

Legal Opinions: GMP-0090

Index: 7.353, 7.475
Subject: FOIA Appeal: OGC Attorney Staff Notes

June 19, 1992

Mr. Joseph Polidori
408 Lark Dr.
Mt. Laurel, New Jersey 08054

Dear Mr. Polidori:

This is in response to your Freedom of Information Act (FOIA) appeal dated November 7, 1991. You appeal the October 28, 1991 partial denial by Gail L. Lively, former Director, Executive Secretariat. In response to your initial FOIA request, Ms. Lively provided two documents concerning the settlement agreement between the Department and Davis Enterprises. The agreement pertained to Davis Enterprises' failure to comply with the Department's Manufactured Home Construction and Safety Standards, 24 C.F.R. Part 3280. Under Exemption 5 of the FOIA, Ms. Lively withheld intra-office, attorney staff notes.

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) and the attorney-client privilege, to protect confidential communications between an attorney and his client, *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

Protection of internal staff notes by attorneys is vital to the Government's decision-making process and preserves the integrity of legal representation. It also serves to protect our clients' interest. On this basis, I have determined to affirm the initial denial under Exemption 5. I have also determined, pursuant to 24 C.F.R. 15.21, that the public interest in protecting the deliberative process, and the attorney-client relationship, militates against disclosure of the withheld information.

Please note that, in response to your concerns regarding a discrepancy between the \$15,000 offered by the Department in its letter of July 20, 1990 to Ms. Miriam R. Nase, President, Davis Enterprises, and the \$12,000 settlement amount contained in the August 2, 1990 letter to Patricia Weth, the settlement actual amount was \$12,000. This amount was obtained by the Department

following negotiations among the parties. We are unable to locate further documentation regarding the discrepancy.

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
Stuart Margulies
Gary Nemec