

FOIA Appeal: Monitoring Report of Co-Insurance Lender

Legal Opinion: GMP-0072

Index: 7.380

Subject: FOIA Appeal: Monitoring Report of Co-Insurance Lender

April 8, 1992

Nancy E. Richman, Esq.
Senior Staff Counsel
Newsday
780 Third Avenue
New York, New York 10017

Dear Ms. Richman:

This is in response to your Freedom of Information Act (FOIA) appeal dated December 6, 1990. You appeal the November 7, 1990 denial by Gail L. Lively, former Director, Executive Secretariat, of your request for access to an April 1988 monitoring report concerning Carnegie Evans Corporation, a coinsurance lender. The information you requested was withheld pursuant to Exemption 8 of the FOIA, 5 U.S.C. 552(b)(8).

I have determined to reverse the initial denial with respect to Exemption 8. However, three paragraphs were withheld as confidential business information under Exemption 4.

Exemption 8 of the FOIA exempts from disclosure information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." All records concerning a financial institution's condition and operations and in the possession of a Federal agency responsible for the regulation or supervision of the financial institution are exempt from disclosure. *McCullough v. FDIC*, 1 GDS 80,194 at 80,495 (D.D.C. 1980).

HUD's Coinsurance Program functions as a joint venture between the private and public sectors, in which lenders and HUD share mortgage insurance risk, thereby providing an alternative to traditional HUD full insurance financing. An approved lender is subject to on-going monitoring and periodic on-site post commitment review by HUD to assure adherence to statutory and regulatory requirements. Due to such oversight responsibilities, the Department may invoke Exemption 8 to withhold information about, or related to, the condition and operations of financial institutions¹ involved in the Coinsurance Program.

¹You assert that Carnegie Evans Corporation is not a "financial institution" for purposes of Exemption 8 because institutions protected under that exemption are those whose deposits could all be demanded for payment should the public

learn of an adverse financial report. However, the term "financial institution" under Exemption 8 is not limited to depository institutions. See Public Citizen v. Farm Credit

2

While HUD has terminated the making of new loans under the Coinsurance Program,² the oversight and monitoring responsibilities continue with respect to existing portfolios. There are existing coinsuring lenders in the program with coinsurance responsibilities and, consequently, the Department must continue to exercise oversight authority. Because these responsibilities are on-going, the Department ordinarily withholds monitoring reports between HUD and existing coinsuring lenders under FOIA's Exemption 8 to protect the Department's oversight and monitoring operations.

However, in response to your appeal, I have determined to reverse the initial denial and release a copy of the monitoring report concerning Carnegie Evans Corporation. This decision is based on the fact that Carnegie Evans no longer participates in the coinsurance business and disclosure would not interfere with the Department's future activities regarding Carnegie Evans and other Coinsurance Program participants. We have redacted three sections of the monitoring report at MF 7, MF 11 and MF 19 because this material contains confidential commercial or financial business information, protected from disclosure under Exemption 4. I have determined that release of this information would impede the Agency's on-going monitoring process and cause unfair competitive harm to the parties involved. The monitoring report, as redacted, is enclosed.

Very sincerely yours,

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

Enclosure

Administration, 938 F.2d 290 (D.C. Cir. 1991). Mortgage lenders participating in the Government National Mortgage Association's Mortgage-Backed Securities Program are "financial institutions" under Exemption 8. Barron Financial Group v. HUD, C.A. No. SA CV 91-95-GLT (RWRx) (C.D. Calif. 1991).

² See 55 F.R. 41312 (Oct. 10, 1990)