

Oregon Sunshine Committee Special Projects Subcommittee

Recommendations regarding trade secrets

March 16, 2022

As the subcommittee reviewed the public records exemptions related to trade secrets, concerns were raised regarding the over-classification of trade secrets by private entities. This is compounded by the public entity's inherent knowledge gap regarding what could or could not be a trade secret, as they are relatively beholden to the private entity's assertions in that regard. Notwithstanding that knowledge gap, case law requires the public entity to make an inquiry and determine on their own, whether something they have in their possession is a trade secret for the private entity. This could allow for overclassification of potential trade secrets with the public entity stuck in the middle between a record requestor and the potential trade secret holder.

Further, there are potentially two exemptions applicable to trade secrets under the law. ORS § 192.345(2) is an exemption specific to trade secrets and operates as a conditional exemption subject to a public interest balancing test. Further, ORS § 192.355(9)(a) is not a conditional exemption and operates to bar the disclosure of any information protected from disclosure by another law. Under this statute, if the release of potentially trade secret information could be considered a misappropriation of a trade secret under ORS § 646.461, then it is barred from release by ORS § 192.355(9)(a). There is no public interest balancing test for this.

It was determined the biggest impediments to transparency arose from the overclassification of trade secrets by private parties and public bodies making decisions regarding the appropriateness of a trade secret designations without sufficient information on top of a confusing statutory exemption scheme.

A first suggestion would be to require that any private entity that is submitting something to a public entity that it considers a trade secret to do two things: (1) provide the public entity with some documentation or attestation verifying the legitimacy of the trade secret protection of the information and (2) clearly denote what of their submission is considered a trade secret and what is not. If these steps are not followed, then they do not receive the protections of the trade secret exemptions. Given that holders of a trade secret are under the obligation to take reasonable measures to protect the secrecy of that trade secret, these steps would fall in line with that obligation. Further, this will help to streamline requests for such information, and hopefully reduce the possibility of overclassifying information as trade secrets.

In regard to the specific exemptions, it is recommended that the two current statutory exemptions for the release of trade secrets to just one. Preference would be to only protect trade secrets under ORS § 192.345(2), as it is specific to trade secrets and it is a conditional exemption. The use of a conditional exemption only would allow requestors the opportunity to make an argument for disclosure in the public interest, rather than the exemptions under ORS 192.355(9)(a) which does not have such a component. This will help public entities and requestors have a better understanding of what can be disclosed, what cannot be disclosed, and the legal reasoning behind that decision. The current structure of multiple convoluted exemptions possibly being implicated creates confusion amongst the parties involved in the request.

Lastly, it would be beneficial to make the private entity whose trade secret is being requested more formally involved in the process. This could be achieved by having them be the appropriate party for any appeals process following a denial under ORS §§ 192.411, 192.415, as opposed to the public entity. Another possibility would be to utilize a similar scheme to ORS § 192.363, which requires requests for certain personal information be forwarded to the individuals whose information is being requested. This would allow for the private entity to be further involved in the process prior to disclosure. This places the obligation to properly classify potentially trade secret information and require the private entity to take reasonable steps necessary to protect their trade secrets.