

Legal Opinion: GMP-0100

Index: 7.350, 7.533
Subject: FOIA Appeal: Limited Denial of Participation

July 24, 1992

James D. Eckert, Esq.
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Dear Mr. Eckert:

This is in response to your Freedom of Information Act (FOIA) appeal dated May 8, 1992. You appeal the denial dated April 24, 1992 by Jim Chaplin, Manager, Jacksonville Office, withholding under Exemption 5 of the FOIA all inter-office memoranda pertaining to the Limited Denial of Participation (LDP) issued against your client, Edward White, Jr. You assert that, inasmuch as the LDP was formally issued on January 28, 1992 and that no further LDP actions are planned against Mr. White, the referenced material can no longer be construed as predecisional within the meaning of the exemption.

I have determined to affirm the initial denial.

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. Section 552(b)(5). Exemption 5 incorporates a number of privileges known to civil discovery including the deliberative process privilege. See *NLRB v. Sears, Roebuck, and Co.*, 421 U.S. 132 (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 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 United States Supreme Court has construed the deliberative process privilege of Exemption 5 to encompass documents which involve "advisory opinions, recommendations, and deliberations." *NLRB v. Sears, Roebuck, and Co.*, 421 U.S. at 150.

All of the inter-office memoranda subject to your request involved opinions, observations, or recommendations pertaining to the Limited Denial of Participation against Mr. White. Moreover, we have determined that there is no severable part of the documents because the factual matter therein contained is inextricably interwoven with the opinions, recommendations, and deliberations of HUD employees. As such, the material is not

releasable. See EPA v. Mink, 410 U.S. 73, 91 (1973).

Your letter also asserts that the documents have lost their predecisional exemption status because the LDP against Mr. White is a final decision. Please note that predecisional materials properly withheld under Exemption 5 do not lose their exemption character unless the agency expressly incorporates the material in its final decision. See Cuccaro v. Secretary of Labor, 770 F.2d 355, 358 (3rd Cir. 1985). See also May v. Department of Air Force, 777 F.2d 1012, 1015 (5th Cir. 1985). The Notice of Limited Denial of Participation issued to Mr. White on January 28, 1992 did not incorporate or adopt by reference any of the Department's inter-office memoranda pertaining to the LDP.

Pursuant to FOIA's Exemption 5 and the reasons stated above, I have determined to withhold the memoranda you requested. I have also determined, pursuant to 24 C.F.R. Section 15.21, that the public interest in preserving free and frank opinions, advice, and recommendations within the Government militates against release of the withheld information.

Please be advised that 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

cc: Yvette Magruder
Raymond C. Buday, Jr., 4G