

Legal Opinion: GMP-0093

Index: 7.354
Subject: FOIA Appeal: Government Appraisal

June 24, 1992

Ms. Mary Jane Miller
Doherty Rumble & Butler
2800 Minnesota World Trade Center
30 East 7th Street
St. Paul, Minnesota 55101-4999

Dear Ms. Miller:

This letter is in response to your March 23, 1992 Freedom of Information Act (FOIA) appeal regarding the denial of an October 1990 appraisal of The Kenwood, HUD Project No. 092-35439 located in Minneapolis, Minnesota. On March 20, 1992 Thomas T. Feeney, Manager of the Minneapolis-St. Paul Office, withheld the appraisal as predecisional information under Exemption 5.

I have determined to affirm the denial of this document.

The Department has commenced foreclosure proceedings against the project in question. The proceedings have been stayed because the owners have filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois. Disclosure of the appraisal in advance of the sale of the property could place the Department at a competitive disadvantage and may affect prices offered in the marketplace. In addition, release of the appraisal could adversely affect the Department's interest in the on-going foreclosure litigation.

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 other than an agency in litigation with the agency" 5 U.S.C. 552(b)(5). Confidential commercial information generated by the Government is subject to the protection of a qualified privilege under Exemption 5. *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 99 S.Ct. 2800, (1979). Specifically, a realty appraisal generated by a Government agency for the sale of government property is covered by the exemption. *Government Land Bank v. General Services Administration*, 671 F.2d 663 (1st Cir. 1982), (upholding the Government's assertion that Exemption 5 permitted it to postpone disclosure of its appraisal of the value of land the Government was offering for sale until after the sale had been made). See also, *Hoover v. United States Department of Interior*, 611 F.2d 1132, 1137-1138 (5th Cir. 1980) (realty appraisal obtained by the Government from an independent professional appraiser is an intra-agency memorandum exempt from disclosure under Exemption 5 of the FOIA).

Therefore, I have determined to affirm the initial denial under Exemption 5. I have further determined, pursuant to HUD's regulations at 24 C.F.R. 15.21, that the public interest in not placing the Government at a competitive disadvantage in disposing of the property militates against disclosure of the information.

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
Lewis M. Nixon, 5G