

FOIA Appeal: Info. from UDAG Applications

Legal Opinion: GMP-0042

Index: 7.340, 7.470

Subject: FOIA Appeal: Info. from UDAG Applications

January 15, 1992

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Dear Mr. Cowan:

This is in response to your Freedom of Information Act (FOIA) appeal dated April 4, 1991. You appeal, on behalf of your client, the City of Concord, the partial denial issued by Gail Lively, Director of the Executive Secretariat, on March 12, 1991. The agency withheld information regarding the Urban Development Action Grant (UDAG) application submitted by the City of Concord, New Hampshire for the Durgin Block Redevelopment Project under Exemptions 4, 5 and 6 of the FOIA, 5 U.S.C. 552(b)(4), (5), and (6).

I have determined to affirm the initial denial.

Exemption 4 protects from mandatory disclosure trade secrets and commercial or financial information obtained from a person which is privileged or confidential. The courts have interpreted Exemption 4 as protecting confidential commercial or financial information the disclosure of which is likely to: (1) impair the Government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the entity from whom the information was received. *National Parks and Conversation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

The information withheld under Exemption 4 includes confidential financial and commercial information such as cost estimates, projected investments and design schemes, etc. The release of this information would clearly result in substantial harm to the competitive position of the submitter, Capital Plaza Associates.

You requested a more detailed description of the enclosures withheld under Exemption 4. In Item No. 9 the enclosures involving cost estimates were withheld. We have examined records in the Grants Management Division B of the Office of Economic Development and were unable to locate the cost estimates from 1983. According to your appeal, the city of Concord may have

these records. Since you are representing the city, you may wish to check their records. The confidential information withheld in Item No. 14 consists of financial and commercial information

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including projected investments, leasing contracts and design schemes.

Item No. 16 was a letter dated January 10, 1983, with seven enclosures. The January 10 letter itself identifies the information included in the enclosures which was withheld. The enclosures contain the following information: (1) proof of ownership, i.e, copy of the option agreement between Concord National Bank and the current owners of the subject properties; (2) cost breakdowns involving hard and soft costs reflecting increased private sector investment from new project estimates; (3) market feasibility study of Meredith and Grew regarding office market rents in Nashua, Manchester and Concord, New Hampshire; (4) tenant interest letters from tenants expressing interest in the project; (5) a letter from the general contractor outlining the procedures for facade preservation for the Hill Building and the costs associated with the work; and (6) an outline of the proposed equity financing structure. Enclosure (7) apparently involves a letter from the Counsel to the State Industrial Development Authority; however, we are unable to find a copy of this letter in our files.

Item No. 17's withheld enclosures consist of updated total program costs, ten year cash flow projections, an updated commitment letter of a letter of credit and a commitment letter for the purchase of a bond offering.

The materials withheld under Exemption 5 consist of internal memoranda, drafts, reports and reviewers' handwritten notes which pertain to the UDAG application for the Durgin Block Redevelopment Project. These documents reveal the decisional or evaluative process of the Department regarding approval of UDAG applications. To allow disclosure of viewpoints expressed by employees in the agency's evaluative process would jeopardize the candid nature of the deliberative process. See *Washington Research Project Inc. v. Department of Health, Education and Welfare*, 504 F.2d 238, 250 (D.C. Cir. 1974).

Exemption 6 protects information in medical, personnel and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The information withheld under Exemption 6 involves George P. Apostolicas' Personal Financial Statement, Partnership Agreement and Resume. Disclosure of this information would reveal personal information constituting a substantial invasion of privacy. These documents shed no light on the Department's performance of its statutory duties and their release serves no public interest.

Pursuant to HUD's regulations at 24 C.F.R. 15.21 I have determined that the public interest in preserving free and frank opinions, advice and recommendations within the Government,

protecting confidential commercial and financial information, and

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in preserving personal privacy militates against release of the withheld information. Therefore, I have affirmed the initial denial under Exemptions 4, 5 and 6.

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,

Frank Keating  
General Counsel

cc: Yvette Magruder  
All Regional Counsel