

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.]

## I

## Construction Drawings Under County Code

The Howard County Code provides as follows:

"[N]o building or structure of any kind . . . shall be erected, . . . repaired, . . . or demolished . . . without first obtaining a permit in writing signed by the department of public works of Howard County . . . No application for a permit shall be considered and no permit granted unless and until all information required by the department of public works is supplied, and plans and specifications showing the nature and character of the work to be done [are submitted]." §3.100(a).

For commercial or industrial projects, for example, the Department of Public Works requires "[t]wo . . . complete sets of construction drawings . . . sealed and signed . . . by a registered architect or engineer". Commercial/Industrial Building Permit Submission ¶3 (undated).

## II

## Scope of the Maryland Public Information Act

The Maryland Public Information Act ("MPIA") applies to all "public records", defined to mean all documents received by the State or a political subdivision "in connection with the transaction of public business". Article 76A, §1(b) of the Maryland Code [SG §10-611(f)(1)(i)]. The construction drawings in question are "public records";<sup>1</sup> hence, they are subject to the Act.

The basic principle of the MPIA is disclosure:

"All public records shall be open for inspection by any person at reasonable times, except as provided in this article or as otherwise required by law." Article 76A, §2(a) [SG §10-613(a)].

<sup>1</sup> The definition of "public records" specifically includes "any . . . drawing . . . including all copies thereof". Article 76A, §1(b) [SG §10-611(f)(1)(i)(4)].

In furtherance of this principle, the MPIA directs the custodians of records as follows:

"The custodian of any public records shall allow any person the right of inspection of such records . . . except . . . as [otherwise] provided in . . . this section[.]" Article 76A, §3(a) [SG §10-615].

## III

## §3(c)(v): "Confidential Commercial Data"

A. *In General*

One exemption from mandatory disclosure that is potentially applicable to construction drawings is Article 76A, §3(c)(v) [SG §10-617(d)(2)], "confidential commercial data":

"Trade secrets, information privileged by law, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person[.]"

Your Office concluded that these drawings generally do come within §3(c)(v) [SG §10-617(d)(2)], because nondisclosure would assure the "free flow of information to the government . . . , protect] . . . the work product of Architects and Engineers from plagiarism . . . , and [discourage] potentially unlawful activity, aided by access to construction drawings". Opinion of the County Solicitor No. 83-31, at 3 (September 7, 1983).

We do not doubt that the construction drawings are "commercial" in nature, reflecting the architect's or engineer's professional expertise. Thus, the determinative question is whether they are "confidential", within the meaning of §3(c)(v) [SG §10-617(d)(2)].<sup>2</sup>

<sup>2</sup> We think that construction drawings of this type would fall within the narrower category of "trade secrets" only in extremely rare circumstances. See *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983); 63 *Opinions of the Attorney General* 355, 359 (1978). But see note 4 below.

In our view, the proper test for confidentiality under this MPIA exemption is that applied under the analogous exemption in the federal Freedom of Information Act ("FOIA"):

"[C]ommercial or financial information is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain the necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

This two-prong test has since been "widely adopted" in FOIA cases. 1 O'Reilly, *Federal Information Disclosure* §14:08 at 14-45 (1983). See 63 *Opinions of the Attorney General* at 361 (applying the FOIA test to MPIA §3(c)(v) [SG §10-617(d)]. See also Attorney General's Office, *Public Information Act Manual* 22 (1983). But see 9 to 5 *Organization for Women Office Workers v. Board of Governors of Federal Reserve Syst.*, 721 F.2d 1 (1st Cir. 1983) (other specific harms, in addition to those identified in *National Parks*, might permit assertion of the exemption).

#### B. Impairment of Government Access to Information

As to the first prong of the FOIA test, we do not believe that disclosure of the construction drawings in question would "impair" Howard County's "ability to obtain the necessary information in the future".

Submission of the drawings to the Department of Public Works is a statutory prerequisite to the issuance of a building permit—so anyone who wants a permit has no choice but to submit the drawings, whether they are subject to subsequent disclosure or not. Put another way, the information is "necessary" to the County only when it considers whether to issue a requested permit; and the County can readily compel the submission of the drawings, regardless of their MPIA status, by simply refusing to issue a permit if the drawings are not submitted.

In short, this is not a situation in which disclosure would cause "persons having necessary information . . . [to] decline to cooperate with officials". *National Parks & Conservation Ass'n v. Morton*, 498 F.2d at 767.

#### C. Likelihood of Competitive Injury

The other potential basis for nondisclosure under MPIA §3(c)(v) [SG §10-617(d)(2)] turns on the likelihood of substantial competitive injury to the submitter of the documents. We have found no cases, federal or State, that apply the competitive injury test to construction drawings of precisely the kind in question here. However, an analogous FOIA case does provide some guidance.

In *Air Line Pilots Ass'n v. FAA*, 552 F.Supp. 811 (D.D.C. 1982), some of the documents at issue were engineering drawings relating to the design of a passenger aircraft, which had been prepared and submitted to the government by the manufacturer:

"The representative engineering drawing . . . consists of three pages of blueprints portraying technical design information about, evidently, the aircraft's door assembly and thrust reverser mechanisms. The drawings demonstrate such things as the spatial relationship of the components, the types of parts used, the manner in which the various parts were attached, metallurgical specifications, manufacturing tolerances, and so on. The title block for each drawing includes the subject or title of the drawing, identification numbers for parts and revisions, the date of preparation, and the names of the officials involved in the preparation of the drawing." 552 F.Supp. at 813.

The court decided that these drawings were exempt from mandatory disclosure under the FOIA. "Disclosure of this information would give potential competitors . . . in the market for . . . replacement parts an unfair advantage", because the drawings would reveal the manufacturer's design "modifications" and "secrets". 552 F.Supp at 814-15. Cf. *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981) (design and engineering specifications exempt).

The principle of this case is applicable here. A construction drawing is exempt under §3(c)(v) [SG §10-617(d)(2)] to the extent that the drawing embodies a technique or a building component that (i) is not a common or obvious element of the type of construction in question and (ii) if disclosed, would give the competitors of the architect or engineer a concrete advantage in obtaining future work on that or a similar project.

Conversely, if a drawing merely reflects the routine practice of the profession, or if evidence of competitive injury is no more than unsupported speculation, the exemption may not be asserted. See *generally Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373 (2d Cir. 1977) (widely available information not exempt); *Miami Herald Publ. Co. v. SBA*, 670 F.2d 610 (5th Cir. 1982) ("unsupported speculation" about competitive injury insufficient).

As a practical matter, we question whether many construction drawings will be exempt under this test. It seems unlikely that construction projects very often entail unique know-how. Indeed, the profession itself does not view all such documents as necessarily confidential:

'[The American Institute of Architects] does not have an official policy on the confidentiality of drawings. . . . I am personally unaware of any other requirements of confidentiality within the profession but would suggest that each such case must be individually examined.' Letter from Alan B. Stover, General Counsel of the American Institute of Architects, to Jack Schwartz, Assistant Attorney General (January 25, 1984).<sup>3</sup>

Nevertheless, we certainly cannot rule out in advance the possibility of an exempt construction drawing.<sup>4</sup> We agree with the American Institute of Architects that "each case must be individually examined". Thus, when an MPIA request for access to construction drawings is received, we suggest that the custodian of the records should inform the person who submitted the drawings and solicit any evidence of unusual competitive sensitivity. See Attorney General's Office, *Public Information Act Manual* at 23 [34].

<sup>3</sup> On the other hand, the architects and engineers with whom the County deals apparently do regard all of their drawings to be confidential. Opinion of the County Solicitor No. 83-31, at 3. In any event, the confidential status of information within a trade or company is relevant to, but not determinative of, the information's status under the MPIA. See 63 *Opinions of the Attorney General* at 361.

<sup>4</sup> For example, a drawing might reveal the details of an innovative heating system and thereby permit competitively injurious copying by competitors. See 1 O'Reilly, *Federal Information Disclosure* §14.08 at 14-63 n. 53. In very rare situations, a drawing might even reveal a "trade secret" within the meaning of §3(c)(v) [SG §10-617(d)(1)]—for example, some details of an advanced production method in a manufacturing facility. Cf. note 2 above.

## Conclusion

### IV

In summary, it is our view that construction drawings submitted to Howard County as a prerequisite to issuance of a building permit are generally not exempt from mandatory disclosure under the Maryland Public Information Act. 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.<sup>5</sup>

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<sup>5</sup> By focusing on §3(c)(v) [SG §10-617(d)(2)], the most likely basis for withholding, we do not mean to suggest that other possible reasons for nondisclosure are absolutely foreclosed. If, in extraordinary circumstances, §3(c)(v) [SG §10-617(d)(2)] is inapplicable, but nevertheless "disclosure of the contents of [the drawing] would do substantial injury to the public interest", the "the official custodian may temporarily deny disclosure[,] pending a court determination", under the procedures set out in Article 76A, §3(e) [SG §10-619]. See Attorney General's Office, *Public Information Act Manual* at 28-29 [34-35].