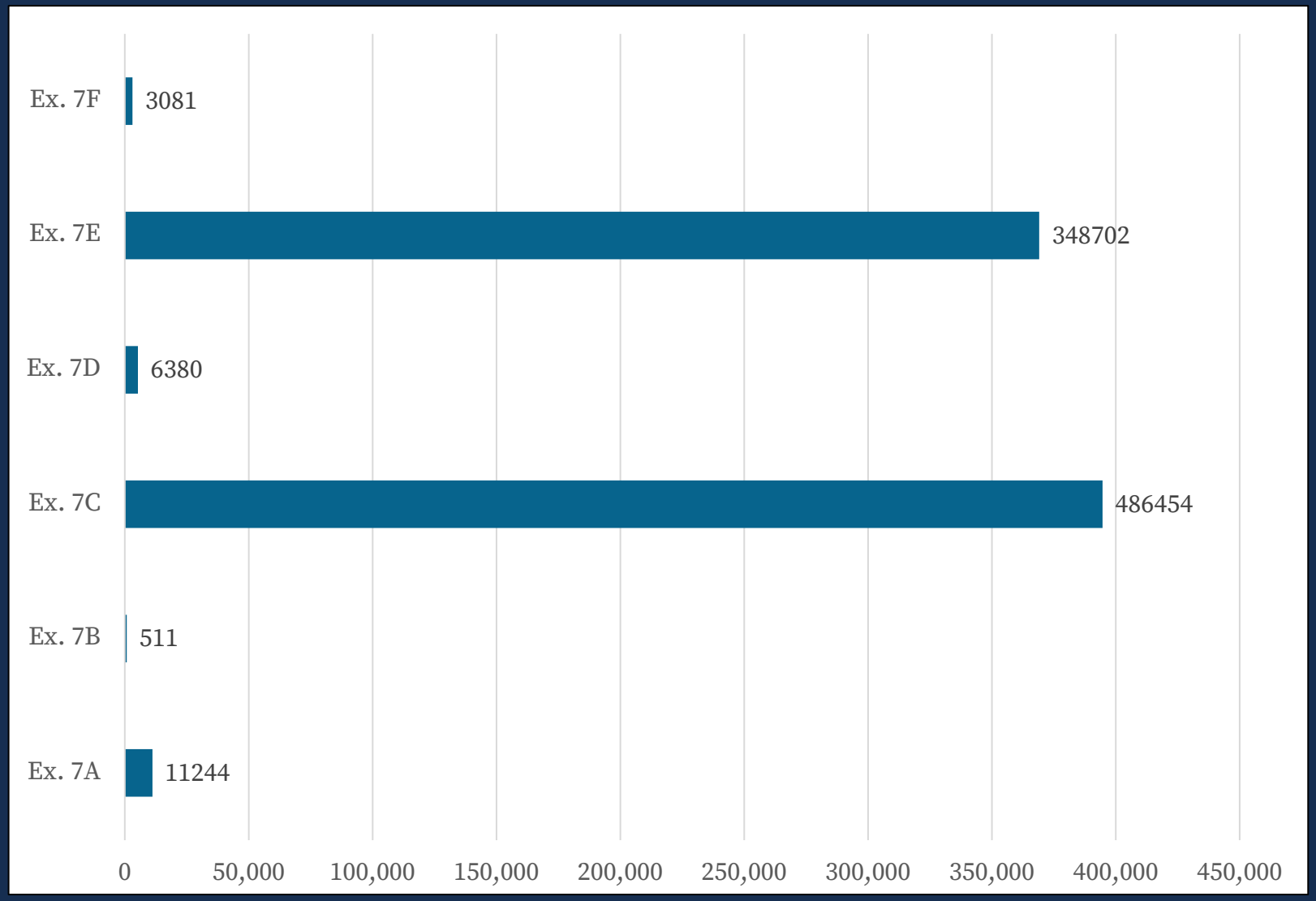
Exemption 7

Introduction to Exemption 7

- Exemption 7 protects important government and individual interests that arise in law enforcement records or information.
- Exemption 7 is most often used by law enforcement agencies but may also be used by non-law enforcement agencies that locate law enforcement information in their records.

Government-wide Ex.7 Usage in FY 2025



Source: Agency FY 2025 Annual FOIA Reports, as located on FOIA.Gov

Exemption 7: The Basic Framework

- 5 U.S.C. § 552(b)(7) contains (1) a threshold requirement and (2) six subparts ((A) - (F))
- To withhold records pursuant to Exemption 7, both the threshold and one of the six subparts must apply

Exemption 7 Threshold

Statutory Language: "records or information compiled for law enforcement purposes"

Three requirements to meet this threshold:

1) Records or Information
2) Compiled
3) Law Enforcement Purposes

Records or Information

- Congress extended the protection of Exemption 7 to include both investigatory records and non-investigatory records compiled for a law enforcement purpose
- The Freedom of Information Reform Act of 1986 focused the inquiry on the purpose for which records or information compiled

Compiled

- Threshold is met for information originally compiled for a law enforcement purpose
- The Supreme Court in 1989 clarified that information *not* originally compiled for a law enforcement purpose can still meet the threshold if later recompiled for a law enforcement purpose

Law Enforcement Purposes

- Criminal, civil, or administrative enforcement
- State or foreign law enforcement purposes also valid
- Can include national security / homeland security-related records
- Courts require sufficient detail about purpose

Law Enforcement Purposes

- Criminal Law Enforcement agency
  - (1) Per se rule (inherently compiled) (1st, 2nd, 6th, 8th, 10th); or
  - (2) Rational nexus test (connected to violation of law) (DC, 3rd, and 9th Cir.)
    - - Pratt v. Webster, 673 F.2d 408, 420-21 (D.C. Cir. 1982)

Law Enforcement Purposes

- Mixed-Function agency (not traditional criminal law enforcement agency)
  - Higher standard to satisfy
  - The agency is enforcing a statute or regulation within its authority
  - E.g., IGs, HHS, USPS

Law Enforcement Purposes

- Personnel Investigations
  - Specific and potentially unlawful activity by particular employees
  - Not general monitoring of employees

Exemption 7(A)

Statutory Language: Withholding of "records or information compiled for law enforcement purposes" (remember your threshold) where disclosure "could reasonably be expected to interfere with enforcement proceedings"

Exemption 7(A) Analysis

Two Steps:

- A specific enforcement proceeding either pending, prospective, or preventative; and
- A cognizable harm caused by release

Exemption 7(A) Enforcement Proceedings

- Criminal law enforcement proceeding
- Civil, regulatory, and administrative enforcement proceeding
- State or foreign enforcement proceeding

For how long does Exemption 7(A) apply?

- Exemption 7(A) applies as long as:
  - Proceeding remains pending;
  - Proceeding is "reasonably anticipated" (prospective); or
  - Record or information is preventative

What types of harm are covered under 7(A)?

- Standard: Proceeding would be harmed by premature release (e.g.,):
    - Reprisals against witnesses
    - Loss of control of investigation
    - Release of strategy or evidence
    - Suppression of evidence or evasion of detection by target

7(A) Categorical Approach

- In litigation an agency may justify withholding a category of records if it:
  - Provides "functional" description of the category of records; and
  - conducts a document-by-document review in order to assign the documents to the proper category; and
  - Explains how release interferes with enforcement proceedings for each category of records

Knowledge Check

Question: The FBI received a FOIA request seeking all records related to the active investigation into the disappearance of Jimmy Hoffa. More than 40 years have passed since Hoffa disappeared from a Bloomfield Hills restaurant. Can the FBI withhold records under Exemption 7A?

A. No -- Hoffa's disappearance occurred so long ago that this is now a cold case.
B. Yes -- there remains an open law enforcement investigation into Hoffa's disappearance and a potential harm from the release of records.

Exemption 7(B)

Statutory Language: Withholding of "records or information compiled for law enforcement purposes" (remember your threshold) where disclosure "would deprive a person of a right to a fair trial or an impartial adjudication"

When would agency use Exemption 7(B)?

Purpose: Exemption 7(B) applies to prevent prejudicial pretrial publicity that could impair a court proceeding

Two-Part Test for Exemption 7(B)

An agency must show that:

- A trial or adjudication is pending or truly imminent; and
- It is more probable than not that disclosure of records or information would seriously interfere with the fairness of those proceedings

- Wash. Post Co. v. DOJ, 863 F.2d 96 (D.C. Cir. 1988)

Exemption 7(C)

Statutory Language: "Could reasonably be expected to constitute an unwarranted invasion of personal privacy"

Exemption 7(D)

Statutory Language: "Could reasonably be expected to disclose the **identity of a confidential source**, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, **information furnished** by a confidential source."

Purpose of Exemption 7(D)

- To encourage individuals/entities to come forward to law enforcement entities and provide information.
- To ensure confidential sources are not lost through retaliation against sources for past disclosure or because of fear of future disclosure.

What constitutes a source?

This term may include both individuals and institutions (e.g., a local law enforcement agency such as a local police department)

What constitutes a Confidential Source?

Confidentiality can be:

- Express; or
- Implied

Implied Confidentiality

Factors to consider:

- Nature of the crime; and
- Source's relation to the crime
- Other factors

What information may be withheld?

Category 1: Identity of a confidential source

What information may be withheld?

Category 2: Information furnished by a confidential source

- Compiled by a criminal law enforcement authority in the course of a criminal investigation or
- By an agency conducting a lawful national security intelligence investigation

Knowledge Check

In which of the following situations would implied confidentiality likely be found to exist?

A. An inmate provides information about his cellmate engaging in gang activity.
B. Information is provided to USDA by third-party inspectors related to a company's violation of organic produce certification requirements.
C. A neighbor provides information on drug-related activity taking place in his neighbor's house.
D. All of the above.

Exemption 7(E)

Statutory Language: Exemption 7(E) allows an agency to withhold records if 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**."

First Clause of Exemption 7(E)

"Techniques and Procedures"

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

First Clause of Exemption 7(E)

- "Investigations or Prosecutions"
  - Not as broad as the Exemption 7 threshold (law enforcement purpose)
- Circumvention harm requirement
- Declarations and in camera review

Second Clause of Exemption 7(E)

"Guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law"

- Expectation of risk is enough

Knowledge Check

Sally is processing a request for records concerning a drug trafficking and money laundering investigation. Various techniques and procedures appear in the records. Which of these can likely be withheld under Exemption 7(E)?

A. Fingerprinting of suspects.
B. Criminal Justice Information System (CJIS) access codes.
C. Details regarding bank security measures, including cameras and alarms.
D. Details concerning a drug cartel provided to DEA by Colombian law enforcement pursuant to an undisclosed information-sharing agreement.

Exemption 7(F)

Statutory Language: Withholding of information that "could reasonably be expected to **endanger** the life or physical safety of any individual."

Who can be protected?

- Note that this exemption allows us to withhold information that could endanger **any** individual. This need not be an American citizen, or even a law abiding one.
- Often used to protect law enforcement personnel who deal directly with dangerous criminals. Also used to protect inmates from one another.

Knowledge Check

Shelley works at a federal agency located downstream from the Falcon Dam. She is provided a copy of an inundation map showing where flooding would likely occur in the event of a breach and included it as part of the agency's emergency action plan. Ian, a GIS, receives a FOIA request for the inundation map. Under which exemptions could this map be withheld?

Introduction to Exclusions

General disclaimer: Congress created a mechanism to protect particularly sensitive national security and law enforcement matters where even acknowledging the existence of such records would harm an interest protected by the FOIA's exemptions and a Glomar response may not be sufficient.

Introduction to Exclusions

- The FOIA contains three exclusions in subsection (c) that remove certain records from the requirements of the FOIA.
- Two of these exclusions, (c)(1) and (c)(2), generally concern certain information covered by Exemption 7(A) or 7(D), respectively.
- The third exclusion, (c)(3), applies to certain FBI records only.

(c)(1) Exclusion Requirements

- Records otherwise satisfy requirements of Exemption 7(A) to be withheld in full and:
  - Such records pertain to a pending criminal investigation; and
  - Agency has reason to believe that the subject of the investigation is unaware of its pendency; and

(c)(1) Exclusion Requirements (continued)

- Agency disclosure of the very existence of the records could reasonably be expected to interfere with the investigation

<u>ALWAYS</u> consult with an OIP exclusion expert before invoking

The (c)(2) exclusion

- Removes from the requirements of the FOIA records concerning an informant requested by a third party under the informant's name or identifier.
- If the informant's status as an informant has been officially confirmed, you cannot use the (c)(2) exclusion.

<u>ALWAYS</u> consult with an OIP exclusion expert before invoking

OIP Guidance, re: Exclusions

- **Guidance:** *Implementing the FOIA's Statutory Exclusion Provisions (September 14, 2012)* - http://www.justice.gov/oip/blog/foia-guidance-6

Applying the Foreseeable Harm Standard

In accordance with the Department of Justice's 2022 FOIA Guidelines, agencies should confirm in their administrative response letters that they have applied the foreseeable harm standard when considering disclosure determinations.

Questions?