

Contracts -- Public Records -- Trade Secrets

Number: INFORMAL

Date: June 23, 2014

Subject:
Contracts -- Public Records -- Trade Secrets

Mr. Romualdo C. Marquinez, Jr.
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501 West State Street
Jacksonville, Florida 32202

Dear Mr. Marquinez:

You ask for assistance in determining whether a private vendor may include non-disclosure language in contracts with Florida public entities to protect contract terms and pricing from being made public pursuant to Chapter 119, Florida Statutes. Your question arises in light of your having asked for contract and pricing information from other public institutions and having been advised that the information constitutes a trade secret exempt from public disclosure under sections 815.045 and 812.081, Florida Statutes.

Regrettably, this office may not comment on the actions of other public entities, absent a request from the entity involved. The following general comments regarding trade secrets and the availability of public information, however, is provided in order to be of assistance.

The general purpose of Chapter 119, Florida Statutes, "is to open public records to allow Florida's citizens to discover the actions of their government." [1] The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose. [2] Any doubt as to the applicability of a Public Records exemption should be resolved in favor of disclosure rather than secrecy. [3]

The Legislature, however, has adopted a number of exemptions relating to trade secrets. Section 812.081(1)(c), defines "Trade secret" to mean:

"the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. 'Trade secret' includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;

2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes."

In addition, the First District Court of Appeal in *Sepro Corporation v. Florida Department of Environmental Protection*,^[4] has concluded that section 815.045, Florida Statutes,^[5] "should be read to exempt from disclosure as public records all trade secrets as defined in section 812.081(1)(c), Florida Statutes. . . ." Although section 815.045 is placed in a chapter entitled Computer-Related Crimes, the *Sepro* court held that language of this provision should be read to exempt from disclosure as public records all trade secrets as defined in section 812.081(1)(c), Florida Statutes, whether or not they are stored on or transmitted by computers.^[6]

This office has addressed several situations in which the "trade secret" or proprietary business information exemption was in question. In Attorney General Opinion 2008-14, a city asked whether the lease payment amount made by a telecommunications company to the city was proprietary confidential business information. Under a lease agreement, the company paid a yearly amount for the use of a parcel of land. While section 202.195, Florida Statutes, provides a public records exemption for proprietary confidential business information obtained by a governmental entity from a telecommunications company, this office concluded that the amount of the lease payment was not information obtained from a telecommunications company and was not required to be treated as proprietary confidential business information.^[7]

I trust that these informal comments will be of assistance to you in resolving the issues you have raised.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997).

[2] *Krischer v. D'Amato*, 674 So. 2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987). *And see Southern Bell Telephone and Telegraph Company v. Beard*, 597 So. 2d 873, 876 (Fla. 1st DCA 1992) (Public Service Commission's determination that statutory exemption for proprietary confidential business information should be narrowly construed and did not apply to company's internal self-analysis was "consistent with the liberal construction afforded the Public Records Act in favor of open

government").

[3] *Tribune Company v. Public Records*, *supra*.

[4] 839 So. 2d 781, 785-787 (Fla. 1st DCA 2003), *review denied sub nom.*, *Crist v. Florida Department of Environmental Protection*, 911 So. 2d 792 (Fla. 2005).

[5] Section 815.045, Fla. Stat., provides:

"The Legislature finds that it is a public necessity that trade secret information as defined in s. 812.081, and as provided for in s. 815.04(3), be expressly made confidential and exempt from the public records law because it is a felony to disclose such records. Due to the legal uncertainty as to whether a public employee would be protected from a felony conviction if otherwise complying with chapter 119, and with s. 24(a), Art. I of the State Constitution, it is imperative that a public records exemption be created. The Legislature in making disclosure of trade secrets a crime has clearly established the importance attached to trade secret protection. Disclosing trade secrets in an agency's possession would negatively impact the business interests of those providing an agency such trade secrets by damaging them in the marketplace, and those entities and individuals disclosing such trade secrets would hesitate to cooperate with that agency, which would impair the effective and efficient administration of governmental functions. Thus, the public and private harm in disclosing trade secrets significantly outweighs any public benefit derived from disclosure, and the public's ability to scrutinize and monitor agency action is not diminished by nondisclosure of trade secrets."

[6] 839 So. 2d at 785. *And see Cubic Transportation Systems, Inc. v. Miami-Dade County*, 899 So. 2d 453, 454 (Fla. 3d DCA 2005) (where a company supplied documents to an agency and failed to mark them as "confidential" and "continued to supply them without asserting even a [legally ineffectual] post-delivery claim to confidentiality for some thirty days after it had once attempted to do so by so informing County staff," the company failed adequately to protect an alleged trade secret claim). *Cf. Seta Corporation of Boca, Inc. v. Office of the Attorney General*, 756 So. 2d 1093 (Fla. 4th DCA 2000).

[7] *See also* Ops. Att'y Gen. Fla. 09-02 (2009) and 97-87 (1997).