

Legal Opinion: GMP-0095

Index: 7.205, 7.450
Subject: FOIA Appeal: No Responsive Records

July 9, 1992

Mr. Donald L. Beebout
Vice President
Showe Management Corporation
1225 Dublin Road
Columbus, Ohio 43215

Dear Mr. Beebout:

This is in response to your January 30, 1992 Freedom of Information Act (FOIA) appeal. You requested the formulae and data used in calculating the Annual Adjustment Factors (AAFs) for adjusting Section 8 contract rents in certain areas in the Midwest Census Region for the years 1981 through 1991. You indicate that you were previously provided a step-by-step explanation of the computation of the AAFs for Fiscal Year 1991. However, in response to your January 30 request, Gail L. Lively, former Director, Executive Secretariat, advised you by letter dated January 15, 1991, that the Department did not have the data or documents to compute the AAF formula for Fiscal Year 1981 to 1990. Your appeal requests administrative review of Ms. Lively's decision.

I have determined to deny your appeal.

In Ms. Lively's initial response, the Department provided you with the explanation used for the Annual Adjustment Factors for Fiscal Year 1991. The information was manually compiled through reconstruction of 1991 computative data we had on file. We have not retained this type of AAF data for the other years noted in your request, namely, 1980 through 1990. You should also note that agencies are not required to reconstruct records in response to a FOIA request where the information does not exist. See *NLRB v. Sears, Roebuck and Co.*, 421 U.S. 132, 161-62 (1974) which held that the FOIA does not require an agency to create records, but only to provide access to records already in existence.

As previously stated, the records to compute the information you requested are no longer retained by the Agency. Section 8(c)(2)(A) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(A)) requires the Department to provide for adjustments in the maximum monthly rents for units covered by the Section 8 Housing Assistance Payments Contracts. These adjustments reflect changes in the fair market rents prevailing in particular market areas and are based on a reasonable formula. This information, and an explanation of the formula used, is published annually in the Federal Register. We have enclosed a copy of the December 1990 Federal Register which contains a

description of the calculation of the formula used. For information regarding the formulae and calculations for prior years, we advise that you review the appropriate Federal Registers. Since the information you requested is no longer retained, I regret we could not be of further assistance.

You have the right to judicial review of this determination under 5 U.S.C. Section 552(a)(4).

Very sincerely yours,

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

Enclosure

cc: Yvette Magruder