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CITY OF PHILADELPHIA,  
DEPARTMENT OF COMMERCE,

Appellant,

v.

MEGAN SHANNON,

Appellee.

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: COURT OF COMMON PLEAS  
: PHILADELPHIA COUNTY  
:

: MAY TERM 2018

: NO. 2928  
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**BRIEF OF APPELLANT**  
**PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATION**

Appellant Philadelphia Industrial Development Corporation (“PIDC”) submits this brief in the above-captioned appeals, as directed by the Court in its August 21, 2018 order.

**I. INTRODUCTION**

These appeals involve Right-to-Know Law requests for the City Incentives portion of Philadelphia’s proposal for the second headquarters for Amazon. PIDC – Philadelphia’s economic development company – participated in the development of the Incentives. PIDC asserts the City Incentives reflect PIDC’s confidential proprietary information and trade secrets, and as a result, that the Incentives are exempt from disclosure under the RTKL. PIDC submitted sworn evidence and a letter brief to the OOR supporting that claim. The OOR ruled against PIDC anyway, and in doing so ignored PIDC’s evidence and applied flawed logic. PIDC now appeals, and seeks reversal of the OOR’s decision.

**II. MATTER BEFORE THE COURT**

These matters involve four appeals of the appellants, PIDC and the City of Philadelphia, from the April 26, 2018 Final Determination of the Office of Open Records, at Nos. AP 2018-0460 and 0461. For the reasons below, PIDC requests that the Court reverse the OOR’s Final

Determination and order that the City of Philadelphia need not take any further action on appellee's RTKL requests.

### **III. STATEMENT OF THE QUESTIONS INVOLVED**

- A. Is PIDC's confidential proprietary information contained in the City of Philadelphia's Amazon second headquarters proposal protected from disclosure by exemption 11 of the Right-to-Know Law, 65 P.S. §67.708(b)(11)?

*Suggested Answer: Yes.*

- B. Are PIDC's trade secrets contained in the City's proposal protected from disclosure by exemption 11 of the RTKL?

*Suggested Answer: Yes.*

### **IV. FACTS**

#### **A. Procedural History**

This Right-to-Know Law matter began in January 2018, when the appellee, attorney Megan Shannon, submitted identical requests to the Philadelphia Mayor's Office and Commerce Department. (R. 19, 37.)<sup>1</sup> Appellee asked for a copy of the City of Philadelphia's proposal to Amazon for selection as the location of its second headquarters. The City provided appellee with a redacted version of the proposal. (R. 17, 35). That version includes 70 unredacted pages, which make up about two-thirds of the proposal. (R. 149-256.)

Appellee challenged the redactions before the Office of Open Records. There, PIDC and the City made substantial submissions supporting their respective claims that the redacted items are protected from disclosure. (R. 72-107, 115-256.) PIDC, for its part, submitted a 21-page letter brief (R. 115-135) supported by a sworn, 10-page affidavit by a knowledgeable senior

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<sup>1</sup> Citations to the record are in the form "(R. \_\_\_\_)" and use the Office of Open Records' pagination of the record reflected on the lower right corner of each page. The OOR filed the certified record with this Court on September 6, 2018.

executive (R. 139-148). PIDC specifically asserted, with citations to supporting evidence, that its confidential proprietary information and trade secrets were within the redactions. (R. 121-134.) Appellee did not rebut PIDC's submission with any competing affidavits or briefing.

The OOR still ruled against PIDC and the City in its Final Determination, concluding that the City Incentives (the financial incentives and financial programs proposed to Amazon) must be disclosed.<sup>2</sup> (R. 261-276.) The OOR's ruling shows it gave basically no consideration to PIDC's submission.

PIDC timely appealed to this Court on May 25, 2018. The City also timely appealed on May 29, 2018. Following a conference, the Court issued a scheduling order on August 21, 2018 requiring the parties to file briefs and then argue the appeals. This brief is timely filed, as directed by the Court's order.<sup>3</sup>

## **B. Factual Background**

### **1. The Amazon HQ2 Process**

In September 2017, Amazon publicly solicited bids for its second headquarters, or "HQ2." It expects to invest over \$5 billion in construction, and intends to grow HQ2 to include as many as 50,000 full-time, well-paying jobs. The project will have a significant and positive effect on the economy of the chosen host locality. (R. 120.)

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<sup>2</sup> As the OOR explained, because appellee "limited her appeal to the City Incentives, [she] has waived any objections regarding the redaction of any other information." (R. 262 n.2.) And since appellee has not cross-appealed, that means this appeal concerns only the City Incentives. *See, e.g., Philadelphia District Attorney's Office v. Cwiek*, 169 A.3d 711, 716 (Pa. Commw. 2017) ("Requester did not cross-appeal, arguing that the OOR erred in determining that no other responsive records exist and, thus, Requester has likewise waived the issue").

<sup>3</sup> Meanwhile, appellee filed an application for extraordinary relief with the Pennsylvania Supreme Court, asking it to assume jurisdiction over this matter. *See* Pa. Supr. Ct. No. 92 EM 2018. PIDC and the City each filed oppositions to the application on August 24, 2018. The Supreme Court has not yet disposed of appellee's application as of this writing.

Amazon's solicitation caused an intensely competitive bidding process: over 200 localities submitted bids, including Philadelphia. In January, Amazon narrowed the field to 20 finalists. Philadelphia is one of those 20. It is now competing against the other 19 locales and PIDC's competitors to try to win Amazon's HQ2. (*Id.*)

## **2. PIDC**

PIDC is a Pennsylvania non-profit, non-stock corporation<sup>4</sup> based in Philadelphia. It is the economic development company serving the City's residents, businesses, and other stakeholders. PIDC's mission is to spur investment, support business growth, and foster developments that create jobs, revitalize neighborhoods, and propel growth in every part of the City. (R. 118.)

To carry out its mission, PIDC attracts, manages, and invests public and private resources in the clients, communities, and markets that drive the City's economy. PIDC offers flexible financing tools, a targeted portfolio of industrial and commercial real estate, and decades of Philadelphia-based knowledge to help its clients invest and develop. PIDC also structures and invests in public-private partnerships for key City policy areas and development priorities. (*Id.*)

For 60 years, PIDC and its affiliates have settled 6,700 transactions, including \$14 billion in financing that has leveraged over \$25 billion in total investment, and has helped create and retain hundreds of thousands of jobs. PIDC's direct loan and managed third-party portfolio at the start of 2016 exceeded \$642 million, representing 520 loans. (*Id.*)

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<sup>4</sup> PIDC is not an agency subject to the RTKL. *See PIDC v. Ali*, No. 528 CD 2010, 2011 WL 10843527 (Pa. Commw. 2011) (holding PIDC is not a "local agency" under the RTKL).

### **3. PIDC's Trade in Attracting Private Businesses**

PIDC's primary business and trade is attracting private businesses to the City to support its economy and growth. To draw private businesses here, PIDC uses the full panoply of resources at its disposal, including its financing tools, real estate portfolio, and decades of Philadelphia-based knowledge, methods, and ideas. (R. 119.)

PIDC competes against other similar economic development entities and consultants, who are also trying to attract private businesses to their own locales. PIDC and its competitors in the business attraction marketplace constantly vie against one another by offering competing proposals to entice private businesses. PIDC uses its carefully-developed, confidential, and proprietary mix of financing, real estate, and intellectual know-how – which it has honed over the past 60 years – and applies them to craft individually-targeted proposals to persuade businesses to locate or relocate their operations in Philadelphia.<sup>5</sup> (*Id.*)

### **4. The City's Amazon Proposal**

The Amazon HQ2 process is much like other business attraction scenarios where PIDC has been in direct competition with its competitors in other localities – even though it is perhaps the most intensely competitive business attraction bidding process in PIDC's history. (R. 120.)

The City's Amazon proposal is a 108-page document entitled "Philadelphia Delivers." PIDC had significant, material input into the City's proposal. And PIDC's confidential and proprietary tools, methods, and information were used in its development. (R. 120, 121.)

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<sup>5</sup> For instance, PIDC deployed its proprietary resources and skills to attract Dietz & Watson to consolidate and expand its operations in Tacony. During that process, PIDC competed with New Jersey entities that tried to keep Dietz there. PIDC won that business because it made a convincing proposal drawing on PIDC's proprietary and secret blend of knowledge, methods, and ideas. (*Id.*)

The City voluntarily disclosed most of the proposal to the public – and to appellee. A copy of the public version of the proposal is in the record at pages 149 through 256.<sup>6</sup> (R. 121.)

**V. ARGUMENT**

**A. PIDC proved the City Incentives reflect its “confidential proprietary information” and “trade secrets” under the RTKL.**

The City correctly withheld the City Incentives from appellee because those items constitute sensitive and proprietary material relating to financial incentives and financial programs that have been proposed to Amazon.<sup>7</sup> The City Incentives are extremely sensitive and proprietary to PIDC. (R. 121.) PIDC proved below that the City Incentives contain PIDC’s “confidential proprietary information” and its “trade secret” under the RTKL, and that the OOR should have held them exempt from disclosure as a result.

**1. The City Incentives depict PIDC’s “confidential proprietary information.”**

Exemption 11 of the RTKL protects from disclosure any record that “constitutes or reveals” “confidential proprietary information.” See 65 P.S. §67.708(b)(11). That term is defined as “[c]ommercial or financial information received by an agency” that (1) “is privileged or confidential,” and (2) “the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.” 65 P.S. §67.102.

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<sup>6</sup> The proposal also is available here: <https://goo.gl/QBu2pc>. A public website provides even more information about Philadelphia’s proposal: <https://public.philadelphiadelivers.com/>

<sup>7</sup> As noted above, the City also redacted the Philadelphia Delivers proposal to shield other items, but the OOR found that appellee narrowed her appeal to challenge only redaction of the City Incentives. Appellee did not cross-appeal from the OOR’s ruling on that or any other basis. As a result, the City Incentives are the only items in dispute in these appeals.

PIDC therefore had to show three things to shield the City Incentives from disclosure:

- (1) The City Incentives are commercial or financial in nature;
- (2) The City Incentives are kept in confidence; and
- (3) Disclosure of the City Incentives would cause PIDC competitive harm.

PIDC's burden was a mere preponderance of the evidence. *See* 65 P.S. §67.708(a)(1) (stating "preponderance of the evidence" standard); *Jaeger v. Bureau of Workers' Comp.*, 24 A.3d 1097, 1101 n.10 (Pa. Commw. 2011) (stating preponderance standard "is the lowest evidentiary standard, tantamount to a more likely than not inquiry").

PIDC thus only had to tip the scales slightly in its favor by showing the City Incentives (1) are commercial or financial, (2) are kept confidential, and (3) would cause competitive harm to PIDC if they are disclosed. PIDC easily cleared its low evidentiary hurdle.

**a. Commercial or Financial Information**

PIDC proved that the City Incentives reflect commercial and financial information. As discussed above, PIDC is engaged in the business or trade of business attraction. (R. 140-42.) The information PIDC developed, as reflected in the City Incentives, is PIDC's commercial and financial information, which it developed as part of its business affairs. And PIDC provided that information to, and it was received by, the City. (R. 144 at ¶42.)

**b. Kept in Confidence**

PIDC also showed the City Incentives are kept confidential and privileged. PIDC never publicly discloses a proposal's specific financial terms and chosen financial tools or its particular methods or ideas at any time during the bidding process. (R. 145 at ¶51.) And PIDC treats each of these items as highly confidential and privileged. (*Id.* at ¶52.)



To protect its information, PIDC always applies and honors electronic and physical security protocols to keep its proprietary information under wraps. (*Id.* at ¶55.) Nobody outside of PIDC can access its proprietary information, nor can anyone inside of PIDC – except those with a business need to know it. (R. 146 at ¶56.) To accomplish that protection, PIDC employs computer password and cybersecurity measures, as well as physical file security measures, all of which comply with applicable industry protocols. (*Id.* at ¶57.) Those steps prevent unwanted access. (*Id.* at ¶58.) PIDC’s proprietary information therefore is not easily or readily available either outside or even inside PIDC. (*Id.* at ¶59.)

None of PIDC’s competitors know the particulars of any of PIDC’s proprietary information, and they cannot duplicate it – as it is unique to PIDC. (*Id.* at ¶60.) PIDC need not submit its proprietary information for agency review and approval during the business attraction proposal process.<sup>8</sup> (*Id.* at ¶61.) And anyone accessing PIDC’s confidential information is always expected and required to maintain this information in confidence. (*Id.* at ¶53.)

Additionally, for the Amazon HQ2 proposal, parties allowed access to PIDC’s confidential information were required to sign non-disclosure agreements providing that those parties would protect PIDC’s proprietary information. (*Id.* at ¶54.)

**c. Competitive Harm**

Finally, disclosure of the City Incentives would harm PIDC’s competitive position.

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<sup>8</sup> PIDC’s information thus cannot be within a “financial record.” *See DPW v. Eiseman*, 125 A.3d 19, 29-32 (Pa. 2015) (holding items required to be submitted for government approval can be considered “financial records”). Nor can that information otherwise fall within the “financial record” concept, at least because it does not constitute an “account, voucher or contract.” *See* 65 P.S. §67.708(c), §67.102.

The City Incentives reflect and discuss a particular application of PIDC's proprietary financial tools, proposals, and methods, all of which are unique to PIDC's business and trade of attracting businesses to the City. (R. 144 at ¶43.) This application of PIDC's financial tools, proposals, methods, and ideas in the Philadelphia Delivers proposal is extremely sensitive and confidential to PIDC. (*Id.* at ¶44.) PIDC considers this information supplied in the Philadelphia Delivers proposal as proprietary to PIDC and also as the intellectual property of PIDC. (*Id.* at ¶45.) The application of PIDC's financial tools, methods, proposals, and ideas are the crucial building blocks for PIDC to compete successfully in the business attraction marketplace. (*Id.* at ¶46.)

PIDC has invested significant time and capital resources in developing the means for deployment of its financial tools, financial proposals, and trade methods and ideas – not only for the Amazon HQ2 proposal, but for all proposals that PIDC has made over the years and decades. (R. 145 at ¶47.) PIDC's financial tools and proposals, and its methods and ideas, are carefully crafted, calibrated, and refined over time, and are based on PIDC's long history of experience and success in attracting businesses to the City. (*Id.* at ¶48.) The selection and particular deployment of PIDC's financial tools, its various types of financial proposals, and its trade methods and ideas in a given business attraction setting vary by scenario. (*Id.* at ¶49.) Substantial time and effort is invested to refine PIDC's specific strategy for each proposal; the Amazon proposal is no exception. (*Id.* at ¶50.)

If PIDC's proprietary information depicted in the City Incentives portion of the City's proposal is publicly disclosed during the ongoing Amazon RFP process, such would undermine PIDC's competitive position. (R. 146 at ¶62.) Indeed, public disclosure will allow one, some, or all the other 19 remaining bidders to adjust their own bids to undercut and undermine PIDC's

market position – both specifically (for the Amazon RFP) and also more generally (in the overall business attraction marketplace). (*Id.* at ¶63.) The other bidders could steal PIDC’s proprietary blend of financial tools, financial proposals, and trade methods and ideas to try to match or outbid the City or otherwise refine their own proposals based on insights unfairly gained from PIDC. (*Id.* at ¶64.) Those other bidders could unfairly take advantage of PIDC’s years of experience and significant investments in developing its proprietary information without having to make investments or develop experience of their own. (R. 147 at ¶65.) The other bidders also could use the information gained to seek to falsely or otherwise improperly or unfairly disparage the City’s Amazon proposal. (*Id.* at ¶66.)

Even worse, improper access by the other bidders to PIDC’s proprietary information will give those other bidders insights on PIDC’s global strategies that it deploys for all of its business attraction proposals. (*Id.* at ¶67.) Other bidders could learn from this PIDC information and then use that information to undercut PIDC in future business attraction bidding processes. (*Id.* at ¶68.)

Underscoring the unfairness to PIDC is the fact that, in some other jurisdictions, other bidders’ proposals may not be subject to public disclosure under those other jurisdictions’ public records laws. (*Id.* at ¶70.) So if PIDC does not prevail here, then PIDC may suffer competitive harm through the disclosure of its information, while bidders from other jurisdictions will not experience that same harm. (*Id.* at ¶71.) This will unfairly tilt the competitive playing field in favor of PIDC’s competitors and against PIDC. (*Id.* at ¶72.)

PIDC thus showed its proprietary information, as reflected in the City Incentives, has independent economic value because, if disclosed, it would furnish competitors with solid parameters by which they could refine their own strategies as part of their efforts to win

businesses away from PIDC or otherwise cause PIDC to lose out in the marketplace. (R. 147 at ¶69.) As a result, the release of the City Incentives would unfairly cause PIDC to suffer substantial harm to its competitive position. (R. 148 at ¶73.)

Based on this evidence, PIDC proved that (1) its information is commercial or financial, (2) it undertakes efforts to keep its information confidential and privileged, and (3) it will suffer substantial harm to its competitive position if the subject information is released. PIDC therefore showed, at least by a preponderance of the evidence, that it is entitled to the protection of the “confidential proprietary information” exemption in section 708(b)(11) of the RTKL. *Compare Smith Butz v. Pa. Dep’t of Env’tl. Prot.*, 161 A.3d 1049, 1064-66 (Pa. Commw. 2017) (holding exemption satisfied based on affidavit stating that information was protected because it revealed company’s “methodology,” which is “unique and client specific”); *Giurintano v. Department of General Services*, 20 A.3d 613, 616-17 (Pa. Commw. 2011) (holding same).

## **2. The City Incentives depict PIDC’s “trade secrets.”**

Exemption 11 of the RTKL separately protects from disclosure any record that “constitutes or reveals” “trade secrets.”<sup>9</sup> See 65 P.S. §67.708(b)(11). That term is defined as “[i]nformation, including a formula, ... 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 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.

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<sup>9</sup> See *Office of Governor v. Bari*, 20 A.3d 634, 647-48 (Pa. Commw. 2011) (“Importantly, ‘confidential proprietary information’ and ‘trade secret’ are defined separately under Section 102 of the RTKL; therefore, the terms are not interchangeable.” (footnote omitted)).

These six factors determine if something is 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 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.

*Smith Butz*, 161 A.3d at 1064 (citation omitted). Of these six factors, “[t]he most critical criteria are ‘substantial secrecy and competitive value.’” *Id.* (citation omitted).

Again, PIDC’s burden was a mere preponderance of the evidence. *See* 65 P.S.

§67.708(a)(1); *Jaeger*, 24 A.3d at 1101 n.10. PIDC therefore had to tip the scales ever so slightly in its favor. It did so.

**a. Extent Known Outside the Business**

The City Incentives are hardly known outside PIDC. Any given application of PIDC’s financial tools, proposals, methods, and ideas is extremely sensitive and confidential to PIDC; that includes the Philadelphia Delivers proposal. (R. 144 at ¶44.) PIDC never publicly discloses a proposal’s specific financial terms and chosen financial tools or its particular methods or ideas at any time during the bidding process. (R. 145, 146 at ¶¶51, 56.) Indeed, PIDC treats each of these items as highly confidential and privileged. (R. 145 at ¶52.) PIDC is not required to submit its information for agency review and approval as part of any particular business attraction proposal process. (R. 146 at ¶61.) In rare instances when this information is shared

outside PIDC, anyone accessing PIDC's confidential information is always expected and required to maintain this information in confidence. (R. 145 at ¶53.) In fact, for the Amazon HQ2 proposal, parties with access to PIDC's confidential information were required to sign non-disclosure agreements providing that those parties would protect PIDC's proprietary information. (*Id.* at ¶54.)

**b. Extent Known Inside the Business**

The City Incentives also are not widely known even by employees and others within PIDC. Indeed, even those within PIDC cannot access its proprietary information, except those with a business need to know it. (R. 146 at ¶56.)

**c. Measures Taken to Guard Secrecy**

PIDC also undertakes extensive measures to guard the secrecy of the City Incentives. PIDC always applies and honors electronic and physical security protocols to keep its proprietary information under wraps. (R. 145 at ¶55.) To accomplish that protection, PIDC employs computer password and cybersecurity measures, as well as physical file security measures, all of which comply with applicable industry protocols. (R. 146 at ¶57.) Those steps prevent unwanted access. (*Id.* at ¶58.) PIDC's proprietary information therefore is not easily or readily available either outside or even inside PIDC. (*Id.* at ¶59.)

**d. Value to the Business and Competitors**

The City Incentives are highly valuable to PIDC and also to its competitors. The City Incentives reflect and discuss a particular application of PIDC's proprietary financial tools, proposals, and methods, all of which are unique to PIDC's business and trade of attracting businesses to the City. (R. 144 at ¶43.) PIDC considers this information supplied in the Philadelphia Delivers proposal as proprietary to PIDC and also as the intellectual property of PIDC. (*Id.* at ¶45.) The particular application of PIDC's financial tools, methods, proposals, and

ideas are crucial building blocks for PIDC to compete in the business attraction marketplace. (*Id.* at ¶46.)

If PIDC's proprietary information depicted in the City Incentives portion of the City's proposal is disclosed during the ongoing Amazon RFP process, such would undermine PIDC's competitive position. (R. 146 at ¶62.) Indeed, public disclosure will allow one, some, or all the other 19 remaining bidders to adjust their own bids to undercut and undermine PIDC's market position – both specifically (for the Amazon RFP) and also more generally (in the overall business attraction marketplace). (*Id.* at ¶63.)

These other bidders could steal PIDC's proprietary blend of financial tools, financial proposals, and trade methods and ideas to try to match or outbid the City or otherwise refine their own proposals based on insights unfairly gained from PIDC. (*Id.* at ¶64.) Those other bidders could unfairly take advantage of PIDC's years of experience and significant investments in developing its proprietary information without having to make such investments or develop this experience on their own. (R. 147 at ¶65.) The other bidders also could use the information gained to seek to falsely or otherwise improperly or unfairly disparage the City's Amazon proposal. (*Id.* at ¶66.)

Even worse, improper access by the other bidders to PIDC's proprietary information will give those other bidders insights on PIDC's global strategies that it deploys for all of its business attraction proposals. (*Id.* at ¶67.) Other bidders could learn from this PIDC information and then use that information to undercut PIDC in future business attraction bidding processes. (*Id.* at ¶68.)

Underscoring the unfairness to PIDC is the fact that, in some other jurisdictions, other bidders' proposals may not be subject to public disclosure under those other jurisdictions' public

records laws. (*Id.* at ¶70.) So if the Court rules against PIDC here, then PIDC will suffer competitive harm through the disclosure of its information, while bidders from other jurisdictions will not. (*Id.* at ¶71.) This will unfairly tilt the competitive playing field in favor of PIDC's competitors and against PIDC. (*Id.* at ¶72.)

PIDC's proprietary information reflected in the City Incentives thus has independent economic value because, if disclosed, it would furnish competitors with solid parameters by which they could refine their own strategies as part of their efforts to win businesses away from PIDC or otherwise cause PIDC to lose out in the marketplace. (*Id.* at ¶69.) As a result, the release of the City Incentives would unfairly cause PIDC to suffer substantial harm to its competitive position. (R. 148 at ¶73.)

**e. Effort or Money Expended on Development**

PIDC has expended extensive time and money in developing its proprietary methods. Indeed, PIDC has invested significant time and capital resources in developing the means for deployment of its financial tools, financial proposals, and trade methods and ideas – not only for the Amazon HQ2 proposal, but for all the proposals that PIDC has made over the years and decades. (R. 145 at ¶47.) PIDC has crafted, calibrated, and refined its financial tools and proposals over time; those tools and proposals are based on PIDC's long history of experience and success in attracting businesses to the City. (*Id.* at ¶48.) The selection and particular deployment of PIDC's financial tools, its various types of financial proposals, and its trade methods and ideas in a given business attraction setting vary by scenario. (*Id.* at ¶49.) Substantial time and effort is invested in refining PIDC's specific strategy for each proposal; the Amazon proposal is no exception. (*Id.* at ¶50.)



**f. Ease or Difficulty in Acquiring or Duplicating**

Finally, it would be extremely difficult – indeed, PIDC believes it would be impossible – for a competitor to acquire or duplicate PIDC’s information. Indeed, none of PIDC’s competitors know the particulars of any of PIDC’s proprietary proposal information, and they cannot duplicate it – as it is unique to PIDC. (R. 146 at ¶60.)

Based on this evidence, PIDC established that it satisfies every one of the criteria for a “trade secret” under the RTKL – in particular, the most “critical” criteria of (1) “substantial secrecy” and (2) “competitive value.” *Compare Smith Butz*, 161 A.3d at 1064-66 (Pa. Commw. 2017) (holding exemption satisfied based on affidavit submission by company describing its “methodology,” which is “unique and client specific”). PIDC therefore showed, at least by a preponderance of the evidence, that it is entitled to the protection of the “trade secrets” exemption in section 708(b)(11) of the RTKL.

**B. The OOR erroneously held the City Incentives are not exempt.**

Despite the foregoing unrebutted evidence, the Office of Open Records held that the City Incentives are not exempt from disclosure under the RTKL.<sup>10</sup> But in doing so, the OOR either

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<sup>10</sup> The OOR thus departed from a host of other OOR decisions holding similar kinds of pricing information protected by exemption 11. *See Yoder v. Lancaster Cty. Solid Waste Mgmt. Auth.*, No. AP 2016-0796, 2017 WL 1856985 (OOR May 5, 2017) (information relating to third party’s “cost structure, pricing and business methodologies and operations” held protected by section 708(b)(11)); *Ropart Asset Mgmt. v. Pa. Turnpike Comm’n*, No. AP 2013-2380, 2014 WL 201994, \*3 (OOR Jan. 14, 2014) (noting that the “OOR has previously held that fees and pricing information are confidential proprietary information and may be protected as confidential proprietary information”); *Hunzeker v. Pa. Ins. Dep’t*, No. AP 2013-0509, 2013 WL 1856150, \*4 (OOR Apr. 25, 2013) (holding contractor’s pricing information protected by section 708(b)(11)). These decisions were cited by PIDC before the OOR, but the OOR’s decision did not discuss them.

ignored PIDC's evidence or applied rationales having no basis in law – and which were not even advocated by appellee. Each of the OOR's flawed rationales is discussed below.<sup>11</sup>

**1. The OOR incorrectly held the City Incentives  
do not include “confidential proprietary information.”**

The OOR's entire discussion of the “confidential proprietary information” exemption is two paragraphs long. (R. 273-74.) There, the OOR gave two reasons why the City Incentives do not include any “confidential proprietary information.” Each one is erroneous.

**a. PIDC submitted information to an agency – the City.**

First, the OOR relied on language in the “confidential proprietary information” definition contemplating that a party “submit[s] the information” and that it is “received by an agency.” (R. 273) (quoting 65 P.S. §67.102). The OOR claimed it is “undisputed that the withheld correspondence was submitted to Amazon, an unrelated third party that is not an agency under the RTKL.” (*Id.*) (emphasis added). The OOR thus held the exemption could not apply here.

The OOR ignored PIDC's evidence. In paragraph 42 of PIDC's supporting affidavit, it explained:

The City Incentives ... were developed and shared between PIDC and the City and reflect specific financial information and other material supplied by PIDC to – and received by – the City of Philadelphia.

(R. 144 at ¶42.) Put another way, PIDC submitted its confidential proprietary information to the City, the City received it, and that information is contained in the City Incentives.<sup>12</sup> That

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<sup>11</sup> This Court's standard of review is *de novo*. See, e.g., *Phila. Dist. Attorney's Office v. Williams*, 2018 WL 3243135, \*1 (Phila. Com. Pl. June 5, 2018) (reversing OOR; citing *Bowling v. Office of Open Records*, 75 A.3d 453, 476-77 (Pa. 2013)). Accordingly, the Court is not required to accord any deference to the OOR's ruling.

<sup>12</sup> The OOR decisions in *Walsh v. Allegheny County*, No. AP 2017-2323, 2018 WL 1034991 (OOR Feb. 20, 2018), *Van Osdol v. City of Pittsburgh*, No. AP 2017-2247 (OOR Jan. 24, 2018),  
(footnote continued on next page)

triggered PIDC's right to protection under RTKL exemption 11. That the City took the City Incentives and then sent them to Amazon does not nullify PIDC's right to protection of its confidential proprietary information that it submitted to the City.

**b. PIDC's collaboration with the City  
does not negate PIDC's RTKL rights.**

Second, the OOR claimed that the "confidential proprietary information" exemption cannot apply because PIDC and the City worked together to create the City Incentives. (R. 273-74.) According to the OOR, "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." (R. 274.)

The OOR's rationale once again shows it paid little or no attention to PIDC's evidence. As stated above, PIDC's affiant asserted that PIDC submitted its confidential proprietary information to the City. (R. 144 at ¶42.) And in any event, it is unclear why close collaboration between an agency and a party submitting confidential information means that the submitting party forfeits its ability to claim protection of confidential information. The OOR cited nothing supporting that outcome.

In fact, the OOR should have reached the opposite result. If collaboration with an agency means automatic forfeiture of RTKL rights, then there will be a chilling effect on parties like PIDC. Those parties will be reluctant to work closely with agencies, lest they forfeit their RTKL

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(footnote continued from prior page)

and *Van Osdol v. Allegheny County*, No. AP 2017-2248 (OOR Jan. 24, 2018), (and perhaps other decisions) thus are distinguishable, as there is no question here that PIDC submitted information to the City.

protections. That cannot be the result intended by the General Assembly in crafting the “confidential proprietary information” exemption.

**2.     The OOR incorrectly held the City  
Incentives do not depict “trade secrets.”**

As for the “trade secrets” exemption, the OOR advanced three reasons why it claimed that exemption does not apply here. (R. 267-73.) Each one fails.

**a.     PIDC can hold a “trade secret,” even if the City cannot.**

First, the OOR decided that the City of Philadelphia cannot have any “trade secrets” here. (R. 267-70.) In particular, the OOR relied on its prior decision as to a request for Amazon information for Pittsburgh, found that the City of Philadelphia is not engaged in business or commerce, and that as a result it cannot have a “trade secret.”

The OOR’s rationale fails for the fundamental reason that it simply does not apply to PIDC. In fact, OOR’s discussion reflects no consideration of PIDC’s submission at all – it is devoted solely to discussing the City’s capacity to hold a “trade secret.” Had the OOR given any consideration to PIDC, it would have found that PIDC does engage in a trade – that of attraction of private businesses. As such, PIDC can – and does – have trade secrets (R. 140-42.) That fundamental difference also sets this matter apart from the Pittsburgh Amazon requests, where it does not appear a PIDC-type entity had submitted any information to the City of Pittsburgh or Allegheny County. (R. 267-68.) And in any event, the OOR was not compelled by *res judicata* or collateral estoppel to apply its Pittsburgh decisions here, given the parties and factual records of the two cases are completely different. *See Scott v. Del. Valley Reg’l Planning Comm’n*, 56 A.3d 40, 44 (Pa. Commw. 2012) (discussing collateral estoppel elements in RTKL case).

**b. The OOR ignored PIDC's trade secrecy evidence.**

Second, the OOR held PIDC and the City had failed to meet their burdens of proof for trade secrecy. (R. 270-72.) The OOR claimed that, “[m]ost importantly, the City and PIDC do not adequately address how other persons can obtain economic value from the City’s Incentives disclosure.” (R. 272.) This rationale once again fails because the OOR completely ignored PIDC’s evidence, instead focusing exclusively on an affidavit by a City witness. (R. 270-71.)

Had the OOR bothered to look at PIDC’s evidence, it would have found exactly what it was looking for – specifically, an explanation for how PIDC’s competitors could obtain economic value, to PIDC’s detriment, by learning of the City Incentives:

62. If PIDC’s proprietary information depicted in the City Incentives ... portion[] of the City’s proposal was publicly disclosed during the ongoing Amazon RFP process, such would undermine PIDC’s competitive position.
63. Indeed, public disclosure will allow one, some, or all of the other 19 remaining bidders to adjust their own bids to undercut and undermine PIDC’s market position – both specifically (as to the Amazon RFP) and also more generally (in the overall business attraction marketplace).
64. Specifically, the other bidders could steal PIDC’s proprietary blend of financial tools, financial proposals, and trade methods and ideas to try to match or outbid the City or to otherwise refine their own proposals based on insights unfairly gained from PIDC.
65. Those other bidders could unfairly take advantage of PIDC’s years of experience and significant investments in developing its proprietary information without having to make such investments or develop such experience on their own.
66. The other bidders also could use the information gained to attempt to falsely or otherwise improperly or unfairly disparage the City’s Amazon proposal.
67. Even worse, improper access by the other bidders to PIDC’s proprietary information will give those other

bidders insights on PIDC's global strategies that it deploys for all of its business attraction proposals.

68. Other bidders could learn from this PIDC information and then use that information to undercut PIDC in future business attraction bidding processes.
69. As such, PIDC's proprietary information reflected in the City Incentives ... has independent economic value because, if disclosed, it would furnish competitors with solid parameters by which they could refine their own strategies as part of their efforts to win businesses away from PIDC or otherwise cause PIDC to lose out in the marketplace.

(R. 146-47).

So, contrary to the OOR's claim, PIDC submitted conclusive proof showing exactly how other persons can obtain economic value by gaining access to the City Incentives. There is no conclusion to draw here except that the OOR overlooked or ignored PIDC's evidence. This error, alone, is grounds for reversal.

**c.     The OOR misconstrued the impact of other states' open records laws.**

Finally, the OOR rejected the City's and PIDC's reliance on other states' open records laws as evidencing their competitive harm. (R. 272-73.) The OOR reasoned that "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 trade secret in the Commonwealth of Pennsylvania." (*Id.*)

The OOR missed the point. PIDC was not suggesting that Pennsylvania law should be construed to match the law of other states. What it was pointing out is that the competitive harm to PIDC from disclosure will be particularly acute here because competitors in other states will have information about PIDC, while PIDC will not have the same information about its competitors. (R. 147 at ¶¶70-72.) So if disclosure is required here, it is not as if all 20 Amazon

finalists will know one another's trade secrets and compete on a level playing field. Instead, PIDC will be fighting with one arm tied behind its back. The OOR did not seem to appreciate that concept. It should be reversed as a result.

**VI. RELIEF**

For these reasons, appellant Philadelphia Industrial Development Corporation requests that the Court reverse the April 26, 2018 Final Determination of the Office of Open Records, at Nos. AP 2018-0460 and 0461, and further order that the City of Philadelphia need not take any further action on appellee's RTKL requests.

Respectfully submitted,

/s/ Karl S. Myers

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Date: September 17, 2018

**CERTIFICATE OF SERVICE**

I, Karl S. Myers, hereby certify that on September 17, 2018, I caused a copy of the foregoing to be filed with the court and served it by the Court's electronic filing system and electronic mail upon:

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