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**CITY OF PHILADELPHIA MAYOR'S
OFFICE**

Appellant

v.

MEGAN SHANNON

Appellee

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

**May Term, 2018
No. 02926**

**CITY OF PHILADELPHIA
DEPARTMENT OF COMMERCE**

Appellant

v.

MEGAN SHANNON

Appellee

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

**May Term, 2018
No. 02928**

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

Dated: October 15, 2018

Case ID: 180502926

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I. ARGUMENT

Requester-Appellee Megan Shannon's ("Requester") Brief to this Court acknowledges three critical facts –

first, that the location of the second headquarters of Amazon, Inc. ("HQ2") could have a significant impact on the "economic, political, and social fabric" of the Philadelphia region;

second, that there is intense competition across the country to attract HQ2; and

third, that the City will have to convince its City Council—the elected representatives of Philadelphia—to pass requisite legislation to implement its offer, and Amazon will play no official roll in that process.

These admissions, underscore and support arguments made by the City and PIDC that the release of the City incentives package¹ would likely be used by competing municipalities to harm the City's position in the competition, and that the public will have a robust opportunity for comment and participation before any financial incentives to attract HQ2 to Philadelphia are binding. This is simply not that time.

Requester's brief, however, is as notable for what it does not say as for what it does. Requester has abandoned the argument that persons asserting the trade secret exception must separately establish that they were engaged in "trade" in addition to the actual legal requirements set forth under the Pennsylvania Right-to-Know Law ("RTKL") and Uniform Trade Secrets Act. Likewise, Requester has not contested that the City and PIDC both took reasonable steps to safeguard the confidentiality of the proposal.

Rather, Requester's arguments fall into three categories – each of which will be addressed in turn: (A) the City and PIDC have not established by a preponderance of the

¹ See Appellant City of Philadelphia's opening brief ("City Brief") at p. 4, and 7-9 (describing and defining the City incentives package).

evidence a specific element of each exemption asserted; (B) a public policy argument that the public should be permitted to participate in the HQ2 process now; and (C) an argument raised for the first time on appeal—which thus, has been waived—that agencies simply cannot hold confidential proprietary or trade secret information under any circumstances.

A. The Evidence Establishes That it is More Likely Than Not That the City Incentives Package (1) Has Independent Economic Value, (2) Its Release Would Cause Harm to the Competitive Positions of the City and PIDC, and (3) Reflects the City’s Strategy to Achieve Legislation to Bring Amazon HQ2 to Philadelphia

Contrary to Requester’s assertion, both the City and PIDC have submitted more than sufficient evidence to meet their burdens of proof that the City incentives package has independent economic value and thus is exempt as a trade secret under Section 708(b)(11) of the RTKL, that its release would harm the City or PIDC’s competitive position and thus is exempt as confidential proprietary information under Section 708(b)(11),² and that the package reflects the City’s strategy to develop or achieve legislation³ to attract Amazon HQ2 to Philadelphia and thus is exempt under Section 708(b)(10)(i)(B).

Notably, the City and PIDC need only to prove it is more likely than not that **one** of these elements has been met for the City incentive package to be exempt from disclosure.⁴ *California*

² The trade secret and confidential proprietary exceptions are both listed in Section 708(b)(11), but each has different elements and the City and PIDC need only establish one or the other applies to exempt the City incentives package from disclosure.

³ The City refers to the strategy to develop and/or achieve legislation or legislative strategy throughout this brief as short hand to refer to “strategy to be used to develop or achieve the successful adoption of a . . . legislative proposal” pursuant to 708(b)(10)(i)(B).

⁴ Aside from blanketly arguing that City records can never constitute trade secret or confidential proprietary information, which is undermined by both the statutes at issue as discussed in Section II(C) of this brief, the Requester does not contest that the City and PIDC have established the remaining elements necessary to demonstrate the City incentives package reflect trade secrets

Borough v. Rothey, 185 A.3d 456, 464 (Pa. Commw. 2018) (“The burden of proving that a ‘record’ is exempt from public access is placed on the local agency receiving a request by a preponderance of the evidence.”); *accord* Requester Brief at p. 6. Here, the City has established that the City incentives package meets ***all three elements***. As set forth at length in the City’s opening brief, it: (1) has independent economic value, (2) disclosure would harm the City or PIDC’s competitive position, and (3) the package reflects the City’s strategy to achieve legislation ultimately needed if Amazon chooses to relocate to Philadelphia. City Brief at pp. 7-10 (setting forth facts related to independent economic value and competitive harm), 20-23 (discussing independent economic value), 27-28 (discussing competitive harm); 29-30 (discussing City legislative strategy); PIDC Brief at pp. 14-15 (discussing independent economic value) and pp. 9-11 (discussing competitive harm).

First, the Requester does not submit *evidence*. The mere *argument* she presents is insufficient to undermine the documentary evidence the City and PIDC have provided in support of their position that the City incentive package is exempt from disclosure as a trade secret, as confidential/propriety information, and/or as a strategy to develop or achieve a legislative proposal. Requester may *believe* that the City incentive proposal has no independent economic value, and that its release would not harm the City or PIDC because it could not be used by competitors against Philadelphia, but the unverified opinion statements Requester makes in her brief are not evidence. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216

and confidential information. With respect to the legislative strategy exemption, there are no other elements to prove. If a record reflects the City’s strategy to “develop or achieve the successful adoption of a legislative proposal,” it is exempt. 65 P.S. § 67.708(b)(10)(i)(B).

(Pa. Commw. 2012) (holding that unsworn statements of counsel are not competent evidence); Shannon Brief at 7-8, 10-11. The City prevails for this reason alone.

Moreover, Requester's assertions are factually inaccurate. She misunderstands the nature of the strategy deployed by PIDC and the City to create the City incentive package offered here, as well as the nature of economic development deals generally. While the Philadelphia Region is certainly unique in many respects, incentives packages are, by their nature, the portion of the City's proposal that could easily be co-opted—and replicated or exceeded—by competition in this or future deals, if publicly known. The record developed by the City and PIDC as outlined at length in the opening briefing establishes these facts and demonstrates that it is more likely than not that the City incentives package has independent economic value, and that the City and PIDC would be harmed if such incentives were released, both in their efforts to attract Amazon HQ2 to this region and their attempts to attract other businesses.

In any event, the City need not show harm to withhold records that reflect the City's strategy to successfully develop or achieve a legislative proposal pursuant to Section 708(b)(10)(i)(B) – nor does such strategy need to be kept internal. Requester concedes that the point of the bid is for “Amazon to commit to building its HQ2 in Philadelphia” and that ultimately “[t]he City would have to convince its voters and their representatives to pass such legislation” Shannon Brief at 11. While Requester argues that the strategy to attract HQ2 is distinct from the strategy to develop or adopt a successful legislative proposal, she is mistaken. The bid reflects the Administration's strategy to close the deal and was crafted specifically to “appeal to Amazon and have support in the legislative process.” Supp. Gallier Howard Aff. ¶ 4, City Brief at Exhibit A.

If this Honorable Court believes that the record is not sufficiently developed, given the importance of this issue, the City respectfully requests that an evidentiary hearing be held to ensure a complete record and to address any lingering concerns that this Court may have. *Allegheny Cty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1040-41 (Pa. Commw. Ct. 2011) (remanding to permit a party to submit additional evidence regarding whether certain information was subject to the RTKL or would threaten the personal security of employees, noting that while the party was not prevented from creating a record, it was a “serious matter that deserve[d] thoughtful consideration on a complete record.”); *see also, e.g. Bowling v. Office of Open Records*, 990 A.2d 813, 823 (Pa. Commw. Ct. 2010), *aff'd*, 621 Pa. 133, 75 A.3d 453 (2013).

B. Neither the RTKL Nor Public Policy Requires the City to Disclose its Highly Confidential Strategy at this Juncture.

Requester also stresses her belief that public policy favors the release of the highly confidential City incentives package. Her position, that the current Administration must make its plans known *now* to give the public a window into the City’s offer and bargaining position, is belied by the record evidence.

First, as discussed in the City’s opening brief and above, releasing the City incentives package now would irreparably hurt the City’s and PIDC’s competitive positions. This would contradict the General Assembly’s intention, in crafting the RTKL, to *avoid* putting agencies at an economic disadvantage and to enable them to create strategies out of the public eye. *See, e.g.*, 65 P.S. § 67.708(b)(1) (exempting records that would result in the loss of federal or state funds); *id.* at § 67.708(b)(13) (exempting the names of donors); *id.* at § 67.708(b)(10)(i)(A) (exempting internal pre-decisional deliberations); *id.* at § 708(b)(9) (exempting draft bills, resolutions, and statements of policy); *id.* at § 708(b)(7)(viii) (exempting employee personnel file materials

except the final action of demotion or discharge); *id.* at § 708(b)(12) (exempting employee notes and working papers); *id.* at § 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*).

While many other entities wholly withheld their proposal, the City carefully reviewed the Philadelphia Delivers⁵ proposal and redacted only that information that would harm the City, PIDC's and the public's interests. While the Requester in this instance is apparently a concerned citizen, in another case, the requester could just as easily be one of the City's or PIDC's competitors. In fact, if the City is forced to show its hand as the result of this appeal, and its Amazon HQ2 proposal becomes public, it is as though a competitor were the requester: everyone, including Philadelphia's competitors, will get access to critical and secret information about how the City attracts business to the region. Such potential disclosures would undercut not just the City's efforts in this deal, but the City's ability to attract businesses generally.

Moreover, it is simply untrue that "Philadelphians will not have any meaningful way to participate in a nuanced debate" about the offerings in the City's Incentive Package, as Requester contends. Shannon Brief at 12. *If and when Philadelphia is selected by Amazon, there will be ample occasion for the public to weigh in on any financial incentives that will form part of the deal, because any such incentives will require legislation. The legislative process will afford interested members of the public an opportunity to offer their opinions. See, e.g., 65 Pa. C.S. §§ 704 (Pennsylvania Sunshine Act requires open meetings); id. at § 709 (public notice), id. at § 710.1 (public participation); Philadelphia Home Rule Charter § 2-201 (providing for notice to*

⁵ City Brief at p. 4 (defining the "Philadelphia Delivers Proposal").

the public, public hearings on legislation before final vote, and restricting any amendments which would “change [the bill’s] original purpose”); § 2-204 (providing that “[t]he meetings of the Council shall at all times be open and accessible to the public.”). Requester implicitly concedes this, acknowledging that it is the elected City representatives that will ultimately need to pass any legislation necessary to implement the City’s Offer and that “Amazon would have no official vote in that process.” Requester Brief at 11.

However, the City has determined that the release of the City incentive package⁶ *at this point* would in fact *harm* the public interest – in this and other circumstances – where the City is competing to attract billions of dollars of economic development to the Philadelphia region. *See* City Brief at 6. Indeed, other Pennsylvania cities, the Governor’s Office, and the Commonwealth’s Department of Community & Economic Development have taken similar positions in related litigation. *If* Amazon chooses Philadelphia as the location legislation will be introduced and the public will have an opportunity to comment. This is simply not that time.

C. City Records May Reflect Trade Secret and Confidential Proprietary Information and These New Arguments, Asserted by Requester for the First Time, Have Been Waived

Finally, for the first time on appeal, Requester attempts to raise new arguments not identified in her initial appeal submission before OOR and that OOR did not address. First, she asserts that agencies such as the City records cannot reflect confidential proprietary information or trade secret information, period, even when it collaborates with third parties for the benefit of the public. Instead, she contends that when a third party collaborates with the City they

⁶ The City incentives are financial and non-financial incentives which the City crafted using both City resources and external partners to appeal directly to Amazon in the competition for HQ2. *See* Gallier-Howard Aff. ¶ 12, 25, C.R. at 90, 92.

relinquish their right to claim their information remains confidential or as a trade secret.⁷

Notably, she has abandoned any argument that the exceptions only apply if an agency is engaged in a “trade” and that the City and PIDC did not safeguard the confidentiality of the City incentives package, instead asserting this scorched earth position.

These new arguments are waived. The Right-to-Know Law requires that appeals state “the grounds upon which the requester asserts that the record is a public record.” 65 P.S. § 67.1101(a). The Commonwealth Court has held that when an argument is not raised in a requester’s initial appeal, such argument is waived. *See Dep’t of Labor & Indus. v. Heltzel*, 90 A.3d 823, 827 n.4 (Pa. Commw. 2014) (citing Section 1101, holding that appellee requester had waived specific statutory argument—that the Hazmat Act applies—supporting its contention that the requested information is public record, where, before the OOR, requester only argued that another statute conferred public status upon the records), *citing* 65 P.S. § 67.1101(a). Requester’s only arguments on submission of her appeal to the OOR relevant to the instant appeal were that the Philadelphia Delivers Proposal did not reflect legislative strategy,⁸ that the City’s argument that tax incentives are exempt as “trade secret or confidential property

⁷ Requester also improperly focuses on the fact that information was ultimately submitted to Amazon. However, PIDC’s information was *submitted to* and *received by* the City. Additionally, the City is a “person” as that term is used in Section 708(b)(11). As a result, and as the City explained in its opening brief, OOR’s construction of the exemption to only apply to agency confidential information that is submitted to another agency would be an absurd result. City Brief at 26-27 and n.10. This is not the only provision within the RTKL that has lead to confusion given its obscure wording, as the Commonwealth Court has noted “[u]nfortunately, much in the RTKL is left open to interpretation, with no clear direction.” *See, e.g., Department of Public Welfare v. Froehlich ex rel. Community Legal Services*, 29 A.3d 863, 868 (Pa. Commw. 2011) (holding that an agency’s decision not to waive fees is not a denial of access subject to appeal to OOR).

⁸ 65 P.S. § 67.708(b)(10)(i)(B) (exempting records reflecting “[t]he strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.”).

information' is specious[,]" and that she was not "interested in any trade secrets of the Philadelphia tech community," or "in learning the feasibility estimates of real estate." C.R. at 11 (Requester's submission to OOR). As a result, these new arguments have been waived.

Even assuming, *arguendo*, that these arguments were not waived, Requester's arguments fail. It is clear under the language of the Right-to-Know Law and settled caselaw holds that government agencies such as the City may both possess and create trade secret and confidential proprietary information. Both the trade secret and confidential proprietary exemption of the RTKL, Section 708(b)(11), and the Uniform Trade Secrets Act ("UTSA") refer to Trade Secret/Confidential Proprietary information of a "person." The City is a "person" under both statutes regardless of whether you look to the UTSA or to the definition under the Statutory Construction Act. *See* 12 Pa.C.S. § 5302 (UTSA definition of "Person"); 1 Pa.C.S. § 1991 (Statutory Construction Act definition of "Person").

The Commonwealth Court has also expressly recognized that government entities can hold trade secrets. *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177, 185 (Pa. Commw. 2006). In *Parsons*, a requester sought "vouchers ... for travel by PHEAA employees and board members." *Parsons*, 910 A.2d at 181. The Court held that the travel vouchers, while not *per se* exempt from disclosure under the UTSA, "may refer to secret information of competitive value" and could be redacted to remove it. *Id.* at 186. Even after concluding that the agency at issue improperly flouted the requirements of the Right-to-Know Law, the Court nevertheless held that the agency could redact their vouchers to remove the exempt information. Thus, *Parsons* stands for the proposition that the government may create and hold trade secrets, including records containing a "strategy to break into a market" and other similar "secret

information of competitive value.” *Id.* It also recognizes that the government may protect these secrets by exempting them from disclosure, including by redaction as the City did here.

Requester, in arguing that the City cannot hold a trade secret, mistakenly relies solely on decades old caselaw that has been superseded by the UTSA and the RTKL. *Hoffman* was decided under the prior version of the RTKL, 65 P.S. § 66.1, *et seq.*, in 1983, years before the passage of the UTSA in 2004. *Hoffman v. Com., Pennsylvania Game Com’n*, 455 A.2d 731 (Pa. Commw. 1983); 12 Pa.C.S. § 5301, *et seq.*, (the UTSA). As both the *Parsons* and *Hoffman* courts noted, at the time *Hoffman* was decided there was no authority for the proposition that a government agency could possess or create a trade secret. *Hoffman*, 455 A.2d at 733; *Parsons*, 910 A.2d at 186 (distinguishing *Hoffman* and noting that it was the first court to apply the Trade Secrets Act in the connection of Right-to-Know requests). The analysis in *Hoffman* has been plainly superseded by the UTSA and 708(b)(11) of the RTKL. 12 Pa.C.S. § 5301; 65 P.S. § 67.708(b)(11).

Requester attempts to build on this faulty logic to argue for the first time that because, under her construction, the City cannot have confidential proprietary or trade secret information, that third parties waive their right to assert protection for their confidential and trade secret information when they collaborate with the City. Requester Brief at p. 11-12. This argument is wholly unsupported in addition to have been waived. The plain language of the exemption for trade secrets and confidential proprietary information under the RTKL has no such limitation. 65 P.S. § 67.708(b)(11). The RTKL applies to records “of” the City. 65 P.S. § 67.101 (defining

“public record” to be “a record . . . of a . . . local agency that . . . is not exempt under section 708”). If the proposal was not a record “of” the City, the RTKL would be wholly inapplicable.⁹

In addition, such a construction would have a chilling effect on the City’s ability to collaborate with third parties for the benefit of the citizens of Philadelphia and largely gut Section 708(b)(11). This was not the intent of the General Assembly. Requester’s concerns that if permitted the City would be able to shield its records by working with third parties and incorporating their confidential information are without merit. There are specific elements that need to be proven, and the City and PIDC have proven here, to establish that the information is exempt from disclosure.

⁹ Further, the City could not, as Requester asserts, avoid its obligations to release public records under the RTKL by simply “partner[ing] with PIDC and similar institutions.” Shannon Br. at 11. It goes without saying that partnering alone would not render a disclosable document exempt from disclosure; the City can only protect documents that the RTKL already deems non-public. However, if a document is non-public, it belies logic that it must be disclosed merely if the City decides to collaborate with third parties for the benefit of the citizens of Philadelphia.

II. CONCLUSION

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

Respectfully submitted,

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Dated: October 15, 2018

CERTIFICATE OF SERVICE

I, Robert Kieffer, hereby certify that on October 15, 2018, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT CITY OF PHILADELPHIA IN SUPPORT OF APPEAL FROM DETERMINATION OF OFFICE OF OPEN RECORDS in the above-captioned matter was served upon the parties below via the Court's ECF Filing System.

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