

DECODING FOIA EXEMPTIONS

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

AMERICAN SOCIETY OF ACCESS PROFESSIONALS

NATIONAL TRAINING CONFERENCE

SESSION 3.07 – INTERMEDIATE/ADVANCED TRACK – FOIA

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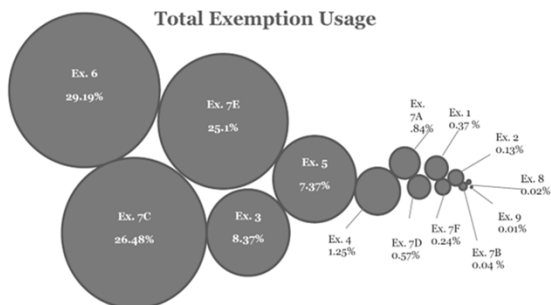
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FOIA'S LAW ENFORCEMENT TOOLS - EXEMPTION 7

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

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AGENCY USE OF EXEMPTIONS IN FISCAL YEAR 2021



Source: DOJ Summary of Annual FOIA Reports for Fiscal Year 2021

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EXEMPTION 7 THRESHOLD TEST

- records or information compiled for law enforcement purposes
- disclosure could 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

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EXEMPTION 7 THRESHOLD BROADER THAN JUST CRIMINAL LAW

- Civil, criminal, administrative enforcement
- Personnel investigations involving specific allegations of misconduct
- National security/terrorism investigations
- Most agencies have some type of law enforcement mission

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DECODING FOIA EXEMPTIONS 7(A), 7(B), 7(C), 7(D), 7(E) & 7(F)

Exemption 7 Threshold: Examples from Case Law and Practice

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**EXEMPTION 7(A) -
ACTIVE INVESTIGATIONS**

Threshold requirement

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

5 U.S.C. § 552(b)(7)(A).

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**TWO ELEMENTS OF
EXEMPTION 7(A)**

1. Active, pending or prospective investigation
2. Harm would result from disclosure

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EXEMPTION 7(A)

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

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Exemption 7(A):
Examples from Case Law
and Practice

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EXEMPTION 7(B) -
FAIR TRIAL

- 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)(A)
 - Flip side of Ex. 7(A)

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EXEMPTION 7(D)
CONFIDENTIAL SOURCES

- Confidential sources are critical to law enforcement
- Threshold requirement
- Covers records/information reasonably expected to disclose the identify of a confidential source, and in some cases information provided by a source.

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**EXEMPTION 7(D)
CONFIDENTIAL SOURCES**

- Purpose: Ensures that confidential source is not lost:
 - through retaliation (physical, employment, etc.)
 - because of past information or fear of future disclosure

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**EXEMPTION 7(D)
CONFIDENTIAL SOURCES**

- Confidentiality can be EXPRESS or IMPLIED
- *Glomar*
- Do not disclose if you suspect coercion
- Verify identity of source/requester
- Physically safeguard information

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

- Institutional sources
- Federal gov't employees can be sources
- *Landano* test:
 - Express grant of confidentiality
 - Implied grant of confidentiality
 - Waiver

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**Exemption 7(D):
Examples from Case Law
and Practice**

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

- 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).

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

- First Clause – Techniques & Procedures
 - Cannot be well known to the public
 - Articulating harm in release
 - Would disclosure nullify effectiveness?
- EXAMPLES
 - *Glomar*

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

- Second Clause – Guidelines
 - Harm standard is risk of circumvention
- **EXAMPLES:**
 - law enforcement manuals
 - policy guidance documents,
 - settlement guidelines
 - monographs on law enforcement subjects
 - emergency plans

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**Exemption 7(E):
Examples from Case Law
and Practice**

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

- Threshold requirement
- Disclosure would 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

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Exemption 7(F):
Examples from Case Law
and Practice



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QUESTIONS?
COMMENTS?



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