

Legal Opinion: GMP-0094

Index: 7.354

Subject: FOIA Appeal: Financial Information of Apartment Project

June 26, 1992

James F. Brelsford, Esq.
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Dear Mr. Brelsford:

This letter is in response to your May 13, 1992 Freedom of Information Act (FOIA) appeal. You appeal the April 14, 1992 denial of the audited financial statement and monthly reports for establishing net income for the Willowbrook Apartments, Project No. 121-35727, located in Pittsburg, California. The information was withheld under Exemption 4 of the FOIA by Joan Hall, Freedom of Information Liaison Officer, San Francisco Regional Office, in a letter to Morgan Cartwright, of the Contra Costa Times.

I have determined to affirm the initial denial under Exemption 5 of the FOIA.

Exemption 5 of the FOIA exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" 5 U.S.C. 552(b)(5). Confidential commercial information generated by the Government is subject to the protection of a qualified privilege under Exemption 5. *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 99 S.Ct. 2800, (1979). The purpose behind the qualified privilege for confidential Government commercial information is to insure that the Government is not placed at a competitive disadvantage in business dealings, such as property sales.

The FDIC acquired title to the Willowbrook Apartments as a result of a bank failure and intends to sell the property by soliciting competitive bids. When contacted by HUD, the FDIC stated that they did not wish the Department to disclose the requested information. They advised that disclosure of the information would impair their ability to sell the property for the highest possible price. Therefore, the FDIC is very much a competitor in the commercial marketplace. In these circumstances, the withheld information constitutes confidential financial information of the Government and may be withheld under Exemption 5. *Government Land Bank v. General Services Administration*, 671 F.2d 663 (1st Cir. 1982), (upholding the Government's assertion that Exemption 5 permitted it to postpone disclosure of its appraisal of the value of land the Government was offering for sale until after the sale had been made). See

also, *Hoover v. United States Department of Interior*, 611 F.2d 1132, 1137-1138 (5th Cir. 1980) (realty appraisal obtained by the Government from an independent professional appraiser is an intra-agency memorandum exempt from disclosure under Exemption 5 of the FOIA).

You question the competitive harm involved by release of this financial information. HUD has consistently withheld this type of information. The financial information pertaining to the Willowbrook Apartments contains a history of its economic activities and explains the financial operations of the project. Release of this information would permit competitors to gain "valuable insight into the operational strengths and weaknesses of the supplier of the information." *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976). Courts have recognized the competitive harm to a submitter by release of such financial information. See, e.g., *Gulf & Western Industries, Inc. v. U.S.*, 615 F.2d 527 (D.C. Cir. 1979) protecting from disclosure financial information including profit and loss data, expense rates, and break-even point calculations.

Therefore, I have decided to affirm the initial denial under Exemption 5. Further, I have determined, pursuant to HUD's regulations at 24 C.F.R. 15.21, that the public interest in not placing the Government at a competitive disadvantage in disposing of the property militates against disclosure of the information you requested.

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

cc: Yvette Magruder
Beverly Agee, 9G