.S. Secret Serv., 611 F.2d 1021, 1026 (5th Cir. 1980) (holding broadly that material pertaining to "Secret Service investigations carried out pursuant to the Service's protective function" -- to prevent harm to protectees -- is eligible for Exemption 7(A) protection); cf. Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1322 (D. Utah 2003) (recognizing that the use of the dam inundation maps "could increase risk of an attack on the dams" by enabling terrorists to assess prospective damage) (Exemption 7(F) case).

[11] See Antonelli v. U.S. Parole Comm'n, No. 93-0109, slip op. at 3-4 (D.D.C. Feb. 23, 1996) (reiterating that courts repeatedly find "lengthy, delayed or even dormant investigations" covered by Exemption 7(A) and holding that release of eight-year-old investigative file "would interfere with possible proceedings"); Butler v. U.S. Dep't of Justice, No. 86-2255, 1994 WL 55621, at *24 (D.D.C. Feb. 3, 1994) (stating that agency "leads" were not stale simply because they were several years old given that indictee remained at large), appeal dismissed voluntarily, No. 94-5078 (D.C. Cir. Sept. 8, 1994); Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at *4 (S.D.N.Y. May 26, 1993) (finding that documents that would interfere with lengthy or delayed investigation fall within protective ambit of Exemption 7(A)); see also Davoudlarian v. Dep't of Justice, No. 93-1787, 1994 WL 423845, at *2-3 (4th Cir. Aug. 15, 1994) (unpublished table decision)
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ample, in 1993 it was held applicable to the FBI's continuing investigation into the 1975 disappearance of Jimmy Hoffa.[12] And in 2005, the continued use of Exemption 7(A) was held proper in the FBI's long-term investigation of the 1971 airplane hijacking by "D.B. Cooper," who infamously parachuted out of that plane with a satchel of money.[13] Indeed, even when an investigation is dormant, Exemption 7(A) has been held to be applicable because of the possibility that the investigation could lead to a "prospective law enforcement proceeding."[14] The "prospective" proceeding, however, must be a concrete possibility, rather than a mere hypothetical one.[15]

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[11](...continued)
(holding that records of open investigation of decade-old murder remained protectible).

[12] Dickerson, 992 F.2d at 1432 (affirming district court's conclusion that FBI's investigation into 1975 disappearance of Jimmy Hoffa remained ongoing and therefore was still "prospective" law enforcement proceeding). But see Detroit Free Press v. U.S. Dep't of Justice, 174 F. Supp. 2d 597, 600 (E.D. Mich. 2001) (ordering an in camera inspection of FBI's records of the Hoffa disappearance investigation in light of the "inordinate amount of time that [it] has remained an allegedly pending and active investigation").

[13] Cook v. U.S. Dep't of Justice, No. 04-2542, 2005 WL 2237615, at *2 (W.D. Wash. Sept. 13, 2005) (stressing that "the mere fact that this crime remains unsolved . . . do[es] not establish, or even raise a genuine issue of material fact, regarding the pendency of this investigation").

[14] See, e.g., Nat'l Pub. Radio v. Bell, 431 F. Supp. 509, 514-15 (D.D.C. 1977) (explaining that although the investigation into the death of nuclear-industry whistleblower Karen Silkwood is "dormant," it "will hopefully lead to a 'prospective law enforcement proceeding'" and that disclosure "presents the very real possibility of a criminal learning in alarming detail of the government's investigation of his crime before the government has had the opportunity to bring him to justice" (emphasis added)); see also FOIA Update, Vol. V, No. 2, at 6.

[15] See In Def. of Animals, 2001 U.S. Dist. LEXIS 24975, at *9 (stating that an "anticipated filing satisfies FOIA's requirement of a reasonably anticipated, concrete prospective law enforcement proceeding"); Judicial Watch, 2001 U.S. Dist. LEXIS 25732, at *16 (accepting agency's representation that "proceedings may become necessary as investigation progresses" as sufficient to establish concrete possibility); ACLU Found., 833 F. Supp. at 407 (finding that possibility of interference not so evident for investigative documents related to generalized categories of cases; agency must show that disclosure would actually threaten similar, ongoing enforcement proceedings); Badran v. U.S. Dep't of Justice, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987) (relying on pre-amendment language, court held that mere possibility that person mentioned in file might some day violate law was insufficient to invoke Exemption 7(A)); Nat'l Pub. Radio, 431 F. Supp. at 514 (holding that
(continued...)

Further, even after an enforcement proceeding is closed, courts have ruled that the continued use of Exemption 7(A) may be proper in certain instances. One such instance involves "related" proceedings, i.e., those instances in which information from a closed law enforcement proceeding will be used again in other pending or prospective law enforcement proceedings -- for example, when charges are pending against additional defendants[16] or when additional charges are pending against the original de-

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[15](...continued)
"dormant" investigation "is nonetheless an 'active' one," which justifies continued Exemption 7(A) applicability); see also 120 Cong. Rec. S9329 (daily ed. May 30, 1974) (statement of Sen. Hart).

[16] See Solar Sources, 142 F.3d at 1040 (explaining that although the government has "closed" its cases against certain defendants by obtaining plea agreements and convictions, withholding is proper because the information "compiled against them is part of the information" in ongoing cases against other targets); New England Med. Ctr. Hosp. v. NLRB, 548 F.2d 377, 385-86 (1st Cir. 1976) (finding Exemption 7(A) applicable when a "closed file is essentially contemporary with, and closely related to, the pending open case" against another defendant; applicability of exemption does not hinge on "open" or "closed" label agency places on a file); Givner v. Executive Office for U.S. Attorneys, No. 99-3454 slip op. at 3, 7 (D.D.C. Mar. 1, 2001) (explaining that although plaintiff is "serving his sentence," withholding is proper because "release of prosecutorial documents could potentially jeopardize" pending trial and habeas action of co-conspirators); Cucci v. DEA, 871 F. Supp. 508, 512 (D.D.C. 1994) (finding protection proper when information pertains to "multiple intermingled investigations and not just the terminated investigation" of subject); Engelking v. DEA, No. 91-0165, slip op. at 6 (D.D.C. Nov. 30, 1992) (reasoning that information in inmate's closed file was properly withheld because fugitive discussed in requester's file is still at large; explaining that records from closed file can relate to law enforcement efforts which are still active or in prospect), summary affirmance granted in pertinent part, vacated in part & remanded, No. 93-5091, 1993 U.S. Dist. LEXIS 33824 (D.C. Cir. Oct. 6, 1993); Warmack v. Huff, No. 88-H-1191-E, slip op. at 22-23 (N.D. Ala. May 16, 1990) (finding that Exemption 7(A) applicable to documents in multi-defendant case involving four untried fugitives), aff'd, 949 F.2d 1162 (11th Cir. 1991) (unpublished table decision); Freedberg v. Dep't of the Navy, 581 F. Supp. 3, 4 (D.D.C. 1982) (holding that Exemption 7(A) remained applicable when two murderers were convicted but two other remained at large). But see Linn, 1995 WL 417810, at *9 (explaining that the statement that "some unspecified investigation against a fugitive, or perhaps more than one fugitive, was ongoing . . . without any explanation of how release" of the information would interfere with "efforts to apprehend this (or these) fugitive (or fugitives) is patently insufficient to justify the withholding of information").

fendant.[17]

Another circumstance in which the continued use of Exemption 7(A) has been held proper involves post-conviction motions, i.e., those instances in which the requester has filed a motion for a new trial or has otherwise appealed the court's action.[18] The extent of protection in such a circumstance, however, varies; some courts have limited Exemption 7(A) protection to only the material not used at the first trial,[19] while other courts in

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[17] See Pinnavaia v. FBI, No. 04-5115, 2004 WL 2348155, at *1 (D.C. Cir. Oct. 19, 2004) (explaining that although FBI San Diego Field Office's investigation was closed, its New York Field Office records were part of investigatory files for separate, ongoing investigation, so use of Exemption 7(A) therefore was proper); Franklin v. U.S. Dep't of Justice, No. 98-5339, slip op. at 3 (11th Cir. July 13, 1999) (holding that "disclosure could have reasonably been expected to interfere with [defendant's] federal appeal and state criminal trial"); Hoffman v. U.S. Dep't of Justice, No. 98-1733-A, slip op. at 3 (W.D. Okla. Sept. 21, 2001) (explaining that although the federal trial was completed, a decision to proceed with a state prosecution "convinces the Court" that the requested records should not be disclosed); Cudzich, 886 F. Supp. at 106-07 (holding that while INS investigation is complete, parts of file "containing information pertaining to pending investigations of other law enforcement agencies" are properly withheld); Kuffel v. U.S. Bureau of Prisons, 882 F. Supp. 1116, 1126 (D.D.C. 1995) (ruling that Exemption 7(A) remains applicable when inmate has criminal prosecutions pending in other cases); Dickie v. Dep't of the Treasury, No. 86-649, slip op. at 8 (D.D.C. Mar. 31, 1987) (holding that release of documents from closed federal prosecution could jeopardize state criminal proceedings).

[18] See, e.g., Kansi v. U.S. Dep't of Justice, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (explaining that the "potential for interference . . . that drives the 7(A) exemption . . . exists at least until plaintiff's conviction is final"; thus, plaintiff's pending motion for new trial is pending law enforcement proceeding for purposes of FOIA); see also Keen v. Executive Office for U.S. Attorneys, No. 96-1049, slip op. at 7 (D.D.C. July 14, 1999) (magistrate's recommendation) (reasoning that pending motion to redetermine sentence qualifies as "pending enforcement proceeding for purposes of FOIA Exemption 7(A)"), adopted (D.D.C. Mar. 28, 2000); Burke v. DEA, No. 96-1739, slip op. at 5 (D.D.C. Mar. 31, 1998) (finding that post-conviction appeal qualifies as law enforcement proceeding).

[19] See Pons v. U.S. Customs Serv., No. 93-2094, 1998 U.S. Dist. LEXIS 6084, at *14 (D.D.C. Apr. 23, 1998) (ruling that disclosure of information not used in plaintiff's prior trials could "interfere with another enforcement proceeding"); Hemsley v. U.S. Dep't of Justice, No. 90-2413, slip op. at 10 (D.D.C. Sept. 24, 1992) (holding that Exemption 7(A) protection applied when the "only pending criminal proceeding" was an appeal of the denial of a new trial motion; "[k]nowledge of potential witnesses and documentary evidence that were not used during the first trial" could "genuinely harm

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some cases have extended Exemption 7(A) protection to all of the information compiled during all of the law enforcement proceedings.[20]

Similarly, Exemption 7(A) also may be invoked when an investigation has been terminated but an agency retains oversight or some other continuing enforcement-related responsibility.[21] For example, it has been found to have been invoked properly to protect impounded ballots where their disclosure could "interfere with the authority of the NLRB" to conduct and process future collective bargaining representation elections.[22] If, however, there is no such ongoing agency oversight or continuing enforcement-related responsibility, courts do not permit an agency to continue the use

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[19](...continued)
government's case"); cf. Senate of P.R. v. U.S. Dep't of Justice, 823 F.2d 574, 578 (D.C. Cir. 1987) (relying on language of statute prior to 1986 FOIA amendments to remand case for additional explanation of why no segregable portions of documents could be released without interfering with related proceedings); Narducci v. FBI, No. 93-0327, slip op. at 3-4 (D.D.C. Sept. 22, 1995) (explaining that Exemption 7(A) remains applicable "in light of retrial, not yet scheduled, of several defendants," when agency had "adequately identified" how disclosure would interfere with retrial; however, agency must release all "public source documents").

[20] See Keen, No. 96-1049, slip op. at 6-8 (D.D.C. July 14, 1999) (finding use of Exemption 7(A) proper to withhold entire criminal file while motion to "redetermine" sentence is pending); Kansi, 11 F. Supp. 2d at 44 (holding that Exemption 7(A) protection "exists at least until plaintiff's conviction is final"); Burke, No. 96-1739, slip op. at 5 (D.D.C. Mar. 31, 1998) (ruling that protection of records "compiled for . . . prosecution of plaintiff in a previous criminal trial" is proper in light of plaintiff's post-conviction appeal because "disclosure of these records could harm the government's prosecution of the plaintiff's appeal"); Crooker v. ATF, No. 83-1646, slip op. at 1-2 (D.D.C. Apr. 30, 1984) (finding "no question that Exemption 7(A) is controlling" while motion to withdraw guilty plea is still pending).

[21] See, e.g., Alaska Pulp Corp. v. NLRB, No. 90-1510D, slip op. at 2 (W.D. Wash. Nov. 4, 1991) (stating that Exemption 7(A) remains applicable when corporation found liable for unfair labor practices, but parties remain embroiled in controversy as to compliance); Erb v. U.S. Dep't of Justice, 572 F. Supp. 954, 956 (W.D. Mich. 1983) (finding withholding proper when investigation "concluded 'for the time being'" and then subsequently reopened); ABC Home Health Servs. v. HHS, 548 F. Supp. 555, 556, 559 (N.D. Ga. 1982) (holding documents protected when "final settlement" was subject to reevaluation for at least three years); Timken v. U.S. Customs Serv., 531 F. Supp. 194, 199-200 (D.D.C. 1981) (finding protection proper when final determination could be challenged or appealed); Zeller v. United States, 467 F. Supp. 487, 501 (S.D.N.Y. 1979) (finding that records compiled to determine whether party is complying with consent decree were protectible).

[22] Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419-20 (N.D. Cal. 1986).

of Exemption 7(A) to protect information.[23]

The types of "law enforcement proceedings" to which Exemption 7(A) may be applicable have been interpreted broadly by the courts.[24] Such proceedings have been held to include not only criminal actions,[25] but civil actions[26] and regulatory proceedings[27] as well. They include "cases in which

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[23] See, e.g., Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 66-67 (D.D.C. 1999) (finding that release of audit statistics and details of settlement from closed investigation of one hospital would not interfere with possible future settlements with other institutions when none were being investigated); Ctr. for Auto Safety v. Dep't of Justice, 576 F. Supp. 739, 751-55 (D.D.C. 1983) (rejecting the agency's argument that "disclosures which make consent decree negotiations more difficult" qualify as "interference" with law enforcement proceedings because "release at this time of the documents at issue will occur after the termination of any proceeding to which the documents are relevant"), partial reconsideration granted, No. 82-0714, 1983 WL 1955 (D.D.C. July 7, 1983); see also Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (stating that documents from unfair labor practice are not protected by Exemption 7(A) when no claim is pending or contemplated); Poss v. NLRB, 565 F.2d 654, 656-58 (10th Cir. 1977) (same); cf. Linn, 1995 WL 417810, at *9 (finding that an unspecified possible investigation against an unknown number of fugitives "is patently insufficient to justify the withholding of information"); Badran, 652 F. Supp. at 1440 (calling the agency's position "bewildering and indefensible" when it argued that Exemption 7(A) was proper because it "could use [the information] against a person who might some day violate immigration laws").

[24] See, e.g., Ctr. for Nat'l Sec. Studies, 331 F.3d at 926 (stating that law enforcement proceeding requirement is met by investigation into "breach of this nation's security"); Edmonds v. FBI, 272 F. Supp. 2d 35, 54-55 (D.D.C. 2003) (concluding that agency justified its withholding of records under Exemption 7(A) in case involving "national security issues").

[25] See, e.g., Manna, 51 F.3d at 1165 (finding that criminal law enforcement proceedings involving La Cosa Nostra and its "long, sordid and bloody history of racketeer domination and exploitation" meets threshold); Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) (explaining that ongoing criminal investigation of organized crime activities including narcotics, gambling, stolen property, and loan sharking satisfies threshold), summary affirmance granted, No. 95-5388 (D.C. Cir. Jan. 24, 1997); Gould, 688 F. Supp. at 703 (ruling that post-award audit reports pertaining to ongoing criminal investigation into pricing discounts qualify); Nat'l Pub. Radio, 431 F. Supp. at 510, 513-15 (reasoning that documents relating to a nuclear-safety whistleblower's plutonium contamination, given the "possibility of obstruction of justice," fall "within the protective scope of Exemption 7(A)").

[26] See, e.g., Manna, 51 F.3d at 1165 (stating that disclosure would inter-

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the agency has the initiative in bringing an enforcement action and those . . . in which it must be prepared to respond to a third party's challenge."[28] Enforcement proceedings in state courts[29] and foreign courts[30] also qualify

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[26](...continued)
fere with contemplated civil proceedings); Judicial Watch v. Rossotti, 285 F. Supp. 2d 17, 29 (D.D.C. 2003) (concluding that the "documents in question relate to an ongoing civil investigation by IRS and are exempt under Exemption 7(A)"); Bender v. Inspector Gen. NASA, No. 90-2059, slip op. at 1-2, 8 (N.D. Ohio May 24, 1990) (explaining that information relating to "official reprimand" was reasonably expected to interfere with government's proceeding to recover damages "currently pending" before same court).

[27] See, e.g., Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005) (stating that the disclosure of records compiled as part of EPA's investigation into violations of its Toxic Substance Control Act "would prematurely reveal the EPA's case . . . in the administrative proceeding that is currently pending"); Graves v. EEOC, No. CV 02-6842, slip op. at 10 (C.D. Cal. Apr. 4, 2003) (finding employment dispute and pending EEOC charge sufficient to meet law enforcement standard), aff'd, 144 F. App'x 626 (9th Cir. 2005); 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"); Rosenglick v. IRS, No. 97-747-18A, 1998 U.S. Dist. LEXIS 3920, at *6 (M.D. Fla. Mar. 10, 1998) (confirming that phrase "law enforcement purposes" includes "civil, criminal, and administrative statutes and regulations such as those promulgated and enforced by the IRS"); Farm Fresh, Inc. v. NLRB, No. 91-603-N, slip op. at 1, 7-9 (E.D. Va. Nov. 15, 1991) (holding that NLRB's unfair labor practice action constitutes law enforcement proceedings); Alaska Pulp, No. 90-1510D, slip op. at 2, 5 (W.D. Wash. Nov. 4, 1991) (explaining that after finding of unfair labor practice, compliance investigation to determine back pay awards constitutes enforcement proceedings); Concrete Constr. Co. v. U.S. Dep't of Labor, No. 2-89-649, slip op. at 2-6 (S.D. Ohio Oct. 26, 1990) (ruling that Department of Labor's regulation and inspection of construction sites constitute enforcement proceedings); Injex, 699 F. Supp. at 1419 (finding that NLRB's responsibility to process collective bargaining representation elections constitutes law enforcement proceedings); Fedders Corp. v. FTC, 494 F. Supp. 325, 327-28 (S.D.N.Y.) (concluding that FTC investigation into allegations of unfair advertising and offering of equipment warranties constitutes law enforcement proceedings), aff'd, 646 F.2d 560 (2d Cir. 1980) (unpublished table decision).

[28] Mapother v. Dep't of Justice, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

[29] See, e.g., Shaw v. FBI, 749 F.2d 58, 64 (D.C. Cir. 1984) (holding that "an authorized federal investigation into the commission of state crime [the JFK assassination] qualifies"); Hoffman, No. 98-1733-A, slip op. at 3 (W.D. Okla. Sept. 21, 2001) (stating that although federal proceedings were completed, a decision to proceed with state prosecution qualifies); Butler, 888 F. Supp. at 182-83 (explaining that release could jeopardize pending state
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for Exemption 7(A) protection.

It is well established that in order to satisfy the "law enforcement proceedings" requirement of Exemption 7(A), an agency must be able to point to a specific pending or contemplated law enforcement proceeding that could be harmed by disclosure.[31] By comparison, while some courts have extended the attorney work-product privilege of Exemption 5 to instances of "foreseeable litigation, even if no specific claim is contemplated,"[32] courts have not likewise extended the protection of Exemption 7(A).[33]

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[29](...continued)
criminal proceeding).

[30] See, e.g., Bevis v. Dep't of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986) (stating that the "language of the statute makes no distinction between foreign and domestic enforcement purposes" (citing Shaw, 749 F.2d at 64)); Zevallos-Gonzalez v. DEA, No. 97-1720, slip op. at 11-13 (D.D.C. Sept. 25, 2000) (explaining that even though no indictment in United States was likely, disclosure of information sought would "interfere with efforts of Peruvian officials" to investigate and prosecute).

[31] See Mapother, 3 F.3d at 1542 ("We believe that a categorical approach is appropriate in determining the likelihood of enforcement proceedings in cases where an alien is excluded from entry into the United States because of his alleged participation in Nazi persecutions or genocide. Otherwise, we must exercise our faculties as mind-readers."); Nat'l Sec. Archive v. FBI, 759 F. Supp. 872, 883 (D.D.C. 1991) (reasoning that FBI's justification that disclosure would interfere with its overall counterintelligence program "must be rejected" as too general to be type of proceeding cognizable under Exemption 7(A), and permitting FBI to demonstrate whether there existed any specific pending or contemplated law enforcement proceedings).

[32] Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992); see also, e.g., Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987) (extending attorney work-product privilege to documents prepared at time when identity of prospective litigation opponent was not yet known).

[33] See Phila. Newspapers, 69 F. Supp. at 66-67 (rejecting agency's argument that disclosure of audit statistics would interfere with possible future action because "investigation is over"); Ctr. for Auto Safety, 576 F. Supp. at 751-55 (stating that modification of consent decree from closed proceeding not protected when not being used in ongoing proceeding; rejecting agency's argument that disclosure would make future negotiations more difficult); see also Van Bourg, Allen, Weinberg & Roger, 751 F.2d at 985 (finding that Exemption 7(A) does not apply to documents from closed proceeding when no other claim is pending or contemplated); Poss, 565 F.2d at 656-58 (same); Linn,1995 WL 417810, at *25 (ruling that Exemption 7(A) is not applicable when no investigation exists); Badran, 652 F. Supp. at 1440
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As one court has observed, "[i]f an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on some hypothetical enforcement proceeding, the FOIA would be meaningless."[34] Rather, it is the existence of a pending or prospective law enforcement proceeding against other investigative targets that permits the continued use of Exemption 7(A) when law enforcement proceedings against initial investigatory target are "closed."[35] Thus, information cannot properly be protected just because a law enforcement agency asserts, without a firm basis, that release would interfere with future actions.[36]

With respect to judicial deference to agency judgments under Exemption 7(A), the courts can be quite pragmatic. Indeed, in a significant decision involving post-September 11 detainees, the D.C. Circuit in Center for National Security Studies v. United States Department of Justice not

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[33](...continued)
(rejecting agency's attempt to equate "might some day" with "pending").

[34] Badran, 652 F. Supp. at 1440.

[35] See, e.g., Solar Sources, 142 F.3d at 1040 (finding use of Exemption 7(A) proper in closed case when there is ongoing case against other targets); New England Med. Ctr. Hosp., 548 F.2d at 385-86 (stating that protection of closed file is proper when it relates to pending open case); Givner, No. 99-3454, slip op. at 3, 7 (D.D.C. Mar. 1, 2001) (explaining that although plaintiff is "serving his sentence," impeding trial of two co-conspirators and habeas action of convicted co-conspirator "clearly satisfy" requirement); Concrete Constr., No. 2-89-649, slip op. at 3-5 (S.D. Ohio Oct. 26, 1990) (approving use of Exemption 7(A) when release of program plans would permit prospective targets to gauge "potential of being investigated"); see also Engelking, No. 91-0165, slip op. at 6 (D.D.C. Nov. 30, 1992) (ruling that inmate's file was properly withheld when fugitive was involved); Warmack, No. 88-H-1191-E, slip op. at 22-23 (N.D. Ala. May 16, 1990) (holding Exemption 7(A) applicable to documents involving fugitives).

[36] See, e.g., Dow Jones, 219 F.R.D. at 174 (stating that the "defendant fails to cite, and the Court was unable to locate, any case in which a court upheld an agency's determination to withhold disclosure pursuant to Exemption 7(A) because disclosure would interfere with settlement discussions or impede the willingness of targets of the investigation to voluntarily disclose additional information"); Ctr. for Auto Safety, 576 F. Supp. at 751-55 (holding that records concerning a modification of a consent decree from a closed proceeding are not protectible when not "being used in an on-going investigation"; disclosure would not interfere with future settlements); see also Van Bourg, Allen, Weinberg & Roger, 751 F.2d at 985 (stating that documents from unfair labor practice are not protected by Exemption 7(A) when no claim is pending or contemplated); Poss, 565 F.2d at 656-58 (same).

long ago declared that "the courts must defer to the executive on decisions of national security" under Exemption 7(A) as well as elsewhere.[37] Explaining that "America faces an enemy just as real as its former Cold War foes,"[38] the D.C. Circuit stressed the concept of deference repeatedly in this case, citing both to its own prior decisions and to Supreme Court precedent.[39] Further, it said that it would "reject any attempt to artificially limit the long-recognized deference to the executive on national security issues," which means that this deference now clearly has been extended to the law enforcement realm.[40] Thus, there is a strong connection between law enforcement, national security, and homeland security when it comes to combating the threat of domestic terrorism,[41] particularly insofar as courts "have wisely respected the executive's judgment in prosecuting the national response to terrorism."[42]

Further, regarding an agency's specific evaluation of harm, the D.C. Circuit in Center for National Security Studies also recognized that "Exemption 7(A) explicitly requires a predictive judgment of the harm that will re-

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[37] Ctr. for Nat'l Sec. Studies, 331 F.3d at 928, 932 (emphasizing that "we owe the same deference under Exemption 7(A) in appropriate cases, such as this one"); cf. L.A. Times Commc'ns v. Dep't of the Army, 442 F. Supp. 880, 899 (C.D. Cal. 2006) (stating that "[t]he Court defers" to Army officer's evaluation of how release of information could benefit insurgents in Iraq). But see Haddam v. FBI, No. 01-434, slip op. at 23-27 (D.D.C. Sept. 8, 2004) (stating that "[a]s with national security matters, this Court generally does not question the FBI's expert assessment that disclosure of the requested information could interfere with pending or prospective law enforcement proceedings," but nevertheless declaring that the agency "has not shown how naming certain statutory provisions upon which [d]efendant plans to rely after the 7(A) exemption lapses would jeopardize the ongoing investigation or national security more generally").

[38] Ctr. for Nat'l Sec. Studies, 331 F. 3d at 928.

[39] See id. at 926-28 (citing Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (stating that terrorism warrants heightened deference) (non-FOIA case); Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (concluding that courts should be reluctant to intrude into national security affairs) (non-FOIA case); CIA v. Sims, 471 U.S. 159, 179 (1985) (explaining that the CIA is familiar with "the whole picture" so its decisions merit deference); King v. U.S. Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987) (stating that "the court owes substantial weight to detailed agency explanations in the national security context").

[40] Ctr. for Nat'l Sec. Studies, 331 F.3d at 928-30.

[41] See *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (discussing "the safeguarding and protection of homeland security-related information").

[42] Ctr. for Nat'l Sec. Studies, 331 F.3d at 932.

sult from disclosure of information."[43] While its discussion of the concept of Exemption 7(A)'s "predictive judgment" in this particular case involved an agency's judgment in the national security arena, the D.C. Circuit nevertheless carefully reviewed the government's submissions and found that they readily met Exemption 7(A)'s standards.[44] Thus, agencies should keep in mind the D.C. Circuit's deferential "predictive judgment" approach when determining the applicability of Exemption 7(A) among other FOIA exemptions, when describing the agency expertise brought to bear on such determinations, and when articulating the harm envisioned by the release of withheld information, whether or not the case involves particularly sensitive national security issues.[45]

More generally, with respect to the showing of harm to law enforcement proceedings required to invoke Exemption 7(A), the Supreme Court in NLRB v. Robbins Tire & Rubber Co. rejected the position that "interference" must always be established on a document-by-document basis, and held that a determination of the exemption's applicability may be made "generically," based on the categorical types of records involved.[46] Indeed, the Supreme Court in United States Department of Justice v. Reporters Committee for Freedom of the Press emphatically affirmed the vitality of its Robbins Tire approach and further extended it to include situations arising under other FOIA exemptions in which records can be entitled to protection on a "categorical" basis.[47]

Along these lines, in a recent case involving a request for a particular agency form used for wiretapping, it was found that the defendant agency initially "denied the request pursuant to Exemption 7(A) . . . before deter-

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[43] Id. at 928; see also L.A. Times, 442 F. Supp. at 899 (stating that "[t]he Court defers to [Army officer's] predictive judgments" about Exemption 7(A) harm in insurgency setting); Edmonds, 272 F. Supp. 2d at 55 (addressing the issue of harm regarding "the likelihood of intimidation of individuals involved in the investigation").

[44] Ctr. for Nat'l Sec. Studies, 331 F.3d at 926 (quoting Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 32 (D.C. Cir. 1998), and Pratt v. Webster, 673 F.2d 408, 419 (D.C. Cir. 1982)).

[45] See, e.g., *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (emphasizing importance of protecting sensitive homeland security-related information under FOIA's law enforcement exemptions); see also Ctr. for Nat'l Sec. Studies, 331 F.3d at 928 (discussing government's descriptions of harm flowing from release of particular types of information, and finding that "government's expectation [of harm] is reasonable").

[46] 437 U.S. at 236.

[47] Reporters Comm., 489 U.S. at 776-80 (Exemption 7(C)).

mining that the document in question [actually] did not exist in its files."[48] Accepting this approach, the court observed that it is "well-established that the government may justify its withholdings by reference to generic categories of documents, rather than document-by-document," and it further explained that the "government's explanation for initially withholding the document under Exemption 7(A) was proper [because] 'with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.'"[49] Indeed, almost all courts have accepted affidavits in Exemption 7(A) cases that specify the distinct, generic categories of documents at issue and the harm that would result from their release, rather than requiring extensive, detailed itemizations of each document.[50]

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[48] Powers v. U.S. Dep't of Justice, No. 03-C-893, 2006 U.S. Dist. LEXIS 62756, at *1 (E.D. Wis. Sept. 1, 2006).

[49] Id. (quoting Solar Sources, 142 F.3d at 1038 (citing Robbins Tire, 437 U.S. at 236)); cf. Watkins Motor Lines, Inc. v. EEOC, No. 8:05-1065, 2006 WL 905518, at *5 (M.D. Fla. Apr. 7, 2006) (finding, in a case in which the EEOC continued to investigate even after the charging party withdrew the complaint, that the agency's use of Exemption 7(A) was proper because "'with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings'" (quoting Robbins Tire, 437 U.S. at 236)).

[50] See, e.g., Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., No. 03-14823, slip op. at 6-7 (11th Cir. June 24, 2004) (declaring that "[a]ll Amtrak has to do is show a reasonable expectation of 'interference' from release of the category of documents involved here, as opposed to having to do a document by document or page by page analysis," and noting supporting decisions in the Sixth, Eighth, and Ninth Circuits); Lynch v. Dep't of the Treasury, No. 99-1697, 2000 WL 123236, at *2 (9th Cir. Jan. 28, 2000) (explaining that "government need not 'make a specific factual showing with respect to each withheld document'" (quoting Lewis, 823 F.2d at 380)); Solar Sources, 142 F.3d at 1038 (reiterating that government "may justify its withholdings by reference to generic categories of documents, rather than document-by-document"); In re Dep't of Justice, 999 F.2d 1302, 1308 (8th Cir. 1993) (en banc) (The "Supreme Court has consistently interpreted Exemption 7 of the FOIA (specifically so far subsections 7(A), 7(C), and 7(D))" to permit the government to proceed on a "categorical basis" and to not require a document-by-document Vaughn Index.), on remand sub nom. Crancer v. U.S. Dep't of Justice, No. 89-234, slip op. at 6 (E.D. Mo. Oct. 4, 1994) (magistrate's recommendation) (approving FBI's "generic" affidavit as sufficient and denying plaintiff's requests for methodology of document review and accounting of time spent reviewing documents), adopted (E.D. Mo. Nov. 7, 1994); Dickerson, 992 F.2d at 1431 (stating that it is "often feasible for courts to make 'generic determinations'

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[50](...continued)
about interference"); Lewis, 823 F.2d at 380 (holding that IRS need only make general showing and is not required to make specific factual showing with respect to each withheld page); Wright, 822 F.2d at 646 (explaining that "a detailed listing is generally not required under Exemption 7(A)"); Spannaus, 813 F.2d at 1288 (stating that Supreme Court accepts generic determinations); Curran, 813 F.2d at 475 (holding that generic determinations permitted); Bevis, 801 F.2d at 1389 (finding that agency may take "generic approach, grouping documents into relevant categories"); Crooker, 789 F.2d at 67 ("Because generic determinations are permitted, the government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document."); Campbell, 682 F.2d at 265 (recognizing that "government may focus upon categories of records"); Newry Ltd. v. U.S. Customs & Border Prot. Bureau, No. 04-2110, 2005 WL 3273975, at *5 (D.D.C. July 29, 2005) (explaining that "[a]n agency need not detail the potential interference on a document-by-document basis," but may group documents into relevant categories that are "'sufficiently distinct to allow a court to grasp'" how release of the information in question would interfere with law enforcement proceedings (quoting Bevis, 801 F.2d at 1389)); Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, No. 04-1919, 2005 WL 913268, at *8 (D.D.C. Apr. 20, 2005) (stating that agency may take generic approach and group documents into relevant categories that allow court to grasp how release would interfere with proceedings); Envtl. Prot., 364 F. Supp. 2d at 588 (stating that an "agency is not required to establish on a document-by-document basis the interference that would result from the disclosure of each document," but instead may take a generic approach "based on categorical types of records" (citing Robbins Tire, 437 U.S. at 232)); Edmonds, 272 F. Supp. 2d at 54 (explaining that the agency may group documents into categories, but that "[i]n order to utilize this categorical approach, [an agency] must 'conduct a document-by-document review' of all responsive documents to assign documents to the proper category and 'explain to the court how the release of each category would interfere with enforcement proceedings'" (quoting Bevis, 801 F.2d 1389-90)); Sandgrund v. SEC, 215 F. Supp. 2d 178, 180-81 (D.D.C. 2002) (acknowledging that generic or categorical approach is proper, but finding some descriptions to be "too broad or generic" to satisfy "government's Vaughn obligation" and to permit meaningful court review); ACLU Found., 833 F. Supp. at 407 (An agency "must supply sufficient facts about the alleged interference . . . . This does not, however, necessarily require an individualized showing for each document."); see also FOIA Update, Vol. V, No. 2, at 3-4 ("FOIA Counselor: The 'Generic' Aspect of Exemption 7(A)") (advising agencies on most efficient and practical uses of Exemption 7(A)); cf. Robinson, No. 00-11182, slip op. at 8-9 (11th Cir. Mar. 15, 2001) (reiterating that while courts can accept generic determinations of interference with enforcement proceedings, government must "make at least some minimal showing"; because the district court ruled sua sponte, it "lacked an adequate factual basis for its deci-

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Nevertheless, in a recent decision discussing the procedures necessary to use such a categorical approach, a court stressed the importance of a document-by-document review.[51] In explaining the necessity of reviewing Exemption 7(A) records prior to placing them in categories, it described by comparison the different treatment accorded to Exemption 5's attorney work-product privilege and Exemption 7(A), observing that the "work-product doctrine is broadly construed and applies to facts, law, opinions, and analysis. Thus, where a document is withheld pursuant to the work-product doctrine, there is no reasonably segregable portion to release."[52] The court stated that it "decline[d] to leap that far" for Exemption 7(A) and declared that such a broad application "would eviscerate the segregation requirement under Exemption 7(A)."[53]

Likewise, in another recent case discussing the categorical approach under Exemption 7(A), another court first stated that the "FOIA permits agencies to craft rules exempting certain categories of records from disclosure under Exemption 7(A) instead of making a record-by-records showing," but then added that an "agency's ability to rely on categorical rules, however, has limits."[54] The court continued to describe the proper approach to categorizing records by explaining that agencies bear the burden of "identifying either specific documents or functional categories of information that are exempt from disclosure, and disclosing any reasonably segreable, non-exempt" portions, because to do otherwise "would eviscerate the principles of openness in government that the FOIA embodies."[55]

Thus, agencies sometimes are cautioned by courts to review all requested documents in order to know the character and content of all records being placed into particular generic categories, as was made clear by the District Court for the District of Minnesota in Gavin v. Securities & Ex-

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[50](...continued)
sion"); Beneville, No. 98-6137, slip op. 22-23 (D. Or. June 11, 2003) (holding that "Exemption 7(A) does not authorize 'blanket exemptions' for 'all records relating to an ongoing investigation,'" and instructing agency to "submit additional briefing" describing why it did not segregate and release records such as newspapers and magazine articles in its initial response (quoting Campbell, 682 F.2d at 259)).

[51] Gavin v. SEC, No. 04-4522, 2006 U.S. LEXIS 75227, at *13 (D. Minn. Oct. 13, 2006).

[52] Id.

[53] Id.; cf. Judicial Watch v. Dep't of Justice, 432 F.3d 366, 371 (D.C. Cir. 2005) (declaring that "the Circuit's case law is clear" and reiterating that if "a document is fully protected as work product, then segregability is not required").

[54] Long, 2006 WL 2578755, at *27.

[55] Id. at *27, *29.

change Commission.[56] In Gavin, the court explained that while "[n]umerous courts, including the Eighth Circuit, hold that an agency may utilize the categorical approach to justify its burden with regard to FOIA Exemption 7(A)," a document-by-document review to categorize the documents is required.[57] In a subsequent decision in the same case, this court reiterated that an agency's ability to place documents into categories "does not obviate the requirement that an agency conduct a document-by-document review"; rather, it must conduct a document-by-document review in order to assign documents to proper categories.[58]

Then, in yet a third ruling in this case, the court chastised the Securities and Exchange Commission by stating that it "has continually and deliberately stalled in fulfilling its obligations to conduct a document-by-document review of material it seeks to withhold pursuant to Exemption 7(A). In doing so, the SEC has attempted to play by its own rules and disregard the law."[59] This insistence on at least some review of the documents in order to place them in the proper category is, indeed, in line with the general rule in the D.C. Circuit as well as in other jurisdictions.[60]

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[56] Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *3-4 (D. Minn. Oct. 24, 2005), partial reconsideration denied, No. 04-4522, 2006 WL 208783 (D. Minn. Jan. 26, 2006), clarification & stay denied, No. 04-4522, 2006 WL 1738417 (D. Minn. June 20, 2006); summary judgment granted in part, 2006 U.S. Dist. LEXIS 75227 (Oct. 13, 2006).

[57] Id.

[58] Gavin v. SEC, No. 04-4522, 2006 WL 208783, at *2 (D. Minn. Jan. 26, 2006) (citing In re Dep't of Justice, 999 F.2d at 1305-09).

[59] Gavin v. SEC, No. 04-4522, 2006 WL 1738417, at *3 (D. Minn. June 20, 2006); see also Gavin, 2006 U.S. Dist. LEXIS 75227, at *11-13 (approving the agency's withholding of that portion of records for which the agency finally conducted a document-by-document review, but denying the agency's motion as to the remaining documents for which it had not conducted such a review).

[60] See, e.g., Bevis, 801 F.2d at 1389 (stating that although an agency need not justify its withholding on a document-by-document basis, "it must review each document to determine the category in which it properly belongs"); see also In re Dep't of Justice, 999 F.2d at 1309 (explaining that agency must conduct document-by-document review to assign documents to proper categories); Crooker, 789 F.2d at 67 (describing review of documents file-by-file as unnecessary, but stressing review of documents for category-by-category assignment as necessary); Barney, 618 F.2d at 1273 (reiterating that agency is not required to make specific factual showing with respect to each withheld document, but instead may focus on particular categories of documents); Inst. for Justice & Human Rights v. Executive Office of the U.S. Attorney, No. 96-1469, 1998 U.S. Dist. LEXIS 3709,

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EXEMPTION 7(A)

Specific guidance has been provided by the Courts of Appeals for the First, Fourth, and D.C. Circuits as to what constitutes an adequate "generic category" in an Exemption 7(A) affidavit.[61] The general principle uniting their decisions is that affidavits must provide at least a general, "functional" description of the types of documents at issue sufficient to indicate the type of interference threatening the law enforcement proceeding.[62] It

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[60](...continued)
at *16-17 (N.D. Cal. Mar. 18, 1998) (stating that declarations need to establish that each document was reviewed); Kay, 976 F. Supp. at 35 (explaining that agency must conduct document-by-document review in order to assign each document to proper category); Jefferson, 1997 U.S. Dist. LEXIS 3064, at *10 n.1 (explaining need for document-by-document review of responsive records); Hillcrest Equities, Inc. v. U.S. Dep't of Justice, No. CA3-85-2351-R, slip op. at 7 (N.D. Tex. Jan. 26, 1987) (declaring that government must review each document to determine category to which it belongs).

[61] See Spannaus, 813 F.2d at 1287, 1289 (stating that "details regarding initial allegations giving rise to this investigation; notification of [FBI Headquarters] of the allegations and ensuing investigation; interviews with witnesses and subjects; investigative reports furnished to the prosecuting attorneys," and similar categories are all sufficient); Curran, 813 F.2d at 476 (same); Bevis, 801 F.2d at 1390 (explaining that "identities of possible witnesses and informants, reports on the location and viability of potential evidence, and polygraph reports" are sufficient; categories "identified only as 'teletypes,' 'airtels,' or 'letters'" are insufficient); see also Cucci, 871 F. Supp. at 511-12 (holding that "evidentiary matters category" -- described as "witness statements, information exchanged between the FBI and local law enforcement agencies, physical evidence, evidence obtained pursuant to search warrants and documents related to the case's documentary and physical evidence" is sufficient); cf. Solar Sources, 142 F.3d at 1036-39 (explaining that agency's six broad categories and eight subcategories "may have provided a sufficient factual basis" for judicial review, but cautioning that "we might give some weight to appellants' argument [that categories did not provide functional descriptions] had the district court not conducted a thorough in camera review").

[62] See, e.g., Lion I, 354 F.3d at 1084 (explaining that its holding does "not imply that the government must disclose facts that would undermine the very purpose of its withholding," but that particularly if the agency wants the court to rely on an in camera declaration, it must justify its exemption position "in as much detail as possible"); Curran, 813 F.2d at 475 ("Withal, a tightrope must be walked: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag."); Crooker, 789 F.2d at 67 ("The hallmark of an acceptable Robbins category is thus that it is functional; it allows the court to trace a rational link between the nature of the document and the alleged likely interference."); Owens v. U.S. Dep't of Justice, No. 04-1701, 2006 WL 3490790, at *6 (D.D.C. Dec. 1, 2006) (observing that "courts reviewing the
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should be noted, however, that both the First and the Fourth Circuits have approved a "miscellaneous" category of "other sundry items of information."[63] Although the D.C. Circuit has not yet specifically addressed an af-

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[62](...continued)
withholding of agency records under Exemption 7 cannot demand categories 'so distinct as prematurely to let the cat out of the investigative bag,'" but finding that the agency's categories in this case did not provide "so much as a bare sketch of the information" and that the agency therefore had not met its burden under Exemption 7(A) (quoting Curran, 813 F.2d at 475)); Gavin, 2005 WL 2739293, at *3 (stating that the "[p]roper utilization of the categorical approach requires" categories to be "functional," which is defined as allowing "'the court to trace a rational link between the nature of the document and the alleged likely interference'" (quoting Bevis, 801 F.2d at 1389)); Pinnavaia v. FBI, No. 03-112, slip op. at 11 (D.D.C. Feb. 25, 2004) (stating that the declaration provides an "adequate basis to find that disclosure of the withheld information would interfere with law enforcement proceedings"), summary affirmance granted, No. 04-5115, 2004 WL 2348155, at *1 (D.C. Cir. Oct. 19, 2004) (explaining that "FBI's affidavits have substantiated its claim" that release could reasonably be expected to interfere with enforcement proceedings (citing Ctr. for Nat'l Sec. Studies, 331 F.3d at 928)); Voinche v. FBI, 46 F. Supp. 2d 26, 31 (D.D.C. 1999) (explaining that generic approach is appropriate, but that agency must demonstrate how each category of documents, if disclosed, could reasonably be expected to interfere with law enforcement proceedings); Hoffman v. U.S. Dep't of Justice, No. 98-1733-A, slip op. at 15, 18 (W.D. Okla. Dec. 15, 1999) (explaining that while Supreme Court has approved categorical approach, responsive documents must be grouped into "categories that can be linked to cogent reasons for nondisclosure"); Kitchen v. DEA, No. 93-2035, slip op. at 12-13 (D.D.C. Oct. 11, 1995) (approving categorical descriptions when court can trace rational link between nature of document and likely interference); cf. Inst. for Justice & Human Rights, 1998 U.S. Dist. LEXIS 3709, at *14-15 (explaining that four categories -- confidential informant, agency reports, co-defendant extradition documents, and attorney work product -- are too general to be functional and ordering government to "recast" categories to show how documents in "new categories would interfere with the pending proceedings"); Putnam v. U.S. Dep't of Justice, 873 F. Supp. 705, 714 (D.D.C. 1995) (stating that agency "administrative inquiry file" is "patently inadequate" description); SafeCard Servs. v. SEC, No. 84-3073, slip op. at 6 n.3 (D.D.C. May 19, 1988) (holding that agency "file" is not sufficient generic category to justify withholding), aff'd in part, rev'd in part on other grounds & remanded, 926 F.2d 1197 (D.C. Cir. 1991); Pruitt Elec. Co. v. U.S. Dep't of Labor, 587 F. Supp. 893, 895-96 (N.D. Tex. 1984) (explaining that disclosure of reference material consulted by investigator that might aid an unspecified target in unspecified manner found not to cause interference).

[63] Spannaus, 813 F.2d at 1287, 1289; Curran, 813 F.2d at 476 (finding that wide range of records made some degree of generality "understandable -- (continued...)

fidavit containing such a category, a subsequent decision of the District Court for the District of Columbia held that documents categorized as "Other Agency Records," and described in agency affidavits as "material evidence that was the basis for the conviction," were described "sufficient[ly] to allow the court to determine that the files were properly withheld."[64]

The functional test set forth by the D.C. Circuit does not require a detailed showing that release of the records is likely to interfere with the law enforcement proceedings; it is sufficient for the agency to make a generalized showing that release of these particular kinds of documents would generally interfere with enforcement proceedings.[65] Indeed, publicly revealing too many details about an ongoing investigation could jeopardize the government's ability to protect such information.[66] Also, it should be

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[63](...continued)
and probably essential").

[64] Keen, No. 96-1049, slip op. at 10 (D.D.C. July 14, 1999).

[65] See, e.g., Judicial Watch, 285 F. Supp. 2d at 29-30 (approving the IRS's use of Exemption 7(A) to withhold names of specific employees because "[c]ollecting taxes is an unpopular job, to put it mildly, and IRS 'lower level' employees are entitled to some identity protection"); Kay, 976 F. Supp. at 39 (stating that agency "need not establish that witness intimidation is certain to occur, only that it is a possibility"); Pully v. IRS, 939 F. Supp. 429, 436 (E.D. Va. 1996) ("All that is required is an objective showing that interference could reasonably occur as the result of the documents' disclosure."); Wichlacz v. U.S. Dep't of Interior, 938 F. Supp. 325, 331 (E.D. Va. 1996) (holding that a "particularized showing of interference is not required; rather, the government may justify nondisclosure in a generic fashion"), aff'd, 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision); Gould, 688 F. Supp. at 703-04 n.34 (describing functional test as steering "middle ground" between detail required by Vaughn Index and blanket withholding); Alyeska Pipeline Serv. v. EPA, No. 86-2176, 1987 WL 17081, at *2-3 (D.D.C. Sept. 9, 1987) (explaining that the government need not "show that intimidation will certainly result," but that it must "show that the possibility of witness intimidation exists"), aff'd, 856 F.2d 309 (D.C. Cir. 1988).

[66] See Detroit Free Press, 174 F. Supp. 2d at 600-01 (concluding that information published in a newspaper -- including quotes from the FBI Special Agent-in-Charge of the Detroit Field Office -- "details some of the evidence developed and being developed, and the direction and scope" of the twenty-seven-year-long Hoffa disappearance investigation and thus "calls into question the veracity of the FBI's justification for withholding"; in camera review ordered); cf. Va. Dep't of State Police, 2004 WL 2198327, at *5 (recognizing that "law enforcement agencies must be able to investigate crime without the details of the investigation being released to the public in a manner that compromises the investigation"); Cook, 2005 WL 2237615,
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remembered that making this showing is easier than in the past due to the current language of the statute.[67]

However, it is important to note that the D.C. Circuit in Bevis v. Department of State, held that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs."[68] Indeed, when an agency elects to use the "generic" approach, the court stated, the agency "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings."[69] (For a further discussion, see Litigation

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[66](...continued)
at *2 (stating that "[t]he Court is persuaded, however, that disclosure of the non-public information contained in the existing records could reasonably be expected to hinder the investigation" and not, as contended, facilitate help from the public in apprehending the 1971 airplane hijacker).

[67] See Manna, 51 F.3d at 1164 n.5 ("Congress amended this exemption to relax significantly the standard for demonstrating interference with enforcement proceedings."); Gould, 688 F. Supp. at 703 n.33 (explaining that the 1986 FOIA amendments "relaxed the standard of demonstrating interference with enforcement proceedings").

[68] 801 F.2d at 1389; see also Crooker, 789 F.2d at 67 (explaining that while government can justify its withholding category-by-category, government cannot justify its withholdings file-by-file); accord In re Dep't of Justice, 999 F.2d at 1309 (The "government may meet its burden by . . . conducting a document-by-document review to assign documents to proper categories."); Gavin, 2006 WL 208783, at *2 (emphasizing that the categorical approach "does not obviate the requirement that an agency conduct a document-by-document review" in order to assign documents to the proper category); Inst. for Justice, 1998 U.S. Dist. LEXIS 3709, at *16-17 (determining that declarations "do not establish that each document was reviewed"); Kay, 976 F. Supp. at 35 (explaining that an "agency must conduct a document-by-document review in order to assign each document to a proper category" (citing Bevis, 801 F.2d at 1389-90)); Jefferson, 1997 U.S. Dist. LEXIS 3064, at *10 n.1 (stating that "it would appear from a review of their declaration that Defendants may have never conducted a document-by-document review of responsive material," and denying the government's motion for summary judgment pending further submission); Hillcrest Equities, No. CA3-85-2351-R, slip op. at 7 (N.D. Tex. Jan. 26, 1987) (declaring that government must review each document to determine category in which it belongs).

[69] Bevis, 801 F.2d at 1389-90; see also Newry, 2005 WL 3273975, at *5 (referring to three-fold task); Beneville, No. 98-6137, slip op. at 17-18 (D. Or. (continued...)

Considerations, "Vaughn Index," below.)

The courts have long accepted that Congress intended that Exemption 7(A) apply "whenever the government's case in court would be harmed by the premature release of evidence or information,"[70] or when disclosure

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[69](...continued)
June 11, 2003) (same); Judicial Watch, 2001 U.S. Dist. LEXIS 25732, at *13-16 (same); Voinche, 46 F. Supp. 2d at 31 (same); Kay, 976 F. Supp. at 35 (same); Jefferson, 1997 U.S. Dist. LEXIS 3064, at *12 (same); Maccaferri Gabions, Inc. v. U.S. Dep't of Justice, No. 95-2576, slip op. at 11-13 (D. Md. Mar. 26, 1996) (same), appeal dismissed voluntarily, No. 96-1513 (4th Cir. Sept. 19, 1996); Cudzich, 886 F. Supp. at 106 (same); Cucci, 871 F. Supp. at 511 (same).

[70] Robbins Tire, 437 U.S. at 232; see, e.g., Mapother, 3 F.3d at 1543 (holding that release of prosecutor's index of all documents he deems relevant would provide "critical insights into [government's] legal thinking and strategy"); Faiella v. IRS, No. 05-238, 2006 WL 2040130, at *3 (D.N.H. July 20, 2006) (stating that "disclosing information under active consideration" in a criminal investigation could undermine any future prosecution by "prematurely disclosing the government's potential theories, issues, and evidentiary requirements"); Suzhou Yuanda Enter. Co. v. U.S. Customs & Border Prot., 404 F. Supp. 2d 9, 14 (D.D.C. 2005) (agreeing that release of information "would interfere with an agency investigation [by] informing the public of the evidence sought and scrutinized by this type of investigation"); Envtl. Prot., 364 F. Supp. 2d at 588 (explaining that disclosure "would prematurely reveal the EPA's case"); Judicial Watch v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 179 (D.D.C. 2004) (finding that agency has demonstrated that law enforcement proceedings are pending and that release of agent notes and information concerning export violations could "reasonably be expected to interfere" with proceedings); Rosenberg v. Freeh, No. 97-0476, slip op. at 1, 9 (D.D.C. May 13, 1998) (stating that release of code name would be "premature and damaging"); Rosenglick, 1998 U.S. Dist. LEXIS 3920, at *7-8 (explaining that "courts have liberally interpreted the term interference" and holding that "[s]uch an interpretation makes sense" because early access could "aid a wrongdoer in secreting or tampering with evidence [as well as reveal] the nature, scope, strategy and direction of the investigation"); Palmer Commc'ns v. U.S. Dep't of Justice, No. 96-M-777, slip op. at 4 (D. Colo. Oct. 30, 1996) (finding that release would harm "court's ability to control the use of discovery materials . . . [resulting in] an unacceptable interference with a law enforcement proceeding"); Durham v. USPS, No. 91-2234, 1992 WL 700246, at *1 (D.D.C. Nov. 25, 1992) (deciding that release of investigative memoranda, witness files, and electronic surveillance material would substantially interfere with pending homicide investigation by impeding government's ability to prosecute its strongest case), aff'd, No. 92-5511 (D.C. Cir. July 27, 1993); cf. Cecola v. FBI, No. 94 C 4866, 1995 WL 143548, at *2 (N.D. Ill. Mar. 30, 1995) (disallowing deposition of agency affiant when it might alert plaintiff to

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would impede any necessary investigation prior to the enforcement proceeding.[71] In Robbins Tire, the Supreme Court found that the NLRB had

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[70](...continued)
government's investigative strategy). But see LeMaine v. IRS, No. 89-2914, 1991 U.S. Dist. LEXIS 18651, at *13 (D. Mass. Dec. 10, 1991) (finding that agency failed to demonstrate that release would "seriously impair any ongoing effort to collect taxes or penalties . . . or to pursue criminal charges").

[71] See, e.g., Lynch, 2000 WL 123236, at *2 (stating that agency declarations "made clear" that release of records could harm "efforts at corroborating witness statements . . . alert potential suspects . . . [and] interfere with surveillance"); Solar Sources, 142 F.3d at 1039 (stating that disclosure could interfere by revealing "scope and nature" of investigation); Dickerson, 992 F.2d at 1429 (holding that public disclosure of information in Hoffa kidnapping file could reasonably be expected to interfere with enforcement proceedings); Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, No. 05-00806, 2006 U.S. Dist. LEXIS 89614, at *21-24 (D.D.C. Dec. 12, 2006) (finding that release of records regarding alleged misuse of tribal gaming revenues during investigation could allow targets to ascertain direction of investigations, to identify potential charges to be brought, and to expose state and nature of current investigations, thereby undermining federal investigations); Gerstein v. U.S. Dep't of Justice, No. C-03-04893, slip op. at 11 (N.D. Cal. Sept. 30, 2005) (explaining that release of sealed warrants "could reasonably be expected to interfere" with ongoing investigation); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 119 (D.D.C. 2005) (holding that "release of this information could undermine the effectiveness" of the agency's investigation); Judicial Watch v. U.S. Dep't of Justice, 306 F. Supp. 2d 58, 75-76 (D.D.C. 2004) (observing that release of documents during course of investigation could damage agency's ability to obtain information); Kay, 976 F. Supp. at 38-39 (holding that the agency "specifically established that release" would permit the requester to gain insight into the FCC's evidence against him, to discern the narrow focus of the investigation, to assist in circumventing the investigation, and to create witness intimidation, and that disclosure would "reveal the scope, direction and nature" of the investigation); Pully, 939 F. Supp. at 436 (explaining that the requester's promise not to interfere with the investigation is of "no consequence" because government "need not take into account the individual's propensity or desire to interfere"; objective showing that disclosure could lead to interference found sufficient); W. Journalism, 926 F. Supp. at 192 (noting that disclosure could "contaminate the investigative process"); Butler, 888 F. Supp. at 182-83 (finding that disclosure would interfere with pending investigations by local police department of requester for stalking and murder); Kay v. FCC, 867 F. Supp. 11, 19 (D.D.C. 1994) (holding that documents, including letters to FCC from informants, would reveal scope of investigation and strength of case against plaintiff; disclosure of documents, "even redacted to exclude proper names," could lead to retaliatory action and intimidation of witnesses); Vosburgh v. IRS, No. 93-1493, 1994 WL 564699, at *2-3 (D. Or. July 5, 1994) (stating that dis-
(continued...)

established interference with its unfair labor practice enforcement proceeding by showing that release of its witness statements would create a great potential for witness intimidation and could deter their cooperation.[72]

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[71](...continued)
closure of "DMV" record, memoranda of interview, police report, and portions of search warrants could interfere with IRS's investigation by revealing nature, scope, and direction of investigation, evidence obtained, government's strategies, and by providing requester with opportunity to create defenses and tamper with evidence); Int'l Collision Specialists, Inc. v. IRS, No. 93-2500, 1994 WL 395310, at *2, 4 (D.N.J. Mar. 2, 1994) (ruling that disclosure could reasonably be expected to interfere with enforcement proceedings by enabling requester "to determine nature, source, direction, and limits" of IRS investigation and to "fabricate defenses and tamper with evidence"); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 721 (C.D. Cal. 1993) (finding that disclosure likely to interfere with IRS's ability to investigate requester pursuant to Church Audit Procedures Act, 26 U.S.C. § 7611 (2000)); Church of Scientology v. IRS, 816 F. Supp. 1138, 1157 (W.D. Tex. 1993) (stating that disclosure could reasonably be expected to interfere with enforcement proceedings, subject IRS employees to harassment or reprisal, and reveal direction and scope of IRS investigation); Nat'l Pub. Radio, 431 F. Supp. at 514-15 (explaining that disclosure would impair agency's continued, long-term investigation into suspicious death of nuclear-safety whistleblower).

[72] 437 U.S. at 239; see also Ctr. for Nat'l Sec. Studies, 331 F.3d at 929 (reasoning that requested list of names "could be of great use" by terrorists in "intimidating witnesses"); Solar Sources, 142 F.3d at 1039 (stating that disclosure could result in "chilling and intimidation of witnesses"); Judicial Watch, Inc. v. U.S. Dep't of Justice, 102 F. Supp. 6, 19-20 (D.D.C. 2000) (reiterating that prematurely disclosing documents related to witnesses could result in witness tampering or intimidation and could discourage continued cooperation); Anderson v. U.S. Dep't of Treasury, No. 98-1112, 1999 U.S. Dist. LEXIS 20877, at *10 (W.D. Tenn. Mar. 24, 1999) (finding that disclosure allows "possibility of witness intimidation" and interference with proceedings); Accuracy in Media, Inc. v. Nat'l Park Serv., No. 97-2109, 1998 U.S. Dist. LEXIS 18373, at *26 (D.D.C. Nov. 13, 1998) (acknowledging that "disclosure of witnesses' statements and reports acquired by law enforcement personnel may impede the [Office of Independent Counsel's] investigation"), aff'd on other grounds, 194 F.3d 120 (D.C. Cir. 1999); Kansi, 11 F. Supp. 2d at 44 (holding that disclosure provides "potential for interference with witnesses and highly sensitive evidence"); Anderson v. USPS, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998) (explaining that release "would expose actual or prospective witnesses to undue influence or retaliation"), aff'd, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision); Rosenglick, 1998 U.S. Dist. LEXIS 3920, at *7-8 (reasoning that disclosure "could aid a wrongdoer in secreting or tampering with evidence or witnesses"); Wichlacz, 938 F. Supp. at 331 (finding Independent Counsel "justified in concluding that there are substantial risks of witnesses intimidation or har-
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Similarly, in a 2005 decision involving the FBI's still-ongoing investigation into a 1971 airplane hijacking, the court discussed the difficulties with gathering reliable information from witnesses by first noting that disclosure of nonpublic information "could reasonably be expected to hinder the investigation," rather than, as contended by the FOIA plaintiff, advance the public's help in solving the crime.[73] This court went on to describe in detail the kinds of harm that could that could result from the release of nonpublic information, and thus hinder the investigation, by enumerating that the requested FOIA disclosure could make it "far more difficult" for the FBI:

> (a) to verify and corroborate future witness statements and evidence, (b) to discern which tips, leads, and confession have merit and deserve further investigation and which are inconsistent with the known facts and can be safely ignored, and (c) to conduct effective interrogations of suspects.[74]

Other courts have ruled that interference has been established when, for example, the disclosure of information could prevent the government from obtaining data in the future.[75] Indeed, the D.C. Circuit in Alyeska

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[72](...continued)
assment [and] reduced witness cooperation" in investigation which remains active and ongoing); Holbrook v. IRS, 914 F. Supp. 314, 316 (S.D. Iowa 1996) (releasing information might permit targets of pending investigation to "tamper with or intimidate potential witnesses"); cf. Franklin, No. 98-5339, slip op. at 2-3 (11th Cir. July 13, 1999) (ruling that "district court correctly determined" that disclosure of statements made by eight government witnesses who testified at criminal trial "could have reasonably been expected to interfere with . . . appeal and state criminal trial").

[73] Cook, 2005 WL 2237615, at *2.

[74] Id.

[75] See, e.g., Ctr. for Nat'l Sec. Studies, 331 F.3d at 930 (recognizing that witnesses "would be less likely to cooperate" and that a "potential witness or informant may be much less likely to come forward and cooperate with the investigation if he believes his name will be made public"); Watkins Motor Lines, 2006 WL 905518, at *8-9 (noting that the fact that a witness does not object to disclosure of notes from interviews "is not dispositive," as disclosure could reasonably be expected to cause harm, and adding that "the possibility of harm from disclosure of witness statements arises regardless of whether the witness is favorable to the person seeking disclosure" (citing Robbins Tire, 437 U.S. at 241-42)); Kay, 976 F. Supp. at 38-39 (finding potential for "witness intimidation and discourage[ment of] future witness cooperation" in ongoing investigation of alleged violation of FCC's rules); Wichlacz, 938 F. Supp. at 331 (reducing cooperation of potential witnesses when they learn of disclosure, thus interfering with ongoing investigation); Dow Jones & Co. v. U.S. Dep't of Justice, 880 F. Supp. 145, 150
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Pipeline Service v. EPA, ruled that disclosure of documents pertaining to a corporation under investigation that might identify which of that corporation's employees had provided those documents to a private party (who in turn had provided them to EPA) would "thereby subject them to potential reprisals and deter them from providing further information to [the] EPA."[76]

The exemption has been held to be properly invoked when release would hinder an agency's ability to control or shape investigations,[77] would

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[75](...continued)
(S.D.N.Y. 1995) (Disclosing "statements by interviewees . . . might affect the testimony or statements of other witnesses and could severely hamper the Independent Counsel's ability to elicit untainted testimony."), vacated on other grounds, 907 F. Supp. 79 (S.D.N.Y. 1995); Kay, 867 F. Supp. at 19 (explaining that witness "intimidation would likely dissuade informants from cooperating with the investigation as it proceeds"); Manna v. U.S. Dep't of Justice, 815 F. Supp. 798, 808 (D.N.J. 1993) (disclosing FBI reports could result in chilling effect on potential witnesses), aff'd, 51 F.3d 1158, 1165 (finding "equally persuasive the district court's concern for persons who have assisted or will assist law enforcement personnel"); Crowell & Moring v. DOD, 703 F. Supp. 1004, 1011 (D.D.C. 1989) (holding that disclosure of identities of witnesses would impair grand jury's ability to obtain cooperation and would impede government's preparation of its case); Gould, 688 F. Supp. at 703 (disclosing information would have chilling effect on sources who are employees of requester); Nishnic v. U.S. Dep't of Justice, 671 F. Supp. 776, 794 (D.D.C. 1987) (disclosing identity of foreign source would end its ability to provide information in unrelated ongoing law enforcement activities); Timken, 531 F. Supp. at 199-200 (Disclosure of investigation records would interfere with the agency's ability "in the future to obtain this kind of information.").

[76] 856 F.2d at 311. But cf. Clyde v. U.S. Dep't of Labor, No. 85-139, slip op. at 6 (D. Ariz. July 3, 1986) (describing possible reluctance of contractors to enter into voluntary conciliations with government if substance of negotiations released does not constitute open law enforcement proceeding when specific conciliation process has ended); Cohen v. EPA, 575 F. Supp. 425, 428-29 (D.D.C. 1983) (holding Exemption 7(A) inapplicable to protect letters sent to entities suspected of unlawfully releasing hazardous substances when such disclosure not shown to deter parties from cooperating with voluntary cleanup programs).

[77] See, e.g., Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996) (holding that the release "could reveal much about the focus and scope" of the investigation); J.P. Stevens & Co. v. Perry, 710 F.2d 136, 143 (4th Cir. 1983) (finding that premature disclosure would "hinder [agency's] ability to shape and control investigations"); Cal-Trim, Inc. v. IRS, No. 05-2408, slip op. at 6-8 (D. Ariz. Feb. 6, 2007) (finding that release of documents would reveal nature, direction, scope, and limits of tax investigation); Watkins Motor Lines, 2006 905518, at *6 (explaining that document release would give insight into
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enable targets of investigations to elude detection[78] or to suppress or fabricate evidence,[79] or would prematurely reveal evidence or strategy in the

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[77](...continued)
progress, scope, and direction of investigation); Judicial Watch, 306 F. Supp. 2d at 75 (finding that release could reveal status of investigation and agency's assessment of evidence (citing Swan, 96 F.3d at 500)); Youngblood v. Comm'r, No. 2:99-cv-9253, 2000 U.S. Dist. LEXIS 5083, at *36 (C.D. Cal. Mar. 6, 2000) (holding that disclosure "could reveal the nature, scope, direction and limits" of the investigation); Kay, 976 F. Supp. at 38-39 (discussing how release would reveal scope, direction, and nature of investigation).

[78] See, e.g., Moorefield, 611 F.2d at 1026 (explaining that disclosure of the requested information would enable targets "to elude the scrutiny of the [Secret] Service").

[79] See, e.g., Solar Sources, 142 F.3d at 1039 (stating that disclosure "could result in destruction of evidence"); Mendoza v. DEA, No. 06-0591, 2006 WL 3734365, at *4 (D.D.C. Dec. 20, 2006) (reiterating that disclosure could assist fugitives and other targets to avoid apprehension and to develop false alibis); Watkins Motor Lines, 2006 WL 905518, at *8 (finding that "even if the Court disregards the allegation that Plaintiff may falsify or dispose of records, Defendants have made a sufficient showing of harm that could reasonably be expected to result from disclosure"); Lion II, 2005 WL 2704879, at *7-8 (agreeing that it is "unlikely that Lion will now try to extricate itself from these accusation of fraudulent fabrication by fabricating more documents directly under the nose of USDA," yet ruling that the documents nevertheless were properly withheld); Alyeska Pipeline, 856 F.2d at 312 (ruling that disclosure could allow for destruction or alteration of evidence, fabrication of alibis, and identification of witnesses); Accuracy in Media, Inc. v. U.S. Secret Serv., No. 97-2108, 1998 WL 185496, at *4 (D.D.C. Apr. 16, 1998) (explaining that release could permit witnesses to modify, tailor, or fabricate testimony); Cujas v. IRS, No. 1:97-00741, U.S. Dist. LEXIS 6466, at *14 (M.D.N.C. Apr. 15, 1998) (finding that release of information would "alert" plaintiff to scope and direction of case and provide "opportunity to dispose" of assets), aff'd, 162 F.3d 1154 (4th Cir. 1998) (unpublished table decision); Rosenglick, 1998 U.S. Dist. LEXIS 3920, at *7 (reiterating that disclosure "could aid wrongdoer in secreting or tampering with evidence"); Maccaferri, No. 95-2576, slip op. at 14 (D. Md. Mar. 26, 1996) (determining that disclosure of information could provide plaintiff with opportunity to alter or destroy evidence); Holbrook, 914 F. Supp. at 316 (releasing information could allow targets to construct defenses); Nishnic, 671 F. Supp. at 794 (releasing information might allow subjects to suppress or fabricate evidence); see also Manna v. U.S. Dep't of Justice, No. 92-1840, slip op. at 11 n.3 (D.N.J. Aug. 25, 1993) (finding that possible suppression of evidence manifest when copy of search warrant was left on body of gangland-style murder victim), aff'd, 51 F.3d 1158, 1162, 1164-65 (3d Cir. 1995); cf. Lion I, 354 F.3d at 1085 (explaining that the agency's con-
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government's case.[80] Additionally, information that would reveal investigative trends, emphasis, and targeting schemes has been determined to be eligible for protection under Exemption 7(A) in those instances when disclosure would provide targets with the ability to perform a "cost/benefit

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[79](...continued)
cerns that disclosure would provide the target with "an opportunity to forge or falsify" the documents at issue are "speculative and farfetched" in a situation in which "there is no possibility that Lion could tamper with or falsify the authentic USDA-retained originals . . . because Lion seeks only copies").

[80] See, e.g., Ctr. for Nat'l Sec. Studies, 331 F.3d at 928 (stating that the requested information "would enable al Qeada or other terrorist groups to map the course of the investigation," thus giving terrorist organizations "a composite picture"); Solar Sources, 142 F.3d at 1039 (determining that disclosure could result in "revelation of the scope and nature of the Government's investigation"); Mapother, 3 F.3d at 1543 (holding that release of prosecutor's index of all documents he deems relevant would afford a "virtual roadmap through the [government's] evidence . . . which would provide critical insights into its legal thinking and strategy"); Suzhou, 404 F. Supp. 2d at 14 (agreeing that disclosure could "inform the public of the evidence sought and scrutinized in this type of investigation"); Hambarian v. Comm'r, No. 99-9000, 2000 U.S. Dist. LEXIS 6217, at *7 (C.D. Cal. Feb. 16, 2000) (explaining that disclosure would reveal agency's theories and analysis of evidence); McErlean v. U.S. Dep't of Justice, No. 97-7831, 1999 WL 791680, at *8 (S.D.N.Y. Sept. 30, 1999) (finding that release of memoranda would reveal substance of information gathered and thus interfere with enforcement proceedings); Anderson, 1999 U.S. Dist. LEXIS 20877, at *10 (reasoning that the disclosure of the requested "checkspread" (the agency's compilation of checks written by the requester) "could very well jeopardize the proceedings by more fully revealing the scope and nature" of the government's case); Anderson, 7 F. Supp. 2d at 586 (stating that the release of the requested information "would disclose the focus" of the government's investigation); Maccaferri, No. 95-2576, slip op. at 14 (D. Md. Mar. 26, 1996) (reasoning that disclosure of the records requested would give "premature insight into the Government's strategy and strength of its position"); Cecola, 1995 WL 143548, at *3 (finding that release of information in ongoing criminal investigation might alert plaintiff to government's investigative strategy); Afr. Fund, 1993 WL 183736, at *4 (explaining that the disclosure sought "risks alerting targets to the existence and nature" of the investigation); Manna, 815 F. Supp. at 808 (holding that disclosure would obstruct justice by revealing agency's strategy and extent of its knowledge); Raytheon Co. v. Dep't of the Navy, 731 F. Supp. 1097, 1101 (D.D.C. 1989) (holding that the requested information "could be particularly valuable to [an investigative target] in the event of settlement negotiations"); Ehringhaus v. FTC, 525 F. Supp. 21, 22-23 (D.D.C. 1980) (stating that disclosure would reveal the focus, "important aspects of the planned strategy of [FTC] attorneys, [and] the strengths and weaknesses of the government's case").

analysis" of compliance with agency regulations.[81] Still other courts have indicated that any premature disclosure, by and of itself, can constitute interference with an enforcement proceeding.[82] In contrast, the D.C. Circuit has held that the mere fact that defendants in related ongoing criminal proceedings might obtain documents through the FOIA that were ruled unavailable "through discovery, or at least before [they] could obtain them through discovery," does not itself "constitute interference with a law enforcement proceeding."[83]

Furthermore, Exemption 7(A) ordinarily will not afford protection

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[81] Concrete Constr., No. 2-89-649, slip op. at 3-5 (S.D. Ohio Oct. 26, 1990) (holding that disclosure of past fiscal year's Field Operation Program Plans, containing projections for inspections and areas of concentration, would be "obviously a detriment to the enforcement objectives of the Department of Labor" because disclosure "takes away the guessing" about the potential of being investigated); see also Farmworkers Legal Servs. v. U.S. Dep't of Labor, 639 F. Supp. 1368, 1374 (E.D.N.C. 1986) (approving the use of Exemptions 7(A) and 7(E) for information pertaining to the agency's "targeting scheme," the disclosure of which "would 'reveal the amount of investigative resources targeted and allocated'" for inspections (quoting agency declaration)).

[82] See Robbins Tire, 437 U.S. at 224-25, 234-37 (concluding that disclosure of "witness statements in pending unfair labor practice proceedings" would generally interfere with enforcement proceedings); Lewis, 823 F.2d at 380 (agreeing with the "reasoning of the Eight Circuit" that the "'government is not required to make a specific factual showing [of harm] with respect to each withheld document'" (quoting Barney, 618 F.2d at 1273)); Barney, 618 F.2d at 1273 (stating that disclosure "prior to the institution of civil or criminal tax enforcement proceedings, would necessarily interfere with such proceedings"); Safeway, Inc. v. IRS, No. C05-3182, 2006 WL 3041079, at *5 (N.D. Cal. Oct. 24, 2006) (explaining that "'under exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document,'" and thus agency's "general concern that revealing the scope of [its] case could frustrate its ability to pursue it" is sufficient (quoting Barney, 618 F.2d at 1273)); Steinberg v. IRS, 463 F. Supp. 1272, 1273 (S.D. Fla. 1979) (explaining that the "premature disclosure of [requested] records could seriously hamper the ongoing investigations and prejudice the government's prospective case").

[83] North, 881 F.2d at 1097; see also Goodman, 2001 U.S. Dist. LEXIS 22748, at *13 (explaining that scope of permissible discovery is of no consequence under Exemption 7(A)); Warren, 2000 U.S. LEXIS 17660, at *18 (stating that "discovery process" is not relevant to applicability of Exemption 7(A)); cf. Senate of P.R., 823 F.2d at 589 (finding that trial court's failure to describe harm from release of undescribed documents developed for closed law enforcement investigation, but assertedly relevant to open criminal law enforcement proceeding, did not permit upholding Exemption 7(A) applicability).

when the target of the investigation has possession of or submitted the information in question.[84] Nevertheless, it is increasingly clear that agencies can properly withhold information if they can demonstrate that its "selectivity of recording" information provided by the target would suggest the nature and scope of the investigation,[85] or if it can articulate with specificity how each category of documents, if disclosed, would cause interference.[86] Indeed, in a case in which two clients requested statements that

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[84] See, e.g., Lion I, 354 F.3d at 1085 (stating-- in a situation in which the investigatory target already possessed copies of the documents sought -- that "[b]ecause Lion already has copies . . . USDA cannot argue that revealing the information would allow Lion premature access to the evidence upon which it intends to rely at trial"); Wright, 822 F.2d at 646 (observing that disclosure of information provided by plaintiff would not provide plaintiff "with any information that it does not already have"); Dow Jones, 219 F.R.D. at 174 (stating that there cannot be harm, because "each target company has a copy . . . and therefore is on notice as to the government's possible litigation strategy and potential witnesses"); Scheer, 35 F. Supp. 2d at 14 (declaring that agency assertions of harm and "concern proffered . . . cannot stand" when agency itself disclosed information to target); Ginsberg v. IRS, No. 96-2265-CIV-T-26E, 1997 WL 882913, at *3 (M.D. Fla. Dec. 23, 1997) (reiterating that "where the documents requested are those of the [requester] rather than the documents of a third party . . . 'it is unlikely that their disclosure could reveal . . . anything [the requester] does not know already'" (quoting Grasso, 785 F.2d at 77)); see also Oncology Servs. Corp. v. NRC, No. 93-0939, slip op. at 17 (W.D. Pa. Feb. 7, 1994) (finding that agency may not categorically withhold transcribed interviews, conducted in presence of requester's attorney, for these interviewed individuals who consented to release of their own transcripts); cf. Campbell, 682 F.2d at 262 (discussing the legislative history of Exemption 7(A), and distinguishing between records generated by the government and those "submitted to the government by such targets").

[85] See Willard v. IRS, 776 F.2d 100, 103 (4th Cir. 1985) (concluding that "selectivity in recording" those portions of interviews that agents considered relevant "would certainly provide clues . . . of the nature and scope of the investigation"); see also Gould, 688 F. Supp. at 704 n.37 (reiterating that "disclosure of which records were selected by investigators from the universe of available materials for copying or compiling would reveal the nature, scope and focus of the government's investigation").

[86] See Linsteadt v. IRS, 729 F.2d 998, 1004 & n.10, 1005 (5th Cir. 1984) (stating that release would frustrate the investigation by revealing reliance government placed upon particular evidence and by aiding targets in tampering with evidence); see also Grasso, 785 F.2d at 76-77 (tempering its order to release records where the "IRS had not shown" that disclosure could interfere with the investigation by adding that, in some circumstances, a "memorandum of the individual's own statement may be exempt from disclosure, as, for example, when it discloses the direction of [a] po-

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their attorney made to the SEC and argued that the "information their attorney conveyed to the [agency] must be treated as coming from them," it was held that the "harm in releasing this information flows mainly from the fact that it reflects the [agency] staff's selective recording . . . and thereby reveals the scope and focus of the investigation."[87]

Because Exemption 7(A) is temporal in nature, it generally has been recognized that once Exemption 7(A) applicability ceases with a change in underlying circumstances an agency then may invoke other applicable exemptions; therefore, agencies ordinarily do not determine what other, underlying exemptions are appropriate until the underlying investigation reaches a point at which the documents no longer merit Exemption 7(A) protection.[88]

In fact, the Supreme Court, the D.C. Circuit, and other circuit courts of appeals have approved the generic approach and the functional test for Ex-

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[86](...continued)
tential investigation"); cf. Alyeska Pipeline, 856 F.2d at 314 (explaining that mere assertions that requester knows scope of investigation are not sufficient to present genuine issue of material fact that would preclude summary judgment).

[87] Swan, 96 F.3d at 500-01.

[88] See Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 906-07 (D.C. Cir. 1996) (permitting agency on remand to apply exemptions other than Exemption 7(A) for records of investigation which was terminated during litigation); Dickerson, 992 F.2d at 1430 n.4 (explaining that "when exemption (7)(A) has become inapplicable," records may still be protected under other exemptions); Senate of P.R., 823 F.2d at 589 (finding that the "district court did not abuse its discretion in permitting the DOJ to press additional FOIA exemptions after its original, all-encompassing (7)(A) exemption claim became moot"); Chilivis v. SEC, 673 F.2d 1205, 1208 (11th Cir. 1982) (holding government not barred from invoking other exemptions after reliance on Exemption 7(A) rendered untenable by conclusion of underlying law enforcement proceeding); W. Journalism, 926 F. Supp. at 192 (explaining that once the Independent Counsel's task is completed, the documents are "turned over to the Archivist and at that time would be subject to FOIA [disclosure]"); Curcio v. FBI, No. 89-0941, slip op. at 4-6 (D.D.C. Mar. 24, 1995) (permitting the agency to invoke new exemptions when Exemption 7(A) is no longer applicable, because the agency has "made a clear showing of what the changed circumstances are and how they justify permitting the agency to raise new claims of exemption" and has "proffered a legitimate reason why it did not previously argue all applicable exemptions"); cf. Miller Auto Sales, Inc. v. Casellas, No. 97-0032, slip op. at 3 (W.D. Va. Jan. 6, 1998) (remanding to give the agency an "opportunity to make a new FOIA determination at the administrative level now that enforcement proceedings have ended").

emption 7(A),[89] and in multiple rulings have approved the continued use of Exemption 7(A) where necessary even after initial enforcement proceedings are closed.[90] Notwithstanding this widely accepted practice, however, the D.C. Circuit seven years ago ruled that the government must prove its case with respect to any other, underlying FOIA exemptions "at the same time" in the original court proceedings "in an Exemption 7(A) case in such a manner that the district court can rule on the issue,"[91] and it denied the defendant agency's motion to remand a case back to the district

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[89] See, e.g., Robbins Tire, 437 U.S. at 223-24, 236 (explaining that applicability of Exemption 7(A) may be made generically, based on categories); Lynch, 2000 WL 123236, at *2 (stating that specific factual showing is not necessary); Solar Sources, 142 F.3d at 1038 (reiterating that government may use generic categories); In re Dep't of Justice, 999 F.2d at 1308 (approving use of categorical bases for nondisclosure); Spannaus, 813 F.2d at 1288 (stating that the "Supreme Court has rejected . . . particularized showings of interference, holding instead that the Government may justify nondisclosure in a generic fashion"); Bevis, 801 F.2d at 1389 (explaining that the agency may take generic approach); Crooker, 789 F.2d at 67 (describing an acceptable Robbins Tire category as "functional," allowing "the court to trace a rational link between the nature of the document and the alleged interference"); Campbell, 682 F.2d at 265 (stating that categories are permitted); see also Gould, 688 F. Supp. at 703-04 & n.34 (approving use of "functional test set forth in Bevis and Crooker"); cf. Reporters Comm., 489 U.S. 776-80 (holding that FOIA exemption determinations sometimes may be made "categorically" (citing Robbins Tire, 437 U.S. at 214)).

[90] See Franklin, No. 98-5339, slip op. at 2-3 (11th Cir. July 13, 1999) (approving continued use of Exemption 7(A) during federal appeal of conviction and pending state criminal trial); Solar Sources, 142 F.3d at 1035, 1037, 1040 (approving continued use of Exemption 7(A) although case closed against certain defendants); New England Med. Ctr. Hosp., 548 F.2d at 385-86 (approving continued use of Exemption 7(A) when "closed file records" related to pending case); Keen, No. 96-1049, slip op. at 6-8 (D.D.C. July 14, 1999) (stating that motion to redetermine sentence qualifies records for Exemption 7(A) protection); Kansi, 11 F. Supp. 2d at 45 (approving continued use of Exemption 7(A) while inmate's appeal of sentence is pending); Pons, 1998 U.S. Dist. LEXIS 6084, at *14 (approving continued use of Exemption 7(A) for certain information not used in requester's prior trials); Burke, No. 96-1739, slip op. at 5 (D.D.C. Mar. 31, 1998) (holding that records were properly withheld in light of plaintiff's post-conviction appeal); Cudzich, 886 F. Supp. at 106-07 (approving continued use of Exemption 7(A) because there were "pending investigations of other law enforcement agencies"); Kuffel, 882 F. Supp. at 1126 (ruling that Exemption 7(A) properly applies while other cases pending against defendant); Timken, 531 F. Supp. at 199-200 (finding that Exemption 7(A) remains applicable as long as determination still could be appealed).

[91] Maydak v. U.S. Dep't of Justice, 218 F.3d 760, 765 (D.C. Cir. 2000) [hereinafter Maydak I].

court once Exemption 7(A) became inapplicable.[92]

This decision by the D.C. Circuit was a departure from its prior rulings,[93] as well as the prior rulings of the District Court for the District of Columbia and other circuit courts,[94] and did not permit any accommodation based on the temporal nature of the exemption.[95] The D.C. Circuit in Maydak v. United States Department of Justice further ruled that the nature of the burden of proof under Exemption 7(A) does not relieve an agency from having to prove its case with respect to other, underlying exemptions in

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[92] See id. at 769.

[93] See Computer Prof'ls, 72 F.3d at 906-07 (permitting application of exemptions other than Exemption 7(A) when underlying circumstances changed); Senate of P.R., 823 F.2d at 589 (approving district court's exercise of its discretion in remanding to agency for agency "to press additional FOIA exemptions" after Exemption 7(A)'s circumstances changed).

[94] See, e.g., Dickerson, 992 F.2d at 1430 n.4 (explaining that if Exemption 7(A) has become inapplicable, records may still be protected by other exemptions); Chilivis, 673 F.2d at 1208 (finding that government was not barred from invoking other exemptions after reliance on Exemption 7(A) was rendered untenable by changed circumstances); Curcio, No. 89-0941, slip op. at 4-6 (D.D.C. Mar. 24, 1995) (permitting agency to invoke new exemptions when Exemption 7(A) became no longer applicable); see also Bevis, 801 F.2d at 1390 (remanding to permit the agency to "reformulate its generic categories in accordance with the Crooker requirement"); Crooker, 789 F.2d at 66-67 (explaining that the agency's affidavit did not adequately establish applicability of Exemption 7(A), and remanding so that agency could "make a presentation"); Campbell, 682 F.2d at 265 (finding agency affidavits insufficient; remanding for the agency to demonstrate how release of information "would interfere with the investigation").

[95] See Maydak I, 218 F.3d at 766 (disagreeing with the government's view that once "Exemption 7(A) is inapplicable, then the government should be allowed to start back at the beginning" -- by declaring that Exemption 7(A) is not "so unique" and should not be "singled out for preferential treatment"); see also *FOIA Post*, "Supreme Court Declines to Review Waiver Case" (posted 8/7/01) (discussing temporal nature of Exemption 7(A)); cf. Delta Ltd. v. U.S. Customs & Border Prot., 384 F. Supp. 2d 138, 153 (D.D.C.) ("Plaintiff seems to argue that because it is the subject of the investigation, it is afforded a special right to the information withheld pursuant to Exemption 7(A). No such right exists."), partial reconsideration granted, 393 F. Supp. 2d 15 (D.D.C. 2005); Changzhou Laosan, 2005 WL 913268, at *8 (stating that "plaintiff appears to believe that it is entitled [to information b]ut there is no such exception to 7(A) for the benefit of targets").

the original district court proceedings.[96] Indeed, the Court rebuffed the agency's reliance on longstanding Exemption 7(A) practice and supporting case law by declaring that "nothing" in existing case law "should be construed as supporting the proposition that, when the government withdraws its reliance on Exemption 7(A) after the district court has reached a final decision and an appeal has been filed, the appropriate course of action is necessarily remand to the agency for reprocessing of the FOIA request in question."[97] In fact, in Maydak I, the court went so far as to declare that "merely stating that 'for example' an exemption might apply is inadequate to raise a FOIA exemption," even when underlying a uniquely temporal one such as Exemption 7(A).[98]

Prior to the Maydak I decision, when agencies found themselves in litigation in which "changed circumstances" (i.e., the end of underlying law enforcement proceedings) had placed into question the continuing viability of Exemption 7(A), they either voluntarily "reprocessed" the requested records using all other appropriate exemptions or were ordered to do so by the court.[99] Now, however, whenever invoking Exemption 7(A) in litigation, agencies may choose to seek and receive permission from the district court to invoke Exemption 7(A) alone (thereby reserving all other poten-

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[96] See Maydak I, 218 F.3d at 765-66.

[97] Id. at 767 (emphasis added); cf. Jefferson v. Dep't of Justice, 284 F.3d 172, 179 (D.C. Cir. 2002) (following Maydak I and ruling that the agency may not raise Exemption 6 for the first time on remand after ruling that the only exemption raised by the agency did not cover all potential records within the scope of the request); Smith v. U.S. Dep't of Justice, 251 F.3d 1047, 1050 (D.C. Cir. 2001) (holding -- in a situation in which the government initially relied on Exemption 3 only, subsequently "changed its position," and then requested a remand to raise other exemptions -- that the government "'must assert all exemptions at the same time, in the original district court proceedings'" (quoting Maydak I, 218 F.3d at 764)).

[98] Id. (citing Ryan v. Dep't of Justice, 617 F.2d 781, 792 n.38a (D.C. Cir. 1980)).

[99] See, e.g., Computer Prof'ls for Soc. Responsibility, 72 F.3d at 906-07 (permitting use of exemptions other than Exemption 7(A) when investigation was terminated during course of FOIA litigation); Dickerson, 992 F.2d at 1430 n.4 (explaining that when Exemption 7(A) has become inapplicable, records may be processed using other FOIA exemptions); Senate of P.R., 823 F.2d at 589 (finding that the district court properly permitted the Department of Justice to raise underlying FOIA exemptions once Exemption 7(A) ceased to apply); Chilivis, 673 F.2d at 1208 (holding government may invoke other exemptions after Exemption 7(A) was rendered untenable by conclusion of underlying law enforcement proceeding).

tially invokable exemptions)[100] or undertake the time-consuming process of invoking Exemption 7(A) together with all other, underlying, exemptions in their initial Vaughn declarations.[101] Indeed, in a recent case that attempted a third approach by describing "the exemptions being invoked solely on an in camera, ex parte basis," the District Court for the District of Columbia, relying on Maydak I, ruled that "[t]his Circuit requires a defendant agency to 'genuinely assert' the exemptions upon which it plans to rely after Exemption 7(A) no longer is available to withhold information," and added that it could "find[] no precedent to permit a defendant agency to name and rely on the exemptions being invoked solely on an in camera, ex parte basis."[102] With any of these approaches, however, it is important to note that an agency is not bound by the exemptions it relied on at the administrative stage, as courts have routinely held that the need to raise all applicable exemptions only arises once the request goes to litigation.[103]

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[100] Accord Senate of P.R., 823 F.2d at 589 (evincing that the district court maintains such discretion by explicitly holding "that the district court did not abuse its discretion in permitting [the agency] to press additional FOIA exemptions after its original, all-encompassing (7)(A) exemption claim became moot").

[101] See, e.g., Ayyad v. U.S. Dep't of Justice, No. 00 Civ. 960, 2002 U.S. Dist. LEXIS 6925, at *4 n.2 (S.D.N.Y. Apr. 18, 2002) (noting that agency invoked exemptions in addition to Exemption 7(A) "because of Maydak").

[102] Haddam, No. 01-434, slip op. at 26-27 (D.D.C. Sept. 8, 2004).

[103] See, e.g., Ford v. West, No. 97-1342, 1998 WL 317561, at *1 (10th Cir. June 12, 1998) (adjudicating exemption not raised at administrative level and raised for first time in litigation); Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992) (stating that "an agency does not waive FOIA exemptions by not raising them during the administrative process"); Pohlman, Inc. v. SBA, No. 4:03-01231, slip op. at 26 (E.D. Mo. Sept. 30, 2005) (agreeing that an agency is "not precluded from relying on Exemption 3 simply because [it was not raised] at the administrative level"); Leforce & McCombs v. HHS, No. 04-176, slip op. at 13 (E.D. Okla. Feb. 3, 2005) (emphasizing that even if the agency had "failed to invoke the attorney-client privilege in the administrative proceeding, the Court would nevertheless be free to consider [it]"); Boyd v. U.S. Marshals Serv., No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *6 (D.D.C. Mar. 15, 2002) (stating that although the defendant did not raise exemptions other than Exemption 7(A) at the administrative level, it did not have to do so because the "government must assert all applicable exemptions [only] in the district court proceedings"), summary judgment granted on other grounds, 2004 U.S. Dist. LEXIS 27406 (D.D.C. Sept. 22, 2004); Living Rivers, 272 F.2d at 1318 (recognizing that although "at the administrative level" the agency "did not cite Exemption 7 . . . an agency may raise a particular exemption for the first time in the district court"); Dubin v. Department of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981) (explaining that agency did not waive FOIA exemptions in litigation by not raising

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EXEMPTION 7(A)

Notwithstanding the above Maydak I "solutions" of receiving permission to raise other applicable exemptions later or "Vaughning" and briefing fully all possible exemptions at the onset of litigation,[104] it is highly significant that several post-Maydak I cases have permitted agencies to raise exemptions not invoked initially in litigation.[105] In two of these cases, the courts relied on Senate of Puerto Rico v. United States Department of Justice[106] and interpreted Maydak I liberally to permit "later" exemption claims.[107] In fact, in August v. FBI, the D.C. Circuit itself distinguished Maydak I, harmonized it with Senate of Puerto Rico, and declared that "we have repeatedly acknowledged that there are some 'extraordinary' circumstances in which courts of appeals may exercise their authority . . . to require 'such further proceedings to be had as may be just under the circumstances,' in order to allow the government to raise FOIA exemption claims it failed to raise the first time around."[108] Indeed, it carefully explained that "[g]iven the drafters' recognition that the harms of disclosure may in some cases outweigh its benefits, we have avoided adopting a 'rigid press it at the threshold, or lose it for all times' approach to . . . agenc[ies'] FOIA ex-

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[103](...continued)
them during administrative process), aff'd, 697 F.2d 1093 (11th Cir. 1983) (unpublished table decision).

[104] See *FOIA Post*, "Supreme Court Declines to Review Waiver Case" (8/7/01) (advising of practical implications of, and response to, Maydak I upon its issuance).

[105] See generally Trentadue v. Integrity Comm., No. 04-4200 (10th Cir. Sept. 27, 2005); August, 328 F.3d 697; Gavin, 2005 WL 2739293; Piper v. U.S. Dep't of Justice, 374 F. Supp. 2d 73 (D.D.C. 2005), on remand, 428 F. Supp. 2d 1 (D.C. 2006); Sciba v. Bd. of Governors of the Fed. Reserve Sys., No. 04-1011, 2005 WL 758260 (D.D.C. Apr. 1, 2005), summary judgment granted, 2005 WL 3201206 (D.D.C. Nov. 4, 2005); Maydak v. U.S. Dep't of Justice, 362 F. Supp. 2d 316 (D.D.C. 2005) [hereinafter Maydak II]; Summers, No. 98-1837 (D.D.C. Apr. 13, 2004).

[106] August, 328 F.3d at 699, 701 (reiterating that courts have avoided adopting "rigid" approach and that courts have discretion to permit government to invoke other FOIA exemptions after underlying basis for Exemption 7(A) ceases to exist (citing Senate of P.R., 823 F.2d at 581)); Summers, No. 98-1837, slip op. at 7 (D.D.C. Apr. 13, 2004) (permitting the government "to assert new exemptions prior to the district court issuing final judgment" (citing generally Senate of P.R., 823 F.2d 574)).

[107] August, 328 F.3d at 700-02 (distinguishing Maydak I by stressing that government's behavior in August was more consistent with simple human error than with "tactical maneuvering" and that therefore "remand is particularly appropriate in this case"); Summers, No. 98-1837, slip op. at 7 (D.D.C. Apr. 13, 2004) (interpreting Maydak I as permitting government to invoke new exemptions at any time during "district court proceedings").

[108] 328 F.3d at 700 (quoting Maydak I, 218 F.3d at 767).

emption claims."[109]

This recognition of "the harms of disclosure" mentioned in August was at the forefront of the court's reasoning two years ago in Piper v. United States Department of Justice.[110] While the District Court for the District of Columbia in this case chastised the agency for its "sluggish neglect" and its "bungled . . . litigation," it nevertheless found that "in certain FOIA cases where the judgment will impinge on rights of third parties that are expressly protected by FOIA . . . district courts not only have the discretion, but sometimes the obligation to consider newly presented facts and to grant relief."[111] Thus, the court concluded that it would reconsider its prior ruling to determine if the "redactions, newly justified" were proper.[112]

Indeed, in Summers v. United States Department of Justice, that court, following August and relying on Senate of Puerto Rico, pragmatically re-cast Maydak I completely.[113] It stated that "Maydak, however, provides that the government is required to raise all claimed exemptions at the district court proceedings, but does not hold that all exemptions must be raised at the same time"[114] -- whereas Maydak I in fact had stated that "[w]e have plainly and repeatedly told the government that, as a general rule, it must assert all exemptions at the same time."[115] The result of this recasting of Maydak I allowed the agency in Summers to "substitute" exemptions in the not uncommon situation of the underlying factual circumstances changing during the course of litigation.[116] However, even where

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[109] Id. at 699 (quoting Senate of P.R., 823 F.2d at 581, and by way of clarification, harmonizing Maydak I with it).

[110] 374 F. Supp. 2d 73, 78 (D.D.C. June 1, 2005).

[111] Id. at 78-79 & n.1 (citing August, 328 F.3d at 699-702); accord Senate of P.R., 823 F.2d at 581.

[112] Id. at 79.

[113] Summers, No. 98-1837, slip op. at 7 (D.D.C. Apr. 13, 2004).

[114] Id.

[115] Maydak I, 218 F.3d at 764 (citing Wash. Post v. HHS, 795 F.2d 205, 208 (D.C. Cir. 1986); Ryan, 617 F.2d at 789, 792; Holy Spirit Ass'n v. CIA, 636 F.2d 838, 846 (D.C. Cir. 1980)); see also Jefferson, 284 F.3d at 179 (finding that "Glomar response was inappropriate" and ordering release of all "non-law enforcement records" unless covered by FOIA exemptions invoked already, because "invocation on appeal of Exemption 6 comes too late").

[116] Summers, No. 98-1837, slip op. at 7-8 (D.D.C. Apr. 13, 2004) (discussing agency's "failure to claim the correct exemption" and the consequences of disclosure of information by stating that the "'law does not require that third parties pay for the Government's mistakes'" (quoting August, 328 F.3d

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circumstances have changed, some courts have gone so far as to judge the applicability of Exemption 7(A) as of the time that the agency made its determination as to its applicability.[117]

In its trend of relaxing the rule announced in Maydak I and permitting agencies to "substitute" exemptions due to changed circumstances during litigation, the District Court for the District of Columbia continues to pragmatically treat the Maydak I decision[118] by de-emphasizing the "at the same time" portion of the phrase used in Maydak I to instruct federal agencies to "assert all exemptions at the same time, in the same original district court proceeding."[119] Indeed, this court recently found that exemptions raised for the first time in a renewed summary judgment motion were proper "in any event," because the new exemptions were being raised in the original district court proceedings.[120] Likewise, exemptions not raised in an Answer, but claimed in later district court filings have been held to be

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[116](...continued)
at 701)).

[117] See Tellier v. Executive Office for U.S. Attorneys, No. 96-5323, 1997 WL 362497, at *1 (D.C. Cir. May 15, 1997) (per curiam) (finding a law enforcement proceeding pending at the time of the request; affirming the withholding of the documents because "'[t]o require an agency to adjust or modify its FOIA responses on post-response occurrences could create an endless cycle of . . . reprocessing'" (quoting Bonner v. U.S. Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991))); Goodman, 2001 U.S. Dist. LEXIS 22748, at *9 ("The determination as to whether a release of records could reasonably be expected to interfere with enforcement proceedings is to be made as of the time the agency decided to withhold the documents." (citing Bonner, 928 F.2d at 1152)); Gomez v. U.S. Attorney, No. 93-2530, 1996 U.S. Dist. LEXIS 6439, at *2 (D.D.C. May 13, 1996) (reasoning that Exemption 7(A) is claimed properly as of the receipt of the request and that when circumstances change, a plaintiff is "free to file a new FOIA request"), appeal dismissed voluntarily, No. 96-5185 (D.C. Cir. May 12, 1997); Lynch, 2000 WL 123236, at *3 (stating that judicial review is to be made as of time agency decided to withhold documents); Keen, No. 96-1049, slip op. at 6-7 (D.D.C. July 14, 1999) (maintaining that court review is limited to time at which agency made its exemption determination); Local 32B-32J, Serv. Employees Int'l Union v. GSA, No. 97-8509, 1998 WL 726000, at *8 (S.D.N.Y. Oct. 15, 1998) (stating that judicial review of agency's decision must be made in light of status of enforcement proceedings at time at which agency responded).

[118] See generally Trentadue, No. 04-4200 (10th Cir. Sept. 27, 2005); Sciba, 2005 WL 758260; Maydak II, 362 F. Supp. 2d 316.

[119] Maydak I, 218 F.3d at 765.

[120] Maydak II, 362 F. Supp. 2d at 318-19.

properly before the court.[121]

Along these same lines, in two recent cases in which Exemption 7(A) became no longer applicable because the investigations had closed, the courts in both instances explained at length the special circumstances surrounding the situations that justified remands for further exemption consideration.[122] In Trentadue v. Integrity Committee, the Court of Appeals for the Tenth Circuit specifically stated that it would "retain jurisdiction" and ordered a "limited remand" after the law enforcement proceeding terminated because, though the agency raised other exemptions at the district court level, the "district court did not rule on these alternate bases for exemption."[123] In Gavin v. SEC, the court simply remanded the case back to the agency.[124]

The D.C. Circuit likewise did not apply Maydak I rigidly in two other relatively recent cases in which the agencies did not invoke all applicable exemptions at the district court level.[125] In LaCedra v. Executive Office for United States Attorneys, the agency, due to its misreading of a FOIA request, conducted a limited search and processed only a portion of the requested records.[126] But stating that "[n]othing in Maydak requires an agency to invoke any exemption applicable to a record that the agency in good faith believes has not been requested," the D.C. Circuit specifically permit-

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[121] See Sciba, 2005 WL 758260, at *1 n.3 (permitting the agency to later invoke exemptions not raised in its Answer, and reiterating that an "exemption only need be raised at a point in the district court proceedings that gives the court an adequate opportunity to consider it," and further noting that "an agency only waives FOIA exemptions by failing to claim them in the original proceedings before the district court"); see also Lawrence v. United States, 355 F. Supp. 2d 1307, 1310-11 (M.D. Fla. 2004) (finding that the defendant agency filed its Answer before its FOIA review was complete, and explaining that "[u]nder these circumstances, Defendant's untimeliness in failing to assert the FOIA exemptions in its answer is excused"); accord Senate of P.R., 823 F.2d at 589 (reasoning that district court did not abuse its discretion by permitting agency to raise other FOIA exemptions after original invocation of Exemption (7)(A) became moot).

[122] Trentadue, No. 04-4200, slip op. at 4 (10th Cir. Sept. 27, 2005); Gavin, 2005 WL 2739293, at *2.

[123] Trentadue, No. 04-4200, slip op. at 4 (10th Cir. Sept. 27, 2005).

[124] Gavin, 2005 WL 2739293, at *2 & n.2.

[125] See generally United We Stand Am., 359 F.3d 595 (D.C. Cir. 2004); LaCedra v. Executive Office for U.S. Attorneys, 317 F.3d 345 (D.C. Cir. 2003).

[126] LaCedra, 317 F.3d at 348 (stating that agency's interpretation of request was "implausible" and "erroneous").

ted the agency to invoke all applicable exemptions on remand.[127]

In United We Stand America v. IRS, the request concerned a document that the IRS prepared at the direction of a congressional committee and which the agency maintained was not an "agency record" subject to the FOIA.[128] The agency simply stated to the district court that "'[s]hould the Court determine that the documents in question constitute agency records for purposes of the FOIA . . . the defendant reserves the right, pursuant to the statute, to assert any applicable exemption claim(s), prior to disclosure, and to litigate further any such exemption claims.'"[129] The D.C. Circuit concluded that "only those portions of the IRS response that would reveal the congressional request are not subject to FOIA," and it then specifically remanded "with instructions" for the agency "to release any segregable portions that are not otherwise protected by one of FOIA's nine exemptions."[130]

As a final Exemption 7(A)-related matter, agencies should be aware of the "(c)(1) exclusion,"[131] which was enacted by the FOIA Reform Act in 1986.[132] This special record exclusion applies to situations in which the very fact of a criminal investigation's existence is as yet unknown to the in-

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[127] Id. (explicitly rejecting plaintiff's argument that Maydak I required "exemption waiver" result).

[128] 359 F.3d at 597 (presenting fact pattern very much akin to that of Ryan, 617 F.2d at 781).

[129] Id. at 598 (quoting government's brief).

[130] Compare United We Stand Am., 359 F.3d at 597, 605 (remanding case to release segregable portions of agency records commingled in file with congressional records not subject to FOIA), with Maydak I, 218 F.3d at 765 ("We have said explicitly in the past that merely stating that 'for example' an exemption might apply is inadequate to raise a FOIA exemption." (citing Ryan, 617 F.2d at 792 n.38a)); see also Senate of P.R., 823 F.2d at 580-81 (reiterating that "fairness to parties seeking disclosure ordinarily requires that they be accorded a full and concentrated opportunity to challenge and test comprehensively the agency's evidence regarding all claimed exemptions" and that the agency "'should be able to cite all possible relevant exemptions well before the appellate stage'" (quoting Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 780 (D.C. Cir. 1978) (en banc))); *FOIA Post*, "Supreme Court Declines to Review Waiver Case" (posted 8/7/01) (discussing difficulty of raising all FOIA exemptions in original district court proceedings, and stressing that "raising" means invoking exemptions in such manner that court can rule on their applicability); accord August, 328 F.3d at 701 (permitting agency to raise additional exemptions, and harmonizing Maydak I with language in Senate of P.R. by emphasizing court's existing discretion).

[131] 5 U.S.C. § 552(c)(1).

[132] Pub. L. No. 99-570, § 1802, 100 Stat. at 3207-49.

vestigation's subject, and disclosure of the existence of the investigation (which would be revealed by any acknowledgment of the existence of responsive records) could reasonably be expected to interfere with enforcement proceedings.[133] In such circumstances, an agency may treat the records as not subject to the requirements of the FOIA. (See the discussion of the operation of subsection (c)(1) under Exclusions, below.)

EXEMPTION 7(B)

Exemption 7(B) of the FOIA, which is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."[1] Despite the possible constitutional significance of its function, in practice this exemption is not often invoked -- for example, it was used just over 200 times by all federal departments and agencies during Fiscal Year 2006.[2] In the situation in which it would most logically be employed -- i.e., an ongoing law enforcement proceeding -- an agency's application of Exemption 7(A) to protect its institutional law enforcement interests invariably would serve to protect the interests of the defendants to the prosecution as well. Even in the non-law enforcement realm, the circumstances that call for singular reliance upon Exemption 7(B) occur only rarely.

Consequently, Exemption 7(B) has been featured prominently in only one FOIA case to date, Washington Post Co. v. United States Department of Justice.[3] At issue there was whether public disclosure of a pharmaceutical company's internal self-evaluative report, submitted to the Justice Department in connection with a grand jury investigation, would jeopardize the company's ability to receive a fair and impartial civil adjudication of several personal injury cases pending against it.[4] In remanding the case

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[133] See Attorney General's 1986 Amendments Memorandum at 18-22.

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

[2] See Governmentwide Compilation of All Departments' and Agencies' Annual FOIA Reports, Fiscal Year 2006, available at http://www.usdoj.gov/oip/fy06.html.

[3] 863 F.2d 96, 101-02 (D.C. Cir. 1988); see also Alexander & Alexander Servs. v. SEC, No. 92-1112, 1993 WL 439799, at *10-11 (D.D.C. Oct. 19, 1993) (citing Washington Post to find that company "failed to meet its burden of showing how release of particular documents would deprive it of the right to a fair trial") ("reverse" FOIA suit), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996).

[4] Wash. Post, 863 F.2d at 99; see also Palmer Commc'ns v. U.S. Dep't of Justice, No. 96-M-777, slip op. at 4 (D. Colo. Oct. 30, 1996) ("[T]he unavoid-

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