

Legal Opinion: GMP-0085

Index: 7.340, 7.360, 7.523
Subject: FOIA Appeal: Bidders' Cost Elements

June 15, 1992

Mr. James Simons
President
American Surety Title Insurance Co., Inc
3637 4th Street North, Suite 490
St. Petersburg, Florida 33704-1337

Dear Mr. Simons:

This is in response to your Freedom of Information Act (FOIA) appeal of April 29, 1992 requesting our review of the denial from the Tampa Office. On March 25, 1992 you requested copies of all information submitted to HUD in response to Solicitation No. 52-92-067 by Coastal Bonded, First American Title, and the Renic Corporation. On April 13, 1992 you requested copies of all proposals submitted to HUD in response to Solicitation No. 38-91-067. Rachel R. Arbuthnot, Deputy Manager, Tampa Office, denied your requests on April 27, 1992 under Exemption 4 of the FOIA.

I have determined to affirm the initial denial pertaining to the withheld information submitted in response to Solicitation No. 52-92-067. I have also determined that your appeal of the withheld information pertaining to Solicitation No. 38-91-067 was not timely filed under 24 C.F.R. 15.61, which requires the filing of a request for review within thirty days after issuance of the written denial. You had previously requested copies of the proposals pertaining to Solicitation No. 38-91-067 on September 18, 1991 and George A. Milburn, Jr., Tampa Office, denied your request on October 24, 1991. The time for filing your appeal for the withheld proposals concerning Solicitation No. 38-91-067 expired last fall and your second request for the same information does not provide you with new additional appeal rights.

The documents at issue in regard to Solicitation No. 52-92-067 contain a detailed description of cost elements concerning the bidders' businesses. This information includes each bidder's estimated costs and pricing. Also, some of the companies included a financial statement and operating statement. Part 1 of the bid includes a resume of key personnel showing their background and experience.

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 and privileged or confidential." The courts have interpreted Exemption 4 as protecting confidential commercial or financial information the

disclosure of which is likely to cause substantial harm to the competitive position of the entity from whom the information was received. *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

The information contained in the Contract Pricing Proposals is detailed labor and cost information concerning each bidder. "Cost and labor data . . . are commercial information which if released would cause substantial harm to a bidder's competitive position." *BDM Corp. v. Small Business Administration*, Civ. No. 80-1180 (D.D.C. May 20, 1981), 2 GDS 81,189, at 81,495. See also *Fidell v. United States Coast Guard*, Civ. No. 80-2291 (D.D.C. March 3, 1981), 2 GDS 81,144, ("the particularity of the bid proposal would allow competitors to estimate . . . a bidder's costs and profits and perhaps undercut its future bids.") *Id.* at 81,386.

Since the cost proposals 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.

In addition, I am withholding resumes, containing prior and current experience and additional information, under Exemption 6 of the FOIA. Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), protects information in medical, personnel and "similar" files. The U.S. Supreme Court in *United States Department of State v. Washington Post*, 456 U.S. 595, 602 (1982), held that the term "similar files" would be interpreted broadly to encompass any information which "applies to a particular individual" regardless of the label of the file in which the information is contained. 456 U.S. at 601-602.

Any stated purpose for the 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), 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. The resumes contains the kind of personal information that would fall within Exemption 6, and there is no public interest in disclosure for release of the information.

Accordingly, I have decided to affirm the initial denial

pursuant to Exemptions 4 and 6 of the FOIA and the Trade Secrets Act. I have also determined that the public interest in protecting personal privacy militates against release of the withheld information.

You have a right to a 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
Ray Buday, 4G