

This class determination remains applicable insofar as it does not conflict with *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019). The Agency is in the process of evaluating whether any changes need to be made to its regulations and guidance to conform with this recent U.S. Supreme Court decision and will update class determinations, as appropriate.

US EPA ARCHIVE DOCUMENT

## CLASS DETERMINATION 1-80

### CONFIDENTIALITY OF BUSINESS INFORMATION OBTAINED FROM ARCHITECT/ENGINEERING FIRMS PARTICIPATING IN STEP 2 AND STEP 3 LEVEL OF EFFORT STUDY

Grantees of construction grant funds under Title II of the Clean Water Act engage the professional services of architect and engineer (A/E) firms to design and construct a variety of projects. In reviewing proposed subagreements under 40 CFR 35.937-6 EPA Regional Offices often have difficulty determining whether the proposed price of A/E services is fair and reasonable. (See 40 CFR 35.937-5(c)(4)).

In the interest of establishing uniform guidelines, EPA's Office of Water Program Operations is planning a nationwide study to determine the level of effort required for engineering services on EPA-funded construction projects. One phase of the study will require that EPA personnel examine the records of firms which have worked on selected projects to extract cost and level of effort data.

This study cannot succeed unless A/E firms are willing to grant EPA access to their records. The firms are likely to claim that the information they provide to EPA is confidential. Since EPA probably will receive requests for copies of the data under the FOIA, the Office of Water Program Operations has asked for a class determination that the information is entitled to confidential treatment under EPA regulations at 40 CFR Part 2, Subpart B. Under 40 CFR 2.207, I have authority to issue such class determinations and I have made the following findings:

1. EPA will be obtaining information on cost and level of effort for architect and engineering services under the Construction Grants program.
2. The information will all be of the same character and it is proper to treat all of the information similarly for the purposes of this determination.
3. A class determination would serve a useful purpose by simplifying [sic] EPA responses to FOIA requests for the data, reducing the burden of individual determinations, and informing requesters and affected businesses of EPA's position in advance.

EPA may withhold information from disclosure under the FOIA if the information falls within one of the exemptions contained in the Act. One exemption is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. 552(b)(4)). Since the information to be obtained from A/E firms concerns the amounts expended and the work-hours required to design various projects, it is clearly "commercial and financial information obtained from a person." The issue is whether the information is exempt from disclosure as "trade secret" or is otherwise "confidential" within the meaning of 5 U.S.C. 552(b)(4).

Before EPA may conclude that the information is exempt from disclosure as a trade secret or confidential or commercial information, the Agency must find that the information is maintained in confidence by the business and is not publicly available. If it is not, the information must be disclosed under the FOIA.

Information that has been kept confidential and has not been made public in any way 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 or financial information may be withheld only if disclosure would be likely to: (1) impair the ability of the Government to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person who submitted it to the Government.

I have determined that the following types of information which will be obtained from A/E firms, if claimed as confidential and maintained in confidence, are entitled to confidential treatment under the Morton tests:

- (1) work-hours
- (2) salary
- (3) overhead rates
- (4) direct costs
- (5) profit

With respect to the first Morton test, I have determined that release of the information listed above, (if claimed as confidential) would be likely to impair EPA's ability to obtain such information in the future. Such information is "voluntarily submitted" under 40 CFR 2.201(i), since EPA must rely upon the cooperation of the A/E firms to provide the information if the Agency is to establish uniform policy and guidance for evaluating costs for A/E services. EPA cannot demand this information.

As to the second Morton test, I have determined that release of the above information (if claimed as confidential) would be likely to cause substantial harm to a submitter's competitive position since disclosure would enable other A/E firms to compete more effectively with the submitter. Competitors would know the number of hours a rival firm required to perform a particular project, the pay of the firm's employees, the profit the firm made on a project and the direct and indirect cost rates the firm incurred. Such knowledge on the part of its competitors would be likely to cause substantial harm to a submitter, since the submitter could reasonably be expected to lose future business.

Where the submitter has claimed that the information listed above is confidential and is not already available to the public from sources other than the submitted document, such information is exempt from mandatory disclosure under 5 U.S.C. 552(b)(4).

EPA policy requires 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 will not be disclosed.

When the Office of Water Program Operations (OWPO) receives an FOIA request for information covered by this Class Determination, it must review the requested information. If the submitter has claimed that the requested documents are confidential and OWPO determines that information in the documents is not publicly available from other sources, the office must deny the request in whole or in part, as appropriate.

  /s\  

David O. Bickart  
Deputy General Counsel

  4/23/80  

Date