

Legal Opinion: GMP-0141

Index: 7.350

Subject: FOIA Appeal: No Waiver--Discretionary Release

January 26, 1993

Stephen W. Hall, Esq.
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1025 Thomas Jefferson Street, NW
Suite 500 East
Washington, D.C. 20007

Dear Mr. Hall:

This is in response to your Freedom of Information Act (FOIA) appeal dated February 27, 1992. You appeal the denial dated January 15, 1992 from Gail Lively, former Director, Executive Secretariat, withholding two documents under Exemption 5 of the FOIA.

I have determined to affirm the initial denial.

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).

Ms. Lively withheld two records under Exemption 5 as intra-agency, predecisional memoranda:

1. Monitoring review file containing a report of review of Gateway Mortgage Company conducted October 21, 1991 by HUD's Monitoring Division;
2. Notes dated in October, 1991 from the files of Walter E. Warren, Senior Trial Attorney, Office of General Counsel, Inspector General and Administrative Proceedings Division.

These memoranda contain internal, predecisional deliberations and were properly withheld under the deliberative

process privilege of Exemption 5. It is my understanding that the Inspector General and Administrative Proceedings Division, in its discretion, previously made available to you a limited number of intra-agency, predecisional documents from a Monitoring Division report which might have been withheld under one or more FOIA exemptions. This was done in support of the judgment of assigned litigation counsel that it was appropriate, in that case, to facilitate a settlement in the public interest. However, an agency's discretionary disclosure of exempt information does not constitute a waiver of the agency's authority to invoke applicable FOIA exemptions to withhold other related records. See, United States Student Association v. CIA, 620 F. Supp. 565, 571 (D.D.C. 1985).

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 withheld information.

You are entitled to judicial review of this determination under 5 U.S.C. Section 552(a)(4). Judicial review of my action on this appeal is available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, or in the judicial district where the records you seek are located.

Very sincerely yours,

George L. Weidenfeller
Deputy General Counsel (Operations)

cc: Yvette Magruder