IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

BLUE CREEK WIND FARM, LLC, Plaintiff, v. OHIO DEPARTMENT OF NATURAL RESOURCES and OHIO POWER SITING BOARD, Defendants.	)	CASE NO. 16 CV 004414 JUDGE JENIFER FRENCH

BRIEF *AMICI CURIAE* OF THE AMERICAN BIRD CONSERVANCY AND THE BLACK SWAMP BIRD OBSERVATORY IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION AND SUMMARY

The American Bird Conservancy ("ABC") and the Black Swamp Bird Observatory ("BSBO") file this brief *amici curiae* in opposition to Plaintiff's motion for summary judgment. We show below that Plaintiff's argument that the number of birds and bats its turbines kill is a "trade secret" is demonstrably frivolous. Under Ohio's Trade Secret Act, to prove that the mortality data is a trade secret and secure an injunction, Plaintiff bears the burden of showing by clear and convincing evidence that the mortality data would have real economic value to Plaintiff's competitors. But Plaintiff has not identified any specific competition it has ever encountered from any other wind power company to build a wind project at any particular location, or explained how its mortality data *could actually be used* by a potential competitor to

its advantage**.** Instead Plaintiff offers the sort of generic, conclusory statements about competition that Ohio courts have repeatedly ruled cannot establish the existence of a trade secret.

Indeed, if there were any doubt about the matter, it should be laid to rest by the recent release by Defendant Ohio Department of Natural Resources, in response to a request from BSBO, of the full range of mortality data from one of Plaintiff's alleged competitors *without its objection.* That shows that bird and bat mortality is irrelevant to competition, for Plaintiff's wind turbines and its supposed competitors' wind turbines are technologically indistinguishable in their propensity to kill birds and bats.

The conclusion that the mortality data is not a trade secret is also strongly supported by the case law construing Ohio's Public Records Act, which essentially establishes a presumption in favor of disclosure by the Defendant government agencies – a presumption that can only be overcome by clear and convincing evidence of a trade secret, which Plaintiff has not come even close to presenting.

Finally, we show that federal law under the Freedom of Information Act, the Bald and Golden Eagle Protection Act, the Migratory Treaty Bird Act, and the Endangered Species Act further supports the conclusion that Plaintiff's data is not a trade secret. And we explain why Plaintiff misrepresents the facts when it tells the Court that the federal Fish and Wildlife Service has agreed that Plaintiff's mortality data is a trade secret.

Accordingly, the Court should deny Plaintiff's motion for summary judgment.

INTEREST OF THE *AMICI CURIAE*

ABC and BSBO are both non-profit, science-based, membership organizations dedicated to conserving native birds. ABC acts to safeguard the rarest species, conserve and restore

habitats throughout the Americas, and reduce threats, while building capacity in the bird conservation movement. *See* www.abcbirds.org. BSBO's mission is to inspire the appreciation, enjoyment, and conservation of birds and their habitats through research, education and outreach. *See* www.BSBO.org.

ABC and BSBO support the development of non-carbon-based, renewable energy sources, including wind power projects. But these projects must be constructed responsibly and with minimal impact on our public trust resources such as native birds and bats, and particularly those species that are threatened, endangered, or otherwise protected. ABC is a proponent of Bird Smart Wind Energy, described in some detail on its web site. *See* https://abcbirds.org/program/wind-energy/bird-smart-strategies; *see also www.bsbo.org/responsible-wind-energy.html.*

Proper siting of wind energy projects is the most important consideration in avoiding the unnecessary killing of birds and bats. Wind energy companies routinely downplay the extent to which their turbines kill birds and bats and, as this lawsuit vividly demonstrates, try to conceal from the public the actual mortality evidence. But mortality data are critical to a full and proper understanding of the consequences of siting wind turbines in particular areas, and in making decisions about future sitings.

STATEMENT

1. Wind power projects are proliferating in Ohio and across the Nation.

Wind turbines and their associated infrastructure (powerlines and towers), are rapidly spreading across our landscapes. At the end of 2016, more than 52,000 utility scale wind turbines were operating, with many more under construction. Hundreds of miles of new power lines and towers have been built to take this generated power into the grid (Magill 2014). *See*

http://www.awea.org/wind-energy-facts-at-a-glance; http://www.climatecentral.org/news/ wind-solar-boosting-investment-in-power-lines-17949.

2. Wind power projects are known to kill birds and bats.

Wind turbines alone have been estimated to kill hundreds of thousands of birds and bats annually in the United States. Raptors, night-time migratory songbirds, and bats appear to be the most vulnerable, although hundreds of different species have been affected. When deaths from collisions and electrocutions at associated power lines and towers are included, the number of bird deaths reaches into the tens of millions. The actual toll at turbines alone could be many times higher, since all of the mortality data have been collected using non-standardized methods by paid consultants to the wind industry.[1]

3. **Mortality data is important to designing future efforts to mitigate wind power projects' adverse effects on birds.**

Recent studies of the efficacy of mitigation for bird deaths at wind energy facilities found that only two types of mitigation have been proven to be effective: (1) proper siting away from large concentrations of birds, and (2) curtailment of the turbine blades. The latter is unpopular with and seldom employed by wind energy developers because it cuts into profit. The collection of valid mortality data post-construction is key to identifying future means of testing and successfully mitigating the negative impacts of wind turbines on wildlife. *See* Arnett, E.B. and

[1]Support for these statements appears in http://journals.plos.org/plosone/article?id= 10.1371/journal. pone.0107491 (a comprehensive analysis of small-passerine fatalities from collisions with wind turbines); Johnson, D.H., Loss, S.R., Smallwood, K.S, and Erickson, W.P. 2016. Avian fatalities at wind energy facilities in North America: a comparison of recent approaches, in Human-Wildlife Interactions 10(1): 7-18; Loss, S.R., Will, T., and Marra, P.P. 2013. Estimates of bird collision mortality at wind facilities in the contiguous United States, in. Biological Conservation 168: 201–209; Loss, S.R., Will, T., and Marra, P.P. 2015. Refining estimates of bird collision and electrocution mortality at power lines in the United States, in PLoS ONE 9(7): e101565. doi:10.1371/journal.pone.0101565; Smallwood, S.K. 2013. Comparing bird and bat fatality rate estimates among North American wind energy projects, in Wildlife Society Bulletin 37 (1): 19–33; Smallwood, K. S. and Thelander, C. G. 2008. Bird mortality in Altamont Pass Wind Resource, Area California. J. Wildl. Manage.72: 215–223.

May, R.F. 2016. Mitigating wind energy impacts on wildlife: Approaches for multiple taxa, in Human-Wildlife Interactions 19: 28-41.

4. An Alleged Competitor of Plaintiff Has Released Its Mortality Data.

Plaintiff states that the Timber Road II Wind Farm ("Timber Road") is a nearby competitor. Pltf's. Br. p. 6. On February 22, 2017, Defendant ODNR released to BSBO all of the Timber Road mortality data in response to a similar public record request by BSBO for such data. Timber Road's owner, EDP Renewables, had every opportunity to oppose disclosure, but readily cooperated with BSBO's request, releasing that data both as part of a PowerPoint presentation in a meeting with BSBO and ODNR, and taking no steps to assert any trade secret exemption, and permitting ODNR to respond fully to BSBO's request. Kaufman Affidavit, ¶¶3-5, attached hereto as Exh. 1.

ARGUMENT

PLAINTIFF'S MORTALITY DATA IS NOT A TRADE SECRET

The very idea that the number of birds and bats killed by Plaintiffs' wind turbines could be a trade secret is counter-intuitive, to say the least. Trade secrets are routinely understood to mean the results of personal or corporate ingenuity, inspiration, and/or dogged perseverance – such as formulas and ingredients and technologies for products and the creation of customer lists – the disclosure of which would give a competitor an undeserved windfall advantage in the marketplace.[2]

[2] *See, e.g. Procter & Gamble Co. v. Stoneham,* 140 Ohio App.3d 260 (Ohio Ct. App. 2000) (drilling technology, drilling techniques, business model, bidding practices, pricing strategy, annual budgets, customer preferences, and marketing efforts were trade secrets); *Berardi's Fresh Roast, Inc., v. PMD Enterprises, Inc.,* 2008 Ohio 5470 (Ohio Ct. App., Eighth Dist., Oct. 23, 2008) (proprietary formulas for producing coffee blends were trade secrets); *Salemi v. Cleveland Metroparks,* 145 Ohio St.3d 408 (2016) (customer list); *Avery Dennison Corp. v. Kitsonas,* 118 F. Supp. 2d 848 (S.D. Ohio 2000) (customer lists, pricing information, sales strategies, and business philosophy were trade secrets).

The number of birds and bats killed by Plaintiff's wind turbines is not remotely comparable to what we normally think of as a trade secret. The killings are the *unplanned and unintended* consequences of the operation of Plaintiff's wind turbines, and keeping the number of deaths secret can hardly be said to secure a competitive advantage for Plaintiff, especially when Plaintiff does not contend that the mortality data reflect some secret wind turbine technology known only to Plaintiff.

Hence it is not surprising that one of Plaintiff's alleged competitors has expressly declined to assert a trade secret objection to the ODNR's release of its mortality data to BSBO.

But we need not rely solely on the common sense understanding of a trade secret. Rather, we now show that the bird and bat mortality data at issue is not a trade secret as the Ohio Legislature has defined that term.

A. Plaintiff Has Not Met Its Heavy Burden of Showing that the Mortality Data Is A Trade Secret Under Ohio Law

Ohio has adopted the Uniform Trade Secret Act. *See* R.C. Sections 1333.61 to 1333.69. The Act defines a trade secret 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.

R.C. section 1333.61(D) (emphasis added).

The party claiming trade secret status "*bears the burden* to identify and demonstrate that the material is included in categories of protected information under the statute." *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535 (2000), citing *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 181 (emphasis added).

Moreover, "[p]roof by *clear and convincing evidence is required* to justify relief in trade secrets cases under O.R.C. § 1333.62. *Procter & Gamble* [*Co. v. Stoneham*], 140 Ohio App. 3d [260,] at 268." *Prosonic Corporation v. Stafford*, 539 F. Supp.2d 999, 8 (S.D. Ohio 2008) (emphasis added).

The Ohio courts have carefully explained how the statute works and should be applied. To begin with, whether something is a trade secret requires a case-by-case, factual determination. *Fred Siegel Co.*, 85 Ohio St.3d 171, 181*; see also DeBoer Structures Inc. v. Shaffer Tent & Awning Co.*, 233 F. Supp.2d 934, 948 (S.D. Ohio 2002) ("The determination of whether information constitutes a trade secret is a highly fact-specific inquiry."). **In making that determination, and whether the plaintiff has met its burden, the courts consider six factors, including "(4) *the savings effected and the value to the holder in having the information as against the competitor."*** *State ex rel. Besser*, 87 Ohio St.3d 535, quoting *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525 (1997) (emphasis added).

In determining whether Plaintiff has met its burden, it is critical to understand two thing at the outset: neither Plaintiff's turbine technology nor its data collection methods are at issue.

Thus, Plaintiff does not say that its mortality figures reflect or reveal anything about Plaintiff's wind technology that should be considered a trade secret. Plaintiff does not contend that its wind turbines are any different in terms of killing birds and bats from any competitor's

turbines. Rather, from all that appears, Plaintiff and its supposed competitors all buy their wind turbines from the same supplier and thus each company's turbines will kill the same number of birds and bats at any given siting. Hence mortality data reveals nothing about Plaintiff's technology, and Plaintiff does not contend otherwise.

With respect to data collection methods, Plaintiff admits that it "followed the methodology required by ODNR" as publicly prescribed. Complaint ¶ 36; *accord* ¶¶ 29, 30. Hence they cannot be secrets at all, let alone trade secrets. *See State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency* (2000), 88 Ohio St.3d 166, 173, 724 N.E.2d 411, 418 (trade secret status is restricted to information that "is not generally known or readily ascertainable to the public") (citation omitted).

As for why the mortality data *itself* should be considered a trade secret, Plaintiff has not come close to meeting its burden. Plaintiff must prove, in the words of the Act, that the data "derives independent economic value * * * from not being generally known to * * * other persons who can obtain economic value from its disclosure or use." R.C. Section 1333.61(D)(1). But Plaintiff's arguments regarding the economic value of its mortality data are fatally vague. Plaintiff does say that the other companies compete with it "to lease and maintain wind rights, and development rights, and development assets" (Pltf's. Br. p. 7), but it offers no examples of competition and it does not even describe the terms themselves (what are "wind" rights versus "development" rights and what are "development assets"?).

Moreover, and most important, Plaintiff never really explains how mortality data would actually factor in to the supposed competition. Its brief is full of generalizations about competition but offers no specifics to discharge its burden of showing that competition actually exists. Hence, Plaintiff says that other wind companies could use the mortality data to "develop

and refine their own business plans" (Pltf's. Br. p. 27) and to "evaluate and budget costs for their own current and future wind projects with specificity" (*id.* p. 28), but offers no actual explanation of how this could be so. The closest Plaintiff gets is this: "understanding the actual wildlife risk as opposed to the perceived wildlife risk has implications for operational expenses as well as reduced revenue." *Id.* p. 27. The "implications" are never explained, nor does Plaintiff say anything about how in fact mortality data could ever effect operating expenses or "reduced revenue." In short, these vague and nonspecific assertions of how its mortality data would actually confer real-life "economic value" on its supposed competitors do not remotely satisfy Plaintiff's burden of showing with clear and convincing evidence that its mortality data is a trade secret under Ohio law.

Plaintiff's next claim, that the mortality data can help a supposed competitor satisfy the ODNR's regulatory requirements, is doubly flawed – first because it, too, is fatally vague and second because it is demonstrable nonsense. The argument is that supposed competitors could use the mortality data "to support permit applications" and to "potentially reduce or fulfill their own [Post Construction Monitoring] to satisfy the requirements of the OPSB, ODNR, and/or USFWS." Pltf's. Br. p. 29. How the data could support a permit application or "potentially reduce or fulfill" a competitor's monitoring duties is left to the imagination. Similarly, Plaintiff says that if the mortality data is released, competitors could "benefit from a reduction in the stringency and frequency of the [monitoring] required." *Id.* How could they? If Plaintiff's mortality data showed a small number of bird kills, *maybe* ODNR would require less monitoring, but in that case it would also require less monitoring by Plaintiff as well, evening the playing field. If Plaintiff's mortality data showed a large number of bird kills, presumably no developer would benefit from lowered monitoring responsibilities. In any event, this is all speculation,

because Plaintiff never actually explains how the mortality data would in fact be of competitive advantage to a competitor in seeking a permit.

Moreover, and equally if not more important, Plaintiff's argument makes no sense. The ODNR *already has Plaintiff's mortality data* and will presumably take that data into account in deciding on the appropriate data-collection methodology for any other proposed wind project in the vicinity. The importance (if any) that the ODNR gives to the data in dealing with other developers is what counts, and ODNR already has it. Accordingly, the role that Plaintiff's mortality data plays in the ODNR's consideration of another developer's permit application will be exactly the same whether or not the data is disclosed outside of the ODNR.

Finally, Plaintiff's argument that its supposed competitors could use its mortality data to satisfy federal requirements is highly misleading, because in fact there are no federal requirements: the FWS has promulgated only *voluntary guidelines* for wind developers, who are entirely free to disregard them with no fear of penalty of any kind. *See* FWS Land-based Wind Energy Guidelines, https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf.

In short, Plaintiff has offered no plausible basis – least of all concrete facts – for its ultimate conclusion that its mortality data "would be extremely valuable to any competitor." Complaint ¶ 39. Accordingly, Plaintiff's trade secret claim should be denied, for Ohio courts routinely reject trade secret claims that rely on conclusory statements. *See, e.g., Block Communications, Inc., v. Pounds*, 2015-Ohio-2679 (Ohio Ct App., Sixth Dist., June 30, 2015) (no trade secret established by anecdotal evidence and subjective opinions that disclosure would cause competitive harm); *Arnos v. MedCorp, Inc.*, 2010 Ohio 1883 (Ohio Ct. App., Sixth Dist., Apr.30 2010) (conclusory affidavit fails to establish trade secret); *see also Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) ("Conclusory and generalized

allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents.") (under FOIA).

B. The Mortality Data Must Be Disclosed Under The Public Records Act.

Plaintiff's trade secret claim is doubly doomed because its mortality data constitutes a public record under the Ohio Public Records Act, R.C. 149.43. A "public record" is "any record that is kept by any public office." R.C. 149.43(A)(1). "Records" include "any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G).

Under these definitions, the mortality data required and maintained by the ODNR is a public record. *See State ex rel. Cincinnati Enquirer v. Krings,* 93 Ohio St. 3d 654 (2001) ("This language 'manifests an intent to afford access to public records, even when a private entity is responsible for the records.'") (citing *State ex rel. Mazzaro v. Ferguson* (1990), 49 Ohio St.3d 37, 39, 550 N.E.2d 464, 467; *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.* (1992), 65 Ohio St.3d 258, 263, 602 N.E.2d 1159, 1163).

The Public Records Act essentially creates a presumption in favor of disclosure. "[T]he inherent, fundamental policy of R.C. 149.43 is to promote open government, not restrict it." *Besser,* 89 Ohio St.3d at 398. As the Court held in *State ex rel. Perrea v. Cincinnati Public Schools*, 123 Ohio St.3d 410 (2009), the Act "implements the state's policy that 'open government serves the public interest and our democratic system.' [citation omitted] 'Consistent with this policy, we construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records.'" (citation omitted).

More recently, the Ohio Supreme Court has said:

> "Exceptions to disclosure under the Public Records Act are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception." *State ex rel. Miller v. Ohio State Hwy. Patrol,* 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 23. "A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception." *Id.*

Salemi v. Cleveland Metroparks, 145 Ohio St. 3d 408, 413 (2016); *accord, State ex rel. Carr v. Akron,* 112 Ohio St.3d 351 (2006) (same); *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St. 3d 654 (2001); *State ex rel. Cincinnati Enquirer v. Dupuis,* 98 Ohio St.3d 126 (2002).

Trade secrets under the Trade Secrets Act are exempt from disclosure, *Besser, supra,* and many decisions under the Public Records Act resolve claims for trade secret protection. These decisions, reflecting the open-government goals of the Act, set a high bar. *Besser* among them is strong authority for rejecting Plaintiff's trade secret claim. There, as here, the claimant offered "no factual evidence to support [its] conclusory statements," and the Court ruled in favor of disclosure, holding that the claimant had "failed to meet its evidentiary burden to establish how disclosure of [the contested] information * * * would benefit [its] competitors." 89 Ohio St.3d at 402, 403. The claimant's "reliance on conclusory affidavits" did not "establish that these records derived actual or potential independent economic value from not being generally known" and claimant had failed to "introduce *specific factual evidence concerning the savings effected and the value to [claimant] of having the information as against its competitors*." *Id.* p. 404 (emphasis added). The court concluded that its conclusion was "consistent with [its] duty in public records cases to strictly construe exemptions from disclosure under R.C. 149.43 and to resolve any doubts in favor of disclosure of public records." *Id.* p. 405.

In sum, Plaintiff has failed to meet its burden under the Trade Secrets Act standing alone, and its higher burden under the Public Records Act. The Court should reject its claim for trade secret status and dismiss its Complaint with prejudice.

C. Federal Law Supports Disclosure.

We recognize that the jurisprudence under the federal Freedom of Information Act does not apply to the Ohio Public Records Act or the Trade Secrets Act. *State ex rel. Cincinnati Enquirer v. Dupuis,* 98 Ohio St.3d 126 (2002) ("FOIA does not apply to nonfederal agencies or officers."). Even so, it may bear noting that the result we seek – disclosure – would also be compelled under federal law.

Exemption 4 of the FOIA exempts trade secrets from disclosure. 5 U.S.C. 552(b)(4). In *Public Citizen Health Research Group v. FDA,* 704 F.2d 1280 (D.C. Cir. 1983), the Court defined a "trade secret" to be "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Plaintiff's mortality data would not qualify as a trade secret under that definition and hence would be disclosable under FOIA.

Another federal law, the Bald and Golden Eagle Protection Act, makes it a crime to kill Bald and Golden Eagles without a permit from the Fish & Wildlife Service. *See* 16 U.S.C. 668-68d. Similarly, the Migratory Bird Treaty Act makes it a crime to kill any migratory birds native to the United States. *See* 16 U.S.C. 703. And the Endangered Species Act makes it a crime to kill any species listed as endangered or threatened under the Act. *See* 16 U.S.C. 1538. So far as appears, Plaintiff has no permit to take any birds under any of these statutes, and therefore its mortality data is potential evidence of a crime, which can hardly be considered a trade secret.

D. The FWS Did Not Say That Plaintiff's Mortality Data Is A Trade Secret.

Plaintiffs states that, in denying BSBO's FOIA request for Plaintiff's mortality data, FWS said that the data was a trade secret. Pltf's. Br. pp. 3, 10. Even if that were so, a FOIA result would not settle the question whether the mortality data is a trade secret under Ohio law. *See State ex rel. Cincinnati Enquirer, supra* ("FOIA does not apply to nonfederal agencies or officers."). But it is not necessarily so.

FOIA Exemption 4 covers both trade secrets *and* "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4) (2006). In dealing with BSBO's FOIA request for Plaintiff's mortality data, FWS invited Plaintiff to state whether it considered the data to be a trade secret ***or*** confidential commercial or financial information. *See* Attachment A (FWS letter to Plaintiff of [date]. One test for whether information is "confidential" – as opposed to a trade secret – is whether it has been submitted voluntarily to the federal agency and "would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. NRC,* 975 F.2d 871 (1992). In urging FWS to withhold its mortality data, Plaintiff argued that the data was submitted voluntarily and was not routinely available to the public. *See* Pltf's. Br. p. 9; Becker Aff., Exh. 3 (Plaintiff's letter to FWS). And in denying BSBO's request, FWS said it was acting under Exemption 4, but did not specify whether it deemed the mortality data a trade secret or merely confidential. Becker Aff., Exh. 4. Accordingly, so far as appears, FWS did *not* conclude that the mortality data is a trade secret, which would have been the correct result under federal law. *See* Part C. above.

E. Plaintiff Misperceives the Public Interest

We have shown above that, on the merits, Plaintiff has failed to show by clear and convincing evidence that its mortality data are trade secrets. The public interest as well sets its face against Plaintiff's efforts. Given its inability to adduce facts demonstrating real economic value in its mortality data, it is reasonable to suppose that Plaintiff's real motivation is to hide from the public the lethal effects of its turbines on birds and bats. But the public is entitled to know what impact Plaintiff's turbines are having on valuable public resources. As one court has observed:

> Competitive harm should not be taken to mean simply any injury to competitive position, as might flow * * * from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws.

Public Citizen Health Research Group v. FDA, 704 F.2d at 1291 n.30 (citation omitted).[3]

In its discussion of the public interest, Plaintiff never mentions bird or bat mortality, asserting that the public interest this case is limited to preserving trade secrets. Since Plaintiff has no trade secrets, the Court should disregard that blinkered view. The real public interest lies in an understanding of the true facts regarding Plaintiff's turbine's effects on wildlife – a valuable *public trust* resource – and hence the public interest also disfavors Plaintiff's motion.

CONCLUSION

Plaintiff's motion for summary judgment should be denied, and the mortality data should be released.

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[3]*See also General Electric Co. v. United States Nuclear Regulatory Agency*, 750 F.2d 1394 (7th Cir. 1984)(Posner, J.) "[T]he competitive harm that attends any embarrassing disclosure is not the sort of thing that triggers [FOIA] exemption 4.") (finding conclusory allegations of competitive harm insufficient).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 7th day of March, 2017, this document was electronically filed via the Court's authorized electronic filing system, which will send notifications of this filing to the following:

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Blue Creek Wind Farm LLC,	)	Case No.: 16CVH05-4414
Plaintiff,	)	Judge Jenifer French
v.	)	**AFFIDAVIT OF KIMBERLY KAUFMAN**
Ohio Department of Natural Resources,	)	
And	)	
Ohio Power Siting Board	)	
Defendants.	)	

State of Ohio)
) ss:
County of Ottawa)

Kimberly Kaufman, being of sound mind and lawful age, and being of first duly sworn according to law, deposes and states with personal knowledge as follows:

1. I am Executive Director of the Black Swamp Bird Observatory ("BSBO"), located at 13551 West State Route 2, Oak Harbor, Ohio 43449.

Exhibit 1 to Brief *Amici Curiae* of
American Bird Conservancy and
Black Swamp Bird Observatory

2. At my direction, Black Swamp Bird Observatory presented a public record request to the Ohio Department of Natural Resources ("ODNR") for post-construction bird and bat mortality data for the Timber Road II Wind Farm located in Paulding County, Ohio.

3. On January 11, 2017, EDP Renewables, the operator of the Timber Road II Wind Farm, presented a summary of the post-construction bird and bat mortality data as part of a PowerPoint presentation to BSBO and ODNR in Columbus, Ohio.

4. On or about February 22, 2017, ODNR released to BSBO all of the Timber Road II post-construction bird and bat mortality data in response to BSBO's public record request.

5. In responding to BSBO's request, EDP Renewables took no steps to assert any trade secret exemption, permitting ODNR to respond fully to BSBO's request for the bird and bat mortality data.

Affiant further sayeth not.

Kimberly Kaufman

State of Ohio)
) ss:
County of Ottawa)

Sworn to and subscribed before me this 6 day of March, 2017.

Notary Public

PETER N. LAVALETTE, ATTORNEY-AT-LAW
NOTARY PUBLIC, STATE OF OHIO
My Commission Has No Expiration Date
Sec. 147.03RC