amendments to the statute should or could be imposed retroactively to buildings constructed after July 1, 1977, but before the effective date of the adoption of the amendments.

Adoption of administrative regulations by the State Fire Prevention Commission pursuant to Article 38A, Section 3(a) could also remedy at least some of the subtitle's interpretive and administrative deficiencies discussed above. As to the immediate problem of occupants who because of advanced "age" may need assistance in evacuation, the Commission may wish to consider the adoption of a regulation that would, for example, provide (1) a clear definition of what is meant by "age" and (2) a *per se* rule unmistakably specifying for the benefit of everyone that either all or a certain percentage of the occupants over a specific age shall be considered as "occupants needing evacuation assistance." Any particular age selected as the cut-off should, from a practical point of view, be geared to minimum age levels typically employed in special housing facilities for the elderly. Any such *per se* rule adopted would, of course, have to have some reasonable basis in fact in order to be legally defensible.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM KARL WILBURN, *Assistant Attorney General.*

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[1] "Automatic fire extinguishing system," defined in Art. 38A, § 53(c), as we interpret the statute, envisions a more comprehensive system than mere installation of "sprinklers," Art. 38A, § 50. The latter assist only in the extinguishing of a fire, whereas the former also include devices to "automatically detect . . . while sounding an alarm."

[2] Although "age" is not defined in Art. 38A, references elsewhere in the Annotated Code inconsistently contemplate "elderly" status to commence at ages 60 (Art. 88A, § 109(d)), 62 (Art. 70B, § 1), or 65 (Art. 88A § 85(b)).

63 OAG 355



# FREEDOM OF INFORMATION ACT

## FREEDOM OF INFORMATION ACT–TRADE SECRETS AND CONFIDENTIAL COMMERCIAL OR FINANCIAL DATA EXCEPTIONS–OBJECTIVE TEST FOR DETERMINING APPLICATION TO DEMAND FOR BID DATA.

October 27, 1978.

*William H. Adkins, II, Esquire,*
*State Courts Administrator,*
*Administrative Office of the Courts.*

In your letter of August 24, 1978, you have asked for our guidance in replying to a demand from a bidder for the responses of other bidders to a Request for Proposals on a program of your office funded by the Law Enforcement Assistance Administration (LEAA). We understand that this bidder's demand was submitted under the Federal Freedom of Information Act after the bids had been received, the successful bidder selected, and the contract awarded. More particularly, you have asked the following questions:

1. Should we decline to disclose responses to proposals if the response includes a "proprietary notice" or some similar indication of the vendor's intention to have it remain confidential unless it results in a contract?

2. Even in the absence of a "proprietary notice" or its equivalent, should we decline to disclose pricing information or data giving the names and backgrounds of individuals who would be working on the project?

3. Should we decline to disclose information if the vendor has specifically identified it as a trade secret or as confidential commercial or financial data?

4. If there is neither a "proprietary notice" or specific identification of trade secrets or confidential commercial or financial data, have we an obligation to determine whether a response includes such material before we disclose it?

5. If a "proprietary notice" or some similar indica-

tion of an intention that material be kept confidential is not sufficient to protect against disclosure under Article 76A, do we have an obligation to advise potential vendors of this fact? If a "proprietary notice" or some similar designation is effective to prevent disclosure under Article 76A, should we advise potential vendors of this?

6. Some argue that non-disclosure of materials of this sort, at least until a contract has been developed, is in the public interest because free disclosure of such materials might dissuade some vendors from submitting responses and thus inhibit competitive bidding. Would it be appropriate for us to seek a judicial determination of the "public interest" question under Section 3(e)?

While this bidder made its request under the Federal Freedom of Information Act, 5 U.S.C. § 552 (hereinafter "the Federal Act"), you have suggested that this Act is inapplicable and that the request should be regarded as having been made under the Maryland Freedom of Information Act, Md. Ann. Code, Art. 76A, §§ 1-5 (hereinafter "the Maryland Act"). We agree. The Federal Act applies only to agencies of the federal government.[1] The Administrative Office of the Courts is, of course, a State agency. Md. Ann. Code, Courts Article, § 13-101. Moreover, we have found no provision in the Federal Act, the LEAA statute, 42 U.S.C. §§ 3701-3796c, or any other federal statute or regulation which indicates that a State court system is subject to the Federal Act if it administers a program funded by LEAA. However, under the LEAA statute, the records of a "State planning agency" and "other planning organizations" are open to the public, "except as such records are required to be kept confidential by any other provision of local, State or Federal law." 42 U.S.C. § 3723(g).[2] We are not advised if the Administrative Office is recognized as a "State planning agency" or "other planning organization" for purposes of the LEAA statute. However, even if it were, we think that it is clear that this general disclosure requirement governs only in the absence of an applicable federal or State law. While we have found no other federal law which might govern this matter, we think that the Maryland Act is applicable under this statute and in its own right.



The Maryland Act was first enacted in 1970, Ch. 698, Laws of Maryland, 1970, and was most recently amended in the 1978 Session of the General Assembly, Ch. 1006, Laws of Maryland, 1978. The basic provisions of the Maryland Act have remained unaltered since their initial enactment. As originally and presently constituted, the Maryland Act provides all persons with a broad right of access to the public records of State and local government. Art. 76A, § 2. This right, however, is subject to the restrictions of other State statutes, federal statutes and regulations, and judicial rules. Sec. 3(a). Moreover, a custodian of public records may, unless otherwise provided by law, deny access to certain specified classes of public records on the grounds that disclosure would be contrary to the public interest. Sec. 3(b). A custodian of records is, unless otherwise provided by law, required to deny access to certain other specified classes of records. Sec. 3(c) With court approval, a custodian may also deny access to public records not specified in Secs. 3(b) or 3(c) on the grounds that disclosure would cause substantial injury to the public interest. Formerly Sec. 3(f), now Sec. 3(e). The general right of access is judicially enforceable, formerly Sec. 3(e), now Sec. 5, and willful and knowing violations are misdemeanors. Sec. 5. Among the changes made in the most recent revision of the Act,[3] the burden of justifying a denial of access was explicitly placed on the denying custodian. Sec. 5(b). Moreover, the already established general right of access to public records was strengthened with the addition of the following provision as Sec. 1A:

> The State, counties, municipalities, and political subdivisions, or any agencies thereof, may maintain only such information about a person as is relevant and necessary to accomplish a purpose of the governmental entity or agency which is authorized or required to be accomplished by statute, executive order of the Governor or the chief executive of a local jurisdiction, judicial rule, or other legislative mandate. Moreover, all persons are entitled to information regarding the affairs of government and the official acts of those who represent them as public officials and employees. To this end, the provisions of this Act shall be construed in every instance with the view toward public access, unless an unwar-

ranted invasion of the privacy of a person in interest would result therefrom, and the minimization of costs and time delays to persons requesting information.

There is, then, a broad, but not absolute, right of access to the public records of State and local governments by any person.

Applying the statute to the facts you here presented, we would agree, at the outset, that the requested responses are "public records" within the meaning of the Act.[4] Moreover, as recently revised, the Act explicitly applies to the Judicial Branch. Sec. 1(b). Finally, while the demand for access which you have received may be regarded as having been submitted by an individual, even a corporate entity is a "person" under the Act.[5] However, as noted, the right of access under the Maryland Act is not absolute, and in this particular case there are two significant bases which may be applicable in denying access to the requested information,[6] or at least parts of it.[7] First, there is the trade secret and confidential commercial or financial data exception. This exception is found in Sec. 3(c) (v)[8] and provides, as follows:

> (c) The custodian shall deny the right of inspection of the following records or any portion thereof, unless otherwise provided by law:
>
> * * *
>
> (v) Trade secrets, information provileged by law, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person;

Second, there is the substantial public injury exception which is found in Sec. 3(e) [9] and is noted below.

While Sec. 3(c)(v) of the Maryland Act *requires* a custodian to withhold, unless otherwise provided by law, trade secrets and confidential commercial or financial data furnished by or obtained from any person,[10] the Act does not define these terms or indicate how they are to be applied nor are there any reported cases which do so. The crucial question with respect to defining and applying these terms is whether they are properly regarded as subjective or objective in nature. That is, does information become a "trade secret" or "confidential commercial or financial data" simply on the assertion of the



person submitting the information? We think not. Moreover, we are of the opinion that even the agreement of the person submitting the information and the custodian on how to characterize the information is not dispositive, although the parties may agree that information is *not* to be regarded as a "trade secret" or "confidential commercial or financial data." For the following reasons we conclude that an objective, rather than subjective, approach is required by the nature of the concept of a "trade secret" and by the underlying policy of the Maryland Act.

A "trade secret" has been defined as "an unpatented secret formula or process known only to certain individuals using it in compounding some article of trade having commercial value." (Footnote omitted). 55 Am.Jur.2d, *Monopolies, Restraints of Trade, and Unfair Trade Practices*, § 705 (1971). Secrecy is an essential element. Thus, "[a] trade secret is something known to only one or a few, kept from the general public, and not susceptible of general knowledge. If the principles incorporated in a device are known to the industry there is no trade secret which can be disclosed." (Footnote omitted). *Id.*, § 706. Thus, the very nature of a "trade secret" requires that the information is not generally known in the trade. This requires an objective inquiry. The very nature of "confidential" information does not require an objective inquiry. However, the underlying policy of the Maryland Act does. The basic policy of the Act favors disclosure. To allow person submitting information or that person and a custodian to definitively characterize information as "confidential" would allow the liberal disclosure policy of the Act to be defeated merely by an assertion of one party or the agreement of both. We think that this underlying policy requires that commercial or financial data may be characterized as "confidential" only if such information is customarily regarded as confidential in the particular trade and only if a recognized governmental or private interest is served which is sufficiently compelling to override the general policy in favor of disclosure. Such a governmental interest might be insuring the continued flow of necessary information to the government. Such a private interest might be protecting the privacy of particular individuals or protecting sources from competition which would result from the disclosure of information submitted by them. Our position in this matter finds support in the Federal Act.[11]

In broad outline the Federal Act is similar to the Maryland Act. As in the Maryland Act, the Federal Act creates a broad right of public access to public records. As in the Maryland Act, the Federal Act limits this rights by various specific exceptions.[12] While the Federal Act does not contain an explicit liberal disclosure rule such as that in Sec. 1A of the Maryland Act, the basic policy of the Federal Act is unquestionably one which favors disclosure. This is apparent not only in the provisions of the Federal Act itself but also from the legislative history and the judicial interpretation and application of the Act. Thus, Sec. 552(c) provides that the Federal Act "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." [13] In the passage of the Federal Act,[14] the Senate Report states that the purpose of the Act is "to establish a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. . . ." Senate Report at 3. The courts have also understood that the Act favors disclosure. The Supreme Court has found that the Federal Act is broadly conceived and that its basic policy is in favor of disclosure. *N.L.R.B.* v. *Robbins Tire and Rubber Co.*, —*U.S.* —, 98 S.Ct. 2311, 2316 (1978). Moreover, it has been held that the liberal disclosure requirement of the Act is limited only by "specific exemptions which are to be narrowly construed." *Bristol-Myers Co.* v. *F.T.C.*, 424 F.2d 935, 938 (D.C. Cir.), *cert. den.* 400 U.S. 824 (1970). Where there is doubt as to the interpretation of a provision, the interpretation favoring disclosure is preferred. *Vaughn* v. *Rosen,* 523 F.2d 1136, 1142 (D.C. Cir. 1975).

Among the exceptions in the Federal Act is one for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Sec. 552(b)(4). In its essential elements, this exception is similar to the provision in Sec. 3(c)(v) of the Maryland Act. However, there is also the question of how the terms are to be defined and applied. The provision in the Federal Act has remained essentially unchanged since its original enactment.[15] The purpose of the provision was explained in the Senate Report, as follows:

> Exemption No. 4 is for "trade secrets and commercial or financial information obtained from any person and privileged or confidential." This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges. Specifically it would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.



Senate Report at 9. This language suggests that an objective standard of "customary practice" is to be used in applying this provision. However, the House Report, in describing the identical provision in quite similar language, adds, "It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government." House Report at 10. This language, of course, suggests a subjective standard.

In interpreting the trade secrets and confidential data exception of the Federal Act, there is clearly a judicial preference for the Senate Report.[16] Many of these cases have been decided by the U.S. Court of Appeals for the District of Columbia. This court has held that the test for determining confidentiality is an objective one. *National Parks and Conservation Asso.* v. *Morton,* 498 F.2d 765, 766 (D.C. Cir. 1974) (hereinafter cited as *National Parks*). A mere claim of confidentiality is insufficient, *Bristol-Myers Co.* v. *F.T.C., supra,* as is a promise of confidentiality, *Petkas* v. *Staats,* 501 F.2d 887, 889 (D.C. Cir. 1974). Rather, the information must customarily be treated as confidential, but this is only one factor in determining if it is confidential. *National Parks* at 766-767. Such information may be withheld under the Federal Act only if the withholding serves a public or private interest recognized by the Act. *Id.* at 767. Thus, it has been held that commercial or financial data is confidential only if its disclosure would impair the government's ability to obtain necessary information or cause substantial harm to the competitive position of the person submitting the data. *Id.* at 770.[17] A somewhat different formulation, which emphasizes the role of

custom as an essential element of the test,[18] was given by another panel of the same court which decided *National Parks*. Thus, in *Pacific Architects and Engineers, Inc.* v. *Renegotiation Board*, 505 F.2d 383, 384 (D.C. Cir. 1974), the test for confidentiality was stated, as follows:

> The established tests for determining whether documents are "confidential" business statistics within the meaning of Exemption 4 are that the statistics must be the sort not customarily disclosed to the public and that disclosure of the statistics must not be likely to either 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 is obtained. (Footnotes omitted).

While not, of course, controlling in interpreting the Maryland Act, we think that this case on the Federal Act supports our view that commercial or financial data is confidential under the Maryland Act only if it is customarily so regarded in the trade and the withholding of the data would serve a recognized governmental or private interest sufficiently compelling as to override the general disclosure policy of the Act.

The substantial public injury exception, which is found in Sec. 3(e) of the Maryland Act, might also be regarded as a basis for refusing to disclose the requested responses, although we do not think so. Sec. 3(e) provides, as follows:

> If, in the opinion of the official custodian of any public record which is otherwise required to be disclosed under this article, disclosure of the contents of said record would do substantial injury to the public interest, the official custodian may temporarily deny disclosure pending a court determination of whether disclosure would do substantial injury to the public interest provided that, within ten working days of the denial the official custodian applies to the circuit court of the county where the record is located or where he maintains his principle office for an order permitting him to continue to deny or restrict such disclosure. The failure of the official custodian to apply for a court determination following a temporary denial of inspection will result in his becoming



> subject to the sanctions provided in this article for failure to disclose authorized public records required to be disclosed. After hearing, the court may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. The person seeking permission to examine the record shall have notice of the application sent to the circuit court served upon him in the manner provided for service of process by the Maryland Rules of Procedure and shall have the right to appear and be heard.

Quite clearly, the general basis for refusing to disclose public records is to be applied only after it is determined that the specific statutory bases do not justify non-disclosure. This is evident from the reference in the first sentence to ". . . any public record which is otherwise required to be disclosed under this Article." We think that this general provision was inserted in the Act by the Legislature in recognition of the fact that it cannot anticipate every situation in which it is appropriate to refuse to disclose public records.[19] However, we think that this general provision is to be used only in unanticipated instances in order to avert substantial disruption of the governmental process or to protect some other compelling public interest. This is evident, we think, from the preference of the Act for disclosure, the care taken by the Legislature in setting out the specific bases for refusing disclosure, the fact that this general provision is available only if a specific basis is not, and the fact that this general basis can be used only to prevent "substantial injury to the public interest." From our review of the documents you have sent us, we think that the matter has been anticipated by the Legislature and is governed by the specific trade secret and confidential commercial or financial data exception. Should this provision not prevent disclosure, it would not be readily apparent to us, on the basis of the limited information at hand, that a demand for material of this nature once the successful bidder has been selected and a contract awarded is the sort of case which would justify resort to the general provision.[20] However, because of the expertise available to you regarding this particular marketplace, you may have a significant doubt about this matter. In that event, clearly it would be appropriate for you to refuse disclosure on the general "public injury" grounds of Sec. 3(e) and seek the judicial resolution which is contemplated by that section.

In summary, then, we think that the disclosure of responses to a request for proposals from your office is governed by the trade secrets and confidential commercial or financial data exception of the Maryland Freedom of Information Act. Whether particular information is a trade secret or confidential under this provision is a matter to be determined objectively. The advice of a person who is familiar with the practices of the particular business would, we think, be highly desirable in making this determination. By its very nature, a trade secret is a process which is known to only one or a few persons in a particular business. If the process is generally known in the business, then, by definition it is not a trade secret. The nature of the concept of "confidentiality" does not require an objective inquiry, but the underlying policy of the Act does. To allow a matter to be regarded as "confidential" *merely* on the claim of the person submitting the information or even upon agreement with the custodian would, we think, allow the liberal disclosure policy of the Act to be defeated by the assertion of one party or the agreement of both. We think that this underlying policy requires that commercial or financial data be regarded as "confidential" only if it is customarily so regarded in the business and only if the withholding of the data would serve a recognized governmental or private interest sufficiently compelling to override the general policy in favor of disclosure. Insuring the flow of information to the government would be such a governmental interest. Protecting the privacy of particular individuals [21] or the competitive position of the person submitting the data would be such a private interest.

Applying the foregoing, we respond to your questions, as follows:

> 1. Should we decline to disclose responses to proposals if the response includes a "proprietary notice" or some similar indication of the vendor's intention to have it remain confidential unless it results in a contract?

As we have indicated, the *mere* assertion by a vendor that commercial data is "confidential" is not sufficient to make it "confidential" under the Maryland Act. Therefore, we advise you not to refuse to disclose commercial data *simply* because it bears a "proprietary notice" indicating the vendor's intention that the data be "confidential." However, we think that you are obliged to make the determination indicated in our response to Question #4.



> 2. Even in the absence of a "proprietary notice" or its equivalent, should we decline to disclose pricing information or data giving the names and backgrounds of individuals who would be working on the project?

As we have indicated, we think that the test for determining whether commercial data is confidential is an objective one. It requires an inquiry as to whether such data is customarily regarded as confidential in the business and whether the withholding of the data would serve a governmental or private purpose sufficiently compelling to overcome the liberal disclosure policy of the Act. Such a determination clearly requires advice from a person familiar with the particular business.[22] However, we can understand that in a highly competitive business it might be customary for a firm to carefully protect the identity of its highly skilled staff members, its pricing data and its marketing practices, and that a government agency which discloses that identity might inhibit the firm from future dealings with the agency or might harm its competitive position so that a refusal to disclose their identity might be justified.

> 3. Should we decline to disclose information if the vendor has specifically identified it as a trade secret or as confidential commercial or financial data?

Our response here is essentially the same as for Question #1. A vendor's mere assertion that information is a "trade secret" or "confidential commercial or financial data," while entitled to consideration, is not in and of itself sufficient to make it so. However, we think that you are obliged to make the determination indicated in our response to Question #4.

> 4. If there is neither a "proprietary notice" or specific identification of trade secrets or confidential commercial or financial data, have we an obligation to determine whether a response includes such material before we disclose it?

Yes. The Act clearly states that the custodian shall refuse to disclose such data and only the custodian can determine if the data is a "trade secret" or "confidential commercial or

financial data" in accordance with the objective test we have set out.

> 5. If a "proprietary notice" or some similar indication of an intention that material be kept confidential is not sufficient to protect against disclosure under Article 76A, do we have an obligation to advise potential vendors of this fact? If a "proprietary notice" or some similar designation is effective to prevent disclosure under Art. 76A, should we advise potential vendors of this?

As a matter of law, we advise that vendors are conclusively presumed to know the limitations of a public officer or employee with whom it contracts. *See Hanna* v. *Bd. of Education*, 200 Md. 49, 57 (1952). However, as a policy matter, we recommend that vendors be advised that the mere assertion that a matter is a trade secret or confidential is not sufficient to make it so under the Maryland Act.

> 6. Some argue that non-disclosure of materials of this sort, at least until a contract has been developed, is in the public interest because free disclosure of such materials might dissuade some vendors from submitting responses and thus inhibit competitive bidding. Would it be appropriate for us to seek a judicial determination of the "public interest" question under Section 3(e)?

As we have indicated with respect to the facts of the present request, i.e., a demand for bid information after the awarding of the contract, it is not readily apparent to us that this is the sort of case which would justify resort to Sec. 3(e). However, compliance with a demand for bid information prior to the awarding of the contract might present a greater risk a "substantial injury to the public interest," and thus justify resort to this section. In either case, if you have a significant doubt about this matter, it would be appropriate for you to refuse disclosure on the general "public injury" grounds of Sec. 3(e) and seek the judicial resolution which is contemplated by that section.

FRANCIS B. BURCH, *Attorney General*

RICHARD E. ISRAEL, *Assistant Attorney General.*



[1] The Federal Act applies only to "each agency." The term "agency"is defined in 5 U.S.C. § 551 for the subchapter including the Federal Act. The definition in § 551 is, as follows:

> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include–
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States;
>
> (D) the government of the District of Columbia;
>
> or except as to the requirements of § 552 of this title–
>
> (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
>
> (F) courts martial and military commissions;
>
> (G) military authority exercised in the field in time of war or in occupied territory; or
>
> (H) functions conferred by §§ 1738, 1739, 1743, and 1744 of title 12, chapter 2 of title 41; or §§ 1622, 1884, 1891-1902, and former § 1641(b)(2), of title 50, appendix;

The Federal Act itself contains this further provision concerning the term "agency,"

> For purposes of this section, the term "agency" as defined in § 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. 5 U.S.C. § 552(e).

Moreover, we do not believe that it can be successfully argued that you are merely an arm or agent of a federal agency and thus directly subject to the Federal Act. See, Ciba-Geigy Corp. v. Mathews, 428 F. Supp. 523 (S.D.N.Y. 1977).

[2] Under the LEAA statute, recipients of grants may not, except as otherwise provided by federal law, disclose research and statistical information furnished under the statute "by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained in accordance with this chapter." 42 U.S.C. § 3771(a). However, it does not appear that this bidder's request is for such research or statistical information.

[3] Ch. 1006, Laws of Maryland, 1978, was introduced as H.B. 1326 in the 1978 Session. This bill was substantially the same as H.B. 462 of the 1977 Session, which incorporated provisions of S.B. 176 of the 1977 Session and was vetoed by the Governor. For background on H.B. 462, see Legislative Policy Committee, *Reports of Committees to the General Assembly of Maryland, 1977 Session* 110-112. For background on S.B. 176 and its predecessor, S.B. 1010 of the 1976 Session, see, respectively, *Id.* at 190, and *Report to the Senate of Maryland by the Senate Investigating Committee Established Pursuant to Senate Resolutions 1 and 151 of the 1975 Maryland General Assembly* 73-74.

[4] The term "public records" is defined in Sec. 1(b) of the Maryland Act to include "any paper . . . or other written document . . . received . . . in connection with the transaction of public business." We think that under this broad definition responses by bidders to a request for proposals are "public records."

[5] Sec. 1(h) of the Maryland Act defines "person" as "any natural person, corporation, partnership, association or governmental agency."

[6] In the recent revision of the Maryland Act by Ch. 1006, Laws of Maryland, 1978, Sec. 3(a) was amended to provide for the denial of access on the grounds that "such public records are privileged or confidential by law." Prior to the revision, this phrase appeared as a qualification of the term "public records" in Sec. 1. However, we do not think that this new provision is a grounds for denying access to the information as we are unaware of any privilege or law, other than the Maryland Act itself, that would make the information confidential.

[7] As provided in the recent revision of the Maryland Act by Ch. 1006, Laws of Maryland, 1978, a custodian may now withhold a part of a record rather than the entire record. See Secs. 3(b) and (c). Sec. 3(d), as revised, makes it clear that this authority is to be used to facilitate disclosure where only part of a record is subject to denial. Sec. 3(d) provides, in part, that ". . . any reasonably severable portion of a record shall be provided to any person requesting such record after deletion of those portions which may be withheld from disclosure."

[8] In the revision of the Maryland Act by Ch. 1006, Laws of Maryland, 1978, this exception is Sec. 3(c)(iv). However, inasmuch as a previously deleted Subsec. (iv) was restored by amendment without changing the subsequent enumeration, it is apparent that the exception should be referred to as Subsec. (v) and will so appear in the Annotated Code.

[9] While Sec. 3(a) of the Maryland Act explicitly provides for disclosure unless exempted by subsections (a), (b) or (c) of that section, the very provisions of subsec. (a) as well as Sec. 2 make it clear that the provisions of Sec. 3(e) are properly regarded as independent grounds for denying access to public records.

[10] We have found no other provision of law which governs the disclosure of the bid responses in question or which would make them privileged information.

[11] We have previously indicated that the Federal Act is of assistance in interpreting Sec. 3(c)(v) of the Maryland Act, although the relevant provisions are not identical. 58 Opinions of the Attorney General 53, 58-59 (1973).

[12] While the Maryland Act provides that the custodian may withhold certain records, Sec. 3(b), and shall withhold others, Sec. 3(c), the Federal Act simply exempts certain matters from the Federal Act, Sec. 552(b). The Federal Act has been understood as authorizing but not requiring the withholding of various records, but this discretion may not be abused. Pennzoil v. Federal Power Commission, 534 F.2d 627, 630-632 (5th Cir. 1976).

[13] The Federal Act, like the Maryland Act, also places the burden of justifying the withholding of information on the refusing agency, Sec. 552(a)(4)(B).

[14] The Federal Act was introduced on February 17, 1965 as S. 1160 by Senator Edward V. Long of Missouri as an amendment to Sec. 3 of the



Administrative Procedure Act, Ch. 324, 60 Stat. 238 (1946). The bill was referred to the Committee on the Judiciary, which reported it favorably with amendments on Oct. 4, 1965. S. Rept. 813, 89th Cong., 1st Sess., hereinafter referred to as Senate Report. The bill was considered, amended and passed by the Senate on Oct. 14, 1965. 111 *Cong. Rec.* 26820-26823. In the House of Representatives, the bill was referred to the Committee on Government Operations which favorably reported the bill on May 9, 1966. H. Rept. 1497, 89th Cong. 2d Sess., hereinafter referred to as House Report. The bill was considered and passed by the House of Representatives on June 20, 1966, 112 *Cong. Rec.* 13640-13662, and was approved by President Johnson on July 4, 1966 as Pub. L. 89-487. This Act was subsequently codified as part of Title 5 by Pub. L. 89-554 and has been amended by Pub. L. 90-23, Sec. 1, Pub. L. 93-502, Secs. 1-3, and Pub. L. 94-409, Sec. 5(b).

[15] As introduced in S. 1160, the exception read as follows: "trade secrets and commercial or financial information obtained from the public and privileged or confidential." 111 *Cong. Rec.* 2798. As recommended by the Committee on the Judiciary, Senate Report at 1, and passed by the Senate, 111 *Cong. Rec.* 26821, the term "the public" was deleted in favor of "any person." The term "any person" became "a person" in the 1966 codification. See fn. 14.

[16] In resolving various conflicts between the House and Senate Reports, there has been a preference for the Senate Report as a more accurate reflection of the intent of Congress. See, e.g. Getman v. N.L.R.B., 450 F.2d 670, 673 (D.C. Cir. 1971); Hawkes v. I.R.S., 467 F.2d 787, 794 (6th Cir. 1972); and Vaughn v. Rosen, 523 F.2d 1136, 1141 (D.C. Cir. 1975).

[17] The Court, in this case, expressly reserved the question of whether some other governmental interest might be embodied in this exemption. *National Parks* at 770, n. 17.

[18] This difference was recognized in National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 678, n. 16 (D.C. Cir. 1976), in which it was noted that whether commercial or financial data is "customarily" confidential is relevant only "insofar as it informs the court as to the likelihood of substantial competitive injury. . . ."

[19] An analogous provision is found in another public information statute, the Open Meetings Act, Md. Ann. Code, art. 76A, §§ 7-15. While Sec. 11 sets out 12 specific bases for closing meetings, a general basis is also available for other exceptional cases "so compelling as to override the general public policy in favor of open meetings."

[20] However, a demand for disclosure of such documents at an earlier stage of such proceedings might well fall within the purview of Sec. 3(e). For example, the disclosure of any such documents prior to the final date for submission of all bids would vitiate the competitive bidding process.

[21] But see, National Parks and Conservation Asso. v. Kleppe, 547 F.2d 673, 687 (D.C. Cir. 1976).

[22] In view of this statutory responsibility for planning and controlling data processing in the several departments and agencies of the Executive Branch, see *Md. Ann. Code*, art. 15A, § 23B, the Secretary of Budget and Fiscal Planning well may be of technical assistance in this regard.

law applies to a school construction contract only if 75% or more of the funds actually used are State funds. Thus, the Interagency Committee may approve a proposed construction contract that does not provide for prevailing wage rates if the local authority commits itself to funding more than 25% of the total cost of construction.

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*Editor's Note:* Since the issuance of this Opinion, the State Prevailing Wage Law has been recodified twice, without substantive change. The provisions of Article 21 cited in the text are now to be found, with identical section numbering, at Title 18, Subtitle 5 of the State Finance and Procurement Article. Effective July 1, 1987, the Prevailing Wage Law will be Title 12, Subtitle 3 of that Article.



# PUBLIC INFORMATION

ARCHITECTS AND ENGINEERS–CONSTRUCTION DRAWINGS–"CONFIDENTIAL COMMERCIAL DATA"–"TRADE SECRETS"–DRAWINGS SUBMITTED TO OBTAIN BUILDING PERMIT NOT NECESSARILY EXEMPT FROM PUBLIC DISCLOSURE, BUT SUBMITTER SHOULD BE GIVEN OPPORTUNITY TO SHOW POSSIBLE COMPETITIVE INJURY.

February 3, 1984

*Timothy E. Welsh, Esq., County Solicitor*
*Ellicott City, Maryland*

You have requested our views as to the status of certain construction drawings under the Maryland Public Information Act.* Specifically, you ask whether architectural and engineering plans that are submitted to the County as a prerequisite to issuance of a building permit are exempt from mandatory disclosure under the Act.

For the reasons given below, we conclude that these drawings are generally not exempt from mandatory disclosure. However, because such documents, in some instances, may contain confidential commercial data within the meaning of Article 76A, §3(c)(v) of the Maryland Code [SG §10-617(d)(2)], the submitter of any construction drawing of which inspection is sought should be afforded the opportunity, in advance of disclosure, to present evidence of any competitive injury that would likely result from disclosure of the drawings.

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* [*Editor's Note:* Since the issuance of this Opinion, the Maryland Public Information Act has been recodified, without substantive change, as Title 10, Subtitle 6, Part III of the State Government Article ("SG" Article). Cross-references to the new codification have been added to the text in brackets. In addition, the *Public Information Act Manual* cited in the Opinion has been updated and reissued. Page references to the Fourth Edition of the *Manual* have been added to the text in brackets.]