



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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July 31, 2008

Peter Korn
Portland Tribune
6605 SE Lake Road
Portland, OR 97222

John S. Thomas
Deputy County Attorney
501 SE Hawthorne
Portland, OR 97214

Re: Petition of Peter Korn on behalf of the Portland Tribune received July 22, 2008
to disclose certain records of Multnomah County

Dear Mr. Korn and Mr. Thomas:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Peter Korn requests the District Attorney to order Multnomah County to provide copies of the following records:

[A]n un-redacted copy of an unsolicited proposal the county received in 2005 from the Bechtel Infrastructure Corporation titled, "A private-public Partnership for Rapid Replacement of the Sellwood Bridge."

Petitioner requested the materials by email from Althea Milechman, County Public Affairs Manager, on June 19, 2008. Shawn Cunningham responded for the department in a June 25, 2008 email. Mr. Cunningham indicated that all copies of the unsolicited bid were reviewed and returned to Bechtel after it was determined not to act further on it. In a June 27, 2008 email, Mr. Cunningham related that it had come to his attention that "not all copies of the proposal were returned to Bechtel" and that a redacted copy was available to petitioner. The County claimed exemption for the redacted portion under ORS 192.502(4), Confidential Submissions.

In his petition, Mr. Korn argued that the public would benefit from knowing what the Bechtel proposal contained. "This document will assist the public in taking an active role as decisions are made on the Sellwood Bridge replacement. It will provide some basis for comparisons as future proposals are given consideration."

Petitioner contended that disclosure was required in the public interest to facilitate understanding of how public business is conducted and how government operates. Petitioner argued in his petition that [e]ncouraging more dealings that will never see the light of day does not encourage good government.”

In response to the petition, Deputy County Attorney John Thomas continued to maintain that the information was exempt as a confidential submission. He provided a copy of the “Procedure for Receipt and Award of Contracts Pursuant to Unsolicited Proposals for Public-Private Partnership Infrastructure Projects” adopted by the Multnomah County Commission on April 20, 2005. According to Mr. Thomas, the procedure was put in place in anticipation of the Bechtel proposal. The language borrowed heavily from a similar procedure adopted by Tri-Met.

The County represented that Bechtel’s proposal was “expressly submitted in confidence” and included a “complete description of the proposed project including financing, risk allocation, implementation plan and so on.” The proposal was not required to be submitted by law, was the type of information that would be considered confidential, and was received with a commitment of confidentiality. According to Mr. Thomas, the bid was not solicited by the County.

Petitioner and Executive Editor Mark Garber provided this office with additional arguments directed at the concept of “unsolicited bids” and whether the County actually promised not to disclose the information. Mr. Garber noted the inconsistency of this “secret process” with the traditional public process for bids. At our request, Deputy County Attorney Thomas investigated the circumstances of the failure to return a copy of Bechtel’s bid. Mr. Thomas determined that retention of the proposal was inadvertent. It is the intent of Mr. Thomas to return the documents to Bechtel if the County is not required to disclose the documents in this records petition.

DISCUSSION

I. Confidential Submissions

ORS 192.502(4) exempts:

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

As stated in the Attorney General’s Public Records and Meetings Manual, 2008, p. 74-75, there are “no less than five conditions that must be met” for the exemption to apply:

1. The informant must have submitted the information on the condition that the information would be kept confidential.
2. The informant must not have been required by law to provide the information.
3. The information itself must be of a nature that reasonably should be kept confidential.
4. The public body must show that it has obligated itself in *good faith* not to disclose the information.
5. Disclosure of the information must cause harm to the public interest.

The representations of Deputy City Attorney Thomas together with the procedures established to receive unsolicited bids clearly establishes that the first four conditions have been met. Petitioner's principle disagreement is with the County policy. The process implemented by the County in anticipation of unsolicited bids may or may not serve a public purpose. That, however, is not the issue here.

An analysis of the "public Interest" must, of necessity, depend on the particular circumstances of a records petition. Retention of an unsolicited bid (or bids) could in a given case create the perception of secret arrangements and lead to speculation on the fairness of any subsequent public process on a major infrastructure project such as a replacement bridge. The public interest is never served when an environment exists for backroom deals.

There is no indication the County is not acting with the best interests of its constituents in mind. The procedure for unsolicited bids includes the requirement that all copies of the bid should be returned to the bidder. Unfortunately, that was not done in this case. Arguably, the Bechtel proposal is not even a public record because it was not intentionally "retained" by the County. See ORS 192.410(4)(a). The commitment of the County to return the proposal diminishes the significance of petitioner's argument. Disclosure now would not serve the public interest.

ORDER

Accordingly, it is ordered that the petition of Peter Korn on behalf of the Portland Tribune for the production of records of Multnomah County is denied.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon