WHOSE LINE IS IT ANYWAY: DIFFERING INTERPRETATIONS OF THE LAW ENFORCEMENT EXCEPTION OF THE FREEDOM OF INFORMATION ACT

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The Freedom of Information Act (FOIA) was enacted to provide the public with access to information on the government's activities. In trying to strike the right balance between national security and civil rights, Congress created several exemptions to FOIA's disclosure requirements. Unfortunately, recent circuit court decisions have threatened to disrupt the careful balance envisioned by Congress. This note examines competing interpretations of FOIA Exemption 7(E) and concludes that compelling precedent exists to support the application of the risk of circumvention standard to techniques or procedures. Arbitrary and broad use of Exemption 7(E), used to withhold law enforcement techniques and procedures entirely,, not only sends a bad message to the public, but could also lead to accountability issues and breed a culture of secrecy and abuse.

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INTRODUCTION

Imagine you are Naji Hamdan, a Lebanese-American living in the United States since 1984, working as a proud small business owner and giving back to the community as a volunteer at the local mosque.[1] Since 1999, Hamdan had been questioned by the FBI several times about potential ties to terrorism and in 2006 Hamdan moved to the United Arab Emirates (UAE) to start a new business.[2] In August 2008, Hamdan was detained by UAE state security without explanation and placed in a secret facility for three months where he was tortured and forced to make false confessions about his involvement with terrorist activities.[3] While in captivity, Hamdan was approached by a man with an American accent and dressed in Western-style clothes who advised Hamdan to cooperate with his interrogators or face punishment.[4] Near the end of his detainment, Hamdan was visited by a U.S. consular official but said nothing about the torture due to the presence of U.A.E. state security and fear of further punishment.[5] Hamdan was finally released from his secret detention in November 2008 after his wife filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Columbia, alleging the U.S. government was complicit in whatever had happened to her husband.[6]

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[1] Hamdan v. DOJ, 797 F.3d 759, 767 (9th Cir. 2015).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

In July 2010, Hamdan filed a Freedom of Information Act (FOIA) request with several federal agencies seeking any information about what he believed to be the United States' role in his detention and torture at the hands of U.A.E. officials.[7] After his FOIA request was denied, Hamdan filed a FOIA administrative appeal and a subsequent judicial appeal contesting the FBI's categorical use of FOIA Exemption 7(E) to withhold fifteen documents relating to his circumstances.[8] This provision exempts from FOIA requests:

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information....(E) 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.[9]

The Ninth Circuit ruled in favor of the government and held that the FBI had no burden to show that disclosure of the records would lead to a danger of future lawbreaking because the documents in question involved law enforcement techniques and procedures, not guidelines.[10] Much of this ruling was based on the absence of a comma preceding the "circumvention of the law" language in Exemption 7(E).[11] By interpreting the punctuation this way, the court concluded Hamdan had no right to access documents that may shed light on the details of his torture and allowed the government to broadly claim withholdings by classifying the documents at issue as involving law enforcement techniques and procedures under Exemption 7(E).[12]

Other decisions like this would surely have a chilling effect on government accountability and confidence in our federal law

[7] *Id.* at 768.
[8] *Id.* at 768, 777.
[9] 5 U.S.C. § 552(b)(7) (2012).
[10] *Hamdan*, 797 F.3d at 778.
[11] *Id.*
[12] *Id.*

enforcement agencies. Hamdan's case, at the very least, should have required proof that a potential threat to future law enforcement activities existed in order to withhold the records relating to his detention by U.A.E. officials. Rather, Hamdan may never know to what extent U.S. officials were complicit in his torture and law enforcement agencies may seize upon this ruling to withhold information wholesale about controversial investigatory techniques and procedures.

Fortunately, not all courts interpret Exemption 7(E) in a way that seems to defeat the spirit and purpose of FOIA. Though the Supreme Court has never ruled on the interpretation of Exemption 7(E), circuit courts have split on the appropriate burden agencies should bear when invoking 7(E).[13] Some, like in *Hamdan*, have held there is no requirement to show how disclosure could reasonably risk circumvention of the law regarding techniques and procedures. Others have attached this standard of harm burden whenever an agency invokes Exemption 7(E). A uniform standard for interpreting Exemption 7(E)'s risk of the circumvention of law standard would be judicially efficient and provide much-needed clarity to federal agencies and requesters in a process fraught with ambiguity. This Comment suggests that applying the risk of circumvention standard to guidelines, as well as techniques or procedures, is the proper method of interpreting Exemption 7(E). This interpretation is consistent with the statute's intent, the purpose of Exemption 7, and the legislative history of FOIA. Additionally, compelling legal precedent exists to support applying the risk of circumvention standard to techniques or procedures.

Part I of this comment traces the history of FOIA and how Exemption 7 came to exist in its current state. Part I also examines what interpretative aspects of the statute are not contested and how competing interpretations of Exemption 7(E) grew to exist. Part II of

[13] *See* Riser v. U.S. Dep't of State, No. 09-3273, 2010 U.S. Dist. LEXIS 112743, at *15 (S.D. Tex. Oct. 22, 2010); Asian Law Caucus v. DHS, No. 08-00842, 2008 WL 5047839, at *3 (N.D. Cal. Nov. 24, 2008).

this comment analyzes the legislative history and case law supporting applying a risk of circumvention standard to guidelines but not techniques and procedures. Part III will rebut the argument advanced in Part II by laying out the more compelling case for applying the risk of circumvention standard to law enforcement techniques or procedures and guidelines.

I. BACKGROUND

A. FOIA Origins and Developments

Since FOIA's inception, disclosure, not secrecy, has been its objective.[14] This fundamental notion was reaffirmed as recently as 2009 when President Obama issued a memorandum regarding FOIA, stating in part, "[t]he presumption of disclosure should be applied to all decisions involving FOIA."[15] Additionally, FOIA's primary purpose has been recognized by the Supreme Court to be a consistent assurance of a properly functioning democratic society full of informed individuals who can hold their government accountable.[16]

Enacted on July 4, 1966, FOIA established the statutory right for any member of the public to request federal agency records subject to a list of specific statutory exemptions.[17] While it may be taken for granted today in light of search engines and the numerous state "sunshine laws," passage of FOIA marked a watershed moment for public access to federal executive branch information. The pre-FOIA method for obtaining federal agency records was the public information section of the Administrative Procedure Act (APA).[18] Unfortunately, the APA's mechanism for disseminating government

[14] Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976).
[15] FREEDOM OF INFO. ACT MEM. FOR THE HEADS OF EXEC. DEPTS. AND AGENCIES, 70 Fed. Reg. 15, 4683 (Jan. 21, 2009).
[16] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).
[17] Bill F. Chamberlin & Martin E. Halstuk, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up to*, 11 COMMLAW CONSPECTUS 511, 512 (2006).
[18] *See* 112 Cong. Rec. H13642 (daily ed. June 20, 1966) (statement of Rep. Moss detailing the historic problems of government information sharing).

information developed a reputation for withholding government records rather than releasing them.[19] Chief among its flaws was the government's all-encompassing ability to withhold information if it was "in the public interest" or for "good cause."[20] This method of government information sharing did little to inspire confidence in government transparency or accountability and it ultimately led to the creation of the Special Government Information Subcommittee[21] in 1955.[22] Following a decade-long study and deliberation across the federal government and third-party stakeholders, FOIA emerged as the solution to a previously pervasive problem.

Notwithstanding the overarching purpose of FOIA, both the Supreme Court and Congress have noted the importance of finding a balance between the public's right to know and a government agency's ability to carry out its mission.[23] This delicate process of striking the right balance takes on added importance when it comes to Exemption 7. On one extreme, the public's inability to serve as a check on law enforcement could lead to systemic corruption and disregard for civil rights. On the other end, revealing too much information about federal law enforcement agencies could allow criminals to easily evade detection, unnecessarily drain law enforcement agencies' resources, and weaken national security.

Of particular import to this Comment, FOIA underwent substantial amendments in 1974 and 1986.[24] The 1974 amendments narrowed the law enforcement exemption scope by changing the text of the language from "investigatory files" to "investigatory records,"

[19] *See* S. Rep. No. 89-813, at 5 (1965).
[20] *See* 112 Cong. Rec. H13642, *supra* note 17.
[21] The Special Government Information Subcommittee was established in 1955 and originally chaired by Rep. John Moss to monitor executive branch secrecy. The subcommittee was tasked with various issues concerning the creation, maintenance, and use of and access to Government information. Available at https://www.archives.gov/files/declassification/pidb/meetings/06-22-07-hofius.pdf
[22] *See* 112 Cong. Rec. H13642, *supra* note 17.
[23] *See* John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted* in 1966 U.S.C.C.A.N. 2418, 2423); 112 Cong. Rec. H13642, *supra* note 17.
[24] DEP'T OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT INTRODUCTION, 7-8 (2013).

and further required that any withholding under Exemption 7 fall within one of the newly specified harms.[25] In particular, the 1974 amendments to FOIA gave birth to Exemption 7(E), which allowed the withholding of investigatory records compiled for law enforcement purposes that would disclose investigative techniques and procedures.[26] The purpose of this amendment was to overturn a series of court cases that had allowed the withholding of records based on the fact that they were placed within an investigatory file.[27]

Subsequently, Congress passed the Freedom of Information Reform Act of 1986, the most comprehensive FOIA reform to date, which provided broader exemption protection for law enforcement information.[28] This change turned 7(E) into two distinct clauses and considerably expanded the breadth of the exemption beyond previous versions of FOIA.[29] As a result, techniques and procedures could be withheld under 7(E) even when not necessarily "investigative" in nature.[30] Additionally, the 1986 amendments added records containing guidelines for law enforcement investigations or prosecutions to the protections afforded under 7(E).[31]

Despite the amendments, statutory ambiguity and convoluted judicial application persist. For example, courts faced with FOIA litigation have failed to delineate between what records they consider to be techniques or procedures and what records they consider guidelines.[32] Notwithstanding this potential source of confusion, the clearest definitional distinction between the two groups of records

[25] Att'y Gen.'s 1974 FOIA Amends. Memorandum., 39 Fed. Reg. 43734 (Dec. 18, 1974).
[26] Pub. L. No. 93-502, 88 Stat. 1561 (1974) (current version at 5 U.S.C. § 552 (2012)).
[27] Att'y Gen.'s 1974 FOIA Amends. Memorandum., 39 Fed. Reg. 43734 (Dec. 18, 1974).
[28] DEP'T OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT INTRODUCTION, 8 (2013).
[29] Dep't of Justice, Att'y Gen.'s 1986 FOIA Amends. Memorandum. (Dec. 1987), https://www.justice.gov/archive/oip/86agmemo.htm#7%28E%29.
[30] *Id.*
[31] *Id.*
[32] *See* McCann v. HHS, 828 F. Supp. 2d 317, 324-25 (D.D.C. 2011); Holt v. DOJ, 734 F. Supp. 2d 28, 47 (D.D.C. 2010); DEP'T OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT Exemption 7, 3 (2014).

comes from the Second Circuit. As described by that court, the term "guidelines" means an indication or outline of future policy or conduct, and in this context generally refers to law enforcement resource allocation.[33] Whereas the phrase "techniques and procedures" describes the technical methods of accomplishing the desired aim and a particular way of going about accomplishing something.[34] In the context of Exemption 7(E), "techniques and procedures" would refer to how law enforcement officials go about investigating a crime.[35] Further, the phrase "could reasonably be expected to risk circumvention of the law" has been understood to mean agencies are not required to prove that a future circumvention is the necessary result of the disclosure, only that disclosure *could risk* a circumvention harm.[36] While a seemingly low threshold to meet, it remains an important bulwark against blanket agency withholding assertions.

B. The Current Process

FOIA requesters dissatisfied with the outcome of their requests may appeal at the administrative level; if they are still unhappy after the appeal, they may seek judicial relief (usually in the District of Columbia, which has universal jurisdiction).[37] In applying Exemption 7(E), courts must first decide whether the record in question meets the threshold test of Exemption 7 as a whole. To qualify under Exemption 7 generally, records or information must be compiled for a law enforcement purpose and meet this threshold before an agency may invoke one of its subparts.[38] The phrase "law enforcement purposes" is rather broad, and courts have been willing to grant agencies substantial discretion in labeling records and

[33] Allard K. Lowenstein Int'l Human Rights Project v. DHS, 626 F.3d 678, 682 (2d Cir. 2010).
[34] *Id.* (citing Webster's Third New International Dictionary (1986)).
[35] *Id.*
[36] *See* Mayer Brown LLP v. IRS, 562 F.3d 1190, 1192-93 (D.C. Cir. 2009).
[37] 5 U.S.C. § 552(a)(4)(B) (2012); 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa) (2012).
[38] DEP'T OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT Exemption 7, 5 (2014), https://www/justice.gov/oip/foia-guide/exemption_7/download; Schoenman v. FBI, 575 F. Supp. 2d 136, 162 (D.D.C. 2008).

information.[39] To determine whether agencies have met the initial threshold of Exemption 7, courts apply a two-part rational nexus test, asking:

> (1) whether the agency's investigatory activities that give rise to the documents sought are related to the enforcement of federal laws or to the maintenance of national security; and (2) whether the nexus between the investigation and one of the agency's law enforcement duties is based on information sufficient to support at least a colorable claim of rationality.[40]

Thus, while this rational nexus test is not a particularly difficult hurdle for agencies to clear, it remains an important part of a court's analysis when dealing with Exemption 7 withholdings. Upon satisfying this initial threshold, one of Exemption 7's subparts may be applied if an agency seeks to withhold certain records or information. Exemption 7 has six subparts, but this Comment addresses only 7(E).

In applying Exemption 7(E), courts widely agree that it only applies to techniques, procedures, and guidelines, or the circumstances of their use not already well-known to the public.[41] Beyond this general agreement, some courts muddy the waters by failing to distinguish between techniques and procedures or guidelines when going through the analysis stage of determining a proper withholding.[42] Courts would be best served by adopting a clear interpretative standard when applying Exemption 7(E), such that agencies and requesters alike can be on the same page for the sake of judicial economy and government efficiency.

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[39] DEP'T OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT Exemption 7, 6-13 (2014), https://www.justice.gov/oip/foia-guide/exemption_7/download.

[40] *Id.* at 20 n.47.

[41] *See* Rosenfeld v. DOJ, 57 F.3d 803, 815 (9th Cir. 1995); Billington v. DOJ, 69 F. Supp. 2d 128, 140 (D.D.C. 1999); Pub. Emps. for Envtl. Responsibility v. EPA, 978 F. Supp. 955, 963 (D. Colo. 1997); *Campbell v. DOJ*, No. 89-3016, 1996 WL 554511, at *10 (D.D.C. Sept. 19, 1996).

[42] *See* Elec. Frontier Found. v. DOD, No. 09-05640, 2012 WL 4364532, at *3 (N.D. Cal. Sept. 24, 2012); McCann, 828 F. Supp. 2d at 324-25; Holt v. DOJ, 734 F. Supp. 2d 28, 47 (D.D.C. 2010).

II. APPLYING THE CIRCUMVENTION OF LAW STANDARD TO GUIDELINES

At the most basic level, a casual reading of Exemption 7(E) would leave one with the impression that techniques and procedures may be categorically withheld from a FOIA requester. The construction of 7(E) renders a plain meaning in which agencies are only required to show a risk of circumvention of the law when withholding law enforcement guidelines. Support for this interpretation can be found through traditional methods of statutory interpretation and from the legislative and administrative history of FOIA and precedent from the Ninth and Second Circuits and the District Court for D.C. While the general spirit of FOIA is a preference for open government, the language of 7(E) tempers this expectation by allowing agencies to exercise an appropriate level of discretion when matters sensitive to law enforcement are at stake. Ultimately, Exemption 7(E) is the result of a careful balancing test worked out by both Congress and the courts to allow an informed citizenry to keep tabs on its government while simultaneously allowing federal agencies to maximize their effectiveness in enforcing and upholding the law.

A. Statutory Interpretation & Legislative History

Applying a textualist approach, the updated language and use of punctuation in the 1986 FOIA amendments serve to apply the risk of circumvention standard only to law enforcement guidelines. When a statute is clear on its face and not subject to ambiguity, it should be interpreted according to its plain meaning.[43] Under the punctuation rule of statutory interpretation, Congress is presumed to follow accepted punctuation standards such that the placement of a comma (or lack thereof) is assumed to be meaningful.[44] In this instance, the placement of a comma following the language regarding techniques

[43] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

[44] *See generally* United States v. Ron Pair Ent., 489 U.S. 235, 241-42 (1989); Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 357-58 (2010).

and procedures and preceding the language regarding guidelines appears to create two disjunctive, independent phrases.

This interpretation based on punctuation was the one adopted by the Department of Justice following the passage of the 1986 FOIA.[45] Then-Attorney General Meese disseminated an explanatory memo, specifically noting that the FOIA Reform Act significantly modified Exemption 7 and expanded the breadth of 7(E) by creating two distinct protective clauses.[46] Meese stressed that agencies should be "aware of the distinct protections now provided in Exemption 7(E)'s two clauses."[47] He further stated that techniques and procedures are entitled to categorical protection under Exemption 7(E) due to the clauses' disjunctive phrasing.[48] The Ninth Circuit also adopted this type of textual analysis in 2015, holding that since there is no comma before the risk of circumvention clause, and because the text creates two distinct categories of records, the risk of circumvention standard does not apply to techniques and procedures.[49]

In addition to using a disjunctive comma, the use of "or" seems to add further credence to the argument in favor of viewing Exemption 7(E) as creating two distinct categories of records. Under a plain meaning approach, one would naturally assume the use of the word "or" implies that whatever language follows will apply in the alternative.[50] Thus by placing "or" in such a critical position, and if we are to assume each word Congress included in the statute has forceful meaning, two separate clauses with separate standards seem evident.[51] The lack of a comma before the risk of circumvention clause seems to give the use of "or" added weight by linguistically anchoring the harm standard to guidelines alone. Since 1986, Congress has substantively amended FOIA four times; in each of these amendments, Exemption 7(E)'s text remained the same. Thus, the argument is: if Congress had

[45] U.S. DEP'T OF JUSTICE, ATT'Y GEN.'S 1986 FOIA AMENDS. MEMORANDUM (1987).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Hamdan v. DOJ, 797 F.3d 759, 778 (9th Cir. 2015).
[50] *See* Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239, 2244-45 (1994).
[51] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012).

intended the risk of circumvention standard to apply to all of 7(E), it had several opportunities to make the necessary change and chose not to.

However, when reading Exemption 7(E), even an ardent textualist like the late Justice Antonin Scalia may have trouble interpreting the text to exclude law enforcement techniques and procedures from the risk of circumvention standard. Such a reading would violate the canon of avoiding absurdity. Even Justice Scalia recognized that the text cannot always control in the face of a ridiculous or absurd result.[52] In this case, the absurd result would be to place a higher burden on agencies when seeking to exempt law enforcement guidelines, but not techniques and procedures. Such arbitrary classification would lead to law enforcement agencies labeling as much as possible as "techniques and procedures" to avoid being required to show that release of a specific guideline could risk future circumvention of the law. In the same vein, interpreting Exemption 7(E) in such a rigid grammatical fashion would violate the foundational Golden Rule of statutory interpretation.[53] It would seem manifestly absurd, not to mention out of step with the entire purpose of FOIA, to allow a scrivener's error to give agencies the chance to broadly assert 7(E) protection for law enforcement techniques and procedures without explaining the need for the withholding.

Additionally, the legislative history demonstrates strong support beyond the statute's text for interpreting 7(E) to protect techniques and procedures categorically. To accurately understand the purpose and intent of the FOIA amendments of 1986, specifically the changes to Exemption 7(E), a look at the 1983 legislative history is essential. One of the key legislators responsible for crafting the FOIA Reform Act, Senator Patrick Leahy, noted during his explanation of the bill that the proposed changes were meant to have the same meaning and effect as the language in a previous attempt at amending FOIA in 1983.[54] The Judiciary Committee (of which Leahy was a

[52] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-29 (1989).
[53] J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 299 (1936) (describing how the golden rule was created in reaction to strict literalism that would not have allowed exception even for absurdity).
[54] 132 CONG. REC. S14,296 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

member, as was Orrin Hatch, the eventual sponsor of the 1986 bill) issued a report concerning the precursor to the 1986 amendments and interpreted the new language of Exemption 7(E) very broadly.[55] Specifically, the Committee Report noted that the proposed language was intended to exempt techniques and procedures, regardless of whether they were investigative or non-investigative.[56] The only restriction the report put on withholding techniques and procedures was that they could not be routine or already well-known to the public.[57]

As further evidence, the structure of the Committee Report placed discussion of techniques and procedures separately from guidelines. If Congress had intended both clauses to be subject to the risk of circumvention standard, Congress would have included techniques and procedures in its discussion of the harm standard. Instead, the report merely restated the proposed statute's language and explained that the addition of guidelines within the protection of 7(E) was meant to overrule a D.C. Circuit Court decision denying protection for prosecutorial guidelines.[58] In treating the two clauses as separate, the only logical conclusion is that the drafters of Exemption 7(E) intended the two categories of records to have different standards of harm for withholdings.

At the time of passage in 1986, the bill's sponsor, Senator Hatch, made it clear that the changes intentionally broadened the scope of Exemption 7(E) and explained how the protections could be used.[59] Hatch described the changes to Exemption 7 as intended to "greatly enhance the ability of all Federal law enforcement agencies to withhold additional information necessary for them to maximize the effectiveness with which they perform their critical functions."[60] As both the primary sponsor of this bill and the chairman of the subcommittee responsible for considering FOIA legislation over the past few years, Senator Hatch's words should carry substantial weight.

[55] S. REP. NO. 98-221, at 24-25 (1983) (Conf. Rep.).
[56] *Id.* at 24.
[57] *Id.* at 25.
[58] *Id.*
[59] 132 CONG. REC. S16504-05 (1986) (statement of Sen. Hatch).
[60] *Id.*

Hatch recognized, while the overall goal of FOIA is to release information, that is not always possible when the needs of law enforcement outweigh the public's interest. Both Senator Hatch and Senator Leahy noticed that the legislation at hand was identical to a previous version from 1983.[61]

In discussing the text of 7(E), Senator Hatch explained the changes were meant to allow agencies to withhold all guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law.[62] It is telling that Hatch made no mention of techniques and procedures when explaining the risk of circumvention requirement. After this detailed explanation of how the new language regarding guidelines served to overrule a recent D.C. Circuit Court decision, Senator Hatch referred to the "additional law enforcement provisions of the bill."[63] This is likely a reference to techniques and procedures under 7(E) as Hatch went on to state these provisions must logically operate as exclusions rather than merely exemptions.[64] Assuming Senator Hatch, at least in part, referred to the previously unmentioned techniques and procedures clause of 7(E), it would add further evidence to the argument that they are categorically protected as a result of the 1986 amendments.

B. Case Law

The Second and Ninth Circuits have interpreted Exemption 7(E) as two separate clauses with the risk of circumvention standard only applying to guidelines.[65] In *Lowenstein Human Rights Project v. DHS*, the court began its Exemption 7(E) analysis by looking to the statute's plain meaning, which it found clear and unambiguous.[66] Using similar tools of statutory analysis previously discussed, the Second Circuit noted that the sentence structure of Exemption 7(E)

[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *See id.*
[65] *See* Hamdan v. DOJ, 797 F.3d 759, 778 (9th Cir. 2015); Allard K. Lowenstein Int'l Human Rights Project v. DHS, 626 F.3d at 678, 681 (2d Cir. 2010).
[66] Lowenstein v. DHS, 626 F.3d at 681.

indicates the qualifying phrase containing the risk of circumvention standard only modifies guidelines.[67] The court explained that since "the two alternative clauses that make up Exemption 7(E) are separated by a comma, whereas the modifying condition at the end of the second clause is not separated from its reference by anything at all."[68] Using the rule of the last antecedent, the Second Circuit held the language in the statute would naturally be read such that the qualifying phrase modifies only the immediately antecedent phrase and not the more remote phrase containing the techniques and procedures language.[69] Looking at the history of amendments to FOIA, the court further concluded there could be no doubt that Exemption 7(E) provides a categorical exemption to techniques and procedures.[70] The fact that the modifying language was not originally part of the techniques and procedures clause reinforced the court's belief that the modifying language only attaches to the language it was created along with.[71]

Five years later, the Ninth Circuit applied the Second Circuit's analysis, quoting *Lowenstein* at length to reach a similar interpretation of Exemption 7(E).[72] In *Hamdan v. DOJ*, the Ninth Circuit rebutted the plaintiff's argument that an agency must show that disclosure would lead to future law-breaking, suggesting this logic was based on a flawed reading of the statute.[73]

Similarly, a string of cases in the D.C. District Court has interpreted the protections available for law enforcement techniques and procedures under Exemption 7(E) broadly.[74] In 2012, relying on its own precedent, the court concluded the first clause of Exemption

[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Lowenstein v. DHS, 626 F.3d at 681.
[72] Hamdan v. DOJ, 797 F.3d 759, 778 (2015).
[73] *Id.*
[74] *See* Pub. Emps. For Envtl. Responsibility v. U.S. Section Int'l Boundary & Water Comm'n., 839 F. Supp. 2d 304, 327 (D.D.C. 2012), *rev'd on other grounds* 740 F.3d 195 (D.C. Cir. 2014); McRae v. DOJ, 869 F. Supp. 2d 151, 169 (D.D.C. 2012); Keys v. DHS, 510 F. Supp. 2d 121, 129 (D.D.C. 2007).

7(E) affords categorical protection for techniques and procedures.[75] Explaining the presence of two different clauses within Exemption 7(E), the court stated the exemption's second clause serves to "separately protect" guidelines for law enforcement investigations or prosecutions.[76] A few months later, the court reached a similar holding by ruling an agency had no burden to show a risk of circumvention of the law when invoking Exemption 7(E) to withhold techniques and procedures.[77]

The D.C. District Court has a history of interpreting Exemption 7(E) broadly, thus creating a line of precedent that requires careful consideration.[78] In *Judicial Watch v. Dep't of Commerce*, the court explained that agencies may justify the application of Exemption 7(E) by describing the general nature of techniques and procedures, rather than explaining the full details to show how its disclosure might benefit future lawbreakers.[79] In *Keys v. DHS*, the court again relied on its precedent to reemphasize that, since Exemption 7(E) provides categorical protection to techniques and procedures, there is no requirement to demonstrate potential harm or balance the interests of the public with those of the law enforcement agency.[80] *Keys* broadened Exemption 7(E) even more by noting that even techniques and procedures well-known to the public may be withheld when their disclosure could reduce or nullify their effectiveness.[81]

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[75] Pub. Emps. For Envtl. Responsibility, 839 F. Supp. at, 327 (D.D.C. 2012) (quoting Showing Animals Respect & Kindness v. U.S. Dep't of Interior, 730 F. Supp. 2d 180, 199-200 (D.D.C. 2010)).
[76] *Id.*
[77] McRae, 869 F. Supp. 2d at 169 (D.D.C. 2012).
[78] *See* Keys, 510 F. Supp. 2d 121 (D.D.C. 2007); Peter S. Herrick's Customs & Int'l Trade Newsletter v. Customs and Border Prot., No. 1:04-cv-00377, 2006 WL 1826185 (D.D.C. June 30, 2006); Judicial Watch, Inc. v. Dep't of Commerce, 337 F. Supp. 2d 146 (D.D.C. 2004); Smith v. ATF, 977 F. Supp. 496, 501 (D.D.C. 1997).
[79] Judicial Watch, Inc. v. Dep't of Commerce, 337 F. Supp. 2d 146, 182 (D.D.C. 2004).
[80] Keys, 510 F. Supp. 2d at 130 (D.D.C. 2007) (quoting Peter S. Herrick's Customs & Int'l Trade Newsletter v. Customs and Border Prot., No. 1:04-cv-00377, 2006 WL 1826185, at *7 (D.D.C. June 30, 2006)).
[81] Keys, 510 F. Supp. 2d at 130 (D.D.C. 2007).

III. APPLYING THE CIRCUMVENTION OF LAW STANDARD TO TECHNIQUES/PROCEDURES & GUIDELINES

Applying the risk of circumvention standard solely to guidelines is clearly a minority view among the circuit courts. This interpretation relies heavily on an unworkable and highly formalistic approach to the natural meaning of Exemption 7(E). Since the 1986 FOIA amendments, six circuit courts have held that Exemption 7(E) requires agencies to demonstrate a risk of circumvention of harm when dealing with techniques or procedures.[82] Exemption 7(E)'s legislative history cannot be viewed in a vacuum and must be examined in light of the intent regarding both Exemption 7 and FOIA as a whole. In this manner, it seems clear that a broad, categorical exemption for law enforcement techniques and procedures was never intended to be part of Exemption 7(E).

A. Case Law

As the universal forum for FOIA litigation, other circuit courts across the country have recognized the D.C. Circuit's rulings as persuasive and often defer to its expertise when handling FOIA cases of their own.[83] Even the Second Circuit, a proponent of the minority 7(E) interpretation, has deferred to the D.C. Circuit's interpretation of FOIA Exemption 5 and referred to the D.C. Circuit's FOIA interpretations as that of a "specialist." [84]

The most influential court when it comes to interpreting FOIA spoke with a clear voice in 2011, ruling that agencies

[82] *See* Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011); Catledge v. Mueller, 323 F. App'x 464, 466-67 (7th Cir. 2009); Davin v. DOJ, 60 F.3d 1043, 1064 (3d Cir. 1995); Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994); Benavides v. U.S. Marshals Serv., No. 92-5622 1993 WL 117797, at *5 (5th Cir. 1993) (per curiam*);* Hale v. DOJ, 973 F.2d 894, 902-03 (10th Cir. 1992), *vacated on other grounds*, 2 F.3d 1055 (10th Cir. 1993).
[83] 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa) (2012); Gaylor v. DOJ, No. 05-CV-414, 2006 WL 1644681, at *1 (D.N.H. June 14, 2006) (noting the District Court for District of Columbia's special expertise in FOIA manners); Matlack, Inc. v. EPA, 868 F. Supp. 627, 630 (D. Del. 1994) (describing the Court of Appeals for the District of Columbia as the leading edge for interpreting the parameters of how a federal agency may withhold under the FOIA).
[84] *See* Brennan Center for Justice v. DOJ, 697 F.3d 184, 200 (2012).

withholding law enforcement techniques or procedures under Exemption 7(E) must show a risk of circumvention of the law.[85] In *Blackwell*, the FBI invoked 7(E) to withhold forensic examinations of computers and data collection techniques and analysis in agency investigations.[86] In its analysis, the D.C. Circuit explained that justifying a withholding under 7(E) as a risk of circumvention of the law is a "relatively low bar."[87] Thus, agencies need not meet a highly specific burden to justify withholding records regarding techniques or procedures, but they must logically demonstrate how the release of the information might create a risk of circumvention of the law.[88]

Blackwell is far from the only D.C. Circuit decision supporting this position; in 2009, the court similarly applied the risk of circumvention standard to the entirety of Exemption 7(E).[89] In *Mayer Brown LLP v. IRS*, the court held that the risk of circumvention standard, while broad, most certainly applies to the entirety of Exemption 7(E).[90] In this case, the court required the IRS to show there was a risk that future criminals could use the requested information to more successfully engage in illegal tax shelter schemes.[91]

This interpretation of 7(E) has been applied in the national security context as well, making it applicable in all instances where an agency asserts Exemption 7(E) to justify applicable withholdings.[92] In *Barnard v. DHS*, the court interpreted the risk of circumvention standard to apply to law enforcement techniques and procedures, requiring DHS to state the risk in order to meet its burden to exempt

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[85] *Id.*
[86] *Blackwell*, 646 F.3d at 42.
[87] *Id.*
[88] *Id.*
[89] *See generally* Mayer Brown LLP v. IRS, 562 F.3d 1190, 1192-93 (D.C. Cir. 2009).
[90] *Id.*
[91] *Id.* at 1193-94.
[92] *See* Barnard v. DHS, 598 F. Supp. 2d 1, 22 (D.D.C. 2009) (protecting procedures including instructions for processing international travelers); Voinche v. FBI, 940 F. Supp. 323, 332 (D.D.C. 1996) (approving nondisclosure of information relating to security procedures for Supreme Court Justices"); Ctr. for Nat'l Sec. Studies v. INS, No. 87-2068, 1990 WL 236133, at *5-6 (D.D.C. Dec. 19, 1990) (according Exemption 7(E) protection to final contingency plan in event of attack on United States and to guidelines for response to terrorist attacks).

the information at issue properly .[93] In its explanation, DHS stated it had used certain law enforcement techniques involving specific forms of collaboration with other agencies that, if exposed, would give future potential suspects the ability to anticipate these techniques being used on them and frustrate their usefulness.[94] While the D.C. District Court has in the past, as noted above, ruled in favor of broadly exempting law enforcement techniques and procedures, the precedential value of the D.C. Circuit is far stronger and should be looked to as a guide for circuits yet to conclusively rule on the interpretation of Exemption 7(E).

The more open and proactive interpretation of Exemption 7(E) reaches well beyond the D.C. Circuit, receiving support from a majority of the circuits across the country. In 2009, the Seventh Circuit interpreted Exemption 7(E)'s risk of circumvention standard so as to apply to law enforcement techniques.[95] In *Catledge*, the FBI sought to withhold certain National Security Letters from the requester, explaining that releasing redacted portions of the letters would detail the specific circumstances under which the FBI used this law enforcement technique.[96] The release of this information could allow terrorists to see who is currently under investigation by the FBI and teach them how to evade future investigations.[97]

When viewed in this more flexible light, it is clear that applying a risk of circumvention standard to all records falling under Exemption 7(E) is not unduly burdensome for law enforcement agencies and still provides necessary deference to agencies. This method of interpretation both respects the rights of requesters by denying agencies the ability to categorically assert Exemption 7(E) and protects critical law enforcement information. It is especially telling that the requester in *Blackwell* was not appealing the lack of an FBI explanation regarding the risk of future lawbreaking, but rather its sufficiency.[98] In *Blackwell*, the FBI recognized it sought to withhold a

[93] *Barnard*, 598 F. Supp. 2d at 22-23.
[94] *Id.* at 22.
[95] Catledge v. Mueller, 323 F. App'x 464, 466-67 (7th Cir. 2009).
[96] *Id* at 467.
[97] *Id.*
[98] *See Blackwell*, 646 F.3d at 37.

law enforcement technique, yet still proactively provided the requester with an explanation of how releasing the requested records in full could risk circumvention of the law.[99] If any group has an incentive to push for categorical exemption of techniques or procedures under Exemption 7(E), it is most certainly federal law enforcement agencies. Yet, in recognizing the proper and accurate interpretation of Exemption 7(E), the FBI complied with its statutory duty.

By relying on rigid grammar canons to reach its decision, the Second Circuit in *Lowenstein* failed to do FOIA justice.[100] Further, its scant reliance on mandatory authority shows the weakness of its holding from a stare decisis standpoint; instead, much of the opinion's rationale is devoted to a textual argument disconnected from the entire point of FOIA.[101] Similarly, the Ninth Circuit's decision in *Hamdan* was based entirely on the persuasive authority of *Lowenstein* and fails to articulate additional independent justification to improve the line of cases in support of this minority position.[102] In considering the merits of both sides, not only has applying a risk of circumvention standard emerged as the more popular view among the circuits, but it also finds ample support in the purpose of the statute, its legislative history, and encourages a more natural reading of the text.

B. Interpreting Legislative & Statutory History

In light of FOIA's purpose – to promote an open and responsible government – it would seem unlikely that the bill's drafters ever intended such an expansive view of 7(E) to take hold. In fact, in the legislative history from the 1974 FOIA amendments, the Joint Committee Report explicitly stated its disapproval and rejection of courts expanding the scope of Exemption 7.[103] This clear expression of intent and purpose came despite the language of Exemption 7(E)

[99] *Id* at 42.
[100] *Lowenstein*, 626 F.3d at 681-82.
[101] *See generally Lowenstein*, 626 F.3d at 678.
[102] *Hamdan*, 797 F.3d at 778.
[103] *See* H.R. REP. NO. 93-1380 (1974) (Conf. Rep.), *reprinted in* Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book at 229 (1975).

being considerably vaguer than the current language existing today.[104] Thus, even when the language was less clear, it was still the sense and intent of Congress in 1974 to craft a statute that did not vest law enforcement agencies with the ability to withhold records categorically . It follows then that the 1986 amendments can hardly be read as creating any broad, categorical Exemption 7(E).

The primary driver behind amending the language of Exemption 7(E) in 1986 was the congressionally unexpected ruling of *Jordan v. DOJ*. In *Jordan*, the D.C. Circuit rejected the government's argument that law enforcement guidelines could be withheld under Exemptions 2, 5, or 7.[105] The D.C. Circuit went so far as to reject the risk of circumvention standard with regard to Exemption 2.[106] This ruling pushed Congress to place the statutory language within Exemption 7(E), thus ensuring that, going forward, law enforcement guidelines would be covered under FOIA.[107] From this view, it is clear that the additional language was not meant to create a categorical exemption for law enforcement techniques and procedures, but rather to overrule *Jordan* and include law enforcement guidelines within the protection of Exemption 7(E)[108]. As previously noted, the language and meaning of the 1986 FOIA amendments were nearly identical to 1983 reform efforts.[109] The Senate Judiciary Committee Report, in discussing changes to Exemption 7(E), declared it was designed to force courts and agencies to reflect on the dangers of "secret law."[110] Furthermore, the Committee noted that its understanding and interpretation of Exemption 7(E) was guided by the Supreme Court's

[104] 5 U.S.C. § 552(b)(7)(E) (1976) (current version at 5 U.S.C. § 552 (2020) ("investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . disclose investigative techniques and procedures…").
[105] Jordan v. DOJ, 591 F.2d 753 (D.C. Cir. 1978) (en banc).
[106] *Id.*
[107] 132 CONG. REC. 31,42 (1986) (statement of Sen. Hatch).
[108] *Id.*
[109] 132 CONG. REC. 27,189 (1986) (statement of Sen. Leahy).
[110] S. REP. NO. 98-221, at 25 (1983) (Conf. Rep.).

recent adoption of a "circumvention of the law" standard for Exemption 2.[111]

In touting the successes of FOIA to bring about a more transparent government, the Senate Judiciary Committee highlighted the concerns of a study by the Attorney General, finding that lawbreakers used FOIA to learn information about law enforcement and to evade investigations.[112] Clearly, both the executive and legislative branches during this amendment process were worried about releasing law enforcement records to the extent they risked future circumvention of the law. These conclusions made by the Attorney General give no room to conclude Exemption 7(E) – as a result of the 1986 FOIA amendments – was intended to allow agencies to withhold records containing law enforcement techniques or procedures categorically.

More generally, the legislative history of the 1986 FOIA amendments, and legislative statements since, have always declared FOIA operates in favor of openness and against blanket withholdings. The Senate Judiciary Committee Report included such purpose-based declarations as, "no one questions the obvious virtues of an open government," and declared the goal of the FOIA to be "a more informed citizenry and a responsible and effective government."[113] When comparing the two interpretations for Exemption 7(E), it is abundantly clear which aligns with the stated goal of the legislation and which serves to directly undermine it. In the background and purpose section of the most recent update to FOIA, the FOIA Improvement Act of 2016, Congress declared that FOIA – regardless of politics – should be approached with a presumption of openness.[114] The bill codified President Obama's 2009 policy, which mandated that agencies may only withhold information if they reasonably foresee specific identifiable harm to an interest protected by an exemption or prohibited by law.[115] This shows the extreme disapproval with which

[111] *Id.*
[112] *Id* at 2.
[113] *Id.*
[114] S. REP. NO. 114-4, at 6 (2016).
[115] *Id* at 9.

Congress views categorical and general withholdings not grounded in some sort of standard of harm.

When it comes to opposing interpretations of a statute, each side can pick and choose legislative history to support its position. The legislative history regarding FOIA has been generously referred to as having "conflicting intent," and it is likely for the best not to rely exclusively on this history to determine the proper interpretation.[116] Discussions and explanations of the 1986 FOIA amendments go clause-by-clause and never explicitly state that the risk of circumvention standard applies to techniques or procedures, but they also never explicitly say it does not.

Traditional methods of statutory interpretation would start by looking at the plain meaning of the text before resorting to the legislative history, but the text can feasibly bend to both sides of this argument. From a rigid grammatical perspective, it would appear the risk of circumvention standard applies only to law enforcement guidelines. Yet, a more natural reading of the statutory language gives the impression that it would be rather strange to apply the standard to only half of a subsection. Looking to the other subsections of Exemption 7, each uses a similar "could reasonably be expected" standard (except for 7(B) which involves deprivation of a fair trial).[117] When looking at Exemption 7 as a whole, it seems absurd that law enforcement techniques and procedures would not be subject to a similar reasonable expectation like in the other subparts. Further still, it would be especially odd if the strongest argument for excluding techniques or procedures from this standard is the lack of a comma. A single missing grammatical modifier in a 1986 statute spanning hundreds of pages is hardly a persuasive reason to afford law enforcement agencies such categorical ability to withhold records, especially when the risk burden is a "low bar."[118]

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[116] Charles N. Davis & Daxton R. Stewart, *Bringing Back Full Disclosure: A Call For Dismantling FOIA* 21 COMMLAW CONSPECTUS 515, 527 (referring to interpreting any of the FOIA exemptions generally).
[117] 5 U.S.C. § 552(b)(7) (2012).
[118] *Blackwell*, 646 F.3d at 42.

Considering all of the textual ambiguity and the absurd result created by following strict grammar rules, Exemption 7(E) may be best served via a purposive approach. Previously cited legislative history makes it abundantly clear that FOIA was originally passed to make the government more accountable – not less. A purposive approach would serve to align the intent of the drafters (open government) with an interpretation favoring the application of the risk of circumvention standard to guidelines as well as techniques and procedures.

A critical point to underscore is the distinction between the two methods of interpreting Exemption 7(E). Applying the risk of circumvention standard to guidelines as well as techniques and procedures is, in reality, only a slight change and would do little to increase the burden of proof for agencies to withhold information. Yet, this slight change would serve to further FOIA's goal: making the government more accountable to its citizens. Broadly exempting entire categories of information without the slightest explanation seems not only counterintuitive to the FOIA process, but also plainly wrong. The government's default position should not be, and is not, to withhold information. Promoting a culture of openness and encouraging frank discussion with the public would be a powerful step toward cultivating a more positive image of a government working for and with the people, rather than against society.

CONCLUSION

When compared side by side, it is indisputable that one interpretation of Exemption 7(E) is vastly superior and more consistent with the statute's purpose, intent, and history. Applying the risk of circumvention standard to guidelines as well as techniques and procedures properly balances traditional deference to the needs of law enforcement with fundamental democratic principles of transparency and open government. Arbitrary and broad use of Exemption 7(E), used to withhold law enforcement techniques and procedures categorically, not only sends a bad message to the public, but could also lead to accountability issues and breed a culture of secrecy and abuse. Relying on a minor grammar issue, proponents of applying the risk of circumvention standard solely to law enforcement guidelines seem content to ignore the obviously absurd result created. A court

distinguishing between whether something is a law enforcement guideline, or a technique or procedure, should not then dictate an agency's burden of proof. Each of these groups should be evaluated at the same threshold to promote an efficient and fair FOIA process. Looking to the future, it is clear the most definitive solution would be a legislative fix. The lack of any current push to revise FOIA makes this solution unlikely, and so it may be left to the courts to correct past mistakes. Because the Supreme Court is unlikely ever to take up what should be an easy legislative fix, it falls on the shoulders of the minority view circuit courts to recognize the proper statutory interpretation and join the majority of circuits already applying the proper approach.