EDUCATION VOTERS
of Pennsylvania

January 11, 2022

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

Re: Supplemental Record Submission Docket #AP 2021-2799
Susan Spicka v. Commonwealth Charter Academy Charter School

Dear Attorney Young,

I write to provide supplemental information to the Office of Open Records ("OOR") in the above-referenced matter relating to Pennsylvania Commonwealth Charter Academy, pursuant to the Right to Know Law, 65 P.S. 67.101 ("RTKL").

As the requestor, I already have submitted legal argument when I effectuated my appeal under Section 1101. In addition to that legal argument already before the OOR, I am providing additional legal argument in support of my appeal. That information is attached herein.

If you have additional questions, I can be reached at sspicka@educationvoterspa.org or by phone at 717-331-4033.

Respectfully,

Susan

Susan Spicka, Executive Director, Education Voters of PA

cc: Katherine Fitzpatrick and Jennifer Clarke (via electronic and U.S. Mail)

Enclosures

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SUPPLEMENTAL LEGAL ARGUMENT

1. Public Records

In its response, CCA contends that the appeal did not state the grounds upon which the Requestor asserts that the records requested are public records.

However, charter schools are specifically identified as local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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.

The Requester used the OOR's standard appeal form, which provides that the signature of the Requester constitutes a statement that the requested records exist in the possession of the agency. See Barnett v. Pa. Dep't of Public Welf., 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). The OOR has held that this statement is sufficient to satisfy a requester's burden under Section 1101(a). See, e.g., Phillips and WHYY v. Pa. Dep't of Envtl. Prot., OOR Dkt. AP 2016-1782, 2017 PA O.O.R.D. LEXIS 222; Tomassi v. Municipality of Mt. Lebanon, OOR Dkt. AP 2017-0644, 6 2017 PA O.O.R.D. LEXIS 896.

The records requested, which relate to spending of taxpayer dollars by CCA, is clearly a public record under the RTKL. In that case, the burden of proving the applicability of any cited exemptions lies with CCA. See 65 P.S. § 67.708(b).

2. Confidential Proprietary Information and Trade Secrets

Requestor accepts the affidavits from CCA stating that no records exist relating to items 1 and 2 of its initial request. However, its claim that item 3, relating to confidential proprietary information and trade secrets, is invalid.

The Right to Know Law submission at issue includes this request:

"3. 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."

CCA responded that records denied this request relating to the cost of the CCA promotional spot for the November 2021 6abc Dunkin' Donuts Thanksgiving parade because it included information that CCA and an affected third party considered confidential proprietary information and trade secrets that if disclosed would cause "substantial harm to its competitive position."

Section 708 of the RTKL places the burden of proof on agency, in this case CCA and the affected third party, to demonstrate that a record is exempt. RTKL Section 708(a) states: "(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a)(1). Preponderance of the evidence mean "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence." Pa. State Troopers Ass'n v.

Scolforo, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd., 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

CCA and Target Media, Inc. have failed to meet the burden of showing that an invoice for a promotional ad constitutes either a trade secret or confidential proprietary information.

First, under the law, a trade secret is defined 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 readily ascertainable by proper means by other person who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. 65 P.S. § 67.102.

Confidential proprietary information is defined 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." 65 P.S. § 67.102.

For the exemption to apply, an agency must establish that both elements of these two-part tests are met. Office of the Governor v. Bari, 20 A.3d 634 (Pa. Commw. Ct. 2011). In determining whether information is "confidential," one factor to be considered is what "the efforts the parties undertook to maintain their secrecy." Commonwealth v. Eiseman, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), rev'd in part, Pa. Dep't of Pub. Welfare v. Eiseman, 125 A.3d 19 (Pa. 2015).

"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 competitive injury if the information were released." Id.

A "trade secret" determination relies on consideration of several 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. Smith v. Pa. Dep't of Envtl. Prot., 161 A.3d 1049, 1064 (Pa. Commw. Ct. 2017). The most important factors to be considered are "substantial secrecy and competitive value to the owner." Mission Pa., LLC v. McKelvey, 212 A.3d 119, 136 (Pa. Commw. Ct. 2019) (citing W. Chester Univ. of Pa. v. Schackner (Bravo), 124 A.3d 382 (Pa. Commw. Ct. 2015).

CCA and Target Media failed to demonstrate how a simple invoice to purchase airtime for a promotional spot meets the definition of either a trade secret or confidential proprietary information. The requestor is simply seeking documentation to demonstrate the cost of the promotional spot through a local television station. That is neither secret nor confidential, nor is it proprietary. Its disclosure does not constitute substantial competitive injury to either CCA or Target Media, Inc.

The OOR has previously ruled that charter schools do not compete in the free market or engage in some trade with private competitors, and therefore cannot claim trade secret or confidential proprietary information. Hacke v. Pa. Cyber Charter School, OOR Dkt. AP 2017-1684, 2017 PA O.O.R.D. LEXIS 1773 ("However, the OOR cannot conclude that the Charter School engages in a trade or that the Charter School's marketing plan is the type of information from which economic value can be derived where the primary activity of the Charter School is providing the essential governmental service of education and its 'competitors' are primarily other local agencies.")

In *Spicka v. Commonwealth Charter Academy Charter School*, OOR Dkt. AP 2019-1979, the also ruled that third party consultants to a charter school did not have any interest in a school's marketing plans, such that they would constitute trade secrets or confidential proprietary information. Similarly here, an invoice paid by Target Media, Inc. for a promotional spot on behalf of CCA does not create a protected interest for that media buyer.

"[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records." Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (en banc); see also Office of the Dist. Atty. of Phila. v. Bagwell, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL") (citations omitted); Pa. Dep't of Educ. v. Bagwell, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) ("Affidavits that are conclusory or merely parrot the exemption do not suffice") (citing Scolforo, supra); Schackner et al., 124 A.3d at 393 ("The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions") (citing Carey v. Pa. Dep't of Corr., 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)).

In addition, exemptions from disclosure must be narrowly construed under the RTKL. Pa. State Police v. Grove, 161 A.3d 877, 992 (Pa. 2017) ("Consistent with the RTKL's goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed") (citing Davis, 122 A.3d at 1191).

CCA and Target Media, Inc.'s conclusory affidavit's fail to meet the burden of proving an exemption by a preponderance of the evidence.