ATTORNEY GENERAL'S MEMORANDUM
ON THE 1986 AMENDMENTS TO THE
FREEDOM OF INFORMATION ACT

A MEMORANDUM FOR THE EXECUTIVE DEPARTMENTS AND
AGENCIES CONCERNING THE LAW ENFORCEMENT AMENDMENTS
TO THE FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552, ENACTED AS
THE FREEDOM OF INFORMATION REFORM ACT OF 1986, §§ 1801-1804
OF THE ANTI-DRUG ABUSE ACT OF 1986, 100 STAT. 3207, 3207-48
(OCTOBER 27, 1986).

UNITED STATES DEPARTMENT OF JUSTICE

Edwin Meese III, Attorney General
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STATEMENT BY PRESIDENT REAGAN
UPON SIGNING PUBLIC LAW NO. 99-570 ON OCT. 27, 1986

As I stated in my remarks at the signing ceremony for this bill, I am pleased to sign the Anti-Drug Abuse Act of 1986.

One other matter concerning the Act is worthy of note. This Act contains several important provisions reforming the Freedom of Information Act (FOIA) that will considerably enhance the ability of Federal law enforcement agencies such as the Federal Bureau of Investigation and the Drug Enforcement Administration to combat drug offenders and other criminals. My Administration has been seeking such reforms since 1981.

The FOIA reforms substantially broaden the law enforcement exemptions in that Act, thereby increasing significantly the authority of Federal agencies to withhold sensitive law enforcement documents in their files. The statutory language changes make clear, for example, that any Federal law enforcement information relating to pending investigations or confidential sources may be withheld if its disclosure could reasonably be expected to cause an identified harm. The Act also includes, for the first time, special exclusions whereby certain law enforcement records would no longer be subject to the requirements of the FOIA under particularly sensitive, specified circumstances.
Additionally, the Act makes several changes with respect to the charging of fees under the FOIA. Agencies will now be able to charge and recover the full costs of processing requests for information under the FOIA, consistent with the Federal user fee concept, in the large number of cases in which FOIA requests are made for "commercial" purposes, a term that has been broadly construed in other contexts of the FOIA. At the same time, the Act will somewhat limit the fees applicable to noncommercial educational or scientific institutions and to bona fide representatives of established news media outlets. It is important that no such special treatment is accorded to organizations engaged in the business of reselling government records or information.

Finally, the bill improves the standard governing the general waiver of FOIA fees, by mandating that such waivers be granted only where it is established that disclosure is in the "public interest" because it is likely to "contribute significantly to public understanding" of the operations or activities of the government. This standard is intended to focus upon benefits to the public at large, rather than upon the interest of a particular segment of the public, and thus clarifies the type of public interest to be advanced.

**FOREWORD**

In enacting the Freedom of Information Act (FOIA), Congress established a new mechanism of public access to federal records, one which completely reversed the pre-existing legal presumption that such records would not be made publicly available unless good cause for their disclosure was shown. It did so based upon the principle that, as President Johnson phrased it when he signed the FOIA into law on July 4, 1966, "a democracy works best when the people have all the information that the security of the Nation permits."

During the last twenty years, the many departments and agencies of the federal government have struggled to implement this rough embodiment of an American ideal. As they have done so, there has been much public debate over the FOIA's proper formulation and application. Such debate inevitably reduces down to the fundamental policy question sought to be addressed by the Act: How much public disclosure of government information can the security of the Nation reasonably permit? This question has been raised almost continuously over the past two decades.

In 1966, when first acting to reverse a history of routine government nondisclosure, Congress sought to answer this question through broad exemptions and procedural requirements designed to preserve legitimate governmental interests in the face of the
new general disclosure policy. Several years later, in the wake of the "Watergate affair," Congress decided to alter the course of government disclosure policy through a series of "liberalizing" FOIA amendments, the most significant of which restructured and considerably narrowed Exemption 7, the Act's vital law enforcement exemption. But in its reaction to the perceived need for greater disclosure, Congress overcorrected through those FOIA amendments and seriously impaired the ability of federal law enforcement agencies to perform their crucial mission of protecting our citizenry.

It is this very miscorrection in the course of our national information-disclosure policy that the Freedom of Information Reform Act of 1986 recognizes and is principally designed to set right. Through its major law enforcement provisions, enacted as part of the Anti-Drug Abuse Act of 1986, Public Law No. 99-570, Congress has now rectified the many weaknesses that were present in its previous restructuring of Exemption 7 and has established important new record exclusions covering the records of especially sensitive law enforcement activities. These new protections, Congress recognized, are particularly essential to the success of federal drug enforcement activities. Indeed, they are essential to the effective functioning of all federal law enforcement agencies and should be applied comprehensively toward that end.

Edwin Meese III,
Attorney General,
December 1987

ATTORNEY GENERAL'S MEMORANDUM
ON THE 1986 LAW ENFORCEMENT AMENDMENTS TO THE
FREEDOM OF INFORMATION ACT

A. Introduction

The enactment of the Freedom of Information Reform Act of 1986 ("FOIA Reform Act") marks the culmination of many years of administrative and congressional consideration of the need for such legislative reform. From the beginning, the most significant driving force behind these efforts was the need for greater law enforcement protection under the FOIA. In 1981, Federal Bureau of Investigation Director William H. Webster testified to the vulnerability of the FBI and other federal law enforcement agencies to use of the FOIA by sophisticated requesters for purposes of gleaning sensitive law enforcement information; his testimony demonstrated that the strengthening of the Act's law enforcement protections was necessary to avoid the impairment of vital law enforcement interests.\(^{(1)}\)

That year, the first group of FOIA reform amendments was formally proposed, leading to the Senate Judiciary Committee's unanimous approval of a compromise bill (S. 1730, 97th Cong.) which passed the Senate in the following Congress (as S. 774, 98th Cong.) and became the major forerunner of the FOIA reform legislation ultimately enacted into law. Although congressional deliberation over the subject of FOIA reform took several years, both Houses of Congress acted with exceptional speed in passing this FOIA reform legislation at the close of the 99th Congress.

The FOIA Reform Act amends the Freedom of Information Act in two major areas. Most significantly, it broadens the protections of the FOIA's law enforcement exemption, Exemption 7, and it creates special record exclusion protections, in new subsection (c), for certain categories of especially sensitive law enforcement records. These amendments became effective immediately upon their enactment on October 27, 1986, and were made applicable to all FOIA matters pending, either administratively or in court, as of that date. See Pub. L. No. 99-570, § 1804(a) (1986) (not codified).

Secondly, it has established a new statutory structure for the assessment of FOIA fees, one which permits the charging of full "document review" fees to commercial requesters and which also includes special fee limitations that are applicable to specified categories of noncommercial requesters. See 5 U.S.C. § 552(a)(4)(A), as amended by Pub. L. No. 99-570, § 1803 (1986). Additionally, the FOIA Reform Act established a revised statutory standard governing the general waiver or reduction of FOIA fees. See 5 U.S.C. § 552(a)(4)(A)(iii). These amendments were made effective as of April 25, 1987, but require implementing agency regulations to be fully effective. See Pub. L. No. 99-570, § 1804(b) (1986) (not codified).\(^{(2)}\)

Under the FOIA Reform Act's provisions, government-wide policy responsibility regarding matters of FOIA fees and fee limitations now rests with the Office of Management and Budget, which is required under the statute to establish "a uniform schedule of fees for all agencies." 5 U.S.C. § 552(a)(4)(A)(i). Accordingly, OMB has
promulgated its Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10011 (Mar. 27, 1987), to guide agencies in their implementation of the new fee and fee limitation provisions. These OMB Fee Guidelines, which are attached as Appendix I to this memorandum, should be consulted regarding this part of the FOIA Reform Act's amendments.

To guide agencies in their implementation of the FOIA Reform Act's new provision governing the waiver or reduction of fees, the Department of Justice issued a memorandum to the heads of all federal agencies from Assistant Attorney General for Legal Policy Stephen J. Markman on April 2, 1987. This advisory memorandum, entitled "New FOIA Fee Waiver Policy Guidance," sets out six analytical factors logically to be taken into consideration in the making of fee waiver determinations; it discusses them, as well as related procedural considerations, in detail. This comprehensive document replaces the previous fee waiver guidance issued by the Department and should be consulted regarding any matter of fee waiver policy or procedure.\(^{(3)}\) It is attached as Appendix II.

This memorandum will address the law enforcement amendments of the FOIA Reform Act, as previous such Attorney General's memoranda have addressed new provisions of the FOIA upon its amendment in 1974 and upon its original enactment. See Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (February 1975); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967). Accord 5 U.S.C. § 552(e) (establishing statutory responsibility of Attorney General to encourage agency compliance with FOIA). The purpose of this memorandum will be to outline and discuss these law enforcement amendments as a guide to their implementation.\(^{(4)}\)

In approaching these FOIA Reform Act amendments, the Department of Justice has reviewed and thoroughly taken into consideration the limited legislative history of this legislation. Due to the accelerated procedures by which Congress enacted the FOIA Reform Act, as a floor amendment to the Anti-Drug Abuse Act of 1986 at the close of a legislative session, neither House of Congress prepared a committee report on the FOIA Reform Act, nor is there any conference committee report to consult. The only items of "legislative history" generated on the FOIA Reform Act itself were the statements of individual Senators and Congressman who were actively involved in the legislative process of considering FOIA reform but who -- it is readily obvious from their statements -- expressed some disparate views of the amendments.\(^{(5)}\)

However, the Senate Judiciary Committee prepared a formal committee report when the Committee unanimously approved the major predecessor FOIA reform bill in the 98th Congress (S. 774), which contained Exemption 7 amendments virtually identical
to those ultimately adopted by Congress in the FOIA Reform Act. See S. Rep. No. 221, 98th Cong., 1st Sess. (1983). One of the two principal authors of the Exemption 7 amendments explicitly recognized the singular authoritativeness of this committee report, and it already has been so employed to construe the amended language of Exemption 7 in one of the first appellate court decisions to consider the FOIA Reform Act. See Spannaus v. Department of Justice, 813 F.2d 1285, 1288 (4th Cir. 1987); see also Struth v. FBI, Civil No. 82-C-51, slip op. at 27-28 (E.D. Wis. Oct. 30, 1987) (same). Accordingly, this memorandum refers to that committee report where applicable.

The focal point for understanding and applying the FOIA Reform Act's law enforcement amendments, though, is the language of the statute itself. See, e.g., Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). As the D.C. Circuit Court of Appeals recently had occasion to observe in the context of a FOIA exemption, "[t]he words of a statute presumptively establish its meaning, and the intent of Congress behind it." Martin v. Office of Special Counsel, 819 F.2d 1181, 1185 (D.C. Cir. 1987). Further, where the language of a statute is clear, its "plain meaning" should be applied. See, e.g., CIA v. Sims, 471 U.S. 159, 167 (1985); United States v. Weber Aircraft Corp., 465 U.S. 792, 798 (1984) (legislative history must contain "compelling evidence of congressional intent [for it to be proper to] look beyond the plain statutory language"). Thus, it is primarily to the language and plain meaning of the FOIA Reform Act's law enforcement amendments that the following discussion looks in order to guide their implementation.

B. The Threshold of Exemption 7

The FOIA Reform Act expands the protections available for law enforcement records under Exemption 7 by broadening its language virtually throughout the exemption and its subparts. The first of these modifications can be found in the introductory language of Exemption 7, which establishes the threshold requirement that must be met before consideration can be given to the applicability of one or more of the exemption's six subparts.

Prior to the FOIA Reform Act, Exemption 7's protections were available only to "investigatory records compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7) (1982). The Reform Act modified this threshold requirement in two distinct respects -- by deleting the word "investigatory" and by adding the words "or information" -- so that Exemption 7 now extends potentially to all "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7), as amended by Pub. L. No. 99-570, § 1802 (1986).
The more technical of these two language modifications is the expansion of the exemption to cover "information" compiled for law enforcement purposes. This modification, by its terms, permits Exemption 7 to apply not only to compilations of information as they are preserved in particular records requested, but also to any part of the information itself, so long as that information was compiled for law enforcement purposes. It plainly is designed "to ensure that sensitive law enforcement information is protecte

This amendment thus broadens the focus of Exemption 7 from "records" to items of "information." In so doing, it builds upon the Supreme Court's approach to Exemption 7's threshold in FBI v. Abramson, 456 U.S. 615, 626 (1982), in which the Court focused upon the "kind of information" contained in the law enforcement records before it. Now it is clear that an item of information originally compiled by an agency for a law enforcement purpose retains Exemption 7 protection even if it is maintained in or recompiled into a non-law enforcement record. This properly places "emphasis on the contents, and not the physical format of documents." Center for National Security Studies v. CIA, 577 F. Supp. 584, 590 (D.D.C. 1983) (decision applying Abramson to afford counterpart FOIA protection to different document copies).

Therefore, in applying the Exemption 7 threshold, agencies should now focus on the content and compilation purpose of each item of information involved, regardless of the overall character of the record in which it happens to be maintained.

The second amendment to Exemption 7's threshold language may be of considerably greater importance. The FOIA Reform Act removed the requirement that records or information be "investigatory" in character in order to qualify for Exemption 7 protection. Under the former threshold language, agencies and courts considering Exemption 7 issues often struggled with the "investigatory" requirement, as some kinds of sensitive law enforcement information did not readily fit the label of "investigatory." Courts generally interpreted this statutory term as requiring that the records in question result from specifically focused law enforcement inquiries, as opposed to more routine monitoring or oversight of government programs. Compare, e.g., Sears, Roebuck & Co. v. GSA, 509 F.2d 527, 529-30 (D.C. Cir. 1974) (records submitted for mere monitoring of employment discrimination found not "investigatory") with Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974) (records of agency review of public schools suspected of discriminatory practices found "investigatory").

The distinction between "investigatory" and "noninvestigatory" law enforcement records, however, was not always so clear. Compare, e.g., Gregory v. FDIC, 470 F. Supp. 1329, 1334 (D.D.C. 1979) (bank examination report "typifies routine oversight" and thus is not "investigatory") with Copus v. Rougeau, 504 F. Supp. 534, 538.
(D.D.C. 1980) (compliance review forecast report "clearly" is investigatory record). Moreover, the "investigatory" requirement per se was frequently blurred together with the "law enforcement purposes" aspect of the exemption, so that it sometimes became difficult to distinguish between the two. See, e.g., Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.47 (D.C. Cir. 1974).

By eliminating the "investigatory" requirement under Exemption 7, the FOIA Reform Act should put an end to such troublesome distinctions and broaden the potential sweep of the exemption's coverage. The protections of Exemption 7's six subparts are now available to all records or information that have been "compiled for law enforcement purposes." Even records generated pursuant to routine agency activities that could never be regarded as "investigatory" now qualify for Exemption 7 protection where those activities involve a law enforcement purpose. This includes records generated for general law enforcement purposes that do not necessarily relate to specific investigations. Records such as law enforcement manuals, for example, which formerly were found unqualified for Exemption 7 protection only because they were not "investigatory" in character, now should readily satisfy the exemption's threshold requirement. See S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983) (citing, e.g., Sladek v. Bensing, 605 F.2d 899, 903 (5th Cir. 1979) (holding Exemption 7 inapplicable to DEA manual that "was not compiled in the course of a specific investigation"); Cox v. Department of Justice, 576 F.2d 1302, 1310 (8th Cir. 1978) (same)).

To be sure, the FOIA Reform Act has not altered the basic Exemption 7 requirement that the records or information be "compiled for law enforcement purposes." Indeed, this threshold requirement, which was the subject of secondary focus and case law discussion under the former formulation, now stands as the primary consideration for determining Exemption 7's new potential applicability. As courts now apply the plain meaning of this term in the absence of the former "investigatory" limitation, all federal agencies should also reassess the extent to which their records may now qualify for possible Exemption 7 protection.

What constitutes a proper "law enforcement purpose" within the meaning of Exemption 7 can depend greatly, of course, upon the primary purpose of the agency seeking to invoke it. Court decisions considering this issue in the context of Exemption 7's former threshold generally have found it appropriate to distinguish between agencies holding both law enforcement and administrative functions and those whose principal function is in the area of traditional law enforcement. Federal agencies for which "[l]aw enforcement, indeed, is often [only] one of . . . [the] agency's proper functions" have been required to show that their records relate to "an identifiable possible violation of law." Birch v. Postal Service, 803 F.2d 1206, 1210 (D.C. Cir. 1986). By contrast, the records of a principal federal law enforcement
agency, such as the FBI, have been found to qualify simply by virtue of the primacy of the agency's law enforcement mission, see, e.g., Irons v. Bell, 596 F.2d 468, 474-76 (1st Cir. 1979) (investigatory records of law enforcement agencies are "inherently" law enforcement records), or because a rational connection can readily be shown between the records' compilation and the agency's law enforcement purpose, see, e.g., Pratt v. Webster, 673 F.2d 408, 420-22 (D.C. Cir. 1982). These standards can be taken as guideposts to the proper application of this term at this juncture. See also Keys v. Department of Justice, 830 F.2d 337, 340 (D.C. Cir. 1987) (applying Pratt as "the controlling precedent" on "the requirement that survives the 1986 amendments").

Therefore, each federal agency should carefully consider the effect of the amended Exemption 7 threshold with respect to its particular records and the context in which they are generated. For the principal federal civil and criminal law enforcement agencies, the elimination of the "investigatory" limitation means that any record heretofore not considered covered by Exemption 7 due solely to its noninvestigatory character is likely to be sufficiently related to the agency's general law enforcement mission that it now can be considered for possible Exemption 7 protection. Other agencies should carefully consider the extent to which any of their records, even though not compiled for a specific investigation, are so directly related to the enforcement of civil or criminal laws that they might reasonably meet Exemption 7's revised threshold standard and thus qualify for necessary protection under it. Such records as law enforcement manuals, background investigation documents and program oversight reports can be prime candidates for such consideration. At bottom, however, the effect of this amendment will be realized only upon the case-by-case identification of particular items of noninvestigatory law enforcement information the continued disclosure of which could cause one of the harms specified in Exemption 7's subparts.

C. The Risk of Harm -- Exemptions 7(A), 7(C), 7(D) and 7(F)

Once the threshold requirement of Exemption 7 has been found to be satisfied, it still must be established that an item of information falls within at least one of Exemption 7's six subparts before it properly can be withheld under the exemption. These subparts enumerate a series of harms that can be caused by the disclosure of law enforcement information. Prior to the FOIA Reform Act, each Exemption 7 subpart was prefaced with the word "would" -- for example, "would (A) interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (1982). This phrasing established the risk of harm that had to be demonstrated by an agency in invoking these law enforcement exemptions.

One of the most significant law enforcement amendments of the FOIA Reform Act is the modification of this harm standard in the major subparts of Exemption 7.
Exemptions 7(A), 7(C), 7(D), and 7(F) are now modified to protect, in pertinent parts, records or information compiled for law enforcement purposes which

(A) could reasonably be expected to interfere with enforcement proceedings, . . .

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(D) could reasonably be expected to disclose the identity of a confidential source, . . . [or, in records of criminal or national security investigations] information furnished by a confidential source, . . . [or]

(F) could reasonably be expected to endanger the life or physical safety of any individual.


(15) This pointed substitution of the phrase "could reasonably be expected to" for "would" in these four exemptions obviously establishes a more relaxed harm standard to be met by agencies in invoking them, a lesser risk of harm that need be shown. As was recognized in the first decision to appraise the significance of this modification, it "creates a broader protection than had existed under the old language of the statute." Allen v. Department of Defense, 658 F. Supp. 15, 23 (D.D.C. 1986) (considering modification of Exemption 7(C)); see Arenberg v. DEA, Civil No. 86-1326, slip op. at 3 (S.D. Fla. Sept. 30, 1987) ("Exemption 7 was broadened substantially"); see also Keys v. Department of Justice, 830 F.2d at 346.

Indeed, during the course of Congress' protracted consideration of FOIA reform legislation, much concern was expressed about the ability of federal law enforcement agencies to protect all items of sensitive law enforcement information under Exemption 7, particularly in the face of any sophisticated analysis of disclosed record portions by those seeking to evade the law. In the context of Exemption 7(D), especially, there was recognized to be a serious "perception problem" of confidential sources doubting the ability of federal law enforcement agencies to adequately protect their identities in the face of FOIA requests. S. Rep. No. 221, 98th Cong., 1st Sess. 23-24 (1983). These longstanding concerns led to the adoption of this lessened harm standard. See id.

In adopting the "could reasonably be expected to" standard for these critical law enforcement exemptions, Congress specifically utilized the harm standard that already had been employed under the FOIA to protect critical national security information,

The "mosaic" principle of information protection did not comfortably comport with the former "would" standard in Exemption 7, which by its phrasing seemed to suggest a greater certainty of harm required. It was in specific recognition of this that Congress allowed for a lesser degree of certainty in the determinations to be made and justified under these exemptions.\(^{[18]}\) The burden of demonstrating the risk of particular harms under them thus is a more reasonable one with less certainty required. As one court has specifically observed:

The agency's showing under the amended statute, which in part replaces "would" with "could reasonably be expected to," is to be measured by a standard of reasonableness, which takes into account the "lack of certainty in attempting to predict harm" while providing an objective test.


Therefore, agencies should be mindful of the greater latitude that is now inherent in these major law enforcement exemptions. While it remains to be seen exactly how the new harm standard will shape their evolving contours, it is clear that, through it, 
"[Congress] acted to broaden the provisions of Exemption 7." Irons v. FBI, 811 F.2d 681, 687 (1st Cir. 1987). Though relatively few courts have yet considered the significance of this new Exemption 7 standard, it already has been applied, in the Exemption 7(A) context, toward the conclusion that an agency need show only that "disclosure could generally interfere with enforcement proceedings." Korkala v. Department of Justice, Civil No. 86-0242, slip op. at 8-9 (D.D.C. July 31, 1987); see also Wright v. OSHA, 822 F.2d 642, 647 (7th Cir. 1987); Spannaus v. Department of Justice, 813 F.2d at 1289; Curran v. Department of Justice, 813 F.2d 473, 474 n.1 (1st Cir. 1987); accord NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 234-35 (1978).

In the context of Exemption 7(C), which often requires more precise and detailed nondisclosure determinations in order to protect the personal privacy interests that are necessarily implicated in law enforcement files, one court readily recognized that there now is a "broader category of information that is protectible" under this exemption. Allen v. Department of Defense, 658 F. Supp. at 23. More recently, it has
been observed that "[t]he new language in the 1986 Amendments to the Act allows
greater latitude in protecting privacy interests against disclosure . . . under a more
elastic standard." Washington Post Co. v. Department of Justice, Civil No. 84-3581,
slip op. at 31 (D.D.C. Sept. 25, 1987) (magistrate's
recommendation), adopted (D.D.C. Dec. 15, 1987); see also Nishnic v. Department of
Justice, 671 F. Supp. 776, 788 (D.D.C. 1987) (harm shown need no longer be
"likely"). The significantly lessened certainty of harm now required should permit
agencies to afford full protection to personal privacy interests in law enforcement files
wherever it reasonably can be seen that those interests are threatened by FOIA
disclosure.\(^{(19)}\)

This should be all the more the case with respect to the protection of confidential
sources and the physical safety of individuals under Exemptions 7(D) and 7(F),
respectively.\(^{(20)}\) As was noted above, much of the impetus for the harm standard's
modification (and, for that matter, behind FOIA reform overall) centered around the
vital need of federal law enforcement agencies to ensure the protection of their
confidential sources, particularly in light of the "mosaic" and "perception" problems
surrounding this area. Accordingly, all federal agencies maintaining law enforcement
information should apply the specifically strengthened Exemption 7(D) wherever
reasonably necessary to ensure adequate source protection. They should employ, in
the words of one of the first courts to consider the matter under the Reform Act, "[a]
'robust' reading of exemption 7(D)." Sluby v. Department of Justice, Civil No. 86-
/extending Exemption 7(D) protection even to sources who received only conditional
assurances of confidentiality).\(^{(21)}\)

**D. Additional Exemption 7(D) Modifications**

In addition to strengthening Exemption 7(D) through the new harm standard discussed
above, the FOIA Reform Act modifies this exemption in three other significant
respects. These modifications, too, serve the Reform Act's strong goal of ensuring
comprehensive source protection, in that they codify the majority case law on three
chronically troublesome points of Exemption 7(D) interpretation.

First, the Reform Act inserts into Exemption 7(D), immediately after the exemption's
first reference to the term "confidential source," the following language: "including a
State, local, or foreign agency or authority or any private institution which furnished
information on a confidential basis." 5 U.S.C. § 552(b)(7)(D), as amended by Pub. L.
No. 99-570, § 1802 (1986). This insertion specifically expands the statutory treatment
of the term "confidential source," so as to expressly include in it all non-federal
governmental entities that confidentially share law enforcement information, as well
as all private "institutional sources" who likewise cooperate with federal law
enforcement agencies. These entities thus now unquestionably qualify for the
source-identification protection afforded by Exemption 7(D) and, in the case of a
criminal or lawful national security investigation, for the protection of all information
furnished by such confidential sources, under the exemption's second part. See
generally Duffin v. Carlson, 636 F.2d 709, 712 (D.C. Cir. 1980) (explicating
difference between Exemption 7(D)'s two parts).

This modification of Exemption 7(D) makes explicit what the majority of court
decisions on this point have properly recognized: that the vital source system relied
upon by federal law enforcement agencies necessarily must include -- and therefore
should protect under the FOIA -- such public and private institutions. See, e.g.,
Founding Church of Scientology v. Regan, 670 F.2d 1158, 1161-62 (D.C. Cir. 1981)
("confidential source" includes nonfederal entities such as state, local and foreign law
enforcement agencies), cert. denied, 456 U.S. 976 (1982); Dunaway v. Webster, 519
F. Supp. 1059, 1081-82 (N.D. Cal. 1981) ("confidential source" includes financial and
commercial institutions). Including this specificity directly within the statute should
remove all doubt on the point and curtail any lingering effect of the minority case law
1978). Accordingly, government entities such as law enforcement authorities, schools
and other municipal agencies, as well as private entities such as telephone companies
and commercial credit bureaus, all should readily be entitled to Exemption 7(D)
protection wherever they provide information on a confidential basis.

The other two language modifications adopted for Exemption 7(D) relate to the
second half of the exemption, which accords broad, categorical protection to the
information actually furnished by sources in criminal and national security
investigations. The FOIA Reform Act deletes the words "confidential" and "only"
from the exemption's final clause, so that it now encompasses all "information
No. 99-570, § 1802 (1986).

Prior to these modifications, when it was phrased as "confidential information
furnished only by the confidential source," this last clause of Exemption 7(D) was
subject to the literal interpretation that it protected merely that information which was
furnished "only" by one confidential source. This sometimes resulted in
administrative confusion and it even caused some courts to pause over the intended
meaning of the exemption. See, e.g., Shaw v. FBI, 749 F.2d 58, 62 (D.C. Cir. 1984)
(whatever "furnished only by a confidential source" means, it does not mean
"obtainable only from the confidential source"); Radowich v. United States Attorney,
District of Maryland, 658 F.2d 957, 964 (4th Cir. 1981) (Congress intended to protect
all information from a confidential source, regardless of whether information might be
available from another source). Similarly, there existed some concern that the
presence of the word "confidential" immediately preceding "information," if taken literally, could unnaturally limit the exemption as well. See, e.g., Shaw v. FBI, 749 F.2d at 61.

By making these small language modifications, the FOIA Reform Act makes clear beyond any possible doubt that all information furnished by a confidential source is exempt, so long as it was furnished in connection with a criminal or lawful national security investigation. Thus, Exemption 7(D) now indicates plainly what had been generally accepted as its logical meaning. See, e.g., Duffin v. Carlson, 636 F.2d at 712-13; Brant Construction Co. v. EPA, 778 F.2d 1258, 1262 (7th Cir. 1985). Agencies maintaining source information that meets the requirements of this second part of Exemption 7(D) should be sure to apply its provisions accordingly.

E. Exemption 7(E) Modifications

The FOIA Reform Act comprehensively revises Exemption 7(E) through a number of language modifications and insertions which have the effect of recasting the exemption into two distinct protective clauses. Together with the significant corresponding modification of the language of Exemption 7's threshold, these alterations should considerably expand the breadth of Exemption 7(E) protection.

Prior to the Reform Act, Exemption 7(E) protected only investigatory records compiled for law enforcement purposes the production of which would "disclose investigative techniques and procedures." 5 U.S.C. § 552(b)(7)(E) (1982). As now amended, it encompasses all law enforcement information the production of which "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E), as amended by Pub. L. No. 99-570, § 1802 (1986).

The first difference in this new formulation of the exemption is the omission of the word "investigative." That word formerly qualified the basic terms of Exemption 7(E), much the same as the word "investigatory" formerly qualified the term "records compiled for law enforcement purposes" in Exemption 7's threshold. As amended, however, the first clause of Exemption 7(E) now simply encompasses all "techniques and procedures for law enforcement investigations or prosecutions." 5 U.S.C. § 552(b)(7)(E). As such, it authorizes the withholding of information consisting of, or reflecting, a law enforcement "technique" or a law enforcement "procedure," as Exemption 7(E) formerly had provided. But such items no longer are required to be "investigatory" or "investigative" in character in order to be withheld. Rather, a technique or procedure now can properly be protected under Exemption 7(E) wherever it is "for law enforcement investigations or prosecutions" generally.
Thus, the protection now available under this first clause of the exemption is unquestionably broader than that formerly available under Exemption 7(E) as a whole.\(^{(25)}\) One of the Exemption 7 weaknesses specifically addressed by Congress in achieving FOIA reform was its inadequacy to protect such records as law enforcement manuals which, though certainly containing law enforcement "techniques" and "procedures," did not satisfy the former "investigatory" requirement of the exemption. See S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983) (citing, e.g., Sladek v. Bensinger, 605 F.2d 899 (5th Cir. 1979)).\(^{(26)}\) Such documents, additionally including those which pertain to the "prosecution" stage of the law enforcement process, now should meet the requirements for withholding under Exemption 7(E) to the extent that they consist of, or reflect, law enforcement techniques and procedures best kept confidential.\(^{(27)}\)

Exemption 7(E)'s entirely new second clause provides a specific basis for withholding "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). This distinct new provision effectively protects the type of law enforcement guideline information that the D.C. Circuit formerly found ineligible to be withheld. See Jordan v. Department of Justice, 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc) (guidelines for drug prosecutions). This provision has now eradicated any lingering effect of that decision,\(^{(28)}\) while at the same time ensuring that agencies do not unnecessarily maintain "secret law" on the standards used to regulate behavior. See S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983).

Accordingly, this clause of Exemption 7(E) is plainly designed so as to protect any "law enforcement guideline" information of the type involved in Jordan, whether it pertains to the prosecution or basic investigation stage of a law enforcement matter, wherever it is determined that its disclosure "could reasonably be expected to risk circumvention of the law."\(^{(29)}\) In choosing this particular harm formulation, Congress employed the more relaxed harm standard now used widely throughout Exemption 7,\(^{(30)}\) and "was guided by the 'circumvention of the law' standard that the D.C. Circuit established in its en banc decision in Crooker v. BATF, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (interpreting Exemption 2)." S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983).\(^{(31)}\)

Agencies should therefore be aware of the distinct protections now provided in Exemption 7(E)'s two clauses. "Noninvestigatory" law enforcement records should be reassessed to determine where, and to what extent, they can be fairly regarded as reflecting techniques or procedures and thus be newly entitled to categorical protection under Exemption 7(E)'s first clause. Law enforcement guidelines should be evaluated under the broader standards for nondisclosure now established by Exemption 7(E)'s second clause.\(^{(32)}\)
F. Additional Exemption 7(F) Modification

The final Exemption 7 modification made by the FOIA Reform Act is to Exemption 7(F), which now protects against the disclosure of any law enforcement information that "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F), as amended by Pub. L. No. 99-570, § 1802 (1986).

Prior to the Reform Act, in addition to having a more stringent harm standard as discussed above, Exemption 7(F) was limited in scope so as to protect the lives and physical safety of "law enforcement personnel" only. 5 U.S.C. § 552(b)(7)(F) (1982). The expansion of this exemption's protective scope to encompass "any individual" is obviously designed to ensure that no law enforcement information that could endanger anyone if disclosed under the FOIA should ever be required to be released.\(^{(33)}\)

Thus, Exemption 7(F) is now available to provide necessary protection for the full range of persons whose personal physical safety can be at stake in sensitive law enforcement files. As such, it should be of greater utility to federal law enforcement agencies, especially given the broadened "could reasonably be expected to" harm standard now governing the exemption's application.\(^{(34)}\) Agencies can reasonably regard Congress' modifications of this exemption as clear authority to invoke it wherever there is any reasonable likelihood of a FOIA disclosure endangering any person.

G. New Subsection (c) Exclusions

In addition to expanding the protective scope of the FOIA's principal law enforcement exemptions, the FOIA Reform Act creates an entirely new mechanism for protecting certain especially sensitive law enforcement matters, under new subsection (c) of the FOIA. These three new special protection provisions, referred to as record "exclusions," now expressly authorize federal law enforcement agencies, for certain especially sensitive records under certain specified circumstances, to "treat the records as not subject to the requirements of [the FOIA]." 5 U.S.C. § 552(c)(1), (c)(2), (c)(3), as enacted by Pub. L. No. 99-570, § 1802 (1986). In other words, an agency applying an exclusion in response to a FOIA request will respond to the request as if the excluded records did not exist.

1. The (c)(1) Exclusion
The first of these important new provisions, to be known as the "(c)(1) exclusion," is the one that should be the most frequently applied of the three, by the widest potential range of federal agencies. It provides as follows:

Whenever a request is made which involves access to records described in subsection (b)(7)(A) and --

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,


This special record exclusion is designed to provide necessary protection in those situations in which the mere exemption protection afforded by Exemption 7(A) is inadequate to the task. Exemption 7(A) covers law enforcement records or information the disclosure of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A), as amended by Pub. L. No. 99-570, § 1802 (1986). It permits agencies to withhold requested records where their disclosure could harm a prospective law enforcement proceeding through the "premature release of evidence or information." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978). It is well recognized that such disclosure could allow an investigation's subject or target to interfere with the ongoing law enforcement proceeding in a number of possible ways. See id.

Ordinarily, the protection of Exemption 7(A) is sufficient to guard against any impairment of law enforcement investigations or proceedings through the FOIA. To avail itself of Exemption 7(A), however, an agency must routinely specify that it is relying on that exemption -- first administratively and then, if sued, in court -- even where it is invoking the exemption to withhold all responsive records in their entireties. The difficulty is that in those unusual situations in which the investigation's subject is as yet unaware of the investigation's existence, the agency's specific reliance on Exemption 7(A) can "tip off" the subject and thereby cause harm.

In such cases, even invoking Exemption 7(A) to withhold all details of an investigation during its pendency would not be sufficient to avoid interference, because the investigation's subject would be "tipped off" to its existence nonetheless. By the same token, any person (or entity) who suspects that a federal investigation might have been launched against him regarding certain of his activities could try to use the FOIA to confirm that suspicion. A carefully worded FOIA request is all that it
would take. An agency response invoking Exemption 7(A) would confirm the existence of an ongoing investigation; conversely, any response that did not invoke Exemption 7(A) in withholding law enforcement files would tell such a requester that his activities (or perhaps those of some other entity named in the request) have thus far escaped detection.

The (c)(1) exclusion now provides federal law enforcement agencies with a means of guarding against this danger of "tipping off" an investigation's subject. It authorizes them, under these particular circumstances, to exclude their records of ongoing criminal investigations or proceedings -- records that would be withheld as entirely exempt from disclosure under Exemption 7(A) anyway -- from the very reach of a FOIA request. This is the only effective way to avoid the "tip off" problem. The (c)(1) exclusion permits agencies to avoid having to disclose to investigative subjects a sensitive fact (i.e., whether there is an investigation ongoing or not) that would be disclosed by the mere invocation of Exemption 7(A).

This special protection is available only under certain circumstances specified clearly in the statute. Of course, the records in question must be those falling within the scope of Exemption 7(A) in the first place. Further, they must relate to an "investigation or proceeding [that] involves a possible violation of criminal law." 5 U.S.C. § 552(c)(1)(A). Hence, any records of an ongoing matter that is purely civil in nature, although they could qualify for ordinary Exemption 7(A) withholding, cannot be excluded from the FOIA under this provision. However, the statutory requirement that there be only a "possible violation of criminal law," by its very terms, admits a wide range of investigatory files maintained by federal agencies, not merely those of criminal law enforcement agencies.

Next, the statute imposes two closely related requirements which go to the very heart of the particular harm addressed through this record exclusion. An agency considering whether it should employ the (c)(1) exclusion must consider whether it has "reason to believe" that the investigative subject in question is not aware of the investigation's pendency and that, most fundamentally, disclosure of the very existence of the records in question "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(c)(1)(B).

Obviously, where all investigative subjects already are aware of an investigation's pendency, the "tip off" harm sought to be prevented through this record exclusion is not of concern. Accordingly, the language of this exclusion requires agencies to consider the level of awareness already possessed by all investigative subjects involved as they consider employing it. It is appropriate that agencies do so, as the statutory language provides, according to a good-faith, "reason to believe" standard,
which closely comports with the "could reasonably be expected to" standard utilized both within this exclusion and in the amended form of Exemption 7(A).

This "reason to believe" standard for considering a subject's pre-existing awareness should afford agencies all necessary latitude in making such determinations. As the exclusion is phrased, this requirement is satisfied so long as an agency determines that it affirmatively possesses "reason to believe" that such awareness does not in fact exist. While it is always possible that an agency might possess somewhat conflicting or even contradictory indications on such a point, it should be firmly resolved that a subject is aware of an investigation before an agency risks impairing it through any telling FOIA disclosure. \(^{(38)}\)

As for the fundamental judgment that disclosure of the very existence of the records would cause Exemption 7(A)-type harm, it must be remembered that this judgment transcends the ordinary harm determination made under Exemption 7(A). In many cases, indeed the vast majority of them, an agency considering the reasonably expected consequences of disclosing active law enforcement files will determine that they should be withheld under Exemption 7(A), perhaps in their entireties, but that disclosure of the very existence of records being withheld will not jeopardize an investigation. Only in the case in which an agency reaches the judgment that, given its reasonable belief of subject unawareness, the mere invocation of Exemption 7(A) could reasonably be expected to cause harm, can the exclusion properly be employed.

Lastly, the explicit language of this exclusion conditions its applicability so that it can be utilized "during only such time" as the above required circumstances continue to exist. This condition comports with the extraordinary nature of the protection afforded by the exclusion, as well as with the basic temporal nature of Exemption 7(A) underlying it. It means, of course, that an agency that has employed the exclusion in a particular case is obliged to cease doing so once the circumstances warranting it cease to exist. Once a law enforcement matter reaches a stage at which all subjects are aware of its pendency, or at which the agency otherwise determines that the public disclosure of that pendency no longer could lead to harm, the exclusion should be regarded as no longer applicable. If the FOIA request which triggered the agency's use of the exclusion remains pending either administratively or in court at that time, the excluded records should then be identified as responsive to that request and processed in the ordinary course. \(^{(39)}\)

Where all of these requirements are met, and an agency reaches the judgment that it is necessary and appropriate to employ the (c)(1) exclusion in connection with a request, that means that the records in question will be treated, as far as the FOIA requester is concerned, as if they did not exist. Where the excluded records are but a part of the totality of records responsive to a FOIA request, the request should be handled as if
the other responsive records are the only responsive records in existence. Where there are no such nonexcluded records responsive to a request, the requester may lawfully be advised that no records responsive to his FOIA request exist. In either case, the requester will not learn of the existence of the excluded records, or of the investigation or proceeding which underlies them, through the agency's response to his FOIA request. By the same token, sophisticated FOIA requesters never again will be able to rely on "no records" responses to carefully crafted FOIA requests to discern those instances in which no investigation is underway.

2. The (c)(2) Exclusion

The second exclusion created by the FOIA Reform Act applies to a narrower situation, involving the threatened identification of confidential informants, that sometimes can be encountered by criminal law enforcement agencies. The new "(c)(2) exclusion" provides as follows:

Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of [the FOIA] unless the informant's status as an informant has been officially confirmed. 5 U.S.C. § 552(c)(2).

This exclusion is designed to protect against the possible use of the FOIA to discover the identities of confidential informants, which would be contrary to the protective policy of Exemption 7(D), just as the (c)(1) exclusion is aimed at maintaining the integrity of the policy underlying Exemption 7(A). It contemplates the situation in which a sophisticated requester could try to ferret out an informant in his organization by forcing a law enforcement agency into a position in which it could not ordinarily withhold records on a suspected informant except by relying on Exemption 7(D) -- which would confirm that the person whose records are sought is indeed an informant.

In the ordinary situation, Exemption 7(D), as now amended, should adequately allow a law enforcement agency to withhold all items of information necessary to prevent the identification of any of its confidential sources. As with Exemption 7(A), though, the mere act of invoking Exemption 7(D) in response to a FOIA request tells the requester that somewhere within the records encompassed by the scope of his particular request there is reference to at least one confidential source. Ordinarily, within the subject-matter context of the usual FOIA request, the disclosure of this abstract fact poses no direct threat. Within the context of a FOIA request specifically
targeted at any files maintained on a named individual, however, the threat can be real and palpable.

It is possible, for example, for a source working in a criminal organization to come under suspicion by others around him, either specifically or more generally together with others. Those in control of that organization could seek to ferret out the source by requesting all law enforcement agency records that relate to him, as well as to any others similarly suspected, in any way. As a matter of routine policy, federal law enforcement agencies generally respond to such "third-party" requests for records on named individuals by neither confirming nor denying the existence of responsive records, pursuant to Exemption 7(C). However, in such a situation the source could readily be forced to surrender any such privacy protection if compelled by the organization to execute a privacy waiver or to make the request directly on the organization's behalf. In either case, a law enforcement agency could find itself in the untenable position of having to respond to a valid FOIA request directly targeted at a named informant's files. To invoke Exemption 7(D) in response to such a request would be utterly useless.

The (c)(2) exclusion is principally intended to address this situation by permitting an agency to avoid giving a response that would be tantamount to identifying a named party as a source under such circumstances. Any criminal law enforcement agency is now authorized to treat such requested records, within the extraordinary context of such a FOIA request, as beyond the FOIA's reach. As with the (c)(1) exclusion, the agency would have "no obligation to acknowledge the existence of such records in response to such request." S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983).

A criminal law enforcement agency forced to employ this exclusion should do so in the same fashion as it would employ the (c)(1) exclusion already discussed, except that it is less likely here that there will exist any nonexcluded records that would have to be processed in response to such a targeted request. Thus, in the instances in which the (c)(2) exclusion need be employed, the requester likely will receive a disarming "no records" response.

3. The (c)(3) Exclusion

The third of these special record exclusions pertains to certain especially sensitive records that are generated specifically by the Federal Bureau of Investigation. The new "(c)(3) exclusion" provides as follows:

Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is
classified information as provided in [Exemption 1], the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of [the FOIA].


This exclusion obviously is more particularly focused than the other two, but it is to operate in the same way. It recognizes the exceptional sensitivity of the FBI's activities in the areas of foreign intelligence, counterintelligence and the battle against international terrorism, as well as the fact that the classified files of these activities can be particularly vulnerable to targeted FOIA requests.

Sometimes, within the context of a certain FOIA request, the very fact that the FBI does or does not hold any records on a specified person or subject can itself be a sensitive fact, properly classifiable in accordance with Executive Order 12,356 and protectible under FOIA Exemption 1, 5 U.S.C. § 552(b)(1). Within such a context, however, as can be the case under Exemptions 7(A) and 7(D), the mere invocation of Exemption 1 to withhold such information can provide a harmful signal to an adversarial requester. In other possible contexts, the furnishing of an actual "no records" response, even to a seemingly innocuous "first-party" request, can compromise sensitive activities.

The FOIA Reform Act now takes cognizance of this through the (c)(3) exclusion, in which it authorizes the FBI to protect against such harm in connection with any of its records pertaining to these three especially sensitive areas. To do so, the FBI must of course reach the judgment, in the context of a particular request, that the very existence or nonexistence of responsive records is itself a classified fact and that it need employ this record exclusion to prevent its disclosure. By the terms of this provision, the excluded records may be treated as beyond the FOIA's reach so long as their existence, within the context of the request, "remains classified information." 5 U.S.C. § 552(c)(3).

4. The Exclusion Mechanism

In considering the applicability of any of these new exclusion provisions, it is important to keep in mind the essential nature of the exclusion mechanism, as distinguished from any other kind of action under the FOIA. For example, it occasionally has been erroneously suggested that the special protections provided by these new record exclusions might have been available prior to the FOIA Reform Act through application of what is colloquially referred to as the "Glomarization" principle, in connection with the pertinent exemptions. The "Glomarization" principle -- so called because it originated in a FOIA case involving the *Glomar*
Explorer submarine-retrieval ship, see Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) -- holds that an agency may properly deny a FOIA request by refusing to confirm or deny the existence of responsive records where to do otherwise could in and of itself cause harm cognizable under a particular FOIA exemption. See, e.g., Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982).

To be sure, the protection afforded through "Glomarization" can adequately shield sensitive abstract facts in certain categorically defined situations. However, the "Glomarization" principle, by its nature, operates necessarily on the basis of (and openly connected with) specified FOIA exemptions, and it is limited in such a way as to mask only an abstract fact related to a defined record category. See FOIA Update, Spring 1983, at 5; see, e.g., FOIA Update, Spring 1986, at 2. Thus, mere "Glomarization" simply is inadequate to guard against the harm caused by the very invocation of a particular exemption, nor is it capable of being applied realistically where the "category" of threatening requests can be as broad as, in effect, "all FOIA requests seeking records on named persons or entities." It is precisely because "Glomarization" inadequately protects against the particular harms in question that the more delicate exclusion mechanism, which affords a higher level of protection, sometimes must be employed. (47)

By the same token, the utilization of the exclusion mechanism requires extremely careful attention on the part of agency personnel, lest it be undermined, even indirectly, by the form or substance of an agency's actions. Agencies should pay particular attention to the phrasing of their FOIA-response communications in light of the new exclusions. Where an exclusion is employed, the agency is legally empowered to "treat" the excluded records as not subject to the FOIA at all. Accordingly, a requester can properly be advised in such a situation that "there exist no records responsive to your FOIA request." Such phrasing -- as opposed to any more detailed statement that, for example, any records specified in a particular request "could not be located" -- most rationally and fairly implements an exclusion's effect. Moreover, in order to maintain the integrity of an exclusion, each agency that employs it must ensure that its FOIA responses are consistent throughout, so that no telling inferences can be drawn by requesters. It does little to shield sensitive abstract facts if an agency phrases its response in an exclusion situation in any way differently than usual. It therefore is essential that all agencies that could potentially employ at least one of the three exclusions ensure that their FOIA communications are consistently phrased accordingly.

Furthermore, in order to maintain the effectiveness of the exclusion mechanism, agencies of course must, wherever the question arises, refuse to confirm or deny that an exclusion was employed in any particular case; to do otherwise could allow requesters, by process of elimination, to determine those cases in which records are
excluded, thereby defeating the exclusion's very purpose. Thus, this abstract fact \((i.e.,)\) whether an exclusion has been employed in a particular case) becomes one that is properly handled at the level of "Glomarization."

5. Additional Procedural Considerations

Additionally, some other procedural considerations regarding the implementation and operation of these new exclusions need be mentioned. First, it must be recognized that an agency's decision to employ an exclusion in response to a particular request is one peculiarly reached and implemented entirely internally; by definition, the requester receives no indication of even the existence of that decision, let alone any specification of its scope or rationale. Therefore, agencies should take particular pains to make exclusion determinations with both care and precision. All such decisions should be reviewed carefully by supervisory agency officials,\(^{(48)}\) and there should be clear delineations made as to exactly which records, of all those responsive to a request, are encompassed within an exclusion determination.

Any agency employing an exclusion necessarily will have to keep a record memorializing each such instance. Such records will be essential, for example, to the proper defense of an exclusion action if challenged in court. Of course, agencies will have to neither confirm nor deny the existence of such records regarding any particular matter -- and quite possibly could even have to exclude such records themselves, depending upon the nature of any subsequent FOIA request which might encompass them.\(^{(49)}\)

Such care in the implementation of these exclusion provisions is particularly essential to the upholding of agency exclusion action in the face of possible requester challenges. Properly implemented, of course, an exclusion action leaves the requester with no idea that one of the three such statutory provisions has been employed; indeed, that is the very nature and purpose of the action. Yet any FOIA requester, being on notice that these exclusions theoretically could be employed in any given case, could seek review of what might be suspected to be an exclusion action in his case. It does not really matter whether that requester's case actually was an exceptional one warranting such action; the challenge is a legitimate one in either event, and the agency is obliged to treat it as such in order to preserve the integrity of the overall exclusion mechanism. This means that agencies should be prepared to handle administrative appeals and even court challenges which seek review of the \textit{possibility} that an exclusion was employed in a given case. Such administrative and judicial proceedings will have to be handled with exceptional care in order to maintain the effectiveness of the exclusion mechanism.
As regards administrative appeals of FOIA denials, agencies should accept any clear request for review of the possible use of an exclusion in a given matter and treat it as a distinct aspect of the appeal. In the exceptional case in which an exclusion was in fact employed below, there should of course be rigorous review of the correctness of that action, including a specific judgment as to the exclusion's continued applicability as of that time. In the event that an employed exclusion is found no longer to be applicable, the appeal should be remanded for prompt processing of all formerly excluded records, with the requester advised accordingly. Where it is determined either that an exclusion was properly employed or that, as in the overwhelming bulk of cases, no exclusion was used, the result of the administrative appeal should, by all appearances, be the same: The requester should be specifically advised that this aspect of his appeal was reviewed and found to be without merit.

A more complex situation could be presented where a "no records" denial is given at the initial level. As a technical matter, such a denial does not give rise to the right to an administrative appeal, in that the statute provides for such review only where there has been an "adverse determination" of a request. Therefore, agencies are not required to provide requesters with standard administrative appeal notifications in denying such requests, nor are they technically required to review such denials on appeal. Nevertheless, most FOIA administrative appeals authorities will routinely accept appeals from "no records" denials in order to verify that an adequate search was conducted and that, in fact, there truly are no records responsive to the request. In practice, this affords administrative review of the correctness of the request-interpretation and record-search actions taken below.

Agencies need not depart from such practices in light of the FOIA's new exclusion mechanism. "No records" responses at the initial denial level should remain unchanged in this regard. Indeed, as already has been observed, any discernible departure from ordinary practice risks the effectiveness of exclusion actions. Administrative appeals offices receiving appeals from "no records" denials, as with any other appeal, should verify that no possible exclusion was improperly employed and then dispose of the matter in such a way that no intimation of exclusion action is made, one way or the other. Administrative appeals which contain specific requests for review of suspected exclusion actions should receive such review, whether taken from a "no records" denial or not, in a manner likewise preserving the integrity of the exclusion mechanism.

The handling of exclusion issues in court actions should follow a roughly comparable path, according to some novel, but fundamentally logical, operating principles. First, it must be recognized that all judicial review of suspected exclusion determinations must be conducted through in camera court filings submitted directly to the judge.
Second, it is essential to the viability of the exclusion mechanism that requesters not be able to deduce whether an exclusion was employed at all in a given case based upon how any case is handled in court. Thus, it will be critical that the special *in camera* defenses of exclusion issues raised in FOIA cases occur not merely in those cases in which an exclusion actually was employed and is in fact being defended.

Accordingly, it shall be the government's standard litigation policy in the defense of FOIA lawsuits that wherever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government routinely will submit an *in camera* declaration addressing that claim, one way or the other. Where an exclusion was in fact employed, the correctness of that action will be justified to the court. Where an exclusion was not in fact employed, the *in camera* declaration will simply state that fact, together with an explanation to the judge of why the very act of its submission and consideration by the court was necessary to mask whether that is or is not the case. In either case, the government will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion situation. Such a public decision, not unlike an administrative appeal determination of an exclusion-related request for review, should specify only that a full review of the claim was undertaken and that, if an exclusion in fact was employed, it was, and continues to remain, amply justified.

H. Conclusion

As can be seen from the above discussion, these crucial law enforcement amendments made by the Freedom of Information Reform Act of 1986 significantly expand the possible protection of law enforcement information under the FOIA. Exemption 7, as comprehensively amended, together with the special new record exclusions of subsection (c), should afford agencies broad authority to protect sensitive law enforcement information wherever reasonably required.

In granting federal law enforcement agencies this increased measure of protection, Congress has acted to strike a more refined balance between the competing societal interests that necessarily converge under the Freedom of Information Act: the general public interest in an open government, on the one hand, and the public necessity of protecting legitimate interests from being harmed through government information disclosure, on the other. The interests implicated in sensitive law enforcement records are now more properly accommodated by the Reform Act's law enforcement amendments. They should be implemented carefully by all federal agencies possessing law enforcement information, consistent with the FOIA's mandate of achieving "the fullest responsible disclosure." *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)) (emphasis added).

2. Because Congress provided only a 180-day period for the preparation and implementation of new agency fee regulations, virtually all federal agencies still remained engaged in this multiple-step process as of the April 25, 1987 effective date. Consequently, OMB advised agencies to give FOIA requesters the full benefits of both the old and new fee provisions, consistent with the clear contemplation of the new law, *see* Pub. L. No. 99-570, § 1804(b)(2) (1986), and the Department of Justice advised likewise regarding the making of fee waiver determinations. *See FOIA Update*, Winter/Spring 1987, at 2.

3. Additionally, agencies are encouraged to consult with the Department of Justice's Office of Information and Privacy, at (FTS or 202) 633-FOIA, regarding their implementation of this part of the FOIA Reform Act's amendments.

4. To further aid understanding of the amendments made by the FOIA Reform Act, attached to this memorandum as Appendix III is a complete copy of the Freedom of Information Act, as amended, underscored and interlineated to show the exact changes made by the amendments.

The remarks of individual legislators, even those directly involved with a particular piece of legislation, cannot be taken as authoritatively evincing the congressional intent behind that legislation. See, e.g., Weinberger v. Rossi, 456 U.S. 25, 35 (1982) (remarks of single legislator inadequate to establish affirmative congressional intent); Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) (remarks of single legislator, even bill's sponsor, not controlling). This is especially so where a lack of agreement is reflected in those remarks. Cf. Jordan v. Department of Justice, 591 F.2d 753, 767 (D.C. Cir. 1978) (en banc) (FOIA decision discussing "perils of reliance on legislative history" consisting of "contradictory" statements). See also Haddon v. Bowen, 657 F. Supp. 679, 685 (D. Utah 1986) (clear statutory language should be given effect over conflicting statements of individual legislators).

6. The two principal authors of the Exemption 7 amendments were Senator Orrin Hatch, who introduced the original predecessor bill (S. 1730) in the 97th Congress, and Senator Patrick Leahy. In speaking of the Exemption 7 amendments in the FOIA Reform Act, Senator Leahy observed that "[t]he language of these amendments is identical to that proposed in section 10 of S. 774" and stated that Senate Report No. 221 "sets out the legislative history which should be consulted to determine the scope of the section we are adopting in this bill." 132 Cong. Rec. S14296 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy). See also 132 Cong. Rec. H9465-66 (daily ed. Oct. 8, 1986) (statement of Rep. Kindness).


8. This phrasing was adopted in 1974 when Congress replaced the original "investigatory files" formulation of Exemption 7 with its more demanding subpart structure.

9. By the same token, an item of information not initially compiled for a law enforcement purpose can nevertheless qualify for Exemption 7 protection if it subsequently is recompiled for a valid law enforcement purpose. See, e.g., Lesar v. Department of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980); Fedders Corp. v. FTC, 494 F. Supp. 325, 328 (S.D.N.Y.), aff'd mem., 646 F.2d 560 (2d Cir. 1980).

10. The decision in Center for National Security Studies v. CIA suggests the logic of protecting sensitive information regardless not only of the format but also of the location in which it is maintained, because to do otherwise could yield anomalous results in the treatment of counterpart records and information. See 577 F. Supp. at
590 & n.4 (citing *FBI v. Abramson*, 456 U.S. at 641 n.12 (O'Connor, J., dissenting)). To avoid such anomalous disclosure results, agencies should ensure that they protect all sensitive information, where appropriate under one or more of Exemption 7's subparts, that is in any way derivative of information compiled for a law enforcement purpose.

11. Such records as law enforcement manuals can now qualify for possible protection as setting out "techniques and procedures for law enforcement investigations" under subpart (E) of Exemption 7, 5 U.S.C. § 552(b)(7)(E), as amended by Pub. L. No. 99-570, § 1802 (1986), which is discussed in Part E infra.


13. Of course, a "law enforcement purpose" under Exemption 7 includes the enforcement of civil as well as criminal laws, see, e.g., *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d at 81 & n.46, as well as statutes authorizing administrative (i.e., regulatory) proceedings, see, e.g., *Ehringhaus v. FTC*, 525 F. Supp. 21, 22-23 (D.D.C. 1980). *Cf. Nagel v. HEW*, 725 F.2d 1438, 1441 (D.C. Cir. 1984) (agency discipline of employee constitutes "authorized law enforcement activity" within meaning of subsection (e)(7) of Privacy Act of 1974).

14. The elimination of the "investigatory" requirement should be regarded and applied in light of its evident purpose, which was to ensure that valid law enforcement information whose disclosure could cause one of the harms cognizable under Exemption 7 is not foreclosed from protection merely due to its noninvestigatory character. See S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983). In some instances, this modification might mean merely that an additional or perhaps superior exemption is available to apply to information already determined to be exempt on other grounds. For example, an agency currently withholding information under Exemption 6 of the FOIA on the ground that its disclosure "would cause a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), a relatively high standard to meet, might profitably determine that the information can properly be withheld as "information compiled for law enforcement purposes [the disclosure of which] could reasonably be expected to cause an unwarranted invasion of personal privacy" under the more relaxed standard of Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), as amended by Pub. L. No. 99-570, § 1802 (1986).

15. Detailed discussions of the various aspects of these exemptions can be found in the "Justice Department Guide to the Freedom of Information Act," which is revised and issued each year as part of the Department's annual *Freedom of Information Case List* publication.
16. This "could reasonably be expected to" harm standard was inserted by the Reform Act also into the new formulation of Exemption 7(E), which employs it as appropriate in the latter part of that comprehensively revised exemption, as is discussed in Part E infra. See 5 U.S.C. § 552(b)(7)(E), as amended by Pub. L. No. 99-570, § 1802 (1986). No such modification was made in the case of Exemption 7(B) -- which protects law enforcement information the disclosure of which "would deprive a person of a right to a fair trial or an impartial adjudication," 5 U.S.C. § 552(b)(7)(B) -- inasmuch as no need for such relaxation of the harm standard was identified for that rarely employed exemption.


Although Exemption 7 currently attempts to protect confidential informants and investigations, this protection can be compromised when small pieces of information, insignificant by themselves, are released and then pieced together with other previously released information and the requester's own personal knowledge to complete a whole and accurate picture of information that should be confidential and protected, such as an informant's identity.

19. It is noteworthy that during the relatively brief exchange of bill language between the Senate and the House prior to the FOIA Reform Act's enactment, there was an attempt in the House to retain the previous, more demanding "would" standard of harm with respect to Exemption 7(C), see 132 Cong. Rec. H9463 (daily ed. Oct. 8, 1986), but that this attempt was rejected in favor of adopting the lesser "could reasonably be expected to" standard for Exemption 7(C) as well.

20. Under Exemption 7(F), it almost goes without saying, agencies should take pains to ensure that they withhold any information that, if disclosed under the FOIA, could reasonably be expected to endanger someone's life or physical safety. While the only decision thus far to consider the new harm standard under Exemption 7(F) addressed it based upon an agency showing of "a very strong likelihood" of harm, Dickie v. Department of the Treasury, Civil No. 86-0649, slip op. at 13 (D.D.C. Mar. 31, 1987), it is most reasonable that this exemption be applied wherever there is any likelihood of such harm. See also the discussion of Exemption 7(F) in Part F infra.
21. Even prior to the FOIA Reform Act, the Seventh Circuit Court of Appeals emphasized that a "robust" Exemption 7(D) is absolutely crucial to ensuring that "confidential sources are not lost because of retaliation against the sources for past disclosure or because of the sources' fear of future disclosure." *Brant Construction Co. v. EPA*, 778 F.2d 1258, 1262 (7th Cir. 1985).

22. Other federal agencies, however, cannot reasonably be regarded as "confidential sources" under Exemption 7(D). *See Retail Credit Co. v. FTC*, 1976-1 Trade Cas. (CCH) 60,727, at 68,127 n.3 (D.D.C. 1976); *see also FOIA Update*, Spring 1984, at 7.

23. The FOIA Reform Act makes one additional, technical modification of Exemption 7(D)'s language: It inserts the words or information" following the word "record" in the exemption, consistent with the parallel modification made in the threshold language of Exemption 7, discussed in Part B *supra*.

24. *See* text accompanying note 11 *supra*.

25. Already recognized as properly withholdable under the former version of Exemption 7(E), depending upon surrounding circumstances, are such items as audit criteria, computer programs, laboratory techniques, and a variety of law enforcement procedures. For a further discussion of the case law under Exemption 7(E), see the Exemption 7(E) discussion contained in the "Justice Department Guide to the Freedom of Information Act." *See* also note 15 *supra*.

26. *See also* note 11 *supra* and accompanying text.

27. Significantly, the phrasing of this first clause of Exemption 7(E) is such that it does not require any particular determination of "harm" that would be caused by disclosure of the information described within it. Rather, it is designed to provide a more "categorical" protection of the information so described, not unlike that afforded under the second part of Exemption 7(D). *See* text accompanying note 23 *supra*. *Cf. FBI v. Abramson*, 456 U.S. at 631 ("Congress thus created a scheme of categorical [protection]"). However, it is equally clear that this "technique and procedure" protection should not be extended to "routine techniques and procedures already well known to the public." S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983) (citing H.R. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974)). Hence, all noninvestigatory law enforcement records containing techniques or procedures heretofore withheld on the basis of the protection fashioned for them under Exemption 2 of the FOIA -- according to the governing judicial standard that their disclosure would "significantly risk[] circumvention of [law]," *Crooker v. BATF*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc) -- should gain the benefit of broader protection under Exemption
7(E), bounded only by this general "well-known-to-the-public" standard. See also note 32 infra.

28. The D.C. Circuit's subsequent en banc decision in Crooker had sharply limited the reach of its Jordan decision, but it was not clear whether Jordan could still require the disclosure of law enforcement guideline-type information. See 670 F.2d at 1090-92 (Ginsburg, J., concurring); id. at 1117-18 (Wilkey, J., dissenting); see also Fund for a Conservative Majority v. Federal Election Comm'n, Civil No. 84-1342, slip op. at 5 (D.D.C. Feb. 26, 1985).

29. See S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983) (expressing intent that amendment combat FOIA's "potential for aiding lawbreakers to avoid detection or prosecution").

30. See the discussion of this harm standard in Part C supra.

31. The Department takes notice of one particular individual congressional statement made regarding the implementation of new Exemption 7(E), in which it was suggested that the exemption's second clause should not be invoked unless it is determined that "there is no risk of public disclosure from other sources." 132 Cong. Rec. H9467 (daily ed. Oct. 8, 1986) (remarks of Rep. Kindness). The statutory language contains no such limitation and there is no basis for engrafting such an additional requirement upon the exemption. Rather, Exemption 7(E) should be applied simply according to the plain harm standard that was enacted: Wherever it is determined that disclosure of a law enforcement guideline "could reasonably be expected to risk circumvention of the law," the guideline can be withheld.

32. In making these determinations, agencies should be particularly mindful that the protections that have been fashioned for some such information under Exemption 2 of the FOIA, due to the former limitations of Exemption 7(E), are now eclipsed by, and in some respects widened by, this exemption as amended. (See the "Justice Department Guide to the Freedom of Information Act" for a discussion of this aspect of Exemption 2 protection. See also note 15 supra.)

33. It may be noted that the protections of Exemption 7(F) sometimes are regarded as overlapping with the personal privacy protection afforded by Exemption 7(C). Even apart from the greater severity of the harms cognizable under Exemption 7(F), however, its protective scope is potentially broader than that of Exemption 7(C) in that it requires no balancing of interests whatsoever. See FOIA Update, Spring 1984, at 5.

34. See note 20 supra and accompanying text.
35. See the discussion under Part G.4 infra.

36. See note 13 supra.

37. Many agencies primarily engaged in other than criminal law enforcement activities nevertheless generate law enforcement files that involve potential criminal violations. Such law enforcement matters are often pursued at these agencies toward the possibility of referral to the Department of Justice for further prosecution. Although the need for the special FOIA relief afforded by the (c)(1) exclusion might be less at such agencies than at those agencies holding primary criminal law enforcement responsibilities, such agencies should be nonetheless mindful of the potential availability of this protection in appropriate instances.

38. Indeed, it is even conceivable that some investigative subjects seeking to force out sensitive information through the FOIA might attempt to evade the protective barrier of this exclusion by generally professing (i.e., speculating) to agencies at the outset that they "know" of ongoing investigations against them. Because such a ploy, if accepted, could defeat the exclusion's clear statutory purpose, agencies should rely upon their own objective indicia of subject awareness and consequent harm.

39. The same should of course hold regarding any other FOIA request, including follow-up requests, received by the agency after the point at which the circumstances warranting the exclusion discontinue. However, an agency is under no legal obligation to spontaneously revisit a closed FOIA request already acted upon, even though records were excluded during its entire pendency. In such cases in which the (c)(1) exclusion was properly invoked, the records, by operation of law, simply were not subject to the FOIA during the pendency of the request.


41. This exclusion also could, by its very terms, be applied to any FOIA request that expressly seeks "all informant records" on a particular individual. Such a request, of course, would be an inherently self-defeating one, antithetical per se to the source-protection policy of Exemption 7(D), and readily defended against on that basis in any court action. The (c)(2) exclusion would provide a further ground for such defense.

42. The (c)(2) exclusion is the only one of the three record exclusions of the FOIA Reform Act to have its genesis in earlier formal legislative deliberations on FOIA reform. As enacted in the FOIA Reform Act, it is substantially the same in both form and effect as the exclusion contained in the predecessor bill (S. 774, 98th Cong.) which was commented upon in Senate Report No. 98-221.
43. Not unlike the (c)(1) exclusion, this exclusion is expressly conditioned so as to not apply where "the informant's status as an informant has been officially confirmed." 5 U.S.C. § 552(c)(2). Although the temporal nature of this condition is made somewhat less clear through the structure and phrasing of exclusion (c)(2) than is the counterpart condition in exclusion (c)(1), it reasonably should be taken as likewise requiring that an agency employing (c)(2) protection cease doing so in the unlikely event that, during the pendency of a request, the informant involved becomes "officially confirmed" as such. In this regard, however, it should be remembered that, as a matter of well-recognized principle under the FOIA, "official confirmation" is a high standard indeed. See, e.g., Schlesinger v. CIA, 591 F. Supp. 60, 66 (D.D.C. 1984).

44. The protection of the "tip off" exclusion, subsection (c)(1), would not necessarily be available to cover such a case.

45. Although this statutory provision addresses the foreign intelligence, counterintelligence, and international terrorism records "maintained by the [FBI]," and will be employed where necessary in the judgment of that major Department of Justice component, it is conceivable that records derived from such FBI records might be maintained elsewhere, potentially in contexts in which the harm sought to be prevented by this exclusion is no less threatened. In any such extreme situation, it would be appropriate for another agency and the FBI jointly to consider the possible applicability of this exclusion, on a derivative basis, where necessary to avoid an anomalous result. See note 10 supra.

46. This exclusion provision thus contains the same sort of temporal limitation as is contained in the other two exclusions; it should be applied in the same fashion. See notes 39 and 43 supra and accompanying text.


48. Given the unusual nature of these new exclusion provisions, they must be implemented with the utmost care. All questions arising as to their proper implementation should be directed to the Department's Office of Information and
Privacy (OIP). See also note 3 supra. During at least the immediate future, it is strongly urged that agencies considering the use of an exclusion do so only upon close consultation with OIP.

49. Agencies will be expected to keep careful records reflecting their exclusion actions, but they should do so with an eye toward the unique sensitivity of those records themselves. Obviously, the very existence of such a record in a given matter reveals the very secret that is being protected. Such special administrative records should be created and kept distinct from other records so that, if necessary, they themselves can be excluded in response to a probing future FOIA request.

50. See note 39 supra and accompanying text; see also notes 43 and 46 supra.

51. An agency should be sure to maintain copies of all excluded records, against the possibility that those records will have to be processed subsequently, just as it would do for records withheld under the FOIA as exempt. Cf. FOIA Update, Fall 1984, at 4 (agencies should preserve rights of FOIA requesters to challenge determinations that certain records are "personal records" not subject to FOIA).

52. Such administrative appeal conclusions necessarily must be stated in a way that does not intimate, one way or the other, whether an exclusion was in fact employed. See Part G.4 supra. In making such statements, though, agencies should bear in mind, within the limits demanded by the exclusion principle, that in all but the rare administrative appeal an exclusion will not in fact have been employed; agency statements to requesters should not be unnecessarily pointed in mentioning exclusion possibilities.

53. All Justice Department and agency counsel responsible for defending FOIA suits should use reasonable judgment in determining whether a FOIA plaintiff has raised an exclusion-related claim with sufficient clarity to trigger this automatic defense policy. Such claims should neither be engendered nor ignored.

54. In effect, the Department will ask those courts deciding exclusion-related claims to "Glomarize" the question of whether an exclusion was or was not employed in each case, just as is to be done at the administrative appeal level. See note 52 supra and accompanying text.