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Can You Keep a Secret? You May Discover the Answer is Yes Under Missouri's Privilege for Trade Secrets

*State ex rel. Blue Cross and Blue Shield
of Missouri v. Anderson*¹

*The basic law of capitalism is you or I, not both you and I.*²

I. INTRODUCTION

Competition is at the heart of capitalism and part of what makes America great. There should be a reward for performing better than the next guy. To this end, it is not uncommon for our constitutions and lawmakers to "encourage" the innovative and risk takers of our society. For example, entire bodies of common law, in addition to state and federal statutory schemes, protect ideas, creations, works and the like through copyright protection, issuance of trademarks and patents, and "trade secret" status.³ "Trade secrets," by definition, constitute valuable information which allow one trade member to obtain an advantage over his or her competitors.⁴ As such, the one who acquires the secret wishes to shelter it. Under some circumstances, however, compromising this proprietary information may be appropriate in the interest of justice.

1. 897 S.W.2d 167 (Mo. Ct. App. 1995).

2. Karl Liebknecht, speech (1907), *reprinted in* THE MERRIAM-WEBSTER DICTIONARY OF QUOTATIONS 50 (1992).

3. *See generally* Title 15 of the United States Code [Trademarks]; Title 17 of the United States Code [Copyrights]; Title 35 of the United States Code [Patents]; Title 37 of the Code of Federal Regulations [Trademarks, Copyrights and Patents]; Chapter 417 of the Missouri Revised Statutes (1996) [Missouri's Uniform Trade Secret Act].

4. "Trade secret" is a term of art. Classification of information, formulas, patterns, etc. as "trade secrets" gives rise to certain protections afforded by law. *Black's Law Dictionary* provides a typical definition of "trade secret":

A "trade secret," as protected from misappropriation, may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives persons an opportunity to obtain an advantage over competitors who do not know or use it; or, it may be a formula or a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

BLACK'S LAW DICTIONARY 1494 (6th ed. 1990).

Other definitions of "trade secret" exist. *See infra* note 83.

This Note examines which factors give rise to classification of information, patterns, formulas and the like as "trade secrets." Missouri's legislature, in its Uniform Trade Secrets Act, has offered a noncomprehensive definition of "trade secret."⁵ While this and other proffered definitions provide some guidance, attempting to define any term of art cannot be done in absolute measures. As a result, courts are left with a great deal of discretion to write their own definitions on a case-by-case basis. In so doing, courts should closely scrutinize both the nature of the purported proprietary information and the policy implications of revealing or protecting "trade secrets," such as the thwarting of innovation, product and industry safety, technological development, and general principles of capitalism.⁶

In *State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson*, plaintiff, a competitor of defendant, claimed a need to discover certain of defendant's "trade secrets" to prosecute its case.⁷ This claimed need raised the questions of whether and to what extent information valuable to an adversary not only in the courtroom, but also in the marketplace, should be discoverable. The court found that the items at issue were "trade secrets," and plaintiff's need for the secrets did not outweigh the potential harm to the defendant in revealing them, and thus denied discovery.⁸

II. FACTS AND HOLDING

Two consolidated underlying actions comprised the instant case. The first, *St. John's Medical Center v. Blue Cross Hospital Services, Inc. of Missouri*, was filed October 4, 1974, seeking monetary damages and injunctive

5. See *infra* note 83. This Note examines the scope and discoverability of common law "trade secrets." In addition to common law protections, "trade secrets" are given rights under the Uniform Trade Secrets Act, which has been adopted in at least 41 jurisdictions, including Missouri (*see* MO. REV. STAT. §§ 417.450-417.467 (1994 & Supp. 1995)). For a discussion of the difference between common law actions and actions under the Uniform Trade Secrets Act, see Susan C. Miller, Comment, *Florida's Uniform Trade Secrets Act*, 16 FLA. ST. U. L. REV. 863 (1988).

6. For a discussion of the origins of the concept of "trade secrets" and theories of liability thereunder, see Edmond Gabbay, Note, *All the King's Horses—Irreparable Harm in Trade Secret Litigation*, 52 FORDHAM L. REV. 804 (1984); see also Christopher Rebel J. Pace, *The Case for a Federal Trade Secrets Act*, 8 HARV. J.L. & TECH. 427 (1995). For a discussion of Fifth Amendment implications of "trade secrets" (defining "trade secrets" as property entitled to Fifth Amendment protection), see John C. Janka, Comment, *Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets*, 54 U. CHI. L. REV. 334 (1987).

7. *State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson*, 897 S.W.2d 167, 170-71 (Mo. Ct. App. 1995).

8. *Id.* at 171.

relief.⁹ Several hospitals¹⁰ filed the second action on September 17, 1976, against Blue Cross and Blue Shield of Missouri ("Blue Cross"), Relator,¹¹ seeking relief similar to that in the first action.¹²

Blue Cross is a not-for-profit health care services corporation operating pursuant to Chapter 354 of the Missouri Revised Statutes.¹³ Blue Cross contracted to furnish specified health care benefits to persons it referred to as "members."¹⁴ These contracts contained a provision prohibiting members from assigning their health care benefits to health care providers.¹⁵ Blue Cross also contracted with certain health care providers, who provided services to Blue Cross's members.¹⁶

St. John's Medical Center ("St. John's"), although a health care provider, did not have a contract with Blue Cross.¹⁷ When St. John's furnished health care services to a person who had a contract with Blue Cross, it did not receive payment for those services directly from Blue Cross.¹⁸ Instead, Blue Cross's practice was to pay its members, and the members could then pay St. John's.¹⁹

St. John's, in an attempt to avoid this two-step process, received assignments of benefits from Blue Cross's members.²⁰ Blue Cross refused to honor those assignments.²¹ Thereafter, St. John's instituted the first underlying lawsuit seeking damages for Blue Cross's failure to honor various assignments by its members to St. John's and for an injunction requiring Blue Cross to pay assigned benefits directly to it in the future.²² On October 18,

9. *Id.* at 168.

10. The hospitals involved were West Plains Memorial Hospital, Cardwell Memorial Hospital, Inc., St. Francis Hospital and Southeast Hospital, Dexter Memorial Hospital, and Dunklin County Memorial Hospital. *Anderson*, 897 S.W.2d at 168.

11. A relator is a party in interest who is permitted to institute a proceeding in the name of the State when the right to sue resides solely in that sovereign. BLACK'S LAW DICTIONARY 1289 (6th ed. 1990).

12. *Anderson*, 897 S.W.2d at 168.

13. *Id.* Chapter 354 of the Missouri Revised Statutes governs the operation of certain health services corporations, health maintenance organizations, and prepaid dental plans. *See* MO. REV. STAT. §§ 354.010-354.725 (1994 & Supp. 1995)

14. *Anderson*, 897 S.W.2d at 168.

15. *Id.*

16. *Id.* The contracts with the health care providers cover various health care services with a specified amount payable to the provider directly from Blue Cross. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

1974, the trial court issued a temporary injunction requiring Blue Cross to include St. John's's name on checks issued to Blue Cross's members for benefits provided by St. John's.²³

On February 28, 1994, St. John's served a subpoena *duces tecum*²⁴ upon an officer of Blue Cross seeking to have certain documents (listed below) produced at a deposition.²⁵ After various filings, hearings, and motions, the trial court entered a protective order which limited disclosure of said documents to the counsel and specified officials of St. John's.²⁶ Before producing these documents, Blue Cross filed a Motion for Reconsideration, which the circuit court denied.²⁷ Blue Cross then filed a Petition for Writ of Prohibition.²⁸ The Southern District granted a preliminary order staying production of the documents.²⁹

Blue Cross's writ of prohibition sought to prevent the circuit court from allowing St. John's access to several documents: (1) the current pricing arrangements between Blue Cross and various hospitals in a thirteen-county area in Southwest Missouri; (2) studies of the relative costs of health care at hospitals in that area; and (3) a provision of a 1994 contract between Blue Cross and Lester E. Cox Medical Center ("Cox Medical Center").³⁰

Blue Cross contended that officials at St. John's having access to the disclosed documents had formed a corporation to establish a competitive network of health care providers in Southwest Missouri which would compete with Blue Cross.³¹ Therefore, Blue Cross contended the requested documents contained confidential and proprietary business information, the disclosure of which would cause Blue Cross irreparable harm. Thus, Blue Cross argued that prohibition of production of the documents should lie.³² Cox Medical Center also protested disclosure of the information.³³ Conversely, St. John's contended the documents were relevant to the

23. *Id.*

24. A subpoena *duces tecum* is a court process initiated by a party in litigation compelling production of specific documents. BLACK'S LAW DICTIONARY 1426 (6th ed. 1990). See also MO. SUP. CT. R. 58.01 (1996).

25. *Anderson*, 897 S.W.2d at 169.

26. *Id.*

27. *Id.*

28. *Id.* See *infra* Section III.C.2 for a discussion of writs of prohibition.

29. *Anderson*, 897 S.W.2d at 169.

30. *Id.*

31. *Id.*

32. *Id.*

33. Cox Medical Center, a third party to the lawsuit, was a hospital in competition with St. John's. *Id.* at 171.

underlying action, and that a specific need existed for them.³⁴ Thus, St. John's argued the documents should have been discoverable.³⁵

The Southern District ruled its preliminary order should be made absolute, holding that prohibition of discovery of the documents should lie as the documents were confidential ("trade secrets"), and the risk of irreparable harm and the invasion of non-party privacy rights outweighed St. John's' need for the requested documents.³⁶

III. LEGAL BACKGROUND

A. Introduction

By definition, a lawsuit is an adversarial process. As a result, parties to a suit will have competing interests. Recognizing this potential for conflict, the rules of discovery strive for compromise in many situations. The following two rules illustrate this attempt. Generally, a party to a lawsuit may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the pending suit.³⁷ However, as an exception to this general rule, a court can issue a protective order precluding a party from obtaining otherwise discoverable information.³⁸ Such an order might be issued to protect against the disclosure of a "trade secret" or other proprietary information.³⁹

34. *Id.* at 170-71. *See infra* Section IV.B.

35. *Anderson*, 897 S.W.2d at 170-71.

36. *Id.* at 171.

37. MO. SUP. CT. R. 56.01(b)(1) (1996). Rule 56.01(b)(1) reads:

In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

38. MO. SUP. CT. R. 56.01(c) (1996). Rule 56.01(c) reads:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden, or expense

39. MO. SUP. CT. R. 56.01(c)(7) (1996). Rule 56.01(c)(7) reads:

B. Scope of Discovery

As stated previously, Missouri Supreme Court Rule 56.01(b)(1) permits discovery by a party to the lawsuit of any matter, not privileged, which is relevant to the lawsuit.⁴⁰ Thus, under the plain language of Rule 56.01, two requirements exist for obtaining discovery: (1) the item sought to be discovered must be relevant; and, (2) the item sought to be discovered must not be privileged. While the balance of this Note focuses on the latter requirement, a brief discussion of the former requirement may be beneficial. Under Rule 56.01(b)(1), the term "relevant" is defined broadly to include material "reasonably calculated to lead to the discovery of admissible evidence."⁴¹ The Federal Rules of Evidence define "admissible evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁴² However, as alluded to earlier and as Rule 56.01 makes clear, not all relevant evidence is discoverable.

[T]hat a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

Protective orders might be issued and provide that:

- (1) discovery not be had;
- (2) that discovery be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition after being sealed by be opened only by order of the court; or
- (7) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

40. See *supra* note 37 for the text of MO. SUP. CT. R. 56.01(b)(1).

41. *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. 1995).

42. FED. R. EVID. 401.

C. When Should Relevant Matters not be Discoverable?

1. Protective Orders

Upon motion of a party to the lawsuit or someone from whom discovery is sought, a court may issue a protective order limiting or precluding discovery of certain matters.⁴³ As the language of Rule 56.01(c) and other discovery rules suggest, a court has substantial discretion in the administration of discovery rules.⁴⁴ If a party (or a non-party from whom discovery is sought) feels that a discovery request should not be complied with, it can seek a protective order under Rule 56.01(c).⁴⁵ A protective order might limit or altogether prohibit discovery.⁴⁶

The issuance of a protective order in discovery matters involves a fact specific inquiry.⁴⁷ In so doing, courts frequently will consider the conflicting interests of the interrogator and the respondent.⁴⁸ While the rules allow discovery of any relevant matter, not privileged,⁴⁹ they do not contemplate that all matters not privileged and relevant will be discoverable.⁵⁰ As a result, in ruling on objections to discovery requests, trial judges must consider not only questions of privilege and relevance, but should also balance the need of the interrogator to obtain the information against the respondent's burden in furnishing it.⁵¹ Therefore, even if discoverable information is sought, upon objection the court should consider whether the information can be adequately furnished in a manner less intrusive, less burdensome, or less expensive than that designated by the requesting party.⁵² While courts have considerable discretion in issuing a protective order, that discretion is not

43. MO. SUP. CT. R. 56.01(c). See *supra* note 38 for the text of Rule 56.01(c).

44. State *ex rel.* Plank v. Koehr, 831 S.W.2d 926, 927 (Mo. 1992). See *supra* note 38 for the text of Rule 56.01(c).

45. *Id.* See *supra* note 38 for the text of Rule 56.01(c).

46. MO. SUP. CT. R. 56.01(c)(7). See *supra* note 39. For a discussion of the nature of protective orders in the context of trade secret cases, see Gabbay, *supra* note 6, at 815.

47. State *ex rel.* Charterbank Springfield, N.A. v. Donegan, 658 S.W.2d 919, 923 (Mo. Ct. App. 1983).

48. State *ex rel.* Hoffman v. Campbell, 428 S.W.2d 904, 906 (Mo. Ct. App. 1968).

49. MO. SUP. CT. R. 56.01(b).

50. See MO. SUP. CT. R. 56.01(c); see *supra* note 38. See also State *ex rel.* Blue Cross and Blue Shield of Missouri v. Anderson, 897 S.W.2d 167, 169 (Mo. Ct. App. 1995).

51. Boswell v. Curtis, 334 S.W.2d 757, 763 (Mo. Ct. App. 1960).

52. See State *ex rel.* Albert v. Adams, 540 S.W.2d 26, 30-31 (Mo. 1976).

absolute, and an improper decision may be barred through the issuance of a writ of prohibition. The writ, as discussed below, can enjoin a court from acting in a certain fashion.

2. Writs of Prohibition

Writs of prohibition are closely associated with the issuance of protective orders. When the trial court either grants or fails to grant a protective order, an aggrieved person may seek to change this result by filing a writ of prohibition against the court. The writ of prohibition is an extraordinary judicial remedy whereby a court or official about to commit an act judicial in nature is ordered not to do so, on the ground that such court or official is acting without or in excess of its jurisdiction.⁵³ Courts take the view that writs are to be used with great caution and forbearance and only in cases of extreme necessity.⁵⁴ Prohibition should not be used as a substitute for appeal, and it should not be used to adjudicate grievances that may be adequately redressed in the ordinary course of judicial proceedings.⁵⁵

When seeking a writ of prohibition, the relator⁵⁶ petitions a superior court to hear and decide whether the lower court or official has 'jurisdiction' to pursue the lower court action.⁵⁷ In response to the petition, the superior court issues a preliminary writ of prohibition to the lower court or official to show why the writ should not be made permanent.⁵⁸ A party opposing the writ will usually file a return to the preliminary order to show cause why it should not lie, or he may simply move to dismiss or quash the preliminary order.⁵⁹ Issuance of the preliminary order is basically a formality as the

53. *State ex rel. Douglas Toyota v. Keeter*, 804 S.W.2d 750, 752 (Mo. 1991). See also Note, *The Writ of Prohibition in Missouri*, 1972 WASH. U. L.Q. 511 [hereinafter *Prohibition in Missouri*].

54. *Keeter*, 804 S.W.2d at 752. See also *infra* note 57.

55. *Keeter*, 804 S.W.2d at 752. See also *infra* note 57.

56. See *supra* note 11. A relator can be a party to the suit or a third party. *Prohibition in Missouri*, *supra* note 53, at 513.

57. See *Prohibition in Missouri*, *supra* note 53, at 514. Typically, there are three situations where superior courts have found that an inferior court has exceeded its "jurisdiction" and thus have issued a writ prohibiting said action. The first is where the inferior court lacks either personal or subject matter jurisdiction. Second, a writ may issue where there exists a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated. Third, a writ may issue, even though there is no clear abuse of discretion or lack of personal or subject matter jurisdiction, when there is no adequate remedy on appeal. *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. 1986).

58. See *Prohibition in Missouri*, *supra* note 53, at 514.

59. See *Prohibition in Missouri*, *supra* note 53, at 514.

superior court still must decide whether to make the order absolute, or, alternatively, to quash the preliminary order.⁶⁰

Examination of several prior cases may help explain the somewhat equivocal standards laid out above. *State ex rel. Charterbank Springfield, N.A. v. Donegan*⁶¹ involved a dispute over claimed deficiencies under a promissory note. The plaintiff sought to depose defendant, who lived in the State of California, at plaintiff's attorney's office in Springfield, Missouri.⁶² Defendant claimed through his attorney that he was physically and financially unable to travel to Missouri.⁶³ Defendant sought a protective order to strike the deposition notice or have plaintiff pay defendant's travel and lodging expenses in attending the deposition.⁶⁴ The trial court granted an order forbidding plaintiff from compelling defendant to appear in Missouri for the deposition unless plaintiff paid defendant's expenses.⁶⁵ Plaintiff petitioned for a writ of prohibition, which the Southern District granted, holding that the trial court abused its discretion in entering defendant's protective order.⁶⁶ The Southern District stated the proper order would have been, if defendant was going to be in Missouri for the trial, then he must, at no expense to plaintiff, arrive a sufficient time in advance of the trial date to allow for the taking of his deposition by plaintiff.⁶⁷

*State ex rel. Albert v. Adams*⁶⁸ presents another prohibition case in the context of discovery. In *Adams*, plaintiffs sought an injunction to prevent defendant from trespassing across their land.⁶⁹ Defendant admitted to use of a portion of plaintiffs' land but claimed such use was based on a deed for a "private roadway" she was granted from plaintiffs' predecessor in title.⁷⁰ Both parties admitted the existence of the easement for the private roadway but differed as to the scope of the easement.⁷¹ During the injunction proceeding, plaintiffs served interrogatories on defendant, asking for a legal description by metes and bounds of the claimed "private roadway."⁷² Defendant's answer to the interrogatory stated she was unable to do so as she

60. *See Prohibition in Missouri, supra* note 53, at 516.

61. 658 S.W.2d 919 (Mo. Ct. App. 1983).

62. *Id.* at 920.

63. *Id.* at 920-21.

64. *Id.* at 921.

65. *Id.* at 922.

66. *Id.* at 924.

67. *Id.* at 923.

68. 540 S.W.2d 26 (Mo. 1976).

69. *Id.* at 28.

70. *Id.*

71. *Id.* at 29.

72. *Id.*

had no survey available and was not trained to survey the property herself.⁷³ Plaintiffs responded by moving for summary judgment, claiming defendant's answers were evasive and thus should have been treated as a failure to answer.⁷⁴ The trial judge granted the motion and defendant petitioned for a writ of prohibition.⁷⁵

The Missouri Supreme Court made absolute its preliminary writ of prohibition barring the entry of summary judgment.⁷⁶ The court found the sole objective of the interrogatories was to force defendant to have the roadway surveyed so that the result of said survey would be available to plaintiffs.⁷⁷ The court stated that not only had plaintiffs failed to show they had a substantial need for the survey, but more importantly, plaintiffs failed to show they were unable to obtain the same themselves.⁷⁸ Thus, forcing defendant to obtain the survey would expose her to unwarranted annoyance, expense, and oppression.⁷⁹

As the cases discussed above illustrate, in the context of discovery matters, justification for issuing a writ of prohibition exists when the trial court has abused its discretion and/or there is no adequate remedy on appeal.⁸⁰ Consider the following as a further example of this. If an item sought to be discovered is in fact a trade secret or other confidential information, and a party does discover the item, it is extremely difficult, if not impossible, to retroactively correct the error on appeal, as the mere revelation of a trade secret destroys its protected status.⁸¹ As discussed below, in the case of trade secrets, the inherent conflict between relevance and confidentiality presents competing issues of privilege and trial preparation, and also pits the courtroom against the marketplace.

73. *Id.*

74. *Id.* at 28-29.

75. *Id.* at 29.

76. *Id.* at 31.

77. *Id.* at 29-30.

78. *Id.* at 30.

79. *Id.*

80. *See Prohibition in Missouri*, *supra* note 53, at 524. *See also State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson*, 897 S.W.2d 167, 169 (Mo. Ct. App. 1995).

81. *See generally Anderson*, 897 S.W.2d at 169-71. *See also infra* note 105.

D. "Trade Secrets"

1. Privileged or Discoverable?

Rule 56.01(c)(7) provides in part that a court, for good cause shown, may make an order preventing or limiting the revelation of a "trade secret" or other confidential research, development, or commercial information.⁸² Courts have generally examined the following factors to determine whether information is in fact a "trade secret": (1) the extent to which the information sought is known outside of the business; (2) the extent to which the information sought is known to those involved in the business; (3) the extent of the measures taken to guard the secrecy of the information sought; and (4) the value of the information sought to the business and its competitors.⁸³

82. MO. SUP. CT. R. 56.01(c)(7).

83. *Cuno, Inc. v. Pall Corp.*, 117 F.R.D. 506, 508 (E.D.N.Y. 1987). The *Anderson* court noted that this is the standard federal courts have adopted when applying Federal Rule of Civil Procedure 26(c). Moreover, Missouri Supreme Court Rule 56.01(c)(7) is identical to Rule 26(c), and apparently was derived from it. Therefore, federal law is strong, persuasive authority in interpreting the meaning of the Missouri rule. *Anderson*, 897 S.W.2d at 169-70. Other factors courts have considered in determining whether information is in fact a "trade secret" include: the amount of effort or money expended by the business owner in developing the information, and the ease or difficulty with which the information could be properly acquired or duplicated by others. *Ultra-Life Labs., Inc. v. Eames*, 221 S.W.2d 224, 232 (Mo. Ct. App. 1949).

In addition to the factors courts look at in determining whether information is a trade secret, it may be helpful to offer an actual definition for "trade secrets." RESTATEMENT OF TORTS § 757 (1939) defines a "trade secret" as:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or do not use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally, it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or

A finding that information is a "trade secret" does not end the inquiry. There is no *per se* rule that "trade secrets" are not discoverable.⁸⁴ In order to avoid or limit discovery of a trade secret, the party seeking protection must establish that the information sought is indeed a "trade secret" and then demonstrate that its disclosure might be harmful.⁸⁵ Once the party seeking protection meets these requirements, the burden shifts to the other party to

catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

See *United States v. International Business Machines*, 67 F.R.D. 40, 46-47 (S.D.N.Y. 1975); *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 18-19 (Mo. 1966) (en banc).

Additionally, even if the subject matter meets the definition of a "trade secret," before receiving "trade secret" status, the subject matter must have been treated as such by its proprietor. RESTATEMENT OF TORTS § 757 (1939) offers the following insights into the secrecy of a "trade secret":

The subject matter of a trade secret must be secret. Matters of public knowledge or of a general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. . . .

The Missouri General Assembly also has defined "trade secrets," at least for the purpose of Missouri's Uniform Trade Secret Act, incorporating both the subject matter and secrecy requirements. A "trade secret" is defined therein as:

information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process, that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

MO. REV. STAT. § 417.453(4) (Supp. 1995).

For a discussion of the difference between the Restatement definition of "trade secret" and the Uniform Trade Secret Act's definition of "trade secret," see Miller, *supra* note 5, at 870-76; see also Gale R. Peterson, Symposium, *Trade Secrets In An Information Age*, 32 HOUS. L. REV. 385 (1995).

84. *Cutler v. Lewiston Daily Sun*, 105 F.R.D. 137, 140 (D. Me. 1985).

85. *Id.*

establish that discovery of the secret is relevant and necessary to the action.⁸⁶ If the party seeking discovery fails to establish the relevancy of or its need for the information sought, then discovery should be denied.⁸⁷ However, if the party seeking discovery meets its burden, it is then within the discretion of the trial court to decide whether the need for the information sought outweighs the harm of disclosure.⁸⁸

*Hartley Pen Company v. United States District Court for the Southern District of California, Central Division*⁸⁹ provides a classic example of a "trade secret" case. In *Hartley*, plaintiff (Hartley) manufactured ball point pens containing cartridges of ink made under a "secret" formula belonging to a third party to the suit (Formulabs).⁹⁰ In manufacturing the ink used in its pens, plaintiff also used dye made by the defendant (du Pont).⁹¹ Plaintiff alleged that defendant supplied defective and unmerchantable dye lots and suffered damages as a result thereof.⁹² Defendant, purportedly in aid of one of its defenses, served interrogatories upon plaintiff to learn Formulabs' "secret" ink formula as well as certain of Formulabs' "secret" testing procedures.⁹³ Although plaintiff objected to said discovery, the district court ordered plaintiff to answer the interrogatories.⁹⁴ Plaintiff petitioned for writ of prohibition to preclude the order requiring disclosure of the "secret" ink formula and testing procedures.⁹⁵

The Ninth Circuit held that the ink formula and testing processes were "trade secrets" and that their revelation would cause irreparable harm. Therefore, plaintiff was entitled to some form of relief.⁹⁶ However, the court remanded to allow defendant to establish that the information it sought was relevant and necessary to the prosecution of its defense.⁹⁷ On remand, the district court found discovery of the secret ink and testing procedures was both relevant and necessary to the defense and thus allowed discovery.⁹⁸ However, the district court allowed only limited discovery. Namely, the "trade secrets" could be examined by no more than five agents of defendant

86. *Id.*

87. *Id.*

88. *Id.*

89. 287 F.2d 324 (9th Cir. 1961).

90. *Id.* at 325.

91. *Id.*

92. *Id.*

93. *Id.* at 325-26.

94. *Id.* at 325.

95. *Id.*

96. *Id.* at 330.

97. *Id.* at 331-32.

98. *Formulabs, Inc. v. Hartley Pen Co.*, 318 F.2d 485, 494 (9th Cir. 1963).

who were permanently enjoined from revealing any part of the secrets, or any facts likely to lead to their revelation, except as may reasonably have been needed during the trial.⁹⁹

Hartley involved a "secret" ink formula produced by research and development and capital investment by a company. "Trade secrets" do not always involve matters that are this unique or seemingly proprietary. When these types of "secrets" are at issue, the party seeking protection may have a more difficult time satisfying its burden showing that the information is in fact a trade secret and its revelation would be harmful. For example, in *Cuno, Inc. v. Pall Corporation*,¹⁰⁰ the defendant wanted to protect certain documents plaintiff sought to discover. Defendant claimed the documents were internal proprietary documents containing valuable confidential information generated by its scientists.¹⁰¹ The court found that defendant did not show good cause that the documents should be protected. The court indicated that conclusory statements that documents were maintained as internal proprietary documents and contained valuable confidential technical information were not sufficient to show good cause.¹⁰² Additionally, the court found defendant had failed to specifically identify a clearly defined harm associated with disclosure of the documents.¹⁰³ While the court found the documents were not confidential, it still provided that plaintiff should not use the information it sought outside of the litigation at issue.¹⁰⁴

2. Secrecy: Once a "Trade Secret," Always a "Trade Secret?"

Even if the subject matter of a purported trade secret meets the definition of a "trade secret," if it is not guarded in some manner by its proprietor, it will not receive the protection afforded "trade secrets."¹⁰⁵ Failure to guard the

99. *Id.*

100. 117 F.R.D. 506 (E.D.N.Y. 1987).

101. *Id.* at 507.

102. *Id.* at 508.

103. *Id.*

104. *Id.*

105. RESTATEMENT OF TORTS § 757 (1939); *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 22 (Mo. 1966) (en banc). See also *supra* note 83. See generally Donald M. Zupanec, Annotation, *Disclosure of Trade Secret as Abandonment of Secrecy*, 92 A.L.R.3d 138 (1979) (disclosure of secret information results in abandonment of "trade secret" status).

information may be a result of an omission by the proprietor,¹⁰⁶ or it may be that the information is of a type that simply cannot be guarded.¹⁰⁷

Although disclosure of a "trade secret" by its proprietor effectively destroys its status as such, certain instances exist where the secret will remain protected notwithstanding limited disclosure. For example, a proprietor may freely communicate the secret to employees involved in its use.¹⁰⁸ Additionally, disclosure to one in a confidential relationship with the proprietor will not destroy the protection afforded the secret.¹⁰⁹

106. *National Rejectors*, 409 S.W.2d at 22, provides an example. In that case the plaintiff, National Rejectors ("National"), claimed that the design drawings of certain products (slug rejectors and electrical coin changers) it designed and manufactures were proprietary because the dimensioning shown on said design drawings, along with substantial research and development toward refining said products, allowed National to manufacture the products with a greater degree of accuracy, with a lesser degree of tolerance and with a greater efficiency than similar devices manufactured by National's competitors. *Id.* at 17. The court found that National failed to take any steps at its plant to keep design drawings secret and confidential. *Id.* at 22. National's engineers and other personnel were not called upon to sign agreements not to compete with National, nor were National's employees told that anything about National's products were regarded as secret or confidential. *Id.* Therefore, the design drawings were not afforded "trade secret" status. *Id.* at 23-24.

107. If this is the case, then the information or product likely was never even a proper subject matter to be considered a "trade secret" in the first instance. In *National Rejectors*, 409 S.W.2d at 20, there was testimony that the products at issue were of a type that could be easily taken apart and studied, and that if this were done, then the information National regarded as confidential (the dimensioning of the product) could be readily obtained. The court suggested that this evidence could establish that the drawings were not in fact trade secrets. *Id.*

108. *National Rejectors*, 409 S.W.2d at 19. *See also supra* note 83.

109. *Reddi-Wip, Inc. v. Lemay Valve Co., Inc.*, 354 S.W.2d 913, 917 (Mo. Ct. App. 1962). In *Reddi-Wip*, the court found the confidential relationship arose from an employment contract signed by the employer and employee requiring the employee to assign the rights to an invention to the employer. Thus, the employee could not then reveal the information without liability to the employer. *Id.* at 916. In such a case, liability may exist against the one who has revealed the trade secret if it can be shown that: (1) a "trade secret" existed, (2) the "trade secret" was communicated to another, (3) the communication occurred while the communicator was in a position of trust and confidence, and (4) the proprietor of the "trade secret" was injured thereby. *Id.* at 917.

IV. INSTANT DECISION

In *State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson*, three different documents were sought to be discovered: (1) the current pricing arrangements between Blue Cross and various hospitals in a thirteen-county area in Southwest Missouri; (2) studies of the relative costs of health care at hospitals in that area; and (3) a provision of a 1994 contract between Blue Cross and Cox Medical Center.¹¹⁰ In considering Blue Cross's Petition for Writ of Prohibition, the court followed the analytical framework laid out in the previous section. First, it determined whether the information sought to be discovered constituted "trade secrets."¹¹¹ Next, after finding the information was "trade secrets," it then considered whether it was relevant, and whether St. John's had a specific need for it.¹¹² Finally, the court considered other factors, including the privacy rights of non-parties, which it utilized in balancing the need for discovering the items against the harm in the doing the same.¹¹³

A. Was the Information Sought "Trade Secrets?"

Blue Cross argued that the information sought to be discovered was confidential and "trade secrets." It argued that the pricing arrangements were not available publicly, that they contained information agreed to through private negotiations, that the hospitals that were parties to the agreements did not want the information revealed, and that the pricing arrangements were available to Blue Cross's employees only on a limited basis.¹¹⁴

Similarly, Blue Cross argued the study of relative health costs was confidential.¹¹⁵ The study was an analysis of the confidential pricing information compiled by employees of Blue Cross.¹¹⁶ Blue Cross argued that only a few of its key employees had access to the study, the study was kept in a locked file, and revelation of the information in the study would allow St. John's to entice health care providers to leave Blue Cross and join St. John's' network of health care providers.¹¹⁷

110. *State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson*, 897 S.W.2d 167, 169 (Mo. Ct. App. 1995).

111. *Id.* at 170.

112. *Id.* at 170-71.

113. *Id.* at 171.

114. *Id.* at 170.

115. *Id.*

116. *Id.*

117. *Id.*

The court found that all of the information at issue was confidential and "trade secrets," and that specific potential harm could result from its disclosure.¹¹⁸ The court presumed disclosure to a competitor was more harmful than disclosure to a non-competitor.¹¹⁹ Upon finding the information was in fact confidential, the burden then shifted to St. John's to show relevance and specific need.¹²⁰

B. Did St. John's Show Relevance and Specific Need?

St. John's argued that each of the documents it sought to discover was both relevant and necessary, in that the documents would have supported a response to Blue Cross's defense in the underlying action.¹²¹ As a defense, Blue Cross argued that non-assignment clauses, like the ones contained in its contract with its members, helped to contain health care costs in Southwest Missouri.¹²² St. John's argued that the contract with Cox Medical Center was relevant to Blue Cross's defense because, if Blue Cross and Cox Medical Center were parties to an exclusive contract, then Blue Cross could not contract with St. John's or other local hospitals in an effort to contain health care costs.¹²³ However, the court rejected this argument, finding that St. John's already had other evidence that Blue Cross did in fact have an exclusive agreement with a hospital in Southwest Missouri,¹²⁴ and thus, the contract it sought to discover was not relevant.¹²⁵

St. John's argued that the pricing arrangements and market study were relevant to the issue of whether health care costs would actually be reduced if Blue Cross were allowed to dishonor valid assignments.¹²⁶ The court rejected this argument, finding that the pricing arrangements only showed what the health care costs currently are at hospitals with contracts with Blue Cross.¹²⁷ Similarly, the market study only analyzed Blue Cross's business

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 170-71.

124. St. John's had the testimony of the regional vice president of Blue Cross at a deposition acknowledging that Blue Cross had an exclusive agreement with a hospital in the Southwest Missouri Area. Further, whether Cox Medical Center was that hospital was not relevant. *Id.* at 171.

125. *Id.*

126. *Id.*

127. *Id.*

approach to the health care industry, based on the cost at its member hospitals.¹²⁸ Furthermore, neither document contained information regarding health care charges by every health care provider in Southwest Missouri. Rather, they were limited to hospitals which contracted with Blue Cross and therefore the court found neither document relevant on the issue of whether health care costs in Southwest Missouri were contained by non-assignment clauses.¹²⁹ In summary, the court found St. John's had not established that any of the requested documents were relevant, nor had it shown they were necessary to its trial preparation.¹³⁰

C. Privacy Rights of Non-Parties and Other Factors

Cox Medical Center, a third party to the suit, also protested the discovery of the information by St. John's.¹³¹ The court found discovery of the information sought would impose a burden because doing so might affect the privacy rights of non-parties. The pricing arrangements sought by St. John's contained health care costs agreed to by non-party health care providers as a result of private negotiations.¹³² The court noted that, as St. John's appeared to provide health care services in the same geographical area as Cox Medical Center and perhaps other hospitals included in the pricing arrangements, St. John's appeared to be in competition with those other hospitals.¹³³ Consequently, those hospitals had an interest in keeping the cost arrangements out of the hands of St. John's.¹³⁴

In summary, the Southern District made absolute its preliminary order prohibiting discovery of each of the documents, holding that the documents were confidential and "trade secrets," that a risk of irreparable harm would exist if they were disclosed, and that St. John's did not establish the relevancy of the documents or that they fulfilled a specific need for its trial preparation.¹³⁵

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 169.

132. *Id.* at 171.

133. *Id.*

134. *Id.*

135. *Id.* at 170-71.

V. COMMENT

Three important questions are raised by an analysis of the *Anderson* court's decision—(1) whether the information at issue should have been given protected "trade secret" status, (2) whether the court's decision is supported by policy considerations inherent in protecting "trade secrets," and (3) whether the court could have better accommodated the interests of the parties.

*A. Should the Information at Issue be
Classified as "Trade Secrets?"*

The *Anderson* court determined that the pricing arrangements, the health care cost studies, and the provision of the contract between Blue Cross and Cox Medical Center were "trade secrets" and gave them absolute protection.¹³⁶ In finding the information to be "trade secrets," the court purported to follow the widely accepted "federal test" for determining whether information is a "trade secret."¹³⁷ While the court recited how the information at issue met the "federal test,"¹³⁸ it nevertheless may have failed to fully take into account the nature of the information which it was considering.

Some information may be readily shown to meet the "trade secret" definition.¹³⁹ For example, in *Hartley*, the Ninth Circuit found that a manufacturer's ink formula and testing process were secrets.¹⁴⁰ This author would argue that this sort of "trade secret," namely one that is at the heart of a business's product, is of a different class than the information at issue in *Anderson*. In *Anderson*, the court was confronted with pricing information, health care cost studies, and a contract provision. While this information is certainly capable of being just as proprietary as a design or formula, a court should not be so quick to assume the same.¹⁴¹

The *Anderson* court, in finding the documents to be confidential, stated that the pricing information was agreed to through private negotiations, was not available publicly, and that various hospitals had indicated to Blue Cross

136. *Id.* at 170.

137. *Id.* See *supra* Section III.D for the "federal test."

138. *Anderson*, 897 S.W.2d at 170.

139. See *supra* note 83 for other definitions of a "trade secret." See *supra* Section III.D for the "federal test."

140. *Hartley Pen Co. v. United States District Court for the Southern District of California*, Central Division, 287 F.2d 324, 327 (9th Cir. 1961); see *supra* Section III.D.

141. See *infra* note 162.

that they did not want the information revealed.¹⁴² While these factors likely fall within the criteria established by the "federal test," given the wide latitude of the "federal test," this should not always be conclusive as to whether it truly makes the information "trade secrets." As the Restatement of Torts, Section 757 suggests, for information to truly be regarded as a "trade secret," that information must not only be confidential in nature but must allow one to obtain an advantage over his competitors.¹⁴³

Prior cases have held that information which is guarded and treated as proprietary by a business nonetheless does not deserve protection as a "trade secret."¹⁴⁴ For example, in *Reliance Insurance Company v. Barron's*,¹⁴⁵ the "trade secret" status of cash flow forecasts and cash budget and projections was at issue. The *Barron's* court stated that internal management projections, even if they are treated as confidential, and are allowed only limited access by a company's employees, are not typically "trade secrets" as contemplated by the rules of discovery.¹⁴⁶

Similarly, in *Paxton Company v. Massachusetts Mutual Life Insurance Company*,¹⁴⁷ the U.S. District Court for the Western District of Missouri considered the confidentiality of a net interest rate that an insurance company used in crediting the accounts of its policyholders.¹⁴⁸ That court found that an affidavit by an employee of the insurance company stating that the information was secret and confidential was insufficient to give "trade secret" protection to the information.¹⁴⁹ Further, the Restatement definition itself suggests that, generally, a "trade secret" relates to the production of goods.¹⁵⁰

These decisions do not compel the conclusion that the *Anderson* court was incorrect in classifying the information at issue as "trade secrets." They do, however, suggest that the record in cases dealing with information that is not at the heart of a business's function should be scrutinized more closely. Conclusory statements that information is confidential should not be sufficient, as confidentiality is not the only requirement.¹⁵¹ If courts do not closely examine allegations of this sort, the lenient "federal test" will almost certainly

142. *Anderson*, 897 S.W.2d at 170.

143. *See supra* note 83.

144. *See infra* note 162.

145. 428 F. Supp. 200, 203 (S.D.N.Y. 1977).

146. *Id.*

147. *Frank Paxton Co. v. Massachusetts Mut. Life Ins. Co.*, No. 86-0978-CV-W-1, 1988 U.S. Dist. LEXIS 10111, (W.D. Mo. Sept. 8, 1988).

148. *Id.* at *1.

149. *Id.*

150. *See supra* note 83.

151. *Cuno, Inc. v. Pall Corp.*, 117 F.R.D. 506, 508 (E.D.N.Y. 1987).

be satisfied by even the most insignificant internal business documents. Ultimately, this might result in determinations being made by factfinders based on records containing something less than all the relevant evidence.

B. Policy Considerations

Several rationales exist for protecting "trade secrets."¹⁵² Such reasons include preventing the thwarting of innovation and the hampering of healthy competition.¹⁵³ It is also argued that not providing protection would destroy the incentive to improve product design and safety by discouraging the development of new products.¹⁵⁴ Additionally, it has been argued that absolute protection should be given to "trade secrets" because any revelation of such information destroys its status as a "trade secret."¹⁵⁵ Countervailing policy considerations include providing a party with sufficient information to adequately prepare its case for trial.¹⁵⁶

The *Anderson* court found that the potential harm to Blue Cross in revealing the documents was greater than St. John's's need for the documents.¹⁵⁷ Apparently, this was an easy finding, as the court stated that St. John's had failed to show that the information sought was relevant or that it fulfilled a specific need for trial preparation.¹⁵⁸ In making its decision, the court presumed that revelation of information to a competitor is more harmful than revelation to a non-competitor.¹⁵⁹ Although protection from competitors is a valid rationale for providing "trade secret" status, a potential problem exists with presuming inherent harm in revealing information to

152. See *supra* note 6.

153. *In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1031 (8th Cir. 1991). See also *infra* note 162.

154. *Remington*, 952 F.2d at 1031-32.

155. *Id.* See *supra* note 83 for the definition of a "trade secret." See also *supra* note 105.

156. *State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson*, 897 S.W.2d 167, 169 (Mo. Ct. App. 1995).

157. *Id.* at 170-71.

158. *Id.* at 171. Although elementary, it should be noted that there is more than one way to prove a case. For example, in *Vaughn v. Michelin Tire Corporation*, 756 S.W.2d 548 (Mo. Ct. App. 1988), a products liability action, defendant Michelin alleged that certain documents showing the design specifications of one of defendant's tires were trade secrets. While the court found that the documents were in fact "trade secrets" and disallowed discovery of the same, plaintiffs still were able to admit into evidence an exhibit constructed by plaintiff's expert depicting his rendition of the design of the tire (produced by the expert by examining a cross section of the tire). *Id.* at 556.

159. *Anderson*, 897 S.W.2d at 170.

competitors.¹⁶⁰ Potentially, the court forsakes inquiry into whether the information is truly confidential and worthy of protection. In other words, just because two businesses are in competition with each other, not all information they have relating to their businesses should be confidential.¹⁶¹ The presumption certainly stacks the odds in favor of such a finding. The policy behind the protection of trade secrets is to protect information that gives one an advantage over his counterpart. Such protection should not be allowed to shield information that should actually be discoverable merely because the parties to the lawsuit are competitors in the same business arena.

C. Reaching Compromise Between the Parties

Many courts, when faced with a request to provide "trade secret" protection to documents, will issue a limited protective order.¹⁶² Under such an order, discovery of the information is allowed, but is limited in its scope or by certain conditions. For example, the court's order might provide for any or all of the following: (1) that use of the information be limited to the particular lawsuit, or (2) that the persons who are given access to the information shall be limited, or (3) that reproduction of confidential documents be limited or prohibited, or (4) that a bond be furnished to protect against the risk of injury, or (5) that an attorney be designated to serve as custodian for all confidential documents.¹⁶³

Allowing limited discovery with the court determining the condition of said discovery seeks to serve the competing interests of the parties. It is not always fully effective, as some "trade secrets" undoubtedly will lose their value upon the slightest revelation.¹⁶⁴ However, a court should remain open to this alternative as a means of protecting the confidentiality of proprietary information while ensuring the pursuit of fairly litigated trials. In *Anderson*,

160. *See id.* at 170.

161. At least one Missouri appellate court has found that information similar to that at issue in *Anderson*—contract prices, escalator factors and base-line prices of company contracts—are not proprietary. *See State ex rel. Utility Consumers Council v. Public Serv. Comm'n*, 562 S.W.2d 688, 694 (Mo. Ct. App. 1978).

162. *See In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1033 (8th Cir. 1991).

163. *Id.*

164. In the context of an adjudication, the revelation of "trade secrets" under an order protecting dissemination does not serve to destroy the classification of the information as a "trade secret" to the public at large. *Sedlock by Sedlock v. BIC Corp.*, 926 F.2d 757 (8th Cir. 1991). For a discussion of the limits on the dissemination of discovered information, see Patrick M. Livingston, Note, *Seattle Times v. Rhinehart: Making Good Cause a Good Standard for Limits on Dissemination of Discovered Information*, 47 U. PITT. L. REV. 547 (1986).

the court could have pursued this alternative to better accommodate both parties' interests.¹⁶⁵

VI. CONCLUSION

Protection of "trade secrets" presents obvious problems in our adversarial system. On the one hand, if information is in fact a "trade secret," revelation of the same likely will destroy its value. However, of equal but competing importance is the court's role in ensuring the furtherance of justice. In short, when a court seeks to determine whether information is entitled to "trade secret" protection, it is faced with the difficult task of not only determining the nature of the information at issue, but also determining the motives of the parties in seeking to protect or reveal that information. The *Anderson* court gave strict protection to the information at issue. While this was not necessarily a bad result, in the interest of fairness and justice the court should have given more attention to the nature of the information at issue. Additionally, the court might have considered pursuing alternative means, such as limited disclosure, thus accommodating both allowing discovery and affording a degree of protection to the information.

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165. The trial court originally did provide for limited discovery of the documents. *Anderson*, 897 S.W.2d at 169.

