



UNITED STATES DEPARTMENT *of* JUSTICE

Exemptions 6 & 7(C)



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The FOIA provides two exemptions to protect personal privacy, Exemptions 6 and 7(C).

These two exemptions are the most frequently used exemptions.



Exemption 6 - 5 U.S.C. § 552(b)(6)

Applies to “personnel and medical files and similar files” when disclosure of such information “**would constitute a clearly unwarranted** invasion of personal privacy.”



Exemption 7(C) - 5 U.S.C. § 552(b)(7)(C)

Applies to “records or information compiled for law enforcement purposes,” the disclosure of which “**could reasonably be expected to constitute an unwarranted** invasion of personal privacy.”



Compare Exemptions 6 & 7(C)

Privacy Exemption	Type of Record	Likelihood of Privacy Invasion	Type of Privacy Invasion
6	Personnel, medical, “similar”	<u>would</u> constitute	<u>clearly</u> unwarranted
7(C)	Law enforcement purposes	<u>could</u> <u>reasonably</u> constitute	unwarranted



Exemptions 6 & 7(C)

The same analysis is used for both Exemptions 6 and 7(C):

- **Step 1** -- Threshold satisfied?
- **Step 2** -- Privacy interest implicated?
- **Step 3** -- “FOIA public interest” in disclosure?
- **Step 4** -- Balancing interests.



Exemption 6 Threshold

“Personnel and medical files and similar files”

Q: What is a “similar file”?

A: Courts have found this prong satisfied where the information pertains to a particular individual.



Exemption 6 Threshold

A “similar file” can generally exist in any format.

Audio recordings, for example, can be similar files.

N.Y. Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990).



Exemption 7(C) Threshold

“Records or information compiled for law enforcement purposes”

This includes records:

- **Created** by an agency pursuant to a law enforcement activity
- **Collected or recompiled** during the course of a law enforcement activity



Exemption 7(C) Threshold

Types of Law Enforcement Covered

- The "law" to be enforced within the meaning of the term "law enforcement purposes" includes:
 - Civil
 - Criminal
 - Statutes authorizing administrative (i.e., regulatory) proceedings
 - May apply to records compiled to enforce state law, and even foreign law



Threshold Hypothetical – No. 1

- **Question:** Bamm-Bamm Rubble, a federal inmate, made a FOIA request for his own records. Would photos of Bamm-Bamm and other inmates fall under the Exemption 6 and 7(C) threshold?



Threshold Hypothetical – No. 2

- **Question:** While processing responsive records, you come across a list of drugs ordered for use by some members of a large group. There are no names or other identifying information next to this information. Can you withhold this list under a privacy exemption?



Threshold Hypothetical – No. 3

- **Question:** While processing responsive records, you come across a list of names and affiliations of individuals who attended training sponsored by your agency. Does this information fall under the Exemption 6 threshold? How do you respond to your colleague who argues that it does not because the information is not particularly “personal” or “sensitive”?



Privacy Interest

Privacy encompasses an “individual’s control of information concerning his or her person.”

Information does not need to be intimate or embarrassing to qualify for protection.

DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).



Privacy Interest

Privacy interests have been found in personally identifying information such as:

- Name
- Address
- Phone Number
- Date of Birth
- Criminal History
- Medical History
- Social Security Number



What doesn't get protection?

Federal employees – 5 C.F.R. 293.311:

- Names
- Position titles and occupational series
- Annual salary rates (performance awards and bonuses)
- Grades
- Duty stations
- Position descriptions and job elements
- Performance Standards

Exception: Federal employees in law enforcement, DOD, National Security and other sensitive occupations. See current “OPM Data Release Policy” on the OPM website.



What doesn't get protection?

Corporations have no privacy interests.

Exception: Small companies/sole proprietorships generally take on the privacy interests of their members.

FCC v. AT&T, Inc., 562 U.S. 397 (2011).



What doesn't get protection?

A deceased individual has greatly diminished personal privacy interests in the context of the FOIA.

Survivor Privacy: A deceased individual's survivors may have a privacy interest in preventing disclosure of certain information pertaining to the deceased.



Privacy Interest – Practical Obscurity

The general rule is individuals have no privacy interest in information that has been previously disclosed unless the information has over time become “practically obscure.”

DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).



Privacy Interest

The passage of time does not diminish a privacy interest and may, in fact, enhance it.



Privacy Interest

Public figures may have a diminished privacy interest but they do not forfeit all of their privacy rights.



Privacy Interest Hypothetical No. 1

Question: Barney Rubble is a public affairs official in your agency's Office of Inspector General. How do you assess Barney's privacy interest in his name and duty station against non-OIG employees of your agency – is it higher or lower? How do you assess Barney's privacy interest against an OIG agent – is it higher or lower?



Privacy Interest Hypothetical No. 2

Question: Wilma is running for Congress. Wilma worked at your agency for five years earlier in her career. Her opponent just requested any medical records, leave requests, and emails she sent while she worked there. Assess Wilma's privacy interests in these records.



Privacy Interest Hypothetical No. 3

- **Question:** You are reviewing an FBI file on a homicide investigation, and come across several photographs of the victim at the crime scene. Can you use Exemption 7(C) to withhold the photographs?



FOIA Public Interest

Q: What is a FOIA public interest?

A: Disclosure of information that “sheds light on an agency’s performance of its statutory duties.”

DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).



Public, not Private Interest

A requester's identity or private need for the information is not given any weight in this determination.



FOIA Public Interest - Burden

The Supreme Court has held that the burden is on the requester to show how disclosure would shed light on the operations of an agency.

NARA v. Favish, 541 U.S. 157, 172 (2004).



FOIA Public Interest - Nexus

The **public interest** must be served by the disclosure of the requested information.

What do I learn about the agency's operations by knowing an individual's personal information?



Examples of a FOIA Public Interest

Certain court docket information:

used to show the kinds of crimes the government uses cell phone tracking data to investigate.

ACLU v. DOJ, 655 F.3d 1 (D.C. Cir. 2011).



Examples of a FOIA Public Interest

Addresses of claimants awarded disaster assistance: used to facilitate the public's understanding of FEMA's disaster relief operations.

Sun-Sentinel v. DHS, 431 F. Supp. 2d 1258 (S.D. Fla. 2006), aff'd sub nom. News-Press v. DHS, 489 F.3d 1173 (11th Cir. 2007).



Examples of a FOIA Public Interest

Identities and professional

backgrounds of certain experts:

relevant to analyzing the functionality of a DHS office and how it is spending taxpayer dollars.

Adelante Alabama Worker Ctr. v. DHS, 376 F. Supp. 3d 345 (S.D.N.Y. 2019).



Public Servant Accountability

Consider:

- Allegations substantiated?
- Act of a serious and intentional nature?
- High-level official?
- Generally, the lower the level of the employee, the less substantial the public interest.

Evidentiary Showing: Requesters “must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred.”

NARA v. Favish, 541 U.S. 157, 174 (2004).



FOIA Public Interest

In the absence of a **cognizable public interest**, the privacy interest will prevail in the balance.

“Something, even a modest privacy interest, outweighs nothing every time.”

Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).



FOIA Public Interest Hypothetical

- **Question:** Fred Flintstone files a FOIA request for FBI records related to his conviction, and seeks the names of individuals who were interviewed as part of the FBI investigation. Fred argues that he already knows these individuals, and that he needs this information to prove his innocence. Is this a valid FOIA public interest?



Balance the Interests

If there is a privacy interest and a FOIA public interest in disclosure:

- Accord each interest a measure of value
- Balance them to determine which is greater



The Glomar Response

When a request seeks records concerning an **identifiable individual** and the records are of a **particularly sensitive nature** so that disclosure of their very existence could cause an invasion of privacy, it may be necessary to neither confirm nor deny the existence of the records, or “Glomarize.”



The Glomar Response

- Must be a targeted third-party request.
- Cannot acknowledge the very existence of records.
- May need to “bifurcate” a request to process it – separate third-party subjects from other subjects.



The Glomar Response

- Official Acknowledgement or admission waives a Glomar Response
- Gets to the core purpose of a Glomar Response, which distinguishes between existence and content



The Glomar Response

Who Made the Acknowledgment:

- Your Component
- Another Component within your Agency
- Another Federal Agency
- The Target of the Investigation



The Glomar Response

How was the Investigation Acknowledged?

- Statement to media
- Formal press release
- Unofficial leak



Categorical Denials

- When a third-party request seeks records concerning an identifiable individual and the agency or the subject of the request has already publically confirmed the existence of the records.
- Agencies may be able to categorically protect the contents of a responsive file without the need to conduct a search.

DOJ v. Reporters Committee, 489 U.S. 749, 777 (1989).



Categorical Denials

- Must be a targeted third-party request
- Requires a category of document review
- May still need to “bifurcate” a request to process it – separate third-party subjects from other subjects



Categorical Denials

What privacy interest is being protected?

- Effectively operates similarly to a Glomar response, but with one key distinction.



Categorical Denials

A Glomar response protects a third-party's privacy interest as to whether or not the government even maintains records on them.

A Categorical response protects a third-party's privacy interest in the content of the records. Existence of the records is known.



Conclusion

- If privacy is not threatened by disclosure, 6 and 7(C) do not apply.
- If there is a privacy interest, but no countervailing FOIA public interest in disclosure, protection is appropriate.
- If there is a privacy interest and a FOIA public interest, balance.



Additional Resources

- *FOIA Counselor Service*
202-514-FOIA

- *The DOJ Guide to the FOIA*
<http://www.justice.gov/oip/doj-guide-freedom-information-act>



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Questions?