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Tripled FOIA Requests Put SEC to the Test

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The drill is second nature to many attorneys who practice before the Securities and Exchange Commission's Enforcement Division: client documents about to be shipped off to the SEC are diligently stamped by a legal assistant or document vendor with a "Confidential Treatment Requested Under FOIA" legend; the attorney cover letter enclosing the documents is marked with the same legend and includes the talismanic paragraph invoking confidential treatment under the Freedom of Information Act; and a copy of the cover letter is simultaneously sent to the SEC's FOIA Officer to complete the process.

Most SEC practitioners, however, are only vaguely aware of the statutory protections available to their clients and to the SEC should third parties initiate a FOIA request for copies of the documents they have submitted to the SEC on behalf of their clients and the process the SEC must follow to withhold material pursuant to the FOIA's exemptions from disclosure. The recent culmination of protracted litigation concerning the SEC's response to FOIA requests submitted by one party reveals the increasing FOIA burdens on the SEC, and the scrutiny courts will apply to the agency's response to FOIA requests.

In recent years, the number of requests the SEC has received under the FOIA, 5 U.S.C. §552, has more than tripled, leaving the agency with a hefty backlog of thousands of requests. [FOOTNOTE 1] According to the SEC, it received 8,961 FOIA requests just in its fiscal year ("FY") ending September 30, 2006, up from 2,834 requests six years earlier. [FOOTNOTE 2] Further, at the end of FY 2006, the agency had 10,403 requests pending compared to only 151 requests when FY 2000 ended. [FOOTNOTE 3]

The SEC has publicly attributed this drastic increase in FOIA requests to "commercial requesters" who file over 90 percent of the

FOIA requests the agency receives. [FOOTNOTE 4] Commercial requesters include research firms, financial reporters and financial publications, each eagerly seeking access to the treasure trove of public company and investigative information submitted to, and generated by, the SEC staff. Recently, J. Patrick Gavin, the principle of one such research firm called "SEC Insight," ended a three-year legal battle with the SEC over FOIA requests in the case of *Gavin v. SEC*. [FOOTNOTE 5]

Like other similar information-retrieval businesses, SEC Insight uses the FOIA as a research tool to elicit company information from the SEC, and then sells its analysis of such information to institutional investors and others. [FOOTNOTE 6] Gavin claimed that the SEC improperly denied twenty-six FOIA requests. [FOOTNOTE 7] Although the court eventually granted the SEC's motion for summary judgment, it put the SEC to the test through three rounds of summary judgment motions and multiple declarations and document indices in defending its refusal to produce documents under each FOIA exemption the agency asserted. Indeed, the court noted that Gavin "substantially prevailed," because, in many instances, Gavin's "vigorous prosecution of the action compelled the SEC either to produce the requested records or to apply proper FOIA exemptions." [FOOTNOTE 8]



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THE FREEDOM OF INFORMATION ACT

FOIA was enacted in 1966 and generally provides that any person has the right to request access to federal agency records or information. The act presumes that requested records will be disclosed, and the agency must make its case for withholding requested documents pursuant to the act's exemptions from the rule of disclosure. [FOOTNOTE 9] There are nine FOIA exemptions that authorize federal agencies to withhold "nonpublic" information, including:

(1) information classified as secret, pursuant to an executive order, in the interest of national defense or foreign policy;

(2) internal agency rules and practices;

(3) information that is prohibited from disclosure by another federal law;

(4) trade secrets and other confidential business information;

(5) inter-agency or intra-agency communications that are protected by legal privileges;

(6) information involving matters of personal privacy;

(7) records or information compiled for law enforcement purposes, to the extent that the production of those records (A) could reasonably be expected to interfere with enforcement activities, (B) would deprive a person of a right to a fair trial or an 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 techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) information relating to the supervision of financial institutions; and;

(9) geological information on wells. [FOOTNOTE 10]

In *Gavin*, the SEC relied on exemptions 2, 4, 5, 7(a), 7(c), and 8 to justify withholding the documents and information Gavin sought. [FOOTNOTE 11]

THE SEC IS PUT TO THE TEST IN 'GAVIN'

In 2005, Gavin and his firm, SEC Insight, asked the SEC to release information pursuant to the FOIA regarding Formal Orders of Investigation, [FOOTNOTE 12] Wells Notices, [FOOTNOTE 13] and subpoenas issued by the agency and its staff to a number of public companies. Initially, Gavin received no information from the SEC in response to any of his twenty-six requests. Following three rounds of summary judgment motions, however, the SEC withdrew some of the exemptions it relied upon, and was asked by the court to reprocess several requests, and submit detailed attorney declarations stating that the agency had conducted extensive document-by-document reviews.

Exemption 7(a)

FOIA exemption 7(a) allows the SEC to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with law enforcement proceedings." [FOOTNOTE 14] Exemption 7(a) is by far the exemption upon which the SEC relies most frequently. In FY 2006, the SEC withheld documents on the basis of exemption 7(a) 564 times. [FOOTNOTE 15] The second most used was exemption 6, but the SEC invoked it only 73 times. [FOOTNOTE 16]

Documents may be withheld under Exemption 7(a) under a categorical approach, meaning that the SEC must "(1) define functional categories of documents, (2) conduct a document-by-document review to assign documents to proper categories, and (3) explain to the Court how the release of each category would interfere with enforcement proceedings." [FOOTNOTE 17] The *Gavin* court initially denied the SEC summary judgment as to records withheld based on exemption 7(a) because while the categories it used were appropriate, the SEC had failed to provide the court with declarations stating that SEC attorneys undertook a document-by-document review to assign documents to the proper categories. [FOOTNOTE 18]

Eventually, the SEC provided the court with supplemental declarations from its attorneys who stated that they engaged in document-by-document reviews and that each document fit into a particular category. [FOOTNOTE 19] In addition, the court required the declarations to state that the documents did not include any non-exempt information that was reasonably segregable. [FOOTNOTE 20] Based on the declarations the SEC provided, the *Gavin* court granted summary judgment in the agency's favor on its entitlement to withhold documents under FOIA exemption 7(a). [FOOTNOTE 21]

Exemption 2

FOIA exemption 2 covers matters "related solely to the internal personnel rules and practices of an agency." [FOOTNOTE 22] In order to rely on this exemption, the SEC must show that:

- the materials are predominantly internal;
- the materials relate to trivial, administrative matters;
- and the matters are of no genuine public interest. [FOOTNOTE 23]

SEC information that "is used to facilitate the administration and management of SEC investigation[s] and provides no insight on substantive contents of the investigations" falls within Exemption 2. [FOOTNOTE 24] Examples of this type of information includes case names and numbers, dates investigations were opened and closed, dates of agency staff recommendations and reports, checklists, internal classification codes and keywords, staff names and telephone numbers and investigation assignment dates. [FOOTNOTE 25] The *Gavin* court rejected the argument that there is a substantial public interest

in SEC staff assignments because such information does not provide substantive information, such as how much time was spent on a matter. [FOOTNOTE 26]

Exemption 4

FOIA exemption 4 allows the SEC to withhold information obtained from individuals or companies if it consists of trade secrets or sensitive and confidential commercial or financial information. [FOOTNOTE 27] In FY 2006, the SEC invoked this exemption 71 times, making it the third most used exemption. [FOOTNOTE 28] Whether the SEC has properly invoked this exemption depends on whether the information at issue was voluntarily provided to the SEC or compelled, for example, by a subpoena. [FOOTNOTE 29] If information is voluntarily disclosed to the SEC, it must be withheld from further disclosure if “it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” [FOOTNOTE 30] If the SEC has compelled submission of the information, it may not disclose it pursuant to a FOIA request if disclosure is likely “(1) to impair the Government’s ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” [FOOTNOTE 31] After requiring and reviewing detailed affidavits submitted by both SEC attorneys and the general counsel of one of the corporations from which information was sought, the *Gavin* court concluded that the SEC properly withheld certain information compelled and voluntarily provided to the SEC. [FOOTNOTE 32]

Exemption 5

Under FOIA exemption 5, the SEC may withhold information based on certain evidentiary privileges that would apply to the information in a civil litigation, namely, the attorney-client privilege, the work-product privilege and the deliberative process privilege. [FOOTNOTE 33]

Exemption 5 covers “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency” in litigation with the agency that received the FOIA request. [FOOTNOTE 34] For example, if the information sought contains attorney recommendations, identifies potential securities law violations or provides legal advice, the SEC is exempt from production because the attorney-client privilege would apply, just as it would to privileged or work product protected information in the hands of a private litigant. [FOOTNOTE 35] The *Gavin* court noted that “to rely on the work product doctrine, [the SEC] must show that the document was ‘prepared with a specific claim supported by concrete facts which would likely lead to litigation in mind.’” [FOOTNOTE 36] In addition, the *Gavin* court determined that the SEC properly applied Exemption 5 as the documents at issue contained reports and recommendations regarding the status of an ongoing investigation and, therefore, were prepared in

anticipation of litigation. [FOOTNOTE 37]

The SEC also prevailed on its argument that such material, along with similar internal agency reports, including investigation summaries and other internal memoranda, were protected from FOIA disclosure pursuant to the deliberative process privilege. [FOOTNOTE 38] As the court explained it,

“[t]he purpose of the deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny.” . . . Thus, an agency may withhold an inter- or intra-agency memorandum that is both pre-decisional and deliberative. . . . A pre-decisional document is one that assists the decision-making process and contains personal opinions rather than agency policy. . . . A document is deliberative if its disclosure would discourage candid discussion in agency decision making. [FOOTNOTE 39]

Exemption 7(C)

The SEC may withhold information under FOIA exemption 7(C) if the information was compiled for law enforcement purposes and disclosure of such information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” [FOOTNOTE 40] In determining whether an agency has properly invoked this exemption, a court must weigh the individual’s privacy interest against the public interest. [FOOTNOTE 41] If a legitimate privacy interest exists, the party seeking disclosure must “(1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest.” [FOOTNOTE 42] The *Gavin* court found that the SEC had properly invoked exemption 7(C) to redact personal information concerning SEC staff members and third parties, including the individuals’ names, contact information and account numbers. [FOOTNOTE 43]

Exemption 8:

FOIA exemption 8 allows the SEC to withhold information “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” [FOOTNOTE 44] The legislative purposes behind Exemption 8 are (1) to ensure financial institutions’ security and (2) to foster communication between banks and their regulatory agencies. [FOOTNOTE 45] “Congress enacted Exemption 8 to address ‘concern that the disclosure of examination, operation and condition reports containing frank evaluations of investigated banks might undermine public confidence and cause unwarranted runs on banks.’” [FOOTNOTE 46] The *Gavin* court determined that certain requested SEC documents that included access requests to bank

regulator investigator files and responses thereto, and letters from the Federal Reserve Bank to the SEC regarding an investigation, fell within the scope of FOIA exemption 8. [FOOTNOTE 47]

CONCLUSION

Although in *Gavin* the SEC ultimately prevailed in justifying the withholding of documents and information from disclosure under certain FOIA exemptions, the decision shows that at a time where the number of requests under FOIA for SEC documents and information is at an historical high, “commercial requesters” are aggressively challenging the agency’s response to FOIA requests. The *Gavin* decision further highlights that the SEC’s response will not be rubber-stamped, and that the burden on the agency to justify the withholding of documents will continue to grow. For attorneys representing clients submitting sensitive documents to the SEC in enforcement investigations, the decision serves as a reminder regarding the statutory exemptions available to preclude disclosure of client documents in response to a third party’s FOIA request, and is a rare illumination of the process the SEC must follow in responding to such requests.

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FOOTNOTES:

FN1 According to an SEC spokesman, as of August 2007, the agency had a backlog of 4,106 requests pending from 2005-06. “FOIA Bombs Backlog the SEC,” CFO Magazine, Aug. 31, 2007, available at 2007 WLNR 17416072.

FN2 Compare SEC “Freedom of Information Act Annual Report for the Fiscal Year Ending September 30, 2006,” available at www.sec.gov/foia/arfoia06.htm, with SEC “Freedom of Information Act Annual Report for the Fiscal Year Ending September 30, 2000, available at www.sec.gov/foia/arfoia00.htm.

FN3 Id.

FN4 See supra note 1.

FN5 No. 04-4522, 2007 U.S. Dist. LEXIS 62252, (D. Minn. Aug. 23, 2007).

FN6 See supra note 1.

FN7 Gavin, 2007 U.S. Dist. LEXIS 62252, at *1-2.

FN8 Id. at *41.

FN9 See “A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records,” H.R. Rep. No. 109-226 (2005).

FN10 See U.S.C. §552(b)(1)-(9); see also 17 CFR §200.80(b)(1)-(9).

FN11 Gavin, 2007 U.S. Dist. LEXIS 62252, at *18-*40.

FN12 Formal Orders of Investigation authorize the SEC Enforcement staff to issue subpoenas for documents and testimony in an SEC investigation.

FN13 Wells Notices are issued in the form of letters from the SEC Enforcement staff to entities or individuals generally outlining an enforcement action the staff is prepared to recommend that the SEC bring in federal court or before an SEC Administrative Law Judge. The recipient of a Wells Notice is then given a period of time to make a submission to the staff explaining why some or all of the staff’s

proposed enforcement recommendation is unjustified as a matter of law, policy or the investigative factual record.

FN14 5 U.S.C. §552(b)(7)(A); see also 17 CFR §200.80(b)(7)(i).

FN15 SEC “Freedom of Information Act Annual Report for the Fiscal Year Ending September 30, 2006,” available at www.sec.gov/foia/arfoia06.htm.

FN16 Id.

FN17 Gavin, 2007 U.S. Dist. LEXIS 62252 at *9 (citation omitted).

FN18 The SEC in Gavin used the following categories: “(1) documents produced by third parties; (2) SEC correspondence with potential witnesses; (3) transcripts of testimony; (4) attorney notes and trial preparation material; and (5) memoranda by SEC staff.” 2007 U.S. Dist. LEXIS at *10.

FN19 Id. at *10-11.

FN20 Id. at *12-*13.

FN21 Id. at *14.

FN22 5 U.S.C. §552(b)(2); see also 17 CFR § 200.80(b)(2).

FN23 Gavin, 2007 U.S. Dist. LEXIS 62252, at *17.

FN24 Id. at *18.

FN25 Id.

FN26 Id. at *18-19.

FN27 5 U.S.C. §552(b)(4); see also 17 CFR § 200.80(4)(i)-(iii).

FN28 See supra note 14.

FN29 Gavin, 2007 U.S. Dist. LEXIS, at *20.

FN30 Id. (quotation omitted).

FN31 Id.

FN32 Id. at *22-23.

FN33 Id. at *23-*24.

FN34 5 U.S.C. §552(b)(5); see also 27 CFR §200.80(b)(5).

FN35 Gavin, 2007 U.S. Dist. LEXIS 62252, at *24.

FN36 Id. at *25 (citations omitted).

FN37 Id. at *26-28.

FN38 Gavin, 2007 U.S. Dist. LEXIS 62252, at *28-29.

FN39 Id. at *29 (citations omitted).

FN40 5 U.S.C. § 552(b)(7)(C); see also 17 CFR §200.80(b)(7)(iii).

FN41 Gavin, 2007 U.S. Dist. LEXIS 62252, at *32-33.

FN42 Id. at *33 (quotation omitted).

FN43 Id. at *32-36.

FN44 5 U.S.C. § 552(b)(8); see also 17 CFR §200.80(b)(8).

FN45 Gavin, 2007 U.S. Dist. LEXIS 62252, at *36-37.

FN46 Id. at *39.

FN47 Id. In addition to the exemptions discussed in Gavin, the SEC may invoke certain additional exemptions to withhold information requested by a third party under the FOIA. See supra, note 14.