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NEW PROCEDURE FOR PROTECTION OF TRADE SECRETS AND OTHER RESEARCH, DEVELOPMENT, OR COMMERCIAL INFORMATION

Given the recent rise in requests for the protection of “trade secrets or other confidential research, development, or commercial information” (confidential information) the Michigan Tax Tribunal has adopted and will be utilizing **effective immediately** a new procedure for the protection of confidential information. In that regard, the Tribunal has utilized an *in-camera review* process to comply with the decision rendered by the Michigan Court of Appeals in *Herald Co, Inc v Tax Tribunal*, which 258 Mich App 78, 90; 669 NW2d 862, 870 (2003), *abrogated by Speicher v Columbia Twp. Bd. of Trustees*, 497 Mich 125; 860 NW2d 51 (2014), which provides that:

These statutes [i.e., Freedom of Information Act (FOIA) and Open Meetings Act (OMA)] mandate that the public body **separate** exempt and nonexempt material, **describe where practicable** the exempt material, **make the nonexempt material available**, and **state on the record** the purpose of the closed session **before** initiating the closed session. **When applied to the MTT**, the plain language of these statutes **instruct that** when faced with FOIA exempt material as applied to the OMA, **the MTT must** state on the record those documents it deems exempt under the FOIA together with the associated FOIA exemption justifying the document's nondisclosure, describe those documents unless description would defeat the purpose of the nondisclosure, and complete this process on the record in open session before conducting the closed hearing. M.C.L. § 15.244(1)-(2); MCL § 15.267(1); MCL § 15.268(h); MCL § 15.269(1). [Emphasis added.]

The Tribunal has, however, misapplied that decision. More specifically, the Tribunal's previous process provided for an *in-camera review* for both discovery and hearing purposes even though such information, if “exempt,” may not be discussed or otherwise offered for hearing purposes. Further, the Tribunal also failed to require the parties to identify and support the specific FOIA and OMA exemptions that would allow the Tribunal to conduct a portion of a hearing as a closed session. See MCL 15.243 (i.e., “[r]ecords or information specifically described and exempted from disclosure by statute”) and 15.268 (i.e., “[t]o consider material exempt from discussion or disclosure by state or federal statute”). For example, see MCL 211.9c(2)(iv), which provides that:

On and after December 31, 2000, heavy earth moving equipment subject to 1 or more lease agreements with the same person totaling not more than 1 year and principally intended for sale rather than lease. A lease agreement used to support this exemption shall be made available to the assessor on request and **shall be considered confidential information** to be used for assessment purposes only. [Emphasis added.]

The Tribunal's previous process may have also, unfortunately, subjected the documents submitted by email for review by the presiding judge prior to the conducting of the *in-camera review* to disclosure even though the documents had not been formally filed with the Tribunal. As a result, orders are being prepared to address the protection of confidential information during the discovery process, which will include either an in-person or a virtual *in-camera review*, if the opposing party objects to the motion for protective order. As for the virtual *in-camera review*, the review will be conducted based on a "sharing" of documents during the *in-camera review*, rather than the submission of documents by email. With respect to the protection of documents or, more appropriately, the closing of a portion of the public hearing to consider "exempt" materials, parties will be required to file a motion or motions in advance of the scheduled prehearing conference to request the conducting of closed session, if a protective order has been issued in the case and that party or parties intend on discussing the exempt materials during the hearing, or to request the protection of purported confidential information and the conducting of a closed session. Timely filed motions will be discussed during the prehearing conference and addressed in the prehearing summary. Untimely motions will be denied. Finally, the motions will be required to identify and support the specific FOIA and OMA exemptions that would allow the Tribunal to conduct a portion of a hearing as a closed session, as indicated above. Failure to identify or support the identified FOIA and OMA exemptions will result in the denial of the motions.

Respectfully submitted,



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