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## Alyeska Pipeline Service Co. v. EPA: EPA's Need to Protect Its Confidential Sources versus Its Duty to Disclose under the Freedom of Information Act

Warren J. Roth

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***Alyeska Pipeline Service Co. v. EPA:***  
**EPA's Need to Protect**  
**Its Confidential Sources**  
**Versus Its Duty to Disclose**  
**Under the Freedom of Information Act**

I. Introduction

On July 4, 1966, Congress enacted the Freedom of Information Act (FOIA)<sup>1</sup> "to establish a general philosophy of full agency disclosure unless information is exempted under clear statutory language."<sup>2</sup> Since FOIA's inception, it has been substantially amended twice. The first revision occurred in 1974 notwithstanding President Ford's veto. The second revision occurred in 1986.<sup>3</sup>

The 1974 amendment to Exemption 7 exempts from disclosure investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records, if such disclosure created one of the six specific harms enumerated in the exemption.<sup>4</sup> The 1974 version

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1. Freedom of Information Act, Pub. L. No. 89-554, § 552, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1988)).

2. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965). The text of the Act is reprinted in FREEDOM OF INFORMATION ACT SOURCE BOOK 1 (Comm. Print 1975) [hereinafter SOURCE BOOK].

For a complete list of all published and unpublished judicial opinions and law review articles dealing with FOIA, see U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION CASE LIST (1988).

3. 5 U.S.C. § 552(b)(7) (1988). See *infra* note 20.

4. Exemption 7 as amended in 1974 provided:

[The Freedom of Information Act] does not apply to . . . investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelli-

of Exemption 7 allowed an agency to withhold information which, if publicly disclosed, would endanger ongoing investigations or judicial proceedings, invade personal privacy, endanger confidential sources, reveal investigatory techniques, or threaten the life or well-being of law enforcement agents.<sup>5</sup>

In *Alyeska Pipeline Service Co. v. Environmental Protection Agency* (EPA),<sup>6</sup> the pipeline service sought release under FOIA of copies of certain of its own corporate records that were provided to the EPA by a third party.<sup>7</sup> The EPA refused to surrender the documents, invoking FOIA Exemption 7(A), which authorizes the withholding of information compiled for law enforcement purposes when the production thereof could reasonably be expected to interfere with enforcement proceedings.<sup>8</sup> The United States Court of Appeals for the District of Columbia Circuit, upheld the ruling of the district court, which granted the EPA's motion for summary judgment against the pipeline company's request for disclosure of the documents.<sup>9</sup>

This note focuses on the EPA's use of Exemption 7 of FOIA to protect against the premature disclosure of information collected for law enforcement purposes. The courts, in determining which information should be disclosed to criminal defendants, must strike a balance between a defendant's right to disclosure and the government's need for confidentiality. Part II provides a brief summary of the EPA's disclosure policy and an overview of the current Exemption 7 provision. Part III analyzes the issues raised in *Alyeska* and the court's decision. Part IV concludes that the EPA must receive the maximum protection available under Exemption 7 in order to effectively carry out its enforcement function.

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gence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Freedom of Information Act, ch. 502, § 2, 88 Stat. 1561, 1563-64 (1974) (current version at 5 U.S.C. § 552(b)(7) (1988)).

5. *Id.*

6. 856 F.2d 309 (D.C. Cir. 1988).

7. *Id.* at 309-10.

8. *Id.* at 310.

9. *Id.* at 315.

## II. Background

### A. EPA's Policy on Disclosure of Records

The EPA will make the fullest possible disclosure of records<sup>10</sup> "consistent with the rights of individuals to privacy, the rights of persons in business information entitled to confidential treatment, and the need for EPA to promote frank internal policy deliberations and to pursue its official activities without undue disruption."<sup>11</sup> All EPA records are available to the public unless they are found to be exempt from the disclosure requirements of FOIA.<sup>12</sup> If a requested document contains both exempt and nonexempt material, the exempt portion of that material will be withheld by the EPA.<sup>13</sup> If it is the determination of the local EPA office that the material in question is exempt<sup>14</sup> from production under FOIA, the person

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The term "EPA record" or simply "record" means any document, writing, photograph, sound or magnetic recording, drawing, or other similar thing by which information has been preserved, from which the information can be retrieved and copied, and over which EPA has possession or control. It may include copies of the records of other Federal agencies . . . . The term includes informal writings (such as drafts and the like), and also includes information preserved in a form which must be translated or deciphered by machine in order to be intelligible to humans. The term includes documents and the like which were created or acquired by the EPA, its predecessors, its officers, and its employees by use of Government funds or in the course of transacting official business. However, the term does not include materials which are published by non-Federal organizations which are readily available to the public, such as books, journals, and periodicals available through reference libraries, even if such materials are in the EPA's possession.

40 C.F.R. § 2.100(b) (1988).

11. 40 C.F.R. § 2.101(a) (1988). Business information means "any information which pertains to the interests of any business, which was developed or acquired by that business, and (except where the context otherwise requires) which is possessed by EPA in record form." 40 C.F.R. § 2.201(c) (1988).

12. 40 C.F.R. § 2.101(b) (1988).

13. 40 C.F.R. § 2.103 (1988). The applicability of an exemption does not necessarily mean that the record must or should be withheld. 40 C.F.R. § 2.118(b) (1988).

14. 40 C.F.R. § 2.118 (1988). The exemption categories are:

(a) 5 U.S.C. 552(b) establishes nine exclusive categories of matters which are exempt from the mandatory disclosure requirements of 5 U.S.C. 552(a). No request under 5 U.S.C. 552 for an existing, located record in EPA's possession shall be denied by any EPA office or employee unless the record contains (or its disclosure would reveal) matters that are—

requesting the documents may file an appeal with the General Counsel.<sup>15</sup> Once a petitioner has exhausted the internal appeals process of the EPA, the petitioner may proceed to a fed-

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- (1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;
  - (2) Related solely to the internal personnel rules and practices of an agency;
  - (3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)): *Provided*, That such statute:
    - (i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
    - (ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;
  - (4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . ;
  - (5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
  - (6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
  - (7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information: (A) Could reasonably be expected to interfere with enforcement proceedings; (B) Would deprive a person of a right to a fair trial or an impartial adjudication; (C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source; (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; or (F) Could reasonably be expected to endanger the life or physical safety of any individual;
  - (8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
  - (9) Geological and geophysical information and data, including maps, concerning wells.

40 C.F.R. § 2.118 (1988).

15. For a detailed description of this appeal process, see 40 C.F.R. § 2.114-117 (1988).

eral district court and request a court order to compel disclosure by the EPA.

### B. *Current Provisions of Exemption 7*

When President Johnson first signed the Freedom of Information Act into law, he wrote: “[N]o one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to public interest.”<sup>16</sup> In reality, it was the belief of critics in the early 1970’s that “the act had become a ‘freedom from information’ law, and that the curtains of secrecy still remain tightly drawn around the business of our government.”<sup>17</sup> In 1974, Congress responded to this criticism by passing an amendment to FOIA over President Ford’s veto.<sup>18</sup> This legislation was again the subject of substantive change in 1986.<sup>19</sup> Under the current Exemption 7,<sup>20</sup> an agency can now withhold “records or information compiled for law enforcement purposes” if one of the six listed harms would

16. STAFF OF THE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., SOURCE BOOK, *supra* note 2, at 1.

17. *Id.* See also Nader, *Freedom of Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970).

18. See SOURCE BOOK, *supra* note 2, at 3.

19. 5 U.S.C. § 552(b)(7) (1988). See *infra* note 20.

20. The current Exemption 7 provides that the Freedom of Information Act does not apply to:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosures could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual . . . .

5 U.S.C. § 552(b)(7) (1988).

occur or "could reasonably be expected" to occur.<sup>21</sup> This standard of "reasonableness" was one of the central points addressed by the court of appeals in *Alyeska*.<sup>22</sup>

### III. The Court of Appeals Decision

#### A. Facts

In the spring of 1969, a major oil field was discovered in the North Slope of Alaska. In June of that same year, a consortium owning the Alyeska Pipeline Service Company<sup>23</sup> submitted an application to the Department of the Interior to construct a pipeline for the transport of oil from the North Slope to the lower forty-eight states.<sup>24</sup> Alyeska now owns and operates the Trans-Alaska Pipeline System which transports unrefined liquid hydrocarbons produced on Alaska's North Slope to Valdez, Alaska.<sup>25</sup> At the Valdez terminal, Alyeska maintains a ballast water treatment (BWT) facility where water is removed from the holds of tankers awaiting loading. The water is treated to remove grease, oil and aromatics before being discharged into Valdez Bay.<sup>26</sup>

Alyeska's BWT facility has been (and still is) the subject of an EPA investigation regarding possible violations of environmental laws.<sup>27</sup> In January 1985, pursuant to its statutory authority, the EPA submitted interrogatories to Alyeska concerning the operation of its facility.<sup>28</sup> Two months later, Charles Hamel, a private citizen, gave notice to the EPA of his intent to commence an action to enforce the terms of Alyeska's National Pollutant Discharge Elimination System

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21. *Id.* In the current Exemption 7, only subsections 7(A), 7(C), 7(D), and 7(F) contain the new "could reasonably be expected to occur" language.

22. *Alyeska Pipeline Service Co. v. EPA*, 856 F.2d 309, 314 (D.C. Cir. 1988).

23. In 1968, Atlantic Richfield Co., Humble Oil and Refining Co., and British Petroleum Corp. formed the Trans-Alaska Pipeline Service (Alyeska). *Alyeska Pipeline Service Co. v. Wilderness Society*, 419 U.S. 823, 824 (1974).

24. *Alyeska*, 856 F.2d at 310.

25. *Id.* at 310.

26. *Id.*

27. *Id.*

28. *Id.*

(NPDES) permit.<sup>29</sup> Hamel informed the EPA that he had obtained twenty-two documents from employees of Alyeska. Hamel subsequently released these corporate records to the EPA in order to expose alleged violations of federal environmental laws on the part of the Alyeska Pipeline Service Company.<sup>30</sup> Subsequently, the EPA ordered Alyeska to preserve all of its records pertaining to its Valdez treatment facility.<sup>31</sup> The EPA then issued two compliance orders to Alyeska enumerating violations at the BWT facility and requiring Alyeska to correct them.<sup>32</sup>

In February 1986, Alyeska requested disclosure of the documents given to the EPA by Hamel pursuant to FOIA.<sup>33</sup> The EPA located twenty-two responsive documents, comprising approximately 177 pages, but withheld them.<sup>34</sup> The EPA, citing Exemption 7, refused to disclose the documents to Alyeska "because [the request was for] investigatory records compiled for law enforcement purposes the disclosure of which would identify the confidential source of these documents and investigative techniques and procedures."<sup>35</sup> The EPA maintained that the documents related to an ongoing investigation of Alyeska concerning possible violations of the Clean Water Act,<sup>36</sup> the Clean Air Act,<sup>37</sup> the Resource Conservation and Recovery Act,<sup>38</sup> and the Toxic Substances Control Act.<sup>39</sup>

Alyeska filed suit in the district court of the D.C. Circuit

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29. *Id.* While the EPA advised the court of appeals that one facet of this investigation had been completed, Alyeska still is faced with a citizen's suit under section 505 of the Clean Water Act, 33 U.S.C. § 1365 (1982 & Supp. V 1987).

30. *Alyeska*, 856 F.2d at 310.

31. *Id.*

32. *Id.* The first of these orders was issued in July and the second was issued four months later in November 1985.

33. *Id.*

34. *Id.*

35. *Id.* (quoting letter from Ernesta B. Barnes to Maryann Armbrust (Feb. 13, 1986) (paraphrasing 5 U.S.C. § 552(b)(7) (1988))).

36. 33 U.S.C. §§ 1251-1376 (1982 & Supp. V 1987).

37. 42 U.S.C. §§ 7401-7642 (1982 & Supp. V 1987).

38. 42 U.S.C. §§ 6901-6992 (1982 & Supp. V 1987).

39. 15 U.S.C. §§ 2601-2629 (1988); *Alyeska Pipeline Service Co. v. EPA*, No. 86-2176, slip op. at 3 (D.D.C. Sept. 9, 1987) (WESTLAW, Allfeds).

in August 1986.<sup>40</sup> On cross-motions for summary judgment, the court held that the EPA's refusal to produce the requested materials was justified by FOIA Exemption 7(A) because disclosure would interfere with the EPA's ongoing law enforcement proceedings against Alyeska.<sup>41</sup> The district court further held that Alyeska was not entitled to a Vaughn index.<sup>42</sup> The court concluded that giving Alyeska a list of the records at issue would be equivalent to disclosing the records in full.<sup>43</sup>

On appeal, Alyeska argued that summary judgment was inappropriate since the parties' affidavits conflicted with regard to whether disclosure could reasonably be expected to interfere with the EPA's law enforcement proceeding.<sup>44</sup> Further, Alyeska contended that the district court failed to examine the agency's exemption claim *de novo*, as required by FOIA.<sup>45</sup>

## B. *The Burden of Proof*

### 1. *The First Prong of the Test*

The court of appeals affirmed the district court's decision and upheld the lower court's use of a two-prong test to determine whether the documents in the EPA's possession were protected under Exemption 7. Under Exemption 7(A), the EPA must first show that the documents at issue were compiled for law enforcement purposes and that the release of these records would interfere with enforcement proceedings.<sup>46</sup> The first of these two requirements, derived from *Pratt v.*

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40. *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 310 (D.D.C. Cir. 1988).

41. *Id.*

42. The term "Vaughn index" is derived from the case *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). A "Vaughn index" is a list of documents that a party has in his possession and may use in a legal action against the party wishing to have them disclosed. *Id.*

43. The court noted that Alyeska created the records at issue. *Alyeska*, 856 F.2d at 311.

44. *Id.*

45. *Id.*

46. *Alyeska Pipeline Serv. Co. v. EPA*, No. 86-2176, slip op. at 3 (D.D.C. Sept. 9, 1987) (WESTLAW, Allfeds).

*Webster*,<sup>47</sup> is referred to as the "threshold test."<sup>48</sup>

In *Pratt*, the court of appeals determined that FOIA makes no distinction on its face between agencies whose principal function is criminal law enforcement, and agencies with both law enforcement and administrative functions. However, the court found that it would be unnecessarily "wooden" to treat both groups identically when they claim Exemption 7 as a basis for withholding.<sup>49</sup>

The EPA, a governmental agency whose primary purpose is not criminal law enforcement,<sup>50</sup> has the burden of proving that the requested records were gathered for law enforcement purposes.<sup>51</sup> If, however, the EPA is unable to satisfy this first test, the information must be disclosed even if one of the six specific harms listed in Exemption 7 will occur upon disclosure.<sup>52</sup> This "threshold test," has created a situation in which confidential informants may refrain from giving information to the EPA because of the possibility of being exposed if the information is deemed to have been gathered for administrative, rather than law enforcement, purposes.<sup>53</sup>

## 2. *The Second Prong of the Test*

The court of appeal's affirmation of the lower court's decision was largely based upon the affidavit of John Y. Hohn, Assistant Regional Counsel for the EPA, Region 10.<sup>54</sup> Hohn, who had actively participated in the supervision of the EPA's

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47. 673 F.2d 408 (D.C. Cir. 1982).

48. *Id.* at 413.

49. *Id.* at 416.

50. The EPA was created to coordinate and effect governmental action to "assure the protection of the environment by abating and controlling pollution on a systematic basis . . . Complimentary to these activities are the Agency's coordination and support of research and antipollution activities carried out by State and local governments, private and public groups, individuals, and educational institutions." 40 C.F.R. § 1.3 (1989).

51. *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 311 (D.C. Cir. 1988).

52. *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982).

53. For a full discussion of the possible crippling effect of the "threshold rule" as applied to other governmental agencies, see Note, *Threshold Requirements for the FBI Under Exemption 7 of the Freedom of Information Act*, 86 MICH. L. REV. 620, 620-45 (1987).

54. *Alyeska*, 856 F.2d at 311-12.

investigation of Alyeska, represented in his affidavit that the EPA was conducting an ongoing investigation of Alyeska for numerous alleged environmental violations.<sup>55</sup> "Hohn averred that during EPA's investigation, he engaged in 'detailed confidential conversations with Mr. Hamel'<sup>56</sup> during which he 'requested that Mr. Hamel provide [Hohn] with documents that pertained to specific allegations of statutory violations by Alyeska that would serve to substantiate portions of his [Hamel's] notice of citizen's suit.'<sup>57</sup>

The district court concluded that the first of the two tests was satisfied, since the plaintiff did not dispute the EPA's claim that the documents related to an ongoing investigation of alleged violations by Alyeska of the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Toxic Substances Control Act.<sup>58</sup> While Alyeska was willing to concede that the threshold test was met, it still asserted that the disclosure of the documents would not interfere with law enforcement proceedings.<sup>59</sup>

To meet the burden necessary to satisfy the second part of the test, the district court required the EPA to show "by more than conclusory statement[s], how disclosure would interfere with a pending enforcement proceeding."<sup>60</sup> The EPA was required to present the court with specific examples and explanations of the type of harm that would result from the disclosure of the records.<sup>61</sup> The EPA was not required to describe the possible risks involved in disclosing each document requested.<sup>62</sup> Without objection from Alyeska, the EPA as-

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55. *Id.* at 312.

56. *Id.*

57. *Id.*

58. *Alyeska Pipeline Serv. Co. v. EPA*, No. 86-2176, slip op. at 3 (D.D.C. Sept. 9, 1987) (WESTLAW, Allfeds).

59. *Id.*

60. *Id.*, citing *Campbell v. Department of Health and Human Servs.*, 682 F.2d 256, 259 (D.C. Cir. 1982).

61. *Alyeska*, No. 86-2176, slip op. at 3.

62. *Id.* at 3-4. The EPA may focus on categories of documents and show how disclosure of each category could impede enforcement proceedings. *Id.* at 4, citing *Beavis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986); *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64 (D.C. Cir. 1986); *Campbell v.*

serted that all twenty-two documents could be classified into one general category.<sup>63</sup>

In the court of appeals, the burden was on the EPA to show that this category of records, if disclosed, would interfere with its ongoing investigation of Alyeska.<sup>64</sup> The EPA suggested to the court two possible problems that could arise if the documents were disclosed.

First, the Hohn affidavit<sup>65</sup> asserted that disclosure would "prematurely reveal[] to the subject of the ongoing investigation the size, scope, and direction of this investigation."<sup>66</sup> The court of appeals interpreted Hohn's affidavit to stand for the proposition that because the materials given to the EPA were selectively chosen, identification of the documents would reveal the particular types of allegedly illegal activities under EPA investigation.<sup>67</sup> In this instance, both the district court and the court of appeals were satisfied that Alyeska was not fully cognizant of the scope and focus of the EPA investigation and that the release of these documents could provide great insight to Alyeska in this respect.

Second, the EPA stated its fear that the release of the documents could allow Alyeska to trace them to the individual employees who relinquished them to Hamel.<sup>68</sup> Mr. Hohn contended that such a disclosure would cause a loss of cooperation from potential witnesses in EPA investigations.<sup>69</sup> He felt these witnesses could be subject to reprisals, while nonemployee witnesses would not.<sup>70</sup> Mr. Hohn repeatedly emphasized that "the employees who provided the records were 'fearful of financial and physical retribution from Alyeska if their identities were discovered.'"<sup>71</sup> Mr. Hohn concluded that the release of the records at the time of this proceeding would

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Department of Health and Human Servs., 682 F.2d 256, 265 (D.C. Cir. 1982).

63. *Alyeska*, No. 86-2176, slip op. at 4.

64. *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d at 311.

65. Affidavit of John Y. Hohn, *Alyeska*, No. 86-2176, slip op. at 4.

66. *Alyeska*, 856 F.2d at 312 (quoting *Alyeska*, No. 86-2176, slip op. at 4).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

chill future investigations by discouraging witnesses from providing confidential information.<sup>72</sup>

In deciding whether or not the EPA had satisfied the second prong of the disclosure test, the court of appeals noted that "it is not enough for an agency to shore up its exemption claim merely with general and conclusory statements regarding the effect of disclosure."<sup>73</sup> Alyeska maintained that there was no reason to suspect that they would engage in employee harassment of any kind.<sup>74</sup> In affirming the district court's opinion, the court of appeals agreed that "it is not necessary to show that intimidation will certainly result."<sup>75</sup> The defendant instead must prove that the possibility of witness intimidation exists.<sup>76</sup> In reaching its decision in favor of the EPA, the court of appeals examined the Supreme Court's decision in *NLRB v. Robbins Tire & Rubber Co.*<sup>77</sup>

In *Robbins*, an employer, charged with unfair labor practices and facing a pending hearing, requested copies of all records that the National Labor Relations Board (NLRB) had received from potential witnesses.<sup>78</sup> The NLRB denied the request, claiming that this prehearing disclosure would interfere with enforcement proceedings.<sup>79</sup> The NLRB's decision was subsequently reviewed by the Supreme Court. In upholding the NLRB's position, the Supreme Court noted that in creating Exemption 7, "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or

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72. *Id.* For further examples of this potential chilling effect, see *National Security, Law Enforcement, and Business Secrets Under the Freedom of Information Act*, 38 BUS. LAW. 707, 708-12 (1982).

73. *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 312 (D.C. Cir. 1988).

74. *Id.* at 311.

75. *Id.* (quoting *Alyeska Pipeline Service v. EPA*, No. 86-2176, slip op. at 4 (D.D.C. Sept. 9, 1987) (WESTLAW, Allfeds)).

76. *Id.*

77. 437 U.S. 214 (1978). The Supreme Court stated: "The danger of witness intimidation is particularly acute with respect to current employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage." *Id.* at 240.

78. *Id.* at 216.

79. *Id.* at 216-17.

placed at a disadvantage when it came time to present their cases.”<sup>80</sup> The Court further noted that “[t]he most obvious risk of ‘interference’ with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not to testify at all.”<sup>81</sup> The Supreme Court concluded that a suspected violator with advance access to these records “could construct defenses which would permit violations to go unremedied.”<sup>82</sup>

The court of appeals, agreed with the rationale of the Court in *Robbins* and concluded that the EPA had met its burden of proof in establishing that Exemption 7(A) is broad enough to intercept the documents in question in order to protect the EPA’s ongoing enforcement proceedings.<sup>83</sup>

### C. *The Motion for Summary Judgment*

A motion for summary judgment may only be rendered when it is shown that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>84</sup> “[W]hen the litigants quarrel over key factual premises for a determination [of the probable consequences of releasing particular information], we have unhesitatingly ruled that summary judgment is inappropriate.”<sup>85</sup> Alyeska contended that the court of appeals should deviate from past precedent and create a doctrine that whenever the parties’ affidavits disagree on the probable consequences of a

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80. *Id.* at 224.

81. *Id.* at 239.

82. *Id.* at 241 (quoting *New England Medical Center Hosp. v. NLRB*, 548 F.2d 377, 382 (1st Cir. 1976)).

83. *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 313 (D.C. Cir. 1988).

84. *Id.* at n.35 (quoting *FED. R. Civ. P. 56(c)*) (“[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”).

85. *Alyeska*, 856 F.2d at 313 (quoting *Washington Post Co. v. Department of State*, 840 F.2d 26, 30 (D.C. Cir. 1988)).

disclosure, summary judgment should be barred.<sup>86</sup> The court of appeals correctly disregarded this request. "If FOIA parties could routinely block summary judgment in this fashion, many unmeritorious FOIA cases could not be disposed of prior to a trial."<sup>87</sup>

In the instant case, the affidavit submitted to the court by Alyeska did not raise any dispute with the facts presented in the affidavit submitted by the EPA.<sup>88</sup> The alleged conflict purportedly arose from the Alyeska affidavit, submitted by Ivan Henman, an Alyeska employee in charge of a task force established by the company in direct response to the EPA investigation.<sup>89</sup> It was Henman's position that Alyeska was aware that its Valdez facility was under investigation by the EPA, and that the disclosure of the records would not provide Alyeska with any new insight in this regard.<sup>90</sup> Henman argued that through his company's interaction with the EPA over the past three years, the scope of the agency's investigation had been made clear as had the specific alleged violations of the Clean Water Act.<sup>91</sup>

In reviewing Henman's affidavit, the court stated that "a party's purported knowledge of the general scope of the investigation is a far cry from specific knowledge of the particular activities being investigated and the direction being pursued."<sup>92</sup> The court noted that while it might concede that Alyeska is aware of the specific violations of the Clean Air Act of which it is accused, the "EPA has made plain that its investigation encompasses numerous other environmental statutes as well."<sup>93</sup> The court of appeals concluded that Henman's affidavit was nothing more than speculation<sup>94</sup> and, therefore, was

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 314.

90. *Id.*

91. *Id.* Henman relied upon the EPA's previous requests for information (the two compliance orders issued by the EPA in 1985, and the agency's interviews with Alyeska employees) to substantiate his argument. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*; see FED. R. CIV. P. 56(e) ("[S]upporting and opposing affidavits shall be

insufficient to raise a key factual question.<sup>95</sup>

#### D. *The EPA's Exemption Claim De Novo*

Alyeska's final claim on appeal was that the district court failed to consider *de novo* the EPA's exemption claim.<sup>96</sup> Alyeska based this claim solely on the district court's remark that "[t]he affidavits of a government agency in FOIA are to be given substantial weight by a reviewing court."<sup>97</sup> Alyeska contended that this comment was indicative of the lower court's lack of scrutiny in reviewing the government's affidavits.<sup>98</sup>

The court of appeals rejected the claim and pointed out that the lower court cited to two FOIA Exemption 1 cases involving issues of national security in which the government's affidavits were afforded substantial weight by the court.<sup>99</sup> In the instant case, the court of appeals concluded that the content of the government's affidavits was more than sufficient on its face.<sup>100</sup>

### IV. Conclusion

The court of appeals decision in *Alyeska* is indicative of the judiciary's growing recognition that the EPA needs protection against mandatory disclosure under the Freedom of Information Act. Exemption 7 must be given great weight when applied to the EPA if the agency is to be successful in enforcing environmental laws. When interpreting FOIA, courts must be vigilant against those who seek to have information disclosed in order to avoid prosecution. An example of such judicial vigilance is the court of appeals' decision that

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made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* at n.45.

95. *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 314 (D.C. Cir. 1988).

96. *Id.* at 315.

97. *Id.*

98. *Id.*

99. *Id.* For the text of these two decisions, see *Hayden v. National Sec. Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Gardels v. CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982).

100. *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 314 (D.C. Cir. 1988).

the EPA should be afforded the protection of Exemption 7 of FOIA when the records gathered are to be used for law enforcement purposes.

Warren J. Roth