A penny for your thoughts, $5 for your docs

Protecting company property against Access to Information requests.

By Noel Courage

Think all you can get for $5 these days is a foot-long sub? Actually, that's all your competitor has to spend to get a CD of your company's documents under a federal access to information (ATI) request. But there are ways to protect your company's valuable proprietary information (a.k.a. the 'secret sauce') from prying eyes.

Under the *ATI Act*, the federal government is required to release information unless it falls within an exemption. There is an exemption for trade secrets, confidential information and other information that could cause competitive/financial harm if disclosed. The access laws balance broad rights of access (transparency) with protection of third-party information.

ATI requests keep government departments very busy. For example, Health Canada received 1,481 new ATI requests in fiscal year 2010, according to its most recent annual report About one in three requests were duds — either no records existed or the applicants abandoned the requests. Nearly one in five completed requests provided full disclosure of all relevant records and half received partial disclosure.

Information was withheld as exempt in only 3 per cent of requests. Full exemptions are rare so be prepared to have some company information released. This should be acceptable as long as the released information is commercially neutral and not within an exemption.

The Supreme Court of Canada recently issued its first decision (*Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] SCC 3) on exemptions of third-party commercial information from federal ATI disclosure (s.20 of the *ATI Act*). The decision was made in the pharmaceutical context. The same exclusions apply to other federal ATI requests for third-party information on issues such as the environment, food regulation, trade regulation, natural resources and technology. The case will also be influential in provincial ATI requests subject to similar exemptions.

The Merck case involved Health Canada's release of information from a regulatory submission for approval of Singulair, an asthma medication. Some of the information was released without any notice to Merck. For other information, Health Canada conducted an initial examination, notified Merck and placed the onus on Merck to provide evidence of an applicable exemption to prevent release. Merck applied for a court order blocking release of the information.

The government is not out to get you

The bottom line remains that the federal government will not knowingly disclose exempted information. Health Canada has an established practice of consulting internal technical experts to help determine the sensitivity of the requested scientific and technical information.

In Merck, there appears to have been little 'juicy stuff' in issue. Highly sensitive information, such as chemistry and manufacturing data, was not at risk of disclosure. The dispute focused on items such as format and structure of the new drug submission and lists of published articles that Merck relied upon. The Court considered most of the disputed information releasable and dismissed the appeal. It seems unlikely that Merck suffered any prejudice after release.

Submitting your information to government

Companies should have control over all their proprietary information, irrespective of ATI issues. Identify and catalogue valuable information. Treat it as confidential. Protect it with a company policy that controls access, use and disclosure.

Keep government on a need-to-know basis. Be forthright in submissions of information, but avoid oversharing. Sometimes oversharing stems from uncertainty about what government needs. Tap into outside expertise if necessary to find out the minimum requirements.

Mark all exempted information as confidential or something similar. This is not determinative, but it should trigger notice from government before disclosure. If possible, consider keeping confidential and non-confidential information separated in such a manner that they are easily severable.

Make an internal record of why each document is exempted. This is especially important when the exemption would not be readily apparent. Keep track of information that is subsequently published by the company and becomes non-confidential.

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The Court set a fairly low threshold for notice. Disclosure without notice is only permitted when there is *no reason* to believe that the disclosed information might contain exempted information. When in doubt or redacting documents, notice will be given to the company. The low threshold reduces the risk of mistaken disclosure.

ATI requests require rapid response. The government completes its response to many ATI requests within 60 days. Requests involving voluminous records or consultation often take longer. A company must likewise move fast, within specified timelines (usually extendable), in order to make its case for exemptions.

Responding to an ATI request

When preparing a response, keep two things in mind: first, the government must make a serious attempt to decide on access and exemptions; it cannot do a cursory review and shift its responsibility to the company, and second, disclosure of information and protecting confidentiality are both *equally important* objectives. Companies must provide reasonable, cooperative assistance to government. This approach will better protect information, but it may create more work for the government and companies.

Make clear, targeted submissions for exemption of information. Identify and argue for any special categories of information that arose after the initial filings with the government, such as correspondence and government reviewer notes. These will not be disclosed if they contain exempted information. They will be disclosed if they contain comments of government officials based on their own observations.

Redacting is only an appropriate compromise where disclosure of the unexcised portions provides meaningful information. If severance leaves only disconnected snippets of releasable information, the company should assert that severance and disclosure are improper.

If you end up in the rare situation of going to court to block release, the onus of proof (civil standard) will be on the company.

Taking these steps to carefully protect your company information should ensure that your competitors are left hungry after they review the results of their ATI request. ■

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