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Corporations Should Know How to Both Protect Information From Disclosure, and How to Obtain Information, Under FOIA

Editor's Note: Thomas M. Susman is a co-author of BNA Corporate Practice Series Portfolio No. 14-3rd, "Business Uses of the Freedom of Information Act," which will be mailed to subscribers this month. He recently answered questions from BNA on certain issues involving FOIA.

BNA: How long does it usually take for an agency to process a request for records under FOIA?

Susman: The law requires that an initial decision be made in 20 working days, and the vast majority of FOIA requests are handled within this time-frame. Many agencies have backlogs, however, and some—like the FBI and INS—experience chronic delays of months or even years in responding to FOIA requests. Some agencies dealing primarily with business information, such as the FDA or Environmental Protection Agency, also have substantial backlogs. As a rule of thumb, a requester should expect an agency to take at least a month to respond to a simple request, and complex requests take much longer.

BNA: What fees, if any, are charged by an agency in connection with providing records in response to a request for them?

Susman: Every agency has a FOIA fee schedule applicable to processing requests. While waivers and reductions are provided for media and public interest requesters, for example, business requesters must pay the costs provided by the agency's schedule for searching, reviewing, and copying the records to be disclosed.

BNA: If an agency denies a request for records, should the requester appeal, and what is the appeal process concerning that request?

Susman: The FOIA appeal is extremely simple and inexpensive: the requester need only read the agency's denial letter, which must include instructions on how to appeal, and send in a letter that complies with those instructions appealing the denial. Because it is so easy, and because a different agency official will be handling the appeal, it ordinarily will make sense to appeal if the requester has doubts about the agency's response and if the requester has the additional time that the appeal could take—which is often much longer than the 20 working days provided by the statute (whether or not there are exceptional circumstances).

A business can suffer harm in the marketplace if its documents containing highly sensitive information are provided to the government, but are not adequately protected from disclosure to competitors.

BNA: Is a corporation always going to be notified by a federal agency that it is planning to release records concerning that business in response to a request for the records? If so, what is the process for the corporation to try to block the decision to release the records?

Susman: All federal agencies have procedures for notifying a business submitter of information where those records or portions of records that constitute confidential commercial information have been identified and marked as "business confidential" and where the agency nonetheless determines to make a disclosure. This notice must be

given before the agency releases records under FOIA where there is a reasonable claim that the information should be exempt. When such a notice is received by a corporation, it must immediately provide the agency with very specific support for its confidentiality claims that are tied to the criteria imposed by the statute. Courts have often emphasized that generalized, unsubstantiated claims of confidentiality will not suffice to support nondisclosure.

BNA: What are some common examples of situations in which sensitive information about or provided by corporations has been sought from a federal agency?

Susman: Every government contractor, applicant for a federal license or product approval, or regulated business that provides data to the government must be alert to the potential for disclosure of its information. Likewise, after a corporation has been investigated by the government, the materials gathered by the regulatory or law enforcement agency may be subject to disclosure under FOIA under some circumstances. In short, every corporation that does business with the government, is regulated by the government, reports to the government, or is investigated by the government needs to be aware of the possibility that business data in agency files will always remain subject to FOIA requests and potential disclosure. Only

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select areas—like tax returns at the IRS and premerger filings at the FTC and DOJ—have remained sacrosanct and can be considered reliably out of reach for a FOIA requester because they are protected by very specific statutory nondisclosure language.

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BNA: Are there things that a corporation can do when providing information to a government agency that will enhance the possibility that the information will not later be released in response to a FOIA request?

Susman: Companies should always mark information as “confidential commercial information” or “business confidential” at the time it is submitted to the government, but only if the information qualifies for that designation. Some agencies require explanatory cover sheets or submission of confidentiality claims to specific offices, so agency regulations should always be consulted to ensure that any special requirements for claiming confidentiality have been complied with.

BNA: Why wouldn't it make sense for a business submitter of information to the government always to mark everything as “business confidential”? That way there would be no risk that any potentially sensitive data would be overlooked.

Susman: Marking information as “business confidential” when it is not will inevitably have two adverse consequences to the submitter. First, it

will mean that the agency will start from scratch and accord no weight to the submitter's marking. That cannot be helpful. Second, it undermines the submitter's credibility should any questions later arise; the agency will not likely give the benefit of any doubt to a submitter that it knows has attempted to overreach.

BNA: Is the reason why someone requests records ever relevant to an agency's decision whether to release information?

Susman: Except where the requester is asking for a fee waiver or expedited processing, an agency is not supposed to consider the reason for making a request; thus, the identity of a requester is generally irrelevant.

Sometimes the agency will consider making a discretionary release, and in these cases, the reason for the request can be very influential, but this discretion does not exist where business information is at stake.

BNA: You mentioned in the portfolio that federal agencies sometimes have discretion to release information notwithstanding the applicability of an exemption. How does this work in practice? Do agencies frequently release information even though an exemption is applicable to it?

Susman: Where there are third-party interests involved—like privacy or business confidentiality—or where other statutes prohibit disclosure, agencies are deprived of the discretion to disclose the information covered.

But, for the vast amounts of information pertaining to governmental activities only, agencies may exercise discretion to disclose.

In practice, however, agencies seldom exercise this discretion if an exemption applies. In fact, Attorney General Ashcroft has advised agencies against tilting toward discretionary disclosure of this kind of information.

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BNA: Can foreigners avail themselves of the right of access to government information under FOIA? Does the real requester have to identify him- or herself?

Susman: The Freedom of Information Act provides that a request may be made by “any person.” Courts have interpreted this as including not only foreigners, but corporations, partnerships, associations, and everyone else. A requester seeking a fee waiver or expedited processing must provide information to persuade the agency that such treatment is warranted, and it would be hard to do that anonymously. A requester who prefers to remain anonymous can use a third party to make a FOIA request. Lawyers frequently make requests for undisclosed clients; commercial FOI services also can perform this task.

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BNA: Do most states have a statute that is similar to FOIA?

Susman: All states have some form of FOI or Open Records statute, though many are quite different from

the federal FOIA—including both substantive and procedural aspects. State laws also apply to municipal, as well as to state-level, entities.

When corporations provide information to state and local governments, counsel should become familiar with the relevant state disclosure statutes and take precautions called for to prevent unanticipated disclosures. It is possible, for instance, that records that would be protected under the federal FOIA could be subject to disclosure under the relevant state law.

BNA: Do you anticipate that there will be any significant changes to FOIA in the near future? Are there any changes to the statute that you think should be made?

Susman: While there are unlikely to be changes to FOIA in the near future, almost every Congress enacts special statutes that carve out separate exceptions from FOIA; most recently, these exceptions have pertained to homeland security.

In the past I have recommended, for example, clarification of the exemption for confidential commercial information, but the courts have worked through most of the problem areas and now provide greater predictability. We have a statute that has proved to be a model for many other countries, and while we could improve on it ourselves, we are probably better off just faithfully applying the law that we have on the books.

BNA: It is commonly believed that all prices paid by the government to contractors are and have always been public information. You suggest in the portfolio that this is not always the case. Can you explain why?

The FOIA appeal is extremely simple and inexpensive.

Susman: The “bottom line” pricing—or total cost to the government in any specific contract—has always been considered public information, and rightly so. It represents the total taxpayer dollars being spent under the contract.

Sometimes, however, pricing elements and even unit or line-item pricing may reveal a great deal about the contractor’s strategies, and thus disclosure could have important competitive consequences. In those cases, the bottom line will still be public, but the agency needs to be careful not to disclose pricing terms that could cause the contractor competitive harm.

BNA: Some presidential administrations seem to be more pro-disclosure than others. Does this tend to affect the availability of business information submitted under FOIA?

Susman: It is certainly true that some administrations have been more pro-disclosure, and it is probably not coincidental that in the past 25 years Democratic administrations appear more prone toward disclosure than Republican ones.

As a general matter, this has not affected release of business information, but, for example, I think that the EPA under the Clinton administration may well have been more prone to resolve doubts in favor of making disclosures to environmental groups. It also appears that the current Bush administration is taking extra care to protect business information submitted in the homeland security context. But I haven’t seen much change in the approach to handling FOIA requests for business information at

New CPS Portfolios

The following revised portfolios are being added to the Corporate Practice Series library:

- No. 15-3rd, *Inside Information: Preventing Corporate Information Abuse*, by Daniel L. Goelzer, Esq., Public Counting Oversight Board, Washington, D.C. and Laurie L. Brejcha, Esq., Baker & McKenzie, Chicago

- No. 77-2nd, *The SEC Enforcement Process and Procedure in Handling an SEC Investigation After Sarbanes-Oxley*, by Colleen P. Mahoney, Esq., Charles F. Walker, Esq., Erich T. Schwartz, Esq., Louis D. Greenstein, Esq., all of Skadden, Aron, Meagher & Flom LLP, Washington, D.C., and Robert J. York.

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agencies like HHS or DOD or Interior, for example.

Almost every Congress enacts special statutes that carve out exceptions from FOIA.

BNA: Have you found government agency employees who work on FOIA matters to have a bias in favor of the requester, or are they closer to the caricature of the bureaucrat who favors secrecy all of the time?

Susman: In the early days of FOIA, it could be easily said that the federal bureaucracy had a general resistance to disclosure. Through the years, however, those working in the information and privacy areas have become professionals and take their

work and the law seriously. Many are members of a professional organization—the American Society of Access Professionals—attend regular training, and follow the case law closely. So I don't think it is fair to say that there is a bias toward secrecy, and any tendency toward disclosure simply reflects the presumption in the statute.

All states have some form of FOI statute. It is possible that records that would be protected under the federal FOIA could be subject to disclosure under the relevant state law.

BNA: What level of sophistication does a corporation need to take effective steps to protect the information it submits to a federal agency?

Susman: History demonstrates that a business can lose an important competitive edge and suffer other harm in the marketplace if its documents containing highly sensitive information are provided to the government, but are not adequately protected from disclosure to competitors and the public.

The portfolio provides many tactics and procedures and arguments designed to assist a corporation in protecting its valuable information. The more valuable the information and the greater the threat of disclosure, the more important it will be for the company and its counsel to master the tools we describe and use them effectively.