United States Department of Justice
Office of Information Policy

An Overview of the Freedom of Information Act Exemptions

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."

New Era of Open Government

- "At the same time," the Attorney General has recognized that "the disclosure obligation under the FOIA is not absolute. "

New Era of Open Government

- Congress included nine exemptions in the FOIA in order to protect certain information from disclosure.

New Era of Open Government

- When applying these exemptions, agencies must consider whether they reasonably foresee that disclosure would harm an interest protected by one of the exemptions.

New Era of Open Government

- 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.

New Era of Open Government

- 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 current Executive Order is 13526.

EXEMPTION 1

- Exemption 1 protects national security information that is properly classified under the proced uralland sub stantive 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."

You should be aware that a recent Supreme Court decision, Milner v. Dep't of the Navy, has fundamentally changed the way that agencies interpret Exemption 2 of the FOIA.

Exemption 2

- The old, pre-Milner interpretation of Exemption 2 consisted of the following test:

  1. Are the records "predominantly internal" to the agency?

  2. If so, the records were withholdable if they were of no genuine public interest ("low 2"). If the records were of genuine public interest, they were released unless the release would cause a significant risk of circumvention of the law ("high 2").

Exemption 2

The records at issue in Milner consisted of explosives blast radius records.

Under the old interpretation of Ex. 2, such records would likely have been withholdable under “high 2 ”as predominantly internal material whose release could significantly risk harm by providing a roadmap for a successful terrorist attack on the Navy’s explosives storage depot.

Exemption 2

Milner's holding: The Supreme Court overturned thirty years of well-established reliance on the prior interpretation of Exemption 2, finding that the Navy's explosives blast radius maps were not "personnel" records under the ordinary usage of that word. The Court said that the word "personnel," essentially ignored under the traditional interpretation of Exemption 2, is actually the key word in the statute.

Exemption 2

- Test for withholding under Milner (note the strict adherence to the actual text of the statute):
- 1. The records must concern personnel-related rules and practices (the word "personnel" should be interpreted as records pertaining to human-resources and employee regulations);
- 2. The records must relate "solely" to such rules or practices; and
- 3. The records must be "internal" to the agency.

Exemption 2

- Implications of Milner:

1. Because records must now constitute internal personnel records under Exemption 2, many, many sensitive documents can no longer be withheld under Exemption 2.
2. The Attorney General's FOIA Guidelines should play an important role with the new Exemption 2 because there is no foreseeable harm from the release of many internal personnel records of an agency.
3. Other Exemptions, including Exemptions 1, 3, 4, and 7 may be able to protect much of the information formerly protected pursuant to the "high 2" aspect of Exemption 2.

EXEMPTION 3

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

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

Exemption 4

2. Req uired submissions:

a) impairment

b) substantial competitive harm

c) other governmental interests

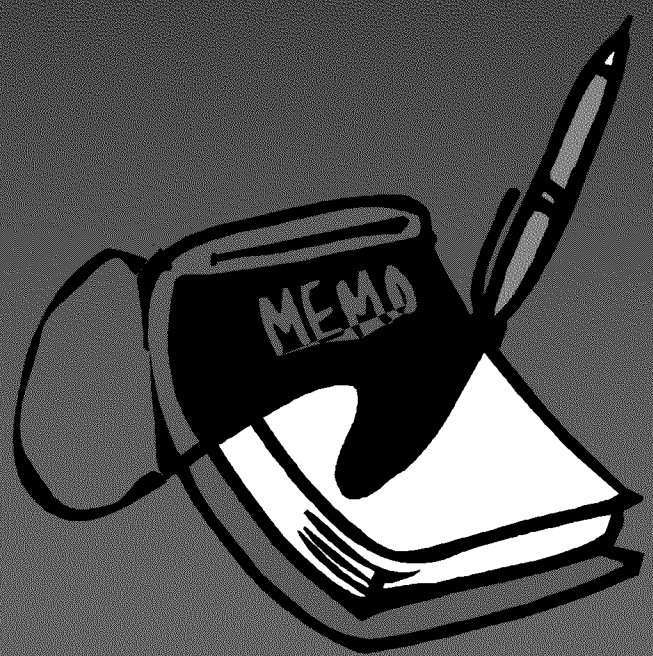
Exemption 4

- Reverse FOIA lawsuits

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

Exemption 5

PRIVILEGED INFORMATION



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

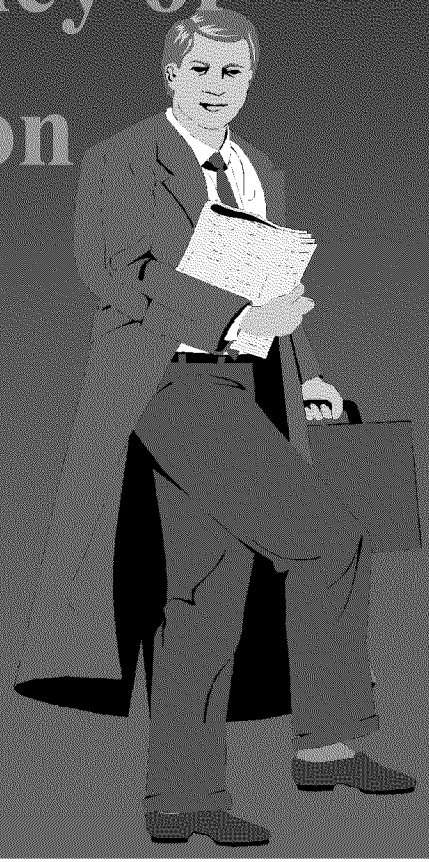
Attorney Work-Product Privilege

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

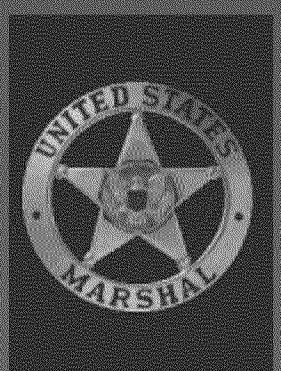
Exemption 6

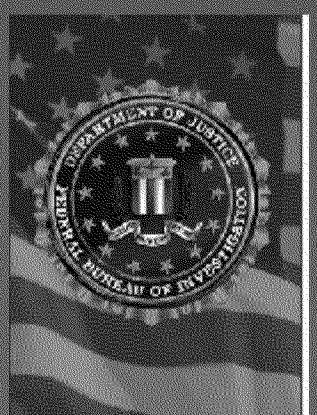
Balancing

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

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.