

Legal Opinion: GMP-0146

Index: 7.340, 7.350
Subject: FOIA Appeal: General Partner's Finances

January 27, 1993

Mr. Murray Haber
201 East 66th Street
New York, New York 10021

Dear Mr. Haber:

This is in response to your Freedom of Information Act (FOIA) appeal dated November 24, 1992. On your own behalf, as well as on behalf of the other limited partners, you appeal the October 27, 1992 partial denial of your attorney's FOIA request by William Hernandez, Manager, Hartford Office. Mr. Hernandez withheld 19 items of documents, as identified in the Attachment to his FOIA denial ("the Attachment"), pursuant to Exemptions 4 and 5 of the FOIA, 5 U.S.C. Section 552(b)(4), (5).

In accordance with your December 14, 1992 telephone conversation with Abraham Brandwein, Assistant Regional Counsel, Boston Regional Office, you are appealing the denial of all of the documents listed in the Attachment. You contend that the FOIA exemptions cited in Mr. Hernandez's letter were improperly applied to the documents and, in the alternative, that Exemption 4 may not be used to withhold financial information from you and the other limited partners, since you have an identity of interest with the General Partner who submitted the financial information.

I have decided to affirm the denial of the documents under Exemptions 4 and 5.

Exemption 4 of the FOIA exempts from mandatory disclosure under FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Information may be withheld pursuant to Exemption 4 if its disclosure is likely to have either of the following effects: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

I have determined that the items identified in the Attachment as subject to Exemption 4 contain information pertaining to the trade secrets and commercial or financial status of the General Partner regarding his operation of the properties. Release of such 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 requester that would arise from the release of such information. See, e.g., *Gulf & Western Industries, Inc. v. United States*, 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).

Moreover, although HUD retains discretion to determine that information falling under an exemption may be released, the Trade Secrets Act, 18 U.S.C. Section 1905, makes it a criminal offense for an employee of the United States, or its agencies, to disclose trade secrets and other forms of confidential commercial or financial information, except when such disclosure is authorized by law. Pursuant to the Trade Secrets Act, confidential commercial or financial information includes the "amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association."

Your alternative argument in support of your appeal is that the identity of interest between the projects' limited partners and the General Partner, makes Exemption 4 inapplicable to deny the limited partners access to the documents.

There is no basis under the FOIA for concluding that a requester's legal, contractual, or other relationship with the submitter is relevant to a determination of the requester's right to obtain information. Moreover, the Supreme Court has held that a requesting party's identity "has no bearing on the merits of his or her FOIA request." *Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989). Therefore, Federal agencies must treat all FOIA requesters alike, without taking into account a particular requester's identity.

Although your status as a limited partner may indeed confer upon you an enforceable contractual right to obtain these documents from the General Partner, HUD may not release these documents to you in response to your FOIA request unless we would be required to release these documents to all other requesters as well. As noted above, the Department is prohibited by the Trade Secrets Act from doing so. Consequently, your status as a limited partner does not affect my determination that the documents were properly withheld under Exemption 4 and the Trade Secrets Act.

Exemption 5 of the FOIA permits the Department to withhold inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency. Documents that are privileged in the context of civil discovery are thus exempt from mandatory release under Exemption 5. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149

(1975). Among the civil discovery privileges incorporated into Exemption 5 are the deliberative process privilege and the attorney-client privilege.

The deliberative process privilege of Exemption 5 was the basis for withholding the documents identified in Items 16 and 19 in the Attachment. The purpose of this privilege is to preserve free and candid internal agency deliberations that lead to executive branch decision-making. The deliberative process privilege applies to documents that are predecisional and deliberative in nature. A predecisional document is one that is "antecedent to the adoption of an agency policy." *Jordan v. Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc). A deliberative document is one that is 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, 1143-44 (D.C. Cir. 1975).

The attorney-client privilege was the basis for withholding Item 18 of the Attachment. Item 18 was prepared by a member of the Field Office legal staff and provided legal advice to program officials. The attorney-client privilege, as incorporated into Exemption 5, protects such "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Accordingly, I have determined that Items 16, 18, and 19 of the Attachment were properly withheld in accordance with Exemption 5 of the FOIA.

I have also determined, pursuant to 24 C.F.R. Section 15.21, that the public interest in protecting confidential commercial and financial information and the deliberative process, militates against disclosure of the withheld information.

You are advised that you have the right to judicial review of this determination under 5 U.S.C. Section 552(a)(4). Judicial review of my action on this appeal is available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, or in the judicial district where the records you seek are located.

Very sincerely yours,

George L. Weidenfeller
Deputy General Counsel (Operations)

cc: Yvette Magruder
Marvin Lerman, 1G