

FOIA Appeal: Business Info. in UDAG Application

Legal Opinion: GMP-0045

Index: 7.340, 7.350, 7.470

Subject: FOIA Appeal: Business Info. in UDAG Application

January 21, 1992

Mr. Scott E. Diamond  
Paul, Hastings, Janofsky & Walker  
Twelfth Floor  
1050 Connecticut Ave.  
Washington, D.C. 20036-5331

Dear Mr. Diamond:

This is in response to your Freedom of Information Act (FOIA) appeal dated March 8, 1991. You appeal the partial denial dated February 6, 1991 by Gail L. Lively, Director, Executive Secretariat. Ms. Lively withheld certain documents from five Urban Development Action Grant (UDAG) projects under Exemptions 4, 5 and 6 of the FOIA, 5 U.S.C. 552(b)(4), (5), (6). You appeal Ms. Lively's decision to withhold the documents under Exemptions 4 and 5.

I have determined to affirm in part and reverse in part.

Exemption 4 of FOIA, 5 U.S.C. 552(b)(4), does not allow disclosure of "trade secrets and commercial or financial information" which is obtained from a person and privileged or confidential. The Trade Secrets Act, 18 USC 1905, makes it a criminal offense for an officer or employee of the United States to disclose information relating to the trade secrets or confidential business information of any person, firm, partnership, corporation or association. Ms. Lively's letter to you dated February 6, 1991 contains a listing of the documents withheld under Exemption 4. I have determined to affirm the withholding of this information. The withheld documentation consists of records pertaining to business information such as cost breakdowns, cash flow analyses, proformas, appraisals and market studies, revenues and expenditures, financing plans, and contracts.

Release of this business 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). 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

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margins, purchasing activity, and cost of goods sold); Hawaiian International Shipping Corp. v. Department of Commerce, 3 GDS 82,366 (D.D.C. 1982) (protecting estimated and actual sales cost data); BDM Corp. v. SBA, 2 GDS 81,189 (D.D.C. 1981) (protecting technical and commercial data and information on performance, cost, and equipment).

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 . . . 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 files for the five UDAG projects which you requested are intra-agency documents and, therefore, qualify for nondisclosure under the deliberative process privilege of Exemption 5. However, I have determined to reverse the initial denial of these documents and provide you with access to these records. I have attached a list of the documents pertaining to each UDAG project that were initially withheld under Exemption 5, which I am now making available to you. Copies of the released documents are enclosed.

Your March 8, 1991 appeal also advised that paragraphs 3 and 4 of your original request, dated November 15, 1990, were never answered. Upon our review of the UDAG project files, we have located documents generated by the Project Review Panel for the Overton Ridge project. We also found correspondence generated to or from DuBois Gilliam, Stanley Newman, Robert Kenison and the Office of General Counsel. These documents are identified and enclosed.

In regard to your request for a sample UDAG application and related materials, I have enclosed the following documents: (1) a copy of the Urban Development Action Grant Information Book; (2) a copy of the "Application Contents" pertaining to UDAG's, consisting of information about application procedures and sample forms; (3) a copy of the UDAG Draft Policy Book, circulated by Alfred Moran, Assistant Secretary for Community Planning and Development, to all Regional Administrators and Category A Field Managers, in a memorandum dated October 21, 1986; and (4) a copy of the Department's UDAG regulations.

Our review of the UDAG project files did not find any copies of UDAG staff meeting minutes and/or agendas during the time period between January 1984 and January 20, 1989 for these projects.

In paragraph 4 of your original request, you also requested files or documents maintained by the UDAG Office on Halcyon, consultants to HUD on the UDAG program. The former UDAG Office maintains 54 files on Halcyon. I have determined to provide you access to these records. I have enclosed copies of documents from the following Halcyon files: (1) the budget proposal file; (2) the technical assistance file; (3) the small cities file; and (4) the case studies file. The various state files, the quarterly reports file and Voucher Files I and II, contain thousands of additional pages of documentation. You may decide whether you want copies of all of these documents provided to you at the requisite copying charge or whether you wish to inspect the documents and choose which documents to be copied. Please advise the Office of the Assistant General Counsel for Personnel and Ethics Law of your decision. If you choose to inspect the documents, we will make the necessary arrangements through the Office of the Executive Secretariat. I have included an enclosure containing: (1) the names and a brief description of the 54 Halcyon files; and (2) a list of the documents for which we have provided copies.

We have enclosed 1077 pages of material at a copying fee of 10 cents per page. There is also a fee for review time of 15 hours at \$18.50 per hour. These costs were generated in response to your FOIA appeal. Please submit a check for payment to the Office of the Executive Secretariat in the amount of \$384.80 made payable to the U.S. Treasury. The address is:

Department of Housing and Urban Development  
451 7th Street, S.W., Room 10139  
Washington, D.C. 20410  
Attention: Yvette Magruder

I have determined, pursuant to 24 C.F.R. 15.21, that the public interest in protecting confidential business 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. 552(a)(4).

Very sincerely yours,

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

Enclosures