

CLASS DETERMINATION 3-79

CONFIDENTIALITY OF BUSINESS INFORMATION REPORTED FOR THE INITIAL INVENTORY OF CHEMICAL SUBSTANCES UNDER SECTION 8(b) OF THE TOXIC SUBSTANCES CONTROL ACT

On December 23, 1977, the Environmental Protection Agency (EPA) promulgated regulations (42 FR 64572, 40 CFR Part 710) for the reporting of chemical substances for inclusion in the inventory of chemical substances under Section 8(b) of the Toxic Substances Control Act (TSCA). The regulations provided for two separate reporting periods. During the initial reporting period manufacturers of chemical substances and certain importers of chemical substances reported concerning the chemical substances they manufactured or imported. During the second reporting period processors of chemical substances and certain other importers were given the opportunity to report chemical substances not previously reported in the initial reporting period. EPA required reporting of the chemical substances manufactured, processed or imported in the U.S. since January 1, 1975 to compile the inventory under Section 8(b) of TSCA. EPA also required reporting of other information to develop a profile of the chemical industry.

Reporting for the initial inventory was done through submission of three types of reporting forms which were designated as Forms A, B, and C. During the initial reporting period approximately 50,000 reporting forms were received with 120,000 reporting lines which were determined to include approximately 43,000 distinct chemical substances.

During the course of promulgating the inventory reporting regulations, it became clear that the affected industry was very concerned about the potential confidentiality of the business information which would be submitted on the reporting forms. Accordingly, EPA provided the means on each form for the submitter to claim the submitted information as confidential and to substantiate the claims of confidentiality.

All three types of forms allowed the submitter to claim the following items of information with respect to a chemical substance as confidential: the identity of the parent corporation, the identity of the plant site, the production volume, the fact of manufacture, the fact of importation, and the identification of a particular chemical substance as site limited. In order to make any of these claims of confidentiality, the submitter was required to check a box indicating the claim and to sign a certification statement appearing at the top of the form by which the submitter attested to the truth of four general confidentiality statements appearing on the back of the form and a statement explaining the nature of each claim. Copies of Forms A, B, and C are appended to this Class Determination.

In addition, Form C allowed the submitter to claim the specific chemical identity as confidential. Those claims are not the subject of this Class Determination.

EPA has begun to receive ever increasing requests under the Freedom of Information Act (FOIA) for information from the inventory data base. In order to deal with these large numbers

of requests, I have determined that a Class Determination pursuant to 40 CFR 2.207 would be appropriate. In accordance with 40 CFR 2.207, I have made the following findings:

1. EPA has obtained a large number of related items of information from persons reporting for the initial inventory on Forms A, B, and C.
2. The information reported on Forms A, B, and C with respect to each chemical substance reported is of the same character. Therefore, it is proper to treat all of the information reported on Forms A, B, and C as in the same class for purposes of this Determination.
3. A class determination would serve a useful purpose in that it would simplify and speed the response of EPA to FOIA requests for inventory data, reduce the burden of making individual determinations, and better inform requesters and affected businesses of EPA's position with respect to the confidentiality of data reported on inventory reporting forms.

This Class Determination applies to the following specific information with respect to each chemical substance reported for the initial inventory:

1. Corporate identity.
2. Plant site identity.
3. Fact of manufacture of the chemical substance.
4. Fact of importation of the chemical substance.
5. Fact that the chemical substance is site limited.
6. Production volume for the chemical substance.

EPA may withhold information from disclosure under the FOIA if the information falls within one of the exemptions of the Act. One of these exemptions is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. 552(b)(4)). The information reported for the initial inventory is clearly commercial information obtained from a person. The information was submitted by manufacturers and certain importers of chemical substances on forms prescribed by EPA. The information reported concerns the commercial manufacture and importation of the chemical substances. The real issue is whether the information is exempt from disclosure as "trade secrets" or is otherwise "confidential" within the meaning of 5 U.S.C. 552(b)(4).

The threshold decision that EPA must make before it may conclude that the information is exempt from disclosure as a trade secret or confidential commercial information is that the information is maintained in confidence by the business and is, therefore, not publicly available from a source other than the inventory report forms. If EPA finds that the information is publicly available elsewhere, the information is not entitled to confidential treatment and must be disclosed under FOIA. To make this threshold decision, EPA will rely on the certified statements by the submitter that:

1. My company has taken measures to protect the confidentiality of the information and it intends to continue to take such measures.
2. The information is not, and has not been, reasonably obtainable without our consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding).
3. The information is not publicly available elsewhere.

Unless information comes to EPA's attention which contradicts these statements, EPA will assume that the information claimed as confidential and so certified has been determined as confidential.

Once EPA has determined that information submitted in the inventory report forms has been kept confidential and has not been made public elsewhere, the information may be entitled to confidential treatment under 5 U.S.C. 552(b)(4) if it meets one of the tests set out in National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Under Morton commercial information may only be withheld from disclosure if disclosure by EPA would be likely: (1) to impair the ability of the Government to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person who submitted it to the Government.

The first Morton test is not applicable to the information reported on the inventory report forms because this information was not "voluntarily submitted" as defined in 40 CFR 2.201(i). Many of the submitters were required to report by the inventory reporting regulations in 40 CFR Part 710. The remaining submitters reported in order to ensure that their particular chemical substances would appear on the inventory thereby avoiding the premanufacture notification requirements of Section 5 of TSCA.

As to the second Morton test I have determined that release of the items of information set forth above, if the submitter claims them as confidential and certifies that "[d]isclosure of the information would cause substantial harm to our competitive position," would be likely to cause substantial harm to the competitive position of the submitter.

The items of information in question would not be confidential in isolation. However, the information has been reported to EPA in conjunction with other information, and this linkage of information creates the confidentiality problem. For each chemical substance reported to EPA whether on Form A, B, or C, the submitter identified the corporate identity, the plant site identity, whether the substance was manufactured or imported, whether the substance was site limited, and the production volume for the substance.

On the reporting forms, EPA enabled submitters to make confidentiality claims for the links between certain items of information:

1. By claiming “Corporation” confidential the submitter could protect the link between the chemical substance and the corporation.
2. By claiming “Plant Size” confidential the submitter could protect the link between the chemical substance and the plant site.
3. By claiming “Site Limited” confidential the submitter could protect the fact that the particular chemical substance is site limited.
4. By claiming “Production” confidential the submitter could protect the production volume for the specific chemical at the particular plant site.
5. By claiming “Manufacture” confidential the submitter could protect the fact that the submitter manufactures the particular chemical substance.
6. By claiming “Import” confidential the submitter could protect the fact that the submitter imports the particular chemical substance.

During the course of the inventory reporting it became clear that there was a misunderstanding concerning the difference between the claims for corporation or plant site identity and “Manufacture” and “Import.” In some cases submitters claimed “Manufacture” or “Import” to indicate that the link between their identity and the chemical substance was confidential. Accordingly, EPA has treated a claim for “Manufacture” or “Import” as encompassing “Corporation,” “Plant Site,” “Manufacture,” and “Import” in order to avoid revealing confidential information. In addition, if the submitter claimed “Corporation,” the claim was automatically applied to “Plant Site” because the disclosure of the plant site would reveal the corporation.

Disclosure of the link between the chemical substance and the corporation would identify the corporation as manufacturing or importing the chemical substance. Although a manufacturer or importer may be publicly identified with a particular product, the product’s formulation may be secret. Linking the corporation with the chemical substance identity could enable competitors to ascertain the ingredients of known products of the corporation. This would enable the competitors to duplicate those products and market them. This would very likely result in loss of sales for the submitter which would be substantial harm. In some cases, the chemical substance in question would be a catalyst or intermediate used in the manufacture of other chemical substances. If the manufactured substances are known, disclosure of the intermediates or catalysts might reveal secret manufacturing processes. Because the identity of the corporation is linked to the substance, the process by which a competitor could discover a secret manufacturing process would be easier. Disclosure of the manufacturing process would enable a competitor to

manufacture the product using the secret process and, therefore, be better able to compete with the submitter. This would very likely result in lost sales for the submitter which would be substantial harm. In many cases the submitter has put a great deal of research and development cost into the secret manufacturing process. If a competitor could ascertain the process without the same expenditure for research and development, the competitor would be able to market competing products more cheaply because of a lower investment cost. This would place the submitter at a distinct market disadvantage.

Disclosure of the link between the chemical substance and the plant site could reveal essentially the same information as that discussed above under corporation and could cause substantial harm. In addition, even if the corporation is not confidential, the plant site might be confidential because the plant site identifies the actual site of manufacture. If a competitor knows that a corporation manufactures a particular substance but did not know the specific plant site, disclosure of the plant site might reveal secret processes or formulations as discussed above.

Disclosure of the fact that a particular chemical substance is site limited would identify that the substance is a catalyst or intermediate. This would reveal the fact that it is used in a manufacturing process. If the products of a particular corporation are known, knowledge of site limited substances of that corporation could reveal the manufacturing processes for those products. This would cause substantial harm as set forth above under corporation.

Disclosure of the production volume for a specific substance would reveal the amount manufactured or imported. Traditionally this has been one of the most secret areas in the chemical industry, and this has been reflected by the fact that more claims were made for production volume than by any other item of information reported for the inventory. Knowledge of production volume would identify the size of potential markets. It also would, in conjunction with volumes of other substances, reveal the proportions of specific formulations made at a particular plant site. A competitor who knew the potential capacity of a plant and the actual production of the plant would know whether or not the site had the capacity to produce more. If the plant were already at capacity, the competitor would know that the plant would not have the flexibility to increase production. This could affect marketing decisions and strategy enabling a competitor to move into a competing market. Any loss of business in this context would be substantial harm.

Disclosure of the fact that a specific substance is manufactured or imported by a particular company would tell a competitor about the potential sources of supply for the substance. For example if the substance were identified as imported, the competitor could interfere with the source of supply of the submitter. This would affect the submitter's ability to meet its market commitments. Disruption of supply could be a critical factor in sales. Knowing that a submitter manufactures a particular substance, a competitor could take steps to affect raw materials. These would tend to cause substantial harm.

On the basis of the above discussion, I have determined that, when the submitter has claimed information reported on the inventory report forms as confidential, the information is not already available to the public from sources other than the report forms, and the submitter has certified that “[d]isclosure of the information would cause substantial harm to our competitive position,” disclosure by EPA would be likely to cause substantial harm to the submitter’s competitive position. Accordingly, I have determined that such information is exempt from mandatory disclosure under 5 U.S.C. 552(b)(4) because the information meets the second test of Morton.

EPA policy and Section 14(a) of TSCA require that information which is exempt from mandatory disclosure under 5 U.S.C. 552(b)(4) must be maintained in confidence by the Agency, subject to any modification that might arise under 40 CFR 2.205(h) or any other requirement in 40 CFR Part 2. Accordingly, such information may not be disclosed.

To implement this Class Determination, the Office of Pesticides and Toxic Substances (OPTS) must, upon receipt of a FOIA request, review the requested information. If OPTS determines that the information has been claimed as confidential, the certifications have been made, and that the information is not publicly available from sources other than the inventory reporting forms, OPTS must deny the request in whole or in part, as appropriate, in reliance on this Class Determination.

Because the confidentiality of the inventory information is based on linkages of the information, EPA has limited the types of requests that will be processed and the manner in which searches of the data will be conducted. At the present time only two types of searches of the inventory data base can be made. One is to search the data base by chemical identity. In this case a printout is produced which displays all nonconfidential information linked to that chemical identity from each report form filed with EPA and placed in the computer system. The second type of search is by the plant site identity. In the case of this type of search, if the plant site has been claimed as confidential, no data is printed. This is to prevent the inadvertent disclosure of confidential information. EPA is concerned that the confidential information be protected. Accordingly, the primary search mechanism will be by chemical identity. Any other search items in the future will be designed to prevent the possibility of different types of searches being used together to reveal confidential information.

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Date

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David O. Bickart
Deputy General Counsel