

The Federal Library of Business

by Robert N. Saylor and Mark Nozette

A portrayal of every private enterprise of any consequence lies in Government files. . . . A small industry has grown up to monitor the flow of business information out of Government files. . . . It is common practice for those who submit information to the Government to use FOIA to obtain a copy of each FOIA request made by the competitors and others for that information, as well as a copy of the materials supplied in response to the request. Where the requester is a competitor, the company may then seek information which the competitor has filed with the agency. This may, in turn, prompt more FOIA activity. A significant portion of the corporate FOIA use appears to result from this type of monitoring.

HOUSE COMM. ON GOVERNMENT OPERATIONS
H.R. REP. NO. 95-1382, 95th Cong., 2d Sess., 1, 2, 5-7 (1978).

The federal government now operates what amounts to a national library of business, which probably rivals the Library of Congress in size, comprehensiveness, cost, and ease of public access. Regularly, the government is asked to scour corporate files in its possession and to organize and produce them on short notice to corporate competitors, interest groups, dissenting stockholders, prospective suitors, or the merely curious. And it is doing it, but at a high cost both to government and those supplying documents to it.

The subject has generated extensive administrative and court litigation, congressional hearings and reports, and scholarship. These points emerge:

- The government's present policies in the area are in disarray. The agencies have adopted widely divergent practices; in some cases, officials or units in the same agency follow inconsistent paths. The courts have divided sharply on key substantive and procedural issues, only some of which have been resolved by the Supreme Court. There is some movement toward legislative solutions, but no proposal is far along in Congress.
- By and large, the cards are stacked in favor of disclosure of corporate-generated data to requesters. Disclosure of corporate-generated data has been governed largely by the same principles as government-generated data. In practice, however, corporate data enjoys fewer protections because the government rarely has the competence or disposition to identify

and shield competitively significant data submitted to it.

- Existing policy has imposed a heavy workload on the courts, paralyzed the agencies with crushing administrative and cost burdens, and damaged data submitters.
- All of this has come to pass notwithstanding that present policy is not compelled by any legislation, is assailed from many quarters, and is not justified by any persuasive policy arguments. It is a classic illustration of a worthy objective—open government—stretched beyond its purpose. In the name of opening up government, existing disclosure policy has tied it up.

Recent congressional hearings attest that:

- the government now collects vast amounts of extremely sensitive business data such as marketing strategies, future plans, financial and commercial information, proprietary manufacturing process details, and product designs;
- competitors and other outsiders, in exponentially increasing numbers, call upon the government to pull this data together and produce it to them; and
- significant quantities of this data are disgorged.

Administrative Slipup

In some cases (where, for instance, specific legislation expressly requires confidentiality) submitters are assured that confidentiality will be maintained absent an administrative slipup. But in the usual case, submitters of corporate data, no matter how sensitive, must assume a substantial risk that their documents will be released to

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outsiders with inadequate or no notice and that, even if notice is provided, they will be unable to persuade agencies or courts to bar production.

This combination of factors operates:

Legislation. Requests are usually made under the Freedom of Information Act (FOIA). That statute provides for the mandatory disclosure of documents in the hands of the government, excepting nine enumerated categories of materials that an agency may release in its discretion. Among the materials that the agency may withhold are trade secrets, and privileged or confidential commercial information provided to the government by outsiders. 5 U.S.C. § 552 (b) (4). The agency will handle any request for this information in accordance with summary procedures established by FOIA to encourage prompt disclosure decisions and in which only the agency and requesters participate.

Another federal law, the Trade Secrets Act (18 U.S.C. § 1905), makes it a crime for government officials to release certain documents to outsiders. The precise scope of this civil war vintage statute is unclear, and it may be construed to permit the disclosure of documents having substantial competitive significance if they are outside the reach of the categories of data specifically prescribed in that statute. The Trade Secrets Act does not independently establish a private right of action to enforce compliance.

The Courts. Although the Supreme Court's recent decision in *Chrysler Corp. v. Brown*, 47 U.S.L.W. 4434 (U.S. April 18, 1979), recognizes that FOIA has "a largely unforeseen tendency to exacerbate the uneasiness of those who comply with government demands for information," many of the troubling issues in this area remain unsettled. The Court concluded that because FOIA is solely a *disclosure* statute, the submitter's interest in confidentiality is protected only when endorsed by the agency collecting the information—leaving the submitter with no right under that statute to seek to enjoin agency action. Moreover, while the Court held that an agency's decision to apply the Trade Secrets Act was reviewable under the APA, the substantive scope of that statute remains uncharted. Indeed the Court expressly refused to decide what procedures lower courts must follow in entertaining such suits, *i.e.*, whether submitters are entitled to *de novo* review or must rely entirely on the often incomplete record made by the agency. Finally, neither the Supreme Court in *Chrysler* nor other courts require the general implementation of administrative procedures adequate to assure the protection of confidential documents. In particular, the courts do not require, as a matter of general policy, that the agencies provide for prerelease notice to submitting parties or that agencies entertain any confidentiality showing by submitters before disclosure. Nor have the courts in these cases lessened the burdens imposed upon the government in other FOIA contexts to describe fully all withheld documents, to summarize the basis for withholding, and to carry the burden of proof to demonstrate the legality of withholding sensitive corporate documents.

The Agencies. The Department of Justice, which retains supervisory responsibility over agency administra-

tion of FOIA, urges agencies to produce *all* documents sought under the Act, including those covered by an express exemption, unless there is a strong and demonstrable public interest in withholding. Justice also says that it will not defend FOIA suits unless it is satisfied that some strong public interest consideration supports such action.

The agencies themselves have adopted widely divergent regulations and policies on the treatment of confidential data supplied by outsiders and the disposition of requests for production of that information. A review of prevailing agency practice reveals that many agencies either have no regulation requiring notice to submitters before release or in practice fail to afford adequate notice, and in some cases both; that the agencies have no authority to impose protective conditions on the use of documents as would be the case in court litigation; that many agencies routinely release documents to other agencies, to Congress, or to state governments without notice to submitting parties even though the practice is to give notice when the request comes from other parties; that some agencies are unwilling, and virtually all are ill-equipped, to undertake the review and indexing of outsiders' documents required to justify withholding and, therefore, have adopted the practice of routinely producing such documents absent a court order barring production; that few agencies are willing to determine at the time documents are submitted that they will get confidential treatment, and many will not even entertain such a showing; that even where confidentiality commitments are made by agency staff, they will have no effect on the agency itself; that many agencies by regulation or practice discretionally release exempt documents; that even when dealing with exempt documents, many agencies attempt to adhere to the time requirements of the Act and, accordingly, act with dispatch and with little or no information from submitting parties; and that few regulations set forth standards for determining what the agency will withhold on confidentiality grounds.

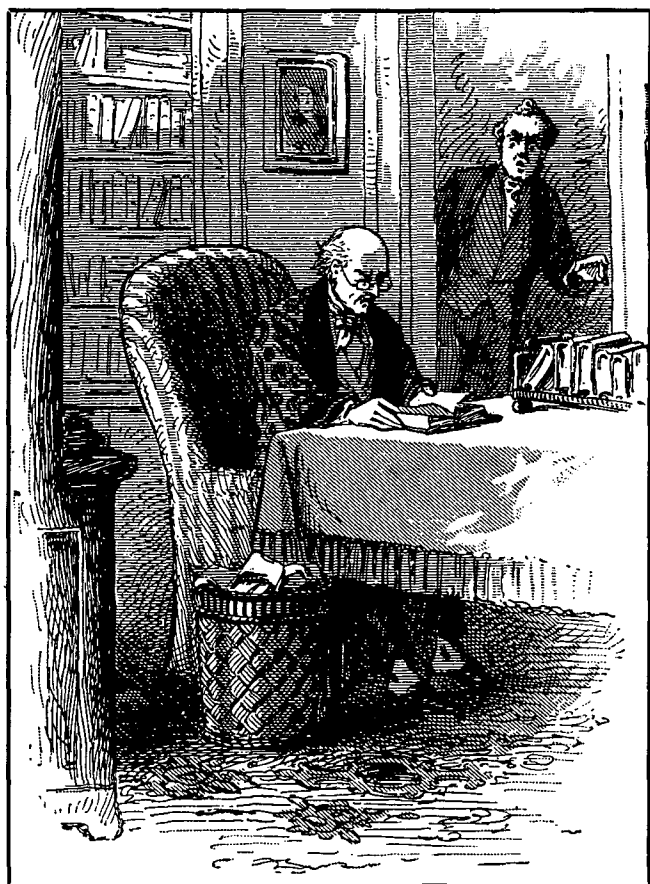
Uphill Battle

The submitting party thus faces an uphill battle at every stage. He may receive little or no notice. Incentives for the agency custodian weigh strongly in favor of release because of time pressures, frequent unfamiliarity with the documents, and the substantial burdens of reviewing, indexing, and preparing a decision justifying withholding. Once the submitter gets to court, he faces a set of legal doctrines tilted toward disclosure, and at every step the submitter confronts dislocations of his business operations and the sometimes enormous expense of intervening in FOIA disputes and preparing a detailed document-by-document showing of the competitive harm that would be caused by release. The requester, by contrast, can initiate the entire process for the cost of a postage stamp.

Many of those legislating, regulating, adjudicating, and commenting on this topic have concluded that the public interest is ill-served by a presumptive disclosure policy and that release of captive corporate data should be confined to instances in which disclosure satisfies some demonstrable public interest and causes no appreciable damage to the interests of information submitters. Certainly, the general thrust of existing federal

legislation is that the public interest is disserved by production of corporate files to outsiders. That policy finds expression in the Trade Secrets Act, the trade secrets exemption in the Freedom of Information Act (designed to "assure" the confidentiality of data submitted to the government), and specific confidentiality provisions of various federal laws.

Even if Congress has not expressly forbidden the production of sensitive corporate data, it indisputably has never by legislation or otherwise determined that a free release policy in this area *promotes* the public interest. The most that requesters can assert is that, while Congress has exempted sensitive corporate data from open release requirements, it has not *precluded* release in any comprehensive legislation. Nor have the agencies generally endorsed in theory any open disclosure policy about documents produced by outsiders. Many have protested on the ground that this policy dries up sources of information, penalizes those most forthcoming in submitting data to the government, and imposes administrative burdens on the agencies in responding to requests for information supplied by outside entities. Nor have the courts agreed on any public policy interest served by this new direction. Many courts have assailed the increased judicial burden stemming from Freedom of Information Act litigation (much of it relating to corporate documents), questioned whether and to what extent the cause of "open government" is advanced by production of documents of this type, and expressed concern that this approach encourages "industrial espionage" and may detract from, rather than enhance, the quality of



governmental decision making by restricting the government's ability to obtain documentation from outsiders.

Occasionally it has been argued that since all corporate data in the possession of the government has been collected for some public purpose, that data "may tell more about the workings of government than about the status of the submitter." This is what the government argued in its brief to the Supreme Court in the *Chrysler* case, *supra*, and the recent HOUSE GOVERNMENT OPERATIONS REPORT said something of the same. That much can be granted, but it does not justify the present policy.

Unquestionably, release of corporate data *sometimes* can be justified because the data set forth the basis for some governmental action or otherwise best reveal the "workings of government" and should therefore be governed by a presumption of release in the interest of "open government." But one paints with too broad a brush to contend that all, or even most, documents containing corporate data should be treated in the same manner and produced for the same reasons as governmental documents. Unlike government-generated materials, corporate documents are usually prepared for a corporate purpose and not for the purpose of conducting or assisting public business. Such documents teach far more about the workings of the submitter than the government, and are developed in a competitive framework, with stringent precautions against release to competitors, by corporate employees who have no public mandate to carry out the public will in the public view.

Rational Policy

Just as important, the government has the competence to implement a rational public dissemination policy on documents disclosing its inner workings, but government ordinarily does not have such competence for information developed elsewhere. The government should be able to determine which of its own documents should be withheld in the interest of national security, foreign relations, or protection of its deliberative processes or investigations. But the government does not have the competence and often lacks the disposition or manpower to decide which of the reams of corporate data produced to it are of greatest competitive significance. The government cannot, therefore, be expected to defend adequately its withholding decisions in court.

This does not mean that it is now impossible to protect corporate secrets in government hands, but that protecting confidentiality typically will require considerable work and good fortune. Depending upon the nature of the data submitted and the kind of FOIA request filed (as well as the proceedings and the agency involved), several approaches can be used to protect confidentiality.

If the option is available, the submitting party's first line of defense is to block production. Depending upon the nature of the proceedings, this may take the form of moving to quash or attempting to persuade the agency to withdraw or narrow its request or, where possible, initiating court proceedings to enjoin any compulsory production.

When initially providing information, a submitting party should consider the feasibility of production in a manner that does not cause its documents to become

“agency records.” In some cases submitters have persuaded agency personnel to inspect private documents at the submitters’ places of business, or have produced the documents for inspection at the offices of a third party with limitations imposed on note-taking and copying by agency staff personnel.

If sensitive documents are turned over, the submitter can try to negotiate an agreement identifying the most sensitive data and committing the agency to withhold production for a time certain. The submitter should seek the agency’s assurances, in writing if possible, that documents will be treated confidentially by the agency and that these documents will be protected by the agency, with controlled access and proper instructions to agency personnel. In certain instances a memorandum should be submitted documenting the confidentiality claim.

It is most important for the parties to agree at the time of production on procedures to be followed in the event of requests for disclosure. The submitter should seek adequate notice of requests for documents from private parties, other agencies, Congress, or state and local governments. If possible, the submitter should obtain a promise that the agency will deny an initial FOIA request for the documents. And the submitter should seek assurance of sufficient notice of any decision to disclose confidential documents to enable him to seek judicial relief.

There is a question about how far the agency can go in assuring confidentiality under current law. However, the government’s Supreme Court *Chrysler* brief contends that at least the Act’s expedited time schedule does not apply once the agency determines that documents are within the confidential business information exemption.

Upon learning that its documents have been sought, the submitter should immediately contact the agency to determine its timetable for decision. The submitter should be prepared promptly to file affidavits and other materials supporting withholding of especially significant papers. In the event the agency upholds the submitter’s position by initially denying an FOIA request, the submitter should be prepared to participate in any administrative appeal by filing affidavits and other papers to support its position and create a favorable administrative record.

If the agency decides to disclose confidential materials, the submitter should be prepared immediately to seek an injunction in court. Before filing suit, the submitter should notify the agency and the requesting party, and settlement should be explored.

In preparation for either an action to enjoin release, or intervention if a suit is brought by the requester, the submitter should be prepared affirmatively to establish (or assist the government in establishing) that disclosure is likely to cause substantial competitive harm to the submitter.

There are proposals for reform. Several congressional committees have conducted hearings at which government agencies, private corporations, and practicing attorneys have spotlighted these and other difficulties that have developed in the eleven years since FOIA’s enact-

ment. The July, 1978, report of the House Government Operations Committee called upon federal agencies to improve the processing of FOIA requests and to adopt new regulations to identify the material they considered confidential. The report did not, however, recommend enactment of any new legislation at this time.

Many agencies have adopted or are considering new procedures to streamline their processing of FOIA requests and to afford a greater measure of protection. It is unlikely, however, that administrative measures alone can afford submitters fully adequate protections or screen agencies from the overwhelming burdens imposed upon them in this area.

Legislation Needed

Many practitioners and commentators have concluded that legislation is required. Among the suggested proposals are the following:

- New legislation to deal comprehensively with these questions: (1) types of documents generally entitled to confidentiality protection; (2) under what circumstances any disclosure of such documents would be permitted in special cases and the nature of protections afforded in those cases; and (3) procedures to be followed in litigation respecting the disclosability of documents that submitting parties want to have shielded from production. Any such legislation should address the questions of: (1) disclosure principles in those cases in which documents submitted by outsiders form the basis for governmental actions, and (2) whether protection would automatically be afforded for various categories of documents or only where submitting parties can make a showing that production would have substantial competitive effect in the particular case.
- A requirement that agencies adopt uniform procedures for submitting commercial documents. Submitters could label material they believe is exempt from future FOIA disclosure. Experience with this procedure in the Environmental Protection Agency reveals that the ultimate requirement to justify confidentiality inhibits any tendency to make blanket claims of confidentiality.
- A requirement that agencies provide submitters notice of requests for labeled confidential materials and an opportunity to make an informed submission supporting claims of confidentiality. Concomitantly, the time for initial agency decisions and appeals could be lengthened in any case where a confidentiality claim was asserted.
- Provision for *de novo* court review in cases involving a dispute as to the protectability of documents submitted to the government.

These approaches still involve a considerable amount of line drawing and will continue to require a high level of agency and court involvement. The ideal solution would induce the contesting parties to resolve their disputes voluntarily by creating incentives for the submitting party to limit confidentiality claims to documents of first-rank

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capable of. We will do it with rusty, blunt meat axes.

Lady Macbeth, faced with a similar problem, offered this advice: "Be bloody, bold and resolute." Perhaps only judges can accomplish the task.

Formal Investigations

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taken that can seriously harm his client. It appears that the courts will not set aside Commission action if the staff fails to advise a witness that he is a target and counsel therefore does not make a timely submission. *SEC v. National Student Marketing Corp.*, 538 F.2d 404 (1976), cert. denied, 429 U.S. 1073 (1977). The regulations provide, however, that the staff upon request may advise the witness of the amount of time that may be available for preparing and submitting a statement before the staff makes its presentation to the Commission. 17 C.F.R. § 202.5(c). When the testimony starts, counsel should always make a request on the record that if the staff intends to make a recommendation that the Commission take any action, counsel be given an opportunity to make a submission under Release No. 5310.

A witness has the unqualified right to inspect the official transcript of his own testimony. Although a witness is entitled upon written request to obtain a transcript of his testimony, that request may be denied by the Commission "for good cause" (Rule 6). See *Commercial Capital Corp. v. SEC*, 360 F.2d 856 (7th Cir. 1966). While as a general matter the witness should request a copy of the transcript, there are circumstances when that may be inadvisable. Once requested, a transcript of testimony in a formal investigation is not privileged and can be ordered produced in discovery in private litigation. *LaMorte v. Mansfield*, 438 F.2d 448 (2d Cir. 1971). If a copy of the transcript is not requested, or the request is denied, the official transcript should be inspected so that counsel can decide whether the transcript was garbled by

the reporter or if any action to correct the transcript is advisable.

A final note of caution: the Commission's enforcement staff is often quite young, with little experience compared to members of the private bar involved in significant investigations. It can be both tempting and a serious mistake to assume an attitude of superiority toward the staff or to grandstand to impress a client. It inevitably offends the staff, which has a large measure of discretion about the actions they will recommend to the Commission. The client only loses if his lawyer gives the staff an additional incentive to make a recommendation for enforcement action. Equally important, it is unprofessional to offend an adversary unnecessarily, and it is foolish to underestimate an opponent.

Federal Library

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significance, and incentives for the requesting party to forgo requests for confidential data except where it had a strong reason to press ahead.

One approach would authorize the award of fees, including attorneys' fees, to a party substantially prevailing in any contest for corporate data. Congress has authorized the award of attorney's fees *against the government* in FOIA litigation on behalf of "substantially prevailing" requesters and has authorized the taxing of search and copying fees to cover the costs initially incurred by the government in responding to FOIA requests. FOIA practitioners believe that these provisions have had beneficial effects by inducing more refined requests and overcoming bureaucratic reticence. But the Act does not authorize the award of attorneys' fees against a requesting party no matter how frivolous the request or great the costs incurred by the government and submitting parties in defense. Conversely, the Act does not require submitters to pay attorneys' fees even when opposition to disclosure lacks any merit.

Confidentiality claims could be handled like this: at the time of sub-

mitting documents, submitting parties could identify those deemed confidential. When a request is received, the government would produce non-confidential documents and advise both the submitting and requesting parties that some documents were being withheld pending further proceedings on confidentiality. The submitting party could then withdraw its confidentiality claims, in whole or in part, and submit a summary description and a confidentiality justification for the balance. The requester, on the basis of that showing, would identify the desired documents. The agency would render a decision, and court review would be available on either side. The court would have the discretion, but would not be required, to impose fees in favor of the substantially prevailing party.

In order to avoid any untoward chilling effect, fees would be awarded only where one party had substantially prevailed and, even then, only in the discretion of the court. This would permit the court to assess the interests and financial wherewithal of the losing party.

The advantage of this approach is that it should induce reasonable compromise. It puts financial pressure on the submitter to weed out all but the most damaging documents; otherwise, he runs the risk of substantially losing and incurring additional fees. It pressures the requesting party to pare his request to documents clearly satisfying his needs and unconvincingly defended by the submitter. It places most of the burden of justifying withholding on the submitter rather than the agency. It permits imposition of litigation costs on the disputants rather than the government (which now faces the prospect of having to cover attorney fees if it loses a fourth exemption case in court). This will permit an agency to make a more disinterested judgment in these cases because it does not have to fear financial liability if it errs on the side of withholding.

We do not suggest a blanket insulation of corporate business files. In some cases either the public at large or litigants and others with special interests should have access. But the stakes and potential burdens are sufficiently large to call for a more rational and certain regime, and its development should have a first priority.