

June 5, 1975

Mr. Leonard E. Albert
Executive Director
Maryland Comprehensive Health
Planning Agency
Department of Health and Mental Hygiene
201 West Preston Street
Baltimore, Maryland 21201

Dear Mr. Albert:

You have asked whether the Maryland Comprehensive Health Planning Agency and the designated areawide planning agency of the Department of Health and Mental Hygiene may permit examination and review by the public of the contents of portions of the Certification of Conformance project files. You have further explained that the information contained in those files can be classified into three categories:

1. That financial or commercial information submitted by an applicant in the Application for State Certification of Conformance for hospitals or related institutions and/or Federal Section 1122 Certification for Reimbursement of Capital Expenditures;
2. Additional information that you, as the reviewing agency, have found necessary for an adequate review of the projects;
3. Unsolicited information received regarding the proposed projects.

Article 76A of the Annotated Code of Maryland (1974 Cumulative Supplement) entitled "Public Information", hereinafter called the Act, provides for the right to inspect public records as set forth in that Act. The custodian of public records is responsible for permitting inspection of all public records but the Act also requires that he shall allow, may deny, or shall deny the right of inspection of certain defined categories of public records.

Restrictions against disclosure are contained in Article 76A, Section 3. The pertinent provisions dealing with information such as is contained in Certification of Conformance project files is Article 76A, Section 3 (c) (V), which provides:

(c) This custodian shall deny the right of inspection of the following records, unless otherwise provided by law:

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(V) Trade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any other person;

There are no reported Maryland cases construing this section of the Act. We, therefore, have to turn to that body of case law construing the Federal Freedom of Information Act (5 U.S.C. Section 552) for guidance. The relevant section of that Act is 5 U.S.C. Section 552 (b) (4), which provides that "Trade secrets and commercial or financial information obtained from a person and privileged or confidential" and exempt from disclosure. To bring a matter (other than a trade secret) within this exemption, it must be shown that the information is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971).

To determine if this information is of a "confidential" nature, there are certain objective criteria that must be applied. If the information that has been submitted to you is of such a nature that the person would not ordinarily reveal this information to the public and if that person should be entitled to a reasonable expectation of privacy, then the information in question should not be released to the public. Ditlow v. Volpe, 362 F. Supp. 1321 (D.D.C. 1973). To determine if the information is such that it would not ordinarily be disclosed to the public, you must determine if release of the information would cause substantial harm to the competitive position of the person from whom the information is obtained. Pacific Architects and Engineers, Inc. v. The Renegotiation Board, 505 F. 2d 383 (D.C. Cir. 1974). When a person submits information to your agency with the expectation that the information will remain confidential, then that information should be treated as such by your agency. To do otherwise would impair your ability in the future to obtain the information necessary to conduct a complete review for Certification of Conformance.

The information contained in the Application for State Certification of Conformance for Hospitals and Related Institutions and/or Federal Section 1122 Certification for Reimbursement of Capital Expenditures is submitted to the areawide agencies for their initial review and to the Health Services Cost Review Commission for analysis and study pursuant to Article 43 Annotated Code of Maryland, Section 568R (1974 Cumulative Supplement). That Section provides that the Health Services Cost Review Commission shall "require the filing of information concerning the total financial needs of each institution and the resources available or expected to become available to meet such needs; including, but not limited to, the effect of proposals made by comprehensive areawide and State health planning agencies". Section 568P (d) of that Act provides that "all reports, except privileged medical information, filed under any provision of this subtitle shall be open to public inspection and shall be available for examination at the offices of the

Commission during regular business hours". The information contained in the application that is forwarded to the Health Services Cost Review Commission becomes a report submitted to the Commission and is open to public inspection. That same information contained in your files would be open to public inspection pursuant to Article 76A, Section 3 (c) as having been otherwise provided by law.

The additional information that you, as the reviewing agency, require from the applicant should be analyzed to determine if it falls within Article 76A, Section 3 (c) (V). The previously stated objective criteria should be applied to determine if this information is of a "confidential" nature.

The unsolicited information that you receive, since not obtained from the applicant and not submitted with any expectation of privacy, should be open to inspection by the public. Volunteered information of a scurrilous nature, or that may be libelous, should not be disclosed.

As you know, Public Law 93-641 (1975), entitled "National Health Planning and Resources Development Act of 1974", contains a provision which would require the State Agency to "make its records and data available, upon request, to the public". Public Law 93-641, Section 1522 (b) (6) (C). The House Report accompanying this legislation provides that all records and data will be available to the public "except to the extent that the Secretary, by regulation, prescribes exceptions to these requirements which he finds necessary to protect the confidentiality of matter comparable to that described" in the Freedom of Information Act (5 U.S.C. Section 552 (b)). These regulations, when promulgated, will specifically address the question of confidentiality of your records. At that time, we should re-evaluate this question. Without the guidance of these regulations, we are not in a position to comment on such exceptions. We also note that no funds have been appropriated pursuant to this Act.

The opinions expressed herein are of necessity of a general nature. Should questions regarding specific records, arise, we will be available to assist you.

Very truly yours,

Louise T. Keelty,
Assistant Attorney General

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