

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 2-89

DISCLOSURE OF INFORMATION CONTAINED IN ASBESTOS ABATEMENT NOTICES

I. Background

Before a facility containing asbestos can be demolished or undergo certain renovations, the owner or operator of the facility must submit an asbestos abatement notice to the Environmental Protection Agency (EPA) pursuant to 40 C.F.R. §§61.145 and 61.146 (1987). This determination concerns the public availability of the information contained in asbestos abatement notices.

The term “owner or operator” in 40 C.F.R. §61.02 of EPA’s regulations includes many parties connected with the demolition or renovation of a facility containing asbestos. The owner of the facility, the asbestos removal contractor, the architect, the industrial hygienist, and several other parties may come under the heading of “owner or operator” and any of them could be required to submit an asbestos abatement notice for a particular facility. In most instances, it is the asbestos removal contractor that submits the notice to EPA.

Under 40 C.F.R. §61.145, certain jobs necessitate that a submitter include all of the information pursuant to §61.146 within the notice. Such information includes:

- (1) Name and address of the owner or operator.
- (2) Description of the facility being demolished or renovated, including the size, age and prior use of the facility.
- (3) Estimate of the approximate amount of friable asbestos material present in the facility.
- (4) Location of the facility being demolished or renovated.
- (5) Scheduled starting and completion dates of demolition or renovation.
- (6) Nature of planned demolition or renovation and method(s) to be used.
- (7) Procedures to be used to comply with the requirements of Part 61, Subpart M (National Emission Standard for Asbestos).
- (8) Name and location of the waste disposal site where the friable asbestos waste material will be deposited.
- (9) For facilities described in §61.145(c), the name, title and authority of the state or local governmental representative who has ordered the demolition.

The asbestos abatement notice is submitted under §112 and §114 if the Clean Air Act (CAA). The information contained in the notice enables EPA to ensure that asbestos removal is done in a safe manner in compliance with the National Emission Standard for Asbestos, 40 C.F.R. Part 61, Subpart M. The asbestos abatement notice is the cornerstone of EPA's monitoring and enforcement effort in this area.

II. Discussion

This determination discusses whether information submitted by a contractor in an asbestos abatement notice is emission data as that term is defined in the CAA and EPA's regulations on business confidentiality under the CAA. 42 U.S.C. §7414, 40 C.F.R. §2.301. Under these authorities, emission data must be made available to the public. In addition, it discusses whether the information submitted in the asbestos abatement notice is the type which would be entitled to confidential treatment under exemption 4 of FOIA or §114 of the CAA.

A. Disclosability of Information Obtained under the Clean Air Act

Information gathered under the CAA must be disclosed to the public, if requested, if it is "emission data" as that term is defined in the CAA and EPA's business confidentiality regulations. 42 U.S.C. §7414, 40 C.F.R. §2.301.

Emission data is a broad category which encompasses information relating to the identity, amount, frequency, concentration and other characteristics of any emission from a source regulated under the CAA. 40 C.F.R. §2.301. A general description of the location and nature of the source to the extent necessary to distinguish it from other sources is included in the definition found in §2.301(a)(2)(i)(C) of EPA's regulations.

The information required in an asbestos abatement notice concerns the location and nature of an emission source. The name of the owner or operator, the estimated amount of asbestos at the facility, the scheduled starting and completion dates, the address of the facility, the general procedure to be used in the renovation or demolition and in complying with Part 61, Subpart M, and the name of the waste facility where the friable asbestos waste material is to be deposited are information which enable EPA to properly monitor the work and to be able to distinguish one source from another in the event an enforcement action is necessary.

This information is, therefore, emission data and must be disclosed to the public under the CAA and EPA's regulations.

B. Confidentiality of Information under Exemption 4 of FOIA and §114 of the Clean Air Act

Even if the information provided in an asbestos abatement notice were not emission data, it still would not be entitled to protection as confidential under exemption 4 of the FOIA or as trade secret under §114 of the CAA.

Information other than emission data is entitled to confidential treatment under Exemption 4 of the FOIA if that information is trade secret or commercial or financial information which is privileged or confidential, 5 U.S.C. §552(b)(4), or under §114 of the CAA if it is trade secret, 42 U.S.C. §7414.

The information contained in an asbestos abatement notice is clearly not trade secret because it is not a secret, commercially valuable process which can be said to be the end product of either innovation or substantial effort. The information consists simply of names, addresses, dates and general descriptions of processes sufficient to apprise EPA of the general nature of the action to be taken at the facility. This is not the type of process information which courts have held to be trade secret. See, e.g., Public Citizen Health Research Group v. Food and Drug Admin., 704 F.2d 1280 (D.C. Cir. 1983).

The information contained in the notice is not confidential business or financial information either. Information is only entitled to confidential treatment if the submitter can demonstrate that it has accorded the information confidential treatment and that disclosure by EPA would be likely to either: (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. National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir 1974).

The information in an asbestos abatement notice is not submitted voluntarily to EPA but is required by regulation. There are no grounds for finding that the Government's ability to obtain necessary information in the future would be harmed if the information contained in such notices were disclosed. Therefore, the first prong of the National Parks test is not applicable.

Concerning the second prong of the National Parks test, the information submitted in an asbestos abatement notice is not the type of information that would be likely to cause substantial competitive harm to a submitter if it were released. The information contained in the notice is not proprietary in nature. Though it may be useful to a competitor in some way or embarrassing to the submitter, it is not valuable in the sense that a trade secret would be.

For instance, an asbestos removal contractor cannot have a proprietary interest in the information that it is doing work for a particular company. Though customer lists have been protected from disclosure under exemption 4 in certain limited circumstances, the information that a contractor is doing work for a particular company does not meet the requirements set out

for this protection. See Goldstein v. Interstate Commerce Comm'n., Civil No. 82-1511, slip op. at 6 (D.D.C. July 31, 1985).

A customer list is accorded confidential treatment when a company can show that: (1) it has spent time and money researching potential customers, (2) the customer list is closely held within the company, and, (3) most companies in the industry consider their customer lists to be confidential. Greenberg v. Food and Drug Admin., 803 F.2d 1213 (D.C. Cir. 1986). In the asbestos removal industry, contractors do not spend money researching potential customers. Customers seek out contractors. Furthermore, based upon our experience with confidentiality claims, the information that a contractor is doing asbestos removal or demolition work for a particular client is not closely guarded within most companies and most companies in the industry do not consider this information to be confidential.

The possibility that release of information linking a contractor with a facility on particular dates would enable a labor union to picket a non-union contractor's work site is not substantial competitive harm as that term has been interpreted by the courts. The potential loss of business resulting from the release of information embarrassing to a party is not the type of harm to which exemption 4 of FOIA applies. See General Electric Co. v. Nuclear Regulatory Comm'n., 750 F.2d 1394 (7th Cir. 1984).

The disclosure of procedures for renovation or demolition of a facility containing asbestos would not cause substantial competitive harm because the asbestos abatement notice only requires a general description of the procedures to be followed. No procedures specific enough to be trade secret or confidential are provided in the notice. See American Scissors Corp. v. Gen. Serv. Admin., Civil No. 83-1562, slip op. (D.D.C. Nov. 15, 1983).

The disclosure of the remaining information contained in an asbestos abatement notice, including the amount of friable asbestos at the facility and the name and location of the waste disposal site where the friable asbestos material will be deposited, would similarly not cause substantial competitive harm to the contractor. This information could not be used by a contractor's competitors to obtain an advantage in future contract bids.

Disclosure of the information submitted in an asbestos abatement notice would not therefore be likely to cause substantial competitive harm to a contractor. Accordingly, even if this information did not qualify as emission data, there would be no basis for finding that the information would be confidential business information under exemption 4 of the FOIA.

III. Findings

Based on the information contained in this Determination, I have found in accordance with 40 C.F.R. §2.207 that:

1. EPA has received and will continue to receive asbestos abatement notices from asbestos removal contractors.
2. The information contained in asbestos abatement notices is of the same character. Therefore, it is proper to treat all of the notices in one class for purposes of this Determination.
3. A class determination would serve a useful purpose in that it would simplify the response of EPA to FOIA requests for this information, reduce the burden of making individual determinations, and inform requesters and affected businesses of EPA's position in advance.

IV. Determination

The Office of General Counsel hereby determines that information submitted in asbestos abatement notices as listed in this determination by asbestos removal contractors or any other parties cannot be claimed confidential.

This information is emission data as that term is defined in the EPA regulations that govern information collected under the CAA. Since emission data are public information under the CAA, the information contained in asbestos abatement notices would be required to be made public.

In addition, this information is neither trade secret nor confidential business or financial information. Therefore, it cannot be kept confidential under either FOIA Exemption 4 or §114 of the Clean Air Act.

/s/
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3/7/89
Date