UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

January 5, 2016

VIA CERTIFIED U.S. MAIL - RETURN RECEIPT REQUESTED:
7004 1160 0003 0352 8907

Courtesy copy via email

William Fry, VP and General Counsel
Furmanite Corporation
10370 Richmond Ave, Suite 600
Houston, TX 77042

Re: Final Determination Concerning Confidentiality of Business Information
Freedom of Information Act (FOIA) Request EPA-R6-2012-001413 [06-FOI-00083-12]; and Case No. 2:14-cv-01827-JTM-MBN [Entergy Gulf States Louisiana, LLC et al. v. EPA]

Dear Mr. Fry:

Furmanite Corporation ("Furmanite") has asserted claims of confidentiality for certain information contained in the documents listed on the Document Log enclosed as Attachment 1 ("information") that is responsive to the above-referenced FOIA request to the United States Environmental Protection Agency ("EPA" or "Agency"). The information comprises two single-page invoices, dated December 2006, for work performed by Furmanite at Entergy's White Bluff plant. The information was submitted to EPA by Entergy in response to EPA's Clean Air Act Section 114 Information Request dated February 14, 2011 ("Information Request").

By letter dated June 17, 2015, EPA requested that you substantiate your claims of confidentiality ("substantiation request") within 15 working days of your receipt of the substantiation request. Delivery of the substantiation request to you on June 23, 2015 was confirmed by the certified mail return receipt. Therefore, your substantiation response ("substantiation") was due by July 15, 2015. Because the Agency had not received your substantiation by the date it was due, Janet Adams of the EPA Region 6 Compliance Assurance and Enforcement Division, Air Branch contacted you via email on August 20, 2015 to request that you submit substantiation comments concerning your confidentiality claims or otherwise confirm waiver of your claims, in accordance with the EPA regulation at 40 C.F.R. § 2.205(b)(4). You replied to Ms. Adams's August 20 email on the same day stating that, "We do not waive confidentiality. Please note many times we sign agreements with owners and other third parties that does [*sic*] not give us the right to waive confidentiality." You provided no additional information or comments supporting your claim of confidentiality. On August 21, 2015, Yerusha Beaver, in the EPA Region 6 Office of Regional Counsel, contacted you via email to inform you that your August 20 email was insufficient to allow EPA to protect the information as confidential. Ms. Beaver's email also stated that if EPA does not receive your substantiation comments on or before August 31, 2015 responding directly to the questions posed in the Agency's June 17 substantiation request, any

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confidentiality claim your company might have will be unsubstantiated and effectively waived. Additionally, Ms. Beaver's email included the name of and contact information for Entergy's attorney as an additional resource for you. The Agency received no further response from you.

I have carefully considered your claims. For the reasons stated below, I find that the information claimed as confidential is not entitled to confidential treatment.

DISCUSSION

Exemption 4 of the FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order for information to meet the requirements of Exemption 4, EPA must find that the information is either (1) a trade secret; or (2) commercial or financial information that is obtained from a person and privileged or confidential. Information that meets the Exemption 4 requirements is commonly referred to as "Confidential Business Information" (CBI).

Initial Considerations

EPA's regulations at 40 C.F.R. § 2.208 require that business information be entitled to confidential treatment if, *inter alia*:

(a) The business has asserted a business confidentiality claim and that claim has not expired, been waived, or been withdrawn;
(b) The business has shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;
(c) The information is not, and has not been, reasonably obtainable by a third party without the business's consent through legitimate means (other than discovery in litigation); and
(d) No statute specifically requires disclosure of the information.

In your August 20 email, you merely reasserted your confidentiality claim and alleged that Furmanite might not have the right to waive confidentiality. You failed to address any of the questions set forth in EPA's substantiation request other than to indicate that Furmanite desires confidential treatment permanently. Furmanite has offered no comments regarding whether the information has been disclosed to anyone outside the company who is not bound by an agreement not to disclose the information further or subject to other precautions; whether the information is available in any other manner to the public; and what, if any, measures Furmanite has taken to protect the confidentiality of the information and safeguard it against unauthorized disclosure. Accordingly, Furmanite has failed to provide any evidence that the above requirements are satisfied. Stating simply that many times Furmanite signs agreements that do not give you the right to waive confidentiality is not sufficient to satisfy these requirements. Further, EPA lacks any documentation that no interceding events have negated Furmanite's previous claim and that this approximately nine-year-old information has not become stale. Information submitted to EPA can become stale over time, as the passage of time often erodes

the likelihood of competitive harm.[1] Because Furmanite has failed to satisfy the above requirements, you have not demonstrated that the information is entitled to confidential treatment. Moreover, as discussed below, the information does not meet the definition of trade secret or the criteria for commercial or financial information obtained from a person and privileged or confidential.

Trade Secret

The definition of "trade secret" under the FOIA is limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires that there be a "direct relationship" between the information and the production process. Id.

You have neither asserted a claim that the information is a trade secret, nor have you explained how the Agency's release of this information would identify a plan, formula, process, or device. Furmanite has thus not demonstrated how disclosure of the information would identify or reveal a trade secret. Consequently, I find that the information does not constitute a trade secret.

Exempt Commercial or Financial Information

If the information does not reveal a trade secret, it may still be exempt from release under Exemption 4 of the FOIA if it is exempt commercial or financial information, i.e., "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The terms "commercial" or "financial," for purposes of Exemption 4 of the FOIA, "should be given their ordinary meanings." Pub. Citizen, 704 F.2d at 1290 (citing Wash. Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982)). The information at issue relates to a business, thereby meeting the ordinary definition of "commercial." Since Furmanite meets the definition of the term "person," as defined by EPA's regulations at 40 C.F.R. § 2.201(a), the information was "obtained from a person" as required by Exemption 4 of the FOIA.

Finally, in order to qualify as exempt commercial or financial information, the information must be "privileged or confidential." You have claimed the information to be confidential, but you have not claimed the information to be privileged. The Agency has no indication that the information is subject to a common-law privilege and will therefore limit its discussion to the issue of confidentiality. Information submitted to the Government on a voluntary basis "is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Critical Mass Energy Project v.

[1] Age of documents is a factor to consider in determining whether disclosure is likely to cause competitive harm. In re Agent Orange Product Liability Litigation, 104 F.R.D. 559, 575 (E.D.N.Y. 1985) (citing, e.g., case holding information "stale and not entitled to protection" after three to fifteen years); Ctr. for Pub. Integrity v. DOE, 191 F. Supp. 2d. 187, 195 (D.D.C. 2002) ("Courts have recognized that the passage of time can mitigate the potential for harm that might otherwise have resulted from the release of commercial information").

NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). Information that is required to be submitted to the Government is confidential if its "disclosure would be likely either '(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'" Critical Mass, 975 F.2d at 878 (quoting Nat'l Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted).

Voluntary or Required Submission

In your August 20 email, you offered no comments concerning whether the information was a voluntary or required submittal to the Agency. Under EPA's regulations at 40 C.F.R. § 2.201(i), voluntarily submitted information consists of business information the submission of which EPA had no statutory or contractual authority to require, as well as business information the submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability. For a submission to be required, an agency must possess the authority to require submission of information to the agency and must exercise this authority. Nat'l Parks, 498 F.2d at 770; Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 149 (D.C. Cir. 2001); Parker v. Bureau of Land Mgmt., 141 F. Supp. 2d 71, 77-79, 78 n.6 (D.D.C. 2001); see also, Critical Mass, 975 F.2d at 880.

In this case, the Agency had the authority to require the submission of the information and exercised it. It is undisputed that the information was collected expressly pursuant to EPA's authority under Section 114 of the Clean Air Act, 42 U.S.C. § 7414. Because EPA not only has the authority to require submission of the information, but also has exercised its authority, Entergy's submission of the information was required and was not voluntary. I will next address whether the information is confidential.

Impairment Prong

As discussed above, the test for confidentiality of commercial or financial information that is required to be submitted to the Government is governed by National Parks. Under the National Parks test, commercial or financial information that is required to be submitted to the Government is "confidential" if "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Id. at 770 (footnote omitted).

In addressing impairment to the Government's ability to obtain necessary information that is required to be submitted in the future, the inquiry focuses on the likelihood that the Government will receive accurate information from the submitter. In other words, "[if] the government can enforce the disclosure obligation, and if the resultant disclosure is likely to be accurate, that may be sufficient to prevent any impairment." Wash. Post, 690 F.2d at 268. Additionally, as another court noted, "[t]o show impairment of future investigatory capabilities the agency must adduce

factual data from which the district court may infer that disclosure is likely to make others reluctant to cooperate on future investigations." Calhoun v. Lyng, 864 F.2d 34, 36 (5th Cir. 1988). In this case, EPA has the authority under Section 114 of the Clean Air Act to enforce its requests for information. Further, the Agency has no factual data to support a conclusion that others would be reluctant to cooperate on future investigations if this information is disclosed. Therefore, the Government's ability to obtain similar information in the future is not likely to be impaired.

Competitive Harm

As set forth in EPA's regulations at 40 C.F.R. § 2.208, required business information is entitled to confidential treatment if "[t]he business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position."

To meet the competitive harm test, it is not enough to show that the release of the information would likely cause *any* potential for competitive harm. Rather, you must demonstrate a likelihood of *substantial* competitive harm in order to overcome the FOIA's strong presumption of disclosure. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988). Further, the party seeking to avoid disclosure bears the burden of proving that the circumstances justify nondisclosure. Nat'l Parks, 547 F.2d at 679 n.20.

As set forth in the request for substantiation, in order to support a claim for confidential treatment, you must discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Further, you must explain the nature of these harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. In addition, you must explain how your competitors could make use of this information to your detriment.

In your August 20 email, you offered no comments regarding whether disclosure of the information is likely to cause substantial harm to the competitive position of Furmanite. Therefore, I have determined that you have not demonstrated how disclosure of the information is likely to cause substantial harm to your competitive position.

Merely reasserting your confidentiality claim and suggesting that Furmanite may have signed an agreement with Entergy that did not give you the right to waive confidentiality is insufficient to substantiate why the information is entitled to confidential treatment. Submitters are required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict. Lykes Bros. S.S. Co. v. Peña, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993). Additionally, it is appropriate to reject competitive harm claims when a submitter fails to provide adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury. Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996). Further, conclusory and generalized allegations of substantial competitive harm cannot support an agency's decision to withhold requested documents. Pub. Citizen, 704 F.2d at 1291; Delta Ltd. v. US. Customs & Border Prot. Bureau,

384 F. Supp. 2d 138, 149 (D.C. Cir 2005); Miami Herald Publ'g Co. v. SBA, 670 F.2d 610, 614 (5th Cir. 1982); Ctr. for Pub. Integrity, 191 F. Supp. 2d at 191.

The two one-page invoices at issue appear facially to not merit entitlement to confidential treatment. One invoice purports to collect a single fee for "machining." That invoice does not include any details about the cost or about the goods or services generically described as machining. The second invoice is simply for the sales taxes that were inadvertently omitted from the first invoice.

The burden of proving that the present circumstances justify nondisclosure of this information has not been met. The Court of Appeals for the District of Columbia Circuit has "emphasize[d]" that the "'important point for competitive harm in the FOIA context ... is that it be limited to harm flowing from the affirmative use of proprietary information by competitors.'" Pub. Citizen, 704 F.2d at 1291 n.30 (quoting Mark Q. Connelly, Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data, 1981 Wis. L. Rev. 207, 235-36); *accord* CNA, 830 F.2d at 1152 & n.158 (reiterating "policy behind Exemption 4 of protecting submitters from external injury" and rejecting submitter objections that did "not amount to 'harm flowing from the affirmative use of proprietary information by competitors'" (quoting Pub. Citizen, 704 F.2d at 1291 n.30)).

In sum, because you have failed to explain in any way how disclosure of the information would likely cause substantial competitive harm to Furmanite, you have failed to support any claim of competitive harm that could have been made. Accordingly, I find that EPA's release of this information is not likely to cause substantial harm to Furmanite's competitive position.

CONCLUSION

For the reasons set forth above, I find that the information claimed as confidential is not a trade secret or confidential commercial or financial information. Consequently, the information is not within the scope of Exemption 4 of the FOIA. Pursuant to EPA's regulations at 40 C.F.R. § 2.205(f), this constitutes the final EPA determination concerning your business confidentiality claims. This determination may be subject to judicial review under 5 U.S.C. §§ 701 et seq. In response to the above-referenced FOIA request, EPA will release the information to the FOIA requester on the tenth working day after the date of your receipt of this determination, unless the EPA Office of General Counsel has first been notified of your commencement of an action in Federal court (1) to obtain judicial review of this determination and (2) to obtain preliminary injunctive relief against disclosure. Even if you have commenced an action in Federal court, EPA may make this information available to the public if the court refuses to issue a preliminary injunction or upholds this determination. In addition, EPA may make this information available to the public, after reasonable notice to you, whenever it appears to the Agency that you are not taking appropriate measures to obtain a speedy resolution of the action.

Should you have any questions concerning this final determination, please call Ms. Yerusha Donaldson at (214) 665-6797.

Sincerely,

Ben Harrison
Acting Regional Counsel

cc: Kevin Miller, EPA Office of General Counsel

Megan Berge
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ATTACHMENT 1
Furmanite Document List

Record No.	Bates Number start	Bates Number end	Third Party 1	Date	Page Volume	Document Type	Comments
1	WB_00018231	WB_00018231	Furmanite America Inc.	12/04/06	1	Invoice	No clear description
2	WB_00018317	WB_00018317	Furmanite America Inc.	12/15/06	1	Invoice	Invoice for Sales Tax
Total pages					2		