FOIA Decoding - FOIA Exemptions

7(A), 7(B), 7(C), 7(D), 7(E) & **7**(E)

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FOIA'S LAW ENFORCEMENT TOOLS - EXEMPTION 7

- · Why are law enforcement records different?
 - ▶Inherent sensitivity to subject
 - ► Disclosure of information could derail investigation

EXEMPTION 7 THRESHOLD TEST

- ▶records or information compiled for law enforcement purposes
- ► disclosure could be expected to cause one of the harms outlined in the 6 subparts. 5 U.S.C. § 552(b)(7)
 - 1) Records or information
 - 2) Compiled for
 - 3) Law enforcement purposes

THRESHOLD BROADER THAN JUST CRIMINAL LAW

- ▶ Civil, criminal, administrative enforcement
- ► Personnel investigations involving specific allegations of misconduct
- ▶ National security/terrorism investigations
- ► Most agencies have some type of law enforcement mission

FOIA DECODING-FOIA EXEMPTIONS 7(A), 7(B), 7(C), 7(D), 7(E) & 7(F)

Examples from Case Law and Practice

EXEMPTION 7(A) - ACTIVE INVESTIGATIONS

- ► Threshold requirement
- ► Protects information if disclosure could reasonably be expected to interfere with enforcement proceedings.

5 U.S.C. §552(b)(7)(A).

TWO ELEMENTS OF EXEMPTION 7(A)

- 1. Active, pending or prospective investigation
- 2. Harm would result from disclosure

EXEMPTION 7(A)

- ▶Not intended to last forever
- ►"Who gets to say 7(A)?"
- ▶Fugitives and other issues
- ▶ Articulating the harm
- ▶Expiration of 7(A)
- **▶**Exclusions

FOIA DECODING-FOIA EXEMPTIONS 7(A), 7(B), 7(C), 7(D), 7(E) & 7(F)

Examples from Case Law and Practice

EXEMPTION 7(B) - FAIR TRIAL

- ► Purpose: Prevent prejudicial pretrial publicity that could impair a court proceeding
- ►Threshold requirement
- ► Disclosure would "... deprive a person of a right to a fair trial or impartial adjudication." 5 U.S.C. §552(b)(7)(A)
 - ► Flip side of Ex. 7(A)

EXEMPTION 7(D) CONFIDENTIAL SOURCES

- ► Confidential sources are critical to law enforcement
- ▶Threshold requirement
- ► Covers records/information reasonably expected to disclose the identify of a confidential source, and in some cases information provided by a source.

EXEMPTION 7(D) CONFIDENTIAL SOURCES

- ▶ Purpose: Ensures that confidential source is not lost:
 - ► through retaliation (physical, employment, etc.)
 - ► because of past information or fear of future disclosure

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EXEMPTION 7(D) CONFIDENTIAL SOURCES

- **▶** Glomar
- ▶Do not disclose if you suspect coercion
- ▶ Verify identity of source/requester
- ▶ Physically safeguard information

EXEMPTION 7(D) WHO CAN BE A SOURCE?

- ▶Institutional sources
- ▶ Federal gov't employees <u>can</u> be sources
- ► Landano test:
 - ▶Express grant of confidentiality
 - ▶ Implied grant of confidentiality
 - **▶** Waiver

FOIA DECODING-FOIA EXEMPTIONS 7(A), 7(B), 7(C), 7(D), 7(E) & 7(F)

Exemption 7(D):
Examples from Case Law and Practice

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EXEMPTION 7(E) TECHNIQUES/PROCEDURES/ GUIDELINES

- ▶Threshold requirement
- ► Techniques and procedures for law enforcement investigations or prosecutions and
- ► Guidelines for law enforcement investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of law
- ▶5 U.S.C. §552(b)(7)(E).

EXEMPTION 7(E)

- ▶ First Clause Techniques & Procedures
 - ▶ Cannot be well known to the public
 - ▶ Articulating harm in release
 - ► Would disclosure nullify effectiveness?
 - **▶**EXAMPLES
 - **▶** Glomar

EXEMPTION 7(E)

- ► Second Clause Guidelines
 - ▶ Harm standard is risk of circumvention
 - **►EXAMPLES**

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FOIA DECODING-FOIA EXEMPTIONS 7(A), 7(B), 7(C), 7(D), 7(E) & 7(F)

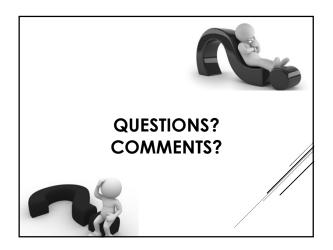
Examples from Case Law and Practice

EXEMPTION 7(F) -ENDANGER LIFE OR PHYSICAL SAFETY

- ► Threshold requirement
- ► Disclosure would endanger life or physical safety of any individual. 5 U.S.C. §552(b)(7)(F)
- ► Lower threshold than (b)(7)(C)
 - ▶no balancing test required
 - ▶ show reasonable likelihood of harm
 - ▶ deference to agency's harm assessment

FOIA DECODING-FOIA EXEMPTIONS 7(A), 7(B), 7(C), 7(D), 7(E) & 7(F)

Examples from Case Law and Practice



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