

Trade secret

1. Access to public information and the principle of openness in public life

The right of citizens to public information was regulated in the Access to Public Information Act dated 6th September 2001 (Journal of Laws, Nr 112, item 1198, with later amendments, further referred to as APIA), reference to which was contained in art. 61 section 4 of the Constitution of the Republic of Poland, which confers on everyone a right to obtain information about the activity of organs of public authority and the persons performing public functions. These regulations stem from the principle of openness in public life, which constitutes one of the foundations of democracy and contributes to the transparency of public life. The right to public information under article 3 of the APIA covers the entitlement to obtain public information, including a right to obtain information processed to such an extent that is essential for the public interest, as well as the right to inspect official documents and to participate in collegial sessions of the organs held by the organs of public authority coming from the general election.

The Act provides for the cases when the access to public information may be restricted, among others because of a trade secret, unless the entrepreneur resigns from exercising his right (article 5 section 2 APIA). Moreover, article 4 section 1 of APIA, amended by article 24 item 2a of APIA, effective from 1st January 2002, specifies that entrepreneurs are obliged to provide information to the press about their activity, inasmuch as on the basis of separate provisions this information is not kept secret.

2. A notion of trade secret on the basis of the Suppression of Unfair Competition Act and in the case law of the Polish Supreme Court

Under article 55¹ of the Polish Civil Code (Journal of Laws, Nr 16, item 93) trade secret belongs to the complex of enterprise components. Article 11 section 4 of the Suppression of Unfair Competition ACT dated 16th April 1993 (Journal of Laws, Nr 47, item 211, with later amendments, further referred to as SUCA) defines trade secret as “technical, technological and organizational information undisclosed to the public, in possession of an enterprise, or other information of economic value, in case of which an entrepreneur took necessary measures in order to preserve its confidentiality”. Passing on, disclosing or taking advantage of someone else’s trade secret, as well as acquiring it from an unauthorized person, if it threatens or violates

the entrepreneur's interest, are treated as an act of unfair competition (article 11 section 1 SUCA). This provision is also applicable to a person who was employed in the period of three months after the termination of employment relationship.

It should be emphasized that the information violating the public interest may not be regarded as trade secret and in result cannot be protected. Moreover, the Supreme Court in its judicial opinion to the ruling dated 3rd October 2000 (case file no. I CKN 304/00, OSNC 2001/4/59) stated that if the trade secret concerns an information "undisclosed to the public", in other words an information not known to the general public or the persons who are interested in obtaining it because of their profession, the entrepreneur must have a will that the information will be kept secret from the competition and certain circles of recipients, while this will must be recognizable to them. Even though the information is known, but there is no will of the entrepreneur of keeping it secret, such information is not a trade secret. The information which every competitor could learn about "by common and legal means" loses its legal protection. The Court gives an example of the information provided by trade journals, as well as the situation when every professional is able to judge by the merchandise for sale which production method was used. There should be created such conditions so that the protected information could not get through to the third parties without their taking special measures in order to obtain it. With regard to the legal protection, the Court distinguishes between trade secret and knowledge, experience and professional skills, acquired by an employee during his work in the enterprise. In case of the latter, the entrepreneur does not avail of legal protection. However, it is possible for an entrepreneur and an employee to conclude an agreement including a clause confining the possibility to take advantage of the knowledge acquired at work after the termination of employment for competitive reasons.

The Court expressed also a similar opinion in the judgment dated 5th September 2001(case file no. I CKN 1159/00, OSNC 2002/5/67). In its justification of the judgment, the Court stated also that the entrepreneur must make an effort to provide such mechanisms securing from uncontrolled information outflow that the third parties who would like to become familiar with the content of information would have to cause the elimination of these mechanisms so that the information could be protected on account of a trade secret.

In the judgment from 3rd October 2000, the Supreme Court specified the statutory definition of a trade secret. It stated that “the information is of technological nature when it concerns generally perceived means of production, chemical and other formulas, as well as methods of activity”. There shall be listed among others unpatented inventions, components of products, and chemical formulas of new substances. On the other hand, “trade information, in general terms, encompasses the whole of experiences and information useful for running a company, which are not directly connected with the production cycle”. These are: lists of contracting parties, trade contacts, advertising policy, and commercial correspondence.

In the judgment of the Supreme Court dated 25th January 2007 (case file no. I PK 207/06), there was a distinction between the prohibition of competition after the termination of an employment relationship and a duty to keep a trade secret. The Court stated that an exemption from the prohibition of competition granted to former employees is not synonymous with the employer’s permission to make any use of the information by the employees, especially if it is at variance with the interests of the entrepreneur. Thus, former employees with whom the agreement on the prohibition of competition was not concluded are not entitled to disclose a trade secret.

To sum up, basing on the case law of the Supreme Court, it should be stated that a particular information is a trade secret, if it fulfills all three conditions: it is of technological, technical, or organizational nature; it was not disclosed to the public; there were made efforts in order to retain its confidentiality.

3. Trade secret and public procurement law

There are references to a trade secret in article 8 of the Public Procurement Law Act dated 29th January 2004 (Journal of Laws of 2007, Nr 223, item 1655, with later amendments, further referred to as PPLA), which specifies that even though the public procurement procedure is open, there is one exception from this rule, which is a trade secret provided that the contractor made it clear, not later than the closing date for submitting offers and applications for participation in the proceedings, that this information must not be disclosed. In article 86 section 4, additionally, there were enumerated information which may not be reserved. These are: “company name, contractors’ addresses, as well as information concerning a price, deadline for order performance,

warranty period, and payment conditions included in the offers". The principle of openness, expressed in article 8, guarantees transparency of the proceedings conducted by the ordering party. This principle may be limited only in exceptional cases, such as a reservation of confidential information included in the offer made by a contractor.

Referring to the reservation in question, the Supreme Court in its resolution dated 21st October 2005 (case file no. III CZP 74/05) stated that in case, if after the examining the effectiveness of the reservation of a trade secret made by a contractor, the ordering party comes to the conclusion that the reservation was unfounded, he may regard it as ineffective, so the prohibition of disclosure will be rescinded. The resolution in question defines the scope and specifies the term of the reservation of information which constitutes a trade secret in the offer made in the public procurement procedure. The Supreme Court addressed the prohibition of disclosing confidential information to the ordering party who is obliged to examine, whether the disclosed information is of confidential nature. Before passing the resolution, there was a practice of rejecting an offer, if in opinion of an ordering party the contractor reserved information which were not a trade secret, as a matter of fact. For instance, in the judgment of Regional Court in Warsaw dated 27th April 2005 (case file no. V Ca 10/05) it was stated that if the contractor is in possession of the information, the ordering party is obliged to respect the tenderer's standpoint with regard to keeping it secret. In that case, the Court ordered turning down an offer of the contractor who unfoundedly regarded some information as a trade secret. Whereas, it is now established that the acceptance of reservation's ineffectiveness causes only the exclusion of the disclosure prohibition.

4. Trade secret in the case law of national courts

In the judgment dated 25th February 2006 (case file no. II Ca 706/06), the Regional Court in Kalisz considered the issue, whether a cost estimate may be regarded as a confidential information. The Court stated that the cost estimate may not be treated as a widely known information or such an information that every interested party could be easily acquainted with it in a legal way. The possibilities of regarding a cost estimate in public procurement law as a trade secret and reserving its confidentiality in the tender are not excluded by the circumstance that the contractor in previous tenders disclosed the cost estimate to the public.

On the other hand, the Regional Court in Warsaw in its judgment dated 5th June 2006 (case file no.V Ca 440/06) concerned the issue when the information of technical nature may not be classified because of a trade secret. The Court referred to the ruling of the Supreme Court dated 5th September 2001, which introduced a principle that the information which every entrepreneur can get to know by a common and legal way are not confidential. In this case, a consortium, which reserved information concerning technical data as a trade secret, cited the fact that the reserved technical solutions were prototypical on the particular market. However, the Regional Court stated that even if the confidential information concerned the prototypical solutions, they do not deserve a legal protection, as the solutions offered by the consortium should be in accordance with the actual knowledge and world standards in the particular field. The ordering party expected solutions proven on a particular market, and not technical experiments. Thus, in the Court's opinion the information concerning technical specifications shall not be reserved, even if they are prototypical.

The Regional Court in Warsaw, dismissing an appeal from the ruling of the District Court for Warsaw-Mokotów dated 8th December 2006 (file no. XVI C 942/04, dismisses an appeal) issued a similar ruling as regards the possibilities of reserving technical specifications as a trade secret. The Court stated that the technical specifications for communication protocol KSI MAIL, used by the computer programme for wireless transmission of insurance data to the Social Insurance Company – “Płatnik – przekaz elektroniczny”¹, shall be disclosed, as it constitutes a public information. Thus, the principle of openness is applicable to it and it may not be classified as a trade secret.

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¹ „Payer – electronic remittance”