



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1997

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR97-0990

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 26398.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information generated on or after, or regarding events occurring on or after April 1, 1992, concerning waste, air or hazardous waste at the carbon black plants of three companies: Sid Richardson Carbon, Ltd., formerly Sid Richardson Carbon and Gasoline Co. ("Sid Richardson") in Borger and Big Spring, Texas; Degussa Corporation in Aransas Pass, Texas; and Witco, Inc. ("Witco"), in Sunray, Texas. The commission has released some of the requested information. However, you explain that the commission has two items of information that were marked "confidential" when submitted to the commission. You are concerned that the documents are excepted from disclosure pursuant to section 382.041 of the Health and Safety Code in conjunction with section 552.101 of the Government Code.

The first item is a two-page letter with a ten-page attachment from Mr. E. F. Gunn, Manager of Environmental Health and Safety for Sid Richardson, to Mr. Greg Nudd, a Permit Engineer for the commission. This letter is marked "confidential" on every page. You state the "[i]f the information is unique to this facility and is not related to the determination of air emissions for compliance reasons, then the criteria for the trade secret privilege would appear to be met." The second item is from Witco, and contains numerous documents relating to stack sampling of Witco's Sunray plant.

Pursuant to section 552.305, we notified Sid Richardson and Witco of the request. See Gov't Code § 552.305; Open Records Decision No. 542 (1990). Sid Richardson responded to our notification by asserting that the requested information is protected under 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. We did not receive a response from Witco.

Section 552.101 of the Government Code excepts from disclosure information that is confidential by statutory law. 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).¹ You have indicated that Sid Richardson and Witco identified these documents as confidential at the time that the companies submitted

¹There 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.

the documents to the commission. In our opinion, however, Sid Richardson has failed to establish a prima facie case that these documents are trade secrets. Sid Richardson'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. Similarly, because we did not receive a response from Witco, we have no basis to conclude that the information from Witco is a trade secret. Consequently, none of information may be withheld under section 382.041 of the Health and Safety Code in conjunction with section 552.101 of the Government Code. *See* Open Records Decision No. 402 (1983).

Sid Richardson also asserts that the information is a trade secret as 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 Sid Richardson has provided only general arguments in support of its contention that the information it seeks to withhold is a trade secret, we conclude that Sid Richardson has failed to establish a prima facie case that this information is a trade secret. Therefore, the commission may not withhold the records under the trade secret prong of section 552.110.

We are issuing this ruling based on the information and arguments provided at the time you sought a request for a ruling from this office. This file may contain "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision" encompassed by section 552.110 of the Government Code. In February, 1996, this office issued Open Records Decision No. 639 (1996), in which this office overruled the test set out in Open Records Decision No. 592 (1991) for this type of information and adopted the test federal courts have used when interpreting exemption 4 to the federal Freedom of Information Act. As section 552.110 is designed to protect third party interests, a claim under this exception may overcome the conclusion that this type of information should be released to the public. *See* Open Records Decision No. 552 (1990). However, a governmental body may not withhold this information without a ruling from this office.

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# 26398

Enclosures: Submitted documents

cc: W. Andrew Scott
Paul, Hastings, Janofsky & Walker
Forty-Second Floor
Georgia-Pacific Center
133 Peachtree Street, N.E.
Atlanta, Georgia 30303-1840
(w/o enclosures)

Mr. Todd N. Miller
Director, Safety, Health and Environmental Affairs
Witco Corporation
P.O. Box 42817
Houston, Texas 77242-2817
(w/o enclosures)

Ms. Margaret M. Menicucci
Kelly, Hart & Hallman
301 Congress, Suite 2000
Austin, Texas 78701
(w/o enclosures)