

24-1964

To Be Argued By:
ALLISON M. ROVNER

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 24-1964



RADAR ONLINE LLC, JAMES ROBERTSON,

Plaintiffs-Appellants,

—v.—

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

JAY CLAYTON,
*United States Attorney for the
Southern District of New York,
Attorney for Defendant-Appellee.*
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2691

ALLISON M. ROVNER,
BENJAMIN H. TORRANCE,
*Assistant United States Attorneys,
Of Counsel.*

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BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

This appeal arises from a Freedom of Information Act (“FOIA”) request by plaintiffs-appellants Radar Online LLC and one of its employees (collectively, “Radar Online”) for records kept by the Federal Bureau of Investigation (“FBI”) relating to the investigation and prosecution of Jeffrey Epstein. The FBI withheld those records because they are central to the pending criminal prosecution of Epstein associate Ghislaine Maxwell—who, following her conviction on multiple counts relating to sex trafficking of minors, is seeking Supreme Court review of the conviction and

has indicated an intention to then seek further collateral review.

The district court correctly determined that the FBI had met its burden to show that it properly withheld these records under FOIA's law-enforcement exemption. To safeguard against interfering with pending criminal prosecutions, Congress expressly exempted from FOIA disclosure any records that could reasonably be expected to interfere with pending law enforcement proceedings. The withheld records sought by Radar Online fall at the heart of this exemption because their premature release could reasonably be expected to harm the government's criminal prosecution of Maxwell if she were to obtain a retrial on further review of her conviction.

The district court also correctly concluded that the FBI properly withheld certain information under other FOIA exemptions. FOIA permits government agencies to withhold information from disclosure if its release could reasonably be expected to constitute an unwarranted invasion of personal privacy, or to reveal law enforcement techniques, procedures, or guidelines. As the district court determined, the FBI properly invoked those exceptions to protect the identities of victims and witnesses involved in a wide-ranging sex-abuse scheme, and to ensure that law-enforcement techniques and guidelines are not revealed so as to permit circumvention of the law.

For all those reasons, the district court's judgment should be affirmed.

Jurisdictional Statement

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B) because the claim arose under FOIA. The district court entered final judgment in the government's favor on June 26, 2024 (Joint Appendix ("JA") 645). Radar Online filed a timely notice of appeal on July 22, 2024. (JA 656). Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the district court correctly upheld the FBI's assertion of FOIA Exemption 7(A) to protect from disclosure records that, if released, could reasonably be expected to interfere with the pending prosecution of Maxwell.
2. Whether the district court correctly upheld the FBI's assertion of FOIA Exemptions 6 and 7(C) to protect from disclosure information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.
3. Whether the district court correctly upheld the FBI's assertion of FOIA Exemption 7(E) to protect from disclosure information that, if released, would result in harm by revealing law enforcement techniques, procedures, and guidelines.

Statement of the Case

A. Procedural History

Radar Online commenced this action on May 25, 2017, to compel disclosure of all documents relating to the FBI's investigation and prosecution of Epstein. (JA 2, 10-11). The parties initially cross-moved for summary judgment, and the district court (Paul G. Gardephe, J.) issued an opinion and order on September 19, 2023, which among other things granted the FBI's motion with respect to Exemptions 6, 7(C), and 7(E) and certain aspects of the FBI's assertion of Exemption 7(A), and otherwise denied without prejudice the FBI's motion with respect to Exemption 7(A). (JA 364-417). The parties then submitted renewed cross-motions for summary judgment. (JA 7). On June 25, 2024, the district court issued an opinion and order granting the FBI's motion and denying Radar Online's motion with respect to FOIA Exemption 7(A). (JA 625-44). Final judgment was entered on June 26, 2024. (JA 645). Radar Online filed a notice of appeal on July 22, 2024. (JA 656).

B. Factual Background

1. The Epstein and Maxwell Prosecutions

Following federal and state investigations in Florida, in 2007 Epstein entered into a non-prosecution agreement with the U.S. Attorney's Office for the Southern District of Florida, then in 2008 pleaded guilty to state offenses relating to prostitution. *United States v. Maxwell*, 118 F.4th 256, 261 (2d Cir. 2024); *United States v. Epstein*, 19 Cr. 490, ECF No. 32 at 3.

On July 2, 2019, Epstein was indicted by a federal grand jury in the Southern District of New York (“SDNY”) on one count of sex trafficking and one count of conspiracy to commit sex trafficking. (JA 607 ¶ 4). He was arrested on July 6, 2019. (JA 44 n.4). Epstein died by suicide on August 10, 2019, while the charges were pending. (JA 421 ¶ 6, 607 ¶ 4). On August 29, 2019, the district court entered an order of *nolle prosequi* dismissing the charges against Epstein. (JA 607 ¶ 5).

On June 29, 2020, Epstein associate Maxwell was indicted by a grand jury in the SDNY on multiple counts relating to enticing and transporting minors to engage in sexual activity. (JA 607 ¶ 6). On March 29, 2021, the grand jury returned a superseding indictment that also included charges relating to sex trafficking of minors. (JA 607-08 ¶ 7). Following a trial, on December 29, 2021, a jury convicted Maxwell on multiple counts, and on June 22, 2022, the district court sentenced Maxwell to 20 years’ imprisonment. (JA 608 ¶ 8).

Maxwell appealed the criminal judgment to this Court (JA 608 ¶ 9), which affirmed her conviction on September 17, 2024, *Maxwell*, 118 F.4th 256, and later denied Maxwell’s petition for rehearing en banc, No. 22-1426 (2d Cir.), ECF Nos. 117, 120. On April 10, 2025, Maxwell filed a petition for a writ of certiorari with the Supreme Court. (*Maxwell v. United States*, No. 24-1073). The matter was distributed for the Supreme Court’s conference of September 29, 2025.

2. Radar Online's FOIA Request and the FBI's Withholdings

On April 20, 2017, Radar Online submitted a FOIA request to the FBI seeking all documents relating to the FBI's earlier investigation and prosecution of Epstein. (JA 18, 40 ¶ 6). Radar Online then commenced this action in district court on May 25, 2017. (JA 2, 10-11). On October 5, 2017, the parties stipulated that the FBI's search obligations would be limited to records in certain specified files maintained by the FBI. (JA 3).

From October 2017 through June 2019, the FBI processed nearly 11,000 responsive pages. (JA 41-44 ¶¶ 9-29). Most of the pages were redacted in part or withheld in full based on certain exemptions under FOIA, including Exemptions 6, 7(C), and 7(E). The FBI also relied on Exemption 3, which exempts from disclosure records protected by other statutes, here including the Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509, and Federal Rule of Criminal Procedure 6(e), which governs the secrecy of grand jury proceedings; Exemption 5, which exempts from disclosure privileged records; and Exemption 7(D), which exempts from disclosure certain information provided by confidential sources. (JA 41-44 ¶¶ 9-29).

After Epstein was charged with criminal offenses in July 2019, the FBI asserted Exemption 7(A) over the information it had processed and withheld before that time, as well as over all records after that time, based on a categorical review (except for 46 pages that the FBI released in full). (JA 44-45 ¶¶ 30-31 & n.4-5,

421-22 ¶ 7).¹ The FBI also asserted Exemptions 3, 5, 6, 7(C), 7(D), and 7(E) over information in the records that it categorically reviewed after Epstein's arrest. (JA 44 ¶ 30).

C. The District Court's Decisions

1. The District Court's September 19, 2023, Decision

In its September 19, 2023, opinion and order, the district court granted summary judgment to the FBI with respect to Exemptions 6, 7(C), and 7(E), and certain aspects of the FBI's assertion of Exemption 7(A); otherwise the court denied summary judgment without prejudice with respect to Exemption 7(A). (JA 364-417).²

¹ During a categorical review, the FBI reviews each document and determines if release of the document would interfere with an ongoing law enforcement proceeding. (JA 44 n.5).

² The district court also granted the FBI's summary judgment motion with respect to Exemption 3 for information withheld under the Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509, and Exemption 7(D) to protect information confidentially provided by local law enforcement, holdings Radar Online does not challenge in this appeal. (JA 389, 394-96, 410-11). The district court denied the FBI's summary judgment motion without prejudice with respect to Exemption 3 as it pertains to grand jury materials withheld pursuant to Federal Rule of Criminal Proce-

The district court first determined that the FBI had timely asserted Exemption 7(A) over all records. (JA 374-80). The district court explained that the FBI asserted Exemption 7(A) “soon after Epstein’s 2019 indictment, when the exemption became applicable” and well before the district court’s decision on the summary judgment motions or even any briefing on it. (JA 374-80). The district court then concluded that the records were law enforcement records and that Maxwell’s appeal of her criminal conviction meant that there was a pending law enforcement proceeding. (JA 380-81).

However, the district court determined that the FBI had not met its burden of demonstrating that release of the records could reasonably be expected to interfere with law enforcement proceedings because it found that the FBI’s declarations did not sufficiently link the categories of withheld documents it had identified to potential harm to the Maxwell prosecution. (JA 381-88). The district court therefore denied the FBI’s summary judgment motion without prejudice as to Exemption 7(A). (JA 387, 417).

With respect to Exemptions 6 and 7(C), the district court concluded that the FBI properly withheld names and other identifying information of government employees and third parties, the release of which could reasonably be expected to constitute an unwarranted invasion of their personal privacy. (JA 396-405). The

dure 6(e) and Exemption 7(D) to protect information provided on a confidential basis, which are also not the subject of this appeal. (JA 389-93, 407-09).

district court concluded that these individuals had “cognizable privacy interests” that outweighed the “weighty public interest in ensuring the diligence of the FBI’s investigation concerning Epstein and Maxwell,” and that disclosure “would not advance the public’s understanding of the FBI’s performance of its statutory duties.” (JA 399-404 (quotation marks and alterations omitted)).

Finally, with respect to Exemption 7(E), the district court concluded that the FBI satisfied its burden of demonstrating that each category of information it withheld qualified as techniques, procedures, or guidelines, the disclosure of which could reasonably be expected to risk circumvention of the law. (JA 411-13). The district court noted that although Radar Online complained that the FBI “offers nothing more than a paraphrase of Exemption 7(E),” Radar Online “do[es] not contest the FBI’s reasoning” and “ignores the . . . detailed description” contained in the FBI’s declaration. (JA 413 (quotation marks and alterations omitted)).

2. The District Court’s June 25, 2024, Decision

The parties filed renewed cross-motions for summary judgment in January 2024. (JA 7). In its June 25, 2024, opinion and order, the district court granted summary judgment to the FBI, concluding that the FBI properly withheld records pursuant to Exemption 7(A). (JA 625-44).³

³ Because the FBI asserted Exemption 7(A) over all unreleased information, the district court did not

The district court concluded that the FBI met its burden of demonstrating how disclosure of certain categories of documents could reasonably be expected to interfere with a retrial of Maxwell if she prevailed on appeal. (JA 635-36). Specifically, the district court determined that the declaration of one of the Assistant United States Attorneys on the Maxwell prosecuting team (the “AUSA Declaration”) properly explained how two categories of documents—“Evidentiary/Investigative Materials” and “Administrative Materials”—would be reasonably likely to interfere with a retrial of Maxwell by affecting witness testimony, including the witnesses’ willingness to testify; prejudicing the jury pool so as to hinder the government’s ability to present its case in court; and providing Maxwell with greater access to the investigatory files than she would otherwise have during the criminal discovery process. (JA 636-38).

Finally, the district court concluded that the FBI met its burden of demonstrating that any non-exempt information could not reasonably be segregated from exempt information without risking interference with the Maxwell prosecution. (JA 642-43).

evaluate the applicability of the other exemptions the FBI had asserted in its renewed motion, including Exemption 3 as it pertained to grand jury materials and Exemption 7(D) with respect to the names and identity information of confidential sources. (JA 7, 641-42).

Final judgment was entered on June 26, 2024. (JA 645). This appeal followed.

Summary of Argument

The district court correctly held that the FBI properly withheld records under Exemptions 7(A), 6 and 7(C), and 7(E).

First, the FBI properly withheld records under Exemption 7(A) due to the pending prosecution of Maxwell. The FBI met its burden of showing that if Maxwell were to prevail in review of her conviction, release of the records could reasonably be expected to interfere with a retrial by influencing witness testimony, prejudicing the jury pool, and giving Maxwell greater access to documents than she would have through the criminal discovery process. The FBI reviewed all of the documents, separated them into categories, and demonstrated likely harms to the government's law enforcement proceedings if records in each of those categories were disclosed and Maxwell were retried. *See infra* Point I.C. The FBI also met its burden of demonstrating that non-exempt portions of documents were not reasonably segregable from exempt portions. *See infra* Point 1.D. Finally, the district court correctly held that the FBI's assertion of Exemption 7(A) in July 2019 upon Epstein's arrest and criminal charges, but after productions had commenced in the FOIA litigation, was timely, as agencies are permitted to raise new exemptions during a district court case before the district court reaches a final decision on the merits, as well as based on changed circumstances. *See infra* Point 1.E.

Second, the FBI properly withheld records under Exemptions 6 and 7(C) because the information the FBI withheld implicates strong privacy interests, including of victims identified in the records, that override the public interest in disclosure. *See infra* Point II.B. Finally, the FBI properly withheld records under Exemption 7(E) because release would result in unwarranted disclosure of law enforcement techniques, procedures, and guidelines. *See infra* Point III.B.

For these reasons, the district court's judgment should be affirmed.

A R G U M E N T

Standard of Review

This Court reviews the district court's determinations on summary judgment *de novo*. *ACLU v. DoD*, 901 F.3d 125, 132 (2d Cir. 2018).

P O I N T I

The District Court Correctly Upheld the FBI's Withholding of Records Protected by Exemption 7(A)

A. The Freedom of Information Act

FOIA is intended to strike “a workable balance between the right of the public to know and the need of the Government to keep information in confidence.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quotation marks omitted). FOIA mandates disclosure of “agency records” upon request unless they

fall within one of nine enumerated exemptions. 5 U.S.C. § 552(a)-(b). These exemptions “reflect Congress’ recognition that releasing certain records might prejudice legitimate private or governmental interests.” *A. Michael’s Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994). “FOIA expressly recognizes that important interests are served by its exemptions, and those exemptions are as much a part of FOIA’s purposes and policies as the statute’s disclosure requirement.” *Food Marketing Institute v. Argus Leader Media*, 588 U.S. 427, 439 (2019) (citations, quotation marks, and alterations omitted).

Most FOIA actions are resolved through summary judgment. *See Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). “In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing . . . that any withheld documents fall within an exemption to the FOIA.” *Long v. OPM*, 692 F.3d 185, 190 (2d Cir. 2012) (quoting *Carney*, 19 F.3d at 812). An agency may meet that burden through declarations that “describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (quotation marks omitted); *accord Long*, 692 F.3d at 190 (“In resolving summary judgment motions in a FOIA case, a district court proceeds primarily by affidavits in lieu of other documentary or testimonial evidence . . .”). The declarations submitted by the agency are

“accorded a presumption of good faith,” *Carney*, 19 F.3d at 812 (quotation marks omitted), and “the agency’s justification is sufficient if it appears logical and plausible,” *ACLU*, 901 F.3d at 133.

B. Exemption 7(A)

Exemption 7(A) exempts from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). In enacting Exemption 7(A), “Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). Congress intended that “Exemption 7(A) would apply whenever the Government’s case in court . . . would be harmed by the premature release of evidence or information.” *Id.* at 232 (quotation marks omitted).

With respect to whether release of information could reasonably cause some articulable harm, the government’s burden is not high; the government need only show that “disclosure of particular kinds of investigatory records . . . would generally interfere with enforcement proceedings.” *Id.* at 236 (quotation marks omitted). In doing so, the government must demonstrate a “rational link” between the requested public disclosure and interference with the government’s ongoing or prospective investigations or proceedings.

Center for National Security Studies v. DOJ, 331 F.3d 918, 931 (D.C. Cir. 2003); *Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986).

The government is not required to make a specific factual showing with respect to each withheld document that disclosure would interfere with a particular enforcement proceeding. *See Robbins Tire*, 437 U.S. at 236. Rather, the showing of harm under Exemption 7(A) may be made categorically. *Id.* That is, “an agency may satisfy its burden of proof ‘by grouping documents in categories and offering generic reasons for withholding the documents in each category.’” *Citizens for Responsibility & Ethics in Washington v. DOJ* (“*CREW I*”), 746 F.3d 1082, 1098 (D.C. Cir. 2014) (citing *Maydak v. DOJ*, 218 F.3d 760, 765 (D.C. Cir. 2000)).

C. Release of the FBI’s Withheld Records Would Reasonably Be Expected to Interfere with Pending Law Enforcement Proceedings Against Maxwell

It is undisputed that the records withheld under Exemption 7(A) were compiled for law enforcement purposes and that a law enforcement proceeding is currently pending against Maxwell given her unresolved petition for a writ of certiorari before the Supreme Court. (Brief for Plaintiffs-Appellants (“Br.”) 14-15). Although Exemption 7(A) “is temporal in nature” and therefore “[t]he proceeding must remain pending at the time of [the Court’s] decision, not only at the time of the initial FOIA request,” a proceeding

remains pending during a criminal appeal. *CREW I*, 746 F.3d at 1097; accord *Kidder v. FBI*, 517 F. Supp. 2d 17, 27-28 (D.D.C. 2007) (“A pending appeal of a criminal conviction qualifies as a pending or prospective law enforcement proceeding for purposes of Exemption 7(A).” (citing *Kansi v. DOJ*, 11 F. Supp. 2d 42, 44 (D.D.C. 1998))).⁴

Thus, the only issue before the Court is whether the FBI satisfied its burden of demonstrating that release

⁴ Contrary to Radar Online’s contentions (Br. 14 n.3), the government’s basis for relying on Exemption 7(A) is not necessarily extinguished if the Supreme Court denies Maxwell’s petition for certiorari. Maxwell has indicated that she intends to seek collateral review of her conviction. See, e.g., *United States v. Maxwell*, 20 Cr. 330, ECF No. 803 (submission by Maxwell stating that “[s]he is preparing a habeas petition”); July 29, 2025, letter from David Markus to James Comer, available at <https://kfoxtv.com/resources/pdf/af9ffb24-3a29-4fb6-8348-16576ddb095-ResponsetoChairmanComer.pdf> (referring to Maxwell’s “forthcoming habeas petition”). Courts have held the assertion of Exemption 7(A) to be proper through collateral attack on a conviction. See, e.g., *Johnson v. FBI*, 118 F. Supp. 3d 784, 792 (E.D. Pa. 2015) (“[L]ogic suggests that the existence of a pending motion under [28 U.S.C.] § 2255 makes it reasonably foreseeable that an enforcement proceeding (i.e., a new trial) will take place, leading to the expectation that Exemption 7(A) may apply to protect materials whose release could reasonably be expected to interfere with that new trial.”).

of the records could reasonably be expected to interfere with a retrial of Maxwell if one were held. The district court correctly held that it had. (JA 634-42). As the district court recognized, the FBI properly “defined its categories functionally,” performed “a document-by-document review in order to assign documents to the proper category,” and “explain[ed] to the court how the release of each category would interfere with enforcement proceedings.” (JA 640 (citing *CREW I*, 746 F.3d at 1098)).

First, following a document-by-document review, the FBI properly grouped the documents into two categories of withheld records. (JA 44 n.5, 61-62 ¶¶ 61-63, 419-20 ¶ 3, 424 ¶ 15, 609-10 ¶¶ 13-14, 638-39). One category consisted of “Evidentiary/Investigative Materials” including “copies of records or evidence, analysis of that evidence, and derivative communications summarizing or otherwise referencing evidence.” (JA 609-10 ¶¶ 13-14). This category also included business records and “documents and evidence provided by witnesses to law enforcement,” as well as information regarding those witnesses. (JA 609-10 ¶¶ 13-14).

A second category consisted of “Administrative Materials,” including “internal communications among investigators within the FBI” and between the FBI and other government agencies regarding the investigation, “grand jury subpoenas identifying the names of witnesses and documents sought during the investigation,” and “organizational documents” such as envelopes, cover sheets, transmittal forms, and routing slips, “some of which contain the names of witnesses,

including victim-witnesses, and subjects of the investigation.” (JA 62-64 ¶¶ 64-66, 609 ¶ 13, 615-16 ¶ 15).⁵

As discussed below, the FBI then properly linked disclosure of each of these two categories of records to the likely harm that would result if Maxwell were re-tried. (JA 610-18 ¶¶ 14-16, 637-42).

1. Disclosure of the Withheld Records Would Be Reasonably Likely to Affect Witness Testimony

First, as recognized by the district court, the government properly explained how the release of Evidentiary/Investigative Materials and Administrative Materials could interfere with a retrial of Maxwell by affecting witness testimony. In particular, the AUSA Declaration demonstrated that releasing this information could “provid[e] the opportunity for witnesses

⁵ The FBI identified a third category of documents, “Public Source/Non-Investigative Harm Materials,” which “consists of publicly available news reporting and other open source materials that are already accessible online through public sources.” (JA 64 ¶¶ 67-68, 609 ¶ 13, 618 ¶ 16). The FBI concluded that release of this category of records did not present any concerns of interference with the Maxwell prosecution and therefore it produced these records in full to Radar Online. (JA 618 ¶ 16). As stated in the AUSA Declaration, the government has also made available to the press the publicly disclosed exhibits from Maxwell’s trial and is willing to provide those exhibits to Radar Online upon request. (JA 615 ¶ 14(f)).

to shape their testimony to conform with other evidence gathered during the investigation,” thereby undermining the government’s efforts to present witness testimony that is uninfluenced by exposure to other evidence in the case and from which the jury could assess witness credibility. (JA 610-11 ¶ 14(a), 616 ¶ 15(a), 638-39). The AUSA Declaration also noted that the majority of the records in these categories were not introduced as public exhibits during Maxwell’s trial and remained non-public, although the government could seek to introduce them into evidence should Maxwell be granted a retrial. (JA 610-11 ¶ 14(a), 616 ¶ 15(a)).

The AUSA Declaration also reasonably explained that these categories of records contained identifying and other sensitive information about witnesses, many of whom testified at the trial under pseudonyms and some of whom did not testify but could be called if there were a retrial. (JA 611-12 ¶ 14(b), 616 ¶ 15(a), 641). As discussed in the declaration, many of these witnesses only agreed to cooperate with the government’s investigation because they understood that the government would make every effort to protect their privacy. (JA 611-12 ¶ 14(b), 616 ¶ 15(a)). The declaration further explained that “[t]he public release of this information could lead to the identification and intimidation of witnesses, who may decline to cooperate with the parties and be disinclined to testify if their personal information is released to the public.” (JA 611-12 ¶ 14(b), 639).

The district court correctly observed that the negative effect on witness testimony from disclosure is one of the “paradigmatic harms” recognized by courts in

affirming withholdings under Exemption 7(A). (JA 641); *see, e.g., Center for National Security Studies*, 331 F.3d at 930 (recognizing that a “potential witness or informant may be much less likely to come forward and cooperate with the investigation if he believes his name will be made public”); *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (stating that disclosure could result in “chilling and intimidation of witnesses”); *Dickerson v. DOJ*, 992 F.2d 1426, 1433 (6th Cir. 1993) (“Verification of statements given by future witnesses becomes harder . . . where the factual information developed in the investigation has entered the public domain.”).

Although Radar Online characterizes the FBI’s concerns about the effect from premature release on witness testimony as “speculative,” courts must “give deference to an agency’s predictive judgment of the harm that will result from disclosure of information.” *CREWI*, 746 F.3d at 1098; *accord ACLU*, 901 F.3d at 134 (in national security context, “it is bad law and bad policy to second-guess the predictive judgments made by the government’s intelligence agencies” (quotation marks omitted)); *Lewis v. Dep’t of the Treasury*, 851 F. App’x 214, 216 (D.C. Cir. 2021) (noting “deference given to an agency’s predictive judgment that disclosure will harm ongoing proceedings” in Exemption 7(A) case).⁶ As long as the government’s prediction is

⁶ In contrast, the court owes no deference to expert speculation by a FOIA requester, such as Radar Online’s unsupported assertion that because some witnesses testified at Maxwell’s trial and that trial

logical and plausible, the agency has met its burden under FOIA. *ACLU*, 901 F.3d at 134. As the district court observed, the FBI has more than met its burden of providing a logical and plausible explanation of how release of Evidentiary/Investigative Materials and Administrative Materials would affect witness testimony. (JA 641 (concluding that because the FBI had “establishe[d] that the release of the requested information could reasonably be expected to cause articulable harm,” “[t]here is no need for the FBI to further particularize how the exposure of this material would influence witness testimony”)).

2. Disclosure of the Withheld Records Would Be Reasonably Likely to Prejudice the Jury Pool

Second, as recognized by the district court, the AUSA Declaration explained how premature release of the two categories of records—most of which were not admitted into evidence at Maxwell’s trial—could reasonably be expected to further impair the government’s ability to present its case in court at a retrial because it risks prejudicing the jury pool. (JA 612-14 ¶ 14(c), 616-17 ¶ 15(b), 637-39 & n.4). The declaration explained that if materials are released but then not admitted into evidence at a retrial, the jury could improperly consider that material instead of the actual evidence presented by the government; or it might draw unwarranted adverse inferences against the

received news coverage there would be no effect on witness testimony at a retrial. (Br. 24-25).

government based on a belief that the government was trying to hide something. (JA 612-14 ¶ 14(c), 616-17 ¶ 15(b), 639). Additionally, if materials that were prematurely released were later admitted at trial, jurors could have preconceived notions of that evidence's relevance or importance, particularly given the media scrutiny of the Maxwell case and commentary that is likely to follow the release of any records of substance from the investigative file. (JA 612-14 ¶ 14(c), 616-17 ¶ 15(b)).

Indeed, the risks regarding witnesses and the jury pool are underscored by the entry of a protective order in Maxwell's criminal case, which generally prohibited the defense from disclosing information provided to it in discovery. (JA 614 ¶ 14(e), citing *Maxwell*, No. 20 Cr. 330, ECF No. 36). As the AUSA Declaration explains, the protective order reflected the recognition by the parties and the district court in the criminal case that disclosure of information in the government's possession could put an impartial trial at risk. (JA 614 ¶ 14(e), 618 ¶ 15(d)). Radar Online now contends that "concerns of violating a protective order in third-party litigation does not provide a legitimate justification for withholding materials pursuant to a FOIA request." (Br. 16 n.4). But that is wrong as a matter of law, see *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 384-87 (1980) (documents are not improperly withheld under FOIA when agency is enjoined from disclosing them); moreover, it is irrelevant, as the government's point is not that the protective order by its terms bars the disclosure of the requested records, but that it demonstrates the seriousness of the concerns underlying Exemption 7(A) in this case.

Radar Online asserts that it “def[ies] logic” to contend that potential jurors might encounter and form prejudices regarding records released as a result of its FOIA request. (Br. 20). But the Epstein and Maxwell cases have garnered an extraordinary level of public attention, and it is hardly unreasonable to suggest that the contested information here would receive widespread scrutiny and cause many readers to form strong opinions. And while Radar Online points to a trial court’s ability to exclude evidence, that misses the point: potential jurors’ views may well be influenced by evidence released outside the courtroom, which would prejudice the government’s ability to fairly present its case. Moreover, some of the concerns explained above relate to information the government might seek to introduce into evidence at a retrial; it is no answer to those concerns to point to the possibility that such evidence might not be admitted at all. While it is true that a trial court can screen potential jurors for possible bias and issue instructions, those tools are imperfect, and in some cases may not be sufficient to overcome widespread public exposure to unscreened but prejudicial information. *Cf. Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (criminal defendant constitutionally entitled to change of venue after community was “pervasively exposed” to prejudicial evidence). More to the point, Exemption 7(A) allows the government to avoid the need for those judicial mechanisms by shielding documents from disclosure in order to prevent the government’s case from being “hindered” or “harmed” in the first place. *Robbins Tire*, 437 U.S. at 224, 232.

Nor is there merit to Radar Online’s assertions (Br. 20-24) that the government’s case would not be

harmful by disclosure because the public already possesses some information relating to Maxwell. As Radar Online notes, some court filings in private civil litigation relating to Maxwell were unsealed by court order. *See Brown v. Maxwell*, 929 F.3d 41, 45-54 (2d Cir. 2019); *Giuffre v. Maxwell*, No. 15 Civ. 7433 (S.D.N.Y. Jan 19, 2021), ECF No. 1196 (Tr.) at 5.⁷ But that is immaterial to whether the FBI properly withheld its investigatory records. There is no reason to believe that the law-enforcement information requested in this FOIA case is the same as the information contained in the civil court filings. And the potential effect on the jury pool from disclosure of documents in a civil case is not comparable to the effect from documents released by the FBI, which, as described above, contain witness statements; phone, travel, and financial records; agency analysis of evidence; and other materials gathered in the course of a criminal investigation. (JA 610 ¶ 14).

Further, DOJ's partial release of three previously unavailable documents relating to Epstein is also

⁷ This Court issued its decision in *Brown* in July 2019, well before Maxwell's prosecution. Further, the district court in *Giuffre* observed that Maxwell had failed to meet her burden of showing that the unsealing of portions of the docket, including portions of her deposition testimony, would jeopardize her right to a fair trial, *Giuffre*, Tr. at 5—a conclusion that has no bearing on whether the government has shown that release of the FBI's file would impede its ability to present its case in court.

irrelevant to the FBI's assertion of Exemption 7(A) here. An official disclosure of certain records may waive an agency's right to claim an exemption, but for that to be true, "(1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure." *Montgomery v. IRS*, 40 F.4th 702, 710 (D.C. Cir. 2022) (quotation marks omitted); *accord Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (adopting same test). But there is no showing in this case that the recent DOJ release "matches" or is "as specific as" the information Radar Online requests. *See National Archives and Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (holding that "the fact that other pictures had been made public [does not] detract[] from the weighty privacy interests" in remaining pictures). In sum, as the district court recognized, the FBI more than met its burden of making a showing that "allows the court to be able to trace a rational link between the nature of the document and the alleged likely interference." (JA 638 (quotation marks omitted)).

3. Disclosure of the Withheld Records Would Give Maxwell Unwarranted Access to Records

Third, the FBI properly withheld records on the basis that disclosure of the materials would provide Maxwell with greater access to records than she would otherwise have through the criminal discovery process. As explained in the AUSA Declaration, although

the majority of Evidentiary/Investigative Materials, such as testifying witness statements, were already produced to Maxwell in connection with her trial, some materials in this category have not been produced to her, such as internal FBI analyses of records and work product resulting from those analyses. (JA 614 ¶ 14(d)). Further, many of the Administrative Materials, including grand jury subpoenas, cover sheets, internal FBI communications, and communications with other law enforcement agents, were not discoverable and therefore not produced to Maxwell. (JA 617 ¶ 15(c)). Disclosure of these materials would thus allow Maxwell to have greater access to the investigatory files than she would otherwise have through the criminal discovery process, which, as the district court concluded, is a “paradigmatic harm” under Exemption 7(A) and constitutes an additional valid basis for withholding the materials. (JA 614 ¶ 14(d), 617 ¶ 15(c), 637-41).

The Supreme Court has recognized that “[f]oremost among the purposes” of Exemption 7(A) “was to prevent harm to the government’s case in court by not allowing litigants earlier or greater access to agency investigatory files than they would otherwise have.” *Robbins Tire*, 437 U.S. at 224-25 (citations, alteration, and quotation marks omitted). Contrary to Radar Online’s contentions (Br. 17-19), and as the district court properly recognized, “[t]he standard for application of Exemption 7(A) is not whether the target of the investigation has seen millions of records,”⁸ but rather

⁸ The decisions Radar Online cites (Br. 15, 17-18) are not to the contrary. See *Lion Raisins Inc. v. USDA*,

whether an agency has “explain[ed] to the court how the release of each category would interfere with enforcement proceedings.” (JA 638 (quotation marks omitted)). Because the FBI properly explained its rationale here, the district court’s decision should be affirmed.

D. The FBI Satisfied Its Duty to Segregate and Release Any Non-Exempt Information

The district court also correctly concluded that “the FBI satisfied its segregability burden with respect to the documents withheld in full under Exemption 7(A).” (JA 642-43). FOIA provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”

354 F.3d 1072, 1085 (9th Cir. 2004), *overruled on other grounds by Animal Legal Defense Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2016); *Campbell v. HHS*, 682 F.2d 256, 265 (D.C. Cir. 1982); *Chesapeake Bay Found., Inc. v. U.S. Army Corps of Engineers*, 677 F. Supp. 2d 101, 108 (D.D.C. 2009); *Dow Jones Co., Inc. v. F.E.R.C.*, 219 F.R.D. 167, 174 (C.D. Cal. 2003); *Scheer v. DOJ*, 35 F. Supp. 2d 9, 14 (D.D.C. 1999); *McDermott v. F.T.C.*, No. 80-2275, 1981 WL 2056, at *5 (D.D.C. Apr. 13, 1981). Unlike here, these decisions did not involve the target’s lack of access to the assertedly exempt information in connection with a trial and multiple other asserted bases for the Exemption 7(A) withholding; or the courts otherwise found the agencies’ explanations to be deficient.

5 U.S.C. § 552(b). “Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material.” *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). Although “agencies must be required to provide the reasons behind their conclusions [regarding segregability] in order that they may be challenged by FOIA plaintiffs and reviewed by the courts,” “[o]f course agencies should not be forced to provide such a detailed justification that would itself compromise the secret nature of potentially exempt information.” *Mead Data Central, Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

The FBI has met its burden here. As the FBI explained in its declarations, the records withheld in full by the FBI do not contain any reasonably segregable non-exempt information. (JA 422, ¶¶ 9-10, 437-39 ¶ 42, 618-19 ¶ 17). As explained in the AUSA Declaration, to the extent there is non-exempt information contained in the records withheld under Exemption 7(A), that information is intertwined with exempt information and cannot reasonably be segregated without risking interference with the Maxwell prosecution. (JA 618-19 ¶ 17); *see Mays v. DEA*, 234 F.3d 1324, 1327 (D.C. Cir. 2000) (information “inextricably intertwined” with Exemption 7 information need not be segregated and disclosed (quotation marks omitted)); *Lead Industries Ass’n, Inc. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979) (Friendly, J.) (same for Exemption 5). Further, as the AUSA Declaration explained, “[t]he media coverage of speculation and theories about Maxwell’s association with Epstein makes the segregation of any possibly non-exempt information

particularly difficult because providing information pertaining to Epstein without complete context can reasonably be expected to contribute to the dissemination of speculation and theories about the *Maxwell* case,” which, in turn, would be reasonably likely to interfere with a retrial of Maxwell. (JA 618-19 ¶ 17). These reasonable and logical explanations satisfy the FBI’s burden. (JA 642-43).

E. The FBI Timely Asserted Exemption 7(A)

The district court also properly ruled that the FBI’s assertion of Exemption 7(A) was timely. (JA 374-80). Contrary to Radar Online’s contentions (Br. 25-29), FOIA exemptions are not forfeited simply because they were not asserted in the initial rounds of document processing. An agency may identify exemptions at any stage of the litigation before the conclusion of the district court proceedings, as the FBI did here. (JA 44-45 ¶ 30-31 & n.4-5; 376 (district court stating that “[a]gencies are therefore permitted to review their determinations, and, as here, raise new FOIA exemptions as they become applicable prior to the district court’s final decision.”)); *see, e.g., Senate of the Commonwealth of Puerto Rico v. DOJ*, 823 F.2d 574, 578, 580-81 (D.C. Cir. 1987) (Exemption 7(A) properly raised more than two years after initial FOIA request); *Heffernan v. Azar*, 317 F. Supp. 3d 94, 119 n.14 (D.D.C. 2018) (holding that the agency did not waive exemptions asserted for the first time in the government’s reply submission, as it was asserted before summary judgment was complete and before appellate review). That rule makes sense: “the document production process is a fluid one at the district court level, and it

often includes contemporaneous review and continuous production determinations by agency-defendants.’ Agencies are therefore permitted to review their determinations[] and[] ... raise new FOIA exemptions as they become applicable prior to the district court’s final decision.” (JA 376 (quoting *EPIC v. DOJ*, 296 F. Supp. 3d 109, 122 (D.D.C. 2017)).

And allowing that flexibility is particularly necessary when new circumstances present themselves. *See Senate of Puerto Rico*, 823 F.2d at 580-81 (district court was permitted to allow agency to “reevaluate its exemption claims in light of the intervention of events”; even on appeal, a “substantial change in the factual context of the case” may permit a new assertion of exemptions (quotation marks omitted)). As the district court concluded, because the FBI promptly asserted Exemption 7(A) soon after Epstein’s 2019 indictment, and years before any briefing even occurred on the parties’ cross-motions for summary judgment, the FBI’s assertion of Exemption 7(A) over both the previously processed and withheld portions of documents and documents yet to be reviewed was timely and proper. (JA 377-79).

Radar Online’s response essentially speculates that the FBI might act in bad faith by asserting “placeholder exemptions” that it knows are inapplicable until a different exemption becomes available. (Br. 26-27). But there is no dispute that Epstein was indicted years after the FBI began processing documents in response to Radar Online’s request, and there can be no serious contention that, as the district court put it, that indictment “triggered the applicability of

Exemption 7(A).” (JA 379). Thus Radar Online has “not been prejudiced in any meaningful sense by the timing of the government’s assertion of Exemption 7(A), nor [has it] provided any evidence of bad faith with respect to the government’s timing on this issue,” or shown that the agency was improperly seeking a “tactical advantage” or that it “manipulated the course of events to frustrate [Radar Online’s] FOIA request.” (JA 377-78 (quotation marks and alterations omitted); citing *Senate of Puerto Rico*, 823 F.2d at 580-81). Absent evidence that an agency is “play[ing] cat and mouse” by “springing” an exemption on a “surprised opponent[,]” a district court is permitted to “allow[] [an agency] to reevaluate its exemption claims in light of the intervention of events.” *Senate of Puerto Rico*, 823 F.2d at 580-81 (quotation marks omitted).

Nor is Radar Online correct that an agency should only be permitted to assert an exemption midway through processing or litigation if that exemption was available to it all along. (Br. 26-27). That contradicts the clear statements in the case law, cited above, that changing circumstances and intervening events are proper bases for newly asserting a FOIA exemption. Moreover, in the context of Exemption 7(A)—which “is temporal in nature,” *CREW I*, 746 F.3d at 1097—it would be inconsistent with Congress’s intent to protect against interference with actual ongoing enforcement proceedings to forbid an agency from asserting the exemption simply because that proceeding did not begin until after the FOIA litigation was initiated.⁹ *See*

⁹ Radar Online suggests that if the FBI had processed records at twice the 500-page-per-month rate

August v. FBI, 328 F.3d 697, 699 (D.C. Cir. 2003) (“Given [FOIA’s] drafters’ recognition that the harms of disclosure may in some cases outweigh its benefits, we have avoided adopting a ‘rigid “press it at the threshold, or lose it for all times” approach to agencies’ FOIA exemption claims.’” (quoting *Senate of Puerto Rico*, 823 F.3d at 851 (alterations omitted))).¹⁰

ordered by the district court (and stipulated to by Radar Online), it would have finished before Epstein’s indictment. (Br. 28-29; Dist. Ct. ECF No. 16, 17). But that hypothetical is irrelevant, given that the district court correctly concluded the FBI did not delay or manipulate production of responsive documents in anticipation of the Epstein indictment or obtain that indictment to avoid producing responsive records in this FOIA case. (JA 379).

¹⁰ Radar Online relies on *Shapiro v. DOJ*, 177 F. Supp. 3d 467, 469-71 (D.D.C. 2016), but that case is consistent with the government’s position here. In *Shapiro*, the court held that the agency could not change the exemptions it asserted based on a new FOIA processing policy implemented *after* the court had issued its decision in the matter, when that policy had existed eight months *before* the decision. The court nonetheless allowed the agency to submit briefing on whether the records should be withheld under another exemption relating to national security or the disclosure of sensitive, personal, or private information. *Id.* at 471.

Accordingly, the district court correctly concluded that the FBI's 2019 assertion of Exemption 7(A) was timely.

POINT II

The District Court Correctly Upheld the FBI's Withholding of Materials Protected by Exemption 6 and 7(C)

A. Exemption 6 and 7(C)

Exemption 6 protects from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Exemption 7(C), which is even more protective of privacy interests, exempts from disclosure records or information compiled for law enforcement purposes whose production “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). “When information is claimed to be exempt from disclosure under both provisions, courts focus on Exemption 7(C) because it provides broader privacy protection than Exemption 6 and thus establishes a lower bar for withholding material.” *Citizens for Responsibility & Ethics in Washington v. DOJ* (“*CREW II*”), 854 F.3d 675, 681 (D.C. Cir. 2017) (quotation marks and alteration omitted).

Under Exemption 7(C), “[i]f the agency identifies a privacy interest in the requested documents, ‘disclosure is unwarranted . . . unless the requester can show a sufficient reason for the disclosure.’” *Behar v. United States Dep’t of Homeland Security*, 39 F.4th 81, 91 (2d

Cir. 2022) (quoting *Associated Press v. DoD*, 554 F.3d 274, 288 (2d Cir. 2009)). “To overcome the privacy interest, the requester ‘must show that the public interest sought to be advanced is a significant one,’ with ‘an interest more specific than having the information for its own sake,’ and that ‘the information is likely to advance that interest.’” *Id.* at 91-92 (quoting *Favish*, 541 U.S. at 172). “‘Goals other than opening agency action to public scrutiny are deemed unfit to be accommodated under FOIA when they clash with privacy rights.’” *Id.* at 92 (quoting *Associated Press*, 554 F.3d at 293; alterations omitted).

B. Release of the Withheld Records Could Reasonably Be Expected to Constitute an Unwarranted Invasion of Personal Privacy

As the district court correctly concluded, the information that the FBI withheld under Exemptions 6 and 7(C) directly implicates privacy interests, including the names and identifying information of third parties who were of investigative interest to the FBI; third-party victims; third-party witnesses, including confidential informants; FBI special agents and victim specialists; and local law enforcement and government personnel. (JA 65-73 ¶¶ 69-83, 188-351 (*Vaughn* index), 397-98).

Radar Online does not dispute that these individuals have a strong privacy interest, nor could it. *See, e.g., Perlman v. DOJ*, 312 F.3d 100, 106 (2d Cir. 2002) (witnesses and third parties to a report of investigation “possess strong privacy interests, because being identified as part of a law enforcement investigation could

subject them to embarrassment and harassment”; quotation marks omitted), *vacated on other grounds by* 541 U.S. 970 (2004), *reaff’d on remand*, 380 F.3d 110 (2d Cir. 2004); *Halpern v. FBI*, 181 F.3d 279, 296-97 (2d Cir. 1999) (those once subject to criminal investigation and agents and other government employees have an interest against the disclosure of their identities); *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 894 (D.C. Cir. 1995) (privacy interest extends to witnesses, informants, and others mentioned in investigatory files); *Associated Press*, 554 F.3d at 286-88 (“detainees, both those who have suffered abuse and those who are alleged to have perpetrated abuse, have a measurable privacy interest in the non-disclosure of their names and other identifying information,” and whether detainees would want to voluntarily disclose information publicly is “inapposite to the privacy interest at stake”).

The district court also properly concluded that the privacy interests of individuals identified by Radar Online (Br. 31-37), including alleged co-conspirators and victims, was not diminished (JA 401-04).¹¹ In

¹¹ The district court did not, as Radar Online asserts (Br. 31-32), hold that the privacy interests of private citizens may never be diminished. (JA 401-04). Rather, the district court correctly concluded that an “ordinary citizen’s privacy interest [is not] diminished because his or her name was mentioned in a court filing or because they have made public statements concerning the investigation” and proceeded to correctly explain why potential co-conspirators, victims, and other individuals identified by Radar Online

arguing otherwise (Br. 31-37), Radar Online overlooks the well-established difference between media reporting and official government confirmation of facts. Even if an individual’s name has been associated with Epstein in media reports, the individual still maintains a privacy interest in the government’s not confirming or further publicizing any association. *See, e.g., DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 770-71 (1989) (finding “substantial” privacy interest in rap sheets even though they contain information previously disclosed to public); *Halpern*, 181 F.3d at 296-97 (noting that “[c]onfidentiality interests cannot be waived through prior public disclosure or the passage of time”); *Judicial Watch, Inc. v. National Archives and Records Admin.*, 876 F.3d 346, 349 (D.C. Cir. 2017) (determining “distinct” privacy interest in contents of subject’s investigation files, although existence of investigation into subject was public knowledge); *Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998) (reasoning that subject of investigation’s acknowledgement of the existence of an investigation did not constitute a waiver of the subject’s interest in keeping contents of a report confidential); *Bast v. DOJ*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (finding that “publicity in the popular media cannot viti-ate the FOIA privacy exemption for official information”).¹²

did not have diminished privacy interests here. (JA 402-04).

¹² Nor do privacy interests, like Virginia Giuffre’s, necessarily extinguish at death as Radar Online

Finally, contrary to Radar Online’s contentions (Br. 37-39), the district court properly considered the public’s interest in disclosure (JA 399-400). As the district court correctly observed, “it is [Radar Online’s] ‘burden to “show the information withheld as private under Exemption 7(C) is likely to advance” the public interest.’” (JA 399 (quoting *CREW II*, 854 F.3d at 683, in turn quoting *Favish*, 541 U.S. at 172; alterations omitted)). The district court reasonably recognized “[t]he weighty public interest in ensuring the diligence of the FBI’s investigation concerning Epstein and Maxwell,” but correctly explained that this did not outweigh the substantial privacy interests involved. (JA 399-405); *see, e.g., Associated Press*, 554 F.3d at 288-89 (“‘disclosure of information affecting privacy interests is permissible only if the information reveals something *directly* about the character of a government agency or official’” (quoting *Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991))).

suggests, particularly in light of the sensitive matters at issue here (Br. 36 n.10). *See, e.g., Favish*, 541 U.S. at 165-67 (protecting death-scene photographs relating to an apparent suicide on the basis of the privacy interests of the deceased’s family members); *ACLU v. DOJ*, 750 F.3d 927, 936 (D.C. Cir. 2014) (finding that “[d]eceased defendants never convicted of a crime retain a reputational interest in keeping information concerning their prosecutions out of the public eye”); *Schrecker v. DOJ*, 254 F.3d 162, 166 (D.C. Cir. 2001) (“[O]ne’s own and one’s relations’ interests in privacy ordinarily extend beyond one’s death.”).

POINT III

The District Court Correctly Upheld the FBI's Withholding of Materials Protected by Exemption 7(E)

A. Exemption 7(E)

Exemption 7(E) exempts from disclosure law enforcement records where release “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).

The qualification “such disclosure could reasonably be expected to risk circumvention of the law” “modifies only ‘guidelines’ and not ‘techniques or procedures.’” *Allard K. Lowenstein Int’l Human Rights Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010). Therefore, the FBI is not required to show that the disclosure of information regarding the “techniques and procedures” in question could reasonably be expected to risk circumvention of law a result of disclosure. *Id.* However, a 2016 amendment to FOIA requires that an agency may withhold information only if “the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or if “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A). “The term ‘guidelines’ . . . generally refers in the context of Exemption 7(E) to resource allocation,” while the “phrase ‘techniques and procedures’ . . . refers to how law enforcement officials go about investigating a crime.” *Allard K. Lowenstein*, 626 F.3d at 681.

B. Release of the Withheld Records Would Risk Harm by Disclosing Techniques, Procedures, and Guidelines

As the district court correctly determined, the FBI properly invoked Exemption 7(E) to withhold seven categories of information: (1) collection and analysis of information that would reveal investigative techniques; (2) sensitive file numbers; (3) the dates and types of investigations, such as “preliminary” or “full”; (4) the target, dates, and scope of surveillance; (5) information located within the FBI’s FD-515 forms used to report investigative accomplishments, such as an arrest; (6) database identifiers or printouts; and (7) monetary payments or funding needed for investigative purposes. (JA 79-88 ¶¶ 95-112, 411-13). Although not required to do so, a declaration submitted by the FBI also described in nearly ten pages of detail how release of each category of information could reasonably be expected to create a risk of circumvention of the law. (JA 79-88 ¶¶ 95-112, 411-13).

With respect to the category of monetary payments or funding needed for investigative purposes—the only category Radar Online specifically challenges on appeal (Br. 40-43)—the FBI’s declaration explained that disclosure of certain information relating to how it strategically allocates its limited resources to implement certain investigative techniques “would reveal the FBI’s level of focus on certain types of law enforcement or intelligence gathering efforts and priority given to certain investigative matters.” (JA 87 ¶ 112). This, in turn, would “paint a picture as to where the FBI’s strengths and weaknesses lie within the

spectrum of illegal activities it is mandated to investigate,” and “[r]eleasing this information would give criminals the opportunity to structure their activities in a manner which avoids the FBI’s strengths and exploits its weaknesses,” thereby “enabl[ing] criminals to circumvent the law.” (JA 87-88 ¶ 112).

Radar Online’s sole arguments (Br. 40-43) are that the district court failed to sufficiently consider whether information relating to monetary payments or funding needed for investigative purposes fall under “guidelines” rather than “techniques and procedures,” or failed to sufficiently analyze the sufficiency of foreseeable harm pursuant to § 552(a)(8)(A) with respect to any category. But Radar Online did not contest these matters in district court (and has therefore now forfeited the point), instead incorrectly informing the district court that “[t]he FBI again offers nothing more here than a paraphrase of exemption 7(E) itself.” (Dist. Ct. ECF No. 43 at 21). The district court recognized this and correctly observed that the FBI’s detailed declaration explained how release of information in each category could cause harm by helping criminals circumvent the law. (JA 412-13). Even now, Radar Online fails to explain how the FBI’s explanations were deficient other than to call them generic and criticize them for tracking the language that courts have found to be sufficient.

The FBI’s detailed explanations are more than sufficient under the relevant case law. *See, e.g., Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (noting that “[r]ather than requiring a highly specific burden of showing how the law will be circumvented,

[E]xemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law’” (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009)); *Reporters Committee for Freedom of the Press v. FBI*, 754 F. Supp. 3d 56, 72-73 (D.D.C. 2024) (monetary payments protected under Exemption 7(E)); *Gonzalez v. USCIS*, 475 F. Supp. 3d 334, 351-52 (S.D.N.Y. 2020) (identification codes, law enforcement event numbers, law enforcement case numbers and categories, FBI numbers and URLs for internal law enforcement database web addresses protected under Exemption 7(E)); *Ford v. DOJ*, 208 F. Supp. 3d 237, 253 (D.D.C. 2016) (information related to dates and types of FBI investigations properly exempted); *Levinthal v. FEC*, 219 F. Supp. 3d 1, 8 (D.D.C. 2016) (“information connected to law enforcement databases qualifies for exemption under 7(E)”).

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully submitted,

JAY CLAYTON,
*United States Attorney for the
Southern District of New York,
Attorney for Defendant-Appellee.*

ALLISON M. ROVNER,
BENJAMIN H. TORRANCE,
*Assistant United States Attorneys,
Of Counsel.*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 9,497 words in this brief.

JAY CLAYTON,
*United States Attorney for the
Southern District of New York*

By: ALLISON M. ROVNER,
Assistant United States Attorney