

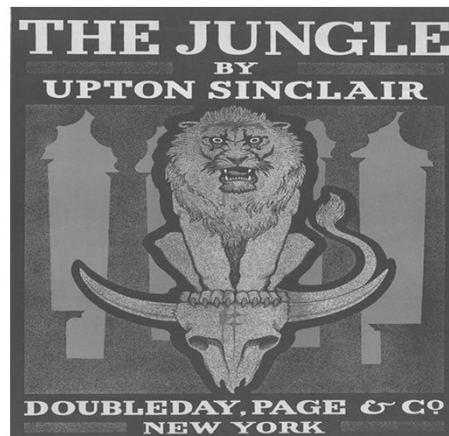
# Interacting with the Enforcer

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## REGULATION



Maybe it's not so bad.

## **Topics to cover:**

- **Pre-investigation considerations**
- **Pre-complaint discovery (the investigative demand process)**
- **Confidentiality concerns**

**You may encounter the Attorney General's Office in a variety of ways in an antitrust investigation.**

- **Target**
- **Witness/information source**
- **Complainant**

## **Your Goals:**

**Protect your organization, to the extent possible, from:**

- **Expense/burden**
- **Exposure to liability**
- **Unnecessary disclosure of confidential materials/trade secrets**

## **PRE-INVESTIGATION CONSIDERATIONS**

**Help Yourself.**

**Leniency for self-disclosure –  
It's not just for the feds.**

**U.S. DOJ's Antitrust Division has had some form of leniency program in place since 1978.**



**Businesses or individuals who are the first to confess federal antitrust violations can secure protection from criminal convictions, incarceration and criminal fines.**

**In December of 2013, Ohio Attorney General Mike DeWine adopted the “Leniency Policy for Self-Reported Business and Charity Violations”**

**Applies to antitrust, *as well as* consumer protection and charitable law violations.**

## **Leniency (antitrust)=**

- **No criminal prosecution**
- **No referral to outside agencies for criminal prosecution**
- **No civil suit by AG for damages, penalties or other remedies unless agreement breached**
- **No AG action to revoke charter or debar**

**Leniency may be granted if the reporting business satisfies certain criteria, including...**

## **Disclosing business is either:**

- **First to report wrongdoing of which the AG was unaware, *or***
- **First to come forward to report wrongdoing of which the AG *is* aware, but for which the AG did not previously have evidence to sustain conviction or finding of liability.**

**Disclosing business must have stopped promptly and disclosed candidly.**



**Disclosing business *must* cooperate with any ongoing investigation.**

**Whenever possible, disclosing business must make restitution to injured parties.**



**Leniency Policy can be found at:**

[https://www.ohioattorneygeneral.gov/Files/Business-and-nonprofits/Business/LeniencyPolicy\\_2019.aspx](https://www.ohioattorneygeneral.gov/Files/Business-and-nonprofits/Business/LeniencyPolicy_2019.aspx)

**The Business Review Program permits parties contemplating a transaction or other business conduct to request a business review letter.**

**The Attorney General may not, by statute, give advisory opinions to private parties.**

## **Business Review Program Requirements:**

- **Request must be in writing;**
- **Must describe actual proposed conduct (no hypotheticals);**
- **Requesting party must make full and true factual disclosures.**

**Business review letter will state the Attorney General's *present enforcement intentions* with respect to the proposed transaction or conduct.**

## **Best Practice**

**Discuss with your counsel the benefits of engaging with the Attorney General's Antitrust staff early when potential violations are discovered (Leniency Policy) or when mergers or similar transactions are contemplated (Business Review Program).**

## **Pre-complaint Discovery: The Investigative Demand**

### **R.C. 1331.16**

**Authorizes the Attorney General to issue investigative demands to “any person” that may have materials or knowledge relevant to an investigation of possible violations of the Valentine Act (Ohio’s equivalent to the Federal Sherman Act).**

**Your have received an Investigative  
Demand...  
Now what?**

**Remember...**

**Recipients of IDs are not necessarily  
targets.**

## **1. Identify potential trouble spots and questions.**

- **Substantive**
- **Procedure/formatting**

## **2. Communicate early and often.**

- **If our document requests, interrogatories, or instructions are unclear ... ask!**
- **If additional time is needed to get it right ... ask!**

### **3. Suggest/remain open to alternative approaches to the production process.**

- **Pre-production interviews with business and IT personnel**
- **Document “seed sets”**
- **Production as an iterative process – talk to us about priorities**

### **4. Treat the ID process like a modified Rule 26F conference**

- **Stop and think about where the information lives before you start gathering**
- **Consider putting your “techies” in touch with our “techies” early in the process**
- **But, don’t forget the paper!**



# **CONFIDENTIALITY ISSUES**

**Antitrust investigations typically involve competitively-sensitive business information and documents.**



**Crucial Question:**

**Are documents and information protected from disclosure when in the hands of the Attorney General's Office in the context of an antitrust investigation?**

**Unsatisfying (but accurate) answer:  
Maybe.**

**R.C. 1331.16(L) protects ID responses (materials and information) from disclosure EXCEPT:**

- By court order
- With consent of producing party
- In a grand jury proceeding
- After notice to producing party, AG may use in “official proceeding” involving alleged Valentine Act violation

**What about information provided to the Attorney General in an antitrust investigation *without* an ID?**

**Information provided verbally in an interview or similar communication can be kept confidential.**

**Voluntary document productions to the AGO in antitrust investigations may qualify for an exemption from public records disclosure. (See R.C. 149.43(A)(1))  
Examples: trade secrets, medical records, intellectual property records.**

**Best Practice:**

**Contact the Attorney General's Antitrust Section before making a voluntary production of white papers, documents or other materials it considers sensitive.**

**Question:**

**If I produce documents in a multistate or joint state/federal antitrust investigation, will those documents be shared among the enforcers?**

**Answer: They can be.**

**Ohio generally cannot *share* your client's documents with other antitrust enforcers without consent, but many states have sharing provisions that allow us to *receive* productions made to those states with no consent required.**

**If Ohio receives materials from other jurisdictions whose statutes make those materials confidential, the materials are likely exempt from public records disclosure in Ohio. (R.C. 149.43(A)(1)(v))**

**Question:**

**How can I keep an antitrust settlement with the Attorney General's Office confidential?**

**CONFIDENTIAL**

**Answer: No.**

**Ohio's public records law contains no exemption for settlement agreements.**

**Attorney General Yost's policy (and the policy of each of his predecessors over the past 20+ years) is that this Office will not negotiate settlement terms that restrict what we will or will not say to the public or press.**

**Question:**

**Can I withhold materials responsive to an Attorney General ID request that are HIPAA-protected?**





**Answer: Not Generally**

**45 C.F.R. §164.512(f)(1)(ii)(C):**

**Protected health information may be disclosed to law enforcement officials for law enforcement purposes if...**

**\*The information is relevant and material to legitimate law enforcement inquiry;**

**\*The information is specific and limited in scope to the extent practicable;**

**\*De-identified information cannot be used.**

**Best Practice:**

**Call us whenever responsive documents are or may be HIPAA protected. We may be able to find a middle ground.**

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**Practical Considerations:**

- 1. The protected parts of the responsive document generally are not the parts of interest to us.**
- 2. It is easier for our Office *not* to get HIPAA-protected information in the first place.**
- 3. We will work with you to try to find an appropriate means to address your client's concerns.**

**We can't work with you if you don't call.**

## **Consumer Protection Matters**

- **The Ohio Consumer Sales Practices Act**
- **The Ohio Telephone Solicitation Sales Act & Federal Telephone Consumer Protection Act**
- **The Fair Debt Collection Practices Act**

## **Data Breach Investigations**

**Failure to secure and protect key personal information belonging to customers, patients, or affiliates.**

**Failure to notify impacted persons of breach.**

**Failure to mitigate harm.**

**The Ohio Data Protection Act**  
Amended Sections 1354.01, 1354.02,  
1354.03, 1354.04, and 1354.05 of the  
Revised Code to provide a legal safe  
harbor to covered entities that implement  
a specified cybersecurity program.

## **QUESTIONS?**

**Call Attorney General Yost's Antitrust  
Section at 614-466-4328, the Consumer  
Protection Section at 800-282-0515, or  
visit [www.ohioattorneygeneral.gov](http://www.ohioattorneygeneral.gov)**



## How to contact us

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