



Most-abused U.S. FOI(A) exemptions

AND CREATIVE WAYS TO FIGHT BACK
AGAINST THE VEIL OF GOVERNMENT SECRECY
A PRESENTATION BY BRANDON SMITH

In rough order of what we face:

- ▶ Active law enforcement investigation (Exemption 7)
- ▶ Attorney-client privilege (Exemption 5)
- ▶ Predecisional-deliberative material (Exemption 5)
- ▶ Trade secrets given to gov't that would reduce competition (Exemption 4)
- ▶ Other laws that provide expressly for or necessitate withholding of information (Exemption 3)

Active/ongoing law enforcement investigation records (Exemption 7)

- ▶ Meant to prevent several kinds of harm to investigations.
- ▶ Clearly we want them to be able to do their investigations without being hampered. But the types of harm are spelled out, and if there is not a “reasonable” chance that one applies, then they don’t have an argument for withholding.
- 1. 7(A): Reasonable expectation of interference with enforcement proceedings
 - ▶ Investigations are not “enforcement proceedings.” This applies ONLY when an enforcement proceeding has actually begun, or when there is a “concrete prospect” that an ongoing investigation will lead to an enforcement proceeding.

Exemption 7 (con't)

- ▶ We might get hit with 7(E) – harm that results when revealing the document(s) “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.”
- ▶ Good candidate for “discretionary release” (See subsequent slide) – if you can argue that harm would not occur.
- ▶ Documents that consist of guidelines for conducting investigations and prosecutions are exempt under 7(E) if disclosure could “reasonably be expected to risk circumvention of the law.”

Predecisional-deliberative AKA Exemption 5

- ▶ Sometimes referred to as “internal agency memos” or material “normally privileged in civil litigation.”
- ▶ Can be used to withhold “advice, recommendations and opinions”
- ▶ CANNOT BE USED to withhold statements of fact. So if someone compiles a fact-based report, the only redact-able parts are those parts which are the opinion of the author.
- ▶ NO LONGER APPLIES if a decision-maker “clearly adopts the position set forth” in the deliberative document in question. (Question is, how would we know which position they took? Let’s ask OGIS.)
- ▶ “Final opinions” and “post-decisional” documents explaining an agency position are not exempt.

Predecisional-deliberative (Con't) – Exemption 5

- ▶ Also DOES NOT APPLY if the original “source” of the information is not the government agency
- ▶ Exemption also covers attorney-client privilege
- ▶ Officers often cite attorney work-product, but this ONLY APPEARS TO APPLY IF “disclosure would reveal the attorney’s theory of the case or planned trial strategy.”
- ▶ To withhold, disclosure would have to “adversely affect the purposes of the exemption,” and to determine that, courts ask “whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.”

Exemption 5 – last point for GC folks

- ▶ “Information related to awarding of government contracts may be withheld, so long as the government can show that disclosure would place it at a competitive disadvantage. However, once the contract has been awarded or the offer withdrawn, the government cannot claim this privilege. (This information may fall under another exemption, however, particularly Exemption 3.)”

Trade secrets – “Exemption 4”

Applies only to info submitted to gov't by a private entity, usually a company
Apparently, interpretation varies highly by jurisdiction but generally...

- ▶ “Trade secret” has a fairly limited meaning: information that is generally not known in the trade, but is commercially valuable, secretly maintained, and is used for the making, preparing, compounding or processing of trade commodities. It must also be the end product of either innovation or substantial effort.
- ▶ To withhold documents as “commercial or financial information,” the government must be able to prove the information is “confidential.” However, a mere promise of confidentiality to the one who supplied the information does not merit use of this exemption. Courts have said that information is “confidential” only if its disclosure would be likely either (1) “to impair the government’s ability to obtain necessary information in the future” or (2) “to cause substantial harm to the competitive position” of the person from whom the information was obtained.
- ▶ “Substantial harm” itself has a limited definition: “data revealing assets, profits, losses and market shares, (or) detailed information filed to qualify for loans and government contracts.”

Other laws that describe information withholding (Exemption 3)

- ▶ Agencies have to cite the statute that allows or requires their withholding of documents.
- ▶ Courts require that:
 1. the cited statute authorize or require withholding;
 2. Congress intend the specified statute to grant the agency the power to withhold information
 3. the specified statute set the criteria for when information can be withheld, leaving no discretion to agency officials.
- ▶ If the statute cited was enacted after Oct. 28, 2009, the FOIA officer must also cite exemption 3; that is, they cannot cite the law. (I'm not sure whether this means the agency can't go back and correct its omission.)
- ▶ Hundreds of statutes could be used, but if you get back one and want to check, Google RFCP's page "**Examples of Statutes that Do/Do Not Qualify as Exemption 3 Statutes**"

Dealing with the “Glomar”

- ▶ “We can neither confirm nor deny the potential existence of responsive records.”
- ▶ I’m currently in an appeals process to figure out whether agencies can apply it to law enforcement, as the vast majority of the time it’s used only for national security issues. If they can’t take this on a law enforcement matter, this gives me a way to confirm that an investigation may be taking place, so long as they can’t come up with a solid, specific way that revealing it would harm the investigation.
- ▶ Most effective defense is to show that the agency’s justification for nondisclosure contradicts other evidence in the record, or is in bad faith. Other possibilities are that it fails the test of “reasonableness, specificity, or plausibility.”

Discretionary releases

- ▶ Many exemptions to the FOIA are not worded such that an agency HAS to withhold a thing, but rather that it MAY withhold it. The permissiveness to do this waffles as a function of the current presidential administration.
- ▶ The “predecisional-deliberative” exemption is ripe for this. RCFP details others.
- ▶ Agencies are often reluctant to make discretionary releases because the top FOIA officer, in answering an annual questionnaire from the DOJ, has to say whether they made any discretionary releases that year, describe them, and describe why they chose to release them. Not only is that a hassle but that opens them up to increased oversight by the DOJ’s Office of Information Policy – the “keeper of the FOIA,” if you will.

DOJ OIP and OGIS

- ▶ DOJ OIP maintains white papers summarizing the most relevant caselaw to each aspect of the FOIA, and can actively censure agencies that aren't following it properly. They're not to be confused with Office of Government Information Services (OGIS), which educates FOIA officers and offers a (relatively toothless) dispute mediation service. Sometimes they help, though.

Brandon's tips and tricks

- ▶ You can always get documents in the form in which the government keeps them. This is especially useful with spreadsheets. If they give you a PDF of a spreadsheet, or an unusable output of a database, you can demand they export it as a file you can manipulate, because they themselves can manipulate it.
- ▶ You have the right to an ETA on your response.
- ▶ You nearly always have the right to a “rolling response” to a lengthy FOIA; one with multiple parts; or one in which they have to request documents from multiple sources who may not all respond at the same time. In a “rolling response,” they send to you documents as they receive them or process/review them.

Brandon's tips and tricks (con't)

- ▶ When you're asking for expedited processing, you have to meet two burdens:
 1. You work for an organization primarily engaged in disseminating information
 2. The requested documents would alleviate "an urgency to inform the public about actual or alleged government activity."
- ▶ Meeting this burden tends to rely on the strength of your argument that the matter in question is "urgent." Agencies want to see a "specific, external timeline" that is driving this "urgency." The upcoming presidential election was the main one, and maybe only one, at FTC last year.
- ▶ Non-response: occasionally, for some of the small agencies with a one-person FOIA shop, you won't even get an acknowledgement for 21 business days. In this case, they may have waived their right to claim that fulfilling the request is unduly burdensome. So you can go ahead and make sure you get all 20,000 emails.