

FOIA Appeal: Inter-agency Documents Between HUD and DOJ

Legal Opinion: GMP-0079

Index: 7.350, 7.525

Subject: FOIA Appeal: Inter-agency Documents Between HUD and DOJ

May 14, 1992

Ms. Maribelle Davis
Director of Libraries
City of Plano
Public Library System
P.O. Box 860356
Plano, Texas 75086-0356

Dear Ms. Davis:

This is in response to your April 17, 1992 Freedom of Information Act (FOIA) appeal. You request administrative review of the March 17, 1992 partial denial by Anna-Marie Kilmade Gatons, Director, Executive Secretariat, (FOIA Control No.: FI-283075D). Ms. Gatons withheld six documents consisting of correspondence from Samuel R. Pierce, Jr., former Secretary of HUD, to Ed Meese, former Attorney General, Arnold I. Burns, former Deputy Attorney General, and William E. Brock, former Secretary of Labor. This information was withheld under Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5).

I have determined to affirm the initial denial.

The letters and their enclosures are inter-agency documents pertaining to HUD's request for a Department of Justice legal opinion on the applicability of Davis-Bacon prevailing wage requirements to construction work financed with Community Development Block Grants (CDBG), Urban Development Action Grants (UDAG), or loan guarantees provided under Title I of the Housing and Community Development Act of 1974, as amended. The documents provide HUD's legal position to Justice and Labor in regard to the scope of Davis-Bacon coverage to the CDBG, UDAG and loan guarantee programs. As such, the documents are predecisional and deliberative and exempt from disclosure under Exemption 5.

Exemption 5 of the FOIA exempts 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." 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).

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

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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).

Consequently, I am affirming the determination to withhold five of the documents under Exemption 5. Any factual statements in these records are inextricably intertwined with exempt material under the deliberative process privilege and are not segregable without compromising the private remainder of the documents. *EPA v. Mink*, 410 U.S. 73, 91 (1973). We have been unable to locate or confirm the existence of the May 5, 1987 letter from former Secretary Pierce to Ed Meese, listed as Item 3 in the Executive Secretariat's March 17, 1992 letter.

I have also determined, pursuant to 24 C.F.R. 15.21, that the public interest in protecting the deliberative process privilege militates against the disclosure of the withheld documents.

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,

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

cc: Yvette Magruder