No. 14-5013

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

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia

RESPONSE TO PETITION FOR REHEARING EN BANC

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GLOSSARY

DHS	Department of Homeland Security
EPIC	Electronic Privacy Information Center
FOIA	Freedom of Information Act
JA	Joint Appendix
SOP 303	Standard Operating Procedure 303

INTRODUCTION AND SUMMARY

Exemption 7(F) of the Freedom of Information Act protects from mandatory disclosure "records or information compiled for law enforcement purposes" where disclosure "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). A unanimous panel reversed a district court's decision holding that the government could not withhold under Exemption 7(F) a protocol for disabling wireless communications during critical emergencies, such as threatened remote detonation of a bomb, because the government had not shown that disclosure could endanger the life or physical safety of *specifically identified* individuals. The panel correctly reasoned that the plain language of Exemption 7(F) references "any individual," not "any specifically identified individual." The Court also concluded that, when the protocol is used to address a critical emergency, there are identifiable groups of individuals who are most likely to be put at risk.

Plaintiff, the Electronic Privacy Information Center ("EPIC"), urges that the panel's interpretation of Exemption 7(F) is too broad. EPIC's proposed constructions of the term "any individual" in Exemption 7(F) as limited to individuals associated with law enforcement investigations or individuals identified in advance with specificity are at odds with the statutory text, and are not supported by the legislative history. Nor does EPIC provide support for its assertion that Exemption 7(F) cannot apply to certain unclassified but sensitive information that has a nexus to national security.

EPIC alleges that the panel's decision conflicts with the Second Circuit's now-vacated decision in *ACLU* v. *Department of Defense*, 543 F.3d 59 (2008), *vacated,* 558 U.S. 1042 (2009). But the panel specifically distinguished the Second Circuit's assessment of a risk of harm to "'vast' populations" in that case with the context at issue here, where "[e]xactly who will be passing near an unexploded bomb when it is triggered" is unknowable but "the critical emergency itself provides a limit." Op. 10-12. EPIC also contends that the panel's decision contravenes *Yates* v. *United States*, 135 S. Ct. 1074 (2015). But the panel's interpretation of the term "any individual" in the "context" of the rest of Exemption 7 was fully consistent with the Supreme Court's observation that text must be interpreted in context. Op. 11-12. The petition for rehearing en banc should be denied.

BACKGROUND

1. The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, was passed to strike a "workable balance between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966)). At the same time, "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information, and therefore provided the specific exemptions under which disclosure could be refused." *Ibid.* (internal quotation marks omitted). These exemptions "are intended to have meaningful reach and application." *Ibid.*

FOIA Exemption 7 protects from disclosure various "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). As relevant here, FOIA Exemption 7 shields such records where release "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Congress enacted this language in 1986, expanding Exemption 7(F) from its prior protection of records where release "would endanger the life or physical safety of law enforcement personnel." See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. N, § 1802(a), 100 Stat. 3207, 3207-48.

2. The Department of Homeland Security's ("DHS") Standard Operating Procedure 303 ("SOP 303") is a protocol for determining if and when to shut down and restore wireless networks "during critical emergencies such as the threat of radio-activated improvised explosive devices," and for executing voluntary shutdowns and restorations. JA 16-19. SOP 303 was created after the 2005 bombings of the London transportation system to address shortcomings in the United States' ability to address such threats. JA 16; see also JA 39-40. SOP 303 "establishes a protocol for verifying that circumstances exist that would justify shutting down wireless networks," and steps for addressing the detrimental effects of shutting down wireless networks, such as "the inability of first-responders and the public to use wireless phones for calls, including 911 calls." JA 18. SOP 303 also establishes a "step-by-step process for the orderly shut-down of wireless networks," such as authentication protocols to prove

that a requester is authorized to initiate a shutoff. *Ibid.* It includes similar procedures and authentication protocols for restoring communications. *Ibid.*

Plaintiff, the Electronic Privacy Information Center ("EPIC"), filed a Freedom of Information Act request with DHS seeking the full text of SOP 303, the full set of questions for deciding whether a shutdown is necessary, and any related protocols and guidelines. JA 12; see JA 27. DHS withheld much of SOP 303 under Exemptions 7(E) and 7(F), explaining that public disclosure of the document "would enable bad actors to circumvent or interfere with a law enforcement strategy designed to prevent activation of improvised explosive devices by providing information about when shutdown procedures are used and how a shutdown is executed." JA 17, 18-19, 38. Bad actors could "insert themselves into the process of shutting down or reactivating wireless networks by appropriating verification methods and then impersonating officials designated for involvement in the verification process." JA 19. Using SOP 303, bad actors could "disable the protocol [and] freely use wireless networks to activate * * * improvised explosive devices." *Ibid.*

3. The district court granted summary judgment for EPIC and ordered that DHS turn over SOP 303 with only limited redactions for personal privacy. JA 57. The court agreed that the government had satisfied Exemption 7's threshold requirement by showing that SOP 303 was "compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7); JA 46-49, 51 (citing, *inter alia*, *Milner* v. *Dep't of the Navy*, 131 S. Ct. 1259, 1272 (2011) (Alito, J., concurring) ("[S]teps by law enforcement officers to

prevent terrorism surely fulfill 'law enforcement purposes.'"). The court held, however, that SOP 303 does not satisfy the additional requirements of Exemptions 7(E) and 7(F). JA 47-56. As relevant here, the court held that Exemption 7(F)'s protection for records where disclosure "could reasonably be expected to endanger the life or physical safety of any individual" applies only if the agency "identif[ies] the individuals at risk with some degree of specificity." JA 51-52. The court concluded that this rule does not apply where release would enable large-scale attacks that could harm any or many persons, and that it is not sufficiently specific to identify individuals "within the blast radius of a remotely detonated bomb." JA 51, 54.

4. A unanimous panel reversed the grant of summary judgment and remanded for the district court to apply the correct interpretation of Exemption 7(F) to the withheld material. The panel observed that Exemption 7(F)'s protection for records where release "could reasonably be expected to endanger the life or physical safety of any individual" "is broadly stated" (Op. 8) and "provides no textual basis for requiring the Department * * * to identify the specific individuals at risk" (Op. 11). The panel rejected EPIC's reliance on *ACLU* v. *Department of Defense,* 543 F.3d 59 (2d Cir. 2008), *vacated*, 558 U.S. 1042 (2009), in which a panel of the Second Circuit rejected an Exemption 7(F) argument for photographs depicting abusive treatment of detainees by United States soldiers in Afghanistan and Iraq. In addition to noting that this Court has previously questioned the Second Circuit's interpretation of Exemption 7(F) in that case, the panel here pointed to the Second Circuit's acknowledgment that

the case did not involve any "showing of a reasonable expectation of danger with respect to one or more individuals," as is the case here. Op. 10-11.

The panel further reasoned that "[t]he language of Exemption 7(F), which concerns danger to the life or physical safety of any individual, suggests Congress contemplated protection beyond a particular individual who could be identified before the fact." Op. 11-12. For example, "[e]xactly who will be passing near an unexploded bomb when it is triggered somewhere in the United States may often be unknowable beyond a general group or method of approach (on foot, by car, etc.), but the critical emergency itself provides a limit (*e.g.*, a situs on the London transportation system)." Op. 12.

The panel found unpersuasive EPIC's argument that Congress's reference to "any individual" "rather than danger in general" requires that there be a specifically identified individual. Op. 12 (emphasis omitted). The Court explained that "understood in context, the phrase 'any individual' makes clear that Exemption 7(F) now shields the life or physical safety of *any* person, not only the law enforcement personnel protected under the pre-1986 version of the statute." *Ibid.*

The panel also rejected the argument that EPIC's "interpretation of Exemption 7(F) is rooted in the exemption's command that disclosure '*could reasonably be expected to endanger* the life or physical safety of any individual.'" Op. 12-13 (quoting 5 U.S.C. § 552(b)(7)(F)) (Court's emphasis). The Court observed that "EPIC does not explain why the release of records or information could reasonably be expected to endanger

the life or physical safety of any individual only where the individual or individuals at risk can be identified specifically." Op. 13. Indeed, the Court noted that with respect to large-scale dangers, such as terrorist attacks, "before-the-fact individual identification is unlikely to be practical." *Ibid.*

The panel similarly rejected EPIC's suggestion that "if there is a real danger from disclosure, then the Department should classify SOP 303, bringing it within FOIA Exemption 1." Op. 13. The panel explained that "the possibility of classification and the concomitant protection from disclosure provided by Exemption 1 do not render Exemption 7(F) superfluous," and, indeed, noted the government's concern with "'practical barriers'" to classifying a protocol that "'must be shared with federal law enforcement officials, [S]tate homeland security officials, and national cellular carriers.'" Op. 14 (brackets in original).

Finally, the panel rejected EPIC's argument that Exemption 7(F)'s legislative history shows that "any individual" refers only to "witnesses, interviewees, victims, informants, and families of law-enforcement personnel." Op. 15-16. The Court observed that the plain text contains no such limitations. *Ibid.* The Court further observed that some testimony and floor statements "reflect concern about those groups' prior omission" but that these are "reasonably understood as illustrative not exclusive" and that other floor statements spoke more broadly. *Ibid.*

The panel remanded for the district court to consider segregability, and explained that "[i]t remains for EPIC and other litigants to seek additional judicial

scrutiny by requesting findings on specific matters or *in camera* review." Op. 14, 16-17.

DISCUSSION

A. The unanimous panel's decision was correct. FOIA Exemption 7(F) shields from disclosure "records or information compiled for law enforcement purposes" where disclosure "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). As the panel recognized, following this Court's prior decisions, "[t]hat language is very broad." *Public Emps. for Envtl. Responsibility* v. *U.S. Section, Int'l Boundary & Water Comm'n, U.S.–Mexico* ("*PEER*"), 740 F.3d 195, 205 (D.C. Cir. 2014). When documents "relat[e] to critical infrastructure, such as blueprints, maps, and emergency plans," and detailed declarations establish that release of those documents would facilitate and enable terrorist attacks, disclosure "could reasonably be expected to endanger the life or physical safety of any individual." See Op. 2, 12-13, 16-17; *PEER*, 740 F.3d at 205-206.

There is no basis in either the statutory text or the legislative history to engraft on additional limitations. The panel correctly recognized that "'the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'" Op. 11 (quoting *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997))). Nothing in the statutory text suggests any of the varying interpretations advocated by EPIC. For example, before the panel

EPIC defended the district court's rule that "any individual" means any individual who can be identified with specificity. But the panel correctly recognized that "Congress could have, but did not, enact [that] limitation." *Ibid.* Indeed, this is in contrast to FOIA's companion statute, the Privacy Act, which affords special treatment to certain law enforcement records associated with an "identifiable individual," 5 U.S.C. § 552a(j)(2)(B); see also 5 U.S.C. § 552a(a)(6), (*l*)(2), (3) (other requirements pertaining to "an identifiable individual"); cf. *CIA* v. *Sims*, 471 U.S. 159, 169 n.13 (1985) (relying on Privacy Act to construe FOIA).

The sorts of limitations that EPIC has urged are also implausible in the context of Exemption 7(F), which guards weighty interests in "life or physical safety." For example, a "specifically identified individual" rule would permit an agency to withhold a document if disclosure poses a danger to a small group of specifically identifiable people, but would require disclosure if the danger posed is to many or most people. See *U.S. Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 601 (1982) (avoiding interpretation that would produce such "anomalous results"). This interpretation is also difficult to square with other changes that Congress made to Exemption 7(F) in the same amendments, such as changing the required degree of risk from "would endanger" to "could reasonably be expected to endanger," in light of the "lack of certainty in attempting to predict harm," S. Rep. No. 98-221, at 23-24 (1983). See also 132 Cong. Rec. 31,423-31,424 (1986) (statement of Sen. Hatch, "principal author" of

amendments, explaining that they were intended to "ease considerably" an "agency's burden in invoking" Exemption 7's protections).

B. Although EPIC declares that the panel read Exemption 7(F) too broadly, it is not clear what interpretation EPIC is advocating. Much of EPIC's petition simply contains recitations about the general purposes of FOIA, or legislative history of prior version of Exemption 7(F), from before Congress enlarged that exemption from shielding "law enforcement personnel" to "any person." To the extent that EPIC takes issue with the panel's suggestion that on remand Exemption 7(F) will shield much of the emergency-response procedure at issue in this case, EPIC's argument is highly factbound, and the interlocutory posture further counsels against en banc review.

In places, EPIC suggests that Exemption 7(F) cannot shield any information that concerns national security matters that could be classified and then subject to Exemption 1. See Pet. 6-7. But EPIC does not explain how or why Exemption 7(F)'s requirement that release "could reasonably be expected to endanger the life or physical safety of any individual" warrants such an interpretation. The possibility of classification is neither coextensive with nor mutually exclusive of Exemption 7(F) and, more importantly, it does not provide any reason for adopting EPIC's atextual rule. EPIC notes (Pet. 7) that when Congress expanded Exemption 7(F) from addressing danger to "law enforcement personnel" to danger to "any individual," Congress did not expressly address situations where release would endanger large

numbers of people. But the "whole value of a generally phrased [provision]" like Exemption 7(F) is that its text captures a spectrum of "matters not specifically contemplated" by Congress. *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 860 (2009).

In places, EPIC appears to urge (Pet. 8-10) that Exemption 7(F)'s protection for "any individual" actually applies only to "informants, witnesses, agents, or their families." The statutory text, however, contains no such limit. And EPIC misunderstands the legislative history that it cites. This Court correctly noted that "[t]here are statements of Members of Congress and the Executive Branch that reflect concern about those groups' prior omission," but many references to these groups are "illustrative not exclusive," and there are also "statements [that] viewed the amendment to Exemption 7(F) as relatively broad." Op. 15-16. Thus, the testimony of then-Professor Scalia (cited by EPIC at Pet. 10) observed the "inadequacy, almost irrationality" of limiting Exemption 7(F) to "law enforcement personnel," and then asked, "Why not their spouses and children? Come to think of it, why not anyone, even you and me?" 1 *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 959 (1981). Moreover, "statutory provisions often go beyond the principal evil [targeted by Congress] to cover reasonably comparable evils," and "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); see, *e.g., H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989).

Finally, EPIC seems to urge (Pet. 13-14) that the Court should adopt the Second Circuit's now-vacated rule that construed "any individual" to mean any *specifically identified* individual. But as noted, there is no basis in the statutory text for this limitation. EPIC's arguments before the panel relied on certain testimony or floor statements. But as we explained in our briefs, those statements did not support the Second Circuit's rule and were, in any event, simply taken out of context. See DHS Br. 14-18; Reply Br. 4. Moreover, even EPIC understands this legislative history to show that the 1986 amendment replacing "law enforcement personnel" with "any person" was intended "only to relax the category of covered persons." EPIC Br. 19 (internal quotation marks omitted). And EPIC does not appear to dispute that prior to the amendment, Exemption 7(F) did not require the government to identify particular at-risk officials. See, *e.g., LaRouche* v. *Webster*, No. 75-cv-6010, 1984 WL 1061, at *8 (S.D.N.Y. Oct. 23, 1984) (applying Exemption 7(F) to shield FBI report describing homemade machine gun, to protect "persons who are charged with law enforcement" generally).

C. In addition to failing to show that the panel decision is wrong, EPIC also does not establish that it meets any of the standard criteria for en banc review.

EPIC asserts (Pet. 11-13) that the panel's decision is in conflict with *Yates* v. *United States*, 135 S. Ct. 1074 (2015), which observed that statutory language must be interpreted in the "specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 1077. But that is exactly what the panel did

here. The panel began by noting how the word "any" is "[g]enerally" construed; the panel acknowledged that "there are statutory contexts in which 'any' does not mean 'any'"; and the panel considered the context here. Op. 11; see also Op. 12 (considering alternate phrasings and interpreting the term "in context").

EPIC also asserts that the decision "creates an irreconcilable conflict between the D.C. Circuit and the Second Circuit." Pet. 13. But the Second Circuit decision that EPIC identifies, *ACLU* v. *Department of Defense*, has been vacated. In that case, the Solicitor General filed a petition for a writ of certiorari making many of the same arguments that the Court accepted here. Pet. for Writ of Cert., *Department of Defense* v. *ACLU*, No. 09-160 (S. Ct. Aug. 7, 2009), 2009 WL 2430236. When Congress passed a statute that would address the documents at issue in that case, the Supreme Court granted certiorari, vacated, and remanded. 558 U.S. 1042 (2009).

Moreover, even had the decision not been vacated, the degree of conflict would be uncertain, and this case would be a poor vehicle to address any conflict that exists. The panel made clear that given the facts of this case, it had no occasion to address the core holding of the Second Circuit's now-vacated decision and suggested that under the Second Circuit's rule, the government would prevail in this case. Thus, the panel observed that *ACLU* concerned "'vast' populations" without "a showing of a reasonable expectation of danger with respect to one or more individuals." Op. 10-11. And the panel "conclude[d] [that] there is [such a showing] here." *Ibid.* "Exactly who will be passing near an unexploded bomb when it is triggered somewhere in the

United States may often be unknowable beyond a general group or method of approach (on foot, by car, etc.), but the critical emergency itself provides a limit (*e.g.*, a situs on the London transportation system)." Op. 12.

At bottom, EPIC seems simply to disagree with the panel's observation that, even under the Second Circuit's now-vacated legal standard, "much if not all of SOP 303" is exempt from disclosure (Op. 2, 16-17; see Op. 14). That argument is highly factbound and interlocutory, and does not warrant the full Court's review.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

Respectfully submitted,

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APRIL 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the requirements of Federal Rule of Appellate Procedure 35(b)(2) and this Court's order of April 3, 2015, because it has been prepared in 14-point Garamond, a proportionally spaced font, and does not exceed 15 pages, excluding material not counted under Rule 32.

/s/ Adam Jed
Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Adam Jed
Adam C. Jed