

For the Appellee City
of Moscow

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Entered October 27, 2000

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This matter is now before the Board of Tax Appeals upon appellant's written motion, reasserting its prior oral request, to seal a portion of the evidentiary record in these appeals. On October 3, 2000, an Order was issued sealing, for a period of thirty days, the documents to which appellant's motion is directed, *i.e.*, appellant's Exhibits 10, 11, 33, 38, 55 and appellee BOE's Exhibit F.¹ The purpose of the preceding Order was "to accord this Board an adequate period within which to consider appellant's written arguments, the transcript of the hearing upon said motion and to conduct an *in camera* inspection of the documents which are claimed to be of a confidential nature." *Id.* at 2. Provided they retain the ability to access the information sought to be sealed, appellees do not oppose appellant's motion to seal and have not elected to file written responses thereto.

The overriding basis for appellant's motion is that the referenced materials constitute "trade secrets," consistent with the definition set forth in R.C. 1333.61(D) of the "Uniform Trade Secrets Act." See, generally, R.C. 1333.61, *et seq.* Before we may consider whether the documents sought to be sealed constitute trade secrets, a more fundamental issue exists, *i.e.*, whether or not this Board has the

¹ We note that appellant has sought to seal only a portion of appellee BOE's Exhibit F. However, at this preliminary stage, the entire document was subject to the temporary seal.

authority to seal records.² Since the sealing of records has the effect of preventing public access thereto, we are mindful of R.C. 149.43(B) which mandates that “[a]ll public records shall be promptly prepared and made available for inspection to any person ***,” and further that the General Assembly intended that the Ohio Public Records Act “be liberally construed to ensure that governmental records be open and made available to the public and that public records are subject only to a few very limited and narrow exceptions.” *State ex rel. Williams v. Cleveland* (1992), 64 Ohio St.3d 544, 549.³

The Board of Tax Appeals is an administrative, quasi-judicial body charged with resolving disputes between taxpayers and taxing authorities. See, e.g., *Zangerle v. Evatt* (1942), 139 Ohio St. 563;⁴ *Superior’s Brand v. Lindley* (1980), 62 Ohio St.2d 133. Although our adjudicative proceedings resemble judicial proceedings, this Board has neither the authority of nor is subject to the same rules applicable to Ohio courts. See, e.g., *Orange City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1996), 74 Ohio St.3d 415 (holding that the Rules of Evidence do not apply, but may serve as a guide, in hearings conducted before the Board of Tax Appeals);

² We note that there exists at least one other instance in which a motion to seal records was granted by this Board. See *MCI Telecommunications Corp. v. Limbach* (June 12, 1992), B.T.A. No. 88-G-1137, unreported, reversed on other grounds, (1994), 68 Ohio St.3d 195. In addition, we note that this Board has indicated through its rules that it may take appropriate steps, e.g., the issuance of a protective order, in order to restrict discovery of a “trade secret or other confidential research, development or commercial information.” Ohio Adm. Code 5717-1-11(D).

³ If, as appellant contends, the information sought to be sealed is a trade secret, it would not constitute a “public record” pursuant to R.C. 149.43(A)(1)(r) which specifically excepts from the definition “[r]ecords the release of which is prohibited by state or federal law.” See *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535.

⁴ In *Zangerle*, the court acknowledged that this Board, which at that time was a branch of the Department of Taxation (“Department”), had both “quasi-judicial and administrative powers.” *Id.* at paragraph three of the syllabus. However, in 1976, the Board was recreated as an independent, quasi-

Dublin Bd. of Edn. v. Franklin Cty. Bd. of Revision (1997), 80 Ohio St.3d 450, 452; *In the Matter of Vaughn, M.D. v. State Medical Bd.* (Aug. 6, 1991), Franklin App. No. 90AP-1160, unreported, at 6 (“Civ. R. 1(A) specifically states that the Civil Rules apply to courts of the state. Therefore, the Civil Rules are not binding in adjudicatory proceedings before administrative agencies.”); *Midwest Enterprises v. Cuyahoga Cty. Bd. of Revision* (Feb. 6, 1995), Cuyahoga App. Nos. 67203 and 67565, unreported (holding that the Board of Tax Appeals can only reconsider its decision until an appeal is filed or expiration of time for appeal and that the Board has no ability to grant Civ. R. 60(B) relief); *Sovran Self Service Assoc. v. Cuyahoga Cty. Bd. of Revision* (Nov. 15, 1999), Cuyahoga App. Nos. 74777, *et seq.*, unreported. The distinction is highlighted by the fact that constitutionally created courts have express statutory, and perhaps inherent,⁵ authority to order records sealed. See, *e.g.*, R.C. 1333.65; R.C. 2151.358; R.C. 2953.32; R.C. 2953.52; *Pepper Pike v. Doe* (1981), 66 Ohio St.2d 374, 377.

Although the Board of Tax Appeals conducts quasi-judicial proceedings, we recognize that it is a creature of statute. *Steward v. Evatt* (1944), 143 Ohio St. 547, paragraph one of the syllabus. This Board is therefore like other administrative agencies which, generally, “have no common-law or inherent powers other than have been granted to or conferred on them by law.” *Leiphart-Lincoln Mercury, Inc. v. Bowers* (1958), 107 Ohio App. 259, 265. See, also, *Steward, supra*; *State ex rel. Gallon & Takacs Co., L.P.A. v. Conrad* (1997), 123 Ohio App.3d 554, 559 (“It is axiomatic that an administrative

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judicial, appellate tribunal, with its prior administrative responsibilities being retained by the Department’s Division of Tax Equalization.

agency has no existence or authority beyond the statutes and may exercise only powers that are clearly granted by the General Assembly.”) Compare, *e.g.*, *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph three of the syllabus (provided no express statutory limitation indicates otherwise, administrative agencies have inherent authority to reconsider their own decisions until such time as the institution of court appeal or expiration of the time for such appeal). Cf. *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision* (1998), 81 Ohio St.3d 58 (holding that the “judicial mental process” privilege extends to proposed opinions of our attorney examiners, thereby exempting such draft opinions from disclosure under R.C. 149.43, and further that our adjudication proceedings are not subject to Ohio’s Sunshine Law, *i.e.*, R.C. 121.22).⁶

While this Board has not been granted specific statutory authority to place under seal information submitted to it, neither does there exist a statute which expressly mandates *all* materials relating to appeals be held open to public inspection. See, *e.g.*, R.C. 5715.07.⁷ But, see, R.C. 5703.02(C)⁸; R.C. 5703.13.⁹ We recognize the potential for

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⁵ For a general discussion of a court’s inherent powers, see *Hale v. State* (1896), 55 Ohio St. 210, 213.

⁶ In *TBC Westlake*, the court compared this Board’s proceedings to judicial proceedings in the following manner:

“The BTA’s adjudication is a quasi-judicial proceeding that settles a ‘justiciable dispute requiring evaluation and resolution.’ *** Although the BTA opens its hearings to the public under Ohio Adm.Code 5717-1-15(D), it, like all judicial bodies, requires privacy to deliberate, *i.e.*, to evaluate and resolve, the disputes. This privacy frees the BTA from the open pressure of the litigants as it contemplates the case. Privacy provides an opportunity for candid discussion between board members and staff on the legal issues and the facts so the BTA can reach a sound decision. *** For these reasons, the Sunshine Law does not apply to adjudications of disputes in quasi-judicial proceedings, such as at the BTA. *Id.* at 62. (Citations omitted.)

⁷ R.C. 5715.07 provides as follows:

conflict between the Public Records Act and the protections afforded by the Uniform Trade Secrets Act, the purpose of which is “to maintain commercial ethics, encourage invention, and protect an employer’s investments and proprietary information.” *Levine v. Beckman* (1988), 48 Ohio App.3d 24, 28 (citing *Valco Cincinnati, Inc. v. N & D Machining Service., Inc.* (1986), 24 Ohio St.3d 41, 48). See *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513. Because a litigant concludes it is required to submit information constituting a trade secret to this Board in attempt to prevail in either its challenge to or defense of a taxing authority’s decision, it should not be deprived of the protections accorded by R.C. 1333.61, *et seq.* See *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 539-540. We therefore conclude that after an *in camera* review, this Board has the authority to seal records which are demonstrably “trade secrets,” and thus expressly excluded from the definition of a “public record.”¹⁰

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“All files, statements, returns, reports, papers, or documents of any kind relating to the assessment of real property which are in the office of a county auditor or county board of revision or in the official custody or possession of such officer or board shall be open to public inspection.”

⁸ R.C. 5703.02(C) provides:

“Maintain a journal, which shall be open to public inspection and in which the secretary shall keep a record of all of the proceedings and the vote of each of its members upon every action taken by it[.]”

⁹ R.C. 5703.13 provides in part:

“All investigations, inquiries, hearings, and decisions of the board, and every order made by a member when approved and confirmed by the board and shown on its record of proceedings is deemed the order of the board.”

¹⁰ R.C. 149.43 provides, in pertinent part:

“(A) As used in this section:

“(1) ‘Public record’ means any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, except that ‘public record’ does not mean any of the following:

We now proceed to determine whether the information sought to be sealed by appellant, in fact, constitutes a “trade secret.” In making this determination, we refer to R.C. 1333.61(D) which defines that term as follows:

“‘Trade secret’ means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

“(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

“(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

In *State ex rel. The Plain Dealer, supra*, the Supreme Court held that the following factors, originally delineated by the court in *Pyromatics v. Petruziello* (1983), 7 Ohio App.3d 131, 134-135, should be considered when determining whether information claimed is in fact a trade secret:

“(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it

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“(r) Records the release of which is prohibited by state or federal law.”

would take for others to acquire and duplicate the information.” *Id.* at 524-525.

The documents in issue, and the justification tendered for sealing them, are set forth in appellant’s written motion:

“Exhibit #10 - The redacted pages from the 1997 Integrated Resource Plan: This document contains information that is required to be filed with the Public Utilities Commission of Ohio [‘PUCO’]. It is filed under seal at the PUCO because it contains the Appellant’s competitive cost and price information which serve as the basis for the company’s cost and price structure. A competitor could repeatedly underbid Appellant if it obtained the Appellant’s cost and price information contained in Exhibit #10. This financial information is considered by the Appellant to be a trade secret because the Company derives independent economic value from this information not being known or ascertainable through proper means by other persons who can obtain economic value from its disclosure and the Company internally places limitation within the Company to restrict its access to only those management persons who need to rely upon the information for decision making purposes.

“Exhibits #11 & 33 - Bidest Plus Version 3.01 for DOS User’s Guide and Output from Bidest Database: This information is the proprietary and intellectual property of Stone & Webster to which Appellant has a reciprocal confidentiality agreement regarding information exchanged between the parties. This exhibit is the user’s guide that coincides with a software program designed and developed by Stone & Webster to assist it in developing bids to engineer and develop projects such as electric generation plants. The user guide represents the proprietary intellectual property of Stone & Webster. It is considered a trade secret because Stone & Webster derives independent economic value from this information not being known or ascertainable through proper means by other persons who can obtain economic value from its disclosure and the [*sic*] Stone & Webster internally restricts access to the software and its user manual to those engineers developing bids. Stone & Webster derives economic value from this material

because it is the basis for which it develops competitive bid proposals for engineering assignments.

“Exhibit 38 - 1997 Cinergy Market Price Forecast: The 1997 Market Price Forecast is Appellant’s prediction of the future price of electricity. A competitor could repeatedly undercut Appellant if it obtained the Appellant’s cost and price information contained in Exhibit #38. This price information is considered by the Appellant to be a trade secret because the Company derives independent economic value from this information not being known or ascertainable through proper means by other persons who can obtain economic value from its disclosure and the Company internally places limitations within the Company to restrict its access to only those management persons who need to rely upon the information for decisions involving the sale and purchase of electricity in the market place. The Company derives significant economic advantage from this document, has invested considerable sums to develop this information and guards this information from disclosure by employees through contract and restrictions on use.

“Exhibit 55 - Zimmer Capital Budget: This budget information is considered by the Appellant to be a trade secret because the Company derives independent economic value from this information not being known or ascertainable through proper means by other persons who can obtain economic value from its disclosure and the Company internally places limitation within the Company to restrict its access to only those management persons who need to rely upon the information for decisions in operating the Zimmer station. The Company derives economic benefit and advantage from this document by maintaining the secrecy of the Zimmer Station’s cost structure which has a correlative affect on the Company’s electricity pricing decisions. The Company guards this information from disclosure by internally restricting access to it.

“Exhibit F - Subpart D, Pages D-36 and D-37, Pages from the unredacted 1997 Integrated Resource Plan: This is deemed a trade secret for the same reasons identified for Exhibit #10 above.

“Exhibit F - Subpart I - The Zimmer Property Records: This exhibit contains detailed information on the cost to construct and convert the station from its original nuclear production capability to its current coal burning production capability. This is regarded as confidential and proprietary cost information which is not available to the public. The Company derives independent economic value from this information not being known or ascertainable through proper means by other persons who can obtain economic value from its disclosure. The Company restricts access to this information by limiting to the department responsible accounting for such costs.

“Exhibit F - Volume III, Subpart G, Pages: G-91 through G-99, inclusive: PROMOD IV and Fuel Purchase Summaries: These documents contain highly confidential and proprietary cost information regarding Appellant’s costs to produce electricity and its fuel prices. This cost and price information is considered by the Appellant to be as [*sic*] trade secret because the Company derives independent economic value from this information not being known or ascertainable through proper means by other persons who can obtain economic value from its disclosure and the Company internally places limitations within the Company to restrict its access to only those management persons who need to rely upon the information for decisions involving the sale and purchase of electricity in the market place. The Company derives significant economic advantage from these documents, the Company has invested considerable sums to develop PROMOD IV [*sic*] this output information is guarded from disclosure by employees through restrictions on access. Similarly, the fuel cost information is restricted within the company and is subject to confidentiality agreements with various sellers.

“Exhibit F - Volume IV, Subpart N, Pages: N-3 through N-8, inclusive: This is deemed a trade secret for the same reasons identified for Exhibit #55 above.

“Exhibit F - Volume IV, Appendix C and Pages: P-Tax-28 through P-Tax-72, inclusive:¹¹ The Cincinnati Gas & Electric Company’s 1996 Ohio Tax Return filed with the Ohio Department of Taxation and Pollution Control Abatement Certificates: Tax returns are confidential. They are not accessible from the Ohio Department of Taxation. Appellant deems this financial information to be a trade secret. This financial information is considered by the Appellant to be a trade secret because the Company derives independent economic value from this information not being known or ascertainable through proper means by other persons who can obtain economic value from its disclosure and the Company internally places limitations within the Company to restrict its access to only those management persons who need to rely upon the information for decision making purposes.”

During the course of the merit hearing in these appeals, appellant’s witnesses described the general nature of these materials, the manner in which they were created and how they are used by appellant and could be used by its competitors so as to obtain an economic advantage over appellant or Stone & Webster. It further appears that considerable time and expense has been devoted to the development of this information. The materials sought to be sealed do not appear to be known by individuals outside appellant or Stone & Webster and efforts are made to restrict internal access to only those individuals having a specific need to rely upon them. In the proceedings before this Board, appellant has consistently attempted to protect unnecessary disclosure of this information. See, *e.g.*, March 1, 1999 and April 4, 2000 Orders.

¹¹ Through a subsequent filing, appellant moved to amend its earlier motion to seal by requesting that Appendix P of Exhibit F, in its entirety, be placed under seal. Appellant’s motion is considered as amended and Appendix P of Exhibit F, in its entirety, will be considered subject to this Order.

After conducting an *in camera* review of the materials sought to be sealed and the arguments related thereto, we find appellant's motion to be well-taken and the documents, as identified above, are hereby ordered placed under seal. However, the parties' counsel, as identified below, shall be able to review these documents:

Raymond D. Anderson
Scott J. Ziance
Carol Mahaffey
David C. DiMuzio
Alan C. Motta
Alan Lee Edwards
Wayne A. Harris
Franklin A. Klaine, Jr.

Authorized counsel desiring an opportunity to review records placed under seal in these appeals shall make written request at least two (2) business days in advance of the date upon which review is sought. Said request shall designate both the date and approximate time desired for conducting such review. At the time of the review, counsel shall be required to comply with such other procedures imposed by this Board intended to maintain the integrity and spirit of this Order.

Finally, the parties are hereby advised that this Order, which places certain records under seal, shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public record of these proceedings. If appellant, or any other party to these proceedings, wishes this Board to extend this Order beyond eighteen months, that party shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The

motion shall include a detailed discussion of the need for continued protection from disclosure.