

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC.

American Society of Access Professionals

Overview of FOIA's 9 Exemptions

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FOIA-Privacy Act Training Workshop
 September 4-6, 2019
 Chicago, Illinois

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Learning Outcomes


- Understand the changes to the disclosure requirements in the "FOIA Improvement Act of 2016"
- Understand the difference between mandatory withholding, and discretionary withholding
- Understand the nine FOIA exemptions.

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Nine Exemptions

FOIA is a disclosure statute that provides for the withholding of "exempt" information from public disclosure.



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FOIA Improvement Act of 2016

- Signed June 30, 2016
- Applies to all federal agencies
- Codifies the “foreseeable harm” test for FOIA exemptions which have a discretionary component
 - Certain categories of records are not appropriate for release because release would harm government or private interests

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Foreseeable Harm Standard

- Agencies “shall withhold information”... only if the agency reasonably foresees that disclosure would:
 1. Harm an interest protected by an exemption, or
 2. Disclosure is prohibited by law
- Consider whether partial disclosure is possible, if full disclosure isn’t possible
 - Take “reasonable steps” to segregate and release non-exempt information.

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Discretionary Release and Consultation

- Discretionary release impacts Exemptions 2, 5, & some parts of Exemption 7
- Consider consultation, referral, & your agency coordination procedures, when redacting agency records
 - DOJ/OIP guidance
<https://www.justice.gov/oip/blog/foia-guidance-13>

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**Exemption I
Classified Records**

Protects records the disclosure of which would cause harm to national security or foreign policy

Records must be properly classified under procedural & substantive requirements of current Executive Order

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**Exemption I
Classified Records**

- Executive Order 13,526 establishes procedures for classifying information as either "top secret," "secret," or "confidential"
- No discretionary release
 - Courts tend to defer to agencies in determining whether disclosure would cause national security harm
 - Not all agencies have classification authority

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Exemption I & "Glomar"

The "Glomar" response: "neither confirm, nor deny..."

- Protects abstract fact that agency has requested records
- "Glomar" requires a formal denial
- Concept is applicable to information that may be withheld under other FOIA exemptions

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Mosaic Effect
“Application of a Concept”

- Assembly of different pieces of information (including information available from non-gov’t sources)
- Individual pieces would not reveal exempt information, but do when added together

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Exemption 2:
Internal Personnel Rules & Practices

- Supreme Court’s 2011 decision “Milner v. Dept. of the Navy” narrowed the scope of Exemption 2, fundamentally changing the long standing interpretation (“circumvention argument”)
- Exemption 2 now protects only records related solely to agency internal personnel rules and practices related to human resources

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Information Must be Related to
“Personnel” Rules & Practices

Information must relate to:

- “...the selection, placement, and training of employees ... the formulations of policies, procedures, and relations with employees or their representatives”
- Deals with “employee relations or human resources,” re “conditions of employment in federal agencies ... such matters as hiring and firing, work rules and discipline, compensation and benefits”

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Exemption 2

- 3 part test applies:
 - Must be related to "personnel" rules & practices
 - Relates "solely" to those personnel rules & practices
 - Must be "internal," meaning that "the agency must typically keep the records to itself for its own use"
- May overlap with Exemption 6
- Foreseeable Harm test applies

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Exemption 3: Matters Specifically Protected by Other Statutes

- Statutes must be passed into law by Congress.
 - **Subpart (A)(i):** statutes that require information to be withheld and leave the agency no discretion on the issue
 - **Subpart (A)(ii):** statutes that either provide criteria for withholding information or refer to particular matters to be withheld

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Exemption 3

- Your Agency's Annual Report contains the list of Exemption 3 statutes used to withhold records
- DOJ's Office of Info & Policy publishes a list of Exemption 3 statutes which have been upheld by the courts:
 - https://www.justice.gov/oip/foia-resources%23s4/statutes_found_to_qualify_under_exemption_3/download

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Exemption 4
**Trade Secrets and Commercial or
Financial Information Obtained
from a Person that is Privileged or
Confidential**

Protects sensitive business information

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Exemption 4

A “trade secret” is narrowly defined as “any secret, commercially valuable plan, formula, process or device that is used for making, preparing, compounding, or processing of trade commodities, that can be said to be the end product of either innovation or substantial efforts”

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Exemption 4

- The information must be commercial or financial data used in the course of business and
- Is obtained from a person, and
- Is privileged or confidential

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Exemption 4 Confidential Information

If the information was:

- Submitted voluntarily, it must be the type of data that is not customarily disclosed to the public
- Referred to as *Critical Mass* test

Critical Mass Energy Project v NRC, 975 F.2d 871 (D.C. Cir. 1992)

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Exemption 4 Confidential Information

- If not voluntarily submitted, is information, if disclosed:
 - likely to cause substantial harm to the competitive position ("competitive harm prong"), or
 - impair the agency's ability to obtain similar data in the future ("impairment prong"), or
 - protect other governmental interests, such as compliance and program effectiveness (the "third prong")
 - National Parks test*

National Parks & Conservation Ass'n v Morton, 498 F.2d 715 (D.C. Cir. 1974)

2019: We cannot approve such a casual disregard of the rules of statutory interpretation.

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Ex. 4 - Confidential – Supreme Court- Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 915 (2019),

- The term "confidential" meant then, as it does now, "private" or "secret." Webster's Seventh New Collegiate Dictionary 174 (1963).
- Contemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential.
 - In one sense, information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it.
 - In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.
- "common usage"
- Where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within the meaning of Exemption 4.
- Dissent – what about harm requirement?

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Exemption 5

- Protects inter- or intra-agency records that would be privileged in civil discovery
- 3 primary privileges protected:
 - Deliberative process privilege
 - Attorney work-product privilege
 - Attorney-client privilege

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Exemption 5 Deliberative Process Privilege

- Protects the quality of agency decision-making
- Encourages frank & open agency discussion
- Prevents premature disclosure before decision is adopted
- Requires reasonable segregation; does not protect factual information

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Exemption (b)(5): Deliberative Process

Protects information that is pre-decisional and deliberative

- makes recommendations
- expresses opinions (legal or policy)
- drafts are protected
- usually goes "up the chain of command"
- may include email

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**Exemption 5
Attorney Work-Product**

- Records prepared by an attorney or at the direction of an attorney in reasonable anticipation of litigation
- Limited to litigation and pre-litigation documents

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**Exemption 5
Attorney Work-Product**

- Once work-product, always work-product
- Even if the document contains final opinions or recommendations that later become the basis for a final agency decision
- No need to segregate factual information for release

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**Exemption 5
Attorney-Client**

What information is protected?

- Confidential communications between a client and an attorney
- Opinions given by an attorney to a client based on confidential communication, and
- Communications between attorneys that reflect client-supplied information
- No need to segregate factual information for release

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Exemption 5 and Foreseeable Harm

- Exemption 5 is a primary opportunity to apply the foreseeable harm test
- If your agency decides records may be released without causing a specific harm and without violating a law, records must be released
- The 2016 Amendments limit protection to 25 years for the deliberative process application
 - ("The deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.")

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**Exemption 6
Clearly Unwarranted Invasion
of Personal Privacy**

- Personnel, medical, and similar files
- Release must constitute a clearly unwarranted invasion of personal privacy
- Identifiable to an individual, not a corporate entity (except small businesses)

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**Exemption 6
Personal Privacy**

- Balance the individual's privacy interest against the public interest in disclosure
- Living individuals have privacy interest in not having information released about them
 - No privacy interest: Disclose
 - No expectation of privacy: Disclose
 - No public interest: Withhold

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Exemption 6 Personal Privacy

- No protection under Exemption 6 for corporations (except closely held corporations)
- Some protection for next of kin of deceased persons in “time of death” records (Favish Supreme Court decision*)

* National Archives & Records Administration v. Favish, 124 S. Ct. 1570 (2004)

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Exemption 7 Records Compiled for Law Enforcement

Exemption protects 6 categories of records compiled for law enforcement purposes, if release would:

- (A) Interfere with enforcement proceedings
- (B) The right to a fair trial or impartial adjudication
- (C) Unwarranted invasion of personal privacy
- (D) Identify a confidential source
- (E) Law enforcement techniques & procedures
- (F) Endanger life or physical safety of an individual

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Exemption 7(A) Law Enforcement Records

- Withhold if disclosure could reasonably be expected to interfere with a pending or prospective law enforcement proceedings
- When law enforcement proceedings are concluded, Exemption 7(A) no longer applies
 - In litigation, always review record for applicability of other exemptions

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**Exemption 7(B)
Deprive a Person of the Right to a Fair Trial or Hearing**

- Purpose: Prevent prejudicial pre-trial publicity, that could impair a court proceeding or hearing
- Compiled for law enforcement purposes
- Withhold if disclosure would:
 - deprive person of a right to a fair trial or impartial adjudication

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**Exemption 7(C)
Personal Privacy**

- Compiled for a law enforcement purpose
- Disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy”
- Lower burden of proof than Exemption 6 due to sensitivities inherent in law enforcement records
 - Same balancing test as Exemption 6

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**Exemption 7(D)
Confidential Source**

- Protects all identifying information in any law enforcement record
- Additionally, in the cases of criminal or national security investigations, all information provided by the confidential sources

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**Exemption 7(D)
Confidential Source**

- Purpose: Ensures that confidential sources will not be lost
 - Through retaliation (physical threats, employment, etc.), or
 - Because of past information or fear of future disclosure
 - May work with Whistleblower Protection Act

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**Exemption 7(D)
Confidential Source**

- Glomar option
- If you suspect that subject is being coerced into making the request (check with subject personally)
- You will need to verify identity of any first-party confidential source requester
- Physically safeguard information

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**Exemption 7(E)
Techniques & Procedures**

- Compiled for law enforcement purposes
- Withhold if disclosure could reasonably be expected to risk "circumvention of law"
 - Includes guidelines for law enforcement investigations/prosecutions if disclosure could reasonably be expected to risk circumvention of the law

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Exemption 7(F) Endanger Life or Physical Safety

- Compiled for law enforcement purposes
- Disclosure could reasonably be expected to “endanger life or physical safety of any individual”
 - Includes law enforcement personnel and all other persons
- Broader protection than (b)(7)(C)
 - no balancing test required
 - show only a reasonable likelihood of danger

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Exemption 8

Contained or relating to reports prepared by, or for, an agency responsible for regulation or supervision of financial institutions

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Exemption 9

Geological and geophysical information and data, including maps, concerning wells

Includes oil, gas, and water wells

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Questions?

Thanks for your participation!

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