

## *Democracy Dies Behind Closed Doors*

by Rena Steinzor

For most Americans, the squabbling in Washington over the new Department of Homeland Security probably seemed like little more than an insider exercise in rearranging bureaucrats, with a battle over labor issues thrown in for seasoning. In fact, much more was at work, including a disturbing provision in the new law that throws a veil of government secrecy over corporate wrongdoing wholly unrelated to matters of national security.

The provision allows any corporation in charge of “critical infrastructure information” to stamp embarrassing documents “confidential,” then voluntarily turn them over to the government and win immunity both from enforcement actions by federal officials, and from civil suits brought by parties harmed by their actions. Critical infrastructure is defined in the law as virtually any piece of equipment that terrorists could attack – from computer systems that run power plants or generate schemes to dodge tax laws, to assembly lines that manufacture dangerous chemicals, cars, or other consumer products. Not only will the federal government be barred from disclosing this information, any federal employee who made the mistake of releasing it would face a year in jail and hefty fines. Leaving no secrecy stone unturned, the law even preempts state and local “open government” laws.

Consider the following scenarios. Worried about public exposure of an Enron-type scheme to establish dubious investment accounts, a corporation tells the new Department of Homeland Security that its entire computer system is vulnerable to attack over the Internet, and turns in details of how its software operates. Unless an agency had already subpoenaed the information, the corporation could then use the new critical infrastructure law to block any further scrutiny, not just within the government agency, but also in any federal or state civil court. In a face-saving gesture, authors of the law specified that criminal conduct coming to light as a result of the voluntary submissions could still be punished, but employees cheated by the company’s squandering of their pension funds would be out-of-luck.

The law invites companies to assess the risks of their industrial practices, submit “risk management” audits to the government, and achieve immunity, as a practical matter, from any further repercussions. Companies in blatant violation of environmental, worker safety, or civil rights laws could hide evidence of their wrong-doing in this manner. Even if some bureaucrat mustered the courage to challenge such scams, risking criminal charges for disclosing “secrets” to “terrorists,” at the very least court battles over the implications of the new law could drag on for years, making efforts to hold companies accountable prohibitively expensive.

Under the new law, information designated as confidential by companies, without any review by objective third parties, would receive more protection than information that is “classified” under existing law. To achieve protection as classified information, material must first be reviewed by government experts and deemed to qualify for protection. But the Homeland Security law protects company-generated information without any objective review by anyone in the government.

Americans are learning to live with the dread unleashed by September 11. No one wants

to risk the possibility that by posting information on the Internet we provide a road map to terrorists. But even if Osama Bin Laden and his ilk are alive and well in some subterranean bunker, conspiring to use the openness of our society to harm us, it is hard to imagine their weapon of choice would be a Freedom of Information Act request for disclosure of information stamped confidential by corporations embarrassed by its content. Indeed, the attacks of September 11 were based on information gathered by a visit anyone could have made to the Boston airport.

A wise federal judge named Damon Keith recently reminded us that “democracy dies behind closed doors.” Watergate and other government scandals taught us this lesson all too well, triggering enactment of federal, state, and local open government laws. We have lived with these laws so long that we take them for granted. It would be the cruelest of ironies if legislation designed to protect our democratic way of life turned the clock back to an era where both the government and private industry were not accountable for their mistakes and misdeeds.

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