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OPINION	:	No. 84-803
	:	
of	:	<u>JANUARY 16, 1985</u>
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THE HONORABLE DOUGLAS V. MEWHINNEY, DISTRICT ATTORNEY, COUNTY OF CALAVERAS, has requested an opinion on the following question:

Are pre-qualification financial statements requested and received by a county in confidence from potential bidders on a county contract for refuse disposal open to public inspection when they are examined by a committee of the board of supervisors at a meeting subject to the Brown Act, where the privilege of non-disclosure was claimed prior to such meeting in the manner prescribed by law?

CONCLUSION

Pre-qualification financial statements requested and received by a county in confidence from potential bidders on a county contract for refuse disposal are not open to public inspection when they are examined by a committee of the board of supervisors at a

meeting subject to the Brown Act, where the privilege of non-disclosure was claimed prior to such meeting in the manner prescribed by law.

ANALYSIS

As an essential part of the state's comprehensive program for solid waste management and resource recovery, a county is authorized to provide for the furnishing of solid waste handling services by contract, with or without competitive bidding, under such terms and conditions as are prescribed by the county board of supervisors. (Gov. Code, §§ 66755-66757.)¹ Specifically, section 66757 provides:

"Notwithstanding any other provision of law, each county, city and county, city, special district, or other local governmental agency may determine all of the following:

"(a) Aspects of solid waste handling which are of local concern including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, nature, location, and extent of providing solid waste handling services.

"(b) Whether such services are to be provided by means of nonexclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding, or, if in the opinion of its governing body, the public health, safety and well-being so require, by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding. Such authority to provide solid waste handling services may be granted under such terms and conditions as are prescribed by the governing body of the local governmental agency by resolution or ordinance.

"(c) (Emphases added.)

While the State Contract Act expressly provides, in the case of state contracts, that prospective bidders may be required to answer questions contained in a standard form of questionnaire and financial statement including a complete statement of financial ability and experience in performing public works (Pub. Cont. Code, § 10160), and further that such questionnaires and financial statements are not public records and are not open to public inspection (Pub. Cont. Code, § 10165), and while no corresponding provision may be found with respect to contracting by counties (cf. Pub. Cont. Code,

¹ Hereinafter, all undesignated section references are to the Government Code.

§§ 20120-20150.14, & 21000 et seq.), such a requirement might surely fall within "such terms and conditions as are prescribed" by a county board of supervisors. (See § 66757, subd. (b), *supra*.) The present inquiry is whether such pre-qualification financial statements requested and received by a county in confidence from potential bidders on a county contract for refuse disposal are open to public inspection when they are examined by a committee of the board of supervisors at a meeting subject to the Brown Act, where the privilege of non-disclosure was claimed prior to such meeting in the manner prescribed by law. It has been urged that the confidentiality of such financial statements may be prescribed, under the express provisions of section 66757, subdivision (b), by the county as part of the terms and conditions under which the authority to provide solid waste handling services is granted, "[n]otwithstanding any other provision of law." In any event, we predicate our conclusion upon the statutes pertaining to disclosure of documents considered at "a meeting subject to the Brown Act" as posited by the inquiry.

It is the function of the committee in question to review the financial statements and to make recommendations with respect thereto to the county public works department. For purposes of this analysis it will be assumed, in accordance with the premises of the inquiry, that the committee is a "legislative body" within the purview of sections 54952-54952.5. Section 54957.5, subdivision (a), provides:

"Notwithstanding Section 6255 or any other provision of law, agendas of public meetings and other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by a member, officer, employee, or agent of such body for discussion or consideration at a public meeting of such body, are public records under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1) as soon as distributed, and shall be made available pursuant to Sections 6253 and 6256. However, this section shall not include any writing exempt from public disclosure under Section 6253.5, 6254, or 6254.7."

Again, for purposes of the inquiry presented, we do not unduly extend this analysis to encompass issues not presented for consideration; it is assumed that the inquiry concerns writings, i.e., financial statements, which are distributed to all, or a majority of all, of the members of a legislative body of a local agency by a member, officer, employee, or agent of such body for discussion or consideration at a public meeting of such body. Such writings are, under the express terms of section 54957.5, *supra*, public records under the California Public Records Act which must be made available pursuant to sections 6253²

² Section 6253, subdivision (a), provides:

and 6256.³ This is true notwithstanding section 6255⁴ or any other provisions of law, but subject to the exemptions provided under sections 6253.5, 6254, or 6254.7.

Section 6253.5 pertains to the inspection of election petitions and is not relevant to this discourse. Section 6254.7, subdivision (d), concerns trade secrets, including a "compilation of information," which must, however, be used "to fabricate, produce, or compound an article of trade or a service having commercial value" In any event, we predicate our conclusion upon section 6254 which provides in pertinent part as follows:

"Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

".

"(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

".

"(k) Records of the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. [⁵]

"Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. . . "

³ Section 6256 provides:

"Any person may receive a copy of any identifiable public record or copy thereof. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency.

"Each agency, upon any request for a copy of records shall determine within 10 days after the receipt of such request whether to comply with the request and shall immediately notify the person making the request of such determination and the reasons therefor."

⁴ Section 6255 provides:

"The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

⁵ Such provisions of the Evidence Code include the following:

".....

"(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish his personal qualification for the license, certificate, or permit applied for.

".....

"Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

"....."

In *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, a waste disposal company had entered into a long term contract with a city to collect waste. The company proposed and the city granted a substantial rate increase. A newspaper sought access to financial reports concerning the current year of operations which were

" 1040.

"(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

"(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

"(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

"(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

" 1060.

"If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice."

submitted by the company and used by the city as its basis for granting the petition, thus increasing the costs of services payable by the public. The court first determined, citing our opinion 58 Ops.Cal.Atty.Gen. 629, 633-634 (1975), that such reports were public records within the meaning of section 6252, subdivision (d). (*San Gabriel Tribune v. Superior Court, supra*, at 774-775.)

With respect to subdivision (k) of section 6254, *supra*, which incorporates Evidence Code section 1040 (fn. 5, *ante*), no showing had been made that disclosure was prohibited by state or federal law, that the company would be injured by disclosure,⁶ or that disclosure was against the public interest. (*Id.*, at 776.) Nor were the assurances of confidentiality by the city sufficient to convert what was a public record into a private record. (*Id.*, at 775, 776; *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 909; *Johnson v. Winter* (1982) 127 Cal.App.3d 435, 439; cf., 58 Ops.Cal.Atty.Gen., *supra*, 636.)

With respect to subdivision (c) of section 6254, *supra*, the court observed that a writing which would otherwise qualify for exemption⁷ lost its exempt status when the city announced that such writing provided the basis for its determination. (*San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d at 777-778.)⁸

The court further determined that subdivision (n), pertaining to applications for licensure, did not apply. (*Id.*, at 779-780.) With regard to section 6255 the court stated (*id.*, at 780):

"We are mindful that respondents may have legitimate privacy interests to protect, yet, the interests on the part of the City in not chilling

⁶ The court noted in this regard that "public interest" for purposes of Evidence Code section 1040, subdivision (b)(2) may not be established by reference to the privacy interests of a private contractor. (*Id.*, at 777.)

⁷ We have previously observed that the information protected under subdivision (c) includes financial data. (67 Ops.Cal.Atty.Gen. 414, 418 (1984).)

⁸ The court did not consider whether subdivision (c), exempting from mandatory disclosure information which would constitute an unwarranted invasion of *personal* privacy, would otherwise apply to the records of a corporate or other business organization. (Cf. *National Parks and Conservation Ass'n. v. Kleppe* (1976) 547 F.2d 673, 685.)

Nor did the court discuss the possible meaning or effect upon its analysis of the constitutional right of privacy (Cal. Const., art. I, § 1). Inasmuch as we conclude on purely statutory grounds that such writings are not subject to disclosure, and in the absence of further inquiry as to whether such writings *may* be disclosed (§§ 6254, *supra*; 6253.1), we do not consider the privacy provision of the California Constitution (cf. 67 Ops.Cal.Atty.Gen. 414, *supra*).

future information-gathering abilities in business transactions, and on the part of the Disposal Company in jeopardizing competitive advantages, does not outweigh the public's need to be informed of the provision of governmental services contracted on behalf of the residents."

The present inquiry differs significantly from that in *San Gabriel* in that it concerns the financial statement of each business enterprise submitting such a statement without regard to any existing contractual relationship. The circumstances here are more analogous to those which were the subject of our opinion in 58 Ops.Cal.Atty.Gen. 371 (1975). It was there determined that the financial status of a prepaid health plan negotiating a proposed contract with the State Department of Health was exempt under sections 6254, subdivision (k), and 6255, based on the commercial nature of the information that would be vulnerable to appropriation by a competitor, and the chilling effect that disclosure could have on the future development of such plans. The court in *San Gabriel* expressly distinguished the opinion on the basis that the City of West Covina was not concerned with a *proposed* contract but with an existing contractual relationship of more than 20 years. (*Id.*, at 776-777.)

Evidence Code section 1040, which must be considered in relationship with section 6254, subdivision (k), requires a balancing of respective interests to determine whether "there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice" (See *Register Div. of Freedom Newspapers, Inc. v. County of Orange, supra*, 158 Cal.App.3d at 905.) Similarly, section 6255 requires a balancing of respective interests to determine whether ". . . on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." While, under the provisions of section 54957.5, a writing, under the circumstances indicated, must be made available "[n]otwithstanding section 6255 or any other provisions of law," the same balancing test is prescribed under section 1040 of the Evidence Code.⁹

In our view, the distinction suggested by the court in *San Gabriel* between proposed and existing contracts is significant. Perhaps equally significant is the fact that the contract in that case was a long term virtual monopoly respecting a public service.

⁹ Another privilege which would fall within the scope of subdivision (k) of section 6254 may be claimed and imposed upon others by the owner of a trade secret. (Evid. Code, § 1060, fn. 5, *ante*; *California School Employees Assn. v. Sunnyvale Elementary School Dist.* (1973) 36 Cal.App.3d 46, 66.) While the concept of "trade secret" may be broader than that envisioned in section 6254.7, subdivision (d) (cf. *Uribe v. Howie* (1971) 19 Cal.App.3d 194, 206-208), and may extend to financial statements (cf. *San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d at 776), we predicate our conclusion herein on alternative premises.

Competitive advantage was not a tantamount concern. By way of comparison, the issue in *National Parks and Conservation Ass'n. v. Kleppe, supra*, 547 F.2d 673 was whether title 5, United States Code, section 552(b)4, providing for the exemption from disclosure under the federal Freedom of Information Act of "trade secrets and commercial or financial information obtained from a person and privileged or confidential . . .," exempted the federal agency from disclosing financial records filed by national park concessionaires. The court observed initially (*id.*, at 679):

"The preponderance of the evidence indicates . . . that there is competition respecting the renewal of concession agreements as well as competition for the tourist dollar. There is competition between concessioners within parks, and there is competition between concessioners and businesses located nearby the parks, by which visitors must pass on the way to the parks. In addition, there is competition within the parks between the concessioners and businesses operating on privately owned land within the parks."

The court considered, in light of the comprehensive nature of the financial records sought to be disclosed, the probability of substantial harm to the concessioners' competitive positions to be "virtually axiomatic" (*id.*, 684):

"Disclosure would provide competitors with valuable insights into the operational strengths and weaknesses of a concessioner, while the non-concessioners could continue in the customary manner of 'playing their cards close to their chest.' Selective pricing, market concentration, expansion plans and possible take-over bids would be facilitated by knowledge of the financial information the Association seeks. Suppliers, contractors, labor unions and creditors, too, could use such information to bargain for higher prices, wages or interest rates, while the concessioner's unregulated competitors would not be similarly exposed. Appellees' experienced witness described each schedule of the Concessioner Annual Report and explained how competitors would use this information to the detriment of the concessioners."

With respect to pre-qualification financial statements from potential bidders, a court would probably hold, subject, of course, to the limitless variety of extraneous circumstances which might appear in a given case, that the interests on the part of the local agency in not chilling future information-gathering ability in prospective contractual relationships, and on the part of each enterprise in protecting its legitimate privacy interests as well as in the preservation of its undisclosed competitive advantages, would outweigh the public's need to be informed with regard to the contents of such financial statements.

Finally, the court in *San Gabriel* observed, as previously noted in connection with its discussion of subdivision (c) of section 6254, that the exemption therein provided was lost once the financial data "was used not only to support but to justify the rate increase." (*Id.*, at 781; citing *American Mail Line, Ltd. v. Gulick* (D.C. Cir. 1969) 411 F.2d 696, 703; and see *Register Div. of Freedom Newspapers, Inc. v. County of Orange*, *supra*, 158 Cal.App.3d at 902-903.) Moreover, it was noted that "voluntary entry into the public sphere diminishes one's privacy interests." (*San Gabriel Tribune v. Superior Court*, *supra*, 143 Cal.App.3d at 781; citing *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 36.) It is doubtful that the submission of a pre-qualification financial statement could be deemed such an entry into the public domain as to constitute a general waiver of the right of privacy in financial matters. Nor may it be similarly declared that the data contained in each or any of such statements was used to support and justify an ultimate decision by the county respecting a contract.

It is concluded that pre-qualification financial statements requested and received by a county in confidence from potential bidders on a county contract for refuse disposal are not open to public inspection when they are examined by a committee of the board of supervisors at a meeting subject to the Brown Act, where the privilege of non-disclosure was claimed prior to such meeting in the manner prescribed by law.
