OVERVIEW OF THE PRIVACY ACT OF 1974, 2010 EDITION

TEN EXEMPTIONS

A. One Special Exemption -- 5 U.S.C. § 552a(d)(5)

"nothing in this [Act] shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding."

Comment:

The subsection (d)(5) provision is sometimes mistakenly overlooked because it is not located with the other exemptions in sections (j) and (k). It is an exemption from only the access provision of the Privacy Act. But cf. Smith v. United States, 142 F. App'x 209, 210 (5th Cir. 2005) (per curiam) (holding that plaintiff had no right to amend record that was "prepared in response to [his] [Federal Tort Claims Act] claim" because it fell within coverage of subsection (d)(5) and, therefore, it was "also exempt from the amendment requirements of the Act" (emphases added)).

This exemption provision reflects Congress's intent to exclude civil litigation files from access under subsection (d)(1). See 120 Cong. Rec. 36,959-60 (1974), reprinted in Source Book at 936-38, available at http://www.loc.gov/rr/frd/Military_Law/pdf/LH_privacy_act-1974.pdf. Indeed, this Privacy Act provision has been held to be similar to the attorney work-product privilege, see, e.g., Martin v. Office of Special Counsel, 819 F.2d 1181, 1187-89 (D.C. Cir. 1987); Hernandez v. Alexander, 671 F.2d 402, 408 (10th Cir. 1982); Barber v. INS, No. 90-0067C, slip op. at 4-6 (W.D. Wash. May 15, 1990), and to extend even to information prepared by non-attorneys, see Varville v. Rubin, No. 3:96CV00629, 1998 U.S. Dist. LEXIS 14006, at *9-12 (D. Conn. Aug. 18, 1998) (citing Martin and Smiertka, infra, for proposition that courts "have interpreted the exemption in accordance with its plain language and have not read the requirements of the attorney work product doctrine into Exemption (d)(5)," and broadly construing subsection (d)(5) to protect report prepared pursuant to ethics inquiry into alleged hiring improprieties, finding "that the fact that the documents at issue were not prepared by or at the direction of an attorney is not determinative in deciding whether Exemption (d)(5) exempts the documents from disclosure"); Blazy v. Tenet, 979 F. Supp. 10, 24 (D.D.C. 1997) (broadly construing subsection (d)(5) to protect communications between CIA's Office of General Counsel and members of plaintiff's Employee Review Panel while panel was deciding whether to recommend retaining plaintiff), summary affirmance granted, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998); Smiertka v. U.S. Dep't of the Treasury, 447 F. Supp. 221, 227-28 (D.D.C. 1978) (broadly construing subsection (d)(5) to cover documents prepared by and at direction of lay agency staff persons during period prior to plaintiff's firing), remanded on other grounds, 604 F.2d 698 (D.C. Cir. 1979); see also Nazimuddin v. IRS, No. 99-2476, 2001 WL 112274, at *3-4 (S.D. Tex. Jan. 10, 2001) (applying subsection (d)(5) to internal memorandum from anonymous informant to plaintiff's supervisor prepared in anticipation of disciplinary action of plaintiff); Taylor v. U.S. Dep't of Educ., No. 91 N 837, slip op. at 3, 6 (D. Colo. Feb. 25, 1994) (applying subsection (d)(5) to private citizen's complaint letter maintained by plaintiff's supervisor in anticipation of plaintiff's termination); Gov't Accountability Project v. Office of Special Counsel, No. 87-0235,

1988 WL 21394, at *5 (D.D.C. Feb. 22, 1988) (subsection (d)(5) "extends to any records compiled in anticipation of civil proceedings, whether prepared by attorneys or lay investigators"); Crooker v. Marshals Serv., No. 85-2599, slip op. at 2-3 (D.D.C. Dec. 16, 1985) (subsection (d)(5) protects information "regardless of whether it was prepared by an attorney"); Barrett v. Customs Serv., No. 77-3033, slip op. at 2-3 (E.D. La. Feb. 22, 1979) (applying subsection (d)(5) to "policy recommendations regarding plaintiff['s] separation from the Customs Service and the possibility of a sex discrimination action").

This provision shields information that is compiled in anticipation of court proceedings or quasi-judicial administrative hearings. See, e.g., Martin, 819 F.2d at 1188-89; Louis v. U.S. Dep't of Labor, No. 03-5534, slip op. at 7 (W.D. Wash. Mar. 8, 2004); McCready v. Principi, 297 F. Supp. 2d 178, 189-90 (D.D.C. 2003), aff'd in part & rev'd in part on other grounds sub nom. McCready v. Nicholson, 465 F.3d 1 (D.C. Cir. 2006); Nazimuddin, 2001 WL 112274, at *3-4; Frets v. DOT, No. 88-0404-CV-W-9, slip op. at 11 (W.D. Mo. Dec. 14, 1988); see also OMB Guidelines, 40 Fed. Reg. 28,948, 28,960 (July 9, 1975), available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf ("civil proceeding" term intended to cover "quasi-judicial and preliminary judicial steps").

It should be noted, however, that this provision is in certain respects not as broad as Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5) (2006). For example, by its terms it does not cover information compiled in anticipation of criminal actions. (Of course, subsection (j)(2), discussed below, may provide protection for such information.) Also, subsection (d)(5) does not incorporate other Exemption 5 privileges, such as the deliberative process privilege. See, e.g., Savada v. DOD, 755 F. Supp. 6, 9 (D.D.C. 1991). But see Blazy, 979 F. Supp. at 24 (incorrectly stating that "FOIA Exemption 5 and Privacy Act Exemption (d)(5) permit the agency to withhold information that qualifies as attorney work product or falls under the attorney-client or deliberative process privilege"). This means that deliberative information regularly withheld under the FOIA can be required to be disclosed under the Privacy Act. See, e.g., Savada, 755 F. Supp. at 9.

In addition, one court has held that an agency had not waived the applicability of subsection (d)(5) to preclude access despite plaintiffs' arguments that the agency waived its common law attorney-client and attorney work-product privileges. McCready, 297 F. Supp. 2d at 189-90 (concluding that "[s]ubsection (d)(5) states that 'nothing in this section shall allow' access to information compiled in anticipation of a civil action" and that "[s]ince 'shall' is a mandatory word," the agency had not waived its right to invoke subsection (d)(5)), aff'd in part & rev'd in part on other grounds sub nom. McCready v. Nicholson, 465 F.3d 1.

Unlike all of the other Privacy Act exemptions discussed below, however, subsection (d)(5) is entirely "self-executing," inasmuch as it does not require an implementing regulation in order to be effective. Cf. Mervin v. Bonfanti, 410 F. Supp. 1205, 1207 (D.D.C. 1976) ("[A]n absolute prerequisite for taking advantage of [exemption (k)(5)] is that the head of the particular agency promulgate a rule.").

B. Two General Exemptions -- 5 U.S.C. § 552a(j)(1) and (j)(2)

"The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is --

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of

(A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;

B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section."

Comment:

One district court has described subsection (j) as follows: "Put in the simplest terms, what Congress gave Congress can take away, which it did here by conferring on agencies the power to exempt certain records from the Privacy Act." Williams v. Farrior, 334 F. Supp. 2d 898, 905 (E.D. Va. 2004). The court went on to explain that "Congress, at most, granted" an "inchoate right" to individuals. Id. "[B]y specifically granting agencies . . . the power to exempt certain records from the Privacy Act," moreover, "Congress conditioned any right [an individual] might have to assert a Privacy Act claim on whether [a particular agency] exercises this power." Id. Thus, "[w]hen [an agency] exercise[s] this exemption power, any inchoate claim [an individual] may once have had [is] extinguished." Id.

For cases involving subsection (j)(1), see Alford v. CIA, 610 F.2d 348, 348-49 (5th Cir. 1980); Bassiouni v. CIA, No. 02-4049, 2004 U.S. Dist. LEXIS 5290, at *13-24 (N.D. Ill. Mar. 30, 2004), aff'd, 392 F.3d 244 (7th Cir. 2005); Pipko v. CIA, No. 02-3250, 2004 WL 743958, at *6-7 (D.N.J. Mar. 26, 2004); Blazy v. Tenet, 979 F. Supp. 10, 23-25 (D.D.C. 1997), summary affirmance granted, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998); Hunsberger v. CIA, No. 92-2186, slip op. at 2-3 (D.D.C. Apr. 5, 1995); Wilson v. CIA, No. 89-3356, 1991 WL 226682, at *1 (D.D.C. Oct. 15, 1991); Bryant v. CIA, No. 90-1163, 1991 U.S. Dist. LEXIS 8964,

at *2 (D.D.C. June 28, 1991); and Anthony v. CIA, 1 Gov't Disclosure Serv. (P-H) ¶ 79,196, at 79,371 (E.D. Va. Sept. 19, 1979).

Subsection (j)(2)'s threshold requirement is that the system of records be maintained by "an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws." This requirement is usually met by such obvious law enforcement components as the FBI, DEA, and ATF. In addition, Department of Justice components such as the Federal Bureau of Prisons, see, e.g., Skinner v. BOP, 584 F.3d 1093, 1096 (D.C. Cir. 2009); White v. U.S. Prob. Office, 148 F.3d 1124, 1125 (D.C. Cir. 1998); Kellett v. BOP, No. 94-1898, 1995 U.S. App. LEXIS 26746, at *10-11 (1st Cir. Sept. 18, 1995) (per curiam); Duffin v. Carlson, 636 F.2d 709, 711 (D.C. Cir. 1980), the U.S. Attorney's Office, see, e.g., Holub v. EOUSA, No. 09-347, 2009 WL 3247000, at *5-6 (D.D.C. Oct. 12, 2009); Foster v. EOUSA, No. 4:05CV658, 2006 WL 1045762, at *2 (E.D. Mo. Apr. 19, 2006); Hatcher v. DOJ, 910 F. Supp. 1, 2-3 (D.D.C. 1995), the Office of the Pardon Attorney, see, e.g., Binion v. DOJ, 695 F.2d 1189, 1191 (9th Cir. 1983), the U.S. Marshals Service, see, e.g., Boyer v. U.S. Marshals Serv., No. 04-1472, 2005 WL 599971, at *2-3 (D.D.C. Mar. 14, 2005), and the U.S. Parole Commission, see, e.g., Fendler v. U.S. Parole Comm'n, 774 F.2d 975, 979 (9th Cir. 1985); James v. Baer, No. 89-2841, 1990 U.S. Dist. LEXIS 5702, at *2 (D.D.C. May 11, 1990), qualify to use subsection (j)(2). Other entities that have been held to meet the threshold requirement include the Criminal Investigation Division of the Internal Revenue Service, see Carp v. IRS, No. 00-5992, 2002 U.S. Dist. LEXIS 2921, at *17 (D.N.J. Jan. 28, 2002), the U.S. Secret Service, a component of the Department of Homeland Security, see Arnold v. U.S. Secret Serv., 524 F. Supp. 2d 65, 66 (D.D.C. 2007), the Postal Inspection Service, a U.S. Postal Service component, see Anderson v. USPS, 7 F. Supp. 2d 583, 586 n.3 (E.D. Pa. 1998), aff'd, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision); Dorman v. Mulligan, No. 92 C 3230 (N.D. Ill. Sept. 23, 1992), and the Air Force Office of Special Investigations, see, e.g., Gowan v. U.S. Dep't of the Air Force, 148 F.3d 1182, 1189-90 (10th Cir. 1998); Butler v. Dep't of the Air Force, 888 F. Supp. 174, 179 (D.D.C. 1995), aff'd per curiam, No. 96-5111 (D.C. Cir. May 6, 1997).

However, it has been held that the threshold requirement is not met where only one of the principal functions of the component maintaining the system is criminal law enforcement. See Alexander v. IRS, No. 86-0414, 1987 WL 13958, at *4 (D.D.C. June 30, 1987) (IRS Inspection Service's internal "conduct investigation" system); Anderson v. U.S. Dep't of the Treasury, No. 76-1404, slip op. at 6-7 (D.D.C. July 19, 1977) (same). Several courts have held that an Inspector General's Office qualifies as a "principal function" criminal law enforcement component. See Seldowitz v. Office of IG, No. 00-1142, 2000 WL 1742098, at *4 (4th Cir. Nov. 13, 2000) (per curiam); Mumme v. U.S. Dep't of Labor, 150 F. Supp. 2d 162, 172 (D. Me. 2001), aff'd, No. 01-2256 (1st Cir. June 12, 2002); Taylor v. U.S. Dep't of Educ., No. 91 N 837, slip op. at 5 (D. Colo. Feb. 25, 1994); Von Tempske v. HHS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,091, at 82,385 (W.D. Mo. Nov. 11, 1981).

Once the threshold requirement is satisfied, it must be shown that the system of records at issue consists of information compiled for one of the criminal law enforcement purposes listed in subsection (j)(2)(A)-(C). See, e.g., Holz v. Westphal, 217 F. Supp. 2d 50, 54-56 (D.D.C. 2002) (finding subsection (j)(2) inapplicable to report of investigation even though report was maintained in exempt system of records, because agency's operating regulations provided that

investigation underlying report was never within agency's purview and therefore was not compiled for criminal law enforcement purpose). Given the breadth of this exemption, an agency's burden of proof is generally less stringent than under the FOIA, at least in the access context. See Binion, 695 F.2d at 1192-93 (9th Cir. 1983) (referencing legislative history in support of "a broad exemption" because these records "contain particularly sensitive information" (quoting H.R. Rep. No. 1416, 93d Cong., 2d Sess. 18 (1974))). Indeed, several courts have observed that "the Vaughn rationale [requiring itemized indices of withheld records] is probably inapplicable to Privacy Act cases where a general exemption has been established." Restrepo v. DOJ, No. 5-86-294, slip op. at 6 (D. Minn. June 23, 1987) (citing Shapiro v. DEA, 721 F.2d 215, 218 (7th Cir. 1983), vacated as moot, 469 U.S. 14 (1984)); see also Miller v. FBI, No. 77-C-3331, 1987 WL 18331, at *2 (N.D. Ill. Oct. 7, 1987); Welsh v. IRS, No. 85-1024, slip op. at 3-4 (D.N.M. Oct. 21, 1986). Moreover, in access cases the Act does not grant courts the authority to review the information at issue in camera to determine whether subsection (j)(2)(A)-(C) is applicable. See 5 U.S.C. § 552a(g)(3)(A) (in camera review only where subsection (k) exemptions are invoked); see also Exner v. FBI, 612 F.2d 1202, 1206 (9th Cir. 1980); Reyes v. DEA, 647 F. Supp. 1509, 1512 (D.P.R. 1986), vacated & remanded on other grounds, 834 F.2d 1093 (1st Cir. 1987). However, this may be a rather academic point in light of the FOIA's grant of in camera review authority under 5 U.S.C. § 552(a)(4)(B). See, e.g., Von Tempske v. HHS, 2 Gov't Disclosure Serv. at 82,385 (rejecting claim that "administrative inquiry" investigative file fell within subsection (j)(2)(B), following in camera review under FOIA).

An important requirement of subsection (j) is that an agency must state in the Federal Register "the reasons why the system of records is to be exempted" from a particular subsection of the Act. 5 U.S.C. § 552a(j) (final sentence); see also 5 U.S.C. § 552a(k) (final sentence). It is unclear whether an agency's stated reasons for exemption -- typically, a list of the adverse effects that would occur if the exemption were not available -- limit the scope of the exemption when it is applied to specific records in the exempt system in particular cases. See Exner, 612 F.2d at 1206 (framing issue but declining to decide it). As discussed below, a confusing mass of case law in this area illustrates the struggle to give legal effect to this requirement.

Most courts have permitted agencies to claim subsection (j)(2) as a defense in access and/or amendment cases -- usually without regard to the specific records at issue or the regulation's stated reasons for the exemption. See, e.g., Castaneda v. Henman, 914 F.2d 981, 986 (7th Cir. 1990) (amendment); Wentz v. DOJ, 772 F.2d 335, 337-39 (7th Cir. 1985) (amendment); Fendler, 774 F.2d at 979 (amendment); Shapiro, 721 F.2d at 217-18 (access and amendment); Binion, 695 F.2d at 1192-93 (access); Duffin, 636 F.2d at 711 (access); Exner, 612 F.2d at 1204-07 (access); Ryan v. DOJ, 595 F.2d 954, 956-57 (4th Cir. 1979) (access); Jordan v. DOJ, No. 07-cv-02303, 2009 WL 2913223, at *26-27 (D. Colo. Sept. 8, 2009) (access); Davis v. BOP, No. 06-1698, 2007 WL 1830863, at *2 (D.D.C. June 26, 2007) (amendment); Enigwe v. BOP, No. 06-457, 2006 WL 3791379, at *3 n.2 (D.D.C. Dec. 22, 2006) (amendment); Cooper v. BOP, No. 02-1844, 2006 WL 751341, at *3 (D.D.C. Mar. 23, 2006) (amendment); Fisher v. BOP, No. 05-0851, 2006 WL 401819, at *1 (D.D.C. Feb. 21, 2006) (amendment); Maydak v. DOJ, 254 F. Supp. 2d 23, 34-35 (D.D.C. 2003) (access to accounting of disclosures); Anderson v. U.S. Marshals Serv., 943 F. Supp. 37, 39-40 (D.D.C. 1996) (access); Hatcher, 910 F. Supp. at 2-3 (access); Aquino v. Stone, 768 F. Supp. 529, 530-31 (E.D. Va. 1991) (amendment), aff'd, 957

F.2d 139 (4th Cir. 1992); Whittle v. Moschella, 756 F. Supp. 589, 595-96 (D.D.C. 1991) (access); Simon v. DOJ, 752 F. Supp. 14, 23 (D.D.C. 1990) (access), aff'd, 980 F.2d 782 (D.C. Cir. 1992); Bagley v. FBI, No. C88-4075, slip op. at 2-4 (N.D. Iowa Aug. 28, 1989) (access to accounting of disclosures); Anderson v. DOJ, No. 87-5959, 1988 WL 50372, at *1 (E.D. Pa. May 16, 1988) (amendment); Yon v. IRS, 671 F. Supp. 1344, 1347 (S.D. Fla. 1987) (access); Burks v. DOJ, No. 83-CV-189, slip op. at 2 n.1 (N.D.N.Y. Aug. 9, 1985) (access); Stimac v. Dep't of the Treasury, 586 F. Supp. 34, 35-37 (N.D. Ill. 1984) (access); Cooper v. DOJ, 578 F. Supp. 546, 547 (D.D.C. 1983) (access); Stimac v. FBI, 577 F. Supp. 923, 924-25 (N.D. Ill. 1984) (access); Turner v. Ralston, 567 F. Supp. 606, 607-08 (W.D. Mo. 1983) (access), superseded by statute on other grounds, Central Intelligence Agency Information Act, Pub. L. No. 98-477, codified at 5 U.S.C. § 552a(t); Smith v. DOJ, No. 81-CV-813, 1983 U.S. Dist. Lexis 10878, at *15-20 (N.D.N.Y. Dec. 13, 1983) (amendment); Wilson v. Bell, 3 Gov't Disclosure Serv. (P-H) ¶ 83,025, at 83,471 (S.D. Tex. Nov. 2, 1982) (amendment); Nunez v. DEA, 497 F. Supp. 209, 211 (S.D.N.Y. 1980) (access); Bambulas v. Chief, U.S. Marshal, No. 77-3229, slip op. at 2 (D. Kan. Jan. 3, 1979) (amendment); Pacheco v. FBI, 470 F. Supp. 1091, 1107 (D.P.R. 1979) (amendment); Varona Pacheco v. FBI, 456 F. Supp. 1024, 1034-35 (D.P.R. 1978) (amendment). But cf. Mittleman v. U.S. Dep't of the Treasury, 919 F. Supp. 461, 469 (D.D.C. 1995) (finding subsection (k)(2) applicable and citing regulation's stated reasons for exemption of Department of Treasury Inspector General system of records from accounting of disclosures provision pursuant to subsections (j) and (k)(2)), aff'd in part & remanded in part on other grounds, 104 F.3d 410 (D.C. Cir. 1997).

Indeed, the Court of Appeals for the Seventh Circuit has gone so far as to hold that subsection (j)(2) "'does not require that a regulation's rationale for exempting a record from [access] apply in each particular case.'" Wentz, 772 F.2d at 337-38 (quoting Shapiro, 721 F.2d at 218). This appears also to be the view of the Court of Appeals for the First Circuit. See Irons v. Bell, 596 F.2d 468, 471 (1st Cir. 1979) ("None of the additional conditions found in Exemption 7 of the FOIA, such as disclosure of a confidential source, need be met before the Privacy Act exemption applies."); see also Reyes, 647 F. Supp. at 1512 (noting that "justification need not apply to every record and every piece of a record as long as the system is properly exempted" and that "[t]he general exemption applies to the whole system regardless of the content of individual records within it").

The Bureau of Prisons has promulgated rules exempting a number of its systems of records -- among them, notably, the Inmate Central Records System -- from various subsections of the Act, including (d), (e)(5), and (g). See 28 U.S.C. § 16.97 (2009). Among the most frequently litigated Privacy Act claims are those brought by federal inmates against BOP based on one or more allegedly inaccurate records. In a typical case, an inmate sues BOP seeking amendment of or damages arising out of an allegedly inaccurate record contained in a BOP system of records -- usually the Inmate Central Records System. Courts have consistently dismissed these claims on the ground that BOP has exempted the system of records containing the allegedly inaccurate record from the pertinent subsection of the Act. See, e.g., Davis v. United States, No. 09-7490, 2009 WL 4071827 (4th Cir. Nov. 25, 2009) (per curiam); Skinner, 584 F.3d at 1096; Martinez v. BOP, 444 F.3d 620, 624 (D.C. Cir. 2006); Scaff-Martinez v. BOP, 160 F. App'x 955, 956 (11th Cir. 2005); Barbour v. U.S. Parole Comm'n, No. 04-5114, 2005 WL 79041, at *1 (D.C. Cir. Jan. 13, 2005); Williams v. BOP, 85 F. App'x 299, 306 n.14 (3d Cir. 2004); Locklear v. Holland, 194

F.3d 1313, 1313 (6th Cir. 1999); Duffin, 636 F.2d at 711; Jordan, 2009 WL 2913223, at *26-27; Brown v. BOP, 498 F. Supp. 2d 298, 301-03 (D.D.C. 2007); Robinson v. Vazquez, No. CV207-082, 2007 WL 4209370, at *1 (S.D. Ga. Nov. 26, 2007); Reuter v. BOP, No. C-06-00259, 2007 WL 1521544, at *5 (S.D. Tex. May 24, 2007); Elliott v. BOP, 521 F. Supp. 2d 41, 56 (D.D.C. 2007); Collins v. BOP, No. 5:06CV129, 2007 WL 2433967, at *3-4 (S.D. Miss. Aug. 2, 2007); Edwards v. Lewis, No. 06-5044, 2007 WL 1035029, at *6 (D.N.J. Mar. 30, 2007); Simpson v. BOP, No. 05-2295, 2007 WL 666517, at *2-3 (D.D.C. Mar. 2, 2007); Davis v. Driver, No. 1:05CV419, 2007 WL 2220997, at *3 (E.D. Tex. Aug. 2, 2007); Parks v. BOP, No. 7:06-CV-00131, 2006 WL 771718, at *1 (W.D. Va. Mar. 23, 2006); McClellan v. BOP, No. 5:05CV194, 2006 WL 2711631, at *5 (S.D. Miss. Aug. 2, 2006); Cerralla v. Lappin, No. 1:06CV2101, 2006 WL 2794624, at *3 (N.D. Ohio Sept. 27, 2006); Bryant v. BOP, No. 04-2263, 2005 WL 3275902, at *2 (D.D.C. Sept. 27, 2005); Anderson, 1988 WL 50372, at *1.

As discussed above under "5 U.S.C. § 552a(e)(5)," note that it was not until 2002 that BOP exempted many of its systems of records, including the Inmate Central Records System, from subsection (e)(5) pursuant to subsection (j)(2). See 28 C.F.R. § 16.97(j) (codifying 67 Fed. Reg. 51,754 (Aug. 9, 2002)). Thus, inmates' subsection (e)(5)/(g)(1)(C) claims arising subsequent to August 9, 2002, should not succeed. See, e.g., Fisher v. BOP, No. 06-5088, 2007 U.S. App. LEXIS 5140, at *1 (D.C. Cir. Mar. 1, 2007) (per curiam). See "5 U.S.C. § 552a(e)(5)," above, for a more complete discussion of this issue.

Some courts have construed subsection (j)(2) regulations to permit exemption of systems of records from provisions of the Act even where the stated reasons do not appear to be applicable in the particular case. See, e.g., Alexander v. United States, 787 F.2d 1349, 1351-52 & n.2 (9th Cir. 1986) (dismissing subsection (g)(1)(C) damages action -- alleging violation of subsection (e)(5) -- on ground that system of records was exempt from subsection (g) even though implementing regulation mentioned only "access" as rationale for exemption); Wentz, 772 F.2d at 336-39 (dismissing amendment action on ground that system of records was exempt from subsection (d) even though implementing regulation mentioned only "access" as rationale for exemption and record at issue had been disclosed to plaintiff). Note, however, that the Ninth Circuit's decision in Fendler v. U.S. Bureau of Prisons significantly narrowed the breadth of its earlier holding in Alexander. See 846 F.2d at 554 n.3 (observing that agency in Alexander "had clearly and expressly exempted its system of records from both subsection (e)(5) and subsection (g) . . . [but that for] some unexplained reason, the Bureau of Prisons, unlike the agency involved in Alexander, did not exempt itself from [subsection] (e)(5)").

In contrast to these cases, a concurring opinion in the decision by the Court of Appeals for the Ninth Circuit in Exner v. FBI articulated a narrower view of subsection (j)(2). See 612 F.2d 1202, 1207-08 (9th Cir. 1980) (construing subsection (j)(2)(B) as "coextensive" with FOIA Exemption 7 and noting that "reason for withholding the document must be consistent with at least one of the adverse effects listed in the [regulation]"). This narrower view of the exemption finds support in two decisions -- Powell v. U.S. Department of Justice, 851 F.2d 394, 395 (D.C. Cir. 1988) (per curiam), and Rosenberg v. Meese, 622 F. Supp. 1451, 1460 (S.D.N.Y. 1985). In Powell, the Court of Appeals for the District of Columbia Circuit ruled that "no legitimate reason" can exist for an agency to refuse to amend a record (in an exempt system of records) already made public with regard only to the requester's correct residence address, and that

subsection (j)(2) does not permit an agency to refuse "disclosure or amendment of objective, noncontroversial information" such as race, sex, and correct addresses). 851 F.2d at 395. In Rosenberg, a district court ordered access to a sentencing transcript contained in the same exempt system of records on the ground that the "proffered reasons are simply inapplicable when the particular document requested is a matter of public record." 622 F. Supp. at 1460. The system of records at issue in both Powell and Rosenberg had been exempted from subsection (d), the Act's access and amendment provision. Powell, 851 F.2d at 395; Rosenberg, 622 F. Supp. at 1459-60. However, the agency's regulation failed to specifically state any reason for exempting the system from amendment and its reasons for exempting the system from access were limited. Powell, 851 F.2d at 395; Rosenberg, 622 F. Supp. at 1460. Apparently, because the contents of the particular records at issue were viewed as innocuous -- i.e., they had previously been made public -- each court found that the agency had lost its exemption (j)(2) claim. Powell, 851 F.2d at 395; Rosenberg, 622 F. Supp. at 1460.

The issue discussed above frequently arises when an agency's regulation exempts its system of records from subsection (g) -- the Act's civil remedies provision. Oddly, the language of subsection (j) appears to permit this. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,971, available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf. However, in Tijerina v. Walters, 821 F.2d 789, 795-97 (D.C. Cir. 1987), the D.C. Circuit held that an agency cannot insulate itself from a wrongful disclosure damages action (see 5 U.S.C. § 552a(b), (g)(1)(D)) in such a manner. It construed subsection (j) to permit an agency to exempt only a system of records -- and not the agency itself -- from other provisions of the Act. See 821 F.2d at 796-97. The result in Tijerina was heavily and understandably influenced by the fact that subsection (j) by its terms does not permit exemption from the subsection (b) restriction-on-disclosure provision. Id.; see also Nakash v. DOJ, 708 F. Supp. 1354, 1358-65 (S.D.N.Y. 1988) (agreeing with Tijerina after extensive discussion of case law and legislative history).

Some cases suggest that the regulation's statement of reasons for exempting a system of records from the subsection (g) civil remedies provision itself constitutes a limitation on the scope of the exemption. See Fendler, 846 F.2d at 553-54 & n.3 (declining to dismiss subsection (g)(1)(C) damages action -- alleging violation of subsection (e)(5) -- on ground that agency's "stated justification for exemption from subsection (g) bears no relation to subsection (e)(5)"); Ryan v. DOJ, 595 F.2d 954, 957-58 (4th Cir. 1979) (dismissing access claim, but not wrongful disclosure claim, on ground that record system was exempt from subsection (g) because regulation mentioned only "access" as reason for exemption); Nakash, 708 F. Supp. at 1365 (alternative holding) (declining to dismiss wrongful disclosure action for same reason); Kimberlin v. DOJ, 605 F. Supp. 79, 82 (N.D. Ill. 1985) (same), aff'd, 788 F.2d 434 (7th Cir. 1986); Nutter v. VA, No. 84-2392, slip op. at 2-4 (D.D.C. July 9, 1985) (same); see also Alford v. CIA, 610 F.2d 348, 349 (5th Cir. 1980) (declining to decide whether agency may, by regulation, deprive district courts of jurisdiction to review decisions to deny access).

Another important issue can arise with regard to the recompilation of information originally compiled for law enforcement purposes into a non-law enforcement record. The D.C. Circuit confronted this issue in Doe v. FBI, 936 F.2d 1346 (D.C. Cir. 1991), in which it applied the principles of a Supreme Court FOIA decision concerning recompilation, FBI v. Abramson, 456

U.S. 615 (1982), to Privacy Act-protected records. It held that "information contained in a document qualifying for subsection (j) or (k) exemption as a law enforcement record does not lose its exempt status when recompiled in a non-law enforcement record if the purposes underlying the exemption of the original document pertain to the recompilation as well." Doe, 936 F.2d at 1356. As was held in Abramson, the D.C. Circuit determined that recompilation does not change the basic "nature" of the information. Id.; accord OMB Guidelines, 40 Fed. Reg. at 28,971, available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf ("The public policy which dictates the need for exempting records . . . is based on the need to protect the contents of the records in the system -- not the location of the records. Consequently, in responding to a request for access where documents of another agency are involved, the agency receiving the request should consult the originating agency to determine if the records in question have been exempted."). By the same token, law enforcement files recompiled into another agency's law enforcement files may retain the exemption of the prior agency's system of records. See Dupre v. FBI, No. 01-2431, 2002 WL 1042073, at *2 n.2 (E.D. La. May 22, 2002) (finding that Suspicious Activity Report maintained in exempt Department of the Treasury system of records remained exempt under that system of records when transferred to FBI for law enforcement purposes).

C. Seven Specific Exemptions -- 5 U.S.C. § 552a(k)

"The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is --

[The seven specific exemptions are discussed in order below.]

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section."

Comment:

As noted above, subsection (g)(3)(A) grants courts the authority to "examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section." 5 U.S.C. § 552a(g)(3)(A). Further, several courts have held that reasonable segregation is required under the Act whenever a subsection (k) exemption is invoked. See, e.g., May v. Dep't of the Air Force, 777 F.2d 1012, 1015-17 (5th Cir. 1985); Lorenz v. NRC, 516 F. Supp. 1151, 1153-55 (D. Colo. 1981); Nemetz v. Dep't of the Treasury, 446 F. Supp. 102, 105 (N.D. Ill. 1978).

1. 5 U.S.C. § 552a(k)(1)

subject to the provisions of section 552(b)(1) of this title."

Comment:

Subsection (k)(1) simply incorporates FOIA Exemption 1, 5 U.S.C. § 552(b)(1). See Arnold v. U.S. Secret Serv., 524 F. Supp. 2d 65, 66 (D.D.C. 2007); Makky v. Chertoff, 489 F. Supp. 2d 421, 441 (D.N.J. 2007); Bassiouni v. CIA, No. 02-4049, 2004 WL 1125919, at *4 (N.D. Ill. Mar. 30, 2004), aff'd on other grounds, 392 F.3d 244 (7th Cir. 2004); Pipko v. CIA, No. 02-3250, 2004 WL 743958, at *4-6 (D.N.J. Mar. 26, 2004); Snyder v. CIA, 230 F. Supp. 2d 17, 23 (D.D.C. 2003); Keenan v. DOJ, No. 94-1909, slip op. at 2 n.2, 7-9 (D.D.C. Dec. 17, 1997); Blazy v. Tenet, 979 F. Supp. 10, 23-25 (D.D.C. 1997), summary affirmance granted, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998); Laroque v. DOJ, No. 86-2677, 1988 WL 28334, at *2 (D.D.C. Mar. 16, 1988); Moessmer v. CIA, No. 86-948C(1), slip op. at 3-5 (E.D. Mo. Feb. 19, 1987); Demetracopoulos v. CIA, 3 Gov't Disclosure Serv. (P-H) ¶ 82,508, at 83,279 (D.D.C. Oct. 8, 1982); see also OMB Guidelines, 40 Fed. Reg. 28,948, 28,972 (July 9, 1975), available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf. The exemption has been construed to permit the withholding of classified records from an agency employee with a security clearance who seeks only private access to records about him. See Martens v. U.S. Dep't of Commerce, No. 88-3334, 1990 U.S. Dist. LEXIS 10351, at *10-11 (D.D.C. Aug. 6, 1990).

2. 5 U.S.C. § 552a(k)(2)

"investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section [September 27, 1975], under an implied promise that the identity of the source would be held in confidence."

Comment:

This exemption covers: (1) material compiled for criminal investigative law enforcement purposes, by nonprincipal function criminal law enforcement entities; and (2) material compiled for other investigative law enforcement purposes, by any agency.

The material must be compiled for some investigative "law enforcement" purpose, such as a civil investigation or a criminal investigation by a nonprincipal function criminal law enforcement agency. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,972-73 (July 9, 1975), available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf; see also, e.g., Gowan v. U.S. Dep't of the Air Force, 148 F.3d 1182, 1188-89 (10th Cir. 1998) (fraud, waste, and abuse complaint to IG); Berger v. IRS, 487 F. Supp. 2d 482, 497-98 (D.N.J. 2007) (civil trust fund recovery penalty investigation), aff'd 288 F. App'x 829 (3d Cir. 2008), cert.

denied, 129 S. Ct. 2789 (2009); Melius v. Nat'l Indian Gaming Comm'n, No. 98-2210, 1999 U.S. Dist. LEXIS 17537, at *14-15, 18-19 (D.D.C. Nov. 3, 1999) (law enforcement investigation into suitability of person involved in gaming contracts); Shewchun v. INS, No. 95-1920, slip op. at 3, 8-9 (D.D.C. Dec. 10, 1996) (investigation into deportability pursuant to Immigration and Nationality Act), summary affirmance granted, No. 97-5044 (D.C. Cir. June 5, 1997); Viotti v. U.S. Air Force, 902 F. Supp. 1331, 1335 (D. Colo. 1995) (inspector general's fraud, waste, and abuse investigation into plaintiff's travel records), aff'd, 153 F.3d 730 (10th Cir. 1998) (unpublished table decision); Jaindl v. Dep't of State, No. 90-1489, slip op. at 3 (D.D.C. Jan. 31, 1991) (non-principal function law enforcement agency assisting in apprehension of plaintiff by revoking his passport), summary affirmance granted, No. 91-5034 (D.C. Cir. Jan. 8, 1992); Barber v. INS, No. 90-0067C, slip op. at 6-9 (W.D. Wash. May 15, 1990) (enforcement of Immigration and Nationality Act); Welsh v. IRS, No. 85-1024, slip op. at 2-3 (D.N.M. Oct. 21, 1986) (taxpayer audit); Spence v. IRS, No. 85-1076, slip op. at 2 (D.N.M. Mar. 27, 1986) (taxpayer audit); Nader v. ICC, No. 82-1037, 1983 U.S. Dist. LEXIS 11380, at *14 (D.D.C. Nov. 23, 1983) (investigation to determine whether to bar attorney from practicing before ICC for knowingly submitting false, inaccurate, and misleading statements to agency); Heinzl v. INS, 3 Gov't Disclosure Serv. (P-H) ¶ 83,121, at 83,725 (N.D. Cal. Dec. 18, 1981) (investigation regarding possible deportation); Lobosco v. IRS, No. 77-1464, 1981 WL 1780, at *3 (E.D.N.Y. Jan. 14, 1981) (taxpayer audit); Utah Gas & Oil, Inc. v. SEC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,038, at 80,114 (D. Utah Jan. 9, 1980) (dictum) (SEC investigatory files). But cf. Louis v. U.S. Dep't of Labor, No. 03-5534, slip op. at 8 (W.D. Wash. Mar. 8, 2004) (inexplicably finding that records compiled for purposes of Federal Employee Compensation Act claim were properly exempt based on stated reasons for exemption in agency's regulation without discussing whether records were indeed compiled for investigative law enforcement purposes as is statutorily required).

Therefore, subsection (k)(2) does not include material compiled solely for the purpose of a routine background security investigation of a job applicant. See Vymetalik v. FBI, 785 F.2d 1090, 1093-98 (D.C. Cir. 1986) (noting applicability of narrower subsection (k)(5) to such material and ruling that "specific allegations of illegal activities" must be involved in order for subsection (k)(2) to apply); Bostic v. FBI, No. 1:94 CV 71, slip op. at 7-8 (W.D. Mich. Dec. 16, 1994) (following Vymetalik). However, material compiled for the purpose of investigating agency employees for suspected violations of law can fall within subsection (k)(2). See Strang v. U.S. Arms Control & Disarmament Agency, 864 F.2d 859, 862-63 n.2 (D.C. Cir. 1989) ("Unlike Vymetalik, this case involves not a job applicant undergoing a routine check of his background and his ability to perform the job, but an existing agency employee investigated for violating national security regulations."); Cohen v. FBI, No. 93-1701, slip op. at 4-6 (D.D.C. Oct. 3, 1995) (applying Vymetalik and finding that particular information within background investigation file qualified as "law enforcement" information "withheld out of a legitimate concern for national security," thus "satisf[ying] the standards set forth in Vymetalik," which recognized that "'[i]f specific allegations of illegal activities were involved, then th[e] investigation might well be characterized as a law enforcement investigation'" and that "'[s]o long as the investigation was "realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached" the records may be considered law enforcement records'" (quoting Vymetalik, 785 F.2d at 1098, in turn quoting Pratt v. Webster, 673 F.2d 408, 421 (D.C. Cir. 1982))); see also Nazimuddin v. IRS, No. 99-

2476, 2001 WL 112274, at *2, 4 (S.D. Tex. Jan. 10, 2001) (protecting identity of confidential source in document prepared in anticipation of disciplinary action resulting from investigation of employee's alleged misuse of Lexis/Nexis research account); Croskey v. U.S. Office of Special Counsel, 9 F. Supp. 2d 8, 11 (D.D.C. 1998) (finding Office of Special Counsel Report of Investigation, which was developed to determine whether plaintiff had been fired for legitimate or retaliatory reasons, exempt from access and amendment provisions of Privacy Act pursuant to subsection (k)(2)), summary affirmance granted, No. 98-5346, 1999 WL 58614 (D.C. Cir. Jan. 12, 1999); Viotti, 902 F. Supp. at 1335 (concluding, "as a matter of law, that [Report of Inquiry] was compiled for a law enforcement purpose as stated in 5 U.S.C. § 552a(k)(2)" where "original purpose of the investigation . . . was a complaint to the [Inspector General] of fraud, waste and abuse," even though "complaint was not sustained and no criminal charges were brought," because "plain language of the exemption states that it applies to the purpose of the investigation, not to the result"); Mittleman v. U.S. Dep't of the Treasury, 919 F. Supp. 461, 469 (D.D.C. 1995) (finding that Inspector General's report "pertain[ing] to plaintiff's grievance against Treasury officials and related matters . . . falls squarely within the reach of exemption (k)(2)"), aff'd in part & remanded in part on other grounds, 104 F.3d 410 (D.C. Cir. 1997); Fausto v. Watt, 3 Gov't Disclosure Serv. (P-H) ¶ 83,217, at 83,929-30 (4th Cir. June 7, 1983) (holding that investigation prompted by a "hotline" tip and conducted to avoid fraud, waste, and abuse qualified under (k)(2)); Frank v. DOJ, 480 F. Supp. 596, 597 (D.D.C. 1979).

However, in Doe v. U.S. Department of Justice, 790 F. Supp. 17, 19-21 (D.D.C. 1992), the District Court for the District of Columbia construed Vymetalik narrowly and determined that although subsection (k)(5) was "directly applicable," subsection (k)(2) also applied to records of an FBI background check on a prospective Department of Justice attorney. It determined that the Department of Justice, as "the nation's primary law enforcement and security agency," id. at 20, had a legitimate law enforcement purpose in ensuring that "officials like Doe . . . be 'reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States,'" id. (quoting Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953)). It would seem to follow that subsection (k)(2) would likewise apply to background investigations of prospective FBI/DEA special agents. See Putnam v. DOJ, 873 F. Supp. 705, 717 (D.D.C. 1995) (finding that subsection (k)(2) was properly invoked to withhold information that would reveal identities of individuals who provided information in connection with former FBI special agent's pre-employment investigation).

Subsequently, though, the District Court for the District of Columbia, when faced with the same issue concerning subsection (k)(2)/(k)(5) applicability, relied entirely on the D.C. Circuit's opinion in Vymetalik, with no mention whatsoever of Doe v. DOJ. Cohen v. FBI, No. 93-1701 (D.D.C. Oct. 3, 1995). Nevertheless, the District Court found subsection (k)(2) to be applicable to one document in the background investigation file because that document was "withheld out of a legitimate concern for national security" and it "satisfie[d] the standards set forth in Vymetalik," which recognized that "'[i]f specific allegations of illegal activities were involved, then th[e] investigation might well be characterized as a law enforcement investigation'" and that "'[s]o long as the investigation was "realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached" the records may be considered law enforcement records.'" Cohen, No. 93-1701, slip op. at 3-6 (D.D.C. Oct. 3, 1995) (quoting Vymetalik, 785 F.2d at 1098, in turn quoting Pratt, 673 F.2d at 421). Another district

court considered Doe but found "the rationale in Vymetalik more compelling," and held that "'law enforcement purposes' as that term is utilized in [subsection (k)(2) of] the Privacy Act, does not apply to documents and information gathered during a[n FBI agent applicant's] pre-employment background investigation." Bostic, No. 1:94 CV 71, slip op. at 7-8 (W.D. Mich. Dec. 16, 1994).

Unlike with Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A) (2006), there is no temporal limitation on the scope of subsection (k)(2). See Irons v. Bell, 596 F.2d 468, 471 (1st Cir. 1979); Lobosco, 1981 WL 1780, at *4. But see Anderson v. U.S. Dep't of the Treasury, No. 76-1404, slip op. at 9-11 (D.D.C. July 19, 1977) (subsection (k)(2) inapplicable to investigatory report regarding alleged wrongdoing by IRS agent where investigation was closed and no possibility of any future law enforcement proceedings existed).

Although the issue has not been the subject of much significant case law, the OMB Guidelines explain that the "Provided, however" provision of subsection (k)(2) means that "[t]o the extent that such an investigatory record is used as a basis for denying an individual any right, privilege, or benefit to which the individual would be entitled in the absence of that record, the individual must be granted access to that record except to the extent that access would reveal the identity of a confidential source." OMB Guidelines, 40 Fed. Reg. at 28,973, available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf; cf. Nazimuddin, 2001 WL 112274, at *4 (protecting identity of source under express promise of confidentiality pursuant to subsection (k)(2) without discussion of whether investigatory record was used to deny right, privilege, or benefit); Guccione v. Nat'l Indian Gaming Comm'n, No. 98-CV-164, 1999 U.S. Dist. LEXIS 15475, at *11-12 (S.D. Cal. Aug. 5, 1999) (approving agency invocation of subsection (k)(2) to protect third-party names of individuals who had not been given express promises of confidentiality where plaintiff did not contend any denial of right, privilege, or benefit). The only decision that has discussed this provision in any depth is Viotti v. U.S. Air Force, 902 F. Supp. at 1335-36, in which the District Court for the District of Colorado determined that an Air Force Colonel's forced early retirement "resulted in a loss of a benefit, right or privilege for which he was eligible -- the loss of six months to four years of the difference between his active duty pay and retirement pay," and "over his life expectancy . . . the difference in pay between the amount of his retirement pay for twenty-six years of active duty versus thirty years of active duty." Id. The court found that "as a matter of law, based on [a report of inquiry, plaintiff] lost benefits, rights, and privileges for which he was eligible" and thus he was entitled to an unredacted copy of the report "despite the fact that [it] was prepared pursuant to a law enforcement investigation." Id. It went on to find that "the 'express' promise requirement" of (k)(2) was not satisfied where a witness "merely expressed a 'fear of reprisal.'" Id. (citing Londrigan v. FBI, 670 F.2d 1164, 1170 (D.C. Cir. 1981)).

The Court of Appeals for the Tenth Circuit, in affirming Viotti, noted that subsection (k)(2)'s limiting exception applied only in the context of access requests and did not apply to limit the exemption's applicability with regard to amendment requests. Viotti v. U.S. Air Force, No. 97-1371, 1998 WL 453670, at *2 n.2 (10th Cir. Aug. 5, 1998). While the court's footnote in Viotti spoke in terms of the particular exempting regulations at issue, the more general proposition is in complete accord with the plain language of subsection (k)(2). See 5 U.S.C. § 552a(k)(2) (in provision limiting exemption's applicability requiring that "material shall be provided to [the]

individual except to the extent that disclosure of such material would reveal the identity of a [confidential source]" (emphasis added)). Nevertheless, only a matter of weeks earlier, in its decision in Gowan v. U.S. Department of the Air Force, 148 F.3d 1182, 1189 (10th Cir. 1998), the Tenth Circuit, citing the Viotti district court decision in comparison, went through the exercise of determining whether subsection (k)(2)'s limiting exception applied in the context of the amendment claims before it. The Tenth Circuit stated that subsection (k)(2)'s limiting exception was inapplicable to an Inspector General complaint because "the charges contained in the complaint were deemed unworthy of further action." Gowan, 148 F.3d at 1189. Given the very limited case law interpreting subsection (k)(2)'s limiting exception and what constitutes denial of a "right, privilege, or benefit," it is worth noting the Tenth's Circuit's statement in Gowan, even though the court's subsequent footnote in Viotti certainly calls into question its relevance to the court's ultimate holding regarding subsection (k)(2)'s applicability.

In Doe v. U.S. Department of Justice, 790 F. Supp. at 21 n.4, 22, the court noted this provision of subsection (k)(2), but determined that it was not applicable because the plaintiff "ha[d] no entitlement to a job with the Justice Department." Inexplicably, the court did not discuss whether the denial of a federal job would amount to the denial of a "privilege" or "benefit." See id.; see also Jaindl, No. 90-1489, slip op. at 2 n.1 (D.D.C. Jan. 31, 1991) (noting that "[b]ecause there is no general right to possess a passport," application of (k)(2) was not limited in that case). Another court refused to address the provision's applicability where the plaintiff failed to raise the issue at the administrative level. Comer v. IRS, No. 85-10503-BC, slip op. at 3-5 (E.D. Mich. Mar. 27, 1986), aff'd, 831 F.2d 294 (6th Cir. 1987) (unpublished table decision).

It should be noted that information that originally qualifies for subsection (k)(2) protection should retain that protection even if it subsequently is recompiled into a non-law enforcement record. See Doe v. FBI, 936 F.2d 1346, 1356 (D.C. Cir. 1991) (discussed under subsection (j)(2), above); accord OMB Guidelines, 40 Fed. Reg. at 28,971, available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf (same).

Finally, two courts have considered claims brought by individuals who allegedly provided information pursuant to a promise of confidentiality and sought damages resulting from disclosure of the information and failure to sufficiently protect their identities pursuant to subsection (k)(2). Bechhoefer v. DOJ, 934 F. Supp. 535, 538-39 (W.D.N.Y. 1996), vacated & remanded, 209 F.3d 57 (2d Cir. 2000) (finding that information at issue did qualify as "record" under Privacy Act); Sterling v. United States, 798 F. Supp. 47, 49 (D.D.C. 1992). In Sterling, the District Court for the District of Columbia stated that the plaintiff was "not barred from stating a claim for monetary damages [under (g)(1)(D)] merely because the record did not contain 'personal information' about him and was not retrieved through a search of indices bearing his name or other identifying characteristics," 798 F. Supp. at 49, but in a subsequent opinion the court ultimately ruled in favor of the agency, having been presented with no evidence that the agency had intentionally or willfully disclosed the plaintiff's identity. Sterling v. United States, 826 F. Supp. 570, 571-72 (D.D.C. 1993), summary affirmance granted, No. 93-5264 (D.C. Cir. Mar. 11, 1994). However, the District Court for the Western District of New York in Bechhoefer, when presented with an argument based on Sterling, stated that it did not "find the Sterling court's analysis persuasive." Bechhoefer, 934 F. Supp. at 538-39. Having already determined that the information at issue did not qualify as a record "about" the plaintiff, that

court recognized that subsection (k)(2) "does not prohibit agencies from releasing material that would reveal the identity of a confidential source" but rather "allows agencies to promulgate rules to exempt certain types of documents from mandatory disclosure under other portions of the Act." Id. The court went on to state that "plaintiff's reliance on § 552a(k)(2) [wa]s misplaced," and that subsection (k) was "irrelevant" to the claim before it for wrongful disclosure. Id. at 539.

3. 5 U.S.C. § 552a(k)(3)

"maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of Title 18."

Comment:

This exemption obviously is applicable to certain Secret Service record systems. For a discussion of this exemption, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,973 (July 9, 1975), available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf.

4. 5 U.S.C. § 552a(k)(4)

"required by statute to be maintained and used solely as statistical records."

Comment:

For a discussion of this exemption, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,973 (July 9, 1975), available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf.

5. 5 U.S.C. § 552a(k)(5)

"investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section [September 27, 1975], under an implied promise that the identity of the source would be held in confidence."

Comment:

This exemption is generally applicable to source-identifying material in background employment and personnel-type investigative files. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,973-74 (July 9, 1975), available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf; 120 Cong. Rec. 40,406, 40,884-85 (1974), *reprinted in Source Book at 860, 996-97*, available at http://www.loc.gov/rr/frd/Military_Law/pdf/LH_privacy_act-1974.pdf. The Court of Appeals

for the District of Columbia Circuit has held that exemption (k)(5) is also applicable to source-identifying material compiled for determining eligibility for federal grants, stating that "the term 'Federal contracts' in Privacy Act exemption (k)(5) encompasses a federal grant agreement if the grant agreement includes the essential elements of a contract and establishes a contractual relationship between the government and the grantee." Henke v. U.S. Dep't of Commerce, 83 F.3d 1445, 1453 (D.C. Cir. 1996). In addition, exemption (k)(5) is applicable to information collected for continued as well as original employment. See Hernandez v. Alexander, 671 F.2d 402, 406 (10th Cir. 1982). In situations where "specific allegations of illegal activities" are being investigated, an agency may be able to invoke subsection (k)(2) -- which is potentially broader in its coverage than subsection (k)(5). See, e.g., Vymetalik v. FBI, 785 F.2d 1090, 1093-98 (D.C. Cir. 1986).

Subsection (k)(5) -- known as the "Erlenborn Amendment" -- was among the most hotly debated of any the Act's provisions because it provides for absolute protection to those who qualify as confidential sources, regardless of the adverse effect that the material they provide may have on an individual. See 120 Cong. Rec. 36,655-58 (1974), reprinted in Source Book at 908-19, available at http://www.loc.gov/rr/frd/Military_Law/pdf/LH_privacy_act-1974.pdf.

That aside, though, subsection (k)(5) still is a narrow exemption in two respects. First, in contrast to Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(D) (2006), it requires an express promise of confidentiality for source material acquired after the effective date of the Privacy Act (September 27, 1975). Cf. Viotti v. U.S. Air Force, 902 F. Supp. 1331, 1336 (D. Colo. 1995) (finding that "'express' promise requirement" of subsection (k)(2) was not satisfied when witness "merely expressed a 'fear of reprisal'"), aff'd, 153 F.3d 730 (10th Cir. 1998) (unpublished table decision). For source material acquired prior to the effective date of the Privacy Act, an implied promise of confidentiality will suffice. See 5 U.S.C. § 552a(k)(5); cf. Londrigan v. FBI, 722 F.2d 840, 844-45 (D.C. Cir. 1983) (no "automatic exemption" for FBI background interviews prior to effective date of Privacy Act; however, inference drawn that interviewees were impliedly promised confidentiality where FBI showed that it had pursued "policy of confidentiality" to which interviewing agents conformed their conduct). See generally DOJ v. Landano, 508 U.S. 165 (1993) (setting standards for demonstrating implied confidentiality under FOIA Exemption 7(D)). Second, in contrast to the second clause of FOIA Exemption 7(D), subsection (k)(5) protects only source-identifying material, not all source-supplied material.

Of course, where source-identifying material is exempt from Privacy Act access under subsection (k)(5), it typically is exempt under the broader exemptions of the FOIA as well. See, e.g., Keenan v. DOJ, No. 94-1909, slip op. at 16-17 (D.D.C. Mar. 25, 1997), subsequent decision, slip op. at 5-7 (D.D.C. Dec. 16, 1997); Bostic v. FBI, No. 1:94 CV 71, slip op. at 8-9, 12-13 (W.D. Mich. Dec. 16, 1994); Miller v. United States, 630 F. Supp. 347, 348-49 (E.D.N.Y. 1986); Patton v. FBI, 626 F. Supp. 445, 446-47 (M.D. Pa. 1985), aff'd, 782 F.2d 1030 (3d Cir. 1986) (unpublished table decision); Diamond v. FBI, 532 F. Supp. 216, 232 (S.D.N.Y. 1981), aff'd, 707 F.2d 75 (2d Cir. 1983). One court has held that subsection (k)(5) protects source-identifying material even where the identity of the source is known. See Volz v. DOJ, 619 F.2d 49, 50 (10th Cir. 1980). Another court has suggested to the contrary. Doe v. U.S. Civil Serv. Comm'n, 483 F. Supp. 539, 576-77 (S.D.N.Y. 1980) (aberrational decision holding the addresses

of three named persons "not exempt from disclosure under (k)(5) . . . because they didn't serve as confidential sources and the plaintiff already knows their identity").

Subsection (k)(5) is not limited to those sources who provide derogatory comments, see Londrigan v. FBI, 670 F.2d 1164, 1170 (D.C. Cir. 1981); see also Voelker v. FBI, 638 F. Supp. 571, 572-73 (E.D. Mo. 1986). It has also been held that the exemption is not limited to information that would reveal the identity of the source in statements made by those confidential sources, but also protects information that would reveal the source's identity in statements provided by third parties. See Haddon v. Freeh, 31 F. Supp. 2d 16, 21 (D.D.C. 1998). Also, the exemption's applicability is not diminished by the age of the source-identifying material. See Diamond, 532 F. Supp. at 232-33.

However, an agency cannot rely upon subsection (k)(5) to bar a requester's amendment request, as the exemption applies only to the extent that disclosure of information would reveal the identity of a confidential source. See Vymetalik, 785 F.2d at 1096-98; see also Doe v. FBI, 936 F.2d at 1356 n.12 (although documents at issue were not limited to exemption pursuant to subsection (k)(5), noting that subsection (k)(5) would not apply where FBI refused to amend information that had already been disclosed to individual seeking amendment); Bostic, No. 1:94 CV 71, slip op. at 9 (W.D. Mich. Dec. 16, 1994) (application of exemption (k)(5) in this access case is not contrary to, but rather consistent with, Vymetalik and Doe because in those cases exemption (k)(5) did not apply because relief sought was amendment of records).

Note also that OMB's policy guidance indicates that promises of confidentiality are not to be made automatically. 40 Fed. Reg. 28,948, 28,974, available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf. Consistent with the OMB Guidelines, the Office of Personnel Management has promulgated regulations establishing procedures for determining when a pledge of confidentiality is appropriate. See 5 C.F.R. § 736.102 (2009); see also Larry v. Lawler, 605 F.2d 954, 961 n.8 (7th Cir. 1978) (suggesting that finding of "good cause" is prerequisite for granting of confidentiality to sources).

Nevertheless, the District Court for the District of Columbia has held that in order to invoke exemption (k)(5) for sources that were in fact promised confidentiality, it is not necessary that the sources themselves affirmatively sought confidentiality, nor must the government make a showing that the sources would not have furnished information without a promise of confidentiality. Henke v. U.S. Dep't of Commerce, No. 94-0189, 1996 WL 692020, at *9-10 (D.D.C. Aug. 19, 1994). The court went on to state: "[T]he question of whether the reviewers expressed a desire to keep their identities confidential is wholly irrelevant to the Court's determination of whether they were in fact given promises of confidentiality." Id. at *10. On appeal, the Court of Appeals for the District of Columbia Circuit stated that while it "would not go quite that far," as agencies "must use subsection (k)(5) sparingly," agencies may make determinations that promises of confidentiality are necessary "categorically," as "[n]othing in either the statute or the case law requires that [an agency] apply subsection (k)(5) only to those particular reviewers who have expressly asked for an exemption and would otherwise have declined to participate in the peer review process." Henke v. U.S. Dep't of Commerce, 83 F.3d 1445, 1449 (D.C. Cir. 1996).

Finally, it should be noted that information that originally qualifies for subsection (k)(5) protection should retain that protection even if it subsequently is recompiled into a non-law enforcement record. See Doe v. FBI, 936 F.2d 1346, 1356 (D.C. Cir. 1991) (discussed under subsection (j)(2), above); accord OMB Guidelines, 40 Fed. Reg. at 28,971, available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf (same).

6. 5 U.S.C. § 552a(k)(6)

"testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process."

Comment:

It should be noted that material exempt from Privacy Act access under subsection (k)(6) is also typically exempt from FOIA access under FOIA Exemption 2. See Patton v. FBI, 626 F. Supp. 445, 447 (M.D. Pa. 1985), aff'd, 782 F.2d 1030 (3d Cir. 1986) (unpublished table decision); Oatley v. United States, 3 Gov't Disclosure Serv. (P-H) ¶ 83,274, at 84,065-66 (D.D.C. Aug. 16, 1983); see also Robinett v. USPS, No. 02-1094, slip op. at 15 & n.2, 16-18 (E.D. La. July 24, 2002) (finding that information showing "how much [the agency] reduced [the plaintiff's] application score because of [a traffic violation]" was "just the type of information that courts have found could compromise an agency's evaluation process" and thus was exempt from disclosure under subsection (k)(6), and further, noting that although the court did not need to address the agency's FOIA Exemption 2 argument "[i]n light of the Court's finding that the information fits under another FOIA exemption," FOIA Exemption 2 "has been read to reflect the same concerns and cover the same information as the exemption codified in Section 552a(k)(6)"). For a further discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,974 (July 9, 1975), available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf.

7. 5 U.S.C. § 552a(k)(7)

"evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section [9-25-75], under an implied promise that the identity of the source would be held in confidence."

Comment:

For an example of the application of this exemption, see May v. Dep't of the Air Force, 777 F.2d 1012, 1015-17 (5th Cir. 1985). For a further discussion of this provision, see OMB Guidelines, 40 Fed. Reg. 28,948, 28,974 (July 9, 1975), available at http://www.whitehouse.gov/omb/assets/omb/inforeg/implementation_guidelines.pdf.