

THE PERSONAL PRIVACY EXEMPTIONS OF THE FREEDOM OF INFORMATION ACT: EXEMPTIONS 6 AND 7(C)

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PERSONAL PRIVACY EXEMPTIONS: OVERVIEW

In passing the FOIA, Congress observed that federal agencies “have great quantities of files containing intimate details about millions of citizens” the “disclosure of which might harm the individual.”

In the 56 years since, technological advancements have compounded that threat.

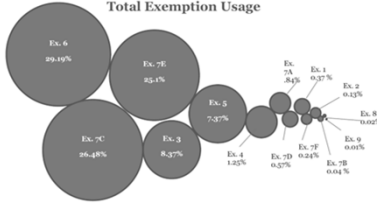


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PERSONAL PRIVACY EXEMPTIONS: OVERVIEW


The FOIA provides two exemptions to protect personal privacy, **Exemptions 6 and 7(C)**.

Total Exemption Usage



Exemption	Percentage
Ex. 6	39.19%
Ex. 7(C)	26.48%
Ex. 7(E)	15.1%
Ex. 3	8.57%
Ex. 2	7.37%
Ex. 4	1.82%
Ex. 7(D)	0.24%
Ex. 1	0.37%
Ex. 5	0.6%
Ex. 8	0.02%
Ex. 9	0.04%
Ex. 7(F)	0.04%
Ex. 7(B)	0.04%

Source: Summary of Annual FOIA Reports for FY 2021
U.S. Dept. of Justice, Office of Information Policy



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PERSONAL PRIVACY EXEMPTIONS: OVERVIEW

Exemption 6 protects “**personnel and medical files and similar files** the disclosure of which **would constitute a clearly unwarranted** invasion of personal privacy.”

Exemption 7(C) protects “**records or information compiled for law enforcement purposes,**” the disclosure of which “**could reasonably be expected to constitute an unwarranted** invasion of personal privacy.”

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PERSONAL PRIVACY EXEMPTIONS: OVERVIEW

Apply the same analysis for each:

- Step 1.** Determine if the threshold issue is satisfied.
- Step 2.** Identify a “substantial” privacy interest that will be threatened by disclosure.
- Step 3.** Identify a public interest in disclosure.
- Step 4.** Perform a balancing test to determine which interest is weightier.

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STEP 1. THRESHOLD EXEMPTION 6

“**Personnel and medical files and similar files:**” Interpreted broadly to include all government records and all information “which can be identified as applying to that individual.”

- Essentially, Exemption (b)(6) covers personal privacy interests in virtually any government record.
- Format does not matter. Any hard copy, soft copy, or even audio or video recordings qualify.

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STEP 1. THRESHOLD

EXEMPTION 7(C)

“Records or information compiled for law enforcement purposes”:

- **Law enforcement purposes** include those records compiled to enforce federal, state, or even foreign civil, criminal, or administrative laws.
- **Compiled** requires only that the records were organized to enforce one of those laws at some point in time. Records **created** by an agency pursuant to a law enforcement activity or **collected or recompiled** during the course of a law enforcement activity qualify.



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STEP 1. THRESHOLD

EXEMPTION 7(C)

The nature of the records can change, but as long as they were once created or compiled for law enforcement purposes, the exemption may apply.

- **Recompiled records**



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STEP 2. IDENTIFYING THE PRIVACY INTEREST

The privacy interest encompasses an individual’s ability to control information concerning his or her person.

- Is there an identifiable individual? The privacy interest belongs to the individual, not the agency. Protection extends to both citizens and foreign nationals.
- What information do you learn about that individual? The type of information covered includes the prosaic (e.g., place of birth and date of marriage) as well as the intimate and potentially embarrassing.



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STEP 2. IDENTIFYING THE PRIVACY INTEREST

The exemptions only protect a "substantial" privacy interest.

- The exemptions protect only that information in which an individual has an expectation of privacy.
- The threat to privacy must be real rather than speculative. There must be a causal relationship between the threatened disclosure and the privacy interest.
- That threat need not be obvious. If the release of some otherwise harmless information leads to the discovery of private information, there could be a derivative invasion of privacy.



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STEP 2. IDENTIFYING THE PRIVACY INTEREST

EXAMPLES

- | | |
|-------------------------------|-------------------------|
| • Name | • Criminal history |
| • Address (physical / e-mail) | • Financial information |
| • Phone number | • Photographs |



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STEP 2. IDENTIFYING THE PRIVACY INTEREST

For Federal Employees

What is protected and what is not protected?

Federal employees have less privacy interest than individuals in the following:

- Names
- Titles

Federal Employees do not have a privacy interest in: Names, Titles, Grades, Salary, Duty Station, Position descriptions, and Performance standards, Successful employment applications. They may have a privacy interest in work contact information, performance evaluations, and other sensitive information found in personnel files.

- **Law Enforcement Personnel**, military personnel, and employees in sensitive occupations have additional privacy interests based on their specific line of work because their identity could expose them to "harassment and annoyance in the conduct of their official duties and in their private lives."
- **Higher-level employees** have lesser privacy interests than lower-level employees.



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STEP 2. IDENTIFYING THE PRIVACY INTEREST
SPECIAL CASES

- Corporations
- Deceased individuals and survivors and heirs
- Public Figures
- FOIA Requesters

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STEP 2. IDENTIFYING THE PRIVACY INTEREST
INFORMATION IN THE PUBLIC DOMAIN

Generally, individuals do not have a “substantial” privacy interest in information that is already in the public domain. But there are a host of exceptions:

- “practically obscure”
- related or additional information
- Accidental (or even intentional) release of personally identifiable information

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STEP 3. IDENTIFYING THE PUBLIC INTEREST

There is only one potential public interest: Shedding light on the agency’s performance of its statutory duties.

- Key Issue: What does the public learn about the agency’s operations by knowing the individual’s private information?
- All requesters must be treated the same. Their personal interest has no bearing on the balancing test, so it does not matter if the requester is looking for information to overturn their criminal conviction or looking to supplement a discovery request in a civil lawsuit.
- “A release to one is a release to all.”

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1. The names of illegal aliens involved in a traffic accident, requested by the insurer of the truck involved in the accident. Time is of the essence because the aliens can be deported momentarily.

2. Names of your agency's employees who received disaster payments after the last natural disaster and the amounts of such payments.

Is there a privacy interest? |

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STEP 3. IDENTIFYING THE PUBLIC INTEREST

A requester carries the burden of proving how the disclosure will shed light on the agency's performance of its statutory duties.

- A requester must show a rational nexus between the requested information and the asserted public interest.
- The nexus need not be direct; if the information could be used to shed light on the agency's performance, the derivative use could be considered part of the public interest.
- A requester cannot satisfy their burden without explaining how disclosure serves the public interest.

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STEP 3. IDENTIFYING THE PUBLIC INTEREST

EXEMPTION 7(C) AND ALLEGATIONS OF GOVERNMENT WRONGDOING

If the asserted public interest is exposing government misconduct, a requester must provide compelling evidence that the agency engaged in wrongdoing.

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STEP 3. IDENTIFYING THE PUBLIC INTEREST

When might personal information shed light on agency performance of its statutory duties?



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STEP 4. PERFORMING THE BALANCING TEST

To determine whether this information ought to be withheld, an agency must balance the privacy interests involved against the public interest in disclosure.



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STEP 4. PERFORMING THE BALANCING TEST

Some factors to consider in balancing:

- How significant is the privacy interest?
- What are the adverse consequences of disclosure?
- What type of records are involved?
- How significant is the benefit to releasing the information?



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STEP 4. PERFORMING THE BALANCING TEST

REASONABLE SEGREGATION

Remember to reasonably segregate and release information where possible.



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STEP 4. PERFORMING THE BALANCING TEST

CATEGORICAL WITHHOLDING

Where information categorically implicates a privacy interest and the requester did not assert a cognizable public interest, the information can be withheld without addressing the individual circumstances of the information, or potentially without even conducting a search.

- Where there is a bright-line rule, apply categorical balancing instead of case-by-case balancing.
- Example: "The mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation."



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STEP 4. PERFORMING THE BALANCING TEST

THE GLOMAR RESPONSE

Sometimes, denying a FOIA request because it would impinge on an individual's personal privacy could, in itself, violate their privacy.



- Instead of denying the request, simply state that "the agency can neither confirm nor deny the existence of any records."
- Use the same language where mere acknowledgement of the records would reveal exempt information. If a Glomar response is provided only when records are found, the response would be interpreted that responsive records exist.



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STEP 4. PERFORMING THE BALANCING TEST

THE GLOMAR RESPONSE

Limitations on using the Glomar Response:

- Must be a targeted third-party request.
- The subject cannot have already been publicly associated with the agency (because the agency would obviously have records related to that individual).
- The Glomar Response can be overcome by a sufficient public interest.



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THE PERSONAL PRIVACY EXEMPTIONS: RECAP

- If you are processing law enforcement records, Exemption 7(C) protects individuals' privacy rights. If you are processing any other type of agency record, Exemption 6 protects individuals' privacy rights.
- **If there is no privacy interest**, then there is no need to even conduct the balancing test. The exemptions do not apply.
- **If there is no public interest** (as proven by the requester), then the privacy interest will prevail in the balancing. The information should be withheld.
- **If there is both a privacy interest and a public interest**, perform a balancing test. Accord extra weight to one side or the other depending on which personal privacy exemption applies.



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1. Materials that bear on the fact that a moderately high-level former government employee was arrested for serving beer to minors at a party given by his or her child.
2. Records about an internal investigation of a government staff attorney who may have made an illegal disclosure of information about a third party. The attorney was subsequently disciplined. Later he advised the media that he was investigated and disciplined, but he didn't specify any of the particulars of the investigation or the discipline.

Is there a public interest? |

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QUESTIONS?

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