



## Exemption 7

### Introduction

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

The threshold requirement for Exemption 7 has been modified by Congress twice since the enactment of the FOIA. The latest amendments occurred in 1986 with the passage of the Freedom of Information Reform Act of 1986, often referred to as the 1986 FOIA amendments, which broadened the threshold of Exemption 7 by eliminating the requirement that the records be "investigatory."<sup>2</sup> The word "investigatory" was deleted and the words "or

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<sup>1</sup> 5 U.S.C. § 552(b)(7) (2006), amended by OPEN Government Act of 2007, Pub. 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).

<sup>2</sup> See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; see also *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002) (explaining that 1986 FOIA amendments broadened threshold for Exemption 7); *North v. Walsh*, 881 F.2d 1088, 1098

information" were added so that Exemption 7 protections are potentially available to all "records or information compiled for law enforcement purposes."<sup>3</sup> And, except for Exemption 7(B) and part of Exemption 7(E), the 1986 FOIA amendments altered the requirement that an agency demonstrate that disclosure "would" cause the harm each subsection seeks to prevent, to the lesser standard that disclosure "could reasonably be expected to" cause the specified harm.<sup>4</sup>

Prior to the 1986 FOIA amendments, law enforcement manuals containing sensitive information about specific procedures and guidelines followed by an agency were held not to qualify as "investigatory records" because they had not originated in connection with any specific investigation, even though they clearly had been compiled for law enforcement purposes.<sup>5</sup> As a result of the 1986 FOIA amendments, however, records which previously were found unqualified for Exemption 7 protection only because they were not "investigatory" in character, now satisfy the exemption's threshold requirement.<sup>6</sup> As such, even records

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<sup>2</sup>(...continued)

n.14 (D.C. Cir. 1989) (stating that Congress in 1986 "changed the threshold requirement for withholding information under exemption 7" so that "it now applies more broadly"); Hopkinson v. Shillinger, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989) ("The 1986 amendment[s] broadened the scope of exemption 7's threshold requirement . . ."); Wash. Post Co. v. DOJ, No. 84-3581, 1987 U.S. Dist. LEXIS 14936, at \*26 (D.D.C. Sept. 25, 1987) (magistrate's recommendation) (noting that "[a]gency's burden of proof in this threshold test has been lightened considerably"), adopted, (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96 (D.C. Cir. 1988).

<sup>3</sup> § 1802, 100 Stat. at 3207-48; see also Abdelfattah v. DHS, 488 F. 3d. 178, 184 (3d. Cir. 2007) (explaining that "1986 FOIA amendments broadened the applicability of Exemption 7 by expressly removing the requirement that the records be 'investigatory'"); Tax Analysts, 294 F.3d at 79 (explaining that 1986 FOIA amendments deleted "any requirement" that information be investigatory and emphasizing that "legislative history makes it clear that Congress intended the amended exemption to protect both investigatory and non-investigatory materials, including law enforcement manuals and the like" (citing S. Rep. No. 98-221, at 23 (1983))).

<sup>4</sup> DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989) (recognizing that shift from "would constitute" standard to "could reasonably be expected to constitute" standard "represents a congressional effort to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7]"); see Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 9-13 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

<sup>5</sup> See Sladek v. Bensinger, 605 F.2d 899, 903 (5th Cir. 1979) (holding Exemption 7 inapplicable to DEA manual that "was not compiled in the course of a specific investigation"); Cox v. DOJ, 576 F.2d 1302, 1310 (8th Cir. 1978) (same).

<sup>6</sup> See Attorney General's 1986 Amendments Memorandum at 7; see, e.g., Tax Analysts, 294 F.3d at 79 (explaining that "legislative history makes it clear that Congress intended the amended exemption to protect both investigatory and non-investigatory materials, including

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generated pursuant to routine agency activities can qualify for Exemption 7 protection when those activities involve a law enforcement purpose,<sup>7</sup> although some decisions still contain the pre-1986 FOIA amendments "investigatory" language.<sup>8</sup>

Further, as the legislative history shows, Congress intended that the exemption ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the

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<sup>6</sup>(...continued)

law enforcement manuals and the like"); PHE, Inc. v. DOJ, 983 F.2d 248, 249, 251 (D.C. Cir. 1993) (holding portions of FBI's Manual of Investigative Operations and Guidelines properly withheld pursuant to Exemption 7(E)); Peter S. Herrick's Custom & Int'l Trade Newsletter v. Customs & Border Protection, No. 04-0377, 2006 U.S. Dist. LEXIS 44802, at \*1, \*20-21 (D.D.C. June 30, 2006) (explaining that "if the personnel oversight and investigation procedures [in the agency's forfeiture handbook] concern misconduct that violates the law, then the information may be deemed to meet the threshold requirement of Exemption 7"); Sussman v. U.S. Marshals Serv., No. 03-610, 2005 WL 3213912, at \*9 (D.D.C. Oct. 13, 2005) (finding that "administrative and operational guidelines and procedures" that are used to investigate threats against federal court employees satisfy law enforcement requirement), summary judgment granted in pertinent part, No. 06-5085, 2006 U.S. App. LEXIS 26317 (D.C. Cir. Oct. 20, 2006); Mosby v. U.S. Marshals Serv., No. 04-2083, 2005 U.S. Dist. LEXIS 18914, at \*13-14 (D.D.C. Sept. 1, 2005) (explaining that "administrative and operational guidelines and procedures" meet threshold, because "[t]his information facilitates monitoring investigations, the flow and maintenance of investigative records, and aids in detecting and apprehending fugitives"); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993) (concluding that parts of IRS Law Enforcement Manual were exempt from disclosure pursuant to Exemption 7(E)); Ctr. for Nat'l Sec. Studies v. INS, No. 87-2068, 1990 WL 236133, at \*6 (D.D.C. Dec. 19, 1990) (reiterating that documents relating to INS's law enforcement procedures meet threshold requirement as "purpose in preparing these documents relat[es] to legitimate concerns that federal immigration laws have been or may be violated"). But see Maydak v. DOJ, 254 F. Supp. 2d 23, 38 (D.D.C. 2003) (finding that BOP failed to satisfy law enforcement threshold for records in its Inmate Central Records System, which it described as concerning day-to-day activities and events occurring during inmates' confinement); Cowsen-El v. DOJ, 826 F. Supp. 532, 533 (D.D.C. 1992) (explaining that threshold is not met by BOP guidelines covering how prison officials should count and inspect prisoners).

<sup>7</sup> See Boyd v. DEA, No. 01-0524, slip op. at 7-8 (D.D.C. Mar. 8, 2002) (finding that agency could withhold highly sensitive research analysis in intelligence report pursuant to Exemption 7(E)); Tran v. DOJ, No. 01-0238, 2001 WL 1692570, at \*3 (D.D.C. Nov. 20, 2001) (concluding that INS form was properly withheld under Exemption 7(E) because it would reveal law enforcement techniques).

<sup>8</sup> See, e.g., Allnutt v. DOJ, 99 F. Supp. 2d 673, 680 (D. Md. 2000) (stating that Tax Division records at issue "must generally arise during the course of an investigation" and "must involve the detection or punishment of violations of law" to satisfy the Exemption 7 threshold), renewed motion for summary judgment granted, No. Y-98-901, 2000 WL 852455, at \*20-21 (D. Md. Oct. 23, 2000), aff'd sub nom. Allnutt v. Handler, 8 F. App'x 225 (4th Cir. 2001); Morales Cozier v. FBI, No. 1:99-0312, slip op. at 15 (N.D. Ga. Sept. 25, 2000) (finding that records "generated through an investigation" initiated by invitation to official of Cuban government to speak in United States were compiled for law enforcement purposes).

particular format or record in which it is maintained.<sup>9</sup> The intent of the 1986 amendments was to avoid use of any mechanical process for determining the purpose for which a physical record was created and to instead establish a focus on the purpose for which information contained in a record has been generated; thus, in making their determinations of threshold Exemption 7 applicability, courts have focused on the content and compilation purpose of each item of information involved, regardless of the overall character of the record in which it happens to be maintained.<sup>10</sup>

### "Compiled" for Law Enforcement Purposes

Federal agencies "must meet the threshold requirements of Exemption 7 before they may withhold requested documents on the basis of any of its subparts."<sup>11</sup> That threshold

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<sup>9</sup> S. Rep. No. 98-221, at 23 (1983) (expressing intent to protect sensitive non-investigatory materials); see Tax Analysts, 294 F.3d at 79 (explaining that prior to 1986 language change, "legislative history makes it clear that Congress intended [Exemption 7] to protect both investigatory and non-investigatory materials").

<sup>10</sup> See FBI v. Abramson, 456 U.S. 615, 624, 626 (1982) (explaining that "threshold requirement for qualifying under Exemption 7 turns on the purpose for which the document sought to be withheld was prepared" because focus is on nature of information); accord Jefferson v. DOJ, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (reiterating that "this circuit has long emphasized that the focus is on how and under what circumstances the requested files were compiled"); Robinson v. Attorney Gen. of the U.S., 534 F. Supp. 2d 72, 81 (D.D.C. 2008) (noting that "[i]n assessing whether records are compiled for law enforcement purposes," focus is on how and under what circumstances records are compiled and whether records "relate to anything that can fairly be characterized as an enforcement proceeding" (quoting Jefferson, 284 F. 3d at 176-77)); Thomas v. DOJ, 531 F. Supp. 2d. 102, 107 (D.D.C. 2008) (explaining that to assess "whether records are compiled for law enforcement purposes," focus is on how and under what circumstances records are compiled); Kidder v. FBI, 517 F. Supp. 2d 17, 25 (D.D.C. 2007) (same); Ruston v. DOJ, No. 06-0224, 2007 U.S. Dist. LEXIS 18147, at \*13 (D.D.C. Mar. 15, 2007) (same); Melville v. DOJ, No. 05-0645, 2006 WL 2927575, at \*7 (D.D.C. Oct. 12, 2006) (same); see also, Sinsheimer v. DHS, 437 F. Supp. 2d 50, 55 (D.D.C. 2006) (stressing that "[i]t is the purpose of the record, not the role of the agency, that is determinative"); Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 1313, 1319 (D. Utah 2003) (finding that records created to protect dams from terrorism satisfy Exemptions 7's threshold, and reasoning that "the context in which an agency has currently compiled a document . . . determines whether it is 'compiled for law enforcement purposes'" (quoting John Doe Agency v. John Doe Corp., 493 U.S. 146, 153-54 (1989))); Hogan v. Huff, No. 00 Civ. 6753, 2002 WL 1359722, at \*11 (S.D.N.Y. June 21, 2002) (declaring that "[d]ue to the nature of the origin" of documents used to determine target's "status as a potential unregistered agent for the Cuban government, the documents in question meet the requirement of being gathered for law enforcement purposes"); Ctr. for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 589-90 (D.D.C. 1983) (finding that whether request pertained to "original or photocopy" is of no consequence and reiterating that "[FOIA] consistently focuses on the nature of the information" (quoting Abramson, 456 U.S. at 618)).

<sup>11</sup> Pratt v. Webster, 673 F.2d 408, 416 ( D.C. Cir. 1982); see, e.g., Abramson v. FBI, 456 U.S.

requires the records or information to be "compiled for law enforcement purposes."<sup>12</sup> The 1986 FOIA amendments<sup>13</sup> essentially codified prior judicial determinations that an item of information originally compiled by an agency for a law enforcement purpose does not lose Exemption 7 protection merely because it is maintained in or recompiled into a non-law enforcement record.<sup>14</sup>

Furthermore, the Supreme Court in 1990 resolved a conflict in lower court decisions<sup>15</sup>

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<sup>11</sup>(...continued)

615, 622, (1982) (explaining that in order to assert "Exemption 7 privilege" requested record must have been compiled for law enforcement purposes); Schoenman v. FBI, 575 F. Supp. 2d 136, 163 (D.D.C. 2008) (finding that agency "failed to establish" law enforcement purpose; "therefore [records] do not demonstrate . . . threshold requirement for the application of Exemption 7(C)"); Antonelli v. ATF, 555 F. Supp. 2d 16, 24 (D.D.C. 2008) (explaining that agency "withheld information under FOIA exemption 7(C)," but did not demonstrate that records were "compiled for law enforcement purposes"; therefore agency "is not entitled to judgment on this claim"); Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1318-20 (D. Utah 2003) (explaining that before determining if "dam inundation" maps created by the Department of the Interior's Bureau of Reclamation (BOR) were withheld properly pursuant to either Exemption 7(E) or Exemption 7(F), agency first had to demonstrate that Exemption 7's threshold requirement was met).

<sup>12</sup> 5 U.S.C. § 552(b)(7) (2006), amended by OPEN Government Act of 2007, Pub. No. 110-175, 121 Stat. 2524.

<sup>13</sup> See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48.

<sup>14</sup> See Abramson, 456 U.S. at 631-32 ("We hold that information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where that recorded information is reproduced or summarized in a new document for a non-law-enforcement purpose."); Lesar v. DOJ, 636 F.2d 472, 487 (D.C. Cir. 1980) (holding that documents from review of previous FBI surveillance meet threshold); see also Assassination Archives & Research Ctr. v. CIA, 903 F. Supp. 131, 132-33 (D.D.C. 1995) (finding that information from criminal investigations recompiled into administrative file to assist FBI in responding to Senate committee hearings "certainly satisfies" threshold requirement), dismissed without prejudice, No. 94-0655 (D.D.C. May 31, 1996); Exner v. DOJ, 902 F. Supp. 240, 242 & n.3 (D.D.C. 1995) (protecting law enforcement document even if copy is maintained in non-law enforcement file), appeal dismissed, No. 95-5411, 1997 WL 68352 (D.C. Cir. Jan. 15, 1997). But cf. Rosenfeld v. DOJ, 57 F.3d 803, 811 (9th Cir. 1995) (affirming district court's refusal to apply Abramson principle to documents originally compiled for law enforcement purposes but "channelized" into non-law enforcement files when principle raised as defense for first time in motion for reconsideration).

<sup>15</sup> Compare Crowell & Moring v. DOD, 703 F. Supp. 1004, 1009-10 (D.D.C. 1989) (holding that solicitation and contract bids may be protected), and Gould Inc. v. GSA, 688 F. Supp. 688, 691 (D.D.C. 1988) (finding that routine audit reports may be protected), with John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) (ruling that routine audit reports are not

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by holding that information not initially obtained or generated for law enforcement purposes may still qualify under Exemption 7 if it is subsequently compiled for a valid law enforcement purpose at any time prior to "when the Government invokes the Exemption."<sup>16</sup> Rejecting the distinction between documents originally compiled or obtained for law enforcement purposes and those later assembled for such purposes, the Court held that the term "compiled" must be accorded its ordinary meaning - - which includes "materials collected and assembled from various sources or other documents" -- and it found that the plain meaning of the statute contains "no requirement that the compilation be effected at a specific time."<sup>17</sup>

In addition to all such matters of federal law enforcement, Exemption 7 also applies to

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<sup>15</sup>(...continued)

protectible), rev'd & remanded, 493 U.S. 146 (1989), and Hatcher v. USPS, 556 F. Supp. 331, 335 (D.D.C. 1982) (holding that routine contract negotiation and oversight material is not protectible).

<sup>16</sup> John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989); see also Lion Raisins v. USDA, 354 F.3d 1072, 1082 (9th Cir. 2004) ("Information need not have been originally compiled for law enforcement purposes in order to qualify for the 'law enforcement' exemption, so long as it was compiled for law enforcement at the time the FOIA request was made."); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (applying John Doe Agency to hold that information regarding personnel interview conducted before investigation commenced and later recompiled for law enforcement purposes satisfied Exemption 7 threshold); Lawyers' Comm. for Civil Rights v. Dep't of the Treasury, No. 07- 2590, 2008 WL 4482855, at \*11-12 (N.D. Cal. Sept. 30, 2008) (reiterating that records need not have been originally compiled for law enforcement purposes so long as they were compiled for law enforcement purposes at time FOIA request was made); ACLU v. DOD, 389 F. Supp. 2d 547, 570 (S.D.N.Y. 2005) (ruling that photographs taken for "personal use" were compiled for law enforcement purposes, because Army Criminal Investigation Command opened investigation immediately upon receipt of photographs and agents used them to conduct that investigation), reconsideration denied, 396 F. Supp. 2d 459 (S.D.N.Y. 2005); Kansi v. DOJ, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (explaining that once documents become assembled for law enforcement purposes, "all [such] documents qualify for protection under Exemption 7 regardless of their original source"); Hayes v. U.S. Dep't of Labor, No. 96-1149, 1998 U.S. Dist. LEXIS 14120, at \*12 (S.D. Ala. June 10, 1998) ("Records that are incorporated into investigatory files also qualify . . . even though those records may not have been created originally for law enforcement purposes."), adopted, (S.D. Ala. Aug. 10, 1998); Perdue Farms, Inc. v. NLRB, No. 2:96-27, 1997 U.S. Dist. LEXIS 14579, at \*37 (E.D.N.C. Aug. 5, 1997) (magistrate's recommendation) (stating that language of statute "contains no requirement that the compilation be effected at a specific time" (citing John Doe Agency, 493 U.S. at 153)), adopted, (E.D.N.C. Jan. 20, 1998); Butler v. Dep't of the Air Force, 888 F. Supp. 174, 179-80, 182 (D.D.C. 1995) (holding Air Force personnel background report -- requested by local law enforcement agency for its investigation into murder -- to be compiled for law enforcement purposes), aff'd per curiam, No. 96-5111 (D.C. Cir. May 6, 1997); cf. Ruston v. DOJ, No. 06-0224, 2007 U.S. Dist. LEXIS 18147, at 14 (D.D.C. Mar. 15, 2007) (psychological evaluations deemed "compiled" for law enforcement purposes because prison staff "used those records in carrying out" its law enforcement mission).

<sup>17</sup> John Doe Agency, 493 U.S. at 153.

records compiled to enforce state law,<sup>18</sup> and even foreign law.<sup>19</sup>

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<sup>18</sup> See Hopkinson v. Shillinger, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989) (holding that Exemption 7 applies "to FBI laboratory tests conducted at the request of local law enforcement authorities"); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257-58 (D.D.C. 2005) (determining that "local police arrest reports [and] bail bond information" met threshold), motion to amend denied, 421 F. Supp. 2d 104 (D.D.C. 2006); Antonelli v. ATF, No. 04-1180, 2005 U.S. Dist. LEXIS 17089, at \*12 (D.D.C. Aug. 16, 2005) (declaring that records "compiled during the course of an investigation by a local police department, with ATFE assistance," satisfy threshold); Franklin v. DEA, No. 97-1225, slip op. at 7 (S.D. Fla. June 26, 1998) (stating that documents compiled for "federal or state" law enforcement purposes meet threshold); Code v. FBI, No. 95-1892, 1997 WL 150070, at \*5 (D.D.C. Mar. 26, 1997) (finding that documents compiled in connection with FBI's efforts to assist local police in homicide investigations meet threshold); Butler, 888 F. Supp. at 180, 182 (finding that Air Force personnel background report -- requested by local law enforcement agency for its investigation into murder -- was compiled for law enforcement purposes); Kuffel v. BOP, 882 F. Supp. 1116, 1124 (D.D.C. 1995) (ruling that information from state law enforcement agency investigating various state crimes qualifies); Wojtczak v. DOJ, 548 F. Supp. 143, 146-48 (E.D. Pa. 1982) ("This Court must therefore interpret the statute as written and concludes that Exemption 7 applies to all law enforcement records, federal, state, or local, that lie within the possession of the federal government."); see also Shaw v. FBI, 749 F.2d 58, 64 (D.C. Cir. 1984) (explaining that authorized federal investigation into commission of state crime constitutes valid criminal law enforcement investigation); Palacio v. DOJ, No. 00-1564, 2002 U.S. Dist. LEXIS 2198, at \*16 (D.D.C. Feb. 11, 2002) (explaining that records of investigation conducted by city task force were "created or compiled" for law enforcement purposes and thus satisfy threshold), summary affirmance granted, No. 02-5247, 2003 U.S. App. LEXIS 1804 (D.C. Cir. Jan. 31, 2003); Rojem v. DOJ, 775 F. Supp. 6, 10 (D.D.C. 1991) (determining that material provided to FBI by state law enforcement agency for assistance in that state agency's criminal investigation is "compiled for law enforcement purposes"), appeal dismissed for failure to timely file, No. 92-5088 (D.C. Cir. Nov. 4, 1992).

<sup>19</sup> See, e.g., Bevis v. Dep't of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986) (finding no distinction between foreign and domestic enforcement purposes in language of statute); Miller v. DOJ, 562 F. Supp. 2d 82, 117-18 (D.D.C. 2008) (reiterating that FBI records were compiled for law enforcement purposes because agency assisted foreign police; concluding that records located at Criminal Division's Office of International Affairs concerning events in foreign country met law enforcement purpose because office is charged with extraditing international fugitives as well as international evidence gathering; finding that DEA files pertaining to its foreign activity were compiled for law enforcement purposes because DEA is authorized to investigate trafficking in controlled substances, dangerous drugs, and precursor chemicals at interstate and international levels); Zevallos-Gonzalez v. DEA, No. 97-1720, slip op. at 9 (D.D.C. Sept. 25, 2000) (concluding that documents generated during an investigation conducted under the "authority of Peruvian laws and under the authority granted to the DEA under the Controlled Substance Act to pursue the agency's law enforcement obligations under both United States statutes and international agreements . . . were compiled for law enforcement purposes"); Schwarz v. DOJ, No. 95-2162, slip op. at 6 (D.D.C. May 31, 1996) (stating that information compiled by INTERPOL at behest of foreign government meets requirement), summary affirmance granted, No. 96-5183 (D.C. Cir. Oct. 23, 1996); Donovan v.

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"Law Enforcement Purpose"

Courts have held that Exemption 7's law enforcement purpose encompasses a wide variety of records and information, as can be seen in the following examples:

- (1) records compiled in the "investigations of crimes";<sup>20</sup>

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<sup>19</sup>(...continued)

FBI, 579 F. Supp. 1111, 1119-20 (S.D.N.Y. 1983) (stating that an FBI investigation undertaken and laboratory tests performed in support of a foreign government's efforts to identify and prosecute perpetrators of crimes satisfy threshold, and reasoning that "refusing to apply Exemption 7 to foreign law enforcement might have the practical effect of interfering with cooperation and information sharing"), vacated on other grounds on motion for reconsideration, 579 F. Supp. 1124 (S.D.N.Y.), appeal dismissed as moot, 751 F.2d 368 (2d Cir. 1984).

<sup>20</sup>Baez v. FBI, 443 F. Supp. 2d 717, 724 (E.D. Pa. 2006) (declaring that "there is no question" that documents pertaining to "investigation of crimes," were compiled for law enforcement purposes); see, e.g., DeMartino v. FBI, 577 F. Supp. 2d 178, 181 (D.D.C. 2008) (finding that law enforcement requirement satisfied because records pertain to multi-subject investigation of Columbo crime family and murder); Thomas v. DOJ, 531 F. Supp. 2d 102, 107 (D.D.C. 2008) (finding records pertaining to investigation and prosecution for assault with intent to kill, assault with a dangerous weapon, and kidnapping satisfy law enforcement threshold); Johnson v. DOJ, No. 06-1248, 2007 WL 3408458, at \*3 (E.D. Wis. Nov. 14, 2007) (noting that statements "taken in preparation for a criminal prosecution" were compiled for law enforcement purposes); Barbosa v. DOJ, No. 06-0867, 2007 WL 1201604, at \*3 (D.D.C. April 23, 2007) (recognizing that records of DEA's chemical analysis of seized material compiled during criminal law enforcement investigation satisfies threshold); Ruston v. DOJ, No. 06-0224, 2007 U.S. Dist. LEXIS 18147, at \*14 (D.D.C. Mar. 15, 2007) (concluding that records generated as result of threats made against federal official were compiled for law enforcement purposes); Associated Press v. DOD, No. 05-5468, 2006 WL 2707395, at \*3 (S.D.N.Y. Sept. 20, 2006) (stating that "records of investigations to determine whether to charge U.S. military personnel with misconduct . . . were compiled for law enforcement purposes" (citing Aspin v. DOD, 491 F.2d 24, 26-28 (D.C. Cir. 1973) (explaining that records from investigation "directed toward discovering and toward obtaining evidence of possible offenses under the Uniform Code of Military Justice" were compiled for law enforcement purposes)); Long v. DOJ, No. 00-0211, 2006 WL 2578755, at \*17 n.20 (D.D.C. Sept. 8, 2006) (accepting agency's uncontested assertion that records are compiled for law enforcement purposes when government is in role of prosecutor or plaintiff); Maydak v. DOJ, No. 00-0562, 2006 U.S. LEXIS 58409, at \*8-9 (D.D.C. Aug. 21, 2006) (observing that records concerning fraudulent access device applications and unauthorized telecommunications access devices satisfy law enforcement threshold); Ray v. FBI, 441 F. Supp. 2d 27, 33-34 (D.D.C. 2006) (determining that documents generated by FBI efforts to prevent distribution of pornography, combat insurance fraud, and battle drug trafficking meet law enforcement threshold); Watkins Motor Lines, Inc. v. EEOC, No. 8:05-1065, 2006 WL 905518, at \*3 (M.D. Fla. Apr. 7, 2006) (stating that because "records were compiled while the EEOC was investigating an alleged violation of federal law, the records were compiled for law enforcement purposes"); Delta Ltd. v. Customs & Border Protection, 384 F. Supp. 2d 138, 142-43, 152 (D.D.C. July 26, 2005) (finding "no question" that records created

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- (2) records revealing investigatory files and file systems;<sup>21</sup>
- (3) records of audits;<sup>22</sup>
- (4) records reflecting monitoring of inmate telephone calls;<sup>23</sup> and

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<sup>20</sup>(...continued)

during seizure of merchandise exported from China were compiled for law enforcement purpose); Maydak v. DOJ, 362 F. Supp. 2d 316, 323 (D.D.C. 2005) (finding "no dispute" that records involving alleged or actual assaults at federal penitentiary were compiled for law enforcement purposes).

<sup>21</sup> See Deglace v. DEA, No. 05-2276, 2007 WL 521896, at \*2 (D.D.C. Feb. 15, 2007) (finding that DEA records systems pertaining to criminal activity satisfy threshold); Boyd v. ATF, No. 05-1096, 2006 U.S. Dist. LEXIS 71857, at \*1, \*22 (D.D.C. Sept. 29, 2006) (stating that it is "evident from the nature of the plaintiff's FOIA requests" for his criminal investigative file that records were "compiled for law enforcement purposes"); Balderrama v. DHS, No. 04-1616, 2006 WL 889778, at \*1, \*7-9 (D.D.C. Mar. 30, 2006) (explaining that "Pre-Sentencing Investigation Reports," which are routinely prepared regarding all convicted felons during prosecution process, are part of law enforcement file and thus satisfy law enforcement requirement); Butler v. DEA, No. 05-1798, 2006 WL 398653, at \*3 (D.D.C. Feb. 16, 2006) (noting that records maintained in DEA's Investigative Reporting and Filing System and in DEA's Operations File satisfy threshold because they contain information on individuals investigated by agency and identities and details regarding confidential sources); Wilson v. DEA, No. 04-1814, 2006 WL 212138, at \*1, \*5, \*7 (D.D.C. Jan. 27, 2006) (stating that "[g]iven the nature of the request" for conspiracy records and drug laboratory reports, "DEA clearly meets the threshold requirement"); see also Melville v. DOJ, No. 05-0645, 2006 WL 2927575, at \*7 (D.D.C. Oct. 12, 2006) (describing records of investigation and prosecution of narcotics-related activity as being maintained in Criminal Case File System and thus qualifying as "law enforcement records for purposes of Exemption 7"); Antonelli v. ATF, No. 04-1180, 2006 WL 141732, at \*4 (D.D.C. Jan. 18, 2006) (stating that records "maintained in the Prisoner Processing and Population Management/Prison Tracking System and in the Warrant Information Network" were compiled for ATF's law enforcement purposes of processing and transporting prisoners, executing arrest warrants, and investigating fugitive matters, and that they "therefore satisfy . . . [the] threshold requirement").

<sup>22</sup> Faiella v. IRS, No. 05-CV-238, 2006 WL 2040130, at \*4 (D.N.H. July 20, 2006) (observing that "an IRS audit is a law enforcement activity"); cf. Van Mechelen v. U.S. Dep't of the Interior, No. C05-5393, 2005 WL 3007121, at \*1, \*4 (W.D. Wash. Nov. 9, 2005) (explaining that reports generated by investigation into building leases satisfy law enforcement threshold); Small v. IRS, 820 F. Supp. 163, 166 (D.N. J. 1992) (agreeing that IRS audit guidelines satisfy threshold); O'Connor v. IRS, 698 F. Supp. 204, 206-07 (D. Nev. 1988) (finding that IRS internal tolerance criteria used in its investigations is "information compiled for law enforcement purposes").

<sup>23</sup> See, e.g., Swope v. DOJ, 439 F. Supp. 2d 1, 6 (D.D.C. July 3, 2006) (stating that inmate telephone calls are monitored and that "such telephone recordings are the functional equivalent of law enforcement records"); Thomas v. DOJ, No. 1:04-112, 2006 WL 722141, at \*2 (E.D. Tex. Mar. 15, 2006) (reiterating that telephone calls are monitored "to preserve the  
(continued...)

(5) records containing information pertaining to informants.<sup>24</sup>

However, even with such wide latitude, courts do not determine automatically that records involving "wrongdoing" necessarily satisfy the law enforcement threshold.<sup>25</sup> In addition, the Court of Appeals for the District of Columbia Circuit has indicated that if an

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<sup>23</sup>(...continued)

security of the institution and to protect the public" and that recordings thus satisfy law enforcement requirement); Butler v. Fed. BOP, No. 05-643, 2005 WL 3274573, at \*3 (D.D.C. Sept. 27, 2005) (finding that "BOP is a law enforcement agency," and explaining that because inmate telephone calls are monitored to preserve security and orderly management of institution and to protect the public, "such telephone recordings are the functional equivalent of law enforcement records"); Pendergrass v. DOJ, No. 04-112, 2005 WL 1378724, at \*4 (D.D.C. June 7, 2005) (explaining that prisons monitor and record telephone calls in order "to preserve the security and orderly management of the institution and to protect the public"; consequently, recordings are "functional equivalent of law enforcement"); Jones v. BOP, No. 03-1647, slip op. at 1 (D.D.C. Oct. 6, 2004) (declaring that "monitoring and taping of inmate telephone calls [do] serve a law enforcement purpose"); Monaco v. DOJ, No. 02-1843, slip op. at 6 (D.D.C. Sept. 24, 2003) (concluding that BOP tapes of telephone conversations "are law enforcement records for purposes of Exemption 7").

<sup>24</sup> See Robinson v. Attorney Gen. of the U.S., 534 F. Supp. 2d 72, 81 (D.D.C. 2008) (explaining that "it is clear" that records pertaining to "alleged confidential informants and information they provided . . . would have been compiled for law enforcement purposes"); Valdez v. DOJ, No. 04-0950, 2007 U.S. Dist. LEXIS 10566, at \*10 (D.D.C. Feb. 16, 2007) (concluding that records pertaining to alleged confidential informants "would be law enforcement records"); Deglance, 2007 WL 521896, at \*2 (finding that records systems pertaining to confidential sources satisfy threshold); Boyd, 2006 U.S. Dist. LEXIS 71857, at \*1, \*22 (stating that policies/procedures pertaining to confidential informants were compiled for law enforcement purposes); Dipietro v. EOUSA, 357 F. Supp. 2d 177, 184 (D.D.C. 2004) (declaring that "[g]iven the nature of [the] request" for criminal files including confidential informant records, requested records satisfy "law enforcement" threshold), summary judgment granted, 386 F. Supp. 2d 80 (D.D.C. 2005); Hogan v. Huff, No. 00 6753, 2002 WL 1359722, at \*11 (S.D.N.Y. June 21, 2002) (explaining that records concerning "information provided by a confidential source" satisfy Exemption 7's threshold).

<sup>25</sup> See, e.g., Cawthon v. DOJ, No. 05-0567, 2006 WL 581250, at \*4 (D.D.C. Mar. 9, 2006) (explaining that malpractice records for two BOP doctors "appear to come from personnel records" and therefore do not meet Exemption 7's law enforcement threshold); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (finding "no evidence that the paralegal names and work numbers" appearing in communications related to monitoring federal elections were "compiled for law enforcement purposes"), motion to amend denied, 421 F. Supp. 2d 104 (D.D.C. 2006); Maydak, 362 F. Supp. 2d at 321-23 (concluding that psychological test maintained in BOP files, documents pertaining to accidents and injuries sustained in recreation department at prison, and list of staff names and titles of prison employees were not compiled for law enforcement purposes); Phillips v. ICE, 385 F. Supp. 2d 296, 306 (S.D.N.Y. 2005) (finding law enforcement requirement not met for report involving immigration status of two former military officials from El Salvador accused of atrocities, because report "was prepared for Congress").

investigation is shown to have been in fact conducted for an improper purpose, Exemption 7 and its subparts may not be applicable to the records of that investigation.<sup>26</sup> Courts therefore require some detail as to the law enforcement purpose behind the compilation of the requested records.<sup>27</sup> Finally, there is no requirement that the matter culminate in actual administrative, civil, or criminal enforcement.<sup>28</sup>

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<sup>26</sup> See Pratt v. Webster, 673 F.2d 408, 420-21 (D.C. Cir. 1982) (reiterating that Exemption 7 is not intended to "include investigatory activities wholly unrelated to law enforcement agencies' legislated functions of preventing risks to the national security and violations of the criminal laws and of apprehending those who do violate the laws"); see also Quiñon v. FBI, 86 F.3d 1222, 1228-29 (D.C. Cir. 1996) (explaining that agency's connection between target and asserted law enforcement duty cannot be pretextual or wholly unbelievable); Rosenfeld v. DOJ, 57 F.3d 803, 808-09 (9th Cir. 1995) (finding no law enforcement purpose when "documents all support a conclusion that . . . any asserted purpose for compiling these documents was pretextual"); Shaw v. FBI, 749 F.2d 58, 63 (D.C. Cir. 1984) (stating that "mere existence of a plausible criminal investigatory reason to investigate would not protect the files of an inquiry explicitly conducted . . . for purposes of harassment"); Lesar v. DOJ, 636 F.2d 472, 487 (D.C. Cir. 1980) (questioning whether records that were generated after investigation "wrongly strayed beyond its original law enforcement scope" would meet threshold test for Exemption 7, but finding that records at issue were compiled "during the course of a legitimate law enforcement investigation" and thus meet threshold requirement); Weissman v. CIA, 565 F.2d 692, 696 (D.C. Cir. 1977) (ruling that CIA's actions were unauthorized; thus, "law-enforcement exemption is accordingly unavailable"); Taylor v. DOJ, 257 F. Supp. 2d 101, 108 (D.D.C. 2003) (stating that investigations must be "within the agency's law enforcement authority" (quoting Whittle v. Moschella, 756 F. Supp. 589, 593 (D.D.C. 1991))), reconsideration denied, 268 F. Supp. 2d 34 (D.D.C. 2003), appeal dismissed for failure to prosecute, No. 03-5111, 2003 WL 2205968 (D.C. Cir. Aug. 19, 2003).

<sup>27</sup> See, e.g., Schoenman v. FBI, 575 F. Supp. 2d 136, 162 (D.D.C. 2008) (finding that mere statement that agency document "inherently relates to a law enforcement purpose will not suffice"); Miller v. DOJ, 562 F. Supp. 2d 82, 118 (D.D.C. 2008) (finding that agency "neither explains adequately the manner and circumstances under which the telegrams were compiled nor links these telegrams to any enforcement proceeding"); United Am. Fin. v. Potter, 531 F. Supp. 2d 29, 45-46 (D.D.C. 2008) (describing agency's explanation as "fall[ing] far short of establishing" that records were compiled for law enforcement purposes); Antonelli v. ATF, No. 04-1180, 2005 U.S. Dist. LEXIS 17089, at \*26 (D.D.C. Aug. 16, 2005) (noting that agencies "have proffered no evidence from which the Court may find for them on the threshold requirement"); Flores v. DOJ, No. 03-2105, slip op. at 4 (D.D.C. Aug. 31, 2004) (finding that while "description of the records suggests that a criminal investigation was conducted, [the] mere suggestion" is not sufficient to meet threshold of "law enforcement"), summary judgment granted (D.D.C. Feb. 7, 2005), summary affirmance granted, No. 05-5074, 2005 U.S. App. LEXIS 24159 (D.C. Cir. Nov. 8, 2005).

<sup>28</sup> See, e.g., Ortiz v. HHS, 70 F.3d 729, 730 (2d Cir. 1995) (holding that unsigned, unsolicited letter used to launch criminal investigation by SSA meets threshold for law enforcement purposes, although no charges filed against target); Berger v. IRS, 487 F. Supp. 2d 482, 489, 500 (D.N.J. 2007) (finding that records compiled during IRS civil and criminal tax investigations satisfy threshold even though "[n]o charges were ever brought against Plaintiff

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Types of Law Enforcement

The "law" to be enforced within the meaning of the term "law enforcement purposes" includes both civil<sup>29</sup> and criminal statutes,<sup>30</sup> as well as those statutes authorizing

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<sup>28</sup>(...continued)

as a result of these investigations"), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008); Ponder v. Reno, No. 98-3097, slip op. at 5 (D.D.C. Jan. 22, 2001) (ruling that records were compiled for law enforcement purpose despite fact that subject was never prosecuted); Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at \*8-9 (D.D.C. July 29, 1999) (magistrate's recommendation) (determining that investigation of presidential candidate for possible criminal violations was for legitimate law enforcement purpose even if that investigation "went nowhere"); cf. Wolk v. United States, No. 04-CV-832, 2005 WL 465382, at \*4 (E.D. Pa. Feb. 28, 2005) (stating that "[w]e construe the term 'enforcement' to encompass the conducting of a security background check of a federal judicial nominee" even when the process reveals no improprieties, because "[i]t is impossible, ex ante, to determine whether an FBI investigation will reveal troubling information about a specific nominee").

<sup>29</sup> See, e.g., Rugiero v. DOJ, 257 F.3d 534, 550 (6th Cir. 2001) (explaining that "Court has adopted a per se rule" that applies not only to criminal enforcement actions, but to "records compiled for civil enforcement purposes as well"); Rural Hous. Alliance v. USDA, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974) (holding that "character of the statute violated would rarely make a material distinction, because the law enforcement purposes . . . include both civil and criminal purposes"); Morley v. CIA, No. 03-2545, 2006 WL 2806561, at \*14 (D.D.C. Sept. 29, 2006) (mentioning that law enforcement "extends to civil investigations and proceedings"); Env'tl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 587 (N.D. W. Va. 2005) (reiterating that law enforcement standard includes "civil laws"); Martinez v. EEOC, No. 04-CA-0391, 2004 WL 2359895, at \*2 (W.D. Tex. Oct. 19, 2004) (restating that requirement of "law enforcement purpose" is satisfied by both criminal and civil laws); Judicial Watch, Inc. v. Rossotti, No. 01-2672, U.S. Dist. 2002 LEXIS 25213, at \*19-20 (D. Md. Dec. 16, 2002) (ruling that letters written by citizens concerned about plaintiff's compliance with IRS laws were compiled for "civil law enforcement purposes"), aff'd sub nom. Judicial Watch, Inc. v. United States, 84 F. App'x 335 (4th Cir. 2004); Schiller v. INS, 205 F. Supp. 2d 648, 659 (W.D. Tex. 2002) (stating that "[l]aw enforcement for purposes of the FOIA is not limited strictly to criminal investigations but also includes within its scope civil investigations" (citing Rugiero, 257 F.3d at 550)); Baltimore Sun v. U.S. Marshals Serv., 131 F. Supp. 2d 725, 728 n.2 (D. Md. 2001) (reasoning that United States Marshals Service forfeiture records satisfy threshold because agency is responsible for "enforcement of civil and criminal seizure and forfeiture laws"); Youngblood v. Comm'r of Internal Revenue, No. 2:99-9253, 2000 WL 852449, at \*10 (C.D. Cal. Mar. 7, 2000) (holding that IRS "investigations or proceedings in the civil or criminal context" satisfy threshold). But see Grandison v. DOJ, 600 F. Supp. 2d 103, 113 (D.D.C. 2009) (deciding that "it cannot be said that the deposition transcripts and interrogatories" pertaining to civil lawsuit arising from requester's murder conviction were compiled for law enforcement purposes).

<sup>30</sup> See, e.g., Beard v. Espy, No. 94-16748, 1995 WL 792071, at \*1 (9th Cir. Dec. 11, 1995) (protecting complaint letter and notes compiled during criminal investigation involving USDA loans); Ortiz v. HHS, 70 F.3d 729, 730 (2d Cir. 1995) (holding that unsigned, unsolicited letter used to launch criminal investigation by SSA meets threshold for law enforcement purposes);

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administrative (i.e., regulatory) proceedings.<sup>31</sup>

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<sup>30</sup>(...continued)

Judicial Watch v. DOJ, No. 99-1883, slip op. at 2-3, 11 (D.D.C. June 9, 2005) (finding that information from databases and computer systems created by Civil Rights Division task force members in response to abortion clinic violence satisfies law enforcement threshold, because evidence gathered relates to violations of federal criminal statutes); Oliver v. FBI, No. 02-0012, slip op. at 4 (D.D.C. Mar. 8, 2004) (finding that records compiled during investigation into, and criminal prosecution for, kidnapping and transporting minor across state lines satisfy law enforcement threshold), aff'd per curiam, No. 04-5445, 2005 U.S. App. LEXIS 13991 (D.C. Cir. July 8, 2005); Oquaju v. EOUSA, No. 00-1930, slip op. at 3 n.2 (D.D.C. Sept. 25, 2003) (finding that threshold requirement was satisfied when information was compiled as part of "criminal investigation, prosecution and conviction" of requester), summary affirmance granted, No. 04-5407, 2005 U.S. App. LEXIS 23891 (D.C. Cir. Nov. 3, 2005); Solar Sources v. United States, No. 96-0772, slip op. at 5 (S.D. Ind. Mar. 10, 1997) (holding that criminal antitrust investigation of explosives industry was "indisputably" compiled for law enforcement purposes), aff'd, 142 F.3d 1033 (7th Cir. 1998); Hoffman v. Brown, No. 1:96-53, slip op. at 4 (W.D.N.C. Nov. 26, 1996) (finding that information compiled by VA police canvassing plaintiff's neighbors regarding "alleged criminal activity of plaintiff at home" meets threshold), aff'd, 145 F.3d 1324 (4th Cir. 1998) (unpublished table decision); Mavadia v. Caplinger, No. 95-3542, 1996 WL 592742, at \*2 (E.D. La. Oct. 11, 1996) (finding that both civil and criminal investigations of possible violations of immigration laws satisfy threshold); Cappabianca v. Comm'r. U.S. Customs Serv., 847 F. Supp. 1558, 1565 (M.D. Fla. 1994) (stating that records of internal investigation focusing specifically on alleged acts that could result in civil or criminal sanctions were compiled for law enforcement purposes); Stone v. Def. Investigative Serv., 816 F. Supp. 782, 787 (D.D.C. 1993) (protecting foreign counterintelligence investigation and investigation into possible violation of federal statute), appeal dismissed for failure to prosecute, No. 93-5178 (D.C. Cir. Mar. 11, 1994); Buffalo Evening News, Inc. v. U.S. Border Patrol, 791 F. Supp. 386, 394 (W.D.N.Y. 1992) (reasoning that USBP form meets threshold because it is generated in investigations of violations of federal immigration law).

<sup>31</sup> See, e.g., Jefferson v. DOJ, 284 F.3d 172, 178 (D.C. Cir. 2002) (reiterating that Exemption 7 "covers investigatory files related to enforcement of all kinds of laws,' including those involving 'adjudicative proceedings'" (quoting Rural Hous., 498 F.2d at 81 n.46)); Ctr. for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974) (holding that administrative determination has "salient characteristics of 'law enforcement' contemplated" by Exemption 7 threshold requirement); Schoenman v. FBI, 573 F. Supp. 2d 119, 146 (D.D.C. 2008) (finding that Exemption 7 threshold applies to files related to enforcement of all kinds of laws including "administrative matters"); Env'tl. Prot. Servs., 364 F. Supp. 2d at 587 (stating that records compiled in EPA's administrative proceeding satisfy law enforcement threshold, because Exemption 7 applies to "enforcement of civil laws, such as regulations"); Schiller, 205 F. Supp. 2d at 559 (stating that "law enforcement" for purposes of FOIA includes regulatory proceedings (citing Rugiero, 257 F.3d at 550)); Hidalgo v. BOP, No. 00-1229, slip op. at 3 (D.D.C. June 6, 2001) (determining that records compiled during investigation of prisoner for violating institutional rules and regulations satisfy threshold), summary affirmance granted, No. 01-5257, 2002 WL 1997999 (D.C. Cir. Aug. 29, 2002); McErlean v. DOJ, No. 97-7831, 1999 WL 791680, at \*8 (S.D.N.Y. Sept. 30, 1999) (stating that "it is well-settled that documents compiled by the INS in connection with the administrative proceedings authorized

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Courts have also recognized that "law enforcement" within the meaning of Exemption 7 can extend beyond these traditional realms into the realms of national security and homeland security-related government activities as well.<sup>32</sup> For example, in Center for National Security Studies v. DOJ, the Court of Appeals for the District of Columbia Circuit explained that the names of post-9/11 detainees, found on documents that traditionally have been public, were properly withheld because they were compiled for the law enforcement purpose of pursuing a "violation of federal law as well as a breach of national security."<sup>33</sup> Indeed, in accepting arguments that terrorists could use information previously considered innocuous and safe for public release, courts have acknowledged the needs of homeland security by

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<sup>31</sup>(...continued)

by the Immigration and Naturalization Act are documents compiled for 'law enforcement purposes'); Gen. Elec. Co. v. EPA, 18 F. Supp. 2d 138, 143-44 (D. Mass. 1998) (reasoning that EPA decision to classify site as contaminated "is not an enforcement action at all but rather ordinary informal rulemaking," which would ordinarily not meet Exemption 7 threshold, though in this case it did because "it is entirely reasonable for the agency to anticipate that enforcement proceedings are in the offing"); Johnson v. DEA, No. 97-2231, 1998 U.S. Dist. LEXIS 9802, at \*9 (D.D.C. June 25, 1998) (reiterating that "law being enforced may be . . . regulatory"); Straughter v. HHS, No. 94-0567, slip op. at 4 (S.D. W. Va. Mar. 31, 1995) (magistrate's recommendation) (finding threshold met by records compiled by HHS's Office of Civil Rights in course of investigation of handicap discrimination as violation of Rehabilitation Act), adopted, (S.D. W. Va. Apr. 17, 1995); Kay v. FCC, 867 F. Supp. 11, 16-18 (D.D.C. 1994) (explaining that FCC's statutory authority to revoke licenses or deny license applications is qualifying law enforcement purpose); Aircraft Gear Corp. v. NLRB, No. 92-C-6023, slip op. at 10 (N.D. Ill. Mar. 14, 1994) (stating that documents created in connection with NLRB unfair labor practices cases and union representation case meet threshold); Ehringhaus v. FTC, 525 F. Supp. 21, 22-23 (D.D.C. 1980) (deciding that documents prepared as part of FTC investigation into advertising practices of cigarette manufacturers meet threshold); cf. Gordon v. FBI, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (explaining that law enforcement is not limited to criminal law, but can encompass "internal guidelines" (citing Dirksen v. HHS, 803 F.2d 1456, 1459 (9th Cir. 1986))).

<sup>32</sup> See Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 926 (D.C. Cir. 2003) (finding law enforcement threshold met by records compiled in course of investigation into "breach of this nation's security"); Kidder v. FBI, 517 F. Supp. 2d 17, 27 (D.D.C. 2007) (stressing that intelligence gathering is law enforcement activity because "[i]nvestigating terrorism is 'one of DOJ's chief law enforcement duties at this time'" (quoting Ctr. for Nat'l Sec. Studies, 331 F. 3d at 926)); Gordon, 388 F. Supp. 2d at 1036 (extending law enforcement threshold to include memoranda and e-mail messages created by FBI in its handling of various aviation "watch lists" created to "protect the American flying public from terrorists"); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 964-65 (C.D. Cal. 2003) (ruling that terrorists could use information to avoid detection and to direct "merchandise to vulnerable ports"), appeal dismissed voluntarily, No. 03-55833 (9th Cir. Aug. 26, 2003); see also Pratt v. Webster, 673 F.2d 408, 421 (D.C. Cir. 1982) (explaining that "to pass the FOIA Exemption 7 threshold," agencies must establish that their activities are based on a concern that "federal laws have been or may be violated or that national security may be breached").

<sup>33</sup> 331 F.3d at 926, 929.

recognizing the law enforcement nexus for such documents.<sup>34</sup>

In determining that documents related to national or homeland security satisfy Exemption 7's law enforcement requirement, courts have looked to the agencies' mandates to protect society and to prevent violence in determining whether the threshold is satisfied.<sup>35</sup>

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<sup>34</sup> See id. at 929 ("While the name of any individual detainee may appear innocuous or trivial, it could be of great use to al Qaeda in plotting future terrorist attacks or intimidating witnesses in the present investigation."); see also L.A. Times v. Dep't of the Army, 442 F. Supp. 2d 880, 898 (C.D. Cal. 2006) (ruling that incident reports from private security contractors in Iraq meet law enforcement threshold because purpose is to improve intelligence information, thus enhancing security); Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1321 (D. Utah 2003), (reasoning that terrorists could use "inundation maps" to aid in carrying out attacks on dams both in choosing potential targets and in selecting particular, more vulnerable features of certain dams); Coastal Delivery, 272 F. Supp. 2d at 964, 966 (explaining that information that appears to be "innocuous on its own" could reasonably be used by "potential terrorists and smugglers" to circumvent law enforcement procedures).

<sup>35</sup> See Ctr. for Nat'l Sec. Studies, 331 F.3d at 926, 928 (explaining that terrorism investigation is one of DOJ's chief law enforcement duties); Kidder, 517 F. Supp. 2d at 26-27 (emphasizing that records at issue were compiled for law enforcement purposes because FBI's investigation into violations of criminal laws and "possible terrorist activity against the United States" falls within FBI's law enforcement duties; further explaining that investigating terrorism is "one of DOJ's chief law enforcement duties at this time" (quoting Ctr. for Nat'l Sec. Studies, 331 F.3d at 926)); Owens v. DOJ, No. 04-1701, 2006 WL 3490790, at \*5 (D.D.C. Dec. 1, 2006) (noting that "threshold showing has been made" because records were "generated during an investigation into terrorist attacks" and defendant agencies are "statutorily authorized to investigate activities of this type"); L.A. Times, 442 F. Supp. 2d at 898 (explaining that there is "a cognizable law enforcement mandate in Iraq" of improving intelligence information that will enhance security); Gordon, 388 F.2d at 1045 ("[T]he information was compiled in connection with maintaining the watch lists to prevent another terrorist attack on civil aviation. There is nothing in the redacted information that suggests that the FBI's assertion of a law enforcement purpose is pretextual, that is, that the FBI is placing names on the watch lists because of a person's First Amendment activities rather than for a law enforcement purpose."); Living Rivers, 272 F. Supp. 2d at 1320 (concluding that "inundation maps" were compiled for law enforcement purposes because they are used for homeland security as part of the Department of the Interior's "Emergency Action Plans and to protect and alert potentially threatened people"); Coastal Delivery, 272 F. Supp. 2d at 964-65 (reasoning that law enforcement requirement is satisfied by cargo-inspection data at seaports where disclosure could permit terrorists to direct activities to "vulnerable ports"); Ayyad v. DOJ, No. 00-960, 2002 WL 654133, at \*8-12 (S.D.N.Y. Apr. 17, 2002) (ruling that information satisfies Exemption 7's threshold because it "is clearly related to law enforcement proceedings and was compiled by the FBI to investigate" 1993 World Trade Center bombing); Judicial Watch v. Reno, No. 00-0723, 2001 WL 1902811, at \* 9 (D.D.C. 2001) (finding that records concerning investigation of terrorist threats involved legitimate law enforcement duty and satisfied threshold); Morales Cozier v. FBI, No. 1:99-0312, slip op. at 14-15 (N.D. Ga. Sept. 25, 2000) (stating that threshold was satisfied because "[p]laintiff's activities in contacting an official of a government with which the United States has no official relations and inviting him to the United States could

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Such reviews by the courts in order to determine whether a law enforcement purpose can be established in investigations arising from national security concerns are not new; for example, reviews of this variety date back to investigations of alleged "subversive" organizations in the 1960s and 1970s and investigations of the Communist Party in the 1950s.<sup>36</sup> Further, even after finding that the law enforcement threshold had been met in instances involving these older investigations, courts reviewed all the records relating to the investigation in order to determine if any part of the investigation deteriorated into mere monitoring, in which case Exemption 7's threshold would no longer be satisfied.<sup>37</sup>

#### Personnel Actions v. Law Enforcement Activity

"Background security investigations by governmental units which have authority to conduct such functions"<sup>38</sup> have been held by the courts to meet the threshold test under Exemption 7.<sup>39</sup> Further, personnel investigations of government employees have also been

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<sup>35</sup>(...continued)

have presented an interference with United States foreign policy or national security in an area where the FBI has an investigatory or enforcement interest").

<sup>36</sup> See, e.g., Campbell v. DOJ, 164 F.3d 20, 31-33 (D.C. Cir. 1998) (discussing 1960s investigations of subversive organizations believed to be threat to U.S. security and finding that "although the FBI may possess some documents related to a valid law enforcement purpose," FBI's position that once investigation is justified, all documents generated are exempt is "untenable"); Pratt, 673 F.2d at 410, 422-23 (finding that documents gathered during the investigation of Black Panther Party, "an allegedly subversive and violent domestic organization," met law enforcement threshold because investigation involved "prevention of violence" on American soil); Simon v. DOJ, 752 F. Supp. 14, 18 (D.D.C. 1990) (explaining that given "climate existing during the early 1950's [the court] cannot conclude that it was irrational or implausible" to take into account "earlier passivist activities" and conduct "criminal investigation into the possibility that [the subject] harbored Communist affiliations," and therefore finding that records met law enforcement threshold).

<sup>37</sup> See Campbell, 164 F.3d at 33 (explaining that simply because "some documents relate[] to a valid law enforcement investigation" of civil rights activist, not every withheld document satisfies threshold); Rosenfeld v. DOJ, 761 F. Supp. 1440, 1445-448 (N.D. Cal. 1991) (finding that investigation into Free Speech Movement and anti-war protesters "was opened and initially pursued for the legitimate purpose of ascertaining the role of subversive organizations," but disintegrated into routine monitoring), aff'd in pertinent part, rev'd in part & remanded, 57 F.3d 803 (9th Cir. 1995); cf. Lamont v. Dep't of State, 475 F. Supp. 761, 775 (S.D.N.Y. 1979) (noting that "information collected" about suspected Communist Party member consisted of "generalized monitoring and information-gathering that are not related to [agency's] law enforcement duties").

<sup>38</sup> S. Conf. Rep. No. 93-1200, at 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6291.

<sup>39</sup> See, e.g., Mittleman v. OPM, 76 F.3d 1240, 1241-43 (D.C. Cir. 1996) (OPM background investigation); Rosenfeld v. DOJ, 57 F.3d 803, 809 (9th Cir. 1995) ("FBI government appointment investigations"); Wolk v. United States, No. 04-CV-832, 2005 WL 465382, at \*4

(continued...)



found to have been compiled for law enforcement purposes if they focus on "specific and potentially unlawful activity by particular employees" of a civil or criminal nature.<sup>40</sup>

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<sup>39</sup>(...continued)

(E.D. Pa. Feb. 28, 2005) (concluding that "enforcement" encompasses conducting a "security background check" by reasoning that "enforcement of the law fairly includes not merely the detection and punishment of violations of law but their prevention" (quoting Miller v. United States, 630 F. Supp. 347, 349 (E.D.N.Y. 1986))); Melius v. Nat'l Indian Gaming Comm'n, No. 92-2210, 1999 U.S. Dist. LEXIS 17537, at \*6, \*15 (D.D.C. Nov. 3, 1999) ("suitability investigations" for gaming contracts); Assassination Archives & Research Ctr. v. CIA, 903 F. Supp. 131, 132 (D.D.C. 1995) (FBI "background investigations"), dismissed without prejudice, No. 94-0655 (D.D.C. May 31, 1996); Bostic v. FBI, No. 1:94 CV 71, slip op. at 2, 11 (W.D. Mich. Dec. 16, 1994) (FBI pre-employment investigation); Doe v. DOJ, 790 F. Supp. 17, 20-21 (D.D.C. 1992) (background investigation of individual conditionally offered employment as attorney); Miller v. United States, 630 F. Supp. 347, 349 (E.D.N.Y. 1986) (USIA background-security investigation of federal job applicant).

<sup>40</sup> Stern v. FBI, 737 F.2d 84, 89 (D.C. Cir. 1984); see Perlman v. DOJ, 312 F.3d 100, 103, 105 (2d Cir. 2002) (discussing allegations of preferential treatment and undue access and influence in INS Investor Visa Program by former INS general counsel, and finding that records compiled during investigation into allegations satisfy Exemption 7's threshold, because such acts could subject him to criminal or civil penalties), aff'd, 380 F.3d 110 (2d Cir. 2004); Kimberlin v. DOJ, 139 F.3d 944, 947-48 (D.C. Cir. 1998) (concluding that investigation "conducted in response to and focused upon a specific, potentially illegal release of information by a particular, identified official" satisfies threshold); Strang v. Arms Control & Disarmament Agency, 864 F.2d 859, 862 (D.C. Cir. 1989) (characterizing agency investigation into employee violation of national security laws as law enforcement); O'Keefe v. DOD, 463 F. Supp. 2d 317, 320, 324 (E.D.N.Y. 2006) (finding that report detailing investigation of complaint alleging misconduct by commanding officers on multiple occasions was compiled for law enforcement purposes); Lewis v. United States, No. 02-3249, slip op. at 1, 6 (C.D. Cal. June 2, 2003) (finding that investigation of alleged unauthorized collection action by IRS employees was for law enforcement purposes); Mueller v. Dep't of the Air Force, 63 F. Supp. 2d 738, 742 (E.D. Va. 1999) (holding that investigation into prosecutorial misconduct was for law enforcement purposes because "agency investigation of its own employees is for law enforcement purposes . . . if it focuses directly on specifically alleged illegal acts, illegal acts of a particular identified official, acts which could, if proved, result in civil or criminal sanctions" (quoting Stern, 737 F.2d at 89)); Hayes v. U.S. Dept of Labor, No. 96-1149, 1998 U.S. Dist. LEXIS 14120, at \*11-12 (S.D. Ala. June 10, 1998) (explaining that records of "internal agency investigations are considered to be compiled for 'law enforcement purposes' when the investigations focus on specifically alleged acts, which, if proved, could amount to violations of civil or criminal law"), adopted, (S.D. Ala. Aug. 10, 1998); Lurie v. Dep't of the Army, 970 F. Supp. 19, 36 (D.D.C. 1997) (explaining that threshold met because investigation focused directly on specifically alleged illegal acts of identified officials (citing Rural Hous. Alliance v. USDA, 498 F.2d 73, 81 (D.C. Cir. 1974)), appeal dismissed voluntarily, No. 97-5248 (D.C. Cir. Oct. 22, 1997); Linn v. DOJ, No. 92-1406, 1995 WL 631847, at \*22 (D.D.C. Aug. 22, 1995) ("[D]ocuments compiled for purposes of internal discipline of employees are not compiled for law enforcement purposes . . . [b]ut such internal monitoring of employees may be 'for law enforcement purposes' if the focus of the investigation concerns acts that could result in civil or criminal

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Indeed, in Jefferson v. Department of Justice, the Court of Appeals for the District of Columbia Circuit, in clarifying the mixed-function nature of the Department of Justice's Office of Professional Responsibility (OPR), stated that "OPR conducts both law enforcement and non-law enforcement activities," and it then discussed the difference between the two types of files that "government agencies compile: (1) files in connection with government oversight of the performance of duties by its employees, and (2) files in connection with investigations that focus directly on specific alleged illegal acts which could result in civil or criminal sanction."<sup>41</sup> The D.C. Circuit declined to find that all OPR records were compiled for law enforcement purposes, particularly because the "Department's regulations describe OPR as a mixed-function agency with responsibilities that embrace not only investigations of violations of law and breaches of professional standards that may result in civil liability . . . but breaches of internal Department guidelines that may lead to disciplinary proceedings . . . of such non-law violations."<sup>42</sup> Thus, courts continue to distinguish between mere supervision of federal employees for performance of their assigned duties, on one hand, and investigations of federal employees for law enforcement purposes, on the other -- finding repeatedly that "an agency's general monitoring of its own employees to ensure compliance with the agency's statutory mandate and regulations" does not satisfy Exemption 7's threshold requirement.<sup>43</sup>

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<sup>40</sup>(...continued)

sanctions." (quoting Stern, 737 F.2d at 89)), appeal dismissed voluntarily, No. 97-5122 (D.C. Cir. July 14, 1997); Housley v. U.S. Dep't of the Treasury, 697 F. Supp. 3, 5 (D.D.C. 1988) (reiterating that investigation concerning misconduct by special agent which, if proved, could have resulted in federal civil or criminal sanctions qualifies as law enforcement).

<sup>41</sup> 284 F.3d 172, 176-77 (D.C. Cir. 2000) (citing Rural Hous. Alliance v. USDA, 498 F.2d 73, 81 (D.C. Cir. 1974)).

<sup>42</sup> Id. at 179; see also Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1194 (N.D. Cal. 2006) (discussing difference between supervision and law enforcement by explaining that "[i]f the investigation is for a possible violation of law, then the inquiry is for law enforcement purposes, as distinct from customary surveillance of the performance of duties by government employees" (quoting Jefferson, 284 F.3d at 177)).

<sup>43</sup> Stern, 737 F.2d at 89 (dictum) (reminding that "it is necessary to distinguish between those investigations conducted 'for a law enforcement purpose' and those in which an agency, acting as the employer, simply supervises its own employees"); see also Jefferson, 284 F.3d at 177-78 (ruling that agencies must distinguish between records based on "allegations that could lead to civil or criminal sanctions" and records "maintained in the course of general oversight of government employees"); Patterson v. IRS, 56 F.3d 832, 837-38 (7th Cir. 1995) (holding that "general citation to an entire body of statutes contained in the United States Code under the heading 'Equal Employment Opportunity statutes'" does not establish law enforcement purpose, and declaring that agency must "distinguish between internal investigations conducted for law enforcement purposes and general agency monitoring" (quoting Stern, 727 F.2d at 89)); Rural Hous. Alliance v. USDA, 498 F.2d 73, 81 (D.C. Cir. 1974) (distinguishing between agency oversight of performance of employees and investigations focusing on specific illegal acts of employees); Coleman v. Lappin, No. 06-2255, 2007 U.S. Dist LEXIS 47647, at \*9 (D.D.C. July 3, 2007) (stating that "nothing in the BOP's motion and supporting documents establishes that the disciplinary records pertaining to a former BOP  
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Thus, while the line between mere employee monitoring and an investigation of an employee that satisfies the threshold requirement of Exemption 7 is narrow, the following examples satisfying the threshold shed useful light on this distinction:

- (1) an investigation of an employee's allegations of misconduct and gross incompetence;<sup>44</sup>

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<sup>43</sup>(...continued)

employee are law enforcement records"); MacLean v. U.S. Dep't of the Army, No. 05-1519, 2007 U.S. Dist. LEXIS 16162, at \*27 (S.D. Cal. Mar. 6, 2007) (explaining critical distinction between investigation of particular employee for particular violation of law and customary surveillance of performance of duties); Wood v. FBI, 312 F. Supp. 2d 328, 345 (D. Conn. 2004) (reiterating that "investigation conducted by a federal agency for the purpose of determining whether to discipline employees for activity which does not constitute a violation of law is not for law enforcement purposes under Exemption 7" (quoting Stern, 737 F.2d at 90)), aff'd in part & rev'd in part on other grounds, 432 F.3d 78 (2d Cir. 2005); Jefferson v. DOJ, No. 01-1418, slip op. at 16 (D.D.C. Mar. 31, 2003) (finding that Office of Inspector General records concerning particular federal employee were not oversight records of internal agency monitoring, because they were compiled during investigation into her failure to comply with court order), aff'd, 168 F. App'x 448 (D.C. Cir. 2005); Varville v. Rubin, No. 3:96CV00629, 1998 WL 681438, at \*14 (D. Conn. Aug. 18, 1998) (explaining that threshold was not met by report discussing possible ethical violations and prohibited personnel practices because inquiry "more closely resembles an employer supervising its employees than an investigation for law enforcement purposes"); Lurie, 970 F. Supp. at 36 ("The general internal monitoring by an agency of its own employees is not shielded from public scrutiny under Exemption 7, because 'protection of all such internal monitoring under Exemption 7 would devastate FOIA." (quoting Stern, 737 F.2d at 89)); Fine v. DOE, 823 F. Supp. 888, 907-08 (D.N.M. 1993) (ruling that threshold met by agency with both administrative and law enforcement functions when documents were compiled during investigation of specific allegations and not as part of routine oversight).

<sup>44</sup> Edmonds v. FBI, 272 F. Supp. 2d 35, 42, 54 (D.D.C. 2003); see also Jefferson v. DOJ, No. 04-5226, 2005 U.S. App. LEXIS 23360, at \*2 (D.C. Cir. Oct. 26, 2005) (affirming district court's ruling that law enforcement threshold is met by investigation concerning Department of Justice attorney accused of official misconduct); MacLean, 2007 U.S. Dist. LEXIS 16162, at \*28-29 (determining that "evidence is sufficient to show that the requested investigation-related documents did not arise from an 'internal audit' or 'customary surveillance,' but instead arose from 'specifically alleged illegal acts'"; thus, information was compiled for law enforcement purposes (citing Kimberlin, 139 F.3d at 947-48)); Trentadue v. Integrity Comm., No. 2:03-339, 2006 WL 1184636, at \*5 (D. Utah May 2, 2006) (finding threshold met by documents prepared in course of investigation of allegations against federal employee); Pagan v. Treasury Inspector Gen. for Tax Admin., No. 04-4179, slip op. at 6 (E.D.N.Y. Jan. 31, 2006) (finding that documents created as result of specific allegations of misuse of government equipment and of conducting personal business while on official duty qualify as law enforcement documents); aff'd, 231 F. App'x 99 (2d Cir. 2007); MacLean v. DOD, No. 04-2425, slip op. at 14 (S.D. Cal. June 2, 2005) (finding that documents created in response to allegations of professional misconduct against prosecutor satisfy law enforcement threshold); Judicial Watch v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 179 (D.D.C. 2004) (finding that investigations of certain agency personnel for possible violations of campaign finance laws and trade mission

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- (2) an investigation triggered by a complaint letter alleging that particular government prosecutors had withheld certain information during litigation;<sup>45</sup>
- (3) an investigation of a particular AUSA for disclosing confidential information about the alleged use of cocaine by a suspect;<sup>46</sup> and
- (4) an investigation triggered by an allegation of racial harassment.<sup>47</sup>

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

- (1) an investigation into whether an employee who spoke at a meeting sponsored by a regulated company violated agency regulations when the case focused on "whether an agency employee has complied with agency regulations";<sup>48</sup>
- (2) records concerning an employee who had been disciplined because the agency was

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<sup>44</sup>(...continued)

improprieties qualify as law enforcement); cf. Herrick's Custom & Int'l Trade Newsletter v. Customs & Border Protection, No. 04-0377, 2006 U.S. Dist. LEXIS 44802, at \*1, \*20-21 (D.D.C. June 30, 2006) (explaining that "if the personnel oversight and investigation procedures concern misconduct that violates the law, then the information may be deemed to meet the threshold requirement of Exemption 7"); Dohse v. Potter, No. 8:04CV355, 2006 WL 379901, at \*1, \*7 (D. Neb. Feb. 15, 2006) (ruling that investigation by Postal Service of independent contractor for "interpersonal conflicts," including "alleged threats to postal personnel," satisfies law enforcement threshold).

<sup>45</sup> Ligoner v. Reno, 2 F. Supp. 2d 400, 402-03 (S.D.N.Y. 1998).

<sup>46</sup> Kimberlin, 139 F.3d at 946-47.

<sup>47</sup> Ford v. West, No. 97-1342, 1998 WL 317561, at \*1-2 (10th Cir. June 12, 1998); see also Martinez v. EEOC, No. 04-CA-0271, 2005 U.S. Dist. LEXIS 3864, at \*2, \*11 (W.D. Tex. Mar. 3, 2005) (finding that information compiled in relation to charges of "a racially hostile work environment" meets law enforcement threshold); cf. Sakamoto, 443 F. Supp. 2d at 1194 (discussing files "compiled by the EPA as part of the internal investigatory or adjudicatory proceedings associated with the EEOC process for complaints of discrimination in accordance with Title VII of the Civil Rights Act," and concluding that agency "has met its burden" to show that records were compiled for law enforcement purposes); Sinsheimer v. DHS, 437 F. Supp. 2d 50, 52, 55 (D.D.C. 2006) (declaring that investigations into allegations of sexual misconduct in the workplace meet law enforcement threshold, even when the charges were dropped, because "investigations were carried out to enforce federal civil rights laws"); Watkins Motor Lines, Inc. v. EEOC, No. 8:05-1065, 2006 WL 905518, at \*1-3 (M.D. Fla. Apr. 7, 2006) (reasoning that records compiled during an investigation into allegation of employment discrimination -- based on company's denial of employment to person convicted of aggravated sexual abuse -- "were compiled for a law enforcement purpose," because the EEOC investigated "charge that [the company] violated federal law by discriminating").

<sup>48</sup> Greenpeace USA, Inc. v. EPA, 735 F. Supp. 13, 14-15 (D.D.C. 1990).

participating "as an employer" and not as an "agency enforcing the revenue laws";<sup>49</sup> and

(3) an investigation conducted by an IG that the agency merely asserted "must" have been for law enforcement purposes even though the IG "also investigates internal matters concerning agency inefficiency and mismanagement."<sup>50</sup>

The common thread running through all these cases is the one first established in Rural Housing and then reiterated in Stern: Courts look at how the agency articulates the purpose of its actions and, as necessary, "distinguish[es] [between] two types of files relating to government employees."<sup>51</sup>

### Mixed-Function Agencies

When determining whether a record concerning matters other than an agency's own activities and personnel was "compiled for law enforcement purposes" under Exemption 7, the courts have generally distinguished between agencies with both law enforcement and

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<sup>49</sup> Patterson, 56 F.3d at 837.

<sup>50</sup> Cotton v. Adams, 798 F. Supp. 2d, 25 (D.D.C. 1992); see also Jefferson, 284 F.3d at 178-79 (stating that oversight of performance, including review of violations of agency rules, does not qualify as "law enforcement" within meaning of Exemption 7); Coleman v. Lappin, 535 F. Supp. 2d 96, 98 (D.D.C. 2008) (stating that "employee status alone" does not establish nexus between employee discipline records and agency's law enforcement duties; finding that agency's "vague and general" statements do not demonstrate how requested records were compiled nor explain "what enforcement or administrative proceedings may have occurred or may have been authorized"); Coleman, 2007 U.S. Dist. LEXIS 47647, at \*9 (D.D.C. July 3, 2007) (explaining that although "BOP is considered a law enforcement agency," BOP did not establish that disciplinary records pertaining to former employee are law enforcement records within scope of Exemption 7); Wood, 312 F. Supp. 2d at 346 (finding that employee conduct at issue involved only "violations of agency policy" and thus did not satisfy threshold).

<sup>51</sup> Rural Hous., 498 F.2d at 82 (stating that "purpose of the 'investigatory files' is thus the critical factor," and reiterating that agency must distinguish between its "surveillance of the performance of duties by government employees [and its] inquiry as to an identifiable possible violation of law"); Stern, 737 F.2d at 89 (emphasizing that agency's "general internal monitoring of its own employees to insure compliance with the agency's statutory mandate and regulations is not protected from public scrutiny under Exemption 7 . . . [and that] an agency's investigation of its own employees is for 'law enforcement purposes' only if it focuses 'directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions'" (quoting Rural Hous., 498 F.2d at 81)); Cotton, 798 F. Supp. at 25 (stating that while IG has "ability to conduct investigations," it also looks into "internal matters concerning agency inefficiency and mismanagement"; because Court cannot infer "a law enforcement purpose," it required fuller explanation from agency as to purpose of its actions giving rise to documents). But see Dean v. FDIC, 389 F. Supp. 2d 780, 785, 790 (E.D. Ky. 2005) (finding that inquiry into whether agency employee, who "as a private citizen" violated any ethical standards by developing certain software concepts, satisfied law enforcement threshold, and explaining that "the Court is of the opinion that the OIG has the authority and responsibility to investigate even potential criminal violations").

administrative functions and those whose principal function is criminal law enforcement.<sup>52</sup> Nevertheless, while both mixed-function and criminal law enforcement agencies must satisfy Exemption 7's threshold,<sup>53</sup> an agency whose functions are "mixed" has a higher standard to satisfy<sup>54</sup> in that it usually has to show that the records at issue involved the enforcement of a statute or regulation within its authority and that the records were compiled for adjudicative or enforcement purposes.<sup>55</sup>

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<sup>52</sup> See Pratt v. Webster, 673 F. 2d 408, 416 (D.C. Cir. 1982) (explaining that "[w]hile FOIA makes no distinction on its face between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions, it would be unnecessarily wooden to treat both groups identically"); Sciba v. Bd. of Governors of the Fed. Reserve Sys., No. 04-1011, 2005 WL 3201206, at \*7 (D.D.C. Nov. 4, 2005) (finding that Board is law enforcement agency, because it has responsibility not only to monitor for compliance but also to detect and prosecute crimes and violations of federal statutes within its sphere, including Bank Secrecy Act); Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp., No. 6:02-CV-126, 2003 WL 21146674, at \*17 (M.D. Fla. May 13, 2003) (reiterating that agency "with mixed law enforcement and non-law enforcement functions requires the Court to consider the purpose of the investigation and to determine whether the information was gathered as part of an inquiry about a potential violation of the law, rather than in the course of the agency's administrative function of overseeing compliance with its rules and regulations"), remanded on other grounds, 376 F.3d 1270 (11th Cir. 2004), cert. denied, 543 U.S. 1121 (2005); cf. Mayer, Brown, Rowe & Maw v. IRS, No. 04-2187, 2006 U.S. Dist. LEXIS 58410, at \*23 (D.D.C. Aug. 21, 2006) (saying that IRS "combines administrative and law enforcement functions"); see also Attorney General's 1986 Amendments Memorandum at 7.

<sup>53</sup> See, e.g., Abramson v. FBI, 456 U.S. 615, 622 (1982) (explaining that to assert "Exemption 7 privilege" agency must show that records were compiled for law enforcement purpose); Pratt, 673 F.2d at 414 (stating that "law enforcement purpose" not only describes "type of agency," but also functions as "a condition on the use of the exemption by agencies having administrative as well as civil enforcement duties" (quoting Irons v. Bell, 596 F.2d 468, 474 (1st Cir. 1979))).

<sup>54</sup> See, e.g., Pratt, 673 F.2d at 416, 418 (noting "more exacting scrutiny of Exemption 7 claims by agencies whose principal function is not law enforcement" and contrasting it with "more deferential attitude toward the claims . . . made by a criminal law enforcement agency"); United Am. Fin. v. Potter, 531 F. Supp. 2d 29, 46 (D.D.C. 2008) (explaining that "this Circuit's admonition" mandates that courts give thoughtful consideration to whether mixed-function agencies satisfy law enforcement purpose); Living Rivers v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1319 (D. Utah 2003) (stating that "standard for establishing a law enforcement purpose" is "lower [for per se law enforcement agency] than it is for . . . mixed-function agency").

<sup>55</sup> See, e.g., Cooper Cameron Corp. v. Dep't of Labor, 280 F.3d 539, 545 (5th Cir. 2002) (observing that "Congress obviously intended OSHA inspections to be part of an enforcement program," particularly when agency is responding to workplace accident); Lewis v. IRS, 823 F.2d 375, 379 (9th Cir. 1987) (holding the threshold met when the IRS "had a purpose falling within its sphere of enforcement authority in compiling particular documents"); Birch v. USPS,

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The phrase "law enforcement purpose" can be interpreted broadly in agencies with mixed functions.<sup>56</sup> For example, in Living Rivers, Inc. v. United States Bureau of Reclamation, the court explained that before it could determine if "dam inundation" maps created by the Department of the Interior's Bureau of Reclamation (BOR) were withheld properly pursuant to either Exemption 7(E) or Exemption 7(F), it first had to determine whether Exemption 7's

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<sup>55</sup>(...continued)

803 F.2d 1206, 1210-11 (D.C. Cir. 1986) (explaining that threshold was met because enforcement of laws regarding use of mails falls within statutory authority of Postal Service); Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service for it to show that investigation involved enforcement of statute or regulation within its authority); Irons v. Bell, 596 F.2d 468, 473 (1st Cir. 1979) (determining that mixed-function agency must demonstrate purpose falling within its sphere of enforcement authority); United Am. Fin., 531 F. Supp. 2d at 46 (finding that agency must explain how records pertaining to complaints "about solicitation of access to life insurance accounts" were compiled for law enforcement purposes); Lawyers' Comm. for Civil Rights v. Dep't of the Treasury, No. 07-2590, 2008 WL 4482855, at \*11 (N.D. Cal. Sept. 30, 2008) (reiterating that mixed-function agency "must demonstrate that its purpose in compiling the particular document fell within its sphere of enforcement activity"); Stanley v. U.S. Dep't of the Treasury, No. 2:06-CV-072, 2007 LEXIS 49737, at \*8-9 (N.D. In. July 9, 2007) (finding that threshold satisfied because "records arose from an investigation related to the enforcement of the tax laws, and the investigation was part and parcel of [agency's] law enforcement duties"); Finkel v. Dep't of Labor, No. 05-5525, 2007 U.S. Dist. LEXIS 47307, at \*31 (D.N.J. June 29, 2007) (finding "records at issue are compiled for law enforcement purposes because they were collected in the course of OSHA acting pursuant to its statutory authority to inspect workplaces, question employees, and cite employers violating safety and health regulations"); Suzhou Yuanda Enter. Co. v. Customs & Border Protection, 404 F. Supp. 2d 9, 14 (D.D.C. 2005) (finding law enforcement threshold met by investigation into suspected scheme to import merchandise, because agency is charged with enforcing federal laws regarding proper importation of merchandise); Wayne's Mech. & Maint. Contractor, Inc. v. Dep't of Labor, No. 1:00-45, slip op. at 7 n.2 (N.D. Ga. May 7, 2001) (concluding that records compiled by OSHA during investigation of industrial accident were within agency's statutory law enforcement mandate); Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 67 (D.D.C. 1999) (holding that investigative records created in response to specific allegations of Medicare fraud by physicians at a teaching hospital were compiled for law enforcement purposes).

<sup>56</sup> See, e.g., Living Rivers, 272 F. Supp. 2d at 1318-20 (explaining that while standard for establishing law enforcement purpose is high for mixed-function agency, here inundation maps were directly related to agency's statutory mandate to "maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands," thus standard satisfied (quoting 43 U.S.C.A. § 373b(a)(2006))); Coastal Delivery v. U.S. Customs Serv., 272 F. Supp. 2d 958, 963 (C.D. Cal. 2003) (stating that "inquiry of whether the information is for 'law enforcement purposes' begins with the determination of whether the agency has a law enforcement function"; finding such purpose because agency used information "to track overall effectiveness of its examination technique, and evaluate both its commercial enforcement strategy and its border security responsibilities"), appeal dismissed voluntarily, No. 03-55833 (9th Cir. Aug. 26, 2003).

threshold requirement was met.<sup>57</sup> Reiterating the differences between "per se" law enforcement agencies and those with both administrative and law enforcement functions, the court acknowledged that "Congress has provided the BOR with express 'law enforcement authority' to 'maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands.'"<sup>58</sup> After endorsing this express grant of law enforcement authority, the court next addressed the "compilation" aspect of the threshold requirement, finding that the "context in which an agency has currently compiled a document, rather than the purpose for which the document was originally created, determines whether it is 'compiled for law enforcement purposes.'"<sup>59</sup> The court ruled that "the inundation maps are presently used and were compiled in direct relation to the BOR's statutory law enforcement mandate," and therefore satisfied the law enforcement threshold of Exemption 7.<sup>60</sup>

Similarly, in Coastal Delivery v. United States Customs Service, the court recognized that "Customs has a law enforcement mandate" regarding the "number of examinations it performed on merchandise arriving into the Los Angeles/Long Beach seaport."<sup>61</sup> Accordingly, it found a sufficient Exemption 7 nexus, in support of both Exemption 2 and Exemption 7(E) protection, because the agency's cargo container inspection numbers "allow Customs to track the overall effectiveness of its examination technique, and evaluate both its commercial enforcement strategy and its border security responsibilities."<sup>62</sup>

#### Criminal Law Enforcement Agencies and Deference

In the case of criminal law enforcement agencies, the courts have accorded the government varying degrees of deference when considering whether their particular records meet the threshold requirement of Exemption 7.<sup>63</sup> While the degree of deference varies, it is

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<sup>57</sup> 272 F. Supp. 2d at 1318.

<sup>58</sup> Id. at 1318-19 (quoting "General Authority of Secretary of the Interior," 43 U.S.C.A. § 373b(a) (2000 & Supp. III 2003), pertaining to law enforcement authority granted to Bureau of Reclamation, specifically regarding public safety).

<sup>59</sup> Id. at 1319-20.

<sup>60</sup> Id. (quoting John Doe Agency v. John Doe Corp., 493 U.S. 146, 153-54 (1989)).

<sup>61</sup> 272 F. Supp. 2d at 963; see also Seized Prop. v. Customs and Border Protection, 502 F. Supp. 50, 56-57 (D.D.C. 2007) (referencing need to establish "nexus" between enforcement of federal laws and agency law enforcement duties, notes that Customs is law enforcement agency and records generated in exercise of agency duty to seize goods for violations of laws satisfy requirement); Suzhou, 404 F. Supp. 2d at 14 (declaring that "Customs is a law enforcement agency charged with enforcing federal law regarding the proper entry of merchandise into the United States" and that agency "properly applied Exemption 7").

<sup>62</sup> 272 F. Supp at 963.

<sup>63</sup> Compare, e.g., Pratt v. Webster, 673 F.2d 408, 418 (D.C. Cir. 1982) (declaring that "a court can accept less exacting proof from [a law enforcement agency]"), with Kuehnert v. FBI, 620 F.2d 662, 667 (8th Cir. 1980) (holding that "Exemption 7 extends to all investigative files of a  
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well established that courts do defer to agencies' assertions of "law enforcement purposes."<sup>64</sup> In recognizing the propriety of judicial deference, the Court of Appeals for the District of Columbia Circuit in Center for National Security Studies v. DOJ observed that it was acting "in accord with several federal courts" that defer to the executive on decisions of national security.<sup>65</sup>

The District Court for the District of Columbia has opined that the decision of the D.C. Circuit in Center for National Security Studies "[a]t most, . . . stands for the proposition that the Department's claim that records were compiled for a law enforcement purpose is entitled to some deference, so long as its proffer in that regard meets the standards set forth in the case law."<sup>66</sup>

Along these lines, the First, Second, Sixth, Eighth, and Eleventh Circuit Courts of Appeals have adopted a per se rule that qualifies all "investigative" records of criminal law

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<sup>63</sup>(...continued)  
criminal law enforcement agency").

<sup>64</sup> See Gardels v. CIA, 689 F. 2d 1100, 1104-05 (D.C. Cir. 1982) (explaining that "test" is not whether court agrees with agency; rather, test is "whether on the whole record the Agency's judgment objectively survives" because court must "accord" weight to agency determination); Campbell v. DOJ, 164 F.3d 20, 32 (D.C. Cir. 1998) (stating that FBI specializes in law enforcement and thus its "decision to invoke exemption 7 is entitled to deference"); Barnard v. DHS, 598 F. Supp. 2d 1, 14 (D.D.C. 2009) (stating "[a]t the outset the Court notes" that law enforcement agency is entitled to deference); see also, e.g., Edmonds v. FBI, 272 F. Supp. 2d 35, 55 (D.D.C. 2003) (stating that "the Circuit Court recently chronicled in detail the 'weight of authority counseling deference . . .' and concluded that the deference that has historically been given to the executive when it invokes FOIA Exemption 1 must be extended to Exemption 7(A) in cases like this one, where national security area issues are at risk" (quoting Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 927-28 (D.C. Cir. 2003))); cf. Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (recognizing that terrorism can warrant "heightened deference") (non-FOIA case).

<sup>65</sup> 331 F.3d 918, 932 (D.C. Cir. 2003); accord L.A. Times v. Dep't of the Army, 442 F. Supp. 2d 880, 899 (C.D. Cal. 2006) (deferring to agency's predictive judgments and explaining that it is "well-established that the judiciary owes some measure of deference to the executive in cases implicating national security" (quoting Ctr. for Nat'l Sec. Studies, 331 F.2d at 926-27)); see, e.g., Milner v. U.S. Dep't of the Navy, No. C06-1301, 2007 U.S. Dist. LEXIS 80221, at \*21-22 (W.D. Wash. Oct. 30, 2007) (stating that "[i]nformation need not be 'secret' to implicate national security and explaining that where government concerns are "weighty," courts are more likely to defer to agency's expertise; thus, agency's "risk assessment is entitled to deference").

<sup>66</sup> Long v. DOJ, 479 F. Supp. 2d 23, 27 (D.D.C. 2007); see also Barnard, 598 F. Supp. 2d at 14 (noting that "'deferential' standard of review that the Court applies to this determination is not 'vacuous'"); Schoenman v. FBI, 575 F. Supp. 2d 166, 174 (D.D.C. 2008) (stating that at "the onset the Court notes" agency specializing in law enforcement is entitled to deference when it invokes Exemption 7, but adding that deferential standard is not vacuous); Schoenman v. FBI, 575 F. Supp. 2d 136, 158 (D.D.C. 2008) (same).

enforcement agencies for protection under Exemption 7.<sup>67</sup>

Other courts, while according significant deference to criminal law enforcement agencies, have held that an agency must demonstrate some relationship or "nexus"<sup>68</sup> between

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<sup>67</sup> See First Circuit: Curran v. DOJ, 813 F.2d 473, 475 (1st Cir. 1987) (holding that investigatory records of law enforcement agencies are "inherently" compiled for law enforcement purposes); Irons v. Bell, 596 F.2d 468, 474-76 (1st Cir. 1979) (holding that "investigatory records of law enforcement agencies are inherently records compiled for 'law enforcement purposes' within the meaning of Exemption 7"); Second Circuit: Halpern v. FBI, 181 F.3d 279, 296 (2d Cir. 1999) (applying rule that when records are compiled in course of law enforcement investigation, purpose of investigation is not subject of review by court); Ferguson v. FBI, 957 F.2d 1059, 1070 (2d Cir. 1992) (finding that there is "no room for [a] district court's inquiry into whether the FBI's asserted law enforcement purpose was legitimate"); Williams v. FBI, 730 F.2d 882, 884-85 (2d Cir. 1984) (ruling that records of law enforcement agency are given "absolute protection" even if "records were compiled in the course of an unwise, meritless or even illegal investigation"); Peltier v. FBI, No. 03-CV-905S, 2005 WL 735964, at \*14 (W.D.N.Y. Mar. 31, 2005) (explaining that "legitimacy of the investigation is immaterial [because] the rule in this Circuit is that the Government need only show that the records were compiled by a law enforcement agency in the course of a criminal investigation"); Sixth Circuit: Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 96 (6th Cir. 1996) (holding that "mug shots" are created for law enforcement purpose, and applying per se rule adopted previously in Jones v. FBI, 41 F.3d 238, 246 (6th Cir. 1994) (adopting per se rule that FBI is "archetypical" federal law enforcement agency and that "concern about overbroad withholding should therefore be addressed by proper scrutiny of the claimed exemptions themselves and not by use of a blunt instrument at the threshold")); Eighth Circuit: Miller v. USDA, 13 F.3d 260, 263 (8th Cir. 1993) (tardiness in working on case does not eliminate law enforcement purpose); Kuehnert, 620 F.2d at 666 (FBI need not show law enforcement purpose of particular investigation as precondition to invoking Exemption 7); Eleventh Circuit: Robinson v. DOJ, No. 00-11182, slip op. at 10 (11th Cir. Mar. 15, 2001) (holding that investigative records concerning search and seizure of drug-carrying vessel are "inherently records compiled for law enforcement purposes" (quoting Curran, 813 F.2d at 475)); Arenberg v. DEA, 849 F.2d 579, 581 (11th Cir. 1988) (suggesting that courts should be "hesitant" to reexamine law enforcement agency's decision to investigate if there is plausible basis for agency's decision); see also Binion v. DOJ, 695 F.2d 1189, 1193-94 (9th Cir. 1983) (holding that "a fortiori" approach is appropriate when FBI pardon investigation was "clearly legitimate").

<sup>68</sup> Davin v. DOJ, 60 F.3d 1043, 1056 (3d Cir. 1995) (stating that "preferable test is an adaptation of the two-prong 'rational nexus' test articulated by the Court of Appeals for the District of Columbia" in Pratt v. Webster, 673 F.2d 408 (D.C. Cir. 1982) and explaining that agency must describe nexus between "each document" and particular investigation), on remand, No. 92-1122, slip op. at 11-13 (W.D. Pa. Apr. 9, 1998) (finding that government demonstrated connection between target and "potential violation of law or security risk" for each investigation), aff'd, 176 F.3d 471, 471 (3d Cir. 1999) (unpublished table decision); see, e.g., Abdelfattah v. DHS, 488 F.3d 178, 184-85 (3d Cir. 2007) (explaining that agency required "to demonstrate that the relationship between its authority to enforce a statute or regulation and the activity giving rise to the requested documents is based upon information sufficient to support at least a colorable claim of the relationship's rationality"); Finkel v. Dep't of Labor,

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the records and a proper law enforcement purpose.<sup>69</sup> If an agency cannot establish a

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<sup>68</sup>(...continued)

No. 05-5525, 2007 U.S. Dist. LEXIS 47307, at \*29-30 (D.N.J. June 29, 2007) (discussing requirement that agency demonstrate relationship between its authority to enforce statute or regulation and its activity giving rise to requested documents); George v. IRS, No. C05-0955, 2007 WL 1450309, at \*6 (N.D. Cal. May 14, 2007) (explaining that "agency must demonstrate that 'the nexus between [its] activity [] and its law enforcement duties [is] based on information sufficient to support at least a colorable claim of its rationality'" (quoting Keys v. DOJ, 830 F.2d 337, 340 (D.C. Cir. 1987))); Van Mechelen v. U.S. Dep't of the Interior, No. C05-5393, 2005 WL 3007121, at \*4 (W.D. Wash. Nov. 9, 2005) (reiterating that phrase "law enforcement purpose" applies to records "created in the course of an investigation 'related to the enforcement of federal laws . . . and that [the] nexus between [the] investigation and [the] agency's law enforcement duties [is] based on information sufficient to support at least a colorable claim of its rationality'" (quoting Pratt, 673 F.2d at 420-21)); Gordon v. FBI, 388 F.2d 1028, 1035 (N.D. Cal. 2005) (finding that because "FBI 'has a clear law enforcement mandate, [it] need only establish a rational nexus between enforcement of federal law and the document for which [a law enforcement] exemption is claimed'" (quoting Rosenfeld v. DOJ, 57 F.3d 803, 808 (9th Cir. 1995))); Wolk v. United States, No. 04-CV-832, 2005 WL 465382, at \*3 (E.D. Pa. Feb. 28, 2005) (stating that "Third Circuit has adopted a rational nexus test" requiring agency to "(1) detail the connection between the individual under investigation and a potential violation of law or security risk; and (2) show 'that this relationship is based upon information'" sufficient to support colorable claim of rationality (quoting Davin, 60 F.3d at 1056)); Beneville v. DOJ, No. 98-6137, slip op. at 17 (D. Or. June 11, 2003) (declaring that agency "has established that it is a law enforcement agency" and that it satisfied threshold requirement by showing "rational nexus between the enforcement of a federal law and the documents for which the exemption is claimed"); Kern v. FBI, No. 94-0208, slip op. at 9 (C.D. Cal. Sept. 14, 1998) (rejecting FBI's Vaughn Index as inadequate because it did not demonstrate nexus between duty to investigate espionage and documents sought); Franklin v. DEA, No. 97-1225, slip op. at 7-8 (S.D. Fla. June 26, 1998) (reiterating need for "nexus between the records and the enforcement of federal or state law"); Grine v. Coombs, No. 95-342, 1997 U.S. Dist. LEXIS 19578, at \*14-18 (W.D. Pa. Oct. 10, 1997) (holding that "proper test is the 'rational nexus' test," and determining that investigatory reports triggered by complaints of dumping hazardous waste satisfy test), appeal dismissed for failure to prosecute, 98 F. App'x 178 (3d Cir. 2004); Crompton v. DEA, No. 95-8771, slip op. at 12-13 (C.D. Cal. Mar. 25, 1997) (stating that agencies with "clear law enforcement mandate such as the DEA need only establish a 'rational nexus' between enforcement of a federal law and the document for which a law enforcement exemption is claimed," and holding that there is such nexus between DEA's "law enforcement duties to manage the national narcotics intelligence system" and information withheld).

<sup>69</sup> See, e.g., Finkel, 2007 U.S. Dist. LEXIS 47307, at \*31 (finding records compiled for law enforcement purposes because agency has statutory authority to inspect workplaces, question employees, and cite employers violating safety and health regulations); George, 2007 WL 1450309 at \*6 (stating that "IRS has broad authority to enforce the internal revenue laws" and noting that "[t]he Supreme Court has explained that the power of the IRS to investigate does not depend on a case or controversy," but that IRS can investigate on "'suspicion that the law is being violated'" (quoting United States v. Powell, 379 U.S. 48, 57 (1964))); Marriott Employees' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478-A, 1996 WL 33497625,

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relationship or "nexus" between its activities and a law enforcement purpose, or cannot establish a law enforcement purpose, then the compiled records have been found not to satisfy the threshold of Exemption 7.<sup>70</sup>

The existing standard for review of criminal law enforcement records in the Court of Appeals for the District of Columbia Circuit is somewhat more stringent than the per se rule discussed above. The D.C. Circuit held in 1982 in Pratt v. Webster that records generated as part of a counterintelligence program of questionable legality, which was part of an otherwise clearly authorized law enforcement investigation, met the threshold requirement for Exemption 7 and rejected the per se approach.<sup>71</sup> Instead, it adopted a two-part test for determining whether the threshold for Exemption 7 has been met: (1) whether the agency's investigatory activities that give rise to the documents sought are related to the enforcement of federal laws or to the maintenance of national security; and (2) whether the nexus between the investigation and one of the agency's law enforcement duties is based on information sufficient to support at least a colorable claim of rationality.<sup>72</sup>

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<sup>69</sup>(...continued)

at \*4 (E.D. Va. Dec. 24, 1996) (finding that documents compiled by NCUA pursuant to administration of Federal Credit Union Act satisfy standard, because NCUA "is empowered" by Congress to enforce Act by conducting necessary "investigations and litigation"); Friedman v. FBI, 605 F. Supp. 306, 321 (N.D. Ga. 1984) (finding that the FBI was "'gathering information with the good faith belief that the subject may violate or has violated federal law' rather than 'merely monitoring the subject for purposes unrelated to enforcement of federal law'" (quoting Lamont v. DOJ, 475 F. Supp. 761, 770 (S.D.N.Y. 1979))).

<sup>70</sup> See, e.g., Poulsen v. Customs & Border Protection, No. 06-1743, 2006 WL 2788239, at \*6 (N.D. Cal. Sept. 26, 2006) (explaining that while Customs "has a clear law enforcement mandate" and need only establish "rational nexus between enforcement of a federal law and the document for which an exemption is claimed," records that agency generated in response to computer virus "were not created as part of an investigation, or in connection with CBP's enforcement of a federal law" and thus did not satisfy law enforcement threshold (quoting Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 748 (9th Cir. 1979))); Blanton v. DOJ, No. 93-2398, slip op. at 5-8 (W.D. Tenn. July 14, 1994) (finding that information concerning validity of plaintiff's counsel's purported license to practice law does not meet threshold because law licenses are matter of public record and that government failed to prove that records were "compiled for a law enforcement purpose"); Rosenfeld v. DOJ, 761 F. Supp. 1440, 1445-48 (N.D. Cal. 1991) (explaining that FBI investigation of Free Speech Movement "was begun in good faith and with a plausible basis," but ceased to have "colorable claim [of rationality] as the evidence accumulated" and became "a case of routine monitoring . . . for intelligence purposes"; date at which FBI's initial law enforcement-related suspicions were "demonstrably unfounded" was "cut-off point for the scope of a law enforcement purpose" under Exemption 7), aff'd in pertinent part, rev'd in part & remanded, 57 F.3d 803 (9th Cir. 1995).

<sup>71</sup> 673 F.2d at 416 n.17.

<sup>72</sup> Id. at 420-21; see, e.g., Campbell, 164 F.3d at 32 (requiring nexus between agency activities and law enforcement duties, and finding that most FBI files of 1960s investigations (continued...))

Since the removal of the word "investigatory" from the threshold requirement of

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<sup>72</sup>(...continued)

of James Baldwin -- believed to be associated with subversive organizations-- meet threshold, but elaborating that law enforcement agency may not simply rely on file names to satisfy threshold); Summers v. DOJ, 140 F.3d 1077, 1083 (D.C. Cir. 1998) (to show nexus, FBI must link names redacted from former FBI Director J. Edgar Hoover's telephone logs to law enforcement activities), on remand, No. 87-3168, slip op. at 3 (D.D.C. Apr. 19, 2000) (finding that "government has adequately established that information withheld" was compiled for law enforcement purposes); Quiñon v. FBI, 86 F.3d 1222, 1228-29 (D.C. Cir. 1996) (reiterating that agency's basis for connection between object of investigation and asserted law enforcement duty cannot be pretextual or wholly unbelievable and remanding because FBI's affidavits were insufficient to show that Pratt nexus test satisfied when only specific fact cited is filing of motion; "filing of a non-fraudulent pleading cannot, taken alone, form the basis for a legitimate obstruction of justice investigation"); Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 902, 904 (D.C. Cir. 1996) (finding that investigation into allegations of telecommunications fraud satisfies threshold, as do documents pertaining to police breakup of public meeting of computer hackers club); King v. DOJ, 830 F.2d 210, 229 (D.C. Cir. 1987) (supporting Pratt two-part test by stating that agency must identify particular individual/incident as object of its investigation and specify connection between individual/incident and possible security risk or violation of federal law and that agency must then demonstrate that relationship is based on information sufficient to support colorable claim of rationality); Founding Church of Scientology v. Smith, 721 F.2d 828, 829 n.1 (D.C. Cir. 1983) (holding that "Pratt is the law of this circuit insofar as it interprets the threshold requirement of exemption 7"); Wheeler v. DOJ, 403 F. Supp. 2d 1, 14 (D.D.C. 2005) (describing how agency established nexus when it "clearly identified the particular individual who was the object of its investigation" and stated that it was authorized to conduct investigation and that it "investigated him to see if he were acting on behalf of the Cuban government," thus providing "information sufficient to support at least a colorable claim of its rationality" (quoting Pratt, 673 F.2d at 420-21)); Judicial Watch v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 179 (D.D.C. 2004) ("A 'law enforcement purpose' exists where there is a 'rational nexus' between the compiled document and a law enforcement duty of the agency and where there is 'a connection between an individual or incident and a possible security risk or violation of federal law.'" (quoting Ctr. for Nat'l Sec. Studies, 331 F.3d at 926)); Wichlacz v. U.S. Dep't of Interior, 938 F. Supp. 325, 330 (E.D. Va. 1996) (observing that "investigative activities giving rise to the compilation of the records must be related to the enforcement of federal law, and there must be a rational connection between the investigative activities and the agency's law enforcement duties"), aff'd, 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision); Exner v. DOJ, 902 F. Supp. 240, 242-43 (D.D.C. 1995) (finding that investigatory activities were based on legitimate concern that federal laws were being violated and that activities connected rationally to target), appeal dismissed, No. 95-5411, 1997 WL 68352 (D.C. Cir. Jan. 15, 1997); cf. Schoenman, 575 F. Supp. 2d at 174 (noting that deferential standard applied to criminal law enforcement agencies is not vacuous and reiterating need for agencies to establish nexus between investigation and agency duties); CEI Wash. Bureau, Inc. v. DOJ, 404 F. Supp. 2d 172, 178 (D.D.C. 2005) (describing two-part nexus test and finding that "individuals' A-numbers and FBI numbers" maintained in agency database satisfy nexus requirement).

Exemption 7 in 1986,<sup>73</sup> the D.C. Circuit has had few opportunities to reconsider the Pratt test, a portion of which expressly requires a nexus between requested records and an investigation.<sup>74</sup> In Keys v. DOJ, however, the D.C. Circuit modified the language of the Pratt test to reflect those amendments and to require that an agency demonstrate the existence of a nexus "between [its] activity" (rather than its investigation) "and its law enforcement duties."<sup>75</sup> Notwithstanding the Keys decision and 1986 FOIA amendments, some courts continue to use the term "investigation" in describing the elements necessary for an agency to establish the relationship or nexus between the records it has compiled and its authority to generate those records.<sup>76</sup>

In Davin v. DOJ, the Court of Appeals for the Third Circuit in 1995 stated that it "must

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<sup>73</sup> See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 (broadening threshold of Exemption 7 by deleting word "investigatory").

<sup>74</sup> See, e.g., King, 830 F.2d at 229 n.141 (dictum) (holding that the 1986 FOIA amendments did not "qualif[y] the authority of Pratt" test).

<sup>75</sup> 830 F.2d 337, 340 (D.C. Cir. 1987); see also Rochon v. DOJ, No. 88-5075, slip op. at 3 (D.C. Cir. Sept. 14, 1988) (holding that agency must demonstrate nexus between its compilation of records and its law enforcement duties); George, 2007 WL 1450309, at \*6 (stating that agency must demonstrate "nexus between [its] activity [ ] and its law enforcement duties" (quoting Keys, 830 F.2d at 340)); Code v. FBI, No. 95-1892, 1997 WL 150070, at \*4-5 (D.D.C. Mar. 26, 1997) (reiterating requirement for nexus between activities and law enforcement duties); Wickline v. FBI, No. 92-1189, 1994 WL 549756, at \*2 (D.D.C. Sept. 30, 1994) (finding that requirement for "nexus between the agency's activity and its law enforcement duties" was met when FBI compiled requested information through its investigation of series of murders involving organized crime); Abdullah v. FBI, No. 92-0356, slip op. at 3 (D.D.C. Aug. 10, 1992) (holding that "law enforcement agencies such as the FBI must show that the records at issue are related to the enforcement of federal laws and that the law enforcement activity was within the law enforcement duty of that agency"); Beck v. DOJ, No. 87-3356, slip op. at 26-27 (D.D.C. Nov. 7, 1989) (explaining that "defendants must merely establish that the nexus between the agency's activity and its law enforcement duty" is based on "colorable claim of rationality").

<sup>76</sup> See, e.g., Jefferson v. DOJ, 284 F.3d 172, 177-79 (D.C. Cir. 2002) (explaining that whether employee records consist of oversight of performance or satisfy law enforcement threshold depends "on the purpose of the investigation"); Simon v. DOJ, 980 F.2d 782, 783 (D.C. Cir. 1992) (stating that agency must demonstrate nexus between investigation and one of its law enforcement duties (citing Pratt, 673 F.2d at 420-21)); Reiter v. DEA, No. 96-0378, 1997 WL 470108, at \*3 (D.D.C. Aug. 13, 1997) (describing how nexus "requires an agency to establish a connection between the individual under investigation and a possible violation of a federal law"), summary affirmance granted, No. 97-5246 (D.C. Cir. Mar. 3, 1998); Keenan v. DOJ, No. 94-1909, slip op. at 12-15 (D.D.C. Mar. 2, 1997) (ruling that agency had not established required nexus, because it was "unclear as to whether an investigation was conducted at all"); Assassination Archives & Research Ctr. v. DOJ, No. 92-2193, 1993 WL 763547, at \*6-7 (D.D.C. Apr. 29, 1993) (declaring that government must establish that investigation related to enforcement of federal law raises colorable claim "rationally related" to one or more of agency's law enforcement duties).

devise a test" to determine whether an agency had "sustain[ed] its burden of establishing the threshold element of Exemption 7."<sup>77</sup> The court explained that "the preferable test is an adaptation of the two-pronged 'rational nexus' articulated by the D.C. Circuit in Pratt" and that "[u]nder this test, the government must identify a particular individual or incident as the object of the investigation and specify the connection of the individual or incident to a potential violation of law or security risk."<sup>78</sup> Twelve years later, in 2007, the Third Circuit referred to "that portion of the Davin test which refers to the identification of a particular individual or incident as the object of an investigation" as "dicta" and reemphasized that the 1986 FOIA amendments "broadened the applicability of Exemption 7 by expressly removing the requirement that the records be 'investigatory.'"<sup>79</sup> The Court then reiterated that an agency must "demonstrate that the relationship between its authority" and the "activity giving rise to the requested documents . . . supports at least a colorable claim of the relationship's rationality," thus adopting the Keys modification of the nexus test.<sup>80</sup>

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<sup>77</sup> 60 F.3d at 1056.

<sup>78</sup> Id.

<sup>79</sup> Abdelfattah, 488 F.3d at 181, 185 (stating that "we clarify the test, announced in Davin" and "we interpret as dicta" portion pertaining to "investigation"); see also Finkel, 2007 U.S. Dist. LEXIS 47307, at \*30 (explaining that "Third Circuit has recently clarified the test announced in Davin"; while agency is not required to identify particular individual or incident as object of investigation, agency must demonstrate that relationship between its authority to enforce statute or regulation and activity giving rise to requested documents is based upon information sufficient to support at least colorable claim of rationality).

<sup>80</sup> Abdelfattah, 488 F.3d at 185-86.