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Albany County Supreme Court Decision Calls into Question the New York State Public Service Commission

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An Albany County Supreme Court decision issued on July 31, 2014 calls into question the New York State Public Service Commission's ("Commission") analytical framework for making trade secret determinations. While the Commission has appealed the decision, if it is upheld, the Commission would likely need to change the way it makes trade secret determinations.

In Verizon New York Inc. v. New York State Public Service Commission, 2014 WL 4276767 (N.Y. Sup. Ct., July 31, 2014), Verizon New York Inc. ("Verizon") petitioned under Article 78 of the New York State Civil Practice Law and Rules to challenge a final appeal determination made by the Commission's Secretary upholding a determination by the Commission's Records Access Officer ("RAO") that certain documents submitted by Verizon in a Commission proceeding were not exempt from disclosure as trade secret under the New York State Freedom of Information Law (Public Officers Law, §§ 84, et seq.) ("FOIL"). In the underlying determination, the RAO denied Verizon's request for trade secret protection for two categories of information: (1) cost and network information ("Cost Information"); and (2) methods and procedures related to Verizon Voice Link ("MandP Information"). While the RAO found that the Cost Information and part of the MandP Information fit within the definition of "trade secret," the RAO denied Verizon's request for protection because the RAO determined that Verizon failed to satisfy the second prong of the Commission's two-part test - that disclosure of the information would cause substantial injury to Verizon's competitive position. The Commission Secretary upheld the RAO's decision.

Verizon appealed the decisions under Article 78, arguing that contrary to the findings of the RAO and Secretary, exemption under FOIL does not require a showing that disclosure of trade secrets would cause substantial competitive injury. Verizon asserted that once the Secretary found such materials to be trade secrets, the Secretary was required to exempt them from disclosure without further inquiry.

The Albany County Supreme Court agreed with Verizon and held that, as a matter of law, once a document is established to be trade secret under FOIL, the record may not be disclosed and a showing that disclosure would cause substantial injury is not required. In rendering its decision, the Court analyzed the plain text of FOIL and asserted that the statute created three categories of protected information: (1) trade secrets; (2) records submitted to an agency by a commercial enterprise; and (3) records derived from information obtained from a commercial enterprise. The Court found that of these three categories, trade secrets "delineate[] a discrete,

stand-alone category deserving of protection from disclosure." In contrast, the Court determined that the other two categories of records only deserve protection when their disclosure would cause substantial injury to the competitive position of the subject enterprise. The Court reasoned that because disclosure of a trade secret would "by its very nature" negatively impact the entity seeking protection, a required showing of substantial injury would be "unnecessary and overly burdensome." The Court also reviewed the legislative history of FOIL and held that the statute's 1990 amendment intended to expand the ambit of records that may fall within the "confidential commercial information" exemption, not subject the "trade secret" exemption to an additional evidentiary obligation.

Notably, the Court distinguished Matter of Encore College Bookstores v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 N.Y.2d 410 (1995), a Court of Appeals decision traditionally interpreted by the Commission to require an entity seeking trade secret status to prove that disclosure would cause substantial injury. The Court determined that Encore was inapposite to the present case because in Encore trade secrets were not at issue; rather that case focused on whether disclosure of confidential commercial information would create the likelihood of substantial competitive injury. The Court concluded that Encore and other decisions citing Encore do not require a two-part test for the release of trade secrets under FOIL.

The Court also acknowledged that the Commission's regulations (16 NYCRR § 6-1.3) require "in all cases" that a person seeking an exemption from disclosure under FOIL must "show the reasons why the information, if disclosed would be likely to cause substantial injury to the competitive position of the subject commercial enterprise." However, according to the Court, the regulation's implementation of FOIL is "wholly inconsistent with the legislative history of [FOIL], which indicates that the 'substantial injury' prong was not intended to apply to trade secrets, . . . is at variance with the Restatement [of Torts'] discussion of 'trade secret,' . . . and has little, if any, support in existing case law." Due to the nature of the question before the Court, the Court was not obliged to defer to the Commission's regulation implementing FOIL exemptions, and declined to do so. In so doing, the Court found that as a matter of law, to the extent a person proves a document is a trade secret under FOIL, the inquiry ends there and the record may not be disclosed.

The Secretary to the Commission, the New York State Department of Public Service and the RAO have appealed the decision to the New York State Appellate Division, Third Judicial Department. The appeal is currently pending.

In the wake of the Verizon decision, although it is on appeal, the Secretary to the Commission and the Commission's Administrative Law Judges ("ALJs") have started to reconsider some of their prior determinations for exempting material under FOIL. For example, on August 15, 2014, the Secretary to the Commission remanded to the ALJ for reconsideration the ALJ's determination denying Comcast Corporation's ("Comcast") and Time Warner Cable Inc.'s ("TWC") request to exempt certain documents from public disclosure as trade secret in Case 14-M-0183 - Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control. In his Determination on Remand, the ALJ conceded that under Verizon no showing of "substantial injury" is required if the party seeking protection claims that the records at issue are trade secret. The ALJ further stated that "[t]he only question for agency determination is whether the trade secret claim is valid." To determine the validity of Comcast's and TWC's trade secret claim, the ALJ applied the definition of "trade secret" from the Restatement of Torts, which is repeated in the Commission's regulations, and states that:

“A trade secret may consist of any formula, pattern, device or compilation of information which is used in [a] business, and which gives [the business] an opportunity to obtain an advantage over competitors who do not know or use it.” Based on this definition, the ALJ concluded that a valid trade secret claim requires specific, persuasive evidence that the confidential document provides a competitive advantage to the owner. Applying this standard, the ALJ determined that the companies failed to establish that the information at issue was trade secret. Comcast and TWC subsequently appealed, arguing that the Restatement of Torts’ definition of “trade secret” merely requires proof that the contested information confers the business with an *opportunity* to obtain a competitive advantage, rather than an actual demonstration of a competitive injury as the ALJ asserted. This appeal is pending before the Secretary to the Commission.

The outcome of the Verizon appeal and the Comcast/TWC appeal may have implications on the way the Commission makes trade secret determinations in the future as they call into question the manner in which the Commission currently analyzes requests that information is afforded trade secret protection under FOIL. Additionally, the Verizon decision undermines the validity of the Commission’s regulations implementing FOIL. Cullen and Dykman will continue to follow these proceedings and any future developments.

If you have any questions, please feel free to contact Brian T. FitzGerald at 518-788-9401 bfitzgerald@cullenanddykman.com, Bruce V. Miller at 516-296-9133 bmiller@cullenanddykman.com or Gregory G. Nickson at 518-788-9402 gnickson@cullenanddykman.com.

Practices

- Corporate

Attorneys

- Brian T. FitzGerald
- Bruce V. Miller
- Gregory G. Nickson