

Legal Opinion: GMP-0108

Index: 7.350
Subject: FOIA Appeal: Non-inter-agency Record

August 5, 1992

Mr. Jose Luzunaris Martinez
P.O. Box 3216
Hato Rey, Puerto Rico 00919

Dear Mr. Luzunaris-Martinez:

This is in response to your Freedom of Information Act (FOIA) appeal dated June 19, 1992. You appeal the denial dated May 21, 1992 issued by Rosa C. Villalonga, Manager, Caribbean Office, withholding under Exemption 5 of the FOIA, the records and files of the Agreement between the Commonwealth of Puerto Rico and the Federal Government concerning privatization. Your request was to examine the records and files concerning the Agreement and the Agreement itself. You were furnished a copy of the Agreement. The documents withheld were:

1.A memorandum from the Chief Counsel of the Caribbean Office to the Manager rendering an opinion on the Agreement.

2.An opinion of the Secretary of Justice for the Commonwealth of Puerto Rico.

3.Notes of telephone conversations providing predecisional opinions and recommendations to Ms. Villalonga concerning the Agreement.

I have decided to reverse the denial withholding the opinion of the Secretary of Justice for the Commonwealth of Puerto Rico and to affirm the denial of the Chief Counsel's memorandum and the notes of the Caribbean Office's telephone conversations.

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 other than an agency in litigation with the agency...." 5 U.S.C. Section 552(b)(5). Exemption 5 incorporates a number of privileges known to civil discovery including the deliberative process privilege. See *NLRB v. Sears, Roebuck, and Co.*, 421 U.S. 132 (1975).

A note or memorandum 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 United States

Supreme Court has construed the deliberative process privilege of

Exemption 5 to encompass documents which involve "advisory opinions, recommendations, and deliberations." NLRB v. Sears, Roebuck, and Co., 421 U.S. at 150.

The memorandum of the Chief Counsel and notes of telephone calls are intra-agency, predecisional documents exempt from disclosure under the deliberative process privilege of Exemption 5. Therefore, I am affirming the denial of these documents. Further, I have determined, pursuant to HUD's regulations at 24 C.F.R. Section 15.21, that the public interest in preserving free and frank opinions, advice, and recommendations within the Government militates against release of the withheld information.

However, I have determined to reverse the initial denial and release a copy of the opinion of the Secretary of Justice of the Commonwealth of Puerto Rico. This opinion is not an "inter-agency or intra-agency" memorandum or letter which would qualify for exclusion under Exemption 5 of the FOIA. I am instructing the Caribbean Office to send this material to you.

Your letter also raised certain administrative issues, namely:

1. You question whether the 10 business day requirement of the regulations was met because of a delay between the date shown on the letter and the date that it was received. The records of the Caribbean Office indicate that the request was received on May 8, 1992 and responded to on May 21, 1992. This is within the 10 business day requirement. We regret any delay there may have been in your receiving this response.

2. You question the Caribbean Office's instructions to send your appeal to the Assistant General Counsel for Personnel and Ethics Law. Subsequent to the publishing of Volume 24 of the Code of Federal Regulation, April 1, 1991, there has been a realignment of duties within the Office of General Counsel. The instructions regarding the mailing of your appeal were correct.

3. You point out that you were only advised that the envelope be marked "Freedom of Information Request" and you were not instructed to mark the letter also. Fortunately the envelope and the letter did not get separated and arrived simultaneously. Your appeal was given proper consideration.

Please be advised that you have the right to judicial review of this determination under 5 U.S.C. Section 552(a)(4).

Very sincerely yours,

George Weidenfeller
Deputy General Counsel (Operations)

cc: Yvette Magruder
Raymond Buday, 4G
Rosa Villalonga, 4.13S