



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 14, 1993

Ms. Terry G. Salem  
Staff Attorney, Legal Division  
Texas Air Control Board  
12124 Park 35 Circle  
Austin, Texas 78753

OR93-306

Dear Ms. Salem:

You ask for clarification of Open Records Letter No. 92-674 (1992), which concerned a request to the Texas Air Control Board ("the board") for information about the Hyponex Corporation ("Hyponex"). You contended that portions of the information were excepted from required public disclosure under section 3(a)(10) of the Open Records Act as trade secrets. However, we determined in Open Records Letter No. 92-674 that the requested information must be released since neither the board, or Hyponex Corporation explained why the information constituted a trade secret.

The information at issue is product formulation information in Hyponex's air permit modification application for its Huntsville facility. The information describes the materials used in the production process, the bulk processing operations, and the formula ration for their product. You explain that when Hyponex submitted the application to the board on July 1, 1992, it did not mark any of it as confidential. You therefore released it in its entirety to three individuals. Subsequently, this information was requested under the Open Records Act. When notified of the open records request, Hyponex asked that portions of the application be kept confidential.

You enclosed the information at issue, together with an analysis of the information in light of the six trade secrets criteria which this office uses in determining whether information may be withheld as trade secrets under section 3(a)(10) of the Open Records Act.<sup>1</sup> You ask us now to reconcile section 381.022 of the Health and Safety Code with section 3(a)(10) of the Open Records Act. Additionally, you ask "whether the failure to mark a document as confidential when submitted precludes a company from later asking that it be so marked and removed from public files."

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<sup>1</sup>For purposes of applying section 3(a)(10) of the Open Records Act, this office considers the six factors found in comment b of section 757 of the Restatement of Torts as criteria for determining whether information constitutes a trade secret. See Open Records Decision No. 552 (1990).

You cite section 381.022 of the Health and Safety Code, which states as follows:

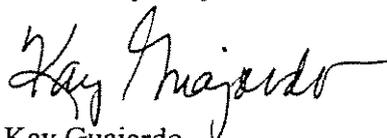
A member, employee, or agent of the board may not disclose information submitted to the board relating to secret processes or methods of manufacture or production that is identified as confidential *when submitted*. [Emphasis added.]

In order for information to be protected from disclosure under this provision, the information must (1) relate to secret processes or methods of manufacture or production; and (2) be identified as confidential at the time of submission. See Attorney General Decision H-836 (1976) (construing predecessor provision, section 1.07 of V.T.C.S. article 4477-5). Hyponex did not identify information in the application as confidential when it submitted it to the board; therefore, section 381.022 does not preclude a "member, employee, or agent of the board" from disclosing the product formulation information in the Hyponex application.

In contrast, the application of the trade secret aspect of section 3(a)(10) of the Open Records Act does not depend on whether the information was marked as confidential when submitted to the governmental body. See, e.g., Open Records Decision No. 554 (1990) (relying on the Restatement of Tort's definition and six factors as criteria in deciding trade secret claims under section 3(a)(10)). Marking information as confidential, either before or after its initial submission, is relevant to several of the trade secret factors, but the failure to so mark is not fatal to a 3(a)(10) trade secret claim. However, simply marking information as a confidential trade secret, without explaining why it constitutes a trade secret, is indeed fatal to such a claim under section 3(a)(10). Such was the case in Open Records Letter No. 92-674.

I hope I have answered your questions. If you have additional questions, please contact this office.

Yours very truly,



Kay Guajardo  
Assistant Attorney General  
Opinion Committee

KHG/KKO/le

cc: Mr. Robert E. DeLong, Jr.  
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(w/o enclosures)