



UNITED STATES DEPARTMENT *of* JUSTICE

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# **Advanced Considerations Exemptions 6 & 7(C)**



## *The Basics – Exemptions 6 and 7(C)*

The same analysis is used for both Exemptions 6 and 7(C):

Step 1 -- Threshold satisfied?

Step 2 -- Privacy interest implicated?

Step 3 -- “FOIA public interest” in disclosure?

Step 4 -- Balancing interests.



## *Roadmap for Advanced Concepts*

**Glomar:** When presented with a targeted third-party request, first consider a Glomar response.

- Glomars protect the existence of responsive records

**Categorical denial:** If the Glomar has been pierced, next consider a categorical denial.

- Categorical denials protect the contents



## *The Glomar Response*

When a request seeks records concerning an identifiable individual and the records are of a particularly sensitive nature, it may be necessary to neither confirm nor deny the existence of the records, or “Glomarize.”



## *The Glomar Response*

- Must be a targeted third-party request.
- Cannot acknowledge the very existence of records.
- May need to “bifurcate” a request to process it – separate third-party subjects from other subjects.



## *The Glomar Response*

- Official acknowledgement or admission waives a Glomar response
- Gets to the core purpose of a Glomar response, which distinguishes between **existence** and **content**



## *The Glomar Response*

Who Made the Acknowledgment:

- Your Component
- Another Component Within Your Agency
- Another Federal Agency
- The Target of the Investigation



## *The Glomar Response*

How was the Investigation Acknowledged?

- Statement to media
- Formal press release
- Unofficial leak





## *The Glomar Response*

The formality of admission is important:

“[A]n individual’s privacy interest is not extinguished merely because the media reports or the public speculates that the individual may have been the subject of an investigation.”

Bartko v. DOJ, 62 F. Supp. 3d 134, 143 (D.D.C. 2014).



## *The Glomar Response*

“A statement to the media made by a person authorized to speak for the agency certainly suffices.”

Bartko v. DOJ, 62 F. Supp. 3d 134, 144 (D.D.C. 2014).



## *The Glomar Response*

An acknowledgement or admission by one agency component can operate as an acknowledgement or admission by the entire agency.

See Bartko v. DOJ, 62 F. Supp. 3d 134 (D.D.C. 2014).



## *The Glomar Response*

An acknowledgement or admission by one agency generally **does not** operate as an acknowledgement or admission for another agency.

People for the Ethical Treatment of Animals v. NIH, 745 F.3d 535 (D.C. Cir. 2014).



## *The Glomar Response*

“Here, notwithstanding other entities’ acknowledgment of investigations, NIH’s own official acknowledgment that it had investigated the named researchers would carry an added and material stigma.”

People for the Ethical Treatment of Animals v. NIH, 745 F.3d 535, 542 (D.C. Cir. 2014).



## *Categorical Denials*

When a third-party request seeks records concerning an identifiable individual and the agency or the subject of the request has already publically confirmed the existence of the records.

See DOJ v. Reporters Committee, 489 U.S. 749, 777 (1989).



## *Categorical Denials*

- Must be a targeted third-party request
- May still need to “bifurcate” a request to process it – separate third-party subjects from other subjects



## *Categorical Denials*

What privacy interest is being protected?

- Effectively operates similarly to a Glomar response, but with one key distinction.





## *Categorical Denials*

A Glomar response protects a third-party's privacy interest as to whether or not the government even maintains records on them.

A categorical response protects a third-party's privacy interest in the content of the records. Existence of the records is known.



## *Categorical Denials*

### *Select Cases*

Court held that the investigatory file of former Congressmen Tom Delay could not be withheld, in full, on a categorical basis.

Crew v. DOJ, 746 F.3d 1082 (D.C. Cir. 2014).



## *Categorical Denials*

### Considerations:

#### Privacy Interest:

- Avoiding stigma of having name associated with criminal investigation
- Avoiding disclosure of the contents of the investigative files



## *Categorical Denials*

### Public Interest:

“Weighty interest in shining a light on the FBI’s investigation of major political corruption and the [Department’s] ultimate decision not to prosecute a prominent member of Congress . . . .”

Crew v. DOJ, 746 F.3d 1082, 1093 (D.C. Cir. 2014).



## *Categorical Denials*

### Balancing:

In such cases, the agency should look to the “rank of the public official involved and the seriousness of the misconduct alleged.”

Kimberlin v. DOJ, 139 F.3d 944, 949 (D.C. Cir. 1998).



## *Categorical Denials*

Agency must clearly define the category, or categories, of responsive records being withheld.

“The purpose of [a] categorical exemption is to provide ‘workable rules’ for agencies in future cases.”

Pickard v. DOJ, No. 06-00185, 2014 WL 1868841 (N.D. Cal. May 7, 2014).



## *Considerations*

Glomar responses and categorical denials are not appropriate when:

- There is a substantial FOIA Public interest in the requested information that outweighs the privacy interest
- The third-party subject is deceased
- The subject waives privacy rights



## *Hypothetical No. 1*

Pam, an employee at Dunder Mifflin, makes a request to the FBI for records concerning herself and her boss Michael Scott. The FBI/DOJ has made no official acknowledgment of an investigation. Can the FBI assert a 6/7C Glomar response?





## *Hypothetical No. 1 – cont'd*

There are numerous news articles speculating about the paper scam investigation into Michael Scott. Can the FBI assert a 6/7C Glomar response now?



## *Hypothetical No. 1 – cont'd*

One day, Michael Scott is interviewed by the local news and publicly states that he was the subject of an FBI investigation, while also asserting his innocence. If there is no overriding FOIA public interest, how should the FBI respond to the FOIA request for records that concern him?



## *Hypothetical No. 2*

Dwight, an employee at Dunder Mifflin, makes a request to the FBI for records concerning Senator Robert Lipton. The Senator issued a press release that he was investigated for bribery in connection with earmarking funds that would benefit a particular real estate developer but no charges were brought. How should the FBI respond to the FOIA request?



## *Practical Application*

Generally, an agency can issue a Glomar response or categorical denial without first conducting a search.

If a Glomar response or categorical denial are not appropriate, the agency generally needs to search for and process responsive records.



## *Conclusion*

When presented with a targeted third-party request, first consider a Glomar response, and then consider a categorical denial.

- Glomar responses protect the existence of records
- Categorical denials protect the content of records when their existence is known