

Legal Opinion: GMP-0148

Index: 7.340, 7.360, 7.420
Subject: FOIA Appeal: Investors in GNMA Pools

January 28, 1993

Mr. E. M. McCartt
Burwood Financial Group
89 Orinda Way, Suite 4
Orinda, California 94563

Dear Mr. McCartt:

This is in response to your Freedom of Information Act (FOIA) appeal dated November 17, 1992. You appeal the partial denial dated November 6, 1992 from Anna-Marie Kilmade Gatons, Director, Executive Secretariat (FOIA Control No.: FI-304384Q). Ms. Gatons withheld the names of investors in multifamily GNMA pools guaranteed by GNMA under Exemptions 4 and 6 of the FOIA, 5 U.S.C. Section 552(b)(4),(6).

The identities of the investors consist mostly of companies as well as individuals. It is my determination that the identities of individual investors are withholdable under Exemption 6 and that the identities of the companies which are investors are withholdable under Exemption 4.

Exemption 6 protects personal information maintained in Government records. Such personal information is withholdable under FOIA's Exemption 6 if its disclosure would constitute "a clearly unwarranted invasion of personal privacy." In this instance, I do not believe that disclosure is warranted.

Disclosure of personal privacy information must satisfy the new public interest determination of United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (hereinafter "Reporters Committee"). Reporters Committee establishes a new framework for analyzing the public interest under Exemptions 6 and 7(C) by establishing that only the furtherance of FOIA's core purpose of informing citizens about "what their Government is up to" can warrant the release of information implicating individual privacy interests.

Disclosing the names of the individuals in the GNMA pools does not further the public interest under the test of the Reporters Committee case. Disclosure of the names would not reveal any information concerning the operations of government, in this case, the determinations by GNMA in guaranteeing the multifamily GNMA pools. Further, courts have determined that personal financial information lies near the core of the privacy interests protected by Exemption 6. Aronson v. HUD, C.A. No. 86-0333-S (D. Mass. 1986), aff'd in part, rev'd in part, 822 F.2d 182 (1st Cir. 1987). See also, Gregory v. Federal Deposit Insurance Corporation, 470 F. Supp. 1329, 1335 (D.D.C. 1979)

(release of personal information such as the size of one's loan, assets, or the collateral put up for a loan would constitute a clearly unwarranted invasion of personal privacy).

Therefore, in the absence of a valid public interest in disclosure under the Reporters Committee case which would outweigh the investors' personal privacy interests, I have determined to withhold the information under Exemption 6.

Exemption 4 of 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." Information may be withheld under Exemption 4 if disclosure of the information 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).

It is my opinion that disclosure of the identities of the companies and individual investors in the GNMA pools could cause substantial competitive harm and possibly result in a competitive disadvantage regarding future investment activity. Moreover, I am advised that it is a well established practice in the securities industry to consider such information confidential. Courts have also recognized the competitive harm to a submitter by release of business 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). Accordingly, I have determined to affirm the initial denial under Exemption 4.

I have also determined, pursuant to 24 C.F.R. Section 15.21, that the withheld information is confidential commercial and financial information and also involves personal privacy and that Exemptions 4 and 6 are proper bases for its being withheld.

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 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