IMPLICATIONS OF FOIA ON TEK

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FREEDOM OF INFORMATION ACT (FOIA)

• Congress had two goals when it enacted FOIA: (1) “to permit access to official information long shielded unnecessarily from public view,” and (2) “to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”

• The purpose of FOIA is “disclosure, not secrecy.”

• FOIA’s goal is to “pierce the veil of administrative secrecy and open agency action to the light of public scrutiny.”

• FOIA requires, upon request, federal agencies to disclose records to help citizens become informed, a goal that is “vital to the functioning of a democratic society.”
FOIA EXEMPTIONS

• Exemption 3 of the Freedom of Information Act incorporates certain nondisclosure provisions contained in federal statutes other than the FOIA.
  • The National Historic Preservation Act (NHPA, 54 U.S.C. § 307103), which provides limited authority for withholding disclosure of information about the “location, character and ownership” of historic resources to the public.
  • The Archaeological Resources Protection Act (ARPA, 16 U.S.C. § 470hh), which provides authority to limit information on the “nature and location” of archaeological resources.

• Exemption 6 which applies to “personnel medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”
  • In National Association of Home Builders v. Norton, the D.C. Circuit rejected an argument that files containing private property owners observations about owl sightings was “clearly unwarranted” and held that the information was subject to FOIA.
• Exemption 4 protects trade secrets or information that is privileged or confidential disclosed by an individual with a commercial or financial value.

  • There are two ways for information to be protected under Exemption Four: (1) it is a trade secret or (2) it is privileged commercial or financial information (CFI) disclosed by a person.

  • The court defined a trade secret as a “commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”

  • For CFI to apply, the information must satisfy a three-part test: (1) commercial or financial; (2) obtained from a person; and (3) privileged or confidential.

  • CFI has applied to water rights.
CFI AND THE COURTS


  • Information regarding allocation of water rights on an Indian reservation was a trade secret. The court reasoned that the information was commercial or financial data under FOIA because the information created the tribes’ negotiating position regarding water, supported their claims, and maximized the tribes’ position.

  • “There is no doubt that water rights themselves are an object of commerce. They are a property interest that is bought and sold.”

• Starkey v. U.S. Dep’t Of Interior, 238 F. Supp. 2D 1188, 1195 (S.D. Cal. 2002).

  • “[W]ater is a precious, limited resource and is commercial or financial ‘because it defines the amount of water on the reservation.... Release of the ground water [related information] ... would cause competitive harm to the Band because the tribe does not have an adjudicated water right and the release of the withheld information would adversely affect the Band’s ability to negotiate its water rights or to litigate that issue’ … Accordingly, the court concludes that water and well related information is commercial in nature and satisfies the first prong of the statutory scheme.”
DOES FOIA APPLY GENERALLY TO CONSULTATION WITH TRIBES?

  • Information disclosed by Tribe about impacts of irrigation project to Fish and Wildlife was subject to disclosure under FOIA.
  • Interagency/intra-agency exemption to FOIA does not apply.
  • The Court stated that the United States’ fiduciary responsibility to the tribes does not outweigh the purposes of FOIA.
  • The Department claimed that the federal government has an obligation to keep information, but the Court rejected this argument and declined to read a trust/trustee relationship exemption into FOIA.
TEK INFORMATION SHARED MAY BE SUBJECT TO FOIA

• If a Tribe consults with an agency and provides TEK, most of the information provided during such consultations may be subject to FOIA.

• Tribes may not want agencies to disclose all of this information to the general public because it contains sensitive cultural information such as fishing grounds, location of sensitive sites, or where culturally valuable plants are located.

• Federal agencies must disclose to Tribes that information may be subject to disclosure.
INTERAGENCY POLICY STATEMENT ON THE CONFIDENTIALITY OF INFORMATION ABOUT INDIAN SACRED SITES

• Agencies should seek to preclude, to the greatest extent possible, the possibility that disclosure of sensitive information may be required by the Freedom of Information Act or other authority. To that end, agencies and their contractors should request and record only that information about sacred sites that is absolutely necessary to support required administrative decisions. For instance, areas that tribes regard as spiritually or culturally significant should be identified in the broadest terms practicable, sufficient to alert agencies to an area’s significance without recording or revealing precise site locations or sensitive information about tribal religious beliefs or cultural practices.

WAYS TO MINIMIZE RISK AND ADDRESS CONCERNS

1. CLARIFY WHETHER AND HOW AGENCY WILL USE THE INFORMATION
   A. HOW WILL THE TEK IMPACT THE DECISION
   B. COULD IT RESULT IN A BETTER DECISION

2. IF TEK IS SENSITIVE BUT THERE IS INFORMATION TO BE DISCUSSED, SHARE ORALLY AND ENSURE THAT NO ONE TAKES NOTES.

3. IF THERE ARE ANY QUESTIONS OR DOUBTS, ASK EPA TO GET OPINIONS FROM GENERAL COUNSEL OR TALK TO TRIBAL ATTORNEY.