Exemption 7(E)

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

Techniques and Procedures

Exemption 7(E) is comprised of two distinct clauses. The first clause permits the withholding of "records or information compiled for law enforcement purposes . . . [that] would disclose techniques and procedures for law enforcement investigations or prosecutions."[2] The first clause is separated from the second clause by a comma, and so would not appear to require a showing that disclosure of the technique or procedure could risk circumvention of the law.[3]

The courts, however, have reached different conclusions on this point.[4] Some courts have implicitly or explicitly found that the language concerning risk of circumvention is

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[1] 5 U.S.C. § 552(b)(7)(E) (2006 & Supp. IV 2010); 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, 74 Fed. Reg. 51879 (Oct. 8, 2009); 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) (providing guidance on implementing presumption favoring disclosure).

[2] 5 U.S.C. § 552(b)(7)(E).

[3] See id.

[4] See Riser v. U.S. Dep't of State, No. 09-3273, 2010 U.S. Dist. LEXIS 112743, at *15 (S.D. Tex. Oct. 22, 2010) (noting that courts reach differing results on whether agencies must demonstrate risk of circumvention of law to withhold law enforcement techniques and procedures); Asian Law Caucus v. DHS, No. 08-00842, 2008 WL 5047839, at *3 (N.D. Cal. Nov. 24, 2008) ("The

applicable to the first clause as well as the second clause of Exemption 7(E), thereby requiring a showing that disclosure of a law enforcement technique or procedure could risk circumvention of the law.[5] Many of the cases that have come to this conclusion cite to the PHE, Inc. v. DOJ case that was decided by the Court of Appeals for the District of Columbia Circuit in 1993.[6] Notably, in a recent decision, the District Court for the District of Columbia found that the documents at issue in the PHE case constituted "guidelines" rather than "techniques and procedures," so that the first prong of Exemption 7(E) was not actually at issue in PHE.[7] The D.C. Circuit in 2011 applied a risk of circumvention standard

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Courts that have reviewed Exemption 7(E) disclosures have come out on both sides of [this] issue.").

[5] See, e.g., Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011) (applying, without analysis, "risk of circumvention" standard to law enforcement techniques and procedures); Catledge v. Mueller, 323 F. App'x 464, 466-67 (7th Cir. 2009) (per curiam) (requiring showing of risk of circumvention for techniques and procedures); Davin v. DOJ, 60 F.3d 1043, 1064 (3d Cir. 1995) ("Exemption 7(E) applies to law enforcement records which, if disclosed, would risk circumvention of the law."); PHE, Inc. v. DOJ, 983 F.2d 248, 250 (D.C. Cir. 1993) (stating that under Exemption 7(E), agency "must establish that releasing the withheld materials would risk circumvention of the law"); Elec. Frontier Found. v. DOD, No. 09-05640, 2012 WL 4364532, at *3 (N.D. Cal. Sept. 24, 2012) (requiring that agency satisfy "risk of circumvention" standard without distinguishing between first and second prongs of Exemption 7(E)); Bloomer v. DHS, 870 F. Supp. 2d 358, 369 (D. Vt. 2012) (applying "risk of circumvention" standard to "'internal instructions, codes, and guidance [that] would reveal both a law enforcement technique and an internal investigative practice'" (quoting agency declaration)); Muslim Advocates v. DOJ, 833 F. Supp. 2d 106, 109 (D.D.C. 2012) [hereinafter Muslim Advocates II] (citing prior case in which court required circumvention showing under first clause of Exemption 7(E), and finding that agency made adequate showing of circumvention harm for certain techniques and procedures); Riser, 2010 U.S. Dist LEXIS 112743, at *16 (holding that "risk of circumvention" analysis must be applied to withholdings of law enforcement techniques and procedures); Clemente v. FBI, 741 F. Supp. 2d 64, 83, 88 (D.D.C. 2010) (finding that FBI's declaration inadequately demonstrated that release of withheld law enforcement techniques could result in evasion of law enforcement efforts by investigatory targets); Council on Am.-Islamic Relations, Cal. v. FBI, 749 F. Supp. 2d 1104, 1123 (S.D. Cal. 2010) (stating that agency can withhold techniques or guidelines whose release could risk circumvention of law); Gerstein v. CIA, No. 06-4643, 2010 U.S. Dist. LEXIS 15578, at *25 (N.D. Cal. Feb. 23, 2010) (holding that both clauses of Exemption 7(E) require showing that release could reasonably be expected to risk circumvention of law); Unidad Latina En Accion v. DHS, 253 F.R.D. 44, 49 (D. Conn. 2008) (stating that for Exemption 7(E) to apply, court must find disclosure "could reasonably be expected to risk circumvention of the law"); Duncan v. DEA, No. 06-1032, 2007 U.S. Dist. Lexis 38769, at *20-21 (D.D.C. May 30, 2007) (explaining, in case involving techniques and procedures, that Court must find that disclosure "could reasonably be expected to circumvent the law"); Piper v. DOJ, 294 F. Supp. 2d 16, 30 (D.D.C. 2003) (advising that test for proper withholding under Exemption 7(E) includes finding that release of information could reasonably be expected to risk circumvention of law), aff'd per curiam, 222 F. App'x 1 (D.C. Cir. 2007).

[6] 983 F.2d 248 (D.C. Cir. 1993).

[7] ACLU v. DOJ, 698 F. Supp. 2d 163, 168 n.4 (D.D.C. 2010) (agreeing with defendant agency that PHE did not establish binding precedent regarding applicability of "risk of circumvention" standard to first prong of Exemption 7(E) because records at issue fell under second prong of

to techniques and procedures, but it did so without analysis and cited to a case that had involved guidelines.[8] One recent court, while not specifically stating that "risk of circumvention" must be demonstrated under the first clause of Exemption 7(E), took cognizance of the affirmative showings of this standard made by agencies in the context of the first clause's protection for "techniques and procedures."[9] Courts often combine the clauses or do not distinguish between them, making it unclear whether they would require a showing of a risk of circumvention to withhold law enforcement techniques and procedures under the first clause of the Exemption.[10]

At the same time, there are other courts that have expressly found that no showing of "risk of circumvention" is necessary when protection is sought under the first clause for techniques and procedures.[11] In a case recently decided by the Court of Appeals for the

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Exemption 7(E) (citing PHE, 983 F.2d at 248)), aff'd in part on other grounds & vacated & remanded in part on other grounds, 655 F.3d 1 (D.C. Cir. 2011).

[8] See Blackwell, 646 F.3d at 42 (citing Mayer Brown LLP v. IRS, 562 F.3d 1190, 1193-94 (D.C. Cir. 2009)).

[9] See Skinner v. DOJ, 744 F. Supp. 2d 185, 214 (D.D.C. 2010) [hereinafter Skinner I] (recognizing cases that allowed withholding of law enforcement techniques or procedures where disclosure could lead to circumvention of the law).

[10] See, e.g., Hasbrouck v. U.S. Customs & Border Prot., No. 10-3793, 2012 WL 177563, at *3-4 (N.D. Cal. Jan. 23, 2012) (allowing withholding of certain identifiers used to retrieve personal information from law enforcement databases due to government's showing of plausible circumvention harms, but failing to identify whether first or second clause of Exemption 7(E) was at issue); McCann v. HHS, No. 10-1758, 2011 WL 6251090, at *5 (D.D.C. Dec. 15, 2011) (accepting agency's characterization of document as constituting "procedures, techniques, and guidelines" for investigations of HIPAA violations, agreeing that disclosing withheld material would risk circumvention of law without distinguishing between "guidelines" and "techniques and procedures"); Kortlander v. BLM, 816 F. Supp. 2d 1001, 1014 (D. Mont. 2011) (endorsing withholding of records regarding techniques and procedures associated with undercover operations because disclosure could allow criminals to circumvent such efforts and because such techniques are unknown to public); Sussman v. USMS, 734 F. Supp. 2d 138, 144-45 (D.D.C. 2010) (agreeing with withholding of methods by which U.S. Marshals Service conducts threat assessments due to possibility that subjects of investigation could circumvent "protective arrangements," but referring to such methods as both "guidelines" and "procedures"); Holt v. DOJ, 734 F. Supp. 2d 28, 47 (D.D.C. 2010) (noting that certain cases have allowed withholding of techniques and procedures where agency made showing that disclosure would risk circumvention of law, but failing to take express position on whether such showing is required under first clause of Exemption 7(E)).

[11] See, e.g., Allard K. Lowenstein Int'l Human Rights Project v. DHS, 626 F.3d 678, 681-82 (2d Cir. 2010) [hereinafter Lowenstein II] (finding "no ambiguity" in Exemption 7(E)'s application of risk of circumvention standard to "guidelines" prong, but not "techniques and procedures" prong of Exemption 7(E)); Ahmed v. U.S. Citizenship & Immigration Serv., No. 11-6230, 2013 WL 27697, at *4 (E.D.N.Y. Jan. 2, 2013) (noting that Second Circuit precedent applies risk of circumvention clause to "guidelines," but not "techniques and procedures" clause of Exemption 7(E) (quoting Lowenstein II, 626 F.3d at 681-82)); ACLU of Mich. v. FBI, No. 11-13154, 2012 WL 4513626, at *9 (E.D. Mich. Sept. 30, 2012) (holding specifically that no showing of harm is

Second Circuit, the court stated that the statutory language had "no ambiguity" and that a basic analysis of the text and structure of Exemption 7(E) clearly indicates that the circumvention requirement does not apply to the "techniques and procedures" clause of the Exemption.[12] The court noted that this plain meaning is supported by the legislative history of the modification of the text of Exemption 7(E) at the time of the 1986 FOIA Amendments.[13] Indeed, a number of courts have found that the first clause is designed to provide "categorical" protection for law enforcement techniques and procedures.[14] (For a

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required to withhold law enforcement "techniques and procedures"); McRae v. DOJ, No. 09-2052, 2012 WL 2428281, at *13 (D.D.C. June 27, 2012) (contrasting "techniques and procedures" prong of Exemption 7(E), which provides "categorical" protection, to "guidelines" prong of Exemption 7(E), which requires showing of risk of circumvention); Families for Freedom v. U.S. Customs & Border Prot., No. 10-2705, 2011 WL 6780896, at *5 (S.D.N.Y. Dec. 27, 2011) [hereinafter Families for Freedom II] (noting that because certain information at issue constituted techniques and procedures rather than guidelines any circumvention risks were irrelevant under FOIA); Banks v. DOJ, 813 F. Supp. 2d 132, 146 (D.D.C. 2011) (noting that Exemption 7(E) provides for "categorical" protection of techniques and procedures under first clause of Exemption); ACLU v. DOJ, 698 F. Supp. 2d at 167-68 (holding that "the first prong of Exemption 7(E) permits withholding of information that would disclose techniques and procedures for law enforcement investigations or prosecutions without [demonstrating a] risk of circumvention"); Jordan v. DOJ, No. 07-2303, 2009 WL 2913223, at *16 (D. Colo. Sept. 8, 2009) (adopting magistrate's recommendation) ("The court is not required to make any particular finding of harm or circumvention of the law when evaluating applications of Exemption 7(E) involving law enforcement techniques."); Keys v. DHS, 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (stating that first clause of Exemption 7(E) '"requires no demonstration of harm or balancing of interests'" (quoting Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-00377, 2006 WL 1826185, at *7 (D.D.C. June 30, 2006))); Burke v. DOJ, No. 96-1739, 1999 WL 1032814, at *8 (D.D.C. Sept. 30, 1999) (holding that Exemption 7(E) "does not require the FBI to show that disclosure of [FBI Form FD-515] ratings [of effectiveness of investigative techniques] would cause any particular harm"); Coleman v. FBI, No. 89-2773, slip op. at 25 (D.D.C. Dec. 10, 1991) ("The first clause of this exemption . . . does not require a determination that harm . . . would be caused by disclosure of the records or information within its coverage."), summary affirmance granted, No. 92-5040, 1992 WL 373976, at *1 (D.C. Cir. Dec. 4, 1992) (per curiam).

[12] Lowenstein II, 626 F.3d at 681 (finding that "basic rules of grammar and punctuation dictate that the qualifying phrase ['could reasonably be expected to risk circumvention of the law'] modifies only the immediately antecedent 'guidelines' clause and not the more remote 'techniques and procedures' clause").

[13] Id. at 681-82 (pointing out that amended version of Exemption 7(E) added entire second clause to Exemption including "risk of circumvention" language, clearly indicating that Congress wished to protect guidelines, but only where risk of circumvention existed, while continuing to protect techniques and procedures regardless of risk of circumvention).

[14] See, e.g., ACLU of Mich. v. FBI, 2012 WL 4513626, at *9 (finding that law enforcement techniques and procedures receive "categorical protection" from disclosure if such techniques and procedures are not well known to public); McRae, 2012 WL 2428281, at *13 (applying "categorical" protection for law enforcement techniques and procedures); Citizens for Responsibility & Ethics in Wash. v. DOJ, 870 F. Supp. 2d 70, 85 (D.D.C. 2012) (declaring that "longstanding precedent" supports categorical protection for law enforcement techniques and

further discussion of the second clause of Exemption 7(E), see Exemption 7(E), Guidelines for Law Enforcement Investigations and Prosecutions, below.) Moreover, even when the D.C. Circuit has applied a "risk of circumvention" standard under Exemption 7(E), it has stated more than once that the FOIA sets a "relatively low bar" for withholding under this exemption.[15]

Notwithstanding the lack of agreement with regard to the application of Exemption 7(E)'s "circumvention" requirement, in order for the first clause of the exemption to apply courts have uniformly required that the technique or procedure at issue ordinarily must not be well known to the public.[16] Accordingly, techniques such as "wiretaps,"[17] the "use of post

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procedures); Skinner v. DOJ, 806 F. Supp. 2d 105, 116 (D.D.C. 2011) [hereinafter Skinner II] ("Law enforcement procedures and techniques are afforded categorical protection under Exemption 7(E)"); Durrani v. DOJ, 607 F. Supp. 2d 77, 91 (D.D.C. 2009) ("'Exemption 7(E) affords categorical protection for techniques and procedures used in law enforcement investigations and prosecutions.'" (quoting Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 181 (D.D.C. 2004))); Keys, 510 F. Supp. 2d at 129 (same).

[15] Blackwell, 646 F.3d at 42 (noting that "'[r]ather than requiring a highly specific burden of showing how the law will be circumvented, [E]xemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law'"); accord Skinner v. DOJ, 893 F. Supp. 2d 109, 114 (D.D.C. 2012) [hereinafter Skinner III] (noting that D.C. Circuit precedent sets a "'low bar'" for withholding under Exemption 7(E) (quoting Blackwell)); Strunk v. U.S. Dep't of State, 845 F. Supp. 2d 38, 47 (D.D.C. 2012) (explaining "low standard" for withholding set forth by Blackwell Court); see also Mayer Brown, 562 F.3d 1190 at 1194 (observing that while FOIA requires exemptions to be construed narrowly, Exemption 7(E) constitutes "broad language").

[16] See Rugiero v. DOJ, 257 F.3d 534, 551 (6th Cir. 2001) (stating that first clause of Exemption 7(E) "protects [only] techniques and procedures not already well-known to the public"); Davin, 60 F.3d at 1064 (holding that "[t]his exemption . . . may not be asserted to withhold 'routine techniques and procedures already well known to the public'" (quoting Ferri v. Bell, 645 F.2d 1213, 1224 (3d Cir. 1981))); Rosenfeld v. DOJ, 57 F.3d 803, 815 (9th Cir. 1995) (establishing rule within that circuit that law enforcement techniques must not be well known to public); ACLU of Mich. v. FBI, 2012 WL 4513626, at *9 (noting that categorical withholding is only permissible for unknown techniques and procedures); Frankenberry v. FBI, No. 08-1565, 2012 U.S. Dist. LEXIS 39027, at *68 (M.D. Pa. Mar. 22, 2012) (finding that Exemption 7(E) cannot be used to withhold well-known techniques and procedures); Kubik v. BOP, No. 10-6078, 2011 U.S. Dist. LEXIS 71300, at *33-34 (D. Or. July 1, 2011) (finding that tactics used by BOP personnel during prison riot cannot be withheld because they are known to inmates who were present during riot); Holt, 734 F. Supp. 2d at 48 (protecting law enforcement techniques and procedures in Violent Criminal Apprehension Program file where such techniques and procedures were not well known to public); Unidad Latina En Accion, 253 F.R.D. at 51-52 (finding that "the details, scope and timing" of surveillance techniques such as target apprehension charts are "not necessarily well-known to the public" and thus are properly withheld); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 181 (D.D.C. 2004) (recognizing exemption's protection for techniques "not well-known to the public"); Goldstein v. Office of Indep. Counsel, No. 87-2028, 1999 WL 570862, at *14 (D.D.C. July 29, 1999) (finding that portions of two documents were improperly withheld because they did not contain "a secret or an exceptional investigative technique"; treating age of documents (ten and sixteen years old) as significant factor).

office boxes,"[18] pretext telephone calls,[19] and "planting transponders on aircraft suspected of smuggling"[20] have been denied protection under Exemption 7(E) when courts have found them to be generally known to the public. Furthermore, at least one court has rejected the withholding of records where such records could not fairly be characterized as describing "techniques or procedures."[21]

However, even records pertaining to commonly known procedures have been protected from disclosure when the circumstances of their usefulness are not widely known,[22] or their use "'in concert with other elements of [an] investigation and in their

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[17] Billington v. DOJ, 69 F. Supp. 2d 128, 140 (D.D.C. 1999) (noting that "commonly known law enforcement practices, such as wiretaps . . . are generally not shielded"); Pub. Emps. for Envtl. Responsibility v. EPA, 978 F. Supp. 955, 963 (D. Colo. 1997) (noting that "[i]nterception of wire, oral, and electronic communications are commonly known methods of law enforcement"), appeal dismissed voluntarily, No. 97-1384 (10th Cir. Nov. 25, 1997).

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

[19] See Rosenfeld, 57 F.3d at 815 (rejecting agency's attempt to protect existence of pretext telephone calls because this technique is generally known to public); see also Campbell v. DOJ, No. 89-3016, 1996 WL 554511, at *10 (D.D.C. Sept. 19, 1996) (ordering disclosure of information pertaining to various "pretexts" because information is known to public, requested records do not describe details of techniques, and disclosure would not undermine techniques' effectiveness); Struth v. FBI, 673 F. Supp. 949, 970 (E.D. Wis. 1987) (dismissing pretext as merely "garden variety ruse or misrepresentation"). But see Nolan v. DOJ, No. 89-2035, 1991 WL 36547, at *8 (D. Colo. Mar. 18, 1991) (concluding that disclosure of information surrounding pretext phone call could harm ongoing investigations because similar calls might be used again), aff'd on other grounds, 973 F.2d 843 (10th Cir. 1992).

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

[21] See ACLU of Wash. v. DOJ, No. 09-0642, 2012 U.S. Dist. LEXIS 137204, at *17-19 (W.D. Wash. Sept. 21, 2012) (ordering release of characteristics of individuals suspected of illegal activity as well as internal agency telephone number associated with Terrorist Watch List because such information does not constitute law enforcement techniques or procedures, regardless of harm associated with releasing such information).

[22] See, e.g., ACLU of Mich. v. FBI, 2012 WL 4513626, at *11 (finding that public's knowledge of some aspects of technique or procedure "not dispositive" where manner and circumstances of use not publicly known); Elec. Frontier Found., 2012 WL 4364562, at *5 (rejecting plaintiff's argument that agency could not withhold details of agency's known use of social networking websites to conduct investigations because withheld details were not known to public); Vazquez v. DOJ, 887 F. Supp. 2d 114, 117-18 (D.D.C. 2012) (noting that while public is generally aware of FBI's National Crime Information Center databases, details of their use and whether individuals are mentioned in them is not known to public); Muslim Advocates v. DOJ, 833 F. Supp. 2d 92, 104-05 (D.D.C. 2011) [hereinafter Muslim Advocates I] (finding that while certain aspects of law enforcement techniques at issue are publicly known, because circumstances under which such techniques may be used are non-public, withholding of such information is permissible); Kubik, 2011 U.S. Dist. LEXIS 71300, at *33 (agreeing that withholding is justified where identity of technique is known, but circumstances of use of technique is unknown); Skinner I, 744 F. Supp.

totality directed toward a specific investigative goal constitute a 'technique' which merits protection.'"[23]

Moreover, courts have endorsed the withholding of the details of a wide variety of commonly known procedures -- for example, polygraph examinations,[24] undercover

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2d at 215 (protecting portion of document specifying which of several publicly-known law enforcement techniques were used in particular investigation and FBI's numerical rating of effectiveness of such techniques because future targets could modify their illicit activities to circumvent such techniques); Showing Animals Respect and Kindness v. U.S. Dep't of Interior, 730 F. Supp. 2d 180, 199-200 (D.D.C. 2010) (endorsing withholding of details of wildlife refuge surveillance by agency where general fact of surveillance was well known, but location and timing of surveillance and equipment used for such surveillance was not publicly known); Span v. DOJ, 696 F. Supp. 2d 113, 122 (D.D.C. 2010) (upholding agency's withholding of rating of effectiveness of known law enforcement techniques, noting that agency did not withhold techniques themselves but rather agency's internal assessment of their utility to particular investigation); Jordan, 2009 WL 2913223, at *15-16 (protecting photocopied inmate correspondence to protect details of BOP's well-known inmate mail-monitoring technique, endorsing protection of specific application of known technique where release could diminish effectiveness of such technique); Barnard v. DHS, 598 F. Supp. 2d 1, 23 (D.D.C. 2009) (recognizing that "[t]here is no principle . . . that requires an agency to release all details [of] techniques simply because some aspects are known to the public"); Buffalo Evening News, Inc. v. U.S. Border Patrol, 791 F. Supp. 386, 392 n.5, 393 n.6 (W.D.N.Y. 1992) (finding that Exemption 7(E) protects fact of whether alien's name is listed in INS Lookout Book and method of apprehension of alien).

[23] PHE v. DOJ, No. 90-1461, slip op. at 7 (D.D.C. Jan. 31, 1991) (quoting agency declaration), aff'd in pertinent part, rev'd in part & remanded, 983 F.2d 248 (D.C. Cir. 1993); see, e.g., Asian Law Caucus, 2008 WL 5047839, at *4 (approving protection of database names that relate to watch lists, noting that watch lists may be common knowledge but disclosure of related database names "could . . . facilitate improper access to the database"); Gordon v. FBI, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005) (protecting details of agency's aviation "watch list" program, including records detailing "selection criteria" for watch lists and handling and dissemination of lists, and "addressing perceived problems in security measures"); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d at 181-82 (approving withholding of "firearm specifications" and "radio frequencies" used by agents protecting Secretary of Commerce); Judicial Watch, Inc. v. FBI, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at *29-30 (D.D.C. Apr. 20, 2001) (protecting "identities of two types of records concerning prison inmates which are often checked by FBI special agents," because even identifying records would enable inmates "to alter their activities[,] thus hindering the effectiveness of this technique"); Hassan v. FBI, No. 91-2189, 1992 U.S. Dist. LEXIS 22655, at *13 (D.D.C. July 13, 1992) (protecting common techniques used in conjunction with uncommon technique to achieve unique investigative goal), summary affirmance granted per curiam, No. 92-5318, 1993 U.S. App. LEXIS 12813, at *1 (D.C. Cir. Mar. 17, 1993).

[24] See, e.g., Hale v. DOJ, 973 F.2d 894, 902-03 (10th Cir. 1992) (concluding that disclosure of "polygraph matters" could hamper their effectiveness), cert. granted, vacated & remanded on other grounds, 509 U.S. 918 (1993); Frankenberry, 2012 U.S. Dist. LEXIS 39027, at *73-76 (withholding polygraph procedures that are unknown to public because disclosure could encourage circumvention of law); Piper, 294 F. Supp. 2d at 30 (declaring that polygraph materials were properly withheld because release would reveal sensitive "logistical

operations,[25] surveillance techniques,[26] and bank security measures[27] because disclosure could reduce or even nullify the effectiveness of such procedures.[28] As one court observed,

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

[25] See, e.g., Brown v. FBI, 873 F. Supp. 2d 388, 407-08 (D.D.C. 2012) (withholding Vehicle Identification Numbers of vehicles used in undercover operations because criminals could determine which vehicles were being used by law enforcement agents); Kortlander, 816 F. Supp. 2d at 1014 (protecting means by which law enforcement "plans and executes undercover operations" because disclosure could allow wrongdoers to plan criminal activities to evade detection); LaRouche v. DOJ, No. 90-2753, slip op. at 21 (D.D.C. Nov. 17, 2000) (rejecting plaintiff's argument that information regarding techniques for undercover work must be released, because even "widely known techniques" are entitled to protection when disclosure would negatively affect future investigations); Sinito v. DOJ, No. 87-0814, 2000 U.S. Dist. LEXIS 22504, at *45-48 (D.D.C. July 12, 2000) (holding that disclosure of information about "electronic recording device" (body microphone) "would impair the FBI's ability to conduct future investigations"), summary affirmance granted, 22 F. App'x 1 (D.C. Cir. 2001); Rosenberg v. Freeh, No. 97-0476, slip op. at 17 (D.D.C. May 13, 1998) (protecting "information on the use of false identities for undercover special agents," because disclosure "could significantly reduce [the] future effectiveness of this investigative technique"), summary affirmance granted per curiam, No. 99-5209, 1999 WL 1215961, at *1 (D.C. Cir. Nov. 12, 1999); Foster v. DOJ, 933 F. Supp. 687, 693 (E.D. Mich. 1996) (holding that release of techniques and guidelines used in undercover operations would diminish effectiveness). But see Homick, No. 98-00557, slip op. at 33 (N.D. Cal. Sept. 16, 2004) (ordering release of records generally related to "establishment of a nationwide undercover program utilized by the FBI," because agency's "justification [for withholding] is wholly conclusory").

[26] See, e.g., Soghoian v. DOJ, 885 F. Supp. 2d 62, 75 (D.D.C. 2012) (protecting electronic surveillance techniques because release of information showing what information is collected during surveillance, how it is collected, and when it is not collected could allow criminals to evade detection); Showing Animals Respect and Kindness, 730 F. Supp. 2d at 199-200 (protecting secret details of wildlife refuge surveillance techniques due to risk of circumvention from disclosure of such techniques); Lewis-Bey v. DOJ, 595 F. Supp. 2d 120, 138 (D.D.C. 2009) (protecting details of electronic surveillance techniques, including "'circumstances . . . timing of their use, and the specific location where they were employed'" (quoting agency's declaration)); Boyd v. ATF, 570 F. Supp. 2d 156, 158-59 (D.D.C. 2008) (concluding ATF properly withheld detailed information regarding use of surveillance equipment); Shores, 185 F. Supp. 2d at 85 (protecting details of surveillance operations at federal prison, including information about telephone system); Steinberg v. DOJ, No. 93-2409, slip op. at 15-16 (D.D.C. July 14, 1997)

this is especially true "when the method employed is meant to operate clandestinely, unlike [other techniques] that serve their crime-prevention purpose by operating in the open."[29] In this regard, the use of a "Glomar response"[30] under Exemption 7(E), i.e., where the agency neither confirms nor denies the existence of the requested records, has been approved by

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(approving nondisclosure of precise details of telephone and travel surveillance despite fact that criminals know that such techniques are used generally).

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

[28] See, e.g., Hale, 973 F.2d at 902-03 (concluding that disclosure of use of security devices and their modus operandi could lessen their effectiveness); Bowen v. FDA, 925 F.2d 1225, 1229 (9th Cir. 1991) (deciding that release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); McGehee v. DOJ, 800 F. Supp. 2d 220, 236-37 (D.D.C. 2011) (finding that Exemption 7(E) does not require that techniques be unknown to public where release of non-public details of such techniques would allow circumvention of techniques); Cal-Trim, Inc. v. IRS, 484 F. Supp. 2d 1021, 1027-28 (D. Ariz. 2007) (protecting records related to agency investigation because release could allow individuals under investigation "to craft explanations or defenses based on the [IRS] agent's analysis or enable them the opportunity to disguise or conceal the transactions that are under investigation"); Maydak v. DOJ, 362 F. Supp. 2d 316, 320 (D.D.C. 2005) (holding that agency properly withheld techniques that were "used to detect that plaintiff was sending requests to security agencies while claiming he was a staff member," because disclosure "'would assist an inmate in correlating the use of a particular investigative technique with its corresponding effectiveness'" (quoting agency declaration)); Leveto v. IRS, No. 98-285, 2001 U.S. Dist. LEXIS 5791, at *21 (W.D. Pa. Apr. 10, 2001) (protecting dollar amount budgeted for agency to investigate particular individual because release could allow others to learn agency's monetary limits and undermine such investigations in future). But see Hidalgo v. FBI, 541 F. Supp. 2d 250, 253-254 (D.D.C. 2008) (ordering disclosure of payment information to confidential informants because "the FBI has not shown that there is a 'significant risk' that its future investigations will be circumvented by disclos[ure]" (internal citations omitted)); Gerstein v. DOJ, No. 03-04893, 2005 U.S. Dist. LEXIS 41276, at *38-43 (N.D. Cal. Sept. 30, 2005) (ordering release of compilation detailing each United States Attorney's Office's use of certain delayed-notice warrants, because technique "is a matter of common knowledge" and disclosure would not reduce technique's effectiveness).

[29] Maguire, 2004 WL 1124673, at *3.

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

the courts when disclosing the abstract fact that a particular law enforcement technique was employed would reveal the circumstances under which that technique was used.[31]

Although courts have rejected agency declarations that are too conclusory,[32] which merely recite the statutory standard,[33] or which otherwise fail to demonstrate that the release of records would cause the claimed harms,[34] courts have permitted agencies to

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[31] See Catledge, 323 F. App'x at 467 (affirming agency's refusal to confirm or deny existence of National Security Letters pertaining to requester); Vazquez, 887 F. Supp. 2d at 117-18 (affirming agency's use of Exemption 7(E) Glomar because public confirmation of whether or not individual is listed in one of FBI's National Crime Information Center databases would cause harm meant to be protected by Exemption 7(E)); El Badrawi v. DHS, 596 F. Supp. 2d 389, 396 (D. Conn. 2009) (concluding agency "properly asserted a Glomar response" where "confirming or denying that [an individual] is a subject of interest . . . would cause the very harm FOIA Exemption[] . . . 7(E) [is] designed to prevent").

[32] See, e.g., Strunk, 845 F. Supp. 2d at 47 (holding that even under "low standard" for withholding under Exemption 7(E) established by D.C. Circuit, agency's declaration offered "too little detail" to demonstrate withholdability of records at issue); ACLU v. Office of the Dir. Of Nat'l Intelligence, No. 10-4419, 2011 WL 5563520, at *11 (S.D.N.Y. Nov. 15, 2011) (finding that agency failed to justify withholdings where it offered merely "boilerplate" assertions regarding harms from release); Banks, 813 F. Supp. 2d at 146 (denying agency's motion for summary judgment, noting that although Exemption 7(E) offers "categorical" protection of techniques and procedures, "vague" or "conclusory" descriptions of such withholdings are insufficient); Raher v. BOP, No. 09-526, 2011 WL 2014875, at *9 (D. Or. May 24, 2011) (granting summary judgment to requester because agency's declarant failed to explain why responsive records met standard for withholding under Exemption 7(E)); Clemente, 741 F. Supp. 2d at 88 (noting that declarant cannot merely rely upon "vaguely worded categorical description" of withheld law enforcement techniques, but "must provide evidence . . . of the nature of the techniques in question"); Allard K. Lowenstein Int'l Human Rights Project v. DHS, 603 F. Supp. 2d 354, 360 (D. Conn. 2009) [hereinafter Lowenstein I] (criticizing portions of agency's declaration describing "ongoing law enforcement techniques" as "vague" and "of little, or no, use"; agency "must understand that affidavits and indices must be 'relatively detailed' and nonconclusory to serve their intended purpose") (citation omitted), aff'd on other grounds, 626 F.3d 678 (2d Cir. 2010); Feshbach v. SEC, 5 F. Supp. 2d 774, 786-87 & n.11 (N.D. Cal. 1997) (finding agency's reasons for withholding computer printouts from internal database to be conclusory and insufficient).

[33] See, e.g., Island Film, S.A. v. Dep't of the Treasury, 869 F. Supp. 2d 123, 138 (D.D.C. 2012) (rejecting agency's attempt to withhold database printouts because agency "merely recite[d] the language of the exemption"); Banks v. DOJ, 700 F. Supp. 2d 9, 16 (D.D.C. 2010) (finding agency declaration deficient for relying on restatement of statutory language as sole basis for withholding under Exemption 7(E) and other exemptions); Defenders of Wildlife v. U.S. Border Patrol, 623 F. Supp. 2d 83, 90 (D.D.C. 2009) (same (quoting Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 392-93 (D.C. Cir. 1987))); El Badrawi v. DHS, 583 F. Supp. 2d 285, 313 (D. Conn. 2008) (finding agencies' "Vaughn indices merely restate statutory language and case law, and lack the specificity necessary" for de novo review).

[34] See, e.g., Families for Freedom v. U.S. Customs & Border Prot., 797 F. Supp. 2d 375, 391-94 (S.D.N.Y. 2011) [hereinafter Families for Freedom I] (rejecting agency's withholding of border arrest statistics; finding they were not sufficiently detailed to enable wrongdoers to circumvent border security measures; also rejecting withholding of "charge codes" keyed to legal reason that

describe secret law enforcement techniques in only general terms, where necessary, while withholding the full details.[35] Courts have also recognized that sometimes it is not possible to describe secret law enforcement techniques even in general terms without disclosing the very information sought to be withheld.[36] A court's in camera review of the documents at issue may be required to demonstrate the propriety of nondisclosure in such cases.[37]

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individual was arrested for violation of immigration laws because such codes were already publicly available and could not cause harm); Lowenstein I, 603 F. Supp. 2d at 363 (ordering release of "general outline of the operational steps" because it "would not reveal specific operational techniques"); Judicial Watch, Inc. v. U.S. Secret Serv., 579 F. Supp. 2d 182, 188-89 (D.D.C. 2008) (stating that records pertaining to visitor names, dates of visits, and persons visited would not reveal investigation procedures); Hidalgo, 541 F. Supp. 2d at 253 (expressing skepticism regarding agency's explanation that release of amount of money paid to confidential informant would allow future wrongdoers to circumvent agency's confidential informant program).

[35] See, e.g., Bowen, 925 F.2d at 1229 (ruling that release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); Brown, 873 F. Supp. 2d at 407 (endorsing practice of submitting documents for in camera review where even general description of records would reveal secret law enforcement techniques or procedures); Judicial Watch, Inc. v. Dep't of State, 650 F. Supp. 2d 28, 34 n.6 (D.D.C. 2009) (allowing agency to describe techniques and procedures in general terms where greater specificity would allow investigatory targets to thwart investigation).

[36] See Boyd v. ATF, No. 05-1096, 2006 WL 2844912, at *9 (D.D.C. Sept. 29, 2006) (stating that "[i]n some cases, it is not possible to describe secret law enforcement techniques without disclosing the very information withheld"); McQueen v. United States, 264 F. Supp. 2d 502, 521 (S.D. Tex. 2003) (finding that requested documents detail how agent detected tax evaders and that "these details, by themselves, would reveal law enforcement techniques and procedures" and thus were properly withheld), summary affirmance granted on other grounds, 100 F. App'x 964 (5th Cir. 2004); Smith v. ATF, 977 F. Supp. 496, 501 (D.D.C. 1997) (noting that some secret law enforcement techniques cannot be described "even in general terms" without disclosing the technique itself).

[37] See, e.g., Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994) (concluding upon in camera review that investigative techniques were properly withheld); Asian Law Caucus, 2008 WL 5047839, at *5 (concluding after in camera review that agency properly withheld "specific topics for questioning" of persons attempting to enter United States and agreeing release "could . . . risk circumvention of the law"); El Badrawi, 583 F. Supp. 2d at 310-20 (ordering in camera review for all Exemption 7(E) claims made by defendants due to deficiencies in declarations), subsequent opinion, 596 F. Supp. 2d at 397-99 (following in camera review, ordering partial releases of portions of records previously withheld under Exemption 7(E), approving withholdings of other portions, but simultaneously ordering supplemental Vaughn Indices for those portions properly withheld to correct deficiencies noted in previous opinion); Sussman v. DOJ, No. 03-3618, 2008 WL 2946006, at *10 (E.D.N.Y. July 29, 2008) (ordering in camera review where agency asserted that revealing name of investigative technique would allow circumvention of investigative efforts); ACLU v. FBI, No. 05-1004, 2006 WL 2303103, at *1 (D.D.C. Aug. 9, 2006) (granting summary judgment to agency after "conduct[ing] an in camera, ex parte review of the disputed documents" including certain documents submitted under 7(E)).

Because Exemption 7(E) covers "techniques and procedures for law enforcement investigations or prosecutions,"[38] it has been found to authorize the withholding of a law enforcement "technique" or a law enforcement "procedure," wherever it is used "for law enforcement investigations or prosecutions" generally, whether civil or criminal.[39] Finally, courts have construed Exemption 7(E) to encompass the withholding of a wide range of techniques and procedures, including immigration enforcement techniques,[40] information regarding certain databases used for law enforcement purposes,[41] surveillance tactics and

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[38] 5 U.S.C. § 552(b)(7)(E).

[39] See Nowak v. IRS, 210 F.3d 384 (9th Cir. 2000) (unpublished table decision) (affirming district court's finding that disclosure of redacted information "'would significantly hamper the defendant's tax collection and law enforcement functions, and facilitate taxpayer circumvention of federal Internal Revenue laws'"); Mosby v. U.S. Marshals Serv., No. 04-2083, 2005 WL 3273974, at *5 (D.D.C. Sept. 1, 2005) (finding that "administrative and operational guidelines and procedures" were properly withheld, as contents "would provide assistance to persons threatening individuals and property protected by the USMS and allow fugitives to avoid apprehension"); Gordon, 388 F. Supp. 2d at 1036 (rejecting the plaintiff's "narrow[]" reading of the "law enforcement purpose" requirement of Exemption 7(E), and noting that it "is not limited to documents created in connection with a criminal investigation"); Judicial Watch, Inc. v. FBI, 2001 U.S. Dist. LEXIS 25732, at *27 (finding the term "'law enforcement purpose' [in context of Exemption 7(E)] is not limited to criminal investigations . . . in its scope" (quoting Mittleman v. OPM, 76 F.3d 1240, 1243 (D.C. Cir. 1996))); cf. Cozen v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 782 (E.D. Pa. 2008) (noting that in context of Exemption 7, protection for "law enforcement" records or information "is not limited to documents involving criminal proceedings").

[40] Lowenstein II, 626 F.3d at 680-82 (finding that criteria used to rank priority of immigration enforcement cases constitutes techniques and procedures rather than guidelines, further finding that law does not require showing of circumvention of law for such techniques and procedures); Ahmed, 2013 WL 27697, at *4-5 (protecting techniques for vetting of naturalization applicants who might pose national security concerns); Families for Freedom II, 2011 WL 6780896, at *5 (withholding operational details of train inspections made by Border Patrol agents); Tran v. DOJ, No. 01-0238, 2001 WL 1692570, at *3 (D.D.C. Nov. 20, 2001) (concluding that agency form -- used when agencies share information from immigration records -- was properly withheld because it would reveal law enforcement techniques).

[41] See Blackwell, 646 F.3d at 42 (affirming withholding of Choicepoint reports made to FBI because particular method by which data is "searched, organized, and reported" to FBI is not publicly known, and release of such reports could allow criminals to develop countermeasures to technique); Vazquez, 887 F. Supp. 2d at 117-18 (protecting FBI's National Crime Information Center transaction logs because release would alert wrongdoers as to whether and by whom their illegal activities are under investigation); Hasbrouck, 2012 WL 177563, at *4 (protecting certain identifiers used to access personal information in law enforcement databases to prevent disclosure of whether "CBP also tracks one or more non-obvious identifier[s], or for it to admit that it cannot retrieve information except by obvious identifiers"); Adionser v. DOJ, 811 F. Supp. 2d 284, 300 (D.D.C. 2011) (protecting techniques and procedures concerning "the identification and contents of [certain] FBI databases"); Asian Law Caucus, 2008 WL 5047839, at *4 (approving protection of database names that relate to watch lists); Cozen, 570 F. Supp. 2d at 786 (ruling that Exemption 7(E) protects information regarding commercial "databases and information services withheld").

methods,[42] portions of a law enforcement agency's investigations and operations manual,[43] funds expended in furtherance of an investigation,[44] law enforcement codes,[45] and

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[42] See, e.g., ACLU of Mich. v. FBI, 2012 WL 4513626, at *10-11 (protecting devices, methods, and tools used for surveillance and monitoring of illegal activity because disclosure of such techniques would allow criminals to develop countermeasures to nullify effectiveness of law enforcement investigations); Soghoian, 885 F. Supp. 2d at 75 (protecting electronic surveillance techniques and guidance provided to investigators on use of such techniques because release could allow criminals to circumvent law enforcement efforts); Frankenberry, 2012 U.S. Dist. LEXIS 39027, at *71 (accepting FBI's explanation that disclosure of precise placement of recording devices used by FBI to monitor conversations would allow circumvention of technique); Skinner II, 806 F. Supp. 2d at 115-16 (protecting "subject tracking" information); ACLU v. DOJ, 698 F. Supp. 2d at 167 (protecting templates used by assistant U.S. attorneys to draft "applications, orders, and declarations to obtain authorization for cell phone monitoring" because release of such information would reveal details about types of information that such cell phone records can capture, limitations of such techniques, and uses of records that are not well known to public); Kurdykov v. U.S. Coast Guard, 657 F. Supp. 2d 248, 257 (D.D.C. 2009) (upholding protection of maritime counter-narcotics surveillance techniques and procedures); Boyd, 570 F. Supp. 2d at 158-59 (withholding details of "consensual monitoring" surveillance); Carbe v. ATF, No. 03-1658, 2004 WL 2051359, at *11 (D.D.C. Aug. 12, 2004) (finding that "electronic surveillance request forms and asset forfeiture reimbursement forms . . . [are] [c]ertainly . . . protected from release by Exemption 7(E)," as disclosure "might reveal the nature of electronic equipment and the sequence of its uses").

[43] See, e.g., ACLU of N.J. v. DOJ, No. 11-2553, 2012 WL 4660515, at *10 (D.N.J. Oct. 2, 2012) (unpublished disposition) (withholding portions of FBI's Domestic Investigations and Operations Guide (DIOG) that list certain techniques, procedures and events that trigger FBI's use of such techniques and procedures, because disclosure of such records could allow bad actors to circumvent FBI's efforts); ACLU of Mich. v. FBI, 2012 WL 4513626, at *10 (withholding sections of FBI's DIOG that would, if released, allow wrongdoers to undermine FBI's law enforcement activities); Elec. Frontier Found., 2012 WL 4364532, at *4-5 (protecting portions of law enforcement handbook containing details of agency's use of internet and social networking websites for investigations); Muslim Advocates II, 833 F. Supp. 2d at 109 (protecting portions of FBI's DIOG that would reveal circumstances under which investigations are or are not approved, and which particular investigative activities are or are not allowed in context of particular investigations, because such information could allow wrongdoers to alter behavior to avoid detection by law enforcement officers); Muslim Advocates I, 833 F. Supp. 2d at 104-05 (endorsing withholding of Chapters five and ten of FBI's DIOG).

[44] See, e.g., Frankenberry, 2012 U.S. Dist. LEXIS 39027, at *71 (protecting expenditures made by law enforcement authorities during investigation); Concepcion v. FBI, 606 F. Supp. 2d 14, 43-44 (D.D.C. 2009) (withholding amount of money used to purchase evidence). But see Hidalgo, 541 F. Supp. 2d at 253-254 (ordering disclosure of information regarding payments to confidential informants because agency failed to show risk of circumvention from disclosure).

[45] See, e.g., Skinner III, 893 F. Supp. 2d at 114 (protecting TECS codes because release could allow individual to access database or otherwise circumvent law); Miller v. DOJ, 872 F. Supp. 2d 12, 28-29 (D.D.C. 2012) (agreeing with withholding of TECS and NADDIS numbers maintained by DEA because release could reveal law enforcement techniques or otherwise lead to legal circumvention); McRae, 2012 WL 2428281, at *13-14 (withholding computer codes from TECS,

techniques used to uncover tax fraud.[46] Courts have also upheld the withholding of techniques and procedures pertaining to the forensic analysis of firearms[47] and computers,[48] details of the status of investigatory efforts,[49] search and arrest warrant execution techniques,[50] suspect threat detection techniques,[51] law enforcement checkpoints,[52]

National Criminal Information Center, and local law enforcement databases); Bloomer, 870 F. Supp. 2d at 369 (withholding law enforcement TECS database codes); Abdelfattah v. ICE, 851 F. Supp. 2d 141, 145 (D.D.C. 2012) (protecting FBI "program codes").

[46] See Carp v. IRS, No. 00-5992, 2002 WL 373448, at *6 (D.N.J. Jan. 28, 2002) (concluding that disclosure would "expose[] specific, non-routine investigative techniques used by the IRS to uncover tax fraud"); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 17 (D.D.C. 2001) (protecting agency summary of tax-avoidance scheme, "including identification of vulnerabilities" in IRS operations), rev'd & remanded on other grounds, 294 F.3d 71 (D.C. Cir. 2002); Peyton v. Reno, No. 98-1457, 2000 WL 141282, at *1 (D.D.C. Jan. 6, 2000) (protecting Discriminant Function scores used to select tax returns for evaluation); Wishart v. Comm'r, No. 97-20614, 1998 WL 667638, at *6 (N.D. Cal. Aug. 6, 1998) (protecting Discriminant Function scores to avoid possibility that "taxpayers could manipulate" return information to avoid IRS audits), aff'd, 199 F.3d 1334 (9th Cir. 1999) (unpublished table decision).

[47] See Skinner I, 744 F. Supp. 2d at 214-15 (protecting details of firearms toolmark forensic techniques to avoid disclosure of means by which law enforcement officers identify such toolmarks).

[48] See Blackwell, 646 F.3d at 42 (protecting techniques of forensic examinations of computers conducted by law enforcement personnel because release would expose "computer forensic vulnerabilities" to wrongdoers).

[49] See, e.g., Skinner II, 806 F. Supp. 2d at 115-16 (withholding "all-points bulletin" regarding ongoing criminal law enforcement operation); Council on Am.-Islamic Relations, Cal., 749 F. Supp. 2d at 1116, 1123 (finding that disclosure of bases for investigations, dates of initiation of investigations, and whether investigations are "preliminary" or "full field" would allow targets to avoid detection and circumvent law, and would impede FBI's investigative effectiveness).

[50] See Skinner I, 744 F. Supp. 2d at 214-15 (protecting details of search and arrest warrant techniques where disclosure would allow investigatory subjects to identify circumstances under which search warrants are executed).

[51] See ACLU of N.J. v. DOJ, 2012 WL 4660515, at *10 (protecting criteria for identification and evaluation of suspected terrorism groups because release of such information would allow targets to alter behavior to "avoid detection and to exploit gaps in FBI intelligence"); Elec. Frontier Found., 2012 WL 4364532, at *10 (withholding search terms used to detect online threats to Secret Service protectees); ACLU of Wash., 2012 U.S. Dist. LEXIS 137204, at *5-6 (protecting "events, behaviors, and objects" to be considered in detection of terrorist activity because even if some indicators are publicly known, disclosure of all such factors would allow wrongdoers to adjust behavior to avoid detection); Skinner II, 806 F. Supp. 2d at 115-16 (agreeing with agency's withholding of criminal profile describing habits and threat level of subject of investigation); Sussman, 734 F. Supp. 2d at 144-45 (withholding information about methods used by law enforcement officials to conduct criminal threat assessments); Holt, 734 F. Supp. 2d at 48 (ruling that agency properly withheld Violent Criminal Apprehension Program data used to conduct behavioral analysis of violent criminals).

selection criteria and fraud indicators associated with applications for employment or government benefits,[53] and a list showing which select techniques and procedures were used by the FBI in a given case, along with the FBI's internal rating of the effectiveness of each of those techniques.[54]

Guidelines for Law Enforcement Investigations and Prosecutions

The second clause of Exemption 7(E) protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law."[55] This clause of Exemption 7(E) has a harm standard built into it.[56] It previously had considerable overlap with the formerly recognized "high 2" prong of Exemption 2,[57] but "high 2" no longer exists as a distinct standard for withholding due to

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[52] Skinner II, 806 F. Supp. 2d at 115-16 (protecting information regarding actions to be taken by law enforcement personnel stationed at checkpoints if subjects of investigation are encountered); cf. Families for Freedom I, 797 F. Supp. 2d at 391 (allowing withholding of station-level, but not regional arrest data for Customs border entry checkpoints despite simultaneously holding that such data does not constitute "techniques or procedures" or "guidelines").

[53] See Morley v. CIA, 508 F.3d 1108, 1129 (D.C. Cir. 2007) (affirming CIA's invocation of Exemption 7(E) to prevent release of techniques and procedures pertaining to background investigations conducted to determine suitability for security clearances); Am. Immigration Lawyers Ass'n v. DHS, 852 F. Supp. 2d 66, 77-80 (D.D.C. 2012) (protecting fraud indicators used to review H-1B visa applications); Techserve Alliance v. Napolitano, 803 F. Supp. 2d 16, 29 (D.D.C. 2011) (allowing withholding of "selection criteria, fraud indicators, and investigative process" . . . "use[d] in fraud investigations during the H-1B visa process").

[54] See, e.g., Frankenberry, 2012 U.S. Dist. LEXIS 39027, at *68-69 (protecting portions of FBI FD-515 form used to rate effectiveness of investigative techniques); Skinner I, 744 F. Supp. 2d at 214-15 (noting that release of such information could allow criminal targets to change their modus operandi to avoid detection); Tunchez v. DOJ, 715 F. Supp. 2d 49, 55-56 (D.D.C. 2010) (same), aff'd per curiam, No. 10-5228, 2011 WL 1113423 (D.C. Cir. Mar. 14, 2011); Span, 696 F. Supp. 2d at 122 (same); Sellers v. DOJ, 684 F. Supp. 2d 149, 164-65 (D.D.C. 2010) (noting that multiple cases have upheld withholding of such records).

[55] 5 U.S.C. § 552(b)(7)(E) (2006 & Supp. IV 2010).

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

[57] See, e.g., Unidad Latina En Accion v. DHS, 253 F.R.D. 44, 50 (D. Conn. 2008) (holding that "[a]ny computer coding or web site information . . . is covered by both Exemptions (b)(2) and (b)(7)(E), since the information is internal to DHS and would disclose information that might significantly risk circumvention of the law"); Hidalgo v. FBI, 541 F. Supp. 2d 250, 253 (D.D.C. 2008) (stating that "the standard under Exemptions 2 and 7(E) is substantially the same"); Gordon v. FBI, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005) (applying Exemptions 2 and 7(E) to same information); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 965 (C.D. Cal. 2003) (concluding that agency properly applied Exemption 2 for same reasons

the Supreme Court's decision in Milner v. Department of the Navy.[58] (See discussion under Exemption 2, above). Notably, a recent decision in the Court of Appeals for the Tenth Circuit relied on Milner in stating that Exemption 7(E) allows for withholding essentially the same types of information as the old "high 2" except that Exemption 7(E) also requires that the records be compiled for law enforcement purposes.[59]

The second clause of Exemption 7(E) is available to protect any "law enforcement guideline" when it is determined that its disclosure "could reasonably be expected to risk circumvention of the law."[60] A recent decision by the Court of Appeals for the Second Circuit succinctly distinguished between "guidelines" in the second clause of Exemption 7(E) and "techniques and procedures" in the first clause, by noting that the former term refers to the means by which agencies allocate resources for law enforcement investigations (whether to investigate) while the latter term refers to the means by which agencies conduct investigations (how to investigate).[61]

With regard to the proper interpretation of the meaning of the phrase "could reasonably be expected to risk circumvention of the law" the Court of Appeals for the District of Columbia Circuit has held that the government need not prove that circumvention is a necessary result of disclosure, but merely that the disclosure could "risk" a circumvention harm.[62] The D.C. Circuit found that the agency need not show that there is

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that it applied Exemption 7(E)); Voinche v. FBI, 940 F. Supp. 323, 329, 332 (D.D.C. 1996) (approving nondisclosure of information "relating to the security of the Supreme Court building and the security procedures for Supreme Court Justices" on basis of both Exemptions 2 and 7(E)).

[58] 131 S. Ct. 1259, 1265 (2011) (ruling that Exemption 2 protection is limited by its statutory text to "personnel" rules and practices and contains no distinct "high 2" component to protect against risk of circumvention of the law).

[59] Jordan v. DOJ, 668 F.3d 1188, 1200 (10th Cir. 2011) (finding that circumvention standard is same for both the old "high 2" and Exemption 7(E) and any law enforcement records covered by Exemption 7(E) would have been "predominantly internal" under prior "high 2" standard (citing Milner, 131 S. Ct. at 1268)).

[60] 5 U.S.C. § 552(b)(7)(E).

[61] See Allard K. Lowenstein Int'l Human Rights Project v. DHS, 626 F.3d 678, 682 (2d Cir. 2010) (noting as example that if tax investigators are told only to bring charges against those who evade more than a certain enumerated dollar amount in taxes, such guidance constitutes guidelines, while if investigators are given instructions on manner in which to investigate those suspected of tax evasion, such guidance constitutes techniques and procedures); see also Families for Freedom v. U.S. Customs & Border Prot., No. 10-2705, 2011 WL 6780896, at *5 (S.D.N.Y. Dec. 27, 2011) (relying on definition set forth in Allard to state that techniques and procedures constitute how, where, and when law enforcement methods are carried out, while policy and budgetary decisions about law enforcement staffing patterns arguably constitute "guidelines" under Exemption 7(E)).

[62] Mayer Brown, 562 F.3d at 1192-93.

a certainty that a risk is present; it is enough if there is an "expectation" of a risk of circumvention.[63] Even the expectation of risk need not be certain, the court held, as the statute merely requires that the risk "could reasonably" be expected.[64] The D.C. Circuit opined that this standard "is written in broad and general terms" to ensure the necessary deterrence of those who would otherwise attempt to evade the law.[65]

Courts have found protection for various types of law enforcement guidelines "that pertain[] to the prosecution or investigative stage of a law enforcement matter,"[66] including law enforcement manuals,[67] policy guidance documents,[68] settlement guidelines,[69]

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[63] Id.

[64] Id.; see also Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011) (same (quoting Mayer Brown)); McRae v. DOJ, No. 09-2052, 2012 WL 2428281, at *14 (D.D.C. June 27, 2012) (same).

[65] Mayer Brown, 562 F.3d at 1192-93; see also Strunk v. Dep't of State, 845 F. Supp. 2d 38, 47 (D.D.C. 2012) (observing that Mayer Brown set forth a "low standard" for withholding records pursuant to Exemption 7(E)).

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

[67] See, e.g., PHE, Inc. v. DOJ, 983 F.2d 248, 251 (D.C. Cir. 1993) (approving withholding of portion of FBI manual containing investigation guidance); ACLU of Mich. v. FBI, No. 11-13154, 2012 WL 4513626, at *11 (E.D. Mich. Sept. 30, 2012) (protecting hypotheticals used to train investigators to recognize circumstances that would trigger an investigation, circumstances under and extent to which informants are allowed to participate in activities of third parties, and approval limitations on use of certain technique or procedure by law enforcement personnel); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-00377, 2006 WL 1826185, at *7 (D.D.C. June 30, 2006) (protecting many portions of manual pertaining to seized property, including details of "the transport, seizure, storage, testing, physical security, evaluation, maintenance, and cataloguing of, as well as access to, seized property"); Guerrero v. DEA, No. 93-2006, slip op. at 14-15 (D. Ariz. Feb. 22, 1996) (approving nondisclosure of portions of Special Agents Manual); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993) (concluding that parts of agency Law Enforcement Manual concerning "procedures for handling applications for tax exemption and examinations of Scientology entities" and memorandum regarding application of such procedures were properly withheld).

[68] See Vento v. IRS, No. 08-159, 2010 WL 1375279, at *8 (D.V.I. Mar. 31, 2010) (endorsing withholding of DOJ policy memorandum to IRS employees regarding when and how they should process certain law enforcement summons); Asian Law Caucus v. DHS, No. 08-00842, 2008 WL 5047839, at *5 (N.D. Cal. Nov. 24, 2008) (protecting interim policy guidance for border searches and examinations even where guidance was superseded by later version because "the newer version does not render the [earlier] policy valueless").

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

monographs,[70] and emergency plans,[71] as well as other types of law enforcement guidelines.[72] One court has recently upheld protection for computer codes, not because the codes themselves constituted law enforcement guidelines, but because wrongdoers could use such codes to illegally gain access to sensitive law enforcement databases that contain withholdable law enforcement guidelines.[73] Courts have denied protection, however, when the agency has failed to demonstrate that circumvention of the law would occur[74] or where

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

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

[72] See, e.g., Jordan, 668 F.3d at 1201 (protecting guidelines to staff for handling dangerous inmate because public release of guidelines could allow inmate to circumvent such guidelines); Sussman v. U.S. Marshall Serv., No. 03-610, 2005 WL 3213912, at *9 (D.D.C. Oct. 13, 2005) (protecting "guidelines and procedures utilized in investigation [of] threats against federal court employees," because release "could create a risk of circumvention of the law"), aff'd in pertinent part, vacated in part & remanded in part on other grounds, 494 F.3d 1106 (D.C. Cir. 2007); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 17 (D.D.C. 2001) (agreeing with agency that the Technical Assistance documents are law enforcement guidelines and determining that disclosure of agency summary of tax-avoidance scheme, "including identification of vulnerabilities" in IRS operations, could risk circumvention of law), rev'd & remanded on other grounds, 294 F.3d 71 (D.C. Cir. 2002).

[73] See Strunk v. U.S. Dep't of State, No. 08-2234, 2012 WL 5875653, at *4-5 (D.D.C. Nov. 21, 2012) (agreeing that TECS database codes should be withheld to prevent unauthorized access to databases used by U.S. Customs and Border Protection, which contain information such as guidelines followed by Customs officials to target and inspect suspicious international travelers).

[74] See, e.g., Families for Freedom, 2011 WL 6780896, at *5 (ordering release of portions of Amtrak meeting minutes, past Border Patrol staffing patterns, and transit node definitions because such records are not "techniques and procedures," and to extent such records constitute "guidelines" their release would not risk legal circumvention); ACLU of Wash. v. DOJ, No. 09-0642, 2011 WL 887731, at *7-9 (W.D. Wash. Mar. 10, 2011) (disagreeing with agency's withholding of variety of watch-list related material including watch-listing procedures, criteria for watch list inclusion, location of database information, procedures to prevent individuals from discovery of watch list status, watch list field codes, and guidelines for handling individuals determined to be on watch list, noting that much of this information was already public and agency failed to adequately explain harm from releasing remainder of withheld information), reconsideration granted in part on other grounds, 2011 WL 1900140, (W.D. Wash. May 19, 2011); Unidad Latina En Accion, 253 F.R.D. at 59 (ordering disclosure of queries contained in agency emails, finding that disclosure would not risk circumvention of law); Gordon v. FBI, 388 F. Supp. 2d at 1036-37 (holding that agency did not adequately explain how release of "the legal basis for detaining someone whose name appears on a watch list . . . could be used to circumvent agency regulations").

the information at issue was not related to law enforcement investigations or prosecutions.[75]

Similarly, courts have disapproved agency declarations under Exemption 7(E)'s second clause when they provide conclusory or otherwise insufficient justifications for the withholdings.[76] Additionally, courts have found it necessary at times to conduct in camera review of the withheld documents to establish the appropriateness of the agency's withholding under the second clause of Exemption 7(E).[77]

Homeland Security Records and Exemption 7(E)

Courts have regularly applied Exemption 7(E) to protect information relating to homeland security under both prongs of Exemption 7(E), including:

(1) guidelines for response to terrorist attacks;[78]

(2) records pertaining to terrorism "watch lists";[79]

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

[76] See, e.g., PHE, 983 F.2d at 252-53 (describing agency's affidavit as "too vague and conclusory to support summary judgment"; agency's submission should have included "more precise descriptions of the nature of the redacted material" from agency's enforcement manual); Hussain v. DHS, 674 F. Supp. 2d 260, 271 (D.D.C. 2009) (explaining that withholdings cannot be upheld under Exemption 7(E) where agency's Vaughn index merely recites statutory language and fails to explain harm from release); Feshbach v. SEC, 5 F. Supp. 2d 774, 786-87 & n.11 (N.D. Cal. 1997) (finding agency's reasons for withholding checklists and selection criteria used "to determine what type of review to be given . . . documents filed with the [agency]" conclusory and insufficient).

[77] See, e.g., PHE, 983 F. 2d at 252 (stating that "in camera review is appropriate when agency affidavits are not sufficiently detailed to permit meaningful assessment of the exemption claims"); Mayer, Brown, Rowe & Maw LLP v. IRS, No. 04-2187, 2006 WL 2425523, at *8 (D.D.C. Aug. 21, 2006) (directing agency to submit "a representative sample of the [withheld] records for in camera review" because agency's declaration did not have sufficient detail to permit ruling on applicability of Exemption 7(E)), subsequent opinion, No. 04-2187, slip op. at 2-3 (D.D.C. Oct. 24, 2006) (concluding after in camera review that Exemption 7(E) was properly applied).

[78] See Ctr. for Nat'l Sec. Studies v. INS, No. 87-2068, 1990 WL 236133, at *5-6 (D.D.C. Dec. 19, 1990) (according Exemption 7(E) protection to final contingency plan in event of attack on United States, to guidelines for response to terrorist attacks, and to contingency plans for immigration emergencies).

[79] El Badrawi v. DHS, 596 F. Supp. 2d 389, 396 (D. Conn. 2009) (agreeing that confirming or denying individual's presence in FBI's Violent Gang and Terrorist Organization file database "would cause the very harm FOIA . . . [Exemption] 7(E) [is] designed to protect"); Asian Law

(3) terrorist "trend" information that would reveal travel plans by regional area;[80]

(3) records confirming whether an individual is the subject of a national security letter;[81]

(4) inspection and arrest statistics of border entry points;[82]

(5) analyses of security procedures;[83]

(6) records pertaining to domestic terrorism investigations;[84]

Caucus v. DHS, No. 08-00842, 2008 WL 5047839, at *4 (N.D. Cal. Nov. 24, 2008) (withholding detailed information regarding watch lists, and noting that "knowing about the general existence of government watchlists does not make further detailed information about the watchlists routine and generally known"); Gordon v. FBI, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005) (protecting details of agency's aviation "watch list" program -- including records detailing "selection criteria" for lists and handling and dissemination of lists, and "addressing perceived problems in security measures"). But see ACLU of Wash. v. DOJ, No. 09-0642, 2011 WL 887731, at *7-9 (W.D. Wash. Mar. 10, 2011) (rejecting agency's withholding of variety of watch-list related material in absence of sufficient showing of harm), reconsideration granted in part on other grounds, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

[80] ACLU of Wash., 2011 WL 887731, at *9 (crediting agency's explanation that disclosure of terrorist travel plans by geographic area could tip off terrorists about government's knowledge of their travel plans, allowing terrorists to take countermeasures against investigators).

[81] See Catledge v. Mueller, 323 F. App'x 464, 467 (7th Cir. 2009) (per curiam) (affirming agency's refusal to confirm or deny whether plaintiff was "a subject of the [national security] letters" because it "would reveal the circumstances under which the FBI has used this technique").

[82] See Families for Freedom v. U.S. Customs & Border Prot., 797 F. Supp. 2d 375, 391 (S.D.N.Y. 2011) (allowing withholding of station-level, but not regional arrest data for Customs border entry checkpoints because station-level data could tell wrongdoers about relative activity levels and arrest success rates between stations); Coastal Delivery Corp. v. U.S. Customs Serv., 272 F. Supp. 2d 958, 963-65 (C.D. Cal. 2003) (protecting number of examinations at particular seaport because information could be used in conjunction with other publicly available information to discern rates of inspection at that port, thereby allowing for identification of "vulnerable ports" and target selection).

[83] See, e.g., Voinche v. FBI, 940 F. Supp. 323, 329, 332 (D.D.C. 1996) (approving nondisclosure of information "relating to the security of the Supreme Court building and the security procedures for Supreme Court Justices" on basis of both former version of Exemption 2 and Exemption 7(E)); cf. U.S. News & World Report v. Dep't of the Treasury, No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at *8 (D.D.C. Mar. 26, 1986) (upholding protection of Secret Service's contract specifications for President's armored limousine).

[84] See Allard K. Lowenstein Int'l Human Rights Project v. DHS, 603 F. Supp. 2d 354, 364 (D. Conn. 2009) (finding "specific reference to the database used as a lookout was properly withheld under Exemption 7(E) since this information was compiled for law enforcement purposes, and if

(7) financial crimes research analysis;[85] and

(8) U.S. Customs Service traveler examination criteria and techniques.[86]

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disclosed, could reasonably be expected to risk circumvention of the law"), aff'd on other grounds, 626 F.3d 678 (2d Cir. 2010); ACLU v. FBI, 429 F. Supp. 2d 179, 194 (D.D.C. 2006) (holding that agency properly withheld certain records, release of which "could allow individuals 'to develop countermeasures' that could defeat the effectiveness of the agency's domestic terrorism investigations" (quoting agency declaration)).

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

[86] See Families for Freedom, 2011 WL 6780896, at *5 (protecting operational details of train passenger inspections by Customs agents); Barnard v. DHS, 598 F. Supp. 2d 1, 22 (D.D.C. 2009) (protecting "examination and inspection procedures," including instructions for processing international travelers); Asian Law Caucus, 2008 WL 5047839, at *5 (withholding specific topics for questioning travelers attempting to enter United States); Hammes v. U.S. Customs Serv., No. 94-4868, 1994 WL 693717, at *1 (S.D.N.Y. Dec. 9, 1994) (protecting Customs Service criteria used to determine which passengers to stop and examine).