

violation of criminal law, when there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the investigation could reasonably be expected to interfere with enforcement proceedings. When a request is made for records under § 4.11(a), the Commission may treat the records as not subject to the requirements of the Freedom of Information Act.

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(d) Except as provided in paragraphs (f) and (g) of this section and in § 4.11 (b), (c), and (d), no material which is marked or otherwise identified as confidential and which is within the scope of § 4.10(a)(8) and no material which is within the scope of § 4.10(a)(9) which is not otherwise public shall be made available to any individual other than a duly authorized officer or employee of the Commission or a consultant or contractor retained by the Commission who has agreed in writing not to disclose the information without the consent of the person who produced the material. All other Commission records may be made available to a requester under the procedures set forth in § 4.11 or may be disclosed by the Commission except where prohibited by law.

(e) Except as provided in paragraphs (f) and (g) of this section and in § 4.11 (b), (c), and (d), material not within the scope of § 4.10(a)(8) or § 4.10(a)(9) which is received by the Commission and is marked or otherwise identified as confidential may be disclosed only if it is determined that the material is not within the scope of § 4.10(a)(2), and only if the submitter is provided at least 10 days' notice of the intent to disclose the material involved.

(f) Nonpublic material obtained by the Commission may be disclosed to persons other than the submitter in connection with the taking of oral testimony without the consent of the submitter only if the material or transcript is not within the scope of § 4.10(a)(2). If the material is marked confidential, the submitter will be provided 10 days' notice of the intended disclosure or will be afforded an opportunity to seek an appropriate protective order.

(g) Material obtained by the Commission:

- (1) * * *
- (2) * * *
- (3) * * *

Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or in camera

order. All other material obtained by the Commission may be disclosed in Commission administrative or court proceedings at the discretion of the Commission except where prohibited by law.

18. Section 4.11 is amended by revising the heading, the first sentence in paragraph (b), the first, second and third sentences in paragraph (c), the heading in paragraph (e), and paragraphs (e)(1) through (e)(5) to read as follows:

§ 4.11 Disclosure requests.

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(b) *Requests from congressional committees and subcommittees.* Requests from congressional committees and subcommittees for nonpublic material shall be referred to the General Counsel for presentation to the Commission, subject to the provisions in 5 U.S.C. 552(c) and FTC Act 21(b) that neither the Freedom of Information Act, 5 U.S.C. 552, nor the Federal Trade Commission Act, 15 U.S.C. 41, et seq., is authority to withhold information from Congress. * * *

(c) *Requests from Federal and State law enforcement agencies.* Requests from law enforcement agencies of the Federal government shall be addressed to the liaison officer for the requesting agency, or if there is none, to the General Counsel. Requests from state agencies shall be addressed to the General Counsel. With respect to requests under this paragraph, the General Counsel or the appropriate liaison officer is delegated the authority to dispose of them or may refer them to the Commission for determination, except that requests must be referred to the Commission for determination where the Bureau having the material sought and the General Counsel do not agree on the disposition. * * *

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(e) *Material and information requested by subpoena in cases or matters to which the agency is not a party.* (1) The procedures specified in this section will apply to all subpoenas directed to Commission employees, except special government employees, that relate in any way to the employees' official duties. These procedures will also apply to subpoenas directed to former Commission employees and current or former special government employees of the Commission, if the subpoenas seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (e)(3) of this section will also apply to subpoenas directed to the agency. For purposes of this section, the term "subpoena"

includes any compulsory process in a case or matter to which the agency is not a party; the term "nonpublic" includes any material or information which, under § 4.10, is not required to be made public; the term "employees," except where otherwise specified, includes "special government employees" and other agency employees; and the term "special government employees" includes consultants and other employees as defined by section 202 of title 18 of the United States Code.

(2) Any employee or former employee who is served with a subpoena shall promptly advise the General Counsel of the service of the subpoena, the nature of the material or information sought, and all relevant facts and circumstances.

(3) A party causing a subpoena to be issued to the Commission or any employee or former employee of the Commission shall furnish a statement to the General Counsel. The statement shall set forth the party's interest in the case or matter, the relevance of the desired testimony or material, and a discussion of whether it is reasonably available from other sources. If testimony is desired, the statement shall also contain a general summary of the testimony and a discussion of whether agency records could be produced and used in its place. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(4) Absent authorization from the General Counsel, the employee or former employee shall respectfully decline to produce requested material or to disclose requested information. The refusal should be based on this paragraph and on *Touhy v. Ragen*, 340 U.S. 462 (1951).

(5) The General Counsel will consider and act upon subpoenas under this section with due regard for statutory restrictions, the Commission's rules and the public interest, taking into account factors such as the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for determining whether justification exists for the disclosure of confidential information and material.

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19. Section 4.12 is amended by revising paragraphs (a) and (c) to read as follows: