

## NORTH CAROLINA DIVISION OF AIR QUALITY

### MEMORANDUM

**TO:** Regional Supervisors  
Section Chiefs

**FROM:** Michael A. Abraczinskas



**DATE:** September 23, 2022

**SUBJECT:** Procedures for Confidential Business Information (CBI) Requests

### I. Introduction

This document explains how to handle information received by the Division of Air Quality (DAQ) for which confidential treatment is requested. This applies to permit applications, emission inventories, stack test reports, periodic reports, and any other information submitted from external sources to the DAQ. This policy supersedes the July 30, 2009 policy memo from Keith Overcash titled, "Procedure for Handling Confidential Information Requests." Please note that the legal requirements for handling Confidential Business Information (CBI) requests are established by applicable statutes and regulations, and nothing in this memo supersedes these requirements. Further, the guidance set forth in this memo may be altered at the discretion of the Director (or their delegate) on a case-by-case basis.

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 North Carolina General Statutes (G.S.) and Title 15A North Carolina Administrative Code (NCAC) 02Q .0107 require all information submitted to the DAQ pursuant to 15A NCAC 02Q or 02D to be disclosed to the public unless the person submitting the information demonstrates that it is entitled to confidential treatment under G.S. 143-215.3C. **The General Statutes allow confidential treatment of "trade secrets" as referenced in G.S. 132-1.2 with the exception of "emission data" as defined under 40 CFR 2.301 (1 July 1993 edition).**

"Emission data" is defined in 40 CFR 2.301(a)(2)(i) (1 July 1993 edition) as:

- A. *Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;*
- B. *Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and*
- C. *A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).*

The trade secret provision is the exemption most often exercised in the normal course of business by the DAQ. "Trade secret" is referenced in G.S. 132-1.2 and defined in G.S. 66-152(3) as follows:

*"Trade secret" means business or technical information, including but not limited to a formula, pattern, device, compilation of information, method, technique, or process that:*

- a. *Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and*
- b. *Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*

*The existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person or licensed to other persons.*

Given the above rules and definitions (see attached to this memo), DAQ procedures for handling information for which confidential treatment has been requested are as follows:

## **II. Receipt of CBI Requests:**

15A NCAC 02Q .0107(b) provides that a person requesting that information be treated as confidential submit such request at the time that the information is submitted. The request must be in writing and state the reasons why the information should be treated as confidential. The requirement to submit the justification for confidential treatment up front is particularly important as some cases may require legal review by the Attorney General's Office (AGO) or the Department of Environmental Quality's Office of General Counsel (OGC), which takes additional time.

DAQ requires the following in order to issue a determination on a request for confidential treatment of information:

1. The requester must submit two versions of the document, including:
  - a. A confidential version, which includes all the information for which confidentiality has been requested. Only the page(s) containing confidential information should be marked as “confidential.”
  - b. A publicly viewable version, which includes the confidential information either redacted or removed from the document. If removed, an insert should be included to reference that information was removed for confidentiality purposes.
2. The requester must submit a written justification detailing the rationale for requesting the confidentiality claim. As the written justification is also a publicly viewable, the confidential information shall not be included in this document. This written justification, at a minimum, must explain the following:
  - a. How the information is protected by the requester and how its disclosure would affect the requester,
  - b. Why the information meets the definition of “trade secret,” and
  - c. Why the information does not meet the definition of “emission data.”
3. The requester must submit the package including the confidential version, publicly viewable version, and written justification either via mail or an approved electronic portal designed for the receipt of confidential information. **It is the DAQ’s preference that CBI requests are not submitted via e-mail.** However, if the CBI request is submitted via e-mail, the DAQ is still under an obligation to protect the information until a determination is made.

Any request not meeting the first two requirements is considered incomplete per 15A NCAC 02Q .0107. If a request is lacking any of the required documentation, the DAQ reviewer should call the requester and give them the opportunity to correct or amend the request and require that such correction or amendment be completed within 30 days. **While waiting for the corrected or amended information, the DAQ reviewer must maintain the information as if it were “confidential.”**

**Third Party Requests:** If a request for confidential treatment of information is received and a request to view the information is received from a third party **before** an approval or denial letter is issued, the information should continue to be treated as confidential and the Director’s office and an air pollution subject matter attorney of the AGO or OGC should be contacted immediately (see section III of this memo).

### **III. Review and Response to CBI Requests:**

15A NCAC 02Q .0107(c) requires the Director (or their delegate) to notify the requester of the decision whether or not to treat the information as confidential within 180 days of receipt of the request.

**Written response to the requester of the DAQ's final determination for all CBI requests is required. Improper disclosure of confidential information can result in liability for DAQ.**

The response is either an approval or denial letter for which Regional Supervisors (and others) have delegated signature authority. **The DAQ reviewer is responsible for tracking the 180-day clock, which is initiated upon receipt of a complete CBI request.**

The DAQ reviewer should evaluate the information to see that it is **both “trade secret” and not “emission data”** according to the definitions above and develop a recommended determination within 30 days of receipt of the request.

#### **A. Approval of CBI Request**

If the DAQ reviewer concludes that the information meets the criteria for confidential treatment, the reviewer should prepare an approval letter to the requester documenting this determination and identifying the information that will be treated as confidential (e.g., “pages 2-6 of application, Appendix A, Table 1, and Plant Layout Diagram”). This draft approval letter shall be submitted for review by the next level supervisor that has delegated signature authority for CBI determinations. Once signed, the approval letter must be sent to the requester via certified mail.

If the next level supervisor disagrees with the reviewer's recommendation, the requester should be given the option to withdraw their request or submit additional information before the final determination is made as specified in section III.B below.

Information deemed confidential shall be maintained in a designated, secured confidential storage location (in physical or electronic format) for the duration of its use, in accordance with the retention and disposition schedules.

#### **B. Denial of CBI Request**

If the DAQ reviewer concludes that the information does not meet the criteria for confidential treatment, the reviewer should inform the next level supervisor that has delegated signature authority for CBI determinations. If that supervisor agrees with the reviewer's preliminary finding, then the reviewer should call the requester and inform them of the recommendation for denial of the CBI request and explain the basis for that recommendation.

- i. If the requester agrees the information is not confidential, then the requester may withdraw the request and resubmit the information with the confidentiality claim and notations removed.
- ii. If the requester disagrees and wishes to send additional information to substantiate their claim, then this information must be submitted within 30 days and will be evaluated by the DAQ reviewer and the supervisor.
- iii. If, upon review of any additional information, the DAQ reviewer and the supervisor conclude that the information does not meet the criteria for confidential treatment, then they should consult with the Director's office and an air pollution subject matter attorney of the AGO or OGC. If, after consultation with counsel, the Director (or their delegate) determines that the information is not entitled to confidential treatment, the reviewer shall prepare a draft letter denying the confidentiality request and submit it to the Director (or their delegate) for signature. This letter shall contain an explanation of the basis for the denial and must be sent via certified mail.

Under G.S. 143-215.3C(d), if the requester is dissatisfied with DAQ's denial of a confidentiality claim, the requester has ten days after receipt of the denial letter to request a declaratory ruling from the Environmental Management Commission in accordance with G.S. 150B-4. Any information that is in contention shall be maintained as confidential for at least fifteen days after the requester has received the denial letter via certified mail. If the requester chooses to pursue further legal proceedings, the information for which a determination is sought shall be treated as confidential until the administrative and judicial process conclude.

**Third Party Requests:** Any person denied a request to view information on the basis of confidentiality may request a declaratory ruling from the Environmental Management Commission within 10 days after the person is notified of the decision to treat the information as confidential pursuant to G.S. 143-215.3C(d).

Cc: Michael Pjetraj  
Local Programs

## Attachment – Rules Governing Confidentiality

### 15A NCAC 02Q .0107 CONFIDENTIAL INFORMATION

- (a) All information required to be submitted to the Commission or the Director pursuant to 15A NCAC 02Q or 02D shall be disclosed to the public unless the person submitting the information demonstrates that the information is entitled to confidential treatment pursuant to G.S. 143-215.3C.
- (b) A request that information be treated as confidential shall be made by the person submitting the information at the time that the information is submitted. The request shall state in writing the reasons why the information should be treated as confidential.
- (c) The Director shall decide which information is entitled to confidential treatment and shall notify the person requesting confidential treatment of his or her decision within 180 days of receipt of a request to treat information as confidential.
- (d) Information for which a request has been made pursuant to Paragraph (b) of this Rule shall be treated as confidential until the Director decides that it is not confidential.

*History Note: Authority G.S. 143-215.3(a)(1); 143-215.3C;  
Temporary Adoption Eff. March 8, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;  
Eff. July 1, 1994;  
Amended Eff. April 1, 1999; July 1, 1997;  
Readopted Eff. April 1, 2018.*

## CHAPTER 143 - STATE DEPARTMENTS, INSTITUTIONS, AND COMMISSIONS

### Article 21 - Water and Air Resources

#### § 143-215.3C. Confidential information protected.

- (a) Information obtained under this Article or Article 21A or 21B of this Chapter shall be available to the public except that, upon a showing satisfactory to the Commission by any person that information to which the Commission has access, if made public, would divulge methods or processes entitled to protection as trade secrets pursuant to G.S. 132-1.2, the Commission shall consider the information confidential.
- (b) Effluent data, as defined in 40 Code of Federal Regulations § 2.302 (1 July 1993 Edition) and emission data, as defined in 40 Code of Federal Regulations § 2.301 (1 July 1993 Edition) is not entitled to confidential treatment under this section.
- (c) Confidential information may be disclosed to any officer, employee, or authorized representative of any federal or state agency if disclosure is necessary to carry out a proper function of the Department or other agency or when relevant in any proceeding under this Article or Article 21A or Article 21B of this Chapter.
- (d) The Commission shall provide for adequate notice to any person who submits information of any decision that the information is not entitled to confidential treatment and of any decision to release information that the person who submits the information contends is entitled to confidential treatment. Any person who requests information and any person who submits information who is dissatisfied with a decision of the Commission to withhold or release information may request a declaratory ruling from the Commission under G.S. 150B-4 within 10 days after the Commission notifies the person of its decision. The information may not be

released by the Commission until the Commission issues a declaratory ruling or, if judicial review of the final agency decision is sought by any party, the information may not be released by the Commission until a final judicial determination has been made. (1993 (Reg. Sess., 1994), c. 694, s. 2.)

## **CHAPTER 132 - PUBLIC RECORDS**

### **§ 132-1.2. Confidential information**

Nothing in this Chapter shall be construed to require or authorize a public agency or its subdivision to disclose any information that:

(1) Meets all of the following conditions:

- a. Constitutes a "trade secret" as defined in G.S. 66-152(3).
- b. Is the property of a private "person" as defined in G.S. 66-152(2).
- c. Is disclosed or furnished to the public agency in connection with the owner's performance of a public contract or in connection 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.
- d. Is designated or indicated as "confidential" or as a "trade secret" at the time of its initial disclosure to the public agency.

(2) Reveals an account number for electronic payment as defined in G.S. 141-86.20 and obtained pursuant to Articles 6A or 6B of Chapter 147 of the General Statutes or G.S. 159-32.1.

(3) Reveals a document, file number, password, or any other information maintained by the Secretary of State pursuant to Article 21 of Chapter 130A of the General Statutes.

(4) Reveals the electronically captured image of an individual's signature, date of birth, drivers license number, or a portion of an individual's social security number if the agency has those items because they are on a voter registration document.

(5) Reveals the seal of a licensed design professional who is licensed under Chapter 83A or Chapter 89C of the General Statutes that has been submitted for project approval to (i) a municipality under Part 5 of Article 19 of Chapter 160A of the General Statutes or (ii) to a county under Part 4 of Article 18 of Chapter 153A of the General Statutes. Notwithstanding this exemption, a municipality or county that receives a request for a document submitted for project approval that contains the seal of a licensed design professional who is licensed under Chapter 83A or Chapter 89C of the General Statutes and that is otherwise a public record by G.S. 132-1 shall allow a copy of the document without the seal of the licensed design professional to be examined and copied, consistent with any rules adopted by the licensing board under Chapter 83A or Chapter 89C of the General Statutes regarding an unsealed document.

(6) Reveals documents related to the federal government's process to determine closure or realignment of military installations until a final decision has been made by the federal government in that process.

(7) Reveals name, address, qualifications, and other identifying information of any person or entity that manufactures, compounds, prepares, prescribes, dispenses, supplies, or administers the drugs or supplies obtained for any purpose authorized by Article 19 of Chapter 15 of the General Statutes.

(8) Reveals the name, address, or other identifying information of any individual winning more than fifty million dollars (\$50,000,000) in a lottery game who requests to remain anonymous for 90 days, as provided in G.S. 18C-132(j1).

(9) Reveals proprietary design work or work product included in a proposal that is submitted to the Department of Transportation for consideration, or any Department intra-agency communications related to the review of a proposal, during a competitive bid process. For the purposes of this subdivision, the competitive bid process is completed upon contract award. Proprietary design work, work product, or intra-agency communications that are otherwise public records pursuant to G.S. 132-1 are no longer confidential and subject to disclosure upon contract award. (1989, c. 269; 1991, c. 745, s. 3; 1999-434, s. 7; 2001-455, s. 2; 2001-513, s. 30(b); 2003-226, s. 5; 2004-127, s. 17(b); 2009-346, s. 1; 2014-79, s. 8; 2015-198, s. 6; 2019-142, s. 6; 2019-156, s. 3.)

## **CHAPTER 66 - COMMERCE AND BUSINESS**

### **Article 24 - Trade Secrets Protection Act**

#### **§ 66-152. Definitions.**

As used in this Article, unless the context requires otherwise:

- (1) "Misappropriation" means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.
- (2) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity.
- (3) "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
  - a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
  - b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person, or licensed to other persons. (1981, c. 890, s. 1.)

### **40 CFR 2.301 Special rules governing certain information obtained under the Clean Air Act. (1 July 1993 edition)**

(a) *Definitions.* For the purpose of this section:

(1) *Act* means the Clean Air Act, as amended, 42 U.S.C. 7401 *et seq.*

(2)

(i) *Emission data* means, with reference to any source of emission of any substance into the air-

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any

emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

(ii) Notwithstanding paragraph (a)(2)(i) of this section, the following information shall be considered to be *emission data* only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

(B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.