

# ***Headquarters U.S. Air Force***

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*Integrity - Service - Excellence*

## **Freedom of Information Act Training Exemption 7**



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# ***Exemption 7***

**Created or compiled for a law enforcement purpose**

- **7(A) “could reasonably be expected to interfere with enforcement proceedings” [pending or prospective]**
- **7(B) “would deprive an individual of the right to a fair trial or impartial adjudication”**
- **7(C) “could reasonably be expected to constitute an unwarranted invasion of privacy”**
- **7(D) “could reasonably be expected to disclose the identity of a confidential source ...”**
- **7(E) “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**
- **7(F) “could reasonably be expected to endanger the life or physical safety of any individual”**



# ***Exemption 7 threshold***

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- **Withholds appropriate information contained in a record created or compiled for a law enforcement purpose**
- **What is considered a record compiled or created for a law enforcement purpose is very broad: criminal and civil investigations of misconduct against an individual; background security investigations; etc**
  - **Compiled: records not initially created for a law enforcement purpose can become part of such a record (such as one of its attachments). In that case, the otherwise non-law enforcement created record is treated as a record compiled for a law enforcement purpose *WHEN* it is otherwise *associated* with the underlying report that is a record created for a law enforcement purpose**
    - **Example: medical records**



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# ***Exemption 7***

- **No *per se* rule on withholding or releasing records compiled for a law enforcement purpose when requested**
- **Generally speaking, a First Party (who the record is about) will get more information when requested under the FOIA than a Third Party (everyone else)**
  - **See Dept of Justice narrative discussion of what is considered a record compiled or created for a law enforcement purpose @ [http://www.justice.gov/oip/foia\\_guide09/exemption7.pdf](http://www.justice.gov/oip/foia_guide09/exemption7.pdf), pages 491-521**



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# ***Exemption 7(A)***

- **Narrative discussion on pages 523-558 of DOJ FOIA Guide very helpful**
  
- **Two part test:**
  - **Whether law enforcement proceeding is pending or contemplated**
  - **Whether release of information about it could reasonably be expected to cause some articulable harm**
  
- **Temporal**



# ***Exemption 7(B)***

- **Release would “deprive” a person of a right to a fair trial or an impartial adjudication**
  - **No balancing test, but...**
  
- **Rarely used. See pages 559-560 of DOJ FOIA Guide for narrative discussion. There is only one page of discussion of this exemption for a reason.... Rarely used because test very difficult to meet**



- **Read narrative portion of pages 561-601 of DOJ FOIA Guide**
  
- **Release “could reasonably be expected to constitute an unwarranted invasion of personal privacy”**
  - **Conduct the privacy interest v. public interest balancing test**



# 7(C) - *The Balancing Test*

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- Many factors can/are considered when conducting the balancing test with respect to the release of a person's personal info or info about himself (usually concerning alleged misconduct investigations):
  - Rank/Grade of person
  - For misconduct reports, were allegations substantiated?
  - Seriousness of misconduct. Disciplined?
  - Whether the information is about an AF wide policy
  - Whether information sought is related to an employee's job function, or, rather, is of a personal nature
  - Is the person whose records are requested considered a public figure
  - Role of individual in publicly providing the requested information
    - Did he go to the public first?



# ***The Balancing Test con't***

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- **The current general public knowledge in the underlying facts and circumstances concerning the records requested**
  - **Pre or post-trial conviction?**
- **Personal sensitivity of information requested**
- **How long ago in the past the underlying info/conduct occurred**
- **The individual's role in making public the underlying nature of the subject matter**
- **How the requested information affects the public**
- **Courts have generally held that the public interest in learning of a government employee's official conduct or misconduct “increases as one moves up an agency's hierarchical ladder“**
- **When all is reviewed, would release constitute an unwarranted invasion of an individual’s privacy? If yes, withhold. If no, release**



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## *Exemption 7(C) con't.*

- **There may be privacy interests in old information that once was public – the practical obscurity standard**
- **The identity of the requester is usually not considered in determining *what should* be released**
- **Should not consider the purpose(s) for which the request is being made**
  - **If the requester wants to use the records to have a bonfire, that fact has nothing to do with a release decision**



# ***Exemption 7(D)***

- Pages 603-635 of DOJ FOIA Guide (no balancing test/harm)
  
- Release could reasonably be expected to disclose the *identity* of a confidential source, to include a state, local, foreign agency or private institution confidential source. **AND also**, “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.*”
  
- IDENTITY of source
  - Except for valid law enforcement purposes
  - Can be much more than just the “name” of the source – see pages 625, 626 of DOJ Guide
  
  - Express confidentiality or under circumstances from which such an assurance could be reasonably inferred
    - Underlying Agency Office/official must be authorized to ensure confidentiality



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***7(D) con't***

- **Confidential Source INFORMATION (pages 627-631 of DOJ FOIA Guide)**
  
- **Waiver (Pages 631-635)**



# Exemption 7(E)

- Pages 637-651 of DOJ FOIA Guide
  
- Can withhold if release “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.”
  
- No balancing test
  - Courts have disagreement as to whether harm must be found when techniques and procedures involved, but in general agreement that technique or procedure must not be well known to public to allow for withholding
  
  - Remember that Air Force [public] Instructions are filled with guidelines, techniques and procedures....



# ***Exemption 7(F)***

- **Release “could reasonably be expected to endanger the life or physical safety of any individual”**
- **No balancing test**
- **See pages 653-658 of DOJ FOIA Guide**
  - **Can protect the names and identifying information of non-law enforcement federal employees and other third persons in connection with particular law enforcement matters**
  - **But, most likely appropriate to use in conjunction with 7(C) concerning the protection of U.S. military/civilian government personnel.**
  - **Post-court testimony; after retirement, etc**



# *Special Exclusions*

- Under 5 U.S.C. § 552(c)(2), a criminal law enforcement agency can entirely exclude records from the FOIA process when necessary to avoid divulging the existence of a confidential source relationship. Specifically, that section states:
  - Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements [of the FOIA] unless the informant's status as an informant has been officially confirmed



# *Special Exclusions con't*

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- **5 U.S.C. § 552(c )(1), an Agency may treat records as not subject to the FOIA if an investigation or proceeding involving a possible violation of criminal law is ongoing; and there is reason to believe the subject is not aware of the proceeding; and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings**
- **This can only be done only during such time as these circumstances continue/exist**



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**FOIA**

**Questions?**