



UNITED STATES DEPARTMENT *of* JUSTICE

# Exemption 7



## *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*

- Information originally compiled for a law enforcement purpose
- The Supreme Court in 1990 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 (courts require some detail)
- State or foreign law enforcement purposes also valid
- Can include National Security / Homeland Security-related records



## *Law Enforcement Purposes*

- Criminal Law Enforcement agency
  - (1) Per se rule (inherently compiled) (1st, 2nd, 6th, 8th, 10th, and 11th Cir.);  
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)<sup>7</sup>



## *Law Enforcement Purposes*

- Mixed-Function agency (not traditional criminal law enforcement agency)
  - The agency is enforcing a statute 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 for 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
  - Explains how release interferes with enforcement proceedings for each category of records



## *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.





## *(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

**ALWAYS 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>



## *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



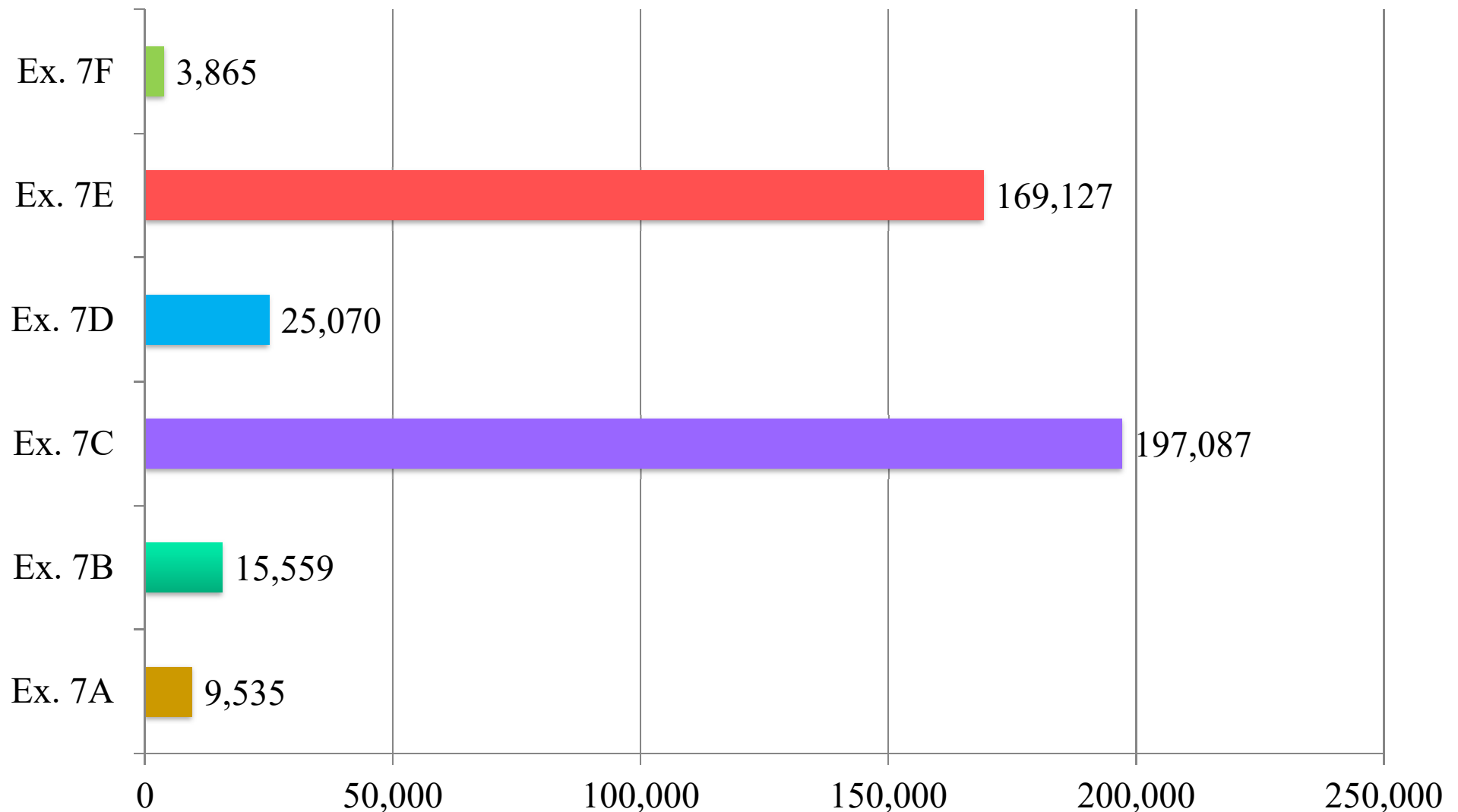
## *Two-Part Test for Exemption 7(B)*

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



# Government-wide Ex.7 Usage in FY 2017



Source: Agency FY 2017 Annual FOIA Reports, as located on FOIA.Gov



## *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



## *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



## *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.



## *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”**

- Criminal or Civil
- Limited to unknown techniques
- Unknown ways/circumstances in which known techniques are used
  - E.g., polygraphs, BOP surveillance videos



## *First Clause of Exemption 7(E)*

- “Investigations or Prosecutions”
  - Not as broad as the Exemption 7 threshold (law enforcement purpose)
- Circumvention harm requirement
  - Courts are split on whether an agency is required to show that disclosure of a law enforcement technique or procedure could risk circumvention of the law



## *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”**

- Ex. IRS prosecution thresholds



## *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.



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**Questions?**