

STATE OF NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE



SUPERINTENDENT OF INSURANCE
Alice T. Kane

BULLETIN 2024-018

October 1, 2024

TO: AUTHORIZED INSURERS THAT SEEK TO REQUEST A CONFIDENTIALITY DETERMINATION BY THE NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE OF MATERIAL OR FORMS REQUIRED TO BE FILED WITH THE LIFE & HEALTH DIVISION

RE: RECISSION OF BULLETINS 2022-001 AND 2022-003 AND REPLACEMENT BULLETIN FOR THE CONFIDENTIALITY REQUEST DETERMINATION PROCESS

Bulletins 2022-001 and 2022-003 are rescinded and replaced with this Bulletin.

This Bulletin shall expire two years after the date it is issued by the Office of Superintendent of Insurance (the OSI), unless earlier rescinded or revoked.

When requesting that information be determined to be confidential by the OSI, it shall be assumed that the requesting Insurer confirms that the OSI will not be held responsible for any unintentional release of confidential material and that any fees that may be incurred to defend the handling of confidential material is the responsibility of the requesting Insurer.

Authorized Insurers in New Mexico are required to file electronic copies of all forms with the Superintendent of Insurance for approval pursuant to §59A-18-12(A), NMSA 1978 of the Insurance Code. However, §59A-2-12(B), NMSA 1978 of the Insurance Code expressly authorizes the Superintendent to deem certain filings as confidential and protected from public disclosure:

The superintendent may classify as confidential certain records and information obtained from another governmental agency or other source upon the express

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condition that they remain confidential or are deemed confidential by the superintendent, and such records and information shall not be subject to public inspection while confidentiality exists; except that no filing required to be made with the superintendent under the Insurance Code shall be deemed confidential unless expressly so provided by law.

Some filings that are required to be made with the Superintendent are protected as confidential expressly under the Inspection of Public Records Act (IPRA). IPRA provides, at §14-2-1(F), NMSA 1978, that, "Every person has a right to inspect public records of this state **except... trade secrets.**" (Emphasis added.) In turn, the Uniform Trade Secrets Act at §57-3A-2(D), NMSA 1978 defines a trade secret to mean:

...[I]nformation, including a formula, pattern, compilation, program, device, method, technique or process, 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.

Under IPRA, an Insurer may submit a confidentiality request to the OSI to consider whether specific information that the Insurer required file should be protected from public disclosure as a trade secret.

Also, regarding health insurance or health care plan rates information that an Insurer is required to file with the OSI pursuant to §59A-18-12 NMSA 1978, another law found at §59A-18-13.2(G), NMSA 1978 of the Insurance Code provides an Insurer with the opportunity to request confidentiality of filed health insurance material, and that law also provides that the OSI will not disclose the material that is the subject of the Insurer's confidentiality request, as follows:

...[U]pon request by an insurer, the superintendent may exempt from public disclosure any part of the [health insurance or health care plan rate] filing that the superintendent determines to contain proprietary information that would, if disclosed, harm competition. Pending the superintendent's determination under this subsection, the superintendent shall not disclose the part of a filing that is the subject of an insurer's request. (See Subsection of the Insurance Code.)

The now-rescinded Bulletin 2022-001 directed regulated entities who requested a confidentiality determination of filed material to follow certain processing guidelines. This Bulletin amends the processing guidelines to clarify how confidentiality is protected in compliance with the law, and to establish a review procedure that ensures that information that has been deemed to be confidential is not inadvertently disclosed by the OSI to the public in response to an IPRA request. The guidelines also enable the OSI to track confidentiality request determinations.

Confidentiality Review and Determination

The OSI shall advise the requestor of a confidentiality determination within thirty days whether such material is deemed confidential or whether it is subject to public inspection under IPRA. The OSI will keep all materials submitted in support of the confidentiality request, or otherwise filed as confidential in SERFF as part of the determination review process, closed from public inspection on a permanent basis. After a determination has been made by the OSI, the Insurer is responsible to uploading publicly accessible versions of the confidential material that is properly redacted and must upload public versions of material that is not confidential.

Insurers are cautioned to exercise good planning as to the timing of submitting confidentiality request, allowing for at least thirty days before any deadline the Insurer may face. Expedited determinations will not be routinely allowed but may be performed at the discretion of the OSI under unforeseeable circumstances.

Requests must sufficiently explain why the material should be treated as confidential. A broad, conclusory statement that material is a trade secret, is proprietary, or would harm competition if released, will not support a determination that a filing, or parts of a filing, may be deemed by the OSI as confidential. If a confidentiality request asserts that the subject material is protected by law, the exact law must be identified. Fact-specific details must be provided about how the material, if disclosed to the public, will result in a loss in economic value or would harm competition with the Insurer in some specific fashion. In other words, frivolous confidentiality requests will be denied.

To deem material confidential, the OSI assigned reviewer will review the material that is provided by the Insurer. During that process, the reviewer may initiate communication with the Insurer to aid the review of a request. The reviewer will either approve or grant the request, deny or reject the request, or seek additional information to enable adequate evaluation of the request. The OSI will document its determination on the confidentiality request form that was submitted

and will return that determination to the requestor within thirty days that the request was received.

Confidential Treatment Request Form and Process

1. Insurers wishing to request confidentiality for specific material in filings must **simultaneously** email the request to confidentiality.requests@osi.nm.gov and must also upload the request to the SERFF filing system.

The OSI confidentiality request form is located on the OSI website or can be found here:

chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://a.storyblok.com/f/

132761/x/9a40a33598/request-for-confidential-status_02-03-2023.pdf.

Insurers should email **only** the completed confidentiality request form to the above email address. No supporting documentation should be emailed, but rather must be uploaded to SERFF. In general, do not include specific confidential information on the confidentiality request form itself because the confidentiality request form normally will become publicly accessible on SERFF.

2. Insurers must upload to SERFF a completed and signed confidentiality request form, along with the materials that are the subject of the Insurer's confidentiality request, to the "Supporting Documentation" tab on SERFF, and must be designated by the Insurer on SERFF as confidential. The actual document that is claimed to be confidential must be uploaded and have inserted on every page of the claimed confidential material the following words:

NOT A PUBLIC VERSION - CONFIDENTIAL TREATMENT REQUESTED

3. The OSI assigned reviewer will review the identified legal authority and the facts for each specific confidentiality request. The reviewer will view the claimed confidential materials that are uploaded in SERFF. If questions arise, the reviewer may communicate with the Insurer in SERFF. All these communications must be maintained on SERFF and must be marked confidential.

4. After the determination has been made, if certain elements of the requested materials are determined to be confidential, but other elements in the same record are determined to be not confidential, the Insurer must upload to SERFF a public version of the materials that reveals the non-confidential information and that redacts the confidential material.

5. When a confidentiality request has been approved, the Insurer must upload to SERFF the final approved confidentiality request form and must upload the redacted versions of the materials. The pages that contain approved confidential information must be redacted and marked with the word "CONFIDENTIAL." There are very few instances in which an insurer will

not be required to upload a redacted version of its material. The OSI will verify that the material has been properly uploaded to SERFF and has been properly set for public access in SERFF upon the filing's approval. The unredacted version of the materials, which still contains the material that was reviewed, as well as any OSI objections, Insurer responses thereto, or other communications between the OSI and the Insurer related to the confidentiality determination process, will remain permanently confidential on SERFF and must not be available to the public.

6. If the OSI rejects a confidentiality request, the Insurer must remove confidentiality markings of any kind from the material and must upload the material as publicly accessible on SERFF.

Confidentiality Policy

OSI is committed to New Mexico sunshine policies favoring the broadest possible public access to government records. However, OSI will not routinely grant requests for confidential treatment without appropriate authority. Frivolous confidentiality requests will be denied.

Reliance

OSI confidentiality determinations do not necessarily bind the courts. Because a court could conclude that information considered confidential by the OSI is either a public record or discoverable evidence in connection with a judicial proceeding, the OSI makes no express or implied representation or warranty in connection with how a confidentiality determination may be made in the courts. To the contrary, an Insurer requesting confidentiality must rely solely on its own assessment of New Mexico confidentiality laws in determining whether to submit information to the OSI.

Questions concerning the information in this Bulletin may be directed to David.Black@osi.nm.gov.

ISSUED this 1st day of October 2024.



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