



## **Exemption 7(B)**

Exemption 7(B) of the Freedom of Information Act, which is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."<sup>1</sup>

In practice, this exemption is rarely invoked; consequently, Exemption 7(B) has been featured prominently in only one FOIA case to date, Washington Post Co. v. DOJ.<sup>2</sup> At issue in that case was whether public disclosure of a pharmaceutical company's internal self-evaluative report, submitted to the Justice Department in connection with a grand jury investigation, would jeopardize the company's ability to receive a fair and impartial civil adjudication of several personal injury cases pending against it.<sup>3</sup> In remanding the case for further consideration, the Court of Appeals for the District of Columbia Circuit articulated a two-part standard to be employed in determining Exemption 7(B)'s applicability: "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material

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<sup>1</sup> 5 U.S.C. § 552(b)(7)(B) (2006 & Supp. IV 2010); see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009); see FOIA Post, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

<sup>2</sup> 863 F.2d 96, 101-02 (D.C. Cir. 1988); see also Alexander & Alexander Servs. v. SEC, No. 92-1112, 1993 WL 439799, at \*10-11 (D.D.C. Oct. 19, 1993) (citing Wash. Post to find that company "failed to meet its burden of showing how release of particular documents would deprive it of the right to a fair trial") ("reverse" FOIA suit), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996).

<sup>3</sup> Wash. Post, 863 F.2d at 99.

sought would seriously interfere with the fairness of those proceedings."<sup>4</sup> Although the D.C. Circuit in Washington Post offered a single example of proper Exemption 7(B) applicability -- i.e., when "disclosure through FOIA would furnish access to a document not available under the discovery rules and thus would confer an unfair advantage on one of the parties" -- it did not limit the scope of the exemption to privileged documents only.<sup>5</sup>

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<sup>4</sup> 863 F.2d at 102; see also [Chiquita Brands Int'l v. SEC, No. 13-435](#), 2013 WL 6092150, at \*3-4 (D.D.C. Nov. 19, 2013) (discussing two part test and finding that while first part met because trial or adjudication is pending or truly imminent, second part is not because "Chiquita failed to specifically articulate how disclosure" of requested documents "would confer an unfair advantage upon plaintiffs" in litigation and its "speculation about potential publicity and its effect on a future jury . . . does not satisfy the level of certainty required by FOIA Exemption 7(B)" which "expressly requires that disclosure 'would' compromise the fairness of a proceeding," not that it merely "'could' impact fairness or impartiality") (reverse FOIA lawsuit); cf. Dow Jones Co. v. FERC, 219 F.R.D. 167, 175 (C.D. Cal. 2002) (finding that there is "no evidence that any trial or adjudication" is pending and that agency has not demonstrated that release "would generate pretrial publicity that could deprive the companies or any of their employees of their right to a fair trial," and accordingly ruling that exemption did not apply).

<sup>5</sup> Wash. Post, 863 F.2d at 102.