



Exemption 7(E)

Exemption 7(E) of the Freedom of Information Act affords protection to all law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."¹

Techniques and Procedures

Exemption 7(E) is comprised of two distinct clauses. The first clause permits the withholding of "records or information compiled for law enforcement purposes . . . [that] would disclose techniques and procedures for law enforcement investigations or prosecutions."² This clause is phrased in such a way so as to not require a showing of any particular determination of harm -- or risk of circumvention of law -- that would be caused by disclosure of the records or information within its coverage.³

The courts, however, are not in complete harmony with regard to the breadth of the application of the phrase "disclosure could reasonably be expected to risk circumvention of the law" that is found in the second clause of Exemption 7(E).⁴ Some courts have found this

¹ 5 U.S.C. § 552(b)(7)(E) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

² 5 U.S.C. § 552(b)(7)(E) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

³ See id.

⁴ See *Asian Law Caucus v. DHS*, No. 08-00842, 2008 WL 5047839, at *3 (N.D. Cal. Nov. 24, 2008) ("The Courts that have reviewed Exemption 7(E) disclosures have come out on both sides of [this] issue.").

phrase to be applicable to the first clause as well as the second clause of Exemption 7(E).⁵ Other courts, while not specifically stating that "risk of circumvention" must be demonstrated under the first clause of Exemption 7(E), have taken cognizance of affirmative showings of this standard made by agencies in the context of the first clause's protection for "techniques and procedures."⁶ Still others have found that no showing of "risk of circumvention" is necessary for the first clause.⁷ Indeed, a number of courts have found that the first clause is designed

⁵ See, e.g., Catledge v. Mueller, No. 08-3550, 2009 WL 1025980, at *2 (7th Cir. Apr. 17, 2009) (per curiam) (stating that statutory standard provides for showing of risk of circumvention for techniques and procedures); Davin v. DOJ, 60 F.3d 1043, 1064 (3d Cir. 1995) ("Exemption 7(E) applies to law enforcement records which if disclosed, would risk circumvention of the law."); PHE, Inc. v. DOJ, 983 F.2d 248, 250 (D.C. Cir. 1993) (stating that under Exemption 7(E), agency "must establish that releasing the withheld material would risk circumvention of the law"); Unidad Latina En Accion v. DHS, 253 F.R.D. 44, 49 (D. Conn. 2008) (stating that for Exemption 7(E) to apply, court must find disclosure "could reasonably be expected to risk circumvention of the law"); Duncan v. DEA, No. 06-1032, 2007 U.S. Dist. Lexis 38769, at *20-21 (D.D.C. May 30, 2007) (reiterating, in case involving techniques and procedures, that Court must find that disclosure "could reasonably be expected to circumvent the law"); Gordon v. FBI, 388 F. Supp. 2d 1028, 1035 (N.D. Cal. 2005) (observing that agency must demonstrate "that the records reveal law enforcement techniques or guidelines that if disclosed "could reasonably be expected to risk circumvention of the law" (quoting statute)); Piper v. DOJ, 294 F. Supp. 2d 16, 30 (D.D.C. 2003) (advising that test for proper withholding under Exemption 7(E) includes finding that release of information could reasonably be expected to risk circumvention of the law), aff'd per curiam, 222 F. App'x 1 (D.C. Cir. 2007); Billington v. DOJ, 69 F. Supp. 2d 128, 140 (D.D.C. 1999) (finding that Exemption 7(E) analysis "requires defendant to show that disclosure would frustrate enforcement of the law"), aff'd in pertinent part, vacated in part & remanded on other grounds, 233 F.3d 581 (D.C. Cir. 2000).

⁶ See, e.g., James v. U.S. Customs and Border Prot., 549 F. Supp. 2d 1, 10 (D.D.C. 2008) (stating that agency properly invoked Exemption 7(E) for investigative techniques where agency had demonstrated that release "could enable [others] to employ measures to neutralize those techniques" (quoting agency's declaration)); Judicial Watch, Inc. v. U.S. Dept of Commerce, 337 F. Supp. 2d 146, 181 (D.D.C. 2004) (finding agency's description of investigative technique and its explanation of "circumvention" sufficient for protection under Exemption 7(E)).

⁷ See, e.g., Keys v. DHS, 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (stating that first clause of Exemption 7(E) "requires no demonstration of harm or balancing of interests" (quoting Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-00377, 2006 WL 1826185, at *7 (D.D.C. June 30, 2006))); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-00377, 2006 WL 1826185, at *7 (D.D.C. June 30, 2006) (acknowledging that first clause of Exemption 7(E) "requir[es] no demonstration of harm or balancing of interests"); Burke v. DOJ, No. 96-1739, 1999 WL 1032814, at *8 (D.D.C. Sept. 30, 1999) (holding that Exemption 7(E) "does not require the FBI to show that disclosure of [FBI Form FD-515] ratings [of effectiveness of investigative techniques] would cause any particular harm"); Coleman v. FBI, No. 89-2773, slip op. at 25 (D.D.C. Dec. 10, 1991) ("The first clause of this exemption . . . does not require a determination that harm . . . would be caused by disclosure of the records or information within its coverage."), summary affirmance granted,

(continued...)

to provide "categorical" protection to law enforcement techniques and procedures.⁸ (For a further discussion of the second clause of Exemption 7(E), see Exemption 7(E), Guidelines for Law Enforcement Investigations and Prosecutions, below.)

Notwithstanding the lack of agreement with regard to the application of Exemption 7(E)'s "circumvention" requirement, in order for the first clause of the exemption to apply courts have uniformly required that the technique or procedure at issue ordinarily must not be well known to the public.⁹ Accordingly, techniques such as "wiretaps,"¹⁰ the "use of post

⁷(...continued)

No. 92-5040, 1992 WL 373976, at *1 (D.C. Cir. Dec. 4, 1992) (per curiam).

⁸ See, e.g., Durrani v. DOJ, 607 F. Supp. 2d 77, 91 (D.D.C. 2009) ("Exemption 7(E) affords categorical protection for techniques and procedures used in law enforcement investigations and prosecutions." (quoting Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 181)); Keys, 510 F. Supp. 2d at 129 (same); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. at 181 (reiterating that first clause of Exemption 7(E) provides "categorical protection" for law enforcement techniques and procedures (quoting Judicial Watch, Inc. v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at *26-27 (D.D.C. Apr. 20, 2001))); Smith v. ATF, 977 F. Supp. 496, 501 (D.D.C. 1997) ("Exemption 7(E) provides categorical protection to information related to law enforcement techniques."); Fisher v. DOJ, 772 F. Supp. 7, 12 n.9 (D.D.C. 1991) (explicitly recognizing categorical protection for law enforcement techniques and procedures), aff'd, 968 F.2d 92 (D.C. Cir. 1992) (unpublished table decision). But see Judicial Watch, Inc. v. U.S. Secret Serv., 579 F. Supp. 2d 182, 188-89 (D.D.C. 2008) (finding that records pertaining to visitor names, dates of visits, and persons visited are not categorically protected because "it is difficult to imagine" how disclosure "would reveal the way in which the investigation was conducted").

⁹ See Rugiero v. DOJ, 257 F.3d 534, 551 (6th Cir. 2001) (stating that first clause of Exemption 7(E) "protects [only] techniques and procedures not already well-known to the public"); Becker v. IRS, 34 F.3d 398, 405 (7th Cir. 1994) (concluding that "investigative techniques used by the IRS with respect to tax protesters . . . unquestionably fall under [Exemption 7(E)]," and implicitly upholding district court's finding that such techniques were not publicly known); Unidad Latina En Accion, 253 F.R.D. at 51-52 (finding that "the details, scope and timing" of investigative techniques such as target apprehension charts are "not necessarily well-known to the public" and thus are properly withheld); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 179, 181 (recognizing exemption's protection for techniques "not well-known to the public"); Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at *14 (D.D.C. July 29, 1999) (finding that portions of two documents were improperly withheld, because they did not contain "a secret or an exceptional investigative technique"; treating age of documents (ten and sixteen years old) as significant factor); Campbell v. DOJ, No. 89-3016, 1996 WL 554511, at *10 (D.D.C. Sept. 19, 1996) (declaring that Exemption 7(E) applies to "obscure or secret techniques," and refusing to apply it to "basic" techniques), rev'd & remanded on other grounds, 164 F.3d 20 (D.C. Cir. 1998).

¹⁰ Billington, 69 F. Supp. 2d at 140 (noting that "commonly known law enforcement practices, such as wiretaps . . . are not generally shielded"); Pub. Employees for Env'tl. Responsibility v. EPA, 978 F. Supp. 955, 963 (D. Colo. 1997) (noting that "[i]nterception of wire,

(continued...)

office boxes,¹¹ pretext telephone calls,¹² and "planting transponders on aircraft suspected of smuggling"¹³ have been denied protection under Exemption 7(E) when courts have found them to be generally known to the public.

However, even records pertaining to commonly known procedures have been protected from disclosure when "the circumstances of their usefulness . . . may not be widely known,"¹⁴ or their use "in concert with other elements of [an] investigation and in their totality directed

¹⁰(...continued)

oral, and electronic communications are commonly known methods of law enforcement"), appeal dismissed voluntarily, No. 97-1384 (10th Cir. Nov. 25, 1997).

¹¹ See Billington, 69 F. Supp. 2d at 140 (observing as general matter that "use of post office boxes" is "commonly known" for purposes of Exemption 7(E)).

¹² See Rosenfeld v. DOJ, 57 F.3d 803, 815 (9th Cir. 1995); see also Campbell, 1996 WL 554511, at *10 (ordering disclosure of information pertaining to various "pretexts" because information is known to public, requested records do not describe details of techniques, and disclosure would not undermine techniques' effectiveness); Struth v. FBI, 673 F. Supp. 949, 970 (E.D. Wis. 1987) (dismissing pretext as merely "garden variety ruse or misrepresentation"). But see Nolan v. DOJ, No. 89-2035, 1991 WL 36547, at *8 (D. Colo. Mar. 18, 1991) (concluding that disclosure of information surrounding pretext phone call could harm ongoing investigations because similar calls might be used again), aff'd on other grounds, 973 F.2d 843 (10th Cir. 1992).

¹³ Hamilton v. Weise, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at *30 (M.D. Fla. Oct. 1, 1997).

¹⁴ Wickline v. FBI, No. 92-1189, 1994 WL 549756, at *5 (D.D.C. Sept. 30, 1994) (quoting Parker v. DOJ, No. 88-0760, slip op. at 8 (D.D.C. Feb. 28, 1990), aff'd in pertinent part, 934 F.2d 375 (D.C. Cir. 1991)); see, e.g., Barnard v. DHS, 598 F. Supp. 2d 1, 23 (D.D.C. 2009) (recognizing that "[t]here is no principle . . . that requires an agency to release all details of techniques simply because some aspects are known to the public"); Miller v. DOJ, 562 F. Supp. 2d 82, 124 (D.D.C. 2008) (noting that although "it is common knowledge that law enforcement agencies develop psychological profiles," this does not compel disclosure of specific information utilized); James, 549 F. Supp. 2d at 10 (finding agency properly withheld information "that applies to the type of search conducted" on plaintiff for contraband); Brunetti v. FBI, 357 F. Supp. 2d 97, 108 (D.D.C. 2004) (agreeing with agency's assessment that release of notations regarding "efficacy [of techniques used] would allow criminals to adapt their activities and methods in order to avoid future detection"); Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) (declaring withholding of agency accomplishment report (containing information on use and effectiveness of investigative techniques) to be "well established" and "proper"), summary affirmance granted, No. 95-5388 (D.C. Cir. Jan. 24, 1997); Buffalo Evening News, Inc. v. U.S. Border Patrol, 791 F. Supp. 386, 392 n.5, 393 n.6 (W.D.N.Y. 1992) (finding that Exemption 7(E) protects fact of whether alien's name is listed in INS Lookout Book and method of apprehension of alien).

toward a specific investigative goal constitute a 'technique' which merits protection.¹⁵ Moreover, courts have endorsed the withholding of the details of a wide variety of commonly known procedures -- for example, polygraph examinations,¹⁶ undercover operations,¹⁷

¹⁵ PHE v. DOJ, No. 90-1461, slip op. at 7 (D.D.C. Jan. 31, 1991) (quoting agency declaration), aff'd in pertinent part, rev'd in part & remanded, 983 F.2d 248 (D.C. Cir. 1993); see, e.g., Asian Law Caucus, 2008 WL 5047839, at *4 (approving protection of database names that relate to watchlists, noting that watch lists may be common knowledge but disclosure of related database names "could . . . facilitate improper access to the database"); Gordon, 388 F. Supp. 2d at 1035-36 (protecting details of agency's aviation "watch list" program, including records detailing "selection criteria" for watch lists and handling and dissemination of lists, and "addressing perceived problems in security measures"); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 181-82 (approving withholding of "firearm specifications" and "radio frequencies" used by agents protecting Secretary of Commerce); Judicial Watch, Inc. v. FBI, 2001 U.S. Dist. LEXIS 25732, at *29-30 (protecting "identities of two types of records concerning prison inmates which are often checked by FBI special agents," because even identifying records would enable inmates "to alter their activities[,] thus hindering the effectiveness of this technique"); Hassan v. FBI, No. 91-2189, 1992 U.S. Dist. LEXIS 22655, at *13 (D.D.C. July 13, 1992) (protecting common techniques used with uncommon technique to achieve unique investigative goal), summary affirmance granted per curiam, No. 92-5318, 1993 U.S. App. LEXIS 12813, at *1 (D.C. Cir. Mar. 17, 1993).

¹⁶ See, e.g., Hale v. DOJ, 973 F.2d 894, 902-03 (10th Cir. 1992) (concluding that disclosure of "polygraph matters" could lessen effectiveness), cert. granted, vacated & remanded on other grounds, 509 U.S. 918 (1993); Piper, 294 F. Supp. 2d at 30 (declaring that polygraph materials were properly withheld because release would reveal sensitive "logistical considerations"); Edmonds v. FBI, 272 F. Supp. 2d 35, 56 (D.D.C. 2003) (deciding that agency's declaration "convincingly describes how the release of [polygraph] information might create a risk of circumvention of the law"); Shores v. FBI, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (determining that agency properly withheld polygraph information to preserve effectiveness of polygraph examinations); Blanton v. DOJ, 63 F. Supp. 2d 35, 49-50 (D.D.C. 1999) (finding that disclosing certain polygraph information -- e.g., "sequence of questions" -- would allow individuals to employ countermeasures), aff'd per curiam, 64 F. App'x 787 (D.C. Cir. 2003). But see Homick v. DOJ, No. 98-00557, slip op. at 14-15, 32 (N.D. Cal. Sept. 16, 2004) (ordering disclosure of details of twenty-year-old polygraph test, including "the type of test given, the number of charts, and the serial number of the polygraph machine," because "the FBI has provided no statement that the type of machine, test, and number of charts used twenty years ago are the same or similar to those utilized today"), appeal dismissed voluntarily, No. 04-17568 (9th Cir. July 5, 2005).

¹⁷ See, e.g., LaRouche v. DOJ, No. 90-2753, slip op. at 21 (D.D.C. Nov. 17, 2000) (rejecting plaintiff's argument that information regarding techniques for undercover work must be released, because even "widely known techniques" are entitled to protection when disclosure would negatively affect future investigations); Sinito v. DOJ, No. 87-0814, 2000 U.S. Dist. LEXIS 22504, at *45-48 (D.D.C. July 12, 2000) (holding that disclosure of information about "electronic recording device" (body microphone) "would impair the FBI's ability to conduct future investigations"), summary affirmance granted, 22 F. App'x 1 (D.C. Cir. 2001); Rosenberg v. Freeh, No. 97-0476, slip op. at 17 (D.D.C. May 13, 1998) (protecting "information on the use of

(continued...)

surveillance techniques,¹⁸ and bank security measures¹⁹ -- on the basis that disclosure could reduce or even nullify the effectiveness of such procedures.²⁰ As one court observed, this is

¹⁷(...continued)

false identities for undercover special agents," because disclosure "could significantly reduce [the] future effectiveness of this investigative technique", summary affirmance granted per curiam, No. 99-5209, 1999 WL 1215961, at *1 (D.C. Cir. Nov. 12, 1999); Foster v. DOJ, 933 F. Supp. 687, 693 (E.D. Mich. 1996) (holding that release of techniques and guidelines used in undercover operations would diminish effectiveness). But see Homick, No. 98-00557, slip op. at 33 (N.D. Cal. Sept. 16, 2004) (ordering release of records generally related to "establishment of a nationwide undercover program utilized by the FBI," because agency's "justification [for withholding] is wholly conclusory").

¹⁸ See, e.g., Lewis-Bey v. DOJ, 595 F. Supp. 2d 120, 137 (D.D.C. 2009) (protecting details of electronic surveillance techniques, including "circumstances . . . timing of their use, and the specific location where they were employed" (quoting agency's declaration)); Boyd v. ATF, 570 F. Supp. 2d 156, 159 (D.D.C. 2008) (concluding ATF properly withheld detailed information regarding use of surveillance equipment); Shores, 185 F. Supp. 2d at 85 (protecting details of surveillance operations at federal prison, including information about telephone system); Burke v. DOJ, No. 96-1739, slip op. at 9 (D.D.C. Mar. 31, 1998) (upholding agency's refusal to disclose detailed description of surveillance techniques); Steinberg v. DOJ, No. 93-2409, slip op. at 15-16 (D.D.C. July 14, 1997) (approving nondisclosure of precise details of telephone and travel surveillance despite fact that criminals know that such techniques are used generally).

¹⁹ See, e.g., Maguire v. Mawn, No. 02 Civ. 2164, 2004 WL 1124673, at *3 (S.D.N.Y. May 19, 2004) (protecting details of bank's use of "bait money"; although technique is publicly known, "disclosure . . . could reasonably make the [b]ank more susceptible to robberies in the future"); Williams v. DOJ, No. 02-2452, slip op. at 11-12 (D.D.C. Feb. 4, 2004) (protecting "serial numbers on bait money" because "disclosure of this technique would undercut its usefulness"), reconsideration denied, (D.D.C. Mar. 10, 2004), aff'd per curiam, 171 F. App'x 857 (D.C. Cir. 2005); Rivera v. FBI, No. 98-0649, slip op. at 9-10 (D.D.C. Aug. 31, 1999) (upholding categorical protection for bank security measures); Dayton Newspapers, Inc. v. FBI, No. C-3-85-815, 1993 WL 1367435, at *6 (S.D. Ohio Feb. 9, 1993) (concluding that agency properly withheld details of bank security devices and equipment used in bank robbery investigation).

²⁰ See, e.g., Hale, 973 F.2d at 902-03 (concluding that disclosure of use of security devices and their modus operandi could lessen effectiveness); Bowen v. FDA, 925 F.2d 1225, 1229 (9th Cir. 1991) (deciding that release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); Cal-Trim, Inc. v. IRS, No. 05-2408, 2007 U.S. Dist. LEXIS 14544, at *15 (D. Ariz. Feb. 6, 2007) (protecting records related to agency investigation because release could allow individuals under investigation "to craft explanations or defenses based on the [IRS] agent's analysis or enable them the opportunity to disguise or conceal the transactions that are under investigation"); Whitfield v. U.S. Dep't of the Treasury, No. 04-0679, 2006 WL 2434923, at *5-6 (D.D.C. Aug. 22, 2006) (concluding that details of arrest procedures were properly withheld because disclosure could assist suspects in avoiding arrest), aff'd, 255 F. App'x 533 (D.C. Cir. 2007); Maydak v. DOJ, 362 F. Supp. 2d 316, 320 (D.D.C. 2005) (holding that agency properly withheld techniques that were "used to detect that plaintiff was sending requests to security agencies while claiming he was a staff

(continued...)

especially true "when the method employed is meant to operate clandestinely, unlike [other techniques] that serve their crime-prevention purpose by operating in the open."²¹ In this regard, the use of a "Glomar response"²² under Exemption 7(E), has been approved by the courts when disclosing the identity of the subject of a particular law enforcement technique would reveal the circumstances under which that technique has been used.²³

Although courts have rejected agency declarations that are too conclusory²⁴ or which

²⁰(...continued)

member," because disclosure "would assist an inmate in correlating the use of a particular investigative technique with its corresponding effectiveness" (quoting agency declaration)); Judicial Watch, Inc. v. U.S. Dept of Commerce, 337 F. Supp. 2d at 181-82 (protecting details of techniques used to "identify parties and transactions that should be monitored for violations of [agency] regulations," as disclosure would indicate "what kinds of action [agency] categorizes as significant and what kinds of action may be considered less significant" (quoting agency declaration)); Piper, 294 F. Supp. 2d at 31 (observing that public's "[g]eneral, non-specific knowledge that the FBI possesses capabilities to electronically monitor the movement of automobiles . . . is not the same as identifying the actual device, its function, and its capabilities"); Leveto v. IRS, No. 98-285, 2001 U.S. Dist. LEXIS 5791, at *21 (W.D. Pa. Apr. 10, 2001) (protecting dollar amount budgeted for agency to investigate particular individual because release could allow others to learn agency's monetary limits and undermine such investigations in future). But see Hidalgo v. FBI, 541 F. Supp. 2d 250, 253-254 (D.D.C. 2008) (ordering disclosure of payment information to confidential informants because "the FBI has not shown that there is a 'significant risk' that its future investigations will be circumvented by disclos[ure]" (internal citations omitted)); Gerstein v. DOJ, No. 03-04893, 2005 U.S. Dist. LEXIS 41276, at *38-43 (N.D. Cal. Sept. 30, 2005) (ordering release of compilation detailing each United States Attorney's Office's use of certain delayed-notice warrants, because technique "is a matter of common knowledge" and disclosure would not reduce technique's effectiveness).

²¹ Maguire, 2004 WL 1124673, at *3.

²² See Phillippi v. CIA, 546 F. 2d 1009, 1013 (D.C. Cir. 1976) (approving agency's response where it would "neither confirm nor deny" the existence of responsive records) (origin of term "Glomar response").

²³ See Catledge v. Mueller, No. 08-3550, 2009 WL 1025980, at *3 (7th Cir. Apr. 17, 2009) (per curiam) (affirming agency's refusal to confirm or deny existence of any National Security Letters pertaining to requester); El Badrawi v. DHS, 596 F. Supp. 2d 389, 396 (D. Conn. 2009) (concluding agency "properly asserted a Glomar response" where "confirming or denying that [an individual] is a subject of interest . . . would cause the very harm FOIA Exemption[] . . . 7(E) [is] designed to prevent").

²⁴ See, e.g., Allard K. Lowenstein Int'l Human Rights Project v. DHS, 603 F. Supp. 2d 354, 360 (D. Conn. 2009) (criticizing portions of agency's declaration describing "ongoing law enforcement techniques" as "vague" and "of little, or no, use"; agency "must understand that affidavits and indices must be 'relatively detailed' and nonconclusory to serve their intended purpose") (citation omitted); Smith, 977 F. Supp. at 501 (explaining that although agency might

(continued...)

merely recite the statutory standard,²⁵ courts have permitted agencies to describe secret law enforcement techniques in only general terms, where necessary, while withholding the full details.²⁶ Courts have also recognized that sometimes it is not possible to describe secret law enforcement techniques even in general terms without disclosing the very information sought to be withheld.²⁷ A court's in camera review of the documents at issue may be required to

²⁴(...continued)

not be able to discuss details of certain techniques, "that does not excuse the agency from providing the Court with information sufficient for it to decide whether the material is properly withheld under Exemption 7(E)," and rejecting the agency's declaration as "conclusory"; Feshbach v. SEC, 5 F. Supp. 2d 774, 786-87 & n.11 (N.D. Cal. 1997) (finding agency's reasons for withholding computer printouts from internal database to be conclusory and insufficient).

²⁵ See, e.g., El Badrawi v. DHS, 583 F. Supp. 2d 285, 313-15 (D. Conn. 2008) (finding agencies' "Vaughn indices merely restate statutory language and case law, and lack the specificity necessary" for de novo review); Boyd v. ATF, No. 05-1096, 2006 WL 2844912, at *9 (D.D.C. Sept. 29, 2006) (criticizing agency's "inadequate" Vaughn Index, as it "tend[s] to recite the language of the FOIA exemption and refer to [its other] Vaughn indices, without explaining why the release of the information would compromise law enforcement"); Antonelli v. ATF, No. 04-1180, 2005 U.S. Dist. LEXIS 17089, at *30 (D.D.C. Aug. 16, 2005) (rejecting agency's general averments of harm because "mere recitation of the statutory language does not satisfy its burden of proof"), summary judgment granted in pertinent part, No. 04-1180, 2006 WL 3147675, at *1 (D.D.C. Nov. 1, 2006).

²⁶ See, e.g., Bowen, 925 F.2d at 1229 (ruling that release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); Cohen v. Smith, No. 81-5365, slip op. at 8 (9th Cir. Mar. 25, 1983) (protecting details of telephone interviews); Carbe v. ATF, No. 03-1658, 2004 WL 2051359, at *11 (D.D.C. Aug. 12, 2004) (finding that "electronic surveillance request forms and asset forfeiture reimbursement forms . . . [are] [c]ertainly . . . protected from release by Exemption 7(E)," as disclosure "might reveal the nature of electronic equipment and the sequence of its uses"); Peyton v. Reno, No. 98-1457, 2000 WL 141282, at *1 (D.D.C. Jan. 6, 2000) (protecting Discriminant Function Scores used to select tax returns for evaluation); Larogue v. DOJ, No. 86-2677, 1988 WL 75942, at *3 (D.D.C. July 12, 1988) (protecting "Reason and Source codes" in State Department "lookout notices," which are not generally known to public); U.S. News & World Report v. Dep't of the Treasury, No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at *8 (D.D.C. Mar. 26, 1986) (protecting Secret Service's contract specifications for President's armored limousine).

²⁷ See Boyd, 2006 WL 2844912, at *9 (stating that "[i]n some cases, it is not possible to describe secret law enforcement techniques without disclosing the very information withheld"); McQueen v. United States, 264 F. Supp. 2d 502, 521 (S.D. Tex. 2003) (finding that requested documents detail how agent detected tax evaders and that "these details, by themselves, would reveal law enforcement techniques and procedures" and thus were properly withheld), summary affirmance granted on other grounds, 100 F. App'x 964 (5th Cir. 2004); Smith, 977 F. Supp. at 501 (noting that some secret law enforcement techniques cannot be described "even in general terms" without disclosing the technique itself); Butler v. Dep't of the Treasury, No. 95-1931, 1997 WL 138720, at *4 (D.D.C. Jan. 14, 1997) (observing that "[i]t is sometimes impossible to describe secret law enforcement techniques without disclosing

(continued...)

demonstrate the propriety of nondisclosure in such cases.²⁸

Because Exemption 7(E) covers "techniques and procedures for law enforcement investigations or prosecutions,"²⁹ it authorizes the withholding of a law enforcement "technique" or a law enforcement "procedure," wherever it is used "for law enforcement investigations or prosecutions" generally, whether civil or criminal.³⁰ Further, courts have construed Exemption 7(E) to encompass the withholding of a wide range of techniques and

²⁷(...continued)

the information sought to be withheld").

²⁸ See, e.g., Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (concluding upon in camera review that investigative techniques were properly withheld); Asian Law Caucus, 2008 WL 5047839, at *5 (concluding after in camera review that agency properly withheld "specific topics for questioning" of persons attempting to enter United States and agreeing release "could . . . risk circumvention of the law"); El Badrawi, 583 F. Supp. 2d at 310-20 (ordering in camera review for all Exemption 7(E) claims made by defendants due to deficiencies in declarations), subsequent opinion, 596 F. Supp. 2d at 397-99 (following in camera review, ordering partial releases of portions of records previously withheld under Exemption 7(E), approving withholdings of other portions, but simultaneously ordering supplemental Vaughn Indices for those portions properly withheld to correct deficiencies noted in previous opinion); Sussman v. DOJ, No. 03-3618, 2008 WL 2946006, at *9 (E.D.N.Y. July 29, 2008) (ordering in camera review where agency asserted that revealing name of investigative technique would allow circumvention of investigative efforts); ACLU v. FBI, No. 05-1004, 2006 WL 2303103, at *1 (D.D.C. Aug. 9, 2006) (granting summary judgment to agency after "conduct[ing] an in camera, ex parte review of the disputed documents" including certain documents submitted under 7(E)).

²⁹ 5 U.S.C. § 552(b)(7)(E).

³⁰ Id.; see also Nowak v. IRS, No. 98-56656, 2000 WL 60067, at *1 (9th Cir. Jan. 18, 2000) (affirming district court's finding that disclosure of redacted information "would significantly hamper the defendant's tax collection and law enforcement functions, and facilitate taxpayer circumvention of federal Internal Revenue laws"); Mosby v. U.S. Marshals Serv., No. 04-2083, 2005 WL 3273974, at *5 (D.D.C. Sept. 1, 2005) (finding that "administrative and operational guidelines and procedures" were properly withheld, as contents "would provide assistance to persons threatening individuals and property protected by the USMS and allow fugitives to avoid apprehension"); Gordon, 388 F. Supp. 2d at 1036 (rejecting the plaintiff's "narrow[]" reading of the "law enforcement purpose" requirement of Exemption 7(E), and noting that it "is not limited to documents created in connection with a criminal investigation"); Judicial Watch, Inc. v. FBI, 2001 U.S. Dist. LEXIS 25732, at *27 (finding the term "law enforcement purpose" [in context of Exemption 7(E)] is not limited to criminal investigations and proceedings in its scope" (quoting Mittleman v. OPM, 76 F. 3d 1240, 1243 (D.C. Cir. 1996))); cf. Cozen v. U.S. Dept of Treasury, 570 F. Supp. 2d 749, 782 (E.D. Pa. 2008) (noting that in context of Exemption 7, protection for "law enforcement" records or information "is not limited to documents involving criminal proceedings").

procedures, including "immigration enforcement operation" techniques,³¹ information regarding certain databases,³² particular database names,³³ and techniques used to uncover tax fraud.³⁴ Some courts, however, have determined that the information at issue was not covered by Exemption 7(E) because its release would not reveal law enforcement techniques or procedures.³⁵

Guidelines for Law Enforcement Investigations and Prosecutions

The second clause of Exemption 7(E) protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law."³⁶ This clause of Exemption 7(E) has a harm standard built into it,³⁷ similar to the harm encompassed by the "high 2" aspect of Exemption 2, and so it has

³¹ Allard K. Lowenstein Int'l Human Rights Project, 603 F. Supp. 2d at 365 (stating that disclosure of "criteria used to rank the cases" by priority level "would disclose law enforcement techniques" and assist those seeking "to evade future immigration enforcement operations"); Tran v. DOJ, No. 01-0238, 2001 WL 1692570, at *3 (D.D.C. Nov. 20, 2001) (concluding that agency form -- used when agencies share information from immigration records -- was properly withheld because it would reveal law enforcement techniques).

³² See Cozen, 570 F. Supp. 2d at 786 (ruling that Exemption 7(E) protects information regarding commercial "databases and information services withheld").

³³ See Asian Law Caucus, 2008 WL 5047839, at *4 (approving protection of database names that relate to watchlists).

³⁴ See Carp v. IRS, No. 00-5992, 2002 WL 373448, at *6 (D.N.J. Jan. 28, 2002) (concluding that disclosure would "expose[] specific, non-routine investigative techniques used by the IRS to uncover tax fraud"); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 17 (D.D.C. 2001) (protecting agency summary of tax-avoidance scheme, "including identification of vulnerabilities" in IRS operations), rev'd & remanded on other grounds, 294 F.3d 71 (D.C. Cir. 2002); Wishart v. Comm'r, No. 97-20614, 1998 WL 667638, at *6 (N.D. Cal. Aug. 6, 1998) (protecting Discriminant Function Scores to avoid possibility that "taxpayers could manipulate" return information to avoid IRS audits), aff'd, 199 F.3d 1334 (9th Cir. 1999) (unpublished table decision).

³⁵ See Allard K. Lowenstein Int'l, 2009 WL 763620, at *4 (ordering release of "general outline of operational steps" because it "would not reveal specific operational techniques"); Judicial Watch, Inc. v. U.S. Secret Service, 579 F. Supp. 2d at 188-89 (stating that records pertaining to visitor names, dates of visits, and persons visited would not reveal investigation procedures); see also Don Ray Drive-A-Way Co. of Cal. v. Skinner, 785 F. Supp. 198, 200 (D.D.C. 1992) (finding that agency's calculation of safety rating in connection with its inspection of motor carriers "does not . . . involve investigative techniques or procedures").

³⁶ 5 U.S.C. § 552(b)(7)(E) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

³⁷ See Mayer Brown LLP v. IRS, 562 F.3d 1190, 1192-93 (D.C. Cir. 2009) (discussing meaning of phrase "could be expected to risk circumvention of the law" found in second clause of Exemption 7(E)).

considerable overlap with "high 2."³⁸ (See the discussion under Exemption 2, "High 2": Risk of Circumvention, above.)

This clause of Exemption 7(E) is available to protect any "law enforcement guideline" when it is determined that its disclosure "could reasonably be expected to risk circumvention of the law."³⁹ Courts have found protection for various types of law enforcement guidelines "that pertain[] to the prosecution or investigative stage of a law enforcement matter,"⁴⁰

³⁸ See, e.g., Unidad Latina En Accion v. DHS, 253 F.R.D. 44, 50 (D. Conn. 2008) (holding "[a]ny computer coding or web site information . . . is covered by both Exemptions (b)(2) and (b)(7)(E), since the information is internal to DHS and would disclose information that might significantly risk circumvention of the law"); Hidalgo v. FBI, 541 F. Supp. 2d 250, 253 (D.D.C. 2008) (stating that "the standard under Exemptions 2 and 7(E) is substantially the same"); Gordon v. FBI, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005) (applying Exemptions 2 and 7(E) to same information); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 965 (C.D. Cal. 2003) (concluding that agency properly applied Exemption 2 for same reasons that it applied Exemption 7(E)); Schwarz v. U.S. Dept't of Treasury, 131 F. Supp. 2d 142, 150 (D.D.C. 2000) (finding agency information evaluating personal characteristics and threat potential of individuals to be "clearly exempt from disclosure" under both Exemptions 2 and 7(E)), summary affirmance granted, No. 00-5453, 2001 WL 674636, at *1 (D.C. Cir. May 10, 2001); Voinche v. FBI, 940 F. Supp. 323, 329, 332 (D.D.C. 1996) (approving nondisclosure of information "relating to the security of the Supreme Court building and the security procedures for Supreme Court Justices" on basis of both Exemptions 2 and 7(E)); Berg v. Commodity Futures Trading Comm'n, No. 93 C 6741, slip op. at 11 n.2 (N.D. Ill. June 23, 1994) (magistrate's recommendation) ("[I]t would appear that exemption (b)(7)(E) is essentially a codification of the 'high 2' exemption[.]"), accepted & dismissed per stipulation, (N.D. Ill. July 26, 1994).

³⁹ 5 U.S.C. § 552(b)(7)(E); see, e.g., Unidad Latina En Accion, 253 F.R.D. at 59 (ordering disclosure of queries contained in agency emails, finding that disclosure would not risk circumvention of law).

⁴⁰ See Judicial Watch, Inc. v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at *29 (D.D.C. Apr. 20, 2001).

including law enforcement manuals,⁴¹ policy guidance documents,⁴² settlement guidelines,⁴³ monographs,⁴⁴ and emergency plans,⁴⁵ as well as other types of law enforcement guidelines.⁴⁶ Courts have denied protection, however, when the agency has failed to demonstrate that circumvention of law would occur⁴⁷ or where the information at issue was not related to law

⁴¹ See, e.g., PHE, Inc. v. DOJ, 983 F.2d 248, 251 (D.C. Cir. 1993) (approving withholding of a portion of FBI manual containing investigation guidance); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-00377, 2006 WL 1826185, at *7 (D.D.C. June 30, 2006) (protecting many portions of manual pertaining to seized property, including details of "the transport, seizure, storage, testing, physical security, evaluation, maintenance, and cataloguing of, as well as access to, seized property"); Guerrero v. DEA, No. 93-2006, slip op. at 14-15 (D. Ariz. Feb. 22, 1996) (approving nondisclosure of portions of Special Agents Manual); Linn v. DOJ, No. 92-1406, 1995 WL 417810, at *32 (D.D.C. June 6, 1995) (affirming nondisclosure of one page from Special Agent's Guide to Forfeiture of Assets on basis that agency explained harm); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993) (concluding that parts of agency Law Enforcement Manual concerning "procedures for handling applications for tax exemption and examinations of Scientology entities" and memorandum regarding application of such procedures were properly withheld).

⁴² See Asian Law Caucus v. DHS, No. 08-00842, 2008 WL 5047839, at *5 (N.D. Cal. Nov. 24, 2008) (protecting interim policy guidance for border searches and examinations even where guidance was superseded by later version because "the newer version does not render the [earlier] policy valueless").

⁴³ See Mayer Brown LLP, 562 F.3d at 1192 (finding that settlement guidelines in case that involved fraudulent tax schemes "fall squarely within" language of Exemption 7(E)'s second clause).

⁴⁴ See Silber v. DOJ, No. 91-876, transcript at 25 (D.D.C. Aug. 13, 1992) (bench order) (ruling that disclosure of DOJ monograph on fraud litigation "would present the specter of circumvention of the law").

⁴⁵ See Ctr. for Nat'l Sec. Studies v. INS, No. 87-2068, 1990 WL 236133, at *5-6 (D.D.C. Dec. 19, 1990) (recognizing that release of INS plans to be deployed in event of attack on U.S. could assist terrorists in circumventing border).

⁴⁶ See, e.g., Sussman v. U.S. Marshall Serv., No. 03-610, 2005 WL 3213912, at *9 (D.D.C. Oct. 13, 2005) (protecting "guidelines and procedures utilized in investigation [of] threats against federal court employees," because release "could create a risk of circumvention of the law"), aff'd in pertinent part, vacated in part & remanded in part on other grounds, 494 F.3d 1106 (D.C. Cir. 2007); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 17 (D.D.C. 2001) (agreeing with agency that the Technical Assistance documents are law enforcement guidelines and determining that disclosure of agency summary of tax-avoidance scheme, "including identification of vulnerabilities" in IRS operations, could risk circumvention of law), rev'd & remanded on other grounds, 294 F.3d 71 (D.C. Cir. 2002).

⁴⁷ See, e.g., Gordon v. FBI, 388 F. Supp. 2d at 1036-37 (holding that agency did not adequately explain how release of "the legal basis for detaining someone whose name appears on a watch list . . . could be used to circumvent agency regulations").

enforcement investigations or prosecutions.⁴⁸

Courts have also recognized the application of Exemption 7(E) to protect information relating to homeland security, including:

- (1) guidelines for response to terrorist attacks;⁴⁹
- (2) records pertaining to aviation "watch lists";⁵⁰
- (3) records confirming whether an individual is the subject of a national security letter;⁵¹
- (4) inspection statistics of an international seaport;⁵²
- (5) analyses of security procedures;⁵³

⁴⁸ See Herrick's Newsletter, 2006 WL 1826185, at *7 (holding that portion of agency manual pertaining to destruction of seized property is not related to law enforcement investigation and instead "relate[s] only to the conservation of the agency's physical and monetary resources"); Cowsen-El v. DOJ, 826 F. Supp. 532, 533-34 (D.D.C. 1992) (finding agency's program statement to be internal policy document wholly unrelated to investigations or prosecutions).

⁴⁹ See Ctr. for Nat'l Sec. Studies, 1990 WL 236133, at *5-6 (accorded Exemption 7(E) protection to final contingency plan in event of attack on United States, to guidelines for response to terrorist attacks, and to contingency plans for immigration emergencies).

⁵⁰ Gordon, 388 F. Supp. 2d at 1035-36 (protecting details of agency's aviation "watch list" program -- including records detailing "selection criteria" for lists and handling and dissemination of lists, and "addressing perceived problems in security measures").

⁵¹ See Catledge v. Mueller, No. 08-3550, 2009 WL 1025980, at *2 (7th Cir. Apr. 17, 2009) (per curiam) (affirming agency's refusal to confirm or deny whether plaintiff was "a subject of the [national security] letters" because it "would reveal the circumstances under which the FBI has used this technique").

⁵² See Coastal Delivery Corp., 272 F. Supp. 2d at 963-65 (protecting number of examinations at particular seaport because information could be used in conjunction with other publicly available information to discern rates of inspection at that port, thereby allowing for identification of "vulnerable ports" and target selection).

⁵³ See, e.g., Voinche, 940 F. Supp at 329, 332 (approving nondisclosure of information "relating to the security of the Supreme Court building and the security procedures for Supreme Court Justices" on basis of both Exemptions 2 and 7(E)); cf. U.S. News & World Report v. Dep't of the Treasury, No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at *8 (D.D.C. Mar. 26, 1986) (upholding protection of Secret Service's contract specifications for President's armored limousine).

- (6) records pertaining to domestic terrorism investigations;⁵⁴
- (7) financial crimes research analysis;⁵⁵ and
- (8) U.S. Customs Service passenger examination criteria.⁵⁶

Courts have disapproved agency declarations under Exemption 7(E)'s second clause when they provide too little information.⁵⁷ In appropriate instances, however, courts have allowed agencies to use general descriptions of guidelines for law enforcement investigations and prosecutions, while withholding the particular details that could risk circumvention of the law.⁵⁸ Additionally, courts have found it necessary at times to conduct in camera review of the withheld documents to establish the appropriateness of the agency's withholding under the second clause of Exemption 7(E).⁵⁹

⁵⁴ See Allard K. Lowenstein Int'l Human Rights Project v. DHS, 603 F. Supp. 2d 354, 364 (D. Conn. 2009) (finding "specific reference to the database used as a lookout was properly withheld under Exemption 7(E) since this information was compiled for law enforcement purposes, and if disclosed, could reasonably be expected to risk circumvention of the law"); ACLU v. FBI, 429 F. Supp. 2d 179, 194 (D.D.C. 2006) (holding that agency properly withheld certain records, release of which "could allow individuals 'to develop countermeasures' that could defeat the effectiveness of the agency's domestic terrorism investigations" (quoting agency declaration)).

⁵⁵ See Boyd v. DEA, No. 01-0524, 2002 U.S. Dist. LEXIS 27853, at *11-13 (D.D.C. Mar. 8, 2002) (upholding protection under both clauses of Exemption 7(E) for highly sensitive research analysis in intelligence report).

⁵⁶ See Hammes v. U.S. Customs Serv., No. 94 Civ. 4868, 1994 WL 693717, at *1 (S.D.N.Y. Dec. 9, 1994) (protecting Customs Service criteria used to determine which passengers to stop and examine).

⁵⁷ See, e.g., PHE, 983 F. 2d at 252-53 (describing agency's affidavit as "too vague and conclusory to support summary judgment"; agency's submission should have included "more precise descriptions of the nature of the redacted material" from agency's enforcement manual); Feshbach v. SEC, 5 F. Supp. 2d 774, 786-87 & n.11 (N.D. Cal. 1997) (finding agency's reasons for withholding checklists and selection criteria used "to determine what type of review to be given . . . documents filed with the [agency]" conclusory and insufficient).

⁵⁸ See Klunzinger v. IRS, 27 F. Supp. 2d 1015, 1027-28 (W.D. Mich. 1998) (upholding protection of documents which, if disclosed, would "reveal confidential information regarding when the IRS would undertake compliance activity").

⁵⁹ See, e.g., PHE, 983 F. 2d at 252 (stating that "in camera review is appropriate when agency affidavits are not sufficiently detailed to permit meaningful assessment of the exemption claims"); Mayer, Brown, Rowe & Maw LLP v. IRS, No. 04-2187, 2006 WL 2425523, at *8 (D.D.C. Aug. 21, 2006) (directing agency to submit "a representative sample of the [withheld] records for in camera review" because agency's declaration did not have sufficient detail to permit ruling on applicability of Exemption 7(E)), subsequent opinion, No. 04-2187,

(continued...)

⁵⁹(...continued)

slip op. at 2-3 (D.D.C. Oct. 24, 2006) (concluding after in camera review that Exemption 7(E) was properly applied).