

Legal Opinion: GMP-0113

Index: 7.350  
Subject: FOIA Appeal: Segregable Facts

August 26, 1992

John P. Campbell, Esq.  
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Washington, D.C. 20006

Dear Mr. Campbell:

This is in response to your Freedom of Information Act (FOIA) appeal dated August 19, 1991. You appeal the July 19, 1991 denial by Gail L. Lively, former Director, Executive Secretariat, who withheld intra-agency documents under Exemption 5 of the FOIA.

I have determined to affirm, in part, and reverse, in part, the initial denial.

The withheld documents consist of: (1) an April 23, 1991 memorandum from Anthony M. Villane, Jr., Regional Administrator, New York Regional Office, to Anna Kondratas, Assistant Secretary for Community Planning and Development; (2) a June 24, 1991 memorandum from Paul Bardack, Acting Assistant Secretary for Community Planning and Development, to Anthony M. Villane, Jr.; (3) deliberative notations contained on routing and transmittal slips dated September 17, 1987 and December 7, 1988; and (4) notations contained on an October 5 "memorandum of call."

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." 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 express opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

The withheld documents contain predecisional opinion and analysis, and therefore, qualify for exemption from disclosure under the deliberative process privilege of Exemption 5. Thus, I have determined to affirm the initial denial of these documents. However, Exemption 5 does not apply to segregable factual portions of deliberative documents, *EPA v. Mink*, 410 U.S. 73, 87-88 (1973). Therefore, I have determined that the first two pages and part of page three of the April 23, 1991 memorandum are segregable facts which can be disclosed under the FOIA. I am

releasing this information to you.

Pursuant to HUD's regulations at 24 C.F.R. Section 15.21, I have determined that the public interest in preserving free and frank opinions, advice and recommendations within the Government militates against the release of the withheld information.

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)

Enclosure

cc: Yvette Magruder