

# THE PERSONAL PRIVACY EXEMPTIONS OF THE FREEDOM OF INFORMATION ACT: EXEMPTIONS 6 AND 7(C)

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## PERSONAL PRIVACY EXEMPTIONS: OVERVIEW

On passing the FOIA, Congress observed that federal agencies “have great quantities of files containing intimate details about millions of citizens” the “disclosure of which might harm the individual.”

In the 50+ years since, technological advancement has compounded that threat.

- More data collected
- Improved ability to analyze data
- Improved ability to disseminate and preserve information



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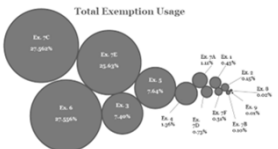
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## PERSONAL PRIVACY EXEMPTIONS: OVERVIEW

The FOIA provides two exemptions to protect personal privacy, Exemptions 6 and 7(C).



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## PERSONAL PRIVACY EXEMPTIONS: OVERVIEW

**Exemption 6** protects “personnel and medical files and similar files the disclosure of which **would constitute a clearly unwarranted** invasion of personal privacy.”

**Exemption 7(C)** protects “records or information compiled for law enforcement purposes,” the disclosure of which “**could reasonably be expected to constitute an unwarranted** invasion of personal privacy.”



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## PERSONAL PRIVACY EXEMPTIONS: OVERVIEW

Apply the same analysis for each:

**Step 1.** Determine if the threshold issue is satisfied.

**Step 2.** Identify a “substantial” privacy interest that will be threatened by disclosure.

**Step 3.** Identify a public interest in disclosure.

**Step 4.** Perform a balancing test to determine which interest is weightier.



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## STEP 1. THRESHOLD

### EXEMPTION 6

**“Personnel and medical files and similar files”:** Interpreted broadly to include all government records and all information “which can be identified as applying to that individual.”

- Essentially, Exemption (b)(6) covers personal privacy interests in virtually any government record.
- Format does not matter. Any hard copy, soft copy, or even audio or video recordings qualify.



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**STEP 1. THRESHOLD****EXEMPTION 7(C)**

"Records or information compiled for law enforcement purposes":

- **Law enforcement purposes** include those records compiled to enforce federal, state, or even foreign civil, criminal, or administrative laws.
- **Compiled** requires only that the records were organized to enforce one of those laws at some point in time. Records **created** by an agency pursuant to a law enforcement activity or **collected or recompiled** during the course of a law enforcement activity qualify.



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**STEP 1. THRESHOLD****EXEMPTION 7(C)**

The nature of the records can change, but as long as they were once created or compiled for law enforcement purposes, the exemption may apply.

- The records need not have initially been created for law enforcement purposes. If they were created for some other reason, but were later recompiled during the course of a law enforcement activity, they qualify.
- Similarly, if the records were created for a law enforcement purpose and then recompiled for some other purpose, they still qualify for the exemption.



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**STEP 2. IDENTIFYING THE PRIVACY INTEREST**

The privacy interest encompasses an individual's ability to control information concerning his or her person.

- Is there an identifiable individual? The privacy interest belongs to the individual, not the agency. Protection extends to both citizens and foreign nationals.
- What information do you learn about that individual? The type of information covered includes the prosaic (e.g., place of birth and date of marriage) as well as the intimate and potentially embarrassing.



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## STEP 2. IDENTIFYING THE PRIVACY INTEREST

The exemptions only protect a "substantial" privacy interest.

- The exemptions protect only that information in which an individual has an expectation of privacy.
- The threat to privacy must be real rather than speculative. There must be a causal relationship between the threatened disclosure and the privacy interest.
- That threat need not be obvious. If the release of some otherwise harmless information leads to the discovery of private information, there could be a derivative invasion of privacy.

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## STEP 2. IDENTIFYING THE PRIVACY INTEREST EXAMPLES

- |                               |                         |
|-------------------------------|-------------------------|
| • Name                        | • Criminal history      |
| • Address (physical / e-mail) | • Computer user ID      |
| • Phone number                | • Medical history       |
| • Birth date                  | • Financial information |
| • Religious affiliation       | • Photographs           |
| • Social security number      | • Recordings            |

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## STEP 2. IDENTIFYING THE PRIVACY INTEREST SPECIAL CASES

**Federal Employees** do not have a privacy interest in: Names, Titles, Grades, Salary, Duty Station, Position descriptions, and Performance standards, Successful employment applications. They may have a privacy interest in work contact information, performance evaluations, and other sensitive information found in personnel files.

- **Law Enforcement Personnel**, military personnel, and employees in sensitive occupations have additional privacy interests based on their specific line of work because their identity could expose them to "harassment and annoyance in the conduct of their official duties and in their private lives."
- **Higher-level employees** have lesser privacy interests than lower-level employees.

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## STEP 2. IDENTIFYING THE PRIVACY INTEREST

### SPECIAL CASES

**Corporations** do not have privacy interests. However, financial information of closely held small businesses could provide insight to the personal finances of its owners.

**Deceased Individuals** have greatly diminished privacy interests, but their **survivors and heirs** may have additional privacy interests in information pertaining to the deceased.

**Public Figures** have a diminished privacy interest, but do not forfeit all privacy rights.

**FOIA Requesters** do not have any expectation of privacy in the fact that they made a FOIA request, unless the request is about their own records.

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## STEP 2. IDENTIFYING THE PRIVACY INTEREST

### INFORMATION IN THE PUBLIC DOMAIN

Generally, individuals do not have a "substantial" privacy interest in information that is already in the public domain. But there are a host of exceptions:

- Information may become "practically obscure" if it is difficult to obtain or a significant amount of time has passed since its release. The passage of time does not diminish a privacy interest; it may enhance it.
- Individuals may have privacy interests in related or additional information being released and disseminated.
- Accidental (or even intentional) release of personally identifiable information does not waive future protection.

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## STEP 3. IDENTIFYING THE PUBLIC INTEREST

There is only one potential public interest: Shedding light on the agency's performance of its statutory duties.

- Key Issue: What does the public learn about the agency's operations by knowing the individual's private information?
- All requesters must be treated the same. Their personal interest has no bearing on the balancing test, so it does not matter if the requester is looking for information to overturn their criminal conviction or looking to supplement a discovery request in a civil law suit.
- "A release to one is a release to all."

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### STEP 3. IDENTIFYING THE PUBLIC INTEREST

A requester carries the burden of proving how the disclosure will shed light on the agency's performance of its statutory duties.

- A requester must show a rational nexus between the requested information and the asserted public interest. The nexus need not be direct; if the information could be used to shed light on the agency's performance, the derivative use could be considered part of the public interest.
- A requester cannot carry its burden without explaining how disclosure serves the public interest.

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### STEP 3. IDENTIFYING THE PUBLIC INTEREST

#### EXEMPTION 7(C) AND ALLEGATIONS OF GOVERNMENT WRONGDOING

If the asserted public interest is exposing government misconduct, a requester must provide compelling evidence that the agency engaged in wrongdoing.

- There must be more than a "bare suspicion" of official misconduct – it must "warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Otherwise, there is no balancing.

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### STEP 3. IDENTIFYING THE PUBLIC INTEREST

When might personal information shed light on agency performance of its statutory duties?

- Height and weight of Guantanamo detainees (to determine whether they were being provided appropriate nourishment).
- Locations of homes and farms receiving FEMA aid (to determine whether aid was distributed equitably).
- Political affiliation of investigative agents (to determine if an investigation was politically motivated).

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## STEP 4. PERFORMING THE BALANCING TEST

To determine whether this information ought to be withheld, an agency must balance the privacy interests involved against the public interest in disclosure.

- If the privacy interest is greater, the material should be redacted.
- If the public interest is greater, it should be released.

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## STEP 4. PERFORMING THE BALANCING TEST

The weight of nothing:

- **If there is no private interest**, then there is no need to even conduct the balancing test.
- **If there is no public interest** (as proven by the requester), then the privacy interest will prevail in the balancing. "Something, even a modest privacy interest outweighs nothing every time."

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## STEP 4. PERFORMING THE BALANCING TEST

Some factors to consider in balancing:

- **How significant is the privacy interest?** Are intimate details of the person's life involved? Is any of the information already in the public domain? Is the individual a public figure or official? Has a significant amount of time passed? What is the context of the information?
- **What are the adverse consequences of disclosure?** Could the release lead to stigma, embarrassment, or retaliation? How likely are those consequences to occur if the information is released? Can the agency limit the disclosure to minimize the harm?
- **What type of records are involved?** If applying Exemption 6, tip the scales in favor of disclosure. If applying Exemption 7(C), the scales tilt against releasing personal privacy information.
- **How significant is the benefit to releasing the information?**

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## STEP 4. PERFORMING THE BALANCING TEST

### CATEGORICAL WITHHOLDING

Where information categorically implicates a privacy interest and the requester did not assert a cognizable public interest, the information can be withheld without addressing the individual circumstances of the information, or potentially without even conducting a search.

- Where there is a bright-line rule, apply categorical balancing instead of case-by-case balancing.
- Example: "The mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation."<sup>19</sup>

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## STEP 4. PERFORMING THE BALANCING TEST

### THE GLOMAR RESPONSE

Sometimes, denying a FOIA request because it would impinge on an individual's personal privacy could, in itself, violate their privacy.



- Instead of denying the request, simply state that "the agency can neither confirm nor deny the existence of any records."
- Use the same language where mere acknowledgement of the records would reveal exempt information. If a Glomar response is provided only when records are found, the response would be interpreted that responsive records exist.

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## STEP 4. PERFORMING THE BALANCING TEST

### THE GLOMAR RESPONSE

Example: The Nosy Neighbor.

- A requester suspects that his neighbor is a drug dealer and requests records related to an investigation into his neighbor's conduct.
- Withholding the records pursuant to the personal privacy exemptions would admit the existence of the investigation into the neighbor.

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## STEP 4. PERFORMING THE BALANCING TEST

### THE GLOMAR RESPONSE

Limitations on using the Glomar Response:

- Must be a targeted third-party request.
- The subject cannot have already been publicly associated with the agency (because the agency would obviously have records related to that individual).
- The Glomar Response can be overcome by a sufficient public interest.

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## STEP 4. PERFORMING THE BALANCING TEST

### REASONABLE SEGREGATION

Remember to reasonably segregate and release information where possible.

- Is it possible to redact the records to protect personal privacy interests while still releasing additional information?
- If there is a strong public interest in the release of private information, consider whether you can satisfy that interest by releasing limited private information.

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## THE PERSONAL PRIVACY EXEMPTIONS: RECAP

- If you are processing law enforcement records, Exemption 7(C) protects individuals' privacy rights. If you are processing any other type of agency record, Exemption 6 protects individuals' privacy rights.
- If there is **no private interest**, then there is no need to even conduct the balancing test. The exemptions do not apply.
- If there is **no public interest** (as proven by the requester), then the privacy interest will prevail in the balancing. The information should be withheld.
- If there is **both a privacy interest and a public interest**, perform a balancing test. Accord extra weight to one side or the other depending on which personal privacy exemption applies.

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# QUESTIONS?

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