

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALLEGHENY COUNTY,

CIVIL DIVISION

Petitioner,

No. SA 18 -

vs.

PAUL VAN OSDOL,

Respondent,

**PETITION FOR JUDICIAL REVIEW
OF A FINAL DETERMINATION OF
THE PENNSYLVANIA OFFICE OF
OPEN RECORDS**

Filed on Behalf of: Allegheny County,
Petitioner

Counsel of Record for This Party:

ANDREW F. SZEFI
County Solicitor
Pa. I.D. No. 83747

GEORGE M. JANOCKO
Assistant County Solicitor
Pa. I.D. No. 26408

**ALLEGHENY COUNTY LAW
DEPARTMENT**
Firm No. 057
300 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
(412) 350-1120

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALLEGHENY COUNTY,)	CIVIL DIVISION
)	
Petitioner,)	
)	
vs.)	NO. SA 18 -
)	
PAUL VAN OSDOL,)	
)	
Respondent,)	

**PETITION FOR JUDICIAL REVIEW OF A
FINAL DETERMINATION OF THE PENNSYLVANIA OFFICE OF OPEN RECORDS**

AND NOW, comes the Petitioner, Allegheny County, by and through its attorneys, Andrew F. Szefi, Esquire, Allegheny County Solicitor, and George M. Janocko, Esquire, Assistant County Solicitor, and respectfully presents this Petition for Judicial Review of a Final Determination of the Pennsylvania Office of Open Records (hereinafter “the Petition”) and, in support thereof, sets forth the following grounds for judicial review:

The Parties

1. The Petitioner is the Allegheny County, a home rule county and political subdivision under the laws of the Commonwealth of Pennsylvania (hereinafter “the County”). The County has its offices at Room 119 Court House, 436 Grant Street, Pittsburgh, Pennsylvania, 15219.

2. The Respondent is Paul Van Osdol (hereinafter “Van Osdol”) who is an adult individual with a business address of 400 Ardmore Boulevard, Pittsburgh, Pennsylvania, 15221.

Jurisdiction

3. This Petition is filed with this Honorable Court pursuant to Section 67.1302 of the Pennsylvania Right to Know Law (hereinafter the “RTK Law,” Pa. Stat. Ann. tit. 65, § 67.1302),

as the result of a Final Determination of the Pennsylvania Office of Open Records (hereinafter the "OOR) issued and mailed on January 24, 2018.

Procedural and Factual History

4. On October 19, 2017, Jerry Tyskiewicz, the County's Director of Administrative Services and the County's RTK Law Officer, electronically received a RTK Law request from Van Osdol for access to the following:

A copy of the proposal submitted by Pittsburgh and Allegheny County to Amazon to locate Amazon's second headquarters (HQ2) in the Pittsburgh region (hereinafter referred to as "the Amazon Proposal").

All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word "Amazon" between County Executive Rich Fitzgerald and anyone using the email domains @pittsburghpa.gov, @pa.gov, @maya.com or @amazon.com.

All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word "Amazon" between Chief of Staff Jennifer Liptak and anyone using the email domains @pittsburghpa.gov, @pa.gov, @maya.com or @amazon.com.

All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word "Amazon" between Liptak and Fitzgerald (hereinafter collectively referred to as "the E-Mails")

A true and correct copy of Van Osdol's RTK request to Director Tyskiewicz is incorporated by reference in its entirety herein and attached to this Petition as Exhibit "A."

5. After invoking the extension of time provision in Section 902(a)(3) and (4) of the RTK Law (65 P.S. § 67.902 (a) (3), (4)) due to bona fide staffing limitations and the need for a legal review, Director Tyskiewicz sent a letter dated November to Van Osdol's RTK in which he denied the request for the Amazon Proposal and the E-Mails for the following reasons: (a) the Amazon Proposal was exempt from disclosure under the "trade secret" and "confidential proprietary information" exemptions in Section 708 (b) (11) of the RTK Law, the "real estate" exemption in Section 708 (b) (22) (i) (A), the "procurement exemption" in Section 708 (b) (26),

and the Pennsylvania's Uniform Trade Secret Act, 12 P.S. § 5301 *et seq.* (hereinafter "the Trade Secrets Act"); and (b) after conducting a careful and diligent search, none of the Emails were found to exist. A true and correct copy of Director Tyskiewicz's November 27, 2017 letter denying Van Osdol's RTK request is incorporated by reference in its entirety herein and attached to this Petition as Exhibit "B."

6. On December 4, 2017, OOR, through its Executive Director, Erik Arneson, (hereinafter "Arneson") sent an Official Notice that Van Osdol had filed an appeal of the County's denial of access to the Amazon Proposal and the E-Mails. The Official Notice also stated that Van Osdol's appeal had been assigned to Appeals Officer Kyle Applegate, Esq. (hereinafter the "OOR Appeals Officer").

7. On January 24, 2018, the OOR Appeals Officer issued a written Final Determination pursuant to 65 P.S. § 67.1102 (a) (4) in which he granted Van Osdol's appeal for access to the Amazon Proposal and denied Van Osdol's appeal for the E-Mails. A true and correct copy of the OOR Appeals Officer's Final Determination which is the subject of this Petition is incorporated by reference in its entirety herein and attached to this Petition as Exhibit "C."

STANDARD AND SCOPE OF REVIEW

8. Under Chapter 13 the RTK Law, common pleas courts "are the ultimate finders of fact and that they are to conduct full *de novo* reviews of appeals from decisions made by the RTK Law appeals officers." *Bowling v. Office of Open Records*, 75 A.3d 453, 474 (Pa. 2013).

9. Further, the "scope of review" of common pleas courts hearing appeals of a decision made by the RTK Law appeals officer likewise is broad or plenary, and permits trial courts "to expand the record" to fulfill their statutory function as fact-finders and thereby

consider matters beyond the record that is certified by the OOR. *Bowling*.

GROUND FOR REVIEW

10. The Final Determination of the OOR Hearing Officer in which he granted Van Osdol's RTK Law appeal in part and directed the County to provide the Amazon Proposal should be reversed for the following reasons:

a. The Final Determination is tainted by the OOR's bias and prejudgment of the merits of the case due to Arneson's publicly reported comments concerning how the OOR would decide any possible appeal of a denial of the RTK requests for the Amazon Proposal.

b. The OOR Appeals Officer made numerous important factual errors that rendered the conclusions in the Final Determination legally erroneous. These factual errors include, but are not limited to, the finding that the Amazon Proposal contained the confidential proprietary information of the City, County and Commonwealth of Pennsylvania, when the Amazon Proposal clearly contained confidential proprietary information/trade secrets of PGHQ2, the entity which submitted the Amazon Proposal.

c. The OOR Appeals Officer erred by failing to even consider the County's clearly and separately stated alternative ground that the County (independently of any claims of confidentiality or exempt status made by PGHQ2 under the RTK Law or other applicable laws) could itself assert that the information contained in the Amazon Proposal was trade secret information possessed by the County and therefore was exempt from disclosure under the Trade Secrets Act.

d. The OOR Appeals Officer erred by misapplying the "trade secret" and "confidential proprietary information" exemptions in Section 708 (b) (11) of the RTK Law;

e. The OOR Appeals Officer erred by misapplying the real estate exemption in Section 708 (b) (22) (i) (A) of the RTK Law

f. The OOR Appeals Officer erred by misapplying the procurement exemption in Section 708 (b) (26) of the RTK Law

11. For these reasons and for any other reasons that may become apparent upon the filing of the Record in this matter, the OOR Appeals Officer erred in granting the Van Osdol's appeal in part and in directing the County to provide the Amazon Proposal.

WHEREFORE, the Allegheny County respectfully requests that this Honorable Court issue a decision with findings of fact and conclusions of law based upon the evidence as a whole that reverses the instant Final Determination of the OOR Appeals Officer and provides such relief as the Court deems proper and just.

Respectfully submitted,



Andrew F. Szefi
County Solicitor
Pa. I.D. No. 83747




George M. Janocsko
Assistant County Solicitor
Pa. I.D. No. 26408

Allegheny County Law Department
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300 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: George M. Janosko

Signature: 

Name: George M. Janosko

Attorney No.: 26408

From: Van Osdol, Paul
To: OpenRecords@AlleghenyCounty.us
Cc: Downs, Arnie
Subject: WTAE RTKL Request
Date: Thursday, October 19, 2017 4:21:00 PM
Importance: High

Oct. 19, 2017

Mr. Jerry Tysklewicz
Open Records Officer
Allegheny County
Pittsburgh, PA

Mr. Tysklewicz,

Please provide the following records under the Right to Know Law:

- A copy of the proposal submitted by Pittsburgh and Allegheny County to Amazon to locate Amazon's second headquarters (HQ2) in the Pittsburgh region.
- All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word "Amazon" between County Executive Rich Fitzgerald and anyone using the email domains @pittsburghpa.gov, @pa.gov, @maya.com or @amazon.com.
- All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word "Amazon" between Chief of Staff Jennifer Uptak and anyone using the email domains @pittsburghpa.gov, @pa.gov, @maya.com or @amazon.com.
- All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word "Amazon" between Uptak and Fitzgerald.

If these records are maintained electronically please provide them in that form, as the RTKL requires.

I look forward to your prompt response.

Paul Van Osdol
Investigative Reporter
WTAE TV
400 Ardmore Blvd.
Pittsburgh, PA 15221
412.443.5178



COUNTY OF



ALLEGHENY

RICH FITZGERALD
COUNTY EXECUTIVE

November 27, 2017

Paul Van Osdol
WTAE TV
400 Ardmore Blvd.
Pittsburgh, PA 15221

Re: RTK Request - Final Response

Dear Mr. Van Osdol:

This is in response to your request for records made pursuant to the Pennsylvania Right-To-Know Law (the "RTKL"). This Office received your record request via an e-mail dated October 19, 2017. In response to your request, this Office notified you on October 26, 2017 that an extension of time to respond to your request was necessary due to bona fide staffing limitations and the need for a legal review of your request. The specific records that you have requested and the County's response to each part of your request are set forth below.

Item No. 1 - A copy of the proposal submitted by Pittsburgh and Allegheny County to Amazon to locate Amazon's second headquarters (HQ2) in the Pittsburgh region.

County's Response to Item No. 1:

Your request for the particular record described in "Item No. 1" above is respectfully denied because it is exempt from disclosure under the following exceptions set forth in Section 708 (b) of the RTKL:

Section 708 (b) (11) - A record that constitutes a trade secret or confidential proprietary information.

Section 708 (b) (22) - (i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following: (A) The leasing, acquiring or disposing of real property or an interest in real property.

JERRY TYSKIEWICZ, DIRECTOR
DEPARTMENT OF ADMINISTRATIVE SERVICES
202 COURTHOUSE • 436 GRANT STREET • PITTSBURGH, PA 15219
PHONE (412) 350-6109 • FAX (412) 350-4925 • WWW.ALLEGHENYCOUNTY.US

EXHIBIT

tabbies
B

County's Response to Item No. 1, continued:

Section 708 (b) (26) - A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

Additionally, Section 305 of the RTKL states that the presumption that a record in the possession of a local agency is a public record shall not apply if the record is exempt from disclosure under other State law. Because the requested record contains confidential proprietary information and/or trade secrets, it is protected from disclosure under the Pennsylvania Uniform Trade Secret Act, 12 Pa.C.S.A. § 5301 *et seq.*

Item No. 2 - All e-mails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word "Amazon" between County Executive Rich Fitzgerald and anyone using the email domains @pittsburghpa.gov, @pa.gov, @maya.com or @amazon.com.

County's Response to Item No. 2:

Your request for the records described in "Item No. 2" is respectfully denied for the following reasons. After a careful and diligent search, no e-mails with the suffix @pa.gov or @maya.com. or @amazon.com have been found to exist. Section 705 of the RTKL provides in part that an agency is not required to create a record that does not exist.

Your request for all other records described in Item No. 2 above is respectfully denied because they are exempt from disclosure under the following exceptions set forth in Section 708 (b) of the RTKL:

Section 708 (b) (10) (i) - A record that reflects: (A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

Section 708 (b) (11) - A record that constitutes a trade secret or confidential proprietary information.

Section 708 (b) (22) - (i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following: (A) The leasing, acquiring or disposing of real property or an interest in real property.

County's Response to Item No. 2. continued:

Section 708 (b) (26) - A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

Additionally, Section 305 of the RTKL states that the presumption that a record in the possession of a local agency is a public record shall not apply if the record is exempt from disclosure under other State law. Because the requested record contains confidential proprietary information and/or trade secrets, it is protected from disclosure under the Pennsylvania Uniform Trade Secret Act, 12 Pa.C.S.A. § 5301 *et seq.*

Item No. 3 - All e-mails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word "Amazon" between Chief of Staff Jennifer Liptak and anyone using the email domains @plttsburghpa.gov, @pa.gov, @maya.com or @amazon.com.

County's Response to Item No. 3:

Your request for the records described in "Item No. 3" above is respectfully denied for the following reasons. After a careful and diligent search, no e-mails with the suffix @pa.gov or @maya.com. or @amazon.com have been found to exist. Section 705 of the RTKL provides in part that an agency is not required to create a record that does not exist.

Your request for all other records described in Item No. 3 above is respectfully denied because they are exempt from disclosure under the following exceptions set forth in Section 708 (b) of the RTKL:

Section 708 (b) (10) (i) - A record that reflects: (A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

Section 708 (b) (11) - A record that constitutes a trade secret or confidential proprietary information.

Section 708 (b) (22) - (i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following: (A) The leasing, acquiring or disposing of real property or an interest in real property.

November 27, 2017

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County's Response to Item No. 3, continued:

Section 708 (b) (26) - A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

Additionally, Section 305 of the RTKL states that the presumption that a record in the possession of a local agency is a public record shall not apply if the record is exempt from disclosure under other State law. Because the requested record contains confidential proprietary information and/or trade secrets, it is protected from disclosure under the Pennsylvania Uniform Trade Secret Act, 12 Pa.C.S.A. § 5301 *et seq.*

Item No. 4 - All e-mails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word "Amazon" between Liptak and Fitzgerald.

County's Response to Item No. 4:

Your request for the records described in "Item No. 4" is respectfully denied for the following reasons. After a careful and diligent search, no e-mails during the stated time period containing the key word "Amazon" have been found to exist. Section 705 of the RTKL provides in part that an agency is not required to create a record that does not exist.

If such e-mails did exist, your request for access to these e-mails would have to be respectfully denied because they would be exempt from disclosure under Section 708 (b) (10) (i) - A record that reflects: (A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

Pursuant to Section 1101 of the RTKL, a party denied access to a requested record may file a written appeal of the denial with the Pennsylvania Office of Open Records ("OOR") within fifteen (15) business days of the mailing date of the local agency's response. The OOR's address is:

Pennsylvania Office of Open Records
Commonwealth Keystone Building
400 North Street, Plaza Level
Harrisburg, PA. 17120-0225

November 27, 2017
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Sincerely,

A handwritten signature in black ink that reads "Jerry Tyskiewicz". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

Jerry Tyskiewicz, Director
County of Allegheny Open Records Officer



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

PAUL VAN OSDOL AND
WTAE-TV,
Requester

v.

ALLEGHENY COUNTY,
Respondent

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Docket No.: AP 2017-2248

INTRODUCTION

Paul Van Osdol and WTAE-TV (collectively, “Requester”) submitted a request (“Request”) to Allegheny County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a copy of a proposal submitted to Amazon, along with emails. The County denied the Request, stating, among other reasons, that the proposal constitutes confidential proprietary information and a trade secret. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

On October 19, 2017, the Request was filed, seeking:

- A copy of the proposal submitted by Pittsburgh and Allegheny County to Amazon to locate Amazon’s second headquarters (HQ2) in the Pittsburgh region.



- All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word “Amazon” between County Executive Rich Fitzgerald and anyone using the email domains @pittsburghpa.gov, @pa.gov, @maya.com or @amazon.com.
- All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word “Amazon” between Chief of Staff Jennifer Liptak and anyone using the email domains @pittsburghpa.gov, @pa.gov, @maya.com or @amazon.com.
- All emails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word “Amazon” between Liptak and Fitzgerald.

On November 27, 2017, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the County denied the Request. For Item 1 of the Request, the County argued that the proposal constitutes confidential proprietary information and a trade secret, 65 P.S. § 67.708(b)(11);¹ contains real estate evaluations, 65 P.S. § 67.708(b)(22); and constitutes an exempt proposal record, 65 P.S. § 67.708(b)(26). For Items 2-4, the County argued that certain emails do not exist, and that any responsive emails are subject to the same exemptions cited above, with the addition of 65 P.S. § 67.708(b)(10)(i)(A) (records reflecting internal predecisional deliberations).

On December 1, 2017, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On December 13, 2017, the County submitted a position statement in support of the exemptions cited by the County in its response. The County also submitted the affidavits, made under penalty of perjury, of Jennifer Liptak, the Chief of Staff for County Executive Rich Fitzgerald, and Joseph Gavlik, Chief Information Officer of the County and Director of the Division of Computer Services. Additionally, the County provided a copy of Amazon’s Request

¹ The County also cited the Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§ 5301 *et seq.*

for Proposals instructions. Finally, the County stated that it adopted the arguments and evidence set forth by the City of Pittsburgh (“City”) in the appeal docketed at *Van Osdol and WTAE-TV v. City of Pittsburgh*, OOR Dkt. AP 2017-2247, which was also assigned to this Appeals Officer and involved similar records.²

On December 20, 2017, the OOR requested additional information from the City and County regarding PGHQ2, LLC, the entity that submitted the proposal to Amazon, and the City and County’s claims that proposal contains information that is exempt under Section 708(b)(22) of the RTKL. On December 29, 2017, the City and County submitted a joint response providing additional information.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that

² Most of the arguments and evidence submitted by the City in OOR Dkt. AP 2017-2247 are duplicative of the submissions made by the County in this appeal, and as a result, do not need to be separately discussed here, with the exception of the attestation of Brian Ross, which will be discussed later in this Final Determination.

an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The County is a 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. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, 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). Preponderance of the evidence has been defined as “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)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The proposal cannot be withheld

The County argues that the Amazon proposal is not subject to public access. First, it maintains that the proposal is exempt under Section 708(b)(11) of the RTKL, which exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). These terms are defined in Section 102 of the RTKL as follows:

“Confidential proprietary information.” Commercial 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 [entity] that submitted the information.

“Trade secret.” 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.

65 P.S. § 67.102 (emphasis added). An agency must establish that both elements of either of these two-part tests are met in order for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). In determining whether certain information is “confidential,” the OOR considers “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.*

Pennsylvania courts confer “trade secret” status based upon 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. *See, e.g., Crum v. Bridgestone/Firestone N. Amer. Tire*, 907 A.2d 578 (Pa. Super. Ct. 2006) (adopting standard from RESTATEMENT (SECOND) OF TORTS § 757 (1965)). To constitute a “trade secret,” the information must be an “actual secret of peculiar importance to the business and constitute competitive value to the owner.” *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177 (Pa. Commw. Ct. 2006). The most critical criteria are “substantial secrecy and competitive value.” *Crum*, 907 A.2d at 585. While the County has also separately raised the Uniform Trade Secrets Act, 12 Pa.C.S. §§ 5301 *et seq.*, as a basis for denial, the RTKL’s “self-contained trade-secrets exception supplants the more general application of the Uniform Trade Secrets Act,” so that the OOR need not separately analyze whether the Uniform Trade Secrets Act applies. *See Eiseman*, 125 A.3d at 32-33; *see also Pa. Dep’t of Rev. v. Flemming*, No. 2318 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 626, *9-10 (Pa. Commw. Ct. 2015) (“[The RTKL’s] definition [of trade secrets] is identical to that contained in the Uniform Trade Secrets Act”).

a. The proposal is not a trade secret

The County argues that the proposal constitutes both confidential proprietary information and a trade secret. Although the County maintains that the proposal has economic value, and disclosure of the proposal would allow other jurisdictions to appropriate that economic value, the proposal is not covered by the trade secrets exemption.

While not defined in the RTKL, “trade” is commonly defined as: “1. The business of buying and selling or bartering goods or services; COMMERCE.... 2. A transaction or swap. 3. A business or industry occupation; a craft or profession. – trade, vb.” BLACK’S LAW DICTIONARY 1721 (10th ed. 2014). Commerce, meanwhile, is defined as “[t]he exchange of goods and services, esp. on a large scale involving transportation between cities, states, and countries.” *Id.* at 325. Necessarily, a “trade secret” pertains to business or commerce, and this context is crucial in understanding the exemption. *See* 1 Pa.C.S. § 1903(a) (“Words and phrases shall be construed according to rules of grammar and according to their common and approved usage ...”); 1 Pa.C.S. § 1923(c) (“Words and phrases which may be necessary to the proper interpretation of a statute and which do not conflict with its obvious purpose and intent, nor in any way affect its scope and operation, may be added in the construction thereof”). Here, the proposal is not related to any business or commerce being conducted by the County; instead, through the proposal, the County is hoping to attract Amazon to the region so that *it* may engage in commerce, and the region can reap the benefits of jobs and investment.

The County has not pointed to any support for the proposition that a government agency may have a trade secret when not engaging in business or commerce. The Pennsylvania Supreme Court has stated that a trade secret must be “of peculiar importance *to the business* and constitute competitive value to the owner.” *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177,

185 (Pa. 2006) (emphasis added); *see also Hoffman v. Commonwealth*, 455 A.2d 731 (Pa. Commw. Ct. 1983) (finding that “the trade secret contention ceases to be of any moment when the function is recognized as governmental, rather than that of a private business”). While Pennsylvania courts have intimated that agencies, when engaging in business, may have trade secrets, *see Parsons*, 910 A.2d at 186-87; *Flemming*, 2015 Pa. Commw. Unpub. LEXIS 626, *13-14, the OOR cannot find any support for the notion that an agency can have a trade secret when it is not engaged in business or commerce. *See Hacke and PublicSource v. Pa. Cyber Charter Sch.*, 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”). Therefore, the proposal cannot constitute or contain trade secrets of the County.

b. The proposal is not confidential proprietary information

The County also argues that the proposal contains confidential proprietary information, and therefore must be withheld in its entirety. While the City, County, and Commonwealth have treated the proposal as confidential, this alone does not make the proposal confidential proprietary information.³ Instead, certain requirements must be met. The definition of confidential proprietary information requires that the information be “received by an agency.” 65 P.S. § 67.102. Likewise, the definition requires that there must be “substantial harm to the competitive position of *the person that submitted the information.*” *Id.* (emphasis added). “Person” is undefined in the RTKL;

³ Likewise, Ms. Liptak attests that “assurances were made to participants, including owners of real estate potentially involved in future transactions, that confidential proprietary information would not be released.” However, these assurances do not establish that the proposal is confidential proprietary information.

however, the Statutory Construction Act defines “person” to include “a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.” 1 Pa.C.S. § 1991; *see also McKelvey and PennLive v. Pa. Dep’t of Health*, OOR Dkt. AP 2017-1443, 2018 PA O.O.R.D. LEXIS ____ (discussing the difference between “person” and “individual” under the RTKL). Therefore, while the City and County can constitute a person, the definition of confidential proprietary information requires that they *submit* the information to an agency.

Here, it is undisputed that the proposal was submitted to Amazon through PGHQ2, LLC, which “was formed to serve as the conduit through which a response to the Amazon RFP would be prepared and submitted on behalf of the Pittsburgh-Allegheny County region.”⁴ There is no claim that the proposal is confidential proprietary information of PGHQ2, LLC; rather, the City and the County claim that the proposal contains the confidential proprietary information of the City, County, and Commonwealth.⁵ The proposal was not received by or submitted to another agency; instead, it was received by and submitted to Amazon. Because the confidential proprietary information exemption does not protect this type of record, the proposal cannot be confidential proprietary information under the RTKL.⁶

⁴ An explanation of PGHQ2, LLC’s formation is contained in the City and County’s joint response to the OOR’s request for additional information.

⁵ Based on the evidence submitted, PGHQ2, LLC is an alter ego of the City and County. *See West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 395 (Pa. Commw. Ct. 2015) (“Foundations at the various institutions of the SSHE in large part are alter egos of the member universities to carry out activities that those universities want to undertake; otherwise, they would not exist”). Kevin Acklin, an affiant in OOR Dkt. AP 2017-2247, who is the Mayor’s Chief of Staff and Chairman of the Board of the Urban Redevelopment Authority, also identifies himself as Manager of PGHQ2, LLC. Any argument that PGHQ2, LLC is a separate legal entity under the RTKL would ignore the reality that PGHQ2, LLC was formed so that the City and County could submit a regional proposal.

⁶ Additionally, Section 708(c) of the RTKL states that the exemption does not apply to financial records. *See* 65 P.S. § 67.708(c); *see also* 65 P.S. § 67.102 (defining “financial record”). The County fails to explain how financial components of the proposal, specifically financial incentives, do not meet this definition.

The City has also provided the attestation of Brian Ross, Deputy Director for Project Management for the Pennsylvania Department of Community and Economic Development (“DCED”),⁷ who attests that the proposal contains a “DCED/Commonwealth Incentive Proposal” and that this information is “confidential proprietary information to the Department and the Commonwealth of Pennsylvania.”⁸ However, the Commonwealth is not a “person” under the definition of confidential proprietary information. *See* 1 Pa.C.S. § 1991 (excluding the Commonwealth). Because the Commonwealth is not a person, DCED’s incentive proposal cannot constitute confidential proprietary information of the Commonwealth under the RTKL.⁹

c. The County has not met its burden of proving that the proposal is exempt under Section 708(b)(22) of the RTKL

The County also argues that the proposal contains real estate feasibility estimates and evaluations, specifically “information setting forth the merits of possible sites for the location of the Amazon HQ2 Project.” Section 708(b)(22) exempts from disclosure:

The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations *made for or by an agency* relative to the following:

- (A) The leasing, acquiring or disposal of real property or an interest in real property.
- (B) The purchase of public supplies or equipment included in the real estate transaction.
- (C) Construction projects.

⁷ DCED did not request to participate pursuant to 65 P.S. § 67.1101(c) in this appeal, or the appeal docketed at OOR Dkt. AP 2017-2247.

⁸ This affidavit is referenced by the County in its position statement, and incorporated by reference by the County.

⁹ Mr. Ross does not suggest that the information constitutes a trade secret. Although the RTKL’s “self-contained trade-secrets exception supplants the more general application of the Uniform Trade Secrets Act,” the definition of “person” in the Uniform Trade Secrets Act includes the government, and does not exclude the Commonwealth. *See* 12 Pa.C.S. § 5302. While this definition is relevant to the determination of whether information constitutes a trade secret under the RTKL, it is inapplicable to confidential proprietary information, which is not covered under the Uniform Trade Secrets Act. Regardless, as set forth above, there is no support for the incentive proposal being a trade secret of the Commonwealth. Further, although having notice of this appeal, DCED has not requested to participate pursuant to 65 P.S. § 67.1101(c).

65 P.S. § 67.708(b)(22)(i) (emphasis added). However, the exemption “shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property or an interest in real property or the purchase of public supply or construction project.” 65 P.S. § 67.708(b)(22)(ii).

Amazon’s RFP asks bidders to:

Please provide information regarding potential buildings/sites that meet the criteria described herein. Along with general site information, please provide the current ownership structure of the property, whether the state/province, or local governments control the property, the current zoning of the site, and the utility infrastructure present at the site.

Ms. Liptak attests that “as the governing bodies of this region do not now own all of the square footage Amazon requires, there are many privately owned parcels included in the ... Proposal, whose owners have expressed strong interest in being part of the future Amazon development.”

The City’s joint response with the County further explains:

The sites identified in the [proposal] as potential locations for Amazon’s second headquarters are either within the City or are outside the City but within the County. These sites include properties owned by private landowners as well as properties owned by various public entities. Amazon could acquire ownership of any of these identified properties from either a public entity owner or from a private owner. Amazon could also decide to enter into long-term lease arrangements for any of these identified properties. In the alternative, another private entity could acquire the property (or properties) and either sell or lease to Amazon. Again, the intent was to create flexibility, not a pre-determined ownership structure.

Based on Amazon’s RFP instructions, evaluations were made to locate properties that meet the criteria for Amazon. These evaluations were “made for or by an agency” as required by Section 708(b)(22). However, neither the City nor the County are necessarily leasing, acquiring or disposing of real property on Amazon’s behalf. As explained above, there is flexibility in how these properties could be obtained, and it is unclear whether Amazon would obtain these properties directly, or if the City or County (or even PGHQ2, LLC) would obtain the properties to convey to Amazon. Under the exemption, if Amazon itself performed the evaluations, the evaluations would

not be exempt from disclosure because the evaluations were not prepared “by or for” an agency. *See, e.g., Cedar Realty Trust v. Lower Macungie Twp.*, OOR Dkt. AP 2013-1799, 2013 PA O.O.R.D. LEXIS 1072. Similarly, the exemption does not permit an agency to perform real estate evaluations on a private entity’s behalf, when that agency is not the entity ultimately leasing, acquiring or disposing of real property. “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.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015) (citation omitted). Therefore, the exemption is limited to evaluations performed in conjunction with an agency’s lease, purchase, or disposition of property, and the proposal is not subject to the exemption.

d. The County has not met its burden of proving that the proposal is exempt under Section 708(b)(26) of the RTKL

Finally, the County argues that the proposal is exempt from disclosure under Section 708(b)(26) of the RTKL, which exempts from disclosure:

A proposal pertaining to *agency* procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation to bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability; or the identity of the members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

65 P.S. § 67.708(b)(26) (emphasis added).

The County argues that “the proposal exemption is applicable because the Requested Information is the Pittsburgh HQ2 Proposal to Amazon” and that “[b]ecause the Requested Information pertains to a proposal prior to the award of any contract or the rejection of a proposal, the Requested Information does not have to be made accessible at this time.” However, the County misconstrues the exemption. The RTKL defines “agency” as “[a] Commonwealth agency, a local

agency, a judicial agency or a legislative agency.” 65 P.S. § 67.102. As a publicly-traded corporation, Amazon is none of these. The City and the County are neither procuring nor disposing of supplies, services or construction from Amazon, as contemplated by the exemption; instead, as explained in Amazon’s RFP instructions, the information provided in the proposal “will allow Amazon to determine the ideal location for our Project.” Section 708(b)(26) is limited to situations where an *agency* receives a proposal. The purpose of the RTKL is to “to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling*, 990 A.2d at 824. As a result, it is clear that Section 708(b)(26) was not intended to shield promises made, and incentives offered, to third parties by government agencies.

2. The County has met its burden of proving that the requested emails do not exist

On appeal, the County argues that no responsive emails exist. In support of this assertion, Mr. Gavlik, the County’s Chief Information Officer and Director of the Division of Computer Services, attests that he performed a search of the County’s email system, using the parameters set forth in the Request. Mr. Gavlik further states:

After conducting a good faith search of the County’s e-mail system based upon the search parameters set forth in [the Request], I did not find any e-mails from Sept. 7, 2017 through Oct. 18, 2017 containing the key word “Amazon” between County Executive Rich Fitzgerald and anyone using the email domains @pittsburghpa.gov, @pa.gov, @maya.com or @amazon.com; containing the key word “Amazon” between Chief of Staff Jennifer Liptak and anyone using the email domains @pittsburghpa.gov, @pa.gov, @maya.com or @amazon.com; or containing the key word “Amazon” between Liptak and Fitzgerald.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the County acted in bad faith

or that the records exist, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Therefore, based upon the evidence provided, the County has met its burden of proving that records responsive to Items 2-4 of the Request do not exist.¹⁰ *See Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the County is required to provide the proposal to the Requester within thirty days. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Allegheny County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.¹¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 24, 2018

/s/ Kyle Applegate

APPEALS OFFICER
KYLE APPLGATE, ESQ.

Sent to: Paul Van Osdol (via e-mail only);
Jerry Tyskiewicz (via e-mail only);
George Janocsko, Esq. (via e-mail only)

¹⁰ Although the County initially argued that various exemptions apply to any responsive emails, it has now demonstrated that no responsive emails exist. Therefore, the OOR will not address the exemptions originally referenced by the County.

¹¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ALLEGHENY COUNTY,)	CIVIL DIVISION
)	
Petitioner,)	
)	
vs.)	NO. SA 18 -
)	
PAUL VAN OSDOL,)	
)	
Respondents,)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Petition for Judicial Review of a Final Determination of the Pennsylvania Office Of Open Records was served on the 23rd day of February, 2018, by first class mail, postage prepaid, upon the following:

Paul Van Osdol
400 Ardmore Boulevard
Pittsburgh, Pennsylvania, 15221

Pennsylvania Office of Open Records
Kyle Applegate, Hearing Officer
333 Market Street, 16th Floor
Harrisburg, PA 17126-0333



GEORGE M. JANOCSKO
ASSISTANT COUNTY SOLICITOR