

EXEMPTION 7(B)

investigation's subject, and disclosure of the existence of the investigation (which would be revealed by any acknowledgment of the existence of responsive records) could reasonably be expected to interfere with enforcement proceedings.¹³³ In such circumstances, an agency may treat the records as not subject to the requirements of the FOIA. (See the discussion of the operation of subsection (c)(1) under Exclusions, below.)

EXEMPTION 7(B)

Exemption 7(B) of the FOIA, which is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."¹ Despite the possible constitutional significance of its function, in practice this exemption is not often invoked -- for example, it was used just over 200 times by all federal departments and agencies during Fiscal Year 2006.² In the situation in which it would most logically be employed -- i.e., an ongoing law enforcement proceeding -- an agency's application of Exemption 7(A) to protect its institutional law enforcement interests invariably would serve to protect the interests of the defendants to the prosecution as well. Even in the non-law enforcement realm, the circumstances that call for singular reliance upon Exemption 7(B) occur only rarely.

Consequently, Exemption 7(B) has been featured prominently in only one FOIA case to date, Washington Post Co. v. United States Department of Justice.³ At issue there was whether public disclosure of a pharmaceutical company's internal self-evaluative report, submitted to the Justice Department in connection with a grand jury investigation, would jeopardize the company's ability to receive a fair and impartial civil adjudication of several personal injury cases pending against it.⁴ In remanding the case

¹³³ See Attorney General's 1986 Amendments Memorandum at 18-22.

¹ 5 U.S.C. § 552(b)(7)(B) (2000 & Supp. IV 2004).

² See Governmentwide Compilation of All Departments' and Agencies' Annual FOIA Reports, Fiscal Year 2006, available at <http://www.usdoj.gov/oip/fy06.html>.

³ 863 F.2d 96, 101-02 (D.C. Cir. 1988); see also Alexander & Alexander Servs. v. SEC, No. 92-1112, 1993 WL 439799, at *10-11 (D.D.C. Oct. 19, 1993) (citing Washington Post to find that company "failed to meet its burden of showing how release of particular documents would deprive it of the right to a fair trial") ("reverse" FOIA suit), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996).

⁴ Wash. Post, 863 F.2d at 99; see also Palmer Commc'ns v. U.S. Dept of Justice, No. 96-M-777, slip op. at 4 (D. Colo. Oct. 30, 1996) ("[T]he unavoid-

(continued...)

EXEMPTION 7(C)

for further consideration, the Court of Appeals for the District of Columbia Circuit articulated a two-part standard to be employed in determining Exemption 7(B)'s applicability: "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings."⁵ Although the D.C. Circuit in Washington Post offered a single example of proper Exemption 7(B) applicability -- i.e., when "disclosure through FOIA would furnish access to a document not available under the discovery rules and thus would confer an unfair advantage on one of the parties" -- it did not limit the scope of the exemption to privileged documents only.⁶

EXEMPTION 7(C)

Exemption 7(C) provides protection for personal information in law enforcement records. This exemption is the law enforcement counterpart to Exemption 6, which is the FOIA's fundamental privacy exemption. (See the discussions of the primary privacy-protection principles that apply to both exemptions under Exemption 6, above.) Exemption 7(C) provides protection for law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹ Despite their similarities in language, though, the relative sweep of the two exemptions can be significantly different.

Whereas Exemption 6 routinely requires an identification and balancing of the relevant privacy and public interests, Exemption 7(C) can be even more "categorized" in its application. Indeed, the Court of Appeals for

⁴(...continued)

able conclusion is that granting the requested relief would harm this court's ability to control the use of discovery materials in the criminal case. That is an unacceptable interference with a law enforcement proceeding as defined by Exemption 7(A). Moreover, disclosure of the material sought under these circumstances would seriously interfere with the fairness of the procedures as defined by Exemption 7(B)."

⁵ 863 F.2d at 102; cf. Dow Jones Co. v. FERC, 219 F.R.D. 167, 175 (C.D. Cal. 2002) (finding that there is "no evidence that any trial or adjudication" is pending and that the agency has not demonstrated that release "would generate pretrial publicity that could deprive the companies or any of their employees of their right to a fair trial," and accordingly ruling that the exemption did not apply).

⁶ Wash. Post, 863 F.2d at 102.

¹ 5 U.S.C. § 552(b)(7)(C) (2000 & Supp. IV 2004).