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COMMUNITY LEGAL PROBLEM SERVICES

Title: Is Information Submitted by the Coast
Guard, Required by the Motor Boat
Safety Act of 1971, Privileged
Information That May Not Be
Divulged to the Public?

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IS INFORMATION SUBMITTED BY THE COAST GUARD, REQUIRED BY THE
MOTOR BOAT SAFETY ACT OF 1971, PRIVILEGED INFORMATION THAT MAY
NOT BE DIVULGED TO THE PUBLIC

Brief answer:

Only that information which would constitute a "trade secret" may not be divulged to the public at large pursuant to the above act.

Statement of facts:

Pursuant to the 1971 Motor Boat Safety Act, two types of information are required by the Act to be furnished to the Coast Guard. The first type is information on noncompliance with the mandatory safety requirements of the Act; and the second is information on any defects which would render a manufactured boat unsafe to its original and subsequent purchasers. Within this context the question arises as to what, if any, information may be made available to the public at large once it is furnished by a manufacturer to the Coast Guard. The scope of this short memorandum will seek to answer that question.

Discussion:

Title 46, U.S. Code, §§ 1451 et seq. constitute The National Boating Safety Act of 1971.

§ 1463 covers the inspection, investigation and reporting of both noncompliance with the Act and defects in boats manufactured.

Under this section trade secrets may be provided to the Secretary of Transportation in confidence. Subsection (a) provides for the manufacturer's duty to permit investigations by the Secretary or his designated agents. Subsection (b) provides that all information relating to: 1) trade secrets; or 2) information covered by Title 18 U.S.C. § 1905; or 3) information specifically excepted by Title 5 U.S.C. § 552 (b) would be considered confidential and except where the Secretary may approve the release to official employees or his agents under this chapter, any information so deemed confidential may not be released to the public.

§ 1464 deals with repairs and replacement of defects and notification required by the manufacturer. § (a) provides for the duty of the manufacturer to disclose to the Secretary. § (b) sets out the persons to be notified, namely: 1) by certified mail the first purchaser; 2) again by mail subsequent purchasers if known by the manufacturer; and 3) by certified mail all dealers and distributors of said boats. § (c) provides for the contents to be furnished and § (d) provides that copies of all notifications be sent to the Secretary of the department in which the Coast Guard is situated, i.e., at this time the Secretary of the Department of Transportation. In this same section the duties of the Secretary as it affects the public at

large are set out:

"The Secretary may publish or otherwise disclose to the public so much of the information contained in such notices or other information in his possession as he deems will assist in carrying out the purposes of this chapter, but shall not disclose any information which contains or relates to a trade secret unless he determines that it is necessary to carry out the purposes of this chapter."

§ (e) delineates the authority of the Secretary to determine defects by testing, inspection, investigation, research or examination of reports submitted by manufacturers. The Secretary's duties vis-a-vis the public under this section are as follows:

"When the Secretary determines that it is in the public's interest he may publish notice of such proceeding in the Federal Register and afford interested persons, including the Boating Safety Advisory Council, an opportunity to comment thereon."

It thus appears that, aside from the area of trade secrets and certain exceptions which will be explained later, any information regarding to boating safety or noncompliance with the Act may be releasible to the public within the discretion of the Secretary.

For the legislative history of the Act 1971 Edition of the U.S. Code Congressional and Administrative News at 1333 was surveyed. Although the House version of the particular bill was adopted, it included almost verbatim the Senate language,

therefore the Senate report is set out in detail in the legislative history. According to the Senate report the purpose of the Act was to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the department in which the Coast Guard is operating, that is, the Department of Transportation. It is interesting to note that in the final draft the duty of care was upgraded to require reporting of defects from an original good faith standard to one of a reasonable and prudent judgment, thereby encompassing as well what is known in tort law as ordinary negligence. Notification is required specifically both for: 1) noncompliance with any provisions of the Act or standards promulgated pursuant to it; and 2) any defects known to the manufacturer.

Title 18 U.S.C. § 1905 deals with information which is not revealable to the public. It applies to any officer or employee of the U.S. The Act prohibits publishing, divulging, or disclosing, or making known information coming within the course of the employment of the individual by his examination or by reports furnished to him. The scope of this section encompasses trade secrets, processes, operations, style of work, apparatus, identity, confidential statistical data, amount or source of income or profits and losses, or expenditures of a person, corporation,

firm, partnership, etc. It provides fines of a \$1,000 or one year or both. Little case law exists on this section, but a prior section (Title 19 U.S.C. § 1335) was interpreted by the courts to include trade secrets as meaning an unpatented secret, commercially valuable plan, appliance, formula or process. The latter section has been interpreted by the case of Shapiro & Co. v. S.E.C., 339 Fed. Supp. 467 (District Court, D.C. 1972) as not being in conflict with any sections of the Freedom of Information Act, otherwise known as Title 5, U.S.C. §§ 552 et seq.

The Freedom of Information Act itself, Title 5 U.S.C. § 552 et seq. deals with the release of public information, agency rules, opinions, orders, records or proceedings. Its purpose is the free and full disclosure of all government processes providing for only specific exceptions which are set out under § 552(b) as follows:

- "(1) National defense items.
- (2) Those items solely related to the internal personnel rules of the agency.
- (3) Specifically excepted by statute.
- (4) Trade secrets, commercial or financial information, privileged and confidential.
- (5) Interagency memorandums.
- (6) Personnel files.
- (7) Law enforcement investigative files.
- (8) Financial institution reports required to be submitted.
- (9) Geological information."

From the two above exceptions it can be seen again that whatever is not a trade secret or what is not specifically

excluded and required to be kept confidential by the Freedom of Information Act may be releasible at the discretion of the Secretary.

For a parallel construction the National Traffic and Motor Vehicle Safety Act of 1966 as amended in 1970 was also consulted. Under title U.S.C. §§ 1401 et seq., § 1402(d) set out the same duty on the part of the requisite Secretary, the same information as to defects and noncompliance to be submitted to the respective Secretary and included the same specific prohibition against the divulging of trade secrets. It also permits disclosure by the Secretary to the public at large of any information deemed in his judgment again to promote the carrying out of the purposes of that chapter.

Conclusion:

It can thus be seen then from looking at the purposes of the Act, the information required to be furnished, the legislative history of the Act itself and the treatment of the parallel Motor Vehicle Safety Act, some guidelines exist for the Secretary in reseasing information to the general public. It would appear then in the two types of information, namely: 1) information on the noncompliance with the Act itself in terms of standards issued pursuant to it, presumably in the Code of Federal Regulations, and 2) information on safety defects reported by the

manufacturers, that only specific exceptions set out in the Act need bind the Secretary's discretion or that of his delegated assistants in releasing information to the general public. While no burden is mentioned specifically in the Act, it would appear that the burden is upon the manufacturer to establish that the information furnished the Secretary is a trade secret or as of such nature to be treated as confidential by the Secretary or his designated agents. In conclusion, then, any information which is not set out as a trade secret or more particularly financial information of the manufacturer, regardless of whether it deals with failure to comply with the Code or defects inherent in boats reported by their respective manufacturers, that such information is releasible to the public at large within the discretion of the Secretary, the only guidelines furnished is that it be promoting the purposes of the Act. The purposes of the Act are to encourage motorboat safety and the construction of boats that will lessen the increase of motorboat safety accidents, which led to the drafting and enactment of the Act. Within this framework then, the Secretary or his designated assistants in the U.S. Coast Guard should be free to issue information to the general public, couching it in terms of the purposes of the Act.

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