

Legal Opinion: GMP-0098

Index: 7.340, 7.360, 7.523  
Subject: FOIA Appeal: Contract Pricing Proposals

July 14, 1992

Ms. Shari Lynn Wiles  
President  
AmeriServices Title Company  
2901 W. Busch Boulevard, Suite 703  
Tampa, Florida 33618

Dear Ms. Wiles:

This is in response to your Freedom of Information Act (FOIA) appeal of May 1, 1992 requesting our review of the denial from the Tampa Office. Your request was for copies of all proposals submitted to HUD in response to Solicitation No. 52-92-067. Rachel R. Arbuthnot, Deputy Manager, Tampa, Florida Office, denied your request under Exemption 4 on April 27, 1992.

I have determined to affirm the initial denial under Exemptions 4 and 6 of the FOIA and the Trade Secrets Act.

The documents at issue 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. Section 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: (1) impair the Government's ability to obtain necessary information in the future or (2) 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. "[C]ost 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 court in *Fidell* stated that disclosure of data in a bid proposal "reveals details about . . . [a bidder's] structure [and] allocation of resources

. . . which could be quite helpful to competitors. The particularity of the information would allow competitors to estimate . . . [a bidder's] costs and profits and perhaps undercut its future bids." Id. at 81,386. Accordingly, we have determined that this information is confidential commercial and financial information which may be withheld under Exemption 4.

In addition, since the contract pricing proposals contain confidential commercial and financial information, release of this information is further prohibited by the Trade Secrets Act, 18 U.S.C. Section 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."

Exemption 6 protects information in medical and personnel files and information in "similar files." Whether release of information constitutes a clearly unwarranted invasion of personal privacy is determined by balancing the public interest in disclosure against the potential invasion of individual privacy. *Washington Post v. Department of Health and Human Services*, 690 F.2d 252, 258 (D.C. Cir. 1982). 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). *Reporters Committee* provides a new framework for analyzing the public interest under Exemptions 6 and 7(c) by establishing 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. Id. at 772-73.

The resume with prior and current experience and additional information 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 am affirming the denial of this information under Exemption 6. I have also determined, under 24 C.F.R. Section 15.21, that the public interest in protecting information implicating personal privacy militates against release of the resume information.

Finally, the Federal Acquisition Regulations, 48 C.F.R. Chapter 1, Section 15.1003(b) provides that point-by-point comparisons with other offerors' proposals shall not be made. Also, that "debriefing shall not reveal any information that is not releasable under the Freedom of Information Act; for example

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(1)Trade secrets;

(2)Privileged or confidential manufacturing processes and techniques; and

(3)Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information."

You have a right to a judicial review of this determination under 5 U.S.C. Section 552(a)(4).

Very sincerely yours,

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

cc: Yvette Magruder  
Raymond Buday, 4G