

**American Society of  
Access Professionals**

**Uncommon Exemptions:  
2, 3, 8, 9**

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**FOIA Exemptions**

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



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

- 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"

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



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



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## 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

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## 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.

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## 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 as 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"

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## Exemption 2 Examples



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## Exemption 3: Matters Specifically Protected by Other Statutes

- 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

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## Exemption 3

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

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## Exemption 8

- 5 U.S.C. § 552(b)(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 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.

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## 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.”
  2. 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)

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## Exemption 8 Examples

- *Gregory v. FDIC*, 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 confidentiality.
- *McKinley v. FDIC*, 744 F. Supp. 2d 128, 144 (D.D.C. 2010)
  - Allows withholding of real-time bank failure as release of this "information in furtherance of [an agency's] 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, 220 (D.C. Cir. 1993)
  - In relation to discovery in litigation the court found that "bank examination privilege protects only agency opinions and recommendations from disclosure; purely factual information falls outside the privilege"

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## Exemption 8 Examples



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## Exemption 9

- 5 U.S.C. § 552(b)(9)
- Geological and geophysical information and data, including maps, concerning wells
- Includes oil, gas, and water wells

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

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## Exemption 9 Examples



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## Is there an Exemption!!



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# Questions?

Thanks for your participation!

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