

ENVIRONMENTAL LIABILITY AND FREEDOM OF INFORMATION ON THE INFORMATION SUPERHIGHWAY: NEW OPPORTUNITIES AND CONCERNS FOR BUSINESS

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Environmental agency files are overflowing with information and large quantities of it are spilling onto the information superhighway. Businesses, attorneys, and consultants need to know both how to use and how to protect this information. This becomes increasingly important as these agencies work to make their information easier for the public to access and their services more user friendly. This article examines what steps you can take to protect your information and how you can find valuable business information.

Who is Seeking Access to Information?

Generally, unless a business takes specific steps, anything sent into a government agency is accessible to the public. The term "public" includes competitors, potential buyers, customers, sales people, suppliers, foreign governments, neighbors and anyone else with an interest in your plant. Businesses, consultants, attorneys, environmental groups, and private citizens may review environmental, health and safety files. A recent review of a large company's file log at a state environmental agency found the following people reviewing their files:

- attorneys for the company,
- attorneys for a competitor,
- attorneys for a citizen's group,
- newspaper reports,
- contractors and consultants trying to obtain bid information, and
- competitors trying to find out about the company.

Wendy Schumacher, Freedom of Information Officer for the Environmental Protection Agency (EPA) Region V, says that many filers of Freedom of Information Act (FOIA) requests are insurance companies, attorneys and consultants looking for potential environmental liability. They want to know, for example, if their client has potential Superfund liability responsibilities. EPA also gets many requests from consultants investigating property transfers.

Attorneys will often focus in on specific agency rulings on an issue. When a client faces an environmental issue, attorneys frequently use agency files from similar issues to help develop a strategy for the defense of their client. Likewise, environmental consultants will dig through agency files to find solutions to client problems. Attorneys and consultants will also pour through more general topics looking for ideas for journal articles so they can build their client base, according to Schumacher. Savvy consultants and contractors will review a prospect's files to increase their chances for winning contracts.

Consultants and pollution equipment manufacturers file FOIA requests to develop client lists. EPA will get letters proclaiming the benefits of a new product and addressing

certain pollution concerns and requesting the names and addresses of everyone in the region who might benefit from the product.

Besides using environmental files to research their competition or identify prospects, businesses will look at their competitors environmental permits to make sure they are on a level playing field. They want to know when they have to invest in expensive pollution control equipment and their competitor does not.

Region V, according to Schumacher, does not get a lot of public interest groups making requests but on the east and west coasts, EPA receives FOIA requests from public interest groups.

The Public Information in Government Files

According to the EPA Region II FOIA website, FOIA requests can request access to any agency record. They define record as:

. . .any EPA document, writing, photograph, sound or magnetic recording, drawing, computerized record (disks, database), electronic mail, EPA policies and decisions or anything in which information can be retrieved and/or copied.

Region V's Ms. Schumacher points out that the EPA will not release information relating to ongoing enforcement cases, certain personal staff documents, and information that businesses themselves have identified as confidential. What is "personal" often depends on the individual staff person's judgment. Some will release field notes, telephone memos, and hand written comments while others will be reluctant to release anything with their name on it.

Even with these restrictions, agency environmental files can contain a wide range of detailed, business information. Businesses routinely submit detailed, technical information about their plant and operations to environmental agencies to comply with regulations. Files may also hold process flow diagrams, construction specifications, piping and instrumentation diagrams, ventilation diagrams and other detailed technical information. Determined researchers can unearth detailed lists of production equipment including manufacturer, model number, capacity and date installed from environmental reports. Want to know if a plant is producing up to its capacity, the number and kinds of presses it has or the types of inks it uses? You may find the answer in their regulatory files. A review of environmental health and safety files may also uncover accidents, spills, process upsets, process chemistry, enforcement issues, complaints and even information on competitive bids.

Air permit applications, for example, contain information on any heating source, any painting or coating process, anything that might evaporate and anything that might produce dust. This covers the bulk of industrial processes. These applications often include the make and model of a piece of equipment, its age, and its maximum rated capacity. Emission inventors will include actual emission information for the facility. With a little understanding of emission calculations and a calculator, you can develop a reasonable estimate of the production rate and annual production of a piece of equipment. Material Safety Data Sheets, submitted with many permit applications, tell who a printer buys ink from and who supplies paint to a furniture manufacturer.

Businesses often submit far more detailed information than required by regulation. When a regulator asks for a process flow diagram, businesses find it easier to submit an

engineering design rather than redraw a more simplified diagram. When asked for a building diagram, many businesses have submitted construction drawings rather than a simple diagram. The kind of information found in permit files may allow an investigator to determine exactly how goods are produced. Files may also contain information on the mix of chemicals that go into a specific process.

Even when businesses only submit required information, this information may include trade secrets. Unless they take specific, meticulous steps to protect trade secret information, the public has access to everything submitted to a regulatory agency.

Can You Protect Your Data?

Can you keep confidential information out of the hands of your competitors and the general public? In many cases, you can. State and federal regulatory agencies generally allow you to protect trade secret information. To protect your data, you need to take the following steps:

- **Treat the Information as Confidential Within Your Business**

Restricting who has access to the information bolsters your claim of confidentiality.

- **Be Consistent**

Request confidentiality for the data everywhere it appears. Failing to claim an item as a trade secret in one part of a report may prevent you from protecting the item as a trade secret anywhere else.

- **Defend Your Data**

If an agency mistakenly releases confidential data, request that they get the material back and notify the recipients that they cannot use or disseminate the data.

- **Review Your Consultant's Work**

Do not assume your consultant took proper steps to assert confidentiality when submitting reports about your facility. Failure to make the proper confidentiality claim in a monitoring or modeling report can undermine a claim for confidentiality made for data elsewhere, making it public.

State and local data privacy laws do not always conform to the federal Freedom of Information Act. If you submit a report claiming trade secret protection to a local agency, you need to make sure that you have also followed state and federal procedures if these agencies will have access to the report. Documents that state agencies have treated as confidential have turned up in EPA files as publicly accessible. Determined researchers have found documents that the EPA wanted confidential due to ongoing investigations in state, local and other EPA division files. If they can't protect their own information, how well do you expect them to protect yours?

If you have trade secret information worth protecting, it is worth reviewing it with an attorney familiar with local, state and federal data privacy regulations. After you have made your confidentiality request, you have your attorney review submittals to the agency to make sure they do not contain information that may compromise your trade secrets. Most data privacy regulations require you to submit a blacklined copy for the public file and

a full text version for the agency file. You may also want to do this when negotiating specific requests with an agency. When the action on the issue is complete, ask the agency to return both sets of data. Agencies may archive inactive files for years.

Ms. Schumacher explains that when someone asks to see business confidential information, an agency attorney will initially review the request. Generally, they will ask the facility to justify their confidentiality claim and then make a determination on the validity of the claim.

Even with this review process, some confidential information can slip through the cracks. Protecting your data should be an active, ongoing process. One large manufacturer had a consultant review their files to look for confidential data. Both the EPA and a State agency released information to the consultant that the company had requested be kept confidential. No one contacted the company prior to the release of the information. For highly confidential information, businesses may consider having a third party search their files to see what information turns up.

How Do I Get Access to Data?

Both the EPA and state environmental agencies are dramatically increasing the amount of information available through the Internet. Before making a Freedom of Information Act (FOIA) request, make sure that what you want is not already available. Two buttons on the U.S. EPA's home page <<http://www.epa.gov/>> "databases and software" and "publications" provide a good place to start. The main page also has links to each of the regions and many of the regions have links to the states.

State agencies vary widely in how they treat information requests. Because each division in a state agency may have its own filing system, it helps to know the organization of the agency. Many state agencies have web pages that at least tell about the agency, its structure and who to call for more information. Often you can call and ask to see a file. They will either copy it and send it off to you or invite you in to look through their files. While states may have a FOIA type procedure, they often prefer you handle your request informally unless you need a paper trail. You may need to consult an attorney to find out about data privacy laws and specific restrictions that apply in your jurisdiction. Some states, like the new York State Department of Environmental conservation, have a web page<<http://www.dec.state.ny.us/website/about/abtfoil3.html>> that provides instructions on how to file a formal request.

State agencies usually have numerous lists of facilities covered by various regulations. Air emissions inventories can now produce lists of facilities that emit specified quantities of regulated pollutants. If you want a list of furniture manufacturers or printers who emit more than 50 tons per year of volatile organic compounds, most state environmental agencies can produce such a list. States can produce lists for any activity that requires a state or federal permit and can often sort out subsets of that list. While lists may not be on the internet, they are often available with a telephone call.

While the volume of facility specific information on the Internet grows daily, "hard copy" documents such as permit applications, correspondence, monitoring reports, inspections, risk assessments, complaints, and reports on specific issues still reside in a file cabinet somewhere. Use Internet sources to get as specific as possible. Many agencies now publish annual reports on the Internet. These reports may give you the name of the document or the program you are actually looking for.

FOIA on the Internet

Most EPA regional offices have a FOIA page and many allow email submittal of FOIA requests. Most also have a form on their FOIA web page you can use to submit your request on.

You can find the EPA Region I (Connecticut, Massachusetts, Main, New Hampshire, Rhode Island, and Vermont) FOIA page at <<http://www.epa.gov/region01/oaarm/foai/>>. Their main page has a direct link to their FOIA page. They allow electronic submission of FOIA request.

EPA Region II (New York, New Jersey, Puerto Rico, and the U.S. Virgin Islands) has a FOIA page at <<http://www.epa.gov/region02/epd/foia.htm>>. They allow electronic submission of FOIAs and have a direct link from their main page to their FOIA page. Their FOIA page also includes links to the other Region's FOIA pages.

EPA Region III (Washington D.C., Delaware, Maryland, Pennsylvania, Virginia and West Virginia) has a FOIA page at: <<http://www.epa.gov/region03/r3lib/faq/foia.htm>>. While you might not be able to find this page from Region III's main page, you can get there from Region II's page. They do not allow electronic submittals but they do provide an address for written requests.

For EPA Region IV's (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee) FOIA page go to <<http://www.epa.gov/region4/foiapps/foimenu.htm>>. Their FOIA page is easy to find from their main page and they allow electronic submission of FOIA requests.

EPA Region V (Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin) was one of the first EPA Regions to accept electronic FOIA requests. They have an automatic answer back feature to confirm your request. Their FOIA page is at: <<http://www.epa.gov/region5/foia.htm>>. Their main page has a link to the FOIA page.

Finding EPA Region VI's (Arkansas, Louisiana, New Mexico, Oklahoma and Texas) FOIA page from their main page requires a search. The search will take you to: <<http://www.epa.gov/earthlr6/6md/foia.htm>>. While Region VI does not have an electronic form on the web page, they do provide an email address.

You can find EPA Region VII's (Iowa, Kansas, Missouri, and Nebraska) FOIA page through their index 0 or go there directly by typing <<http://www.epa.gov/region07/newsinfo/foia.html>>. While they provide an email address, they claim that FOIA requests must be written.

EPA Region VIII's (Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming) main page has a direct link to their FOIA page. You can get there directly by typing: <<http://www.epa.gov/region08/info/foia/foimenu.html>>. They allow electronic submittal of FOIA requests.

EPA Region IX (Arizona, California, Hawaii and Nevada) does not have a specific FOIA page but if you search under Freedom of Information Act you end up at the comment page at: <<http://www.epa.gov/region09/comments.html>>. You can submit an electronic request form the comment page.

To find the FOIA page at EPA Region X (Alaska, Idaho, Oregon and Washington) go to the index or type in: < <http://epainotes1.rtpnc.epa.gov:7777/r10/extaff.nsf/webpage/Freedom+of+Information+Act>>. While they do not have an electronic form, they do provide an email address for electronic submittals.

EPA Headquarters is working on a FOIA page. The Office of Enforcement and Compliance Assurance has a FOIA page at: <<http://es.epa.gov/oeca/datasys/subfoia.html>>. They allow electronic submittals.

Prior to the Internet, it took a concerted effort to crack the labyrinth of agency filing systems. Obscurity often worked as well as the law in protecting confidential business information. Environmental Agencies are requiring ever more detailed information from those they regulate.

Even without having every document on the Internet, the Internet makes it easier to find out what agencies have in their files. A competitor in California – or Taiwan – can use the internet to find out about your facility in New York and submit FOIA requests to the New York State Department of Environmental Conservation, Region III EPA and EPA Headquarters Office of Compliance Assurance without ever leaving their computer. Businesses need to rethink how to protect their data and what they need to do as it become increasingly easier to access. On the other hand, to keep a level playing field with their competition, businesses, attorneys and consultants need to know how to tap into and use these new information resources.

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