

The below text was excerpted from:

The Freedom of Information Act, 5 U.S.C. § 552 As Amended in 2002  
<http://foia.state.gov/foia.asp>

and

Freedom of Information Act Guide, May 2004  
<http://www.usdoj.gov/04foia/foi-act.htm>

An agency can refuse to disclose agency records only when they fall within one of the nine specific statutory exemptions from the FOIA's disclosure provisions under section 552(b) of the law. Exemptions include:

**Exemption 1** applies to matters that are

***"(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."***

Executive Order 12356, issued by President Reagan, requires agency records to be classified if their disclosure "reasonably could be expected to cause damage to the national security." Such records, if "in fact properly classified" according to the substantive and procedural rules of the Executive Order, are exempt from mandatory disclosure under the FOIA.

Requesters should note that courts have upheld agencies decisions to "neither confirm nor deny" the existence of requested records in cases where disclosure merely of the records' existence reasonably could be expected to cause damage to the national security.

FOIA amendments adopted in 1986 authorize the FBI to do this for its classified records pertaining to foreign intelligence, counterintelligence, or international terrorism investigations.

**Exemption 2** applies to matters that are

***"related solely to the internal personnel rules and practices of any agency."***

This has generally been interpreted to exempt from disclosure only those minor and routine matters in which the public could not reasonably be expected to have an interest. It has also been interpreted to exempt law enforcement manuals from disclosure where such manuals are predominantly of internal interest to agency

personnel and their disclosures significantly risks circumvention of agency regulations or statutes.

**Exemption 3** applies to matters that are

*"specifically exempted from disclosure by statute (other than Section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."*

In order to assert this exemption, an agency must cite a federal statute other than the FOIA and show that (1) the statute meets either the (A) or (B) criteria of the exemption, and (2) the records at issue fit within the category of information which the statute authorizes to be withheld.

\*\*\*See HSL\_overview.doc for Exemption 3 statute from Subtitle B of the Homeland Security Act: "Critical Infrastructure Information"\*\*\*

**Exemption 4** applies to matters that are

*"trade secrets and commercial or financial information obtained from a person and privileged or confidential."*

In order to bring a record within this exemption, an agency must show that the information is (A) a trade secret or (B) information that is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.

If the information was generated by the government, it cannot fall within this exemption. However, the term "person" is here, as elsewhere in the FOIA, broadly construed to include a wide range of entities, private corporations and the like.

Requested records will be considered "confidential" within the meaning of this exemption if their disclosure is likely to either impair the government's ability to obtain necessary information in the future, or cause substantial harm to the competitive position of the person from whom the information was obtained. A pledge of confidentiality from the agency, or the fact that the information at issue is not customarily available to the public, will not qualify requested materials as "confidential" under this exemption.

Exemption 4 cases sometimes give rise to so-called "reverse FOIA" actions, in which the original submitter of the requested materials will seek to prevent the agency from releasing them to the requester.

**Exemption 5** applies to matters that are

***"inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."***

This provision was intended to incorporate certain common law discovery privileges into the FOIA exemption scheme, and it is probably the most complex of the FOIA's nine exemptions. Included within its scope are the "executive" privilege (protecting advice, recommendations and opinions which are part of the deliberative, consultative, decision-making processes of government), the attorney "work-product" privilege (protecting documents prepared by an attorney in anticipation of particular proceedings, where disclosure would reveal the attorney's litigation strategy or theory of the case), and the attorney-client privilege (protecting confidential communications between an attorney and his client).

The "executive" privilege, which is the most frequently encountered application of Exemption 5 generally involves the most difficult "line-drawing" problems for the agencies and the courts. Pre-decisional versus post-decisional, fact versus opinion - these distinctions hold clear only to a point. Courts have held that pre-decisional recommendations, which would ordinarily be exempt, lose the protection of the "executive" privilege if an agency, in making a final decision, chooses expressly to adopt them or incorporate them by reference. Conversely, facts that would ordinarily be available to the public have been withheld where they are selected or summarized in a way that reflects the deliberative process, or where their disclosure would impair the agency's ability to obtain information that is essential to the agency's decision-making process.

**Exemption 6** applies to

***"personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."***

This exemption requires agencies and Courts to balance personal privacy interests against the public interest in disclosure when the record of information at issue can be identified as applying to a particular individual. Although the Supreme Court has noted that the exemption standard of "clearly unwarranted" appears to tilt this balance in favor of disclosure, the Court has also made clear that, for purposes of the FOIA, there is "public interest" in the disclosure of "personal" information only when such information will shed light on the operations or activities of some government agency or official.

**Exemption 7** applies to

***"records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right***

*to a fair trial or an impartial adjudication, © 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, 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 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, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual."*

Congress had substantially revised the original 1966 language of this exemption in 1974, and the current version reflects further amendments enacted in October 1986.

Before demonstrating that disclosure of particular records would result in at least one of the six enumerated harms, the agency must show that the records are "compiled for law enforcement purposes."

Although civil and criminal, judicial and administrative enforcement proceedings may all qualify for protection, the proceedings must involve a specific, suspected violation of law.

In the case of a criminal law enforcement agency, whether records were "compiled for a law enforcement purpose" is generally a function of whether there is a "rational" link between the information connected and one of the agencies law enforcement duties.

However, in the case of the FBI, some courts have concluded that virtually all Bureau records are necessarily "compiled for law enforcement purposes" because of the nature of the FBI's responsibilities. Many courts have also said that such information, when compiled in the course of a criminal investigation, is presumed confidential under Section (7) (D), unless proven otherwise.

It should also be noted that information contained in records originally compiled for law enforcement purposes does not lose Exemption protection when it is summarized or reproduced in a new document that is compiled for some purpose other than law enforcement. Conversely, records originally compiled for purposes other than law enforcement can nevertheless qualify for Exemption 7 protection if they are subsequently assembled for law enforcement purposes.

The 1986 FOIA amendments permit an agency to refuse to confirm or deny the existence of records when disclosure of their existence could reasonably be expected to

interfere with a criminal law enforcement proceeding and there is reason to believe that the subject of the proceeding is not aware of its pendency.

**Exemption 8** applies to matters that are

*"contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."*

This seldom-encountered exemption is broadly applied by the courts to withhold a wide variety of reporting materials from many different kinds of "financial institutions." Although the term financial institution is not defined in the FOIA or its legislative history, case law has ruled that it may include any entity authorized to do business under federal laws concerning banks and related institutions. The scope of the exemption is, therefore, not limited to depository Institutions or entities actually regulated by the agency at issue, nor is it limited to matters affecting the solvency of the particular institution.

**Exemption 9** applies to matters that are

*"geological and geophysical information and data, including maps, concerning oil wells."*

This least-asserted, least-litigated exemption of the FOIA provides blanket protection for oil well information, which is in most cases also protected by Exemption 4.

It is important to remember that the exemptions listed above are discretionary rather than mandatory; in effect, this means that an agency can decide to release records to a requester even after it has determined that the records may be withheld pursuant to one or more of the exemptions.

The FOIA also requires an agency to provide a requester with any "reasonably segregable portion" of a record after deletion of the portions which are exempt" from disclosure. This means that any agency may not withhold an entire document on the grounds that some portions of the document are exempt.