

To: Transportation Interim Committee (TIC)
From: Joe Carroll
Date: March 8, 2022

Re: autonomous vehicles and trade secrets

Question: How might a Montana court deal with a subpoena for the information in an autonomous vehicle's event data recorder (black box) and a subsequent assertion that such information is a trade secret?

Brief answer: The information in a black box may be a trade secret. If so, a Montana court could take steps to preserve the secret with regards to the public, while making the information available in the lawsuit.

I. Information in a black box might be a trade secret. Montana is one of 47 states that adopted the Uniform Trade Secrets Act (UTSA).¹ The definition section of the UTSA provides that:

"Trade secret" means information or computer software, including 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.²

Discussing how trade secrets work under the UTSA, law professor Elizabeth Rowe explained that "when a trade secret is disclosed and becomes generally known to others, it loses its status as a trade secret, and that status cannot be reclaimed."³ This would seem to encourage possessors of potential trade secrets to take reasonable efforts to preserve the secrecy of information not yet disclosed to the public.

Autonomous vehicle manufacturers may already be interested in preserving the secrecy of black box information. The National Highway Traffic Safety Administration requires reporting on autonomous vehicle crashes "describing circumstances of a vehicle crash where [an automated driving system] . . . was engaged prior to or through the end of a crash," including information

¹ Uniform Law Commission, *Why States Should Adopt the Uniform Trade Secrets Act*, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f0fd9607-5912-9945-85e2-7cea5015447d&forceDialog=0>; Title 30, chapter 14, part 4, MCA.

² 30-14-402(4), MCA.

³ Elizabeth Rowe, *Striking a Balance: When should trade-secret law shield disclosures to the government?*, 96 Iowa L. Rev. 799, at 800.

on the ADS version of the vehicle, whether the vehicle was within its operational design domain at the time of the incident, and a narrative.⁴

Offering commentary on the reporting requirement, the law firm Jones Day suggests that "affected companies may need to disclose [confidential business information,] such as information on the engagement of ADS . . . and its associated, confidential source code to meet reporting requirements for a vehicle incident." The law firm goes on to explain how companies can request CBI protection when filing reports.⁵

This suggests that divulging black box information affects things that (a) have economic value and are (b) subject to efforts to maintain secrecy, potentially satisfying the elements of "trade secret" under Montana law.

II. Montana courts are able to preserve trade secrets and make the information available in a lawsuit. The Uniform Trade Secrets Act additionally provides that:

In an action under this part, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.⁶

A protective order is issued by a court to enforce, quash, or modify a subpoena.⁷ A protective order can limit access to subpoenaed information to specific people involved in the lawsuit.⁸

An in-camera hearing is a hearing in the judge's office. In-camera hearings can be useful for preserving privacy before a judge determines how to handle disputed evidence.⁹

Sealing a record limits access to the case file. As part of a protective order, a court can order trade secrets be filed under seal and limit who may access those records.¹⁰

Montana courts have tools to preserve trade secrets while making the information available within a lawsuit.

⁴ Jones Day, *Secrets on the Road: Protecting Trade Secrets of Highly Automated Vehicles Against Public Disclosure*, <https://www.jonesday.com/en/insights/2021/09/protecting-trade-secrets-of-highly-automated-vehicles>.

⁵ Id.

⁶ 30-14-406, MCA.

⁷ Rule 28(c)(5), MRCP.

⁸ See *Montana Propane, Inc. v. Heritage Operating Limited Partnership*, 2003 ML 1953.

⁹ See 2-6-1020(8), MCA.

¹⁰ See *Comm'r of Political Practices of Mont. v. Mont. Growth Network, Inc.*, 2017 Mont. Dist. LEXIS 13.