

request incorrectly states that the requested materials are in an investigative file that falls under two separate sections of FOIA's seventh exemption, exemptions 7(A) and 7(C). *See* Exhibit B.

A. Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), Does Not Apply.

Exemption 7(A) allows the FBI to withhold "documents records or information compiled for law enforcement purposes, *but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings[.]*" 5 U.S.C. § 552(b)(7) (emphasis added). Courts have set forth a two-step inquiry to determine whether documents can "reasonably be expected to interfere with enforcement proceedings." *Id.*

The first inquiry is whether a law enforcement proceeding is pending or prospective; if a law enforcement proceeding is found to be pending or prospective, the second inquiry is whether release of information about the law enforcement proceeding could reasonably be expected to cause some articulable harm. *See Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *Lewis v. I.R.S.*, 823 F.2d 375, 379 (9th Cir. 1987).

1. *The FBI's law enforcement investigation in this case has concluded and is, therefore, not "pending or prospective."*

To satisfy the "law enforcement proceedings" requirement of Exemption 7(A), the FBI must be able to point to a *specific* pending or contemplated law enforcement proceeding that could be harmed by disclosure; it is insufficient for the FBI to simply identify any foreseeable law enforcement proceeding:

If an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on

some hypothetical enforcement proceeding, the FOIA would be meaningless.

Badran v. United States Dep't of Justice, 652 F.Supp. 1437, 1440 (N.D.Ill. 1987); see also *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993).

In this case, Edgar Omar Ramos-Villareal was shot on October 20, 2004.

In a letter dated May 3, 2005, the Phoenix FBI Office confirmed that

[t]he investigation the Phoenix FBI initially initiated on October 21, 2004, the day after the incident, has been closed. All physical evidence collected during this investigation has either been destroyed or returned.

See Letter from Jana D. Moore to Scott E. Richardson, May 3, 2005, at 1, attached hereto as Exhibit C. Thus, the only possible remaining "law enforcement proceeding" is "a limited civil rights violation investigation of the incident based on information provided by the Mexican Embassy in Washington, D.C." *Id.* Because this investigation is "limited," and because the shooting occurred over eight months ago, the civil rights investigation, if not already concluded, should be near conclusion.

2. *The release of information about the FBI's "limited civil rights investigation" will not cause any harm because it is based on information that has already been publicly disclosed.*

The government bears a heavy burden of proof in FOIA cases; thus, the agency possessing the requested records, the FBI in this case, *must* disclose them unless the FBI can specifically show that an exemption applies. See 5 U.S.C. § 552(a); *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989); *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976) (holding that the agency seeking to avoid disclosure has the burden of proof).

To meet its burden and show the requisite articulable harm under Exemption 7(A), the FBI cannot rely on a conclusory statement such as the one in