

FOIA Appeal: Title VIII Investigation File

Legal Opinion: GMP-0074

Index: 7.330, 7.350, 7.413

Subject: FOIA Appeal: Title VIII Investigation File

April 21, 1992

Mr. Robert L. Sallee
2943 Kalakaua Avenue
Honolulu, Hawaii 96815

Dear Mr. Sallee:

This is in response to your Freedom of Information Act (FOIA) appeal dated March 18, 1991. By fax message dated February 6, 1991 to LaVera Gillespie, Director, Office of Fair Housing and Equal Opportunity, San Francisco Regional Office, you requested copies of the Final Investigation Report, the entire investigation file and any other written material, pertaining to your case, Sallee vs. Tropic Seas, Inc., HUD Case No. 09-89-1381-1. In a letter dated February 21, 1991, Dirk Murphy, Public Information Officer, San Francisco Regional Office, released copies of information pertaining to your request except intra-office documents, withheld under Exemption 5, and information pertaining to conciliation, withheld under Exemption 3.

I have determined to affirm the initial denial.

The following documents are being withheld under the deliberative process privilege of Exemption 5, which protects predecisional information involved in the decisionmaking process: (1) Memorandum to the File dated July 5, 1990 from Lynne Coleman, Investigator, Office of Fair Housing and Equal Opportunity, San Francisco Regional Office; (2) Completeness Checklist-Title VIII Cases, by Lynne Coleman, dated June 22, 1990; (3) Memorandum dated July 24, 1990 from Jacquelyn Shelton, Director, Office of Fair Housing Enforcement and Section 3 Compliance, to David Enzel, Acting Assistant General Counsel for Fair Housing; (4) Memorandum to the File dated August 15, 1989 and accompanying case activity chronology from June 6, 1989 to November 14, 1989; (5) Memorandum to the File dated February 9, 1990 by Leona Crabbe, Investigator; (6) Handwritten Memoranda to the File dated April 4 and 23, May 18, and June 8, 1990 by Lynne Coleman, Investigator; and (7) Eight pages of typed notes, author not identified.

Exemption 5 of the FOIA exempts from mandatory disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. 552(b)(5). Exemption 5 incorporates a number of privileges known to civil discovery, including the

deliberative process privilege, the general purpose of which is to "prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

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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 expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

The intra-office memorandum and other memoranda to the file and notes, and the Title VIII Completeness Checklist constitute predecisional deliberative material. These records are part of the Agency decisionmaking process regarding the investigation, case analysis and disposition of your Title VIII complaint. As such, the information is protected and, thus, exempt from disclosure under the FOIA's Exemption 5. Release of the predecisional information would harm the Agency's deliberative process by inhibiting employees from expressing open and candid views in predecisional reviews and recommendations. In addition, this material does not contain factual information which is reasonably segregable for release. Therefore, I am affirming the denial of this information under Exemption 5.

In addition, the following documents are being withheld under Exemption 3, 5 U.S.C. 552(b)(3): (1) Memorandum to the File dated February 9, 1990 by Leona Crabbe, Investigator; (2) Handwritten Memoranda to the File dated April 4 and 23, May 18, and June 8, 1990 by Lynne Coleman, Investigator; (3) Eight pages of typed notes, author not identified. Exemption 3 incorporates the disclosure prohibitions that are contained in various other Federal statutes. The Fair Housing Amendments Act of 1988, P.L. 100-430, amends Title VIII of the Civil Rights Act of 1968 to prohibit disclosure of information obtained in the course of conciliation. 42 U.S.C. 3610(d). See also, 24 C.F.R. 103.330. The investigators' handwritten and typed memoranda and other notes pertain to matters involving conciliation of the case. This information was properly withheld under the non-disclosure prohibitions of Title VIII, as amended, as an Exemption 3 statute.

Pursuant to 24 C.F.R. 15.21 I have determined that the public interest in protecting the deliberative process militates against disclosure of the information listed above.

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

Very sincerely yours,

C.H. Albright, Jr.
Principal Deputy General Counsel