

Incentivizing Government: The People's Trade Secrets

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This article is the flip side of my previous article, "Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure," 59 FL. L. REV. 135 (2007) ("Secrecy"). In Secrecy, I examined the question of whether private entities engaged in the provision of public infrastructure, like voting machines and public wifi Internet access, should be allowed to shield information regarding their products and services from public disclosure by way of trade secrecy. This is a question of applying democratic values like transparency and accountability to private entities, the practical effect of which is in direct conflict with the purpose of trade secrecy, namely keeping information private. I concluded, in essence, that, as applied to public infrastructure, trade secrecy should not be utilized by private entities engaged in its provision.

In this article, the converse question is asked: should government be allowed to shield information that it created from public disclosure by way of trade secrecy? Importantly, I am not focusing here on trade secrets shared with government by private industry or created by private industry on the public's dime. Rather, I am talking about information that the government itself creates and which would meet the applicable definition of a trade secret.

While the conflict here is similar – transparency versus secrecy – the policy considerations are quite different. For example: do we need to incentivize innovation in government by way of trade secrecy? Is the capture of revenue by way of the competitive advantages inherent in trade secrecy a necessary prerequisite to governmental operations? Moreover, the application of trade secrecy by government is a very recent development (at least in the United States), and its ramifications have yet to be explored in detail. At this stage, I am tentatively concluding that trade secrecy is a poor fit to government, and redundant given the ability of government to patent its inventions.