

Protection of Trade Secret Information Under Florida Insurance Code

December 29, 2011

The tension between Florida's broad public records disclosure laws and insurance regulators' document demands presents challenges for insurers and other persons or entities regulated by the Florida Office of Insurance Regulation (Office) or the Florida Department of Financial Services (FDfs) (hereinafter collectively "agency") when it comes to protecting the confidentiality of trade secret information in documents that must be provided to insurance regulators, particularly when such information is requested during an examination or investigation. **Florida Insurance Code's Trade Secret Exemption** The Florida Insurance Code recognizes a trade secret exemption from public records disclosure, pursuant to [Section 624.4213, Florida Statutes](#); however, very specific steps must be followed and the failure to fulfill each of these procedural steps can result in waiver of the trade secret exemption from public records disclosure:

- A written notice by the submitting party claiming trade secret to the agency.
- Included with the written notice, an affidavit certifying under oath to the truth of the following statements concerning all documents or information that are claimed to be trade secrets:
 - The person or entity considers the information a trade secret that has value and provides an advantage or an opportunity to obtain an advantage over those who do not know or use it.
 - The person or entity has taken measures to prevent the disclosure of the information to anyone other than those who have been selected to have access for limited purposes, and the person or entity intends to continue to take such measures.
 - The information is not, and has not been, reasonably obtainable without the person's or entity's consent by other persons by use of legitimate means.
 - The information is not publicly available elsewhere.

- Each page of the document or specific portion of a document claimed to be a trade secret must be clearly marked as “trade secret.”
- All material marked as a trade secret must be separated from all non-trade secret material, such as being submitted in a separate envelope clearly marked as “trade secret.”

In the event the agency receives a public records request for a document or information that has been submitted pursuant to the procedures outlined above, the agency must promptly notify the person or entity that submitted the trade secret information to the agency that a request for that information has been made and that the person or entity has 30 days following receipt of such notice to file an action in circuit court seeking a determination whether the document in question contains trade secret information and an order barring public disclosure of the document. If an action is filed within the 30 day period, the agency is prohibited from releasing the requested documents pending the outcome of the action. If an action is not filed within the 30 day period, the agency must release the requested document to the requestor. Therefore, because the agency’s notice to the person or entity concerning the public records triggers a 30 day deadline to seek judicial relief, it is highly recommended that the notice of trade secret include the name and contact information (business address, email address, telephone number, and fax number) of the person to be contacted by the agency concerning public records request for the submitted trade secret information.

Electronic Records – Additional Concerns In the context of electronic records, compliance with the above-referenced statutory steps requires exceptional caution in Florida. In the course of examinations or investigations, the regulators often demand data containing trade secrets in electronic spreadsheet format. As noted above, each page of the trade secret document or specific portion of a document claimed to be a trade secret must be clearly marked as “trade secret.” Certainly, most spreadsheet programs have functions that make it possible to produce data in a spreadsheet in a way that complies with Florida’s “mark every page” requirement. For instance, most programs allow the placement of a “trade secret” legend in a header or footer on each page of data. However, producing a spreadsheet in its native format, even with such a legend inserted on every page, provides no real assurance that a producing party’s right to trade secret protection can and will be honored by the agency when it receives a public record inspection demand. Also, regulators prefer to receive information in electronic spreadsheets because they make it easy to copy, edit, sort, and rearrange the data in a variety of ways to facilitate analysis. But, it is this very feature - the ease of copying, editing, and rearranging - that also presents serious problems with assuring trade secret protection in practice. It should be expected that the regulatory agency will copy data from the original spreadsheet into other, agency-generated spreadsheets, or will extract and place portions of it in the agency’s other internal work papers. In practice, that regularly happens. When such extraction occurs, the trade secret legends on each page of the original spreadsheet will be lost, unless the agency is extremely careful in the process. Providing the original spreadsheet in “read only” format does not solve the problem. If agency personnel simply select and copy the data from the “read only” version and paste it into a new spreadsheet (as often happens), the trade secret legend will not be transported to the newly-created spreadsheet. This creates serious practical problems for implementing meaningful trade secret protection. Such activities make it extremely

difficult to later identify the copied information as being part of what the producing party originally marked as trade secret, if agency personnel can do so at all. In fact, when confronted with a public records inspection demand, the agency may not recognize the copied information residing in agency-generated “work papers” as being information originally marked as trade secret by the producing party. The agency therefore may inadvertently allow public inspection. Similarly, it may inadvertently fail to notify the producing party that release is intended, as required by section 624.4213(2), Florida Statutes, and thereby compromise the producing party's ability to timely avail itself of the judicial remedies to protect its trade secrets. When confronted with an agency demand to produce data in spreadsheet form, the most prudent mode of production may be to print the spreadsheet in paper form or convert the spreadsheet file to an image file that does not allow piecemeal copying and extraction. This will likely encounter resistance from the regulator, but it is presently the only production format that, under Florida law, substantially guards against these all-too-real risks that trade secret protection may be lost through inadvertence. In sum, when responding to regulatory document demands under the Florida Insurance Code, careful analysis of the request (and responsive documents) and planning is essential to effectively assert trade secret rights and preserve those rights in practice. [Resources Section 624.4213, Fla. Stat. Section 624.310](#), Florida Statutes, provides for an examination or investigation “work paper” exemption from public records disclosure. This exemption is temporary and ceases to exist upon the filing of an examination report or until the investigation is completed or ceases to exist. Therefore, use of the “workpaper” exemption to protect trade secret information is ill advised.

Related Practices

[Government Law & Consulting](#)

[Life, Annuity, and Retirement Litigation](#)

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.