



# Protecting Your Company's Trade Secrets and Confidential Information in Government Contracting

*By*

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You just learned that your company has an opportunity to submit a bid in response to a request for proposals (RFP) issued by a government agency for the products or services offered by your company. The contract with the government agency has the potential to generate significant revenue and positive exposure for your company. Responding to the RFP presents an opportunity either to introduce your company as a new player in a developing market sector, or to solidify your company as the “go to” contractor for certain

products or services. In order to respond fully to the RFP, your company may, however, be required to disclose some of its most valuable intellectual property: trade secrets and confidential information. The significance of whether — and to what extent — to provide this information to a government agency requires careful consideration. Such information may be intentionally or inadvertently disclosed by a government agency to a third party, or may become the subject of a request for disclosure under applicable state or federal freedom of information laws.

In general, state and federal freedom of information statutes give any person the right to obtain government documents unless the documents (or portions thereof) are exempt from disclosure as specifically enumerated in the applicable statute. Information that is exempt from disclosure includes, for example, documents related to national security, government agency personnel rules and practices, trade secrets and confidential commercial and financial information. In the context of government contracting, freedom of information requests can be a useful tool to identify and harvest intelligence regarding your competitors' business, including previous bid proposals and existing public contracts. This tool is, however, double-edged because similar information and documents about your company, which are available in the public domain, may be equally accessible to your competitors.

Assuming that some degree of confidential information or limited aspects of a trade secret will be part of a response to the request for proposal (RFP), a company bidding for a public contract should be mindful of the actions that it takes both *before* and *after* disclosing such information. Planning ahead may minimize the risk that third parties, including your competitors, will obtain and use this information for their own competitive advantage — to the disadvantage of your company.

## Does Your Response Contain Trade Secret or Confidential Information?

Trade secrets are generally exempt from disclosure under state and federal freedom of information statutes. Although there is no uniform definition of what information constitutes a "trade secret" under federal and state law, a trade secret is generally regarded as:

1. information used in a company's business that is *not known or available to the public*,
2. information that provides the company with an *economic advantage over its competitors* in the marketplace, and
3. information that the company actively protects from disclosure through *reasonable efforts to maintain its status as a "secret."*

Some federal courts have adopted a more narrow definition of a trade secret, referring to it as "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



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product of either innovation or substantial effort." Although the most common example of a trade secret is the formula for Coca-Cola, other examples of trade secrets include:

- proprietary databases, business processes and methods,
- information pertaining to overhead, costs, pricing and margins,
- manufacturing processes,
- proprietary computer software programs, and
- strategic plans and marketing programs.

When in doubt, you may assess whether sensitive business information constitutes a "trade secret" based on the following six factors:

1. the extent to which the information is known outside of the company's business;
2. the extent to which the information is known by employees and others involved in the company's business;
3. the extent of the measures taken by the company to protect the secrecy of the information;
4. the value of the information both to the company and its competitors;
5. the amount of effort or money spent by the company to develop the information; and
6. the ease or difficulty with which the information could be lawfully acquired or duplicated by others.

Even if your company's information does not qualify as a "trade secret," you may be able to protect your information from disclosure by a government agency if the information is "confidential." Although there is no uniform definition of what constitutes "confidential" information, state and federal courts have a long track record of addressing this issue in response to challenges to a government agency's decision to withhold information from disclosure on the basis that the information is confidential either to the government agency or a government contractor. For example, under Exemption 4 in the federal Freedom of Information Act (FOIA), information that is not a trade secret may be exempt from disclosure provided that the information is commercial or financial, the information is obtained from a person and the information is privileged or confidential. Because virtually all information submitted by a business in response to a government agency's RFP is "commercial" in nature, and because individuals, partnerships, corporations and associations constitute "persons" under FOIA, courts have

routinely determined that companies easily satisfy the first two prongs of the exemption.

Thus, under FOIA and its state statutory counterparts, the question of whether a company's sensitive business information is exempt from disclosure usually focuses on whether the information is "confidential." In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the National Parks and Conservation Association sought disclosure of audits conducted by companies that operated concessions in national parks, as well as annual financial statements and other financial information that the concessionaires filed with National Park Service as a condition of their contractual right to operate concessions in national parks. The government agency refused to disclose the requested information based on the agency's determination that such information was "confidential" to its concessionaire-contractors. Although the appellate court remanded the matter for further proceedings in the trial court, the appellate court held that, where a government agency *requires* a company to disclose commercial or financial information, such information will be deemed

"confidential" and exempted from disclosure if disclosure of the information will "cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks*, 498 F.2d at 770 (emphasis added). In those instances in which a government contractor *voluntarily* submits confidential information to a government agency, such information is exempt from disclosure if it "is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

If a government agency *requires* you to disclose confidential information in a bid proposal, then the test of whether such information is exempt from disclosure is whether the disclosure of the information will cause substantial harm to your competitive position in the marketplace. If you *voluntarily* provide confidential information to a government agency in a bid proposal, however, then the test of whether such information is exempt from disclosure is governed by a far more *deferential* standard of whether, in the ordinary course of your business operations, you would not release the information to the public.

## A Case Study — *Canadian Commercial Corp. v. Department of the Air Force*

In January 2002, the Department of the Air Force (Air Force) issued a request for proposals to provide repair, maintenance and modification services on certain turbojet engines. As required by federal law, the request for proposals required a responder to include its pricing information in its proposal. Canadian Commercial Corporation (CCC) won the bid and entered into a three-year base contract, including four one-year options, with the Air Force. The contract incorporated by reference the line-item pricing information that CCC submitted in its proposal.

In September 2003, Sabreliner Corporation (Sabreliner), which submitted an unsuccessful bid for the same contract, filed a request under the Freedom of Information Act (FOIA) for a copy of the contract between CCC and the Air Force. Upon receipt, the Air Force notified CCC of Sabreliner's FOIA request and asked CCC to review the contract, identify whether the contract contains any trade secret, commercial or financial information, and provide the Air Force with an analysis of why the requested information was subject to an exemption from disclosure under FOIA. CCC objected in writing to the disclosure of any pricing information contained in the contract on the basis that such information constituted a trade secret. The Air Force rejected CCC's objection.

CCC filed a reverse-FOIA lawsuit and sought to enjoin disclosure of its trade secret or confidential information by the

Air Force. In *Canadian Commercial Corporation v. Department of the Air Force*, 442 F. Supp.2d 15 (D.D.C. 2006), aff'd, 514 F.3d 37 (D.C. Cir. 2008), the court reversed the decision of the Air Force. The district court concluded that the Air Force's determination that CCC would not be harmed by the release of its line-item pricing information was "arbitrary and capricious," and enjoined the Air Force from disclosing CCC's trade secrets. The Court of Appeals for the District of Columbia Circuit affirmed the district court and expressly held that "[c]onstituent or line-item pricing information in a Government contract falls within Exemption 4 of the FOIA if its disclosure 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.'" The Air Force unsuccessfully argued, among other such contentions, that CCC would not be harmed by disclosure of its line-item pricing because the Air Force was "not likely" to switch contractors during the contract's option years due to the fact that switching contractors would entail significant transaction costs. The court determined that CCC had demonstrated that a release of its line-item pricing information would cause it substantial competitive harm with respect to any bid for the option years on the contract because competitors would be able to use the information to their advantage by developing lower bids.

## What Are the Risks of Disclosure to a Government Agency?

While identifying the risks associated with the disclosure of trade secrets and confidential information to a government agency may be fairly straightforward, actually assessing the impact of these risks may be more difficult. By far, the most significant risk is that, by disclosing a trade secret to a government agency (which is, by definition, outside the company), the information will lose its status as a “trade secret.” Put simply, what was once “secret” is no longer. Although there are certain protective measures in place to prevent a government agency from disclosing your trade secrets to third parties irrespective of whether your company ultimately secures the government contract, you may have difficulty enforcing your company’s trade secrets in an unrelated dispute if the opposition discovers that you voluntarily placed this information in the public domain.

Although less likely, your company runs the risk that the government agency may intentionally disclose your trade secrets to another government agency or third party, either of which threatens your information with a loss of its “trade secret” status. The federal Trade Secrets Act, 18 U.S.C. § 1905, reduces the likelihood that a federal government agency would intentionally disclose your company’s trade secrets to a third party because it makes an intentional disclosure a crime that is punishable by a fine, imprisonment and/or loss of employment. If the disclosure of your company’s trade secrets by a government agency constitutes a crime, then it is unlikely that your company’s information would lose its “trade secret” status.

## Checklist for Protecting Your Trade Secret and Confidential Information from Public Disclosure:

1. In addition to carefully reviewing a request for proposal for specific guidance, familiarize yourself with the applicable freedom of information statutes and regulations before you submit your proposal.
2. Use the procurement process to clarify what specific information should be submitted to a government agency and whether, if at all, the agency will protect your information from subsequent disclosure.
3. Disclose only as much information as necessary to respond fully to the request for proposals.
4. Promptly respond to government agency notices that a third-party has requested disclosure of your trade secret or confidential information; and
5. Be prepared to file a lawsuit to protect your rights.

Given that the **timeframe for rendering a decision about whether a government agency will withhold information from disclosure is strikingly short**, a **company** whose trade secret or **confidential information** has been requested should be prepared to **file a lawsuit seeking** to enjoin disclosure of its trade secret or **confidential information** if the government agency **ultimately decides** that it will disclose the information.

The *inadvertent* disclosure of your company’s trade secrets or confidential information by a government agency is not, however, merely a theoretical concern because, in the first instance, the responsibility of determining whether requested information is exempt from disclosure usually resides with the government employee charged with responding to a freedom of information request. In this regard, you should attempt to determine whether a government agency is required to provide notice to its contractors upon receipt of a request for information before the agency makes any disclosure.

For example, New Jersey’s Open Public Records Act provides a state agency’s custodian of records with exclusive responsibility for determining whether a requested record contains trade secret or confidential information. If the record custodian determines that a record contains proprietary information, then the law requires the record custodian to “delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” New Jersey’s Open Public Records Act does not require any notice to the company whose trade secret or confidential information is the subject of a request for disclosure.

On the other hand, Pennsylvania’s Right-to-Know Law requires a state agency to notify a company of a request to disclose trade secret or confidential information within five

business days of receipt of the request by a state agency, provided that the company designated the information as a trade secret or confidential when it initially provided the information to the state agency. The company then has five business days to provide the state agency with the company's position concerning disclosure of its information. Within 10 days of the date provided, notice of the request to the company and the state agency is required to deny the request or release the information. Similarly, under New York's Freedom of Information Law, a state agency is required to notify a company who provided trade secrets or confidential information to a state agency (and appropriately designated the information as such) that a request for the information has been received. A company has 10 business days to respond to the state agency by explaining why the information should be exempt from disclosure. Within seven days of its receipt of the company's response, the state agency must issue a written decision concerning whether it will or will not exempt the company's information from disclosure. Whether and to what extent your company may appeal an adverse decision by a government agency varies from state to state.

Other states provide similar protection. The Texas Public Information Act requires a state agency to make a "good faith effort" to notify a company whose proprietary interests may be affected by a request for information within 10 business days of the state agency's receipt of the request. Under the Mississippi Public Records Act, a state agency will not disclose records that contain trade secrets or confidential information until it gives notice to the company whose proprietary information had been requested. After waiting a "reasonable" period of time, the state agency will disclose the records unless the company provides the state agency with a court order that protects the records as confidential.

Given that the timeframe for rendering a decision about whether a government agency will withhold information from disclosure is strikingly short, a company whose trade secret or confidential information has been requested should be prepared to file a lawsuit seeking to enjoin disclosure of its trade secret or confidential information if the government agency ultimately decides that it will disclose the information.

## How Can You Minimize Your Risk?

There are several protective measures that your company should consider and implement — both before and after you respond to a government agency's RFP — in order to protect your company's trade secret and confidential information. Nonetheless, the fact remains that, as a practical matter, the disclosure of trade secret and confidential information to a government agency carries a certain degree of inherent risk. If the risk of disclosure to a competitor

outweighs the benefit of disclosure to the government agency, then you should consider omitting any trade secret or confidential information from your proposal.

Before you respond to an RFP, you should familiarize yourself with the applicable freedom of information statute and regulations so that you know what is required to maximize the protection of your trade secret or confidential information. You should also attempt to ascertain what electronic or physical safeguards, if any, a government agency has in place, or available, to protect the confidentiality of your information. In this regard, during the procurement process and before the submissions of written proposals, there is often an opportunity to submit to the procuring agency questions in writing, or ask questions at a bidders' conference, that can address or clarify what information must be submitted and how, if at all, it will be protected from subsequent disclosure. You also may want to request that the government agency enter into a non-disclosure agreement before you submit your proposal. During the "diligence" phase, you should advise your sales personnel to be on the lookout for third party consultants retained by the government agency to assist with the RFP and the evaluation of proposals. Such third party consultants may have a confidentiality obligation that runs in favor of the government, but does not protect bidders. Where possible, you should consider entering into a confidentiality agreement with the third party consultant before you submit your bid.

Whenever possible, you should attempt to reach an understanding with a government agency that, as part of

## List of Additional Resources

1. Freedom of Information Act, 5 U.S.C. § 552, *et seq.*
2. California Public Records Act, Gov't Code § 6250, *et seq.*
3. Mississippi Public Records Act, § 25-61-1, *et seq.*
4. Pennsylvania Right-to-Know Law, 65 P.S. § 67.101, *et seq.*
5. New Jersey Open Public Records Act, N.J.S. § 48:1A-1, *et seq.*
6. New York Freedom of Information Law, NY CLS Pub 0 § 84, *et seq.*
7. Texas Public Information Act, Gov't Code § 552, *et seq.*
8. United States Department of Justice, FOIA Guide [www.usdoj.gov/oip/foia\\_guide07.htm](http://www.usdoj.gov/oip/foia_guide07.htm).
9. Theresa Costonis, *What Constitutes Commercial or Financial Information, Exclusive of Trade Secrets, Exempt from Disclosure Under State Freedom of Information Acts*, 8 A.L.R.6th 117.
10. The FOIA Blog — Everything FOIA and Government Disclosure <http://thefoialblog.typepad.com/>.

responding to an RFP, your company is *voluntarily* submitting trade secret or confidential information. In the event of a challenge to the reasonableness of an agency decision to withhold your trade secret or confidential information from disclosure, the fact that your company *voluntarily* provided the information will likely subject the information at issue to the highly deferential and protective standard articulated by the court in *Critical Mass*.

In addition to reviewing carefully the RFP and applicable procurement regulations for specific guidance, your company's proposal should only disclose as much sensitive information as necessary to respond to the request. You should designate each page of your proposal that contains trade secret or confidential information with an appropriate legend that states that the information is a trade secret or confidential and not subject to disclosure under any federal or state freedom of information law or regulation. Whether in a bid proposal or in separate written correspondence, you should also request prompt written notice of any request for disclosure of your company's trade secret or confidential information, as well as the maximum amount of time available under the applicable statute to object in writing to any disclosure of such information. If your company employs a widely dispersed sales force, and your sales personnel submit

proposals directly to the government agency, then you should consider advising your sales personnel to include in the proposal a centralized address for the receipt of notices from the government agency so that appropriate action can be taken by your company, if necessary.

After you submit your proposal, you should respond promptly to any notices from the government agency concerning requests for disclosure of your trade secrets or confidential information. Your response should clearly and concisely articulate the harm that would result if the government agency disclosed your sensitive information. Finally, you should be prepared to protect your rights by filing a lawsuit to enjoin the disclosure of your trade secrets or confidential information.

### Common Sense Safeguards

There is no question that if a competitor gets its hands on your trade secret or confidential information then the harm would be immeasurable. Because contracting with the government is a business reality, we have outlined common sense safeguards and practical strategies that your company may consider in order to protect its trade secrets and confidential information. 

Have a comment on this article? Email [editorinchief@acc.com](mailto:editorinchief@acc.com).

## ACC Extras on...Protecting Trade Secrets

### ACC Docket

- *Making a Federal Case Out of Employee Theft of Trade Secrets* (Oct. 2008). Your company hires an employee away from a competitor. Her old company could claim that she emailed herself confidential, proprietary and trade secret information, and subpoena your company's computers. This article explores how in-house attorneys should respond while protecting their company's confidential information. [www.acc.com/docket/tradesec\\_oct08](http://www.acc.com/docket/tradesec_oct08)
- *Keeping Secrets: Developing Confidentiality Systems* (Oct. 2006). This article lays out what you need to know about trade secrets and confidential information laws. [www.acc.com/docket/confidsys\\_oct06](http://www.acc.com/docket/confidsys_oct06)
- *Trade Secrets and Corporate Espionage: Protecting Your Company's Crown Jewels* (April 2004). About 85 percent of all corporate espionage incidents involve current or past employees. Use this article to implement your battle plan. [www.acc.com/docket/tsec\\_apr04](http://www.acc.com/docket/tsec_apr04)

### Quick Reference

- *Top Ten Questions (and Answers) for Protecting Your Company's Trade Secrets* (May 2008). Read the 10 key

questions and their answers to help you understand why trade secrets are important to your company and why you need to take steps to protect them.

[www.acc.com/quickref/top10\\_may08](http://www.acc.com/quickref/top10_may08)

- *Kroll's Key Takeaways on Brand Protection for Corporate Counsel* (Oct. 2008). Learn how a brand is at risk, the definition of proactive brand protection and the do's and don'ts of enforcing brand protection in developing economies. [www.acc.com/quickref/krolls\\_oct08](http://www.acc.com/quickref/krolls_oct08)

### Program Material

- *Demystifying Trade Secrets: How to Identify and Protect Them* (Oct. 2008). This panel reviews the basics of trade secrets and the practical steps in-house attorneys should take to protect them — and educate company personnel on how to safeguard them as well. [www.acc.com/demys/tsec\\_oct08](http://www.acc.com/demys/tsec_oct08)

ACC has more material on this subject on our website. Visit [www.acc.com](http://www.acc.com), where you can browse our resources by practice area or use our search to find documents by keyword.