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Will the FCC Keep Your Secrets?

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We get questions on how the FCC handles confidential information in certification applications. Here are some answers.

Legal Basis

The Freedom of Information Act (“FOIA”) generally requires federal agencies to disclose their records on request. Agency records include most documents submitted to the agency by members of the public. That makes an FCC certification application, together with all of its exhibits and correspondence, an agency record for FOIA purposes, and hence presumptively subject to disclosure.

But FOIA also permits an agency to withhold from the public “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” Under this provision, the FCC can lawfully keep certain parts of a certification application from public disclosure.

Default Rule

The FCC always treats a certification application as confidential until it is granted. Unless the applicant requests otherwise, on the day of the grant the FCC will post the entire application on its website, including all of the exhibits and correspondence. (If the FCC denies an application, the application never becomes public.)

An applicant can seek to alter the automatic disclosure in three different ways. These can be used individually or in any combination.

1. Delayed Grant

On proper request, the FCC will postpone grant of certification (and hence disclosure of the application) until a date specified by the applicant. Typically this is the date the product will be announced. An applicant makes the request by ticking off the appropriate box on Form 731 (certification application). There is no additional charge. The FCC can decline to honor requests that made after the application is filed.

2. Delayed Disclosure

On proper request, the FCC will delay disclosure of certain application exhibits for 45 days following grant of the certification. These include the external and internal photos,

test setup photos, block diagram, schematics, user's manual, parts list, tune-up procedures, and operational description. The delay is meant to give manufacturers and importers time to deliver the product to retailers and prepare for marketing. This option is useful because shipment to retailers -- or anywhere else -- is prohibited prior to the grant of certification, which ordinarily triggers disclosure.

Like a delayed grant, delayed disclosure must be requested in the original filing of Form 731. There is an additional charge. The delay can be extended for a second 45 days, but the extension request must reach the FCC at least seven calendar days before the first 45 days expires. There is no additional charge for the extension.

Delayed disclosure comes with an obligation. The certification grantee must notify the FCC or TCB promptly if it "engages in public marketing activities" or otherwise publicizes the device. The FCC will then post the complete application on its website (except for materials withheld permanently, as below).

3. Permanent Confidentiality

On proper request, the FCC will withhold a smaller category of exhibits from the public on a permanent basis. These include the block diagram, schematics, parts list, tune up procedures, and operational description. The FCC assumes that information contained in other parts of the application (internal and external photos, manual, etc.) is not "confidential" under the FOIA statute, inasmuch as it becomes available to anyone purchasing the product. But the FCC will also withhold other exhibits on a showing that the information they contain cannot easily be obtained or reverse-engineered from the product.

This category of confidentiality also must be requested on the original Form 731, and incurs an additional charge.

The FCC's initial determination to withhold a particular exhibit is only provisional. If the FCC receives a request under FOIA for such an exhibit, it notifies the certification grantee, and only then litigates whether the exhibit qualifies to be withheld. If it determines to disclose the exhibit, it will delay doing so for a short time so the grantee has an opportunity to appeal the disclosure in court.

Other questions? Give us a call.