

FOIA Appeal: Plan of Action

Legal Opinion: GMP-0069

Index: 7.340

Subject: FOIA Appeal: Plan of Action

April 1, 1992

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Dear Mr. Fredenburg:

This is in response to your Freedom of Information Act (FOIA) appeal dated January 9, 1992. You appeal the denial dated December 11, 1991 by James J. Barry, Manager of HUD's Manchester Office, of the Plan of Action submitted to HUD by the owners of Royal Gardens and Concord Gardens. The information requested by your clients, the Royal Concord Gardens Tenants Association, was withheld pursuant to Exemption 4 of the FOIA.

I have determined to affirm the initial denial by the Manchester Office.

Title II, Subtitle B of the Housing and Community Development Act of 1987, Pub. L. 100-242, approved February 5, 1988, entitled "Preservation of Low Income Housing," prohibits an owner of eligible low income housing from prepaying a subsidized mortgage except in accordance with a Plan of Action approved by the Secretary. The same prohibition applies to acceptance of prepayment by mortgagees. The Plan of Action which you requested was submitted in accordance with Title II and the Department's regulations at 24 C.F.R. Part 248. As a standard practice, Plans of Action contain extensive financial detail about the housing projects and commercial information regarding the projects' future use. They also include the owners' reason for requesting prepayment and specify changes in mortgages or regulatory agreements.

Under the Department's regulations at 24 C.F.R. 248.217, owners have the right to modify their plans at any time prior to HUD approval. Premature disclosure of Plans of Action which contain sensitive commercial and financial information could cause the owners substantial competitive harm and jeopardize their efforts to obtain fair prices at the time of sale. Moreover, if Plans of Action were disclosed under the FOIA, this would provide interested parties with useful insight into the projected plans and lead to an unfair competitive advantage.

Exemption 4 of FOIA, 5 U.S.C. 552(b)(4), exempts from

mandatory disclosure "trade secrets and commercial or financial information obtained from a person which is privileged or confidential." Information may be withheld under Exemption 4 if disclosure of the information is likely to have either of the

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following effects: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

While we recognize the tenants' concern regarding participating in decisions affecting low-income housing, we believe adequate opportunity is provided under 24 C.F.R. Part 248. We further believe it is essential to preserve the protections afforded by Exemption 4 regarding nondisclosure of confidential commercial and financial information. Therefore, I have determined to affirm the initial denial of the Plan of Action.

Since the Plan of Action contains confidential commercial and financial information, release is further prohibited by the Trade Secrets Act, 18 U.S.C. 1905. The Trade Secrets Act makes it a criminal offense for any employee of the United States, or one of its agencies, to release trade secrets and certain other forms of confidential commercial or financial information except when disclosure is authorized by law. The statute classifies as confidential commercial or financial information, the "amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association." Thus, the discretionary release provided in 24 C.F.R. 15.21 should not be employed under the circumstances of your request.

With respect to your conclusion contained in the initial November 22, 1991 FOIA request that "housing act regulations. . . clearly define HUD's responsibility to provide. . . the Plan of Action", please note that the agency is only required to release a summary. Under HUD's regulations at 24 C.F.R. 248.218, the Department must prepare a summary of the Plan of Action and assess the anticipated impact on current tenants prior to approval of the plan. The owner is required to send a copy of the summary to each tenant and post a copy in each occupied building. Tenants then have 60 calendar days to submit any comments to HUD, which the Department must take into account before giving final approval to the Plan of Action. The regulations do not require disclosure of the plan itself.

Finally, under the FOIA, an agency is permitted to withhold a record in its entirety where segregation of nonexempt material would impose significant costs on the agency and produce an edited document of little informational value. Nuefield v. IRS, 646 F.2d 661 (D.C. Cir. 1981). Redacting the segregable and unrelated confidential, commercial and financial information from the Plan of Action which you requested would leave similar

information as that contained in the summary. Accordingly, I have concluded that it was appropriate for the Manchester Office

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to withhold the plan in its entirety.

You are advised that you have the right to judicial review of this determination under 5 U.S.C. 552(a)(4).

Very sincerely yours,

C.H. Albright, Jr.  
Principal Deputy General Counsel

cc: Yvette Magruder  
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