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June 1, 2020

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

Re: Matter 10-01709 – Annual Report of Verizon New York Inc.

Dear Ms. Overton:

Enclosed is the Annual Report of Verizon New York Inc. for the Year Ending December 31, 2019 (“Annual Report”). Verizon New York Inc. (“Verizon”) hereby seeks exemption from public disclosure of certain portions of Schedules 3, 8, and 61 of the Annual Report, pursuant to the Freedom of Information Law (“FOIL”) and the rules of the Commission promulgated thereunder, on the grounds that these schedules contain trade secrets and confidential commercial information the public disclosure of which would place Verizon at an unfair competitive disadvantage. Additionally; public disclosure of this information would constitute an unwarranted invasion of personal privacy.¹ For the reasons shown below, Schedules 3, 8, and 61 of the Annual Report are entitled to exemption from disclosure under the Commission’s rules.

¹ The protection of trade secrets and confidential commercial information is explicitly provided for in FOIL and in the Commission’s rules. The Commission’s rule, 16 N.Y.C.R.R. § 6-1.3, implements the provision of FOIL that exempts from public disclosure both trade secrets and records “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,” N.Y. PUB. OFF. LAW § 87(2)(d). The New York Public Officers Law also states that an agency may deny access to records or portions thereof that “if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article.” *Id.* § 87(2)(b).



STANDARDS 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.² 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(d)(2) “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

² 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.

§ 757, Comment b) (emphasis added).”³ The court also noted that “[i]mportantly, the Restatement does not require that the advantage be ‘substantial.’”⁴

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.*⁵ 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

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

⁴ *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.”

⁵ 87 N.Y.2d 410, 663 N.E.2d 302, 639 N.Y.S.2d 990.

information, so as to further the State’s economic development efforts and attract business to New York⁶

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 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.”⁷

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.⁸

⁶ *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).

⁷ 87 N.Y.2d at 421, 663 N.E.2d at 308, 639 N.Y.S.2d at 996.

⁸ *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’ . . .”).

Unwarranted Invasion of Personal Privacy. In addition to the exemptions under FOIL for trade secrets and confidential commercial information, N.Y. PUB. OFF. LAW § 87(2)(b) exempts information the disclosure of which “would constitute an unwarranted invasion of personal privacy.” See *Empire Realty Corp. v New York State Div. of the Lottery*, 230 A.D.2d 270, 273, 657 N.Y.S.2d 504, 507 (3d Dep’t 1997) (“What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities. . . . This determination requires balancing the competing interests of public access and individual privacy.”); *Pennington v. Clark*, 16 A.D.3d 1049, 1051-052, 791 N.Y.S.2d 774, 777 (4th Dep’t 2005) (same); *Federation of New York State Rifle & Pistol Clubs, Inc. v. New York City Police Dep’t*, 73 N.Y.2d 92, 97, 538 N.Y.S.2d 226, 229 (1989) (“[I]t is precisely *because* no governmental purpose is served by public disclosure of certain personal information about private citizens that the privacy exemption of section 87(2)(b) fits comfortably within FOIL’s statutory scheme.”).

APPLICATION OF THE STANDARDS

For the following reasons, the specified sections of the Annual Report satisfy the standards summarized above.

1. The redacted information in Schedules 3, 8, and 61 meets the criteria for trade secrets and confidential commercial information.

First, public disclosure of the information contained in the schedules would cause unfair economic and competitive disadvantage to Verizon and its affiliates. Competitors could use this information to determine where and how they could most effectively compete with Verizon and its affiliates. The access line information in Schedule 61 could enable competitors to deduce

Verizon's strategies and to target particular portions of Verizon's service area. Similarly, the information in Schedule 8 would enable competitors to determine the profitability of Verizon's promotions and to modify their own promotions accordingly. The compensation information in Schedule 3 could allow competitors to lure Verizon's executives. Verizon and its affiliates do not have access to comparable information regarding their competitors' plans. Allowing any competitor to have access to the information would clearly put Verizon at a competitive disadvantage.

Second, the information contained in the schedules is not known to persons outside Verizon or its affiliates. It is unique to Verizon and cannot be replicated by others engaged in similar activities. Accordingly, Verizon treats this information as highly confidential.

Third, the information in Schedule 61 is highly valuable to Verizon and its affiliates because it contains confidential, geographically disaggregated market data. The information in Schedule 8 would enable competitors to determine which of Verizon's promotions were most and least profitable, and the compensation information in Schedule 3 could enable competitors to attract Verizon's executives. Thus, the information in these schedules would be extremely valuable to the competitors of Verizon and its affiliates.

Fourth, the information contained in the schedules was developed by means of a lengthy data-gathering process, which involved the work of numerous persons across New York State.

Fifth, the information contained in the schedules could not be duplicated by those outside of Verizon and its affiliates without their consent.

2. In addition, the redacted compensation information contained in Schedule 3, if disclosed, "would constitute an unwarranted invasion of personal privacy," N.Y. PUB. OFF. LAW

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§ 87(2)(b). No governmental purpose would be served by its disclosure. Compensation information is normally considered private and confidential, and is rarely exchanged or disclosed publicly except where required by law. Therefore, this information is entitled to protection under the Commission's rules.

CONCLUSION

For all the foregoing reasons, Verizon requests that the information identified as confidential be exempted from public disclosure. If you have any questions concerning this request, please do not hesitate to contact me.

Respectfully submitted,



Keefe B. Clemons