



Thomas A. Pendleton is a partner at the law firm of MacDonald Illig Jones & Britton, LLP. A graduate in Economics and German from Allegheny College and a graduate of the Vanderbilt University School of Law, he practices in the area of business transactions and related litigation.

What Businesses Need to Know About Pennsylvania's New Right-to-Know Law

Businesses work hard to keep their most important information secret. This desire to keep information secret can come into conflict with the need to submit information to Pennsylvania's governmental agencies ("agencies"), either in the form of required reports, grant applications or contracts. This article discusses what information can be obtained through a public records request and what steps a business must take to keep important information confidential.

Under the new Right-to-Know Law ("Law"), a "record" is information that documents a transaction or an activity of an agency and is created, received or retained pursuant to law or in connection with the activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

A "public record" is a record of a Commonwealth or local agency that is not exempt under the Law; is not exempt from being disclosed under any other federal or state law or regulation (such as laws which protect medical records), judicial order or decree; or is not protected by a privilege. Section 708 of the Law protects trade secrets and confidential information.

The Law defines a trade secret as information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process if: 1) the information has independent economic value because it is not generally known to others; and 2) the trade secret owner takes reasonable steps to maintain the secrecy of the information.

Likewise, confidential proprietary information is defined as commercial or financial information received by an agency 1) which is privileged or confidential; and 2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

If an agency receives a request for information that includes a request for trade secrets and confidential information, the agency is required to notify a business of the request if the business provided the record and included a signed statement that the record contains a trade secret or confidential information. The agency is required to provide this notice within five business days of receipt of the request for the record. A business then has five business days from receipt of the notice to provide input on the release of the record. The agency must then decide whether to release the information, redact the trade secrets or deny the request.

If a business must submit trade secret information to an agency, there are several things that the business can do to protect this information. First, if the information is submitted as part of a contract or a contract proposal, the business can request that the agency agree to keep the information secret as part of the contract. Furthermore, the business can request that the agency notify the business if the agency receives a request for information that includes the trade secret.

Finally, the business should place all of the trade secret information in a separate envelope when the contract, proposal or report is submitted to the agency. This envelope should be sealed and marked on the outside in bold letters: **"Trade Secret Information. Do not disclose as part of a public records request. Contact [insert company name and telephone number] with questions."**

Attached to the outside of the envelope should be a statement from the business, signed by an officer or manager, that the material contains trade secrets or confidential information. A copy of the statement should be placed inside the envelope in case the statement on the outside gets lost or damaged.

It is very important to place confidential information in a separate envelope and to clearly label the contents. Lawyers who frequently review public records say that they often see documents that are labeled confidential but clearly are not being treated as confidential by the agency.

Worth Noting

- Most provisions of the new Right-to-Know Law take effect January 1, 2009.
- The Law expands the definition of a "public record" that can be obtained from a government agency.
- Because more information is considered "public," businesses must be sure to label information as "trade secrets" or "confidential" if such information must be submitted to an agency.
- Each agency will have its own policy for handling public records requests. It would be prudent to obtain a copy of this policy so you know how public records requests will be handled.

For more information, contact Thomas Pendleton at MacDonald, Illig, Jones & Britton, LLP at 814/870-7756 or tpendleton@mijb.com.