

FOIA Appeal: Proposed Plans of Action/Related Info.

Legal Opinion: GMP-0067

Index: 7.340, 7.350

Subject: FOIA Appeal: Proposed Plans of Action/Related Info.

March 30, 1992

Glen A. Smith, Esq.
Senior Staff Counsel
Los Angeles Times
Times Mirror Square
Los Angeles, California 90053

Dear Mr. Smith:

This is in response to your August 22, 1991 Freedom of Information Act (FOIA) appeal. You appeal the partial denial of information by Reagan S. Reed, Public Affairs Officer in the Department's Los Angeles Office, dated July 10 and 22, 1991. Mr. Reed denied your request for numerous documents relating to the Lakeview Terrace Apartments and the Alvarado Gardens under Exemptions 4, 5 and 6 of the FOIA, 5 U.S.C. 552(b)(4),(5),(6). Specifically, you appeal the information withheld under Exemptions 4 and 5.

I have decided to affirm, in part, and reverse, in part, the initial denial of the information withheld under Exemptions 4 and 5.

Exemption 4

In response to your appeal regarding amendments to the Regulatory Agreements, I have determined to reverse the denial of the 1989 and 1990 proposed amendments and two undated amendments. These are draft documents which were not adopted by the Department and contain no privileged or confidential business information. Therefore, I have determined to release this information to you. However, in regard to your request for the Plans of Action, I am affirming the initial denial from the Los Angeles Office. The proposed Plans of Action and two unapproved amendments relating to these plans are preliminary documents which contain "commercial or financial" information obtained in the course of business negotiations with the Department. As such, the documents are confidential and, thus, protected from disclosure under Exemption 4.

With respect to the letters between HUD, Lawrence Levy and John Knapp, attorneys representing Richard Spieker, owner of the Lakeview Terrace and Alvarado Gardens Apartments, I have determined to affirm the initial denial. These letters contain proposed provisions for various parts of the Plans of Action which were not agreed upon between the parties. They also

contain confidential "commercial and financial information" obtained in discussions among the parties. This is privileged information protected under FOIA's Exemption 4 and nondisclosure of such information is essential to the Department's effort to

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successfully negotiate future Plans of Action. Likewise, the Supplement to the Project Analysis contains detailed information regarding the owner's projected costs and profits. Release of this confidential commercial and financial information could cause the owner substantial competitive harm and jeopardize efforts toward future projects. Moreover, if we permitted disclosure of this information under the FOIA, it could provide interested parties with useful insight into the owner's projected plans and lead to an unfair competitive advantage. It would also cause harm to the Agency's negotiation process by prohibiting other prospective owners from engaging in candid and open discussions regarding their plans and mortgage obligations.

Exemption 4 of the 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 is likely to have either of the 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 Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

I have determined that the proposed Plans of Action and amendments, letters between the project owner's attorneys and the Department, and the Supplement to the Project Analysis constitutes confidential commercial and financial information protected from disclosure under Exemption 4. Therefore, it is my determination to affirm the initial denial of this information. See *9 to 5 Org. for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1st Cir. 1983). I am, however, releasing Exhibits A and C which accompany one of the proposed amendments to the Plans of Action. I have determined that disclosure would not result in divulging any confidential business information. These exhibits include letters involving repairs to Lakeview Terrace and Alvarado Gardens. The letters are from Mr. Spieker to Sharon Bowman, Supervisor and Loan Specialist in the Department's Los Angeles Office.

Exemption 5

In regard to Exemption 5, you appeal the denial of several letters issued from HUD to Mr. Spieker. Since these letters are communications between the Department and an outside party, they do not constitute intra-agency documents afforded protection under Exemption 5. Therefore, I have determined to release this information. However, the Department's originator, concurrences and complimentary lists on these letters qualify as trivial administrative markings exempt from disclosure under Exemption 2,

5 U.S.C. 552(b)(2). Therefore, this information is not enclosed.

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Exemption 5 protects from disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Department ." 5 U.S.C. 552(b)(5). A document can qualify for exemption from disclosure under the deliberative process privilege of Exemption 5 when it is predecisional, i.e., "antecedent to the adoption of an agency policy," *Jordan v. Dept. of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc), and deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

I have affirmed, in part, and denied, in part, your appeal for 24 intra-office memoranda involving various aspects of the Lakeview Terrace and Alvarado Gardens Plans of Action. Twenty two of these memoranda were written prior to the November 1, 1990 approval of the final plans and contain predecisional advice and recommendations. Release of this privileged information would harm the Agency's deliberative process by inhibiting employees from expressing open and candid views in predecisional assessments and evaluations. Therefore, I am affirming the initial denial of 22 of these intra-agency memoranda. I am, however, reversing the initial denial by the Los Angeles Office and releasing two documents. One document, dated November 29, 1990, was written by the San Fernando Valley Neighborhood Legal Services, Inc. to the Department and is not protected under Exemption 5. A second document, dated December 3, 1990, is a handwritten intra-office routing and transmittal slip which does not contain predecisional advice or recommendations.

Finally, you appeal the denial of the Management Review Report dated April 22, 1987. This document contains opinions, recommendations and deliberations which reveal the Department's evaluative and decisional process. I have determined to affirm the initial denial of this information pursuant to the FOIA's Exemption 5. However, page 1 of this report contains factual information not covered by Exemption 5. Since the material is "reasonably segregable" from the opinions, recommendations and deliberations, I am releasing the segregable information.

Conclusion

Based on the above analysis, I have determined to affirm the denial of the following documents:

1. Interoffice memoranda of the following dates: (Exemption 5)

1-88	6-11-89	6-04-90	8-21-90
1-10-88(p.4)	5-11-90	6-08-90	10-12-90

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2-2-88	5-22-90	6-22-90	10-25-90
1-11-89	5-23-90	7-02-90	
1-15-89	5-30-90	7-31-90	
2-15-89	12-27-89	8-22-90	
1-24-89			

2. Supplement to Project Analysis: (Exemption 4)
12-24-90
3. Management Review Report: (Exemption 5)
4-22-87 (pp. 2 to 4)
4. Amendments to Plans of Action: (Exemption 4)
Undated Amendment
Unapproved Amendment
5. Letters from Lawrence Levy, Esq. to HUD: (Exemption 4)
6-13-90
6-06-90
3-28-89
1-24-89 (with attachment letter dated 8-10-88)
6. Letters from John Knapp, Esq. to HUD: (Exemption 4)
12-07-89
10-09-89
2-17-89
5-25-88
7. Proposed Plans of Action: (Exemption 4)
12-16-88 2-13-90 6-06-90 3-23-90
 11-89 3-07-90 6-11-90
11-21-89 5-04-90 6-13-90

I have reversed the initial denial with respect to the following documents, copies of which are enclosed:

1. Letter to Keith Axtell, San Francisco Office, from San Fernando Valley Neighborhood Legal Services, Inc., dated 12-03-90, and intra-office routing and transmittal slip dated 12-03-90
2. Amendments to Regulatory Agreement
1989
1990
Two undated documents
3. Management Review Report
4-22-87 (p. 1)
4. Letters from HUD to Mr. Spieker

3-09-90
1-26-89
2-17-89

1-20-89
2-15-89

5. Exhibits A and C to Unapproved Amendment to Plan of Action

Pursuant to the Department's regulations at 24 C.F.R. 15.21, I have determined that the public interest to protect the deliberative process and to protect confidential commercial and financial information militates against release of the withheld information.

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,

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

Enclosures

cc: Janine Dolezel 9.4G
Reagan S. Reed 9.4SP
Beverly Agee 9G