

TABLE OF CONTENTS

Section

- .1 General
- .2 Criminal Sanctions and Disciplinary Proceedings
- .3 Public Disclosure
 - .3.1 Disclosure on the Public Record
 - .3.1.1 General
 - .3.1.2 Public Record Disclosure in Prior Approval Proceedings
 - .3.1.2.1 The Applications and Supporting Documents Provided by Applicant
 - .3.1.2.2 Written and Oral Communications Between Outside Parties and Commissioners' Offices
 - .3.1.2.3 Public Comments
 - .3.1.2.4 Prior Compliance Reports
 - .3.1.2.5 Disposition of Public Record and File
 - .3.2 Disclosure in Response to a Public Access Request
 - .3.2.1 Initial Requests
 - .3.2.2 Appeals from Denials of Access
 - .3.2.3 Treatment of Particular Materials
 - .3.2.3.1 Materials from Other Agencies
 - .3.2.3.2 Copyrighted Materials
 - .3.2.4 Retention of Requested Documents
 - .4 Limitations on Disclosure
 - .4.1 FTC Act Provisions
 - .4.1.1 Trade Secrets and Privileged or Confidential Commercial or Financial Information - Section 6(f)
 - .4.1.2 Documents Received in a Law Enforcement Investigation, Irrespective of Content - Sections 21(b) and 21(f) and Commission Rule 4.10(d)
 - .4.1.3 Documents Received Other Than in Law Enforcement Investigations, Irrespective of Content, and Unsolicited Submissions - Section 21(c)
 - .4.1.4 Line of Business Data - Section 6(h)
 - .4.2 The Hart-Scott-Rodino Act
 - .4.3 The Freedom of Information Act
 - .4.3.1 Exemption 2 - Internal Personnel Rules and Practices
 - .4.3.2 Exemption 3 - Matters Specifically Exempted by Statute
 - .4.3.3 Exemption 4 - Trade Secrets and Confidential Commercial Information
 - .4.3.4 Exemption 5 - Internal Memoranda
 - .4.3.4.1 Discretionary Release of Internal Documents
 - .4.3.5 Exemption 6 - Personal Privacy
 - .4.3.6 Exemption 7 - Investigatory Files

- .4.4 Confidentiality and the Privacy Act
- .4.5 Confidentiality and the Sunshine Act: Treatment of Commission Minutes
- .5 Requests for Confidential Treatment
- .5.1 Documents Subject to Public Record Disclosure
- .5.2 Other Documents
- .6 Access Requests from Congress, its Committees and Subcommittees
- .6.1 Office of the Secretary and Office of Congressional Relations Responsibilities
- .6.2 Responsibility for Preparing the Response
- .6.2.1 Notice to Submitters
- .6.3 Nature of the Response
- .6.3.1 Release of Nonpublic Information or Documents
- .6.3.1.1 Nonpublic Materials or Information That Are Exempt from Mandatory Disclosure
- .6.3.1.2 Nonpublic Materials of Information That Are Not Exempt from Mandatory Disclosure
- .6.3.1.3 Treatment of Voluminous or Highly Sensitive Information or Materials, Requests to Review Documents, And Requests to Interview Staff
- .6.3.2 Publicly Available Materials or Information
- .7 Access Requests from Federal, State and Local Governments
- .7.1 Requests for "Law Enforcement Purposes"
- .7.2 Telemarketing Materials
- .7.3 Program for Federal-State Cooperation in Merger Enforcement
- .7.4 Requests for Purposes Other Than Law Enforcement
- .7.5 Disclosure by Bureau and Regional Office Staff
- .8 Other Disclosure
- .8.1 Administrative Litigation and Subpoenas
- .8.2 Consultants
- .8.3 Writing Samples
- .8.4 Articles or Speeches
- .9 Sunshine Act Procedures
- .10 Privacy Act Procedures
- .10.1 General
- .10.1.1 Definitions for Purposes of this Subsection
- .10.1.1.1 Individual
- .10.1.1.2 Record
- .10.1.1.3 System of Records
- .10.1.1.4 Routine Use
- .10.2 Policies in Collecting and Storing Information
- .10.2.2.4 Description of Routine Uses
- .10.3 Disclosures in Collecting Information
- .10.3.1 Procedures for Disclosures

Chapter Fifteen

CONFIDENTIALITY AND ACCESS

- .10.3.1.1 Use of Standard Notices Developed by Other Agencies
- .10.3.2 Contents of Disclosure
 - .10.3.2.1 Authority for Collecting Information
 - .10.3.2.2 Mandatory or Voluntary Solicitation
 - .10.3.2.3 Principal Purposes for Information
 - .10.3.2.4 Description of Routine Uses
 - .10.3.2.5 Effects of Not Providing Information
- .10.4 Disclosure of Records to Persons Other Than the Subject Individual
 - .10.4.1 Information Concerning Commission Employees Available to the Public
- .10.5 Accounting of Disclosures
- .10.6 Notices of Systems of Records
- .11 Right to Financial Privacy Act Procedures
 - .11.1 General
 - .11.1.1 Definitions for Purposes of this Section
 - .11.1.2 Exemptions from All Provisions of the RFPA
 - .11.1.3 Exemptions from Specific Provisions of the RFPA
 - .11.1.4 Identification of Documents Obtained Under the Act
 - .11.2 Commission Access to Financial Records
 - .11.2.1 Customer Notice Requirements
 - .11.2.1.1 Customer Notice When Records Are Sought By Process
 - .11.2.1.1.1 Delay of Notice
 - .11.2.2 Certificate of Compliance
 - .11.3 Transfer of Records
 - .11.4 Remedies and Sanctions for Violations of the Act
- .12 Custodial Documents
 - .12.1 Treatment of Custodial and Other Documents Submitted to the Commission
 - .12.2 Copying and Using Custodial Documents
 - .12.3 Change of Custodian
- .13 Disposition of Documents
 - .13.1 Applicable Laws, Rules and Schedules
 - .13.1.1 The Federal Records Act
 - .13.1.1.2 Drafts of Consent Decrees
 - .13.1.2 The FTC Act and Commission Rules
 - .13.1.3 The Freedom of Information Act
 - .13.2 Procedures
 - .13.2.1 General
 - .13.2.2 Disposition of Files at the Close of a Proceeding
 - .13.2.2.1 Return of Documents to Submitters
 - .13.2.2.2 Retention of Documents by the Commission
 - .13.2.3 Return of Submitted Documents Prior to the Close of a Proceeding
 - .13.2.4 Return of Commission-made Copies of Submitted Documents

Chapter Fifteen **CONFIDENTIALITY AND ACCESS**

- .14 Confidentiality of Line of Business ("LB") and Quarterly Financial Report ("QFR") Data

Illustrations

- 1 Letter Responding to Request for Confidential Treatment
- 2 Sample Response Letter for Congressional Access Request for Nonpublic Information
- 3 Notice of Congressional Access Request
- 4 Certification of Intent to Maintain Confidentiality of Documents and to Restrict Need to Official Purposes
- 5 FTC Privacy Act Request Form
- 6 Information Disclosure Statement
- 7 Letter Requesting Consent for Disclosure
- 8 Privacy Act Inventory Form
- 9 Notice to Customer of Commission Request for Financial Records
- 10 Motion to Quash Federal Trade Commission Subpoena
- 11 Notice to Customer of Delayed Notice
- 12 Certificate of Compliance [Customer is Not the Target of Commission Investigation]
- 13 Certificate of Compliance [Customer is the Target of Commission Investigation]
- 14 Certificate of Compliance for Transfer of Records
- 15 Notice to Customer of Commission Transfer of Financial Records.
- 16 Model Certification for States (Program for Federal-State Cooperation in Merger Enforcement)
- 17 Model Waiver for Submitters (Program for Federal-State Cooperation in Merger Enforcement)
- 18 Disclosure Provisions of the FTC Act, Clayton Act, and FTC Rules of Practice

.1 GENERAL

This chapter provides guidance concerning confidentiality and disclosure, and discusses policies and procedures implementing the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. § 552b, the Right to Financial Privacy Act, 15 U.S.C. § 1601 *et seq* ("RFPA"), the Federal Records Act, 44 U.S.C. § 3301 ("FRA"), and Sections 6(f) and 21 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 46(f), 57b-2. These laws apply to the collection, release, maintenance, and disposition of information collected or generated by the Commission. They cover information stored on computer data bases, as well as information in written documents.

.2 CRIMINAL SANCTIONS AND DISCIPLINARY PROCEEDINGS

Commission records can be disclosed pursuant to FOIA procedures; pursuant to procedures for access by law enforcement agencies and Congress; pursuant to procedures for use in the taking of oral testimony or litigation; by the assigned Commissioner in a matter considered at an open Commission meeting pursuant to Rule 4.15(b)(3); and after approval by the General Counsel for use in teaching, lecturing or writing pursuant to Rule 5.12(c). (See Rule 4.9(a)(2).) Under Section 10 of the FTC Act, 15 U.S.C. § 50, unauthorized release of information obtained by the Commission is a criminal offense, with penalties up to a \$5,000 fine and one year imprisonment. In some cases, criminal sanctions may also be available under the Trade Secrets Act, 18 U.S.C. § 1905, or the Larceny Act, 18 U.S.C. § 641. Also, unauthorized release of any nonpublic information may lead to disciplinary proceedings.

These penalties do not apply to disclosures pursuant to OM Ch. 16.8, which provides guidelines on information that staff may disclose concerning the legality of practices or applicable legal issues, jurisdiction, and the availability of relief; Ch. 16.9, which provides guidelines on disclosure of such information as the identity of a respondent; and Ch. 15.7.1, which authorizes certain staff disclosures to other government agencies.

.3 PUBLIC DISCLOSURE

.3.1 DISCLOSURE ON THE PUBLIC RECORD

.3.1.1 General

As detailed in Rule 4.9(b), certain records are subject to routine disclosure on the Commission's public record. Disclosure on the public record is subject to exemptions for

nonpublic information, and submitters may request confidentiality for records subject to these disclosure requirements. (See Rule 4.9(c) and .5.1 below).

.3.1.2 Public Record Disclosure in Prior Approval Proceedings

The following procedure should be used when placing materials concerning applications for approval of divestitures, acquisitions or similar transactions subject to Commission review under outstanding orders on the public record. (See Rule 2.41(f).) These procedures do not apply to Hart-Scott-Rodino filings, which are subject to strict confidentiality provisions. (See .4.2. below.)

.3.1.2.1 The Application and Supporting Documents Provided By Applicant

These documents, which are filed with the Secretary, are examined by Commission staff to determine (1) whether they are requests or applications as distinct from expressions of interest, and (2) whether they are subject to confidentiality requests. When confidentiality questions are not involved, these materials will be paginated and indexed by the bureau with the assistance of the Information Services Division (ISD), returned to the Office of the Secretary, and then placed on the public record immediately by the ISD. The Office of Public Affairs will issue a news release drafted by the bureau, specifying the deadline for comments under the 30-day comment period and noting that the comments will go on the public record when received.

Material as to which confidentiality is requested is handled pursuant to the procedures outlined in section .5 below. To the extent that confidentiality is denied, such materials will be indexed and paginated by the bureau as an addition to the material already on the record, and will be added to the public record immediately after the Commission has responded to the confidentiality issue, and the applicable period has expired for notice to the submitter of the denial.

.3.1.2.2 Written and Oral Communications Between Outside Parties and Commissioners' Offices

Written material received by Commissioners will be forwarded to the Office of the Secretary and placed on the public record immediately upon receipt. A memorandum setting forth the full contents of any oral communication and the circumstances thereof should be furnished to the Secretary and placed on the public record.

.3.1.2.3 Public Comments

Public comments, whether received directly by the Secretary or received by the staff and forwarded to the Secretary, will be immediately placed on the public record by the

Information Services Division after receipt by the Office of the Secretary, subject to the resolution of any confidentiality issues. Copies of comments received by the Secretary will be referred expeditiously to the appropriate staff attorney, and acknowledgments of all letters will be prepared by the staff for the Secretary's signature.

.3.1.2.4 Prior Compliance Reports

Applications for approval of divestitures and materials in prior related interim reports of compliance will be placed on the public record, excluding information or documents relating to respondent's assets as to which divestiture negotiations have not been completed. Material placed on the public record under this section need not be paginated or indexed.

.3.1.2.5 Disposition of Public Record and File

Upon expiration of the 30-day period, the Secretary will send a copy of the public record file related to the application to the appropriate staff attorney, who will forward those materials to the Commission together with a report and recommendation within 30 days of receipt.

.3.2 Disclosure in Response to a Public Access Request

.3.2.1 Initial Requests

Rule 4.11 describes the procedures for FOIA requests. Requests are handled initially by the Office of the Deputy Executive Director for Planning and Information (DEDPI). If a staff member receives a written request for Commission records, it should be transmitted to the Office of the DEDPI for handling. (Other inquiries and correspondence may be handled in accordance with the limitations on disclosure of nonpublic information in Rule 4.9(a)(2) and OM Ch. 15.4 and the guidance in OM Ch. 16.)

The Office of the DEDPI will request the appropriate offices to search for responsive materials, including materials stored in data bases. Staff must search for and identify responsive materials and recommend whether the responsive materials should be disclosed or withheld, based on applicable exemptions under the FOIA, FTC, and HSR Acts. (See sections .4.1, .4.2, and .4.3 below.) Minutes of Commission meetings are subject to exemptions under the Sunshine Act. (See section .4.5 below.) All documents will be reviewed by the Office of the DEDPI, except documents in pending investigations.

Staff need not forward separate recommendations for individual documents, but staff should consider whether particular documents fall within exempt categories. For example, since exemption 7(A) can only be claimed for documents in an open file whose release would interfere with law enforcement proceedings, some materials within a file, such as newspaper articles, may not be exempt.

If the initial request is wholly or partially denied, the DEDPI or the Director, Information Services Division (DISD) is deemed to be the sole official responsible for such denial, unless the material is contained in an active investigatory file. In those cases, the Director or Deputy Director of the appropriate Bureau, or the Regional Office Director, is the responsible official.

The DEDPI or DISD may grant discretionary release of records that have previously been released and of records that may be released pursuant to an established Commission policy. (See .4.3.4.1 below.)

.3.2.2 Appeals from Denials of Access

Appeals from a denial of access should be forwarded to the General Counsel. In unusual or difficult cases, the General Counsel may, as a matter of discretion, refer an appeal to the Commission. Subject to applicable statutes, rules, and policies, the General Counsel may grant discretionary release of exempt records. (See section .4.4 below.)

.3.2.3 Treatment of Particular Materials

.3.2.3.1 Materials from Other Agencies

When responsive materials include documents that were received previously from another agency, the submitting agency will be contacted by the DEDPI on initial requests or by the General Counsel on appeal. The materials should not be released if the submitting agency determines that they are exempt. (See also .4.1.2 below)

.3.2.3.2 Copyrighted Materials

When responsive materials include copyrighted documents, such as published advertising substantiation materials, the requester should ordinarily be given lists of the titles and sources of the materials, rather than actual documents. This will often be agreeable to the requester because it will limit copying costs. In any event, copies of copyrighted materials will be routinely withheld if providing them would violate section 6(f) by adversely affecting the commercial value of the copyright. See United States Department of Justice, FOIA Update, Fall 1983, at 3.

The determination of whether to copy particular materials will depend upon such factors as the amount of material requested, the age of the material, and whether it is still available from the copyright holder. Also, works that comprise a small portion of a publication are more appropriately copied than works that comprise a large portion of a publication.

Although determinations will be made on a case-by-case basis, requesters will rarely be provided copies of entire books, newsletters, or other publications, or of Dun & Bradstreet Reports. Journal articles and reprints of case decisions generally will be copied, and non-exempt newspaper clippings from investigative files will almost always be copied.

.3.2.4 Retention of Requested Documents

When a FOIA requester has been denied access to documents, the documents must be retained until the expiration of the thirty-day period during which the requester may file an administrative appeal and, in appropriate cases, the documents should be retained until the expiration of the six-year statute of limitations for judicial review. Prior to disposing of such documents, staff should contact the Information Services Division.

.4 LIMITATIONS ON DISCLOSURE

This discussion describes limits on disclosure of Commission records. The applicable statutes and implementing regulations govern whether the Commission will refrain from placing material on the public record or deny a public access request for the materials. These authorities may also determine whether the Commission will request confidentiality for information provided to Congress, and whether a request from another law enforcement agency seeking access for purposes other than law enforcement will be granted (See sections .6 and .7 below.)

The limits described in this section apply to disclosure of information contained in records, as well as to physical copies of records. As a general matter, staff should not disclose any nonpublic information to members of the public. But cf. OM Ch. 16.9 (providing for limited disclosure of information about Commission investigations).

.4.1 FTC ACT PROVISIONS

The discussion that follows analyzes the limitations on disclosure under the FTC Act. The chart on page 41 provides a brief summary of how each of these provisions affects public disclosure (as well as use in depositions and litigation, disclosure to Congress and disclosure to law enforcement agencies).

.4.1.1 Trade Secrets and Privileged or Confidential Commercial or Financial Information - Section 6(f)

Section 6(f) of the FTC Act, 15 USC § 46(f), prohibits disclosure of trade secrets, as well as commercial or financial information that is privileged or confidential. Section 6(f) parallels FOIA exemption 4, which exempts similar materials from mandatory public disclosure. The case law construing

the coverage of exemption 4 (and, by implication, of section 6(f)), is summarized in the "Justice Department Guide to the Freedom of Information Act." The Guide is revised annually and published in the Department's "Freedom of Information Case List." In brief, most questions under section 6(f) involve confidential commercial information. Such information is confidential if disclosure is likely to (1) impair the agency's ability to obtain information in the future, or (2) cause substantial harm to the competitive position of the person from who the information is obtained or of a third party. See National Parks & Conservation Assn v. Morton 498 F.2d 765, (D.C. Cir. 1974); S. Rep. 96-500, 96th Cong., 1st Sess. 11 (1980). These criteria are not satisfied simply because a submitter would not ordinarily make the information public or because of a previous assurance of confidentiality.

No set of inherently confidential documents can be defined. Significant factors include the age of a document (since commercial information generally becomes less sensitive over time) and applicable disclosure requirements (since information would not be confidential if it is subject, for example, to SEC disclosure requirements). Close scrutiny is warranted for:

- (1) trade secrets that appear to have significant intrinsic value;
- (2) names of customers (particularly customer lists);
- (3) current manufacturing formula and processes that cannot easily be developed independently;
- (4) recent sales, inventory and production statistics;
- (5) recent balance sheets or profit and loss statements;
- (6) current appraised value of assets;
- (7) current contract bids and negotiations;
- (8) terms of current contracts, including prices paid by individual customers; and
- (9) current marketing and production plans, or other plans for future operations.

.4.1.2 Documents Received in a Law Enforcement Investigation, Irrespective of Content - Sections 21(b) and 21(f) and Commission Rule 4.10(d)

Section 21(f) of the FTC Act, 5 U.S.C. § 57b-2(f), exempts from mandatory FOIA disclosure any materials received pursuant to process or voluntarily in lieu of process in an investigation, "a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission."

Almost any information or documents requested by staff in connection with an actual or potential law enforcement investigation will be covered by section 21(f). This includes information or documents requested from any source including other government agencies. Compulsory process need not have been authorized. See, McDermott v. FTC, 1981-1 Trade Cas. (CCH) ¶ 63,964 (D.D.C. Apr. 13, 1981). Section 21(f) applies retroactively to documents received prior to passage of the FTC Improvements Act of 1980, on May 28, 1980.

Other provisions preclude even discretionary release of many materials covered by section 21(f). Section 21(b) of the FTC Act, 15 U.S.C. §§ 57(b)-2(b), precludes disclosure of materials that were received under process in a law enforcement investigation, if they were received after May 28, 1980 (Section 21(b), unlike section 21(f), is not retroactive). Rule 4.10(d) precludes disclosure of materials received voluntarily in lieu of process, if they were designated confidential. This assures submitters that they need not insist on compulsory process to obtain confidentiality for their documents. (See 46 FR 26,287 (1981).)

.4.1.3 Documents Received Other Than in Law Enforcement Investigations, Irrespective of Content, and Unsolicited Submissions - Section 21(c)

Documents received outside of a law enforcement investigation are not protected by section 21(b) or 21(f), or by Rule 4.10(d). Trade secrets and confidential information, however, would be protected by section 6(f) whether or not they were received in a law enforcement investigation. Further, if materials received outside a law enforcement investigation are determined to be subject to disclosure, and if they were designated confidential, the submitter is entitled to ten days notice prior to public disclosure. The submitter may sue in district court for a stay of disclosure and, pending a decision on the stay, no disclosure may be made. (See Sections 21(c) and (d) of the FTC Act, 15 U.S.C. §§ 57b-2(c) and (d); Rule 4.10(d), (e).) Even submitters of unsolicited information are entitled to notice prior to disclosure if their submissions were marked confidential.

This notice provision does not apply in certain limited circumstances described in Section 21 of the FTC Act. For example, disclosure may be made to Congress without 10 days' prior notice, although the Commission must immediately notify the submitter of any such information that a request has been received.

.4.1.4 Line of Business Data - Section 6(h)

Section 6(h) of the FTC Act, 15 U.S.C. § 46(h), forbids disclosure of Line of Business Data, which the Commission collected between 1973 and 1977. The treatment of such data is discussed in section .14.

.4.2 THE HART-SCOTT-RODINO ACT

Hart-Scott-Rodino submissions, both initial filings and material submitted in response to "second requests," are nonpublic. (See 15 U.S.C. § 18a(h); 5 U.S.C. § 552(b)(3).) Protected information includes the fact of filing, which would reveal that filing thresholds were met. However, the fact of filing is not protected if it has been disclosed by publication of a notice of early termination.

.4.3 THE FREEDOM OF INFORMATION ACT

The FOIA lists nine exemptions to its mandatory disclosure requirements. Some rarely if ever apply to the Commission, i.e., exemptions 1 (classified documents), 8 (applicable to agencies regulating or supervising financial institutions), and 9 (geological information). The remainder are summarized below.

More extensive discussion can be found in the "Justice Department Guide to the FOIA," which is published in the Department's "Freedom of Information Case List" and revised annually.

.4.3.1 Exemption 2 - Internal Personnel Rules and Practices

Exemption 2, which covers materials "related solely to the internal personnel rules and practices of an agency," protects two sorts of documents. First, "low 2" protects routine administrative materials, such as personnel's use of parking facility or regulation of lunch hours. See S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965). Second, "high 2" protects predominantly internal documents whose disclosure "significantly risks circumvention of agency regulations or statutes." Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051 (D.C. Cir. 1981). "High 2" closely parallels exemption 7(E) but, unlike exemption 7(E), does not entail a "law enforcement" threshold. (See .4.3.6 below.)

.4.3.2 Exemption 3 - Matters Specifically Exempted by Statute

Exemption 3 protects material that is specifically exempted from disclosure by a statute that (A) requires that the matters be withheld in such manner that leaves no discretion, or (B) establishes particular criteria for withholding or refers to particular types of matters

to be withheld. This includes information protected under the FTC Act or Hart-Scott-Rodino Act, as discussed in sections .4.1 and .4.2. Materials obtained from other agencies may also be protected under statutes applicable to those agencies. (See .4.1.2 above.)

.4.3.3 Exemption 4 - Trade Secrets and Confidential Commercial Information

Exemption 4 parallels section 6(f) of the FTC Act. (See .4.1.1 above.)

.4.3.4 Exemption 5 - Internal Memoranda

Exemption 5 protects inter- or intra-agency memoranda that would not be routinely discoverable by a party in litigation with the agency. "Inter-agency documents" have been construed to include certain correspondence with state agencies, see Mobil Oil Corp. v. FTC, 406 F. Supp. 205, 315 (S.D.N.Y. 1976), and with Congress, see Ryan v. Department of Justice, 617 F.2d 781, 791 (D.C. Cir. 1980) (responses by senators to questionnaire from Attorney General). Exemption 5 also protects memoranda prepared by outside consultants.

Exemption 5 incorporates litigation privileges and protects many internal memoranda in whole or in part. The most common privileges are: (1) the deliberative process privilege for "predecisional" and "deliberative" documents, including drafts and interview reports that reflect the author's thought processes; (2) the attorney work-product privilege for materials prepared, by or at the direction of an attorney, in anticipation of litigation; and (3) the attorney-client privilege. Other privileges that might be recognized by the courts, including a possible privilege for settlement materials, would also be incorporated into exemption 5.

Reasonably segregable factual portions of documents protected by the deliberative process privilege should be released, unless the segregable factual material is separately exempt from disclosure. In this respect, courts consider factual portions segregable unless they appear with nonfactual material in a single sentence. Also, memoranda protected by the attorney work-product privilege are exempt in their entirety, so there is no need to segregate "factual material" if a memoranda is protected both as deliberative and as work-product.

.4.3.4.1 Discretionary Release of Internal Documents

Absent a compelling reason for withholding, most information protected solely by exemption 5 in a file closed over ten years will be released.

Nevertheless, the following retain a presumption against release regardless of age: 1) documents prepared or annotated by individual Commissioners and their staffs; 2) General Counsel advice in response to specific requests; 3) sensitive personnel documents; and 4) communications from an agency which the other agency would object to disclosing. The presumption favoring release does not apply to portions of internal documents that are protected by other exemptions.

.4.3.5 Exemption 6 - Personal Privacy

Exemption 6 protects personnel and medical and similar files whose disclosure would be a "clearly unwarranted" invasion of personal privacy. The exemption involves a balancing between the individual's right to privacy and the public's right to government information. It does not apply to protect corporate records or information about professionals in their professional capacity.

Exemption 7(C), which also protects personal privacy, covers materials whose release would be an "unwarranted" (as opposed to a "clearly unwarranted") invasion of privacy. However, exemption 7(C) (unlike exemption 6) can only be claimed for "records or information compiled for law enforcement purposes."

.4.3.6 Exemption 7 - Investigatory Files

Exemption 7 permits an agency to withhold six categories of records or information compiled for law enforcement purposes.

Subsection (A) applies if (1) a law enforcement proceeding is pending or prospective; and (2) release could cause some articulable harm that would interfere with the proceeding. Courts have interpreted "interference" broadly. Documents may be withheld, for example, when premature release of evidence, strategy or analysis would be likely to harm a case in court or impede an ongoing investigation. Although exemption 7(A) broadly protects investigative files, it does not cover particular materials that could be released without causing some articulable harm, and materials such as newspaper articles should be closely scrutinized to determine whether an exemption could be sustained. It should also be noted that certain documents otherwise protected under Exemption 7(A) are "not subject" to the disclosure requirements of the FOIA. When an exclusion applies, the Commission can simply advise a requester that it has "no responsive documents." The most significant exclusion applies when an investigation involves possible criminal activity (even though the Commission would have to refer criminal charges to the Justice Department), and there is reason to believe that the subject is unaware of the investigation. 5 U.S.C. § 552(c)(1).

Subsection (B) is aimed at prejudicial pretrial publicity. It is rarely invoked by any agency, and has never been invoked by the Commission.

Subsection (C), concerning unwarranted invasions of personal privacy, is discussed in section .4.3.5.

Subsection (D) applies to information that could reasonably be expected to disclose a confidential source (including a law enforcement agency or private institution). There must be an express assurance of confidentiality or circumstances from which such assurance could reasonably be inferred. It is general Commission policy to withhold the names of complaining parties to the extent permitted by law. (See Rule 2.2(d).) Express or implied assurances of confidentiality will generally be found when a complainant is a competitor of, an employee of, or a party to some other ongoing relationship with the party about whom the complaint is filed. The identity of consumer complainants may also be protected, on a case-by-case basis, under subsection (D) (as well as, in appropriate cases, under subsection (C) or Exemption 6).

Subsection (E) protects law enforcement information "which would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." Exemption 7(E) will frequently overlap a "high 2" exemption. (See 4.3.1 above.)

Subsection (F) permits withholding of information whose release could reasonably be expected to threaten an individual's safety.

.4.4 CONFIDENTIALITY AND THE PRIVACY ACT

The Privacy Act generally precludes disclosure of information in a "system of records" (as defined in the Act) absent the request or consent of the person to whom the records pertain. However, pursuant to 5 U.S.C. § 552a(b), the prohibition on disclosure does not apply, among other situations, to disclosure required by the FOIA; disclosure to Congress, its committees or subcommittees; or disclosure to other agencies for civil and criminal law enforcement. (See .10 below.)

.4.5 CONFIDENTIALITY AND THE SUNSHINE ACT: TREATMENT OF COMMISSION MINUTES

Records of Commission meetings are treated somewhat differently than other agency records. The Sunshine Act, which requires disclosure of certain records of Commission meetings, contains exemptions that differ from those under the FOIA in significant

respects. For example, the Sunshine Act does not contain an exemption parallel to FOIA exemption 5, although it does contain exemptions that protect many materials covered by FOIA exemption 5. When dealing with requests for records of Commission meetings, Sunshine Act exemptions, rather than FOIA exemptions, apply. (See .9 below.)

.5 REQUESTS FOR CONFIDENTIAL TREATMENT

.5.1 DOCUMENTS SUBJECT TO PUBLIC RECORD DISCLOSURE

Submitters may request confidential treatment for compliance reports and other materials that would otherwise be placed routinely on the public record under Rule 4.9(a). A confidentiality request must be supported by a showing of justification. Rule 4.9(c). Staff may contact a requester who fails to make an adequate showing, and provide a further opportunity to make the showing.

A recommendation for the disposition of the matter by the Commission, including a draft letter to the requester, should be approved by the Bureau Director and sent to the General Counsel for concurrence. The recommendation should analyze whether disclosure is prohibited under section 6(f) of the FTC Act and whether the information would otherwise be exempt under the FOIA. (See .4.3.3 above and Rule 4.10(a).) Staff should be particularly sensitive to disclosures likely to cause a clearly unwarranted invasion of personal privacy because submitters might fail to assert an exemption 6 claim for individual consumer records (e.g., credit files) despite the privacy interests of the consumers. (See FOIA exemption 6, .4.3.5 above.)

.5.2 OTHER DOCUMENTS

Submitters, merely by designating their documents "confidential," may secure substantial protection. (See nondisclosure and notice provisions in .4.1 above.) For documents not subject to public record disclosure requirements, staff should use the language of Illustration 1 on page 24 to respond to requests for assurances of confidentiality.

.6 REQUESTS FROM CONGRESS, ITS COMMITTEES, AND SUBCOMMITTEES, AND REPORTS TO CONGRESS, ITS COMMITTEES, AND SUBCOMMITTEES

This section describes the procedures for processing requests for information and documents from a House of Congress, a Congressional Committee, or a Congressional Subcommittee ("Congressional requests"), and submitting reports and views to Congress, its Committees, or Subcommittees.

It does not apply to requests from individual members of Congress, including requests from a committee or subcommittee chair who does not ask for information on behalf of the committee or subcommittee. Such requests are handled like FOIA requests and processed by the Information Services Division.

.6.1 OFFICE OF THE SECRETARY AND OFFICE OF CONGRESSIONAL RELATIONS RESPONSIBILITIES IN PROCESSING REQUESTS

Congressional requests are received in the Office of the Secretary (OS), which forwards them to the appropriate bureau or office and assigns deadlines that must be strictly followed. If a request seeks information or documents from different divisions or bureaus, OS will assign the request to the appropriate offices and coordinate the response. OS will distribute copies of the request to all Commissioners and to the Offices of the General Counsel, Public Affairs, and Congressional Relations (OCR).

OCR will assist in coordinating the response to Congressional requests, and will serve as the primary contact with Congressional staff and take other appropriate steps to facilitate responses to access requests. In cases involving documents, OCR should keep for future reference an exact copy of the materials provided. OCR is responsible for delivering the Commission's response.

.6.2 RESPONSIBILITY FOR PREPARING THE RESPONSE

Congressional requests may seek: (1) "information" (e.g., replies to specific factual questions); (2) documents (e.g., certain internal memoranda); (3) agency "views" or opinions, which may or may not reveal nonpublic information; or (4) some combination of the above.

Where information only is sought, the office with most or all of the responsive information shall forward, with the General Counsel's concurrence, a memorandum and draft response to the Commission. (See Illustration 2 on page 25.)

Where documents are sought, the General Counsel's Office shall coordinate or prepare the memorandum and draft response. Staff shall assist by identifying, locating, and compiling responsive materials, and by identifying applicable exemptions from disclosure. Where a request seeks information as well as documents, staff shall also prepare answers to questions to be included either in the form of an enclosure or in the text of the letter drafted by the General Counsel. Where views are sought, the procedures in Chapter 14 shall be followed.

.6.2.1 Notice to Submitters

If responsive information or documents were obtained by compulsory process, or if responsive documents were designated confidential by the submitter, submitters are entitled to immediate notice of the request. (See FTC Act §§ 21(b)(3)(C) and 21(d)(1)(A); Commission Rule 4.11(b).) Information submitted in an HSR filing or in response to a second request is automatically treated as information designated confidential. Staff should provide this notice by telephone and then by letter. (See Illustration 3 on page 26.)

.6.3. Nature of the Response

.6.3.1 Release of Nonpublic Information or Documents

No nonpublic information or documents may be furnished in response to a Congressional access request without formal Commission authorization. Responses that disclose nonpublic material are designated "by the direction of the Commission," and are signed by the Chairman (or by the Secretary if the Chairman is unavailable). The Chairman is the assigned Commissioner for Congressional access requests.

.6.3.1.1 Nonpublic Materials or Information That Are Exempt from Mandatory Disclosure

If nonpublic materials are exempt from mandatory public disclosure, the memorandum and the proposed response letter must identify the exempt information and cite the applicable exemptions, unless the materials are subject to a policy favoring discretionary release, (See .4.3.4.1 above) or staff otherwise recommends that exemptions not be claimed. If staff recommends against invoking applicable exemptions (in which event the proposed response will not ask that the materials be kept confidential), the memorandum and letter should explain the basis of the recommendation.

Draft letters shall contain the following:

- (1) a statement describing the documents or information that have been requested;
- (2) a statement in the initial paragraph that information or documents are being provided in response to an official request of a House of Congress (or a Congressional Committee or Subcommittee), citing 5 U.S.C. § 552(d);
- (3) a brief description of any information or documents that are exempt from FOIA disclosure, with a citation to the applicable laws;
- (4) a statement that notwithstanding any exempt status, the FOIA does not constitute authority to withhold information from Congress, 5 U.S.C. § 552(d), and that the Commission has determined to provide the requested information and/or documents to the requester; and

- (5) a statement requesting that exempt materials be kept confidential, or a statement that the Commission does not request confidentiality for all or some of the exempt material.

.6.3.1.2 Nonpublic Materials or Information That Are Not Exempt from Mandatory Disclosure

If nonpublic materials or information are not exempt from mandatory public disclosure, they may be released without requesting that they be kept confidential. If the materials or information are nonpublic, authorization for release must come from the Commission.

.6.3.1.3 Treatment of Voluminous or Highly Sensitive Information or Materials, Requests to Review Documents, And Requests to Interview Staff

The Commission may, at the request of a House, Committee or Subcommittee, or by agreement with a House, Committee, or Subcommittee, grant access to review responsive documents at the FTC to determine if copies are necessary. The Commission may also authorize interviews of FTC staff. Where a request does not expressly contemplate such a response, staff should contact OCR, where appropriate, about securing the agreement of Congressional staff to accept access to documents or a staff briefing in lieu of actually receiving the documents. This should be done in advance of seeking Commission authorization.

In certain situations (e.g., matters in ongoing adjudications), it may be inappropriate for the Commission itself to review particular responsive documents or information. The General Counsel's office should be contacted for guidance in these instances, and the memorandum to the Commission should advise the Commission of the existence of such materials.

.6.3.2 Publicly Available Materials or Information

Requests that seek only publicly available materials or information do not require Commission approval, and responses should be prepared for action by the Chairman. The Chairman will determine if full Commission review is appropriate.

.6.4 Reports

Reports prepared by Commission staff for Congress, its committees, or subcommittees that are based on nonpublic information should be submitted to the General Counsel for review prior to submission to the Commission for approval. This procedure should be

followed even if staff believes the information has been presented in an aggregated or generalized manner that avoids prohibited disclosure of nonpublic information.

.7 ACCESS REQUESTS FROM FEDERAL, STATE AND LOCAL GOVERNMENTS

.7.1 REQUESTS FOR "LAW ENFORCEMENT PURPOSES"

Staff may advise federal, state, and local law enforcement agencies of the existence of an investigation, the identity of the target, the general nature of the practices involved, and the general nature of the information in the agency's files. (See .7.4 below.) However, staff may not disclose other information about, or obtained in, the investigation. Other agencies must file access requests to obtain such additional information.

Access requests for law enforcement purposes are processed by the General Counsel or, for certain federal agencies, by a liaison officer. (Liaison officers are identified in OM Ch. 14.) Such requests must contain a certification that materials will be maintained in confidence and used only for official law enforcement purposes. (See Illustration 4 on page 27.) They should also identify the statute under which the law enforcement activity will be conducted, and describe the nature of the law enforcement activity and the relevance of the material sought. An agency will be considered to have requested information for law enforcement purposes if it seeks the material in connection with any criminal, civil, or administrative proceeding, or any investigation potentially leading to such a proceeding.

As provided in Rule 4.11(c), nonpublic materials may be released in response to a "law enforcement" request without regard to the nondisclosure and notice provisions in sections 6(f) and 21 of the FTC Act and in Commission Rules 4.10(d) and (e). (See .4.1 above.) Such requests will, however, be subject to any applicable restrictions on disclosure to other agencies, including the prohibition on disclosure of Hart-Scott-Rodino submissions, e.g., Lieberman v. FTC, 771 F.2d 32, 37 (2nd Cir. 1985), and limitations imposed by court orders. Provisions for sharing various types of material with states are summarized in the chart on pages 41 and 42.

Notice will be provided to the submitter at the time the request is granted, unless the requester asks that such notice not be given.

If the General Counsel and the Bureau responsible for the matter disagree as to the disposition of a request, the matter will be referred to the Commission.

.7.2 TELEMARKETING MATERIALS

The Commission has created a database on telemarketing fraud. The database incorporates complaints from government agencies and private agencies and is accessible to participating government agencies.

The Associate Director for Service Industries Practices has the authority to release information in the database, as well as additional materials on telemarketing fraud, to government agencies participating in the program. Agencies that wish to participate in the program must apply to the Associate Director and complete a certification providing that the materials will be maintained in confidence and used only for official law enforcement purposes. Participants who seek additional information not in the database about an investigation listed in the database must submit an additional case-specific certification to the Associate Director.

.7.3 PROGRAM FOR FEDERAL-STATE COOPERATION IN MERGER ENFORCEMENT

The Commission has also implemented a program to facilitate federal-state cooperation in merger enforcement. The program is designed to complement the National Association of Attorneys General Voluntary Pre-Merger Disclosure Compact, which applies when a proposed transaction is subject to HSR reporting requirements. Participants in the Compact have agreed that they will not serve demands for information during the HSR waiting period and prior to instituting a judicial proceeding to enjoin a proposed transaction, if the parties to the proposed transaction ("submitters") provide specified information to the liaison state defined by the Compact. The information includes copies of (1) the submitter's HSR filing; (2) HSR second requests and other requests directed to submitters by Federal antitrust enforcement authorities; and (3) on request by a participating state, materials produced in response to such further Federal requests.

Under the Commission program, the Commission provides certain additional information to participants in the Compact who have submitted a certification of confidentiality to the General Counsel. (See Illustration 16 on page 39.) Information can be provided under the program, however, only when a submitter chooses (1) to provide a copy of its HSR filing to the liaison state under the Compact (the Commission will not provide a copy of the HSR filing to any state), and (2) to provide the Assistant Director for Premerger Notification with a letter waiving confidentiality protections under Federal law, insofar as those protections constrain disclosures by the Commission to members of the Compact. (See Illustration 17 on page 40.)

If waivers are received from submitters, staff will thereafter respond to requests for assistance from the participating liaison state. Specifically, under this program, staff will provide the liaison state with the following information.

- (a) Staff will provide copies of second requests, and copies of third party subpoenas with the identities of the subpoena recipients redacted. (If redaction of identities is insufficient to protect confidential information about subpoena recipients, individual specifications may be deleted or entire subpoenas may be withheld.)
- (b) Staff will identify the expiration dates of HSR waiting periods.
- (c) Staff will provide limited assistance in analyzing the merger. However, staff will not disclose specific recommendations made to agency decisionmakers and will limit disclosures as necessary to protect confidential information, including information supplied by third parties.

States that obtain information under this program, unlike states that obtain information through law enforcement requests under Rule 4.11(c), can share this information on a confidential basis with other law enforcement agencies, if the other agencies are themselves participants in the program. The General Counsel's office will maintain a list of participating states, and will provide the list to each participating state. The General Counsel's Office is also available to advise staff with respect to any questions that may arise under the program.

.7.4 REQUESTS FOR PURPOSES OTHER THAN LAW ENFORCEMENT

When the requesting agency does not have a law enforcement purpose, the nondisclosure and notice provisions under the FTC Act, the HSR Act, and Rules 4.10(d) and (e) apply. (See Rule 4.11(d) and .4.1 and .4.2 above.)

.7.5 DISCLOSURE BY BUREAU AND REGIONAL OFFICE STAFF

Consistent with any applicable directives from office heads, staff is authorized to advise another government agency, on a nonpublic basis, of the existence of an investigation, the identity of the target, and the general nature of the practices involved, and the general nature of the information in the agency's files. However, staff should not disclose specific information submitted to the Commission except as provided under the access procedures set forth above.

To the extent consistent with applicable confidentiality requirements, statutory or otherwise, personnel named by a Regional Director to participate in coordinating committee activities can exchange information with other committee members respecting local consumer protection matters and on Commission matters of low priority and local import. They are also authorized to refer consumer complaints to other members and receive consumer complaints from other members. In areas where no coordinating committee exists, the Commission has delegated to the Directors of the Bureaus of

Consumer Protection and Competition the authority to refer complaints to other law enforcement agencies, and the Bureau Directors may redelegate this authority as necessary.

Reference should also be made to OM Chs. 3.1.2.5, 3.3.6.10, 14.1.4, 14.2.3.1, 14.2.3.2, 14.2.3.6, and 16.9.3.2, which contain further discussions about contacts with other agencies in the course of an investigation.

.8 OTHER DISCLOSURE

.8.1 ADMINISTRATIVE LITIGATION AND SUBPOENAS

Disclosure in administrative litigation is governed by Rule 4.10 (f) (disclosure in taking testimony); Rule 4.10 (g) (notice provision for use in litigation), and by Part 3 of the Rules of Practice. (See, e.g., Rule 3.45 (in camera orders).) See also OM Chs. 3.3.6.4.2, 10.13.6.4.6 (Jencks Act). As the chart on pages 40 and 41 shows, even statutorily protected information can be used in litigation, subject to an opportunity for submitters to seek a protective order. Also, as summarized in that chart, the information can sometimes be used to take a deposition.

If an administrative discovery demand covers documents located in other offices within the Commission, complaint counsel should contact the Information Services Division to conduct a search.

Disclosure in response to subpoenas other than subpoenas in administrative litigation before the Commission are governed by Rule 4.11(e). Staff members who receive such subpoenas should immediately contact the Office of the General Counsel.

.8.2 CONSULTANTS

Staff may disclose nonpublic material to consultants who have signed a standard confidentiality agreement. Consultants may not reveal information acquired during the course of Commission employment, unless properly authorized by the contracting officer or the contracting officer's representative, with approval of the General Counsel. They may rely on nonpublic information in an adjudication, subject to Rule 4.10(g) (notice and opportunity to seek protective or in camera order.)

.8.3 WRITING SAMPLES

Employees or former employees of the Commission should contact the Office of the General Counsel for authorization before disclosing to potential employers nonpublic samples of their work at the Commission. (Rule 4.11(f)).

Chapter Fifteen **CONFIDENTIALITY AND ACCESS**

.8.4 ARTICLES OR SPEECHES

As provided by Rule 5.12(c), the General Counsel may authorize use of nonpublic information in articles or speeches. Requests for such authorization should be addressed to the Office of the General Counsel. Further guidance concerning the preparation of articles and speeches, including a discussion of when clearance must be obtained from officials other than the General Counsel, is found in OM Ch. 17.

.9 **SUNSHINE ACT PROCEDURES**

The Sunshine Act, 5 U.S.C. § 552b, opens Commission meetings to the public in much the same way that the FOIA opens Commission files to the public. Meetings may be closed only if they fall within a specific exemption, some of which closely track FOIA exemptions.

The decision to have an open or closed meeting is made by the Commission in consultation with the General Counsel. The decision is based on the nature of the information the Commission expects to discuss, not on what information appears in documents that relate to the meeting's agenda. Therefore, a meeting at which the Commission considers documents that contain confidential commercial information may be open if the Commission does not expect to discuss the confidential material. Because the closed or open status of Commission meetings depends on the kind of information that will probably be discussed, not on what documents have been submitted, the preparation of recommendations, memoranda, and other material for presentation to the Commission should not be affected by the Sunshine Act.

The Sunshine Act requires that the agency maintain a record of business conducted in closed meetings. The record may consist of a transcript, electronic recording, or minutes except that, for meetings closed only on the basis of certain Sunshine Act exemptions, the only acceptable record is a transcript or electronic recording. Portions of the record that are determined not to be exempt under the Sunshine Act will be released to the public. The Act does not require the maintenance of any record of business conducted at open meetings.

Staff generally may attend nonadjudicative portions of closed meetings, but will be required to sign in and present identification.

.10 **PRIVACY ACT PROCEDURES****.10.1** GENERAL

The Privacy Act, 5 U.S.C. § 552a, restricts the collection, maintenance, use, and dissemination of information concerning individuals that is found in "systems of records." Also, the Act governs the ability of individuals to obtain such records. This section sets forth the procedures to be used by staff when collecting, maintaining, using, or disseminating information contained in a system of records maintained by the Commission, and describes the availability to the public of information about Commission employees.

Under Rule 4.13, and except as to categories described in Rule 4.13(m) as exempt from disclosure, an individual can: (i) request notification of whether the Commission maintains a record pertaining to him or her; (ii) request access to such a record and to an accounting of its disclosure (See Illustration 5 on page 28); (iii) request that the record be amended or corrected; and (iv) appeal an adverse initial determination of any such request.

.10.1.1 Definitions for Purposes of this Subsection

.10.1.1.1 Individual

"Individual" means a natural person who is a citizen of the United States or an alien lawfully admitted for permanent residence.

.10.1.1.2 Record

"Record" means any item, collection, or grouping of information about an individual that is maintained by the Commission, (including but not limited to education, financial transactions, medical history, and criminal or employment history) that contains a name, or identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. It does not include information about proprietorships, businesses, or corporations. A "record" may include as little as one descriptive item about an individual, and need not be "personal" in nature. The term includes material under the control of the Commission, no matter where it is stored.

.10.1.1.3 System of Records

"System of Records" means any group of records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual -- i.e., a name, social security number, etc. The system must be one that uses an indexing or retrieval system in which "records" are retrieved by an individual identifier. A collection of records is not a "system of records" if it contains an identifier that is not actually used to

retrieve records (e.g., a computer system that contains names but is not programmed to retrieve records using those names).

A system of records is covered by the Privacy Act even if it is operated by an outside entity under contract to the Commission. Also, a system of records can exist if the data are aggregated under a single broad identifier. Thus, a record would be part of a system if it is retrievable by identifier within a primary file, even if it is not directly retrievable without first knowing the name of the primary file (e.g., the title of a 7-digit investigation). A notice must be published by the Commission in the Federal Register pursuant to 5 U.S.C. § 552a(e)(4) describing the system and its uses. (See .10.6 below.)

.10.1.1.4 Routine Use

"Routine use" means the disclosure and use of a record in a manner compatible with the purpose for which it was collected.

.10.2 POLICIES IN COLLECTING AND STORING INFORMATION

The Commission may maintain in its systems of records only such information about an individual as is relevant and necessary to accomplish a Commission function required by statute or Executive Order. To the greatest extent practicable, Commission employees shall collect information directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, or privileges under Federal programs. Also, in keeping with the Act's goal of protecting privacy, staff should not employ filing or indexing systems that use individual identifiers when retrieval of information by such identifiers is not necessary to their work. Staff should not, however, postpone the introduction of individual identifiers in their filing or indexing system merely to avoid the requirements of the Act.

.10.3 DISCLOSURES IN COLLECTING INFORMATION

Certain disclosures, as explained below, must be provided to each individual from whom information is so listed, if that information will be retrieved by using a personal identifier. This requirement applies to subpoenas, section 6(b) orders, access letters, witness interviews, surveys, and other inquiries or forms.

.10.3.1 Procedures for Disclosures

The disclosure required when soliciting information can be made through the Commission's Information Disclosure Statement. (See Illustration 6 on page 29.) It can

also be provided in written paragraph form, when this is more practical or would be more clear.

When information is solicited by subpoena or other written form, the information in the disclosure statement can be incorporated directly into the request form or can be attached as a separate document. When an oral interview is conducted, the information in the disclosure statement should be provided on a form that the interviewee can retain. The interviewer should also orally summarize the information at the outset of the interview, and note in the interview report that such a summary was given.

An individual from whom information is being solicited should be asked to acknowledge in writing the receipt of the disclosure statement, if (1) the information sought is sensitive, (2) it is anticipated that an objection may later be raised to the solicitation, or (3) it is otherwise deemed appropriate. An acknowledgment can usually best be accomplished by asking the individual to sign and date a copy of the Information Disclosure Form for retention by the Commission.

10.3.1.1 Use of Standard Notices Developed by Other Agencies

Privacy Act notices have been developed by other federal agencies, such as the Treasury Department, for most standard forms prepared by those agencies. Any such notices that exist should be used when the underlying form is being used by the Commission.

10.3.2 Contents of Disclosure

10.3.2.1 Authority for Collecting Information

The authority for collecting information will generally be the FTC Act, but may also be a constitutional provision, another statute, or an Executive Order authorizing or directing the agency to perform a function that requires the maintenance of a system of records.

10.3.2.2 Mandatory or Voluntary Solicitation of Information

A response should be described as "mandatory" only when the information is required by law to be furnished to the Commission, e.g., pursuant to process. Other responses should be described as "voluntary." For example, a response to a request for information solicited to determine eligibility to receive consumer redress is voluntary, even if failure to provide the information may preclude redress.

10.3.2.3 Principal Purposes for Information

Chapter Fifteen **CONFIDENTIALITY AND ACCESS**

The individual should be informed of the principal purpose(s) for which the information will be used: e.g., to assist in evaluating whether there is a law violation, or to determine whether the individual is eligible for redress. Generally, the purpose should be directly related to, and necessary for, the purpose authorized by the provision cited as authority for collecting the information.

.10.3.2.4 Description of Routine Uses

The description of routine uses generally should be a summary of the entry for routine uses published in the Federal Register for the pertinent systems of records. See, e.g., 47 FR at 32,622. The routine uses dealing with investigations include use in the investigation; uses for recordkeeping, managerial, and budgeting purposes; referrals to other agencies and use by those agencies; referral to experts; and disclosure to a Congressional office that makes a request for access on behalf of the citizen whose record is involved. 47 FR at 32,635 (1982).

.10.3.2.5 Effects on Individuals Not Providing Information

Any effects on an individual who does not provide all or any part of the requested information should be carefully but concisely explained, so that the individual can make an informed decision as to whether to provide the information. The individual should be advised if no effect results from declining to respond (as is frequently the case), if non-response could result in an enforcement action under section 10 of the FTC Act (as is rarely the case), or if non-response means that the individual would forego a potential benefit, such as consumer redress. The description of effects should be carefully drafted so that the individual is not misled or coerced.

.10.4 DISCLOSURE OF RECORDS TO PERSONS OTHER THAN THE SUBJECT INDIVIDUAL

Generally, no record in a system of records maintained by the Commission may be released to any person or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. (See Illustration 7 on page 30.) Under 5 U.S.C. § 552a(b), however, this requirement does not apply to disclosures:

- (a) To officers or employees of the Commission who need the information in the performance of their official duties;
- (b) Required under the FOIA;
- (c) For a routine use, as published in the notice in the Federal Register of systems of records maintained by the Commission (See .10.3.2.4 above);

Chapter Fifteen CONFIDENTIALITY AND ACCESS

- (d) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of Title 13 of the U.S. Code;
- (e) To a recipient who has provided the Commission with adequate written assurance that the record will be used solely as a statistical research or reporting record, provided the record is transferred in a form that is not individually identifiable;
- (f) To the National Archives as a record that has sufficient historical or other value to warrant its continued preservation, or for evaluation by the Archives to determine whether the record has such value;
- (g) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity, provided the activity is authorized by law, and the head of the agency or instrumentality has made a written request that specifies the particular information desired and the law enforcement activity for which it is sought;
- (h) To a person pursuant to a showing of compelling circumstances affecting the health or safety of the individual to whom the information relates (if upon such disclosure notification is transmitted to the last known address of such individual);
- (i) To a House of Congress, or a Committee or Subcommittee of Congress, to the extent the materials deal with matters within the jurisdiction of the House, Committee or Subcommittee;
- (j) To the Comptroller General or any of the Comptroller General's authorized representatives in the course of the performance of the duties of the General Accounting Office;
- (k) Pursuant to the order of a court of competent jurisdiction; or
- (l) To a consumer reporting agency in accordance with 31 U.S.C. § 3711(f).

Notwithstanding that the Privacy Act does not limit the twelve categories of disclosure listed above, however, these disclosures listed above may only be made consistent with the confidentiality provisions of the FTC Act.

.10.4.1 Information Concerning Commission Employees Available to the Public

The following information about Commission employees may generally be released to the public without prior written consent: name, present and past government position titles, grades, salaries, and duty stations. However, such information may not be released if sought for commercial or other solicitation purposes or for political purposes in violation of subchapter III of chapter 73 of Title 5 of the U.S. Code.

Opinions about an employee may be expressed to a prospective employer without prior written consent, as long as no nonpublic records about the employee are released.

.10.5 ACCOUNTING OF DISCLOSURES

Except for disclosures to Commission employees who have a need for the record in the performance of their duties and disclosures required by the Freedom of Information Act, 5 U.S.C. § 552, the Commission must maintain an accounting of all disclosures of records in its systems of records. Managers or their designees are responsible to ensure appropriate accounting.

System managers or designees can devise any system for keeping notations of disclosure, provided that it will enable a listing to be constructed of all disclosures made of any individual record within the system. Such listing would need to include the date, nature, and purpose of each disclosure, and the name and address of the person or agency to which the disclosure was made. The accounting need not take the form of a notation on or with each record in a system; for example, if an entire file of consumer complaints in a system were disclosed to a state agency, it would be sufficient to place a single memorandum concerning the disclosure in or on the file.

When a disclosure consists of a continuing exchange between the Commission and another agency, as in an investigation of consumer fraud, rulemaking proceeding, or continuing industry study, it is sufficient to make a general notation that, as of a specific date, such contact was initiated and will be maintained until the conclusion of the case or project.

The notation of the accounting, or the system devised for constructing an accounting, must be retained or maintained for 5 years, or the life of the record, whichever is longer, after a disclosure for which an accounting is required. While the accounting or system must be maintained for at least 5 years, the Privacy Act does not require retention of the record itself.

One reason to maintain an accounting is to enable notice to recipients of a record when the record is subsequently corrected or amended at the request of an individual, or a notice of dispute is filed. (See Rule 4.13.) The DEDPI must in such instances notify each agency or person to whom the record has been disclosed, except for FOIA requesters and staff members as to whom no accounting is required.

.10.6 NOTICES OF SYSTEMS OF RECORDS

The Privacy Act requires the Commission to publish in the Federal Register notice of any new or intended use of the information in a system; each new system of records, before the system becomes operational; each change in a system that expands the categories of records maintained, the categories of individuals on whom records are maintained, or the

potential recipients of the information; and each change that alters the procedures by which individuals exercise their rights under the Privacy Act. In addition, notice shall be published of any revision of a system of records.

Information concerning a new system of records or revision of any existing system must be transmitted to the Office of the General Counsel on a Privacy Act Inventory Form (See Illustration 8 on page 31). For a description of the format to be used in preparing a notice for the Federal Register, see OM Ch. 18.7.

The General Counsel has been delegated authority to modify the Commission's notices of systems of records, except for modifications involving routine uses. The General Counsel will bring to the Commission's attention proposed changes in the routine uses of any system of records, and any additions or deletions of systems.

.11 RIGHT TO FINANCIAL PRIVACY ACT PROCEDURES

.11.1 GENERAL

The Right to Financial Privacy Act ("RFPA" or "Act"), 12 U.S.C. § 3401 *et. seq.*, establishes procedures for obtaining a customer's financial records in the possession of financial institutions, including credit card issuers and consumer finance businesses, and for the transfer of any such records obtained by the Commission to other agencies. Subject to the exemptions discussed below, the Act applies to any Commission request to financial institutions for the production of financial records of individuals or of partnerships of five or fewer individuals.

.11.1.1 Definitions for Purposes of This Section

"Financial institution" means any office of a bank, savings, credit card issuer (as defined in section 103 of the Consumers Credit Protection Act, 15 U.S.C. § 1602(n)), industrial loan company, trust company, savings and loan, building loan, homestead association, credit union or consumer finance institution (including consumer finance company, sales finance company, small loan company, consumer discount company, and other similar institutions).

"Financial record" means an original, or copy of, or information known to have been derived from, a record held at a financial institution. The records protected by the Act are those pertaining to accounts maintained in a customer's name for any financial service. The Act does not, therefore, directly protect information concerning a customer that appears in the records of a third person (*e.g.*, check endorsements or loan guarantees).

"Person" means an individual or a partnership of five or fewer individuals.

"Customer" means any person (or an authorized representative of that person) who has utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in that person's name. Thus, the term "customer" within the meaning of the Act includes a debtor of the financial institution, but excludes an entity (such as a car dealer) that assigns contracts to the financial institution.

"Law enforcement inquiry" means a lawful investigation or official proceeding inquiring into a violation of or failure to comply with any criminal or civil statute or any regulation, rule, or order issued pursuant to statute.

.11.1.2 Exemptions from All Provisions of the RFPA

None of the procedures established in the Act apply to: (1) requests for financial information that is not identifiable as being derived from the financial records of a particular customer; (2) financial information required to be disclosed to the Commission by a separate statute or regulation; or (3) records sought in a judicial or Commission adjudicative proceeding in which the government and the customer are parties. 12 U.S.C. §§ 3413(a), (e), (f).

.11.1.3 Exemptions from Specific Provisions of the RFPA

As explained in greater detail below, under subsection 3413(h) of the RFPA, specific provisions of the Act do not apply when the target of the investigation is the financial institution itself or a legal entity other than a "customer." The act is thus inapplicable, for example, to a Commission investigation of Holder-in-Due-Course violations by a car dealer that has assigned installment loan contracts to a financial institution. In that situation, the target is a legal entity other than a customer.

Further, as also explained in greater detail below, under subsection 3413(g) of the RFPA, specific provisions of the Act do not apply when a request seeks only basic identifying information about a customer or an ascertainable group of customers associated with a financial transaction or group of transactions, such as names, addresses, account numbers and types of account. Subsection 3413(g) will rarely be used, however. In cases where that subsection is available, subsection 3413(h) will generally also be available, and proceeding under the latter subsection will generally be preferable because it permits use of informal access procedures. (See .11.2. below.)

.11.1.4 Identification of Documents Obtained Under the Act

Chapter Fifteen **CONFIDENTIALITY AND ACCESS**

Staff should specially mark all financial records obtained under the Act to ensure compliance with the Act's transfer provisions. (See .11.3. below.)

.11.2 **COMMISSION ACCESS TO FINANCIAL RECORDS**

In general, the Commission can obtain access to a customer's financial records in the custody of a financial institution only by judicial or administrative subpoena, or by written customer authorization specifying the Commission as recipient and describing the purpose of the disclosure. (See 12 U.S.C. § 3402.)

However, the requirement that the Commission proceed only by subpoena or customer authorization does not apply to requests that fall within one of the exemptions from all provisions of the RFPA. (See .11.1.2 above.) Also, this requirement does not apply to subsection 3413(h) requests involving investigations in which the target is the financial institution itself or a legal entity other than a "customer." (See 12 U.S.C. § 3413(h)(1).) Finally, notwithstanding the general restrictions limiting how financial institutions can provide information about customers to the Commission, financial institutions may voluntarily notify the Commission of possible law violations. (See 12 U.S.C. § 3403(c).)

.11.2.1 **Customer Notice Requirements**

If records are sought by process rather than through customer authorization, the customer must be served with notice and a copy of the process. (See Illustrations 9 and 10 on pages 32, 33.) See, e.g., 12 U.S.C. § 3405(2).

However, this notice requirement does not apply to access requests that fall within one of the general exemptions from all provisions of the RFPA. (See .11.1.2. above.) Also, it does not apply to subsection 3413(g) requests, which seek only basic identifying information such as names, addresses, account numbers and types of account of customers associated with particular transactions. Finally, the notice requirement does not apply to subsection 3413(h) requests, involving investigations where the target of the investigation is the financial institution itself or a legal entity other than a "customer." However, records obtained pursuant to subsection (h) may not be used in a subsequent investigation of a customer unless customer notice procedures are first followed. (See 12 U.S.C. § 3413(h)(4).)

.11.2.1.1 **Delay of Notice**

When notice to the customer would seriously jeopardize or impede an investigation or other Commission proceeding, the Commission may institute a judicial proceeding to obtain authorization to use a delayed notice procedure. 12 U.S.C. § 3409. Use of the

delayed notice procedure is justified only when notice would result in the destruction of evidence, intimidation of witnesses, or consequences of an equally serious nature. Staff confronted with such a situation should advise the General Counsel by memorandum via the appropriate Bureau Director. (See OM Ch. 13.)

When the Commission obtains authorization for a delay of notice, staff should, after the expiration of all delay periods, mail to the customer a Notice to Customer of Delayed Notice, following the model in Illustration 11 on page 34.

.11.2.2 Certificate of Compliance

A financial institution cannot release customer records unless it receives from the Commission a certificate stating that the Commission has complied with the procedures of the Act. 12 U.S.C. § 3403(b). Further, when the customer is entitled to notice and an opportunity to challenge access, the financial institution cannot release the records until the time for a challenge has passed. E.g., 12 U.S.C. § 3405(3).

Illustrations 12 and 13 provide forms for certifications to financial institutions. Illustration 12 on page 35 is for use when the Commission is proceeding under subsection 3413(h), the exemption that applies when the customer is not the subject of the investigation. Illustration 13 on page 36 is for use when the Commission is not proceeding under any exemption of the Act, or when it is proceeding under subsection 3413(g), the exemption for requests that seek only basic identifying information about a customer or ascertainable group of customers associated with a financial transaction or class of transactions.

.11.3 TRANSFER OF RECORDS

Financial records obtained under the Act may generally be transferred to other agencies only if the Commission, as the transferring agency, certifies that it has reason to believe that the transfer is relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency. 12 U.S.C. § 3412(a). It is staff's responsibility to determine the nature of the receiving agency's law enforcement inquiry and to prepare a Certificate of Compliance for Transfer of Records (Illustration 14 on page 37) for initial approval by the appropriate Associate, Assistant or Regional Director and subsequent approval by the General Counsel. Within fourteen days after the transfer, the staff generally must provide to the customer: (1) a copy of the Certificate of Compliance for Transfer of Records; and (2) a Notice To Customer of Commission Transfer of Financial Records (Illustration 15 on page 38), describing the nature of the law enforcement inquiry. 12 U.S.C. § 3412(b).

These general rules, however, are subject to the following limitations. First, when the Commission transfers records obtained under the RFPA to another agency, customer notice may be delayed beyond the fourteen day limit if the Commission has previously obtained court authorization to use a delayed notice procedure and that authorization is still in effect, or if the receiving agency obtains court authorization to use a delayed notice procedure. 12 U.S.C. § 3412(c).

Second, customer notice of a transfer of records is not required if the transferred records contain only account identification information and were obtained under subsection 3413(g). However, staff should still prepare and retain for the record a certification of compliance with the transfer provisions.

Third, records that were obtained in an investigation of a target other than a customer, pursuant to subsection 3413(h), can be transferred to another agency only if the transfer is made in connection with an investigation by the other agency of a target other than a "customer." 12 U.S.C. § 3413(h)(4). Customer notice is not required for such a transfer. See *id.* Although such records cannot be transferred in connection with an investigation of a "customer" by the other agency, the Commission can notify the other agency that the records exist so that the other agency may itself obtain the records pursuant to the provisions of the Act. 12 U.S.C. § 3413(h)(5).

.11.4 REMEDIES AND SANCTIONS FOR VIOLATIONS OF THE ACT

The Act creates a private right of action that permits customers to recover damages, civil penalties, court costs, and attorneys' fees for violations. 12 U.S.C. § 3418. Customers may also seek injunctive relief and, in the event of willful violations, punitive damages. 12 U.S.C. § 3417. Commission employees who intentionally violate the Act are subject to disciplinary proceedings.

.12 CUSTODIAL DOCUMENTS

Custodial documents include any materials received pursuant to process or voluntarily in lieu of process in an investigation, "a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission."

.12.1 TREATMENT OF CUSTODIAL AND OTHER DOCUMENTS SUBMITTED TO THE COMMISSION

The FTC Improvement Act of 1980 and the Commission's implementing rules require that the Commission establish special procedures to handle documents received pursuant to compulsory process in a law enforcement investigation. A

custodian and a deputy custodian are appointed to receive these documents and to insure that they are kept confidential. Custodians also must limit copies to those required for official Commission use. In addition, since all documents submitted to the Commission must be returned to the submitter on demand at the close of the proceeding, the custodian must preserve the integrity of documents submitted.

The concern for confidentiality and the obligation to return documents submitted extends beyond custodial documents to all documents received by the Commission in any investigation. Thus, the procedures outlined below should be followed for all documents received by the Commission. While due to space and other constraints, it is unworkable to formulate highly detailed procedures that can apply to different bureaus and regional offices, the following procedures are the minimum necessary to insure compliance with the statute.

- (1) When documents are first received by the custodian, deputy custodian, or person in charge of an investigation, each document must be marked with the name of the investigation and the submitter. This process must precede any other review or analysis of documents.
- (2) Each page of every document received in an investigation must be sequentially numbered. Documents should be numbered with colored ink (other than black) which will clearly differentiate the documents initially submitted from Commission-made copies.
- (3) Identifying information for all documents must be recorded in a log. Documents (and portions of documents if appropriate) should be identified as custodial documents, documents submitted in lieu of compulsory process in a law enforcement investigation or documents identified as confidential by the submitter. For example the log could include:
 - (a) Name of case, project or investigation;
 - (b) Number of case, project or investigation;
 - (c) Sequential numbers assigned;
 - (d) Date received;
 - (e) Name of custodian, if applicable;
 - (f) Name of submitter;

- (g) Whether confidentiality has been asserted for any portion of the submission.
- (4) Once the initial processing is completed, the documents submitted should be stored in locking file cabinets. These should be contained in a central document room or (depending upon space and size of the division or office) in the office of the custodian or deputy custodian. Documents from different submitters should be maintained separately, but all files must be preserved intact throughout the course of the investigation and any resulting proceeding.
 - (5) No staff analysis or sorting should take place using the documents originally submitted to the Commission. Copies of those documents required for analysis should be made under the supervision of the custodian, deputy custodian, or person in charge of the investigation, and the submitted documents must be returned immediately to their previous location once the copies are made. Where feasible subsequent copies should be made from the first commission-wide copy. Copies should be made only when essential for efficient conduct of the investigation. Although the Commission need not return copies we make to the submitter, it nevertheless must safeguard the confidentiality of the information on Commission-made copies.

.12.2 COPYING AND USING CUSTODIAL DOCUMENTS

The custodian or deputy custodian may copy the material for official use by Commission employees, including contractors and consultants who have signed standard confidentiality forms. Custodial materials may also be provided to other law enforcement agencies or to Congress, and they may be made available to the submitter or the submitter's authorized representative. (See .6 and .7 above.) They may be used by Commission employees in connection with proceedings brought by the Commission. (After the proceeding, any material not received into the record must be returned to the custodian.) No other disclosure, including disclosure under the FOIA, may be made without consent of the submitting person.

.12.3 CHANGE OF CUSTODIAN

When a custodian or deputy custodian leaves the agency or is relieved of responsibility, a successor is designated by the Bureau Director or Regional Director. At the close of a proceeding, and after any return of documents as discussed in section 13.2.2, the appointed custodian and deputy custodian relinquish responsibility for the files to the Director of the Information Services Division.

Staff should notify the submitter, in writing, of the name and address of each successor custodian or deputy custodian including, when appropriate, the Director of the Information Services Division. If the submitter has been a target of the investigation, this information may be included in the closing letter to the submitter.

Successors assume the responsibilities and duties of their predecessors, but are not responsible for any default or duplication that occurred before their designation.

.13 DISPOSITION OF DOCUMENTS

.13.1 APPLICABLE LAWS, RULES AND SCHEDULES

.13.1.1 The Federal Records Act

The Federal Records Act, 44 U.S.C. § 3301 *et seq.*, requires the FTC to retain documents that are "records" under the Act. "Records" are defined for purposes of the FRA as materials (including machine readable materials) made or received by a federal agency in conducting public business, and appropriate for preservation as evidence of the agency's organization, functions, policies, decisions, procedures, operations, or other activities. 44 U.S.C. § 3301.

The statute specifies that library materials obtained for reference purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not records under the FRA. Other materials that are not records for purposes of the Act include transmittal sheets, routing slips, materials documenting such fringe activities as charitable fund drives, and personal papers that are not prepared or received in the process of transacting government business (e.g., journals, diaries, or notes).

Detailed instructions concerning retention requirements for specific "records" are found in General Records Schedule of the National Archives and Record Administration, and in Commission schedules approved by NARA or its predecessor. Those schedules are available from the Information Management Branch.

.13.1.1.1 Documents Submitted to the Commission

Chapter Fifteen **CONFIDENTIALITY AND ACCESS**

Documents submitted to the Commission are treated as "records" that will need to be retained by virtue of the Federal Records Act only if they are exhibits in an adjudicative proceeding; are critical to an understanding of the agency's action in a non-adjudicative proceeding; are relevant to a current or contemplated agency investigation or proceeding; or have sufficient informational, legal, or research value about the Commission's continuing enforcement and regulatory responsibilities to warrant preservation by the Commission. In determining whether documents have sufficient informational, legal, or research value to be retained on that basis, relevant factors include whether the information in the documents can be found in an equally complete and accessible form in other sources; whether the documents contain valuable information with industry-wide significance or historical importance; or whether they will assist the Commission in applying the law consistently within any given market or industry.

.13.1.1.2 Drafts of Consent Decrees

Drafts of consent decrees should be retained if they are relevant to the understanding of the language of the agreement.

.13.1.2 The FTC Act and Commission Rules

Section 21(b)(5) of the FTC Act requires the Commission to return, on written request and after a specified time, original documents that were (1) received under compulsory process in a law enforcement investigation, but (2) not received into the record of a proceeding. Commission Rule 4.12 extends a similar right of return to other documents submitted to the Commission.

"Original" documents include any documents actually submitted to the Commission. The term can include photocopies, if the original submission was made in that form.

.13.1.3 The Freedom of Information Act

Under the FOIA, a requester is entitled to "agency records" unless they fall within specified exemptions. A requester who is denied records can appeal the decision to the General Counsel, and can seek discretionary release by the General Counsel. Also, a requester whose appeal is denied can seek judicial review. The statute of limitations for seeking such review is six years.

Staff should consult with the Information Services Division or the General Counsel's office on questions about whether documents are "agency records" under the FOIA; the term is not identical to the term "records" under the FRA.

Chapter Fifteen **CONFIDENTIALITY AND ACCESS**

.13.2 PROCEDURES**.13.2.1** General

Staff should generally consult with the Information Services Division before disposing of any documents. However, staff may dispose of personal records and documents of clearly transitory interest (e.g., research notes, drafts of memoranda) without such consultation, unless the documents were requested under the FOIA and the request was denied within six years prior to the proposed disposition.

.13.2.2 Disposition of Files at the Close of a Proceeding**.13.2.2.1** Return of Documents to Submitters

At the close of a proceeding, the custodian shall determine which original documents would be returned to submitters on request. If no request has been made, staff should contact the submitters and determine if a request will be made. Rule 4.12.

If a submitter requests return of original documents, the custodian shall return the documents after insuring that any copies necessary to comply with statutory retention requirements, have been made, and after noting in the file that original documents have been returned to the submitter. (See 13.1 above.)

.13.2.2.2 Retention of Documents by the Commission

After the custodian has returned any original documents requested by the submitter (and copied any such documents that are suitable for preservation by the agency), staff should make arrangements to forward any remaining documents (except for documents of clearly transitory interest) to the Records Branch, with any recommendations for the retention of any documents submitted to the Commission. At the time of transfer, the appointed custodian and deputy custodian relinquish responsibility for the files and the Director of the Information Services Division becomes the official custodian of documents subject to the custodial requirements.

The Records Branch will segregate investigatory files into two categories. Category I will contain all internal documents, arranged in chronological order. Category II will contain all other documents, including documents submitted to the agency.

.13.2.3 Return of Submitted Documents Prior to the Close of a Proceeding

Original documents may be returned to the submitter prior to the close of a proceeding only in extraordinary circumstances. Such action shall be taken by vote of the Commission, after considering recommendations by the appropriate Bureau Director and the General Counsel.

.13.2.4 Return of Commission-made Copies of Submitted Documents

Commission-made copies of documents may be returned to the submitter only in extraordinary circumstances, and only on a showing that (1) the documents are not "agency records" subject to statutory retention requirements, and (2) return will not be unduly costly or burdensome to the Commission or contrary to the public interest. Such action shall be taken by vote of the Commission, after considering recommendations by the appropriate Bureau Director and the General Counsel.

.14 CONFIDENTIALITY OF LINE OF BUSINESS ("LB") DATA AND QUARTERLY FINANCIAL REPORT ("QFR") DATA

LB data are available for years 1974-1977, inclusive, and are computerized. Access to data "whereby any line-of-business data furnished by a particular establishment or individual can be identified" is limited to "designated sworn officers and employees of Commission." (15 USC § 46(h). The statute also includes an express prohibition or disclosure to other federal agencies (Id.)

In accordance with published rules, 55 FR 1869 (1990), only the following employees of the Commission may examine LB reports from individual firms, and only after signing confidentiality agreements required by the LB confidentiality rules:

- (a) employees in the Bureau of Economics who have been designated by that Bureau's Director;
- (b) employees of the Automated Systems Division of the Office of the Executive Director, for the purpose of electronic processing of individual company data, and for the purpose of serving as a custodian or disclosure avoidance officer;
- (c) the Commissioners, General Counsel and the staffs of those offices, for the purposes of making decisions regarding, advising, and representing the Commission with respect to any matters involving LB data;
- (d) the Secretary and the employees of that office, for official record keeping purposes related to matters involving LB data; and
- (e) the Division of Personnel, but only to the extent necessary to deal with personnel actions concerning employees' work with LB data. (The Division of Personnel must retain individual company data in a locked drawer, cabinet, or safe when it is not in use.)

As required by the confidentiality agreement for employees of the Bureau of Economics, any document that is based on individual company data must be submitted to the Bureau of Economics' disclosure avoidance officer before it may be disclosed to persons who are not designated to receive access to individual company data. The disclosure avoidance officer must determine and certify that the document does not identify individual company data before any release of the document may be made. (Release in published documents must also be approved by the General Counsel. (See Rule 5.12(c).)

Individual companies' Quarterly Financial Reports data will receive the same treatment as LB data.

Letter Responding to Request for Confidential Treatment

Re: Request for Confidential Treatment
XYZ Corporation, File No. _____

This is in response to your request for Commission assurances of confidentiality for documents submitted in the above-referenced investigation.

The Federal Trade Commission Act and the Commission's Rules of Practice provide adequate protection for information submitted to the Commission. All information submitted to the Commission in an investigation, a purpose of which is to determine whether any person may have violated the law, is exempt from disclosure under the Freedom of Information Act if the information was obtained pursuant to compulsory process or voluntarily in lieu of compulsory process. Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f). If such information is provided pursuant to compulsory process, the Commission may not disclose it except in the limited circumstances described in Section 21 of the FTC Act, 15 U.S.C. § 57b-2. Similar treatment is afforded to documents submitted voluntarily in lieu of compulsory process under § 21(f), if they are designated confidential. See Rule 4.10(d), 16 C.F.R. § 4.10(d); 46 FR 26284, 26291 (1981).

Other information that is submitted to the Commission and marked confidential cannot be disclosed unless the submitter is provided with 10 days' notice of the intent to do so, except as provided by Section 21 of the FTC Act. Section 21(c) and 21(d) of the FTC Act, 15 U.S.C. § 57b-2(c), (d). See generally 4.10 and 4.11. 16 CFR §§ 4.10, 4.11.

This protection, as embodied in the Act and the Commission's Rules of Practice, is adequate and the additional protection sought in your confidentiality request are unnecessary.

Sample Response Letter for Congressional Access
Request for Nonpublic Information

[This model incorporates only very general statements about exemptions under the Freedom of Information Act, and authority to support those general statements. It may be necessary to incorporate more detailed statements, with appropriate authority, to address specific issues that arise in responding to a specific request.]

Dear Mr. Chairman [or Ms. Chairwoman]:

This is in response to your letter, dated ____, requesting information concerning ____. Your request is granted as an official request of a Congressional [Sub]Committee. 5 U.S.C. § 552(d). The information requested is as follows

[deliberative information]

Public disclosure of portions of this letter would reveal staff recommendations and internal, predecisional analyses that are exempt from public disclosure under Freedom of Information Act Exemption 5. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

[law enforcement information]

Public disclosure of some of the information responsive to your request would reveal nonpublic evidence and legal analyses in an ongoing law enforcement investigation, thereby interfering with staff's ability to conduct its investigation. This information is therefore exempt under FOIA Exemption 7(A). Robbins Tire & Rubber Co. v. NLRB, 437 U.S. 214 (1978).

[information provided voluntarily in lieu of compulsory process]

Certain information contained in this letter was submitted to the Commission voluntarily in lieu of compulsory process in a law enforcement investigation and is exempt under FOIA Exemption 3(B), by virtue of Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f). Dairymen, Inc. v. FTC, 1980-2 Trade Cas. CCH ¶ 63,479 (D.D.C. July 19, 1980).

[confidential business information]

Some of the responsive information constitutes confidential commercial or financial information, the release of which could cause the submitting party competitive harm. It is therefore protected by Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), and Exemptions 3(A) and

4 of the FOIA. See National Parks & Conservation Assn v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

[closing paragraph]

Notwithstanding the exempt status of some of the responsive information, the FOIA is not authority to withhold information from Congress, 5 U.S.C. § 552(d), and the Commission has determined to release it to you. Because this nonpublic information would not be available to the public under the FOIA or otherwise, the Commission requests that the [sub]committee maintain the confidentiality of the exempt information.

By direction of the Commission,

Chairman
[Secretary]

Notice of Congressional Access Request

Dear []

This is to confirm the notice you received by telephone from [], a member of my staff. As you were informed, Chairman [] of the Subcommittee on [] of the Committee on [] has requested access on behalf of the Subcommittee to materials that include information submitted by []. This letter discharges our obligations under Section 21 of the FTC Act, 15 U.S.C. § 57B-2(d)(1)(A), and Sections 4.10 and 4.11 of the Commission's Rules of Practice, 16 C.F.R. §§ 4.10 and 4.

Sincerely,

[Name]

Associate Director (BCP), Assistant Director (BC), or Regional Director

cc: to outside counsel if applicable

TO: General Counsel (or Liaison Officer)
Federal Trade Commission
Washington, D.C. 20580

Re: Certification of Intent to Maintain Confidentiality of Documents and to Restrict Use to Law Enforcement Purposes

Pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and Rules 4.6 and 4.11 of the Commission's Rules of Practice, 16 C.F.R. §§ 4.6 and 4.11, I hereby request copies of the following documents submitted to the Commission concerning [identify subject of request, e.g., target's name, etc.]:

I certify on behalf of this office that any information received pursuant to this request will be maintained in confidence and used only for official law enforcement purposes.

This office is authorized under [cite relevant authority] _____
_____ to [describe nature of law enforcement activity] _____

_____ The information requested from the Federal Trade

Commission is relevant to our activities under this authority because [briefly explain how requested information is relevant to the law enforcement activity] _____

I request that the Commission not send a copy of this Certification to Submitters who provided the Commission with information released pursuant to this request. (Note: Unless this box is checked, the Certification will be sent to submitters. See 16 C.F.R. § 4.11(c)).

Signed: _____

Position: _____

Office: _____

CONCUR (Dept Head): _____

Position: _____

FTC Privacy Act Request Form

Illustration 5 is not available in electronic form.

Information Disclosure Statement

Illustration 6 is not available in electronic form.

Letter Requesting Consent for Disclosure

Dear []:

The above-named requester has asked for access to the records that we hold concerning you. The following records have been requested:

The Privacy Act of 1974, 5 U.S.C. S 552a, requires that we obtain your written consent prior to disclosing the requested records. Please indicate your response below, sign and date one copy of this letter, and return it to us.

Sincerely,

[name]
[title]

Enclosure

I consent to the requested disclosure.

I do not consent to the requested disclosure.

(Signature)

(Date)

Privacy Act Inventory Form

Illustration 8 is not available in electronic form.

Notice to Customer of Commission Request for Financial Records

Dear []:

Under the Right to Financial Privacy Act of 1978, the Federal Trade Commission is required to notify you that the Commission is seeking access from the financial institution named in the attached [administrative or judicial subpoena] to certain records or information concerning your financial transactions. The Commission wants these materials because [state with reasonable specificity the nature of the law enforcement inquiry].

If you do not want such records or information made available, you must:

1. Fill out the accompanying motion paper and sworn statement (or write one of your own), stating that you are the customer whose records are being requested by the Government and either explaining why you believe that the records are not relevant to the law enforcement inquiry described above, or noting any other legal basis for objecting to the release of the records.
2. File the motion and statement by mailing or delivering them to the clerk of the United States District Court for the _____. [For a judicial subpoena, motions should be filed in the district court that issued the subpoena; for an administrative subpoena, the general venue statute is applicable. See 28 U.S.C. § 1391 (e).]
3. Mail or deliver a copy of your motion and statement to the Office of the Secretary, Federal Trade Commission, Washington, D.C. 20580.
4. Be prepared to come to court and present your position in further detail.

You are not required to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, then after the expiration of [ten days from the date of service or fourteen days from the date of mailing], the records or information requested will be made available to the Commission. These records may also be transferred by the Commission to other agencies or departments for legitimate law enforcement inquiries. You will be notified of any such transfer, but only after it has occurred.

The staff contact on this matter is [name, telephone #].

Sincerely,

[Name]

Associate Director (BCP), Assistant Director (BC), or Regional Director

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

<p>(name of customer), Petitioner, v. FEDERAL TRADE COMMISSION, Respondent</p>
--

MOTION TO QUASH

[DESCRIPTION OF ADMINISTRATIVE OR JUDICIAL SUBPOENA]

Petitioner, [name], hereby moves this court pursuant to Section 1110 of the Right to Financial Privacy Act of 1978 to quash a [description of subpoena] dated _____. This subpoena requires the production of petitioner's financial records maintained by [name of financial institution]. In support of this motion, the petitioner states as follows:

1. Petitioner is a customer of [name of financial institution];
2. [The financial records sought by the Commission are not relevant to the law enforcement inquiry described in the Commission's notice of request for financial records, a copy of which is appended as Exhibit 1, because (state reasons with specificity)] or [The Right to Financial Privacy Act has not been substantially complied with because (state reasons with specificity)] or [State with specificity any other legal basis for denying the Commission access to your financial records].

Respectfully submitted,

[Name and Address of Petitioner]

VERIFICATION

_____, being duly sworn, deposes and says that he or she is the person mentioned in the foregoing motion and that the matters and facts stated therein are true to his or her own knowledge.

Sworn to before me this ____ day of _____, 19____.

Notice to Customer of Delayed Notice

Dear []:

Under the Right to Financial Privacy Act of 1978, 12 USC § 3401 et seq. the Federal Trade Commission is required to notify you that on [date], the Commission requested or received from the financial institution named in the attached [administrative or judicial subpoena] access to certain records or information concerning your financial transactions. Notification has been delayed because the [name of court] determined that such notice might [state reason]. The purpose of the investigation or official proceedings is [state with reasonable specificity the nature of the law enforcement inquiry].

Sincerely,

[Name]

Associate Director (BCP), Assistant Director (BC), or Regional Director

Enclosure

Certificate of Compliance
[Commission is Proceeding Under 12 U.S.C. § 3413(h)
Because Customer is Not the Target of Commission Investigation]

Dear []:

This is to certify that the applicable provisions of the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 et seq., have been complied with as to the [administrative or judicial subpoena or other access document] for financial records. A copy of the [administrative or judicial subpoena or other access document] is attached.

The information obtained pursuant to 12 U.S.C. § 3413(h)(1) will be used to determine whether [name of financial institution or legal entity other than a customer under the Act] is in compliance with laws administered by the Federal Trade Commission. The information may be transferred to another department or agency consistent with the Act.

Sincerely

[Name]

Associate Director (BCP), Assistant Director (BC), or Regional Director

Date:

According to the Right to Financial Privacy Act of 1978, good faith reliance upon this certificate relieves your institution and its employees and agents of any liability to the customer in connection with this disclosure of financial records.

Certificate of Compliance
[Commission is Not Proceeding Under 12 U.S.C. § 3413(h)]

This is to certify that the applicable provisions of the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401 *et. seq.*, have been complied with as to the [administrative or judicial subpoena] for financial records. A copy of the [administrative or judicial subpoena] is attached. [If appropriate, add: Information obtained pursuant to this subpoena is subject to 12 U.S.C. § 3413(g) of the Act].

Sincerely,

[Name]

Associate Director (BCP), Assistant Director (BC) or Regional Director

Date:

According to the Right to Financial Privacy Act of 1978, good faith reliance upon this certificate relieves your institution and its employees and agents of any liability to the customer in connection with this disclosure of financial records.

Certificate of Compliance for Transfer of Records

Dear []:

This is to certify that there is reason to believe that the financial records obtained pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401 et. seq., are relevant to a legitimate law enforcement inquiry within the jurisdiction of [name of receiving agency or department].

Sincerely,

[Name]

Associate Director (BCP), Assistant Director (BC), or Regional Director

Date:

Notice to Customer of Commission Transfer of Financial Records

Dear []:

Under the Right to Financial Privacy Act of 1978, 12 USC § 3401 et seq. the Federal Trade Commission is required to notify you that on [date] copies of, or information contained in, your financial records lawfully in possession of the Federal Trade Commission were furnished to [name of receiving agency or department] for the following purpose: [state with reasonable specificity the nature of the law enforcement inquiry].

If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Financial Privacy Act of 1978 or the Privacy Act of 1974.

Sincerely,

[Name]

Associate Director (BCP), Assistant Director (BC), or Regional Director

Program for Federal State Cooperation in Merger Enforcement:
Model Certification for States

To: General Counsel
Federal Trade Commission
Washington, D.C. 20580

Re: Participation in Program for Federal-State Cooperation in Merger Enforcement:
Certification of Intent to Maintain Confidentiality.

On behalf of the Attorney General of (name of jurisdiction), I certify that the (name of jurisdiction) will maintain the confidentiality of all information and analysis (hereafter "information") obtained directly from the Commission under the captioned program, as well as all information obtained indirectly from the Commission through another state participating in the program. All information obtained under the program will be used only for official law enforcement purposes.

If any such information is subject to a discovery request in litigation or an access request under a public access law, the (name of jurisdiction) will advise the General Counsel of the Federal Trade Commission ("General Counsel") of the request, and will vigorously assert any privilege or exemption claimed by the General Counsel, or assist the General Counsel in intervening in a state or federal proceeding to protect the information in question. In no event will any action be taken, or any statement be made, that will compromise the Commission's claim of confidentiality.

Information obtained pursuant to this certification may be shared with other state Attorney General offices that have filed a certification with the General Counsel.

Signed: _____

Position: _____

Telephone: _____

Program for Federal State Cooperation in Merger Enforcement:
Model Waiver for Submitters

TO: Assistant Director for Premerger Notification
Bureau of Competition
Federal Trade Commission
Washington D.C. 20580

With respect to [the proposed acquisition of X Corp. by Y. Corp.], the undersigned attorney or corporate officer, acting on behalf of [indicate entity], hereby waives confidentiality protections under the Federal Trade Commission Act, 15 U.S.C. § 41 et. seq., the Hart-Scott-Rodino Act, 15 U.S.C. §18a(h), and the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 4.9 et. seq., insofar as these protections in any way limit discussions about [identity of transaction] between the Federal Trade Commission and members of the NAAG Voluntary Pre-merger Disclosure Compact.

Signed: _____

Position: _____

Telephone: _____

Illustration 18

Ref. .4.1 on page 3 and Ref. .7.1 on page 10

DISCLOSURE PROVISIONS OF FTC ACT, CLAYTON ACT, AND FTC RULES

TYPE OF INFORMATION	PUBLIC DISCLOSURE [Except for public record documents, including compliance reports (Rule 4.9), disclosure must be pursuant to FOIA procedures, to Rule 5.12 procedures for speeches, etc., or to Commission authorization. (Rule 4.9(b).)]	ORAL TESTIMONY
PROTECTIONS BASED ON SOURCE:		
Information received in a law enforcement investigation pursuant to process after 5/28/80 [§ 21(b)].	No disclosure absent submitter's consent. § 21(b)(3)(C). Exempt from mandatory FOIA disclosure. §§ 21(b), (f); Exemption 3.	Can disclose. § 21(b)(3)(c).
Information received in a law enforcement investigation under process or voluntarily in lieu of process, regardless of date received. [§ 21(f)].	Exempt from mandatory disclosure under FOIA. § 21(f), Exemption 3. § 21(f) material cannot be disclosed if marked confidential. Rule 4.10(d).	Can disclose.
Information received from parties pursuant to the Hart-Scott-Rodino Act [Clayton Act, § 7A(h)] [Notes: This category includes the fact of filing. Also, HSR filings may constitute materials deemed confidential under § 21(c).]	Cannot disclose. § 7A(h). FOIA Exemption 3. (However, the fact of filing is made public when the Commission grants early termination of the waiting period, because the HSR Act requires the Commission to publish a notice of early termination. [Clayton Act, § 7(b)(2)].)	Statutory authorization for disclosure questionable. (Can disclose if taking of testimony is construed as an "administrative proceeding" within the meaning of § 7A(h). Use would then be subject to notice provisions described in entry for "Judicial and Administrative Proceedings.")
Line of business information from which data of individual entity could be identified [§ 6(h)]. [Limits on internal circulation also apply.]	Cannot disclose. § 6(h). FOIA Exemption 3.	Cannot disclose. § 6(h).
PROTECTIONS BASED ON SUBMITTER'S DESIGNATION:		
Information marked or otherwise designated confidential by the submitter [including § 21(c) information].	Can disclose only after ten day's notice to submitter. Rule 4.10(e). If the information that was designated confidential was received voluntarily in lieu of process in a law enforcement investigation, disclosure is prohibited. Rule 4.10(d).	Can disclose only after providing submitter with ten days notice or an opportunity to seek an adequate protective order. Rule 4.10(f).

PROTECTIONS BASED ON CONTENT:

Trade secrets, privileged or confidential commercial or financial information obtained from a person [§ 6(f)].

Cannot disclose. § 6(f).
FOIA Exemptions 3, 4.

Cannot disclose, except with submitter's consent.
Rule 4.10(f).

HOW TO USE THIS CHART: This chart describes protections under the FTC Act, the Clayton Act, and the Commission's rules for information submitted to the Commission. Information may be protected by virtue of its source, its content, or a confidentiality designation by the submitter. It can also be protected by a combination of these factors, and all available protections should be considered before a submitter's information is disclosed.

Also, information may be subject to constraints not listed in this chart: protective orders; protections under the Privacy Act, Sunshine Act, or Right to Financial Privacy Act (discussed in this chapter); and protections applicable to materials provided by other agencies. Further, even when not required as a matter of law, consideration should be given to protecting information whose disclosure would unduly compromise personal privacy. (See FOIA Exemptions 6, 7(C).)

**FEDERAL/STATE
LAW ENFORCEMENT**

[Release must be authorized by General Counsel or liaison officer.
Rule 4.11(c).]

**JUDICIAL OR
ADMINISTRATIVE
PROCEEDINGS**

Can disclose only after providing submitter with notice and opportunity to seek an adequate protective order. § 21(d); Rule 4.10(g).

**OFFICIAL
CONGRESSIONAL
REQUESTS**

[Release must be authorized by the Commission. Rule 4.11(b).]

Can disclose with certification. § 21(b)(6). Notice to submitter unless requester asks otherwise. Rule 4.11(c).

Can disclose. § 21(b)(3)(C). Immediate notice of request to submitter. Rule 4.11(b).

Can disclose with certification; notice to submitter unless requester asks otherwise. Rule 4.11(c).

Same as above.

Can disclose.

Cannot disclose. § 7A(h); Lieberman v. FTC, 771 F.2d 32 (2d Cir. 1985); Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985).

Can disclose. § 7A(h). Flexible 10-day requirement for notice to submitters. Formal Interpretation 42 (1980). May be subject to notice requirements of Rule 4.10(g). Cf. GM Corp., 103 FTC 58 (1984) (applying § 21 to HSR information; pre-Lieberman, Mattox).

Can disclose. § 7A(h). Reasonable notice as possible to submitter. 43 Fed. Reg. 33519 (1978). May be subject to notice requirements of Rule 4.11(b); § 21(d)(1)(A).

Cannot disclose. § 6(h); 40 Fed. Reg. 21542; Aluminum Co. of America v. FTC, 589 F. Supp. 169, 171-72 (SDNY 1984) (dicta).

Cannot disclose. § 6(h).

Cannot disclose. § 6(h); 40 Fed. Reg. 21542; Aluminum Co. of America v. FTC, 589 F. Supp. 169, 171-72 (SDNY 1984) (dicta).

Can disclose with certification; notice to submitter unless requester asks otherwise. Rule 4.11(c). 126 Cong. Rec. 3869 and Fleming v. FTC, 670 F.2d 311 (D.C. Cir. 1982) (1980 Act confirmed policy of sharing).

Can disclose only after providing submitter with notice and an opportunity to seek an adequate protective order. Rule 4.10(g) § 21(d).

Can disclose. Immediate notice of request to submitter. Rule 4.10(b). See also § 21(d)(1)(A).

Can disclose with certification. § 6(f). Notice to submitter unless requester asks otherwise. Rule 4.11(c).

Same as above.

Can disclose. Ashland Oil, Inc. v. FTC, 548 F.2d 977 (D.C. Cir. 1976).