



## **Protecting an Association's Confidential Information from FOIA Requests**

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November, 2012

Your association may be compelled to provide confidential information to government agencies pursuant to a subpoena. How do you know that such information will not subsequently be disclosed to third parties and ultimately, the public at large, pursuant to a Freedom of Information Act (FOIA) request? While it may be impossible to guarantee that confidential information is not disclosed, there are steps you should be taking, both prior to and after receiving a subpoena, to maximize the protection such information is afforded.

Associations frequently compile information from their members that may be of interest to the government and thus, be a target for government subpoenas. For example, members may submit data in confidence to an association reflecting market share in a particular industry. That data might be sought by the government in an antitrust suit. Similarly, an association may perform ratio studies in an attempt to determine an industry's costs as a percentage of its gross revenue. Alternatively, an association might serve as a conduit and compiler of information in regard to an information exchange program whereby the association compiles a variety of industry data. All of this data might be subject to subpoena by the government in antitrust or regulatory compliance actions.

### **FOIA**

FOIA requires government agencies to make their records available upon request. 5 U.S.C. § 552(a)(3). While the Act does not define the term "records," courts have held that the term refers to documents that an agency creates or compiles in the course of performing its duties. There is generally a presumption in favor of disclosure under the Act, so an agency bears the burden of proving that requested materials are not agency records and not subject to disclosure.

There is, however, an important exception to FOIA's disclosure requirements. Section 552(b)(4) provides (inartfully) that it does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Further, Executive Order No. 12600, which was issued on June 23, 1987, provides Predisclosure Notification Procedures for Confidential Commercial Information. The Executive Order states that agencies shall establish procedures to permit submitters of confidential information to designate, at the time the information is submitted, whether the material could reasonably be expected to cause

substantial competitive harm. The Order further provides that agencies use good faith efforts to advise submitters of confidential information when such records are being requested under FOIA.

### **Steps to Avoid Disclosure**

While the procedures outlined above are designed to protect against disclosure of confidential financial and commercial information, it does not guarantee against such disclosure. The agency, or ultimately, a court, may determine that the information sought does not fall within the Section 552(b)(4) exception. Thus, it is advisable to limit the amount of confidential information that the agency retains in its possession. If raw data from association members is used to compile reports, such data should be destroyed after the report is completed. In this regard, it is important that the association have procedures in place to make sure that all employees and agencies are complying with document retention policies. For example, if the raw data is purged from association files but one employee maintains copies of the raw data on his personal computer, it will have to be produced in response to a government subpoena. Similarly, if a third party, such as an accounting firm, is used to compile financial information, it should be provided with explicit instructions as to what documents need to be preserved and what documents should be destroyed. A rigorous document retention policy may prevent the need to engage in litigation as to whether information is or is not subject to disclosure under FOIA.

To the extent that confidential documents are in an association's possession and responsive to a government subpoena, steps should be taken to ensure that you obtain the full benefit of the Section 552(b)(4) exception. In this regard, prior to producing such documents you should attempt to have the government agree that to the maximum extent permissible it will not disclose such information pursuant to FOIA. Such an understanding should be reflected in writing. Further, every confidential document produced should bear a stamp stating "confidential commercial information, not subject to disclosure pursuant to 5 U.S.C. § 552(b)(4)."

### **Conclusion**

Although it may be impossible to absolutely ensure that confidential information obtained from association members is not disclosed pursuant to FOIA request, steps can be taken to maximize the likelihood that such material will not be produced to the government, or if it is produced, will not be subject to disclosure under FOIA. Please feel free to contact us if you want to discuss specific steps your association should take in protecting such confidential information. Brendan Collins can be reached by telephone at 202.342.6793 or by email at [bcollins@gkglaw.com](mailto:bcollins@gkglaw.com).