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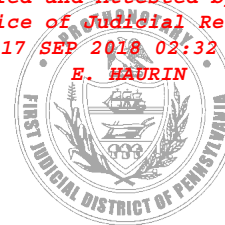
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**CITY OF PHILADELPHIA
MAYOR'S OFFICE**

Appellant

v.

MEGAN SHANNON

Appellee

**COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
TRIAL DIVISION**

**May Term, 2018
No. 02926**

**CITY OF PHILADELPHIA
DEPARTMENT OF COMMERCE**

Appellant

v.

MEGAN SHANNON

Appellee

**COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
TRIAL DIVISION**

**May Term, 2018
No. 02928**

**BRIEF OF APPELLANT CITY OF PHILADELPHIA IN SUPPORT OF
APPEAL FROM DETERMINATION OF OFFICE OF OPEN RECORDS**

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BRIEF OF APPELLANT CITY OF PHILADELPHIA

The City of Philadelphia (the “City”), through its undersigned counsel, respectfully submits this brief in support of the instant appeal.

I. MATTER BEFORE THE COURT

The City of Philadelphia (“City”) appeals the April 26, 2018 Final Determination of the Office of Open Records (“OOR”) in *Megan Shannon v. City of Philadelphia Department of Commerce and Philadelphia Industrial Development Corporation*, AP 2018-0460 (consolidated), which granted Megan Shannon’s (“Requester”) appeal of the City’s partial denial of her Right-to-Know Law Requests (the “Requests”) seeking a copy of the City’s proposal for Amazon, Inc. to locate its proposed second headquarters (commonly referred to as “Amazon HQ2” or simply “HQ2”) in Philadelphia. For the reasons discussed below, the City’s appeal should be granted.

II. STATEMENT OF JURISDICTION

Jurisdiction is proper pursuant to 65 P.S. § 67.1302(a).

III. STATEMENT OF QUESTIONS INVOLVED

1. Are the City’s proposed incentives offered to attract Amazon HQ2 to the Philadelphia region exempt from disclosure as trade secret information where such incentives derive independent economic value from not being publicly known and where the City has taken extensive steps to protect against their release to competitors?

Suggested Answer: Yes.

2. Are the City's proposed incentives offered to attract Amazon HQ2 to the Philadelphia region exempt from disclosure as confidential proprietary information where such incentives have been maintained confidentially by the limited parties with access to them and their disclosure would harm the competitive position of the City as well as its third-party contractor that aided in the development of the such incentives?

Suggested Answer: Yes.

3. Are the City's proposed incentives offered to attract Amazon HQ2 to the Philadelphia region exempt from disclosure as they reflect the City's strategy to develop or achieve a legislative proposal?

Suggested Answer: Yes.

IV. BRIEF STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Philadelphia region is competing with other municipalities to be the site of Amazon's new headquarters, commonly referred to as Amazon HQ2, or simply HQ2. Along with hundreds of other municipalities, the City of Philadelphia (the "City") submitted a proposal to Amazon (the "Philadelphia Delivers Proposal"). Among other things, the Philadelphia Delivers Proposal includes an incentives package created by the City and other entities that collaborated with the City to attract Amazon to the Philadelphia region (the "City incentives package"). Affidavit of Sylvie Gallier-Howard, First Deputy Commerce Director, City of Philadelphia Department of Commerce ("Gallier-Howard Aff.") ¶ 8, 9, Certified Record ("C.R.")¹ at 90. The City disclosed about two thirds of this proposal, but has sought to keep the incentives package confidential to prevent the City's competitors from taking advantage of access to the terms of the Philadelphia

¹ Leading zeros have been omitted from citations to the Certified Record for ease of reference.

Delivers Proposal by matching or exceeding the incentives that the City can offer, or otherwise coopting the structure of such incentives for their own financial gain. Gallier-Howard Aff. ¶ 25, C.R. at 92.

The financial incentives proposed in the Philadelphia Delivers proposal are not themselves binding – nor could they be. Rather, if the Philadelphia region is selected to be the location of Amazon HQ2 an agreement with Amazon to implement incentives would require legislation, a contract with the City, and/or a contract with a third party. Any legislation or contract with the City would necessarily be subject to public scrutiny if the City and Amazon move forward and consummate the City incentives package. *See generally* 65 Pa.C.S. §§ 701-716 (the Pennsylvania Sunshine Act); The Philadelphia Home Rule Charter at Article II, Chapter 2 (Councilmanic Procedure); 65 P.S. § 67.708(c) (noting that agency financial records are public subject to redaction).

Megan Shannon (“Requester”) submitted two identical Right-to-Know Law (“RTKL”) requests to the City, asking for a copy of the City’s proposal.² The City granted the requests in part and denied the requests in part, providing a redacted copy of the Philadelphia Delivers Proposal. C.R. at 16-17. The Requester appealed to the Office of Open Records (“OOR”), challenging only the redactions of the City-incentives portion of the Proposal. Appellate Submission of Megan Shannon, C.R. at 11. The Philadelphia Industrial Development Corporation (“PIDC”), the City’s contractor and a private not-for-profit which collaborated with the City to create the Philadelphia Delivers Proposal, participated on appeal. PIDC is a private, not-for-profit Pennsylvania corporation formed jointly by the Greater Philadelphia Chamber of

² The requests were identical other than one being directed to the City’s Mayor’s Office and the other being directed to the City’s Department of Commerce. *See* C.R. at 19, 37 (the requests submitted by Requester).

Commerce and the City for the purpose of promoting economic development in the City. Notably, PIDC is not a “local agency” subject to the open records requirements of the RTKL. *Phila. Indus. Devel. Corp. v. Ali*, 2011 WL 10843527 at *4 (Pa. Cmwlth., No. 528 C.D. 2010, filed Apr. 18, 2011) (unreported).

The OOR granted the appeal, ordering the City to disclose the City-incentives portion of the Proposal, ruling that it was not exempt from disclosure either as a trade secret or as confidential, proprietary information. C.R. at 276.

A. Amazon solicits proposals for the location of its new headquarters.

Amazon is still deciding where to locate its second headquarters, HQ2. Municipalities across the country are interested in the 50,000 jobs – with an average total compensation exceeding \$100,000 per job – and the billions of dollars of economic development that will come with HQ2: “Bringing in up to 50,000 jobs into a city is pretty much an event you can't duplicate any other way It's akin to winning the lottery.” C.R. at 73-74 (City's position statement, citing authorities).

Amazon chose a unique, highly competitive RFP process to decide on a location for HQ2. Understandably, competition is fierce. In response to Amazon's RFP, the City, along with PIDC, the Commonwealth's Department of Community & Economic Development (“DCED”), the Chamber of Commerce for Greater Philadelphia, and numerous local organizations and businesses, collaborated to create and submit the Philadelphia Delivers Proposal to Amazon for HQ2. Amazon received 238 other bids, and has narrowed the field down to 20 metropolitan regions, with Philadelphia being one of them. *See* Sara Salinas, CNBC (Jan. 18, 2018), <https://www.cnbc.com/2018/01/18/amazon-narrows-list-of-candidates-for-new-headquarters-hq2-to-20.html> (“Amazon narrows the list of metro areas for its new headquarters to 20.”).

The City publicly released information about its proposal through a website that it created to provide information about it — philadelphiadelivers.com. The City has also provided a redacted copy of the Proposal to those who request it, redacting information only to the extent the City determined was necessary to protect its competitive position in the competition for HQ2. C.R. at 34-36 (the City’s final response). In total, the City released two-thirds of its proposal. C.R. at 149-256 (a copy of the redacted proposal). The City redacted the state-incentives package, and, relevant to this appeal, the analogous incentives package that the City itself is willing to provide. Gallier-Howard Aff. ¶¶ 16–29, C.R. at 91-92.

Many of the City’s competitors have not been as forthcoming as Philadelphia with regards to their proposals. They have instead chosen not to disclose significant portions of their proposals, or kept them entirely secret. C.R. at 73 (City’s position statement, citing authorities). The competition for HQ2 is ongoing, and the City’s competitors are actively studying and scrutinizing the various proposals that have been made public. Gallier-Howard Aff. ¶ 28, C.R. at 92.

B. Development of the Philadelphia Delivers Proposal.

A great deal of research and creative inspiration went into what Commerce refers to as their “Creative Pitch” intended to give Philadelphia an edge in the competition. Gallier-Howard Aff. ¶ 11, C.R. at 90. Likewise, the City’s incentive package, consisting of financial and non-financial incentives, was specifically tailored to appeal to Amazon, while leveraging both external partners and City resources that are atypical in business development. Gallier-Howard Aff. ¶¶ 8, 12, C.R. at 90. The Creative Pitch and City incentives, along with the State Incentives crafted by DCED, were the only information redacted when the City publicly released the Philadelphia Delivers Proposal. Gallier-Howard Aff. ¶¶ 13, 19, C.R. at 90-91. Only the City

incentives package is at issue in this appeal. C.R. at 262.

The City incentives package reflects the City's outside of the box thinking in business development, as well as how the City approaches these deals. Gallier-Howard Aff. ¶ 21, C.R. at 91. Ms. Gallier-Howard explains that this approach has developed over many years and its approach "is what gives the City a competitive edge when going head to head with other cities to land an event or draw a business to the region. The City has developed a core message for business development, but also customizes its approach to meet the unique needs of each business it attracts." Gallier-Howard Aff. ¶ 9, C.R. at 90. At the same time, the Creative Pitch and City incentives in the Philadelphia Delivers Proposal were designed specifically to appeal to Amazon and to compete in a unique, country-wide competition. Gallier-Howard Aff. ¶ 12, C.R. at 90. In order to compete, Commerce embraced Amazon's "customer obsession" ethos, and studied "the company deeply to craft a unique pitch that [Commerce and PIDC] felt would best match the company ethos and practices." Gallier-Howard Aff. ¶ 10, C.R. at 90.

As has previously been explained, the incentives involved the City leveraging relationships with external partners and are not simply incentives the City itself has put on the table. Gallier-Howard Aff. ¶¶ 8, 11, C.R. at 90. The resulting City incentive package includes a number of proposals that are ultimately not binding on the City or those third parties the City worked with to develop the proposal. Rather, if there is a decision to move forward and implement the incentives in a binding way, any financial incentive would require legislation, and non-financial incentives would require City contracting and/or contracting with third parties to be binding. Supplemental Affidavit of Sylvie Gallier Howard, First Deputy Commerce Director, City of Philadelphia ("Supp. Gallier Howard Aff.") ¶ 3 (Sept. 17, 2018), attached hereto as

Exhibit A.³

The risk of harm to the City, PIDC and other stakeholders from the release of the City incentives package is real, not mere speculation. As Ms. Gallier-Howard attests, “it is well known among municipalities that competition is fierce for HQ2 and that the municipalities competing are actively studying and scrutinizing their competition.” Gallier-Howard Aff. ¶ 28, C.R. at 92. The value of having “such detailed information about the core of a competitor’s proposal ... is near priceless.” *Id.* The release of the Philadelphia Delivers Proposal would “allow the City’s competition for Amazon HQ2 to better position themselves at the City’s expense,” and to match or exceed any incentives offered by the City or State. Gallier-Howard Aff. ¶ 25, C.R. at 92. The release of the style and structure of the City’s pitch would also “provide its competition with a roadmap, allowing them to appropriate the City’s themes, messaging, and overall creative approach” which they could use against the City in this competition. Gallier-Howard Aff. ¶ 26, C.R. at 92.

This would hurt the City in future business development opportunities as well since competitors would have inside information on how the City approaches and competes for opportunities of this nature – “information that otherwise is not available to them through any legitimate means” and that is “atypical” and reflects “outside the box” thinking in this area of business attraction and development. Gallier-Howard Aff. ¶ 28, 11, 7, C.R. at 90-92. The release of the entire Philadelphia Delivers Proposal would “harm Commerce efforts to attract businesses to Philadelphia ... as well as the City’s negotiating position with such businesses.” Gallier-Howard Aff. ¶ 29, C.R. at 92.

³ The City is filing a motion to supplement the record with Exhibit A contemporaneously with filing the instant Brief. Exhibit citations in this brief are to the respective exhibits attached to the motion to supplement.

It is also reasonably likely to harm the efforts of PIDC, DCED, and other stakeholders, both public and private, to bring business to the Philadelphia region, and to the Commonwealth generally. Gallier-Howard Aff. ¶ 30, C.R. at 92; Affidavit of Ilene Burak, Senior Vice President and General Counsel, Philadelphia Industrial Development Corporation (“Burak Aff.”) ¶¶ 67-69, Certified Record (“C.R.”) at 102-103. Indeed, it is not uncommon for the City to work with agencies outside of the City to create incentive packages for business attraction purposes, which are material parts of the City’s overall presentation to such entities. Gallier-Howard Aff. ¶ 24, C.R. at 92. Ms. Burak also attests as to how PIDC would be harmed by the release of the Philadelphia Delivers Proposal, as the City incentives and Creative Pitch reflect PIDC’s unique methods for attracting businesses to Philadelphia. Burak Aff. ¶ 69, C.R. at 103.

C. Requester seeks the Philadelphia Delivers Proposal under the RTKL; the City denies the request; the OOR reverses.

In January 2018, Requester submitted two identical RTKL requests to the City, seeking “all 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.” C.R. at 19, 37. The City largely granted the requests, carefully balancing the public’s interest in disclosure and redacting information only to the extent the public release of information would harm the competitive or financial position of the City or the entities that collaborated to submit the Philadelphia Delivers Proposal. C.R. at 16-18 (the City’s final response).

Requester appealed to the OOR, challenging only the redactions of the City-incentives portion of the Proposal. Appellate Submission of Megan Shannon, C.R. at 11. PIDC sought to participate, and was granted direct interest participant status. C.R. at 263. DCED also sought to

participate, but its request was denied.⁴ *Id.* The City and PIDC both argued that the City-incentives portion of the Proposal was exempt from disclosure under Section 708(b)(11) of the RTKL, which exempts from disclosure information that is either a “Trade secret” or “Confidential proprietary information.” 65 P.S. § 67.708(b)(11). The OOR found that neither part of that exemption applied. C.R. at 265-274.

As to a “Trade secret,” the OOR read in a requirement that the City and its collaborators engage in “trade” despite the clear definition of “Trade Secret” in the RTKL that has no such requirement, and then incorrectly concluded that business attraction did not qualify as a trade. C.R. at 268-270. OOR also concluded that it was “speculative” that disclosure of the City’s incentives would cause competitive harm in the City’s efforts to attract Amazon HQ2. C.R. at 272.

Next, the OOR found that the City-incentives package was not exempt from disclosure as “Confidential proprietary information” because the information was submitted to a third-party that is not an agency under the RTKL, and the information was confidential as to both the City and PIDC so it couldn’t be considered the confidential information of either party alone and the OOR could not determine which party submitted confidential information to the other. C.R. at 273-274.

Finally, the OOR found that the City was silent on the issue of whether the City incentives reflected the City’s strategy for legislative or regulatory efforts and, therefore, found that the City did not meet its burden of proof.⁵ C.R. at 274-275.

⁴ DCED did not appeal the OOR Final Determination at issue in the instant appeals.

⁵ The City also raised other grounds of denial that are no longer at issue in the current appeal.

Having rejected the City's and PIDC's arguments, the OOR ordered the City to disclose the City-incentives portion of the Philadelphia Delivers Proposal. C.R. at 276. Both the City and PIDC now timely appeal.⁶

V. STANDARD OF REVIEW

“[U]nder the RTKL the . . . courts [of the Commonwealth] are the ultimate finders of fact and . . . are to conduct full *de novo* reviews of appeals from decisions made by RTKL appeals officers [at the OOR].” *Bowling v. Office of Open Records*, 75 A.3d 453, 474 (Pa. 2013). “[T]he scope of review [for appeals of OOR Final Determinations] must . . . be ‘broad’ or plenary; indeed, as the [Commonwealth’s] courts serve as fact-finders, it would also follow that these courts must be able to expand the record . . . as needed to fulfill their statutory function.” *Id.* at 476. Moreover, a court exercising appellate jurisdiction when reviewing an OOR Final Determination is “not limited to the rationale offered in the OOR’s written decision.” *Id.* at 460.

VI. SUMMARY OF THE ARGUMENT

At issue is whether the City, in the midst of a high stakes, nationwide competition to bring 50,000 jobs to the Philadelphia area (along with the economic development that will accompany these positions) must publicly release the core of its nonbinding pitch for the public, and all its competitors, to examine. Specifically, the subject of this appeal is the incentive package developed by the City and its partners through an outside the box approach that is “atypical” in this field and that its competitors would have no legitimate way to obtain. To be sure, if the City moves forward to consummate the proposal there will be a time for public

⁶ Though the OOR consolidated the two requests into one Final Determination, both the City and PIDC have filed two appeals, one for each request.

comment and critique – including an opportunity for public comment with respect to any portion of the financial incentives at issue. This is not that time.

The City-incentives portion of the Philadelphia Delivers Proposal is exempt from disclosure (A) as a trade secret, (B) as confidential, proprietary information, and (C) because it reflects the strategy to be used to achieve the successful adoption of a legislative proposal.

To show that information is exempt from disclosure as a trade secret, the City need only show it (1) derives independent economic value from not being generally known or readily ascertainable and (2) it is the subject of reasonable efforts to maintain its secrecy. There is no independent requirement to show that the information is used in trade and the OOR erred in holding otherwise. The City and PIDC have expended substantial time and resources in developing and structuring a creative incentive package that has real economic value. Competitors could use this valuable information to capitalize in this or other business attraction deals if the City is forced to release it and would profit at the City's expense. Moreover, the City and PIDC have both gone to great lengths to assure the information remains secret, including limiting those employees with access to the information to a need-to-know basis, and storing it in a secure manner.

Similarly, the information is exempt as confidential proprietary information because (1) it is treated in a privileged and confidential manner, and (2) the disclosure would cause substantial harm to the competitive position of the City and its partners. There is no question that the competition to attract HQ2 is intense. It is well known that the competitors are actively studying and scrutinizing their competition and particularly searching for the incentives offered by the various cities that remain in the running. Allowing the City's competition access to its proposal would essentially require the City to compete with its hand on the table while its competitors

play their cards close to the chest. This would irreparably harm the City's and PIDC's competitive position in this, and potentially future business attraction deals. The RTKL does not compel that result.

OOR improperly found that because the City could not separate out the PIDC confidential information from City confidential information, and because the City's confidential information was not requested from a separate agency, the exception did not apply and all information was subject to release. Such an analysis would lead to an absurd result – the release of confidential information because it remains in the hands of an agency who took part in creating it when even OOR would acknowledge that the information would not be subject to disclosure if requested from a third party, such as DCED.

Finally, the City incentive proposal reflects the strategy the City has developed and would implement to successfully achieve the legislative proposal and implement the financial incentives contemplated – *if* the deal goes forward.

VII. ARGUMENT

The City-incentives portion of the Proposal is exempt from disclosure as a trade secret, as confidential, proprietary information, and as the strategy to achieve a legislative proposal. To succeed in a competitive bidding process, that would ultimately require legislation and contracting if it moves forward, some level of confidentiality is essential. The General Assembly did not intend for the RTKL to put Pennsylvania at a systematic disadvantage in attracting businesses and encouraging economic development. Instead, the RTKL and its exemptions reflect the General Assembly's intent to balance the interest of disclosure against competing governmental interests, including protecting the government's ability to consider, negotiate, and make decisions about whether to contract with third-parties outside the public lens. *E.g.* 65 P.S.

§ 67.708(b)(10) (exempting documents reflecting “internal, predecisional deliberations” and “[t]he strategy to be used to develop or achieve the successful adoption of a . . . legislative proposal”); § 67.708(b)(21)(ii) (exempting minutes of executive sessions); § 67.708(b)(26) (exempting certain proposals that contractors make prior to the award of the contract). *See generally* § 67.708(b) (providing for thirty separate exemptions from disclosure).

In short, the General Assembly did not intend that the RTKL be used to compel the City to flip over its cards and allow its competitors to see its hand while the game is still being played. Until the competition is over and a final outcome is reached that requires the City to move forward with legislation or binding agreements, the City-incentives portion of the City’s proposal is exempt from disclosure. Once Amazon makes a decision to move forward, Philadelphians would have every opportunity to consider the legislation and offer their input before any such incentives could become law – just like any other legislative proposal. Similarly, any ultimate agreement reached between the City and Amazon will be memorialized in a contract that would also be subject to public disclosure – just like any other contract. Preliminary proposals and discussions of this nature that are ultimately subject to further City action if agreement is reached between the parties are simply not public.

A. The City-incentives are exempt from disclosure as a trade secret.

The City-incentives portion of the City’s proposal is exempt from disclosure as a trade secret because its disclosure would cause irreparable harm to the City’s competitive position as Amazon searches for a location for HQ2. The OOR found otherwise only because it incorrectly ruled that the exception only applies to entities engaged in “business or commerce” and because the City did not demonstrate how its incentive package had independent economic value. C.R. at 271 (OOR Final Determination). The OOR erred on both findings, as the proposal has

economic value by the information not being known by the City’s competitors. Gallier-Howard Aff. ¶ 28, C.R. at 92.

The RTKL exempts from disclosure any “record that constitutes or reveals a trade secret . . .” 65 P.S. § 67.708(b)(11). The RTKL adopts the standard definition of a trade secret from the Uniform Trade Secrets Act, 12 Pa. C.S. § 5301, *et seq.* – information 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 persons 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. Both requirements are satisfied here.

Interpreting the RTKL’s definition, the Commonwealth Court has endorsed a six-factor test to determine whether a record constitutes a trade secret: (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 his 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. *Commonwealth v. Eiseman*, 85 A.3d 1117, 1126 (Pa. Cmwlth. 2014), *rev’d in part on other grounds*, 125 A.3d 19 (Pa. 2015); *accord W. Chester Univ. of Pa. v. Schackner*, 124 A.3d 382, 392 n.15 (Pa. Cmwlth. 2015).

Pennsylvania courts have repeatedly recognized that information that allows competitive insight into someone else’s bid is a trade secret. *See Omicron Systems, Inc. v. Weiner*, 860 A.2d 554, 562–64 (Pa. Super. 2004) (protecting as trade secrets proposals that reflected a company’s proprietary method of soliciting business); *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 566 A.2d

1214, 1230 (Pa. Super. 1989) (favorably citing *S.I. Handling Systems, Inc. v. Heisley*, 753 F.2d 1244, 1257 (3d Cir. 1985) for the proposition that information that would allow competitors to discover a company’s “pricing methods” can be protected as a trade secret). Likewise, federal courts in Pennsylvania recognize that costing and pricing information, as well as marketing strategies, can be trade secrets under both federal and Pennsylvania law. *Youtie v. Macy’s Retail Holding, Inc.*, 653 F. Supp. 2d 612, 621 (E.D. Pa. 2009); *BIEC Intern., Inc. v. Global Steel Services, Ltd.*, 791 F. Supp. 489, 545 (E.D. Pa. 1992).

As discussed below, all these factors weigh in favor of finding the City’s incentive package constitutes a trade secret. However, OOR failed to apply this test, instead inserting its own requirement that appears neither in the text of the RTKL or associated caselaw, and held the City must be engaged in “trade,” which the OOR identified as “business or commerce,” for the exemption to apply.

1. The RTKL’s definition of a trade secret does not require the City be engaged in a “Trade.”

The OOR erred in finding it irrelevant whether disclosure of the City-incentives portion of the City’s proposal would cause irreparable harm to the City’s ability to win the bid for HQ2 by grafting an entirely new requirement onto the statutory definition of “trade secret” contained in the RTKL: that only information used in a “trade” can be a “trade secret.” It then ruled that information used to attract businesses cannot be a “trade secret” because it did not believe that the business attraction undertaken by the City is a “trade.” C.R. at 268-270.

To start with, the OOR’s ruling was erroneous because it created a new requirement that was contrary to statutory text. The RTKL specifically defines the term “Trade secret” and nowhere does that definition consider whether the information is used in a “trade.” Instead, the RTKL’s definition looks only to the value of protecting the confidentiality of the information at

stake, and what steps were taken to protect the information. 65 P.S. § 67.102; *see Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177, 185–87 (Pa. 2006) (applying the two-part test to determine whether a state agency had a trade secret); *accord Eiseman*, 85 A.3d at 1128 (Pa. Cmwlth. 2014).

The OOR cannot substitute its judgment for the RTKL’s plain text. The RTKL itself settles the balance between disclosure and confidentiality in this case through its definition of “Trade secret,” and the OOR was bound to follow that definition. *See Dep’t of Env’tl. Prot. v. City of Philadelphia*, 692 A.2d 598, 608 (Pa. Cmwlth. 1997) (explaining that, under 1 Pa. C.S. § 1921(a)–(b), courts and administrative bodies must follow the General Assembly’s definition of a defined statutory term). To the extent that the OOR considered what it believed to be the ordinary meaning of the term “Trade secret,” it also erred, as it may consider ordinary meaning only if a statutory term is undefined. 1 Pa.C.S. § 1903(a); *Pa. State Police v. Grove*, 161 A.3d 877, 892 (Pa. 2017).

In sum, the Trade Secret exemption in the RTKL has only two clear requirements that must be met, and there is no independent requirement to show the party asserting protection is engaged in a trade. State courts that have addressed this question in construing statutes concerning access to public records alleged to be trade secrets have expressly rejected OOR’s reasoning. *See, e.g., Univ. of Conn. v. Freedom of Info. Comm’n*, 36 A.3d 663, 668 (Conn. 2012) (“[T]here is no requirement, express or implied, that the entity generally must be engaged in a ‘trade,’ however one might define that term.”); *see also State ex rel. Perrea v. Cincinnati Pub. Sch.*, 916 N.E. 2d 1049, 1053–54 (Ohio 2009) (applying the two-part test to determine that the exams that a school district administered were a trade secret).

Just as with the RTKL, the Connecticut Freedom of Information Act drew the definition of a Trade Secret from its state version of the Uniform Trade Secrets Act, while the Ohio Supreme Court applied the Ohio Uniform Trade Secrets Act directly. *Univ. of Conn.*, 36 A.3d at 668 (noting the definition of trade secret under Connecticut’s Freedom of Information Act mirrors the definition in Connecticut’s Uniform Trade Secrets Act); *Cincinnati Pub. Sch.*, 916 N.E. 2d at 1053 (applying Ohio’s Uniform Trade Secrets Act, which has the same definition of trade secret as Pennsylvania’s, to an Ohio Public Records Act request). Decisions from other states concerning the interpretation of a uniform act, such as the definition of “Trade secret” that the RTKL takes from the Uniform Trade Secrets Act, are particularly important. *See* 1 Pa. C.S. § 1927 (directing courts to interpret uniform laws in light of the policy of making uniform the law of all states that enact them); *Sternlicht v. Sternlicht*, 876 A.2d 904, 911 (Pa.Super. 2005) (requiring Pennsylvania courts to give “great deference” to other states’ decisions interpreting uniform acts). The OOR attempted to distinguish the Ohio and Connecticut cases on the ground that the OOR has a duty to construe the RTKL’s exemptions narrowly. C.R. at 268-269. However, Ohio and Connecticut courts have the same obligation. *Lieberman v. Aronow*, 127 A.3d 970, 975 (Conn. 2015) (noting “it is well established that the general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed”); *Ohio ex rel. Cincinnati Enquirer v. Ohio Dep’t of Public Safety*, 71 N.E.3d 258, 266 (Ohio 2016) (“We strictly construe these exceptions [to disclosure] against the public-records custodian.”).

Moreover, even if the government must be engaged in a “trade” to have a “Trade secret,” both the City and DCED are engaged in the trade of business development and attraction. As the OOR itself recognized, C.R. at 269, the ordinary meaning of a “trade” is, among other things, “[a] business or industry occupation; a craft or profession.” Black’s Law Dictionary 1721 (10th

ed. 2014). Business development and attraction is an occupation. The record contains ample examples of people whose full-time job – whose “trade,” “craft,” or “profession” – is to encourage businesses to locate in Philadelphia or in the Commonwealth, including employees of DCED, the City’s Department of Commerce, and various other governmental and non-government organizations – such as the Philadelphia Convention and Visitors Bureau, the Philadelphia Industrial Development Corporation, Select Greater Philadelphia, the Chamber of Commerce for Greater Philadelphia, and of course the other cities throughout the country competing for HQ2. Gallier-Howard Aff. ¶ 4, C.R. at 89. Protecting the confidentiality of the City’s proposal is of substantial value in the trade of business development and attraction, as explained later.

The OOR’s conclusions that the City and PIDC may only have a trade secret when engaged in “trade” and that business attraction is not a trade are unsupported either by the text of the RTKL or by caselaw interpreting the application of the Uniform Trade Secrets Act in Pennsylvania and elsewhere.

2. The City-incentives have independent economic value from not being generally known.

In identifying the independent economic value relevant for the trade secret analysis, the Courts have looked to “the value of the information to [the] business and to competitors,” as well as “the amount of effort or money expended in developing the information.” *See, e.g., Eiseman*, 85 A.3d at 1126.

During the competition for HQ2, the City-incentives portion of the City’s proposal derives economic value from not being generally known because the City’s competitors could use knowledge of it to undercut the City’s bid, strengthen their own, or to otherwise compromise the City’s negotiating position. Gallier-Howard Aff. ¶ 25, C.R. at 92. Indeed, it is common

knowledge that the competitors are actively researching the proposals of other municipalities in the competition. Gallier-Howard Aff. ¶ 28, C.R. at 92. As the City has explained, this information is considered “near priceless” to itself and its competitors. *Id.*

The City-incentives also derive value from the cost and effort put into the Philadelphia Delivers Proposal by the City and its partners. As the City explained:

7. The Philadelphia Delivers Proposal is the result of weeks of directed efforts by the City and its partners, most notably PIDC, but it stood on the shoulders of years of experience in marketing, business and talent attraction. It was possible because of the countless successful events held in the City, meetings with other businesses exploring relocation, and learning from lost opportunities. While the RFP required the City to turn around its proposal in a short time frame, the City was able to draw on years of experience between the City and its private and public partners in responding.

...

9. Over the years, Commerce has developed confidential marketing strategies and innovative approaches to attract large events and businesses to the region. This is what gives the City a competitive edge when going head to head with other cities to land an event or draw a business to the region. The City has developed a core message for business development, but also customizes its approach to meet the unique needs of each business it attracts.

10. In the case of the Philadelphia Delivers proposal, we embraced the company’s value of “customer obsession” and studied the company deeply to craft a unique pitch that we felt would best match the company ethos and practices.

...

12. The City incentive package was . . . specifically crafted to appeal to Amazon based on our 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 that we thought would appeal directly to Amazon.

Gallier-Howard Aff. ¶¶ 7-12, C.R. at 90. The City incentives package is a core component of the Philadelphia Delivers Proposal and the City’s efforts to convince Amazon to locate HQ2 in Philadelphia. The package reflects both how “the City approaches these deals” and, at the same

time, was crafted “specifically to appeal to Amazon and compete on this country-wide scale.” Gallier-Howard Aff. ¶¶ 21-24, C.R. at 91-92. If other competitors had access to them, they could replicate features of the City’s proposal and outside the box thinking that they would not otherwise have known about. Competitors could take advantage of the time, effort, and money the City put into creating the proposal and use it for their own benefit in this or other business attraction deals without expending their own time or funds, at the expense of the taxpayers of Philadelphia. Gallier-Howard Aff. ¶¶ 20-22, C.R. at 91. The City-incentives also have economic value based on the potential future economic development the City could receive as well. Gallier-Howard Aff. ¶ 20, C.R. at 91.

The City’s competitors do not otherwise have access to the City’s proposal in a legitimate way, just as the City does not have such an ability to learn equivalent information about many of its competitors’ proposals. *Eiseman*, 85 A.3d at 1126 (noting the relevance of “the ease or difficulty with which the information could be properly acquired or duplicated by others”). In short, disclosure would force the City to negotiate with its cards on the table, while its competitors could conceal their own. *See* Gallier-Howard Aff. ¶¶ 19-29, C.R. at 91-92 (discussing the competitive harm to the City).

As a result, the City-incentives portion of the Proposal “derives independent economic value” from being kept confidential and is in fact “near priceless” in value, Gallier-Howard Aff. ¶ 28, C.R. at 91, plainly satisfying the first prong of the trade-secrets test. *See generally* *W. Chester Univ. of Pa. v. Schackner*, 124 A.3d 382, 392 n.15 (Pa. Cmwlth. 2015) (outlining factors that courts consider in assessing whether information is a trade secret).

Here, the City’s business attraction proposal including financial and non-financial incentives which leverage “both external partners and City resources that are atypical in business

development” have independent economic value that should be protected. Gallier-Howard Aff. ¶ 12, C.R. at 90.

3. The City took sufficient steps to protect the confidentiality of the City-incentives.

The City took reasonable steps to protect the secrecy of the City-incentives portion of the City’s proposal, satisfying the second prong of the trade-secret test. The holder of a trade secret must take sufficient steps to protect it, or else it loses its status as a trade secret. Specifically, the RTKL demands that a trade secret must be “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” 65 P.S. § 67.102; *see Schackner*, 124 A.3d at 392 n.15; Restatement (3d) of Unfair Competition § 39 (discussing the definition of “trade secret” as codified in the Uniform Trade Secrets Act). The OOR held that the City did not meet “either prong of the trade secret test,” C.R. at 273, but did not otherwise address the significant steps the City took to protect the confidentiality of the City-incentives.⁷

The City provided access to the City-incentives package to only select City employees on a need-to-know basis. Gallier-Howard Aff. ¶ 35, C.R. at 93. The Proposal itself, containing the City-incentives, was provided to Amazon via secure delivery, and to DCED subject to a non-disclosure agreement. Gallier-Howard Aff. ¶ 32, C.R. at 93. Any third-parties who collaborated with the City to create the Proposal were also required to sign nondisclosure agreements

⁷ In a companion case, the OOR improperly found that the agency did not meet this prong as its confidentiality agreements were unreasonable because they were too long, *i.e.* that the entity was too aggressive in its efforts to protect the information. *Opilo v. Pennsylvania Department of Community and Economic Development*, AP 2018-0145 (Pa. OOR Mar. 26, 2018). Here, the OOR simply failed to provide any explanation for its conclusion.

prohibiting them from releasing any confidential City information, and with one exception required for the instant litigation, none were provided with the City-incentives. *Id.*⁸

For the foregoing reasons, both prongs of the trade-secret test are satisfied and the City-incentives package is exempt from disclosure as a trade secret.

B. The City-incentive portion of the Philadelphia Delivers Proposal is exempt from disclosure as confidential, proprietary information.

The City-incentive portion of the City's proposal is also exempt from disclosure as confidential, proprietary information. The RTKL exempts from disclosure "[a] record that constitutes or reveals a trade secret or confidential proprietary information," the RTKL defines the latter 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. §§ 67.708(b)(11), 67.102. As the City has discussed above, the relevant portions of the Proposal have been confidentially stored, and their release would cause substantial harm to the City and PIDC. The City and PIDC took extensive steps to protect the confidentiality of this information to ensure that competitors in the bidding for HQ2 would not be able to access it. *See supra* Argument at pages 22 to 23.

The City collaborated with its partners to create incentives that would uniquely appeal to Amazon but that also showed the City and PIDC's creative approach to business attraction more

⁸ The City has released only a select portion of the Creative Pitch and incentive package that reflected that third party's confidential information, as carefully packaged by the City to allow that third party the opportunity to participate in RTK appeals related to the proposal. *Gallier-Howard Aff.* ¶ 34, C.R. at 93.

broadly. Gallier-Howard Aff. ¶ 21, C.R. at 91. PIDC *submitted* confidential information that was *received* by the City, and ultimately incorporated with the City's and PIDC's joint analysis and creativity into the City incentives package. Gallier-Howard Aff. ¶ 31, C.R. at 92. The City and PIDC have explained how the release of such confidential information would harm the competitive advantage of both parties. *See generally* Gallier-Howard Aff. ¶¶ 19-31, C.R. at 91-92; Burak Aff. ¶¶ 36-73, C.R. at 99-103.

The OOR acknowledged that the information was confidential to PIDC and the City. C.R. at 274. OOR also correctly recognized that the sharing and collaboration between the City and PIDC⁹ – a private entity not directly subject to the RTKL – to create the confidential information at issue in this appeal rendered it impossible to separate the confidential information to determine specifically which entity it belonged to. C.R. at 273-274. However, it erred in concluding that meant the incentives were subject to release.

Since the incentive package undisputedly reflects PIDC confidential information exempt from disclosure pursuant to Section 708(b)(11), there is no need to separate what portion is City confidential from what portion is PIDC confidential – the entire record is exempt from disclosure. *See, e.g., Commonwealth Dep't of Labor & Indus. v. Simpson*, 151 A.3d 678, 682 (Pa. Cmwlth. 2016), *appeal denied sub nom.*, 166 A.3d 1231 (Pa. 2017) (reversing OOR final determination and holding that “OOR erred in ordering redaction of information from a record that is exempt from disclosure and therefore not a public record”); *Heavens v. Pennsylvania Dep't of Env'tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Cmwlth. 2013) (internal citation omitted) (holding that “records that are exempt under Section 708 . . . are not considered public records and are

⁹ There can be no question that PIDC, a private non-profit not subject to the RTKL, can have confidential information and that its confidential information submitted to the City is protected from disclosure.

therefore not subject to the redaction requirement contained in Section 706, which applies only to records that are public and contain information that is not subject to access.”); *Pa. State Police v. Office of Open Records*, 5 A.3d 473, 481 (Pa. Cmwlth. 2010) (holding that “where a record . . . is not a public record as defined by the RTKL . . . an agency is not required to redact the record”). However, even assuming *arguendo* that the record is a “public record” subject to redaction, the RTKL provides that where “information which is not subject to access is an integral part of the public record” and is “not able to be redacted” the City may deny access to the record. 65 P.S. § 67.706.

Finally, the OOR improperly concluded that City confidential information can only be protected from disclosure if it is disclosed to another “agency” under the RTKL and requested from that agency. C.R. at 273. The OOR acknowledged that the City is plainly a “person” for purposes of the RTKL and that agencies can create confidential information. *Id.*¹⁰ Under OOR’s construction, the City’s confidential information would be exempt from disclosure if requested from a state entity such as DCED, but is not confidential when requested from the City itself. *Van Osdol v. City of Pittsburgh*, AP 2017-2247 (Pa. OOR Jan. 24, 2018) (holding that the City of Pittsburgh’s proposal was not exempt from disclosure because the “proposal was not received by or submitted to another agency; instead, it was received by and submitted to Amazon”). Indeed, another appeal, currently pending in Commonwealth Court pertains to a request made to DCED for a portion of the City’s proposal. *Dept. of Econ. Develop. v. Opilo*, 569 C.D. 2018 (Pa. Cmwlth. filed Apr. 24, 2018).¹¹ Applying the OOR’s analysis, the City’s

¹⁰ The RTKL does not have its own definition of “person” and so the Statutory Construction Act’s definition applies, unless “context clearly indicates otherwise.” 1 Pa. C.S. § 1991. The Statutory Construction Act defines “person” to include “a government entity (other than the Commonwealth).” *Id.*

confidential proprietary information would be exempt from disclosure when requested from DCED, but subject to public disclosure when requested from the City. This is nonsensical. Where government agencies share information, the “Confidential proprietary information” exemption should not be interpreted to require rigid analysis of which government agency “submitted” or “received” the information. Instead, if the information is confidential and the disclosure would cause the requisite competitive harm to a government agency, it is exempt from disclosure.

Holding otherwise would subject the confidential, proprietary information exemption to procedural gamesmanship. If the exemption applied only where requesters asked for information from the agency that technically “received” it, then requesters could make the exemption irrelevant by instead requesting the information from the agency that technically “submitted” it. The General Assembly could not have intended to allow requesters to manipulate the application of the exemption through procedural games. *See* 1 Pa. C.S. § 1922(1) (presuming that the General Assembly does not intend unreasonable or absurd results).

The City-incentives are a core component of the Philadelphia Delivers Proposal and the City’s efforts to convince Amazon to locate HQ2 in Philadelphia. Gallier-Howard Aff. ¶¶ 21-24, C.R. at 91-92. During the competition for HQ2, the City and PIDC retain a competitive advantage that would be undermined if it is required to publicly release its incentive pitch or to otherwise compromise the region’s negotiating position. If the City was required to release its incentive package competitors could use this knowledge in their negotiations with Amazon, allowing them to match or exceed what the City developed, or even to use their knowledge of the

¹¹ Even in the instant case, if DCED’s information was still at issue, it would have been “received by” the City.

City's incentives to distinguish and buttress their own. Outside the competition as well, if the information were released competitors could use the City and PIDC's confidential information to gain unfair advantage in other business attraction deals. If other competitors had access to them, they could replicate features of the City and PIDC's approach that such competitors would not otherwise have known about.

It is not merely speculation that the City would suffer harm if the proposal were to be released in its unredacted form; it is well known among municipalities that competition for Amazon HQ2 is fierce and that competitors are actively studying and scrutinizing their competition. Gallier-Howard Aff. ¶ 28, C.R. at 92. Indeed, the *same* concerns cited here by the City have been echoed by its competitors for Amazon HQ2. C.R. at 73 (City's position statement, citing authorities). In this extreme competition, any City competitor would almost certainly use information obtained about the Philadelphia Delivers Proposal – through the RTKL or otherwise – to bolster its own submissions, providing additional economic value to its region if Amazon were to select it as the location of HQ2.

The RTKL simply does not mandate that the City disclose confidential information and permit its competitors to exploit the substantial time and energy that went into the development of the City incentives to improve their own business attraction strategy at no cost and at the City's expense. The City does not have the same ability to learn equivalent information about many of its competitors' proposals. In short, disclosure would force the City to negotiate with its cards on the table, while its competitors could conceal their own. *See* Gallier-Howard Aff. ¶¶ 19-29, C.R. at 91-92 (discussing the competitive harm to the City).

For these reasons, the City incentives portion of the City's proposal is exempt from disclosure as "Confidential, proprietary information."

C. The City-incentive portion of the Philadelphia Delivers Proposal is exempt from disclosure as the strategy to implement a legislative proposal.

The City-incentives in the Philadelphia Delivers Proposal are exempt from disclosure as the strategy to achieve the successful adoption of a legislative proposal. The RTKL exempts records which reflect the strategy used to develop or achieve the adoption of a legislative proposal. 65 P.S. § 67.708(b)(10)(i)(B). Importantly, unlike the RTKL's exemption of records used in *internal* predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), this exemption applies regardless of whether such records are internal or external to an agency.

The implementation of any of the financial incentives proposed in the Philadelphia Delivers Proposal would require legislation to implement. Supp. Gallier Howard Aff. ¶ 3, Exhibit A. Indeed, the City-incentives in the Philadelphia Delivers Proposal are just that: proposals which are ultimately not binding without further action by the City or third-parties. *Id.* There are no binding commitments made to Amazon or to anyone else in the City-incentives. Rather, as the City explained, the proposal is “a business attraction proposal that contemplates a business relocating, in part, to the Philadelphia area, and further discussions that will result if such relocation and development progresses.” Gallier-Howard Aff. ¶ 14, C.R. at 90. The incentives package is just a part of the City's overall strategy to attract HQ2 to Philadelphia and to enact any necessary enabling legislation to achieve that goal. It was developed to “creatively leverage the City's resources to minimize the cost to the City while maximizing the benefits offered to Amazon.” Supp. Gallier Howard Aff. ¶ 4, Exhibit A. Thus, its disclosure would reveal the Administration's strategy to accomplish these goals and achieve the passage of the necessary legislation. *Id.*

Reading the Section 708(b)(10)(i)(B) exemption to exempt the Philadelphia Delivers Proposal as the strategy to achieve the adoption of a legislative proposal would be entirely

consistent with a major theme of the RTKL: exempting records that reflect the internal process through which agency decisions are made particularly before the agency is publicly committed to moving forward. In contrast to the many exemptions in the RTKL which exempt various records used in agency decision-making,¹² once a legislative proposal is finalized and introduced to the legislative body, the public may participate in the decision-making process. *See generally* 65 Pa.C.S. §§ 701-716 (the Pennsylvania Sunshine Act); The Philadelphia Home Rule Charter at Article II, Chapter 2 (Councilmanic Procedure). At the point when the City and Amazon decide to move forward to potentially implement financial incentives, such incentives would go through a legislative process which would be open to the public. Members of the public would at that time have an opportunity to comment. The Philadelphia Home Rule Charter at § 2-201 (requiring public notice and a public hearing on all bills).

But the General Assembly has been consistent with its intent through its enactment of the various exemptions in the RTKL that records such as the Philadelphia Delivers Proposal that are simply part of a decision-making process and reflect the strategy for a future legislative proposal are not ripe for public disclosure.

¹² *See, e.g.*, 65 P.S. § 67.708(b)(10)(i)(A) (exempting internal pre-decisional deliberations); 708(b)(9) (exempting draft bills, resolutions, and statements of policy); 708(b)(7)(viii) (exempting employee personnel file materials except the final action of demotion or discharge); 708(b)(12) (exempting employee notes and working papers); 708(b)(8)(i) (exempting labor relations and collective bargaining strategy); 708(b)(22) (exempting various records related to the purchase of real estate or construction until after a decision to proceed has been made).

VIII. CONCLUSION – RELIEF REQUESTED

For the foregoing reasons, the instant appeal should be granted and the OOR's Final Determination granting Megan Shannon access to the City's confidential incentives package from the Philadelphia Delivers Proposal should be reversed.

Respectfully submitted,

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