



UNITED STATES DEPARTMENT *of* JUSTICE

Freedom of Information Act Exemptions Overview



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



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.



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



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



Exemption 1

Protects properly classified
information



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



Exemption 1

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



Exemption 2

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



Exemption 2

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



Exemption 3

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



Exemption 3

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

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



Exemption 3

- Subpart A(i) – Absolute prohibition on disclosure
– no agency discretion

- Subpart A(ii) – Limited prohibition on disclosure
 - a) statute defines particular matters to be withheld; or
 - b) 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



Exemption 3

Absolute Prohibition on Disclosure:

- Federal Rules of Criminal Procedure 6(e)
- Broad, sweeping policy of preserving the secrecy of “a matter occurring before the grand jury.”



Exemption 3

Federal Rules of Criminal Procedure 6(e)

- Congress amended in 1977 and so satisfies “statute” requirement.
- Agency must establish a nexus between the release of the information it seeks to protect and how disclosure would reveal an aspect of the grand jury’s investigation.



Exemption 3

Limited Prohibition on Disclosure – Identifies Matters to be Withheld:

- 18 U.S.C. § § 2510-20 [Title III of the Omnibus Crime Control and Safe Streets Act]



Title III of the Omnibus Crime Control and Safe Streets Act

- Title III identifies intercepted wire, oral, or electronic communications as particular matters to be withheld.
- Examples of protected information:
 - Electronic surveillance tapes, information obtained by a wiretap, wiretap applications and derivative information.



Exemption 3

Limited Prohibition on Disclosure – Provides Criteria for Withholding:

- 18 U.S.C. § 3509(d) [Federal Victims' Protection and Rights Act]



Exemption 3

Federal Victims' Protection and Rights Act

- Protects certain records containing identifying information pertaining to children involved in criminal proceedings.

- Subsection (d) provides a criteria for withholding.
 - The information is available only to those who are a part of the proceeding and have a reason to know such information.



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

Certain Self-Executing Treaties

➤ May qualify as an Exemption 3 “statute” when a bilateral treaty is ratified by the Senate.

➤ Recent Examples:

➤ Treaty Between U.S. and the Republic of Korea on Mutual Assistance in Criminal Matters.

➤ Treaty Between U.S. and Switzerland on Mutual Assistance in Criminal Matters.

➤ Protects evidence obtained through a treaty with a confidentiality clause. The court found the treaties²² were equivalent to an act of the legislature.



Exemption 3 Resources

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

https://www.justice.gov/oip/foia-guide/exemption_3/download

➤ 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 Fiscal Year 2017

<https://www.justice.gov/oip/foiaresources/fy17statutes/download#FY%202017>



Exemption 3

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. True
- b. False



Exemption 4

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



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



Exemption 4

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



Exemption 4

Determining whether information is “Confidential”

- Voluntary submission
 - Customary treatment of submitter

- Required submission (primary test)
 - Likelihood of substantial competitive harm to submitter
 - EO 12600 requires notification to submitter if agency has any question as to existence of competitive harm



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”



Exemption 5

Threshold

- Created and exchanged within or between agencies
- Consultants



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



Exemption 6

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



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



Exemption 7

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



Exemption 7

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



Exemption 7

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



Exemption 7

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



Exemption 7

- 7(D) -- disclosure could reasonably be expected to reveal identity of 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:
 - 1) techniques and procedures for investigations or prosecutions; or
 - 2) guidelines for investigations or prosecutions if disclosure could risk circumvention of the law



Exemption 7

- 7(F) -- disclosure could reasonably be expected to endanger the life or physical safety of individuals
 - undercover agents
 - witnesses subject to violent reprisal



Exemption 7

Knowledge check:

The DEA is publicly known to be investigating Jimmy, who is suspected of involvement in drug trafficking activities, but nothing is known about the nature of the investigation. As part of its surveillance of this individual, the DEA is testing a new proprietary technology that can tell its agents whether a home contains illegal drugs simply by pointing a device at an



Exemption 7

Knowledge check:

individuals' home from several hundred yards away. If nosy neighbor Ned makes a FOIA request for records about DEA investigations of Jimmy, what FOIA exemptions are most likely to be applicable to withhold records concerning the surveillance of Jimmy (choose all that apply)?



Exemption 7

Knowledge check:

- a. Exemption 7A, because this is an ongoing investigation,
- b. Exemption 7C, to protect Jimmy's privacy,
- c. Exemption 7D,
- d. Exemption 7E, to protect the surveillance technology.
- e. All of the above.



Exemption 8

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



Exemption 9

Protects geological information and data,
including maps, concerning wells



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>



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Questions?