

Keith Paul Bishop

October 6, 2015

Via Email (rule-comments@sec.gov)

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE,
Washington, DC 20549-1090

Re: File No. File No. S7-19-15

Dear Mr. Fields:

I am writing to comment on the Securities and Exchange Commission's ("Commission") proposal to amend its Rules of Practice to require persons involved in administrative proceedings to submit all documents and other items electronically ("Proposed Rules").

1. Background.

I am an attorney in private practice in Irvine, California. I am writing in my individual capacity and not on behalf of my law firm or any of my law firm's clients.

I previously served as California's Commissioner of Corporations and in that capacity administered and enforced California's securities laws. I have taught as an adjunct professor at the University of California, Irvine and Chapman School of Law. I have also served as Co-Chairman of the Corporations Committee of the Business Law Section of the California State Bar and Chairman of the Business and Corporate Law Section of the Orange County (California) Bar Association. As indicated above, this letter is written in my individual capacity and not on behalf of either of these groups.

2. The Privacy Act prohibits disclosure of home addresses by the Commission.

Under the Proposed Rules, a party to an administrative proceeding would be required to omit sensitive personal information from electronic filings and submissions. However, the Commission is not proposing to require a party to remove home addresses. Ostensibly, the Commission is requiring this in order to fulfill its obligations under the Privacy Act of 1974, 5 U.S.C. § 552a (“**Privacy Act**”). Thus, the Proposed Rules implicitly assume that disclosure of home addresses is permitted under the Privacy Act. Section 552a provides:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be— . . . (2) required under section 552 of this title [Freedom of Information Act (“**FOIA**”)].

Exemption 6 of the FOIA provides that an agency need not disclose “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). In *Dept. of Defense v. FLRA*, 510 U.S. 487 (1994), the U.S. Supreme Court held that addresses are “records” and that disclosure of addresses would be a clearly unwarranted invasion of federal employees' privacy. In reaching this conclusion, the Court weighed the interest under FOIA against the privacy interests of the employees. The Court found the interest under FOIA to be scant, because home addresses shed no light on what the government was up to. See *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989). While acknowledging that often home addresses are often publicly available, the Court found that an “individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.” *Dept. of Defense*, 510 U.S. at 500.

Disclosure of home addresses furthers no FOIA interest while individuals have a significant interest in maintaining the privacy of their home addresses. Therefore, the Privacy Act bars the Commission from disclosing home addresses.

3. The Commission may not avoid its obligations under the Privacy Act.

In proposing to require parties to omit sensitive personal information, the Commission is transparently attempting to devolve its Privacy Act responsibilities on private parties. As noted in the Commission’s economic analysis, it currently undertakes responsibility for removal of protected information from information filed in hard copy form. Thus, the Commission apparently believes that if it adopts the Proposed Rules, it will be able to shift these costs to private parties who generally have no choice but to participate in proceedings instituted by the Commission.

Whether or not the Commission requires parties to delete protected information from electronic filings, it remains responsible for not disclosing information in violation of the Privacy Act. Thus, should a party fail to omit information prohibited from disclosure, the Commission could be subject to civil liability under the Privacy Act, including damages, reasonable attorneys' fees and other costs. 5 U.S.C. § 552a(g). In addition, an officer or employee of the Commission may be fined up to \$5,000 for knowingly and willfully disclosing individually identifiable information that is prohibited from such disclosure by the Privacy Act or by agency regulations. 5 U.S.C. § 552a(i). The Commission's economic analysis fails to consider these potential costs.

4. The Privacy Act prohibits disclosure of all medical information.

The Proposed Rules would permit parties to omit "sensitive health information" identifiable by individual. As discussed above, FOIA Exemption 6 specifically and explicitly exempts from agency disclosure "medical information". Exemption 6 by its terms is not limited to medical information that is "sensitive". The Commission, moreover, fails to define "sensitive health information" or provide any standards for parties to determine whether medical information constitutes "sensitive health information". Because disclosure of medical files (whether sensitive or not) would not advance FOIA's objective of permitting public scrutiny of agency action, the Commission is required by the Privacy Act to withhold medical information, not simply "sensitive health information".

5. The Proposed Rules are tautological.

The Proposed Rules would require that sensitive personal information be "redacted or omitted". It is not clear what the Commission intends by requiring redaction or how redaction would differ from omission of sensitive personal information. The Commission should avoid the ambiguity of pleonasm in amending its rules.

Very Truly Yours,

/s/ Keith Paul Bishop