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The intersection of the Right-to-Know Law, trade secrets and confidential proprietary info

How public agencies and private parties can protect confidential data

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In 2008, Pennsylvania enacted the current Right-to-Know Law with the intent to promote transparency between the public and state and local agencies by establishing that records held by state and local agencies are accessible to the public, unless subject to an exception.

One exception is receiving increased scrutiny due to proposals submitted to Amazon by Pittsburgh and Allegheny County, through a company created by the city and county – PGHQ2, LLC – for the location of the company's second headquarters. The exception is for trade secrets and confidential proprietary information. Records subject to this exception must involve documents that have been protected, subject to secrecy, the release of which would affect the competitive position of the owner of such records.

Numerous news outlets submitted requests to the city and county for a copy of the proposal. Those requests were all denied, but the state Office of Open Records reversed on appeal. The Office of Open Records found that the proposal was not a trade secret because the city and county were not engaged in any business or commerce that could be impacted by the release of the information. Additionally, the records were not confidential proprietary information because the information was submitted, not received, by the government, as required by the definition in the Right-to-Know Law. PGHQ2 submitted the proposal to Amazon, a factor dismissed by the Office of Open Records because the city and county claimed the proposal contained confidential proprietary information of the governmental agencies and because they found PGHQ2 to be an alter ego of the city and county. The city and county recently appealed the decisions to the Allegheny County Court of Common Pleas, and the requested records have not yet been released. However, based on the Office of Open Records decisions, the Amazon HQ2 proposal is not protected as a trade secret or confidential proprietary information due to the position of the city and county as a public entity.

Although public entities may have limited protections under the trade secret and confidential proprietary information exception, private third parties engaged in work with governmental bodies and agencies can use this exception to protect their information that, when turned over to a public entity, would otherwise become a public record. Private companies must take certain steps to avail themselves of the protections afforded to trade secrets and confidential proprietary information, and state and local agencies must take certain steps when receiving a record request for third-party records potentially protected by the exception.

The first step any private company must take to protect its information is to include a written statement with any records provided to a public agency, signed by a company representative, stating that the record contains confidential information. If such a statement is provided, then the public agency is required to notify the third-party when it receives a request for the information, allowing the third-party an opportunity to provide input on the potential release of the information.

Inclusion of such a statement requires the public entity to contact the third party prior to responding to the request, but it does not guarantee the protections of the trade secret and confidential proprietary information exception. Courts have analyzed the exception and have set out factors to determine whether information may be a trade secret. Those factors include: (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. Confidential proprietary information is defined by the Right-to-Know Act as 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 who submitted the information.

Third parties should have internal policies in place that will provide the public agency with evidence to support any conclusions that the records contain confidential information. Although state and local agencies may be limited in protecting records generated by themselves under the trade secret and confidential proprietary information exception, those same agencies must be aware of the steps they are required to take before releasing any potential third-party confidential information in their possession. ■

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