the TOXIC TORT newsletter

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We Make The Complex Simple

FOIA Disclosures: Restricting Their Discovery and Use by Opposing Counsel

*By Jeffrey Singer and Catherine Goldhaber**

Introduction

Manufacturers submit documents to the federal government for a multitude of reasons; including to gain FDA approval of a drug or device, to seek a government contract, or to comply with a regulation such as the Asbestos Information Act. These company documents become records of the federal agencies to which they are submitted. The submitted information may have to be disclosed to others by the agencies pursuant to a Freedom of Information Act ("FOIA") request unless they fall within one of nine FOIA exceptions.[1] The EPA describes the nine exceptions as the following types of documents/ information:

1. properly classified as secret in the interest of national defense or foreign policy;
2. related solely to internal personnel rules and practices;
3. specifically made confidential by other statutes;
4. trade secrets and commercial or financial information which is obtained from a person and is privileged or confidential;
5. inter-agency or intra-agency memoranda or letters, except under certain circumstances;
6. personnel and medical files and similar files, the disclosure of

* Presented by Jeffrey Singer before the Product Liability Advisory Meeting, Montreal, Quebec, Canada, (April 22, 2004).

[1] 5 U.S.C. § 552(b).

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Welcome

How many times has it been suggested to you that one of those mysterious FOIA searches be done for government documents. The red tape and procedures that must be dealt with is mind boggling. In this issue, Jeff Singer and Catherine Goldhaber give you a logical and pragmatic approach for dealing with FOIA requests.

The purpose of this newsletter is to alert you to the new developments and trends in asbestos litigation and other toxic tort matters and to outline strategies and tactical options in managing the litigation. Please provide us with your comments or suggested topics that you might want discussed in future issues. We thank you for reviewing this material for us.

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About The Editors

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Mr. McCambridge was the Chairman and President of the Chicago Asbestos Defense Group and was appointed by the Circuit Court of Cook County as liaison officer and lead counsel for the defense of all asbestos litigation pending in Cook County.

He is a frequent lecturer, having spoken at numerous venues including the Conference of Insurance Legislators, the Chicago Bar Association on asbestos litigation and a featured speaker at a National Business Institute Seminar on "Trial Advocacy," among others. Mr. McCambridge is the 1991 and 1999 author of "Trial Advocacy in Illinois," and gives lectures on the article. He has also authored a chapter on handling toxic tort cases in the Illinois Association of Defense Trial Counsel Manual.

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which would constitute a clearly unwarranted invasion of personal privacy;
7. records or information compiled for law enforcement purposes, the release of which (a) could reasonably be expected to interfere with enforcement proceedings, (b) would deprive a person of a right to a fair trial or impartial adjudication, (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (d) could reasonably be expected to disclose the identity of a confidential source, (e) would disclose investigative techniques, and/or (f) could reasonably be expected to endanger the life or physical safety of any individual;
8. information contained in or related to certain examination, operating, or condition reports concerning financial institutions;
9. certain information concerning gas or oil wells.[2]

While some agencies such as the CPSC notify a submitter before any documents are released, other agencies are not required to notify submitter unless the agency will release confidential documents. In this litigious environment, the knowledge that confidential trade secrets are in the hands of the government may understandably make companies uneasy. Moreover, because communications a company has with federal agencies are discoverable,[3] many litigants attempt to discover the communication itself as a means to establish notice or fault.

In 1966, Congress enacted FOIA, 5 U.S.C. §552, to provide citizens a statutory right to gain access to federal government records.[4] Today, FOIA has become a discovery tool for the prosecution and defense of product liability claims. Any person may make a FOIA request by sending a mere letter of request to the appropriate department of a federal agency, so long as the request complies with clear instructions that are readily available on agency websites. Requests may also be made directly on an agency website, such as the EPA.[5] A person's purpose or motivation for seeking the information is not a consideration in the agency's decision to release the information.[6] Since FOIA's enactment, newspaper reporters investigating news stories and businesses investigating competitors have used FOIA to obtain information from federal agencies.[7] Likewise, corporate records submitted to federal agencies, as well as documents generated by the agencies themselves, are fodder for the plaintiff bar.

Because of the relatively easy access to corporate or agency documents, it follows that preventing the discovery and the introduction of agency records into evidence has become another challenge facing the defense bar. The challenge continues beyond a particular case since any document obtained by a plaintiff's attorney absent a protective order may be freely disseminated. Because any person may request documents from a federal agency, a plaintiff may start discovery well before an action is initiated. Information from regulatory agencies may provide evidence supporting or refuting defect, causation, notice, and/or industry standards.[8] Thus, having knowledge of what information is available to parties, learning how to block a plaintiff from obtaining a company's federal agency records, and assessing how such FOIA information may be treated by the trial court are necessary components of a company's defense.

[2] http://www.epa.gov/foia/broc.htm#a; see also 5 U.S.C. § 552(b).
[3] *Bates v. Firestone Tire & Rubber Co., Inc.*, 83 F.R.D. 535, 537 (D.S.C. 1979).
[4] Paul M. Nick, *DeNovo Review in Reverse Freedom of Information Act Suits*, 50 Ohio St. L.J. 1307 (1989).
[5] http://www.epa.gov/foia/requestform.html
[6] Nick, *supra* note 4, at 1310, 1311.
[7] Nick, *supra* note 4, 1307.
[8] David P. Graham & Jacqueline M. Moen, "Discovery of Regulatory Information for Use in Private Products Liability Litigation: Getting Past the Road Blocks", 27 *Wm Mitchell L. Rev.* 653 (2000).

Information Available by FOIA Request - Documents Submitted to or Generated by Federal Agencies

Federal agencies both acquire documents submitted from companies and generate documents in the form of agency investigations, reports, and guidelines.[9] A FOIA request for agency records may result in obtaining both types of documents—those submitted by a company and those generated by the federal agency. Agency records that are subjected to a FOIA request are considered materials created or obtained by a particular federal agency at the time of the FOIA request.[10] *Executive Order 12,600* requires agencies to provide notice to companies of requests for their confidential submissions.[11] Some agencies have specific notice requirements. For example the Consumer Product Safety Act requires the CSPC to give manufacturers 30 days notice prior to the release of information pursuant to a FOIA request.[12]

For other agencies, however, a manufacturer need not wait for notice from an agency, but may simply go to the agency's website to monitor incoming requests. For instance, the NHTSA posted requests on its cite as recently as February 2004 at http://www.nhtsa.dot.gov/nhtsa/whatsup/foia/requests/index.cfm. NHTSA's posted requests in February 2004 included records of purported Firestone Steeltex tire failures and an FOIA appeal to a previous request for fatality analysis reporting systems (FARS) records for 1992-2003 Ford Crown Victoria and Lincoln Town Cars. The NHTSA website disclosed the date of the request, the name of requester, and the employer of the requester.[13] As recently as mid-January 2005, however, this detailed information could not be located on the website.

Moreover, no FOIA request is necessary for some documents held by federal agencies because the agencies post the most frequently requested documents on their websites. The FDA website hosts an electronic reading room at http://www.fda.gov/foi/electrr.htm. The EPA will be posting "Frequently-Requested Records," and the website link at http://www.epa.gov/foia/reading.html reads "*Coming soon!*" The only description given of what may soon appear is as follows:

> [5 USC 552 (a) (2)](D) copies of all records, regardless of form or format, which have been released to any person . . . and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same record.

FOIA was not intended as a discovery method for litigants.[14] Information that is not available due to exemptions from FOIA may in fact be

[9] Other types of documents include: documents generated during inspections of businesses (FDA inspecting labs) and manufacturing facilities (OSHA air testing); documents/reports regarding product testing performed by a federal agency (CPSC findings on testing of bicycle helmet buckles—specifically references brands); compliance testing on motorcycle helmets (NHTSA); letters requesting FOIA requests, and the agency's response; documents related to product recall (CPSC recall of Mickey Mouse electric waffle irons)—including Underwriters Laboratories Inc. reports; reports prepared for agencies by other businesses (KARCO Engineering, LLC report on New Car Assessment Program Side Impact Test for a 2002 Saturn L 100 4 Door Sedan; prepared for U.S. DOT, NHTSA). CPSC, FDA, and NHTSA documents listed are available on each respective agency's website. Website addresses which link to documents are: http://www.cpsc.gov/library/library.html; http://www.fda.gov/foi/foia2.htm; http://www.osha.gov/as/opa/foia/archive-foia.html; http://www.nhtsa.dot.gov/nhtsa/whatsup/foia/index.html.

[10] Marjorie A. Shields, J.D., "What Are 'Records' of Agency Which Must Be Made Available Under Freedom of Information Act (5 U.S.C.A. §552(A)(3))", 153 A.L.R. Fed. 571, pg. 15 (West 1999-2004), citing *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 109 S. Ct. 2841, 106 L.Ed.2d 112 (1989).

[11] James T. O'Reilly, "Remedies After Mistaken Disclosure," 1 Fed. Info. Discl. §10:49 (3d ed.) (2003).

[12] 15 U.S.C. § 2055(b)(1).

[13] For example, James Marner of Shultz & Rollins, Ltd. Requested documents "concerning Conway Western Express, Inc." and noted "firm represent Michelle & Jimena Coronado who sustained injuries resulting fm collision involving Conway Western Express, ES have no records." http://www.nhtsa.dot.gov/nhtsa/whatsup/foia/requests/index.cfm

[14] *Culinary Foods, Inc. v. Raychem Corp.*, 150 F.R.D. 122, 125 (N.D. Ill. 1993), citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989), et al.

available pursuant to a subpoena.[15] Should the agency respond to a subpoena by asserting a privilege, then the burden falls upon the opponent to engage in formal discovery. Thus, it would be the agency's burden to establish a privilege to avoid producing the information sought.[16] Where FOIA exemptions correlate with discovery privileges, the policies behind the FOIA exemptions should be considered in a balancing test between the government's interest in confidentiality and the litigant's need for the information.[17]

A FOIA requester may obtain information from the agency, or a government official, when the party's interest in discovering the information outweighs the interest of the government in preventing employees from engaging in time intensive discovery.[18] Information from an agency is not limited to materials. In certain circumstances, a party may depose a government inspector as to his inspection of physical evidence where the party did not attend the inspection but the evidence had subsequently become destroyed.[19]

Despite the easy access to government records, a plaintiff need not go to a government agency for information and may simply serve discovery. In written discovery responses, a corporate defendant may not require a plaintiff to request information under FOIA in order to obtain non-privileged materials or non-confidential communications between the defendant and the federal agency; especially where disclosure of the material is not unduly burdensome, the cost to plaintiff of proceeding under FOIA would involve substantial time and expense, and the procedure would delay the resolution of the lawsuit.[20] Furthermore, a party whose FOIA request has been denied or the response restricted due to FOIA exemptions (such as trade secrets) may opt to serve the agency with a subpoena. If the case is not pending in federal court, the subpoena will almost certainly be ignored as state courts do not have jurisdiction over federal agencies.[21] Thus, a party seeking the information may need to initiate a separate action against the federal agency in federal court.[22] For the legitimate federal case; however, a subpoena may be a more successful method to get information than what may instead be produced by a mere FOIA letter request.

Discovery of documentation surrounding a recall campaign

Public policy favors the discovery of facts surrounding a recall campaign and agency investigation.[23] Moreover, the facts may be particularly relevant as any efforts to hamper an investigation and/or prevent public knowledge of a product defect may be used to establish punitive damages.[24] Not only may documents be disclosed, but also depositions may be taken concerning the recall and inves-

[15] *Culinary Foods, Inc.*, 150 F.R.D. at 125, citing *Friedman v. Bache Halsey Stuart Shields Inc.*, 738 F.2d 1336, 1344 (D.C.Cir. 1984); *Pleasant Hill v. United States*, 58 F.R.D. 97, 99 (W.D.Mo. 1973).

[16] *Culinary Foods, Inc.*, 150 F.R.D. at 130 (After portions of its FOIA request were denied, defendant subpoenaed information on a fire investigation performed by the Dept. of Labor; the Dept. of Labor claimed informant privilege and the work product doctrine; the claim of informant privilege was upheld for documents would disclose the identity of informants if disclosed; the assertion of the work product doctrine did not succeed as the Dept. of Labor failed to show that its investigation was in preparation for a lawsuit, as opposed to just routine).

[17] *Culinary Foods, Inc.*, 150 F.R.D. at 126, citing *ACLU v. Brown*, 609 F.2d 277, 280 (7th Cir. 1979).

[18] Am. L. Prod. Liab. 3d § 53:35 *Information Submitted To Or Held By Government* (West 2004), citing *Stacey v. Caterpillar, Inc.*, 901 F.Supp. 244 (E.D. Ky. 1995).

[19] Am. L. Prod. Liab. 3d § 53:35 *Information Submitted To Or Held By Government* (West 2004), citing *Stacey v. Caterpillar, Inc.*, 901 F.Supp. 244 (E.D. Ky. 1995).

[20] Am. L. Prod. Liab. 3d § 53:35 *Information Submitted To Or Held By Government* (West 2004), citing *Culligan v. Yamaha Motor Corp., USA*, 110 F.R.D. 122 (S.D.N.Y. 1986).

[21] Robert R. Kiesel, "Every Man's Evidence and Ivory Tower Agencies: How May a Civil Litigant Obtain Testimony from an Employee of a Nonparty Federal Agency?", *59 Geo.Wash.L.Rev. 1647*, 1662 (1991), citing *Sharon Lease Oil Co. v. Federal Energy Regulatory Commission*, 691 F.Supp. 381 (D.D.C. 1988); *Environmental Enterprises v. EPA*, 664 F.Supp. 585 (D.D.C. 1987); *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989).

[22] Kiesel, *supra* Note 21, at 1662, citing *Davis Enters v. EPA*, 877 F.2d 1181, 1189 n.2 (3d Cir. 1989)(Weis, J. dissenting).

[23] *Kuiper v. Dist. Ct. of the 8th Judicial Dist. of Montana*, 193 Mont. 452, 469, 632 P.2d 694 (Mont. 1981).

[24] *Kuiper*, 193 Mont. at 468.

[25] *Kuiper*, 193 Mont. at 468.

tigation.[25] Any disclosure or deposition may be limited by other privileges, such as attorney-client or work product.[26]

It is important to note that under a FOIA request to the CPSC, the requester may only obtain a manufacturer's required reporting to the CPSC if the CPSC issued a complaint, accepted a settlement, or obtained the consent of the submitter of the information.[27] In litigation, however, this policy does not apply, as stated by 15 U.S.C. § 2055[b][5], and courts have found that there is no statutory privilege to the disclosure of the manufacturer's reports to the CPSC in personal injury litigation.[28]

The rationale for this is that were the CPSC to disclose inaccurate information to the public, a manufacturer's reputation may be damaged unfairly; however, in the context of litigation, a manufacturer may protect itself as "it will have a full opportunity to refute or explain whatever may be revealed."[29]

Discovery of documentation submitted pursuant to government regulation

The government may require the submission of data for the purpose of disseminating it to the public. For instance, in 1988, H.R. 5442, also known as the "Asbestos Information Act" required the submission by "any person who manufactured or processed … asbestos or asbestos-containing material that was prepared for sale for use as surfacing material, thermal system insulation, or miscellaneous material in buildings" of "the years of manufacture, the types of classes of product, and, to the extent available, other identifying characteristics reasonably necessary to identify or distinguish the asbestos or asbestos-containing material."[30] The EPA then published the information in "Asbestos; Publication of Identifying Information," 55 Fed. Reg. 30, pg. 5144, February 13, 1990.[31] Obtaining the information submitted by companies under the act is as easy as following these instructions from the internet: "If you are interested in obtaining copies of industry submissions under the Asbestos Information Act of 1988, please contact the Pollution Prevention and Toxics Docket Office at 202-566-0280 and ask for the index to Docket #62073."[32] As of January 17, 2005, these records were not available on-line.

Blocking FOIA Requests

There are strategies to put into play in order to prevent records from being tendered to opposing counsel pursuant to FOIA. These methods include the assertion of a "reverse" FOIA action or invoking the common law privilege against disclosure of critical self-analysis.

The "Reverse FOIA" Action

The "Reverse FOIA" action was developed to protect companies from the wide discretionary power of agencies to produce information.[33] With a "Reverse FOIA" action, "a party who earlier submitted information to an agency seeks to prevent the agency from disclosing the information in response to a FOIA request from a third party."[34] With FOIA came a concern that because access to records was no longer limited to concerned parties, confidential information could be obtained by competitors.[35] Judicial review of these actions is governed by the Administrative Procedure Act;[36] and courts may set aside an agency action where the court finds the action to be an

[26] *Kuiper*, 193 Mont. at 468.
[27] *Lamitie v. Emerson Electric Company—White Rodgers Div.*, 142 A.D.2d 293, 535 N.Y.S.2d 650 (App.Div.NY 1988), citing 15 U.S.C. § 2064(b)(2) and 15 U.S.C. § 2055[b][5].
[28] *Lamitie, 142 A.D.2d* 293, citing *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 682-83 (N.D. Ind. 1985).
[29] *Lamitie, 142 A.D.2d* at 297.
[30] Asbestos Information Act of 1988. P.L. 100-577, §§ 1-4, 102 Stat. 2901.
[31] Also available at http://www.epa.gov/fedrgstr/EPA-TOX/pre1994/3687-9.pdf
[32] http://www.epa.gov/asbestos/asbreg.html
[33] Nick, *supra* note 4, at 1308.
[34] *Lykes Bros. Steamship Co., Inc., et al. v. Pena*, 1993 WL 786964 (D.D.C.)
[35] Nick, *supra* note 4, at 1312.
[36] 5 U.S.C. §§ 701-706.

abuse of discretion, arbitrary, capricious, or not in accordance with law.[37]

Generally, the events leading up to the filing of a reverse FOIA action would be that where a party receives notice that certain documents will be released by an agency pursuant to a FOIA request, the party objects, the agency disagrees, the party requests reconsideration, the agency denies, and then the party files suit in the form of a reverse FOIA action. For the court to review the agency's decision the agency must produce a record of how it reached its decision or the court will vacate the agency's decision and remand for an explanation.[38]

To protect against such a release of information, Congress set forth nine exemptions in FOIA.[39] In the reverse FOIA action, the corporation/plaintiff alleges which FOIA exemption protects the information from disclosure. For example, Exemption 4 allows for the denial of a disclosure if the information sought consists of "trade secrets and commercial or financial information obtained from a person and privileged and confidential."[40] Exemption 4 is often relied upon in a reverse FOIA action to prevent competitors from gaining sensitive, proprietary information.

With Exemption 4, the party seeking to prevent the information release has the burden of showing that the "trade secrets and commercial or financial information obtained from a person" are confidential.[41] For voluntarily submitted documents to fall within this FOIA exemption, they must be documents which the company (as opposed to the industry as a whole) would not ordinarily release to the public.[42] The documents need not be identical to previously released documents.[43] If the documents were a mandatory submission to the agency, they fall within Exemption 4 if their disclosure would "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained."[44] With mandatory documents, it is difficult to show that the release would hinder the Government's ability to obtain the information due to the mandatory nature of the submission. Thus, it is the manner in which the agency initially sought the documents which determines the character of a submission.[45]

Critical Self-Analysis Privilege

A party may claim a privilege against the disclosure of documents revealing its own critical self-analysis in response to a request seeking materials pertaining to communications with

[37] *Lykes Bros. Steamship Co., Inc., et al. v. Pena*, 1993 WL 786964 (D.D.C.), citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18, 99 S.Ct. 1705, 1725, 60 L.Ed.2d 208 (1979). The United States Supreme Court held in *Chrysler Corporation v. Brown* that FOIA served as purely a disclosure statute; therefore, there is no private right of action to enjoin agency disclosure under FOIA.

[38] *Reliance Electric Co. v. Consumer Product Safety Commission*, 924 F.2d 274, 277, 28 U.S.App.D.C. 30 (1991), citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643 (1985) and *Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 1244, 36 L.ed.2d 106 (1973).

[39] 5 U.S.C. § 552(b).

[40] 5 U.S.C. § 552(b)(4); Nick, *supra* note 3.

[41] *Lykes Bros. Steamship Co., Inc., et al. v. Pena*, 1993 WL 786964, pg. 6 (D.D.C.), citing *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679-80 (D.C. Cir. 1976) ("National Parks II") and *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *Center for Auto Safety v. National Highway Traffic Safety Administration*, 244 F.3d 144, 146, 345 U.S.App.D.C. 248 (2001), citing *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir 1992), *en banc*.

[42] *Center for Auto Safety v. National Highway Traffic Safety Administration*, 244 F.3d 144, 146, 345 U.S.App.D.C. 248 (2001), citing *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 872, 878-80 (D.C. Cir 1992), *en banc*.

[43] *Center for Auto Safety*, 244 F.3d at 146. There is a test known as the "identical information" test which holds that information must be disclosed if the party favoring disclosure meets the burden of showing that the information is identical to information available to the public. *Id*. at 151 applying the test from *Niagara Mohawk Power Corp. v. United States Dept. of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999), which is different from the "customary disclosure" test where the party opposing disclosure must meet the burden of showing that the information is a type of information that would not customarily be released to the public. 244 F.3d at 151-52 citing *Critical Mass*, 975 F.2d at 879.

[44] *Center for Auto Safety*, 244 F.3d at 146, quoting *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir 1992), *en banc*.

[45] *Center for Auto Safety*, 244 F.3d at 149 (actual legal authority rather than subjective believes or intentions determines the character of submissions for purposes of judicial review; NHTSA required submissions regarding airbags was actually in violation of the Paperwork Reduction Act could have been ignored).

or investigations of a federal agency. The public policy behind the privilege is that the self-criticism should be protected from discovery in order to be encouraged, particularly when performed to improve product safety.[46] Keeping the self-criticism confidential will allow companies to evaluate their compliance with regulations without simultaneously creating evidence that could be used against them in litigation.[47] This privilege arises from common law, falling within Fed. R. Ev. 501.[48]

Federal courts are split as to whether there is such a privilege.[49] Supreme Court decisions in *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990), aff'g 850 F.2d 969 (3rd Cir. 1988), and T*rammel v. United States*, 445 U.S. 40, 47 (1980), aff'g 583 F.2d 1166 (10th Cir. 1978), indicate that the decision to apply the privilege should be selectively made on a case-by-case basis.[50] For civil actions arising out of state law, the privilege is determined pursuant to state law.[51] Like the federal courts, some states apply the privilege while others do not. For those who do not, it is often held that such privileges are statutory; and thus absent legislation there is no common-law critical self analysis privilege.[52]

Jurisdictions that recognize the critical self-analysis privilege in regard to agency records have used the following criteria to determine whether the critical self-analysis privilege applies: (1) the materials sought were prepared for mandatory government reports; (2) the materials are subjective and evaluative; (3) the

[46] George S. Hodges, Karen A. Jockimo, & Paul E. Svensson, "The Self-Critical Analysis Privilege In The Product Liability Context: If Analyzed As a Subsequent Remedial Measure, Self-Evaluation Wouldn't Impede Discovery, But The Information Would Be Protected." 70 Def. Couns. J. 40 (2003), citing *Sheppard v. Consol. Edison Co.*, 893 F.Supp. 6, 7 (E.D.N.Y. 1995).

[47] Hodges, *supra* note 46, at 42, citing *Reichhold Chemicals Inc. v. Textron Inc.*, 157 F.R.D. 518 (E.D. Tenn. 1977).

[48] Hodges, *supra* note 46.

[49] *Scroggins v. Uniden Corp. of America*, 506 N.E.2d 83 (Ind. Ct. App. 1987) (holding that there is no such privilege in Indiana as all privileges are statutory and not common law based).

Cases which apply the privilege are (as set forth in Hodges, *supra* note 33):

Roberts v. Carrier Corp., 107 F.R.D. 678 (N.D. Ind. 1985), cited in *Scroggins*, 506 N.E.2d at 84-85;
Jamison v. Storer Broadcasting Co., 511 F.Supp. 1286, 1296-97 (E.D.Mich. 1981), cited in *Scroggins*, 506 N.E.2d at 84;
Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 506 (D.Ore. 1982), cited in Scroggins, 506 N.E.2d at 84;
Resnick v. American Dental Ass'n, 95 F.R.D. 372, 374 (N.D. Ill. 1982), cited in *Scroggins*, 506 N.E.2d at 84;
O'Connor v. Chrysler Corp., 86 F.R.D. 211 (D.Mass. 1980), cited in *Scroggins*, 506 N.E.2d at 84;
Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. GA. 1971), cited in *Scroggins*, 506 N.E.2d at 84;
Bredice v. Doctor's Hospital, 50 F.R.D. 249, 250 (D. D.C. 1970), aff'd 479 F.2d 920 (D.C. Cir. 1971);
New York Stock Exch. v. Sloan, 489 F.2d 1 (2d Cir. 1973);
Crazy Eddie Sec. Litig., 792 F.Supp. 197 (E.D. N.Y. 1992);
Keyes v. Lenori Rhyne College, 552 F.2d 579 (4th Cir.), cert. denied, 443 U.S. 904 (1977);
Granger v. Nat'l R.R. Corp., 116 F.R.D. 507 (E.D. Pa. 1987);
Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518 (E.D. Tenn. 1977);
Bradley v. Melroe Co., 141 F.R.D. 1 (D.D.C. 1991).

Cases which find that the privilege does not apply are (as set forth in Hodges, *supra* note 33):

In re Burlington Northern, Inc., 679 F.2d 762 (8th Cir. 1982);
Ford v. University of Notre Dame Du Lac, 24 E.P.D. § 31,203 (N.D. Ind. 1980);
Witten v. A.H. Smith & Co., 100 F.R.D. 446 (D.Md. 1984);
Equal Employment Opportunity Commission v. I.S.C. Financial Corp., 14 E.P.D. §7729 (W.D.Mo. 1977).

[50] Hodges, *supra* note 46, at 41.

[51] Hodges, *supra* note 46, at 40, quoting Fed. R. Evid. 501.

[52] Hodges, *supra* note 46, at 44; listing states which recognize the privilege to include:

Kansas in *Kansas Gas & Elec. v. Eye*, 789 P.2d 1161 (Kan. 1990) and *Berst v. Chapman*, 653 P.2d 107 (Kan. 1982);
Pennsylvania in *Anderson v. Hahnemann Med. Coll.*, 1985 WL 47218 (Pa.Commw.Ct.);

States who do not recognize the privilege include:

Payton v. New Jersey Turnpike Auth., 691 A.2d 321 (N.J. 1997) (no common law critical self-analysis; however court may consider it as part of balancing test);
Univ. of Ky v. Courier-Journal & Louisville Times Co., 830 S.W.2d 272 (KY 1992);
Scroggins, *supra* Note 36;
Southern Bell Tel. & Tel. Co. v. Beard, 597 So.2d 873 (Fla.App.1992);
Combined Communications Corp. v. Public Serv. Co. of Colorado, 865 P.2d 893 (Colo.App. 1993) (found no such privilege, then applied in case and determined privilege not applicable to case at bar);
Cloud v. Superior Court (*Litton Indus. Inc.*), 58 Cal.Rptr 2d 365 (Cal. App. 1996);

privilege does not apply to objective data; (4) the policy in favor of exclusion must clearly outweigh the requesting party's need for discovery.[53] Other factors considered might also include whether the documents resulted from critical self-analysis, whether it is in the public's interest to continue such a free flow of information, whether the flow of information would cease if discovery were allowed, and whether the information was created with the intention that it would be confidential and remain confidential.[54]

In applying the factors, courts have held that not only must the report be mandatory, but also that the submissions must be a mandatory component of the report.[55] Moreover, the privilege does not apply to evaluations of a product that were later submitted to the government where they were created for a purpose other than to comply with mandatory reporting to an agency.[56] An admission in a cover letter to the federal agency also would be privileged as it supports the public policy of encouraging openness in submissions to the agency.[57] A submission to a government agency as a result of a subpoena by the agency for its administrative review has been deemed not privileged.[58] To determine to which documents the critical self-analysis privilege applies, an *in camera* inspection may be necessary. Also, similar to the work product doctrine, the requester of the documents may trump the privilege with a showing of "extraordinary circumstances or special need."[59]

Adding a Subsequent Remedial Measures Argument

Using Fed. R. Ev. 407, the subsequent remedial measures evidence rule strengthens the likelihood that a court will apply the critical self-analysis privilege.[60] Similar to the application of Rule 407, some courts have held that the self-analysis privilege did not limit discovery of the facts, just the related self-analysis.[61] The end result may be that while such documents could be produced in discovery, they would not necessarily be admissible at trial.[62]

Responding to Requests for Production

Plaintiffs need not use FOIA or subpoenas to obtain information submitted to federal agencies, but may request them directly from defendants in the course of discovery. In fact, courts have stated that "[i]t would indeed be anomalous if this Court permitted the defendants to use FOIA, a disclosure statute, as a shield to avoid discovery in a separate civil suit."[63] In order to show that a plaintiff must file a FOIA request for information in the possession of the defendant, the defendant would need to show that the disclosure was unduly burdensome, which would be difficult in light of the potential for delay and cost to the plain-

Grimes v. DSC Comm. Corp., 724 A.2d 561 (Del.Ch. 1998);
Harris-Lewis v. Mudge, 1999 WL 98589 (Mass.Super. 1999);
Office of Consumer Council v. Dep't of Pub. Util. Control, 665 A.2d 921 (Conn.Super. 1994);
Lamitie v. Emerson Elec. Co-White Rodgers Div., 535 N.Y.S.2d 650 (App.Div. 3d Dep't 1988), leave to appeal dismissed, 74 N.Y.2d 650 (1989) (allows disclosure for litigation, may bar pubic access to information via entry of a protective order).

[53] *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 684 (N.D. Ind.1985), citing *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 374 (N.D. Ill. 1982).
[54] Hodges, *supra* note 46, at 42-43, citing *Dowling v. American Hawaii Cruises*, 971 F.2d 423 (9th Cir. 1992).
[55] *Id.* [107 F.R.D. at 684, citing *Resnick*]
[56] *Roberts*, 107 F.R.D. at 684.
[57] *Roberts*, 107 F.R.D. at 684.
[58] Hodges, *supra* note 46, at 43, citing *Fed Trade Comm'n v. TRW Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980).
[59] Hodges, *supra* note 46, at 43, quoting *Mao-Shiung Wei v. Bodner*, 127 F.R.D. 91 (D. N.J. 1989), citing also *Bredice v. Doctor's Hospital*, 50 F.R.D. 249, 250 (D. D.C. 1970), aff'd 479 F.2d 920 (D.C. Cir. 1971). Fed. R. Ev. 26(b)(3).
[60] Hodges, *supra* note 46, at 49, citing *Reichhold Chemicals Inc. v. Textron Inc.*, 157 F.R.D. 522, 524 (N.D. Fla. 1994) (N.Dist. of Fl. Relied on Rule 407 in finding self-analysis privilege applied to environmental audits).
[61] Hodges, *supra* note 46, at 49-50.
[62] Hodges, *supra* note 46, at 50.
[63] *Culligan v. Yamaha Motor Corporation, USA*, 110 F.R.D. 122 (S.D.N.Y. 1986), quoting *Kleinerman v. United States Postal Service*, 100 F.R.D. 66, 68-69 (D.Mass. 1983).

tiff should the plaintiff need to take the FOIA request route.[64]

In this regard, there is potentially bad law for manufacturers. It is "proper and appropriate" to inquire as to whether a manufacturer "ever filed a report or been requested to file a report with any United States Government Agency relating in any manner to" the product in litigation.[65] In fact, a party may be required to answer the interrogatory by providing "all facts, papers, and copies of correspondence defendant has had concerning defendant's knowledge of same or similar types of accidents or happenings in connection … in the last ten years."[66]

Similarly, manufacturers cannot expect that information submitted to federal agencies as confidential would be protected from discovery on that same basis.[67] Statutes protecting information from being disclosed to the public are not meant to prevent the use of information in litigation.[68] To protect the information from the public, often courts find that simply a protective order will suffice.[69]

Trade Secret Privilege

Perhaps the best response in opposition to an FOIA production is to argue that the information is privileged because it is a trade secret. Similar to FOIA Exemption 4, twenty state statutes permit the withholding of trade secret information.[70] A trade secret has been defined as "information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[71] It is up to the protector of the information to establish to the court that the information is a trade secret.[72] In federal court, the party asserting the privilege must show that the information is a trade secret and that it would be harmed by the disclosure.[73] Once the protector of information establishes the trade secret privilege the burden shifts to the requester of the information to show that the privileged information is necessary to adjudicate its claim.[74] It is not enough for the information to be relevant; the party seeking the trade secret information must show that the information is both "relevant and necessary to the proof of, or defense against, a material element of one or more causes of action…and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit."[75] Likewise, it

[64] *Culligan*, 110 F.R.D. at 126-27 (court denied defendant's objection to discovery request for disclosure of CPSC communications; defendant had argued that non-confidential information was available by making a FOIA request to the CPSC).
[65] *Bates v. Firestone Tire & Rubber Co., Inc.*, 83 F.R.D. 535, 537 (D.S.C. 1979).
[66] *Bates*, 83 F.R.D. at 537-39. It should be noted that the particular interrogatory was not analyzed and the court relied on the Fourth Circuit case *Gardner v. Q.H.S.*, 448 F.2d 238, 244 (1971), which held that relevant evidence included: prior depositions of users of the product of which the company had knowledge prior to the incident at issue; complaint letters; product testing results; and a Consumers Report article.
[67] *Culligan*, 110 F.R.D. at 127.
[68] *Culligan*, 110 F.R.D. at 127, citing *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C.Cir. 1984).
[69] *Culligan*, 110 F.R.D. at 127 (the court instructed Yamaha to mark confidential any trade secret document, which would then be produced only to plaintiff's counsel; plaintiff's counsel was then required to provide Yamaha with 10 days notice prior to the disclosure of any such document to persons involved with trial preparation, allowing Yamaha an opportunity to object to any such disclosure).
[70] The following states have codified a trade secret privilege: Alabama, Alaska, Arkansas, California, Delaware, Florida, Hawaii, Kansas, Louisiana, Maine, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin, as indicated by *In re Continental General Tire, Inc.*, 979 S.W.2d 609, 611, 42 Tex. Sup.Ct.J. 141 (1998). [note: PLAC filed an amicus curiae brief in this case—issue was on disclosure of trade secrets]
[71] *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384 (Iowa 1983), quoting RESTATEMENT OF TORTS § 757, comment b (1939), citing *United States v. International Business Machines Corp.*, 67 F.R.D. 40, 46-47 (S.D.N.Y. 1975).
[72] *In re Continental General Tire, Inc.*, 979 S.W.2d 609, 611, 42 Tex. Sup.Ct.J. 141 (1998), citing *Rare Coin-It, Inc. v. I.J.E.*, Inc., 625 So.2d 1277, 1278 (Fla. Ct.App. 1993).
[73] *Continental General Tire*, 979 S.W.2d at 610, citing 8 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 2043 (1994), *American Standard, Inc. v. Pfizer Inc.*, 828 F.2d 734, 740-41 (Fed. Cir. 1987); et al.
[74] *Continental General Tire*, 979 S.W.2d at 610 (plaintiff sought formula for rubber compound used in manufacture of tire where tire failed due to separation of tread and outer belt from the inner belt; plaintiff failed to show necessity of formula to the adjudication of case). In Texas, a party may refuse to disclose trade secrets so long as invoking the trade secret privilege does not conceal fraud or otherwise cause injustice. *Id.* citing Tex. R.Evid. 507.
[75] *Continental General Tire*, 979 S.W.2d at 611, quoting *Bridgestone/Firestone v. Superior Court*, 7 Cal.App.4th 1384, 9 Cal.Rptr.2d 709, 713 (Cal. Ct.App.1992); California's trade secret privilege is codified in Cal.Evid.Code § 1060.

is not enough for the requester to show that the information would be useful.[76] Should the requester meet its burden and the information be deemed necessary for a fair adjudication of the claims, then a protective order should be considered.[77]

Attorney-Client &/or Work Product Privilege

Should the information not fall under a trade secret privilege, it may be attorney client or work product privileged. A claim can be made to preclude production of documents related to a federal agency's investigation by asserting that the documents are not discoverable pursuant to the Work Product Doctrine. The Work Product Doctrine states:

> (Fed. R. Ev. 26(b)(3)): "a party may obtain discovery of documents and tangible things…prepared in anticipation of litigation or for trial … only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means … In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

This is parallel to FOIA exemption 5.[78] To assert, the protector of information cannot just show that an investigation was conducted, but must also show that it was conducted in preparation for litigation.[79] In regard to records generated by an agency, courts may conclude that absent a finding of a safety violation, company documents submitted as part of an agency investigation are not work product privileged, but rather were simply submitted as a result of a routine agency investigation. Still a work product privilege claim may prevail where the agency's investigation commenced after a violation was found.[80] In regard to manufacturer-generated documents, the work product privilege may attach as soon as an agency claim file is opened and prior to the start of litigation.[81] The work product privilege remains in place even after the litigation has terminated.[82]

Should a company be required to tender documents it considers work product and/or attorney client privileged, the privilege is not deemed waived if the documents are produced pursuant to court order.[83] Waiver will occur only if the documents are voluntarily distributed.[84] Also, courts may consider that a manufacturer waived the privilege if the company becomes aware that the documents are being distributed in violation of a protective order and the company takes no action to protect them from disclosure.[85]

Protective Orders

Litigation "is a form of expression protected by the First Amendment."[86] A protective order is a limitation of that First Amendment right. Thus, to stand-up to review the following

[76] *Id*; also, "because relevance is the standard for discovery in general … [to find the trade secret information must only be relevant] would render [the trade secret privilege] meaningless." *Id*. at 613.
[77] *Id*.
[78] *Culinary Foods, Inc. v. Raychem Corp.*, 150 F.R.D. 122, 129 (N.D. Ill. 1993).
[79] *Culinary Foods*, 150 F.R.D. at 131, citing *McLaughlin v. Miles Laboratories, Inc.*, 124 F.R.D. 629, 630 (N.D.Ind. 1988), *Binks Mfg. Co. v. Nat. Presto Industries Inc.*, 709 F.2d 1109, 1118 (7th Cir. 1983).
[80] *Culinary Foods*, 150 F.R.D. at 130, citing *Martin v. Albany Business Journal, Inc.*, 780 F.Supp. 927, 941-943 (N.D.N.Y. 1992).
[81] *Kuiper v. Dist. Ct. of the 8th Judicial Dist. of Montana*, 193 Mont. 452, 465, 632 P.2d 694 (Mont. 1981).
[82] *Kuiper*, 193 Mont. at 464.
[83] *Kuiper*, 193 Mont. at 460, citing *State ex. Rel. Union Oil Co. of Cal. V. District Court*, 160 Mont. 229, 503 P.2d 1008 (1972).
[84] Kuiper, 193 Mont. at 460.
[85] *Kuiper*, 193 Mont. at 460 (if Goodyear was aware that documents tendered in a previous case had been made available to non-parties and took no action to limit the distribution, any privilege would be considered waived).
[86] *Kuiper*, 193 Mont. at 452, quoting *In re Halkin*, 598 F.2d 176, 187 (D.C.Cir. 1979).

record should be made in support of a protective order: (1) that serious and substantial harm would result if the material was disseminated; (2) the protective order is narrowly and precisely drafted; and (3) there is no less intrusive manner by which to protect the public's interest.[87]

In-Camera Review

In camera review by the court of materials claimed to be secret is no different from *in camera* review of allegedly secret materials in a trade secrets case, or of evidence asserted to be subject to the attorney-client privilege; therefore, a court's *in camera* inspection to determine whether a privilege applies is not itself a breach of the privilege.[88]

With a showing of relevance, a plaintiff may more likely than not succeed at having documents released. As the plaintiffs bar is known for disseminating documents at a rapid pace, it is imperative that a protective order be entered whenever appropriate. Should a company learn that the order has been violated, steps must be taken to enforce the order and to prevent courts from determining that the company waived confidentiality in future litigation. As indicated by the situations below, courts more often than not will find that documents are discoverable, and may not always enter a protective order.

When an Agency Releases Documents in Error

Despite certain requirements that a submitter of information be given notice prior to the release of the information by an agency due to a FOIA request, agencies do occasionally mistakenly release trade secret information.[89] Companies should then seek injunctive relief to obtain the return or destruction of the information from the recipient.[90] To succeed, one should show that the release may cause irreparable harm caused by the benefit of its having had exclusive possession of the information, the potential damage it may incur from the loss of the benefit, and the confidentiality of the disclosed information.[91] The original submitter of the information should show that the released information is considered a trade-secret by state and or federal law.[92] Further, the submitter must set forth compelling evidence establishing that the recipient is threatening to disclose, use, or sell the formula.[93] The mistaken release of information in one instance does not negate the confidential status of the information; nor does the mistakenly released information become publicly "available" in later FOIA requests.[94]

Objection to the Admissibility of Various Types of Documents at Trial

In the event objections to interrogatories and requests for production fail, discovery progresses, and the documents are used as evidence at trial, it remains important to create a clear record for the court in attempts to keep the documents out of evidence. Possible objections and potential rulings include the

[87] *Kuiper*, 193 Mont. at 458, citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed. 683 (1976).
[88] *See, e.g., United States v. Zolin*, 491 U.S. 554, 568-69, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) (privileges survive *in camera* review); *In re Perrigo Co.*, 128 F.3d 430, 441 (6th Cir.1997) (no waiver of attorney-client privilege by submitting documents to the court for *in camera* review); *Burlington N.R. Co. v. Omaha Pub. Power Dist.*, 888 F.2d 1228, 1232 (8th Cir.1989) (contract alleged to be trade secret could be reviewed *in camera* without revealing trade secret); see also *Anderson v. Dep't of Health and Human Serv.*, 907 F.2d 936, 942 (10th Cir.1990) (*in camera* review by court of documents to determine if material could be released to public under the Freedom of Information Act ("FOIA") does not equate with release to the public). See also *Doe v. Tenet*, 329 F.3d 1135, *1149 (C.A.9 (Wash.) 2003).
[89] *Myers v. Williams*, 819 F.Supp. 919 (D.Or. 1993) (FDA released the formula for Upjohn's Halcion to a prison inmate who blamed the sleeping pill prescription for his criminal behavior; Upjohn succeeded in obtaining a preliminary injunction requiring the inmate to return the information to Upjohn).
[90] O'Reilly, *supra* note 11.
[91] O'Reilly, *supra* note 11.
[92] O'Reilly, *supra* note 11; 18 U.S.C.A. § 1905.
[93] O'Reilly, *supra* note 11.
[94] O'Reilly, *supra* note 11, citing *Parker v. Bureau of Land Management*, 141 F.Supp.2d 71 (D.D.C. 2001), citing *Martin Marietta Corp. v. Dalton*, 974 F.Supp.37, 40 (D.D.C. 1997).

following:

- **Hearsay:** The argument that federal agency (CPSC) documents were hearsay was rejected on review when documents were offered not for the truth of the matter asserted, but to show that defendants had knowledge of the potential dangerousness of the product.[95] Also, OSHA reports concerning both an employer and premises owner generated after an OSHA investigation of an accident/worksite were admissible as a hearsay exception pursuant to FRE 803(8)(C); Rule 803 allowed the introduction of the factual findings resulting from "an investigation made pursuant to authority granted by law, unless the source of information or other circumstances indicate a lack of trustworthiness."[96] In determining "trustworthiness" there are four factors which courts consider:

1. "[T]he timeliness of the investigation;
2. The investigator's skill and experience;
3. Whether a hearing was held;
4. Possible bias when reports are prepared with a view toward possible litigation."[97]

At trial, the opponent has the right to present evidence which would contradict or lessen the weight of the conclusions contained within the admitted report.[98] Reports are presumed admissible; therefore, it is the burden of the opposing party to show enough negative factors to warrant exclusion of the report from evidence.[99] The *Masemer* court found that the subject OSHA report was admissible because the investigation took place one day after the accident, the defendant did not produce any evidence that questioned the investigator's experience or skill,[100] and the report was prepared by an independent government agency and thus lacked any bias.[101] Conversely, the court ordered that the evidence of subsequent remedial measures be redacted.[102]

- **Relevance:** The argument that those vehicles and the accidents which were the subject of the CPSC's investigation documents were not "substantially similar" to the vehicle and accident in the issue at bar failed where the vehicles in the CPSC documents were of similar design to the subject vehicle and where the accidents dealt with the instability of those vehicles as a class.[103] On the other hand, the admission of safety violations on prior jobs of a roofing contractor was deemed an abuse of discretion where there was no evidence that the safety violations or job responsibilities were similar.[104]
- **Overly Prejudicial:** Where the record indicates that the court properly applied the balancing test and determined that the evidence's probative value was not outweighed by prejudice or confusion of the issues, nor was likely to mislead the jury or cause undue delay, the evidence will be

[95] *Oberg v. Honda Motor Co., Ltd.*, 316 Or. 263, 851 P.2d 1084, 1087-88 (Or. 1993), en banc, reconsideration denied (ATV litigation).
[96] *Masemer v. Delmarva Power & Light Company*, 723 F. Supp. 1019, 1020 (U.S. Dist. Ct. Delaware 1989). Interpreting this evidentiary rule, the District Court noted that the U.S. Supreme Court held in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 449, 102 L.Ed.2d. 445 (1988) that the rule allows for the introduction of facts as well as opinions or conclusions in a report as long as the following criteria were met:
1. All statements in the report that a party seeks to admit are based upon factual investigation;
2. Any part of a report that is to be admitted must be sufficiently trustworthy.
[97] *Masemer*, 723 F.Supp. at 1021, quoting from *Beech*, 109 S. Ct. at 449 n. 11 (citing Advisory Committee's Notes on Fed.R.Evid. 803(8), 28 U.S.C.App. p. 725).
[98] *Masemer*, 723 F.Supp. at 1021, citing *Beech*, 109 S.Ct. at 449.
[99] *Masemer*, 723 F.Supp. at 1021, citing Advisory Committee Comments and *Beech*, 109 S.Ct. at 448.
[100] *Masemer*, 723 F.Supp. at 1021.
[101] *Masemer*, 723 F.Supp. at 1021, citing *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 268-69 (3d Cir. 1983).
[102] *Masemer*, 723 F.Supp. at 1022, e.g. *Beech*, 109 S.Ct. at 449 (other means of exclusion, such as relevancy and prejudice, may provide means for excluding portions of evaluative reports).
[103] *Oberg*, 316 Or. 263.
[104] *Fogarty v. Parichy Roofing Company*, 175 Ill.App.3d 530, 529 N.E.2d 1055, 124 Ill.Dec. 938 (1st Dist. 1988).

deemed properly admissible.[105]

- **Exclusion Based on FRE 408 – Compromise and Offers to Compromise:** A premises defendant attempted to exclude an OSHA citation, notification of penalty, and payment of a fine pursuant to Federal Rule of Evidence 408, which prohibited evidence of consideration paid to settle a disputed claim as evidence of liability for the claim.[106] The court disagreed and found that FRE 408 applied neither to the OSHA citation nor to the notification of penalty because FRE 408 made no reference to a citation, fine, or notification of penalty.[107] On the other hand, in regard to the payment of the fine, the District Court excluded that evidence on the basis that the purpose of FRE 408 was to encourage compromises to promote the policy of settlement of disputes.[108] The court's decision was based on an assertion by the respondent that the fine was only $490, it would have spent more to contest the fine than to pay it, it was paid to "secure the peace" between the respondent and OSHA, and due to the public policy of encouraging settlement.[109]

Conclusion

The vast amount of information available from making a FOIA request presents challenges to product manufacturers who either voluntarily or alternatively are mandated to provide information to governmental agencies. Trade secrets, proprietary art, sensitive financial data, adverse field reports involving manufactured products, agency investigations on product safety and corporate activities are all subject to public disclosure. Corporate and trial counsel must not assume that formal discovery procedures are the primary or exclusive resource for the plaintiff's bar and others to prosecute product liability actions against the company.

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[105] *Oberg*, 851 P.2d at 1088 (Or. 1993), en banc, reconsideration denied (ATV litigation; CPSC reports on ATVs other than the Honda ATV at issue, as well as CPSC documents regarding ATV accidents, were properly admitted into evidence).
[106] *Masemer*, 723 F.Supp. at 1022.
[107] *Id*.
[108] *Id*.
[109] *Id*. at 1022-23.

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