

Comments of the Center for Economic Justice

SERFF Public Access Enhancement to Indicate Whether Documents Have Been Withheld from Public Disclosure

October 15, 2015

CEJ submits the following comments in response to comments submitted on the SERFF Filing Access (SFA) proposal consumer advocates submitted in 2014 and which is before the Speed to Market Task Force.

Currently, a filing downloaded via SFA contains the public information and only the public information available in the filing. However the SFA document does not indicate whether the filing contained additional documents that were withheld from public disclosure. The SFA proposal is to list – but not include or make public – the documents withheld from public disclosure so a public information requester can see if any parts of the filing have been withheld from public disclosure.

There are several key points to the consumer proposal:

1. Does not make any confidential information public
 - a. Allows member of the public to learn what documents, if any, have not been included in the SFA file because the withheld information is not public information.
2. Better fulfills the SFA function for state insurance departments
 - a. Purpose of SFA was to relieve state regulators of manually responding to public information requests for filings or otherwise reduce regulatory resources devoted to such public information requests.
 - b. Additional functionality addresses a problem with current implementation:
 - i. In every state, agency receiving a public information request must provide the requested information or, if such information is withheld, provide the reason for withholding the information.
 - ii. Current implementation of SFA fails to alert a public information requester that information has been withheld.
 - iii. Enhancement will address this omission and make SFA more compliant with state public record requirements.

As a preliminary matter, we object to the Task Force's further delay by pursuing a survey of states to ask if states will use the new functionality. It is unreasonable to ask states about their preference for such functionality addressing a problem with SFA, when none of the states utilizing SFA even identified the problem. The problem with SFA was identified by consumer advocates and brought to regulators' attention. It is unlikely that a simple survey will adequately convey the issues to the states surveyed.

Further, the proposed SFA enhancement is essential for SFA to become more compliant with state public information requirements. Asking a state whether they will use the SFA enhancement is analogous to asking a state if it will follow public information law and disclose to public information requesters that requested information has been withheld.

Two industry trades have submitted comments – AIA and PCI. It is useful to put the AIA and PCI comments in historical context. These industry trades and other industry trades fought for years to prevent implementation of SFA. The record shows that industry trades have routinely argued against improved public access to public information for not substantive reason other than to make it more difficult for the public to access public information, as well as to shrink the information available to the public. In essence, the trades are asking regulators to assist industry in circumventing public information laws, which are the most important tool consumers have for holding insurers accountable for their practices.

The AIA wants “re-platforming” to be prioritized over SFA enhancement because AIA claims the SFA enhancement would not have measurable effect on speed to market.

SERFF staff has indicated that the proposed enhancement could probably be accomplished by Q2 2016 “if there are no major changes in SERFF project priorities.” To the extent re-platforming is on the SERFF to do list, the AIA comment is irrelevant.

The PCI comments are straw-man arguments based on a mischaracterization of the SFA enhancement proposal. PCI first argues that public information laws “balance several public policies, not just transparency.” These musings are irrelevant to the issue at hand. The proposal does not nothing – nada – zilch – to change any state's public information law or change whether any document is or not subject to public disclosure. The proposal simply provides an electronic response to public information more faithful to state public information laws.

PCI claims it has “raised some critically important concerns.” Yet, it has raised no such concerns. PCI’s alleged concerns are non-sequiturs. Here are the questions PCI has raised:

To begin with the latter, each state’s law should be considered and they are not all alike.

PCI has not shown that disclosing to a public information requester that certain documents have been withheld would violate any state public information law – because no such prohibition exists. This is a cynical red herring argument.

What terminology will a state use to categorize the document?

This is another non-issue. When insurers make a filing and request certain documents be withheld from disclosure, the insurers indicate the reason for the disclosure – it is not a decision made by the state.

If certain specific parts of the filing are exempt from disclosure by statute, then the category of document is obvious and conforms to the state requirement.

Will the state notify the insurer and will the insurer have a chance to question the categorization?

Yet, another non-issue. There is no difference between what the state does now and what it would do under the SFA enhancement. If a member of the public requests a copy of a filing and portions are withheld, the state must provide the reason for withholding the document from public disclosure. The same process would apply under the SFA, but, as ISO has pointed out in its comments, the SFA enhancements would better protect insurers from mistaken disclosure.

What if a document’s categorization as not subject to disclosure is challenged by a third party?

Again, this is no different than the current situation. PCI is effectively arguing that states should not disclose whether certain information has been withheld so a member of the public would not know to question whether the withholding was proper.

This is wrong-headed to be sure, but imagine the insurer response if they were seeking information from the government and the government withheld documents but did not let the insurers know the documents existed.

How will that be reviewed by the state? Will the insurance company be notified and have an opportunity to protect its document?

Again, this is a non-issue because the response by the state will be the same as it currently exists. Today, if I download a file from SERFF (or request a paper copy of the filing) and then e-mail the insurance department to ask if any documents have been withheld from public disclosure, the department must state whether any such documents have been withheld and why. If I then challenge the withholding of the document, each state has procedures in place to respond to that challenge, including notification of the affected insurer. There will be no difference with the SFA enhancement

PCI then launches into the horrors of inappropriate disclosure of intellectual property. Putting aside the “Martians have abducted me” nature of the PCI argument, the horrors raised by PCI are simply not relevant to the proposal before the S2M TF. These alleged horrors would be a result of either an error by the insurer or an error by the department. The SFA would not create additional potential for such errors; rather, the proposed enhancement would reduce the likelihood of such errors.

In summary, the PCI arguments are ill-informed and meritless. They are precisely the same type of unconscionable arguments used to delay SFA in the first place and should be rejected. In fact, PCI’s blind commitment to reducing transparency by objecting to the SFA enhancement fails to recognize that the SFA enhancement actually reduces the likelihood of the great harms they profess to fear.

The Insurance Services Office submitted comments. It is useful to note that the draft minutes of the August 2015 S2M TF meeting state:

Mary Van Sise (Insurance Services Office—ISO) said the current process for public access in SERFF was error-prone because it sometimes relies on manual button-checking in order to mark documents. However, she thinks this enhancement will be a big improvement.

ISO’s comment letter is directed principally at an issue not before the S2M task force – ISO’s displeasure with SERFF’s protection of its confidential information. Consequently, ISO’s comments are aimed at improved SERFF protection of its copyrighted information. We have no objection to ongoing improvements to SERFF to improve such protection if needed, but that is a different issue than the one before the S2M task force. ISO’s concern about disclosure of non-public information is, by their own admission, improved with the proposed SFA enhancement. We do object to creating confusion about the SFA enhancement proposal by introducing unrelated issues.

ISO’s two suggestions for “improving” the SFA enhancement can be easily integrated into the development process.