



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

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Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA¹ generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.² Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

¹ 5 U.S.C. § 552.

² See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.³

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.⁴ Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.⁵ See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

³ "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

⁴ See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

⁵ All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

CHART 1		
If	Then	And
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL
		After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.⁶ The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.⁷ If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.⁸ Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

⁶ For example, [these statutes](#) have been found to be covered by Exemption 3.

⁷ For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

⁸ This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law⁹, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.¹⁰

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials¹¹ that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

⁹ It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

¹⁰ Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office [has required](#) Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

¹¹ If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.¹²
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

CHART 2		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

¹² For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

CHART 2 (CONT.)		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	Generally Protects this Type of Information	If this Exemption Applies then Conduct
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (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; (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; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis