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EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATION, Appellant, v. MEGAN SHANNON and CITY OF PHILADELPHIA, MAYOR'S OFFICE, Appellees.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY MAY TERM 2018 NO.

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NOTICE OF APPEAL

Appellant, Philadelphia Industrial Development Corporation, hereby appeals from the decision of the Pennsylvania Office of Open Records, dated April 26, 2018, a copy of which is attached hereto as ***Exhibit A***. The following persons entered an appearance in the proceeding below:

Megan Shannon, Esquire
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Philadelphia PA 19103

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Respectfully submitted,

/s/ Karl S. Myers

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Date: May 25, 2018

CERTIFICATE OF SERVICE

I, Karl S. Myers, hereby certify that on May 25, 2018, I caused a true and correct copy of the foregoing to be filed with the court and served it via First Class U.S. Mail, postage prepaid, upon the following:

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/s/ Karl S. Myers
Karl S. Myers

A

pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MEGAN SHANNON,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2018-0460**
	:	**(CONSOLIDATED)**
PHILADELPHIA DEPARTMENT OF	:	
COMMERCE,	:	
Respondent	:	
	:	
AND	:	
	:	
PHILADELPHIA INDUSTRIAL	:	
DEVELOPMENT CORPORATION,	:	
Direct Interest Participant	:	

INTRODUCTION

Megan Shannon ("Requester") submitted two requests (collectively, the "Request")—one to the City of Philadelphia Department of Commerce and one to the Philadelphia Mayor's Office (collectively, the "City") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking the City's proposal to host Amazon's second headquarters. The City partially denied the Request, stating, among other reasons, that the redacted information is confidential proprietary information and trade secrets. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted**, and the City is required to take further action as directed.

FACTUAL BACKGROUND

On January 18, 2018, the Request was filed, seeking:

> [A]ll documents sent to Amazon as part of the "Philly Delivers" proposal sent to Amazon in response to its Requests for Proposals for cities to compete for its second headquarters. Amazon requested an electronic copy and five hard copies of the [C]ity's response to be sent between October 16 and 19, 2017. I would like a copy of all documents sent in response to Amazon's RFP, including Philadelphia's written responses to the RFP questions.

On February 26, 2018, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the City partially granted the Request by providing a copy of the proposal with information redacted under the following exemptions: 65 P.S. § 67.708(b)(10) (internal, predecisional deliberations); 65 P.S. § 67.708(b)(11) (trade secrets and confidential proprietary information), 65 P.S. § 67.708(b)(22) (real estate evaluations), and 65 P.S. § 67.708(b)(26) (proposals pertaining to agency procurement or disposal of supplies, services or construction).

On March 13, 2018, the Requester appealed to the OOR,[1] challenging the partial denial and stating grounds for disclosure. Specifically, the Requester challenged only the redaction of the City Incentive Proposal.[2] The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On March 28, 2018, the City submitted a position statement reiterating its grounds for denial. In support of its position, the City submitted the affidavits of Sylvie Gallier-Howard, First Deputy Commerce Director, and Illene Burak, the Vice President and General Counsel for the

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[1] The Requester filed an appeal challenging the City's response to each request docketed as OOR Dkt. AP 2018-0460 and OOR Dkt. AP 2018-0461. Because the appeals involved departments of the same agency, the same Requester, the same responsive record, and nearly identical requests, the appeals are consolidated into OOR Dkt. AP 2018-0460. *See* 65 P.S. § 1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

[2] Because the Requester limited her appeal to the City Incentives, the Requester has waived any objections regarding the redaction of any other information. *See Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

Philadelphia Industrial Development Corporation ("PIDC"). The City also submitted copies of nondisclosure agreements with the Pennsylvania Department of Community and Economic Development ("DCED"), signed by both the City and PIDC.

On March 23, 2018, DCED submitted a request to participate as a direct interest participant in this appeal. In support of its position, DCED submitted the affidavit of Brian Ross, Deputy Director for Project Management, describing the City's proposal submitted to Amazon. DCED also submitted copies of nondisclosure agreements signed with the City and PIDC. However, as the instant appeal challenges only the redaction of the City Incentive Proposal, and the Commonwealth Incentive Proposal is severable from the remainder of the document, DCED's request to participate is denied because DCED has only a general interest in withholding the City Incentives. 65 P.S. § 67.1101(c)(2); *Opilo and The Morning Call v. Pa. Dep't of Cmty. & Econ. Dev.*, OOR Dkt. AP 2018-0145, 2018 PA O.O.R.D. LEXIS 432 (denying requests to participate by the City and the PIDC in an appeal involving only the Commonwealth Incentive Proposal).

On April 4, 2018, PIDC submitted a request to participate as a direct interest participant. PIDC submitted a redacted copy of the Philadelphia Delivers proposal that was released by the City, as well a second affidavit from Ilene Burak, Vice President and General Counsel of PIDC. As PIDC claims that the withheld City Incentive Proposal contains confidential proprietary information of PIDC, the OOR grants PIDC direct interest participant status in this appeal and accepts their submission into the record. *See* 65 P.S. § 67.1101(c)(2).

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request." 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The City is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: "(1) The burden of proving that a

record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The City's Incentive Proposal is not a trade secret or confidential proprietary information

The City and PIDC claim that the City Incentive Proposal is confidential proprietary information and a trade secret. Section 708(b)(11) of the RTKL exempts from disclosure "[a] record that constitutes or reveals a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11). The RTKL defines these terms differently. First, a trade secret is defined as:

> Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other person who can obtain economic value from its disclosure or use; and
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102. Confidential proprietary information, meanwhile, is defined as "[c]ommercial 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." *Id.* An agency must establish that both elements of either these two-part tests are met in order for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). In determining whether certain information is "confidential," the

OOR considers "the efforts the parties undertook to maintain their secrecy." *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev'd in part, Pa. Dep't of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015). "In determining whether disclosure of confidential information will cause 'substantial harm to the competitive position' of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released." *Id.*

Pennsylvania courts confer "trade secret" status based upon the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to [the] business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See, e.g., Crum v. Bridgestone/Firestone N. Amer. Tire*, 907 A.2d 578 (Pa. Super. Ct. 2006) (adopting standard from RESTATEMENT (SECOND) OF TORTS § 757 (1965)). To constitute a "trade secret," the information must be an "actual secret of peculiar importance to the business and constitute competitive value to the owner." *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177 (Pa. Commw. Ct. 2006). The most critical criteria are "substantial secrecy and competitive value." *Crum*, 907 A.2d at 585. While the City has also separately referenced the Uniform Trade Secrets Act ("UTSA"), 12 Pa.C.S. §§ 5301 *et seq.*, the RTKL's "self contained trade-secrets exception supplants the more general application of the Uniform Trade Secrets Act," so that the OOR need not separately analyze whether the Uniform Trade Secrets Act applies. *See Eiseman*, 125 A.3d at 32-33; *see also Pa. Dep't of Rev. v. Flemming*, No. 2318 C.D. 2014, 2015

Pa. Commw. Unpub. LEXIS 626, *9-10 (Pa. Commw. Ct. 2015) ("[The RTKL's] definition [of trade secrets] is identical to that contained in the Uniform Trade Secrets Act").

a. The proposal is not a trade secret

On appeal, the City argued that the City Incentive Proposal is a trade secret. The OOR has recently held that the Amazon proposal jointly submitted by the City of Pittsburgh and Allegheny County was not a trade secret, reasoning:

> While not defined in the RTKL, "trade" is commonly defined as: "1. The business of buying and selling or bartering goods or services; COMMERCE.... 2. A transaction or swap. 3. A business or industry occupation; a craft or profession. – trade, vb." BLACK'S LAW DICTIONARY 1721 (10th ed. 2014). Commerce, meanwhile, is defined as "[t]he exchange of goods and services, esp. on a large scale involving transportation between cities, states, and countries." *Id.* at 325. Necessarily, a "trade secret" pertains to business or commerce, and this context is crucial in understanding the exemption. *See* 1 Pa.C.S. § 1903(a) ("Words and phrases shall be construed according to rules of grammar and according to their common and approved usage ..."); 1 Pa.C.S. § 1923(c) ("Words and phrases which may be necessary to the proper interpretation of a statute and which do not conflict with its obvious purpose and intent, nor in any way affect its scope and operation, may be added in the construction thereof"). As explained by Mr. Acklin's attestation, the proposal is intended "to bring Amazon to Pittsburgh" in order to "give[] this region the potential for 50,000 more jobs and $5 billion in investment over the next decade and a half." The proposal is not related to any business or commerce being conducted by the City or the County; instead, through the proposal, the City and County are hoping to attract Amazon to the region so that *it* may engage in commerce, and the region can reap the benefits of jobs and investment.
>
> Neither the City nor County has pointed to any support for the proposition that a government agency may have a trade secret when not engaging in business or commerce. The Pennsylvania Supreme Court has stated that a trade secret must be "of peculiar importance *to the business* and constitute competitive value to the owner." *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177, 185 (Pa. 2006) (emphasis added); *see also Hoffman v. Commonwealth*, 455 A.2d 731 (Pa. Commw. Ct. 1983) (finding that "the trade secret contention ceases to be of any moment when the function is recognized as governmental, rather than that of a private business"). While Pennsylvania courts have intimated that agencies, when engaging in business, may have trade secrets, *see Parsons*, 910 A.2d at 186-87; *Flemming*, 2015 Pa. Commw. Unpub. LEXIS 626, *13-14, the OOR cannot find any support for the notion that an agency can have a trade secret when it is not engaged in business or commerce. *See Hacke and PublicSource v. Pa. Cyber*

> *Charter Sch.*, OOR Dkt. AP 2017-1684, 2017 PA O.O.R.D. LEXIS 1773 ("However, the OOR cannot conclude that the Charter School engages in a trade or that the Charter School's marketing plan is the type of information from which economic value can be derived where the primary activity of the Charter School is providing the essential governmental service of education and its 'competitors' are primarily other local agencies"). Therefore, the proposal cannot constitute or contain trade secrets of the City or County.

Van Osdol v. City of Pittsburgh, OOR Dkt. AP 2017-2247, 2018 PA O.O.R.D. LEXIS 113.

The City argues that it may own a trade secret and that there are no additional trade or commerce requirements upon governments or government entities. In support, the City cites court cases from Ohio and Connecticut finding that government agencies may own trade secrets. *See State ex rel. Perrea v. Cincinnati Pub. Sch.*, 916 N.E.2d 1049 (Ohio 2009); *Univ. of Conn. v. Freedom of Info. Comm'n*, 36 A.3d 663 (Conn. 2012). Specifically, in *Univ. of Conn.*, the Connecticut Supreme Court found that, based upon a definition of "trade secret" similar to that found in the RTKL, "there is no requirement, express or implied, that the entity generally must be engaged in a 'trade,' however one might define that term" when holding that a database of a university's athletic event season ticket purchasers were a protected trade secret. 36 A.3d at 668. Similarly, in *Perrea*, the Ohio Supreme Court noted that public agencies can possess trade secrets when determining whether questions created for a standardized test were trade secrets of the school district. *See Perrea*, 916 N.E. 2d at 1054-1055.

However, the OOR must narrowly construe exemptions. *See Pa. State Police v. Grove*, 161 A.3d 877, 992 (Pa. 2017) ("Consistent with the RTKL's goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed") (citing *Office of Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015). The court in *Univ. of Conn.* is silent as to any such mandate under Connecticut's Freedom of Information Act. While the court in *Perrea* confirmed that agencies may possess trade secrets

in Ohio, where exceptions to access are narrowly construed, such a decision is not binding on the OOR, especially in light of recent OOR decisions addressing the same issue. While the OOR may look to other jurisdictions for guidance regarding uniform laws such as the UTSA, *see* 1 Pa.C.S. § 1927 ("Statutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them"), the City does not cite to any overwhelming support for the proposition that the City may own a trade secret unrelated to business or commerce under the UTSA, and therefore under the RTKL, in light of the OOR's mandate to narrowly construe exemptions.

Regardless, the City also argues that it does engage in business or commerce by engaging in business development. Specifically, the City argues that business development is a "trade" because it is a "craft or profession" and deals in business transactions. *See* BLACK'S LAW DICTIONARY 1721 (defining "trade" as including a transaction or craft or profession). The City explains that its Commerce Department "works with a variety of public and private entities, including the Philadelphia Convention & Visitors Bureau, [DCED] ..., the [PIDC] ..., Select Greater Philadelphia, and the Chamber of Commerce for Greater Philadelphia." The City also argues that there is no basis for the OOR to limit the definition of "trade" to require some connection to the buying and selling of goods. However, based on the definition of "trade" as set forth by the OOR in its prior decisions, the City itself does not engage in business or commerce; rather, its purpose is to promote and encourage others to engage in business or commerce in the City. *See Dep't of Corr. v. Maulsby*, 121 A.3d 585, 589 (Pa. Commw. Ct. 2015) ("While an administrative agency is not bound by the rule of stare decisis, an agency does have the obligation to render consistent opinions, and should either follow, distinguish or overrule its own

precedent.").[3] As such, because the courts of this Commonwealth have not recognized that a public agency may have a trade secret in such unrelated to business or commerce, the OOR finds that the City Incentive Proposal cannot constitute a trade secret of the City. *See Van Osdol*, OOR Dkt. AP 2017-2247, 2018 PA O.O.R.D. LEXIS 113; *see also Parsons*, 910 A.2d at 186.

Nevertheless, even if the City Incentive Proposal *can* constitute a trade secret of both the City and PIDC, the City and PIDC have not met its burden of proving that the information *is* a trade secret of either the City or PIDC. Ms. Gallier-Howard attests that "[t]he City incentive package was likewise specifically crafted to appeal to Amazon" and that the City Incentives are "[t]he result of weeks of directed efforts by the City and its partners, most notably PIDC[.]" Ms. Gallier-Howard further attests, in relevant part:

> 8. Commerce worked closely with the City's partners, including PIDC, to create the Philadelphia Delivers Proposal. The proposal contains the City's incentive package which includes financial and non-financial incentives....
>
> 12. The City incentive package was ... specifically crafted to appeal to Amazon based on research into the company, the City's experience, and third-party input, with this nationwide competition in mind. We thought outside of the box, leveraging both external partners and City resources that are atypical in business development as we thought it would appeal directly to Amazon.
>
> 13. The Creative Pitch and City incentives overlap, but cover pages 5-14, 17, 46, 54-58, 84, and 87-94 of the Philadelphia Delivers Proposal....
>
> 24. It is not uncommon for Commerce to work with agencies outside of the City, such as PIDC and DCED, to create incentive packages for business attraction.

[3] The OOR has previously addressed the public nature of local municipalities' Amazon proposals and related correspondence in the following final determinations: *Shoemaker v. City of Pittsburgh*, OOR Dkt. AP 2017-2249, 2018 PA O.O.R.D. 239; *Van Osdol v. Allegheny County*, OOR Dkt. AP 2017-2248, 2018 PA O.O.R.D. LEXIS 112; *Opilio v. Pa. Dep't of Community and Economic Dev.*, OOR Dkt. AP 2018-0145, 2018 PA O.O.R.D. LEXIS 432; *Van Osdol v. City of Pittsburgh*, OOR Dkt. AP 2017-2247, 2018 PA O.O.R.D. LEXIS 113; *Walsh v. Allegheny County*, OOR Dkt. AP 2017-2323, 2018 PA O.O.R.D. LEXIS 269; *Shoemaker v. Allegheny County*, OOR Dkt. AP 2017-2252, 2018 PA O.O.R.D. LEXIS 162; *Belko v. City of Pittsburgh*, OOR Dkt. AP 2018-0022, 2018 PA O.O.R.D. LEXIS 281; Shoemaker v. Pa. Office of the Governor, OOR Dkt. AP 2017-2254, 2018 PA O.O.R.D. LEXIS 163; *Boren v. City of Pittsburgh*, OOR Dkt. AP 2017-2217, 2018 PA O.O.R.D. LEXIS 200; *Boren v. Allegheny County*, OOR Dkt. AP 2017-2218, 2018 PA O.O.R.D. LEXIS 196; *Shoemaker v. Allegheny County*, OOR Dkt. AP 2017-2253, 2018 PA O.O.R.D. LEXIS 174; and *Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2017-1946, 2017 PA O.O.R.D. LEXIS 1946.

While such incentive packages may originate outside the City, they are a material part of the City's overall presentation to outside entities, including here with Amazon.

25. The City and other stakeholders involved with the Philadelphia Delivers Proposal would be harmed by the release of the redacted portions of the proposal because it would allow the City's competition for Amazon HQ2 to use the carefully crafted strategy the City created with its partners to better position themselves at the City's expense, allow them to match or exceed the incentives offered by the City, and otherwise attempt to point out flaws in the City's proposal in an attempt to strengthen their own. Any harm to the City in its efforts to attract business would be reasonably likely to harm the Commonwealth as well, as the City is a constituent part of it.

26. The release of the style and structure of the City's Creative Pitch would provide the City's competition with a roadmap, allowing them to appropriate the City's themes, messaging and overall approach.

27. This could hurt the City not only in the instant deal but in future business attraction opportunities as competitors would be able to obtain inside information into how the City approaches and competes for opportunities of this nature. This is information that otherwise is not available to them through any legitimate means.

28. The value of having such detailed information about the core of a competitor's proposal cannot be accurately valued as it is near priceless, and in this particular deal is worth billions of dollars in economic development. This fear is not mere speculation or guesswork; it is well known among municipalities that competition is fierce for HQ2 and that the municipalities competing are actively studying and scrutinizing their competition.

29. Thus, not only would the release of redacted sections of the Philadelphia Delivers Proposal harm the City's efforts to attract Amazon HQ2 to Philadelphia, their release would harm other Commerce efforts to attract businesses to Philadelphia for the same reasons described previously, as well as the City's negotiating position with such businesses.

30. It is also reasonably likely that their release would harm the efforts of PIDC, DCED, and other business attraction agencies, both public and private, to bring businesses to the Philadelphia region and the Commonwealth generally.

31. Because Commerce worked so closely with PIDC to craft the Creative Pitch and City incentives package, it is not possible to separate out PIDC's confidential information from the City's—it is one in the same.

Based upon this evidence, the City and PIDC have not demonstrated how the City Incentives have economic value by not being known to other persons, or how those other persons can obtain economic value from its disclosure. The fact that the City and PIDC invested time and

resources into creating an incentive program tailored to the Amazon HQ2 project does not, in of itself, give the information "independent economic value." Most importantly, the City and PIDC do not adequately address *how* other persons can obtain economic value from the City's Incentives disclosure. Affiants for both the City and PIDC attest that disclosure of the information would harm the City's negotiating position and harm both the City's and PIDC's economic development initiatives; however, these statement, in addition to being speculative and conclusory,[4] do not address how persons will obtain economic value from the City Incentive Proposal's disclosure.[5]

The City and PIDC also attest that they are at a competitive disadvantage due to specific exemptions found in other states' open records laws, that disclosure of the City Incentive Proposal would allow other regions to supplement their proposals to match or copy the unique features, and that release of the Incentive Proposal would harm the City by allowing other applicants to exploit and profit from work product developed by City and PIDC staff. In addition, both the City and PIDC also argue that the release of the City Incentives, in addition to reducing the competitiveness of the current Amazon proposal, could undermine the attractiveness of future City and PIDC proposals when competing against other regions to attract other businesses. However, the fact that other states may have specific statutory exemptions regarding the information contained in the Incentive Proposal does not affect the determination of whether the City Incentive Proposal is a

[4] Under the RTKL, "a generic determination or conclusory statements are not sufficient to justify the exemption of public records." *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (en banc); *see also Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL") (citations omitted); *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d at 659 ("Affidavits that are conclusory or merely parrot the exemption do not suffice") (citing *Scolforo*); *W. Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) ("The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions") (citing *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)).

[5] Ms. Gallier-Howard also attests to harm in future negotiations. However, this concern is not probative to the issue of whether the City's Incentive Proposal contained in the proposals submitted to Amazon is a trade secret.

trade secret in the Commonwealth of Pennsylvania. Therefore, even if the City Incentive Proposal can constitute a trade secret of the City and PIDC, they have not met either prong of the trade secret test and have not met their burden of proof under the RTKL. 65 P.S. § 67.708(a)(1).

b. The Incentive Proposal cannot be confidential proprietary information

The City and PIDC argue that the correspondence contains confidential proprietary information. While the City, PIDC and others treated the proposal as confidential, this alone does not make the withheld information confidential proprietary information. Instead, certain requirements must be met. The definition of confidential proprietary information requires that the information be "received by an agency." 65 P.S. § 67.102. Likewise, the definition requires that there must be "substantial harm to the competitive position of *the person that submitted the information*." *Id.* (emphasis added). "Person" is undefined in the RTKL; however, the Statutory Construction Act defines "person" to include "a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person." 1 Pa.C.S. § 1991; *see also McKelvey and PennLive v. Pa. Dep't of Health*, OOR Dkt. AP 2017-1443, 2018 PA O.O.R.D. LEXIS 72 (discussing the difference between "person" and "individual" under the RTKL). Therefore, while the City and PIDC can constitute a person, the definition of confidential proprietary information requires that they *submit* the information to an agency.

Here, it is undisputed that the withheld correspondence was submitted to Amazon, an unrelated third party that is not an agency under the RTKL. Because the confidential proprietary information exemption does not protect this type of record, the requested correspondence cannot be confidential proprietary information under the RTKL. *See Van Osdol v. City of Pittsburgh*, OOR Dkt. AP 2017-2247, 2018 PA O.O.R.D. LEXIS 113; *Van Osdol v. Allegheny County*, OOR

Dkt. AP 2017-2248, 2018 PA O.O.R.D. LEXIS 112. Further, the City explains that it "worked so closely with PIDC to craft the Creative Pitch and City [I]ncentives Package … [that] it is not possible to separate out PIDC's confidential information from the City's—it is one in the same." Thus, as the information cannot be considered the confidential information of either party alone, the OOR would be unable to determine which "person" submitted the information and suffered substantial harm.

2. The City's Incentive Proposal does not reflect the strategy to achieve the successful adoption of a budget or a legislative proposal

The City also cited Section 708(b)(10)(i)(B) to withhold the proposal. Section 708(b)(10)(i)(B) exempts from disclosure a record that reflects the "strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation." 65 P.S. § 67.708(b)(10)(i)(B). In order to be exempt under Section 708(b)(10)(i)(B), a record must reflect an agency's strategy. *See Camburn v. Borough of Pottstown*, OOR Dkt. AP 2015-0315, 2015 PA O.O.R.D. LEXIS 509; *Williams v. Middlesex Twp.*, OOR Dkt. AP 2015-0062, 2015 PA O.O.R.D. LEXIS 166. The term "strategy" means "the art of devising or employing plans or stratagem toward a goal." *Knauss v. Chadds Ford Sch. Dist.*, OOR Dkt. AP 2009-0443, 2009 PA O.O.R.D. LEXIS 653 (citing Merriam-Webster's Dictionary, 11th ed.); *see also Camburn v. Borough of Pottstown*, OOR Dkt. AP 2015-0246, 2015 PA O.O.R.D. LEXIS 436 (holding that records reflecting the strategy of an agency's adoption of an ordinance was not subject to access under the RTKL). Here, the City argues that the proposal reflects the City's and Commonwealth's legislative strategy to improve business development. However, the evidence submitted by the City is silent on the issue of whether the proposal contains the City's strategy for any legislative or regulatory efforts in the City incentives themselves. Based upon the evidence presented, the City has not met its burden to prove that the City's Incentive Proposal contains strategic

information subject to withholding under Section 708(b)(10)(i)(B) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

3. The City's Incentive Proposal is not related to the City's procurement of goods or services

Finally, the City argues that the proposal is exempt from disclosure under Section 708(b)(26) of the RTKL, which exempts from disclosure:

> A proposal pertaining to *agency* procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation to bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of the members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

65 P.S. § 67.708(b)(26) (emphasis added).

The City argues that the proposal contemplated the City's provision of certain services to Amazon and, therefore, as an agency bid submitted to a vendor, should be exempt under Section 708(b)(26) of the RTKL. However, the City misconstrues the exemption. The RTKL defines "agency" as "[a] Commonwealth agency, a local agency, a judicial agency or a legislative agency." 65 P.S. § 67.102. As a publicly-traded corporation, Amazon is none of these. The City is neither procuring nor disposing of supplies, services or construction from Amazon, as contemplated by the exemption; instead, as explained in Amazon's RFP instructions, the information provided in the proposal "will allow Amazon to determine the ideal location for our Project." Section 708(b)(26) of the RTKL is limited to situations where an *agency* receives a proposal. The purpose of the RTKL is to "to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling*, 990 A.2d at 824. As a result, it is clear that Section 708(b)(26) was not intended to shield promises made, and incentives offered, to third parties by government agencies.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted,** and the City is required to disclose the City Incentive Proposal to the Requester within thirty days. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Philadelphia County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.[6] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: April 26, 2018

/s/ Benjamin A. Lorah

APPEALS OFFICER
BENJAMIN A. LORAH, ESQ.

Sent to: Megan Shannon (via e-mail only);
Robert Kieffer, Esq. (via e-mail only);
Edward Garcia (via e-mail only);
Scott Longwell, Esq. (via e-mail only);
Karl Myers, Esq. (via e-mail only)

[6] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CIVIL

PHILADELPHIA INDUSTRIAL DEVELO	MAY TERM 2018
VS SHANNON, MEGAN	No. 02805

CASE MANAGEMENT ORDER
AGENCY APPEAL

1. Service: You must serve a copy of your appeal papers and a copy of this Order to each of the following by certified mail, return receipt requested. That copy must arrive within **ten (10) days** of the date of this Order.

If you are appealing an order of a state agency, you must serve a copy of your appeal papers upon:

1. The agency that issued the order.
2. Any party who participated in the proceedings before that agency.*

*Anyone in this category must also be sent a copy of this order.

If you are appealing an order of a local Philadelphia agency, you must serve a copy of your appeal papers upon:

1. The agency that issued the order;
2. Any party who participated in the proceedings before that agency

3. City of Philadelphia Law Department
   Attn: Agency Appeals Administrator
   1515 Arch Street, 14th Floor
   Philadelphia PA 19102

Note: Failure to give a copy of your appeal papers to any of the above offices may result in the dismissal of your appeal. Keep your return receipts. The post office will be able to issue a form, allowing you to verify receipt of mailings. You are not required to file an affidavit of service, but may need your receipts as proof of service.

2. Procedure: All motions and petitions and any responses thereto shall be filed in the Motions section of the Electronic Filing System for the Trial Division - Civil available online at: http://courts.phila.gov. This appeal has been brought, and will be handled, under the guidelines set forth in Phila. Civ. R. 320 available online at: http://courts.phila.gov/regs/rule320.htm.

3. Scheduling: If this appeal is not disposed of within sixty (60) days of the date on this order, the court will enter a scheduling order that sets a date for the appeal or events leading to its completion.

4. Notes of Testimony: ***You are required to obtain a copy of the hearing transcript or certified record if applicable from the agency once a scheduling order is issued. Appellant must order a transcript of the proceedings by serving the stenographer with a copy of the Notice of Appeal and paying the stenographer for the cost of producing the notes.*** The stenographer must then transcribe the notes of testimony, file the original notes with the appropriate agency and deliver a copy of the notes to appellant within thirty (30) days. Failure to order the transcript will result in the dismissal of the appeal absent good cause shown.
Note: The appellant shall incur any cost associated with obtaining hearing transcripts.

BY THE COURT:
Idee C. Fox
Supervising Judge, Trial Division - Civil

Dated: 05/25/2018

Court of Common Pleas of Philadelphia County
Trial Division

Civil Cover Sheet

For Prothonotary Use Only (Docket Number)
MAY 2018
E-Filing Number: 1805061376
002805

PLAINTIFF'S NAME	DEFENDANT'S NAME
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATION	MEGAN SHANNON
PLAINTIFF'S ADDRESS 1500 MARKET STREET SUITE 2600 WEST PHILADELPHIA PA 19102	**DEFENDANT'S ADDRESS** 1801 MARKET STREET SUITE 2300 PHILADELPHIA PA 19103
PLAINTIFF'S NAME	**DEFENDANT'S NAME**
PLAINTIFF'S ADDRESS	**DEFENDANT'S ADDRESS**
PLAINTIFF'S NAME	**DEFENDANT'S NAME**
PLAINTIFF'S ADDRESS	**DEFENDANT'S ADDRESS**

TOTAL NUMBER OF PLAINTIFFS	TOTAL NUMBER OF DEFENDANTS	COMMENCEMENT OF ACTION
1	1	☐ Complaint ☐ Petition Action ☒ Notice of Appeal ☐ Writ of Summons ☐ Transfer From Other Jurisdictions

AMOUNT IN CONTROVERSY
☐ $50,000.00 or less
☐ More than $50,000.00

COURT PROGRAMS
☐ Arbitration ☐ Mass Tort ☐ Commerce ☐ Settlement
☐ Jury ☐ Savings Action ☐ Minor Court Appeal ☐ Minors
☐ Non-Jury ☐ Petition ☐ Statutory Appeals ☐ W/D/Survival
☒ Other: AGENCY APPEAL

CASE TYPE AND CODE
51 - MISC ADMINISTRATIVE AGENCY

STATUTORY BASIS FOR CAUSE OF ACTION

RELATED PENDING CASES (LIST BY CASE CAPTION AND DOCKET NUMBER)

FILED
PRO PROTHY
MAY 25 2018
M. BRYANT

IS CASE SUBJECT TO COORDINATION ORDER? YES NO

TO THE PROTHONOTARY:

Kindly enter my appearance on behalf of Plaintiff/Petitioner/Appellant: PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATION

Papers may be served at the address set forth below.

NAME OF PLAINTIFF'S/PETITIONER'S/APPELLANT'S ATTORNEY	ADDRESS
KARL S. MYERS	STRADLEY RONON STEVENS YOUNG 2600 ONE COMMERCE SQUARE PHILADELPHIA PA 19103
PHONE NUMBER: (215)564-8000 **FAX NUMBER**: (215)564-8120	
SUPREME COURT IDENTIFICATION NO.: 90307	**E-MAIL ADDRESS**: kmyers@stradley.com
SIGNATURE OF FILING ATTORNEY OR PARTY: *KARL MYERS*	**DATE SUBMITTED**: Friday, May 25, 2018, 08:14 am

FINAL COPY (Approved by the Prothonotary Clerk)