



ALAN WILSON
ATTORNEY GENERAL

June 16, 2022

Mark W. Tollison, Esq.
County Attorney
Greenville County
County Square
301 University Ridge
Suite 2400
Greenville, South Carolina 29601-3681

Dear Mr. Tollison:

We received your request for an opinion of this Office concerning the disclosure of documents submitted by architects and engineers to Greenville County pursuant to requests made under the South Carolina Freedom of Information Act ("FOIA"). In your letter, you state as follows:

As part of the commercial building process, signed and sealed construction documents – including drawings, plans, and specifications – must be submitted to Greenville County that are in compliance with South Carolina architectural and engineering law. The South Carolina Freedom of Information Act ("FOIA") allows public bodies to exempt from disclosure certain business information that meets the definition of a trade secret.

As such, you ask

whether these signed and sealed construction documents are considered trade secrets, exempt from disclosure under FOIA as commercially valuable plans? Are there any other exemptions under FOIA that apply to these signed and sealed documents, such as matters specifically exempted from disclosure by statute or law? Can these documents be withheld until a Certificate of Occupancy has been issued, as the plans are frequently changed during the building process? Finally, can a requestor under FOIA make copies of these plans (in light of federal copyright laws) after they have been submitted to a local government in order to receive a building permit?

Law/Analysis

FOIA gives any person the right to inspect or copy "any public record of a public body." S.C. Code Ann. § 30-4-30(A)(1) (Supp. 2021). Our Court of Appeals described FOIA as follows:

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“South Carolina’s FOIA was designed to guarantee the public reasonable access to certain activities of the government.” Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). The FOIA creates an affirmative duty on the part of public bodies to disclose information. Bellamy, 305 S.C. at 295, 408 S.E.2d at 221; Campbell, 354 S.C. at 281, 580 S.E.2d at 166. The purpose of the FOIA is to protect the public by providing for the disclosure of information. Id. The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. Campbell, 354 S.C. at 281, 580 S.E.2d at 166.

Burton v. York Cnty. Sheriff’s Dep’t, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004). However, section 30-4-40 of the South Carolina Code (2007 & Supp. 2021) provides exemptions from disclosure under FOIA at the discretion of the public body. Included in these exemption is:

Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally recognized as confidential and work products, in whole or in part collected or produced for sale or resale, and paid subscriber information. Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, marine terminal service and nontariff agreements, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation.

S.C. Code Ann. § 30-4-40(a)(1) (2007).

In our research, we only found one South Carolina case discussing the trade secret exception under FOIA. In Campbell v. Marion County Hospital District, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003), the Court of Appeals addressed whether information pertaining to physician salaries and purchase prices of physician practices amounted to trade secrets such that a hospital district could refuse to disclose them. Acknowledging that South Carolina courts have not addressed the trade secret exemption, the Court looked to the federal FOIA exemption for trade secrets, noting that “trade secrets” was not defined in the statute, but cases interpreting it found a trade secret to be

a “secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” Center for Auto Safety v. National Hwy. Traffic Safety Admin., 244 F.3d 144, 150–51 (D.C.Cir.2001); Herrick v. Garvey, 298 F.3d 1184, 1190 (10th Cir.2002).

Id. at 285, 580 S.E.2d at 168. In addition, the Court of Appeals looked to the plain meaning of the term “trade secret.” Id. at 169, 580 S.E.2d at 286. The Court determined “[s]alaries, compensation, and purchase prices of practices do not constitute unpatented, secret, commercially valuable plans or processes used for making, preparing, or processing trade commodities obtained from a third party” or “work product collected for sale or resale or paid subscriber information” as described under section 30-4-40(a)(1). Id. at 285-86, 580 S.E.2d at 169. Because the hospital district marketed services, the Court also found this information does not include “‘feasibility, planning, and marketing studies, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation’” as described in section 30-4-40(a)(1). Id. at 286, 580 S.E.2d at 169 (quoting S.C. Code Ann. § 30-4-40(a)(1)). Moreover, the Court noted its belief that the Legislature “intended the ‘trade secret’ exemption to protect an organization’s studies or preparations in its quest to produce or sell its product or service to ‘potential customers,’ not in its internal quest to obtain employees.” Id. As such, the Court determined “[c]ompensation and salary information regarding physicians and the purchase price of physician practices indubitably do not meet this unambiguous definition.” Id.

Construction documents are not similar to information related to physician salaries and prices paid for physician practices. However, we believe a court would use a similar analysis to determine whether they are trade secrets. Thus, we first turn to the plain language used by the Legislature in section 30-4-40(a)(1). Initially, we do not believe a court would likely consider construction documents to be an appliance, formula, or process. However, because documents may contain plans and drawings that others may find valuable, a court may find them to be “commercially valuable plans.” In addition, we recognize certain drawings or plans could be considered work product “collected or produced for sale or resale.” Moreover, taking into account the legislative intent as described by the Court of Appeals, a court may also find that some construction documents are considered preparations in the contractor’s or architect’s quest to sell their services to potential customers. Thus, a court may very well find that particular construction documents meet the definition of a “trade secret” qualifying them as exempt under FOIA. However, in order to make this determination, a court must evaluate the facts surrounding the specific construction documents, which is beyond the scope of an opinion of this Office. Op. Att’y Gen., 1995 WL 803662 (S.C.A.G. May 19, 1995) (“[T]his Office has no jurisdiction or authority to undertake the determination of facts.”). Accordingly, we cannot opine as to whether a specific set of construction documents does or does not fall within the trade secret exemption from FOIA.

Nevertheless, we found other jurisdictions with similar exemptions found construction plans exempt from their open records laws. In a 2000 opinion, the Texas Attorney General found a contractor met a prima facie case for asserting that a city should withhold construction plans for a hotel under the trade secrets exemption from the Texas open records laws. Op. Att’y Gen., 2000 WL 33972765 (Tex. A.G. Apr. 7, 2000). The Texas Attorney General cited to six factors used in determining whether information qualifies as a trade secret as pronounced in the Restatement of Torts, which includes:

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. (quoting Restatement of Torts § 757 cmt. b (1939)). The Attorney General found the construction plans contained unique design features that were the result of contractor's years of experience in hotel design and only known to the designer, contractor, engineers, and consultants to the contractor. Id. Thus, the contractor established a "prima facie case that the construction plans constitute trade secrets which are confidential under section 552.110 of the Government Code." Id. Accordingly, the Attorney General concluded "the city must withhold the construction plans." Id. However, the Attorney General limited the opinion to these particular facts and noted it "must not be relied upon as a previous determination regarding any other records or any other circumstances." Id.

Similarly, the Pennsylvania Office of Open Records (the "OOR") considered whether elevations and floor plans for a residential home qualified as a trade secret exempting them from the Pennsylvania Right-to-Know Law. In the Matter of: Mr. Craig Maller v. West Manheim Township, 2009 WL 6503801 (Pa.Off.OpenRec. July 17, 2009). The OOR focused its inquiry on whether or not disclosure of the plans would cause economic harm to a party by allowing a third party to benefit economically from the disclosure of the documents. Ultimately, the OOR found the company who prepared the drawings had financial interest in the nondisclosure and reasonable steps were taken to maintain the secrecy of the drawings. Id. As such, the OOR ruled the town was not required to disclose the drawings. Id. See also, In the Matter of Kimberly Borland v. Wilkes-Barre Area School District, 2016 WL 3478934 (Pa.Off.OpenRec. Jun. 21, 2016) (denying the request for school building plans under the Pennsylvania open records laws due to the proprietary nature of the plans).

Both the Pennsylvania OOR's ruling and the Texas Attorney General's opinion focus on the value of the plans in the hands of their creator as well as their value in the hands of a third party in addition to the effort to maintain secrecy of the information. We believe our Legislature's use of the term "commercially valuable" to describe plans exempt from FOIA as trade secrets connote the same focus and therefore, we believe our courts would also focus on similar facts when determining whether the exemption applies. However, as we noted in numerous opinions, "this Office consistently advises public bodies with regard to FOIA that when in doubt, the body should disclose the information requested." Op. Att'y Gen., 2011 WL 1740747 (S.C.A.G. Apr. 29, 2011). In addition, as the Court of Appeals stated in Campbell, "we must all keep in mind that these exemptions allow the public body the ability to not disclose, the nondisclosure is not mandatory." 354 S.C. at 348, 594 S.E.2d at 893. Therefore, even if a public body finds information may be exempt as a trade secret, FOIA does not preclude the disclosure of such information. If a question exists as to whether the exemption applies, we advise the public body to disclose the information.

Next, you inquire as to whether there are any other exemptions under FOIA that apply to construction documents. As stated in section 30-4-30(A)(1), "[a] person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws" Other than the trade secret exemption provided for in section 30-4-40(a)(1) and as discussed above, we did not find a provision under section 30-4-40 exempting construction related documents from FOIA. Moreover, we are unaware of any other state or federal laws exempting the disclosure of construction related documents.

You also ask whether the disclosure of these documents can be withheld until the Certificate of Occupancy has been issued. Section 30-4-30(A)(1) provides the disclosure requirement shall be "in accordance with reasonable rules concerning time and place of access." Section 30-4-30(C) of the South Carolina Code (Supp. 2021) gives detailed requirements concerning when non-exempt records must be provided:

If the request is granted, the record must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the final determination was provided, unless the records are more than twenty-four months old, in which case the public body has no later than thirty-five calendar days from the date on which the final determination was provided. If a deposit as provided in subsection (B) is required by the public body, the record must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the deposit is received, unless the records are more than twenty-four months old, in which case the public body has no later than thirty-five calendar days from the date on which the deposit was received to fulfill the request. The full amount of the total cost must be paid at the time of the production of the request.

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Accordingly, we do not find any provision that specifically allows for a delay in providing construction documents until the issuance of a Certificate of Occupancy.

Lastly, you inquire as to whether, in light of federal copyright laws, a requestor can make copies of plans after they are submitted to a local government to obtain a building permit. In South Carolina, we only discovered one case pertaining to the interaction between our FOIA and federal copyright laws. In Seago v. Horry County, 378 S.C. 414, 663 S.E.2d 38 (2008), Horry County did not intend to restrict the disclosure of copyrighted material, but only sought to copyright the GIS mapping data it produced and regulate its reproduction. Id. In regard to FOIA, the Court stated:

The purpose of FOIA is satisfied once the public information is provided. It does not violate FOIA for a public entity to copyright specially-created digital data and to restrict subsequent commercial use as long as the information is provided initially to the requesting person or entity. If an entity is allowed to copyright the specially-created data, it is logical that the governmental entity should be allowed to enact ordinances to restrict further commercial dissemination of the information in order to protect the copyright. See 17 U.S.C.A. § 106 (2005) (providing that copyright holders have the exclusive right to allow certain uses, and thus impose subsequent use restrictions).

Id. at 424-25, 663 S.E.2d at 43. The Court further noted,

we agree with the master that FOIA and copyright law can be “read harmoniously” and that the Horry County ordinance allowing the licensing restrictions on further commercial dissemination of the GIS data does not violate FOIA. The ability to copyright specially-created data, as long as the public is given access to the public data, does not frustrate the purpose of FOIA.

Id. at 425, 663 S.E.2d at 44. As such, the Court concluded “[a]lthough Horry County could use its copyright to protect the GIS data from subsequent commercial distribution for profit, it may not refuse to honor the initial FOIA request.” Id. at 429, 663 S.E.2d at 46.

While Seago indicates South Carolina FOIA and federal copyright laws may be read in harmony with one another, because Horry County agreed to the initial disclosure of GIS data, it does not address whether federal copyright laws operate to exempt an initial disclosure under FOIA. While we did not find a South Carolina case addressing this issue, we are aware that federal courts have held in regard to federal FOIA, “the mere existence of copyright, by itself, does not automatically render FOIA inapplicable to materials that are clearly agency records.” Weisberg v. U.S. Dep’t of Just., 631 F.2d 824, 825 (D.C. Cir. 1980). Nonetheless, federal courts seem to consider copyrighted materials under Exemption 4 to federal FOIA, which shields from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential” 5 U.S.C. § 552(b)(4). The District Court for the District of Columbia recently described the interplay between federal FOIA and federal copyright laws as follows:

Indeed, while “[c]ase law analyzing the interaction between the Copyright Act and FOIA exemptions is sparse,” at least one court in this district has found that what exists indicates that “the only appropriate approach for protecting copyrighted documents under FOIA is through the application of Exemption 4.” Hooker v. Dep’t of Health & Hum. Servs., 887 F. Supp. 2d 40, 61 n.18 (D.D.C. 2012), *aff’d*, No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014); see also DEP’T OF JUST., FOIA Update: OIP Guidance: Copyrighted Materials and the FOIA (Jan. 1, 1983), <https://bit.ly/3GJhSHR> (“The only appropriate approach for protecting copyrighted documents under the FOIA is through the application of Exemption 4 Commercially valuable copyrighted works plainly pertain to commerce and thus logically satisfy this requirement of Exemption 4.”).

Naumes v. Dep’t of the Army, No. CV 21-1670 (JEB), 2022 WL 594541, at *6 (D.D.C. Feb. 28, 2022). That Court recognized the “routine release of copyrighted information through FOIA requests would undermine the market for the creator’s work in much the same way that the release of other types of commercial information could inflict competitive harm.” Id. It also determined

[t]here is no reason, however, that a party should be able to use FOIA as an end run around the protections afforded by copyright to access information it would otherwise have to pay for, nor should the Act be read to place agencies in the position of having to disclose information that could later lead to infringement suits. Cf. Rojas v. Fed. Aviation Admin., 989 F.3d 666, 689 (9th Cir. 2021) (Wardlaw, J., concurring), cert. denied, — U.S. —, 142 S. Ct. 753, 211 L.Ed.2d 472 (2022) (explaining that Congress has “amended FOIA when it wanted to stop the use of FOIA as an end run around discovery”) (citation and internal quotation marks omitted); BuzzFeed, Inc. v. Dep’t of Just., 419 F. Supp. 3d 69, 80 (D.D.C. 2019) (FOIA requester “should not be able to use FOIA to do an end-run around the disclosure lines Congress established in the Ethics in Government Act” regarding private financial information). There must thus be some circumstances in which Exemption 4 may provide a basis for withholding copyrighted materials because they are commercial, confidential information obtained from a person.

Id. at 8. Ultimately, the District Court determined the Army should confer with the copyright holders to determine whether they treat the materials as confidential in order to fully evaluate whether Exemption 4 applies to the materials. Id.

Other states have also considered the interaction between their open records laws and federal copyright laws. The Connecticut Supreme Court determined

to the extent that the act and the Copyright Act impose conflicting legal obligations, the Copyright Act is a “federal law” for purposes of the federal law

exemption. Accordingly, although the federal law exemption does not entirely exempt copyrighted public records from the act, it exempts them from copying provisions of the act that are inconsistent with federal copyright law.

Pictometry Int'l Corp. v. Freedom of Info. Comm'n, 307 Conn. 648, 673–74, 59 A.3d 172, 187 (2013). However, other attorneys general conclude federal copyright laws do not exempt otherwise disclosable materials from disclosure. See Ops. Att'y Gen., 1990 WL 482368 (HI A.G. June 12, 1990); 1998 WL 15038 (Mich. A.G. Jan. 16, 1998).

Section 30-4-30(A)(1) gives persons not only the right to inspect public records, but explicitly allows them to copy those records. While our courts have not specifically weighed in on whether federal copyright law would prohibit the copying of records subject to FOIA, federal courts and other jurisdictions do not automatically prohibit the copying of such records due to federal copyright laws. Rather, copyright protection is considered in determining whether this information is exempt from disclosure. Given the dicta in Seago, we believe our courts would likely err on the side of disclosure as the Court of Appeals reiterated that Horry County could not “refuse to honor the initial FOIA request.” 378 S.C. at 429, 663 S.E.2d at 46. Thus, we believe our courts would not automatically excuse disclosure due to federal copyright laws, but certainly would consider this as a factor in determining whether certain records are exempt from disclosure. Moreover, based on the Court of Appeals decision in Seago, we believe a court may also allow a public body to restrict commercial distribution of copyright material.

Conclusion

Based on the analysis provided above, we believe a court could find certain construction documents exempt from disclosure under FOIA as trade secrets. In analyzing whether particular documents fall under this exemption to FOIA, we believe a court would likely consider the commercial nature of the documents and whether disclosure would benefit a third party to the detriment of the document’s creator and whether the creator took steps to insure the confidentiality. These determinations require consideration of the facts pertaining to a particular document. As such, this Office is precluded from making such a determination in an opinion. Op. S.C. Atty. Gen., 1989 WL 406130 (April 3, 1989) (stating “because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions.”). Furthermore, while an exemption from FOIA may allow a public body to withhold certain records or parts of records, the public body is not under a duty to not disclose. As we reiterated in several opinions, this Office takes the position that “when in doubt, the body should disclose the information requested.” Op. Att’y Gen., 2011 WL 1740747 (S.C.A.G. Apr. 29, 2011).

Although we believe construction documents under certain circumstances may qualify as trade secrets exempt from disclosure under FOIA, we do not believe any other exemption under section 30-4-40 applies to construction documents. Furthermore, we are not aware of any other provision under state or federal law specifically prohibiting the disclosure of such documents.

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If construction documents must be disclosed, you also inquire as to whether disclosure may be delayed until after the Certificate of Occupancy is issued. Section 30-4-30(C) provides detailed requirements concerning when non-exempt records must be provided. We did not find any provision allowing for a delay in disclosure of construction documents until after a Certificate of Occupancy is issued.

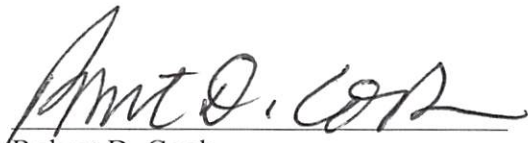
In regard to whether federal copyright law prohibits the copying of plans, we believe our courts would likely approach the interplay between South Carolina FOIA and federal copyright law similarly to federal courts and other jurisdictions. Thus, we believe our courts would find federal copyright law does not exempt records from disclosure, but may be considered in determining whether the records are exempt as trade secrets. Moreover, in regard to the reproduction of nonexempt materials, the Court of Appeals decision in Seago indicates a court may allow restrictions on the reproduction of copyright material for profit assuming the public body complied with the initial disclosure.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General