Exemption 7(B)

Exemption 7(B) of the Freedom of Information Act, which is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."[1]

In practice, this exemption is rarely invoked, with the Court of Appeals for the District of Columbia Circuit first addressing the application of Exemption 7(B) in Washington Post Co. v. DOJ.[2] At issue in that case was whether public disclosure of a pharmaceutical company's internal self-evaluative report, submitted to the Department of Justice in connection with a grand jury investigation, would jeopardize the company's ability to receive a fair and impartial civil adjudication of several personal injury cases pending against it.[3] In remanding the case for further consideration, the D.C. Circuit articulated a two-part test to be employed in determining Exemption 7(B)'s applicability: "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings."[4] This two-part test has become the governing standard when reviewing an application of Exemption 7(B) to withhold records.[5]

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[1] 5 U.S.C. § 552(b)(7)(B) (2018).

[2] 863 F.2d 96, 101-02 (D.C. Cir. 1988).

[3] Id. at 99.

[4] Id. at 102.

[5] See, e.g., Chiquita Brands Int'l v. SEC, 10 F. Supp. 3d 1, 5 (D.D.C. 2013), aff'd, 805 F.3d 289 (D.C. Cir. 2015), (discussing two-part test and finding that while first part is met because trial or adjudication is pending or truly imminent, second part is not because "Chiquita failed to specifically articulate how disclosure" of requested documents "would confer an unfair advantage upon plaintiffs" in litigation and its "speculation about potential publicity and its effect on a future jury . . . does not satisfy the level of certainty required by FOIA Exemption 7(B)" which "expressly requires that disclosure 'would' compromise the fairness of a proceeding," not that it merely "'could' impact fairness or impartiality")

Although the D.C. Circuit in Washington Post offered a single example of proper Exemption 7(B) applicability – i.e., when "disclosure through FOIA would furnish access to a document not available under the discovery rules and thus would confer an unfair advantage on one of the parties" – it did not limit the scope of the exemption to privileged documents only.[6]

The D.C. Circuit again addressed the application of Exemption 7(B) in Chiquita Brands International Inc. v. SEC.[7] In that case, the court determined that Exemption 7(B) was not applicable to certain records concerning payments made to paramilitary groups in Colombia by a subsidiary of Chiquita Brands International.[8] Chiquita had sought to prevent the release of the information, arguing that its disclosure "would be an end-run around the protections afforded the defendants in the discovery process yet to be established in [ongoing] litigation" and that agencies are prevented "from granting a FOIA request for law enforcement records whenever litigation is pending and the documents requested are not yet available in discovery."[9] The court held that "the phrase 'impartial adjudication' as it appears in the statute refers to determinations made by the administrative agencies, not to pretrial decisions issued by a judge."[10] The court also found that "[plaintiff was] wrong to urge that a slight advantage conferred on a

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(reverse FOIA lawsuit); N.Y. Times Co. v. DOJ, No. 16-6120, 2017 WL 4712636, at *24-25 (S.D.N.Y. Sept. 29, 2017) (finding that ongoing litigation satisfies pending or truly imminent judicial proceeding prong and that disclosure of requested FBI files concerning interviews of third parties in threat assessment reports would result in access to documents not available under discovery rules); Dow Jones Co. v. FERC, 219 F.R.D. 167, 175 (C.D. Cal. 2002) (utilizing two-part test and determining there is "no evidence that any trial or adjudication" is pending and that agency has not demonstrated that release "would generate pretrial publicity that could deprive the companies or any of their employees of their right to a fair trial," and accordingly ruling that exemption did not apply); Alexander & Alexander Servs. v. SEC, No. 92-1112, 1993 WL 439799, at *10-11 (D.D.C. Oct. 19, 1993) (relying on two-part test to determine that company "failed to meet its burden of showing how release of particular documents would deprive it of the right to a fair trial") (reverse FOIA suit), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996).

[6] Wash. Post Co., 863 F.2d at 102.

[7] 805 F.3d 289 (D.C. Cir. 2015) (reverse FOIA lawsuit).

[8] Id. at 295.

[9] Id. at 294.

[10] Id. at 295-96 (noting that plaintiff "asks [the court] to disregard the phrase 'fair trial' and focus instead on Exemption 7(B)'s protection of an 'impartial adjudication'").

party in a single phase of a case necessarily threatens the fairness of the trial."[11] In other words, the court explained that "[plaintiff] erroneously rested on the legal theory that it simply had to show the documents sought are presently unavailable to the . . . plaintiffs [in the related case], without showing how releasing those records now would impair the fairness of a future trial."[12] The court warned that "Exemption 7(B) is not a tool to protect reputation and privacy interests unless the damage disclosure might pose to such interests is likely to impact the ultimate fairness of a trial."[13]

[11] Id. at 295-98 (holding that "the Commission reasonably applied Exemption 7(B) and concluded that disclosure of the records to the Archive will not 'seriously interfere with the fairness' of the . . . proceedings [in which plaintiff is involved]").

[12] Id. at 299.

[13] Id.