



How to Request Confidentiality for Business Information

March 2018

Information submitted to the Wisconsin Department of Natural Resources (DNR) is considered an open record and available for any person to review upon request, according to the State of Wisconsin's open records law. A business may request confidentiality for some information it submits to DNR and, after review and notice to the public, DNR may grant in full, deny in full, or grant or deny in part the confidentiality request.

The surest way to keep information confidential is to not submit unnecessary information to DNR. Before submitting information with a confidentiality request, the facility is encouraged to contact DNR for an initial consultation to evaluate if submitting such information is needed for permit application or compliance purposes. Some information submitted by the facility may be deemed a "trade secret" and can be kept confidential, but all other information submitted to DNR will be made available in response to open records requests, so facilities are encouraged to limit the amount of extraneous information submitted to DNR.

Once facility-specific information is submitted to DNR, it can be protected from disclosure outside the agency if the facility receives confidential status. In order for DNR to grant confidential status, the applicant must follow the procedures described in s. NR 2.19, Wis. Adm. Code, to show that the information is a "trade secret." Prior to the submittal of information, the facility is encouraged to have a pre-consultation call with a DNR Confidentiality Request Liaison. The department's confidentiality process includes the following steps:

1. Facility submits confidentiality request
2. DNR grants interim confidentiality
3. DNR makes a preliminary decision to fully grant, fully deny, or grant in part / deny in part a confidentiality request
4. The source and the public are given notice and the opportunity to contest the preliminary decision
5. DNR issues a final confidentiality determination

Once granted, final confidential status is permanent.

What is "trade secret"?

Before requesting that any information be treated as confidential, the applicant must evaluate whether the information can be considered a "trade secret." The burden of proof for showing that specific information constitutes a trade secret is upon the applicant. Under s. 134.90(1)(c), Wis. Stats., there are three elements to a "trade secret:"

- 1. The material in question must be a formula, pattern, compilation, program, device, method, technique, process, or other type of information.***

2. 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 include the actual or potential economic value of the information (in dollars), and details to support this contention. Relevant details may include:

- Why or how the information gives the company a competitive advantage over its competitors
- The work hours and staffing required to develop the information
- Whether the company is the sole possessor of the information
- Whether the general public has knowledge of the information
- Any other relevant factors

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

To assist DNR in establishing whether this requirement is satisfied, the facility is encouraged to provide details in the confidentiality request relating to the level of access to the information. Relevant details may include:

- The number and type of employees with access to the information
- Persons outside of the company with knowledge of the information
- Steps taken to notify employees and others of the confidential nature of the information
- Previous disclosure of the information to another governmental agency and requests to, or approval by, another agency of confidential treatment
- Any other persons or groups the company has disclosed the information to and why
- Past marking of the information as "confidential," or the existence of any non-disclosure agreements (NDAs) affecting the disclosure of the information
- Other efforts to maintain secrecy
- Any other potentially relevant information

Can the entire submittal be listed as confidential?

No. The applicant must clearly state which portions of 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. Emission data and air pollution control permits issued by DNR cannot be given confidential status.

What should the facility submit with the request?

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 identification number (FID#) 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, the emission unit description and specific data associated with the unit. An example of information that should be included is the actual annual throughput rate in gallons per year for a specific storage tank
 - The type(s) of document(s) that contain this requested information (i.e.: permit application,

emission inventory report, inspection report, etc.)

- Specific justifications for each assertion that information meets all three elements of a “trade secret,” as defined in s. 134.90(1)(c), Wis. Stats., and listed under “What is trade secret?” above

2. Two sets of the documents:

- One set of documents for the public file with the requested confidential information redacted.
- A second set of documents containing the complete application (including confidential information) for DNR’s confidential file.

Where should the request be submitted?

Do not submit any documents that contain confidential information through e-mail. 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 happens after a request is submitted?

The department will conduct a preliminary assessment of the confidentiality request package. The department may request additional information, if the package does not contain sufficient information. Once the request package is deemed complete, DNR will grant “interim confidentiality status” and keep the requested information confidential until a final determination is made.

After DNR completes the review of the confidentiality request, the department may propose to grant in full, deny in full, or partially grant and partially deny the request. Depending on the decision, the following procedures are used:

(1) Confidentiality request granted in full

The 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 send a “final decision on the confidentiality” letter to the facility. If a hearing is requested, a hearing will be held before an administrative law judge (ALJ). 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 ALJ 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. Once the ALJ has made a final decision, this becomes a DNR determination subject to further appeal.

(2) Confidentiality request denied in full

The 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. If the denial is appealed, the information is treated as confidential for 40 days after the completion of all

appeals.

(3) Confidentiality request is granted in part and denied in part

The DNR will issue separate partial grant and partial denial letters to the facility. The partial grant will follow the procedure established in (1) above, while the partial denial will follow the procedures in (2). 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.

The department tracks the processing of confidentiality requests using a tracking number derived from the facility's nine digit facility identification (FID) number and the year of the request. Similar to permit progress monitoring, the processing status of confidentiality requests can be viewed online by clicking the link for the **Air Permit Search Tool** from this web address: <http://dnr.wi.gov/topic/AirPermits/Search.html>. Enter the FID or facility name; click the tab for "Permits and Permit Applications"; select the permit # with "CONFID" for the documents and milestones associated with this confidentiality request.

Where can a facility go for questions or assistance?

For additional assistance with 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. 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.

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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 2018



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

AM-19-0076

DOCUMENT TITLE

Fact Sheet on Air Facility Confidentiality Requests

PROGRAM/BUREAU

Air Management

STATUTORY AUTHORITY OR LEGAL CITATION

Section 134.90, Wisconsin Statutes; Chapter NR 2, Wisconsin Administrative Code

DATE SENT TO LEGISLATIVE REFERENCE BUREAU (FOR PUBLIC COMMENTS)

December 16, 2019

DATE FINALIZED

February 3, 2020

No comments were received during the comment period 16DEC2019 to 06JAN2020

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.

January 10, 2020

Signature

Date