

**Exemptions 6 and 7(C):**  
*The Personal Privacy Exemptions of  
the FOIA*



ASAP 2019 National Training Conference  
Presenters: Scott Hodes and Jaret Fishman

---

---

---

---

---

---

---

---

**Why is Privacy so Important?**

- ▶ Cultural, gender, generational views on privacy
- ▶ Privacy in the electronic age
- ▶ Expanding risk of harm
- ▶ Who carries the risk?
- ▶ Several FOIA exemptions and one separate statute

2

---

---

---

---

---

---

---

---

**Exemptions 6 & 7(C)**

Each exemption covers different types of records

Same analysis applies to both exemptions:

1. Is the exemption's threshold met?
2. Is there an identifiable privacy interest?
3. Is there a qualifying public interest?
4. Balance the two interests

3

---

---

---

---

---

---

---

---

**Exemption 6—Non-law enforcement records**

**Threshold language:** Personnel and medical files and similar files the disclosure of which **would constitute a clearly unwarranted** invasion of personal privacy

5 U.S.C. § 552(b)(6)

4

---

---

---

---

---

---

---

---

**Exemption 7(C) — Law enforcement records**

**Threshold language:** records or information compiled or recompiled for law enforcement purposes, but only to the extent that [disclosure] **could reasonably be expected to constitute an unwarranted** invasion of personal privacy

5 U.S.C. § 552(b)(7)(C)

5

---

---

---

---

---

---

---

---

**Exemption 6 Threshold**

- Personnel and medical files and similar files
- Dep't of State v. Washington Post, the U.S. Supreme Court opined that the Congressional intent was to interpret "similar files" broadly
- All information that "applies to a particular individual" meets the threshold requirement

6

---

---

---

---

---

---

---

---

**Exemption 7(C) Threshold**

- **“Records or information compiled for law enforcement purposes”**

This includes records:

- **Created** by an agency pursuant to a law enforcement activity
- **Collected or recompiled** during the course of a law enforcement activity

7

---

---

---

---

---

---

---

---

**Identify and Evaluate Privacy Interest**

- ✓ Do you have information about an identifiable individual?
- ✓ Can you identify an individual by reading the document?
- ✓ What type of information about an individual would you consider “private”?

8

---

---

---

---

---

---

---

---

**The Privacy Interest**

*U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989)*

- broadened interpretation of privacy
- “practical obscurity”—information once public, but memories have faded over time
- limited scope of “public interest”—sheds light on government operations

9

---

---

---

---

---

---

---

---

**The Privacy Interest**

*Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008)

- Disclosure would compromise a substantial, as opposed to *de minimis*, privacy interest
- “[i]f no significant privacy interest is implicated . . . FOIA demands disclosure.”

10

---

---

---

---

---

---

---

---

**The Privacy Interest**

*Pub. Citizen Health Research Group v. U.S. Dep't of Labor*, 591 F.2d 808, 809 (D.C. Cir. 1978)

- “[t]he threat to privacy . . . need not be patent or obvious to be relevant.”

11

---

---

---

---

---

---

---

---

**The Privacy Interest**

*Dep't of the Air Force v. Rose*, 425 U.S. 352, 380 n.19 (1976)

- the threat to privacy must be real rather than speculative.

12

---

---

---

---

---

---

---

---

**The Privacy Interest**

*NARA v. Favish*, 541 U.S. 157 (2004)

- Recognized survivor privacy interest
- Does not alter longstanding rule that an individual's privacy rights are **mostly** extinguished upon death

13

---

---

---

---

---

---

---

---

**Identifying a Privacy Interest**

Where there is no privacy interest:

- Corporations
- Deceased individuals
- Public records (unless they are practically obscure)
- Most federal employees
- Identities of FOIA requesters

14

---

---

---

---

---

---

---

---

**Identifying a Privacy Interest**

Some rules to remember:

- ✓ An agency cannot invoke a privacy exemption when the particular interest to be protected is the requester's own interest
- ✓ The passage of time does NOT diminish privacy
- ✓ If there is NO privacy interest in the information, DISCLOSE it

15

---

---

---

---

---

---

---

---

**The Privacy Interest**

Is there an identifiable privacy interest in:

- a list of names and credit card numbers for government employees?
- information about who commented on a notice of proposed rulemaking and what they said?
- a list of persons that HR determines are qualified for a Federal position?

16

---

---

---

---

---

---

---

---

**The Privacy Interest**

Is there an identifiable privacy interest in:

- a deceased detainee's journal entries written in the days leading up to his suicide?
- the name of an FBI Special Agent who testified at a public trial?

17

---

---

---

---

---

---

---

---

**The Privacy Interest**

Obvious privacy interests?

- ✓ Social Security Number
- ✓ Age/Date of birth
- ✓ Home address
- ✓ Marital status
- ✓ Types of leave for Federal employees
- ✓ Allegations of misconduct/disciplinary actions
- ✓ Medical conditions and disabilities

18

---

---

---

---

---

---

---

---

**The Public Interest**

- The *Reporters Committee* case held that public interest must fall within the FOIA's "core purpose" of shedding light on an agency's performance of its duties.
- Neither the identity of the requester nor the purpose for which the information is sought is given any weight
- A requester's private need for the information is not given any weight

19

---

---

---

---

---

---

---

---

**The Public Interest**

- The *Reporters Committee* case held that public interest must fall within the FOIA's "core purpose" of shedding light on an agency's performance of its duties.
- Information that does not directly reveal the operations or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve."

20

---

---

---

---

---

---

---

---

**Is There a Qualifying Public Interest?**

- The agency's conduct is the focus, not the personal conduct of individuals
- The public interest must be directly served by disclosure of the requested information
- The particular way that one requester can use the information to serve the public is irrelevant because all FOIA disclosures are public disclosure (except for first-party requests)

21

---

---

---

---

---

---

---

---

**The Public Interest**

Is there a qualifying public interest in:

- a list of the names of borrowers and loan amounts of loans approved by the Farm Services Agency?
- records of an investigation into allegations of misconduct of an SES?
- all information pertaining to the selection process for the position of GS-7?

22

---

---

---

---

---

---

---

---

**The Public Interest**

- *NARA v. Favish*, 541 U.S. 157 (2004)
  - Established heightened public interest standard
  - Requester must produce evidence of agency wrongdoing that would warrant a belief by a reasonable person that the alleged impropriety might have occurred

23

---

---

---

---

---

---

---

---

**FOIA Public Interest - Burden**

The Supreme Court has held that the burden is on the requester to show how disclosure would shed light on the operations of an agency.

See *NARA v. Favish*, 541 U.S. 157, 172 (2004).

24

---

---

---

---

---

---

---

---



**Balancing the Interests**

- If there is NO privacy interest, disclose the information
- If there is an identifiable privacy interest and no qualifying public interest, withhold the information
- If there is a privacy interest and a public interest, balance them to see which is greater

25

---

---

---

---

---

---

---

---

**Factors to Consider in Balancing**

- Passage of time serves to increase privacy interest
- Are intimate details of a person's life involved?
- Any known adverse consequences in disclosure?
- Were allegations of official misconduct substantiated?

26

---

---

---

---

---

---

---

---

**Factors to Consider in Balancing**

General rule: proven misconduct of a serious & intentional nature by high-level official = sufficient public interest

27

---

---

---

---

---

---

---

---

### Categorical Withholding

- The *Reporters Committee* case introduced the concept of categorical withholding:
- Allows agencies to withhold certain categories of information without conducting a balancing of interests
- **Examples:** in law enforcement records--third party names; names of special agents; state, local, foreign law enforcement personnel; names of third parties merely mentioned; and, names of witnesses, informants and suspects

28

---

---

---

---

---

---

---

---

### The Glomar Response

- Records concerning an identifiable individual and are of a particularly sensitive nature if they exist
- Agency may neither confirm nor deny the existence or non-existence of the records = Glomar response.
- Depends on how the request is worded
- Targeted or third party request
- To acknowledge existence of records would cause harm
- Consider Bifurcation

29

---

---

---

---

---

---

---

---

### Segregation

Rule:

- We are always obligated to review each document line-by-line and release all non-exempt information

Exception:

- When the non-exempt information is inextricably intertwined with the exempt information, so that only meaningless words/phrase are left for disclosure

30

---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---