

BEFORE THE COMMISSIONER OF INSURANCE

STATE OF GEORGIA

IN THE MATTER OF:)
REGULATION 120-2-2-.25) DOCKET NUMBER
TRADE SECRET ASSERTIONS) I-15-I-10

ORDER

I. STATEMENT OF PROCEEDINGS

On November 30, 2015, a *Notice of Hearing and Intent to Adopt Rule Changes* was issued regarding the proposed Regulation 120-2-2-.25 entitled "Trade Secret Assertions." (Record, Exhibit 1) The purpose of the proposed regulatory action is to clarify the trade secret affidavit filing requirement in O.C.G.A. Section 50-18-72(a)(34). By letter dated December 28, 2015, the Office of the Attorney General opined that the proposed regulation was within the Commissioner's scope of authority. (Record, Exhibit 5) Pursuant to O.C.G.A. §50-13-4(e), the proposed regulation was also transmitted to Wayne R. Allen, Legislative Counsel for the General Assembly, for assignment to the appropriate standing committees of the Senate and House of Representatives. (Record, Exhibit 6) The proposed regulation was assigned accordingly. (Record, Exhibit 7)

Interested persons were given the opportunity to participate in the proposed rulemaking by submitting their written comments by December 30, 2015, and by making oral comments at the public hearing held on January 6, 2016. No written comments were submitted. Although no written comments were submitted regarding the current version of the proposed regulation, one letter ("MAG's letter") was previously submitted by Eric Frisch of the law firm Carlock, Copeland & Stair on behalf MAG Mutual Insurance Company ("MAG") regarding a previous version of the proposed regulation. As some of the issues in that letter are relevant to the current proposed regulation, MAG's letter was offered into evidence. (Record, Exhibit 8)

Margaret Witten, General Counsel of this office (the "Department"), spoke in favor of the

proposed regulation. (Transcript, pp. 10-23, 43-47) According to Ms. Witten, the new affidavit requirement was added to the Open Records Act in 2012. Some companies appear unaware of the affidavit requirement. Others appear aware of the requirement but are unsure what the content of the affidavit should be. These issues have left a significant number of companies exposed to the risk of having their competitors obtain unprotected trade secret information through open records requests made to the Department. (Transcript, pp. 11-12)

In addition to benefiting companies filing trade secrets with the Department, Ms. Witten asserted that the proposed regulation would benefit the Department's staff. According to Ms. Witten, the trade secret filing requirement requires the person claiming trade secret protection to identify the information in the records purportedly constituting a trade secret. The proposed regulation fleshes out this specificity requirement and requires the person filing the document to identify the relevant information by page number, document, exhibit or other identifying characteristic. The proposed regulation will be helpful to Department staff in instances in which the submitted filing is hundreds or even thousands of pages. Rather than having Department staff determine where in a large filing a trade secret may be located, the entity submitting the documents would be required to point specifically to the relevant portions of the filing. (Transcript, pp. 13-14)

Ms. Witten also took issue with the arguments posited against the proposed regulation in MAG's letter. Accordingly, Ms. Witten argued that the Commissioner has the authority to promulgate the proposed regulation and she cited the Georgia Attorney General's conclusion that such authority exists. She asserted that the proposed regulation does not amend the Open Records Act and that it is consistent with the relevant statutory language in Title 50¹ and Title 10². She also asserted that the "submit and attach" language in the Open Records Act concerning trade secret affidavits (discussed later in this Order) should be interpreted to mean

¹ In pertinent part, O.C.G.A. Section 50-18-72(a)(34)

² In pertinent part, O.C.G.A. Section 10-1-761(4)(the definition of "trade secret")

that the trade secret affidavit should be attached to the trade secret filing at the time of the filing. Finally, she indicated that the affidavit itself would be open to public inspection but that it would not be necessary to embed in the affidavit the actual trade secrets. (Transcript, pp. 14-23)

Steve Manders, Director of the Products Review Division of the Department also spoke in favor of the proposed regulation. (Transcript, pp. 23-29, 42-43, 46-49) According to Mr. Manders, his staff in the Products Review Division spends a significant amount of time making participants in the industry aware of the trade secret affidavit filing requirement and helping companies properly identify information that the companies want protected in the affidavits that they file. He believes that the proposed regulation will benefit both the filers and his staff.

David Root, an attorney with Carlock, Copeland & Stair, spoke on behalf of MAG against the proposed regulation. (Transcript, pp. 30-37, 49-50) Mr. Root asserted that the trade secret filing requirement in the Open Records Act is clear and the proposed regulation is consequently unnecessary. He also argued that the Department does not have the authority to promulgate the proposed regulation and that the proposed regulation unlawfully amends the Open Records Act. Finally, Mr. Root opined that the trade secret affidavit does not need to be submitted at the same time that the documentation purportedly containing the trade secrets is submitted.

Jay Thaw, an attorney with MAG, also spoke against the proposed regulation. (Transcript, pp. 37-39) Mr. Thaw asserted that if all state agencies promulgated regulations concerning the applicability of the trade secret statute in [Title] 10, the result could be a watering down of the law, contrary to the intent of the legislature. He also re-iterated MAG's concern that if the proposed regulation is promulgated, trade secrets could become discoverable by competitors obtaining copies of trade secret affidavits on file with the Department. This concern was initially expressed in the MAG letter as follows: "the accompanying affidavit does not itself appear to be 'protectable' as a trade secret, leading to the ironic possibility that the affidavit

would be subject to Open Records production even where the underlying trade secret document(s) were shielded from disclosure.”³

Amy Atkinson, Associate General Counsel for Munich Re Life U.S., (“Munich Re”) also offered oral comments at the hearing. (Transcript, pp. 39-42, 47-48) Ms. Atkinson stated that the volume of material covered by her company’s trade secret assertions could be significant but she also recognized the Department’s need to have companies make good faith assessments of the materials being filed. These assessments should enable companies to properly identify information that may be protected by trade secret assertions. If the Commissioner decides to implement the proposed regulation, Munich Re plans to work closely with the Department during the implementation process.

II. CONSIDERATION OF INTERESTED PARTY COMMENTS

In light of the conflicting assertions made in the record concerning whether there is a need for the proposed regulation, the Commissioner seeks to determine which parties are in a better position to measure that need. As a Division Director who supervises multiple employees that have frequent contact with numerous industry participants, Steve Manders is in a strong position to measure the industry’s need for the proposed regulation. According to Mr. Manders, personnel in the Products Review Division answer questions from companies attempting to comply with the trade secret filing requirement on a “day-to-day” basis.⁴ Mr. Manders is also in a strong position to determine *the Department’s* need for the proposed regulation. Representatives of MAG did not claim to have had significant contacts with other industry participants or Department personnel regarding the need for the proposed regulation. Consequently, the Commissioner determines that Mr. Manders is in a better position than the representatives of MAG to determine the need for the proposed regulation.

With regard to MAG’s assertion that the Commissioner lacks the authority to promulgate the proposed regulation, an examination of relevant law is required. Pursuant to O.C.G.A. Section 33-2-9,

³ Exhibit 8

⁴ Transcript, p. 43

before a proposed regulation may become legally effective, the Commissioner is required to obtain the Attorney General's approval as to the proposed regulation's legality. As the Commissioner noted at the hearing,⁵ he obtained that approval and evidence of the AG's approval was admitted into the record.⁶ Therefore, the record shows that the Commissioner fulfilled his statutory obligations. Although MAG's representatives disagree with the AG's legal opinion, the Commissioner chooses to accept the AG's advice.

With regard to MAG's assertion that the trade secret affidavit does not need to be submitted contemporaneously with the submission of the purported trade secrets, O.C.G.A. Section 50-18-72(a)(34) provides as follows: "An entity submitting records containing trade secrets that wishes to keep such records confidential under this paragraph shall *submit and attach* to the records an affidavit affirmatively declaring that specific information in the records constitute trade secrets pursuant to Article 27 of Chapter 1 of Title 10." [emphasis added.] The "cardinal rule of statutory construction is first, to ascertain the legislative intent and purpose in enacting the law and then to give it that construction which will effectuate the legislative intent and purpose." *Albany Surgical, P.C. v. Depart. of Community Health*, 257 Ga. App. 636, 639 (2002). It seems likely that if the legislature had intended to allow entities submitting trade secrets to state agencies to submit the trade secrets in one filing and to submit the affidavit in a separate, subsequent filing, the legislature would have expressed that intent through a statutory scheme describing separate submissions. The legislature did not create such a scheme. To the contrary, the legislature appears to have reasonably intended for entities submitting records containing trade secrets to *contemporaneously* attach to the records being filed an affidavit affirmatively declaring that specific records in the filing constitute trade secrets.

Finally, MAG's concern that its competitors will be able to determine MAG's trade secrets by obtaining copies of MAG's trade secret affidavits should be addressed. The Commissioner

⁵ Transcript, p. 35-36

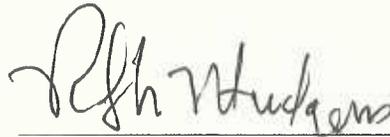
⁶ Exhibit 5

agrees with Ms. Witten that it is not necessary for any company to embed in the trade secret affidavit itself the actual trade secrets. Therefore, MAG's concern is misplaced.

III. DECISION

WHEREAS, the Commissioner finds persuasive the comments offered by Ms. Witten and Mr. Manders, **IT IS HEREBY ORDERED** that Regulation 120-2-2-.25 entitled "Trade Secret Assertions," a copy of which is attached hereto and made a part hereof by reference, is **HEREBY ADOPTED**.

Given under my Hand and Official Seal this 28th day of January, 2016.



RALPH T. HUDGENS
INSURANCE AND SAFETY FIRE COMMISSIONER
STATE OF GEORGIA



120-2-2-.25 Trade Secret Assertions

(a) Any entity that is required by law, regulation, bid or request for proposal to submit to an agency records that it wishes to be confidential under O.C.G.A. Section 50-18-72(a)(34), shall attach to the records an affidavit that includes the following:

(1) An affirmative declaration that specific information in the records constitutes trade secrets pursuant to Article 27 of Chapter 1 of Title 10;

(2) An identification of the specific information by page number, document, exhibit or other identifying characteristic;

(3) An affirmative declaration that the entity does not wish the information to be made public;

(4) An affirmative declaration that the information is not commonly known by or available to the public;

(5) An affirmative declaration that the entity derives economic value, actual or potential, from the information 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; and

(6) An affirmative declaration that the information is the subject of reasonable efforts under the circumstances to maintain its secrecy.

(b) The affidavit must be submitted at the same time that the records are submitted.

(c) Nothing in this rule affects any other protections under the law that may be applicable to records submitted to the Department.

Authority: O.C.G.A. Sections 10-1-761(4), 33-2-9, 33-2-14, 33-13-7, 33-13-8 and 50-18-72.