

# U.S. Office of Government Ethics

## 2014 National Government Ethics Summit

### *How to Determine What Ethics Information is Subject to Release under FOIA*

Vanessa R. Brinkmann  
Senior Counsel  
Office of Information Policy  
U.S. Department of Justice



## *The Freedom of Information Act*

Agencies, upon receiving requests for records which (i) reasonably describes the records sought and (ii) are made in accordance with published rules stating the time, place, fees (if any), shall make records promptly available...

Unless the records are properly withheld pursuant to any of nine FOIA Exemptions.



## *The Freedom of Information Act*

The FOIA pertains to federal agency records that exist and can be located in agency files.



## *Freedom of Information*

United States Supreme Court:

“The basic purpose of [the Freedom of Information Act] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”



## *FOIA & Ethics: Common Goals*

On his first full day in office, President Obama established new transparency and ethics rules.

**Transparency + Ethics = Accountability**



## *President Obama's Freedom of Information Act Memorandum*

“A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, ‘sunlight is said to be the best of disinfectants.’”



## *President Obama's Freedom of Information Act Memorandum*

“In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.”



## *Attorney General Holder Issued Freedom of Information Act Guidelines in March 2009*

### Attorney General Holder's FOIA Guidelines:

- emphasize agency accountability
- require reporting by agency Chief FOIA Officers
- encourage discretionary disclosures
- discourage “unnecessary bureaucratic hurdles”
- stress need for prompt and proactive disclosures





# *Overview of FOIA Exemptions*



# *Freedom of Information Act Exemptions*

- Exemption 1 protects national security information that is properly classified under the procedural and substantive requirements of the current Executive Order on classification.
- Exemption 2 protects records that are “related solely to the internal personnel rules and practices of an agency.”
- Exemption 3 protects information that has been “specifically exempted from disclosure by statute.”



## *Freedom of Information Act Exemptions*

- Exemption 4 protects trade secrets or commercial or financial information obtained from a person that is privileged or confidential.
- Exemption 5 protects records subject to civil discovery privileges.
- Exemption 6 protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy.



# *Freedom of Information Act Exemptions*

- *Exemption 7* protects six different types of law enforcement information:
  - On-going proceedings
  - Right to a fair trial
  - Personal privacy
  - Confidential sources
  - Techniques and procedures
  - Life or physical safety
- *Exemption 8* protects matters related to examination, operating, or condition reports prepared by or for regulators or supervisors of financial institutions.
- *Exemption 9* protects geological information and data, including maps, concerning wells.



# *Applying FOIA to Ethics: FOIA Exemptions Commonly Used for Ethics-Related Documents*



## *Federal agencies received 704,394 requests in Fiscal Year 2013*

The most commonly cited FOIA exemptions by agencies government-wide:

- Exemptions 6/7(C) (personal privacy)
- Exemption 7(E) (law enforcement techniques & procedures)
- Exemption 5 (civil discovery privileges)

The most commonly cited FOIA exemptions by OGE:

- Exemption 6
- Exemption 5
- Exemption 3 (records exempted by statute)



## *Ethics Records Likely to be Requested under FOIA*

- Financial disclosure and related records
- Ethics advice and counsel
- Ethics waivers and approvals
- Ethics training records
- Ethics reports and questionnaires
- OGE referrals to the Department of Justice
- Ethics program management materials

Some records are accessible directly through provisions of the Ethics in Government Act of 1978. 15



# *FOIA Exemption 3: Statutory Prohibitions on Disclosure*





## *FOIA Exemption 3*

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



## *FOIA Exemption 3*

- Subpart A(i) – Absolute prohibition on disclosure – no agency discretion



## *FOIA Exemption 3*

- Subpart A(ii) – Limited prohibition on disclosure
  - a) statute defines particular matters to be withheld; or
  - b) statute provides specific criteria for withholding



## *FOIA Exemption 3*

- Subpart B – the OPEN FOIA Act of 2009 established an additional requirement, that any statute “enacted after the date of enactment of the OPEN FOIA Act of 2009 [must] specifically cite[] to this paragraph” in order to qualify under Exemption 3.



# *Applying Exemption 3 to Ethics Records*

## *Statutes Found to be Applicable to Ethics Records*

- 5 U.S.C. app 107(a) (confidential financial disclosure reports)
  - Meyerhoff v. EPA, 958 F.2d 1498, 1500-02 (9th Cir. 1992); Seife v. NIH, 874 F. Supp. 2d 248, 254 (S.D.N.Y. 2012); Concepcion v. FBI, 606 F. Supp. 2d 14, 33 (D.D.C. 2009); Glascoe v. DOJ, No. 04-0486, 2005 WL 1139269, at \*1 (D.D.C. May 15, 2005)
  - 5 U.S.C. app. 105 has also been cited by OGE
- 18 U.S.C. 208(d)(1) (conflict of interest waiver determinations)
  - Seife v. NIH, 874 F. Supp. 2d 248, 256 (S.D.N.Y. 2012)



# *FOIA Exemption 5: The Civil Discovery Privileges*



## *FOIA 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.”



## *FOIA Exemption 5*

Records covered by Exemption 5  
are good candidates for  
discretionary release.





## *Exemption 5 Threshold*

Threshold: inter-agency or intra-agency memoranda or letters

- Within or between agencies
- Consultants



# *The Deliberative Process Privilege*

## The Deliberative Process Privilege

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



# *The Attorney Work-Product Privilege*

## 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



# *The Attorney-Client Privilege*

## Attorney-Client Privilege

- a) communication from client to attorney
- b) communication confidential



# Applying Exemption 5 to Ethics Records

- E-mails, memoranda, recommendations, notes and approvals related to ethics analyses and waiver requests
- Ethics guidance, opinions, and advice
- Ethics program and training materials
- Ethics-related policies
- Referrals to the Department of Justice



# *FOIA Exemption 6: Privacy*



## *FOIA Exemption 6*

Protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy.



## *Exemption 6 Threshold*

- “Personnel and medical files and similar files”
  - Personnel & medical files = easy to identify
  - What’s a “similar file?”
    - Almost anything else qualifies as a similar file. Courts have found that the “similar file” prong is satisfied where the information pertains to a particular individual.
- A file can exist in any format. NY Times v. NASA (audio recordings can be similar files).





## *Exemption 6: Privacy Interest*

### *Exemption 6*

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



## *Privacy Interest*

- Privacy encompasses an “individual’s control of information concerning his or her person.”
- Information need not be intimate or embarrassing to qualify for protection.



## *Privacy Interest*

- Privacy interests have been found in personally identifying information such as:
- a person's name,
  - address,
  - phone number,
  - date of birth,
  - criminal history
  - medical history, and
  - social security number.



## *Privacy Interest – Glomar Response*

When a request seeks records concerning an identifiable individual and the records are of a particularly sensitive nature, it may be necessary to neither confirm nor deny the existence of the records, or “Glomarize.”

- 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.



## *Privacy Interest*

*What doesn't get protection?*

Federal employees. Per OPM regulation, 5 C.F.R. 293.311, agencies should release:

- Name;
- Present and past position titles and occupational series;
- Present and past grades;
- Present and past annual salary rates performance awards and bonuses;
- Present and past duty stations; and
- Position descriptions, job elements; and performance standards.



## *Privacy Interest*

*What doesn't get protection?*

Corporations have no privacy interests

- **Exception:** Small companies/sole proprietorships can take on the privacy interests of its members.



## *Privacy Interest*

Unless information has become “practically obscure” there is generally no expectation of privacy in information that is in the public domain or widely available.



## *Privacy Interest*

Public figures do not forfeit all rights  
of privacy.





## *Privacy Interest*

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



## *“FOIA Public Interest”*

- What’s a FOIA public interest?
  - It’s not necessarily what’s of general interest to the public.
  - Disclosure of the information must serve the “core purposes” of the FOIA, to “shed light on an agency’s performance of its statutory duties.”  
DOJ v. Reporters Committee.
- The agency’s conduct, not the personal conduct of individuals is relevant.



## ***“FOIA Public Interest”***

### *Requester's Identity is Irrelevant*

- Neither the identity of the requester nor the purpose for which the information is sought is given any weight in this determination.
- A requester's private need for the information is not given any weight in this determination.



## *“FOIA Public Interest”*

### *Public, not Private Interest*

- The particular way that one requester can use the information to serve the public is irrelevant because all FOIA disclosures are public disclosures (except first party requests).
- The public interest must be served by disclosure of the requested information.



## ***“FOIA Public Interest”***

### *Official Misconduct*

- Official Misconduct Standard:
  - Often requesters will argue disclosure will reveal agency wrongdoing
  - The U.S. Supreme Court has held requesters must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred. NARA v. Favish.
- There is a **significant public interest** in substantiated allegations of official misconduct of a serious & intentional nature by high-level official.
  - The lower level the employee, the less substantial the public interest.



## *“FOIA Public Interest”*

### *Burden*

- 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.” NARFE v. Horner.



## *Balance the Interests*

### *Balancing*

- If there is a privacy interest and a FOIA public interest in disclosure:
  - Accord each interest a measure of value, and
  - Balance them to determine which is greater.



## *Balance the Interests*

### *Factors To Consider In Balancing*

- 1) Information concerning the intimate details of a person's life generally deserve protection.
- 2) The passage of time usually serves to increase the privacy interest.
- 3) Agency may consider any adverse consequences disclosure may have on the identified individual.
- 4) Proven allegations of official misconduct, constitute a significant public interest.
- 5) Identities of individuals in law enforcement records are virtually never "very probative of an agency's behavior or performance." SafeCard Services v. SEC.





## *Balance the Interests*

- One approach: redact personally identifying information and release remainder
- This both protects privacy and reveals government activity



## Balancing the Interests

- If privacy is not threatened by disclosure, Exemption 6 does not apply.
- If there is a privacy interest but no countervailing FOIA public interest in disclosure, withhold the record.
- If there is a privacy interest and a FOIA public interest, balance.



# Applying Exemption 6 to Ethics Records

- Financial information and business relationships
- Familial information
- Home and personal addresses and contact information
- Social security numbers, dates of birth
- Gifts and travel information
- Outside activities
- Identities of 278 and 450 filers, and individuals receiving training



*Questions?*



## *Resources*

U.S. Department of Justice, Office of Information Policy (OIP):

- [www.justice.gov/oip](http://www.justice.gov/oip)
- (202) 514-FOIA (3642)
- [www.foia.gov](http://www.foia.gov)