

FOIA Appeal: Allegations of Improper Conduct

Legal Opinion: GMP-0037

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Subject: FOIA Appeal: Allegations of Improper Conduct

January 13, 1992

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Dear Mr. Eaton:

This responds to your Freedom of Information Act (FOIA) appeal dated June 13, 1991 on behalf of your client, High Park Gardens Cooperative Corp. ("High Park"). You appeal from the partial denial of your request by Theodore R. Britton, Jr., the Manager of the HUD Newark Office, dated May 14, 1991. Mr. Britton denied your request for certain documents pursuant to Exemption 7(C) and (D) of the FOIA, 5 U.S.C. 552(b) 7(C),(D) and 24 C.F.R. 15.21(a)(7). Your letter dated April 24, 1991 requested "correspondence, notes or other documents in HUD's files which pertains to High Park Gardens, its officers, directors, employees, property or operations, from the period June 1, 1990 to the present".

I have determined to reverse the initial denial of documents and release items numbered 1 through 8 listed below.

The eight items which were withheld pursuant to 5 U.S.C. 552(b)(7)(C) and (D) are:

1. Letter dated November 7, 1990 to Mr. Frank Walcott, Supervisory Loan Specialist, U.S. Department of Housing and Urban Development ("HUD") from Mary Burrell and Beverly Scott. Copies of this letter were also sent to All Board Members, Mayor James, and three HUD employees of the Newark Office, Connie Loukatos, Alfonso Taylor and Theodore R. Britton, Jr.;
2. Letter dated November 15, 1990 to Mr. James Smith, Loan Specialist, HUD, from Mary Burrell and Beverly Scott. A copy of this letter was sent to Alfonso Taylor, HUD;
3. Undated letter entitled "To The Stockholder of H.P.G." from "The Concerned Stockholders";
4. Anonymous letter dated November 25, 1990 to the stockholders;
5. Anonymous general newsletter dated November 13, 1990;
6. Letter dated September 26, 1990 to the Board of Directors from Mary Burrell and Beverly Scott;

7. Letter dated December 18, 1990 to Mr. Alfonso Taylor from Mary Burrell and Beverly Scott, copy to Ms. Encarnacion Loukatos; and

8. Letter dated December 18, 1990 to Mr. James Smith, Loan Specialist, HUD, from Mary Burrell and Beverly Scott, copy to Encarnacion Loukatos and Theodore Britton.

Exemption (7)(C) and (D) of the FOIA authorizes the withholding of information contained in "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, or (D) could reasonably be expected to disclose the identity of a confidential source"

The first test under Exemption 7 is whether the records indicate that the agency was gathering information with the good faith belief that the subject may violate or has violated federal law, or was merely monitoring the subject for purposes unrelated to enforcement. *Lamont v. Department of Justice*, 475 F. Supp. 761, 773 (D.D.C. 1979). In the instant case, these documents were unsolicited letters received by HUD, containing allegations of improper actions and expenditures by members of the board of directors of High Park Gardens. It does not appear that these documents satisfy the threshold test to qualify for Exemption 7, as there is presently no pending legal or enforcement proceeding, and HUD has not initiated any investigation, or forwarded these documents to a law enforcement authority such as the FBI, the U.S. Attorney or the HUD Office of the Inspector General. See, *Fedders Corp. v. Federal Trade Commission*, 494 F.Supp. 325 (S.D.N.Y.), *aff'd*, 646 F.2d 560 (1980).

The production of these records also does not constitute an unwarranted invasion of personal privacy since they do not contain personal information about the writer (Exemption 7(C)), nor would they disclose the identity of a confidential source (Exemption 7(D)). Items 1, 3, 4, 5 and 6 are documents which were previously distributed to the Board Members and Stockholders of High Park Gardens. Therefore, they should be released. As to items 2, 7 and 8, the courts have recognized a need to provide a broad 7(D) exemption to protect confidential sources. However, an assurance of confidentiality with regard to the identity of the individual(s) lodging the complaints cannot be inferred in this instance, since Ms. Burrell and Ms. Scott have already identified themselves as complainants in their letter dated November 7, 1990, which was circulated to all the Board Members. Accordingly, I have decided that items 2, 7 and 8 may also be released.

I am notifying the New York Regional Office of my determination in this decision and authorizing them to release copies of the listed documents to you.

Sincerely yours,

Shelley A. Longmuir
Deputy General Counsel

cc: Burton Bloomberg
John P. Deller, Regional Counsel
Yvette Magruder