

Corporate Counsel

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Don't Count on FOIA to Access Investigative Data

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Imagine that you receive notice that the U.S. Centers for Disease Control and Prevention (CDC) has dispatched investigators to a commercial establishment owned, operated or managed by your company to conduct interviews and gather data in connection with a suspected infectious disease outbreak. You are advised only that the outbreak may potentially be linked to

the establishment. The CDC, directly or through local public health officials, requests that you permit their representatives to inspect the premises and collect environmental samples to further the investigation. A cursory review of state and federal public health statutes confirms that the authorities have a legal basis to conduct such investigations, and to gather information and data from privately owned premises when there is a suspected public health emergency. In the meantime, local media outlets are publishing daily updates regarding the investigation, identifying your company's establishment as a suspected source of the pathogen.

Faced with this scenario, general counsel and risk managers may reasonably conclude that the proper course of action is to allow the investigation to proceed with minimal, if any, supervision or oversight by company representatives. Public health investigators are then permitted to inspect the premises, interview your employees, and collect environmental samples and other data. At the conclusion of the site inspection, you are advised only that the investigation is ongoing and the results will be released in due course.

You are then asked by your company's board of directors to determine if there is any liability exposure arising from the event. Letters and telephone calls to public health investigators, seeking the results of the investigation, elicit no response. You then direct a Freedom of Information Act (FOIA) request to the CDC, believing that the agency will be compelled to disclose its findings to you. Recent experience with infectious disease outbreak investigations

informs us that, unfortunately, months (if not years) may pass before any meaningful information is disclosed as a result. While cooperation with public health investigations is advisable, our experience dictates that one cannot expect transparency and/or disclosure from government authorities in charge of such investigations. Reliance on the authorities to make timely and full disclosures of their findings and conclusions will likely be the exception, and not the rule, for those facing such investigations.

Rather than be held hostage by the limitations of FOIA, counsel should consider alternatives. In particular, a carefully planned and executed independent investigation, conducted contemporaneously with the government investigation, can provide your company with the information it needs to evaluate liability exposure and, potentially, defend any claims or lawsuits that may follow. From a business perspective, that information could even be used to mitigate unfavorable press.

The Freedom of Information Act

FOIA, codified at 5 U.S.C. § 552, was enacted to ensure the public's access to governmental information or, at its core, to inform citizens about "what their government is up to." Notwithstanding the fact that the Obama administration has called for federal agencies to administer FOIA by operating under a "clear presumption" that, in "the face of doubt, openness prevails," the government may respond to FOIA requests through partial or no disclosure.

Based on this policy of openness and transparency, submitting a FOIA request for documents—for example, the reports and data compiled by public health investigators pursuant to a Legionnaires' disease outbreak potentially associated with a commercial establishment owned, operated or managed by your company—should be relatively straightforward and simple. You may, for example, send a letter to the FOIA administrator at the CDC that "reasonably describes" the information you are seeking and believe you are on your way. 5 U.S.C. § 552(a)(3)(A). Your request may even be so specific and tailored based on your knowledge of the situation that you feel guaranteed to access the information you need.

However, there are numerous exemptions that the CDC can claim, and your request, as drafted, may not elicit the anticipated response. While a successful administrative appeal may yield some additional information, the next step of FOIA litigation is drawn out, expensive and not likely to result in a favorable outcome. Counsel must be aware of the pitfalls associated with FOIA and how to more effectively access the necessary information to protect their company's interests.

Counsel should not assume that they will obtain the information from the government, either directly or through FOIA. Although the statute places an emphasis on the fullest possible disclosure of information, there are nine exemptions to document production that any agency such as the CDC may assert, including the "deliberative process" privilege, which exempts "pre-decisional" and "deliberative" material from disclosure that does not reflect the agency's adopted position on a matter. While the assertion of one or more exemptions in response to an inquiry may not seem like a major impediment, counsel is immediately disadvantaged because they cannot know, vis-à-vis the agency, what information was withheld. Additionally, while FOIA requires that an agency provide its reasoning for withholding information, it is sometimes not possible, based on an agency's response, to determine the reasonableness of an exemption. While agency records presumptively should be disclosed and exemptions narrowly construed, the reality is that requesting documents through FOIA can be unproductive, time consuming and costly.

Suppose that you receive little to no information in response to your request to the CDC due to the assertion of the deliberative process privilege, and you have no basis for understanding whether the information withheld actually qualifies under that exemption. What are your options?

There are two means of appeal. First, counsel may appeal the withholding of information to the head of the agency. At this juncture, a well-drafted, specifically tailored appeal could result in the release of additional records. According to a publication by the National Security Archive, a senior agency employee will likely reexamine the request and the reasons for any adverse decision, and he or she may have a different perspective on the agency's initial response as well as the authority to exercise greater discretion in responding to the request. Furthermore, where an entire document may have been withheld based on the "deliberative process" exemption, additional review of the document may result in the disclosure of any segregable portions that are not actually exempt. Although an administrative appeal, by statute, should take 20 days or

less, this is often not the case due to the sheer volume of FOIA requests the government processes.

Following the administrative appeal, counsel may file a lawsuit in federal district court, where the court's review of the agency decision is de novo. Counsel at this stage will find themselves at a disadvantage on the burden of proof, as FOIA litigation is often resolved by summary judgment motions. While the burden is on the agency to prove that any claimed exemption applies, FOIA specifically provides that a court "shall accord substantial weight to an affidavit of an agency concerning the agency's determination" as to the applicability of an exemption. 5 U.S.C. § 552(a)(4) (B). The agency need only submit an affidavit indicating that it has conducted a thorough search of its records and providing reasonably detailed explanations as to why any withheld documents fall within an exemption. Even when a court finds that a government affidavit is insufficient to carry the agency's burden, it may simply deny the agency's motion for summary judgment without prejudice, resulting in the filing of a successful renewed summary judgment motion with a more detailed declaration. Accordingly, the decision to litigate any adverse FOIA determination should be carefully considered.

While companies targeted in public health investigations may obtain some information through FOIA requests, counsel should be cognizant of the fact that they will not have full access to the information requested, due to the likely assertion of one or more exemptions. The process is also time consuming. Even an initial response to a request may take several months; the actual disclosure of documents could take years. Furthermore, litigating the denial of a FOIA request can be cost-prohibitive, and the burden of proof weighs in the government's favor.

The Alternative to Reliance on FOIA

Reliance on FOIA to obtain the reports and data compiled by federal investigators is likely to be a dead end. The alternative is to deploy a team of independent investigators at the outset to monitor and participate in the federal investigation. Although this approach will incur initial costs, counsel will have immediate access to the information needed to evaluate liability exposure and, potentially, defend related lawsuits—and you will be spared the time and expense of later having to piece together the information through FOIA administrative appeals and litigation.

Employing a team of your own consultants to monitor the public health investigation and conduct its own

analysis may also lead to the discovery of exculpatory evidence. Counsel should not assume, for example, that the investigators will test, or know to test, all possible sources of a Legionnaires' disease outbreak. Your team may be able to assess those overlooked sources and potentially find evidence confirming that your company is not implicated in the outbreak. Similarly, an independent team may identify flaws in the government's investigation, and counsel may later argue that the government's findings are incorrect or unreliable.

Counsel should take a proactive role at the outset of an investigation, rather than the passive and problematic approach of requesting documents pertaining to an investigation through FOIA. They should not assume that the government will provide the necessary information, either directly or through FOIA requests, and pursuit of the information through FOIA will likely be unproductive, untimely and costly. Despite FOIA's policy of openness, "[t] here is a certain tension in balancing the public interest in having the government operate in the sunshine against the

interests set forth in the exemptions that may, by shielding disclosure of information, keep the public in the dark." Having your own team in place to monitor a public health investigation and to conduct an independent inquiry is the most effective strategy to avoid FOIA impediments, so that a company seeking government information need not unnecessarily be "in the dark."

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