

Legal Opinion: GMP-0014

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Subject: Applicability of FOIA to Sec. 103, HUD Reform Act

November 6, 1991

MEMORANDUM FOR: Principal Staff
Regional Administrators
Regional and Office Managers
Regional Counsel
Chief Counsel
Chief Attorneys

FROM: Frank Keating, General Counsel

SUBJECT: Applicability of the FOIA to Section 103 of the
Department of Housing and Urban Development
Reform Act of 1989

With the passage of the HUD Reform Act of 1989, Pub. L. 101-235, 103 Stat. 1987, (1989), questions have arisen whether there is a conflict between Section 103 of the Act, which prohibits advanced disclosure of funding decisions, and the Freedom of Information Act (FOIA), which mandates disclosure of information.

It is my determination that there is no conflict between Section 103 and the FOIA and that Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), supports the provision in Section 103 prohibiting advanced disclosure of funding decisions.

Exemption 3 of the FOIA 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."

Section 103 of the HUD Reform Act meets the criteria of Exemption 3 and qualifies as a statute recognized by the exemption prohibiting disclosure of information. Section 103 amends the Department of Housing and Urban Development Act by adding at the end the following new section which states in Section 12(a):

During any selection process, no officer or employee of the Department of Housing and Urban Development shall knowingly disclose any covered selection information regarding

such selection, directly or indirectly, to any person other than a person authorized by the Secretary to receive such information.

Under this provision the Department has no discretion concerning the disclosure of funding decisions during the selection process. This provision, therefore, meets the requirements of subpart (A) of Exemption 3 which applies to statutes that absolutely prohibit agency disclosure of specific material. As a statute meeting the criteria of Exemption 3, the Department can assert this exemption when responding to FOIA requests to disclose advanced funding decisions.