STATE OF VERMONT
WASHINGTON COUNTY, SS

PUBLIC CITIZEN, INC., Plaintiff v. WILLIAM H. SORRELL, in his official capacity as ATTORNEY GENERAL OF THE STATE OF VERMONT, Defendant	SUPERIOR COURT Docket No. 513-8-05 Wncv

RULING ON MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff in this case seeks disclosure of certain records of pharmaceutical manufacturers under the Vermont Public Records Act, 1 V.S.A.§ 315-338. The State opposes disclosure on the grounds that it is barred by another statute, 33 V.S.A. § 2005. Alternatively, the State argues that the manufacturers should be made parties to this case.

Background

The records sought are in the custody of the Attorney General's Office pursuant to reporting requirements imposed upon pharmaceutical companies by 33 V.S.A.§ 2005 (what Plaintiff refers to as the Gift Disclosure Act). Under that statute, pharmaceutical manufacturers are required to report "the value, nature, and purpose of any gift, fee, payment, subsidy, or other economic benefit provided" in connection with promoting or marketing their products to health care providers in Vermont. The Attorney General is then required to prepare an annual report on the data for the Legislature and the Governor.

At issue here is the provision of the statute that permits the manufacturers to designate portions of their disclosures as "trade secrets," and directs that the Attorney General "shall keep confidential all trade secret information, as defined by 1 V.S.A.§ 317(b)(9)," an exemption to disclosure that appears in the Public Records Act. 33 V.S.A.§ 2005(a)(3). The definition (which actually appears at 1 V.S.A. § 317(*c*)(9), not (*b*)(9)) is defined as follows: "trade secrets, including, but not limited to, any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it."

In December of 2004, Public Citizen made a record request to the Attorney General's Office seeking the records filed by the pharmaceutical companies. The office provided the requested documents with the exception of those designated by the manufacturers as trade secrets.

The Legal Issues

Public Citizen argues that it is entitled to the records designated as trade secrets unless the State affirmatively establishes that the records meet the "trade secrets" definition in the Public Records Act, 1 V.S.A. § 317(b)(9). The State argues that the more specific statute under which the records were collected overrides the Public Records Act, and that the Legislature did not mean to impose on the State the duty to defend the manufacturers' designations of what constituted trade secrets.

Under the Public Records Act (Records Act), the burden of establishing an exemption to the general rule of public disclosure falls upon the agency seeking to

withhold the records. 1 V.S.A. § 319(a). Thus, if the Records Act is applicable here, the State must demonstrate why the records meet the definition. What the State argues, however, is that because the Gift Disclosure Act (Gift Act) is more specific, its terms prevail over those in the Records Act.

Our Supreme Court has stated that "[i]t is axiomatic that '[i]n construing conflicting statutes that deal with the same subject matter, the more specific provision controls over the more general one.'" Judicial Watch, Inc., v. State of Vermont, 2005 VT 108, ¶ 8, __ Vt. __ (2005)(citation omitted). However, in this case the court does not see the two statutes as being in conflict. Under the Gift Act, the burden on the Attorney General is to keep confidential only those trade secrets that are "defined in" the Records Act. Thus, although the manufacturers are permitted to "identify any information that is a trade secret," the obligation of the State is not to keep confidential *whatever* the manufacturers "identify," but only what actually meets the definition in the Records Act. For example, if a manufacturer listed its company president's name as a trade secret, that would not meet the definition of the Records Act, and thus the State would have no duty to keep it confidential. In other words, the Gift Act does not change the existing trade secrets exemption in the Records Act. The two statutes do not conflict with, but complement, each other.

The court is sympathetic to the State's desire not to be saddled with defending trade secret designations made by others in a field in which it does not have business expertise. The court agrees that the Legislature likely did not foresee that it might be creating such a burden upon the State in creating the Gift Act. However, at least when a challenge is raised as in this case, the clear language of the statute gives the State the

burden of reviewing the companies' trade secret designations and determining whether they meet the definition of the Records Act before the State is required to keep them confidential. Just as the court is no expert on pharmaceutical trade secrets, and might require evidence from those in the field to analyze the applicability of the definition, the State may need to obtain further information from the manufacturers to determine whether to defend the designations. However, the court cannot conclude based on this burden to the State that the Legislature intended when it passed the Gift Law to say "the Public Records Law does not apply to these records." To the contrary, the fact that it references the definition in that statute suggests precisely the opposite. The Legislature clearly was aware of the Records Act and yet failed to say that it would not apply here.

The State argues that if this case is to proceed, the 22 companies who have designated materials as trade secrets should be joined as defendants. The court agrees. The entities whose information is at issue are the companies. It is their purported trade secrets that are at risk of public disclosure. If they truly are trade secrets, it is the companies, not the State, whose interests will be affected if the court orders disclosure. The "disposition of the action in [their] absence may ... as a practical matter impair or impede [their] ability to protect" what they claim to be trade secrets. V.R.C.P. 19(a). [1] While Plaintiff is correct that they have not claimed an interest in this litigation per se, by designating their records as trade secrets they have claimed an interest in the subject matter.

[1] The State represents that there are approximately 22 relevant companies and that they are apparently all "subject to service of process" as required by Rule 19. Motion for Judgment on the Pleadings at 13. For today's purposes, the court presumes this to be the case.

Order

The State's motion for judgment on the pleadings is denied. The State's motion to join necessary parties is granted. The State is ordered to promptly provide Plaintiff with the list of companies who have designated material as trade secrets. Plaintiff is directed to promptly join and serve those companies as defendants. Once service is complete, a status conference will be scheduled. The motion to stay discovery pending resolution of this motion is moot.

Dated at Montpelier this 9th day of February, 2006.

Helen M. Toor
Superior Court Judge