



RECORD REDACTION & COMMONLY USED FOIA EXEMPTIONS

OFFICE OF OPEN GOVERNMENT

JULY 30, 2024 - 1:00PM

INSTRUCTOR

Brandon W. Lewis

Attorney Advisor

Office of Open Government

D.C. Board of Ethics and Government Accountability

Washington, D.C.

brandon.lewis@dc.gov



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QUESTIONS & ANSWERS

During and after the presentation, if you have questions raise your hand in Teams or put it in the Chat.

1

Redaction

Identifying and obscuring privileged information.

2

2023 FOIA Report

Details District's comprehensive FOIA activity.

3

Trade Secrets

D.C. FOIA Exemption #1.

4

Personal Privacy

D.C. FOIA Exemption #2.

5

Law Enforcement

D.C. FOIA Exemption #3.

6

Agency Commun.

D.C. FOIA Exemption #4.

COURSE OUTLINE

RECORD REDACTION

HOW TO PERFORM REASONABLE REDACTION OF RECORDS

FD-302 (Rev. 3-3-59)

-1-

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/12/74

[REDACTED] was advised of the identity of the interviewing agents and the purpose of the interview. She then provided the following information:

2200Y HOFFA is buried in the basement of a farm house near the intersection of Pine and State Roads near India, Michigan. She was present in July of 1974 when a body was buried in the house's basement and another one in a mass grave. The mass grave is located in a corn field behind the house. One of the three people burying the bodies looked like JAMES F. HOFFA (FBI). One of the other men was carrying a shotgun. After observing the burial she began to walk toward the property, but she was lammed in by a six foot barbed wire fence. At that time she was chased by a bull who lamed her in the back when they rolled down a hill together. The bull rolled off of her and then charged three small trees four times. On the fourth charge the bull collapsed and she crawled two and one half hours later by crawling under the fence where she deeply scarred her bottom, which she refused to show the interviewing agents (the agent was [REDACTED] place arrested and see an acquaintance, [REDACTED] had [REDACTED] in 1974). She hid her in the house [REDACTED] had the bathroom. While in the bathroom she cleaned the blood off her face and threw the towel on the floor and ran outside. [REDACTED] helped her drive away but mentioned during the drive that she and HOFFA would have joint grave sites.

[REDACTED]

[REDACTED]

Date 8/12/74 at Dearborn, Michigan File # 44-1987-507

[REDACTED] and [REDACTED] Date 8/12/74

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PRODUCING THE RECORDS: REASONABLE REDACTION

A record may only be withheld in its entirety if the agency determines that the record cannot be reasonably redacted.

e.g., document may contain parts that are protected by a privilege, and parts that are not protected – the existence of the privileged parts cannot be used to justify withholding the non-privileged portions if reasonable redaction is possible.

PRODUCING THE RECORDS: REASONABLE REDACTIONS

D.C. Official Code § 2-534(b) states:

(b) Any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure pursuant to subsection (a) of this section.

In each case, the justification for the deletion shall be explained fully in writing, and the extent of the deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (a) of this section under which the deletion is made.

If technically feasible, the extent of the deletion and the specific exemptions shall be indicated at the place in the record where the deletion was made.

QUESTIONS TO ASK WHEN REDACTING

1. Am I withholding an entire record?

2. Are parts of the record not-exempt?

3. If I remove the not-exempt portions, is the document still legible?

Answers to REASONABLE REDACTION Questions

Q1:AM I WITHHOLDING AN ENTIRE RECORD?

Did the search find responsive records?

If the search yields nothing, then you are NOT withholding a record.

Is the requester receiving everything found?

If the requester got everything found, you are not withholding an entire record.

Answers to REASONABLE REDACTION Questions

Q2: YOUR AGENCY IS WITHHOLDING AN ENTIRE RECORD; WHAT IS THE BASIS FOR WITHHOLDING IT?

If you were to pick any random part of the record, would that basis be applicable?

If YES, it is proper to withhold in its entirety.

If NO, you should be redacting and producing the record.

Is the reason personal privacy? Does the ENTIRE record raise privacy concerns (e.g. a tax return) or only parts (e.g. a work email that has a post-script about a medical procedure)?

Redacting personally identifying information (PII) may preserve privacy; if the record contains non-exempt content, you must produce the non-exempt content to the requester even if you redact some content, for example, to prevent a clearly unwarranted invasion of privacy.

Answers to REASONABLE REDACTION Questions

Q3: ARE PORTIONS OF THE RECORD NOT EXEMPT?

Are you withholding due to attorney-client privilege?

Is all of the document embraced by that privilege?

Was part of the communication shared with a third-party?

Is the reason deliberative process? Does the ENTIRE record raise privacy concerns (e.g. a tax return) or only parts (e.g. a work email with a post-script about a medical procedure)?

Is the entire document part of the deliberation or are parts of it definitive statements of already established policy?

Does the document contain purely factual information – e.g. charts and graphs? Was the record shared with a third party?

Answers to REASONABLE REDACTION Questions

Q3: ARE PARTS OF THE RECORD NOT EXEMPT?

Are you withholding due to a commercial interest?

Would the release of the entire document cause harm?

Or would only the release of dollar amounts cause harm?

REASONABLE REDACTION

QUESTION 3:

If I remove the exempt portions, is the document still legible?

"non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions."

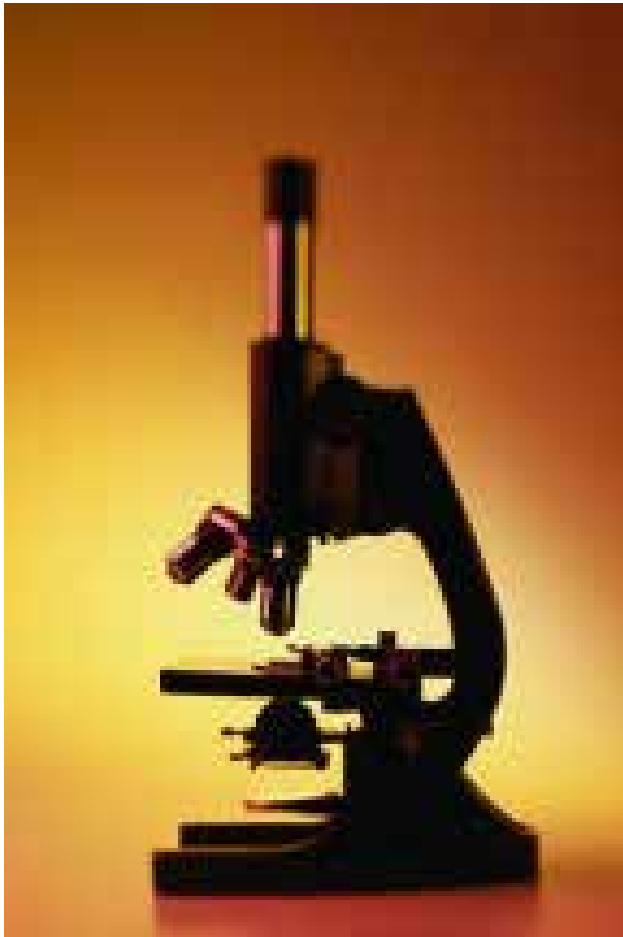
Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977).

<https://www.justice.gov/oip/blog/foia-update-oip-guidance-reasonable-segregation-obligation>

If you redacted all exempt portions would you be looking at a wall of black ink?
If so, then you don't have to engage in redaction.

Are there paragraphs or pages that would not be exempt?
If so, then you redact and release.

“SCOPING”



- Once I have identified a responsive record, can I redact information within the record that is non-responsive? (A practice known as “scoping”)
- Once the government concludes that a particular record is responsive to a disclosure request, **the sole basis** on which it may withhold particular information within that record is if the information falls within one of FOIA’s statutory exemptions. *American Immigration Lawyers Ass’n v. Executive Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016).
- What does this mean?**
- That discrete information within a responsive record cannot be redacted on the basis of non-responsiveness. It can be redacted only if a statutory exemption applies.



COMMONLY USED FOIA EXEMPTIONS

2023 REPORT & AGENCIES



2023 FOIA REPORT

Each year, the Mayor requests info from each public body and submits a comp. report to the D.C. Council, covering public record disclosure activities of each public body during the preceding fiscal year.

D.C. Official Code § 2-538(a).

We will cover these statistics:

- | Total FOIA Requests in 2023
- | Exemptions used over 200 times
- | Agencies with Highest Requests



2023 FOIA REPORT STATISTICS

i Access the 2023 FOIA Report here:

<https://os.dc.gov/page/annual-reports>

i Total Number of FOIA Requests in 2023: **10,913**

i *Total Number in 2022: 11,522*

AGENCIES WITH THE HIGHEST NUMBER OF REQUESTS

¡ ABCA 241

¡ DC Health 590

¡ DDOT 454

¡ DHDC 233

¡ DLCP 348

¡ DOB 952

¡ DOEE 700

¡ FEMS 1491

¡ MPD 2611

¡ OUC 371

MOST FREQUENTLY USED D.C. FOIA EXEMPTIONS

- Exemption 1 "Trade Secrets" - 384
- Exemption 2 "Personal Privacy" - 2878
- Exemption 3 "Law Enforcement" - 1777
- Exemption 4 "Agency Communication" - 243

DESCRIPTION OF THE EXEMPTIONS

- **Exemption 1:** Protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential.
- **Exemption 2:** Protects information about individuals when the disclosure would constitute a clearly unwarranted invasion of personal privacy.
- **Exemption 3:** Protects certain investigatory records compiled for law enforcement purposes (including the records of Council investigations).
- **Exemption 4:** Protects inter-agency or intra-agency “deliberative” and “predecisional” materials written as part of the decision-making process in D.C. agencies.

APPLICATION OF FEDERAL FOIA TO D.C. FOIA

D.C. FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law, *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521 n.5 (D.C. 1989), where the language is identical.



TRADE SECRETS

To withhold responsive records under Exemption 1, the agency must show that the information:

- § (1) is a trade secret or commercial or financial information;
- § (2) was obtained from outside the government; and
- § (3) would result in substantial harm to the competitive position of the person from whom the information was obtained.

D.C. Official Code § 2-534(a)(1).

THE PROTECTION OF PROPRIETARY INTERESTS FROM PUBLIC DISCLOSURE.

- i To withhold responsive records under Exemption 1, an agency must show that the information: (1) is a trade secret or commercial or financial information; (2) was obtained from outside the government; and (3) would result in substantial harm to the competitive position of the person from whom the information was obtained. D.C. Official Code § 2-534(a)(1).
- i The D.C. Circuit has defined a trade secret, for the purposes of the federal FOIA, “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.” *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).
- i The D.C. Circuit has also instructed that the terms “commercial” and “financial” used in the federal FOIA should be accorded their ordinary meanings. *Id* at 1290.
- i Exemption 1 has been “interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury.” *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); see also, *Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989).

THE PROTECTION OF PROPRIETARY INTERESTS FROM PUBLIC DISCLOSURE

Exemption 1 – Trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained.

D.C. Official Code § 2-534(a)(1)

“When does information provided to a federal agency qualify as confidential?”

THE PROTECTION OF PROPRIETARY INTERESTS FROM PUBLIC DISCLOSURE

The Supreme Court held that information is confidential and protected if:

- (1) the information is “customarily kept private, or at least closely held” and
- (2) where the receiving party provides some assurance that the information will remain secret.

***Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356 (June 24, 2019).**

DEPARTMENT OF JUSTICE GUIDANCE (FEDERAL EXEMPTION 4) – GUIDE TO DETERMINING CONFIDENTIALITY

(1) Does the submitter customarily keep the information private or closely held?

If your answer is NO = NOT “CONFIDENTIAL”

If your answer is YES = Move on to Question 2

(2) Did the government provide an express or implied assurance of confidentiality when the information was shared with the government?

If your answer is NO = answer Question 3

If your answer is YES, the information is “CONFIDENTIAL”

DEPARTMENT OF JUSTICE GUIDANCE (FEDERAL EXEMPTION 4) – GUIDE TO DETERMINING CONFIDENTIALITY

(3) Were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?

If your answer is NO, the information is “CONFIDENTIAL”. If the government is silent – the submitter’s routine practice will be sufficient to determine information is “CONFIDENTIAL”

If your answer is YES, and no other countervailing factors exist, a submitter cannot expect the information to be “CONFIDENTIAL”.

Source: www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential



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PERSONAL PRIVACY

EXEMPTION 2

PERSONAL PRIVACY

Exemption 2 – Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

D.C. Official Code § 2-534(a)(2).

PERSONAL PRIVACY – CASE EXAMPLES

D.C. FOIA exempts the release of presentence reports, academic records, mental health assessments and other records pertaining to prison inmates' applications for minimum sentence reductions. See *Hines v. Bd. of Parole*, 567 A.2d 909, 913 (D.C. 1989).

D.C. FOIA exempts personal information of public employees, unless the requestor shows that "the withheld information will shed light on an agency's performance of its statutory duties or otherwise let citizens know what the government is up to." *Fraternal Order of Police v. District of Columbia*, 124 A.3d 69, 77 (D.C. 2015) (internal quotation marks omitted).

PERSONAL PRIVACY – FEDERAL VS. D.C.

D.C. FOIA's privacy exemption is broader than that of federal law. Unlike the language of the federal statute, which limits its comparable exemption to personnel, medical and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, see 5 U.S.C.A. § 552(b)(6), D.C. FOIA exempts all information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of privacy.

PERSONAL PRIVACY EXCEPTION BALANCING TEST

When determining whether the exemption for personal privacy would apply to the requested records, both D.C. FOIA and federal FOIA apply the standard set forth in *Department of Justice v. Reporters Comm. for Freedom of Press*, which requires that the government balance the individual's privacy interests against the public interest in disclosure. A FOIA Officer must perform the balancing test under this exemption: the individual's privacy interest in the material at issue must be balanced against the public interest in disclosing it, and this public interest must serve the "core purpose of shedding light on an agency's performance of its statutory duties."

Department of Justice v. Reporters Comm. for Freedom of Press,
489 U. S. 749, 772, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989)



D.C. OOG ADVISORY OPINION #OOG-002.10.18.21_AO

- i The initial question is whether there is a more than *de minimis* privacy interest in the records that are the subject of the FOIA request.
- i Absent a more than *de minimis* privacy interest, the underlying principles of FOIA would require disclosure of the records.
- i If established that the individual(s) maintain more than a *de minimis* privacy interest in the records, the next question is whether there is a public interest in disclosure that outweighs the privacy interest.
- i To establish a FOIA public interest in disclosure, the information sought must serve the “basic purpose of the Freedom of Information Act, to open agency action to the light of public scrutiny.”
- i When privacy interests are implicated, the burden is on the requestor to establish that disclosure would serve a significant public interest, and that interest must be more specific than having the information for its own sake.

PRIVACY EXEMPTION BALANCING TEST EXAMPLES

IN RE APPEAL OF THE WASHINGTON POST CO.

- ^a The privacy interests of students and teachers under investigation for the consumption of alcohol substantially outweighs the public interest in their identifying information.

IN RE APPEAL OF WALTER THOMAS

- ^a May disclose names, professional qualifications, and work experiences of successful job applicants, but refuse to disclose other private information, such as home telephone numbers and addresses, Social Security numbers, marital status and personal references, or any information regarding unsuccessful job applicants.

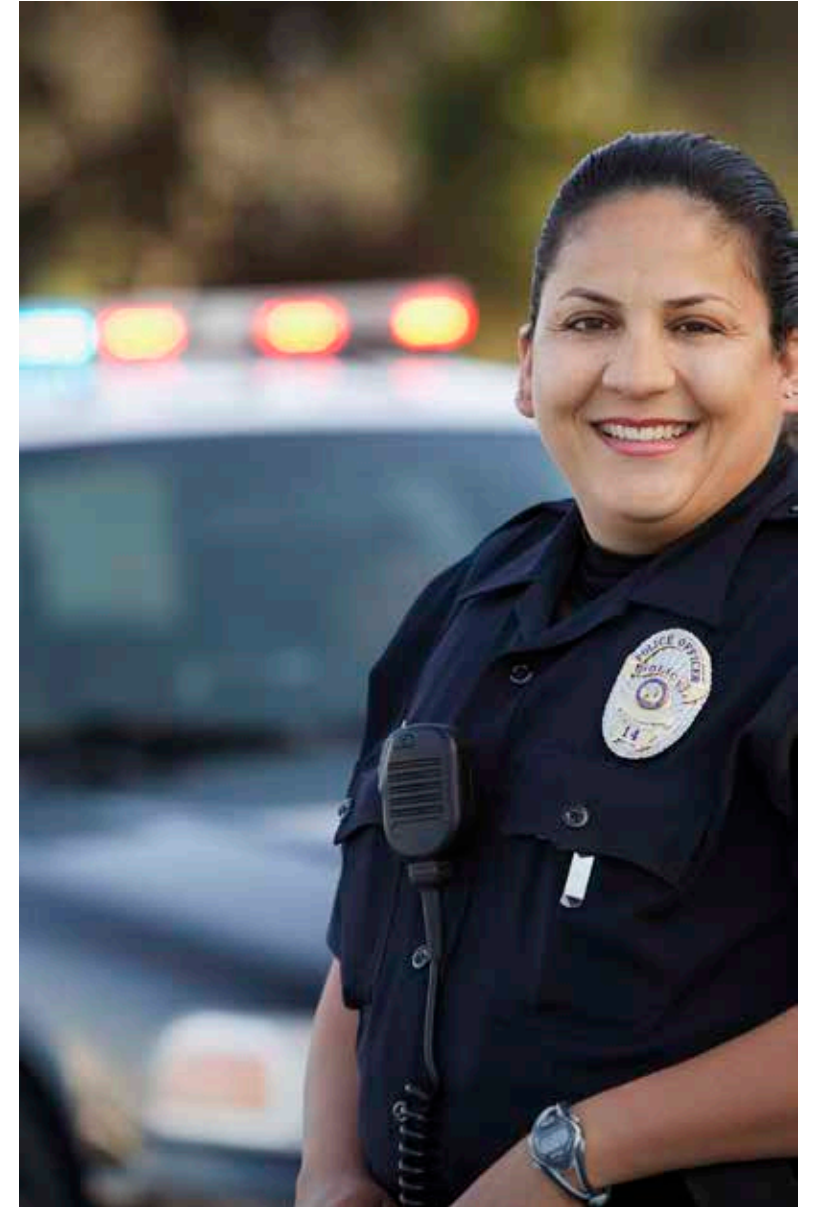


LAW ENFORCEMENT

Interfere with
Investigation

Right to a Fair Trial

Personal Privacy



LAW ENFORCEMENT EXEMPTION

- i D.C. FOIA exempts certain investigatory records compiled for law enforcement purposes (including the records of Council investigations).
- i The exemption allows nondisclosure when disclosure would interfere with enforcement proceedings or Council investigations, deprive a person of a fair trial, constitute an unwarranted invasion of privacy, disclose the identity of a confidential source, disclose investigation techniques, or endanger the lives of law enforcement officers. D.C. Official Code § 2-534(a)(3).
- i The exemption applies only to investigatory records that are compiled in the course of specific investigations and that focus on specific individuals and acts. See *Fraternal Order of Police, Metro. Labor Comm. v. District of Columbia*, 82 A.3d 803, 815 (D.C. 2014) (holding that records concerning use of breathalyzer were exempt only if "(1) the documents requested . . . [were] compiled for law enforcement purposes, and (2) disclosure of those documents would interfere with enforcement proceedings."); *Barry v. Washington Post Co.*, 529 A.2d at 321-22.
- i Law Enforcement records are exempt, however, only if their release would also result in the interference with enforcement proceedings or cause one of the other results described in D.C. Official Code § 2-534(a)(3). See *In re Appeal of Ernest Middleton*, Matter No. 01-171746, 48 D.C. Reg. 9022 (Office of the Secretary, Sept. 19, 2001); *In re Appeal of Mark W. Howes, Esq.*, Matter No. 00-10587, 48 D.C. Reg. 7827 (Office of the Secretary, Aug. 13, 2001).

LAW ENFORCEMENT EXEMPTION

- i Threshold requirement for this exemption to apply is the record or information sought must have been compiled for a law enforcement purpose.
- i Courts have held that the law enforcement purpose encompasses a wide variety of records and information.
- i Records compiled as part of violent investigations or drug trafficking investigations, including records pertaining to the use of informants, have been found to meet the threshold. Records compiled as part of investigations into non-violent illegal activity have been found to satisfy the threshold, as have records used in efforts to prevent wrongful activity.
- i Additionally, courts have found the threshold satisfied for non-investigatory records provided they involve a law enforcement purpose, such as law enforcement manuals, but have denied protection when the agency failed to establish a sufficient connection between the records and any law enforcement function.

LAW ENFORCEMENT EXEMPTION

- i Courts grant agencies wide latitude in defining their law enforcement purposes.
- i Courts have denied protection under law enforcement exemption when the agency did not adequately demonstrate that (1) the records were compiled as part of the agencies' stated law enforcement purposes and duties; or (2) the records existed independently of the stated law enforcement purpose; or (3) the connection to law enforcement was pretextual; or (4) the associated investigation was conducted for an improper purpose.

LAW ENFORCEMENT EXEMPTION EXAMPLES

- D.C. FOIA "seeks to strike a balance for maximum disclosure even of law enforcement information, but not in cases where the information would endanger people, interfere with due process or severely hamper law enforcement effort." Comm. on Judiciary Report, at 7.
- Example: the Mayor's Office of Legal Counsel (MOLC) has ruled that investigatory records in a 6-year-old murder case are exempt from disclosure if charges and criminal litigation are still possibilities. *Glenn A. Stanko, Esq. v. Metro. Police Dep't*, FOIA App. No. 92-24 (Feb. 24, 1995).
- Example: the MOLC held that the privacy interests of police and the crime victim's family militate against releasing a videotaped murder confession that was never admitted into evidence against the accused when the tape was sought by a news reporter. *In re Appeal of Molly Pauker, Esq.*, (unnumbered FOIA appeal) (Office of the Mayor, Nov. 3, 1989).

LAW ENFORCEMENT EXEMPTION

i The MOLC also held that disclosing a police officer's records regarding an investigation into her alleged drug abuse, when no disciplinary charges were brought and absent allegations that the investigation was mishandled, would serve no public purpose. *Pretext Servs. Inc. v. Metro. Police Dep't*, FOIA App. No. 92-10 (Office of the Mayor, March 8, 1995).

i **Example:** D.C. FOIA provides that all complaints and other specific police records shall be open for inspection. D.C. Official Code § 5-113.06; see also D.C. Official Code § 2-534(c) ("This section shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law."). Therefore, the names of some 70 police officers and information about criminal charges filed against them were required to be disclosed under § 5-113.06 [formerly D.C. Code § 4-135]. *Washington Post v. Metro. Police Dep't*, FOIA App. No. 93-15 (Office of the Mayor, March 11, 1994).

LAW ENFORCEMENT EXEMPTION 3(c) – PERSONAL PRIVACY

- i Exemption 3(c) provides an exemption for disclosure for “[i]nvestigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would . . . (c) Constitute an unwarranted invasion of personal privacy.”
- i While Exemption 2 requires that the invasion of privacy be “clearly unwarranted,” the word “clearly” is omitted from Exemption 3(c). Thus, the standard for evaluating a threatened invasion of privacy interests under Exemption 3(c) is broader than under Exemption 2. See *United States Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

LAW ENFORCEMENT EXEMPTION 3(c) – PERSONAL PRIVACY

- i Records pertaining to investigations conducted by the MPD are exempt from disclosure under Exemption 3(c) if the investigations focus on acts that could, if proven, result in civil or criminal sanctions. *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). See also *Rugiero v. United States Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001)(The exemption “applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well.”).

LAW ENFORCEMENT EXEMPTION 3(c)

- i Determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of one's individual privacy interests against the public interest in disclosing the information.

LAW ENFORCEMENT EXEMPTION 3(c)

- i Absent substantial allegations of wrongdoing, courts generally recognize that law enforcement personnel have a privacy interest in nondisclosure of their names due to the potential for harassment or embarrassment if their identities are disclosed. See *e.g.*, *Dorsett v. United States Dep't of the Treasury*, 307 F. Supp. 2d 28, 38-39 (D.D.C. 2004); *Manna v. DOJ*, 51 F.3d 1158, 1166 (3d Cir. 1995); see also *Abraham & Rose, P.L.C. v. United States*, 138 F.3d 1075, 1083 (6th Cir. 1998) (stating that clear privacy interest exists with respect to names, addresses, and other identifying information, even if it is already available in other public filings).

AGENCY COMMUNICATION

Inter-Agency or
Intra-Agency Memo

Inter-Agency or
Intra-Agency Letters

Litigation-Related



AGENCY COMMUNICATION: INTERAGENCY MEMOS AND LETTERS (D.C. OFFICIAL CODE § 2-534(a)(4))

This exemption covers inter-agency and intra-agency memorandums or letters (including memorandums or letters generated or received by the staff or members of the Council), which would not be available by law to a party in litigation with a public body.



LITIGATION-BASED EXEMPTIONS

D.C. Official Code § 2-531(a)(4) provides an exemption from disclosure for privileges which could be asserted in litigation.

- § Deliberative Process Privilege
- § Attorney-Client Privilege
- § Attorney Work Product

AGENCY COMMUNICATION – LITIGATION BASED PRIVILEGES

- D.C. FOIA expressly provides that the deliberative process privilege, the attorney work product privilege, and the attorney-client privilege are incorporated into the exemption in D.C. Official Code § 2-534(a)(4). D.C. Official Code § 2-534(e); see also *Kane v. District of Columbia*, 180 A.3d 1073, 1079-80 (D.C. 2018).
- Historically, the MOLC has used the common law deliberative process privilege to find documents are exempt from disclosure under D.C. Official Code § 2-534(a)(4) because they would not be available to a party in litigation with the agency.

AGENCY COMMUNICATION – LITIGATION BASED PRIVILEGES

- ; *Shaw Coal. Redevelopment Corp. v. Office of the Assistant City Adm'r for Econ. Dev.*, FOIA App. No. 90-20 (Office of the Mayor, July 17, 1994): withholding documents related to an executive decision about real estate development).
- ; *Alonzo L. Williams v. Office of Superintendent*, FOIA App. No. 95-10 (Office of the Mayor, Aug. 11, 1995): withholding memoranda from a hearing examiner whose recommendation was rejected by the Superintendent of Schools, the final arbiter of the decision at issue.
- ; *In re Appeal of the ACLU (National Prison Project)*, Matter No. 00-118630, 48 D.C. Reg. 2407 (Office of the Secretary, Mar. 6, 2001): remanding case to D.C. Department of Corrections to determine whether requested memorandum is of a "predecisional" and "deliberative" character.

AGENCY COMMUNICATION – WHEN DOES THE EXEMPTION APPLY?

- ü To fall under the Exemption, the record must be a part of the agency's deliberation process.
- ü The Exemption protects the frank discussion of legal and policy matters, so the agency is not swayed by public opinion.
- ü The key test: (1) Is the document a final decision? (2) Are they pre-decisional documents or documents that implement or explain the decision? (3) Communication from the decision-maker or to them?
- ü Example: Advice memos **do not fall** under the Exemption **if they are FINAL** – drafts are viewed as deliberational and pre-decisional; thus, under the exemption.

AGENCY COMMUNICATION: INTERAGENCY MEMOS AND LETTERS (D.C. OFFICIAL CODE § 2-534(a)(4))

As a matter of policy, reports and analyses prepared by an organization outside the government, even if they are used in an agency's deliberative process, do not fall within the exemption.

Belth v. Dep't of Consumer & Regulatory Affairs, 115 Daily Washington Legal Rptr. 2281 (D.C. Super. Ct. 1987)

"To hold otherwise would be to rule that the independently initiated, prepared and funded reports of a private organization . . . which that organization desires to withhold from public scrutiny and discussion but to have used by a governmental agency as the basis for important public policy decisions, would be immunized from disclosure"

AGENCY COMMUNICATION: INTERAGENCY MEMOS AND LETTERS (D.C. OFFICIAL CODE § 2-534(a)(4)) - CONSULTANTS

"Consultant Corollary" Doctrine

In some limited circumstances, a non-agency party may act as a consultant to the government, and in such cases, their communications may qualify as an "intra-agency" exchange for Exemption 4 purposes. This extension of the "intra-agency" relationship to cover such agency consultants is generally referred to as the "consultant corollary."

AGENCY COMMUNICATION: INTERAGENCY MEMOS AND LETTERS (D.C. OFFICIAL CODE § 2-534(a)(4)) - CONSULTANTS

"Consultant Corollary" Doctrine

The US Supreme Court explained, the courts' rationale in these cases is that "the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done."

Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 10 (2001).

AGENCY COMMUNICATION: INTERAGENCY MEMOS AND LETTERS (D.C. OFFICIAL CODE § 2-534(a)(4)) - CONSULTANTS

***People for the Am. Way Found. v. U.S. Dep't of Educ.*, 516 F.Supp.2d 28, 36-39 (D.D.C. 2007).**

- i The court held exchanges between the U.S. Department of Education and the District of Columbia Mayor's Office related to a federally funded school voucher program in the District were not "intra-agency" documents because the mayor's office advocated on behalf of the interests of its own constituents.
- i The court also found a lack of a consultant relationship because the agency and the mayor's office "share[d] responsibility for the D.C. voucher program such that information [was] not being conveyed to DOED to unilaterally make ultimate decisions based on the D.C. Mayor's Office's advice."
- i The court noted that its holding was consistent with the fact that there was "no precedent for withholding documents under Exemption 5 where a federal agency and a non-federal entity share ultimate decision-making authority with respect to a co-regulatory project.

REVIEW OF EXEMPTIONS COVERED IN THE COURSE

Exemption 1. TRADE SECRETS

Exemption 2. PRIVACY

Exemption 3. LAW ENFORCEMENT

Exemption 4. AGENCY COMMUNICATION



SOURCE MATERIAL AND HELPFUL RESOURCES

Lawyer's Committee for Freedom of the Press

i <https://www.rcfp.org/open-government-guide/district-of-columbia/>

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

i <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

Mayor's Office of Legal Counsel (MOLC)

<https://dc.gov/page/freedom-information-act-foia-appeals>



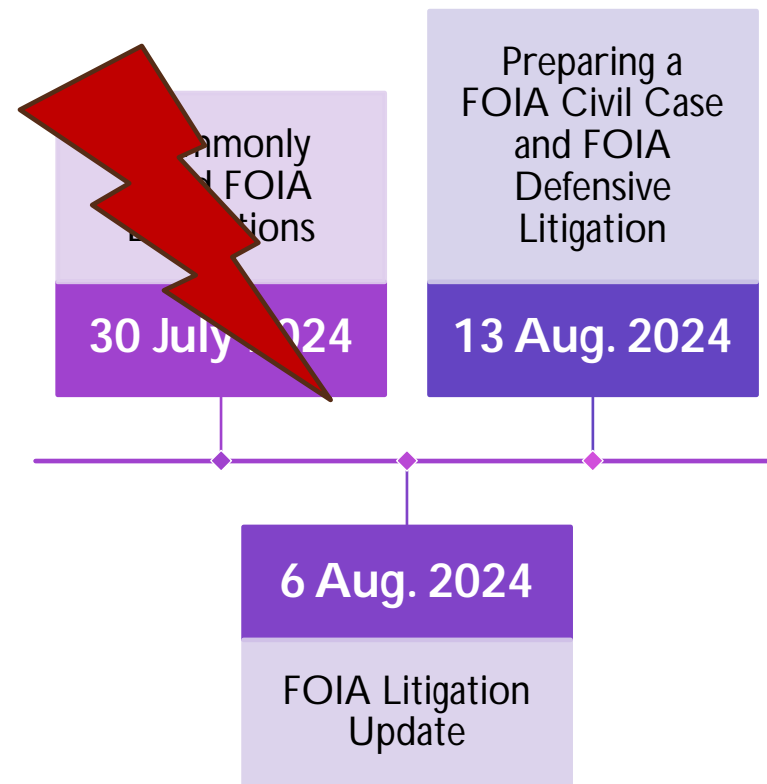
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QUESTIONS & ANSWERS

Let us know if you have questions by raising your hand in Teams or please put it in the chat.

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OPENGOVOFFICE@DC.GOV | (202) 481-3411



Niquelle M. Allen, Esq.
Dir. of Open Government
Niquelle.Allen@dc.gov

Anthony J. Scerbo, Esq.
Attorney Advisor
Anthony.Scerbo1@dc.gov

Brandon Lewis, Esq.
Attorney Attorney
Brandon.Lewis@dc.gov

Louis L. Neal, Jr. Esq.
Chief Counsel
Louis.Neal@dc.gov

Kimberly Brown
Paralegal Specialist
Kimberly.Brown6@dc.gov

Kevin Brown
IT Specialist
Kevin.Brown@dc.gov



THANK YOU !

PLEASE CONTACT US AT OPENGOVOFFICE@DC.GOV WITH QUESTIONS,
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