

Legal Opinion: GMP-0147

Index: 7.350, 7.440
Subject: FOIA Appeal: CIAP Funding Requests

January 27, 1993

Leonard A. Sacks, Esquire
1 Church Street, Suite 201
Rockville, Maryland 20850

Dear Mr. Sacks:

This is in response to your Freedom of Information Act (FOIA) appeal dated October 22, 1991. You appeal the partial denial dated September 9, 1991 by Rheba Gwaltney, Freedom of Information Liaison Officer, Baltimore Office, of certain information pertaining to the Kenilworth/Parkside Comprehensive Improvement Assistance Program (CIAP) construction contract. The following items were withheld by Ms. Gwaltney pursuant to Exemption 5 of the FOIA:

1. Requests for CIAP funding from the District of Columbia Department of Public Assisted Housing.

2. Any and all estimates for construction relating to this project.

3. Correspondence, memoranda and reports regarding design and development of the project prior to it being bid.

I have determined to affirm, in part, and reverse, in part, the initial denial.

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 other than an agency in litigation with the agency" 5 U.S.C. Section 552(b)(5). The exemption incorporates a number of privileges known to civil discovery including the deliberative process privilege. See *NLRB v. Sears, Roebuck and Co.*, 421 U.S. 132 (1975).

A report or memorandum 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 United States Supreme Court has construed the deliberative process privilege of Exemption 5 to encompass documents which involve "advisory opinions, recommendations, and deliberations." *NLRB v. Sears, Roebuck and Co.*, 421 U.S. at 150.

I am reversing the decision to invoke Exemption 5 to withhold the documentation contained in item 1, which encompasses CIAP funding requests from the District of Columbia Department of Public Assisted Housing, including financial recommendations, assessment of need and proposed actions to rectify those needs. These documents are not intra-agency or inter-agency records and do not qualify for protection from disclosure under the deliberative process privilege of Exemption 5.

Similarly, Exemption 5 is not applicable to protect the documentation contained in item 3 which encompasses progress meeting reports of meetings between representatives from HUD, the D.C. Department of Housing and Community Development, the construction managers, and the contractors, and correspondence between HUD and the D.C. Department of Housing and Community Development and between the D.C. Department of Housing and Community Development and the Kenilworth/Parkside Construction Management Corporation.

Item 3 also includes a report entitled "Life-Cycle Cost Analysis for the Kenilworth Housing Project Heating System" prepared by Diversified Engineering, Inc. I am withholding this report under Exemption 5. It contains recommendations concerning alternate methods of repair/replacement for the project's central heating system as well as an economic evaluation of the alternatives. The report assisted HUD decisionmakers in their deliberations about the repair/replacement work to be undertaken with respect to the project's heating system.

Exemption 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 Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)

Item 2 consists of a construction estimate provided by Gilbane Building Company which contains confidential financial information. The release of the construction estimate 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). Accordingly, I have determined that the document qualifies for nondisclosure under Exemption 4 of the FOIA rather than Exemption 5.

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

Enclosed are 173 pages of documentation which I am releasing pursuant to this decision.

Very sincerely yours,

George L. Weidenfeller
Deputy General Counsel (Operations)

Enclosure

cc: Yvette Magruder
Peter Campanella, 3G
Thomas Coleman, 3.1G