

Dumpster Diving and Trade Secret Theft

Is Your Company Adequately Protecting Its Trade Secrets?

By Alan J. Ross, Esq.



Editor's Note: This article, commissioned by NAID, is written as an advisory to companies about protecting their trade information. It, therefore, contains a wealth of information for secure destruction services as well.

If your company is like many in the United States today, it doesn't pay a great deal of attention to its trash. Much of the record keeping is done electronically, and paper, whether generated externally or internally, is relegated to the wastebasket when it has served its purpose. At the end of each day, a company employee or maybe a vendor collects the day's accumulation. By the time the sun goes down, the discard from a day in the life of your company has found its way to the dumpster out back – maybe in the parking lot, maybe in an alley. And maybe in your competitor's office.

Dumpster diving is not confined to the homeless and treasure hunters seeking discarded antiques. Corporate espionage is also conducted out of dumpsters, sometimes quite successfully, as, for example, when the diver finds documents containing important trade secrets thoughtlessly thrown into the trash.

That's exactly what happened in the case of *Winne v. Palmer*. Winne sued Palmer for trade secret theft after learning that Palmer was using trade secrets that had been

recovered by a dumpster diver from Winne's trash. What may surprise you is the result of that lawsuit. Palmer sought to throw out the case on the theory that Winne had failed to protect its trade secrets, and the court seemed inclined to do so, responding with two questions. Was the dumpster in an area exclusively under plaintiff Winne's control, or was the dumpster accessible to others? And were Winne's documents shredded? It's clear from the way the court asked the questions that if the dumpster was accessible to others and the documents were not shredded, it was goodbye trade secrets.

The case, which was decided over a decade ago by a Pennsylvania federal court, has been sharply criticized for its failure to take account of and encourage minimum standards of commercial ethics. But only one state – Connecticut — has made dumpster diving illegal in response to the decision, and neither trade secret law nor privacy law, the two areas of law that govern the decision, have changed in any meaningful way since the decision.