

## FOIA Exemptions

### Exemption 1 - National Security Information

This exemption protects from disclosure all national security information concerning the national defense or foreign policy that has been properly classified in accordance with substantive and procedural requirements of the current executive order. The executive order currently in effect is number 12,958 and was signed by President George W. Bush on March 25, 2003.

### Exemption 2 - Internal Agency Rules

This exemption protects from disclosure records that are “related solely to the internal personnel rules and practices of an agency.” This exemption encompasses two distinct categories of information:

- (a) internal matters of a relatively trivial nature – often referred to as “low 2” information; and
- (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement – often referred to as “high 2” information.

“Low 2” information is exempted from disclosure because the very task of processing and releasing the requested records would place an administrative burden on the agency that would not be justified by any genuine public benefit. Examples of trivial administrative information within the “low 2” category include routine internal personnel matters such as performance standards and leave practices and mundane and more pervasive administrative data such as file numbers, mail routing slips, initials, data processing notations, and brief references to previous communications.

“High 2” information is exempted from disclosure because of the risk of circumvention of a statute or agency regulation posed by disclosure. To qualify for “high 2” exemption, information must be “predominantly internal” and its disclosure must “significantly risk circumvention of agency regulations or statutes.” Examples of such information include general guidelines for conducting investigations, guidelines for conducting post-investigation litigation, guidelines for identifying law violators, studies of agency practices and problems relating to undercover agents, and vulnerability assessments.

Requesters should note that since September 11, 2001, homeland security information has regularly been accorded Exemption 2 protection due to its sensitive nature, regardless of whether or not such information is properly classified.

### Exemption 3 - Information Exempted by Other Statutes

This exemption provides that the FOIA exempts from disclosure matters that are “specifically exempted from disclosure by statute, 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.”

An example of an Exemption 3 statute is Section 821(b)(m) of the National Defense Authorization Act for Fiscal Year 1997, codified at 41 U.S.C. 253b(m). It provides that “a proposal in the possession or control of an executive agency may not be made available to any person under section 552 of title 5, United States Code.” The statute does, however, permit release of proposal documents if they have been set forth or incorporated by reference in the contract entered into between the agency and the contractor that submitted the proposal. 41 U.S.C. 253b(m)(2). This language satisfies subpart (B) of Exemption 3 because it refers to specific types of information to be withheld.

### Exemption 4 - Trade Secrets and Commercial or Financial Information

This exemption protects “trade secrets and commercial or financial information that is privileged or confidential.” It protects the interests of both the government and submitters of information by encouraging submitters to voluntarily furnish useful commercial or financial information to the government and assuring the government that the information so submitted is reliable. This exemption also affords protection to submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure. This exemption covers two broad categories of information: (1) trade secrets and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

A “trade secret” is defined as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”

For the second category of information, it is deemed “commercial or financial” if it relates to business or trade. The information is “obtained from a person” in most all cases. This includes entities such as corporations, banks, agencies of foreign governments, and Native American tribes or nations. Information is “confidential” if its disclosure is likely to either (1) impair the Government’s ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.

Information is “privileged” if it is protected by privileges such as the attorney-client privilege or doctor-patient privilege.

#### Exemption 5 - Inter/Intra-Agency Memorandums and Letters

This exemption protects information contained in inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency. This exempts documents that are normally privileged in the civil discovery context. This exemption is read broadly and applies to statutory privileges and those commonly recognized in case law.

#### Exemption 6 - Personal Privacy Interests

This exemption protects information about individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” This exemption is read broadly and is not limited solely by the labels attached to an individual file. If the requested information is contained in such files, it must be disclosed unless the personal privacy interest outweighs the public’s right to the information.

#### Exemption 7 - Law Enforcement Records

This exemption protects “records of 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 fair trial or an impartial adjudication;
- (C) 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 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;
- (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions; or
- (F) could reasonably be expected to endanger life or physical safety of any individual.

#### Exemption 8 - Records of Financial Institutions

This exemption protects information that is “contained or related to examination, operating, or condition reports prepared by, or on the behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”

#### Exemption 9 - Oil Well Data

This exemption protects “geological and geophysical information and data, including maps, concerning wells.”