

September 14, 2020

Fish & Richardson P.C.
1000 Maine Avenue, S.W.
Suite 1000
Washington, DC 20024
202 783 5070 main
202 783 2331 fax

Mr. Ronald Repasi
Chief, Office of Engineering and Technology
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Certification Application FCC ID: 2ANPE-GS8000

Dear Mr. Repasi:

The above-referenced application, filed by Proceq USA Inc. (Proceq), seeks certification of a ground-penetrating radar (GPR) device. The application shows compliance with the Commission's Rules and does not require a waiver.

We request that certain photographs showing the interior of the device be withheld from public disclosure. The Commission has previously granted confidentiality under similar conditions to the application by Mala GeoScience AB for FCC ID: QLA250MHZ, and numerous applications submitted by Geophysical Survey Systems, Inc., including:

FCC ID: QF750400
FCC ID: QF762000
FCC ID: QF75103A
FCC ID: QLAMID
FCC ID: QLA500MHZ
FCC ID: QLA800MHZ

I. FACTUAL BASIS FOR CONFIDENTIALITY REQUEST

Ordinarily, the Commission denies confidentiality to internal photographs of a device submitted for equipment authorization on the ground that they contain information that is freely available to a competitor by simply purchasing the device and removing the cover. However, the GPR device in question is different as the interior components are packed tightly into a very small form factor that cannot be opened without damaging and disabling the device. To gain access to the views shown in the interior photographs of the Proceq device, a competitor would have to purchase the device and then carry out the following steps:

1. Obtain and use a custom security screwdriver available only from Proceq, to remove the tamper-proof screw securing the cover. The custom screwdriver is only sold to Proceq partners and is never given to customers. Without the custom screwdriver to access the interior of the product, it would require destroying parts of

the device antenna.

2. Disassemble various electronic assemblies in a careful and proper order manner to prevent irreversible damage to the components. To access certain electronics of the antenna it would be necessary to remove the frontend carefully from the shielding. When these steps are done improperly, the electronics can be severely damaged.

A lot of clever mechanical engineering effort has gone into packing everything so tightly in such a small form factor. The device is also not user-serviceable and cannot reliably be restored to its original operating condition once it is opened by someone other than Proceq with the right tools, care, and knowledge regarding its intricate assembly process. Proceq has not released instructions on how to disassemble its units as it keeps such information internal to the company.

The posting of internal photographs on the Commission's web site would allow a competitor to bypass this difficult disassembly and allow it to determine how Proceq managed to pack SFCW GPR electronics into such a small form factor and still maintain the achieved levels of performance. Competitors could also use such information to assist in determining the relative costs of manufacturing, the man-hours required for device construction and assembly and the compatibility/incompatibility with other designs – which in effect would greatly simplify a reverse engineering of the product. Proceq respectfully submits that it should not be required to hand over to competitors, the fruits of it many years of expensive engineering.

II. 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

In *Worthington Compressors*, the D.C. Circuit addressed the specific issue underlying the present request, to wit, the "additional wrinkle that the requested information is available, *at some cost*, from an additional source."⁴ Here, of course, the additional source is the acquisition, disassembly and destruction of a Proceq device for inspection. 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

¹ 5 U.S.C. § 552(b)(4).

² *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 304-05 (D.C. Cir. 1999), quoting *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc). See also *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

³ *Worthington Compressors, Inc., v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981), citing *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

⁴ *Id.*

⁵ *Id.*

Importantly, the court acknowledged that the submitting party can suffer competitive harm if the information has commercial value to competitors,⁶ as would be the case for interior photographs that disclosed a great deal of expensive and proprietary engineering. Further, the court said that 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 went on to note that competitors may get “quite a bargain” and a “potential windfall” if they can acquire hard-won proprietary information at FOIA retrieval costs⁸ and that “[s]uch bargains could easily have competitive consequences not contemplated as part of FOIA’s principal aim of promoting openness in government.”⁹ In the case of photos posted on the Commission’s website, a competitor need not even file an FOIA request but can simply download the material at no cost whatsoever.

The cost of acquiring interior photographs, if they are not available on the Commission’s website, amounts to the retail cost of a GPR unit and the time and effort required for complete disassembly. Although this may not amount to a large expenditure of money in absolute terms, it is still a significant expenditure for a small company, and most GPR manufacturers are small companies. This fact alone warrant protection from disclosure under applicable court precedent.

III. 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. Unlike many other product photographs, the interior photographs of Proceq’s GPR devices meet all of these criteria, and therefore are entitled to protection against public disclosure.

Importantly, Proceq does not request a final ruling on the issue at this time. Proceq asks only that the Commission refrain from posting any internal photographs on its website pursuant to Section 0.459(d)(1), unless and until the Commission receives a properly framed request for inspection of the photographs, so that Proceq is given an adequate opportunity to challenge their release.

Respectfully submitted,



Terry Mahn

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.