



UNITED STATES DEPARTMENT *of* JUSTICE

Freedom of Information Act Exemptions



Freedom of Information Act Exemptions

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.



Freedom of Information Act Exemptions

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



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Exemption 1

- The “Glomar Response” –
neither confirm nor deny



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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.



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Exemption 3

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



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Exemption 3

- Two subparts: A and B
 - Subpart A statutes – Absolute prohibition on disclosure -- no agency discretion



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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



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Freedom of Information Act Exemptions

Exemption 4

- Trade Secrets
- Narrowly defined



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Exemption 4

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



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Exemption 4

- Threshold
 - Commercial or financial
 - Obtained from a person



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Exemption 4

“Confidential” information

1. voluntary submissions:
“customary treatment” test



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Exemption 4

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



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Exemption 4

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



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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



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Exemption 5

The Deliberative Process Privilege

- a) predecisional
- b) deliberative
- c) facts generally not protected



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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



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Exemption 6

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



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Exemption 6

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



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Exemption 6

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



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Exemption 7

Protects six different types of law enforcement information

- On-going proceedings
- Personal Privacy
- Confidential sources
- Techniques and procedures



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Exemption 7

Threshold: Records or information compiled for law enforcement purposes.



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Exemption 7

- 7(A) -- information that would interfere with a pending law enforcement matter



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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.



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Exemption 7

- 7(D) -- determine whether source is confidential
 - a) express confidentiality
 - b) implied confidentiality
 - nature of crime
 - source's relation to crime



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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



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Exemption 7

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



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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.



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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.