

MEMORANDUM

To: William F. O'Brien, Esq.
Senior Hearing Examiner

Janis Dillard
Regulatory Policy Administrator

From: Gary A. Myers
Deputy Attorney General

Subject: *Criteria for Determining (under State Freedom of Information Act)
Whether "Trade Secrets" and "Confidential Commercial and
Financial Information" May be Exempted from Required Public
Disclosure*

Date: February 12, 2007

At yesterday's Staff meeting, Bruce said I was involved in helping discern the "legal" requirements related to the disclosure to the public of information contained in the three bids submitted in the new generation RFP process. I understand that you have been designated to review the bids in order to advise the Commissioners which claims of confidentiality that ultimately might be asserted by the bidders should, or should not, be endorsed. Consequently, I thought it might be helpful to give you a "legal" landscape, painted in broad strokes, about required public disclosure and possible exemptions.

To draw you that picture, I am enclosing two documents. One is an Attorney General's Opinion from 2000 (00-IB15). It reviews prior Delaware case law and earlier AG opinions as they relate to the non-disclosure exemption for "trade secrets" and "financial and commercial information of a confidential or proprietary

nature” under this *State’s* Freedom of Information Act. In doing so, it speaks to bid materials. The second attachment is my choice of excerpts from the 2004 edition of the US Department of Justice’s *Freedom of Information Act Guide*. The excerpts focus on the federal FOIA and its almost identically worded exemption related to public disclosure of trade secrets and confidential commercial information.

Three initial cautions. First, the survey (or more precisely the two enclosures) is premised on the notion that Professor Firestone’s second motion (which I have not seen) is akin to a FOIA request. As I indicated the attached materials here relate to state, and federal, FOIA provisions. Second, the enclosed materials focus on the FOIA exemptions for “trade secrets” and “commercial and financial information” which is of a “confidential or proprietary nature.” I continue to believe that lurking in this RFP matter is an unanswered issue about the public disclosure of bid contents prior to an award and such disclosure’s effect on maintaining the integrity of a competitive bid process. If the bids now filed are not “static” - and can be modified, supplemented, or further negotiated before any final award – then the bid process might be compromised if one bidder can – through public disclosure - learn the contents of the competing bids. The state FOIA exemptions for non-disclosure do not speak to this problem and indeed AG opinion 00-IB15 seemingly says that such concern is not subject to the FOIA exception for confidential commercial information.¹ Finally, as with most Delaware legal issues

¹In contrast, under this State’s procurement laws, submitted bids are generally immune from public disclosure (with certain exceptions) until a final contract is consummated. This is the norm for both “sealed bids” and “sealed but negotiable RFP submissions.” See 29 Del. C. §§ 6923(c)(1), (c)(3), (j)(4); 6924(b)(3), (j)(3).

outside of corporate law, case law from the State courts is sparse and the opinions that do exist can be maddeningly simplistic, ambiguous, or even obtuse.

Atty. Gen. Op. 00-IB15

As I indicated, the 2000 Attorney General's opinion (00-IB15) discusses the reach of the exemption from disclosure set forth in 29 Del. C. § 10002(g)(2) (then 10002(d)(2)). It surveys some case law (including non-FOIA judicial "protective order" cases) and reviews prior Attorney Generals' opinions related to the FOIA exemption. Here, there are three things to highlight. First, the 2000 opinion – looking to a 1977 Attorney General's opinion (77-029) – recites a broad ("Restatement of Torts") definition for "trade secrets" that are presumably exempt from public disclosure.² In contrast, the federal courts have refused to use the Restatement's broad "trade secret" definition to describe the set of materials exempt from disclosure under the federal FOIA's exemption for "trade secrets." The federal courts felt that such broad definition of trade secrets – developed in the context of employee defections - would be inconsistent with the overall goals of FOIA and would indeed almost compel *non*-disclosure in most instances of publicly-filed commercial information. Secondly, the 2000 Attorney General's opinion, at times, seems to conflate "trade secrets" and "commercial or financial information which is of a privileged or confidential nature" into a single category. Again, the federal

²There is a similar broad definition of "trade secret" under the state Trade Secrets Act. See 6 Del. C. § 2001(4)a.-b.

courts (in part because they read “trade secrets” narrowly) have seen two categories under the exemption: (1) trade secrets; and (2) confidential commercial or confidential information. Third, and maybe most importantly, the 2000 opinion cites another 1977 Attorney General’s opinion (77-029) that embraced the federal multi-pronged “National Parks” formula for defining what is “confidential or privileged” commercial or financial information. Under National Parks, the test is:

Will public disclosure of the information either:

- (1) likely impair the government’s ability to obtain necessary information in the future? *or*
- (2) cause substantial harm to the competitive position of the person from whom the information was obtained?

Unless “trade secrets” is given a broad meaning, I think it is the second “competitive harm” prong of the National Parks test that will be the best guidepost for your decision³ as to particular claims for non-disclosure of parts of the bids. Again, this assumes that pre-award disclosure of most information will not in itself compromise the competitive bid selection process.

2004 Freedom of Information Act Guide (US DOJ)

The excerpts from the federal manual might help in applying that second National Parks “competitive harm” prong. Here, what is probably more important

³Remember also that the Hecht decision summarized in Atty. Gen. Op. 00-IB15 was construing, not the State FOIA but, the federal FOIA exemption. Hecht allowed a whole host of background bid information to be exempt from required disclosure.

are the discussions about the “process” rather than any attempt to link up information in the bids to any particular result in any of the cited court cases. Four process points are important. First, the final decision about the existence of “competitive harm” is the agency’s, not the submitter’s (bidders). The bidder must present a road-map about how competitive harm will come about, but the agency must find the harm both real and likely to occur. At the same time, proof of “actual competitive harm” is not required; rather the needed demonstration is “actual competition” (as it relates to the confidential information) and a *likelihood* of substantial competitive injury. The Commission does not need to develop a trial-like record; but it cannot rely on conclusory assertions by the bidders. Rather, the Commission should be able to see on the record, understand, and articulate the path from disclosure to likely competitive harm to position of the bidder.

Additional Tidbits

Lastly, several additional, and largely tangential, considerations. If Professor Firestone’s second motion is indeed a FOIA request, he can file a court challenge to any PSC decision refusing him access to information or documents. That action would have to be filed within 60 days after the turn-down. In most instances, the reviewing court would then likely hear the matter de novo, - creating and deciding the disclosure (or exemption) question on the record built before it. Second, the State FOIA allows a court to direct the agency to pay the attorney’s fees of a person who overturns a refusal to disclose documents (or included information).

However, it remains unclear whether such an award is automatic, or what type of discretion a court can exercise in declining or shaping such an award of counsel fees. Third, there is no explicit provision in the State FOIA law for a “reverse” proceeding – one that would allow the bidder to file suit claiming that the agency misapplied the FOIA exemption language. Rather, the submitter who wishes to overturn a decision to disclose must find another avenue or vehicle to get into court to prevent agency-ordered disclosure. This “no reverse proceeding” assumption dovetails with the generally accepted view that the statutory exemptions allow the agency to withhold disclosure; they do not mandate that the agency must do so. An agency can generally find the FOIA exemption applicable but still choose to disclose the information for some “greater reason.” Generally, the submitting person can have a court overturn a disclosure decision by the agency only when it can point to some law, or other entitlement, that independently mandates that the information not be disclosed.

I hope this is helpful. If you want the additional pages with the footnotes (with their court cites and additional information) for the U.S. Department of Justice materials, let me know. I can also try to answer any further questions you might have.

Enclosures

cc: Bruce Burcat, Exec. Dir. (w/o encls.)
Michael Sheehy, Dep. Dir. (w/o encls.)