

Legal Opinion: GMP-0102

Index: 7.350

Subject: FOIA Appeal: Intra-Agency Correspondence

July 24, 1992

Ms. Dolores T. Thompson
President
Dynes Corp.
17416 Harvard Avenue
Cleveland, Ohio 44128

Dear Ms. Thompson:

This is in response to your letter of May 8, 1992 requesting administrative review of the April 13, 1992 denial of your request for all inquiries and correspondence between HUD Headquarters' 2530 Clearance Department and the Cleveland Office pertaining to Dynes Village. George L. Engel, Manager of the HUD Cleveland Office, denied your request under Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. Section 552(b)(5). This exemption protects from mandatory disclosure inter-agency or intra-agency memoranda or letters that would not be available by law other than to a party in litigation with the Department.

I have determined to affirm the initial denial by the Cleveland Office to withhold intra-agency correspondence under Exemption 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 correspondence you seek is between HUD employees who do not have the authority to take final agency action, and therefore is necessarily predecisional. *Hopkins v. U.S. Department of Housing & Urban Development*, 929 F.2d 81, 85 (2nd Cir. 1991).

Further, disclosure of the facts HUD employees relied on in making their recommendations would reveal the Department's deliberative process. In such circumstances, the factual material can be withheld under Exemption 5. See *Soucie v. David*, 448 F.2d 1067, 1077-1078 (D.C. Cir. 1971), where the court held that factual material is exempt from disclosure if it is inextricably intertwined with policy-making processes, and Mervin

v. Federal Trade Commission, 591 F.2d (821 D.C. Cir. 1978) holding that facts are exempt where disclosure would reveal otherwise exempt material. See also, Lead Industries Association v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979) which held that, where the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material, the factual material is not "reasonably segregable."

I have also determined, pursuant to 24 C.F.R. Section 15.21, that the public interest in protecting the deliberative process militates against disclosure of the information.

You have a right to judicial review of this determination under 5 U.S.C. Section 552(a)(4).

Very sincerely yours,

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

cc: Yvette Magruder
Lewis Nixon, 5G