

Legal Opinion: GMP-0002

Index: 7.340, 7.360  
Subject: FOIA Appeal: Financial and Marketing Research

October 14, 1991

Neil L. Shapiro, Esq.  
Brobeck, Phleger & Harrison  
One Market Plaza  
San Francisco, California 94105

Dear Mr. Shapiro:

This is in response to your letter dated September 18, 1991 requesting reconsideration of my decision dated September 9, 1991 to Jonathan Littman affirming the withholding of various documents under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4), pertaining to the Cabazon Band of Mission Indians. You assert that the commercial and financial documents being withheld under Exemption 4 do not constitute confidential business information and request that they be disclosed under the FOIA.

I cannot agree with your contentions that the withheld documents fail to qualify for protection from disclosure under Exemption 4 and I am reaffirming the Department's administrative determination to withhold them. The documents contain sensitive commercial and financial information which has been accorded protection under the authority of Exemption 4. My analysis of each of these documents is described below.

Exhibit D is an analysis of off-track wagering conducted for the Cabazon Band of Mission Indians by Claremont Research Associates. It involves extensive market research of the off-track betting industry in Southern California and provides marketing recommendations. You assert that it is difficult to identify competitors of the Cabazon Band of Mission Indians with respect to off-track wagering in California and dispute the notion that disclosure of this document would cause competitive disadvantage. However, the market analysis contained in Exhibit D identifies a number of facilities which conduct off-track wagering in southern California, analyzes their operations, and provides a determination of the market potential of an off-track wagering facility by the Cabazon Indians. Courts have recognized that research data constitutes confidential commercial and financial information. See, i.e., *Timken Co. v. United States Custom Service*, 531 F. Supp. 194, 198 (D.D.C. 1981) (price and market data). I conclude that Exhibit D contains sensitive market research data pertinent to the business considerations of the Cabazon Band of Mission Indians and that its disclosure would cause substantial competitive harm if released.

Exhibit E contains an accountant's compilation report of the personal financial statement of Pete and Patricia Ortiz, a balance sheet of Pete Ortiz Construction Incorporated, including related statements of income and cash flows, and information pertaining to potential investment of the company in the off-track betting facility of the Cabazon Indians. The financial breakdown of a business operation involves the most sensitive type of commercial information protected from disclosure by Exemption 4. See, *National Parks Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) subsequent opinion, 547 F.2d 673 (D.C. Cir. 1976); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *McCoy v. Weinberger*, 386 F. Supp. 504 (W.D. Ky. 1974). You state that you find it difficult to imagine how disclosure of such information would place the Cabazon Indians at a competitive disadvantage. I conclude that disclosure of financial information of a potential business partner of the Cabazon Indians would have a deleterious effect to the Cabazon Indians' proposed business venture and I also conclude that disclosure of Ortiz's financial information would have substantial adverse consequences to Ortiz.

I have also determined at this time to withhold the personal financial statement of Pete and Patricia Ortiz under Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), in addition to withholding it under Exemption 4.

Exemption 6 protects information in medical and personnel files and "similar files." The Supreme Court, in *Department of State v. Washington Post*, 456 U.S. 595 (1982), gave "similar files" a broad meaning under Exemption 6 to cover detailed Government records and files on an individual which can be identified as applying to that individual. The Court stated that the protection of an individual's privacy "was not intended to turn upon the label of the file which contains the damaging information." 456 U.S. at 601 (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)). Rather, the Court made clear that all information which "applies to a particular individual" meets the threshold requirement for Exemption 6 protection. *Id.* at 602.

In determining whether information can be withheld within Exemption 6, the public interest purpose for disclosure of personal information must be balanced against the potential invasion of privacy to determine whether release would constitute a clearly unwarranted invasion of privacy. *Wine Hobby, USA, Inc., v. U.S. Internal Revenue Service*, 502 F.2d 133 (3rd Cir. 1974). Any stated purpose for release of personal privacy information must satisfy the new public interest determination of *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (hereinafter "Reporters Committee"). Reporters Committee establishes a new framework for analyzing the public interest under Exemptions 6 and 7(C) by

establishing that only the furtherance of FOIA's core purpose of informing citizens about "what their government is up to" can

warrant the release of information implicating individual privacy interests. Reporters Committee, 489 U.S. at 772-73. Under Reporters Committee disclosure of information about an individual does not serve the "public interest" merely because it is interesting or socially beneficial in some broad sense. Id. at 772 n. 20.

The personal financial statement of Pete and Patricia Ortiz contains highly personal information on their financial holdings. Disclosure of this information would not further the public interest purpose of revealing the Department's administration of its statutory responsibilities. I have therefore concluded under the balancing test of Exemption 6 that disclosure of the information would constitute a clearly unwarranted invasion of personal privacy.

Exhibit F is a financial analysis of the Cabazon Indians' proposed off-track wagering facility. It contains information pertaining to sources and uses of funds, project leverage, pro formas, rate of return calculations, debt service analysis, mortgage amortization spreadsheet, off-track betting pro forma hour and wage assumptions and speed bingo and french bingo assumptions. This information provides detailed financial assumptions and considerations pertaining to the Cabazon Indians' business venture and I cannot agree with your contention that there would be no competitive disadvantage from its disclosure.

Exhibit YZ, subexhibit (a), contains information on the gross sales and profits from french and speed bingo and sales contributions per attendee. This subexhibit contains additional detailed information related to the information in the financial analysis of Exhibit F and I cannot agree with your argument that it is not relevant to the business considerations applicable to off-track wagering.

Exhibit YZ, subexhibit (b), is the financial statement of the Cabazon Band of Mission Indians, including their balance sheet, statement of revenue, expenditures, encumbrances and fund balance, administration and general expenses, cash receipts and disbursements and general fixed assets. My analysis concerning similar financial background information contained in Exhibit F is applicable here and I have determined that the information of this subexhibit is withholdable under Exemption 4.

You state that Congress is in the process of commencing an investigation into grants of this nature and that it will most likely seek the documents in issue here and make them available to the public. The fact that Congress may obtain files from the Department pursuant to an investigation does not affect the availability of those same files to an individual FOIA requestor.

4

Further, I cannot base a decision to release these records under the FOIA on the basis of speculation that Congress may, in the future, make such records available to the public.

You also assert that there is a public interest that outweighs the protection accorded to this business information. Normally, a Federal agency has the authority to determine as a matter of policy to release information which falls within an exemption under the FOIA. However, the Trade Secrets Act, 18 U.S.C. 1905, 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 "trade secrets, processes, operations, style of work, or apparatus or . . . the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association." Thus, HUD is prohibited from releasing the commercial and financial information of the type you have requested here unless authorized to do so by law.

There is no law, pursuant to the requirement of the Trade Secrets Act, that authorizes release of such information. Therefore, I have concluded that the information was properly withheld pursuant to Exemption 4 of the FOIA and the Trade Secrets Act.

I have also determined pursuant to 24 C.F.R. 15.21 that the public interest in assuring the personal privacy of individuals militates against release of the personal privacy information of Pete and Patricia Ortiz.

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

Very sincerely yours,

Shelley A. Longmuir  
Deputy General Counsel