

FOIA Appeal: Audited Financial Statements

Legal Opinion: GMP-0081

Index: 7.340

Subject: FOIA Appeal: Audited Financial Statements

June 4, 1992

Mr. Wayne A. Hall
Special Projects Writer
Times Herald Record
233 Broadway
Newburgh, New York 12550

Dear Mr. Hall:

This is in response to your Freedom of Information Act (FOIA) appeal dated August 12, 1991. You appeal that part of the August 2, 1991 determination issued by Thomas H. Branch, Freedom of Information Act Officer, New York Regional Office, denying your request for audits submitted by Varick Homes and Burton Towers for the period 1986-1990. This request was denied under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

The withheld documents are the audited examinations of the financial statements submitted by Varick Homes Housing Development Fund Company, Inc., (Varick Homes) and Burton Towers Housing Development Fund Co., Inc. (Burton Towers).

After careful review of your appeal, I have determined to affirm the initial denial of the above information.

Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), exempts from mandatory disclosure trade secrets and commercial or financial information obtained from a person and privileged or confidential. Commercial or financial information may be withheld pursuant to Exemption 4 if disclosure of the information is likely to cause substantial harm to the competitive position of the entity from whom the information was received. *National Parks and Conservation Assn. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

The financial statements submitted by Burton Towers and Varick Homes are confidential financial records within the meaning of Exemption 4. These documents contain the submitters' financial operations, including its balance sheets, reports of revenue and expenses, statement of profit and loss and cash flow information. Release of this information could 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); *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); *Timkin Co. v. United States Custom 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 prices, inventory balance, profit margins, purchasing activity, and cost of goods sold).

You assert that disclosure would not cause competitive harm, because Varick Homes and Burton Towers are partially subsidized by governmental agencies, and the financial information requested cannot be considered confidential. Varick Homes is subject to a mortgage insured by the FHA under Section 221(d)(3) of the National Housing Act, and Burton Towers is a mortgagor under Section 202 of the Housing Act of 1958, as amended.

The status of these corporations and their receipt of public benefits does not make inapplicable the protections afforded by Exemption 4. Protectible commercial information can include material submitted by nonprofit entities. See, generally, *American Airlines Inc. v. National Mediation Board*, 588 F.2d 863, 870 (2d Cir. 1978) (nonprofit union's information deemed confidential). The application of Exemption 4 rests upon whether public disclosure would cause substantial competitive harm to the submitter of the information. It is the nature of the information that determines whether it is releasable, not the use to which a particular requester intends to put it.

HUD had consistently withheld the type of information you have requested. Furthermore, The Trade Secrets Act makes it illegal for an officer or employee of the government to disclose "to any extent not authorized by law any information concerning the identity, confidential statistical data, amount or source of income, profits, losses or expenditures of any person" See, 18 U.S.C. 1905. Accordingly, HUD is prohibited from releasing information of the type contained in the audited financial statements unless authorized to do so by law. As no law authorizes the release of this information, any disclosure by HUD of such information would violate the Trade Secrets Act.

Accordingly, I have concluded that the financial statements contain confidential financial information which were properly withheld under Exemption 4.

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