

## **Loose Lips Sink More Than Ships: So, How Much “Secrecy” Is Required To Protect Trade Secrets?**

By Walter Judge on February 20, 2012

In my first post on [Trade Secrets](#), I wrote that a trade secret is information that has commercial value, is not generally known, **and** is the subject of reasonable efforts to keep it secret. So, you ask: what are “reasonable efforts” to maintain secrecy, and how much secrecy is really required?

As a general rule, courts consider the following factors:

1. Are there written confidentiality agreements or nondisclosure agreements (not only with key employees, but [also with outsiders](#) who may have occasional access to the information)?
2. Is confidential information kept somewhere that is generally closed and off-limits? Are the doors locked? Are visitors required to sign in, and are they prevented from accessing confidential information?
3. Is access to the information limited to employees who need it? Do the authorized employees wear identification badges?
4. Are employees notified that the information is confidential? Are they given periodic warnings and reminders (e.g., “loose lips sink ships/chips/careers”)?

As you will see, there is no one-size-fits-all answer to the question of whether a company is taking reasonable steps to maintain the secrecy of its trade secret information. The issue is very context-specific; each case turn on its own facts and circumstances.



For example, in [Rockwell Graphics Systems, Inc. v. DEV Industries, Inc.](#), Rockwell sued a competitor that had been founded by one of Rockwell’s former employees. DEV and its founder argued that Rockwell could not possibly be considered to have exercised reasonable efforts to maintain the secrecy of technical drawings for replacement parts for its printing presses when *thousands of its parts suppliers* had the drawings.

The court disagreed, noting that Rockwell stamped the drawings “confidential,” kept the drawings in a vault, and limited access to the vault and the building in which the vault was located to authorized employees who displayed appropriate identification. The authorized employees were required to sign confidentiality agreements and also to sign when removing a drawing from the vault and when returning it. The parts suppliers who received the drawings also had to sign confidentiality

agreements. Based on these precautions, the court held that Rockwell did not forfeit trade secret protection by disclosing its technical drawings to its many replacement parts suppliers.

What is the take-away? A trade secret owner must be able to make commercial use of its valuable commercial information without forfeiting the ownership of that information.



circumstances, an accidental disclosure will not ruin trade secret protection.

How about a case of good old-fashioned “[dumpster diving](#)”? In [Ziegler v. Ehren](#), Ziegler, a financial firm, accidentally dumped into its recycling bins scrap paper containing customer names and other confidential information. Ehren, an employee of the recycling firm that Ziegler used, recognized the value of the information and sold it to one of Ziegler’s competitors. In the ensuing misappropriation lawsuit brought by Ziegler, Ehren argued that the information was no longer a trade secret once Ziegler allowed it to be dumped into the recycling bins. The court disagreed, holding that Ziegler’s accidental disclosure of the information did not forfeit trade secret protection. The take-away? Under some



This is not to say that courts will not take a hard look at whether a business really tried to maintain secrecy. In the case of [Dicks v. Jensen](#), for example, the Vermont Supreme Court denied a Vermont country inn’s misappropriation lawsuit against a competitor founded by the inn’s former employees. The court held that the inn’s customer list (i.e., a list of tour bus operators who consistently brought “leaf peepers” to the inn during Vermont’s foliage season) could be a trade secret, but that the inn’s owner had never told the former employees that he considered the list to be a trade secret.

Similarly, in [Omega Optical, Inc. v. Chroma Technology Corporation](#), the Vermont Supreme Court held that Omega’s technology for manufacturing microscope filters could be a trade secret, but that Omega had no internal policies or procedures in place to protect the confidentiality of its technical information. Omega’s argument that the former employees should simply have known, without being told, that the technology was a trade secret was not enough.

In the end, it is difficult to predict how a court will decide on the issue of whether or not a trade secret owner took reasonable steps to maintain the secrecy of information. These cases show that the courts may be reluctant to let disloyal employees get away with thievery and they may agree that accidents do happen, but they will require that the trade secrets owner show *some* evidence of efforts to maintain secrecy of trade secrets.

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