CHAPTER THREE

Commercially Sensitive Information and the Public Interest

Perhaps the most widely made—and unchallenged—claim for confidentiality is that it protects *commercially sensitive information*. But this claim is only the beginning of an analysis, not the end. There is no technical definition of commercially sensitive information. Everything, from the existence of a contract, to illegal bribes, to most of what is disclosed under securities regulations, can be classified as "commercially sensitive" in the broadest sense of the term. However, disclosure of such information may still be required, in order to serve a greater public interest. In some cases it may be obvious; but in others, it may require tools to measure and balance the public interest in transparency against the private interest in confidentiality.

The most important public interest at stake is the right to information, which enables democratic accountability. The public's right to government-held information has been recognized by international human rights courts and implemented in national "sunshine" and freedom of information (FOI) laws. Additionally, the European and Inter-American Human Rights Courts have both recognized the right to information. In a case involving the disclosure of documents in a Chilean forestry investment, the Inter-American Court specifically recognized the "principle of maximum disclosure," linking democratic accountability to expansive access to information, including the documents sought on the project.[41]

A. What Is Commercially Sensitive Information?

There is no consensus definition of "commercially sensitive information." The term is not in the authoritative legal dictionary, Black's Law Dictionary, nor were we able to find a settled definition in other legal documents. It is generally understood to be any information that has economic value or could cause economic harm if known.[42]

What constitutes "commercially sensitive information" varies in different industries and in markets within those industries. It is often defined in reference to trade secrets, which do have a set definition:

> "A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives [the holder] an opportunity to obtain an advantage over competitors who do not know or use it."[43]

Specific examples of trade secrets include customer lists, marketing strategies, and formulas for a specific product.

Trade secrets are different from other forms of "intellectual property" because they are, by definition, a secret. Other forms of legally protected information, such as patents, trademarks and copyrighted material, are generally protected upon becoming public. The underlying philosophy is that competitive markets need some amount of protection of information, even after that information becomes known, in order to promote innovation.

Consider the "Coca-Cola formula," which is a *trade secret* and is not protected by other legal mechanisms like a patent. Coca-Cola has never disclosed the secret formula for its product; it therefore remains a trade secret. If Coca-Cola were to seek patent protection for the secret formula, it would have to disclose its trade secret in order to receive a patent license for the formula. The formula would eventually become public information upon expiration of the license, thus losing its economic value to Coca-Cola.[44]

Conversely, consider the pending merger of two companies: news of the potential merger is highly commercially sensitive information, since the stock prices of one or both companies could change if this information becomes public, causing great economic harm. However, a potential merger is not a "trade secret"—it is not a formula, pattern, device or compilation of information that could give a competitor an advantage if known.

1. What is commercially sensitive information in the extractive industries?

Given how open the definition of "commercially sensitive information" can be, a potentially limitless amount of information could fall within it. Some of the information that business officials often cite as commercially sensitive in the extractive industries includes:

- financial terms of the deal;[45]
- assumptions used for assessing commercial terms;
- work obligations;
- environmental mitigation costs;
- quality and quantity of the reserve;
- operational data;
- cost information;
- manufacturing processes;
- pending litigation;
- pending mergers & acquisitions;

- identity of shareholders;
- revenue and cash flow data;
- capital expenditures and operating expenditures; and
- employee information.

Some of this information may be covered under the definition of "trade secret" so long as it is not in the public domain (e.g., manufacturing processes, cost information, operational data). However, some of this information is in the public domain, through securities filings that companies must make (quality and quantity of reserves, information about shareholders, some amount of revenue information).[46] Moreover, under some securities regulations, companies have the right to withhold commercially sensitive information through redactions; but from a limited review of contracts disclosed pursuant to such regulations, there were no such redactions made.

2. Most information cited as commercially sensitive is not in primary contracts

The reader will note that the list of "commercially sensitive information" discussed in the above section is very similar to the list in Chapter One, Section C: "Information Not in Primary Contracts." Indeed, much of the specific information said to be commercially sensitive is not in the primary contract between a company and the government (see chart below).

But some information is necessarily contained in a primary contract, such as the financial terms of the deal. Work obligations, while not always detailed (they may be dependent on further feasibility studies, for example), are enumerated in some production sharing agreements and exploration agreements, and may also be included in the primary contract.

The exact costs of environmental mitigation processes connected with an extractive project are not generally detailed in the primary contracts associated with the project, though they may contain terms requiring the posting of bonds or other sureties[47] so that the costs of environmental damage are not borne by the country. Some primary contracts may require other environmental protection measures (such as the use of best international mining practice or internationally observed industry standards in the building, operating and closure of projects), but the specific *costs* of these measures are not included.

In fact, *costs* will rarely be found in contracts as a general matter, since they are incurred *after* the conclusion of a contract, in most situations. The same is true of *operational information* generally (e.g., manufacturing processes, construction costs or operating costs). None of the operations that generate such information and costs would go into effect until after the contract is concluded; thus, these details are necessarily *not* included in the contract.

The same is true of *payments* throughout the life of the contract. While *rates* of payment may be determined by a contract if not established by law, the actual *amounts* of these payments are not in the contract, with the exception of any set payments, such as signature bonuses or payments to community development funds.

There may also be references to trade secrets in contracts, if in exploring or developing the resource the contractor plans to employ a specific technology that is not broadly used or known in the industry; however, we have not seen such references. The same is true of references to future transactions or pending litigation: one could imagine a situation where Company A is in contract negotiations with Country X, and Company A knows it is about to be acquired by Company B. Company B may view the asset that Company A is acquiring as part of the reason that it wants to buy Company A. Thus, Company A and Company B would want to ensure that Country X will accept Company B as the main contractor once the acquisition is complete. A contractual provision stating as much might be included in the contract. This is possible, but unlikely.

Likely Presence of Commercially Sensitive Information in Contracts			
Not Generally	**Possible, but Unlikely**	**More Likely**	**Almost Always**
▪ Employee information ▪ Assumptions used for assessing commercial terms ▪ Costs and expenditures (operational, environmental, capital) ▪ Most payments ▪ Quality and quantity of the reserve ▪ Operation information and data (construction and development plans, manufacturing processes)	▪ References to future transactions ▪ Trade secrets	▪ Some payments (generally one-time or set payments, e.g., annual contributions to a social development fund) ▪ Work obligations ▪ Local content ▪ Employment and training	▪ Financial terms of the deal (or "contract terms" or "payment rates") ▪ Parties to the contract

B. What If There Is "Commercially Sensitive" Information in Primary Contracts? Should the Contracts Remain Confidential?

The mere presence of commercially sensitive information is not enough to prevent disclosure when it is in the public interest. For example, much commercially sensitive information is routinely required to be disclosed under securities regulations. Thus, the fact that information is "commercially sensitive" is only one consideration among many when determining whether information should be made publicly available.

FOI legislation provides a framework for considering the interests involved in disclosing state information. When a state is a party to a contract, issues of democratic accountability and governance are directly implicated, in addition to commercial interests. A presumption in favor of government transparency has been incorporated into FOI legislation in over 70 countries from all regions of the world.[48] As of June 2008, at least 78 countries had nationwide laws establishing mechanisms for the public to request and receive government-held information.[49] Many sub-national government bodies have public records laws, sunshine acts, and other variants of FOI laws.

While their effectiveness varies, FOI laws not only provide a promising tool for obtaining state-investor agreements, they also provide a basis for evaluating the role that public interest should play in judging arguments asserting the commercial sensitivity of state-investor agreements.

1. FOI principles

Unlike contract and commercial law, which assumes and allows for a high degree of secrecy among parties to a business venture, FOI laws assume the opposite: that government information should be public. While there is not an international standard governing the right of access to information held by public bodies, the principles are common:[50]

1) FOI laws presume that information should be disclosed, unless the public body provides a reason against it.[51]
2) The burden is on the government to explain why information must remain confidential. The requester does not need to demonstrate a reason for seeking the information.
3) Governments should actively publish key information even in the absence of requests.[53]
4) Some common exemptions include information pertaining to:
    a. national security and defense;
    b. internal working documents of agencies;
    c. law enforcement and public safety;
    d. fair and effective administration of justice;
    e. personal privacy; and
    f. trade and commercial secrets.[53]
5) Where categories of information that can be withheld from the public are delineated, these should be interpreted as narrowly as possible.
6) If there are portions of a document that cannot be disclosed due to one of the above exemptions, disclosure is still favored, with redactions that are as limited as possible.[54]
7) Non-disclosure should be limited to circumstances where disclosure would cause extreme harm or is not in the public interest.[55]
8) When considering whether a document or portions thereof can be disclosed, the public agency should not take into account any potential embarrassment, loss of confidence or misunderstanding that may result from such disclosure.[56]

The analysis of whether contracts or portions thereof could be kept confidential under the FOI framework would thus be:

1) Is there a relevant FOI exception that could keep this information from the public? For extractive industry contracts, the relevant exception would be "**Trade and Commercial Secrets**."[57]
2) To warrant redaction under the trade and commercial secrets exception, the information must:
    A) **not** previously have been **disclosed or in the public domain**; and
    B) must be shown to be likely to **cause substantial harm to the competitive position**[58] of the person from whom the information was obtained if disclosed.

a) Trade and Commercial Secrets Exception

The trade and commercial secrets exception is the FOI exception most relevant to contract transparency. Under FOI statutes in most countries, any information determined to be a "trade secret" is protected from disclosure, in addition to a somewhat broader category of commercial

or financial information that is deemed "confidential." In the United States, courts have tended to say that, for the purposes of FOI, "commercial or financial information" is essentially co-extensive with trade secrets, thus narrowing the type and amount of information that cannot be disclosed under US FOIA (see box on US FOIA and the Public Domain, below).

There are few circumstances in which the entire agreement would meet the standard of a trade secret or commercial information. The contract forms used in the extractive industries are widely known and often disclosed, and model contracts are available through industry websites and on government websites and databases. Thus, the issue would be whether to redact parts of the agreement.

b) "Not Previously Disclosed or in the Public Domain"

Even where contracts include protected information, the FOI principles establish a further test: whether the information has been previously released or exists in the public domain. As the IMF points out, "contract terms are likely to be widely known within the industry soon after signing."[59] In addition, US jurisprudence suggests that the "public domain" is co-extensive with "industry knowledge" (see box, below); however, this position may not have been tested in many jurisdictions.

US FOIA AND PUBLIC DOMAIN

The most relevant case under the US FOIA[60] is *Freeman v. Bureau of Land Management*.[61] The logic of the case would compel disclosure of oil and mining contracts under US FOIA; for purposes of US law, such "contracts" would be mining claims, patents and leases where the US government grants title to a company for a particular land parcel. Critical to the court's reasoning in *Freeman* was the fact that much of the information that companies generally seek to classify as confidential is actually known in the industry, and is therefore in the public domain.

The *Freeman* case involved an application for a mining permit and private title to formerly public land under the US General Mining Law of 1872.[62] In evaluating Freeman's proposal to mine iron ore, the Bureau of Land Management (BLM) commissioned a study of the proposed project and produced a detailed report outlining Freeman's business plan. When concerned environmental groups requested the BLM report through FOIA, Freeman argued that the exemptions for trade secrets and commercial and financial information applied to all substantive terms of his proposed mining operation, including the proposed process for extracting and refining iron ore, estimated capital and operating costs, the quality of ore deposits, and the estimated lifespan of mines. The court rejected his argument and ordered disclosure, holding that only information not generally known to others in the relevant industry, such as novel and previously undisclosed production processes, qualifies for exemption under FOIA. Furthermore, the court held that Freeman had failed to show how disclosure of this information, even if it were not available publicly, would be disadvantageous to him.

c) "Likely to Cause Substantial Harm" to Competitive Position

Financial terms of the deal & work obligations

Since the financial terms of many deals are known within the industry, the argument that contract transparency would cause competitive harm seems weak. Rates for significant repeating payments (such as taxes and royalties, profit oil, etc.) constitute the main terms of the deal. Most one-time or set payments (such as annual contributions to community development funds or per acre fees for land) should be treated as basic contract terms, subject to disclosure. Other less significant payments that are not generally known to the industry would likely not be so significant as to cause competitive harm if disclosed.

Work obligations are more difficult to assess. We have seen no literature evaluating the degree to which work obligations are a secret within the industry or whether there could be substantial harm to companies if they were disclosed. Based on interviews, it appears that there may be circumstances in which disclosure could cause competitive damage; for example, in frontier regions, the exploration risk is great and the terms of the market completely unknown. Even so, this particular information could be redacted in a potential disclosure.

References to future transactions & trade secrets

Two categories of information present strong arguments for redaction. Knowledge of future transactions is widely regarded as commercially sensitive information. Parties to a potential merger or acquisition use many measures to ensure that such information does not enter into the public domain, and the potential harm caused by disclosure would likely be discrete enough to meet the "actual harm" test of FOI legislation. The same is true of a trade secret, which by its very nature will not be in the public domain, since its economic value is derived from the fact that it is not widely known in the industry. Other information said to be commercially sensitive is analyzed in the box below.

Summary of FOI Analysis and Examination of Specific Terms		
Possibly in Contracts, but Unlikely	**Public Domain?**	**Substantial Harm?**
▪ References to future transactions	▪ No	▪ Yes
▪ Trade secrets	▪ No	▪ Yes
More Likely to be in Contracts		
▪ Some payments (generally one-time or set payments, e.g., annual contributions to a social development fund)	▪ Possible	▪ Unlikely
▪ Work obligations	▪ Possible	▪ Unlikely
▪ Local content	▪ Possible, but unlikely	▪ Unlikely
▪ Employment and training	▪ Possible, but unlikely	▪ Unlikely
Almost Always in Contracts		
▪ Financial terms of the deal (or "contract terms" or "payment rates")	▪ Likely	▪ Unlikely
▪ Parties to the contract	▪ Likely	▪ Unlikely

2. Contracts should be disclosed under FOI principles

Under FOI, contracts should be made public, with very limited redactions for trade secrets and references to future transactions. FOI laws are not perfect, however, and are enforced with varying efficacy in different countries (see box below). Governments often continue to resist disclosure and do not create databases of information as FOI principles require.

ECUADOR Example

Ecuador's Constitution provides a right of access to information and expressly states that "[i]nformation held in public archives shall not be classified as secret, with the exception of documents requiring such classification for the purposes of national defense or other reasons specified by law."[63] Putting this constitutional law into operation is the Organic Law on Transparency and Access to Public Information (LOTAIP), which was adopted on 18 May 2004.[64] Pursuant to LOTAIP, Ecuador has made hydrocarbon contracts publicly available via the Internet.[65]

UGANDA Example

Oil has recently been discovered in Uganda, and citizen groups have used the country's FOI law to seek access to the contracts that Uganda signed.[66] A case seeking disclosure of the contracts has been filed, but no decision has been made. In March of 2009, the Minister of Energy agreed to give parliamentarians access to the contract, but did not grant wider public access.[67] An independent expert has assessed one contract, with Tullow Oil, as a being a good deal for the country; and the company, in public statements, says it will support whatever decision the government makes.[68] Despite this, it remains unclear whether the contracts will be disclosed to the public.[69]