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OF COUNSEL
RICHARD E. CONNELL

December 23, 2021

Via Electronic Mail

Joshua T. Young, Esquire
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Re: Right-to-Know Law Appeal – Docket # AP 2021-2799
Susan Spicka v. Commonwealth Charter Academy Charter School

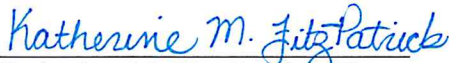
Dear Attorney Young:

On December 7, 2021, Commonwealth Charter Academy Charter School (CCA) received notice from the Office of Open Records (OOR) that it had received the above docketed appeal.

On December 17, 2021, CCA filed a Motion to Dismiss Requester's Deficient Appeal.

This submission by CCA will serve to supplement the record pursuant to the notice of appeal, and to request that the appeal be denied.

Respectfully submitted,



Katherine M. Fitz-Patrick, Esq.
Philip J. Murren, Esq.
Ball, Murren & Connell, LLC
2303 Market Street
Camp Hill, PA 17011
Counsel for Commonwealth Charter Academy

cc: Susan Spicka (via electronic mail and U.S. Mail)

Enclosures

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

SUSAN SPICKA	:
Requester,	:
	:
v.	: Docket # AP 2021-2799
	:
COMMONWEALTH CHARTER	:
ACADEMY CHARTER SCHOOL,	:
Respondent.	:

COMMONWEALTH CHARTER ACADEMY’S RESPONSE TO RTKL APPEAL

I. FACTUAL BACKGROUND

On November 29, 2021, Susan Spicka (Requester) submitted a Right-to-Know Law (RTKL) request to Commonwealth Charter Academy Charter School (CCA). The Requester requested the following:

1. An invoice or other documentation that shows the cost of the parade balloon that was used in the November 2021 6abc Dunkin’ Donuts Thanksgiving parade in Philadelphia.
2. An invoice or other documentation that shows the cost to enter CCA group in the November 2021 6abc Dunkin’ Donuts Thanksgiving parade in Philadelphia.
3. An invoice or other documentation that shows the cost of promotional spot for CCA during the November 2021 6abc Dunkin’ Donuts Thanksgiving parade in Philadelphia.

During the processing of the request, Target Media, Inc., informed CCA that records relating to the November 2021 6abc Dunkin’ Donuts Thanksgiving parade (Parade) in Philadelphia include information classified as confidential proprietary information and trade secrets, and if disclosed, would cause substantial harm to its competitive position. *See* Exhibit 1, Affidavit of Timothy Eller.

On December 6, 2021, CCA advised the Requester that it did not have any records responsive to the request as written. Further adding, “[t]o the extent CCA has records relating to the November 2021 6abc Dunkin’ Donuts Thanksgiving parade in Philadelphia, the records would reveal a trade secret and confidential proprietary information and be exempt from access. *See* 65 P.S. § 67.708(b)(11). This includes records of third-parties. *See* 65 P.S. § 67.707(b).” *See* Exhibit 2, Affidavit of Jennifer Clarke.

On December 7, 2021, Requester filed an appeal of CCA’s response with the Pennsylvania Office of Open Records (OOR), using OOR’s Appeal Form. Requester did not specify in her appeal “the particular defects in an agency’s stated reasons for denying a RTKL request.” *Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Cmwlth. 2011).

On December 8, 2021, CCA gave notice of Requester’s appeal to the affected third party, Target Media, giving it an opportunity to participate. *See* Exhibit 1. Target Media separately filed a request to participate as a direct interest participant, and an affidavit in support of its request that records relating to the Parade not be released to Requester.

On December 13, 2021, CCA requested an extension of the submission deadline, which OOR granted.

On December 17, 2021, CCA filed a Motion to Dismiss, requesting that OOR dismiss Requester’s deficient appeal, or, in the alternative, request that additional information be provided in support of the appeal. OOR confirmed receipt of CCA’s Motion to Dismiss, and informed CCA that the Motion will be held in abeyance and CCA’s arguments will be addressed in the Final Determination.¹

¹ CCA renews its request for dismissal of Requester’s deficient appeal.

On December 21, 2021, by way of an email to OOR, Requester supplemented the record in this appeal, making the following statements:

- “I believe that the records that I requested in the original RTKL request are a public record because Commonwealth Charter Academy is a public school in the Commonwealth of Pennsylvania that is funded by tax dollars. Taxpayers have a right to know how this school is spending the tax dollars it receives.”
- “I believe that records of the cost of the parade balloon, the promotional spot, and the parade entrance fee exist because CCA would need an invoice in order to pay the vendors.”²
- “I believe that Commonwealth Charter Academy's claim that this information should not be publicly available is incorrect because Commonwealth Charter Academy is a public institution organized to execute the government's responsibility to educate children. Commonwealth Charter Academy is not engaged in a business where it competes in the free market or engages in some trade with private competitors and therefore Commonwealth Charter Academy does not have a business interest in the records.”

II. ARGUMENT

A. THE APPEAL SHOULD BE DENIED BECAUSE IT IS DEFICIENT.³

Section 1101(a)(1) of the RTKL requires appeals to “state the grounds upon which the requester asserts that a record is a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1). Courts have held that failure to comply with Section 1101(a)(1) renders an appeal

² Although Requester submitted additional information related to why she believes the information sought is a public record, she fails to address CCA’s assertion, included in the response to her RTKL request, that CCA does not have in its possession records responsive to the request as written. Requester’s statement that “records . . . exist because CCA would need an invoice in order to pay vendors” should be deemed insufficient to carry her burden under the RTKL.

³ As discussed above, on December 17, 2021, CCA filed a separate Motion to Dismiss, requesting OOR to address Requester’s deficient appeal. OOR notified CCA that it would hold the Motion in abeyance because it is unable to bifurcate the appeal. Interesting to note, when OOR dismisses an appeal as deficient under Section 1101(a)(1), the standard notification states that “requester is not prohibited from filing a new appeal.” CCA would argue that this action is in fact a *de facto* bifurcation, and it is in the interest of agencies subject to the RTKL, the resources of OOR, and judicial economy to require a requester to address or explain how and why the agency erred.

deficient. See *Barnett v. Dep't of Pub. Welfare*, 71 A.3d 399, 405-06 (Pa. Cmwlth. 2013); *see also*, *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Cmwlth. 2013).

To file an appeal under the RTKL, OOR states,⁴ in accordance with Section 1101(a)(1) of the RTKL, a requester must provide all of the following:

- “State why you believe the record is a public record. A general statement that the record is public under the RTKL is insufficient. It is advisable to explain why you believe a record documents a transaction or activity of an agency and explain why you believe it was created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.”
- “Address **all** grounds that the agency raised in its denial. You must state why you believe each of the agency’s denial, arguments, and exemptions are incorrect – a general statement that the agency is incorrect is insufficient. Legal argument is not required, but requesters should try to explain why the agency’s reliance on an exemption is misplaced and why a record should be public.”

(emphasis added). OOR’s Appeal Form⁵ contains only the following boilerplate language:

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency’s denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

This boilerplate language alone does not meet the requester’s statutory burden “to specify in its appeal to Open Records the particular defects in an agency’s stated reasons for denying a RTKL request.” *Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Cmwlth. 2011) (Section 1101(a) “places a burden on a requester to *identify* flaws in an agency’s decision denying a request.”). In *Pa. Dep’t of Corr.*, the Requester submitted a handwritten appeal, which contained

⁴ Office of Open Records, Citizens’ Guide:
<https://www.openrecords.pa.gov/Documents/RTKL/CitizensGuide.pdf> (last visited December 16, 2021)

⁵ Online version of the Official OOR Appeal Form:
<https://www.openrecords.pa.gov/Appeals/AppealForm.cfm> (last visited December 16, 2021)

four numbered paragraphs containing procedural history and one numbered paragraph stating, “The above Pa. right to know requests are public.” *Id.* at 431. Commonwealth Court held OOR erred in deciding requester’s clearly deficient appeal. OOR’s standard appeal form does little more than requester’s handwritten note as far as providing an opportunity for a requester to identify flaws in an agency’s decision. OOR cannot lawfully provide a forum for error correction, when it does not have a full picture of the appeal. *See Id.* at 434.

Recently, in *Keystone Nursing and Rehab of Reading, LLC, v. Simmons-Ritchie*, 2020 WL 40042 (Pa. Cmwlth. 2020), Commonwealth Court addressed the issue of whether requesters’ appeal to OOR complied with the requirements set forth in Section 1101(a)(1). *See, Daniel Simmons-Ritchie and Pa Media Group v. Pennsylvania Department of Health*, OOR Docket # 2018-1379. In *Keystone Nursing*, the Requesters, in addition to OOR’s standard appeal form, attached “three pages of detailed explanation including a summary of interactions, the specific items which the Requester[s] wished to appeal, a summary of each and the response of the D[epartment] to each, and why the Requester[s] believed the withheld documents were public records.” *Id.* at *5. The Court concluded that “[t]he standard electronic appeals form, **coupled with** Requesters’ written submission, satisfy the requirements set forth in Section 1101(a)(1).” *Id.* at *6 (emphasis added). Further noting, “[i]n these submissions, Requesters asserted that the Withheld Records are not exempt from disclosure and set forth their rationale for believing that the asserted exemptions do not apply.” *Id.*

Since Requester used OOR’s standard appeal form and did not attach additional documentation to address the grounds CCA raised in its response, i.e., identify flaws in CCA’s decision for denying the request, as the court in *Keystone Living* deemed sufficient, it was unclear

at the time the appeal was filed whether the Requester was challenging the nonexistence of records or the stated exemption. Consequently, the Requester's appeal is deficient.⁶

B. CCA DOES NOT POSSESS RECORDS RESPONSIVE TO THE REQUEST.

“Under the RTKL, an agency bears the burden of demonstrating that it has reasonably searched its records to establish that a record does not exist.” *Dep’t of Labor and Indus. v. Earley*, 126 A.3d 355, 357 (Pa. Cmwlth. 2015). “An affidavit may serve as sufficient evidence of the non-existence of requested records.” *Id.*; *See also, Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Cmwlth. 2011); *McGowan v. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 381 (Pa. Cmwlth. 2014) (“Absent evidence of bad faith, the veracity of an agency’s submissions explaining reasons for nondisclosure should not be questioned.”) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013)).

Requester posits that records responsive to her request exist because “CCA would need an invoice in order to pay the vendors.” This relies on the false presumption that CCA requested or entered a balloon or group in the Parade or was invoiced for the costs of a balloon, group, or spot in the Parade.

In support of CCA’s contention that it conducted a good faith search for records responsive to the request, and that CCA does not possess records responsive to the request as written, CCA submits the attached affidavits of its Open Records Officer, *See Exhibit 2*, and its Senior Vice President of Outreach and Government Relations, *See Exhibit 1*. CCA’s Senior Vice President of Outreach and Government Relations states:

- CCA did not purchase, lease, rent, enter, or request a balloon or float in the Parade, nor did it receive or have an invoice or other documentation requesting payment or showing the costs of a balloon or for promoting CCA on a balloon. (¶¶ 5 – 8; 15.)

⁶ CCA asserts that Requester’s submission to OOR pursuant to the deadlines established in the official notice of appeal does not cure the defects in her appeal and should not be considered in addressing this issue.

- CCA did not enter a group in or request individuals to participate in the Parade; nor did it compensate any individuals to participate in the parade or receive or have an invoice or other documentation requesting payment or showing the costs for a “spot” or for individuals or a group to participate, walk, or march in the parade. (¶¶ 9–14; 16.)

These affidavits clearly establish that none of the requested records exist in CCA’s possession, custody, or control. Requester submitted no evidence in support of her claim that records “must exist.” In light of the detailed averments in the affidavits submitted by CCA and in the absence of any evidence to the contrary, OOR must conclude that CCA has met its burden under the RTKL to show that the records, as described by the Requester, do not exist.⁷

C. CONFIDENTIAL PROPRIETARY INFORMATION AND TRADE SECRETS ARE EXEMPT FROM ACCESS.

“Unless otherwise provided by law, a public record ... or financial record shall be accessible for inspection and duplication in accordance with” the RTKL. 65 P.S. § 67.701. Under the RTKL, a record of a local agency is presumed to be a “public record” unless the record is (1) exempt under section 708; (2) exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) protected by a privilege. 65 P.S. §§ 67.102, 67.302, 67.708. Section 708(b)(11) of the RTKL specifically provides an exemption for “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 708(b)(11).

Section 102 of the RTKL defines “Confidential proprietary information” (CPI) as follows: “[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.” 65 P.S. § 67.102. In *Crouthamel v. Dep’t*

⁷ It is important to note that CCA and its representatives did not state there are no records relating to the Parade in CCA’s possession, custody, or control. Instead, the question is whether the requested records, as described by the Requester, exist. The answer to this question is, “they do not.” To the extent there are other records in CCA’s possession, custody, or control relating to the Parade, they are exempt from access for the reasons explained in CCA’s response to the RTKL Request and further explained herein and in the affidavit submitted by John Bowser, CEO of Target Media.

of Transp., 207 A.3d 432 (Pa. Cmwlth. 2019), Commonwealth Court set forth the following considerations for application of the two-part test:

In determining whether certain information is “confidential,” the OOR must consider “the efforts the parties undertook to maintain . . . secrecy.” *Smith ex rel. Smith Butz, LLC*, 161 A.3d at 1064 (citing *Eiseman*, 85 A.3d at 1128). “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial injury if the information were released.” *Smith ex rel. Smith Butz, LLC*, 161 A.3d at 1064.

207 A.3d at 441.

In addition, Section 708(b)(11) of the RTKL exempts from access “a record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). Section 102 of the RTKL defines “Trade secret” as:

Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

(1) derives independent economic value, actual or potential, from not being generally known to and not being readably 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.

The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

65. P.S. § 67.102; *see also* 12 Pa. C.S. § 5302 (With the exception of the last clause, the definition in the RTKL is identical to the definition of “trade secret” contained in Pennsylvania’s Uniform Trade Secrets Act). Trade secrets are also exempt from access under the Trade Secrets Act.

In determining whether certain information constitutes a “trade secret,” courts examine the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent

of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Crouthamel*, 207 A.3d at 438. The most critical criteria for determining whether information constitutes a trade secret are substantial secrecy and competitive value to the owner. *Id.* (citing *Commonwealth v. Eiseman*, 85 A.3d 1117, 1126 (Pa. Cmwlth. 2014), *rev'd on other grounds*, 633 Pa. 366, 125 A.3d 19 (2015)); *Mission Pennsylvania, LLC v. McKelvey*, 212 A.3d 119, 136 (Pa. Cmwlth. 2019) (citing *West Chester Univ. of Pa. v. Schackner (Bravo)*, 124 A.3d 382 (Pa. Cmwlth. 2015)).

In the *Crouthamel* case, Commonwealth Court provided examples of business and marketing information, which have been classified as “trade secrets.”

“Courts have found ‘trade secrets’ to include ‘certain business and marketing information including the costing and pricing information of an employer’s product or services, an employer’s business plans, marketing strategies, and financial projections and the terms of specific customer accounts including contract expiration dates and revenues generated.’” (citing *Union Carbide Corporation v. UGI Corporation*, 731 F.2d 1186, 1191 (5th Cir. 1984) (protecting marketing information and strategies); *BIEC International, Inc. v. Global Steel Services, Ltd.*, 791 F.Supp. 489, 545 (E.D. Pa. 1992) (protecting cost and pricing information for the final product); *Alexander & Alexander, Inc. v. Drayton*, 378 F.Supp. 824, 833 (E.D. Pa. 1974) (protecting the terms of specific customer accounts); *Air Products and Chemicals, Inc. v. Johnson*, 296 Pa. Super. 405, 442 A.2d 1114, 1121 (1982) (protecting business plans and financial projections)).

207 A.3d at 439.

CCA gave notice of Ms. Spicka’s RTKL Request and subsequent appeal to the potentially affected third-party, Target Media. *See* Exhibit 1. During the processing of the request, Target Media notified CCA that records related to the Parade contain confidential proprietary information and trade secrets, and release of such information will cause immediate and irreparable harm to the company. *Id.*

In its Affidavit, Target Media, Inc., discusses the media and advertising business, noting the importance of advertising rates, “added value” benefits, and strategies remaining a secret, and the harm to its competitive positions should the information be made public. This information is held between consultants and media agencies, for the benefit of the media industry. The public release of their knowledge, strategies, media evaluations, relationships, and contacts in the market would not only negatively impact the industry, it would jeopardize the consultant-client relationship and could put an advertising agency out of business.

Target Media also addresses the steps taken to maintain the secrecy of its information and the harm disclosure of the information would cause to its competitive positions and ability to protect its relationships with its vendors and its clients. The impact of disclosure of the advertising rates and value-added benefits could result in escalating costs due to competition between media outlets. This will cause substantial harm to CCA as it strives to bring information to family decision-makers in the most cost-effective manner.

Because records relating to the Parade contain what CCA understands to be confidential proprietary information and trade secrets, these records are exempt from disclosure under the RTKL and the Pennsylvania’s Trade Secrets Act.

III. CONCLUSION

For the foregoing reasons, it is respectfully requested that the appeal of Requester be denied.

Respectfully submitted,


Katherine M. Fitz-Patrick, Esq.
Philip J. Murren, Esq.
Ball, Murren & Connell, LLC
2303 Market Street
Camp Hill, PA 17011
Counsel for Commonwealth Charter Academy

December 23, 2021

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

Susan Spicka :
 :
 :
 v. : Docket # AP 2021-2799
 :
 Commonwealth Charter Academy :
 Charter School :

CERTIFICATE OF SERVICE

I, Katherine M. Fitz-Patrick, hereby certify that on December 23, 2021, a true and correct copy of CCA's Response to RTKL Appeal was served via First-Class Mail, postage prepaid, and electronic mail upon:

Susan Spicka
Education Voters of PA
412 N. Third Street
Harrisburg, PA 17101
sspicka@educationvoterspa.org


Katherine M. Fitz-Patrick, Esq.
Philip J. Murren, Esq.
Ball, Murren & Connell, LLC
2303 Market Street
Camp Hill, PA 17011
Counsel for Commonwealth Charter Academy

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

SUSAN SPICKA	:
Requester,	:
	:
v.	: Docket # AP 2021-2799
	:
COMMONWEALTH CHARTER	:
ACADEMY CHARTER SCHOOL,	:
Respondent.	:

AFFIDAVIT OF TIMOTHY A. ELLER

I, Timothy A. Eller, hereby declare under the penalty of perjury, pursuant to 18 Pa. C.S. § 4904, that the following statements are true and correct based upon my personal knowledge, information, and belief:

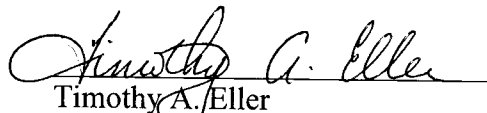
1. I have been employed with Commonwealth Charter Academy Charter School (CCA) since December 3, 2018, and serve as CCA’s Senior Vice President of Outreach and Government Relations.
2. Prior to beginning my position with CCA, I served for eight years in various public relations positions in the Pennsylvania General Assembly; for almost four years as the Press Secretary and Director of Communications for the Pennsylvania Department of Education, and, for almost four years as the Director of the Keystone Alliance for Public Charter Schools, a charter school advocacy organization. I also served as an elected member of Susquenita School District’s Board of School Directors.
3. I am familiar with Susan Spicka’s Right-to-Know Law request (Request), and subsequent appeal, seeking records relating to the November 2021 6abc Dunkin’ Donuts Thanksgiving parade (Parade) in Philadelphia.
4. I worked with Jennifer Clarke, CCA’s Open Records Officer, to assess whether a requested record was within the possession, custody, or control of CCA or a third-party contractor, and to notify the relevant third-party contractor of the request for trade secrets or confidential proprietary information.
5. CCA did not purchase, lease, or rent a balloon or float for the Parade.
6. CCA did not enter a balloon or float in the Parade.
7. CCA did not request a balloon or float for the Parade.

EXHIBIT 1

8. CCA did not receive, nor does it have in its possession, custody, or control, an invoice or other documentation requesting payment for or showing costs of a balloon or float in the Parade.
9. CCA did not enter a group of staff, contractors, agents, or volunteers in the Parade.
10. CCA did not request that any school staff, contractors, agents, or volunteers participate in the Parade.
11. CCA did not compensate any individuals for their participation in the Parade.
12. To the best of my knowledge, no CCA employees, contractors, agents, or volunteers participated in the Parade.
13. CCA did not receive, nor does it have in its possession, custody, or control, an invoice or other documentation for individuals to participate in the Parade on behalf of CCA.
14. CCA did not receive, nor does it have in its possession, custody, or control, an invoice or other documentation requesting payment for or showing the cost of a "spot" for or the participation of individuals walking or marching in the Parade.
15. CCA did not receive, nor does it have in its possession, custody, or control, an invoice or other documentation requesting payment for promoting CCA on a balloon or float in the Parade.
16. CCA did not receive, nor does it have in its possession, custody, or control, an invoice or other documentation requesting payment for promoting CCA with or through a group of individuals walking or marching in the Parade.
17. CCA is a public school of choice. In addition to the school district in which a student resides, the student's family could choose to enroll the student in a private school, a local brick-and-mortar charter school, if one is available, or any one of 14 public cyber charter schools in Pennsylvania, including CCA.
18. A public cyber charter school education for students in grades K through 12 is still a fairly new method of receiving a public education to many Pennsylvania residents, including individuals who move to Pennsylvania from states that do not offer public education choice in the manner available in Pennsylvania.
19. In order to inform students and families of their public education options as well as the nature of public cyber charter education, CCA employs various outreach activities and events throughout the year across Pennsylvania in various forms, including online, television, radio, print media, information sessions, mailers, and appearances at local community events.

20. Advertising dollars must be spent efficiently and effectively to benefit all concerned, including the consumers of the information – the family decision-makers.
21. In the marketing and advertising sector, advertising rates and added-value benefits are not public information. These are trade secrets held between consultants and media agencies, whereas one advertising agency may receive lower or higher advertising rates than another competing advertising agency. Advertising rates are a closely held industry secret that, if released publicly, could harm a consulting agency's reputation and ability to conduct business. The skillset and ability of employees of an advertising agency are leveraged to obtain competitive ad rates from media agencies. The public release of this information would not only negatively impact the industry, it could put an advertising agency out of business.
22. If information related to advertising rates and value-added benefits is made public, CCA will not be able to bring information to the family decision-makers in the most cost-effective manner, since release of the information could result in escalating costs of advertising.
23. On Monday, November 29, 2021, I notified the relevant third-party contractor, Target Media, of the Request. See Attachment A.
24. In response to my notification, John Bowser, President & CEO of Target Media, responded as follows: "As a matter of policy, I do not share invoices/records requested based on the fact that they contain trade secrets and proprietary and confidential information, including rates and pricing that we have with media outlets, and is sole property of Target Media. Such confidential information has been acquired by our company after considerable expense, time and energy and is vital to the continued success of Target's business. Violation of these trade secrets of confidential and proprietary information will cause immediate and irreparable harm to Target Media."
25. On December 9, 2021, I sent Target Media notice of the appeal. See Attachment B.

Date: December 22, 2021



Timothy A. Eller
Senior Vice President of Outreach and Government Relations
Commonwealth Charter Academy

From: [John Bowser](#)
To: [Timothy Eller](#)
Subject: Re: RTK Request Received
Date: Monday, November 29, 2021 7:53:13 PM
Attachments: [image001.png](#)
[image002.png](#)

This email originated outside of CCA. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Tim:

As a matter of policy, I do not share invoices/records requested based on the fact that they contain trade secrets and proprietary and confidential information, including rates and pricing that we have with media outlets, and is sole property of Target Media. Such confidential information has been acquired by our company after considerable expense, time and energy and is vital to the continued success of Target's business. Violation of these trade secrets of confidential and proprietary information will cause immediate and irreparable harm to Target Media.

Thank you.

John Bowser | President & CEO

John@targetmediausa.com



This e-mail and its contents are confidential and are intended only for the named recipient(s). If you have received this message in error, or are not a named recipient, please immediately notify the sender and delete this e-mail message.

From: Timothy Eller <teller@ccaeducate.me>
Date: Monday, November 29, 2021 at 2:26 PM
To: John Bowser <John@targetmediausa.com>
Subject: RTK Request Received

Hi, John:

We received the attached Right to Know request related to CCA's sponsorship of the Philadelphia Thanksgiving Day parade.

Please let me know if Target Media has any concerns or is okay with CCA releasing information responsive to this request.

Thank you.

Timothy A. Eller | Senior Vice President of Outreach and Government Relations
Commonwealth Charter Academy
1 Innovation Way
Harrisburg, PA 17110

Attachment A

Phone: 717-710-3300, ext. 11239

teller@ccaeducate.me

www.ccaeducate.me



This email and any files transmitted with it are to be treated as confidential and privileged and are not to be used or disclosed except for the purpose for which they have been sent. Any unauthorized dissemination of this email or transmitted files is strictly prohibited. If you have received this communication in error, please notify us immediately by replying to this message and deleting the original message. All users of Commonwealth Charter Academy's email system are cautioned that messages sent and received through this system may be subject to public records or student records disclosure laws or litigation discovery and may be reviewed at any time by CCA. Use of this email account is subject to the terms and conditions of the Acceptable Use Guidelines per the learner or staff handbook.

From: [Timothy Eller](#)
To: [John Bowser](#)
Subject: Notice: Appeal of Right to Know Request - Docket No. AP 2021-2799
Date: Wednesday, December 8, 2021 8:36:00 AM
Attachments: [image001.png](#)
[2021-2799_Spicka-CommonwealthCharterAcademyCyberSchool.pdf](#)

Good morning, John:

CCA has received an appeal of a Right to Know Request filed by Susan Spicka.

You may request to participate in this appeal.

Please refer to and read the attached document in full, which includes:

- The Official Notice of Appeal – Docket No. AP 2021-2799;
- Contact information of the Appeals Officer assigned by the Office of Open Records (OOR);
- A 30-day extension of time to issue a Final Determination;
- Request to Participate Before the OOR;
- The appeal filed by the requestor;
- CCA’s December 6, 2021, response to the requestor; and
- The requestor’s original Right to Know request submitted to CCA.

The deadline for submissions in this case is December 16, 2021.

Please note, “Commonwealth Court has held that ‘the burden [is] on third-party contractors...to prove by a preponderance of the evidence that the [requested] records are exempt.’”

“A third party’s failure to participate in a RTKL appeal before the OOR may be construed as a waiver of objections regarding release of requested records.”

Please let me know if you have any questions.

Timothy A. Eller | Senior Vice President of Outreach and Government Relations
Commonwealth Charter Academy
1 Innovation Way
Harrisburg, PA 17110
Phone: 717-710-3300, ext. 11239
teller@ccaeducate.me
www.ccaeducate.me



Attachment B

NOTICE OF DEADLINES

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **February 7, 2022**.

The timeline for this RTKL appeal may be extended by the OOR during the appeal. This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **December 16, 2021**.

If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.

Due to delays in U.S. mail, we urge agencies and requesters to use email for all communications with the OOR to the extent possible.

Presently, the OOR is receiving postal mail on a limited basis. Accordingly, we urge agencies and requesters to use email for all communication with the OOR to the extent possible.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.

December 7, 2021

Via Email Only:

Ms. Susan Spicka
Education Voters of PA
412 North Third Street
Harrisburg, PA 17101
sspicka@educationvoterspa.org

Via Email Only:

Jennifer Clarke
Agency Open Records Officer
Commonwealth Charter Academy Charter
School
One Innovation Way
Harrisburg, PA 17110
jclarke@ccaeducate.me

**RE: OFFICIAL NOTICE OF APPEAL - Spicka and Education Voters of PA v. Commonwealth
Charter Academy Charter School OOR Dkt. AP 2021-2799**

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

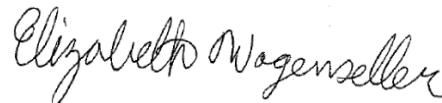
The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. on December 7, 2021. A binding Final Determination (“FD”) will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information about deadlines.**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,



Elizabeth Wagenseller
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records (“OOR”) has received the enclosed appeal, which was filed under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the notice of deadlines enclosed herein. If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR **Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer.** Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; **or** are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer assigned to this case (see 65 P.S. Â§ 67.1101(c)).

The Commonwealth Court has held that “the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt.” (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

A third party's failure to participate in a RTKL appeal before the OOR may be construed as a waiver of objections regarding release of requested records.

NOTE TO AGENCIES: If you have questions about this requirement, please contact the Appeals Officer immediately.

Statements of Fact & Burden of Proof

Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process...”

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.



pennsylvania
OFFICE OF OPEN RECORDS

APPEALS OFFICER:

Bina Singh, Esq.

CONTACT INFORMATION:

Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

FACSIMILE:

(717) 425-5343

EMAIL:

binsingh@pa.gov

**Preferred method of contact and
submission of information:**

EMAIL

**Please direct submissions and correspondence related to this appeal to the above Appeals Officer.
Please include the case name and docket number on all submissions.**

**You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot
speak to parties individually without the participation of the other party.**

The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review
prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff
are also available to provide general information about the appeals process by calling (717) 346-9903.



pennsylvania

OFFICE OF OPEN RECORDS

IN THE MATTER OF

**SUSAN SPICKA,
Requester**

v.

**COMMONWEALTH CHARTER
ACADEMY CHARTER SCHOOL,
Respondent**

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Docket No.: AP 2021-2799

This correspondence confirms the above-referenced Requester’s agreement to an additional thirty (30) day extension of time to issue a Final Determination in this matter as indicated in the Requester’s appeal form. Accordingly, pursuant to 65 P.S. § 67.1101(b)(1), the Office of Open Records will now issue a Final Determination in the above-captioned matter on or before February 7, 2022.

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- An employee of the agency
- The owner of a record containing confidential or proprietary information or trademarked records
- A contractor or vendor
- Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

From: no-reply@openrecordspennsylvania.com
To: sspicka@educationvoterspa.org
Subject: [External] PA Office of Open Records - Appeal Confirmation
Date: Tuesday, December 7, 2021 10:20:30 AM
Attachments: [oor_logo_email.png](#)

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.



You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

Name:	Susan Spicka
Company:	Education Voters of PA
Address 1:	412 N. Third Street
Address 2:	
City:	Harrisburg
State:	Pennsylvania
Zip:	17101
Phone:	717-331-4033
Email:	sspicka@educationvoterspa.org
Agency (list):	Commonwealth Charter Academy Cyber Charter School
Agency Address 1:	One Innovation Way
Agency Address 2:	
Agency City:	Harrisburg
Agency State:	Pennsylvania

Agency Zip: 17110

Agency Phone: 717-710-3300

Agency Email: jclarke@ccaeducate.me

Records at Issue in this Appeal: 1. An invoice or other documentation that shows the cost of the parade balloon that was used in the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia. 2. An invoice or other documentation that shows the cost to enter CCA group in the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia. 3. An invoice or other documentation that shows the cost of promotional spot for CCA during the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia.

Request Submitted to Agency Via: e-mail

Request Date: 11/29/2021

Response Date: 12/06/2021

Deemed Denied: No

Agency Open Records Officer: Jennifer Clarke

Attached a copy of my request for records: Yes

Attached a copy of all responses from the Agency regarding my request: Yes

Attached any letters or Yes

**notices
extending the
Agency's time
to respond to
my request:**

Agree to 30 Days
**permit the
OOR
additional
time to issue a
final
determination:**

Interested in No
**resolving this
issue through
OOR
mediation:**

Attachments:

- 11-29-2021 CCA Parade Balloon RTK.pdf
- Spicka 112921 RTK Request Response-CA-R90YCX0P (1).pdf

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.



Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Commonwealth Charter Academy (Attn: AORO)

Date of Request: 11/29/2021 Submitted via: Email U.S. Mail Fax In Person

PERSON MAKING REQUEST:

Name: Susan Spicka Company (if applicable): Education Voters of PA

Mailing Address: 412 N. 3rd St.

City: Harrisburg State: PA Zip: 17101 Email: sspicka@educationvoterspa.org

Telephone: 717-331-4033 Fax: _____

How do you prefer to be contacted if the agency has questions? Telephone Email U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.*

1. An invoice or other documentation that shows the cost of the parade balloon that was used in the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia.
2. An invoice or other documentation that shows the cost to enter CCA group in the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia.
3. An invoice or other documentation that shows the cost of a promotional spot for CCA during the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia.

DO YOU WANT COPIES? Yes, printed copies (*default if none are checked*)
 Yes, electronic copies preferred if available
 No, in-person inspection of records preferred (*may request copies later*)

Do you want certified copies? Yes (*may be subject to additional costs*) No
RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than \$100 (or) \$_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? Yes No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: Granted Partially Granted & Denied Denied Cost to Requester: \$_____

Appropriate third parties notified and given an opportunity to object to the release of requested records.



December 6, 2021

Susan Spicka
Education Voters of PA
412 N. 3rd St.
Harrisburg, PA 17101

Via email at sspicka@educationvoterspa.org

Dear Ms. Spicka:

On November 29, 2021, Commonwealth Charter Academy (CCA) received your request for records under the Right to Know Law (RTKL). You requested:

1. An invoice or other documentation that shows the cost of the parade balloon that was used in the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia.
2. An invoice or other documentation that shows the cost to enter CCA group in the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia.
3. An invoice or other documentation that shows the cost of promotional spot for CCA during the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia.

CCA does not have any records responsive to your request as written.

To the extent CCA has records relating to the November 2021 6abc Dunkin' Donuts Thanksgiving parade in Philadelphia, the records would reveal a trade secret and confidential proprietary information and be exempt from access. *See* 65 P.S. § 67.708(b)(11). This includes records of third-parties. *See* 65 P.S. § 67.707(b).

Among other types of legally protected trade secrets or proprietary information, the Commonwealth Court of Pennsylvania has construed the RTKL as excluding the following information from disclosure. *Crouthamel v. Department of Transportation*, 207 A.3d 432, 439 (Pa. Cmwlth. 2019) (“[C]ertain business and marketing information including the costing and pricing information of an employer’s product or services, an employer’s business plans, marketing strategies, and financial projections and the terms of specific customer accounts including contract expiration dates and revenues generated.”)

The expansive list of protected types of commercially-sensitive information cited by the Court encompasses the information sought in your request, much of which would be contained or revealed, in whole or in part, in invoices relating to advertising, public relations, and communications. This includes information in invoices or documentation from media companies.



You have a right to appeal the denial of your request in writing to: Office of Open Records, 333 Market St., 16th Floor, Harrisburg, PA 17101-2234. Appeals can also be filed online at the Office of Open Records website, <https://www.openrecords.pa.gov>.

If you choose to file an appeal, you must do so within 15 business days of the mailing date of this letter. See 65 P.S. § 67.1101. Please note that a copy of your original Right-to-Know request and this letter must be included when filing an appeal. More information about how to file an appeal under the Right-to-Know Law is available at the Office of Open Records website, <https://www.openrecords.pa.gov>.

Best Regards,

Jennifer Clarke

Jennifer Clarke
Open Records Office
jclarke@ccaeducate.me
717-710-3327

CC: Phil Murren, CCA Solicitor

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

SUSAN SPICKA	:
Requester,	:
	:
v.	: Docket # AP 2021-2799
	:
COMMONWEALTH CHARTER	:
ACADEMY CHARTER SCHOOL,	:
Respondent.	:

AFFIDAVIT OF JENNIFER CLARKE

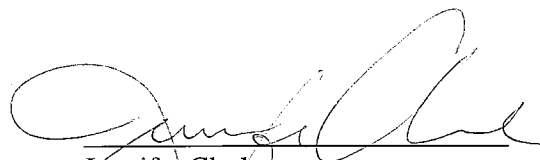
I, Jennifer Clarke, hereby declare under the penalty of perjury, pursuant to 18 Pa. C.S. § 4904, that the following statements are true and correct based upon my personal knowledge, information and belief:

1. I have been employed with Commonwealth Charter Academy Charter School (CCA) since April 2012.
2. Since the 2014-2015 school year, I have served as CCA's Open Records Officer.
3. In my role as the Open Records Officer, I am responsible for responding to Right-to-Know Law (RTKL) requests filed with CCA.
4. Upon receipt of Susan Spicka's (Requester) RTKL request (Request) seeking records relating to the November 2021 6abc Dunkin' Donuts Thanksgiving parade (Parade) in Philadelphia, I worked with Timothy Eller, CCA's Senior Vice President of Outreach and Government Relations, to assess whether a record responsive to the Request underlying this appeal was within the possession, custody, or control of CCA or a third-party contractor.
5. After a good faith search of CCA's files, I concluded that CCA does not have records responsive to the Request as written.
6. Additionally, I worked with Timothy Eller to inquire with the relevant third-party contractor as to whether the requested records exist in their possession. The third-party contractor, Target Media, Inc, informed Timothy Eller any such records responsive to the Request include information classified as confidential proprietary information and/or trade secrets.

EXHIBIT 2

7. My response, on behalf of CCA, to Requester reflected both the internal and external search for responsive records.

Date: December 22, 2021

A handwritten signature in black ink, appearing to read "Jennifer Clarke", written over a horizontal line.

Jennifer Clarke
Open Records Officer
Vice President Data and Analytics
Commonwealth Charter Academy