Freedom of Information Act Exemptions
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**Exemption 1**

Protects properly classified information
Freedom of Information Act Exemptions

Exemption 1

- Classification is governed by the President through Executive Orders.
- The current Executive Order is 13526.
Exemption 1

- Exemption 1 protects national security information that is properly classified under the procedural and substantive requirements of the current Executive Order on classification.

- Proper classification markings are: Confidential, Secret, and Top Secret
Freedom of Information Act Exemptions

Exemption 1

- The “Glomar Response” – neither confirm nor deny
Exemption 2

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

The recent Supreme Court Decision, Milner v. Dep’t of the Navy, has fundamentally changed the way that agencies interpret Exemption 2 of the FOIA.
Exemption 3

Protects information that has been “specifically exempted from disclosure by statute.”
Exemption 3

- Two subparts: A and B

- Subpart A statutes – Absolute prohibition on disclosure — no agency discretion
Exemption 3

• Subpart B statutes – Limited prohibition on disclosure
  a) statute defines particular matters to be withheld; or
  b) statute provides specific criteria for withholding
Exemption 4 Protects trade secrets or commercial or financial information obtained from a person that is privileged or confidential.
Freedom of Information Act Exemptions

Exemption 4

- Trade Secrets
- Narrowly defined
Exemption 4

- Commercial or financial information obtained from a person privileged or confidential.
Exemption 4

Threshold

• Commercial or financial
• Obtained from a person
Freedom of Information Act Exemptions

**Exemption 4**

“Confidential” information

1. voluntary submissions: “customary treatment” test
Freedom of Information Act Exemptions

**Exemption 4**

2. Required submissions:
   a) impairment
   b) substantial competitive harm
   c) other government interests
Exemption 4

- Reverse FOIA lawsuits
- Submitter notice – Executive Order No. 12,600
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.”
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Exemption 5

Records covered by Exemption 5 are good candidates for discretionary release.
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Exemption 5

Threshold: inter-agency or intra-agency memoranda or letters

• Within or between agencies
• Consultants
Freedom of Information Act Exemptions

Exemption 5

The Deliberative Process Privilege

a) predecisional
b) deliberative
c) facts generally not protected
Exemption 5

Attorney Work-Product Privilege

a) prepared by an attorney or under his/her direction
b) in anticipation of litigation
c) no temporal limit
d) facts protected
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Exemption 5

Attorney-Client Privilege

a) communication from client to attorney

b) communication confidential
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Exemption 6

Protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy.
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Exemption 6

Threshold: personnel and medical files and similar files
Exemption 6

Privacy interest: Living individuals have a privacy interest in not having agencies disseminate personal information about them.
Exemption 6

Public interest: serves FOIA “core purpose” of shedding light on agency’s operations or activities.
Exemption 6

Balancing: In order to withhold information, the privacy interest must outweigh the public interest.
Exemption 7

Protects six different types of law enforcement information

- 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 would interfere with a pending law enforcement matter
Freedom of Information Act Exemptions

Exemption 7

- 7(B) -- disclosure of information would deprive a person of the right to a fair trial
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**Exemption 7**

➢ 7(C) -- disclosure could reasonably be expected to cause an unwarranted invasion of personal privacy

1) privacy interests
2) public interest
3) balancing test
4) “Glomar” response
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Exemption 7

7(D) -- protects confidential sources

1) identities of confidential sources
2) all information provided by confidential sources if compiled during criminal or national security investigation.
Freedom of Information Act Exemptions

Exemption 7

7(D) -- determine whether source is confidential

a) express confidentiality
b) implied confidentiality

• nature of crime
• source’s relation to crime
Exemption 7

- 7(E) -- disclosure would reveal investigative techniques and procedures or guidelines for law enforcement investigations or prosecutions if disclosure could risk circumvention of the law
Freedom of Information Act Exemptions

Exemption 7

- 7(E) -- techniques generally unknown to the public and guidelines or manuals
Exemption 7

7(F) -- disclosure would endanger the life or physical safety of individuals

- undercover agents
- witnesses subject to violent reprisal
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Exemption 8

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

Exemption 9

Protects geological information and data, including maps, concerning wells.
**Statutory Exclusions**

In certain extraordinary criminal law enforcement contexts, the FOIA excludes the records from the requirement of the FOIA.

*Agencies should first consult with OIP before using a record exclusion.*