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Pro Se Appellee



PHILADELPHIA INDUSTRIAL
DEVELOPMENT CORPORATION,
Appellant,
and

CITY OF PHILADELPHIA, MAYOR'S
OFFICE,
Appellant,
and

CITY OF PHILADELPHIA, DEPARTMENT
OF COMMERCE
Appellant,

v.

MEGAN K. SHANNON,
Appellee

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

MAY TERM, 2018
No. 2800,
No. 2805,
No. 2926, and
No. 2928

BRIEF OF APPELLEE MEGAN SHANNON

Appellee Megan K. Shannon submits this brief in response to the above-captioned appeals, as directed by the Court in its August 21, 2018 Order.

I. INTRODUCTION

In these appeals, the City of Philadelphia attempts to dodge its requirement under the Right to Know Law to release an unredacted version of its proposal to host the second headquarters for Amazon, Inc. The City has committed millions or billions of dollars to attract a private corporation that will completely alter the economic, political, and social fabric of

Philadelphia, while keeping its citizens completely in the dark about at what cost that change will come. The Right to Know Law enables citizens to hold their government accountable by prohibiting secrets; prohibiting an economic commitment of this scale from being made in secret is exactly what the RTKL is designed to do.

While some records containing trade secrets or confidential proprietary information are exempt from the Right to Know Law's disclosure requirement, those exceptions do not apply in this case. The City of Philadelphia's Mayor's Office and Department of Commerce ("the City") cannot hold a trade secret, and even if it could, its Amazon bid is not a trade secret. The Philadelphia Industrial Development Corporation ("PIDC") claims that it can hold a trade secret, but the final Amazon bid is a product prepared for and owned by the City. Further, the Bid is not confidential proprietary information because public disclosure of it at this point would not harm the City's or PIDC's competitive position.

II. MATTER BEFORE THE COURT

This matter involves the City's and PIDC's appeals from the April 26, 2018 Final Determination of the Office of Open Records, consolidated at Nos. AP 2018-0460, holding that the City's Amazon bid is not a trade secret or confidential proprietary information that would be exempt under § 708(b)(11) of the RTKL, it does not reflect the strategy to achieve the successful adoption of a budget or legislative proposal that would be exempt under § 708(b)(10)(i)(B) of the RTKL, and it does not relate to the City's procurement of goods or services and is therefore not exempt under § 708(b)(26) of the RTKL. On April 26, 2018, the Office of Open Records ordered the City to release an unreacted version of the City Incentive Proposal to appellee within 30 days, and the City and PIDC have appealed.

III. STATEMENT OF THE QUESTIONS INVOLVED

1. Is any portion of the City's Amazon bid exempt from the Right to Know Law's disclosure requirement as confidential proprietary information under § 708(b)(11)?

Suggested answer: No.

2. Is any portion of the City's Amazon bid exempt from the Right to Know Law's disclosure requirement as a trade secret under § 708(b)(11)?

Suggested answer: No.

3. Is the City's Amazon bid exempt from the Right to Know Law's disclosure requirement as a strategy to implement a legislative proposal under § 708(b)(10)(i)(B)?

Suggested answer: No.

IV. FACTS

A. Procedural History

Appellee Megan Shanon sent requests to the Philadelphia Mayor's Office and Commerce Department on January 18, 2018. (R. 19, 37) The identical records asked for:

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

The City extended its time to respond by thirty days because of "bona fide staffing limitations," "a legal review is necessary," "to determine if the request requires the redaction of a public record," and because "the extent or nature of the request precludes a response within the required time period." (R. 12, 13) On February 26, 2018, the City produced a heavily redacted copy of the Amazon bid, which did not contain any information about the financial or tax incentives the

City offered to Amazon. (R. 16-18, 149-256). On March 13, 2018, appellee filed an appeal to the Office of Open Records (“OOR”), challenging the redaction of the City Incentive Proposal in the Amazon Bid. (R. 27-29). On April 4, 2018, PIDC requested to participate as a direct interest participant, claiming that the City Incentive Proposal contained its confidential proprietary information. The OOR granted PIDC direct interest participant status. On April 26, 2018, the OOR issued a final determination holding that the City’s Amazon Bid is a public record not exempt from disclosure by any exception to the RTKL.

PIDC and the City filed these appeals of the OOR’s final determination on May 25, 2018 and May 29, 2018, respectively. While Appellee has filed a Petition for Extraordinary Relief with the Pennsylvania Supreme Court (docketed at 92 EM 2018), the Supreme Court has not acted on this Petition and therefore these appeals remain before this Court.

B. Factual Background

On October 16, 2017, Philadelphia submitted its “Philadelphia Delivers” proposal (“Amazon Bid” or “Bid”) to Amazon in response to Amazon’s request for bids in a competition for Amazon’s new headquarters, “HQ2”. This bid was made on behalf of the City of Philadelphia, and should the City win Amazon’s new HQ2, its citizens and taxpayers will be the ones funding the financial and tax incentives the City offered. The first two pages of the Bid after the table of contents are a letter from Philadelphia’s Mayor Jim Kenney. (R. 151-52). The Bid was submitted by Mayor Kenney, on behalf of the City. Nowhere in the “Philadelphia Delivers” document is the Philadelphia Industrial Development Corporation mentioned. The City had input from “members of the tech and startup community” and “small business and community organizations”, but this final product is the City’s product.

PIDC claims to have “had significant and material input into the Philadelphia proposal and its confidential and proprietary tools, methods, and information have been used to develop the Philadelphia proposal.” (R. 142). However, the Request does not seek the tools, methods and information used to develop the proposal; the Request asks for the final version of the proposal. (R. 19, 37) While PIDC assisted in formulating the City Incentive Proposal, that proposal was created as a product for the City. Neither PIDC nor the City have claimed that the final proposal bid belongs to PIDC.

Over 200 localities submitted bids in response to Amazon’s Request for Proposals. (R. 142, ¶ 25) In January 2018, Philadelphia was selected as one of the 20 finalists. (R. 143, ¶ 29-30). The bidding process is now closed; Philadelphia is not expected to submit a new bid and the City and PIDC have not claimed that any finalist will be able to amend and re-submit their initial bid from October 2017.

The City produced a heavily redacted version of the bid in response to the Appellee’s initial RTKL request. The City’s proposal was redacted “to remove sensitive and proprietary items relating to financial incentives and financial programs that have been proposed to Amazon.” (R. 144, ¶ 40) The City also made redactions “to remove its creative proposal to Amazon - a mix of the City’s and PIDC’s selling points and creative and out-of-the-box ideas, which have been marketed and presented to Amazon through a creative and unique methodology.” (R. 144, ¶ 41). The City and PIDC have not explained even in broad strokes what types of “incentives”, “programs” and “unique methodology” have been redacted. In fact, even the table of contents to the Bid has been redacted. (R. 150)

The bottom line of the City’s bid — the dollar value of the financial and tax incentives offered — may have been reached using PIDC’s proprietary methodology, but the total value of the bid is not and cannot be a trade secret or confidential proprietary information protected from release by the RTKL.

V. ARGUMENT

A. The Right to Know Law

The Right to Know Law, 65 P.S. § 67.607 *et seq.*, is intended “empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermanel*, 45 A.3d 1029, 1041 (Pa. 2012). The law was passed “to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *afford* 75 A.3d 453 (Pa. 2013).

Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law, or protected by a privilege, judicial order, or decree. *See* 65 P.S. § 67.305. Philadelphia is a local agency subject to the RTKL that is required to disclose its public records. 65 P.S. § 67.302.

Exemptions to the Right to Know Law must be narrowly construed. *See Pa. State Police v. Grove*, 161 A.3d 877, 992 (Pa. 2017). The City and PIDC have failed to meet the burden of proof showing that the Amazon Bid is an exempt record by a preponderance of the evidence. *See* 65 P.S. § 67.708(a).

B. The Amazon Bid does not contain “confidential proprietary information” protected from disclosure by the RTKL.

The Amazon Bid is not confidential proprietary information. The RTKL defines proprietary information as “[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.” 67 P.S. § 67.102.

First, the City submitted information to Amazon, an unrelated third party that is not an agency under the RTKL. The confidential proprietary information exemption does protect information submitted by third parties to agencies, not information submitted *to* third parties *by* agencies.

Second, even if the confidential proprietary information exemption could protect information submitted *by* an agency rather than *to* an agency, in this case the City and PIDC have failed to prove that the Amazon Bid’s City Incentives are exempt from disclosure. The Appellants fail to prove that disclosure of the City Incentives “would cause substantial harm to the competitive position of the person that submitted the information.”

PIDC claims that “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”, but this is false; Amazon is no longer accepting initial bids. (PIDC brief, 10-11) The Amazon RFP process closed in October 2017. Philadelphia is now one of 20 finalist cities. At this point in the RFP process, revealing the City’s initial bid from a year ago will not harm the city’s competitive position in the bidding process.

Further, knowing the financial incentives offered by Philadelphia would not benefit other finalist cities. The City’s bid was crafted specifically for Philadelphia. This is not a case of Amazon making a decision solely based on the economic value of tax breaks offered, in which

Philadelphia could have an argument that keeping the bid secret would prevent other cities from undercutting it. The Amazon RFP process evaluates a number of factors in the City's Bid, from potential physical locations, the City's talent pool, logistics, and the livability of Philadelphia.

(R. 150) The financial incentives Philadelphia offered are not necessarily ideal for any of the other 19 finalists, which have vastly different potential physical locations, draw from dissimilar talent pools, and offer different qualities of life. Knowing what Philadelphia put on the table a year ago would not help other finalist cities a year into the negotiation process.

PIDC and the City failed to show by a preponderance of the evidence that disclosure of the City's Amazon Bid would harm the City's competitive position, therefore, the Amazon Bid is not entitled to the protection of the "confidential proprietary information" exemption in §708(b)(11) of the RTKL.

C. The Amazon Bid does not contain "trade secrets" protected by the RTKL.

Under 67 P.S. § 67.708(b)(11), "[a] record that constitutes or reveals a trade secret or confidential proprietary information" is exempt from access by a requester. The City's Amazon Bid is not exempt from disclosure under this section because the record is neither a trade secret nor confidential proprietary information.

i. *The City cannot hold a trade secret.*

Philadelphia claims that the Amazon Bid is not subject to disclosure because it is its trade secret. However, a city cannot hold a trade secret. A trade secret must be "of peculiar importance *to the business* and constitute competitive value to the owner." *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177, 185 (Pa. 2006) (emphasis added). Further, the

contention that information is a trade secret “ceases to be of any moment when the function is recognized as governmental, rather than that of a private business.” *Hoffman v. Commonwealth*, 455 A.2d 731 (Pa. Commw. Ct. 1983). The City cannot hold a trade secret because its development of the Amazon Bid was not participation in business or commerce. The primary activity of the City in formulating the Amazon Bid was the governmental function of promoting the City; its “competitors” were other governments providing the same government service to promote themselves.

ii. *Even if the City can hold a trade secret, the Amazon Bid is not a trade secret.*

The Amazon Bid is not a trade secret. The Right to Know Law defines a trade secret as information that “derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means or by other persons who can obtain economic value from its disclosure or use” and “[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” 67 P.S. § 67.102. The Amazon Bid does not have independent economic value, actual or potential.

Whether information is a trade secret depends on (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. See, e.g., *Crum v. Bridgestone/Firestone N. Amer. Tire*, 907 A.2d 578 (Pa. Super. Ct. 2006).

The Amazon Bid does not derive any economic value by not being known to other persons, and other persons could not obtain economic value from the disclosure of the Amazon Bid. The Amazon Bid was developed by the City, PIDC, and others to highlight unique aspects of Philadelphia and was tailored specifically to Philadelphia. The City would not lose any competitive edge by disclosing the Bid because whatever the City offers is specific to the geography, population, history, and economy of Philadelphia. Other cities in competition for the new Amazon headquarters have vastly different circumstances, therefore unique aspects of Philadelphia's bid should be unusable by other cities.

Additionally, Amazon is no longer accepting initial bids for its HQ2. PIDC claims that other finalist cities could "try to match or outbid the City or otherwise refine their own proposals based on insights unfairly gained by PIDC" (PIDC brief at pg. 15). If the bidding process to Amazon ended in October 2017 and cities cannot re-submit their bids, Philadelphia loses nothing by disclosing its initial offer. If the finalists are in ongoing negotiations with Amazon, Philadelphia loses nothing by disclosing its initial offer because a year of negotiations have already occurred, meaning that Philadelphia's current offer will be different than the initial bid from its October 2017 bid. Philadelphia's citizens, on the other hand, have the right to hold their government accountable and know the extent of financial commitments it is making on their behalf.

PIDC may have made a recommendation for the scale of the City's bid for the Amazon HQ2 — whether to offer tens of millions, hundreds of millions, or billions of dollars in financial incentives. However, "Amazon chose a unique, highly competitive RFP process." (City's brief,

page 6) The information submitted in such a unique contest is not relevant to other, standard RFPs in which the City and PIDC participate.

D. The Amazon Bid is not exempt from disclosure as a strategy to implement a legislative proposal.

The City claims that their Amazon Bid is exempt from disclosure under § 67.708(b)(10)(i)(B) of the RTKL, which exempts records reflecting the “strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.” 65 P.S. § 67.708(b)(10)(i)(B). The City claims that the implementation of the Bid’s financial incentives would require legislation to implement. (City’s brief, page 29) However, the Bid submitted to Amazon is “a business attraction proposal that contemplates a business relocating, in part, to the Philadelphia area.” (*See Gallier-Howard Aff.* ¶ 14, R. at 90). This is not the same thing as an agency’s strategy to get legislation passed. The City’s and PIDC’s goal with the Bid is to get Amazon to commit to building its HQ2 in Philadelphia, not to pass the legislation necessary to implement its offer. The City would have to convince its voters and their representatives to pass such legislation; Amazon would have no official vote in that process.

E. PIDC forfeits its claim to protection of the information it submitted to the City for the City’s bid because that information was intended to be used by City for a public bid.

PIDC claims that its submissions to the City for the City’s bid should be protected under the RTKL because “if collaboration with an agency means automatic forfeiture of RTKL rights, then there will be a chilling effect on parties like PIDC.” (PIDC brief, 19). However, this line of reasoning would also allow the City to partner with PIDC and similar institutions specifically and solely to avoid its obligations to release public records under the RTKL.

The City's Amazon bid is dissimilar from PIDC's typical attempts to lure private businesses to Philadelphia because the City is a public entity acting on behalf of 1.3 million people, and funded by their tax dollars. This fact was apparent when PIDC submitted information to the City for the October 2017 bid. By contributing to an offer made by a local government rather than its own offer to a business, PIDC must accept that the government it assisted is subject to the Right to Know Law and therefore its contributions may be released to the citizens of that government.

F. Public Policy favors releasing the City's bid now.

By keeping its Amazon bid secret, the City is denying its citizens the right to fully participate in the democratic process. If the City offered tax relief or other financial incentives that will require the approval of City Council, the constituents of each City Councilperson should be aware of the full details of what is on the table for Amazon so that they may voice their approval or disapproval to their elected representatives. By keeping the Bid secret, the City puts enormous pressure on City Council to approve whatever has been offered to Amazon in the event Philadelphia is selected.

The City argues that "at the point when the City and Amazon to move forward to potentially implement financial incentives, such incentives would go through a legislative process which would be open to the public." (City's brief, page 30). However, this does not mean that the democratic process is being respected. The City has offered terms to Amazon to get Amazon to commit to building HQ2 in Philadelphia; if Amazon chooses Philadelphia, Philadelphians will not have any meaningful way to participate in a nuanced debate about the

terms Amazon already agreed to; any vote will become a referendum on wholesale acceptance or rejection of their terms.

Philadelphia's leadership was elected to represent the citizens of Philadelphia; it should not be permitted to do so in secret. The Right to Know Law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records, supra* at 824. The time for Philadelphia to make the financial terms to which it wants to bind its taxpayers is *now*, not after Amazon accepts those terms and chooses to relocate to Philadelphia, leaving them no option but to accept the terms Philadelphia negotiated in secret or reject the prospect of 50,000 high-paying jobs outright.

VI. RELIEF REQUESTED

For these reasons, appellee Megan Shannon requests that the Court uphold the Office of Open Records' April 26, 2018 Final Determination at Nos. AP 2018-0460 and 0461, order that the City of Philadelphia release its Amazon Proposal to appellee within 10 days of the date of the Order, and order that the City of Philadelphia reimburse appellee Megan Shannon for all filing fees she incurred in the Court of Common Pleas to uphold this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Megan K. Shannon, certify that on October 1, 2018, copies of the foregoing brief were filed electronically which constitutes service on all parties, as well as sent via e-mail to the following:

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