



UNITED STATES

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1. Article Addressed to:

Mr. John C. Jones
102 Cedar St.
Roxbury, MA 02119

2. Article Number
(Transfer from service label)

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PS Form 3811, February 2004

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John C. Jones Agent Addressee
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CERTIFIED MAIL - 1

March 9, 2010

Mr. John C. Jones
102 Cedar Street
Roxbury, MA 02119

Domestic Return Receipt

102595-02-M-1544

RE: Ineligibility of John Jones's Subpoena Responses for Confidential Treatment under the Toxic Substances Control Act

Dear Mr. Jones:

Thank you for your responses, dated May 21, 2009 and October 23, 2009, to the subpoena issued to you in August 2008 by the Environmental Protection Agency ("EPA") under Section 11(c) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2610(c).¹ The combined contents of your responses included twelve pages of written answers to questions concerning residential rental properties that you own in Massachusetts, letters and certificates of compliance with lead inspection requirements for nine of your properties, four leases, and portions of two housing assistance payments contracts. With each response you included a request that the information you submitted "be held in strict confidentiality" under the heading "III. Claim of Confidential Business Information."² This letter is to notify you that under EPA's regulations at 40 C.F.R. §§ 2.306(d) and 2.204(d)(2), EPA has determined that your responses to its subpoena clearly are not entitled to treatment as confidential business information ("CBI") under Section 14 of TSCA, 15 U.S.C. § 2613.

TSCA provides CBI protection for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." See 5 U.S.C. § 552(b)(4), cited by 15 U.S.C. § 2613(a). Accordingly, EPA evaluates CBI claims using the substantive criteria outlined in 40 C.F.R. § 2.208, which require that:

- (a) The business has asserted a claim of confidentiality and that claim has not expired, been waived, or been withdrawn;

¹ "SUBPOENA under Section 1018 of Title X (the Real Estate Notification and Disclosure Rule) and Section 406(b) of TSCA (the Pre-Renovation Rule)," Docket No. TSCA-SP-2008-077 (Aug. 13, 2008).

² Although you did not conform your claim to the procedures outlined in the subpoena, which instructed you to conspicuously mark each page of material you claim as confidential business information and to send a complete version of the materials to Rose Toscano and a redacted version to Ronnie Levin, EPA is considering your response to be a claim for confidential protection for the entirety of your two submissions.

- (b) The business has 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 by a third party through legitimate means without the business's consent;
- (d) No statute specifically requires disclosure of the information; *and*
- (e) *Either* the business has shown that disclosure of the information is likely to cause substantial harm to its competitive position *or* that the information was submitted voluntarily and its disclosure would likely impair the Government's ability to obtain necessary information in the future.

Therefore, information that a submitter considers to be *private* is not necessarily *confidential* business information warranting protection under TSCA.³

EPA evaluated your claim using the above criteria, as required by 40 C.F.R. § 2.306(g).⁴ Each of the types of information you submitted fails to meet these requirements and so it clearly is not entitled to confidential treatment.

First, your written responses contain general information regarding some of your rental properties, including: the addresses of the properties, your contact information (provided with respect to your capacity as property manager), the sources of public rental assistance received for the properties, a statement that children reside in each of the properties, a statement that some of the properties have been de-leaded, and a statement that you performed minor repainting in some of the properties during a given time period. This is not information that is solely within your control such that you could have taken measures to protect its confidentiality. This information is also reasonably obtainable without your consent by legitimate means: your property ownership, sources of public rental assistance received, property de-leading status, and other basic information about the units and tenants is all accessible through public records and/or from the tenants themselves. Also, because of the general and non-financial nature of this information, its disclosure is not "likely to cause substantial harm to [your] competitive position."⁵

Similarly, the letters and certificates of compliance with lead inspection requirements are publicly available documents which can be obtained by a third party without your consent and which you are required to provide to your tenants. Therefore you cannot protect their confidentiality. Further, as evidence of your properties' *compliance* with certain state lead requirements, they have little to no potential to harm your competitive position if disclosed.

³ This determination only addresses the CBI claim. In the event of a Freedom of Information Act request covering your materials, EPA will evaluate whether Exemption 6, 5 U.S.C. § 552(b)(6), which concerns "personal privacy," applies to any of the information.

⁴ Before making this determination on your CBI claim, EPA confirmed, as required by 40 C.F.R. § 2.204(b), that these materials are not known to have been addressed by a previous CBI determination. Please immediately advise EPA if you believe that such a determination has previously been made with regards to these materials.

⁵ EPA notes that the all information was submitted in response to a subpoena and not voluntarily. See 40 C.F.R. § 2.208(e)(2).

Finally, the leases and housing assistance payments contracts that you submitted are contracts signed by other parties – the tenants. These other signatories already have rightful control over their copies of the documents, and so you cannot protect these documents' confidentiality.

Pursuant to 40 C.F.R. § 2.204(d)(2) and § 2.205(f), this notification constitutes the final EPA determination concerning your business confidentiality claim. This determination may be subject to judicial review under 5 U.S.C. §§ 701 *et seq.*

EPA will remove CBI protection from this information on the thirty-first (31st) calendar day after the date of your receipt of this determination unless you first notify EPA's Office of General Counsel that you have commenced an action in Federal court to: 1) obtain judicial review of this determination, and 2) obtain preliminary injunctive relief against disclosure. Even if you have commenced an action in federal court, EPA may proceed without CBI protection if the court refuses to issue a preliminary injunction or upholds this determination, or if, after reasonable notice to you, it appears to the Agency that you are not taking appropriate measures to obtain a speedy resolution of the action. Once CBI protection is removed, the information may be available to the public.

Should you have any questions concerning this matter, please contact Christine M. Foot, Enforcement Counsel on my staff, at (617) 918-1333.

Sincerely,



Joanna Jerison
Legal Enforcement Manager
Office of Environmental Stewardship
U.S. EPA, Region 1

cc: Christine M. Foot, Enforcement Counsel, U.S. EPA Region 1
Andrea Simpson, Senior Enforcement Counsel, U.S. EPA Region 1
Jill Metcalf, Senior Assistant Regional Counsel, U.S. EPA Region 1
Kevin M. Miller, Assistant General Counsel, U.S. EPA

