INTELLECTUAL PROPERTY LAW SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (IP-2006-13)
REFORMS TO UNIFORM TRADE SECRETS ACT AND
PUBLIC RECORDS ACT

TO: State Bar Office of Governmental Affairs

FROM: Joanna Mendoza, Intellectual Property Law Section Executive Committee

DATE: August 1, 2005

RE: **An act to amend the California Uniform Trade Secrets Act (Civil Code §3426.4, §3426.5, §3426.7(c), and C.C.P. §2019.210), and the Public Records Act (Govt. Code §6253(f), §6254(k), and adding a new section thereto with regard to requests involving trade secrets).**

SECTION ACTION AND CONTACT(S):

Date of Approval by Section Executive Committee: July 30, 2005
Approval vote: Unanimous

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DIGEST: UTSA Reforms: Strengthens trade secret protection during litigation (plaintiff's and defendant's trade secrets) and adds continuity regarding trade secret discovery practices by adding clarifying language intended to adopt best practices. PRA Reforms: Makes changes to PRA to more closely parallel federal FOIA by adding specific exclusion for trade secrets (currently implied but not explicit), and sets forth procedure for state agencies to follow like that done by federal agencies when such requests are made.

Civil Code §3426.4:

For reasons undisclosed in the legislative history, in trade secret misappropriation cases brought in bad faith or cases involving willful and malicious misappropriation, the consequences include an award of attorneys' fees, but "costs" are not enumerated in the statute. It could have been because costs are normally recoverable if one prevails in a case in any event, but there is a possibility for misinterpretation that exists when the term is excluded. Given that the legislative history indicates that the inclusion of

"costs" was proposed and agreed to by the Conference of Delegates in 1983, the failure to include it appears to have been a simple oversight, since it is more reasonable and usual to award costs than attorneys' fees.

Subject to interpretation to exclude the recovery of costs if a party prevails when a claim of misappropriation is found to have been in bad faith, when a motion to terminate an injunction is made or resisted in bad faith, or when willful and malicious misappropriation exists. Furthermore, consequences should include a greater measure of "costs" beyond those usually recoverable given the nature of the conduct involved.

The statute has been amended to included the term "costs" with an expanded definition which includes the costs of expert witnesses who are not regular employees of the party, to reflect the provisions set forth in C.C.P. §998. The language proposed at the end of this section has been directly adapted from that language found at C.C.P.§998 (c) and (d), and is not intended to cover attorneys' fees, which is dealt with separately in the UTSA. It merely expands the recovery for reprehensible conduct to ensure inclusion of a broad definition of costs in addition to attorneys' fees, which are already included in the statute.

ILLUSTRATIONS: None.

DOCUMENTATION: Practitioners recognize the problem and enthusiastically welcome this change. However, there are no known studies which support our conclusion that the existing statute is a problem.

PENDING LITIGATION: None identified.

Civil Code §3426.5:

For reasons unknown, the word "use" was not included in the original language regarding the requirement to maintain the status of trade secrets during litigation. Presently, a court may order any person involved in trade secret litigation not to disclose an alleged trade secret without prior approval, but a court is not entitled to order such a person not to use an alleged trade secret. Including the word "use" would provide more efficient protection to owners of trade secrets.

This is a technical change, but one that is important to make before bad law is made as a result.

ILLUSTRATIONS: The Uniform Trade Secrets Act, as originally passed, was intended by the Legislature to protect against abusive practices by unscrupulous businesses who would use litigation to gain improper access to trade secrets of a competitor or to put a competitor out of business using groundless accusations of trade secret misappropriation. If there remains ambiguity in certain aspects of the UTSA, it provides an opening for argument by such unscrupulous litigants to avoid the intent of the law. In this case, because the statute only prohibits disclosure of trade secrets during litigation, but not their use, it provides an opportunity for a company to argue that their use of their competitor's trade secrets, acquired in the litigation, is not prohibited – only disclosure. If they did not "disclose" the information, they cannot be held accountable. This change ensures no such arguments will be successful.

DOCUMENTATION: None known.

PENDING LITIGATION: None known.

Civil Code §3426.7(c):

This is included in the PRA and the proposed changes thereto. See discussion below. The law, as currently written, leaves ambiguity regarding exclusion of trade secrets and allows a competitor to attempt to circumvent the UTSA discovery provisions (C.C.P. §2019.210) by issuing a PRA for information held by state agencies. In an effort to more closely parallel the language and procedures of the FOIA and federal government agencies, the Committee wants to ensure that sufficient protections are in place and followed uniformly throughout the state.

See discussion below regarding changes to the PRA. In an effort to protect against the use of California's Public Records Act as an improper means of acquiring a competitor's trade secrets, it is recommended that subsection "c" of 3426.7 be deleted and that the Public Records Act be revised to specifically exclude "trade secrets" from disclosure, making the PRA more in line with the Freedom of Information Act under the United States' statutory scheme. [See below]

ILLUSTRATIONS: In a case in which one of our members has been involved, highly sensitive trade secrets (outline of production for an animal biologic) were submitted to the California Department of Food and Agriculture as required by the animal biologics regulations. A competitor subpoenaed information that was trade secret, and the agency ignored the objections made on that basis and decided it was not for them to decide what to withhold. The agency was uncertain what to make of the fact that trade secrets were involved, or the fact that it was a subpoena rather than a PRA request. Explicit language to this effect would have given the agency guidance. Instead, the agency decided it was easiest for them to simply provide the information to the requester and, if the submitter had a problem, it could go to court after the production was made to argue about what should not have been produced. Later, in a situation involving the same parties, the requester submitted a PRA request rather than a subpoena. Because no procedures were in place, the submitter did not learn about the PRA request from the agency and had opportunity to object only because they had learned of it by word of mouth. The submitter asked the CDFA for an opportunity to review the documents that were to be produced in response to the PRA and also requested an opportunity to object on the basis of trade secret privilege. The CDFA declined once again and left it to the submitter to remedy any disclosures to its competitor after the fact. The agency had no interest in involving itself in the litigation by quashing a subpoena or objecting when that was the issue, and it had no interest in making determinations regarding trade secrets when it was a PRA request.

Alternatively, when the United States Department of Agriculture was faced with a similar subpoena in an earlier litigation involving competitors in the animal biologics market, it treated the subpoena like a FOIA request. This involved notifying the submitter, allowing the submitter to review the materials that were responsive to the request and identifying the trade secret material. The submitter was required to explain how the information was a trade secret, and the USDA did not produce the information in response to the subpoena/FOIA request. A procedure for handling this was followed as set forth in the Executive Order, and it was done smoothly. The procedure gave the submitter great assurance that the trade secret information it was required by law to disclose to the government agency would be protected against unwarranted disclosure to a competitor.

DOCUMENTATION: This proposal is supported by personal experience of committee members and members of the legal community, and it is based upon an admittedly unscientific canvassing of state agency personnel who all seemed very supportive of these changes to the PRA. Furthermore, Chapter 23 in the Intellectual Property Section's recent publication, "Trade Secret Litigation and Protection in

California," addresses the disparity between the PRA and the FOIA and concerns regarding California's version.

PENDING LITIGATION: None known.

Code of Civil Procedure §2019.210:

Practitioners and litigants in California have been given no guidance by the state appellate courts with regard to the interpretation of the existing statute. Given the unlikelihood of having a writ on discovery matters heard in this state, it is also unlikely that guidance will come anytime soon. However, with only a handful of federal courts addressing this issue, litigants who are dealing with discovery regarding trade secrets in California are oftentimes spending an inordinate amount of time litigating disputes over the interpretation of this statute. It is costly and a waste of the litigants' time and judicial resources. Furthermore, because of the lack of guidance at the appellate level, there is no uniformity throughout the State courts regarding how the existing statute should be interpreted and applied. As a result, business' trade secrets receive different levels of protection during litigation depending upon the court in which the action is brought. It is important to all involved in the State's judicial process to have guidance and uniformity.

It is uncertain whether this statute is to be applied to only trade secret misappropriation causes of action, or if it should apply to causes of action such as unfair competition, in which misappropriation is the underlying claim. It is uncertain what purpose is to be achieved and how it should be achieved. The level of specificity required is unclear, as are the procedures for objecting to the disclosure and amending it.

In 1983, this section made a proposal to the legislative committee considering adoption of the UTSA to add the original 2019(d) language. The Conference of Delegates presented the reasons as follows:

> One area not addressed by the Uniform Act is the area of plaintiff's abuse in initiating trade secret lawsuits for the purpose of harassing or even driving a competitor out of business by forcing the competitor to spend large sums in defending unwarranted litigation. For example, where a plaintiff's employee quits and opens a competing business, a plaintiff often files a lawsuit for trade secret misappropriation which states that the defendant took and is using plaintiff's trade secrets, but does not identify the trade secrets. The plaintiff can then embark upon extensive discovery which the new business is ill equipped to afford. Furthermore, ***by not informing the defendant with any degree of specificity as to what the alleged trade secrets are, defendant may be forced to disclose its own business or trade secrets, even though those matters may be irrelevant***, and the defendant may not learn of the exact nature of the supposedly misappropriated trade secrets until the eve of trial. [Emphasis added]

Focusing on the purpose of preventing the defendant from having to produce its own trade secrets when they are irrelevant to the lawsuit, together with the other purposes identified for requiring the plaintiff to identify its trade secrets with reasonable specificity prior to being able to engage in discovery, changes are proposed by the Committee which they believe will better serve those purposes.

Unfortunately, the statute has been made vulnerable to broad, conflicting interpretations by trial courts. There was no way for practitioners in 1983, with an untried statute, to know how the language they were proposing would be abused and misinterpreted. Clarification is necessary. Due to the absence of appellate guidance since the statute was passed in 1984, litigants are left to the mercy of the trial court in

which they appear as to how this statute will be interpreted before being required to turn over sensitive trade secret information to a competitor. The results can be devastating to a business that relies upon trade secret protection for its intellectual property. Specific additions to the statutory scheme are required in order to correct its current deficiencies and ensure uniform application.

The Committee proposes deleting "under the Uniform Trade Secrets Act (Title 5 (commencing with Section 3426) of Part 1 of Division 4 of the Civil Code)." The purpose of this deletion is to make sure the statute is applied to any cause of action, the basis of which is misappropriation of trade secrets, despite how the cause of action is labeled (e.g., unfair competition, breach of contract, breach of fiduciary duty, etc.).

Other changes are combined proposals from several members intending to codify the best practices often used in those courts familiar with such litigation. However, in general it has been recognized that the statute was enacted to curb unsupported trade secret lawsuits routinely commenced to harass competitors and former employees. Trade secret claims are especially prone to discovery abuse since neither the court nor the parties can delineate the scope of permissible discovery without an identification of the alleged trade secrets involved in the case. Unlimited disclosure of a competitor's trade secrets would enhance a party's settlement leverage and allow it to conform misappropriation claims to the evidence produced by the other party in discovery. The proposed changes are intended to better address these matters.

ILLUSTRATIONS: Several of the practitioners in the committee have seen this statute abused by both plaintiffs and defendants. Here is an illustration of the problem with the existing statutory language, drawn from a real case:

Plaintiff brings trade secret misappropriation case against defendant former employee who has started a competing business. Former employee was an integral part of the R&D at the plaintiff's place of business. Former employee's new business is succeeding, and products are argued in advertising to be better than plaintiff's. The competition is fierce between them, and plaintiff is angry and suspicious, and would benefit greatly from both a) putting defendant out of business and b) learning what the defendant is doing to make her products better. Defendant is convinced that plaintiff is bringing the case in bad faith for these very purposes.

Before discovery, plaintiff identifies its "trade secrets" as nearly every formula that the defendant developed or was exposed to while employed. Problem: Very little identified by the plaintiff meets the definition of a "trade secret" under the UTSA because it has nearly all been published. Furthermore, the only thing that meets the definition of a "trade secret" does not even belong to the plaintiff, but instead is merely licensed to the plaintiff under a manufacturing agreement only. However, plaintiff's technical formulations identified for the court under 2019(d) appear to the court to be made with "reasonable particularity" because of the technical detail.

Defendant, on the other hand, has created and used new "trade secrets" which improve its products. It objects to the plaintiff's 2019(d) designation because everything identified by the plaintiff either is not a "trade secret" or is not owned by the plaintiff. Nevertheless, because the existing statute only requires that the plaintiff "identify the trade secret with reasonable particularity," and it has provided enough detail to qualify as "reasonably particular," the judge overrules the objection because the defendant is reading things into the statute that simply are not there. The *only* thing the court is looking at is whether the "secret" sued upon has been defined with "reasonable particularity." Because the plaintiff has "complied with the statute," discovery into the defendant's trade secrets is allowed without any sustainable objection thereto. The plaintiff, with no trade secrets that it owns, is now getting access to its competitor's trade secrets – the very trade secrets that the defendant is claiming makes its products better.

The statute, as currently worded, has been strictly adhered to – and §2019(d) served none of the purposes, whatsoever, intended for it to be served when it was originally proposed. The defendant cannot bring a motion for summary judgment or adjudication because several trade secrets were alleged, and such a motion is only appropriate if it can eliminate the entire cause of action – not narrow down the cause of action to only those trade secrets, if any, that are relevant. Despite the fact that plaintiff has no trade secrets which its owns, the defendant must turn over all its most sensitive trade secrets during the litigation, and then must wait until either a motion in limine or trial to get her chance to prove plaintiff had no trade secrets to begin with.

Similar abuses happen when the plaintiff does identify its trade secrets with sufficient particularity, but the defendant consistently objects on the basis that this has not occurred. Both sides of the litigation need guidance. Furthermore, the handling of such matters in the rural county superior courts is very different from that of courts with the experience and sophistication necessary for proper handling of such matters. More guidance is critical for uniformity of application. Some of the practitioners in the committee have had very bad experiences with judges who are simply unfamiliar with the law and do not know how to interpret the existing statutory structure.

DOCUMENTATION: None known. Only identified by practitioners in the field. Articles have been written about it, including the most recent publication by the committee – Trade Secret Litigation and Protection in California.

PENDING LITIGATION: By the time this legislation would be passed, any cases currently pending would have already dealt with this statute since it comes into play before discovery really begins in such cases.

Government Code §6253(f):

There is federal guidance for treating business record subpoenas as FOIA requests, but there is no similar state law doing the same. While the different Acts are intended to be parallel and interpreted accordingly, the federal law has become more developed, and more procedures are in place at the federal level to ensure that the Act addresses the handling of requests, whether they be by written FOIA request or subpoena, with uniformity and keeping trade secrets and commercially sensitive information outside of the public's general access without court order.

Even if a state agency is careful to withhold trade secret information from a PRA requester, such withholding of information is not as likely to occur if the request comes instead in the form of a subpoena for business records. The federal agencies treat such requests identically, ensuring that there is no attempted run around to avoid the protections set forth in the FOIA for submitters of information to the government. The state, however, has no articulated policy. A set policy would ensure compliance with the PRA, regardless of the form in which the request is made, as well as uniformity of application.

This is a proposal to add a new provision to the Public Records Act that would specifically treat a subpoena issued to a California public agency identical to a Public Records Act request, as some federal agencies have done in response to attempts by parties to go around the exemptions listed in the FOIA. The language proposed herein is lifted nearly verbatim from 7 C.F.R. §1.215, which is the USDA's regulation regarding treatment of subpoenas received by that agency. By applying the same procedures and exemptions for handling of document requests, whether they be through a PRA request or a

subpoena, it provides much more uniformity by and guidance to the various public agencies throughout the state, and can help prevent abuses that have been experienced.

Codifying this would prevent trade secrets from being treated differently depending upon the agency who is the guardian of those trade secrets, as well as how the request is received.

ILLUSTRATIONS: In a case in which one of our members has been involved, highly sensitive trade secrets (outline of production for an animal biologic) were submitted to the California Department of Food and Agriculture as required by the animal biologics regulations. A competitor subpoenaed information that was trade secret, and the agency ignored the objections made on that basis and decided it was not for them to decide what to withhold. The agency was uncertain what to make of the fact that trade secrets were involved, or the fact that it was a subpoena rather than a PRA request. Explicit language to this effect would have given the agency guidance. Instead, the agency decided it was easiest for them to simply provide the information to the requester and, if the submitter had a problem, it could go to court after the production was made to argue about what should not have been produced. Later, in a situation involving the same parties, the requester submitted a PRA request rather than a subpoena. Because no procedures were in place, the submitter did not learn about the PRA request from the agency and had opportunity to object only because they had learned of it by word of mouth. The submitter asked the CDFA for an opportunity to review the documents that were to be produced in response to the PRA and also requested an opportunity to object on the basis of trade secret privilege. The CDFA declined once again and left it to the submitter to remedy any disclosures to its competitor after the fact. The agency had no interest in involving itself in the litigation by quashing a subpoena or objecting when that was the issue, and it had no interest in making determinations regarding trade secrets when it was a PRA request.

Alternatively, when the United States Department of Agriculture was faced with a similar subpoena in an earlier litigation involving competitors in the animal biologics market, it treated the subpoena like a FOIA request. This involved notifying the submitter, allowing the submitter to review the materials that were responsive to the request and identifying the trade secret material. The submitter was required to explain how the information was a trade secret, and the USDA did not produce the information in response to the subpoena/FOIA request. A procedure for handling this was followed as set forth in the Executive Order, and it was done smoothly. The procedure gave the submitter great assurance that the trade secret information it was required by law to disclose to the government agency would be protected against unwarranted disclosure to a competitor.

DOCUMENTATION: This proposal is supported by personal experience of committee members and members of the legal community, and it is based upon an admittedly unscientific canvassing of state agency personnel who all seemed very supportive of these changes to the PRA.

PENDING LITIGATION: None.

Government Code §6254(k):

California's Public Records Act, unlike the Freedom of Information Act under 5 U.S.C. §552, does not currently provide a specific exemption of trade secrets from disclosure. One can read such an exemption into the general language of the statute, but a more specific exclusion is necessary in order to ensure uniform application of a prohibition against such disclosure through the use of the PRA.

The proposed change is derived from the Freedom of Information Act exemptions listed at 5 U.S.C. §552(b)(4), and the definitions are taken almost verbatim from President Reagan's Executive Order 12600 of June 23, 1987, which appear at 52 FR 23781, 3 CFR, 1987 Comp., p. 235, entitled "Predisclosure notification procedures for confidential commercial information." The Executive Order itself provides a well-thought out procedure for handling requests involving sensitive trade secret and confidential business information, most of which is found in the following proposed statute to be added to the Government Code detailing those procedures. The procedure and handling of this type of information by federal agencies has worked well. California can do better, especially since the guidelines for how to do so have already been set forth by the federal government in fairly concise and well-reasoned provisions.

Therefore, the IP Section is recommending that we ask the Legislature to add a specific exemption for trade secrets under Government Code §6254, along with a statutory scheme for addressing how an agency is to handle requests which seek trade secret information and the procedures to be adopted uniformly throughout state government – a system which parallels the federal government's handling of trade secret requests under the FOIA statutory scheme and regulations. Because the California Supreme Court has held that the PRA and FOIA "should receive parallel construction" [*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 451] it would be appropriate to use identical or near-identical language wherever possible so that California courts may rely on the large body of case law already established with regard to construction of the trade secret exclusion articulated in the FOIA and the handling of such requests by federal agencies.

California public agencies have difficulty addressing PRA requests that seek sensitive proprietary information required to be submitted to the agency for regulatory compliance. This change would make the law more explicit, and assist agencies, requesters and submitters to understand the limits and processes involved when a PRA request seeks such information.

ILLUSTRATIONS: In a case in which one of our members has been involved, highly sensitive trade secrets (outline of production for an animal biologic) were submitted to the California Department of Food and Agriculture as required by the animal biologics regulations. A competitor subpoenaed information that was trade secret, and the agency ignored the objections made on that basis and decided it was not for them to decide what to withhold. The agency was uncertain what to make of the fact that trade secrets were involved, or the fact that it was a subpoena rather than a PRA request. Explicit language to this effect would have given the agency guidance. Instead, the agency decided it was easiest for them to simply provide the information to the requester and, if the submitter had a problem, it could go to court after the production was made to argue about what should not have been produced. Later, in a situation involving the same parties, the requester submitted a PRA request rather than a subpoena. Because no procedures were in place, the submitter did not learn about the PRA request from the agency and had opportunity to object only because they had learned of it by word of mouth. The submitter asked the CDFA for an opportunity to review the documents that were to be produced in response to the PRA and also requested an opportunity to object on the basis of trade secret privilege. The CDFA declined once again and left it to the submitter to remedy any disclosures to its competitor after the fact. The agency had no interest in involving itself in the litigation by quashing a subpoena or objecting when that was the issue, and it had no interest in making determinations regarding trade secrets when it was a PRA request.

Alternatively, when the United States Department of Agriculture was faced with a similar subpoena in an earlier litigation involving competitors in the animal biologics market, it treated the subpoena like a FOIA request. This involved notifying the submitter, allowing the submitter to review the materials that were responsive to the request and identifying the trade secret material. The submitter was required to explain

how the information was a trade secret, and the USDA did not produce the information in response to the subpoena/FOIA request. A procedure for handling this was followed as set forth in the Executive Order, and it was done smoothly. The procedure gave the submitter great assurance that the trade secret information it was required by law to disclose to the government agency would be protected against unwarranted disclosure to a competitor.

DOCUMENTATION: This proposal is supported by personal experience of committee members and members of the legal community, and it is based upon an admittedly unscientific canvassing of state agency personnel who all seemed very supportive of these changes to the PRA.

PENDING LITIGATION: None.

New Government Code Section – Predisclosure Notification Procedures for Trade Secrets, Confidential Commercial and Financial Information:

See comments above on Government Code proposed changes. This change is proposed in order to provide predisclosure notification procedures under the Public Records Act concerning the potential disclosure of trade secret, confidential commercial and financial information by a government agency, and to make existing agency notification provisions more uniform throughout the State of California. This is taken nearly verbatim from the Executive Order No.12600, 52 Fed. Reg. 23,781 (June 23, 1987)., setting forth procedures used by the United States government since the issuance of Executive Order No. 12600.

Language has also been added regarding a "Vaughan Index," which is required under federal law. Specifically, it is proposed that California codify the federal requirement that the agency responding to a FOIA request where trade secrets are withheld must provide a document similar to a privilege log to show which portions of the information may be segregable and properly produced.

Finally, included is the additional proposal to leave any disputes regarding designations of material exemption from disclosure to be between the requester and the submitter of the records, leaving the government agency out of the dispute and allowing it to stay neutral.

In summary, the statutory scheme should provide the business whose trade secrets are at risk with the opportunity to assert that the information sought under the PRA request (or subpoena treated as a PRA request) is trade secret. This is essentially a procedure similar to the one adopted under FOIA. Once the owner raises these objections, the agency would merely act as a conduit for forwarding those objections to the party requesting the information. If the party seeking the information objects to the characterization of the information as trade secret, the two parties in dispute should be required to seek a remedy outside of the government agency and not involving the government agency, either through an administrative law proceeding or civil writ process.

There is a lack of uniform process throughout the state agencies for handling requests involving trade secret or commercially sensitive information. The lack of procedures in place makes the submission of such information very risky by a company required to do so by regulation, and creates unnecessary tension and distrust between the submitter and the agency. The current state of the law also places too much work on the government agency to make decisions and possibly be held accountable for not properly withholding trade secret information or for not properly disclosing non-trade secret information to a requester.

This proposal, which has worked for the federal government agencies for nearly 20 years, takes such decisions and responsibility out of the agencies hands and passes it on to the submitter, with the requester being able to challenge the submitter's designation directly without having to involve the state agency. It would be most welcome by state agencies as well as by the businesses who are required to do business with them. It would create a new level of trust and comfort with regard to submitting commercially sensitive information to the state.

ILLUSTRATIONS: In a case in which one of our members has been involved, highly sensitive trade secrets (outline of production for an animal biologic) were submitted to the California Department of Food and Agriculture as required by the animal biologics regulations. A competitor subpoenaed information that was trade secret, and the agency ignored the objections made on that basis and decided it was not for them to decide what to withhold. The agency was uncertain what to make of the fact that trade secrets were involved, or the fact that it was a subpoena rather than a PRA request. Explicit language to this effect would have given the agency guidance. Instead, the agency decided it was easiest for them to simply provide the information to the requester and, if the submitter had a problem, it could go to court after the production was made to argue about what should not have been produced. Later, in a situation involving the same parties, the requester submitted a PRA request rather than a subpoena. Because no procedures were in place, the submitter did not learn about the PRA request from the agency and had opportunity to object only because they had learned of it by word of mouth. The submitter asked the CDFA for an opportunity to review the documents that were to be produced in response to the PRA and also requested an opportunity to object on the basis of trade secret privilege. The CDFA declined once again and left it to the submitter to remedy any disclosures to its competitor after the fact. The agency had no interest in involving itself in the litigation by quashing a subpoena or objecting when that was the issue, and it had no interest in making determinations regarding trade secrets when it was a PRA request.

Alternatively, when the United States Department of Agriculture was faced with a similar subpoena in an earlier litigation involving competitors in the animal biologics market, it treated the subpoena like a FOIA request. This involved notifying the submitter, allowing the submitter to review the materials that were responsive to the request and identifying the trade secret material. The submitter was required to explain how the information was a trade secret, and the USDA did not produce the information in response to the subpoena/FOIA request. A procedure for handling this was followed as set forth in the Executive Order, and it was done smoothly. The procedure gave the submitter great assurance that the trade secret information it was required by law to disclose to the government agency would be protected against unwarranted disclosure to a competitor.

DOCUMENTATION: This proposal is supported by personal experience of committee members and members of the legal community, and it is based upon an admittedly unscientific canvassing of state agency personnel who all seemed very supportive of these changes to the PRA.

PENDING LITIGATION: None.

LIKELY SUPPORT & OPPOSITION:

Support Generally: Businesses in California who have trade secrets they are trying to keep protected, plaintiffs in

trade secret misappropriation cases whose trade secrets have been misappropriated, attorneys practicing trade secret litigation; intellectual property practitioners; legislative members who have businesses as constituents that hold intellectual property in the form of trade secrets; the governor, who is trying to make California a better business environment, American Intellectual Property Law Association. (AIPLA); Intellectual Property Owners Association (IPO); AeA (formerly American Electronics Association); California Chamber of Commerce; other trade groups with businesses who maintain trade secrets as a form of intellectual property. Additional support for specific sections: CC §3426.4 - Defendants in misappropriation cases brought about in bad faith CC §3426.5 - defendants in trade secret misappropriation cases and courts. CC §3426.7, Govt. Code §6253(f), 6254(k), and new proposed section – State agencies and businesses required to do businesses with state agencies. Trade groups with businesses that are heavily regulated or who have trade secrets that must be submitted to state agencies CCP §2019.210 - Defendants in trade secret misappropriation cases and courts.
Oppose Defendants who have misappropriated trade. Litigants who have used specific statutes to prolong litigation and discovery. Those who have been able to use the PRA to acquire trade secret or commercially sensitive information belonging to other businesses.

FISCAL IMPACT: No cost.

GERMANENESS: The issue of trade secret protection and assuring that the laws of our state provide sufficient protection for this particular state created intellectual property is uniquely within the expertise of the section. Intellectual property practitioners, who tend to represent both plaintiffs and defendants in intellectual property disputes rather than only one type of litigant, are uniquely qualified to understand the reason for and advantage of changes to the existing UTSA. Similarly, like the PRA changes recommended, trade secret practitioners are uniquely qualified to comment upon and propose changes involving the handling of trade secret information which is required by regulation to be provided to state agencies.

FISCAL IMPACT: None projected. Agencies already deal with these requests.

TEXT OF PROPOSAL

SECTION 1. Section 3426.4 of the Civil Code is amended to read:

3426.4. If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful or malicious misappropriation exists, the court may award reasonable attorney's fees *and costs* to the prevailing party. *Recoverable costs hereunder shall include a reasonable sum to cover the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the prevailing party.*

SEC. 2. Section 3426.5 of the Civil Code is amended to read:

3426.5. In an action under this title, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery

proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to *use or* disclose an alleged trade secret without prior court approval.

SEC. 3. Section 3426.7 of the Civil Code is amended to read:

3426.7 (a) Except as otherwise expressly provided, this title does not supersede any statute relating to misappropriation of a trade secret, or any statute otherwise regulating trade secrets.

(b) This title does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon misappropriation of a trade secret, or (3) criminal remedies, whether or not based upon misappropriation of a trade secret.

~~(c) This title does not affect the disclosure of a record by a state or local agency under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). Any determination as to whether the disclosure of a record under the California Public Records Act constitutes a misappropriation of a trade secret and the rights and remedies with respect thereto shall be made pursuant to the law in effect before the operative date of this title.~~

SEC. 4. Section 2019.210 of the Code of Civil Procedure is amended to read:

2019.210. In any action alleging the misappropriation of a trade secret ~~under the Uniform Trade Secrets Act (Title 5 (commencing with Section 3426) of Part 1 of Division 4 of the Civil Code)~~, before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity ~~subject to any orders that may be appropriate under Section 3426.5 of the Civil Code~~. *Any document identifying a trade secret under this section need not be filed with the court, but the party making the identification may require that it be* subject to any *protective order that may be appropriate under Section 3426.5 of the Civil Code prior to serving it upon any party. If the document identifying a trade secret under this section is filed with the court for any reason, it shall be filed under seal unless good cause is shown. A "trade secret" as referred to herein is defined as set forth in Section 3426.1(d) of the Civil Code.*

(b) In determining the appropriate level of specificity the court shall consider (i) the purposes of this section to deter the filing of frivolous claims, encourage well-investigated claims, and to provide guidance in establishing the scope and limits of discovery related to the trade secret misappropriation claim, (ii) the extent to which the nature of the secret information makes it amenable to precise description, (iii) the extent to which the information is closely integrated with general skill and knowledge properly retained by former employees, and (iv) the extent to which the information is alleged to be exclusively in the possession of the party accused of misappropriation.

(c) If the party alleging the misappropriation does not identify the trade secret with reasonable particularity, or has served a document purporting to identify its trade secret(s) as required in this section, prior to commencing discovery relating to the trade secret, any other party who is the target of or otherwise affected by such discovery may (1) object to any such discovery requested of it; or (2) move for a protective order that such discovery requested of it or others shall not be had until the party alleging the misappropriation fully complies with this section; or (3) both. If such objection or protective order is made, then such discovery need not be responded to until the court makes a determination that the party alleging the misappropriation has identified a trade secret with reasonable particularity.

SEC. 5. Section 6253 of the Government Code is amended to read:

6253. (a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable

record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(c) Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

(d) Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial.

(e) Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.

(f) Subpoenas duces tecum for public records in judicial or administrative proceedings in which the public agency is not a party shall be deemed to be requests for records under the Public Records Act and shall be handled pursuant to the rules governing public disclosure under this chapter. Whenever a subpoena duces tecum compelling production of records is served on a public agency employee in a judicial or administrative proceeding in which the agency is not a party, the employee, after consultation with counsel, shall appear in response thereto, respectfully decline to produce the records on the grounds that it is prohibited by this section and state that the production of the records involved will be handled in accordance with and treated as a Public Records Act request.

SEC. 6. Section 6254 of the Government Code is amended to read:

6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

(d) Contained in or related to any of the following:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(4) Information received in confidence by any state agency referred to in paragraph (1).

(e) Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.

(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflect the analysis or conclusions of the investigating officer. Customer lists provided to a state or local police agency by an alarm or security company at the request of the agency shall be construed to be records subject to this subdivision. Notwithstanding any other provision of this subdivision, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 261, 261.5, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined by Section 220, 261, 261.5, 262, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be deleted

at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code, except that the address of the victim of any crime defined by Section 220, 261, 261.5, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph may not be used directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury. Nothing in this paragraph shall be construed to prohibit or limit a scholarly, journalistic, political, or government use of address information obtained pursuant to this paragraph.

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with Section 99150) of Part 65 of the Education Code.

(h) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision.

(i) Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information.

(j) Library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for reference or exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on the borrowers.

(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. . *Said exemption shall include records which contain trade secret information and confidential commercial or financial information obtained from a submitter which is privileged or confidential. For purposes of this statute, the following definitions shall apply:*

(i) "Trade secret" refers to that term as it is defined in the Uniform Trade Secrets Act found at California Civil Code §3426.1(d).

(ii) "Confidential commercial or financial information" means business and financial records provided to the government by a submitter that contain material the disclosure of which could reasonably be expected to cause substantial competitive harm.

(iii) "Submitter" means any person or entity who provides trade secret or confidential commercial or financial information to the government. The term "submitter" includes, but is not limited to, individuals, corporations, limited liability companies, and partnerships.

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor' s Legal Affairs Secretary, provided that public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter.

(m) In the custody of or maintained by the Legislative Counsel, except those records in the public database maintained by the Legislative Counsel that are described in Section 10248.

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for.

(o) Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health and Safety Code, where an authorized officer of the California Pollution Control Financing Authority determines that disclosure of the financial data would be competitively injurious to the applicant and the data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application that are subject to disclosure under this chapter.

(p) Records of state agencies related to activities governed by Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525), and Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters. Nothing in this subdivision shall be construed to limit the disclosure duties of a state agency with respect to any other records relating to the activities governed by the employee relations acts referred to in this subdivision.

(q) Records of state agencies related to activities governed by Article 2.6 (commencing with Section 14081), Article 2.8 (commencing with Section 14087.5), and Article 2.91 (commencing with Section 14089) of Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code, that reveal the special negotiator's deliberative processes, discussions, communications, or any other portion of the negotiations with providers of health care services, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy, or that provide instruction, advice, or training to employees. Except for the portion of a contract containing the rates of payment, contracts for inpatient services entered into pursuant to these articles, on or after April 1, 1984, shall be open to inspection one year after they are fully executed. In the event that a contract for inpatient services that is entered into prior to April 1, 1984, is amended on or after April 1, 1984, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after it is fully executed. If the California Medical Assistance Commission enters into contracts with health care providers for other than inpatient hospital services, those contracts shall be open to inspection one year after they are fully executed. Three years after a contract or amendment is open to inspection under this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection. Notwithstanding any other provision of law, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee and the Legislative Analyst's Office. The committee and that office shall maintain the confidentiality of the contracts and amendments until the time a contract or amendment is fully open to inspection by the public.

(r) Records of Native American graves, cemeteries, and sacred places maintained by the Native American Heritage Commission.

(s) A final accreditation report of the Joint Commission on Accreditation of Hospitals that has been transmitted to the State Department of Health Services pursuant to subdivision (b) of Section 1282 of the Health and Safety Code.

(t) Records of a local hospital district, formed pursuant to Division 23 (commencing with Section 32000) of the Health and Safety Code, or the records of a municipal hospital, formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Division 3 of Title 4 of this code, that relate to any contract with an insurer or nonprofit hospital service plan for inpatient or outpatient services for alternative rates pursuant to Section 10133 or 11512 of the Insurance Code. However, the record shall be open to inspection within one year after the contract is fully executed.

(u) (1) Information contained in applications for licenses to carry firearms issued pursuant to Section 12050 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department that indicates when or where the applicant is vulnerable to attack or that concerns the applicant's medical or psychological history or that of members of his or her family.

(2) The home address and telephone number of peace officers, judges, court commissioners, and magistrates that are set forth in applications for licenses to carry firearms issued pursuant to Section 12050 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(3) The home address and telephone number of peace officers, judges, court commissioners, and magistrates that are set forth in licenses to carry firearms issued pursuant to Section 12050 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(v) (1) Records of the Major Risk Medical Insurance Program related to activities governed by Part 6.3 (commencing with Section 12695) and Part 6.5 (commencing with Section 12700) of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Part 6.3 (commencing with Section 12695) or Part 6.5 (commencing with Section 12700) of Division 2 of the Insurance Code, on or after July 1, 1991, shall be open to inspection one year after they have been fully executed.

(B) In the event that a contract for health coverage that is entered into prior to July 1, 1991, is amended on or after July 1, 1991, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after the amendment has been fully executed.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contract or amendments to a contract is open to inspection pursuant to paragraph (3).

(w) (1) Records of the Major Risk Medical Insurance Program related to activities governed by Chapter 14 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Chapter 14 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, on or after January 1, 1993, shall be open to inspection one year after they have been fully executed.

(3) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contract or amendments to a contract is open to inspection pursuant to paragraph (2).

(x) Financial data contained in applications for registration, or registration renewal, as a service contractor filed with the Director of the Department of Consumer Affairs pursuant to Chapter 20 (commencing with Section 9800) of Division 3 of the Business and Professions Code, for the purpose of establishing the service contractor's net worth, or financial data regarding the funded accounts held in escrow for service contracts held in force in this state by a service contractor.

(y) (1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code, on or after January 1, 1998, shall be open to inspection one year after they have been fully executed.

(B) In the event that a contract entered into pursuant to Part 6.2 (commencing with Section 12693) or Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to paragraph (2) or (3).

(5) The exemption from disclosure provided pursuant to this subdivision for the contracts, deliberative processes, discussions, communications, negotiations with health plans, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff shall also apply to the contracts, deliberative processes, discussions, communications, negotiations with health plans, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of applicants pursuant to Part 6.4 (commencing with Section 12699.50) of Division 2 of the Insurance Code.

(z) Records obtained pursuant to paragraph (2) of subdivision (c) of Section 2891.1 of the Public Utilities Code.

(aa) A document prepared by or for a state or local agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session.

(bb) (1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 8.7 (commencing with Section 2120) of Division 2 of the Labor Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 8.7 (commencing with Section 2120) of Division 2 of the Labor Code on or after January 1, 2004, shall be open to inspection one year after they have been fully executed.

(B) In the event that a contract entered into pursuant to Part 8.7 (commencing with Section 2120) of Division 2 of the Labor Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to paragraph (2) or (3).

(cc) All information provided to the Secretary of State by a person for the purpose of registration in the Advance Health Care Directive Registry, except that those records shall be released at the request of a health care provider, a public guardian, or the registrant's legal representative.

Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law. Nothing in this section prevents any health facility from disclosing to a certified bargaining agent relevant financing information pursuant to Section 8 of the National Labor Relations Act.

SEC. 7. Section ____ is added to the Government Code, to read:

_____. *(a) The head of each department and agency subject to the Public Records Act (California Government Code §6253 et seq., "PRA") shall, to the extent permitted by law, establish procedures to notify submitters of records containing trade secret, confidential commercial or financial information (as defined in subsection k of Government Code §6254) , when those records are requested under the Act, if after reviewing the request, and the responsive records, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of such protected information of the procedures established under this statute. Further, where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.*

(b)(1) For information which falls within the exemption stated in subsection (k) of Government Code §6254, submitted prior to January 1, 2007, the head of each department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(A) The records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(B) The department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(2) For confidential commercial information submitted on or after January 1, 2007, the head of each department or agency shall, to the extent permitted by law, establish procedures to permit submitters of trade secret, confidential commercial and financial information to designate, at the time the information is submitted to the government agency or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. Additionally, such procedures may permit the agency to designate specific classes of information that will be treated by the agency as if the information had been so designated by the submitter. The head of each department or agency shall, to the extent permitted by law, provide the submitter notice in accordance with subsection (a) of this section whenever the department or agency determines that it may be required to disclose records:

(A) designated pursuant to this subsection; or

(B) fall within the exemption specified in subsection (k) of Government Code §6254; or

(C) The disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

(c) When notification is made pursuant to subsection (a), each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

(d) Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the

extent permitted by law, be provided to submitter at least fifteen (15) calendar days prior to the specified disclosure date to allow the submitter to seek legal remedies to prevent such disclosure.

(e) The notice requirements of this section need not be followed if:

(1) The agency determines that the information should not be disclosed;

(2) The information has been published or has been officially made available to thepublic;

(3) Disclosure of the information is required by law (other than Government Code §6253 et seq.);

(4) The disclosure is required by an agency rule tha:

(A) was adopted pursuant to notice and public comment,

(B) specifies narrow classes of records submitted to the agency that are to be released under the Public Records Act, and

(C) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(5) The information requested is not designated by the submitter as exempt from disclosure when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(6) The designation made by the submitter appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within fifteen (15) calendar days prior to the specified disclosure date.

(f) Whenever an agency notifies a submitter that it may be required to disclose information pursuant to subsection a hereof, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to subsection (d) of this section, the agency shall also notify the requester.

(g) In the event that the agency has deleted segregable portions of the record which are deemed exempt as provided for in section 6253(a), the records withheld and the information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption stated in subsection (k) of section 6254 under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

(h) In the event that the agency denies disclosure of information requested, the agency shall provide the requested with an index identifying the record which has had portions deleted or which has been withheld entirely, without disclosing any details of that record which are trade secret, confidential commercial or financial information, or which could reasonably be expected to cause substantial competitive harm.

(i) Any suit brought by the requester seeking to compel disclosure of records withheld by the agency due to the designation hereunder that those records contain trade secret, confidential commercial or financial information, shall be brought only against the submitter of said records and not against the agency responding to the request or subpoena. Such action shall be in the form of injunctive relief against the submitter, if the designations of exempt material were improperly made, either requiring that the submitter produce such records directly to the requester or otherwise require that the designations made by the submitter be changed to allow the agency to produce the records requested.