

Freedom of Information Act Exemptions Overview



U.S. Department of
JUSTICE

As the Supreme Court has held,
“disclosure not secrecy, is the
dominant objective” of the FOIA.



U.S. Department of
JUSTICE

At the same time, not all records can be released under the FOIA.

Congress established nine categories of information that are not required to be released because release would be harmful to governmental or private interests.



U.S. Department of
JUSTICE

In creating these exemptions, Congress sought to create a “workable balance” between the public’s right to know and the government’s need to protect certain information.



U.S. Department of
JUSTICE

An agency can withhold information under an exemption only if the agency “reasonably foresees that disclosure would harm an interest protected by [that] exemption” or if disclosure is prohibited by law.



U.S. Department of
JUSTICE

Exemption 1

Protects properly classified
information



U.S. Department of
JUSTICE

Exemption 1

- Protects national security information that is properly classified under the procedural and substantive requirements of an Executive Order on classification.
- Proper classification markings are: Confidential, Secret, and Top Secret.



U.S. Department of
JUSTICE

Knowledge Check

Controlled Unclassified Information (CUI) can be withheld under the FOIA in which of the following situations (choose one)?

- a. Exemption 1 protects CUI.
- b. Only if an Exemption other than Exemption 1 applies.
- c. CUI can never be withheld.



U.S. Department of
JUSTICE

Exemption 2

Protects records that are “related solely to the internal personnel rules and practices of an agency”



U.S. Department of
JUSTICE

Exemption 2

- 1) Information must be related to “personnel” rules/practices;
- 2) Information must relate “solely” to those rules; and,
- 3) Information must be “internal.”



Exemption 3

Protects information that has been “specifically exempted from disclosure by statute”



U.S. Department of
JUSTICE

Exemption 3

What can qualify as a “statute” under Exemption 3?

- Certain Federal Statutes
- Federal Rules of Procedure enacted into law by Congress
- Certain Self-Executing Treaties



U.S. Department of
JUSTICE

Exemption 3

- Subpart A(i) – Absolute prohibition on disclosure – no agency discretion.
- Subpart A(ii) – Limited prohibition on disclosure
 - statute defines particular matters to be withheld; or
 - statute provides specific criteria for withholding



Exemption 3

OPEN FOIA Act of 2009

- Any statute enacted after the effective date of the OPEN FOIA Act of 2009 (October 28, 2009) must also specifically reference Exemption 3 of the FOIA.



U.S. Department of
JUSTICE

Exemption 3

Two-Part Analysis

1. Whether the withholding statute qualifies as an Exemption 3 statute; and
2. Whether the records fall within the statute's scope.



Exemption 3 Resources

- Exemption 3 Chapter of the *Department of Justice Guide to FOIA*

<https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

- Statutes Found to Qualify Under Exemption 3

<https://www.justice.gov/oip/foia-resources#s4>

- List of Exemption 3 Statutes cited by Federal Agencies in Annual FOIA Reports

<https://www.justice.gov/oip/foia-resources#s4>



U.S. Department of
JUSTICE

Knowledge Check:

In 2013, Congress enacted the Lawyers Employment Act. The law contains a non-disclosure provision that states as follows: “All records created by agencies to carry out this Act are exempt from public disclosure.”

Is this a valid FOIA Exemption 3 statute?

- a. Yes
- b. No



U.S. Department of
JUSTICE

Exemption 4

Protects trade secrets or commercial or financial information obtained from a person that is privileged or confidential



U.S. Department of
JUSTICE

Office of Information Policy¹⁸

Exemption 4

Two Categories

I. Trade Secrets

- Narrowly defined and limited to “production process”

II. Commercial or financial information obtained from a person and privileged or confidential



U.S. Department of
JUSTICE

Exemption 4

- Requirements for second category:
 - Commercial or financial
 - Obtained from a person
 - Privileged or confidential



U.S. Department of
JUSTICE

Exemption 4

Confidential Information

- Information private or closely-held?
- Government provided an express or implied assurance of confidentiality?
- Express or implied indications at the time the information was submitted that the government would publicly disclose the information?



U.S. Department of
JUSTICE

Exemption 4 Resources

- OIP Guidance:
 - <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media>
- Checklist
 - <https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential>



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”



U.S. Department of
JUSTICE

Exemption 5

Threshold

- Created and exchanged within or between agencies
- *Exceptions: Consultant Corollary and Common Interest Doctrine*



U.S. Department of
JUSTICE

Exemption 5

- Three main legal privileges:
 - Deliberative Process (applies only for 25 years)
 - Attorney Work-Product
 - Attorney-Client



Exemption 6

Protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy



U.S. Department of
JUSTICE

Exemption 6

- **Threshold:** Personnel and medical files and similar files
- **Privacy Interest:** Living individuals have a privacy interest in controlling information about them



U.S. Department of
JUSTICE

Exemption 6

- **Public Interest:** Serves FOIA “core purpose” of shedding light on agency’s operations or activities
- **Balancing:** In order to withhold information, the privacy interest must outweigh the public interest



Exemption 7

Protects six different types of law enforcement information, including:

- On-going proceedings
- Personal Privacy
- Confidential sources
- Techniques and procedures



U.S. Department of
JUSTICE

Exemption 7

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



U.S. Department of
JUSTICE

Exemption 7

- 7(A) -- information that could reasonably be expected to interfere with a pending law enforcement matter



U.S. Department of
JUSTICE

Exemption 7

- 7(B) -- disclosure of information would deprive a person of the right to a fair trial or an impartial adjudication



U.S. Department of
JUSTICE

Exemption 7

- 7(C) -- disclosure could reasonably be expected to cause an unwarranted invasion of personal privacy
 - Privacy interest
 - Glomar/Categorical Responses
 - Public interest
 - Balancing test



Exemption 7

- 7(D) -- disclosure could reasonably be expected to reveal identity of confidential source or, in certain circumstances, information provided by source
 - a) express confidentiality
 - b) implied confidentiality
 - nature of crime or wrongdoing
 - source's relation to crime or wrongdoing



Exemption 7

- 7(E) -- disclosure would reveal one of the following:
 - techniques and procedures for investigations or prosecutions; or
 - guidelines for investigations or prosecutions if disclosure could risk circumvention of the law



U.S. Department of
JUSTICE

Exemption 7

- 7(F) -- disclosure could reasonably be expected to endanger the life or physical safety of individuals
 - Reasonable expectation sufficient
 - Individual need not be specifically identified



Knowledge Check

The FBI released a press statement indicating that it secured a criminal indictment against Windows, Inc. and its CEO, Dave. Requester Tom makes a FOIA request for all investigatory records that led to the indictment. What Exemption(s) may apply to protect the records of the pending investigation?

- A. Ex. 7(A)
- B. Ex. 7(B)
- C. Ex. 7(C)



U.S. Department of
JUSTICE

Knowledge Check

Jimmy's neighbor Tom suspects that Jimmy may be breaking the law. Based on his suspicion, Tom makes a FOIA request to DEA asking for any investigation records concerning Jimmy. What is the likely response from DEA's FOIA Office?

- A. Full Denial – 7(A)
- B. Full Denial – 7(C)
- C. Glomar – 7(C)



Exemption 8

Protects matters contained in or related to examination, operating, or condition reports prepared by or for regulators or supervisors of financial institutions



U.S. Department of
JUSTICE

Exemption 9

Protects geological information and data, including maps, concerning wells



U.S. Department of
JUSTICE

Statutory Exclusions

In certain extraordinary criminal law enforcement or national security contexts, Congress excluded certain categories of records from the requirements of the FOIA.

Agencies should review OIP's guidance on this topic and consult with OIP prior to the use of a statutory exclusion.

<http://www.justice.gov/oip/blog/foia-guidance-6>



U.S. Department of
JUSTICE

Office of Information Policy

Questions?



U.S. Department of
JUSTICE

42
Office of Information Policy