

Cannabis Law 400:200



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# Sunshine Laws No Daydream for Cannabis Companies

**Without the appropriate protections and legal strategy, cannabis companies’ submissions to state agencies could cause their trade secrets to go up in smoke.**

As the cannabis industry emerges from the black market and onto the stock market, investment has sparked an explosion in innovation that just a decade ago would have seemed like stoner science fiction. From advancements in agricultural technology, to novel delivery methods, to the use of data and analytics, cannabis entrepreneurs are confronting a brave new world. And, as in any other technology-rich industry, especially one at the dawn of its era, a cannabis company’s competitive edge depends not only on its ability to develop new innovations but to protect them from falling into the hands of its rivals. Although U.S. patents are available for some cannabis inventions, the costly application process, limited duration of patents (typically 20 years), and restrictions on what can be patented (recipes and abstract ideas, for instance, cannot) have led many companies to instead rely on state-law trade-secret protection. Unlike patents, trade secrets—among the most famous being Coca Cola’s “secret recipe”—require no application, last forever, and broadly include any information that derives competitive value from being kept secret. Recipes for edibles, ingredient sourcing, growing soil mixtures, cloning techniques, nutrient regimens, extraction processes—the list of potential trade secrets in the cannabis space is limited only by one’s imagination.

In order to claim information as a trade secret, of course, the information must be kept a secret. And many cannabis companies are finding that their efforts to maintain secrecy can sometimes run into conflict with another reality of the legalization movement: government intrusion into their affairs. Like companies in other highly regulated industries, cannabis companies must often submit detailed information concerning their operations and processes to state agencies in connection with licensure, investigations, inspections, and other administrative proceedings. For most cannabis companies, the first such compelled disclosure occurs on the company’s application for a state license. A dispensary applicant, for instance, likely will be required to disclose detailed information concerning its business and operations plans. A cultivator applicant likely will need to disclose its proposed cultivation methods and techniques. And a processor applicant likely will be required to disclose its recipes and production techniques, among other things. All of this information may qualify as the companies’ trade-secret information under state law. But, once shared with the government, the information may become a public record—subject to request at the whim of any curious reporter or, more nefariously, a company’s competitor seeking to misappropriate the information for itself. Sensitive information disclosed by the state in response to such a request then becomes part of the public domain, and would thus lose the trade-secret protection for which it would otherwise qualify.

Fortunately, many states provide an escape from this catch-22, allowing a license applicant to designate portions of its application as trade-secret information and exempting such information from disclosure in response to public records requests.<sup>1</sup> But there are still plenty of traps for the unwary. Failure to designate trade secrets in the form and manner specified by the agency could result in designations being disregarded. Further, the designations merely inform the agency of what the applicant *claims* as its trade secrets. Upon receiving a public records request, the agency generally must still make an

independent evaluation of whether the information actually qualifies as a trade secret. And, even if the agency agrees with the applicant's designations, that may not be the end of the matter. The requester of the records may still appeal the agency's refusal to produce the information to a higher administrative body and, ultimately, to a court. In that case, the burden will fall to the company to intervene and prove, with evidence, that its information qualifies as a trade secret.

Prior to making any submission to an agency, whether in connection with a license application or otherwise, cannabis companies should review the submission with counsel to ensure that trade-secret information is properly identified and protected and that, if a dispute arises, the company is prepared to prove and defend its trade secrets either in court or in an administrative proceeding. Following are some practical recommendations for navigating this process.

### **1. Don't Volunteer the "Secret Sauce"**

Even in states that expressly exempt trade secrets from the reach of public records requests, companies should still disclose only as much potentially trade-secret information as is required by the agency (or necessary to ensure a high-scoring application). Once the information is disclosed, even with a trade-secret designation, the company's control over that information is lost, and the company must rely on the agency's judgment—and perhaps a court's judgment as well—to keep the information out of the public domain and away from the prying eyes of the company's competitors. Further, even if the state agrees to respect the secrecy of the information, there remains the potential that the state is asked to share the information with federal law enforcement, and, given that marijuana remains illegal at the federal level, it is unclear whether a cannabis company's trade secrets will qualify for protection under the trade-secrets exemption to the federal Freedom of Information Act (FOIA).<sup>2</sup>

Cannabis companies applying for a state license should carefully parse the language of the application requirements to ensure they are furnishing only the requisite information. For instance, Oregon's form application for a marijuana processor license<sup>3</sup> requires only "a *brief synopsis* of the steps to create your product"—not a detailed description of the applicant's manufacturing procedures. Other states' application forms do ask for detailed information, but that does not necessarily require the applicant to give away its "secret sauce." A prompt asking a processor applicant to describe its extraction methods, for example, can be answered at a sufficiently high level such that the applicant is only disclosing what is already common knowledge in the industry. Unless specifically asked, the applicant need not explain its proprietary techniques for removing chlorophyll from an alcohol extract, controlling pressure, temperature and runtime in a CO<sub>2</sub> extraction, or holding down terpene content in shatter.

### **2. Designate Carefully, and Judiciously**

Once a company has determined what potentially trade-secret information, if any, needs to be disclosed to the state, the next step is to ensure that all potentially trade-secret information that is disclosed is properly designated as such. Some agencies have very specific rules for making trade-secret designations, and the failure to follow these rules to the letter could result in the designations being disregarded. For example, the Ohio Board of Pharmacy, in its instructions for medical marijuana dispensary applications,<sup>4</sup> requires that an applicant "[c]learly mark every page of trade secret materials submitted as an attachment to the application with the words, 'TRADE SECRET,' in capitalized, underlined, and bold type of at least 20 point font" and fill out a separate "Trade Secret Form" articulating how each item of information qualifies as a trade secret under Ohio law. The instructions further caution that "the State of Ohio does not assume liability for the use or disclosure of unmarked or unclearly marked trade secret information[.]"<sup>5</sup> Even if not required, companies should also submit a separate redacted copy of their application to the agency for use in case the agency receives a public records request for the application. The agency is more likely to side with the company if that work has already been done.

Equally important as following the rules is choosing wisely the information claimed as trade secret. Although an applicant's initial urge may be to err on the side of caution and apply sweeping designations to large swaths of its application materials, such blanket designations are likely to be counter-productive. For instance, the Ohio Board of Pharmacy instructs applicants that "[u]se of generic trade secret language encompassing substantial portions of the application submission or simple assertions of trade secret interest without substantive explanation of the basis therefore will not be sufficient to create a trade secret designation."<sup>6</sup>

Determining what can legitimately be claimed as trade secrets, however, is far from black and white. The Uniform Trade Secrets Act (UTSA), adopted in one form or another in almost every state, defines a “trade secret” as “information, including a formula, pattern, compilation, program, device, method, technique, or process that: [i] [d]erives 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 [ii] [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

A company’s proprietary technical and scientific information—presuming reasonable steps to maintain secrecy—is likely to be covered by the UTSA’s definition. But courts have held that certain non-technical business information—such as customer lists, supplier lists, and other competitively valuable information—can qualify for trade-secret protection as well.<sup>7</sup> Some states have also enacted broader versions of the UTSA that explicitly cover such information. For instance, Ohio’s codification of the UTSA includes within the definition of a trade secret “business information or plans, financial information, or listing of names, addresses, or telephone numbers[.]”<sup>8</sup> And Florida’s version of the UTSA extends the definition to include “commercial information, including any . . . list of suppliers, list of customers, [or] business code[.]”<sup>9</sup> A Florida appeals court held in 2017 that the identity of a marijuana dispensary’s consultants might qualify as a “list of suppliers” under this definition, recognizing that “[c]onsultants in the low-THC cannabis and medical cannabis industry can supply organizations with valuable information about how to cultivate, process, transport, and dispense cannabis.”<sup>10</sup> Even these expanded definitions, however, have their limits. In the same case, for instance, the Florida court held that the names and related information of the dispensary applicant’s individual investors and partners did not meet the definition of trade secrets under the Florida UTSA.<sup>11</sup>

### **3. Be Prepared for Battle**

Designating trade secrets disclosed to the state is a critical step in protecting the information, but cannabis companies must remain ever vigilant to ensure that the information is treated in accordance with those designations. Follow-up with the agency is recommended to ensure that the trade-secret designations will be honored and that the agency will advise the company immediately in the event it receives a public records request for the information. If unredacted trade secret information is released publicly by a state agency, there is no guarantee that a cannabis company will have a remedy against the agency to correct the designation.<sup>12</sup> Further, given the high economic and political stakes in burgeoning state cannabis markets, a company should presume that its trade-secret information will be the subject of a public records request and that the requester—whether it be a consumer watchdog group fighting for increased transparency, a media outlet fishing for a story, or a competitor looking to gain an edge—will not simply accept the company’s trade-secret claims (even if the agency does) but will fight to compel disclosure. If and when that battle is waged, the company cannot rely on the agency to defend the confidentiality of the information but must be prepared to enter the fray. In Ohio, for instance, the Board of Pharmacy explicitly cautions applicants that they “must defend any action seeking release of the materials that [they] believe[] to be trade secret information, and indemnify and hold harmless the State, its agents, and employees, from any judgments against the State in favor of the party requesting the materials, and any and all costs connected with that defense.”<sup>13</sup>

Public records litigation may take various forms, and a company and its counsel should be prepared for all potential scenarios. In the event the agency rejects the company’s trade-secret designations and announces its intention to disclose the information, the company may need to file an emergency lawsuit against the agency, coupled with a motion for a temporary restraining order, to block the release of the information. If, on the other hand, the agency sides with the company and refuses to disclose the information, and the requester appeals, the company will need to intervene in the appeal to assert its rights. Public records laws generally will give the company the right to participate in the appeal as an interested party.<sup>14</sup>

Regardless of the form of the proceeding, however, the burden will be on the company to prove that its information qualifies as a trade secret. This is a much higher burden than at the designation stage. The company may no longer rely on conclusory assertions but must back up its trade-secret claims with evidence. This generally means that the company must demonstrate, whether through live testimony or affidavits, that it has taken reasonable measures to protect the secrecy of the information and that the information derives independent economic value from being kept secret.

A 2019 decision by a Pennsylvania appeals court provides a roadmap for successfully making such a showing, and also illustrates the consequences of failing to do so. In *Mission Pa., LLC v. McKelvey*,<sup>15</sup> five successful applicants for medical marijuana grower/processor and dispensary permits challenged a decision by the Pennsylvania Office of Open Records

(OOR) that granted in part and denied in part a reporter’s public records request for un-redacted copies of their permit applications under Pennsylvania’s Right to Know Law (RTKL). In evaluating the applicants’ claims that certain information on their license applications constituted trade secrets, the court looked to the contrasting proof submitted by the applicants. One applicant, Terrapin Investment Fund 1, LLC, had submitted two affidavits that the court described as “a model for establishing the trade secrets exception.” One affidavit came from Terrapin’s Director of Cultivation, who attested to the years he had devoted to developing the nutrient regimen, fertilization for growing and enhancing the growth process, the competitiveness of the medical marijuana industry, and the company’s interest in producing a high-quality product. The other affidavit was from Terrapin’s Director of Infused Product Manufacturing, who attested to the significant time and resources he had invested in developing extraction and oil manufacturing processes. The affidavits also described the measures Terrapin had taken to protect the secrecy of this information. Based on this evidence, the court upheld the OOR’s application of the RTKL’s trade-secret exemption to Terrapin.

As to the other four applicants, only one submitted any evidence at all, and none submitted evidence of measures to maintain secrecy. Accordingly, the court affirmed the OOR’s denial of the RTKL’s trade-secret exemption to these companies and allowed their alleged trade-secret information to be disclosed without redactions. As a result, any trade-secret protection the companies might have otherwise been able to claim in that information is now lost forever. Had the companies come to court better equipped to defend their information—starting with thinking more strategically when submitting and designating the information in the first place—the outcome for them may have been very different.

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### Footnotes

<sup>1</sup> See, e.g., 17 Cal. Code of Regulations § 40131(m) (allowing a California marijuana manufacturer to designate operating procedures and protocols as trade secrets);  28 Pa. Code § 1141.22(c) (allowing an applicant for a Pennsylvania medical marijuana business license to designate information on its application as trade secrets).



<sup>2</sup> This exemption (known as Exemption 4 to FOIA) is codified at  5 U.S.C.A. § 552(b)(4).

<sup>3</sup> Available at  
[https://www.oregon.gov/olcc/marijuana/Documents/Licensing\\_Forms/mj\\_app\\_prc\\_packet-FILLABLE.pdf](https://www.oregon.gov/olcc/marijuana/Documents/Licensing_Forms/mj_app_prc_packet-FILLABLE.pdf).

<sup>4</sup> Available at  
<https://www.medicalmarijuana.ohio.gov/Documents/Dispensaries/Dispensary%20Application/Dispensary%20Application%20Document%20A%20-%20Instructions.pdf>.

<sup>5</sup> See also  28 Pa. Code § 1141.22(d) (“An applicant’s failure to redact confidential proprietary or trade secret information in its submitted permit application will result in disclosure to the public of the confidential proprietary or trade secret information in response to a Right-to-Know Law request.”).

<sup>6</sup> See link at footnote 4, *supra*; see also *PharmaCann Penn LLC v. Ullery*, 219 A.3d 723, 723 (Pa. Commw. Ct. 2019) (detailing Pennsylvania Office of Open Records rejection of trade secret designations by a company that considered its entire application to be a confidential trade secret).

<sup>7</sup> See, e.g.,   *Gable-Leigh, Inc. v. N. Am. Miss*, 2001 WL 521695 (C.D. Cal. Apr. 9, 2001) (“It is well-established that a customer list may constitute a protectable trade secret.”).


<sup>8</sup> [Ohio Rev. Code § 1333.61\(D\)](#).

9            Fla. Stat. § 812.081(1)(c).


10           Surterra Fla., LLC v. Fla. Dept. of Health, 223 So.3d 376 (Fla. App. 2017).

11           Surterra Fla., LLC v. Fla. Dept. of Health, 223 So.3d 376 (Fla. App. 2017).

12           GR Vending CT, LLC v. Dep't of Consumer Prot., No. HHDCV196109300S, 2019 Conn. Super. LEXIS 2776, at \*21 (Super. Ct. Oct. 22, 2019) (“Having considered the statutory language, the legislative history, the purposes of the [Connecticut Uniform Trade Secrets Act], and CUTSA’s relationship to common-law principles, the court concludes that the legislature did not intend CUTSA to authorize actions against state agencies for disclosing records pursuant to FOIA. In fact, the legislature intended that nothing in CUTSA affect state agency’s obligations under FOIA.”)

13           See link at footnote 4, *supra*; see also  28 Pa. Code § 1141.22(e) (“An applicant is responsible for defending its own redactions in any administrative or court proceeding, including any appeals. Any information not adequately defended by the applicant may result in full disclosure of the information in un-redacted form.”)

14           See, e.g., 65 Pa. Cons. Stat. Ann. § 67.1101(c) (permitting “[a] person other than the agency or requester with a direct interest in the record subject to an appeal” to “file a written request to provide information or to appear before the appeals officer or to file information in support of the requester’s or agency’s position”).

15            Mission Pa., LLC v. McKelvey, 212 A.3d 119 (Commonwealth Ct. of Pa. 2019), *appeals granted in part*, McKelvey v. Pa. Dep't of Health, 224 A.3d 1089, 2020 Pa. LEXIS 571, 223 A.3d 672, 2020 Pa. LEXIS 573, 224 A.3d 1089, 2020 Pa. LEXIS 563 (Pa. 2020).