



TRADE SECRET INFORMATION AT MDH

Analysis and Guidance for Handling Trade Secret Information At MDH

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Purpose of this Analysis and Guidance

This analysis and guidance is intended to help ensure that Minnesota Department of Health (MDH) employees handle trade secret information properly. MDH receives trade secret information in a number of ways. MDH might get trade secret information as part of a grant proposal or a request for bids or proposals where most or all of the rest of the data received are public. MDH might receive trade secret information as part of a filing from a regulated individual or regulated organization. This analysis and guidance includes the distilled experience and wisdom of MDH programs that regularly handle trade secret information, along with legal research to ensure that the information is up to date.

Not Intended as Legal Advice for the Public

You may share this analysis and guidance with members of the public (especially since it contains only public data). However, this document is not intended to be legal advice for individuals or organizations submitting data to MDH. Individuals or organizations should contact an attorney for advice they can rely on regarding trade secret information.

Fact Sheet for the Public

Even if we do not give legal advice to the public, it is important to give them some help in understanding what is required to protect information as trade secret information. This will at least give them a starting point in understanding trade secret information and determining whether they need to seek legal advice. For this purpose, page 3 of this analysis and guidance contains a template of an information sheet (entitled Protecting Trade Secret Information) that you should give the public when you are collecting data that might include trade secret information. Customize this template to fit your situation.

Definition of Trade Secret Information

Trade Secret Information is:

"Government data, including a formula, pattern, compilation, program, device, method, technique or process

- 1) That was supplied by the affected individual or organization,
- 2) That is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and
- 3) That 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." *Minnesota Statutes, section 13.37, subdivision 1(b).*

Public Data

All government data collected, created, received, maintained or disseminated by a government entity is public **unless** classified by statute or federal law as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential. *Minnesota Statutes, section 13.03, subdivision 1.*

Trade Secret Information is Classified as "Not Public"

Trade secret information is classified as "not public" under the Minnesota Government Data Practices Act (DPA). (Private, if data on individuals, and nonpublic, if data not on individuals.) *Section 13.37, subdivision 2.*

Must Claim Trade Secret Protection

If an individual or organization believes that a document it submits to MDH contains trade secret information, the individual or organization must do the following:

- 1) Clearly mark the information with the words "trade secret."
- 2) Explain in writing how the information meets each of the three requirements in the definition of trade secret information.

Proprietary Information

Proprietary information is not defined or classified under the DPA. **Therefore, proprietary information would be public data and available to anyone upon request. This is important because if someone marks something as "proprietary," it is not the same as marking it "trade secret."** The two are often confused. The federal Freedom of Information Act **does** protect proprietary information at federal agencies, so companies often believe the same rules apply in Minnesota at the state and local government level. In Minnesota, at the state and local government levels, proprietary information is **NOT** classified and is not protected.

If Document Marked Proprietary or Something Other Than Trade Secret

It is possible that MDH will receive a document marked Proprietary, Protected, or something other than Trade Secret to indicate that the document should be protected. If this happens, we should give the individual or organization submitting the document a copy of the fact sheet "Protecting Trade Secret Information" and clearly tell the individual or organization that the document is not protected until and unless the individual or organization properly claims trade secret protection.

If an Item Marked Trade Secret Does Not Meet Statutory Requirements

MDH should inform the individual or organization in writing if we determine that any or all of the submitted data are not trade secret information. MDH should also inform the individual or organization in writing when there is a public request for access to the data and give the individual or organization the reasons for disclosure of the data. MDH should not release the data to the public for a specific period of time [suggest: ten business days] after the date of the written disclosure notice to the individual or organization from MDH. This would give the individual or organization an opportunity to ask a judge to review the data and make an independent determination whether the data are in fact trade secret and should be protected.

Questions

If you have any questions please contact Lynn Belgea at (651) 201-5741 or Lynn.Belgea@state.mn.us.

**Stacie Engstrom did the research for this guidance in May of 2003. Kori Kaldor did the research when this guidance was updated and revised in February of 2006.

[Template to use to tell the public about trade secret information. Customize this for use with your grant or license application or regulatory filing when you might receive trade secret information.]

PROTECTING TRADE SECRET INFORMATION

Information Made Available to the Public

All or most of the information you submit to the Minnesota Department of Health on this [grant/license/application] will be classified as public and will be available to anyone who requests the information.

Exception

If some of the information you submit is trade secret information, then this information will be classified as "private" or "nonpublic" and will not be made available to the public. *See* Minnesota Statutes, Section 13.37.

What is Trade Secret Information?

Trade secret information could include a formula, pattern, compilation, program, device, method, and technique or process that:

1. You supplied to MDH.
2. You have made reasonable efforts to maintain the secrecy of.
3. You derive actual or potential economic value from not being generally known or readily ascertainable by proper means by other persons who could obtain economic value from its disclosure or use.

How to Protect Trade Secret Information

If you believe that information you submit to MDH should be classified as trade secret, you must do the following:

1. You must clearly mark the information with the words: **"Trade Secret."**
2. You must explain in writing how the information meets each of the three requirements in the definition of trade secret information.

MDH must agree that the information supplied is in fact trade secret. If MDH determines that the information does not meet each of the requirements for "trade secret information," MDH will contact you.

Proprietary Information Versus Trade Secret Information

It is important to note that proprietary information is not defined or classified under the Minnesota Government Data Practices Act. Therefore, anything that you mark as "proprietary" will not be protected. Information marked as "proprietary" is considered public data and will be available to the public on request. This can be confusing as, at the federal level, The Freedom of Information Act does protect proprietary information. However, in Minnesota, proprietary information is considered public information and is **NOT PROTECTED**.

**This document is not meant to be legal advice. You should contact an attorney to determine if your information meets the trade secret definition or if you have any questions about the definition's requirements.

Sample Provisions From Letters Written By Companies
THAT ADEQUATELY DECLARED THEIR DATA AS "TRADE SECRET"

Administrative Service Agreement Letter

The Agreement was deemed to be "a formula, pattern, compilation, program, device, method, technique, or process."

- 1) Data was submitted to MDH from [Company] regarding an Administrative Services Agreement.
- 2) The Agreement documents a unique relationship for the provision of specialized administrative services and includes terms and provisions that are unique to the Agreement and are the byproduct of extensive negotiations between parties, which were undertaken at substantial time and expense to the parties.
- 3) The information in the Agreement derives economic value because it is inaccessible to other health plans, managed behavioral health care organizations, and provider groups.
 - a) [Company] would suffer economic harm to the extent that competitors could use knowledge of proprietary contracts to develop their own programs or relationships.
 - b) The negotiated provisions offer insight into [Company's] contracting methods and approaches of successful negotiation of complex agreements.
 - c) The methods and approaches are a core proprietary resource that [Company] has used significant resources to develop.
 - d) Public disclosure would give unfair negotiating advantage to others that may seek to provide services to [Company] in the future.

[Company] Community Health Plan Agreements Letter

The Agreements were deemed to be "a formula, pattern, compilation, program, device, method, technique, or process."

- 1) Agreements were submitted to MDH on behalf of [Company].
- 2) The negotiated Agreements contain confidential information, including concessions the Health Plan made to gain participation in the network.
- 3) The Health Plan maintained and continues to maintain the desire to keep secret the concessions that relate to its programs and processes that are of economic value.

Amendment Provision to [Company] Health Plans Agreement Letter

The Amendment provision was deemed to be "a formula, pattern, compilation, program, device, method, technique, or process."

- 1) Amendment provision was submitted to MDH by [Company].
- 2) The individual provider agreements that this amendment will be incorporated into for the specific provider include language that prohibit the parties from disclosing the terms of the Agreement to a third party except as required by law, or as required or authorized specifically by the agreement. The amendment is a byproduct of extensive and significant negotiations. The negotiations were undertaken at substantial time and expense to the parties.
- 3) The amendment provision derives economic value from the very fact that it is inaccessible to other health plans and provider groups.
 - a) Public disclosure of this provision would provide economic value, at [Company's] expense, to other health plans as they arrange for and provide services to their members.
 - b) [Company] will suffer corresponding harm to the extent that [Company's] competitors use their knowledge of [Company's] proprietary provisions and contracts to help develop their own programs and/or similar relationships.

- c) The negotiated provision would offer insight into [Company's] contracting methods and approaches for successful negotiation of complex agreements. This negotiated provision is a core proprietary resource that [Company] has expended significant resources to develop.
- d) Public disclosure of this negotiated provision would give an unfair negotiating advantage to any other providers that may contract directly with [Company].

**POSSIBLE GUIDELINES FOR MDH TO USE IN DETERMINING
WHETHER DATA ARE "TRADE SECRET"**

Most of your decisions on whether data falls under the trade secret definition will be obvious based on your review of the facts in relation to the statute. However, this information may be helpful if the decision appears to be a close call.

I. Steps used by MDH's Managed Care Section to Declare Data as "Trade Secret Information" under Minnesota Statutes

- The person or organization supplying the data has to declare the data submitted is trade secret information. This must be more than a declaration, it must be an analysis in writing, of how the criteria of the statute are met.
- MDH then makes a judgment as to whether we agree with the analysis that the data fit the trade secret definition, or whether the data should be classified as public.
- If the data are deemed public and are requested, advance notice of a possible disclosure should be given to the person or organization that submitted the data.
- The person or organization should be told that the requested data are public and will be disclosed upon the request. This advance notice gives the person or organization an opportunity to exercise their legal rights to obtain a ruling that the data held by MDH are not public. The exercise of legal rights could include commencing an action in district court to enjoin the government entity from disclosing the data.

II. Minnesota District Court Opinions and Department of Administration Advisory Opinions

The Commissioner of Administration has consistently interpreted the trade secret definition narrowly (see Advisory Opinion 03-009), but two Ramsey County District Court decisions recently overturned advisory opinions concluding that entities were inappropriately denied access to data based on the trade secret definition.

A. Supervalu, Inc. v. Smith

The first case, *Supervalu, Inc. v. Smith*,¹ involved a dispute over whether certain cigarette data submitted to the Minnesota Department of Revenue by a wholesaler of cigarettes are trade secret information.² Following a public request for the data, the Commissioner of Administration issued an opinion stating that the data did not fall within the trade secret definition. Supervalu then commenced action to enjoin the Commissioner of Revenue from releasing the data. The district court determined that the data are trade secret information.

¹ *Supervalu, Inc. v. Smith*, File No. C9-99-10390 (Second Judicial District, Ramsey County, Minnesota).

² Pertinent Facts: Supervalu is subject to the reporting requirements of the Minnesota Unfair Cigarette Sales Act. The Commissioner of Revenue's agent performing the audit contacted Supervalu for more information. Supervalu did not give the agent a copy of the requested information, but allowed notes to be made from the requested information. (The information included sales by product and division, names and salaries of Supervalu employees, and the time spent on various tasks by the employees. This information is not readily available to the public.) Unbeknownst to Supervalu, the agent made verbatim notes of the information and a competitor of Supervalu subsequently requested that information. Following issuance of the Advisory Opinion, Supervalu commenced action to enjoin the Commissioner from releasing the data.

but with the caveat that the court's determination in this case was not to be controlling for future filing data that may involve different circumstances. The Court concluded that:

1. The verbatim notes taken by the Commissioner's agent from information supplied by Supervalu was a "compilation" contemplated by the statute.
2. Supervalu took reasonable steps to maintain the secrecy of the information by telling the Commissioner's agent that they considered the information to be not public, refusing to provide copies of the information to the Commissioner's agent, asking for the original to be returned upon completion of the audit, exhausting administrative remedies, and commencing action to enjoin nondisclosure.
3. Even though some of the information was ascertainable elsewhere, the specific information that is not readily ascertainable should not lose trade secret status.
4. The information could not conclusively have economic gain from nondisclosure, but only potential gain is necessary to determine economic value under the statute.³

B. Prairie Island v. Dept. of Public Safety

The second district court case, *Prairie Island Indian Community v. Minn. Dept. of Public Safety*, was appealed to the Minnesota Court of Appeals and that court's ruling is explained in section II.

C. Advisory Opinions

The following Advisory Opinions are relevant to the discussion of the trade secret definition.

- Advisory Opinion 94-037: Minnesota Department of Health's data contained in capital expenditure reports should not be classified as trade secret.
- Advisory Opinion 98-050: Minnesota Department of Health's data obtained as part of an application for licensure by Community Coordinated Health Care for licensure are not classified as trade secret.
- Advisory Opinion 99-035: Minnesota Department of Revenue's data related to a mandated statutory filing should not be classified as trade secret. (*Overtured by Ramsey County District Court.*)
- Advisory Opinion 01-051: Minnesota Department of Public Safety's audit data related to certain Indian Tribes' gambling operations should not be classified as trade secret. (*Overtured by Minnesota Court of Appeals.*)
- Advisory Opinion 03-009: Minnesota Department of Health's Operating Agreement with the Minneapolis PET Center should be classified as trade secret.
- Advisory Opinion 03-017: Contract between the Minnesota Department of Transportation and ZRC provides that all data ZRC creates are subject to the requirements of Chapter 13. Thus, any contracts between ZRC and its subcontractors with regard to the Mn/DOT contract are also subject to Chapter 13.

³ Supervalu argued that disclosure could provide competitors with a "blueprint" for organization and operation of cigarette sales, and the court found this sufficient for potential economic value in nondisclosure.

As a final point, the Commissioner of Administration urges government entities to reach their own conclusions regarding trade secret classifications because of department expertise with the particular data. (See Advisory Opinion 01-009.)

II. Minnesota Court of Appeals Decision

The Minnesota Court of Appeals dealt with the trade secret issue as it pertains to government entities in an opinion decided on April 1, 2003. The case was the appeal from a Ramsey County District Court summary judgment determination that the Minnesota Government Data Practices Act does not require the release of financial audit data submitted to the Department of Public Safety by the Prairie Island Indian Community and the Mille Lacs Band of Ojibwe Indians.⁴ The Court of Appeals determined that the portions of the document consisting of trade secret information can be redacted, and the remainder of the document must be released to the public. The court remanded the portion of the case for the district court to determine what, if any, audit data should be redacted.⁵

The Minnesota Supreme Court has yet to interpret the definition of trade secret as applied to data submitted to a government entity.

III. United States Supreme Court and Federal Court Case Law

The United States Supreme Court construed the definition of trade secret to mean that, “[t]he subject of a trade secret must be secret, and must not be public knowledge or of a general knowledge in the trade or business.”⁶

The Department of Administration has also used language from the federal district courts for some guidance in determining trade secret questions. (See Advisory Opinion 98-050.) The Tenth Circuit Court of Appeals addressed the definition of trade secret in the context of a FOIA request made by a litigant who sought to require the FDA to release information contained in a new drug application. The Court said that trade secrets should be defined in the “narrower common law sense, as 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.”⁷ Thus, there must be a direct relationship between the trade secret and the productive process. The Tenth Circuit construed language very similar to the trade secret definition in Minnesota Statutes, making their decision persuasive in a trade secret determination under Minnesota law.

Essentially, federal law provides no precise general test and the definition often depends on context. Six factors that might be considered are:

- The extent to which the information is known outside the business.
- The extent to which employees and others involved in the business know the information.
- The extent of measures taken to guard the secrecy of the information.
- The value of the information to its owner and owner’s competitors.

⁴ *Prairie Island Indian Community v. Minn. Dept. of Public Safety*, 658 N.W.2d 876 (Minn. App. 2003).

⁵ See attached summary of *Prairie Island Indian Community* for further discussion of the Court’s analysis.

⁶ *Kewanee Oil Co. v. Bieron Corp.*, 416 U.S. 470, 475 (1974).

⁷ *Anderson v. Dept. of Health & Human Services*, 907 F.2d 936, 944 (10th Cir.1990).

- The effort or the monetary amount expended by the owner in information development.
- The ease or difficulty with which the information could be properly acquired or duplicated by other persons or organizations.⁸

⁸ Charles H. Koch, Jr., *Administrative Law and Practice: Protection for Private Information in Government Files*, 1 Admin. L. & Prac. § 3.39 (2d ed. West 1997).