



CBI Do's and Don'ts

In order to qualify for Trade Secret – Confidential Business Information (TS/CBI) protection, the information must meet the Arkansas Trade Secret Act definition (*Ark. Code Ann. §§ 4-75-601 to 4-75-607*), the APC&EC Rules definitions, and the six factors set forth in case law.

A. Trade Secret is defined as information including a:

- Formula,
- Pattern,
- Device,
- Method,
- Technique, or
- Process, or Rate of Production that:
 - 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
 - Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

B. Six factors used to evaluate a TS/CBI claim:

- 1.** The extent to which the information is known outside the business.
- 2.** The extent to which the information is known by employees and others involved in the business.
- 3.** The extent of measures taken by a business to guard the secrecy of the information.
- 4.** The value of the information to the business and its competitors.
- 5.** The amount of effort or money expended by the business in developing the information.
- 6.** The ease or difficulty with which the information could be properly acquired or duplicated by others.

Wal-Mart Stores, Inc. v. P.O. Market, Inc., 347 Ark. 651 (2002)

C. The Application Process:

You must submit an affidavit with your TS/CBI request. It must contain certain information stating:

1. Why it is a trade secret,
2. How it complies with the six factors from case law, and
3. The magic sentence:

“The applicant agrees to act as an indispensable party and to exercise extraordinary diligence in any legal action arising from the Department’s denial of public access to the documents or information claimed herein to be a trade secret.”

STEPS:

1. Prepare two copies of your submission. One is a public copy and one is a confidential copy. Both should be clearly marked on the cover page indicating which copy is which.
2. Make sure the page numbers correspond between the public and confidential copies.
3. Mark the cover page clearly and boldly as confidential in red. Then mark it only on the pages containing confidential information.
4. The public copy should have the TS/CBI, and only the TS/CBI, redacted by blacking out the information. Do not remove entire sentences or paragraphs unless you can justify each word that is removed.
5. Prepare your affidavit and make sure to include the magic sentence and the explanation, without disclosing the TS/CBI, as to why you are entitled to protection.
6. Seal the confidential copy and the affidavit in an envelope, then place that envelope together with the public copy in another envelope. Mark the envelopes as confidential. Seal it and either mail or hand deliver it to DEQ headquarters.
7. It is suggested to use removable tabs to mark the public copy pages that contain redacted information.

DO NOT:

- Email it.
- Fail to mark which copy is public and which is confidential.
- Send an incomplete affidavit.
- Mark every page as confidential.
- Make it difficult to make or defend the determination.
- Reword your public copy unless you make an appointment to sit down with an attorney and possibly an engineer to explain it.
- Forget an affidavit all together.

There is no time frame for a determination. If you submit it incorrectly, your submission may be returned or denied, costing you valuable time and possibly exposing the information to competitors.