

request is received by the agency for submitted information.

2. Whether Voluntarily Submitted Materials Should Be Returned Following a Denial of a Confidentiality Request

Bendix suggested that Section 512.18 should be amended to “clarify” that information voluntarily provided to the agency subject to a claim for confidential treatment should be returned to the submitter if the agency denies the request for confidential treatment. Such information may be submitted as part of a rulemaking, research activity or a request for interpretation of our statutes and regulations.

We note that the Federal Records Act imposes limitations on the agency’s ability to return information voluntarily submitted to the agency. That Act mandates the maintenance and preservation of federal records.³ It does not contemplate the return of records to individual submitters. Those providing technical or market information as part of a rulemaking or in connection with the agency’s research activity do so voluntarily and with knowledge of the standards applicable to the treatment of the data. Further, we believe we can respond to interpretation requests while maintaining the confidentiality of any information. Accordingly, we are not adopting this suggestion.

3. Class Determinations

The NPRM proposed no specific changes to the already established class determinations applicable to information found to cause substantial competitive harm if released. Appendix B to part 512 currently contains three such determinations. These classes are blueprints and engineering drawings (under certain circumstances), future specific model plans, and anticipated vehicle or equipment production or sales figures (in some cases, for limited periods of time).

The NPRM sought comment with regard to whether the agency should also consider the establishment of class

determinations applicable to categories of information that presumptively would not cause substantial competitive harm if released. The proposal suggested that such class determinations, if established, would be applicable only to compelled information. The agency did not intend that any such class determinations would be applicable to information voluntarily submitted to the agency. Such information is subject to disclosure under a different legal standard and only upon a showing that the company customarily discloses the information to the public.

We have decided against the creation of class determinations trying to address categories of information the release of which would be presumed not to cause substantial competitive harm. Such class determinations are unnecessary because all data the agency requires to be submitted is already presumptively subject to disclosure under FOIA unless shown to be subject to a FOIA exemption or covered by a class determination. Class determinations merely set forth those categories in which it is unnecessary to make individual submissions regarding the release of data that by its very nature would cause substantial competitive harm or impair the Government’s ability to obtain the information in the future. In addition, we have concluded that some of the areas we posed as candidates for such treatment, such as testing conducted pursuant to “known” procedures, would require specific evaluation, thus rendering the class determination futile.

We nonetheless remain concerned that submitters may routinely seek confidential treatment for information the agency has consistently determined would not cause competitive harm if released. We will take appropriate action to discourage those who repeatedly file claims for confidential treatment despite our consistent rejection of similar requests.

E. Subpart E—Agency Treatment of Information

In Subpart E, the proposal described the manner in which information claimed to be confidential would be treated by the agency. The proposal intended to continue the practice of providing that any information identified and claimed to be confidential would be protected from disclosure by the agency pending an agency decision, and would continue to be treated confidentially as if the submitter’s request for confidential treatment were granted, except under certain limited circumstances.

The Alliance suggested that the final rule should explicitly state that information claimed to be confidential would remain confidential pending the agency’s administrative determination that the information is not entitled to confidential treatment. The NPRM expressly proposed such protection during the administrative reconsideration process: “Upon receipt of a timely petition for reconsideration * * * the submitted information will remain confidential, pending a determination regarding the petition.” The Alliance also suggested an express regulatory provision maintaining the confidentiality of material pending any judicial review of the agency’s final administrative action regarding confidential treatment.

The agency will continue to treat as confidential any information that remains subject to an administrative review. This includes both the initial determination and the agency’s response to any petition for reconsideration. The agency declines, however, to adopt the Alliance’s suggestion that we continue automatically to treat such information as confidential pending judicial review. The agency will make the information publicly available, consistent with its administrative decision, unless ordered otherwise by a court of competent jurisdiction. We recognize that if we were to make information available immediately following the denial of a petition for reconsideration, it would obviate the submitters’ right to judicial review. Accordingly, the regulation will provide that the agency will allow the submitter twenty working days within which to obtain a court order (e.g., through a temporary restraining order) requiring the agency to maintain the confidentiality of information pending judicial review. We have chosen twenty working days to be consistent with the other time periods incorporated into this final rule. We also recognize that, while the basis and arguments for the confidentiality claim should have been fully developed by the time a submitter seeks judicial review of our determination, additional work may be necessary before a lawsuit is filed. In the absence of a judicial order to the contrary, information we have determined is not entitled to confidential treatment will be placed into the public record twenty working days after receipt of the agency’s decision on reconsideration. As in other contexts, we reserve the right to shorten this period if we find that it is in the public interest to do so.

The proposal also provided that a grant of confidentiality may be modified

³ The Act defines a “federal record” as consisting of “all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.” 44 U.S.C. 3301. The disposal of these records is governed by 44 U.S.C. 3314 and related provisions of the Act. See 44 U.S.C. 3302, *et seq.*