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The People's Trade Secrets

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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, two converse questions are asked: should state and local governments be allowed to shield information that they create from public disclosure by way of trade secrecy, and, more broadly, should any government have trade secrets at all? 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 focusing on 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 encourage 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? The application of trade secrecy by government is a very recent development (at least in the United States), and its ramifications (many of which bizarre) have yet to be explored in detail.

More broadly, what can the application of trade secrecy to the government sector teach us about the nature of the trade secrecy doctrine? Given the ongoing debate about the theoretical underpinnings of trade secrecy, what can we deduce from its application in settings for which its basic elements may not have been designed or even considered? Trade secrecy's application to the government sector reveals the very real impact of the theoretical debate ongoing in trade secret scholarly circles – its very malleability as a doctrine poses real concerns about its application in government and its potential for abuse.

Moreover, the use of trade secrecy by government undermines modern democratic theories of governance like deliberative democracy and agency that rely upon a basic level of information sharing at the policy-making level. Beyond the theoretical is the very real impact on

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² 59 FL. L. REV. 135 (2007).

the public's ability to approve of specific policy decisions at the state and local government level, as well as a potential shift in values within certain governmental entities if the aims of trade secrecy operate on a par with transparency. What kinds of information can be and are kept from the public under a trade secret exemption to a state's freedom of information law? What does the possible existence of a trade secret mean for the governmental entity holding it? At this stage, I am tentatively concluding that trade secrecy is a poor fit to government at any level, should not coexist with sovereign immunity, and is redundant given the ability of government to patent its inventions.