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CATCH 7(A): THE PLAINTIFF’S BURDEN UNDER
THE FREEDOM OF INFORMATION ACT

Don Lively †

THE FREEDOM OF INFORMATION ACT ¹ (FOIA) mandates full agency disclosure of government records unless they fall within nine specific statutory exemptions.² In enacting the


2. The FOIA sets forth procedures which guarantee public access to records kept by government agencies unless the agency can show the information falls within one of nine statutory exemptions. The FOIA exempts from disclosure records containing matters that are

   (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

   (2) related solely to the internal personnel rules and practices of an agency;

   (3) specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

   (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

   (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

   (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

   (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

   (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(75)
FOIA, Congress recognized that agency compliance with its mandate depended upon the availability and effectiveness of external monitoring and enforcement. The FOIA is therefore structured in a manner that affords plaintiffs speedy and proximate access to judicial review of agency decisions against disclosure. Prompt judicial scrutiny has been facilitated by liberal venue provisions, a 30 day answering period for responding to a complaint, and docketing priority for FOIA cases. In addition, litigation to obtain disclosure of records is encouraged by provisions allowing a court to assess costs and attorney's fees against the United States.

The statutory scheme provides that a governmental agency which refuses to produce requested documents has the burden of establishing that the documents fit within one of the nine exemptions from disclosure. Although the burden of proof rests with

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(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b)(1)-(9) (1976). The FOIA also provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." Id. § 552(b).


4. A complaint under the FOIA may be brought "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated." 5 U.S.C. § 552(a)(4)(B) (1976).

5. Id. at § 552(a)(4)(C). This section provides that "[n]otwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown." Id. Compare Fed. R. Civ. P. 12(a) (60 days for United States, or officer or an agency thereof to plead to the complaint).

6. See id. § 552(a)(4)(D). This section of the FOIA provides that except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

Id.


8. Id. § 552(a)(4)(B). This section provides in pertinent part: [t]he court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

Id. (emphasis added).
the agency, the FOIA plaintiff is normally at a serious disadvantage from the outset. Typically, an agency knows the exact nature of the documents being withheld, while the plaintiff can only speculate as to their actual content. Worse yet, when faced with a conclusory and generalized exemption claim, a plaintiff is further handicapped in attempting to secure a meaningful basis for testing or rebutting the agency's assertion. Similarly, without more, a court cannot meaningfully review the basis for nondisclosure.


In Ray, the Central Intelligence Agency (CIA) conceded that although it had not compiled an official "file" on either appellant, it was well aware of the contents of several documents that mentioned each one of them. 587 F.2d at 1200 (Wright, J., concurring). The agency's familiarity with the contents of the documents was evidenced by its claim that the information contained therein was exempt from disclosure pursuant to "Exemptions 1 and 3 of the FOIA . . . ." Id. (citing 5 U.S.C. §§ 552(b)(1), (b)(3) (1976).

In Vaughn, the government argued that the documents contained private information which, if released, would constitute an invasion of the individual's right of privacy. 484 F.2d at 824. The plaintiff had no way of determining whether such personal information amounted to the bulk of the documents or a small separable percentage of its contents. Id. For the statutory requirement that agencies segregate information exempt from disclosure from that which is nonexempt, see note 2 supra.

10. See, e.g., Mead Data Cent., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 251-62 (D.C. Cir. 1977) (requiring detailed justification for agency decision that nonexempt material is not segregable would cause the agency to reflect on its decision not to disclose, allow a court to review the decision on an open record and improve adversarial position of FOIA plaintiffs); Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) ("lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution"). But see Brown v. FBI, 658 F.2d 71, 74 (2d Cir. 1981) (detailed requests made by plaintiff indicate his recognition of the nature of the information withheld by the FBI).

11. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). The court in Vaughn noted that the agency's general factual characterization that the requested documents contained personal information precluded the plaintiff from knowing whether in fact this was true or whether only a portion of the documents were accurately described. Id. at 824. According to the court, the "best appellant [could] do is . . . argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information." Id.

12. See id. at 826. The Vaughn court stated:

[S]ince the burden of determining the justifiability of a government claim of exemption currently falls on the court system there is an innate impetus that encourages agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information. . . . If the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore disclosable sections, and persuade the court that the entire mass is exempt.

Id.
To prevent a de facto shift in the burden of proof from FOIA defendants to FOIA plaintiffs, courts frequently require agencies to itemize and index records which have been requested (assuming such documents are in the agency's possession) and to provide a detailed justification for nondisclosure of each record.\textsuperscript{13} This so-called \textit{Vaughn} index\textsuperscript{14} is intended to ensure agency satisfaction of its burden of proof, not through the assertion of blanket claims which realistically cannot be challenged, but by delineating reasons which enable a plaintiff to respond to, and a court to evaluate, the claimed exemption(s) in a reasonably informed manner.\textsuperscript{15} Although these procedures are intended to promote the FOIA's "overwhelming emphasis upon disclosure"\textsuperscript{16} without altering the adversarial balance necessary for a just and fair result, the equilibrium they seek to establish between FOIA plaintiffs and defendants is not consistently realized.

The plaintiff's ability to test an agency's position is especially diminished when the government asserts that documents may be withheld because they fall within FOIA Exemption 7(A) for "investigatory records compiled for law enforcement purposes, . . . [whose] production . . . would interfere with enforcement proceedings."\textsuperscript{17} The Supreme Court has held that, in certain types of ongoing or prospective enforcement proceedings, disclosure of certain kinds of investigative records would constitute an interference.\textsuperscript{18}

\textsuperscript{13} \textit{See}, \textit{e.g.}, Ollstead v. Kelley, 578 F.2d 1109, 1110 (9th Cir. 1978) (FOIA action remanded to district court where defendants were to submit an index with detailed justifications for withholding documents); Seafarers Int'l Union v. Baldovin, 508 F.2d 125, 129, \textit{vакации as moot}, 511 F.2d 1161 (5th Cir. 1975) (court may require "an organization and explanation of all materials" that are submitted for judicial inspection); Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973), \textit{cert. denied}, 415 U.S. 977 (1974) ("[s]uch an indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the government's justification").

\textsuperscript{14} This designation derives from the case that originally set forth the indexing requirement. \textit{See} Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), \textit{cert. denied}, 415 U.S. 977 (1974).

\textsuperscript{15} \textit{See id.} The \textit{Vaughn} court articulated that agency indexing of withheld documents was necessary "(1) [t]o assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) [t]o permit the court system effectively and efficiently to evaluate the factual nature of the disputed information." \textit{Id.} at 826.

\textsuperscript{16} \textit{Id.} at 823. The \textit{Vaughn} court observed that the primary objective of the Act is to provide the public with a means of obtaining most forms of government records. According to the court, this objective necessitates a narrow construction of the exemptions which could otherwise effectively limit the public's right to information. \textit{Id.}

\textsuperscript{17} 5 U.S.C. § 552(b)(7)(A) (1976). For the full text of this statutory provision, see note 2 supra.

\textsuperscript{18} \textit{See} NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978). The Supreme Court, in analyzing the FOIA in light of its legislative history,
Accordingly, many courts have allowed agencies to withhold various types of investigative material based solely upon government affidavits making only generic and conclusory showings of harm. By relying solely upon agency affidavits, and denying plaintiffs' motions for Vaughn indexes or in camera inspection, courts have deemphasized the need for particularized factual showings that disclosure would interfere with enforcement proceedings.

The choice between requiring detailed indexing or accepting generalized claims of interference with enforcement proceedings is part of a broader clash between two competing public interests that must be balanced in Exemption 7(A) cases. Those rival concerns are full agency disclosure and the effective functioning of law enforcement mechanisms. Resolution of the conflict requires the accommodation of, rather than an absolute choice between, public access to government records and an undue burdening of enforcement activities. This article will 1) examine the background and nature of Exemption 7(A); 2) assess the showings agencies theoretically must make to prevail upon Exemption 7(A) claims and contrast them with actual demands placed upon them in the judicial review process; and 3) explore possible approaches that would afford FOIA plaintiffs more meaningful opportunities to contest Exemption 7(A) claims without unreasonably interfering with or burdening law enforcement proceedings.

19. See, e.g., Barney v. IRS, 618 F.2d 1268 (8th Cir. 1980) (court can make a generic determination on the basis of a few affidavits that disclosure of requested documents would interfere with enforcement proceedings and thereby defeat the need for a Vaughn index or in camera inspection); Parker/Hunter, Inc. v. SEC, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,279, at 91,778, 91,779 (D.D.C. Apr. 29, 1981) (where the court, while inviting supplemental memoranda and supporting affidavits specifying how disclosure of the documents would jeopardize the ongoing investigation, noted that an agency asserting Exemption 7(A) need only make a generic showing of the potential harm to enforcement proceedings); Fedders Corp. v. FTC, 494 F. Supp. 325, 329 (S.D.N.Y.), aff'd, 646 F.2d 560 (2d Cir. 1980) (disclosure of the information sought could reveal the government's strategy and be used by plaintiff to confine its responses to the Government's inquiries, thereby frustrating the proceedings); Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47, 50 (D.D.C. 1979) (basis for withholding information was to prevent disclosure of the identity of voluntary confidential sources and investigative strategy).

20. See note 19 supra.
I. THE ORIGINS AND NATURE OF EXEMPTION 7(A)

Public access to documents contained in an agency's investigative files serves the public interest in an elemental fashion by allowing verification of the accuracy of the documents and by satisfying the citizenry's curiosity. It also serves as a means of shedding light upon investigative and enforcement processes, thereby facilitating their review while functioning as a check on abuses. However, access to the wrong documents at the wrong time may disserve the public interest in effective law enforcement by affording wrongdoers premature access to the government's case and an opportunity for them to fabricate defenses that may neutralize enforcement efforts. Since the FOIA's inception, these competing public concerns have proved less than amenable to simultaneous service.

As originally enacted, Exemption 7 allowed agencies to withhold "investigatory files for law enforcement purposes except to the extent available by law to a [party other than an agency]". This exemption was designed "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to [such] files than he would otherwise have" through discovery. The protection for investigative files was at first


23. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 241 (1978). The Supreme Court's rationale for refusing to permit pretrial disclosure of witness statements was to avoid the potential use of such information to frustrate the judicial system by giving a party earlier and greater access to the government's case. Id. More specifically, the court noted that advance access could lead to "defenses which would permit violations to go unremedied". Id. (quoting New England Medical Center Hosp. v. NLRB, 548 F.2d 377, 382 (1st Cir. 1976)). See also 120 CONG. REC. 17,033 (1974) (statement of Sen. Hart), reprinted in FOIA SOURCE BOOK, supra note 3, at 333. Senator Hart expressed the view that the exemption would apply not only "whenever the Government's case in court . . . would be harmed by the premature release of evidence or information . . . [but also] where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding." Id.

24. See, e.g., 120 CONG. REC. 17,039-40 (1974) (statements of Senators Hruska and Kennedy), reprinted in FOIA SOURCE BOOK, supra note 3, at 348-50. Senators Hruska and Kennedy expressed concern that the anonymity of informants be protected to assure that they will be willing to disclose information implicating others, thereby promoting effective law enforcement. Id.


rowly construed by the courts. For instance, in *Bristol-Myers Co. v. FTC*,27 the Court of Appeals for the District of Columbia Circuit concluded that unless an agency demonstrated an imminent and concrete prospect of an enforcement proceeding, Exemption 7 would not apply.28 Although the principle developed in *Bristol-Myers* was seemingly disapproved by other panels in the Circuit,29 it was eventually redeemed when Congress amended the exemption to ensure that agencies could not indefinitely protect records simply because they were or had been compiled in an investigation.30

Congressional revision of Exemption 7 was largely in response to D.C. Circuit decisions following *Bristol-Myers*,31 which recognized more sweeping protections for investigative files than Congress had contemplated.32 Essentially, the D.C. Circuit created a

28. Id. at 939. The *Bristol-Myers* court held that the statutory construction of the Act does not permit a generalized "claim of confidentiality to immunize agency files from scrutiny." Id. at 938. Instead, the court must determine that enforcement proceedings are forthcoming before it will apply the exemption for investigatory files. Id. at 939. Speculation that an "enforcement proceeding may be launched at some unspecified future date" will not trigger the exemption. Id.
29. For those cases which reject the narrow construction of Exemption 7(A), see notes 31, 33-36 and accompanying text infra.
30. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978). The Court observed that "the thrust of congressional concern in its amendment of Exemption 7 was to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file."
32. See 120 Cong. Rec. 17,834-35 & 17,039-40 (1974), reprinted in FOIA Source Book, supra note 5, at §§3-36 & 349. The legislative history reveals the Senate's desire to revise decisions of the District of Columbia Court of Appeals which declined to look at Congress' intent underlying the exemption. Id. at 17,834-35, FOIA Source Book at §§3-36. The amendment to Exemption 7 was designed to remove[e] strict and undiscriminating adherence to narrow interpretations of the Freedom of Information Act. Id. at 17,835, FOIA Source Book at §36. Specifically, in his address to the Senate, Senator Kennedy stated that looking back over the development of legislation under the 1966 act and "looking at the Senate report language from that legislation, it was clearly the interpretation in the Senate's development of that legislation that the "investigatory file" exemption would be extremely narrowly defined." Id. at 17,039, FOIA Source Book at §49.
per se exemption for almost any file that could be labeled investigative. Exemption 7 claims thus were upheld upon the mere showing that the records were investigative in nature and compiled for law enforcement purposes—even if enforcement proceedings had been concluded or if adjudicative proceedings were unlikely. In contrast to the previous insistence upon a concrete prospect of enforcement proceedings, the validity of an Exemption 7 claim was disassociated from the imminence or likelihood of a prospective enforcement action. Instead, Exemption 7 became available for any records contained in an investigative file compiled for law enforcement purposes regardless of whether it was active or closed.

As a result of these decisions, the exemption outgrew its intended ambit by exceeding the basic interest in safeguarding investigative processes and integrity. The wooden construction given Exemption 7 significantly eased an agency’s burden in justifying

33. See, e.g., Ditlow v. Brinegar, 494 F.2d 1073, 1074 (D.C. Cir.), cert. denied, 419 U.S. 974 (1974) (recognizing that Exemption 7 automatically attached upon a showing that the documents in issue are classified as investigative files “compiled for law enforcement purposes” regardless of whether the Government will actually be injured by revelation).

34. See, e.g., Aspin v. Department of Defense, 491 F.2d 24, 30 (D.C. Cir. 1973) (denying appellant’s argument that Exemption 7 does not apply where there is no longer any prospect of future enforcement proceedings); Weisberg v. United States Dep’t of Justice, 489 F.2d 1195, 1198 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974) (even though death of only suspect precluded prosecution, Exemption 7 applied).

35. For a discussion of Bristol-Myers, see notes 27-28 and accompanying text supra.

36. See Center for Nat’l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974). The Weinberger court stated that “[f]or a file to be deemed to have been compiled for law enforcement purposes it is not necessary that an adjudication have been imminent or even likely, either at the time the material was amassed or at the time disclosure is sought under the FOIA.” Id. See also note 34 supra.

37. See Cong. Rec. 17,033 (1974) (statement of Sen. Hart), reprinted in FOIA Source Book, supra note 8, at 352. As Senator Hart observed, courts in the D.C. Circuit construed the exemption so that it “applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point.” Id. This judicial construction of the exemption, Senator Hart argued, “is not consistent with the intent of Congress when it passed the basic act in 1966.” Id. at 17,033, FOIA Source Book at 333. In particular, Senator Hart expressed concern that judicial construction of the exemption would deprive the public of information that was previously available to it such as “meat inspection reports, civil rights compliance . . . and medicare nursing home reports.” Id.

38. See 120 Cong. Rec. 17,034 (1974) (statement of Sen. Kennedy), reprinted in FOIA Source Book, supra note 8, at 335. According to Senator Kennedy, the intent of Congress in enacting this exemption was to promote public access to government information where the information sought would not significantly harm specific governmental concerns. Id. He was therefore critical of the series of D.C. Circuit cases which ignored the Congressional concern for public disclosure by “woodenly and mechanically” applying the exemption where the
denials of FOIA requests and eliminated any question regarding the need for detailed itemization, indexing, and justification of records within an investigative file. Contrary to the FOIA’s spirit of disclosure, Exemption 7 very much became a “stone wall” against public access to any investigative material regardless of whether disclosure would be harmful to enforcement activities.

To clarify its intent in exempting investigative records, Congress amended Exemption 7 in 1974 and divided it into six distinct subsections. Under subsection (A), investigative records compiled for law enforcement purposes may be withheld if their production would “interfere with enforcement proceedings.” The revision made clear that records were not to be protected forever merely because they were placed in an investigative file. Instead, a two-documents sought were labelled investigatory. *Id.* at 17,034, FOIA Source Book at 335-36.


40. 120 Cong. Rec. 17,083 (1974) (statement of Sen. Hart), *reprinted in* FOIA Source Book, supra note 3, at 332. Senator Hart noted that all that was required to trigger the exemption according to the series of D.C. Circuit cases was a mere showing by the agency “that the document sought is an investigatory file compiled for law enforcement purposes.” *Id.*. These courts did not require the more difficult burden of proving “why the disclosure of the particular document should not be made.” *Id.*


42. 5 U.S.C. § 552(b)(7)(A). For the text of § 552(b)(7), see note 2 supra.

43. The debate over the amendment to Exemption 7 reflected a congressional concern that the Exemption be applied selectively. Senator Hart, emphasizing the limited scope of the Exemption, noted that “material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes.” 120 Cong. Rec. 17,083 (1974) (statement of Sen. Hart), *reprinted in* FOIA Source Book, supra note 3, at 333. Senator Kennedy expressed a similar concern about unwarranted application of the exemption by referring to a case in which the FBI refused a request by NBC reporter Carl Stern that it disclose documents relating to counterintelligence activities. 120 Cong. Rec. 36,867 (1974) (statement of Sen. Kennedy), *reprinted in* FOIA Source Book, supra note 3, at 440. When the FBI refused disclosure by arguing that the requested documents were “investigatory files,” a federal judge concluded that the recitation of broad generalizations did not suffice. *Id.* (quoting unnamed federal judge). Senator Kennedy heartily approved this conclusion:

No doubt this is just the kind of document—revealing a program that earlier this week the Justice Department itself characterized as involving ‘practices that can only be considered abhorrent in a free society’—that the FBI would find impractical to review and unlikely be available for release. Yet this is also precisely the kind of Government activity which the public has the greatest interest in knowing about.

*Id.* (statement of Sen. Kennedy).

See also NLRB v. Robbins Tire & Rubber Co., 487 U.S. 214, 226-30. In *Robbins Tire*, the Supreme Court discussed the relevant legislative history concluding that the thrust of congressional concern in its amendment of Exemption

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fold analysis emerged that required 1) a determination of the nature of a document and whether it actually was an investigative record or had merely been placed in an investigative file and, 2) an evaluation of whether disclosure actually would interfere with an enforcement proceeding. These standards for nondisclosure rejected the notion, advanced by the Attorney General, that all “open” files should be exempt. Instead, the amended exemption required an actual showing of harm to justify nondisclosure. Given this new language and the legislative comments accompanying the revisions, it became incumbent upon agencies asserting the exemption to demonstrate that investigative records actually pertained to contemplated or ongoing enforcement proceedings.

Although Congress effectively foreclosed agencies from withholding nonconfidential information merely because it was contained in an investigative file, courts perceived different congressional signals regarding the specificity of harm required to justify nondisclosure. The amended Exemption 7(A) initially was read by the Fourth and Fifth Circuits as requiring particularized evidentiary showings of how disclosure would interfere with prospective enforcement proceedings. Other circuits, however, concluded that it was permissible to determine generally, and by tendency, that “interference with the proceedings could well result.”

7 was to make clear that the Exemption did not endlessly protect material simply because it was an “investigatory file.” Id. at 230.


46. 2 Hearings before the Subcomm. on Administrative Procedure and Separation of Powers of the Senate Comm. on the Judiciary and before the Subcomm. on Intergovernment Relations of the Senate Comm. on Government Operations, 93d Cong., 1st Sess. 227 (1973).

47. See, e.g., 120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart), reprinted in FOIA SOURCE BOOK, supra note 3, at 333. Senator Hart, sponsor of the amendment which became Exemption 7(A), stated that the Exemption applies “whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence of information.” Id.

48. See, e.g., NLRB v. Robbins Tire & Rubber Co., 563 F.2d 724, 728-30 (5th Cir. 1977), rev'd, 437 U.S. 214 (1978) (particularized showing that release of witness statements would interfere with specific NLRB proceeding is required); Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1135-36 (4th Cir. 1977) (disclosure ordered to extent government could show no specific harm to backpay proceeding).

49. Title Guarantee Co. v. NLRB, 534 F.2d 484, 491 (2d Cir.), cert. denied, 429 U.S. 834 (1976). See also Abrahamson Chrysler-Plymouth, Inc. v. NLRB, 561 F.2d 63, 65 (7th Cir. 1977) (witness statements requested by employer prior to administrative hearing fall into Exemption 7(A)); NLRB v. Hardeman Gar-
In resolving the conflict among the circuits, the Supreme Court opted for the less stringent standard for justifying a decision not to grant access to investigative records. The Court, in *NLRB v. Robbins Tire & Rubber Co.*, concluded that Congress had not intended 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." The Court noted that the unique status of Exemption 7(A), owing to legislative design, dispensed with the need for demonstrating particularized risks to enforcement proceedings that would result from premature disclosure of witness statements. Although this decision relieved the National Labor Relations Board of the burden of showing in detail how disclosure of each document would cause a cognizable harm, the means by and extent to which any agency can generalize in demonstrating interference has remained unsettled.


52. Id. at 236.

53. Id. at 234. The Court observed that "[a]lthough Congress could easily have required in so many words that the Government in each case show a particularized risk to its individual 'enforcement proceedin[g]', it did not do so; . . . Indeed, Congress failed to enact proposals that might have had this effect." Id. at 234 & n.15. The Court noted, however, that the statute distinguishes "between subdivision (A) and subdivisions (B), (C) and (D)" and that legislative concern with eliminating blanket protection for any document in an investigative file did not "preclude a court from considering whether 'particular' types of enforcement proceedings, such as NLRB unfair labor practice proceedings, will be interfered with by particular types of disclosure." Id. at 234-35.

54. Id. at 235.
II. THE LIGHTENING OF THE GOVERNMENT'S BURDEN UNDER EXEMPTION 7(A)

The Supreme Court embraced the principle that interference with certain kinds of enforcement proceedings can be demonstrated on a generic basis. Lower courts, however, have been left with the task of determining its applicability to administrative proceedings other than those of the National Labor Relations Board and to documents other than witness statements. In addition, these courts must translate the generic concept into one of practical utility.

Often, the types of proceedings and documents meriting protection are relatively easy to determine. As the Supreme Court noted, the most obvious risk of disclosing documents such as witness statements is that witnesses may be pressured into altering their testimony or not testifying at all. The protection of witness statements in other enforcement contexts thus represents a wholly logical extension of the Robbins Tire rationale that a generic showing of harm is sufficient. Furthermore, documents that would afford a suspected violator early access to an agency’s case have been exempted from production, pursuant to the Robbins Tire rationale, to the extent that they would enable a person to “construct defenses that would permit violations to go unremedied.” In addition to

55. Id. at 236.
56. Id.
57. Id. at 239.
59. 437 U.S. at 241 (quoting New England Medical Center Hosp. v. NLRB, 548 F.2d 377, 382 (1st Cir. 1976)). See, e.g., Moorefield v. United States Secret Serv., 611 F.2d 1021, 1026 (5th Cir. 1980) (documents prepared to help the Service protect safety of the President and his family are exempt from disclosure without the individualized scrutiny generally given to exempt documents); Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir. 1980) (disclosure of “witness statements, documentary evidence, agent’s work papers and internal agency memo- randa, prior to the institution of civil or criminal tax enforcement proceedings, would necessarily interfere with such proceedings by prematurely revealing the government’s case”); Polynesian Cultural Center, Inc. v. NLRB, 600 F.2d 1327, 1329 (9th Cir. 1979) (release of affidavit could allow employer to construct defenses to charges of unlawful discharge of employees); Fedders Corp. v. FTC, 494 F. Supp. 325, 329 (S.D.N.Y.), aff’d, 646 F.2d 560 (2d Cir. 1980) (forced disclosure of FTC documents would provide plaintiff with the government’s strategy and “could be utilized in a way . . . that would tend to frustrate the proceedings”); OKC Corp. v. Williams, 489 F. Supp. 576, 586 (N.D. Tex.), cert. denied, 449 U.S. 952 (1980) (documents comprising an integral part of the SEC’s work product in its investigation of target corporation were exempt from disclosure), Steinberg v. IRS, 463 F. Supp. 1272, 1274 (S.D. Fla. 1979) (special
witness statements, therefore, such records as staff notes, work
papers, internal memoranda, documentary evidence, financial
records and correspondence relating to an ongoing investigation
have been protected from disclosure under Exemption 7(A).

Unlike the process of defining the types of proceedings and
documents to which Exemption 7(A) might apply, no consensual
definition of what constitutes a generic showing of interference has
emerged. Moreover, no uniform guidelines have evolved for de-
termining how such a showing must be made. While courts have
accepted the Supreme Court's invitation to make generic deter-
minations of interference with enforcement proceedings, they
seem to have varying impressions of what that invitation meant.
Generally speaking, most courts have not insisted upon individual-
ized scrutiny of documents or document categories. Furthermore,
they have generally accepted agency affidavits or declarations that
describe documents or document categories in general terms and
frequently explain in conclusory, if not canned, terms how dis-
closure might interfere with enforcement proceedings.

In Chilivis v. SEC, for instance, a federal district court in
Georgia upheld an Exemption 7(A) claim based upon a govern-
ment dangers that disclosure would pose in an ongoing criminal prosecution warrants
exemption of the documents sought).

L. Rep. (CCH) ¶ 98,279 at 97,777 (D.D.C. Apr. 29, 1981) (transcripts, notes,
memo, raw communications and interviews prepared by the SEC are exempt from disclosure); Hirschkop & Grad., P.C. v. SEC, No. 81-0468A (E.D. Va. July 27, 1981) (order).

61. For a discussion of these cases, see notes 58-59 and accompanying text supra.

62. See, e.g., Barney v. IRS, 618 F.2d 1268, 1272 n.9 (8th Cir. 1980) (the
agency affidavit described withheld documents as memoranda of interviews with
third persons, records relative to financial transactions involving the plaintiffs,
special agent's workpapers analyzing evidence developed and received during
investigation, and sworn statements of third parties); Moorefield v. United
States Secret Serv., 611 F.2d 1021, 1025 (5th Cir. 1980) (agency affidavits stated
that plaintiff's "file is considered by the Secret Service to be an active case"). But see Murphy v. FBI, 490 F. Supp. 1138, 1144-45 (D.D.C. 1980) (itemized
identification of documents withheld, together with identification of the exemption
claimed, is usually required except when specific itemization would "under-
mine the efficacy of the claimed exemptions").

63. See, e.g., Barney v. IRS, 618 F.2d 1268, 1273 n.13 (8th Cir. 1980) (affi-
davit stated that release of documents could subject potential witnesses to
harassment, allow plaintiff to construct defenses, and tamper with evidence or
otherwise frustrate enforcement proceedings); Moorefield v. United States Secret
Serv., 611 F.2d 1021, 1025 (5th Cir. 1980) (affidavit stated that disclosure
would make available to would-be assassins the "criteria the Secret Service uses
in conducting a protective investigation" and that such information could be
"utilized to hamper and avoid further investigations").

(N.D. Ga. Nov. 7, 1979), aff'd, 673 F.2d 1205 (11th Cir. 1982). But see Stephen-
declaration that merely described the extensive records in question as bank documents,\textsuperscript{65} transcripts of testimony, witness exhibits, digests of testimony, documents from other governmental agencies, and miscellaneous records.\textsuperscript{66} Although the declaration stated that the records had been compiled for law enforcement purposes,\textsuperscript{67} it lacked any description of how disclosure would interfere with enforcement proceedings.

Regardless of how generically one chooses to define harm, it simply is not evidenced, particularly with respect to such an ill-defined category as “miscellaneous,” without more explanation. Absent a more informative delineation of both the nature of the records in an investigative file and the harm that would result from disclosure, a FOIA plaintiff is denied a meaningful chance to contest an agency’s exemption claim and a court is relegated to decision-making in the dark. But the Supreme Court’s decision in \textit{Robbins Tire}, construed to its outer limits, seems to allow such generic determinations of interference based upon an agency’s blanket characterization of records as investigative in nature and a conjectural extrapolation of potential harm by the court. The net result of that construction, even given the 1974 amendment of Exemption 7(A), would seem to be the judicial erection of a new stone wall in place of one that was congressionally demolished.

A less extreme, but nonetheless relaxed, standard for establishing an Exemption 7(A) claim was utilized by the Eighth Circuit in \textit{Barney v. IRS}.

\textsuperscript{65} See Declaration of Richard T. D’Elia, Chivilis v. SEC, No. 79-457-A (N.D. Ga. Apr. 23, 1979). This category was broken down into “check forms, loan forms, loan documents, overdraft schedules, checking account documents, campaign account documents, and credit documents pertaining to approximately 50 banks and scores of corporations and individuals.” \textit{Id.} at 1-2.

\textsuperscript{66} \textit{Id.} at 2. The miscellaneous category also generally described documents as relating to securities or banking transactions by subjects of the investigation, and as internal memoranda evaluating evidence and making recommendations regarding the investigation. \textit{Id.}

\textsuperscript{67} \textit{Id.} at 1.

\textsuperscript{68} 618 F.2d 1268 (8th Cir. 1980). The government’s affidavits in \textit{Barney}, in contrast to those in \textit{Chivilis}, at least forsook any designation of documents as “miscellaneous” and recited, albeit in conclusory rather than explicit terms, that disclosure would harm the enforcement proceedings. \textit{See id.} at 1272-73 nn.9 & 13.
proof and was justified in withholding certain investigative records, the Eighth Circuit demanded only minimal specificity and relied upon an affidavit that both described the documents in question and defined the potential harm from disclosure in the broadest of terms. The affiant essentially stated that release of the records would (1) tip the government's hand with respect to the direction, scope and limits of its investigation, (2) reveal the identity of potential witnesses and thus subject them to possible intimidation, and (3) aid the plaintiffs in constructing defenses, tampering with evidence and otherwise frustrating enforcement proceedings. This recitation of the potential harms recognized by Robbins Tire, though presented in a laundry list format, proved sufficient for the Barney court to conclude that "[t]his is clearly the kind of case where . . . a generic determination is appropriate." Given the


70. See 618 F.2d at 1272 n.9. The government affidavit summarized the subject documents as:

(1) memoranda of interviews with third parties, (2) records and information received from third parties relative to financial transactions with or otherwise involving the Barneys, (3) special agent's workpapers consisting of among other things notes and other documents analyzing evidence and information developed and received during the investigation, (4) sworn statements of third parties, (5) correspondence from third parties to the Service responding to requests for documents or information made by the Service, (6) internal memoranda which reflect the scope and direction of the investigation and reveal the strengths and weakness of the Government's case, such as memoranda to the file, (7) summons and other documentary requests made to third parties, and (8) correspondence from the Internal Revenue Service to the Department of Justice.

Id.

71. Id. at 1273 n.13.

72. See 437 U.S. at 239-41. In Robbins Tire, Justice Marshall stated that "[t]he most obvious risk of 'interference' with enforcement proceedings . . . is that employers or . . . unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all." Id. at 239. He further stated that disclosure of witness' statements prior to an unfair labor practice proceeding would have a "chilling effect" on the Board's sources because these witnesses would be reluctant to testify absent some assurance of confidentiality. Id. at 240-41. Finally, Justice Marshall stated that "prehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an 'interference, . . . that of giving a party litigant earlier and greater access to the Board's case than he would otherwise have.'" Id. at 241.

73. 618 F.2d at 1273. In Barney, the court focused on the harm caused by "earlier and greater access" which was recognized in Robbins Tire. For a discussion of the types of harm recognized in Robbins Tire, see note 72 supra. In this respect the court in Barney expressed fear that the FOIA was being used as a "private discovery tool." 618 F.2d at 1273 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)).
absence of any meaningful description of documents and danger from disclosure, it is mystifying how the Court could exude such confidence in the agency’s determination. Certain document types, if disclosed, by their very nature may tend to harm certain enforcement proceedings. But it seems that without some demonstration of how disclosure would be potentially detrimental to the actual enforcement proceeding in question, the generic showing of harm requirement becomes a sheer ritual for which agencies merely recite the same script each time.

To the extent that conclusory affidavits are deemed acceptable, the barriers to access under the FOIA are further heightened. The problem is compounded when records subject to a FOIA request are in an agency’s exclusive possession and a government’s characterization of and statements about them are in blanket terms. A court’s evaluation of an agency’s broad depiction of records, and potential interference with enforcement proceedings, has few if any earmarks of independent judicial review.\(^74\) For example, one of the fundamental inequities in the use of affidavits, at least from an opponent's standpoint, is that the affiant is not subject to cross-examination. These disadvantages have not gone completely unrecognized.\(^75\) As noted by the Fifth Circuit, a court that is will-

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74. In other contexts, courts often use in camera review to provide an element of independent judicial review when deciding on the propriety of a party’s withholding of information. Questions dealing with the existence or nonexistence of a privilege permitting nondisclosure in civil suits are often resolved through in camera review. See Kerr v. United States District Court, 426 U.S. 394 (1976). In Kerr, a prisoners’ group sought production of a list of prisoners from California State prison authorities. The court ruled that “an in camera review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioner’s claims of irrelevancy and privilege and plaintiff’s asserted need for the documents is correctly struck.” Id. at 405. See also In re Eisenberg, 654 F.2d 1107 (5th Cir. 1981). In Eisenberg the court stated that “[i]t is well settled that in camera proceedings are an appropriate means to resolve disputed issues of privilege.” Id. at 1112 n.7.

In camera review is also used in the grand jury context. Grand jury proceedings are secret proceedings, and jurors and other persons can disclose information presented at these proceedings, or documents produced therein, “only when so directed by the court.” Fed. R. Crim. P. 6(e). A court may so direct upon a showing of a “particularized need” or a “compelling necessity” for such disclosure. In re Grand Jury Investigation, 82 F.R.D. 175, 181 (S.D. N.Y. 1968) (quoting United States v. Proctor & Gamble, 356 U.S. 677, 683 (1958)). In grand jury proceedings, the burden of proof is on the party seeking production. Id. at 181. In the FOIA context, however, the burden is on the party refusing production. 5 U.S.C. § 552(a)(3) (1976). For a general discussion of the benefits and drawbacks of in camera review, see notes 108-12 and accompanying text infra.

75. See Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir. 1980) (reliance on affidavits is acceptable when it is determined that the purportedly withheld documents do not in fact exist, but once it is established that the records do exist “more is required”); Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973),
ing to accept overly generalized affidavits from an agency assumes the risk of being led astray by agency error or misstatement.\textsuperscript{76} Unless courts insist upon adequate, albeit general, document descriptions, and specific showings of harm from disclosure, the specially tailored adversarial procedures for evaluating the competing claims of FOIA plaintiffs and defendants are effectively bypassed.\textsuperscript{77}

Disclosure not only may give way to satisfactorily (and in some instances unsatisfactorily) articulated potential harms to enforcement efforts but must also be balanced against the harms that may be inherent in the burden of document production itself.\textsuperscript{78} In recognizing such a basis for an Exemption 7(A) claim, the Supreme Court in Robbins Tire observed that diversion of an agency's energies from investigative and enforcement activities to detailed review and characterization of documents could bring enforcement efforts to a halt and ultimately delay and thus interfere with such proceedings.\textsuperscript{79} Circumstances, therefore, may arise in which a court must determine whether the public interest in disclosure is outweighed by enforcement interests that should relieve an agency from even having to review the documents subject to a FOIA request. Given the possible temptation to use Exemption 7(A) as a means for escaping the burdens of the FOIA altogether, however, it is essential that generic principles governing the exemption not be allowed to operate in a one-sided manner.

III. BALANCING THE COMPETING PUBLIC INTERESTS OF DISCLOSURE AND LAW ENFORCEMENT

Reliance upon summary affidavits, which do not enable courts to go beyond an agency's characterization of documents and recitation of harms, would seem to foster one-sidedness in any litigating context. It seems especially contrary to the spirit of a

cert. denied, 415 U.S. 977 (1974) (such reliance on affidavits "foster[s] inefficiency" and renders the plaintiff "effectively helpless").

76. Stephenson v. IRS, 629 F.2d 1140, 1144-45 (5th Cir. 1980).

77. For a discussion of these adversarial procedures under the FOIA, see notes 1-8 and accompanying text supra.

78. 437 U.S. at 238 n.18.

79. See id. See also Parker/Hunter, Inc. v. SEC, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) \$ 98,279, at 91,780 (D.D.C. Apr. 29, 1981) (citing supplemental affidavit of James J. Bowes). That court observed that "a court should give weight to the opinion of a responsible official, like Mr. Bowes [an SEC staff attorney], that distraction of key personnel from the main business of enforcement by imposing time consuming duties to examine and segregate portions of documents would interfere with his investigative duties." Id.
statutory scheme that is as plaintiff oriented as the FOIA. De-

pendence upon such minimally useful procedures can effectively
operate to supersedethe FOIA's express directive for de novo re-
view and the FOIA's allocation of the burden of proof to the agency
seeking to withhold documents. The result is not merely a shift
of the burden but the freezing of it into a state of irrelevancy
for practical purposes, since the plaintiff is essentially powerless to move
forward. Tolerance of exceedingly general and unrevealing affi-
davits may significantly diminish, if not foreclose, the right to
contest agency decisions against disclosure.

An irony in excessive reliance upon generalized and conclusory
affidavits is that certain means for creating more equitable eviden-
tiary procedures are contained in FOIA case law and the statute
itself. In certain circumstances, for instance, a Vaughn index is an
appropriate means for providing a plaintiff with a rudimentary
factual basis for contesting the government's case. While the con-
ditions for employing such a device in an Exemption 7(A) context
may have to be set with more than usual care, because of the danger
of compromising an agency's enforcement effort the hazard
should not be used as a generalized excuse for disregarding the
procedure. Furthermore, when the number of documents sought is
extensive, it may be necessary to consider the possibility that diver-

80. For a discussion of the pro-plaintiff orientation of the FOIA, see notes
3-8 and accompanying text supra.

81. See Ray v. Turner, 587 F.2d 1187, 1215-14 (D.C. Cir. 1978) ("[t]o sub-
stitute a presumption favoring conclusory agency affidavits for the courts' re-
sponsibility to make a de novo determination with the burden on the govern-
ment would repeal the very aspects of the 1974 amendments.").

82. See Vaughn v. Rosen, 484 F.2d 820, 829-24 (D.C. Cir. 1973), cert.
denied, 415 U.S. 977 (1974). The Vaughn court was cognizant of the agencies' power
to silence effectively any real challenge to their non-disclosure decisions, based
upon general affidavits. The court stated:

[T]he party seeking disclosure cannot know the precise contents of the
documents sought . . . . In many, if not most, disputes under the
FOIA, resolution centers around the factual nature [and] the statutory
category, of the information sought . . . . This factual characterization
may or may not be accurate. It is clear, however, that appellant cannot
state that, as a matter of his knowledge, this characterization is
untrue.

Id.

83. See Mead Data Cent., Inc. v. United States Dep't of Air Force, 566
F.2d 242, 261 (D.C. Cir. 1977). ("[a]gencies should not be forced to provide
. . . a detailed justification that would itself compromise the secret nature of the
potentially exempt information."); Tarnopol v. FBI, 442 F. Supp. 5, 9
(D.D.C. 1977) ("[t]he government should not be required to disclose a detailed
index . . . where such disclosure would itself undermine the policies served by
an exemption to the FOIA"); Kanter v. IRS, 433 F. Supp. 812, 820 (N.D. Ill.
1977) (disclosure in a case such as Mead and Tarnopol would "let the cat out
of the bag").
sion of enforcement personnel from investigative duties to document review may constitute an interference with enforcement proceedings. The most logical occasion for ordering a Vaughn index, therefore, would seem to arise when documents are relatively easy to identify and segregate and are not voluminous.

When a FOIA request entails a more extensive or complicated identification process, and enforcement proceedings would be significantly delayed if detailed review and itemization were required, it may be necessary to devise other procedures for maintaining the burden of proof balance between FOIA plaintiffs and defendants. To avoid interfering with enforcement efforts, and also to prevent the government's burden of proof from becoming completely meaningless, some courts have begun to narrow the ambit of Robbins Tire by requiring somewhat more informative, albeit broad, document description in an agency affidavit and the connection of generalized statements of harm to specific operative contexts. Although documents may be described by category rather than individually, each enumerated document classification must be related to the specific interferences which the agency contends disclosure would create. Therefore, even if permitted to describe records generically and by category, an agency is obligated to furnish some basic details that may enable the plaintiff and court to determine the general types of records at issue and the basis for resisting disclosure. The degree of detail, while less than that required in a Vaughn index, nonetheless represents a positive step toward some delineation of the general contents of an investigative file correlated

84. For a discussion of judicial recognition of the problem in Robbins Tire, see notes 78-79 and accompanying text supra.

85. See Baez v. United States Dep't of Justice, 647 F.2d 1328, 1335 (D.C. Cir. 1980) (agency must satisfy the burden of showing proper classification by submitting affidavits which "describe with reasonably specific detail the nature of the documents at issue and the justification for non-disclosure"); Parker/Hunter, Inc. v. SEC [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,279 at 91,777-78 (D.D.C. Apr. 29, 1981) (court requested supplemental memoranda describing how disclosure would jeopardize the ongoing law enforcement proceedings); Copus v. Rougeau, 504 F. Supp. 534, 539 (D.D.C. 1980) (agency affidavits "described with sufficient specificity and detail the documents at issue").

86. See cases cited at note 85 supra.


with a showing of how disclosure might interfere with an actual enforcement proceeding.

The procedure affords agencies the opportunity to meet their burden of proof through the use "of affidavits that describe with reasonably specific detail the nature of the documents at issue and justification for non-disclosure." 89 Such affidavits are given "substantial weight" by the court. 90 Provided the affidavit demonstrates that the records sought are logically covered by Exemption 7(A), and the plaintiff supplies no evidence that controverts the claimed exemption or shows bad faith, the court will award summary judgment for the agency.

A tightening of the standards for specificity and detail in agency affidavits in itself might be sufficient medicine if agency review of documents were error free, but these measures do nothing to ensure such freedom from mistake or oversight. Regardless of how specific an affidavit may be, the factual characterizations therein may or may not be accurate. 92 Given a FOIA plaintiff's lack of meaningful access to the information he needs to challenge an agency's exemption claim, judicial review may be little more than the reflection of an affidavit's quality and accuracy. 93

Although courts will not rely upon agency affidavits found to be lacking in good faith, 94 a plaintiff, since he operates outside the agency's deliberative circles, is beset by the same obstacles in uncovering bad faith as he is in intelligently discussing an agency's decision not to disclose. Given such barriers to challenging an agency's good faith, one court has concluded that affidavits simply

90. Id.
91. Id.
92. See Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir. 1980) (court found that the District Court had been "led astray" by agency affidavit); Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) ("[the] factual characterization [in the affidavit] may or may not be accurate").
93. See Stephenson v. IRS, 629 F.2d 1140 (5th Cir. 1980). The Fifth Circuit denied the agency's Exemption 7(A) claim because 156 of the 209 pages claimed to be exempt in the affidavit were "checks and deposit slips comprising financial information [belonging to] third parties [not related to the tax returns in question]". Id. at 1145.
94. See Baez v. United States Dep't of Justice, 647 F.2d 1328, 1335 (D.C. Cir. 1980) ("if the information [in the affidavit] is neither controverted by contrary evidence in the record nor by evidence of agency bad faith, then summary judgment for the Government is warranted"); Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978) ("where the record contains a showing of bad faith, the district court would likely require in camera inspection"). See also Copus v. Rougeau, 504 F. Supp. 534, 540 (D.D.C. 1980).
will not suffice for certain FOIA exemption claims, including those arising under Exemption 7(A). This decision reflects an awareness that an affidavit, operating largely by itself, is subject to few, if any, meaningful checks against misrepresentation.

Despite some courts' accurate description of the dangers resulting from undue reliance upon agency affidavits, their concern over good faith may be somewhat exaggerated. Emphasis upon good faith does not bring into focus the types of agency action or inaction more likely to lead to erroneous affidavits, at least in an Exemption 7(A) setting. Since documents subject to an Exemption 7(A) claim must ordinarily be released after enforcement proceedings are terminated, no real incentive exists for an agency to operate deceitfully or otherwise in bad faith in withholding documents. The temporal nature of the exemption's applicability, coupled with the FOIA's specific provision for disciplinary action against employees making bad faith nondisclosure decisions, should effectively preclude less than good faith behavior. Erroneous affidavits, rather than being the product of bad faith, are more likely to result from employee oversight connected with a zealous pursuit of agency enforcement goals, disorganized files, or other circumstances owing more to understaffing, inadequate facilities and resource shortages. In practical terms, evaluation of the good faith of an employee responsible for reviewing documents—which could number in the thousands—would seem to be a meaningless exercise to the ex-

95. See Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir. 1980). The Stephenson court observed that "once it is established that records and documents are in the possession of the government agency, more [than an affidavit] is required." Id.

96. See, e.g., id. at 1444 ("[t]he Vaughn court observed that factual characterizations in affidavits may or may not be accurate. . . . Such concern has been conclusively justified in the present action."); Ray v. Turner, 587 F.2d 1187, 1211 n.43 (D.C. Cir. 1978) ("affidavits, unlike in camera inspection, provide no real check on the accuracy of the agency's representation."). See also Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

97. See note 96 supra.


99. Sanctions for improperly withholding agency records include assessment of attorney's fees and other litigation costs and, if agency personnel have acted arbitrarily and capriciously, disciplinary action. 5 U.S.C. § 552(a)(4)(F) (1976).


101. It is conceivable for instance, that an investigative file could be so voluminous that review and production processes would place an impossible demand upon an agency's limited investigative resources. Cf. Vaughn v. Rosen, 383 F. Supp. 1049, 1052 (D.D.C. 1974), aff'd, 523 F.2d 1136 (D.C. Cir. 1975) (cost of indexing voluminous noninvestigative records would be prohibitive in terms of time and money).

102. See id.
tent that good faith is deemed to have any connection with a warrant of accuracy.

To detect agency error, regardless of its motivating force, it is essential that courts do more than merely assure themselves of the good faith and factual basis of an agency's exemption claim.\(^\text{103}\) Even if no solution is "without serious flaws and limitations,"\(^\text{104}\) it is evident that the drawbacks inherent in reliance upon affidavits are serious enough to encourage the use of alternative evidentiary devices whenever possible. To the extent that the government's burden is attenuated by being able to make a generic showing of harm, any increased disadvantage to the plaintiff may be offset, at least to some degree, by requiring the government to present its evidence by means more scrutable than an affidavit.

When affidavits are employed, a plaintiff might be afforded an opportunity to examine under oath appropriate agency representatives\(^\text{105}\) regarding such matters as the size of the investigative file, the number of employees assigned to the investigation, the employee's familiarity with the file and the time devoted to reviewing it.\(^\text{106}\) Such procedures could be accompanied by a requirement for an abbreviated index and even court examination of sample documents.\(^\text{107}\) Assuming no irregularities were discovered, an agency

\(^{103}\) See Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir. 1980); Ray v. Turner, 587 F.2d 1187, 1213 (D.C. Cir. 1978). Straying further from notions of stricter scrutiny, however, the District of Columbia Circuit has determined that review of exemption claims by law enforcement agencies should receive greater judicial deference than is accorded similar assertions by so-called "mixed-function" agencies. See Pratt v. Webster, 673 F.2d 408, 418 (D.C. Cir. 1982). Such a distinction is predicated upon the concept "that an agency whose principal mission is criminal law enforcement will more often than not satisfy the Exemption 7 threshold criterion." Id. Aside from lacking any cited empirical support, such a premise misses entirely the central truths about the deficiencies in FOIA related document review by any government agency. For a discussion of the reasons for these deficiencies, see text accompanying notes 100-01 supra.


\(^{105}\) See, e.g., Stephenson v. IRS, 629 F.2d 1140 (5th Cir. 1980). The Fifth Circuit alluded to this possibility in Stephenson when it stated that [t]he facts of this case amply demonstrate the dangers inherent in reliance upon agency affidavit in an investigative context when alternative procedures such as sanitized indexing, random or representative sampling in camera with the record sealed for review, oral testimony, or combinations thereof would more fully provide an accurate basis for decision.


\(^{107}\) See, e.g., Stephenson v. IRS, 629 F.2d 1140 (5th Cir. 1980). In Stephenson, the Fifth Circuit noted with approval this "intermediate approach." Id. at 1145 (citing Ash Grove Cement Co. v. FTC, 511 F.2d 815, 816 (D.C. Cir. 1975).
would have its claim upheld—albeit not without having had its position subjected to some degree of meaningful judicial scrutiny. Conversely, the appearance of irregularities between the agency's claim and the results of such review could be grounds for an order requiring more detailed document review that would satisfy the court that the agency had accurately reviewed its files.

Thus, an affidavit filed in support of an Exemption 7(A) claim not only would have to describe generically the relevant documents, and how their disclosure would interfere with enforcement proceedings, but also would be required to delineate what efforts the agency had made to review the entire file. A reasonable effort, at a minimum, would require that each document be placed into an appropriate category and that no records be left unaccounted. Even though some documents might fit into more than one category, and the contents of some upon closer scrutiny might turn out to have been wrongly classified, such document review would be an improvement over less rigorous practices.

Although an agency might still be relieved from document review that in itself would interfere with enforcement proceedings, such instances should be reserved for extraordinary instances in which an agency is so understaffed or underfunded, or its files so disorganized through no fault of its own, that the review process would effectively close down the investigation. Details, supported by an estimate of the working hours necessary to conduct document review, should be required in any affidavit asserting such an interference, and the affidavit should be a proper subject for cross-examination.

Essential to a court's responsibility under the FOIA to conduct a de novo review—108—and perhaps the best assurance of independent judicial evaluation of exemption claims—is more widespread resort to in camera review. Such a procedure creates a major incentive for agencies to ensure that their affidavits and testimony are accurate, since the court would have the necessary facts on hand to conduct an independent and detailed investigation into the basis of the alleged exemption. Even assuming agency good faith, in camera review would operate as a prod toward accurate and comprehensive review of files by agency personnel.109

108. For a reference to the directive for de novo review under the FOIA, see note 81 and accompanying text supra.

109. See Ray v. Turner, 587 F.2d 1187, 1212 n.51 (D.C. Cir. 1978). In this case, the D.C. Circuit referred to the "vital role [of] the threat of in camera review," observing that "even in a case in which a specific finding of the Agency's good faith had been made, in camera inspection resulted in dis-
The major drawbacks of *in camera* review are the burdens it places upon the judiciary's often limited resources and the tendency to conduct it on an *ex parte* basis without the benefits of a plaintiff's influence and critique. Even so, Congress, at least partially out of concern for inaccurate agency affidavits, insisted upon *in camera* review in certain circumstances as a means for ensuring that agencies carried their burden of proof under the FOIA. In so doing, Congress even encouraged providing plaintiff's counsel with access to disputed documents whenever possible.

Theoretically, *in camera* review could be conducted, without the danger of disclosing the direction and scope of an agency's case, by allowing plaintiff's counsel or experts to participate subject to a protective order. Such measures would help equalize the leverage of FOIA plaintiffs and defendants, and would do so in a manner consistent with clear terms of the operative statutory scheme itself.

IV. ENHANCING AGENCY RESPONSIVENESS AT THE PRE-LITIGATION STAGE

The FOIA is disclosure oriented, but the administrative process for reviewing FOIA requests frequently is not. Agency responsiveness that reflects compliance with the spirit, and not merely the letter, of the Act might well be enhanced by importing into the administrative review process some of the previously discussed evidentiary devices available to plaintiffs in FOIA litigation.

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110. Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978). The court emphasized that "*in camera* inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt.'" *Id.*


113. See H.R. Rep. No. 876, 93d Cong., 2d Sess. 5, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6267, 6271 and in FOIA SOURCE BOOK, *supra* note 3, at 125. In its report, the House Committee on Government Operations stated that "this bill seeks to reach the goals of more efficient, prompt and full disclosure of information." *Id.* For an additional reference to the FOIA's emphasis on disclosure, see note 16 and accompanying text *supra*.
At the initial stage, a FOIA request is normally reviewed and processed, by a full-time specialist designated by the agency. Typically, upon denial of a request, the agency's FOIA staff sends a letter to the requester advising him of that fact, enumerating the exemption(s) relied upon and informing him of the right to appeal to the agency. If the requester appeals, and the initial determination against disclosure is affirmed, he again receives a letter which merely itemizes the exemptions claimed. In neither instance does he receive information indicating the precise nature of the agency's document review or the basis of its conclusion that a particular exemption or exemptions apply.

To the extent that many FOIA requesters may abandon their efforts, rather than underwrite the costs of securing court ordered disclosure, such agency procedures expedite the processing of FOIA claims and lessen the demands upon agency resources. Burdensome as it may be at times for an agency to divert investigative and enforcement resources to document review pursuant to the FOIA, the fact remains that the FOIA serves profound purposes in an open society. The values underlying the FOIA are not diminished by the press of other, albeit legitimate, administrative missions.

Nonetheless, the demand upon administrative resources is a valid concern to be factored into any formula intended to ensure meaningful agency review and more informative responses to FOIA requests. However, it need not be the dominant concern—nor should it be, especially given the potential for agency exaggeration of or resistance to any unwanted burden imposed upon it. Requirement of a full-fledged Vaughn index might represent an excessive burden at the initial stage of a FOIA request. But at least

116. Id. § 200.80(d)(6)(vi).
117. See House Comm. on Government Operations, Administration of the Freedom of Information Act, H.R. Rep. No. 1419, 92d Cong., 2d Sess. 38 (1972), reprinted in FOIA Source Book, supra note 3, at 45. The committee noted that while some federal agencies complied fully with the FOIA, such positive implementation and constructive efforts are spotty and are not uniform in all federal departments and agencies. In a number of significant instances, the committee finds that an entrenched bureaucracy is stubbornly resisting the efforts of the public to pry open the hidden doors which conceal the government's business from its citizens.

Id.

118. It was estimated in one case, for instance, that the indexing of all documents subject to a particular FOIA request would have required $10,257.1
at the prelitigation level, a requirement for an affidavit—setting forth general document descriptions, articulating grounds for how disclosure would interfere with enforcement proceedings, and incorporating a statement that all documents had been reviewed—might afford a satisfactory compromise. Such a formula, which could be legislated into the FOIA itself, would provide more information to FOIA requestors and perhaps effect a compensating savings upon governmental resources by satisfying requestors who, being otherwise denied a meaningful response, might choose to litigate.

V. CONCLUSION

Although an agency, in asserting an Exemption 7(A) claim, need not make the particularized justification for withholding documents that may be required in connection with other FOIA exemption claims, Exemption 7(A) should not operate as an escape hatch from the obligations imposed by the FOIA. To ensure that the interests of information seeking citizens are not automatically subordinated to the interests of law enforcers, the relaxation in evidentiary standards for the government should not translate into impenetrable barriers against a plaintiff's or court's need to evaluate and assess for themselves. By enhancing the ability of plaintiffs to challenge agency stances and establishing a more active judicial role in reviewing documents, the often competing public interests in disclosure and effective law enforcement may be accommodated without either having to be subordinated.

119 If such a statement were made under oath it would provide further incentive for document review that was more than just cursory.

120. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. at 236. For the provisions of FOIA Exemption 1, see 5 U.S.C. § 552(b)(1) (1976); note 2 supra.