

## **CHECKLIST FOR TRADE SECRET CONFIDENTIALITY REQUESTS**

The Wyoming Public Records Act (WPRA) defines “public records” to include the original and copies of any document received *by any agency* of the State of Wyoming in connection with the transaction of public business, except those privileged or confidential by law. W.S. § 16-4-201(a)(v). All public records shall be open for inspection by any person at reasonable times, except as provided in the WPRA or other law, and subject to reasonable requirements to protect the records and prevent unnecessary interference with the regular discharge of the agency’s duties. W.S. § 16-4-202(a). Unless otherwise provided by law, the custodian shall deny the right to inspection for records obtained which constitute “trade secrets.” W.S. § 16-4-203(d)(v).

In addition, the Wyoming Environmental Quality Act provides that any records, reports or information obtained *by the Wyoming Department of Environmental Quality (DEQ)* under the Wyoming Environmental Quality Act or rules, regulations and standards promulgated thereunder are available to the public, unless the person submitting them makes a “satisfactory” showing to the DEQ that public disclosure of such records, reports or information “or particular portions thereof” (other than emission or pollution data) would divulge “trade secrets.” W.S. § 35-11-1101(a).

Neither the Wyoming Public Records Act nor the Wyoming Environmental Quality Act defines “trade secret.” The Wyoming Supreme Court’s March, 2014, decision in *Powder River Basin Res. Council v. Wyoming Oil and Gas Conservation Comm’n.*, 320 P.3d 222 (Wyo. 2014) (**excerpt attached**), recognizing that the term “trade secrets” had “never been subject to interpretation in the forty-plus years of the WPRA’s existence” (¶35), provided the following “guidance on the standard to be applied in trade secret cases under the WPRA” (¶31):

- The WPRA requires that disclosure generally prevail over secrecy, and implementation of that goal is provided by affording a liberal interpretation to the WPRA and construing exceptions narrowly. The WPRA creates a presumption that the denial of inspection is contrary to public policy, and therefore places the burden of proof upon the custodian to show that withdrawal in any particular instance does not run afoul of statutory limitations. ¶¶33-34.
- The Court adopted the federal Freedom of Information Act (FOIA) definition of “trade secrets,” which, *among other things*, requires that there be “a ‘direct relationship’ between the trade secret and the productive process” itself, as opposed to collateral matters of business confidentiality. ¶¶38-39.
- Disputed information would have to be reviewed on a case-by-case basis, with particularized findings which independently explain the basis for applying the trade secrets definition in each instance. ¶46.

The DEQ's competing responsibilities to make information available to the public while preserving confidentiality of "trade secrets" come from both the Wyoming Environmental Quality Act (W.S. § 35-11-1101) and the Wyoming Public Records Act. The Court's decision in *Powder River Basin Res. Council* specifically addressed the Wyoming Oil and Gas Conservation Commission's (OGCC) obligations under the § 16-4-203(d)(v) of the WPRA. Unlike the DEQ, the OGCC is not subject to the Wyoming Environmental Quality Act, which gives no more "guidance on the standard to be applied in trade secret cases" than the WPRA did before the *Powder River Basin Res. Council* decision.

Since § 35-11-1101(a) of the Wyoming Environmental Quality Act obligates the DEQ to treat information submitted as confidential "upon a showing satisfactory" to the Director that public disclosure would divulge "trade secrets" without any guidance as to what would constitute a satisfactory showing (while at the same time § 35-11-1101(c) makes the DEQ -- and ultimately the taxpayers -- potentially liable for attorney fees and costs if a third party successfully sues to compel release of the information), the Director's August 29, 2011 letter (**copy attached**) explained what the DEQ would look for in a trade secret confidentiality request. That letter, which pre-dated the Court's March, 2014, *Powder River Basin Res. Council* decision, called for such requests to explain why each entire document or particular portion(s) thereof constitutes "trade secrets" based on the definition of "trade secrets" in the Wyoming Uniform Trade Secrets Act (W.S. § 40-24-101) and *also* the criteria listed in 40 C.F.R. § 2.208 (**copy attached**). Since the Wyoming Supreme Court subsequently chose the FOIA definition of trade secrets over the Wyoming Uniform Trade Secrets Act definition for WPRA purposes, DEQ will now apply the FOIA definition for considering trade secret confidentiality requests under § 35-11-1101 of the Wyoming Environmental Quality Act as well. In addition, trade secret confidentiality requests to DEQ subject to § 35-11-1101 should continue to *explain how each separate document meets each of the criteria* set forth in 40 C.F.R. § 2.208, as called for in the Director's August 29, 2011 letter.

The following Checklist lists what persons need to provide for DEQ to consider a request that certain documents submitted in the transaction of public business be treated as confidential to prevent divulging "trade secrets."

- 1) Trade secret confidentiality requests need to be submitted in a single written letter, rather than emails.
- 2) Trade secret confidentiality request letters need to *identify and particularly describe each individual document or specific portion(s) thereof* that is claimed to warrant confidentiality to prevent divulging "trade secrets."
- 3) Trade secret confidentiality request letters need to *explain why each separate document, in its entirety or specific portion(s) thereof*, constitutes "trade secrets" based on the FOIA definition of "trade secrets" as referenced in *Powder River Basin Res.*

*Council v. Wyoming Oil and Gas Conservation Comm'n.*, 320 P.3d 222 (Wyo. 2014), and also based on each of the criteria listed in 40 C.F.R. §2.208.

4) Requests to treat documents or portions thereof as confidential to prevent divulging “trade secrets” should be kept as *specific and narrow* as possible. Redacted copies which can be made available for public inspection are one option.

A determination by DEQ that documents or portions thereof identified in a request appear to contain “trade secrets” based on information provided as called for in the Checklist is only a determination, which is subject to judicial review, and is *not* a “confidentiality agreement.” To the extent DEQ determines that it appears the documents do contain “trade secrets” based on information provided as called for in the Checklist, a person requesting disclosure can seek a court order compelling disclosure. To the extent DEQ determines that it appears the documents do not contain “trade secrets,” DEQ will wait fifteen (15) days before making them available for public inspection to give the submitter an opportunity to seek a protective court order, injunction or other judicial remedy, if it elects to do so. In either event, DEQ would not oppose intervention by the other party.