Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1997

Ms. Janis Boyd Hudson
Staff Attorney, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR97-0987

Dear Ms. Hudson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 107104, formerly ID# 23728.

The Texas Natural Resource Conservation Commission (the "commission") has received a request for information relating to Formosa Plastics Corporation ("Formosa"). Specifically, the requestor seeks "all administrative penalty worksheets and Agreed Board Orders prepared by [the commission] in connection with Formosa" that the requestor has not already received; the petition that the State of Texas filed against Formosa for violations of the state and federal clean air acts; "any and all memos, Administrative Penalty Worksheets, investigation reports, documents, data, records, detailed reports, information, photographs, proposed Agreed Board Orders, and Administrative Penalty Worksheets made in connection with any and all unpermitted release(s), upset or maintenance release(s) by Formosa . . . which occurred after August, 1991"; and "any information regarding the date Formosa . . . obtained operating and construction permits for the existing and expansion facilities." You have submitted copies of seven documents that you contend are responsive to the request and that Formosa designated as confidential when it submitted them to the commission.[1]

In accordance with section 552.305 of the Government Code, the commission has elected to request a decision from the attorney general without stating its reasons for releasing or withholding the information. We have received from a representative for Formosa a letter stating that part of the requested information is confidential pursuant to

[1]To the extent that the requestor seeks more information than you have claimed may be exempt from required public disclosure, we assume that the commission has released the information to the requestor or that the information does not exist in the files of the commission.

section 552.101 of the Government Code, in conjunction with section 382.041 of the Health and Safety Code and section 552.110 of the Government Code. The representative states that Formosa does not object to the release of two of the seven documents submitted to this office: the document entitled "VV-505 R/V Containment System" and the document entitled "Steam Shut Off System." On behalf of Formosa, the representative objects to the remaining five documents. Because Formosa does not object, the commission must release to the requestor the two documents listed. We will consider only whether the commission must release to the requestor the remaining five documents.

In Open Records Decision No. 652 (1997), this office concluded that section 382.041 of the Health and Safety Code protects information submitted to the commission if a prima facie case is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and if the information was identified as confidential by the submitting party when it was submitted to the commission.

According to the Restatement of Torts, a trade secret

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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 materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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).[2] You have indicated that Formosa identified these documents as confidential at the time that it submitted the documents to the

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[2]There are six factors listed by the Restatement which should be considered when determining whether information is 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 the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.

commission. In our opinion, however, Formosa has failed to establish a prima facie case that these documents are trade secrets. Formosa's arguments are largely conclusory and do not discuss any of the above criteria. We therefore conclude that the commission may not withhold the documents under section 382.041 of the Health and Safety Code.

Formosa also asserts that the information is a trade secret and, therefore, excepted from required public disclosure under section 552.110 of the Government Code. Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. When a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we 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 one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. Because Formosa has provided only general arguments in support of its contention that the information it seeks to withhold is a trade secret, we conclude that Formosa has failed to establish a prima facie case that this information is a trade secret.[3]

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

Yours very truly,

Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 23728

Enclosures: Submitted documents

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[3]Formosa has not claimed that this information is either commercial or financial information and, therefore, we need not address the second part of section 552.110.

cc: Ms. Sandra McKenzie
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(w/o enclosures)

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