



UPDATE

THE U.S. FREEDOM OF INFORMATION ACT Negative Emails About Competitor Need Not Be Produced

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Government contractors sometimes pursue the disclosure of competitor information through requests under the U.S. Freedom of Information Act¹ ("FOIA"). When a contractor is notified that the government may reveal confidential information in response to a FOIA request, that contractor has the right to assert that its confidential information be exempted from disclosure.

A contractor was recently successful in preventing the disclosure of emails it sent to the government assailing the qualifications of one of its competitors.² Tybrin Corporation, a contractor under the Air Force's Consolidated Acquisition of Professional Services ("CAPS") program, sent emails to the Air Force questioning the eligibility of a competing CAPS contractor to participate in the program. Approximately six weeks later, the Air Force terminated Tybrin's competitor. Subsequently, the terminated contractor submitted a FOIA request, and the Air Force notified Tybrin that it intended to release the derogatory emails.

Tybrin objected to the government's plan to release the emails and filed suit to prevent their disclosure. Tybrin prevailed when the court held that the emails were confidential commercial communications provided voluntarily to the government. The court determined that the emails were "unequivocal[ly]" confidential because it was the contractor's practice "to keep matters, such as the emails in question, confidential." The court then found that the emails were "commercial" because the contractor had a "commercial interest" in them.

Ordinarily, there is a strong presumption favoring disclosure of information requested under FOIA. In fact, one of the Obama administration's first acts in office was to issue a memorandum directing the Department of Justice to issue new FOIA guidelines to reaffirm the government's commitment to openness.³ The presumption favoring disclosure, however, is not boundless. FOIA exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from disclosure.⁴

Trade secrets are clearly exempt from disclosure; however, the concept of trade secrets is narrow and often is limited to such things as secret formulas used for making products when those formulas are the product of innovation. The tougher cases relate to whether information obtained from a person is "commercial or financial" and "privileged or confidential." Exemption of information submitted by a contractor in response to government requirements generally is limited to data that would cause competitive harm if it were disclosed. However, if the information is submitted voluntarily, it will be afforded broader protection so long as the contractor

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has a commercial interest in the information and the contractor customarily limits disclosure of the information. These examples are far from exhaustive, and each case will often hinge on the nuances presented by specific facts.

Your company has rights under FOIA to prevent the disclosure of confidential information. If you are notified by the government that a competitor has submitted a FOIA request, you should carefully analyze whether commercially sensitive information should be exempt from disclosure. If so, a thorough, prompt response is critical so you can provide the government with ample support to justify a decision that it should not release your information. If the government disagrees with your analysis, you must file suit quickly to prevent the disclosure of the information.

You may waive your rights under FOIA if you lack policies and procedures to guard against releases of information. Among other measures, you should mark confidential information and trade secrets you provide to the government with confidentiality legends.⁵ Sound practices are vital to preventing disclosures.

¹5 USC § 552

²See Tybrin Corp. v. United States Department of the Air Force, Case No. 08-CV-00002-MRM (S.D. Ohio February 19, 2009)

³See Presidential Memorandum dated January 21, 2009

⁴5 USC 552(b)(4)

⁵See, e.g., FAR § 52.215-1(e) (providing restriction on disclosure and use of data)

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