



Rule Concept: Confidentiality

Feb. 17, 2023

Background

This memo provides background information and proposes two rule concepts regarding confidentiality and the disclosure of financial information.

The Plastic Pollution and Recycling Modernization Act contains five subsections that use the word “proprietary” to refer to information that may be designated confidential and not subject to public disclosure. Those subsections use consistent language as follows:

“Proprietary information furnished to the department relating to [particular subsections] may be designated confidential. Information designated confidential is not subject to public disclosure under ORS 192.311 to 192.478, except that the department may disclose summarized information or aggregated data if the information or data do not directly or indirectly identify the proprietary information of [a/any] specific [person/facility/processor].”

These excerpts are in the following citations:

- ORS 459A.920(4): information provided by commingled recycling processing facilities and used to calculate the contamination management fee;
- ORS 459A.923(5): information provided by commingled recycling processing facilities and used to calculate the processor commodity risk fee;
- ORS 459A.932(2)(a): information provided for the equity study by commingled recycling processing facilities on worker conditions, wages, and benefits;
- 459A.955(2)(h)(B): disposition reporting information provided by commingled recycling processing facilities to fulfill the responsible end market obligation (note: the allowance to disclose summarized or aggregated information for this information is applied to both DEQ and PROs); and
- 459A.962 (9): information furnished to the department relating to subsections (7) and (8) of ORS 459A.962 (records regarding control of materials collected and responsibilities under ORS 459A.860 to 459A.975, and which are disclosed to DEQ upon its request).

The following additional subsections use similar language, although they do not include the word “proprietary”:

- 459A.887(3)(a): a producer responsibility organization shall include in [its annual report] a confidential addendum containing information on the membership fees paid to the producer responsibility organization by individual members and information that can be used to calculate the market share of individual members in accordance with rules adopted by the commission under ORS 459A.869. Information included in the confidential addendum is not subject to public disclosure under ORS 192.311 to 192.478, except that the department may disclose summarized

information or aggregated data if the information or data do not directly or indirectly identify the amount of membership fees paid by or market share of any individual producer.

- 459A.890(11)(a) and (c): [DEQ] may review or audit the cost accounting and reimbursement request records of a producer responsibility organization, a local government or the local government's service provider that receives payment under this section... Information furnished to the department. . .may be designated confidential. Information designated confidential is not subject to public disclosure under ORS 192.311 to 192.478, except that the department may disclose the information in a summarized or aggregate form.

Concepts for discussion at RAC meeting on March 10, 2023

DEQ seeks feedback from Rulemaking Advisory Committee members on the following:

I. Rule concept for discussion: Defining Proprietary Information

DEQ proposes to define in rule "proprietary information" as "information protected as a trade secret by the Oregon Uniform Trade Secrets Act¹ or protected by trademark or patent." Proprietary information is not subject to public disclosure unless summarized or aggregated prior to disclosure.

A party providing information to DEQ that it considers "proprietary" or confidential must, at the time it provides the information, specify that the information is proprietary or otherwise not subject to disclosure. The claim must be assigned to specific information and not a generalized statement.

DEQ proposes to establish in rule a list of types of information *excluded* from the definition of "proprietary information" and is subject to public disclosure:

- Information that is already publicly available and where the economic value is derived solely from compilation,
- Market shares of producer responsibility organizations, for the purpose of fair allocation of system costs among PROs,
- List of largest 25 producers subject to ORS 459A.869 by market share in alphabetical order, and
- List of end markets for Oregon's waste, including the business or person name; city, state/region, and country; identity of the material received; and amount received. The names of the commingled recycling processing facilities where the waste originated will be kept confidential.

If necessary for the implementation or enforcement of the Act, DEQ may bring proprietary information to the attention of the PRO, provided that the PRO agrees to treat the information in accordance with the limitations in statute and rule.

¹ Under the Oregon Uniform Trade Secrets Act, "trade secret" is defined as follows in ORS 646.461(4): "information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that: (a) Derives independent economic value, actual or potential, from not being generally known to the public or to 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.

II. Rule concept for discussion: Disclosure of Financial Information

DEQ proposes to clarify in rule that DEQ may request financial information from both the PRO and an existing depot to verify claims that it was not possible for a PRO to contract with existing recycling depots or drop off centers.

ORS 459A.896(1)(a) obliges PROs to contract with existing recycling depots or drop off centers “where possible” to provide collection of covered products on the PRO Recycling Acceptance list. In a rule concept on [Convenience Standards, Collection Targets and Performance Standards for PRO Recycling Services](#) presented to the RAC on Jan. 11, DEQ provided four criteria to define “where possible,” including among them a price premium cap above which a PRO would be freed from its obligation to contract with the existing facility.

In the case of a PRO opening its own facility or contracting with a different entity rather than contracting with an existing facility due to exceeding this cap, DEQ may request financial information to verify that the cap was exceeded. While this information would not be subject to public disclosure, the PRO cannot prohibit, by nondisclosure agreement or other mechanism, sharing the requested information by the existing facility.

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800-452-4011 | TTY: 711 | deqinfo@deq.oregon.gov

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