

# DECODING FOIA EXEMPTIONS

## 7(A), 7(B), ~~7(C)~~, 7(D), 7(E) & 7(F)

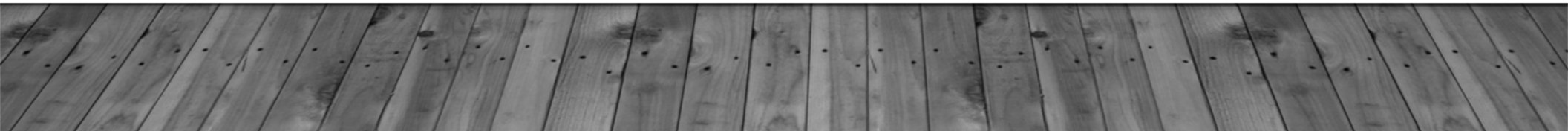
*AMERICAN SOCIETY OF ACCESS PROFESSIONALS*

*FOIA – PRIVACY ACT WORKSHOP*

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*RICHARD HUFF, FORMER CO-DIRECTOR OIP*

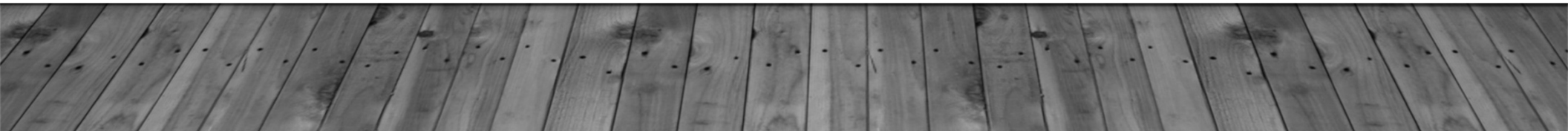
*SPECIAL THANKS TO ALINA SEMO FOR SLIDE CREATION*



# **FOIA'S LAW ENFORCEMENT TOOLS - EXEMPTION 7**

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



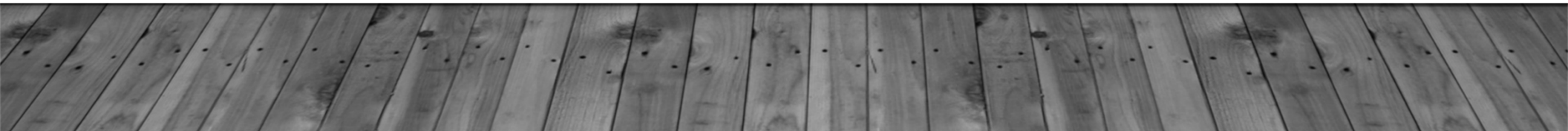
# EXEMPTION 7

## THRESHOLD TEST

- 
- records or information compiled for law enforcement purposes
  - disclosure *would cause or could reasonably be expected to cause* one of the harms outlined in the 6 subparts. 5 U.S.C. § 552(b)(7)

*To withhold records under Exemption 7, both the threshold and one of the 6 subparts must apply*

- 1) Records or information
- 2) Compiled for
- 3) Law enforcement purposes

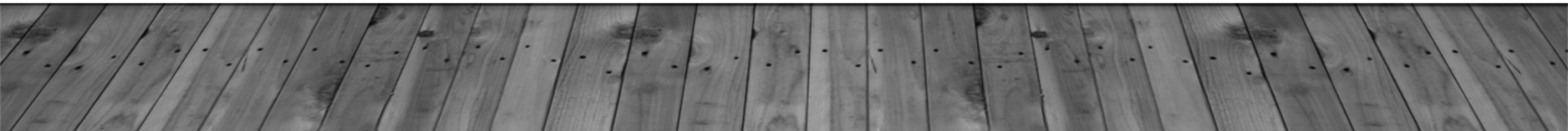


# **EXEMPTION 7 THRESHOLD**

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## **BROADER THAN JUST CRIMINAL LAW**

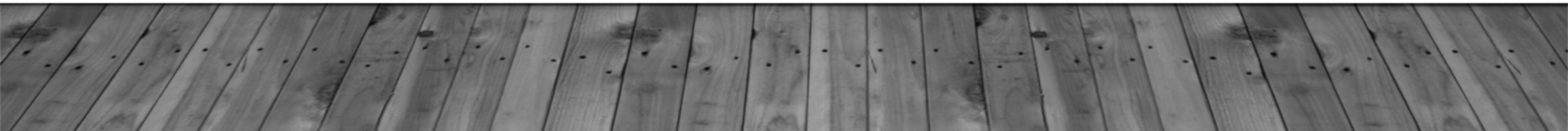
- **Regulatory, civil, and criminal enforcement**
- **Personnel investigations involving specific allegations of misconduct**
- **National security/terrorism investigations**
- **Most agencies have some type of law enforcement mission**



# **DECODING FOIA EXEMPTIONS**

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

**Exemption 7 Threshold:**  
**Examples from Case Law**  
**and Practice**



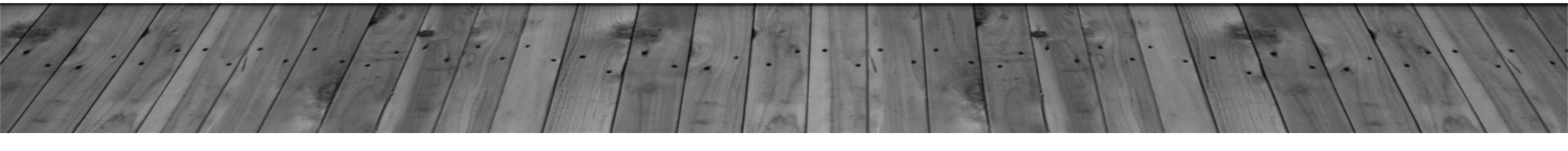
# EXEMPTION 7(A) - ACTIVE INVESTIGATIONS

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## Threshold requirement

- Protects information if disclosure *could reasonably be expected to* interfere with enforcement proceedings.

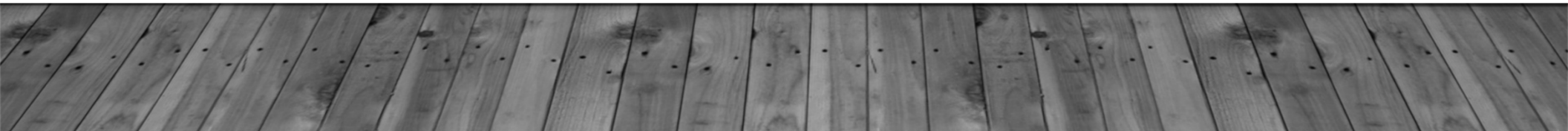
5 U.S.C. § 552(b)(7)(A).



# TWO ELEMENTS OF EXEMPTION 7(A)

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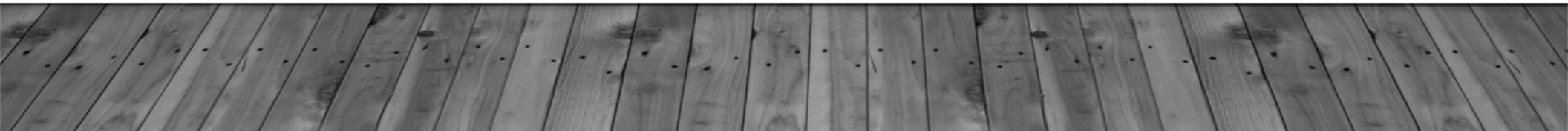
1. Active, pending, or prospective investigation
2. Harm could reasonable be expected to result from disclosure



# EXEMPTION 7(A)

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- Typically not intended to last forever
- “Who gets to say 7(A)?”
- Fugitives and other issues
- Articulating the harm by categories
- Expiration of 7(A)
- Exclusion



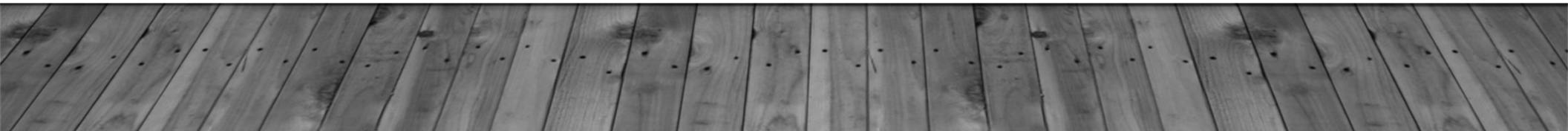


# **DECODING FOIA EXEMPTIONS**

## **7(A), 7(B), ~~7(C)~~, 7(D), 7(E) & 7(F)**

### **Exemption 7(A):**

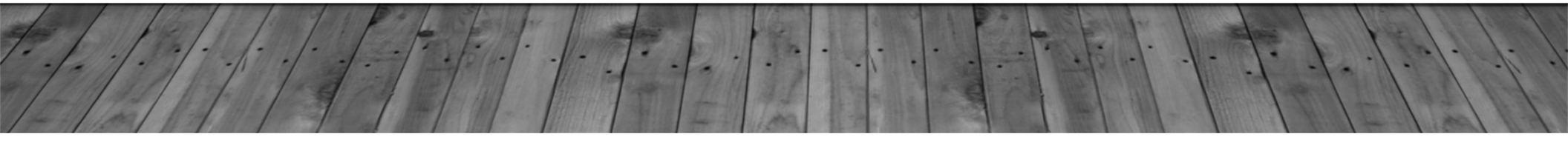
### **Examples from Case Law and Practice**



# EXEMPTION 7(B) - FAIR TRIAL

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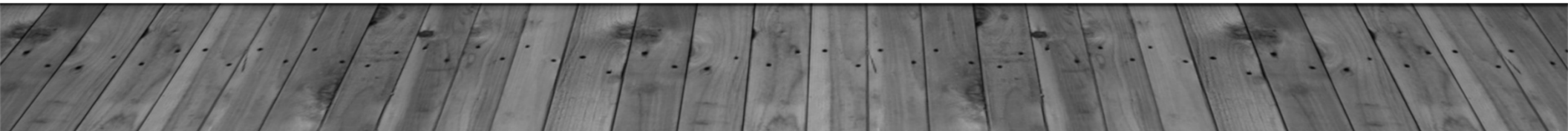
- Purpose: Prevent prejudicial pretrial publicity that could impair a court proceeding
- Threshold requirement
- Disclosure *would* “. . . deprive a person of a right to a fair trial or impartial adjudication.” 5 U.S.C. §552(b)(7)(B)
  - Flip side of Exemption 7(A)



# EXEMPTION 7(D) CONFIDENTIAL SOURCES

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- Confidential sources are critical to law enforcement
- Threshold requirement
- Covers records/information that *could reasonably be expected* to disclose the identify of a confidential source, and additionally in criminal or national security cases all information provided by a source.

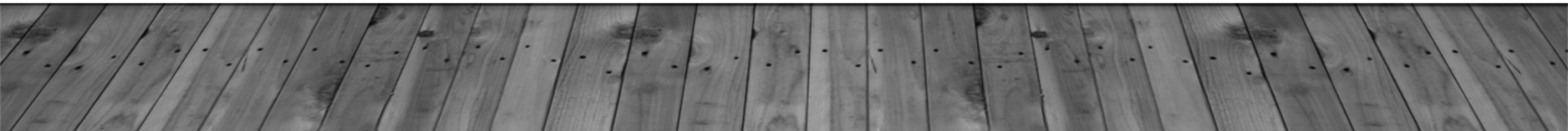


# **EXEMPTION 7(D)**

## **CONFIDENTIAL SOURCES**

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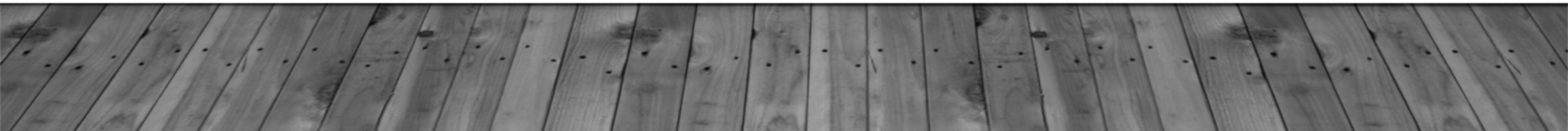
- **Purpose: Ensures that confidential sources are not lost:**
  - **through retaliation (physical, employment, shame in community, etc.)**
  - **because of past information or fear of future disclosure**



# EXEMPTION 7(D) CONFIDENTIAL SOURCES

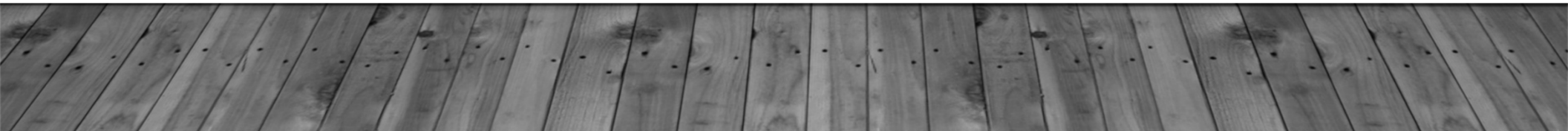
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- Confidentiality can be express or implied
- *Glomar* or exclusion?
- Do not disclose if you suspect coercion
- Verify identity of source/requester
- Physically safeguard information



# EXEMPTION 7(D) WHO CAN BE A SOURCE?

- 
- Can include a state, local, or foreign agency or authority or any private institution
  - Federal gov't employees but not federal agencies can be sources
  - *Landano* test:
    - Express grant of confidentiality
    - Implied grant of confidentiality
    - Waiver

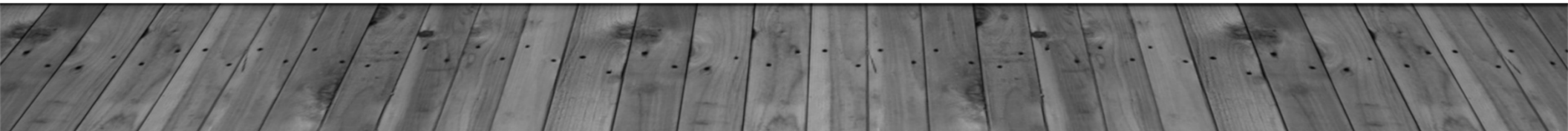


# **DECODING FOIA EXEMPTIONS**

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

### **Exemption 7(D):**

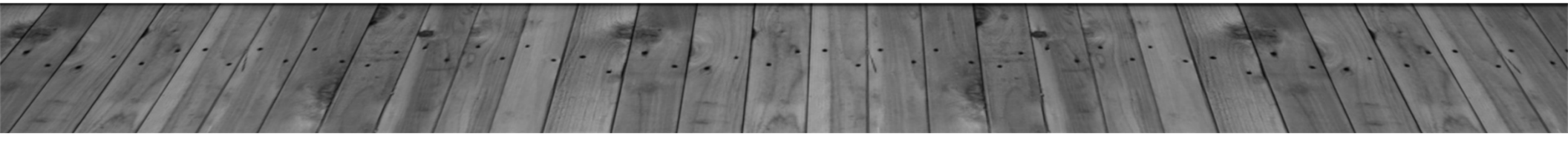
### **Examples from Case Law and Practice**



# EXEMPTION 7(E) - TECHNIQUES/PROCEDURES/ GUIDELINES

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- 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).

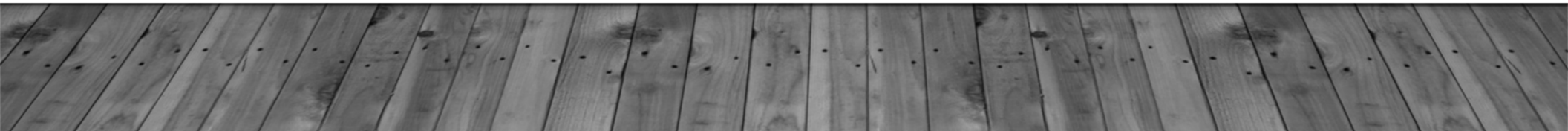




# EXEMPTION 7(E) - TECHNIQUES/PROCEDURES/ GUIDELINES

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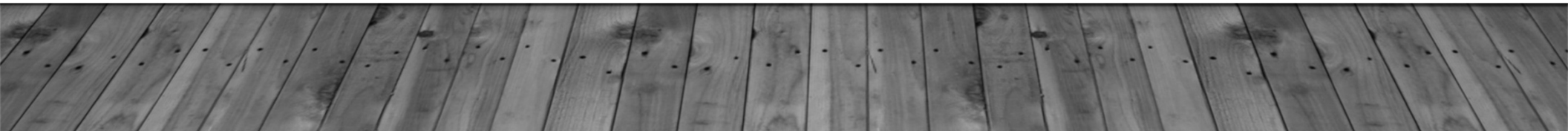
- First Clause – techniques & procedures
  - Cannot be well known to the public
  - Articulating harm in release
  - Would disclosure nullify effectiveness?
  - Examples
  - *Glomar*



# **EXEMPTION 7(E) TECHNIQUES/PROCEDURES/ GUIDELINES**

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- **Second Clause – Guidelines**
  - **Harm standard is risk of circumvention**
- **Possible examples:**
  - **law enforcement manuals**
  - **settlement guidelines**
  - **monographs on law enforcement subjects**
  - **emergency plans**

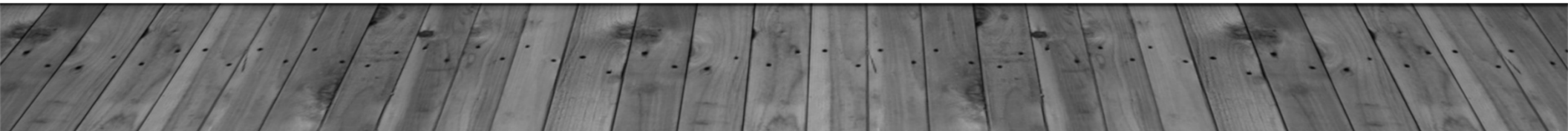


# **DECODING FOIA EXEMPTIONS**

## **7(A), 7(B), ~~7(C)~~, 7(D), 7(E) & 7(F)**

**Exemption 7(E):**

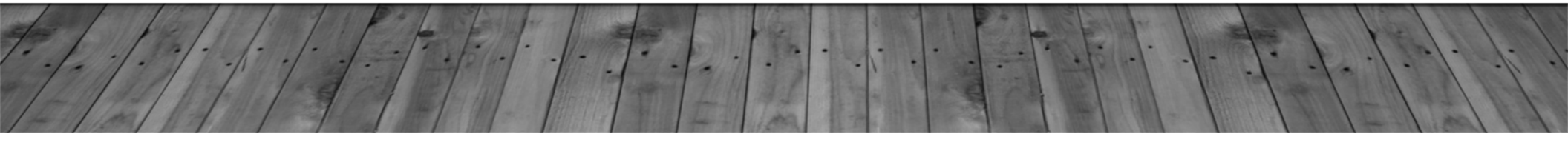
**Examples from Case Law  
and Practice**



# EXEMPTION 7(F) - ENDANGERING LIFE OR PHYSICAL SAFETY

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- Threshold requirement
- Disclosure could reasonably be expected to 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



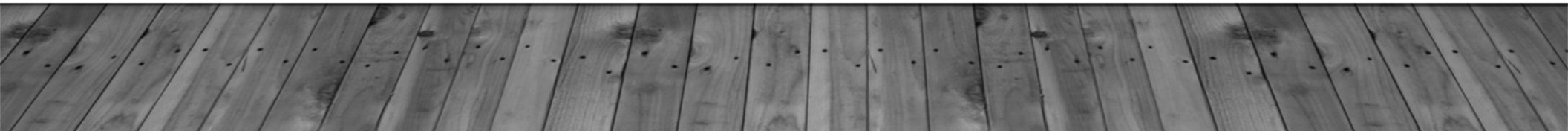
# DECODING FOIA EXEMPTIONS

## 7(A), 7(B), ~~7(C)~~, 7(D), 7(E) & 7(F)

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### Exemption 7(F):

### Examples from Case Law and Practice

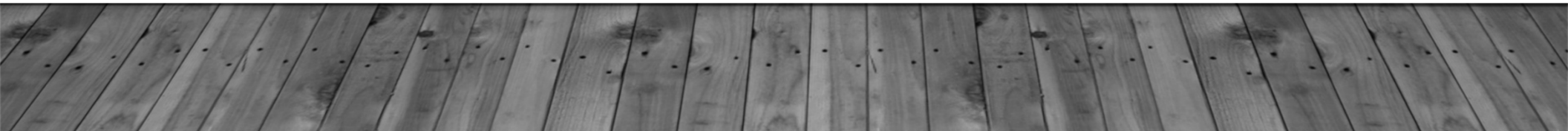


# DECODING FOIA EXEMPTIONS

## 7(A), 7(B), ~~7(C)~~, 7(D), 7(E) & 7(F)

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Applicability of  
Demonstrable Harm  
Standard?



# QUESTIONS? COMMENTS?

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