

Legal Opinion: GMP-0115

Index: 7.340, 7.350, 7.470

Subject: FOIA Appeal: Cash Flow Projections--Leases

August 27, 1992

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Dear Mr. Danzig:

This is in response to your Freedom of Information Act (FOIA) appeal dated August 17, 1992. You appeal the July 21, 1992 partial denial by Anna-Marie Kilmade Gatons, Director, Executive Secretariat. Ms. Gatons provided information pertaining to the Urban Development Action Grant (UDAG) grant agreement for the City of Hamtramck Industrial Park in response to your request, but withheld certain information under Exemptions 4, and 5 of the FOIA, 5 U.S.C. Section 552(b)(4),(5). (FOIA Control No.: FI-293833S).

I have determined to affirm the initial denial.

Exemption 4 protects from mandatory disclosure trade secrets and commercial or financial information obtained from a person which is 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 withheld under Exemption 4 includes confidential financial and commercial information such as cost estimates, cash flow projections, private contract, lease and commercial agreements. 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 the above described 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); *Timken Co. v. United States Customs Service*, 531 F. Supp. 194 (D.D.C. 1981) (protecting financial and commercial information on pricing and marketing); *Braintree*

Electric Light Dep't. v. Department of Energy, 494 F. Supp. 287 (D.D.C. 1980) (withholding financial information including selling price, inventory balance, profit margins, purchasing activity, and cost of goods sold).

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 . . . in litigation with the agency." Exemption 5 incorporates a number of privileges known to civil discovery including the deliberative process privilege, the general purpose of which is to "prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

A document can qualify for exemption from disclosure under the deliberative process privilege of Exemption 5 when it is predecisional, i.e., "antecedent to the adoption of an agency policy," Jordan v. Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc), and deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

The materials withheld under Exemption 5 consist of internal memoranda, drafts, reviewers' handwritten notes, and other internal review documents which pertain to the UDAG grant agreement. These documents reveal the decisional and evaluative process of the Department's internal review of the UDAG for the City of Hamtramck Industrial Park. To allow disclosure of viewpoints expressed by employees in the agency's evaluative process would jeopardize the candid nature of the deliberative process. See Washington Research Project Inc. v. Department of Health, Education and Welfare, 504 F.2d 238, 250 (D.C. Cir. 1974).

Pursuant to HUD's regulations at 24 C.F.R. Section 15.21 I have determined that the public interest in preserving free and frank opinions, advice and recommendations within the Government, and protecting confidential commercial and financial information, militates against release of the withheld information. Therefore, I have affirmed the initial denial under Exemptions 4 and 5.

Please be advised that you have the 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)

cc: Yvette Magruder