To Be Argued By: Jonathan D. Feinberg
Time Requested: 15 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

In the Matter of the Application of VERIZON NEW YORK, INC., Petitioner-Respondent, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules - against - NEW YORK STATE PUBLIC SERVICE COMMISSION, KATHLEEN H. BURGESS, as Secretary to the Commission, NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE and DONNA M. GILIBERTO, as Records Officer for the Department, Respondents-Appellants.	Case No.:

MEMORANDUM OF LAW OF RESPONDENTS-APPELLANTS PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, KATHLEEN H. BURGESS, as Secretary to the Commission, NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE, and DONNA M. GILIBERTO, as Records Officer for the Department

Kimberly A. Harriman
General Counsel
Public Service Commission
of the State of New York et al.
Three Empire State Plaza
Albany, New York 12223-1350

Of Counsel
Jonathan D. Feinberg
Solicitor
Erika Bergen
Assistant Counsel
(518) 474-5597

Dated: May 22, 2015
Albany, New York

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

STATE REGULATIONS

SESSION LAWS OF NEW YORK

NY COMMITTEE ON OPEN GOVERNMENT ADVISORY OPINIONS

TREATISE

PRELIMINARY STATEMENT

The Public Service Commission of the State of New York (PSC or the Commission) et al.[1] appeal from a partial grant by Albany County Supreme Court (Ferreira, A.J.), of a challenge by Verizon New York, Inc. (Verizon) to a determination that Verizon had not shown a likelihood of substantial competitive injury necessary to exempt trade secret or confidential commercial information from disclosure under the Freedom of Information Law (*see* Public Officers Law art 6 [hereinafter FOIL]). The court incorrectly determined that trade secrets are not subject to the substantial competitive injury test, in contravention of the plain language of the statute, as well as the policy and history behind FOIL. Specifically, the Supreme Court failed to recognize that 1) cases applying FOIL have not treated the categories of "trade secret" and "confidential commercial information" differently, and 2) the use of the Restatement of Torts definition of "trade secret" for FOIL purposes causes the two categories of information to impractically and illogically overlap. The category of "confidential commercial information" is likely to be of no importance if trade secrets are defined by the Restatement standard and not subject to the "substantial competitive injury" test. Supreme Court also relied upon a misunderstanding of federal law, which has a narrower definition of "trade secret" than the Restatement definition, in reaching its conclusions. Accordingly, the judgment should be reversed insofar as it exempts from disclosure certain aggregate network costs and protects certain methods and procedures (M&Ps) as trade secrets without the required showing of "likelihood of substantial competitive injury."

---

[1] In addition to the Commission, Appellants include Kathleen H. Burgess, as Secretary to the Commission; New York State Department of Public Service (the Department); and Donna M. Giliberto, as Records Access Officer (RAO) for the Department.

STATEMENT OF FACTS

A. The FOIL Request

In May 2013, Department Staff propounded a series of interrogatories (IRs) in connection with Verizon's plan to replace its damaged copper wireline telephone network on Fire Island, a barrier island located off the southern shore of Long Island, with Verizon Voice Link (VVL), then a new wireless service.[2] In response to the IRs, Verizon submitted various documents, including documents containing estimated cost information on construction of replacement networks on Fire Island and information about its "methods and procedures" related to VVL. It then requested that those documents be accorded blanket protection from disclosure pursuant to Public Officers Law § 87 (2) (d) and 16 NYCRR § 6-1.3 (R. 78-90).

In September 2013, Richard Brodsky made a FOIL request on behalf of Common Cause New York, Communication Workers of America, Region I, Consumers Union, and Fire Island Association (collectively the CWA Group) for Verizon's responses to the IRs containing network costs and the VVL M&Ps. The RAO advised Verizon of the CWA Group's request and her intention to determine the records' entitlement to an exemption from public disclosure pursuant to Public Officers Law § 89 (5) (b) (2) and 16 NYCRR § 6-1.3 (f) (2) (R. 107-108).

---

[2] In September 2013, Verizon agreed to build a new Fiber-to-the-Premises (FTTP) network on western Fire Island (Case 13-C-0197, *Tariff Filing by Verizon New York Inc.*, Request for Suspension of All Deadlines and Proceedings in Case 13-C-0197 [dated Sept. 11, 2013] , Attachment A to this brief). The FTTP network was completed by May 2014 (Case 13-C-0197, *supra*, Response of Verizon to J. Rosenthal regarding deployment of FTTP Facilities on Fire Island [dated May 14, 2014], Attachment B to this brief) and it provides standard tariffed voice service, FiOS Digital Voice service, and FiOS Internet service to the residents. The VVL wireless network has remained active since May 2013, however, and is an optional, non-tariffed service for new customers.

Verizon thereafter filed completely redacted versions of certain documents (R. 217-567),[3] as well as a Statement of Necessity (*see* Public Officers Law § 89 [5] [b] [2]) for its claimed exemption from FOIL (R. 114-128). Verizon argued, among other things, that information related to its network costs had great value in the highly competitive telecommunications environment and also provided valuable input to competitors regarding pricing decisions. Similarly, Verizon asserted that its methods and procedures for marketing and administering VVL would be of significant value to competitors seeking to develop comparable service offerings. Upon receipt of the redacted documents, however, the CWA Group asserted that they did not fulfill its FOIL request. According to the CWA Group, the documents were so heavily redacted that they effectively denied the public the ability to adequately comment on the ongoing proceeding (R. 620-626).

B. The RAO's Determination

On November 4, 2013, the RAO concluded that Verizon failed to demonstrate that a blanket exemption from disclosure for the documents at issue was needed to avoid substantial injury to Verizon's competitive position (R. 569-584). The RAO found, among other things, that Verizon had made a valid case for exemption of only specific, granular network costs, and that only three documents within the "methods and procedures" filing appeared to contain actual methods and procedures (M&Ps), as defined by the Commission, related to the VVL service. The RAO noted, however, that Verizon offered no factual support to sustain a finding that disclosure of all of the documents, either in their entirety or redacted, would cause substantial injury to its competitive position. Accordingly, the RAO determined that Verizon failed to

---

[3] Rather than attempting to reasonably redact the documents, Verizon blacked-out nearly all of the information in them, except for headers, footers, and page numbers (R. 217-567).

demonstrate a particularized and specific justification for denying public access to the documents (R. 581-582).

C. Verizon's FOIL Appeal

Verizon appealed the portions of the RAO's FOIL determination relating to its network costs and alleged M&Ps to the Secretary to the Commission (Secretary) on November 15, 2013 (R. 628-653). Verizon submitted three new declarations (R. 587-618) and a memorandum of law, in which it asserted, among other things, that its Statement of Necessity, as supplemented by the declarations, satisfied its burden under FOIL of providing a persuasive explanation of how the use of the cost information by a competitor is likely to lead to competitive injury (R. 636).

On November 22, 2013, the CWA Group submitted a letter in support of the RAO's determination, asserting that Verizon merely reiterated its earlier broad and conclusory arguments and, therefore, failed to produce coherent, specific and persuasive evidence of its entitlement to a statutory exemption pursuant to Public Officers Law § 87 (2) (d) (R. 662-666). According to the CWA Group, the three declarations were not properly submitted on appeal, but, in any event, did not substantially change the evidence upon which the RAO's determination was based and, thus, failed to satisfy Verizon's burden of proof.

D. The Secretary's Appeal Determination

On December 2, 2013, the Secretary issued an Appeal Determination (R. 668-687) denying Verizon the sweeping protection that it sought. The Secretary accepted the submitted declarations (R. 680), but nevertheless concluded that Verizon had failed to satisfy its burden of proving that a likelihood of substantial competitive injury existed (R. 677-684). Accordingly, she disagreed with Verizon's assertion that a blanket exception of the network costs and

"methods and procedures" documents from public disclosure was warranted under Public Officers Law § 87 (2) (d) and § 89 (5) (e) (R. 687).

With respect to the network cost information, the Secretary found that the declarations of Robert Wheatley II, an Executive Director of Financial Planning and Analysis, and Dr. William Taylor, an economist, demonstrated that the disclosure of specific, granular (unit) information related to estimated network costs would likely cause competitive injury to Verizon (R. 680). The Secretary concluded, however, that the declarations "failed to offer sufficient support as to how the release of aggregate costs alone would result in competitive injury" (R. 680). Similarly, the Secretary noted that only three of the 13 "methods and procedures" documents appeared to meet the description of an M&P, as defined by the Commission, and concluded that Verizon had "failed to demonstrate, in adequate detail, how the complete disclosure of all 13 documents would result in substantial competitive injury" (R. 683).[4]

Dissatisfied with the Secretary's Appeal Determination, Verizon then commenced the instant proceeding pursuant to CPLR Article 78.

E. The Supreme Court's Judgment

By judgment entered July 31, 2014 in Albany County, Supreme Court (Ferreira, A.J.) agreed with Verizon's argument that trade secrets, as defined by the Restatement of Torts § 757, were exempt from FOIL disclosure as a matter of law (*see Matter of Verizon N.Y. v New York State Pub. Serv. Commn.*, 46 Misc 3d 858 [Sup Ct, Albany County 2014]) (R. 8-40). Thus, the court determined that the Secretary had erred by requiring Verizon to make an additional showing of a "substantial competitive injury" (R. 31) (*id.* at 878).

---

[4] Verizon has since consented to the release of the VVL User Guide, which was part of the M&P filing (Confidential Exhibit 3, p. 16-20).

The Supreme Court reasoned that both the legislative history of Public Officers Law § 87 (2) (d) and case law supported its interpretation. Specifically, the court relied on the use of "or" in the original language of Public Officers Law § 87 (2) (d) (*see* L 1977, ch 933) to justify separate treatment of "trade secret" information and confidential commercial information that an agency maintained for regulatory purposes (R. 20-21) (46 Misc 3d at 869). The court claimed the "or" signified that only confidential commercial information was subject to the "substantial competitive injury" test (R. 20-21) (*id.*). According to the court, the 1990 amendments to the statute (L 1990, ch 289, § 1) did not modify the law in a way that subjected trade secrets to the "substantial competitive injury test" but, rather, they broadened the exemption to include confidential commercial information held by an agency for non-regulatory purposes (R. 21-23) (46 Misc 3d at 869-871). Further, the Supreme Court reasoned, it was "the more common practice" for New York courts to evaluate separately whether information sought to be protected under Public Officers Law § 87 (2) (d) was trade secret or confidential commercial information, and it was only when the courts determined that the information was confidential commercial information that the "substantial competitive injury" test was applied (R. 25) (46 Misc 3d at 873).

On the basis of its interpretation of the law, the Supreme Court determined that all of the cost information (both aggregate and specific costs) (R. 33-34), as well as certain M&P documents (Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, and 11) (R. 34-38), constituted trade secret information. Because the court did not apply the "substantial competitive injury test," it reversed the Secretary's determination that these documents were not exempt from disclosure (R. 39) (46 Misc 3d at 878-884). Specifically, the court found that documents 3 through 8 and 11 were not substantively different from M&P documents 1, 2, and 10, which the court mistakenly claimed

had been identified as trade secret by the Secretary (R. 35-38) (*id.*). Therefore, the court determined that M&P documents 3 through 8 and 11 were exempt from disclosure as trade secrets (R. 39) (*id.* at 884). As for M&P documents 9, 12, and 13, the court agreed with the Secretary's determination that they were not trade secret and, thus, must be disclosed (R. 36) (*id.* at 881).

The Appellants appeal from the judgment, and a stay pending appeal is in effect (R. 43) (*see* CPLR 5519 [a] [1]).

QUESTIONS PRESENTED

1. Did the Supreme Court err in determining that the substantial competitive injury test does not apply when information is alleged to be exempt as trade secret pursuant to Public Officers Law § 87 (2) (d)?

   Yes. The entity seeking exemption from disclosure pursuant to Public Officers Law § 87 (2) (d) is required to demonstrate that the information at issue constitutes trade secret or confidential commercial information and the likelihood of substantial competitive injury if such information were disclosed.

2. Did the Supreme Court err in determining that Verizon had met its burden with respect to the exemption, without a showing of substantial competitive injury, and that the majority of the documents are entitled to protection from disclosure under FOIL?

   Yes. Verizon failed to establish that it will likely suffer a substantial competitive injury if the specific granular cost information and certain M&P documents are disclosed.

3. Did the Supreme Court err by adopting the Federal courts' interpretation of the federal Freedom of Information Act (FOIA), which treats trade secrets and confidential commercial information as subject to different tests, without recognizing that the Federal courts use a definition of "trade secret" that is much narrower than the Restatement of Torts definition adopted by the New York courts?

   Yes. If the Federal court interpretation of FOIA is applied to FOIL requests, without also using the much narrower definition of "trade secret" that has been used by Federal courts, then virtually all sensitive, commercially valuable information can be protected as "trade secret."

SUMMARY OF ARGUMENT

First, Supreme Court improperly stated the legal standard in New York for exemption from FOIL disclosure in declaring that trade secret materials are exempt from disclosure, even in the absence of a showing of the likelihood of substantial competitive injury. The Secretary's reading of Public Officers Law § 87 (2) (d) as requiring Verizon to demonstrate a likelihood of substantial competitive injury, even for trade secrets, is consistent with the policy behind FOIL, the plain language of the statute, case law, and legislative history.

Next, the record demonstrates that Verizon failed to establish, by sufficiently particularized and non-speculative argument, that it would likely suffer a substantial competitive injury if the non-specific, aggregated cost information and the M&P documents were disclosed. Rather, Verizon provided only conclusory allegations that fail to satisfy its burden.

Finally, even assuming that Supreme Court appropriately treated trade secrets and confidential commercial information as subject to different tests, as various Federal courts have done when applying FOIA Exemption 4 (5 USC 522 [b] [4]), Supreme Court failed to recognize that Federal courts use a much narrower definition of "trade secret." If the Restatement of Torts definition is used for FOIL purposes, as the Supreme Court did, virtually all sensitive commercial information is exempt under Public Officers Law § 87 (2) (d), which defies the rules of statutory interpretation, the policy behind FOIL, and logic.

I. SUPREME COURT IMPROPERLY DETERMINED THAT THE SUBSTANTIAL COMPETITIVE INJURY TEST DID NOT APPLY TO INFORMATION ALLEGED TO BE TRADE SECRET PURSUANT TO PUBLIC OFFICERS LAW § 87 (2) (d).

Supreme Court's interpretation of Public Officers Law § 87 (2) (d) departs from well-settled principles that impose a broad standard of open disclosure upon government agencies and require FOIL exemptions to be narrowly construed. Under FOIL, all records held by the

government are presumptively open for public inspection unless specifically exempted from disclosure (*see* Public Officers Law § 87 [2]; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]; *Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 746 [2001]). Supreme Court incorrectly found a "lack of clarity" in Public Officers Law § 87 (2) (d) (R. 19) (46 Misc 3d at 868); as shown below, the plain language requires a showing of "substantial competitive injury." Any "lack of clarity" or "inelegance" (R. 19) (*id.*) is nonetheless overcome by the statutory policies of open disclosure and narrow construction of exemptions.

Notably, "[t]he disclosure provisions of FOIL are required to be given an expansive interpretation and the statutory exemptions to disclosure are to be viewed narrowly" in order to give the public maximum access to government records (*Matter of Newsday, Inc. v Empire State Dev. Corp.*, 98 NY2d 359 [2002]; *see Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 18 NY3d 652, 656-657 [2012]; *Matter of Verizon N.Y. v Bradbury*, 40 AD3d 1113 [2d Dept 2007]). It is "'[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld'" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1995], quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). The burden is on the entity resisting disclosure to provide a "'particularized and specific justification'" for withholding requested documents (*Matter of Gould*, 89 NY2d at 275; *see Matter of Markowitz v Serio*, 11 NY3d 43 [2008]; *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; *Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 80 [1984]). Supreme Court's interpretation of Public Officers Law §87 (2) (d) does not comply with these well-settled principles, inasmuch as it grants a broad exemption for Verizon's aggregate cost information and M&P documents, without requiring Verizon to present sufficient evidence justifying such exemption.

A. A plain reading of Public Officers Law § 87 (2) (d) establishes that a showing of "substantial competitive injury" is required to exempt both trade secrets and other confidential commercial information from disclosure.

"[T]he clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]; *Matter of Price Chopper Operating Co., Inc. v New York State Liq. Auth.*, 52 AD3d 924, 925-926 [3d Dept 2008]). Supreme Court's declaration that, once materials are found to contain trade secrets, those materials are exempted from disclosure as a matter of law, without a showing of a likelihood of substantial competitive injury, is not consistent with a plain reading of the statute. Very simply, for FOIL purposes, "trade secret" status is not dispositive; the entity seeking the exemption must also show a likelihood of substantial competitive injury in order to protect the records from disclosure.

Pursuant to Public Officers Law § 87 (2) (d), an agency may deny access to records or portions thereof 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 (emphasis added).

A plain reading of the statute thus establishes that it is one exemption from disclosure that protects two categories of information – trade secrets and confidential commercial information – and the requesting entity's entitlement to the exemption is based upon the level of competitive harm the entity proves. This construction is evinced by the "and," which follows the categories of information, but precedes the requirement that substantial injury be shown (*see e.g. A.J. Temple Marble & Tile v Union Carbide Marble Care*, 87 NY2d 574 [1996] ["Where, as here, a descriptive or qualifying phrase follows a list of possible antecedents, the qualifying phrase

generally refers to and modifies all of the preceding clauses"]). Supreme Court's determination that the need to show "substantial injury to the competitive position" applies only to records "submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise" is, therefore, in contravention of a plain reading of the statute.

Furthermore, it is a basic tenet of statutory construction that "[e]very part of a statute must be given meaning and effect" (*Heard v Cuomo*, 80 NY2d 684, 689 [1993], *see* McKinney's Cons Laws of NY, Book 1, Statutes §§ 97, 98 [a]; § 231). Applying the "substantial competitive injury test" to trade secrets is necessary because, without that test, the broad Restatement of Torts definition of "trade secret,"[5] if used alone as Supreme Court did, renders meaningless the confidential commercial information portion of Public Officers Law § 87 (2) (d). Indeed, virtually no confidential or commercially valuable information would ever fail the trade secret test if the Restatement definition is applied without consideration of whether the disclosure would likely result in a substantial competitive injury. The Federal courts have recognized the breadth of the Restatement definition and accordingly used a narrower definition for FOIA, as shown in POINT III, *infra* (*see e.g. Public Citizen Health Research Group v Food & Drug Admin.*, 704 F2d 1280, 1289 [DC Cir 1983]). Failing to apply "substantial competitive injury" to the sweeping Restatement definition would violate the purposes of FOIL and principles of statutory construction.

---

[5] The Restatement of Torts states that "[a] trade secret may consist of 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 of Torts § 757, comment b; *see Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]; *Matter of New York Tel. Co. v Public Serv. Commn.*, 56 NY2d 213, 219 n 3 [1982]).

B. New York FOIL case law establishes that a showing of "substantial competitive injury" is required to protect both trade secrets and confidential commercial information from disclosure under Public Officers Law § 87 (2) (d).

Supreme Court erroneously declared that two leading FOIL cases from the Court of Appeals – *Matter of Encore Coll. Bookstores v Auxilliary Serv. Corp. of State Univ. of N.Y. at Farmingdale* (87 NY2d 410 [1995]) and *Matter of Markowitz v Serio* (11 NY3d 43 [2011]) – are inapplicable in cases where confidential information is alleged to be trade secret. According to Supreme Court, because "the words 'trade secret' do not even appear" in *Encore*, that case cannot be applied to cases that do use the words "trade secret" (R. 27) (46 Misc 3d at 874). Similarly, Supreme Court concluded that "[t]rade secrets were not at issue in [*Markowitz*]" (R. 28 n 16) (*id.* at 875 n 16). Supreme Court failed to recognize, however, that those cases do not preclude the application of the "substantial competitive injury" test to "trade secrets" but, rather, refine the showing that is required.

In *Encore*, the Court of Appeals did not differentiate between trade secrets and confidential commercial information – it treated Public Officers Law § 87 (2) (d) as one exemption. In fact, in that case, all the Court of Appeals did was to clarify what a commercial entity was required to demonstrate to be entitled to the exemption. Specifically, the entity must demonstrate: 1) that actual competition exists; and 2) that there is a likelihood that substantial competitive injury will result if the information is released (*see Matter of Encore Coll.*, 87 NY2d at 419-421; *see also Matter of Troy Sand & Gravel Co. v New York State Dept. of Transp.*, 277 AD2d 782, 784-786 [2000]). Supreme Court contends that the "disclosure of a trade secret would seem, by its very nature, to adversely impact the entity seeking the protections of the exemption" and render a showing of substantial competitive injury an unnecessary burden (R. 20) (46 Misc 3d at 869). This conclusion is flawed, however, because the Restatement language

the court quotes – "an opportunity to obtain an advantage over competitors who do not know or use it" – cannot be equated to the level of injury or harm required by Public Officers Law § 87 (2) (d). When only the Restatement definition is applied, "trade secret" effectively swallows up the other category. It is implausible that the Legislature intended that completely different tests for harm would be applied to very similar materials. It is more plausible that, after *Encore,* the more stringent test of "likelihood of substantial competitive injury" is applicable.

Further, in *Markowitz* the Court of Appeals did not change the *Encore* test, but merely clarified the quality of the evidence that must be proffered in order for an entity to sustain its burden of proof to exempt information from public disclosure. Specifically, the Court clarified that "the party seeking exemption [of Public Officers Law § 87 (2) (d)] 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" (*Matter of Markowitz v Serio*, 11 NY3d at 51). The Court was emphasizing that an entity's speculative concerns asserting what could possibly result from disclosure are not sufficient; the entity must offer detailed, specific evidence demonstrating the specific injury that will occur upon disclosure of the information at issue. Contrary to Supreme Court's implication (R. 28 n 16) (46 Misc 3d at 875 n 16), in *Markowitz* the Court of Appeals stated that "trade secrets" must meet that evidentiary burden of showing detailed specific evidence of substantial competitive injury. Indeed, the Court recited that under Public Officers Law § 87 (2) (d) agencies "may deny access to records or portions thereof that . . . are trade secrets or are submitted by a commercial enterprise . . . and which if disclosed would cause substantial injury to the competitive position of the subject enterprise" (*Matter of Markowitz v Serio,* 11 NY3d at 50 [emphasis added]). This language does not, as Supreme Court suggests, make it clear that the Court of Appeals

differentiates between trade secrets and confidential commercial information. Rather, the opposite is true: the Court made no distinction at all.

Historically, other New York courts have similarly also applied the substantial competitive injury test regardless of whether trade secret or another type of confidential commercial information is at issue. For instance, in *Matter of Glens Falls Newspapers v Counties of Warren and Washington Indus. Dev. Agency* (257 AD2d 948 [3d Dept 1999]), the Third Department made no distinction whatsoever between trade secret and other confidential commercial information. Instead, the Court found that because disclosure of the information at issue "would be an obvious advantage to [the respondent's] competitors," the information was exempt under Public Officers Law § 87 (2) (d) (*id.* at 950). This practice has often been used by this Court (*see e.g. City of Schenectady v O'Keefe*, 50 AD3d 1384, 1386 [2008] [applying the "substantial injury" test to cost data, without drawing any distinction between "trade secrets" or the other elements of the first prong of Public Officers Law § 87 (2) (d)]; *Matter of Troy Sand & Gravel Co. v New York State Dept. of Transp.*, 277 AD2d 782, *supra*; *Matter of New York State Elec. & Gas Corp. v New York State Energy Planning Bd.*, 221 AD2d 121 [1996]).

The Second Department likewise typically treats Public Officers Law § 87 (2) (d) as one exemption, without differentiating between trade secret and confidential commercial information, and has applied the substantial competitive injury test in all cases (*see e.g. Matter of Verizon N.Y. v Mills*, 60 AD3d 958 [2009]; *Matter of Verizon N.Y. v Devita*, 60 AD3d 956 [2009]). Notably, the Second Department has specifically held that "[t]he exemption set forth in Public Officers Law § 87 (2) (d) protects the interests of a commercial enterprise in avoiding a significant competitive injury as a result of disclosure of information it provided to an agency, thereby fostering the state's economic development efforts to attract business to New York"

(*Matter of Verizon N.Y. v Bradbury*, 40 AD3d 1113 [2007], citing *Matter of Encore Coll.*, 87 NY2d at 420). This approach also has been taken by the Fourth Department (*see Matter of Passino v Jefferson-Lewis*, 277 AD2d 1028 [2000]).

The First Department, moreover, has gone even further to solidify the link between "trade secrets" and the "substantial competitive injury" test. That Court has expressly stated "that records containing 'trade secrets . . . which if disclosed would cause substantial injury to the competitive position of the subject enterprise' are exempt from disclosure" (*Matter of Bahnken v New York City Fire Dept.*, 17 AD3d 228, 230 [2005] [emphasis added]; *see also Matter of Aurelius Capital Mgt., LP v Dinallo*, 70 AD3d 467 [2010]).

A direct link was similarly made between trade secrets and the "substantial competitive injury" test in *Matter of Newman v Dinallo* (22 Misc 3d 1134[A]; 2009 NY Slip Op 50422[U] [Sup Ct, Nassau County 2009], *affd on other grounds* 69 AD3d 636 [2d Dept 2010], *lv denied* 14 NY3d 708 [2010]), a case that was cited by Supreme Court here for support of its novel, and contrary, interpretation of the statute. In *Newman*, the court found that the information sought to be protected was of "substantial commercial value to [the commercial entity's] competitors" and therefore should be protected as trade secret (*id.*, at ***4, citing *Belth v Insurance Dept. of State of N.Y.*, 95 Misc 2d 18 [Sup Ct, NY County 1977] [stating that it was "clear that substantial injury to the competitive position of [the commercial enterprise] would occur if [its trade secrets] were disclosed"]). Thus, in protecting trade secrets, the *Newman* court expressly required a showing of substantial competitive injury.

Moreover, the three cases Supreme Court cited as support for its finding that it is "the more common practice for courts" (R. 25) (46 Misc 3d at 873) to consider separately whether information is either trade secret or information that is subject to the substantial competitive

injury test are actually inapposite to its position. First, in *Matter of Sunset Energy Fleet v State Dept. of Envtl. Conservation* (285 AD2d 865 [3d Dept 2001]), the Third Department did initially determine that the information at issue in that case did not meet the definition of trade secret because it was all publicly available. There is nothing in that decision that indicates, however, that had the information been found to be trade secret, it would *not* have been subject to the substantial competitive injury test. Nor is it evident, as Supreme Court seems to suggest, that *Sunset Energy* somehow limited the substantial competitive injury test to apply only to confidential commercial information.[6]

Second, in *Matter of New York Regional Interconnect v Oneida Co. Indus. Dev. Corp.* (2007 NY Slip Op 52567[U]; 2007 NY Misc LEXIS 9006 [Sup Ct, Oneida County 2007]), it was also initially determined that the information did not satisfy the Restatement trade secret definition. Again, however, it does not necessarily or logically follow that the court in that case would *not* have subjected the information to the substantial competitive injury test if the information had been trade secret (*id.*, at ***13-16).

Third, in *Waste-Stream v St. Lawrence Co. Solid Waste Disposal Auth.* (166 Misc 2d 6 [Sup Ct, St. Lawrence County 1995]), the Supreme Court there specifically stated that the "substantial competitive injury" portion of Public Officers Law § 87 (2) (d) did not apply at all because the agency itself, rather than a commercial enterprise, was resisting disclosure (*id.*

---

[6] Furthermore, it is observed that the Court in *Sunset Energy* stated: "[W]hile we find that the worksheets were compiled by a commercial enterprise, petitioner failed to demonstrate the likelihood of substantial competitive injury if the worksheets were disclosed" (*id.* at 867 [emphasis added]). Information that is "compiled by a commercial enterprise" is a category of information listed in the trade secret definition (*see* Restatement of Torts, § 757, comment b). Thus, it seems that the Court did not exempt what it considered to be potentially trade secret information because the petitioner failed to establish that a substantial competitive injury would likely result.

at 10). Again, the court in that case did not say that the substantial competitive injury test would never apply to the trade secrets of a commercial enterprise.

Thus, as the applicable case law amply demonstrates, Supreme Court here erred in holding that substantial competitive injury test does not apply to both alleged trade secrets and confidential commercial information.

C. **Supreme Court's reliance on FOIL's legislative history is misplaced.**

As Supreme Court correctly noted, as originally enacted, only trade secret information and information that was maintained by an agency for *regulatory purposes* were protected from disclosure (*see* Public Officers Law § 87 former [2] [d]). Supreme Court also correctly noted that the 1990 amendments to the statute were intended to broaden the language of the statute to include protection of records that were submitted to an agency for *non-regulatory purposes* (*see* L 1990, ch 289). While the court further correctly noted that, by broadening the exemption, the Legislature did not add a requirement that trade secrets were subject to the substantial competitive injury test, this is true only because *even as originally enacted* the substantial competitive injury requirement applied to both categories of information – a fact not recognized by Supreme Court.[7]

Indeed, the legislative history to the 1990 amendments supports this interpretation. Robert Abrams, the then-Attorney General, explicitly stated that prior to the amendment, the

---

[7] Further, Supreme Court erred in concluding that, if the intent was to broaden the exemption, then it would be unlikely the Legislature intended to add another evidentiary hurdle (R. 23) (46 Misc 3d at 872). It is more likely that in broadening the exemption, the Legislature intended to subject a broader category of commercially sensitive information to the same test of "substantial competitive injury." The Legislature would not have wanted to subject similar compilations of commercially sensitive information to two different tests depending on whether they were defined as "trade secret" or "confidential information."

"substantial injury" prong applied to "trade secrets." Abrams explained that Public Officers Law § 87 (2) (d)

> exempt[ed] from disclosure business records submitted to an agency that would cause substantial injury to the commercial enterprise submitting the records only when those records contain 'trade secrets' or 'are maintained for the regulation' of the enterprise. In other words, no matter how harmful disclosure of those records may be to a business, they [were] publicly available if they [were] not trade secrets or maintained for regulation (Mem of Dept of Law, Bill Jacket, L 1990, ch 289 at 16 [emphasis added]).

Additionally, comments by Robert J. Freeman, then (as now) the Executive Director of the State Committee on Open Government, explained that the protection of information under FOIL is based upon the effect of disclosure (*i.e.*, substantial competitive injury) and not the type of record (*i.e.*, trade secret versus confidential commercial information). Freeman stated that "the standard [of Public Officers Law § 87 (2) (d)] is based upon the effect of disclosure, for the authority to withhold is restricted to those situations in which disclosure would cause substantial injury to the competitive position of a commercial enterprise" (Mem of Comm on Open Govt, Bill Jacket, L 1990, ch 289 at 15).

In fact, this is an opinion that Freeman has consistently held throughout the years (*see e.g.* FOIL-AO-19045 [June 13, 2013]; FOIL-AO-18756 [Dec. 22, 2011]; FOIL-AO-12190 [July 5, 2000]; FOIL-AO-17875 [Nov. 3, 2009]; *see also* NYS Committee on Open Government, 2014 Annual Report to the Governor and State Legislature, at pp. 12-15 [Dec. 2014], available at www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf [last accessed Feb. 23, 2015]).[8] Indeed,

---

[8] Appellants acknowledge "that advisory opinions from the Committee on Open Government are not binding authority, but may be considered to be persuasive based on the strength of their reasoning and analysis" (*Matter of TJS of N.Y. v New York State Dept. of Taxation & Fin.*, 89 AD3d 239 [3d Dept 2011], citing *Matter of John P. v Whalen*, 54 NY2d 89, 96 [1981]; *Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 77 AD3d 224, 230 n 5 [3d Dept 2010], *lv dismissed* 15 NY3d 906 [2010]). Given the strength and consistency of the Committee's opinions on this issue over the years, which is wholly

Freeman was requested by Common Cause New York and the Consumers Union to provide an opinion regarding the applicability of Public Officers Law § 87 (2) (d) following the Supreme Court decision at issue here. Freeman specifically disagreed with the court's holding, and confirmed that the 1990 amendments to the statute did not "indicate[] that trade secrets were to be considered separately from other records that might fall within the exception" (FOIL-AO-19221, *supra,* at 4).

Thus, in enacting Public Officers Law § 87 (2) (d) the Legislature intended to protect from FOIL disclosure all confidential, commercially valuable information that would cause a commercial entity to suffer a substantial competitive injury if the information were disclosed to the public (*see Sanders v Winship*, 57 NY2d 391, 396 [1982]). Because the rationale for withholding trade secret and other confidential commercial information is the same (*i.e.*, the disclosure of either type of information would cause substantial competitive injury to the commercial entity that submitted the information), it was illogical and improper for Supreme Court to conclude that Public Officers Law § 87 (2) (d) contains two separate tests to be applied – one for trade secrets and one for all other confidential commercial information.

II. VERIZON FAILED TO SATISFY ITS BURDEN OF SHOWING THAT ITS AGGREGATE COSTS AND VARIOUS "METHODS & PROCEDURES" DOCUMENTS ARE ENTITLED TO EXEMPTION UNDER PUBLIC OFFICERS LAW § 87 (2) (d).

Initially, Supreme Court erroneously determined that redaction of the cost information at issue here was not warranted because distinguishing between total (aggregated) costs and specific unit (granular) costs was not permitted (R. 34 n 21) (46 Misc 3d at 880 n 21). The FOIL exemption at issue specifically allows an agency to "deny access to records or portions thereof"

---

supported and reflected by the case law, it is respectfully submitted that this Court should consider the advisory opinions to be persuasive authority.

that contain trade secrets or confidential commercial information that, if disclosed, would cause substantial competitive injury (Public Officers Law § 87 [2] [d] [emphasis added]; *see Matter of Troy Sand & Gravel Co. v New York State Dept. of Transp.*, 277 AD2d at 784-786 [permitting an agency to release redacted documents, withholding only those portions for which the likelihood of competitive harm had been established]; *c.f. Gray v Faculty-Student Assn. of Hudson Val. Community Coll.*, 186 Misc2d 404, 408 [Sup Ct, Rensselaer County 2000] [holding that an agency can redact the number of books ordered because the unit price, standing alone, would not cause substantial competitive injury if disclosed]). Thus, as the Secretary found, and as discussed below, only the portions of the costs that qualify for the exemption (*i.e.*, the non-aggregate, specific unit costs), should be exempt.[9]

A. Supreme Court improperly determined that Verizon's aggregate cost data should be withheld from disclosure.

After reviewing Verizon's cost information, and applying its newly announced standard, Supreme Court determined that Verizon had satisfied its burden of proof for exemption for all of the cost information from disclosure as trade secrets under Public Officers Law § 87 (2) (d) (R. 31-34) (46 Misc 3d at 878-880). Supreme Court explained that cost information has been considered to be trade secret information for FOIL purposes in certain cases (R. 32) (*id.* at 878-879). Appellants' contention here, however, is not that costs cannot be trade secrets; under the Restatement definition currently used, a "trade secret" is "any . . . compilation of information which is used in one's business," and, presumably, that could include costs. Rather, Appellants contend that Verizon failed to satisfy its burden of showing entitlement to exemption of its aggregate costs pursuant to Public Officers Law § 87(2)(d), whether as trade secret or

---

[9] The Secretary found that Verizon demonstrated that the disclosure of the specific, granular cost information would likely cause it a substantial competitive injury (R. 680). That portion of Supreme Court's judgment that protected the specific costs is not at issue on this appeal.

confidential commercial information. Verizon failed to meet its burden of demonstrating that disclosure of total, aggregated costs would likely cause substantial competitive injury (R. 680-681).[10]

Whether substantial competitive injury exists for purposes of this FOIL exemption turns on "the commercial value of the requested information to competitors and the cost of acquiring it through other means" (*Matter of Encore Coll. Bookstores*, 87 NY2d at 420). In support of its position that the aggregate cost information is exempted, Verizon submitted declarations by Robert Wheatley II (R. 610-612) and Dr. William E. Taylor (R. 587-608). As found by the Secretary, however, neither the Wheatley nor the Taylor declaration satisfied Verizon's burden of proof as to how the aggregated, total cost information, which cannot be dissected and deciphered in a manner that would be harmful to Verizon, could result in any competitive injury if disclosed (R. 681). Instead, both Wheatley and Taylor focused their declarations on the alleged effect of disclosure of the specific, or granular, cost information (R. 587-598, 610-612).

For example, neither declaration explained how a competitor could use the "total plant labor" cost figure to competitively harm Verizon. It seems that the total labor cost is relatively useless, unless the competitor also knew the precise work to be performed, the exact number of employees required, hourly pay rates for those employees, and the total number of labor hours necessary to complete the job. Likewise, neither declaration demonstrated how a competitor could use the "total material costs" to harm Verizon. Again, if the competitor has no means of determining what types of cables were to be used, the total footage for each particular type of

---

[10] Supreme Court cited Third Department case law in support of its observation that costs could be considered "trade secret" (R. 32) (46 Misc 3d at 878-879), but the court failed to recognize that those cases applied the "substantial competitive injury" test (*see City of Schenectady v O'Keefe*, 50 AD3d at 1386; *New York State Elec. & Gas Corp. v New York State Energy Planning Bd.*, 221 AD2d at 121).

cable, the brands and models of the cables or the price per foot for each type of cable paid by Verizon, then the total cost has no real competitive value.

In sum, neither the Wheatley nor Taylor declaration shows how aggregate cost information can be used by competitors in a way that would likely cause a substantial competitive injury to Verizon. In light of Verizon's failure to demonstrate how the disclosure of its aggregate total costs would likely cause it to suffer a substantial competitive injury, Supreme Court's determination that such costs were entitled to exemption under Public Officers Law § 87 (2) (d) should be reversed.

B. Supreme Court improperly determined that various M&P documents should be withheld from disclosure.

As an initial matter, it is noted that Supreme Court did not disagree with the Secretary's finding that Verizon "failed to proffer any specific evidence that the disclosure of [the] 13 [M&P] documents will – or would be likely to – cause it competitive injury" (R. 36) (46 Misc 3d at 882). Nevertheless, the court found that certain M&P documents (Documents Nos. 1 through 8, and 10 and 11) were exempt from disclosure as trade secret as a matter of law; this was improper. Because Verizon failed to establish the likelihood of substantial competitive injury, none of the M&P documents should be exempt from disclosure as trade secrets pursuant to Public Officers Law § 87 (2) (d).

Further, as to Documents 1, 2, and 10, Supreme Court misinterpreted the Secretary's determination. The Secretary did not find, as the court states (R. 36) (46 Misc 3d at 881), that Documents 1, 2, and 10 are trade secret; rather, she agreed with the RAO that those documents met the Commission's definition of "methods and procedures" (R. 580, 682).[11] Importantly,

---

[11] Indeed, Supreme Court quotes the RAO out of context as finding that "these three filings 'meet th[e trade secret] description'" (R. 34-35) (46 Misc 3d at 881). However, the RAO

both the RAO and the Secretary determined that, even though Verizon sufficiently established that the documents were "M&Ps," as defined by the Commission, the documents were not entitled to trade secret protection because Verizon failed to satisfy the substantial competitive injury test (R. 583, 680-683). Thus, the court could not "uphold" the Secretary's determination and grant protection from disclosure; the Secretary's determination was that those documents should be disclosed.

More important, however, is that the record shows that Verizon failed to establish that substantial competitive injury would likely result from the disclosure of any of the M&P documents. In that regard, Verizon offered only the declaration of Thomas MacNabb, the Director of Operations in the National Operations organization at Verizon (R. 614-618). MacNabb described in broad terms what the documents were, and vaguely explained why and how the documents were developed. According to MacNabb, the development of the M&P documents required "considerable time, effort, expertise, and coordination among different work groups" (R. 617). MacNabb also very generally states that the M&P documents "reflect Verizon's business strategies" because they "capture the impacts of the customer service, pricing, technology and system strategies implemented by Verizon in response to a competitive marketplace" (R. 616).

None of MacNabb's statements, however, address in specific, particularized terms how the disclosure of any specific M&P document, either alone or used in conjunction with other M&P documents, would likely cause Verizon to suffer a substantial competitive injury. MacNabb neglects to identify any companies providing services comparable to VVL with which

---

actually stated, "While Verizon did not identify which of the 13 documents consist of M&Ps, it appears that documents (1), (2), and (10) of the filing meet that description" (R. 580 [emphasis added]), *i.e.*, the description of M&Ps.

Verizon ostensibly competes, and fails to explain in any amount of detail how the documents could be used by the putative, nameless competitors. The most specific allegation made by MacNabb is that access to the documents could "be very useful to competitors who offer similar products or who are considering offering similar products" by potentially "assist[ing] them in the development of parallel methods and procedures" (R. 618). MacNabb provides no explanation, however, as to what specific type or level of competitive harm could befall Verizon if that were to happen.

The best MacNabb offers as an explanation in that regard is that disclosure of the documents could harm Verizon because "(a) it will allow competitors to 'piggy-back,' for free, on Verizon's own costly efforts to develop this [VVL] product, thus reducing the competitors' costs as compared with Verizon's; and (b) it will provide guidance on how to compete with Verizon more effectively" (R. 618). MacNabb does not identify which competitors could use Verizon's materials, and how the materials would be used. He also does not explain what sort of "guidance" can be provided to any competitors by the various types of materials in the M&Ps, or how such "guidance" translates to a "likelihood of substantial competitive injury."

MacNabb's speculative and conclusory allegations thus do not provide the required "specific, persuasive evidence that disclosure will cause it to suffer a competitive injury" (*Matter of Markowitz v Serio*, 11 NY3d at 51; *Matter of Verizon N.Y. v Bradbury*, 40 AD3d at 1114; *Matter of Bahnken v New York City Fire Dept.*, 17 AD3d at 230). Accordingly, that part of the court's judgment exempting the M&P documents Nos. 1 through 8, and 10 and 11 from disclosure should be reversed.

III. SUPREME COURT ERRED BY ADOPTING THE FEDERAL COURTS' INTERPRETATION OF THE FREEDOM OF INFORMATION ACT WITHOUT RECOGNIZING THAT THOSE COURTS USE A NARROWER DEFINITION OF "TRADE SECRET."

Supreme Court correctly observed (R. 28) (46 Misc 3d at 875-876) that certain Federal courts have stated that FOIA (*see* 5 USC 552) does not require a showing of substantial competitive injury in order to withhold trade secrets from disclosure. What the court failed to recognize, however, is that the federal definition of "trade secret" is much narrower than the Restatement of Torts definition used in New York. Supreme Court wrongly concluded that, as in FOIA cases, "the phrase 'trade secrets' delineates a discrete, stand-alone category deserving of protection from disclosure" (R. 19-20) (46 Misc 3d at 868). Given that the Restatement definition covers any "compilation of information which is used in one's business," the concept of "trade secret" in New York law is not "discrete," when contrasted with the federal definition. Instead, the sweeping Restatement definition, when combined with Supreme Court's rejection of "substantial competitive injury," will dramatically reduce the records for which competitive harm must be shown in order to obtain an exemption.

Exemption 4 of FOIA exempts from disclosure documents that are "trade secrets and commercial or financial information obtained from a person and privileged and confidential" (5 USC 522 [b] [4]). Federal courts have declared that if the requested document "is determined to be a trade secret, the inquiry ends there and the document is exempt from the requirements of FOIA" (*Public Citizen Health Research Group v Food & Drug Admin.*, 704 F2d 1280, 1283 [DC Cir 1983] [internal quotation marks omitted], *supra*; *see National Parks & Conserv. Assoc. v Morton*, 498 F2d 765, 766 [DC Cir 1974]). For a while, the Federal courts, like the New York courts, applied the Restatement definition of "trade secret" (Restatement of Torts, § 757 comment b [1939], *supra*). That definition provides that a "trade secret may consist of any

formula, pattern, device or compilation of information which is used in one's business, and which gives him [or her] an opportunity to obtain an advantage over competitors who do not know or use it" (*id.*).

In 1983, however, the DC Circuit specifically rejected the use of the Restatement definition of "trade secret" as overly broad for FOIA purposes. The Court observed that, "[s]trictly applied, this definition would classify virtually all undisclosed [information] as trade secret" (*Public Citizen Health Research Group v Food & Drug Admin.*, 704 F2d at 1286 [internal quotation marks omitted]). The Court was not the first to observe, however, that the Restatement definition is overly broad when used in the FOIA context. As the federal House of Representatives Committee on Government Operations observed in 1978,

> [i]f a trade secret can be any information used in a business which gives a competitive advantage, then there is little or no information left that could qualify as commercial or financial information under the second category of [Exemption 4] without also qualifying as a trade secret. This [Restatement] definition is therefore inconsistent with the language of the [FOIA], as well as with the general approach taken by the courts to the concept of confidential business information.

(House of Representatives Committee on Government Operations, *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits*, H.R. Rep. No. 1382, 95th Cong., 2d Sess. 16 [1978], Attachment C to this brief; *accord Public Citizen Health Research Group v Food & Drug Admin.*, 704 F2d at 1289). Echoing that sentiment, the DC Circuit reasoned that the Restatement definition was tailored to "protecting businesses from breaches of contract and confidence by departing employees and others under fiduciary obligations [but was] ill-suited for the public law context in which FOIA determinations must be made" (*Public Citizen Health Research Group v Food & Drug Admin.*, 704 F2d at 1289). The Court ultimately concluded that "trade secrets" for FOIA purposes "should be defined in its narrower common law sense, which

incorporates a direct relationship between the information at issue and the productive process" (*id.* at 1288).

Thus, the DC Circuit defined a trade secret for FOIA purposes "as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort" (*id.* at 1288). Adopting this definition avoids "render[ing] meaningless" the confidential commercial or financial information prong of the exemption, as the use of the Restatement definition does (*id.* at 1289).[12]

If the courts of this state were to adopt the FOIA approach of exempting trade secrets, as Supreme Court here did, then the narrower definition of "trade secrets" should be applied, not the Restatement definition. If the narrower definition were applied in this case, Verizon's cost information and M&P materials would be "confidential commercial information," not trade secrets, and therefore remain subject to protection only if there was a showing of "substantial competitive injury" (*id.* at 1290-1291; *see also Gulf & Western Indus. v United States*, 615 F2d

---

[12] The DC Circuit's definition has been expressly adopted by the Tenth Circuit (*see e.g. Herrick v Garvey*, 298 F3d 1184 [2002]; *Anderson v Department of Health & Human Servs.*, 907 F2d 936 [1990]), and by various District Courts (*see e.g. Finkel v United States Dept. of Labor*, 2007 US Dist LEXIS 47307 [D NJ 2007]; *Freeman v BLM*, 526 F Supp 2d 1178 [D Ore 2007]; *Sokolow v FDA*, 1998 US Dist LEXIS 23672 [ED Tx 1998], *affd* 162 F3d 1160 [5th Cir 1998]; *Burnside-Ott Aviation Training Ctr. v United States of America*, 617 F Supp 279, 285 [SD Fla 1985]). *Public Citizen Health Research Group v Food & Drug Admin.* has not been cited by the Second Circuit, but it has been cited by the New York Federal District Courts. However, no New York Federal District Court has had occasion to decide whether information sought to be exempted from disclosure under FOIA Exemption 4 was trade secret. Rather, the cases have been decided based upon the alleged status of the information as confidential commercial or financial data (*see e.g. Plumbers & Gasfitters Local Union No. 1 v United States DOI*, 2011 US Dist LEXIS 123868 [EDNY Oct. 26, 2011]; *Bloomberg L.P. v Board of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262 [SDNY 2009]; *Inner City Press/Community on the Move v Board of Governors of Fed. Reserve Sys.*, 380 F Supp 2d 211 [SDNY 2005]).

527, 530 [DC Cir 1979]). As described above (*supra*, Point II), Verizon has failed to meet that burden.

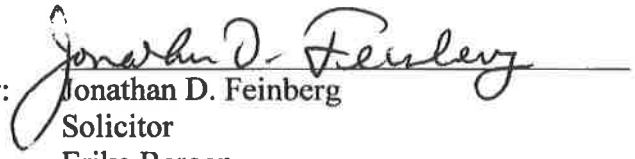
CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse so much of the judgment of the Supreme Court that granted Petitioner's petition, and grant such other and further relief as the Court deems appropriate.

Dated: May 22, 2015
Albany, New York

Respectfully Submitted,

Kimberly Harriman
General Counsel

By: 
Jonathan D. Feinberg
Solicitor
Erika Bergen
Assistant Counsel
Public Service Commission
of the State of New York et al.
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-5597

ATTACHMENT

A

140 West Street
27th Floor
New York, NY 10007-2109
Tel (212) 321-8136
Fax (212) 962-1687
keefe.b.clemons@verizon.com

Keefe B. Clemons
General Counsel – Northeast Region

September 11, 2013

Honorable Kathleen H. Burgess
Secretary
New York State Public Service Commission
Empire State Plaza, Agency Building 3
Albany, New York 12223-1350

Re: Case 13-C-0197

Dear Secretary Burgess:

Based on its ongoing review of its service offerings on Fire Island, Verizon New York Inc. ("Verizon") has decided to re-build its wireline network in western Fire Island, and to offer Verizon Voice Link solely on an optional basis, rather than as its sole service in the area. Further details of Verizon's plans in western Fire Island are set forth in the Attachment to this letter.

Accordingly, Verizon is filing today a tariff amendment stating that § 1.C.3 of Tariff PSC No. 1 — which authorizes the use of Voice Link as the company's sole service offering in western Fire Island — will be of no further effect after the company's new wireline network is completed and the company is able to offer service over that network throughout western Fire Island. The amendment would also immediately eliminate from the tariff subsection (b) of § 1.C.3. That subsection concerned the offering of Voice Link as the sole Verizon service in areas other than those, such as western Fire Island, where the company's facilities had been substantially destroyed.

The completion of Verizon's new wireline network in western Fire Island and the implementation of this tariff amendment will moot the issues now before the Commission in Case 13-C-0197. Accordingly, Verizon respectfully requests that the Commission suspend all deadlines and proceedings in the Case, with a view towards dismissing it once today's tariff amendment is fully implemented.

Respectfully submitted,

Keefe B. Clemons

cc: Mr. Michael Corso
Peter McGowan, Esq.
Mr. Chad G. Hume

SUMMARY OF VERIZON'S PLANS IN WESTERN FIRE ISLAND

1. Verizon will build a Fiber-to-the-Premises ("FTTP") network that will be capable of serving all of its customers in western Fire Island. Verizon is targeting Memorial Day 2014 for the completion of construction, and for the general availability of all services offered over the new network. Between now and the completion of construction, Verizon will keep Staff informed of the progress of construction efforts.

2. Verizon will offer two options for standalone voice service: (a) standard tariffed service over the FTTP network, and (b) Voice Link service. Verizon will also offer one or more bundled FiOS service offerings. The FiOS offerings will include FiOS Digital Voice and broadband Internet access.

3. Following the general availability of services over the FTTP network in Western Fire Island, Voice Link will be offered there as an optional service only. Current Voice Link customers in western Fire Island, if they choose to retain the service, will continue to be governed by the Terms of Service reviewed and approved by Staff in Case 13-C-0197.

ATTACHMENT

B

140 West Street
6th Floor
New York, NY 10007-2109
(212) 519-4717
joseph.a.post@verizon.com

Joseph A. Post
Deputy General Counsel — New York

May 14, 2014

Mr. Jim Rosenthal
Mintz Group
110 Fifth Avenue, 8th Floor
New York, NY 10011
jrosenthal@mintzgroup.com

Re: Deployment of FTTP Facilities on Fire Island

Dear Mr. Rosenthal:

This letter responds to your e-mail of May 5, sent to me and numerous other recipients, concerning the FiOS services offered by Verizon New York Inc. ("Verizon") on Fire Island. As you know, Verizon has completed the installation of a state-of-the-art Fiber to the Premises ("FTTP") network in western Fire Island, and now uses that network to provide area residents with standard tariffed voice service, FiOS Digital Voice service, and FiOS Internet service in a variety of upload and download speeds. Verizon's timely deployment of FTTP facilities, and the services it offers over those facilities, conform in all respects to the extraordinary voluntary commitments that the company made to the Public Service Commission and to residents of western Fire Island in September 2013.[1]

[1] *See* Case 13-C-0197, Letter from Keefe B. Clemons to Hon. Kathleen H. Burgess (September 11, 2013), and the attached "Summary of Verizon's Plans in Western Fire Island."

In western Fire Island, as in many other areas where it has invested in FTTP facilities, Verizon does not offer FiOS Television service. You question Verizon's decision not to do so in this case, asking whether,

> [b]efore the NYS PSC approves Verizon's Amendment to [Verizon] Tariff P.S.C. No. 15, is it not right that the NYS PSC address whether or not [Verizon] has addressed its adherence to both the spirit, if not the terms, of [Verizon's cable television franchise agreement with the Town of Islip], since Fire Island is now included as a Service Area in that [agreement]?

That question, and your e-mail in general, are based on a number of misconceptions, which I will try to clear up.

1. As a preliminary matter, you argue that the Commission should withhold approval of the tariff amendment that Verizon filed on April 17, 2014, which removed the section of the tariff that had authorized Verizon to use wireless service as a replacement for standard tariffed voice service under certain circumstances. The amendment became effective on May 1, 2014 by operation of law, as specified in the April 17 tariff filing. In any event, the issue of whether Verizon offers cable television service on Fire Island has no bearing on the amendment, which merely restored the uncontested tariff provisions that were in place prior to Superstorm Sandy, and thereby mooted the objections that had been raised to the wireless-service provision.

2. Verizon's decision not to offer FiOS Television service on Fire Island violates neither the terms nor the "spirit" of the Islip Agreement. That Agreement requires Verizon to offer cable television service only in a defined "Service Area." (*See* Islip Agreement § 3.1.1.[2]) The term "Service Area," as used in the Agreement, is specifically defined to exclude Fire

[2] Please note that you misleadingly misquote this provision in your e-mail, replacing the term "Service Area" by "Franchise Area," and thus significantly changing its meaning and effect. In fact, § 3.1.1 relates only to the scope of Verizon's service obligations within the "Service Area" — a term that, as noted below, excludes Fire Island.

Island. (*Id.* § 1.28 & Exhibit B.) The exclusion is an unambiguous and unconditional part of the bargain that Verizon struck with the Town, and is not affected in any way by changes in the nature of Verizon's network facilities in Fire Island. You cite no provision of the Agreement as a basis for your assertion that "Fire Island is now included as a Service Area," and indeed there is no such provision.

3. You state that "Verizon recently told the NY PSC that because Fire Island receives FiOS — and is thus no longer an excluded Service Area under the [Islip Agreement] . . . — the previous stipulations agreed to previously under NYS PSC Case # 13-C-0197 should no longer have any binding effect." To be clear, consistent with point 2, above, Verizon has *never* stated that Fire Island "is no longer an excluded Service Area" under the Islip Agreement. You attempt to support this assertion by providing a web link that does not lead to any valid page of the Commission's web site, and when I reached out to you for clarification you sent me a copies of Verizon's filings concerning its intention to deploy FTTP facilities in western Fire Island, none of which contains any such statement.

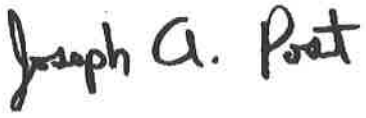
4. Your repeated assertions that now that an FTTP network has been deployed, Verizon would incur no additional costs in offering cable television service in western Fire Island, are incorrect. Construction of an FTTP network is not, by itself, sufficient to support the offering of video service over that network.

5. Your e-mail assumes that the only issue relating to Verizon's authority or obligation to offer cable television service in western Fire Island is the scope of the Islip Agreement. However, that Agreement applies only in a portion of western Fire Island. Some communities in that area are under the jurisdiction of the Town of Brookhaven, not Islip; and Saltaire and Ocean Beach, although physically within the Town of Islip, are separate

incorporated villages and therefore separate franchising authorities. Verizon does not have cable television franchise agreements covering any of those communities — which collectively account for well over half of Verizon's current FiOS subscribers on western Fire Island. Thus, even if Verizon did decide to offer FiOS Television service under the Islip Agreement, it would necessarily be a very patchwork offering.

I hope that this has clarified the situation.

Very truly yours,



Joseph A. Post

cc: Mr. Chad G. Hume
Brian Ossias, Esq.

ATTACHMENT

C

Union Calendar No. 752

95th Congress, 2d Session - - - - - - - - - - House Report No. 95-1382

FREEDOM OF INFORMATION ACT REQUESTS FOR BUSINESS DATA AND REVERSE-FOIA LAWSUITS

TWENTY-FIFTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

JULY 20, 1978.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

U.S. GOVERNMENT PRINTING OFFICE

29-006 WASHINGTON : 1978

LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., July 20, 1978.

Hon. THOMAS P. O'NEILL, Jr.,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's twenty-fifth report to the 95th Congress. The committee's report is based on a study made by its Government Information and Individual Rights Subcommittee.

JACK BROOKS, *Chairman.*

CONTENTS

Union Calendar No. 752

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 95-1382

FREEDOM OF INFORMATION ACT REQUESTS FOR BUSINESS DATA AND REVERSE-FOIA LAWSUITS

JULY 20, 1978.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

TWENTY-FIFTH REPORT

BASED ON A STUDY BY THE GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS SUBCOMMITTEE

On July 19, 1978, the Committee on Government Operations approved and adopted a report entitled "Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits." The chairman was directed to transmit a copy to the Speaker of the House.

I. SUMMARY OF FINDINGS AND RECOMMENDATIONS

A portrayal of every private enterprise of any consequence lies in Government files, frequently unassembled like pieces of a picture puzzle. Collection and maintenance of such information is a universal characteristic of Government operations that regulate private industry, license commercial activities, purchase, and sell goods and services, and deal in numerous other ways with the Nation's businesses.

The Freedom of Information Act allows public access to much of the information accumulated by the Federal Government. This access enables interest groups, news media, business, and others to evaluate the Government's performance. The information may also reflect on the operations of private businesses.

Understandably, firms that submit confidential documents to Federal agencies have expressed concern about their release. While com-

PART III. BRIEF HISTORY OF THE FOURTH EXEMPTION OF THE FREEDOM OF INFORMATION ACT

A. Understanding the Fourth Exemption

The fourth exemption to the Freedom of Information Act embraces: "trade secrets and commercial or financial information obtained from a person and privileged or confidential." [32]

Initial commentators on the FOIA were greatly troubled by the sentence structure of the exemption. It contains no punctuation, but the strategic addition of commas or semicolons could have a considerable effect on its interpretation. For example, the Attorney General's 1967 Memorandum on the Public Information Section of the Administrative Procedure Act suggests at least three possible readings.[33]

This difficult grammatical issue has been resolved by the courts, and it is now recognized that exemption 4 includes two separate categories of information. The first category of exempt information covers trade secrets. The second category covers (a) commercial or financial information (b) obtained from a person and (c) privileged or confidential. In order to fall within the second category, information must meet all three tests.[34]

This second category—commercial or financial information obtained from a person and privileged or confidential—will be referred to generically in this report as "confidential business information". The fourth exemption as a whole, including both trade secrets and confidential business information, will be referred to as the "business records exemption".

B. Trade Secrets

The FOIA does not define "trade secret", yet there has been little controversy over its meaning.[35] Most of the attention in fourth exemption cases has been directed at the second category of the exemption covering confidential business information.

The Restatement of Torts has a very broad definition of "trade secret":

> A trade secret may consist of 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.[36]

---

[32] 5 U.S.C. § 552(b)(4) (1976).

[33] The Attorney General had concluded that exemption 4 covered any information, whether or not commercial or financial, given to the Government in confidence. U.S Department of Justice, 1967 Attorney General's Memorandum of the Public Information Section of the Administrative Procedure Act 32–34 (1967). For comments on the shortcomings of the Attorney General's memorandum, see Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 93d Cong., 2d sess., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 9 (Committee Print 1974) [hereinafter cited as Sourcebook].

[34] See, for example, *National Parks and Conservation Association* v. *Morton* (I), 498 F. 2d 765 (D.C. Cir. 1974). The interpretation of the scope of exemption 4 contained in the 1967 Attorney General's Memorandum is clearly incorrect. *See* K. Davis, *Administrative Law Treatise* § 3A.19 (Supp. 1970): K. Davis, *Administrative Law of the Seventies* § 3A.19 (1976).

[35] See note, "Would Macy's Tell Gimbel's: Government-Controlled Business Information and the Freedom of Information Act, Forwards and Backwards", 6 Loyola University Law Journal 594, 598 (1975). See also "A Short Guide to the Freedom of Information Act" in Department of Justice, Freedom of Information Case List 10 (Feb. 1978) [hereinafter cited as "Department of Justice Short Guide"].

[36] *Restatement of Torts* § 757, comment b at 5 (1939).

If a trade secret can be any information used in a business which gives competitive advantage, then there is little or no information left that could qualify as commercial or financial information under the second category of the exemption without also qualifying as a trade secret. This definition is therefore inconsistent with the language of the act, as well as with the general approach taken by the courts to the concept of confidential business information.

A narrower defintion, and one more suitable for FOIA, has been used in at least one FOIA case:

> An unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities.[37]

This definition keeps the two categories of the fourth exemption distinct. It will not result in the release of any additional information, however, because commercial information that is not a "plan, appliance, formula, or process" may still qualify for exemption under the second category.

C. Early Approaches to Confidential Business Information

The history of the fourth exemption of the FOIA has been primarily a struggle over the concept of confidential business information. The words of the exemption—"commercial or financial information obtained from a person and privileged or confidential" do not have a clear purpose, meaning, or application. Court decisions under exemption 4 reflect a distinct evolution in interpretation. Essentially, the trend has been away from subjective tests of confidentiality adopted in early decisions and toward an objective standard by which the confidentiality of business documents can be measured. While the progression of judicial decisions has not been quite as orderly as the following discussion suggests, there is a fairly distinct pattern to the cases.

In early exemption 4 cases, the courts applied the so-called promise of confidentiality test. An example is *General Services Administration* v. *Benson*, where the Ninth Circuit Court of Appeals concluded:

> * * * that this exemption clearly condones withholding information only when it is obtained from a person outside the agency, and that person wishes the information to be kept confidential.
>
> * * * * *
>
> [T]he exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential.[38]

---

[37] *Consumers Union of United States* v. *Veterans' Administration*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F. 2d 1363 (2d Cir. 1971), quoting *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Commission*, 6 F. 2d 491, 495 (D.C. Cir. 1925), rev'd on other grounds, 274 U.S. 106 (1927).

[38] 415 F. 2d 878, 881 (9th Cir. 1969).