DRAFT 7/13/07 – DO NOT QUOTE

Rough Work-in-Progress Abstract
Prepared for IPSC, August 9-10, 2007

Incentivizing Government: The People's Trade Secrets

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Introduction

This article is the flip side of my previous article, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure* ("Secrecy").[2] In Secrecy, I examined the question of whether private entities engaged in the provision of public infrastructure, like voting machines and public wifi Internet access, should be allowed to shield information regarding their products and services from public disclosure by way of trade secrecy. This is a question of applying democratic values like transparency and accountability to private entities, the practical effect of which is in direct conflict with the purpose of trade secrecy, namely keeping information private. I concluded, in essence, that, as applied to public infrastructure, trade secrecy should not be utilized by private entities engaged in its provision.

In this article, the converse question is asked: should government be allowed to shield information that it created from public disclosure by way of trade secrecy? 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. Rather, I am talking about information that the government itself creates and which would meet the applicable definition of a trade secret.

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? Is the capture of revenue by way of the competitive advantages inherent in trade secrecy a necessary prerequisite to governmental operations? Moreover, the application of trade secrecy by government is a very recent development (at least in the United States), and its ramifications have yet to be explored in detail. At this stage, I am tentatively concluding that trade secrecy is a poor fit to government, and redundant given the ability of government to patent its inventions.

Thus, this rough abstract – a true "work in progress" (or, better yet, a work in very early progress) – sets forth where I am, what I need to research (i.e., the exact nature of governments' operation in the private sector with regard to trade secrets) and where I intend to go with this article. Please also note that footnotes are also in rough form. Thank you for reading and thanks for any comments or suggestions that you may provide.

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[1] Assistant Professor, Charlotte School of Law, and Fellow, Stanford Law School's Center for Internet and Society. I am grateful for the research assistance of Steven Bimbo. This is very much an early work in progress, so please do not cite or quote from it.

[2] 59 FL. L. REV. 135 (2007).

Abstract

As discussed in Secrecy, public-private partnerships (PPP) are on the rise throughout the world. As these partnerships increase, there is a corresponding increase in contracting out activities of government to the private sector. One in six employees of the Securities and Exchange Commission is a private contractor. 94% of the FY2005 budget of the Department of Energy was paid to contractors. Indeed, according to Harper's Magazine, "private employees working on federal contracts now outnumber actual federal employees."[3]

Additionally, royalties are now playing a greater role in government. The National Institutes of Health's (NIH) royalties in funded research constitutes 70% of total government royalties.[4] This is not by coincidence: NIH seeks "corporate partners and licensees to commercialize its funded research projects," in support of its mission as a United States "healthcare agency."[5] While the royalties earned by NIH are certainly a nice bonus in the general effort to spread new and innovative healthcare services to the public, the very earning of revenue by way of royalties would suggest that commercialization can be an end of government in-and-of itself.

The result of these and other realities in the operations of the United States government is an effective change in what services the public can expect to be provided directly by the government. But more importantly, the continued merging of public and private interests, and indeed transfer of governmental roles to private entities, requires a reconsideration of the rules for government already in place. 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.[6] The "business nature" of information created by government, and whether trade secrecy should protect it, is the focus of this article.

This issue is of increasing importance from a legislative perspective in the United States. Indeed, it has arisen in legislation in Congress. For example, in 1997, Congress debated the "Freedom from Government Competition Act" (S. 314). The then Deputy Director for Management, Office of Management and Budget, John Koskinen, testified against the bill before the Senate Governmental Affairs Committee. He explained: "We believe that competition spurs efficiency and creates the environment needed for effective cost control and for creative and innovative change. Government competition for the provision of services to itself encourages lower cost and, therefore, is in the best interests of the taxpayer and the American economy."[7]

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[3] Daniel Brook, *Mall of America,* HARPER'S MAGAZINE (July 2007) at 62-63.

[4] Steven Furguson, *Products, Partners & Public Health: Transfer of Biomedical Technologies from the U.S. Government*, 5 J. of Biolaw and Business 35, 38 (2002).

[5] *Id.* at 36.

[6] Moira Paterson, *Commercial in Confidence and Public Accountability: Achieving a New Balance in the Contract State,* (p w fn 42).

[7] See http://www.whitehouse.gov/omb/legislative/testimony/19970618-3169.html.

Koskinen's observation raises several issues central to this article. Notwithstanding Koskinen's implied assertion, the government's role is not primarily concerned with selling products to consumers, but rather the provision of government services. While agencies like the Department of Energy, the National Institutes of Health and Department of Agriculture develop new technologies in conjunction with the private sector, the government usually facilitates, rather than provides, intellectual property.[8] To the extent that government develops intellectual property within government or by contract, the products developed are for its own use, as opposed to the private sector's creation for consumers.[9] Thus, a central question becomes: Should providing the lowest cost alternative for the taxpayer be government's primary goal?

At the core of these issues, and arguably central to their consideration, is the largely unexplored reality that modern trade secret law and policy allows for non-profit entities, like government, to create and retain trade secrets. The law allows for an entity whose express purpose is to provide public services to achieve its goals through purely commercial means. But as I discussed in Secrecy, this was not always the case. 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."[10]

But despite the seemingly divergent paradigms of private commercial competition through secrecy and the public transparency sought from democratic government, commentators as renowned as Professor Richard Epstein have taken a different position than that of the Pennsylvania Commonwealth Court. Prof. 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."[11] Moreover, the Restatement (Third) of Unfair Competition (Restatement) mentions, without any explanation, that governmental organizations, among others, can hold trade secrets, although the examples of trade secrets that it cites are more geared towards non-profit[12] and charitable organizations.[13]

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[8] David S. Bloch and James G. McEwen, *"Other Transactions" with Uncle Sam: A Solution to the High-Tech Government Contracting Crisis*, 10 TEX. INTELL. PROP. L. J. 195, 213-214 (WINTER 2002).

[9] *Id.*

[10] Hoffman v. Commonwealth of Pennsylvania, 71 Pa. Commw. 99, 103 (Pa. Commw. Ct. 1983).

[11] Richard A. Epstein, Cyberspace and Privacy: A New Legal Paradigm?, 52 STAN. L. REV. 1003, 1044 (May 2000) (arguing that the "government has the same right as private parties to classify information. If the material that it wishes to keep secret qualifies under the general trade secret laws, then like any private party it has the right to injunctive relief to prevent that information from slipping into hostile hands.")

[12] A line of California federal court cases have held that a non-profit organization, in these cases the Church of Scientology, could hold trade secrets if it met California's statutory requirements. See Bridge Publications, Inc. v. Vien, 827 F. Supp. 629, 633-634 (S.D. Ca. 1993) (holding that the Church's "Advanced Technology" spiritual materials met the California statutory definition of a trade secret because, among other reasons, the Church "used proceeds from the sale of these materials . . . to support the operations" of the Church); Religious Tech. Center v. Scott, 869 F.2d

Additionally, the Uniform Trade Secrets Act's (UTSA) definition of "persons" subject to trade secret protection includes governments and governmental subdivisions and agencies, again without any analysis or commentary.[14] And the law has followed: the Ohio Revised Code, typical of most state's laws regarding trade secrets, defines a "person" whom is covered by Ohio's Uniform Trade Secrets Act as including government entities.[15]

The total absence of explanation or discussion in the Restatement and UTSA of the need for and ramifications of allowing a non-profit or governmental entity to create and hold its own trade secrets is perhaps understandable in light of the fact that it appears to have been a little-utilized portion in the law.[16] But that too is changing, and the examples of its application illustrate where the issues lie.

Examples

Context

To set the below examples in context, it is important to note that (1) government often appears to fully support and/or rarely scrutinize the designation of trade secrecy in information that it receives from the private sector, and (2) we live in a society increasingly infused with governmental secrecy, especially post-9/11. For example, in Jennings v. Elections Canvassing Commission of the State of Florida, the plaintiffs sought the trade secrets of ES&S, a voting machine manufacturer, due to alleged malfunction of the iVotronic system during the 2006 13th Congressional District, Florida election. The State of Florida, as was appropriate under the law, defended the trade secrets of its vendor, ES&S, and the court denied the request, citing defendant ES&S' trade secrets and plaintiffs' failure to show a need for them.[17] Thus, the interest of the State of Florida in protecting the trade secrets of its vendor and the vendor's desire to maintain

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1306, 1308 (9th Cir. 1989) (noting that the court had previously held that the Church's "scriptures" were not trade secrets because the Church had not alleged any commercial value assigned to them); Religious Tech. Center v. Netcom On-Line Comm. Services, Inc., No. C-95-20091 RMW, 1997 U.S. Dist. LEXIS 23572, *42 n. 17 (N.D. Ca. Jan. 6, 1997) (in entering a preliminary injunction against the disclosure of certain Church trade secrets, noting that it is difficult to identify "potential competitors" of the Church for purposes of the public knowledge element of the definition of a trade secret).

[13] RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 39, cmt. d (1990) (noting that "lists of prospective members and donors" are examples of "economically valuable information" that a governmental entity might have as a trade secret).

[14] UNIFORM TRADE SECRETS ACT §1(3) (1990).

[15] O.R.C. ANN. § 1333.61(C) (2005)

[16] It is difficult to get a handle on how often trade secrecy is utilized by government, as there are few reported opinions regarding its use and the issue can be raised in non-published documents like responses to Freedom of Information requests and sealed litigation. Assessing its prevalence will be a focus of future work.

[17] *See* Order on Motions, Cir. Ct of 2nd Jud. Dist., Leon Cty., FL, Dec. 29, 2006 (Gary, J.). Trade secrets in voting machines is a topic discussed extensively in Secrets. I do not agree with the decision, but that is beyond the scope of this paper.

its secrets created a scenario where the government – an entity putatively required to assure the proper functioning of elections – supported a private entity's trade secrets against public disclosure.

The designation of vast quantities of information submitted to the government as "proprietary" or "confidential" is also a common-place, and under scrutinized, practice. For example, the Office of the Special Inspector General for Iraq Reconstruction recently reported that government contractor KBR inappropriately marked "almost all" information submitted to the government as proprietary, which hindered competition and oversight, as well as the ability to release the information to the public. The report further suggested that this practice may be a "systemic problem" within the Army's Logistical Civil Augmentation Program.[18]

Commentators have noted that the United States government excessively errs on the side of secrecy, especially post 9/11.[19] Moreover, there is an increased use in the designation "Sensitive but Unclassified" by United States government agencies. This designation is often found on research and science/technological information generated by the government post-9/11, and allows for it to be held from public view.[20] Thus, infused in the following examples are the combined effects of (1) an increasingly secretive governmental structure and (2) a legal environment which encourages the government to protect the proprietary data submitted to it by private entities, largely based upon their own designation of the information as proprietary, confidential and/or trade secrets, as well as its own self-created trade secrets.

Specific Examples

PHEAA

In *Parsons v. Pennsylvania Higher Education Assistance Agency* (PHEAA)[21], three reporters brought a petition for review of a decision in which PHEAA, a governmental agency that administers student loans, refused to disclose certain documents by classifying them as, in part, trade secrets under Pennsylvania's Trade Secrets Act (TSA).[22] The reporters requested an assortment of information, including items related to several PHEAA retreats and other events

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[18] Office of the Special Inspector General for Iraq Reconstruction, Interim Audit Report on Inappropriate Use of Proprietary Data Markings by the Logistics Civil Augmentation Program (LOGCAP) Contractor, SIGIR-06-035, Oct. 26, 2006.

[19] *See* Peter Swire, *A Theory of Disclosure for Security and Competitive Reasons: Open Source, Proprietary Software, and Government Agencies*, 42 HOUSTON L. R. 101, 146 (Jan. 2006). This does not always mean that information remains secret, but administrative errors cannot form the basis of a disclosure regime. *See* Iain Thomson, *US army posted secrets on the web,* Vnunet.com, July 12, 2007, *at* http://www.vnunet.com/vnunet/news/2194072/army-posting-secrets-web (reporting that the United States Army and its contractors accidentally posted military secrets on the web).

[20] *See "Sensitive but Unclassified" Information and Other Controls: Policy and Options for Scientific and Technical Information*, CRS.

[21] 910 A.2d 177, 182 (Pa. Commw. Ct. 2006).

[22] 12 Pa. C.S. § 5301-5308

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, among other holdings, that even though all "expenses are paid from money that it earns, not from appropriations," PHEAA was still subject to the "Right-To-Know Law."[23]

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

> being different from other agencies in that it competes in the private sector and receives no funding for its operations from the General Assembly. It is frequently audited, including by federal regulators and by private-sector lenders for whom it manages billions of dollars in assets. It competes with hundreds of private sector lenders, and in the 2005 - 2006 academic year it provided $170 million dollars from earnings to fund programs for students. To foster necessary trust, PHEAA requires potential clients and business partners to sign confidentiality agreements, and PHEAA maintains high security standards.[24]

Significantly, PHEAA noted that its Board is "controlled" by 16 legislators "acting as agents of the [Pennsylvania] General Assembly."[25] 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."[26]

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

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[23] Right-To-Know Act, 65 P.S. § 66.1 - 66.9 (1957) (defining "public record" subject to disclosure as "[a]ny account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligation of any person or group of persons. . . .")

[24] Parsons at 184; *see also* http://www.pheaa.org/about/Board_Members.shtml (listing members of the Board, all of whom that are elected officials).

[25] *Id.* at 186.

[26] *Id.*

> would permit a competitor to see where PHEAA is concentrating marketing efforts. He 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.[27]

Although the Court held 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" and 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," the Court issued a surprising caveat: "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."[28]

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), the Court allowed PHEAA to redact actual trade secrets (i.e., presumably new lines of business or technology, methods and strategies of business development) from documents to be disclosed to the reporters. Hence, there was real meaning in the Court's note that PHEAA "may not conduct its affairs precisely as a private entity does." Not "precisely," but certainly close enough.

By replacing the word "business" with the phrase "government agency," the 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? 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 exists in government; I am inclined to believe that we need to know the answers to the above questions, even if it means a loss of competitive advantage to a government agency. The tougher question becomes when (or if) the competitive advantage outweighs the public's desire or need to know.

Royal Canadian Mounted Police

Canada is facing similar questions. In one instance, the Royal Canadian Mounted Police ("RCMP") refused to disclose a CD-ROM version of "open source" data regarding a firearm

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[27] *Id.* at 184.

[28] *Id.* at 186. Section 3.2 states, in part: "If an agency determines that a public record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access." 65 P.S. § 66.3-2 (2006)).

registry that included photographs, documentation, and specifications for various firearms to a member of the public.[29] The CD-ROM was used by the RCMP to "assist it in identifying the firearms that its members encounter in police work." Compiled by RCMP at a cost of three (3) million dollars, police organizations around the world had shown interest in the data.

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

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

Subsequently, the Complainant appealed the decision to the Canadian Information Commissioner, who found that the withholding of the CD-ROM was justified under Section 18 of the Canadian Access to Information Act (Act). Section 18 of the Act allows a government institution to refuse access to information where "trade secrets . . . that belong to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value" is involved. In addition, the Act exempts from disclosure information that "could reasonably be expected to be materially injurious to the financial interest of the Government of Canada."[30] The Commissioner explained that "unrestricted disclosure of this record could reasonably be expected to prejudice the competitive position of the RCMP," and that the database had commercial value to the government "since there was continuing interest in the CD-ROM by national and international organizations."

Thus, the *potential* commercial interests of Canada prevented the dissemination of a database created with public funds and input. Putting aside the question of whether such a database should be made public for security and law enforcement reasons, trade secrecy directly impeded the dissemination of an otherwise public and taxpayer-funded database. More specifically, the apparent ability of the government of Canada to eventually sell the CD-ROM

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[29] See Office of the Information Commissioner of Canada, Annual Report 1999-2000: Selling Government Expertise at http://www.infocom.gc.ca/reports/section_display-e.asp?intSectionId=30.

[30] See Access to Information Act, R.S. 1985, c. A-1, s.18. (Exempting "information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution." Id. Also, exempting "scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer of employee of priority of publication;" see also Sec. 18(d).

prevented the information, created with taxpayer funds, from being freely distributed to its own citizens. Again, commercial interests of a government were the main consideration.

Analysis

As I argued in Secrecy, to blindly allow government trade secrets seemingly ignores the fundamental difference between a purely commercial entity distributing private commercial goods and services and an entity operating in the public infrastructure sphere. On the surface, government should not be in the business of keeping information secret just because it might have pecuniary value. The mere possibility that a government could gain commercial advantage or even recoup the costs of developing a good or service should not be the primary policy objective of a government.

However, the question is not that simple. Governments are in the "business" of providing goods and services to the public, and, whether we like it or not, part of that charge has increasingly been to outsource or contract out traditional governmental functions to private entities. To the extent that the government seeks to maximize its ability to provide goods and services to the public on its own, trade secrecy may play a role. Thus, a question that must be answered is whether trade secrecy is part of the bundle of rights upon which governments rely in order to serve the public. The price of that secrecy can often be weighed against the economic benefits of the use of the right.

I posit that there are two certain base principles upon which this analysis must rest. The first is that the relevant stakeholder for government is the "diffuse public," and accountability, due process, and rationality are the primary guiding principles.[31] The second is that trade secrets can be of public concern; they are not exclusively issues about which only private parties are interested.[32] From these guiding principles, the pros and cons of government trade secrets can be discussed.

Pros

The arguments in favor of allowing the government to have its own trade secrets focus primarily on the economic benefits attached to trade secrecy. Much like the private sector, governments entering the commercial market can benefit from trade secrets. The disclosure of government trade secrets can 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, bidders in private sector could reconstruct the benchmark

[31] Jody Freeman, *Public Values in an Era of Privatization*, 116 HARV. L. R. 1285, 1304 (March 2003)

[32] This is, surprisingly, not a settled point. *See i.e.* Jillian Smith, *Secret Settlements: What You Don't Know Can Kill You!*, 2004 Mich. St. L. Rev. 237, 257 (2004) (arguing that "formulas or private issues" do not threaten "public health and safety.")

for subsequent projects and price bids accordingly, thus disadvantaging the government and its ability to price contracts in the most cost-effective manner.[33]

Of course, any such consideration begs the question of how far one can go with that argument. As Paterson notes, taken to its logical extreme, the cost of any government activity could be considered a trade secret, if there were a possibility that at some time that service could be put out to tender."[34] She explains:

> [P]ublic costs are often unknown or uncalculated, while private costs tend to be regarded as commercially confidential. For a proper evaluation and comparison of costs to take place, both the public and private sectors will need to make their bottom lines, if not their calculations, more transparent. In the absence of valid comparisons, the process of contractualism will continue to be based on ideology rather than economics.[35]

Thus, the operation of government trade secrecy in a climate in which secrecy is considered an acceptable norm for government contracting allows for the government to remain on more equal footing in relation to their private partners and contractors.

By comparing the benefits of government patenting, which has a relatively long history in the United States[36], to the likely operation of government trade secrets, one can illustrate trade secrets' benefits and limitations. Most revealing is that while some of the purported benefits of allowing the government to patent its own inventions are found in trade secrecy, others are either redundant or the very opposite of the alleged patent benefit.

The Economic Research Service of the Department of Agriculture (ERS) published a fascinating report in 2006 entitled "Government Patenting and Technology Transfer."[37] In the report, ERS identified several benefits of government patenting. Taking each in turn illustrates some of the benefits, and pitfalls, of trade secrecy in a similar context.

The first benefit of patenting is a corollary to revenue generation. The authors note that patent rights "are not only a means of capturing revenue, but also a mechanism through which public laboratories and other government research facilities can transfer technology that they have developed into widespread use."[38] The passage of Bayh-Dole, Steven-Wydler, and other technology transfer amendments have increased technology transfer from government to the private sector.[39] [Trade secret transfer? Redundant?]

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[33] Paterson, p w fn 69 and 70.
[34] *Id.*
[35] *Id.* (quoting A. Freiberg, *Commercial Confidentiality, Criminal Justice and the Public Interest*, 9 CICJ 125, 136 (1997)).
[36] *See Secrecy, __.*
[37] ERR-15, Economic Research Service/USDA, February 2006.
[38] *Id.* at 1.
[39] *Id.* at 15.

Clearly, one cannot easily dispute that trade secrecy allows for the capture of some revenues, even in government. Although it is hard to imagine how many trade secrets would be licensed by a government to the private sector given the widespread use of private laboratories conducting government sponsored research, one cannot rule out such a possibility. So, it is fair to say that trade secrecy may also allow for technology transfer.

After this one element, it would appear that trade secrecy adds nothing to the benefits derived by government from its patents, and in some instances acts in the opposite manner. ERS notes that "patent awards raise awareness about public research results" and "allows Federal research facilities to take credit for their work."[40] Obviously, the very nature of trade secrecy is secrecy; except in extremely limited circumstances, publicizing one's trade secret means that its protection is lost. So these patent benefits are simply non-existent in trade secrecy. In fact, the opposite effect occurs: allowing the government to retain trade secrets prevents it from publicizing and taking credit for its work.

An often overlooked benefit of government patenting is defensive: "the widespread use of patents could obstruct the government from pursuing public research objectives." Overlapping patent rights could motivate Federal patenting when they "hamper widespread use of federally developed research tools."[41] This concern recognizes the anti-competitive and potentially harmful effects of granting limited monopolies to commercial entities operating in the public sphere, and the authors suggest one partial antidote by way of government patenting. Trade secrecy appears not to address this issue, as one does not know of another's trade secret unless they are already in a confidential relationship with the trade secret's holder by way of a license or other vehicle of sharing information. As trade secret protection is not "issued," but rather arises automatically so long as the relevant statutes and/or common law rules are met, there would be no governmental salve for the private sector's retention of a trade secret, save potentially costly and time-consuming reverse engineering. So, in essence, this point is non-applicable, or at minimum has no discernable impact.

In sum, it would appear that government trade secrecy is similar to government patenting to the extent that it allows for the capture of revenue. All of the other benefits of government patenting, as compared to trade secrecy, are absent, redundant or have the opposite effect.

Cons

As a general matter, economist Joseph Stiglitz and others assert 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."[42] Interestingly, Stiglitz conversely argues that public entities should be entitled to hold patents "if only to avoid allowing the patent to be

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[40] *Id.*

[41] *Id.* at 1.

[42] Joseph Stiglitz et al., The Role of Government in a Digital Age, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION at 70 (October 2000), available at http://archive.epinet.org/real_media/010111/materials.html.

reserved by someone else," echoing the argument of the ERS.[43] This is the fundamental objection to government trade secrets from which other critiques flow.

As noted by ERS, the private sector relies upon clearly defined and enforceable property rights for proper functioning and to spur innovation. The government, however, does not generally need to be incentivized to innovate by way of pecuniary gain, although one could possibly envision a cash-strapped agency seeking to increase its budget by way of intellectual property development and licensing. A democratic government's mandate comes from the people, and development of new programs and services are required by the law, rules and requirements imposed upon it by the public. This does not, or should not, change when the government enters the market, as presumably it is there precisely because it is the (or a) way to meet its requirements to the people.

What seems clear is that the underlying basis for intellectual property rights – encouraging innovation by allowing creators to capture the economic benefits of their creation – is absent in government. In fact, as noted by one commentator, except for questions of security, the fact that government creates for itself rather than commercialization means that government should find contractual arrangements and remedies adequate, eliminating the need for intellectual property rights.[44]

In sum, trade secret law cannot be easily squared with the notion that commercial value is not a relevant consideration, without changing the very purpose of the law. If the PHEAA and RCMP examples are indicative of the use of trade secrecy by governmental entities, then we must consider whether trade secrecy is achieving little more than keeping information which would normally be made public private for, at best, economic reasons. How widespread is its use? How much information is being designated trade secrets by government? The mere fact that those examples exist 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, can form the basis for an exemption from the public's right to know, then we are dealing with a very powerful tool of secrecy. Unless, of course, the commercial interests of government have become a more important consideration than transparency, which in the policy climate of 2007, cannot be easily dismissed.

Tentative Conclusion

Paterson noted that just because government may benefit from some business-like methods does not mean that it should run like one.[45] That sounds like a good start, but where does that leave us? Should trade secrets be abandoned, curtailed, or altered to fit the traditional democratic government's values and priorities?

Not necessarily. New Zealand, another country with extensive experience in this area, has created a set of rules that the New Zealand Ombudsman considers when the government

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[43] *Id.*
[44] Bloch at 10.
[45] Paterson, (page with fn) 22.

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 competition and other characteristics of the market, (3) how information claimed to be exempt related to criteria upon which a government contract is awarded, and (4) the degree to which disclosure would put competitor at advantage.[46] While still heavily focused on commercial gain, this test at least 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, which is a major area in which trade secrets issues likely arise, this can form the basis of a balancing test for government trade secrets disclosure in the United States.

Evidentiary issues must also 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."[47] 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 it is a question of strength of evidence.

It does not appear that we have reached the point in the United States where government trade secrets is a settled issue such that questions of evidence and balancing tests are yet at the forefront of the pressing questions. Notwithstanding the endorsement of such an eventuality by Prof. Epstein, as well as the authors of the UTSA and the Restatement, it is clear that the underlying economic policy issues driving its application to government are both under-analyzed and not well understood. The goal of this article (in its final form) is to gain further understanding of the economic underpinnings of government trade secrets. At this point, I am leaning towards concluding that they should be abandoned, but further research and analysis is required before I can reach a more concrete conclusion.

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[46] Paterson, p w fn 69 (citing the New Zealand Ombudsman's Practice Guidelines – B4.2, sec. 9(2)(b)(ii).

[47] See Office of the Information Commissioner of Canada, Annual Report 1999-2000: Selling Government Expertise at http://www.infocom.gc.ca/reports/section_display-e.asp?intSectionId=30.