

The below text was excerpted from

“Homeland Security Law Contains New Exemption 3 Statute”

<http://www.usdoj.gov/oip/foiapost/2003foiapost4.htm>

and

**Homeland Security Act of 2002, Public Law 107-296
Provisions of Interest to Corporations and Government Contractors**

www.acca.com/infopaks/homeland/securityactchart.pdf

The law passed by Congress to establish the new Department of Homeland Security (DHS) -- the Homeland Security Act of 2002, Public Law 107-296 -- includes a provision that will operate as a new “Exemption 3 statute” under the Freedom of Information Act, 5 U.S.C. § 552(b)(3) (2000), for “critical infrastructure” information that is obtained by that new federal department.

Subtitle B of the Homeland Security Act, entitled “Critical Infrastructure Information,” consists of a group of provisions that address the circumstances under which the federal government obtains and maintains such information. Section 214 of the Act, which is entitled “Protection of Voluntarily Shared Critical Infrastructure Information,” contains the new Exemption 3 statute. It states as follows:

“Notwithstanding any other provision of law, critical infrastructure information (including the identity of the submitting person or entity) that is voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose, when accompanied by an express statement [as specified below]

(A) shall be exempt from disclosure under section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act)[.]”

Pub. L. No. 107-296, 116 Stat. 2135, § 214(a)(1)(A) (to be codified at 6 U.S.C. § 133(a)(1)(A)).

In connection with this provision, the new law includes an extensive definition of the term “critical infrastructure information,” see *id.* at § 212(3)(A)-(C), and it specifies the types of “express statements” by information submitters that are required to trigger the provision, see *id.* at § 214(a)(2)(A)-(B), which are not unlike the marking requirements for the submission of business information that are set forth in Executive Order 12,600 in conjunction with Exemption 4. See [FOIA Update, Vol. VIII, No. 2](#), at 2-3. Section 212

of the Act also specifies that “[t]he term 'covered Federal agency' means the Department of Homeland Security.” Pub. L. No. 107-296, 116 Stat. 2135, § 212(2); see also id. at § 214(c) (adding that the provision does not apply to “independently obtained information”).

Thus, this Exemption 3 statute provides new protection under the FOIA for information pertaining to the nation's critical infrastructure that is voluntarily submitted to the new Department of Homeland Security.

SUMMARY

The Homeland Security Act of 2002, Public Law 107-296 Subtitle B—Critical Infrastructure Information Act of 2002

Sec. 214(a)(1) Critical infrastructure information that is voluntarily submitted to the DHS, when accompanied by an “express statement” of restriction, shall:

- be exempt from disclosure under FOIA;
- not be subject to rules on ex parte communications with a decision making official;
- not, without the consent of the submitting party, be used by the Dept, by any other federal, state, or local government, or by any third party in any civil action arising under federal or state law if such info is submitted in good faith
- not, without the consent of the submitting party, be used or disclosed by any officer or employee of the U.S. for purposes other than the purposes of this subtitle
- not be made available pursuant to any State or local law requiring disclosure of information or records (or be disclosed or used by State and local entities without consent)
- not constitute a waiver of any applicable privilege or protection provided under law, including trade secret protection

Sec. 214(a)(2) The express statement shall be substantially similar to the following: “This information is voluntarily submitted to the Federal Government in expectation of protection from disclosure as provided by the provisions of the Critical Infrastructure Information Act of 2002.”