



North Carolina Department of Environment and Natural Resources

Division of Air Quality

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**Requesting Confidential Treatment of Trade Secret Material**

The North Carolina Public Records Act makes clear that written materials and other information created or received by state and local government is the property of North Carolinians and gives the people a means of enforcing their right to see government records. Consistent with the principle that records and information compiled by state government belong to the people, the North Carolina Supreme Court has developed guideposts for interpreting the law to be used by the courts and government officials charged with fulfilling their disclosure obligations to the public. Specifically: a) the Public Records Act is to be read liberally in favor of public access to records and information; and b) exemptions from the Act's mandatory disclosure requirement are to be read narrowly.

The Public Records Law says records containing certain communications between attorneys and their government clients, state tax information, trade secrets, certain lawsuit settlements, criminal investigation records, and records about industrial expansion are not public records and not subject to public disclosure requirements.

The trade secret provision is the exemption most often exercised in the normal course of business by the North Carolina Division of Air Quality (NCDAQ). Trade secrets are defined at General Statute section 66-152 as business or technical information that has commercial value because it is not generally known or not easily discoverable through independent development or reverse engineering. Trade secrets may include formulas, patterns, programs, devices, compilations of information, methods, techniques or processes.

A request to treat information as confidential based on the trade secret exception to disclosure must meet all of the following conditions:

- 1) Constitute a trade secret as defined in G.S. 66-152(3).
- 2) Is the property of a private "person" as defined in G.S. 66-152(2).
- 3) Is disclosed or furnished to the public agency in connection with the owner's performance of a public contract or in connections with a bid, application, proposal, industrial development project, or in compliance with laws, regulations, rules, or ordinances of the United States, the State, or political subdivisions of the State.
- 4) Is designated or indicated as "confidential" or as a "trade secret" at the time of its initial disclosure to the agency.

Pursuant to the Water and Air Resources statutes, if a person submits information as outlined above, then NCDAQ will treat the information confidential. See G.S. 143-215.3C. There are 3 exceptions to the confidentiality provision. First, emission data, defined at 40 CFR 2.301, are not entitled to confidential treatment. Emission data include, but are not limited to, information

necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission that has been emitted by the source. Second, confidential information may be disclosed to a state agency if disclosure is necessary to carry out a proper function of the Department. Third, confidential information may be released if NCDAQ decides that the information is not entitled to confidential treatment. NCDAQ will provide adequate notice to any person who submits information of any decision that it is not entitled to confidential treatment and of any decision to release the information. Any person who is dissatisfied with a decision to withhold or release information may request a declaratory ruling from the Environmental Management Commission (EMC) under G.S. 150B-4. The information may not be released until the EMC issues a declaratory ruling and, if any appeal, a final judicial determination has been made. It is important to note that once information is received, the Public Records Law prohibits the unlawful return of that information. If it is determined that the information for which confidential treatment was sought is not a trade secret, that information cannot be returned to the requestor and it will be maintained by the State as a public record subject to disclosure upon request by the public.

Please note that the information above is general information and does not constitute legal advice. For more information on North Carolina's public records laws please see the North Carolina General Assembly's web page: [www.ncga.state.nc.us](http://www.ncga.state.nc.us) and from there you can read the full text of the Act. For Public Records, check NC Gen Stat. Chapter 132. See also NCDAQ rules at 15A NCAC 2Q .0107 (<http://www.ncair.org/rules/rules/Q0107.pdf>)