

**PROTECTING CONFIDENTIAL BUSINESS
INFORMATION SUPPLIED TO STATE
GOVERNMENTS: EXEMPTING TRADE SECRETS
FROM STATE OPEN RECORDS LAWS†**

***LINDA B. SAMUELS**

INTRODUCTION

Trade secrets, whether the result of a serendipitous discovery, an arduous research plan, or business experience acquired over years of operation, can make a valuable contribution to a company's competitive position. While trade secrets can be highly valuable to their owners, they may be lost to outsiders through independent discovery¹ or reverse engineering.² Businesses can disclose trade secret infor-

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* Associate Professor, Business Legal Studies, George Mason University. I would like to express my grateful appreciation to Susan C. Fouts for her assistance with this article.

¹ "Independent discovery" means development of the information, process, or knowledge contained in a trade secret without having access to the trade secret itself. *See, e.g., Kewanee Oil v. Bicron Corp.*, 416 U.S. 470, 476 (1974). Independent discoverers of a trade secret are free to use the knowledge which they have discovered "as long as they obtain their knowledge through their own independent efforts." M. JAGER, *TRADE SECRETS LAW* § 3.02 (rev. ed. 1988).

² Reverse engineering refers to the process by which an independent party, "starting with the known product and working backward to find the method by which it was developed," discovers a trade secret. The product which is used to perform the reverse engineering process must be obtained by lawful means, such as purchase on the open market. UNIF. TRADE SECRETS ACT § 1, Commissioner Commentary (1980 and Supp. 1985). Unlike patent law, trade secrets law allows a party discovering protected information through reverse engineering to make commercial use of the information. M. EPSTEIN, *MODERN INTELLECTUAL PROPERTY* 52-54 (1986).

mation on a limited basis to employees, customers, and licensees who have a need to know without defeating the information's status as a trade secret.³ At the same time, governmental entities are requiring businesses to disclose information about their operations to comply with regulatory requirements or for other reasons. Once the trade secret is disclosed to these public offices, what prevents dissemination of the information to the general public? Can freedom of information laws, which were enacted to provide public access to information in the custody of state and local governments, be used by a company's competitors to gain access to confidential business records?

Freedom of Information Acts were enacted in response to pressures for public scrutiny of government proceedings and decision making. Trade secret protection was enacted to ensure that competition not be carried on in an unfair way. When trade secrets are disclosed to governmental entities, where lies the balance between the public's right to know and a business's right to maintain information as confidential? The federal Freedom of Information Act (FOIA) specifically exempts trade secrets from mandatory disclosure;⁴ a presidential executive order requires predisclosure notification procedures to be followed if a federal agency believes it may be required to release confidential commercial information under the terms of the act.⁵ State laws, however, often are far less respectful of the need for nondisclosure. Each state has its own version of a freedom of information act, often referred to as an open records law.⁶ Few of these statutes provide protection for trade secrets.⁷ Many states make no specific mention of trade secrets as a category exempt from disclosure.⁸ As a result, competitors may be able to request copies of information supplied to a state government in the course of regulatory, judicial, or other proceedings to legally gain access to a company's trade secrets.⁹

³ According to the *Restatement of Torts*, for information to be eligible for trade secret protection, "a substantial element of secrecy must exist so that, except by the use of improper means, there would be difficulty in acquiring the information." *RESTATEMENT OF TORTS* § 757 comment b (1939). Failure to protect the confidentiality of a trade secret will lead a court to determine that the information does not qualify for protection under trade secrets law.

⁴ 5 U.S.C. § 522(b)(4) (1982).

⁵ Exec. Order No. 12,600, 3 C.F.R. 235 (1987).

⁶ See Braverman & Heppler, *A Practical Review of State Open Records Laws*, 49 *GEO. WASH. L. REV.* 720 (1981).

⁷ See *infra* text accompanying notes 35-48.

⁸ See *infra* text accompanying notes 49-62.

⁹ Such legal access to a competitor's trade secret contrasts with illegal actions such as fraud, theft, misrepresentation, industrial espionage, or "extraordinary meas-

This article will review state open records laws to determine what level of protection exists for a business that is required to submit or that voluntarily submits confidential information to state or local governments. Several recommendations are offered, including measures that can be undertaken by management to reduce the possibility of disclosure. The article recommends that states which do not have trade secret exemptions in their open records laws amend their statutes to provide protection for trade secrets and confidential commercial information. In addition, states should adopt a comprehensive definition of the term "trade secrets" within their open records statute or incorporate the definition found in their trade secret statute by specific reference. States should also clarify that exemption from disclosure of these trade secrets takes precedence over the operation of open records laws.

TRADE SECRECY AND PROTECTION OF BUSINESS INFORMATION

Trade secret protection arises immediately upon the creation of the secret. It is potentially unlimited in term, and does not require public disclosure or governmental registration or examination of the information that is protected.¹⁰ As a result, in many situations trade secret protection is preferable to, and can be more effective and efficient than, patent or copyright protection. For example, when a patent is issued, full disclosure of all that would be needed to practice the invention is mandated under the law.¹¹ Although disclosure is not required to qualify for protection under federal copyright law, copyright protects only particular expressions (for instance, the particular words used), and not the ideas upon which the expression is based.¹²

U.S. trade secret law developed from common law concepts transferred from England to this country in the 1800s.¹³ In contrast to patent and copyright law, each of which is governed by a detailed federal statute, trade secret protection is basically governed by state law. Many states have enacted a version of the Uniform Trade Secrets Act (UTSA) during the last several years.¹⁴ However, the UTSA is

ures to overcome precautions designed and implemented to protect the secrecy of the trade secret." M. EPSTEIN, *supra* note 2, at 48-52.

¹⁰ *Id.* at 146-47.

¹¹ 35 U.S.C. § 112 (1982).

¹² See, e.g., E. KINTNER & J. LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 364-65 (1982).

¹³ M. JAGER, *supra* note 1, § 2.01.

¹⁴ See *infra* note 31.

brief and has received little judicial interpretation.¹⁵ Although the Uniform Act certainly represents progress toward uniformity, trade secret law still differs substantially from state to state.

A trade secret consists of confidential business information that is capable of industrial or commercial application and that gives the possessor of the secret an economic advantage over those who do not possess and use it.¹⁶ Two definitions of the term "trade secret" are prevalent in the United States; one is provided by the first *Restatement of Torts*,¹⁷ and the other by the Uniform Act. The *Restatement* definition is the most widely adopted by U.S. courts.¹⁸ The U.S. Supreme Court explicitly affirmed the *Restatement* definition in 1974 in *Kewanee Oil v. Bicron Corp.*,¹⁹ where it stated that:

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.

Over the last ten years, many states have adopted an even more expansive definition, which was developed by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association as part of the Uniform Trade Secrets Act.²⁰ It states that:

"Trade Secret" means information, 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 which are reasonable under the circumstances to maintain its secrecy.

This latter definition embraces both information not yet put to use, as well as negative information.²¹

¹⁵ See generally 12 BUSINESS ORGANIZATION, MILGRIM ON TRADE SECRETS § 6 (1988) [hereinafter cited as MILGRIM].

¹⁶ M. JAGER, *supra* note 1, § 2.01.

¹⁷ *Id.* § 3.01.

¹⁸ *Id.* § 3.04.

¹⁹ 416 U.S. 470, 474 (1974).

²⁰ UNIF. TRADE SECRETS ACT § 4, 14 U.L.A. 537 (1985).

²¹ M. JAGER, *supra* note 1, § 3.04. Negative information is information about processes and methods that do not work.

While the federal Freedom of Information Act exempts "trade secrets" from mandatory disclosure, that term has not been consistently defined.²² Though most courts have adopted the *Restatement* definition, in *Public Citizen Health Research Group v. Food and Drug Administration*²³ a federal circuit court of appeals ruled that the term "trade secrets" in exemption 4 of the statute covers only information involving "the productive process itself, as opposed to collateral matters of business confidentiality such as pricing and sales volume data, sources of supply and customer lists." This decision illustrates that without a clearly stated statutory definition, the term "trade secrets" could be interpreted in a more restrictive manner than the *Restatement* or UTSA definitions.

ACCESS TO FEDERAL GOVERNMENT INFORMATION

The federal Freedom of Information Act, enacted in 1966, provides for public access to information regarding the activities of the federal government. Although the law is oriented toward disclosure of governmental processes, it recognizes that some types of information in the government's possession should not be disclosed. Trade secrets are among the several types of information that may be exempt from disclosure under certain circumstances. In relevant part, the act states: "This section does not apply to matters that are...trade secrets and commercial or financial information obtained from a person and privileged or confidential."²⁴

One problem concerning the exemption is whether the federal act requires nondisclosure or gives discretion not to disclose. This issue of mandatory versus permissive exemption of trade secret information from federal FOIA requests was addressed by the Supreme Court in 1979 in *Chrysler Corp. v. Brown*.²⁵ In that case, the Court ruled that FOIA is permissive only and does not require exemption of trade secrets that the federal government chooses to disclose. In 1987, President Reagan issued Executive Order Number 12600,²⁶ directing federal agencies to notify submitters of designated trade secrets or confidential commercial information when the agency believes that disclosure of such information may be required under a FOIA request. Agencies are required to give the submitter the opportunity to provide evidence showing why the material should be

²² *Id.* § 12.04[1]. See also Note, *Developments Under the Freedom of Information Act—1987*, 1988 DUKE L.J. 586 for a discussion of recent definitions.

²³ 704 F.2d 1280, 1287 (D.C. Cir. 1983).

²⁴ 5 U.S.C. § 552(b)(4) (1982).

²⁵ 441 U.S. 281 (1979).

²⁶ See *supra* note 5.

withheld from disclosure. Although an objection from the submitter does not automatically bar disclosure, agencies must give careful consideration to the submitter's objections and provide the submitter with a written explanation if the agency decides that the information must be disclosed. At a minimum, such procedures allow businesses to learn of the possible impending disclosure of information submitted to federal agencies. Most states allowing disclosure of trade secrets and confidential information at the discretion of the state or local agency lack this safeguard.

STATE OPEN RECORDS LAWS

The federal Freedom of Information Act's exemptions apply primarily to information held by the federal government.²⁷ After the passage of the federal FOIA in 1966, states that did not already have a FOIA or an "open records" law enacted statutes to allow public access to information held in the records of state and local governments.²⁸ Every state now has on its books some type of freedom of information act or "open records" law.²⁹ While many of these statutes are modeled after the federal FOIA, and state judges draw on interpretations of the federal statute in rulings related to state law,³⁰ the content of the state laws varies greatly. In particular, provisions for exemption from disclosure of trade secret information held by state governments are not uniform. As a result, companies that operate in more than one jurisdiction may find it difficult to protect trade secret information from disclosure in some states. Because of

²⁷ A number of court decisions have interpreted FOIA to determine what governmental bodies fall within the term "agency" in the act. For example, the statute has been held to apply to the Renegotiation Board, *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 39 (1974); the Federal Home Loan Mortgage Corporation, *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976); the Office of Science and Technology, *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); The Executive Office of the President, *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C.), *stay granted*, 513 F.2d 430 (D.C. Cir. 1975); and the Cost-Accounting Standards Board, *Petkas v. Staats*, 364 F. Supp. 680 (D.D.C. 1973), *rev'd on other grounds*, 501 F.2d 887 (D.C. Cir. 1974). The statute has been held *not* to apply to, for example, the National Institute of Mental Health initial review group which makes recommendations but not decisions, *Washington Research Project, Inc. v. Department of Health, Education and Welfare*, 504 F.2d 238 (D.C. Cir. 1974); the FDA's over-the-counter antacid drugs advisory review panel, *Wolf v. Weinberger*, 403 F. Supp 238 (D.D.C. 1975); the National Academy of Sciences, *Lombardo v. Hondler*, 397 F. Supp 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976); and the White House Office, *Nixon v. Sampson*, 389 F. Supp. 107.

²⁸ *Braverman & Heppler*, *supra* note 6, at 720.

²⁹ See the Appendix to this article for citations to the open records laws of all fifty states and the District of Columbia.

³⁰ *Braverman & Heppler*, *supra* note 6, at 727.

the diversity of statutes, it is also difficult to develop a consistent method of protecting trade secret information supplied to state and local government bodies.

The enactment by many states of the Uniform Trade Secrets Act³¹ may signal progress toward protecting trade secrets in the hands of state governments. In particular, the Act forbids misappropriation of trade secrets.³² Section (1)(2)(ii) of the UTSA defines "misappropriation" of a trade secret as, *inter alia*:

[D]isclosure or use of a trade secret of another without express or implied consent by a person who...at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was...*acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use* (emphasis added.)

Section (1)(3) of the UTSA specifically includes governments and governmental subdivisions or agencies in the definition of "person." Arguably, a government would be guilty of misappropriation if it disclosed a trade secret without consent and knew or had reason to know that it was "acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." However, the interrelationship between state open records laws and state trade secret statutes is imprecise. In particular, the fact that a particular state has enacted a trade secret statute would not necessarily bar that state's govern-

³¹ All of the following states have adopted the Uniform Trade Secrets Act definition, although in some cases the statutes differ. (The Illinois statute has a differing definition. ILL. ANN. STAT. ch. 140, para. 351 to 359 (Smith-Hurd Supp. 1988)). See ALA. CODE §§ 8-27-1 to 8-27-6 (Supp. 1987); ALASKA STAT. §§ 45.50.910 to 45.50.945 (1988 Supp.); ARK. STAT. ANN. §§ 4-75-601 to 4-75-607 (1987); CAL. CIV. CODE §§ 3426 to 3426.10 (West Supp. 1989); COLO. REV. STAT. §§ 7-74-101 to 7-74-110 (1986); CONN. GEN. STAT. ANN. §§ 35-50 to 35-58 (Supp. 1986); DEL. CODE ANN. tit. 6, §§ 2001 to 2009 (Supp. 1984); HB91, FLA. STAT. ANN. §§ 688.001 to 688.009 (Supp. 1988); IDAHO CODE §§ 48-801 to 48-807 (Supp. 1988); IND. CODE ANN. §§ 24-2-3-1 to 24-2-3-8 (West Supp. 1986); KAN. STAT. ANN. §§ 60-3320 to 60-3330 (1983); LA. REV. STAT. ANN. §§ 51:1431 to 51:1439 (West Supp. 1986); ME. REV. STAT. ANN. tit. 10, §§ 1541 to 1548 (1989); MINN. STAT. ANN. §§ 325C.01 to 325C.08 (1981 and Supp. 1986); MONT. CODE ANN. §§ 30-14-401 to 30-14-409 (1985); NEV. REV. STAT. §§ 600A.010 to 600A.100 (1987); N.C. GEN. STAT. §§ 66-152 to 66-157 (1985); N.D. CENT. CODE §§ 47-25.1-01 to 47-25.1-08 (Supp. 1985); OKLA. STAT. tit. 78, §§ 85 to 95 (Supp. 1986); ORE. REV. STAT. §§ 646.461 to 646.475; R.I. GEN. LAWS §§ 6-41-1 to 6-41-11 (1985); S.D. CODIFIED LAWS Ann. §§ 37-29-1 to 37-29-11 (1988 S.D. LAWS, ch. 354, S. 1-11); VA. CODE ANN. §§ 59.1-336 to 59.1-343 (1986); WASH. REV. CODE ANN. §§ 19.108.010 to 19.108.940 (West Supp. 1986); W. VA. CODE §§ 47-22-1 to 47-22-10 (1986); WIS. STAT. ANN. § 134.90 (West Supp. 1986).

³² See *supra* text following note 20 for the UTSA definition of a trade secret.

ment from disclosing trade secret information under the state's open records law. In addition, it cannot be decisively stated that the Uniform Act takes precedence over open records laws. Finally, following the logic of the *Public Health* case,³³ it is uncertain whether the UTSA's definition of the term "trade secret" would be the definition for open records law purposes, unless specifically incorporated by reference in the open records statute. Because of these shortcomings, a model trade secret exemption from open record laws should be drafted for enactment by the states. The following section categorizes state open records laws from the perspective of the trade secret exemption.³⁴

A SURVEY OF STATE OPEN RECORDS STATUTES AND TRADE SECRETS EXEMPTIONS

States Without Trade Secrets Exemptions

Twenty-six state FOIA or open records laws contain no mention or specific exemption of trade secrets as a category of information that may or must be excluded from disclosure.³⁵ Seventeen of these laws contain a general exclusion for records that are required to be kept confidential under other statutes or regulations.³⁶ Three of those statutes specify that this provision refers to requirements for confi-

³³ See *supra* note 23 and accompanying text.

³⁴ See the Appendix to this article for the language of the relevant statutes.

³⁵ States which provide no specific exemption for trade secrets or confidential commercial information in their open records laws are: ALA. CODE § 36-12-40 (1975 & Supp. 1988); ALASKA STAT. § 09.25.120 (1989); ARIZ. REV. STAT. ANN. § 39.121.03 (1985); CAL. GOV'T CODE §§ 6254.2, 6254.7 (West Pocket Part 1989); FLA. STAT. ANN. § 119.07(3)(a) (West 1982 & Pocket Part 1989); HAWAII REV. STAT. § 92-51 (1985); IDAHO CODE § 9-301 (1979); KAN. STAT. ANN. § 45-221(a)(1) (1986); LA. REV. STAT. ANN. § 44:4 (West Pocket Part 1989); ME. REV. STAT. ANN. tit. 1, § 408 (1989); MASS. ANN. LAWS ch. 66, §§ 3-17c (Law. Co-op. 1978); MINN. STAT. ANN. §§ 13.03 and 15.17 (West 1988); MO. REV. STAT. § 109.180 (1978); MONT. CODE ANN. § 2-6-102 (1987); NEV. REV. STAT. § 239.010.1 (1986); N.J. STAT. ANN. § 47:1A-2 (West Pocket Part 1989); N.M. STAT. ANN. § 14-2-1.E (1988); N.C. GEN. STAT. § 132-6 (Supp. 1988); N.D. CENT. CODE § 44-04-18 (1978); OHIO REV. CODE ANN. §§ 149.43 to 149.44 (Page 1984 & Supp. 1988); OKLA. STAT. ANN. tit. 51, § 24A.10 (West Pocket Part 1989); PA. STAT. ANN. tit. 65, § 66.1(2) (Purdon Pocket Part 1988); S.D. CODIFIED LAWS ANN. § 1-27-3 (1985); TENN. CODE ANN. § 10-7-503 (1987); UTAH CODE ANN. § 78-26-2 (1987); VA. CODE ANN. § 2.1-342(B) (Supp. 1988).

³⁶ States which provide a general exemption for confidential materials required to be kept confidential under other laws include Alabama, Alaska, Florida, Hawaii, Idaho, Kansas, Maine, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Pennsylvania, South Dakota, Tennessee, and Utah. See the relevant statutes in *supra* note 35.

identiality in both state and federal statutes.³⁷ The remainder of the statutes in this group simply refer to information required to be kept confidential "by statute," "by other statute," or "by law." Three state statutes contain no general exclusion for confidential material.³⁸ Although the "open records" statutes of these states may contain specific exclusions for certain types of material that generally are not related to business information (for example, privacy of library records, welfare records, or records related to criminal investigations), they do not make specific provision for excluding sensitive commercial information from public disclosure.

Several states provide limited protections against disclosure of trade secrets or commercial information under certain conditions or for certain types of commercial information. In Arizona, for example, one requesting information under the open records law must specify whether information sought under a FOIA request is for a commercial purpose; if the custodian of a record determines that such commercial purpose would constitute a misuse of public records, he may petition the governor to deny the request.³⁹

In several other states, protection against disclosure is limited to specific categories of commercial information. In California, the open records act limits disclosure of trade secrets which are supplied to the state in connection with the regulation of pesticides and air pollution.⁴⁰ However, despite this specific statutory provision, a California court denied a pesticide firm protection for information which it had submitted on the mixtures of pesticides used in spraying farmland, on the grounds that such information did not meet the legal definition of a "trade secret."⁴¹

In addition, Kansas law provides protection from disclosure only for software programs, competitive bidding information, and information regarding the prospective location of a business that has not been publicly disclosed.⁴² North Carolina allows exclusion of information on prospective business locations.⁴³ Virginia provides a number of specific exemptions related to competitive bidding information, financial statements, and information voluntarily supplied to the

³⁷ States which specify confidentiality for material covered by federal as well as state statutes include Alaska, Hawaii, and Kansas. See the relevant statutes in *supra* note 35.

³⁸ States which make no general provision for exemption of confidential materials are Massachusetts, Minnesota, and Ohio.

³⁹ ARIZ. REV. STAT. ANN. § 39-121.03 (1985).

⁴⁰ CAL. GOV'T CODE §§ 6254.2, 6254.7 (West Pocket Part 1989).

⁴¹ *Uribe v. Howie*, 19 Cal. App. 3d 194, 96 Cal. Rptr. 493 (1971).

⁴² KAN. STAT. ANN. § 45-221(a)(1) (1986).

⁴³ N.C. GEN. STAT. § 132-6 (Supp. 1988).

Department of Tourism.⁴⁴ Oklahoma law only exempts trade secret information supplied to the Department of Commerce⁴⁵ and Louisiana's exemption applies only to information furnished in connection with "any deep water or shallow port commission" and to the Department of Health and Human Resources.⁴⁶

Thus, with the exception of these general exclusions for confidentiality and specific limitations, over half of the state open records laws make no provision for the exclusion of trade secrets from disclosure under state open records laws, unless a basis for exclusion can be found in other state⁴⁷ or, in some cases, federal statutes or regulations. It is unclear whether the federal trade secret FOIA exemption would apply in those states that allow exclusion of material required to be kept confidential by federal statute. In Ohio, the attorney general has issued an opinion stating that the federal exemption cannot be used for state records, but Ohio does not have a general confidentiality exemption in its open records statutes.⁴⁸

States With Trade Secrets Exemptions

The remaining twenty-four states and the District of Columbia provide some type of protection for trade secrets and confidential commercial information in their open records statutes.⁴⁹ At least six

⁴⁴ VA. CODE ANN. § 2.1-342(B) (Supp. 1988).

⁴⁵ OKLA. STAT. ANN. tit. 51, § 24A.10 (Pocket Part 1989).

⁴⁶ LA. REV. STAT. ANN. § 44:4 (West Pocket Part 1989).

⁴⁷ For example, in state procurement, trade secrets may be exempted by specific statute. Virginia, for example, exempts "trade secrets or proprietary information." The submitter must "invoke the protections of this section prior to or upon submission of the data or other materials, and must identify the data or other materials to be protected and state the reasons why protection is necessary." VA. CODE ANN. § 11-52(D) (1986).

⁴⁸ Ohio Op. Att'y Gen. No. 75-047 (1975). See the Ohio listing in the Appendix.

⁴⁹ States which provide some type of specific exemption for trade secrets or commercial information in their open records laws are: ARK. STAT. ANN. § 25-19-105(b); COLO. REV. STAT. § 24-72-204(3)(a)(IV) (1988); CONN. GEN. STAT. ANN. § 1-19(b)(5) (West 1988); DEL. CODE ANN. tit. 29, § 10002(d)(2) (Supp. 1988); D.C. CODE ANN. § 1-1524(a)(1) (1987); GA. CODE ANN. § 50-18-72 (Supp. 1988); ILL. REV. STAT. ch. 116, para. 207, § 7 (Smith-Hurd Pocket Part 1989); IND. CODE § 5-14-3-4(a)(4) (1988); IOWA CODE ANN. § 22.7(3) (West Pocket Part 1989); KY. REV. STAT. § 61.878(1)(b) (Baldwin 1986); MD. STATE GOV'T CODE ANN. § 10-617(d) (1984); MICH. COMP. LAWS ANN. § 15.243(1)(g) (West 1981); MISS. CODE ANN. § 25-61-9 (Supp. 1988); NEB. REV. STAT. § 84-712.05(3) (1987); N.H. REV. STAT. ANN. § 91-A:5(IV) (1977 & Supp. 1988); N.Y. PUB. OFF. LAW § 87(2)(d) (McKinney 1988); OR. REV. STAT. § 192.501(2) (Supp. 1988); R.I. GEN. LAWS § 38-2-2(d)(2) (1984 & Supp. 1988); S.C. CODE ANN. § 30-4-40(a)(1) (Law. Co-op. Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a) (Vernon Pocket Part 1989); VT. STAT. ANN. tit. 1, § 317(b)(9) (1985); WASH. REV. CODE ANN. § 42.17.310(1)(h) (Pocket Part 1989); W. VA. CODE § 29B-1-4(1) (1986); WIS. STAT. ANN. § 19.36(5) (West Pocket Part 1988); WYO. STAT. § 16-4-203(d)(v) (1982 & Supp. 1988).

of these states incorporate a specific definition of a trade secret into their open records statutes, either as a direct statement or by reference to the state's enactment of the Uniform Trade Secrets Act.⁵⁰ Most of the others simply specify an exemption for "trade secrets."⁵¹ A few states, discussed below, provide protection for specifically defined commercial information without using the term "trade secret."⁵² This practice could cause difficulty for businesses attempting to show that their information meets the conditions for exemption from disclosure.

The degree and conditions of protection afforded to commercial secrets vary significantly from state to state. Only sixteen of the twenty-five statutes impose a positive bar on the disclosure of trade secrets—that is, they direct that custodians of records containing such secrets "shall not" or "may not" disclose such records or, alternatively, exclude records containing trade secrets from the definition of public records.⁵³ Six states and the District of Columbia exempt trade secret information on a permissive basis—that is, the state may decline to disclose such information, but may also choose to make disclosure if it believes it is in the public interest to do so.⁵⁴

Several other states permit withholding of trade secret and commercial information only if certain specified conditions are met.⁵⁵ Arkansas exempts confidential commercial information from disclosure only if it can be shown that disclosure would provide a specific competitive disadvantage to the provider of the information. In the

⁵⁰ States that incorporate or refer to a specific definition of the term "trade secret" in their open records statutes include Connecticut, South Carolina, Oregon, Vermont, West Virginia, and Wisconsin. See the relevant statutes in *supra* note 49.

⁵¹ States which use the term "trade secret" without definition in their open records statutes are Colorado, Delaware, District of Columbia, Georgia, Illinois, Indiana, Iowa, Maryland, Michigan, Mississippi, Nebraska, New York, Rhode Island, and Texas. See the relevant statutes in *supra* note 49.

⁵² States which exempt confidential commercial information without using the term "trade secrets" in their open records laws are Arkansas, Kentucky, New Hampshire, and Washington. See the relevant statutes in *supra* note 49.

⁵³ States which provide that trade secret information "shall not" or "may not" be released or that the relevant official "shall deny" the release under the state open records laws, or exclude trade secrets from the definition of public records, are Arkansas, Colorado, Delaware, Georgia, Illinois, Indiana, Iowa, Maryland, Mississippi, New Hampshire, Rhode Island, Texas, Vermont, Washington, West Virginia, and Wyoming. See the relevant statutes in *supra* note 49.

⁵⁴ States which allow discretionary withholding of trade secret information are Connecticut, Michigan, Nebraska, New York, Oregon, Wisconsin, and the District of Columbia. See the relevant statutes in *supra* note 49.

⁵⁵ See *supra* note 49 for citations to the relevant Arkansas, District of Columbia, Michigan, and Mississippi statutes.

District of Columbia, exemption of confidential information can take place only if disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained. In Michigan, confidentiality is available only with respect to information submitted to the government voluntarily, and then only if confidentiality is specifically promised by an authorized official at the time of the submission; information that is required to be submitted (for example, in connection with regulatory action) is not exempt. In Mississippi, a party who has submitted confidential trade secret information must be notified if such information is requested under the open records law, but the submitter must obtain a court order if he desires to keep these records confidential.

Finally, three states protect commercial information by definition without using the term "trade secrets." Washington excludes "valuable formulae, designs, drawings, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss."⁵⁶ New Hampshire exempts "confidential, commercial, or financial information. . . whose disclosure would constitute invasion of privacy."⁵⁷ Kentucky excludes "[r]ecords. . . maintained for. . . the regulation of commercial enterprise,"⁵⁸ defining these to include all of the elements of a trade secret stated in the Uniform Trade Secrets Act, but without specifically using the term "trade secret" in its open records statute.

Results of litigation to protect trade secrets from state open records law disclosure are inconsistent. As was previously noted, in the case of *Uribe v. Howie*,⁵⁹ a California pesticide firm was unable to bar disclosure of certain information submitted to the state government concerning pesticide applications. The court ruled that the information for which protection was sought did not constitute a trade secret because it was not information that was used continually in the operation of a business. Similarly, in *Wisconsin Electric Power Co. v. Public Service Commission*,⁶⁰ the Wisconsin Supreme Court ruled against the Wisconsin Electric Power Company, which had attempted to bar disclosure of bid specifications submitted to the Public Service Commission, claiming that the information was protected under Wisconsin's law concerning theft of trade secrets. The court reasoned that the information for which protection was sought was not used in the ongoing operation of a business, and therefore

⁵⁶ WASH. REV. CODE ANN. § 42.17.310(1)(h) (Pocket Part 1989).

⁵⁷ N.H. REV. STAT. ANN. § 91-A:5(IV) (1977 & Supp. 1988).

⁵⁸ KY. REV. STAT. ANN. § 61.878(1)(b) (1986).

⁵⁹ See *supra* note 41 and accompanying text.

⁶⁰ 106 Wis. 2d 142, 316 N.W.2d 120 (1981).

did not qualify as a trade secret. At the time of the case, the Wisconsin Open Records Law did not provide an exemption for trade secrets; however, that law has been amended to provide for the discretionary withholding of trade secrets from disclosure.⁶¹ In the case of *Belth v. Insurance Department*,⁶² by contrast, a New York State court ruled that an insurance company's computer programs, mathematical models, procedures, and assumptions used in pricing newly issued insurance policies were entitled to protection as trade secrets under the state Freedom of Information Act, which requires proof of a competitive injury in order to bar disclosure of trade secrets or commercial information.

WHAT BUSINESS AND GOVERNMENT CAN DO

Many industries are becoming vulnerable to the theft of their trade secrets for a variety of reasons, including advances in telecommunications and increased employee mobility. At the same time, knowledge-based assets, including trade secrets, are increasingly becoming the tools that account for the competitive success of many businesses, particularly in advanced economies such as the United States, where sophisticated technical and service industries are of increasing importance. While many of the factors that make trade secret protection difficult are technological or economic in nature, the difficulty of adapting and fine-tuning the legal system to protect property rights in ideas contributes to the problem of protecting trade secrets.

Companies must be aware that competitors may be able to use state open records laws to gain access to trade secrets by requesting copies of information supplied to the government in the process of regulatory, procurement, judicial, or other legal proceedings. Investments made in research and development or in the licensing of technology will not provide an advantage when competitors can learn of, and benefit from, the results of these investments for free. As businesses are required to submit increasing quantities of information to state and local governments in response to regulatory proceedings; in connection with bidding for, or in the performance of, government contracts; or for informational purposes, the weakness and lack of uniformity of trade secret protection in state open records and FOIA laws will likely become a very significant problem. Companies with operations in states which do not specifically exempt trade secrets from disclosure under open records laws may need to be especially

⁶¹ WIS. STAT. ANN. § 19.36(5) (West Pocket Part 1988), which incorporates Wisconsin's version of the UTSA by reference, was enacted in 1985.

⁶² 95 Misc. 2d 18, 406 N.Y.S.2d 649 (Sup. Ct. 1977).

wary about providing sensitive commercial information to governmental bodies in these states.

As a routine practice, business should take certain precautions when submitting trade secret or confidential commercial information to any government body, either federal or state, regardless of whether the state has specific protections for trade secrets in its Open Records Law. These precautions include clearly marking "Confidential, Proprietary Information" on each page of documents containing trade secret or other commercially sensitive information, communicating requested information orally if possible, obtaining a nondisclosure or confidentiality agreement with the relevant state agency, and requesting return of sensitive material when the agency has finished with it. Companies should periodically request information of state governments to determine if access to confidential information has been requested or granted, and be prepared to file suit to bar disclosure.⁶³

Lack of uniformity among state open records laws can cause difficulties for businesses with multistate operations. States that do not currently provide protection for trade secrets should consider revisions that would balance the public's need for information about government operations against the legitimate needs of information and technology-based businesses to protect confidential commercial information that is crucial to their competitive position and a healthy state business environment. Without a clear and comprehensive exemption, businesses may find that the protections provided against unauthorized disclosure have little utility.

Maintaining information as confidential can be an important tool for preserving business "know how." As a result, the proper utilization and protection of trade secret information is an area of growing importance and concern for many U.S. businesses. Many new industries focus on information and technology as their product, and even those that focus on a more traditional type of output are developers and consumers of information and technology. Recognition of this economic reality has led to increased measures to protect trade secrets submitted to the federal government. The next important step is to ensure that trade secrets are granted the same protection when submitted to state or local government bodies.

⁶³ Epstein & Neelman, *Trade Secrets: A Novel Application to Biotechnology*, J. PROPRIETARY RIGHTS, Dec., 1988, at 16, 20; McManus, *Double Edge*, Forbes, May 21, 1984, at 52.

APPENDIX

PROVISIONS IN STATE OPEN RECORDS LAWS CONCERNING EXEMPTION OF TRADE SECRETS FROM DISCLOSURE

ALABAMA: "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." ALA. CODE § 36-12-40 (1975 & Supp. 1988).

ALASKA: "Every person has a right to inspect a public writing or record in the state. . . except. . . records required to be kept confidential by a federal law or regulation or by a state law." ALASKA STAT. § 09.25.120 (1983).

ARIZONA: "A person requesting. . . public records for a commercial purpose shall. . . provide a certified statement setting forth the commercial purpose for which the copies will be used. . . . If the custodian of a public record determines that the commercial purpose stated. . . is a misuse of public records, the custodian may apply to the governor requesting that the governor by executive order prohibit the furnishing. . . for such commercial purpose." ARIZ. REV. STAT. ANN. § 39.121.03 (1985).

ARKANSAS: "It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter: . . . (9) Files which, if disclosed would give advantage to competitors or bidders. . . ." ARK. STAT. ANN. § 25-19-105(b).

CALIFORNIA: Allows withholding under some conditions of trade secrets submitted in connection with regulation of pesticide use and air pollution. CAL. GOV'T CODE §§ 6254.2, 6254.7 (West Pocket Part 1989).

COLORADO: "The custodian shall deny the right of inspection of the following records, unless otherwise provided by law. . . : [t]rade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person." COLO. REV. STAT. § 24-72-204(3)(a)(IV) (1988).

CONNECTICUT: "Nothing in sections 1-15, 1-18a, 1-19 to 1-19b inclusive, and 1-21 to 1-21k, inclusive, shall be construed to require disclosure of. . . trade secrets, which for purposes of sections 1-15, 1-18a, 1-19 to 1-19b, inclusive, and 1-21 to 1-21k inclusive, are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing,

compounding, treating or processing of articles or materials which are trade commodities obtained from a person and which are recognized by law as confidential, and commercial or financial information given in confidence, not required by statute." CONN. GEN. STAT. ANN. § 1-19(b)(5) (West 1988).

DELAWARE: "For purposes of this chapter, the following records shall not be deemed public:..(2) [t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." DEL. CODE ANN. tit. 29, § 10002(d)(2) (Supp 1988).

DISTRICT OF COLUMBIA: "The following matters may be exempt from disclosure under the provisions of this subchapter:..[t]rade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained." D.C. CODE ANN. § 1-1524(a)(1) (1987).

FLORIDA: "All public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, are exempt from [disclosure]." FLA. STAT. ANN. § 119.07(3)(a) (West 1982 & Pocket Part 1989).

GEORGIA: "This article shall not be applicable to any trade secrets obtained from a person or business entity which are of a privileged or confidential nature and required by law to be submitted to a government agency or to data, records, or information of a proprietary nature,..where such data, records, or information has not been publicly released, published, copyrighted, or patented." GA. CODE ANN. § 50-18-72 (Supp. 1988).

HAWAII: "All public records shall be available for inspection. . . unless public inspection of such records is in violation of any other state or federal law. . . ." HAW. REV. STAT. § 92-51 (1985).

IDAHO: "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." IDAHO CODE § 9-301 (1979).

ILLINOIS: "The following shall be exempt from inspection and copying:..(9) Trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged, or confidential, or where disclosure of such trade secrets or information may cause competitive harm." ILL. REV. STAT. ch. 116, par. 207, § 7 (Smith-Hurd 1989 Pocket Part).

INDIANA: "The following records are exempted from...this chapter and may not be disclosed by a public agency, unless access to the records is specifically required by a state or federal statute...: Records containing trade secrets." IND. CODE § 5-14-3-4(a)(4) (1988).

IOWA: "The following public records shall be kept confidential, unless otherwise ordered by a court...: Trade secrets which are recognized and protected as such by law." IOWA CODE ANN. § 22.7(3) (West Pocket Part 1989).

KANSAS: "Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose... [r]ecords the disclosure of which is specifically prohibited or restricted by federal law, state statute, or rule of the Kansas supreme court...; [s]oftware programs for electronic data processing and documentation thereof...; specifications for competitive bidding...; public records pertaining to the prospective location of a business or industry where no previous public disclosure has been made of the business, of industry's interest in locating in...the state...[t]he bidders list of contractors who have requested bid proposals..." KAN. STAT. ANN. § 45-221(a)(1) (1986).

KENTUCKY: "The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction...Records confidentially disclosed to an agency and compiled and maintained for...the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally recognized as confidential, or for the grant or review of a license to do business and if openly disclosed would permit an unfair advantage to competitors of the subject enterprise. This exemption shall not, however, apply to records the disclosure or publication of which is directed by another statute." KY. REV. STAT. ANN. § 61.878(1)(b) (Baldwin 1986).

LOUISIANA: "This chapter shall not apply...(13) To any of the following for use...with any automated...system conducted by any deep water or shallow port commission...: (b) Any financial or trade secrets or other third party proprietary information of any person, firm, corporation, agency or other entity, whether governmental or private...(14) To any records of the Department of Health and Human Resources...which records contain any technical information pertaining to any formula, method, or process which is a trade secret

which has been submitted. . . in carrying out and enforcing regulations of the state." LA. REV. STAT. ANN. §§ 44:1-40 (1982), § 44:4 (Pocket Part 1989).

MAINE: "Except as otherwise provided by statute, every person shall have the right to inspect and copy any public record. . . ." ME. REV. STAT. ANN. tit. 1, § 408 (1989).

MARYLAND: "A custodian shall deny inspection of the part of a public record that contains. . . : (1) a trade secret; (2) confidential commercial information; (3) confidential financial information; or (4) confidential geological or geophysical information." MD. STATE GOV'T CODE ANN. § 10-617(d) (1984).

MASSACHUSETTS: No exemptions relating to trade secrets or general confidential information. *See* MASS. ANN. LAWS ch. 66, § 3-17c (Michie/Law. Co-op. 1978).

MICHIGAN: "A public body may exempt from disclosure as a public record under this act. . . Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if: (i) The information is submitted upon a promise of confidentiality by the public body; (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made; (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision shall not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit." MICH. COMP. LAWS ANN. § 15.243(1)(g) (West 1981).

MINNESOTA: No exemptions related to trade secrets or general confidential information. *See* MINN. STAT. ANN. §§ 13.03 and 15.17 (West 1988).

MISSISSIPPI: "Records furnished to public bodies by third parties which contain trade secrets or confidential commercial or financial information shall not be subject to inspection. . . until notice to said third parties has been given, but such records shall be released within a reasonable period of time unless the said third parties have obtained a court order protecting such records as confidential." MISS. CODE ANN. § 25-61-9 (Supp. 1988).

MISSOURI: "Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall. . . be

open for a personal inspection by any citizen of Missouri..." MO. REV. STAT. § 109.180 (1978).

MONTANA: "Every citizen has a right to inspect and take a copy of any public writings of this state, except...as otherwise expressly provided by statute." MONT. CODE ANN. § 2-6-102 (1987).

NEBRASKA: "The following records...may be withheld from the public by the lawful custodian of the records:...Trade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose." NEB. REV. STAT. § 84-712.05(3) (1987).

NEVADA: "All public books and records...the contents of which are not otherwise declared by law to be confidential, shall be open...to inspection by any person..." NEV. REV. STAT. § 239.010.1 (1986).

NEW HAMPSHIRE: "The records of the following bodies are exempted from the provisions of this chapter:...Records pertaining to internal personnel practices, confidential, commercial, or financial information...whose disclosure would constitute invasion of privacy." N.H. REV. STAT. ANN. § 91-A:5(IV) (1977 & Supp. 1988).

NEW JERSEY: "Except as otherwise provided in this act or by any other statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, any Federal law, regulation or order, or by any regulation promulgated under the authority of any statute or executive order of the Governor, all records which are required by law to be made...shall...be deemed to be public records. Every citizen of this state...shall have the right to inspect such records." N.J. STAT. ANN. § 47:1A-2 (West Pocket Part 1989).

NEW MEXICO: "Every citizen of this state has a right to inspect any public records of this state except...as otherwise provided by law." N.M. STAT. ANN. § 14-2-1.E (1988).

NEW YORK: "[S]uch agency may deny access to records or portions thereof that:...are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise." N.Y. PUB. OFF. LAW § 87(2)(d) (McKinney 1988).

NORTH CAROLINA: "Every person having custody of public records shall permit them to be inspected...[except that] public records relating to the proposed expansion or location of specific business or industrial projects in the State may be withheld so long as their

inspection, examination or copying would frustrate the purpose for which such public records were created. . . ." N.C. GEN. STAT. § 132-6 (Supp. 1988).

NORTH DAKOTA: "Except as otherwise specifically provided by law, all records of public or governmental bodies. . . shall be public records, open and accessible for inspection. . . ." N.D. CENT. CODE § 44-04-18 (1978).

OHIO: No trade secret or general confidentiality exemptions. See OHIO REV. CODE ANN. §§ 149.43 to 149.44 (Page 1984 & Supp. 1988).

OKLAHOMA: "C. Except as set forth hereafter, the Oklahoma Department of Commerce may keep confidential: 1. Business plans, feasibility studies, financing proposals, marketing plans, financial statements or trade secrets submitted by a person or entity seeking economic advice. . . ." OKLA. STAT. ANN. tit. 51, § 24A.10 (Pocket Part 1989).

OREGON: "The following public records are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in a particular instance: . . ." Trade secrets, " [which], as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is known only to certain individuals within an organization, and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it." OR. REV. STAT. § 192.501(2) (Supp. 1988).

PENNSYLVANIA: "Provided, That the term 'public records'. . . shall not include. . . any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted, or forbidden by statute law or order or decree of court, or which would operate to the prejudice or impairment of a person's reputation or personal security. . . ." PA. STAT. ANN. tit. 65, § 66.1(2) (Purdon Pocket Part 1988).

RHODE ISLAND: "For the purposes of this chapter, the following records shall not be deemed public: . . . Trade secrets and commercial or financial information obtained from a person, firm, or corporation, which is of a privileged or confidential nature." R.I. GEN. LAWS § 38-2-2(d)(2) (1984 & Supp. 1988).

SOUTH CAROLINA: "The following matters are exempt from disclosure under the provisions of this chapter: . . . Trade Secrets, which

are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally regarded as confidential. . . ." S.C. CODE ANN. § 30-4-40(a)(1) (Law. Co-op. Supp. 1988).

SOUTH DAKOTA: "[The general statute providing that public records are open to inspection] shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept." S.D. CODIFIED LAWS ANN. § 1-27-3 (1985).

TENNESSEE: "All state, county and municipal records. . . shall at all times. . . be open for personal inspection by any citizen of Tennessee. . . unless otherwise provided by state statutes." TENN. CODE ANN. § 10-7-503 (1987).

TEXAS: "All information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public. . . with the following exceptions only: . . . (4) information which, if released would give advantage to competitors or bidders; . . . (10) trade secrets and commercial and financial information obtained from a person and privileged or confidential by statute or judicial decision. . . ." TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a) (Vernon Pocket Part 1989).

UTAH: "Every citizen has a right to inspect and take a copy of any public writing of this state except as otherwise expressly provided by statute." UTAH CODE ANN. § 78-26-2 (1987).

VERMONT: "'[P]ublic record' or 'public document' means. . . any. . . written or recorded matters produced or acquired in the course of agency business except: . . . trade secrets, including, but not limited to, any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it." VT. STAT. ANN. tit. 1, § 317(b)(9) (1985).

VIRGINIA: "The following records are excluded from the provisions of this chapter: . . . (15) Contract cost estimates prepared for the confidential use of the Department of Transportation in awarding contracts for construction or the purchase of goods or services. . . ; (16) Vendor proprietary information software which may be in the official

records of a public body. . .; (17) Data, records or information of a proprietary nature produced or collected by or for faculty or staff of state institutions of higher learning. . ., in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues. . ., where such data, records or information have not been publicly released, published, copyrighted or patented. . .; (18) Financial statements not publicly available filed with applications for industrial development financing;. . .(20) Confidential proprietary records, voluntarily provided by private business to the Division of Tourism. . .to indicate to the public statistical information on tourism visitation to Virginia attractions and accommodations." VA. CODE ANN. § 2.1-342(B) (Supp. 1988).

WASHINGTON: "The following are exempt from public inspection and copying: . . . Valuable formulae, designs, drawings, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss." WASH. REV. CODE ANN. § 42.17.310(1)(h) (Pocket Part 1989).

WEST VIRGINIA: "The following categories of information are specifically exempt from disclosure under the provisions of this article: (1) Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors." W. VA. CODE § 29B-1-4(1) (1986).

WISCONSIN: "An authority may withhold access to any record or portion of a record containing information qualifying as a trade secret as defined in § 134.90(1)(c)" (referring to Wisconsin's Uniform Trade Secrets Act, which defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply: 1. The information 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] 2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.") WIS. STAT. ANN. § 19.36(5) (West Pocket Part 1988) [referring to WIS. STAT. ANN. § 134.90(1)(c) (West 1989)].

WYOMING: "The custodian shall deny the right to inspection of the following records, unless otherwise provided by law: . . . Trade secrets,

privileged information and confidential commercial financial, geological or geophysical data furnished by or obtained from any person."

WYO. STAT. § 16-4-203(d)(v) (1982 & Supp. 1988).

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