

Legal Opinion: GMP-0104

Index: 7.340, 7.570
Subject: FOIA Appeal: Profit and Loss Statements

July 24, 1992

Ms. Liz Johnson
Community Organizer
Community Action for Suburban Hennepin
Norwest Bank Building
1011 First Street S., Suite 301
Hopkins, Minnesota 55343

Dear Ms. Johnson:

This responds to your Freedom of Information Act (FOIA) appeal of June 5, 1992, appealing the denial of the three latest profit and loss statements for the Highlands Townhomes, located in Bloomington, Minnesota. In a letter to you dated May 27, 1992, Thomas Feeney, Manager of the Minneapolis-St. Paul Office, released a copy of the latest HUD physical inspection report, a copy of the latest rent schedule and the regulatory agreement for the Highlands project. He denied your request for Highlands's three profit and loss statements under Exemption 4 of the FOIA (FOIA), 5 U.S.C. 552(b)(4).

I have determined to affirm the denial.

Exemption 4 of the FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Commercial or financial information is "confidential" for purposes of Exemption 4 if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information is obtained. *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

Information contained in the last three profit and loss statements of Highlands Townhomes constitutes a history of its economic activities and explains the financial operations of the project. Release of this information would permit competitors to gain "valuable insights into the operational strengths and weaknesses of the supplier of the information." *Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 810 (D.D.C. 1979). Accordingly, we have determined that this information is confidential commercial and financial information and that Exemption 4 is the proper basis for its being withheld. *National Parks and Conservation Association v. Morton*, supra.

While we recognize the tenants' concern regarding the owner's compliance with HUD regulatory requirements, we cannot waive the protections afforded by Exemption 4 to preserve confidential commercial and financial information. Moreover, since the profit and loss statements fall within Exemption 4,

their release is further prohibited by the Trade Secrets Act, 18

U.S.C. Section 1905. Under the Trade Secrets Act, the Department does not have the discretion which can normally be applied under FOIA regulations regarding release of exempted information. 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." In our opinion, this covers the information you request. Therefore, I have determined to affirm the denial by HUD's Minneapolis-St. Paul Office.

You have a right to 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
Lewis Nixon, 5G