

1976 S.C. Op. Atty. Gen. 176 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4349, 1976 WL 22968

Office of the Attorney General

State of South Carolina

Opinion No. 4349

May 14, 1976

*1 ANY RECORDS, REPORTS OR INFORMATION OBTAINED BY THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL UNDER THE PROVISIONS OF THE POLLUTION CONTROL ACT MAY BE KEPT CONFIDENTIAL ONLY IF THE PERSON DESIRING CONFIDENTIALITY MAKES A SATISFACTORY SHOWING TO THE DEPARTMENT THAT SUCH RECORDS, REPORTS OR INFORMATION CONSTITUTE A PARTICULAR SECRET OF A PERSON AND NOT A GENERAL SECRET OF A TRADE; ARE KNOWN ONLY TO CERTAIN INDIVIDUALS WHO HAVE A CONFIDENTIAL OR CONTRACTUAL RELATIONSHIP WITH THE APPLICANT; ARE OF COMMERCIAL VALUE AND PECULIAR TO APPLICANT'S BUSINESS; AND DISCLOSURE OR USE OF THE INFORMATION MUST BE SHOWN TO HAVE THE EFFECT OF CAUSING IRREPARABLE INJURY TO THE APPLICANT.

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QUESTION PRESENTED:

What constitutes proper justification for consideration of information submitted in conjunction with pollution control permit applications as confidential?

STATUTES, CASES, ETC., INVOLVED:

Section 63–195.30 of the South Carolina Code of Laws, 1962, as amended (Section 30 of the Pollution Control Act); [Future Plastics, Inc., v. Ware Shoals Plastics, Inc.](#), 340 F. Supp. 1376; [Arthur Murray Dance Studios, Inc., v. Witter](#), 62 Ohio L. Abs. 17, 105 N.E. 2d 685; [Taylor Freezer Sales Co. v. Sweden Freezer Eastern Corp.](#), 224 Ga. 160, 160 S.E. 2d 356.

DISCUSSION OF ISSUES:

The applicable statute concerning the confidentiality status of information obtained by the South Carolina Department of Health and Environmental Control in pollution control permit applications is Section 63–195.30 of the South Carolina Code of Laws of 1962, as amended. According to this section, the only information which may be considered confidential is information which can be classified as a ‘trade secret.’ It should be noted that the statute specifically excludes from confidentiality any effluent or emission data.

A ‘trade secret,’ as defined in the South Carolina District Court case of [Future Plastics, Inc., v. Ware Shoals Plastics, Inc.](#), 340 F. Supp. 1376 (1972), ‘may consist of 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 is a process or device which is continually used in the operation of the business and thereby differs from secret information which may refer only to an isolated transaction.' The cornerstone requirement of a trade secret is secrecy. (Future Plastics, Inc., supra). To this requirement there are no exceptions. There is no presumption of secrecy and the burden of proof is on the applicant (Arthur Murray Dance Studios, Inc., v. Witter, 62 Ohio L. Abs. 17, 105 N.E. 2d 685). It must be a particular secret of a person and not a general secret of the trade in which he is engaged (Taylor Freezer Sales Co. v. Sweden Freezer Eastern Corp., 224 Ga. 160, 160 S.E. 2d 356), and known only to certain individuals who have a confidential or contractual relationship with that person (Future Plastics, Inc., supra). The secret should be one of commercial value peculiar to the applicant's business (Taylor Freezer Sales Co., supra), and of such a nature that disclosure or use of which would cause irreparable injury to applicant's business (Arthur Murray Dance Studios, Inc., supra). For information obtained from an applicant to be considered confidential the applicant must prove facts which tend to indicate that the information meets all the above requirements of a trade secret. In requesting confidentiality, one should specify only the information which meets all the above requirements of a trade secret. In requesting confidentiality, one should specify only the information which he believes to be trade secrets and wishes to be kept confidential. The determination that a portion of the document be considered a trade secret does not serve as a determination that the entire document be so considered. Any decision made by the Department concerning confidentiality may be appealed to a court of proper jurisdiction once it has become a 'final decision.'

*2 Reviewing the cases in point, a listing of criteria for use in evaluating a request for confidential treatment of information can be derived. The burden of proof will be on the applicant to establish these facts:

- (1) The information must be a secret;
- (2) It must be a particular secret of a person and not a general secret of a trade;
- (3) It must be known to only certain individuals who have a confidential or contractual relationship with the applicant.
- (4) It must be of a commercial value and peculiar to applicant's business; and,
- (5) Disclosure or use of the information must be shown to have the effect of causing irreparable injury to the applicant.

The following is a list of questions which, when answered by the person requesting confidentiality of certain information may be used by the Department in determining whether or not such information should be considered a trade secret:

1. What is the nature of the information (i.e., a formula, pattern, device or compilation of information, etc.)?
2. Explain how the information gives you a competitive edge over others who do not know or use it.
3. How often is the information used in the operation of your business?
4. Explain how the information is kept by your business in such a manner that its contents are not available or made known to the general public or others who are not associated with your business.
5. Is the information a secret of only your business or is it one known to most of the members of the trade in which you are engaged?
6. To which of your business associates or employees is the information made available and what is the nature of their relationship to the business?
7. Of what commercial value is the information and how is the information peculiar to your business?

8. Explain how your business would be irreparably harmed if the information was disclosed or if used by another.

CONCLUSION:

Any records, reports or information obtained by the South Carolina Department of Health and Environmental Control under the provisions of the Pollution Control Act may be kept confidential only if the person desiring confidentiality makes a satisfactory showing to the department that such records, reports or information constitute a particular secret of a person and not a general secret of a trade; are known only to certain individuals who have a confidential or contractual relationship with the applicant; are of commercial value and peculiar to applicant's business; and disclosure or use of the information must be shown to have the effect of causing irreparable injury to the applicant.

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