

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

In the Matter :
of :
the Petition of ALBANY CUSTOM FLOORS, :
INC., :
Petitioner, :
-against- :
JAMES C. O'SHEA, Commissioner of the :
OFFICE OF GENERAL SERVICES of the :
STATE OF NEW YORK, :
Respondent, :
to review a determination in the :
matter of access to public records. :

(Supreme Court, Albany County Special Term Part I,
October 22, 1976. Calendar No. 37)

(JUSTICE GEORGE L. COBB PRESIDING)

APPEARANCES:

Harvey M. Lifset, for petitioner.

Louis J. Lefkowitz, Attorney-General
(Donald P. Hirshorn and Thomas Mead
Santoro of counsel), for respondent.

COBB, J.

In this article 78 proceeding, the petitioner challenges the refusal of the respondent Commissioner to permit it to inspect the list of the retail customers of Northern Floor Coverings, Inc. (hereinafter "Northern") which Northern furnished to the respondent.

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Northern and the petitioner each sell carpeting and each submitted, respectively, the lowest and the next lowest bid to the respondent for furnishing certain carpeting to the State pursuant to specifications of the respondent which included the requirement that each bidder "shall have a permanent place of business from which carpet is sold to the public * * * ". After petitioner had protested to the respondent that Northern had not met the quoted requirement, respondent requested and received from Northern a list of approximately 184 customers of Northern, which list Northern had marked "confidential". After respondent had determined that neither the said list nor the on-site inspections of Northern's facilities it had conducted conclusively established that Northern had met the said requirement, respondent solicited an affidavit from Northern which, to the extent here pertinent, merely recited in conclusory terms that Northern had a permanent place of business from which carpeting was sold to the public. Thereafter, in reliance upon that affidavit, respondent awarded the bid to Northern.

Petitioner asked the respondent to furnish a copy of the said customer list to it and although respondent did furnish a copy of Northern's said affidavit, he would not release the customer list upon the ground that the said list was exempt from disclosure pursuant to section 88 (subd. 3, pars. a, d, e) of the Public Officers Law. Petitioner thereupon instituted this proceeding to compel that disclosure.

Since section 174 of the State Finance Law says, in part, that "[e]ach bid with the name of the bidder shall be entered of record and each record * * * shall be open to public inspection", it is at least arguable that the said customer list is discoverable because it was a part of Northern's public bid. If this be so, the last cited exemption provisions of section 88 of the Public Officers Law may not be applied to limit that discoverability because section 88 (subd. 10) of the Public Officers Law states expressly that "[n]othing in this article shall be construed to limit or abridge any existing right of access at law or in equity of any party to public records kept by any agency or municipality". However, if it be that said customer list was not a part of Northern's public bid, then respondent's counsel is correct when he states that the issue in this case is whether or not the exemption provisions of the last cited statute would insulate this list from public disclosure.

Section 88 (subds. 3, 7) of the Public Officers Law, among other things, exempts from public disclosure (1) personal matters which have been reported in confidence to an agency and which are not relevant or essential to the ordinary work of the agency, (2) lists of names and addresses in the possession of any agency if such lists, if disclosed, would be used for private, commercial or fund-raising purposes, (3) items of a personal nature when disclosure would result

in economic or personal hardship to the subject party and such records are not relevant or essential to the ordinary work of the agency, and (4) information which was confidentially disclosed to an agency and compiled and maintained for the regulation of commercial enterprise or for the grant or review of a license to do business and if openly disclosed would permit an unfair advantage to competitors of the subject enterprise. The last cited exemption, however, does not apply to records, the disclosure and publication of which is directed by some other statute (e.g., State Finance Law, § 174).

Before discussing the specific applicability of the foregoing exemptions to the instant customer list, it is well to bear in mind that the legislative objective of the Freedom of Information Law is "unimpaired access to the records of government" (Public Officers Law, § 85) and that the exemptions in section 88 of the Public Officers Law should receive a strict construction (Matter of Dwyer, 85 Misc 2d 104, 106). Furthermore, a mere claim of privilege by an agency without specific support for that claim will not insulate governmental information from public disclosure (Cirale v. 80 Pine St. Corp., 35 N Y 2d 113, 118-119).

The respondent says that said list is not relevant or essential to the ordinary work of the agency because the said list was "inconclusive" upon the factual issue which that agency was examining, but the mere fact that the agency deemed it

necessary to obtain the list for its use in this connection is persuasive, if not conclusive, evidence of the contrary. In addition, it is at least doubtful that the release of such list might cause "economic or personal hardship" to Northern (see *Leo Silfen, Inc. v. Cream*, 29 N Y 2d 387) and the court cannot accept respondent's argument that a list of commercial retail customers can properly be characterized as a "personal matter" or of a "personal nature" within the meaning of the exemption provisions of the said section 88 of the Public Officers Law. Furthermore, the petitioner says that it seeks the list only to determine if Northern was a qualified bidder and there is no specific evidence to support respondent's claim that, if the list were released, it would be used by anyone for private, commercial or fund-raising purposes. Lastly, the respondent argues that, since the list was submitted to establish that Northern was qualified to submit a public bid to the State, a favorable determination upon this issue is in the nature of a grant of a license to Northern to do business with the State, and, therefore, the list was confidentially disclosed to an agency for the purpose of regulating commercial enterprise. Ingenious as this argument may be, the court cannot so construe the statutory language.

It follows that the respondent has failed to sustain his burden to establish the applicability here of the exemption provisions of section 88 of the Public Officers Law and, there-

fore, the court should, and will, enter a judgment directing the respondent to make available to the petitioner the said customer list at its office in the Empire State Plaza in the City of Albany, New York, on the 23rd day of February, 1977 at 10 A.M. and to furnish to the petitioner at that time and place a copy thereof upon payment by petitioner of respondent's usual charges therefor.

Submit judgment on notice.

Dated: January 28, 1977.

All papers to attorney for petitioner.