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## How Safe Is Too Safe? Exemption 7(F) and the Withholding of Critical Documents

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# HOW SAFE IS TOO SAFE? EXEMPTION 7(F) AND THE WITHHOLDING OF CRITICAL DOCUMENTS

Grant Snyder\*

## ABSTRACT

*The Freedom of Information Act (FOIA) is one of the main tools used by the American public to investigate the actions of its government. Congress created FOIA in an attempt to make most government documents available to the public. Today, the FOIA process favors government withholding. This bias comes from institutional issues in courts' review of FOIA challenges.*

*In the environmental and administrative law context, federal agencies use many exemptions to withhold government records from citizen and non-profit groups. Agencies that are tasked with permitting and regulating energy pipelines and other environmentally-sensitive infrastructure now regularly cite Exemption 7(F). These agencies claim that the release of certain infrastructure documents could be used to facilitate terrorism.*

*This Note contends that agencies are using Exemption 7(F) in a way contrary to congressional intent. Further, this Note argues that courts should reinterpret Exemption 7(F) in light of its legislative history and precedent. At Step 1, mixed agencies should have to show that there is a direct link between the withheld document and a law enforcement purpose. At Step 2, agencies should be required to show a threat of harm to at least one reasonably specified individual. In the alternative, this Note also considers a potential balancing test based on Exemption 7(C) that is outside of traditional Exemption 7(F) jurisprudence. Finally, this Note will also address the consequences of a reinterpreted Exemption 7(F).*

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INTRODUCTION

The Freedom of Information Act<sup>1</sup> (FOIA) is a critical tool to obtain information about the actions of the U.S. Federal Government. The statute was created in 1966 and designed to replace the public disclosure section of the Administrative Procedure Act (APA).<sup>2</sup> By the end of its life, the APA provision was primarily used as a withholding statute.<sup>3</sup> The purpose of the newly created FOIA statute was full agency disclosure unless information was exempted under clearly stated statutory exemptions.<sup>4</sup> The FOIA statute created nine such exemptions to disclosure.<sup>5</sup>

In the modern day, there are many FOIA denials and few trials. For example, in fiscal year 2011, individuals made 644,165 FOIA requests; of these, agencies denied 202,164 in full or in part.<sup>6</sup> When a FOIA request is denied, applicants have a right to file suit in federal district court after exhausting the agency’s administrative appeals process.<sup>7</sup> However, courts only hear about 300-500 FOIA lawsuits each year.<sup>8</sup> In some years, courts do not hear any FOIA cases.<sup>9</sup>

The reason there are so few FOIA trials is that FOIA cases are generally resolved at summary judgment. In FOIA cases, the government must justify its

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1. 5 U.S.C. § 552 (2012).

2. *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 79 (1973).

3. *Id.*

4. S. REP. NO. 89-813, at 2-3 (1965) (noting that “it is the purpose of the present bill to . . . establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld”).

5. 5 U.S.C. § 552(b) (1970).

6. Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV 185, 208 (2013).

7. 5 U.S.C. § 552(a)(4)(B) (2012).

8. *See* Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 256-58 (2011).

9. *See id.*

withholding.<sup>10</sup> However, courts rarely permit juries to determine the factual question of whether an agency properly withheld a given document. Instead, courts generally resolve all issues of fact and law at the summary judgment stage.<sup>11</sup> It is not clear why courts do this, but it seems to be part of a trend to defer to the government when it withholds a record.<sup>12</sup>

The lack of FOIA trials would not create issues if plaintiffs and defendant agencies could effectively litigate the issue through summary judgment. However, at the summary judgment stage, plaintiffs are at an informational and tactical disadvantage. Today, FOIA litigation mainly focuses on battles over the sufficiency of the government's Vaughn index, a record produced by the agency that individually indexes and justifies the government's withholdings.<sup>13</sup> A Vaughn index challenge focuses on whether the agency gave a sufficient description of an underlying record rather than on the merits of whether the withholding of the record fits into an exemption.<sup>14</sup> Many Vaughn indexes consist of boilerplate responses that do not provide the requisite information for plaintiffs to effectively appeal the withholding.<sup>15</sup> Plaintiffs challenge these indexes because courts have interpreted the Vaughn index to deny civil discovery to FOIA plaintiffs, leaving the Vaughn index as the primary evidence plaintiffs use to contest a FOIA withholding at the summary judgment stage.<sup>16</sup>

Armed with little information, plaintiffs will submit their summary judgment briefs. In instances where the court resolves the case at summary judgment, courts almost always side with the government. In 90% of cases, courts affirm an agency's decision to withhold documents information.<sup>17</sup> Even though FOIA withholding cases receive *de novo* review, in practice, courts usually defer to the government's decision to withhold.<sup>18</sup> The affirmance rate is much higher than would be expected if courts were truly applying *de novo* review.<sup>19</sup>

In addition to the uninformative Vaughn indexes and lack of discovery, courts also give the government advantages that it does not afford to plaintiffs seeking disclosure.<sup>20</sup> For example, when FOIA cases do go to trial, agencies can base their

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10. 5 U.S.C. § 552(a)(4)(B) (2012).

11. Kwoka, *The Freedom of Information Act Trial*, *supra* note 8, at 244-49.

12. *Id.* at 248-49.

13. Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973).

14. Kwoka, *Deferring to Secrecy*, *supra* note 6 at 223-24.

15. *Id.* at 223.

16. *Id.*

17. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 706, 713 (2002).

18. Kwoka, *Deferring to Secrecy*, *supra* note 6, at 204-05.

19. *Id.*

20. An example of this disadvantage is that in some criminal enforcement cases, outside of the scope of this piece, courts allow the government to lie and say that a given document does not exist

withholding on exemptions never cited before the trial.<sup>21</sup> This structure violates the *Chenery* principle that agencies must give the rationale for their decision during the informal adjudication stage rather than through post-hoc rationalizations.<sup>22</sup>

The above factors show that the FOIA withholding system is biased against disclosure. In particular, this system disadvantages individuals that attempt to compel the production of government documents related to energy pipelines and other environmentally-sensitive infrastructure.<sup>23</sup> Citizen and non-profit groups routinely request this information, only to be rejected under Exemption 7(F).<sup>24</sup> Government agencies claim that the documents should be withheld under Exemption 7(F) because, if released, they could facilitate terrorism.<sup>25</sup>

This Note will examine agencies' use of Exemption 7(F) to withhold information that should be publicly available pursuant to the argument that disclosure could facilitate terrorism. In particular, I will focus on reinterpreting Exemption 7(F) to allow for the disclosure of documents that the public should be entitled to access. This Note will primarily focus on the hypothetical situation where an Exemption 7(F) case proceeds to trial, even though judges almost always rule against plaintiffs in FOIA cases at the summary judgment stage.<sup>26</sup> The reason for taking this approach is that more plaintiff-friendly case law will have the effect of creating more FOIA trials and instances where a court holds that a plaintiff is entitled to disclosure at summary judgment. In Part II, I will discuss the legislative history of FOIA and Exemption 7(F). In Part III, I will examine the current law of Exemption 7(F). In Part IV, I will recommend changes to Exemption 7(F). There are two separate types of changes courts could choose to make. First, courts could, following the lead of the Second Circuit, impose additional requirements on agencies to justify the exemption at each step of Exemption 7(F). Courts should mandate that mixed agencies show a *direct link* between a withheld document and a law enforcement purpose. Moreover, courts should require that all agencies prove that disclosure creates a threat of harm to at least one *reasonably specified* individual. Second, if courts are unwilling to adopt these changes, they should adapt Exemption 7(C)'s balancing test to Exemption 7(F). Exemption 7(C)'s balancing test is outside of the traditional Exemption 7(F) jurisprudence but would balance the public's interest in

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when it actually does. Christine N. Walz & Charles D. Tobin, *The Government's License to Lie*, 30 COMM. LAW. 10, 11 (2014).

21. Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 MD. L. REV. 1060, 1074 (2014).

22. *Id.* at 1075-76.

23. *See infra* Section I.B.

24. *See infra* Section I.B.

25. *See generally* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 777 F.3d 518, 552-53 (D.C. Cir. 2015) (withholding Department of Homeland Security document detailing network shutoff under the argument that the documents could be used to facilitate terrorism); Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, 740 F.3d 195, 203-04 (D.C. Cir. 2014) (withholding dam inundation maps to prevent risk of terrorism).

26. *See supra* notes 10-22 and accompanying text.

the disclosure of records relating to energy pipelines and environmentally-sensitive infrastructure with the government's interest in maintaining security.

## I. THE TRANSFORMATION OF EXEMPTION 7(F)

The original purpose of Exemption 7(F) was to prevent the disclosure of documents that could be used to harm individuals close to law enforcement agents or law enforcement activities. Over time, agencies began to claim Exemption 7(F) to withhold documents that could be used to facilitate terrorism; courts credited these arguments and subsequently expanded Exemption 7(F) far past Congress' original intention.<sup>27</sup> This transformation has often prevented non-profit and citizen groups from obtaining documents on energy pipelines and other environmentally-sensitive infrastructure.<sup>28</sup>

### A. FOIA's Legislative History and Exemption 7(F)

FOIA and its exemptions have changed over time. The broader Exemption 7 was first created in the 1974 Amendments to FOIA.<sup>29</sup> With these amendments, Congress sought to eliminate loopholes in the original 1966 bill, which allowed agencies to easily withhold documents.<sup>30</sup> Under the 1974 amendments, Exemption 7(F) read that:

[Disclosure] does not apply to matters that are . . . investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . endanger the life or physical safety of *law enforcement* personnel . . . .<sup>31</sup>

The other provisions of Exemption 7 prevent the disclosure of information that would endanger pending investigations, judicial proceedings, personal privacy, confidential sources, and investigatory techniques.<sup>32</sup> Congress primarily adopted

27. See *infra* Section I.A.

28. See *infra* Section I.B.

29. See 5 U.S.C. § 552(b)(7) (1966).

30. See, e.g., 120 Cong. Rec. 6804 (1974) (statement of Rep. Matsunaga), reprinted in House Comm. on Govt. Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502), at 236 (1975) ("The aim of the [1974 amendment to FOIA] . . . is to correct the dangerous inadequacies [of the original FOIA] . . . as well as . . . frustrating personal experiences of many [House members] . . . in their dealings with Federal agencies.")

31. 5 U.S.C. § 552(b)(7) (1982) (emphasis added).

32. *Id.*

Exemption 7 to prevent disclosure that would harm the government's case in a given legal proceeding.<sup>33</sup>

In 1986, Congress amended Exemption 7.<sup>34</sup> Among other things, the amendment replaced the "law enforcement personnel" language and replaced it with the phrase "any individual."<sup>35</sup> Through this amendment, Congress adopted the modern language of Exemption 7(F). In its entirety, the section reads:

[Disclosure] does not apply to matters that are—records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of *any individual*.<sup>36</sup>

At the time of the amendments, the Deputy Attorney General testified in front of Congress and stated that:

The current language in Exemption 7(F) exempts records only if their disclosure would endanger the life of a law enforcement officer. However, the exemption does not give similar protection to the life of any other person. S. 774 expands Exemption 7(F) to include such persons as witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process.<sup>37</sup>

Thus, the purpose of the 1986 amendment was to protect individuals close to law enforcement agents and activities from harm.

Following this codification, courts began to interpret Exemption 7(F) to protect people close to law enforcement agents and activities. In 2005, the D.C. District Court stated that "[i]n general, [Exemption 7(F)] has been interpreted to apply to names and identifying information of law enforcement officers, witnesses, confidential informants and other persons who may be unknown to the requester."<sup>38</sup> The Department of Justice currently maintains a similar interpretation. In a 2014 document created by the Department of Justice for each FOIA exemption, the Department emphasized that Exemption 7(F) primarily serves to withhold documents that identify law enforcement agents, local law enforcement, and

33. *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (citing S. REP. NO. 89-813, at 9 (1965)).

34. *FOIA Update: FOIA Reform Legislation Enacted*, DEP'T OF JUST., <https://www.justice.gov/oip/blog/foia-update-foia-reform-legislation-enacted> (last visited May 26, 2018).

35. 5 U.S.C. § 552(b)(7) (1988).

36. 5 U.S.C. § 552(b)(7)(F) (2012) (emphasis added).

37. 131 CONG. REC. S253 (daily ed. Jan. 3, 1985) (statement of Carol E. Dinkins, Deputy Attorney General).

38. *Maydak v. U.S. Dep't of Justice*, 362 F. Supp. 2d 316, 321 n.4 (D.D.C. 2005).

other persons related to law enforcement activities.<sup>39</sup> The Department of Justice cites a number of decisions that illustrate agencies' usage of the exemption for these purposes.<sup>40</sup>

The usage of Exemption 7(F) began to change in 2011 when the Supreme Court decided *Milner v. Department of the Navy*.<sup>41</sup> *Milner* involved Navy operations at Indian Island, a base in Puget Sound, Washington.<sup>42</sup> The Navy used data called Explosive Safety Quantity Distance (ESQD) on the island<sup>43</sup> to determine how far away munitions had to be stored in order to prevent chain reactions in the case of a detonation.<sup>44</sup> Glen Milner, a Puget Sound resident, submitted a FOIA request for the ESQD information.<sup>45</sup>

The Navy denied his request under Exemption 2.<sup>46</sup> Before the case, the government historically used Exemption 2 to prevent the release of documents that could be used to circumvent the law.<sup>47</sup> The Court held that Exemption 2 did not apply in the case and curtailed the exemption to prevent the disclosure of "only records relating to issues of employee relations and human resources."<sup>48</sup>

The case helps to illustrate why agencies do not just classify all documents they want to withhold. Classified documents are exempt from FOIA disclosure under Exemption 1.<sup>49</sup> However, the Navy did not want to classify the ESQD information in this case because this would prevent the Navy from easily sharing the information with local fire departments and law enforcement.<sup>50</sup> Under Exemption 2, the government could prevent the information from getting into the wrong hands, while also equipping first responders with information to use in the event of an emergency.<sup>51</sup>

39. U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 7(F) 653 (2014), [http://www.usace.army.mil/Portals/2/docs/FOIA-FY14\\_Annual\\_Report.pdf](http://www.usace.army.mil/Portals/2/docs/FOIA-FY14_Annual_Report.pdf).

40. *Id.*; see, e.g., *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001) (protecting names of DEA special agents); *Johnston v. U.S. Dep't of Justice*, No. 97-2173, 1998 WL 518529, at \*1 (8th Cir. Aug. 10, 1998) (protecting names of not only special agents, but also "DEA personnel, local law enforcement personnel, and other third parties").

41. *Milner v. Dep't of the Navy*, 562 U.S. 562, 569-73 (2011).

42. *Id.* at 567-69.

43. *Id.* at 568.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Crooker v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 670 F.2d 1051, 1073-74 (D.D.C. 1981).

48. *Milner*, 562 U.S. at 581.

49. 5 U.S.C. § 552(b)(1) (2012).

50. Transcript of Oral Argument at 27-29, *Milner v. Dep't of the Navy*, 562 U.S. 562 (2011) (No. 09-1163) (argument of Anthony Yang, Assistant to the Solicitor General, representing the respondent).

51. See *id.*



The Court, however, sympathized with the government's position that narrowing Exemption 2 would result in elimination of the exemption for certain sensitive government documents that the government did not wish to classify.<sup>52</sup> The majority pointed to other exemptions that the Navy could rely on instead. The Court recommended Exemption 1 (classification), Exemption 3 (information specifically withheld by statute), and Exemption 7(F).<sup>53</sup> The Court remanded the case to Ninth Circuit to determine if Exemption 7(F) applied,<sup>54</sup> but the Ninth Circuit never heard the case on remand.<sup>55</sup>

In concurrence, Justice Alito gave a full-throated endorsement to using Exemption 7(F) to withhold the ESQD information.<sup>56</sup> Alito argued that "compiled for law enforcement purposes" could include any agency's "proactive steps to prevent criminal activity and to maintain security."<sup>57</sup> He also stated that agencies could easily show that the release of security information could reasonably be expected to endanger lives.<sup>58</sup> This broad interpretation of Exemption 7(F), where "law enforcement purposes" included managing security risks, signaled a departure from the original use of Exemption 7(F): the protection of those closely associated with law enforcement agents and activities.<sup>59</sup>

*Milner* resulted in the expansion of Exemption 7(F) to fill the void left by a narrowed Exemption 2. Following the case, the Department of Justice Office of Information Policy cited Alito's concurrence and recommended that agencies use Exemption 7(F) in certain situations where Exemption 2 would have been used previously.<sup>60</sup> The report provided by the Department of Justice gives no indication that the Department previously interpreted Exemption 7(F) and Exemption 2 to cover many of the same documents.<sup>61</sup> Moreover, in 2005 there were only two cases where agencies withheld documents pursuant to Exemption 7(F) under the argument that their release could be used by nefarious parties to injure a large group of people.<sup>62</sup>

52. *Milner*, 562 U.S. at 580.

53. *Id.* at 580-81.

54. *Id.* at 581.

55. *See Milner v. Dep't of the Navy*, 645 F.3d 1084 (9th Cir. 2011) (remanding case to district court with no subsequent proceeding).

56. *Milner*, 562 U.S. at 581-85 (Alito, J. concurring).

57. *Id.*

58. *Id.*

59. *See supra* notes 29-40 and accompanying text.

60. *See MELANIE ANN PUSTAY, DIR., OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, EXEMPTION 2 AFTER THE SUPREME COURT'S RULING IN Milner v. Department of the Navy* (May 10, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/milner-v-navy.pdf>.

61. *See id.*

62. *See Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1321-22 (D. Utah 2003) (withholding inundation maps for fear terrorists could use the information to place at risk the life or physical safety of downstream residents who would be flooded by a breach of the Hoover

Courts largely allowed the government to substitute Exemption 7(F) for Exemption 2 in FOIA cases. For example, the D.C. Circuit in *Public Employees for Environmental Responsibility v. U.S. Section, International Boundary and Water Commission* allowed an agency to assert Exemption 7(F) to withhold dam inundation plans under the argument that their release could be used to facilitate terrorism.<sup>63</sup> The court noted that these types of plans would have been withheld under Exemption 2 before *Milner*.<sup>64</sup> The broadening of Exemption 7(F) to cover disclosures that previously would have been withheld under Exemption 2 likely has to do with the fact that there is no FOIA exemption which expressly allows the government to withhold documents to protect public safety.<sup>65</sup>

Thus, over time, Exemption 7(F) evolved from an exemption intended to protect law enforcement agents and those close to law enforcement agents or activities to one used to prevent the disclosure of documents if a large and nebulous group of people could be victims of terrorism if documents were released. This definition has outstripped Congress's original intention and should be constrained to allow for more disclosure of energy pipeline and environmentally sensitive infrastructure documents.

### B. Exemption 7(F) and Environmental Withholdings

In the environmental law context, Exemption 7(F) has been used with increasing frequency to prevent the disclosure of documents related to energy pipelines and environmentally-sensitive infrastructure.<sup>66</sup> Since the Court decided *Milner* in 2011, agencies dealing with energy pipelines and environmentally-sensitive infrastructure have relied on Exemption 7(F). For example, two agencies work extensively with pipelines: the Pipeline and Hazardous Materials Safety Administration (PHMSA) and the U.S. Army Corps of Engineers (the Corps). PHMSA sets pipeline regulations and enforces these standards.<sup>67</sup> Similarly, the Corps must provide Clean Water Act permits for oil pipelines that cross waters of the United States.<sup>68</sup> While the available FOIA databases do not say whether an agency was

Dam or Glen Canyon Dam); *Larouche v. Webster*, 75 Civ. 6010, 1984 WL 1061, at \*8 (S.D.N.Y. Oct. 23, 1984) (withholding FBI laboratory report describing manufacture of home-made machine gun to protect law enforcement personnel from encounters with criminals armed with home-made weapons).

63. See *Pub. Emps. for Env'tl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 202-04; 205-06 (D.C. Cir. 2014).

64. *Id.* at 198-99.

65. 5 U.S.C. § 552(b)(7) (2012).

66. See *infra* notes 70–88 and accompanying text.

67. *PHMSA's Mission*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., <https://www.phmsa.dot.gov/about-phmsa/phmsas-mission> (last visited May 26, 2018).

68. See *Section 404 Permit Program*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/cwa-404/section-404-permit-program> (last visited May 26, 2018).

asked to produce energy pipeline information,<sup>69</sup> I have determined that, based on responses to FOIA requests I received from PHMSA and the Corps, both agencies are using Exemption 7(F) to deny FOIA requests that seek energy pipeline maps and pipeline emergency response plans.<sup>70</sup>

These agencies now routinely use Exemption 7(F) to withhold information. In 2016, PHMSA denied in full or in part thirty FOIA requests.<sup>71</sup> Of these, PHMSA denied seventeen requests pursuant to Exemption 7(F).<sup>72</sup> In contrast, in 2010, PHMSA denied in full or in part fifty FOIA requests.<sup>73</sup> Of these, PHMSA denied only one request pursuant to Exemption 7(F).<sup>74</sup> The Corps denied seventeen FOIA requests pursuant to Exemption 7(F) in 2014.<sup>75</sup> However, the Corps used the exemption only three times in 2008.<sup>76</sup>

To discover what type of information PHMSA and the Corps were denying pursuant to Exemption 7(F), I requested that both agencies send me previous FOIA requests that they had denied pursuant to Exemption 7(F). PHMSA provided me with the individual requests they had denied either in full or in part under Exemption 7(F) but did not state in their responses what documents they withheld.<sup>77</sup> However, many of the requests that PHMSA received from citizens, law firms, non-profits, and various community groups asked for energy pipeline maps, detailing the physical locations of pipelines, and pipeline spill response plans.<sup>78</sup> Pipeline operators are required by law to submit these plans under the Clean Water Act.<sup>79</sup>

For example, on June 6, 2012, the Environmental Law and Policy Center requested the most recent oil spill response plans for all pipelines operated by Enbridge, Inc. (the operator of the notorious Line 5 that crosses the Straits of

69. See U.S. Dep't of Justice, *Data*, FOIA.GOV, <https://www.foia.gov/data.html> (last visited Feb. 8, 2018) (The reports generated by the database do not reference the substance of the FOIA claims.).

70. See *infra* notes 76–88 and accompanying text.

71. See *supra* note 69 (at FOIA database page, select “Exemptions” for Step 1, Department of Transportation for Step 2, and Fiscal Year 2016 in Step 3).

72. *Id.*

73. *Id.*

74. *Id.*

75. U.S. ARMY CORPS OF ENG'RS, ANNUAL FREEDOM OF INFORMATION ACT REPORT 3 (2014), [http://www.usace.army.mil/Portals/2/docs/FOIA-FY14\\_Annual\\_Report.pdf](http://www.usace.army.mil/Portals/2/docs/FOIA-FY14_Annual_Report.pdf).

76. U.S. ARMY CORPS OF ENG'RS, ANNUAL FREEDOM OF INFORMATION ACT REPORT 3 (2008), <http://www.usace.army.mil/Portals/2/docs/FOIA-FY08-Annual-Report-for-USACE.pdf>.

77. See, e.g., Letter from Marylin Burke, PHMSA FOIA Officer, to Jennifer Tarr, Envtl. L. & Policy Ctr. (Sept. 5, 2013) (on file with author).

78. See, e.g., Letter from Jennifer Tarr, Envtl. L. & Policy Ctr., to Marylin Burke, PHMSA FOIA Officer (June 26, 2012) (on file with author) (requesting a spill response plan) [hereinafter Jennifer Tarr Letter].

79. 33 U.S.C. § 1321(j)(5) (2012)

Mackinac) within 100 miles of the Great Lakes.<sup>80</sup> PHMSA denied the response in part under Exemption 7(F), likely withholding portions of the response plans that describe the path of a potential spill and where the pipeline crosses bodies of water.<sup>81</sup>

The Corps engaged in a similar type of withholding as illustrated in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*.<sup>82</sup> In the case, the Standing Rock and Cheyenne River Sioux Tribes filed suit to challenge the Corps' construction approval for the Dakota Access Pipeline in federally-regulated waters.<sup>83</sup> The Corps prepared an administrative record.<sup>84</sup> Defendant-Intervenor Dakota Access LLC filed a protective order to prevent the disclosure of Spill-Model Discussions, five corresponding geographic response plans, and a single prevention and response plan prepared by Dakota Access's Horizontal Directional Drilling contractor.<sup>85</sup> Even though the tribes had not requested the information under FOIA, the court allowed for redaction of the Spill-Model Discussions in the administrative record pursuant to Exemption 7(F).<sup>86</sup> Dakota Access and PHMSA recommended a series of other redactions that the court credited under Exemption 7(F).<sup>87</sup> These redactions included maps of the Dakota Access Pipeline at certain water crossings, graphs of spill-risk scores at various points along the pipeline, maps of spill scenarios, and items related to spill response.<sup>88</sup> The court said the documents were properly withheld under Exemption 7(F) because they could be used to facilitate terrorism.<sup>89</sup>

Meanwhile, the Corps' responses to my FOIA requests indicate that the Corps has denied multiple requests for energy pipeline maps and spill response plans.<sup>90</sup> For example, the Corps denied several FOIA requests pursuant to Exemption 7(F) where parties requested preconstruction notifications for the Dakota Access Pipeline and Keystone XL Pipeline.<sup>91</sup> For pipelines, as indicated in *Standing Rock*, these documents would likely contain descriptions of where the pipeline crosses a body of water and spill maps.<sup>92</sup>

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80. Jennifer Tarr Letter, *supra* note 78.

81. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 249 F. Supp. 3d 516, 522 (D.D.C. 2017) (withholding maps detailing water crossings and spill maps).

82. *Id.*

83. *Id.* at 517-18.

84. *Id.* at 517.

85. *Id.* at 517-18.

86. *Id.* at 522-23.

87. *Id.*

88. *Id.* at 522.

89. *Id.* at 523.

90. Vaughn Index, U.S. Army Corps of Eng'rs, Response to Snyder FOIA – Exemption 7F (Sept. 24, 2018) (on file with author).

91. *Id.*

92. See *Standing Rock*, 249 F. Supp. 3d at 522.

While it is likely true that the information withheld by PHMSA and the Corps could be used to facilitate terrorism, this type of information is also very important to communities. This information is critical to the function and public health of communities. People living near energy pipelines and other environmentally-sensitive infrastructure file FOIA requests to determine how proposed projects will affect their natural resources, local wildlife, and public health.<sup>93</sup> Citizen and non-profit groups routinely seek FOIA requests in this area to determine if agencies issued permits that are compliant with the law.<sup>94</sup> Specifically, the tribes in the Dakota Access litigation were concerned with how the Dakota Access Pipeline would impact local water sources and religious sites.<sup>95</sup> A broad interpretation of Exemption 7(F) prevents the disclosure of these types of documents and reduces the transparency of agency action. Exemption 7(F), in light of its legislative history, should be reinterpreted to allow the disclosure of documents detailing the impacts that energy pipelines and other environmentally-sensitive infrastructure will have on communities. To reform the exemption, courts should place additional constraints on each prong of the Exemption 7(F) test or incorporate a balancing test like the one used in Exemption 7(C).

## II. THE LAW OF EXEMPTION 7(F)

Today, when the government claims Exemption 7(F), it must pass a two-part, sequential test.<sup>96</sup> The test has been created by statute and courts.<sup>97</sup> Exemption 7(F) is one of six sub-exemptions listed in the statutory language of Exemption 7.<sup>98</sup> Exemption 7 forms the basis of Step One and reads: “[Disclosure] does not apply to matters that are – records or information *compiled for law enforcement purposes*, but only to the extent that the production of such law enforcement records or infor-

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93. See, e.g., Complaint at 9-10, *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 3:14-cv-00538 (N.D. Cal. Feb. 5, 2014) (requesting information on what bodies of water the Keystone XL pipeline would cross); Complaint at 8-9, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 14-1527 (D.D.C. Sept. 9, 2014) (requesting information on what effect the Keystone XL pipeline will have on migratory birds).

94. See, e.g., *Odland v. Fed. Energy Reg. Comm'n*, 34 F. Supp. 3d 3, 3 (D.D.C. 2014) (seeking to compel the production of documents related to FERC's approval of a natural gas pipeline); *IER Files Keystone XL FOIA Request With EPA*, INST. FOR ENERGY RES. (Mar. 16, 2012), <http://instituteeforenergyresearch.org/press/ier-files-keystone-xl-foia-request-with-epa/> (requesting documents related to President Obama's decision to delay the authorization of the Keystone XL pipeline under the suspicion that the delay was influenced by political factors).

95. Intervenor-Plaintiff Cheyenne River Sioux Tribe's Second Amended Complaint for Declaratory and Injunctive Relief, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 249 F. Supp. 3d 516 (D.D.C. 2017) (No. 1:16-cv-1534-JEB).

96. *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 622 (1982).

97. See *infra* Section II.A to II.B.

98. 5 U.S.C. § 552(b)(7) (2012).

mation . . . .”<sup>99</sup> When read with Exemption 7(F), the basis of Step Two, the statute now reads: “[Disclosure] does not apply to matters that are – records or information *compiled for law enforcement purposes*, but only to the extent that the production of such law enforcement records or information . . . *could reasonably be expected to endanger the life or physical safety of any individual.*”<sup>100</sup>

In *Federal Bureau of Investigation v. Abramson*, the Supreme Court interpreted Exemption 7 to create a two-part test.<sup>101</sup> In *Abramson*, the Court said that to claim the exemption, the government first must show that the document was “compiled for law enforcement purposes.”<sup>102</sup> Step One is applicable to all exemptions under Exemption 7.<sup>103</sup> At Step Two, the government must then demonstrate that one of the “harms” specified in the act applies.<sup>104</sup> The harm for Exemption 7(F) is that the release of the document could reasonably be expected to endanger the life or physical safety of any individual.<sup>105</sup> Circuits differ in what parties must show to satisfy each prong.<sup>106</sup> Circuits also split on how the government can satisfy a “law enforcement purpose”<sup>107</sup> and in what the government has to show to prove that individuals would be endangered if the agency released the disputed record.<sup>108</sup>

### A. Step One: Compiled for Law Enforcement Purposes

The definition of “compiled for law enforcement purposes” varies by circuit. The circuits agree on the definition of “compiled,” but vary in what it means for a document to be compiled for “law enforcement purposes.”

#### 1. Compiled

An agency “compiles” a document under Exemption 7(F) when it gathers it; the agency does not need to create the document.<sup>109</sup> In *John Doe Agency v. John Doe Corp.*, the Federal Bureau of Investigation (FBI) began investigating a defense contractor eight years after a government auditor in the Defense Contract Audit Agency (DCAA) directed the contractor to restructure its charging system.<sup>110</sup> The

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99. *Id.* (emphasis added).

100. 5 U.S.C. § 552(b)(7)(F) (emphasis added).

101. *Abramson*, 456 U.S. at 622.

102. *Id.*

103. *See id.*

104. *Id.*

105. 5 U.S.C. § 552(b)(7)(F) (2012).

106. *See infra* Section II.A to II.B.

107. *See infra* Section II.A.2.

108. *See infra* notes 183-93 and accompanying text.

109. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989).

110. *Id.* at 148-49.

contractor submitted a FOIA request asking for all documents related to the restructuring notice.<sup>111</sup> The DCAA denied the request, citing Exemption 7.<sup>112</sup> The contractor challenged the withholding and argued that “compiled” for law enforcement purposes meant that DCAA “originally compiled,” as in originally used, the documents for law enforcement purposes.<sup>113</sup> The Court rejected this interpretation, stating that documents could be compiled if they were “gather[ed] at one time” for a law enforcement purpose.<sup>114</sup> Thus, under this interpretation, the FBI compiled the documents for a law enforcement purpose because it gathered them for the present criminal investigation.<sup>115</sup> In essence, the agency does not have to create the document nor does the document need to originally be used for a law enforcement purpose.<sup>116</sup> As a result of this decision, there is generally little controversy as to whether an agency compiled a given document under Exemption 7. If an agency at one point uses a document for a law enforcement purposes, it may be considered “compiled” under the statute.<sup>117</sup>

## 2. Law Enforcement Purposes

Circuits differ in how they define law enforcement purposes.<sup>118</sup> Historically, the First,<sup>119</sup> Second,<sup>120</sup> and Eighth<sup>121</sup> Circuits have held that law enforcement agencies, like the FBI, bypass Step One because all of the documents they compile are for law enforcement purposes. Authors have called this the “per se rule.”<sup>122</sup> The per se rule in these circuits does not apply to “mixed” agencies, like PHMSA and the Corps, which have both law enforcement and administrative functions.<sup>123</sup> Courts in these circuits “scrutinize with some skepticism the particular purpose claimed” by mixed agencies invoking Exemption 7(F).<sup>124</sup> For example, the Second

111. *Id.* at 149.

112. *Id.*

113. *See id.* at 154-55.

114. *See id.* at 154 (citing *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 623-24 (1982)).

115. *See id.*

116. *See id.* at 161-63 (Scalia, J., dissenting).

117. *See id.* at 154-55.

118. *See infra* Section II.A.2.

119. *See Irons v. Bell*, 596 F.2d 468, 473-76 (1st Cir. 1979).

120. *See Williams v. Fed. Bureau of Investigation*, 730 F.2d 882, 883-85 (2d Cir. 1984).

121. *See Kuehnert v. Fed. Bureau of Investigation*, 620 F.2d 662, 665-67 (8th Cir. 1980).

122. Richard A. Kaba, Note, *Threshold Requirements for the FBI Under Exemption 7 of the Freedom of Information Act*, 86 MICH. L. REV. 620, 622 (1987).

123. *See Tax Analysts v. Internal Revenue Serv.*, 294 F.3d 71, 76 (D.C. Cir. 2002).

124. *Id.*

Circuit has created tests to determine whether a mixed agency withheld a document for a law enforcement purpose.<sup>125</sup>

The D.C. Circuit generally requires that agencies show that the records were *actually* compiled for “law enforcement purposes” before passing Step One.<sup>126</sup> Academics call this the “threshold rule.”<sup>127</sup> In applying the threshold rule, “courts look to the *purpose* of the investigation and not the *methods* of the investigation.”<sup>128</sup> Thus, under the threshold rule, both law enforcement and non-law enforcement agencies must show that the withheld document was compiled for law enforcement purposes to satisfy Step One.<sup>129</sup> After Congress amended Exemption 7 of FOIA in 1986, the various circuits reaffirmed the usage of their respective tests.<sup>130</sup>

In practice, the D.C. Circuit has abandoned the threshold rule and adopted the *per se* rule in FOIA cases dealing with agencies withholding documents that could be used to facilitate terrorism.<sup>131</sup> For example, in *PEER*, the court held that the U.S. Section properly withheld maps that showed how a dam break would impact downstream communities.<sup>132</sup> The court allowed the U.S. Section, a mixed agency, to pass Step One under the argument that the U.S. Section has a law enforcement purpose of enhancing dam safety.<sup>133</sup> The court explained that the withheld maps were compiled for law enforcement purposes because they were meant to “assist law enforcement” and “help prevent [terrorist] attacks on dams from occurring in the first place.”<sup>134</sup> The court cited *Milner*, where Justice Alito, in concurrence, argued that law enforcement purposes included “proactive steps to prevent criminal activity and to maintain security.”<sup>135</sup> This decision shows that the D.C. Circuit believes that an agency satisfies the threshold rule when it can link its activities to protecting national security.

The Second Circuit still utilizes the *per se* rule for law enforcement agencies but has also developed tests that force mixed agencies to show a connection between their withholding and a law enforcement purpose.<sup>136</sup> The Second Circuit’s

125. See *infra* notes 148-65 and accompanying text.

126. See, e.g., *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982); *Stern v. Fed. Bureau of Investigation*, 737 F.2d 84, 88-89 (D.C. Cir. 1984).

127. *Kaba*, *supra* note 123, at 622-23.

128. *Id.* at 630 (emphasis included).

129. See *id.*

130. See, e.g., *Curran v. U.S. Dep’t of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987) (reaffirming *per se* rule); *Keys v. U.S. Dep’t of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987) (reaffirming threshold rule).

131. See, e.g., *Public Emps. for Envtl. Responsibility v. U.S. Section, Int’l Boundary & Water Comm’n*, 740 F.3d 195, 203-04 (D.C. Cir. 2014).

132. *Id.* at 199.

133. See *id.* at 203-04.

134. *Id.* at 204.

135. *Id.* (citing *Milner v. Dep’t of the Navy*, 562 U.S. 562, 583 (2011)).

136. See *infra* notes 140-48 and accompanying text.



district courts<sup>137</sup> have subjected mixed agencies to variations of the threshold test originally articulated by the D.C. Circuit in *Pratt v. Webster*.<sup>138</sup> *Pratt* created the “rational nexus” test, where the withholding agency must show that a withheld document has a reasonable relationship to the agency’s law enforcement function.<sup>139</sup>

As a baseline, courts in the Second Circuit must first determine that the record withheld by a mixed agency is an “investigatory” file before moving to a variation of the *Pratt* test.<sup>140</sup> If a mixed agency is using a document in an investigation, making the record an investigatory file, the per se rule applies and the document is compiled for law enforcement purposes.<sup>141</sup> This test applies to all subsections of Exemption 7.<sup>142</sup> A record is not investigatory if it does not relate to a past or present investigation.<sup>143</sup> In *Families for Freedom v. U.S. Customs and Border Protection*, the court held that two emails sent within U.S. Customs and Border Protection (Customs) were not investigatory records.<sup>144</sup> The plaintiffs submitted a FOIA request to Customs concerning Customs’ operations on buses and trains in Buffalo, New York.<sup>145</sup> Customs withheld two documents under Exemptions 7(C) and 7(E): a memorandum on deportation case levels and an email describing how many charging documents Customs agents were expected to produce daily.<sup>146</sup> The court held that these documents were non-investigatory because they were not “records that pertain to specific investigations conducted by agencies” and instead were “directives regarding the general execution of tasks by agency personnel.”<sup>147</sup>

District courts in the Second Circuit apply their version of the *Pratt* test to mixed agency withholdings when they determine that a record is not investigatory.<sup>148</sup> A recent iteration of the *Pratt* test in the Second Circuit heightened the

137. See, e.g., *Iraqi Refugee Assistance Project v. U.S. Dep’t of Homeland Sec.*, No. 12-CV-3461 (PKC), 2017 WL 1155898, at \*5-6 (Mar. 27, 2017) (disregarding the heightened requirement for mixed agencies); *Schwartz v. Dep’t of Def.*, No. 15-CV-7077 (ARR) (RLM), 2017 WL 78482, at \*12-13 (E.D.N.Y. Jan. 6, 2017) (requiring a “direct link” between the record and a law enforcement purpose for mixed agencies to withhold).

138. See *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982).

139. *Id.*

140. *Families for Freedom v. U.S. Customs & Border Prot.*, 797 F. Supp. 2d 375, 397 (S.D.N.Y. 2011).

141. See *Kuzma v. U.S. Dep’t of Justice*, No. 16-1992-cv, 2017 WL 2347556, at \*36 (2nd Cir. May 31, 2017).

142. See *Families for Freedom*, 797 F. Supp. 2d at 397.

143. See *id.*

144. *Id.*

145. *Id.* at 382.

146. *Id.* at 396-97.

147. *Id.* at 397.

148. See *id.*; *Schwartz v. Dep’t of Def.*, No. 15-CV-7077 (ARR) (RLM), 2017 WL 78482, at \*12-13 (E.D.N.Y. Jan. 6, 2017).

showing that mixed agencies must make to prove that a record was withheld for law enforcement purposes.<sup>149</sup> In *Schwartz v. U.S. Department of Defense*, the Eastern District of New York articulated the “direct link” test.<sup>150</sup> In the test, a mixed agency compiles a non-investigatory record for a “law enforcement purpose” if there is a “direct link” between the record and a law enforcement purpose.<sup>151</sup> In *Schwartz*, the court rejected the Department of Defense’s (DOD) attempt to withhold building details under Exemption 7(F).<sup>152</sup> DOD attempted to withhold documents related to the physical security of a Washington, D.C. building responsible for providing safety support to Guantanamo Bay.<sup>153</sup> The court found that the documents were non-investigatory and thus DOD, as a mixed agency, needed to show “a clear and direct link” between the records and a law enforcement purpose.<sup>154</sup> In the case, the court defined “law enforcement purposes” broadly to include crime prevention and maintaining security, following *Milner*.<sup>155</sup> The court found that the DOD had law enforcement purposes at Guantanamo Bay, but held that the DOD failed to show the link between the withheld records and Guantanamo Bay’s law enforcement purposes.<sup>156</sup>

In *Schwartz*, the court provided examples of cases where it believed a mixed agency showed a direct link between the withheld record and a law enforcement purpose.<sup>157</sup> For example, the court cited *PEER*, where the D.C. Circuit upheld the U.S. Section’s decision to withhold dam emergency plans and structural reports under Exemption 7(F).<sup>158</sup> *Schwartz* specifically cited this case’s argument that the action plans “were created for a law enforcement purpose because ‘they describe the security precautions that law enforcement personnel should implement . . . during emergency conditions.’ ”<sup>159</sup>

*Schwartz* also favorably cited *Electronic Privacy Information Center v. U.S. Department of Homeland Security*, where the court ruled that Exemption 7 applied to the names of Homeland Security officials listed in a government protocol.<sup>160</sup> In the case, the plaintiffs sought to compel disclosure of a government protocol to shut

149. See *Schwartz*, 2017 WL 78482, at \*13.

150. *Id.*

151. *Id.*

152. *Id.* at \*12-14.

153. *Id.* at \*13-14.

154. *Id.* at \*13.

155. See *id.* at \*12-13.

156. See *id.* at \*13.

157. *Id.*

158. *Public Emps. for Envtl. Responsibility v. U.S. Section, Int’l Boundary & Water Comm’n*, 740 F.3d 195, 206 (D.C. Cir. 2014).

159. *Schwartz*, 2017 WL 78482, at \*13 (citing *PEER*, 740 F.3d at 204).

160. *Id.*; *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 777 F.3d 518, 518 (D.C. Cir. 2015).

down cell service in case of a terrorist attack.<sup>161</sup> The agency withheld the names of the individuals who needed to be contacted to trigger the protocol.<sup>162</sup> The court upheld the withholding under Exemption 7.<sup>163</sup> The *Schwartz* court stated that there was a direct link between the protocol and the law enforcement purpose of preventing terrorist attacks.<sup>164</sup> These cited cases show that the *Schwartz* court felt that crime prevention and emergency response records compiled by mixed agencies had a direct link to law enforcement purposes.<sup>165</sup>

B. *Step Two: Could Reasonably Be Expected to Endanger the Life  
or Physical Safety of Any Individual*

When a court determines that an agency has compiled a record for law enforcement purposes, it then moves to Step Two.<sup>166</sup> For an agency to invoke the exemption, it must prove that the document, if released, “could reasonably be expected to endanger the life or physical safety of any individual.”<sup>167</sup> The D.C. and Second Circuits differ in how they interpret this phrase.<sup>168</sup> The other circuits have not spoken directly to this issue.

In the Second Circuit, the agency must specifically describe a population at risk.<sup>169</sup> In *American Civil Liberties Union v. U.S. Department of Defense*, the Second Circuit rejected the DOD’s attempt to define “any individual” as the entirety of the U.S. Armed Forces.<sup>170</sup> In the case, the plaintiff requested photos from the Abu Ghraib incident.<sup>171</sup> The DOD claimed Exemption 7(F) to withhold the photos under the argument that the photo, if released, “could reasonably be expected to incite violence against United States troops” and other allied forces.<sup>172</sup> The court rejected this definition of “any individual” and said that “an agency must identify at least one individual with *reasonable specificity* and establish that disclosure of the documents could reasonably be expected to endanger that individual” to qualify for

161. *Elec. Privacy Info. Ctr.*, 777 F.3d at 520-21.

162. *Id.* at 521.

163. *Id.* at 522-23.

164. *Schwartz*, 2017 WL 78482, at \*13.

165. *See id.*

166. *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 622 (1982).

167. 5 U.S.C. § 552(b)(7)(F) (2012).

168. *See infra* notes 169-81 and accompanying text.

169. *Am. Civil Liberties Union v. U.S. Dep’t of Def.*, 543 F.3d 59, 71 (2d Cir. 2008).

170. *Id.*

171. *Id.* at 59.

172. *Id.* at 67.

Exemption 7(F).<sup>173</sup> The court noted that people downstream from a dam could be specifically described under the “reasonably specific” standard.<sup>174</sup>

In the D.C. Circuit, agencies do not need to specifically describe endangered populations. In *PEER*, the court stated that “[Exemption 7(F)] does not require that a particular kind of individual be at risk of harm, ‘any individual’ will do.”<sup>175</sup> In the case, the court stated that the agency did not need to list the specific population at risk of harm.<sup>176</sup> It was enough to say that if terrorists attacked a dam, that the downstream population would be endangered.<sup>177</sup> The court also declined to adopt the Second Circuit’s reasonable specificity test.<sup>178</sup>

Additional examples illustrate the difference between these two tests. In certain situations, the release of a given document could lead to the harm of any one individual among the entire population of the United States, but there will be no specific person who can be identified as likely to be harmed. Under the D.C. Circuit’s test, this document would be withheld.<sup>179</sup> In the Second Circuit, however, the government must disclose this information if it cannot reasonably specify an individual at risk of harm.<sup>180</sup> The Second Circuit would seemingly allow for disclosure, however, if a subgroup, like those living downstream from a dam, could be reasonably specified.<sup>181</sup>

### III. AGENCIES CLAIMING EXEMPTION 7(F) SHOULD HAVE TO SHOW A LAW ENFORCEMENT PURPOSE AND A THREAT OF HARM TO A REASONABLY SPECIFIED INDIVIDUAL

There will likely be many times where the government is right to withhold documents that could be used to facilitate terrorism under Exemption 7(F). The narrowing of Exemption 2 and the lack of a public safety exemption in the FOIA statute have forced the government to withhold these rightly withheld documents, such as emergency response protocols, under Exemption 7(F).<sup>182</sup> However, courts that adopt the approach of the D.C. Circuit have placed no restriction on the government’s ability to invoke Exemption 7(F) if a bad actor could arguably use a dis-

173. *Id.* at 71 (emphasis added).

174. *See id.* at 82 (citing *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1321-1322 (D. Utah 2003)).

175. *Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int’l Boundary & Water Comm’n*, 740 F.3d 195, 205 (D.C. Cir. 2014) (emphasis added).

176. *See id.* at 206.

177. *See id.*

178. *Id.*

179. *See id.* at 205-06.

180. *Am. Civil Liberties Union v. U.S. Dep’t of Def.*, 543 F.3d 59, 71 (2d Cir. 2008).

181. *Id.* at 82.

182. *See supra* notes 41-65 and accompanying text.

puted record to attack national security.<sup>183</sup> Without additional procedural safeguards, the government could theoretically withhold any document under the argument that its disclosure could be used to facilitate terrorism. Agencies could withhold information describing how energy pipelines and other environmentally-sensitive infrastructure will impact local natural resources and wildlife or public health and safety.<sup>184</sup> As described above, agencies have already used Exemption 7(F) to withhold documents like flood inundation plans<sup>185</sup> and, outside of the environmental context, photos from the Abu Ghraib incident<sup>186</sup> under the argument that the release of each document could be used to facilitate terrorism.

This type of interpretation is not what Congress intended for Exemption 7(F).<sup>187</sup> Congress sought to protect those individuals close to law enforcement agents and activities.<sup>188</sup> Courts have removed the interpretation from its original legislative history and allowed agencies to use it to stymie disclosure and contravene the public interest through its application. In the post-*Milner* period, courts will not likely shrink Exemption 7(F) back to its original scope of protecting individuals close to law enforcement agents and activities.<sup>189</sup> However, courts can add safeguards to protect against agency abuse of Exemption 7(F).

To constrain the discretion afforded to agencies, courts should adopt one of two strategies. First, courts should adopt the rules of the Second Circuit for mixed agencies, agencies with both law enforcement and administrative purposes.<sup>190</sup> At Step One, courts should require mixed agencies to show a direct link between their withholding and law enforcement purposes. Through this interpretation, circuits using the per se rule can still allow law enforcement agencies to bypass Step One. Mixed agencies, like PHMSA and the Corps,<sup>191</sup> would be subject to the direct link test. In threshold rule circuits, the “direct link” test would apply to all agencies at Step One. Moreover, circuits should adopt the *ACLU* test and require agencies to show a threat of harm to a reasonably specified individual.<sup>192</sup> Second, if courts do not adopt these protections based in previous Exemption 7(F) case law, they should consider imposing a balancing test inspired by Exemption 7(C). The bal-

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183. See *supra* Section IIa to II.B.

184. See *supra* Section II.B.

185. *Pub. Emps. for Env'tl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 206 (D.C. Cir. 2014).

186. *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 543 F.3d 59, 59 (2d Cir. 2008).

187. See *supra* notes 29-40 and accompanying text.

188. See *supra* notes 29-40 and accompanying text.

189. See *supra* notes 60-65 and accompanying text.

190. See, e.g., *Tax Analysts v. Internal Revenue Serv.*, 294 F.3d 71, 77 (D.C. Cir. 2002).

191. *Id.* (defining mixed agencies to include agencies with both law enforcement and administrative functions).

192. See *supra* Section II.B.

ancing test is not based in Exemption 7(F) law, but balances communities' interest in disclosure with the government's interest in maintaining security.<sup>193</sup>

### A. Mixed Agencies and Their Law Enforcement Role

Circuits should adopt the direct link test articulated by the Eastern District of New York in *Schwartz*.<sup>194</sup> Through this approach, mixed agencies must show a direct link between the withheld non-investigatory records and a law enforcement purpose to pass Step One.<sup>195</sup> Under this test, documents currently used in an investigation will generally be treated as investigatory records and thus pass Step One.<sup>196</sup> The Eastern District of New York gives a broad definition of law enforcement purposes that tracks Alito's concurrence in *Milner*.<sup>197</sup> Even though the definition of law enforcement purposes is broad, the court still requires that agencies show more than that the documents are tangentially related to law enforcement purposes.<sup>198</sup> For example, the *Schwartz* court believed that there was a direct link between emergency response and crime prevention documents and law enforcement purposes.<sup>199</sup> The direct link test should be confined to those specific document types.

This test helps to smooth some of the roughest edges of Exemption 7(F). This test would exempt from disclosure documents currently being used in an investigation and thus help to preserve Congress's original intention of preventing disclosure that would harm the government's case in a law enforcement proceeding.<sup>200</sup> By withholding investigatory records, agencies could still withhold documents that would identify, and possibly lead to the harm of, law enforcement officers and those close to law enforcement officers or activities. The interpretation would also allow important emergency response protocols to be withheld.<sup>201</sup> The test would force disclosure only in instances when a document relates indirectly to law enforcement purposes.<sup>202</sup> In the environmental context, this interpretation might force the disclosure of documents like spill maps. Spill maps do not show how a

193. See *infra* notes 220-21 and accompanying text.

194. *Schwartz v. U.S. Dep't of Def.*, No. 15-CV-7077 (ARR) (RLM), 2017 WL 78482, at \*13 (E.D.N.Y. Jan. 6, 2017).

195. *Id.*

196. See *Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982) (holding that courts should give deference so long as there is a "colorable claim" of rationality).

197. See *Schwartz*, 2017 WL 78482, at \*12-13.

198. See *id.* at \*13.

199. See *supra* notes 150-65 and accompanying text.

200. *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

201. See *Schwartz*, 2017 WL 78482, at \*13 (citing *Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 203 (D.C. Cir. 2014)).

202. See *id.* (holding that a presentation concerning threat assessments and opening and closing procedures for a government office could not be exempt without further justification).

pipeline could be pierced or the likely response, but instead show the path that a pipeline burst is likely to take.<sup>203</sup> Arguably, these maps may still be exempt from disclosure under the argument that they help to facilitate an emergency response, but the documents do not list emergency response protocols like the documents cited by the *Schwartz* court in *PEER*.<sup>204</sup> Under the direct link test, non-profit and community groups would have a chance to have these publicly important documents released. The release of these documents would promote the public interest by allowing communities and citizen groups to obtain valuable information on how energy pipeline and environmentally-sensitive infrastructure will affect natural resources and public health.<sup>205</sup>

### B. *Threat of Harm to a Reasonably Specified Individuals*

In addition to the direct link test, courts should follow the lead of the Second Circuit and adopt the “reasonably specific” standard articulated by the court in *ACLU*.<sup>206</sup> Under this test, after passing Step One, agencies must describe with reasonable specificity at least one individual who could be harmed by the release.<sup>207</sup> In practice, this requirement is unlikely to lead to substantial disclosure because of the *ACLU* court’s note that people living downstream from a dam could be specifically described under the reasonably specific standard.<sup>208</sup>

Nevertheless, this test helps to eliminate the worst abuses of Exemption 7(F). As mentioned above, the Second Circuit’s test will force the government to reasonably specify at least one individual among the entire United States population who could be harmed by the disclosure.<sup>209</sup> If a withheld document could theoretically lead to the harm of any person in the entire United States population, but not any one person in particular, the agency will fail at Step Two and must disclose the document.<sup>210</sup> In the environmental law context, this could lead to the disclosure of documents detailing proposed plans for national pipeline placements. For example, an agency will have a harder time arguing that documents detailing potential pipeline locations will endanger a specific individual because the pipelines generally cover multiple states. This would allow public interest organizations to determine what waterways and wildlife may be impacted by a project, while also allowing

203. Cf. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 249 F. Supp. 3d 516, 522 (D.D.C. 2017) (describing the nature of spill maps while upholding the agency’s 7(F) exemption).

204. *See id.*

205. *See supra* Section II.B..

206. *Am. Civil Liberties Union v. U.S. Dep’t of Def.*, 543 F.3d 59, 71 (2d Cir. 2008).

207. *Id.*

208. *See id.* at 82.

209. *Id.* at 71.

210. *See id.* at 67.

communities to comment on the placement of projects and determine the safety and public health impacts of these projects.<sup>211</sup>

### C. *Balancing Test*

If courts choose not to adopt the standards described above, they should reinterpret Exemption 7(F) in light of Exemption 7(C). Exemption 7(C) creates a balancing test. Exemption 7(C) provides that:

[Disclosure] does not apply to matters that are—records or information *compiled for law enforcement purposes*, but only to the extent that the production of such law enforcement records or information . . . *could reasonably be expected to constitute an unwarranted invasion of personal privacy.*<sup>212</sup>

Courts have interpreted this language to create three separate steps.<sup>213</sup> First, at Step One, the withheld document must have been compiled for law enforcement purposes, much like every other Exemption 7 provision.<sup>214</sup> Next, at Step Two, the disclosure of the records must be reasonably expected to constitute an unwarranted invasion of personal privacy.<sup>215</sup> Finally, at Step Three, the “invasion of privacy must not be outweighed by the public interest in the disclosure of the records.”<sup>216</sup> To demonstrate that the public’s interest overrides the privacy intrusion at Step Three, a FOIA applicant must “(1) ‘show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake,’ and (2) ‘show the information is likely to advance that interest.’”<sup>217</sup> The public interest has been interpreted narrowly.<sup>218</sup> To be in the public interest, the “requested information must ‘shed[] light on an agency’s performance of its statutory duties.’”<sup>219</sup>

The balancing test of Exemption 7(C) has no basis in current Exemption 7(F) case law. As a more radical approach, courts should consider incorporating Exemption 7(C)’s balancing test into Exemption 7(F) by adding a Step Three to Exemp-

211. See *supra* Section II.B.

212. 5 U.S.C. § 552(b)(7)(C) (2012) (emphasis added).

213. *Archibald v. U.S. Dep’t of Justice*, 950 F. Supp. 2d 80, 86-87 (D.C. Cir. 2013).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Boyd v. Criminal Div. of U.S. Dep’t of Justice*, 475 F.3d 381, 387 (D.C. Cir. 2007) (quoting *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004)).

218. *Consumers’ Checkbook Ctr. for the Study of Servs. v. U.S. Dep’t of Health & Human Servs.*, 554 F.2d 1046, 1051 (D.C. Cir. 2009) (holding that “[t]he only relevant public interest in disclosure is the extent to which disclosure would serve the ‘core purpose of the FOIA’”) (internal citations omitted).

219. *Id.* (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)).



tion 7(F).<sup>220</sup> The new balancing test, now aligned to Exemption 7(F), would change from weighing invasion of privacy against the public interest to weighing risk of harm to law enforcement purposes against the public interest.<sup>221</sup>

If Exemption 7(C)'s Step Three was added to Exemption 7(F), it could reduce some of the more intolerable withholdings under the exemption, yet still adhere to congressional intent by allowing for the withholding of documents that could harm law enforcement personnel. In the environmental context, a case like *Standing Rock* might come out differently. For example, under Section 404 of the Clean Water Act, the Secretary of the Army, through the U.S. Army Corps of Engineers, must approve the addition of "fill" materials into waters of the United States.<sup>222</sup> If a pipeline company plans to place the pipeline on a wetland, in the water, or needs to add sand or rock into water or a wetland to hold the pipeline upright, the company must first get a permit under Section 404.<sup>223</sup> Section 404 requires that the discharge have minimal adverse effects on the environment.<sup>224</sup> A FOIA request for the *Standing Rock* Spill-Model Discussions and the five corresponding geographic response plans advances the public interest because these documents could be used to ensure that the Corps of Engineers approved a plan, in compliance with its statutory responsibilities, that would have minimal adverse effects on the environment. Thus, the balancing test would allow courts to consider the public's interest in having records relating to energy pipelines and environmentally-sensitive infrastructure with the government's interest in maintaining security.

The strength of the balancing test is limited, however, because the requested information has to shed light on the agency's performance of its statutory duties.<sup>225</sup> Thus, there will be times when information is publicly useful, but the document might not relate to the agency's performance of its statutory responsibilities. For example, in the *Standing Rock* litigation, the tribes wanted documents detailing the path of the pipeline to ensure that it did not cross any religious grounds.<sup>226</sup> In a hypothetical situation, the tribes could initiate a FOIA request to obtain documents detailing the pipeline's path. However, Section 404 contains no requirements that a permit not impinge on religious sites.<sup>227</sup> If we assume that there was no other law that governed the preservation of the tribe's religious sites that Corps

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220. See *Archibald*, 950 F. Supp. 2d at 86-87 (providing an example of the 7(C) balancing test).

221. See 5 U.S.C. § 552(b)(7)(F) (2012).

222. 33 U.S.C. § 1344(a) (2012).

223. See 33 C.F.R. § 323.2(f) (2008).

224. 33 U.S.C. § 1344(e)(1) (2012).

225. *Consumers' Checkbook Ctr. for the Study of Servs. v. Dep't of Health & Human Servs.*, 554 F.3d 1046, 1051 (D.C. Cir. 2009).

226. *Intervenor-Plaintiff Cheyenne River Sioux Tribe's Second Amended Complaint for Declaratory and Injunctive Relief at 1-3, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 249 F. Supp. 3d, 516 (D.D.C. 2017) (No. 1:16-cv-1534-JEB).

227. See 33 U.S.C. § 1344(e)(1) (2012).

was tasked with enforcing, the balancing test would be inapplicable in this situation and the Corps would be free to withhold the documents under Exemption 7(F) provided that the Corps would be able to show that the release of the path documents could be used to facilitate terrorism.

#### D. Possible Consequences of Reinterpreting Exemption 7(F)

Both reinterpretation strategies described above can create negative consequences. For example, if courts decided to reinterpret Exemption 7(F) in light of the Second Circuit's case law, there may be times where agencies are forced to release sensitive documents that could facilitate terrorism. If a court, applying the "direct link" test for law enforcement purposes articulated in *Schwartz*,<sup>228</sup> found that there was not a direct link between the withheld document and a law enforcement purpose, "then the inquiry is over and the information must be disclosed even if one of the six specified [Exemption 7] harms will actually occur upon disclosure."<sup>229</sup> The *Schwartz* test would allow the government to withhold many emergency response and crime prevention documents.<sup>230</sup> There may be some instances where a document that falls outside of these boundaries will cause harm if a court mandates its release. For example, if environmental groups request pipeline water crossings, these documents might be disclosed unless a court considers them to be necessary for emergency response or crime prevention.<sup>231</sup> A terrorist could theoretically use these plans to specifically damage pipelines at water crossings, causing leaks.

The more demanding "reasonably specific" standard articulated in *ACLU* also presents challenges.<sup>232</sup> The main difference between the reasonably specific standard and the D.C. Circuit test is that agencies will have to disclose documents where the agency cannot describe a specific person or subgroup that will be harmed.<sup>233</sup> There may be documents that do not pose a risk of harm to any one person or concrete group of people, but, when released, will inevitably cause harm to at least one individual. An example of this type of document is a federal document detailing how water should be treated at wastewater treatment plants. If the information was released to the public, an individual may use the information to upset the wastewater treatment process, causing harm to at least one unknown community. Because it would be impossible to know in exactly what community

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228. *Schwartz v. U.S. Dep't of Def.*, No. 15-CV-7077 (ARR) (RLM), 2017 WL 78482, at \*13 (E.D.N.Y. Jan. 6, 2017).

229. *Kaba*, *supra* note 123, at 635.

230. *See supra* notes 150-65 and accompanying text.

231. *See Schwartz*, 2017 WL 78482, at \*13.

232. *See Am. Civil Liberties Union v. U.S. Dep't of Def.*, 543 F.3d 59, 71 (2d Cir. 2008).

233. *See supra* Section II.B.

the harm would occur, the document would have to be released under Exemption 7(F).<sup>234</sup>

However, the benefits of revising Exemption 7(F) in light of Second Circuit precedent outweigh the potential negatives. Exemption 7(F) needs to be revised to ensure that the government cannot successfully claim that *any* document could be used to facilitate terrorism.<sup>235</sup> Moreover, withholding information on energy pipelines and environmentally-sensitive infrastructure denies communities and public interest groups the ability to see how large-scale projects will impact their natural resources, wildlife, safety, and public health.<sup>236</sup>

If courts chose to adopt the balancing test outside of Exemption 7(C), and to not adopt the case law of the Second Circuit, there would be fewer negative consequences. Under the balancing test, a judge would ask at Step Three whether there was sufficient public interest in disclosure to warrant releasing the document.<sup>237</sup> This type of test would allow courts to avoid the situation described earlier in this subsection where if a given document does not match the specific test, it must be released.<sup>238</sup> Courts would use the current expanded definitions of Exemption 7(F) to pass Steps One and Two,<sup>239</sup> but then consider whether there was sufficient public interest for the document to be released anyway. The downside of the balancing test is that courts would force agencies to disclose harmful documents that are very useful to the public.

Even though there are negative consequences associated with each reinterpretation, courts should still reinterpret Exemption 7(F). As a rule, FOIA exemptions are intended to be narrowly construed.<sup>240</sup> Courts should not recognize FOIA exemptions when they are not actually applicable. The current interpretation of Exemption 7(F) has strayed far from its foundation as an exemption intended to protect individuals close to law enforcement agents and law enforcement activities.<sup>241</sup>

Moreover, when courts strike down a FOIA exemption, agencies can seek relief from Congress and petition for the creation of a new exemption.<sup>242</sup> After *Milner*, Senator John McCain introduced a bill that would have added two new FOIA exemptions.<sup>243</sup> The first exemption would have shielded “military tactics,

234. See *ACLU*, 543 F.3d at 71.

235. See *supra* Section II.A to II.B.

236. See *supra* Section II.B.

237. See *supra* notes 213-19 and accompanying text.

238. See *id.* notes 213-19 and accompanying text.

239. See *supra* pp. Section II.A to II.B.

240. *Milner v. Dep’t of the Navy*, 562 U.S. 562, 565 (2011).

241. See *supra* notes 29-40 and accompanying text.

242. *Id.* notes 29-40 and accompanying text.

243. Caleb Lueck, Comment, *The End of a Dynasty: A Comment on Milner v. Department of the Navy*, 41 OKLA. CITY U. L. REV. 279, 303 (2016).

techniques, and procedures.”<sup>244</sup> The other would have exempted documents “predominantly internal to an agency, but only to the extent that disclosure could reasonably be expected to risk impairment of the effective operation of an agency or circumvention of statute or regulation.”<sup>245</sup> The amendments did not become law due to issues aside from the language of the exemptions.<sup>246</sup>

If the scope of Exemption 7(F) is narrowed, a similar process should occur. Congress should work with environmental non-profits and community groups to create a FOIA exemption which protects citizens from national security threats, but also provides for broad disclosure of energy pipeline and environmentally-sensitive infrastructure documents. Through this process, the worst excesses of Exemption 7(F) could be curbed and documents that are essential to the public interest could be disclosed.

### CONCLUSION

As of today, the FOIA process allows the federal government to withhold many documents that are useful to the public. Institutional issues inherent in the court system and courts’ broad interpretation of FOIA exemptions cause and perpetuate the problem. The legislative history of Exemption 7(F) shows that the exemption was never meant to be as broad as courts have interpreted it to be. Courts should make it more difficult for agencies to claim Exemption 7(F). They should do this by taking one of two routes. First, the court should use the law of Exemption 7(F) from the Second Circuit. Mixed agencies should have to show a connection between their withholding and a law enforcement purpose. These agencies should also have to show a threat to a reasonably specified individual. If courts choose not to adopt these additional safeguards, courts should instead reinterpret Exemption 7(F) to more closely resemble Exemption 7(C) and its accompanying balancing test. These reinterpretations come with drawbacks, but Congress and agencies are equipped to deal with the consequences of these interpretations. Without these reinterpretations, the public will lose out on publicly useful documents that detail the dangers posed by energy pipelines and environmentally-sensitive infrastructure.

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244. *Id.*

245. *Id.*

246. *Id.*