

Another Federal Appellate Court Protects Information Contained in Export License Applications from Public Disclosure Under FOIA

Recently, the United States Court of Appeals for the District of Columbia upheld the refusal of the United States Department of Commerce to publicly disclose information contained in export license applications under Exemption 3 of the Freedom of Information Act ("FOIA"), even where the statute upon which the agency relied had lapsed. Wisconsin Project on Nuclear Arms Control v. United States Department of Commerce, No. 01-5356 (D.C. Cir. January 31, 2003) (petition for rehearing en banc filed March 13, 2003). Export license applications often contain confidential business information (e.g., technical data) that competitors may attempt to obtain through FOIA. The same result was reached in the Eleventh Circuit. Times Publishing Co. v. United States Department of Commerce, 236 F.3d 1286 (11th Cir. 2001).

The Wisconsin Project on Nuclear Arms Control, a non-profit organization seeking to expose companies and countries engaged in the production and sale of certain items, sought all license applications submitted to the Department of Commerce for proposed exports to the People's Republic of China, India, Israel, Pakistan and Russia under FOIA. The Department of Commerce withheld most of what was requested, including the license applications themselves, under FOIA Exemption 3. FOIA Exemption 3 generally permits agencies to withhold from disclosure, records that are specifically exempt from disclosure by a statute. Exemption 3 is satisfied so long as the information at issue is within the scope of protection of a specific non-disclosure statute.

The government relied on the Export Administration Act ("EAA"), a statute with a provision exempting the information contained in license applications from public disclosure. Such information includes the applicant's name and the specific identification, value, and statement of end use for the subject goods or services. The EAA, however, was a "temporary" statute subject to an expiration date or a "sunset provision." Each time the EAA has lapsed, the President has extended the regulatory scheme by Executive Order. The FOIA request happened to coincide with a time during which the EAA had lapsed. The nuance at issue in the case was whether the EAA could be considered an "exemption statute" under FOIA Exemption 3 during a lapse.

The D.C. Circuit upheld the district court's decision that the authority by which the President may extend the EAA upon its lapse, the International Emergency Economic Powers Act ("IEEPA"), is also a statute and because of the IEEPA (and its predecessor), the export control system has "remained in place without interruption for over fifty years." The Court also examined the legislative history of the EAA which

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in the Court's opinion reflects Congress's clear intent regarding the confidentiality of information submitted and generated in the license application process.

While exporters may have other grounds on which to attempt to block disclosure of certain such information under FOIA (e.g., Exemption 4 covering "trade secrets and commercial or financial information"), Exemption 3 provides broader, more robust protection that could preclude disclosure of the entire substance of a license application. If, however, an agency refuses to withhold the information under Exemption 3, exporters need to be prepared to support an Exemption 4 justification for non-disclosure. Accordingly, it is good business practice to mark export license applications as containing "Confidential Information and Trade Secrets" as a predicate for such an Exemption 4 justification.

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