

July 28, 2015

FOIL 19286

E-Mail

TO:

FROM: Robert J. Freeman, Executive Director

CC:

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear :

As you are aware, I have received your letter, and I hope that you will accept my apologies for the delay in response.

The issue involves a request made pursuant to the Freedom of Information Law (FOIL) by your client for certain records of the Office for People with Developmental Disabilities (hereafter “the Office”). The records sought relate to a situation in which your client engaged in a procurement process that resulted in a “tentative award” in March. Nevertheless, the records sought were withheld on the basis of §87(2)(c) of FOIL, which states that an agency may withhold records or portions of records when disclosure “would impair present or imminent contract awards...” It was contended that even though a tentative award was announced, “the Office’s deliberative process continues and the procurement is not yet the subject of a final agency determination.” It was also stated that disclosure “would impair the Office’s competitive position in negotiating a successful final procurement award and contract”, and that “the request includes materials for which the submitting parties have requested protection from FOIL due to the materials’ proprietary or trade secret nature.”

In this regard, as a general matter, FOIL is based on a presumption of access. Stated differently, all agency records are available, except those records or portions of records that fall within one or more of the exceptions to rights of access appearing in §87(2) of FOIL. Reference was made by the Office to two of the exceptions.

In the exception referenced above, §87(2)(c), the key word is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers.

As we understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure of those bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor a bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied.

In a decision rendered nearly thirty-five years ago, however, it was held that after the deadline for submission of bids or proposals has been reached and a contract has been awarded, "the successful bidder had no reasonable expectation of not having its bid open to the public" (Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 [1980]). Conversely, the Court of Appeals sustained the assertion of §87(2)(c) in Murray v. Troy Urban Renewal Agency, (453 NYS2d 400, 56 NY2d 888 [1982]), in which the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld.

As stated in Contracting Plumbers, *supra*, and confirmed in a case involving a request for a copy of a successful proposal following an award, "Once the contract was awarded...the terms of [the] RFP response could no longer be competitively sensitive" (Cross-Sound Ferry v. Department of Transportation, 219 AD2d 346, 634 NYS2d 575, 577 [1995]). When a tentative award was announced, the records that you requested would be required to be made available to the public at least in part; in our opinions, no longer would disclosure "impair" the ability of the Office to reach a fair and optimal agreement on behalf of the public.

Some have suggested that disclosure is beneficial. If, for example, the award is later rejected, disclosure might enable other entities interested in contracting with an agency to offer a lower price or, in the case of an RFP, to better meet the needs of an agency and offer a better value. In that event, disclosure would not impair, but rather would enhance the government's ability to reach a positive or optimal agreement.

The reference in the response to §89(5) of FOIL relates to §87(2)(d), which permits an agency to deny access to records insofar as disclosure "would cause substantial injury to the competitive position" of a commercial entity. Therefore, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

“[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing,

treating or preserving materials, a pattern for a machine or other device, or a list of customers” (id. at 474, 475).”

In its review of the definition, the court stated that “[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business” (id.). The phrase “trade secret” is more extensively defined in 104 NY Jur 2d 234 to mean:

“...a formula, process, device or compilation of information used in one’s business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business’ employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated.”

In my view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would “cause substantial injury to the competitive position” of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase “substantial competitive injury” in Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, (639 NYS2d 990, 87 NY2d 410 [1995]). In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

“FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for ‘commercial or financial information obtained from a person and privileged or confidential’ (see, 5 USC § 552[b][4]). Commercial information, moreover, is ‘confidential’ if it would impair the government’s ability to obtain necessary information in the future or cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained...”

As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise..." (Id., 419-420).

Whether or the extent to which the Office could meet the burden of demonstrating that disclosure would cause actual harm to the competitive position of a commercial entity is unknown. Nevertheless, it is clear that the burden of justifying secrecy is hardly automatic; on the contrary, the courts have been demanding in determinations involving the assertion of §87(2)(d).

The Court of Appeals, has clearly confirmed that in order to meet the burden of proof in denying access to records, agencies must provide "persuasive evidence" that disclosure would cause the harm envisioned by an exception to rights of access. In a decision dealing specifically with §87(2)(d), it was determined that a "speculative conclusion that disclosure might potentially cause harm" is insufficient to meet the burden of proof. (Markowitz v. Serio, 11 NY3d 43, 51, 862 NYS2d 833 [2008]).

Lastly, it is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY2d 267 (1996)], stating that:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (Matter of Fink v. Lefkowitz, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that certain reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from that referenced in response to your client's request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and

lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (Matter of Fink v. Lefkowitz, *supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., *supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.)."

In the context of your client's request, the Office appears to have engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access.

In an effort to encourage reconsideration of the determination to deny access, a copy of this opinion will be forwarded to Anne J. Binseel, the Appeals Officer at the Office.

I hope that I have been of assistance.