9.6 PROPRIETARY DATA

The rules of the OAH protect parties from the disclosure of proprietary information.[1] An ALJ faced with a claim of proprietary information may fashion appropriate protective orders and proceed as otherwise provided for by law. Confidential information includes trade secrets and proprietary information and those matters that, although not strictly proprietary in an economic sense, ought to receive some protection from disclosure to protect the source of the information.

The Minnesota Supreme Court, in *Cherne Industrial v. Grounds & Associates*,[2] defined trade secrets and proprietary information in terms of the following tests:

> Certain common elements can be distilled from these definitions and fashioned into a workable test encompassing both concepts. The elements comprising that test are: (1) The protected matter is not generally known or readily ascertainable, (2) it provides a demonstrable competitive advantage, (3) it was gained at expense to the employer, (4) it is such that the employer intended to keep it confidential. It is commonly recognized that " . . . matters of general knowledge within the industry may not be classified as trade secrets or confidential information entitled to protection."[3]

The Minnesota Uniform Trade Secrets Act contains a similar definition of proprietary information.[4]

The Tenth Circuit, in *Centurion Industries v. Warren Stuerer & Associates,*[5] stated the conditions for disclosure of proprietary information:

> "[T]here is no absolute privilege for trade secrets and similar confidential information." . . . To resist discovery under Rule 26(c)(7), a person must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful . . . If these requirements are met, the burden shifts to the party seeking discovery to establish that the disclosure of trade secrets is relevant and necessary to the action. . . . The district court must balance the need for the trade secrets against the claim of injury resulting from disclosure. . . . If proof of relevancy or need is not established, discovery should be denied. . . . On the other hand, if relevancy and need are shown, the trade secrets should be disclosed, unless they are privileged or the subpoenas are unreasonable, oppressive, annoying, or embarrassing.[6]

---

1 MINN. R. 1400.6700, subp. 4 (2013).

2 278 N.W.2d 81 (Minn. 1979).

3 *Id.* at 90 (citation omitted); *see also* Electro-craft Corp. v. Controlled Motion, 332 N.W.2d 890 (Minn. 1983) (requisites of trade secrets); Jostens, Inc. v. Nat'l Computer Sys., 318 N.W.2d 691 (Minn. 1982) (computer software as trade secret); United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628 (Minn. 1982) (reasonable efforts required to maintain secret of trade secret).

4 MINN. STAT. § 325C.01, subd. 5 (1998). *See generally* Note, *Protection and Use of Trade Secrets,* 64 HARV. L. REV. 976, 977-78 (1951).

5 665 F.2d 323 (10th Cir. 1981).

6 *Id.* at 325-26 (citations and footnotes omitted).

If the existence of relevant proprietary information sought to be discovered is established, the ALJ may issue such orders as are reasonably necessary to protect the integrity of the information, including a denial of discovery if protection can be afforded in no other manner.[7] An order compelling disclosure of trade secrets may require the party obtaining the discovery to treat the material obtained as confidential.[8] Allegations of harm due to the release of proprietary data must be specific and not merely conclusory.[9]

Logically distinct from trade secret information is material the disclosure of which might subject a party to annoyance, embarrassment, or oppression.[10] When information, although not of an economically proprietary nature, would have an extreme adverse impact on a party if disclosed, the same factors that make a protective order appropriate or that are considered in regard to a trade secret apply.[11] Both the governing statute[12] and the rules of civil procedure,[13] made applicable to the OAH, provide ample authority for an ALJ to issue an appropriate protective order when the discovery of confidential material not qualifying as proprietary information is sought.[14]

---

7 *See* MINN. R. 1400.6700, subp. 4 (2013); Thermorama v. Shiller, 271 Minn. 79, 86, 135 N.W.2d 43, 45-46 (1965); MINN. R. CIV. P.26.03; *see also* Snyker v Snyker, 245 Minn. 405, 408, 72 N.W.2d 357, 359 (1955).

8 Centurian Industries, 665 F.2d 323, 326 (10th Cir. 1981); Vollert v. Summa Corp., 389 F. Supp. 1348, 1351 (D. Hawaii 1975); Triangle Ink & Color Co. v. Sherwin-Williams Co., 61 F.R.D. 634, 636 (N.D. Ill. 1974).

9 *In re* Rahr, 632 N.W.2d 572, 576 (Minn. 2001) (denying a writ of prohibition against the tax court because Rahr's allegations of harm were conclusory but remanded to allow Rahr to present data to the tax court at an *in camera* hearing).

10 MINN. R. CIV. P. 26.03.

11 *See In re* Richardson-Merrell, 97 F.R.D. 481, 484 (S.D. Ohio 1983); *Thermorama*, 271 Minn. at 83, 135 N.W.2d at 46; *see also* Beatty v. Republican Herald Publ'g Co., 291 Minn. 34, 38-39, 189 N.W.2d 182, 185 (1971).

12 MINN. STAT. § 14.60, subd. 2 (2014).

13 MINN. R. CIV. P. 26.03.

14 For a discussion of the circumstances under which a protective order from discovery is appropriate to protect a party from annoyance, embarrassment, or oppression, see 6 MOORE'S FEDERAL PRACTICE, § 26.105 (3d ed. 1997). Specific authority for an ALJ to issue a protective order to protect against annoyance, embarrassment, oppression, or undue burden or expense was added in 2001 to MINN. R. 1400.6700, subp. 4.