

*Professor Gellhorn presented this paper before the Federal Trial Examiners' Seminar. He comments favorably on one approach to business secrets developed by the Federal Trade Commission: Let the party seeking in camera treatment prepare a non-confidential summary of the document or testimony for the public record.—The Editors*

## BUSINESS SECRETS IN ADMINISTRATIVE AGENCY ADJUDICATION

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What rules and procedures govern or should govern the administrative trial treatment of business secrets? While this inquiry leads immediately into the protection of business information in several contexts—for example, the discovery of business secrets, the disclosure of business secrets in trial testimony—many questions must remain untouched. Critical business information comes into contact with the administrative process at many other levels—rulemaking hearings, informational investigations, public inquiries for agency files, to name a few. I will not discuss the treatment of business secrets in these contexts.

### *Business Secrets*

What is it, then, that we mean when we refer to “business secrets” (or to use the legal term, “trade secrets”)? We must know what they are before we can decide whether and how much protection they deserve.

The lawyer commonly searches for accurate, acceptable definitions. Unfortunately he seldom finds them. Trade secrets are no exceptions. Courts have struggled for decades. One court accurately described matters when it observed:

In the law of trade secrets, embracing mechanical engines, chemical formulae, confidential lists and the like, matters ranging from sugar in tea for sweetening purposes to the most complicated machines will be encountered. Questions as to classification will arise and their solution may not always be free from difficulties. Examples may be more helpful than definition or attempted redefinition. . . .<sup>1</sup>

Giving up, then, before having started, a review of the cases reveals that protection is granted under the “trade secret” label to almost anything used in a business which gives one business an advantage over his

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<sup>1</sup>*K & G Oil Tool & Serv. Co. v. G G Fishing Tool Serv.*, 158 Tex. 594, 606, 314 S.W.2d 782, 790 (1958).

competitors who neither know nor use it.<sup>2</sup> A business secret may be a formula for a chemical compound (which need not be patentable), a pattern or design for making a machine, a manufacturing process, or even a list of current customers. If you will recall the last time you watched three and four year-olds at play and think of each child as competing businesses, you will understand what I mean. Whatever the one has the other wants; and, as a result, what each has becomes valuable. So it is with many business properties.

But this really is still not very helpful. Perhaps I can clarify the picture by spelling out some features present in trade secret cases. There are, I believe, some common threads. First, the information must be secret. Matters of public or trade knowledge cannot be business secrets. This includes anything that could be made public even if now secret. For example, a chemical formula used to produce a better toothpaste is not a business secret if it can be determined by chemical analysis of the finished product sold by the grocer or druggist. Second, the process or data must be used in the on-going operation of the business. Single or ephemeral events in the conduct of a business—such as the amount or terms of a secret contract bid, the salary of certain employees, or the date fixed for announcing a new policy or model—are usually not protected. In other words, a business secret must actually be of some continuing value to the business seeking to protect it; the mere labeling of information as sensitive is not enough. Finally, the subject matter of a trade secret usually relates to the production of goods. But it need not be so limited. In administrative hearings, in fact, it usually relates to information about the sale of goods or other operations of a firm. Conceptually, this division can be labeled as ideas or know-how.<sup>3</sup> The former include such things as manufacturing processes; that is, something having value independent from any connection with a particular firm. Know-how, on the other hand, is of peculiar value to the owner; it includes internal business facts such as customer lists which have no value outside the particular business connection but which could be ruinous if disclosed to competitors. It is this latter group which creates the most troublesome problems in administrative hearings. At one time the Federal Trade Commission sought to distinguish between what it called traditional trade secrets (by which it meant ideas) and

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<sup>2</sup>For a compilation of the cases, see Doerfer, *The Limits of Trade Secret Law Imposed by Federal Patent and Antitrust Supremacy*, 80 HARV. L. REV. 1432, 1437 (1967); R. MILGRIM, TRADE SECRETS § 2.01 (1969). See generally, 4 RESTATEMENT OF TORTS § 757 (0939) (comments).

<sup>3</sup>See R. CALLMAN, 2 UNFAIR COMPETITION, TRADE MARKS AND MONOPOLIES § 52 (3d ed. 1968).

confidential business information (such as sales figures); it said that ideas generally were entitled to protection and that except in unusual circumstances, sales were not. But this distinction proved unsound and appears to have been abandoned. The protection of each now depends on proof under the same standard.<sup>4</sup>

### *The Use of Judicial Analogues*

Before considering what business secrets deserve protection in administrative hearings, however, one *caveat* needs to be noted. When looking for analogues for deciding current questions, the temptation is to accept helpful judicial classifications of trade secrets regardless of the type of action involved. Unnecessary confusion may result. The substantive law of trade secrets, whether an action to punish a thief or to protect sensitive data from an unwanted invasion, fills many volumes. On the other hand, opinions and articles spelling out procedural protection for trade secrets—for example, does trial testimony deserve confidential treatment—are harder to find. The natural tendency, then, is to rely on substantive definitions when deciding procedural questions. This can be both wrong and misleading. Different interests are at stake. The court is dealing with separate questions, and its answers must be examined in context.

In deciding whether a substantive action is available, the court starts from the premise that valuable business secrets are an important interest<sup>5</sup> deserving protection. Thus, it protects the owner of the trade secret against “breaches of faith and reprehensible means of learning another’s secrets.”<sup>6</sup> The question is not whether the information should become public knowledge, but should the person who made it public, disclosed it to another, or stole it for his own use, be held accountable. The answer may depend upon whether the defendant obtained the trade secret wrongfully or whether the sensitive data is so intertwined with an employee’s skill that providing protection would constitute an unwarranted interference with his opportunity to be employed

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<sup>4</sup>Compare *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961), with *Crown Cork & Seal Co.*, Dkt. No. 8687 (FTC June 26, 1967); see E. Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: The Hearing*, 116 U. PENN. L. REV. 401, 415-21 & n.109 (1968).

<sup>5</sup>Whether this interest is based on a property right or a confidential relation is disputed. Compare *E. I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917) (Holmes, J.), with *National Starch Prods., Inc. v. Polymer Indus., Inc.*, 273 App. Div. 732, 79 N.Y.S. 2d 357 (1st Dep’t 1948). See *Stedman, Trade Secrets*, 23 OHIO ST. L.J. 4, 21 (1962); *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 948-49 (1964); R. ELLIS, *TRADE SECRETS* § 6 (1953); R. MILGRIM, *supra* note 2, § 1.01.

<sup>6</sup>4 RESTATEMENT OF TORTS § 757, *comment b* (19239).

elsewhere. That is to say, protection of the trade secret as a question of substantive law depends on proof that the defendant either wrongfully acquired the information or has (or will) improperly disclose it.

The question of confidential testimony—that is, procedural protection of business information—starts from a different base. Roughly speaking the propriety of the acquisition or disclosure of the information is not at stake. Instead, the question is whether the documents or testimony should be disclosed in open court. The issue, in other words, is whether the need for confidentiality outweighs the undesirability or inconvenience resulting from protective treatment. The secrecy of the data or ideas is again a threshold question. But in the procedural context, close questions are usually decided in favor of confidentiality. While the owner (that is, witness) can occasionally succeed by attacking the questioner's need for the sensitive information, the dispute is usually limited to the manner in which the information is received—in public hearing on an open record or *in camera* for use only by the parties and the court. Since the information is being made available for use in the hearing, the argument for unlimited disclosure is less compelling.

#### *Administrative Proceedings*

Your concern with business secrets, of course, is generally limited to procedural questions.<sup>7</sup> Should sensitive data be protected from open disclosure in administrative hearings? Since the answer obviously is yes, at least in some hearings, the tough problems are when and how.

The judicial treatment of business secrets in civil trials preceded the administrative practice and consequently provides the backdrop for current procedures.<sup>8</sup> Courts have long ruled that the possessor of secret information has only a qualified duty to testify. There is no absolute privilege such as that afforded marital, physician-patient, or attorney-client communications, however. In contrast to such privileges, the trade secrets exception seeks only to safeguard the sensitive information, not (as with the other privileges) the confidential relationship.

The scope of the trade secrets "privilege," if it can be called that, then, depends on the type of information sought and the interests affected if disclosed or withheld. In the information is indispensable for ascertaining the facts, it is clearly established that the privilege must give

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<sup>7</sup>At one time the Federal Trade Commission used its powers under § 5 of the FTC Act (prohibiting "unfair methods of competition in commerce") to prosecute substantive trade secret actions. See *Philip Carey Mfg. Co. v. FTC*, 29 F.2d 49 (6th Cir. 1928); *Standard Car Equipment Co.*, 1 F.T.C. 144 (1918). Except for this early period, the Commission has relied upon prosecution by private parties to police this area.

<sup>8</sup>I have summarized the judicial analogue in Gellhorn, *supra* note 4, at 409.

way even though the possessor of the secret is a bystander who may be unfairly injured by broad dissemination of the information. While civil trials generally are private matters, the public interest in having all citizens freely give their testimony outweighs private fears. Nevertheless, "courts are loath to order disclosure of trade secrets absent a clear showing of an immediate need for the information requested."<sup>9</sup> Moreover, once disclosure is deemed necessary, the court will usually impose conditions designed to limit the demanding party's use of the information only in the litigation and to prevent disclosure to competitors or the public at large.

As one would expect, administrative adjudicatory hearings adhere to these basic principles. Administrative trials are, like their judicial counterparts, invariably public.<sup>10</sup> The underlying premise is, as Jeremy Bentham once trenchantly observed, that publicity "operates as a check upon [the] mendacity and incorrectness" of witnesses and "keeps the judge himself, while trying, under trial."<sup>11</sup> Administrative hearings, however, contain an added element. The dispute is not merely between private parties; it also involves a public interest in the enforcement of the agency's mandate. Open hearings are a necessity if this public interest is to be protected. Public records permit scrutiny of agency performance and encourage witnesses to be honest and judges fair.

With this background, the problems inherent in administrative treatment of business secrets should be easier to understand—and, hopefully, to resolve. The trial examiner faces questions of business secrets at two levels—during discovery and at the hearing. This is not to say that difficult procedural trade secret questions do not occur at other levels of the adjudicatory process—for example, during investigations<sup>12</sup> and upon issuance of the complaint—but these questions tend to be resolved directly by agency decision so I will concentrate on problems at the discovery and hearing levels. Since different issues are involved at each stage, I will examine them separately in context.

### (1) *Discovery*

Once the exceptional practice, discovery has now become well established in most agency procedures. At first administrative adoption

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<sup>9</sup>4 J. MOORE & B. GARFINKEL, FEDERAL PRACTICE ¶ 26.22[3], at 1290 (2d ed. 1966).

<sup>10</sup>See, e.g., 15 U.S.C. § 77u (1964) (SEC); 49 U.S.C. § 17(3) (1964) (ICC). Section 5(b) of the FTC Act merely states that the Commission shall conduct a "hearing." 15 U.S.C. § 45(b) (1964). Nonetheless, the proceeding is a matter of public record once the complaint is served. See *E. Griffiths Hughes, Inc. v. FTC*, 63 F.2d 362, 363 (D.C. Cir. 1933).

<sup>11</sup>1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 522, 523 (1827).

<sup>12</sup>See, e.g., *FCC v. Schreiber*, 381 U.S. 279 (1965).

of discovery proved illusory as agencies applied restrictive confidentiality rules to withdraw what liberalized discovery rules appeared to grant. But as continuous trials replaced interval hearing procedures, basic fairness has required meaningful discovery. Further impetus will be provided, I am sure, by proddings from the Administrative Conference which is currently considering wide-ranging recommendations to increase the scope of pretrial evidence exchanges.

Agency policy governing the treatment of business secrets has occasionally been the victim of this maelstrom. Disclosure of business secrets during discovery has depended, for example, more on who seeks to learn the business secret and from whom it is being sought, than on whether disclosure or protection is warranted.

Discovery by government counsel, that is, by the agency, is the natural starting point. Agency treatment of business secrets at this level is also the easiest to describe. The hallmark of administrative agencies is their broad power of investigation and discovery.<sup>13</sup> Investigative powers are not limited by the sensitivity of the information sought or by its location.<sup>14</sup> While individual agencies have limited the scope of discovery available to government counsel to supplement the precomplaint investigation,<sup>15</sup> the secrecy of the information sought has no bearing on this question.<sup>16</sup> Any sensitive information acquired by the agency is automatically entitled to confidential treatment while in government hands, and it usually is.<sup>17</sup> Congress has generally condemned disclosure of trade secrets by government employees<sup>18</sup> and re-enacted similar provisions in many agency enabling acts.<sup>19</sup> Agency rules reinforce these statutory commands.<sup>20</sup> Government counsel's desire to protect his case and his reliance on the work product privilege further support this treatment. Consequently, agency discovery of business secrets has presented few problems for trial examiners.

The grant of discovery rights to respondents and intervenors in adjudicatory hearings, on the other hand, has increasingly raised

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<sup>13</sup>E.g., S. Doc. No. 8, 77th Cong. 1st Sess. 414-15 (1941); Note, *Discovery in Federal Administrative Proceedings*, 16 STAN. L. REV. 1035 (1964).

<sup>14</sup>FCC v. Schreiber, *supra* note 12. The one exception is the retained copy of a census report. 13 U.S.C. § 9(a) (1864).

<sup>15</sup>All-State Indus. of N.C., Inc., 3 TRADE REG. REP. ¶ 18, 103 at 20,550 (FTC 1967).

<sup>16</sup>See, e.g., *Menzies v. FTC*, 242 F.2d 81 (4th Cir. 1957).

<sup>17</sup>The most famous indiscretion, which in fact only involved disclosure of the name of a private complainant, was former FTC chairman Howrey's release to presidential assistant Sherman Adams who passed the information along to friend Bernard Goldfine. H.R. REP. NO. 2711, 85th Cong., 2d Sess. 46-50 (1959). See also R. MILGRIM, *supra* note 2, § 6.02.

<sup>18</sup>18 U.S.C. § 1905 (1964); 44 U.S.C. § 423(b) (Supp. IV, 1965-68).

<sup>19</sup>15 U.S.C. §§ 46(f), 50 (1964) (FTC); 21 U.S.C. § 331(j) (supp. IV, 1965-68) (FDA).

<sup>20</sup>See, e.g., 16 C.F.R. §§ 4.10(a)(2) & (6), 4.10(d) (1969) (FTC); 21 C.F.R. § 130.32 (1969) (FDA).

questions concerning the protection of business secrets. Here sensitive information is sought by a private party whose prying eyes will automatically destroy the business secret; when he sees it, of course, it is no longer secret. The general statutory edicts, proscriptions in agency enabling acts, or agency rules prohibiting employee disclosure of trade secrets do not protect the owner of business secrets; they apply only to agency personnel and then only against voluntary indiscretions. When the data is sought from agency files, the various statutes and rules are inapplicable because the discovering party relies on lawful, that is, involuntary, process. Moreover, discovery by respondents and intervenors is accomplished in most cases through subpoena or deposition of private, third persons possessing this information. Thus, the burden of deciding whether business secrets are being sought and whether they deserve protection during discovery falls upon the trial examiner.

According to agency decisions, the examiner's decision will be affected by the location of the information, or, to put it another way, by whether the information is in the agency's files or private party hands. Examining the simpler situation first, when the private litigant seeks to discover business secrets from their owners (or private possessors), the person most intimately concerned with maintaining the secrecy of the data knows about it immediately and is likely to object. Objection usually takes the form of a motion to quash the subpoena or to limit the scope of discovery deposition, or of conditional disclosure on assurances of confidential treatment. Motions are made to the examiner; assurances are often arranged informally with private counsel subject to trial examiner approval.<sup>21</sup> At one time parties sought to guarantee such conditional disclosure by awaiting judicial enforcement of the subpoena and by obtaining judicially compelled assurances of nondisclosure beyond the confines of the case.<sup>22</sup> The Supreme Court's decision in *FCC v. Schreiber*,<sup>23</sup> while technically limited to subpoenas issued during a public investigation, indicates that this procedure is inappropriate. The district court is compelled to issue the subpoena upon the agency's request, if authorized by statute, whether or not confidential information is sought. Then, when the data is produced the agency has an opportunity to rule on the witness's request with the sensitive

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<sup>21</sup> While agencies have sought to encourage disclosure to agency personnel by honoring promises of confidentiality made by agency attorneys, no such policy applies to representations by private counsel and cautious counsel usually seek additional protection.

<sup>22</sup> E.g., *FCC v. Cohn*, 154 F. Supp. 899 (S.D.N.Y. 1957); *FTC v. Bowman*, 149 F. Supp. 624 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957).

<sup>23</sup> 381 U.S. 279 (1965).

information before it. And only after having exhausted the administrative process is judicial protection available to prevent irreparable injury which cannot await review of a final decision in agency proceedings.<sup>24</sup>

Discovery of trade secrets from agency files is a horse of a different color. The Federal Trade Commission's practices—the current favorite of those who point with scorn—are illustrative. Until recently, private parties had only limited rights of discovery from Commission files. FTC files were covered by a blanket of secrecy on several theories, some valid, others irrelevant. Priority was given to keeping channels of communication open with cooperating businessmen or to honoring confidences established in acquiring the information. The requesting respondent was an alleged law-breaker, and the Commission asked itself, why should his position as a defendant in an FTC prosecution allow respondent free license to rummage through the trade secrets of his competitors now on file with the agency? Nor did the third party who owned the secret necessarily know—and therefore have an opportunity to object—to this potentially damaging disclosure. Rather than looking at these interests and analyzing their impact on disclosure policies, the agency ruled that all requests for business secrets (and all other confidential information) must be made directly to the agency itself. But once it discovered what was inside the business secret fruit—and finding itself unable to formulate coherent policies after hearing dozens of requests—the Commission happily relinquished its first bite of this wormy apple and returned the issue where it rightly belonged, to the trial examiner's lap, subject, of course, to occasional Commission review and guidance.<sup>25</sup> As you might suspect, dilatory requests declined and rational policies were developed with the aid of examiner opinions. Nonetheless, several restrictions remained, not all of them sound or sensible. Not only do the usual rules regarding disclosure of trade secrets apply but respondent must satisfy other conditions which the FTC puts on private litigant raids of its files. That is, respondent must demonstrate (a) that the documents are relevant by describing them with as much precision as the situation permits and by showing why and how they will aid him in meeting the charges; (b) that the request is responsible by showing that the information is critical to his case, will not delay the proceedings, and cannot be developed in another way; (c) that the documents are not

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<sup>24</sup>*Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136 (S.D.N.Y. 1966); *R.H. Macy & Co. v. Tinley*, 249 F. Supp. 778 (D.D.C. 1965). Some district courts have not yet perceived the message of *Schreiber*. See, e.g., *FTC v. Continental Can Co.*, 267 F. Supp. 713 (S.D.N.Y. 1967).

<sup>25</sup>16 C.F.R. § 3136 (1969).

available elsewhere, often regardless of the number of sources which would have to be contacted; and (d) that disclosure is in the interest of justice.<sup>26</sup> These requirements, however, have more to do with agency reluctance to permit respondent's discovery of agency files than discovery of business secrets—although these separate questions are often confused.

One thing seems clear in administrative discovery, however. If the litigant—be it the respondent, an intervenor, or the government—establishes a need for disclosure of the business secret in connection with preparation of its case it is entitled to see or acquire the secret regardless of the data's location or the impact which disclosure may have on the trade secret's owner.<sup>27</sup> This principle governs requests for trade secrets from witnesses during the public hearing as well. It seems equally clear that the trial examiner's initial examination to determine whether confidential treatment is warranted should generally be held *in camera* if the question of confidentiality is not to be rendered moot.<sup>28</sup>

Now that disclosure of business secrets in discovery is aligned to judicial practice, agencies have also adopted protective measures long used by courts in preventing unnecessary dissemination of business secrets disclosed to private litigants. Courts have limited disclosure to counsel and those assisting him on a need to know basis. For example, where the data is to be evaluated by disinterested experts, data is revealed directly to the experts and only the unidentifiable results are revealed to private parties. Alternatively, the data may be disguised to prevent recognition of the source of particular information. Two FTC cases, *Grand Union Co.*<sup>29</sup> and *Columbia Broadcasting System, Inc.*,<sup>30</sup> illustrate similar administrative approaches. In these cases respondent's counsel were permitted to examine, summarize, and copy secret reports which competitors had filed with the Commission; this information was not to

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<sup>26</sup>See E. Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 159-68 (1968).

<sup>27</sup>*Cf.* FCC v. Schreiber, *supra* note 12; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 161-3 (1951); Jencks v. United States, 353 U.S. 657, 670-1 (1957).

<sup>28</sup>*Koppers Co.*, 3 TRADE REG. REP. ¶ 18,577, at 20,919 (FTC 1968); see Cohn & Zuckman, *FCC v. Schreiber: In Camera and the Administrative Agency*, 56 GEO. L.J. 451 (1968). In *Koppers* the FTC also suggested that the examiner might excise unneeded secrets from documents before disclosing them to respondent.

<sup>29</sup>62 F.T.C. 1491 (1963).

<sup>30</sup>62 F.T.C. 1518 (1963). Because of judicial concern with the harmful effects of disclosure, the FTC has occasionally given explicit orders to government counsel and his experts to hold sensitive data in confidence. *Koppers Co.*, *supra* note 28; see *Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D.D.C. 1963).

be disclosed to anyone other than such counsel except experts specifically approved by the trial examiner. Disclosure to respondent—that is, the private business as distinct from its attorney—was expressly forbidden. Other cases have gone further and limited disclosure to the independent experts alone.<sup>31</sup> Confidentiality pending the hearing has also been maintained by keeping depositions off the public record.<sup>32</sup>

The FTC has made clear, however, that protective measures are not automatically applicable every time business secrets are sought by private litigants during discovery. Rather, as in *Furr's, Inc.*,<sup>33</sup> the Commission has pointedly noted that the effect of any restrictions on respondent's "practical and expeditious preparation of its defense" is to be balanced against the sensitivity of the data, the likelihood of its ultimate disclosure on the public record at trial, and the need to prevent undue delay or confusion in the conduct of the proceeding. While these words have a platitudinous ring which sounds good to the ears, unless applied with discrimination they will lead to unfortunate results. Confidential treatment limited to the pretrial stage can usually be granted freely by the trial examiner without impairing public or private interests. The standard should not be the same as that applied in determining whether protective measures are warranted during the hearing. There is no "public interest" in disseminating discovery on the public record as there is in the full disclosure of trial evidence. Nor should discovery be sidetracked into lengthy hearings on whether protective treatment is warranted. In discovery, counsel's professional statement should generally be sufficient. The information may never be introduced into evidence so the trial question may be irrelevant; and the objecting party's concern may relate to disclosure to the public at large rather than to release to respondent.

## (2) *The Hearing*

Moving on to the trial, then, the question of business secrets arises in administrative hearings in two ways: upon the introduction of documentary evidence or in the elicitation of testimony. As I noted earlier, administrative agency hearings on adjudicatory matters, with few exceptions, are public. Coupled with this requirement is the general duty incumbent upon all witnesses to give their testimony freely. Privileges from this duty are as exceptional in agency hearings as in courts.

In agency trials, these principles have two ramifications. First, the

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<sup>31</sup> *Mississippi River Fuel Corp.*, Dkt. 8657 (FTC June 8, 1966, July 15, 1966).

<sup>32</sup> *Koppers Co.*, Dkt. 8755 (FTC July 9, 1968).

<sup>33</sup> Dkt. No. 8581 (FTC November 18, 1963). See also *Koppers, Co.*, *supra* note 28.

trade secret "privilege" is circumscribed by limiting the definition of what constitutes a business secret. As a corollary, protective measures such as *in camera* hearings and sealed transcripts are exceptional rather than commonplace. The problems are similar to those facing the trial examiner during discovery; but their resolution may vary. Again, this analysis follows Federal Trade Commission practice, primarily because its procedures have given rise to most of the published opinions on these questions. A perusal of other agency rulings indicates that FTC practices are unexceptional,<sup>34</sup> except, perhaps, that they are more fully developed than in most agencies.

At one time agencies such as the FTC freely granted claims for trade secret protection even though disclosure by testimony or through documents was compelled. It did so by acceding to most requests for secret hearings and sealed records.<sup>35</sup> Judicial standards for recognizing the trade secret privilege were adopted with modification.<sup>36</sup> Some courts, moreover, seemed to suggest that it was the agency's burden to prove the propriety of holding public hearings when the privilege was asserted.<sup>37</sup>

All this was turned around in the leading case of *H. P. Hood & Sons, Inc.*,<sup>38</sup> when the FTC sharply restricted those situations in which the trial examiner should permit the receipt of evidence *in camera*. In *Hood* and later cases<sup>39</sup> it was established that: (1) the burden of showing good cause for secret treatment rests on the party seeking an *in camera* order; and (2) this burden is satisfied only by demonstrating that public disclosure would result in "clearly defined, serious injury to the person or corporation whose records are involved." This vague standard, however, proved unsatisfactory to parties and trial examiners alike. Agency decisions invariably reiterated the "open records" policy while they, in fact, recognized innumerable exceptions. A perusal of published opinions or comparison of supporting facts revealed no clear pattern.<sup>40</sup> Take, for example, the treatment of sales and price data which businessmen claimed were entitled to secret handling. Current sales and price data are generally entitled to secrecy; dated information is not. But decisions as to what constitutes "current" information are irreconcilable. Two FTC decisions are illustrative. In *Crown Cork & Seal Co.*,<sup>41</sup> the Commission denied *in camera* protection to sales data

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<sup>34</sup>See Cohn & Zuckman, *supra* note 28.

<sup>35</sup>See, e.g., *Uarco, Inc.*, 58 F.T.C. 1168 (1968); *Pure Oil Co.*, 57 F.T.C. 1542 (1960).

<sup>36</sup>E.g., *Maico Co.*, 51 F.T.C. 1197, 1202 (1955).

<sup>37</sup>See *FTC v. Bowman*, *supra* note 22.

<sup>38</sup>58 F.T.C. 1184, 1188 (1961).

<sup>39</sup>See *Gellhorn*, *supra* note 4, at 408-22.

<sup>40</sup>*Id.* at 419-22.

<sup>41</sup>Dkt. No. 8687 (FTC June 26, 1967).

ranging in age from two and one-half to six and one-half years even though submitted by a nonparty witness whose request for confidentiality was not opposed by either government or respondent's counsel. By comparison, in *National Tea Co.*,<sup>42</sup> the FTC did not disturb a trial examiner's order that seven-year-old price and sales figures be treated as business secrets. Unlike most FTC stories, this one has a happier ending. In response to criticism, the Commission has recently given content to the "serious injury" standard—of what business secrets are entitled to protection—by adopting a proposed test which requires that the trial examiner weigh five factors in determining whether the item is a "business secret" entitled to protection. In *Lehigh Portland Cement Co.*,<sup>43</sup> the Commission suggests that the trial examiner ask and answer the following questions:

1. How many people have knowledge of the supposedly "secret" information? Will disclosure increase that number to a significant degree?
2. Does the contested information have any value to the possessor? To a competitor? Is that value substantial?
3. Did the party possessing the information incur any expense in its development? Has he had a sufficient opportunity to realize an adequate return on that investment?
4. What damage, if any, would the possessor of the secret suffer from its disclosure? What advantages would his competitors reap from disclosure?
5. What benefits are likely to flow from disclosure? To whom? Are they significant? In this connection, what is the public "need" for disclosure? Can it be satisfied in any other way?

Once the examiner determines that the secret really is a business secret entitled to protection, he must still decide what protection to order. He has several choices. In most situations, if decided cases are our guide, the examiner should order a secret hearing, seal the record, limit the parties' use of such evidence in briefs (or require separate *in camera* briefs for secret data), and impose a duty of continuing secrecy on the part of those participating in the *in camera* hearing.<sup>44</sup> But the trial

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<sup>42</sup>[1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,463, at 22,699 (FTC 1966). *But see* Columbia Broadcasting System, Inc., 3 TRADE REG. REP. ¶ 18,037, at 20,459 (FTC 1967).

<sup>43</sup>3 TRADE REG. REP. ¶ 18,475, at 20,832-33 (FTC 1968), *quoting from* Gellhorn, *supra* note 4, at 422-23.

<sup>44</sup>The FRC's rules also provide that protective orders must include a date on which *in camera* treatment will expire. 16 C.F.R. § 3.45(b) (1969).

examiner need not choose between a silent and probably meaningless public record and full but harmful disclosure. The FTC has suggested to its examiners that the party seeking *in camera* treatment can be required, if feasible, to prepare a non-confidential summary of the document or testimony for inclusion in the public record.<sup>45</sup> Where practicable, this alternative is the path for the future since it protects both the public interest in a meaningful record and the private interest in maintaining the confidentiality of business secrets.

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<sup>45</sup>Koppers Co., *supra* note 28.

