

MEMORANDUM

SUBJECT: Confidentiality of Information Received Under Agency's Self-Disclosure Policy

FROM: Steven A. Herman /s/
Assistant Administrator for Enforcement and Compliance Assurance

TO: OECA Office Directors
Regional Counsel
Regional Administrators
Deputy Regional Administrators
Regional Enforcement Coordinators

Summary

This memorandum sets out the policy of the Office of Enforcement and Compliance Assurance (OECA) with respect to the confidentiality of self-disclosures received by EPA under the Agency's policy on "Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations" ("self-disclosure policy"). In brief, the Agency will withhold self-disclosures from release under the Freedom of Information Act (FOIA), assuming the self-disclosure qualifies for FOIA exemption, until such time as the Agency and the self-discloser have formally settled the case. In cases where the Agency determines that release of the document poses no harm to ongoing attempts to settle the case, it may choose to release a self-disclosure prior to settlement, but only if: (1) the submitter has not made a Confidential Business Information (CBI) claim, or (2) such a claim has been made and rejected by EPA, and (3) Headquarters has been consulted on the decision to release.

Withholding Self-Disclosures Until Settlement is Reached

Provided that the material meets the necessary conditions, the Agency will generally withhold self-disclosures from release under FOIA exemption 7(A) until such time as the case has been formally settled. The purpose of this policy is to minimize interference with settlement negotiations. Exemption 7(A) of FOIA protects from disclosure, "records or information compiled for law enforcement purposes, but only to the extent that the production of such law

enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings.” Your denial letter should explain, consistent with exemption 7(A), that release of the self-disclosure might reasonably interfere with the Agency’s efforts to prepare and settle an enforcement case against the self-discloser.

As noted below, the Region has discretion to determine that the information sought under FOIA does not affect settlement. In such cases, the Region must, prior to release, consider whether any of the self-disclosed information might be claimed as confidential, and must take appropriate steps if the answer is yes (**see CBI discussion, below; see also the section below on Releasing Self-Disclosures Prior to Settlement**).

Once a self-disclosure case has been settled, copies of the settlement agreement (excluding CBI, if any) and all other pertinent documents appropriate for release under FOIA will be made publicly available. This is in keeping with the self-disclosure policy, which provides in Section II.H that “EPA will make publicly available the terms and conditions of any compliance agreement reached under this policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.” 60 *Federal Register* 66706, 66712 (December 22, 1995).

Confidential Business Information

The Agency’s current CBI regulations, found at 40 C.F.R. Part 2, require that specified procedures be followed when a person submitting material to EPA claims that the material contains CBI. The regulations also generally require the Agency, when no claim has been made but there is reason to believe that the material might contain CBI, to contact the submitter and ask whether it wishes to make a CBI claim.¹

Thus, when the submitter self-discloses violations and claims the material as CBI, the Agency must follow the CBI regulations and determine whether the material is in fact CBI. Where no CBI claim is made but the Agency has reason to believe that the submission might contain CBI, EPA must contact the submitter and ask whether it wishes to claim the material as CBI. If the answer is “yes”, the attached “Model CBI Substantiation Letter” can be used to

¹ OECA intends to publish a Notice in the *Federal Register* amending the self-disclosure policy to state that submissions under the policy will be publicly available unless the submitter claims them as CBI, or unless they are subject to another exemption under FOIA. After this amendment becomes effective, self-disclosures for which no CBI claim is received from the submitter will be released unless OECA determines that another FOIA exemption applies. Thus, following publication of the *Federal Register* notice, we need only determine whether release would harm settlement negotiations, **unless** the submitter affirmatively asserted CBI when submitting the self-disclosed material. In the meantime, where a self-disclosure appears to contain CBI but no CBI claim has been made, you must still contact the submitter and ask if it wishes to make a CBI claim.

help verify the claim. (See also the attached document entitled, “Procedures for Handling FOIA Requests for Confidential Business Information”.)

Generally, where a FOIA request is received for information for which there is an outstanding CBI claim, the Region should withhold the self-disclosure from release pending determination of the claim. In so doing, the Region should cite exemption 4 of FOIA, which protects “trade secrets and commercial or financial information obtained from a person [which information is] privileged or confidential.”

Releasing Self-Disclosures Prior to Settlement

For the time being, where the Region feels that releasing a particular self-disclosure prior to formal settlement of the case will cause no harm to negotiations and will not otherwise delay or complicate settlement,² it should contact Gary Jonesi, Senior Counsel for Strategic Litigation in the Office of Regulatory Enforcement, before proceeding. This informal consultation will help ensure that the Agency treats self-disclosures consistently across Regions with respect to confidentiality and FOIA.

If you have any questions about this memorandum, contact Robert Fentress at 564-7023.

Attachments (2)

cc: Self-Disclosure Policy Task Force
Quick Response Team

² This exception to the general rule of withholding self-disclosures prior to settlement will not, of course, apply to those cases where the submitter has made a CBI claim for the self-disclosure and such claim has either been accepted or has not yet been resolved.

MODEL CBI SUBSTANTIATION LETTER

Approved OMB 2020-0003
Approval expires 1/31/97

[date stamp]

Certified Mail
Return Receipt Requested

[Addressee]

Re: [Reference the RIN number and or the Information which is the subject of the final confidentiality determination.]

Dear [name of the representative of the Affected Business]:

The Environmental Protection Agency (EPA) has received a request under the Freedom of Information Act (FOIA) for certain records pertaining to (description of the information which is the subject of the final confidentiality determination). You asserted a business confidentiality claim covering (all or part) of this information. In accordance with EPA's Freedom of Information Act regulations (40 C.F.R. Part 2), the request has been initially denied to afford you an opportunity to substantiate your claim before a final determination is made.

This letter is to notify you that the EPA [appropriate legal office] will be making a final confidentiality determination concerning this information. If you feel that some or all of the above information is entitled to confidential treatment, please specify which portions of the information you consider confidential. Please be specific by page, paragraph and sentence when identifying the information subject to your claim. *Any information not specifically identified as subject to a confidentiality claim may be disclosed to the requestor without further notice to you.* For each item or class of information that you identify as being subject to your claim, please answer the following questions:

1. For what period of time do you request that the information be maintained as confidential? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.
2. Information submitted to EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?
3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information still be considered confidential?

4. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.
5. Is the information contained in any publicly available material such as promotional publications, annual reports, articles, etc.? Is there any means by which a member of the public could obtain access to the information?
6. For each category of information claimed as confidential, discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?
7. Do you assert that the information is "voluntarily submitted" as defined at 40 C.F.R. sec. 2.201(i)? If so, explain why, and how disclosure would tend to lessen EPA's ability to obtain similar information in the future.
8. Any other issue that you deem relevant.

Please note that *you bear the burden of substantiating your confidentiality claim* pursuant to 40 C.F.R. 2.208(e). Conclusory allegations will be given little or no weight in the determination. If you wish to claim any of the information in your response as confidential, you must mark the response "**CONFIDENTIAL**" or with a similar designation, and must bracket all text so claimed. Information so designated will be disclosed by EPA only to the extent allowed by, and by means of the procedures set forth in, 40 C.F.R. Part 2. If you fail to claim the information as confidential upon submission of your response, it may be made available to the public without further notice to you.

Your comments must be postmarked or hand delivered to this office by the 15th working day after your receipt of this letter. You may seek an extension of time to submit your comments, but the request must be made to the [appropriate legal office] before the end of the 15-day period. Except in extraordinary circumstances, no extension will be made without the permission of the requester. Failure to submit your comments within that time will be regarded as a waiver of your confidentiality claim, and EPA may release the information.

Should you have any questions in this matter, please call me at [telephone number].

Sincerely,

[Signature and Title]

[**NOTE:** Please be sure to check with your FOIA Officer or FOIA Coordinator to determine whether the affected business has designated a specific person or office to receive this letter. If they have, you *must* address the request for substantiation to that designated person or office (see 40 C.F.R. 2.213).]

Procedures for Handling FOIA Requests for Confidential Business Information

1. The program office checks for the existence of CBI claims. Even if no claim has been asserted, where circumstances suggest that the submitter might object to disclosure if he or she knew EPA proposed to do so, the office must ask the submitter whether he or she claims the information as CBI (unless the submitter has already been notified that information not claimed as CBI may be made public).
2. When a CBI claim is found, the program office initially denies the FOIA request, pending a final confidentiality determination.
 - Note that if a claim is clearly invalid (e.g., an EPA determination or regulation states that the data is not entitled to confidentiality), the program office may issue a final determination of business confidentiality.
3. The program office requires the submitter to substantiate the CBI claim, giving 15 working days (following receipt of the substantiation request) to respond. The office must call the submitter to inform him/her that the substantiation request is coming, and send the request via certified mail, return receipt requested, or via other means which allows verification of the fact and date of receipt. An extension of the response period may be granted if a timely request is received, but if no timely substantiation or extension request is received, the claim is waived. If no response is received, the office must first verify with the submitter that the request was not lost in the mail before considering the claim waived.
4. The EPA legal office (Regional Counsel or General Counsel) then makes a final determination whether the information is entitled to confidentiality,
5. If the information is entitled to confidentiality, the FOIA request is given a final denial.
6. If the information is not entitled to confidentiality, the legal office issues a final determination denying confidentiality. The submitter is given 10 days advance notice (30 days if the information was collected under TSCA or FIFRA) of EPA's intent to disclose the information, in the absence of other FOIA exemptions that would authorize withholding.
7. During the notice period, the submitter may file in district court to enjoin disclosure of the information determined not to be subject to the CBI exemption.