

FAQs About Business Confidentiality for Documents Submitted to DEQ

Oct. 22, 2014

Making a claim of business confidentiality is legally complex in some cases. The following information is provided as an overview to the law governing business confidentiality, but it may also be appropriate to consult with an attorney. Claimants should also be aware that under Utah law even an appropriate business confidentiality claim may be denied if the public interest in the record is greater than or equal to the business interests in withholding it. See the Utah Government Records Access and Management Act (GRAMA), Utah Code Ann. §§ 63G-2-401(6), 63G-2-403(11)(b), and 63G-2-404(8)(a). It may be appropriate to address that weighing process during any appeal.

Note that the standards used in evaluating most business confidentiality claims are listed in the answer to Part II, Question D on page 4.

Questions or comments? Please call Laura Lockhart in the Utah Attorney General's Office at (801) 536-0290.

I. PROCEDURES		
Question	Answer	Applicable law
A. How do I request confidential treatment of information submitted to DEQ?	<p>The answer is in GRAMA:</p> <p><i>A business seeking confidential treatment of records submitted to an agency shall provide with the record:</i></p> <p><i>(A) a written claim of business confidentiality; and</i></p> <p><i>(B) a concise statement of reasons supporting the claim of business confidentiality.</i></p> <p>Not many documents are completely business confidential, and DEQ is required to segregate protected information and provide the parts that are public. Please be precise about what information you are requesting to be kept confidential; this will help DEQ appropriately focus its evaluation. It is also strongly suggested that the business simultaneously submit a public version of the records with confidential information redacted. This will ensure that it is the business, not the agency, that decides which parts of the document the business is actually claiming as confidential. An appropriately-redacted document may also help avoid unnecessary appeals by a requester since it allows the requester to see the context of the redacted information.</p>	GRAMA § 63G-2-309(1)
B. Does GRAMA apply to business confidentiality classification if I i's done under DEQ statute § 19-1-306(2)?	Yes, GRAMA applies except as provided in DEQ statute § 19-1-306. That means, for example, that the procedural requirements of GRAMA still apply.	DEQ Statute § 19-1-306(1)

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C. Is the information described in I.A. the only information the agency will need to protect my records?	<p>It depends. If DEQ does make a determination about the validity of your claim, it will often need additional information. The agency is not required to make a determination, though, unless the records are requested by another person. Most agency records are never requested. However, the agency may also have other reasons to make a determination about a claim. For example, the agency may want to put documents on the internet as it seeks to improve its transparency.</p> <p>See Part II.C through F for more about the kind of additional information the agency will need.</p>	GRAMA § 63G-2-307
D. Can the agency make a determination about my claim before it gives me a chance to submit additional information?	Although it is not required by law, the agency will ordinarily notify you and allow you to submit additional information before a determination is made. The agency is not required to do that under GRAMA, however, and there may be some circumstances where it will not contact you, e.g., where it is facing GRAMA deadlines or where it believes review of the records themselves is sufficient for its determination.	
E. Will the agency make the records public if it determines I do not have a good claim? What if I disagree?	The agency is required to continue to notify you of a decision and to keep the records confidential while you evaluate whether you are going to appeal its determination and during any appeal period.	GRAMA § 63G-2-309(2)
F. How do I find out that the agency has denied my claim?	The agency will notify you.	GRAMA § 63G-2-309(2)
G. How do I appeal if the agency decides against me?	Ordinarily, the letter denying your claim will provide instructions, but you may also consult the statutory provisions listed in the “Applicable Law” column to the right. For appeals to the State Records Committee, additional resources are available here: archives.utah.gov/src/index.html . You must file your appeal within 30 days of the date of the decision, whether that appeal is at the initial level, before the agency, or at higher levels – the State Records Committee or the District Court.	§§ 63G-2-401 through 404
H. What if a GRAMA requester appeals a denial based on my claim?	Although it is not required by law, the agency will ordinarily notify you of an appeal. Once you get notice, you are required to intervene in an appeal before the State Records Committee, or your claim will be considered waived.	GRAMA § 63G-2-309(2)
I. Who represents me during an appeal?	You or your representative do. The agency is required to appear and describe its reasons for making the determination it did. Even if the agency decided in your favor, however, it will only be describing its actions, not serving as your advocate.	

II. APPLICABLE STANDARDS		
Question	Answer	Applicable law
A. What law applies when DEQ evaluates my business claim?	<p>The standards of the federal FOIA will usually apply, as provided in DEQ's governing statutes. Utah Code Ann. § 19-1-306(2) states:</p> <p><i>(2) (a) The standards of the federal Freedom of Information Act, 5 U.S.C. Sec. 552, and not the standards of Subsections 63G-2-305(1) and (2), shall govern access to records of the department for which business confidentiality has been claimed under Section 63G-2-309, to the extent those records relate to a program:</i></p> <p><i>(i) that is delegated, authorized, or for which primacy has been granted to the state;</i></p> <p><i>(ii) for which the state is seeking delegation, authorization, or primacy; or</i></p> <p><i>(iii) under the federal Comprehensive Environmental Response, Compensation, and Liability Act.</i></p> <p><i>(b) The regulation of the United States Environmental Protection Agency interpreting the federal Freedom of Information Act, as it appeared at 40 C.F.R. Part 2 on January 1, 1992, shall also apply to the records described in Subsection (1).</i></p> <p>Go to http://www.deq.utah.gov/Laws_Rules/ to see all of Utah Code Ann. § 19-1-306.</p>	<p>§ 19-1-306(2)</p> <p>5 U.S.C. § 552(b)(4)</p>
B. What does 5 U.S.C. § 552(b)(4) say?	It exempts from disclosure " <i>trade secrets and commercial or financial information obtained from a person and privileged or confidential.</i> "	5 U.S.C. § 552(b)(4)
C. How do I know whether my information is a trade secret?	This has been interpreted by federal case law to mean "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."	<u>Public Citizen v. FDA</u> , 704 F.2d 1280, 1288 (DC Cir. 1983)

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D. How do I know whether my information is commercial or financial information obtained from a person and privileged or confidential?	<p>This has been interpreted by federal case law as a three part test: is the information commercial or financial, was it obtained from a person, and is it privileged or confidential? The answer to all three questions must be yes for the claimed information to be kept confidential.</p> <p>The validity of most claims revolves around the interpretation of the word "confidential," so the tests for interpreting that response are outlined below. See the next two questions for information about the rest of the test.</p> <p>Two different tests apply in determining whether a record is "confidential." Usually the information is submitted because it is required, e.g., as part of a permit application or contract bid. If that is the case, the test is whether release of the information would cause substantial harm to the competitive position of the business. Allegations of specific harm are generally required, not generalized claims of harm.</p> <p>Sometimes a record is submitted voluntarily because it was requested by the agency but was not required, e.g., when an agency is taking a survey of regulated entities. In that case, the test is whether the information is of a kind that would customarily not be released to the public by the person from whom it was obtained.</p>	<p><u>Critical Mass Energy Project v. NRC</u>, 975 F.2d 871, 878 (D.C. Cir. 1992)</p>
E. How are "commercial or financial information," and "obtained from a person" interpreted?	<p>These two parts have both been interpreted fairly broadly, using ordinary language, and rarely pose a challenge for those claiming confidentiality.</p>	<p><i>E.g.</i>, <u>Public Citizen v. FDA</u>, 704 F.2d 1280, 1290 (DC Cir. 1983)</p>
F. How has "privileged" been interpreted?	<p>"Privileged" has also been interpreted to have its ordinary meaning, e.g., material that is subject to the attorney/client communications privilege or the physician/patient confidentiality privilege.</p>	<p><i>E.g.</i>, <u>Nadler v. F.D.I.C.</u>, 92 F.3d 93, 95 (2d Cir. 1996)</p>

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G. DEQ's governing statutes also say that 40 C.F.R. Part 2 (as it appeared on January 1, 1992) shall also apply. What does that rule say?	<p>There are five provisions that are of particular interest; you may find them on DEQ's website at http://www.deq.utah.gov/Laws_Rules/.</p> <ul style="list-style-type: none"> • 1991 40 C.F.R. § 2.208 provides general guidance regarding business confidentiality. • 1991 40 C.F.R. § 2.301(f) requires certain air emissions data to be public. • 1991 40 C.F.R. § 2.302(f) requires certain water effluent data to be public. • 1991 40 C.F.R. § 2.304(f) requires certain drinking water contaminant information to be public. • For several programs, the agency may in some circumstances release information that is otherwise entitled to confidential treatment if it is relevant to a proceeding. See paragraphs (g) in 1991 40 C.F.R. § 301 (air), 302 (water), 304 (drinking water), 306 (solid waste, incl. hazardous waste) and 310 (CERCLA). 	40 C.F.R. Part 2