Exemption 7(A)

Introduction

The first subpart of Exemption 7 of the Freedom of Information Act, Exemption 7(A), authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."[1] The Freedom of Information Reform Act of 1986 lessened the showing of harm originally required under this exemption from a demonstration that release "would interfere with" to a demonstration that release "could reasonably be expected to interfere with" enforcement proceedings.[2] Courts have recognized repeatedly that the change in the language for this exemption effectively broadened its protection.[3]

Two-Part Test

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[1] 5 U.S.C. § 552(b)(7)(A) (2018).

[2] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 (1986).

[3] See Manna v. DOJ, 51 F.3d 1158, 1164 n.5 (3d Cir. 1995) (stating that Congress amended statute to "relax significantly the standard for demonstrating interference"); Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 311 n.18 (D.C. Cir. 1988) (stating that lower court's reliance on pre-amendment version of Exemption 7(A) "does not impact upon [its] disposition" as it "required EPA to meet a higher standard than FOIA now demands"); Wright v. OSHA, 822 F.2d 642, 647 (7th Cir. 1987) (explaining that amended language creates broad protection); Curran v. DOJ, 813 F.2d 473, 474 n.1 (1st Cir. 1987) ("[T]he drift of the changes is to ease – rather than to increase – the government's burden in respect to Exemption 7(A)."); Citizens for Resp. & Ethics in Wash. v. DOJ, 658 F. Supp. 2d 217, 225 (D.D.C. 2009) (noting that "Congress 'relaxed' the language of Exemption 7(A) in 1986," thus broadening its scope); In Def. of Animals v. HHS, No. 99-3024, 2001 WL 34871354, at *3 (D.D.C. Sept. 28, 2001) (reiterating that "'could reasonably' . . . represents a relaxed standard; before 1986, the government had to show that disclosure 'would' interfere with law enforcement"); Gould Inc. v. GSA, 688 F. Supp. 689, 703 n.33 (D.D.C. 1988) ("[The] 1986 amendments relaxed the standard of demonstrating interference with enforcement proceedings.").

Exemption 7(A) requires a two-step analysis.[4] First, there must be a "pending or reasonably anticipated" law enforcement proceeding.[5] Second, release of the information must be reasonably expected to cause some articulable harm to that proceeding.[6]

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[4] See, e.g., Juarez v. DOJ, 518 F.3d 54, 58-59 (D.C. Cir. 2008) (explaining that government must show that records relate to law enforcement proceeding and that proceeding could be harmed by premature release of evidence or information); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1113-14 (D.C. Cir. 2007) (discussing dual elements necessary to invoke Exemption 7(A): reasonably anticipated law enforcement proceeding and harm if information released); Lion Raisins, Inc. v. USDA, 231 F. App'x 565, 566 (9th Cir. 2007) (stating that applicable standard met where "criminal investigation remains ongoing" and release of information could "jeopardize that investigation"); Lion Raisins, Inc. v. USDA, 231 F. App'x 563, 564 (9th Cir. 2007) (finding that agency submissions described "ongoing proceedings and explained how disclosure" could interfere); Manna v. DOJ, 51 F.3d 1158, 1164 (3d Cir. 1995) ("To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm."); Campbell v. HHS, 682 F.2d 256, 259 (D.C. Cir. 1982) (stating that agency must demonstrate interference with pending enforcement proceeding); Amnesty Int'l v. CIA, 738 F. Supp. 2d 479, 525-26 (S.D.N.Y. 2010) (reiterating two-step analysis to assert Exemption 7(A)); Blackwell v. FBI, 680 F. Supp. 2d 79, 94 (D.D.C. 2010) (restating that agency must show that release "reasonably could be expected to cause some distinct harm to pending or imminent enforcement proceeding or investigation"), aff'd on other grounds, 646 F.3d 37 (D.C. Cir. 2011); Citizens for Resp. & Ethics in Wash. v. DOJ, 658 F. Supp. 2d 217, 225-26 (D.D.C. 2009) (holding that Exemption 7(A) analysis involves determining whether disclosure of records could reasonably be expected to interfere with enforcement proceedings that are pending or reasonably anticipated); Carter, Fullerton & Hayes v. FTC, 637 F. Supp. 2d. 1, 9 (D.D.C. 2009) (same).

[5] Mapother v. DOJ, 3 F.3d 1533, 1542 (D.C. Cir. 1993) (determining that "in the run of cases involving persons excluded from the United States . . . there is a reasonable likelihood of a challenge" and so holding that "Exemption 7(A)'s requirement that enforcement proceedings be reasonably anticipated is met"); see also Boyd v. DOJ, 475 F.3d 381, 386 (D.C. Cir. 2007) (finding that "'potential criminal proceedings against individuals'" constitute law enforcement proceedings (quoting agency affidavit)); ACLU v. DOD, No. 18-154, 2019 WL 3945845, at *9 (D. Mont. 2019) (finding that government's "general[] anticipat[ion] [of] law enforcement involvement" does not adequately support Exemption 7(A)); James v. U.S. Secret Serv., 811 F. Supp. 2d 351, 353 n.2 (D.D.C. 2011) ("A pending appeal of a criminal conviction qualifies as an enforcement proceeding for purposes of Exemption 7(A)." (citing Kansi v. DOJ, 11 F. Supp. 2d 42, 44 (D.D.C. 1998)); Adionser v. DOJ, 811 F. Supp. 2d 284, 298 (D.D.C. 2011) (same); Barrett v. DOJ, No. 09-2959, 2010 WL 4256366, at *3 (E.D. Cal. Oct. 21, 2010) ("[A] pending criminal investigation constitutes an 'enforcement proceeding.'"); Gray v. U.S. Army Crim. Investigation Command, 742 F. Supp. 2d 68, 73 (D.D.C. 2010) (concluding that records compiled for pending administrative disciplinary action may fall within Exemption 7(A)); Vento v. IRS, No. 08-159, 2010 WL 1375279, at *7 (D.V.I. Mar. 31, 2010) (stating that "record shows" agency was preparing case; thus, allegation that records were not created for concrete, prospective law enforcement proceeding "is without merit"); see also Cook v. DOJ, No. 04–2542, 2005 WL 2237615, at *2 (W.D. Wash. Sept. 13, 2005) (determining that investigation being

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The Supreme Court has held that "the thrust of congressional concern" in enacting Exemption 7(A) was "to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file."[7] Thus, as a general rule, Exemption 7(A)

"dormant" does not render Exemption 7(A) inapplicable); cf. Kuzma v. DOJ, 692 F. App'x 30, 35 (2d Cir. 2017) (finding that requester's "unsupported personal opinion that this investigation is unlikely [pending] is not the contradictory evidence or evidence of bad faith required to overcome the presumption of good faith we afford the government's declarations"); Watters v. DOJ, 576 F. App'x 718, 725 (10th Cir. 2014) (finding that plaintiff's questioning of whether there is ongoing effort to capture fugitive insufficient to establish that undisclosed material was improperly withheld).

[6] See, e.g., ACLU of Mich. v. FBI, 734 F.3d 460, 468 (6th Cir. 2013) (holding that "[b]ecause the FBI has adequately shown that release of racial and ethnic demographic data is reasonably likely to interfere with ongoing investigations by revealing FBI priorities and analytic methods, the district court properly applied Exemption 7(A)"); Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003) (holding that "government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it is reasonable"); Majuc v. DOJ, No. 18-00566, 2019 WL 4394843, at *3 (D.D.C. Sept. 13, 2019) (stating that summary judgment cannot be granted when faced with "glaring ambiguity about whether a related investigation is in fact ongoing," and rejecting the argument that the "mere pendency of post-conviction monitoring and compliance of a corporate defendant qualifies as 'a concrete prospective law enforcement proceeding'") (quoting Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1097 (D.C. Cir. 2014)); Hammouda v. OIP, 920 F. Supp. 2d 16, 24 (D.D.C. 2013) (finding that defendant properly invoked Exemption 7(A) because disclosure of information would "'allow [the targets of the investigation] to elude detection or tamper with evidence'"); Abuhouran v. Dep't of State, 843 F. Supp. 2d 73, 82 (D.D.C. 2012) (holding that defendant properly withheld notes which "'could hamper an ongoing law enforcement action'"); Adionser, 811 F. Supp. 2d at 298 (holding defendant properly asserted Exemption 7(A) because disclosure of material "'would reveal the scope, direction, nature and pace of the investigation as well as reveal information that could harm the government's prosecution in the criminal appellate process'" (quoting agency declaration)); Int'l Union of Elevator Const. Loc. 2 v. U.S. Dep't of Lab., 804 F. Supp. 2d 828, 835 (N.D. Ill. 2011) (finding that agency provided specific and detailed descriptions of harm to ongoing investigation necessary to justify use of Exemption 7(A)).

[7] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 230 (1978); see Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1097 (D.C. Cir. 2014) (holding that "Exemption 7(A) is temporal in nature," and "reliance on Exemption 7(A) may become outdated when the proceeding at issue comes to a close"); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1037 (7th Cir. 1998) (holding that "Exemption 7(A) does not permit the Government to withhold all information merely because that information was compiled for law enforcement purposes"); Dickerson v. DOJ, 992 F.2d 1426, 1431 (6th Cir. 1993) (reiterating that when investigation is over and purpose of it expired, disclosure would no longer cause interference).

may only be invoked so long as the law enforcement proceeding involved remains pending,[8] or so long as an enforcement proceeding is fairly regarded as prospective[9] or as preventative.[10]

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[8] See, e.g., Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (stating that documents from unfair labor practice are not protected by Exemption 7(A) when no claim is pending or contemplated); Barney v. IRS, 618 F.2d 1268, 1273-74 (8th Cir. 1980) (explaining that once enforcement proceedings are "either concluded or abandoned, exemption 7(A) will no longer apply"); Barrett v. DOJ, No. 09-2959, 2010 WL 4256366, at *3 (E.D. Cal. Oct. 21, 2010) ("[A] pending criminal investigation constitutes an 'enforcement proceeding.'"); Gray v. U.S. Army Crim. Investigation Command, 742 F. Supp. 2d 68, 73 (D.D.C. 2010) (concluding that records compiled for pending administrative disciplinary action may fall within Exemption 7(A)); Blackwell v. FBI, 680 F. Supp. 2d 79, 94-95 (D.D.C. 2010), aff'd, 646 F.3d 37 (D.C. Cir. 2011) (holding that FBI properly relied on Exemption 7(A) because disclosure of records would interfere with "pending FBI investigation"); Carter, Fullerton & Hayes, LLC v. FTC, 637 F. Supp. 2d 1, 10 (D.D.C. 2009) (holding that defendant correctly withheld material where defendant had shown that law enforcement investigation into state liquor control boards was pending).

[9] See, e.g., Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1114 (D.C. Cir. 2007) (explaining that "enforcement proceedings need not be currently ongoing; it suffices for them to be 'reasonable anticipated'"); Boyd v. DOJ, 475 F.3d 381, 386 (D.C. Cir. 2007) (stating that government's identification of targets of investigation satisfies concrete prospective law enforcement proceeding requirement); Ctr. for Nat. Sec. Stud. v. DOJ, 331 F.3d 918, 926 (D.C. Cir. 2003) ("Exemption 7(A) does not require a presently pending 'enforcement proceeding[;]' [r]ather, . . . it is sufficient that the government's ongoing September 11 terrorism investigation is likely to lead to such proceedings."); Manna v. DOJ, 51 F.3d 1158, 1165 (3d Cir. 1995) (ruling that when "prospective criminal or civil (or both) proceedings are contemplated," information is protected from disclosure); Stein v. SEC, 358 F. Supp. 3d 30, 34-35 (D.D.C. 2019) (finding that "[b]ecause the potential for interference remains even when a case is on appeal, the SEC is permitted to withhold law enforcement records 'until all reasonably foreseeable proceedings stemming from that investigation are closed'" (quoting Kay v. FCC, 976 F. Supp. 23, 38 (D.D.C. 1997))); Jud. Watch, Inc. v. DOJ, 282 F. Supp. 3d 242, 250 (D.D.C. 2017) (finding that "[u]ntil [the subject's] appeal is fully exhausted, disclosure of investigative materials could be reasonably expected to interfere with whatever occurs going forward"), vacated and remanded for consideration of other FOIA exemptions claimed by government due to conclusion of law enforcement proceeding underpinning use of Exemption 7(A), 806 F. App'x 5 (Mem) (D.C. Cir. Apr. 17, 2020); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at *6 (D.D.C. Mar. 9, 2007) (finding that material properly withheld where law enforcement investigation into terrorist attacks in Africa are prospective); In Def. of Animals v. HHS, No. 99-3024, 2001 WL 34871354, at *3 (D.D.C. Sept. 28, 2001) ("Previous USDA investigations of animal deaths at the Foundation resulted in formal charges . . . , and there is no evidence that the agency would treat its most recent investigation differently."); Jud. Watch v. FBI, No. 00-745, 2001 WL 35612541, at *5 (D.D.C. Apr. 20, 2001) (explaining that "[a]lthough no enforcement proceedings are currently pending, the FBI has represented that such proceedings may become necessary as the investigation progresses").

Courts have found that Exemption 7(A) remains viable throughout the duration of long-term investigations.[11] Indeed, even when an investigation is dormant, Exemption 7(A) has been held to be applicable if there is a concrete possibility that the investigation could lead to a "prospective law enforcement proceeding."[12]

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[10] See, e.g., Moorefield v. U.S. Secret Serv., 611 F.2d 1021, 1025-26 (5th Cir. 1980) (finding that material pertaining to "Secret Service investigations carried out pursuant to the Service's protective function" – to prevent harm to protectees – is eligible for Exemption 7(A) protection because law enforcement purposes "include the prevention as well as the detection and punishment of violations of the law"); ACLU of N.J. v. DOJ, No. 11-2553, 2012 WL 4660515, at *6-8, *10 (D.N.J. Oct. 2, 2012), aff'd sub nom. ACLU of N.J. v. FBI, 733 F.3d 526 (3d Cir. 2013) (accepting agency's description that maps are used as tool in ongoing and prospective investigations to pinpoint areas of concern and focus, to assess and analyze activities, and to allocate resources in order to counteract terrorist threats, and that disclosure of certain records can make it difficult for agencies to gather information necessary to prevent crime).

[11] See, e.g., Al-Turki v. DOJ, 175 F. Supp. 3d 1153, 1192 (D. Colo. 2016) (finding that while some of the information protected under Exemption 7(A) may stretch back ten years, "Exemption 7(A) has been held to apply to long-term investigations"); Hammouda v. OIP, 920 F. Supp. 2d 16, 24 (D.D.C. 2013) (holding that age of requested documents did not undercut agency showing that law enforcement proceeding remained pending); Barrett, 2010 WL 4256366, at *3-4 (finding Exemption 7(A) applicable because investigation into "Zodiac Killer" murders of 1968 and 1969 is unsolved, "is ongoing" in several California jurisdictions, and agency showed that release of information could interfere with those investigations); Cook v. DOJ, No. 04-2542, 2005 WL 2237615, at *2 (W.D. Wash. Sept. 13, 2005) (discussing length of time spent investigating airplane hijacking and stressing that "mere fact that this crime remains unsolved . . . do[es] not establish, or even raise a genuine issue of material fact, regarding the pendency of this investigation," thus, finding that there is "no evidence" investigation is completed); Butler v. DOJ, No. 86-2255, 1994 WL 55621, at *24 (D.D.C. Feb. 3, 1994) (stating that agency "leads" were not stale simply because they were several years old given that indictee remained at large); Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at *4 (S.D.N.Y. May 26, 1993) (finding that documents that would interfere with lengthy or delayed investigation fall within protective ambit of Exemption 7(A)); see also Davoudlarian v. DOJ, No. 93-1787, 1994 WL 423845, at *2-3 (4th Cir. Aug. 15, 1994) (unpublished table decision) (holding that records of open investigation of decade-old murder remained protectable).

[12] See, e.g., Vento v. IRS, No. 08-159, 2010 WL 1375279, at *7 (D.V.I. Mar. 31, 2010) (finding use of Exemption 7(A) reasonable where agency was "preparing a case"; thus, documents were created "in anticipation of an enforcement proceeding, even if a formal action had not yet been filed"); Citizens for Resp. & Ethics in Wash. v. DOJ, 658 F. Supp. 2d 217, 229-30 (D.D.C. 2009) (reiterating that "long line of cases" recognizes necessity of identifying concrete prospective law enforcement proceeding to justify use of Exemption 7(A) and explaining that accepting hypothetical proceedings would be in direct contravention of basic FOIA policy); In Def. of Animals, 2001 WL 34871354, at *2 (stating that "anticipated filing satisfies FOIA's requirement of a reasonably anticipated, concrete prospective law enforcement proceeding"); Jud. Watch, 2001 WL 35612541, at *5 (accepting agency's representation that "proceedings may become necessary as investigation progresses" as

Courts have afforded protection under Exemption 7(A) despite the fact that discovery procedures may eventually allow access to certain records.[13] Further, some courts have upheld the use of Exemption 7(A) even after documents have been disclosed in discovery.[14] The D.C. Circuit has cautioned, however, that Exemption 7(A) does not

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sufficient to establish concrete possibility); Nat'l Pub. Radio v. Bell, 431 F. Supp. 509, 514-15 (D.D.C. 1977) (explaining that although investigation into death of nuclear-industry whistleblower Karen Silkwood is "dormant," it "will hopefully lead to a 'prospective law enforcement proceeding'" and that disclosure "presents the very real possibility of a criminal learning in alarming detail of the government's investigation of his crime before the government has had the opportunity to bring him to justice"); see also FOIA Update, Vol. V, No. 2, at 6. Compare Dickerson v. DOJ, 992 F.2d 1426, 1432 (6th Cir. 1993) (affirming district court's conclusion that FBI's investigation into 1975 disappearance of Jimmy Hoffa remained ongoing and therefore was still "prospective" law enforcement proceeding), with Detroit Free Press v. DOJ, 174 F. Supp. 2d 597, 600 (E.D. Mich. 2001) (ordering in camera inspection of FBI's records of Hoffa disappearance investigation in light of "inordinate amount of time that [it] has remained an allegedly pending and active investigation").

[13] See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 241 & n.21 (1978) (explaining that "prehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an 'interference' with NLRB enforcement proceedings" even though NLRB, "under its own discovery rules will turn over those statements once the witness has actually testified"); Shannahan v. IRS, 672 F.3d 1142, 1151 (9th Cir. 2012) (explaining that while information most likely would be released during discovery, criminal proceedings have not taken place; thus, release of information during pendency would interfere with law enforcement proceedings); Radcliffe v. IRS, 536 F. Supp. 2d 423, 438 (S.D.N.Y. 2008) (explaining that although "[i]t may be true that if this matter proceeds to trial plaintiff will be entitled to discovery of some or all of the documents at issue," withholding was still proper because Exemption 7(A) was created specifically to avoid early disclosure of evidence and potential resulting impact that such disclosure would have on ongoing government investigation); Warren v. United States, No. 99-1317, 2000 U.S. Dist. LEXIS 17660, at *18 (N.D. Ohio Oct. 13, 2000) (explaining that although plaintiffs "will likely be entitled to release of all the documents at issue in this proceeding, through the criminal discovery process, that fact does not prohibit reliance on Exemption 7 in the context of this case"); cf. Ameren Mo. v. EPA, 897 F. Supp. 2d 802, 814 (E.D. Mo. 2012) (describing purpose of Exemption 7(A) as protecting against "advance notice" and affirming its use in instant case, but adding that "[m]oreover, the FOIA is not intended as a substitute for civil discovery and the Court's determination here in no way affects Plaintiff's ability to employ civil discovery tools").

[14] See Moffat v. DOJ, No. 09-12067, 2011 WL 3475440, *19 (D. Mass. Aug. 5, 2011), aff'd, 716 F.3d 244 (1st Cir. 2013) (finding that "previous unredacted disclosure of this document [to Massachusetts Hampden County District Attorney's Office] is irrelevant to the FBI's redaction determination at issue here, as the standards for disclosure of information under FOIA are different from the standards for disclosure of information in a criminal trial"); Cuban v. SEC, 744 F. Supp. 2d 60, 86 (D.D.C. 2010) (finding use of Exemption 7(A) proper despite contention that records were produced in discovery in state case); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at *5 (D.D.C. Mar. 9, 2007) (stating that "exemption claims"

permit the withholding of documents solely because they are protected by discovery rules and has required the agency to show interference with a law enforcement proceeding.[15]

Types of Law Enforcement Proceedings

The types of "law enforcement proceedings" to which Exemption 7(A) may be applicable have been interpreted broadly by the courts; such proceedings have been held to include not only criminal actions,[16] including those connected with terrorism and

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cannot be defeated "simply by pointing to a judicial proceeding in which some of the responsive documents may or could have been released").

[15] North v. Walsh, 881 F.2d 1088, 1097, 1100 (D.C. Cir. 1989) (holding that the mere fact that defendants in related ongoing criminal proceedings might obtain documents through the FOIA that were ruled unavailable "through discovery, or at least might obtain the documents before [they] could obtain them through discovery," does not itself "constitute interference with a law enforcement proceeding"); see also Playboy Entm't, Inc. v. DOJ, 677 F.2d 931, 936 (D.C. Cir. 1982) ("[T]he issues in discovery proceeding and the issues in the context of a FOIA action are quite different. That for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA.").

[16] See, e.g., Boyd v. DOJ, 475 F.3d 381, 386 (D.C. Cir. 2007) (finding that "'potential criminal proceedings against individuals'" constitute law enforcement proceedings (quoting agency affidavit)); Manna v. DOJ, 51 F.3d 1158, 1164-65 (3d Cir. 1995) (finding that disclosure of prior criminal law enforcement proceedings involving requester's involvement in La Cosa Nostra "would interfere with prospective criminal" proceedings because prior information is relevant to contemplated prosecutions; thus, use of 7(A) was appropriate); Barrett v. DOJ, No. 09-2959, 2010 WL 4256366, at *3 (E.D. Cal. Oct. 21, 2010) ("[A] pending criminal investigation constitutes an 'enforcement proceeding.'"); Van Bilderbeek v. DOJ, No. 08-1931, 2010 WL 1049618, at *4-5 (M.D. Fla. Mar. 22, 2010) (explaining that Columbian government's allegation that requester was involved in international drug trade and money laundering created "plausible basis" for agency to open criminal investigation and upholding use of Exemption 7(A) because release of these documents would interfere with ongoing investigation); Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) (finding that FBI "properly applied" Exemption 7(A) in ongoing criminal investigation of organized crime activities including narcotics, gambling, stolen property, and loan sharking), summary affirmance granted, No. 95-5388 (D.C. Cir. Jan. 24, 1997).

national security,[17] but civil actions[18] and regulatory proceedings[19] as well. The Court of Appeals for the District of Columbia Circuit has held that the proceedings encompassed within Exemption 7(A) include "cases in which the agency has the initiative in bringing enforcement action and those . . . in which it must be prepared to respond to a third

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[17] See, e.g., Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 926-28 (D.C. Cir. 2003) (holding that disclosure of requested information was reasonably likely to interfere with terrorism investigation and finding use of Exemption 7(A) proper); Jud. Watch, Inc. v. DHS, 59 F. Supp. 3d 184, 193 (D.D.C. 2014) (holding that "DHS properly withheld . . . documents [because it] demonstrates that the information in question is part of an ongoing investigation into the September 11, 2001 terrorist attacks"); Long v. DOJ, 479 F. Supp. 2d 23, 29 (D.D.C. 2007) (discussing "dilemma" in preserving "integrity of the Department's ongoing terrorism investigations without wholly undermining the purpose of the FOIA," and finding "appropriate balance" by permitting certain information to be redacted pursuant to Exemption 7(A)); Edmonds v. FBI, 272 F. Supp. 2d 35, 54-55 (D.D.C. 2003) (concluding that agency justified its withholding of records under Exemption 7(A) in case involving "national security issues").

[18] See, e.g., Manna, 51 F.3d at 1165 (holding that disclosure would interfere with contemplated civil proceedings so that records were properly withheld pursuant to Exemption 7(A)); Vento v. IRS, 714 F. Supp. 2d 137, 148 (D.D.C. 2010) (explaining that there is no distinction "in the law" between civil and criminal law enforcement and release of withheld information "could reasonably be expected to interfere" with ongoing investigation into requester's tax liability; thus, use of Exemption 7(A) is proper); Faiella v. IRS, No. 05-238, 2006 WL 2040130, *4 (D.N.H. July 20, 2000) (explaining that distinction between "the civil audit and the criminal investigation is not meaningful" because Exemption 7(A) is "'applicable to investigation developed documents whether potentially civil or criminal in import'" (quoting White v. IRS, 707 F.2d 897, 901 (6th Cir. 1983))); Jud. Watch v. Rossotti, 285 F. Supp. 2d 17, 29 (D.D.C. 2003) (concluding that "documents in question relate to an ongoing civil investigation by IRS and are exempt under Exemption 7(A)").

[19] See, e.g., Gray v. U.S. Army Crim. Investigation Command, 742 F. Supp. 2d 68, 73 (D.D.C. 2010) (declaring that pending administrative proceeding "does qualify as a law enforcement proceeding" for Exemption 7 (A)); Carter, Fullerton & Hayes v. FTC, 637 F. Supp. 2d 1, 9-10 (D.D.C 2009) (holding FTC's investigations of "possible anticompetitive effects of state liquor control board regulations" qualify as law enforcement proceeding for Exemption 7(A)); Env't Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005) (finding that disclosure of records compiled as part of EPA's investigation into violations of its Toxic Substance Control Act "would prematurely reveal the EPA's case . . . in the administrative proceeding that is currently pending"); Rosenglick v. IRS, No. 97-747, 1998 WL 773629, at *2 (M.D. Fla. Mar. 10, 1998) (confirming that phrase "law enforcement purposes" includes "civil, criminal, and administrative statutes and regulations such as those promulgated and enforced by the IRS," and explaining use of Exemption 7(A) proper here); Fedders Corp. v. FTC, 494 F. Supp. 325, 327-28 (S.D.N.Y. 1980) (concluding that FTC investigation into allegations of unfair advertising and offering of equipment warranties constitutes law enforcement proceedings), aff'd, 646 F.2d 560 (2d Cir. 1980) (unpublished table decision).

party's challenge."[20] Enforcement proceedings in state courts[21] and foreign courts[22] have also been held to qualify for Exemption 7(A) protection. (For a further discussion of "law enforcement proceeding," see Exemption 7.)

Related Proceedings

Even after an underlying enforcement proceeding is closed, the continued use of Exemption 7(A) may be proper, provided that "related" proceedings are still pending.[23]

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[20] Mapother v. DOJ, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

[21] See, e.g., Hopkinson v. Shillinger, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989) (stating Exemption 7 applies "with equal force" to records involving local law enforcement authorities and explained that this interpretation "encourages cooperation and information sharing" between local law enforcement agencies and the federal government); Butler v. Dep't of the Air Force, 888 F. Supp. 174, 182-83 (D.D.C. 1995) (explaining that release could jeopardize pending state criminal proceeding), aff'd per curiam, No. 96-5111 (D.C. Cir. May 6, 1997).

[22] See, e.g., Bevis v. Dep't of State, 801 F.2d 1386, 1388 (D.C. Cir. 1986) (holding that Exemption 7(A) makes no distinction between foreign and domestic enforcement proceedings and therefore applies to each); Lewis v. Dep't of the Treasury, No. 17-0943, 2020 WL 1667656, at *4 (D.D.C. Apr. 3, 2020) (explaining that Exemption 7 applies not only to domestic law enforcement proceedings, but also to foreign law enforcement proceedings), aff'd per curiam, 851 F. App'x 214 (D.C. Cir. 2021).

[23] Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, at *18 (D.D.C. July 2, 2020) (holding Exemption 7(A) applied to specific records based upon government illustrating "logical link between the subjects at issue" and related ongoing investigations concerning "potential terrorism activities"); Al-Turki v. DOJ, 175 F. Supp. 3d 1153, 1192 (D. Colo. 2016) (finding that "the documents at issue, while not directly related to an ongoing investigation, contain information that is intertwined with or related to other ongoing investigations"); see also, e.g., Cucci v. DEA, 871 F. Supp. 508, 512 (D.D.C. 1994) (finding protection proper when information pertains to "multiple intermingled investigations and not just the terminated investigation" of subject).

This includes situations when charges are pending against additional defendants[24] or when additional charges are pending against the original defendant.[25]

Additionally, Exemption 7(A) has been held proper when there is a motion for a new trial, appeal of the court's action, or a collateral attack on conviction.[26] Exemption

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[24] See Solar Sources, Inc. v. United States, 142 F.3d 1033, 1040 (7th Cir. 1998) (explaining that although government has "closed" its cases against certain defendants by obtaining plea agreements and convictions, withholding is proper because information "compiled against them is part of the information" in ongoing cases against other targets); New Eng. Med. Ctr. Hosp. v. NLRB, 548 F.2d 377, 385-86 (1st Cir. 1976) (finding Exemption 7(A) applicable when "closed file is essentially contemporary with, and closely related to, the pending open case" against another defendant; applicability of exemption does not hinge on "open" or "closed" label agency places on file); Watters v. DOJ, No. 10-270, 2013 WL 4482968, at *13 (N.D. Okla. Aug. 20, 2013) (determining that because subject's file contains information on third party of interest who is in fugitive status, "information was properly withheld" pursuant to Exemption 7(A)); DeMartino v. FBI, 577 F. Supp. 2d 178, 182 (D.D.C. 2008) (explaining that case remains open and pending because co-defendant is "scheduled to be retried" and "other unindicted co-conspirators" remain at large); Hidalgo v. FBI, 541 F. Supp. 2d 250, 256 (D.D.C. 2008) (finding "although [plaintiff was] convicted long ago . . . ongoing search for – and possible future trials of – indicted and unindicted fugitives satisfies" standard); Cucci, 871 F. Supp. at 512 (finding protection proper when information pertains to "multiple intermingled investigations and not just the terminated investigation" of subject).

[25] See Pinnavaia v. FBI, No. 04-5115, 2004 WL 2348155, at *1 (D.C. Cir. Oct. 19, 2004) (explaining that although FBI San Diego Field Office's investigation was closed, its New York Field Office records were part of investigatory files for separate, ongoing investigation, so use of Exemption 7(A) therefore was proper); Int'l Union of Elevator Constr. Loc. 2 v. U.S. Dep't of Lab., 804 F. Supp. 2d 828, 836 (N.D. Ill. 2011) (explaining that material responsive to request was originally compiled for civil investigations that are now closed, but material is being used in current criminal investigation, thus properly withheld under Exemption 7(A) because "release could reasonably be expected to interfere with the current investigation"); Seized Prop. Recovery, Corp. v. U.S. Customs & Border Prot., 502 F. Supp. 2d 50, 62 (D.D.C Aug. 17, 2007) (explaining that while underlying forfeiture proceedings have ended, possibility of different investigations, separate and apart from investigation attendant to seizure satisfies standard); Cudzich v. ICE, 886 F. Supp. 101, 106-07 (D.D.C. 1995) (holding that while INS investigation is complete, parts of file "containing information pertaining to pending investigations of other law enforcement agencies" are properly withheld); Kuffel v. BOP, 882 F. Supp. 1116, 1126 (D.D.C. 1995) (ruling that Exemption 7(A) remains applicable when inmate has criminal prosecutions pending in other cases).

[26] See, e.g., Stein v. SEC, 358 F. Supp. 3d 30, 34 (D.D.C. 2019) (finding that "[b]ecause the potential for interference remains even when a case is on appeal, the SEC is permitted to withhold law enforcement records 'until all reasonably foreseeable proceedings stemming from that investigation are closed'" (quoting Kay v. FCC, 976 F. Supp. 23, 38 (D.D.C. 1997))); Johnson v. FBI, 118 F. Supp. 3d 784, 792 (E.D. Pa. 2015) (explaining that "logic suggests that the existence of a pending motion under [28 U.S.C.] § 2255 makes it reasonably foreseeable that an enforcement proceeding (i.e., a new trial) will take place,

7(A) has also been upheld when there are related civil proceedings[27] and when an investigation has been terminated, but an agency retains oversight or some other continuing enforcement-related responsibility.[28]

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leading to the expectation that Exemption 7(A) may apply to protect materials whose release could reasonably be expected to interfere with that new trial"); Adionser v. DOJ, 811 F. Supp. 2d 284, 298 (D.D.C. 2011) ("For purposes of Exemption 7(A), a pending appeal of a criminal conviction qualifies as an ongoing law enforcement proceeding."); King v. DOJ, No. 08-1555, 2009 WL 2951124, *6 (D.D.C. Sept. 9, 2009) ("This Court has previously applied FOIA exemption (b)(7)(A) to post-conviction motions to vacate a sentence. . . . Accordingly, [requester] cannot prevail on his argument that materials related to his § 2255 motion fall outside the scope of FOIA exemption (b)(7)(A)."); James v. U.S. Secret Serv., No. 06-1951, 2007 WL 2111034, at *5 (D.D.C. July 23, 2007) (finding that "pending appeal of a criminal conviction qualifies as an ongoing or prospective law enforcement proceeding," and adding that disclosure could "harm the government's prosecution of Plaintiff's appeal"); DeMartino, 577 F. Supp. 2d at 182 (concluding that "law enforcement proceeding has not concluded" because criminal conviction is not final); Kidder v. FBI, 517 F. Supp. 2d 17, 27 (D.D.C. 2007) (reiterating that "pending appeal of a criminal conviction qualifies as a pending or prospective law enforcement proceeding for purposes of Exemption 7(A)"); Kansi v. DOJ, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (explaining that "potential for interference . . . that drives the 7(A) exemption . . . exists at least until plaintiff's conviction is final"; thus, plaintiff's pending motion for new trial is pending law enforcement proceeding for purposes of FOIA; Pons v. U.S. Customs Serv., No. 93-2094, 1998 U.S. Dist. LEXIS 6084, at *14 (D.D.C. Apr. 23, 1998) (ruling that disclosure of information not used in plaintiff's prior trails could "interfere with another enforcement proceeding").

[27] See Frank LLP v. CFPB, 480 F. Supp. 3d 87, 98 (D.D.C. 2020) (stating that records identified as responsive in two related civil enforcement proceedings, one active and one where agency had moved to re-open case following stay, were properly withheld under Exemption 7(A)); Cozen O'Conner v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 783 (E.D. Pa. 2008) (holding that agency "is entitled to invoke protection" even for documents "developed in preparation" for case against two entities that now no longer exist; noting that documents in those cases "would necessarily" discuss information developed during the investigation process and affect a pending delisting proceeding); Watkins Motor Lines, Inc. v. EEOC, No. 05-1065, 2006 WL 905518, at *5-6 (M.D. Fla. Apr. 7, 2006) (declaring that requested withdrawal of charge of discrimination "does not mean that there is no prospective law enforcement proceeding" because EEOC may pursue its own civil action; so requirement of harm for Exemption 7(A) is satisfied).

[28] See, e.g., Jud. Watch, Inc. v. DHS, 59 F. Supp. 3d 184, 194 (D.D.C. 2014) (holding that even though the subject of the request is deceased, Exemption 7(A) applies to the ongoing investigation into the 9/11 terrorist attacks, which may lead to future law enforcement proceedings); Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419-20 (N.D. Cal. 1986); Erb v. DOJ, 572 F. Supp. 954, 955-56 (W.D. Mich. 1983) (finding withholding of FBI report of its investigation proper in situation where press release stated that investigation was "concluded 'for the time being'" and investigation reopened subsequently); ABC Home Health Servs. v. HHS, 548 F. Supp. 555, 556, 559 (N.D. Ga. 1982) (explaining that "exemption is designed to protect contemplated proceedings, not particular allegations," thus holding documents protected when "final settlement" was subject to reevaluation for at

Generalized Showing of Harm

To fall within the protection of Exemption 7(A), courts have held that it is sufficient for an agency to make a generalized showing that release of the records would interfere with enforcement proceedings.[29] Indeed, courts have found that publicly revealing too many details about an ongoing investigation could jeopardize the investigation.[30] While

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least three years because "further proceedings are not foreclosed by the settlement"). But cf. Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 66-67 (D.D.C. 1999) (finding that release of audit statistics and details of settlement from closed investigation of one hospital would not interfere with possible future settlements with other institutions that were being audited but not investigated).

[29] See, e.g., Lazardis v. Dep't of State, 934 F. Supp. 2d 21, 37 (D.D.C. 2013) ("'Under exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding[;] . . . [r]ather, federal courts may make generic determinations that [disclosure of certain kind of records] would generally 'interfere with enforcement proceedings.'" (quoting Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir. 1980))); Cuban v. SEC, 744 F. Supp. 2d 60, 86-87 (D.D.C. 2010), on reconsideration in part, 795 F. Supp. 2d 43 (D.D.C. 2011) (noting that agency "describes generally how disclosure of each category could cause harm to the defendant's investigatory interests," explaining that "extensive specificity is not required for Exemption 7(A)," and holding that agency "described in sufficient detail . . . the harm that could befall the agency if these records are prematurely released"); Kay v. FTC, 976 F. Supp. 23, 39 (D.D.C. 1997) (stating that agency "need not establish that witness intimidation is certain to occur, only that it is a possibility"); Pully v. IRS, 939 F. Supp. 429, 436 (E.D. Va. 1996) ("All that is required is an objective showing that interference could reasonably occur as the result of the documents' disclosure."); Wichlacz v. U.S. Dep't of Interior, 938 F. Supp. 325, 331 (E.D. Va. 1996) (holding that "particularized showing of interference is not required; rather, the government may justify nondisclosure in a generic fashion"), aff'd, 114 F.3d 1178 (4th Cir. 1997) (unpublished table decision); Alyeska Pipeline Serv. v. EPA, No. 86-2176, 1987 WL 17071, at *2-3 (D.D.C. Sept. 9, 1987) (explaining that government need not "show that intimidation will certainly result," but that it must "show that the possibility of witness intimidation exists"), aff'd, 856 F.2d 309 (D.C. Cir. 1988)).

[30] Agrama v. IRS, No. 17-5270, 2019 WL 2067719, at *2 (D.C. Cir. Apr. 19, 2019) (finding that "[w]hile the IRS's public disclosures [concerning its use of Exemption 7(A)] are cursory, [the court has] held that 'there are occasions when extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed'" (quoting Lykins v. DOJ, 725 F.2d 1455, 1463 (D.C. Cir. 1984))); Int'l Union of Elevator Constr. Loc. 2 v. U.S. Dep't of Lab., 747 F. Supp. 2d 976, 982 (N.D. Ill. 2010) (explaining that agency need only provide enough information to permit court to review its claims that disclosure "could compromise" investigation; thus, compelling production of Vaughn index could effectively defeat very purpose of Exemption 7(A)); Cuban, 744 F. Supp. 2d at 86 (stating that "extensive specificity" is not required where such detail would undermine the precise reason for nondisclosure); Blackwell v. FBI, 680 F. Supp. 2d 79, 94 (D.D.C. 2010) (explaining that agency "need not submit declarations that reveal the exact nature and purpose of its investigations in order to satisfy FOIA-exemption 7(A)").

generalized showings of harm are accepted, courts have also cautioned that the exemption does not permit "blanket" withholding.[31] The Court of Appeals for the District of Columbia Circuit has held that an agency must show how disclosure of the records would interfere with an enforcement proceeding.[32]

Types of Interference

The Supreme Court has held that Congress intended that Exemption 7(A) apply "whenever the government's case in court . . . would be harmed by the premature release of evidence or information"[33] or when disclosure would impede any necessary

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[31] See, e.g., Cuban, 744 F. Supp. 2d at 85 (stressing that exemption does not permit "blanket" withholding for all records relevant to investigation); UtahAmerica Energy v. U.S. Dep't of Lab., 700 F. Supp. 2d 99, 109 (D.D.C. 2010), rev'd in part, vacated in part sub nom. UtahAmerica Energy, Inc. v. Dep't of Lab., 685 F.3d 1118 (D.C. Cir. 2012) (reiterating that "automatic, or wholesale withholdings" are not authorized simply because law enforcement proceeding is ongoing); United Am. Fin. v. Potter, 531 F. Supp. 2d 29, 38-40 (D.D.C. 2008) (reiterating that agency "should be mindful of the standards applicable in this Circuit" and that even under categorical approach, agency must review each document because there is "no 'blanket exemption'"); Gould Inc. v. GSA, 688 F. Supp. 689, 703, 704 n.34 (D.D.C. 1988) (describing generic categories approach as steering "middle ground" between detail required by Vaughn Index and blanket withholding).

[32] Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (remanding for further fact finding because "it is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; 'it must rather demonstrate how disclosure' will do so"); Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1114 (D.C. Cir. 2007) (finding that an agency must demonstrate how disclosure would reveal the focus of an investigation); Campbell v. HHS, 682 F.2d 256, 259 (D.C. Cir. 1982) (holding that the government must show "how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding").

[33] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978) (holding that NLRB had established interference with its unfair labor practice enforcement proceeding by showing that release of witness statements would create greater potential for witness intimidation and could deter cooperation); see, e.g., Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 929 (D.C. Cir. 2003) (reasoning that requested list of names "could be of great use" by terrorists in "intimidating witnesses"); Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (stating that disclosure could result in "chilling and intimidation of witnesses"); Mapother v. DOJ, 3 F.3d 1533, 1543 (D.C. Cir. 1993) (holding that release of prosecutor's index of all documents he deems relevant would provide "critical insights into [government's] legal thinking and strategy"); Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir. 1980) (reiterating that one primary purpose of Exemption 7(A) was to prevent harm to government's case in court (citing Robbins Tire & Rubber Co., 437 U.S. at 224-25)); Fox News v. SEC, No. 09-2641, 2010 WL 3911453, at *2 (S.D.N.Y. Sept. 14, 2010) (noting that disclosure could prematurely provide "information on litigation strategy"); Radcliffe v. IRS, 536 F. Supp. 2d 423, 437-38 (S.D.N.Y. 2008) (explaining that agency's "declaration is sufficiently specific" to establish harm should matter proceed to trial and reiterating that one primary purpose of Exemption 7(A) was to "'prevent harm [to] the Governments' case

investigation prior to the enforcement proceeding.[34] Courts have upheld the application of Exemption 7(A) when release of the protected information would reveal the nature,

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in court by not allowing litigants earlier or greater access;" and to prevent "'prematurely revealing the government's case'" (quoting Barney, 618 F.2d at 1273)); Stolt-Nielsen Trans. Grp., Ltd. v. DOJ, 480 F. Supp. 2d 166, 180 (D.D.C. 2007) (noting that release of information "would provide potential witnesses with insights into the Division's strategy and the strength of its position"), vacated and remanded on other grounds, 534 F.3d 728, 733-34 (D.C. Cir. 2008); Faiella v. IRS, No. 05-238, 2006 WL 2040130, at *3 (D.N.H. July 20, 2006) (stating that "disclosing information under active consideration" could undermine any future prosecution by "prematurely disclosing the government's potential theories, issues, and evidentiary requirements"); Jud. Watch, Inc. v. DOJ, 102 F. Supp. 6, 19-20 (D.D.C. 2000) (reiterating that prematurely disclosing documents related to witnesses could result in witness tampering or intimidation and could discourage continued cooperation); Cujas v. IRS, No. 97-00741, 1998 WL 419999, at *4 (M.D.N.C. Apr. 15, 1998) (finding that release of information would "alert" plaintiff to scope and direction of case, thus interfering with agency's case because "suspected violator with advance access to the government's case could construct defenses'" (quoting Robbins Tire & Rubber Co., 437 U.S. at 241)), aff'd, 162 F.3d 1154 (4th Cir. 1998) (unpublished table decision).

[34] See, e.g., Robbins Tire & Rubber Co., 437 U.S. at 224 (finding that "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations"); ACLU of Mich. v. FBI, 734 F.3d 460, 466 (6th Cir. 2013) (explaining that release of demographic data "directly reveals a targeting priority, and indirectly reveals the methodologies and data used to make that selection"; thus determining withholding proper because disclosure could interfere in investigation by revealing "selection process," leads, and scope); Shannahan v. IRS, 672 F.3d 1142, 1150 (9th Cir. 2012) (reiterating standards to establish interference in tax enforcement proceedings and holding use of Exemption 7(A) proper where agency-explained harm to ongoing investigation by showing that release could reveal identity of confidential informants and thus hinder other individuals from cooperating, violate terms of an international agreement, and expose scope of investigation); Lynch v. Dep't of the Treasury, 210 F.3d 384, 384 (9th Cir. 2000) (unpublished table decision) (stating that agency declarations "made clear" that release of records could harm "efforts at corroborating witness statements . . . alert potential suspects . . . [and] interfere with surveillance"); Solar Sources, Inc., 142 F.3d at 1039 (stating that disclosure could interfere by revealing "scope and nature" of investigation); Elec. Priv. Info. Ctr. v. DOJ, No. 19-810, 19-957, 2020 WL 5816218, at *13-14 (D.D.C. Sept. 30, 2020) finding Exemption 7(A) appropriate for "withheld 'FBI file numbers' that 'are not known to the general public because the release of a file numbering convention identifies the investigative interest or priority given to such matters[,]' the disclosure of which 'could result in the acknowledgment of the existence of unknown investigations or proceedings and divulge the scope/volume of the FBI's investigative efforts'"), aff'd in part & remanded in part on other grounds, 18 F.4th 712 (D.C. Cir 2021)); Performance Coal Co. v. U.S. Dep't of Lab., 847 F. Supp. 2d 6, 16 (D.D.C. 2012) (agreeing with agency that disclosure could permit interference with ongoing criminal investigation by giving important information to potential witnesses or defendants); Lowy v. IRS, No. 10-00767, 2011 WL 1211479, at *13 (N.D. Cal. Mar. 30, 2011) (accepting agency declarations that release "would impair" ongoing tax law enforcement proceedings by revealing direction of investigation); Cook v. DOJ, No. 04-2542, 2005 WL 2237615, at *2 (W.D. Wash. Sept. 13, 2005) (holding that

scope, direction, or focus of an investigation,[35] which could damage the government's ability to control or shape its investigation.[36] The release of such information could allow

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disclosure could make it "far more difficult" for FBI "(a) to verify and corroborate future witness statements and evidence, (b) to discern which tips, leads, and confessions have merit and deserve further investigation and which are inconsistent with the known facts and can be safely ignored, and (c) to conduct effective interrogations of suspects"); Kay v. FTC, 976 F. Supp. 23, 38-39 (D.D.C. 1997) (holding that agency "specifically established that release" would permit the requester to gain insight into FCC's evidence against him, to discern narrow focus of investigation, to assist in circumventing investigation, and to create witness intimidation, and that disclosure would "reveal the scope, direction and nature" of investigation); Pully, 939 F. Supp. at 436 (explaining that requester's promise not to interfere with investigation is of "no consequence" because government "need not take into account the individual's propensity or desire to interfere"; objective showing that disclosure could lead to interference found sufficient).

[35] See, e.g., Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996) (holding that release "could reveal much about the focus and scope" of investigation); Frank LLP v. CFPB, 480 F. Supp. 3d 87, 100 (D.D.C. 2020) (upholding application of Exemption 7(A) to protect witness transcripts from an investigation since premature release would risk revealing the "focus and scope" of the proceedings); Agrama v. IRS, No. 17-5270, 2019 WL 2067719, at *2 (D.C. Cir. Apr. 19, 2019) (finding Exemption 7(A) was properly applied to protect investigatory records where premature disclosure might "reveal the scope and direction of the investigation" (quoting North v. Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989))); Arizechi v. IRS, No. 06-5292, 2008 WL 539058, at *6 (D.N.J. Feb. 25, 2008) (concluding that release could reveal "nature, scope, direction and limits" of investigation); Watkins Motor Lines, Inc. v. EEOC, No. 05-1065, 2006 WL 905518, at *6 (M.D. Fla. Apr. 7, 2006) (same); Youngblood v. Comm'r, No. 99-9253, 2000 U.S. Dist. LEXIS 5083, at *36 (C.D. Cal. Mar. 6, 2000) (holding that disclosure "could reveal the nature, scope, direction and limits" of investigation); Kay, 976 F. Supp. at 38-39 (discussing how release would reveal scope, direction, and nature of investigation).

[36] See, e.g., J.P. Stevens & Co. v. Perry, 710 F.2d 136, 143 (4th Cir. 1983) (finding that premature disclosure would "hinder [agency's] ability to shape and control investigations"); Carter, Fullerton & Hayes v. FTC, 637 F. Supp. 2d. 1, 13 (D.D.C. 2009) (same); EDUCAP, Inc. v. IRS, No. 07-2106, 2009 WL 416428, at *5 (D.D.C. Feb. 18, 2009) (same); Jud. Watch, Inc. v. DOJ, 306 F. Supp. 2d 58, 75 (D.D.C. 2004) (finding that release could reveal status of investigation and agency's assessment of evidence (citing Swan, 96 F.3d at 500)).

targets to elude detection,[37] suppress or fabricate evidence,[38] or prevent the government from obtaining information in the future.[39] Relatedly, some courts have upheld the

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[37] See, e.g., ACLU, 734 F.3d at 466 (holding that "release of ['racial and ethnic demographic data'] may reveal what leads the FBI is pursuing and the scope of those investigations, permitting groups to change their behavior and avoid scrutiny"); Moorefield v. U.S. Secret Serv., 611 F.2d 1021, 1026 (5th Cir. 1980) (explaining that disclosure of requested information would enable targets "to elude the scrutiny of the [Secret] Service"); Leopold v. DOJ, 301 F. Supp. 3d 13, 29 (D.D.C. 2018) (finding 7(A) Glomar permissible because confirmation through response to plaintiffs' FOIA request "'could reasonably be expected to interfere with enforcement proceedings,' . . . because disclosure 'would tip off subjects and persons of investigative interest, thus giving them the opportunity to take defensive actions to conceal their criminal activities, elude detection, and suppress and/or fabricate evidence'" (quoting agency declaration)); Buzzfeed, Inc. v. DOJ, 344 F. Supp. 3d 396, 404 (D.D.C. 2018) (finding that acknowledging existence of responsive records "would enable individuals involved in criminal activity to track planes, learn where the FBI is conducting an investigation, and alter their behavior to avoid detection or interrupt or impede ongoing law enforcement investigations" and "denying the existence of records could signal to criminals that certain planes are not FBI planes and certain routes are free from FBI surveillance"); Mantilla v. Dept. of State, No. 12-21109, 2013 WL 424433, *6 (S.D. Fla. Feb. 1, 2013) (holding that release of information concerning ongoing DEA investigations would allow "individuals and/or entities, who are of investigative interest to [the] DEA, [to] use the information to develop alibis, create fictitious defenses, or intimidate, harass, or harm potential witnesses"); Council on Am.-Islamic Rels. v. FBI, 749 F. Supp. 2d 1104, 1118 (S.D. Cal. 2010) (accepting agency's assertion that release could enable targets to evade detection); Azmy, 562 F. Supp 2d at 605 (stating that disclosure could enable targets to "conceal their activities"); Mendoza v. DEA, 465 F. Supp. 2d 5, 11 (D.D.C. 2006) (reiterating that disclosure could assist fugitives and other targets to avoid apprehension and to develop false alibis), aff'd, No. 07-5006, 2007 U.S. App. LEXIS 22175, at *2 (D.C. Cir. Sept. 14, 2007).

[38] See, e.g., Agrama, 2019 WL 2067719, at *2 (finding that disclosure of the withheld records could allow the target of an investigation to "'destroy or alter evidence, fabricate fraudulent alibis, and intimidate witnesses'" (quoting North, 881 F.2d at 1097); Juarez v. DOJ, 518 F.3d 54, 58 (D.C. Cir. 2008) (finding that release "would compromise the investigation as it could lead to destruction of evidence"); Solar Sources, Inc., 142 F.3d at 1039 (stating that disclosure "could result in destruction of evidence"); Alyeska Pipeline Serv. v. EPA, 856 F.2d 309, 312 (D.C. Cir. 1988) (ruling that disclosure could allow for destruction or alteration of evidence, fabrication of alibis, and identification of witnesses); Leopold, 301 F. Supp. 3d at 29 (finding 7(A) Glomar permissible because confirmation through response to plaintiffs' FOIA request "'would tip off subjects and persons of investigative interest, thus giving them the opportunity to take defensive actions to conceal their criminal activities, elude detection, and suppress and/or fabricate evidence'" (quoting agency declaration)); Performance Coal Co., 847 F. Supp. 2d at 16 (noting that prematurely revealing information might permit altering of evidence); Council on Am.-Islamic Rels., 749 F. Supp. 2d at 1119 (noting that release could permit targets to alter, destroy, or create false evidence); Lieff, Cabraser, Heimann & Bernstein v. DOJ, 697 F. Supp. 2d 79, 88 (D.D.C. 2010) (agreeing with agency that disclosure could provide details about illegal activities being investigated thus enabling targets to determine what evidence to destroy); EDUCAP, Inc., 2009 WL 416428, at *5

application of Exemption 7(A) to protect law enforcement records under a mosaic theory of harm, through which distinct pieces of information can be combined together to cause harm.[40]

(upholding protection for "'documents related to an ongoing investigation target because disclosure . . . could allow the target to destroy or alter evidence, fabricate fraudulent alibis, and intimidate witnesses'" (quoting North, 881 F.2d at 1097)); Rosenglick v. IRS, No. 97-747-18A, 1998 WL 773629, at *2 (M.D. Fla. Mar. 10, 1998) (reiterating that disclosure "could aid wrongdoer in secreting or tampering with evidence").

[39] See, e.g., Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 930 (D.C. Cir. 2003) (recognizing that witnesses "would be less likely to cooperate" and that a "potential witness or informant may be much less likely to come forward and cooperate with the investigation if he believes his name will be made public"); Alyeska Pipeline Serv., 856 F.2d at 311 (ruling that disclosure might identify who had provided documents and would "thereby subject them to potential reprisals and deter them from providing further information"); Lieff, Cabraser, Heimann & Bernstein, 697 F. Supp. 2d at 85 (reiterating that "D.C. Circuit has previously held" that withholding of information about investigation was proper where disclosure could provide details about "'particular types of allegedly illegal activities being investigated'" including "names of potential witnesses, who would then be 'less likely to cooperate'" (quoting Alyeska Pipeline Serv., 856 F. 2d at 312)); EDUCAP, Inc., 2009 WL 416428, at *6 (explaining that agency's "expressed concern that release of the interview notes could deter potential witnesses from providing information is sufficient" to show interference); Stolt-Nielsen Trans. Grp., Ltd. v. DOJ, 480 F. Supp. 2d 166, 180 (D.D.C. 2007) (finding that "release of this information would . . . chill necessary investigative communications with foreign governments, and have a chilling effect on amnesty applications"); Watkins Motor Lines, Inc., 2006 WL 905518, at *8-9 (accepting agency's enumerations of specific harms, including harm that release could prevent agency from obtaining information in the future, or make it more difficult to obtain from reluctant witnesses, by showing "that disclosure of these documents could reasonably be expected to interfere" (citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 241-42 (1978)); Kay, 976 F. Supp. at 38-39 (finding potential for "witness intimidation and discourage[ment of] future witness cooperation" in ongoing investigation of alleged violation of FCC's rules); Wichlacz v. U.S. Dep't of Interior, 938 F. Supp. 325, 331 (E.D. Va. 1996) (reducing cooperation of potential witnesses when they learn of disclosure, thus interfering with ongoing investigation); Kay v. FCC, 867 F. Supp. 11, 19 (D.D.C. 1994) (explaining that witness "intimidation would likely dissuade informants from cooperating with the investigation as it proceeds"); Manna v. DOJ, 815 F. Supp. 798, 808 (D.N.J. 1993) (disclosing FBI reports could result in chilling effect on potential witnesses), aff'd, 51 F.3d 1158, 1165 (3rd Cir. 1995) (finding "equally persuasive the district court's concern for persons who have assisted or will assist law enforcement personnel"); Gould Inc. v. GSA, 688 F. Supp. 689, 703 (D.D.C. 1988) (disclosing information would have chilling effect on sources who are employees of requester).

[40] See, e.g., Ctr. for Nat'l Sec. Stud., 331 F.3d at 928 (finding Exemption 7(A) protected list of 9/11 detainees under a mosaic theory because release "would give terrorist organizations a composite picture of the government investigation" even if release of "any individual detainee may appear innocuous or trivial"); Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, at *16 (D.D.C. July 2, 2020) (approving "mosaic" effect-based withholding of information

Courts have held that Exemption 7(A) ordinarily will not afford protection when the target of the investigation has possession of, or has submitted, the information in question[41] or the agency has made it public.[42] Courts have, however, upheld protection

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which "may not have all come from active investigative files" but the release of which "could reasonably be expected to interfere with ongoing enforcement proceedings against some of the subjects at issue in [active] litigation"); Elec. Priv. Info. Ctr. v. DOJ, 490 F. Supp. 3d 246, 270 (D.D.C. 2020) (protecting file names and serial numbers where "'[a]pplying a mosaic analysis, suspects and foreign adversaries could use these numbers (indicative of investigative priority), in conjunction with other information known about other individuals and/or techniques, to formulate an exceptional understanding of the body of investigative intelligence available to the FBI; and where, who, what, and how it is investigating certain detected activities'" (quoting agency declaration)); N.Y. Times Co. v. FBI, 297 F. Supp. 3d 435, 446-47 (S.D.N.Y. 2017) (finding use of 7(A) appropriate because release of withheld portions of FBI 302s cross-referencing specific national security investigations and prosecutions of other terrorism suspects would "allow[] the FBI's adversaries to 'piece[] together' a 'mosaic of information' regarding the agency's investigative strategy" (quoting agency declaration)); cf. Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) (explaining the mosaic harm where an "individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself") (Exemption 3 case).

[41] See, e.g., Lion Raisins v. USDA, 354 F.3d 1072, 1085 (9th Cir. 2004) (stating – in a situation in which investigatory target already possessed copies of documents sought – that "[b]ecause Lion already has copies . . . USDA cannot argue that revealing the information would allow Lion premature access to the evidence upon which it intends to rely at trial"); Wright v. OSHA, 822 F.2d 642, 646 (7th Cir. 1987) (observing that disclosure of information provided by plaintiff would not provide plaintiff "with any information that it does not already have"); Chesapeake Bay Found., Inc. v. Army Corps of Eng'rs, 677 F. Supp. 2d 101, 108 (D.D.C. 2009) (finding that the agency did not explain "how its investigation will be impaired by the release of information that the targets of the investigation *already possess*"); Est. of Fortunato v. IRS, No. 06-6011, 2007 WL 4838567, at *4 (D.N.J. Nov. 30, 2007) (explaining that because information appears to be either in plaintiff's possession or known to plaintiff, agency "has not met its burden of justifying the withholding of these documents under Exemption 7(A)"); Dow Jones Co. v. FERC, 219 F.R.D. 167, 174 (C.D. Cal. 2002) (stating that there cannot be harm because "each target company has a copy . . . and therefore is on notice as to the government's possible litigation strategy and potential witnesses"); Ginsberg v. IRS, No. 96-2265, 1997 WL 882913, at *3 (M.D. Fla. Dec. 23, 1997) (reiterating that "where the documents requested are those of the [requester] rather than the documents of a third party . . . 'it is unlikely that their disclosure could reveal . . . anything [the requester] does not know already'" (quoting Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986)).

[42] UtahAmerica Energy v. Dep't of Lab., 700 F. Supp. 2d 99, 108 (D.D.C. 2010) (finding withholding of investigatory reports into two mining accidents not justified where reports "have been available in full on [Mining Safety and Health Administration] website" and adding that agency's "failure to explain with greater particularity how that information could compromise those ongoing investigations some two years [after posting reports on website]

for "selected" information provided by the target which would suggest the nature and scope of the investigation.[43]

Generic Categories

When invoking Exemption 7(A), the Supreme Court has held that the government may justify its withholdings by reference to generic categories of documents, rather than document-by-document.[44]

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should not be rewarded by this Court"); Scheer v. DOJ, 35 F. Supp. 2d 9, 14 (D.D.C. 1999) (declaring that agency assertions of harm and "concern proffered . . . cannot stand" when agency itself disclosed information to target).

[43] See, e.g., Swan v. SEC, 96 F.3d 498, 500-01 (D.C. Cir. 1996) (holding that "harm in releasing ['information [two clients'] attorney conveyed to the [agency]'] flows mainly from the fact that it reflects the [agency] staff's selective recording . . . and thereby reveals the scope and focus of the investigation"); Mapother v. DOJ, 3 F.3d 1533, 1543 (D.C. Cir. 1993) (discussing report agency compiled of source materials, including those submitted by target of investigation, and finding some records protected by Exemption 7(A) because release "will provide a virtual road map" through evidence, and "disclosure is apt to provide critical insights into [agency's] legal thinking and strategy"); Willard v. IRS, 776 F.2d 100, 103 (4th Cir. 1985) (concluding that "selectivity in recording" those portions of interviews that agents considered relevant "would certainly provide clues . . . of the nature and scope of the investigation"); Linsteadt v. IRS, 729 F.2d 998, 1004 & n.10, 1005 (5th Cir. 1984) (stating that release of "any statements made by [target] during the course of the tax investigation" would frustrate investigation by revealing reliance government placed upon particular evidence and by aiding targets in tampering with evidence); Lowy v. IRS, No. 10-00767, 2011 WL 1211479, at *13-14 (N.D. Cal. Mar. 30, 2011) (noting possibility of withholding target's own statement in situation where release would disclose direction of investigation); Arizechi v. IRS, No. 06-5292, 2008 WL 539058, at *1, *7-8 (D.N.J. Feb. 25, 2008) (finding that disclosure of target's tax "information returns (Forms W-2, K-1, 1098, and 1099)" could reveal reliance agency placed on evidence).

[44] See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 236 (1978) (explaining that statute draws distinction "between subdivision (A) and subdivisions (B), (C), and (D)" of Exemption 7, holding that 7(A) "appears to contemplate that certain generic determinations might be made," and finding that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings'"); see also Batton v. Evers, 598 F.3d 169, 182 (5th Cir. 2010) (reiterating that Supreme Court has held that generic categorical determinations may be made under Exemption 7(A)); Solar Sources Inc. v. United States, 142 F.3d 1033, 1038 (7th Cir. 1998) ("It is well-established that the Government may justify its withholdings by reference to generic categories of documents, rather than document-by-document." (citing Robbins Tire & Rubber Co., 437 U.S. at 236)); Leopold v. DOJ, 301 F. Supp. 3d 13, 26 (D.D.C. 2018) (finding categorical approach permissible because "even a *Vaughn* index or other precise description of the records being withheld would 'reveal non-public information about the targets and scope of the investigation' which 'could reasonably be expected to' interfere with it").

When an agency elects to use the "generic" approach, the Court of Appeals for the District of Columbia Circuit has held that the agency "has a three-fold task":[45]

> First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings.[46]

(For a further discussion, see Litigation Considerations, Vaughn Index.)

Courts traditionally accept agency declarations in Exemption 7(A) cases that specify the distinct, generic categories of documents at issue and the harm that would result from their release, rather than requiring extensive, detailed itemizations of each document.[47]

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[45] Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1098 (D.C. Cir. 2014); accord Bevis v. Dep't of State, 801 F.2d 1386, 1389-90 (D.C. Cir. 1986).

[46] Citizens for Resp. & Ethics in Wash., 746 F.3d at 1098 (quoting Bevis, 801 F.2d at 1389-90); see also In re DOJ, 999 F.2d 1302, 1310-11 (8th Cir. 1993) ("To satisfy its burden with regard to Exemption 7(A), the government must define functional categories of documents, it must conduct a document-by-document review to assign documents to proper categories; and it must explain to the court how the release of each category would interfere with enforcement proceedings." (citing Bevis, 801 F. 2d at 1389-90)); Int'l Union of Elevator Constructors Loc. 2 v. DOJ, 804 F. Supp. 2d 828, 834 (N.D. Ill. 2011) (same) (quoting In re DOJ, 999 F.2d at 1310-11); Banks v. DOJ, 700 F. Supp. 2d 9, 17 (D.D.C. 2010) (same); Bilderbeek v. DOJ, No 08-1931, 2010 WL 1049618, at *5 (M.D. Fla. Mar. 22, 2010), aff'd sub nom. Van Bilderbeek v. DOJ, 416 F. App'x 9 (11th Cir. 2011) (discussing that "D.C. Circuit stated that in order to use a categorical approach when withholding records, an agency must define the categories to be used, conduct a document-by-document review before assigning documents to the appropriate category, and 'explain to the court how the release of each category would interfere with enforcement proceedings'" (quoting Bevis, 801 F. 2d at 1389-90)); United Am. Fin. v. Potter, 531 F. Supp. 2d 29, 40 (D.D.C. 2008) (describing three-fold task).

[47] See, e.g., Lynch v. Dep't of the Treasury, No. 99-1697, 2000 WL 123236, at *2 (9th Cir. Jan. 28, 2000) (explaining that "government need not 'make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding'" (quoting Lewis v. IRS, 823 F.2d 375, 380 (9th Cir. 1987))); Solar Sources, Inc., 142 F.3d at 1038 (reiterating that government "need not establish that release of a particular document would actually interfere, [but] may justify its withholdings by reference to generic categories of documents, rather than document-by-document"); In re DOJ, 999 F.2d at 1308 (en banc) ("[T]he Supreme Court has consistently interpreted Exemption 7 of the FOIA (specifically so far subsections 7(A), 7(C), and 7(D)) to permit the government to proceed on a categorical basis" and to not require a document-by-document

Courts have emphasized, however, that an agency's ability to place documents into categories "does not obviate the requirement that an agency conduct a document-by-document review"; rather, agencies have been required to conduct a document-by-document review in order to assign documents to their proper categories.[48]

Vaughn Index.); Dickerson v. DOJ, 992 F.2d 1426, 1431 (6th Cir. 1993) (stating that it is "often feasible for courts to make 'generic determinations' about interference"); Lewis, 823 F.2d at 380 (holding that IRS need only make general showing that disclosure "would interfere with its enforcement proceedings" and is not required to make specific factual showing with respect to each withheld page); Wright v. OSHA, 822 F.2d 642, 646 (7th Cir. 1987) (explaining that "detailed listing is generally not required under Exemption 7(A)"); Spannaus v. DOJ, 813 F.2d 1285, 1288 (4th Cir. 1987) (stating that Supreme Court "has rejected the argument that the statute requires particularized showings of interference, holding instead that the Government may justify nondisclosure in a generic fashion"); Curran v. DOJ, 813 F.2d 473, 475 (1st Cir. 1987) (holding that generic determinations of likely interference are permitted); Bevis, 801 F.2d at 1389 (finding that agency "need not proceed on a document-by-document basis, detailing to the court the interference that would result from disclosure," but may take "generic approach, grouping documents into relevant categories"); Crooker v. ATF, 789 F.2d 64, 67 (D.C. Cir. 1986) ("Because generic determinations are permitted, the government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document."); Campbell v. HHS, 682 F.2d 256, 265 (D.C. Cir. 1982) (recognizing that "government may focus upon categories of records"); Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, at *17 (D.D.C. July 2, 2020) (accepting defendant's description of categories of responsive records withheld in pending investigative files because agency averred that "'providing a document-by-document description or listing of the records responsive to Plaintiff's request[s] ... would ... undermine[ ] the very interests that the FBI [seeks] to protect'"); Leopold, 301 F. Supp. 3d at 26 (finding that instead of specific information about each withheld record, agency "describes for each type of responsive record, how disclosure could interfere with the Special Counsel's investigation and any prospective enforcement proceedings"); Banks, 700 F. Supp. 2d at 17 ("[T]he government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document." (quoting Crooker v. ATF, 789 F.2d at 67)); Int'l Union of Elevator Constr. Loc. 2 v. U.S. Dep't of Lab., 747 F. Supp. 2d 976, 982 (N.D. Ill. 2010) (explaining that use of generic categories to justify withholdings is well-established and that "[c]ompelling the production of a *Vaughn* index could also effectively defeat the very purpose of Exemption 7(A)"); see also FOIA Update, Vol. V, No. 2, at 3-4 ("FOIA Counselor: The 'Generic' Aspect of Exemption 7(A)") (discussing use of generic categories under Exemption 7(A)).

[48] See, e.g., Bevis, 801 F.2d at 1389 (explaining that agency "must itself review each document to determine the category in which it properly belongs"); Banks, 700 F. Supp. 2d at 17 (finding that agency must determine, document-by-document, the category into which each document falls); Van Bilderbeek, 2010 WL 1049618, at *5 (determining that agency used categorical approach properly because it reviewed each document responsive to request and placed document in its appropriate category); Laws.' Comm. for C.R. v. Dep't of the Treasury, No. 07-2590, 2009 WL 1299821, at *3 (N.D. Cal. May, 11, 2009) ("In order to apply an exemption categorically, there must be some indicia that the individual documents within the class of documents are similar; and that the agency has reviewed and ensured that the individual documents it seeks to include in the class of documents are indeed

Indeed, courts have held that the burden is on agencies to "identify either specific documents or functional categories of information that are exempt from disclosure, and disclos[e] any reasonably segregable, non-exempt" portions.[49] The D.C. Circuit has upheld protection for an entire investigative file when the agency demonstrated that

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similar."); United Am. Fin., 531 F. Supp. 2d at 40 (stating that under generic category approach, agency must review each document to determine in which category it properly belongs); Kidder v. FBI, 517 F. Supp. 2d 17, 28 (D.D.C. 2007) (determining that agency used categorical approach properly because it reviewed each document responsive to request and placed document in its appropriate category); (Gavin v. SEC, No. 04-4522, 2006 WL 2975310, at *2-3 (D. Minn. Oct. 13, 2006) (explaining that agency must conduct "document-by-document review of responsive documents for categorization"); Edmonds v. FBI, 272 F. Supp. 2d 35, 54 (D.D.C. 2003) (explaining that agency may group documents into categories, but that "[i]n order to utilize this categorical approach, [an agency] must 'conduct a document-by-document review' of all responsive documents to assign documents to the proper category'" (quoting Bevis, 801 F.2d at 1389-90)); Kay v. FTC, 976 F. Supp. 23, 35 (D.D.C. 1997) (same).

[49] Long v. DOJ, 450 F. Supp. 2d 42, 76 (D.D.C. 2006) (explaining that to do otherwise "would eviscerate the principles of openness in government that the FOIA embodies"); see, e.g., Inst. for Just. v. IRS, 941 F.3d 567, 574 (D.C. Cir. 2019) (finding that defendant failed to "tailor the categories of information withheld to what Exemption 7(A) protects: law enforcement records that could reasonably be expected to interfere with enforcement proceedings" (quoting Citizens for Resp. & Ethics in Wash., 746 F.3d at 1091, 1096)); Gatson v. FBI, 799 F. App'x 112, 117 (3d Cir. 2019) (stating that the FBI provided sufficient detail as to how the withheld records fell into one or more of three "functional" categories and that "(1) [defendant's] explanations for any redactions, (2) the very fact that the withholding was partial, and (3) the amenability of all of that information to construction of a basic Vaughn index . . . leaves [the court] satisfied that there is sufficient '"connective tissue"' between the document[s], the deletion[s], the exemption[s] and the explanation[s]'" (quoting Davin v. DOJ, 60 F.3d 1043 (3d Cir. 1995))); Batton v. Evers, 598 F.3d 169, 182 (5th Cir. 2010) (reiterating that while Supreme Court has held that generic categorical determinations are permissible, it "expressly refused to find that an agency can simply claim [Exemption 7(A)] for everything in a file labeled 'investigative'" and attempt to do so is "plainly insufficient to satisfy [agency's] burden"); Smith v. ICE, 429 F. Supp. 3d 742, 765-66 (D. Colo. 2019) (explaining that while Exemption 7(A) may categorically apply to some types of records in specific database at issue, agency failed to demonstrate that specific database contains only these types of records); Gray v. U.S. Army Crim. Investigation Command, 742 F. Supp. 2d 68, 75 (D.D.C. 2010) (stating that "boilerplate statements, without reference to specific documents or even categories of documents, fail to support" Exemption 7(A)); Banks, 700 F. Supp. 2d at 18 (repeating that "mere fact that the underlying investigation remains open is not a sufficient basis for withholding the entire case file; such a decision is justified only on a showing that the release of each category of documents could reasonably be expected to interfere with enforcement proceedings"); Gavin v. SEC, No. 04-4522, 2006 WL 2975310, at *3-4 (D. Minn. Oct. 13, 2006) (refuting agency's assertion that categorization eliminates duty to segregate; explaining that agency must conduct "document-by-document review of responsive documents for categorization and segregation purposes").

release of any portion could reasonably be expected to compromise an ongoing investigation.[50]

Several Courts of Appeals have provided specific guidance as to what constitutes an adequate "generic category" in an Exemption 7(A) declaration.[51] The general principle uniting their decisions is that agency declarations must provide at least a general, "functional" description of the types of documents at issue sufficient to indicate the type of interference threatening the law enforcement proceeding.[52] The First and Fourth

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[50] See Patino-Restrepo v. DOJ, No. 17-5143, 2019 WL 1250497, at *2 (D.C. Cir. Mar. 14, 2019) (holding that FBI properly withheld in full investigative file concerning crime organizations under Ex. 7(A) because release of any portion of file would be reasonably likely to compromise an ongoing investigation by creating chilling effect on witnesses and possibly revealing scope of investigation, alerting potential targets).

[51] See Gatson, 799 F. App'x at 117 (approving the "functional" categories provided by the government to support withholding records in full under Exemption 7(A) and finding that "those categories, either facially or through detailed explanation . . ., plainly provided the District Court with ample information to assess the applicability of Exemption 7A, including an inquiry as to whether disclosure would interfere with the then-pending criminal prosecution"); Spannaus v. DOJ, 813 F.2d 1285, 1289 (4th Cir. 1987) (holding that "details regarding initial allegations giving rise to this investigation; notification of [FBI Headquarters] of the allegations and ensuing investigation; interviews with witnesses and subjects; investigative reports furnished to the prosecuting attorneys," and similar categories are all sufficient); Curran v. DOJ, 813 F.2d 473, 476 (1st Cir. 1987) (same); Bevis v. Dep't of State, 801 F.2d 1386, 1390 (D.C. Cir. 1986) (explaining that "identities of possible witnesses and informants, reports on the location and viability of potential evidence, and polygraph reports" are sufficient; categories "identified only as 'teletypes,' 'airtels,' or 'letters'" are insufficient); see also Cucci v. DEA, 871 F. Supp. 508, 511-12 (D.D.C. 1994) (holding that "evidentiary matters category" – described as "witness statements, information exchanged between the FBI and local law enforcement agencies, physical evidence, evidence obtained pursuant to search warrants and documents related to the case's documentary and physical evidence" is sufficient).

[52] See Bevis, 801 F.2d at 1389 (describing proper "functional" categories as those that allow "'court to trace a rational link between the nature of the document and the alleged likely interference'" (quoting Crooker v. ATF, 789 F.2d 64, 67 (D.C. Cir. 1986))); see also e.g., Batton, 598 F.3d at 182 (reiterating that "Supreme Court has held that generic categorical determinations" are permissible, while at the same time holding that category labeled "certain documents" makes it impossible to determine type of documents agency asserts are exempt; thus, standard for Exemption 7(A) not satisfied); Curran, 813 F.2d at 475 ("Withal, a tightrope must be walked: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag."); Crooker, 789 F.2d at 67 ("The hallmark of an acceptable Robbins category is thus that it is functional; it allows the court to trace a rational link between the nature of the document and the alleged likely interference."); Owens v. DOJ, No. 04-1701, 2006 WL 3490790, at *6 (D.D.C. Dec. 1, 2006) (observing that "courts reviewing the withholding of agency records under Exemption 7 cannot demand categories 'so distinct as prematurely to let the cat out of the investigative bag,'" but finding that agency's categories in this case did not provide "so

Circuits have approved a "miscellaneous" category of "other sundry items of information" as one of the permissible categories.[53]

Deference

The Court of Appeals for the District of Columbia Circuit has recognized that "Exemption 7(A) explicitly requires a predictive judgment of the harm that will result from disclosure of information."[54] In Center for National Security Studies v. DOJ, the D.C. Circuit also held that in the national security context, "the long-recognized deference to the executive" utilized by the courts when applying Exemptions 1 and 3[55] should also apply in the Exemption 7A context.[56] While granting greater deference to agencies in the

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much as a bare sketch of the information" and that agency therefore had not met its burden under Exemption 7(A) (quoting Curran, 813 F.2d at 475)); Gavin v. SEC, No. 04-4522, 2005 WL 2739293, at *3 (D. Minn. Oct. 24, 2005) (stating that "[p]roper utilization of the categorical approach requires" categories to be "functional," which is defined as allowing "'court to trace a rational link between the nature of the document and the alleged likely interference'" (quoting Bevis, 801 F.2d at 1389)); cf. Inst. for Just. & Hum. Rts. v. EOUSA, No. 96-1469, 1998 WL 164965, at *5 (N.D. Cal. Mar. 18, 1998) (explaining that four categories – confidential informant, agency reports, co-defendant extradition documents, and attorney work product – are too general to be functional and ordering government to "recast" categories to show how documents in "new categories would interfere with the pending proceedings").

[53] Spannaus, 813 F.2d at 1287, 1289; accord Curran, 813 F.2d at 476 (finding that wide range of records made some degree of generality "understandable – and probably essential").

[54] Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003); Elec. Priv. Info. Ctr. v. DHS, 82 F. Supp. 3d 307, 320 (D.D.C. 2015) (same); see, e.g., Jud. Watch, Inc. v. DHS, 59 F. Supp. 3d 184, 193 (D.D.C. 2014) (holding that "[i]n light of the deference owed to the agency . . . the Court concludes that DHS properly withheld the documents" because they "are part of an ongoing investigation . . . which may lead to future law enforcement proceedings").

[55] 5 U.S.C. § 552(b)(1), (3) (2018).

[56] Ctr. for Nat'l Sec. Stud., 331 F.3d at 928, 932 (explaining that courts "must defer" to executive on national security matters; therefore, "we owe the same deference under Exemption 7(A)" when national security is at issue); see also ACLU of Mich. v. FBI, 734 F.3d 460, 467 (6th Cir. 2013) (discussing deference and holding that demographic data was properly withheld pursuant to Exemption 7(A) because it concerns "matter of national security as to which the agency is owed deference"); Lowy v. IRS, No. 10-00767, 2011 WL 1211479, at *12, *15 (N.D. Cal. Mar. 30, 2011) (finding, in cases involving tax information exchanged between IRS and foreign tax offices, that "IRS's determination about potential harms to tax administration was 'entitled to some deference'" (quoting Shannahan v. IRS, 680 F. Supp. 2d 1270, 1276 (W.D. Wash. 2010))); Council on Am.-Islamic Rels. v. FBI, 749 F. Supp. 2d 1104, 1117, 1119 (S.D. Cal. 2010) (reiterating that courts should be hesitant to second guess law enforcement agencies and agreeing with agency that release of records would cause specific, potential harms); Shannahan, 680 F. Supp. 2d at 1276 (holding that

national security area, courts still carefully review the government's submissions to determine if they meet Exemption 7(A)'s standards.[57]

Time Frame for Determining Exemption 7(A) Applicability

The Court of Appeals for the District of Columbia Circuit has held that the law enforcement proceeding supporting the use of Exemption 7(A) "must remain pending at

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"conclusions [in agency declarations] are entitled to some deference as the court is not in a position to independently evaluate what actions on the part of the IRS or the United States government would impair relations between Hong Kong and the United States"; because disclosure would interfere with ongoing enforcement proceedings, agency "has met its burden under Exemption 7(A)"), aff'd, 672 F.3d 1142 (9th Cir. 2012); Am.-Arab Anti-Discrimination Comm. v. DHS, 516 F. Supp. 2d 83, 89 (D.D.C. 2007) (finding information about individuals arrested on national security criteria withholdable under Exemption 7(A) and explaining that "Center for National Security Studies may have ratcheted up the degree of deference that must be accorded the executive, but it was clear long before that decision that the courts are not simply to use their own best judgment in a national security context"); L.A. Times Commc'ns v. Dep't of the Army, 442 F. Supp. 2d 880, 899 (C.D. Cal. 2006) (stating that "[c]ourt defers to [Army officer's] predictive judgments" about Exemption 7(A) harm in insurgency setting); Edmonds v. FBI, 272 F. Supp. 2d 35, 55 (D.D.C. 2003) (stating that deference "must be extended to Exemption 7(A) in cases like this one, where national security issues are at risk" (citing Ctr. for Nat'l Sec. Stud., 331 F. 3d at 927-28)).

[57] See Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (stressing that "although we give deference to an agency's predictive judgment of the harm that will result from disclosure of information, . . . it is not sufficient for the agency to simply assert that disclosure will interfere"); Ctr. for Nat'l Sec. Stud., 331 F.3d at 926-32 (while stating that "[w]e have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated," nonetheless still reviewing standards agencies must meet and stressing that "we do not abdicate the role of the judiciary"); see also Shannahan, 680 F. Supp. 2d at 1275 ("Although the IRS's determination is entitled to deference, the court nonetheless reviews the determination de novo. . . ."); Am.-Arab Anti-Discrimination Comm., 516 F. Supp. 2d at 89-90 (noting that "courts have consistently deferred to executive affidavits predicting harm to the national security," but nonetheless reviewing agency submissions to determine if agency "satisfies" test of reasonableness and provides "sufficient detail"); Kidder v. FBI, 517 F. Supp. 2d 17, 27-28 (D.D.C. 2007) (mentioning deference given to law enforcement agencies, but stressing that agency must show, even in case involving terrorism and intelligence gathering, how release of records could interfere with proceedings); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at *6-8 (D.D.C. Mar. 9, 2007) (noting "sensitive investigations" involving terrorist bombings in Tanzania and Kenya, yet requiring agency to provide sufficient detail to allow court to trace link between document and purported interference with "potential criminal proceedings"); cf. Shearson v. DHS, No. 06-1478, 2007 WL 764026, at *4 (N.D. Ohio Mar. 9, 2007) (finding that actual enforcement proceedings must be reasonably contemplated for national security deference to be applicable, and that deference afforded to law enforcement agencies fluctuates depending on extent to which withheld information implicates matters of national security).

the time of [the court's] decision, not only at the time of the initial FOIA request."[58] The D.C. Circuit declared that Exemption 7(A) is "temporal in nature,"[59] and reliance on it "may become outdated when the proceeding at issue comes to a close."[60]

Changes in Circumstances During Litigation When Exemption No Longer Applies

When a change in circumstances associated with a law enforcement proceeding impacts the applicability of Exemption 7(A), a court may order further review, and possible release, of the withheld material.[61] In Maydak v. DOJ, the Court of Appeals for the District of Columbia Circuit denied the government's motion for remand "so that it might defend the applicability of other FOIA exemptions" when Exemption 7(A) became inapplicable and instead "order[ed] the release of all requested documents," ruling that

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[58] Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1097 (D.C. Cir. 2014) (citing Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1115 (D.C. Cir. 2007)); see Sussman, 494 F.3d at 1115 (holding that "relevant proceedings must be pending or reasonably anticipated at the time of the district court's eventual decision, not merely at the time of [plaintiff's] original FOIA request, in order to support redaction under Exemption 7(A)") (citing August v. FBI, 328 F.3d 697, 698 (D.C. Cir. 2003)); see also Cuban v. SEC, 744 F. Supp. 2d 60, 87 (D.D.C. 2010) (explaining that Exemption 7(A) "is only temporary" and given passage of time since it was first invoked, agency must establish at upcoming hearing whether investigation is still ongoing").

[59] Citizens for Resp. & Ethics in Wash., 746 F.3d at 1097 (citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 230-32 (1978)).

[60] Id. (citing Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 870 (D.C. Cir. 1980)).

[61] Jud. Watch v. DOJ, No. 17-5283, 2018 WL 10758508, at *1 (D.C. Cir. June 22, 2018) (vacating and remanding case involving FBI 302s to the district court after finding that law enforcement proceeding that served as basis for assertion of Exemption 7(A) was no longer pending); Citizens for Resp. & Ethics in Wash. v. DOJ, 746 F.3d 1082, 1097 (D.C. Cir. 2014) (finding that "reliance on Exemption 7(A) may become outdated when the proceeding at issue comes to a close," and remanding case to clarify whether investigation was ongoing in light of concluded sentencings and appeals); August v. FBI, 328 F.3d 697, 698 (D.C. Cir. 2003) (ordering further review of records withheld under Exemption 7(A) and in camera consideration of other applicable FOIA exemptions due to conclusion of law enforcement proceedings); Conti v. DHS, No. 12-5827, 2014 WL 1274517, at *22 (S.D.N.Y. Mar. 24, 2014) (ordering production of un-redacted records withheld under Exemption 7(A) due to conclusion of law enforcement proceeding); cf. Shapiro v. DOJ, No. 12-313, 2020 WL 3615511, at *19 (D.D.C. July 2, 2020) (holding that where number of responsive records is large enough to warrant sampling procedure, agency action should be gauged based on propriety of withholdings at time they were made).

the government "must assert all exemptions at the same time, in the original court proceedings."[62]

The D.C. Circuit subsequently declared in August v. FBI that "we have repeatedly acknowledged that there are some 'extraordinary' circumstances in which courts of appeals may exercise their authority . . . to require 'such further proceedings to be had as may be just under the circumstances,' in order to allow the government to raise FOIA exemption claims it failed to raise the first time around."[63] It further explained that "[g]iven the drafters' recognition that the harms of disclosure may in some cases outweigh its benefits, we have avoided adopting a 'rigid press it at the threshold, or lose it for all times' approach to . . . agenc[ies'] FOIA exemption claims."[64]

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[62] 218 F.3d at 765, 769 (noting that delay caused by permitting agency to raise FOIA exemption claims one at a time interferes with statutory goals of efficient and prompt disclosure of information and finding that agency offered no convincing reason why it could not have raised other exemptions in district court proceeding); see, e.g., Abuhouran v. Dep't of State, 843 F. Supp. 2d 73, 81 (D.D.C 2012) (agreeing that applying Exemption 7(A) "in conjunction with exemption 5 to a handwritten note" was proper); Laws.' Comm. for C.R. v. Dep't of the Treasury, No. 07-2590, 2009 WL 1299821, at *3 (N.D. Cal. May, 11, 2009) (discussing agency's use of eight exemptions while also relying on "Exemptions 7(A) and 7(F)"); Owens v. DOJ, No. 04-1701, 2007 WL 778980, at *1 (D.D.C. Mar. 9, 2007) (noting agency maintained that all responsive materials were properly withheld under Exemption 7(A) but advanced other exemptions to avoid waiving them); Ayyad v. DOJ, No. 00-960, 2002 WL 654133, at *1 n.2 (S.D.N.Y. Apr. 18, 2002) (noting that agency invoked exemptions in addition to Exemption 7(A) "because of Maydak").

[63] 328 F.3d 697, 700 (D.C. Cir. 2003) (quoting Maydak, 218 F. 3d at 764, 767) (holding that because failure to raise all FOIA exemptions at the outset resulted from human error, because wholesale disclosure would pose a significant risk to the safety and privacy of third parties, and because agency had taken steps to ensure that it does not make the same mistake again, remand is appropriate for consideration of other potentially applicable exemptions); see also Smith v. DOJ, 251 F.3d 1047, 1050 (D.C. Cir. 2001) (stating that "'as a general rule, [agency] must assert all exemptions at the same time, in the original district court proceeding,'" and noting that while "'extraordinary circumstances' or 'interim developments'" could warrant "departure from this rule," finding that no such circumstances were identified by agency; therefore, agency "must produce the [records] notwithstanding any other FOIA exemptions it may assert in a future case of this sort" (quoting Maydak, 218 F. 3d at 764, 767) (Exemption 3 case))).

[64] August, 328 F.3d at 699 (finding that "we have repeatedly acknowledged that there are some 'extraordinary' circumstances in which courts of appeals may exercise their authority . . . to require 'such further proceedings to be had as may be just under the circumstances,' in order to allow the government to raise FOIA exemption claims it failed to raise the first time around"); see e.g., Gawker Media, LLC v. FBI, 145 F. Supp. 3d 1100, 1106 (M.D. Fla. 2015) (finding that "[a]s soon as the FBI no longer claimed that their entire investigative file was being withheld under exemption 7(A), the FBI identified more specific exemptions in its Vaughn Index and supporting declaration;" "[Plaintiff] has had an opportunity to object to those exemptions and the Court has had an opportunity to consider the exemptions along with [Plaintiff's] objections;" and "[Plaintiff's] objections and response to summary

Exclusion Considerations

Finally, the FOIA affords special protection to certain ongoing law enforcement proceedings through the "(c)(1) exclusion."[65] When there is reason to believe that the subject of a criminal law enforcement investigation is not aware of the existence of the investigation and disclosure of the existence of the investigation could reasonably be expected to interfere with enforcement proceedings, the agency may treat the records as not subject to the requirements of the FOIA.[66] (See discussion of the operation of subsection (c)(1) under Exclusions.)

judgment does not change the Court's decision to consider the additional exemptions"); Conti v. DHS, No. 12-5827, 2014 WL 1274517, at *22 (S.D.N.Y. Mar. 24, 2014) (noting that agency "may apply other exemptions" to records withheld under Exemption 7(A) upon conclusion of the law enforcement proceeding triggering the application of 7(A)).

[65] 5 U.S.C. § 552(c)(1) (2018).

[66] Id.