

Information for Businesses Submitting Confidential Business Information to Ecology under RCW 70A.350

Background

In 2019, the Washington State Legislature passed a new law to protect consumers from toxic chemicals in products they purchase and use. The statute ([RCW 70A.350](https://app.leg.wa.gov/rcw/default.aspx?cite=70A.350)¹) is the nation's strongest state law regulating toxic chemicals in products. Safer Products for Washington is the Washington Department of Ecology (Ecology)'s implementation program for the law. RCW 70A.350 allows Ecology to request specific types of information from manufacturers of consumer products that are sold in Washington. This information will assist with identifying priority consumer products under RCW 70A.350.030, and making regulatory determinations under RCW 70A.350.040. You must provide the required information to Ecology no later than six months after receipt of the request by the department (RCW 70A.350.030(4)).

You may be asked to provide information on product description, chemical function, chemical amount, and exposure and hazard information for priority chemicals in priority products. Ecology understands that some manufacturers may be reluctant to share information about proprietary formulations due to a concern that the information will be made public and could become available to your competitors. Ecology's priority product identification and determination of regulatory actions **will** require a degree of transparency to the public. In some cases, Ecology may share the information with contractors. The law requires that Ecology's work be reviewed by a broad group of stakeholders, be reported to the Legislature, and, if needed, be the basis of rulemaking. Ecology's public materials and reports will need to include sufficiently detailed information to explain and give confidence in Ecology's findings.

However, Ecology can provide a process to lessen the risk of public disclosure of confidential product details. You must show that the product details are legitimately unique to your company, or are worthy of protection due to a real potential for competitive harm to you from disclosure to competitors.

This document describes how you can apply for limited protection of confidential business information, should you decide to request it, and includes additional details on how that data may be disclosed.

Providing Trade Secret or Confidential Business Information (CBI)

Requesting Confidential Treatment

If you plan to provide data that are trade secrets or confidential business information, you may submit a request to have your proprietary information granted confidential treatment under [RCW 43.21A.160](https://apps.leg.wa.gov/RCW/default.aspx?cite=43.21A.160).² You may request the assurance of confidential treatment prior to providing the actual information to Ecology.

¹ <https://app.leg.wa.gov/rcw/default.aspx?cite=70A.350>

² <https://apps.leg.wa.gov/RCW/default.aspx?cite=43.21A.160>

Your request must offer convincing evidence that the criteria in RCW 43.21A.160 for confidential treatment are met. These criteria include:

- The information “relate[s] to the processes of production unique to the owner or operator thereof,” or
- The information “may affect adversely the competitive position of such owner or operator if released to the public or to a competitor.”

Following this request, Ecology staff will determine whether to recommend that the Director grant conditional confidential treatment, subject to exceptions needed to meet Ecology’s public transparency needs.

Ecology Contractor Access to CBI

In some cases, Ecology will need to provide your information to a contractor. In these cases, for Ecology to perform the required work, you must agree to make the information you provide to Ecology available on a limited basis to Ecology’s contractor(s).

The department may require a manufacturer to provide:

- A list of products containing priority chemicals.
- Product ingredients.
- Information regarding exposure and chemical hazard.
- A description of the amount and the function of the priority chemical in the product.

If Ecology determines that your information must be shared with a contractor, you will be notified at the time that the determination is made. You are free to require Ecology’s contractor(s) to execute a non-disclosure agreement with you before Ecology shares your CBI with the contractor.

Alternatively, you may authorize Ecology to provide the information to its contractor(s) subject to an agreement between Ecology and each contractor requiring the information be kept confidential. Key terms of the nondisclosure agreements that Ecology would require with its contractor(s) are described below.

Requirements for providing documents

In order to facilitate confidential handling of your information, you will be required to provide documents with the specific confidential information highlighted, but readable, in order to facilitate redaction of only the truly confidential information. If Ecology believes you have highlighted information that exceeds Ecology’s grant of confidential treatment under RCW 43.21A.160, Ecology will return the documents to you with a request to change the highlighting accordingly to afford a reasonable degree of transparency to the public.

Legal challenges

In the event of legal action to challenge Ecology's determinations, we may be required to make the confidential information part of the record for review by the court. Should this occur, Ecology will seek a protective order from the court, asking that the confidential information be protected against access by the general public.

Contractor confidentiality agreement key terms

If you decide to allow Ecology to execute its own non-disclosure agreement with contractors (rather than having the contractor sign your own non-disclosure agreements), then Ecology would require its contractor(s) to sign a confidentiality agreement with Ecology that would include the following key terms:

- Use the information only for the purposes of the contract.
- Do not disclose to third parties.
- Store separately and securely.
- When providing deliverables or making comments to Ecology that reference information granted confidentiality protection by the director, mark the cover sheet and each page of the document conspicuously with the words "CONFIDENTIAL UNDER RCW 43.21A.160—DO NOT DISCLOSE." Mark any information in the document that has been granted CBI protection with brackets and the word "CONFIDENTIAL." This will facilitate redaction by Ecology if it becomes necessary to produce a public version of the document.
- Destroy written records after conclusion of the contract work.

Submission Process

1. Manufacturer/supplier submits request to Cheryl Niemi (contact details below) for CBI protection:
 - a. All requests for CBI protection must be initiated by you.
 - b. A [template for the request](#)³ with suggested content can be found on the [Safer Products for WA stakeholder website](#)⁴ under the documents section. In the template, brackets note the areas where you should replace template language with your own information.
 - c. Cheryl Niemi will work with the Ecology Public Disclosure Coordinator to process the CBI request and forward it to the Director's office for approval.
2. Ecology notifies manufacturer/supplier on decision to grant CBI.
3. Manufacturer/supplier provides documents necessary to Ecology with CBI highlighted consistent with Ecology's grant of confidentiality.

³ https://www.ezview.wa.gov/Portals/_1962/Documents/saferproducts/SaferProductsWA_CBI_Request_Template.pdf

⁴ https://www.ezview.wa.gov/site/alias__1962/37555/safer_products_for_washington.aspx

Ecology CBI Handling Process

1. Ecology will label and inventory all documents covered by CBI.
2. These documents will be kept in a secure filing cabinet with limited access by staff who have been granted access.
3. Ecology will obtain relevant non-disclosure agreements from the contractor. You are also free to negotiate your own non-disclosure agreement with Ecology's contractor.
4. Ecology will provide the CBI documents as needed to the authorized parties during the course of the project work.
5. At the close of the project, if Ecology has supplied CBI to any authorized parties, Ecology will obtain letters confirming that manufacturer/supplier CBI has been deleted and destroyed by all parties with non-disclosure agreements.

Additional information

- Cheryl Niemi, Senior Toxics Reduction Planner
 - Department of Ecology
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