How the FBI Protects Your Sensitive Data after a Breach

Theft of Trade Secrets

Insider Threats

Computer Intrusion

How the FBI Protects Your Sensitive Data after a Breach
In a Criminal Matter
- Grand Jury Subpoena
  - Has its own secrecy rules
- Administrative Subpoenas
  - Drug
  - Child Exploitation
  - Health Care
- Voluntary disclosure
- Search Warrant
- Title III Intercept (wiretap)
- Emergency Disclosure
In a National Security Matter involving classified information

- Voluntary Disclosure
- National Security Letters
- FISA Business Records
- FISA Search Warrant
- FISA Intercept (Wiretap)
- Emergency Disclosure
What happens to the information you provide?

- Proprietary Information
- Trade Secrets
- Sensitive Information
... A competitor files a request for your information under the Freedom of Information Act (FOIA)?

... The case is prosecuted?

... A rival in a lawsuit tries to obtain it with a subpoena or a court order in civil litigation?

And tries to use the information to your disadvantage?
What the FBI can do to protect the information

- **Under the Freedom of Information Act (FOIA) 5 U.S.C. § 552**
  - Nine exemptions
  - Three exclusions

- **Under the “Touhy” regulations by asserting a legal determination such as:**
  - A privilege
  - A statutory prohibition
  - The requestor is required to comply with the Privacy Act
Enacted in 1966 5 U.S.C. § 552

Provides “right of access” to Federal records that are reasonably described

- unless they fall within one of the statute’s nine exemptions or three exclusions

Designed

- to ensure informed citizenry and prevent secret agency laws and rules.

Appeal to DOJ Office of Information Policy

- it creates a right to file suit in US District Court if we don’t comply

Processed by our Record/Information Dissemination Section, Records Management Division
“Records” under FOIA

Accepted definition:

- “Books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency.

Generally, “records” are not tangible, evidentiary objects*
Exemption 1:

**National Security information properly classified and which meets requirements of EO 13526**

- (The president determines the policy governing what information needs to be protected to prevent harm to national security.)
- **Includes:**
  - Intelligence activities, Sources, methods, or cryptology
  - Scientific, technological, or economic matters relating to national security;
  - Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to the national security;
  - And other military, foreign, nuclear and WMD information
- Has limitations
  - (Preventing embarrassment is not one of them)
Exemption 1: National Security information, continued

- Additional consideration: the release was documented & official
- If challenged, the federal judiciary conducts a de novo review, but should give deference to the agency’s determination.
- If specific and identical information is already in the public domain, this exemption may not be allowed
- No information can remain classified indefinitely (10, 25, 50 years)
Exemption 2:

- Internal personnel rules and practices of an agency
- Very narrow
Exemption 3:

Prohibition of other federal statutes
- Grand jury,
- Applications and orders for pen registers and resulting evidence while sealed
- Title III, etc.

Not federal Rules of Procedure, unless they are enacted into law

Other examples of proprietary information that might be protected
- Section 777 of the Tariff Act of 1930,
- Federal Victims’ Protection and Rights Act governs the disclosure of information that would identify children who were victims of crimes or witnesses
- Juvenile Delinquency Records
**FOIA Exemption 4**

- **Exemption 4:**
  - Trade Secrets, privileged and confidential Information
  - Designed to protect both the Government and Submitters of information
  - Ensures required submissions voluntarily provided will be reliable
  - Submissions required to be provided will be safeguarded from the competitive disadvantages that could result from disclosure.
FOIA EXEMPTION 4 CONT.

Two categories of information:

1) Trade Secrets (smaller category)
   ▪ Narrowly construed
   ▪ Recognized for product design and manufacturing information

2) Information that is
   ▪ A) Commercial or financial and
   ▪ B) Obtained from a person and
   ▪ C) Privileged or confidential.
   ▪ Much larger category
Commercial and Financial information is defined broadly

- relates to business or trade
- The submitter has a “commercial interest” in them

Examples:

- Business sales statistics; research data; technical designs; customer and supplier lists; profit & loss data; overhead and operating costs; information on financial condition
The term “person”

- refers to individuals as well as to a wide range of entities, including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations, who provide information to the government.

- Government summaries of the information are also protected

- There may be a difference between information that is voluntarily provided or compelled.
- Voluntarily provided information is "confidential' if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." This categorical test for voluntarily submitted information is "objective" and that the agency invoking it "must meet the burden of proving the provider's custom.
- If compelled, you might be required to show commercial disadvantage.
- Depends on the Circuit you are in.
- Contact your counsel for legal advice.
FOIA Exemptions, Continued

Privileged:

- Attorney-client work product
- Attorney-client communications
- Doctor-patient

Maybe:

- Confidential report privilege
- Self-critical analysis privilege
**Trade Secrets Act**

- Prohibits the unauthorized disclosure of all data protected by Exemption 4.

- Commercial and Financial Data
Exemption 5*: Inter/Intra agency records which would not be available to a party in litigation with the agency.

- Deliberative process,
- attorney-client,
- attorney work product
  - Exempts those documents that are normally privileged in civil discovery
  - Can be a consultant hired to advise agency
Exemption 6:

- Personnel, medical or similar files that would constitute a clearly unwarranted invasion of personal privacy
- Belongs to the individual, not the agency
Exemption 7: Law enforcement records or information that

- 7 (A): Could reasonably be expected to interfere with law enforcement proceedings

Two part test:
- Is the pending proceeding pending or prospective? Appeal, additional defendants, etc.
- Would release of the information reasonably be expected to cause harm to the proceeding?
  - (very broad for FBI who has primarily criminal and national security mission)
  - Entire Categories of documents can be excluded, and it doesn’t have to be page by page (like an affidavit)
FOIA Exemption 7, continued

- **7(B): Would deprive individual of right to fair trial**
  - To protect against prejudicial, pre-trial publicity
  - Hardly ever invoked

- **7(C): Would constitute an unwarranted invasion of personal privacy**
  - A third party’s request for law enforcement records pertaining to a private citizen categorically invades that citizen’s privacy, and where a request seeks no official information about a government agency, the privacy invasion is unwarranted.
  - Categories of information can be withheld
  - More protection than exemption 6
  - Protecting against the unwarranted association in allegations of criminal activity witnesses, informants, sometimes even subjects)
  - Still requires a public interest balancing test, although not as broad (e.g., to show government impropriety)
Government can refuse to confirm or deny whether responsive records concerning other individuals exist

- Such a response is necessary because members of the public may draw adverse inferences from the mere fact that an individual is mentioned in the files of a criminal law enforcement agency.

- Unless:
  - 1) Third-party is deceased (and won’t traumatize family),
  - 2) Provides a written waiver of his or her privacy rights, or
  - 3) There is an overriding public interest

- Protects the personal privacy interests of those who are in fact the subject of, or mentioned in, investigatory files.

- Generally been found appropriate when responding to requests for documents regarding alleged government informants, trial witnesses, subjects of investigations, or individuals who may merely be mentioned in a law enforcement record.
Protects records or information compiled for law enforcement purposes which could reasonably be expected to disclose the identity of a confidential source which includes a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of information compiled by a criminal law enforcement authority in the course of a criminal investigation or a lawful national security intelligence investigation, information furnished by a confidential source.

Guards the flow of information to these agencies.
The Source’s understanding of confidentiality really matters

- Express promise of confidentiality
- Could be reasonably inferred.
- Source should be deemed confidential if the source furnished information with the understanding that the [agency] would not divulge the communication except to the extent . . . thought necessary for law enforcement purposes.
- Until actual testimony?
- Inferred — case by case potential for retaliation
- Waiver
  - By source or
  - Source’s testimony?
FOIA Exemptions, continued

- **7(E): Techniques and Procedures for Law Enforcement of Prosecutions That Could Risk Circumvention of the Law**
  - Allow criminals to avoid detection
- **7(F): Could Reasonably Be Expected to Endanger Life or Physical Safety of an Individual**
- **Exemption 8: Records of Financial Institutions** (seldom used by FBI)
- **Exemption 9: Geographical and Geophysical Information and Data** (for example, Information on wells, seldom used by FBI)
Exclusions outside of FOIA

- (c ) (1): Pending criminal case in which the target does not know he’s a target and disclosure would interfere with case
- (c ) (2): Identification by third party of confidential informants and information provided by them
  - Unless officially confirmed
- FBI records dealing with counterintelligence or counterterrorism
  - The existence or not in itself is classified
Cyber Security Act of 2015

- Disclosure of information pursuant to this act is exempt from FOIA
- Voluntary
- Sets up a process to provide security threats to federal government through DHS
- Some liability protections
- But must scrub personal information and privileges might not be protected
- Other bills have been considered
- Still evolving area of the law
In a lawsuit, what happens if the other side serves a subpoena or court order on the FBI for your information?

The “housekeeping statute”

- 5 U.S.C. § 301
- Prohibits federal employees from disclosing any information without approval from appropriate authority
The primary federal statute that applies to the info collected by the FBI

Balances the government’s need for information with unwarranted invasions of privacy

- Stemming from the Government’s collection, maintenance, use and disclosure of personal information
The Privacy Act of 1974

- Four principles:
  - Disclosure of PII
  - Access to records on oneself
  - Amendment to records if inaccurate
  - Fair information practices - compliance
The “Touhy” regs

- The approval process
- Refusal for disclosure must be based on a sound legal determination
Under the “Touhy Regs”, the requestor must provide:

- A jurisdictionally valid subpoena, court order, or demand from a court or other authority
- A summary of the information sought and
- Its relevance to the proceedings
- The requestor must comply with the Privacy Act:
  - No disclosure of records concerning an individual without written consent
What happens next if your opponent sends a subpoena?

Federal subpoenas: Objections can be made if:
- 1) failure to allow reasonable time for compliance
- 2) requires a person to travel more than 100 miles from where they live or work,
- 3) seeks disclosure of privileged or other protected matters,
- 4) imposes undue burden.

See Fed. R. Civ. P. 45(c)(3)(A)(i), (ii), (iii) and (iv).

State subpoenas are not enforceable against U.S. agencies because of sovereign immunity

But, requestors can use Administrative Procedures Act to challenge our decision as arbitrary, capricious, or contrary to law
CONCLUSION

- PRIVACY IS BALANCED WITH THE GOVERNMENT’S NEED FOR INFORMATION
- INFORMATION CAN BE PROTECTED BY LABELING IT APPROPRIATELY
- CONFIDENTIALITY CAN BE GRANTED, BUT AN EXPRESS PROMISE IS BEST