



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 5, 1996

Ms. Maria Sánchez
Staff Attorney
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-0896

Dear Ms. Sánchez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39687.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information in its files relating to E.I. duPont de Nemours & Co., Inc.'s ("DuPont") air permit (R-9074) and water discharge permit (IWD 01651). The commission has submitted to this office requested documents which DuPont contends contain trade secrets that are excepted from required public disclosure under section 552.110 of the Government Code. The commission has declined to take a position on whether the documents are excepted from disclosure.

Pursuant to section 552.305, we notified DuPont of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. DuPont responded by claiming that some of the requested documents, specifically those marked confidential by DuPont, contain trade secrets and are therefore excepted from disclosure under section 552.110.¹

DuPont notes that the commission received a similar request in 1993. DuPont argued in 1993 that certain documents in the commission's files relating to DuPont's air permit contained trade secrets. We agreed, and in Open Records Letter No. 93-413

¹We note that information is not confidential under the Open Records Act simply because the party submitting it anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

(1993) ruled that those documents were excepted from disclosure under section 552.110. The pending request for information implicates the documents that we considered in 1993, as well as similar air permit documents that DuPont has submitted to the commission since we issued Open Records Letter No. 93-413 (1993) and documents in the commission's files relating to DuPont's water discharge permit. DuPont has resubmitted to us the brief and supporting affidavits that it submitted in connection with Open Records Letter No. 93-413 (1993). Circumstances have not changed, and therefore we believe that the conclusion we reached in that ruling is applicable to the pending request. Accordingly, the commission must withhold from disclosure those documents that we determined were excepted from disclosure by section 552.110 in Open Records Letter No. 93-413 (1993).²

Now we turn to the air permit documents that DuPont has submitted to the commission since we issued Open Records Letter No. 93-413 (1993) and the documents in the commission's files relating to DuPont's water discharge permit. DuPont contends that these documents also contain trade secrets that are excepted from disclosure under section 552.110. Specifically, DuPont believes that the following twelve categories of information are trade secrets:

1. The plant plot plan.
2. Emissions calculations, rates and stack parameters.
3. Air pollution abatement devices.
4. Water pollution abatement devices.
5. Process flow diagrams.
6. Process descriptions, throughputs.
7. Material balances.
8. Certain material safety data sheets.
9. Safety data detailing process conditions.
10. Best Available Control Technology.
11. Production rates.
12. Additional Fugitive data.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving

²We have enclosed a copy of Open Records Letter No. 93-413 (1993) for your convenience.

materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.*

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added).

In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ We have held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

We have considered DuPont's arguments that the twelve categories of information are trade secrets. We conclude that DuPont has made a *prima facie* case that the twelve categories of information are trade secrets. Therefore, in addition to withholding those documents that are within the scope of Open Records Letter No. 93-413 (1993), pursuant to section 552.110 the commission must also withhold from disclosure any requested document that document falls within any of the twelve categories listed above.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous

³The Restatement lists the following six factors to be considered in determining whether particular information constitutes a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 39776

Enclosures: Submitted documents
Open Records Letter No. 93-413 (1993)

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