



UNITED STATES DEPARTMENT *of* JUSTICE

Exemptions 6 & 7(C)



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The FOIA provides two exemptions to protect personal privacy, Exemptions 6 and 7(C).

These two exemptions are the most frequently used exemptions.



Exemption 6 - 5 U.S.C. § 552(b)(6)

Applies to “personnel and medical files and similar files” when disclosure of such information “**would constitute a clearly unwarranted** invasion of personal privacy.”



Exemption 7(C) - 5 U.S.C. § 552(b)(7)(C)

Applies to “records or information compiled for law enforcement purposes,” the disclosure of which “**could reasonably be expected to constitute an unwarranted** invasion of personal privacy.”



Compare Exemptions 6 & 7(C)

Privacy Exemption	Type of Record	Likelihood of Privacy Invasion	Type of Privacy Invasion
6	Personnel, medical, “similar”	<u>would</u> constitute	<u>clearly</u> unwarranted
7(C)	Law enforcement purposes	<u>could</u> <u>reasonably</u> constitute	unwarranted



Exemptions 6 & 7(C)

The same analysis is used for both Exemptions 6 and 7(C):

- **Step 1** -- Threshold satisfied?
- **Step 2** -- Privacy interest implicated?
- **Step 3** -- “FOIA public interest” in disclosure?
- **Step 4** -- Balancing interests.



Exemption 6 Threshold

“Personnel and medical files and similar files”

Q: What is a “similar file”?

A: Courts have found this prong satisfied where the information pertains to a particular individual.



Exemption 6 Threshold

A “similar file” can generally exist in any format.

Audio recordings, for example, can be similar files.

See N.Y. Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990).



Exemption 7(C) Threshold

“Records or information compiled for law enforcement purposes”

This includes records:

- **Created** by an agency pursuant to a law enforcement activity
- **Collected or recompiled** during the course of a law enforcement activity



Exemption 7(C) Threshold

Types of Law Enforcement Covered

- The "law" to be enforced within the meaning of the term "law enforcement purposes" includes:
 - Civil
 - Criminal
 - Statutes authorizing administrative (i.e., regulatory) proceedings
 - May apply to records compiled to enforce state law, and even foreign law



Threshold Hypothetical – No. 1

- **Question:** Responsive records contain the names, addresses, and phone numbers of consumers who filed complaints against the FTC. Does any of this information fall under the Exemption 6 threshold? How do you respond to your colleague who argues that Exemption 6 does not apply as this information is not particularly "personal" or "sensitive"?



Threshold Hypothetical – No. 2

- **Question:** While processing responsive records, you come across a list of drugs ordered for use by some members of a large group. There are no names or other identifying information next to this information. Can you withhold this list under a privacy exemption?



Threshold Hypothetical – No. 3

- **Question:** You are reviewing an FBI file on a homicide investigation, and come across several photographs of the victim at the crime scene. Can you use Exemption 7(C) to withhold the photographs?



Privacy Interest

Privacy encompasses an “individual’s control of information concerning his or her person.”

Information does not need to be intimate or embarrassing to qualify for protection.

See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).



Privacy Interest

Privacy interests have been found in personally identifying information such as:

- Name
- Address
- Phone Number
- Date of Birth
- Criminal History
- Medical History
- Social Security Number



What doesn't get protection?

Federal employees – 5 C.F.R. 293.311:

- Name
- Position titles and occupational series
- Annual salary rates (performance awards and bonuses)
- Grades
- Duty stations
- Position descriptions and job elements
- Performance Standards

Exception: Federal employees in law enforcement, DOD, National Security and other sensitive occupations. See current “OPM Data Release Policy” on the OPM website.



What doesn't get protection?

Corporations have no privacy interests.

Exception: Small companies/sole proprietorships generally take on the privacy interests of their members.

See FCC v. AT&T, Inc., 562 U.S. 397 (2011).



What doesn't get protection?

A deceased individual has greatly diminished personal privacy interests in the context of the FOIA.

Survivor Privacy: A deceased individual's survivors may have a privacy interest in preventing disclosure of certain information pertaining to the deceased.



Privacy Interest – Practical Obscurity

The general rule is individuals have no privacy interest in information that has been previously disclosed **unless** the information has over time become “practically obscure.”

See DOJ v. Reporters Comm. for Freedom of the Press,
489 U.S. 749 (1989).



Privacy Interest

The passage of time does not diminish a privacy interest and may, in fact, enhance it.



Privacy Interest

Public figures may have a diminished privacy interest but they do not forfeit all of their privacy rights.



Privacy Interest Hypothetical No. 1

Question: Jim is a public affairs official in your agency's Office of Inspector General. How do you assess Jim's privacy interest in his name and duty station against non-OIG employees of your agency – is it higher or lower? How to assess Jim's privacy interest against an OIG agent – is it higher or lower?



Privacy Interest Hypothetical No. 2

Question: Rita is running for Congress in Virginia's 1st Congressional District. Rita worked in your agency's Office of General Counsel for five years earlier in her career. Her opponent just requested all of her records from her time at your agency. Assess Rita's privacy interests in those records.



FOIA Public Interest

Q: What is a FOIA public interest?

A: Disclosure of information that “sheds light on an agency’s performance of its statutory duties.”

See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).



Public, not Private Interest

A requester's identity or private need for the information is not given any weight in this determination.



FOIA Public Interest - Burden

The Supreme Court has held that the burden is on the requester to show how disclosure would shed light on the operations of an agency.

See NARA v. Favish, 541 U.S. 157, 172 (2004).



FOIA Public Interest - Nexus

The **public interest** must be served by the disclosure of the requested information.

What do I learn about the agency's operations by knowing an individual's personal information?



Examples of a FOIA Public Interest

Certain court docket information:
used to show the kinds of crimes the government uses cell phone tracking data to investigate.

See ACLU v. DOJ, 655 F.3d 1 (D.C. Cir. 2011).



Examples of a FOIA Public Interest

Addresses of claimants awarded disaster assistance: used to facilitate the public's understanding of FEMA's disaster relief operations.

See Sun-Sentinel v. DHS, 431 F. Supp. 2d 1258 (S.D. Fla. 2006), aff'd sub nom. News-Press v. DHS, 489 F.3d 1173 (11th Cir. 2007).



Examples of a FOIA Public Interest

The names of unsuccessful pardon applicants: to assist the public in analyzing the “circumstances in which the executive chooses to grant or deny a pardon and the factors that bear on that decision.”

See Lardner v. DOJ, 2005 WL 758267, at *17 (D.D.C. Mar. 31, 2005).



Public Servant Accountability

Consider:

- Allegations substantiated?
- Act of a serious and intentional nature?
- High-level official?
- Generally, the lower the level of the employee, the less substantial the public interest.

Evidentiary Showing: Requesters “must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred.”

See NARA v. Favish, 541 U.S. 157, 159 (2004).



FOIA Public Interest

In the absence of a **cognizable public interest**, the privacy interest will prevail in the balance.

“Something, even a modest privacy interest, outweighs nothing every time.”

See Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).



FOIA Public Interest Hypothetical

- **Question:** Fred Flintstone files a FOIA request for FBI records related to his conviction, and seeks the names of individuals who were interviewed as part of the FBI investigation. Fred argues that he already knows these individuals, and that he needs this information to prove his innocence. Is this a valid FOIA public interest?



Balance the Interests

If there is a privacy interest and a FOIA public interest in disclosure:

- Accord each interest a measure of value
- Balance them to determine which is greater



The Glomar Response

When a request seeks records concerning an **identifiable individual** and the records are of a **particularly sensitive nature** so that disclosure of their very existence could cause an invasion of privacy, it may be necessary to neither confirm nor deny the existence of the records, or “Glomarize.”



The Glomar Response

- Must be a targeted third-party request.
- Cannot acknowledge the very existence of records.
- May need to “bifurcate” a request to process it – separate third-party subjects from other subjects.



The Glomar Response

- Official Acknowledgement or admission waives a Glomar Response
- Gets to the core purpose of a Glomar Response, which distinguishes between existence and content



The Glomar Response

Who Made the Acknowledgment:

- Your Component
- Another Component within your Agency
- Another Federal Agency
- The Target of the Investigation



The Glomar Response

How was the Investigation Acknowledged?

- Statement to media
- Formal press release
- Unofficial leak



Categorical Denials

- When a third-party request seeks records concerning an identifiable individual and the agency or the subject of the request has already publically confirmed the existence of the records.
- Agencies may be able to categorically protect the contents of a responsive file without the need to conduct a search.

See DOJ v. Reporters Committee, 489 U.S. 749, 777 (1989).



Categorical Denials

- Must be a targeted third-party request
- Requires a category of document review
- May still need to “bifurcate” a request to process it – separate third-party subjects from other subjects



Categorical Denials

What privacy interest is being protected?

- Effectively operates similarly to a Glomar response, but with one key distinction.



Categorical Denials

A Glomar response protects a third-party's privacy interest as to whether or not the government even maintains records on them.

A Categorical response protects a third-party's privacy interest in the content of the records. Existence of the records is known.



Conclusion

- If privacy is not threatened by disclosure, 6 and 7(C) do not apply.
- If there is a privacy interest, but no countervailing FOIA public interest in disclosure, protection is appropriate.
- If there is a privacy interest and a FOIA public interest, balance.



Additional Resources

➤ *FOIA Counselor Service*

202-514-FOIA

➤ *The DOJ Guide to the FOIA*

<http://www.justice.gov/oip/doj-guide-freedom-information-act>



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Questions?