

## Trade Secret Protection for Health Insurance Filings in SERFF

In Nebraska, SERFF filings are public records unless the company specifically requests a trade secret exemption and the exemption is granted by the Department. If a trade secret information request is made in connection with a new SERFF filing or in response to a DOI objection or request for information in SERFF, two documents must be filed in SERFF to prevent the trade secret from becoming part of the public record when the filing is approved. **Trade secret materials must be separated from public record materials by filing two separate SERFF documents, a “Public SERFF Document” and a “Trade Secret SERFF Document.”** The public document and protected trade secret document will be linked by cross references, as explained below.

**FIRST: Public SERFF Document** provides information to the extent it is not a trade secret, then informs the reader that related trade secret information is not included in the public record. This document explains the company’s legal basis for requesting a “proprietary or commercial information” exception to the Nebraska Public Records Act, Neb. Rev. Stat. § 84-712.05(3).

A redacted actuarial memorandum could be a Public SERFF Document. In addition to the redacted version of the document, the Public SERFF Document must contain a statement asserting trade secret protection for any redacted information.

An assertion of trade secret protection should be organized as follows:

- Description of Trade Secret Information – describes the type of information without disclosing any trade secret details.
- DOI Request – reference to the DOI objection or request that requires disclosure of the trade secret information, if applicable.
- Associated Documents – cross reference listing the naming conventions of the Public SERFF Document and corresponding Trade Secret SERFF Document.
- Basis for Trade Secret Protection under § 84-712.05(3) – must identify business competitor(s) that may gain a competitive advantage by disclosure of the information and specify the nature of the competitive advantage that would be gained by disclosure. If the item is listed as “always considered trade secret” below, include that information in the basis for trade secret protection.

**SECOND: Trade Secret SERFF Document** contains protected trade secret information. This document should be limited to trade secret information, or be the full version of a redacted public SERFF document. If the filer requests trade secret protection for an entire document that includes public information, the DOI may ask that the filer supply a redacted version for public view.

- The naming convention of a Trade Secret SERFF Document must end with “TradeSecret.pdf.” Example: **[name of document]\_TradeSecret.pdf**.
- The first page(s) of a Trade Secret SERFF Document should reproduce the assertion of trade secret protection in the Public SERFF Document, including the description of

information, DOI request, naming conventions of associated documents, and legal basis for trade secret protection.

- Each page of the Trade Secret SERFF Document must be marked “trade secret.”

### **Important Considerations for Filers:**

Claims of trade secret protection are subject to DOI approval. If a claim for trade secret protection is rejected, the DOI will contact the filer and provide an opportunity for the filer to amend the response before it is made public.

Please be aware that only information provided in a Trade Secret SERFF Document is protected from public disclosure – there may be instances when the reviewer’s objection could require an answer that refers to trade secret information. In order for the DOI to keep this part of the review trade secret, you should note that the information discussed is trade secret, so that the trade secret information can be suppressed when the filing is closed.

Trade secret requests cannot be used as an excuse for providing late or incomplete responses to reviewer objections in SERFF.

### **Legal Basis for Trade Secret Protection in Nebraska:**

Pursuant to Neb. Rev. Stat. § 84-712.01(1), all records and documents of or belonging to the State of Nebraska are public records unless a statute expressly protects them from disclosure. Exceptions to the Nebraska Public Records Act include § 84-712.05(3), for trade secrets and “other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose.”

The trade secret exception at § 84-712.05(3) is interpreted in AG Opinion 92068, April 27, 1992 (“the mere assertion by an agency that some unknown business competitor may gain some unspecified advantage by disclosure of information does not provide an adequate basis for nondisclosure. Rather a finding that a specified competitor (or competitors) may gain a demonstrated advantage by disclosure is required to invoke the exception under § 84-712.05(3)”), and AG Opinion 97033, June 4, 1997 (emphasizing the need to name specific competitors which might gain an advantage and specify the nature of the advantage which could be gained by disclosure).

### **SECTION 1: Items that are Always Considered to be Public:**

The following items will always be considered to be Public documents, and the Department will not typically allow these items to be kept confidential within a Trade Secret request:

**A) Actuarial Memorandum (may be redacted):** All rate filings must contain an actuarial memorandum meeting standards set by the NAIC, CMS, or the State of Nebraska for the relevant type of rate filing. This actuarial memorandum, or a redacted version of this memorandum, will be made Public. If the carrier uses a redacted actuarial memorandum as the public version, then the full un-redacted version may be kept confidential if it is requested within the Trade Secret document. The public version of the actuarial memorandum must include the following:

- The Target Loss Ratio and percentage of premium retention expected for the new rating period, where retention should be split out by at least the following expense categories: Administrative expenses, commissions and broker fees, marketing expenses, profit margin & contingencies (Pre-Tax and Post-Tax), premium taxes, assessments and fees.
- Summary of the recent historical experience by year including claims, premiums, member months, loss ratio, and a similar summary of any base experience used for setting rates.
- Projected claims, premiums, expenses, member months, loss ratio for the new rating period, and a projection calculation showing how base experience was adjusted, trended and projected to the new rating period, and demonstrating that the target loss ratio will be achieved.
- For products utilizing Lifetime Loss Ratios (Long term Care, Medicare Supplement) this would include the entire historical and future lifetime loss ratio exhibit for each plan rated separately.
- For renewal rate filings a complete explanation of all rate changes being implemented, including a side-by-side illustration showing for each rate and rating factor the current value, new proposed value, percentage change in value. This should include (when applicable) area rating factor changes, network rating factor changes, Industry rating factor changes, age/gender rating factor changes.

**B) Rate Manual:** All rate filings must contain a public rate manual containing rate tables, or containing all base rates, rating factors and formulas and illustrating how they are applied to develop any Individual, Family or group rate. For each Association Group within a Large Group rate filing the carrier should include a separate rate manual.

- For Large Group rate filings where specific employer or association groups are partially or fully experience rated, the public rate manual should include a manual rate section containing all of the above, and also contain an experience rating section indicating the trend factors, and credibility factors to be applied, and provide a description for how a group's experience is used to develop their experience rates, and how they are blended with manual rates. A carrier may be requested to submit a full experience rating manual containing all experience rating formulas, and underwriting adjustments, which the Department typically will allow to be kept confidential as part of a Trade Secret request.
- Rate manuals for Associations should clearly explain how the plan will define "employer." Separate rate manuals are required for "traditional" Associations, which can rate based on health status but cannot include "working owners," and "AHP Rule" Associations, which must comply with the nondiscrimination provisions of the 2018 AHP Rule.
- For Large Employer rate filings, the Department typically only requests a sampling of benefit factors for the most common plans sold to be submitted in the filing, and these may be kept confidential if they are part of a Trade Secret request (as also noted in Section 2.C below). Benefit factors for Individual and Small Employer rate filings, and for Small Employer plans within an Association Group rate filing, are always deemed to be public.
- For ACA Individual and Small Employer On and Off Exchange rate filings the Department's required Excel spreadsheet rate tables are always required to be made public.

**(C) Administrative and SERFF tab information:** Is generally expected to be public.

- The Nebraska Life & Health Division Filing Form should always be public.
- Rate Filing Cover Letters are always public.
- Letters of Authorization giving authority to outside organizations to submit rate filings are public.

**(D) Policyholder Letters and FAQs:** Are always public.

**SECTION 2: Items that are Always Considered to be Trade Secret:**

The following items will always be allowed to be Trade Secret if a proper Trade Secret request is submitted:

**A) Specific Provider Reimbursement Rates:** The specific reimbursement rate to a hospital or physician group, specific PBM rebate level, etc. Summarized claims utilization and average unit cost for a specific provider.

**B) Specific Agent and Broker Commission Schedules:** The specific commission and reimbursement schedules paid to agents and brokers may be kept confidential. The Overall average commission percentage of premium, and average commission percentage by primary group size categories and products, will be made public.

**C) Large Employer Rate Filing Benefit Factors:** Benefit factors for Large Employer plans are always allowed to be kept confidential.

**D) Claims or premium for specific members:** Disclosure of any HIPAA prevented information, claims for very small groups of members who could be isolated and identified: For example, summarized claims support for a rating factor load based on large claims for 6 individuals with HIV.

**E) Detailed claims experience and detailed rating model calculations from an actuarial consultant's proprietary model.** However, the summary data indicated in Section 1 should still be made public. The fact that a model is proprietary does not preclude the Department from obtaining complete internal review of the model.

**F) A sensitive business plan provided around supporting a rating factor.** For example, a carrier that has a competitive business plan to expand into a new region in the state, the plan to add specific providers.

**G) Specific investments and returns** supporting our inquiry into Return on Capital calculations, related to supporting the profit margin levels built into rates.

**H) Specific Hospital data** should be made confidential. Historic and projected population morbidity metrics supporting Risk Adjustment may be kept confidential.

**I) Part III Actuarial Memorandum (unredacted):** For ACA Individual and Small Employer rate filings, the Federal Part III Actuarial Memorandum un-redacted version may be kept confidential in the rate filing, where a redacted public version will be made public. Note that this does NOT imply that Nebraska will allow the same level of confidentiality to be used in the Nebraska Actuarial Memorandum and supporting documents that CMS allows in the Part III Actuarial Memorandum. Nebraska does not have the ability to force CMS to remove redactions from their document, but the CMS confidentiality allowance is not binding on the Department.