

THE PEOPLE'S TRADE SECRETS?

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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 public school examination fair and accurate? Is that voting machine working so that my vote gets counted? 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, state 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 may 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 and 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

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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, Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure ("Secrecy").¹ In Secrecy, I examined the question of whether private entities engaged in the provision of public infrastructure, like voting machines and public Wi-Fi 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 purpose of trade secrecy, namely, keeping commercial 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 I, I examine the basic issues involved in finding and maintaining a trade secret. In Part II, 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, 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 the

1. David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135 (2007) [hereinafter *Secrecy*]. The present Article builds on *Secrecy* and a recently published book chapter, David S. Levine, *The Impact of Trade Secrecy on Public Transparency*, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH* 442 (Rochelle C. Dreyfuss & Katherine J. Strandburg, eds., 2011).

problem of government trade secrets may be growing. In Part III, I outline the basic principles of transparency, accountability, and democratic governance. In Part IV, 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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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.²

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 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’s 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. 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 information,³ 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.

2. *Council to Discuss “Trade Secrets and the Purchase of Property” on Tuesday*, HUDSON HUB TIMES (June 18, 2010), <http://www.hudsonhubtimes.com/news/article/4846202>.

3. *See generally*, David S. Levine, *Transparency Soup: The ACTA Negotiating Process and “Black Box” Lawmaking*, 26 AM. U. INT’L. L. REV. 811 (2011) (discussing the impact of the Internet on government transparency and lawmaking).

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 information with, at best, unclear and amorphous benefits to the public derived from maintaining the secrecy. 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 statute that mandates open government with certain exemptions, one of which will be discussed in detail in this Article.⁴ 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 ("OMB") 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

4. Memorandum from President Barack Obama to the Heads of Exec. Dep'ts & Agencies (Jan. 21, 2009), *available at* <http://www.fas.org/sgp/obama/foia012109.pdf>; Freedom of Information Act, 5 U.S.C. § 552 (2006).

5. *Id.*

6. Memorandum from Attorney Gen. Eric Holder to the Heads of Exec. Dep'ts & Agencies 1 (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

(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 optimistically 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 previously unreleased documents for public inspection.⁹ In fact, every cabinet department is supposed to unveil a new open government project.¹⁰

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-9/11.¹¹ Moreover, there has been increased use of the designation “Sensitive but Unclassified” by United States government agencies. This designation, often found on research and scientific or technological information generated by the government post-9/11, allows the information to be withheld from public view.¹² Thus, the OMB Memorandum has the potential not only to begin to reverse post-9/11 excessive secrecy but also to allow for a re-imagination of the relationship between government and its citizens at all levels, federal, state, and local.¹³

7. Memorandum from Peter R. Orszag, Director, Office of Mgmt. & Budget, to the Heads of Exec. Dep’ts & Agencies (Dec. 9, 2009), available at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

8. Ellen Miller, *A Watershed Moment in Transparency and Accountability*, THE SUNLIGHT FOUND. (Dec. 11, 2009, 5:48 PM), <http://sunlightfoundation.com/blog/2009/12/11/a-watershed-moment-in-transparency-and-accountability>.

9. Miranda Fleschert, *White House Announces 20 Agency Open Government Initiatives*, THE REPS. COMMITTEE FOR FREEDOM OF THE PRESS (Dec. 10, 2009, 3:50 PM), <http://www.rcfp.org/newsitems/index.php?i=11165>. For more recent information on the federal government’s mixed results in releasing data on the Internet, see David S. Levine, *The Social Layer of Freedom of Information Law*, 90 N.C.L. REV. (forthcoming 2012).

10. Norm Eisen & Beth Noveck, *Why an Open Government Matters*, OPEN GOV’T INITIATIVE (Dec. 9, 2009, 3:16 PM), <http://www.whitehouse.gov/blog/2009/12/09/why-open-government-matters>.

11. See Peter P. Swire, *A Theory of Disclosure for Security and Competitive Reasons: Open Source, Proprietary Software, and Government Systems*, 42 HOUS. L. REV. 1333, 1378 (2006). This does not always mean that information remains secret, but administrative errors cannot form the basis of a disclosure regime. See Iain Thomson, *U.S. Army Posted Secrets on the Web*, V3.CO.UK (July 12, 2007), <http://www.v3.co.uk/v3-uk/news/1971520/us-army-posted-secrets-web>.

12. See GENEVIEVE KNEZO, CONG. RESEARCH SERV., RL33303 “SENSITIVE BUT UNCLASSIFIED” INFORMATION AND OTHER CONTROLS: POLICY AND OPTIONS FOR SCIENTIFIC AND TECHNICAL INFORMATION (2006) available at <http://www.fas.org/sgp/crs/secrecy/RL33303.pdf>.

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*, L.A. TIMES (Mar. 21, 2010), <http://articles.latimes.com/>

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.¹⁴ As the federal government has practically dealt with this anomaly by exempting government from FOIA’s definition of a person, 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 government trade secrets, 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 to sell products to consumers, but rather to provide government services. While agencies like the Department of Energy, the National Institutes of Health, and the Department of Agriculture develop new technologies in conjunction with the private sector, the government has historically facilitated, rather than created, intellectual property.¹⁵ To the extent that the government develops intellectual property or contracts for its creation, the products developed have historically been for government use, as opposed to the private sector’s creation of products for consumers.¹⁶ 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?

From a broader perspective, as public and private interests blur and governments and businesses partner, a reconsideration of the rules for government is not only a good idea but a necessity.¹⁷ 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.¹⁸

2010/mar/21/nation/la-na-ticket21-2010mar21 (“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* Part I.B.

15. David S. Bloch & James G. McEwen, “Other Transactions” with Uncle Sam: A Solution to the High-Tech Government Contracting Crisis, 10 TEX. INTELL. PROP. L.J. 195, 213–14 (2002). See also 35 U.S.C. § 200 (2006).

16. Bloch & McEwen, *supra* note 15, at 195–96. The major and most high profile exception to this general trend is the existence of prisoner-made products. See David Dishneau, *Web Catalog Offers Prison-Made Products*, WASH. POST (Nov. 25, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/25/AR2006112500378.html>.

17. See *Secrecy*, *supra* note 1, at 191, for an extended discussion of these issues.

18. Moira Paterson, *Commercial in Confidence and Public Accountability: Achieving a New Balance in the Contract State*, 32 AUSTL. BUS. L. REV. 315, 321 (2004).

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. There is a 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. This absence is understandable in light of the fact that the government trade secret appears to be a nascent exemption from open government laws.¹⁹ But ultimately, the trend towards increased governmental commercial activity, like servicing student loans and selling databases,²⁰ combined with increasing budgetary pressure on state and local governments to provide services at the lowest possible cost,²¹ means that one can expect governments to 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 government and the public uncritically accepts the role of government as a marketplace competitor no different than Coca-Cola.

The early examples of trade secrecy application in government operations 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 I addresses the first concern by exploring the basics of trade secrecy and freedom of information laws, and how these two areas of law interact, emphasizing the theoretically discordant nature of a government trade secret. In Part II, I discuss several scenarios in which government trade secrets

19. For a rare discussion of the 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 unpublished documents like responses to Freedom of Information Act requests and sealed litigation. Assessing its prevalence will be a focus of future work.

20. See *infra* Part III.

21. Michael A. Fletcher, *States Seek Financial Help as New Fiscal Year Begins*, WASH. POST (July 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/30/AR2010063005355.html>.

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 that the use of government trade secrets is likely to increase. Part III addresses the second concern by considering governmental use of trade secrecy against the background principles of transparency, accountability, and democratic governance. In Part IV, I discuss possible solutions to the problems discussed, and Part V concludes that the best solution is to eliminate the concept of the government trade secret.

I. THE RELEVANT LAW

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

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

22. See *Secrecy*, *supra* note 1, at 136.

23. As the seminal definition of trade secrets found in the Restatement (First) of Torts ("Torts Restatement") states, "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." 4 RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

24. UNIF. TRADE SECRETS ACT, 14 U.L.A. 71 table of jurisdictions wherein act has been adopted (1985).

25. UNIF. TRADE SECRETS ACT, 14 U.L.A. 1(4) (1985) (emphasis added). The italicized terms are those that are problematic when used in connection with governments.

Coca-Cola. The formula, which 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 appear to have been written with application to governments in mind; rather, unfair competition between private actors is its singular focus.²⁷ But, as discussed below and in *Secrecy*, most states' expansive interpretation of the application of trade secrecy law allows governments to assert trade secrecy.

As I discussed in *Secrecy*,²⁸ not all states and courts endorse government trade secrets, although those that do not 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."²⁹ Nonetheless, despite the seemingly divergent paradigms of private commercial competition through secrecy and the public transparency sought from democratic government, commentators like Professor Richard Epstein have taken a different position than that of the Pennsylvania Commonwealth Court.³⁰ 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-profit³¹ and charitable organiza-

26. See *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 289 (D. Del. 1985). Noting the efforts that Coca-Cola has undertaken to protect its secret, the court explained that the formula "has been tightly guarded since Coca-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." *Id.*

27. See *Secrecy*, *supra* note 1, at 147.

28. *Id.* at 163.

29. *Hoffman v. Pennsylvania*, 455 A.2d 731, 733 (Pa. Commw. Ct. 1983).

30. Richard A. Epstein, *Cyberspace and Privacy: A New Legal Paradigm?*, 52 STAN. L. REV. 1003, 1044 (2000). 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 alleging 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 *Religious Tech. Ctr. 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. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, No. C-95-20091 RMW, 1997 U.S. Dist. LEXIS 23572, at *42 n.17 (N.D. Cal. 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

tions.³² Additionally, the UTSA definition of “persons” subject to trade secret protection includes governments and governmental subdivisions and agencies, again without any analysis or commentary.³³ The law has generally followed the restatement approach: the Ohio Revised Code, typical of most states’ laws regarding trade secrets, defines a “person” covered by Ohio’s Uniform Trade Secrets Act as including government entities.³⁴

Superficially, a government trade secret seems fine; after all, it might allow for greater efficiency in government operations or lower costs to the public for goods and services. But notwithstanding the current state of the law, which was 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.

1. Trade Secrecy Theory

Scholars have long debated the theoretical underpinnings of trade secret law.³⁵ The utilitarian theory of trade secrecy, variations of which undergird most of intellectual property law, 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.³⁶ This, of course, leads us into the unfair

a trade secret); *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629, 633–34 (S.D. Cal. 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 “use[d] proceeds from the sale of these materials . . . to support the operations” of the Church).

32. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. d (1995) (noting that “lists of prospective members and donors” are examples of “economically valuable information” that a charity might have as a trade secret).

33. UNIF. TRADE SECRETS ACT, 14 U.L.A. 1(3) (1985).

34. OHIO REV. CODE ANN. § 1333.61(C) (2005). *See also* CAL. CIV. CODE § 3426.1(c) (2011) (“‘Person’ means 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.”); N.C. GEN. STAT. § 66–152(2) (2011) (“‘Person’ means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity.”); UTAH CODE ANN. § 13-24-2(3) (“‘Person’ means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.”).

35. *See* Mark A. Lemley, *The Surprising Virtues of Treating Trade Secret Rights as IP Rights*, 61 STAN. L. REV. 311, 312 n.3 (2008).

36. As Lemley points out in *The Surprising Virtues of Treating Trade Secrets as IP Rights*, “[a]lthough under the tort theory trade secret protection is not explicitly about encouraging investments, it is plain that one consequence of deterring wrongful behavior

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 led Professor Robert Bone to pen an influential article in this area bluntly titled *A New Look at Trade Secret Law: Doctrine in Search of Justification*.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 Professor Mark Lemley's *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.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 exemption from 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

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." *Id.* at 319–20. Thus, although other considerations may come into play, both major theories share the common thread of encouraging investment as their reason for being. The Economic Espionage Act of 1996, 18 U.S.C. §§ 1831–39 (West, Westlaw through 2011 legislation), which created federal criminal liability for misappropriation of trade secrets, further amplifies the tension between the property and tort-based theories of trade secrecy protection.

37. Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241 (1998).

38. Lemley, *supra* note 35.

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*, *supra* note 1, at 147. 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 342–45. 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.

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—and 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 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 unless a statutory exemption in FOIA or other law prevents public dissemination. While trade secrecy theoretically might help taxpayers obtain the most cost-efficient government possible, other significant values in direct conflict with trade secrecy, like transparency and accountability, have even stronger moorings.⁴³ Lemley’s justification underscores the theoretical disconnect of a government trade secret, as trade secrecy is primarily used as an exemption from state freedom of information laws that encourage and mandate disclosure of public records unless an exemption applies.⁴⁴ 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 goods and services including trade secrets to be developed by government; rather, it will only mean that less

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 performed on September 15, 2011, for the phrase “government trade secret” yielded no hits involving a government trade secret as defined herein other than my own work. 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, such 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 342–45.

43. See *Secrecy*, *supra* note 1, at 158–62 for a discussion of the history of transparency as a value in democratic government.

44. See *infra* Part I.B.

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 or that they license their trade secrets. 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 made to protect the secret,⁴⁵ 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.⁴⁶

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.⁴⁷ 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 (B) at the time of disclosure or use, knew or had reason to know that his

45. See UNIF. TRADE SECRETS ACT, 14 U.L.A. 1(4)(ii) (1985).

46. 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* Part II.D(1). 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 but possible.

47. Although, as discussed above, there is nothing in model or state laws that would prevent governments 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, *supra* note 35, at 344–45. I argue in Part III that we do not want to encourage government to engage trade secrecy precisely because it flies in the face of transparency and accountability. See *infra* Part III.

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.⁴⁸

The UTSA envisions misappropriation to constitute actions by individuals or entities that generally use “improper means” or act in breach of confidence. Therefore, how could the public (as opposed to a former government employee) seeking public information 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.⁴⁹

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 nebulosity. Notwithstanding (and 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 abuse⁵⁰—than its more theoretically grounded and constitutionally based intellectual property brethren, especially copyright and patent.⁵¹ Lemley has made a similar observation with

48. UNIF. TRADE SECRETS ACT 14 U.L.A. 1(2) (1985) (emphasis added).

49. This argument is amplified in Part III.B, *infra*, which discusses the agency theory of transparency, as well as Part II.C, *infra*, which discusses another problematic aspect of the UTSA in the context of public school examinations.

50. See *infra* Part II. Of course, as more industries assert robust intellectual property rights, 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. U.S. CONST. art. I, § 8, cl. 8. Those brethren, particularly copyright and patent, also have express rules regarding their application to government. See 537 C.F.R. § 404.1(b) (2011) (discussing patent rules); Copyright Basics, U.S. COPYRIGHT OFF. 5, <http://www.copyright.gov/circs/circ1.pdf> (last visited Oct. 25, 2011) (discussing copyright rules).

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 standardless, free-roaming right to sue competitors for business conduct that courts or juries might be persuaded to deem objectionable.⁵²

As seen in Part II, 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—for example, to protect the security of the nation—and a business's 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

[r]espondents 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.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.⁵⁴

52. See Lemley, *supra* note 35, at 342–43 (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).

53. State *ex rel.* Toledo Blade Co. v. Univ. of Toledo Found., 602 N.E.2d 1159, 1163–64 (Ohio 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, 1049–50 (Ohio 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 Co.*, *supra*, cited *State ex rel. Fox v. Cuyahoga County Hospital System*, 529 N.E.2d 443, 446 (Ohio 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 [the 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. *Id.*

54. 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 Educ., 747 N.E.2d 255, 259 (Ohio Ct. App. 2000) (applying the Ohio UTSA and *Besser*, 721 N.E.2d at 1049–

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 entities receiving the incentive are governments that will create based upon legislative mandate, court order, 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 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.

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) impacts the conclusions reached.

Thus, as courts have occasionally been confronted with the oddity of a government trade secret, and as courts 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 II and III, look *outside* trade secrecy doctrine to conclude that the government trade secret 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 trade secret doctrine have been identified: (1) although the utilitarian theory is perhaps the most sound justification for trade secrecy, trade secrecy

150, and 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, because the court did not see "what independent economic value the . . . information has or how other private persons could reap some economic benefit from having it").

55. See *supra* text accompanying notes 11–13.

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 following examples.

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. All of the examples discussed below could or do 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 examples indicate, FOIA 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,⁵⁶ is designed to force disclosure and "permit access to official information long shielded from public view"⁵⁷ by permitting any citizen or business to request information from the federal government by way of a FOIA request.⁵⁸ Indeed, "[f]ew 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."⁵⁹

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

56. Christopher J. Lewis, *When Is A Trade Secret Not So Secret? The Deficiencies of 40 C.F.R. Part 2, Subpart B*, 30 ENVTL. L. 143, 153 (2000).

57. *Env'tl. Prot. Agency v. Mink*, 410 U.S. 73, 80 (1973); see also *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976).

58. *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1289 (D.C. Cir. 1983).

59. *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 971 (1975).

political power.”⁶⁰ 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. FOIA includes a number of exemptions from disclosure, including those for certain documents and information regarding national defense, foreign policy,⁶¹ law enforcement,⁶² and, as determined by the federal agency holding the information, commercial trade secrets.⁶³ 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.”⁶⁴ 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.”⁶⁵ The FOIA trade secret exemption further establishes that trade secrecy is designed and conceived with private industry in mind, not governments.

Despite an exemption for trade secrets,⁶⁶ FOIA effectively orients government away from secrecy by setting a default of disclosure unless an exemption applies. This orientation is the opposite of trade secrecy, which limits disclosure except in narrow 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, as the United States Court of Appeals for the District of Columbia Circuit found in *Gulf & Western Indus. v. United States*, the exemption does not

60. Carl Sessions Stepp, *Is Investigative Reporting Here to Stay?*, AM. JOURNALISM REV., Dec. 2005–Jan. 2006, at 67, 67 (reviewing and quoting JAMES L. AUCOIN, THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM 66 (2006)).

61. See 5 U.S.C. § 552(b)(1) (2005).

62. 5 U.S.C. § 552(b)(7).

63. 5 U.S.C. § 552(b)(4).

64. *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979).

65. Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the Open Government Act of 2007 Falls Short*, 16 COMM'LAW CONSP'CTUS 427, 440 (2008).

66. See *Citizens Comm'n on Human Rights v. Food & Drug Admin.*, No. CV 92-5313, 1993 U.S. Dist. LEXIS 21369, at *2 (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 5 U.S.C. § 552(b)(4).

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 is inappropriate. Particularly because the focus in such cases is public values such as disclosure of information through transparency, narrowly tailoring the definition of a trade secret is a good idea. For example, in rejecting the use of the Restatement of Torts definition of a trade secret⁶⁹ in FOIA's commercial trade secrets disclosure exemption,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 of trade secret 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 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—thereby properly balanced public and private interests by allowing the disclosure of information deemed to be worthy of disclosure

68. See *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 529–30 (D.C. Cir. 1979).

69. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

70. See 5 U.S.C. § 552(b)(4).

71. *Pub. Citizen Health Research Grp. v. Food and Drug Admin.*, 704 F.2d 1280, 1289 (D.C. Cir. 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 generally Stephen R. Wilson, *Public Disclosure Policies: Can a Company Still Protect Its Trade Secrets?*, 38 NEW ENG. L. REV. 265 (2004) (discussing whistleblower protection and other laws that encourage public disclosure of commercial information, often over concerns regarding trade secrecy).

in the public interest and under the intent of FOIA.⁷³ The tailoring of the trade secret definition to its context will be explored in more detail in Part IV, but *Gulf & Western*⁷⁴ underscores the notion 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.⁷⁵

Unfortunately, states appear to almost uniformly take a different approach that allows government trade secrets and ignores the theoretical disconnect. Significantly, 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 II, because most states follow the UTSA, it appears likely that state legislatures may have unwittingly allowed their governments to claim trade secrecy as an exemption to disclosure under their state freedom of information laws.⁷⁶ The Ohio example,⁷⁷ which allows a government trade secret, seems the most likely outcome under most states' laws.

A notable exception to the scenarios discussed in Part II, and one that should be a model for other states' freedom of information laws, appears in a recent opinion of Connecticut's Freedom of Information Commission ("CT Commission").⁷⁸ In *Pelto v. Connecticut*, the complainant sought a

73. *Pub. Citizen*, 704 F.2d at 1287–88 (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, 330–31 (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. See *supra* text accompanying notes 67–68.

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

76. 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 makes predicting the outcome even more difficult, it is important to emphasize that because most state courts have not confronted the issue of a government trade secret, it is impossible to say definitively how all fifty states would come out if confronted with this scenario. The purpose of this Article is to make their analysis simpler when that day comes.

77. OHIO REV. CODE ANN. § 1333.61 (2005).

78. *Pelto v. Connecticut*, No. FIC 2008-341 (Conn. Freedom of Info. Comm'n May 13, 2009) (final decision), available at <http://www.state.ct.us/foi/2009FD/20090513/FIC2008-341.htm>; see also Ryan M. Ingram, *Must Government Contractors "Submit" to Their Own Destruction?: Georgia's Trade Secret Disclosure Exemption and United Healthcare of Georgia, Inc. v. Georgia Department of Community Health*, 60 MERCER L. REV. 825, 832 (2009) (noting that "trade secrets of government agencies themselves are not exempt from disclosure" under Georgia's open government laws).

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 [Connecticut’s 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.⁷⁹

After noting that the CT Commission had never confronted the question of whether the trade secrets exemption “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 performing a textual analysis of the word “trade.”⁸⁰ 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 [UC] 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 [UC] are incidental to its primary governmental function of education. It is also found that the [UC] is largely subsidized by public funding, unlike a private business engaged in trade that depends on earned income for its continued existence.⁸¹

This analysis, like that of the Ohio Supreme Court in *Toledo Blade*,⁸² is based on a utilitarian theory of trade secrecy suggesting the absence of a need for government trade secrets. The analysis resulted in the CT Commission finding that the records were not customer lists or trade secrets under

79. *Pelto*, No. FIC 2008-341 at ¶ 32.

80. *Id.* at ¶ 38 (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.”).

81. *Id.* at ¶¶ 39–41, 47. This analysis suggests a proposed solution to the problem, discussed in Part IV, *infra*.

82. *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 602 N.E.2d 1159, 1163–64 (Ohio 1992).

Connecticut law and ordering their disclosure to the complainant.⁸³ 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. Unlike a profit-making entity that relies on income for its survival, UC 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.

The laudable utilitarian stance of the CT Commission seems to be the severe outlier in the face of the examples discussed in Part II. Nonetheless, it harbingers the faint possibility of a counter-trend that might begin to reverse the pattern that seems to be emerging in which 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.⁸⁴ Such a counter-trend currently faces an uphill battle. Even at the more open federal level, the statutory exemptions to FOIA remain in place. 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.”⁸⁵ Thus there is a lot of wiggle room for the government to find information exempt from disclosure and little apparent political interest or motivation to change the standard.

Although I encourage states' governors to follow the President's charge and issue their own open government directives, few states have adopted 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. Moreover, as pressure mounts to provide

83. Unfortunately, the Connecticut Superior Court overturned the Commission's decision and said that the University of Connecticut could create a trade secrets exemption from public disclosure under Connecticut state law. *See Univ. of Conn. v. Freedom of Info. Comm'n*, No. HHBCV094021320S, 2010 Conn. Super. LEXIS 996 (Conn. Super. Ct. Apr. 21, 2010). The court based its analysis on precisely the problems discussed above: Connecticut freedom of information law defines a “person” as including the government and the standard definition of a trade secret is broad enough to include a variety of information. *Id.* at *22–24. The decision is pending appeal. *UConn Fights to Keep Donor List*, CBS N.Y. (Feb. 13, 2011, 5:11 AM), <http://newyork.cbslocal.com/2011/02/13/uconn-fights-to-keep-donor-list-secret>. Nonetheless, the persuasiveness of the administrative decision remains.

84. *See State ex rel. Dayton Newspapers v. Dayton Bd. of Educ.*, 747 N.E.2d 255, 259 (Ohio Ct. App. 2000).

85. Orszag, *supra* note 7, at 6. Indeed, the trend, if any, is in favor of more trade secrecy. A recently proposed FOIA rule change from the United States Department of Justice regarding its handling of FOIA requests would make it easier for private entities to claim the trade secret exemption under FOIA. *See John Wonderlich, Obama's DOJ Seeks to Weaken the FOIA*, SUNLIGHT FOUND. (Oct. 28, 2011, 5:36 PM), http://sunlightfoundation.com/blog/2011/10/28/obamas-doj-seeks-to-weaken-the-foia/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+SunlightNews+%28Sunlight+News%29.

government services on smaller budgets and the trend of outsourcing government services continues, trade secrecy may play a more prominent role in the creation of government services. This trend would have a significant impact on public disclosure because the trade secret exemption to disclosure is often the government's last resort argument. 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, the subject information would likely have been disclosed because other exemptions from disclosure requirements would have been more difficult or impossible to apply.⁸⁶ 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.

Regardless of the theoretical rationale, the concept of a "government trade secret" is an anomaly because its existence is 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). Instead, the government trade secret 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 no utilitarian construct, can justify or even explain such an application. The very existence of a government trade secret can only add to the theoretical confusion marring trade secrecy generally. 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.

II. SPECIFIC EXAMPLES AND WHAT THEY TEACH US

Having examined the structure and purposes of trade secrecy, its theoretical underpinnings, and how it operates under federal and state freedom of information laws, we can now examine examples 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 suggests how courts and legislatures can rectify the problem, the focus of Part IV. Moreover, the examples suggest the real possibility of increased use of trade secrecy by governments. The examples can be divided into three types of scenarios: (1) a governmental entity directly competing with the private sector (examples A and perhaps B, below),

86. It is for that primary reason that I see the government trade secret exemption 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 exemption reasonably fits the scenario.

(2) the government not competing at all with the private sector (examples C and D(1)), and (3) the government contracting or partnering with the private sector (examples D(1) and (2)).

These examples also illustrate the underlying reasons why governments might want to assert trade secrecy. Aside from the obvious practical reason that it allows for an exemption from state freedom of information laws, other rationales also come into play: 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 desire to avoid public scrutiny.

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

In *Parsons v. Pennsylvania Higher Education Assistance Agency*,⁸⁷ three reporters brought a petition for review of a decision in which the Pennsylvania Higher Education Assistance Agency (PHEAA), a governmental agency that administers student loans, refused to disclose certain documents by classifying them, in part, as trade secrets under Pennsylvania's Trade Secrets Act (PTSA).⁸⁸ 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 [PHEAA] earns, not from appropriations," PHEAA was still subject to the "Right-To-Know Law."⁸⁹

Reaching the court on appeal as a case of first impression, the question was whether the PHEAA could claim exemption from the Right-to-Know

87. *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177, 182 (Pa. Commw. Ct. 2006), *app. denied*, 591 Pa. 686 (2007).

88. Pa. Unif. Trade Secrets Act, 12 PA. CONS. STAT. ANN. §§ 5301–08 (West 2004).

89. See RIGHT-TO-KNOW ACT, ch. 3, 65 P.S. §§ 66.1–66.9 (1957), *repealed by* 2008, Feb. 14, P.L. 6, No. 3, § 3102(2)(ii), effective Jan. 1, 2009 (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. . . ."); *Parsons*, 910 A.2d at 182 ("All of PHEAA's expenses are paid from money that it earns, not from appropriations. PHEAA uses its retreats, attended by Board members, employees, clients and customers, to promote its business, and it pays all of the expenses for food, lodging and so forth. No official action is taken at retreats and no minutes are kept.").

Law's requirement of public disclosure of governmental information. Illustrating the complications inherent when a government agency acts 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.⁹⁰

Significantly, PHEAA noted that its Board is “controlled” by 16 legislators “acting as agents of the [Pennsylvania] General Assembly.”⁹¹ 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.”⁹²

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.⁹³

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 instrumentality and that its earnings are public moneys about which the public has a right to know.”⁹⁴ 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.”⁹⁵ Nonetheless, the Court’s holding undermined these laws

90. *Parsons*, 910 A.2d at 184; see also *Board Members*, PHEAA, <http://www.pheaa.org/about/board-members/index.shtml> (last visited Nov. 11, 2011) (listing members of the Board, all of whom are elected officials).

91. *Parsons*, 910 A.2d at 186.

92. *Id.*

93. *Id.* at 184.

94. *Id.* at 186.

95. *Id.*

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.”⁹⁶

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 undoubtedly last-ditch effort to prevent the disclosure and public scrutiny of the information,⁹⁷ the Court allowed PHEAA to redact information that would fall under the statutory definition of a trade secret (i.e., new lines of business, new technology, and 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 understatement that PHEAA “may not conduct its affairs precisely as a private entity does.”⁹⁸ Indeed, not “precisely,” but because the Court was content to ignore the crucial differences between PHEAA and a private entity when deciding whether PHEAA was required to release material that met the definition of a trade secret, they were treated as a *de facto* private entity. This, increasingly, is how governmental entities are treated; trade secrecy underscores the risks associated with such *de facto* treatment.

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.⁹⁹ Had the court considered a utilitarian analysis, it may have concluded that PHEAA would remain in existence at its most fundamental level and continue to market and offer its services to the public regardless of trade secrecy protection. PHEAA would have to 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 public¹⁰⁰ and Pennsylvania state law directs its activities.¹⁰¹ Nor did the

96. *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.” RIGHT-TO-KNOW ACT § 66.3-2 (1957).

97. It seems 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. None of the other typical exemptions from disclosure, save perhaps an exemption for commercially valuable information, would seem to apply.

98. *See Parsons*, 910 A.2d at 186.

99. The theoretical underpinnings of trade secrecy were apparently irrelevant to the court, as it all but ignored them.

100. *See Parsons*, 910 A.2d at 186.

101. *See Student Financial Aid*, 22 PA. CODE § 121.1–406 (2000).

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 designation "business" with "government agency," 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 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? Aside from the potentially corrupting influence of private financing in our elections process generally, one could imagine actual criminal acts, like 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 trade-off 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 government agency loses some competitive advantage.

The tougher question becomes when (or if) the competitive advantage outweighs the public's desire or need to know. Like private sector actors, 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 United States Air Force ("USAF") example below (example D(2)), bidders in the 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.¹⁰²

Of course, that consideration raises the question of how far one can go with that argument. As Moira Paterson notes, "if such logic were taken to its conclusion, the cost of any government activity could be considered a trade

102. See Paterson, *supra* note 18, at 327. *But see infra* Part II.D(2) (USAF example).

secret, if there were a possibility that at some time that service could be put out to tender.”¹⁰³ Arie Freiberg 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 contractualisation will continue to be based on ideology rather than economics.¹⁰⁴

Thus, the operation of government trade secrecy in a climate in which secrecy is considered an acceptable norm for government contracting allows 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.

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.¹⁰⁵ OTB’s president was appointed by the Mayor of the City of New York.¹⁰⁶ 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.”¹⁰⁷ 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.

103. See Paterson, *supra* note 18, at 327.

104. Arie Freiberg, *Commercial Confidentiality, Criminal Justice and the Public Interest*, CURRENT ISSUES IN CRIM. JUST., Nov. 1997, at 125, 136.

105. See Off-Track Betting, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/h/horse_racing/offtrack_betting/index.html (last updated Dec. 9, 2010). OTB has recently ceased operations but, as a hypothetical, the example is still useful.

106. N.Y. RACING, PARI-MUTUEL WAGERING AND BREEDING LAW § 502.1 (McKinney 2000).

107. See Off-Track Betting, *supra* note 105.

However, faced with a request for such documents, OTB could have chosen to assert a trade secret exemption to freedom of information laws. As the court decided in the PHEAA case, a state court in any state that allows government trade secrets might find that the information is OTB's trade secret and therefore exempt it from disclosure. 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.¹⁰⁸ Nonetheless, using reasoning similar to the court's in the PHEAA case, OTB would have been 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.¹⁰⁹ The government seems to be jumping on the property rights bandwagon. The government does not, however, generally need to be incentivized to innovate by way of pecuniary gain, although one could 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 fewer ideas or services if the trade secrets exemption were unavailable.

B. Government as Provider of Commercial Goods: *Firearm Registry: Royal Canadian Mounted Police*

Canada is facing similar issues grappling with the increasingly commercial aspects of governmental operations. 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.¹¹⁰ The CD-ROM was used by the RCMP to "assist it in identifying the firearms that its members encounter in police work."¹¹¹

108. The latter scenario, where guesswork replaces real and verifiable information, is what late Senator Daniel Patrick Moynihan eloquently labeled "ignorant armies clash[ing] by night." *Secrecy*, *supra* note 1, at 16 (discussing at length the benefits to society of less governmental secrecy).

109. Of course, it would be helpful if trade secrecy stood on a widely accepted theoretical footing.

110. See OFFICE OF THE INFO. COMM'R OF CAN., ANNUAL REPORT 1999–2000: SELLING GOVERNMENT EXPERTISE 60–61 (2000), available at <http://www.infocom.gc.ca/eng/rp-pr-ar-ra-archiv.aspx>.

111. *Id.* at 60.

Compiled by RCMP at a cost of three million dollars, police organizations around the world have shown interest in the data.¹¹²

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.¹¹³ The complainant, a Canadian citizen who chose not to become a verifier, requested a copy of the CD-ROM from RCMP. RCMP denied access, stating that:

[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.¹¹⁴

Subsequently, the complainant appealed the decision to the Canadian Information Commissioner (“CIC”), which 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 [are] reasonably likely to have substantial value” are 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.”¹¹⁵ The CIC explained in summary 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 interest in partnership agreements to produce future registries. Thus, the RCMP was engaged in the creation of a “commercial product.”¹¹⁶

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

112. *Id.*

113. *Id.*

114. *Id.* This explanation, which borrows its language from the Canadian Access to Information Act, *see infra* note 115, seems to largely mirror the UTSA definition of a trade secret. *See* UNIF. TRADE SECRETS ACT 14 U.L.A. 1(4) (1985).

115. *See* ACCESS TO INFORMATION ACT, R.S.C. 1985, c. A-1. The Act exempts “information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution.” *Id.* It also exempts “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 or employee of priority of publication” *Id.*

116. OFFICE OF THE INFO. COMM’R OF CAN., *supra* note 110, at 61.

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 speculative ability of the government of Canada to eventually sell the CD-ROM for profit prevented the information, created with taxpayer funds, from being freely distributed to its own citizens. As with the PHEAA example, the commercial interest asserted by a government, rather than openness, was the main consideration.

The RMCP case 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.”¹¹⁷ 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.”¹¹⁸ 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 of disclosure on a government’s net revenues 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. Government in Its Traditional Role: *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 held that public school semester examinations, after being administered to ninth-grade students, constituted trade secrets and were therefore exempt from disclosure under Ohio’s open government laws.¹¹⁹ Here, the court implicitly used a utilitarian theory of trade secrecy

117. JOSEPH STIGLITZ ET AL., THE ROLE OF GOVERNMENT IN A DIGITAL AGE 70 (2000), available at http://archive.epinet.org/real_media/010111/materials/stiglitz.pdf.

118. OFFICE OF THE INFO. COMM’R OF CAN., *supra* note 110, at 61.

119. State *ex rel.* *Perrea v. Cincinnati Sch.*, 916 N.E.2d 1049 (Ohio 2009); OHIO REV. CODE ANN. § 149.43 (West 2011) (listing exceptions to disclosure listing); Ohio Uniform Trade Secrets Act, OHIO REV. CODE ANN. §§ 1333.61–69 (West 2011). It is important to note that CPS paid a private entity to develop the examinations, but CPS alleged that the examinations were its own trade secrets as opposed to those of the private entity, and the private entity did not appear in the case.

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.

Perrea, a teacher in CPS, requested the examinations from CPS because he was "concerned about the design, implementation, and scoring of the semester exams."¹²⁰ 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."¹²¹

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 reuses the same questions each year.¹²² The court rejected Perrea's argument that the placement of essay question scoring guidelines on CPS's intranet constituted public dissemination of the exams (and hence rendered 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.¹²³ Furthermore, the court accepted CPS's 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.¹²⁴ Thus, relying on *Besser*,¹²⁵ which established the principle that governments may have trade secrets in Ohio, the court found that the examinations were not public records, but rather trade secrets exempt from disclosure.

120. *Perrea*, 916 N.E.2d at 1051.

121. *Id.*

122. *Id.* at 1053.

123. *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." Transcript of Oral Argument, *id.* 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).

124. *Perrea*, 916 N.E.2d at 1053.

125. *See State ex rel. Besser v. Ohio State Univ.*, 721 N.E.2d 1044 (Ohio 2000).

Certainly, one may be sympathetic to a city board of education's desire 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.

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.*"¹²⁶ 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 not surprising, since it is hard to conceive who 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 the examinations in a way cognizable by the law.¹²⁷ Even if the court had envisioned CPS students or teachers as "other persons" 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.¹²⁸ Therefore, the court missed the point because the law does not fit the public body context in which it has been situated.

Moreover, Ohio law, following common law principles, requires courts to consider the following factors, which all sound in competition, 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

126. *Perrea*, 916 N.E.2d at 1053 (quoting Ohio Unif. Trade Secrets Act, OHIO REV. CODE ANN. § 1333.61(D) (West 2011) (emphasis added)).

127. 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 schools.

128. *See State ex rel. Dayton Newspapers v. Dayton Bd. of Educ.*, 747 N.E.2d 255, 259 (Ohio Ct. App. 2000).

time and expense it would take for others to acquire and duplicate the information.¹²⁹

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, the court 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.

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 especially given the severe impact on transparency and accountability created by finding a government trade secret.

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 since trade secrecy law has always been conceived as involving competition between 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.

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 court (a) 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 do 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 *carte blanche*, the decision about whether disclosure is warranted becomes easy because the public's interest has nothing to do with the decision. *Perrea* represents a primary example of the simple fact that when we take a utilitarian doctrine designed with private entities in mind and apply it 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 citizen's request to

129. *Perrea*, 916 N.E.2d at 1053 (emphasis added). This list is problematic on its face since it seems to downplay the commercial competition framework of trade secrecy.

analyze public school examinations that have already been administered to independently determine their efficacy,¹³⁰ but if viewed as merely a request to disclose a garden-variety trade secret, it is not so strange and even arguably correct.¹³¹

D. Public Contracting: *County of San Diego and the United States Air Force*

The next 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, the San Diego scenario, like *Perrea*, is an example of 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 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. Government's Core Functions: 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

130. 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 (Ohio 1998).

131. 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, 17 U.S.C. § 106 (1976) (allowing owners to control reproduction, distribution, and display of original works). I raise this point to emphasize that I am addressing only the inappropriateness of the trade secrecy exemption 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.

heading "Proprietary Considerations," the parties agreed, 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 [the] County [of San Diego]."¹³² Thus, San Diego contracted for the trade secret rights in its modifications to voting machines that it purchased from Diebold.¹³³

Why San Diego placed this language in the contract is unclear, 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, that information relating to those modifications is exempt from disclosure under trade secrecy, pure and simple.¹³⁴ Why allow the public to second-guess and challenge elections if trade secrecy law can be asserted to prevent such problems?

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,¹³⁵ it is hard to identify who or what might compete with or gain economic advantage over 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

132. County of San Diego Registrar of Voters Direct Record Electronic Voting System Contract No. 46619, ¶ 17. (Dec. 9, 2003), *available at* http://accurate-voting.org/contracts/CA/San_Diego/CA_sandiego_2003.pdf.

133. On behalf of the County, the contract is signed by its Director, Department of Purchasing and Contracting, and a Senior Deputy County Counsel. *Id.*

134. Whether it would be successful is another matter. While it is beyond the scope of the Article to thoroughly examine California law, California Civil Code § 3426 ("California UTSA") adopts the UTSA and grants trade secret holders protection from misappropriation. CAL. CIV. CODE § 3426 (2011). 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. CODE § 6250 ("California Act"), does not expressly reference trade secrets as information exempt from public disclosure. CAL. GOV. CODE § 6250 (2011). 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, San Diego could not either. *Id.*

135. *Id.*

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.¹³⁶

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 trade secrecy protection 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 the public's own voting machines.¹³⁷ 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 their heads, 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. Even in our age of excessive lobbying and closed-door lawmaking, this is a shocking display of disregard for the public's interest in accountable government.

2. Government as Contractor: 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*,¹³⁸ the United States Air Force 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

136. See *Secrecy*, *supra* note 1, at 180–83 for an extended discussion of this issue.

137. Perhaps San Diego plans to sell or license its modifications back to the vendor or another municipal entity, but that is not apparent from the document, and contract law can achieve this result without resort to trade secrecy.

138. *McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162 (D.C. Cir. 1995); see also David Levine, *The Impact of Trade Secrecy on Public Transparency*, in *THE LAW AND THEORY OF TRADE SECRECY* 430–32 (Rochelle C. Dreyfuss and Katherine J. Strandburg eds., 2011) (from which this subpart is, in part, excerpted).

USAF in a “reverse” FOIA action to enjoin disclosure of, among other information, the line item prices.¹³⁹

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.”¹⁴⁰ 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 trade secret question.

It is indeed “passing strange” that such information could be designated as a trade secret; after all, this involved expended taxpayer dollars.¹⁴¹ 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 another 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,¹⁴² it is quite conceivable that, based on 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

139. *McDonnell Douglas Corp.*, 57 F.3d at 1165.

140. *Id.* at 1167.

141. See Gregory H. McClure, *The Treatment of Contract Prices under the Trade Secrets Act and Freedom of Information Act Exemption 4: Are Contract Prices Really Trade Secrets?*, 31 PUB. CONT. L.J. 185 (2002) (taking the position that contract prices are not trade secrets).

142. Compare UNIF. TRADE SECRETS ACT § 1–4 and *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 289 (D. Del. 1985) with *Public Citizen Health Research Grp. v. Food and Drug Admin.*, 704 F.2d 1280, 1289 (D.C. 1983) (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).

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.

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.¹⁴³ 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 inappropriate 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, more frequent 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 an open, deliberative fashion.

III. 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 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.¹⁴⁴ While we might want 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 theoretically have some modicum of pecuniary value or keep costs marginally lower. The mere possibility that a government could gain com-

143. 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.

144. See *Secrecy*, *supra* note 1, at 164–65.

mercial 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's 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 or partner with them. Governments are in the "business" of providing goods and services to the public, and 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.¹⁴⁵ As the Canadian Information Commissioner predicted (example B), 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. 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 also as a sword to assert trade secret misappropriation.

Unless a strong and pervasive conception of government that prioritizes transparency and accountability develops, the increasing involvement of government in the commercial sphere could create a situation where applying trade secret protection in the government context does not appear to be theoretically problematic. Especially as trade secrecy's theoretical underpinnings remain in flux or are believed to not exist,¹⁴⁶ trade secrecy could be found to be in harmony with amorphous public or governmental values. Trade secrecy's very lack of a strongly 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. In PHEAA, while 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.¹⁴⁷ Akin to Professor Epstein's argument,¹⁴⁸ the governmental entities met the test for trade secret application, and that was the end of the analysis from a preclusion standpoint. The basic threshold of applicability was met. So why

145. *IRS FreeFile*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/efile/article/0,,id=118986,00.html> (last updated Oct. 18, 2011).

146. Bone, *supra* note 37.

147. See *supra* Part II.A, II.C.

148. Epstein, *supra* note 30, at 1044–45.

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, divorcing those tests from (a) any clear and robust theoretical underpinning in trade secrecy or democracy, (b) any notion of the public's interest in the hidden information, or (c) the context of promoting fair private competition and punishing misappropriation.

If we view government as primarily a commercial actor, as in the PHEAA example, 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 the government does not yet act in a commercial manner generally and we do not uniformly view government 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.¹⁴⁹

Before automatic trade secrecy becomes a conscious, standard operating procedure for governments, a fundamental question must be answered: 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 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.¹⁵⁰ 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."¹⁵¹ In order to have the possibility of ac-

149. Note that the use of trade secrecy in the private sector is on the rise. See *Secrecy*, *supra* note 1, at 139. This trend could be mirrored in the public sector.

150. See *Secrecy*, *supra* note 1, at 158–62 (discussing at length the history of these ideas and their centrality to democratic government).

151. 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, 2073 (2005).

countability, transparency is required.¹⁵² 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.”¹⁵³

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 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.”¹⁵⁴ Given its application to creating corporate law and in other fields, it is logical to apply it to public officials generally in the context of commercial trade secret law.

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.”¹⁵⁵ Thus, deliberative democracy theory stands as the modern alternative to relying on elections to achieve accountability. Professor 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 requirement or expectation that they give reasoned explanations for their decisions that meet those criteria.¹⁵⁶

Deliberative democracy theory has a number of public benefits. Primarily, it allows for citizens to “engage in fairly sophisticated deliberation about public policy.”¹⁵⁷ 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.¹⁵⁸ Moreover, it can expose common ground among citizens.¹⁵⁹ Ultimately, it can lead to better decisions.

152. Jane Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 756 (2004).

153. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1164 (2000).

154. Renee M. Jones, *Legitimacy and Corporate Law: The Case for Regulatory Redundancy*, 86 WASH. U. L. REV. 1273, 1281 (2009) (citing Staszewski, among other authors, for the assertion that “[d]eliberative democracy has been embraced as an analytical framework by legal scholars working in a range of fields”).

155. Staszewski, *supra* note 151, at 1254.

156. *Id.* at 1255.

157. Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1303 (2004).

158. *Id.*

159. Staszewski, *supra* note 151, at 1279–85.

But deliberative democracy 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.¹⁶⁰

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’s 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.

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:

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,

160. *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, it is beyond the scope of this Article to fully critique it. See ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 196 (2007). Rather, I apply it here because it is 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.

or politician will find a motive to control every government information product or service, the temptations are there.¹⁶¹

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.”¹⁶² 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.”¹⁶³ Trade secrecy, at least at the state level, appears to be an exception to that statement. Trade secrecy offers an opportunity to control the public dissemination of 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.”¹⁶⁴

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,¹⁶⁵ with government as the public’s agent.¹⁶⁶ 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.”¹⁶⁷ While this does not always lead to a failure in carrying out governmental duties in the public’s interest,¹⁶⁸ because trade secrecy has no strong theoretical basis for its very existence in the government context, it is ultimately a needless risk to take.

161. Robert M. Gellman, *Twin Evils: Government, Copyright and Copyright-Like Controls over Government Information*, 45 SYRACUSE L. REV. 999, 1046 (1995) (citation omitted).

162. COMM. ON GOV’T OPERATIONS, ELECTRONIC COLLECTION AND DISSEMINATION OF INFORMATION BY FEDERAL AGENCIES: A POLICY OVERVIEW, H. R. REP. NO. 99-560, at 36 (1986) (Conf. Rep.).

163. *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”).

164. 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).

165. The principal is the person who is delegating authority.

166. ARTHUR LUPIA AND MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 79 (1998).

167. *Id.*

168. *Id.* at 79–81.

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.”¹⁶⁹ 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 or litigation, to have any chance of access to the undisclosed information. 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 severely diminished. At that point, the only option left may very well be to attempt to “throw the bums out.” As stated in the OMB Memorandum, “[t]imely publication of information is an essential component of transparency.”¹⁷⁰ Thus, the existence of a government trade secret can increase the transaction costs associated with accountability.

IV. 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 and 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 I and III, is that the relevant stakeholder for government is the “diffuse public,” and accountability and transparency are the primary guiding principles.¹⁷¹ The second, as demonstrated in Part II, is that information designated as trade secrets can be of public concern; trade secrets are not the exclusive interests of private parties.¹⁷²

169. VERMEULE, *supra* note 160, at 196.

170. Orszag, *supra* note 7, at 2; *see also* Levine, *supra* note 9.

171. *See* Jody Freeman, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1285, 1303 (2003).

172. This is surprisingly not a settled point. *See, e.g.*, 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 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 Commission¹⁷³ and clarifying trade secrecy law generally by redefining “trade secret” to unambiguously state that there is no such thing as a government trade secret, thereby eliminating the theoretical trade secrecy doctrine problems 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”).¹⁷⁴

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 of trade secrecy would never come up, as the law would eliminate government trade secrets. This would be particularly beneficial in contexts such as CPS (example C) and San Diego (example D(1)), which seem to be egregious examples of trade secrecy gone awry. Under this solution, the government trade secret becomes a non-issue and courts would have a relatively simple bright-line test to apply. This solution has the added benefit of not requiring any specific change in freedom of information laws, to the extent that a state's law has a trade secret exemption. Moreover, as trade secrecy is not used by governments 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 to this solution comes in the context of PHEAA (example A). 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 can.¹⁷⁵ If a government agency

173. See *supra* notes 53, 78–82 and accompanying text.

174. Of course, a fourth choice is to do nothing at all, but I reject that out of hand.

175. See Tammy D'Amato, *The Patent Scorecard 2009—Government Agencies*, INTL. PROP. TODAY (October 2009), http://www.iptoday.com/articles/2009-10-damato.asp#_ftn1 (noting that “government agencies do not patent heavily”).

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 trade secrecy because of its public disclosure requirements and limited duration of monopoly. A patent application, which usually becomes public 18 months after filing,¹⁷⁶ must “describe, enable, and set forth the best mode for carrying out the invention,”¹⁷⁷ 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:

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.¹⁷⁸

In contrast, while trade secrecy allows reverse engineering and independent discovery (an often time intensive or impossible endeavor), trade secrecy by its very definition abhors both transparency and public accountability.¹⁷⁹ There is no such thing as “written description and enablement” made available to the public in trade secrecy, nor can there be. Thus, abandoning trade secrecy in government and limiting protection to that which is patentable is likely the right, if not perfect, answer.¹⁸⁰

176. 35 U.S.C. § 122(b)(1)(A)(2006).

177. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 736 (2002) (citing 35 U.S.C. § 112 (1994)). The “best mode” requirement, it should be noted, has been significantly weakened and rendered almost meaningless as a result of the America Invents Act. See Zahra Hayat et al., *How the America Invents Act Will Change Patent Litigation*, REUTERS (Nov. 18, 2011), http://newsandinsight.thomsonreuters.com/New_York/Insight/2011/11_-_November/How_the_America_Invents_Act_will_change_patent_litigation (noting that failing to meet the best mode requirement is no longer a basis for patent invalidity).

178. *Winston Research Corp. v. 3M Corp.*, 350 F.2d 134, 138 n.2 (9th Cir. 1965) (citation omitted).

179. See *Secrecy*, *supra* note 1, at 146–47 (discussing reverse engineering and independent discovery).

180. It is important to recognize that commercial enterprises face real alternatives to secrecy that are the subject of recent scholarly works. See HENRY CHESBROUGH ET AL., *OPEN INNOVATION: RESEARCHING A NEW PARADIGM* 170–74 (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 also Jim Chen, *Biodiversity and Biotechnology: A Misunderstood Relation*, 2005 MICH. ST. L. REV. 51, 79–81 (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*

Whether this solution would create the most profitable outcome for governments is, for purposes of this argument, secondary to the fact that transparency and accountability would be increased under such a system and the theoretical morass in trade secrecy would be 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.¹⁸¹ 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.¹⁸² Nonetheless, the fact remains that trade secrecy law serves interests that are anathema to basic values of transparency and accountability, and the sacrifice of greater public accountability diminishes the importance of the purely pecuniary advantages of trade secrecy.

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 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.¹⁸³ 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

Patent Law Technology-Specific?, 17 BERKELEY TECH. L.J. 1155, 1161–63 (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. See DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* (2009) (detailing various criticisms of patent law).

181. See BURK & LEMLEY, *supra* note 180 and accompanying text.

182. It is unclear how much of a difference there would be in terms of patentability in the government context compared to the business context, since governments rarely seek patent protection 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)* 13 (Nat'l Bureau of Econ. Research, Working Paper No. 7552, 2000) (noting 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, it seems possible that some of PHEAA's undisclosed information might be patentable. See BURK & LEMLEY, *supra* note 180.

183. Cohen et al., *supra* note 182, at 17–18.

disclosure of valuable information, like the United States Army (which operates power generating facilities through the Corps of Engineers)¹⁸⁴ as well as the Departments of Energy and Health and Human Services, use patents and operate without trade secrecy as an exemption to disclosure.¹⁸⁵ The federal government's ability to function despite the lack of a trade secret FOIA exemption suggests that states probably do not need this incentive either.

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 exemptions¹⁸⁶ 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 secret exemption.

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

2. FOIA Solution

The FOIA Solution is similar to the No Government Trade Secrets Solution but with more downsides. Like the CT Commission approach, it is a bright-line solution that eliminates the government trade secret exemption 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 created by the pre-

184. *Electric Power Industry Overview 2007*, U.S. ENERGY INFO. ADMIN., <http://www.eia.doe.gov/cneaf/electricity/page/prim2/toc2.html> (last visited Feb. 4, 2011).

185. See D'Amato, *supra* note 175.

186. See *supra* notes 61–63 and accompanying text.

vious solution would be created here as well. This solution also has the benefit of having strong precedent behind it, namely FOIA and United States Courts of Appeals decisions.

But the FOIA Solution 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, both of which would face significant political hurdles to their implementation, 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 PHEAA-scenario downsides. As I discuss more thoroughly below, however, either of these solutions seems 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.”¹⁸⁷ This definition is certainly narrower than that of the UTSA¹⁸⁸ and would force a governmental entity to specifically identify how the requested information is, in fact, directly connected to their commercial efforts. 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.

But 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 is related, (2) the number of competitors, degree of

187. *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1288–89 (D.C. Cir. 1983).

188. *See* UNIF. TRADE SECRETS ACT 14 U.L.A. 1(4) (1985).

competition, and other characteristics of the market, (3) how information claimed to be exempt is related to criteria upon which a government contract is awarded, and (4) the degree to which disclosure would put a competitor at an advantage.¹⁸⁹ 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) it 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 could form the basis of a balancing test for government trade secret disclosure generally with minor alterations (like eliminating the third factor entirely). In tandem with the *Public Citizen* trade secret definition, this test could be an attractive solution. Especially as there is a presumptive public interest in government trade secrets that eclipses that in 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 . . . [m]ere assertions of commercial value or threat to competitive position will not be sufficient to justify the exemption. Clear, direct evidence is required.”¹⁹⁰ 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” to justify the exemption 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.¹⁹¹

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

189. Paterson, *supra* note 18, at 327 (citing the New Zealand Ombudsman's Practice Guidelines B4.2, § 9(2)(b)(ii)).

190. OFFICE OF THE INFO. COMM'R OF CAN., *supra* note 110, at 60–61.

191. See SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, FREEDOM OF INFORMATION ACT ANNUAL REPORT, FISCAL YEAR 2009 6 (2009), available at <http://www.sigir.mil/files/foia/2009/FOIA-AnnualReportFiscalYear2009.pdf> (“Exemption 4 [from FOIA]: trade secrets and other confidential business information”).

relation to its private competitors, a goal that has been long considered key to government involvement in commerce.¹⁹²

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 than have a secret of potentially infinite duration, like the Coca-Cola formula,¹⁹³ 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 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.¹⁹⁴

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 this solution. Also, because it uses a multi-factor test, this solution would create 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.¹⁹⁵ 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 *ad hoc* decisions regarding where the line between a "public concern" justifying disclosure and a "private concern" prohibiting disclosure should be drawn.¹⁹⁶

192. COMM. ON GOV'T OPERATIONS, *supra* note 162, at 59 ("[A]n agency that unavoidably competes with the private sector . . . must compete fairly.").

193. See *supra* note 26 and accompanying text.

194. 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.

195. Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts after Eldred*, 44 *Liquormart*, and *Bartnicki*, 40 *HOUS. L. REV.* 698, 739–49 (2003); see also Alex Eaton-Salners, Note, *DVD Copy Control Association v. Bunner: Freedom of Speech and Trade Secrets*, 19 *BERKELEY TECH. L.J.* 269, 282–83 (2004) (criticizing the decision of the California Supreme Court because its "formulation and application of the public concern doctrine was incorrect").

196. Similarly, the United States Supreme Court has struggled with the definition of a matter of "public concern" in First Amendment jurisprudence. See *Dun & Bradstreet, Inc. v.*

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.

CONCLUSION

The goal of this Article is 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 secrecy or harmonize the differing core values of commerce and government. The proper goal is to have public transparency without coercion and without having to resort to the regulatory or administrative processes or to the courts. The goal should be the “presumption of openness,” and the Public Citizen Solution would 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 upside, and arguably the 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 where public services are being drastically cut, 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 and getting worse? Especially where public and private interests are increasingly blurred with commercial interests, defeating the interests of the

Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (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). 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 muddled future notwithstanding CT Commission’s opinion.

public at large,¹⁹⁷ I conclude that it is not. The public, sensing that it knows less and less about how political decisions are made, has developed a fundamental lack of trust and confidence in its elected and non-elected public officials. At the same time, commercial interests generally are receiving increasingly favored treatment in the law with limited meaningful public discussion or debate. 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 significant, though fewer, options in intellectual property protection.

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?¹⁹⁸ 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.¹⁹⁹ Transparency has its forward-thinking ambitions; witness the federal General Services Administration's 2009 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."²⁰⁰ As Ellen Miller, Executive Director of the Sunlight Foundation, cautions, "we can similarly expect Congress, states and municipal governments nationwide to feel pressure to

197. See Suzanne Craig & Deborah Solomon, *Bank Bonus Tab: \$33 Billion*, WALL ST. J., 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). This helped push the financial system to the brink, leading the government to inject \$175 billion into the nine firms through its Troubled Asset Relief Program." The situation was called "shocking and appalling" by Rep. Edolphus Towns of New York. *Id.* On a lighter but nonetheless disturbing 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*, L.A. TIMES (Mar. 3, 2010), <http://articles.latimes.com/2010/mar/03/business/la-fi-google-topeka3-2010mar03>.

198. These are questions reserved for answering in future research.

199. See, e.g., Morley Winograd and Michael Hais, *MILLENNIAL MAKEOVER: MY SPACE, YOUTUBE, AND THE FUTURE OF AMERICAN POLITICS* 49 (Rutgers University Press 2008); LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

200. Miller, *supra* note 8.

release information. That is, if the public demands it.”²⁰¹ While we are far from the ideal deliberative democracy, given the largely anomalous existence of the government trade secret, now is the proper time to demand that this theoretically unjustifiable concept with significant negative effects on both trade secrecy law and transparent and accountable government be left as a relic of the less transparent past. In an era where the sharing of useful information 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.

201. *Id.* The significant shortcomings in our current efforts to maintain a modern transparent government are discussed in Levine, *supra* note 9.