



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Guidelines

CONFIDENTIALITY

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CONFIDENTIALITY GUIDELINES

INTRODUCTION

This guideline addresses the designation, protection, use and transmission of confidential information in all proceedings before the Canadian International Trade Tribunal as well as the measures put in place to control access to, and to protect, properly designated confidential information.

The Tribunal's mandate is to carry out its legislative responsibilities in a fair, informal and transparent manner. In order to do so, the Tribunal has developed procedures to ensure that its proceedings are open and accessible to parties, their counsel and the public at large. Given the nature of issues that arise during its proceedings, the Tribunal often requires access to commercially sensitive information submitted by persons,¹ which, if disclosed to a business rival, could have significant adverse financial consequences. Therefore, protecting commercially sensitive information against unauthorized disclosure has been, and continues to be, of paramount importance to the Tribunal. With the cooperation of counsel who appear before the Tribunal, the Tribunal has developed a solid reputation for protecting confidential information in all its proceedings.

Transparency of the Tribunal's Decision-Making Process

The *Canadian International Trade Tribunal Act (CITT Act)* provides that certain information is confidential and must be protected. However, complete and well-documented public reasons are essential to the transparency of the Tribunal's decision-making process. Also, in the case of advisory reports, complete and well-documented public reasons are essential to fully inform the Minister of Finance, the Government and Parliament with respect to the issues under consideration.

The need for transparency in Tribunal proceedings requires that the record contain a public redacted version or public summary of all confidential information on the record. The designation of information as confidential is subject to review by the Tribunal to ensure that it is warranted and that public edited versions or public summaries of confidential information contain sufficient information to allow non-represented parties to present their cases, and also permit the Tribunal to provide meaningful reasons for its decisions. Large volumes of confidential information or the excessive use of a confidential designation may undermine the Tribunal's ability to issue reasons for its decisions that publicly disclose all the relevant information upon which it based its decisions.

Designation of Confidential Information

The statutory provisions governing the designation of confidential information in the Tribunal's proceedings are found in sections 45 to 49 of the *CITT Act*. Usually, requests that some information be designated as confidential come from the person submitting the information, although the Tribunal may, on its own initiative, designate information as confidential at any time during the course of proceedings.

1. In this document, the term "persons" includes all individuals, companies and parties involved in any way in a Tribunal proceeding.

A party wanting portions of the information that it files with the Tribunal to be designated as confidential must submit two versions of the information to the Tribunal, as follows:

1. A confidential version containing all the confidential information and labelled “Confidential” on every page that contains confidential information. In addition, all confidential information should be highlighted by using shading, boldface characters or square brackets (for a sample confidential document see Appendix 1); and
2. a) A public version of the same document with the confidential information fully deleted. It is not sufficient to simply mask or hide the confidential information, it must be deleted. (for a sample public (redacted) version of a confidential document see Appendix 2).

In the alternative to filing a public version as described in 2(a) or 2(b), you may file a public summary of the confidential information. In either case, the public version or the public summary must give the party opposite and the Tribunal sufficient information to understand the nature of the confidential information.

While a party may submit documents marked “Confidential”, it does not automatically follow that the information is given a designation as confidential. The Tribunal reserves the right to refuse to accept a confidential designation, in whole or in part. If the Tribunal has concerns about the designation of information as confidential, the party providing the information will be given an opportunity to provide an acceptable explanation of why the designation is appropriate. In these instances, the following may occur:

1. If the Tribunal is satisfied with the explanation provided, the information will be treated as confidential.
2. If the Tribunal is not satisfied with the explanation for the requested designation of confidentiality, and the party fails to provide an acceptable public version, the information submitted as confidential will not be taken into account by the Tribunal and will not be made part of the record.
3. The party providing the information may agree to the information being placed on the public record.
4. The party providing the information may withdraw the information.

Access to Confidential Information by Counsel

According to the *Canadian International Trade Tribunal Rules (Rules)*, “counsel” includes any person who acts in a proceeding on behalf of a party.

Counsel cannot obtain access to confidential information if they are a director, servant or employee of the party they represent. Prior to counsel obtaining access to confidential information, the party on whose behalf they are acting must file a Notice of Participation (Form I) with the Tribunal providing counsel’s name and contact information. Counsel are required to file a Notice of Representation (Form II) and those who wish to obtain access to confidential information must file a Declaration and Undertaking of Confidentiality (Form III) in which they declare that they:

- are ordinarily resident in Canada
- are not a director, servant or employee of a party to the proceeding for which they act and
- have read and understand the subsections 45 to 49 of the *CITT Act* pertaining to access to confidential information.

And that they undertake to:

- Use the confidential information exclusively for duties performed in respect of the subject proceeding;
- Not divulge any confidential information received, except to another person granted access by the Tribunal to such information;
- Protect the information in the manner specified by the Tribunal;
- Not reproduce the confidential information unless prior approval is received from the Registrar;
- Destroy the information on completion of the proceeding, and so notify the Tribunal;
- Return to the Registrar of the Tribunal, where applicable, all electronic media issued by the Tribunal; and
- Report promptly any violations or suspected violations of an Undertaking of Confidentiality to the Tribunal.

Forms can be found on the Tribunal's Web site at www.citt-tcce.gc.ca/en/forms.

Access to Confidential Information by Counsel Appearing Before the Tribunal for the First Time on a Trade Remedy Case

Before accepting a Declaration and Undertaking of Confidentiality from counsel who has not previously appeared before the Tribunal on a trade remedy case, the Registrar of the Tribunal will circulate their *curricula vitae* to other counsel participating in that particular proceeding and will ask for comments on the request for access. The Tribunal will take a decision on the request, on such terms as it considers appropriate.

Disclosure Orders Issued by the Tribunal

Where the Tribunal is satisfied that counsel meets the requirements of their Declaration and Undertaking of Confidentiality, the Tribunal will issue a Disclosure Order granting said counsel access to confidential information subject to the conditions of their Declaration and Undertaking. Disclosure Orders are issued only during the course of trade remedy proceedings before the Tribunal that fall under the *Special Import Measures Act (SIMA)*. Although counsel must file a Notice of Representation and Declaration and Undertaking of Confidentiality for each and every proceeding, once a Disclosure Order has been issued it remains in force for all future proceedings, unless revoked by the Tribunal. Some exceptions apply, notably in the case of Disclosure Orders issued to counsel who are not residents of Canada and Disclosure Orders issued to experts, as discussed below.

Access to Confidential Information by Counsel Who are not Residents of Canada

Where the Tribunal is persuaded that it is warranted, the Tribunal may issue a Disclosure Order granting access to confidential information by counsel who are not residents of Canada, on the condition that access take place under the direction and control of a Canadian counsel who has been granted a Disclosure Order, and that the confidential information remain in Canada at all times. A Disclosure Order issued in such cases would apply only to the specific case for which it was issued. In these cases, non-resident counsel must provide a copy of their *curriculum vitae* along with the name and coordinates of the Canadian counsel under whose direction and control they may be permitted access.

Access to Confidential Information by Experts

The *CITT Act* provides for the disclosure of confidential information to experts who are acting under the control or direction of counsel, or who are retained by the Tribunal. Experts cannot obtain access to confidential information if they are a director, servant or employee of a party. A Disclosure Order issued to an expert only applies to the specific case for which it was issued and is subject to any conditions that the Tribunal may consider reasonably necessary to protect the confidential information.

The designation of a person as an expert is determined in each instance by the Tribunal. Experts asked to testify before the Tribunal or provide expert written opinions have specialized knowledge in their specific area of expertise. In order to perform their analysis and give evidence, experts may not need access to the entire confidential record. When parties submit the notice of an expert witness and make a request for access to confidential information, they should specify the area(s) of the record to which their expert will need access. If any counsel or party considers that an expert does not need access to the entire confidential record, that counsel or party may request that the Tribunal give directions on what confidential information should be made available to the expert. Counsel may also request that experts be permitted to view the specific confidential information only at the offices of the counsel who have retained them and from whom they receive direction. These procedures are outlined in rule 16 of the *Rules*.

In addition, prior to obtaining access to confidential information, experts are required to complete a Declaration and Undertaking (Expert) (Form V), a Proposed Expert Witnesses: Acknowledgement and Undertaking (Form VII) and file them with the Tribunal.

When Access to Confidential Information is Challenged

When a request for access to confidential information by a counsel, representative or expert is challenged or should the Tribunal itself have any concerns, the Tribunal will invite submissions from counsel of record prior to making its decision. In such cases, the Tribunal will provide reasons for its decision to grant or deny access.

Notice of Change of Counsel

The Registrar of the Tribunal must be notified in writing when a party changes counsel during the course of a proceeding. New counsel is required to file the requisite forms as set out above and the former counsel must proceed to destroy any confidential information and return any electronic media issued by the Tribunal within 10 days of notice of change of counsel.

Information that is Typically Considered Public

The following is a non-exhaustive list of the type of information that the Tribunal typically considers to be *public*:

- Aggregated data, including industry association data, where specific company data cannot be identified or deduced;
- “Rate-of-change” information for a country, a company, a market or an industry relating to various performance indicators, *except* for company-specific financial information that is not in the public domain; and information that could, when combined with other information available to a party, disclose confidential “level” information about another party;

- General views and opinions on the state of the market, including market competition, consumer behaviour and preferences, future market demand and product trends;
- Information available through public sources, including data relating to production, imports and other market indicators;
- Qualitative descriptions of market factors;
- Published price lists and discounts;
- Products produced and production processes, excluding proprietary processes;
- Published financial statements, annual reports or other published information;
- Portions of customer-specific injury allegations submitted in response to the Tribunal's questionnaires, including:
 - name of company or party making the allegation;
 - specific type(s) of product in question;
 - nature of alleged injury (e.g. lost sales, price suppression, price erosion);
 - date of event;
 - source of product (i.e. country, exporter or importer against whom the allegation is being made);
- Descriptions of company history, ownership (if a public company), marketing and distribution channels;
- Samples of products offered for sale;
- Grounds of procurement complaints and responses thereto that do not disclose business proprietary information;
- Solicitation documents in a procurement complaint;
- Correspondence between the complainant and the Government Institution in a procurement complaint;
- Grounds for appeals filed under the *Customs Act*, *SIMA Act*, or *Excise Tax Act* filed by appellants and responses thereto that do not disclose proprietary information.

Information that is Typically Considered Confidential

“Confidential information” generally includes business proprietary information, personal information or third party information. The following non-exhaustive list identifies the types of information the Tribunal typically considers to be *confidential*:

- In dumping and /or subsidizing proceedings, information provided (and designated as confidential) by way of questionnaires or requests for information (e.g. company-specific and product-specific quantitative data, including production costs, sales, investments, employment, profits, business plans, contractual agreements, and bids);
- In a procurement inquiry, information designated as confidential by a supplier or the government institution and accepted as such by the Tribunal (e.g. confidential pricing or business strategies, financial bid and other financial information, curriculum vitae, personal information, third party information [information that does not belong to the complainant or to the government institution], completed evaluation grid);

- In an appeal under the *Customs Act*, *SIMA*, or *Excise Tax Act*, information designated as confidential by an appellant or a respondent and accepted as such by the Tribunal (e.g. personal or financial information, business proprietary information, or third party information).

Documents Produced by the Tribunal

The Tribunal ensures that any public document that it produces contains only information that has been put into the public domain by parties or is a publicly disclosable aggregation of confidential party-specific information.

Where it is necessary to produce a document containing confidential information, this confidential document is made available only to counsel who have signed a Declaration and Undertaking of Confidentiality. The public version of that document will have all confidential information deleted; however, it will contain either a summary or a general indication of the nature of the confidential information.

Distribution of the Record to Counsel and Parties

Parties who have filed a Notice of Participation, and who are not represented by counsel, will be provided with the public record.

Counsel who have filed a Notice of Representation and a Declaration and Undertaking of Confidentiality (and in trade remedy-related proceedings have been granted a Disclosure Order) will be provided with either an electronic or paper copy of the public and confidential record.

Public Hearings and Use of *in Camera* Proceedings

Section 35 of the *CITT Act* provides that hearings before the Tribunal shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit.

Where the Tribunal holds oral hearings, it normally conducts them in public. This practice facilitates the transparency, openness and accessibility of the Tribunal's proceedings. The exception to this practice is where a witness believes that confidential information will be disclosed during testimony. At that point, the public portion of the hearing is suspended and the Tribunal will ensure that all persons who are not authorized to hear confidential evidence leave the hearing room. The only persons who may remain in the hearing room, besides the panel members, are Administrative Tribunals Support Service of Canada (ATSSC) – Canadian International Trade Tribunal Secretariat staff (CITT Secretariat), counsel for the party providing the confidential testimony, including witnesses who are testifying, counsel for the other parties who have signed a Declaration and Undertaking of Confidentiality, court reporters and interpreters who have signed confidentiality undertakings. With leave of the Tribunal, accompanying officials of a corporate witness providing confidential testimony may remain in the hearing room. Such confidential hearings are referred to as *in camera* sessions or *in camera* proceedings. The hearing will resume in public upon conclusion of the *in camera* session.

All transcripts of *in camera* proceedings are under the Tribunal's control and subject to the same protection measures as all other confidential information. CITT Secretariat staff prepares public summaries of *in camera* proceedings and these summaries are placed onto the public record of the proceeding. To the extent

that any testimony given *in camera* is subsequently found to be public in nature, the Presiding Member may direct, with the consent of the witness, that said portion of the testimony be placed on the public record.

Reference to Confidential Information in Closing Arguments

As it is the Tribunal's objective that its hearings be conducted in public, to the greatest extent possible, it follows that closing argument should also be made in public. This can be achieved by counsel only making reference in their arguments to the location of confidential information in the confidential record, while refraining from revealing the actual confidential information in public. In this regard, counsel may find it useful to prepare and file brief confidential aids to argument that contain the confidential material or precise references to the location of confidential information in the record.

Electronic Transmission of Documents

In order to safeguard confidential information, the Tribunal does not distribute any confidential information to counsel by electronic mail. Such material will be distributed by courier only.

Parties and the public may file public and/or confidential documents with the Tribunal electronically through its Secure E-filing Service which can be found on the Tribunal's Web site at: www.citt-tcce.gc.ca/en/secure_e_filing_service. This service allows the secure transmission of confidential information. The information is fully encrypted from the sender to the Tribunal.

"Third party confidential information" means confidential information that does not belong to the party filing the information, or to the party on whose behalf the information is being filed. Documents containing third-party confidential information may only be transmitted electronically to the Tribunal by way of the Tribunal's Secure E-filing Service.

Documents that do not include any third-party confidential information or redacted portions can be transmitted by electronic mail provided the associated risks are accepted.

Public documents can be transmitted by electronic mail or via the Secure E-filing Service.

Table summarizing instructions regarding the electronic transmission of documents

Nature of the Document	Transmission to the Tribunal by Secure E-filing	Transmission to the Tribunal and Parties by E-mail	
Confidential Document containing third-party information	Yes	No	
Confidential Document that do not include third-party information	Yes	Yes	
Redacted Document containing third-party information (Public)	Yes	Yes	

Public Document	Yes	Yes	
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The above instructions apply to all transmissions between counsel and the Tribunal and among counsel themselves.

The Tribunal requires that counsel and parties serve each other directly as follows:

1. Submissions that contain information that is confidential to you or your client may be served by electronic means provided the associated risks are accepted.
2. Submissions that contain third-party confidential information, meaning confidential information that does not belong to you or your client, must be served by hand or by courier and must be received by the due date set out by the Tribunal.
3. Proof of service is required to be filed with the Tribunal.

Breach of Confidentiality Undertakings

Counsel are bound by their Declaration and Undertaking of Confidentiality to protect any confidential information provided to them in the context of a Tribunal proceeding. Any violation of the terms of their declaration and undertaking is a serious offence.

The *CITT Act* provides for fines of up to \$1 million and potential prohibition from appearing before the Tribunal in any future proceedings for anyone (counsel or expert) who breaches his/her Undertaking of Confidentiality.

Should any party or counsel become aware of a confidentiality breach or even a potential confidentiality breach, that person must immediately advise the Registrar of the Tribunal. The Tribunal will investigate immediately and take the necessary steps to correct the situation. A breach can occur if case-related information, which has been designated as confidential by a party or by the Tribunal, is made available to a person who is not authorized to have access to this information.

Every precaution must be taken by counsel and parties when preparing the public (redacted) version of any confidential document to ensure the public version does not contain any confidential information. Careful verification must always be made before serving the public version on other parties and on the Tribunal. In addition, the Tribunal's instructions regarding the electronic transmission of confidential documents must be adhered to at all times.

Obligation of Tribunal Members and CITT Secretariat Staff

Tribunal members and CITT Secretariat staff are under a statutory obligation not to disclose knowingly, or allow to be disclosed, confidential information that comes into their possession while holding office or being employed in the public service to any other person in any manner that is calculated or likely to be made available for the use of any business competitor or rival of a person to whose business or affairs the information relates. This statutory obligation continues to bind Tribunal members and CITT Secretariat staff after they cease to hold office or to be employed in the public service.

Account-Specific Injury Allegations in Trade Remedy Proceedings and Limited Disclosure Undertakings

In trade remedy proceedings, account-specific injury allegations may occasionally be made by domestic producers to bolster their arguments that dumped or subsidized products are causing or threatening to cause injury. Domestic producers are under no obligation to provide this type of information and, while it may be helpful in certain cases, it is not essential to the conduct of the proceedings in inquiries or expiry reviews. The Tribunal recognizes that some of the information in these allegations may be sensitive and may need to be treated as confidential by the Tribunal, subject to certain conditions. If, however, a party wishes to make these account specific injury allegations, it must in all fairness provide opposing parties (against whom it is making the allegations) with enough information to defend themselves in a timely and effective manner.

In its questionnaires,² the Tribunal will request, as indicated in the following table, different types of information on account-specific injury allegations (if a party wishes to make such allegations and subject to the availability of the information). This table indicates whether the information should be categorized as public or confidential (and, if the information is confidential, whether part of it could be subject to limited disclosure to the parties who may wish to defend themselves against these injury allegations as discussed below).

2. Questionnaires are customized for each case to take into account the special circumstances of the product and the market. In developing these customized questionnaires, the CITT Secretariat staff may modify slightly the type of information requested from parties in support of any account-specific allegations.

Information	Public	Confidential ³	Limited Disclosure
Producer Making the Allegation	X		
Account or Customer		X	X
Specific Product Offered for Sale by Producer	X		
Nature of Alleged Injury	X		
Date of Alleged Injury	X		
Producer's Own Information			
Price Offered		X	
Actual Selling Price		X	
Volume Offered		X	
Volume Sold		X	
Information About Alleged Competitor			
Name		X	X
Source of Product (country or exporter)	X		
Type of Product Offered	X		
Price Offered by Competitor		X	X
Actual Selling Price		X	X
Volume Offered		X	X
Volume Sold		X	X

A party that wishes to receive information about an account-specific injury allegation made against it must sign a Limited Disclosure Declaration and Undertaking and Acknowledgement (Form IV). The Tribunal considers that a party giving limited disclosure to this otherwise confidential information should provide, in addition to the public information identified in the table above, at least the following additional information, to the extent that it is available:

- Name of competitor;
- Name of customer, client or account in question;
- Price offered by competitor;
- Competitor's actual selling price (if competitor made the sale);
- Volume of product offered for sale by competitor;
- Volume of product actually sold by competitor (in the case of allegations of lost sales).

If the party making the injury allegations refuses to provide this limited disclosure, this may affect the weight that the Tribunal will give to the allegations.

Similarly, details of any responses to allegations should be disclosed to the party making the original allegations under the same general terms and conditions as the original allegations.

3. Parties may wish to put some or all this information in the public portion of their questionnaire responses.

The Limited Disclosure process is generally undertaken between counsel and parties directly without the involvement of the Tribunal, unless parties cannot agree.

Destruction of Copies of Confidential Documents

Upon conclusion of proceedings, in accordance with the Declaration and Undertaking of Confidentiality, counsel must provide the Registrar of the Tribunal with a certificate of destruction or a letter attesting that any confidential information provided in hard-copy by the Tribunal, or by any other party, or printed by counsel, including any notes, has been destroyed. This ensures that there are no copies of commercially sensitive information stored indefinitely outside the Tribunal. The Certificate of Destruction form can be found on the Tribunal's Web site at www.citt-tcce.gc.ca/en/forms.

Return to the Tribunal of All USB Keys (Or Other Electronic Media)

Upon conclusion of proceedings, counsel must return to the Tribunal all USB keys (or other electronic media) on which confidential information has been provided.

CONCLUSION

The Tribunal is proud of its record of protecting confidential information. At the same time, however, it recognizes that it must remain vigilant to ensure that the procedures dealing with confidential information continue to provide effective protection.

For additional clarification or information regarding these guidelines, please contact:

The Registrar
Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7
Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

APPENDIX 1 SAMPLE CONFIDENTIAL DOCUMENT

During the period from 2011 to 2013, Company A's net profits (as a percentage of sales) declined from [17.8] to [10.2] percent. During the first quarter of 2014, profitability showed improvement, increasing from [5.6] to [12.6] percent.

Table 1 reports Company A's standard costs for domestic sales of Product X on a dollar per unit basis. Total standard costs increased by [1.5] percent in 2012 and then rose by a further [1.1] percent in 2013. Comparing the first quarter of 2013 with that of 2014, total standard costs declined by [17] percent.

During the period of inquiry, material costs represented close to [50] percent of total standard costs. Material costs showed the widest fluctuations among the standard cost components. In 2012, the [2] percent drop was followed by a [16] percent increase in 2013 and a [22] percent decline in the first quarter of 2014, when compared to the first quarter of 2013.

	2011	2012	2013	<u>January to March</u>	
				2013	2014
LEVELS					
Volume of Goods Sold (net tons)	[4,339]	[4,926]	[4,291]	[953]	[1,575]
Materials	[1,595]	[1,571]	[1,816]	[1,525]	[1,183]
Labour	[781]	[782]	[599]	[834]	[652]
Overhead	[491]	[558]	[529]	[542]	[586]
Total Standard Costs	[2,867]	[2,911]	[2,944]	[2,901]	[2,421]

Source: Producers' Questionnaire, Question 25.

During the period of inquiry, export sales represented between [11] and [26] percent of total company sales. The contribution of exports to total company gross margins far exceeded their contribution to total company sales.

APPENDIX 2

SAMPLE PUBLIC (REDACTED) VERSION OF CONFIDENTIAL DOCUMENT

During the period from 2011 to 2013, Company A's net profits (as a percentage of sales) declined from [] to [] percent. During the first quarter of 2014, profitability showed improvement, increasing from [] to [] percent.

Table 1 reports Company A's standard costs for domestic sales of Product X on a dollar per unit basis. Total standard costs increased by [] percent in 2012 and then rose by a further [] percent in 2013. Comparing the first quarter of 2013 with that of 2014, total standard costs declined by [] percent.

During the period of inquiry, material costs represented close to [] percent of total standard costs. Material costs showed the widest fluctuations among the standard cost components. In 2012, the [] percent drop was followed by a [] percent increase in 2013 and a [] percent decline in the first quarter of 2014, compared to the first quarter of 2013.

Table 1					
Company A					
Standard Cost Breakout—Domestic Sales					
(\$/unit)					
	2011	2012	2013	<u>January to March</u>	
				2013	2014
LEVELS	[]	[]	[]	[]	[]
Volume of Goods Sold (net tons)	[]	[]	[]	[]	[]
Materials	[]	[]	[]	[]	[]
Labour	[]	[]	[]	[]	[]
Overhead	[]	[]	[]	[]	[]
Total Standard Costs	[]	[]	[]	[]	[]

Source: Producers' Questionnaire, Question 25.

During the period of inquiry, export sales represented between [] and [] percent of total company sales. The contribution of exports to total company gross margins [] their contribution to total company sales.

Note: The public version of a confidential document must be created by deleting rather than masking or hiding the confidential information.