January 19, 2022
Location: WebEx
Sunshine Committee Members

Eileen Eakins, Northwest Local Government Legal Advisors LLC / Co-chair
Charlie Fisher, OSPIRG State Director / Co-chair
Morgan Smith, Polk County Counsel
Karin Johnson, Independence City Recorder
Stephanie Clark, State Archivist
Selena Deckelmann, Director of Engineering, Mozilla Firefox

Guests

Andy Foltz, Public Records Counsel, Department of Justice
Cameron Miles, Office of Legislative Counsel
Carmen Graham, Department of Justice
Isabela Romero, Department of Justice
Lydia Loren, Lewis & Clark Law School
Mike Rogoway, The Oregonian
Sofie Parr
Phil Donovan
Bennett Minton
Dan
Garrett Andrews
Les Ruark
Josie Koehne
Daniel Maguire

Agenda

AUDIO STREAM 0:00:00-01:50:22

First Agenda Item –Administrative Business

1. December 2021 Minutes approved as presented.
2. No attendees had a membership vacancy update, so this discussion will be moved for next meeting.
3. Group decided to polish/work to submit previous 2020 Report to Legislature as is. **Chair Fisher** moves to approve report and delegated himself to figure out how to make revisions, submit and circulate to appropriate parties.

Second Agenda Item – Subcommittees Update

1. *Legislative Review Committee* – **Chair Fisher on behalf of Mr. Walth:** Mr. Walth will update the group in March about Legislative Subcommittee. Group will meet in early February to review new bills with open government impact statements, that might impact public records exemptions. **Chair Eakins:** Mr. Kron had previously written an email to her containing the new laws that were passed in 2021, that impacted public record exemptions. She forwarded this email to Mr. Walth for subcommittee review.
2. *Special Projects Subcommittee* – Mr. Smith lists members (Morgan, Bennett, Selena, Karin) and shares there are no special projects at this time.

Third Agenda Item – Trade Secret Discussion

Chair Eakins: Each Chair recruited individuals to discuss Trade Secrets and Intellectual Property to Committee, following the group's decision to discuss these topics in previous

meetings. She introduces **Professor Lydia Loren** from Lewis & Clark Law School, to present – Ms. Loren displays slideshow to discuss with group.

Introduction to trade secrets and its core elements (copyright, patent, trademark, and trade secrets). in the realm of intellectual property. Copyright and Patent Laws (generally discussing "utility patents" new and nonobvious inventions that are disclosed to the public) are exclusively Federal Laws (aka "Broad Preemptive Suite") which means no room for states to have any copyright/patent protection in these areas. Trademarks and trade secrets have Federalism competent – federal and state law protection.

Why are there trade secret protections?

1. There are certain things that competitors should not do to one another e.g., misappropriation of a trade secret.
2. Top-level protection creates an incentive for individuals and companies to invest in the creation of valuable information/innovations.
3. The protection a patent receives is high-quality. Because the public gets disclosure of information - quid pro quo on disclosure.
4. For trade secrets, we are not disclosing it, so the public isn't getting that knowledge.

Uniform Trade Secrets Act was created in 1985, Oregon adopted this act in 1987. Each time a state adopts this act, they can make changes to wording – Oregon has done that. In both state and federal laws there is a trend line of greater protection over time. Congress adopted Defend Trade Secrets Act, which granted civil action of trade secret law in 2016. Oregon has made it easier to get trade secret protection and perhaps, protecting more information than the Uniform Act might normally protect. The Uniform Act doesn't have the public side to it – this act only applies to competitors. Federal Statue is almost identical to Uniform Act. ORS 646.461: information that has independent economic value from being not generally known from public or competitors. Its value must stem from its secrecy. **Chair Fisher:** asks about holes between state and federal law. **Ms. Loren:** the Defense Grade Secret Act is only 5 years old, so there's not a ton of litigation. This kind of scenario is probably not too likely because Federal Statue is narrow, and Oregon is broader.

Judge will evaluate if there really is a trade secret. The disclosure of the trade secret is given to the Judge, under seal for protection. The person asserting trade secret ownership must fulfill these requirements:

a. Must identify exactly what information is alleged to be a trade secret
b. Prove that it is not "generally known" or "readily ascertainable"
c. Identify the commercial value it has by being kept secret from competitors
d. Demonstrate measures taken to protect information's secrecy

2) Trade secret owner must demonstrate misappropriation (Trade secrets are protected against "misappropriation" e.g., acquired the trade secret through improper means (hacking a computer system) or disclosing or using a trade secret when you have a duty not to disclose or use e.g., an employee with knowledge of employer's trade secret information).

Ms. Deckleman asks about incentivizing an innovation. **Ms. Loren:** trade secrets don't help advance knowledge like patents do because they require disclosure. So, there is an incentive

to have kinds of information you can exploit without disclosing it e.g., the sequence of ingredients, or the temperature at which something is developed.

Chair Fisher: Questions if a state agency disclosing information they had (and deemed to have public interest) prevail over the trade secret? Or if information was deemed not a trade secret, and later through perhaps judicial process, was determined to be a trade secret, would this qualify as misappropriation? **Ms. Loren:** explains she is not an expert in public records law and does not know the answer to the questions. Trade secrets are a protection a state decides to grant, and that state has the authority to decide how the law will be shaped.

Chair Eakins asks if someone were to sue a public entity for misappropriation of trade secret, how are damages determined? **Ms. Loren:** Uniform Act and ORS provides damage remedy for actual harm, so you'd need to prove the actual loss of value, because of the disclosure. Or if a competitor is using the information and they haven't disclosed, but they are gaining profit. Then you'd have a disgorgement of the ill-gained profits. With a public official, we wouldn't be talking about disgorgement but of acts of harm. A monetary award against the state, you'd have to bring up sovereign immunity.

Mr. Smith: If government officials release documents that are perceived as trade secrets, would a ROI that someone argues in trade secret, invalidate trade secret protections since it's publicly known? **Ms. Loren:** once information is "generally known" it no longer qualifies as not being "generally known". It will affect what type of damages you get.

Second guest speaker introduced. **Mr. Mike Rogoway,** Technology Business Reporter with the Oregonian:

The Oregonian started looking at Google's plans to expand its data centers in the Dallas, the company wanted a new package of tax breaks, and a new deal to ensure they had enough water to cool their office. He had a chat with Dave Anderson (Facilities Director of Google) and walked through the report. He forgot to discuss Google's water consumption, so he followed up to Mr. Anderson via email. His email was an exhibit in the lawsuit Google filed against him and the paper, asserting that Google's water consumption was a trade secret and were exempt from disclosure.

The Dallas collected, maintained, and owned the information as the operator of the City's Public Water Utility. The city filed the lawsuit, not Google - companies can contractually oblige their cities to enforce a company's understanding of what constitutes a trade secret. The city has a non-disclosure agreement (NDA) with Google, and it does not mention water use. The Oregonian appealed to the Wasco County DA and the DA ruled that water use did not meet the definition of a trade secret. The Dallas won on appeal and the city filed a response. The Dallas who is being represented by the Reporters Committee for Freedom of the Press, has not responded yet. This litigation began in September and is ongoing.

An argument made by The Dallas is that Google's water use in other centers is public because there's been litigation or public records finds. DA did not rule on this either.

It did not occur to him this could be a trade secret; he mentions he's worked with many other cities who have previously responded to public records requests about this kind of information. Willamette Week published this last year their list of residential customers with largest water use in Portland. Our current process allows companies to intervene and delay disclosure.

Chair Fisher: wonders if there has been conversation about the public interest or if it has solely been litigation on if this is a trade secret. The public balancing test seems easier to conduct rather than examine for a trade secret. Questions if the government folks have had a lot of experience determining something is a trade secret, but there's public interest, so you must disclose it. or is it mostly just competitors trying to get an advantage. **Mr. Rogoway:** The Dallas made the argument that it doesn't constitute a trade secret and that there is public interest. The DA did not rule on whether there is a public interest in disclosure, he said there is no reason to rule on that question, because this is not a trade secret. **Chair Fisher** adds that it would be in the private interest not to have it disclosed. There's no public interest in trade secrets being secret. **Chair Eakins:** expresses disagreement since Ms. Loren explained there may be a public interest in promoting competition and enabling certain companies to keep information private. There could be public interest in the confidentiality side of things.

Mr. Rogoway: files very little public records requests, it's not what he focuses on. **Mr. Foltz:** there are qualified immunity provisions both in PR law and Oregon's UTSA and both have a good faith requirement. It would not be a good faith disclosure under the UTSA, to disclose something that does meet the definition of misappropriation. So how does that work when you have a trade secret public records exemption, that says regardless of if it's a trade secret, it's a public interest and requires disclosure. The PRR's that he sees most often are those that have been appealed involving state agencies.

Mr. Smith: usually this comes up with vendors, and their competitors, making PRR's for what that vendor is currently contracted in. A competitor made a PRR trying to seek information of the pricing of commissary of food in jail. The contract with the vendor, outlined certain portions of the contract are confidential. It would be better to find some way to get the government out from being the middleman in these. The Dallas are like clients he's represented in that they don't have a ton of resources to defend themselves against these big companies, like Google. Question about conditional disclosure if its disclosed, then it's no longer a trade secret. Feels odd organizationally to have a trade secret as a conditional disclosure - the very nature of a trade secret is that it's in the public interest to not be disclosed. He argues it's an incongruity within the law.

Mr. Foltz: states he put together the primer (as a non-committee member he is not acting on behalf of the AG). There was 1 unreported case, trial decision, in Chevron. One of the most recent cases where the AG did not decide on if the information was in fact a trade secret, she stated that regardless of it was a trade secret or not, the public interest required disclosure. The information that the AG ordered the agency to disclose, was obtained under some assurance that confidentiality would be maintained. The Trial Judge overruled the AG on that stating the information did qualify as trade secret because it was obtained with the assurance of confidentiality, therefore citing misappropriation. There is some ambiguity between trade

secrets exemption and Oregon's UTSA. Confirms that public agencies have a tough time and lack expertise needed to evaluate trade secrets.

Mr. Smith contributes the immunity mentioned is all tort-based immunity and his concern is the contractual responsibilities with vendor to not disclose. **Chair Fisher:** if public bodies are entering into a contract that potentially requires them to conflict with another statute, that feels wrong. **Mr. Foltz:** clarifies they didn't contract their way out of information that would otherwise be exempt.

Another caveat to PR law is that there are some agencies that question whether to disclose otherwise exempt information. An agency can contract with a third party agreeing not to exercise its discretion, the law permits that. One of the ways you can reconcile the UTSA with the trade secrets law but there are some holes. **Mr. Smith:** if you did eliminate the ability to have contractual requirements, then an argument could be made that the third-party entity didn't take the appropriate measures to keep your trade secret, secret. So, they could lose their protection regardless.

Chair Fisher asks Mr. Foltz on the cases he handles, what's the general length of time it takes to adjudicate. **Mr. Foltz:** mixed timeline every time. There are the normal response timeframes in statute that the custodian of records must comply with, which is considered the 15-day rule, so the agency should either complete its response or provide a reasonable completion date during that timeframe. After that, there's no statutory statute of limitations on the requestor filing an appeal if they don't like the results. Appeals have been seen two years later. Once an appeal is received, DOJ only has 7 calendar days to respond. There's usually a lot to do in that timeframe and DOJ will usually request an extension, which is usually first step. The agencies are not equipped to make this decision, but PR law leaves them with the burden to do so. He observes the difficulty in understanding what constitutes a public record.

Fourth Agenda Item – Future Business

Chair Eakins: mentions the work of Mr. Foltz in preparing summary of law on trade secrets and public records law. Mr. Kron will discuss case law on this matter next meeting. Applauds discussions had from all sides thus far. Question based off the issues that have been raised, is it an appropriate next step to delegate this issue to the special projects subcommittee to evaluate some potential recommendations for legislature? **Mr. Smith** of the subcommittee confirms they will review and will have an update for next meeting in March.

Mr. Foltz mentions 30 some exemptions the committee already reviewed. However, it was pre-covid, so no action or recommendation was taken.

Next Sunshine Committee meeting date: 3/16/22 at 1:30pm

The special projects subcommittee will meet on 2/16 at 1:30 -3:30pm

Adjournment