STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

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September 3, 2014

Via Electronic Mail	Via Electronic Mail	Via Electronic Mail
Gerald A. Norlander, Esq.	Andrew M. Klein, Esq.	Maureen O. Helmer, Esq.
Executive Director	Klein Law Group Pllc	Hiscock & Barclay, LLP
New York's Utility Project	1250 Connecticut Ave NW	80 State Street
P.O. Box 10787	Suite 200	Albany, NY 12207
Albany, NY 12201	Washington, D.C. 20036	MHelmer@hblaw.com
gnorlander@utilityproject.org	AKlein@KleinLawpllc.com	

Re: Determination on remand from the Secretary concerning the exception from disclosure of certain records requested by Mr. Norlander

Dear Mr. Norlander, Ms. Helmer, Mr. Klein:

By e-mail dated June 17, 2014, Mr. Norlander, on behalf of New York's Utility Project, requested certain records related to pending Commission Case 14-M-0183.[1] The records sought by Mr. Norlander were, at the time, all subject to requests for exception from disclosure pursuant to Public Officers Law (POL) §87(2)(d). In accordance with the requirements of POL §89(5), I issued my determination concerning access to those records by letter dated July 22, 2014.

By filing on August 1, 2014, Time Warner and Comcast appealed my determination to the Secretary with respect to four records, namely, the Companies' response to information request DPS-26, and information request exhibits 24, 26 and 46.[2] By letter dated August 15, 2014, the Secretary remanded the determination with respect to these records to me for reconsideration in light of a decision issued by the Albany County Supreme Court on July 31, 2014, in Verizon New York Inc. v. New York State Public Service Commission (Index No. 6735-13) (Verizon).

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1 Case 14-M-0183, Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control. Comcast Corporation and Time Warner Cable Inc. are referred to herein as Comcast and Time Warner, respectively, and collectively as the Companies.

2 The exhibits were attachments to the responses of Comcast and Time Warner to information requests DPS-24, DPS-26, and DPS-46, respectively.

In order to allow Comcast and Time Warner to address the Verizon case, I authorized the companies to submit supplemental information by August 29, 2014. Neither did so.

The balance of this letter constitutes my determination pursuant to POL §89(5) as to the entitlement to an exception from disclosure pursuant to POL §89(5)(a)(1) for the records subject to the Secretary's remand.

Discussion

POL §87(2)(d) provides that exception from disclosure may be granted for records, or portions of records, that:

> are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise

Prior to Verizon, the final clause of this section had been interpreted as applying to all of the records covered by the section, that is, both trade secrets and information from a commercial enterprise. Indeed, the Commission's rules expressly state that, "A person submitting trade secret or confidential commercial information" must, "[i]n all cases ... show the reasons why the information, if disclosed, would cause substantial injury to the competitive position of the subject commercial enterprise."[3]

In Verizon, after reviewing the legislative history of POL §87(2)(d), the court concluded that this interpretation was incorrect. It found that the clause concerning substantial injury to the competitive position was intended to apply only to information obtained from a commercial enterprise. If the claim is that records constitute trade secrets, no showing of substantial injury is required. The only question for agency determination is whether the trade secret claim is valid.

While the meaning of "trade secret" in the context of the Freedom of Information Law has not been defined explicitly in the case law, the Court of Appeals has suggested that the definition set forth in comment b to §757 of the Restatement of Torts is a "useful and widely adopted" one.[4] That definition, which is repeated in the Commission's rules at 16 NYCRR §6-1.3(a), states that, "A trade secret may consist of any formula, pattern, device or compilation of information which is used in [a] business, and which gives [the business] an opportunity to obtain an advantage over competitors who do not know or use it."

In light of this definition and the holding of the Verizon court, the appropriate interpretation of POL §87(d)(2) would appear to be that records may be excepted from disclosure under FOIL if they are either (a) secret and provide the owner with a competitive advantage (trade secrets), or (b) secret and would cause the owner substantial competitive injury if they were disclosed (confidential commercial information). The burden of demonstrating entitlement

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[3] 16 NYCRR §6-1.3(b)(2).

[4] New York Telephone Co. v. Public Service Commission, 56 N.Y. 2d 213, 219 note 3 (1982).

to an exception on either of these grounds rests with the party requesting the exception. "To meet its burden, the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm."[5] The same standard would apply to a demonstration that information claimed to be a trade secret provides a competitive advantage to the owner.

In my July 22, 2014, determination, I did not dispute the fact that the Companies treated the information in DPS-26 and Exhibits 24, 26, and 46 as secret. What I found was that the claims of potential competitive injury made by the Companies were entirely general and speculative, and failed to articulate any clear nexus between disclosure and substantial competitive injury. The word "substantial" was, in fact, superfluous. Had the standard applied been "any competitive injury," my conclusion would have been the same. The showing did not meet the Companies' burden.

Substituting the trade secret standard of "competitive advantage" for the confidential commercial information test of "competitive injury" does not change that result. The claims remain non-specific and speculative. Just as there was no clear showing of a connection between disclosure and competitive injury, there remains no clear nexus between non-disclosure and the retention of a competitive advantage.

Conclusion

The requests of the Companies for exception from disclosure pursuant to POL §87(2)(d) and 16 N.Y.C.R.R. §6-1.3(b)(2) for the records discussed in this determination on remand from the Secretary are denied. Review of my determination may be sought, pursuant to POL §89(5)(c)(1) and 16 N.Y.C.R.R. §6-1.3(g), by filing a written appeal with Kathleen H. Burgess, Secretary, at the address given above, within seven business days of receipt of this determination. Unless a contrary showing is made, receipt will be presumed to have occurred on September 4, 2015, and the deadline for the receipt of any such written appeal will be September 15, 2014.

Sincerely,

/s/

David L. Prestemon
Administrative Law Judge

cc: Robert.Freeman@dos.ny.gov
AZoracki@KleinLawpllc.com
Kathleen H. Burgess, Secretary

[5] Markowitz v. Serio, 11 N.Y.3d 43, 50-51 (2008).