

Legal Opinion: GMP-0110

Index: 7.331, 7.350, 7.360, 7.413
Subject: FOIA Appeal: Conciliation Records--Title VIII

August 18, 1992

Ms. Mattye F. Faulkner
P. O. 4515
San Pedro, California 90731

Dear Ms. Faulkner:

This is in response to your Freedom of Information Act (FOIA) appeal dated January 29, 1990 [sic] 1991, of a denial of information by the San Francisco Regional Office. Although your appeal letter does not refer to a case number or the date of the initial denial letter by the San Francisco Regional Office, we assume that you are appealing the denial letter issued to you on December 31, 1990 by Dirk Murphy, Public Information Officer, San Francisco Regional Office. In your initial request dated December 10, 1990, you requested "everything in the investigatory file ... including all correspondence to and from HUD ... all material/documents obtained by the investigator and all notes" concerning HUD Case Number 09-89-1382-1, a Title VIII investigatory case file. Mr. Murphy released copies of information pertaining to your request except intra-office documents, withheld under Exemption 5, and information pertaining to conciliation, withheld under Exemption 4.

I have determined to affirm the initial denial of the intra-agency documents under Exemption 5 and information pertaining to conciliation under Exemption 3.

In your appeal, you have indicated that you are the aggrieved party in this Title VIII case. However, HUD Case Number 09-89-3812-1 does not contain any information identifying you as the aggrieved party. The complainant in the case was the Hollywood Wilshire Fair Housing Council.

The information available under the FOIA of a Title VIII case file is not the same for third parties as it is for the complainant and respondent. Since our records do not identify you as the complainant, we are treating your appeal as a third party request.

Exemption 5 of the FOIA, 5 U.S.C. Section 552(b)(5), exempts from mandatory disclosure, "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." The purpose of this exemption is to preserve free and candid internal agency deliberations leading to executive branch decision-making. In keeping with this policy, the Supreme Court has construed Exemption 5 as

encompassing the advice, opinions, and recommendations of

staff members in the agency decision-making process. NLRB v. Sears, Roebuck and Co., 421 U.S. 132, 151 (1975). The inter-agency memorandum and the investigator's handwritten notes comes within Exemption 5 and I am affirming the denial under the exemption.

The San Francisco Office also withheld documents concerning the conciliation process pursuant to Exemption 4. I am affirming the denial of such information under Exemption 3.

Exemption 3 of the FOIA, 5 U.S.C. Section 552(b)(3), incorporates the disclosure prohibitions that are contained in various other federal statutes. Exemption 3 allows the withholding of information prohibited from disclosure by another statute only if that statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." A statute thus falls within the exemption's coverage if it satisfies any one of its disjunctive requirements. See Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980).

The file you requested has information concerning the conciliation process, consisting of: (1) handwritten staff notes; (2) correspondence with Respondent's counsel discussing terms for the conciliation agreement; and (3) draft copies of the conciliation agreement. The Fair Housing Amendments Act of 1988, (FHAA) P.L. 100-430, amends Title VIII of the Civil Rights Act of 1968 to prohibit disclosure of information obtained in the course of conciliation without the written consent of the persons concerned. 42 U.S.C. Section 3610(d). See also, 24 C.F.R. Section 103.330. Beverly G. Agee, Regional Counsel, contacted the Respondent's representative in an attempt to obtain such consent. The representative refused to give her consent. This meets the requirements of subpart (B) of Exemption 3. Accordingly, I have decided to affirm the initial denial of the conciliation information pursuant to Exemption 3 of the FOIA and the FHAA of 1988.

In addition, the file contains a conciliation agreement signed by the parties and the terms of such agreement provide that the document shall not be made public unless the complainant and respondent otherwise agree. Under the Fair Housing Amendments Act, 42 USC Section 3610(b)(4), a "conciliation agreement shall be made public unless the complainant and the respondent otherwise agree and the Secretary determines that disclosure is not required to further the purposes of this subchapter." The Respondent's

representative also advised Ms. Agee that the respondent would not agree to the conciliation agreement being

disclosed to the public and the Secretary has not determined that disclosure is required to further the purposes of the Act. Therefore, I have determined that the requirements of subpart (B) of Exemption 3 have been met with respect to the conciliation agreement itself and I am affirming the initial denial of this document.

Although it is not clear whether you were previously provided information contained in the investigatory file concerning the tenants residing at respondent's properties, particularly the name of the tenant, the unit size, the number in each household, the date of occupancy, and the base rent, I am denying you such information based on Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. Section 552(b)(6),(7)(C).

Exemption 6 protects information in medical, personnel and similar files. Exemption 7(C) protects personal privacy information contained in records or information compiled for law enforcement purposes. In determining whether information can be withheld under Exemptions 6 and 7(C), the public interest purpose for disclosure of personal information must be balanced against the potential invasion of privacy. *Wine Hobby, USA, Inc., v. U.S. Internal Revenue Service*, 502 F.2d 133 (3rd Cir. 1974).

United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (hereinafter "Reporters Committee") establishes a framework for analyzing the public interest under Exemptions 6 and 7(C) by establishing that only the furtherance of FOIA's core purpose of informing citizens about "what their government is up to" can warrant the release of information implicating individual privacy interests. *Reporters Committee*, 489 U.S. at 772-73.

In this case, the information contained in the FHEO files concerning tenants involves personal privacy information. I have determined that there is no public interest purpose in release of such information and, thus, under the balancing test, the information can be withheld under the exemptions.

I have also determined pursuant to 24 C.F.R. Section 15.21 that the public interest in protecting advice, opinions, and recommendations in the deliberative process and in protecting personal privacy militates against release of the withheld information.

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

Very sincerely yours,

George L. Weidenfeller
Deputy General Counsel (Operations)

cc: Yvette Magruder
Beverly Agee, 9G