The FOIA Blitzkrieg

Company documents provided to the SEC are under attack

By Michael J. Rivera and Kimberly A. Cain

With so many hedge funds and other investment companies flush with cash and looking to outshine their brethren, skirmishes to find the next successful investment are fiercer than ever. An increasingly popular “research” technique is filing requests under the Freedom of Information Act (FOIA) for access to government-held public company documents. FOIA was enacted under the premise that citizens own the government and, absent a compelling reason, should have access to all documents in the government’s possession. A successful FOIA request can yield valuable information about a public company, particularly now that individual employee emails produced by a company to the government often are included in the windfall.

Some investors file their own FOIA requests. Most, however, now seek the assistance of companies whose business plans involve bombarding the Securities and Exchange Commission (SEC) with FOIA requests, hoping to score vital information. As a result,

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FOIA requests have become a cottage industry. Almost 42,000 FOIA requests were filed with the SEC between 2000 and 2006. In this environment, companies producing documents to the SEC are well advised to meticulously follow the SEC’s confidential treatment rules. Failing to do so leaves vulnerable documents that might otherwise qualify for protection under FOIA. A FOIA request can be initiated by a simple letter and requires no legal proceeding. Of course, even if documents are protected under FOIA, a valid subpoena to the custodian agency can nonetheless prompt production. This article reviews FOIA and the SEC’s confidential treatment rules, and recommends how best to protect documents from unnecessary release to the public.

The Freedom of Information Act

FOIA (5 U.S.C. § 552) grants the public the right to access nonpublic government-held records. FOIA is premised on the notion that a well informed public will hold its government accountable for its actions, and will ensure the continuing vitality of our democratic system. Generally, the government must grant the public access to a government-held document, unless the document qualifies for a FOIA exemption (5 U.S.C. § 552(b)). The exemptions attempt to balance the general presumption of open government against other interests of the general public, including the need to protect sensitive personal, commercial, and governmental information. For example, FOIA exempts from disclosure documents containing privileged or confidential commercial or financial information (including trade secrets) and certain documents compiled for law enforcement purposes.

SEC FOIA requests have increased dramatically

In recent years, private research firms have sought to profit from selling information obtained in response to SEC FOIA requests. Investment companies, accounting firms, law firms and investment banks, among others, pay to access such information.

The aggressive FOIA tactics adopted by private research firms, coupled with the post-Enron spike in the public’s and plaintiff lawyer’s interest in corporate fraud, has caused a dramatic increase in the number of SEC FOIA requests. The current volume of SEC FOIA requests is staggering. In the SEC’s 2006 fiscal year, the SEC received 8,961 FOIA requests, compared to 2,875 FOIA requests in fiscal
Improving response times to its current FOIA backlog, such as steps the SEC will take to eliminate pdf) in June 2006. The plan outlines "FOIA Program Action Plan" (www.sec.gov/foia/foiaactionplan.2006). The plan outlines specific time milestones and adopts measurements of success.

Top 10 considerations for protecting information provided to the SEC

Any information submitted to the SEC is at serious risk of being released to the public in response to a FOIA request. The most important step a company can take to avert unwanted disclosure is to properly request "confidential treatment" for records submitted to the SEC. The procedures for requesting confidential treatment are set forth in 17 C.F.R. § 200.83 (the "SEC Rules"). Asserting confidentiality is important, even if a company can take to avert unwanted disclosure or can request "confidential treatment" at the time of a FOIA request. The most important step a company can take to avert unwanted disclosure is to properly request "confidential treatment" for records submitted to the SEC. The procedures for requesting confidential treatment are set forth in 17 C.F.R. § 200.83 (the "SEC Rules").

1. Stamp every page of every document. The SEC Rules require that an identifying number or code be affixed to "each page" for which confidential treatment is sought. Each page must also be marked with the words "Confidential Treatment Requested by [insert name of requesting party]." Stamping the first page of a multi-page document is not sufficient—every page must be marked with its own "FOIA Stamp" consisting of both an identifying number and confidential treatment statement.

2. Stamp documents produced in electronic format. To respond to a FOIA Request, Technology has developed a solution to this issue. It is now possible to configure a disk or hard drive so that a FOIA Stamp is electronically affixed to each page of each electronic document. A number of document management firms offer this service.

3. Protect witness depositions. Transcripts of depositions conducted in the course of SEC investigations are eligible for confidential treatment. Confidentiality may be important for the substantive issues discussed during the testimony, as well as to protect personal information elicited during background questioning. Because it is impractical to file a written confidential treatment request at the time of a deposition, the SEC Rules allow up to 30 days after the deposition to file a request that the SEC could erroneously produce the documents in response to a FOIA Request. Technology has developed a solution to this issue. It is now possible to configure a disk or hard drive so that a FOIA Stamp is electronically affixed to each page of each electronic document. A number of document management firms offer this service.
written request. But the requester must notify the SEC staff at the deposition “or as soon thereafter as possible, that he or she is requesting confidential treatment.” It is prudent to assert this request on the record at the beginning of the deposition.

4. Request confidentiality for correspondence. Confidential treatment is not reserved exclusively for preexisting company documents. Confidential treatment can, and in many cases should, be claimed for correspondence with the SEC and other written documents prepared for submission to the SEC. In SEC enforcement investigations, for example, companies routinely draft letters responding to enforcement staff questions and information requests. Such correspondence, including so-called “Wells” submissions and document production cover letters, may contain sensitive information, including the fact that an investigation exists, the staff’s allegations, and/or a company’s defenses. Persons seeking confidential treatment for correspondence should affix a FOIA Stamp to each page of the correspondence (in the same manner as preexisting documents).

5. Confidential treatment is not limited to SEC enforcement investigations. Confidential treatment requests are most commonly associated with SEC Enforcement investigations, likely because of the large volume of documents any one investigation can yield. However, companies provide documents and information to the SEC for numerous other reasons. For example, documents are produced in connection with comment processes regarding a company’s periodic filings, proxy contests, and examinations by the Office of Compliance and Inspections. Counsel should remember to seek confidential treatment in these contexts if warranted. If confidential treatment is not warranted, however, no request should be made. That is because the SEC staff has cautioned that it may bring enforcement actions against market participants that assert unwarranted confidential treatment claims for comment letters. See Alan Beller, SEC Division of Corporation Finance, Remarks at the Meeting of the ABA Committee on Federal Regulation of Securities, in Atlanta GA (August 9, 2004) (available at www.abanet.org/abanet/common/login/securedarea.cfm?areaType=committee&role=CL410000&url=/buslaw/committees/CL410000/diologue/2005013100001.pdf).

6. Submit a proper confidential treatment request letter. The SEC Rules state that a confidential treatment letter must accompany the document for which confidential treatment is requested. The confidential treatment letter must (i) identify the numbers affixed to the documents for which confidential treatment is being requested, (ii) prominently and clearly display a legend on the top of the page stating “FOIA Confidential Treatment Request,” and (iii) contain the name, address, and telephone number of the person requesting confidential treatment. In situations where a law firm (or other third party) is requesting confidential treatment on behalf of a client, the letter must identify the client and provide the name, telephone number and address of the person at the client whom the SEC should contact in the event a relevant FOIA request is filed. It is also possible and prudent to seek confidential treatment for the confidential treatment letter itself. This can be accomplished by affixing a FOIA Stamp to the confidential treatment letter and denoting that confidential treatment is also being sought for the letter.

A copy of the confidential treatment letter (but not the documents for which confidential treatment is requested) must be sent to the SEC’s FOIA Office. All information contained in the letter that is not required by the SEC Rules (as described above) may be redacted. For example, it is common to have a document production cover letter serve also as a confidential treatment letter. In such circumstances, a requester may redact statements about the document production from the version of the letter filed with the FOIA Office.

7. Expressly identify voluntarily produced documents. A FOIA exemption shields from disclosure “trade secrets and commercial or financial
ber, however, that voluntarily produc-
ing privileged documents risks waiving
the privilege. See In Re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982).

8. Request that produced materials
be returned to you. It is unfortunate, to
put it mildly, when submitted docu-
ments become subject to a FOIA
request filed when the documents
should no longer have been in the
SEC’s possession. Counsel can try to
avoid this outcome by asking the SEC
to return documents immediately after
the agency’s need for them ends.
Although many such requests are not
honored, sometimes the staff will
return documents. It is worth making
the request.

9. Renew confidential treatment
requests after 10 years. Under the SEC
Rules, a confidential treatment request
expires after 10 years. A confidential
treatment request can be renewed for
successive 10 year periods, so long as a
renewal request is filed with the SEC’s
FOIA office before each 10-year period
expires. The SEC will not notify
requesters when a claim is about to
expire. Thus, at the time of production
it is wise to evaluate whether a 10-year
renewal is likely to be necessary. If so,
a reliable calendaring system could be
used to ensure that the issue is
reviewed prior to the 10-year mark.

10. Fight for your rights. The
SEC’s FOIA Office is required to
promptly notify a confidential treat-
ment requester when the FOIA Office
has determined that no grounds
appear to exist to justify withholding
documents subject to a FOIA request.
The submitter then has 10 days to
submit a written explanation (called a
substantiation) detailing why the doc-
uments should not be released. It is
important that the substantiation be
filed in a timely manner. If it is not fea-
sible to file a substantiation within the
requisite 10 days, it is common for the
FOIA Office to grant an extension on
request. Should the FOIA Office ulti-
mate determine to disclose docu-
ments that a confidential treatment
requester believes are protected under
FOIA, the requester may appeal the
decision to the SEC General Counsel,
whose decision can be appealed in
federal district court. Documents can
be, and have in many instances been,
prevented from disclosure after a well-
written (and timely) substantiation
and/or appeal has been filed.

Closing

In the current environment, compa-
nies under investigation often produce
very sensitive information to
federal agencies in order to maximize
the “cooperation credit” they hope to
receive. Shielding this information from
public disclosure may be important to
protect trade secrets, personal informa-
tion or other FOIA-protected categories
of data. Knowing the FOIA rules can be
essential to achieving this goal.