

FOIA Appeal: Standards of Conduct Advice

Legal Opinion: GMP-0047

Index: 7.340, 7.350

Subject: FOIA Appeal: Standards of Conduct Advice

January 27, 1992

Robert Plotkin, Esq.
Paul, Hastings, Janofsky & Walker
12th Floor
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5331

Dear Mr. Plotkin:

This is in response to your Freedom of Information Act (FOIA) appeal dated November 19, 1991. You request a review of the partial denial dated October 23, 1991 by Gail L. Lively, Director, Executive Secretariat, withholding intra-office memoranda, letters, and handwritten notes under Exemptions 5 and 6 of the FOIA, 5 U.S.C. 552(b)(5),(6). You request access to the documents withheld under Exemption 5, claiming the actions of Departmental personnel under investigation on numerous projects and programs while employed at HUD are now matters of public record.

I have determined to affirm the initial denial under Exemptions 5 and 6.

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).

A document can qualify for exemption from disclosure under the deliberative process privilege of Exemption 5 when it is predecisional, i.e., "antecedent to the adoption of an agency policy," *Jordan v. Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc), and deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

The documents withheld here come within the deliberative process and attorney-client privileges of Exemption 5. They contain predecisional information involving advice, discussions and recommendations in the deliberative process of agency consideration of standards of conduct issues of Departmental

employees. They also contain legal advice by agency counsel to agency clients. I do not agree that the issues discussed in

2

these documents pertain to public actions taken by these employees on Departmental projects and programs.

These documents are also being withheld under Exemption 6 because they contain matters of personal privacy pertaining to Departmental employees. Redaction of the names of the employees will not protect their personal privacy since the topics and discussions contained in the documents will, in many instances, reveal the identities of the individuals.

While we are sympathetic to the needs of your client to provide for his defense in the ongoing Independent Counsel investigation, we also have an obligation to protect the integrity of the attorney-client and deliberative process privileges, as well as individuals' personal privacy. However, the Department's application of Exemption 5 is discretionary. Therefore, if you can provide specific justification why information on these individuals is relevant to your client's defense against allegations of fraud and abuse, we would be happy to reconsider our decision.

I have also determined pursuant to the Department's regulations at 24 C.F.R. 15.21 that the public interest in preserving free and frank opinions, advice and recommendations within the Government, and in protecting personal privacy militates against release of the withheld information.

The FOIA under 5 U.S.C. 552(a)(4) provides for judicial review of this determination.

Sincerely yours,

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