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Discovery of Confidential State Documents in Civil Proceedings

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DISCOVERY OF CONFIDENTIAL STATE DOCUMENTS IN CIVIL PROCEEDINGS

State ex rel. Von Hoffman Press, Inc. v. Saitz (*Von Hoffman Press* I)[1]
State ex rel. Von Hoffman Press, Inc. v. Saitz (*Von Hoffman Press* II)[2]

In two decisions likely to inspire further litigation, the Missouri Court of Appeals for the Eastern District removed two apparent barriers to discovery of confidential state documents. These cases have extensive policy implications. They support an inference that few statutes prohibiting disclosure of information obtained by the state will be interpreted to limit discovery in a judicial proceeding.

The underlying controversy commenced in 1976 when a use tax assessment of $60,000 was levied against plaintiff Von Hoffman Press, Inc. Seeking to annul the assessment, the plaintiff filed suit against the Director of Revenue, claiming the tax should have been collected from twenty-three "out-of-state" vendors from which it purchased merchandise. These companies, plaintiff urged, had sufficient contact with the state to trigger sales tax liability on the merchandise and exonerate plaintiff from the use tax.

In preparation for trial, the plaintiff served notice on the Director of Revenue, requesting that he appear for deposition with all sales, use, corporate, partnership, individual, and franchise tax returns filed by the twenty-three companies during the assessment period. At the same time, a subpoena was served on the Director of Employment Security commanding him to appear and produce all employment experience reports and all reports showing contributions to the unemployment compensation fund filed for each of the companies during the assessment years. The plaintiff maintained that these reports and returns would show the extent and nature of the companies' business activities in Missouri[3] and "tend to establish that . . . they should be paying a sales tax rather than . . . [plaintiff] paying a use tax."[4]

The Director of Revenue and the Director of Employment Security moved to quash the notice and subpoena. Each claimed he was prohibited

1. 604 S.W.2d 770 (Mo. App., E.D. 1980).
2. 607 S.W.2d 219 (Mo. App., E.D. 1980).
3. Brief for Relators at 9, 607 S.W.2d 219.
4. Suggestions in Opposition to Special Appearance and Motion to Quash Subpoena to Produce Documents of the Director of the Missouri Division of Employment Security at 1-2, Von Hoffman Press, Inc. v. Burris, No. 391317 (Cir. Ct., St. L. Cty., Mo., filed Feb. 9, 1977).

by statute from disclosing the requested information. Under Missouri Revised Statutes section 32.057,[5] it is a felony for the Director of Revenue to divulge information relative to any report or return filed with the Department of Revenue, except, *inter alia*, when the information is "directly involved" in a proceeding under Missouri revenue laws. As this statute was interpreted by the director, the only tax returns directly involved in a revenue proceeding are those filed by a party to the proceeding. Missouri Revised Statutes section 288.250[6] provides, with certain exceptions, that information filed with the Division of Employment Security is confidential and privileged. The Director of Employment Security contended that disclosure to a private party in a suit unrelated to the employment security laws is not included in any exception enumerated in the statute. Both directors' motions were sustained by the trial court, but the plaintiff petitioned for alternative writs of mandamus. In *Von Hoffman Press* I and *Von Hoffman Press* II, the eastern district court of appeals agreed with the plaintiff. In each case, it was held that the trial court's action exceeded its jurisdiction and that production of the documents must be compelled.[7]

At minimum, these decisions represent a slight, practical expansion in the scope of Missouri discovery. In a proceeding under the revenue laws of this state, Missouri Revised Statutes section 32.057[8] does not bar discovery from the Department of Revenue of tax returns filed by nonparties.[9] Likewise, Missouri Revised Statutes section 288.250[10] does not prohibit production of information filed with the Division of Employment Security if the information is relevent to a proceeding in which the Director of Revenue is a party.[11]

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5. (Cum. Supp. 1980). Plaintiff contended the case should have been decided under RSMo § 32.057.2(b) (Cum. Supp. 1980) because the underlying case, Von Hoffman Press, Inc. v. Burris, No. 391317 (Cir. Ct., St. L. Cty., Mo., filed Feb. 9, 1977), essentially was an action to *enforce* the revenue laws. Brief for Relators at 11, 607 S.W.2d 219. In the alternative, plaintiff argued that production should be compelled under RSMo § 32.057.2(c) (Cum. Supp. 1980) because the requested documents are "directly involved" in an action under the revenue laws. Brief for Relators at 12, 607 S.W.2d 219. The court declined to apply subsection 2(b) to the facts of this case, but awarded discovery under subsection 2(c). 607 S.W.2d at 222-23.

6. (Cum. Supp. 1980). It is not clear from the *Von Hoffman* I opinion which version of this statute was applied. The court cited RSMo § 288.250 (1969) but quoted *id.* (Cum. Supp. 1980). *See* 604 S.W.2d at 772 n.1. RSMo § 288.250 (1978) was in effect when production of the documents was refused, but *id.* (Cum. Supp. 1980) was effective when the alternative writ was made peremptory. The difference between the two versions is not relevant to this case.

7. 607 S.W.2d at 220; 604 S.W.2d at 772, 773.

8. (Cum. Supp. 1980).

9. 607 S.W.2d at 222-23.

10. (Cum. Supp. 1980).

11. 604 S.W.2d at 772, 773.

The *Von Hoffman Press* decisions are also consistent with a broader view. They reiterate the conclusion reached in early Missouri cases that public policies underlying state confidentiality statutes do not justify withholding information from judicial proceedings.[12] Almost certainly, these cases will be used to attack other statutes. Before they are accepted as modern precedent, however, a note of caution is in order. The *Von Hoffman Press* opinions do not point out that modern rules of civil procedure impel a balancing of policy interests that was unnecessary in the past.

When a party to a civil suit seeks discovery of confidential documents from the state, two important policies conflict. On one hand, there is a vital public interest in promoting exact and evenhanded administration of justice. This interest is furthered by allowing the broadest possible scope of discovery consistent with the notion of reasonable search and seizure.[13]

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12. *See* State *ex rel.* Ross v. Sevier, 334 Mo. 977, 984, 69 S.W.2d 662, 665 (1934); *In re* French, 315 Mo. 75, 84, 285 S.W. 513, 516 (En Banc 1926); *In re* Millspaugh, 307 Mo. 185, 193, 270 S.W. 110, 112 (En Banc 1925); Jones v. Giannola, 252 S.W.2d 660, 663 (Mo. App., St. L. 1952).

13. Missouri courts often have indicated that compulsory production of information that is irrelevant or immaterial to a suit can constitute an unreasonable search and seizure in violation of MO. CONST. art. I, § 15. *See* State *ex rel.* Cummings v. Witthaus, 358 Mo. 1088, 1092-93, 219 S.W.2d 383, 386 (En Banc 1949); State *ex rel.* Kansas City Pub. Serv. Co. v. Cowan, 356 Mo. 674, 679-80, 203 S.W.2d 407, 409-10 (En Banc 1947); State *ex rel.* Iron Fireman Corp. v. Ward, 351 Mo. 761, 766, 173 S.W.2d 920, 921-22 (En Banc 1943); State *ex rel.* St. Louis Union Trust Co. v. Sartorius, 351 Mo. 111, 119-20, 171 S.W.2d 569, 574 (1943); State *ex rel.* Mo. Broadcasting Co. v. O'Malley, 344 Mo. 639, 644, 127 S.W.2d 684, 685-86 (En Banc 1939); State *ex rel.* Schlueter Mfg. Co. v. Beck, 337 Mo. 839, 851-52, 85 S.W.2d 1026, 1032 (En Banc 1935); State *ex rel.* Chicago, R.I. & Pac. Ry. v. Wood, 316 Mo. 1032, 1039, 292 S.W. 1033, 1035-36 (En Banc 1927); State *ex rel.* Atchison, T. & S.F. Ry. v. Trimble, 254 Mo. 542, 557-58, 163 S.W. 860, 863-64 (En Banc 1914). When these decisions were rendered, however, the only information considered relevant and material to a suit was information that was admissible in evidence. *See* note 45 *infra*. In 1960, the scope of discovery in Missouri was expanded considerably, and MO. R. CIV. P. 56.01 now allows discovery not only of admissible evidence but also of information reasonably calculated to lead to the discovery of admissible evidence. Presumably, a court order commanding production of information not relevant to determination of a suit but likely to lead to discovery of admissible evidence would not be held to constitute an unreasonable search or seizure. The cases suggest, however, that there is a point at which valid constitutional objections to discovery orders might still be raised. The ripest case for testing in this area is one in which production of a document or tangible item, such as a computer tape, is requested, and only a small portion of the document or item contains admissible evidence or information reasonably calculated to lead to the discovery of admissible evidence. Under current Missouri rules, once a document or tangible thing has been requested or subpoenaed, limitations on discovery are entirely within the discretion of the trial court. MO. R. CIV. P. 56.01, 57.09, 58.01. The cases cited above, however, and the more recent decisions in State *ex rel.* Isbell v. Kelso, 442 S.W.2d 163 (Mo.

State policy favoring liberal discovery is codified in Missouri Rules of Civil Procedure 56.01, which generally grants civil litigants access to any information, not privileged, that is relevant to the subject matter of a suit.

On the other hand, there is a strong public interest in maintaining the confidentiality of certain state documents. Many important state programs, such as the collection of revenue, protection of children from abuse, supervision of health care, and industry regulation, depend, for their effectiveness, on ready and full disclosure of personal information to the state. If no restrictions are placed on public access to this information, invasion of privacy may result from full compliance with the law. By minimizing this undesirable effect, confidentiality statutes encourage full and voluntary participation, which is essential to the effectiveness of many programs.[14] State confidentiality statutes also further the public interest in minimizing state intrusion into the private lives of its citizens. These principles underlie more than thirty-five Missouri statutes that restrict disclosure of information acquired by the state.[15]

App., Spr. 1969) and State *ex rel.* Woods v. Kirkwood, 426 S.W.2d 690 (Mo. App., St. L. 1968) indicate that there may be occasions when MO. CONST. art. I, § 15 requires a protective order limiting discovery to that part of the document or item that is pertinent to the case.

14. See 8 J. WIGMORE, EVIDENCE § 2377, at 780 (rev. 1961 & Supp. 1981).

15. A number of statutes expressly permit state officers to disclose otherwise confidential information on court order. RSMo § 115.493 (1978) (voted ballots and other election materials); *id.* § 193.240 (illegitimacy); *id.* § 193.250 (original birth certificate after adoption); *id.* § 193.260 (original birth certificate after legitimation); *id.* § 198.032 (Cum. Supp. 1980) (personal records of convalescent, nursing, and boarding home residents); *id.* § 276.551 (applications and reports filed and inspections permitted under grain dealers law); *id.* § 351.665 (1978) (statements of corporate assets and liabilities); *id.* § 453.120 (files and records of court in adoption proceedings).

A greater number permit disclosure only when it furthers a specific purpose for which the information was acquired. *Id.* § 32.057 (Cum. Supp. 1980) (returns and reports filed with the Department of Revenue); *id.* § 58.449 (1978) (results of alcohol and drug tests conducted on deceased drivers by coroner); *id.* § 188.055 (Cum. Supp. 1980) (information obtained from abortion patients); *id.* § 189.085 (1978) (records concerning applications by and recipients of local health services); *id.* § 201.120 (treatment records maintained by crippled children's service); *id.* § 208.120 (information concerning applicants for and recipients of public assistance) (*but see* notes 29-32 and accompanying text *infra*); *id.* § 208.155 (information concerning applicants for and recipients of medical assistance); *id.* § 210.150 (Cum. Supp. 1980) (reports of and records concerning child abuse and neglect); *id.* § 276.615 (1978) (sales records of livestock dealers obtained by state veterinarian); *id.* § 285.015 (lists of employees furnished to municipal corporations for purpose of city earnings tax); *id.* § 288.250 (Cum. Supp. 1980) (information obtained by Division of Employment Security) (*but see Von Hoffman Press* I); *id.* § 549.151 (1978) (information obtained by probation and parole officers).

A few statutes place the decision whether to disclose largely within the discre-

The *Von Hoffman Press* controversy is not the first occasion on which the public policy favoring production of information in judicial proceedings and the public interest in maintaining the confidentiality of cer-

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tion of a state administrator. *Id.* § 219.061 (information about children maintained by Division of Youth Services); *id.* § 276.551 (Cum. Supp. 1980) (applications and reports filed and inspections permitted under grain dealers law); *id.* § 287.380 (accidents, injuries, and deaths reported by employers to Division of Workers' Compensation); *id.* § 320.235 (1978) (records kept by state fire marshal); *id.* § 335.091 (information obtained about licensees by state board of nursing); *id.* § 411.180 (Cum. Supp. 1980) (information obtained during inspections of grain warehouse books and records).

A number of statutes provide, without further explanation, that certain information is to be closed, kept confidential, or not to be disclosed or made public. *Id.* § 192.450 (1978) (data obtained from registration, inspection, and investigation of radiation sources); *id.* § 201.120 (treatment records maintained by crippled children's service); *id.* § 210.040 (optional blood test of pregnant women for syphilis); *id.* § 383.115 (1978) (reports of malpractice claims against Missouri insureds); *id.* § 386.480 (information furnished to public service commission); *id.* § 444.820 (Cum. Supp. 1980) (certain information submitted with application for surface coal mining permit); *id.* § 444.825 (portions of surface mine reclamation plans); *id.* § 610.100 (1978) (arrest records when no charge is filed within 30 days); *id.* § 610.105 (arrest records when case is nolle prossed, dismissed, or accused is found not guilty).

Id. § 610.025 provides that certain records may be closed: records of judge and jury deliberations and grand jury meetings; records of juvenile court, adoption, illegitimacy, and probation and parole proceedings; records pertaining to litigation and certain real estate transactions involving governmental bodies; records of the state militia and national guard; records of nonjudicial mental health proceedings; records of proceedings involving physical health; records regarding scholastic probation, expulsion, and graduation; records of welfare cases; and records relating to the hiring, firing, and promotion of government personnel.

Six statutes limit disclosure of information which would not be admissible evidence in a pending action. *Id.* § 148.100 (reports filed with the Division of Finance by banking institutions); *id.* § 148.200 (reports filed with the Division of Finance by credit institutions); *id.* § 335.091 (information obtained about licensees by state board of nursing); *id.* § 351.665 (information obtained from examination of corporate books and records by Secretary of State); *id.* § 355.485 (answers to interrogatories issued to corporations by Secretary of State); *id.* § 361.080 (Cum. Supp. 1980) (information obtained by Director of Division of Finance concerning banks, trust companies, and small loan businesses).

Finally, there are miscellaneous statutes that limit access to information in state custody. *Id.* § 195.290 (1978) (drug offense records); *id.* § 195.540 (results of narcotics addiction tests not usable against patient in criminal proceedings); *id.* § 211.321 (Cum. Supp. 1980) (juvenile court records and records of peace officers concerning children under 17 disclosed on order of juvenile court); 1980 Mo. Laws 623 (to be codified at RSMo § 260.430) (trade secrets discovered during hazardous waste management program not available to public); RSMo § 610.100 (1978) (arrest records).

tain documents have competed for judicial favor. In 1923, state law prohibited the Commissioner of Finance from disclosing information obtained in bank examinations, except "when . . . called as a witness in any criminal proceedings or trial in a court of justice."[16] The commissioner believed that this statute prohibited disclosure in all but criminal proceedings. He refused to provide evidence in a civil suit and was jailed for contempt. In *In re Millspaugh*,[17] the Missouri Supreme Court upheld the commissioner's sentence, reasoning that "[t]he purpose of the law . . . [is] not to hide legitimate evidence when the same is required by the courts in the disposition of even and exact justice as between litigants."[18]

Legislative response to this decision was immediate. Less than two months after *Millspaugh* was decided, the statute was amended to prohibit disclosure "except when . . . [the commissioner] is called on as a witness in any criminal proceedings or *criminal* trial . . . ."[19] Confronted in *In re French*[20] with this unequivocal manifestation of legislative intent, the Missouri Supreme Court struck down the enactment as contrary to article II, section 10 of the Missouri Constitution of 1875.[21] This section provided that "[t]he courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character . . . ."[22] If a litigant in a civil case is forbidden by statute to obtain evidence, the court ruled, then the power of the judiciary is impaired and a certain remedy is not afforded.[23] The court suggested that in an appropriate case nondisclosure might be justified on grounds of public policy, but found that no such justification appeared in *French*.[24]

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16. 1923 Mo. Laws 222, § 11679.
17. 307 Mo. 185, 270 S.W. 110 (En Banc 1925).
18. *Id.* at 193, 270 S.W. at 112.
19. 1925 Mo. Laws 230, § 11679 (emphasis added).
20. 315 Mo. 75, 285 S.W. 513 (En Banc 1926).
21. Now MO. CONST. art. I, § 14.
22. 315 Mo. at 83-84, 285 S.W. at 515-16. In *In re* French, 1925 Mo. Laws 230, § 11679 also was invalidated as a violation of U.S. CONST. amend. XIV, which forbids any state to make or enforce any law which denies the equal protection of the laws, and MO. CONST. art. IV, § 53 (1875) (now MO. CONST. art. III, § 40), which prohibited the General Assembly from passing any local or special law "granting to any corporation, association or individual any special or exclusive right, privilege or immunity." 315 Mo. at 81, 285 S.W. at 514. Section 11679 permitted the Commissioner of Finance to disclose information obtained from bank examinations to the federal reserve board and federal reserve banks, to the United States Comptroller of the Currency and his examiners, and to clearinghouses of the State of Missouri and their examiners. The court found there was no rational distinction between the federal reserve banks, boards, and state clearinghouses that were allowed access to state bank examination reports and other debtors, creditors, and interested persons who were not. *Id.* at 81-83, 285 S.W. at 514-15.
23. 315 Mo. at 83, 285 S.W. at 515.
24. *Id.* at 84, 285 S.W. at 516.

Eight years later, the likelihood that nondisclosure would be upheld on grounds of public policy diminished. At that time, the Commissioner of Securities was authorized by law to place in a confidential file "not open to the public any information which he deems in justice . . . should not be made public."[25] On the basis of this statute, the commissioner refused to comply with a court order directing him to allow the plaintiff in a suit to copy relevant documents. In *State ex rel. Ross v. Sevier*,[26] the Missouri Supreme Court ruled that although the public interest in promoting acquisition of full information by the state may justify keeping certain documents "from the prying eyes and hands of the general public," it does not justify placing evidence beyond the reach of the court.[27] In fact, the court added, any statute empowering the commissioner to keep evidence from a judicial proceeding would be vulnerable to the same constitutional attack that succeeded in *In re French*.[28]

In *Jones v. Giannola*,[29] the plaintiff brought an action to recover $1,400 she allegedly placed with the defendant for safekeeping. The defendant countered that the plaintiff's claim was a "figment of the imagination"; she had no such sum, but was, in fact, poor and had been receiving old age assistance for years. To support his allegations, the defendant caused a subpoena duces tecum to be served on the director of the local welfare office, commanding him to bring to court all welfare records pertaining to the plaintiff. At trial, the court refused to permit the director to testify, ruling that any testimony he might give could subject him to a misdemeanor prosecution. At that time, Missouri Revised Statutes section 208.120[30] made it unlawful for a state employee to "make known in any manner whatever to any person any information . . . relative to the identity of . . . recipients of old age assistance or the amount of assistance any recipient receives," except in certain public assistance proceedings. The St. Louis Court of Appeals affirmed the trial court's judgment on procedural grounds,[31] but admonished that while the statute forbids voluntary disclosures, it does not forbid disclosure of the contents of official old age assistance files in response to a subpoena duces tecum where the contents of the files are pertinent to a judicial inquiry.[32]

25. RSMo § 7739 (1929).
26. 334 Mo. 977, 69 S.W.2d 662 (1934).
27. *Id.* at 983-84, 69 S.W.2d at 665.
28. *Id.*
29. 252 S.W.2d 660 (Mo. App., St. L. 1952).
30. (1949).
31. 252 S.W.2d at 663.
32. *Id.* The court ruled that although the reason given by the trial court for excluding the records from evidence was incorrect, the error was not prejudicial because defendant had failed to show the contents of the records would be pertinent to the litigation. *Id.* The court offered its interpretation of the statute in dictum, but clearly indicated that had a proper offer of proof been made, the statute would not have barred production of old age assistance records. After the *Jones* decision, § 208.120 was amended to provide, "In any judicial proceedings, except

The only deviation in this line of cases is the 1977 Kansas City Court of Appeals decision in *State ex rel. Collins v. Donelson*.[33] The case involved a claim against a decedent's insurer by the beneficiary of an accidental death policy. Before trial, the plaintiff and the defendant joined in causing subpoenas duces tecum to be served on the county coroner and Director of the Division of Highway Safety. The subpoenas commanded production of the results of a blood test performed on the decedent by the coroner and fowarded to the division. The coroner and director refused to comply, citing Missouri Revised Statutes section 58.449.[34] This statute provides that the results of such tests "shall be used only for statistical purposes." In *Donelson*, the court declined to enforce the subpoenas, stating, "By use of the word 'only' the legislature has limited the use of the report and test results for statistical purposes solely, exclusively and for nothing else or more. . . . It inevitably follows that such report and test results cannot be made available to litigants or anyone else."[35]

Although none of these prior cases is mentioned in either *Von Hoffman Press* opinion, both decisions echo the *Millspaugh, French, Ross*, and *Jones* opinions issued many years before.

In *Von Hoffman Press* I, the decision to compel production of employment security documents rested on three gounds: (1) employment security information is not absolutely privileged; inspection by public employees, claimants, employing units, authorized representatives, and certain not-for-profit agencies is permitted; (2) the plaintiff did not intend to use the information for purposes of subverting the employment security laws; and (3) the court did not see how use of the information would affect honesty in reporting to the state.[36]

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such proceedings as are directly concerned with the administration of these programs, such information . . . [relating to applicants for and recipients of public assistance] shall be confidential and not admissible in evidence." RSMo § 208.120.1 (1978). In light of *Millspaugh* and *French*, the validity of this amendment is uncertain.

33. 557 S.W.2d 707 (Mo. App., K.C. 1977).

34. (Cum. Supp. 1975).

35. 557 S.W.2d at 710.

36. 604 S.W.2d at 772. These arguments notwithstanding, RSMo § 288.250 (Cum. Supp. 1980) does not appear to permit disclosure of employment security information to a private party in a suit unrelated to employment security laws. The statute provides that information obtained by the division of employment security from employing units shall be kept confidential and shall not be open to public inspection, except to public employees in the performance of their public duties, to claimants and employing units to the extent necessary for proper presentation of employment compensation claims and employer liability protests, and to authorized representatives of employing units on certain occasions. *Id.* concludes with the provision, "Any information obtained by the division in the administration of this law shall be privileged . . . ." The court did not explain its finding in terms of statutory language or legislative intent, so clarification of the theory underlying this decision must await future litigation.

In *Von Hoffman Press* II, the court was similarly unswayed by the argument that *complete* confidentiality is necessary to secure truthful disclosure of information to the state.[37] The primary purpose of Missouri Revised Statutes section 32.057,[38] according to the court, is to prevent voluntary disclosure of confidential information, not to prohibit production of necessary records in judicial proceedings.[39] Construing the statute so that "legitimate judicial inquiry is not limited," the court held that section 32.057 does not bar discovery from the Department of Revenue of documents that are relevant to a proceeding under state revenue laws.[40]

With the exception of *Donelson*, Missouri cases evidence a single theme. Statutes restricting access to information in possession of the state have not been allowed to impede production of evidence in judicial proceedings.[41] When possible, statutory language has been interpreted to per-

37. "[D]ishonesty is more directly deterred by the penalty provision . . . making violations of the law requiring returns a misdemeanor." 607 S.W.2d at 222.

38. (Cum. Supp. 1980).

39. 607 S.W.2d at 222.

40. *Id.* at 222-23.

41. *Von Hoffman Press* II; *Von Hoffman Press* I; State *ex rel.* Ross v. Sevier, 334 Mo. 977, 69 S.W.2d 662 (1934); *In re* French, 315 Mo. 75, 285 S.W. 513 (En Banc 1926); *In re* Millspaugh, 307 Mo. 186, 270 S.W. 110 (En Banc 1925). While public policies underlying state confidentiality statutes rarely have been deemed to justify withholding evidence from judicial proceedings, they have justified indefinite sequestration of information from public inspection. RSMO § 610.025 (1978) provides that records relating to the firing of a governmental body employee may be "closed" at the discretion of the governmental body. The statute is silent, however, on how long these records are to remain closed. In Wilson v. McNeal, 575 S.W.2d 802 (Mo. App., St. L. 1978), the plaintiff contended that a report compiled by the St. Louis Metropolitan Police Department during an investigation into the death of her husband while he was in police custody should have been made public after the case was concluded and no disciplinary action was planned. In denying the plaintiff's petition, the St. Louis Court of Appeals (which included Judge Dowd, who authored *Von Hoffman Press* I, and Judge Snyder, who authored *Von Hoffman Press* II) declared:

> If the purpose of the exemption is to permit candid, open and confidential discussion of personnel matters within a public governmental body, the purpose is defeated if members and informants know that, although the initial discussion and any record made are confidential, they are immediately open to the press and public once a decision is made or a vote taken. . . .
>
> Disclosure of the report would inhibit officers and citizens from divulging information in the future. . . .
>
> Meetings, records or votes closed as authorized under § 610.025(4) may remain closed indefinitely at the discretion of the supervising public governmental body.

575 S.W.2d at 811. The *Von Hoffman Press* decisions indicate that the plaintiff might have had more success if she had filed an action against the Board of Police Commissioners and requested discovery of the document.

mit disclosure.[42] With less flexible wording, courts have concluded that the legislature intended to prohibit only voluntary disclosure.[43] In the extreme case of an unequivocal statutory ban, the Missouri Supreme Court has indicated it will invoke the constitution to obtain evidence.[44]

Underlying all of these decisions is a determination that benefits obtained by compelling production of confidential documents in judicial proceedings outweigh any detrimental effects disclosure might have on personal privacy or honest reporting to the state. While this value judgment may have adequately reflected public priorities when *Millspaugh, French, Ross,* and *Jones* were decided, it needs refinement today.

Until 1960, no document was discoverable in Missouri unless it contained admissible evidence.[45] Discovery was not authorized without a court

42. *Von Hoffman Press* II, 607 S.W.2d at 221-22; *In re* Millspaugh, 307 Mo. 185, 193, 270 S.W. 110, 112 (En Banc 1925).

43. Jones v. Giannola, 252 S.W.2d 660, 663 (Mo. App., St. L. 1952) (dictum); State *ex rel.* Ross v. Sevier, 334 Mo. 977, 983-84, 69 S.W.2d 662, 665 (1934). This theory also may explain the *Von Hoffman Press* I decision. *See* note 36 *supra.*

44. State *ex rel.* Ross v. Sevier, 334 Mo. 977, 983-84, 69 S.W.2d 662, 665 (1934) (dictum); *In re* French, 315 Mo. 75, 81-84, 285 S.W. 513, 514-16 (En Banc 1926).

45. Courts may order parties to produce books or writings in their possession or power containing evidence. RSMo § 510.030 (1959) (on good cause shown); *id.* § 510.030 (1949) (same); 1943 Mo. Laws 353, § 86 (same); RSMo § 1075 (1939) (no mention of good cause); *id.* § 924 (1929) (same); *id.* § 1374 (1919) (same); *id.* § 1944 (1909) (same); *id.* § 737 (1899) (same); *id.* § 2177 (1889) (same); *id.* § 3644 (1879) (same); *id.* ch. 128, § 36 (1855) (same); 1849 Mo. Laws 98, § 3 (merger of law and equity); RSMo ch. 136, § 7 (1845); *id.* art. IV, § 5 (1835); 1 TERR. LAWS 851, § 44 (1822) (on good and sufficient cause shown); *id.* at 111 (1807) (same).

Courts may order parties to permit inspection and copying of documents containing evidence. RSMo § 510.030 (1959) (on good cause shown); *id.* § 510.030 (1949) (same); 1943 Mo. Laws 353, § 86 (same); RSMo § 1079 (1939) (no mention of good cause); *id.* § 928 (1929) (same); *id.* § 1378 (1919) (same); *id.* § 1948 (1909) (same); *id.* § 741 (1899) (same); *id.* § 2181 (1889) (same); *id.* § 3648 (1879) (same); *id.* ch. 128, § 40 (1855) (same); 1849 Mo. Laws 98, § 2 (same).

On order of the court, a subpoena may command production of documentary evidence on the taking of a deposition. RSMo § 492.280 (1959) (no mention of good cause); *id.* § 492.280 (1949) (same); 1943 Mo. Laws 353, § 142 (same).

Although no statute explicitly required that matter sought be *admissible* evidence, Missouri courts steadfastly implied such a requirement. *See* State *ex rel.* Chicago, R.I. & Pac. R.R. v. Riederer, 303 S.W.2d 71, 73-74 (Mo. En Banc 1957); State *ex rel.* Headrick v. Bailey, 365 Mo. 160, 164-65, 278 S.W.2d 737, 740-41 (En Banc 1955); Johnson v. Cox, 262 S.W.2d 13, 17-18 (Mo. 1953); State *ex rel.* Kansas City Pub. Serv. Co. v. Cowan, 356 Mo. 674, 681-82, 203 S.W.2d 407, 410-11 (En Banc 1947); State *ex rel.* Thompson v. Harris, 355 Mo. 176, 180, 195 S.W.2d 645, 647-48 (En Banc 1946); State *ex rel.* Williams v. Buzard, 354 Mo. 719, 728, 190 S.W.2d 907, 912 (En Banc 1945); State *ex rel.* Mo. Pac. R.R. v. Hall, 325 Mo. 102, 106, 27 S.W.2d 1027, 1028-29 (En Banc 1930); State *ex rel.* Evans v. Broaddus, 245 Mo. 123, 142, 149 S.W. 473, 478 (En Banc 1912); State

order.[46] During much of the state's history, good cause for production also was required.[47] In this context, ruling that a litigant was entitled to production or inspection of confidential documents authorized disclosure only of documents that were important to the litigant's case. Today, the same ruling has a far more sweeping effect.

Since Missouri's Supreme Court Rules of Civil Procedure became effective on April 1, 1960, documents sought need not be admissible in evidence.[48] It is sufficient that they are "relevant" or appear "reasonably calculated to lead to the discovery of admissible evidence."[49] No court order for discovery is required.[50] Good cause for production need not be shown.[51] To the extent the *Von Hoffman Press* decisions permit discovery in this modern sense, they authorize a greater incursion into confidential state files than any previous Missouri case. Caution should be exercised before these holdings are extended beyond their facts.

In concluding that the policies underlying state confidentiality statutes rarely justify withholding evidence necessary to a judicial proceeding, *Millspaugh*,[52] *French*,[53] *Ross*,[54] and *Jones*[55] are persuasive. Acquisition of a document in possession of the state may be essential to the ascertainment of truth, and production when *necessary* is not likely to jeopardize important state goals. An assertion that justice demands or policy favors exposing confidential documents to the full scope of modern discovery, however, is less persuasive. Permitting inspection of every document that is relevant or appears reasonably calculated to lead to the discovery of admissible evidence in any litigated case would all but

ex rel. Boswell v. Curtis, 334 S.W.2d 757, 760 & n.4 (Mo. App., Spr. 1960); State *ex rel.* Kroger Co. v. Craig, 329 S.W.2d 804, 806 (Mo. App., Spr. 1959); State *ex rel.* Land Clearance for Redev. Auth. v. Southern, 284 S.W.2d 893, 896-97 (Mo. App., K.C. 1955).

RSMo § 491.090 (1978) provides for summoning witnesses to testify and produce documents at trial. Although restrictions on documents discoverable before trial have been relaxed considerably, a witness at trial still can be compelled to produce only those documents that are admissible in evidence.

For a discussion of prestatutory discovery at common law and in equity, see 6 J. WIGMORE, EVIDENCE §§ 1845-47, 1857-58 (rev. 1976). For a discussion of the development of discovery in Missouri, see State *ex rel.* Schlueter Mfg. Co. v. Beck, 337 Mo. 839, 846-50, 85 S.W.2d 1026, 1029-31 (En Banc 1935); Comment, *The Production and Inspection of Documents, Papers, and Tangible Things in Missouri: A Comparison to the Federal Rules*, 1955 WASH. U.L.Q. 413.

46. *See* note 45 *supra*.
47. *See* note 45 *supra*.
48. MO. R. CIV. P. 56.01.
49. *Id.*
50. *Id.* 56.01, 57.09, 58.01.
51. *Id.* 56.01, 57.09, 58.01.
52. 307 Mo. at 193, 270 S.W. at 112.
53. 315 Mo. at 83-84, 285 S.W. at 515-16.
54. 334 Mo. at 983-84, 69 S.W.2d at 665.
55. 252 S.W.2d at 663.

eliminate any protection afforded personal information provided to the state. At some point, the importance of a document to the proceeding or the need for its discovery becomes sufficiently frail that the detriment of disclosure outweighs the benefit of discovery.

None of the recent Missouri cases happily accommodates these policy interests. Under the rule announced in *Donelson*, Missouri Revised Statutes section 58.449[56] precludes discovery of certain test results, no matter how vital to the ascertainment of truth or how minute the likelihood of harm.[57] Under the *Von Hoffman Press* holdings, in contrast, Missouri Revised Statutes sections 32.057[58] and 288.250[59] constitute no bar to discovery in certain cases.[60] Developing an approach that enables a balancing of policy interests in each case might produce more satisfactory results.

Under Missouri's current rules of civil procedure, a certain balancing of interests already is contemplated. Documents may be requested from parties to an action under Missouri Supreme Court Rule 58.01. After such discovery is requested, the party from whom it is requested or another party may petition the court for a protective order.[61] For good cause shown, the court may make "any order which justice requires" to protect the party from "annoyance, embarrassment, oppression, or undue burden or expense."[62] Under Missouri Supreme Court Rule 57.09, subpoenas may be issued to command production of documents by party and nonparty witnesses at a deposition. On "motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith," the court may "quash or modify the subpoena if it is unreasonable or oppressive."[63] While these rules may sufficiently balance the interests of most litigants, they may be inadequate to protect the public interest in minimizing state disclosure of confidential information. When discovery is requested from an officer of the state who is a party to the action, nonparties, such as the twenty-three companies affected by *Von Hoffman Press* II, have no standing to request protective orders.[64] When documents are subpoenaed for deposition, it is not clear whether nonparties who are not served, such as the twenty-three companies affected by *Von Hoffman*

56. (Cum. Supp. 1975).
57. State *ex rel.* Collins v. Donelson, 557 S.W.2d at 710.
58. (Cum. Supp. 1980).
59. (Cum. Supp. 1980).
60. 607 S.W.2d at 222-23; 604 S.W.2d at 773.
61. MO. R. CIV. P. 56.01(c). *Id.* 58.01 authorizes one party to request discovery from another party of documents that contain matters relevant to the action or that appear reasonably calculated to lead to the discovery of admissible evidence. Under *id.* 56.01, it is only the party from whom such discovery is sought or another party who may petition the court for a protective order.
62. *Id.* 56.01(c).
63. *Id.* 57.09(b).
64. *Id.* 56.01(b), 58.01.

Press I, have standing to file motions to quash.[65] In any event, there is no assurance in the rules that parties or nonparties who are not direct recipients of discovery requests will be notified in time to seek appropriate protection.[66] If discovery of confidential documents is governed solely by rules of civil procedure, disclosure of nonpublic information will be left largely to the discretion of state employees served with discovery requests. Under the rules of discovery, the burden is always on those seeking protection to convince the court discovery should be limited or denied.[67] Conscientious as they may be, most state employees do not have the time or expertise required to champion the specialized interests of all persons providing personal information to the state.

A better policy balance might be achieved by imposing a good cause requirement for discovery of confidential documents from the state. Unless the party requesting discovery of a document convinces a court that there is good cause for discovery of the document *and* good cause for its discovery from the state, production should be denied. When a document is important to a litigant's case, on the other hand, and unavailable from a source other than the state, discovery should be allowed. Under this two-tiered test of good cause, production of documents that are important to judicial proceedings would not be impeded.[68] By obliging litigants to seek documents from their source before approaching the state, the test would also assure those who provide information to the state an opportunity to defend requests for appropriate protective orders. Confidential state files thereby would be opened far enough to serve the interests of justice, but not so far as to allow unreasonable infringements on privacy or to deter ready and truthful disclosure of information to the state.

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65. *Id.* 57.09 provides for the issuance of subpoenas to compel the attendance at depositions of party and nonparty witnesses. The rule further provides:

> A subpoena may also command the person to whom it is directed to produce the . . . documents . . . designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may . . . quash or modify the subpoena if it is unreasonable or oppressive.

Id. Under this rule, standing to file motions to quash is not expressly reserved to deponents, and it is uncertain whether such a restriction would be implied. Clearly, nondeponent parties have standing to petition for protective orders under *id.* 56.01, but whether nondeponent nonparties may file motions to quash under *id.* 57.09 is uncertain.

66. *Id.* 56.01, 57.09, 58.01.

67. *Id.* 56.01, 57.09.

68. Under this test, tax returns, for example, rarely would be discoverable from the state. In most cases, they are freely discoverable from the filing individual or association. See State *ex rel.* Caloia v. Weinstein, 525 S.W.2d 779, 780 (Mo. App., St. L. 1975); State *ex rel.* Boswell v. Curtis, 334 S.W.2d 757, 762-63 (Mo. App., Spr. 1960); MO. R. CIV. P. 56.01.