



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**Region I – New England
5 Post Office Square, Suite 100
Boston, MA 02109-3912**

By eMail Return Receipt Requested:

Date: See Signature Stamp Below

Lynn Tillotson
Granite Shore Power, Vice President
431 River Road
Bow, NH 03304
603-230-7968
Elizabeth.Tillotson@graniteshorepower.com

Re: GSP Schiller LLC (GSP)

Dear Lynn Tillotson:

Granite Shore Power Schiller LLC (“GSP”), has asserted a claim of confidential business information (“CBI”) for certain information contained in a 36-page report dated June 21, 2021, entitled Wedgewire Screen Site Specific Study Engineering Evaluation, dated July 28, 2020 (the “Report”), which is in the possession of the United States Environmental Protection Agency Region 1 (“EPA” or “Agency”). The Agency is making a final confidentiality determination pursuant to 40 C.F.R. § 2.205.

On March 3, 2023, the EPA requested that you substantiate your claim of confidentiality (“request for substantiation”). On March 24, 2023, you submitted your response to EPA’s request (“substantiation”). By substantiation letter dated March 24, 2023, GSP asserted portions of the document identified above should be withheld as confidential.¹ This decision will address documents/information claimed as CBI.

I have carefully considered GSP’s claims of confidentiality, its substantiation, and the recommendation from the Region 1’s Office of Water Division (WD). For the reasons stated below, I find that the information claimed as confidential is entitled to confidential treatment.²

Discussion

Exemption 4 of the FOIA exempts from disclosure “trade secrets and commercial or financial information obtained from a person [that is] 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 (a) obtained from a person, and (b) [that is] privileged or confidential. Information meeting these criteria is commonly referred to as CBI. In its substantiation, GSP indicated it sought confidential

¹ Letter from Elizabeth Tillotson, Vice President, GSP Schiller, LLC to Mark R. Smart, FOIA Paralegal, EPA Region 1, dated March 24, 2023.

² GSP additionally asserted their Substantiation Letter dated March 24, 2023, also constitutes CBI pursuant to 40 C.F.R. Part 2.

treatment because the information qualifies as CBI.

I. Threshold Requirements

EPA's regulations at 40 C.F.R. § 2.208(a)–(d) set forth the threshold requirements for an EPA determination that the information is entitled to confidential treatment pursuant to Exemption 4 of the FOIA. For business information to be entitled to confidential treatment, the Agency must have determined, *inter alia*, that:

- (a) The business has asserted a claim of confidentiality and that claim has not expired by its terms, nor been waived, nor withdrawn;
- (b) The business has satisfactorily 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 without the business's 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); and
- (d) No statute specifically requires disclosure of the information.

40 C.F.R. § 2.208(a)–(d).³

In its substantiation, GSP maintains a “permanent” confidentiality claim over portions of the Report. GSP has not subsequently withdrawn its confidentiality claim. GSP asserts that it has also taken reasonable measures to protect the confidentiality of those documents and require the information be released to individuals within the company and contractors on a “need-to-know” basis. The information is not reasonably obtainable without GSP's consent and is accessible only through password-protected electronic devices. No statute specifically requires disclosure. *Id.*

Since these documents meet the requirements of 40 C.F.R. § 2.208(a)–(d), the decision will next consider whether this information is (1) a trade secret or (2) commercial or financial information that is (a) obtained from a person, and (b) privileged or confidential (commonly referred to as CBI).

II. Confidential Business Information (“CBI”)

As explained above, to qualify as CBI under Exemption 4 the information must be: (1) commercial or financial; (2) obtained from a person; and (3) privileged or confidential.

A. “Commercial” or “Financial”

The terms “commercial” or “financial,” for purposes of Exemption 4 of the FOIA, should be given their “ordinary meanings.” *National Ass’n of Homebuilders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2003) (citing *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)).

The information at issue pertains to the design and configuration of new cooling water intake structure technologies thereby meeting the ordinary definition of “commercial.”

B. “Obtained from a Person”

³ 40 C.F.R. § 2.208(e) conflicts with the holding in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (*Argus Leader*). In light of the *Argus Leader* decision, the Agency will not consider 40 C.F.R. § 2.208(e) in this determination. The Agency anticipates amending 40 C.F.R. § 2.208(e) so that it is consistent with the decision in *Argus Leader*.

Next, this decision considers whether GSP's Report dated July 28, 2020, was "obtained from a person" for purposes of Exemption 4. GSP meets the definition of the term "person," as defined by EPA's regulations at 40 C.F.R. § 2.201(a). Consistent with the definition of "obtain," the D.C. Circuit focuses on whether the information at issue originated from outside the government agency. *Board of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980); *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 530 (1979). "Information originally obtained from an outside source, but later included in agency documents, may be considered 'obtained from a person'" and qualify for Exemption 4 protection. *Ctr. For Auto Safety v. U.S. Dep't of Treasury*, 133 F. Supp. 3d 109, 123 (D.D.C. 2015); see, *EPIC v. Department of Homeland Security*, 117 F. Supp. 3d 46 (D.D.C. 2015); see also *San Juan Citizens Alliance v. U.S. Dep't of the Interior*, 70 F. Supp. 3d 1214 (D. Col. 2014).

The submission of this Report by GSP to the EPA was mandatory. As such EPA obtained GSP's Report from a person for purposes of Exemption 4.

C. "Privileged or Confidential"

Finally, in order to qualify as CBI, the information must be "privileged or confidential." GSP has claimed that the information at issue is "confidential."

The United States Supreme Court in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (*Argus Leader*) evaluated the definition of "confidential" as used in Exemption 4. The Court held that at least where "commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Argus Leader*, 139 S. Ct. at 2366. As a result, this determination considers the conditions established by *Argus Leader* in deciding whether the claimed information qualifies as confidential under FOIA Exemption 4. See *Argus Leader*, 139 S. Ct. at 2366; see also *Exemption 4 After the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media and Accompanying Step-by-Step Guide*, United States Department of Justice, Office of Information Policy (Oct. 4, 2019) (available at <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media>).

1. Does GSP customarily and actually keep the information private or closely-held?

GSP asserted and consistently maintains the confidentiality of the information claimed as CBI, is kept private and is not publicly disclosed to third-parties other than as required, and that access is limited to individuals on a need-to-know basis. GSP has other control measures which include restricting access to employees that require such information on a need-to-know basis, and routinely trains and advises its employees, prohibiting GSP employees from disclosing CBI unless authorized to do so, and maintains confidentiality provisions in its contracts with outside parties where sensitive information is at issue. GSP further asserted confidential business files are maintained on a secure electronic database or kept in physical files that are monitored and kept locked outside of business hours. After careful consideration of GSP's substantiation, I find that GSP customarily and actually treated this information as private.

2. Did EPA provide an express or implied assurance of confidentiality when the information was shared with EPA?

GSP was mandated to provide the EPA with their Report. EPA did not provide an express assurance of confidentiality at the time of submission. GSP asserts the EPA provide an implied assurance of confidentiality insofar as: 1) its regulations and principles established in other federal statutes, regulations and case law, and 2)

the EPA has a long history of protecting infrastructure, business, design, and configuration information of this kind.

However, under the Argus Leader decision, EPA must consider whether there was an implied assurance of confidentiality. Factors to consider include treatment of similar information and its broader treatment of information related to the program or initiative to which the information relates. For example, an agency's long history of protecting certain commercial or financial information can serve as an implied assurance to submitters that the agency will continue treating their records in the same manner. Here, Region 1 historically does not affirmatively make information similar to the GSP Report publicly available. Additionally, Region 1 has previously issued CBI determinations protecting CBI contained in such documents.

3. Were there any express or implied indications, at the time the information was submitted, that EPA would publicly disclose the information?

Next, EPA considers whether, at the time of submission, there was an express or implied indication that EPA would publicly disclose the information. If there was such an indication, then the information may not be confidential. Conversely, if there was no such indication, a submitter's practice of keeping information private is sufficient to warrant confidential status. At the time of submission, EPA provided no express or implied indication that it would publicly disclose the information. Accordingly, the information qualifies as "confidential."

In sum, as explained above, GSP customarily, and actually, treated the claimed information as confidential and EPA provided no express or implied indication that it would not hold the information as confidential. Therefore, the information qualifies as confidential under Exemption 4.

III. 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 trade secret and the production process. *Id.* GSP claims to the best of their knowledge, that no part of the Report constitutes a trade secret. Because EPA determines that the applicable information constitutes CBI, it need not address the claim that it also constitutes a trade secret.

Conclusion

Pursuant to EPA's regulations at 40 C.F.R. §§ 2.204(f)(6) and 2.204(f)(9), the appropriate EPA program office, Region 1's WD has been consulted about whether your claim of confidentiality is valid. Region 1 WD supports GSP's assertions that the information be kept confidential.

Upon consideration of GSP's claims for protection, substantiation of those claims, and the recommendation by the Region 1 WD, the Agency has found that the applicable portions of the Report dated July 28, 2020, are confidential business information under Exemption 4.

This constitutes the final EPA determination concerning your business confidentiality claim. *See* 40 C.F.R. § 2.205(f). This determination may be subject to judicial review under 5 U.S.C. §§ 701 et seq. The EPA will release the information that does not qualify as confidential to the FOIA requestor 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. At a minimum, please notify Mark R. Smart of my office, at the contact information below. 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 matter, please contact Mark R. Smart, Office of Regional Counsel, at smart.mark@epa.gov or 617-918-1094.

Sincerely,

Carl F. Dierker
Regional Counsel
Region 1

cc: Ms. Elizabeth Tillotson
Vice President, GSP Schiller LLC
Elizabeth.Tillotson@graniteshorepower.com