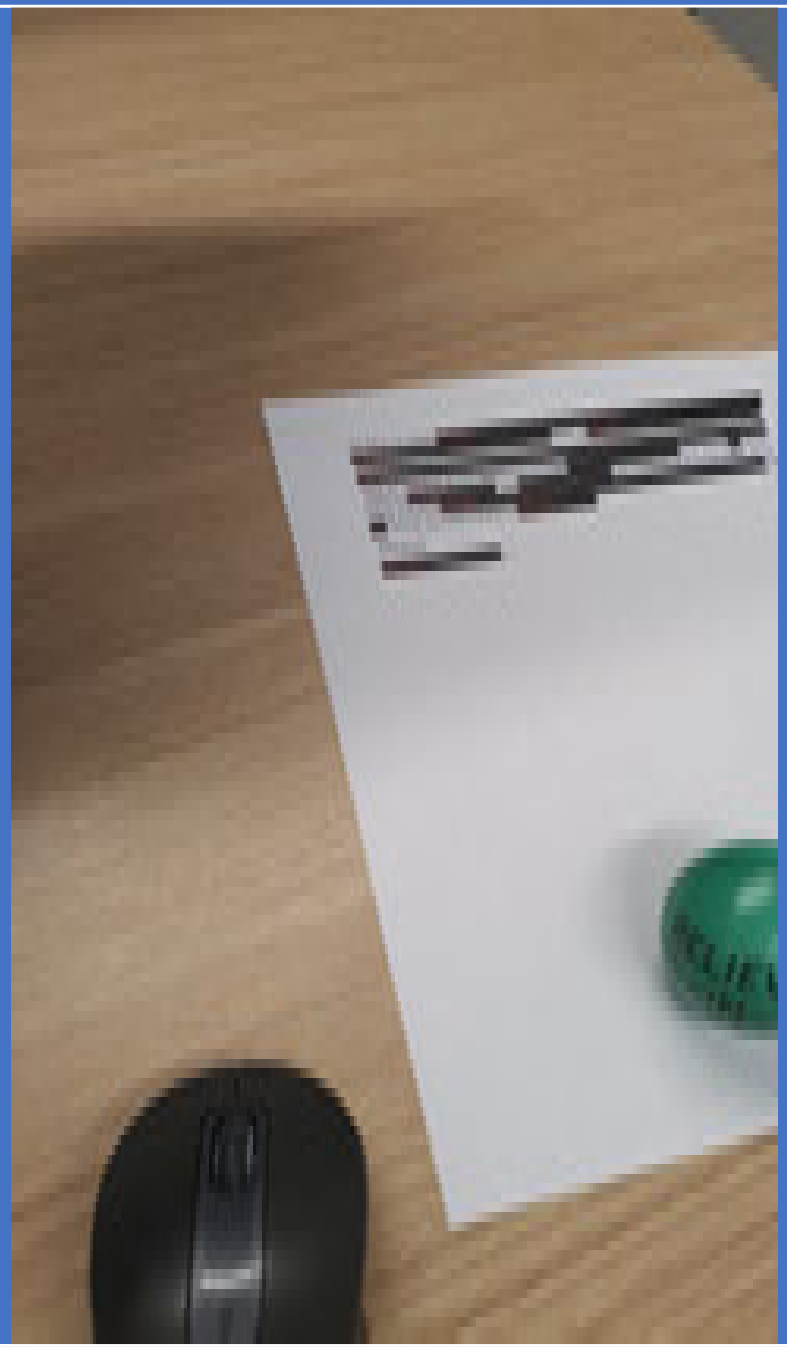

COMMONLY USED DC FOIA EXEMPTIONS & REDACTION

OFFICE OF OPEN GOVERNMENT

May 14, 2026

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If you have questions during the presentation, please place them in the chat, or use the raised-hand feature in Teams at the end of my presentation.

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2025 FOIA Report

Details District's Comprehensive FOIA Activity

2

Trade Secrets

D.C. FOIA Exemption #1

3

Personal Privacy

D.C. FOIA Exemption #2

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Law Enforcement

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Agency Commun.

D.C. FOIA Exemption #4

6

Redaction

Identifying and obscuring exempt information

Course Outline

Exempt?

Exempt means that certain records or information held by government agencies are not required to be disclosed to the public, even in the face of an appropriate or complete FOIA request.

D.C. Official Code § 2–534

COMMONLY USED FOIA EXEMPTIONS

2025 REPORT & AGENCIES

1

2025 FOIA Report

Details - District's Comprehensive FOIA Activity

2

Personal Privacy

D.C. FOIA Exemption #2

3

Law Enforcement

D.C. FOIA Exemption #3

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Trade Secrets

D.C. FOIA Exemption #1

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Agency Commun.

D.C. FOIA Exemption #4

2025 FOIA Report

Each year, the Mayor requests info from each public body and submits a 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)


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We will cover the following statistics:

- **Total FOIA Requests in 2025;**
- **Exemptions used over 200 times; and**
- **Agencies with Highest Requests.**

2025 FOIA REPORT STATISTICS

- Access the 2025 FOIA Report here:

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

- Total Number of FOIA Requests in 2025: **13,923**
  - *Total Number in 2024:* ***12,260***
  - *Total Number in 2023:* ***10,913***

AGENCIES WITH THE HIGHEST NUMBER OF REQUESTS

- Alcoholic Beverage and Cannabis Admin (ABCA) **424** (I)
- Board of Elections (DC BOE) **476** (I)
- Dept. of Housing & Community Dev. (DHCD) **223** (D)
- Dept. of Buildings (DOB) **1,253** (I)
- Fire & Emergency Med Services (FEMS) **1,575** (D)
- Metro Police Dept. (MPD) **3,678** (I)
- Office of Unified Comm. (OUC) **396**
- DC Health **592** (D)
- District Dept. of Transportation (DDOT) **560** (D)
- Dept. of Licensing & Consumer Protection (DLCP) **346** (I)
- Department of Energy & Environment (DOEE) **689** (I)
- Homeland Security & Emergency Management (HSEMA) **393** (I)
- Office of the Chief Financial Officer (OCFO) **282** (D)

MOST FREQUENTLY USED D.C. FOIA EXEMPTIONS

- **Exemption 1 "Trade Secrets" – 373 (2024: 327)**
- **Exemption 2 "Personal Privacy" – 2,399 (2024: 4,615)**
- **Exemption 3 "Law Enforcement" – 1,531 (2024: 2,120)**
- *The most frequently used sub-category of Exemption 3 was (c) - Records that constitute an unwarranted invasion of personal privacy*
- **Exemption 4 "Agency Communication" – 301 (2024: 371)**

DESCRIPTION OF THE EXEMPTIONS

- **Exemption 1:** Protects trade secrets and commercial or financial information obtained from outside the government, and disclosure would result in substantial harm to the person's competitive position.

- **Exemption 2**: Protects information about individuals where 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 and the Office of Police Complaints).

- **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).

"The District of Columbia FOIA … was modeled on the corresponding federal statute, … and many of its provisions closely parallel those of the federal act. Like the federal FOIA, the local FOIA embodies a strong policy favoring disclosure of information about governmental affairs and the acts of public officials, a policy which requires the courts to read narrowly any statutory exemptions from disclosure."

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

#1 - TRADE SECRETS

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

- (1) is a trade secret and 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

- 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).
- 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.
- **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)

Exemption 4: Trade secrets or commercial or financial information that is confidential or privileged. **5 U.S.C. § 552(b)(4)**

"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 Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (June 24, 2019)**

(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 that the information is "CONFIDENTIAL."

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

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

PERSONAL PRIVACY – EXEMPTION 2

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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. Board of Parole*, 567 A.2d 909, 913 (D.C. 1989).

D.C. FOIA exempts personal information of public employees, unless the requester 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)**. D.C. Court of Appeal quoted a previous FOP case (75 A.3d, 266 (2013)) that borrowed from a federal Court of Appeal case, U.S. *Dept. of Defense v. Fed. Labor Relations Authority*, 510 U.S. 487 (1994).

D.C. Court of Appeals in the 2015 case, balanced the privacy interest of individuals with the public's interest in disclosure, and found that the private interest was not outweighed by any public interest identified by the FOP. Its intended use of the information to educate police officers and defend those facing disciplinary action is a private interest of the FOP and its members and not a public interest.

PERSONAL PRIVACY – FEDERAL V. D.C.

D.C. FOIA's privacy exemption (#2) appears broader than that of federal law (#6). 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. § 552(b)(6)), D.C. FOIA exempts all information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The Supreme Court held that based on the legislative history of FOIA, Congress intended for the term **"similar files"** to be interpreted broadly. The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information." Rather, the Court stated that information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection. However, the threshold of Exemption 6 has been found not to be met when the information cannot be linked to a particular individual, or when the information pertains to federal government employees but is not personal in nature. Look to 5 U.S.C. § 552(b)(7)(c)

U.S. Department of State v. Washington Post Co., 456 U.S. 595 (1982)

PERSONAL PRIVACY EXEMPTION 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 Committee 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's 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)**

The FOP cases on slide 21 and U.S. *Dept. of Defense v. Fed. Labor Relations Authority* relied on this case.

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

- 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.
- Absent a more than *de minimis* privacy interest, the underlying principles of FOIA would require disclosure of the records.
- 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.
- 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."
- When privacy interests are implicated, the burden is on the requester 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.

* If the information is for the requester's own sake, the privacy interest is not outweighed by the public's interest.

Privacy Exemption Balancing Test Examples

IN RE APPEAL OF WASHINGTON POST CO.

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

No. 01-170008, 48 D.C. Reg. 8629 (Office of the Secretary, Sept. 7, 2001)

IN RE APPEAL OF WALTER THOMAS

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.

No. 04-409467, 51 D.C. Reg. 6969 (Office of the Secretary, June 21, 2004)

#3 - LAW ENFORCEMENT

- Interfere with Investigation
- Right to a Fair Trial
- Personal Privacy

LAW ENFORCEMENT EXEMPTION

- D.C. FOIA exempts certain investigatory records compiled for law enforcement purposes (including the records of Council investigations).
- 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 personal privacy, disclose the identity of a confidential source, disclose investigation techniques, or endanger the lives or physical safety of law enforcement officers. D.C. Official Code § 2-534(a)(3).
- 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.") See also, *Barry v. Washington Post Co.,* 529 A.2d at 321-22 (D.C. 1987).

LAW ENFORCEMENT EXEMPTION

- While the threshold requirement for this exemption to apply is that the record or information sought must have been compiled for a law enforcement purpose.
- Courts have held that the law enforcement purpose encompasses a wide variety of records and information.
- 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. Also, 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**.

LAW ENFORCEMENT EXEMPTION

- Courts grant agencies wide latitude in defining their "law enforcement purposes."
- However, courts have denied protection under law enforcement exemption (1) when the agency did not adequately demonstrate that the records were compiled as part of the agency's **stated law enforcement purposes** and duties; (2) when the records existed independently of the **stated law enforcement purpose**; or (3) when 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[‘s lives], 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

- 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).
- However, another statute (D.C. Code Ann. § 5-113.06) provides that all complaints and other specific police records shall be open for inspection.

Therefore, D.C. Official Code § 2-534(c) must not "operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law." Example, 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

- Exemption 3 exempts from disclosure "[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."
- 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. Likewise, the Supreme Court has interpreted the equivalent exemption (5 U.S.C. § 552(b)(7)(C)) covering information relating to law enforcement as more expansive than the federal statute's personnel, medical and similar files privacy – Exemption 6. *See United States Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 756 (1989).

LAW ENFORCEMENT EXEMPTION 3(C) v. PERSONAL PRIVACY IN CIVIL CASES UNDER FEDERAL FOIA

- Under Federal FOIA, (b)(7)(c) has been applied in civil cases. See *Safecard Services, Inc., Appellant, v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991)*. The Court of Appeal agreed with the District Court that the SEC had correctly applied (b)(7)(c) by deleting/redacting names and addresses of third parties mentioned in witness interviews, of customers listed in stock transaction records obtained from investment companies, and of persons in correspondence with the SEC. The Court held that "The public interest in disclosure is not just less substantial, it is insubstantial."

LAW ENFORCEMENT EXEMPTION 3(C)

- 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's interest in disclosing the information. See *Safecard Services, Inc., Appellant, v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991).* In putting forward this balancing test, on appeal, the Court cited, *Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 762, 109 S. Ct. 1468, 1475-76, 103 L. Ed. 2d 774 (1989).*

LAW ENFORCEMENT EXEMPTION 3(C)

- 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. DO*J, 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), in which the Court states that "clear privacy interest exists with respect to names, addresses, and other identifying information," even if it is already available in other public filings.
- Compare with Maryland Court of Appeal Case - *Mayor & City Council of Ocean City v. The Washington Post,* No. 774, Sept. Term, 2024

LAW ENFORCEMENT EXEMPTION 3(C)

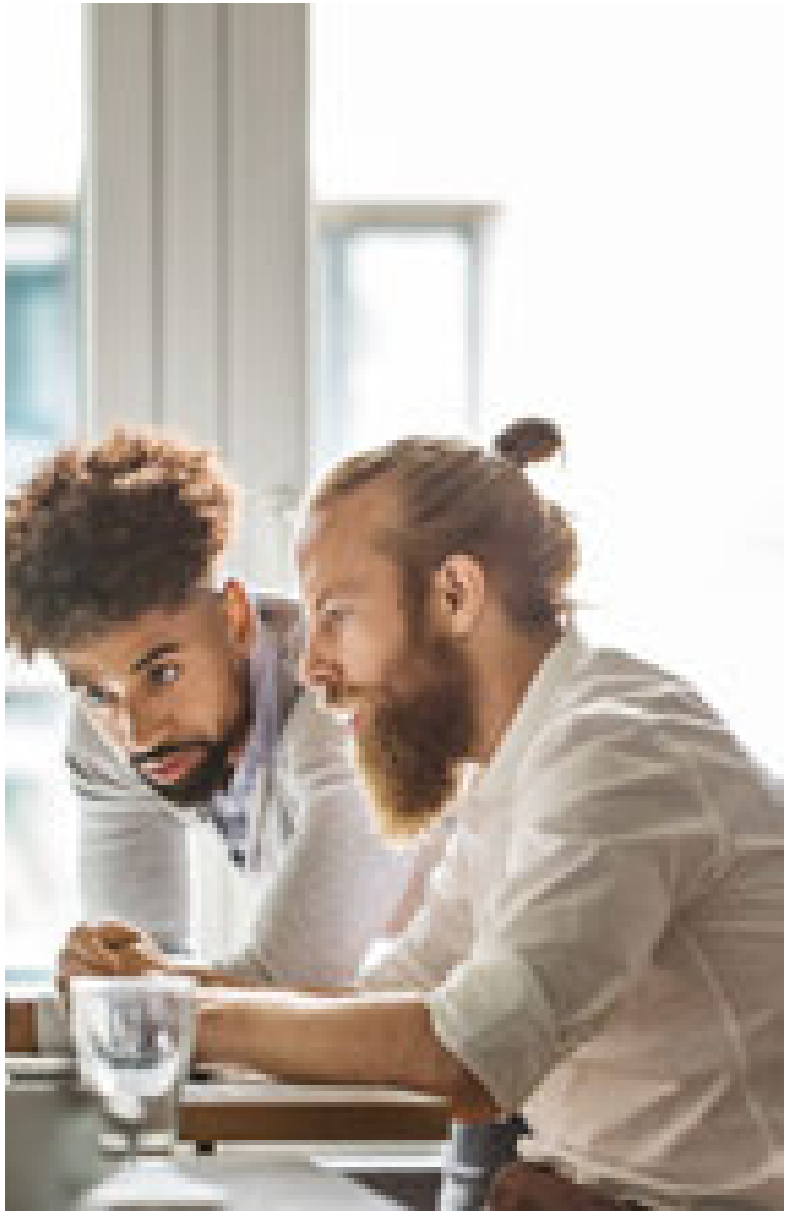
- However, it should be noted that prior to the *Reporters Committee* and *SafeCard* decisions, courts ordinarily held that because Exemption 7(C) involves a balancing of the private and public interests on a case-by-case basis, there existed no "blanket exemption for the names of all [law enforcement] personnel in all documents" (*Lesar, 636 F.2d at 487*). Nonetheless, absent a demonstration of significant misconduct on the part of law enforcement personnel or other government officials, most courts have declared their identities exempt from disclosure pursuant to Exemption 7(C) (*Manna*, 51 *F.3d at 1166*). Those few decisions ordering disclosure of the names of government investigators -- other than when demonstrated misconduct has been involved -- either predate *Reporters Committee* or else the court found an unusually significant public interest in disclosure.
- Note though, there are two Court Appeals for the Ninth Circuit cases (over ten years after *Reporters Committee)* that ignored well-recognized privacy interests and refused to adhere to the narrow definition of public interest set forth in *Reporters Committee.* The cases are *Lissner v. United States Customs Service, 241 F.3d 1220 (9th Cir. 2001)* and *Favish v. Office of Independent Counsel, 217 F.3d 1168 (9th Cir. 2000).*

4 - AGENCY COMMUNICATION

Inter-Agency or Intra-Agency Memo

Inter-Agency or Intra-Agency Letters

Litigation/Civil Discovery Privileges



AGENCY COMMUNICATION: AGENCY 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 other than a public body in litigation with the public body.

LITIGATION-BASED EXEMPTION

D.C. Official Code § 2-534(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 (D.C. Official Code § 2-534(e)) 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). 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

Instance in which the Mayor's Office relied on the common law deliberative process privilege to find that documents are exempt from disclosure under D.C. Official Code § 2-534(a)(4) -

- *Alonzo L. Williams v. Office of Superintendent*, FOIA App. No. 95-10 (Office of the Mayor, Aug. 11, 1995): memoranda from a hearing examiner was withheld, whose recommendation was rejected by the Superintendent of Schools, the final arbiter of the decision at issue.

AGENCY COMMUNICATION – WHEN DOES THE EXEMPTION APPLY?

- ✓To fall under Exemption 4, the record must be an inter-agency or intra-agency record (letter or memorandum).
- ✓There must be an applicable litigation or civil discovery privilege (deliberative process, attorney work product, or attorney-client).

DELIBERATIVE PROCESS PRIVILEGE

The Two Elements of Deliberative Process Privilege are:

- Predecisional; and
- Deliberative

PREDECISIONAL

- Predecisional communications precede the adoption of an agency policy.

- For the predecisional element to be found, the agency must be able to identify a decision-making process that led to the creation of the withheld documents.

Note, final agency decision is not required. Concerning federal FOIA, courts have recognized that agencies sometimes decide not to decide.

PREDECISIONAL v. POSTDECISIONAL

- Postdecisional records are not protected by the deliberative process privilege.

- Examples of postdecisional documents:

►Documents that reflect an agency's final position on an issue; so, it is not records of the process, but the final decision concerning a specific issue.

►Documents that explain an agency's actions; not documentation of the decision-making process but explains why the agency has taken a certain position. The public has the right to know about official agency positions.

The common thread in these two examples are post actions – after the decision.

DELIBERATIVE

- Deliberative communications are offered in support of an agency's decision-making process.

- Deliberative process information must reflect deliberative communications -

Examples:
(1) Recommendations
(2) Opinions; some key identifying words are "In my opinion …," or "I believe that …"

AGENCY COMMUNICATION: AGENCY 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. Dept. 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: AGENCY MEMOS & 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.”

CONSULTANT COROLLARY

- Consultants can be those who have a formal, contractual, paid relationship with an agency *(Hoover v. Dept. of the Interior)* as well as those consulted by the agency on an unpaid volunteer basis (*Wu v. National Endowment for Humanities, 460 F. 2d 1030* (*5th Cir. 1972*)).
- In *Wu*, a scholar of Chinese history, who had previously filed an application for a grant from the National Endowment for the Humanities to write a history of the Chinese people, sought disclosure of the reports of the five outside experts who had evaluated his proposal and recommended that it be rejected. The Court denied the disclosure request holding, in part, that the experts' reports were "intra-agency memoranda even though the five professors were not actually agency employees" *(Wu, supra, 460 F.2d at 1032)*.

WHO IS A CONSULTANT?

- The Department of the Interior had consulted local Native American tribes on assignment of water rights. Significantly, the tribes were among many applicants for the water rights.

- The Supreme Court ruled that the tribes could not be considered "consultants" to the Department of the Interior.

- The Court explained that an outsider cannot be a consultant when the outsider is:
- seeking a government benefit
- at the expense of another party.

Dept. of Interior v. Klamath Water Users Protective Assn., 532 *U.S. 1 (2001)*.

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

People for the American Way Foundation v. U.S. Dept. of Educ., 516 F.Supp.2d 28, 36-39 (D.D.C. 2007).

- The court held that 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.
- 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."
- 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.

REDACTION OF RECORDS

Any reasonably segregable portion of a public record MUST be provided to a requester after deletion (removal/redaction) of any exempt portion.

D.C. Official Code § 2-534(b)

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.

A 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 REDACTION CONTINUES

The reasonably segregable requirement is a statutory obligation to consider individual portions of records for disclosure. This prevents the withholding of entire documents simply because an exemption/(s) applies to parts of the document.

D.C. Official Code § 2-534(b) states:

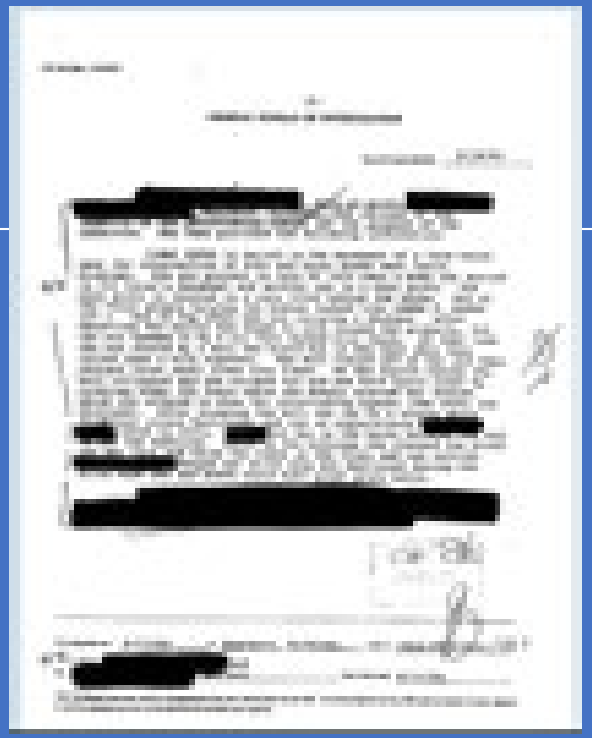
(b) Any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure pursuant to subsection (a) of this section.

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.

REDACTION OF RECORDS

How to Perform Reasonable Redaction of Records



LET US REDACT

Tom Jones' home address is [redacted].

His attendance is required at the conference to be held at Hotel Nuevo Conference Center at 1 East-West Highway.

The information for booking provided by Mary Jane last year needs to be updated. As a government employee and a member of the Training Organization, she is entitled to the government and TO members' discount. Her personal telephone number is [redacted] and her work number is 202 111-1111.

QUESTIONS TO ASK WHEN REDACTING

1. Am I withholding an entire record?

2. Are parts of the record not exempt (releasable)?

3. Have I redacted only the exempt parts, or have I incorporated some non-exempt (releasable) parts?

Answers to RELEASE/WITHHOLD Questions

Q1: Am I withholding an entire record?

Did the search yield responsive records?

If the search yields nothing, then you are **NOT** withholding a record and you are **NOT** required to release records. **NIF**

Is the requester receiving everything found (without any redactions)? **GIF**

If the requester received everything found in full (without redactions), you are not withholding an entire record. You are also not withholding a part of a document.

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 letter that has a someone's Social Security Number)?

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 (releasable)?

Are you withholding due to attorney-client privilege?

Is all the document embraced by that privilege?

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

Is the reason deliberative process?

Is the entire document part of the deliberation or are parts of it? Are there 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 (releasable)?

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, will there be remaining information?

"non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions."
Mead Data Cent., Inc. v. United States Dept. 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 do not have to engage in redaction – Withhold in Full.

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

HOW TO TREAT NON-RESPONSIVE RECORDS?

- **Once I have identified a responsive record, can I redact information within the record that is non-responsive?**
- 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 based on non-responsiveness. It can be redacted only if a statutory exemption applies.

HOW TO TREAT NON-RESPONSIVE RECORDS?

- I saw on the federal side where the requester asked the agency/FOIA Officer to redact the non-responsive portions of the document, if the responsive and non-responsive information were on the same pages. In which case, the redaction code was "non-responsive" or "NR."
- The FOIA Officer must always have such request in writing. If it was done verbally, put it in writing and ensure that the requester provides written confirmation, or vice versa – the requester places the verbal request in writing and the FOIA Officer acknowledges it as the full verbal communication.
- Reason for agreeing to this form of redaction – it will save the agency time, in that privileged and confidential information will not have to be redacted within the non-responsive portions of the document.

EXEMPTIONS COVERED IN THE COURSE

Exemption 1. TRADE SECRETS

Exemption 2. PRIVACY

Exemption 3. LAW ENFORCEMENT

Exemption 4. AGENCY COMMUNICATION

REMINDER - AGENCY COMMUNICATION: EXEMPTION 4

Always remember that there are two criteria to be fulfilled under Exemption 4 →

- The record must be an inter-agency or intra-agency record (letter or memorandum); and

- There must be an applicable litigation or civil discovery privilege (deliberative process, attorney work product, or attorney-client).

REMINDER - AGENCY COMMUNICATION: EXEMPTION 4

Always remember that there are two elements to be fulfilled under each privilege →

- **Deliberative process** – predecisional and deliberative
- **Attorney work-product** – prepared by or at the direction of an attorney in reasonable anticipation of litigation
- **Attorney-client** – (1) Confidential: communication made with the intent that it remains private; and (2) Legal Purpose: communication for the purpose of seeking or providing legal advice.

SOURCE MATERIAL AND HELPFUL RESOURCES

Reporter's Committee for Freedom of the Press

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

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

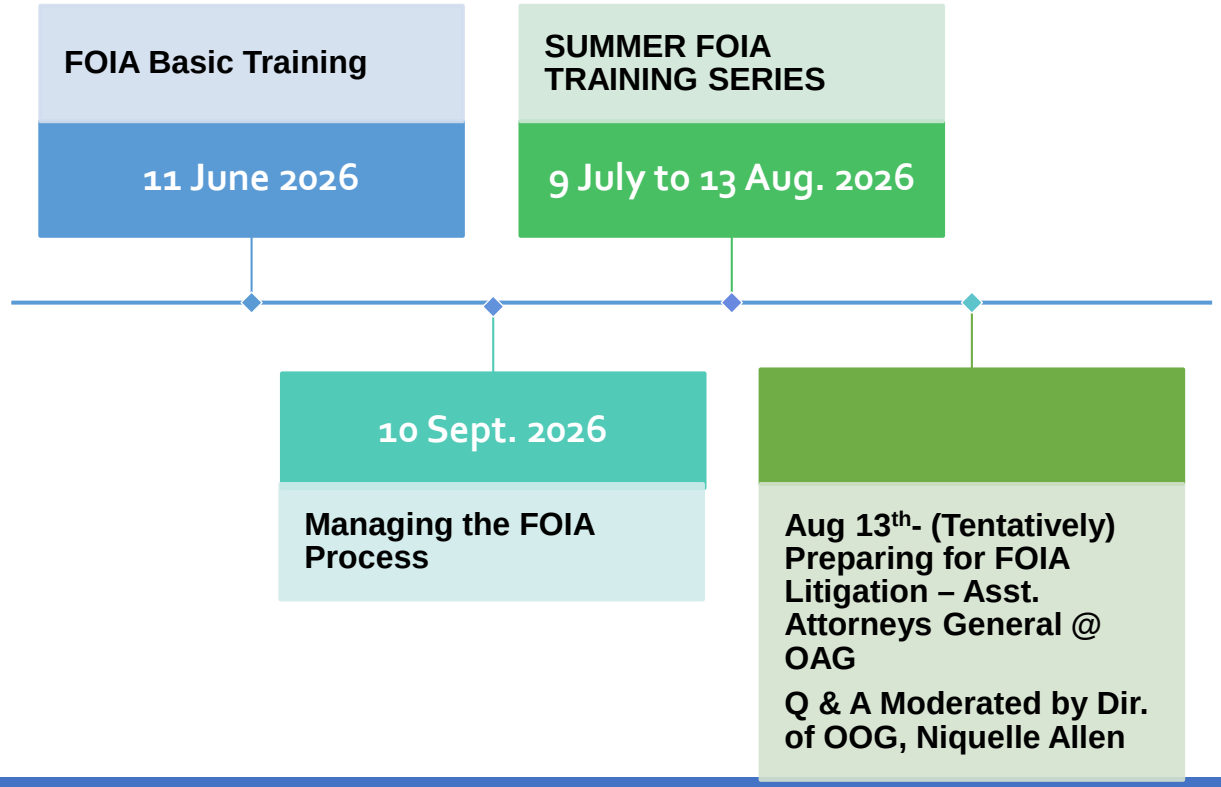
- https://www.justice.gov/oip/doj-guide-freedom-information-act-o

Mayor's Office of Legal Counsel (MOLC)

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

FY2026 FOIA Training & DC FOIA Officers Summer Training Series

Remaining Courses



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RESPOND TO OUTSTANDING QUESTIONS

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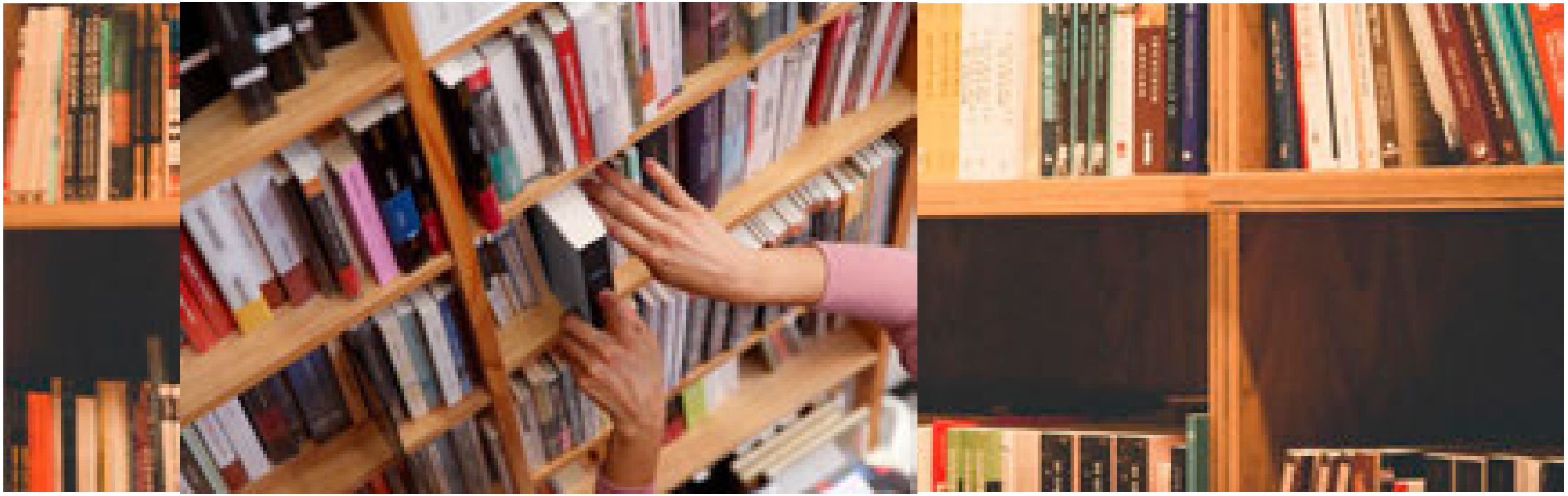

THANK YOU!

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