



# United States Department of Justice *Office of Information Policy*

## PERSONAL PRIVACY Exemptions 6 & 7(C)



**The FOIA provides two exemptions to protect personal privacy.**

**The FOIA exemption cited most often is Exemption 6, which protects personal privacy.**

**The second most cited exemption is Exemption 7(C), which also protects personal privacy.**

**Exemption 7(C) affords greater privacy protection, but is limited to records compiled for law enforcement purposes.**

# EXEMPTIONS 6 & 7(C)

## *The Personal Privacy Exemptions*

- The exemptions are slightly different, but the following analysis is used for both exemptions:
  - **Step 1.** Threshold satisfied?
  - **Step 2.** Privacy interest implicated?
  - **Step 3.** “FOIA public interest” in disclosure?
  - **Step 4.** Balancing interests.

# Exemption 6

- Applies to “personnel and medical files and similar files” when disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. 552(b)(6).

# Exemption 7(C)

- Applies to “records or information compiled for law enforcement purposes,” the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. 552(b)(7)(C).



# Exemption 6 Threshold

## ■ 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 7(C) Threshold

## ■ Threshold:

- “Records or information compiled for law enforcement purposes.”
- This includes records:
  - (1) created by an agency pursuant to law enforcement activity, and
  - (2) information collected/recompiled during the course of a law enforcement activity.

# Compare Exemptions 6 & 7(C)

Privacy Exemption	Type of Record	Likelihood of Invasion	Type of Invasion
6	Personnel, medical, "similar"	<u>would</u> constitute	<u>clearly</u> unwarranted
7(C)	Law enforcement purposes	<u>could</u> <u>reasonably</u> constitute	unwarranted

# Privacy Interest

- Privacy encompasses an “individual’s control of information concerning his or her person.”

# Privacy Interest

- **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 or 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:
  - (1) Name;
  - (2) Present and past position titles and occupational series;
  - (3) Present and past grades;
  - (4) Present and past annual salary rates, performance awards and bonuses;
  - (5) Present and past duty stations; and
  - (6) 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

## *What doesn't get protection?*

- General rule is that deceased individuals have no privacy.
  - **SURVIVOR PRIVACY:** A deceased individual's survivors may have a privacy interest in preventing disclosure of certain information pertaining to the deceased.
  - NARA v. Favish. Surviving family members' right to personal privacy with respect to death-scene photos.
  - NY Times v. NASA. Final words of Space Shuttle Challenger astronauts withheld to protect privacy of family 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 is it?*

- 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 directly 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 United States 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*

- Burden is on the requester to show how disclosure would shed light on the operations of an agency.
- Disclosure of the 3<sup>rd</sup> party’s personal information must serve a FOIA public interest.
  - What do I learn about the agency’s operations by knowing a third party’s personal information?

# “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. The passage of time usually serves to increase the privacy interest.
2. Agency may consider any adverse consequences disclosure may have on the identified individual.
3. Proven allegations of official misconduct, constitute a significant public interest.
4. Identities of individuals in law enforcement records are virtually never “very probative of an agency’s behavior or performance.”  
SafeCard Services v. SEC.

# ▪ **Balancing:**

**One approach:**

- **Redact personally identifying information and release remainder**
- **This both protects privacy and reveals government activity**

# Examples:

- **Disciplinary records of cadets at service academy**
- **Lists of drugs routinely ordered by congressional pharmacy**
- **Database of medical tort claims filed**
- **Patient studies**
- **Drug reports of air traffic controllers**

**Balance can also lead to disclosure.**

**Examples:**

- **Addresses of recipients of hurricane relief money**
- **Higher-level agency officials found to have committed misconduct**



# Conclusion

- If privacy is not threatened by disclosure, 6 and 7(C) do 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.