

Locke Lord QuickStudy: How to Keep a Trade Secret: Texas Supreme Court Weighs in on TUTSA and Sealing of Court Records

Locke Lord LLP

WRITTEN BY

[Lani Blake](#) | [Jeffrey M. McPhaul](#)

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In cases involving allegations of trade secret misappropriation, litigants and courts necessarily face an important dilemma: how to protect the confidential nature of the trade secrets in a court system intended to be open to the public.

With the passage of the Texas Uniform Trade Secrets Act (TUTSA) in 2013, litigants appeared to receive much-needed assistance. In cases involving TUTSA issues, courts must preserve the secrecy of an alleged trade secret by reasonable means and freely grant protective orders, including orders sealing records. Prior to the passage of TUTSA, the sealing of court records in misappropriation cases was governed entirely by Texas Rule of Civil Procedure 76A, which triggered a detailed sealing process, including a public posting, notice to the Texas Supreme Court, and a public hearing.

However, despite its good intentions, after enactment, the scope of TUTSA's directive to "preserve the secrecy of trade secrets" remained unclear. Did TUTSA provide an independent basis for sealing records, displacing the extensive sealing mechanisms under Civil Procedure Rule 76A? Or, did TUTSA simply inform how the typical 76A process should proceed? In the recent case of *HouseCanary, Inc. v. TitleSource, Inc.*, the Texas Supreme Court declared it is the latter.

In *HouseCanary*, HouseCanary moved to seal a number of trial exhibits under Rule 76A. After the motion was denied, HouseCanary asked the Court to reconsider—this time relying solely on TUTSA and avoiding the strict requirements of Rule 76A. TitleSource opposed the motion, and two media organizations, the Reporters Committee for Freedom of the Press and the Houston Forward Times, intervened and joined TitleSource in its opposition. Ultimately, the trial court granted HouseCanary's second motion, and TitleSource appealed.

The Fourth Court of Appeals in San Antonio reversed the trial court's order sealing records under TUTSA, holding the only path to sealing records in Texas was via Rule 76A. HouseCanary then sought review by the Texas Supreme Court.

Agreeing with the Fourth Court of Appeals, the Supreme Court held that parties seeking to seal court records, even in misappropriation cases, must follow the requirements of Rule 76A. The Supreme Court explained that

TUTSA provides a presumption in favor of sealing records containing trade secret information, but it does not provide litigants with a separate procedural pathway to seal court records.

Importantly, in addition to clarifying how litigants can seal documents in trade secret litigation, the *HouseCanary* Court provided additional guidance for litigants seeking to protect trade secrets. As part of its appeal, TitleSource argued that HouseCanary's trade secrets lost their secrecy because HouseCanary used and discussed the documents in open court at trial. Despite this public disclosure, the Texas Supreme Court refused to find HouseCanary waived trade secret protection as a matter of law. Though employers should take care to protect their trade secrets and confidential information, the *HouseCanary* case makes clear that the test for trade secret status is not absolute secrecy but whether the owner took "reasonable measures under the circumstances to keep the information secret."

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