**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| ELECTRONIC PRIVACY INFORMATION CENTER<br><br>Appellant<br><br>v.<br><br>UNITED STATES CUSTOMS AND BORDER PROTECTION,<br><br>Appellee. | ) | Case No. 17-5078 |

**RESPONSE TO MOTION FOR SUMMARY AFFIRMANCE**

This Court has never held that Exemption 7(E) of the Freedom of Information Act ("FOIA") includes records that were not "compiled in connection with criminal investigations," Mem. Op. 6, Mar. 24, 2017, ECF No. 42 [hereinafter Second Opinion] (emphasis in original). Nor has this Court held that the "risk of circumvention" in 7(E) includes risks unrelated to disclosure of the underlying "techniques and procedures." Second Opinion 7. Both holdings are matters of first impression for this Court.

The D.C. Cir. Handbook makes clear this is not an appropriate case for summary affirmance.

> Summary affirmance is appropriate where the merits are so clear as to justify summary action. *See Cascade Broadcasting Group, Ltd. V. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per

> curiam); *Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Summary reversal is rarely granted and is appropriate only where the merits are "so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision." *Sills v. Federal Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985). Parties should avoid requesting summary disposition of issues of first impression for the Court.

*D.C. Circuit Handbook of Practice and Internal Procedures* 36 (2017).

As this Court has recent held, summary affirmance will be denied where the "merits of the parties positions are not so clear as to warrant summary action. *Prisology v. Fed. Bureau of Prisons*, No. 15-5003 (D.C. Cir. May 22, 2015) (per curiam) (citing *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987)).

## ARGUMENT

This case arises from EPIC's request for records about the CBP system Analytical Framework for Intelligence ("AFI"). Mem. Op. 2, Feb. 17, 2016, ECF No. 28 [hereinafter First Opinion]. AFI is a data mining and analysis tool that combines "information from commercial data aggregators" with other data gathered by CBP. Pl's Combined Opp'n to Def's Mot. Summ. J. and Cross-mot. Summ. J. 2, ECF No. 21-1 [hereinafter EPIC CMSJ]. CBP uses AFI for the "processing of international travelers," including U.S. travelers, and screening of those travelers at the border. Decl. of Sabrina Burroughs ¶ 34, ECF No. 18-1; Appellee's Mot. 3–4. That

includes so-called "risk assessments" of individuals made by the Department of Homeland Security's "Automated Targeting System." EPIC CMSJ 2–3. DHS exempted these risk assessments from the "notification, access, amendment, and certain accounting procedures of the Privacy Act." EPIC CMSJ 3. There is no evidence that AFI is used for criminal investigations or prosecutions.

This case presents two issues of statutory interpretation that this Court has not previously addressed. First, the lower court held that the scope of 7(E) was not "limited to records compiled in connection with criminal investigations," Second Opinion 6, despite the fact that the provision specifically refers to "investigations and prosecutions." This ruling is both inconsistent with the text of the FOIA and unsupported by any decision of this Court.

Exemption 7(E) provides a limited basis to withhold records sought under the Freedom of Information Act. The provision was added by Congress in the 1974 amendments to broaden the scope of law enforcement records subject to disclosure under the FOIA. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 229 (1978). Exemption 7(E) provides, in pertinent part, that "records or information compiled for law enforcement purposes" are exempt from disclosure to the extent that (1) production "would disclose techniques and procedures for law enforcement

investigations or prosecutions" and (2) "such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).

In subsequent cases, this Court has applied Exemption 7(E) only to techniques, procedures, and guidelines used in criminal investigations and prosecutions. *See, e.g.*, *Sack v. DOD*, 823 F.3d 687 (2016) (concerning records related to polygraph examination techniques); *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (concerning records generated in the course of a criminal investigation of an individual); *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (2009) (concerning IRS settlement strategies used in criminal tax investigations). Indeed, the Court emphasized in *PEER* that "investigations may constitute 'law enforcement investigations' where there is suspicion of *criminal* sabotage or terrorism." *Public Employees for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 205 (D.C. Cir. 2014) (emphasis added). Lower courts have also found that Exemption 7(E) applies to "acts by law enforcement after or during the commission of a crime, not crime-prevention techniques." *EPIC v. DHS*, 999 F. Supp. 2d 24, 31 (D.D.C. 2013), *rev'd on other grounds*, 777 F.3d 518 (D.C. Cir. 2015).

The second issue of first impression presented is the "risk" at issue in Exemption 7(E). The lower court concluded that the disclosure of training slides and contracts fell within Exemption 7(E). This speculative risk bears

no connection to a law enforcement "technique" contemplated in Exemption 7(E). 5 U.S.C. § 552(b)(7)(E).

None of the remaining records in dispute could logically reveal aspects of investigatory techniques or procedures that would risk circumvention of the law. These records are (1) "training modules" and "Quick Reference Cards" including (2) screen shots of the AFI system as well as (3) statements of work and orders for supplies and services including (4) descriptions of databases. Supp. Decl. of Sabrina Burroughs ¶¶ 10–16, ECF No. 32-1. The "training modules" include "tutorials, screen shots, and instructor notes designed to teach the student how to access the AFI system, how to navigate AFI and its different components and available data sources, and how to input, change, edit, and delete information in the AFI system." Supp. Burroughs Decl. ¶ 12. The Quick Reference Cards include "practical exercises to test the user's familiarity and proficiency" with the AFI system. Supp. Burroughs Decl. ¶ 14. The statements of work include "information identifying LexisNexis Products" as well as descriptions of the security of those products. Supp. Burroughs Decl. ¶ 15. The orders include additional "database-specific information identifying LexisNexis Products." Supp. Burroughs Decl. ¶ 15.

CBP's motion focuses entirely on the degree of deference accorded to agency declarations in Exemption 7(E) cases, Appellee Mot. 5–9, but that

deference only applies where the underlying risk is related to disclosure of a law enforcement technique. To assert Exemption 7(E), an agency must "demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Blackwell v. FBI*, 646 F.3d at 42. The quintessential Exemption 7(E) case concerns the disclosure of the details of a law enforcement technique used to investigate crimes. *See, e.g.*, *Sack v. DOD*, 823 F.3d at 694–95 (upholding an Exemption 7(E) claim for polygraph reports where release of the reports would reveal "deficiencies in law enforcement agencies' polygraph programs."). None of the records at issue here could "logically" reveal a law enforcement technique.

This case also presents issues concerning the segregability of non-exempt information in the specific documents at issue. None of these issues present questions are appropriate for summary affirmance. Indeed, the lower court denied CBP's first motion for summary judgment because the agency failed to provide "a relatively detailed justification." First Opinion 9, ECF No. 28. As the lower court emphasized, the agency failed to establish that "the withheld materials are indeed techniques, procedures, or guidelines for law enforcement investigations or prosecutions." First Opinion 10. But the lower court reversed course in its second opinion, finding that the agency need not show that the records concern techniques used for law enforcement investigations. Second Opinion 6. The inconsistencies in the lower court's

two opinions warrant additional briefing and undercut the court's conclusions regarding segregabilty and risk of circumvention.

Summary disposition is only appropriate where the merits of the claims are "so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision." *Sills v. Federal Bureau of Prisons*, 761 F.2d 792, 793–94 (D.C. Cir. 1985). The Court should deny CBP's motion for summary affirmance.

Respectfully Submitted,

Dated: June 12, 2017

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## CERTIFICATE OF SERVICE

I, Alan Butler, hereby certify that on June 12, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 27(d)(2)(A) and D.C. Circuit Rule 27(a)(2), because it contains 1,330 words.

/s/ Alan Butler
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