The People's Trade Secrets?

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Abstract

The content of administered public school exams, modifications made by a government to its voting machines, and the business strategies of government corporations should be of interest to the public. At a minimum, they are the kinds of information that a government should allow its citizens to see and examine. After all, the public might have some legitimate questions for its government: Is that voting machine working so that my vote gets counted? Is that public school examination fair and accurate? To whom or what is that government agency marketing and are kickbacks involved? One would think that the government should have to publicly answer such questions, at least in a democracy.

While initially the above does not sound too controversial, the law has made it problematic. Getting access to the information that would answer the above questions may not be easy because the person requesting the information might have to show that the information is not a government trade secret before it can be disclosed. Today, the government of the people can keep information from the people by way of the commercial, intellectual property law of trade secrecy. Strangely, the people – citizens of states and the United States – apparently have trade secrets that they themselves cannot see. In other words, there is information that the government itself creates on its own (a “government trade secret”) and that courts or attorneys general have found meet the applicable definition of a trade secret. This article examines whether a government trade secret should be allowed to exist, and, if so, whether governments should be allowed to shield government trade secrets from public disclosure.

Importantly, I am not focusing here on trade secrets shared with government by private industry or created by private industry on the public’s dime. That topic was the focus of an earlier article. In Secrecy, I examined the question of whether private entities engaged in the provision of public infrastructure, like voting machines and public wifi Internet access, should be allowed to shield information regarding their products and services from public disclosure by way of trade secrecy. This is a question of applying democratic values like transparency and accountability to private entities, the practical effect of which is in direct conflict with the

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purpose of trade secrecy, namely, keeping information private. I concluded that, as applied to public infrastructure, trade secrecy should not be utilized by private entities engaged in its provision.

While the conflict here is similar – transparency versus secrecy – the policy considerations are quite different. For example: do we need to incentivize innovation in government by way of trade secrecy? Should the government be in the business of leveraging competitive advantage in order to generate revenue or, much worse, for an unstated ulterior motive like avoiding public scrutiny? If the government is allowed to consider cost-effectiveness in its operations, should trade secrecy be the mechanism that allows for this consideration? As the application of trade secrecy by government is a very recent development (at least in the United States) and there are very few reported decisions dealing with the issue, its ramifications have yet to be explored in detail.

I examine these questions and issues by explaining how trade secrecy and freedom of information laws interact, emphasizing the theoretically discordant nature of the government trade secret. In part two, I examine the basic issues involved in finding and maintaining a trade secret. In part three, I discuss several scenarios where government trade secrets have been asserted with questionable basis in the law, such as a county’s modification of voting machines, and/or where government trade secrecy has prevented the public from accessing valuable information, such as a public school system’s examinations and the minutes of public corporation board meetings. Additionally, I posit reasons why we may think that the problem of government trade secrets may be growing. In part four, I outline the basic principles of transparency, accountability and democratic governance. In part five, I discuss possible solutions to the problems discussed, and conclude that trade secrecy is a poor fit in government for two primary reasons: (a) the utilitarian basis for trade secrecy does not fit well when applied to government, and (b) transparency and accountability, two core democratic values, are severely undermined when trade secrecy is used to prevent disclosure of otherwise public information.
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I. INTRODUCTION

Hudson Mayor William Currin has called a special meeting of [the] Council on June 22 at 7:30 p.m. in Town Hall to discuss “trade secrets and the purchase of property for public purposes.” The discussion will take place in executive session, which means it is not open to the public.3

An announcement of a town hall meeting is both commonplace and unexceptional. But this particular town hall meeting announcement illustrates a problem that requires immediate attention. In fact, when the mayor of Hudson, Ohio announced this June 22, 2010 meeting the announcement exemplified the problem that is the focus of this article. This meeting for the benefit of the citizens of Hudson, Ohio was not open to the public. It was not public because unstated and unidentified trade secrets would presumably be discussed. However, the propriety of closing the meeting – of keeping this information from the public – depends on whose trade secrets are going to be discussed. On the one hand, if a private business’ trade secrets would be discussed, perhaps the private business should have the right to keep that information from the public; else, it is no longer a trade secret. But if the meeting would discuss, for example, spending taxpayer dollars to purchase property, should the government have the power to say that information about public expenditures is a trade secret – a “government trade secret” – and therefore keep that information from the public?

This article posits that the answer to the above question should and must be no for two primary reasons: first, a “government trade secret” should be a contradiction in terms because the existence of a government trade secret conflicts with the policies underlying and purposes of trade secrecy; and second, even where government trade secrets have been allowed to exist, democratic values like transparency and accountability should eclipse whatever arguable economic benefit a government receives from maintaining the alleged trade secret. Particularly in a democracy faced with the existence of entities dedicated to unmasking government secrets, like Wikileaks, and the Internet itself, which has vastly increased the ability to disseminate public information4, we need to guard against the tendency of governments to avoid unwanted and potentially unfavorable scrutiny by unjustifiably foreclosing disclosure of information. Thus, I argue that if the government is going to prevent disclosure of data and information, it should find a much better reason than the theoretically unjustified and concretely problematic government trade secret.

As discussed in this article, this quandary has already manifested itself in situations ranging from questions found in administered public school examinations to the business strategies of the board of a public corporation comprised of elected officials to modifications made by a government to voting machines. In these scenarios, and others discussed in this article, the same basic problem arises: the government’s ability to assert trade secrecy protection

over information that it creates at public expense prevents the public from knowing the information with, at best, unclear and amorphous benefits to the public derived from maintaining the secrecy. But while this scenario has already occurred and will continue to occur in increasing numbers if left unaddressed, in the past two years, a fundamental counter-position in government transparency has been articulated in the United States that suggests that now is the time to address this problem.

During his first day as President of the United States, Barack Obama issued a “memorandum for the heads of executive departments and agencies” regarding the federal Freedom of Information Act (“FOIA”), the federal act that mandates open government with certain exceptions, one of which will be discussed in detail in this article. In the first sentence of the memorandum, President Obama noted that a “democracy requires accountability, and accountability requires transparency.” The memorandum went on to state that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.” As part of the directive, President Obama ordered the Attorney General to issue new FOIA guidelines and the Office of Management and Budget to “update guidance” to the agencies to effect his directive.5 The Attorney General issued his memorandum on March 19, 2009, in which he laid out two primary implications for how federal agencies should respond to FOIA requests based upon President Obama’s memorandum: “First, an agency should not withhold information simply because it may do so legally. … Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make a partial disclosure.”6 As discussed in more detail below, this is a fundamental reorientation of how agencies respond to FOIA requests.

The Office of Management and Budget took a bit more time to present its guidance to agencies, but it did so on December 8, 2009 in a potentially groundbreaking way, issuing its Open Government Directive (the “OMB Memorandum.”)7 The OMB Memorandum requires federal agencies to “take specific actions to implement the principles of transparency, participation, and collaboration” set forth in the President’s memorandum. This effort has been hailed as having the potential to be a “watershed moment for democracy, the likes of which can forever change the relationship between the government and the public it serves.”8 Indeed, it has already resulted in agencies moving for the first time towards releasing data on the Internet, making data available for download for no charge, and disclosing previous unreleased documents for public inspection.9 In fact, every cabinet department is supposed to unveil a new open government project.10

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To understand the significance of these developments, it is important to note the trend since the terrorist attacks of September 11, 2001. Commentators have found that, as a general matter, the United States government errs on the side of secrecy, especially post 9/11. Moreover, there has been increased use of the designation “Sensitive but Unclassified” by United States government agencies. This designation is often found on research and science/technological information generated by the government post-9/11, and allows for it to be withheld from public view. Thus, the FOIA memorandum has the potential to not only begin to reverse post-9/11 excessive secrecy but to allow for a re-imagination of the relationship between government and its citizens at all levels, federal, state and local.

States can similarly embrace the idea of making their governments more transparent and accountable by addressing the anomaly of the “government trade secret,” which in most states allows the government to keep from public view information created entirely by the government and designated as trade secrets by the government itself. As the federal government has largely dealt with this anomaly, this article seeks to lay the groundwork for state legislatures to follow the lead of the federal government, and the few states that have addressed it, and eliminate this unjustified and ultimately unjustifiable hindrance to the release of significant and valuable public information.

Historically, it has been axiomatic that the government’s role is not primarily concerned with selling products to consumers, but rather the provision of government services. While agencies like the Department of Energy, the National Institutes of Health and Department of Agriculture develop new technologies in conjunction with the private sector, the government has historically facilitated, rather than created, intellectual property. To the extent that government develops intellectual property within government or by contract, the products developed have historically been for its own use, as opposed to the private sector’s creation of products for consumers. But as these practices change and governments become more direct commercial actors, we should ask a basic question: Should transparency and accountability give way to providing the most efficient and cheapest alternative to the taxpayer?

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13 Unfortunately, the Obama administration has also taken positions in favor of secrecy that undermine optimism for fundamental change. See Andrew Malcolm, A Little Secret About Obama’s Transparency, March 21, 2010, available at (“An Associated Press examination of 17 major agencies’ handling of FOIA requests found denials 466,872 times, an increase of nearly 50% from the 2008 fiscal year under Bush.”)

14 The federal government has addressed this anomaly in FOIA. See infra at Part II(b).


Indeed, from a broader perspective, as public and private interests get blurred and governments and businesses partner, a reconsideration of the rules for government is not only a good idea but necessary. In Australia, which is further along in this process than the United States, commentators have noted that “an important consequence of the reconfiguring of government is that a significant portion of the information generated and held by what is left of the government sector is of a business nature,” due to government commercial activities or outsourcing of delivery of government services. The issues become even more complex when the “business” information is created by the government itself. The “business nature” of information created by government, and whether trade secrecy should protect it in the face of significant costs to the existence of a transparent and accountable government, is the focus of this article.

Despite its ramifications, this issue has received scant attention. The total absence of explanation or discussion in the relevant trade secret model laws and statutes of the basis for, need for, and ramifications of allowing a governmental entity to create and hold its own trade secrets is understandable in light of the fact that it appears to be a nascent exception to open government laws. But ultimately, the trend towards increased governmental commercial activity, like servicing student loans and selling databases, combined with increasing budgetary pressure on state and local governments to provide services at as low a cost as possible, means that one can expect that governments will increasingly utilize commercial law concepts like trade secrecy in their operations. This reality is a force opposing the trend of transparency at the state level because some traditional operating principles of government, like transparency and accountability, conflict with those of the private sector, like maintaining commercial secrecy for competitive advantage. These opposing forces have been largely unexplored in intellectual property literature, but such examination is needed— including examination of whether trade secrecy belongs in this sphere at all— before this practice becomes common in the government sector.

As trade secrecy gains prominence in government operations, the early examples of its application discussed and analyzed in this article illustrate where the issues and solutions lie. There are two concerns to address: first, whether government generated information can qualify as a trade secret under traditional definitions of trade secrecy; and second, whether the government should be allowed to assert trade secrecy even if certain of its information qualifies. This Article takes on these issues from both a theoretical and practical perspective. Part II addresses the first question by exploring the basics of trade secrecy and freedom of information

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17 See Secrecy at 191 for an extended discussion of these issues.
19 For a rare discussion of government’s commercial rights under FOIA, see Steven W. Feldman, The Government’s Commercial Data Privilege Under Exemption Five of the Freedom of Information Act, 105 Mil. L. Rev. 125 (1984). It is difficult to get a handle on how often trade secrecy is utilized by governments, as there are few reported opinions regarding its use and the issue can be raised in non-published documents like responses to Freedom of Information requests and sealed litigation. Assessing its prevalence will be a focus of future work.
20 See infra Part IV.
laws, and how these two areas of law interact, emphasizing the theoretically discordant nature of a government trade secret. In Part III I discuss several scenarios in which government trade secrets have been asserted with little or no basis in the theoretical underpinnings of the law, such as a county’s modification of voting machines, and where government trade secrecy has prevented the public from accessing valuable information, such as a public school system’s examinations. Additionally, I posit reasons to think that the use of government trade secrets will increase. Part IV addresses the second question by considering governmental use of trade secrecy against the background principles of transparency, accountability and democratic governance in part. In Part V, I discuss possible solutions to the problems discussed, and Part VI concludes that the best solution is to eliminate the concept of the government trade secret.

II. THE RELEVANT LAW

There are two basic laws that need to be understood in order to assess the cases discussed in Part III: trade secrecy and freedom of information laws.

A. Trade Secrecy

As discussed at length in Secrecy, trade secrecy, by its very name, invokes two core interests: secrecy and commerce.\(^{22}\) It is a singularly commercial doctrine designed to protect private commercial interests by allowing companies and individuals to keep secret, for a potentially unlimited time, those formulas, processes and inventions that afford them pecuniary gain.\(^{23}\) Trade secrecy is a state law doctrine, and the Uniform Trade Secrets Act (“UTSA”), which has been adopted in 45 states and the District of Columbia\(^{24}\), defines a trade secret as

information, including a formula, pattern, compilation, program device, method, technique, or process, that: (i) 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 (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.\(^{25}\)

The paradigmatic example of a trade secret is the “secret combination of flavoring oils and ingredients known as ‘Merchandise 7X,’” the formula for Coca-Cola. It is not patented, is the most famous example of a trade secret, and it has existed as a trade secret for over 100 years.\(^{26}\)
Given that a formula for a soft drink is the trade secret paradigm, it should not come as a surprise that neither the Restatement nor UTSA were written with application to governments in mind; rather, unfair competition between private actors is its singular focus. But, as discussed below and in Secrecy, most states’ expansive interpretation of the application of trade secrecy law allows for governments to assert trade secrecy.

As I discussed in Secrecy, not all states and courts endorse government trade secrets, although they are currently in the severe minority. For example, in 1983, the Pennsylvania Commonwealth Court held that a “trade secret contention ceases to be of any moment when the function is recognized as governmental, rather than that of a private business.” Nonetheless, despite the seemingly divergent paradigms of private commercial competition through secrecy and the public transparency sought from democratic government, commentators as renowned as Professor Richard Epstein have taken a different position than that of the Pennsylvania Commonwealth Court. Epstein has asserted that “government has the same right as private parties to classify information.” He argues that so long as government meets the relevant standard to establish a trade secret, it should be able to avail itself of that protection and seek “injunctive relief to prevent that information from slipping into hostile hands.” Moreover, the Restatement (Third) of Unfair Competition includes governments in a list of non-business organizations that can hold trade secrets, but does not explain why trade secrets are appropriate for governments, and only mentions examples of trade secrets held by non-profit and charitable organizations. Additionally, the UTSA definition of “persons” subject to trade secret protection includes governments and governmental subdivisions and agencies, again without any analysis or commentary. And the law has generally followed: the Ohio Revised Code, typical

Cola was first invented and is known by only two persons within The Coca-Cola Company” and that the “only written record of the secret formula is kept in a security vault at the Trust Company Bank in Atlanta, Georgia, which can only be opened upon a resolution from the Company’s Board of Directors.”

27 See Secrecy at 147.
28 See Secrecy at 163.
30 Richard A. Epstein, Cyberspace and Privacy: A New Legal Paradigm?, 52 STAN. L. REV. 1003, 1044 (May 2000) (arguing that the "government has the same right as private parties to classify information. If the material that it wishes to keep secret qualifies under the general trade secret laws, then like any private party it has the right to injunctive relief to prevent that information from slipping into hostile hands.") How that would play out is difficult to imagine, and I have been unable to find any reported cases where the government has brought an action for trade secret misappropriation.
31 A line of California federal court cases have held that a non-profit organization, in these cases the Church of Scientology, could hold trade secrets if it met California's statutory requirements. See Bridge Publications, Inc. v. Vien, 827 F. Supp. 629, 633-634 (S.D. Ca. 1993) (holding that the Church’s “Advanced Technology” spiritual materials met the California statutory definition of a trade secret because, among other reasons, the Church "used proceeds from the sale of these materials . . . to support the operations" of the Church); Religious Tech. Center v. Scott, 869 F.2d 1306, 1308 (9th Cir. 1989) (noting that the court had previously held that the Church's "scriptures" were not trade secrets because the Church had not alleged any commercial value assigned to them); Religious Tech. Center v. Netcom On-Line Comm. Services, Inc., No. C-95-20091 RMW, 1997 U.S. Dist. LEXIS 23572, *42 n. 17 (N.D. Ca. Jan. 6, 1997) (in entering a preliminary injunction against the disclosure of certain Church trade secrets, noting that it is difficult to identify "potential competitors" of the Church for purposes of the public knowledge element of the definition of a trade secret).
32 RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 39, cmt. d (1990) (noting that “lists of prospective members and donors” are examples of “economically valuable information” that a governmental entity might have as a trade secret).
of most states’ laws regarding trade secrets, defines a “person” whom is covered by Ohio's Uniform Trade Secrets Act as including government entities.\textsuperscript{34}

Superficially, a government trade secret seems fine; after all, it might allow for greater efficiency in government operations and/or lower costs to the public for goods and services. But notwithstanding the current state of the law, created with little analysis of what a government trade secret would actually be, the core theoretical moorings of trade secrecy do not support the existence of government trade secrets. Moreover, the UTSA itself does not appear to envision government trade secrets.

1. Trade Secrecy Theory

Scholars have long debated the theoretical underpinnings of trade secret law.\textsuperscript{35} The utilitarian theory of trade secrecy, variations of which undergird most of intellectual property law generally, posits that protecting against misappropriation or theft of a trade secret encourages investment, innovation, and efficient dissemination of information along supply chains. This can be, and often is, tied to the notion that a trade secret is a form of property.

The utilitarian theory is the most prominent of the theoretical bases that anchor trade secrecy law. The major alternate theory focuses on misappropriation of trade secrets and deterring bad acts, suggesting a tort based theory of trade secrecy that encourages fair competition and ethical business practices and punishes bad acts.\textsuperscript{36} This, of course, leads us into the unfair competition realm, itself a potentially separate space (at least by Restatement standards) from pure torts. This ongoing debate about trade secrecy’s theoretical underpinnings has lead Professor Robert Bone to pen an influential article in this area bluntly titled \textit{A New Look at Trade Secret Law: Doctrine in Search of Justification}.\textsuperscript{37}

While the question of which (if any) theoretical justifications support the existence of trade secrecy is beyond the scope of this article, the debate about what should be the governing theory of trade secrecy makes it a doctrine prone to misapplication and misuse. Perhaps the most persuasive recent article to take on the theoretical question is Lemley’s \textit{The Surprising Virtues of Treating Trade Secrets as IP Rights}, which argues that the proper theoretical alignment of trade secrecy is with the utilitarian theory of intellectual property.\textsuperscript{38} But trade secrecy applied to government-created information inverts the very theoretical bases that Lemley uses to support his argument. Put simply, governments do not appear to be spurred to innovate because they have trade secrecy protection; rather, trade secrecy operates primarily as an exception to

\textsuperscript{34} O.R.C. ANN. § 1333.61(C) (2005)
\textsuperscript{36} As Mark Lemley points out in \textit{The Surprising Virtues of Treating Trade Secrets as IP Rights}, “Although under the tort theory trade secret protection is not explicitly about encouraging investments, it is plain that one consequence of deterring wrongful behavior would be to encourage investment in trade secrets. Hence, despite their conceptual differences, the tort and property/incentive approaches to trade secrets may well push in the same direction in many respects.” \textit{Id. at} 319-320. Thus, although other considerations may come into play, both major theories share the common thread of encouraging investment as their reason for being.
\textsuperscript{37} 86 Cal. L. Rev. 241 (1998).
\textsuperscript{38} \textit{Supra} note 35.
disclosure of information under state freedom of information laws. Because the utilitarian theory does not adequately explain the need for government trade secrets, Lemley’s defense of commercial trade secrecy based upon the utilitarian theory underscores the mismatch of governments and trade secrets.³⁹

Lemley argues that, in sum, “trade secrets can be justified as a form, not of traditional property, but of intellectual property (IP). The incentive justification for encouraging new inventions is straightforward. Granting legal protection for those new inventions not only encourages their creation, but enables an inventor to sell her idea.”⁴⁰ This justification is far from “straightforward” when applied to governments. From the outset, this motivation is almost completely irrelevant to governments: as discussed more fully below, governments need no incentive from the market to serve the public, and selling a product (and generating a profit) is not the primary reason that governments exist, even where a particular governmental entity competes with the private sector. Perhaps the reason that there are so few cases involving government trade secrets—almost all of those cases arise in the freedom of information context—is precisely because the doctrine has not operated as an incentive for innovation within government.⁴¹

Lemley goes on to argue that the existence of trade secrecy law actually encourages disclosure rather than secrecy, noting that “without legal protection, companies in certain industries would invest too much in keeping secrets. Trade secret law develops as a substitute for the physical and contractual restrictions those companies would otherwise impose in an effort to prevent competitors from acquiring their information.”⁴² Again, governments do not fit into this analysis and in fact invert it, since trade secrecy does not appear to serve this purpose in the government context. Businesses, unlike government, do not operate under a presumption of openness; thus, because businesses are allowed to keep many secrets, trade secrecy law may very well serve the disclosure function that Lemley identified.

In the government context, however, the default is openness and disclosure of public records. While trade secrecy might help taxpayers obtain the most cost efficient government possible, other significant values in direct conflict with trade secrecy, like transparency and

³⁹ While beyond the scope of this article, I have argued in Secrecy that the entire history of trade secrecy law is built around the basic notion of protecting secret information that has private commercial value and in that way encouraging private innovation. See Secrecy at 147. Because treating trade secrecy as an IP right puts the element of actually having a secret as the first consideration, whereas treating it as a tort does not, see Lemley, supra note 35 at 342-345. I tend to agree with Lemley’s position that treating trade secrecy as an IP right is the most internally consistent and logical position. Thus, I analyze this problem through the utilitarian prism.

⁴⁰ Lemley, supra note 35 at 313.

⁴¹ I could not find any evidence that trade secrecy has operated as an incentive to innovate within government agencies. For example, while not conclusive evidence, a Google search of the phrase “government trade secret” yielded no hits involving a government trade secret as defined herein other than my own work. (Search performed February 8, 2011). One would expect that if trade secrecy were serving utilitarian goals in government, there might be a few reported decisions where government affirmatively asserted trade secrets in situations other than the freedom of information context like as a basis for a misappropriation action. It is beyond the scope of this article to identify empirical evidence of the use of trade secrecy as an incentive to innovation in government, but I intend to examine this question in future research, not surprisingly, by way of FOIA requests.

⁴² Lemley, supra note 35 at 342-345.
accountability, have even stronger moorings. Thus, Lemley’s justification underscores the theoretical disconnect of a government trade secret, as trade secrecy primarily operates as an exception to state freedom of information laws that encourage and mandate disclosure of public records unless an exemption applies. In other words, if the information sought to be disclosed by the government is deemed a government trade secret, such designation will be unlikely to encourage more trade secrets to be developed by government; rather, it will only mean that less information will be disclosed since the government trade secret will be exempt from disclosure. There is no direct evidence that state governments are incentivized to serve the public by the availability of trade secrecy protection. Thus, in the government context, trade secrecy does the exact opposite of Lemley’s supposition -- it allows for more secrecy and less disclosure -- and does not appear to encourage any more government innovation than would otherwise exist.

2. The UTSA

In fact, by looking at the basic definitions found in the UTSA, we can press this analysis a bit further to illustrate how mismatched trade secrecy is in the government context. For example, applying basic elements of what constitutes a trade secret to government information, especially the requirement that reasonable efforts be engaged to protect the secret, would by definition undoubtedly encourage more secrecy even where the default is transparency. Because trade secrecy operates primarily as a defensive shield to disclosure under freedom of information laws and is apparently viewed as such by some governmental entities and courts, a government trade secret has no significant practical connection to any of the underlying theories for trade secrets’ existence generally. To the extent that government trade secrets have been asserted, they have always been used as a shield to public disclosure of the alleged trade secrets, rather than a sword in a misappropriation action.

Governments have not brought affirmative trade secret misappropriation claims for good reason: so far, they don’t appear to use trade secrecy law in that manner, nor can they. The UTSA defines misappropriation as

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
(ii) disclosure or use of a trade secret of another without express or implied consent by a person who (A) used improper means to acquire knowledge of the trade secret; or

See Secrecy at 158-162 for discussion of the history of transparency as a value in democratic government.

See subpoint B, infra.


The clearest possible exception to this trend appears to be the reference to government modifications of voting machines by the City of San Diego, discussed infra at 31. Because this example is found in a contract, rather than a scenario in which a third party sought information from the government and was denied, the use of government trade secrecy as a sword is, as of now, speculative.

Although, as discussed above, there is nothing in model or state laws that would prevent them from doing so -- other than the perplexing questions of what a government trade secret misappropriation claim would look like, and why such a claim would be brought given the existence of other more plausible causes of action, like unfair competition, unjust enrichment or even criminal prosecution. See Lemley at 344-345. I argue in Point IV that we do not want to encourage government to engage trade secrecy precisely because it flies in the face of transparency and accountability.
(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was (I) derived from or through a person who had utilized improper means to acquire it; (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (C) before a material change of his [or her] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.  

Thus, the UTSA envisions misappropriation to constitute actions by individuals or entities that generally use “improper means” and/or act in breach of confidence. Therefore, how could the public seeking public information (as opposed to a former government employee) misappropriate a government trade secret? It seems particularly illogical for the public as a whole to be viewed as “a person” having misappropriated information from a public entity, especially where that information relates to the activities of that public entity. As the public is ultimately the owner of the information itself, it appears impossible that it could misappropriate its own information. Simply, one cannot misappropriate from oneself.

3. The Impact of the Theoretical and Practical Disconnect: the Government Trade Secret

The malleability of trade secrecy theory is perhaps its fundamental weakness as a doctrine, and the existence of government trade secrets is one of the unfortunate outcomes of this nebulousness. Notwithstanding (or perhaps because of) the existence of a doctrine with debatable theoretical underpinnings, as discussed in the following part, courts are finding government trade secrets with, it appears, little or no analysis regarding why or how the government can have or need a trade secret. This is perhaps understandable because trade secrecy is still very much in search of a uniformly accepted and applied justification. Therefore, it is arguably more malleable – and prone to abuse – than its more theoretically grounded intellectual property brethren, especially copyright and patent. Lemley has made a similar observation with reference to traditional trade secrecy litigation by lamenting courts’ difficulty in finding a strong IP-based theoretical underpinning for trade secrecy:

Courts have departed from the principle of trade secrets as IP rights. … Doing so risks turning trade secrets from a well-defined legal right that serves the broader purposes of IP law into a

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48 UTSA § 1(2) (1985) (emphasis added).
49 This argument is amplified in Part IV(B), infra, which discusses the agency theory of transparency, as well as Part III(C), infra, which discusses another problematic aspect of the UTSA in the context of public school examinations.
50 See infra at Part III. Of course, as robust and strong intellectual property rights are asserted by more and more industries, it is not surprising that governments might jump on the bandwagon and assert a right where a uniformly-accepted and strong theoretical objection is absent.
51 Those brethren, particularly copyright and patent, also have express rules regarding their application in government. For copyright, see http://www.copyright.gov/circs/circ1.pdf at 5. For patents, see 37 C.F.R. §404.1(a).
standardless, free-roaming right to sue competitors for business conduct that courts or juries might be persuaded to deem objectionable.\textsuperscript{52}

As seen in part three, in the context of government trade secrets, Lemley’s fear of a “standardless, free-roaming right” has already come to pass. However, we do have at least one example of a court actually applying the utilitarian theory of trade secrecy to this scenario and thereby revealing the theoretical absurdity of a government trade secret. When considering the fundamental difference between the reasons that a government might wish to keep information secret, like to protect the security of the nation, and a business’ trade-based and profit-oriented reasons, the Ohio Supreme Court focused on a utilitarian analysis. With reference to the competitive position of the governmental entity, the court noted that

Respondents cite no authority, however, holding that a public office can even have its own protected trade secrets . . . [T]his court has held that the fact that disclosure of information will result in a competitive disadvantage to the public institution is not grounds for preventing disclosure . . . The protection of competitive advantage in private, not public, business underpins trade secret law.\textsuperscript{53}

Underscoring the need for this article, this decision was subsequently superseded by a UTSA-based statute that now allows governments to hold trade secrets.\textsuperscript{54}

Nonetheless, the persuasiveness of Toledo Blade’s argument remains. As the Ohio Supreme Court decision explains, public institutions like universities simply should not engage the same goals or motivations as private sector entities. There is little utilitarian basis for trade secrecy when the entity receiving the incentive are governments that will create based upon legislative mandate, court order and/or the perceived needs of the people, not because they may marginally benefit from trade secrecy protection and earn more profit. But the fact that Ohio

\textsuperscript{52} See Lemley, supra note 35 at 342-343 (noting several cases, including the Supreme Court’s decision in Smith v. Dravo Corp., where courts have misconstrued the purpose of trade secrecy law, leading to undesirable results).

\textsuperscript{53} State ex rel. Toledo Blade Co. v. University of Toledo Foundation, 602 N.E.2d 1159, 1163-1164 (Oh. 1992) (emphasis in original) (citations omitted), superseded by statute as stated in State ex rel. Besser v. Ohio State Univ., 721 N.E.2d 1044, 1049-1050 (Oh. 2000) (finding that Ohio UTSA now allows for governments to have trade secrets and noting that other jurisdictions, including Florida and Washington, also allow public entities to have trade secrets). In the context of the University of Toledo’s argument that release of the requested documents would lead to a competitive disadvantage, Toledo Blade cited State ex rel. Fox v. Cuyahoga County Hosp. Sys., 39 Ohio St. 3d 108 (1988) for the proposition that “[n]o pleading of too much expense, or too much time involved, or too much interference with normal duties, can be used by [University of Toledo] to evade the public's right to inspect and obtain a copy of public records within a reasonable time.” Thus, the court took a very dim view of the notion that the relative competitive position of a governmental entity should trump the disclosure of public records.

\textsuperscript{54} Id. This statutory change does not automatically mean that the government can maintain a trade secret. See State ex rel. Dayton Newspapers v. Dayton Bd. of Ed., 747 N.E.2d 255, 259 (Oh. App. 2000) (the court applying the Ohio UTSA and Besser but finding no basis for trade secret protection of the names, applications and resumes of people who applied for a position with the Dayton Board of Education, and explaining that it failed to see “what independent economic value the . . . information has or how other private persons could reap some economic benefit from having it”).
subsequently discarded this distinction in adopting the UTSA, with no apparent analysis of the impact of this change, further suggests that trade secrecy remains on shaky theoretical ground even as the utilitarian theory is advanced. Therefore, more work needs to be done to underscore and rectify the problem.

In sum, there is no straightforward, clear or complete utilitarian basis for the existence of a government trade secret. Moreover, as the UTSA and Restatements illustrate, trade secrecy law was not designed with governments in mind. Nonetheless, because states and courts fail to identify any trade secrecy-based rationale for having, or not having, a government trade secret, the debate about the theoretical basis for trade secrecy remains critically important. Because there is no one unified theory of trade secrecy, a court can, if it wishes, pick and choose the theoretical rationale for its conclusion. As discussed above, the choice of a theoretical basis (or absence of a choice) can and does impact the conclusions reached.

Thus, as courts have occasionally been confronted with the oddity of a government trade secret, and will likely see more such claims in the future (if the below recent examples suggest a trend, which I believe they do)55, a clear understanding of this theoretical incongruity is crucial to getting the right result – that is, one that abhors a government trade secret as theoretically unjustifiable. Firmly explaining the lack of a connection between trade secrecy and traditional notions of democratic governance requires that the court (a) understand the primary utilitarian basis for trade secrecy’s existence, and (b) as discussed in Parts III and IV, look outside trade secrecy doctrine to see that it unjustifiably stands in the way of government transparency and accountability.

B. Trade Secrecy and Federal and State Freedom of Information Laws

So far, I’ve addressed a basic question: Why are we allowing governments to have trade secrets? To address that question, two problems regarding the nature of the trade secret doctrine have been identified: (1) although the utilitarian theory is perhaps the most sound justification for trade secrecy, trade secrecy is prone to potential abuse because it lacks a strong theoretical foundation that is widely accepted by courts, and (2) as a result odd permutations can arise that appear to have limited or no connection to any theoretical or statutory basis for the doctrine. The odd permutations are increasingly and primarily occurring in the context of freedom of information requests made to a governmental entity. Therefore, understanding the complex intersection of trade secrecy and freedom of information laws is critical to analyzing this problem and the examples that follow.

As discussed above, I posit that the courts should not even get to the point of applying a government trade secrecy exemption to freedom of information laws since trade secrecy was not created with governments in mind and the concept of a governmental trade secret is theoretically and practically problematic. To show the practical effects of this theoretical conundrum, it is important to understand the basics of how the trade secrecy exemption to freedom of information laws operates at the federal and state level. Most of the examples discussed below all involve variations on one basic theme: use of a trade secret exemption in a state’s freedom of information law to prevent disclosure of government-created trade secrets. As the below indicates, FOIA

55 See supra Introduction.
may get this right (albeit for definitional as opposed to theoretical reasons), whereas state governments too often are deciding against transparency. While it may be tempting to simply accept FOIA’s interpretation and move on, examining why FOIA gets it right reveals the depth of the problem for the great majority of states that do not share its view.

FOIA, enacted in 1966 as a result of increased interest in allowing investigative journalism, is designed to force disclosure and “permit access to official information long shielded from public view” by permitting any citizen (and indeed, businesses) to request information from the federal government by way of a FOIA request. Indeed, as one scholar has explained, “Few aspects of government-citizen relations are more central to the responsible operation of a representative democracy than the citizen’s ability to monitor governmental operations. Critical in this regard is the existence of a general individual right of access to government-held information.”

Indeed, FOIA can be the avenue for journalists and private citizens alike to discover exactly what the government is doing. In the wake of FOIA and a few other significant events of the 1960s, “major media . . . began accepting ‘a duty to report beyond the superficial handouts from those with social and political power.’” Thus, any impediment to the operation of FOIA can have devastating effects on the ability of citizens to accurately analyze and critique the activities of government.

Notwithstanding the goal of transparency, FOIA recognizes that some information in the possession of government should be kept from public disclosure. Therefore, FOIA includes a number of exemptions from disclosure, including those for certain documents and information regarding national defense, foreign policy, law enforcement, and, as determined by the federal agency holding the information, commercial trade secrets. As explained by the Supreme Court, Congress felt the need for a trade secret exemption because “with the expanding sphere of government regulation and enterprise, much of the information within [government] files has been submitted by private entities seeking [government] contracts or responding to unconditional reporting obligations imposed by law.” Martin Halstuk notes that “[f]ederal agencies persuaded Congress that government-regulated businesses—such as drug manufacturers, food producers, and telecommunications firms—needed assurances that the proprietary and confidential business information they were required to submit to federal agencies would be protected.” Thus, the FOIA trade secret exemption further establishes that trade secrecy is designed and conceived with private industry in mind, not governments.

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57 EPA v. Mink, 410 U.S. 73, 80 (1973); *see also* Dep’t of the Air Force v. Rose, 425 U.S. 352 (1976).
58 *Supra* note 70.
62 *Id.* § 552(b)(7).
63 *Id.* § 552 (b)(4).
Despite the protection of trade secrets\(^{66}\), the fact that FOIA sets a default of disclosure unless one of the exemptions applies effectively orients government towards disclosure and away from secrecy – the opposite orientation of trade secrecy, which protects secrecy except in limited circumstances. As such, under FOIA the government may not use the trade secret exemption for information generated by the government itself. The trade secrets exemption only applies to information that is “obtained from a person” by the governmental entity.\(^{67}\) In construing the statutory phrase “obtained from a person,” courts have concluded that the government is not a “person” for purposes of FOIA. Thus, the exemption does not apply to information generated by the federal government itself, and is limited primarily to documents prepared by the federal government that contain summaries or reformulations of information supplied by a source outside the government.\(^{68}\)

Moreover, when courts apply the trade secrets FOIA exemption to a proper entity, like a private company that submits an alleged trade secret to a federal agency, utilizing a broad commercial definition of a trade secret has been found to be inappropriate when the focus is public values such as disclosure of information through transparency. For example, in rejecting the use of the Restatement of Torts definition of a trade secret\(^{69}\) in FOIA’s commercial trade secrets exception to disclosure,\(^{70}\) the United States Court of Appeals for the District of Columbia Circuit explained:

> [T]he [Restatement of Torts] definition, tailored as it is to protecting businesses from breaches of contract and confidence by departing employees and others under fiduciary obligations is ill-suited for the public law context in which FOIA determinations must be made. . . . The common law definition was tailored to private contexts where public policy almost exclusively focuses on the unjust enrichment and competitive harm resulting when someone acquires a business intangible through the breach of a contract or a confidential relationship. . . . The Restatement approach, with its emphasis on culpability and misappropriation, is ill-equipped to strike an appropriate balance between the competing interests of regulated industries and the general public.\(^{71}\)

Thus, the court chose a narrower definition that allowed the disclosure of “health and safety data” regarding intraocular lenses submitted by regulated companies to the United States Food and Drug Administration (“FDA”), despite the trade secrets exemption to FOIA.\(^{72}\) The

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\(^{66}\) See Citizens Comm’n on Human Rights v. FDA, No. 92-5313, 1993 U.S. Dist. LEXIS 21369 (C.D. Cal. May 10, 1993) (“[T]he documents which are part of the Prozac New Drug Application that have been withheld by the FDA are exempt from disclosure because they contain trade secrets . . . .”), aff’d in part and remanded in part on other grounds, 45 F.3d 1325 (9th Cir. 1995).

\(^{67}\) See 552(b)(4).

\(^{68}\) See Gulf & Western Indus. v. United States, 615 F.2d 527, 529-30 (D.C. Cir. 1979).

\(^{69}\) 4 RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939)


\(^{71}\) Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1289 (D.C. 1983).

\(^{72}\) Id. at 1290. Commentators have expressed concerns regarding the government’s ability to disclose, either accidentally or purposefully, commercial trade secrets that it controls because of its regulatory, contracting and licensing capabilities. See Stephen R. Wilson, Public Disclosure Policies: Can a Company Still Protect Its Trade Secrets?, 38 NEW ENGLAND L. REV. 265 (discussing whistleblower protection and other laws that encourage public disclosure of commercial information, often over the concerns regarding trade secrecy).
restrictive definition “incorporated a direct relationship between the information at issue and the productive process” – again, applying the utilitarian basis for trade secrecy’s existence – and thereby properly allowed for the disclosure of information deemed to be worthy of disclosure in the public interest and under the intent of FOIA. The tailoring of the trade secret definition to its context will be explored in more detail in the solutions section, but Gulf & Western underscores that when courts confront trade secrecy in the freedom of information context (much less in the context of a government trade secret), they must consider its theoretical underpinnings in order to apply it properly and accommodate the core values of transparency and accountability.

Unfortunately, states appear to almost uniformly take a different approach that allows government trade secrets and ignores the theoretical disconnect. It is true that few state courts have confronted this issue and I have yet to find any state legislature that reported considering the possibility of a government trade secret in passing its trade secret law. But, among other reasons discussed in part three, because most states follow the UTSA, it appears likely that they may have unwittingly allowed their governments to claim trade secrecy as an exemption to disclosure under their state freedom of information laws. Thus, the Ohio example, which allows a government trade secret, seems the likely outcome under most states’ laws.

A notable exception to the scenarios discussed in part three, and one that can be a model for other states freedom of information laws, appears in a recent opinion of Connecticut’s Freedom of Information Commission (the “CT Commission.”) In Pelto, the complainant sought a variety of records from the University of Connecticut (“UC”). With regard to requested lists of athletic event ticket purchasers and prospects, the CT Commission noted that

[UC] claimed that such records are customer lists and therefore exempt from mandatory disclosure as trade secrets, pursuant to

73 Id. at 1287-1288 (adopting a definition of a trade secret, for purposes of FOIA, “as 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.”); see also Dianna G. Goldenson, FOIA Exemption Five: Will It Protect Government Scientists from Unfair Intrusion?, 29 B.C. ENVTL. AFF. L. REV. 311, 330-331 (2002) (noting the difficulties that government scientists face of “unfair intrusion into their scientific process – an intrusion not suffered by scientists in the private sector because those individuals are not vulnerable to disclosure under FOIA”).

74 The very existence of a trade secret definition designed specifically for FOIA suggests that the commercial definition is inappropriately applied to entities that operate in the governmental or public infrastructure spheres.

75 Indeed, one commentator has noted that most state freedom of information laws contain no explicit statement of purpose. See John A. Kidwell, Open Records Laws and Copyright, 1989 Wisc. L. Rev. 1021, 1028 (1989). While the absence of a statement of purpose would make predicting the outcome even more difficult, it is important to emphasize that because most state courts have not confronted this issue, it is impossible to definitively say how all 50 states would come out if confronted with this scenario. The purpose of this article is to make their analysis simpler when that day comes.

76 See supra at 4.

[Connecticut freedom of information law]. [UC] also contended that such customer lists “derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons” like the complainant who “can obtain economic value from” the disclosure or use of the respondent’s customer list. Additionally, [UC] contended that it has taken reasonable efforts under the circumstances to maintain the secrecy of [relevant] databases.

After noting that the CT Commission had never confronted the question of whether the trade secrets exception “applies to records that a public agency asserts are its own trade secrets, rather than the trade secrets of private entities submitted to or filed with the agency,” the CT Commission rejected UC’s arguments by doing a textual analysis of the word “trade.” Specifically, it noted the differing goals of the public and private sectors and ultimately applied a utilitarian trade secrecy theory:

The Commission takes administrative notice of the fact that public agencies are generally engaged in governance, not trade. … The Commission also takes administrative notice of the fact that the principal function of the University of Connecticut is not trade, but rather education, a traditional governmental function. … Unlike a private business entity engaged in “trade” where profits are closely linked to such entities’ existence and economic advantage, the cultural and athletic activities of the University of Connecticut are incidental to its primary governmental function of education. It is also found that the University of Connecticut is largely subsidized by public funding, unlike a private business engaged in trade that depends on earned income for its continued existence.

This analysis, like Toledo Blade, again based on a utilitarian idea suggesting the absence of a need for the government to have a trade secret, resulted in the CT Commission finding that the records were not customer lists or trade secrets under Connecticut law and ordering their disclosure to the complainant. Placed in its utilitarian context, the CT Commission was effectively saying that UC does not need a trade secret incentive to engage in its primary function, education. It is not in the “trade” of conducting athletic events, and the existence of such events is not closely linked to its mission as a public educational institution rather than a profit-making entity that relies on income for its survival.

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78 Noting that “Black’s Law Dictionary (8th Ed. 2004) defines ‘trade’ in relevant part as: ‘The business of buying and selling or bartering goods or services … A transaction or swap … A business or industry occupation; a craft or profession.’” Id.

79 This analysis suggests a proposed solution to the problem, discussed in Part V, supra.

80 Supra at note 53.

The laudable utilitarian stance of the CT Commission seems to be the outlier in the face of the examples discussed in part three. Nonetheless, it harbingers some possibility of a counter-trend that can begin to reverse the pattern that seems to be emerging where courts, and governments themselves, find that trade secrecy can be a successful weapon against disclosure of information that would otherwise have to be disclosed under a state’s freedom of information law. Such a counter-trend currently faces an uphill battle. Make no mistake, even at the more open federal level, the statutory exemptions to FOIA remain in place. Indeed, at the end of the OMB Memorandum, its author, OMB Director Peter Orszag, reminds the reader that “nothing in this Directive shall be construed to suggest that the presumption of openness precludes the legitimate protection of information whose release would threaten national security, invade personal privacy, breach confidentiality, or damage other genuinely compelling interests.”

Thus, under FOIA, the above noted exemptions remain in full effect, and there is a lot of wiggle room to find information exempt from disclosure. In other words, although FOIA does not allow for a government trade secret, the exemptions found there are alive and well, even in the face of the President’s directive.

Although I encourage states’ governors to follow the President’s charge and issue their own open government directives, states do not yet appear to have a similar formal mandate. Especially in the absence of an executive mandate, the government trade secret problem risks becoming slowly but increasingly entrenched at the state level. Especially as pressure mounts to provide government services on smaller budgets and in a shaky economy, and the trend to outsourcing government services continues, it is possible that trade secrecy could play a more prominent role in the creation of government services than it does today. This trend would have a significant impact on public disclosure because in every case discussed below in which a state freedom of information law was involved, were there no such beast as a government trade secret, it appears that the subject information would likely have been disclosed because other exceptions to disclosure would have been more difficult or impossible to apply. Thus, with each new case or administrative decision finding the existence of a government trade secret, or argument by a governmental entity that it owns trade secrets, this problematic phenomenon will become that much more difficult to dislodge, meaning ever more otherwise-public information will be withheld.

Thus, regardless of the theoretical rationale, the concept of a “government trade secret” is an anomaly because its existence is apparently not an incentive to encourage innovation (under the utilitarian theory) and has not been used as a weapon to prevent illegal misappropriation (as in a tort-based theory of trade secrecy), but has a developing track record as a last-ditch basis to deny disclosure of information to the public. No proffered theory of trade secrecy, and especially a utilitarian construct, can justify or even explain such an application. Indeed, the very existence of a government trade secret can only add to the theoretical confusion marring trade secrecy generally. After all, if the government – an entity that is not conceived as a

82 See also Dayton Newspapers, supra note 54.
84 It is for that primary reason that I see the government trade secret exception as a last-ditch effort to prevent disclosure of information. Given its limited track record and odd permutations, I envision that government counsel would use this argument as an add-on to stronger arguments, or only because no other exception reasonably fits the scenario.
commercial enterprise (even if certain agencies and public corporations compete with the private sector), is accountable directly to the public and whose core values include transparency and accountability – can have a trade secret, what person or entity should not? Eliminating government trade secrets should help lend clarity to why we have trade secrets generally, to whom they apply and what they are designed to promote and encourage. The following part gives examples to support this assertion.

III. SPECIFIC EXAMPLES AND WHAT THEY TEACH US

Having examined the structure and purposes of trade secrecy, its theoretical underpinnings (such as they are) and how it operates under federal and state freedom of information laws, we can now examine some examples alluded to above where state courts and governments have allowed a government trade secret to exist. Each example illustrates the theoretical and practical disconnect between governments and trade secrecy but also suggest how courts and legislatures can rectify the problem, the focus of Part V. Moreover, they suggest the real possibility of increased use of trade secrecy by governments. They can be divided into three types of scenarios: (1) a governmental entity directly competing with the private sector (scenario A and perhaps B), (2) the government not competing at all with the private sector (scenario C and D(1)), and (3) the government contracting or partnering with the private sector (scenarios D(1) and (2)).

These examples also illustrate the underlying reasons why governments might want to assert trade secrecy beyond their impact on transparency. Aside from the obvious practical reason that it allows for an exception to state freedom of information laws, the influence of private interests with strong incentives to keep information private, the pressure to provide government services at the lowest cost possible, and the old-fashioned politics of the desire to avoid public scrutiny all come into play. As the below examples show, there are numerous scenarios where this issue may arise.

A. Board of Directors Papers: The Pennsylvania Higher Education Assistance Agency (PHEAA)

In Parsons v. Pennsylvania Higher Education Assistance Agency, three reporters brought a petition for review of a decision in which PHEAA, a governmental agency that administers student loans, refused to disclose certain documents by classifying them as, in part, trade secrets under Pennsylvania’s Trade Secrets Act (PTSA). The reporters requested an assortment of information, including items related to several PHEAA retreats and other events attended by board members. Among the items requested were vouchers (including receipts) for travel by PHEAA employees and board members, “credit card bills for incidental expenses,” expenses incurred on a board retreat and seven other retreats, including receipts for lodging, dining, and housing, “conference agenda and any minutes, orders, decisions or other records of any official business” conducted by the board at a business development conference. The matter went before a court-appointed hearing examiner, who found that even though all “expenses are

paid from money that it earns, not from appropriations,” PHEAA was still subject to the “Right-To-Know Law.”

Reaching the court on appeal as a case of first impression, the question was whether the TSA operated as an exception to the Right-to-Know Law’s requirement of public disclosure of governmental information. Illustrating the complications inherent in a government agency acting in the commercial sector, PHEAA described itself as

being different from other agencies in that it competes in the private sector and receives no funding for its operations from the General Assembly. It is frequently audited, including by federal regulators and by private-sector lenders for whom it manages billions of dollars in assets. It competes with hundreds of private sector lenders, and in the 2005 - 2006 academic year it provided $170 million dollars from earnings to fund programs for students. To foster necessary trust, PHEAA requires potential clients and business partners to sign confidentiality agreements, and PHEAA maintains high security standards.

Significantly, PHEAA noted that its Board is “controlled” by 16 legislators “acting as agents of the [Pennsylvania] General Assembly.”

PHEAA also explained that Board members, when they engage in PHEAA activities, “represent their party’s caucus, and when they act officially on behalf of PHEAA, they act in their legislative capacities” as “an arm of the General Assembly.”

With regard to trade secrets found in the requested documents, PHEAA explained that disclosure of trade secrets to a competitor such as Sallie Mae would likely cause PHEAA to lose competitive advantage and would permit a competitor to see where PHEAA is concentrating marketing efforts. [PHEAA] stated that trade secrets pervade the requested documents, revealing business initiatives, customers called upon, purposes of marketing calls, sales and marketing methods, geographic marketing efforts and product development.

The Court explained that “the fact that PHEAA is engaged also in profitable business activities does not change the fact that it is a public corporation and a government

87 Right-To-Know Act, 65 P.S. § 66.1 - 66.9 (1957) (defining "public record" subject to disclosure as "[a]ny account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligation of any person or group of persons. . . .")
88 Parsons at 184; see also PHEAA Board Members, http://www.pheaa.org/about/Board_Members.shtml (last visited Feb. 2, 2011) (listing members of the Board; all of whom are elected officials).
89 Id. at 186.
90 Id.
91 Id. at 184.
instrumentality and that its earnings are public moneys about which the public has a right to know." It also found that PHEAA was not exempt from nor had it met its responsibilities under the Right to Know Law, which “favors public access regarding any expenditure of public funds.” Nonetheless, the Court’s holding undermined these laws and principles and allowed PHEAA to withhold its alleged trade secrets: “The Court is not unmindful of the fact that some of the requested records may refer to secret information of competitive value. If so, the information may be redacted and the balance supplied under Section 3.2 of the Right-to-Know Law.”

Thus, in the end, even though PHEAA had used the trade secret designation to attempt to keep secret vast amounts of information that would not fall under the statutory (i.e., commercial) definition of a trade secret (presumably vouchers and receipts) in an apparent last-ditch effort to prevent the disclosure and public scrutiny of the information, the Court allowed PHEAA to redact actual trade secrets (i.e., presumably new lines of business or technology, methods and strategies of business development, as opposed to expense reports) from documents to be disclosed to the reporters. Hence, there was real meaning in the Court’s note that PHEAA “may not conduct its affairs precisely as a private entity does.” Indeed, not “precisely,” but certainly close enough.

Here we see a clear example of the impact of applying trade secrecy divorced from its core utilitarian purpose: in the government trade secret context, it becomes little more than a weapon to prevent disclosure rather than an incentive to innovate. Had the court considered a utilitarian analysis, it may have concluded that at its most fundamental level PHEAA would remain in existence and continue to market and offer its services to the public regardless of trade secrecy protection and work around the alleged competitive disadvantage resulting from disclosure of its trade secrets, as its board is made up of elected officials that answer to the public and Pennsylvania state law directs its activities. Nor did the court require anything more than an assertion that the information had commercial value. Instead, by ignoring trade secrecy’s theoretical mooring while at the same time apparently crediting the implicit position of PHEAA that it is essentially just another commercial marketplace actor rather than an instrumentality of government, the court prevented disclosure of otherwise public records.

Aside from the theoretical problem, by replacing the word “business” with the phrase “government agency,” the significant transparency issues become clear. Is it a problem that the “marketing efforts” of a government agency whose board is composed of elected officials may be designated a trade secret? Do we want or need to know to whom or what such an agency is

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92 Id. at 186.
93 Id.
94 Id. Section 3.2 states, in part: “If an agency determines that a public record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access.” 65 P.S. § 66.3-2 (2006).
95 One could easily assume that the trade secret defense to disclosure was the worst and last of the defendant’s arguments, but the only one that it thought might keep the information from being made public.
96 The theoretical underpinnings of trade secrecy were apparently irrelevant to the court as it all but ignored them.
97 Supra note at 88.
98 See 22 Pa. Code § 121 et seq.
marketing? Do we want or need to know to whom or what these legislators, as board members of PHEAA and elected officials, are, by extension, marketing? Do we want or need to know what “products” are in development in a government agency? Or exactly how such public revenues are earned? For example, one could imagine bribery or other forms of public corruption entering into the equation for a dishonest public official. Or, is it more important that PHEAA be able to conduct its business in the most competitively advantageous manner? Such are the issues and questions raised when trade secrets exist in government. There is a clear tradeoff between transparency and accountability versus alleged governmental efficiencies and commercial benefits, and as I discuss more thoroughly below, I am inclined to believe that we need to know the answers to the above questions, even if it means the possible loss of some competitive advantage to a government agency.

The tougher question becomes when (or if) the competitive advantage outweighs the public’s desire or need to know. Much like the private sector, governments entering the commercial market can benefit from trade secrets. The disclosure of government trade secrets might have consequences that mimic those in the private sector. For example, as one Australian commentator has noted, government benchmarks and financial calculations can fall under the rubric of trade secrecy. If such calculations were disclosed to those seeking government contracts, as in the USAF example below, bidders in private sector could reconstruct the benchmark for subsequent projects and price bids accordingly, thus disadvantaging the government and its ability to price contracts in the most cost-effective manner.

Of course, that consideration raises the question of how far one can go with that argument. As Moira Paterson notes, “taken to its logical extreme, the cost of any government activity could be considered a trade secret, if there were a possibility that at some time that service could be put out to tender.”

She explains:

[P]ublic costs are often unknown or uncalculated, while private costs tend to be regarded as commercially confidential. For a proper evaluation and comparison of costs to take place, both the public and private sectors will need to make their bottom lines, if not their calculations, more transparent. In the absence of valid comparisons, the process of contractualism will continue to be based on ideology rather than economics.

Thus, the operation of government trade secrecy in a climate in which secrecy is considered an acceptable norm for government contracting allows for the government to remain on more equal footing in relation to their private partners and contractors, but can lead to a slippery slope where wide swaths of information can be painted with the trade secrecy brush.

100 Id.
101 Id. (quoting A. Freiberg, Commercial Confidentiality, Criminal Justice and the Public Interest, 9 CICJ 125, 136 (1997)).
That slippery slope is ultimately a major concern. Consider a hypothetical: the New York City Off-Track Betting Corporation ("OTB"), until recently, operated a vast wagering system that allowed an individual to bet on horse races without actually being at the race track. OTB was a "public-benefit corporation," a governmental entity whose profits go to the public.\(^{102}\) OTB’s president was appointed by the Mayor of the City of New York.\(^{103}\) Its mission was to "raise needed revenue for the City [of New York] and State [of New York], to combat organized crime’s hold on gambling on horse races by providing a legal alternative and to be []compatible with the well-being of the New York State’s racing industry."\(^{104}\) Now place OTB or any similar profit-making entity, like state lotteries or liquor stores, in the vast majority of states that allow government trade secrets. What would the public want to know about OTB? Given that part of its mission is to help combat organized crime’s hold on horse race gambling, the public might want to know that OTB has not been influenced or captured by organized crime. Documents relating to methods or strategies for developing new lines of business might suggest that OTB has had contact with suspicious persons or entities or is considering business plans or methods that warrant investigation. Alternatively, they may prove that OTB is acting true to its mission and is an entity free of illegal influence.

However, faced with a request for such documents, OTB could choose to assert a trade secret exemption to freedom of information laws. Based upon PHEAA, a state court in any state that allows government trade secrets might find that the information is OTB’s trade secret and therefore exempt from disclosure. But failing to release the information would not serve the public interest if corruption exists within OTB, or it may conversely engender public suspicion where none is warranted.\(^{105}\) Nonetheless, under PHEAA, OTB is allowed to make a self-interested assessment of whether it wants to release the information or not based upon trade secrecy law, without regard to the public’s potential need for or right to the information. This is not the purpose of trade secrecy, and it definitely does not sound like transparent and accountable government.

In sum, the private sector relies upon clearly defined and enforceable property rights for proper functioning and to spur innovation. Trade secrecy can arguably help serve that purpose.\(^{106}\) The government seems to be jumping on the property rights bandwagon. However, it does not generally need to be incentivized to innovate by way of pecuniary gain, although one could possibly envision a cash-strapped agency seeking to increase its budget by way of intellectual property development and licensing. A democratic government’s mandate comes from the people only, and maintenance and development of new programs and services are required by the law, rules and requirements imposed upon it by the public. It is doubtful that PHEAA and other governmental entities would come up with lesser ideas if the trade secrets exception were unavailable.

\(^{102}\) See About Us, at http://www.nycotb.com/newnycotb/AboutUs/NYCOTBHistory/tabid/57/Default.aspx. OTB has recently ceased operations, but as a hypothetical, the example is still useful.

\(^{103}\) N.Y. PML. LAW § 502(1).


\(^{105}\) The latter scenario, where guesswork replaces real and verifiable information, is what late Sen. Daniel Patrick Moynihan eloquently labeled “ignorant armies clash[ing] by night.” DANIEL PATRICK MOYNIHAN, SECRECY, at 16 (1998) (introduction discussing at length the benefits to society of less governmental secrecy).

\(^{106}\) Of course, it would help a lot more if trade secrecy stood on a widely accepted theoretical footing.
Moreover, governments are required to be transparent and accountable. None of the above changes when the government provides a service and enters the market, as presumably it is there precisely because it is the (or a) way to meet its requirements to the people. And, as seen below, if the government’s mandate should not change when the government enters the market, it should certainly not change when it is not in the market at all.

B. Firearm Registry: Royal Canadian Mounted Police

Canada is facing similar issues. For example, the Royal Canadian Mounted Police (“RCMP”) refused to disclose a CD-ROM version of “open source” data regarding a firearm registry that included photographs, documentation, and specifications for various firearms to a member of the public. The CD-ROM was used by the RCMP to “assist it in identifying the firearms that its members encounter in police work.” Compiled by RCMP at a cost of three million dollars, police organizations around the world have shown interest in the data.

To compile the list, RCMP disclosed the CD-ROM free of charge to a group of public volunteers called “verifiers.” The verifiers helped gun owners complete registration paperwork, in return for free training and a copy of the CD-ROM. The Complainant, a Canadian citizen who chose not be become a verifier, requested a copy of the CD-ROM from RCMP. RCMP denied access stating:

[1] [T]he CD-ROM contained financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and that has substantial value or is reasonably likely to have substantial value; and [2] disclosure of the information in the record could reasonably be expected to prejudice the competitive position of a government institution.

Subsequently, the Complainant appealed the decision to the Canadian Information Commissioner (“CIC”), who found that the withholding of the CD-ROM was justified under Section 18 of the Canadian Access to Information Act (Act). Section 18 of the Act allows a government institution to refuse access to information where “trade secrets . . . that belong to the Government of Canada or a government institution and [have] substantial value or is reasonably likely to have substantial value” is involved. In addition, the Act exempts from disclosure information that “could reasonably be expected to be materially injurious to the financial interest of the Government of Canada.” The Commissioner summarily explained that “unrestricted disclosure of this record could reasonably be expected to prejudice the competitive position of the RCMP,” and that the database had commercial value to the government “since there was continuing interest in the CD-ROM by national and international organizations” and an interest

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108 This explanation seems to largely mirror the UTSA definition of a trade secret. See supra at 8.
109 See Access to Information Act, R.S. 1985, c. A-1, s.18. (Exempting "information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution." Id. Also, exempting "scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer of employee of priority of publication;" see also Sec. 18(d).
in partnership agreements to produce future registries. Thus, the RCMP was engaged in the creation of a “commercial product.”

While the RCMP case fell under Canadian law, it is nonetheless illustrative. Here, the potential commercial interests of Canada in selling the CD-ROM and producing future versions prevented the dissemination of a database created with public funds and input. Putting aside the question of whether such a database should be made public for security and law enforcement reasons, trade secrecy directly impeded the dissemination of an otherwise public and taxpayer-funded database. More specifically, the apparent ability of the government of Canada to eventually sell the CD-ROM prevented the information, created with taxpayer funds, from being freely distributed to its own citizens. Again, commercial interests asserted by a government, rather than openness, were the main consideration.

RMCP illustrates a basic objection to government trade secrets. As a general matter, economist Joseph Stiglitz asserts that “a governmental entity should generally not be allowed to withhold information from the public solely because it believes such withholding increases its net revenue.” But the CIC, recognizing a possible trend of increased assertion of commercial interests by governments, prognosticated under the heading “Lessons Learned” that “[a]s government organizations increasingly embark on commercial ventures to generate revenues, refusals of access based on commercial value or threat to competitive position will undoubtedly increase.” This is the fundamental trend that must be addressed. Stiglitz succinctly states the objection to government trade secrets from which other critiques flow: focusing primarily on the effects on government’s net revenues from information disclosure is a poor way to make policy about government disclosure. The danger is that if trade secrecy law is applied automatically to government information, effects on net revenues will too often be the sole or deciding factor in making disclosure decisions.

C. Public School Examinations: City of Cincinnati Public Schools

Another startling example of an alleged government trade secret was recently identified by the Ohio Supreme Court, which found that public school multiple choice and essay questions are trade secrets of the City of Cincinnati Public Schools (“CPS”). In Perrea v. Cincinnati Public Schools, the Ohio Supreme Court found that public school semester examinations, after having been administered to ninth-grade students, constituted trade secrets and were therefore exempt from disclosure under Ohio’s open government laws. Here, the court impliedly used a utilitarian theory of trade secrecy and accepted the city’s assertions that the tests constituted exempt trade secrets, but ignored the obvious impact on public transparency as well as the private commercial context of trade secret law.

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111 Supra note 107.
112 916 N.E.2d 1049 (2009); see supra Ohio open government law. It is important to note that CPS paid a private entity to develop the examinations, but CPS alleged that the examinations were its trade secrets as opposed to the private entity, and the private entity did not appear in the case.
Perrea, a teacher in CPS, requested the examinations from CPS because he was “concerned about the design, implementation, and scoring of the semester exams.” The court explained that he wanted copies of the ninth-grade semester exams administered in January 2007 and that he “did not intend to use the copies for any commercial purpose.” Perrea specified that he would use the copies only “for criticism, research, comment, and/or education.” Consistent with a petition signed by about 60 CPS teachers, Perrea noted in one of his requests that he wanted the exams to be released so that they could be evaluated by an independent, qualified psychometrician for “fairness, accuracy, and validity.”

After CPS refused to produce the exams, Perrea brought an action to compel their production. In arguing that the examinations were exempt from disclosure as trade secrets, CPS pointed out that it spent over $750,000 to develop ninth, tenth and eleventh-grade examinations, took steps to maintain the secrecy of the exams and repeats the same questions each year. The court rejected Perrea’s argument that the placement of essay question scoring guidelines on CPS’ intranet constituted public dissemination of the exams (and hence rendering them something other than trade secrets), explaining that the scoring guidelines do not “restate the actual test questions” and were not accessible without the intranet address, which the court found was not known to non-teachers. Furthermore, the court accepted CPS’ assertion that since it would be unable to use the exams if they were made public (as their effectiveness would be compromised), the expense of recreating the exams would make administering the exams cost prohibitive and render the revealed questions unusable in the future. Thus, relying on Besser, the court found that the examinations were not public records, but rather trade secrets not subject to disclosure.

Certainly, one may be sympathetic to a city’s board of education wanting to avoid the cost of having to create new exams each year. But here, trade secrecy again has no place and is the wrong vehicle by which to make such an argument. While Ohio state law limited the court’s options in deciding this case, the court nonetheless failed to consider the private commercial context of trade secret law or address Perrea’s public-interest reasons for wanting the examinations. This is perhaps understandable since, as discussed above, trade secret law does not envision public entities claiming a trade secret and makes no provision for their presence.

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113 Id. at 1051.
114 Id. at 1053.
115 Id. at 1054. A concurring opinion by two justices found that only the multiple choice questions were trade secrets since “CPS has not established that it made reasonable efforts to secure its internet website.” Id. at 1055. Also, in oral argument, the court apparently rejected Perrea’s argument that distribution of the tests to students destroyed their trade secret status, since a test must be distributed to students. The court stated that “the question is what you do afterward.” Oral arg transcript. It would seem, however, that Perrea’s arguments have merit since trade secrecy is generally destroyed by public dissemination. Restatement (First) of Torts §757 cmt. B (1939).
116 Id. at 1053.
117 Supra note 53
But there were at least two opportunities where the court might have identified the oddity of finding a CPS trade secret.

First, Ohio law, modeled after the UTSA, follows the general definition that a trade secret must, in part, “derive[] 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.”\(^\text{118}\) The court completely ignored this requirement; in fact, other than quoting the statutes it never used the words “compete,” “competitor” or even the phrase “economic value” in its opinion. This is also not surprising, since it is hard to conceive whom or what would be the competitor of a public school system in the administration of its own examinations, or gain economic value from access to them in a way cognizable by the law.\(^\text{119}\) Even if the court had envisioned CPS students or teachers gaining some sort of “economic value” from having access to the examinations that didn’t involve cheating or malfeasance, trade secret law, as a beast of commercial private competition, is not designed to address such an argument.\(^\text{120}\) Therefore, the court missed the point here because the law does not fit the public body context in which it has been situated.

Moreover, Ohio law, following the common law Restatement principles, requires courts to consider the following factors to determine whether a trade secret exists:

1. The extent to which the information is known outside the business;
2. The extent to which it is known inside the business, i.e., by the employees;
3. The precautions taken by the holder of the trade secret to guard the secrecy of the information;
4. The savings effected and the value to the holder in having the information as against competitors;
5. The amount of effort or money expended in obtaining and developing the information; and
6. The amount of time and expense it would take for others to acquire and duplicate the information.\(^\text{121}\)

Assuming that the court even attempted to identify a competitor of CPS in the administration of exams, once the court could not identify such an entity it should have paused and taken the opportunity to reconsider its position. Indeed, the fact that Perrea himself was not a competitor of CPS, but rather one of its employees, should have been considered. Instead, it did not address the issue at all, so we now have a precedent establishing that public school examinations are trade secrets, meaning that they have economic value to a public school system’s unidentified and questionable competitors and others who might theoretically obtain value from them.

\(^\text{118}\) \textit{Id.} at 1053 (quoting R.C. 1333.61(D) (emphasis added)).

\(^\text{119}\) Conceivably, private tutor services could use such questions as part of a test preparation service, but those would not be competitors of the public school in the administration of the tests themselves. Moreover, schools give tests as part of their core administrative duties, and test preparation entities serve to augment the preparation of the students taking the tests, not to compete with the schools themselves.

\(^\text{120}\) \textit{See} Dayton Newspapers, \textit{supra note} 54.

\(^\text{121}\) \textit{Id.} at 1053 (emphasis added). This list is problematic on its face since it seems to downplay the commercial competition framework of trade secrecy.
As such, *Perrea* further establishes that trade secrecy law does not fit well when the entity claiming the trade secret is a public body, especially one that has no competitors and relies on taxpayer funding to survive. The lack of a clear competitor to a governmental entity should be an automatic disqualifier for trade secret protection, or we might face an explosion of asserted government trade secrets based upon a hypothetical competitor’s or others’ use of government information generally, despite the Internet’s ability to foster greater and more meaningful distribution of government data and information to the public.

Additionally and notably absent in the Ohio UTSA and the above list of factors is any consideration of whether the public at large has a legal right or need to know the subject information. That absence should not come as a surprise either since trade secrecy law has always been conceived as involving private parties. As a general matter, a private party does not have a legal right to know another’s trade secret unless a licensing agreement or some other confidential arrangement has been created; thus, whether the public has an interest in the information is irrelevant from a trade secrecy perspective. In sum, trade secret law is simply not equipped to deal with a government trade secret, especially one asserted by a public school system.

Where does this leave the public? The public has a general right to know governmental information unless a specified exemption from disclosure applies. But, when (a) a court applies a list of trade secret defining factors that are designed to ascertain a private entity’s commercial interest and investment in the subject information and that naturally does not consider the public’s interest, if any, in accessing the subject information, and then (b) uses the result in a rule that simply states that trade secrets are exempt from public disclosure, the decision about whether disclosure is warranted becomes easy because the public’s interest has nothing to do with the decision. Thus, *Perrea* represents a primary example of the simple fact that when we take a utilitarian doctrine designed with private entities in mind and apply to public entities, we can get results that we may not want, and certainly that do not encompass the considerations of the public at large. *Perrea* is a strange result when viewed as a citizens’ request to analyze public school examinations that have already been administered to independently determine their efficacy, but if viewed as merely a request to disclose a garden-variety trade secret, it is not so strange and even arguably correct.

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122 Indeed, the Ohio Supreme Court had previously recognized the value of public access to administered state examinations. The court found, in the context of a request to release portions of the Twelfth Grade Ohio Proficiency Test and the Ohio Vocational Competency Assessment, “As education of its citizenry is one of the most important functions of the state, the legislature has made it clear its intent that parents, students, and citizens have access to these tests in order to foster scrutiny and comment on them free from restraint.” *Rea v. Ohio Dep't of Educ.*, 81 Ohio St. 3d 527, 531 (1998).

123 I am mindful of the fact that, as a law professor, should I ever work at a public university, the position advanced herein could require me to disclose my exams -- if trade secrecy were the only basis for non-disclosure. However, because I might retain copyright in my works of authorship, there would be other ways that I possibly could prevent such disclosure. See Copyright Act of 1976 which allows owners to control reproduction, distribution, and display of original works (17 U.S.C. §106 (1976)). I raise this point to emphasize that I am addressing only the inappropriateness of the trade secrecy exception in the government trade secret context. I take no position on the applicability or efficacy of other freedom of information law exemptions or how they conflict with the general principle of openness.
D. Public Contracting: County of San Diego and the United States Air Force.

The last two examples involve public contracting. These examples, especially the second involving the USAF, can be viewed as hybrid public/private trade secrets, since they implicate information relating to a private entity. Nonetheless, I include them here to emphasize the impact of government contracting on the questions herein. Importantly, in the San Diego scenario, as in Perrea, it is the government asserting the trade secret exemption based on its own interests, rather than asserting it on behalf of a private entity. Also, it is an example of a potential affirmative use of trade secrecy as an element of a misappropriation claim, rather than a shield to public disclosure of information. Conversely, the USAF scenario involves the government asserting the trade secret rights of a private entity, which is a related but fundamentally different scenario than those discussed before and does not involve a government trade secret as defined in this article. Nonetheless, I include it for purposes of completeness to show the impact of trade secrecy generally on the public’s ability to access information about how its money is spent.

1. Voting Machine Modifications by the County of San Diego

In 2003 the County of San Diego, California (“San Diego”) contracted with Diebold Election Systems, Inc. (“Diebold,” now doing business as Premier Election Solutions) for the provision of voting machines to San Diego by Diebold. In a paragraph entitled “County Product” under the heading “Proprietary Considerations,” the parties agree, in relevant part, that “all plans, reports, acceptance test criteria, acceptance test plans, the [Statement of Work], departmental procedures and processes, data, and information and other similar materials developed by County [of San Diego] … (collectively “County Product”), and all … trade secret rights … therein shall be the sole property of County [of San Diego].” Thus, San Diego contracted for the trade secret rights in its modifications to voting machines that it purchased from Diebold.

Why San Diego placed this language in the contract is a mystery, especially since it has no competitors in the facilitation of its elections and has a strong legal mandate, independent of trade secret protection, in running proper elections. But one could easily envision that San Diego will ignore that issue and might attempt to take the same position as Diebold in the face of a freedom of information request, namely, information relating to those modifications is exempt from disclosure under trade secrecy, pure and simple. Why allow the public to second-guess and challenge elections if trade secrecy law can be asserted to prevent such problems?

125 On behalf of the County, the contract is signed by its Director, Department of Purchasing and Contracting and a Senior Deputy County Counsel. Id.
126 Whether it would be successful is another matter. While it is beyond the scope of the article to thoroughly examine California law, Cal.Civ.Code § 3426 (“California UTSA”) adopts the UTSA and grants trade secret holders protection from misappropriation. The California UTSA defines a “person” who can have a trade secret as “a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.” Id. While this issue has not been litigated in California, it would seem possible on this basis that a California court might find a government trade secret exempt from disclosure. On the other hand, the California Open Records Act, Cal. Gov.
As with Perrea, San Diego suffers the same two errors of ignoring the purpose of trade secrecy law and the public’s interest. First, since California also follows the UTSA, it is hard to identify whom or what might compete with San Diego in the modification of its voting machines and the facilitation of its elections or how the public could be viewed to have misappropriated information about how its own voting machines operate. Moreover, San Diego needs no incentive to administer elections or use accurate voting machines, as that is one of the core roles of any democratic government. Secondly, how (or whether) a voting machine works is perhaps the prototypical example of information that the public should have a right to know, regardless of the owner’s trade secret claims.

Thus, San Diego is perhaps the most extreme example of the problems with government trade secrets. Here, the county, funded by taxpayers and whose mission is to facilitate free and accurate elections, has claimed its own trade secrets in its own modification of voting machines, the primary instrument of democratic elections. In doing so, it has suggested that it has a competitor in the operation of county elections, and has potentially given itself the option to prevent the public from inspecting – or, from its apparent perspective, misappropriating – the government’s modifications of their own voting machines. Under any theory of trade secrecy, this scenario is a perversion of trade secrecy law itself, as the existence of a trade secret right in voting machine modifications does not fit within the purposes of trade secrecy law and creates the ability for governments to prevent disclosure of the operation of voting machines to the public at large. It equally turns transparency and accountability on its head, as it is impossible to have either when the public may not be able to inspect the very machines that are used to ostensibly guarantee the most fundamental of democratic government principles, a free, open and accurate election.

2. Prices Paid by the United States Air Force

Lastly, we can examine a related but fundamentally different situation where dollar amounts spent by a public entity are designed as a trade secret by a private entity. In McDonnell Douglas Corporation v. Widnall, the United States Air Force (“USAF”) received a FOIA request from General Dynamics Corp. regarding pricing and unexercised options under a contract between the USAF and McDonnell Douglas Corporation (“McDonnell”), a competitor. The USAF contacted McDonnell, which advised the USAF that certain “line item prices” contained in the contract were, among other designations, trade secrets. The USAF decided that a separate federal regulation required it to release the information. As a result, McDonnell wound up suing the USAF in a “reverse” FOIA action to enjoin disclosure of, among other information, the line item prices.

Code § 6250 (“California Act”), does not expressly reference trade secrets as information exempt from public disclosure. However, under § 6254(k), the California Act does exempt “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law,” which leaves open the question of whether the court would therefore find that because FOIA does not allow for governments to assert the trade secrecy exemption, supra at 16, that San Diego could not either.

127 Id.
128 See Secrecy at 180-183 for an extended discussion of this issue.
129 Perhaps San Diego plans to sell or license its modifications back to the vendor.
130 57 F.3d 1162 (D.C. Cir. 1995). See also The Impact of Trade Secrecy on Public Transparency, supra note 2, from which this subpart is, in part, excerpted.

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For a variety of unusual administrative and procedural reasons not relevant to the present discussion, the USAF never explicitly took a position as to whether the line item prices were trade secrets. As a result, and because of the administrative posture of the case, the court found that it was not required to issue a holding on the issue. While the court noted that the USAF “implicitly” contested the designation of the line item prices as trade secrets, it stated in dicta that “[a]lthough the idea that a price charged to the government for specific goods or services could be a ‘trade secret’ appears passing strange to us, we agree with the government that it is not open to us to attempt to decide that issue at this stage.” The case was remanded to the district court and ultimately back to the USAF so that the USAF could provide a “considered and complete statement” of its position; however, the court never resolved the question.

It is indeed “passing strange” that such information could be designated as a trade secret; after all, this involved expended taxpayer dollars. Yet at the administrative level at which the FOIA request was evaluated, the designation of the line item prices as trade secrets by McDonnell determined the disposition of the FOIA request. As a result, the disclosure of basic information regarding the prices paid by the USAF for goods and services was delayed and might have been forever halted. While the court, in a different procedural and administrative posture, might have ruled that the information was not a trade secret, McDonnell’s position appears to have been at least colorable -- the designation was de facto accepted by the USAF, necessitating litigation to challenge the trade secrecy assertion.

Widnall highlights a fundamental problem in FOIA: the broad modern definition of a trade secret controls in light of the lack of a trade secret definition within the FOIA statute itself. If a court applies the broad modern definition of a private commercial trade secret, it is quite conceivable that, based upon the descriptions afforded by the putative owner of the trade secret, be it government or the private sector, it could find a wide swath of requested information with significant public importance to constitute trade secrets. Applying the letter of the law, such a court might end up denying taxpayers the ability to discover what the USAF (and hence taxpayers themselves) are paying for goods and services. Such a result does not seem to serve the purpose of FOIA; it is certainly not transparency.

More generally, it is important to remember that FOIA applies only to the federal government. As illustrated above, the states have their own freedom of information laws and, of course, to the extent that they include an exemption for trade secrets, may define a trade secret as they choose. Therefore, the definition of a trade secret again becomes the fundamental question. If a state does not have a statutory definition, a clear theoretical understanding of the law or as well-developed a body of cases as is found in the federal courts, then the possibility for abuse of a trade secret exemption is manifest.

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131 Id. at 1167.
133 See supra, notes 25 and 26.; cf. Public Citizen Health Research Group v. FDA, supra at 16 (articulating a narrower definition of a trade secret tailored to FOIA requests that is followed by many courts and has been accepted as the definition of a trade secret for purposes of FOIA).
The ambiguous and increasingly intrusive trade secret exemption in FOIA and state freedom of information laws is a serious challenge to our conception of a transparent and accountable government. As the government increasingly regulates and partners with private industry, we can expect that the trade secrets exemption will be of mounting importance.\textsuperscript{134} As it stands today, we often sacrifice transparency on the altar of protecting the commercial interests of trade secret owners, which courts have found to include governments themselves. While it would be difficult to advance a position that calls for the complete absence of any trade secret exemption under FOIA, in light of the danger of disclosing a legitimate trade secret to the trade secret holder’s competitors, we currently have a freedom of information scheme, on both the federal and state levels, that gives short shrift to concerns about transparent and accountable government in the trade secrecy context. As public-private partnerships and government commercial activities increase, the increasing assertion of government trade secrets may leave us by default with policies and practices that would not stand up to public scrutiny if the policies were made by legislatures in a deliberative fashion.

\textbf{IV. TRANSPARENCY AND ACCOUNTABILITY AND ITS RELATIONSHIP WITH TRADE SECRECY: IF THE PEOPLE HAVE TRADE SECRETS, THEN THE PEOPLE MUST KNOW THE TRADE SECRETS}

As the previous examples indicate, aside from my concerns about trade secrecy doctrine and its application as discussed above, the issue of public input and the values of transparency and accountability are fundamental to my concern about the existence of government trade secrets. As I argued in Secrecy, to blindly allow government trade secrets seemingly ignores the fundamental difference between a purely commercial entity distributing private commercial goods and services and an entity operating in the public infrastructure sphere that is required to be both transparent and accountable.\textsuperscript{135} While we might like natural monopolies, like public utilities, to be run by governments so as to prevent monopoly pricing by private entities, governments still should not be in the business of keeping information secret just because it might have some modicum of pecuniary value and/or keep costs marginally lower. The mere possibility that a government could gain commercial advantage or even recoup the costs of developing a good or service should not be the primary policy objective of a government.

However, the question is not that simple. Governments no longer play the single role of handling the public’s core business, like the City of San Diego’s administration of elections, the CPS’ administration of school examinations, or the United States Air Force’s defense of the nation. As the PHEAA case illustrates, governments now openly act in the private sector, form public corporations, and compete with private entities and/or partner with them. Indeed, governments are in the “business” of providing goods and services to the public, and, whether we like it or not, part of that charge has increasingly been to outsource or contract out traditional governmental functions to private entities, or even compete directly with the private sector.\textsuperscript{136} As the CIC predicted, to the extent that the government seeks to maximize its ability to provide goods and services to the public on its own, trade secrecy will likely play an increasing role.

\textsuperscript{134} A focus of future research should include a detailed study of the actual use of FOIA’s trade secret exemption by the federal government. Of course, that would require filing many FOIA requests.

\textsuperscript{135} Secrecy at 164-165.

Therefore, as trade secrecy increases its prominence in government operations, we can reasonably expect that the assertion of trade secrecy rights by governments will increase, primarily as a shield to prevent disclosure of information but perhaps as a sword to assert trade secret misappropriation.

As the role of government changes and evolves, unless there develops a strong and pervasive conception of government that prioritizes transparency and accountability, the increasing involvement of government in the commercial setting could create a situation where trade secrecy does not appear to be a theoretical conflict. Especially as trade secrecy’s theoretical underpinnings remain in flux, or are believed to not exist, trade secrecy could be found to be in harmony with amorphous public or governmental values. Trade secrecy’s very lack of a strong unified theoretical underpinning that is uniformly accepted allows it to continuously morph to fit a given scenario, making it a legal shape shifter that eludes a clear line of analysis in its application to government.

Indeed, that is what we see with the PHEAA and CPS examples. While, in PHEAA, the court challenged the designation of particular information as trade secrets, the government still found a legally justifiable way to use it. In CPS, the court ultimately chose to read the law in an incomplete but unchallenged way and came to a logical result. Akin to Professor Epstein’s argument, the governmental entities met the test for its application, and that was the end of the analysis from a preclusion standpoint. The basic threshold of applicability was met. So why have courts and legislatures allowed the government to have trade secrets? The answer seems to be that courts simply consider whether the information meets the elements of the applicable trade secrecy tests, but the courts divorce those tests from any (a) clear and robust theoretical underpinning in trade secrecy or democracy, (b) notion of the public’s interest in the hidden information, and/or (c) the context of promoting fair private competition and punishing misappropriation.

If we view government as primarily a commercial actor, as in PHEAA, the practical problems seem less severe although still quite problematic because the government is in the role of a business seeking to compete and earn revenues, and trade secrecy is a legitimate means towards that goal. But we are still a bit away from government acting in a commercial manner generally or being uniformly viewed through such an altered lens. Therefore, it is a good time to consider this conflict as the issue begins to arise with more frequency, especially in areas where the government has no competition. Equally important is the need to recognize that trade secrecy’s theoretical debate has very real and significant repercussions.

Before automatic trade secrecy becomes standard operating procedure for governments, a fundamental question must be answered; that is, whether trade secrecy is part of the bundle of rights upon which governments can and should rely in order to serve the public. Where arguably applicable, as in situations where the government competes directly with the private sector, the price of that secrecy and the perverse incentives that it may engender should be weighed against

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137 Bone, supra note 37.
138 See supra Part III(a) and (b).
139 Note that the use of trade secrecy in the private sector is on the rise. See Secrecy at 139. This trend could be mirrored in the public sector.
the economic benefits of the use of the right. In most other situations, however, trade secrecy will fall on its own inapplicability to the governmental activity at issue.

A. Trade Secrecy, Transparency, Accountability and Deliberative Democracy Theory

In order to give a theoretical and practical underpinning as to why government trade secrets might be viewed as problematic from the perspective of democratic governance, it is important to have operative definitions of the words “accountability” and “transparency” and to understand the basics of the relationship between the two concepts. Professor Glen Staszewski has defined accountability in the context of deliberative governmental operations as a “requirement or expectation that [public officials] give reasoned explanations for their decisions.” In order to have the possibility of accountability, transparency is required. Therefore, transparency may be defined as “the ability of the citizenry to observe and scrutinize policy choices and to have a direct say in the formation and reformulation of these decisions.”

With that basic framework, we can outline deliberative democracy theory. It is important to note at the outset that I invoke deliberative democracy purposefully as it is has recently been described as “the model [that] focuses on the very features of an ideal political structure that seem lacking in our current system for corporate lawmaking.” Given its application to creating corporate law and in other fields, it is logical to apply it to public officials generally.

Deliberative democracy theory advocates posit that “public officials are not held politically accountable for their specific policy decisions pursuant to periodic elections, and there are overwhelming reasons to believe that this will never be the case.” Thus, deliberative democracy theory stands as the modern alternative to relying on elections to achieve accountability. Professor Glen Staszewski frames deliberative democracy in the context of modern governmental operations as positing that:

individual policy choices are democratically legitimate to the extent that they are supported by public-regarding explanations that could reasonably be accepted by free and equal citizens with fundamentally different interests and perspectives. Accordingly, public officials can be held deliberatively accountable by a

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140 I discussed the history of these ideas and their centrality to democratic government at length in Secrecy at 158-62.
141 Glen Staszewski, Reason-Giving and Accountability, 93 Minn. L. Rev. 1253, 1279 (2009). Accountability has been similarly defined as “the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation.” Edward Rubin, The Myth of Accountability and the Anti-Administrative Impulse, 103 Mich. L. Rev. 2073 (2005).
143 Erik Luna, Transparent Policing, 85 Iowa L. Rev. 1107, 1164 (2000).
144 Renee M. Jones, Legitimacy and Corporate Law: The Case for Regulatory Redundancy, 86 Wash. U. L. Rev. 1273, 1281 (2009) (citing Staszewski, among other articles, for the assertion that “[d]eliberative democracy has been embraced as an analytical framework by legal scholars working in a range of fields”).
145 Staszewski, supra note 141 at 1254.
requirement or expectation that they give reasoned explanations for their decisions that meet those criteria.\textsuperscript{146}

Deliberative democracy theory has a number of public benefits. Primarily, it allows for citizens to “engage in fairly sophisticated deliberation about public policy.”\textsuperscript{147} This deliberation and debate can eliminate or severely hinder a public official’s ability to self-deal, make selfish policy choices, and engage in “naked preferences for one individual group over another.” Moreover, it can expose common ground among citizens.\textsuperscript{148} Ultimately, it can lead to better decisions.

But it requires transparency in order for it to be operative; without transparency deliberative democracy cannot exist. As Staszewski explains:

If citizens are unaware that a particular governmental official has made a specific policy decision, they cannot possibly hold that official accountable in any meaningful way for this action. A requirement or expectation that the public official will provide a reasoned explanation for the decision enables interested citizens and other public officials to evaluate, discuss, and criticize the action, as well as potentially to seek political or legal reform. For this process to work, the reasons that governmental officials provide for their decisions must ordinarily be publicly available.\textsuperscript{149}

Thus, as illustrated in all of the examples above, when trade secrecy prevents the public from accessing basic information that would allow for the public to “evaluate, discuss, and criticize the action,” whether it be PHEAA’s marketing of products and services, the efficacy of CPS’ tests, the operation of San Diego’s voting machines, or USAF’s expenditure of public funds, deliberative democracy, in addition to the openness that we need in a democracy generally, is defeated.

Indeed, there is a slippery slope potential if the concept of a government trade secret takes hold, namely, that there are too many potential benefits to a governmental entity that seeks to avoid public scrutiny. There are a variety of pernicious reasons that governmental officials or agencies might want to keep a secret, as explained by Robert E. Gellman, a former chief counsel to the House of Representatives’ Government Operations’ Subcommittee on Information, Justice, Transportation, and Agriculture:

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\textsuperscript{146} Id. at 1255.
\textsuperscript{148} Staszewski, \textit{supra} note 141 at 1279-1285.
\textsuperscript{149} Id. at 1281. While there are potential downsides to deliberative democracy theory, like the possibility that posturing and polarization could occur if too much information is revealed, see Adrian Vermeule, \textit{Mechanisms of Democracy}, at 196 (Oxford University Press 2007), it is beyond the scope of this article to fully critique it. Rather, I apply it here because it currently a dominant theory with a growing currency. I posit, however, that under any theory of democratic government that involves transparency and accountability, government trade secrets are problematic
\end{flushright}
The reasons agencies, government officials, and legislators want to control the information in their domain are many and varied. Information may be a source of power that can be best exploited in an environment of secrecy. Information may be closely held in order to avoid embarrassment, to evade oversight, to establish a function and create jobs at an agency, to develop a constituency of users, or to develop a source of revenue. While not every agency, bureaucrat, or politician will find a motive to control every government information product or service, the temptations are there.\footnote{150}{Robert M. Gellman, Twin Evils: Government, Copyright and Copyright-Like Controls Over Government Information, 45 Syracuse L. Rev. 999, 1046 (1995) (citation omitted).}

It is the unwarranted and unjustified control of government information that is at the heart of my concern. In an early analysis regarding whether and how government data may be used by the private sector given new information technologies, Gellman noted that “[c]ontrols that may be intended to prevent unfairness or misquoting might also be used to prevent uncomplimentary use of data, censor information, or hide documents.”\footnote{151}{Committee on Government Operations, Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview, House Report 99-560, April 29, 1986 at 36.} Trade secrecy, as a doctrine resting partially (but not primarily) on the notion of preventing unfair competition can easily be misused to achieve a similar outcome. Moreover, as Gellman notes, “these powers have always been denied to government.”\footnote{152}{Id. (noting that proposals “to give the government copyright controls over information have been made in the past and have been rejected by the Congress.”)} Trade secrecy, at least at the state level, appears to be an exception to that statement. Thus, trade secrecy offers an opportunity to control information with limited theoretical or practical basis or justification, and can threaten democracy as a result. As summarized by Professor Jerry Mashaw in the context of administrative reason giving, “administration without reason cannot meet the challenge of defending its democratic legitimacy.”\footnote{153}{Jerry L. Mashaw, Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance, 76 Geo. Wash. L. Rev. 99, 124 (2007).}

B. Agency theory

A second related theory with which government trade secrecy conflicts is the agency theory of democracy. This theory places the public in the role of the principal\footnote{154}{The person who is delegating authority.}, with government as the public’s agent.\footnote{155}{ARTHUR LUPIA AND MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 79 (Cambridge University Press 1998).} When government trade secrets allow otherwise public information to remain hidden, then the “central dilemma of delegation” is present: “[A]gents often do not have common interests with their principals and … may have information about the delegation that their principals lack.”\footnote{156}{Id.} While this does not always lead to a failure in carrying out governmental duties in the public’s interest,\footnote{157}{Id. at 79-81.} because trade secrecy has no strong
theoretical basis for its very existence in the government context, it is ultimately a needless risk to take.

Indeed, from an agency perspective, trade secrecy stands in the way of another principal benefit of transparency: to “reduce the monitoring costs borne by the principals (voters) to ensure that their agents (lawmakers) pursue their objectives.”\(^{158}\) The ability of a government to claim a trade secret and thereby prevent disclosure of information means that the public would have to jump through legal hoops, by way of administrative appeals and/or litigation, to have any chance of access to the undisclosed information. Again, in the absence of a clear theoretical basis for a government trade secret to exist, this is a cost incurred with no meaningful benefit to the public or the law itself.

The problem of transaction costs indicates another significant impact of the government trade secret. Even if the public is successful in accessing the secret, by the time the information is made available, it may be too late. The delays caused by appeals, both at the administrative and litigation levels, may defeat the purpose of accessing the information. If a citizen wants to be able to offer meaningful input on a decision not yet made by a public entity, it needs real-time access to the information while options are being considered. By the time the decision is made, the value of any input that may have been offered to impact that decision will be at or near zero, but at any rate severely diminished. At that point, the only option left may very well be to attempt to “throw the bums out.” Thus, as stated in the OMB Memorandum, “Timely publication of information is an essential component of transparency.”\(^{159}\) Thus, the existence of a government trade secret can increase the transaction costs associated with accountability.

V. SOLUTIONS

I have discussed the basics of trade secrecy, its theoretical and practical application, examples of its application in the government trade secret context, its practical impact on transparency, accountability, its impact on basic theories of democracy, and the potential benefits of government trade secrets. Solutions to the problem can now be considered.

There are two basic principles upon which any solution must rest. The first, as discussed in Parts II and IV, is that the relevant stakeholder for government is the “diffuse public,” and accountability and transparency are the primary guiding principles.\(^{160}\) The second, as demonstrated in Part III, is that information designated as trade secrets can be of public concern; trade secrets are not the exclusive interests of private parties.\(^{161}\)

There are three possible solutions to the problem of government trade secrets, each with pros and cons: (1) following the inspiration of Toledo Blade and the CT Commission and clarifying trade secrecy law generally by redefining “trade secret” to unambiguously state that

\(^{158}\) Vermeule, supra note 149.

\(^{159}\) Open Government Directive, supra note 7, at 2.

\(^{160}\) See Jody Freeman, Public Values in an Era of Privatization, 116 HARV. L. R. 1285, 1304 (March 2003).

\(^{161}\) This is, surprisingly, not a settled point. See i.e. Jillian Smith, Secret Settlements: What You Don't Know Can Kill You!, 2004 Mich. St. L. Rev. 237, 257 (2004) (arguing that “formulas or private issues” do not threaten “public health and safety.”)
there is no such thing as a government trade secret, thereby eliminating the theoretical trade secrecy doctrine and practical transparency and accountability problems at their root (the “No Government Trade Secrets Solution”), (2) following federal FOIA and clarifying state freedom of information laws to say that government trade secrets are not cognizable as an exemption to FOIA requests but otherwise leaving trade secrecy law undisturbed (the “FOIA Solution”), or (3) allowing the concept of government trade secrets to exist but applying the narrower Public Citizen definition of a trade secret in the freedom of information context and requiring that the government show that it is directly competing in the private sector, as would be required of an entity like PHEAA (the “Public Citizen Solution”).

1. The No Government Trade Secrets Solution

This solution, from a theoretical and practical standpoint, is the most satisfying. By declaring that a government trade secret in any context is little more than a legal fiction, trade secrecy theory and application are clarified and transparency, accountability and deliberative democracy are not curtailed by trade secrecy. The need for litigation to establish whether the subject information should be disclosed would be minimal since the issue would never come up, as the law would eliminate government trade secrets. This would be particularly beneficial in contexts such as CPS and San Diego, which seem to be egregious examples of trade secrecy gone awry. Thus, this becomes a non-issue and a relatively simple bright-line test to apply, with the added benefit of not requiring any change in freedom of information laws, to the extent that they have a specific trade secret exemption. Moreover, as trade secrecy is not used to bring misappropriation claims, there would be no loss of relied-upon legal protection. Ultimately, more disclosure of public information would result.

Of course, an obvious objection comes in the context of PHEAA. What do we do with the governmental entity that competes in the private sector and claims that trade secrecy allows it to maintain a competitive advantage? One solution would be for governments to find their protection in patent law, as they currently do. If a government agency really needs intellectual property protection, it could seek it in patent if it meets the requirements of patentability.

At least from a theoretical standpoint, the idea of patents as the primary substitute for trade secrecy has some appeal. In the present context, patent law is a significantly more democratic doctrine from a transparency standpoint than is trade secrecy because of its public disclosure requirements and limited duration of monopoly. A patent application, which usually becomes public 18 months after filing, must “describe, enable, and set forth the best mode for carrying out the invention,” thus providing substantial public disclosure to anyone who wishes to understand the operations of the invention. In relation to trade secrecy and its available injunctive relief, the Ninth Circuit explained the appealing disclosure requirements of patent law:

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162 Of course, a fourth choice is to do nothing at all, but I reject that out of hand.
The federal patent statutes require full disclosure of the invention as a condition to the grant of monopoly so that at the end of the period of monopoly the development may be freely available to all. Thus, the federal patent statutes would seem to reflect a congressional determination that any individual or social interests which may be served by secrecy are outweighed by those served by full disclosure.\footnote{166}

In contrast, while it allows reverse engineering and independent discovery (an often time intensive and/or impossible endeavor), trade secrecy by its very definition abhors both transparency and public accountability.\footnote{167} Therefore abandoning trade secrecy in government and limiting protection to that which is patentable is likely the right, if not perfect, answer.\footnote{168}

Whether this is the most profitable outcome for governments is, for purposes of this argument, secondary to the fact that transparency and accountability are increased under such a system and the theoretical morass in trade secrecy is eliminated. But I do not suggest that patents are purely democratic, that all patent applications are thorough and complete, or that patent constitutes the perfect substitute.\footnote{169} Clearly, there are certain ideas and processes that are better suited to trade secrecy protection, and items like bid pricing may not be patentable in the first place.\footnote{170} Nonetheless, the fact remains that trade secrecy law serves interests that are anathema to basic values of transparency and accountability, and the sacrifice to greater public accountability may, by definition, diminish some of the purely pecuniary advantages of trade secrecy.

\footnote{166}{Winston Research Corp. v. 3M Corp., 350 F.2d 134, 138 n. 2 (9th Cir. 1965) (internal citation omitted).}
\footnote{167}{For discussion of reverse engineering and independent discovery, see Secrecy at 146-7.}
\footnote{168}{It is important to recognize that commercial enterprises face real alternatives to secrecy that are the subject of recent scholarly works. See Henry Chesbrough, Open Innovation at 170-174 (2006) (discussing Intel, Inc.’s practice of publishing, rather than patenting, those inventions that they would “prefer to put in the public domain,” in an effort to benefit their business); see Jim Chen, Biodiversity and Biotechnology: A Misunderstood Relation, 2005 Mich. St. L. Rev. 51, 79-81 (Spring 2005) (discussing the public benefits of patent law over trade secrets, noting that trade secret law, “by design, keeps information concealed [and] by contrast, [patent law is] designed to deliver privately held information into public hands”); but see Dan L. Burk and Mark Lemley, Is Patent Law Technology-Specific?, 17 Berkeley Tech. L.J. 1155, 1161-1163 (Fall 2002) (noting that Section 112 of the Patent Act imposes minimal disclosure requirements for software). Patent law has been subject to much criticism in recent years, for reasons ranging from the overuse of patents in the computer software context to the amount of information that is actually revealed in a patent application, and is therefore not the perfect solution. For a detailed discussion and critique of various criticisms of patent law, see Dan L. Burk & Mark A. Lemley, The Patent Crisis and How the Courts Can Solve It (2009).}
\footnote{169}{Patent law has been subject to much criticism in recent years, for reasons ranging from the overuse of patents in the computer software context to the amount of information that is actually revealed in a patent application, and is therefore not the perfect solution. See Lemley and Burk, supra note 168.}
\footnote{170}{It is unclear how much of a difference there would be in the government context, since governments do not patent much and have not brought trade secret misappropriation claims. See Wesley Cohen, et al., Protecting Their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (OR NOT), National Bureau of Economic Research, Working Paper No. 7552 at 13 (Feb. 2000) (secrecy is generally emphasized over patents and lead time in the development of new processes in certain industries). However, as business methods are currently patentable, see Burk & Lemley, supra note at 168, it seems possible that some of PHEAA’s undisclosed information might be patentable.}
Critically, the fact that trade secrecy has only been used by government to prevent disclosure under freedom of information laws suggests that the primary bases for trade secrecy – to encourage innovation and/or prevent misappropriation – are not major factors in the government’s operations or use of trade secrecy. Conversely, the textbook trade secret case involves one party that is alleged to have misappropriated the trade secrets of another by one or more bad acts. One would be hard pressed to find a case involving a freedom of information exception to trade secrecy in an intellectual property or trade secrecy textbook. There is a good reason for this: protecting governments from freedom of information requests is not a reason for trade secrecy’s existence.

Therefore, perhaps the best argument in support of the position that governments do not need trade secrecy to serve the public is that the federal government continues to serve the public and innovate in the absence of a trade secrecy exemption to FOIA. It is doubtful that governments create more or better goods and services because of trade secrecy. Entities that might significantly benefit from having trade secrecy as an option to prevent disclosure of valuable information, like the United States Army (which operates power generating facilities through the Corps of Engineers), as well as the Departments of Energy and Health and Human Services, use patents and operate without trade secrecy as an exemption to disclosure. Thus, the federal government’s operations despite the lack of a trade secret FOIA exemption suggests that states may (and probably do) not need this incentive either.

Indeed, a fundamental reason why governments do not need trade secrecy is that they have ample ways to prevent information from being disclosed to the public aside from trade secrecy. It is important to emphasize that there may be other legitimate reasons why information that might meet a definition of a trade secret should remain undisclosed. I take no position on any other aspect of FOIA or state freedom of information laws. The existence of national security and other FOIA and state freedom of information law exemptions remain unencumbered by this solution, meaning that information that should not be disclosed for other reasons will not automatically be disclosed by the elimination of a trade secrets exemption.

Ultimately, my quarrel is solely with government trade secrets because it is an illegitimate basis for non-disclosure. Indeed, in the absence of trade secrecy, it appears that all of the information denied public disclosure in the discussed examples would have been disclosed because other exceptions would have been inapplicable. Thus, it appears that the government trade secret exception to freedom of information laws is a last resort argument considering its limited case history, but a powerful exception if allowed. In sum, because government trade secrecy is theoretically unsound and has real impact on basic democratic values and the disclosure of otherwise public information, this solution has significant advantages with a hypothetical risk to a governmental entity that competes with the private sector, owns potential trade secrets and cannot avail itself of patent protection.

171 Supra at 17-8.
173 See D’Amato, supra note 163.
174 See supra at 16.
2. FOIA Solution

The FOIA Solution is similar to the no government trade secrets solution but with more downsides. Like the CT Commission Solution, it is a bright-line solution that eliminates the government trade secret exception to freedom of information laws, but does it in a more direct way. Rather than addressing the problem from the trade secret law side, this solution seems cleaner and perhaps easier to implement if the sole concern is to make government more transparent and accountable. All of the benefits of increased transparency and accountability found in the previous would be found here as well. It also has the benefit of having strong precedent behind it, namely FOIA and United States Courts of Appeals decisions.

But it leaves the theoretical morass in trade secrecy intact and still has all of the PHEAA-scenario downsides discussed above. Thus, as between the above and the FOIA Solution, the better choice seems to be the no government trade secrets solution since it addresses trade secrecy and freedom of information law concerns with the same downsides. As I discuss more thoroughly below, however, either of these solutions seem better than the Public Citizen Solution.

3. Public Citizen Solution

This solution attempts to address the problem in a way that marginally increases transparency and accountability by allowing an entity like PHEAA to have some diminished protection in trade secrecy. The Public Citizen Solution approach focuses on the definition of a trade secret for purposes of freedom of information laws. Rather than attempt to alter trade secrecy doctrine in the purely commercial setting (where it is often quite effective), a hybrid set of trade secrecy rules that recognizes the transparency and accountability aspects of democratic government might be preferred. Thus, this solution has the benefit of defining the narrow circumstances in which governments might properly assert trade secret rights.

Public Citizen defines a trade secret from a utilitarian perspective “as 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.”175 This definition is certainly narrower than that of the UTSA176 and would force a governmental entity to specifically identify how the requested information is, in fact, directly connected to their commercial efforts. Thus, it would have the benefit of raising the standard for governments when they seek to prevent disclosure of information by way of trade secrecy doctrine but prevent broad assertion of a general government trade secret right.

This definition leaves quite a bit of information secret that could be of high public interest. New Zealand, which has extensive experience in this area, has created a set of rules that the New Zealand Ombudsman considers when the government seeks to deny disclosure of public records on the basis of commercial confidentiality. In balancing disclosure against impact on government, the Ombudsman weighs: (1) the particular market activity to which the information

175 See supra note 71.
176 See supra at 8.
is related, (2) the number of competitors, degree of competition and other characteristics of the market, (3) how information claimed to be exempt related to criteria upon which a government contract is awarded, and (4) the degree to which disclosure would put competitor at advantage. While still heavily focused on commercial gain, this test has two primary strengths: (1) it forces the government to establish a clear connection between the information and its commercial efforts and (2) implicitly recognizes that there may be information for which even commercial concerns are not significant enough to warrant denial of disclosure. Although focused on government contracting, this test can form the basis of a balancing test for government trade secrets disclosure generally with minor alterations (like eliminating the third factor entirely). In tandem with the Public Citizen trade secret definition, it could be an attractive solution to the problem. Especially as there is a presumptive public interest in government trade secrets that eclipses almost all other trade secrets, courts should demand that a strong link to a government’s commercial interests exists before denying a fundamental democratic right.

Were this solution implemented, evidentiary issues would also have to be addressed. A Canadian summary of such issues notes: “[a]s government organizations increasingly embark on commercial ventures to generate revenues . . . mere assertions of commercial value or threat to competitive position will not be sufficient to justify the exemption. Clear, direct evidence is required.” At least in Canada, the issue has developed so that it is no longer a question of whether government should have trade secrets, but rather of strength of evidence. A heightened standard that requires “clear, direct evidence” must be part of this solution, lest the government engage in the same broad-brush designation of trade secrets that has been one of the hallmarks of trade secrecy in the FOIA context generally.

Additionally, should this solution be implemented, the government should automatically lose some of its rights to sovereign immunity, the doctrine that prevents governments from being sued under a wide variety of claims, or have that right severely curtailed. The government should be specifically required to waive its right to sovereign immunity in any commercial claims, especially torts that might be brought by a private entity. In that way, the government would further level the playing field in relation to its private competitors, a goal that has been long considered key to government involvement in commerce.

To further limit the impact of the continued existence of government trade secrets on transparency and accountability, the duration of a government trade secret could be limited. Rather that have a secret of potentially infinite duration, like the Coca-Cola formula, a government trade secret could be protected for up to five years, at which time the trade secret would be subject to public inspection. This alteration of trade secrecy law in the government context would further recognize the public’s interest in government information, but allow the

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177 Paterson, supra note 18 (citing the New Zealand Ombudsman’s Practice Guidelines – B4.2, sec. 9(2)(b)(ii)).
180 Supra note 151 at 59 (“[A]n agency that unavoidably competes with the private sector . . . must compete fairly.”)
181 See supra at 8.
governmental entity to protect the information especially during the research and development phase. Thus, the protection would be for a reasonable and valuable amount of time.\textsuperscript{182}

This solution does not address the theoretical problem in trade secrecy generally, and leaves transparency and accountability largely subject to the commercial interests of a governmental entity. These realities alone cause me to reject it. Also, as a multi-factor test, it is prone to the possibility of much litigation because of the difficulty of line drawing. For example, to the extent that we might consider requiring a court to consider whether the subject information is a “public concern” for purposes of whether it should be disclosed, Professor Eugene Volokh has pointed out that courts have had a difficult time determining what a “public concern” is for purposes of First Amendment protection of disclosure of trade secrets by the press. Volokh has persuasively argued that the courts have consistently run into problems when considering situations where the news media is sued for publishing a trade secret leaked to it by someone in violation of their duty of confidentiality, but without encouragement from the news media.\textsuperscript{183} Therefore, a possible solution of relying on the courts to simply allow dissemination of trade secrets deemed a “public concern” would likely continue to run into the same subjective judicial problems regarding where the line between a “public concern” justifying disclosure and a “private concern” prohibiting disclosure should be drawn.\textsuperscript{184}

The Public Citizen Solution faces a similar fate of much litigation over the balancing between public and commercial interests. Additionally, it underscores the basic problem with governments depending on secrecy to compete with the private sector. In fact, the problems with this solution are perhaps the strongest argument for the proposition that governments should not compete with the private sector at all if their ability to do so depends on secrecy.

VI. CONCLUSION

The goal of this article has been to gain further understanding of the utilitarian underpinnings of trade secrecy and to identify the major conflicts between government trade secrecy and transparency and accountability, with the hope that state legislatures will address this problem. To be sure, none of the proposed solutions, save doing away with government trade secrets, are fully satisfactory, as they do not fully address the theoretical problems in trade

\textsuperscript{182} Even if this aspect of the solution were implemented, the public would still not be able to give real-time input into government decisions, a major drawback of this solution generally.

\textsuperscript{183} Volokh, \textit{supra} note 53 at 739-749. See also Alex Eaton-Salners, \textit{Note, DVD Copy Control Association v. Bunner: Freedom of Speech and Trade Secrets}, 19 \textit{BERKELEY TECH. L. J.} 269, 282-283 (2004) (criticizing decision of the California Supreme Court because its “formulation and application of the public concern doctrine was incorrect”).

\textsuperscript{184} Of course, by way of analogy, the United States Supreme Court has struggled with the definition of a matter of “public concern” in First Amendment jurisprudence. \textit{See} Dun & Bradstreet, Inc. \textit{v. Greenmoss Builders, Inc.}, 472 U.S. 749, 758-759 (1985) (applying the “public concern” test to a private plaintiff who alleged defamation based upon the defendant sending an errant credit report to five subscribers, and noting that “speech on public issues” is of primary concern to the First Amendment). For example, it seems reasonable to assume that the operation of a voting machine and its impact on one’s ability to cast a recorded vote would have to qualify as a “public concern” under First Amendment analysis. However, PHEAA’s marketing efforts might be subject to more debate. Additionally, one would expect that an effort to define whether the government is in “trade” as a basis for deciding whether subject information is exempt from disclosure would face a similar litigious and muddied future, notwithstanding CT Commission’s opinion.
secrecy and/or harmonize the differing core values of commerce and government. The proper goal is to have public transparency without coercion, absent the regulatory/administrative process or resort to the courts. The goal should be the “presumption of openness,” and the Public Citizen Solution will have difficulty meeting that democratic ideal. While the FOIA Solution comes closer, it still leaves trade secrecy in a muddled state. Thus, the No Government Trade Secrets Solution, with its benefits to both trade secrecy and transparent and accountable government, seems the most beneficial solution with the fewest downsides.

It bears acknowledging that the major, and arguably, only upside of government trade secrets is their potential to allow some governmental entities to maximize revenues and reduce costs. I am not unsympathetic to the importance of that goal, especially in a weak economy, but is it worth the price paid in muddling trade secrecy law and obscuring the operations of government in a time where cynicism towards and suspicion of government is widespread? Especially where public and private interests increasingly are being blurred with commercial interests, defeating the interests of the public at large,\(^{185}\) I conclude that it is not. The No Government Trade Secrets Solution is not perfect, but it addresses a serious problem in trade secrecy law and transparent and accountable government, and leaves a government entity with fewer options in intellectual property protection, but significant options nonetheless.

This article leaves some questions unanswered. How widespread is the use of government trade secrecy? How much information is being designated as trade secrets by government?\(^{186}\) The existence of the above examples suggest that trade secrecy is exacting a significant cost to transparent government, without necessarily creating any public benefit. If a speculative market for a good, like the RCMP’s CD-ROM, or a public school system’s blanket assertion that it cost a lot of money to create a test, like CPS’s argument, can form the basis for an exemption from the public’s right to know, then we are confronting a very powerful tool of secrecy. Additionally, the combined effect of increasing government commercial activity and budgetary pressure makes it a safe bet that the use of trade secrecy by governments will steadily increase.

The current climate of increased interest in transparent and accountable government indicates that this is a good time to reassess the existence of government trade secrets.\(^{187}\) Transparency, or at least public support for it, appears to be on the rise; witness the federal General Services Administration’s plan to release “a full database of all federal advisory committee members that can be mashed up with lobbying records and contribution databases to show the influence that resides on these important bodies.”\(^{188}\) As Ellen Miller, Executive

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\(^{185}\) See Suzanne Craig and Deborah Solomon, Bank Bonus Tab: $33 Billion, Wall St. Journal, July 31, 2009 (explaining that the “nine firms [identified in a report issued by the New York State Attorney General as having paid $33 billion in bonuses in 2008] had combined 2008 losses of nearly $100 billion. That helped push the financial system to the brink, leading the government to inject $175 billion into the firms through its Troubled Asset Relief Program.” The situation was called “shocking and appalling” by Rep. Edolphus Towns of New York). On a lighter but nonetheless disturbing [disturbing why?] note, the mayor of Topeka, Kansas recently issued a proclamation changing the name of Topeka to “Google” in an effort to lure the Internet giant to build a fiber-optic broadband network in the city. Jessica Guynn, Topeka becomes Google, Kan, for a month, Los Angeles Times, March 3, 2010.

\(^{186}\) These are questions reserved for answering in future research.

\(^{187}\) Morley Winograd and Michael Hais, Millennial Makeover at 49 (Rutgers University Press 2008).

\(^{188}\) Miller, supra note 8.
Director of the Sunlight Foundation cautions, “we can similarly expect Congress, states and municipal governments nationwide to feel pressure to release information. That is, if the public demands it.” Given the largely anomalous existence of the government trade secret, this may be the proper time to demand that this theoretically unjustifiable concept with significant negative impact on both trade secrecy law and transparent and accountable government be left as a relic of the less transparent past. In an era where information sharing and access to knowledge is technologically easier to achieve than ever before in human history, the people should have access to their trade secrets, or more precisely and accurately, their own information.

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189 Id.