Foreseeable Harm

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1

5 U.S.C. § 552(a)(8)

(A) An agency shall—
  (i) Withhold information under this section only if—
    (I) the agency reasonable foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
    (II) disclosure is prohibited by law[.]

[. . .]

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

2

Historical Background: DOJ's "Presumption of Openness"

October 4, 1993 – Reno FOIA Memo

- "[DOJ] will no longer defend an agency's withholding of information merely because there is a 'substantial legal basis' for doing so."
- DOJ will only defend the use of an exemption if "the agency **reasonably foresees** that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exception, it ought not to be withheld."

3

OIP Guidance: "Applying the 'Foreseeable Harm' Standard Under Exemption 5" FOIA Update, vol. XV, no. 2 (Jan. 1, 1994)

- "[T]he application of the 'foreseeable harm' standard and its accompanying discretionary disclosure principle necessarily will vary according to the nature of the FOIA exemptions, and underlying interests that are involved."
- "Where 'only a government interest would be affected' . . . There is a far greater potential for discretionary disclosure than exists where such interests as personal privacy or business confidentiality . . . are at stake."
- Also, "several of the Act's exemptions . . . have a firm 'harm' requirement already built into them."
- The "presumption of openness" is at its strongest with "institutional" exemptions.

4

1994 OIP Guidance (continued)

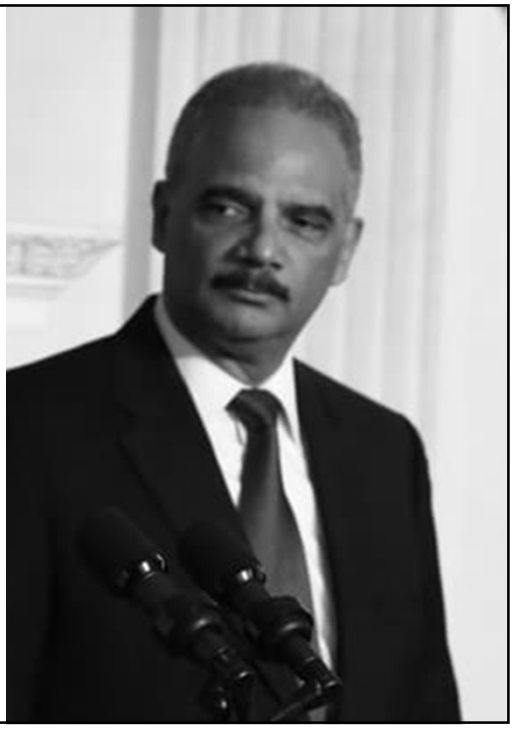
- Deliberative-Process Privilege
  - Nature of the decision involved and the decision-making process
  - Status of the decision and any personnel involved
  - Potential for process impairment, and the significance of such impairment
  - Age and sensitivity of the information at issue
- Attorney Work-Product Privilege
  - Timing and litigation connection
  - Substantive scope and inherent sensitivity
- Attorney-Client Privilege
  - "It will do little good for an agency to pursue discretionary waiver of its attorney work-product privilege . . . if it does not waive any applicable attorney-client privilege in like fashion."

5

Historical Background: DOJ's "Presumption of Openness"

March 2009 – Holder FOIA Memo

- "[A]n agency should not withhold information simply because it may do so legally." At the least, it should consider "whether it can make partial disclosure."
- DOJ "will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."



6

OIP Guidance: "President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines"

- "Every record should be reviewed . . . for its content, and the actual impact of disclosure for that particular record, rather than simply looking at the type of document or the type of file the record is located in."
- The presumption of openness entails examining a record's "agency, content, and character[.]" "[M]ere 'speculative or abstract fears' are not a sufficient basis for withholding."
- "[I]n the face of doubt, openness prevails."

7

And then came . . .

The FOIA Improvement Act of 2016

Pub. L. No. 114-185, 130 Stat. 538 (2016)

8

The Impetus for Codification

- "[T]here are concerns that some agencies are overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure." (Senate Report No. 114-4)
- "Ever-changing guidance [from DOJ] is undoubtedly confusing to FOIA processors and requesters alike, and agencies need clearer guidance regarding when to withhold information covered by a discretionary FOIA exemption. Codification . . . Makes clear that FOIA, under any administration, should be approached with a presumption of openness." (*Id.*)

9

How Should Agencies Apply the Standard?

- "An inquiry into whether an agency has reasonably foreseen a **specific**, **identifiable harm** that would be caused by disclosure would require the ability to **articulate both the nature of the harm and the link between the specified harm and specific information** contained in the material withheld." (House Report No. 114-391)
- "The [standard] would be applicable to discretionary exemptions, such as exemption two or exemption 5, which cover personnel policy and legal privileges[.]" (*Id.*)
- "[T]he presumption does not alter the scope of information that is covered under an exemption."

10

"Under this standard, the **content of a particular record** should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its **age**, **content**, and **character**, would harm an interest protected by the applicable exemption. . . . [M]ere 'speculative or abstract fears,' or fear of embarrassment are an insufficient basis for withholding information." (Senate Report)

11

The Limits of The Standard

- "[A]gency decisions to withhold information relating to **current law enforcement actions** under the foreseeable harm standard [should] be subject to judicial review for abuse of discretion." (Senate Report)
- The standard only applies to **discretionary** exemptions. The Senate Report suggests that the standard does not apply to:
  - Exemption 1
  - Exemption 6 / 7(C)
  - Other prongs of Exemption 7 (*i.e.*, 7(A), 7(D), 7(E), 7(F))
  - Exemption 8

(*See id.*)

12

The FOIA's foreseeable-harm standard places an independent and meaningful burden on an agency to go beyond the technical requirements for invoking a statutory exemption.

There's a new **"two-step" analysis** required to justify a withholding:

1. Does the record (or a portion of the record) fall within any exemption(s)?
2. Would disclosure result in reasonably foreseen harm to an interest underlying the applicable exemption(s)?

13

General Guidelines

- Focus on the *concrete harm*
  - Mere "speculative or abstract" fears are not a sufficient basis for withholding
  - Identify the nature of the harm, and the link between a specified harm and the record at issue
  - Consider the "age, content, and character" of the responsive material
  - "Boilerplate" arguments are inadequate
- Although the analysis must be *particularized* and "case-by-case," it can be presented on a categorical basis so long as harms are not "perfunctory" or too generalized
- Do not treat the foreseeable-harm standard as a codification of existing practice ("business as usual")
- Consider consulting with subject-matter experts.
- Consider partial release
- Provide the requester with some description of why there is foreseeable harm

14

Some interesting, unanswered questions?

- Does the foreseeable-harm standard apply to *all* exemptions? What does "prohibited by law" mean?
- How do we identify the "interests" protected by an exemption?
- How does the foreseeable-harm analysis change for each exemption—or, with Exemption 5, between different privileges? In application or in terms of an agency's burden?

15

No harm analysis is required for **Exemption 3**!

The analysis is always required for **Exemptions 2, 5, 8*, and 9**.
*NB: The legislative history!

For some exemptions, foreseeable "harm" is arguably already included in the technical analysis for defending use of the exemption.

- **Exemption 1**
- **Exemption 4** (or not?!)
- **Exemptions 6 / 7(C)**
- **Exemptions 7(A), (D), (E), and (F)**

16

Exemption 1

- Materials that are "(A) specifically authorized . . . by an Executive order to be kept secret in the interest of national defense or foreign policy . . . and (B) [which] are in fact properly classified pursuant to such Executive order."
- **Executive Order 13,526** (at Sec. 1.4): "Information shall not be considered for classification unless its unauthorized disclosure **could reasonably be expected to cause identifiable or describable damage** to the national security . . ."

17

Exemption 4

- "[T]rade secrets and commercial or financial information obtained from a person and privileged or confidential[.]"
- ***Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019)**
  - Eliminated the D.C. Circuit's "substantial competitive harm" test for mandatory submissions of information to the government. But did not consider the impact on the foreseeable-harm standard.
  - What, now, is the **interest** protected by the exemption?

18

The Minority Approach with Exemption 4

- ***Am. Small Bus. League v. Dep't of Def.*,**
  411 F. Supp. 3d 824 (N.D. Cal. 2019)
  - The loss of the exemption would be a harm in-and-of-itself because release of the records would render them non-private
  - "[T]he plain and ordinary meaning of Exemption 4 indicates that the relevant protected interest is that of the information's *confidentiality*—that is, its private nature. Disclosure would necessarily destroy the private nature of the information, no matter the circumstance."

19

The Majority Trend with Exemption 4

- Disclosure in-and-of itself cannot pose a cognizable harm without some further demonstration of harm.
- ***Ctr. for Investigative Reporting*, 436 F. Supp. 3d 90 (D.D.C. 2019)**
  - An agency "must explain how disclosing, in whole or in part, the specific information . . . would harm an interest protected by this exemption, such as by causing 'genuine harm to [the submitter's] economic or business interests,' and thereby dissuading others from submitting similar information to the government."
- ***Seife v. Food & Drug Admin.*, 43 F.4th 231 (2d Cir. 2022)**
  - "The interests protected . . . are the submitter's commercial or financial interests in information that is of a type held in confidence and not disclosed to any member of the public by the person to whom it belongs. An agency . . . can therefore meet the foreseeable harm requirement . . . by showing foreseeable commercial or financial harm to the submitter[.]"

20

Remaining Thoughts on Exemption 4

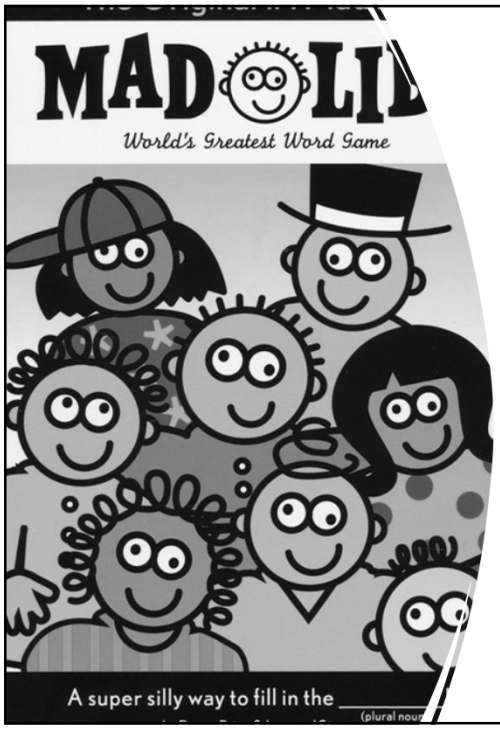
- Practically, agencies should rely on submitters to provide insight into the confidentiality of records and the possible harm in disclosure, notwithstanding the technical availability of Exemption 4.
- This may be accomplished through the submitter-notification process *(e.g.*, processes regarding business data under E.O. 12,600).
- Is Exemption 4 still "coextensive" with the **Trade Secrets Act** (18 U.S.C. § 1905), as many pre-*Argus Leader* courts explained? Is disclosure of at least *some* information protected by Exemption 4 "prohibited by law"?

21

Exemption 5: Deliberative-Process Privilege

- ***Reporters Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, 3 F.4th 350 (D.C. Cir. 2021)**
  - ✓ "[A]gencies must concretely explain how disclosure **'would'—not 'could'**—adversely impair deliberations."
  - ✓ "A 'perfunctory state[ment] that disclosure of all the withheld information—regardless of category or substance—would jeopardize the free exchange of information between senior leaders within and outside of the [agency]' will not suffice."
  - ✓ "[W]hat is needed is a **focused** and **concrete** demonstration of why disclosure of the particular type of material at issue will, in the **specific context of the agency action at issue**, **actually impede** those **same agency deliberations** going forward. Naturally, this inquiry is **context specific**."

22



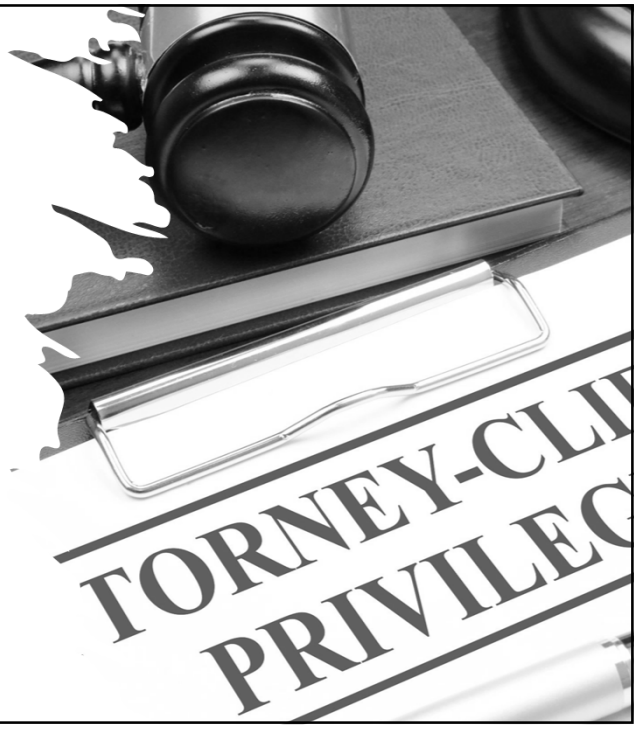
It isn't a pleading exercise!

- ***Nat'l Pub. Radio v. Dep't of Homeland Sec.*, No. 20-2468, 2022 WL 4534730 (D.D.C. Sept. 28, 2022)**
  - ✓ "The fatal flaw in [the agency's] first 'reasonably foreseeable harm justification is that it is essentially a restatement of 'the generic rationale for the deliberative process privilege itself.'"
  - ✓ "It is as if [the agency] turned the generalized justification . . . into a game of 'Mad Libs' and filled in the blanks with the name of the agency and the things that it does. If such an exercise were sufficient to satisfy an agency's burden under the FOIA Improvement Act, that statute's 'reasonably foreseeable' requirement would be so easy to evade as to be essentially dead letter."

23

Exemption 5: Attorney-Client Privilege

- ***Reporters Comm. for Freedom of the Press v. U.S. Customs & Border Prot.*, 567 F. Supp. 3d 97 (D.D.C. 2021)**
  - "Congress added the foreseeable harm requirement specifically to limit 'agency overuse and abuse of Exemption 5 and the deliberative process privilege. . . . So an agency's burden . . . may be more easily met when invoking other privileges and exemptions for which the risk of harm through disclosure is more self-evident and the potential for agency overuse is attenuated."
  - "[E]stablishing the attorney-client privilege will go a long way to show the risk of foreseeable harm. . . . But an agency must still provide a non-generalized explanation on the foreseeable harm that would result from disclosure of attorney-client communications. . . . More[over], the record [itself] shows no obvious reason why disclosing these records would create a foreseeable harm."



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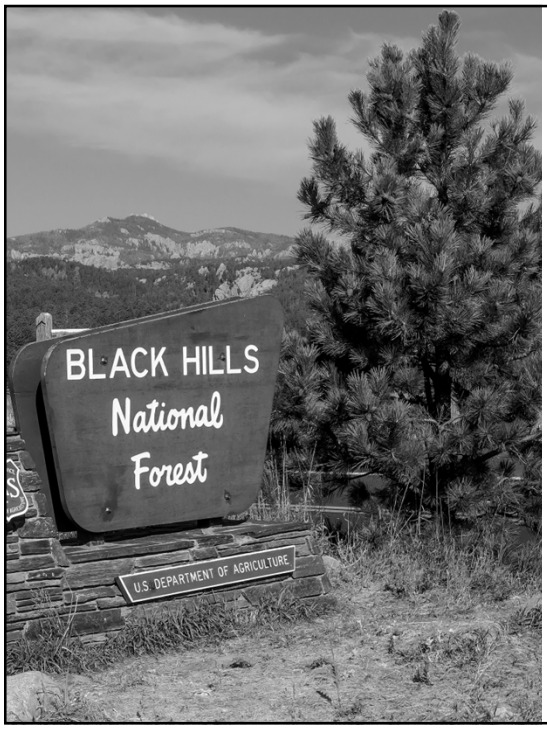


But see . . .

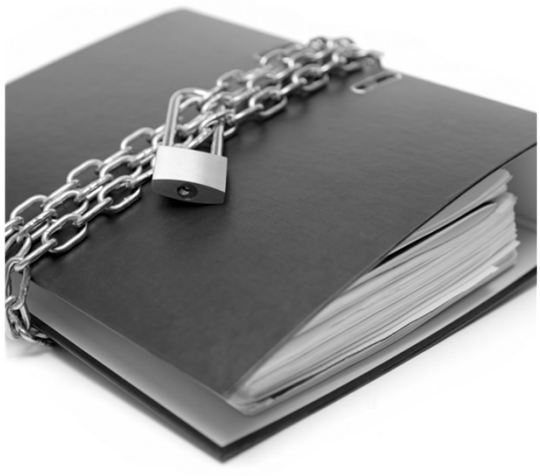
- ***Black Hills Clean Water All. v. U.S. Forest Serv.*, No. 20-5034, 2022 WL 2340440 (D.S.D. June 29, 2022)**

  "The agency's allegation that the redacted information, if disclosed, would reveal confidential, privileged material does nothing more than bring that information within the gambit of the attorney-client privilege. It does not, on its own, specifically identify any harm the agency foresees would result to its interest in keeping confidential information privileged. If it did, all information subject to the attorney-client privilege would be protected from disclosure under FOIA, effectively nullifying FOIA's additional requirement [under the foreseeable-harm standard]."

25

Exemption 5: Attorney Work-Product Privilege

- ***Louise Trauma Ctr. LLC v. Dep't of Homeland Sec.*, No. 20-1128, 2022 WL 1081097 (D.D.C. Apr. 11, 2022)**
  - "[T]he 'context and purpose' of the attorney work product makes self-evident the harm from its disclosure. . . . Like the attorney-client privilege, the work-product privilege 'holds a prominent and sacrosanct role in the law.'"
- ***Selgjekaj v. Exec. Office for U.S. Attorneys*, No. 20-2145, 2021 WL 3472437 (D.D.C. Aug. 6, 2021)**
  - "A court may find the [foreseeable-harm] requirement satisfied if '[t]he very context and purpose of' the withheld document 'make the foreseeability of harm manifest.' . . . It is hardly debatable that the government's ability to prosecute . . . cases would be impeded if its attorneys were deprived of 'a "zone of privacy" within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories.'"



26

Other Exemption 5 Privileges

***Tobias v. Dep't of the Interior*, No. 18-1368, 2021 WL 4262488 (D.D.C. Sept. 20, 2021)**

- Privileges invoked: deliberative-process, attorney-client, attorney work-product, and **commercial-information**
- "So long as the agency 'specifically focused "on the information at issue" . . . and concluded that disclosure of that information 'would' chill future internal discussions,' the court can conclude that '[t]he agency correctly understood the governing legal requirement and explained why it was met.'"
- "Each declaration focuses on the information at issue, and each concludes that disclosure would chill future internal discussions or otherwise 'harm an interest protected by an exemption.'"
  - DPP: Protecting the "integrity of the agency's decision-making process"
  - ACP: Ensuring the ability of agency employees "to fully inform agency counsel when seeking legal advice" and avoiding "unsound legal advice and advocacy"
  - AWP: Avoiding scrutiny of "attorneys' preparation materials" and harm to the "adversarial trial process"
  - CIP: Not putting the agency "at a competitive disadvantage" and harming its "financial interests"

27

Exemption 5: Presidential-Communications Privilege

***Am. First Legal Found. v. Dep't of Agric.*, No. 22-3029, 2023 WL 4581313 (D.D.C. July 18, 2023)**

- "Judges on this Court have consistently credited declarations describing the potential chilling effects on confidential and candid presidential [or future presidential] decision-making as sufficient identification of foreseeable harm."
- "The White House Special Counsel's affidavit clearly states that 'release of the plans would impose a chilling effect on presidential decisionmaking, as such disclosure would hinder the ability of the President and senior presidential advisors to obtain frank, unfettered information and advice . . . on important policy issues[.]"

28

Exemptions 6 & 7(C)

- ***Ecological Rights Found. v. Envtl. Prot. Agency*, 541 F. Supp. 3d 34 (D.D.C. 2021)**
  - "The purpose of Exemption 7(C) is 'to protect the privacy of individuals identified in certain agency records,' . . . such that disclosure of identifying information is a harm in and of itself. Thus, when invoking Exemption 7(C), an agency need not establish much more than the fact of disclosure to establish foreseeable harm."
- ***Ball v. U.S. Marshals Serv.*, No. 19-1230, 2021 WL 4860590 (D.D.C. Oct. 19, 2021)**
  - But an agency must still "'connect the [foreseen] harms in a meaningful way to the information withheld,'" even with Exemption 7(C).

29

The Other Subparts of Exemption 7

- ***Citizens for Responsibility & Ethics in Wash. v. Dep't of Homeland Sec.*, 525 F. Supp. 3d 181 (D.D.C. 2021)**
  - "Unlike Exemption 5, the statutory text of Exemption 7 predating the FOIA Improvement Act already contained an explicit requirement that the agency show a reasonable nexus between the withheld information and a predicted harm."
- ***Kendrick v. Fed. Bureau of Investigation*, No. 20-2900, 2022 WL 4534627 (D.D.C. Sept. 28, 2022)**
  - "The proper assertion of 7(E) goes a long way to show the risk of foreseeable harm from disclosure. . . . Indeed, the agency has shown that self-evident risk."

30

Exemption 8

- Material "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions[.]"
- ***Leopold v. Dep't of Justice*, No. 19-3192, 2021 WL 124489 (D.D.C. Jan. 13, 2021)**
  - As background, Exemption 8 is not "narrowly construed"
  - Harm should be understood in light of legislative purpose:
    - Is withholding needed to "ensure the security of financial institutions"?
    - Will disclosure "undermine public confidence and cause unwarranted runs on banks"?
    - Will disclosure dissuade banks from "cooperat[ing] less fully with federal authorities"?
    - Will disclosure cut against "regulatory effectiveness"?

31

Q&A

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32