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SAFEGUARDING WASHINGTON’S TRADE SECRETS: PROTECTING BUSINESSES FROM PUBLIC RECORDS REQUESTS

John Delaney*

Abstract: Lawmakers constantly balance competing interests. They decide where to draw lines so that societal goals are accomplished without ignoring the needs of those who will be affected by their choices. The Washington State Legislature is now in the process of addressing the line between government transparency and the protection of private companies’ trade secrets. Companies who provide technology to the federal government are susceptible to losing their trade secrets through a public records request. The Washington State Legislature is currently reviewing the trade secret exception to the Public Records Act to ensure it is continuing to protect companies from losing their trade secrets. This Comment will both address the dangers companies face and evaluate the current proposals to change the law.

INTRODUCTION

Scholars consider transparency in government to be essential for the proper functioning of a modern-day democracy. Likewise, most voters uphold and respect transparency as the embodiment of “government of the people, by the people, for the people.”¹ For example, the opening passage of the Washington State Public Records Act (PRA) proudly proclaims:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.²

Even President Lyndon B. Johnson, who had serious doubts about the federal Freedom of Information Act (FOIA), signed it into law and

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1. Abraham Lincoln, President of the U.S., The Gettysburg Address (Nov. 19, 1863), <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> [<https://perma.cc/SJ78-BMCP>].

2. WASH. REV. CODE § 42.56.030 (2016).

declared that he was deeply proud that the “United States is an open society.”³

However, even though we value transparency, some types of information should remain secret. The most common justification for secrecy is national security.⁴ However, there is another significant interest that demands that some information collected by the government be withheld from public disclosure: trade secrets. Companies have always disclosed pricing information. But now they disclose much more valuable information like drone schematics, body camera technology, and software source code and data.⁵ Companies that provide goods and services to the government have a significant interest in protecting their trade secrets from exposure. In the event of the exposure of trade secrets, government contractors stand to lose any advantage their confidential information gives them over their competitors. A policy that allows for the over-exposure of trade secrets would, in all likelihood, result in significant harm to both large and small companies.

As valuable intellectual property assets, trade secrets are legally protected because they are not “generally known” or “ascertainable.”⁶

3. Lyndon B. Johnson, President of the U.S., Statement by the President Upon Signing S. 1160 (July 4, 1966), <http://nsarchive2.gwu.edu/nsa/foia/FOIARelease66.pdf> [<https://perma.cc/XP88-GXRM>].

4. *See, e.g., id.* (“I have always believed that freedom of information is so vital that only the national security . . . should determine when it must be restricted.”).

5. For example, on the national stage, one of the largest fights in the battle between protecting company trade secrets and government transparency involves the litigation surrounding the “fracking” practices of drilling companies that seek to mine oil and natural gas. *See* John Craven, Note, *Fracking Secrets: The Limitations of Trade Secret Protection in Hydraulic Fracturing*, 16 VAND. J. ENT. & TECH. L. 395 (2014). The risk of the chemicals that are used in fracking getting into the groundwater has caused a general outcry, with people becoming concerned about the potential adverse effects to human health. John D. Furlow & John R. Hays, Jr., *Disclosure with Protection of Trade Secrets Comes to the Hydraulic Fracturing Revolution*, 7 TEX. J. OIL, GAS & ENERGY L. 289, 296 (2011) (“[n]otwithstanding the current outcry . . . alleging risks to water supply . . .”). Drilling companies can invest millions of dollars in researching and developing the “recipes” for these so-called “fracking fluids.” *See id.* at 306 (“Energy companies have invested millions of dollars into research to develop formulas specifically tailored to different [geological] formations . . .”); Mike Soraghan, *Hydraulic Fracking: Two-Thirds of Frack Disclosures Omit ‘Secrets’*, E&E NEWS.COM (Sept. 26, 2012), <https://www.eenews.net/stories/1059970474> [<https://perma.cc/DPQ4-GFKL>]. These companies claim that disclosing these formulas would provide their competitors with an unfair competitive advantage. Furlow & Hayes, *supra*, at 306; Craven, *supra*, at 401 (“Forcing disclosure of those ‘secret recipes’ would produce a windfall for other companies and cost the disclosing company much of the economic advantage that its research produced.”). However, the public also has a great interest in gaining access to information that is essential to evaluate health risks and determine the appropriate steps to ensure their safety. *See* Craven, *supra*, at 404. The balancing between the governmental interest in protection of trade secrets and the interest in transparency sharply overhangs this issue.

6. UNIF. TRADE SECRETS ACT § 1(4)(i) (UNIF. LAW COMM’N 1985) [hereinafter UTSA].

Thus, maintaining their secrecy is essential. Companies will go to great lengths to prevent people from finding out their trade secrets because keeping them secret gives them an advantage over their competitors. In fact, taking reasonable efforts to maintain secrecy is one of the fundamental tenets of the very definition of trade secrets.⁷ Losing trade secrets could be devastating for a business and incredibly lucrative for their competitors.

Therefore, it is not surprising that the vast majority of public records requests are made by businesses, not ordinary private citizens or news media outlets.⁸ Any information businesses submit to the government as part of the contract bidding process or through an ongoing relationship with the government can end up in the hands of a competitor.⁹

As state governments procure more and more complicated technologies, concern over protecting the associated trade secrets has become more acute. For example, two exciting new areas of government procurement are drones and body cameras. By 2013, approximately twenty-five state and local law enforcement agencies either had applied for the Federal Aviation Administration's drone authorization program or had borrowed Customs and Border Protection drones.¹⁰ The number of state police forces using drones can only be expected to increase as drones change and improve the way the police operate,¹¹ with other public entities not far behind.¹²

7. *Id.* § 1(4)(ii).

8. Daniel B. Goldman, *(Trade) Secrets, Secrets Are No Fun—Especially When Disclosed Through FOIA Requests to Everyone*, 3 SEVENTH CIR. REV. 690, 710 (2008) (referencing studies of FOIA requests); Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1380 (2016) (noting that at the SEC, FDA, EPA, and DLA “commercial requests represent the overwhelming majority of all requests received”). Professor Kwoka also reveals evidence that a “cottage industry” has emerged based on FOIA requesting. Kwoka, *supra*, at 1380. At five of the six agencies that she studied, “some of the highest-volume requesters are companies whose business model is to request federal records under FOIA and resell those very records for a profit” and that, “by contrast, the relative paucity of news media requests is apparent across the board.” *Id.* at 1381; *see also id.* at 1382–414 (breaking down the data of FOIA requestors for six large government agencies).

9. Kwoka, *supra* note 8.

10. *Law Enforcement Agencies Using Drones List, Map*, GOVERNING, <http://www.governing.com/gov-data/safety-justice/drones-state-local-law-enforcement-agencies-license-list.html> [<https://perma.cc/F3VM-2E9Y>] (last updated 2013).

11. Matt Alderton, *To the Rescue! Why Drones in Police Work Are the Future of Crime Fighting*, AUTODESK: REDSHIFT (Apr. 30, 2015), <https://redshift.autodesk.com/drones-in-police-work-future-crime-fighting/> [<https://perma.cc/C59U-JKWD>] (listing hostage negotiation, bomb investigation, missing persons, crime surveillance and pursuit, drug interdiction, and crime scene analysis as some of areas in which police work will be improved by drones).

12. Already, it is more than only state and local law enforcement agencies that are using drones. *See generally* ASS'N OF GOVERNMENTAL RISK POOLS & NAT'L LEAGUE OF CITIES, RISK INFO. SHARING CONSORTIUM, USE AND REGULATION OF DRONES BY LOCAL GOVERNMENT ENTITIES &

Washington State is no different. Both the Seattle Police Department¹³ and the King County Sheriff's Office applied for the Federal Aviation Administration's drone program by 2013.¹⁴ During the summer of 2016, the Renton Police Department began using drones to help investigate crimes and serious accidents.¹⁵ Moreover, several other agencies in the greater Seattle area are looking into using drones as well.¹⁶

As in the case with drones, state and local law enforcement agencies are also ramping up their usage of body cameras.¹⁷ In 2013, only about 25% of police departments around the country were using body cameras.¹⁸ Now, 95% of surveyed police departments have committed to body camera usage or have already implemented body camera programs.¹⁹ The manager of the Seattle Police Department's own body camera program, Nick Zajchowski, has said that the plan is to equip 850 officers with the cameras by the fall of 2017.²⁰

In order to keep up with the increase in the complexity of technology, state governments—including Washington State—need to get more sophisticated about the procurement process and how they are safeguarding the trade secrets of the companies from which they obtain their technology. The breadth of information that could now be exposed

SCHOOLS: THOUGHTS FOR PUBLIC ENTITY POOLS (2015), http://www.agrip.org/assets/1/6/Drones_IssueAnalysisJuly2015.pdf [<https://perma.cc/Q9DV-L93R>]. Local public entities, "including local governments and schools," are expressing interest in a variety of uses for drones, like inspecting infrastructure, filming and photographing events, and property inspections and appraisals. *Id.* at 2.

13. *Law Enforcement Agencies Using Drones List, Map*, *supra* note 10.

14. 2011–2012 FAA List of Drone License Applicants, ELEC. FRONTIER FOUND., <https://www.eff.org/document/2012-faa-list-drone-applicants> [<https://perma.cc/F745-C5EH>].

15. Andrew Padula, *Renton Police Dept. Becomes First in State To Use Drones To Investigate Crimes, Crash Scenes*, Q13 FOX NEWS (Aug. 3, 2016, 5:11 PM), <http://q13fox.com/2016/08/03/renton-police-using-drones-to-investigate-crime-crash-scenes/> [<https://perma.cc/Z76R-H73N>].

16. *Id.* Furthermore, "several [Washington State] agencies—including the Department of Transportation, the Department of Fish and Wildlife, and the Department of Ecology—are finalizing a model drone policy." Drew Atkins, *Washington: The "Wild West" for Surveillance Drones*, CROSSCUT (Apr. 19, 2016), <http://crosscut.com/2016/04/washington-the-wild-west-for-surveillance-drones/> [<https://perma.cc/3A58-T4ML>].

17. Mike Maciag, *Survey: Almost All Police Departments Plan To Use Body Cameras*, GOVERNING (Jan. 26, 2016), <http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html> [<https://perma.cc/P2EZ-A672>].

18. *Police Body Camera Use in the United States*, BALLOTPEDIA, https://ballotpedia.org/Police_body_camera_use_in_the_United_States#tab=Background [<https://perma.cc/8YXE-VEDH>].

19. Maciag, *supra* note 17.

20. Jessica Lee, *Police Body Cams To Add 'Another Layer' of Evidence, Issues for Seattle Officials*, SEATTLE TIMES (Sept. 4, 2016), <http://www.seattletimes.com/seattle-news/police-body-cams-to-add-another-layer-of-evidence-issues-for-seattle-officials/> [<https://perma.cc/8YXE-VEDH>].

by transparency presents a difficult question for states: when does trade secret information need to be available for public review and when does it need to be kept secret? For example, it might be more important to ensure that software, source code, and data associated with the voting process are open to the public²¹ but not as important for the drone technology. Another example is that it might be more important to protect the body camera data than it is to protect the body camera software. Moreover, even in the cases when transparency is the chosen path there are often practical, implementation problems achieving that goal.²² Thus, more complex technology raises important questions about balancing when it might be more important and safer for companies to ensure that the trade secrets associated with certain goods and services are protected from public disclosure versus when government transparency is more important.

The quintessential symbols of government transparency are public records acts. Every state has a public records act, most of which are patterned after the broad “any person,” “any record”²³ language of FOIA.²⁴ Therefore, in most states, any person can make a public records request and any agency document is subject to public disclosure upon receipt of such a request.²⁵ Moreover, Washington State has an

21. See, e.g., R. James Woolsey & Brian J. Fox, *To Protect Voting, Use Open-Source Software*, N.Y. TIMES (Aug. 3, 2017), <https://www.nytimes.com/2017/08/03/opinion/open-source-software-hacker-voting.html?mcubz=3> [<https://perma.cc/4SM7-WJMA>] (discussing the added security benefits of open-source software, precisely because everyone can see how it operates).

22. For example, in the case of police body camera footage, the best interests of the public are in making that footage available when requested. But there have been problems with implementing that transparency goal. Take the example of Tim Clemans, a Seattle man who made blanket requests for every dash-cam and body-cam video generated by the Seattle Police Department (SPD). Jennifer Sullivan, *Seattle Police Tech Officer Quits, Criticizes Department*, DIGITAL COMTYS. (Oct. 30, 2015), <http://www.govtech.com/dc/articles/Seattle-Police-Tech-Officer-Quits-Criticizes-Department.html> [<https://perma.cc/3B53-6CFS>]. The sheer volume of the requests made it practically impossible for the SPD to fulfill and threatened the implementation of the Seattle Police Department's budding body-cam program. See Steve Miletich & Jennifer Sullivan, *Costly Public-Records Requests May Threaten SPD Plan for Body Cameras*, SEATTLE TIMES (Nov. 20, 2014), <https://www.seattletimes.com/seattle-news/costly-public-records-requests-may-threaten-spd-plan-for-body-cameras/> [<https://perma.cc/M7N8-HGRD>]. The amount of time that would have needed to be spent (it can take thirty minutes to edit a twenty-seven second video) and the amount of money it would have cost (agencies can charge for making copies, but not for other staff time, i.e., paying people to spend hours editing would have to come out of an agencies' budget) almost caused the Seattle Police Department to cancel the body-cam program altogether. *Id.*

23. 5 U.S.C. § 552 (3)(A)–(B) (2012).

24. *State Public Record Laws*, FOIADVOCATES, <http://foiadvocates.com/records.html> [<https://perma.cc/G9N6-W6YT>].

25. Goldman, *supra* note 8, at 709.

incredibly broad public records act.²⁶ Couple that with an extremely pro-public records state Supreme Court²⁷ and the result is a state where government transparency has a long reach and significant power.²⁸

Washington State has already taken steps to protect trade secret information from public records requests. Courts have generally read a trade secret exemption into the PRA.²⁹ The statute contains language such that records that fit within a specified exemption defined by PRA or any “*other statute*” are protected from disclosure.³⁰ This “*other statute*” language has been interpreted to include the Uniform Trade Secrets Act as adopted by Washington State.³¹ Thus, trade secrets are generally exempt from disclosure by a public records request.³²

However, the existence of this exemption does not mean that companies are in the clear. The “*other statute*” language is buried within the statute and does not expressly state that trade secrets are exempted.³³ In addition, PRA contains another provision that generally exempts “*financial, commercial and proprietary information.*”³⁴ This section contains twenty-seven subsections, all of which discuss information that could qualify under the broad definition of trade secrets.³⁵ The confusion generated by the hidden “*other statute*” language and the ambiguous

26. *Nissen v. Pierce County*, 183 Wash. 2d 863, 874, 357 P.3d 45, 52 (2015) (“As we so often summarize, the PRA ‘is a strongly worded mandate for broad disclosure of public records.’” (internal citations omitted) (citing *Yakima County v. Yakima Herald–Republic*, 170 Wash. 2d 775, 791, 246 P.3d 768 (2011))).

27. *O’Neill v. City of Shoreline*, 170 Wash. 2d 138, 147, 240 P.3d 1149, 1154 (2010) (“Our broad PRA exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information.”).

28. *Nissen*, 183 Wash. 2d at 874, 357 P.3d at 52 (proclaiming that the PRA “is a strongly worded mandate for broad disclosure of public records” (quoting *Yakima Herald–Republic*, 170 Wash. 2d at 791, 246 P.3d 768 at 775)); *see also, e.g.*, *Belenski v. Jefferson County*, 187 Wash. App. 724, 733, 350 P.3d 689, 694 (Wash. Ct. App. 2015) (“The statute’s language ‘reflects the belief that the sound governance of a free society demands that the public have full access to information concerning the workings of the government.’ Accordingly, courts must avoid interpreting the PRA in a way that would tend to frustrate that purpose.” (quoting *Amren v. City of Kalama*, 131 Wash. 2d 25, 31, 929 P.2d 389 (1997))), *rev’d in part*, 186 Wash. 2d 452, 378 P.3d 176 (2016).

29. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 262, 884 P.2d 592, 603 (1994).

30. WASH. REV. CODE § 42.56.070(1) (2016) (emphasis added).

31. *Progressive Animal*, 125 Wash. 2d at 262, 884 P.2d at 603.

32. *See generally id.* (recognizing a trade secret exemption to PRA).

33. Unlike the Freedom of Information Act, which clearly lists trade secrets among the exemptions to disclosure. *See* 5 U.S.C. § 552(b)(4) (2012).

34. WASH. REV. CODE § 42.56.270 (2016).

35. *Id.*; *see also* WASH. REV. CODE § 19.108.010(4) (2016) (incorporating the UTSA’s broad definition of trade secrets).

section on “financial, commercial and proprietary information” makes it very hard for businesses to know that their trade secret information is exempted from a public records request.

The legislative committee responsible for monitoring and updating these exemptions has recognized the problem and issued a proposal to fix it.³⁶ The “Sunshine Committee” has suggested adding a subsection to the “financial, commercial and proprietary information” provision that specifically exempts “trade secrets as defined in RCW 19.108.010(4).”³⁷ Its stated goal is to help businesses submitting information to the government to recognize that their trade secrets are protected from disclosure.³⁸ However, while a step in the right direction, this proposal does not accomplish that goal.

This Comment will propose an amendment to Washington law to clarify the PRA, streamline the disclosure process for practicing lawyers, requestors, and disclosing agencies, and help businesses—especially small businesses—know their trade secrets are protected. The Comment proceeds with Part I, which provides a general overview of trade secret law. Part II then discusses the federal approach to trade secret exemption, embodied in FOIA. Part III provides an overview of the procurement framework in Washington, summarizes the public records act, as well as the trade secrets exemptions, and provides two examples of ambiguity in the case law. Part IV explains the various problems caused by the current exemption construction, analyzes the benefits and drawbacks of adopting the legislature’s proposed solution, and concludes by proposing a number of solutions, including renaming a key provision in the PRA to specify a clear trade secret exemption.

I. OVERVIEW OF TRADE SECRET LAW

United States intellectual property law protects four main categories of intellectual property: patents, trademarks, copyright, and trade secrets.³⁹ Of these four categories, trade secrets are unique because their protection “may extend indefinitely, lasting as long as the subject matter

36. PUB. RECORDS EXEMPTIONS ACCOUNTABILITY COMM., STATE OF WASHINGTON 2016 ANNUAL REPORT (2016), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/Open_Government/Sunshine_Committee/2016-Sunshine-Committee-Annual-Report.pdf [<https://perma.cc/P62J-XJC7>].

37. *Id.* at 10.

38. *Id.* at 4–5.

39. See ROGER M. MILGRIM & ERIC E. BENSON, MILGRIM ON TRADE SECRETS § 9.01 (2016); BRIAN T. YEH, CONG. RESEARCH SERV., R43714, PROTECTION OF TRADE SECRETS: OVERVIEW OF CURRENT LAW AND LEGISLATION 4 (2016).

of the trade secret . . . is kept confidential.”⁴⁰ Thus, the primary requirement for trade secret protection is that trade secrets are *secret*.⁴¹

A. *History of Trade Secrets*

Trade secret law developed through the common law⁴² and is primarily controlled by state law.⁴³ Unlike the other forms of intellectual property, trade secret protection was not developed until the mid-nineteenth century.⁴⁴ Trade secrets were first widely accepted as legitimate intellectual property holding value in 1939 when they were incorporated in the First Restatement of Torts.⁴⁵ As described by the Restatement:

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. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.⁴⁶

This definition is generally considered to be very broad,⁴⁷ encompassing a wide array of information.⁴⁸ Some of the most well-known examples of trade secrets “include the formula for Coca-Cola, the recipe for Kentucky Fried Chicken, and the algorithm used by Google’s

40. YEH, *supra* note 39, at 3; MILGRIM & BENSON, *supra* note 39, § 1.03.

41. UTSA § 1(4)(i) (UNIF. LAW COMM’N 1985) (noting that a trade secret gains its value from “not being generally known” and “not being readily ascertainable”).

42. Goldman, *supra* note 8, at 699.

43. *See e.g.*, MILGRIM & BENSON, *supra* note 39, § 1.01.2.vii (discussing the states’ adoption of the UTSA and the importance of uniformity). That is not to say that federal law on trade secrets is not influential. Recently President Obama signed the Defend Trade Secrets Act (DTSA), an amendment to the Economic Espionage Act. Peter J. Toren, *The Defend Trade Secrets Act*, INTELL. PROP. & TECH. L.J., July 2016, at 3. DTSA, among other things, provides federal civil remedies for misappropriation of trade secrets, a matter that was previously left exclusively to state law. *Id.*

44. Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 316 (2008) (noting that “[t]he doctrine of trade secrets evolved out of a series of [nineteenth century] common law torts”).

45. Goldman, *supra* note 8, at 690, 699.

46. RESTATEMENT OF THE LAW OF TORTS § 757 cmt. b (AM. LAW INST. 1939).

47. *See, e.g.*, Goldman, *supra* note 8, at 699–700 (observing that courts have held “a bevy of nontechnical subject matter can qualify as trade secrets, including business pricing information, sales data, supplier capabilities, marketing plans, promotional materials, and even some religious texts,” and also discussing client lists and abstract ideas).

48. *See, e.g.*, YEH, *supra* note 39, at i.

search engine.”⁴⁹ For something to become a trade secret it must meet minimal standards of novelty and inventiveness.⁵⁰ The purpose of this requirement is to prevent extending protection to something that is generally or commonly known in a particular industry.⁵¹ Thus, the most important element of a trade secret is its secrecy;⁵² information that is publicly disclosed cannot be protected as a trade secret.⁵³

Although the broad nature of eligible subject matter makes it difficult to determine what qualifies as a trade secret,⁵⁴ the First Restatement of Torts laid out six factors to consider in determining whether some particular subject matter is a trade secret. These factors are:

- (1) The extent to which the information is known outside of his business;
- (2) the extent to which it is known by employees and others involved in his business;
- (3) the extent of measures taken by him to guard the secrecy of the information;
- (4) the value of the information to him and to his competitors;
- (5) the amount of effort or money expended by him in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁵⁵

Applying these factors and determining what information constitutes a trade secret is a question of fact and therefore is resolved by a jury.⁵⁶

The First Restatement's definition of trade secret and the six factors used to determine its existence were widely accepted by the courts.⁵⁷ But, the subject of trade secrets was omitted from the Second Restatement of Torts.⁵⁸ This exclusion left several issues unaddressed, like the availability of injunctive relief and the statute of limitations.⁵⁹

49. *Id.*

50. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974).

51. *Id.* (“[S]ome novelty will be required if merely because that which does not possess novelty is usually known.”).

52. *Goldman*, *supra* note 8, at 701 (“Of course, the single most important requirement for a trade secret is that it must actually *be secret*.” (emphasis in original)).

53. *Id.*

54. RESTATEMENT OF THE LAW OF TORTS § 757 cmt. b (AM. LAW INST. 1939) (“An exact definition of a trade secret is not possible.”); *see also* *Learning Curve Toys, Inc. v. Playwood Toys, Inc.*, 342 F.3d 714, 723 (7th Cir. 2003) (“[A] trade secret ‘is one of the most elusive and difficult concepts in the law to define.’” (quoting *Lear Siegler, Inc. v. Ark-Ell Springs, Inc.*, 569 F.2d 286, 288 (5th Cir. 1978))).

55. RESTATEMENT OF THE LAW OF TORTS § 757 cmt. b (AM. LAW INST. 1939).

56. MILGRIM & BENSEN, *supra* note 39, § 15.01.

57. *Goldman*, *supra* note 8, at 702.

58. *Id.*

59. *Id.*

Fortunately, the National Conference of Commissioners on Uniform State Laws addressed this omission in 1979.⁶⁰ The commissioners drafted and approved the Uniform Trade Secrets Act (UTSA).⁶¹ The UTSA defines a trade secret as:

[I]nformation, 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.⁶²

This description departs from the First Restatement of Torts definition in a number of ways,⁶³ but the UTSA description retains the primary requirement of secrecy.⁶⁴ The UTSA lays out four main elements that must be satisfied to justify trade secret protection.⁶⁵ A trade secret must be (1) information; (2) that derives independent economic value; (3) from not being generally known or ascertainable by proper means from people who can obtain economic value from its disclosure or use; and (4) is subject to reasonable efforts to maintain its secrecy.⁶⁶ The UTSA proved to be wildly successful and was adopted in one form or another by forty-seven states, including Washington State.⁶⁷ Since then, the UTSA has remained the prevailing definition of trade secrets.⁶⁸

60. *Id.* at 703.

61. *Id.*

62. UTSA § 1(4)(i)–(ii) (UNIF. LAW COMM’N 1985).

63. Goldman, *supra* note 8, at 703.

64. UTSA § 1(4)(i) (noting that a trade secret gains its value from “not being generally known” and “not being readily ascertainable”).

65. *Id.* § 1(4)(i)–(ii).

66. *Id.*

67. *Legislative Fact Sheet—Trade Secrets Act*, UNIF. LAW COMM’N., <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act> [<https://perma.cc/457G-CXQB>]; see WASH. REV. CODE § 19.108 (2016) (Washington State’s codified version of the UTSA).

68. In the aftermath of the UTSA, the topic of trade secrets has been reincorporated back into the Restatements, but this time in the Third Restatement of Unfair Competition. This Restatement revised the previous treatment from the First Restatement of Torts to match the new train of thought expressed by the UTSA. To that end, it omitted the determining six factors and focused more on the UTSA’s criteria of economic value and the secrecy of the information. Compare RESTATEMENT OF THE LAW OF TORTS § 757 cmt. b (AM. LAW INST. 1939), with RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 reporter’s note cmt. d (AM. LAW INST. 1995) (noting that “many cases rely on the factors identified in [the] Restatement of Torts” but not expressly adopting them). See also Goldman, *supra* note 8, at 704 (noting that “[t]he new treatment omitted the six factors” and that the Restatement “opt[ed] instead for a more holistic approach to relevant factors such as the monetary value of the purported trade secret, [and] the secrecy and definiteness of the information”).

On April 27, 2016, President Obama brought about the most recent federal development of trade secrets when he signed the Defend Trade Secrets Act (DTSA), which went in to effect on that same day.⁶⁹ The main effect of the DTSA is that it provides civil remedies in federal court for misappropriation of trade secrets, an area that previously “was strictly a matter of state law.”⁷⁰ To this end, it was enacted as an amendment to the Economic Espionage Act.⁷¹ The DTSA amends this Act’s definition of a trade secret to bring it “more in line with the UTSA,” keeping the traditional broad definition.⁷² The DTSA further follows the UTSA’s lead by only categorizing information as a trade secret if (1) the information is actually secret by virtue of not being generally knowable or properly ascertainable by a person who could obtain economic value from its use; (2) reasonable measures have been taken to maintain that secrecy; and (3) the information derives independent economic value from its secrecy.⁷³ The DTSA does not “eliminate or preempt the various state trade secret rights,”⁷⁴ and so the full scope of its effect on the states has not been fully explored yet.

B. *Destruction of Trade Secret Protection*

The main takeaway from the development of trade secret law is that information is only protectable as a trade secret if it is kept secret.⁷⁵ Trade secret protection can potentially last forever,⁷⁶ but because “[a] trade secret is of value ‘only because it is a secret, and only so long as it remains a secret,’”⁷⁷ once the secret gets out it can no longer be

69. Toren, *supra* note 43.

70. *Id.*

71. *Id.*

72. *Id.* at 4.

73. 18 U.S.C. § 1839(3)(A)–(B) (2012); *see also* Toren, *supra* note 43, at 4.

74. Toren, *supra* note 43, at 3.

75. *See, e.g.*, 18 U.S.C. § 1839(3)(A)–(B) (trade secrets gain value “from not being generally known . . . and not being readily ascertainable”); UTSA § 1(4)(i) (UNIF. LAW COMM’N 1985) (trade secrets gain value “from not being generally known . . . and not being readily ascertainable”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW INST. 1995) (“A trade secret is any information . . . that is sufficiently valuable and secret . . .”); RESTATEMENT OF THE LAW OF TORTS § 757 cmt. b (AM. LAW INST. 1939) (trade secrets give the owner “an advantage over competitors who do not know or use it”).

76. MILGRIM & BENSON, *supra* note 39, § 8.02[6] (noting that “trade secret protection is ‘perpetual’ (i.e., of indeterminate duration) until the matter becomes generally known”); *see also* United States v. Dubilier Condenser Corp., 289 U.S. 178, 186 (1933) (explaining that an inventor can “keep his invention secret and reap its fruits indefinitely”).

77. LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 14:27 (4th ed. 2017).

protected.⁷⁸

This requirement of secrecy, however, seems to conflict with the functioning of the American workplace. After all, trade secrets are used every day in organizations that can potentially employ thousands of employees.⁷⁹ Furthermore, employees are continuously moving from company to company, often working for a competitor of a former employer.⁸⁰ Thus, using a trade secret to maximize a company's profit often requires confiding that secret to other parties.⁸¹ To reconcile the legal requirement of secrecy with the practical reality of the frequent disclosure of trade secrets to necessary parties, courts will uphold trade secret protection as long as a trade secret owner takes "reasonable measures" to maintain secrecy.⁸² Essentially, courts will look at the entirety of the circumstances surrounding the use of a trade secret to determine whether secrecy has been maintained, often analyzing cost-benefit aspects of actual measures taken versus measures that could have been taken.⁸³ Courts are reluctant to find an absence of "reasonable measures" as a matter of law when the trade secret owner took some measures to ensure secrecy.⁸⁴

There is no minimum standard for precautions that must be taken for a court to find "reasonable measures" to protect secrecy.⁸⁵ However, some measures that courts will often consider when evaluating "reasonable measures" are: (1) use of techniques to put employees and others on notice of the trade secret status of the subject matter with which they are working; (2) posting cautionary signs; (3) restricting visitors; (4) dividing the work process into several steps and among several departments, thus maintaining internal secrecy; (5) using coded information or ingredients; (6) keeping secret documents or materials locked up; and (7) limiting access to computer materials using passwords.⁸⁶ But, the techniques that can be employed to maintain

78. *Id.* (publication of the secret destroys its value as such); YEH, *supra* note 39, at 3 ("Once a trade secret has been exposed to the public, its protected character is lost and cannot later be retrieved.").

79. MILGRIM & BENSON, *supra* note 39, § 1.04.

80. *See id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* This is not an exhaustive list, but are some of the most commonly evaluated measures.

secrecy are infinite.⁸⁷ Practically, the care taken to maintain secrecy corresponds to the economic value and the nature of the trade secret, as some secrets are more easily protected with minimal precautions than others are with extensive safeguards.⁸⁸

Thus, use of a trade secret does not necessarily destroy trade secret protection, as long as “reasonable measures” are taken to ensure that it remains secret.⁸⁹ As such, “protected transactions involving trade secrets, such as licensing them or disclosing them on a confidential basis for evaluation, cannot be equated with unprotected use.”⁹⁰

However, one way that the secrecy of a trade secret is lost is through misappropriation. Tort law handles misappropriation of trade secrets.⁹¹ There are three main ways that a trade secret can be misappropriated: first, when an individual obtains the information through improper (i.e., illegal) means, such as theft, bribery, misrepresentation, or espionage;⁹² second, when an individual uses or discloses the trade secret through a breach of confidence;⁹³ third, if someone knows that a trade secret was obtained through improper means and discloses it anyway or if they disclose it by mistake.⁹⁴

However, the traditional forms of misappropriation are not the only ways that trade secrets can be disclosed. Trade secrets can be publicized—and their protection lost—“accidentally or intentionally . . . by anyone.”⁹⁵ Sometimes this disclosure can even be by the government. A public records request will make public any information contained within the documents requested,⁹⁶ potentially even information otherwise qualifying for trade secret protection.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. YEH, *supra* note 39, at 3.

92. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40(a) (AM. LAW INST. 1993); *see also* YEH, *supra* note 39, at 3.

93. YEH, *supra* note 39, at 3 (giving the example of an employee who switches jobs and then breaks a confidentiality agreement and discloses the prior employer's trade secrets).

94. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40(b) (AM. LAW INST. 1993); *see also id.* § 40 cmt. d (observing that if someone accepts a trade secret from a third party, knowing it was acquired through a “breach of a duty of confidence” (i.e. theft), that person is subject to liability; conversely, someone who acquires a trade secret from a third party without knowing that it was stolen is not liable).

95. YEH, *supra* note 39, at 3.

96. *See* Goldman, *supra* note 8, at 711 (observing that the success of the Freedom of Information Act lies (in part) on the “fullest responsible disclosure” and that “disclosure of agency records is the act's foremost goal”).

II. THE FREEDOM OF INFORMATION ACT

The federal FOIA is one of the most important resources the public can use to ensure government transparency.⁹⁷ FOIA grants the citizenry broad access to the inner workings of their government, empowering “any person”⁹⁸ to have access to “any record” if they just ask.⁹⁹ It has been so influential that most states’ public records acts, including Washington State’s,¹⁰⁰ were modeled after FOIA.¹⁰¹

FOIA has its roots in the Cold War.¹⁰² In the 1950s and ’60s, the public was concerned about increased government secrecy and supported passing a law to promote government transparency.¹⁰³ So, in 1955, Democratic Congressman John Moss suggested passing such a law.¹⁰⁴ However, there was a strong contingent in the government that opposed such action.¹⁰⁵ Among the group suspicious of the bill was Lyndon B. Johnson.¹⁰⁶ In fact, years later upon signing the bill into law as President, he released a written statement declaring his concerns about the impact on national security.¹⁰⁷ However, he ended the statement, “I signed this measure with a deep sense of pride that the United States is an open society,”¹⁰⁸ demonstrating that the interest in transparency won out in the end.¹⁰⁹

97. *History of FOIA*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/transparency/history-of-foia> [<https://perma.cc/U7X2-QV8P>].

98. 5 U.S.C. § 552(a)(3)(A) (2012). If “any person” can make a public records request, then certainly business competitors are included in that broad grant. *See infra* note 122 (describing the broad definition of “any person”).

99. 5 U.S.C. § 552(a)(3)(B).

100. *See Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 266, 884 P.2d 592, 605 (1994).

101. *State Public Record Laws*, *supra* note 24.

102. *History of FOIA*, *supra* note 97.

103. *Id.*

104. *Id.*

105. *Id.* (noting Moss could not find a republican co-sponsor for years after first announcing the project and that “every federal agency and department at the time opposed it”).

106. *Id.*

107. Lyndon B. Johnson, President of the U.S., Statement by the President Upon Signing S. 1160 (July 4, 1966), <http://nsarchive2.gwu.edu/nsa/foia/FOIARRelease66.pdf> [<https://perma.cc/XP88-GXRM>] (“[A] democracy works best when the people have all the information that the security of the nation permits . . . [and] I have always believed that freedom of information is so vital that only the national security . . . should determine when it must be restricted.”).

108. *Id.*

109. *History of FOIA*, *supra* note 97. President Johnson also signed the bill on the 4th of July (1966), a holiday that is synonymous with freedom from government oppression. *Id.* That obvious symbolism also seems to undercut any opposition he may have wanted to raise against government

However, when the bill was signed and FOIA was codified in title five, section 552 of the United States Code,¹¹⁰ it lacked the force necessary to get government agencies to comply with its requirements.¹¹¹ It was not until after Watergate that FOIA was amended to become a more forceful statute.¹¹² The Senate and House, overriding President Ford's veto, added "many new requirements, timeframes, [and] sanctions for wrongly withheld information" and waived FOIA fees for journalists and public interest groups.¹¹³

Since then the dominant trend has been curtailing FOIA's power.¹¹⁴ While the Electronic Freedom of Information Act, passed during the Clinton administration, provided for greater accessibility of government documents online, the three administrations that followed have been highly secretive.¹¹⁵ After September 11th, the Bush administration limited the public's access to former presidential records and failed to comply with many of FOIA's provisions.¹¹⁶ Likewise, despite promises to the contrary, the Obama administration failed to comply with many of FOIA's requirements.¹¹⁷ The Trump administration has also "been widely criticized for trying to circumvent the norms of disclosure and transparency to shield its inner workings from public view."¹¹⁸ President Trump has stopped "releasing logs of visitors to the White House," "banned cameras from news briefings," and has notoriously "refus[ed] to

transparency.

110. 5 U.S.C. § 552 (2012).

111. See Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970). Mr. Nader conducted a three-month test of FOIA and concluded:

"[G]overnment officials at all levels in many of these agencies have [been able to get away with] systematically and routinely violat[ing] both the purpose and specific provisions of the law. These violations have become so regular and cynical that they seriously block citizen understanding and participation in government. Thus the Act, designed to provide citizens with tools of disclosure, has been forged into a shield against citizen access. There is a prevailing, official belief that these federal agencies need not tolerate searching inquiries or even routine inquiries that appear searching because of their infrequency."

Id. at 2.

112. *History of FOIA*, *supra* note 97.

113. *Id.* Thus, the problems Mr. Nader pointed out were addressed (if not completely solved) by imposing penalties on the agencies officials. Non-compliance with, or avoidance of, a public records request was no longer an option.

114. See generally *id.*

115. *Id.*; Kate Kelly & Julie Hirschfeld Davis, *Lawsuit Challenges Secrecy of White House Advisors on Infrastructure*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/2017/07/25/us/politics/lawsuit-infrastructure-trump.html> [<https://perma.cc/P89Q-B4PV>].

116. *History of FOIA*, *supra* note 97 ("[T]he Bush Administration[] . . . was widely regarded as the most secretive administration in history.").

117. *Id.*

118. Kelly & Davis, *supra* note 115.

release his income tax returns,” breaking with decades of tradition.¹¹⁹

Despite multiple administrations curtailing the power of FOIA, it is still one of the greatest tools to ensure federal government transparency.¹²⁰ FOIA provides that federal government records must be made available to the public upon request.¹²¹ The statute provides that “any person”¹²² can make a request.¹²³ Likewise, FOIA makes no distinction between records created by government agencies and records that are merely collected by those agencies “after being submitted by private business concerns.”¹²⁴ Thus, any record an agency possesses is likely subject to a disclosure request.¹²⁵

However, as a consequence of the competing interests that surround FOIA, Congress added nine exemptions to FOIA’s general requirement of disclosure.¹²⁶ FOIA provides that there are several “matters” to which “[t]his section does not apply.”¹²⁷ The fourth listed exemption includes “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹²⁸ When the original FOIA bill was introduced to Congress this exemption was drafted as “trade secrets and other information obtained from the public and customarily privileged or confidential.”¹²⁹ It was intended to cover information “obtained by the Government” but that the person from whom it was obtained would not normally disclose to the public.¹³⁰ When the Senate revisited the bill, the exemption was redrafted to read “trade secrets and commercial or financial information.”¹³¹ The change was to ensure that information that was submitted in connection with a loan was covered.¹³²

119. *Id.*

120. *History of FOIA*, *supra* note 97.

121. 5 U.S.C. § 552 (2012).

122. The definition of “person,” applied by FOIA, is quite expansive and basically includes every conceivable entity that is not the government itself. A “person” is defined as “an individual, partnership, corporation, association, or public or private organization other than an agency.” *Id.* § 551(2). Thus, pretty much any organization or individual has access to government records if they simply submit a request for them.

123. *Id.* § 552(a)(3)(A).

124. Goldman, *supra* note 8, at 709.

125. *Id.* at 709–10.

126. *See* 5 U.S.C. § 552(b)(1)–(9).

127. *Id.* § 552(b).

128. *Id.* § 552(b)(4).

129. S. REP. NO. 88-1219, at 6 (1964).

130. *Id.*

131. S. REP. NO. 89-813, at 44 (1965).

132. *See id.* (noting that the exemption now includes “[s]pecifically . . . any commercial,

The House then clarified this change by adding that the exception would include “information which is given to an agency in confidence.”¹³³ Thus, this provision has been treated as “cover[ing] two distinct categories of information,” trade secrets and the much broader “commercial or financial” information,¹³⁴ which can apply to anything that falls under the ordinary definition of “commercial” or “financial.”¹³⁵ It seems that the intent was for FOIA to provide a clear exemption for trade secret information¹³⁶ and also create a catchall exemption for other information that a person might entrust to the government “in confidence”¹³⁷ but that would not qualify as a trade secret.

III. THE WASHINGTON STATE PUBLIC RECORDS ACT, TRADE SECRET EXEMPTION, AND TENSION IN THE CASE LAW

As mentioned above, the Washington State procurement system must balance the competing interests of government functionality and transparency.¹³⁸ Broadly, the Department of Enterprise Services (DES or the Department) system seeks to “promote open competition,” conducted with the “highest ethical standards.”¹³⁹ To that end, government procurement seeks to promote the welfare of the state by ensuring “proper accounting for contract expenditures” and encouraging the government to procure “goods and services from Washington small businesses.”¹⁴⁰ However, the State has declared that it has just as great an interest in transparency, “ease of public review . . . [and] provid[ing] state agency contract data to the public in a searchable manner.”¹⁴¹ Therefore as part of the statutory procurement framework, the legislature has declared that the records generated by government procurement are

technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan”).

133. H.R. REP. NO. 89-1497, at 31 (1965).

134. U.S. DEP'T OF JUSTICE, *Exemption 4*, in GUIDE TO THE FREEDOM OF INFORMATION ACT 263, 263 (2004).

135. *See id.* at 266.

136. *See* 5 U.S.C. § 552(b)(4) (2012).

137. H.R. REP. NO. 89-1497, at 31 (1965).

138. *See* WASH. REV. CODE § 39.26.005 (2016) (describing the competing interests of “facilitat[ing] state agency purchase of goods and services” and “open competition and transparency”).

139. *Id.*

140. *Id.*

141. *Id.*

“public records subject to disclosure” under the PRA.¹⁴² However, there are a number of exemptions to that broad mandate, including a trade secret exemption.¹⁴³

A. *The Framework for Government Procurement in Washington State*

The Washington State government is a busy entity, maintaining government services to better the lives of the citizenry. To complete the myriad of projects a government runs it must solicit services from outside businesses. This process of soliciting services is subject to a designated system laid out by the state legislature.¹⁴⁴ Government procurement policy seeks to obtain the best services at the lowest cost to accomplish the projects the state has set out.¹⁴⁵ However, these interests must be balanced with the competing government interest of transparency.¹⁴⁶ Hence, the documents generated when a good or service is procured are subject to Washington State’s PRA and must be disclosed upon request.¹⁴⁷

In 2011,¹⁴⁸ the Washington State legislature established a specific government agency that is responsible for procuring all necessary goods and services, the DES.¹⁴⁹ The purpose of creating this organization was to provide “centralized leadership in efficiently and cost-effectively managing resources necessary to support the delivery of state government services.”¹⁵⁰ To that end, the Department is charged with “provid[ing] products and services to support state agencies”¹⁵¹ and is responsible for entering into contracts on behalf of the state.¹⁵² In short, DES is responsible for procuring all goods and services on behalf of the

142. *Id.* § 39.26.030.

143. *See* WASH. REV. CODE § 42.56.070(1) (2016) (containing language that gives rise to Washington State’s trade secret exemption).

144. *See generally* *Agency Overview*, WASH. DEP’T ENTERPRISE SERVS., <https://des.wa.gov/about/agency-overview> [<https://perma.cc/5AVU-7CNS>].

145. *See e.g.*, WASH. ADMIN. CODE § 200-01-020 (2016) (noting that DES manages the resources that are “necessary to support the delivery of state government services”).

146. *See* discussion *supra* Introduction.

147. *See* WASH. REV. CODE § 39.26.030.

148. 2011 Wash. Sess. Laws 3523; WASH. ADMIN. CODE § 200-01-020 (“The department, created in chapter 43, Laws of 2011 . . .”).

149. WASH. REV. CODE § 43.19.005 (2016) (“The department of enterprise services is created as an executive branch agency.”).

150. WASH. ADMIN. CODE § 200-01-020.

151. WASH. REV. CODE § 43.19.005.

152. *Id.* § 43.19.011(2)(a).

government and for overseeing and funding those contracts.¹⁵³

The legislature established a general framework that DES follows when monitoring the procurement process.¹⁵⁴ First, agencies that are soliciting goods or services must provide notice to all businesses that they are accepting bids for a particular project.¹⁵⁵ DES operates an “enterprise vendor registration” and “bid notification” system as mandated by statute.¹⁵⁶ This system bears the unwieldy title of “Washington Electronic Business Solution.”¹⁵⁷ Vendors are required to register with this system.¹⁵⁸ Government agencies post contract opportunities on the system¹⁵⁹ and registered vendors then receive notice of these opportunities through email.¹⁶⁰ Vendors can also view notices by going to the DES website.¹⁶¹ Additionally, agencies may fulfill the notice requirement by sending vendors and potential bidders notices by mail, newspaper advertisements, or other appropriate methods.¹⁶²

Once DES posts the notice (also referred to as a solicitation), vendors submit their bids.¹⁶³ The DES website provides a set of “Preparation Tips” that vendors can follow to help ensure that they submit a competitive bid.¹⁶⁴ For example, vendors might attend pre-bid conferences or site visits and research previous bids and contracts from that particular agency.¹⁶⁵ The bid must be delivered to DES’s office in Olympia before the date and time set for the bid opening and be signed in ink.¹⁶⁶ Vendors may attend any bid opening, but the winning bidder is not determined at the bid opening.¹⁶⁷ The only information disclosed at

153. *See generally id.* § 43.19.011; WASH. REV. CODE § 39.26.080 (2016) (“The director is responsible for the development and oversight of policy for the procurement of goods and services by all state agencies . . .”).

154. *See* WASH. REV. CODE § 39.26.

155. *Id.* § 39.26.150(1).

156. *Id.*

157. *Doing Business with the State*, WASH. DEP’T ENTERPRISE SERVS., <http://www.des.wa.gov/services/contracting-purchasing/doing-business-state> [<https://perma.cc/5WJA-AZG7>].

158. *Id.*

159. WASH. REV. CODE § 39.26.150(1).

160. *About the Bidding Process*, WASH. DEP’T ENTERPRISE SERVS., <http://www.des.wa.gov/services/contracting-purchasing/doing-business-state/bid-opportunities/about-bidding-process> [<https://perma.cc/XKF3-FTQW>].

161. *Id.*

162. WASH. REV. CODE § 39.26.150(1).

163. *About the Bidding Process*, *supra* note 160.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

the bid opening is the name of the bidder and the time the bid was received.¹⁶⁸

Once all the bids are received, the Procurement Coordinator (an officer of DES) analyzes the bids to ensure they comply with the conditions of the solicitation and that the vendor is actually capable of providing the goods or services required.¹⁶⁹ The requesting agency then has three options.¹⁷⁰ First, it can reject all bids and rebid or cancel the solicitation.¹⁷¹ Second, it can solicit “best and final offers” from promising bidders¹⁷² to try and improve their options. Finally, it can award the contract to a bidder.¹⁷³ To win a contract the vendor must be the “lowest responsive and responsible” bidder,¹⁷⁴ which the agency determines.¹⁷⁵ The agency may then enter into negotiations with the “lowest responsive and responsible” bidder to see if the bid can be approved.¹⁷⁶ Once the agency has chosen the recipient of the contract (the Apparent Successful Vendor), it will announce its decision and make all received bids available for public viewing.¹⁷⁷ Generally, this is the procurement framework that all state agencies use.¹⁷⁸ A local agency would have its own framework, but would still be subject to PRA

168. *Id.*

169. *Id.*

170. WASH. REV. CODE § 39.26.160(1)(a)(i)–(iii) (2016).

171. *Id.* § 39.26.160(1)(a)(i).

172. *Id.* § 39.26.160(1)(a)(ii).

173. *Id.* § 39.26.160(1)(a)(iii).

174. *Id.*

175. *See id.* § 39.26.160(2)(a)–(f) (providing the following factors to determine whether a bidder is responsible: “(a) The ability, capacity, and skill of the bidder to perform the contract or provide the service required; (b) The character, integrity, reputation, judgment, experience, and efficiency of the bidder; (c) Whether the bidder can perform the contract within the time specified; (d) The quality of performance of previous contracts or services; (e) The previous and existing compliance by the bidder with laws relating to the contract or services; and (f) Such other information as may be secured having a bearing on the decision to award the contract”); *id.* § 39.26.160(3)(a)–(f) (laying out “best value criteria” for determining the lowest responsive and responsible bidder: “(a) Whether the bid satisfies the needs of the state as specified in the solicitation documents; (b) Whether the bid encourages diverse contractor participation; (c) Whether the bid provides competitive pricing, economies, and efficiencies; (d) Whether the bid considers human health and environmental impacts; (e) Whether the bid appropriately weighs cost and noncost considerations; and (f) Life-cycle cost”).

176. *Id.* § 39.26.160(6).

177. *About the Bidding Process*, *supra* note 160.

178. *Frequently Asked Questions*, WASH. DEP’T ENTERPRISE SERVS., <http://www.des.wa.gov/about/about-enterprise-services/frequently-asked-questions> [<https://perma.cc/QSP9-DLT8>] (noting that DES provides services to the “state government”).

requirements.¹⁷⁹

B. General Disclosure Requirements and Framework of the PRA

The PRA is codified in title forty-two, chapter fifty-six of the Revised Code of Washington (RCW).¹⁸⁰ The PRA was originally adopted in 1972.¹⁸¹ It has been frequently revised since then.¹⁸² It requires that “most records maintained by state, county, and city governments be made available to members of the public.”¹⁸³ PRA also applies to all state and local agencies,¹⁸⁴ as well as the legislature.¹⁸⁵

Like all state agencies, DES must follow the PRA disclosure framework for documents generated by the procurement process.¹⁸⁶ The director of DES appoints a public records officer,¹⁸⁷ who is responsible for overseeing the Department’s rules concerning disclosure of these documents and making sure that the Department’s disclosure program complies with the PRA.¹⁸⁸ To obtain a document from DES, a person must submit a public records request to the public records officer.¹⁸⁹ The request can be in writing—using the proper form—or by letter, phone, fax, or email.¹⁹⁰ The public request form is available for download at DES’s website to ensure easy access.¹⁹¹ The one caveat is that bid submissions and evaluations are exempt from disclosure until a

179. WASH. REV. CODE § 42.56.580(1) (2016) (“Each state and local agency shall appoint and publicly identify a public records officer whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency’s compliance with the public records disclosure requirements of this chapter.”).

180. *Id.* § 42.56; MRSC, PUBLIC RECORDS ACT FOR WASHINGTON CITIES, COUNTIES, AND SPECIAL PURPOSE DISTRICTS 7 (2016).

181. WASH. SEC’Y OF STATE, OFFICIAL VOTERS PAMPHLET: GENERAL ELECTION TUESDAY, NOVEMBER 7, 1972, at 11 (1972) [hereinafter 1972 VOTERS PAMPHLET]; MRSC, *supra* note 180, at 7.

182. MRSC, *supra* note 180, at 7.

183. *Id.*

184. *Id.*

185. WASH. REV. CODE § 42.56.010(2).

186. *See* WASH. ADMIN. CODE § 200-01 (2016).

187. Each “state and local agency” is required to “appoint and publicly identify a public records officer.” WASH. REV. CODE § 42.56.580(1). It is that person’s responsibility to interact with members of the public seeking disclosure and to oversee that the particular agency is in compliance with the PRA. *Id.*

188. WASH. ADMIN. CODE § 200-01-030.

189. *Id.* § 200-01-040.

190. *Id.*; *Request a Public Record*, WASH. DEP’T ENTER. SERVS., <http://www.des.wa.gov/about/news-media-center/request-public-record> [https://perma.cc/8XUP-DADP].

191. *Request a Public Record*, *supra* note 190.

procuring agency announces the Apparent Successful Vendor.¹⁹²

Within five days of receiving a request the public records officer will do one of three things: make the documents available for inspection and copying, provide a reasonable estimate for when the records will be available, or deny the request.¹⁹³ The PRA may exempt some records or part of records.¹⁹⁴ In that case, the public records officer will redact all or part of the documents and provide the requester with an explanation for why the record is being withheld, along with the relevant PRA exemption.¹⁹⁵

Once an agency receives a public records request, it has the option to inform a third party that may have an interest in the requested documents.¹⁹⁶ Unless the agency is required by law to inform an interested third party, it is completely up to the disclosing agency whether to inform a third party.¹⁹⁷ The purpose of giving a third party notice is to allow the third party to ask the requester to modify the request¹⁹⁸ or obtain an injunction from a court preventing or limiting disclosure of the requested documents.¹⁹⁹ If a third party has received notice of an impending public records request, they have a reasonable amount of time to obtain an injunction.²⁰⁰ However, it is the practice of many agencies to only allow ten days for a third party to obtain such an injunction.²⁰¹ If the third party does not get an injunction by the end of that ten day period, the agency is required to disclose the records in full.²⁰²

192. WASH. REV. CODE § 39.26.030 (2016).

193. WASH. ADMIN. CODE § 200-01-045(1)(a)–(e).

194. *Id.* § 200-01-045(3).

195. *Id.*

196. WASH. REV. CODE § 42.56.540 (2016) (“An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested.”); *see also* WASH. ADMIN. CODE § 200-01-045(2) (stating DES’s public records officer “may” give notice to an affected third party).

197. *See* WASH. REV. CODE § 42.56.540.

198. WASH. ADMIN. CODE § 200-01-045(2).

199. *See* WASH. REV. CODE § 42.56.540.

200. *Wade’s Eastside Gun Shop v. Dep’t of Labor & Indus.*, 185 Wash. 2d 270, 291, 372 P.3d 97, 106 (2016) (noting that the PRA allows an agency to give a third party a “realistic opportunity” to obtain an injunction).

201. WASH. ADMIN. CODE § 44-14-04003(11) (2016) (“The practice of many agencies is to give ten days’ notice.”).

202. WASH. STATE OFFICE OF THE ATT’Y GEN., OPEN GOVERNMENT RESOURCE MANUAL 17 (2016), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/Open_Government/Open_Government_Internet_Manual/Open%20Government%20Resource%20Manual%202016%20-%20Oct.%2031%202016%20%282%29.pdf [https://perma.cc/PP5S-6TT4]. For an

If a request is denied, the requester can submit a petition to the public records officer, who will give the petition to the agency for review.²⁰³ The agency will review the petition and render a decision within two business days of the receipt of the petition.²⁰⁴ Once the agency has either affirmed or denied the refusal to disclose, the administrative procedures are considered exhausted and the requester or the affected agency may appeal the decision to the courts.²⁰⁵

When DES discloses the documents obtained from vendors there is a danger that those companies will lose valuable assets. In order to give themselves the best chance of obtaining the contract, companies will include specific and precise secret information.²⁰⁶ Bidders will include this information in order to bolster their credentials or in response to specific requests.²⁰⁷ Thus, these bids often contain intellectual property assets that a company has a vested interest in keeping secret from its competitors.²⁰⁸ Moreover, the dangers of disclosure continue to exist beyond the bidding stage.²⁰⁹ Sometimes, as a condition to awarding the contract, a government agency may require the company to submit more confidential information about its operations.²¹⁰

Even after that, when the contract has been in place for a while, the contracted company may be required to submit ongoing disclosures to

example of this process see the discussion of the *Robbins Geller* case, *infra* section III.C.4.

203. WASH. ADMIN. CODE § 200-01-080(1)(a), (c).

204. *But see id.* § 200-01-080(2) (providing that the two-day period may be shortened or lengthened by agreement between DES and the requester).

205. *Id.* § 200-01-080(3)–(4).

206. *See* JACK BOOS & SONIA R. GIOSEFFI, K&L GATES, LEGAL INSIGHT: THE THREAT OF DISCLOSURE OF PROPRIETARY INFORMATION UNDER THE CALIFORNIA PUBLIC RECORDS ACT 1 (2013), http://m.klgates.com/files/Publication/03c1b0ac-8319-419c-98e1-683153ec1686/Presentation/PublicationAttachment/7eb35c17-21c9-470b-a50b-703c128aa9bb/Government_Contracts_Alert_09102013.pdf [<https://perma.cc/FQ75-7AJH>] (discussing the issue in the context of the California Public Records Act).

207. *Id.* After all, the government wants to make sure that it is getting the best product. When shopping, it is not wise to take the merchants at their word. Prudent shoppers check their facts and research the product. The government is no different; important aspects of a vendor's contract could end up in the bid at the government's request. This presents a problem for the vendor trying to protect its intellectual property. It goes beyond trade secrets as well. What if the vendor has a patent pending? Public disclosure of their patent information would destroy the patentability of their innovation and they would lose that protection.

208. *See* WASH. ADMIN. CODE § 44-14-06002(7) (2016) (“Many agencies hold sensitive proprietary information of businesses they regulate. For example, an agency might require an applicant for a regulatory approval to submit designs for a product it produces.”).

209. BOOS & GIOSEFFI, *supra* note 206, at 1–2.

210. *Id.*

the agency that may include its confidential information.²¹¹ Because the law only protects certain intellectual property assets as long as they are kept secret,²¹² disclosure of these trade secrets could be catastrophic for businesses submitting bids for government contracts. For this reason, it is important that the PRA have a fully functioning trade secret exemption.

C. *The Various Trade Secret Exemptions in the PRA*

Unlike FOIA, the Washington PRA includes several exemptions for trade secret information. One exemption is derived from an obscure, two-word phrase that relies on the UTSA to exempt trade secrets. The others stem from a list of exemptions for various specific examples of trade secrets, embodied in RCW 42.56.270.

1. *The “Official” Trade Secret Exemption*

Washington’s PRA “closely parallels” the federal Freedom of Information Act.²¹³ Like the federal act, the Washington PRA was the “product of the ‘open government’ climate brought about by distrust of government accountability and by misuse of government power during the civil rights and Vietnam protest era.”²¹⁴ However, unlike the federal act,²¹⁵ the PRA did not meet strong political opposition, as it passed “at a time when conservative opposition to such measures was discredited.”²¹⁶ In fact, in the Voters Pamphlet that accompanied the ballot (which is one of only a few primary source materials that exist from the original act),²¹⁷ even the “Statement against” refers to the Act as “well-intentioned.”²¹⁸ Later, “changes in the political climate” and other

211. *Id.* at 2.

212. See discussion *supra* section I.B.

213. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 266, 884 P.2d 592, 605 (1994).

214. ERIC M. STAHL & MICHAEL J. KILLEEN, *OPEN GOVERNMENT GUIDE: OPEN RECORDS AND MEETINGS LAWS IN WASHINGTON* 1 (6th ed. 2011).

215. *History of FOIA*, *supra* note 97 (noting the strong opposition to FOIA, including from President Johnson).

216. STAHL & KILLEEN, *supra* note 214.

217. In contrast to FOIA, which was a formal piece of legislation passed through bicameral legislative process, the Washington PRA was originally enacted as a citizens’ initiative. See 1972 VOTERS PAMPHLET, *supra* note 181, at 11. That initiative, I-276, created the public disclosure laws. Over time, these laws were amended to what we commonly refer to as the Public Records Act. See *In re Request of Rosier*, 105 Wash. 2d 606, 609, 717 P.2d 1353, 1356 (1986) (referring to what has become the PRA as the “public disclosure law”).

218. 1972 VOTERS PAMPHLET, *supra* note 181, at 11.

factors led to a “legislative and judicial retrenchment . . . including an increase in the number and scope of exemptions.”²¹⁹ But, the political climate at the time resulted in a state act that “is more severe than the federal act in many areas.”²²⁰ The Washington PRA emphasizes heavily the benefits of government disclosure²²¹ and thus, exceptions to a public records request are not accepted lightly.²²²

Although trade secrets are now generally exempted,²²³ unlike FOIA, the Washington trade secret exemption is not clear on the face of the statute.²²⁴ The section on “[d]ocuments and indexes to be made public” provides that each government agency has to make available all public records, “unless the record falls within the specific exemptions of subsection (8) of this section, this chapter, or *other statute* which exempts or prohibits disclosure of specific information or records.”²²⁵ This “other statute” language triggers the trade secret exemption.²²⁶

Not all statutes qualify under this language, as “an exemption will not be inferred or presumed.”²²⁷ In fact, the “other statute” provision “applies only to those exemptions explicitly identified in other statutes.”²²⁸ It does not allow a court to “imply exemptions but only allows specific exemptions to stand.”²²⁹ But the Washington State

219. STAHL & KILLEEN, *supra* note 214.

220. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 266, 884 P.2d 592, 605 (1994).

221. *See* WASH. REV. CODE § 42.56.030 (2016) (“The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.”).

222. *See, e.g., id.* (“This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.”). *But see Sunshine Committee*, WASH. STATE OFFICE OF THE ATT’Y GEN., <http://www.atg.wa.gov/sunshine-committee> [<https://perma.cc/QLL5-QBDM>] (observing that the number of exemptions has grown from ten to over 500 since the PRA’s enactment).

223. WASH. REV. CODE § 42.56.070(1) (containing the language for Washington State’s trade secret exemption).

224. *Id.*

225. *Id.* (emphasis added).

226. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 262, 884 P.2d 592, 603 (1994) (holding that the UTSA qualifies as an “other statute”).

227. WASH. STATE OFFICE OF THE ATT’Y GEN., OPEN GOVERNMENT RESOURCE MANUAL 23 (Oct. 31, 2016), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/Open_Government/Open_Government_Internet_Manual/Open%20Government%20Resource%20Manual%202016%20-%20Oct.%2031%202016%20%282%29.pdf [<https://perma.cc/PP5S-6TT4>].

228. *Progressive Animal*, 125 Wash. 2d at 262, 884 P.2d at 603.

229. *Brouillet v. Cowles Publ’g Co.*, 114 Wash. 2d 788, 800, 791 P.2d 526, 533 (1990).

Supreme Court has held that the UTSA, as adopted by the Washington State Legislature,²³⁰ qualifies as an “other statute.”²³¹ Thus, “a record is exempt from disclosure if it constitutes a ‘trade secret’ under the Uniform Trade Secrets Act.”²³²

The codification of the “other statute” path to exemption did not happen immediately. In the original initiative there were only ten named exemptions to the bill.²³³ They were all specific exemptions, excusing things like personal information,²³⁴ tax information,²³⁵ information compiled by law enforcement in the course of their criminal investigations,²³⁶ and examination data (e.g., test questions and scoring sheets).²³⁷ The “other statute” language was added in 1987 when the legislature amended a section of the PRA.²³⁸ The amendment was a response to a Washington State Supreme Court case, *In re Request of Rosier*.²³⁹ In that case, the Supreme Court took it upon itself to interpret a section of the PRA to imply a general exemption for personal privacy.²⁴⁰ The legislature immediately added the “other statute” language to keep the Court from creating its own exemptions.²⁴¹ The legislature emphasized that exemptions to the PRA should be express and that agencies should not have to worry about courts changing the rules they have to follow.²⁴² Since then, the number of PRA exemptions has grown considerably. Now, the PRA has over one hundred specific,

230. WASH. REV. CODE § 19.108 (2016) (Washington’s adoption of the UTSA).

231. *Progressive Animal*, 125 Wash. 2d at 262, 884 P.2d at 603 (“Two state statutes qualify as ‘other statutes’ in the present context . . . First, the State Uniform Trade Secrets Act . . .”).

232. WASH. ADMIN. CODE § 44-14-06002(7) (2016).

233. 1972 VOTERS PAMPHLET, *supra* note 181, at 63.

234. *Id.* (exempted in section 31(1)(a)–(b)).

235. *Id.* (exempted in section 31(1)(c)).

236. *Id.* (exempted in section 31(1)(d)).

237. *Id.* (exempted in section 31(1)(f)).

238. E.S.H.B. 4, 50th Leg., 1st Extraordinary Sess. (Wash. 1987).

239. 105 Wash. 2d 606, 717 P.2d 1353 (1986).

240. *Id.* at 609–13, 717 P.2d at 1356–58.

241. H.B. Rep. on E.S.H.B. 4, 50th Leg., Reg. Sess., at 3 (Wash. 1987) (noting that testimony in favor stated: “(1) The release of public records should be based upon whether or not there is an express exemption prohibiting release; it should not be based upon a complex decision-making process for weighing various interests. (2) The bill clarifies that exemptions from disclosure can be found in other statutes outside the public disclosure statutes. (3) The *Rosier* decision obscured the guidance given agencies for releasing records; public agencies need bright lines of guidance”); *see also Doe ex rel. Roe v. Wash. State Patrol*, 185 Wash. 2d 363, 372, 372 P.3d 63, 67 (2016) (noting that “the legislature made it very clear, following our holding in *In re Rosier* . . . that it did not want this court creating exemptions when there were none” (citation omitted)).

242. H.B. Rep. on E.S.H.B. 4, 50th Leg., Reg. Sess., at 3 (Wash. 1987).

named exemptions.²⁴³ Not only that but the “other statute” language sweeps in more than four hundred more records exemptions from other, non-PRA statutes.²⁴⁴

2. *Additional Trade Secret Exemptions*

The PRA includes other provisions that could be construed to exempt trade secrets.²⁴⁵ As mentioned above, the PRA has exploded beyond its original ten exemptions to include over one hundred named exemptions.²⁴⁶ These additional exemptions were added piece by piece, at many different times, encompassing all manner of situations²⁴⁷ and were added to the same section of the PRA.²⁴⁸ In 2006, the legislature attempted to clean up the PRA by re-codifying it in a new chapter under title forty-two of the Revised Code of Washington and organizing all the various exemptions by subject matter.²⁴⁹ As part of this reorganization, the legislature created RCW 42.56.270, an exemption for “[f]inancial, commercial, and proprietary information.”²⁵⁰ This provision currently includes some twenty-eight specific examples of situations when that type of information is exempted.²⁵¹ For example, RCW 42.56.270(1) says that “[v]aluable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss” is exempted from disclosure.²⁵² Under the

243. *Public Records Act*, WASH. COAL. FOR OPEN GOV'T (Aug. 6, 2016), <http://washingtongov.org/public-records-act/> [https://perma.cc/9H4R-G9EJ].

244. *Id.*

245. *See* WASH. REV. CODE § 42.56.270(1) (2016) (talking about material that could fit a definition of trade secrets under any of the four major codifications); *id.* § 42.56.270(11) (specifically mentioning “trade secrets”).

246. *Public Records Act*, *supra* note 243.

247. Here are examples of a few of the many exemptions: information relating to archeological sites, WASH. REV. CODE § 42.56.300; library records, *id.* § 42.56.310; membership and ownership interests in timeshares and condominiums, *id.* § 42.56.340; client records for domestic abuse or sexual assault programs and services, *id.* § 42.56.370; information relating to agriculture and livestock, *id.* § 42.56.380; and information relating to “insurance and financial institutions,” *id.* § 42.56.400.

248. All of the exemptions were originally codified in WASH. REV. CODE § 42.17.310. S.H.B. 1133, 59th Leg., Reg. Sess. (Wash. 2005). The list was so long that the last listed exemption was codified as WASH. REV. CODE § 42.17.310(1)(iii), having cycled through the entire alphabet twice and with some sections including many additional subsections. *Id.*

249. *Id.*

250. *Id.*

251. *See* WASH. REV. CODE § 42.56.270.

252. *Id.* § 42.56.270(1). Incidentally, this was one of the first ten exemptions included in the

UTSA's definition of a trade secret,²⁵³ this type of information could easily qualify as a trade secret. In fact, the Washington State Supreme Court observed that "[t]he clear purpose of [this] exemption is to prevent private persons from using the Act to appropriate potentially valuable intellectual property for private gain,"²⁵⁴ seemingly confirming that the provision is intended to protect trade secrets.

RCW 42.56.270 also includes sections that explicitly mention trade secrets. There are three sections that specifically mention trade secrets, sections 270(11), 270(16), and 270(28).²⁵⁵ However, they only exempt trade secrets in specific circumstances. Section 270(11) only exempts trade secrets if they relate to "(a) [a] vendor's unique methods of conducting business; (b) data unique to the product or services of the vendor; or (c) determining prices or rates to be charged for services . . . for purposes of the development, acquisition, or implementation of state purchased health care."²⁵⁶ Section 270(16) only exempts "trade secrets submitted by a permit holder, mine operator, or landowner to the department of natural resources."²⁵⁷ Similarly, section 270(28) only exempts trade secrets that are part of an agreement or contract entered into by a registered marijuana business.²⁵⁸ The existence of all of these different exemptions that seem to all exempt trade secrets creates tension in the statute, tension that is illustrated through two interesting cases.

3. Progressive Animals Welfare Society v. University of Washington

One of the most important Washington cases dealing with the PRA and exempt information is *Progressive Animals Welfare Society v. University of Washington (PAWS)*.²⁵⁹ In that case, an animal rights group submitted a public records request to obtain information contained in a grant proposal.²⁶⁰ A scientist, working at the University of Washington, proposed research to study the brain development of monkeys who were

original initiative that created what is now the PRA. 1972 VOTERS PAMPHLET, *supra* note 181, at 63.

253. UTSA § 1(4) (UNIF. LAW COMM'N 1985).

254. *Servais v. Port of Bellingham*, 127 Wash. 2d 820, 829, 904 P.2d 1124, 1129 (1995) (referencing WASH. REV. CODE § 42.56.270(1)).

255. WASH. REV. CODE § 42.56.270(11), (16), (28).

256. *Id.* § 42.56.270(11).

257. *Id.* § 42.56.270(16).

258. *Id.* § 42.56.270(28).

259. 125 Wash. 2d 243, 884 P.2d 592 (1994).

260. *Id.* at 243, 884 P.2d at 592.

raised without social interaction.²⁶¹ Through this research, the scientist hoped to understand why some humans engage in self-injurious behavior and to eventually treat such behavior.²⁶² The scientist submitted a grant request in order to obtain funding for his project.²⁶³ Progressive Animal Welfare Society (the Society) submitted a public records request to the University.²⁶⁴ The University denied the request and the Society filed suit to obtain the records.²⁶⁵ The University argued that the grant proposal was exempt from disclosure under a number of exemptions, including the PRA “other statute” exemption for trade secrets²⁶⁶ and the “financial, commercial, and proprietary information” section.²⁶⁷ On the surface, this public records request looks like a simple attempt to ensure the humane treatment of research animals, but the problem is that the grant proposal contained information that could potentially “eventuate in trade secrets.”²⁶⁸

The Court’s analysis in this case is problematic for several reasons. First, it is odd that the court concluded that the University held trade secrets. In general, public universities do not hold trade secrets. Therefore, it is unusual that this case, and this set of facts, would result in the controlling decision on trade secret exemption.

Second, after the decision in *In re Rosier*, the Washington Legislature declared specifically that the rules governing disclosure of information should be clear.²⁶⁹ The rules governing the disclosure or nondisclosure of trade secrets are anything but clear after this case. When discussing the “other statute” exemption, the Washington State Supreme Court recognized that the University has an interest in preventing exposure of information that has “even potential economic value.”²⁷⁰ This seems like

261. *Id.* at 247, 884 P.2d at 595.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 250, 884 P.2d at 596.

266. *Id.* at 261–63, 884 P.2d at 602–03.

267. *Id.* at 254, 884 P.2d at 599.

268. *Id.* at 262, 884 P.2d at 603.

269. E.S.H.B. 4, 50th Leg., 1st Extraordinary Sess. (Wash. 1987). In the *In re Rosier* decision, the Court made a new rule for determining when information that reveals a unique fact about a particular individual is exempt from disclosure. *See In re Request of Rosier*, 105 Wash. 2d 606, 717 P.2d 1353 (1986). In response, the Legislature declared that the disclosure of public records should be based on whether or not there is an express exemption, not a complicated balancing analysis. E.S.H.B. 4, 50th Leg., 1st Extraordinary Sess. (Wash. 1987). Thus, the Legislature determined that the *In re Rosier* decision confused the guidance given to agencies and that the agencies need clear guidance. *Id.*

270. *Progressive Animal*, 125 Wash. 2d at 262, 884 P.2d at 603. *But see* *Belo Mgmt. Serv., Inc.*

a sweeping declaration that the information at issue here was exempt as trade secrets under the “other statute” exemption.²⁷¹ This would be fine, except that the Court introduced ambiguity by also utilizing a subsection of the “financial, commercial and proprietary information” exemption, a specific exemption for “valuable formulae” or “research data.”²⁷² The Court had to adopt a broad view of the information at issue to hold that it fell under this exemption.²⁷³ Moreover, the Court blurred the lines between the “other statute” trade secret exemption and this exemption by couching this exemption in terms of potential loss of intellectual property and thus affirming that it also addressed trade secrets.²⁷⁴ The rules governing disclosure are supposed to be clear but, in this case, the court cannot seem to decide how exactly trade secrets are to be protected from disclosure. On the one hand, the Court seems to approve of widespread exemption for trade secrets, but on the other uses two different exemptions of the PRA to accomplish this, interpreting both incredibly broadly. This raises the question of why there needs to be two exemptions for the same thing. Despite the legislative mandate of clarity, the Court provided two different avenues of exemption, then blurred the distinction between the two, and subsequently gave both a wide reach.

Third, the Court’s interpretation—that the UTSA qualifies as an “other statute”²⁷⁵—does not agree with a logical reading of the statute and the provisions of the UTSA. The relevant provision of the RCW provides that each agency shall make all public records available for inspection, “unless the record falls within the specific exemptions of

v. ClickA Network, 184 Wash. App. 649, 658, 343 P.3d 370, 375 (Wash. Ct. App. 2014) (observing that releasing information that would give competitors an unfair advantage “is insufficient to prove that the information is a trade secret”).

271. *Progressive Animal*, 125 Wash. 2d at 262, 884 P.2d at 603. The Court used a lot of strong language that seemed to back up the applicability of the “other statute” exemption. *Id.* (“Given the potential for unfunded biomedical grant proposals to eventuate in trade secrets . . . this ‘other statute’ operates as an independent limit on disclosure of portions of the record at issue here that have even potential economic value. The Public Records Act is simply an improper means to acquire knowledge of a trade secret.”).

272. *Id.* at 254–55, 884 P.2d at 598–99.

273. *Id.* at 255, 884 P.2d at 599 (“Valuable ‘research data’ include not only raw data but also the guiding hypotheses that structure the data.”).

274. *Id.* (first noting that “[t]he clear purpose of the exemption is to prevent private persons from using the Act to appropriate potentially valuable intellectual property for private gain” and then also observing, “[m]oreover, the valuable research data implicit in unfunded grant proposals is precisely the kind of information or record envisaged by this exemption. If the data or hypotheses contained in the unfunded grant proposal were prematurely released, the disclosure would produce both the private gain constituted by potential intellectual property piracy and the public loss of patent or other rights”).

275. *Id.* at 261–63, 884 P.2d at 602–03.

subsection (8) of this section, this chapter, or *other statute which exempts or prohibits disclosure of specific information or records.*²⁷⁶ A logical reading of the statute supports the conclusion that the to qualify as an “other statute” the statute in question must explicitly exempt or prohibit disclosure of the relevant records. However, the UTSA does not explicitly exempt trade secrets from disclosure as a result of a public records request.²⁷⁷ Nowhere does the UTSA explicitly provide for an exemption from public records requests for trade secrets.²⁷⁸ The UTSA only provides a framework for misappropriation and various remedies for misappropriation,²⁷⁹ but not an exemption for trade secrets from public records requests. This is very unlike other acts that have been held to qualify as “other statutes.” Those statutes provide an exemption from public records requests.²⁸⁰ Given the Washington State Supreme Court’s own mandate that the “other statute” exemption only applies to exemptions “explicitly identified” in other statutes²⁸¹ it is strange (to say the least) that they then inferred an exemption in a statute that does not provide for an exemption from public records requests. The Court seemed to go against their express rule.

Fourth, the Court did not spend a lot of time on this guidance. In the published, thirty-four-page case, the valuable formulae or research data exemption is allotted little more than one page,²⁸² while the “other statute” link to the UTSA is given little more than a paragraph.²⁸³ The discussion of the valuable formulae focused mostly on the scope of this

276. WASH. REV. CODE § 42.56.070(1) (2016) (emphasis added).

277. *See generally* WASH. REV. CODE § 19.108 (2016) (Washington’s codified adoption of the UTSA).

278. *See e.g., id.*

279. *See e.g., id.* §§ 19.108.010–030, 19.108.050, 19.108.900, 19.108.910.

280. The language through which courts find exemptions in “other statutes” can be quite vague. For example, the Washington statute governing the confidentiality of child support records (WASH. REV. CODE. § 26.23.120 (2016)) provides that these records are subject to disclosure only as provided by that chapter and “under appropriate circumstances.” *Id.* § 26.23.120(1)–(3). This language has been held to qualify as an “other statute” because it provides an exemption to the general rule that all public records are subject to disclosure. *Anderson v. Dep’t of Soc. and Health Servs.*, 196 Wash. App. 674, 683–84, 384 P.3d 651, 656–57 (Wash. Ct. App. 2016), *review denied*, 188 Wash. 2d 1006, 393 P.3d 786 (2017). However, the UTSA does not even provide this tenuous language for the Court to justify its decision. *See generally* WASH. REV. CODE § 19.108.

281. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 262, 884 P.2d 592, 603 (1994) (“[The ‘other statute’] language does not allow a court to imply exemptions but only allows specific exemptions to stand.” (internal quotations omitted)).

282. *Id.* at 254–55, 884 P.2d at 598–99.

283. *Id.* at 262–63, 884 P.2d at 602–04.

exemption as it pertained to research data and hypotheses.²⁸⁴ The analysis of the “other statute” exemption was limited to a mere declaration that the UTSA qualifies as an “other statute.”²⁸⁵ With this cursory analysis, the Court could not dive into the issue of trade secret exemption as completely as was necessary to provide clear guidance. These two to three pages on trade secret exemption does not provide the necessary guidance to institute a clear rule that public agencies can follow.

4. Robbins, Geller, Rudman & Dowd, LLP v. State

Another example of the tension between the various trade secrets in the PRA occurred more recently in *Robbins, Geller, Rudman & Dowd, LLP v. State*.²⁸⁶ An attorney from Atlanta²⁸⁷ filed a public records request to obtain information related to law firm responses to government solicitations.²⁸⁸ The Washington State Attorney General’s Office (AGO) submitted a request for qualifications and quotations from private law firms, who could represent the Workplace Safety and Insurance Board in future securities litigation.²⁸⁹ The AGO’s request warned firms that their responses were subject to disclosure under the PRA.²⁹⁰ Robbins, Geller, Rudman & Dowd, LLP (Robbins Geller) submitted a response and even marked relevant portions as proprietary.²⁹¹ Eventually, the AGO chose it to execute a securities agreement between the Workplace Safety and Insurance Board and the AGO.²⁹² Vincent Gresham, a securities attorney²⁹³ (and presumably a competitor), filed a request for any information related to requests for proposals from securities law firms, as well as any responses.²⁹⁴ The

284. *Id.* at 254–55, 884 P.2d at 598–99.

285. *Id.* at 262–63, 884 P.2d at 602–04.

286. 179 Wash. App. 711, 328 P.3d 905 (Wash. Ct. App. 2014).

287. *Robbins, Geller, Rudman & Dowd, LLP v. Vincent T. Gresham and State of Washington, Office of the Attorney General*, TRADE SECRETS INST., <http://tsi.brooklaw.edu/cases/robbins-geller-rudman-dowd-llp-v-vincent-t-gresham-and-state-washington-office-attorney-genera> [https://perma.cc/3XL4-SYEC].

288. *Robbins Geller*, 179 Wash. App. at 717, 328 P.3d at 909.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Robbins, Geller, Rudman & Dowd, LLP v. Vincent T. Gresham and State of Washington, Office of the Attorney General*, *supra* note 287.

294. *Robbins Geller*, 179 Wash. App. at 717, 328 P.3d at 909.

AGO notified Robbins Geller that they had received the request and would release the firm's response, including all the proprietary information if Robbins Geller did not obtain an injunction.²⁹⁵ Robbins Geller quickly filed a lawsuit against the AGO to keep it from disclosing their proprietary information, which included calculations for proposed fees, records of past billing, client lists, insurance information, and the names and contacts of client references.²⁹⁶ The Washington appellate court that heard the case concluded that the information did not constitute trade secrets under the UTSA.²⁹⁷ The court reasoned, with regard to parts of the proprietary information, that the specific information submitted was not materially different from their competitors and thus disclosure did not provide those competitors with a significant advantage.²⁹⁸ With regard to the rest of the information, the court discovered that it had already been disclosed, partially through the website *The American Lawyer*.²⁹⁹ Therefore, it was no longer a trade secret.³⁰⁰ Nonetheless, the court held that the law firm was permitted to invoke the financial, commercial, and proprietary exemption to the PRA.³⁰¹ But, ultimately it decided that that exemption did not apply to the facts or information in this case.³⁰² By holding that Robbins Geller could not invoke the "other statute" exemption but could invoke one of the myriad exemptions embodied in the financial, commercial, and proprietary exemption,³⁰³ the court implied that RCW 42.56.270 exempts a much broader category of information than just trade secrets.

IV. THE CURRENT STATE OF THE TRADE SECRET EXEMPTION: PROBLEMS AND SOLUTIONS

There are several problems with the current trade secret exemption. As a result of there being two different avenues for trade secret exemption, there are also two different standards for injunctive relief. This results in a situation where the choice of exemption essentially translates to a choice for injunctive standard. Additionally, the ambiguity

295. *Id.*

296. *Id.* at 717–18, 328 P.3d at 909.

297. *Id.* at 723–27, 328 P.3d at 911–13.

298. *Id.* at 723–24, 328 P.3d at 911–12.

299. *Id.* at 724–27, 328 P.3d at 912–13.

300. *Id.*

301. *Id.* at 728–29, 328 P.3d at 914.

302. *Id.* at 733–35, 328 P.3d at 916–17.

303. This section of the PRA is WASH. REV. CODE § 42.56.270 (2016).

that has resulted from the case law and the existence of two different paths to exemption makes it difficult for business owners to protect their trade secrets.

A. *The Injunction Problem*

As discussed previously, an important piece of protecting a trade secret from disclosure is the process of obtaining an injunction to prevent an agency from disclosing records that contain trade secrets.³⁰⁴ However, the presence of two separate, and differently constructed, provisions that address trade secret exemption raises a question of which injunctive standard applies. The PRA has its own injunctive standard.³⁰⁵ A court can enjoin a record from being disclosed if the party seeking the injunction can meet four elements: (1) that the record in question specifically pertains to that party; (2) an exemption applies; (3) disclosure would not be in the public interest; and (4) disclosing the record would substantially and irreparably harm that party or a “vital government function.”³⁰⁶ In addition to these statutory requirements, a party must generally satisfy three common law requirements to obtain an injunction: “(a) a clear legal or equitable right; (b) a well-grounded fear of immediate invasion of that right; and (c) that the act complained of will result in actual or substantial injury.”³⁰⁷ However, as a Washington State appellate court recently recognized:

It is unclear how these [common law] requirements relate to the injunction requirements of RCW 42.56.540, and no case has applied these general requirements in a RCW 42.56.540 case. However, the first two requirements for a permanent injunction relate to the existence of an exemption and the third requirement is consistent with a similar requirement in RCW 42.56.540.³⁰⁸

What is clear is that when a third party tries to stop an agency from disclosing a particular record, they must satisfy the PRA injunctive standard.³⁰⁹

304. See discussion of the *Robbins Geller* case *supra* section III.C.4.

305. See WASH. REV. CODE § 42.56.540.

306. *Ameritrust Mortg. Co. v. Office of Attorney Gen. of Wash.*, 177 Wash. 2d 467, 487, 300 P.3d 799, 809 (2013); see also WASH. REV. CODE § 42.56.540.

307. *Huff v. Wyman*, 184 Wash. 2d 643, 651, 661 P.3d 727, 731 (2015).

308. *Wash. Pub. Emp. Ass’n v. Wash. State Ctr. for Childhood Deafness & Hearing Loss*, 404 P.3d 111, 115 (Wash. Ct. App. 2017) (citing *SEIU Healthcare 775NW v. Dep’t of Soc. & Health Servs.*, 193 Wash. App. 377, 393, 377 P.3d 214, 221 (Wash. Ct. App. 2016), *review denied*, 186 Wash. 2d 1016, 380 P.3d 502 (2016)).

309. WASH. REV. CODE § 42.56.540; see also *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wash.

However, many “other statutes” also have their own injunctive standards, including the UTSA.³¹⁰ The UTSA provides that “[a]ctual or threatened misappropriation may be enjoined.”³¹¹ This implies that an automatic injunction may be imposed if the court even suspects misappropriation. But, in *eBay, Inc. v. MercExchange, LLC*,³¹² the United States Supreme Court held that a court may not impose an automatic injunction without adhering to the well-established principles of equity.³¹³ Thus, a person seeking an injunction must satisfy a well-known, four-part test, demonstrating that (1) they have suffered an irreparable injury; (2) available legal remedies are inadequate to compensate them for that injury; (3) an injunction is warranted; and (4) granting the injunction would be in the public interest.³¹⁴

The Washington State Supreme Court, in *PAWS*, held that “this ‘other statute’ [the UTSA] operates as an *independent* limit on disclosure of portions of the records at issue here that have even potential economic value.”³¹⁵ It went on to observe that the “Public Records Act is simply an improper means to acquire knowledge of a trade secret.”³¹⁶ In addition, the *PAWS* case neglected to clarify this statement, a statement made in dicta.³¹⁷ The Court did not define when making a public records

2d 363, 370, 372 P.3d 63, 66 (2016) (“In an action brought under the injunction statute, [WASH. REV. CODE] § 42.56.540, the party seeking to prevent disclosure . . . bears the burden of proof.”).

310. WASH. REV. CODE § 19.108.020(1) (2016).

311. *Id.*

312. 547 U.S. 388 (2006).

313. *Id.* at 391.

314. *Id.* *eBay v. MercExchange* was a patent case, explicitly holding that a finding of patent infringement did not justify the granting of an automatic injunction without going through the test. *Id.* (“The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion. These familiar principles apply with equal force to disputes arising under the Patent Act.”). However, this holding has been extended to the other forms of intellectual property as well. *Id.* at 392–93 (“And as in our decision today, this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.”); see also *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 880 (9th Cir. 2014) (extending the *eBay* ruling to trademarks). While no legally persuasive case has explicitly extended the holding to trade secrets yet, the fact that it applies to all the other forms of intellectual property is strong evidence that automatic injunctions are also not allowed in the trade secret context.

315. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 262, 884 P.2d 592, 603 (1994) (emphasis added).

316. *Id.* Despite this observation, Washington courts have not addressed whether or not a public records request rises to the level of trade secret misappropriation, dispensing with the injunctive standard required by the PRA.

317. *Id.*

request rises to the level of misappropriation and when it does not.³¹⁸ This unusual, and very unhelpful, as it departs from the commonly accepted federal principle that simply making a public records request for trade secret information is not misappropriation.³¹⁹

This observation might suggest that, in Washington State, a public records request could amount to trade secret misappropriation, which can be enjoined by the courts³²⁰ without engaging in the traditional public records injunctive standard.³²¹ In fact, the Robbins Geller law firm and the Washington State Attorney General's office tried to argue this theory in *Robbins, Geller, Rudman & Dowd, LLP v. State*.³²² However, the Washington State appellate court that heard the case observed that “[n]o court has addressed whether the PRA injunction standard, RCW 42.56.540, applies when a court relies on an ‘other statute’ exemption, such as the UTSA, rather than a PRA exemption to bar disclosure.”³²³ The court also declined to provide guidance on the issue,³²⁴ thereby leaving the question of which injunctive standard applies when using the possible different trade secret exemptions unresolved.

This leaves a multitude of questions unanswered. Does use of PRA to obtain a competitor's trade secret constitute misappropriation under the UTSA, such that the UTSA's standard applies? Does the UTSA injunctive standard only apply when someone uses the “other statute” language to trigger the exemption? Does the PRA standard only apply if someone uses a named exemption in the PRA, like RCW 42.56.270? If using the PRA to obtain trade secrets is misappropriation, then does a

318. *Id.*

319. *See generally* discussion *supra* Part II (discussing the exemption of trade secret information from public records requests in FOIA).

320. WASH. REV. CODE § 19.108.020(1) (2016).

321. Under the PRA, a court may grant an injunction prohibiting the disclosure of information through a public records request only if it finds that disclosure “would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.” WASH. REV. CODE § 42.56.540 (2016).

322. Brief for Respondent at 31–32, *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wash. App. 711, 328 P.3d 905 (Wash. Ct. App. 2014) (No. 44520–4–II), 2012 WL 8944930, at *31–32 (arguing that because of the holding in *PAWS* “an injunction will issue under the UTSA to protect a trade secret from public disclosure without a showing that” the PRA elements for injunctive relief had been met).

323. *Robbins Geller*, 179 Wash. App. at 726, 328 P.3d at 913.

324. *Id.* The court in *Robbins Geller* applied the PRA injunctive standard to the WASH. REV. CODE § 42.56.270 claims, but declined to apply any injunctive standard to the “other statute” claims because it determined that the information at issue was not trade secrets under the UTSA. *See id.* at 731–32, 325 P.3d at 915–16.

business forfeit the UTSA's automatic injunction if they used one of the provisions in RCW 42.56.270 to trigger an exemption? All of these unanswered questions increase the difficulty of getting an injunction, deterring small businesses from going through the process of obtaining an injunction and likely resulting in the loss of trade secrets. Additionally, this ambiguity leaves attorneys and judges unclear on how to proceed when advising clients and deciding cases. As has been argued, the difference between the various exemptions as applied warrants clarification. Therefore, it is hard to predict which injunctive standard will be applied. Given the right set of facts, this gap in the disclosure framework could present a complex conundrum.

1. *The Washington Legislature and Courts Should Adopt the PRA Injunctive Standard and Dispense with the UTSA Injunctive Standard*

Although the Washington State Supreme Court has ruled that the UTSA's injunctive standard can be applied to public records requests for trade secrets, the Court should dispense with it in favor of the PRA injunctive standard. First, the UTSA's automatic injunction for even threatened misappropriation is unlikely to find legal support in the post-*eBay* legal framework. After *eBay*, courts must conduct the traditional equitable relief test before granting an injunction.³²⁵ Courts cannot simply impose an automatic injunction.³²⁶ The PRA injunctive standard already strongly resembles this test.³²⁷ This makes it easier to simply apply the PRA injunctive standard instead of having to decide whether requesting public records is or is not misappropriation before being able to apply the UTSA standard.³²⁸ Thus, applying the UTSA's injunctive standard conflicts with federal law and is more difficult than applying the PRA standard. Second, the PRA standard works. Public records requests should be subject to an analysis that weighs the competing interests in government transparency with the potential harm that could

325. *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

326. *Id.*; see also discussion *supra* note 314 (noting that the holding of *eBay* has been expanded to the other forms of intellectual property as well).

327. Compare *Ameritrust Mortg. Co. v. Office of Attorney Gen. of Wash.*, 177 Wash. 2d 467, 487, 300 P.3d 799, 809 (2013), and WASH. REV. CODE § 42.56.540 (2016) (laying out the PRA injunctive standard), with *eBay, Inc.*, 547 U.S. at 391 (describing the traditional four-part test for granting injunctive relief).

328. Accordingly, the Washington State Supreme Court should also clarify that the dicta in *PAWS* was not meant to bring public records requests into the realm of trade secret misappropriation.

result from such disclosure. If trade secrets are disclosed, the harm to the trade secret holder is guaranteed and the only parties that benefit are their competitors. Businesses already submit the majority of public records requests,³²⁹ presumably to try to expose their competitors' trade secrets and destroy their competitive advantage. This is not the purpose of public records acts³³⁰ and that practice should be curtailed. After all, the motive behind a public records request should matter. Public records requests could provide valuable information, from exposing fraud to discovering poor contracting choices. Requesting records for these purposes should be allowed. Requests simply to gain an advantage over a business competitor should not. The PRA, by providing an injunction standard that weighs the potential harm to businesses with the value of government transparency, solves this problem in a way that works for all parties. This injunctive standard would ensure that a public records request in which a trade secret could be disclosed is capably and extensively evaluated, protecting businesses while still considering the government's interest in disclosure. This would protect businesses, cut down on the practice of "fishing" for trade secrets through public records requests, increase businesses' confidence while working with the government, and resolve some of the current ambiguity within the statute; all while also maintaining the value of government transparency. Accordingly, the Washington State Supreme Court should expressly hold that submitting a public records request to obtain a trade secret triggers only one injunctive standard,³³¹ the PRA standard, and not the UTSA standard.

B. Current Proposals for Changes to the Trade Secret Exemption

1. The Sunshine Committee

The legislative committee that is responsible for reviewing and updating the exemptions to the PRA is saddled with the unwieldy title of the "Public Records Exemptions Accountability Committee."³³² This title is commonly disregarded for the more whimsical moniker of the

329. See discussion *supra* Introduction.

330. See WASH. REV. CODE § 42.56.030 (referencing that the purpose of the PRA is so the people can "remain[] informed so that they may maintain control over the [government] instruments that they have created").

331. This also has the added value of maintaining conformity and simplicity within the PRA, by not requiring courts to navigate different injunctive standards.

332. *Sunshine Committee*, *supra* note 222.

“Sunshine Committee”.³³³ This committee was established in 2007, at the request of the Washington State Attorney General’s office.³³⁴ The legislature passed Substitute Senate Bill 5435,³³⁵ and the Sunshine Committee was codified in the PRA as section 140.³³⁶ The Sunshine Committee consists of thirteen committee members³³⁷ appointed from various bodies of the legislature,³³⁸ the executive,³³⁹ and the public.³⁴⁰ Among these members must be representatives of the governor,³⁴¹ local government,³⁴² the Attorney General,³⁴³ and “a statewide media association.”³⁴⁴ These members serve four-year terms.³⁴⁵ Once a year, the Sunshine Committee must provide recommendations about whether to continue an exemption without modification, to modify the exemption, to schedule the exemption for “sunset review” at a future date, or to terminate the exemption.³⁴⁶

The Sunshine Committee submitted its 2016 recommendations to the Legislature on November 15th, 2016.³⁴⁷ The Sunshine Committee proposed five substantial amendments to PRA exemptions, two of which involved trade secrets.³⁴⁸ The first amendment relating to trade secrets moved some clarifying language around in RCW 42.56.270(11).³⁴⁹

The second recommended amendment is more substantial.³⁵⁰ The recommendation establishes a procedural requirement.³⁵¹ Only proprietary information that is marked confidential and comes with a summarized explanation of the expected harm that would result from

333. *Id.*

334. *Id.*

335. S.S.B. 5435, 60th Leg., Reg. Sess. (Wash. 2007).

336. WASH. REV. CODE § 42.56.140 (2016).

337. *Id.* § 42.56.140(1)(a).

338. *Id.* § 42.56.140(1)(a)(iv)–(v).

339. *Id.* § 42.56.140(1)(a)(i).

340. *Id.* § 42.56.140(1)(a)(vi).

341. *Id.* § 42.56.140(1)(a)(i).

342. *Id.*

343. *Id.* § 42.56.140(1)(a)(ii).

344. *Id.*

345. *Id.* § 42.56.140(1)(a)(vi)(c).

346. *Id.* § 42.56.140(7)(a), (d).

347. *See* PUB. RECORDS EXEMPTIONS ACCOUNTABILITY COMM., *supra* note 36.

348. *Id.* at 5.

349. *Id.* at 8 (moving some information relating to the Department of Social and Health Services from the bottom of the section to the top).

350. *See generally id.* at 10 (laying out more changes to section 270).

351. *Id.*

disclosure is exempt.³⁵² The new language also prevents disclosure of trade secret information if the agency decides that disclosing the information would result in “public or private loss or unfair private gain.”³⁵³ The recommendation also allows a defendant opposing an injunction on disclosure of proprietary information to recover attorney’s fees, “to the extent that the defendant prevailed in opposing [the] injunction.”³⁵⁴ However, perhaps most importantly, the Sunshine Committee recommended that a new subsection be added to section 270 creating a specific exemption for trade secrets.³⁵⁵ The addition of this subsection would make section 270 read, “[t]he following financial, commercial, and proprietary information is exempt from disclosure under this chapter . . . [t]rade secrets as defined in RCW 19.108.010(4).”³⁵⁶ This proposed cross-reference was added “to assist public agencies, private entities providing records to public agencies, and records requestors in recognizing that the trade secrets law may exempt any such records requested under the PRA.”³⁵⁷

On January 12, 2017, House Bill 1160 was introduced in the Washington State House of Representatives.³⁵⁸ The Bill substantially adopts all of the Sunshine Committee’s suggestions.³⁵⁹ It passed the House on February 15, completely unopposed.³⁶⁰ The Bill was then introduced in the Senate on February 16, where it remains pending a final vote.³⁶¹

352. *Id.* (adding “PROVIDED, that the information is clearly marked as confidential and accompanied by a particularized explanation of expected harm from disclosure at the time of submission . . .” to the beginning of section 270).

353. *Id.* (continuing the addition to section 270 with “or the agency determines that disclosure of the information is substantially likely to cause public or private loss or unfair private gain”).

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.* at 4.

358. *HB 1160 - 2017-18: Enacting Recommendations of the Sunshine Committee*, WASH. ST. LEGIS., <http://app.leg.wa.gov/billsummary?Year=2017&BillNumber=1160#billhistorytitle> [https://perma.cc/J495-J8RV] [hereinafter *HB 1160, Bill History*].

359. *See* S.H.B. 1160, 65th Leg., Reg. Sess. (Wash. 2017). The primary difference between the new bill and the Sunshine Committee’s proposals is that the new bill changes the subsection designations from a numerical ordering to an alphabetical system. *Id.* at 5–9. Thus, the new subsection discussing trade secrets becomes WASH. REV. CODE § 42.56.270(1)(bb) instead of § 42.56.270(24). *Id.* at 9. The new subsection is also the last subsection of § 42.56.270(1), instead of being placed in the middle. *Id.*

360. *HB 1160, Bill History*, supra note 358.

361. *Id.*

2. *The Washington Legislature Should Not Adopt the Sunshine Committee's Suggestion Because It Does Not Resolve the Ambiguity in the Statute*

The Washington State Legislature could follow the proposal submitted by the Sunshine Committee, which adds a subsection that would specifically exempt trade secrets. However, this proposal does not resolve the current confusion in the statute. Therefore, the Washington Legislature should not adopt the Sunshine Committee's suggestions to amend the trade secret exemption.

a. *The Ambiguity in the Statute Makes It Difficult for Businesses to Protect Their Trade Secrets*

The confusing structure of the PRA makes it difficult for businesses to know how to protect their trade secrets, or even to understand that they can protect them. The obscure "other statute" language is not helpful. A small business cannot be expected to know that this two-word clause protects their trade secrets. RCW 42.56.270 provides added uncertainty by introducing twenty-eight examples of exempt situations, all of which could constitute trade secret information and three of which explicitly do.³⁶² This extra provision seems redundant at best and confusing at worst. If all trade secrets are exempted, a provision that provides examples of exempted trade secrets is not necessary. If the reason RCW 42.56.270—and its examples of exemptions³⁶³—exists is to provide clarity about the trade secret exemption, then it is unclear why the trade secret exemption is not more clearly identified.

For an example of the effect of this uncertainty, one need not look further than the *Robbins Geller* case. The Court in *Robbins Geller* held that the information at issue was not a trade secret under the UTSA, thus barring the law firm from using the "other statute" exemption.³⁶⁴ However, the Court also held that the law firm could use the exemptions in RCW 42.56.270 to try to protect their information.³⁶⁵ This implies that RCW 42.56.270 is somehow broader than the trade secret exemption embodied in the "other statute" language. In other words, RCW 42.56.270 covers more information than trade secrets. But, if that is the

362. See WASH. REV. CODE § 42.56.270 (2016).

363. One of which is a remnant from before the "other statute" language existed and is four decades old. 1972 VOTERS PAMPHLET, *supra* note 181, at 63.

364. *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wash. App. 711, 721–26, 328 P.3d 905, 911–13 (2014).

365. *Id.* at 727–28, 328 P.3d at 913–14.

case, explicitly mentioning trade secrets in RCW 42.56.270 and describing other trade secret-like information obscures that goal of covering more information than just trade secrets. Moreover, even the *PAWS* case, perhaps the most significant case in PRA jurisprudence, seemed unclear on the role of RCW 42.56.270 as it related to trade secrets. *PAWS* talked about both the “other statute” and the RCW 42.56.270 exemption in the context of trade secrets and with trade secret-like language.³⁶⁶ If RCW 42.56.270 has a wider reach than the “other statute” trade secret exemption, giving it intellectual property and trade secret connotations will obscure that purpose. Even setting aside the express trade secret language in sub-sections 270(11), (16), and (28), the statute still seems to be framed around trade secrets,³⁶⁷ which is ambiguous if the real purpose is to exempt a broader category of information than just trade secrets. Having a single, clear, and generic trade secret exemption seems much simpler than the current entanglement.

Furthermore, understanding the procedure for preventing disclosure through a public records request is incredibly important. Businesses that submit information to a government agency have to know how to make use of the trade secret exemptions in the PRA in order to safeguard their trade secrets. They need to know how to communicate with the relevant office, obtain an injunction when the public records request goes through, mark relevant portions as proprietary, and other facets of the process. Any business that is not a successful law firm might, understandably, not know how to navigate all the ins and outs of preventing disclosure (and even then, as in the case of *Robbins Geller*, it still might not be enough). Being uninformed of the trade secret exemption and how it functions is a particularly relevant problem for small businesses that may not have an in-house counsel or be able to afford outside legal assistance. Furthermore, the structure and ease (or lack thereof) of the disclosure process has implications for how strong trade secret protection is. The harder it is to sue to protect trade secrets, the weaker trade secret protection is because fewer businesses will bother to go through the process. In addition, how the legislature projects the process to the business community determines how that community views the incentives to sue to protect its trade secrets. A small business that sees a complicated legal process may decide to

366. *See supra* notes 271 and 274.

367. *See* WASH. REV. CODE. § 42.56.270 (listing twenty-five other examples (beyond (11), (16), and (28)) that all could qualify as trade secrets under the UTSA definition).

forego the process all together and end up losing its trade secrets as a result.

In addition, this current statutory framework is confusing for the agency workers that work with this trade secret information. They need to know when something is exempt from disclosure. It makes their job much more difficult to have to decide on their own whether information is protected from disclosure. Thus, it is important to have an easily accessible and clear process that also is sufficiently stringent to provide adequate protection.

b. The Proposed Subsection Would Not Resolve the Ambiguity in the Statute

Adopting the Sunshine Committee's proposal would not help to clarify the statute, would not resolve the injunction issue, would not achieve the stated goal of the proposal—helping to inform small businesses about trade secret exemption—and might cause more problems. First, adopting this provision does not solve the ambiguity generated by having the trade secret exemption seemingly embodied in two different sections of the PRA.³⁶⁸ If this provision was enacted it would provide for an explicit trade secret exemption within the “financial, commercial and proprietary information” section.³⁶⁹ This solution does not address the existence of the trade secret exemption triggered by the “other statute” language in another section of the PRA.³⁷⁰ If anything, it exacerbates the problems with RCW 42.56.270. It does not clarify whether RCW 42.56.270 has a broader scope than the “other statute” exemption, or even indicate that the two are different. So, the current framework would continue, without any clarification.

Second, the Sunshine Committee's proposal does nothing to address the problem of two injunctive standards, with no clear guidance indicating when and to which provisions they apply. The proposal may even confound the problem more. The wording of the proposal exempts trade secrets as defined by the UTSA.³⁷¹ By referencing the UTSA, the proposal raises the same questions as before and expands the uncertainty to RCW 42.56.270. With the proposal's language, the UTSA's

368. See *supra* sections III.C.1–2.

369. See PUB. RECORDS EXEMPTIONS ACCOUNTABILITY COMM., *supra* note 36, at 10.

370. See WASH. REV. CODE § 42.56.070(1); *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wash. 2d 243, 262, 884 P.2d 592, 603 (1994) (noting that the UTSA qualifies as an “other statute[]”).

371. PUB. RECORDS EXEMPTIONS ACCOUNTABILITY COMM., *supra* note 36, at 10.

injunctive standard could apply to the new section or could apply to the entirety of RCW 42.56.270. The result being that the PRA standard is not supplanted nor is its role clarified. Thus, both standards could apply simultaneously to both the “other statute” and to RCW 42.56.270.

Third, beyond problems with the new trade secret exemption to RCW 42.56.270, the proposal also adds a problematic requirement: that proprietary information must be marked confidential and include an accompanying explanation to be exempt.³⁷² By identifying information as exempt up front, this requirement might seem like a way to simplify the process. The public records officer can evaluate the exemption claim and make a decision without getting a court involved. However, a court would still likely have to be involved because if the public records officer decides that the information is not exempted, the interested party will likely challenge that decision in court. Furthermore, this requirement does not take into account the case of the person who does not know to mark their information confidential or who simply forgets. Moreover, and perhaps most importantly, marking documents or other media containing trade secrets confidential is not a requirement for maintaining secrecy.³⁷³ The only requirement is that the trade secret holder take “reasonable measures” to protect secrecy.³⁷⁴ There are no set requirements that define “reasonable measures,” only a few examples that courts will commonly look at.³⁷⁵ This marking requirement is not usual. By obligating businesses to mark the information they submit to the government, the Sunshine Committee is mandating a requirement for secrecy that trade secret law does not include. In fact, transactions like the ones at issues here—“disclosing [trade secrets] on a confidential basis for evaluation”—are considered to be protected use and do not require any additional measures for secrecy than those which would normally constitute “reasonable measures.”³⁷⁶ Not only is the Sunshine Committee requiring an unnecessary and abnormal measure for secrecy but the marking requirement also creates an additional hardship for small businesses, the very community that the Sunshine Committee is attempting to assist. For a small business, the time spent making sure all their information is properly marked as confidential is time that the business is not spending on their innovation. The business will have to

372. *Id.*

373. MILGRIM & BENSON, *supra* note 39, § 1.04.

374. *Id.*

375. *Id.* These examples are by no means exhaustive.

376. *Id.*

worry about every little thing, ensuring that everything that could be a trade secret is properly marked. In addition, if the business decides to play it safe and simply mark everything as confidential, they run the risk of the government—or courts for that matter—failing to take the markings seriously. After all, not everything that is disclosed can be a trade secret, even if it is marked confidential. This marking requirement might actually get in the way of innovation. An individual or business should not run the risk of forfeiting all or even some protection for his or her trade secret information because of this unusual rule.

Finally, placing the language specifically exempting trade secrets as the last provision in an already ambiguous provision will not help potential vendors “recogniz[e] that the trade secrets law may exempt any such records requested under the PRA.”³⁷⁷ The section of the PRA dealing with “financial, commercial and proprietary information” already includes twenty-seven subsections.³⁷⁸ Most, if not all, of them could be interpreted as trade secrets under the UTSA’s broad definition as adopted by Washington State.³⁷⁹ Additionally, the proposed subsection is marked as subsection twenty-four.³⁸⁰ This location has the dual nature of being toward the bottom of the section and yet still buried within the main text.³⁸¹ It is unlikely that potential vendors will be able to find this new subsection within the long and confusing “financial, commercial and proprietary information” section. Small businesses, which the procurement system is supposed to encourage,³⁸² will have a particularly difficult time. Reading a long and complex statute, all of which may or may not encompass trade secrets, is not a top priority for small businesses. These businesses likely lack the legal resources to spend on combing the Washington statutes for a six-word³⁸³ exemption for trade secrets. Burying this provision does not accomplish the stated goal of helping potential bidders for government contracts understand that their trade secret information is exempted from PRA requests, especially if the potential bidder is a small business. Therefore, following the Sunshine Committee’s advice and adding a “trade secret” provision at the end of the provision on “financial, commercial and

377. PUB. RECORDS EXEMPTIONS ACCOUNTABILITY COMM., *supra* note 36, at 5.

378. WASH. REV. CODE § 42.56.270 (2016).

379. WASH. REV. CODE § 19.108.010(4) (2016) (UTSA definition of trade secret).

380. PUB. RECORDS EXEMPTIONS ACCOUNTABILITY COMM., *supra* note 36, at 10.

381. *See* WASH. REV. CODE § 42.56.270; *cf.* PUB. RECORDS EXEMPTIONS ACCOUNTABILITY COMM., *supra* note 36, at 10.

382. *See* WASH. REV. CODE § 39.26.005 (2016).

383. *See* PUB. RECORDS EXEMPTIONS ACCOUNTABILITY COMM., *supra* note 36, at 10.

proprietary information”³⁸⁴ would not necessarily solve the problems with the existing statute and might complicate things even more.

3. *Instead, the Washington Legislature Should Make Two Changes*

The first change should be to change the title of the “financial, commercial and proprietary information” section of the PRA to “Trade Secret Information and Financial, Commercial and Proprietary Information.” The Sunshine Committee was right to recognize that the location of the trade secret exemption within the PRA’s framework is ambiguous and thus makes it difficult for potential bidders on government contracts to know that their trade secrets are protected from public records requests. However, the proposed solution does not clarify the statute or assist potential vendors as much as is needed. Therefore, the amendment to the PRA should go one step further and simply rename the section on “financial, commercial and proprietary information” as the “Trade Secret Information” section. The proposed renaming of the statutory provision would look like this:

42.56.270. Trade Secret Information and Financial, Commercial and Proprietary Information

The following trade secret information and financial, commercial, and proprietary information is exempt from disclosure under this chapter:

- (1) Valuable, formulae, designs, drawings . . . etc.

First, renaming the section serves the main goal of helping vendors realize that their valuable trade secrets are protected from disclosure through public records requests. Putting the information that trade secrets are exempted up front and clearly labeled helps potential bidders for government contracts realize that their trade secrets are exempted. They will not have to dig through case law or muddle through a long and complex statute. This re-naming will particularly help small businesses. Just by looking at the title of the section, a small business owner can understand that his or her trade secret information is protected.³⁸⁵

384. *Id.*

385. While this is a legal solution to the problem, it does not have to be the only solution. There is more than one way to achieve the goal of informing businesses that trade secrets are exempt. For example, DES (and every agency) could have a page on their website announcing that trade secrets

Second, the proposed renaming clears up the ambiguity with the “other statute” language. With a clearly labeled “trade secret” section to the PRA the “other statute” section will not be necessary. The “other statute” language can be used for the other exemptions that are not expressly required, as was intended. Moreover, the holding in *PAWS*, qualifying the UTSA as an “other statute”, was at best ill-considered and at worst wrong.³⁸⁶ It raises the question of whether Washington’s trade secret exemption should rest on a case that, at the very least, did not fully consider the issue.³⁸⁷ Given the dubious reasoning of the *PAWS* Court when invoking the “other statute” exemption it makes more sense to dispense with the “other statute” exemption all together. In short, simply re-naming the section, instead of burying the “trade secret” language, keeps all the benefits provided by the Sunshine Committee’s suggestion while eliminating its drawbacks. In fact, renaming the provision would also provide an opportunity to consolidate the section. Most, if not all, of the current twenty-eight provisions could qualify under the definition of trade secrets. Those subsections, which were added over many years, could be safely deleted. If there are concerns about deleting the “financial, commercial and proprietary information” language completely, it can still be included in the title. This change would resemble the way the FOIA exemption works and would leave room for a trade secret category and a broader “financial, commercial, and proprietary” category, which would also align with the implications from the *Robbins Geller* case. As Washington begins to move into new areas of technology, the method for protecting trade secrets should be updated. The federal government has been procuring more sophisticated trade secret information for longer than the Washington State government has. As a result, there is more robust federal case law surrounding trade secret exemption and subsequently more guidance. This case law could provide a sound basis to help Washington improve its own methods for dealing with procurement and for protecting the businesses that it works with. Explicitly mentioning that trade secrets are exempted up front will allow businesses to understand that their trade secret information is exempt and accomplish the goals the Sunshine Committee articulated.

The second change should be to the Sunshine Committee itself. Currently, the only express group—outside of the government—

are exempted, explaining what a trade secret is, and detailing the process for protecting trade secrets from disclosure.

386. See discussion *supra* section III.C.3.

387. See *id.* (discussing the Court’s brief analysis).

represented on the Sunshine Committee is the media.³⁸⁸ This reflects a view of the PRA from an early age, when freedom of the press was one of the only concerns implicated by government disclosure.³⁸⁹ Government disclosure has expanded³⁹⁰ and more interests should be represented on the Sunshine Committee. Therefore, the State Legislature should mandate that at least one member of the Sunshine Committee should come from the business community. Such a provision would ensure that at least one member of the business community would understand trade secrets and could provide another perspective on their disclosure.³⁹¹

CONCLUSION

Public records requests provide a unique danger to businesses that submit information to the government. Such a request could potentially destroy their trade secrets, an outcome that could be devastating. The general exemption in the Washington State Public Records Act provides some protection against this. However, the current statutory scheme is confusing and ambiguous due to the discrete location of the current exemption and the presence of a similar, but incredibly ambiguous, “financial, commercial and proprietary information” provision. The Sunshine Committee has proposed a potential solution. While a step in the right direction, burying a new twenty-fourth subsection in said “financial, commercial and proprietary information” provision for trade secrets does not resolve the problem. But, renaming that provision to make it explicitly about trade secrets will solve the problem. Changing this language will clear up the ambiguity in the provision and make it more obvious that trade secrets are exempted, thus accomplishing the stated goal of the Sunshine Committee to make businesses aware that their trade secrets are protected from disclosure by a public records request. In addition, the courts should clarify that the PRA injunctive standard is the gauge that applies in the trade secret context. Furthermore, the State Legislature should add a member to the Sunshine Committee that represents the business community. This addition will provide a perspective that the Sunshine Committee needs to pay

388. WASH. REV. CODE § 42.56.140(1)(a)(ii) (2016).

389. *See, e.g.,* STAHL & KILLEEN, *supra* note 214.

390. *See* discussion *supra* Introduction.

391. Granted, the Sunshine Committee’s role is to evaluate all of the exemptions to the PRA, not just the trade secret exemption. However, more than one exemption will be relevant to the business community and having this perspective will provide insight on many future problems that arise.

attention to, while also reflecting the expanded nature of government disclosure.

House Bill 1160 provides the perfect time for the legislature to revisit an important part of the law. The PRA has come a long way from the voter initiative that only had ten exemptions forty years ago. Now, with more than 500 exemptions, the PRA has become unwieldy and, at least in the trade secret context, unworkable for small business owners and potentially for practicing lawyers and courts. This is an opportunity for the legislature to evaluate the purpose and effect of the PRA, to consider whether the right lines are still being drawn, to examine other models,³⁹² and to continue the work that was started with the 2006 recodification. This is an opportunity to clean up the PRA, make it a more workable open government act, and help some people in the process.

392. It seems that FOIA's trade secret exemption might be a good model for the revised PRA. It combines trade secrets with a broader catchall category. This appears to be what the PRA is trying to accomplish. The Court in *Progressive Animal Welfare Society v. University of Washington*, 125 Wash. 2d 243, 266, 884 P.2d 592, 605 (1994), noted that the PRA "closely parallels" FOIA, but it cannot parallel FOIA too closely as the fundamental basis of the two acts was so different—voter initiative versus congressional bill. The legislature should consider whether FOIA is a good model and, if it is, it should consider how closely the PRA should mimic the FOIA model.