An Overview of the Freedom of Information Act Exemptions

OIP FOIA Module 103
New Era of Open Government

• As President Obama has declared: “A democracy requires accountability, and accountability requires transparency.”
New Era of Open Government

• The “FOIA is often explained as a means for citizens to know ‘what their government is up to.’”

• President Obama has stated that “[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government.”
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• “At the same time,” the Attorney General has recognized that “the disclosure obligation under the FOIA is not absolute.”
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- Congress included nine exemptions in the FOIA in order to protect certain information from disclosure.
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• When applying these exemptions, agencies must consider whether they reasonably foresee that disclosure would harm an interest protected by one of the exemptions.
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• In the absence of such harm, agencies are encouraged to make a disclosure of the information in keeping with the President’s call for greater transparency.
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• Generally, when only government interests are at stake, the agency has broader discretion to release the information.
Exemption 1

Exemption 1 protects properly classified information.
Exemption 1

• Classification is governed by the President through Executive Orders.

• The Executive Order in effect as of September 2009 is Executive Order 12,958, as amended.
EXEMPTION 1

• Exemption 1 protects national security information that is properly classified under the procedural and substantive requirements of the current Executive Order on classification.

• Proper classification markings are: Confidential, Secret, and Top Secret
Exemption 1

- The “Glomar Response” – “neither confirm nor deny”
EXEMPTION 2

Exemption 2 protects records that are “related solely to the internal personnel rules and practices of an agency.”
Exemption 2

• Threshold: Information must be predominantly internal.
Exemption 2

- Two aspects of Exemption 2
  - Low 2
  - High 2
Exemption 2

Low 2

Information is trivial and of no significant public interest.

Consider Attorney General Guidelines.
Exemption 2

High 2

Protects predominantly internal information when disclosure would risk circumvention of a statute or agency regulation.
Exemption 3 protects information that has been "specifically exempted from disclosure by statute."
Exemption 3

Two subparts: A and B

Subpart A statutes - Absolute prohibition on disclosure -- no agency discretion.
Exemption 3

Subpart B statutes - Limited prohibition on disclosure

a) statute defines particular matters to be withheld; or

b) statute provides specific criteria for withholding.
Examples of Exemption 3 Statutes

**Examples of Subpart A Statutes:**

- **Census Act** – Prohibits release of any identifying information collected during the national census. No discretion was granted to the agency.

- **Civil Rights Act of 1964** – Prohibits release of information concerning matters presently before the EEOC. No discretion was granted to the agency.
Examples of Exemption 3 Statutes

Examples of Subpart B Statutes:

- **Patent Statute** - prohibits disclosure of *pending* patent applications. Some discretion to agency.

- **National Security Act** - prohibits disclosure of intelligence *sources and methods*. Some discretion to agency.
Exemption 4 protects trade secrets or commercial or financial information obtained from a person that is privileged or confidential.
Exemption 4

Trade Secrets

Narrowly defined
Exemption 4

- Commercial or financial information obtained from a person privileged or confidential.
Exemption 4

Threshold:

• Commercial or financial
• Obtained from a person
Exemption 4

“Confidential” information

1. voluntary submissions:
   - “customary treatment” test
2. Required submissions:
   a) impairment
   b) substantial competitive harm
   c) other governmental interests
Exemption 4

- Reverse FOIA lawsuits

- Submitter notice -- Executive Order No. 12,600
Exemption 5

• Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."
Exemption 5

- Records covered by Exemption 5 are good candidates for discretionary release.
Exemption 5

Threshold: inter-agency or intra-agency memoranda or letters

- Within or between agencies
- Consultants
Exemption 5

The Deliberative Process Privilege

a) predecisional
b) deliberative
c) facts generally not protected
Exemption 5

Attorney Work-Product Privilege

a) prepared by an attorney or under his/her direction
b) in anticipation of litigation
c) no temporal limit
d) facts protected
Exemption 5

Attorney-Client Privilege

a) communication from client to attorney

b) communication confidential
Exemption 6

- Exemption 6 protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy.
Exemption 6

Threshold: personnel and medical files and similar files
Exemption 6

Privacy interest: Living individuals have a privacy interest in not having agencies disseminate personal information about them.
Exemption 6

Public interest: serves FOIA “core purpose” of shedding light on agency’s operations or activities
Exemption 6

Balancing

In order to withhold information, the privacy interest must outweigh the public interest.
EXEMPTION 7

LAW ENFORCEMENT INFORMATION
Exemption 7

• Exemption 7 protects six different types of law enforcement information.
Exemption 7

- **Exemption 7 Threshold:**
  Records or information compiled for law enforcement purposes
Exemption 7

**Exemption 7(A):** Information that could interfere with a pending law enforcement matter.

1. Pending, prospective or preventative investigation
2. Harm would result from disclosure
Exemption 7

- **Exemption 7(B):** Disclosure of information would deprive a person of the right to a fair trial.
Exemption 7

- **Exemption 7(C):** Disclosure could reasonably be expected to cause an unwarranted invasion of personal privacy
  1) privacy interests
  2) public interest
  3) balancing test
  4) “Glomar” response
Exemption 7

**Exemption 7(D):** Protects confidential sources

1) identities of confidential sources
2) all information provided by confidential sources if compiled during criminal or national security investigation
Exemption 7

- **Exemption 7(D):** Determining whether source is confidential
  
a) express confidentiality
  
b) implied confidentiality
  
  * nature of crime
  
  * source’s relation to crime
Exemption 7

- **Exemption 7(E):** Disclosure would reveal investigative techniques and procedures or guidelines for law enforcement investigations or prosecutions if disclosure could risk circumvention of the law.
Exemption 7

Exemption 7(E)

1) techniques generally unknown to the public

2) guidelines or manuals
Exemption 7

- **Exemption 7(F):** Disclosure would endanger the life or physical safety of individuals.
- Undercover agents
- Witnesses subject to violent reprisal
Exemption 8

BANK RECORDS
Exemption 8

Exemption 8 protects matters contained in or related to examination, operating, or condition reports prepared by or for regulators or supervisors of financial institutions.
Exemption 9

INFORMATION ON WELLS
Exemption 9 protects geological information and data, including maps, concerning wells.
STATUTORY EXCLUSIONS

• In certain extraordinary law enforcement contexts the FOIA excludes the records from the requirements of the FOIA.

• Agencies should first consult with OIP before using a record exclusion.