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Ms. Michelle Zaludek
Records Access Officer
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223

Re: Case 00-C-2051 – Request for Confidential Treatment

Dear Ms. Zaludek:

Verizon New York Inc. ("Verizon") respectfully requests that the accompanying Special Services Service Inquiry Reports ("SIRs") be treated by the Commission and the Department of Public Service as trade secret and confidential commercial information within the meaning of the State Freedom of Information Law ("FOIL"), Publ. Off. L. §§ 87(2)(d) and 89(5), and the Department's regulations implementing FOIL. These reports identify non-threshold performance in Special Services reporting entities. Confidential treatment is sought on the grounds that public disclosure of the information contained in the reports would place Verizon at an unfair competitive disadvantage.

STANDARD FOR CONFIDENTIAL TREATMENT

Section 87(2)(d) of the New York Public Officers Law authorizes agencies to deny access to 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." The section thus

provides two alternative bases for exempting a document from disclosure: the fact that it includes trade secrets *or* the fact that it includes confidential commercial information.[1] Further, Publ. Off. L. § 89(5)(a), not only authorizes but *requires* agencies to "except[] from disclosure" any information submitted pursuant to a claim of confidential treatment under § 87(2)(d) "until fifteen days after the entitlement to such exception has been finally determined."

The state courts have clarified the standards applicable to the two branches of the § 87(2)(d) test.

Trade Secrets. The State Supreme Court has held that "[a]lthough the term 'trade secret' is not defined under FOIL, 'courts applying New York law generally follow Section 757 of the Restatement of Torts in determining whether information is entitled to protection as a trade secret' . . . . The Restatement defines a trade secret as any formula, pattern, device or compilation of information which is used in one's business, and which gives him *an opportunity to obtain an advantage over competitors who do not know or use it* (Restatement [First] of Torts § 757, Comment b) (emphasis added)."[2] The court also noted that "[i]mportantly, the Restatement does not require that the advantage be 'substantial.'"[3]

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[1] *See Verizon v. Publ. Serv. Comm'n*, 46 Misc. 3d 858, 874, 991 N.Y.S.2d 841, 855 (N.Y. Sup. Ct. 2014), *aff'd*, 137 A.D.3d 66, 23 N.Y.S.3d 446 (3d Dep't 2016) ("Once a document has been found to be a trade secret under Public Officers Law § 87(2)(d), the analysis ends [citing cases] . . . . These cases appear, to this Court, to be consistent with the legislative intent of the amendment and with the legislative policy that trade secrets, by their very nature, should be protected from disclosure . . . ."). *See also id.*, 46 Misc. 3d at 868, 991 N.Y.S.2d at 851.

[2] *Verizon v. Publ. Serv. Comm'n, supra,* 46 Misc. 3d at 872, 991 N.Y.S.2d at 853-54.

[3] *Id.*, 46 Misc. 3d at 873, 991 N.Y.S.2d at 854. *See also* 46 Misc. 3d at 876-77, 991 N.Y.S.2d at 856-57. The Restatement identifies a number of factors that may be relevant to a determination of trade-secret status: "(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

Confidential Commercial Information. The controlling precedent on the scope of the separate "confidential commercial information" prong of § 87(2)(d) is the 1995 decision of the State Court of Appeals in *Encore College Bookstores v. Auxiliary Service Corp*.[4] The Court of Appeals noted in *Encore* that the exemption was intended to track the parallel exemption in the federal Freedom of Information Act ("FOIA"), and that "whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means." The *Encore* court also quoted with approval federal precedent holding that:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only the minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government.
>
> The reasoning underlying these considerations is consistent with the policy behind [Public Officers Law § 87(2)(d)] — to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York . . . .[5]

Applying this standard to the document at issue in the case (a list compiled by Barnes & Noble, identifying the textbooks that professors at a branch of the State University planned to use for their courses, which a competing bookstore operator sought to obtain under FOIL), the Court concluded that "the booklist has obvious commercial value to Encore [the competitor] since it

[4] 87 N.Y.2d 410, 663 N.E.2d 302, 639 N.Y.S.2d 990.

[5] *Id.*, 87 N.Y.2d at 420, 663 N.E.2d at 307, 639 N.Y.S.2d at 995, *quoting Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

would enable Encore to offer the precise inventory that its target clientele . . . is required to purchase . . . . The *potential* damage to Barnes & Noble as a result is the loss of student customers to its competitor and a corresponding loss of profits." (Emphasis supplied.) The Court went on to note that "[t]he likelihood of harm to Barnes & Noble is enhanced by the economic windfall conferred upon Encore were it to receive the booklist at the mere cost of FOIL fees. . . . Disclosure through FOIL . . . would enable Encore to obtain the requisite information without expending its resources, thereby reducing its cost of business and placing Barnes & Noble at a competitive disadvantage."[6]

Thus, under *Encore*, the windfall resulting from the free disclosure of competitively valuable information to a submitting party's competitors is *itself* a "substantial competitive harm" sustained by the submitting party, or at a minimum gives rise to a clear likelihood of such harm. The Court specifically rejected the contention that actual consequential harm beyond that free-ride need be shown.[7]

APPLICATION OF THE STANDARD

For the following reasons, the Special Services SIRs satisfy the standards summarized above.

First, the reports are not made publicly available, so competitors would not have access to them other than through the FOIL process. Moreover, the information in the reports could only be replicated, if at all, by performing special studies requiring significant effort, time and

[6] 87 N.Y.2d at 421, 663 N.E.2d at 308, 639 N.Y.S.2d at 996.

[7] *See id.* at 421 ("ASC was not required to establish actual competitive harm to Barnes & Noble. Rather, '[a]ctual competition and the likelihood of substantial competitive injury is all that need be shown' . . . .").

expense; and even then the results would not be as accurate as complete as the data that could be derived from the reports.

Second, disclosure of the reports would provide competitors with valuable information that they could use to obtain a competitive advantage over Verizon. The reports provide an analysis of specific service issues in individual Special Services bureaus or centers in discrete parts of Verizon's service territory; they also set forth Verizon's detailed plans for service improvement and target dates for meeting threshold reporting levels.

Verizon would sustain competitive harm if such information were made publicly available. Competitors could use the information included in the reports to deduce Verizon's strategic business and marketing plans as well as Verizon's service quality strengths and weaknesses and its plans to address service issues in the particular geographic locations served by the reporting centers. Competitors could use such information to target Verizon customers in areas where Verizon's service quality is in need of improvement. Similarly, they could use the reports to develop competitive responses to Verizon's plans for enhancing service quality in those areas. Verizon does not make this information available to its competitors and competitors of Verizon do not make comparable information available to Verizon. Verizon incurred substantial costs in developing this information since each report required an analysis of service quality issues and development of plans for addressing them. Competitors could not duplicate this information since they would have no means of determining Verizon's specific service quality issues, the reasons for such issues or Verizon's plans for addressing the issues short of obtaining these reports.

For these reasons, disclosure of the reports would give competitors an opportunity to obtain a competitive advantage over Verizon and would cause substantial injury to Verizon's competitive position. The reports therefore meet the criteria for exemption from disclosure in Publ. Off. L. §87(2)(d).

Respectfully submitted,

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