



## **Public Records Law: Protocol for Handling Trade Secrets**

In accordance with [Executive Order 2020-02, Transparency in Agency Guidance Documents](#), guidance documents promulgated by the department are not new laws. They represent an interpretation of existing law, except as authorized by Idaho Code or incorporated into a contract.

### **Agency Contact**

Division Administrator – Minerals, Public Trust, Oil & Gas

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## **I. Purpose**

The Idaho Department of Lands (IDL) has adopted the following procedure for handling the oil and gas regulatory program’s public records that may contain trade secrets. This process applies to IDL when acting in its administrative capacity under the Idaho Oil and Gas Commission’s authority.

The very nature of trade secrets makes it difficult for IDL to determine whether certain information is a trade secret within a particular industry. IDL has developed this protocol to ensure that the public’s right to examine public records remains intact, while at the same time protecting trade secrets.

## **II. Definition(s)**

IDL receives numerous public records requests. The Public Records Law, Title 74, Chapter 1, Idaho Code, embodies Idaho’s policy that the public has a right to review records held by public agencies. However, there are certain specific statutory exemptions. One of those exemptions pertains to trade secrets and is found in Idaho Code § 74-107. That section provides that the following information is exempt from disclosure:

- (1) Trade secrets including those contained in response to public agency or independent public body corporate and politic requests for proposal, requests for

clarification, requests for information and similar requests. "Trade secrets" as used in this section means information, including a formula, pattern, compilation, program, computer program, device, method, technique, process, or unpublished or in progress research that:

- (a) 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; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

I.C. § 74-107(1). Therefore, a trade secret is information that a person is reasonably keeping secret from competitors because it derives economic value to that entity by not being generally known.

### **III. General Principles**

- A. A document containing trade secrets does not itself become a trade secret or exempt from disclosure; only the information within the document that meets the definition of trade secret is exempt from disclosure and may be redacted.
- B. Exemptions from the public records law are narrowly construed. Persons should not designate information as exempt under Idaho Code § 74-107(1) unless there is a good faith argument that the information is exempt.
- C. Other exemptions to the Public Records Act may apply to a document that a person designates as containing certain trade secret information. IDL will be solely responsible for determining the applicability of any exemptions to the Public Records Act. See I.C. § 74-104 through - 111.
- D. IDL will consider all proposed trade secret exemption requests. However, consistent with its legal obligations, IDL will make the final determination as to whether information is exempt from disclosure under the Public Records Act as a trade secret.

### **IV. Procedure for Filing Trade Secret and Privileged Data**

A person seeking to exempt otherwise public records from disclosure as a trade secret will be given the opportunity to designate information in those records as a trade secret, as that term is defined in Idaho Code § 74-107(1).

#### **A. Documents IDL created (i.e., investigation reports, audits, etc.)**

If a person believes that IDL may have created documents about that person that may contain trade secrets, the person will have an opportunity to review those records and designate trade secrets in accordance with the procedure set forth in Section IV, below.

#### **B. Documents already retained by IDL**

IDL will send a notice to each person who has submitted records that may contain trade secrets when IDL receives a public records request for these documents. Those persons will have an opportunity to review those records and designate trade secrets in accordance with the procedure set forth in Section IV, below.

### **C. Documents submitted to IDL**

Going forward, a person submitting records claimed to contain trade secrets must both: (a) submit all documents in their original form, and (b) submit another set of documents identifying the information within a document which constitutes or contains trade secrets, whether in whole or in part.

The second set of documents must show exactly which information is claimed as a trade secret. A document containing trade secrets does not itself become a trade secret or privileged; only the information within the document that meets the definition of trade secret is protected and may be redacted.

## **V. Identification of Trade Secret and Privileged Information**

In addition to submitting records as described in paragraph II.C., a person must clearly mark each relevant page of the individual document with language such as “exempt,” “trade secret,” or “confidential.” The person shall also indicate the justification for its redaction as a trade secret with a statement substantiating the claim. *See* I.C. § 47-326(3). This justification must include an explanation of how the information meets the definition of a trade secret under Idaho Code § 74-107.

Except as described in Section III.B., when a trade secret claim does not accompany a record, IDL will disclose that record in accordance with applicable state law and policy without further notice to the person who submitted the record. IDL interprets a person’s failure to designate a record as exempt as a complete waiver of any and all claims for damages caused by the release.

## **VI. Access to Trade Secret or Privileged Information**

Trade secret information is exempt from disclosure to and shall be protected from disclosure to the public. IDL’s internal access to protected trade secret information is limited to Oil and Gas Commissioners, employees of the program whose work assignments reasonably require access, authorized representatives of IDL, and to other authorized agencies and persons. *See* I.C. § 47-327(4). In addition, a person is authorized to access and copy records of IDL pertaining to that person. *See* I.C. § 74-113. Therefore, the person who submitted the trade secret claim may view its own records at the agency. IDL shall exercise care and good faith in copying and storing trade secret information to prevent improper disclosure both within and outside of the agency. *See* I.C. §§ 74-118; 47-327(5).

## **VII. Requests for Public Access to Trade Secret Information**

Upon receiving a public records request for records containing trade secrets, IDL will review the substantiation statement originally filed with the two (2) documents versions submitted by the person claiming trade secret protection. IDL will then review whether or not the information claimed as a trade secret meets the standards given in Idaho Code § 74-107(1).

- A. In the event that IDL believes material designated as exempt is not exempt from disclosure pursuant to the Idaho Public Records Law, IDL will notify the person who submitted the record as soon as practicable of such belief and will delay disclosing the public records for as long as possible consistent with existing law. This will allow the person to initiate protective

proceedings or procedures to seek to prevent such release pursuant to applicable law. That person will provide the legal defense for any and all claims related to the protection of records claimed as exempt. IDL will not defend the record as exempt.

- B. If IDL believes the material designated as exempt is exempt from disclosure, IDL will redact the exempt information and provide the requesting party a redacted document. IDL expects that a person claiming a Public Records Act exemption as trade secrets will indemnify and defend IDL for honoring an exemption designation. IDL shall provide the legal defense for any and all claims relating to the protection of IDL records which IDL claims are exempt from disclosure.
- C. If a request is made for the disclosure of trade secrets by subpoena, court or government order, or any other similar legal process, IDL will provide the person claiming the trade secret with a copy of the notice so that the person may seek a protective order or other appropriate remedy. See I.C. § 74-115. It is the obligation and responsibility of the person desiring to protect the confidentiality of trade secrets from subpoena, court of governmental order, or any other similar legal process, and to provide the legal defense for such claims related to the protection and nondisclosure of any such purported trade secrets.