

FOIA EXEMPTION 7 SUBPARTS A, B, D, E, F

American Society of Access Professionals
16th Annual National Training Conference

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What Will We Cover?

- Exemption 7
- Exemption 7 Threshold for Use
- Subparts A, B, D, E, F
- Who is Using Exemption 7?
- Questions

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FOIA Exemption 7: The Law Enforcement Exemption

- Protects six distinct categories of law
enforcement information

Why are Law Enforcement records special?

- Inherently sensitive in nature
- Disclosure of LE info could jeopardize an
investigation or even a life

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Threshold: When can Exemption 7 be used?

Threshold: For any of the six categories of information to be protected, they must be "records or information compiled for law enforcement purposes"

- To apply subparts A, D, and F agencies must demonstrate that disclosure "*could*" reasonably be expected to cause a harm that they seek to prevent
- To apply subparts B and E agencies must demonstrate that disclosure "*would*" cause the harm these subsections seek to prevent

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Exemption 7 Usage

- To withhold records under Exemption 7 both the threshold and a subpart must apply
- Information originally compiled by an agency for a law enforcement purpose does not lose Exemption 7 protection merely because it is maintained in or recompiled into a non-law enforcement record
- The "law" to be enforced within the meaning of the term "law enforcement purposes" includes both civil and criminal statutes, as well as those statutes authorizing administrative (i.e., regulatory) proceedings
- Has been found to apply to records compiled to enforce state and foreign law

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Exemption 7 Usage

- Courts can require significant detail about the purpose of the records
- Mixed function agencies can apply (b)(7) but have a higher standard to satisfy
 - Typically used by this type of agency when they are enforcing a regulation within their authority
 - Example: USCIS, FEMA, IG

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Exemption (b)(7)(A): Active Investigations

Threshold Requirement:

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

- Can apply to active, pending, or prospective investigations
- Harm would definitively be caused by disclosure

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Exemption (b)(7)(A): Active Investigations

How Long Can it Apply?

- As long as proceeding remains pending;
- Proceeding is "reasonably anticipated" or prospective; or
- Record or information is preventative

What types of harm are covered?

- Reprisals against witnesses
- Release of strategy or evidence
- Loss of control of investigation
- Evasion of law enforcement by target

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Exemption (b)(7)(B): Fair Trial

Threshold requirement:

Disclosure "would deprive a person of a right to a fair trial or an impartial adjudication"

- Exemption 7(B) applies to prevent prejudicial pretrial publicity that could impair a court proceeding
- An agency must show that:
 - 1) A trial is pending or imminent; AND
 - 2) It is probable that disclosure would interfere with the fairness of the proceedings

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Exemption (b)(7)(D): Confidential Sources

Threshold requirement:

Disclosure "could reasonably be expected to disclose the identity of a confidential source"

- Covers state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis
- The information provided by a source can be protected depending on if the source was used to compile information for a criminal law enforcement authority during an investigation or if the information was gathered during a national security intelligence investigation

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Exemption (b)(7)(D): Confidential Sources

Why Does This Exemption Exist?

- Confidential sources are critical to law enforcement
- Helps to encourage individuals/entities to come forward to law enforcement entities and provide information
- Helps to ensure confidential sources are not lost through retaliation against sources for past disclosure or because of fear of future disclosure
- The confidentiality of a source can be express *or* implied:
 - To determine implied confidentiality, take into account the nature of the crime and the source's relation to that crime

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Exemption (b)(7)(E): Law Enforcement Techniques/Procedure/Guidelines

Threshold requirement:

Disclosure "would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

- Used in criminal or civil investigations or prosecutions
- Limited to unknown techniques or unknown ways/circumstances in which known techniques are used

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Exemption (b)(7)(E): Law Enforcement Techniques/ Procedure/Guidelines

Techniques & Procedures

- Cannot be well known to the public
- Articulating harm in release

EXAMPLES:

- Location of Law Enforcement checkpoints/geo-coordinates
- NOTE: the technique can be known to be used, but the circumstances or details surrounding how are not public
- Non-public codes or event numbers generated by law enforcement databases
- Details regarding how, why, or even what types of surveillance are used by law enforcement

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Exemption (b)(7)(E): Law Enforcement Techniques/ Procedure/Guidelines

Guidelines

- The harm standard here is 'risk of circumvention'

EXAMPLES:

- Law enforcement manuals
- Policy guidance documents
- Build specifications for detention or holding facilities
- Emergency plans

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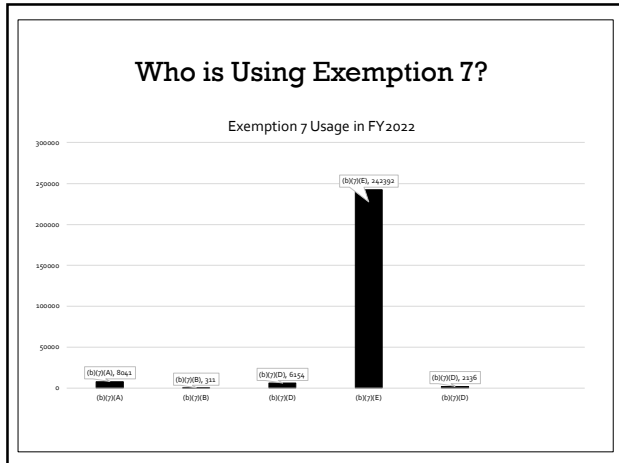
Exemption (b)(7)(F): Endangering Life of Physical Safety

Threshold requirement:

Disclosure of information "could reasonably be expected to endanger the life or physical safety of any individual."

- Has a lower threshold than (b)(7)(C)
- No balancing test required
- Agency just needs to show reasonable likelihood of harm
- Shows deference to agency's harm assessment

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Who is Using Exemption 7?

- (b)(7)(A)
- *Applied the most times by Department of Labor
- (b)(7)(B)
- *Applied the most times by Department of Defense
- (b)(7)(D)
- *Applied the most times by Department of Labor
- (b)(7)(E)
- *Applied the most times by Department of Homeland Security
- (b)(7)(F)
- *Applied the most times by Department of Justice

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Questions?

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