



Information submitted to the Department of Natural Resources (DNR) is considered an open record and available for any person to review upon request, according to the state open records law in ss. 19.31-19.39, Wis. Stat. Information can be protected from disclosure outside the agency if the facility applies for and receives confidential status. In order for DNR to grant confidential status, the applicant must follow the procedures described in NR 2.19, Wis. Adm. Code, and the information must constitute a trade secret as defined in s. 134.90(1)(c), Wis. Stats.

The DNR's confidentiality procedure consists of the facility's confidentiality request, granting of interim confidentiality, and the final confidentiality determination. Once granted, confidential status is permanent. The process is explained below.

What Does “Trade Secret” Mean?

Before requesting any information be treated as confidential, the applicant must evaluate whether the requested information can be considered a “trade secret”, as defined under s. 134.90(1)(c), Wis. Stats. The following two criteria must be met to satisfy the definition of “trade secret”:

1. *The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.*

To satisfy this requirement, the confidentiality request should contain sufficient details to support the contention: for example, why or how the information gives the company a competitive advantage over its competitors, how long it took the company to develop the information, the actual or potential economic value of the information to the company, whether the company is the sole possessor of the information, whether the general public has knowledge of the information, and any other relevant factors.

2. *The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.*

To assist the DNR in establishing whether this requirement is satisfied, details should be provided in the confidentiality request relating to the level of access to the information. Important information to supply are the number and type of employees given access to the information, whether persons outside the company have knowledge of the information, awareness of employees and others as to the confidential nature of the information, previous disclosure of the information to another governmental agency and requests to or

approval by them of confidential treatment, any other persons or groups the company has disclosed the information to and why, past marking of the information as "confidential," other general attempts to maintain secrecy and anything else that is potentially relevant.

The burden of proof for showing that specific information constitutes a trade secret is upon the applicant, as explained under s. NR 2.19(2), Wis. Adm. Code. It should be noted, however, that emission data and air pollution control permits issued by the DNR cannot be given confidential status, under s. 285.70(2), Wis. Stats.

Can the Entire Submittal Be Confidential?

No. The applicant must specify clearly which elements in the submittal are included in the request for confidential treatment; which may include selected calculations, emission unit descriptions or specifications, data/graphs, portions of permit application forms, compliance reports, etc. As previously mentioned, emissions data and air pollution control permits cannot be considered confidential.

What Do I Submit With The Request?

According to s. NR 2.19(3), Wis. Adm. Code, the following information should be included when submitting a request for confidentiality.

1. A **notarized and signed affidavit** that includes the following:

- The company name, facility location address, and the facility ID of the applicant.
- The name, position, and mailing address of the individual filing the application.
- The specific information for which confidential status is sought, including the emission unit ID, emission unit description, and specific data element with unit. For example: *the actual annual throughput rate in gallons per year for the storage tank T01.*
- The type(s) of document(s) that contains this requested information (i.e.: permit application, emission inventory report, inspection report, etc.)
- The justification, including the facts and supporting legal authority, believed to constitute a basis for obtaining confidential treatment of the information. For each data element requested, the supporting justification should include the answers for the following questions, as applicable:
 - a. *How is the information valuable to the company? How does it give the company a competitive edge? Why is the continued secrecy of the information important to the company?*
 - b. *What would be gained by a competitor who obtained the information?*
 - c. *Is this information general public knowledge? Has it ever been published or publicly displayed?*
 - d. *Are other companies aware of, or using, the information?*
 - e. *How much time and effort was involved in the development of the technique/process/formula?*

- f. What specific methods are used by the company to safeguard the secrecy of the information?*
- g. How is the information treated within the company? Who has access to it? Is it marked as confidential? Are there any written policies as to its confidentiality?*
- h. Has the company disclosed the information in any other circumstances? If so, to whom? Have any efforts been made to ensure its confidentiality, despite this disclosure?*

2. Two sets of the documents:

- One set of document for the public file that has the requested confidential information removed, and
- A second set of document that contains the complete information (including confidential information) for DNR's confidential file.

Where Do I Submit the Request?

Do not submit any document that contains confidential information through e-mail since internet security cannot be guaranteed. Mail the request package to the following address:

Wisconsin DNR - Bureau of Air Management
101 S. Webster Street
PO Box 7921
Madison, WI 53707-7921

What Will Happen After I Submit My Request?

DNR will conduct a preliminary assessment to the confidentiality request package. DNR may request additional information if the request package does not contain sufficient information. If the request package is deemed complete, DNR will grant "interim confidentiality status" until a final determination is made pursuant to s. NR 2.19(5), Wis. Adm. Code. DNR will keep the requested information confidential until a final determination is made.

After DNR completes the review of the confidentiality request, DNR will either grant in full, deny in full, or issue a partial grant / partial denial of the request:

(1) Grant the Request:

DNR will send a "preliminary grant of confidentiality" letter to the facility and publish a public notice of the preliminary decision. Interested parties and the applicant have 10 days to request an adjudicatory hearing. If no hearing is requested, DNR will issue a "final decision on the confidentiality" letter to the facility. If a hearing is requested, it would be held before an administrative law judge. Testimony would be under oath, and would be subject to cross-examination. The facility would have the burden of showing that its information is entitled to confidential status. The administrative law judge is required to exercise discretion to determine which individuals may have access to the confidential information and

impose protective measures necessary to safeguard confidentiality of the information during and after the hearing.

(2) Deny the Request:

DNR will issue a denial letter to the facility. The facility has 15 days, from the date of mailing, to appeal the denial decision and request an adjudicatory hearing. Information for which confidential status has been denied will not be open to public scrutiny until 40 days after issuance of the denial.

(3) Partial Grant / Partial Denial the Request:

DNR will issue a partial grant / partial denial letter to the facility. The partial grant process is the same as the process described in (1) above. After the final decision is mailed, the facility has 15 days, from the date of mailing, to appeal the partial denial decision and request an adjudicatory hearing. If partial confidentiality is granted, the facility will need to submit a revised public copy of the document that redacts only the granted confidential information.

DNR now tracks the processing of confidentiality requests using a tracking number derived from your facility's 9-digit FID# and the year of the request, ex: "123456780-2015CONFID". Similar to how the progress on permits can be viewed, the status of the processing of confidentiality requests can be viewed online, by clicking on the link for **Air Permit Search Tool** from this web address: <http://dnr.wi.gov/topic/AirPermits/Search.html>.

What if I Have Questions?

For additional help submitting a confidentiality request, or clarification on the information provided here, please contact the Confidentiality Request Liaison at (608) 266-7718.

DISCLAIMER —This document is intended solely as guidance and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts. The Wisconsin Department of Natural Resources provides equal opportunity in employment, programs, services and functions under an Affirmative Action Plan. If you have any questions, please write to Equal Opportunity Office, Department of Interior, Washington, DC 20240. This publication is available in alternative format (large print, Braille, audio tape, etc.) upon request. Please contact the Bureau of Air Management, phone 608-266-7718, for more information.



Wisconsin Department of Natural Resources
Bureau of Air Management
Box 7921- AM/7
Madison, WI 53707
PHONE 608-266-7718 • FAX 608-267-0560
Publication AM-530 2016