

Legal Opinion: GMP-0103

Index: 7.205
Subject: FOIA Appeal: Non-Federal Records

July 24, 1992

Mr. Curt C. Juergens
Architectural Advisor
Union Electric
P.O. Box 149
St. Louis, Missouri 63166

Dear Mr. Juergens:

This responds to your May 19, 1992 letter, appealing the May 6, 1992 Freedom of Information Act (FOIA) determination of the St. Louis Office. Specifically, in your April 29, 1992 initial request, you sought the backup data from the most recent Life Cycle Cost Analysis for phase two of the Clinton-Peabody Apartments. You assert that this information is in the custody of the St. Louis Housing Authority, and you request that HUD obtain the information in response to your FOIA request. Mr. John Susi, Deputy Manager, advised you that the data was not maintained by HUD's St. Louis Office and the Department was not obligated under FOIA to obtain data which is not in the physical possession of the Agency.

I have determined to deny your appeal.

The Freedom of Information Act applies only to records in the physical possession of the Federal agency. It does not apply to records that are created by entities that "are neither chartered by the Federal Government nor controlled by it." H.R. Rep. No. 93-1380, 93rd Cong., 2nd Sess. 14 (1974). Further, Agencies are not required to obtain information from outside the agency in order to respond to FOIA requests. See *Forsham v. Harris*, 445 U.S. 169 (1980); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980).

Your appeal letter also raises the question as to whether the Department is complying with 42 U.S.C. Section 1437k and the implementing regulations at 24 C.F.R. Section 941.404. Please note that Public Housing Authorities (PHA) may submit proposals for funding under the U.S. Housing Act of 1937 in accordance with HUD's regulations, 24 C.F.R. Part 941. Section 941.404 prescribes the requirements which must be included in the PHA's proposal, including a utility analysis. Section 941.404(h) defines a utility analysis as "an analysis of utility costs demonstrating that the best utility combination is being proposed, based on initial installation costs and long term operation and maintenance costs, energy conservation, and evidence that the selected utilities will be available for the proposed project." There is no obligation by law or regulation which requires the Department to maintain backup data with

respect to utility analyses.

Based on the reasons stated above, the initial determination of the St. Louis Office is affirmed. You may seek 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
Joseph James, 7G