

30 September 2010

Federal Communications Commission
Office of Engineering and Technology
Equipment Authorization Division
7345 Oakland Mills Road
Columbia, MD 21046

REQUEST FOR CONFIDENTIALITY - FCC ID: YSD-5840-SL-3000

Reutech officially requests that the complete User Manual as well as the photographs referred to as "Internal photos" be withheld from disclosure and not appear on the FCC website.

These items contain confidential information that could improperly disclose Reutech intellectual property.

MANUAL: Reutech requires its clients to enter into contractual non-disclosure agreements covering the user manuals that are applicable to all the users on the client's mine sites. Reutech user manuals are only provided to trained users, who are barred by this agreement from disclosing them. Our manuals are not accessible by the general public.

INTERIOR PHOTOS: Ordinarily the Commission denies confidentiality to interior photographs on the ground that the information they contain is freely available to a competitor by purchasing the device and unscrewing the cover. But to access the device in question would require purchasing a unit at a prohibitive cost of more than US\$33,000.

INTERIOR PHOTOS: LEGAL BASIS FOR REQUEST

The Freedom of Information Act (FOIA) protects from disclosure "commercial or financial information obtained from a person and privileged or confidential."¹ Information is confidential if it is "the kind of information 'that would customarily not be released to the public by the person from whom it was obtained,'"² and would cause "substantial harm to the competitive position of the person from whom the information was obtained."³

The D.C. Circuit in Worthington Compressors addressed the specific issue here: the "additional wrinkle that the requested information is available, at some cost, from an additional source."⁴ Here, the "additional source" is the purchase of a specimen unit at high cost.

¹ 5 U.S.C. Sec. 552(b)(4).

² *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 304-05 (D.C. Cir. 1999).

³ *Worthington Compressors, Inc., v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

⁴ *Id.* (italics in original).

According to the Worthington court, availability of the information through alternate sources triggers two additional inquiries: (1) the commercial value of the information, and (2) the cost of acquiring the information through the other means.⁵ The court acknowledges that the submitting party can suffer competitive harm if the information has commercial value to competitors.⁶ That is the case here, as the interior photographs disclose a great deal of expensive (and proprietary) engineering.

Once commercial value is established, the inquiry turns to the cost of acquiring the information by means other than agency disclosure. If competitors “can acquire the information [by other means] only at considerable cost, agency disclosure may well benefit the competitors at the expense of the submitter.”⁷

The court notes that competitors may get “quite a bargain” and a “potential windfall” if they can acquire hard-won proprietary information at FOIA retrieval costs.⁸ (Here, of course, a competitor need not even file and prosecute a FOIA request, but can simply download the material from the Commission's website at no cost whatsoever.) Said the court: “Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government.”⁹

CONCLUSION

Federal case law protects information submitted to an agency and (1) withheld from the public; (2) capable of causing substantial competitive harm to the submitter; and (3) expensive to acquire by other means. The interior photographs at issue meet all of these criteria, and so are entitled to protection against public disclosure.

Procedural note. Reutech does not request a final ruling on the issue at this time. We ask only that the Commission refrain from posting the photographs and manual on its website, and defer further action pursuant to Section 0.459(d)(1), unless and until the Commission receives a properly framed request for inspection of the photographs and/or manual.

Respectfully submitted,

JF de Beer
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5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* (citation footnote omitted).