

FOIA Appeal: Plan of Action and Related Docs.

Legal Opinion: GMP-0070

Index: 7.340, 7.543

Subject: FOIA Appeal: Plan of Action and Related Docs.

April 1, 1992

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Dear Ms. Hessel:

This is in response to your Freedom of Information Act (FOIA) appeal dated February 12, 1992. You appeal the partial denial dated January 14, 1992 from Ted L. Brown, Freedom of Information Officer, Chicago Regional Office. Mr. Brown denied your request for a Plan of Action submitted by the owner of the project at 840 West Sunnyside, Project No. 071-55116, related correspondence and HUD analyses, and tenant certification forms (HUD-50059), under Exemptions 4 and 5 of the FOIA. The information was requested by your clients, the 840 Sunnyside West Tenants Association. You appeal the denial of the Plan of Action, related correspondence and the HUD analyses which the Department withheld under Exemption 4.

I have determined to affirm the initial denial.

The following information was withheld by the Chicago Regional Office: (1) the Plan of Action; (2) an appraisal report, containing a market analysis on the fair market value of the property; (3) a management improvement operations (MIO) plan, containing information on the physical problems of the building, and a description and projected cost of repairs; and (4) a statement of sources and uses of funds.

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, a Plan of Action contains extensive financial detail about the housing projects and commercial information regarding the project's future use. It also includes the owner's reason for requesting prepayment and specifies changes in mortgages or regulatory agreements.

Under the Department's regulations at 24 C.F.R. 248.217, an owner has the right to modify its plan at any time prior

to HUD approval. Premature disclosure of a Plan of Action which contains sensitive commercial and financial information could cause the owner substantial competitive harm and jeopardize its efforts to obtain fair prices at the time of sale. Moreover, if a Plan of Action was disclosed under the FOIA, it would provide interested parties with useful insight into the projected plan 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 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 and related financial and commercial information.

Since the Plan of Action and the other documentation contain 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.

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. We

have been advised that, pursuant to 24 C.F.R. 248.218, the tenants of the West Sunnyside project were provided with the required "summary" of the Plan of Action, as well as a description of the repairs to be completed.

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
Lewis Nixon, Regional Counsel