

Florida State University Law Review

Volume 18 | Issue 2

Article 12

Winter 1991

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Patricia E. Chamberlain

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Recommended Citation

Patricia E. Chamberlain, *The Public Records Act: Should Trade Secrets Remain in the Sunshine?*, 18 Fla. St. U. L. Rev. 559 (2017).
<http://ir.law.fsu.edu/lr/vol18/iss2/12>

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THE PUBLIC RECORDS ACT: SHOULD TRADE SECRETS REMAIN IN THE SUNSHINE?

PATRICIA E. CHAMBERLAIN

IMAGINE that your business has been issued a subpoena by the Florida Attorney General's office compelling your company to turn over information regarding the marketing of a new product. There have been complaints about false advertising, and the Attorney General's office wants to investigate.¹ You and the other directors know there is nothing to hide, so a compliance is prepared. Before giving the information to the Attorney General's office, however, you ask them to sign a stipulation stating that this information constitutes a trade secret, and that public access to the material will not be permitted.

Unfortunately, even if the stipulation was signed by a representative from the attorney general's office, your corporation has a problem—Florida's Public Records Act.² There is currently no blanket exemption for trade secrets listed in chapter 119,³ therefore, the requested information becomes a public record open to inspection by any person, for any reason, as soon as it is received by a participating state agency. Unfair as it may seem, your competitors will now have access to a wide variety of information generated by your company that they otherwise would not have been able to obtain.

Based on the apparent inequitable nature of the above scenario, this Comment will explain why the Public Records Act should be amended to include an exemption for trade secrets. In doing so, two opposing public policies will be explored—one favoring disclosure of public records, and the other favoring the protection of the innovator from disclosure to the public. The Florida Legislature must weigh these policies to decide if trade secrets should be granted an exemption from the Public Records Act. A draft amendment to chapter 119 is included which addresses the stated concerns. Also included is a discussion of the Federal Freedom of Information Act and its exemption for trade secrets. The provisions of this act dictate how the federal government

1. See, e.g., FLA. STAT. § 501.206 (1989) (defining powers of enforcing authority to investigate possible violation of Florida Deceptive and Unfair Trade Practices Act).

2. FLA. STAT. §§ 119.01-.14 (1989).

3. Chapter 119 does speak of a trade secret, but only in relation to software obtained by an agency under a licensing agreement. See FLA. STAT. § 119.07(3)(r) (1989).

is to handle the release of private confidential information through its public records laws. Finally, an alternative to amending Chapter 119 is discussed: using Florida's recently enacted Uniform Trade Secrets Act against a state agency to enjoin disclosure of trade secrets.

I. FLORIDA'S PUBLIC RECORDS ACT

The State of Florida consistently has been a leader in the area of open government and has some of the strongest policies favoring the disclosure of public records. Enforcement of the Government-in-the-Sunshine Law⁴ and the Public Records Act⁵ continues to play an important part in the preservation of traditional democratic principles.⁶ In 1969, the Florida Supreme Court stated:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with "hanky panky" in the minds of public-spirited citizens.⁷

The Sunshine Laws are designed to promote public faith in government based on the belief that if people are aware of the government's activities they will be more conscientious and informed when voting and otherwise participating in the political process.⁸ However, the Sunshine Laws occasionally have the effect of allowing the revelation of confidential information belonging to private entities.

To facilitate the policies underlying open government, "public record" is given the broad definition of "all documents, papers, letters,

4. The Government-in-the-Sunshine Act requires in part that [all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

FLA. STAT. § 286.011(1) (1989).

5. The Public Records Act, chapter 119 of the Florida Statutes, states in part that "all state, county, and municipal records shall at all times be open for a personal inspection by any person." FLA. STAT. § 119.01(1) (1989).

6. See generally OFFICE OF THE ATTORNEY GENERAL, FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE AND PUBLIC RECORDS LAW MANUAL (1990) [hereinafter cited as SUNSHINE MANUAL].

7. Board of Public Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969).

8. The right to inspect government records is an important means of ensuring a citizenry sufficiently informed to participate intelligently in our system of self-government. See Comment, *The Right to Inspect Public Records in Oregon*, 53 OR. L. REV. 354 (1974).

maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”⁹ An “agency” is defined as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”¹⁰

These definitions necessarily include information supplied to a government agency by a private entity, even if the information is identified as confidential when submitted. “[A] person who sends a communication to a public officer, relative to the public business, cannot make his [or her] communication private and confidential simply by labeling it as such. The law determines its character, not the will of the sender[.]”¹¹

A. History

Florida’s public records laws were first enacted in 1909 to codify an emerging state policy that gave people the right to know what their government was doing.¹² The legislature later enacted a statutory requirement that “all [s]tate, county, and municipal records shall at all times be open for a personal inspection [by] any citizen of Florida.”¹³ In 1967 the public records laws were substantially amended and the Public Records Act was created.¹⁴

In *Wisher v. News-Press Publishing Co.*,¹⁵ the Florida Second District Court of Appeal recognized judicial authority to grant exemptions from the law based on public policy. The court interpreted the general exemption provision of the Public Records Act, which referred to records “deemed by law to be confidential,”¹⁶ to mean that the courts as well as the legislature could determine what should be

9. FLA. STAT. § 119.011(1) (1989).

10. FLA. STAT. § 119.011(2) (1989).

11. 1971 FLA. ATT’Y GEN. ANN. REP. 544, 547 (quoting *Egan v. Board of Water Supply*, 205 N.Y. 147, 98 N.E. 467, 470 (1912)).

12. Ch. 5492, § 1, 1909 Fla. Laws 132.

13. *Id.* (current version allows for personal inspection of public records “by any person.” FLA. STAT. § 119.01(1) (1989)).

14. Ch. 67-125, 1967 Fla. Laws 254.

15. 310 So. 2d 345 (Fla. 2d DCA 1975), *quashed and remanded*, 345 So. 2d 646 (Fla. 1977). The supreme court quashed the decision on narrow grounds, not considering the public access issue.

16. 310 So. 2d at 347.

exempt from disclosure.¹⁷ Although the court recognized that no statute specifically exempted personnel files from public disclosure, it used the new-found general exemption power to exclude these files from public disclosure as a matter of public policy.¹⁸ The court held that to allow anyone to "rummage through the personnel files of any employee of state, county, and city government would be to make a mockery of" the right to privacy.¹⁹ Other states' courts have granted similar exemptions on public policy grounds.²⁰

In 1975, responding to an increase in non-statutory exemptions to the public disclosure requirements, the legislature amended the general exemption clause, changing the phrase "deemed by law" to read "provided by law."²¹ This change in language led the Florida courts to hold that the legislature intended to restrict judicial exemptions to the Public Records Act.²²

In *Wait v. Florida Power & Light Co.*,²³ the Florida Supreme Court held that no exemptions from public disclosure would be recognized unless expressly stated by the legislature.²⁴ The issue in *Wait* was whether certain common law privileges, such as attorney-client and work product, were waived by the enactment of the Public Records Act or were included in the general exemption provision.²⁵ The district court of appeal held that the general exemption "clearly waives any common law privilege of confidentiality which includes attorney-client communications."²⁶ The Florida Supreme Court affirmed and declared exempt only "those public records made confidential by statutory law," and held "those documents which are confidential or privileged only as a result of the judicially created privileges of attorney-client and work product" not exempt.²⁷ The court refused to

17. *Id.*

18. *Id.* Since private employers assume the obligation of treating personnel information on a confidential basis, government's failure to do so would diminish its ability to compete with the private sector for qualified job applicants. Therefore, it was in the public interest to deem personnel files confidential. *Id.* at 348.

19. *Id.*

20. *See, e.g.,* *Runyon v. Board of Prison Terms & Paroles*, 26 Cal. App. 2d 183, 79 P.2d 101 (Cal. Ct. App. 1938).

21. Ch. 75-225, § 4, 1975 Fla. Laws 637, 638 (current version at FLA. STAT. § 119.07(3)(a) (1989)).

22. *See State ex rel. Veale v. City of Boca Raton*, 353 So. 2d 1194 (Fla. 4th DCA 1978) (holding that a court is not free to balance the public's interest in disclosure against the harm resulting to an individual by reason of such disclosure).

23. 372 So. 2d 420 (Fla. 1979).

24. *Id.* at 425.

25. *Id.* at 422.

26. 353 So. 2d 1265, 1267 (Fla. 1st DCA 1978).

27. 372 So. 2d at 424.

“equate the acquisition of public documents under [the Public Records Act] with the rights of discovery afforded a litigant by judicially-created rules of procedure.”²⁸ Consequently, every public record is subject to examination and inspection provisions unless a specific statutory provision exempts those records from disclosure.²⁹

Since *Wait*, the common law attorney-client privilege has been codified in the Florida Evidence Code.³⁰ The Florida Legislature also has created a limited exemption for such information from the disclosure requirements of Chapter 119.³¹

B. Current Exemptions from the Public Records Act

Section 119.07(3), Florida Statutes, lists the types of records exempt from public disclosure requirements. In addition to listing twenty-five specific exemptions³² the section provides that “[a]ll 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 the disclosure requirements.³³ This general exemption allows the legislature to place exemptions throughout the Florida Statutes. The office of the Attorney General lists a total of 444 exemptions to the Government-in-the-Sunshine Law and the Public Records Act, twenty-seven of which pertain to trade secrets and

28. *Id.* at 425.

29. See also *Forsberg v. Housing Auth.*, 455 So. 2d 373 (Fla. 1984); *Shevin v. Byron, Harless, Schaffer, Reid & Assoc.*, 379 So. 2d 633 (Fla. 1980).

30. FLA. STAT. § 90.506 (1989).

31. This limited exemption reads as follows:

A public record which was prepared by an agency attorney (including an attorney employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from the provisions of subsection (1) until the conclusion of the litigation or adversarial administrative proceedings. When asserting the right to withhold a public record pursuant to this paragraph, the agency shall identify the potential parties to any such criminal or civil litigation or adversarial administrative proceedings. If a court finds that the document or other record has been improperly withheld under this paragraph, the party seeking access to such document or record shall be awarded reasonable attorney's fees and costs in addition to any other remedy ordered by the court.

Ch. 84-298, § 5, 1984 Fla. Laws 1398, 1403 (current version at FLA. STAT. § 119.07(3)(o) (1989)).

32. See FLA. STAT. § 119.07(3)(b)-(z) (1989). Under the rules of statutory interpretation, enumerated exemptions are indicative of the legislative intent to leave all unmentioned items subject to the law. *State ex rel. Veale v. City of Boca Raton*, 353 So. 2d 1194, 1197 (Fla. 4th DCA 1977).

33. FLA. STAT. § 119.07(3)(a) (1989).

other proprietary business information.³⁴ There may be exemptions inadvertently excluded from these numbers because of the difficulty in identifying them.³⁵

Under current Florida case law, a determination of exemption from the Public Records Act is not an exercise of judicial discretion.³⁶ Instead, the determination involves only the search for a precise statutory exemption. "If the document contains the information specified in the exemption provision, it is exempt; if it does not, it is not exempt and must be made available."³⁷ Public policy arguments are no longer relevant in these cases.

C. Open Government Sunset Review Act of 1984

As the number of exemptions to the Public Records Act increased, the legislature began to recognize that certain exemptions would eventually become obsolete.³⁸ Thus, the Legislature enacted the Open Gov-

34. SUNSHINE MANUAL, *supra* note 6, at 108-75, 348-50. These exemptions are identified in sections other than section 119.07(3). For statutes providing exemptions for trade secrets and other proprietary confidential information, see FLA. STAT. § 24.105(14)(a) (1989); *id.* § 119.07(3)(r) (1989); *id.* § 163.01(15)(m) (1989); *id.* § 230.66(9) (1989); *id.* § 240.241(2) (1989); *id.* § 240.334(2) (1989); *id.* § 252.88(1) (1989); *id.* § 288.075(2) (1989); *id.* § 341.419 (1989); *id.* § 350.121 (1989); *id.* § 364.183 (1989); *id.* § 366.093 (1989); *id.* § 367.156 (1989); *id.* § 377.2408(3) (1989); *id.* § 377.606 (1989); *id.* § 377.701(4) (1989); *id.* § 378.101(3)(b) (1989); *id.* § 378.406(1)(a) (1989); *id.* § 403.111 (1989); *id.* § 403.73 (1989); *id.* § 403.771 (1989); *id.* § 487.041(8) (1989); *id.* § 502.222 (1989); *id.* § 570.48(2)(b) (1989); *id.* § 570.544(8) (1989); *id.* § 601.76 (1989); *id.* § 812.081(2) (1989).

35. Since the word "exemption" has no statutory definition, no uniform language was used when exemptions were created. STAFF OF FLA. S. COMM. ON GOV'T OPS., THE IMPLEMENTATION OF THE OPEN GOVERNMENT SUNSET REVIEW ACT (Apr. 1985) [hereinafter cited as IMPLEMENTATION REP.]. It follows that even a computer-based search would not identify all the exemptions. *Id.* at 14. For these reasons, estimates of the number of exemptions have varied to a large degree.

36. See, e.g., *Rose v. D'Alessandro*, 380 So. 2d 419 (Fla. 1980); see generally *supra* notes 13-28 & accompanying text.

37. *Florida Soc'y of Newspaper Editors v. Florida Pub. Serv. Comm'n*, 543 So. 2d 1262, 1264 (Fla. 1st DCA 1989).

38. Specifically, the Speaker of the House, Representative H. Lee Moffit, Dem., Tampa, 1974-1984, spoke of his commitment to open government in his initial address to the House of Representatives:

Fifteen years ago this state began an unprecedented experiment in open government. Since that time other states and the federal government have followed Florida's lead. What a tragedy it would be if we were now to permit that experiment to fail. Florida's commitment to government in the sunshine has been threatened by the passage of far too many exceptions, many of them buried in large bills which have escaped the attention of most legislators. It is estimated that there are now hundreds of exceptions to the public records law alone. I will be appointing a subcommittee to review all current exceptions to the public records and government in the sunshine laws and will request that subcommittee to recommend measures to ensure that exceptions will not be passed in the future without a visible showing of overriding public necessity.

ernment Sunset Review Act ("Sunset Review Act"), which mandates periodic legislative review and provides for the periodic repeal of exemptions to the open government laws.³⁹

The Sunset Review Act provides that an exemption should be maintained only if it serves an identifiable public purpose. An "identifiable public purpose" worthy of exemption is defined as one that:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption, or
2. Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize the safety of such individuals, or
3. *Protects information of a confidential nature concerning entities; including but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, and its disclosure would injure the affected entity in the marketplace.*⁴⁰

The Sunset Review Act eliminates unnecessary or obsolete exemptions. It does not, however, imply that no other exemptions should be enacted. Rather, it requires that exemptions fall into one of the three identifiable public purpose categories listed above.

Because almost any proposed exemption could conceivably fit into one of the broad identifiable public purpose categories listed above, the Sunset Review Act proposes two other tests that an exemption must pass to be created or maintained. First, the exemption must "be significant enough to override the strong public policy of open government."⁴¹ Second, the exemption must "provide for the maximum public access to the meetings and records as is consistent with the purpose of the exemption."⁴² The issues are whether an exemption for trade secrets serves an identifiable public purpose; and if so, whether that identifiable public purpose is strong enough to override the countervailing public purpose of open government. The federal govern-

39. Ch. 84-298, § 8, 1984 Fla. Laws 1398, 1404 (codified at FLA. STAT. § 119.14 (Supp. 1984)). The 1984 Sunset Review Act was amended in 1985 to correct technical and interpretive flaws. See Ch. 85-301, § 1, 1985 Laws 1879, 1880 (codified at FLA. STAT. 119.14 (1989)). This Comment will discuss only the 1985 Sunset Review Act.

40. FLA. STAT. § 119.14(4)(b) (1989) (emphasis added).

41. Ch. 85-301, § 1, 1985 Fla. Laws 1879, 1880.

42. FLA. STAT. § 119.14(4)(e) (1989).

ment and several other states have answered this question in the affirmative.

II. GOVERNMENT DISSEMINATION OF CONFIDENTIAL INFORMATION

The problem of government disclosure of confidential information was discussed by United States Supreme Court Justice William Rehnquist in the opening paragraph of *Chrysler Corporation v. Brown*:⁴³

The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demands for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power. The Freedom of Information Act [FOIA] . . . was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought that the information would be held in confidence.⁴⁴

A. Federal

The federal counterpart to Florida's Public Records Act is the Freedom of Information Act,⁴⁵ which requires that each federal agency disclose to any requesters all records, subject to listed exceptions.⁴⁶ The federal courts have universally accepted the proposition that the FOIA creates a liberal disclosure requirement, limited only by narrowly construed specific exemptions.⁴⁷ As with Florida's Public Records Act, the identity of the requester and the motivation underlying the request are irrelevant.⁴⁸ The FOIA also lists certain types of information that are exempt from public disclosure requirements.⁴⁹ One of the listed exemptions is for trade secrets.⁵⁰

43. 441 U.S. 281 (1979).

44. *Id.* at 285.

45. 5 U.S.C. § 552 (1988).

46. See generally Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 WISC. L. REV. 207.

47. *Bristol-Meyers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970).

48. 5 U.S.C. § 552(a)(3) (1988) provides that agencies "shall make . . . records promptly available to any person."

49. 5 U.S.C. § 552(b) (1988).

50. 5 U.S.C. § 552(b)(4) (1988).

Because the government regularly interacts with private businesses, full public disclosure by the government of its own affairs necessarily results in disclosure of information emanating from private business. By creating a specific exemption for trade secrets under the FOIA, Congress in effect has stated a policy against public disclosure by the government of valuable, private commercial information.⁵¹ This exemption, commonly known as "exemption four," provides that the FOIA does not apply to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁵² Because a "trade secret" is not defined in the FOIA, courts have relied on the definition found in the First Restatement of Torts.⁵³

Another FOIA exemption relates to matters "specifically exempted from disclosure by statute" other than the FOIA itself.⁵⁴ There are several federal statutes that relate to confidential information that may qualify as such statutes.⁵⁵

Despite these exemptions there is evidence that many businesses are fearful of and frustrated with what they consider excessive government disclosure of their proprietary information.⁵⁶ Firms often resist enforcement of agency subpoenas for information, citing fears that the agency will disclose the information pursuant to FOIA requests.⁵⁷

51. In S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965), it was stated that a trade secret exemption "[i]s necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained." See also H.R. REP. NO. 89-1497, 89th Cong., 2d Sess. (1966).

52. 5 U.S.C. § 552(b)(4) (1988).

53. The Restatement definition of trade secrets is:

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 [or her] an opportunity to obtain an advantage over competitors who do not know or use it. . . . It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of a business, as, for example, the amount or other terms of a secret bid for a contract. . . . A trade secret is a process or device for continuous use in the operation of the business.

RESTATEMENT (FIRST) OF TORTS § 757 comment b (1939).

54. 5 U.S.C. § 552(b)(3) (1988). This is similar to Florida's Public Records Act. See FLA. STAT. § 119.07(3)(a) (1989).

55. *E.g.*, Census Act § 9, 13 U.S.C. § 9 (1988); Consumer Product Safety Act, § 6, 15 U.S.C. § 2055 (1988); The Trade Secrets Act, 18 U.S.C. § 1905 (1988); Patent Act § 122, 35 U.S.C. § 122 (1988).

56. Connelly, *supra* note 46, at 208.

57. See, *e.g.*, *Exxon Corp. v. FTC*, 588 F.2d 895 (3d Cir. 1978); *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir.), *cert. denied*, 431 U.S. 974 (1977); *Usery v. Whittin Mach. Works, Inc.*, 554 F.2d 498 (1st Cir. 1977); *FTC v. Anderson*, 442 F. Supp. 1118 (D.D.C. 1977); *SEC v. Lockheed Aircraft Corp.*, 404 F. Supp. 651 (D.D.C. 1975). Generally the businesses' efforts in these cases to have the subpoenas quashed or to have the agencies enjoined from releasing the information have been unsuccessful. Connelly, *supra* note 46, at 208 n.7.

Businesses' efforts to protect from disclosure information they submit to a government agency have become known as "reverse-FOIA" suits.⁵⁸

The federal government's initiative to protect private entities from the unnecessary disclosure of confidential information should send a message to Florida legislators. Florida should provide equal or greater protection to this information than the federal government in order to promote the development of the innovative ideas that are at the heart of commercial industry.

B. Other States

There are currently forty-eight other states with public records laws,⁵⁹ twenty-eight of which have exemptions for trade secrets.⁶⁰

58. One of the most important reverse-FOIA cases to date was *Chrysler v. Brown*, 441 U.S. 281 (1979). In that case, Chrysler, as a party to numerous Government contracts, had submitted to the Defense Logistics Agency (DLA) reports and other information about its affirmative action programs and the general composition of its work force. The submission of information had been required by regulations of the Department of Labor's Office of Federal Contract Compliance Programs. Certain third parties made a FOIA request for disclosure of such information concerning one of Chrysler's plants. DLA proposed to release the requested information, and Chrysler sued to enjoin the release. The Supreme Court held that there was no private right of action to enjoin release of information by government agencies under FOIA.

For general discussions of the reverse-FOIA concept, see Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEX. L. REV. 587 (1977); Note, *Reverse FOIA Suits After Chrysler: A New Direction*, 48 FORDHAM L. REV. 185 (1979).

59. See, e.g., **Alabama**: ALA. CODE § 36-12-40 (1975 & Supp. 1990); **Alaska**: ALASKA STAT. § 09.25.110 et seq. (1983 & Supp. 1990); **Arizona**: ARIZ. REV. STAT. ANN. § 39-121 et seq. (1985 & Supp. 1989); **Arkansas**: ARK. STAT. ANN. § 25-19-105 (1987 & Supp. 1990); **California**: CAL. GOV'T CODE § 6250 et seq. (West 1980 & Supp. 1990); **Colorado**: COLO. REV. STAT. § 24-72-201 et seq. (1988); **Connecticut**: CONN. GEN. STAT. ANN. § 1-17 (West 1988); **Delaware**: DEL. CODE ANN. tit. 29, § 10001 et seq. (1983 & Supp. 1988); **Georgia**: GA. CODE ANN. § 50-18-70 et seq. (1986 & Supp. 1990); **Hawaii**: HAW. REV. STAT. § 92F-1 et seq. (Supp. 1989); **Idaho**: IDAHO CODE § 9-338 et seq. (1990); **Illinois**: ILL. ANN. STAT. ch. 116, para. 43.4 et seq. (Smith-Hurd 1988); **Indiana**: IND. CODE ANN. § 5-14-3-1 et seq. (Burns 1987 & Supp. 1990); **Iowa**: IOWA CODE ANN. § 22.1 et seq. (West 1989 & Supp. 1990); **Kansas**: KAN. STAT. ANN. § 45-215 et seq. (1986); **Kentucky**: KY. REV. STAT. ANN. § 61.870 et seq. (Michie/Bobbs-Merrill 1986 & Supp. 1990); **Louisiana**: LA. REV. STAT. ANN. § 44.1 et seq. (West 1980 & Supp. 1990); **Maine**: ME. REV. STAT. ANN. tit. 1, § 401 et seq. (1989 & Supp. 1989); **Maryland**: MD. STATE GOV'T CODE ANN. § 10-612 et seq. (1984 & Supp. 1989); **Massachusetts**: MASS. GEN. LAWS ANN. ch. 66, § 1 et seq. (West 1988 & Supp. 1990); **Michigan**: MICH. COMP. LAWS ANN. § 15.231 et seq. (West 1989 & Supp. 1990); **Minnesota**: MINN. STAT. ANN. § 13.03 et seq. (West 1988 & Supp. 1990); **Missouri**: MO. ANN. STAT. § 610.010 et seq. (Vernon 1988 & Supp. 1990); **Montana**: MONT. CODE ANN. § 2-6-101 et seq. (1989); **Nebraska**: NEB. REV. STAT. § 84-712 (1987); **Nevada**: NEV. REV. STAT. ANN. § 239.010 et seq. (Michie 1986 & Supp. 1989); **New Hampshire**: N.H. REV. STAT. ANN. § 91-A:1 et seq. (1978 & Supp. 1989); **New Jersey**: N.J. STAT. ANN. § 47:1A-1 et seq. (West Supp. 1989); **New Mexico**: N.M. STAT. ANN. § 14-2-1 (1978 & Supp. 1990); **New York**: N.Y. PUB. OFF. LAW § 84 et seq. (McKinney 1988 & Supp. 1990); **North Carolina**: N.C. GEN. STAT. § 132-1 et seq. (1986 & Supp. 1989); **North Dakota**: N.D. CENT. CODE § 44-04-18

These states have acknowledged the need for confidentiality by specif-

(1978 & Supp. 1989); **Ohio**: OHIO REV. CODE ANN. § 149.43 (Anderson 1990); **Oklahoma**: OKLA. STAT. ANN. tit. 51, § 24A.1 et seq. (West 1988 & Supp. 1991); **Oregon**: OR. REV. STAT. § 192.410 et seq. (1985 & Supp. 1990); **Pennsylvania**: PA. STAT. ANN. tit. 65, § 66.1 et seq. (West 1959 & Supp. 1990); **Rhode Island**: R.I. GEN. LAWS § 38-2-1 et seq. (1984 & Supp. 1989); **South Carolina**: S.C. CODE ANN. § 30-3-10 et seq. (Law. Co-op. 1977 & Supp. 1989); **South Dakota**: S.D. CODIFIED LAWS ANN. § 1-27-1 et seq. (1985 & Supp. 1990); **Tennessee**: TENN. CODE ANN. § 10-7-301 et seq. (1987 & Supp. 1990); **Texas**: TEX. REV. CIV. STAT. ANN. art. 6252-17-a (Vernon Supp. 1990); **Utah**: UTAH CODE ANN. § 78-26-2 (1987 & Supp. 1990); **Vermont**: VT. STAT. ANN. tit. 1, § 315 (Supp. 1984); **Virginia**: VA. CODE ANN. § 2.1-340 et seq. (1987 & Supp. 1990); **Washington**: WASH. REV. CODE ANN. § 42.17.250 et seq. (Supp. 1990); **West Virginia**: W. VA. CODE § 29B-1-1 et seq. (1986 & Supp. 1990); **Wisconsin**: WISC. STAT. ANN. § 19.31 et seq. (West 1986); **Wyoming**: WYO. STAT. § 16-4-201 et seq. (1990).

60. ARK. STAT. ANN. § 25-19-105(b)(9) (1987 & Supp. 1989) ("Files which, if disclosed, would give advantage to competitors or bidders"); CAL. GOV'T CODE § 6254(k) (West 1980 & Supp. 1990) ("Records the disclosure of which is exempted or prohibited pursuant to provisions . . . of the Evidence Code relating to privilege"); COLO. REV. STAT. § 24-72-204(3)(a)(IV) (1988) ("Trade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person"); CONN. GEN. STAT. ANN. § 1-19(b)(5) (West 1988) ("trade secrets, which . . . are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes"); DEL. CODE ANN. tit. 29, § 1002(d)(2) (1983) ("Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature"); GA. CODE ANN. § 50-18-72(b) (Supp. 1990) ("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"); IDAHO CODE § 9-340(2) (1990) ("Trade secrets including those contained in response to public agency requests"); IND. CODE ANN. § 5-14-3-4(4) (Burns 1987 & Supp. 1990) ("Records containing trade secrets"); IOWA CODE ANN. § 22.7(3) (West 1989) ("Trade secrets which are recognized and protected as such by law"); KAN. STAT. ANN. § 45-221(2) (1986) ("Records which are privileged under the rules of evidence"); LA. REV. STAT. ANN. § 44.4(13)(b) (West Supp. 1990) ("Any financial or trade secrets . . . of any person, firm, corporation, agency, or other entity"); MD. STATE GOV'T CODE ANN. § 10-617(d)(1) (1984) ("a trade secret"); MINN. STAT. ANN. § 13.37(b) (West 1988) ("trade secret information" is defined to be general nonpublic data); MO. STAT. ANN. § 610.021(15) (Vernon 1988 & Supp. 1990) ("public records relating to scientific and technological innovations in which the owner has a proprietary interest"); NEB. REV. STAT. § 84-712.05(3) (1987) ("Trade secrets . . . and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose"); N.H. REV. STAT. ANN. § 91-A:5(IV) (Supp. 1989) ("Records pertaining to . . . confidential, commercial, or financial information"); N.Y. PUB. OFF. LAW. § 87(2)(d) (McKinney 1988 & Supp. 1990) ("trade secrets . . . which if disclosed would cause substantial injury to the competitive position of the subject enterprise"); N.C. GEN. STAT. § 132-1.2 (Supp. 1989) ("any information which . . . constitutes a 'trade secret'"); N.D. CENT. CODE § 44-04-18.4 (Supp. 1989) ("trade secrets and commercial or financial information"); OKLA. STAT. ANN. tit. 51, § 24A.19 (Supp. 1991) ("information related to research . . . including trade secrets and commercial or financial information"); OR. REV. STAT. § 192.500(1)(b) (1985 & Supp. 1990) ("trade secrets [which give] its users an opportunity to obtain a business advantage over competitors who do not know or use it"); R.I. GEN. LAWS § 38-2-2(d)(2) (1984 & Supp. 1989) ("Trade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature"); S.C. CODE ANN. § 30-4-40(a)(1) (Supp. 1989) ("Trade secrets"); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(10) (Vernon Supp. 1990) ("trade secrets and commercial or financial information"); VT. STAT. ANN. tit. 1, § 317(b)(9) (Supp. 1984) ("trade secrets . . . [which give] its user or owner an opportunity to obtain business advantage over competitors who do not know or use it"); WASH. REV. CODE ANN. § 42.17.310(1)(aa) (Supp. 1990) ("financial and valuable trade

ically excluding records containing trade secrets and other confidential information from public inspection.

C. Florida

Florida's Public Records Act currently does not contain a blanket exemption for the protection of trade secrets or other confidential information not connected to criminal intelligence or criminal investigative information.⁶¹ Hence, when a private entity has any civil dealings with the Attorney General's office requiring the disclosure of confidential information for which there is no statutory exemption, the private entity has no assurance that the information will not become public record.

III. PROTECTION OF TRADE SECRETS

The common law recognized that the misappropriation of business information could constitute a species of unfair competition.⁶² The First Restatement of Torts was the first attempt to enunciate the generally-accepted principles of trade secret law.⁶³ The comment to section 757 noted 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 [or her] an opportunity to obtain an advantage over competitors who do not know or use it."⁶⁴

The Second Restatement of Torts, published in 1979, did not contain any provisions relating to trade secrets. The American Law Insti-

information"); W. VA. CODE § 29B-1-4(1) (1986 & Supp. 1990) ("Trade secrets . . . having commercial value, and which give[] [their] users an opportunity to obtain business advantage over competitors"); WISC. STAT. ANN. § 19.36(5) (West 1986 & Supp. 1989) ("a record containing information qualifying as a trade secret as defined [by statute]"); WYO. STAT. § 16-4-203(d)(v) (1990) ("trade secrets, privileged information and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person").

61. Section 119.011(3), Florida Statutes, provides in part:

(a) "Criminal intelligence information" means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity.

(b) "Criminal investigative information" means information with respect to an identifiable person or group of persons collected by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.

The information was exempted from the requirements of the Public Records Act by a 1979 amendment to section 119.07, Florida Statutes. Ch. 79-187, 1979 Fla. Laws 723.

62. See, Comment, *The Theft of Trade Secrets: The Need for a Statutory Solution*, 120 U. PA. L. REV. 378 (1971).

63. RESTATEMENT (FIRST) OF TORTS § 757 (1939).

64. *Id.*

tute deleted the trade secrets provisions in the belief that this type of trade regulation had developed into an independent body of law no longer based upon tort principles. Thus, the American Law Institute has not discussed the law of trade secrets as it has evolved since the publication of the First Restatement of Torts.⁶⁵ To fill this void the National Conference of Commissioners on Uniform State Laws⁶⁶ took common law principles and incorporated them into a civil cause of action. This cause of action is codified in the Uniform Trade Secrets Act ("UTSA"), which protects a trade secret owner from the misappropriation of trade secrets.⁶⁷

Thirty-two states, including Florida,⁶⁸ have adopted the UTSA in an attempt to bring uniformity to trade secret law. By adopting the UTSA, states hope to give the judiciary guidance in misappropriation of information cases.⁶⁹

65. See Klitzke, *The Uniform Trade Secrets Act*, 64 MARQ. L. REV. 277, 283 (1980).

66. The Uniform Law Commissioners are part of the National Conference of Commissioners on Uniform State Laws. Since 1892, practicing lawyers, judges, law professors, and government officials have worked together for the improvement of state laws. They work to encourage the free flow of goods, credit and services, full economic growth, and uniformity. Uniform Law Comm'rs Press Release Pamphlet (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

67. See UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS, 14 U.L.A. 399 (Supp. 1988) [hereinafter UTSA]. The UTSA was adopted by the National Conference in 1979; five amendments were incorporated on the recommendation of the American Bar Association's Patent, Trademark and Copyright Law Section in 1985.

68. **Alabama:** ALA. CODE §§ 8-27-1 to -6 (Supp. 1990); **Alaska:** ALASKA STAT. §§ 45.50.910-.945 (Supp. 1990); **Arkansas:** ARK. STAT. ANN. §§ 4-75-601 to -607 (1987); **California:** CAL. CIV. CODE §§ 3426 to 3426.10 (West Supp. 1990); **Colorado:** COLO. REV. STAT. §§ 7-74-101 to -110 (1986 & Supp. 1989); **Connecticut:** CONN. GEN. STAT. ANN. §§ 35-50 to -58 (West 1987); **Delaware:** DEL. CODE ANN. tit. 6, §§ 2001 to 2009 (1983); **Florida:** FLA. STAT. §§ 688.001-.009 (1989); **Hawaii:** HAW. REV. STAT. §§ 482B-1 to -9 (Supp. 1989); **Idaho:** IDAHO CODE §§ 48-801 to -807 (Supp. 1990); **Illinois:** ILL. ANN. STAT. ch. 140, paras. 351-359 (Smith-Hurd Supp. 1990); **Indiana:** IND. CODE ANN. §§ 24-2-3-1 to -8 (Burns Supp. 1990); **Kansas:** KAN. STAT. ANN. §§ 60.3320-.3330 (1983); **Louisiana:** LA. REV. STAT. ANN. §§ 51:1431-.1439 (West 1987 & Supp. 1990); **Maine:** ME. REV. STAT. ANN. tit. 10, §§ 1541-1548 (Supp. 1990); **Maryland:** MD. COM. LAW CODE ANN. §§ 11-1201 to -1209 (1990); **Minnesota:** MINN. STAT. ANN. §§ 325C.01-.08 (West 1981 & Supp. 1990); **Montana:** MONT. CODE ANN. §§ 30-14-401 to -409 (1989); **Nevada:** NEV. REV. STAT. ANN. §§ 600A.010-.100 (Supp. 1989); **New Hampshire:** N.H. REV. STAT. ANN. § 350-B:1 to -B:9 (Supp. 1989); **New Mexico:** N.M. STAT. ANN. §§ 57-3A-1 to -7 (Supp. 1989); **North Dakota:** N.D. CENT. CODE §§ 47-25.1-01 to -08 (Supp. 1989); **Oklahoma:** OKLA. STAT. ANN. tit. 78, §§ 85-94 (1987 & Supp. 1990); **Oregon:** OR. REV. STAT. ANN. §§ 646.461-.475 (1988); **Rhode Island:** R.I. GEN. LAWS §§ 6-41-1 to -11 (Supp. 1989); **South Dakota:** S.D. CODIFIED LAWS ANN. §§ 37-29-1 to -11 (Supp. 1990); **Utah:** UTAH CODE ANN. §§ 13-24-1 to -9 (Supp. 1990); **Virginia:** VA. CODE ANN. §§ 59.1-336 to -343 (1987 & Supp. 1990); **Washington:** WASH. REV. CODE ANN. §§ 19.108.010-.940 (1989); **West Virginia:** W. VA. CODE. §§ 47-22-1 to -10 (1986); **Wisconsin:** WISC. STAT. ANN. § 134.90 (West Supp. 1989); North Carolina enacted a similar statute, N.C. GEN. STAT. §§ 66-152 to -157 (Supp. 1989).

69. See generally Comment, *infra* note 70.

A. Florida's Uniform Trade Secrets Act

Florida adopted the UTSA on October 1, 1988.⁷⁰ Because the UTSA does not apply to misappropriation that began or occurred prior to that date,⁷¹ no Florida case law is yet available to interpret it.

To sustain a cause of action, the UTSA requires that a trade secret be information, with actual or potential independent economic value based on its secrecy, that has been reasonably maintained in secret.⁷² Under this cause of action, a defendant is liable if (1) the defendant used improper means to gain access to the information; (2) the defendant used or disclosed a trade secret given to the defendant in a confidential relation; (3) knowing it was a possible trade secret, the defendant obtained the information from a third party who acquired it through improper means or the breach of a duty; or (4) the defendant used information obtained by accident or mistake after learning that it was a trade secret.⁷³ This prescribed liability implies that a trade secret disclosed to an outsider in a confidential relationship can be protected even before any unlawful attempted use or disclosure.⁷⁴ By adopting the UTSA the Florida Legislature acted on behalf of the identifiable public purpose in favor the protection of trade secrets. That the legislature provided a cause of action for the misappropriation of trade secrets may lead to the inference that this public purpose may be strong enough to override the public purpose of open government.

The interesting part of the UTSA's definition section is that a "person" is defined to be "a natural person, corporation, business trust,

70. Ch. 88-254, § 1-9, 1988 Fla. Laws 1377 (codified at FLA. STAT. §§ 688.001-.009 (1989)). House Bill 91 (1988) was passed on May 17, 1988, by the Florida House of Representatives with 111 yeas and no nays. FLA. H.R. JOUR. 508 (Reg. Sess. May 17, 1988). On June 1, 1988, the Florida Senate substituted this bill for Senate Bill 233 (1988) and passed it with 35 yeas and no nays. FLA. S. JOUR. 707-08 (Reg. Sess. June 1, 1988). On July 5, 1988, Governor Bob Martinez signed House Bill 91 into law. The Florida UTSA includes the 1985 amendments. For an excellent discussion of Florida's Uniform Trade Secrets Act, see Comment, *The Uniform Trade Secrets Act*, 16 FLA. ST. U.L. REV. 863 (1988).

71. Ch. 88-254, § 10, 1988 Fla. Laws 1377, 1380.

72. The actual text of the trade secret definition is as follows:

"Trade secret" means 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.

FLA. STAT. § 688.002(4) (1989).

73. FLA. STAT. § 688.002(2) (1989).

74. Klitzke, *supra* note 65, at 302.

estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.”⁷⁵ The UTSA provides that “[a]ctual or threatened misappropriation may be enjoined.”⁷⁶ When this provision is used in conjunction with the UTSA’s definition of a “person,” it appears to create a cause of action for a trade secret owner to enjoin a government agency that threatens to disclose trade secret information under the ambit of the Public Records Act.⁷⁷

Because the federal FOIA does not provide specific definitions or guidelines for trade secrets, there are uncertainties as to that exemption’s exact scope and meaning. In contrast, Florida will not be plagued with the FOIA’s ambiguous language problems because the precise definitions of the UTSA would substantially limit the need for judicial interpretation and discretion.⁷⁸

One requirement of a trade secret is that reasonable efforts must have been taken to maintain the secrecy of that trade secret. One question for the courts is whether the requirement of “reasonable efforts” allows for turning information over to a state agency, thus making it a public record. The rights to a trade secret have been found to be extinguished when a company discloses it to persons not obligated to protect the confidentiality of such information.⁷⁹ As a result of the Public Records Act, it appears a state agency would be “someone not obligated to protect the confidentiality” of information supplied by a private entity, for the agency must reveal said information upon request.

IV. PROPOSAL FOR AN AMENDMENT TO THE PUBLIC RECORDS ACT

In the past the legislature has addressed other interests in conflict with complete public access by amending the Public Records Act. For example, in *Glow v. State*⁸⁰ a defendant in a criminal action demanded access to “all police reports made in connection with the investigation of the charges” against him.⁸¹ The court held that the police reports were confidential and affirmed the trial court’s denial of the request.⁸² The court stated:

75. FLA. STAT. § 688.002(3) (1989).

76. *Id.* § 688.003(1) (1989).

77. Florida has waived its sovereign immunity in other significant instances. *See, e.g.*, FLA. STAT. § 768.28 (1989) (waiver of sovereign immunity in tort actions).

78. *See supra* text accompanying notes 56-61.

79. *See*, R. MILGRIM, TRADE SECRETS § 1.01[2] (1983).

80. 319 So. 2d 47 (Fla. 2d DCA 1975).

81. *Id.* at 48.

82. *Id.* at 49.

If police reports are held to be public records, there would be nothing to prevent the local representatives of the Mafia from making weekly visits to the police station in order to stay abreast of current efforts being made to investigate and thwart crime. *Due to the great public interest* in protecting and safeguarding the confidentiality of the police reports, the trial court [correctly held them] not open to public inspection.⁸³

The Legislature codified this exemption in its amendment of the Public Records Act in 1979 to provide for the exemption of police investigatory records and other such information.⁸⁴

Some believe that a blanket exemption to chapter 119 for trade secrets would be not be appropriate and that the Legislature should determine exemptions from the Public Records Act on a case-by-case basis.⁸⁵ It is argued that a blanket exemption would be abused by practitioners because every request for information by a government agency would be met by a claim of protected trade secrets. Until recently this was a valid concern. Under the newly enacted UTSA, however, practitioners and agencies have strict definitions and guidelines to follow.

Regardless of the applicability of the UTSA, Florida's Public Records Act should be amended to provide an exemption for trade secrets. This exemption should apply only to: 1) trade secrets; and 2) information that is a) commercial or financial; and b) obtained from a person, corporation, or other entity; and c) privileged or confidential. This exemption should state:

All trade secrets and commercial or financial information, as defined in chapter 688, Florida Statutes, obtained from a person, corporation, or other entity that is privileged or confidential are exempt from the provisions of subsection (1). If a court finds that the document or other record has been improperly withheld under this paragraph, the party seeking access to such document or record shall be awarded reasonable attorney's fees and costs in addition to any other remedy ordered by the court.

This exemption is needed because other attempts at establishing it have not been successful. For example, section 90.506 of the Florida Evidence Code recognizes a privilege with respect to trade secrets.

83. *Id.* (emphasis added).

84. Ch. 79-187, 1979 Fla. Laws 723-725 (codified at FLA. STAT. § 119.07(3)(d)-(k)(1989)).

85. See Richard & Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 FLA. ST. U.L. REV. 705 (1985).

This section provides that a person or corporation has a privilege to refuse to disclose trade secrets when the lack of disclosure does not tend to conceal fraud or otherwise work an injustice.⁸⁶ The issue of a trade secret privilege arises in the context of litigation when one litigant compels disclosure of the opponent's commercially valuable information. It may seem logical that the Trade Secrets Privilege would fall within the scope of Chapter 119's general exemption,⁸⁷ because codification in the Florida Statutes should qualify the Trade Secrets Privilege to be "provided by law to be confidential."

The problem with this theory is the stance that the Florida Supreme Court has taken in regard to the attorney-client privilege. In *Miami Herald Publishing Co. v. City of North Miami*,⁸⁸ the Third District Court of Appeal certified the following question as one of great public importance:

Does the lawyer-client privilege section of the Florida Evidence Code exempt from the disclosure requirements of the Public Records Act written communications between a lawyer and his public-entity client?⁸⁹

The Florida Supreme Court answered with a "qualified no" and went on to state that:

If chapter 90 provided a permanent exemption for attorney/client communications between government agencies and their attorneys . . . it would have been pointless for the legislature to enact [section 119.07(3)(o) of the Florida Statutes]. . . . As we said in [*Neu v. Miami Herald Publishing Co.*], "[i]n construing legislation, courts should not assume that the legislature acted pointlessly."⁹⁰

The court was referring to an exemption to the Public Records Act created by the Legislature in 1984 to provide a temporary exemption

86. The text of the trade secret privilege is as follows:

A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by him [or her] if the allowance of the privilege will not conceal fraud or otherwise work injustice. When the court directs disclosure, it shall take the protective measures that the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice require. The privilege may be claimed by the person or his [or her] agent or employee.

FLA. STAT. § 90.506 (1989).

87. FLA. STAT. § 119.07(3)(a) (1989).

88. 452 So. 2d 572 (Fla. 3d DCA 1984), *approved after remand*, 468 So. 2d 218 (Fla. 1985).

89. *Id.* at 219.

90. *City of North Miami v. Miami Herald Publishing Co.*, 468 So. 2d 218, 220 (Fla. 1985) (citing *Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821, 825 (Fla. 1985)) (citations omitted).

from public disclosure of attorney-prepared litigation files for a government agency during the pendency of litigation.⁹¹ Since the legislature found a need for this exemption after the enactment of the Evidence Code, the court inferred that the legislature did not intend the Evidence Code to override the disclosure requirements of the Public Records Act.⁹²

Another example of a failed attempt to obtain a trade secret exemption is when a litigant attempts to block the discovery of confidential material by filing a motion for a protective order under Florida Rule of Civil Procedure 1.280(c). This rule requires that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."⁹³ Once again, however, courts have held that a rule of procedure promulgated by the Florida Supreme Court could not constitutionally amend or modify a statute,⁹⁴ and thus Florida Rule of Civil Procedure 1.280(c) will not exempt trade secrets from disclosure pursuant to Chapter 119.

The assertion of the trade secret privilege and the motion for a protective order normally may protect information from disclosure, but they do not provide such protection in the context of a business entity dealing with a state agency and the Public Records Act. This is true for two reasons. First, most of the agency requests for information come at the investigative stage of proceedings, and because there is no lawsuit or trial, the rules of procedure will not apply. Second, the courts of this state, particularly the Florida Supreme Court, have refused to recognize exemptions to the Public Records Act based on judicially created or recognized privileges, nor are they persuaded by

91. FLA. STAT. § 90.506 (1989).

92. In his dissent, Justice McDonald stated:

Because the Public Records Act exempts records presently provided by law to be "confidential," and because the Evidence Code provides that documents protected by an attorney/client privilege are "confidential," I find an additional justification to conclude that documents subject to an attorney/client privilege are exempt from the disclosure requirements of the Public Records Act.

468 So. 2d 218, 220 (McDonald, J., dissenting).

93. Rule 1.280 provides in part that:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way

FLA. R. CIV. P. 1.280(c) (1989).

94. See, e.g., *City of Tampa v. Titan Southeast Constr. Corp.*, 535 F. Supp. 163 (M.D. Fla. 1982).

arguments that the Florida Evidence Code creates or codifies such a privilege.⁹⁵

The UTSA may enable a private entity to enjoin a state agency from disclosing confidential proprietary business information. Unfortunately, there is no case law to guide this analysis. However, if the UTSA does not override the Public Records Act, it is not useless in this context, for if the proposed amendment is considered favorably by the Florida Legislature, the UTSA may still be used to guide practitioners and agencies as they confront the new amendment.

V. CONCLUSION

Florida's Public Records Act was designed to keep the public informed about the government's affairs. In order to promote the efficient operation of state agencies it is important that records and information pertaining to state activity be open to public scrutiny. On the other hand, in our technological society innovative ideas are encouraged and generously rewarded. As these ideas are of substantial value to business competitors, the law must respond with protection from loss. The UTSA possibly has accomplished this. Unfortunately, the UTSA cannot be used to its fullest effect if there is no relief from the rigorous requirements of the Public Records Act.

An exemption for trade secrets can be considered an identifiable public purpose by the Legislature,⁹⁶ and this identifiable public purpose overrides Florida's strong policy of open government. The amendment proposed by this Article would promote uniformity, simplicity, and fairness and would not allow the interests of open government to destroy the interest of the marketplace competitor.

95. In *Wait v. Florida Power & Light*, 372 So. 2d 420 (Fla. 1979), the Florida Supreme Court had occasion to consider whether the judicially created privileges of work product and attorney-client extended to public records. The court held that they do not, remarking that if the common law privileges are to be included as exemptions, it is up to the legislature, and not the courts, to amend the statute. See also Smith, *The Public Records Law and the Sunshine Law: No Attorney-Client Privilege Per Se, and Limited Attorney Work Product Exemption*, 14 STET. L. REV. 493 (1985).

96. See *supra* text accompanying notes 24-25.

