U.S. Department of Justice
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FOIA UPDATE

Protecting Law Enforcement Data

When the Freedom of Information Act was enacted in 1966, it had very little impact in the area of federal law enforcement, primarily due to the extremely broad "investigatory files" exemption originally contained in it. That changed drastically, however, when Congress enacted the 1974 Amendments to the Freedom of Information Act almost ten years ago.

During the past decade, the FOIA has had a dramatic effect upon many aspects of federal law enforcement. On a day-to-day basis, federal officers and those with whom they deal are now necessarily concerned with the prospects of law enforcement information disclosure under the FOIA. All across the government, FOIA officials and document analysts process tens of thousands of requests for highly sensitive investigatory records annually, often struggling with the subtle delineations required under the six subparts of the amended Exemption 7. At the FBI alone, hundreds of employees are so occupied.

This issue of *FOIA Update* is devoted to the theme of protecting law enforcement information under the FOIA. In this area, certainly no legal issue is more topical and controversial than the question of whether the broad criminal law enforcement exemption contained in Privacy Act subsection (j)(2) can serve as a FOIA Exemption 3 statute. The Supreme Court has now agreed to decide this complex disclosure issue (see "Supreme Court Update" on pages 12–13) and it is explored further in the "Guest Article" appearing on pages 8–9.

Far less controversial, but similarly economical for law enforcement agencies, is the "generic Exemption 7(A)" approach recommended in the "FOIA Counselor" discussion on pages 3–4. And in the expanded "FOIA Counselor Q&A" section on pages 5–7, eight additional law enforcement data topics are addressed. Finally, the subject of this issue's "FOIA Focus" feature (see pages 14–15) is senior FBI official Tom Bresson, who has personally overseen the FBI's FOIA activities since the time of the 1974 Amendments, becoming over the past decade the acknowledged "dean" of law enforcement information disclosure.

On Agency Practice

The Processing of Investigatory Records

One of the most important functions of federal agencies is the discharge of their statutory and regulatory law enforcement responsibilities. Such federal activities—whether in the criminal, civil or regulatory arenas—commonly involve agency investigations which require detailed law enforcement files. While the particular types of law enforcement records compiled vary considerably from agency to agency, they uniformly contain much of the government's most sensitive information.

As might be expected, the problems facing all FOIA processors of law enforcement records share common characteristics, but also vary according to the specific circumstances of each agency's particular law enforcement agenda. A brief look at the investigatory records processing practices of three very different agencies—the Federal Bureau of Investigation, the Environmental Protection Agency, and the Nuclear Regulatory Commission—gives an overview of FOIA processing concerns in the law enforcement area.

FEDERAL BUREAU OF INVESTIGATION

At the Federal Bureau of Investigation, the nation's leading criminal law enforcement agency, three major areas of concern frequently arise in disclosure determinations under Exemption 7 of the FOIA: the protection of confidential sources, the protection of third-party privacy, and the protection of secret investigatory techniques.

"Sometimes a journalist or researcher will request records about a living person. In the absence of an overriding public interest, prior official confirmation of an FBI investigation of that person, or his or her notarized authorization, we refuse to either confirm or deny the existence of an FBI file," says James K. Hall, Chief of the FOI/PA Section at the FBI.

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. . . Law Enforcement Record Practices Examined

Cont'd from p. 1

"In fact, the Seventh Circuit Court of Appeals just recently upheld our practice in *Antonelli v. FBI* [721 F.2d 615 (7th Cir. 1984)]. We take this position because even the mention of a person's name in an FBI file may damage a reputation or cause embarrassment," Hall adds.

"However, when a researcher or journalist requests information about wrongdoing by a public official, the balancing standard tips more toward disclosure," explains Hall. "The public has a right to information which concerns an official's ability to do his job. Similarly, if the request is for records concerning a criminal prosecution, we would of course admit the existence of our investigation and only protect private personal information not already known."

Hall also points out that the FBI almost always withholds witness statements. "For example, we may receive a FOIA request for the transcript of an FBI interview with a bank teller following a robbery. We may continue to assert Exemption 7(C) and the second clause of Exemption 7(D) even after the witness has testified in court."

Because the FBI makes extensive use of confidential sources, the utmost care is always taken to protect their identities. "When a person with a criminal history requests his own FBI files, an unusual Catch-22 problem can arise," says Hall. "The problem is that FOIA requires the agency to state the basis for withholding information. There is always the danger that when an agency asserts Exemption 7(D), the requester will be able to identify a confidential source by using his unique insight into the nature of the excised material."

Finally, Hall emphasizes the importance of protecting the secrecy of FBI investigative techniques. The general existence of several of its investigatory techniques is widely known. Therefore, the mere mention of electronic surveillance, wiretaps, or surreptitious photography is not in and of itself necessarily harmful.

"However," notes Hall, "this can change drastically within the context of a particular case. Disclosure is harmful when a unique technique is mentioned in connection with a particular type of violation. If a potential lawbreaker knows that the FBI follows certain routine steps in monitoring bank security, he can use that knowledge to commit offenses and avoid detection."

ENVIRONMENTAL PROTECTION AGENCY

The Environmental Protection Agency is responsible for the enforcement of such statutes as the Clean Air Act and the Clean Water Act and with the disbursement of "Superfund" monies to combat hazardous waste pollution. EPA generates investigatory records in carrying out its enforcement responsibilities under each of these statutes. Whether it will release investigatory records often depends on the exact stage at which its enforcement activity stands at the time of a request.

"Documents containing technical information related to routine compliance monitoring are generally available to the public," says Thomas A. Darner, EPA's Assistant General Counsel for Contracts and Information Law. "But once EPA identifies a potential violation, we usually withhold investigatory documents in order to prevent interference with any potential or pending enforcement action."

For example, EPA prepares case status reports listing companies under investigation for unauthorized discharge of effluent material. EPA withholds these reports under Exemption 7(A) of the FOIA, because premature release would likely interfere with the effectiveness of its ongoing enforcement efforts.

This nondisclosure position necessarily changes with the passage of time, however. "Once an enforcement action is concluded, EPA is willing to release investigative documents unless release would interfere with other related enforcement proceedings," says Darner.

NUCLEAR REGULATORY COMMISSION

At the NRC, essentially three different offices perform investigations and/or inspections on a routine basis.

The Office of Inspection and Enforcement at the Nuclear Regulatory Commission conducts routine inspections of nuclear facilities and prepares written reports on such inspections. These inspection reports are regularly available in the NRC's public reading rooms.

"However, sometimes an employee at a nuclear facility or at a construction site informs us of a potential safety violation—that welds were performed in a substandard manner, or that subgrade steel is being used, or that required radiation tests were not performed," says C. Sebastian Aloot, Senior Attorney in the NRC's Office of the General Counsel. "In such cases, the Office of Investigation routinely performs an investigation. Until this investigation is completed and appropriate enforcement action has been taken, these investigative reports are withheld under Exemption 7(A)," he says.

"Once that exemption is no longer applicable, however, the agency must be concerned with other sensitive aspects of the information. Even after the report has been released, the NRC

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U.S. Department of Justice
Office of Information and Privacy

FOIA UPDATE

FOIA Counselor

The "Generic" Aspect of Exemption 7(A)

One of the most valuable FOIA protections available to members of the law enforcement community is Exemption 7(A), which protects "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings." 5 U.S.C. §552(b)(7)(A). The narrowing of Exemption 7's coverage through the 1974 FOIA Amendments reflected deep congressional concern over extending complete and indefinite protection to law enforcement records. Congress addressed this concern by limiting the "blanket" protection previously available under Exemption 7 to only the period during which law enforcement proceedings are actually contemplated or pending. Although the applicability of Exemption 7(A) is thus entirely temporal, its scope is broad enough to provide categorical or "generic" protection for most documents in an agency's open investigatory files.

THE *ROBBINS TIRE* PRECEDENT

In the leading Exemption 7(A) precedent, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court found support in both the FOIA's statutory language and legislative history for its conclusion 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.'" 437 U.S. at 236. The Court found that the release of various witness statements, when considered as a category or "particular kind" of material, would interfere with the government's unfair labor practice action by giving the adverse party "earlier and greater access" to the NLRB's case. *Id.* at 241. It thus specifically approved the use of "generic determinations" in Exemption 7(A) cases. *Id.* at 236.

Since *Robbins Tire*, almost all courts that have been requested to do so have accepted the principle of generic categorization under Exemption 7(A). *See, e.g., J.P. Stevens & Co. v. Perry*, 710 F.2d 136, 141–43 (4th Cir. 1983) (reversing document-by-document *in camera* review); *Campbell v. HHS*, 682 F.2d 256, 265 (D.C. Cir. 1982) (government may "focus upon categories of records"); *Barney v. IRS*, 618 F.2d 1268, 1273 (8th Cir. 1980) (specific factual showing regarding each withheld document not required); *Freedberg v. Department of the Navy*, 581 F. Supp. 3, 4 (D.D.C. 1982) (Exemption 7(A) generic determinations may be made).

Although at first glance a generic approach might seem at variance with the detailed document itemization customarily required by *Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), a categorical Exemption 7(A) statement is actually the only effective method of addressing the contents of most large, open investigatory files while still protecting the agency from the risks of a premature disclosure. *See Kacilauskas v. Department of Justice*, 565 F. Supp. 546, 549 (N.D. Ill. 1983) (preparation of a detailed *Vaughn* index would create the "very risks" Exemption 7(A) was designed to prevent); *Parker/Hunter, Inc. v. SEC*, 2 GDS ¶81,167 at 81,443 (D.D.C. 1981) (motion for *Vaughn* index denied because requirements to justify nondisclosure under Exemption 7(A) are "quite different"); *Murphy v. FBI*, 490 F. Supp. 1138, 1143–45 (D.D.C.) (detailed *Vaughn* index would undercut purpose of claimed exemptions), *summary judgment vacated as moot*, No. 80–1612 (D.C. Cir. 1980).

Ironically, the circuit in which *Robbins Tire* originated is the only one which has wavered in following the line of cases applying the *Robbins Tire* generic Exemption 7(A) approach. In *Stephenson v. IRS*, 629 F.2d 1140, 1144–46 (5th Cir. 1980), the Fifth Circuit Court of Appeals flatly held that the government's generic affidavit was an insufficient substitute for sanitized indexing, random or representative sampling *in camera*, oral testimony, or combinations thereof. This is particularly puzzling in light of the Fifth Circuit's prior wholehearted acceptance of the categorical approach in *Moorefield v. United States Secret Service*, 611 F.2d 1021, 1026 (5th Cir.), *cert. denied*, 449 U.S. 909 (1980). Moreover, the *Stephenson* decision has been criticized as flowing against the "judicial tide" of "all post-*Robbins* district and appellate court decisions." *Kacilauskas v. Department of Justice*, 565 F. Supp. at 548–49. *But see also Martinez v. FBI*, 3 GDS ¶83,208 at 83,914-15 (D.D.C. 1983) (following *Stephenson* minority view).

CATEGORIES OF DOCUMENTS

For the most part, however, there is general accord that the generic affidavit is the appropriate format for justifying nondisclosure under Exemption 7(A). Such affidavits must list the specific categories or types of documents in the file

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. . . "Generic" Exemption 7(A) Protection

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and explain how disclosure would "interfere" with the pending enforcement proceeding, giving clear statements of potential harm, but only category by category. Examples of categories that have been judicially approved include interviews with potential witnesses, agent notes, laboratory tests, consultant's reports and prosecution memoranda. In fact, a number of courts have specifically set forth the categories within their opinions. *See, e.g., J.P. Stevens & Co. v. Perry*, 710 F.2d at 142–43; *Barney v. IRS*, 618 F.2d at 1272 n.9; *Kacilauskas v. Department of Justice*, 565 F. Supp. at 547–48; *Steinberg v. IRS*, 463 F. Supp. 1272, 1273 (S.D. Fla. 1979). *But see also Eisenberg v. Department of Justice*, 2 GDS ¶81,034 at 81,088 (D.D.C. 1980) (government prevailed even without dividing the documents into "manageable parts"), *aff'd*, No. 81-1314 (D.C. Cir. Nov. 27, 1981). While overly broad categories should be eschewed, care must always be taken not to be so specific as to cause the very harm sought to be avoided. *See Kacilauskas v. Department of Justice*, 565 F. Supp. at 549.

POTENTIAL HARMS

As for the potential harms properly cognizable under Exemption 7(A), the Supreme Court found in *Robbins Tire*, for example, that premature release of information to a target would allow it to harass or intimidate witnesses. *See* 437 U.S. at 241. Subsequent Exemption 7(A) cases have involved a wider range of potential harms. *See, e.g., J.P. Stevens & Co. v. Perry*, 710 F.2d at 143 ("chilling effect" on potential witnesses, interference with free flow of information between agencies, lessened ability to "shape and control" investigation, more difficulty for the agency in performing future investigations); *Ostrer v. FBI*, Civil No. 83–0328, slip op. at 5 (D.D.C. Sept. 22, 1983) (suspect could engage in "destruction or alteration of evidence that remains to be discovered" and could "establish fraudulent alibis") (appeal pending); *Murphy v. FBI*, 490 F. Supp. at 1143 (disclosure would "alert other potential defendants as to the nature of the evidence held against them").

Where an agency fails to provide a satisfactory categorization of the documents or explanation of potential harm, the courts typically request a supplemental affidavit. *See, e.g., Campbell v. HHS*, 682 F.2d at 265 (remanded with respect to one of several categories of records for further explanation of potential harm); *Hatcher v. United States Postal Service*, 556 F. Supp. 331, 332 (D.D.C. 1982) (more specific categorization found necessary); *Parker/Hunter, Inc. v. SEC*, 2 GDS ¶81,168 at 81,445-48 (D.D.C. 1981) (agency permitted to submit supplemental affidavit stating more specifically how disclosure would cause harm, category by category).

CONCLUSION

Because it provides a unique opportunity to treat large, pending investigatory files in manageable segments, the generic approach—both as to the nature of the documents and as to the potential harms likely to result from their release—is an extremely economical one. Such a valuable technique, especially now that it has enjoyed growing acceptance in the courts, should be carefully considered for possible use at both the administrative and litigative levels in all Exemption 7(A) cases.

FOIA Update to be Available on JURIS

The Office of Information and Privacy is pleased to announce that *FOIA Update* will soon be available on the Department of Justice's JURIS system. JURIS ("Justice Retrieval and Inquiry System") is the automated legal research system established and maintained by the Justice Department for use in its litigation activities. It is available nationwide in all U.S. Attorney's Offices and at many agencies within the federal legal community.

Also to be placed into JURIS will be the "Short Guide to the Freedom of Information Act," which is revised and updated each year as part of OIP's annual *Freedom of Information Case List* publication. Both the "Short Guide" and *FOIA Update* are expected to be available for JURIS reference and retrieval by August of this year.

In a related development, references to *FOIA Update* articles and policy guidance items will soon be listed in the *Index to U.S. Government Periodicals*. According to the publisher of the *Index*, the first references to *FOIA Update* will appear in its upcoming listing of periodicals published during April through June 1983.

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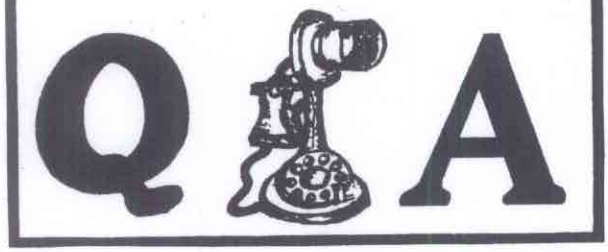

Can an agency withhold under Exemption 7(E) investigative techniques and procedures that are not completely secret?

Yes. Although the legislative history of Exemption 7(E) specifies that it was not intended to protect "routine techniques and procedures," Conf. Rep. No. 1200, 93d Cong., 2d Sess. 12, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6285, 6291, this should not be taken as an absolute secrecy requirement. Rather, the courts have construed Exemption 7(E) as "extend[ing] to investigative techniques and procedures *generally* unknown to the public." *Malloy v. United States Department of Justice*, 457 F. Supp. 543, 545 (D.D.C. 1978) (emphasis added). *See also, e.g., Jaffe v. CIA*, 573 F. Supp. 377, 387 (D.D.C. 1983) ("[Exemption 7(E)] extends to information regarding *obscure or* secret techniques.") (emphasis added). Indeed, Exemption 7(E) was recently found applicable even to certain procedures conceded to be commonly known, where it was shown that "their use in concert with other elements of an investigation and in their totality directed toward a specific investigative goal constitute a 'technique' which merits protection to insure its future effectiveness." *Martinez v. FBI*, Civil No. 82–1547, slip op. at 16 (D.D.C. Oct. 11, 1983).

Can the identities of law enforcement personnel always be withheld under Exemption 7(C)?

No, not as an absolute rule, but such identities are usually found entitled to Exemption 7(C) protection. The courts have for several years now recognized in FOIA cases that a public servant is entitled to privacy protection "even with respect to the discharge of his official duties." *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978). In the law enforcement area, such privacy interests are particularly acute because, as the D.C. Circuit has put it, "disclosure of the names of individual agents could subject these agents to personal harassment or discomfort." *Baez v. United States Department of Justice*, 647 F.2d 1328, 1339 (D.C. Cir. 1980). Consequently, the identities of FBI agents and comparable law enforcement personnel have consistently been found properly withheld pursuant to Exemption 7(C). *See, e.g., Ingle v. Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983); *Miller v. Bell*, 661 F.2d 623, 629–31 (7th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); *Ferguson v. Kelley*, 455 F. Supp. 324, 327 (N.D. Ill. 1978) (on reconsideration) (protecting names of FBI agents and local law enforcement personnel). Indeed, the First Circuit Court of Appeals recently extended such protection to investigators in the Department of Labor's Office of Inspector General. *See New England Apple Council v. Donovan*, 725 F.2d 139, 142–44 (1st Cir. 1984). *See also Casteneda v. United States*, Civil No. 83-0969 (S.D. Cal. Nov. 16, 1983) (USDA Food and Nutrition Service investigator).

However, it must be remembered that Exemption 7(C) necessarily involves a balancing of private and public interests on a case-by-case basis; there thus exists no "blanket exemption for the names of all [law enforcement] personnel in all documents." *Lesar v. United States Department of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980); *see also Baez v. United States Department of Justice*, 647 F.2d at 1339. Consequently, it is always possible that in a given case a court may be reluctant to accord Exemption 7(C) protection to the identity of a law enforcement officer. *See, e.g., Canadian Javelin, Ltd. v. SEC*, 501 F. Supp. 898, 904 (D.D.C. 1980) (names of SEC investigators ordered disclosed); *see also Iglesias v. CIA*, 525 F. Supp. 547, 563 (D.D.C. 1981). In such cases, though, the possible applicability of Exemption 7(F) should be considered. *See, e.g., Stassi v. Department of the Treasury*, Civil No. 78–0533, slip op. at 6, 11–12 (D.D.C. Mar. 30, 1979) (Exemption 7(F) applied in lieu of Exemption 7(C) to protect Customs personnel).

Can Exemption 7 be invoked for information not initially compiled for law enforcement purposes?

Yes, if the information is subsequently compiled into a legitimate law enforcement file. When records not initially compiled for law enforcement purposes "become an important part of the record compiled . . . for an ongoing investigation," Exemption 7 becomes applicable. *Fedders Corp. v. FTC*, 494 F. Supp. 325, 328 (S.D.N.Y.), *aff'd mem.*, 646 F.2d 560 (2d Cir. 1980). In *Lesar v. United States Department of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980), for example, the D.C. Circuit held that even if certain FBI information gathered on Dr. Martin Luther King arguably was not initially compiled for legitimate law enforcement purposes, it nevertheless fell within Exemption 7 when subsequently compiled into an unquestionably proper law enforcement file. *See also, e.g., Cohen v. EPA*, 575 F. Supp. 425, 427 (D.D.C. 1983). Indeed, to exclude such information from Exemption 7 coverage "would exalt form over substance." *Fedders Corp. v. FTC*, 494 F. Supp. at 328. *Cf. FBI v. Abramson*, 456 U.S. 615, 624 (1982).

Records may not be withheld under Exemption 7, however, merely because they became "commingled" in an investigatory file. *See, e.g., Hatcher v. United States Postal Service*, 556 F. Supp. 331, 334–35 (D.D.C. 1982) (routine administrative documents generated prior to investigation, but simply placed into investigatory file, held not entitled to Exemption 7 protection). *See also Goldschmidt v. Department of Agriculture*, 557 F. Supp. 274, 276–77 (D.D.C. 1983).

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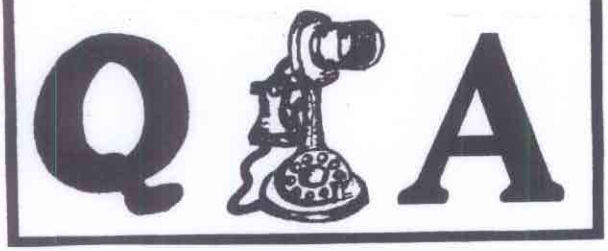
FOIA Counselor (FTS) 724–7400



Can the information given to an agency by a confidential source be protected under Exemption 7(D) even if the source ultimately testifies?

Yes. The second clause of Exemption 7(D) authorizes the nondisclosure of all confidential information furnished by a source in any criminal or lawful national security intelligence investigation. *See* 5 U.S.C. §552(b)(7)(D). It is well established that this broad confidential source protection is not lost once a source's identity becomes known through public testimony or some other such means. *See, e.g., Radowich v. United States Attorney, District of Maryland*, 658 F.2d 957, 960 & n.10 (4th Cir. 1981); *Lame v. United States Department of Justice*, 654 F.2d 917, 925 & n.9 (3d Cir. 1981); *Lesar v. United States Department of Justice*, 636 F.2d 472, 491 (D.C. Cir. 1980); *Keeney v. FBI*, 630 F.2d 114, 119 n.2 (2d Cir. 1980); *Interstate Motor Freight System v. United States Department of Labor*, 554 F. Supp. 692, 694 (W.D. Mich. 1982).

Indeed, as one court has stated it: "Because a person may have given testimony at a trial on a specific topic does not mean that all information offered by that source upon a guarantee of confidentiality automatically becomes available to the person to whom it relates. The nontestimonial information may be far more damaging than any testimony freely given and may place the source in great peril." *Scherer v. Kelley*, 584 F.2d 170, 176 n.7 (7th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979). *Cf. Kiraly v. FBI*, 728 F.2d 273, 280 (6th Cir. 1984) ("The mere act of testifying at trial therefore should not open private files to public disclosure.") (Exemption 7(C)); *see also id.* at 281 (concurring on Exemption 7(D) basis).

Can Exemption 7(A) be used to protect the records of closed or dormant investigations?

Yes, under some circumstances. As a general rule, Exemption 7(A) is not designed to protect the records of closed investigations. In fact, it was the "blanket" nondisclosure of closed investigative files under the original version of Exemption 7 that most prompted Congress to amend it in 1974, leading to the current "interfere with law enforcement proceedings" language of Exemption 7(A). *See, e.g., Title Guarantee Co. v. NLRB*, 534 F.2d 484, 492 (2d Cir. 1976). Further, in the legislative history of the 1974 Amendments, Congress made quite clear that Exemption 7(A) was intended to protect against harm to "concrete *prospective* law enforcement proceeding[s]." 120 Cong. Rec. S9329 (daily ed. May 30, 1974) (remarks of Senator Hart) (emphasis added).

This standard, however, does not rule out the application of Exemption 7(A) to dormant investigations. For example, in *National Public Radio v. Bell*, 431 F. Supp. 509 (D.D.C. 1977), a court considered the applicability of Exemption 7(A) to the Department of Justice's investigative files on the mysterious death of plutonium worker Karen Silkwood. At that time, it was conceded that the investigation was "in a 'dormant' stage in that all available investigative leads ha[d] been pursued" without success. 431 F. Supp. at 514. Nevertheless, noting that the applicable statute of limitations had yet to expire, the court held the investigation to be "one which will hopefully lead to a *'prospective* law enforcement proceeding'" within the meaning of Exemption 7(A). *Id.* (emphasis in original). In so holding, it stressed that Exemption 7(A) was aimed at preventing "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." *Id.* at 514–15. *See also Erb v. United States Department of Justice*, 572 F. Supp. 954, 956 (W.D. Mich. 1983) (Exemption 7(A) protection accorded even after investigation announced to be "concluded 'for the time being'"); *ABC Home Health Services, Inc. v. United States Department of Health & Human Services*, 548 F. Supp. 555, 559 (N.D. Ga. 1982) (Exemption 7(A) held applicable after settlement so long as "further proceedings are not foreclosed").

Finally, it should be remembered that the records of a closed investigation may be quite significant to one or more ongoing ones. As one court stated it, Exemption 7(A) is properly applicable "where the closed file documents remain fully relevant to a specific pending enforcement proceeding, although, to be sure, not the one for which they were precisely intended." *New England Medical Center Hospital v. NLRB*, 548 F.2d 377, 385 (1st Cir. 1976). Indeed, it is possible, under such circumstances, that Exemption 7(A) can be "as fully applicable to the closed as to the open file records." *Id.* at 386. *See also, e.g., Ostrer v. FBI*, Civil No. 83–0328, slip op. at 4–5 (D.D.C. Sept. 22, 1983) (appeal pending); *Capital Times Co. v. NLRB*, 483 F. Supp. 247, 250–51 (E.D. Wis. 1980); *but cf. Nemacolin Mines Corp. v. NLRB*, 467 F. Supp. 521, 523–24 (W.D. Pa. 1979) (agency must actually intend to use information in related future enforcement matter).

Can Exemption 7 be invoked for records compiled by the federal government in connection with a non-federal investigation?

Yes. Exemption 7's threshold requirement that investigatory records be compiled for "law enforcement purposes" makes no reference to federal investigations, nor can any such limitation logically be inferred. Indeed, in every case to have considered this question thus far, it has been held that "there is no implied 'federal law' limit in

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Q&A

Exemption 7." *Peterzell v. Department of Justice*, 576 F. Supp. 1492, 1494 (D.D.C. 1983) (appeal pending). *See also Donovan v. FBI*, 579 F. Supp. 1111, 1117–20 (S.D.N.Y. 1983) (appeal pending) (foreign law enforcement investigation); *Bevis v. Department of State*, 575 F. Supp. 1253, 1256 (D.D.C. 1983) (appeal pending) (same); *Wojtczak v. United States Department of Justice*, 548 F. Supp. 143, 146–48 (E.D. Pa. 1982) ("Exemption 7 applies to all law enforcement records, federal, state, or local, that lie within the possession of the federal government.").

Can Exemption 5 be invoked for criminal law enforcement records?

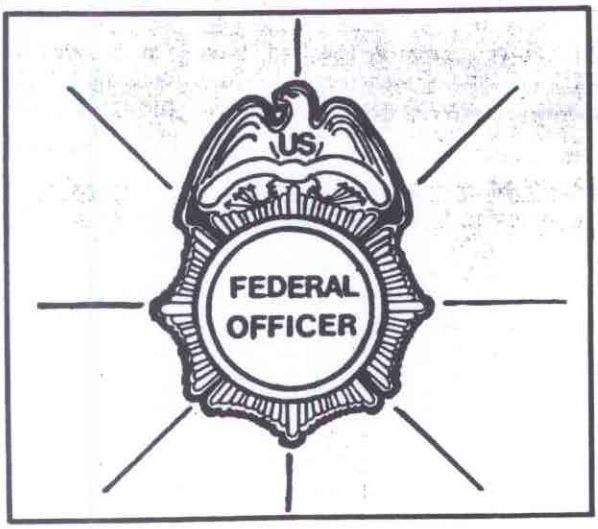
Yes. At first blush, the application of Exemption 5 to criminal law enforcement records might seem a bit odd. To be sure, Exemption 5 incorporates civil discovery privileges and is typically invoked in connection with noncriminal matters. Even the Supreme Court has noted the somewhat nebulous posture of the government with respect to Exemption 5 claims: "[W]e do not know whether the government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant." *EPA v. Mink*, 410 U.S. 73, 86 (1973). *See also Ferri v. United States Department of Justice*, 573 F. Supp. 852, 864 n.33 (W.D. Pa. 1983).

However, there is no logical reason why Exemption 5 privileges could not arise in the context of a criminal law enforcement investigation. After all, as the Supreme Court has stressed, the legislative intent underlying Exemption 5 was to shield certain internal governmental deliberations and consultations from public view where necessary to avoid harm to agency functioning. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); *EPA v. Mink*, 410 U.S. at 87. Nowhere in that legislative history was it suggested that this objective is any less vital for criminal law enforcement matters; consequently, the courts have not refrained from upholding an otherwise applicable Exemption 5 claim for such records.

For example, criminal investigative files quite commonly contain recommendations by subordinate personnel as to "possible approaches to be taken" in such proceedings, which can certainly qualify for deliberative process privilege protection under Exemption 5. *Afshar v. Department of State*, 702 F.2d 1125, 1140 (D.C. Cir. 1983). Likewise, such law enforcement files can easily contain many documents qualifying for broad attorney work-product or attorney-client privilege protection, even if prepared by criminal investigators. *See, e.g., Conoco Inc. v. United States Department of Justice*, 687 F.2d 724, 728–29 (3d Cir. 1982). *See also FOIA Update*, Summer 1983, at 6. Indeed, one court has observed that Exemption 5 is "tailor-made" for protecting sensitive discussions of investigatory data compiled during the criminal investigative and prosecutorial processes. *Fund for Constitutional Government v. National Archives & Records Service*, 485 F. Supp. 1, 13 (D.D.C. 1978), *aff'd on other grounds*, 656 F.2d 856 (D.C. Cir. 1981). *See also Antonelli v. Sullivan*, 732 F.2d 560, 561 (7th Cir. 1984).

Can one federal agency ever be treated as a "confidential source" of another federal agency?

No. Although the courts have generally been quite expansive in extending the protections of Exemption 7(D), there is no basis for treating a federal agency as a "confidential source" within the meaning of this exemption. *See Retail Credit Co. v. FTC*, 1976-1 Trade Cas. (CCH) ¶60,727 at 68,127 n.3 (D.D.C. 1976) ("Certainly [one federal agency] cannot be a confidential source [of another federal agency]."). However, when one federal agency supplies another with information obtained from the first agency's own confidential source, the protection afforded by Exemption 7(D) is in no way impaired. As one court put it: "The text of the FOIA protects without qualification every 'confidential source' and does not draw a distinction between a direct and an indirect 'confidential source.' " *Sands v. Murphy*, 633 F.2d 968, 970 (1st Cir. 1980). It should also be remembered that the courts have now uniformly held that all nonfederal law enforcement authorities—foreign, state, or local—can be considered confidential sources under Exemption 7(D). *See, e.g., Lesar v. United States Department of Justice*, 636 F.2d 472, 491 (D.C. Cir. 1980); *Church of Scientology v. United States Department of Justice*, 612 F.2d 417, 427 (9th Cir. 1979).



Guest Article

The Privacy Act as an Exemption Three Statute

By Douglas N. Letter

Anthony Provenzano, a New Jersey organized crime figure, has filed Freedom of Information Act requests with the FBI and the Justice Department's Criminal Division seeking access to the voluminous files those agencies have compiled concerning him. Provenzano is seeking these records through the FOIA even though they are all exempt from access under the Privacy Act of 1974.

The issue raised by Provenzano's case, as well as by other cases throughout the nation, is whether an individual information requester can attempt to gain access to his federal agency file by using the FOIA if that access is barred by Privacy Act disclosure exemptions; or, in technical terms, is Privacy Act Exemption (j)(2), 5 U.S.C. §552a(j)(2), a nondisclosure statute within the meaning of FOIA Exemption 3, 5 U.S.C. §552(b)(3)?

Four courts of appeals have ruled on this issue thus far and they have split evenly. *Compare Shapiro v. DEA*, 721 F.2d 215 (7th Cir. 1983), *cert. granted*, 104 S.Ct. 1706 (1984), and *Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980), *with Provenzano v. United States Department of Justice*, 717 F.2d 799 (3d Cir.), *reh'g en banc denied*, 722 F.2d 36 (3d Cir. 1983), *cert. granted*, 104 S.Ct. 1706 (1984), and *Greentree v. United States Customs Service*, 674 F.2d 74 (D.C. Cir. 1982). *See also Porter v. United States Department of Justice*, 717 F.2d 787 (3d Cir. 1983) (companion case to *Provenzano*); *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980) (predecessor case to *Shapiro*).

Mr. Letter, an attorney on the Appellate Staff of the Department of Justice's Civil Division, argued the government's position on this issue before the D.C. Circuit, Third Circuit and Seventh Circuit Courts of Appeals.

The Supreme Court has now agreed to consider Provenzano's case, and a definitive resolution of this controversial issue is expected within the next year.

The issue of the proper relationship between the FOIA and the Privacy Act arises because the latter statute has access exemptions that are in certain ways broader than the comparable FOIA ones. Specifically, Privacy Act Exemption (j)(2) authorizes heads of criminal justice agencies to promulgate regulations denying access to most or all of their law enforcement files systems of records. This means that when a person requests his own law enforcement records under the Privacy Act, a criminal law enforcement agency can deny the request readily, without further consideration, with respect to records that are maintained within an exempt system. On the other hand, under FOIA Exemption 7, 5 U.S.C. §552(b)(7), an agency can withhold investigative material in certain specified categories, but the agency generally must justify invocation of a FOIA exemption on a line-by-line basis. Therefore, for criminal law enforcement records, the Privacy Act provides broader protection, with a much lesser administrative burden, than does the FOIA.

The Supreme Court has now agreed to consider Provenzano's case, and a definitive resolution of this controversial issue is expected within the next year.

FOIA Exemption 3 is an unusual exemption that in essence reads into the FOIA other nondisclosure statutes. To qualify, these statutes must either: (1) provide absolutely for nondisclosure; or (2) allow an agency discretion on whether to release, but only where the statute sets out particular criteria *or* describes with particularity the types of materials the agency has discretion to withhold. See 5 U.S.C. §552(b)(3), as amended. If the Privacy Act's exemptions are not regarded as Exemption 3 statutes, then they are reduced to the same scope as the other FOIA exemptions because a requester can simply avoid those Privacy Act exemptions by filing a FOIA request.

The Justice Department is arguing (consistent with the position it has taken since 1981) that Privacy Act Exemption (j)(2) is a FOIA Exemption 3 statute because it sets out with sufficient specificity the types of law enforcement matters that criminal justice agencies have authority to exempt from access. Thus, even though Exemption (j)(2) leaves discretion with agency heads, a plain language analysis of the relevant statutory provisions indicates that Exemption (j)(2) fits the "particular matters" criterion for an Exemption 3 statute.

The legislative history of Exemption (j)(2) supports this plain language analysis. That history reveals that both Houses of Congress and several sponsors of the Privacy Act were concerned that subjects of law enforcement records not be able to gain access to those sensitive records. In addition, the legislative history shows quite clearly that Congress was aware that it was creating Privacy Act exemptions distinctly broader than existing FOIA exemptions. In light of this fact, if Exemption (j)(2) is not an Exemption 3 statute, a puzzling question arises: Why would Congress go out of its way to create Privacy Act access exemptions broader than the FOIA ones if a requester could avoid those Privacy Act exemptions through use of the FOIA? Thus, the Justice Department has argued that there is a basic illogic to the contention that Exemption (j)(2) is not an Exemption 3 statute.

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Why would Congress go out of its way to create Privacy Act access exemptions broader than the FOIA ones if a requester could avoid those Privacy Act exemptions through use of the FOIA?

If Exemption (j)(2) is regarded as an Exemption 3 statute, however, the FOIA's exemptions nonetheless retain their full meaning for a significant number of requests. The Privacy Act covers only records about individuals located through use of an individual's name or other personal identifier. Accordingly, the Privacy Act governs only a fraction of the government records that are covered by the FOIA, which applies to almost all federal agency records. In addition, the Privacy Act access provision, 5 U.S.C. §552a(d), and its exemptions apply solely to first-party requests (requests by an individual for his own records). Consequently, regardless of the outcome of the issue raised by the *Provenzano* case, the FOIA's exemptions are the only ones applicable for all third-party requests (where a requester seeks records pertaining to another individual), and for all requests for non-Privacy Act material.

Although both the Fifth and Seventh Circuit Courts of Appeals have endorsed the Justice Department's argument regarding how these two statutes interrelate, the District of Columbia and Third Circuit Courts of Appeals have rejected it. The latter courts have read the statutes as completely separate, so that the Privacy Act exemptions affect disclosure only under that Act, but have no impact on FOIA requests for the same material. These two courts have relied on three bases to reach this result.

First, both courts have pointed out that Exemption (j)(2) states that it authorizes agencies to exempt certain records from specified requirements "of this section," which refers to the Privacy Act. These courts have therefore concluded that the Privacy Act exemptions affect access only through that Act and not the FOIA. The problem with that reasoning is that it assumes that Congress had no purpose in enacting Privacy Act exemptions broader than the FOIA ones, because such reasoning allows requesters to sidestep the Privacy Act's exemptions.

Second, the D.C. and Third Circuits focused on Subsection (b)(2) of the Privacy Act, 5 U.S.C. §552a(b)(2). Section (b) of the Privacy Act states a general nondisclosure rule, and it then provides a number of exceptions to that rule. Subsection (b)(2) allows disclosure when the FOIA authorizes release. However, in relying on this subsection, these courts appear to have overlooked the introductory language

... if Exemption (j)(2) is finally determined to be an Exemption 3 statute, criminal justice agencies should be able to conserve valuable resources ...

of Section (b), which states that the section applies *except* when an individual has requested his own file or gives his consent to release. The section accordingly applies only to *third-party* requests, while Provenzano has made a *first-party* request for his own records. Therefore, Subsection (b)(2) is simply not pertinent. Indeed, if these courts' rationale on this point is accepted, it raises again the question noted above: why would Congress undo in Subsection (b)(2) what it simultaneously did by enacting broad Privacy Act access exemptions?

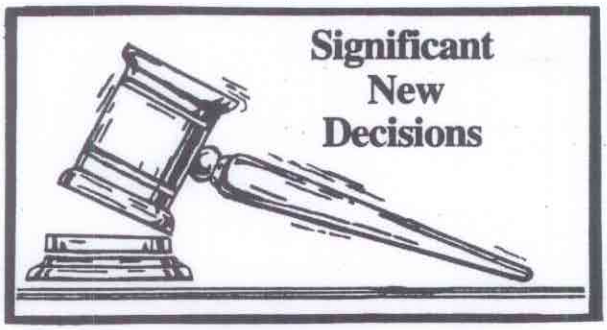
The third reason given by the D.C. and Third Circuits is the most troubling in an academic discussion, and it has come to be referred to as the "third party anomaly" theory. This theory posits that, because third-party requests are covered only by the narrower FOIA exemptions, a third-party requester might be able to obtain more information about the subject of a file than would the subject himself, because the subject's request is governed by the broader Privacy Act exemptions. Thus, according to this theory, an "anomaly" is created by regarding the Privacy Act as an Exemption 3 statute, because a stranger might gain greater access to another individual's file than would the individual himself.

This "third party anomaly" theory is mostly only a theory. The FOIA's privacy exemptions, 5 U.S.C. §552(b)(6) and (7)(C), would in the vast majority of cases prevent access by one person to another person's criminal justice files. Therefore, there would be no greater third-party FOIA access than first-party Privacy Act access in such cases. In addition, there is simply no evidence that Congress contemplated such an "anomaly" when it passed the Privacy Act; this theory thus tells us nothing about the crucial intent of Congress when the Privacy Act was enacted.

As noted above, at the Justice Department's request, the Supreme Court has agreed to hear the *Provenzano* case and to rule on the issue of the proper relationship between these two important government information access statutes. The Court will simultaneously rule on the same issue in the context of a request by two former prisoners seeking their DEA files in the *Shapiro* case. A Supreme Court ruling in the government's favor would be a significant victory.

Indeed, if Exemption (j)(2) is finally determined to be an Exemption 3 statute, criminal justice agencies should be able to conserve valuable resources when processing the thousands of first-party information requests received annually from federal prisoners such as Provenzano.

Editor's Note: Pending the Supreme Court's decision in the* Provenzano *case, this nondisclosure position should not be invoked at the administrative level.* See FOIA Update, *Spring 1983, at 3.* See also *49 Fed. Reg. 12338 (March 29, 1984) (Office of Management and Budget Privacy Act Guideline).



***Williams v. FBI*, 730 F.2d 882 (2d Cir. 1984).**

Relying heavily on the legislative history of the FOIA, the U.S. Court of Appeals for the Second Circuit has joined the First Circuit in *Irons v. Bell*, 596 F.2d 468 (1st Cir. 1979), and the Eighth Circuit in *Kuehnert v. FBI*, 620 F.2d 662 (8th Cir. 1980), in holding that investigatory records of the Federal Bureau of Investigation *per se* meet the threshold requirement of Exemption 7. The lower court in this case had refused to accord Exemption 7 protection to investigatory records compiled during the course of the FBI's investigation of the Coalition for Defense of the Panthers (a group involved in fund raising and public relations on behalf of the Black Panther Party), based upon its conclusion that the FBI could not have reasonably considered the Coalition to pose any threat of potential criminal activity. The Second Circuit rejected this analysis, however, holding that the legislative history of the 1974 FOIA Amendments showed that Congress did not intend to alter then-existing case law treating the phrase "compiled for law enforcement purposes" as a broad descriptive classification encompassing all records of federal criminal law enforcement agencies such as the FBI. Rather, the court of appeals declared, Congress intended to provide "absolute protection" to information falling within Exemption 7 subparts (A)–(F), in order to prevent impairment of the "efficient operation of federal law enforcement agencies." The Second Circuit stressed that a contrary holding would "substantially impair law enforcement" because it would not provide an absolute assurance to persons desiring confidentiality as a condition of cooperating with the government, leading to effects that "would be exactly contrary to the result Congress wanted to achieve."

***Kiraly v. FBI*, 728 F.2d 273 (6th Cir. 1984)—*affirming* 3 GDS ¶82,465 (N.D. Ohio 1982), and 3 GDS ¶82,466 (N.D. Ohio 1982).**

In an aberrational decision rejecting the traditional legal principle that an individual's privacy right is a purely personal interest which expires at death, a divided panel of the U.S. Court of Appeals for the Sixth Circuit has upheld the nondisclosure of a deceased FBI informant's file on the basis of Exemption 7(C) as well as Exemption 7(D). Noting that these two exemptions logically work "in conjunction" with one another, two judges on the panel preferred to rest their decision on both grounds, notwithstanding the death of the individual in question. At the same time, they additionally rejected the plaintiff's argument that the decedent's public testimony at trial precluded Exemption 7(D) protection for his file, declaring: "If every citizen who volunteers information on criminal conduct, or testifies about it, were to thereby open his personal file to the public, convincing citizens to come forward and testify would be far more difficult that it already is." In a separate opinion, one judge emphatically disagreed with the notion that personal privacy rights can survive an individual's demise, reiterating the majority legal rule that "[a] dead man retains no right to privacy after his death." Instead, he found the information in question to be plainly protected under Exemption 7(D) alone.

***EHE National Health Services, Inc. v. HHS*, Civil No. 81-1087 (D.D.C. Feb. 24, 1984).**

In a "reverse" FOIA suit brought by the successful bidder on a government health services management contract, U.S. District Court Judge Thomas Penfield Jackson refused to block the release of certain information contained in the winning bid despite the submitter's argument that disclosure would cause it competitive harm. The submitter of the information filed suit when an unsuccessful bidder sought its winning contract proposal under the FOIA. Although the agency agreed to withhold sensitive information contained in the bid proposal, it decided to release the qualifications of key employees and general descriptions of certain routine operational matters (*e.g.*, employee orientation and site visitation practices). Judge Jackson upheld such disclosure, finding that it would reveal only "mundane" information and that it would not cause competitive harm. Although recognizing that "the more competitors know about a business concern the more vulnerable to effective competition it becomes," he emphasized that "the integrity of the public procurement process is best served by conducting as much of it as possible in public view." He also pointedly cautioned competitors to expect disclosure of more information when they "do business with the government" than when they enter into "purely private" agreements.

***Minnis v. United States Department of Agriculture*, Nos. 83–4089, 83–4209 (9th Cir. May 22, 1984)—*reversing* 3 GDS ¶83,232 (D. Or. 1983).**

In a square reversal of a troubling lower court decision, the U.S. Court of Appeals for the Ninth Circuit has approved the withholding under Exemption 6 of the names and addresses of individuals who applied for permits to ride on rafts down Oregon's Rogue River. Although the district court had found a public benefit in releasing the requested list to the owner of a commercial establishment on the river for solicitation purposes (see *FOIA Update*, Summer 1983, at 4), the court of appeals strongly disagreed. Pointing to the seminal "mailing list" case under the FOIA—*Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974)—the Ninth Circuit said: "We agree with the Third Circuit that commercial interest should not weigh in favor of mandating disclosure of a name and address list." It also observed that the lower court had apparently

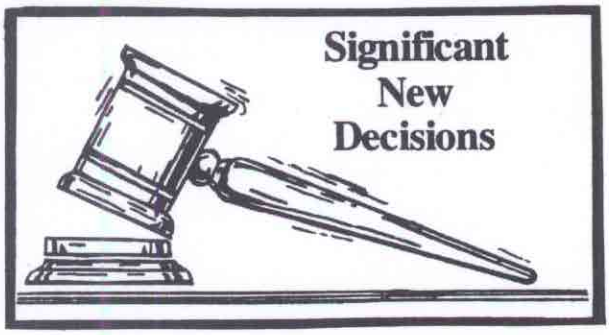
"ignore[d] the possibility that some [persons on the list] would be irritated rather than enlightened by unwanted solicitations." Moreover, it added, there would be nothing to prevent other commercial advertisers from obtaining the list, "subjecting the applicants to an unwanted barrage of mailings and personal solicitations." Finding "more than a minimal privacy interest" implicated in such a list, the Ninth Circuit readily concluded that its disclosure would be "clearly unwarranted."

***Heights Community Congress v. Veterans Administration*, 732 F.2d 526 (6th Cir. 1984)—*affirming* 3 GDS ¶82,284 (N.D. Ohio 1982).**

In another mailing list-type case, the U.S. Court of Appeals for the Sixth Circuit has upheld the application of Exemption 6 to the home addresses of VA loan recipients in the Cleveland area. Heights Community Congress (HCC), a "watchdog" organization committed to investigating "racial steering" in a particular Cleveland neighborhood, sought disclosure of data regarding all VA loans in the area to facilitate its investigation. The Sixth Circuit agreed with the VA, however, that disclosure of such information as the home addresses of VA loan recipients would be "clearly unwarranted" within the meaning of Exemption 6. The court of appeals commenced its analysis with the ancient "maxim that 'a man's home is his castle.'" While it found that HCC's efforts unquestionably embodied a legitimate public interest, it also noted that "assertions of a public interest in merely 'monitoring' the operation of a federal program, without more, have not been viewed favorably by the courts." Further, it emphasized that disclosure "would subject a veteran, who is himself not suspected of any wrongdoing, to involuntary personal involvement in HCC's investigation." Such an outcome, which the court of appeals foresaw could easily include HCC representatives "interrogating the individual buyers of [each] identified property," was viewed by it as contrary to "the basic right in this nation simply to be left alone." The Sixth Circuit thus found itself "accordingly constrained to conclude" that the balance was properly struck in favor of nondisclosure.

***Crooker v. United States Parole Commission*, 730 F.2d 1 (1st Cir. 1984).**

In a lengthy contribution to the growing body of FOIA law endeavoring to define the term "agency record," the U.S. Court of Appeals for the First Circuit has ruled that a presentence report—a document that is "jointly possessed by a FOIA-controlled agency (the Parole Commission)" and "a FOIA-exempt entity (the courts)"—is not an agency record subject to the FOIA. The First Circuit surveyed the case law in which other courts (particularly the D.C. Circuit) have focused on the degree of control exercised by the agency and the non-agency, and it concluded that "courts have not adhered to a single variant of the control test for determining whether a document is an agency record for FOIA purposes." It therefore rejected as dispositive factors in its analysis both the standing court



order retaining control of the presentence report, as well as the "weight of authority," and it looked instead to congressional intent as the "key factor" in resolving the status of the presentence report before it. In deciding that the document was not an "agency record," the First Circuit focused particularly on the fact that Congress had denied the Parole Commission the discretion to permit a prisoner to retain a copy of his presentence report, while it had expressly granted such discretion to the courts. Finally, the court of appeals observed that FOIA access to presentence reports "would permit a quick end run around the court's discretion to refuse release of the report to the defendant after sentencing," and that, if the report were deemed to be an agency record, the uncertainty surrounding the scope of possible FOIA exemptions "might inhibit the free flow of information to probation officers who complete presentence reports."

Contrary conclusions on this issue have been reached this year by the D.C. Circuit and the Ninth Circuit Courts of Appeals, respectively, in *Lykins v. United States Department of Justice*, 725 F.2d 1455 (D.C. Cir. 1984), and *Berry v. Department of Justice*, 733 F.2d 1343 (9th Cir. 1984).

***Miller v. Casey*, 730 F.2d 773 (D.C. Cir. 1984)—*affirming* 3 GDS ¶83,095 (D.D.C. 1982).**

A unanimous panel of the U.S. Court of Appeals for the D.C. Circuit has approved the CIA's refusal to confirm or deny the existence of records concerning an alleged attempt by the United States to overthrow the Albanian government following World War II. The D.C. Circuit readily accepted the CIA's position that "an answer as to whether the files existed would be tantamount to declaring whether the mission occurred," which it found to be an abstract fact fully protectable under Exemption 1. In so doing, it flatly rejected the plaintiff's argument that his request should have been interpreted in such a way as to avoid that result, declaring that the request "made a specific inquiry about specific actions" and that "[t]he agency was bound to read it as drafted." The court of appeals also held that Exemption 3, in conjunction with Section 403 of the National Security Act of 1947, served as an additional ground for nondisclosure because any acknowledgment of such a mission, if it existed, "would reveal how the CIA has deployed its resources in the past, and would deter potential

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. . . Significant New Decisions

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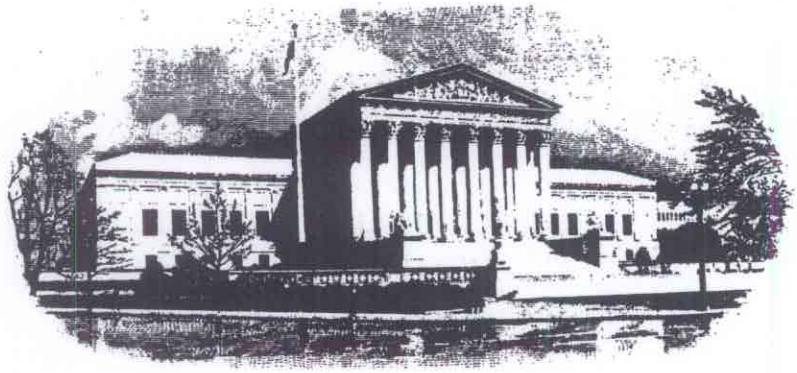
future sources from cooperating." Finally, the D.C. Circuit rebuffed the plaintiff's attempt to obtain the same information pursuant to a CIA regulation permitting access to classified information for historical research purposes, holding that any decision to grant such access under this regulation is made at the sole discretion of the CIA Director and "cannot be reviewed by this court."

***Schlesinger v. CIA*, Civil No. 82–1749 (D.D.C. Mar. 5, 1984).**

In this case, the plaintiff sought access to the CIA's operational file on U.S. involvement in the 1954 Guatemalan coup. The CIA has officially acknowledged that it had some involvement in the coup; it has refused, however, to reveal any additional details despite the age of the documents and despite widespread unofficial disclosures and speculation as to their contents. Extending the principles articulated in *Afshar v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983), District Court Judge Thomas A. Flannery agreed with the CIA and held that only official disclosures—"direct acknowledgements by an authoritative government source"—can preclude an agency's otherwise proper Exemption 1 or Exemption 3 national security claim. Such official disclosures, Judge Flannery firmly stated, do *not* include CIA-cleared books or articles, publications authored by former agency officials, or even discussions contained in congressional reports. Once the term "official disclosure" is thus "properly defined," he reasoned, "any dispute over the extent of indirect, or unofficial disclosures," becomes immaterial to the agency's exemption claims. Judge Flannery also regarded as "inconsequential" the age of the documents at issue, noting that the CIA had recently reviewed them and had determined that harm could still flow from their release, a conclusion which he found particularly plausible in light of the fact that "[c]onditions in Central America are extremely sensitive today."



Supreme Court Update

Addressing a crucial investigatory record issue that arose within the unusual confines of Exemption 5, the Supreme Court unanimously gave the government a significant law enforcement victory on March 20.

In *United States v. Weber Aircraft Corp.*, 104 S.Ct. 1488 (1984), the Court considered a disclosure request for particularly sensitive portions of an Air Force accident investigation report. The report was prepared as part of a standard "safety investigation" undertaken by the Air Force after the crash of one of its aircraft. It contained detailed statements from Air Force personnel who witnessed or participated in the events surrounding the incident. Pursuant to standard Air Force policy, and in order to "encourage witnesses to speak fully and frankly," all such witnesses "receive an assurance that their statements will not be used for any purpose other than accident prevention."

Requester Weber Aircraft Corp. wanted complete access to the report, including all confidential witness statements, to defend itself in a civil damages lawsuit brought by an Air Force pilot injured in the accident. It had been unable to obtain the information during routine document discovery within that civil action because of a longstanding civil discovery privilege that protects all such statements given in aircraft accident investigations. Consequently, Weber Aircraft sought to circumvent this established discovery barrier through use of the FOIA.

Although the district court judge considering Weber Aircraft's FOIA claim found the confidential witness statements properly withheld pursuant to Exemption 5, the U.S. Court of Appeals for the Ninth Circuit ruled in Weber Aircraft's favor. In a distinct departure from established case law, it refused to regard the traditional aircraft accident in-

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. . . Supreme Court Update

vestigation privilege as incorporated into Exemption 5, simply because that privilege was not specifically mentioned anywhere within Exemption 5's legislative history. The Ninth Circuit held that this harsh interpetation was required by the Supreme Court's decision in *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979). See *FOIA Update*, Jan. 1983, at 5.

The Supreme Court, however, reversed the Ninth Circuit by a 9–0 vote, holding that such confidential witness statements are protectable under the FOIA as well as in the civil discovery context. Writing for the Court, Justice John Paul Stevens declared that "[t]he plain language of the [FOIA] itself . . . is sufficient to resolve the question presented." He pointed to the fact that the aircraft accident investigation privilege is "well recognized in the case law as precluding routine disclosure of the statements" and said that, on the basis of that alone, "the statements are covered by Exemption 5." The Court's previous decision in *Merrill*, he concluded, did not compel any different approach.

Further, on a point of wide FOIA applicability, Justice Stevens dwelled on the fact that Weber Aircrft was seeking to use the FOIA to circumvent and in effect nullify traditional civil discovery restrictions. He declared that such an approach, if permitted in this case, "would create an anomaly in that the FOIA could be used to supplement civil discovery." Justice Stevens therefore also based the Court's decision upon this additional ground of legislative intent: "We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented."

Finally, it should not be overlooked that the *Weber Aircraft* opinion contains a potentially significant discussion that goes to the very heart of the investigatory information collection process. In footnote 23 of the Court's opinion, Justice Stevens observed that the nondisclosure result achieved in this case "would not be inconsistent with the fundamental goals of the FOIA since it does not necessarily reduce the amount of information available to the public." This is so for such information as confidential witness statements obtained in an investigation, he noted, "because the Government would not be able to obtain the information but for its assurance of confidentiality." Thus, if FOIA protection were not accorded such information, Justice Stevens reasoned, "the information would not be obtained by the Government in the first place."

* * * * *

In another major development, the Supreme Court on April 2 agreed to decide whether the Privacy Act of 1974 can serve as an Exemption 3 statute under the FOIA. It simultaneously accepted for review both *Provenzano v. United States Department of Justice*, 717 F.2d 799 (3d Cir.), *reh'g en banc denied*, 722 F.2d 36 (3d Cir. 1983), *cert. granted*, 104 S.Ct. 1706 (1984), and *Shapiro v. DEA*, 721 F.2d 215 (7th Cir. 1983), *cert. granted*, 104 S.Ct. 1706 (1984).

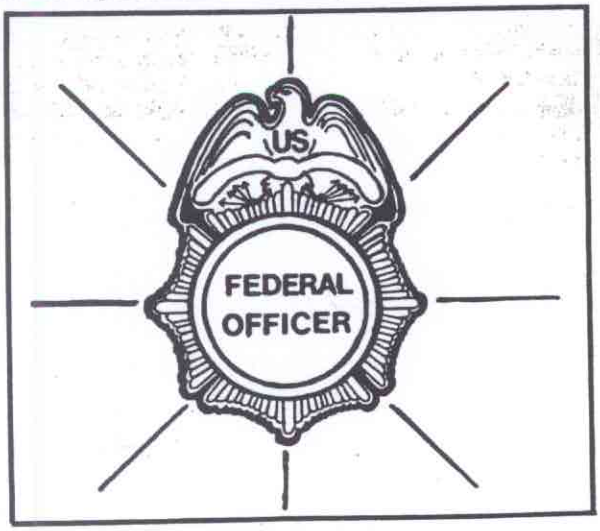
In *Provenzano*, the U.S. Court of Appeals for the Third Circuit ruled that the Privacy Act cannot serve as an Exemption 3 statute, while the Seventh Circuit Court of Appeals in *Shapiro* held squarely that it can. The D.C. Circuit and Fifth Circuit Courts of Appeals have likewise split on the issue, which has thus far focused on the Privacy Act's broad criminal law enforcement exemption, 5 U.S.C. §552a(j)(2). (See the "Guest Article" on pages 8–9 for a detailed discussion of this issue.)

The Court should hear oral argument on this controversial issue sometime in late fall and a decision can be expected during the early part of 1985. The *Provenzano* and *Shapiro* cases have been consolidated for purposes of the Court's consideration, but the issue apparently will be decided under the former case name.

* * * * *

Also pending before the Supreme Court for decision during its 1984–1985 Term is *Sims v. CIA*, 709 F.2d 95 (D.C. Cir. 1983), *cert. granted*, 104 S.Ct. 1438 (1984), which involves the issue of the proper definition of the term "intelligence source" under the CIA's major Exemption 3 statute. See *FOIA Update*, Fall 1983, at 6. The CIA has argued to the Supreme Court that the narrow definition of that term articulated by the D.C. Circuit in *Sims* would "seriously impair" the agency's intelligence gathering functions.

On June 11, the Supreme Court additionally granted the plaintiff's cross-petition for *certiorari* in *Sims*, so the government will be defending a favorable portion of the lower court decision as well. The entire case should be scheduled for oral argument soon after the Court returns from its summer recess in October. As with *Provenzano*, a decision can be expected sometime in early 1985.



FOIA Focus: Thomas H. Bresson

The Federal Bureau of Investigation annually receives more than 15,000 FOIA and Privacy Act requests for records maintained in its vast criminal and intelligence records systems. There is considerable public interest in virtually every major FBI investigation (e.g., the assassination of President John F. Kennedy, the Rosenberg espionage conspiracy, ABSCAM), as well as a steady stream of first-party requesters who seek access to their FBI files.

The FBI's Deputy Assistant Director for Records Management holds direct oversight responsibility for the FBI's administration of the FOIA and the Privacy Act. This official ensures that the FBI's efforts in this area comply as fully as possible with the spirit and intent of these two disclosure statutes. It is a job that requires an enormous depth of experience with law enforcement access issues, as well as great management skill.

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"The FBI allocates 12–13 million dollars per year to the discharge of its responsibilities under the FOIA and the Privacy Act," says Thomas H. Bresson, Deputy Assistant Director of the Records Management Division.

"Our FOI/PA Section, headed up by Jim Hall, employs more than 200 people devoted exclusively to disclosure matters. This figure does not even include the Record Section employees who identify and locate the files that are the subject of a FOI/PA request, nor the many field office personnel who work on such matters. The FBI's commitment totals approximately 400 work years annually."

At the FBI's Headquarters in Washington, D.C., FOIA and Privacy Act processing operations are now highly structured. There are three disclosure units which process access requests. Each unit consists of four teams, which average twelve document analysts per team, who make the initial determinations on what may be released. "Careful review is necessary to ensure the most liberal access afforded by both statutes without inadvertently releasing information that it is our duty to protect," explains Bresson.

Law-trained Special Agents supervise the work of team captains and members. These Special Agents personally follow through on matters appealed by a requester to the Department of Justice's Office of Information and Privacy and are additionally involved in any subsequent litigation.

Other FOI/PA Section subdivisions include the Initial Processing Unit, which logs all incoming requests on computers and handles initial responses; the Field Coordinators, who coordinate disclosure activities between FBI Headquarters and the many FBI field offices; and the Training and Research Unit, which trains newly hired personnel and keeps more experienced personnel abreast of significant new court decisions.

The large and well organized FOI/PA Section is a relatively recent development at the FBI. Indeed, prior to late 1974, it did not even exist.

The version of the FOIA that was initially enacted by Congress in 1966 categorically exempted from disclosure all files that were compiled for law enforcement purposes. "It had virtually no impact on FBI records," says Bresson. In the fall of 1974, however, Congress amended the FOIA and eliminated this blanket exemption, requiring the production of law enforcement records unless an agency can demonstrate that the requested records fall within certain specified exemptions.

After the 1974 FOIA Amendments and the Privacy Act of 1974 took effect, the number of access requests received by the FBI suddenly skyrocketed from 400 per year (1974) to more than 13,000 (1975). Almost overnight, an enormous backlog was born. "Requests came from historical researchers, newsmen, people who had been involved in various organizations active on both the right and the left side of 1930–1974 issues, the prison populace, and the idly curious as well," Bresson recalls.

This unpecedented volume of access requests had a formidable impact on the FBI. Law-trained agents were brought to FBI Headquarters to develop legal policies governing the production of records from the FBI's criminal and intelligence record systems, and to plan and implement the diversion of resources required to meet such new disclosure demands.

* * * * *

In late 1974, on "loan" from the FBI's Washington, D.C., Field Of-

Cont'd on p. 15

1984 *Case List* . . . *Investigatory Records*

The Office of Information and Privacy will publish the 1984 edition of the *Freedom of Information Case List* in September. Agencies wishing to order multiple copies of the *Case List* should do so by forwarding a requisition (specifying publication number 4–00594–DK–40004) to the Government Printing Office by no later than Aug. 17. The base price for the 1984 edition is expected to be only approximately $2 when ordered in advance through agency printing officers.

As in the past, the Office of Information and Privacy will send one courtesy copy of the *Case List* to each principal FOIA contact at each agency. Additional copies must either be ordered in advance or purchased at full price from the GPO bookstore. The bookstore price last year was $6.50.

The 1984 edition of the *Case List* will once again contain a comprehensive listing and index of FOIA and Privacy Act decisions, as well as an updated "Short Guide to the Freedom of Information Act," and the texts of the FOIA, the Privacy Act and the other major federal access statutes.

Pamela Maida, editor of the *Case List*, is available to answer inquiries at (FTS) 724-7402.

FOIA UPDATE

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Cont'd from p. 2

seeks to protects the confidential source and the names of third parties who were inteviewed as part of the investigative effort under Exemptions 7(C) and 7(D)," Aloot emphasizes.

Aloot goes on to describe a third agency office which performs investigations—the Office of the Inspector and Auditor. This office, which acts as the agency's Inspector General, performs internal investigations of employee misconduct. Again, the investigation reports are withheld until the enforcement action has been terminated.

. . . *FOIA Focus*

Cont'd from p. 14

fice, Tom Bresson was brought to the FBI's Legal Counsel Division to handle these newly emerging FOIA and Privacy Act issues. Joining a staff of only six—three law-trained agents and three document analysts—he became engaged in developing policy guidelines for disclosure of law enforcement records, training employees to make initial determinations according to disclosure statutes, and structuring an organization capable of managing the access requests that quickly flooded in.

Bresson's contributions proved most valuable to this nascent organization as it struggled to keep pace with incoming requests. In 1976, he became Chief of the FOI/PA Disclosure Section in the Records Management Division.

By 1976, however, the FBI was faced with one overwhelming problem: the monumental backlog of access requests which had been rapidly accumulating. Even with considerable increases in the numbers of FOI/PA personnel assigned to disclosure matters, the problem soon became unmanageable.

However, following testimony before a congressional subcommittee, the FBI promised to devote the manpower and resources necessary to overcome this backlog of FOIA and Privacy Act requests. The imaginative approach to solving this dilemma, established and implemented under Bresson's direction, was called "Project Onslaught."

Under "Project Onslaught," more than 300 law-trained Special Agents from the FBI's various field offices were deployed to Washington, D.C., from May through September of 1977, to work on reducing this backlog of unanswered requests. The project was a complete success. While the backlog was not completely eradicated, from that point onward it was manageable.

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In the early days of FOIA implementation, Tom Bresson frequently lectured to students at various training programs sponsored by the Department of Justice. As an acknowledged expert on the interaction of law enforcement records and the media, he now speaks at seminars such as those conducted by the Society of Professional Journalists, the International Association of Chiefs of Police, and the American Society for Industrial Security. He has even appeared on a BBC talk show taped for audiences in England discussing American information law statutes.

Like other veteran FOIA experts at many federal agencies, Bresson sort of "fell into" the area and stayed with it during a time of great expansion. Before long, he became virtually indispensable to the FBI's FOIA operations and rose through the ranks accordingly.

Now, looking back on his nearly ten years of FOIA experiences, Bresson says: "I never expected to stay in this one area for so long, but I'm pleased to have been able to make such a long-term contribution."

In the law enforcement information disclosure area, certainly no one has made a greater one.

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FOIA Training Opportunities

DEPARTMENT OF JUSTICE

Legal Education Institute: The Freedom of Information Act for Attorneys and Access Professionals, **July 16–17, October 18-19,** 1875 Connecticut Ave., N.W., Washington, D.C. Contact: Donna White, (FTS) 673-6372. No charge.

Legal Education Institute: Introduction to the Freedom of Information Act, **September 11,** 1875 Connecticut Avenue, N.W., Washington, D.C. Contact: Donna White, (FTS) 673-6372. No charge.

Legal Education Institute: Seminar on the Privacy Act of 1974, **August 3,** San Francisco, CA. Contact: Donna White, (FTS) 673-6372. No charge.

OFFICE OF PERSONNEL MANAGEMENT

Boston Region Training Center: Successful Implementation of the Freedom of Information and Privacy Acts, **July 10–11,** U.S. Customs House, Boston, MA. Contact: Daniel J. Buckley, (FTS) 223-5786. Cost: $200.

New York Region Training Center: Freedom of Information/Privacy Acts Workshop, **September 17–18,** 26 Federal Plaza, New York, NY. Contact: Daniel Parker, (FTS) 264-8431. Cost: $160.

Atlanta Region Training Center: Freedom of Information/Privacy Acts Workshop, **August 21–22,** 600 Federal Place, Louisville, KY. Contact: Stephen Trehern, (FTS) 242-3488. Cost: $150.

Dallas Region Training Center: Freedom of Information Act/Privacy Act, **July 10–11,** North Park Inn, Dallas, TX; **September 12–13,** Four Seasons Hotel, Albuquerque, NM. Contact: Yvonne Lindholm, (FTS) 729-8241. Cost: $170.

Denver Region Training Center: Freedom of Information and Personnel Privacy, **August 21–22,** Federal Building, Salt Lake City, UT; **August 23–24,** Regency Hotel, Denver, CO. Contact: Nina Schmidt, (FTS) 234-2304. Cost: $130.

Government Affairs Institute: Sixth Annual Symposium on the Freedom of Information Act and the Privacy Act, **August 14–15,** Washington, D.C. Contact: Patti Shosteck, (FTS) 632-5662. Cost. $275.

USDA GRADUATE SCHOOL

Implementation of the FOI and Privacy Acts, **September 20–21,** 600 Maryland Ave., S.W., Washington, D.C. Contact: Theresa DeSilva, (FTS) 447-7124. Cost: $175.