NORFOLK SOUTHERN RAILWAY COMPANY, **Plaintiff,** **v.** **MARYLAND DEPARTMENT OF THE ENVIRONMENT, *et al.*,** **Defendants.**	**IN THE** **CIRCUIT COURT** **FOR BALTIMORE CITY** **Case No. 24-C-14-004367**

MEMORANDUM OPINION

This action concerns public access to certain documents provided by Plaintiff Norfolk Southern Railway Company ("Norfolk Southern") to Defendants Maryland Department of the Environment ("MDE") and/or Maryland Emergency Management Agency ("MEMA") in compliance with an order of the United States Department of Transportation.[1] The documents describe in general terms the movement by rail in Maryland of large shipments of Bakken crude oil. In its Amended Complaint, Plaintiff Norfolk Southern seeks declaratory and injunctive relief that the documents are not subject to public disclosure by Defendants MDE or MEMA pursuant to the Maryland Public Information Act ("PIA"), Md. Code, §§ 4-101 *et seq.* of the General Provisions Article ("GP").

The Court conducted a hearing on March 20, 2015 on Defendants' Motion for Summary Judgment and Request for *In Camera* Inspection (Paper No. 13) and Plaintiff Norfolk Southern Railway Company's Motion for Partial Summary Judgment (Paper No. 12). Counsel for the parties appeared at the hearing. In their papers and at the hearing, both parties agreed to *in*

[1] Although not consolidated with this case, the related case of *CSX Transportation, Inc. v. Maryland Department of the Environment*, Case No. 24-C-14-004378, raises nearly identical issues. The Court is issuing a separate opinion in that case.

camera inspection of the documents at issue. After the hearing, both parties filed supplemental memoranda regarding a final rule issued by the Pipeline and Hazardous Materials Safety Administration, an agency of the United States Department of Transportation. The Court has inspected the documents *in camera* and has considered the parties' memoranda and oral arguments.

For the reasons stated on the record and in this opinion, the Court will grant summary judgment in favor of Defendants MDE and MEMA. The Court will issue a declaratory judgment and will order that the notification records that Plaintiff Norfolk Southern provided to Defendants MDE and/or MEMA pursuant to the U.S. Department of Transportation's Emergency Order dated May 7, 2014 be released to the public under the PIA. The Court will stay its Order briefly to give Plaintiff Norfolk Southern time to evaluate whether it will appeal the Court's decision and, if so, to seek a further stay of the Order.

Background

On May 7, 2014, the United States Department of Transportation issued an Emergency Restriction/Prohibition Order requiring all railroad carriers transporting 1,000,000 gallons or more of Bakken crude oil[2] in a single train to provide certain notifications to the State Emergency Response Commission ("SERC") in each state through which such trains pass. *See* U.S. Department of Transportation Emergency Restriction/Prohibition Order, Docket No. DOT-OST-2014-0067 ("DOT Order") (Pl.'s Motion, Exh. 1). The notifications to state officials were required to:

[2] "Bakken crude oil" refers to crude oil extracted from the Bakken shale formation in the Williston basin in North Dakota and extending north into Canada. DOT Order at 4. The DOT Order refers to much of the Bakken crude oil being shipped by rail to refineries near the United States Gulf Coast or to pipeline connections in Oklahoma, *id.* at 4-5, but the Order also cites a 2014 CSX Transportation, Inc. derailment occurring near Lynchburg, Virginia, *id.* at 5.

> (a) provide a reasonable estimate of the number of trains . . . that are expected to travel, per week, through each county within the state; (b) identify and describe the petroleum crude oil expected to be transported in accordance with 49 CFR part 172, subpart C; (c) provide all applicable emergency response information required by 49 CFR part 172, subpart G; and (d) identify the routes over which the material will be transported.

Id. at 2. The DOT cited "recent railroad accidents" and "a pattern of releases and fires involving petroleum crude oil shipments originating from the Bakken," including the "catastrophic" accident in Lac-Mégantic, Quebec, Canada on July 6, 2013 that resulted in forty-seven deaths. *Id.* at 1-2, 6. The DOT Order states that, "in light of continued risks associated with petroleum crude oil shipments by rail, . . . this Order [is] necessary to eliminate unsafe conditions and practices that create an imminent hazard to public health and safety and the environment." *Id.* at 9-10.

Plaintiff Norfolk Southern is a railroad carrier subject to the DOT Order. On May 28, 2014, Norfolk Southern and Tom Levering, Director of Emergency Preparedness Planning for Defendant MDE, executed a non-disclosure agreement regarding the disclosure of the notifications. Norfolk Southern then released to MDE the notification that is the subject of this action. The notification, which has been filed under seal to permit *in camera* review, consists of fourteen pages,[3] including the following items:

> (1) A state map (Exhibit 2) showing Norfolk Southern rail service routes in Maryland for trains carrying one million gallons or more of Bakken crude oil. This page includes the legend, "Railroad Restricted Information" and has a warning box stating in part: "Norfolk Southern Railway Company (NSRC) considers this information to be restricted and of a security sensitive nature. . . .

[3] As submitted by Norfolk Southern to MDE, the pages are designated as Exhibits 2 through 6. The same numbering is used for the Court exhibits. There is no Exhibit 1. The Court assumes that Exhibit 1 is on pages 2 or 3 or both. It is possible that Exhibit 1 to the notification is the non-disclosure agreement attached to the Amended Complaint as Exhibit 3. The parties have offered no explanation of the status of pages 2 and 3 or Exhibit 1 of the notification.

This information should not be distributed publicly in whole or in part without the express written permission of NSRC."

(2) A county map (Exhibit 3) showing Norfolk Southern rail service routes and Norfolk Southern's crude oil routes in one county in Maryland. Like Exhibit 2, this page includes the legend, "Railroad Restricted Information."

(3) A one-page document (Exhibit 4) showing the estimated frequencies of train travel in one county in Maryland.

(4) A six-page document (Exhibit 5) listing the classification of Norfolk Southern's petroleum crude oil, identifying potential hazards and general safety information, and giving the toll-free number for Chemtrec's 24-hour Technical Support to report Norfolk Southern railroad emergencies.

(5) A five-page excerpt (Exhibit 6) from a 2012 Emergency Response Guidebook regarding general emergency response information. The guidebook was published by the U.S. Department of Transportations, Pipeline and Hazardous Materials Safety Administration.

Def.'s Motion for Summary Judgment, Exhs. 2-6.

On June 13, 2014, an Assistant Attorney General representing MDE notified Norfolk Southern by letter that MDE had received a request to release Norfolk Southern's notification records under the Maryland PIA. Am. Compl., Exh. 4. MDE asserted that the non-disclosure agreement was null and void because it is contrary to the PIA and because Mr. Levering had no authority to enter into it on behalf of the SERC.[4] *Id.* MDE further stated that it was considering whether the notification had to be disclosed pursuant to the PIA, and it invited Norfolk Southern to submit its position on that issue by June 23, 2014. *Id.* On July 22, 2014, MDE notified Norfolk Southern of its determination that disclosure is required by the PIA. *Id.*, Exh. 5. MDE

[4] The letter states that MDE previously notified Norfolk Southern of this position that the non-disclosure agreement was ineffective on June 6, 2014.

stated it would release the documents on July 24, 2014 unless Norfolk Southern earlier sought a court determination that the documents are exempt from disclosure. *Id.*

Defendant MEMA also received a request for disclosure of Norfolk Southern's DOT notification under the PIA. Like MDE, Defendant MEMA postponed disclosure while Norfolk Southern sought judicial relief. *Id.*, Exhs. 7A & 7B.

Norfolk Southern filed a Complaint for Injunctive Relief and Motion for Temporary Restraining Order in this Court on July 23, 2014 to prevent disclosure of the documents to the public. Norfolk Southern withdrew the Motion for Temporary Restraining Order when MDE and MEMA agreed that they would not disclose the documents pending decision by the Court. On September 26, 2014, Norfolk Southern filed an Amended Complaint, adding a count for declaratory judgment (Count I). Am. Compl. ¶¶ 31-35.

Both the State, on behalf of MDE and MEMA, and Norfolk Southern moved for summary judgment on the same day. In its Motion for Partial Summary Judgment, Norfolk Southern focused on two related mandatory exemptions from disclosure under the PIA: (1) the "confidential commercial information" exemption, GP § 4-335(2); and (2) the "trade secret" exemption, GP § 4-335(1). Both in its motion for summary judgment and in opposition to Norfolk Southern's motion, MDE and MEMA argue that neither of these two exemptions applies to protect the DOT notifications from disclosure.

In their motion for summary judgment, MDE and MEMA also argue (1) that the DOT notification does not contain security sensitive information under GP § 4-352(b), *see* Am. Compl. ¶ 41, and (2) that the information is not exempt from disclosure under GP § 4-301(2)(ii) based on the Federal Transportation Act, 49 U.S.C. § 11904, *see* Am. Compl. ¶ 38. Norfolk Southern has addressed those additional arguments in its opposition to Defendants' motion.

Standard of Review

Summary judgment is appropriate when "the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f); *see also White v. Friel*, 210 Md. 274, 285 (1956) (holding that when there is no genuine dispute as to any material fact, the moving party must be entitled to summary judgment as a matter of law). Mere allegations and unsubstantiated assertions that do not show material disputes of fact with detail and precision are insufficient to prevent the entry of summary judgment. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 738 (1993). All facts and inferences must be drawn in the light most favorable to the non-moving party. *Merchants Mortgage Co. v. Lubow*, 275 Md. 208, 217 (1975).

This is a "reverse PIA action" in which the agency has determined the information must be disclosed and the person whose information will be disclosed sues to prevent the disclosure. *See, e.g., Canadian Commercial Corp. v. Dept. of Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008) ("reverse-FOIA action"). When an agency has denied inspection, the agency bears the burden of justifying nondisclosure. *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 545 (2000). But when a party challenges the decision to disclose public records, the party bears the burden to demonstrate that the agency's action is contrary to the PIA or arbitrary and capricious. *See National Business Aviation Ass'n, Inc. v. Federal Aviation Admin.*, 686 F. Supp. 2d 80, 84-85 (D.D.C. 2010).

Discussion

A. Public Status of the Information

Before reaching the issues presented by specific PIA exemptions, the Court considers Defendants' broader argument that all the information at issue has already been made public.

See Gallagher v. Office of the Attorney General, 141 Md. App. 664, 672 (2001) (noting that "investigative techniques" exemption "is not designed to exclude what is 'already well known to the public'"). Defendants demonstrate that Norfolk Southern's DOT notifications to several other states have already been made public by officials in those states.[5] Indeed, the maps disclosed by the Commonwealth of Pennsylvania shows Maryland and therefore includes almost exactly the same information as is contained in the map included in the DOT notification to MDE. *See* Def.'s Motion for Summary Judgment, Exhs. 11, 14. Norfolk Southern argues that some of the information in its DOT notification to Maryland has not been disclosed elsewhere, that those other disclosures were not made by it, and that future DOT notifications may include new or varied information that is not yet publicly available.

On this issue, as with other issues below, the Court distinguishes between Exhibits 2, 3, and 4, which contain information specific to Norfolk Southern's operations in Maryland, and Exhibits 5 and 6, which contain generalized information concerning hazardous materials and do not contain any information relating specifically to Maryland. The information in Exhibits 5 and 6 comes from sources that are themselves both general and already public. *See, e.g.*, 2012 Emergency Response Guidebook (U.S. Dept. of Transp. Pipeline and Hazardous Materials Safety Admin.) (available at http://phmsa.dot.gov/pv_obj_cache/pv_obj_id_7410989F4294AE44A2EBF6A80ADB640BCA8E4200/filename/ERG2012.pdf (last visited Aug. 13, 2015)). The simple fact that the information is now incorporated in a DOT notification does not make it non-public. Thus, Exhibits 5 and 6 are not protected from disclosure under any PIA exemption based on confidentiality.

[5] *See, e.g.*, http://www.pema.pa.gov/Documents/1/Pennsylvania.pdf (last visited Aug. 13, 2015).

Exhibits 2, 3, and 4 – the two route maps and the chart showing frequencies of travel in one county – do relate specifically to Norfolk Southern's operations in Maryland. With respect to the route maps, Norfolk Southern concedes that the locations of its track in Maryland is public information. Norfolk Southern itself provides a detailed "system map" on its website. *See* http://www.nscorp.com/content/dam/nscorp/maps/System-Map/ns-system-map.pdf (last visited Aug. 13, 2015). That map is supplemented by information pages where a person can search for Norfolk Southern's operations and facilities by state, including in Maryland. *See*, *e.g.*, http://www.nscorp.com/content/nscorp/en/shipping-options/short-line/short-line-directory.html (last visited Aug. 13, 2015). Norfolk Southern argues, however, that the maps included in the DOT notification shows the actual routes used to transport Bakken crude oil and that the chart gives information about those routes that it does not reveal elsewhere. There appears to be at least some information in Exhibits 2, 3, and 4 of the DOT notification that Norfolk Southern has not itself made public.

Norfolk Southern correctly points out that it has never voluntarily disclosed the most specific information contained in its various DOT disclosures. It is undisputed that Norfolk Southern initially requested and received a non-disclosure agreement in which MDE agreed to treat the Maryland DOT notification as non-public. Although MDE subsequently reneged on that agreement, Norfolk Southern has consistently maintained its position that the information in the DOT notification is not public.[6] This Court does not have sufficient information to determine

[6] Norfolk Southern no doubt was disturbed when MDE announced that it would not honor that initial agreement, but Norfolk Southern does not argue that MDE's initial agreement not to disclose the information is or could be determinative of any issue under the PIA. In addition, because the notifications were required under the DOT Order, Norfolk Southern cannot argue now that it would have refused to provide the information in the absence of the non-disclosure agreement.

the extent to which Norfolk Southern resisted any disclosures of DOT notifications made by other state officials, but there is no contention that Norfolk Southern itself has released this information except as required by the DOT Order to the specified state officials. Although Defendants have shown that some, maybe even most, of the information in Exhibits 2, 3, and 4 is now in the public realm, that is so only because officials in other states have decided to release the information. It is still appropriate for Maryland officials to make the same determination under Maryland law and for this Court to review that determination. Although the Court does not render advisory opinions, the resolution of this issue may inform future determinations concerning similar future DOT notifications, if any.

Defendants also argue that even the information in Exhibits 2, 3, and 4 about the routes used to transport Bakken crude oil should be deemed to be public because that information could be determined by public observation. Defendants argue that an observer could stand by railroad tracks in Maryland and count the frequency and number of freight rail cars bearing certain hazardous material designations. Norfolk Southern argues that gathering more detailed information in this way would require extensive and elaborate efforts. The Court agrees with Norfolk Southern. Even assuming someone were willing to devote the time necessary to make the type of counts suggested, the effort would be impractical. More importantly, Defendants have not shown that information submitted to them necessarily becomes subject to disclosure simply because it conceivably could be duplicated in whole or in part by the application of such effort.

The Court concludes that the public status of much of the information at issue bears on the specific PIA issues but does not moot those specific issues. With respect to Exhibits 2, 3,

and 4 of the DOT notification, the Court must still consider the specific exemptions claimed by Norfolk Southern.

B. The Confidential Commercial Information Exemption to the Maryland Public Information Act

The PIA mandates that "confidential commercial information" is exempt from public disclosure. GP § 4-335(2). "[C]onfidential commercial information" is not defined in the PIA, and no Maryland appellate court has yet applied this particular exemption. Because of the similarities between the PIA and the federal Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552 *et seq.*, Maryland courts ordinarily regard judicial interpretations of FOIA exemptions to be persuasive. *Office of State Prosecutor v. Judicial Watch, Inc*., 356 Md. 118, 138 (1999); *Faulk v. State's Attorney for Harford County*, 299 Md. 493, 506 (1984); *but see Office of the Governor*, 360 Md. at 532-36 (interpreting PIA to apply to "public records" of the Maryland Office of the Governor although "agency records" under FOIA do not encompass records of the Office of the President). Both FOIA and the PIA share the goal of encouraging broad public disclosure. *See Milner v. Department of Navy*, 562 U.S. 562, 565 (2011) (noting that the exemptions to FOIA must be narrowly construed); *Office of the Governor*, 360 Md. at 544-45 ("the statute should be interpreted to favor disclosure") (quoting *Kirwan v. The Diamondback,* 354 Md. 74, 84 (1998); *Cranford v. Montgomery County*, 55 Md. App. 276, 289 (1983) (stating that the PIA is "intended to encourage the disclosure of all but a limited amount of government-held information").

Both Norfolk Southern and MDE and MEMA cite the three-part test in *Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974), to establish the scope of "confidential commercial information" under FOIA and therefore under the PIA. To come within the exemption, the information must be "(a) commercial or financial, (b) obtained from a

person, and (c) privileged or confidential." *Id.* at 766. The Court agrees with Norfolk Southern that its DOT notifications meet the first two of the *Morton* criteria: the information is (1) obtained from a person and (2) commercial or financial in nature. The Court rejects Defendants' contention, based on *National Business Aviation Ass'n*, that the DOT notifications are not even commercial in nature. At stake in that case was release of the aircraft registration numbers of aircraft included on a "block list" and therefore not included in reporting of certain flight data. 686 F. Supp. 2d at 82-84. Both the FAA and the court rejected arguments that the information was commercial because it identified aircraft involved in commerce. *Id.* at 85. The court concluded that the information itself was not commercial, even if it could potentially be used to research commercial activity. *Id.* at 86-88. Here, in contrast, the DOT notifications directly involve Norfolk Southern's operations, which are certainly commercial in nature. Although the Court agrees with Defendants about the lack of competitive significance in this general information, the information is still commercial in nature.

Norfolk Southern has failed to show that the DOT notifications meet the third criterion – that they are confidential. The court in *Morton* found that information is "confidential" under § 552(b)(4) of FOIA if public inspection would either (a) impair the government's ability to obtain necessary information in the future or (b) result in substantial competitive harm to the person from whom the information was obtained. *Id.* at 770. Norfolk Southern does not argue that the government impairment prong of *Morton* applies here, so the focus is only on the claim of substantial competitive harm.

Federal courts use a two-part test to determine whether substantial competitive substantial harm exists under FOIA: first, whether actual competition exists, and second, whether disclosure causes a "likelihood of substantial competitive injury." *Gulf & W. Indus., Inc. v.*

United States, 615 F.2d 527, 530 (D.C. Cir. 1979). The Court accepts that actual competition exists for the transportation of freight generally and for the transportation of Bakken crude oil specifically. Norfolk Southern has described this as competition both among rail carriers and between rail carriers and other modes of transport, including trucking, pipelines, and ships. The first part of the test therefore is satisfied.

Norfolk Southern has failed to show, however, that disclosure would likely cause substantial competitive injury. Citing *Journal of Commerce, Inc. v. U.S. Dep't of Treasury*, 1987 WL 4922 (D.D.C. June 1, 1987), *aff'd*, 878 F.2d 1446 (Fed. Cir. 1989), Norfolk Southern argues that, because the railroad industry is highly competitive, releasing the Norfolk Southern notifications – even where "items taken in isolation may reveal little," *id.* at *5 – would easily allow competitors to identify Norfolk Southern's customers. The court in *Journal of Commerce* found that a railroad company's information was protected from disclosure even though no precise competitive injury was yet identified. *Id.* Norfolk Southern claims that a competitor could combine information from the DOT Order, however vague, with preexisting public data, to the detriment of Norfolk Southern's business.

Unlike the PIA request at issue, the FOIA request in *Journal of Commerce* sought highly specific information. It asked for railroad "cargo manifest data," including the origins and destinations of goods, the exact amount of merchandise shipped, and the names of the shippers. *Id.* The Norfolk Southern information given to MDE and MEMA is much less specific. Here again, a distinction between Exhibits 2, 3, and 4 and Exhibits 5 and 6 is apt. Exhibits 5 and 6 originate from public, governmental sources and contain no specific information about Norfolk Southern operations at all. *See* Def.'s Motion for Summary Judgment, Exhs. 5-6. Even if these documents were not already public, they do not contain any information specific to Norfolk

Southern's commodities, routes, or customers and could not possibly be deemed "confidential commercial information."

Norfolk Southern's Exhibits 2, 3, and 4 – the maps and the chart – do contain information about Norfolk Southern operations, but the information is very generalized. *See* Def.'s Motion for Summary Judgment, Exh. 2-4. DOT states that the data it gathers under the DOT Order is inexact and subject to change:

> DOT is aware that the nature of freight railroad operations does not make it possible in many instances to estimate the exact number of trains implicated by this Order that will travel over a particular route in a specified time period. Thus, this Order requires that railroads make a reasonable estimate as to the number of implicated trains expected to travel through a county per week, and to update the notification whenever a significant increase or decrease in that estimated number occurs.

DOT Order at 12-13. The Court agrees with Defendants that because the notifications lack real-time data and only contain broad estimates of Norfolk Southern's cargo, a competitor would not readily be able to apply these static notifications to already-existing public information. Disclosure of this generalized and variable information is not likely to enable a competitor discern Norfolk Southern's precise customer information and then to use that information to draw away customers or otherwise to cause substantial competitive injury to Norfolk Southern. This is particularly true because sophisticated competitors in the freight transport business likely already understand this basic information. Moreover, nothing in the generalized information at issue reveals anything about Norfolk Southern's pricing of its services.

Although general in nature, the DOT notification at issue is limited to information involving large shipments of Bakken crude oil. Norfolk Southern acknowledges that "only a limited number of potential customers are capable of shipping and/or receiving BCO in the volume covered by the Emergency Order in the areas where Norfolk Southern operates" and that

the "capacity of refineries and terminals to accept or process crude oil, as well as the number of train cars capable of off-loading over a finite period of time, is also generally available on the internet." Pl.'s Mem. at 20, 21. According to Norfolk Southern, this means a competitor could use the information at issue more easily to identify Norfolk Southern's customers from the limited universe of sources or destinations for Bakken crude oil. But the narrower scope of the information involved also means that the likely universe of customers is already well known in the industry. Norfolk Southern's competitors thus likely already target these potential customers. Even if disclosure of the information at issue could be used to identify Norfolk Southern's customers specifically, the disclosure is unlikely to affect the current state of competition in this relatively narrow sector.

The Court therefore concludes that there is no likelihood that disclosure of Norfolk Southern's notifications would cause substantial competitive harm to Norfolk Southern. The information therefore is not "confidential commercial information" under the PIA.

C. The Trade Secret Exemption to the Maryland Public Information Act

Trade secrets are statutorily exempt from disclosure under § 4-335(1) of the PIA. GP § 4-335(1). The issue is considered separately here because the PIA enumerates "a trade secret," "confidential commercial information," and "confidential financial information" separately within GP § 4-335. FOIA, in contrast, groups "trade secrets and commercial or financial information" in one exemption. 5 U.S.C. § 552(b)(4). Although there are circumstances in which there may be distinctions among these items, s*ee, e.g.*, *British Airports Authority v. U.S. Dept. of State,* 530 F. Supp. 46, 48 (D.D.C. 1981) (noting that not all types of commercial information provided to a government agency fall within the trade secrets exemption), there are

no significant differences in this action between Norfolk Southern's "confidential commercial information" and "trade secret" arguments.

In Maryland, a trade secret is defined as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Md. Code, § 11-1201(e) of the Commercial Law Article. Although one may more commonly think of trade secrets as commercial formulas, methods, and processes, customer lists or the identities of customers have been recognized as potentially constituting trade secrets under Maryland law. *See NaturaLawn of America, Inc. v. West Group, LLC*, 484 F. Supp. 2d 392, 399 (D. Md. 2007).

As already discussed, Exhibits 5 and 6 of Norfolk Southern's DOT notification could not conceivably be regarded as containing trade secrets because they contain only public information that is not specific to Norfolk Southern's operations. Even allowing that the identities of Norfolk Southern's specific customers possibly could be a trade secret, Exhibits 2, 3, and 4 of NS's DOT notification do not themselves disclose the identities of any Norfolk Southern customers. For the reasons already discussed, the information in Exhibits 2, 3, and 4 is far too generalized to support Norfolk Southern's argument that a competitor in possession of that information could use it as the key to unlock the identities of Norfolk Southern's customers.

The Court concludes that the information in the DOT notification is not protected from disclosure as a trade secret under § 4-335(1) of the PIA.

D. Disclosure of Customer Identities

The PIA requires a custodian to deny inspection of a public if "the inspection would be contrary to . . . a federal statute or regulation that is issued under the statute and has the force of law . . . ." GP § 4-301(2)(ii). Norfolk Southern argues that this exemption is triggered because a provision of the Federal Transportation Act, 49 U.S.C. § 11904, prohibits Norfolk Southern from disclosing the identities of its customers or certain information about shipments by them. The statute prohibits a rail carrier from disclosing:

> information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation provided under this part, or information about the contents of a contract authorized under section 10709 of this title, that may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of the shipper or consignee.

49 U.S.C. § 11904(b). A rail carrier is not prohibited from providing such information, *inter alia*, "to an officer, employee, or agent of the United States Government, a State, or a territory or possession of the United States." *Id.* § 11904(c)(2).

The federal statute does not prevent disclosure under the PIA for two basic reasons. First, Norfolk Southern is not disclosing the information. Norfolk Southern's disclosure is to MDE or MEMA pursuant to the DOT Order. That disclosure to a state official as required by a federal order is plainly permitted under § 11904(c)(2). Second, the information in the DOT notification is not covered by § 11904(b). It is information about the nature and routing of property being transported by Norfolk Southern, but it does not identify any customer. As already discussed, Norfolk Southern's argument that the information could be used to identify specific customers lacks merit. Moreover, even if specific customers could be identified, it is speculative that this generalized information could "be used to the detriment of the shipper or

consignee or [might] disclose improperly, to a competitor, the business transactions of the shipper or consignee." *Id.* § 11904(b).

The disclosure of the DOT notification by MDE or MEMA therefore would not violate or cause Norfolk Southern to violate the federal statute and is not prohibited by GP § 4-301(2)(ii).

E. Information Related to Emergency Management under the Maryland Public Information Act

Section 4-352 defines "information related to emergency management" and permits a custodian to deny inspection of records containing such information in certain circumstances. GP § 4-352. The information covered by this exemption includes:

> (1) response procedures or plans prepared to prevent or respond to emergency situations, the disclosure of which would reveal vulnerability assessments, specific tactics, specific emergency procedures, or specific security procedures; [and]
>
> (2)(i) building plans, blueprints, schematic drawings, diagrams, operational manuals, or any other records of ports and airports and any other mass transit facilities, bridges, tunnels, emergency response facilities or structures, buildings where hazardous materials are stored, arenas, stadiums, waste and water systems, and any other building, structure, or facility, the disclosure of which would reveal the building's, structure's, or facility's internal layout, specific location, life, safety, and support systems, structural elements, surveillance techniques, alarm or security systems or technologies, operational and transportation plans or protocols, or personnel deployments . . . .

GP § 4-352(a). Unlike the mandatory exemptions in §§ 4-301 and 4-335, disclosure under § 4-352 is discretionary and limited:

> The custodian of records *may* deny inspection of a part of a public record under subsection (a) of this section *only to the extent* that the inspection would:

> (1) jeopardize the security of any building, structure, or facility;
>
> (2) facilitate the planning of a terrorist attack; or
>
> (3) endanger the life or physical safety of an individual.

GP § 4-352(b) (emphasis added).

Norfolk Southern argues that the DOT notification contains "sensitive security information" that could give terrorists better opportunities to carry out attacks. It is undeniable that the nation's rail lines are critical infrastructure and that the movement of hazardous materials on them creates a potential target for acts of terror. In general, the DOT notification deals with a sensitive topic that requires careful attention.

Because § 4-352 involves a discretionary exemption from disclosure, it invests the custodian with a substantial measure of discretion. In addition, the custodian here, Mr. Levering, is vested with responsibility to assess risks as the Director of Emergency Preparedness, Planning and Response for MDE. Mr. Levering states in his affidavit:

> [I]t is my professional opinion that this information is not the kind of records exempt under the emergency management information exemption in GP § 4-352 because the information is insufficiently specific to reveal any confidential information to be detrimental to transportation safety or public safety. For example, [Norfolk Southern's] DOT notifications do not include dates and times for when cargo arrives, the exact points of origin, when certain trains would be going through certain towns, the total number of train stops, rail connecting and railroad switchyards, or critical infrastructure asset information, detailed emergency response techniques, vulnerability assessments, blueprints, diagrams, schematic drawings, surveillance techniques, alarm or security systems, or emergency personnel deployments.

Levering Affidavit at 6, Def.'s Motion for Summary Judgment, Exh. 19. The information at issue here is not nearly as specific as the dam inundation maps that were held to be protected from disclosure under FOIA in *Public Employees for Envtl. Responsibility v. U.S. Section, Int'l*

Boundary & Water Comm'n, U.S.-Mexico, 740 F.3d 195, 205-06 (D.C. Cir. 2014). Moreover, the FOIA exemption at issue in that case is far more general than GP § 4-352. The PIA exemption strikes the balance between disclosure and non-disclosure in favor of disclosure by limiting non-disclosure to those instances in which release of the information would reveal specific information that might be exploited to threaten security. As already discussed, the locations of rail lines in Maryland is public information; the additional general information contained in the DOT notification would not contribute substantially to a risk that does not already exist.

The Court concludes that MDE has assessed the security risks involved and that its decision that disclosure is not prohibited by GP § 4-352 is neither arbitrary nor capricious.

F. The Effects of the Final Rule

The Court takes judicial notice of the final rule issued on May 1, 2015 by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), an agency of the United States Department of Transportation. This rule will amend 49 C.F.R. § 172.820, effectively supplanting the DOT Order. The May 7, 2014 DOT Order remains in effect, however, until the Department of Transportation rescinds it or until the final rule is effective on March 31, 2016. Because the final rule has not yet taken effect, it does not apply in this case. Even if it did apply, the final rule does not mandate that rail carrier notifications are confidential as a matter of law. Rather, PHMSA notes the interest in public disclosure and states that rail carriers "may have an appropriate claim that [their] information constitutes confidential business information, but such claims may differ by state depending on each state's applicable laws." *Id.* at 252. Accordingly, although the new regulation may affect public disclosure of future notifications made pursuant to the new regulation, it does not affect Defendants' actions at issue in this case.

Conclusion

For these reasons, there are no genuine disputes of material fact and Defendants Maryland Department of the Environment and Maryland Emergency Management Agency are entitled to judgment against Plaintiff Norfolk Southern Railway Company as a matter of law. The Court therefore will grant Defendants' motion for summary judgment and deny Plaintiff Norfolk Southern's motion for partial summary judgment. A separate Order and Declaratory Judgment will be entered.

August 14, 2015

Judge Fletcher-Hill's signature appears on the original document in the court file.

Judge Lawrence P. Fletcher-Hill