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FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations

A Popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.1

I. INTRODUCTION

The Freedom of Information Act (FOIA)2 represents an attempt by Congress to eliminate barriers that have restricted public access to government-controlled information.3 Although the FOIA makes nearly all government records presumptively accessible, it also provides several narrowly drawn exemptions that recognize individual privacy rights and the practical necessity of keeping certain records confidential.4 Exemption 7 of the FOIA,5 which permits the withholding of certain law enforcement records, attempts to balance individual constitutional rights, the government's need to enforce its laws, and the public's need to monitor law enforcement agencies.6

The balance struck by Exemption 7 has become particularly controversial in the context of investigations conducted by the Federal Bureau of Investigation (FBI). Although the FBI serves a paramount social interest in enforcing criminal laws, it has also engaged in a well-documented, long-standing pattern of unauthorized political surveillance and harassment of partic-

5. 5 U.S.C. § 552(b)(7) (1976); see note 16 infra and accompanying text.
6. The Senate Report accompanying the original FOIA stated: "It is not an easy task to balance the opposing interests, but it is not an impossible one either... Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure." S. REP. No. 813, 89th Cong., 1st Sess. 2-3 (1965), reprinted in 1974 SOURCE Book, supra note 4, at 37-38.

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ular individuals and groups.\textsuperscript{7} Congress has not expressly indicated whether records from such unlawful investigations should be subject to full disclosure, or be withheld under Exemption 7.\textsuperscript{8} Some of the circuit courts of appeals have adopted polar positions, with one court holding that no records from an unlawful investigation can be withheld,\textsuperscript{9} and others holding that Exemption 7 applies fully to FBI records regardless of the unlawfulness with which they were gathered.\textsuperscript{10} This division among the courts reflects both the fundamental values implicated when the FBI abuses its power,\textsuperscript{11} and the serious risks that sometimes accompany the disclosure of criminal law enforcement records.

Part II of this Note summarizes the development of Exemption 7 to identify the policies Congress sought to implement, and briefly examines how the courts have applied those policies to law enforcement investigations generally. Part III outlines the scope of unlawful FBI activity and the range of potential deterrents to such conduct, and analyzes how courts have applied Exemption 7 to unlawful investigations. The Note concludes that current judicial approaches do not balance satisfactorily the underlying values at issue, and proposes an alternative approach in Part IV. The proposed alternative would require the FBI to demonstrate a nexus between each document withheld and a lawful investigatory purpose. When such a nexus is weak, judicial discretion to approve continued withholding would be permitted only when disclosure seriously risks grave harm to a third party.

\section{II. FOIA EXEMPTION 7}

The FOIA establishes a "general philosophy of full agency disclosure [to any person] unless information is exempted under clearly delineated statutory language."\textsuperscript{12} When an infor-

\textsuperscript{7} See notes 58-84 infra and accompanying text.
\textsuperscript{8} See text accompanying notes 34-37 infra.
\textsuperscript{9} See Abramson v. FBI, No. 79-2500 (D.C. Cir. Oct. 24, 1980); notes 127-37 infra and accompanying text.
\textsuperscript{10} See Kuehnert v. FBI, 620 F.2d 662 (8th Cir. 1980); Irons v. Bell, 596 F.2d 468 (1st Cir. 1979); notes 104-14 infra and accompanying text.
\textsuperscript{11} See 5 U.S.C. § 552a(e)(7) (1976) ("Each agency that maintains a system of records shall . . . maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute . . . or unless pertinent to and within the scope of an authorized law enforcement activity. . . .") (emphasis added).
\textsuperscript{12} S. Rep. No. 1219, 88th Cong., 2d Sess. 8 (1964), reprinted in 1974 Source Book, supra note 4, at 86, 93; see 1 K. Davis, Administrative Law Treatise § 5:28, at 387 (2d ed. 1978) (emphasizing the narrow intent of the FOIA's "specif-
information request is filed, an agency that seeks to withhold any part of the requested information must specify the statutory exemption that permits such action.13 If the requestor brings an action to compel disclosure, the agency bears the burden of demonstrating in court that the particular exemption applies to the document or documents at issue.14

A. THE 1974 AMENDMENTS

The FOIA presumes that investigatory records, like most other federal documents, are “available to any person” requesting them.15 Under Exemption 7, however, “investigatory records compiled for law enforcement purposes” may be withheld from disclosure, but only to the extent that such disclosure would

(A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.16


14. See 5 U.S.C. § 552(a)(4)(B) (1976). The FOIA provides that each federal agency shall make available, to any person, records that are reasonably described and requested "in accordance with published rules". Id. § 552(a)(3). If a request is denied, the requestor may bring an action in district court to have the agency enjoined from withholding the records. Id. § 552(a)(4)(B). When challenged, nondisclosure is permitted only when the court, reviewing the matter de novo, agrees that the exemption applies. Id.


16. 5 U.S.C. § 552(b)(7) (1976). Although an agency may designate certain investigatory files as having been compiled for law enforcement purposes, the propriety of that classification is subject to a judicial determination. See, e.g., Weisberg v. United States Dept of Justice, 489 F.2d 1195, 1202 (D.C. Cir. 1973) (en banc), cert. denied, 416 U.S. 993 (1974). In addition, Exemption 7, like all exemptions to the disclosure requirements of the FOIA, must be narrowly construed because "disclosure, not secrecy, is the dominant objective of the Act," Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976). Noting that "Congress provided in § 552(c) that nothing in the Act should be read to authorize withholding of information or limit the availability of records to the public, ex-
These requirements were adopted in 1974 in response to judicial decisions that had been overly broad in their interpretation of the original "law enforcement" exemption.¹⁷

As originally adopted in 1966, Exemption 7 allowed the withholding of "investigatory files compiled for law enforcement purposes except to the extent [that such files are] available by law to a private party."¹⁸ Initially courts took a functional approach in interpreting this exemption. In Bristol-Meyers Co. v. FTC,¹⁹ for example, the Court of Appeals for the District of Columbia Circuit held that documents originally compiled during a law enforcement investigation lost their protected status when the investigation ended without a prosecution.²⁰ Noting that the purpose of the exemption was to prevent premature discovery of the government's case,²¹ the court reasoned that this purpose could not be served following the abandonment or completion of the enforcement proceeding.²²

except as specifically stated . . . ," the court concluded that "'[t]hese exemptions are explicitly made exclusive . . . , and must be narrowly construed." Id. at 361 (citation omitted).

¹⁷. See notes 23-34 infra and accompanying text.
¹⁸. Pub. L. No. 89-487, 80 Stat. 254 (1966). The early reform bills, which did not include any exemption for investigatory files, were opposed by the Justice Department on the ground that the department did not want any investigative files of the FBI made currently available to the press and public, regardless of whether such files were legally or illegally compiled. See Freedom of Information: Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 202 (1963) (statement of Norbert Schlei, Assistant Attorney General). In finally adding the exemption, Congress appears to have been motivated largely by concern over disclosure prior to the completion of enforcement proceedings. See 110 Cong. Rec. 17667 (1964) (colloquy between Sen. Humphrey and Sen. Long).
²⁰. 424 F.2d at 939.
²¹. Id. at 938. Although the senate report accompanying the original FOIA indicated that it might be operationally necessary to keep FBI investigatory files confidential, see S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), reprinted in 1974 SOURCE BOOK, supra note 4, at 38, the report went on to explain that Exemption 7 is applicable to those files prepared by government agencies to prosecute law violators. Id. at 9, reprinted in 1974 SOURCE BOOK, supra note 4, at 44. The rationale was that "disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court." Id.
²². 424 F.2d at 938; accord, Wellford v. Hardin, 444 F.2d 21, 24 (4th Cir. 1971). Cf. Frankel v. SEC, 460 F.2d 813, 817-18 (2d Cir. 1972) (reading into Exemption 7 the additional purpose of preventing the disclosure of either investigative techniques or the names of informants, and holding that the exemption applied even after the enforcement proceedings had terminated), cert. denied; 460 U.S. 889 (1972); Evans v. Department of Transp., 446 F.2d 821, 824 (5th Cir. 1971) (same), cert. denied, 405 U.S. 918 (1972); contra, Cowles Communications Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Cal. 1971).
The functional approach was later abandoned by the District of Columbia Circuit in favor of an approach focusing on "how and under what circumstances" the government files were compiled. For example, in *Weisberg v. United States Department of Justice*, a private party requested FBI records pertaining to the spectrographic analysis of the bullet that killed President Kennedy. Although the FBI was contemplating no enforcement proceedings, the court held that the requested records were exempt from disclosure because the records "were part of the investigatory files compiled by the FBI for law enforcement purposes." Adopting a literal reading of Exemption 7, the court held that judicial review was limited to determining whether the materials were (1) investigatory files, and (2) compiled for law enforcement purposes. *Weisberg* was quickly followed by a trilogy of cases in which the District of Columbia Circuit extended this per se rule to virtually every government agency—thus ending speculation that *Weisberg* simply sought to apply a separate standard to FBI files. Judicial inquiry in Exemption 7 cases became limited to an examination of "how and under what circumstances" the requested files were compiled—regardless of whether any future enforcement proceeding was likely to be based upon the files.

In the 1974 Amendments to the FOIA, Congress explicitly rejected the per se rule of the District of Columbia Circuit as one that shielded too much information from disclosure. Apparently distressed by the court decisions noted above and by revelations of political abuses under the Nixon Administra-

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25. 469 F.2d at 1197.

26. *Id.* at 1198.


30. 120 CONG. REC. 17039-40 (1974).
tion, Congress went beyond several committee reports recommending mere procedural changes in the FOIA and adopted Senator Hart's floor amendment to Exemption 7 that specified the basic categories for nondisclosure. The intent of Congress was "to set forth explicitly the objectives which [Exemption 7] is intended to achieve in order to assure that information is withheld only if one of those objectives would be frustrated were the information disclosed."

Congress retained the threshold requirement that, to be exempt, investigatory records must have been "compiled for law enforcement purposes," but Congress did not expressly address whether "unlawful" investigations could meet this requirement. The legislative history on this question is:

33. Senator Hart's initial proposal would have amended Exemption 7 to read as follows:
Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication or constitute a clearly unwarranted invasion of personal privacy, (C) disclose the identity of an informer, or (D) disclose investigative techniques and procedures.
120 Cong. Rec. 17033 (1974). Except for the addition of the "invasion of privacy" category, the Hart amendment was substantially the same as a proposal of the Administrative Law Section of the American Bar Association. See id. at 17035. A conference committee amended the exemption without changing its threshold requirements: (1) the word "clearly" was deleted from clause (B) of Hart's amendment, thereby allowing nondisclosure for an "unwarranted invasion of privacy"; (2) clause (C) was amended by substituting "confidential source" for "informer" and allowing the withholding of confidential information under narrowly drawn circumstances; and (3) a clause was added permitting nondisclosure when "the life or physical safety of law enforcement personnel" would be endangered. See Conference Report, Freedom of Information Act Amendments, S. Rep. No. 1200, 93d Cong., 2d Sess. 12-13 (1974) (H. Rep. No. 1380 identical), reprinted in [1974] U.S. Code Cong. & Ad. News 6285, 6290-92. See generally text accompanying note 16 supra. A veto by President Ford was easily overridden in both houses of Congress and the present Exemption 7 became law effective February 19, 1975. Pub. L. No. 93-502, §2(b), 88 Stat. 1561 (1974) (codified at 5 U.S.C. § 552(b)(7) (1976)).
34. 120 Cong. Rec. 17035 (1974) (statement of John Miller, Chairman, Administrative Law Section, American Bar Association (June 11, 1973)).
inconclusive. During floor debate, Senator Weicker suggested that the broader disclosure required under the Hart amendment would help restrain "lawless elements" within the FBI. The FBI generally opposed the Hart amendment, insisting that its investigatory files are compiled "for one purpose only, and that is a law enforcement purpose." Senator Kennedy noted that the amendment had "considerable sensitivity built in to protect . . . the legitimate interests of a law enforcement agency to conduct an investigation into . . . crimes . . . ." These comments notwithstanding, the 1974 Amendments did not specifically confront the problem of illegal investigations, thus giving the courts little guidance to determine when Exemption 7 applies to information derived from such investigations.

B. Judicial Application of Exemption 7

Despite Congress' attempt to clarify the purposes of Exemption 7, the courts have yet to establish clearly what constitutes the threshold requirement of "law enforcement purposes." Judicial confusion is due, in part, to the application of Exemption 7 to all federal agencies—no distinction is made between civil and criminal law enforcement responsibilities.
The six specific grounds justifying nondisclosure under Exemption 7 are oriented predominantly toward criminal investigations, but the same threshold requirement applies to all agencies and to both civil and criminal matters. Therefore, it is not surprising that the standard employed by courts to define "law enforcement purposes" has varied significantly, depending in part on the type of agency involved.

1. Agencies with Mixed Administrative and Law Enforcement Functions

Many agencies are charged with both civil law enforcement duties and substantial administrative functions; it is sometimes difficult to determine whether information gathered by such agencies has been collected for "law enforcement purposes" under the FOIA. The courts have employed two tests in making this determination. One is the "pending proceeding" test, under which records are exempted from disclosure if compiled in connection with a formal enforcement proceeding. In NLRB v. Robbins Tire & Rubber Co., for example, the Supreme Court held that "witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing." After presuming that the requisite purpose attached to the formal proceedings, the Court applied Exemption 7(A), the specific subcategory that guards against interference with government enforcement proceedings. The Court recognized, however, that the 1974 FOIA Amendments were intended to eliminate blanket exemptions for records characterized as "compiled for law enforcement purposes"; it therefore held that Exemption 7(A) applies only "whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information."39

39. The harms that Exemption 7 currently protects against are more likely to occur in the criminal context. See generally text accompanying note 16 supra. One commentator has suggested that the 1974 amendments "did not adequately respond to the need for a distinction between secrecy in the criminal and in the non-criminal law enforcement contexts." See 2 J. O'Reilly, supra note 12, § 17.01, at 17-3.


42. Id. at 236.

43. See generally text accompanying note 16 supra.

44. 437 U.S. at 236.

45. Id. at 232 (quoting 120 Cong. Rec. 17033 (1974) (remarks of Sen. Hart)). The Court also noted that Exemption 7(A) speaks in the plural voice about
Although the basic premise of the "pending proceeding" test is sound, the test gives no guidance in determining the presence of "law enforcement purposes" when, for example, an agency first commences an investigation, or when an investigation is terminated before any formal enforcement proceedings are conducted. The test seems appropriate only when an agency asserts that Exemption 7(A) harm—interference with enforcement proceedings—would result from disclosure.\(^{46}\)

A second test that courts have employed to determine whether law enforcement purposes attach to a particular investigation is the "special intensity" test. This test distinguishes routine inquiries concerning the administration, surveillance, and oversight of federal programs from inquiries that focus directly and with "special intensity" on specific parties and alleged illegal acts.\(^{47}\) Once an investigation departs from the routine, it is deemed to be conducted for law enforcement purposes, regardless of whether an enforcement proceeding is ultimately conducted.\(^{48}\) The "special intensity" test appears better suited than the "pending proceeding" test to the determination of whether the threshold requirement of Exemption 7 has been met. The "special intensity" test protects an agency's legitimate interest in investigating specific, suspected violations of the law, yet also acknowledges that routine administrative inquiries often lack the "law enforcement purposes" required for Exemption 7 protection. Moreover, the "special intensity" test can be applied to virtually every type and stage of agency investigatory conduct.

2. The FBI

Because the FBI engages primarily in criminal law enforcement activities,\(^{49}\) most of its investigations are likely to be for

\(^{46}\) In Robbins, the existence of a pending formal proceeding before the NLRB clearly demonstrated a valid law enforcement purpose. Moreover, the Supreme Court's reluctance to disturb longstanding discovery rules in NLRB proceedings, see 437 U.S. at 239, suggests that the result in Robbins might be limited to the facts of that case.


\(^{48}\) See, e.g., 498 F.2d at 81; 470 F. Supp. at 1334.

\(^{49}\) Under the authority of 28 U.S.C. § 533 (1976), the FBI is responsible for detecting and aiding in the prosecution of federal crimes, investigating other
"law enforcement purposes." Moreover, since the FBI has a legitimate interest not only in detecting crime, but also in preventing crime, courts have recognized that "circumstances may require that the FBI commence an investigation before any specific violation has occurred."50 Most courts, therefore, apply a less rigorous standard for determining "law enforcement purposes" when it is the FBI, rather than an agency with mixed functions, seeking the application of Exemption 7. To meet the standard, the FBI has typically been required to show only "a sufficient connection between the conduct of the investigation and legitimate concerns for maintaining national security or preventing criminal activity,"51 or a "good faith belief that the subject [of the investigation] may violate or has violated federal law."52 In routine criminal investigations, the FBI can usually make this showing to the court through detailed affidavits or oral testimony.53

It seems appropriate to apply a less exacting standard to matters under the control of the Departments of Justice and State, and assisting in the protection of the President. The FBI also performs some administrative functions: collecting crime records, see 5 U.S.C. § 534 (1976), providing training for state and local law enforcement personnel, see 42 U.S.C. § 3774 (Supp. III 1979), and conducting background investigations of presidential appointees and some other federal employees, see 5 U.S.C. § 1304 (Supp. III 1979).

51. Id.
53. See, e.g., Ramo v. Department of the Navy, 487 F. Supp. 127, 130 (N.D. Cal. 1979). Self-serving declarations and conclusory allegations normally will not suffice to establish the applicability of a claimed exemption. See, e.g., Irons v. Bell, 596 F.2d 468, 471 (1st Cir. 1979); Rural Hous. Alliance v. United States Dep't of Agriculture, 498 F.2d 73, 82 n.48 (D.C. Cir. 1974); cf. Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977) (possibility that some government affidavits may be untruthful or "some bits of non-exempt material may be found among exempt material [is not] enough to trigger an in camera investigation by the court"). In a case involving classified documents under Exemption 1, however, "substantial weight" is given to the agent's affidavit. See Weissman v. CIA, 565 F.2d 692, 697 n.10 (D.C. Cir. 1977); Bell v. United States, 563 F.2d 484, 487 (1st Cir. 1977). Where the agency's affidavit is insufficient, courts have frequently required the agency to prepare an itemization of the records withheld, a detailed justification for its claims of exemption, and an index cross-referencing the itemization and justification. First developed by the Court of Appeals for the District of Columbia Circuit to ease the burden on the courts and to give plaintiffs the information necessary to challenge the agency characterization of records without jeopardizing the confidentiality of the disputed documents, see Vaughan v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), this procedure has since received widespread approval. See, e.g., Olstead v. Kelley, 573 F.2d 1109, 1110 (9th Cir. 1978); Seafarers Int'l Union v. Baldovin, 508 F.2d 125, 129, vacated as moot, 511 F.2d 1161 (5th Cir. 1975). If the court is still not satisfied, it may examine the documents in camera to determine whether "such records or any part thereof shall be withheld under any of the exemptions." See 5 U.S.C. § 552(a)(4)(B) (1976).
the FBI. Because the FBI is involved primarily with criminal law enforcement, the standard usually does not result in an inaccurate determination of the purpose behind a particular investigation, nor does it place undue demands on FBI and judicial resources. Moreover, the standard protects the FBI's ability to act swiftly to prevent crimes before they fully unfold.

Perhaps the most important policies behind the less exacting standard arise from the distinction between criminal and civil law enforcement. Although the operational necessity to keep certain law enforcement activities confidential is present in both civil and criminal cases, the danger of disclosure is arguably greater in the criminal context. Inadvertent disclosure of a criminal law enforcement record, for example, seems more likely to risk physical harm to, or intimidation of, witnesses and informants than does the inadvertent disclosure of a civil law enforcement record. On the other hand, because criminal law enforcement agencies are afforded great discretion in their role as protectors of society, the public is justified in seeking assurance that the agencies' methods and goals of investigation are proper.

III. "UNLAWFUL" FBI INVESTIGATIONS

The clash between the accessibility objective of the FOIA and the secrecy objective of the FBI can best be understood after consideration of both the scope of past FBI unlawfulness and the deterrents to such conduct.

A. THE SCOPE OF ABUSES

In stark contrast to its more exemplary record in the area

54. See 2 J. O'Reilly, supra note 12, § 17.01, at 17-2 to -4.
55. The great number of FOIA and Privacy Act information requests received by the FBI creates a risk that some information tending to identify confidential sources may be inadvertently released. Each document requested must be examined line by line to determine whether the information contained therein is exempt. In fiscal year 1978, 368 employees were needed to process over 18,000 FOIA requests, at a total cost of over $9 million. See Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 96th Cong., 1st Sess. 63 (1979).
56. See 2 J. O'Reilly, supra note 12, § 17.01, at 17-4 to -4.1. Fifteen percent of all FOIA requests made to the FBI in fiscal year 1979 were made by or on behalf of prisoners. See Librach v. FBI, 587 F.2d 372, 373 (8th Cir. 1978) (federal prisoner sought information about the witness resettlement program of the Justice Department); Webster, An FBI Viewpoint Regarding the Freedom of Information Act, 7 J. LEGIS. 7, 12 (1980).
57. See 2 J. O'Reilly, supra note 12, § 17.01, at 17-3 & n.6.
of general criminal law enforcement, the FBI has a consistent record of abuse of power in the area of domestic intelligence. Following a period of repressive activity during and after the First World War, the FBI's domestic intelligence unit was first abolished in 1924, then renewed under a presidential directive in 1936. The next forty years "witnessed a relentless expansion of domestic intelligence activity beyond investigation of criminal conduct toward the collection of political intelligence and the launching of secret offensive actions against Americans." By 1975, the FBI had compiled over 500,000 domestic intelligence files, 65,000 of which had been opened in 1972 alone.61

The FBI's re-entry into domestic intelligence in 1936 was a result of public concern over foreign threats and "subversive activities"—a concern that continued through World War II and expanded in the 1950s to include domestic groups thought to be under Communist influence. Many FBI investigations undertaken during this period were later found to have had "no conceivable rational relationship to either national security or violent activity." Indeed, in light of the FBI investigations during the 1960s of civil rights groups and anti-war activists, many commentators have been compelled to conclude that an implicit purpose of FBI domestic intelligence has been to preserve the existing social and political order.64

59. Id. at 392.
60. Id., Book II at 21.
61. Id. at 6.
62. Id. at 21-22. During the "Red Scare" of the 1950s, the FBI maintained a list of at least 26,000 individuals who were to be rounded up in case of a national emergency. Id. at 7. From 1940 to 1966, the FBI opened and photographed at least 130,000 first-class letters in eight U.S. cities. Id. at 6. During the height of domestic intelligence abuses in the late 1960s and 1970s, the FBI, the CIA, the IRS, and the Army all participated in the investigation of Americans who held disfavored political views. Id. at 6-7.
63. Id., Book III at 7.
64. See, e.g., id. at 6-7. Between 1960 and 1974, the FBI conducted over 500,000 separate investigations of persons and groups who fell within the FBI's "subversive" category, predicates the investigations on the possibility that such persons or groups might overthrow the government. Yet, since 1987, there has not been a single prosecution under the laws prohibiting advocacy of overthrowing the government. See id., Book II at 19. Only 1.3% of the over 17,000 FBI domestic intelligence investigations conducted in 1974 resulted in the prosecution and conviction of any crime, while only 2% of all the domestic intellige-
cations of such a purpose include the “Plumbers” unit and “enemies list” established under President Nixon’s Administra-

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For FOIA purposes, an FBI investigation may be consid-
ered “unlawful” if, from the outset, its objective is not related to enforcing or preventing the violation of a federal law. An in-
vestigation may also be deemed “unlawful” if it extends in time beyond any violation-oriented pretext that might plausibly have sparked it, or it reaches “targets” that have no reasonable link to the violation-oriented focus.66

The fear of “Communist infiltration,” for example, has led to a number of long-standing political investigations. Although such “infiltration” alone is not a crime, the NAACP was investigat-
gated on this pretext for twenty-five years, despite the FBI’s knowledge from a field office report submitted in the first year of the investigation that “there is a strong tendency for the NAACP to steer clear of Communistic activities.”67 The Socialist Workers Party (SWP) was under similar investigation for at least thirty-six years,68 despite the FBI’s concession that, since shortly after the Party’s formation, the Party “has not commit-
ted any violent acts, nor have its expressions ‘constituted an in-
dictable incitement to violence.’”69 The fear of basic social or political change, without any credible pretext of a law violation, has led to many other investigations. Following Dr. Martin Lu-
ther King, Jr.’s “I Have A Dream” speech in 1963, for example, the FBI’s Domestic Intelligence Division concluded that he was the “most dangerous . . . Negro leader in the country,”70


66. See 5 U.S.C. § 552(b)(7) (1976) (exempting “investigatory records compiled for law enforcement purposes” from FOIA disclosure provisions under specified conditions) (emphasis added); 5 U.S.C. § 1304 (Supp. III 1979) (FBI may conduct background investigations on some prospective federal employ-

67. CHURCH COMM. REPORT, supra note 58, Book III at 416; see id. at 450, 483.


69. CHURCH COMM. REPORT, supra note 58, Book III at 251.

70. Id. at 109.
prompting an intensive five-year FBI campaign of surveillance and harassment designed to neutralize and discredit Dr. King.71 Virtually all major civil rights and antiwar groups of the 1960s were either put under surveillance or subjected to harassing counter-intelligence techniques.72 Even the "Women's Liberation Movement" was infiltrated by informants who reported on the Movement's policies and on the personal lives of its leaders and members.73

These "unlawful purpose" cases illustrate how the FBI's focus on preventing political violence has resulted in a scope of intelligence activity so broad that it inevitably reaches virtually all vigorous dissenters. This focus has also resulted in intelligence investigations being initiated without reasonable suspicion that a criminal act has been, is being, or will soon be committed. Moreover, because those responsible for such investigations have often seemed unable to distinguish between criminal conduct and constitutionally protected advocacy and association,74 some investigations have been continued for too long.

In addition to having conducted investigations serving no lawful purpose, the FBI has also unreasonably extended the scope of its investigation, and has employed illegal or improper tactics such as unauthorized wiretapping, "black-bag" jobs, mail-opening, "snitch-jacketing," anonymous mailings, dissemination of derogatory information, and interference with judicial process.75 The counter-intelligence program (COINTELPRO) that focused on the Ku Klux Klan is perhaps the most prominent example of such a case. The Klan COINTELPRO began in 1964, when responsibility for the "development of informants and gathering of intelligence on the KKK" was transferred from the FBI's General Investigative Division to the Domestic

71. See id. at 104-84.
72. See id. at 23-27. Targets of the counter-intelligence program (COINTELPRO) that the FBI directed at the New Left included the SDS, all of Antioch College, and students who carried protest signs that had obscene words written on them. Id. at 5. The FBI terminated its COINTELPRO in April, 1971, following publicity stemming from a burglary of its Media, Pennsylvania offices. The pilfered documents indicated that 40% of the total of FBI activities pertained to political surveillance and that the New Left COINTELPRO was designed to "enhance the paranoia endemic in these circles [by getting] the point across [that] there is an FBI agent behind every mailbox." P. COWAN, N. EGLESON & N. HENTOFF, STATE SECRETS 139 (1974); see CHURCH COMM. REPORT, supra note 58, Book III at 3 n.l.
73. See CHURCH COMM. REPORT, supra note 58, Book II at 7, Book III at 250.
75. Id. at 43-59, 271-371, 525-677.
Intelligence Division.\textsuperscript{76} This shift reflected a judgment by some in the FBI that traditional law enforcement methods were not adequate to stop the Klan's involvement in the harassment and murder of civil rights workers.\textsuperscript{77} Although some elements of the Klan were properly under investigation for their violent activities, the "investigation" included now-standard counter-intelligence techniques\textsuperscript{78} and even the participation of paid FBI informants in violent Klan activities.\textsuperscript{79} Moreover, the scope of the investigation gradually expanded to include investigation of many groups lawfully exercising political opposition to such policies as integration or school busing.\textsuperscript{80}

Even more grievous tactics were employed by the FBI in its Black Nationalist COINTELPRO, which focused on the Black Panther Party.\textsuperscript{81} Although some members of the Panthers were properly under investigation,\textsuperscript{82} the "investigation" included the use of tactics that were clearly designed to foster violence between the Panthers and other armed black groups, and, ultimately, to destroy the Black Panther Party.\textsuperscript{83} Anonymous mailings were used to create dissension within the Party and drive away support for its more positive programs, such as its "Breakfast for Children" program.\textsuperscript{84}

B. DETERRENTS TO ABUSES

An obvious deterrent to abuses of power by the FBI would be a statutory charter that clearly defines the FBI's investigative responsibilities. Although a myriad of hearings and reports have addressed the issue of FBI abuses in recent years,\textsuperscript{85} Congress has yet to enact such a charter.\textsuperscript{86} Other deterrents to FBI abuses include private damages actions and public pressure, both of which are facilitated by the FOIA.

When the FBI abuses its investigatory powers, an individual conceivably has at least three causes of action against the

\begin{itemize}
  \item \textsuperscript{76} \textit{Id.} at 18.
  \item \textsuperscript{77} \textit{Id.} at 18 n.81.
  \item \textsuperscript{78} \textit{Id.} at 45, 51-52, 59.
  \item \textsuperscript{79} \textit{Id.} at 239-44.
  \item \textsuperscript{80} \textit{Id.} at 474.
  \item \textsuperscript{81} \textit{Id.} at 185-223.
  \item \textsuperscript{82} \textit{See, e.g., id.} at 246, 249.
  \item \textsuperscript{83} \textit{Id.} at 188-98.
  \item \textsuperscript{84} \textit{Id.} at 210.
  \item \textsuperscript{85} \textit{See id., Book VI} at 293-308 (bibliography of materials on the evolution of the federal intelligence function).
  \item \textsuperscript{86} Several bills have been introduced in the last two years, but not one has emerged from committee. \textit{See, e.g., FBI Charter Act of 1979, S. 1612: Hearings Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 2} (1980).
\end{itemize}
federal government or its agents. First, the individual might bring an action against a federal employee for damages resulting from a "constitutional tort" within the meaning of Bivens v. Six Unknown Named Agents,87 in which the Supreme Court held that federal agents could be sued for violating an individual's fourth amendment rights.88 Courts have extended Bivens to provide relief for other constitutional violations,89 but the scope of such actions remains unclear.90 Second, the individual might bring, under the Federal Tort Claims Act (FTCA),91 an action against the federal government to recover for a federal employee's tort. To recover, however, such a tort must have been within the scope of employment and "under circumstances where the United States, if a private person, would [have been] liable to the claimant" under state law.92 Also, because constitutional torts are a product of federal law for which there is usually no common law analogue, there will often be no cause of action under the FTCA for FBI abuses.93 Moreover, the FTCA does not abrogate the sovereign immunity of the United States with respect to suits for libel, slander, misrepresentation, or deceit—torts that often occur in connection with FBI counterintelligence activities.94 Finally, the individual might bring an action against the government under the Pri-

87. 403 U.S. 388 (1971). Unlike state government officials, who can be sued for violating an individual's constitutional rights under 42 U.S.C. § 1983 (Supp. III 1979), federal officials are not subject to similar statutory liability. Prior to Bivens, no damage action was available against federal officials.
88. 403 U.S. at 397.
90. Moreover, under Butz v. Economou, 438 U.S. 478 (1978), a federal employee may be entitled to qualified immunity in such an action. See id. at 507.
92. Id.
93. To the extent that a plaintiff can assert a common law tort claim based on the law of the forum state, the United States may be held liable. See, e.g., Birnbaum v. United States, 588 F.2d 319, 323-26 (2d Cir. 1978) (government held liable to plaintiffs, whose mail had been opened and read by the CIA, on an invasion of privacy theory based on state law). There is no clear common law analogue, however, for infringement of the right to free speech or for denial of a person's right to be free from unlawful discrimination by the federal government under the fifth amendment. Thus, in these latter cases the plaintiff must resort to the Bivens type of action. See, e.g., Davis v. Passman, 442 U.S. 228, 236 (1979).
95. See notes 67-84 supra and accompanying text.
vacy Act of 1974. Section (e)(7) of the Privacy Act bars agencies from maintaining any records concerning an individual's exercise of first amendment rights unless such recordkeeping is "expressly authorized by statute or . . . pertinent to and within the scope of an authorized law enforcement activity." To state a cause of action for damages under the Act, however, a plaintiff must demonstrate an "adverse effect" that has resulted from the agency's failure to comply with the statute. Because such harm is often of an intangible nature, this cause of action will usually be of limited utility.

Assuming that these causes of action offer the plaintiff an adequate scope of discovery and adequate recovery, there is still a significant hurdle for the prospective plaintiff to consider—standing to sue. Courts have uniformly followed the standing doctrine announced in Laird v. Tatum, in which the Supreme Court held that plaintiffs had no standing to challenge the mere existence of an Army surveillance program: "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." Because prospective plaintiffs are not always aware that they are the target of intrusive intelligence tactics, FOIA disclosures often play an essential role in revealing, and later establishing, the presence of objective harm.

In addition to facilitating private damage actions, the FOIA provides a strong deterrent to FBI political abuses through the

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97. Id. § 552a(e)(7).
98. See id. § 552a(g)(1)(D).
99. In fact, damage awards are often minimal and limited to proof of actual damages. See, e.g., Carey v. Piphus, 435 U.S. 247, 254, 267 (1976); Halperin v. Kissinger, 434 F. Supp. 1193, 1194-95 (D.D.C. 1977); cf. 5 U.S.C. § 552a(g)(4) (1976) (Privacy Act liability shall be equal to actual damages, but in no case less than $1,000 plus costs and attorney fees). Once discovery is permitted, its scope is usually adequate to prove the plaintiff's case. See, e.g., In re Attorney General, 596 F.2d 58, 67 (2d Cir. 1979).
100. 408 U.S. 1 (1972).
102. For example, in Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978), the federal government was held liable to parties whose mail had been opened and read by the CIA, id. at 321, 323; it was only through a FOIA request that the plaintiffs learned of the tampering with their mail, id. at 394.
public disclosure of information. Although the scope of discovery in private damage actions may be limited by need, materiality, or relevance, FOIA disclosure "to any person" may be limited only by the specific exemptions in the Act. Grounded on the theory that the public has a right to know what its government is doing and that public knowledge is the surest deterrent to a repeat of the political abuses of the past,103 the 1974 FOIA Amendments were clearly intended to increase public access to "law enforcement" records, except when specifically defined harms would result. Thus, in addition to affected parties, journalists and other "public watchdogs" are able to assert FOIA provisions to promote the public's interest in overseeing the FBI's exercise of its sweeping investigatory power.

C. JUDICIAL APPLICATION OF THE FOIA TO "UNLAWFUL" INVESTIGATIONS

When confronted with FOIA requests for information derived from "unlawful" FBI investigations, courts have taken one of two approaches. Some courts have held that FBI records are per se "compiled for law enforcement purposes"; others have used a more formalistic method of analysis, making their determination upon the basis of whether the documents at issue are (1) investigatory records and (2) related to a law enforcement purpose. In many circumstances, both of these approaches are inadequate.

The per se approach is illustrated by Irons v. Bell104 and Kuehnert v. FBI,105 which both held that records of a criminal law enforcement agency are "compiled for law enforcement purposes" even if gathered in connection with the illegal surveillance of political activities.106 In Irons, the plaintiff was a former student activist, civil rights organizer, and draft resister. Upon his request for all FBI material relating to himself, the FBI released portions of its files, but withheld material pertaining to the plaintiff's past association with several political groups.107 The FBI asserted that Exemption 7 applied, arguing that disclosure would tend to reveal the identity of a confidential source.108 In Kuehnert, the plaintiff, who had been arrested

103. See notes 31, 35, 37 supra and accompanying text.
104. 596 F.2d 468 (1st Cir. 1979).
105. 620 F.2d 662 (8th Cir. 1980).
106. See note 110 infra and accompanying text.
107. 596 F.2d at 469-70.
108. Id. at 470, cf. 5 U.S.C. § 552(b)(7)(D) (1976) (exempting investigatory records compiled for law enforcement purposes "only to the extent that the
but not convicted for "protest activities," also made a request for FBI material relating to himself, and, as in Irons, the FBI released only some of its files. The FBI withheld the names of confidential sources, all information that would tend to reveal the identity of a particular confidential source, the names of third parties asserted to be "of investigative interest," as well as the names of FBI special agents and other law enforcement officers involved in the investigations.

In Irons, the First Circuit could find no "FBI obligation to conduct a lengthy investigation and infiltration of [plaintiff's] political and religious associations;" in Kuehnert, the Eighth Circuit found a valid law enforcement purpose for investigating one organization linked to the plaintiff, but could not "discern any threshold connection between the [other] organization[s] and activities being investigated and violations of federal law." Both courts nonetheless held that, when it is the FBI that has conducted the investigation, the purpose of the investigation is irrelevant:

The character of the materials excluded under Exemption 7 at least suggests that 'law enforcement purposes' is as much a description of the type of agency the exemption is aimed at as it is a condition on the use of the exemption by agencies having administrative as well as civil enforcement duties.

Both courts cited four additional policy reasons to support their broad construction of the "law enforcement purposes" requirement of Exemption 7, finding that a different decision: (1) "would cost . . . society the cooperation of those who give the FBI information under an express assurance of confidentiality"; (2) would result in the release of information otherwise exempted, causing one or more of the harms Congress sought to guard against; (3) would not deter illegal FBI activity; and (4) would force upon district courts "an unmanageable burden . . . to second . . . guess the judgment of [the FBI] that an investi-

109. The FBI released documents indicating that Kuehnert had been investigated regarding his connection with a group known as the Revolutionary Union, and also released documents indicating the plans for violence that this organization may have had. The FBI also revealed that other organizations with which Kuehnert was associated had been infiltrated and investigated. See 620 F.2d at 664.
110. Id. at 665.
111. 596 F.2d at 472.
112. 620 F.2d at 666.
113. Irons v. Bell, 596 F.2d at 474; see Kuehnert v. FBI, 620 F.2d at 666.
The *Irons* and *Kuehnert* decisions, representing the furthest reach of judicial deference to the FBI in the context of Exemption 7, appear unsound on several grounds. First, as a matter of statutory construction, the special category for the FBI created by the per se rule seems contrary to congressional intent. Although Exemption 7 is predominantly oriented toward criminal law enforcement,\(^{115}\) it does not follow that Congress intended to exclude criminal enforcement agencies from the threshold requirement of showing that withheld documents were collected for "law enforcement purposes." Indeed, the creation of Exemption 7(D), which pertains to certain criminal intelligence and national security investigations,\(^{116}\) suggests that Congress recognized the problem of unlawful intelligence investigations, and intended that the product of such investigations would not be exempt from disclosure.\(^{117}\) This interpretation is supported by legislative history suggesting that the Exemption 7 subcategories are narrow exceptions to a broad policy favoring disclosure—the exceptions being designed to protect only "the legitimate interests of a law enforcement agency."\(^{118}\) Presumably, the FBI has no legitimate interest in shielding information regarding activities that the FBI has no lawful authority to investigate.\(^{119}\)

\(^{114}\) Irons v. Bell, 596 F.2d at 474; see Kuehnert v. FBI, 620 F.2d at 666 n. 9 (citing Irons v. Bell, 596 F.2d at 474).  
\(^{115}\) See note 39 supra and accompanying text.  
\(^{116}\) Exemption 7(D) permits withholding of "the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source." 5 U.S.C. § 552(b)(7)(D) (1976) (emphasis added). At no other point does the statutory language of Exemption 7 indicate a legislative preference for differential treatment of FBI investigatory records.  
\(^{117}\) See Birnbaum v. United States, 588 F.2d 319, 334 n.29 (2d Cir. 1978).  
\(^{119}\) See Stern v. Richardson, 367 F. Supp. 1316, 1321 (D.D.C. 1973); 120 Cong. Rec. 36667 (1974) (Sen. Kennedy commenting on a FOIA request concerning the FBI's COINTELPRO: "[T]his is . . . precisely the kind of Government activity which the public has the greatest interest in knowing about"). Even the *Irons* court conceded that the mere exercise of one's first amendment rights in opposition to some government policy does not trigger any legitimate FBI interest. See 596 F.2d at 472. Although the government may have no interest in protecting the flow of information regarding activities for which there is no lawful authority to investigate, cf. Weissman v. CIA, 565 F.2d 692, 695 (D.C. Cir. 1977) (CIA has no lawful authority to conduct domestic investigations; Exemption 7 inapplicable), a confidential source may have interests to protect. See notes 148-56 infra and accompanying text.
Second, the general policy underlying the protection of confidential sources—"to enlarge the flow of information to the final federal enforcement agency by protecting informers against risks of reprisal or loss of privacy"120—is given undue emphasis by the approach taken in Irons and Kuehnert. The risk of serious harm to informers can be taken into account without adopting a per se threshold rule.121 Moreover, Congress clearly did not intend to provide absolute protection for "confidential sources": the conference report on the FOIA 1974 Amendments indicates that Exemption 7 may protect the identity of informants only in instances "where the investigatory records [now] sought were compiled for law enforcement purposes."122 Because the protection of sources under Exemption 7 is premised on the assumption that the investigation was undertaken pursuant to valid law enforcement purposes, the confidentiality rationale does not justify a rule that confers the requisite "purpose" upon all FBI investigations, lawful or unlawful.

Third, the assertion by the courts in Irons and Kuehnert that full exposure of an investigation's unlawfulness will not deter the FBI from illegal investigations123 is contradicted by the courts' other assertion that the loss of Exemption 7 protection will cost society the cooperation of informants. If the latter is true, as the FBI's vigor in shielding such information might suggest, it follows that full disclosure will at least make unlawful investigations more difficult to conduct. In any event, full disclosure as a deterrent is precisely the objective behind the FOIA.124

Finally, the contention that requiring the FBI to demonstrate a law enforcement purpose places an unmanageable burden on district courts seems to beg the question. The burden, even if substantial, is imposed by the FOIA.125 Indeed, several

120. Sands v. Murphy, 633 F.2d 968, 970 (1st Cir. 1980); see Wellman Indus., Inc. v. NLRB, 490 F.2d 427, 431 (4th Cir.), cert. denied, 419 U.S. 834 (1974); Frankel v. SEC, 460 F.2d 813, 817 (2d Cir.), cert. denied, 409 U.S. 889 (1972).
121. See text accompanying notes 143-56 infra.
123. See Irons v. Bell, 596 F.2d at 474.
124. See text accompanying notes 31-37 supra.
125. See 5 U.S.C. § 552(a)(4)(B) (1976) (providing for in camera inspection and de novo review by the district courts). In a similar context, the Supreme Court has concluded:

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society... If the
district courts have demonstrated their willingness and ability to manage the task.\textsuperscript{126}

Thus far, the only judicial alternative to the per se rule is a more literal, formalistic interpretation of Exemption 7, such as that adopted in \textit{Abramson v. FBI}\textsuperscript{127} by the Court of Appeals for the District of Columbia Circuit. In \textit{Abramson}, the plaintiff was a professional journalist who sought information regarding the extent to which the Nixon Administration "may have used the FBI and its files to obtain derogatory information about political opponents and those that it perceived as enemies."\textsuperscript{128} The FBI, granting plaintiff's request only in part, withheld documents containing "information requested by and transmitted to the Nixon White House concerning eleven individuals" who had been "prominently associated with liberal causes and/or . . . opposition to the war in Indochina."\textsuperscript{129} The FBI based its withholdion on Exemption 7 (C), relating to unwarranted invasions of privacy.\textsuperscript{130} The \textit{Abramson} court held that "any consideration of whether disclosure would constitute an 'unwarranted invasion of personal privacy' is premature until the documents in issue have been shown by the Government" to meet the threshold requirements of Exemption 7.\textsuperscript{131} The court interpreted Exemption 7 as requiring a showing that the requested documents (1) are investigatory records, and (2) were compiled for law enforcement purposes.\textsuperscript{132} The FBI based its "law enforcement" assertion on the "special security and appointment functions" of the White House;\textsuperscript{133} but because the FBI was unable to relate those "broad and general duties to the individuals about whom information was requested," the court found no law enforcement purpose and held Exemption 7 inap-
In contrast to the courts in Irons and Kuehnert, the Abramson court did not focus on the conflict in the underlying policies of Exemption 7, but rather on the plain meaning of the statute. Although it resurrected earlier interpretations of the words "investigatory" and "law enforcement purposes," the court acknowledged the congressional disapproval of the earlier per se approach, and held that, once the threshold requirements of Exemption 7 have been met, "the next question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7."

Although the formal analysis in Abramson is supported by a plain reading of the statute, the underlying harm from disclosure in Abramson was not as great as that in Irons or Kuehnert. The documents released in Abramson were "name checks," summaries of information from FBI files on certain "public personalities," some of whom were either holders of, or candidates for, federal elective office. As "public personalities" these individuals arguably had a lesser privacy interest than the confidential sources and other persons about whom information was withheld in Irons and Kuehnert. In addition, the risk of harm to third parties following disclosure was less in Abramson than in Irons and Kuehnert. Because of its factual basis, Abramson is noteworthy more for its formal anal-

134. Id.

135. Abramson implicitly recognizes that, despite the apparent discrediting of the pre-1974 D.C. Circuit cases interpreting Exemption 7, see notes 23-30 supra and accompanying text, the carryover of some of the language in the 1974 Amendments imparts some precedential value to the pre-amendment cases interpreting the words "investigatory" and "compiled for law enforcement purposes." Without explicitly stating so, the court's analysis focused on the purpose for which the files were compiled. See Rural Hous. Alliance v. United States Dep't of Agriculture, 498 F.2d 73, 82 (D.C. Cir. 1974).

136. See notes 23-30 supra and accompanying text.

137. Abramson v. FBI, slip op. at 11 (quoting Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, reprinted in 1975 Source Book supra note 32, at 516-17) (emphasis in original). The D.C. Circuit's earlier per se rule was far more effective in protecting an individual's right to privacy, albeit inadvertently, because the exemption was held to attach indefinitely once it was determined that the investigatory file had been compiled for law enforcement purposes. See notes 24-30 supra and accompanying text.

138. Abramson v. FBI, slip op. at 3, 5.


140. See Kuehnert v. FBI, 620 F.2d at 666-67; Irons v. Bell, 596 F.2d at 476.
ysis of the threshold requirements of Exemption 7 than for a resolution of the conflict between the underlying values of FOIA and Exemption 7.

A lingering problem with the approach taken in Abramson is the possibility of releasing sensitive information that could result in one or more of the harms specified in Exemption 7. The most serious of these harms would be to the privacy and safety interests of informers, confidential sources, and law enforcement personnel, and to the privacy of parties investigated when an unaffected party requests disclosure. Indeed, it is the difficulty of resolving, on a case-by-case basis, conflicts that arise in balancing the benefits and harms of disclosure that accounts for use of the per se rule. Considerations of judicial economy do not, however, justify the use of the rule. As the reasoning of the Supreme Court in NLRB v. Robbins Tire & Rubber Co. indicates, agency claims of exemption based on Exemption 7 should be analyzed on a case-by-case basis. Moreover, in not following the per se rule, a court can be more faithful to the disclosure objectives of the FOIA while still protecting against serious risks of harm.

IV. A SUGGESTED APPROACH

Neither the approach taken in Irons and Kuehnert, nor the approach taken in Abramson, satisfactorily resolves the Exemption 7 problems associated with unlawful FBI investigations. Reflecting an all-or-nothing approach, the per se rule of Irons and Kuehnert shields information that, if disclosed, would deter FBI misconduct and facilitate private remedies, while the formalistic Abramson approach risks disclosure that might result in serious harm. A better approach would most often provide for disclosure, while allowing a court discretion to protect against the serious risk of harm.

From the outset, the FBI—like any agency asserting an exemption under the FOIA—bears the burden of demonstrating that an exemption applies to documents that have been withheld from a requestor. Courts should recognize at this threshold that the FBI has a legitimate interest both in preventing crimes not yet fully consummated and in detecting those already committed, and should give somewhat more deference to FBI claims under Exemption 7 than to the claims of

141. 437 U.S. 214 (1978); see notes 41-45 supra and accompanying text.
142. See 437 U.S. at 232; note 45 supra and accompanying text.
civil law enforcement agencies. Rather than being required to show that a particular investigation was focused on a specific violation of the law, as under the “special intensity” test, the FBI should be required to show only that its investigation was based on some legitimate law enforcement purpose. Such a purpose should be “violation-oriented”—it should focus on the prevention or discovery of noncompliance with specific federal statutes or regulations. This “violation-oriented” approach, by allowing the FBI to undertake an investigation before any specific violation of the law occurs, recognizes the interest of the FBI in preventing crime; it also, however, requires a good faith belief by the FBI, based on reasonable suspicion, that a violation is likely to occur.

Under the proposed “violation-oriented” approach, the FBI would continue to satisfy its threshold burden in “routine” criminal cases with only a minimal showing, typically by providing affidavits or oral testimony describing the purpose of the particular investigation. In most Exemption 7 cases, the controversy is not whether the investigatory records were compiled for law enforcement purposes, but whether their release would result in one of the six harms specified in the statute. Requiring only a minimal showing of the “lawful purpose” of an investigation appears to be sound from an empirical standpoint because most FBI investigations, domestic intelligence notwithstanding, are conducted for lawful purposes.

When confronted with a colorable assertion that a particular investigation is unlawful, however, courts would more vigorously scrutinize the FBI’s ability to meet the threshold requirements of Exemption 7 under the proposed approach. The FBI’s burden in “unlawful” cases will usually not be susceptible to a bright line test of whether a law enforcement purpose has been pursued. In most fact situations, the FBI will be able to demonstrate some plausible law enforcement purpose, but will have extended its investigation beyond a reasonable period of time or to a range of “targets” that are linked only tenuously to the original lawful purpose. There is little value in drawing arbitrary or controversial lines around the concept of “lawful purpose.” Instead, courts should first examine the nexus between a given record or document and the asserted

144. See Ramo v. Department of the Navy, 487 F. Supp. 127, 131 (N.D. Cal. 1979); text accompanying note 37 supra.
145. See text accompanying notes 51-53 supra.
146. See text accompanying notes 58-84 supra.
lawful purpose, and then consider whether disclosure would result in one of the six harms specified under Exemption 7. When there is a close nexus between the record and the investigation's lawful purpose, any reasonable showing of harm under Exemption 7 should warrant withholding the document. On the other hand, when the nexus between the records and the lawful purpose is weak or highly tenuous—a "minimal nexus"—then disclosure should follow, barring exceptional risk of serious harm to third parties.147 This approach confers considerable discretion on the courts, requiring them to weigh the benefits and risks of disclosure. Before addressing concerns that might arise in regard to such discretion, it is useful to consider how the approach would operate in practice.

One recurring fact scenario has involved the investigation of a violent political group such as the Ku Klux Klan, the Black Panther Party, or the Weather Underground. Such an investigation almost always originates with a violation-oriented focus, but often expands into the realm of illegality.148 Under the proposed approach, the risk from revealing the identity of informers and confidential sources in such an investigation, which can be great, is weighed against the nexus between the source and the lawful, violation-oriented purpose of the investigation. The approach recognizes, for example, that an undercover informant who has infiltrated a violent political group faces greater risks from disclosure than does a confidential source who has only monitored political rallies, and that the undercover informant is more closely linked to the investigation's lawful purpose. Such a case-by-case examination can promote maximum disclosure without running the risk of serious harm. Some sources will, of course, have mixed roles, but whether to disclose the identity of these sources can effectively be treated under a "worst case" assumption of potential harm.

Another scenario has involved standard counterintelligence tactics, which frequently have little nexus with a violation-oriented investigation. Employer interviews and anonymous mailings, for example, have been used to disseminate derogatory information about a "target" in an effort to discredit the person

147 Occasionally an investigation will be wholly unlawful from its outset through its duration. In such a case, the entire record should be disclosed barring the most exceptional of circumstances.

For a similar argument in favor of judicial discretion to refuse enforcement of the FOIA in cases where disclosure would have a strong adverse impact, see Note, supra note 12, at 911-20.

148 See text accompanying notes 75-84 supra.
politically, socially, or professionally. Such tactics lack any substantial link to a lawful purpose, and the proposed approach can often remedy the damage they cause by allowing detailed disclosure.

Finally, some fact scenarios, such as the investigations of the NAACP or of Martin Luther King, have involved a complete lack of a violation-oriented focus. In such a case, the proposed approach would focus analysis on the investigation's lack of any nexus with a lawful purpose, and would allow disclosure of all investigatory records in their entirety. Even in this extreme situation, however, potential disclosures that would compound an already illegal invasion of privacy, such as disclosure of information concerning an individual's sexual habits or other personal characteristics, would require special consideration. The exercise of judicial discretion to refuse disclosure in such a case would certainly seem appropriate, and would be logical under the approach advocated here.\textsuperscript{149}

With these illustrations in mind, the test proposed in this Note can be stated more succinctly: when disclosure sought under the FOIA includes a colorable claim that the FBI records were gathered in an unlawful investigation or by illegal means, the FBI must first establish the nexus between records it seeks to withhold and the lawful, violation-oriented purpose of its investigation. The court should then consider that nexus in light of a demonstrated risk of harm under Exemption 7. Unless there is a reasonable nexus between the lawful purpose and the records withheld, or, absent such a nexus, a serious risk of grave harm to third parties from disclosure, the requested information should be released.

The judicial discretion inherent in this approach would be quite narrow in practice. This discretion is justifiable because FOIA suits are proceedings for injunctive relief, and courts of equity generally have broad discretion in granting relief.\textsuperscript{150} Al-

\textsuperscript{149} The third party adversely affected should assert this privacy interest. The government may move in the nature of an interpleader, joining any parties whose privacy interest would be significantly invaded. \textit{Cf.} 5 U.S.C. § 552(b)(7)(C) (1976) ("unwarranted invasion of personal privacy"). The parties thus joined may at that time petition the court for equitable relief in the form of expungement. \textit{See} Note, Governmental Investigations of the Exercise of First Amendment Rights: Citizens' Rights and Remedies, 60 MINN. L. REV. 1257, 1275-81 (1976).

\textsuperscript{150} The FOIA contains no provision for mandatory judicial enforcement: "On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records . . . ." 5 U.S.C. § 552(a)(4)(B) (1976) (emphasis added).
though most courts have held that they have no general equitable power to refuse enforcement of the Act,151 many of those same courts have agreed that there may be "exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion."152 Indeed, the limited judicial discretion advocated in this Note is far more faithful to the disclosure presumption Congress intended than the per se rule of Irons and Kuehnert.

The discretion not to enforce disclosure when the FOIA appears to require it becomes extremely narrow when the policies favoring disclosure are weighed into the balance. The courts have recognized both that there is a genuine and significant public interest in knowing how the FBI proceeds in investigating a member of a "subversive organization",153 and that disclosure of informants' names may be "directly relevant to an understanding of the nature and extent of the surveillance."154 Even the Irons court admitted that "[w]here available facts tend to show the existence of the very overreaching . . . intended to [be] expose[d] by . . . Exemption 7, a court should use special caution to insure that the limited exemptions from exposure are not used to defeat [their own] purpose."155 Moreover, because the FOIA "does not authorize withholding of information . . . except as specifically stated" in the FOIA,156 the judicial discretion advocated in this Note would most often be exercised in favor of disclosure.

The approach suggested here presents a structure within which courts can protect against serious Exemption 7 harms and yet allow the fullest possible disclosure of agency records and documents. The approach underscores how unnecessary it

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151. See, e.g., County of Madison, N.Y. v. Department of Justice, No. 80-1582 (1st Cir. Mar. 3, 1981). Commentators have also argued that courts have no equitable discretion under the FOIA. See Project, supra note 12, at 1155-62; Comment, The Status of Law Enforcement Manuals Under the Freedom of Information Act, 75 Nw. L. Rev. 734, 763-66 (1980).


155. Irons v. Bell, 596 F.2d at 476.

is to shield FBI misconduct under a per se rule and avoids the risk, inherent in the approach taken in Abramson, that serious harm from full disclosure might occur. Finally, the approach is faithful to the disclosure policies underlying Exemption 7, and conserves judicial resources by only requiring a minimal showing of lawful purposes by the FBI, absent a colorable claim of unlawfulness.

V. CONCLUSION

The overriding mandate of the Freedom of Information Act is that each federal agency must, upon request, disclose its records to any person unless the information contained in the records is specifically exempted by the Act. Exemption 7, however, protects "investigatory records compiled for law enforcement purposes" if their disclosure would result in one of six specified harms.

Application of Exemption 7 to information collected in "unlawful" FBI investigations has presented courts with a difficult but fundamental issue of public access to government-controlled information. In part because Congress has not expressly indicated whether the products of unlawful FBI investigations should fall within Exemption 7, the courts have reached starkly different results. One leading circuit has determined that all records from investigations that lack a "lawful purpose" must be fully disclosed, even though such disclosure may, in some instances, cause severe harm to third parties. Other circuits have applied Exemption 7 to permit FBI withholding of information regardless of whether the material withheld was collected in an unlawful investigation.

This Note has suggested that neither approach is adequate, and has proposed that courts should instead consider the nexus between the withheld documents and the asserted lawful investigatory purpose. When that nexus is weak or tenuous, courts should examine whether disclosure would result in one of the specific harms protected against by Exemption 7. Unless there is a serious risk of grave harm of this type, disclosure should be ordered.

Such an approach is more faithful to the accessibility principle underlying the FOIA, yet it still protects against serious risks of harm. Also, by limiting its applicability to situations in which a colorable claim of FBI unlawfulness is present, the approach conserves judicial and FBI resources and limits the scope of judicial discretion to cases of clear necessity—those in
which the Act itself is unclear. Finally, the approach promotes the deterrent function of the FOIA and Exemption 7—providing the access to information that is critical if Congress and the public are to effectively monitor and prevent unlawful or abusive FBI activity.