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Protecting Sensitive Data During Congressional Inquiries

By **Michael Atkinson, Sharmistha Das and David Favre** (February 6, 2026, 5:07 PM EST)


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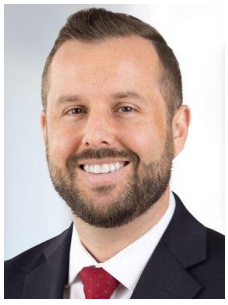
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Congress operates under its own rules, and the available methods to safeguard sensitive information in congressional inquiries can differ significantly from other contexts.

Recent congressional areas of focus have included universities, artificial intelligence and other technology companies, healthcare organizations, energy-sector entities and other organizations doing business with the government.

Although specific focus areas will vary depending on committees, leadership priorities, and party control of the U.S. Senate and U.S. House of Representatives, private entities will continue to encounter congressional interactions ranging from informal inquiries to official hearing notifications and subpoenas.

Congressional staff, members and committees are undoubtedly planning with an eye to the 2026 midterm elections in November, and we will see the signs in their investigations.

Looking ahead, a flip in control of either or both chambers would likely lead to increased oversight of the private sector aligned with the current minority's priorities, which would then have the more robust investigative tools of the majority. Importantly, though, interest in many of the sectors referenced above has been bipartisan.

This heightened attention from Congress brings about an increased risk of public disclosure of sensitive information for private entities.

Whether the inquiry is directly issued from a congressional committee to a private entity or via a federal agency in possession of private information, both scenarios present significant risks to sensitive information — e.g., privileged data, competitively sensitive material, unsubstantiated allegations and other nonpublic details.

Congressional committees typically assert that the common-law privileges protecting these categories from disclosure in other enforcement contexts do not prevent disclosure in response to a congressional inquiry, making it susceptible to disclosure in press releases, hearing questions or public reports unless the congressional recipient is persuaded otherwise.

Although there are no surefire methods to guarantee protection of sensitive information during congressional investigations, entities can adopt strategic, effective and practical measures to mitigate potential risks.

Understanding the Landscape: Congressional Authority for Oversight and Investigations

Congress' power to conduct investigations is broad and "inherent in the legislative process," as articulated by the U.S. Supreme Court in its 1957 decision in Watkins v. U.S.[1] The authority to conduct investigations depends on who in Congress is requesting the information.

The majority party, which holds political control of the Senate or House, appoints the chairperson of each committee, while the minority appoints ranking members. Each role is governed by the rules of the respective chamber and its committees, which are adopted afresh by each new Congress.[2]

Chairpeople possess wide-ranging powers to guide official committee actions, such as issuing subpoenas. Conversely, ranking members and individual members do not have the authority to, for example, issue subpoenas or notice hearings, but they can seek voluntary cooperation and publicize their areas of focus and findings.[3]

Notably, if the political control of either chamber changes, these members might exercise new majority powers to pursue their policy priorities, changing the landscape significantly.

Historically, Congress has recognized properly asserted constitutional privileges, such as those stemming from the First and Fifth Amendments. Due to its legislative function, however, Congress does not consistently recognize common-law privileges such as the attorney-client privilege, the work-product doctrine and common-interest agreements.

Instead, each congressional committee establishes its own subpoena compliance protocols and determines which, if any, common-law privileges they will recognize.

Although the Supreme Court has not definitively ruled on the extent to which Congress must honor common-law privileges, in 2020's Trump v. Mazars USA LLP, Chief Justice John Roberts observed in dicta that those subpoenaed by Congress "have long been understood to retain common-law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege."[4]

Despite this traditional understanding, congressional committees often assert their authority to override common-law objections. For instance, the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol issued a subpoena to Chapman University for emails from its employee, attorney John Eastman.

In 2022, Eastman sued to stop Chapman from complying with the subpoena, in part on grounds of common-law privilege.[5] In Eastman v. Thompson, in the U.S. District Court for the Central District of California, the committee preserved the argument in its brief that it had the discretion to determine the applicability of such privileges in other proceedings, but declined to pursue that specific argument in Eastman's case.

In Bragg v. Jordan, the U.S. District Court for the Southern District of New York in 2023 denied a motion

for a temporary restraining order to enjoin a congressional subpoena.[6] The plaintiff, Manhattan District Attorney Alvin Bragg, raised concerns that the issuing committee's rules allowed for overruling privilege objections.

The court, however, declined to preemptively address this issue, emphasizing that there are judicial review avenues if such situations arise in the future.[7]

These cases emphasize the need for careful evaluation of potential privilege assertions, recognizing Congress' stance, the process involved and the limited case law in this area.

Congressional committees typically operate under tight deadlines, and congressional inquiries to organizations can draw significant public attention. The stakes on all sides offer opportunities to negotiate mutually agreeable resolutions.

Scenario 1: When a Private Entity Receives a Congressional Inquiry

An inquiry letter or subpoena is the most direct way through which a private entity may become involved in a congressional inquiry.

Before an Inquiry

Proactive steps before such an inquiry can strengthen claims for protecting sensitive information, including the following key best practices:

- Regularly evaluate the entity's potential exposure to congressional inquiries, taking into account industry regulations and past trends in legislative interest.
- Encourage careful communication among employees. For instance, in-house counsel should use specific headings to mark documents and communications with "attorney-client privilege" or "attorney work product," where applicable.
- Ensure that proprietary or confidential business information is clearly marked and consistently treated as nonpublic. Limit access to this information, especially for outsiders.
- When engaging third-party consultants, such as forensic accountants or digital forensic experts, counsel should retain and direct them to strengthen any applicable privilege claims.

After Receiving an Inquiry

Following receipt of a congressional inquiry, it's essential to utilize established protections and engage in strategic negotiations with the committee or relevant members. Crafting a response to a congressional inquiry is an art rather than a science.

A clear understanding of the requestor's objectives and the entity's obligations, and a well-designed response strategy, can lead to solutions that work better for both private entities and congressional staff.

Some approaches to protecting sensitive information after receiving a congressional inquiry include the following:

- Reduce document categories: Identify opportunities to be responsive to the request with narrower categories and breadth of documents to expedite compliance, protect sensitive information and reduce review burden on staffers.

- Articulate the sensitivity of information: In communications with congressional staff, clearly articulate any concerns relating to the sensitivity of information, as the owner of the information is the expert on it and staff may be open to alternative solutions.

- Redact sensitive information: Where necessary, utilize conspicuous redactions to protect sensitive data while ensuring responsiveness to the requests.

- Anonymize or aggregate data: Present data in a form that prevents identification of individuals or specific transactions.

- Nondisclosure agreements: If appropriate to the sensitivity of the data, consider requesting an NDA, though remain cautious about continuing risks that could undermine confidentiality.

- In-camera review: Propose limiting viewing to the group that needs access to the information to accomplish their legislative purpose to underscore the sensitivity of the information.

- Propose a Q&A: Suggest substituting written questions and answers for lengthy document requests, simplifying the process for both the private entity and congressional staff.

- Offer interviews: Consider whether providing information in interviews, which can be transcribed or informal, would more efficiently provide information while managing scope and focus.

- Prior review of public materials: Request the opportunity to review any draft public materials the member or committee may wish to issue to ensure the accuracy and security of the information produced.

Of course, which, if any, of these approaches will be appropriate to a particular situation will vary by requestor and inquiry

Scenario 2: When a Federal Agency Receives a Congressional Inquiry

Given Congress' role in oversight, federal agencies are frequently subject to congressional inquiries that may involve information provided by private entities. Any entity that has submitted information to an agency runs the risk of that information being disclosed by the agency during a congressional inquiry, even if it was originally understood that the information would be protected.

This includes, for example, a private entity's responses to requests for information from agencies, such as administrative subpoenas. Just as a private entity would, agencies conduct their own analyses of congressional inquiries, determining responsive information and crafting a response strategy.

This scenario presents significant risks, especially for government contractors that routinely interact with agencies and share procurement data and other competitively sensitive information during contract performance. Challenges and risk mitigation strategies for this scenario include the following:

- The primary challenge is identifying when an inquiry to an agency might involve a private entity's sensitive information. Detection is often difficult because many congressional inquiries to agencies are not public and private entities might not receive notice, necessitating vigilance concerning Congress' priorities and public comments.

- Regularly monitor congressional priorities and relevant public statements to anticipate potential inquiries that could call for publication of sensitive information. While some inquiries may still go unnoticed, maintaining a proactive approach can mitigate risks and promote readiness to respond, should an opportunity to weigh in arise.

- Cultivate strong communication channels with federal agencies to enhance transparency regarding information shared, and its potential exposure to congressional scrutiny.

- Establish robust protocols for sharing information with government agencies that account for the potential risk of congressional scrutiny, emphasizing protection and clarity about confidentiality expectations.

Here, too, the rules are different when it comes to the Hill. Despite established protections like Freedom of Information Act exemptions, which normally prevent agencies from publicly disclosing trade secrets or other confidential information, these do not prevent disclosure in response to congressional inquiries.[8]

Other laws feature similar exclusions for congressional access.[9] But the Office of Legal Counsel at the U.S. Department of Justice views accommodation of these requests by the executive branch as necessary "only when those requests come from a committee, subcommittee, or chairman acting pursuant to oversight authority delegated from a House of Congress."[10]

There may also be agency-specific restrictions on categories of disclosed information or notification requirements.

As with the previous scenario, entities can take proactive measures to strengthen protections over sensitive information, including the following:

- Clearly designate proprietary and sensitive information in agency submissions to leverage FOIA exemptions, in order to signal the intent to protect specific information to the agency and the eventual requestor, even if they are congressional, as it could weigh in how they treat the information.

- Where available, familiarize yourself with agency-specific rules regarding information disclosure and those that apply to congressional inquiries.

- Include language in submissions stipulating that the entity should be notified prior to any external disclosure — a reverse-FOIA-like notice — to bolster your protective measures further. Although agencies may not be obliged to follow these requests, asserting them alongside other protective efforts can be advantageous in, for example, defending arguments that a particular privilege was waived, or preserving trade secret protections.

Following a congressional inquiry directed at a federal agency, entities often face significant challenges in preventing the disclosure of sensitive information. A 1978 case from the U.S. Court of Appeals for the

District of Columbia Circuit, Exxon Corp. v. Federal Trade Commission, continues to influence how courts approach congressional inquiries into agency-held information.[11]

The D.C. Circuit rejected Exxon's attempt to stop the FTC from disclosing trade secrets to Congress, trusting "that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties."[12] The court emphasized the "strong and long-standing principle of judicial abstention into the actions of the legislature."[13]

Given this backdrop, proactive measures and negotiations become essential to effectively manage risks associated with congressional inquiries.

Conclusion

In sum, congressional inquiries should not be managed like typical enforcement or agency inquiries. The stakes can be considerably higher, primarily due to the intensified risk of public disclosure of sensitive information.

This risk compounds existing reputational, financial and legal challenges inherent in congressional investigations. That said, there are also significant opportunities to work cooperatively with congressional staff to help them fulfill their legislative purposes while protecting sensitive information.

Although congressional investigations present nuanced challenges, adhering to best practices in responding to congressional inquiries can help mitigate the risks of disclosing sensitive data, protecting the entity's interests while navigating the complexities involved.

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Crowell & Moring counsel Jeffrey Severson contributed to this article.

[1] Watkins v. U.S., 354 U.S. 178, at 187 (1957). Those investigations must "be within the committee's jurisdiction as defined in House or Senate rule, and serve a valid legislative purpose," which include programmatic, political and institutional purposes. Garvey, Todd, Oleszek, Mark J., Wilhelm, Ben, CRS, Congressional Oversight and Investigations (Dec. 3, 2024), available at https://www.congress.gov/crs-product/IF10015.

[2] Id.

[3] Id.

[4] Trump v. Mazars USA LLP, 591 U.S. 848, at 863 (2020).

[5] Eastman v. Thompson, 594 F. Supp. 3d 1156, at 1174-75 (C.D. Cal. 2022).

[6] Bragg v. Jordan, 669 F. Supp. 3d 257 (S.D.N.Y. 2023), appeal dismissed sub nom. Bragg v. Pomerantz, No. 23-615, 2023 WL 4612976 (2d Cir. Apr. 24, 2023).

[7] Id. at 274.

[8] The statute specifies that FOIA exemptions do not provide agencies with the authority to withhold information from Congress. 5 U.S.C. § 552(d).

[9] See, e.g., National Archives and Records Administration, 44 U.S.C. § 2205(2)(C).

[10] Requests by Individual Members of Congress for Executive Branch Information, 43 Op. O.L.C. 42 (2019), available at https://www.justice.gov/olc/file/1356251/dl?inline=.

[11] Exxon Corp. v. FTC, 589 F.2d 582 (D.C. Cir. 1978).

[12] Id. at 589.

[13] Id. at 590.