



WISCONSIN DEPARTMENT OF NATURAL RESOURCES NOTICE OF FINAL GUIDANCE & CERTIFICATION

Pursuant to ch. 227, Wis. Stats., the Wisconsin Department of Natural Resources has finalized and hereby certifies the following guidance document.

DOCUMENT ID WT-19-0003

DOCUMENT TITLE REQUESTS FOR CONFIDENTIALITY

PROGRAM/BUREAU WATERWAYS PROGRAM

STATUTORY AUTHORITY OR LEGAL CITATION WIS ADM CODE NR 2.19

DATE SENT TO LEGISLATIVE REFERENCE BUREAU (FOR PUBLIC COMMENTS) 8/26/19

DATE FINALIZED 10/21/19

DNR CERTIFICATION

I have reviewed this guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.

10/11/19

Signature

Date



**BUREAU OF WATERSHED MANAGEMENT
PROGRAM GUIDANCE
Waterway and Wetland Protection**

Requests for Confidentiality

Effective Date: February 14th, 2018
EGAD Number: 3500-2017-03

Notice: 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.

APPROVED:

Pam Biersach, Director
Bureau of Watershed Management

2-14-18

Date

In the review of permit applications for projects that are regulated under Ch. 30, Wis. Stats. or s. 281.36, Wis. Adm. Code, staff are sometimes requesting information from an applicant that raises concerns about open records requests and the need for confidentiality for that particular industry or business. However, if the program has determined that the information is necessary for our review, NR 2.19, Wis. Adm. Code establishes the process and standards for holding permit application information as confidential and not subject to an open records request. The purpose of this memo is to establish the process and procedures the Waterway and Wetland Section shall follow in receiving a request for confidentiality.

If an affidavit for confidentiality is submitted with the permit application, Central Intake staff shall complete their review of the submitted materials and shall mark all of the documents listed in the affidavit as confidential before forwarding the application to the Water Management Specialist. Intake staff shall also write "confidentiality request" into the comments section. This is meant to track the number of requests and to ultimately verify that the request is either denied or granted.

Initial Receipt of Required Materials.

1. The applicant may submit a request for confidentiality at any time during the application process. Ideally, applicants will submit requests for confidentiality at the time of application or beforehand during the pre-application process. After applications are submitted through the ePermitting system, they are publicly available. Therefore, the Department cannot guarantee that information submitted during the application process hasn't been viewed by the public, and can only prospectively guarantee confidentiality when requests for confidentiality are submitted after the time of application.
2. The confidentiality request **must be** in affidavit form pursuant to s. NR 2.19(3) Wis. Adm. Code. The signed and notarized affidavit must include the following:
 1. The name and address of the applicant.
 2. The position of the individual filing the application.
 3. The specific type of information for which confidential status is sought.
 4. The facts and supporting legal authority believed to constitute a basis for obtaining confidential treatment of the information.

NOTE: The burden of establishing the need for confidential treatment of any information shall be on the person requesting such treatment of the information. s. NR 2.19(2) Wis. Adm. Code.

3. When the Water Management Specialist receives an application with an affidavit requesting confidentiality, the Water Management Specialist shall perform the preliminary review of the affidavit to verify that the request meets the minimum requirements outlined in the code.

4. Using the criteria described in the section below, the Water Management Specialist in cooperation with the Waterway and Wetland Basin Supervisor and Central Office policy staff, shall make a preliminary decision as to whether the information in the request is complete and sufficient to make a confidentiality determination.
 1. If the request is not complete, not in proper affidavit form, or not sufficient to make an adequate determination, contact the applicant and tell them what is needed. Document the date the applicant was contacted regarding the incomplete request on the confidentiality page in the comments section of the database. If the applicant then provides the necessary information to make a determination, the application is deemed complete.

Note: An incompleteness determination must be done within 30 days of receipt of the request. If the applicant fails to respond to the department request to address deficiencies within 30 days, the department shall deny the request.
 2. The assigned staff may consult with the appropriate program attorney, if it is believed that information is missing and/or insufficient. The attorney will assist, as needed, to draft a request for further information.
5. If the applicant submits additional information, following a notice of incompleteness, then that information should include a separate affidavit for any information the applicant seeks to keep confidential in that supplemental information.

Preliminary Review of Confidentiality Request

1. The assigned staff should conduct a preliminary assessment as to whether confidential status should be granted or denied and the basis for the decision. In order to receive confidential status, the information must satisfy the criteria identified under ss. NR 2.19. The key consideration in ss. NR 2.19 is whether withholding the applicant's information from the public, because of the potential harm done to the public interest, outweighs the public's right to disclosure of the information. *State ex rel. Youmans v. Owens*, 28 Wis.2d 672 at 681. **Also determine if the information meets both of the requirements below.**
 1. **Does the** company derive independent economic value, actual or potential, from the fact that the information is not generally known or readily ascertainable by proper means?
 2. **Has the** company made reasonable efforts to maintain the secrecy of the information for which it is requesting confidential status?

The assigned staff should use professional experience and support staff recommendations to guide you in making the determination of whether the information should be confidential. To help in the review of the two factors above, the following questions should be considered:

1. What specific information has the company requested be held confidential?
2. How is the information valuable to the company? How does it give the company a competitive edge? Why is the continued confidentiality of the information important to the company?
3. What would be gained by a competitor who obtained the information?
4. Is this information general public knowledge? Has it ever been published or publicly displayed?
5. Are other companies aware of, or using, the information?
6. How much time and effort was involved in the development of the technique/process/formula?
7. What specific methods are used by the company to safeguard the confidentiality of the information?
8. 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?
9. 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?

In making the confidentiality determination, staff should remember that they can partially deny a request for confidentiality. Staff may give extra scrutiny to requests that routine application materials such as the WRAPP sheet and site maps be kept confidential. These materials likely will not meet the two factor test for confidentiality.

Drafting Preliminary Grant or Denial of Confidentiality Request

1. Inform the appropriate program attorney of your preliminary decision to grant or deny the request. If you are unsure of whether material should be held confidential, this is the point where you should have further discussion with the program attorney about any specific concerns.
2. **Within 60 days of receiving a completed application, the department shall issue a written preliminary decision on the request for confidentiality.**
3. If decision is to deny confidentiality, the assigned staff will work with the attorney to draft a letter notifying the applicant of the denial. Please note that confidentiality requests can be denied in part, if you feel that only some information should be confidential. Templates for a confidentiality denial letter/ partial denial letter are located in the "Confidentiality" folder on the Waterway and Wetland Guidance Sharepoint site. For any denial, the requesting applicant has 15 days from date of mailing to appeal the Department's denial and request an adjudicatory hearing. Any denial needs to inform the requestor of their appeal rights for that decision.

4. If the decision is to proceed with granting confidentiality, the assigned staff will draft letter notifying the applicant of a **“preliminary grant of confidentiality”** until a final determination is made pursuant to NR 2.19, Wis. Adm. Code. A template for a confidentiality grant letter is located in the “Confidentiality” folder on the Waterway and Wetland Guidance Sharepoint site.
5. Enter the date and decision to deny or preliminarily grant of confidentiality in the comments section in the waterway and wetland database.

Submission of Application Materials

1. Along with their affidavit, applicants should submit both a redacted and complete version of their application materials through the ePermitting system. The intake specialist will then mark the complete version of the materials confidential, process and send to the reviewer. If the confidentiality request is granted, the complete version of the materials will remain marked confidential by the reviewer after the intake stage. If the confidentiality request is denied, the complete version of the materials be unmarked confidential by the reviewer after the intake stage. If the confidentiality request is denied in part, the applicant should submit a new redacted version, which should be made publicly available, while the complete materials should be marked confidential by the reviewer.

Public Notice Requirement for Preliminary Grant of Confidentiality

1. If the Department **grants preliminary confidential status for any or all of the requested information**, then there is an obligation under s. NR 2.19(5)(e), Wis. Adm. Code to public notice the decision to approve the request. The public notice must be a class I notice in the official state newspaper. The assigned staff will prepare notice of the preliminary determination of confidentiality for administrative staff to prepare for publication. A template for a confidentiality grant public notice is located in the “Confidentiality” folder on the Waterway and Wetland Guidance Sharepoint site. Enter date of publication in the database.

NOTE: Do not combine this with the required public notice for individual permits. There are two reasons for this:

- a. An interested party only has 10 days to request an adjudicatory hearing pursuant to s. NR 2.19, in contrast to the wetland or Ch. 30 regulations where interested parties have other time frames in which to request a hearing.
- b. If an interested party requests a hearing on a preliminary grant of confidentiality it goes to a contested case hearing, not a public informational hearing.

2. An interested party has 10 days from date of publication to request a hearing, challenging the preliminary decision to grant confidential status. If hearing is requested, contact the appropriate policy staff. Enter date of hearing request on the confidentiality in the database.
3. If there is no request for a hearing, the confidentiality grant becomes a final determination. Enter date of final grant determination in the database. All documents containing the confidential information must remain private or confidential in Sharepoint. See 'Management of Confidential Information during Review and After Final Determination' section of this guidance for further information on confidential files.
4. The assigned staff shall send the letter to the applicant informing them of the final determination on confidentiality. A template for a final decision to grant confidentiality is located in the "Confidentiality" folder on the Waterway and Wetland Guidance Sharepoint site. Enter the date of the final determination on the confidentiality page in the database.

Management of Confidential Information During Review and After Final Determination

1. The Department discusses management of confidential records in its "Record Management Handbook" found at <http://intranet.dnr.state.wi.us/int/mb/handbooks/95205/95205.pdf>. Staff who work with confidential records need to be familiar with the expectations of proper management, control, and disposal of such records.
2. Central Office and each Region shall maintain the confidential files in Sharepoint as private or confidential, including copies of the public notice and letters created in making the determination that the documentation was confidential.
3. Information for which confidential status has been requested shall be kept confidential by the department while it makes its decision (see s. NR 2.19(8), Wis. Adm. Code). Additional information supplied by the applicant to support the request for confidentiality shall be treated as confidential if the applicant so requests and the applicant demonstrates that the additional information is entitled to confidential treatment under this section.
4. Under s. NR 2.19(8), Wis. Adm. Code, information for which confidential status has been denied may not be open to public scrutiny until 40 days after issuance of the denial. If the denial is appealed, the information may not be open to public scrutiny until 40 days after completion of all appeals.

Once the time frame listed in paragraph 4. above has expired, the Water Management Specialist shall remove the private or confidential status in the Sharepoint file for the documents that have been denied confidentiality by clicking the lock button.

CREATED:

Statewide Policy Team

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October 3rd, 2017

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October 3rd, 2017

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Policy Management Team approved on October 4th, 2017