



U.S. Department of Housing and Urban Development
New York State Office
Jacob K. Javits Federal Building
26 Federal Plaza
New York, New York 10278-0068
<http://www.hud.gov/local/nyn/nynopen.html>

March 14, 2012

Kathleen M. Lee
Harwood Lloyd, LLC
130 Main Street
Hackensack, NJ 07601
(201) 487-4758

Re: Tony Gomez Construction Co., Inc. v. Newark Housing Authority
N.J. Super. Ct. Law Div., Essex County — Docket No. ESX-L-2717-07

Dear Ms. Lee:

This letter responds to two subpoenas, both dated March 1, 2012, that you sent to the United States Department of Housing and Urban Development's (HUD or the Department) Newark Field Office requesting testimony and documents in connection with the above entitled matter. Please note that employees of the Newark Field Office are not authorized to accept service on behalf of HUD. 76 F.R. 42465. All future demands and correspondence should be addressed to this office.

Departmental regulations prohibit the production of material or provision of testimony without the approval of an Authorized Approving Official.¹ 24 C.F.R. § 15.202. The Department cannot process a request for material or testimony absent compliance with the regulations appearing at 24 C.F.R. Part 15. Without foreclosing the possibility of future cooperation in this matter, HUD preliminarily objects to this subpoena.

If a party wishes to seek HUD approval for the testimony of a HUD employee or the production of HUD documents, that party needs to submit a written request that addresses the requirements and standards set forth in 24 C.F.R. Part 15, Subpart C. This Part applies to any subpoena, order, or other demand of a court or other authority that is issued in a legal proceeding and any accompanying submissions. Id. § 15.2. Please be advised that a court cannot compel an agency employee to disobey applicable Federal agency regulations or an agency decision made under such regulations. United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951); Edwards v. U.S. DOJ, 43 F.3d 312, 316–17 (7th Cir. 1994); In Re Boeh, 25 F.3d 761, 763–67 (9th Cir. 1994); Boron Oil Co. v. Downie, 873 F.2d 67, 69–70 (4th Cir. 1989); United States Steel Metal Corporation v. Mattingly, 663 F.2d 68 (10th Cir. 1980); Merco, Inc. v. United States FHA, 2009 U.S. Dist. LEXIS 119472 (D.N.J. 2009). The federal government is shielded from subpoena requests as a nonparty in state court by sovereign immunity. See Houston Business Journal v.

¹ Please note that the undersigned is the Authorized Approving Official, as defined by 24 C.F.R. § 15.2(b), for this matter.

Office of Comptroller, U.S. Department of the Treasury, 86 F.3d 1208 (D.C. Cir. 1996); In re Backer, 2010 U.S. Dist. LEXIS 71821, at *29 (S.D.N.Y. 2010).

The subpoenas to the Department make no attempt to comply with HUD regulations governing production of material or testimony. See generally, 24 C.F.R. § 15.203. Only after you have provided the necessary information can the Department begin to process your request. Pollock v. Barbosa Group, Inc., 478 F. Supp. 2d 410, 414 (W.D.N.Y. 2007) (“A party seeking release of records from a federal agency must comply with the agency’s Touhy regulations by making a proper demand, exhausting any administrative remedies, and otherwise following the directives established by the agency.”)

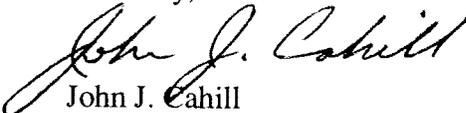
Please note that, as a general matter, the Department is strongly disposed against the approval of live testimony by HUD witnesses. Due to the nature of the programs HUD administers and enforces, HUD employees are particularly vulnerable to the demands of private parties seeking information acquired by the Department. If HUD employees were routinely required to testify in private civil suits, significant loss of staff hours for current employees and inconvenience for former employees would predictably result. The courts have expressed a legitimate concern that the time and energies of public officials be conserved for the public’s business and noted that a failure to place responsible limits upon the access of private litigants to Department officials as sources of routine information would result in a severe disruption of the government’s primary function. See Community Federal Savings and Loan v. Federal Home Loan Bank, 96 F.R.D. 619, 621 (D.D.C. 1983); see also Davis Enterprises v. U.S. Environmental Protection Agency, 877 F.2d 1181 (3d Cir. 1989) (Regional Counsel did not abuse discretion or otherwise err in preventing agency employee from using agency time to give deposition testimony on appellants’ behalf in private litigation).

Furthermore, the subpoenaed official seldom has facts beyond what is presented in existing documents in Departmental files. If the Department produces authenticated documents pursuant to 24 C.F.R. § 15.205(b), those documents are admissible into evidence without authentication by a witness. N.J. Evid.R. 902(b).

Should you wish to make a request compliant with Part 15, pursuant to 24 C.F.R. § 15.203(a)(1), you should allow at least 30 days for HUD’s review. The objection contained in this letter is therefore preliminary. Nothing in this letter should be deemed to be a waiver of any legal objection that HUD may possess with regard to this demand or with regard to the production of any particular document or testimony sought pursuant to future demands.

If you have any questions, or wish to discuss this matter, please call Louis Gioia, Attorney-Advisor, at 212-542-7211.

Sincerely,



John J. Cahill

Regional Counsel for
New York/New Jersey