

American Society of Access Professionals

Uncommon Exemptions: 2, 3, 8, 9

Nicholas Wittenberg

FOIA/ Privacy Act Training Workshop September 6 – 8, 2023

asap

1

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC

FOIA Exemptions

- FOIA is a disclosure statute that provides for the withholding of "exempt" information from public disclosure.
- There are 9 Exemptions
- o This session: 2, 3, 8, 9



asap





AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC

Foreseeable Harm Standard

- Agencies "shall withhold information"...
 only if the agency reasonably foresees that disclosure would:
 - I. 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.

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC

Exemption 2 Information Must be Related to "Personnel" Rules & Practices

- o 5 U.S.C. § 552(b)(2) (2018)
- 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," regarding "conditions of employment in federal agencies ... such matters as hiring and firing, work rules and discipline, compensation and benefits"

asap

4



Exemption 2 Information Must be Related to "Personnel" Rules & Practices



asap

5

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC

Exemption 2 Information Must be Related to "Personnel" Rules & Practices





Exemption 2

- 3-part test applies:
 - 1. Must be related to "personnel" rules & practices
 - 2. Relates "solely" to those personnel rules & practices
 - 3. 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

asap

7





Milner

Milner v. Dep't of the Navy, 562 U.S. 562, 569-70 (2011)



- Glen Milner submitted FOIA request to the Navy regarding Naval Magazine India Island on Explosive Safety Quantity Distance (ESQD) information.
 - Navy keeps weapons, ammunition and explosives on this island.
- Navy denied requests under Exemption 2
- Was appealed to The Supreme Court of the United States
 - Ruled that "plain meaning of the term "personnel rules and practices," encompasses only records relating to issues of employee relations and human resources.
 - Court noted that Government could use other tools to shield disclosure for national security information under Exemptions 1, 3, and 7.

asap

8



Exemption 2 Examples

- NTEU v. U.S. Customs Serv., 802 F.2d 525, 528-29 (D.C. Cir. 1986) Allows to withhold hiring plans as to not give unfair advantages to future applicants
- Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 166 (D.D.C. 2004)
 - Allowed to withhold information that related to the Secretary of Commerce's security as releasing "would compromise the Secretary's safety, making the Secretary subject to unlawful attacks."
- James Madison Project v. CIA, 605 F. Supp. 2d 99, 111-12 (D.D.C. 2009)

 Allowed to withhold information related to employee security clearance process as well has security of foreign nationals to ensure effectiveness and prevent foreign intelligence services from gaining insight.
- Amuso v. DOJ, 600 F. Supp. 2d 78, 100-01 (D.D.C. 2009)
 - Allowed to withhold information relating to FBI undercover operations procedures to ensure effectiveness and releasing information would allow individuals to "predict how the FBI will conduct similar operations in the future."
- Brown v. FBI, 873 F. Supp. 2d 388, 400 (D.D.C. 2012)
- FBI phone numbers are not "personnel rules and practices as they do not relate to HR

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC

Exemption 2 Examples





asap

10

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC

Exemption 3: Matters Specifically Protected by Other Statutes

- o 5 U.S.C. § 552(b)(3).
- 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

asap

11

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC

Exemption 3

- o Requires Withholding
 - Statue does not give agency discretion to release
- o Limited Prohibition on Disclosure
 - Agency may have some discretion on releasing information, but procedures must be followed before releasing

ACCESS PROFESSIONALS, INC

Exemption 3

- o Your Agency's Annual Report contains the list of Exemption 3 statutes used to withhold records
- o DOJ's Office of Information Policy publishes a list of Exemption 3 statutes which have been upheld by the courts:
 - https://www.justice.gov/oip/foiaresources%23s4/statutes found to qualify under exemption 3/do

asap

13



Exemption 3 Examples

- O Freedom Watch, Inc. v. NSA, 197 F. Supp. 3d 165, 174 (D.D.C. 2016)
- O Doe v. Veneman, 380 F.3d 807, 817 (5th Cir. 2004)
 - **TDJsa, including the location from which the data was derived, that would directly or indirectly reveal the identity of individual producers [of cerain petitide].

 7 U.S.C. § 136-II (b) (Federal Insecticide, Englische, and Rodenticide Act)
- O CIA v. Sims, 471 U.S. 159, 167 (1985)
- Intelligence sources and methods

 50 U.S.C. § 3024(i)(1) (formerly at 50 U.S.C. § 403- 1(i)(1)) (National Security Act of 1947)
- O Meyerhoff v. EPA, 958 F.2d 498, 1500-02 (9th Cir. 1992)
 - Confidential financial disclosure report pertaining to certain government employees
 5 U.S.C. app. 4 § 107(a)(2) (Ethics in Government Act of 1978)
- O Larson v. Dep't of State, 565 F.3d 857, 868-69 (D.C. Cir. 2009)
 - Certain classified information pertaining to the cothe United States or any foreign government

 18 U.S.C. § 798 (Espionage Act)

asap

14



Exemption 3 Examples



1. Ofter Historian Replaces Law 21 field	No. Stille, Bulgard 1 of Efficial (Analy) 17) bury (Mell No. Stille-Stille	Fram Aggrega
	CONFIDENTIAL FINANCIAL DISCLE Executive Branch	OSURE REPORT
Why Must I Flat	The duties and responsibilities of your position regu- Francial Decisious Report to exist involved retreat. The purpose of the region to seek annoting conflicts between official duties and, the information you provide will only be used decisioned to any requesting person unities all Statement at the billions of this page.) Present to complete and accounts.	ert in a neal or apparent conflict of it employees and their agencies in physics financial interests or affiliations. for legislimate purposes, and will not be horized by low. (Tase the Physics Ant
When Must I File!	New Entrante: The report is due within 30 days of designated for filling, unless your againty requ- grants you a filling extension. Annual Filters: The report is due no later that grants you a filling extension.	says the unload ensure on hors admired.
What is the New I Reporting Period	behavior. Report the required information for the 13 y time of the torn. Annual Filance: Report the required informatio (January 1 - December 31).	
What FI Nevs F F Questions?	to have any questions about how to complete this to official or go to the Office of Government Ethic Form 450	orn, please contact your efficie is web site at and select under fit
	PENALTIES nation or folium to the or record information required	

PRIAL TES Fabilitation of information or failure to fine or report information regiment to be reported may subject you to designively action by your employing agency or other authority. Knowing and willful fabilitation of information required to be reported may also subject you to continue presendant.
Adult Surder Information 1. It is solved in the computing this form, including extracting the protections and politicing the data respective global processing of the control of the computer of the control of the cont

asap

15

ACCESS PROFESSIONALS, INC

Exemption 8

- ∘ 5 U.S.C. § 552(b)(8)
- o Contained or relating to reports prepared by, or for, an agency responsible for regulation or supervision of financial institutions

asap

16

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC

Exemption 8 Elements

- 1. The institution must be a financial institution.
- 2. Agency has regulatory oversight over the financial institution
- 3. The records in question involve "examination, operating, or condition reports prepared by, on behalf of, or for the use of" the agency with oversight.

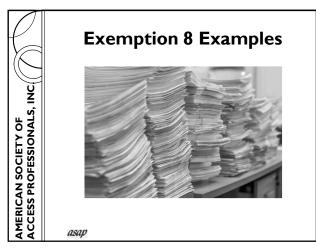
17

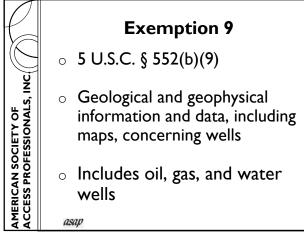
AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC

Exemption 8 Foundation

- "Exemption 8 was intended by Congress and has been interpreted by courts to be very broadly construed."
 - Pentagon Fed. Credit Union v. Nat'l Credit Union Admin., No. 95-1475, 1996 U.S. Dist. LEXIS 22841, at *11 (E.D. Va. June 7, 1996);
- Two reasons for Exemption 8:
 - 1. To "ensure the security of financial institutions."
 - To protect the relationship between banks and
 - regulatory agencies to encourage candid conversation
 Pub. Investors Arbitration Bar Ass'n v. SEC, 930 F. Supp. 2d 55, 64 (D.D.C. 2013)

Exemption 8 Examples Gregory v. FD/C. 631 F.2d 896, 898 (D.C. Cir. 1980) Exemption 8's broadness includes documents related to a bank that was defunct for 4 years for confidentialisy. McKinley v. FD/C. 744 F. Supp. 2d 128, 144 (D.D.C. 2010) Allows withbolding of real-time bank failure as release of this "information in furtherance of [an agency"] mission to regulate our nation's banking system would inarguably be compromised". Pub. Investors Arbitration Bar Ass'n v. SEC, 771 F.3d 1, 7 (D.C. Cir. 2014) The court ruled that "documents the [SEC] collects while examining financial institutions [or] any agency it regulates... are exempt from disclosure. Wachtel v. Office of Thrift Supervision, No. 3-90-833, slip op. at 19-20, 23, 26-28, 30, 33 (M.D. Tenn. Nov. 20, 1990). Can withhold documents that are factual that relate to a financial institution. Schreiber v. Society for Sav. Bancorp, Inc., 11 F.3d 217, 1220 (D.C. Cir. 1993) In relation to discovery in larguiston the court found that "Dank examination privilege process only applications and recommendations from disclosure; purely factual information falls outside the privilege."





IJ	/
	_
Y/	
	\
`	ii
	ž
	=
	S
Ö	₹
` ~	S PROFESSIONALS, I
H	9
=	SS
×	ŭ
S	ä
Z	ž
⋖	•
MERICAN SOCIETY OF	SS
~	Ň
뿕	К
₹	ACCESS

Exemption 9 Examples

- AquAlliance v. U.S. Bureau of Reclamation, 856 F.3d 101, 106 (D.C. Cir. 2017)

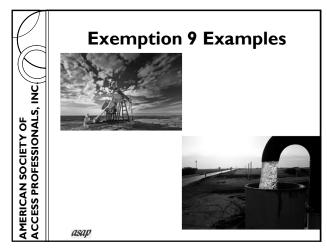
 Could withhold location and depth of water well information.

 - The court stated that, ""[t]he proper course . . . is for [the] court to assume that Congress meant what it said, and said what it meant").
- Starkey v. U.S. Department of Interior, 238 F. Supp. 2d 1188, 1196 (S.D. Cal. 2002)

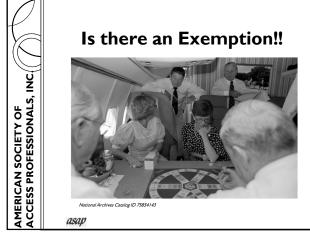
 Ould withhold documents related to "ground water inventories, [water] well yield in gallons per minute, and the thickness of the decomposed granite aquifer."

asap

22



23



24

	Questions?	
SOCIETY OF DFESSIONALS, INC	Thanks for your participation!	
AMERICAN SO ACCESS PROFE	asap	