

**Unclassified****English - Or. English**

26 November 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by the  
United States**

3 December 2019

This document reproduces a written contribution from the United States submitted for Item 4 of the 130th OECD Working Party 3 meeting on 2-3 December 2019.  
More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm](http://www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm)

Please contact Ms Despina PACHNOU if you have any questions about this document  
[Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

**JT03455306**  
OFDE

## *United States*

### **1. Introduction**

1. This paper responds to Working Party 3’s request for information on access to the case file and protection for confidential information in U.S. competition matters. This request arises from the Competition Committee’s long-term theme of Transparency and Procedural Fairness. As the Working Party’s invitation acknowledges, these two issues – right of access and protection for confidential information – represent an ongoing balance between providing transparency into competition enforcement and policy, and enabling antitrust agencies to obtain and protect information necessary to bring cases that protect competition.<sup>1</sup>

2. This paper responds on behalf of the Federal Trade Commission (“FTC,” “Commission,” or “Agency”) and the U.S. Department of Justice Antitrust Division (“DOJ” or “Agency”) (together, the “Agencies”), the two U.S. government antitrust enforcement agencies. The paper discusses (1) the case file and how it is created; (2) the means and circumstances under which parties or the public may access the case file; and (3) limits on access to the case file, including but not limited to, protections for confidential information.

### **2. The case file and how it is created**

3. The term “case file” refers to the collection of information from external sources and internal work product generated, obtained, and utilized by each Agency in the course of investigating whether a violation of antitrust law has occurred.<sup>2</sup>

4. Agency competition investigations may arise from a variety of sources. Staff of the investigating agency may initially collect information from public sources. They may also receive complaints about anticompetitive conduct from citizens and businesses. For certain criminal violations, the DOJ may also hear from informants, or individuals or companies applying for leniency under the DOJ’s Individual or Corporate Leniency Programs.

5. An investigation typically begins in an initial phase in which staff may directly contact the subject or subjects of the investigation. These initial phases usually employ voluntary requests for information, also known as “access letters.” Initial phase investigation of mergers also typically involves review of the merging parties’ filings

---

<sup>1</sup> ICN Recommended Practices describe this balancing as including “the commercial interests of submitters, the procedural rights of parties under investigation, and the overall interest in the efficiency and transparency of enforcement efforts.” ICN Recommended Practices for Investigative Process VI. 10.1. Confidentiality Protections and Legal Privileges.

<sup>2</sup> These laws include the Sherman Act, 15 U.S.C. §§ 1-7, enforced by DOJ; the Clayton Act, 15 U.S.C. §§ 12-27, enforced by both DOJ and FTC; and the FTC Act, 15 U.S.C. § 45, enforced by the FTC. Section 5 of the FTC Act also encompasses violations of the Sherman Act. DOJ has the sole authority to prosecute criminal violations of the Sherman Act.

pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1974 (“HSR Act”) if the transaction is reportable.<sup>3</sup>

6. Staff may proceed to a full phase investigation of a merger or of conduct if they determine it is necessary. For conduct investigations, both Agencies have been authorized by Congress to issue Civil Investigative Demands (“CIDs”), which may be served on any natural or legal person — including suspected violators, potentially injured persons, witnesses, and record custodians — if there is “reason to believe” that the person may have documentary material or information relevant to a civil antitrust investigation.<sup>4</sup> In addition, the FTC may issue subpoenas, which can either seek documents (*duces tecum*) or testimony from individuals or entities (*ad testificandum*).<sup>5</sup> For full phase investigations into mergers, the Agencies may request additional information from the parties under the HSR Act, a process known as issuing a “Second Request.”<sup>6</sup> They may also issue compulsory process to third parties in connection with merger investigations.

7. When the conduct at issue appears to constitute a potential criminal violation (such as price fixing, bid rigging, and customer and territorial allocations), the DOJ convenes a grand jury investigation. During the course of its proceedings, the grand jury will issue compulsory requests for documentary materials (subpoenas *duces tecum*) and testimony (subpoenas *ad testificandum*) from individuals. The grand jury may also subpoena individuals to provide various types of exemplars, such as handwriting samples.

8. DOJ may also use search warrants to obtain documents and other materials relevant to a criminal investigation. Only judges or magistrate judges may issue a search warrant. The process for search warrants in the United States is guided by the U.S. Constitution and the Federal Rules of Criminal procedure.<sup>7</sup> Search warrants are executed by law enforcement agencies, such as the U.S. Federal Bureau of Investigation.

9. In addition to their own information gathering efforts, the Agencies may receive information from other federal and state law enforcement agencies and authorities. Both the FTC and DOJ engage in extensive information sharing between themselves and with state law enforcers, such as state Attorney General offices. Information bearing on competition enforcement may also come from agencies that do not engage in law enforcement or from the U.S. Congress.

10. The case file thus comprises the universe of information received or developed by the Agencies from the combined effect of these tools and these sources. As such, a typical case file may include any of the following specific types of information, among others: (1) market definition data, or data used to support Herfindhal-Hirschman Index (“HHI”) calculations of market concentration; (2) pricing information for relevant products in the

<sup>3</sup> See 15 U.S.C. § 18a.

<sup>4</sup> See Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14 (DOJ CID authority); 15 U.S.C. § 57b-1 (FTC CID authority). Congress granted the FTC CID authority as part of the FTC Improvements Act of 1980 and expressly modeled this authority on DOJ’s. See S. Rep. 96-500, at 23 (1979).

<sup>5</sup> 15 U.S.C. § 49.

<sup>6</sup> 15 U.S.C. 18a(e). Although it arises from a different statutory source, the authority to make a Second Request under the Hart-Scott-Rodino Act may also be considered a form of compulsory process. See, e.g., 16 C.F.R. § 2.13(a)(3) (authorizing the General Counsel of the FTC to commence proceedings to enforce compulsory process, including Second Requests).

<sup>7</sup> U.S. CONST. AMEND. IV; FED. R. CRM. P. 41.

relevant markets; (3) comparative pricing information for substitute products in similar markets; (4) internal documents of investigation targets and third party market participants; (5) testimony from entities or individuals, including officers, directors, managers, or key employees of investigation targets, as well as employees or individuals affiliated with third party market participants; (6) responses to interrogatory requests; (7) information obtained from whistleblowers or tipsters; (8) expert reports, analyses, and work product, and the documents and information used to support them; (9) information provided voluntarily, such as white papers or responses to access letters; or (10) information obtained from inter- or intra-agency sharing arrangements.<sup>8</sup>

11. In addition to materials received from external sources, the case file also includes Agency personnel's own work product, which may include legal analysis and assessments, economic analysis, and internal correspondence generated through the typical governmental decision-making processes.

12. During the course of an investigation, the party or parties under investigation do not have access to the case file. Although the Agencies will often share the nature of their concerns with potential defendants, as well as their general understanding of the facts and evidence, throughout the course of their investigations the Agencies will not – and, indeed, cannot – share confidential information submitted by third parties.<sup>9</sup>

### 3. Access to the case file

13. As described below, the primary means by which an individual or entity external to the Agency may obtain access to the case file is through disclosures required in federal court or administrative litigation.

14. Should the Agencies decide that enforcement is warranted based on the case file, they follow different paths to obtain relief. DOJ must initiate an action in an appropriate U.S. district court, which determines whether the law has been violated and, if so, orders appropriate remedies. By contrast, to enforce the FTC Act, the FTC may use its own administrative processes, codified in its rules. Pursuant to its administrative procedures, the FTC, following a full investigation, issues an administrative complaint, which initiates an enforcement proceeding that is overseen and resolved by an administrative law judge. The decision of the administrative law judge is subject to review by the full Commission, and, ultimately, a U.S. court of appeals. Thus, unlike DOJ, the FTC exercises both prosecutorial and judicial functions.<sup>10</sup> The FTC may also seek a preliminary injunction in a U.S. District Court as a parallel proceeding to an administrative case. In such cases, the FTC uses the injunction to freeze the transaction while the agency evaluates its lawfulness

---

<sup>8</sup> Although a primary goal of the Agencies in seeking and developing this information is to obtain evidence that is admissible in court or agency law enforcement proceedings, not necessarily all of this information may be admissible and some may be obtained in order to inform, support, or understand the information received.

<sup>9</sup> This is in line with ICN Recommended Practices for Investigative Process, III. 5.4. Transparency During an Investigation.

<sup>10</sup> Congressional Record, Sept. 10, 1914, at 14931-33 (discussing the formation of the FTC and the reasons for providing both prosecutorial and judicial functions).

before the administrative tribunal.<sup>11</sup> In cases in which the FTC seeks monetary relief, the FTC may, like DOJ, seek final relief in a court proceeding and forego the administrative process.

15. When an Agency's case proceeds to federal court, the defendants are entitled under the Constitution and the Federal Rules of Civil Procedure to extensive review of the evidence that an Agency has gathered for its case, a process known as discovery. Those rules, for example, require the parties to a litigated matter, including the government, to provide documents and identify those individuals that it may use to support its claims.<sup>12</sup> These rules also entitle the defendants to request documents from the government, to depose the government's witnesses, and to obtain substantial information about the government's expert testimony, if any.<sup>13</sup>

16. For cases brought by the FTC in administrative litigation, the FTC's Part 3 rules provide similar discovery rights and obligations as the Federal Rules of Civil Procedure.<sup>14</sup> These rules require the FTC and the respondent (the party akin to a defendant in a court proceeding) to identify individuals likely to have information relevant to the proceeding, and to produce documents (or certain information about documents) relevant to the proceeding.<sup>15</sup> Also like the Federal Rules of Civil Procedure, the FTC's Part 3 Rules authorize the parties to obtain other discovery from one another through a variety of means and require the parties to identify their experts and to undertake pre-trial discovery involving these experts.<sup>16</sup>

17. Outside of litigation, there are other ways to access information in the case file. For instance, the U.S. Congress or other agencies may obtain access to the case file pursuant to statutory authority or intergovernmental sharing arrangements. These sharing arrangements include sharing with federal and state law enforcement.<sup>17</sup>

18. In civil investigations, the Agencies may disclose confidential information to another federal or state law enforcement agency pursuant to waivers from the parties.<sup>18</sup> In

---

<sup>11</sup> 15 U.S.C. § 53(b). The same provision enables the FTC to seek permanent injunctive relief.

<sup>12</sup> FED. R. CIV. P. 26(a)(1) (specifying required initial disclosures). This complies with ICN Recommended Practices for Investigative Process III. 5.6 Transparency During an Investigation.

<sup>13</sup> See, e.g., FED. R. CIV. P. 26(b)(4) (discovery regarding experts), 30 (depositions), 34 (requests for documents). The Federal Rules authorize additional discovery practices, such as the use of interrogatories. These discovery rights are reciprocal; the Agencies may obtain additional information from defendants and third parties in the course of litigation that may be added to the case file.

<sup>14</sup> See generally 16 C.F.R. §§ 3.31-3.40.

<sup>15</sup> See 16 C.F.R. § 3.31(b) (mandatory initial disclosures).

<sup>16</sup> See 16 C.F.R. §§ 3.34 (authorizing subpoenas *ad testificandum* and *duces tecum*); 3.33 (depositions); 3.31A (expert discovery).

<sup>17</sup> See 15 U.S.C. §§ 57b-2(b)(3)(C) (authorizing disclosure of nonpublic information to Congress); (b)(6) (authorizing disclosure of nonpublic information to Federal and state law enforcement).

<sup>18</sup> See 15 U.S.C. § 57b-2(b)(3)(C); however, even without such consent, the FTC may share information received pursuant to compulsory process with federal or state law enforcement upon a certification from the requesting agency that the information will be "maintained in confidence and will be used only for official law enforcement purposes." 15 U.S.C. § 57b-2(b)(6).

criminal cases, Federal Rule of Criminal Procedure 6(e) limits the disclosure of information obtained in grand jury proceedings.<sup>19</sup>

19. Third parties may also seek access to the case file in instances where the Agencies are not litigants by issuing subpoenas to the Agencies. Under the Federal Rules of Civil Procedure, parties in litigation may issue subpoenas to third parties for documents or testimony.<sup>20</sup> Thus, for instance, a party in private litigation with the target of an FTC investigation or litigation may seek information from the Agency through subpoena.

20. Further, any individual or entity may seek access to the case file by filing a request under the Freedom of Information Act (FOIA). This statute is intended to promote governmental transparency by requiring government agencies to respond and provide records to requestors under certain circumstances and subject to certain limitations.<sup>21</sup>

#### 4. Limits on access to the file

21. The various means by which an individual or entity may access case files are subject to several limitations. First among these, and most pertinent to this paper, are protections for confidential information. Effective protection of confidential information is essential for the Agencies to obtain the sensitive information they need to evaluate conduct and, if necessary, to prove its case in an adjudicative forum.<sup>22</sup> It is, of course, also important to prevent competitively sensitive information from being shared among competitors and other participants in the market or business.

22. The Agencies must abide by statutes restricting the disclosure of certain information. They have also developed rules and policies for the treatment of information that balance the need to protect confidential information obtained in enforcement matters against the need to provide targets of competition enforcement proceedings a fair opportunity to defend themselves.

23. Consistent with the practice in other jurisdictions, the same U.S. federal statutes that provide authority for the Agencies to obtain information from parties and third parties in civil investigations also provide for confidential treatment of submitted information.<sup>23</sup>

---

<sup>19</sup> FED. R. CRM. P. 6(e).

<sup>20</sup> FED. R. CIV. P. 45.

<sup>21</sup> See 5 U.S.C. § 552. In circumstances where subpoenas and FOIA requests are inappropriate, a requestor may simply ask for information from government agencies pursuant to *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). This case has come to stand for the principle that agencies may enact regulations governing how they will respond to requests for information. In so doing, this decision has tacitly authorized such requests. These types of requests are infrequent and rare. The FTC's *Touhy* regulation can be found at 16 C.F.R. § 4.11(e)(3); the DOJ's *Touhy* regulations can be found at 28 C.F.R. §§16.21 et. seq.

<sup>22</sup> See ICN Recommended Practices for Investigative Process VI. 10. Confidentiality Protections and Legal Privileges, "Protection of confidential information is a basic attribute of sound and effective competition enforcement. Respecting confidentiality is important to ensure continued cooperation and the submission of information from parties and third parties during investigations. Any legal framework for competition law enforcement should include protections for confidential information submitted during investigations."

<sup>23</sup> See, e.g., 15 U.S.C. § 18a(h).

This helps the Agencies obtain comprehensive information regarding the topic of the investigation or action by reducing concerns from parties and third parties that information they submit will become public. During the course of an investigation, information provided by parties under investigation or by third parties is generally treated as confidential by the Agencies, both as a matter of policy and pursuant to statutory restrictions. The Agencies are especially careful to protect the identities of any complainants.

24. In the case of the FTC, for materials obtained through compulsory process,<sup>24</sup> the FTC takes physical possession through a designated custodian, who generally must not allow members of the public to access the materials without the permission of the submitter. The FTC must return the materials upon request at the conclusion of an investigation or after a reasonable period of time has elapsed and the material has not been received into the record of a proceeding. The custodian may copy materials submitted as necessary for official use, and may permit them to be used in connection with obtaining oral testimony.

25. DOJ confidentiality requirements for CID materials are governed by the Antitrust Civil Process Act (ACPA). The ACPA requires that DOJ treat information obtained through CIDs as confidential, and, other than for use in oral depositions in furtherance of investigations, no documents produced or transcripts of oral testimony taken pursuant to a CID shall be disclosed without the consent of the individual or company that produced the materials.<sup>25</sup> There are limited exceptions to this rule: information obtained through a CID may be used before any court, before a grand jury, or in federal administrative or regulatory agency cases or proceedings, including in investigations conducted by FTC.

26. For investigations of notified mergers, section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), prohibits public disclosure of any information provided to DOJ or the FTC pursuant to the HSR Act, except “as may be relevant to any administrative or judicial action or proceeding” to which the FTC or DOJ is a party, or to Congress. The FTC is also subject to the confidentiality restrictions in its own statute and regulations protecting the confidentiality of information received during merger investigations.<sup>26</sup>

27. In DOJ criminal antitrust cases, the Federal Rules of Criminal Procedure require secrecy in grand jury proceedings by prohibiting members of the grand jury, government attorneys and their authorized assistants, and other grand jury personnel from disclosing “matters occurring before the grand jury,” except as otherwise authorized.<sup>27</sup> Pursuant to the DOJ’s Leniency Program, DOJ does not publicly disclose the identity of or information obtained from a leniency applicant absent prior disclosure by, or agreement with, the applicant, unless required to do so by court order.<sup>28</sup> This includes disclosing information from a leniency applicant to a foreign government.<sup>29</sup>

---

<sup>24</sup> See generally 15 U.S.C. § 57b-2(a), (b). “Material” means “documentary material, written reports or answers to questions, and transcripts of oral testimony.” *Id.* § 57b-2(a)(1).

<sup>25</sup> 15 U.S.C. § 1313(c), (d).

<sup>26</sup> 15 U.S.C. § 57b-2; 16 C.F.R. §4.10.

<sup>27</sup> FED. R. CRM. P 6(e).

<sup>28</sup> FAQ’s About the Antitrust Division’s Leniency Program and Model Leniency Letter, FAQ 33, available at: <https://www.justice.gov/atr/page/file/926521/download>.

<sup>29</sup> *Id.* at FAQ 34.

28. The FTC must also treat information obtained outside of compulsory process (*i.e.*, voluntarily) as confidential when so marked by the submitter. The FTC may release such information during litigation or in response to a FOIA request if it determines that the information does not involve a trade secret, or confidential or privileged commercial or financial information, but it must provide the submitter 10-day advance notice so that the submitter has an opportunity to bring an action in federal court to restrain or stay disclosure of that information. Similarly, information provided voluntarily to the DOJ (*i.e.*, not under HSR or pursuant to a CID) does not receive statutory protection; however, as a matter of policy the DOJ does not disclose such information without good cause. The FTC likewise does not disclose confidential information without good cause or authorization.<sup>30</sup>

29. As noted above, should the Agencies decide to file a contested case in federal court, the parties would have an opportunity to see the specific evidence against them in accordance with constitutional provisions and federal rules of civil procedure as administered by independent federal judges.<sup>31</sup> Federal judges have a broad range of tools available, including protective orders, to protect confidential business information, and the Agencies typically will support the entry of an appropriate protective order in litigation.<sup>32</sup> The terms of such protective orders may vary, but it is not uncommon during pretrial proceedings for such orders to require especially sensitive information to be filed under seal with access limited to the parties' attorneys.<sup>33</sup>

30. Similarly, the FTC includes a model protective order in its Part 3 Rules that governs the use of confidential materials during an administrative adjudication. In addition to requirements generally to protect the information from the public, such as placing confidential materials under seal and requiring in camera review of any sensitive information, the model order also considers the needs of the respondent and the need to

---

<sup>30</sup> Examples of the authorized uses for confidential, nonpublic information can be found in Rule 4.10 of the FTC's Rules of Practice, 16 C.F.R. § 4.10.

<sup>31</sup> The statutes governing both HSR and CID material permit the use of such material in federal court proceedings.

<sup>32</sup> DIVISION MANUAL III-70-73 (citing H.R. Rep. No. 94-1343, at 2610 (1976)) ("Once a case is filed, the use of CID material [by the DOJ] in that case will typically be governed by a protective order issued by the court in which the suit is pending. Whenever a civil action is commenced based on information obtained by CID, the defendants in that action may invoke their full discovery rights under the Federal Rules of Civil Procedure and obtain CID information gathered in the investigation that is relevant to their defense. ... [D]efendants will thus be able fully to protect their rights at trial by interrogating, cross-examining, and impeaching CID witnesses.... [T]he scope of civil discovery is not unlimited and ... the court has broad discretion under the Federal Rules to set limits and conditions on discovery, typically by issuing a protective order."); 15 U.S.C. § 57b-2(d)(1)(C) (providing that confidentiality restrictions shall not prohibit "the disclosure of relevant and material information in Commission adjudicative proceedings or in judicial proceedings to which the Commission is a party").

<sup>33</sup> DIVISION MANUAL III-70-73 ("The [DOJ Antitrust] Division's position on the reasonableness of protective orders is guided by balancing the public interest in conducting litigation in the open to the greatest extent possible, see 28 C.F.R. § 50.9, against the harm to competition from having competitively sensitive information disclosed to competitors. Staffs should also keep in mind that the disclosure of third-party confidential business information obtained through CIDs may cause third-party CID recipients to be less cooperative with the Division in the future. . . ."); 16 C.F.R. § 3.31 App. A (FTC's Part 3 model protective order).



keep a third party's sensitive materials from being shared with a competitor.<sup>34</sup> The model order accomplishes this goal by limiting the disclosure of such materials to the administrative law judge and staff, FTC employees, outside counsel of record for any respondent (provided they are not employees of a respondent) and anyone retained by outside counsel to assist in hearing preparation (provided they are not affiliated with a respondent or any witness or deponent who may have authored or received the information in question). Thus, for the respondent, the model protective order requires disclosure to be limited to outside counsel, and does not allow confidential third-party materials to be disclosed to in-house counsel or business employees of the respondent.<sup>35</sup>

31. The FTC's confidentiality protections continue to apply if the FTC files an administrative complaint pursuant to Part 3 of its rules or an action in federal court. The FTC's rules provide that material obtained through compulsory process, information that is marked confidential, and confidential commercial or financial information may be disclosed in administrative or court proceedings, but state that the submitter will first be given an opportunity to seek an appropriate protective order or in camera order from the adjudicator.<sup>36</sup>

32. Upon receiving an appropriate request from a congressional committee, the FTC may share confidential information. When it receives such a request, the FTC typically seeks to minimize the exposure of any confidential materials by making presentations to congressional members or their staff in confidential briefings. Before these meetings, the FTC notifies the members and their staff in writing about the confidential nature of the information to be provided and requests that the information remain confidential. The FTC also notifies the submitter of the information that it has received a congressional request.<sup>37</sup> The FTC may also share confidential information with other federal or state law enforcement agencies, if the requesting agency certifies that the information will be maintained in confidence and used only for law enforcement purposes.<sup>38</sup>

33. Several laws, regulations, and procedures provide for sanctions for breaches of the confidentiality laws.<sup>39</sup> Perhaps most importantly, the Agencies' employees are instructed

---

<sup>34</sup> See 16 C.F.R. § 3.31 App. A.

<sup>35</sup> *Id.*

<sup>36</sup> 16 C.F.R. § 4.11(g). See ICN Recommended Practices for Investigative Process VI. 10.6.

Confidentiality Protections and Legal Privileges, "Prior to disclosure of information obtained from parties and third parties during an investigation or enforcement proceeding, the submitter should be able to express its views on the confidentiality of the information."

<sup>37</sup> For DOJ procedures relating to disclosure to Congress, see DIVISION MANUAL III.E.6.b.ii.

<sup>38</sup> In addition to publicly available information, the Agencies and foreign competition agencies possess, and develop during the investigation, relevant information that they are empowered, but not mandated (as in the case of confidential business information), to keep confidential. Such "confidential agency information" can include the fact that an investigation is taking place, the subject matter, and the agencies' analysis of the matter, including market definitions, assessments of competitive effects, and potential remedies. Agencies typically share such information while maintaining its confidentiality outside the agency-to-agency relationship. See INT'L COMPETITION NETWORK, WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS 3-4 n.11 (2005), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

<sup>39</sup> The Trade Secrets Act, 18 U.S.C. § 1905, provides criminal penalties (fine of up to \$1,000 and/or up to one year imprisonment, and removal from employment) for unauthorized disclosure of

from the day they begin work of the importance of protecting confidentiality. Agency staff is made well aware that improper disclosures of confidential information will not be tolerated.

34. Outside of these confidentiality protections, other legal doctrines prevent or limit access to information in the case file. For instance, both Agencies may assert claims of privilege as a basis for withholding information in the case file. One of the most common claims of privilege is the protection for attorney work product. This privilege arises from Supreme Court case law and has been codified in the Federal Rules of Civil Procedure to enable a party to withhold work product from a litigation adversary.<sup>40</sup> This privilege is widely available to all parties in litigation.

35. The Agencies also have recourse to several privileges available only to the government. These include privileges against production of materials reflecting governmental deliberations (or “deliberative process” privilege<sup>41</sup>) and against disclosure of investigative files (“investigative files” or “law enforcement” privilege<sup>42</sup>). The Agencies may assert any of these privileges in response to requests made in any context – in litigation, through subpoena, or through the Freedom of Information Act.

36. Requests made pursuant to FOIA are subject to a number of additional withholdings and the government may decline to produce its records based on a number of statutory exemptions. For example, the HSR Act and the FTC Act provide that particularly sensitive materials, such as information in pre-merger filings and materials received pursuant to compulsory process, are generally exempt from public disclosure.<sup>43</sup> FOIA itself also allows for several exemptions. One of these exemptions allows agencies to withhold information protected from disclosure by other federal laws, which provides an additional basis for protecting information received by the Agencies pursuant to compulsory process and covered by Agency statutes.<sup>44</sup> Another exemption allows agencies to withhold trade secrets or business information, thus directly securing the confidentiality of these types of sensitive

---

confidential business information by government employees. The Theft of Government Property statute, 18 U.S.C. § 641, provides criminal penalties (fine and/or imprisonment up to 10 years) for theft of any record or “thing of value” (including information) possessed by the U.S. government. The FTC Act also provides for criminal penalties for disclosure of nonpublic information. 15 U.S.C. § 50. Finally, the Office of Government Ethics Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.703, prohibits the improper use of non-public information by an Executive Branch employee to further his or her own private interest or that of another person; any violation may be cause for appropriate corrective or disciplinary action.

<sup>40</sup> See *Hickman v. Taylor*, 329 U.S. 495, 509-10 & n.9 (1947); Fed. R. Civ. P. 26(b)(5).

<sup>41</sup> See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *EPA v. Mink*, 410 U.S. 73 (1973).

<sup>42</sup> See, e.g., *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336 (D.C. Cir. 1984); *Black v. Sheraton Corp. of Am.*, 564 F.2d 531 (D.C. Cir. 1977); *McPeck v. Ashcroft*, 202 F.R.D. 332, 336 (D.D.C. 2001) (holding that privilege applies to administrative investigation).

<sup>43</sup> 15 U.S.C. §§ 18a(h), 57b-2(f).

<sup>44</sup> 5 U.S.C. § 552(b)(3).

information.<sup>45</sup> In addition, one of the exemptions to FOIA permits agencies to withhold “records or information compiled for law enforcement” if certain conditions are satisfied.<sup>46</sup>

## 5. Conclusion

37. While there are several tools that may be employed by a party, individual, or entity seeking access to an Agency case file, both Agencies maintain robust and comprehensive protections that enable them to shield confidential or sensitive information. These protections empower the Agencies to obtain the information they need for critical law enforcement in competition matters.

---

<sup>45</sup> 5 U.S.C. § 552(b)(4).

<sup>46</sup> 5 U.S.C. § 552(b)(7). Privileged information is protected from disclosure under FOIA by a separate exemption. 5 U.S.C. § 552(b)(5). Information may be subject to multiple exemptions and thus unavailable for disclosure on several grounds.