



COMMISSIONER OF SECURITIES AND INSURANCE

Troy Downing
Commissioner

Office of the
Montana State Auditor

ADVISORY MEMORANDUM

To: ALL INTERESTED PERSONS

From: TROY DOWNING

Commissioner of Securities and Insurance, Office of the Montana State Auditor

Date: April 14, 2022

Advisory Memorandum Regarding Requests for Trade Secret Protection On Rate and Form Filings

Background

Montana law presumes that every document held by a Montana government official is subject to public inspection. *See* Mont. Const. Art. II § 8 (Right of participation); Mont. Const. Art. § 9 (Right to know); § 2-6-1003, MCA (Citizens entitled to inspect and copy public writings); § 33-1-312, MCA (“the records and insurance filings in the commissioner’s office must be open to public inspection except as otherwise provided in this code with respect to particular records or filings”); *Great Falls Tribune v. Mont. Pub. Serv. Comm’n*, 2003 MT 359, ¶ 54, 319 Mont. 38, 82 P.3d 876 (“there is a constitutional presumption that all documents of every kind in the hands of public officials are amendable to inspection”). Montana government officials have an affirmative duty to make all records and proceedings available for public scrutiny, including regulatory filings by corporations. *Great Falls Tribune*, ¶¶ 54, 60. This presumption applies

unless the information falls within an exclusion identified by the Montana Constitution, United States Constitution, or Montana or Federal statutory law. *See* § 2-6-1002(1), MCA.

One such exclusion applies when a person or business entity asserts a property interest under the Uniform Trade Secrets Act, Title 30 chapter 14, part 4 of the Montana Code. *Great Falls Tribune*, ¶ 39. The Montana Supreme Court has justified the protection of trade secrets through statute because public disclosure would amount to a “taking” without “due process” in violation of the Montana and Federal constitutions. *Id.* at ¶¶ 39, 46, 54, 56. Whether particular information is considered a trade secret requires a factual determination based on the following broad statutory definition:

“Trade secret” means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process 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.

Section 30-14-402(4), MCA. Factors considered by courts regarding economic value include the degree to which the secret information confers a competitive advantage on its owner and the cost and effort necessary to develop the secret information. *United States v. Chung*, 659 F.3d 815, 826 (9th Cir. 2011). The analysis is fact intensive and varies from case to case. *Id.*

If an entity submits trade secrets or confidential proprietary information to a state regulatory agency, the burden is on the entity to “establish prima facie proof that the information is a discernable property right entitled to protection.” *Great Falls Tribune*, ¶ 60. The Supreme Court requires the entity seeking protection from disclosure to submit an affidavit offering “more

than conclusory statements” that the information is confidential. “It must be specific enough for the [agency], any objecting parties, and reviewing authorities to clearly understand the nature and basis of the [entity’s] claims to the right of confidentiality.” *Id.* at ¶ 56. The government agency, then, has the affirmative duty to review the alleged confidential records and supporting affidavits and make an independent determination whether the records are in fact property rights that warrant due process protection. *Id.* at ¶ 57.

To date the CSI has experienced considerable variation in how industry has applied to this office for protection of trade secrets. This has caused considerable and unnecessary iteration and delay in the review process. The primary source of the problem is a lack of specificity and clarity as to the facts upon which entities are asking CSI to rely when granting trade secret protection for specific information.

Guidance

In order to streamline CSI’s review of requests to designate materials confidential, provide consistency in determinations, and reduce delay in decisions, CSI will consider requests to designate specific information as a trade secret only if submitted in SERFF as follows:

- All trade secret requests must be accompanied by CSI’s *GENERAL AFFIDAVIT IN SUPPORT OF REQUEST FOR TRADE SECRET PROTECTION PURSUANT TO Mont. Code Ann. § 30-14-402(4)* and separate *TRADE SECRET CERTIFICATION AFFIDAVIT* for each exhibit that confidentiality is sought. These forms are available here: <https://csimt.gov/insurance/rates/>
- The *GENERAL AFFIDAVIT IN SUPPORT OF REQUEST FOR TRADE SECRET PROTECTION PURSUANT TO Mont. Code Ann. § 30-14-402(4)* and *TRADE SECRET CERTIFICATION*

AFFIDAVIT(s) will not be held confidential by CSI and should not be submitted as confidential in SERFF.

- The information on which confidentiality is being sought must be submitted with the red SERFF goggles and separately from non-confidential documents.
- If CSI ultimately denies confidentiality on information submitted as confidential, the submitting entity may choose among the following options:
 - Submit a revised General Affidavit and/or Trade Secret Certification Affidavit addressing the CSI's concerns;
 - Withdraw the request for confidentiality on the submitted information;
 - Withdraw the filing.

This advisory memorandum is informational only and does not enlarge, delimit, or otherwise modify any requirements of applicable law or in any way limit the authority of CSI under applicable law. CSI encourages interested persons to consult with independent legal counsel for guidance on the application of law to any particular circumstances.



**GENERAL AFFIDAVIT IN SUPPORT OF REQUEST FOR TRADE SECRET PROTECTION PURSUANT TO
Mont. Code Ann. § 30-14-402(4)**

State of _____

County of _____

I (affiants name), _____, being first duly sworn upon oath, declare that the following statements are true:

1. Pursuant to SERFF filing # _____, I am seeking through this affidavit to protect certain information as a trade secret under Montana law. I understand that pursuant to Montana law, any information I provide to the Commissioner of Securities and Insurance (CSI) is presumptively available for public scrutiny, with narrow exceptions. One such exception is if the information is established to be a trade secret as defined in Mont. Code Ann. § 30-14-402(4), which provides as follows:

(4) "Trade secret" means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, 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 understand that under Montana law that the burden to establish "prima facie proof that the information" is a trade secret rests with me. I also understand that I must offer "more than conclusory" statements that the information at issue constitutes a trade secret. Pursuant to these statutory and legal principles, I offer the following facts in support of qualifying specific information as a trade secret:

2. My position and duties are as follows:

3. I have provided the CSI with information in the form of Exhibits, which I hereby certify should be treated as a trade secret under Montana law. The following are the file names of the Exhibits that correspond precisely with the file names of each exhibit provided to CSI:



4. I have attached a separate Trade Secret Certification Affidavit for each of the Exhibits listed in paragraph 2 above, wherein I certify precisely how all the information identified as confidential in each exhibit meets the elements of a trade secret in Montana. Further Affiant Sayeth Not.

[Name of Affiant]

SUBSCRIBED AND SWORN to before me this _____ day of _____, _____, by

_____.

Signature of Notary Public

(Notary Seal)



TRADE SECRET CERTIFICATION AFFIDAVIT

State of _____

County of _____

I (affiants name), _____, being first duly sworn upon oath, declare that the following statements are true:

1. I provide this Trade Secret Certification Affidavit as an addendum to the GENERAL AFFIDAVIT IN SUPPORT OF REQUEST FOR TRADE SECRET PROTECTION PURSUANT TO Mont. Code Ann. § 30-14-402(4) that I have concurrently filed with the Commissioner of Securities and Insurance (CSI).

2. I provide this affidavit to offer facts in support of my request that the following Exhibit submitted in SERFF # _____ qualifies as a trade secret:

_____.

3. All of the information identified as confidential in this Exhibit qualifies as information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, 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 because

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy because



Further Affiant Sayeth Not.

[Name of Affiant]

SUBSCRIBED AND SWORN to before me this _____ day of _____, _____, by
_____.

Signature of Notary Public

(Notary Seal)