



Invention & Industry

# Trade Secret Subject Matter

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## Trade Secret - Subject Matter

### Requirements:

- Trade secret is not merely information that a business wants to keep secret (e.g., embarrassing information).
- Trade secrets must have independent economic value
- The economic value must be as a result of the secrecy.

## Examples:

- formulas
- recipes
- manufacturing methods
- industrial processes
- source code
- geological survey data
- customer lists

## What does “independent economic value” mean?

A plausible uniting concept:

- Information that a competitor could use to the same ends as the trade secret owner to obtain commercial advantage.

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Realothetical: Google’s search algorithms that come up with particularly relevant results for users. *Is there independent economic value?*

Yes, because Yahoo and Bing could use the search algorithms to the same ends to get a commercial advantage.

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Realothetical: A list of local customers who use gutter-cleaner services. *Is there independent economic value?*

Yes, because competing gutter-cleaners could efficiently target marketing to these customers, the same way the owner could to get a commercial advantage.

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Realothetical: The financial statements of Mars (candy company), including cash flow, assets, liabilities, profit & loss. *Is there independent economic value?*

No, because the financial statements help C-level officers manage Mars in a general way. Hershey could use them offensively to exploit Mars’s weaknesses.

But courts are split on whether financial statements can be trade secrets.

## Key takeaways

- Trade secret is not merely information that a business wants to keep secret (e.g., embarrassing information).
- Trade secrets must have economic value that comes from their secrecy.
- Classic examples are: formulas, recipes, manufacturing methods, industrial processes, source code, geological survey data.
- Uniting concept: Information that a competitor could use to the same ends as the trade secret owner to obtain commercial advantage.

## Confusion in the doctrine ...

- There is room to argue for a very broad conception of trade secret subject matter.
- This is because:
  - There is a lack of development of the doctrine.
  - Precedent is slippery, since a successful assertion of trade-secret status means a court decision won't say exactly what it is (otherwise, the secret would be out!).
  - Litigants are often non-adverse when courts rule on trade secret subject matter.
    - E.g., both parties to a business dispute want to keep everything away from the press, so they will stipulate to trying to treat a wide swath of discovery as trade secret.

## The fuzzy, unchecked boundaries of trade secret subject matter

- Because of doctrinal confusion and a lack of an adversarial dynamic in many proceedings, businesses can sometimes successfully assert trade secret status to avoid public disclosure of things that are not classical trade secrets.
- Examples:
  - Toxic emissions, effluents, pollutants.
  - Regular corporate financial data.