

Legal Opinion: GMP-0117

Index: 7.340, 7.470

Subject: FOIA Appeal: Private Equity--Debt Financing

September 1, 1992

Mr. Gary Storrs
Bakery, Confectionery and Tobacco
Workers International Union
10401 Connecticut Avenue
Kensington, Maryland 20895-3961

Dear Mr. Storrs:

This is in response to your Freedom of Information Act (FOIA) appeal dated August 17, 1992. In a letter dated May 21, 1992, Christian D. Wallace, Assistant Director of Research for the Bakery, Confectionery and Tobacco Workers International Union, requested the application and the amended application for the Urban Development Action Grant (UDAG) for the Borough of Oxford, Pennsylvania. On July 6, 1992 Anna-Marie Kilmade Gatons, Director, Executive Secretariat, provided Mr. Wallace with information responsive to his request but withheld some information under Exemptions 4 and 5 of the FOIA. (FOIA Control No.: FI-295582T). You appeal six of the documents withheld under Exemption 4.

I have determined to affirm, in part, and reverse, in part, 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, private equity, debt financing and market feasibility. 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.

Therefore, I am affirming the initial denial under Exemption 4, with the exception of the financial data concerning the UDAG grant which was deleted from page 24 of the Amended Application. This information, consisting of the amount and term of the UDAG grant and the interest rate, is public information releasable under the FOIA. A copy of page 24 of the Amended Application with the UDAG grant information is enclosed.

Pursuant to HUD's regulations at 24 C.F.R. Section 15.21 I have determined that the public interest in protecting confidential commercial and financial information, militates against release of the withheld information.

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,

George L. Weidenfeller
Deputy General Counsel (Operations)

Enclosure

cc: Yvette Magruder