

ERVIN and  
ASSOCIATES  
INCORPORATED

FAX  
COVER

FJ-193789

To: Pat Morgan  
From: David Ervin  
Phone #: 301/469-3422

Date: 7/1/97  
Pages: 4  
(includes cover page)

COMMENTS:

---

RECEIVED  
JUL 1 4 07 PM '97  
EXECUTIVE  
SECRETARIAT

**NOTICE:** The information contained in this facsimile message, which contains the number of pages noted above, may contain confidential information that is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone at the number below. Thank you.

7315 Wisconsin Avenue • Suite 825 W • Bethesda, MD 20814-3202  
(301) 469-3400

Main FAX (301) 469-3433 • Single Family FAX (301) 469-3440

Internet e:Mail address: ervassoc@ix.netcom.com • HUD cc:Mail address: John J. Ervin at FHCPOST2

ERVIN and  
ASSOCIATES  
INCORPORATED

FI-193789

July 1, 1997

Ms. Pat Morgan  
Director, Office of the Executive Secretariat  
U.S. Department of Housing and Urban Development  
451 Seventh Street, SW, Room 10139  
Washington, D.C. 20410-0500

Via Fax to (202) 619-8365

Re: Freedom of Information Act Request  
Bids Submitted On Note Sales

Dear Ms. Morgan:

On October 12, 1996, Ervin and Associates submitted FOIA request FI-160384 for all bids submitted on note sales to date. In its response, HUD withheld certain information, including all losing bids. On November 13, 1996, Ervin appealed this decision. On December 30, 1996, George Weidenfeller partially granted Ervin's appeal of this withholding, but affirmed the decision to withhold losing bids under Exemption 4 citing National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 D.C. Cir 1974.

On March 4, 1997, after HUD's final response had been provided (which was still incomplete beyond losing bids), Ervin requested that Mr. Weidenfeller reconsider his decision regarding losing bids for the following reasons:

"Mr. Weidenfeller indicated in his letter that losing bidder information was exempt from disclosure based on Cf. Raytheon Co. v. Department of the Navy. According to that case, 'disclosure of the unsuccessful offeror's bottom-line prices proposed for a government contract (emphasis added) would cause it to suffer competitive harm by enabling competitors to deduce its pricing strategy.' This case does not apply to our request because the bids we are referring to were for the purchase of tangible assets from the government, not the award of government contracts. Further, they were bids for unique pools of assets that are not subject to duplication. This, along with the fact that they were losing bids, makes them irrelevant to pricing strategy except to the extent that they can educate the public on the workings of the optimization model.

"If you look at the two instances in which the courts have determined Exemption 4 can be authorized, according to National Parks and Conservation Association v. Morton, it is clear that neither apply here. Disclosure of the losing bidders prices in this case will not impair the government's ability to obtain necessary information in the future, because losing bidders will continue to bid on future notes even if their bid prices are released. In addition,

FI-193789

disclosure can not cause substantial harm to the competitive position of the entity from whom the information was received, because the market will react based on the winning bidders prices, not the losing bids. Considering that neither of these circumstances apply to losing bids for tangible assets being sold by the government, the information can not be legitimately withheld under Exemption 4."

Mr. Weidenfeller, in a misguided attempt to protect HUD from documenting corruption with respect to note sales, refused to consider the merits of our request and instead, on May 21, 1997, informed us that "Under the Department's FOIA regulations, there is no provision for a follow-up appeal after the appeal official has issued his administrative appeal decision."

To confirm Ervin's suspicions that HUD was inappropriately withholding losing bids, on March 19, 1997, Mark Dellonte of Ervin called Nick Burgess, the Freedom of Information Act Specialist for the Federal Deposit Insurance Corporation (FDIC), which has been selling off similar government-owned notes for much longer than HUD has been selling such notes. Mr. Dellonte asked Mr. Burgess if the FDIC releases losing bid information on note sales, and he instantly replied "of course we do, otherwise, how would people know the sale was fair." Mr. Burgess further confirmed that the FDIC routinely releases the names and addresses of losing bidders, their respective losing bid amount, as well as the assets each bidder bid on. His response of "how would people know the sale was fair," in fact, focused on the question that HUD has refused to ask.

Additionally, Ervin is requesting this information because it believes that it will definitively show that the optimization model, which has been employed in every HUD note sale thus far, has intentionally favored larger bidders who understood the model and encouraged collusion amongst such bidders. HUD has received similar feedback from other financial advisors who were told that the only aspect of note sales that is non-negotiable is the optimization model. For HUD to claim that it is withholding this information to protect the losing bidders rights, particularly small bidders, when in fact they were the victims of this corruption that will benefit most from disclosure, is not credible.

A recent Supreme Court decision on insider trading made it clear that the definition of insiders is much broader than certain parties previously assumed, or hid behind. If it is ultimately proven that there was insider trading in some of the note sales, and HUD's overly broad application of FOIA Exemptions, with the concurrence of the Office of General Counsel, has continued to contribute to covering up this activity and thus has allowed it to continue, it may appropriately be one of the final HUD scandals.

Secretary Cisneros' administration was directly responsible for allowing the integrity of the note sales that have already closed to be compromised and for dismissing public questions and criticism of the optimization model and other aspects of the note sale process, therefore, they had ulterior motives to prevent the release of this

FD 193789

information. However, Secretary Cuomo's commitment to cleaning up the Agency now allows him the opportunity to take an objective look at whether or not the public has a right to see this information, especially considering that note sales are still occurring and the optimization model is still in place.

Considering this, please provide us with the following information under the Provisions of the Freedom of Information Act:

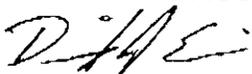
- The optimization analysis prepared after each note sale that summarizes the winning and losing bids;
- Documentation on every bid submitted for each Note Sale, including at a minimum: 1) the identity of the note sale 2) the name of the bidder, 3) the pools or assets included in each bid, and 4) the amount of the bid. Please note that the original bidding sheets supplied by each bidder (or a printout of the bids if submitted on diskette) should be readily available and would be responsive to this request.

It has recently been reported that HUD is reducing Hamilton Securities responsibility as HUD's Crosscutting Financial Advisor, but we also understand that Hamilton is still being paid approximately \$868,000 per month for their work under this task order and they will continue to be paid that amount for the foreseeable future. In fact, it appears that nothing has changed except that the file has been papered so that if the results of the criminal investigation indicate wrongdoing, HUD can insulate itself without actually having done anything. Considering that Hamilton Securities was the financial advisor or crosscutting financial advisor for each note sale in question, to the extent HUD desires, HUD should be able to utilize Hamilton to obtain a response to this FOIA request promptly. A prompt response is critical inasmuch as note sales are still occurring and the same flawed structures and collusion may still be in place.

Please note that the information requested is not for profit making activities. Considering this, Ervin and Associates should be considered a non-commercial requester and any fees assessed should be subject to the limitations on fees for non-commercial requesters.

Ervin and Associates agrees to pay up to \$100 for the processing of this request. If the anticipated fees exceed \$100, please call me at (301) 469-3422 so I may have the opportunity to reformulate the request.

Very truly yours,  
ERVIN and ASSOCIATES, INCORPORATED



David J. Ervin