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# When Congress Seeks Cos.' Nonpublic Info From Regulators

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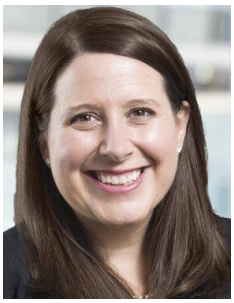

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Last week's announcement that the General Services Administration approved the sale of the Trump International Hotel in the Old Post Office building in Washington, D.C.,[1] brings to a close one of the most enduring and contentious congressional investigations of the Trump administration.

Even as the lease sale likely brings the Trump Hotel inquiry to a close, the investigation — and the recent public release of Trump Organization financial materials obtained from the GSA[2] — offer valuable insights to private parties responding to congressional inquiries of all manners.

In particular, as the pace of congressional investigations has continued to escalate in recent years, investigators on Capitol Hill have adopted ever more sophisticated strategies for obtaining the documents and information they seek. At the same time, recent litigation over the scope of Congress' subpoena power has called into question the availability of traditional means of compelling disclosure.[3]

This dynamic has prompted congressional investigators to begin seeking out private parties' confidential documents from more accommodating sources — federal agencies.

Requests for documents and confidential business information are a persistent feature of interactions between federal agencies and private parties. Whether submitted in connection with a proposed merger or prospective government contract, or to comply with myriad regulatory requirements, documents containing highly confidential, competitively sensitive information are routinely submitted to federal authorities by businesses large and small.

In most cases, parties providing such material do so with the assurance that their confidential information will not be disclosed to others. But while most federal agencies are barred by statute or regulation from publicizing such information, these restrictions often include one important exemption: Congress.

This means that Congress — and frequently, individual committees or subcommittees — can, in many cases, override nondisclosure protections to access

nonpublic information collected from private parties by federal regulators. Given that congressional investigations are quite often specifically designed to publicize internal business deliberations, the possibility of Congress obtaining nonpublic information from a federal regulator presents a new, and often overlooked, risk for parties responding to congressional inquiries.

To understand these risks, it is essential to understand the particular statutory and regulatory regime governing each agency's response to document requests from Congress. This article provides a broad overview of these regimes and highlights key considerations for parties involved in an investigation before Congress.

**Disclosure for Me, But Not for Thee**

Congress has long recognized that providing federal agencies with broad authority to obtain confidential material from regulated parties is an essential component of effective regulation. However, while Congress has seen fit to adopt stringent confidentiality requirements for many of the most active federal regulators, these protections frequently permit Congress itself to obtain information that would not otherwise be available outside an agency.

For example, recognizing the highly competitively sensitive nature of the agency's investigations, Congress has generally barred the Federal Trade Commission from disclosing confidential information obtained from private parties during the course of its work.[4] With the agency frequently relying on voluntary submissions from regulated parties, this assurance that business-sensitive material will be safeguarded is critical to enabling the agency to effectively review and assess proposed transactions and other business conduct.

Nonetheless, specifically exempted from this restriction is the disclosure of confidential information "to either House of the Congress or to any committee or subcommittee of the Congress."[5]

In many cases, even trade secrets are not immune from disclosure to congressional investigators. Indeed, although trade secrets and other confidential financial information is specifically exempt from public disclosure under the Freedom of Information Act, agencies may not rely on this general exemption to withhold such information from Congress.[6]

Likewise, although the National Transportation Safety Board is generally barred from disclosing trade secrets and other nonpublic proprietary information, this restriction does not apply to disclosures to congressional committees with jurisdiction over the subject matter related to the requested information.[7] And though Nuclear Regulatory Commission regulations include confidentiality protections for trade secrets, those regulations do not authorize withholding such information from Congress.[8]

While many corporate clients are familiar with traditional discovery disputes, the possibility that congressional investigators may readily obtain a party's confidential documents from a regulator presents additional complexity for parties responding to a congressional investigation.

**Understanding Different Congressional Disclosure Regimes**

Though most federal agencies are required to comply with at least some congressional requests for nonpublic information, the precise contours of such requirements vary from agency to agency. Below,

we highlight two key considerations for parties assessing the possibility of an agency disclosure to Congress.

***Who may obtain agency documents?***

At the outset, when considering the implications of a congressional request for confidential information held by an agency, it is important to understand who has submitted the request.

By and large, the provisions authorizing the disclosure of confidential material to Congress speak most directly to requests from "appropriate" or "duly authorized" committees and subcommittees.[9] While these terms are frequently left undefined, it is fair to assume that those committees and subcommittees with jurisdiction over an agency's operations have the clearest claim to obtain documents from that agency.

Meanwhile, committees and subcommittees with broad oversight jurisdiction — including the U.S. House of Representatives Committee on Oversight and Reform and the U.S. Senate Permanent Subcommittee on Investigations — can be expected to assert their authority to obtain documents from nearly any executive branch agency.

Nonetheless, while most agencies likely will comply with a document request from a relevant committee or subcommittee, requests from individual members may not be given the same priority. In fact, some agencies are specifically barred from providing individual members with documents that would not otherwise be available to the general public.

As one example, U.S. Food and Drug Administration regulations governing the disclosure of documents require broad disclosure in response to an "authorized request ... made by the chairman of a committee or subcommittee of Congress acting pursuant to committee business."[10] By contrast, requests from individual members are subject to the same rules governing requests from the general public, which generally bar the release of such confidential information.[11]

An important exception to this general limitation on the ability of individual members to obtain documents from federal agencies is the so-called Rule of Seven statute, which permits any seven members of the House Oversight Committee or any five members of the Senate Homeland Security Committee — of which the Permanent Subcommittee on Investigations is a part — to obtain "any information ... relating to any matter within the jurisdiction" of the committee.[12]

In fact, this is the provision under which House Democrats sought — and ultimately received — Trump Organization materials from the GSA.[13] Likewise, certain agencies are required to provide documents sought by even a single member.[14]

In both the House and Senate, individual members or groups of members have increasingly launched their own investigations — without the imprimatur of a committee or subcommittee or involvement of a chairman — as a means of influencing policy and growing their public profile. Private parties responding to such inquiries should carefully consider the extent to which key documents or other information may be obtained indirectly from relevant federal agencies.

***Will the agency provide notice of a congressional request?***

Even as most agencies have limited ability to resist a congressional request for confidential third-party

material, procedural notice requirements often provide private parties with an opportunity to limit or otherwise glean important information from a requested disclosure.

For instance, the Consumer Financial Protection Bureau may only provide to Congress confidential information identified by a financial institution as consisting of a trade secret or privileged or confidential commercial or financial information if the agency has first provided written notice and a copy of the request to the affected institution.[15]

Likewise, before disclosing nonpublic information designated by a private party as a trade secret or otherwise proprietary in response to a request from a congressional committee or subcommittee, the Consumer Product Safety Commission must immediately notify any affected party of the request.[16]

While these requirements generally do not expressly permit private parties to block the disclosure of sensitive material to a requesting congressional committee, receiving such a notice from a regulatory agency can provide vital insight into the likely focus and scope of an ongoing investigation. Indeed, in some cases, such a notice may be the first indication of a forthcoming inquiry, providing an invaluable opportunity to begin preparing a response even before an investigation has begun in earnest.

Depending on the circumstances, early engagement with an agency responding to a congressional request may allow for negotiation regarding the scope of an agency's response and how best to preserve the confidentiality of sensitive material.

Indeed, even in a period of unified government, institutional interests in the executive branch — including, but not limited to, a desire to ensure continued voluntary cooperation by private parties with regulatory processes — can be a powerful tool to limit disclosure of documents held by an agency.

**Limited Judicial Interest in Preventing Broader Disclosure**

Where a regulator is required to provide confidential business information to Congress, there is often a temptation to request — or perhaps require — an assurance that such information will not be publicly disclosed by Congress. Based on the limited case law to date, however, the possibility of obtaining such an assurance is far from certain.

The U.S. Court of Appeals for the D.C. Circuit addressed the question of whether, and when, courts may impose restrictions on Congress' handling of confidential business information most directly in its 1978 decision in Exxon Corp. v. Federal Trade Commission.[17] The Exxon case arose out of an investigation by the Senate Judiciary Committee's Subcommittee on Competition Policy, Antitrust and Consumer Rights into coal and uranium holdings of oil companies.

After the subcommittee sought confidential materials provided to the FTC, Exxon sought a court order barring the agency from complying with the request without an assurance that the sought-after documents would not be publicly disclosed absent a majority committee or subcommittee vote.[18]

While apparently sympathetic to the company's concern regarding potential congressional leaks, the court ultimately declined to impose additional procedural safeguards, in the absence an immediate threat of an illegal disclosure.

Emphasizing a desire to "refrain from creating 'needless friction' with a coordinate branch of

government," the court was "compelled to rely on the assumption that Congressional committees will act responsibly with confidential data revealed to them."[19] This being the case, without "any concrete threat to appellants' vital interests" through "some immediate threat of illegal disclosure," the court denied the company's request for an enforceable assurance of confidentiality.[20]

The D.C. Circuit has not had occasion to revisit this aspect of its Exxon holding in recent years. As it stands, the case highlights the significant challenge confronting any party seeking to preserve the confidentiality of business secrets or other proprietary information subject to congressional disclosure.

**Conclusion**

Even for the most sophisticated clients, congressional investigations present a dizzying array of challenges both familiar and foreign. To meet these challenges, parties responding to such inquiries are well advised to assess of the possibility that a resourceful committee may obtain — or, indeed may have already obtained — sought-after documents or information from a willing federal regulator.

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[1] https://federalnewsnetwork.com/leasing-property-management/2022/03/gsa-approves-sale-of-trump-hotel-lease-after-years-of-scrutiny-from-watchdogs/.

[2] https://oversight.house.gov/news/press-releases/committee-uncovers-evidence-that-trump-concealed-millions-in-losses-hid-debts.

[3] See Comm. on Judiciary of United States House of Representatives v. McGahn, 973 F.3d 121, 122 (D.C. Cir. 2020), reh'g en banc granted, judgment vacated (Oct. 15, 2020).

[4] 15 U.S.C. §§ 57b–2(b), 18a(h).

[5] Id. § 57b–2(b)(3)(C). Relatedly, federal banking regulators are generally required to provide nonpublic data to the FTC and the U.S. Department of Justice for use in reviewing proposed mergers, with such data thereafter subject to disclosure to any duly authorized committee. 12 U.S.C. §§ 1828b(a), (b)(4).

[6] 5 U.S.C. § 552(d). The Office of Legal Counsel at the Department of Justice has interpreted this provision to require disclosure of FOIA-exempt information only in response to a request from the chairman of an oversight committee. See Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 Op. O.L.C. 1, 3-4 (2017).

[7] 49 U.S.C. § 1114(b)(1)(B).

[8] 10 C.F.R. § 9.17(b).

[9] See, e.g., 15 U.S.C. § 2055(a)(7) (authorizing disclosures by the Consumer Product Safety Commission "[u]pon written request of the Chairman or Ranking Minority Member of either of the appropriate Congressional committees or any subcommittee thereof"); id. § 18a(h) (authorizing disclosures by the FTC to "either body of Congress or to any duly authorized committee or subcommittee of the Congress").

[10] 21 C.F.R. §§ 20.87(b), 20.80(a), 20.61(c).

[11] Id. § 20.87(c).

[12] 5 U.S.C. § 2954.

[13] Maloney v. Murphy, 984 F.3d 50, 56 (D.C. Cir. 2020).

[14] See, e.g., 19 U.S.C. § 4203(a)(1)(B) (requiring disclosure by the U.S. Trade Representative of document "relating to" trade negotiations).

[15] 12 U.S.C. § 1070.45(a)(2).

[16] 15 U.S.C. § 2055(a)(7).

[17] Exxon Corp. v. Federal Trade Commission, 589 F.2d 582 (D.C. Cir. 1978).

[18] Id. at 590.

[19] Id. at 590-91.

[20] Id. at 591.