



# Off the Press - January 2010

PENNSYLVANIA ASSOCIATION OF COMMUNITY BANKERS

THE VOICE FOR COMMUNITY BANKING IN PENNSYLVANIA SINCE 1876

## Protecting Trade Secret and Competitive Information From Public Access Under Pennsylvania's New Right-to-Know Law

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Pennsylvania's new Right-to-Know Law, effective January 1, 2009, revamps and dramatically expands public access to documents of state government agencies, including the Department of Banking. The law, which is roughly similar to the federal Freedom of Information Act, applies to every governmental body in Pennsylvania. Two big questions arise:

*Will the information I file with the Department of Banking or other agencies become public?*

*How can I protect my sensitive information?*

The law applies to information in all mediums – even electronic records and e-mails! Any Pennsylvania agency must produce the records. Anyone can request them, and the law specifically provides that a request cannot be denied due to intended use of the public record. Be aware that the law applies even to information you filed before the January 1, 2009, but it does not say how you get retroactive protection for information they have already filed.

When a written request for public records is made, within five days an agency must either produce the documents or describe the reasons it cannot fulfill the request. If the requester disagrees with the agency's decision to withhold documents, the requester may file an appeal.

The statute includes a host of exceptions identifying categories of documents that are not subject to disclosure – ranging from records relating to criminal investigations to records that would jeopardize public safety, as well as records identifying persons who apply for social services or academic transcripts, or those regarding personal information such as Social Security numbers (home addresses are not protected). The law also yields to specific privacy requirements in other state or federal law.

One exception of particular importance is the exception for “trade secret or confidential proprietary information.” Here is where you institution may find protection. The law defines “confidential proprietary information” as information that is confidential or privileged and “the disclosure of which would cause substantial competitive harm to the competitive position of the person who submitted the information.” The law defines “trade secret” more technically, including any formula, drawing, pattern, device, method or technique that “derives independent economic value . . . from not being generally known . . . and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” This exception appears to be similar in scope and intent to the corresponding exception

to disclosure found in the federal Freedom of Information Act. An agency need not produce a document that qualifies as either a trade secret or confidential proprietary information.

To guarantee an opportunity to assert the protection of the trade secret/confidential proprietary information exception in information you file, you must include with your filing a written statement identifying the specific documents that constitute trade secrets or confidential proprietary information. If you do this, the agency is required to notify your institution within five business days that it received a request for records that include the information you have designated as a trade secret or confidential proprietary information. To show you how important this step is, the Office of Open Records has concluded that if a filer does not provide a contemporaneous statement identifying the information as confidential, the filer is not entitled to receive prior notice that the confidential information will be produced and may not have an opportunity to argue against its being produced.

If you identify information as confidential and the agency notifies you of a request for disclosure, you will have five business days to “provide input on the release of the record” before the agency either complies with the



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request. You then have a chance to informally urge the agency to invoke the trade secret/confidential proprietary information exception. If your informal communications fail, then you have a short window of time during which to consider proceeding to court to prevent the disclosure of sensitive information through an injunctive or a mandamus action.

The law is so new that it has not yet been tested in court, but a few early administrative decisions from the state's Office of Open Records have shown a reluctance

to apply the trade secret/confidential proprietary information exception. For example, the Office of Open Records applies a heavy burden of proof on agencies that assert this exception, requiring specific factual evidence of the harm that would befall the filer if the confidential information is disclosed.

Two steps may be prudent to help protect your institution's confidential information:

1. Only provide those sensitive documents that you are required to provide.

2. Begin sending a formal confidentiality request with every filing or submission.

Finally, keep in mind that you can also make strategic requests for information about other people's filings if they have not appropriately requested confidential treatment for the information.