



LAW ENFORCEMENT FOIA EXEMPTIONS AND PROCESSING

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Freedom of Information Act (5 USC 552)



Outline

1. General Background
2. Exemption Review
3. Best Practices
4. Questions



General Background



- Enacted in 1966.
- FOIA provides that any person has a right to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine FOIA exemptions or by one of three special law enforcement record exclusions.
- This right is judicially enforceable, and attorneys fees can be assessed if the Plaintiff substantially prevails.



Freedom of Information Act (5 USC 552)



Causes of Action Include

- Constructive Denial
- Improper Withholding
- Inadequate Search
- Improper denial of
 - Fee waiver, expedited processing, fee categorization
- Pattern and Practice



What About State Records?

- The Federal FOIA does not provide access to records held by state or local government agencies, or by businesses or individuals.
- States have their own statutes governing public access to state and local records and they should be consulted for further information about them.
- However, State records may be disclosed in FOIA—subject to certain exemptions



What is a Record Under FOIA?



- Any agency records are those created or obtained by NOAA and are, when the request is filed, in NOAA's possession and control
- Includes off-site storage
- Agency records can be in any format like print documents, photographs, videos, maps, e-mail and electronic records



EXEMPTION REVIEW



5 U.S.C. 552(b)(1-9)

- Ex. 1: National Security Information
- Ex. 2: Administrative and Personnel
- Ex. 3: Statutorily Prohibited from Disclosure
- Ex. 4: Confidential/Business Proprietary
- Ex. 5: Records Subject to a Privilege
- Ex. 6: Non-Law Enforcement Privacy
- Ex. 7: Law Enforcement Records
- Ex. 8: Reports for/by Financial Institutions
- Ex. 9: Geophysical data, oil well maps



Accessing Exemption 7



Threshold Requirement of being considered a Law Enforcement Record:

- Records or information compiled for law enforcement purposes





Accessing Exemption 7 (Cont'd)



- Content and Compilation Purpose is the judicial question
- “Compiled for Law Enforcement Purpose” includes non-Law Enforcement records compiled later for a law enforcement purpose before invoking the exemption (e.g., evidence, exhibits, emails).



Accessing Exemption 7 (Cont'd)



- Law Enforcement Purposes Include:
 - Investigation material
 - Records revealing Investigatory files and file systems
 - Audits
 - Law Enforcement monitoring
 - Records pertaining to informants



Accessing Exemption 7 (Cont'd)



- Laws Enforcement includes civil and criminal:
 - Civil Enforcement can include
 - Seizure/Forfeiture/Fine laws
 - Regulatory, Immigration, and
 - Civil Rights enforcement
 - Some Personnel Actions (Enforcement related versus performance related).
 - Records must have rational nexus to enforcement.



Exemption (b)(7)(A)



- Producing the records “could reasonably be expected to interfere with enforcement proceedings”





Exemption (b)(7)(A) (Cont'd)



- No longer “would interfere”. Broadened in 1986 to “could interfere.”
 - Two Prong Test:
 - Is there a pending or prospective law enforcement proceeding?
 - Could the information reasonably be expected to cause some articulable harm?



Exemption (b)(7)(A) (Cont'd)



- Temporal in nature—records at some point become releasable
- Can be invoked as long as enforcement remains pending or prospective
 - Can apply to dormant investigations
 - During Trial and Appeal
 - During Long-Term Investigations



When to Invoke an Exclusion



- (c)(1)—If the target is unaware of the investigation and disclosure of the existence could interfere with enforcement proceedings
- (c)(2)—Protects disclosure of unacknowledged, confidential informants
- (c)(3)—Applies only to the FBI regarding domestic terrorism investigations



When to Invoke an Exclusion (Cont'd)



- The correct response is a “no records” response.
- In these scenarios, agencies are to “treat the records as not subject to the requirements of the FOIA.”
- All exclusions are temporal, and cease to apply with the conditions of the exclusion.
- Consult with OIP to make sure they are properly invoked, and contact the FOIA Officer so they are properly recorded.
 - Recognize the risk of inadvertent classified disclosure in FBI consultations



Exemption (b)(7)(B)



- Disclosure would deprive a person of a right to a fair trial or an impartial adjudication
 - Rarely invoked
 - Two part test
 - Is a trial/adjudication pending/imminent?
 - Is it likely disclosure would interfere with proceedings?
 - Used when ancillary pending civil actions would be impacted



Exemption (b)(7)(C)



- Disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy.
 - Categorical withholding of information identifying 3rd party is ordinarily appropriate
 - Easier to apply than Exemption 6 (omission of word “clearly” and “would” changed to “could reasonably be expected to”)
 - Strong interest in not being associated with alleged criminal activity, including for agents





Exemption (b)(7)(C) (Cont'd)



- Balance of privacy interest is still conducted, but regularly is recognized to weigh in favor of withholding targets, agents, witnesses, and third parties referenced in law enforcement files
- Recognized stigma at being mentioned in law enforcement files



Exemption (b)(7)(C) (Cont'd)



Possible Exceptions:

- Alleged federal employee wrongdoing (examine seniority)
- Death of individual (examine survivor interest)
- Publicity of the individual in connection with the record (examine the “practical obscurity”)
- Strong public interest (examine the nexus to the records sought)



Glomar



- The Hughes Glomar Explorer was built by Sun Ships to secretly lift a sunken Soviet Submarine at the height of the Cold War from a three mile depth



Glomar (Cont'd)



- A form of response premised on an underlying Exemption
- When premised on Exemption 7(C), the refusal to confirm or deny is because the public may draw adverse inferences from the mere fact that an individual is mentioned in the criminal law enforcement files of an agency.
- Glomar is the proper response any time the existence or non-existence of records would provide the requester with exempt information.



Exemption (b)(7)(D)



- Records that could reasonably be expected to disclose the identity of a confidential source
- Most comprehensive of all (b)(7) Exemptions
- Includes State, Local, Foreign agencies, includes institutions, individuals, and other sources
- Requires either express or implied assurances of confidentiality



Exemption (b)(7)(D) (Cont'd)



- Express confidentiality can be supported by:
 - Affidavit
 - Agency practice
 - Anonymized references (e.g., informant id numbers)
- Implied confidentiality can be supported by:
 - Circumstances of each case including (1) nature of the crime and (2) the source's relation to it.
 - These factors are examined in the specific case to show potential for retaliation, risk of harm, prior retaliatory acts, danger to the informant, violence/intimidation in the underlying crime.



Exemption (b)(7)(E) (Cont'd)



- Techniques and Procedures for investigations and prosecutions—
OR
 - Guidelines if disclosure could reasonably be expected to risk circumvention of the law
- (Some Courts apply circumvention requirement to both clauses)





Exemption (b)(7)(E)



- Even well-known procedures (wire-taps, mail covers, and pre-text phone calls), can be withheld if the circumstances of their usefulness is not well known, or if disclosure would nullify their effectiveness. (Discriminant Function Scores, President's limo armor, specific topics for questioning)
- Possible use of Glomar to disguise use in a particular circumstance (e.g., Pen Register, GPS loggers).



Exemption (b)(7)(E)



Guidelines always require the risk of circumvention to qualify

- Law Enforcement Manuals
- Emergency Plans
- Settlement Guidelines
- Listing of coordinating databases used for law enforcement (TECS, IDENT, IAFIS, etc.)
- Passenger examination criteria, watch list guidelines
- Surveillance methods





Exemption (b)(7)(F)



Reasonably expected to endanger the life or physical safety of another individual

- Can protect identities beyond 7(C)—no balancing is required
 - Common practice uses rarely challenged:
 - Ballistic criteria
 - Armory locations, munition depots (Milner)
 - Security diagrams or assessments
 - Emergency response plans
 - Threat assessments





Exemption (b)(5) Deliberative Process



- (b)(5) Statute generally protects: “Inter and intra-agency” communications that would not be available by law to a party other than an agency in litigation with the agency”. Courts define this as only documents that are normally privileged in civil discovery. But there is no difference between qualified and absolute privilege (so there is no showing of “need”).
- **Two Part Test:**
 - Is the material pre-decisional, i.e., antecedent to the adoption of the agency policy?; and
 - Is it deliberative (not factual)—making recommendations, expressing opinions on legal or policy matters.



Exemption (b)(5) Deliberative Process



- As to one of those privileges, Deliberative Process Privilege includes:
 - Inter-agency and Intra-agency communication requirement encompasses “consultant corollary”
- If the consultants, contractors, external advisors provided advice similar to what might have been received from an employee. Must ask—
 - Are they an interested party
 - Seeking benefit at the expense of other applicants. If yes, no (b)(5) protection.



Best Practices



Search vs. Review fees

- In the context of hybrid searches (databases extractions and formatting conversions): "Search" and "review" were defined before any hybrid record collection activities were required
- Review is "direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed [under the FOIA]." Review time thus includes processing the documents for disclosure, i.e., doing all that is necessary to prepare them for release".
- Search fees are more inclusive, and encompass "all the time spent looking for responsive material, including page-by-page or line-by-line identification of material within documents."
- Search fees also are ordinarily the only recoverable fee in non-commercial requests.





Best Practices



Narrowing the Scope

The FOIA allows us to toll the twenty-day time period (i.e., stop the clock) under two circumstances:

- (1) one time to obtain information from the requester. Keep in mind—this by definition *does not include the amount of time it takes to make a decision based off of information already provided by the requester*); and
- (2) as "necessary" to clarify fee-related issues with the requester.



Best Practices



Extend the Due Date for Unusual Circumstances

Unusual circumstances include:

- (i) The need to search for and collect the requested agency records from field facilities or other establishments that are separate from the office processing the request;
- (ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are the subject of a single request; or
- (iii) The need to consult with another Federal agency having a substantial interest in the determination of the FOIA request or among two or more components of the Department having substantial subject-matter interest in the determination of the request.

*Include the notification to the requester in the acknowledgment letter



Best Practices



Issuing a Fee Estimate

Follow fee regulations at 15 CFR 4.11.

- If the request has been tasked to your office, check FOIA Online to determine if fees have been waived in full or in part.
- Everyone should be doing this anyway to be compliant with the requirements for 15 CFR 4.7 (a) anyway. (The acknowledgment letter should be confirming if the requester is willing to pay fees).
- If fees have been waived in full, the tasking under 15 CFR 4.5(a) is for a search to commence immediately. Remember that if fees are waived, the fee category is moot—and will likely not be assigned in FOIAOnline.



Best Practices



Grand Jury Material

- FOIA professionals who have a need to know in order to process the records are among those with approved access to grand jury material.
- However, all secret aspects of the grand jury proceedings must still comply with Rule 6(E), so the method of transmission of the records must only be through those authorized under that Rule.





Best Practices



Grand Jury Material (Cont'd)

- Ordinarily this would be accomplished by the SME reviewing the records also being the case agent, or other individual previously authorized to view grand jury material.
- After the Exemption review is complete, the non-exempt material can be uploaded as not being records subject to the secrecy provisions of 6(e)(2)(B).
- Mike Toland, DOC Chief FOIA Officer, confirmed that Unredacted Grand Jury material should not be uploaded into FOIAOnline
- Records should be processed on a properly access restricted drive and fully redacted prior to uploading the remaining releasable records into FOIAOnline ready for release to the requester.



Best Practices



First Person Access Requests

- First Person requests for someone’s own records fall under the Privacy Act.
- If a Privacy Act Exemption applies, then the records are subject to ordinary FOIA procedures—except the release is only made to the requester.
- If no Privacy Act Exemption applies, the records are released in their entirety without a FOIA review.





Questions



QUESTIONS?



References



- **Exemption 7 Threshold Requirements**
 - Compiled for Law Enforcement Purpose
 - Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Sec. 1802, 100 Stat. at 3207-48.
 - Abdelfattah v. DHS, 488 F.3d 178, 184 (3d. Cir. 2007)
 - Content and Compilation Purpose
 - FBI v. Abramson, 456 U.S. 615, 624, 626 (1982).
 - Jefferson v. DOJ, 284 F.3d 172, 176-177 (D.C. Cir. 2002).
 - Non-LE records later compiled for law enforcement purpose
 - John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989).
 - LE Purposes
 - Investigations: Baez v. FBI, 443 F. Supp. 2d 717, 724 (E.D. Pa. 2006).



References (Cont'd)



- **Exemption 7 Threshold Requirements (Cont'd)**

- LE Purposes

- Investigatory Files: *Deglace v. DEA*, No. 05-2276, 2007 WL 521896, at 2 (D.D.C. Feb. 15, 2007).
- Audits: *Faiella v. IRS*, No. 05-CV-238, 2006 WL 2040130, at 4 (D.N.H. July 20, 2006)
- Monitoring: *Swope v. DOJ*, 439 F. Supp. 2d 1, 6 (D.D.C. July 3, 2006).
- Informants: *Robinson v. Attorney Gen. of the U.S.*, 534 F. Supp. 2d 72, 81 (D.D.C. 2008).

- Laws being enforced

- Civil Laws: *Rugiero v. DOJ*, 257 F.3d 534, 550 (6th Cir. 2001).
- Personnel Laws: *Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984).



References (Cont'd)



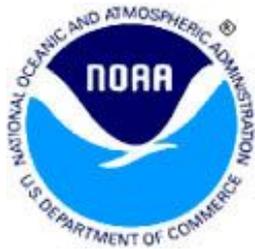
- **Exemption 7 Threshold Requirements (Cont'd)**
 - Law Enforcement Purpose
 - Rational Nexus between record and enforcement purpose: *Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982).
- **Exemption 7(A):**
 - 5 U.S.C. 552(b)(7)(A) (2006).
 - “Could Interfere”: Pub. L. No. 99-570, sec. 1802, 100 Stat. 3207, 3207-48.
 - Two Prong Test: *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).
 - Temporal Duration: *Antonelli v. U.S. Parole Comm’n*, No. 93-0109, slip op. at 3-4 (D.D.C. Feb. 23, 1996).
- **Exclusions**
 - Attorney General Meese 1987 Guidance on FOIA Exclusions;
 - <https://www.justice.gov/oip/blog/foia-guidance-6>



References (Cont'd)



- **Exemption 7(B):**
 - Two Part Test: *Washington Post v. DOJ*, 863 F.2d 96, 101-02 (D.C. Cir. 1988).
- **Exemption 7(C)**
 - 5 U.S.C. 552(b)(7)(C) (2006).
 - Categorical withholding of 3rd party identifying information: *DOJ v. Reporters Committee*, 489 U.S. 749 (1989).
 - Distinguishing (b)(6) from (b)(7)(C): *NARA v. Favish*, 541 U.S. 157, 165-66 (2004).
 - Strong interest in not being mentioned in connection with criminal activity—including for agents or other individuals: *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990).
 - Federal Employee wrongdoing exception: *Stern v. FBI*, D.C. Cir. 1984).
 - Practical obscurity versus Public Interest: *Reporters Committee*, at 780; *NARA v. Favish*, at 172.



References (Cont'd)



- **Glomar**

- Origin of the Glomar Response: *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D. C. Cir. 1976)
- Premised on (b)(7)(C): *Ray v. DOJ*, 778 F. Supp. 1212, 1215 (S.D. Fla. 1991).

- **Exemption (b)(7)(D):**

- 5 U.S.C. 552(b)(7)(D) (2006)
- Most comprehensive (b)(7) Exemption: *Billington v. DOJ*, 301 F. Supp. 2d, 15, 21 (D.D.C. 2004).
- Legislative intent to cover broad range of sources: S. Conf. Rep. No. 93-1200, at 13.
- Requires either express or inferred assurances of confidentiality:
Express: *Rosenfeld v. DOJ*, 57 F.3d 803, 814 (9th Cir. 1995); *Davin v. DOJ*, No. 98-3343, slip op. at 8 (3rd Cir. Jan. 27, 1999).

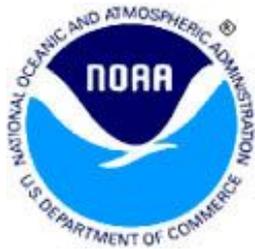
Implied: *DOJ v. Landano*, 508 U.S. 165, 179-80 (1993); *Farrugia v. EOUSA*, No. 04-1298, 2006 WL 335771, at 8 (D.D.C. Feb. 14, 2006).



References (Cont'd)



- **Exemption 7(E)**
 - 5 U.S.C. 552(b)(7)(E)
 - Split Courts on “circumvention” applicability: *Asian Law Caucus v. DHS*, No. 08-00842, 2008 WL 5047839, at 3 (N.D. Cal. Nov. 24, 2008)
 - DDC does not require showing of harm for first clause: *Keys v. DHS*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007).
 - Details, scope, and timing of investigative techniques are protected: *Unidad Latina En Accion*, 253 F.R.D. at 51-52 (D. Conn. 2008).
 - Circumstances of usefulness not widely known: *Wickline v. FBI*, No. 92-1189, 1994 WL 549756, at 5 (D.D.C. Sept. 30, 1994).
 - Would allow criminals to adapt to avoid future detection: *Brunetti v. FBI*, 357 F. Supp. 2d 97, 108 (D.D.C. 2004).
 - Various guidelines protected: *Judicial Watch, Inc. v. FBI*, No. 00-745, 2001 U.S. Dist. LEXIS 25732, at 29 (D.D.C. Apr. 20, 2001).



References (Cont'd)



- **Exemption 7(F)**
 - 5 U.S.C. 552(b)(7)(F)
 - Identity Protection: Peter S. Herrick’s Customs and Int’l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-0377, 2006 WL 1826185, at 9 (D.D.C. June 30, 2006).
 - No (b)(7)(C) balancing: Raulerson v. Ashcroft, 271 F. Supp. 17, 29 (D.D.C. 2002).
- **Exemption 5 Deliberative Process**
 - Inter and Intra Agency: NLRB v. Sears, 421 U.S. 132, 149 (1975).
 - Two Part Test: Jordan v. DOJ, 591 F.2d at 774 (U.S. App. D.C. 1992); Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).
 - Consultant Corollary: Dep’t of the Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 11 (2001).
- **Best Practices**
 - Search versus Review Fees: <http://www.justice.gov/oip/foia-guide-2004-edition-fees-and-fee-waivers>; See also OMB Fee Guidelines, 52 Fed. Reg. at 10,017.
 - Fee Estimates: 15 CFR 4.11



References (Cont'd)



- **Best Practices**

- Scope Narrowing:**

- One time for clarification 5 U.S.C. § 552(a)(6)(A)(ii)
 - As many times as needed for fees: 5 U.S.C. § 552(a)(6)(A)(ii)(I)

- Grand Jury Material—FOIA has access:** (*Canning v. DOJ* No. 92-0463, slip op. at 4-5 (DDC June 26, 1995).

- First Person Requests:**

- Access Requests: 5 U.S.C. 552a(d)(1)

- Guide to the Privacy Act/FOIA dual processing method:

- <https://www.justice.gov/opcl/individuals-right-access>