



LEGAL SERVICES CORPORATION

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John McKay
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September 23, 1997

Ms. Mary Johnson Donahue
2021 Livingston Oak Drive
Virginia Beach, Virginia 23464

RE: Your Freedom of Information Act Appeal

Dear Ms. Donahue:

This is in response to your May 18, 1997, appeal of the Legal Services Corporation's response to your Freedom of Information Act ("FOIA") request for the 1996 application for funding submitted by Tidewater Legal Aid Society ("TLAS").¹

On May 12, 1997, the Corporation's FOIA Administrator responded to your request and sent to you all releasable portions of the application you requested. Portions of the application were deleted to avoid an unwarranted invasion of personal privacy, pursuant to 5 U.S.C. 552(b)(6) and 45 C.F.R. § 16029(a)(5). In addition, the following portions of TLAS' application were withheld, pursuant to 5 U.S.C. § 552(b)(4) and 45 C.F.R. § 1602.9(a)(3) pertaining to proprietary information: Proposal Narrative, Parts 1(A and B) and 2(A-2 and A-5); Form G; Supplementary Documentation A and G.

Your appeal expresses special concern with the omission of Form G and the Supplementary Documentation G but agrees that portions of documents may be deleted to protect the privacy of employees. You stated that you received these same forms when you requested funding applications from prior years.

¹ Your appeal was originally sent in a letter dated May 18, 1997, but it was lost. At the request of LSC's FOIA Administrator, you resubmitted your request, which was received by the Corporation on August 26, 1997.

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Apparently, there is a misunderstanding regarding the nature of the information contained in Form G and the Supplementary Documentation G in the 1996 application. Your letter suggests that you believe the type of information contained in these forms corresponds to the type of information contained in pre-1996 forms with the same letter designation. This is not so.

The type of information included in various forms was changed in 1996 from prior years. For example, the staffing information contained in the pre-1996 G Form is not included in the 1996 G Form. Similar staffing information, however, is included in Form E in the 1996 application and Form E was released to you. The 1996 G Form contains information regarding estimated client services. The information in this form is protected pursuant to FOIA Exemption 4. *See* discussion of this exemption below.

In addition, there was no pre-1996 Supplementary Documentation G² and there was no supplementary documentation that contains staffing information in the 1996 application. Because a document with the information you seek does not exist, it cannot be released to you. The Corporation is not required to provide records that do not exist and a failure to provide nonexistent records is not deemed an improper withholding under FOIA. *See Sordean v. United States*, 1995 WL 86548 (N.D. Cal. 1995) (Granting summary judgment when requested records did not exist).

The document in the 1996 application with the designation "Supplementary Documentation G," has information on malpractice claims, which is unrelated to staffing. This form, as well as the Proposal Narrative, Parts 1 (A and B) and 2 (A-2 and A-5); Form G and Supplementary Documentation A, are not releasable pursuant to 5 U.S.C. 552(b)(4) and 45 C.F.R. §1602.9(a)(3) pertaining to proprietary information. I uphold the decision to withhold these forms under Exemption 4 of FOIA.

Exemption 4 protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. §552(b)(4); 45 C.F.R. §1602.9(a)(3). Information that a person is required to provide in order to compete for a federal grant is considered to be confidential if disclosure would either impair the agency's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the provider of the information. *See Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992)(en banc); *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The documents withheld under this exemption have been determined by the Corporation to be proprietary information, the release of which would substantially harm the provider's competitive position in any subsequent competition.

² Enclosed are copies of the forms discussed in this letter and the 1995 and 1996 application checklists for comparison.

Finally, I also uphold the decision to redact certain portions of the application to avoid an invasion of personal privacy under 5 U.S.C. 552(b)(6) and 45 C.F.R. §1602.9(a)(5). Exemption 6 of FOIA protects personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as the names, social security numbers, home addresses and phone numbers of employees.

If you are dissatisfied with this appeal decision, you may file suit in Federal district court, *see* 5 U.S.C. §552(a)(4)(B).

Sincerely,



John McKay
President