



## CBI Notice Questions and Answers

### 1. Q: Why am I receiving this notice?

A: This Notice provides your business with instructions about how to assert a claim of confidentiality (or confidential business information (CBI) claim) covering information submitted to or obtained by EPA during or after its inspection (or other compliance monitoring). It is EPA's policy to make inspection reports public, including, but not limited to, its website at <https://echo.epa.gov>.

An inspection report is a document written by the inspector that includes accurate and objective observations and environmental conditions during a field inspection. Along with other associated information from an inspection, the inspection report may be used to determine a facility's compliance with environmental regulations. It is EPA's policy for inspection reports to be free of CBI and available to the public.

The notice you are receiving assists your business in making a CBI claim at the time of the inspection and describes the procedures and timeframes associated with the CBI process under EPA's regulations set forth in the Code of Federal Regulations at 40 C.F.R. Part 2.

### 2. Q: What is CBI?

A: The EPA will determine whether information is "CBI" by examining that information under Exemption 4 of the Freedom of Information Act. Exemption 4 of the Freedom of Information Act protects "trade secrets and commercial or financial information obtained from a person [that is] is privileged or confidential," 5 U.S.C. § 552(b)(4), from disclosure to the public.

Exemption 4 covers two distinct categories of information: (1) trade secrets; and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

For more information about what is CBI under Exemption 4, please visit the Department of Justice's guidance at: <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media>.

### 3. Q: Are there time limitations for claiming CBI?

A: YES. CBI claims should be made at the time of submission of information or inspection or within 10-calendar days in order for EPA to protect the information to the fullest extent possible under the regulations. Through this CBI Notice, EPA is requesting you assert any CBI claim information submitted to EPA at the time of inspection or within 10-calendar days following the conclusion of the inspection. If no claim is asserted within this time period, EPA may release the information to the public without further notice.

The 10-calendar day period begins on the day after an inspection concludes. For example, if the inspection of your business commenced on Monday and concluded on Tuesday, the 10-calendar day period begins on Wednesday. If the 10-calendar day period ends on a weekend day or a holiday your claim must be postmarked by the next business day. If you assert a CBI claim after the inspection, EPA strongly recommends that you contact EPA or the inspector by phone or email with tracking information when your response is submitted.

If a claim of confidentiality is made after 10-calendar days from the conclusion of inspection, EPA will make such efforts as are administratively practicable to associate the late claim with copies of the previously submitted information. However, EPA cannot assure that such efforts will be effective, in light of the possibility of prior disclosure of the information.

If information is submitted subsequent to the 10-calendar day period following the conclusion of the inspection, the CBI claim needs to be made along with the submission.

#### **4. Q: What are some examples of information that is CBI?**

A: Some types of information that if kept private or secret, and not excluded from being considered CBI (*see* Question 5 below), may qualify as CBI include:

- Sales or marketing plans or information that would reveal marketing strategy.
- “Trade Secrets,” i.e., a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.
- Manufacturing or quality control process information.
- Portions of submittal that describe innovative technology.
- Production volumes of chemicals or amount stored at a company facility
- Detailed industrial process descriptions or process and instrumentation drawings
- A company’s manufacturing, importing or processing information of a specific chemical.
- Financial data regarding a company (e.g., assets, profits, taxes, commercialization, client lists) obtained from any source.
- Banking information (account numbers in statements or on checks).
- Contractor-supplied information concerning the contractor’s direct labor rates, overhead, fringe benefits, identities or employees and their salaries, monthly progress reports, contract proposals & fees.
- Customer and supplier lists.
- Profit and loss data.

#### **5. Q: What are some examples of information that is NOT CBI?**

A: While this is not a comprehensive list, the following information generally is not entitled to confidential treatment:

- Information which is publicly available.

- Information that is public information by reason of statute or regulation. For example:
  - Clean Air Act (CAA): emissions data;
  - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): physical properties of hazardous substances, and geologic, hydrogeologic, and groundwater monitoring data;
  - Clean Water Act (CWA): effluent data;
  - Resource Conservation and Recovery Act (RCRA): material safety data sheets and manifest data;
  - Federal Insecticide Fungicide and Rodenticide Act (FIFRA): names of pesticides, active ingredients, information concerning the effects of the pesticide, and data on safety to fish and wildlife, humans and other mammals;
  - or
  - Toxic Substances Control Act (TSCA): health and safety data.
- Information which was submitted to a federal, tribal, state or local government which was not claimed as CBI.

## **6. How do I assert a CBI claim?**

A: A business may assert a CBI claim by highlighting, bracketing, boxing, or circling the information claimed as CBI, and marking the page or document with language such as “trade secret,” “proprietary,” “company confidential,” “PBI,” or “CBI.” You must provide a copy of the documents to EPA in which all of the claimed CBI remains visible. In addition to the original submission, you may also submit a sanitized version of the document that blacks out or removes the information you are claiming as CBI.

If your business requests confidential treatment only until a certain date or until a certain event happens, then please indicate this at the time your business makes its CBI claim.

The Notice includes a box (pages 3 and 4) that you or the inspector may use to list and generally describe the CBI claims.

## **7. Q: What happens after I make a CBI claim?**

A: Information claimed as CBI will be protected from disclosure unless the agency makes a formal determination that the information is not entitled to confidential treatment (e.g. finding that the information is not CBI). EPA’s regulations at 40 C.F.R. §§ 2.204 and 2.205 describe the procedures for making preliminary and final CBI determinations.

Under 40 C.F.R. § 2.204(d)(2), if EPA makes a preliminary determination that the information you claimed as CBI is clearly not entitled to confidential treatment, EPA will provide you written notice of denial (or partial denial) of your business confidentiality claim that details the basis of the determination. This determination is a final agency action that is only reviewable through a lawsuit brought in federal court. If you choose not to contest

EPA's determination in federal court, the information that EPA determined to be not entitled to confidential treatment will be made available to the public.

EPA may also conduct a confidentiality determination, consistent with procedures laid out in 40 C.F.R. §§ 2.204(e) and 2.205, in three scenarios: (1) if there has been a request for the information under the Freedom of Information Act (FOIA); (2) an EPA office needs or wants to determine whether business information in its possession is entitled to confidential treatment, even though no request for release of the information has been received; or (3) an EPA office determines that it is likely that EPA eventually will be requested to disclose the information at some future date. Under these scenarios, EPA will provide your business with written notice that it is initiating a confidentiality determination of its CBI claim and will give your business an opportunity to review and substantiate its CBI claim.

**8. Q: What happens if I am asked to review and substantiate my CBI claim(s)?**

A: If you receive a request to review and substantiate your claims, EPA will send your business written notice (commonly referred to as a substantiation letter) requesting that it answer specific questions to substantiate any CBI claims asserted. EPA has found that an effective means for providing information to support a CBI claim is to respond to the substantiation questions. These questions are intended to generate responses providing the factual basis for the assertion that the particular data element is CBI. A copy of EPA's standard substantiation letter is available at the end this document.

If a FOIA request is submitted to EPA for the information you claimed as CBI, EPA will require a response to the request for substantiation within 15 business days from your receipt of the written notice. Failure to respond during that time or seek a timely extension will result in a waiver of any claim and the information may be provided to the public without further notice.

**9. Q: Can I claim everything as CBI? What happens if I make a frivolous claim?**

A: No, unless the entire submission is actually your company's CBI. FOIA Exemption 4 allows for "trade secrets and commercial or financial information obtained from a person [that is] is privileged or confidential" submitted to EPA to be withheld from public disclosure. 5 U.S.C. § 552(b)(4). However, publicly available information, as well information that is mandated by law to be disclosed to the public (e.g., effluent data, emissions data, etc.), may not be protected as CBI.

By asserting a CBI claim, you are submitting information that is accurate and complete to the best of your knowledge and belief. If you assert frivolous CBI claims for some information, you may undermine the merits of potentially valid CBI claims for other information. EPA will review the information submitted and may request your cooperation in providing additional information to identify and justify the basis of your claim.

**10. Q: How does EPA prevent the unauthorized release of my CBI-claimed information?**

A: EPA treats with utmost seriousness the importance of protecting businesses' CBI and information claimed as CBI. Information covered by a claim of confidentiality will be handled in the manner that is consistent with the procedures set forth in 40 C.F.R Part 2, Subpart B, as well as the Trade Secrets Act, 5 U.S.C. § 1905.

**11. Q: Where can I get more information?**

A: EPA's information security policy can be found at <https://www.epa.gov/irmpoli8/information-security-policy>. EPA's CBI regulations are available at: 40 C.F.R. Part.2 subpart B (§§ 2.201 – 2.311): <https://www.ecfr.gov>.

**12. Q: What if I make a CBI claim during the inspection, but change my mind after the inspection?**

A: EPA needs a written statement of withdrawal. You may simply contact the inspector in writing by mail or email to let them know you want to withdraw your CBI claim. If you call EPA to withdraw your CBI claim, then EPA will memorialize your request back to you in writing.

**13. Q: What if I do not believe I am authorized to make a CBI claim for my business?**

A: EPA's regulations do not specify who from a business is authorized to make a CBI claim. If you are authorized to submit information to EPA on behalf of the business, you should make all efforts to determine what, if any, CBI claims your business would like to assert on the information you submit. If you are not authorized or unsure of your authorization, EPA encourages you to consult with management within your organization or with counsel for the business. If an authorized person is on site, please have that person review all claims prior to the conclusion of the inspection. If the authorized person is not on site during the inspection, you can either have the authorized person speak with the EPA inspector by phone while the inspector is still onsite, or you may provide the CBI Notice to the authorized person, who must return the notice to the EPA contact specified by the inspector no later than 10-calendar days after the conclusion of the inspection.

**14. Q: If I do not have a CBI claim, do I still have to sign the notice, i.e., what happens if I do not make a CBI claim/complete the notice?**

A: If you do not sign the notice during the inspection, then we would not treat your information as CBI-claimed information, but you would still have 10-calendar days from the conclusion of the inspection to assert any CBI claims on the submitted information.

**15. Q: What if I am unsure if some information that I provided during an inspection is CBI?**

A: You have the opportunity to assert a CBI claim over the information submitted to EPA at the time of inspection or within 10-calendar days from the conclusion of the inspection.

**16. Q: Do I have to provide EPA with my CBI documents?**

A: EPA encourages you to provide all requested and other appropriate information at the time of the inspection to help facilitate a smooth and efficient inspection process for both the inspector and your facility. EPA's authority to inspect your business and request information at the time of inspection comes from federal laws and implementing regulations. If you refuse to provide information to EPA at the time of inspection, EPA may seek alternate ways of obtaining the information; for example, EPA may issue an information request that is enforceable in federal district court or EPA may obtain a search warrant.