



Invention & Industry

# What Qualifies as a Trade Secret

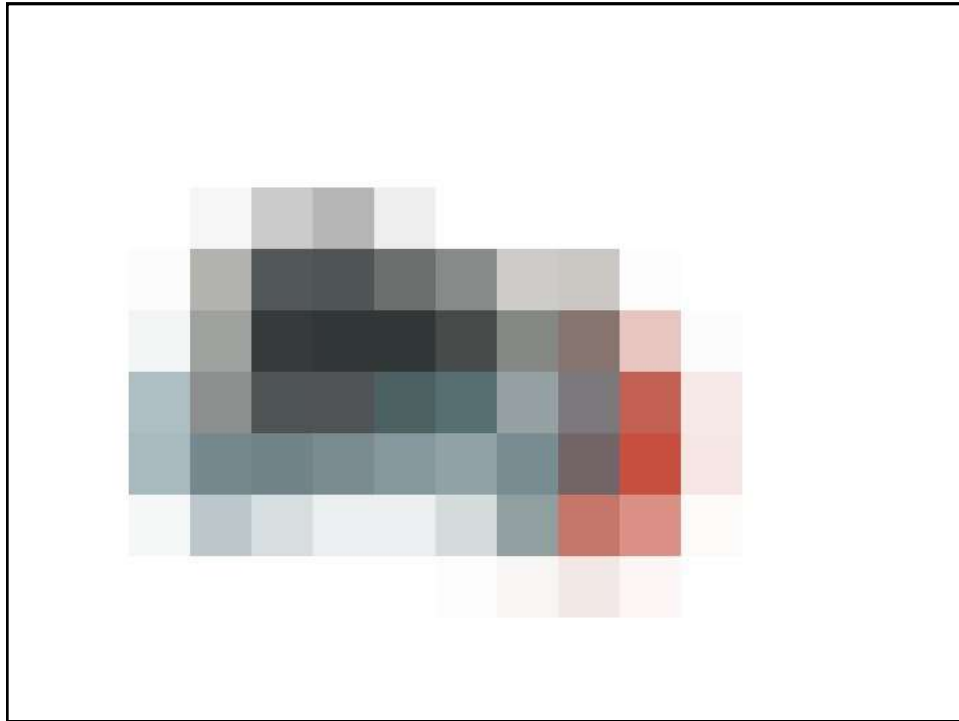
Eric E. Johnson

[ericejohnson.com](http://ericejohnson.com)



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Do you want to see a  
trade secret?



Do you want to see a  
trade secret?

**Too bad!!**  
**You don't get to!!**

# What makes something trade-secret-eligible subject matter?

## Trade Secret – Subject Matter

### Requirements:

- The trade secret must actually be secret (i.e., not generally known to those who could use it).
- Trade secrets must have independent economic value.
- The economic value must be as a result of the secrecy.
- There must be reasonable efforts to keep it secret.

DTSA definition of trade secret, 18 U.S.C. § 1839(3)  
the term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if--  
(A) the owner thereof has taken reasonable measures to keep such information secret; and  
(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

## Examples

formulas

recipes

manufacturing  
methods

industrial  
processes

source code

search

algorithms

geological  
survey data

customer lists

Here's some examples of things that pretty much everyone would agree qualify as potential trade secret subject matter.

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## Blackletter law

the information derives **independent economic value**, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

Here's some  
things to puzzle  
over ...

What makes a trade secret different from other secrets held by a business?

How do we distinguish true trade secrets from regular confidential information or “business intelligence”?

# Can an embarrassing secret be a trade secret?

## So what does “independent economic value” mean?

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**So what does “independent economic value” mean?**

My suggestion for a threshold for independent economic value test (FWIW):

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



**Let's be practical:** This is not a test courts use, mind you, but I think it has some good predictive value. If a putative trade secret passes this test, it's almost certainly in. If it doesn't, then whether the plaintiff succeeds is uncertain and may revolve around the context.

- executive salaries?
- lawsuit settlement terms?
- the identities of a firm's liability insurers?
- current cash reserves?
- past problems with quality control?
- an internal memo that says a company's growth is “de facto good” even though “maybe someone dies”?

*Can these be trade secrets?*

These things don't fit with the examples of classic trade secrets, but given the unpredictable and confused nature of trade secret doctrine and precedent, it is possible that a firm could be successful in claiming these things are trade secrets.





# Can a business philosophy be a trade secret?

Avery Dennison v. Kitsonas, 118 F.Supp. 2d 848 (S.D. Ohio 2000)



We conduct our daily business according to six core values:

- Integrity
- Service
- Teamwork
- Innovation
- Excellence
- Community

**This is Avery's business philosophy, according to what they put on their website in 2010!**

118  
2000)

It seems ridiculous to think *this* was the trade secret Avery was asserting Kitsonas had in 2000. So what could they have been referring to? A plausible answer is that they weren't really referring to anything at all in 2000.

The reality is that Avery didn't want Kitsonas taking away customers; they wanted to enforce the non-compete; and he's got our "business philosophy" is something they said to try to support this. The court was empathetic that the "theft" of customers was bad, and the court went along with Avery's rationale for why the non-compete was necessary and reasonable. Notice the court never even engaged with the question of "independent economic value." The court just said it was there.

### Does a putative trade secret have "independent economic value"? *Examples ...*

Google's search algorithms that come up with particularly relevant results for users.

*Is there independent economic value?*

Does a putative trade secret have  
“independent economic value”? *Examples ...*

Google’s search algorithms that come up with particularly relevant results for users.

*Is there independent economic value?*

Yes. Everyone would agree on this.

The transferability test notion, fwiw, says yes because Bing and Yahoo could use the search algorithms to the same ends to get a commercial advantage in the same way as Google does.

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A list of local customers who use rain-gutter cleaning services. *Is there independent economic value?*

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A list of local customers who use rain-gutter cleaning services. *Is there independent economic value?*

**Probably.** It might depend on some of the particulars. But if it is a good, useful list, and it's really secret, this shouldn't be a problem for IEV.

The transferability test notion, fwiw, could say yes because competing gutter-cleaners could efficiently target marketing to these customers, the same way the original list holder could, to get a commercial advantage.

Does a putative trade secret have  
“independent economic value”? *Examples ...*

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

I picked Mars, btw, because they are famously huge for a privately held company, and they are known for keeping their affairs secret.

Publicly traded companies need to make their financial statements publicly available. (Hershey's financial statements, for instance, are easy to find online.) Not so with privately held companies.

## Does a putative trade secret have “independent economic value”? *Examples ...*

The financial statements of Mars (candy company), including cash flow, assets, liabilities, profit & loss.

*Is there independent economic value?*

Hmmm. Well not under the transferability test notion, (again, fwiw) because the financial statements help C-suite officers manage Mars in a general way. Hershey’s CEO or CFO couldn’t use Mars’s financial statements to manage Hershey. Maybe Hershey could use them offensively to exploit Mars’s weaknesses, but the value they have to Mars doesn’t transfer. But courts are split on whether financial statements can be trade secrets. Some courts might say there is independent economic value and cite, for instance, the fact that the statements required money (accountant services) to produce. But many regard such a “sweat of the brow” theory as erroneous.

The screenshot displays the Frac Focus Chemical Disclosure Registry website. The header includes the logo and navigation links: Home / Welcome / Publications / News & Updates / Links. Below the header are several menu items: HYDRAULIC FRACTURING (HOW IT WORKS), GROUNDWATER PROTECTION, CHEMICAL USE, REGULATIONS BY STATE, FIND A WELL BY STATE, and FREQUENT QUESTIONS. The main content area is titled "Find a Well" and features a "Map Search" button. Below this is a "Search Options" section with a "Show/Hide" toggle. The search form includes the following fields:

- STATE: North Dakota (dropdown)
- COUNTY: Williams (dropdown)
- WELLS IN COUNTY: Choose a Well Name (dropdown)
- OPERATOR: Choose One (dropdown)
- JOB/SUBMITTED DATE: Job Start Date (calendar icon)
- DATE RANGE: Between (dropdown)
- RANGE START DATE: (calendar icon)
- RANGE END DATE: (calendar icon)
- FEDERAL WELL:
- INDIAN WELL:
- API WELL NUMBER: (text input)
- WELL NAME: (text input)
- CAS Number: (text input)
- INGREDIENT LIST: (text input)
- Clear Ingredient: (button)
- SEARCH: (button)
- RESET: (button)

Displaying 50 of 2063 Records

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API No.	Job Start Dt	Job End Dt	State	County	Operator	WellName
33-105-01693-00-00	12/9/2009	12/9/2009	North Dakota	Williams	StratOil Oil & Gas LP	Olson 10-15 #1H
33-105-01761-00-00	6/11/2010	6/11/2010	North Dakota	Williams	StratOil Oil & Gas LP	Owan 29-32 #1H
33-105-01834-00-00	12/28/2010	12/28/2010	North Dakota	Williams	XTO Energy/ExxonMobil	Helen 11X-5
33-105-01834-00-00	12/29/2010	12/29/2010	North Dakota	Williams	XTO Energy/ExxonMobil	Madisyn State 44X-1
33-105-01945-00-00	1/4/2011	1/4/2011	North Dakota	Williams	EOG Resources, Inc.	Round Prairie 010-1819H
33-105-01925-00-00	1/6/2011	1/6/2011	North Dakota	Williams	Hess Corporation	Bergstrom 2-28H
33-105-01919-00-00	1/17/2011	1/17/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Aimer 31X-6
33-105-01909-00-00	1/17/2011	1/21/2011	North Dakota	Williams	Hess Corporation	Hodenfield 15-23H
33-105-01909-00-00	1/23/2011	1/23/2011	North Dakota	Williams	Hess Corporation	GO-Hodenfield 15-23H
33-105-01942-00-00	2/1/2011	2/1/2011	North Dakota	Williams	Hess Corporation	GO Dahl 15-22H
33-105-01628-00-00	2/7/2011	2/7/2011	North Dakota	Williams	Hess Corporation	BL-Iverson 155-95-1819H-1
33-105-01631-00-00	2/10/2011	2/18/2011	North Dakota	Williams	Hess Corporation	TI-Ives-157-95 0106H-1 2
33-105-01908-00-00	2/10/2011	2/10/2011	North Dakota	Williams	Hess Corporation	Bergstrom 2-27H
33-105-01929-00-00	2/13/2011	2/13/2011	North Dakota	Williams	Hess Corporation	Raid 3-3H
33-105-01631-00-00	2/16/2011	2/16/2011	North Dakota	Williams	Hess Corporation	TI-Ives 157-95-0106H-1
33-105-01773-00-00	2/16/2011	2/16/2011	North Dakota	Williams	EOG Resources, Inc.	Round Prairie 009-3625H
33-105-01899-00-00	2/17/2011	2/17/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Michael State 31X-16
33-105-01951-00-00	2/18/2011	2/18/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Linda 41X-22
33-105-01943-00-00	2/24/2011	2/24/2011	North Dakota	Williams	Hess Corporation	Dustin Brose 2-29H
33-105-01948-00-00	2/26/2011	2/26/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Normark 24X-31
33-105-02361-00-00	3/2/2011	3/26/2011	North Dakota	Williams	Hess Corporation	Go-Hauge-156-97-2116H 1

### Hydraulic Fracturing Fluid Product Component Information Disclosure

Fracture Date:	12/9/2009					
State:	North Dakota					
County:	Williams					
API Number:	3310501693					
Operator Name:	BRIGHAM OIL & GAS LP					
Well Name and Number:	Olson 10-15 #1H					
Longitude:	-103.706774					
Latitude:	48.182739					
Long/Lat Projection:	NAD83					
Production Type:	Oil					
True Vertical Depth (TVD):	10,670					
Total Water Volume (gal):	74,268					

Hydraulic Fracturing Fluid Composition:

Trade Name	Supplier	Purpose	Ingredients	Chemical Abstract Service Number (CAS #)	Maximum Ingredient Concentration in Additive (% by mass)**	Maximum Ingredient Concentration in HF Fluid (% by mass)**	Comments
Fresh Water	Operator				100.00%	99.65325%	Density = 8.330
SAND - PREMIUM WHITE	Haliburton	Proppant	Crystalline silica, quartz	14808-60-7	100.00%	2.05592%	
VERSAPROD	Haliburton	Proppant	Aluminum silicate	1302-76-7	65.00%	4.46583%	
			Corundum	1302-44-86	65.00%	4.46583%	
CL-22 UC	Haliburton	Crosslinker	Potassium formate	580-29-4	60.00%	0.00000%	
CL-31 CROSSLINKER	Haliburton	Crosslinker	Potassium hydroxide	1310-58-3	5.00%	0.00000%	
			Potassium metaborate	13700-54-0	60.00%	0.00000%	
M-D-67	Haliburton	Buffer	Sodium hydroxide	1310-73-2	30.00%	0.00000%	
FR-66	Haliburton	Friction Reducer	Hydro-treated light petroleum distillate	84742-47-8	30.00%	0.00562%	
LOSURF-300M™	Haliburton	Surfactant	1,2,4 Trimethylbenzene	96-63-6	1.00%	0.00000%	
			Ethanol	66-17-9	60.00%	0.00712%	
			Heavy aromatic petroleum naphtha	81742-94-5	30.00%	0.02889%	
			Nazabulene	87-20-3	1.00%	0.00000%	
			Poly(2-(2-ethoxyethyl) alpha-(4-nonylphenyl) omega-hydroxy-, branched)	127087-87-0	10.00%	0.00992%	
ALDADICER 3 ANTIMICROBIAL	Haliburton	Corrosion Inhibitor	Glyburide	111-30-8	100.00%	0.00000%	
OptiKeen-WF™	Haliburton	Surfactant	Sodium percarbonate tetrahydrate	10486-00-7	100.00%	0.00293%	
OPTI FLO-1 DELAYED RELEASE BREAKER	Haliburton	Breaker	Ammonium persulfate	7727-54-0	100.00%	0.00000%	
			Crystalline silica, quartz	14808-60-7	30.00%	0.00000%	
WG-35 GELLING AGENT	Haliburton	Gelling Agent	Guar gum	9005-30-0	100.00%	0.00000%	
Bocidex 5000	JACAN	Antibacterial	Glyburide	111-30-8	50.00%	0.08353%	

			Water	7732-18-5	50.00%	0.08359%
			Methanol	67-56-1	0.50%	0.00084%
IWSI 3607	JACAM	Scale Inhibitor	Proprietary Component	Proprietary Component	100.00%	1.62880%
			Ethylene Glycol	107-21-1	100.00%	1.62880%
			Methanol	67-56-1	100.00%	1.62880%
IWOS 1N	JACAM	Oxygen Scavenger	Proprietary Component	Proprietary Component	100.00%	0.06731%
			Ethylene Glycol	107-21-1	100.00%	0.06731%
<p>* Total Water Volume sources may include fresh water, produced water, and/or recycled water  ** Information is based on the maximum potential for concentration and thus the total may be over 100%</p> <p>Ingredient information for chemicals subject to 29 CFR 1910.1200(j) and Appendix D are obtained from suppliers Material Safety Data Sheets (MSDS)</p>						