

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 190 CD 2023

**COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION,
Petitioner, and ANCESTRY.com OPERATIONS INC.,
Petitioner/Intervenor,**

v.

**ALEC FERRETTI,
Respondent.**

**BRIEF OF ANCESTRY.com OPERATIONS INC.,
PETITIONER/INTERVENOR**

Appeal from the Final Determination of the Office of Open Records dated
January 26, 2023 at Docket No. AP 2022-2106

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STATEMENT OF JURISDICTION

Jurisdiction is vested in this Court pursuant to 65 P.S. § 67.1301(a) of the Right-to-Know Law (“RTKL”), 65 P.S. § 67.101 *et seq.* and 42 Pa. C.S. § 763(a)(1).

SCOPE AND STANDARD OF REVIEW

The scope of review of the Final Determination of the Office of Open Records (“OOR”) below is plenary and the standard of review is *de novo*. *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013). The Court is not bound by the findings of fact or conclusions of law by the Appeals Officer below but determines the case “anew” including matters relating to testimony and other evidence. *Id.*, at 156-157, 75 A.3d at 466-467.

ORDER IN QUESTION

For the foregoing reasons, the appeal is granted, and PHMC is required to provide all responsive records within thirty days.

* * * * *

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG

STATEMENT OF QUESTIONS INVOLVED

- I. Did the OOR err in determining that the activities performed by Ancestry pursuant to its License Agreement with PHMC constituted the performance of a governmental function when, in fact, the activities performed by Ancestry were not directly related to any governmental function of PHMC or were, at most, ancillary and thus not accessible as public records under 65 P.S. § 67.506(d)(1).

Suggested answer in the affirmative.

- II. Even if the records requested by Mr. Ferretti are deemed to be accessible under Section 506(d)(1), is not their disclosure barred as they are exempt as confidential proprietary information under 65 P.S. § 67.708(b)(11).

Suggested answer in the affirmative.

STATEMENT OF THE CASE

Ancestry.com Operations Inc. (“Ancestry”) is a Virginia corporation with its principal office located in Lehi, Utah. Ancestry is a for-profit genealogy company and through its websites provides access both nationally and internationally to genealogical and historical records including birth and death records, marriage licenses, and military service records. (S.R. 1b ¶ 3 and 4).

As part of its ever-growing library of such records, Ancestry entered into a License Agreement in 2008 (“License Agreement”) with the Pennsylvania Historical and Museum Commission (“PHMC”) to scan, index and publish certain historical and genealogical records maintained by PHMC. (R.R. 8a-20a). PHMC agreed to provide Ancestry access to various categories of documents in its possession for the purpose of allowing Ancestry to digitize them for Ancestry’s use and at no cost to PHMC. (S.R. 1b, ¶ 11-12). At no time did PHMC pay Ancestry for the digitization. To the contrary, Ancestry spent approximately \$3.25 million to access, scan, index and digitize the documents from PHMC. (S.R. 1b, ¶ 7-11).

Once the documents were scanned Ancestry, through its proprietary processes, indexed and otherwise cataloged the records for access through its various web sites. These digitized records, including the indexes and metadata, comprised the “Licensed Materials” under the License Agreement. (S.R. 1b, ¶ 12). The License Agreement contained certain use restrictions and a confidentiality

clause for both PHMC and Ancestry to “protect the confidentiality of . . . confidential information with the same diligence with which it guards its own proprietary information.” (R.R. 10a-11a), (S.R. 2b, ¶ 18-21). Additionally, the License Agreement requires PHMC to return the Licensed Materials to Ancestry if the License Agreement is terminated.

Alec Ferretti (“Mr. Ferretti”) submitted a request for records under the RTKL, 65 P.S. § 67.101 *et seq.* to the PHMC on September 1, 2022, requesting the following:

All documents scanned (and subsequent indexes and metadata created) pursuant to the contract signed in 2008 between the PHMC and The Generations Network [now Ancestry], along with all documents scanned (and subsequent indexes and metadata created) pursuant to any addenda to that contract, including but not limited to all birth and death records and all metadata for birth and death records.

(R.R. 6a-7a).

Mr. Ferretti did not merely seek copies of the records themselves but the work product created by Ancestry including “indexes and metadata created.” The records provided to Ancestry by PHMC were undigitized and did not contain these indexes or metadata which were created by Ancestry using its proprietary processes. (S.R. 2b, ¶ 22).

Ancestry was not made aware of the initial request for records by Mr. Ferretti nor the denial by PHMC. Upon receipt of the appeal, the OOR had

directed PHMC to notify any interested third parties pursuant to 65 Pa. C.S. § 67.1101(c). (R.R. 23a). Despite this requirement, Ancestry was not notified at the time of the filing of the appeal on September 9, 2022.

Three months later, the OOR Appeals Officer inquired whether third parties had been properly notified as directed earlier. (R.R. 102a). On December 19, 2022, counsel for PHMC emailed an employee in Ancestry's Content Acquisition Team advising for the first time of the filing of the request and the appeal. (R.R. 105a). Ancestry was never supplied with any of the Position Statements filed by Mr. Ferretti or PHMC. PHMC had assured Ancestry that it would handle the appeal before the OOR and before the appellate courts if an appeal was filed. See Memorandum Opinion and Order in response to Ancestry's Application to Intervene of July 26, 2023.

PHMC denied the request on September 9, 2022, asserting that the records requested were not within its possession or control and that it was not required to create a record pursuant to 65 P.S. § 67.705. (R.R. 4a-5a). Mr. Ferretti filed an appeal to the OOR on September 9, 2022. (R.R. 1a-3a). On September 30, 2022, PHMC filed a Statement in Support of its Denial. Basically, it asserted that Mr. Ferretti's request had been denied because PHMC "does not possess or control the documents requested." (R.R. 3a-4a). In addition, PHMC argued that the request could not be granted because it would have cost "nearly \$300,000 annually to

maintain” the requested Ancestry Licensed Materials. Finally, PHMC argued that the request lacked sufficient specificity in violation of 65 P.S. § 67.703. PHMC also supplied an Affidavit by Cynthia Bandroth, its Open Records Officer, in support of its contentions above. (R.R. 36a).

On October 25, 2022, Mr. Ferretti submitted a response. Mr. Ferretti argued that physical custody of the records requested was not required since PHMC was still the “legal custodian” of the records he requested. He argued that the fact that his request was “immense” was not a basis to deny access. Finally, he asserted that the request submitted was sufficiently specific under the requirements of 65 P.S. § 67.703. (R.R. 38a-84a).

On November 14, 2022, PHMC filed a second Position Statement in response to Mr. Ferretti’s October 25, 2022, Statement. It restated its argument that the request was insufficiently specific, asserted a new basis for denial under 65 P.S. § 67.708(24) as “archived materials,” and took issue with Mr. Ferretti’s disagreement over the cost factor for storage of the records cited by PHMC. (R.R. 85a-86a).

On November 29, 2022, the OOR Appeals Officer requested clarification on certain issues primarily on how the records would be accessed using the PHMC and/or Ancestry systems, why charging for a download and other records was not

an option, whether metadata would be included and further clarification of its archived material argument. (R.R. 87a-88a).

On December 6, 2022, PHMC responded to the OOR's request for clarification. (R.R. 89a-91a). Mr. Ferretti submitted his response to the OOR's request for clarification on December 8, 2022. (R.R. 92a-101a). The OOR issued its Final Determination on January 26, 2023, directing that the records requested by Mr. Ferretti be turned over in total.

PHMC filed its Petition for Review of the OOR's Final Determination on February 27, 2023. Ancestry was not served with a copy of the Petition for Review and did not become aware of the Final Determination until approximately June 1, 2023. (R.R. 139a-159a).

On July 11, 2023, Ancestry filed an Application for Intervention pursuant to Pa. R.A.P. § 1531(b). That Application was unopposed and granted by the Court's Memorandum Opinion and Order dated July 26, 2023.

Since Ancestry was not notified of the request, the appeal to the OOR or the Petition for Review, on August 10, 2023, Ancestry filed an Application to Supplement the Record or, Alternatively, to Remand to the OOR for further proceedings and taking of evidence.

SUMMARY OF ARGUMENT

Mr. Ferretti's request does not seek PHMC records, it seeks the work product of an independent third-party. That work product is not public under 65 P.S. §67.305(a). And, contrary to the Final Determination of the OOR below, it is also not public under the provisions of 65 P.S. §506(d)(1) as the License Agreement between Ancestry and PHMC did not involve the performance of a governmental function by Ancestry for PHMC. The License Agreement simply allowed Ancestry to digitize records in PHMC's possession and apply its proprietary processes to index and publish those records to Ancestry's subscriber customers. None of PHMC's statutory duties require it to digitize or index the records over which it is responsible. Thus, the License Agreement did not result in the delegation or ceding by PHMC to Ancestry of the performance of a substantial facet of PHMC's statutory governmental functions or duties. The License Agreement's prohibitive use restrictions on PHMC are further evidence of the fact that the License Agreement did not entail the performance of a governmental function. The OOR's findings to the contrary are in error and mandate reversal.

If the Court should determine that Section 506(d)(1) may apply to the records at issue, the request here still must be denied as the records requested are exempt under 65 P.S. §708(b)(11) as confidential, proprietary information. The Licensed Materials sought by Mr. Ferretti contain confidential and proprietary

information and would cause substantial competitive harm to Ancestry should they be posted on a public website for free. Ancestry employs numerous methods to protect the confidentiality of its processes including limiting access to its proprietary indexing and organizational processes to a discreet team, requiring confidentiality and non-disclosure agreements from its employees and, as with the License Agreement here, including strict confidentiality and use clauses and limiting publication by entities like PHMC.

The competition for subscribers to its websites for historical and genealogical records is fierce. Publication of the records sought here would provide an opportunity to Ancestry's competitors to gain visibility into Ancestry's proprietary production processes and recreate the logic behind the formulas they use to curate data, and allow them to replicate and use the information to undercut Ancestry in the marketplace and unjustly profit from Ancestry's multimillion dollar investments. This would place Ancestry at a substantial competitive disadvantage resulting in harm to its business. Such harm is precisely what Section 708(b)(11) was enacted to prohibit.

As these arguments demonstrate, the decision of the OOR was in error mandating reversal by this Court.

ARGUMENT

A. The OOR erred in determining that the activities performed by Ancestry under its License Agreement with PHMC constituted the performance of a governmental function when, in fact, the activities performed by Ancestry were not directly related to any governmental function of PHMC or were, at most, ancillary and thus not accessible as public records under 65 P.S. § 67.506(d)(1).

1. *Records in the possession of a third-party vendor are not subject to the presumption of openness set forth in 65 P.S. § 67.305(a).*

Unlike the presumption of openness for records within the possession of a Commonwealth Agency, records that are in the possession of third-party contractors with agencies are not automatically presumed public. *Allegheny County Dept. of Administrative Services v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Cmwlth. 2011). A record in the possession of a third-party vendor may be deemed a “public record” if the nature of an agreement between the agency and the vendor is for the performance of a “governmental function” on behalf of the agency and only if, the record: a) directly relates to the governmental function, and b) is not exempt under the RTKL. *Id.*, at 1037-42. Thus, to the extent the records sought by Mr. Ferretti are deemed to be in the possession of Ancestry, they may only be accessed by him if they meet the aforesaid test. They do not.

The records sought by Mr. Ferretti failed to meet the requisite test as the License Agreement between Ancestry and PHMC did not directly relate to the “governmental function” of PHMC and thus, contrary to the OOR’s holding, are

not accessible under the provisions of Section 506(d)(1). (R.R. 148a-156a), (S.R. 2b, ¶ 20).

Our Supreme Court early on rejected the argument that every contract between a government agency and a third-party vendor was the performance of a governmental function. *SWB Yankees, LLC v. Wintermantel*, 615 Pa. 640, 662, 45 A.3d 1029, 1042 (Pa. 2012) (. . . we do agree . . . that the government always – acts – as – government overlay of the *East Stroudsburg* majority is too broad for purposes of Section 506. We also believe the legislature used the “governmental” function delimiter in Section 506 to narrow the category of third-party records subject to disclosure by some measure . . .”). This statement was in reaction to an earlier decision of this Court which held that the government always acts as the government, and thus subjects all contracts to public release under Section 506(d)(1). See, *East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496, 504 (Pa. Cmwlth. 2010).

In rejecting this concept, the Supreme Court further noted that the governmental function requirement would be read “to connote an act of delegation of some **substantial facet** of the agency’s role and responsibilities, as opposed to entry into routine service agreements with independent contractors.” 615 Pa. at 664, 45 A.3d at 1043. (Emphasis supplied). Later the Supreme Court observed that, to qualify as a governmental function, the agency would have to have

delegated or ceded a “core” or vital function of its duties and responsibilities rather than routine services. *Dept. of Public Welfare v. Eiseman*, 633 Pa. 366, 388, 125 A.3d 19, 33 (Pa. 2015). The Supreme Court further observed that analysis under Section 506(d)(1) would be a fact intensive inquiry dependent upon the nature of the statutory requirements of the agency involved.

2. *The statutory duties or “governmental functions” of the PHMC do not require the digitization and indexing of the records it oversees.*

The “powers and duties” of PHMC are set forth in the History Code, 37 Pa. C.S. §§ 101-906. Regarding records, the PHMC is to “preserve public records, historical documents and objects of historical interest, possession and control of which have been transferred to the Commission.” 37 Pa. C.S.A. § 301(2). In essence, the PHMC is the state repository for various historic and cultural records. 37 Pa. C.S.A. §§ 305 and 305.1. In addition, records within its possession may not be sold, transferred or otherwise alienated unless authorized by law or approved record retention policies. 37 Pa. C.S.A. § 305.1(b)(1). To violate this provision can result in penalties provided by law and a civil penalty of not more than \$2,500. 37 Pa. C.S.A. § 305.1(b)(2). The PHMC is to make the records available for educational and academic study along with cooperating with historical or archeological societies, historical commemorations and/or archeological and anthropological investigations. 37 Pa. C.S.A. § 302.

The “governmental function” which the PHMC performs is primarily the receipt of and preservation of historic records. See, Brief of PHMC, pp. 11-12.

Nowhere within the general or specific powers and duties of the PHMC is there a statutory requirement to undertake the digitization and indexing of records within its possession.

3. *The 2008 License Agreement between Ancestry and PHMC does not involve the performance of a governmental function.*

As noted earlier, Ancestry is a for-profit company which provides access to primarily genealogical records for use by people worldwide. Under the License Agreement, PHMC granted Ancestry access to its records to allow Ancestry to “digitize and create a basic index of the records” and agreed to allow Ancestry the right to publish them on the various websites which Ancestry offered to its customers. (R.R. 8a), (S.R. 1b, ¶ 11). As a result, Ancestry scanned and digitized the records and applied their proprietary methodologies and processes for Ancestry’s use. The activities performed by Ancestry under the License Agreement were not “governmental” and were not related in any manner to any of the statutory duties of PHMC outlined above. At most, they were merely ancillary to the “governmental function” of PHMC.

As noted above, the Supreme Court has stated that to qualify as the performance of a governmental function by a third-party vendor, the agency involved must have delegated a “substantial facet of the agency’s role and

responsibilities.” *SWB Yankees*, 615 Pa. 640, 664, 45 A.3d 1029, 1043 (Pa. 2012). The License Agreement between Ancestry and PHMC simply does not delegate a “substantial facet” of any of PHMC’s roles and responsibilities. The factual background of *SWB Yankees* is illustrative of the distinction.

In that case, the Commissioners of Lackawanna County formed a municipal authority known as the Multi-Purpose Stadium Authority of Lackawanna County. The purpose of the Stadium Authority was to own, manage and operate a multi-purpose stadium in Lackawanna County. *Id.*, at 642-643, 45 A.3d at 1030. For a period of approximately seven years, the Authority managed all aspects of the stadium’s operation. *Id.* Later, the Stadium Authority entered into a Management Agreement with a private entity which transferred to the private entity overall management and control of the day-to-day operations of the stadium and its resident baseball club. Later, the Stadium Authority entered into a replacement Management Agreement with *SWB Yankees*. *Id.* After this occurred, a reporter for a local newspaper submitted a Right-to-Know Request to the Stadium Authority for copies of bids submitted for various contracts involving the stadium. In eventually holding that the records sought were public records under the provisions of Section 506(d)(1), the Supreme Court observed:

Moreover, the Management Agreement governing the Stadium Authority’s relationship with the Appellant [SWB Yankees] is framed in such a way as to afford the later “plenary” powers over a primary function of a

government agency, essentially deputizing Appellant as an “agent” of the Authority, and specifically prescribing that certain of Appellant’s [SWB Yankees] actions shall “bind” the agency.

615 Pa. at 661, 45 A.3d at 1042.

Simply stated, the SWB Yankees took over the running of the stadium and thus subsumed a substantial facet of the Authority’s roles and responsibilities. That is in stark contrast to the License Agreement between PHMC and Ancestry. Nothing in the License Agreement delegates or cedes to Ancestry any of the primary duties or functions of PHMC.

First, as stated above, the digitization and indexing of the PHMC records under the contract is simply not a “role or responsibility” of PHMC. Second, the physical records provided by PHMC to Ancestry under the License Agreement either remained with or were returned to PHMC immediately upon completion of the digitization process and, presumably, still exist in hardcopy or microfilm at PHMC. (S.R. 2b, ¶ 13-14). Additionally, as the History Code provides for public access to the records held by the Commission, those records are still accessible at the State Archives, online or through Ancestry to Pennsylvania residents free of charge. (S.R. 2b, ¶ 13-14).

As this Court has also held:

We emphasized the important limitation the General Assembly placed on public access to contracting party

records by the specific language it utilized in Section 506(d):

The General Assembly also used the term “governmental function” to limit access to only those records in a contractor's possession that relate to that function, not other records that a contractor maintains during the normal scope of business. Access is further restricted to records that “directly” relate to carrying out the governmental function, to avoid access that may relate to the contract but do not relate to its performance. For example, material used in preparation for the bid for the governmental contract would not be subject to access because those records do not directly relate to carrying out the governmental function.

Buehl v. Department of Corrections, 6 A.3d 27, 30 (Pa. Cmwlth. 2010) citing *East Stroudsburg*, 995 A.2d at 504.

This concept is further reflected in a companion provision to Section 506(d)(1) which provides “Nothing in this act shall be construed to require access to any other record of the party in possession of a public record.” 65 P.S. § 67.506(d)(2).

Mr. Ferretti’s request seeks materials in a private third party’s possession that do not directly relate to any governmental function of PHMC.

As additional evidence of the lack of Ancestry’s performance of a governmental function are the numerous contractual use restrictions placed on the final product of Ancestry, the Licensed Materials. The License Agreement states that Ancestry would provide to PHMC digital copies of the images and indexes,

however, Ancestry placed numerous restrictions on the resulting use by PHMC.

Although PHMC was given a nontransferable license to use the Licensed Materials for the benefit of its patrons or its own internal use, the License Agreement prohibited PHMC from posting the Licensed Materials on its own website for three (3) years from when Ancestry first posted each set of images on-line. It also expressly forbade PHMC from distributing or reselling the Licensed Materials to “any company or institution for any purpose.” (R.R. 8a-9a), (S.R. 2b, ¶ 15-20). And, if the License Agreement is terminated, PHMC is required to return to Ancestry any Licensed Materials received. (R.R. 11a), (S.R. 2b, ¶ 19).

These prohibitive ‘use’ restrictions are hardly indicia of a vendor performing a governmental function related to a public record, particularly of an agency statutorily charged with acquiring and preserving historic records. Such restrictions are directly contrary to such and further demonstrate that the work done by Ancestry under this License Agreement was not a governmental function as required for access under Section 506(d)(1).

Finally, this Court has required, as part of the governmental function test, that only records pertaining to the “*performance* of the governmental function” can be directly related to a governmental function and thus accessible under Section 506(d)(1). *UnitedHealthcare of PA., Inc. v. Brown*, 171 A.3d 943, 963-964 (Pa. Cmwlth. 2017). Here again, nothing embodied in the License Agreement requires

Ancestry to assume the “performance” of any of PHMC’s statutory duties or governmental functions. Thus, the provisions of Section 506(d)(1) do not provide an avenue of access to the work product of Ancestry under any of the requisite tests or analysis.

The License Agreement between PHMC and Ancestry does not involve a core or vital function of PHMC, and PHMC has not ceded or delegated a substantial facet of its statutory duties to Ancestry and therefore Ancestry is not performing a governmental function which would permit Mr. Ferretti to obtain the Licensed Materials pursuant to the provisions of 506(d)(1). The OOR’s analysis and Final Determination are fatally flawed, in error and should be reversed.

B. Even if the records requested by Mr. Ferretti are deemed to be accessible under Section 506(d)(1), they are exempt from disclosure as they are exempt as confidential proprietary information under 65 P.S. § 67.708(b)(11).¹

Section 708(b)(11) of the RTKL exempts from public disclosure “a record that constitutes or reveals a trade secret or confidential proprietary information.”

¹ This issue was not directly addressed by the OOR below although Ancestry contends it is fairly encompassed within Issue C contained within the Petition for Review of PHMC filed on February 27, 2023. As stated earlier, Ancestry was not informed of the initial request, OOR Final Determination or PHMC’s Petition for Review until early June. Upon being notified of the Petition for Review, Ancestry promptly moved to intervene, and that Application was granted by Memorandum Opinion and Order of Judge McCullough on July 26, 2023. On August 10, 2023, Ancestry further Applied for Permission to Supplement the Record, or Alternatively, to Remand to the OOR for further proceedings.

65 P.S. § 67.708(b)(11). “Confidential proprietary information” is defined as “commercial or financial information received by an agency: 1) which is privileged or confidential; and 2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.” 65 P.S. § 67.102.

In determining whether information is “confidential,” the Court considers “the efforts the parties undertook to maintain their [sic] secrecy.” *Smith on behalf of Smith Butz, LLC v. Pennsylvania Dept. of Environmental Protection*, 161 A.3d 1049, 1064 (Pa. Cmwlth. 2017). Additionally, “in determining whether disclosure of confidential information will cause “substantial harm to the competitive position” of the person for whom the information was obtained, an entity needs to show: 1) actual competition in the relevant market; and 2) a likelihood of substantial injury if the information were released.” *Id.* “Competitive harm analysis ‘is limited to harm flowing from the affirmative use of proprietary information by competitors . . .’” *Id.* The measures undertaken to maintain secrecy of the information are important indicators of the confidential nature of information. *McKelvey v. Pennsylvania Dept. of Health*, 255 A.3d 385, 408 (Pa. 2021). Finally, the record sought, even if it contains confidential proprietary information may still be subject to release if it is determined to be a “financial record.”

The nature and extent of Mr. Ferretti's request falls squarely within the confidential proprietary exemption of Section 708(b)(11). Mr. Ferretti did not just request copies of the records of PHMC which remain in PHMC's possession. He requested the entire work product of Ancestry including, not only the digitized copies of the records themselves, but also all of the metadata and indexes created by Ancestry. (R.R. 4a), (S.R. 2b, ¶ 22). In other words, the request sought not just records, but the entire Licensed Materials created using proprietary processes which Ancestry applied to the records while Ancestry was digitizing and organizing these records pursuant to the License Agreement. (S.R. 2b, ¶ 20, 22).

Because of the growing interest in genealogy and individuals wanting to explore their family history, the market in which Ancestry provides its subscription and related services is highly competitive. Sites like MyHeritage.com, FamilySearch.com, FindMyPast.com and others compete with Ancestry for customers to subscribe to their online services which allow users to research their family history and genealogy using information such as birth and death records, military service records and other historic records. (S.R. 2b, 3b, ¶ 24-25, 27-28). Mr. Ferretti is a board member of Reclaim the Records, an activist group dedicated to providing free online access to public, historical records. (S.R. 3b, ¶ 26). Mr. Ferretti's request is not for the records PHMC is required to preserve and make publicly available but for the entire set of Licensed Materials under the License

Agreement, including the indexes and metadata created using confidential and proprietary processes. (S.R. 2b, ¶ 22). The records PHMC provided to Ancestry under the License Agreement were in paper or microfilm form and did not contain any metadata or indexes. (S.R. 2b, ¶ 22). If Mr. Ferretti, and others, were able to obtain through a public record request not just “copies” of the PHMC records but the actual work product that Ancestry created at great expense and over many years, and then place that information on the internet for any competitor to download for free, the harm to Ancestry would be immediate and devastating. (S.R. 3b, ¶ 25-28).

Recognizing this, Ancestry goes to great lengths to protect its proprietary processes. (S.R. 2b, 3b, ¶ 18-21, 23-25). Only a limited group of employees at Ancestry have access to the processes and understand their application. (S.R. 2b, ¶ 24). Upon hire, all employees of Ancestry are required to sign non-disclosure agreements. (S.R. 2b, ¶ 24). Most telling here is that the contract itself with PHMC contained an express provision requiring:

7.1. TGN agrees to guard the confidentiality of the PHMC with the same diligence with which it guards its own proprietary information. PHMC agrees to protect the confidentiality of TGN’s confidential information with the same diligence with which it guards its own proprietary information. . . . The parties agree that such confidential information shall not be copied, in whole or in part, except when essential for authorized use under this AGREEMENT.

(R.R. 10a-11a), (S.R. 2b, ¶ 21).

Ancestry guards its proprietary processes stringently, as evidenced by the aforesaid non-disclosure agreements, restriction of information to a small team and use of contractual provisions such as the confidentiality clause, use restrictions and ownership provisions in the License Agreement. Ancestry's policies and actions to protect the confidentiality of its proprietary processes both internally and externally are clearly demonstrated. If Ancestry's work product was placed on the internet for free, competitors of Ancestry could easily take the information, gain insight into Ancestry's proprietary processes and use it to compete with Ancestry within the marketplace of genealogical online services. (S.R. 3b, ¶ 25-28).

The indexes and metadata created under the License Agreement and related processes include, for example, proprietary tools such as "dictionaries," which are unique to Ancestry and which it keeps confidential. Ancestry uses these proprietary dictionaries to aggregate certain items such as names which can be expressed in numerous variations and standardize them through its proprietary process to display consistently throughout its website and provide more meaningful data and more accurate and efficient searches for its subscribers. (S.R. 3b, ¶ 25, 27-28).

In addition, Ancestry has many competitors worldwide. For example, MyHeritage, Family Search, and Find My Past provides similar on-line products

for genealogy purposes and would benefit from having access to Ancestry’s proprietary processes developed over decades and at substantial cost. (S.R. 3b, ¶ 27-28).

If competitors of Ancestry were to obtain the Licensed Materials with the indexes and metadata, through analysis they would obtain insight into Ancestry’s proprietary production processes and could recreate the logic behind the formulas it uses to curate data, such as name dictionaries, allowing them to replicate and use the information to undercut Ancestry in the marketplace and unjustly profit from Ancestry’s multimillion dollar investment resulting in substantial competitive harm to Ancestry. (S.R. 3b, ¶ 28). Such harm is precisely what Section 708(b)(11) was enacted to guard against.

Finally, the records requested by Mr. Ferretti do not qualify as “financial records,” and thus the confidential proprietary exemption applies to the records requested. The RTKL defines “financial records” as:

- (i) Any account, voucher or contract dealing with:
 - (i) the receipt or disbursement of funds by an agency; or
 - (ii) an agency’s acquisition use or disposal of services, supplies, materials, equipment or property, ...

The Courts have held that the provisions of Section 708(c) which states: Financial records. –The exceptions set forth in subsection (b) shall not apply to financial

records . . .,” 65 P.S. § 67.708(c), can negate the confidential proprietary information exemption provided under Section 708(b)(11).

Section 708(c) has no applicability here, As indicated earlier, the contract between Ancestry and PHMC did not involve the payment of any funds whatsoever, including any taxpayer funds. (R.R. 8a-14a), (S.R. 1b, ¶ 9, 10). All of the costs associated with the contract here were borne entirely by Ancestry. Therefore, the provisions of Section 708(c) do not negate the application of the confidential proprietary exemption here.

Therefore, even is this Court should determine that the records requested are potentially accessible under Section 506(d)(1), the confidential proprietary information exemption found in Section 708(b)(11) would prohibit their disclosure as Section 506(d)(1) itself prohibits the release of records if they are otherwise exempt under the RTKL. The OOR erred in ordering the release of the records requested by Mr. Ferretti and must be reversed.

CONCLUSION

In light of the foregoing arguments, Ancestry respectfully requests that the January 26, 2023, Final Determination of the Office of Open Records be reversed and that Mr. Ferretti’s request to the Pennsylvania Historical and Museum Commission be denied.

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CERTIFICATE OF WORD LIMIT COMPLIANCE

I hereby certify that this Brief of Petitioner/Intervenor, Ancestry.com Operations Inc., complies with Pa.R.A.P. 2135, in that the word count of the brief, is 5,281 based on the word count of the word processing program used in the preparation of this Brief, excluding the parts exempt by Pa.R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

AND NOW, on the date stated below, I, Ijeoma Okereke an employee of the firm of Nauman, Smith, Shissler & Hall, LLP, hereby certify that I this day in conformance with Pa. R.A.P. 121, served the foregoing “***Brief of Ancestry.com Operations Inc., Petitioner/Intervenor***” via PACfile eService and electronic mail addressed to the following:

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