

Freedom of Information Act Overview

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Freedom of Information Act Overview (Cont'd)

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Lecture Objectives

- Brief overview of the FOIA.
- Review FOIA exemptions.
- Discuss processing procedures & expectations.



FOIA Basics

✦ History

- Enacted in 1966; amended several times since, including the 1996 “Electronic *FOIA* Amendments.”
- Provides statutory right of access to Federal agency records. No showing of need required.
- Goal is to ensure informed citizenry/prevent secret law – Government openness and accountability.
- Records must be disclosed unless exempt/excluded by the Statute.
- Key Agency for FOIA guidance – Department of Justice.



Why FOIA is Important

- ✦ “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” James Madison, Letter to W.T. Barry (Aug. 4, 1822).
- ✦ "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."
-LBJ, on signing of FOIA, 1966



Why FOIA is Important (Cont'd)

- ✦ The purpose of FOIA “is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).



Executive Order 13,392

- ✦ “Improving Agency Disclosure of Information”, issued December 2005
 - Agencies must reform FOIA programs to be more “citizen-centered” and be “results-oriented”
 - Agencies must designate a Chief FOIA Officer, establish a FOIA Requester Service Center & identify FOIA Public Liaison(s)
 - Agencies submitted FOIA Improvement Plans to DOJ
 - FOIA Officers are required to report improvement plan progress to Privacy Office.



E-FOIA Requirements

- ✦ FOIA amended by Public Law 104-231, popularly known as the “Electronic Freedom of Information Act Amendments of 1996” (E-FOIA).
- ✦ The amendment required agencies to:
 - (1) Make all Subsection (a)(2) (reading room) records created on or after 11/1/96 available electronically by 11/1/97
 - (2) Establish a new reading room category of records
 - (3) Submit reports annually covering the preceding fiscal year

Requirements continued on next slide

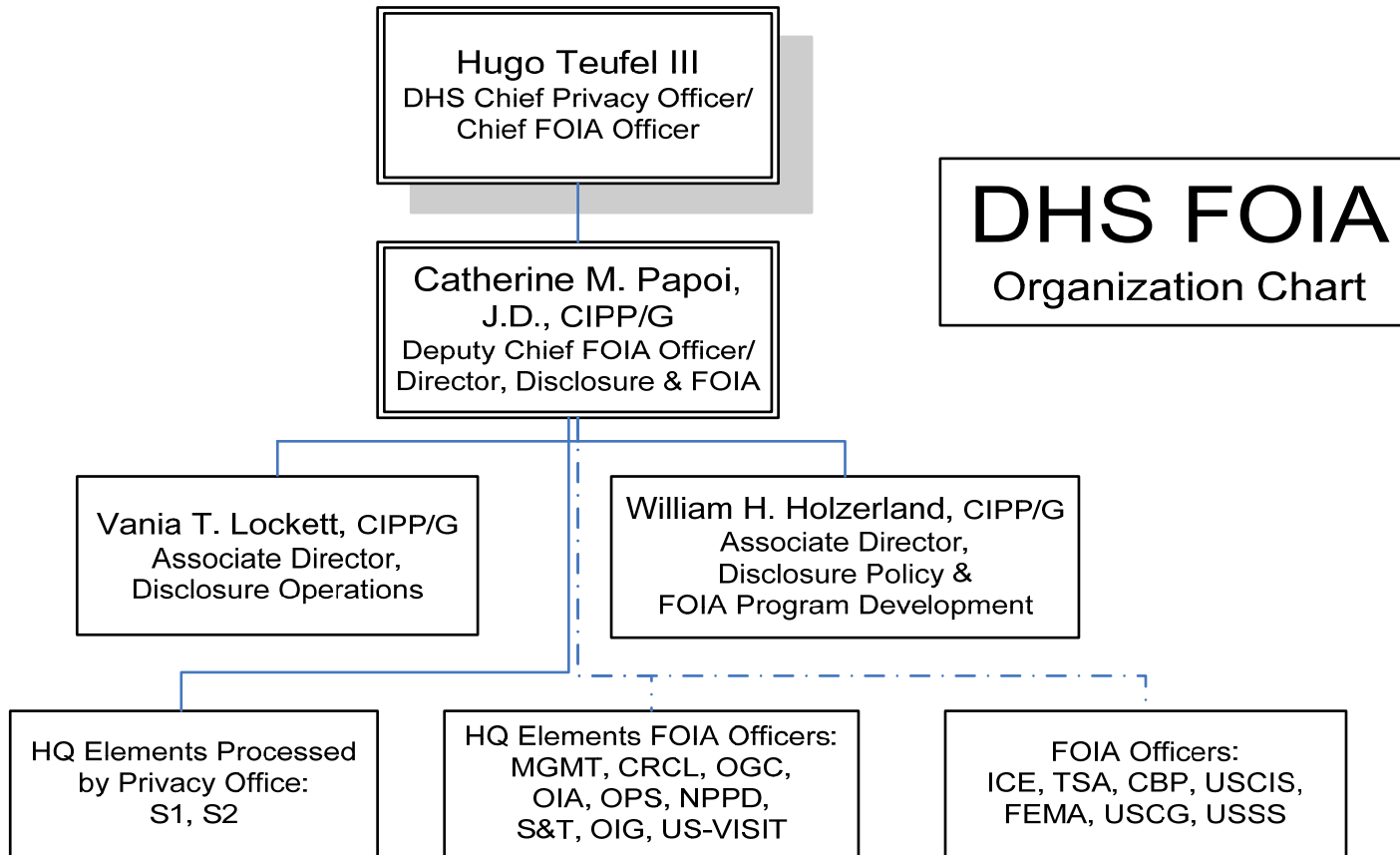


E-FOIA Requirements (Cont'd)

- ✦ The amendment also required agencies to:
 - (4) Prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency
 - (5) Promulgate regulations for expedited processing of requests
 - (6) Ensure that regulations provide for notice of determination whether to provide expedited processing within 10 days.
- ✦ In addition, E-FOIA defined a record to include those in an electronic format.



DHS FOIA Organization



*Component FOIA Officers report to CFOIAO for purposes of FOIA reporting, policy & oversight



THE EXEMPTIONS



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FOIA Exemptions

- Exemption 1 – Classified Information
- Exemption 2 – Internal Personnel Rules and Agency Practices
- Exemption 3 – Statutory Exemptions
- Exemption 4 – Trade Secret and Commercial Information
- Exemption 5 – Common Law Privileges
- Exemption 6 – Personal Privacy
- Exemption 7 – Records Compiled for Law Enforcement Purposes
- Exemption 8 – Financial Institutions
- Exemption 9 – Geological and Geophysical Information



FOIA Exemption Application

- ✦ There is no “embarrassing information” exemption. The FOIA does not allow an agency to withhold information from a requester simply because the disclosure of the requested record would be embarrassing to the agency
- ✦ Agencies and individual employees should keep this in mind when creating records



Exemption 1

- ✦ Protects matters that are specifically authorized under an Executive Order to be kept secret in the interest of national defense or foreign policy and are *in fact* properly classified under the Executive Order.
- ✦ Executive Order 12,958, as amended, is currently in effect.
 - Protects national security information concerning national defense or foreign policy that has been properly classified.
 - Substantive criteria: three classification levels and seven classification categories
 - Procedural criteria: classification authority and proper markings
 - Provides no protection for FOUO



Exemption 2

- ✦ Protects Internal Personnel Rules and Practices of an Agency
 - “Low 2” – Predominantly internal matters of a relatively trivial nature and of no genuine public interest.
 - “High 2” – Predominantly internal matters the disclosure of which would risk circumvention of a statute or regulation. *Crooker v. ATF*, 670 F2d 1051,1074 (D.C. Cir. 1981).



Exemption 2 (Cont'd)

- ✦ “First, the material withheld should fall within the terms of the statutory language as a personnel rule or internal practice of the agency. Then, if the material relates to trivial administrative matters of no genuine public interest, exemption would be automatic under the statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.”

Founding Church of Scientology v. Smith, 721 F.2d 828
(D.C. Cir. 1983)



Exemption 3

- ✦ Protects matters specifically exempted from disclosure by a statute (other than FOIA), provided the statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Examples:

- Adjustment of Status of certain entrants
8 U.S.C. 1255a (c)(5)
- Grand Jury Information
Rule 6(e), Federal Rules of Criminal Procedure



Exemption 4

- ✦ Protects (1) “Trade Secrets” and (2) “Commercial or Financial Information” that is
 - Obtained from a person and
 - Privileged or confidential.



Exemption 4 (cont'd)

✦ Trade Secret

- "Trade secret" defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."

Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).



Exemption 4 (Cont'd)

✦ Commercial or Financial Information

- The terms “commercial” and “financial” are to be given their ordinary meanings; records are commercial if a submitter has a “commercial interest” in them. *See, e.g., Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).
- The term “financial” applies to personal as well as corporate financial information. *Washington Post Co. v. Dept. of Health and Human Services*, 690 F.2d 252,266 (D.C. Cir. 1982); *Defenders of Wildlife v. Dept. of the Interior*, 314 F. Supp. 2d 1,15 (D.D.C. 2004).



Exemption 4 (cont'd)

- ✦ “Obtained from a person” includes:
 - “[A]n individual, partnership, corporation, association, or public or private organization other than an agency,” *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996).



Exemption 4 (cont'd)

- ✦ Two inquiries for “privileged or confidential” :
 - 1) Voluntary Submission
 - Where a submitter voluntarily provides commercial or financial information to the government, it is “confidential for the purpose of Exemption (4) if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (en banc).



Exemption 4 (cont'd)

2) Required Submission

- Where the government requires the submitter to provide commercial or financial information, it is “confidential” for purposes of exemption (4) if disclosure of the information is likely to 1) impair the government's ability to obtain necessary information in the future; or 2) cause substantial harm to the competitive position of the person from whom the information is obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).



Exemption 4 (Cont'd)

- ✦ 2) Required Submission (Cont'd)
 - *Critical Mass* recognized a “third prong” of the *National Parks* test: protecting governmental interests, such as administrative efficiency and program effectiveness, in addition to “impairment” or “competitive harm to the submitter” prongs. See *Pub. Citizen Health Research Group v. NIH*, 209 F. Supp. 2d 37, 52 (D.D.C. 2002)



Exemption 4 (Cont'd)

- ✦ 2) Required Submission (Cont'd)
- ✦ *Public Citizen Health Research Group*, using the program effectiveness prong, held that NIH could withhold royalty rate information contained in agreements by which NIH licensed pharmaceutical companies to use NIH employee inventions; the court reasoned that if NIH were required to release royalty rate information it would be unable to carry out its statutory mandate of using the patent system to promote inventions arising from Federally supported research.



Exemption 4 (cont'd)

- ✦ If applying Exemption 4, duty under Executive Order 12600 to consult with the submitter.
- ✦ “Reverse FOIA” Suits



Exemption 5

- ✦ Protects from release agency records that would be subject to common law privileges in court.
 - Two-part test:
 - 1) Inter-agency or intra -agency memoranda or letters
 - 2) That would not be available by law (i.e., by discovery) to a party other than an agency in litigation with the agency.
- ✦ Courts have interpreted this exemption as protecting those documents that are normally privileged in the civil discovery context. *NLRB v. Sears, Roebuck and Co.*, 421 U.S. 132, 149 (1975).



Exemption 5 (cont'd)

To be protected, an agency record must meet both the “inter-agency or intra-agency” requirement and be subject to a court-recognized discovery privilege.

1. Inter-agency or intra- agency memoranda or letters include:
 - Communications within DHS.
 - Communications between and among federal agencies.
 - Communications between agencies and consultants used by agencies in the conduct of agency business. See *Dept. of the Interior v. Klamath Water Users Protective Assn*, 532 U.S. 1 (2001).
2. Court- recognized discovery privileges include:
 - Deliberative Process
 - Attorney Work Product
 - Attorney/Client



Exemption 5 (cont'd)

- ✦ Deliberative Process Privilege
 - Protects the agency's decision-making process by protecting documents that are both:
 - Pre-decisional AND
 - Deliberative, e.g., drafts, recommendations, proposals, suggestions and other documents that reflect the personal opinion of the author rather than the policy of the agency.
 - Draft documents may be withheld in their entirety.



Exemption 5 (cont'd)

✦ Attorney Work-Product

- Protects documents prepared by or under the supervision of an attorney in contemplation of litigation.
 - Privilege attaches once specific claims have been identified that make litigation probable (not just “possible”) and applies during the course of the litigation; privilege continues to apply even after the litigation ends.
 - Actual commencement of litigation is not required.
 - Privilege relates equally to documents prepared for judicial (criminal and civil) and administrative proceedings.
 - Even factual information is protected.



Exemption 5 (cont'd)

- ✦ Attorney-Client Communications
 - Protects confidential communications between an attorney and client relating to a legal matter for which the client has sought professional advice.
 - Elements: client is always the agency; attorney acted as a lawyer; applies to facts divulged to attorney in confidence to secure legal advice, and any opinion given by the attorney based upon, and reflecting those facts.
 - The privilege is NOT limited to communications prepared in anticipation of litigation.
 - Neither, however, does it extend to all communications between a client and an attorney.



Exemption 6

- ✦ Protects personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
- ✦ The Supreme Court has interpreted “personnel and medical files and similar files” as meaning all information that applies to a particular individual. *Department of State v. Washington Post Co.*, 456 U.S. 595 (1982).
- ✦ Examples of types of information that courts have protected under this exemption:
 - Home addresses
 - Home telephone numbers
 - Social security numbers



Exemption 6 (Cont'd)

- ✦ *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).
 - Five guiding principles announced in this landmark decision:
 - (1) Substantial privacy interests can exist in personal information even though the information has been made available to the general public at some point in time. This is known as the “practical obscurity standard.”



Exemption 6 (Cont'd)

✦ *Reporters Committee* (Cont'd)

(2) The identity of a FOIA requester generally cannot be taken into consideration in determining what should be released under the FOIA. This is based on the rationale that Congress intended any member of the public to have the same right of access as one with a special interest in the document.

(3) In determining whether there is any public interest to be served by a requested disclosure, the purpose for which the request for information is made should not be considered. Rather, the determination must turn on the nature of the requested document and its relationship to the public interest overall.



Exemption 6 (Cont'd)

✦ *Reporters Committee* (Cont'd)

(4) The public interest to be considered in the balancing process is limited to the kind of public interest that furthers the purpose for which Congress enacted the FOIA- to shed light on how a Federal agency carries out its mission. Thus, one asks, in determining the existence and extent of a public interest, to what degree does the requested record contribute to the public understanding of the operations or activities of the agency.



Exemption 6 (Cont'd)

✦ *Reporters Committee* (Cont'd)

- (5) Agencies may engage in “categorical balancing” in favor of non-disclosure, i.e., an agency may determine that certain types of information will always be protected “without regard to individual circumstances.” This primarily applies in the exemption 7(C) context but has also been applied under exemption 6. See *Reed v. NLRB*, 927 F2d 1249,1252 (D.C. Cir. 1991)(exemption 6 categorically protects lists of names and addresses of employees eligible to vote in union elections).



Exemption 6 (cont'd)

- *Reporters Committee (Cont'd)*
- **Balancing Analysis:**
- Is there a viable privacy interest in the information at issue? The privacy interest must be real rather than speculative.
- If no privacy interest, release the information. If there is a privacy interest, determine whether there is a public interest in release.
- Is there a cognizable public interest in the information? The information must shed light on the operations of the agency for there to be such an interest.
- If there is a public interest, balance the degree to which the information sheds light on the agency's mission against the privacy interest at stake. In order to withhold the information it must be determined that the balance clearly tilts in favor of protecting privacy.



Exemption 6 (Cont'd)

- ✦ *Reporters Committee (Cont'd)*
- ✦ Key points in the balancing process:
 - In order to be considered as a public interest in the balancing process the information must shed light on the operations of the agency.
 - To withhold privacy information after the balancing process the balance must clearly tilt in favor of the privacy interest.



Exemption 6 (Cont'd)

- ✦ Examples of situations where there is no real privacy interest:
 - Basic information about most Federal employees: 1) Under 5 CFR 293.311, name, present and past position titles and occupational series, present and past grades, present and past annual salary rates, present and past duty stations; 2) parts of successful applicants' employment applications that show their qualifications for their positions (see *Barvick v. Cisneros*, 941 F. Supp. 1015, 1020 n. 4 (D. Kan. 1996))



Exemption 6 (Cont'd)

- ✦ Examples of cases dealing with home addresses.
- ✦ 1. *Barvick v. Cisneros*, 941 F. Supp. 1015, 1020, n.4 (D. Kan. 1996). Here, the agency had released information from successful job candidates' applications that related to their qualifications for the position. However, the agency withheld the successful applicants' home addresses, home telephone numbers, SSNs, and other personal information unrelated to their qualifications. The agency also withheld all information regarding unsuccessful applicants. Court found that the persons' privacy interests in this information prevailed over whatever public interest there may have been in release. Key to the court's decision was fact that the strong privacy interests in this information were not outweighed by any public interest in release.



Exemption 6 (Cont'd)

- ✦ 2. *News-Press v. Department of Homeland Security*, 2007 U.S. App. LEXIS 14817 (11th Cir. 2007). The court ordered release of home addresses of Florida hurricane relief applicants, finding that the privacy interest in one's home address was low where the individual had requested a government benefit, and that this privacy interest was clearly outweighed by the substantial public interest in knowing the addresses for which flood insurance program benefits had been requested.



Exemption 6 (Cont'd)

- ✦ 3. *People for the American Way v. National Park Service*, 2007 U.S. Dist. LEXIS 62833 (D.D.C. 2007). The court required release of names of individuals who had allegedly petitioned the NPS to change the content of a video shown at the Lincoln Memorial, finding that a petitioner for government action does not have the kind of privacy concerns protected by Exemption 6. However, the court found the petitioners did have a privacy interest in their home addresses and home telephone numbers and that releasing this information would not shed light on NPS activity. Court agreed this information was properly withheld.



Exemption 6 (Cont'd)

- ✦ *Alliance for the Wild Rockies v. Dept. of the Interior*, 53 F. Supp. 2d 32 (D.D.C. 1999). The court required the release of names and home addresses of individuals who had commented on Fish and Wildlife Service proposed rule to reintroduce grizzly bears in the Bitterroot ecosystem in portions of Idaho and Montana. The court found the commenters had little privacy interest in their names and home addresses, and that there was a very high public interest in release of the information because doing so would assist the public in determining whether the FWS fairly considered the comments it received.



Exemption 7

- Protects records or information compiled for law enforcement purposes, where the production of such records or information would cause any one or more of six enumerated harms.
- A key point: the agency need not be a criminal law enforcement agency; “law enforcement” for purposes of the exemption applies to enforcement of civil as well as criminal laws.
- CIS’s adjudicative responsibilities may qualify as law enforcement authorities. See *Abdelfattah v. Department of Homeland Security*, 488 F3d 178 (3rd Cir. 2007)(finding that CIS immigration adjudications, e.g., visa petitions and asylum applications, come within this requirement).



Exemption 7 (Cont'd)

- ✦ Additional examples of agency activities qualifying as “law enforcement” for purposes of Exemption 7:
 - 1) ***Mapother v. Department of Justice*, 3 F3d 1533 (D.C. Cir. 1993)**(holding that procedures for adjudication and review of the former Immigration and Naturalization Service constituted proceedings meeting the exemption 7 threshold test for coverage).
 - 2) ***Finkel v Department of Labor*, 2007 U.S. Dist. LEXIS 47307 (D.N.J. 2007)**(Occupational Safety and Health Administration (OSHA) records, collected in the course of OSHA acting under its statutory authority to inspect workplaces, question employees and cite employers violating safety and health regulations, compiled for law enforcement purposes).



Exemption 7 (Cont'd)

- ✦ Additional example of agency activities qualifying as “law enforcement” for purposes of Exemption 7:
 - 3) *Sinsheimer v. Department of Homeland Security*, 437 F. Supp. 2d 50 (D.D.C. 2006)(records of Equal Employment Opportunity investigations meet “law enforcement” test; it is the purpose of the record, not the role of the agency, that is determinative).



Exemption 7 (cont'd)

- ✦ Once it has been established that the records are compiled for law enforcement purposes, at least one of the following six harms must be established by release of the records for Exemption 7 to apply:
 - (A)** Could reasonably be expected to interfere with pending or prospective enforcement proceedings. See *Center for National Security Studies v. Department of Justice*, 331 F3d 918 (D.C. Cir. 2003)(information identifying individuals detained by the former INS after 9/11, including names, places of arrest and detention, dates of release and names of their lawyers; court found, after giving deference to the Executive Branch because of the national security nature of the case, that the government had demonstrated release could reasonably be expected to interfere with the INS terrorism investigation).



Exemption 7 (Cont'd)

- ✦ Exemption 7(A) (Cont'd)

Balderrama v. DHS, 2006 U.S. Dist. LEXIS 19421 (D.D.C. 2006). Granting deference to ICE's use of FOIA's law enforcement exemptions, court upholds under exemption 7(A) the denial of information about witnesses and suspects contained in imprisoned requester's alien file, where ICE is investigating whether requester is subject to deportation, noting that the investigation is still open and that release of the information could identify suspects being investigated.



Exemption 7 (Cont'd)

(B) Would deprive a person of a right to a fair trial.

In *Washington Post Co. v. United States Department of Justice*, 863 F.2d 96, 101-02 (D.C. Cir. 1988) the court announced two-part standard to determine exemption's applicability: 1) that a trial or adjudication is pending or truly imminent, and 2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings.

This exemption is rarely used, primarily because information protected by this exemption would also be protected by Exemption 7 (A).



Exemption 7 (cont'd)

- (C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy.
- This exemption is closely related to exemption 6, but requires a lesser degree of invasion of personal privacy to justify withholding (exemption 6 requires “clearly unwarranted” invasion).
 - Examples of information commonly withheld: “categorical withholding” of information pertaining to a 3rd party interviewees in an investigation (See *Reporters Committee*, 749 U.S. at 776-780); identities of law enforcement personnel referenced in investigatory files.
 - Landmark case: *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (information contained in FBI “rap sheets”).



Exemption 7 (Cont'd)

(D) Could reasonably be expected to disclose identity of a confidential source, and where the record or information is compiled by criminal law enforcement authority in the course of a criminal law enforcement investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.

A major case is *DOJ v. Landano*, 508 U.S. 165 (1993) (“A source is confidential within the meaning of Exemption 7(D) if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.”)



Exemption 7 (Cont'd)

✦ Exemption 7 (D) (Cont'd)

***Owens v. DOJ*, 2007 U.S. Dist. LEXIS 21721(D.D.C. 2007)(records concerning FBI investigations of terrorist attacks on U.S. Embassies in Africa in 1998; court agrees with FBI that express promise of confidentiality is not required where circumstances demonstrate that disclosure of identity of informant could lead to violent reprisals.)**

***Summers v. DOJ*, 2007 U.S. Dist. LEXIS 37714 (D.D.C. 2007)(source symbol number of confidential informant protected, as informants with source symbol number operate under express assurance of confidentiality.)**



Exemption 7 (Cont'd)

E) Would disclose:

- **techniques and procedures for law enforcement investigations and prosecutions. Provides broad “categorical” protection provided the technique or procedure is not well-known to the public. No demonstration of harm is required. Example: *Judicial Watch v. U.S. Dept. of Commerce*, 2004 U.S. Dist. LEXIS 19706, 337 F. Supp. 2d 146 (D.D.C.2004) (firearms specifications and radio frequencies used by agents protecting the Secretary of Commerce); or**
- **guidelines for law enforcement investigations or prosecution if their disclosure could reasonably be expected to risk circumvention of the law. Example: law enforcement manuals and guidelines provided they meet the statutory test.**



Exemption 7 (Cont'd)

- NOTE: Exemption 7 (E) can be valuable in protecting homeland security-related information. Examples include: guidelines for response to terrorist attacks; records pertaining to watch lists; inspection statistics of an international seaport; analyses of security procedures; and records pertaining to domestic terrorism investigations. See, e.g., *Center for National Security Studies v. Immigration and Naturalization Service*, 1990 WL 236133 (D.D.C. 1990)(contingency plan to be put in effect if United States is attacked, security checks to be used by consular offices in visa determination process, guidelines for use of law enforcement officers in situations involving terrorists, hostages, and other hostile attacks, and contingency plan in the event of a mass immigration of aliens from Caribbean countries).



Exemption 7(Cont'd)

(F) Could reasonably be expected to endanger life or physical safety of any individual.

- “Any individual” is broadly interpreted to include anyone whose life or safety is at risk. This exemption was used to protect Department of the Interior’s Bureau of Reclamation “inundation maps” of the Hoover Dam that showed projected patterns in which downstream areas, including inhabited areas, would be catastrophically flooded in the event of a breach of the dam. *Living Rivers v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1321-1322 (D. Utah 2003). Also see *Peter S. Herrick’s Customs and Int’l Trade Newsletter v. U.S. Customs and Border Patrol*, 2006 WL 1826185, at 9 (D.D.C. 2006)(finding that release of Customs officials’ identities and information concerning seized contraband could endanger Customs officials and innocent bystanders).



Exemption 7 (Cont'd)

- ✦ Exemption 7(F) (Cont'd)
 - Other examples of protected information: names of persons unknown to target of an investigation, such as informants or federal employee who may be working on an aspect of an investigation. See *Rugiero v. U.S. Dept. of Justice*, 257 F3d 534, 552(6th Cir. 2001)(protecting names of DEA agents); *Johnston v. Dept. of Justice*, 1998 U.S. App. LEXIS 18557 (protecting names of DEA personnel, local law enforcement personnel and third parties).



Discretionary Release

- ✦ A discretionary release is the release of information that is subject to protection by a FOIA exemption. A discretionary release may be appropriate where there is no other legal barrier to release. Examples of exemptions for which a discretionary release may be appropriate are exemptions 2 and 5, which protect information that is not subject to such legal barriers. In the absence of legal barriers an agency may make a discretionary release after first making a “full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.” See Memorandum from Attorney General Ashcroft, October 12, 2001, reprinted in *FOIA Post*, October 15, 2001.



Discretionary Release (Cont'd)

- ✦ Once an agency record has been released discretionarily, it can no longer be withheld from future FOIA requesters, but a discretionary release will not preclude withholding similar information in the future. *Mobil Oil Corp. v. EPA*, 879 F2d 698 (9th Cir. 1989)



Discretionary Release (Cont'd)

- ✦ Examples of exemption protection where discretionary release would not be legally permitted:
 - Exemption 1
 - Exemption 3
 - Why?

- ✦ Examples of where discretionary release would not be appropriate:
 - Exemptions 6 and 7(C).
 - Why? Can you think of a reason why discretionary release of information protected by these exemptions may not be legally permissible?



Waiver of Exemptions

- ✦ An agency can lose the right to assert an exemption if the agency has made a prior disclosure of the information, especially if the disclosure was to an interested party to a proceeding. *See North Dakota ex rel. Olson v. Andrus*, 581 F2d 177, 182 (8th Cir. 1978)(finding a waiver where the agency “selectively” released a document to one party to a legal proceeding but not to other parties).
- ✦ A waiver occurs where an agency has made an official and documented disclosure of the information. *Students Against Genocide v. Dept of State*, 257 F3d 828, 836 (D.C. Cir. 2001)(emphasizing that the specific information sought already must have been disclosed and preserved in a permanent public record).



Waiver of Exemptions (Cont'd)

- ✦ The D.C. Circuit found waiver of ability to use a “neither admit nor deny” response to request for records about an individual where the agency head had discussed the individual during Congressional testimony. *Wolf v. CIA*, 473 F3d 370 (D.C. Cir. 2007)
- ✦ Courts have recognized that certain types of release that are necessary for the effective functioning of government do not constitute a waiver. See, for example, *Students Against Genocide*, 257 F3d at 835 (sharing of classified data with a foreign government does not constitute waiver).



Waiver of Exemptions (Cont'd)

- Additionally, courts have not found waiver where the government adds restrictions on further dissemination, *Judicial Watch v. USPS*, 297 F. Supp. 2d 252, 268 (D.D.C. 2004)(a disclosure to a third party that promotes the client's trial strategy and is consistent with maintaining secrecy against trial opponents does not waive the privilege).
- When an agency is compelled to release information to Congress, without making a release to the public, courts have refused to find waiver of exemptions *See, e.g., Rockwell v. Dept of Justice*, 235 F3d 598, 604-05 (D.C. Cir. 2001)(finding no waiver where agency obtained promise of confidentiality from Congressional subcommittee and release was made pursuant to FOIA's Congressional disclosure provision (5 USC 552 (d))).



FOIA Exclusions

What is an exclusion? When a request is for records subject to an exclusion, the agency may treat those records as not being subject to the FOIA. This is different from “Glomarization” where the agency neither admits nor denies that it has responsive records. The correct response to a request for records that are covered by an exclusion is that no records responsive to the request exist.



FOIA Exclusions (Cont'd)

✦ There are three exclusions:

- (1) Whenever records requested are covered by exemption 7(A) and the investigation or proceeding involves a possible violation of criminal law and there is reason to believe that (a) the subject of the investigation or proceeding is unaware of its pendency, and (b) disclosure of the *existence* of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, while the circumstance continues, treat the records as not subject to FOIA.



FOIA Exclusions (Cont'd)

- (2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the name or personal identifier of the informant, the agency may treat the records as not subject to the FOIA unless the informant's status as an informant has been officially confirmed.



FOIA Exclusions (Cont'd)

- (3) Whenever a request involves access to records maintained by the FBI pertaining to foreign intelligence or counterintelligence, or international terrorism, and the *existence* of the records is protected under exemption 1, the FBI may, as long as the *existence* of the records remains classified information, treat the records as not subject to the FOIA.
- NOTE: It may be possible for agencies other than the FBI, such as DHS, to assert the third exclusion on a derivative basis, e.g., if DHS records contain information derived from FBI records eligible for protection under this exclusion.



Processing Procedures & Expectations

Lifecycle of a FOIA

- ✦ Request received by component's FOIA officer
 - Determine fee category
 - Resolve scope issues through communication with requester
- ✦ Acknowledgement letter
 - Was expedition or fee waiver requested?
- ✦ Search for records
- ✦ Analysis of responsive records
 - Are consultations/referrals required?
- ✦ Letter to requestor itemizing ALL responsive records
- ✦ Appeal/Litigation



What is a proper FOIA request?

- ✦ Two requirements:
 - 1.) Request must reasonably describe the records sought; agency personnel must be able to locate responsive records with a “reasonable amount of effort”
 - Broad or burdensome requests don’t always fail “reasonable amount of effort” test
 - Just because a request is broadly drafted or a resource drain does NOT mean we can decline to process it; when this happens, the FOIA office attempts to work with the requester to narrow the scope of the request
 - 2.) Complies with agency regulations
 - DHS Interim FOIA regulations found in 6 CFR Chapter 1, Part 5



What is an Agency Record?

- ✦ An “agency record” under FOIA is a record created or obtained by an agency, and under its control at the time of the FOIA request.
- ✦ This can include records in the possession of a contractor if the records are actually subject to agency control.



Agency Record or Personal Record?

- ✦ **Four factors that are relevant to determining whether an agency exercises sufficient control over a document to render it an "agency record" and therefore subject to the FOIA:**
 - 1. intent of the document's creator to retain or relinquish control over the records;**
 - 2. ability of the agency to use and dispose of the record according to agency records schedules;**
 - 3. the extent to which agency personnel have read or relied upon the document;**
 - 4. degree to which the document was integrated into the agency's record system or files.**

***Burka v. Dept. of Health and Human Services*, 87 F 3d 508, 515 (D.C. Cir. 1996)**



Search Tips

- ✦ Administrative record is key
 - Where were records located?
 - When did search begin?
 - Begin search for records as soon as request is received, because once you've "cast your net" for records, you need not go fishing later for recently created records.
 - In what type of file were responsive records found?
 - Is there information you believe should be withheld? Why (what would be the harm to the agency in release)?
 - Who conducted the search and what is their pay grade?
 - How much time spent on search and review?



Search Tips (Cont'd)

- ✦ Think about the following places when conducting a search under FOIA:
 - Files, desks, boxes, safes, computers (including e-mail), discs and other storage media
- ✦ Think about the following types of documents when conducting a search under FOIA:
 - Calendars (including Outlook), telephone message slips, hand-written notes, draft and final documents (hard copy and e-version), audio/videotapes, photos, transmittal/routing slips, fax cover sheets, e-mail, correspondence files, subject matter files



FOIA Processing Guidelines

- ✦ Segregation
 - The FOIA requires that any reasonably segregable portion of a record must be released after appropriate application of the Act's nine exemptions. 5 U.S.C. § 552(b).
- ✦ “Scoping”
 - Even if a requester seeks only a portion of a document, you must consider the entire document responsive and subject to disclosure. Only in limited circumstances may a mere portion of a record be released.



Federal Records Act (FRA) v FOIA

- ✦ Both laws address Federal records management
- ✦ FRA speaks to Federal records retention and destruction
- ✦ FOIA speaks to Federal records access
- ✦ Cannot destroy a record once it has become subject of a FOIA request or litigation, even if destruction permitted by FRA
- ✦ FRA Key Agency – National Archives and Records Administration
- ✦ FRA questions: Kathy Schultz, DHS Senior Records Officer, 202-447-5075



FOIA Records Retention

- General Records Schedule 14
- Destroy files two years after final response if records were released in entirety
- Destroy files seven years after final response if any withholdings (full or partial) or subject of an appeal. Although NARA authorizes destruction after six years, the statute of limitations on a FOIA claim is seven years. Therefore, we should retain any appeal/denial files for seven years after the Department's final action on the request. However, if litigation is pending at the end of seven years, retain records until litigation terminates unless applicable records retention schedules require them to be maintained longer.



Privacy Act v FOIA

- ✦ **FOIA/PA Interface -1st Party Access**

- ✦ Requests by an individual for access to his/her record should be processed under both FOIA and the Privacy Act
 - Does PA exemption apply?
 - If no, release the record
 - if PA exemption applies, make FOIA analysis and release if required by FOIA
 - Requester gets the benefit of the statute with the more liberal release requirement!



Questions? Concerns?

Please do not hesitate to contact us if we can be of assistance on any disclosure matter:

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