

Protecting Confidential Business Information in Submittals to the Government

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Many state and federal regulations or governmental orders may require the submittal of information considered by your business to contain trade secrets or otherwise confidential business information. For example, various environmental and safety regulations or permits may require you to report the formulations of the chemicals or products you use or produce or provide details on your production processes. Because submittals to the government become public records, this information is generally subject to disclosure to any member of the public, including your competitors. The posting of submitted information on the internet by government agencies is becoming more prevalent and is making such information more easily accessible, highlighting the potential risks to discovery of your confidential business information. The purpose of this article is to alert you to the availability of certain measures you can take to prevent the disclosure of trade secrets or confidential business information to the public.

Federal Protections

The starting place for protecting the confidentiality of trade secrets is the statute or regulation governing the submittal, which may specifically provide for the protection of such information under certain circumstances. For example, the Emergency Planning and Community-Right-to-Know Act ("EPCRA") requires facilities to submit various reports containing information on hazardous chemicals at their facilities. Section 40 C.F.R. Part 350 contains specific procedures for protecting the confidentiality of chemical identity information that a company believes constitutes a trade secret (e.g., the identities of the chemicals contained in a company's product) for certain reports submitted under EPCRA. It is important to note that such protection is not automatic; the regulations outline a series of thresholds a submitter must meet to substantiate a confidentiality claim, as well as certain procedures that must be followed before the information is deemed worthy of confidential status by the government.

Where specific allowances for confidentiality of information submitted to the federal government are not provided in the relevant statute, it may still be possible to assert protection under the confidential business information exclusion of the Freedom of Information Act ("FOIA"). Provisions for confidentiality of such information for submittals to EPA are contained at 40 C.F.R. Part 2. Among other requirements, submitters of information must make the following showings to assert a successful claim of confidentiality:

- The business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;
- The business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;

- The information is not, and has not been, reasonably obtainable without the business's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);
- No statute specifically requires disclosure of the information; and

Either

- The business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position; or
- The information is voluntarily submitted information, and its disclosure would be likely to impair the government's ability to obtain necessary information in the future.

State Protections

With regard to submittals to state agencies, please note that states have their own specific requirements for protecting information as confidential. For example, the Wisconsin Department of Natural Resources ("WDNR") procedures for requesting that information be maintained as confidential are contained at section NR 2.19, Wis. Adm. Code. In addition to setting forth the specific procedures to be followed by both a submitter in requesting confidential status of information and the WDNR in making its determination, this section also sets forth a number of factors that the WDNR must consider for most non-statutory findings of confidentiality (please note that all states will have different criteria and procedures, but these factors demonstrate the type of analysis that the government will make to determine whether protection of information as confidential is in the public interest):

- How many people have knowledge of the supposedly "secret" information? Will disclosure increase that number to a significant degree?
- Does the contested information have any value to the possessor? To a competitor? Is that value substantial?
- What damage, if any, would the possessor of the secret suffer from its disclosure? What advantages would its competitors reap from disclosure?
- What benefits are likely to flow from disclosure? To whom? Are they significant? In this connection, what is the public "need" for disclosure? Can it be satisfied in any other way?

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Conclusion

The considerable procedures in place at both the federal and state levels before information will be allowed as confidential demonstrate the conflict between the need for the public to have access to information that may impact public health and safety, and the need for businesses to keep business information confidential. In the event of an unfavorable confidentiality determination at either the federal or state levels, it may be possible to seek an official review of the government's decision, whether that is through a judicial appeal or an administrative law procedure. The relevant statutes will generally outline the available remedies. If you have any questions or comments, please do not hesitate to call or email either of us: dgallo@reinhartlaw.com / 262-951-4555 or jmorris@reinhartlaw.com / 262-951-4574.

Going Light Green

By David Welch, Everchem Specialty Chemicals

Smoke Stacking

This is a very old marketing term for seeking new, unexpected, unplanned business. When traveling, look for smoke stacks (where there is a smoke stack, there is a factory – where there is a factory, there is business). The 21st Century version would be: assuming you work in an industrialized area and live in the suburbs, occasionally take a different route home looking for businesses that could use what you could make. Don't be afraid to drop in to inquiry the exact nature of their business and drop off your business card. This concept ties with last quarters "Local Business."

If you have any ideas for going "light green," please contact the PMA office at info@pmahome.org.

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