

Legal Opinion: GMP-0091

Index: 7.340, 7.350

Subject: FOIA Appeal: Co. Financial Repts.; Intra-agency Memo

June 19, 1992

Mr. Anthony Noe  
2243 Kline Avenue  
Nashville, Tennessee 37211

Dear Mr. Noe:

This is in response to your Freedom of Information Act (FOIA) appeal received by the Department on September 17, 1991. You appeal the August 16, 1991 determination issued by Gail L. Lively, former Director, Executive Secretariat, denying your July 24 and 25, 1991 FOIA requests for information concerning the Woodbine Community Organization, (WCO). Ms. Lively withheld WCO's financial reports and narratives pursuant to Exemption 4 of the FOIA. She also withheld an intra-agency memorandum dated July 2, 1991 from Syl Angel, Director, Office of Technical Assistance, to Richard Barnwell, Manager, Knoxville Office, under Exemption 5 of the FOIA.

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

Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), exempts from disclosure trade secrets and commercial or financial information which are obtained from a person and are privileged or confidential. The courts have interpreted the exemption as protecting commercial or financial information, the disclosure of which could "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).

The information contained in the financial reports describes the submitter's financial operations. Release of this information would permit competitors to gain "valuable insight into the operational strengths and weaknesses of the supplier of the information." *Comstock Int'l. USA Inc. v. Export-Import Bank*, 464 F. Supp. 804, 810 (D.D.C. 1979). 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); *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). Accordingly, I have determined that this information is

confidential financial information and that Exemption 4 is a proper basis for its being withheld.

I am also affirming the withholding of the intra-agency memorandum under Exemption 5. Exemption 5 of the FOIA exempts from mandatory disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. 552(b)(5). 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).

The memorandum constitutes predecisional deliberative material and is part of the Agency decisionmaking process regarding the Agency's investigation of the WCO. As such, the information is protected and, thus, exempt from disclosure under the FOIA's Exemption 5. Release of the predecisional information would harm the Agency's deliberative process by inhibiting employees from expressing open and candid views in predecisional reviews and recommendations. In addition, this material does not contain factual information which is reasonably segregable for release.

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

You have a right to judicial review of this determination under 5 U.S.C. 552(a)(4).

Very sincerely yours,

C. H. Albright, Jr.  
Principal Deputy General Counsel