

# HELI-SKI U.S. ASSOCIATION, INC.

## Memorandum to Members

**From:** Joel P. Serra

**Re:** Freedom of Information Act

- I. **Overview:** The Freedom of Information Act (FOIA) is a Federal law requiring that government agencies share information in their files with the public unless that information fits into one or more exceptions to disclosure. Most heli-skiing Outfitters submit information to government agencies as part their permit and compliance processes and that information is subject to disclosure under the FOIA. However, Outfitters can take steps to protect confidential data, greatly limiting the scope of information that might be released to a third party via a FOIA request.
- I. **Law:** The Freedom of Information Act (5 U.S.C. 552) broadly requires that, in response to a request from a member of the public, Federal agencies must disclose data within their files unless it falls within an exception under the Act. Not surprisingly, the Act contains exceptions for things like national security and ongoing criminal investigations. However, the Act also contains an exception for trade secrets and other commercial data. To fall within the exception two requirements must be met: (1) the information must be “trade secret [or] commercial or financial information;” and (2) the information must also be “privileged or confidential.” (5 U.S.C. 552 (b)(4)). For purposes of the FOIA, a trade secret is “a secret, commercially valuable plan, formula, process, or device ...that can be said to be the end product of either substantial innovation or substantial effort.” *Anderson v. Department of Health and Human Services*, 907 F. 2d 936 (10<sup>th</sup> Cir. 1990)[emphasis added]. Commercial information is confidential if disclosure is likely “to cause substantial harm to the competitive position of the person from whom the information was obtained.” *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir.1974). In *Frazee v. United States Forest Service, United States Department of Agriculture*, 97 F.3d 367 (9<sup>th</sup> Cir. 1996), the 9<sup>th</sup> Circuit Court of Appeals implicitly found that a Forest Service permittee’s operating plan was a form of trade secret. The court nonetheless ruled that, with two exceptions, the content of the Frazees’ operating plan was readily available from public sources and it was therefore not “confidential” and could be released.

In addition to the exception from disclosure under FOIA, trade secret information and business confidential information belonging to private parties is protected from disclosure under the Federal Trade Secrets Act which makes it a criminal offense for any Federal employee to disclose that information.<sup>1</sup> 18 U.S.C. 1905. The Trade Secrets Act expressly precludes disclosure of

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<sup>1</sup> The criminal penalties associated with disclosure of “Trade Secrets” sometimes causes agency officials to refuse to accept materials labeled as such. While I think that refusal is wrongful, I have never had difficulty getting the same officials to accept a label of “Business Confidential/Proprietary” and that label should be enough to protect the information.

“trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation...” *Id.*

## **II. Practical Considerations – Protecting Your Confidential Information.**

1. Don't disclose needlessly. Do not gratuitously provide more information than the Federal Agency you are working with asks for.
2. Get the information back. When possible, get your confidential information back from the government. The FOIA only applies to information in the government's hands as of the date of the request.
3. Label your confidential and trade secret information as such, when you submit it to the Forest Service or other Federal Agency:

**Confidentiality Notice:** All data contained in this plan is business confidential, trade secret and/or proprietary. This Plan and all materials and information herein remain the property of \_\_\_\_\_. No portion of this document may be produced or delivered to third parties without our express written consent.

4. Treat Confidential and Trade Secret Information as such within your company. Collect all copies of your operating plan from employees at the end of a season. Keep operating information, personnel information, etc. in a locked file cabinet or in a limited access office.
5. Tell the Forest Service you want to be notified of any FOIA request. In a cover letter that accompanies any data you want to protect, tell the Forest Service that you want to be notified of any FOIA request that might be interpreted to include any data or materials that you are submitting. Though Federal Agencies are supposed to notify the owners of data falling within the scope of a FOIA request prior to releasing the information, the cover letter can help to assure you are consulted early in the process.
6. Fight the FOIA request – but act quickly! As the owner of confidential or trade secret information that is in the hands of an Agency you have the right to identify information you believe is exempt from disclosure. However, you must act quickly! From the date of receipt, the Agency has only twenty (20) days (excluding weekends and holidays) to respond to a FOIA request. When the Agency notifies you that it has received a FOIA request, establish a deadline for your response to the Agency. Confirm the date in an email or letter and don't expect any extensions.
7. Be thorough! Go through the document, section by section and tell them why the information is proprietary to your company. Use phrases like... “this process is proprietary to our company and provides us with a competitive advantage” and “this data [plan, program, process, etc] is unique to our company, has been developed by us at considerable expense and disclosure of it to a third party will cause competitive harm to our business” or “profiles of our employees in this section are personnel information, the disclosure of which would be an unwarranted invasion of personal privacy.”