

Legal Opinion: GMP-0106

Index: 7.350
Subject: FOIA Appeal: HUD Market Study

August 5, 1992

Mr. Gary B. Alex
President
American Capital Resource
1990 Resurgens Plaza
945 East Paces Ferry
Atlanta, Georgia 30326

Dear Mr. Alex:

This is in response to your Freedom of Information Act (FOIA) appeal dated June 11, 1992 appealing the denial by the Washington Field Office of the market study prepared by HUD for Summerland Apartments (000-35357-PM), a Section 221(d)(4) project in Woodbridge, Virginia. I. Toni Thomas, Manager, denied the request by Delta Associates, Inc. for the market study under Exemption 5 of the FOIA on June 2, 1992.

I have determined to affirm, in part, and reverse, in part, the initial denial.

The withheld documents consist of: (1) a January 15, 1992 memorandum from Michael Smerconish, Regional Administrator, to I. Toni Thomas, Manager, with three attached tables; and (2) a March 11, 1992 memorandum from Rafiq Munir, Economic and Market Analysis, (EMAS), Office of the Manager, Washington Field Office, to Joan Coats, Multifamily Housing, Washington Field Office.

Exemption 5 of the FOIA, 5 U.S.C. Section 552(b)(5), exempts from mandatory disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 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 express opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

The January 15, 1992 memorandum contains the recommendation and analysis of the EMAS Division, Philadelphia Regional Office. This document constitutes a predecisional staff opinion and, therefore, qualifies for exemption from disclosure under the deliberative process privilege of Exemption 5. Thus, I have determined to affirm the initial denial of the staff opinion contained in the January 15, 1992 memorandum. However, Exemption 5 does not apply to segregable factual portions of

deliberative documents, EPA v. Mink, 410 U.S. 73, 87-88 (1973). Therefore, I have determined that the bottom three paragraphs of page 1 of the January 15, 1992 memorandum are segregable facts which can be disclosed under the FOIA. I am releasing this information to you.

I have also determined to release the March 11, 1992 memorandum. This memorandum contains a detailed comparison of the studies of HUD and Delta Associates and qualifies for withholding under Exemption 5 because it also contains a predecisional staff opinion and analysis. However, the results of this comparison were summarized in a letter dated April 2, 1992 from Felicia Williams, Director, Housing Development Division, Washington Office, to Edward J. Steffen of your company. Therefore, since the main points of the memorandum have been disclosed to you, I have determined to make a discretionary release of the balance of the memorandum. It is my opinion that release of this material would not harm the agency's deliberative process. Copies of the released information are enclosed.

Pursuant to HUD's regulations at 24 C.F.R. Section 15.21, I have determined that the public interest in preserving free and frank opinions, advice and recommendations within the Government militates against the 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,

George Weidenfeller
Deputy General Counsel (Operations)

Enclosure

cc: Peter M. Campanella, 3G
I. Toni Thomas, 3.5S