



NAVIGATING THE INTERSECTION BETWEEN TRADE SECRETS & PUBLIC RECORDS LAW

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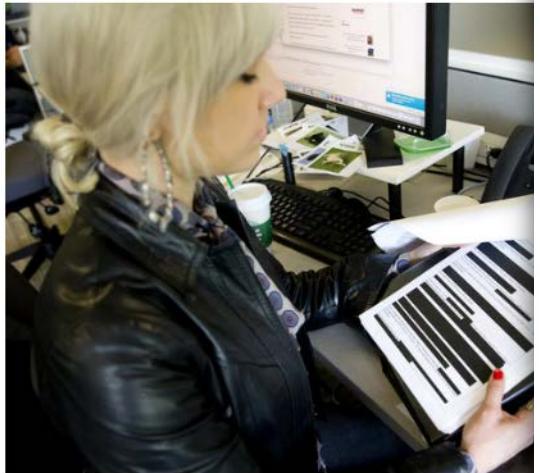
IT'S IN THE NEWS: ISSUES WITH PUBLIC RECORDS



POLITICS & ELECTIONS

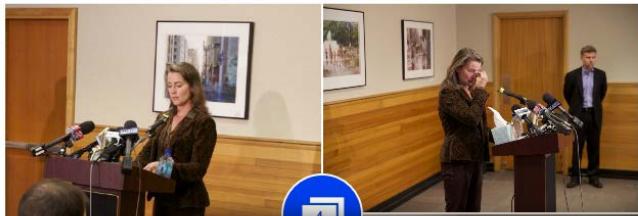
Bill would require review of public records exemptions

Posted on February 22, 2017 at 7:00 AM



These documents, requested by The Oregonian, have heavily redacted. When responding to public records state and local agencies can use 550 exemptions to requests.(Dave Killen/The Oregonian)

Cylvia Hayes must pay The Oregonian's \$128,000 legal bill, judge rules



Trust Records Show Trump Is Still Closely Tied to His Empire

By SUSANNE CRAIG and ERIC LIPTON FEB. 3, 2017



By Molly Young | The Oregonian
Email the author | Follow on Twitter
on May 25, 2016 at 5:00 PM

Former first lady Cylvia Oregonian/OregonLive.com

Here are the photos that show Obama's inauguration crowd was bigger than Trump's



The Seattle Times

Editorials

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Editorials

A win for public records and the public's right to know

Originally published March 24, 2016 at 5:01 pm | Updated March 24, 2016 at 3:59 pm



Amy Crawford loads 9mm bullets into a magazine at West Coast Armory North in Everett in 2015. Crawford was a Kirkland corrections officer exposed to lead in 2007 at the Issaquah Police Firing Range. (Erika Schultz/The Seattle Times)

PRESENTATION GOALS

Public Records Law in
Oregon, Washington and
nationally

Public Records Exemptions
Applicable to Trade Secrets
and Confidential Business
Information

When are trade secrets
protections overridden by
the “public interest”?

What administrative and
litigation procedures apply
to public records
disputes?

Best Practices for Business
and Government to Share
and Protect Trade Secrets
and Confidential Business
Information

WHAT'S NOT FOR TODAY



Detailed discussion
of public records
procedures



Detailed discussion
of other public
records exemptions

RECORDS 101: WHO CAN REQUEST RECORDS?

- **Federal:** “any person” - "Any person" including U.S. citizens, foreign nationals, organizations, associations, and universities.
- **Oregon:** “every person” - any natural person, any corporation, partnership, firm or association, and any member or committee of the Legislative Assembly. ORS 192.410(2)
- **Washington:** “Any person” – Agency is not permitted to “distinguish among persons requesting records” and the person is not required to tell the agency the purpose of their request (exception: commercial use) RCW 42.56.080.

RECORDS 101: ENTITIES SUBJECT TO REQUESTS

- **Federal:** Executive Branch departments, agencies, and offices; federal regulatory agencies; and federal corporations. (Not Congress, the federal courts, and parts of the Executive Office of the President that function solely to advise and assist the President).
- **Oregon:** Public body (defined in ORS 192.410(3)) and functional equivalent, with relevant factors identified in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994) (e.g., independent, non-profit fire department records subject to disclosure)
- **Washington:** “Agencies” as defined in RCW 42.56.010, covers all state and local governments. Includes private corporations that are the “functional equivalent” of governments (e.g. company contracted to provide regional animal control)

RECORDS 101: WHAT IS SUBJECT TO DISCLOSURE (FEDERAL)

“Agency records”

Two-part test: (1) either created or obtained by an agency w/in branch of federal gov’t, and (2) under agency control at the time of the FOIA request.

United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989)



RECORDS 101: WHAT IS SUBJECT TO DISCLOSURE (OREGON)

- “Any writing* that contains information relating to the conduct of the public’s business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.” ORS 192.410(a);
- *See ORS 192.410(6) expansively defining “writing”

RECORDS 101: WHAT IS SUBJECT TO DISCLOSURE (WASHINGTON)

“Any writing” containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.
RCW 42.56.010.

No

Private cell phone records showing calls made on public business

Yes

Text messages from private phone sent on public business

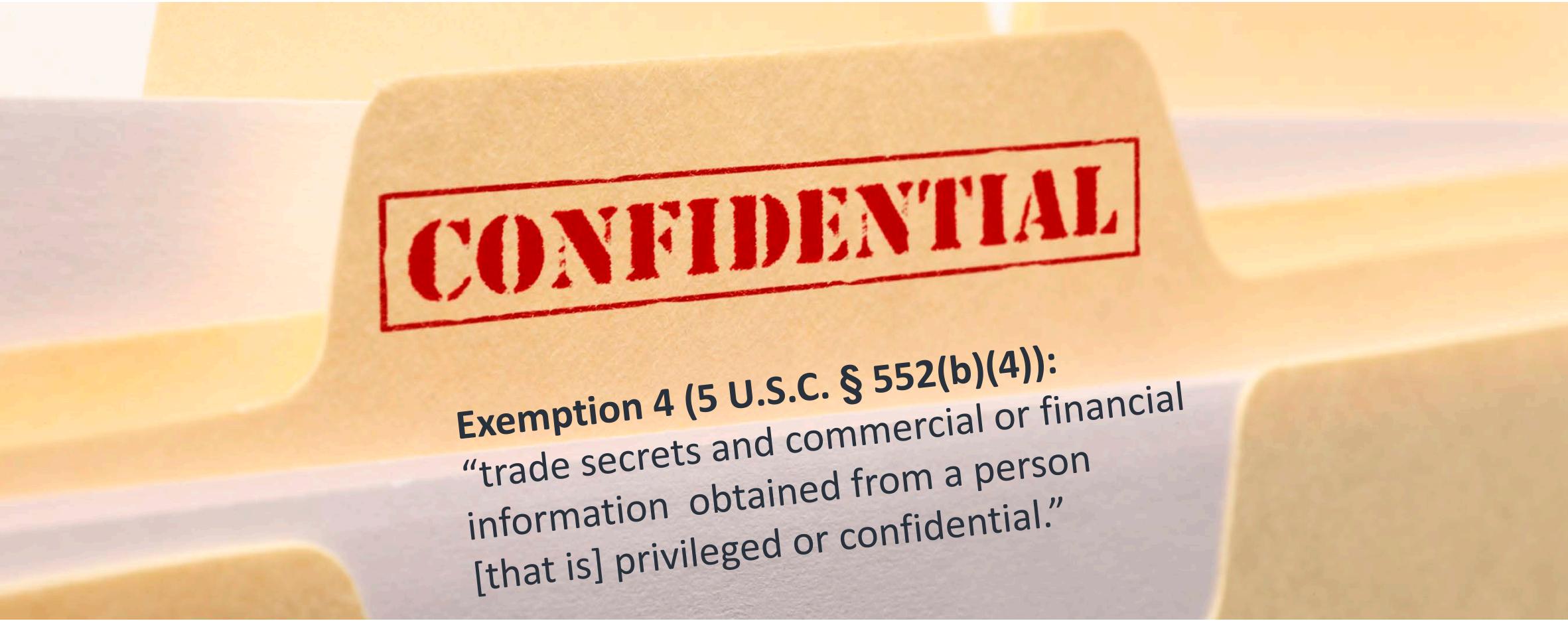
TRADE SECRETS 101: WHAT IS A TRADE SECRET (OUTSIDE OF PUBLIC RECORDS LAW)

- Restatement of Torts, § 757
- Restatement (Third) of Unfair Competition, § 39
- Uniform Trade Secrets Act – (1) information, (2) derives independent economic value from not being generally known or readily ascertainable, and (3) that is subject to reasonable efforts to maintain its secrecy
- Oregon – Adopted UTSA in 1987 – Prior, used Restatement of Torts, but still cite six-factor test, *Citizens Utility Bd. V. Public Util. Comm'n*, 128 Or App 650, 658-59 (1994)
- Washington – Adopted UTSA in 1981 – Prior, defined as “a secret formula or process, not patented, known only to certain individuals who use it in compounding or manufacturing some article of trade having a commercial value.”

TRADE SECRET EXEMPTIONS: WHY EXEMPT TRADE SECRETS?

- Same reasons to protect trade secrets at common law: fair competition, protect innovation, etc.
- Encourage sharing of useful commercial or financial information to the government
- Promote reliability of information.

WHAT IS A TRADE SECRET: FEDERAL PUBLIC RECORDS LAW



CONFIDENTIAL

Exemption 4 (5 U.S.C. § 552(b)(4)):
“trade secrets and commercial or financial
information obtained from a person
[that is] privileged or confidential.”

FEDERAL: EXEMPTION 4 (TRADE SECRET)

Under FOIA, “trade secret” has common law trade secret definition:

"a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *Freeman v. BLM*, 526 F. Supp. 2d 1178 (D. Or 2007)

FEDERAL: EXEMPTION 4 (CONFIDENTIAL OR PRIVILEGED BUSINESS INFORMATION)

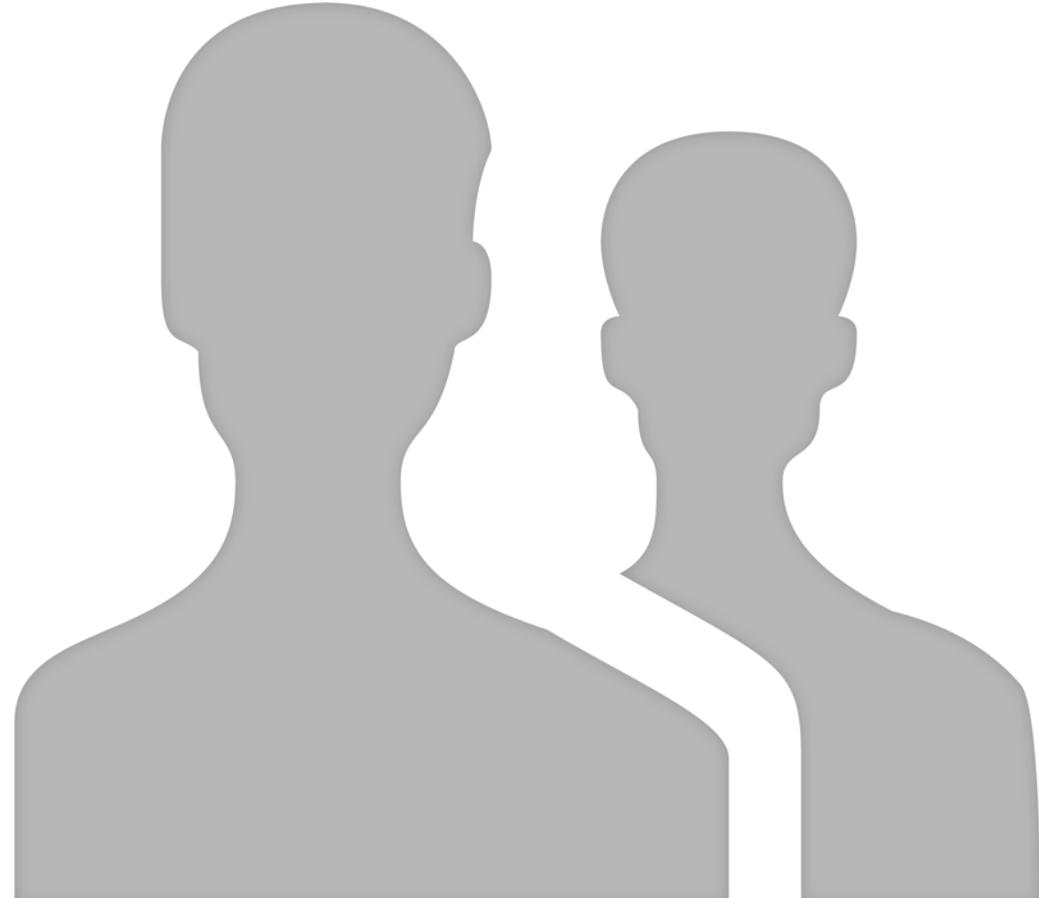
Three elements:



FEDERAL: EXEMPTION 4 (CONFIDENTIAL BUSINESS INFORMATION)

- If submission of information is required = objective, effects-based inquiry.
 - Is it likely (1) to **impair** the Government's ability to obtain necessary information in the future; or (2) to cause substantial **harm to the competitive position** of the person from whom the information was obtained? or (3) to harm "identifiable private or governmental interest which the Congress sought to protect by enacting Exemption 4 of the FOIA. *See National Parks & Conservation Soc. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Lion Raisins Inc. v. USDA*, 354 F.3d 1072, 1080 (9th Cir. 2004).
- If submission is voluntary = is it of a kind that would customarily not be released to the public by the person from whom it was obtained? *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992); *but see Lahr v. NTSB*, 453 F. Supp. 2d 1153, 1175 (C.D. Cal. 2006) (observing that "the Ninth Circuit has not addressed the Critical Mass modification" of the National Parks test)

FEDERAL: EXEMPTION 4 (PRIVILEGED BUSINESS INFORMATION)



- Privileged is not synonymous with confidential; alternative to protecting nonconfidential commercial/financial information
- Examples: attorney-client and doctor-patient privileges

FEDERAL: EXEMPTION 4 (RELATIONSHIP W/ FEDERAL TRADE SECRETS LAW)

- Trade Secrets Act, 18 U.S.C. § 1905, a criminal statute, prohibits unauthorized disclosure of all data protected by Exemption 4.
- The Trade Secrets Act, however, does not preclude disclosure of information "otherwise protected" by that statute, if the disclosure is "'authorized by law.'" *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997)
- Takeaway: if covered by Exemption 4, falls within scope of Trade Secrets Act

OREGON: TRADE SECRETS EXEMPTIONS

- ORS 192.501(2) (conditional)
 - “The following public records are exempt from disclosure...unless the public interest requires disclosure in the particular instance: (2) Trade secrets. ‘Trade secrets,’ 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 not patented, 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.”
- ORS 192.502(9)(a) (unconditional)
 - “The following public records are exempt from disclosure... (a) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.”

OREGON: ORS 192.501(2) (TRADE SECRETS)

- Trade secrets. Trade secrets, 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 not patented, 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.
- Examples: documents containing statistical information, such as lightning-strike data, fee schedules, price lists, projections, and loss ratios can meet the criteria for the exemption.

OREGON: ORS 192.502(9) (“CATCH-ALL”)

- ORS 192.502(9)(a) exempts “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.”
- *Pfizer* case: disclosure “prohibited” under ORS 192.502(9)(a) because it will result in a misappropriation of trade secrets, which is prohibited by the Oregon Uniform Trade Secrets Act (“OUTSA”), codified at ORS 646.461 *et seq.* 254 Or App 144 (2012)

But note: AG Opinion re Pfizer

OREGON: DON'T FORGET ORS 192.501(5)

- “Protected Business Information” exemption
- Information consisting of **production records, sale or purchase records or catch records, or similar business records** of a private concern or enterprise, **required by law to be submitted to or inspected by a governmental body** to allow it to determine fees or assessments payable or to establish production quotas, and the amounts of such fees or assessments payable or paid, **to the extent that such information is in a form that would permit identification of the individual concern or enterprise....** Nothing in this subsection shall limit the use that can be made of such information for regulatory purposes or its admissibility in any enforcement proceeding.

OREGON: WHAT OVERCOMES AN EXEMPTION?

- Conditional exemptions are conditioned on “unless the public interest requires disclosure” – ORS 192.501
- OPRL does not define “public interest in disclosure” but courts recognize there is public interest where information relates to manner in which public business is conducted, or to public officials’ performance of their duties.
- Key case: *ACLU of Or., Inc. v. City of Eugene*, 360 Or 269 (2016)
- General presumption in favor of disclosure, transparency, but may not be strong in case of trade secrets, per AG guidance (heightened scrutiny to contentions that public interest requires release of trade secrets)

WASHINGTON: TRADE SECRETS EXEMPTIONS

- RCW 42.56.070(1) – catchall “other statutes” exemption - Apply Washington’s Uniform Trade Secrets Act criteria to enjoin release
- RCW 42.56.210 *et seq.* – Many specific exemptions that may apply to your individual situation

WASHINGTON: WUTSA (RCW 192.08.010)

- A trade secret is “information, including a formula, pattern, compilation, program, device, method, technique, or process that:
 - (a) 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
 - (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”
- Under the WUTSA, “Actual or threatened misappropriation may be enjoined.” RCW 19.108.020.

WASHINGTON: EXEMPTIONS ARE UNCONDITIONAL

- Exemptions under the Washington PRA are unconditional. Find one that fits and it's an unconditional exemption.
- But... RCW 42.56.540 allows an action by a person "named in the record or to whom the record specifically pertains" to enjoin public release if she can show a release "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."

PROCEDURES (FEDERAL): 5 U.S.C. § 552(A)

1. Requester makes request to federal agency
2. Agency has 20 days from receipt to process request, unless unusual circumstances
3. Requester has right to administrative appeal of adverse determination, which generally must be heard within 20 working days
4. Requester can file lawsuit, which is subject to expedited judicial review when “good cause” can be shown
 - Note – once in court, fee shifting in favor of plaintiff who has “substantially prevailed.”

PROCEDURES (FEDERAL): HOW CAN SUBMITTER PREVENT DISCLOSURE?

- For submitter of information, may file “Reverse FOIA” suit to challenge disclosure, after raising objections directly to agency.
- Essentially, an Administrative Procedure Act case, and agency action is subject to arbitrary and capricious standard of review.
- Key: what is in the agency record?

PROCEDURES (OREGON): ORS 192.450-490

1. Requester makes direct request to public body
2. If denied, requester petitions Oregon AG/local DA for order to disclose records (official has 7 days to respond)
3. Either requester or public body can appeal to circuit court for *de novo* review within 7 days of AG/DA order
4. “Fast-track” trial proceedings
 - Note – Fee shifting in favor of requester once matter is in court

PROCEDURES (OREGON): HOW CAN SUBMITTER PREVENT DISCLOSURE?

- No cause of action under OPRL, generally, or under ORS 192.450 or ORS 192.460, specifically, to enjoin the release of such information.
- Best option? Seek declaratory and injunctive relief under the Declaratory Judgment Act (“DJA”) and the Court’s equitable powers.

PROCEDURES (WASHINGTON): RCW 42.56.520-550

1. Request records from agency (5 business days to respond)
2. If denied, requested can ask for AG and receive AG written opinion (not required, not binding)
3. Cause of action under RCW 42.56.550 to challenge denial of records request
 - *Note – Fee shifting in favor of requester once matter is in court*

PROCEDURES (WASHINGTON): RCW 42.56.540

- Direct cause of action for a private party to enjoin a records disclosure.
- Washington case law holds that a private cause of action exists to assert PRA exemptions, not to assert a “substantial harm” challenge as explicitly set out in § 540.

TIPS: PUBLIC RECORDS CASES MOVE FAST!

1. Expedited procedures

- Federal: expedited for “good cause”
- Oregon: TRO, fast-track public records scheduling
- Washington: “prompt response” rule

2. Consolidated trial/preliminary injunction rules

- Federal: preliminary injunctions rare, a lot of summary judgments
- ORCP 79C(2)
- Wash. CR 65(a)(2)



TIPS: PRACTICAL STEPS TO PROTECT TRADE SECRETS



1. Enter NDA with notice requirements, obligation to challenge request for disclosure, and language about public interest in protecting information from general public
2. Know the jurisdiction and specific exemptions
3. Train employees who share information with government
4. Create a record that satisfies trade secrets definition/exemption
5. Disclose only as much confidential information as needed, and mark it as confidential and exempt from disclosure pursuant to specific exemption
6. Implement process to deal with records requests, police use of confidential info, and be ready to go to court

RESOURCES

- FOIA {
 - DOJ Guide to the FOIA
- Oregon {
 - Attorney General's Public Records and Meetings Manual and Public Records Orders
- Washington {
 - Attorney General's Open Government Resource Manual

QUESTIONS?



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