



FOIA's Law Enforcement Exemptions	
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1

SCHEDULE

- Overview
- Threshold Issues
- Exemption 7(A): Pending Actions
- Exemption 7(B): Fair Trials
- Exemption 7(D): Confidential Sources
- Exemption 7(E): Techniques and Procedures
- Exemption 7(F): Physical Safety



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2

EXEMPTION 7 OVERVIEW

Total Exemption Usage

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3

EXEMPTION 7: LAW ENFORCEMENT

OVERVIEW

Records or information **compiled for law enforcement purposes**, are exempt from disclosure if release:

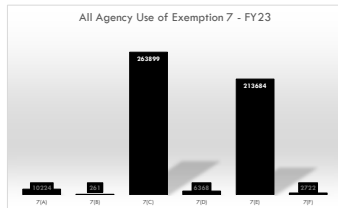
- (A) **could** reasonably be expected to interfere with **pending enforcement proceedings**,
- (B) **would** deprive a person of a **fair trial** or an impartial adjudication,
- (C) **could** reasonably be expected to constitute an unwarranted invasion of **personal privacy**,
- (D) **could** reasonably be expected to disclose the identity of a **confidential source** or information furnished by confidential sources,
- (E) **would** disclose law enforcement **techniques, procedures, or guidelines** if such disclosure could risk circumvention of the law, or
- (F) **could** reasonably be expected to **endanger the life or physical safety** of any individual.



4

EXEMPTION 7: LAW ENFORCEMENT

OVERVIEW —ALL FEDERAL AGENCY USE OF EXEMPTION 7



5

EXEMPTION 7: LAW ENFORCEMENT

THRESHOLD

Why are law enforcement records different? Negative impact on:

- Investigation
- Investigators
- Sources
- Subject



6

EXEMPTION 7: LAW ENFORCEMENT

THRESHOLD

"Records or information compiled for law enforcement purposes":

- **Compiled** requires only that the records were organized to enforce one of those laws at some point in time. Records **created** by an agency pursuant to a law enforcement activity or **collected or recompiled** during the course of a law enforcement activity qualify.
- **Law enforcement purposes** include those records compiled to enforce federal, state, or even foreign civil, criminal, or administrative laws.



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7

EXEMPTION 7: LAW ENFORCEMENT

THRESHOLD

Broader than just criminal law!

- Regulatory, civil, and criminal enforcement
- Personnel investigations involving specific allegations of criminal misconduct
- National security / terrorism investigations



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8

EXEMPTION 7: LAW ENFORCEMENT

THRESHOLD

The nature of the records can change, but as long as they were once created or compiled for law enforcement purposes, the exemption may apply.

- The records need not have initially been created for law enforcement purposes. If they were created for some other reason, but were later recompiled during the course of a law enforcement activity, they qualify.
- Similarly, if the records were created for a law enforcement purpose and then recompiled for some other purpose, they still qualify for the exemption.

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9

EXEMPTION 7: LAW ENFORCEMENT

THRESHOLD

For law enforcement agencies, meeting the threshold is relatively easy:

- In the majority of circuits (1st, 2nd, 6th, 8th, 10th, and 11th), courts apply a *per se* rule.
- In a minority of circuits (DC, 3rd, and 9th), courts apply a rational nexus test, and agencies are afforded deference as to whether the threshold is met.

Mixed function agencies have a higher standard to show the law enforcement purpose of the records.



10

EXEMPTION 7: LAW ENFORCEMENT

THRESHOLD – SUMMARY

To apply any of the exemptions, you must satisfy:

- The threshold (records or information compiled for law enforcement purposes), AND
- One of them harms outlined in the six subparts.



11

EXEMPTION 7(A): PENDING INVESTIGATIONS

OVERVIEW

Exemption 7(A) excludes records or information that, if released, “could reasonably be expected to interfere with enforcement proceedings.”

Two-Part Test

- Law enforcement proceeding is **active, pending, or prospective**; and
- Release of information about it could reasonably be expected to cause some **articulable harm** to the proceeding.



12

EXEMPTION 7(A): PENDING INVESTIGATIONS PENDING OR PROSPECTIVE

Law enforcement proceeding is **active, pending, or prospective**.

- There must be a **specific** pending or contemplated law enforcement proceeding (not just an imaginable or hypothetical one).
- Once the investigation is closed or no longer expected to give rise to a law enforcement proceeding, Exemption (b)(7)(A) can no longer be invoked.
- If the same information might be used again in a separate or related proceeding, it can still be withheld.



13

EXEMPTION 7(A): PENDING INVESTIGATIONS ARTICULABLE HARM

Release of information about it could reasonably be expected to cause some **articulable harm**.

Examples of harm:

- Witnesses may be subject to reprisals or deterred from future cooperation.
- Release would prematurely reveal the government's strategy or evidence.
- Release would allow a target to evade detection.
- Subject could flee jurisdiction.
- Subject could destroy or otherwise suppress evidence.



14

EXEMPTION 7(A): PENDING INVESTIGATIONS EXCLUSIONS - OVERVIEW

The rarely used FOIA exclusions create three very small subsets of agency records that are not responsive to any FOIA request.

- Close loopholes that could have been taken advantage of by sophisticated FOIA requesters.
- Invoking an exemption will not afford adequate protection because the very act of citing the exemption confirms the existence of the protected records.
- Using a "Glomar" response, i.e., a response where the agency neither confirms nor denies the existence of the records, will either be not viable or inadequate to protect the covered records.



15

EXEMPTION 7(A): PENDING INVESTIGATIONS

EXCLUSIONS - OVERVIEW

Instead, treat the records as not subject to the requirements of the FOIA. Respond by saying that no records responsive to the FOIA exist.

- Different from a GLOMAR response, which neither confirms nor denies the existence of any records related to the request.
- Used VERY rarely. In FY2019, exclusions were used in only 0.03% of all processed FOIA requests.
- Consult with the Department of Justice Office of Information Policy (202/514.3642) before employing any of the exclusions



16

EXEMPTION 7(A): PENDING INVESTIGATIONS

EXCLUSIONS - OVERVIEW

Be very careful in corresponding with the requester.

- Do not issue a fee letter for records we will later claim are not responsive to the request.
- "For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist."



17

EXEMPTION 7(A): PENDING INVESTIGATIONS

EXCLUSIONS - OVERVIEW

Exclusion 1: Law Enforcement Proceedings

- To use when Exemption (b)(7)(A) will still tip off an individual about a pending investigation.

Exclusion 2: Confidential Informants

- To use when Exemption (b)(7)(D) will still identify a confidential informant.

Exclusion 3: FBI Investigations

- To use when Exemption (b)(1) will still identify a classified information.



18

EXEMPTION 7(A): PENDING INVESTIGATIONS

EXCLUSIONS – EXCLUSION 1

The agency can treat any otherwise responsive records as not subject to the FOIA where:

- The records involve an investigation into a violation of **criminal law** and would be **withheld in their entirety** under Exemption (b)(7)(A);
 - The agency has a good faith, "reason to believe" that the **subject is unaware of the investigation**; and
 - Agency disclosure of the very existence of the records could reasonably be expected to interfere with the investigation.
- Not enough for the subject to claim to "know" about the investigation. Otherwise, the exclusion could be too easily avoided.



19

EXEMPTION 7(B): RIGHT TO A FAIR TRIAL

OVERVIEW

Exemption (b)(7)(B) excludes records or information that, if released, "would deprive a person of a right to a fair trial or impartial adjudication."

Two-Part Test:

- A trial or adjudication is **pending or truly imminent**; and
- It is more probable than not that disclosure of the material sought would **seriously interfere with the fairness** of imminent enforcement proceedings.



20

EXEMPTION 7(B): RIGHT TO A FAIR TRIAL

HARM

Examples of harm:

- Pre-trial publicity could poison the jury pool.
- Release of documents not otherwise available at trial.



21

EXEMPTION 7(D): CONFIDENTIAL INFORMANTS

OVERVIEW

Exemption 7(D) excludes records or information that, if released, "could reasonably be expected to disclose the **identity of a confidential source**, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, **information furnished by a confidential source.**"

- Applies to two types of information
 - Sources (private individuals, government agencies and personnel, private institutions)
 - Information provided by sources



22

EXEMPTION 7(D): CONFIDENTIAL INFORMANTS

PURPOSE

- To encourage individuals and entities to come forward to law enforcement entities and provide information without fear that their identity will be disclosed.
- To ensure confidential sources are not lost through retaliation for past disclosure or because of fear of future disclosure.



23

EXEMPTION 7(D): CONFIDENTIAL INFORMANTS

SOURCES

Promises of confidentiality can be express or implied.

- Evidence of **express promises**: notations in the record, affidavits from law enforcement personnel, routine agency practice (such as code names or numbers).
- To determine if there was an **inferred promise**, look at: (1) The nature of the crime; and (2) The source's relation to it.
 - The key issue is whether the source might face any **danger of retaliation**, which can include physical or non-physical threats.
 - Examples: Drug / Arms / Human trafficking, terrorism, murder, smuggling, etc.



24

EXEMPTION 7(D): CONFIDENTIAL INFORMANTS
INFORMATION FURNISHED BY A CONFIDENTIAL SOURCE

The exemption also protects the information provided by confidential sources, but only if that information was provided in the course of a **criminal or national security investigation**.

- The focus is on how the information was obtained. If it was obtained in a criminal investigation, but later used for other purposes, it will still be protected.
- Includes all information from a confidential source, not just information that could potentially identify a source and applies even after a source has been identified.



25

EXEMPTION 7(D): CONFIDENTIAL INFORMANTS
ALTERNATIVES TO SUBSTANTIVE RESPONSES

Sometimes, withholding records with Exemption 7(D) may result in the same harm that Congress intended the exemption to protect.

In those circumstances, consider:

- Exclusion 2
- Glomar (neither confirm nor deny the existence of records)



26

EXEMPTION 7(D): CONFIDENTIAL INFORMANTS
EXCLUSION 2

The agency can treat any otherwise responsive records as not subject to the FOIA where:

- Records are maintained by a criminal law enforcement agency by an informant's name;
- There is a request from a third party for an informant's file by that informant's name; and
- The status of the informant is not publicly known.

Applies even if there is a waiver signed by the informant allowing the release of records to the third party requester; risk of coercion.



27

EXEMPTION 7(D): CONFIDENTIAL INFORMANTS THE GLOMAR RESPONSE

Sometimes, denying a FOIA request because it would impinge on an individual's personal privacy could, in itself, violate their privacy.



- Instead of denying the request, simply state that "the agency can neither confirm nor deny the existence of any records."
- Use the same language where mere acknowledgement of the records would reveal exempt information. If a Glomar response is provided only when records are found, the response would be interpreted that responsive records exist.



28

EXEMPTION 7(E): TECHNIQUES AND PROCEDURES OVERVIEW

Exemption (b)(7)(E) excludes records or information that, if released, "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

- Applies to three types of information: techniques, procedures, and guidelines.
- Only (?) applies if such disclosure could reasonably be expected to risk circumvention of the law. The circuits are split as to whether the circumvention requirement applies to techniques and procedures.



29

EXEMPTION 7(E): TECHNIQUES AND PROCEDURES CIRCUMVENTION OF THE LAW

An agency must demonstrate that the release of information might increase the risk that a law will be violated or that violators could escape legal consequences.

- Does not apply to generally known techniques and procedures, unless the public is unaware of the efficacy, manner, circumstances, or extent that technique is used.
- Mosaic approach: If a small piece of information on its own would not risk circumvention of the law, but could risk circumvention if it were combined with other bits of information, it should be redacted.
- It does not matter who the requester is: assume the information being released could make it into the hands of any wrongdoer.



30

EXEMPTION 7(E): TECHNIQUES AND PROCEDURES CIRCUMVENTION OF THE LAW

Examples:

- Computer navigation instructions
- Applications of technology
- Particularized statistics that might allow forum shopping
- Specific techniques practiced by law enforcement
- Codes or event numbers located in law enforcement databases



31

EXEMPTION 7(E): GUIDELINES CIRCUMVENTION OF THE LAW

Examples:

- Law enforcement manuals
- Settlement guides
- Emergency plans



32

EXEMPTION 7(F): PHYSICAL SAFETY OVERVIEW

Exemption (b)(7)(F) excludes records or information that, if released, "could reasonably be expected to endanger the life or physical safety of any individual."

- At least two requirements:
 - There is **at least one individual**, described with reasonable specificity, who could face harm by the document's release.
 - The disclosure of the records or information could reasonably be expected to **endanger** that individual.



33

EXEMPTION 7(F): PHYSICAL SAFETY

OVERVIEW

Historically, (b)(7)(F) has been used in conjunction with other exemptions, notably (b)(7)(C) and (b)(7)(D), to protect the identities of law enforcement officers and confidential informants, but it can extend to security measures, such as the location of weapons caches or custody procedures, as well.

Easier to apply than Exemption 7(C):

- No balancing test required – just show reasonable likelihood of harm
- Agencies often get deference from courts on harm



34

FORESEEABLE HARM

OVERVIEW

An agency cannot withhold information under any exemption unless “the agency reasonably foresees that disclosure would harm an interest protected by an exemption.”

For Exemption 7, the harm is always “baked in” – it is part of whether the exemption applies in the first place.

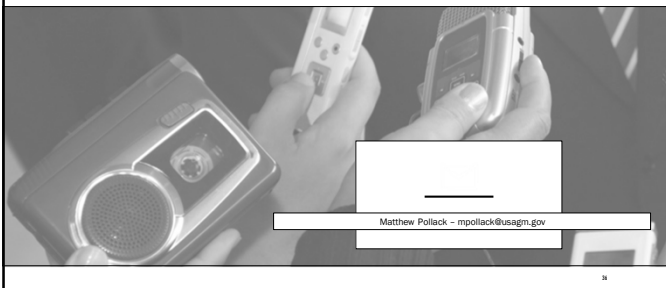
- 7(A) – harm to the pending/expected investigation
- 7(B) – harm to individual at trial
- 7(C) – harm to privacy interests
- 7(D) – harm to informants and investigations
- 7(E) – harm via circumvention
- 7(F) – harm to physical safety



35



Questions?



36
