



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 1, 1997

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

OR97-1510

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# 107097.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for "licenses, inspections, reports, noncompliance reports, chemical spills and releases, or information of any nature" regarding PetroUnited Terminals, Inc. ("PetroUnited"). You state that the commission has made available to the requestor all of the requested information except for certain documents that PetroUnited has marked as being confidential proprietary information, representative samples of which you have submitted to this office for review. You have requested an open records decision from this office pursuant to section 552.305 of the Government Code regarding these materials.

In accordance with the practice this office established in Open Records Decision No. 575 (1990), we notified representatives of PetroUnited that we received your request for an open records decision regarding this information. In our notification, this office requested an explanation as to why the information at issue was excepted from public disclosure, with the caveat that unless we received such explanation within a reasonable time this office would instruct the commission to disclose the information. Representatives of PetroUnited timely responded to our notice and contend that three of the records you have submitted to this office are excepted from required public disclosure as information made confidential under section 382.041 of the Health and Safety Code.¹

¹PetroUnited disavows any knowledge of the document describing "acetaldehyde processing and process flowsheet for acetaldehyde recovery unit," and suggests that this document made have been included in PetroUnited's file in error. Additionally, PetroUnited does not object to the release of the "plot plan" of PetroUnited's Bayport Facility or of the area location map of its Bayport Facility.

Section 382.041(a) of the Health and Safety Code provides:

Except as provided by Subsection (b), a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production *that is identified as confidential when submitted.* [Emphasis added.]

The materials submitted to this office for review were identified by PetroUnited as being confidential at the time they were submitted to the commission. We therefore must now determine whether PetroUnited has met its burden under section 552.305 of demonstrating that the information at issue constitutes "trade secret information" as defined in the Restatement of Torts. See Open Records Decision No. 652 (1997).

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.

RESTATEMENT OF TORTS § 757 cmt. b (1939). See also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978). There are six factors to be assessed in determining whether information qualifies as a trade secret.² This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no

Although PetroUnited contends that other documents it submitted to the commission consist of "trade secret" or "commercial or financial information" that are excepted from required public disclosure pursuant to section 552.110 of the Government Code, the commission did not seek a decision from this office regarding release of this other information. This ruling therefore does not address the propriety of the release of any portion of PetroUnited's "Consolidated Air Quality Permit Application" or its wastewater permit.

²These six factors are

- 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;
- and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 comment b (1939); see also Open Records Decision No. 232 (1979).

evidence of the factors necessary to establish a trade secret claim is presented we cannot conclude that the information must be withheld as such. Open Records Decision No. 402 (1983).

In this instance, PetroUnited has not met its burden in demonstrating that the information before us constitutes "trade secret" information. Although PetroUnited analogizes the information at issue to other records this office has previously determined to constitute trade secrets, PetroUnited has not demonstrated how the six determining factors to be assessed apply to the information at issue.³ We therefore have no basis for concluding that the records before us constitute trade secrets. The commission therefore must release these records in their entirety.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/RWP/cbh

Ref.: ID# 107097

Enclosures: Submitted documents

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(w/o enclosures)

³For example, although PetroUnited has demonstrated the manner in which it restricts access to the information at issue, it has not demonstrated the value of the information, the amount of effort or money expended to develop the information, or the extent to which the information at issue is commonly known by others.

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