

Legal Opinion: GMP-0001

Index: 7.340, 7.350

Subject: FOIA Appeal: Apartment Project Documents

October 9, 1991

Mr. Benjamin B. Weitz
Managing General Partner
c/o Community Management Corp. of Maryland
1 Central Plaza
11300 Rockville Pike
Suite 500
Rockville, Maryland 20852

Dear Mr. Weitz:

This is in response to the Freedom of Information Act (FOIA) appeal dated June 12, 1991 submitted by your attorney, Leslie Platt. Mr. Platt requested administrative review of the partial denial of his November 13, 1990 request for records pertaining to Pemberton Manor Apartments, Project No. 052-44164. Mr. Platt advised that our administrative appeal determination should be addressed to you.

Mr. Platt requested, on your behalf as the owner of Pemberton Manor Apartments, "...copies of all books and records, documents, correspondence, memoranda, notes, files, and/or any and all other written materials, whether formal or informal and whether typed, printed or handwritten, and whether generated by a party inside or outside the Department, that relate to the ownership, operation or management of the subject project during calendar years 1986 through 1990."

Rheba G. Gwaltney, Acting Freedom of Information Officer, Baltimore Field Office, in a letter to you dated May 16, 1991, released certain documents pursuant to your request, but withheld twenty one documents under Exemption 5 of the FOIA listed as follows:

1. Memorandum from Regional Mechanical Engineer to Director of Housing Management Division dated February 10, 1987, containing findings and recommendations regarding Pemberton Manor Apartments.
2. Memorandum from Manager, Field Office, to Regional Inspector General for Audit dated July 12, 1990, requesting audit of several multifamily projects managed by Community Management Corporation.
3. Memorandum to Managers of Baltimore, Washington, and Richmond Field Offices dated February 7, 1991, containing Draft Audit Findings on

Community Management Corporation.

4. Income and Expense Analysis for Pemberton Manor dated June 2, 1988.
5. Annual Financial Statement Completeness Checklist dated September 30, 1986 with attached forms: Calculation of Management Fee, Computation of Surplus Cash, Distributions and Residual Receipts for Fiscal period ended 9/30/86 and Reserve for Replacement review checklist.
6. Annual Financial Statement Completeness Checklist dated December 31, 1987 with attached forms: Calculation of Management Fee, Computation of Surplus Cash, Distributions and Residual Receipts for Fiscal period ended 12/31/87 and Reserve for Replacement review checklist.
7. Annual Financial Statement Completeness Checklist dated September 30, 1988 with attached forms: Calculation of Management Fee, Computation of Surplus Cash, Distributions and Residual Receipts for Fiscal period ended 9/30/88 and Reserve for Replacement review checklist.
8. Annual Financial Statement Completeness Checklist dated September 30, 1989.
9. HUD Representative's Trip Report dated January 29, 1987.
10. State of Maryland Department of Assessments and Taxation records request dated August 21, 1990 with attached response.
11. Letter from Wicomico County, Maryland dated April 1, 1986 regarding Senior AIDES program.
12. Draft letters from Chief, Loan Management Branch, Baltimore Field Office, to President and Vice President, Administration Community Management Corporation dated March 23, 1987, requesting submission of Annual Financial Statement.
13. Letter from Regional Inspector General for Audit to Accounting Firm of Friedman & Fuller dated August 27, 1990, regarding work performed and audit reports.
14. Several handwritten notes to the file regarding various subjects including rent collection policy, management, office staff, vacant units, surplus cash, and financial information.
15. Handwritten memorandum from Chief Counsel to Field Office Manager dated October 14, 1986 and notes regarding CDA Help Loan for Pemberton Manor

Apartments.

16. Handwritten interoffice memorandum dated March 5, 1990 regarding financial statement.
17. Handwritten interoffice memorandum dated May 8, 1990 regarding cash analysis for Pemberton Manor.
18. Handwritten interoffice memorandum dated January 12, 1987 regarding CDA Help Loan for Pemberton Manor.
19. Handwritten interoffice memorandum dated May 16, 1988 mentioning rent increase request for Pemberton Manor.
20. Handwritten interoffice memorandum dated March 7, 1990 regarding request for construction analyst.
21. Handwritten interoffice memorandum from Chief, Loan Management Branch, to Chief Counsel regarding request for legal opinion and decision.

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

Exemption 5 protects 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." Exemption 5 encompasses the deliberative process privilege. The deliberative process privilege covers pre-decisional documents which are deliberative in nature. A memorandum may 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 purpose of the deliberative process privilege is to protect the free disclosure of information in the decision-making process. Under this privilege there exists a legally adequate basis for withholding intra-agency memoranda where the release of such could impair the decision-making process of the Department. In keeping with this policy the U.S. Supreme Court has construed this exemption as encompassing the advice, opinions and recommendations of employees in the agency decision-making process. *NLRB v. Sears, Roebuck and Co.*, 421 U.S. 132, (1974).

I have determined that several documents from the above list should be withheld. Items No. 1, 2, 3, 9, 14, 15, 16, 17, 18,

19, & 21 consist of intra-agency opinions, recommendations, and/or deliberations which reveal the decisional or evaluative process of the Department and are being withheld under Exemption 5. Disclosing viewpoints expressed by agency employees in the evaluative process would jeopardize the deliberative process

because, in the future, employees would not be candid in their review of proposals. See Washington Research Project, Inc. v. Department of Health, Education, and Welfare, 504 F.2d 238, 250 (D.C. Cir. 1974).

I have determined that the other documents may be disclosed. Items No. 4, 5, 6, 7, & 8, reflect financial data and would qualify for nondisclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." However, in light of the fact that you are requesting this information as the project owner, release of these documents would neither cause harm in this case nor breach confidentiality.

Item 10 is a State of Maryland document and Item 11 is a Wicomico County, Maryland document. Although advice from a state agency can qualify as "inter-agency" documents under Exemption 5, Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 315 (S.D. N.Y. 1976), since Item 11 does not contain any predecisional deliberations, the Department will release the document. Items 12 & 20 are intra-agency documents. However, they contain no predecisional deliberations and are, therefore, releasable under the Act. Item No. 13 was previously sent to you.

In response to Mr. Platt's appeal I have determined to release Items 4, 5, 6, 7, 8, 10, 11, 12, and 20. Copies of the items are enclosed. Pursuant to the Department's regulations at 24 C.F.R. 15.21, I have also determined that the public interest to protect the deliberative process militates against release of the information contained in Items 1, 2, 3, 9, 14, 15, 16, 17, 18, 19, and 21. Therefore, this information is being withheld.

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

Very sincerely yours,

Shelley A. Longmuir
Deputy General Counsel

Enclosures