

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

DISCUSSION ON HOW TO DEFINE CONFIDENTIAL INFORMATION

-- United States --

29 October 2013

This note is submitted by United States to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item IV at its forthcoming meeting to be held on 29 October 2013.

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DEFINITION OF CONFIDENTIAL INFORMATION

– United States –

1. Confidentiality Overview

1. Many laws and rules at the federal level address confidentiality and privacy, requiring federal agencies to apply specific confidentiality and privacy protections for the information they receive from individuals, companies, or other governmental bodies. These protections limit the disclosure of certain categories of information and place limits on how certain information can be used. Typically, categories of confidential or private information include trade secrets, legally privileged information, financial information, the existence of law enforcement investigations, and information about individuals.

2. The Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) (together, “Agencies”) depend on access to sensitive, nonpublic information from businesses and consumers to fulfill the Agencies’ missions. No single U.S. federal statute or regulation attempts to define “confidential information” in the antitrust context. Instead, various federal statutes, rules, and policies require that the Agencies treat certain information they obtain as confidential and protect it from public disclosure. Confidential treatment means that the Agencies are limited in whether, to whom, and how they can disclose certain information.¹

3. As a general matter, the treatment of information as confidential by the Agencies will depend on either the purpose for which it is obtained or the manner in which it is used. The Agencies are required by law to treat all information obtained pursuant to the Hart-Scott-Rodino (“HSR”) Act,² which governs mandatory premerger notification and review, as confidential. The FTC must treat as confidential information obtained pursuant to compulsory process under the Federal Trade Commission Act (“FTCA”),³ and DOJ must treat information obtained through civil compulsory process pursuant to the Antitrust Civil Process Act (“ACPA”)⁴ as confidential. The confidentiality protections in these statutes apply to DOJ’s or FTC’s antitrust investigations and mean that confidential information cannot be disclosed publicly, with very limited exceptions. In DOJ criminal antitrust cases, the Federal Rules of Criminal Procedure require secrecy in grand jury proceedings by prohibiting members of the grand jury, government attorneys and their authorized assistants, and other grand jury personnel from disclosing matters occurring before the grand jury, except as otherwise authorized.⁵ In other instances, in both the

¹ For a discussion of the DOJ’s general policies regarding confidential treatment of information, see the Antitrust Division Manual, Nov. 2012 ed., *available at* <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf>. For a discussion of the FTC’s general policies regarding treatment of confidential information, see the FTC’s Operating Manual §§ 15.4-.14, *available at* <http://www.ftc.gov/foia/ch15confidentialityandaccess.pdf>.

² 15 U.S.C. § 18a.

³ 15 U.S.C. §§ 41-68.

⁴ 15 U.S.C. §§ 1311-1314.

⁵ FRCP 6(e) codifies the rule of grand jury secrecy.

civil and criminal contexts, the particular content of the material will require that the Agencies treat it as confidential. For example, laws governing privacy, national security information, and trade secrets require that the Agencies treat such information as confidential.

4. Information treated as confidential under the statutes cited above can be disclosed only in discrete circumstances and for specific uses. The HSR Act expressly allows the Agencies, Section 21 of the FTCA allows the FTC, and the ACPA allows DOJ, to use confidential information produced by parties and third parties in court proceedings. However, if the Agencies file civil (or in DOJ's case, criminal) cases in federal court and seek, or if the FTC issues a complaint in an administrative proceeding before an administrative law judge and seeks, to introduce evidence for use in court proceedings, the parties or source of the confidential information may ask the court for a protective order to prevent such information from being made public or from being used beyond the court proceeding. For example, a protective order may permit attorneys and expert witnesses in an antitrust case to access confidential financial information, but all references to this information in expert reports or testimonial evidence would be removed from the public version. In the event of a dispute, the court will hear arguments and determine what material, if any, should be covered by a protective order. Confidential information provided to a court can also be protected from disclosure by filing the information under seal. A similar process exists in FTC administrative proceedings. Information filed under seal will not be part of the public record.

5. In addition to the statutes and rules cited above, the Agencies are subject to the Freedom of Information Act ("FOIA"),⁶ which provides the public with a right of access to federal agency records. FOIA contains several exemptions that protect confidential information provided to federal agencies from being disclosed. When determining the confidential treatment of information provided to the DOJ or FTC, FOIA must be considered in conjunction with the HSR Act, the FTCA, the ACPA, and other applicable laws. Information exempt from disclosure under FOIA relevant to FTC or DOJ investigations includes: (i) information withheld on the basis of other statutory confidentiality protections,⁷ including HSR and Civil Investigative Demand ("CID") materials; (ii) trade secrets and commercial or financial information identified as privileged or confidential;⁸ (iii) information compiled for law enforcement purposes to the extent that its disclosure could interfere with the proceedings, disclose a confidential source, or constitute an unwarranted invasion of personal privacy;⁹ (iv) intra-agency and inter-agency memoranda or letters that would be routinely privileged in civil discovery, *e.g.*, attorney work-product or attorney-client information;¹⁰ and (v) national defense or foreign policy information that is properly classified.¹¹ FOIA, however, does not authorize withholding information from Congress.

6. Agency policies may also provide confidentiality protections for certain types of information. For example, pursuant to the DOJ's Leniency Program, DOJ does not publicly disclose the identity of or information obtained from a leniency applicant absent prior disclosure by, or agreement with, the applicant, unless required to do so by court order in connection with litigation.

⁶ 5 U.S.C. § 552.

⁷ 5 U.S.C. § 552(b)(3).

⁸ 5 U.S.C. § 552 (b)(4).

⁹ 5 U.S.C. § 552(b)(7)(A), (C), and (D).

¹⁰ 5 U.S.C. § 552(b)(5).

¹¹ 5 U.S.C. § 552(b)(1).

2. Statutory Bases for Confidential Treatment of Information

7. The HSR Act requires parties to certain acquisitions of voting securities or assets to file premerger notification with both Agencies and observe a waiting period before consummating the transaction. The HSR Act's confidentiality provision¹² provides that information submitted to the Agencies pursuant to the HSR Act is exempt from disclosure under FOIA and may not be made public (except as relevant to a judicial or administrative proceeding). The Agencies have consistently interpreted this provision as applying not only to information contained in HSR notifications, "second request" responses, and information provided voluntarily by the merging parties, but also regarding whether an HSR filing has been made, whether a second request has been issued, and a date the waiting period expires. Information obtained under the HSR Act is not disclosed to state attorneys general, other federal agencies, or competition law enforcement authorities in other jurisdictions without a party's written waiver of confidentiality. If a party to a transaction seeks early termination of the HSR Act's waiting period and early termination is granted, the HSR Act requires that the fact of early termination be published in the Federal Register, and that fact also is posted on the FTC's website.

8. Other federal laws also require the Agencies to treat specific types of information as confidential, regardless of how the information is obtained. The Privacy Act of 1974¹³ balances the government's need to collect and maintain personal information about individuals with the rights of individuals to be protected against unwarranted invasions of privacy. The Act prohibits the Agencies from disclosing personal identifying information about an individual (*e.g.*, social security numbers and date of birth) without his or her consent, except under certain specified circumstances. Employees at the Agencies with authorized access to personal information only may reveal it, in the performance of their official duties, to other government officials who have a need for the information.

9. The ACPA applies only to DOJ and authorizes DOJ to compel documents and testimony in furtherance of civil antitrust investigations through the issuance of CIDs. The ACPA requires that DOJ treat information obtained through CIDs as confidential, and Section 1313(c) states that, other than for use in oral depositions in furtherance of investigations, no documents produced or transcripts of oral testimony taken pursuant to a CID shall be disclosed without the consent of the person that produced the materials. There are limited exceptions to this rule: information obtained through a CID may be used before any court, before a grand jury, or in federal administrative or regulatory agency cases or proceedings, including in investigations conducted by FTC.

10. In federal criminal cases, including DOJ criminal antitrust investigations, Rule 6(e) of the Federal Rules of Criminal Procedure codifies a requirement of secrecy that attaches to grand jury proceedings. Rule 6(e) prohibits members of the grand jury, government attorneys, and other grand jury personnel from disclosing "matters occurring before the grand jury." There are limited exceptions to these secrecy requirements, which typically require a district court order to become effective in a particular case.

11. The FTCA protects confidential information and limits disclosure of materials submitted to the FTC. Section 6(f) of the FTCA generally prohibits the FTC from making public any trade secret, commercial or financial information obtained from any person that is privileged or confidential.¹⁴ In addition, all information received by the FTC pursuant to compulsory process¹⁵ in an investigation to

¹² 15 U.S.C. 18a(h).

¹³ 5 U.S.C. § 552a (2006).

¹⁴ 15 U.S.C. § 46(f).

¹⁵ Under the FTCA, the FTC can authorize compulsory process, meaning the target is legally required to provide documents, written response, or testimony to the FTC.

determine whether a law has been violated is treated as confidential, and such information cannot be disclosed publicly without consent of the submitter, with limited exceptions, such as use in judicial proceedings under a protective order, discussed below.¹⁶ Any material received by the Commission in any investigation and provided either voluntarily or pursuant to compulsory process also is protected from disclosure under FOIA.¹⁷

12. Other protections apply to information submitted to the FTC that the submitter marks as confidential. FTC Rule of Practice (“FTC Rule”) 4.10¹⁸ limits disclosure of information obtained in a law enforcement investigation that the submitter marks as confidential, and specifies the exceptions where disclosure may be allowed, such as for use in judicial proceedings under a protective order, discussed below. Information that the submitter marks as confidential received in a context other than law enforcement cannot be disclosed publicly unless the FTC determines that the information is not covered by Section 6(f) and the submitter is provided with 10 days’ notice.¹⁹ The FTCA does not prevent disclosure to Congress but requires the FTC to notify the submitter of the information of a Congressional request for information.²⁰

13. The FTC has discretion to disclose information obtained pursuant to compulsory process or information submitted voluntarily that is marked as confidential in response to a written request from a federal or state law enforcement agency that requires such information for an investigation. Before the FTC considers such a request, the law enforcement agency must certify to the FTC that confidential information will be maintained in confidence and will be used only for official law enforcement purposes.²¹

14. In civil investigations, the DOJ will disclose confidential information to another federal or state law enforcement agency pursuant to waivers from the parties. In criminal cases, Federal Rule of Criminal Procedure 6(e) limits the disclosure of information obtained in grand jury proceedings.

3. Judicial Treatment of Confidential Information

15. The statutory restrictions and rules governing the treatment of confidential information continue to apply after the Agencies have filed a complaint in federal court or initiated administrative proceedings. However, the HSR Act expressly allows the Agencies, the ACPA allows DOJ, and Section 21 of the FTCA allows the FTC, to use confidential information produced by the parties and third parties in judicial or administrative proceedings. As mentioned above, parties or sources of information can request that the court grant a protective order to protect confidential information from disclosure beyond individuals identified in the order. Rule 26(c) of the Federal Rules of Civil Procedure enables parties in civil cases in federal courts to seek a judicial protective orders to limit public access to discovery materials upon a showing of “good cause,” and FTC Rule 3.31(d) allows for an administrative law judge to issue a

¹⁶ FTCA § 57b-2b(b), 15 U.S.C. § 57b-2(b).

¹⁷ FTCA § 57b-2b(f), 15 U.S.C. § 57b-2(f).

¹⁸ 16 C.F.R. Sec. 4.10.

¹⁹ FTCA § 57b-2b(c), 15 U.S.C. § 57b-2(c).

²⁰ FTCA Section 21(c) offers protections for information designated confidential by the submitter and 21(d) provides protections for trade secrets and governs disclosures to Congress, 15 U.S.C. § 57b-2(c), (d); *see also* FTC Rule 4.10, 16 C.F.R. § 4.10 (protecting specific categories of information from disclosure) and FTC Rule 4.11, 16 C.F.R. § 4.11b (governing Congressional requests for information and notice to submitters).

²¹ *See* 15 U.S.C. § 57b-2 and FTC Rule 4.10(d), 16 C.F.R. § 4.10(d); 46 FR 26284, 26291 (1981).

protective order “to protect the parties and third parties against improper use and disclosure of confidential information.”²²

16. Judicial and administrative courts have extensive experience evaluating requests for protective orders and, in determining whether to issue such orders, will consider several factors, including the confidentiality interests at issue, the fairness and efficiency of limiting public access to information, and the importance of the litigation to the public.²³ Parties often seek protective orders from the court to restrict public dissemination of confidential business information. In many cases, the parties and FTC or DOJ will seek to reach agreement on the terms of proposed protective orders sought from a court. When requesting a protective order, a party may file a motion with the court to file confidential information under seal, meaning that the information may be reviewed by the court without becoming a public record. Federal Rule of Civil Procedure 5.2 and the FTC’s administrative law judges also allow a party to provide a redacted copy of a document that will be made public while providing the court with an unredacted copy containing confidential information under seal.

17. In DOJ’s criminal cases Federal Rule of Criminal Procedure 49.1 provides, and in FTC administrative cases FTC Rules 3.45(b) and 4.2(c)(4) provide, that certain private information, such as financial account numbers, dates of birth, and home addresses, may not be disclosed in full in court filings. For good cause, a court may order redaction of additional information or limit or prohibit a nonparty’s remote electronic access to a filed document. A court may also order that a filing be made under seal without redaction and that a redacted version be filed on the public record.

4. Treatment of Confidential Information in the Context of International Cooperation

18. Parties or third parties may choose to waive confidentiality protections to permit the Agencies and non-U.S. competition authorities to share the party’s or third party’s confidential information. In many matters, this enables more effective cooperation. Before confidential information is shared, the Agencies will have an arrangement with the cooperating non-U.S. competition authorities that they will protect confidential information in accordance with their own statutes and rules.

19. The Agencies have developed a joint model waiver of confidentiality for use in civil matters involving non-U.S. competition authorities, which is available on the Agencies’ websites.²⁴ In the Agencies’ practice, the primary use of waivers is to permit informed discussions by agencies in different jurisdictions of confidential information that both agencies already possess. Most cooperation occurs through oral communication between the staffs of the investigating agencies, although in some instances agencies have provided access to physical documents during the course of their cooperation.

20. In the absence of a waiver, the Agencies may share confidential information with their counterparts pursuant to a mutual assistance agreement under the International Antitrust Enforcement Assistance Act (“IAEAA”). The IAEAA sets out specific confidentiality safeguards for sharing information under antitrust mutual assistance agreements.²⁵ The U.S.-Australia Mutual Antitrust Enforcement Assistance Agreement, the only agreement concluded under the IAEAA to date, provides that requests for assistance under the Agreement shall be accompanied by written assurances by the relevant antitrust authority that there have been no significant modifications to the confidentiality laws and

²² 16 C.F.R. § 3.31(d). A sample protective order is included in Appendix A to § 3.31.

²³ For a general reference on protective order issues, *see* Antitrust Law Developments, 731 (7th ed. 2012).

²⁴ *See* <http://www.ftc.gov/oia/waivers/index.shtm> and <http://www.justice.gov/atr/public/international/index.html>.

²⁵ *See* 15 U.S.C. 6201 *et seq.* Art. III.C.

procedures described in Annex A of the Agreement.²⁶ The IAEAA requires that the nature of the assistance provided generally be reciprocal, except in regard to procedures, or to a particular case. The U.S. and Australian agencies maintain the confidentiality of any information communicated to them in confidence under the Agreement.

21. For criminal matters, the United States has bilateral Mutual Legal Assistance Treaties (MLATs), Instruments, or Protocols with more than 80 countries or regional organizations, which allow information to be shared with the criminal law enforcement authorities in another jurisdiction.²⁷ The specific provisions of each agreement vary, but generally provide for assistance in criminal law enforcement matters, such as the conduct of searches, taking of witness testimony, and service of documents. Specific statutory authority or court orders are generally required to share statutorily protected confidential information in an MLAT request. For example, a court order may be obtained under Rule 6(e) of the Federal Rules of Criminal Procedure in order to disclose matters occurring before a grand jury in an MLAT request.

22. In criminal matters, under its Leniency Program, DOJ does not disclose the identity of or information from a leniency applicant to a foreign authority unless the applicant first agrees to the disclosure. Applicants routinely make simultaneous leniency applications to multiple jurisdictions and thus often grant such waivers to allow the sharing of information among authorities.

23. Finally, the FTC or DOJ may share “agency non-public” information with counterparts as part of their international cooperation. This is information that the Agencies are not statutorily prohibited from disclosing, but normally treat as non-public and that may be withheld legitimately from public disclosure under FOIA.²⁸ Examples include the existence or absence of an open investigation; the fact that the DOJ or FTC has requested information from a person located outside U.S. territory; staff views on market definition and competitive effects; and potential remedies being considered.

²⁶ See <http://www.ftc.gov/os/1997/04/annexa.htm>.

²⁷ See <http://www.state.gov/documents/organization/86744.pdf>.

²⁸ 5 U.S.C. § 552(b)(5).