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FBI Law Enforcement Bulletin

The Investigation of Fatal Fires

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The Cover:

An 8-alarm fire in a New York City department store in which there were 12 fatalities resulted in an arson homicide fire investigation. See article p. 1.

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William H. Webster, Director

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The Freedom of Information Act

An Overview for Law Enforcement Professionals

"The FOIA applies to virtually all records compiled by agencies of the Federal Government, but does not govern records in the possession of the Congress, the courts, or the Executive Office of the President."

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, was enacted in 1966 after a decade of public debate. Although public use of the act was relatively rare initially, the FBI alone received over 15,500 requests in 1985, requiring the full-time efforts of over 350 employees to process.

The FOIA applies to virtually all records compiled by agencies of the Federal Government, but does not govern records in the possession of the Congress, the courts, or the Executive Office of the President. All information which does not fall within nine specific exemptions from disclosure is required to be released upon request by any person, institution, association, or corporate entity. It should be noted that while the exemptions authorize withholding of material, they do not prohibit its release. The agency may choose, as a matter of administrative discretion, to release material which could otherwise be protected, unless the disclosure of such material would be prohibited by another statute.¹

The FOIA specifically excludes from mandatory disclosure material which falls within nine categories, described generally as follows:

1) Classified national security information. This exemption will be discussed in more detail below.

2) Information which is purely internal and of no concern to the general public, or material which, while of some public interest, would, if disclosed, jeopardize an agency's ability to fulfill its statutory obligations. This provision has been successfully employed to protect portions of FBI and other law enforcement agencies' manuals, the disclosure of which would harm law enforcement efforts by revealing standard investigative procedures.

3) Material whose release is restricted or prohibited by another Federal statute, or in certain cases, specific material which another statute permits the agency to withhold in its discretion. For example, Federal income tax return information compiled by the IRS cannot be disclosed to third parties under the FOIA. An agency regulation alone is insufficient to exempt the material from the Freedom of Information Act.

4) Commercial or financial information submitted to the Government by businesses or individuals.

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Such material is exempt if its disclosure would either impair the ability of the Government to obtain similar information in the future or cause substantial competitive harm to the submitter.

- 5) Material which would be legally privileged from discovery in the course of litigation with the agency. This exemption is used primarily to withhold drafts of documents, recommendations to superiors, and other information which would reveal agency internal deliberative procedures, attorney-client confidences, and litigation strategies.
- 6) Information which would cause a clearly unwarranted invasion of personal privacy, if released.
- 7) Investigatory records compiled for law enforcement purposes. This exemption will also be analyzed below.
- 8) Information regarding bank audits by Federal officials.
- 9) Geological and geophysical information and data, including maps concerning oil wells.

It should be noted that these exemptions are not mutually exclusive. The same information may be exempt because it is classified national security information (exemption 1), provided by a confidential source during a criminal investigation (exemption 7(D)), the release of which would invade the privacy of some other individual (exemptions 6 and 7(C)). Thus, even if the material fails to fully meet the requirements of one exemption, it may well satisfy the criteria of another exemption.

Even where a page contains exempt information, other information on the page which is not excluded from

disclosure must be released if it is reasonably segregable from exempt material. A requester who believes that an agency is withholding information which does not properly fall within the nine enumerated exemptions has a right to file suit in Federal court to compel release of the contested material. To date, well over 2,000 such lawsuits have been adjudicated, and this figure does not include numerous other cases which were filed, but resolved or dropped before the court ruled on the issues.² Even so, some questions regarding the proper application of FOIA exemptions remain unresolved, and new issues regularly arise. In a FOIA suit, the judge is not required to defer to the agency's prior determination, except possibly in the case of classified national security information. Rather, the court is obligated to review the material as if it were now being evaluated for withholding for the first time.

Two exemptions are of primary concern to law enforcement agencies. Exemption 1 of the act authorizes the withholding of all documents properly classified for national security purposes. Classification of U.S. records is governed by an Executive Order issued by the President. While these orders may be modified from administration to administration, the basic provisions remain essentially intact. Executive Order 12356, presently in effect, specifically provides that "unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security." Thus, under appropriate circumstances, information supplied to the FBI and other Federal law enforcement agencies by foreign police will be protected under this exemption.

Where a requester files suit in court to compel release of classified in-

formation, the Federal courts are entitled to review the classified material, but only to determine whether the information does, in fact, properly fall within the criteria of the Executive Order in effect at the time the agency determination is made. Neither the party seeking the information nor his attorney are entitled to review the withheld material, and when explanations for withholding are considered too sensitive to be placed in the public record, they are made *in camera*.

In reaching its conclusion, the court is obligated to give great weight to the agency's determination as to what material would, if released, pose a threat to national security. As a practical matter, it is rare for a court to order the release of material which an agency has classified. Indeed, judicial opinions have repeatedly emphasized that this exemption "bars the court from prying loose from the government even the smallest bit of information that is properly classified." Equally significant is judicial recognition that information, which may appear innocuous on its face, may nevertheless qualify for protection if the information, when viewed in its full context, would have an adverse impact on the national security. In this same light, where the very fact that the information requested has been compiled by the Government is sensitive, the Government is entitled to refuse to confirm or deny even the existence of the information. Thus, the FBI routinely refuses to answer inquiries concerning wiretaps installed for national security purposes.

Exemption 7 of the FOIA is specifically designed to protect sensitive law enforcement records. Originally, this provision effectively exempted from

disclosure all investigatory files. In 1974, however, in the aftermath of the Watergate scandal, Congress narrowed this exemption to permit nondisclosure of investigatory records only if withholding could be justified by one of six specified types of harm. The provision, in its entirety, now exempts from disclosure:

"Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record 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, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel." 5 U.S.C. § 552 (b)(7)

As can be seen from the wording of the statute itself, this exemption protects a wide range of law enforcement-related material.

Records compiled in conjunction with civil as well as criminal law enforcement proceedings fall within the meaning of "investigatory records." Also, the exemption is not restricted to investigations of Federal violations, but encompasses the activities of Federal agencies aiding in the enforcement of State and even foreign laws. Although material acquired in connection with an agency's routine monitoring function is not normally considered to be "investigatory," once an agency focuses on

specific possible violations, the "investigatory records" threshold is satisfied. Thus, routine oversight by the Drug Enforcement Administration (DEA) of pharmaceutical production would not fall within the confines of exemption 7. Where, however, allegations or evidence of drug manufacturing violations is received by DEA, information obtained as a result of that agency's subsequent investigation into the possible violations would qualify as "investigatory records." This is true even if no actual violations are ever uncovered and no legal enforcement proceedings are ultimately undertaken.

Precisely what constitutes an investigatory record compiled for law enforcement purposes has been the subject of judicial interpretation on a number of occasions. One viewpoint holds that all records compiled by a criminal law enforcement agency in furtherance of its official duties inherently qualify as "compiled for law enforcement purposes." Other courts have adopted a slightly less expansive approach and require a showing of some legitimate connection between an agency's law enforcement function and the specific investigation at issue. Even under the more-narrow interpretation, a law enforcement agency's records will qualify as "investigatory records compiled for law enforcement purposes" so long as an agency is able to identify a possible violation of a specific statute within its enforcement jurisdiction as the basis for its investigation. Of course, this is only the beginning of the inquiry for FOIA purposes. The agency must further demonstrate that its disclosure of the records sought would result in one of the harms set forth in the six subsections on exemption 7.

“... the courts have consistently recognized that the identities of Federal, State, local, and foreign law enforcement officers can be routinely withheld under [exemption 7(C)].”

Exemption 7(A) authorizes the withholding of investigatory records whose release would interfere with law enforcement proceedings. This has been recognized as a broad, but temporary, withholding authorization. Interference can be potential and need not be concretely demonstrated. Once the law enforcement proceedings are completed, however, exemption 7(A) becomes entirely inapplicable. The requester is then free to make a followup request, and the agency will be required to justify withholding under other subsections of exemption 7 or under other FOIA exemptions. Determining when the investigation has concluded is not always simple. An investigation which is dormant (for example, while a fugitive is being sought) remains eligible for exemption 7(A) protection. Finally, while an investigation may be completed with respect to certain individuals, it may remain active as to other suspects.

Exemption 7(B) is aimed at avoiding prejudicial pretrial publicity and was evidently enacted to ensure that the FOIA's disclosure provisions would not conflict with the sixth amendment of the U.S. Constitution, which guarantees defendants a fair trial. Interestingly, the protections provided by the other subsections of exemption 7 appear to have fully accomplished this purpose, as exemption 7(B) has rarely been invoked.

Exemption 7(C), which protects against unwarranted invasions of individuals' privacy, at first glance, appears to duplicate the protection afforded by exemption 6. However, exemption 6 operates only in the face of *clearly* unwarranted invasions of privacy, while exemption 7(C) protects records whose release would produce an unwarranted invasion of privacy.

The courts have regarded the omission of the word “clearly” in the exemption 7(C) language as an indication that lesser privacy invasions will suffice for withholding personal information in the context of law enforcement investigations. National, State, or corporate entities are not regarded as having privacy rights, however, and neither exemption 6 nor 7(C) will protect their privacy, except in the case of a corporation which is so small that its activities can be identified exclusively with its owner.

In all cases, in reviewing withholdings under exemption 7(C), the court first identifies the extent and nature of the privacy interests threatened by disclosure and the public interests, if any, which would be served by release. The court then balances the privacy interests against any public interests and will sustain the agency's withholding if it concludes that the individual's privacy interest is of greater magnitude than the public interest. Although the need to engage in this balancing sometimes makes the outcome of exemption 7(C) withholdings unpredictable, the courts have consistently recognized that the identities of Federal, State, local, and foreign law enforcement officers can be routinely withheld under this exemption. Consequently, exemption 7(C) is normally invoked to protect the identities of FBI Agents and other Bureau employees. (Because they hold positions of some public prominence, identities of senior, supervisory law enforcement personnel, such as FBI Special Agents in Charge, are not ordinarily withheld under exemption 7(C), but as will be discussed shortly, such senior officials can always be protected under exemption 7(D) if they act as confidential sources.) Judges have frequently observed that the potential for harassment of law enforcement officers

clearly tips the privacy interest in favor of nondisclosure. Only where there are not merely the perennial allegations by criminals of misconduct by law enforcement officers, but specific credible evidence that improprieties actually occurred, have courts occasionally seen fit to release the officials' names.

In the case of third parties who are mentioned in criminal investigatory files, the case law clearly protects such persons when they are investigative targets or associates of targets and no charges are ultimately filed against them. In such cases, Federal law enforcement agencies routinely refuse to even confirm or deny that they have records on such persons and have won the endorsement of the courts for this practice. Even where charges are ultimately brought, much personal information about the subject may remain confidential, unless disclosed in court proceedings. Obviously, any material readily available in the public record, either through court filing or press releases, can lose the protection of this exemption. There are, of course, instances in which both public and privacy interests are great, as in the case of notorious criminals or of public figures, and it is not always easy to predict how a court may ultimately balance these countervailing interests. But in the vast majority of cases, exemption 7(C) has proven wholly adequate to protect sensitive personal information.

It should further be noted that exemption 7(C) generally protects only living persons on the principle that an individual's right to privacy dies with him. However, in some instances, information of an exceptionally personal nature which could cause extreme distress to surviving family members if disclosed may be withheld. The mere

fact that records are old does not diminish the protections of exemption 7(C), so long as it appears possible that the individuals discussed could still be alive.

For the law enforcement community, exemption 7(D) probably represents the most important of all FOIA exemptions. This exemption protects the identities of all confidential sources, and in the case of national security or criminal law enforcement investigations, protects all information furnished by the confidential source. In enacting this provision, Congress clearly recognized the fundamental role played by sources in efficient law enforcement operations, and the courts have been extremely reluctant to force the disclosure of any material which would in any way reveal confidential sources.

The courts have consistently given an appropriately broad interpretation to the term "confidential source." The phrase is intended to be construed more broadly than "informant" and applies to anyone who gives information to law enforcement authorities with the expectation that it will not be unnecessarily divulged. The interviewing officer need not expressly promise confidentiality to the source. Indeed, in most instances, confidentiality is implied under the surrounding circumstances. For example, it is clear that anyone providing information regarding serious criminal activity does so expecting that the fact that he supplied incriminating information to the police will not be disclosed. While at present there is a somewhat technical dispute as to the specific legal standard which must be met in order for confidentiality to be implied, it seems clear that at least in the context of a criminal investigation, exemption 7(D) protection is appropriate for virtually anyone who provides information.

Similarly, the term "source" has been construed so broadly that it can potentially encompass nearly everyone. Unlike under exemption 7(C), which does not protect corporate or institutional privacy, corporations and institutions *do* qualify for protection as sources. State, local, and foreign law enforcement agencies and their officers (*including* senior supervisory personnel) are all routinely held to be confidential sources. Indeed, because of the working relationship between Federal law enforcement officers and their counterparts at the State, local, and international level, there is a virtual presumption that such police entities will receive source protection. Of course, private citizens and even most government employees can also be sources. Only *Federal* law enforcement officers cannot be sources, because providing information on suspected violations of the law is the specific objective of their official duties. If, however, Federal officers are merely transmitting information which was originally provided by a source, the source's protection is not lost merely because his information passed through Federal law enforcement channels.

To illustrate the actual operation of this distinction, a surveillance report by an FBI Agent of his direct observations of the activities of a suspected violator would not be accorded exemption 7(D) protection (although it might be protected under other exemptions). On the other hand, if the details of the investigative target's activities have been learned through an interview of a private citizen, or have been provided by a non-Federal police organization, the information will be protected under exemption 7(D) when subsequently included in the Agent's investigative report.

The first clause of exemption 7(D) protects only the identities of confidential sources, but extends this protection to both civil and criminal enforcement proceedings. Again, in recognition of the extreme sensitivity of sources' identities, the courts have not hesitated to approve the withholding of any material which could reasonably be expected to lead to their identification. Thus, in instances where only one or a few individuals would have access to the information provided by the source, it is justifiable to withhold all of this material to prevent the inadvertent disclosure of the source's identity.

In the case of a national security or criminal investigation, the second clause of exemption 7(D) protects not only the identity of the source but all source-provided information as well. One of the most recent court decisions on this issue illustrates how sweeping this protection can be. The sole document sought from the FBI by the FOIA requester was a photograph of a public demonstration. Although it was established that the photograph had been provided by a confidential source, it was equally evident that disclosure of the photograph would in no way compromise the source. Anyone of dozens, perhaps hundreds, of people could have taken the picture. Nevertheless, the court unequivocally held that the photograph could be withheld under exemption 7(D) simply on the basis that it had been supplied by a confidential source in connection with an FBI criminal investigation.

It can be seen that once exemption 7(D) applies to a source or source-provided information, its protections are absolute. In contrast to exemption 7(C), in which privacy protection generally terminates at death, a source's identity and information remains protected even after death. The courts

“Where the sensitivity of the material sought is apparent, the courts have frequently expanded the protections of the act’s exemptions to effectively preclude disclosure.”

have reasoned that such continued protection is essential to allay sources’ fears of reprisals against their friends or families after the source’s death. Similarly, the disclosure of a source’s identity in no way mandates the release of the information the source provided, and conversely, publication of source-provided material does not render withholding of the source’s identity indefensible. Moreover, an unauthorized disclosure of information pertaining to sources (i.e., a “leak”) does not constitute a waiver of this exemption’s protections.

Law enforcement techniques and procedures not known to the general public are exempt from disclosure pursuant to exemption 7(E). In the hearings preceding its enactment, Congress specified that this exemption did not apply to such well-known, routinely used techniques such as fingerprints, lie detectors, or ballistics tests. But even these investigative tools may qualify for protection if they are used in conjunction with other nonpublic techniques or are employed in an unusual fashion. In addition, particular details of well-known techniques are also safeguarded by this exemption. Thus, the specific equipment used in electronic surveillance, the actual questions posed in a lie detector examination, or the particular criteria set forth in hijacker profiles all deserve protection under this exemption. Additionally, a recent court decision has held that the Secret Service properly withheld the weight, specialized equipment, and contract specifications pertaining to two armored limousines purchased for the President. The Court found no basis to distinguish the “protective” techniques employed by the Secret Service to prospectively combat crime from the investigative techniques used after

a crime has been committed. Obviously, it would be self-defeating to list here most of the techniques which do fall within the protection of exemption 7(E), but from the previous example, it is evident that all reasonable claims of exemption under this provision are accepted by the courts.

Exemption 7(F) protects information which would endanger the life or physical safety of law enforcement personnel. Typically, this exemption is employed, often in conjunction with exemption 7(C), to safeguard the identities of certain Federal law enforcement officers, particularly undercover agents. As previously noted, the FBI ordinarily excises the names of Agents and employees under exemption 7(C) alone. Where, however, there is a realistic possibility of retaliation, use of exemption 7(E) for Agents’ and employees’ identities would be entirely appropriate. Since protection of the identities of State, local, and foreign law enforcement officers is already fully ensured through the use of exemption 7(D), exemption 7(F) is not usually invoked to protect non-Federal police. In a somewhat novel approach, the use of this exemption to withhold information concerning the manufacture of homemade weapons was also recently sustained by a court. The court reasoned that such weapons could—and logically would—be used against law enforcement officers if the details of their construction were publicly revealed.

Summary

These latter examples of judicial interpretation of the FOIA, approval of exemption 7(E) to protect Presidential security equipment, and the extension of exemption 7(F) to cover weapons-manufacturing information perhaps best illustrate the attitude of the Federal courts toward the Freedom of In-

formation Act. Where the sensitivity of the material sought is apparent, the courts have frequently expanded the protections of the act’s exemptions to effectively preclude disclosure. The FOIA is valuable because it permits the public to gain some insight into the operations of the massive Federal law enforcement community. But certainly the system is not perfect, and national law enforcement agencies would doubtlessly prefer to be relieved of their considerable burden of processing records under the act. In most instances, the broad protections afforded by FOIA exemptions for law enforcement records, coupled with the generally intelligent and responsible review of FOIA withholdings by the courts, have not resulted in legitimate law enforcement operations being hindered by the act. In a limited number of situations, however, disclosure of information through the FOIA could have an adverse effect on law enforcement activities. The Justice Department maintains close contact with the FBI and all Federal law enforcement agencies on these issues and is keenly aware of the hazards which could develop through release of sensitive investigatory information. Presently, Justice is seeking legislative amendments to the FOIA to eliminate any dangers to law enforcement operations which could possibly result from the FOIA’s disclosure requirements.

FBI

Footnotes

¹Stephen P. Rigglin, “U.S. Information Access Laws: Are They a Threat to Law Enforcement?” *FBI Law Enforcement Bulletin*, vol. 53, No. 7, July 1984, p. 13.

²More-detailed information, including case citations, is available through the U.S. Department of Justice publication, *The Freedom of Information Case List*, for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.