COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

IN THE MATTER OF ANN TRETHEWEY	:	No.
Requester	:	
v.	:	
DOWNINGTOWN AREA SCHOOL DISTRICT	:	
Respondent	:	

APPEAL OF AGENCY DETERMINATION OF ANN TRETHEWEY

Under 65 P.S. 67.1101(a)(1), requester, Ann Trethewey, files an appeal of the January 5, 2023 determination of Downingtown Area School District ("DASD").

BACKGROUND

On January 3, 2023, Trethewey submitted a request with DASD under the Right to Know Law, 65 P.S. § 101, eq. seq. the ("RTKL"), seeking the following documents:

1. Cop[ies] of all documents and materials (paper or electronic) and all presentations used by the Diversity, Equity, and Inclusion (DEI) program director and DEI staff that were used to instruct or lead any training or programs to any staff, teacher, counselor or student in the Downingtown Area School District.
2. Cop[ies] of any Copyright information on materials used (paper or electronic).

3. Cop[ies] of all documents and materials (paper or electronic) and all presentations that were used to instruct or lead any cultural awareness, courageous conversations, unconscious bias and cultural proficiency training or programs to any staff, teacher, counselor or student in the Downingtown Area School District.

On January 5, 2023, DASD's open records officer, Virginia B. Warihay, denied Trethewey's request. A copy of the denial is attached at Exhibit A. DASD denied the request under Section 708(b)(11) of the RTKL, 65 P.S. § 67.708(b)(11), which exempts from disclosure "[a] record that constitutes or reveals a trade secret or confidential proprietary information." This was the lone reason for the denial. DASD did not provide any other reason for its denial and did not claim the documents were exempt from disclosure for any other reasons.

In support of its claim of exemption, the only evidence DASD offers is an attestation from Justin Brown. A copy of the attestation is attached at Exhibit B. Brown is an employee of DASD and serves as DASD's Director of Diversity, Equity, and Inclusion. *Id.*, ¶ 1. Brown claims **all** materials responsive to the request were created by him before he became employed by DASD and they are "copyright and are my personal proprietary training materials." *Id.*, ¶ 2. Brown explains that the "materials are not made available to the public or other organizations." *Id.*, ¶ 3. He further explains that he maintains the confidentiality of the materials through password protection, not providing them to anyone outside of the DASD, and advising DASD employees that the materials are confidential. *Id.*,¶ 3(a)-(f). Still, Brown uses

the materials in training DASD employees. Id., ¶ 3(c). Brown concludes that he "will suffer substantial commercial and competitive harm if they are made available to the public." *Id.*, ¶ 4.

ARGUMENT

This Office of Open Record ("OOR") should overturn the decision of the DASD for several reasons. First, DASD has not carried its burden in demonstrating that the documents requested are exempt from disclosure as confidential and proprietary under Section 708(b)(11) of the RTKL. Indeed, Brown's attestation concedes he derives no commercial benefit from the documents he created. *Id.*, ¶ 3, ("These materials are not made available to the public or other organizations") and he is not in any trade or business in which he has competitors. All cases where courts have recognized the exemption have involved private sector entities involved in commerce. But Brown is a full-time government employee. Pennsylvania courts have never extended the confidentiality and proprietary exemption to full-time government employees. Furthermore, DASD presented no evidence that the materials Brown created are related to a trade. So, Brown's materials do not meet the definition of confidential and proprietary documents as determined by the Courts and the OOR. Finally, even if the materials Brown created were confidential and proprietary (they are not), that exemption would not apply to the entirety of Trethewey's request. Accordingly, Trethewey respectfully requests that OOR overturn the decision of the DASD.

I. DASD OFFERED NO EVIDENCE BROWN'S MATERIALS ARE TRADE SECRETS.

Section 708(b)(11) exempts from disclosure "a record that constitutes or reveals a trade secret or confidential and proprietary information." Section 102 of the RTKL defines a "trade secret" as follows:

> "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 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.

68 P.S. § 67.102

To be a "trade secret" the information must be an "actual secret of peculiar importance to the *business* and *constitutes competitive value* to the owner." *Parsons v. Pa. Higher Education Assistance Agency*, 910 A.2d 177, 185 (Pa. Commw. Ct. 2006). DASD offers no evidence that Brown's materials are "trade secrets" belonging to him or anyone else.

The first problem with DASD's argument that Brown's materials are "trade secrets" is that it offers no evidence that Brown is engaged in any *trade*. While not defined in the RTKL, Black's Law Dictionary defines "trade" is 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." Black's Law

Dictionary 1721 (10th ed. 2014). "Necessarily, a 'trade secret' pertains to business or commerce." *In The Matter Of Mark Belko And The Pittsburgh Post-Gazette, Requester V. Pennsylvania Department Of Community And Economic Development, Respondent,* 2018 WL 3091293 (Pa.Off.Open Rec.) Brown is a full-time government employee of DASD and his attestation beguiles any allegation he is engaged in any "trade" related to the materials he created. Brown does not use his materials to engage in any trade or commerce. Brown's attestation is devoid of any allegations he engages in a trade related to his materials. Rather, Brown states that the materials "are not made available to the public, or other organizations." Ex. B, ¶ 3. Brown is clear that his materials are used only within DASD: "No person outside [DASD] is provided with or permitted to observe these materials." *Id.*, ¶ 3b. Without any evidence that Brown engages in any "trade" the materials cannot be trade secrets.

Brown's attestation fails to adequately explain how the materials are of a competitive value to him. *Parsons*, 910 A.2d at 185. He hardly can. Again, Brown is a DASD employee, who is not engaged in any business and his materials do not confirm any competitive advantaged to him in the business world.

Brown's materials are not even "secrets." He shares the training materials with untold employees within DASD each year. Ex. B, ¶ 3(c). *In the Matter of Austin Nolen, Requestor v. Philadelphia District Attorney's Office, Respondent*, 2016 WL 7241004, the OOR held that a district attorney's office training manual was not exempt from disclosure as confidential or proprietary information of the district attorneys office.

While DASD and Brown believe his materials are secrets and would like them to remain that way, they are not "trade secrets," as defined under the RTKL, the OOR, and by the Courts of this Commonwealth. Accordingly, the appeal should be granted.

II. BROWN'S MATERIALS ARE NOT CONFIDENTIAL PROPRIETARY INFORMATION.

Brown's materials are equally not confidential proprietary information and DASD offers no evidence that they are. Section 102 of the RTKL defines "confidential proprietary information" as:

> "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 person* that submitted the information.

65 P.S. § 67.102.

DASD must establish both prongs of this definition for the exemption to apply. *Off. of Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). "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 injury if the information were released." *Department of Public Welfare v. Eiseman*, 85 A.3d 1117, 1128 (Pa.Cmwlth.) Additionally, "[c]ompetitive harm analysis 'is limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive harm should not be taken to mean simply

any injury to competitive position.' *Dep't of Corr. v. Maulsby*, 121 A.3d 585, 590 (Pa. Commw. Ct. 2015). Here, the same problems with DASD's and Brown's "trade secret" argument plaque their argument that the materials are "confidential proprietary information." Brown's attestation contains no averments that show that his materials even remotely fall within this definition.

There is no evidence that disclosure of Brown's materials would cause substantial harm to him by competitors. Brown has no business and has no competitors. Indeed, Brown does not claim he has a business and he does not identify his competitors. While Brown broadly claims he will suffer "substantial commercial and competitive harm," he never explains how. Indeed, his claim of substantial commercial and competitive harm contradicts his previous averment that "the materials are not made available to the public or other organization." *Id.*,¶ 3. DASD's and Brown's failure to offer any specific evidence about his competitors is fatal to his claim that the materials are exempt from disclosure. In *Pennsylvania Dep't of Revenue v. Flemming*, 2015 WL 5457688 (Pa. Commw. Ct. Aug. 21, 2015), the Commonwealth Court held the Department of Revenue's failure to identify any competitors and how competitors could use information related to the Pennsylvania lottery wrecked its claim that the materials were exempt under Section 708(b)(11). As the Court explained there, like here, "the Department does not identify any competitors, or explain how the information is of any competitive value." *Id.* at *5. The Court then explained:

> "the Department does not explain how "consumable" competitors could use the Ticket Information to the Lottery's disadvantage. Lacking a

> cohesive explanation, we see no obvious way the Lottery would be put at a disadvantage by release of the Ticket Information. A connection between the alleged harm and the information at issue is essential to proving an exemption under the RTKL."

Here, Brown's attestation suffers from the same infirmities. It does not "identify any competitors, or explain how the information is on any competitive value." *Id.* Moreover, the attestation lacks a cohesive explanation of competitive harm and any "connection between the alleged harm and the information at issue." Id.

Then there is the issue of how Brown classifies his materials. Brown claims his materials "are my *personal* proprietary training materials." Brown, ¶ 2. But the RTKL does not exempt *personal* proprietary training materials. It exempts *commercial* proprietary materials. Even then the disclosure is exempt only "when the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information." 65 P.S. 67.102. Once again, Brown is not in a commercial or competitive business and, therefore, cannot suffer a competitive harm.

If Brown's and DASD's arguments are accepted, the RTKL would collapse. An agency could declare virtually any record as exempt from disclosure based on a claim that the document was proprietary to the agency and the agency took efforts to maintain its secrecy. The RTKL requires much more than this. Accordingly, the OOR should grant the appeal.

III. TRETHEWEY SEEKS DOCUMENTS BEYOND THOSE CREATED BY BROWN.

"The exceptions to disclosure of public records must be narrowly construed." *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Cmwlth. 2015). Trethewey requested three categories of documents. DASD's claimed exemption relates only to materials created by Brown. While Trethewey's request would include the Brown materials, it is not limited to it. Trethewey requests materials beyond those created by Brown. DASD offers no explanation why its claimed exemption would apply to the materials Brown did not create. Accordingly, the OOR should grant the appeal.

CONCLUSION

Based on the foregoing, Trethewey respectfully requests that the OOR grant her appeal.

Respectfully submitted,

/s/Walter S. Zimolong

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