

Legal Opinion: GMP-0112

Index: 7.340, 7.570

Subject: FOIA Appeal: Available Records Under Part 245 Regs

August 24, 1992

Mark Andrew Sherman, Esq.  
The Harrison Institute for Public Law  
Georgetown University Law Center  
111 F. St., N.W. - Suite 102  
Washington, D.C. 20001-2095

Dear Mr. Sherman:

This is in response to your Freedom of Information Act (FOIA) appeal dated May 13, 1992. You appeal the partial denial issued by the Washington, D.C. Field Office on April 13, 1992 which denied the release of certain information pertaining to the Edgewood Terrace I Apartments, HUD Project #000-55095. The following items were withheld by the D.C. Field Office pursuant to Exemption 4 of the FOIA, 5 U.S.C. Section 552(b)(4):

- 1.The most recent audited Profit and Loss Statement;
- 2.The annual budget submitted in support of the 1991 rent increase;
- 3.The audited financial statement for the past three years;
- 4.Information regarding monthly receipts, disbursements and reserve account balances;
- 5.All documents relating to the approval of the 1991 rent increase; and
- 6.Documents relating to the proposed Section 241 rehabilitation loan.

In addition to appealing the denial of the above-noted documents, you also state that the D.C. Field Office's initial decision failed to cover some of the documents contained in your FOIA request. In particular, you state that the following documents were not addressed in the agency's initial decision:

- 7.the management plan, if any;
- 8.the management agreement;
- 9.a narrative statement submitted by the landlord in support of the proposed 1991 rent increase;
- 10.a statement submitted by the landlord reflecting the general condition of the property, the frequency of

re-decoration, an itemization of the existing equipment and services presently included in the rents, and a justification of any unusual expenses or unusual increases in such expenses;

11. rental computation forms from prior years;

12. any documentation received by the Field Office regarding the intentions of the owners of HUD Project #000-55095;

13. the contracts of insurance for the HUD-insured mortgages on HUD project #000-55095

I have determined to affirm the initial denial of items 2 through 5 under Exemption 4 of the FOIA. I am reversing the initial denial of item 1 and partially reversing the denial of some documents under item 5 because these documents have lost their confidentiality as a result of their disclosure to the tenants of the subject project pursuant to 24 C.F.R. Part 245. I have also determined that items 6 through 13 should be remanded to the Washington, D.C. Field Office for additional processing of your request.

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 Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

Title 24 C.F.R. Part 245 of the Department's regulations requires a mortgagor of a subsidized project to disclose various documentation to tenants in connection with the project's application to HUD for a rent increase. See 24 C.F.R. Section 245.310 and Section 245.315. The information required to be made available by the mortgagor for inspection and copying by the tenants is set forth at 24 C.F.R. Section 245.315. Pursuant to this regulation, when owners file for a rent increase under Section 245.315(a), tenants are entitled to inspect and reproduce the following documents:

1. A copy of the notice to tenants;

2. An annual Statement of Profit and Loss, Form HUD-92410, covering the project's most recently ended accounting year (this statement must have been audited by an independent public accountant if the project is required by HUD to prepare audited financial statements), and Form HUD-92410 for the intervening period since the date of the last annual statement if more than four months have elapsed since that date;

3.A narrative statement of the reasons for the requested increase in maximum permissible rents; and

4.An estimate of the reasonably anticipated increases in project operating costs that will occur within twelve months of the date of submission of materials under this section.

5.A status report on the project's implementation of its current Energy Conservation Plan.

Ordinarily, the above-noted financial and commercial information requested under the FOIA would be withholdable under Exemption 4. However, this information loses its confidentiality when disclosed to the tenants under Part 245 and may, therefore, be released to FOIA requesters. The documents relating to the 1991 rent increase for the subject project in items 1 and 5 of your request have previously been provided to the tenants of the project and I am releasing them to you under the FOIA. These documents are listed as follows:

1.Letter dated April 17, 1992 from Charlyne J. Fields, Acting Chief, Loan Management Branch, Washington, D.C. Office, to David Barr, District Manager, Security Property Management, Inc., with attached HUD Rent Schedule, HUD Form 92458;

2.Letter dated August 23, 1991 from John M. Taylor, Chief, Loan Management Branch, Washington, D.C. Office, to David Barr;

3.Letter dated July 31, 1991 to John Taylor from David Barr, with attached Owner's Certification As To Compliance With Tenant Comment Procedures In 24 C.F.R. Section 245;

4.Exchange of letters dated July 6 and 31, 1991 between Security Management and a tenant concerning the proposed rent increase. The name and address of the tenant have been deleted from the letters under Exemption 6 to protect the tenant's personal privacy;

5.Letter dated July 2, 1991 from David Barr to John Taylor, with attached: (1) Notice to Residents of Intention to Submit a Request to HUD for Approval of an Increase in Maximum Permissible Rents; and (2) Explanation of Expense Estimates, with Profit and Loss Statement for 1990, HUD Form 92410.

The other requested documents under items 2, 3, 4, and 5, which are not specifically required to be released pursuant to Part 245, are not disclosable under Exemption 4. These documents include the project's budget, financial statements, monthly receipts, disbursements and reserve account balances, and their disclosure would cause substantial harm to the competitive position of the person from whom the information is obtained. We

do not agree with your contention that the project owner would not be competitively harmed by disclosure of this information.

Moreover, the Trade Secrets Act, 18 U.S.C. Section 1905, makes it a criminal offense for an officer or employee of the United States to disclose information relating to the trade secrets or confidential business information of any person, firm, partnership, corporation or association 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, HUD is prohibited from releasing financial information of the type you requested unless authorized to do so by law. Since there is no law, as required by the Trade Secrets Act, that authorizes release of such information, we find that the documents were properly withheld pursuant to Exemption 4 of the FOIA.

With respect to the request for documents as defined in items 7 through 13, it appears that the Washington, D.C. Field Office did not consider these items in its initial decision. Accordingly, we will ask the Washington, D.C. Field Office to address these items and render a decision concerning their releasability under FOIA.

Also, it is my determination that the request for documents as defined in item 6 is too broad. Pursuant to the FOIA, the agency must be provided with a request for an identifiable record. The present request does not identify what records pertaining to the Section 241 loan for the subject project are being requested. Accordingly, we will ask the Washington, D.C. Field Office to work with you to identify the documents sought in connection with this matter and to subsequently make a determination concerning their releasability under the FOIA.

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

Very sincerely yours,

George L. Weidenfeller  
Deputy General Counsel (Operations)

Enclosures

cc: Yvette Magruder  
Peter Campanella, 3G  
I. Toni Thomas, 3.5S