Trade Secrets -- Protective Orders

Number: INFORMAL

Date: March 14, 2016

Subject:
Trade Secrets -- Protective Orders

Mr. Usher L. Brown
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Dear Mr. Brown:

As attorney for the School Board of Osceola County and on behalf of the members of the Board you have asked for assistance in determining whether certain information may constitute a trade secret pursuant to section 812.081(1)(c), Florida Statutes. In addition, you have requested guidance regarding the duty of the school board and its employees to deny an exemption when material does not appear to constitute a trade secret. Attorney General Bondi has asked me to respond to your letter.

Initially, I must advise you that this office cannot determine whether certain categories of information which have been claimed to be trade secret may, in fact, fall within the definition contained in section 812.081(1)(c), Florida Statutes, as such a determination requires application of the law to the particular facts. Resolution of mixed questions of law and fact are the exclusive province of the judiciary.[1] However, in an effort to be of some assistance, I offer the following informal comments.

The Legislature has created a number of statutory exemptions to the Public Records Law relating to trade secrets. Section 812.081(1)(c), defines "Trade secret" to mean:

"[T]he whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes."[2]

Further, the First District Court of Appeal in *Sepro Corporation v. Florida Department of Environmental Protection*,[3] held that "[t]he trade secret owner who fails to label a trade secret as such, or otherwise to specify in writing upon delivery to a state agency that information which it contends is confidential and exempt under the public records law is not to be disclosed, has not taken measures or made efforts that are reasonable under the circumstances to maintain the information's secrecy" as required by section 812.081, Florida Statutes (and section 688.002, Florida Statutes).[4]

Employees of the School Board of Osceola County are prohibited from disclosing trade secrets received in carrying out their duties, to any unauthorized person, provided such trade secrets fall within the definition set forth in section 812.081(1)(c), Florida Statutes, and the owner of the trade secret has taken measures, as discussed in *Sepro Corporation v. Florida Department of Environmental Protection, supra*, to maintain the information's secrecy. If the material claimed by Adventist to be "trade secret" does not appear to meet the statutory test or has not been protected as in *Sepro*, the school board should advise Adventist that it has received a public records request and will release the records and allow Adventist to seek a protective order for those materials.[5]

I trust that these informal comments will be helpful to you in advising your client, the School Board of Osceola County.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See* Department of Legal Affairs Statement of Policy Concerning Attorney General Opinions (Attorney General Opinions are intended to address only questions of law, not questions of fact, mixed questions of fact and law, or questions of executive, legislative, or administrative policy) and *James, Hoyer, Newcomer, Smiljanich, & Yanchunis, P.A. v. Rodale, Inc.*, 41 So. 3d 386 (Fla. 1st DCA 2010) (whether information qualifies as a trade secret, so as to be exempt from disclosure under public records law, necessarily rests on factual determinations).

[2] *And see* s. 688.002(4), Fla. Stat., defining "Trade secret" as:

". . . [I]nformation, 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."

[3] 839 So. 2d 781, 785 (Fla. 1st DCA 2003), *review denied sub nom., Crist v. Florida Department of Environmental Protection*, 911 So. 2d 792 (Fla. 2005).

[4] 839 So. 2d at 784. *See also* s. 688.002(4)(b), Fla. Stat., which provides that a "[t]rade secret" must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *And see Cubic Transportation Systems, Inc. v. Miami-Dade County*, 899 So. 2d 453, 454 (Fla. 3d DCA 2005) (where a company supplied documents to an agency and failed to mark them as "confidential" and for some 30 days after it had once attempted to do so by so informing county staff," the company failed adequately to protect an alleged trade secret claim).

[5] *Cf. Allstate Floridian Insurance Company v. Office of Insurance Regulation*, 981 So. 2d 617 (Fla. 1st DCA 2008), *review denied*, 987 So. 2d 79 (Fla. 2008) (to the extent Allstate believed documents sought by the Office of Insurance Regulation were privileged as trade secrets, Allstate was required to timely seek a protective order in circuit court specifically identifying the requested documents it believed were privileged).