

Legal Opinion: GMP-0119

Index: 7.350, 7.413  
Subject: FOIA Appeal: Title VIII Completeness Checklist

September 21, 1992

Suzanne S. Graeser, Esq.  
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Dear Ms. Graeser:

This is in response to your Freedom of Information Act (FOIA) appeal dated August 18, 1992. You appeal the partial denial of information concerning Benson v. Santiago Villa Mobilehome Park, (HUD Case No. 09-89-1751-1), a housing discrimination complaint brought under Title VIII of the Civil Rights Act of 1968. In a letter to you dated July 31, 1992, Anna-Marie Kilmade Gatons, Director, Executive Secretariat, provided you with 552 pages of documentation in response to your request and withheld three documents under Exemptions 2 and 5 of the FOIA. (FOIA Control No.: FI-298064P).

I have determined to affirm the initial denial under Exemption 5.

The following documents are being withheld under the deliberative process privilege of Exemption 5, 5 U.S.C. Section 552(b)(5), which protects predecisional information involved in the decision-making process: (1) Memorandum to the Case File dated June 13, 1990; (2) Portions of a Memorandum dated June 28, 1990 for Harry L. Carey, Office of Assistant General Counsel for Fair Housing; (3) Completeness Checklist-Title VIII Cases.

Exemption 5 of the FOIA exempts from mandatory disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party . . . 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, the general purpose of which is to "prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (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 intra-office memoranda and the Title VIII Completeness Checklist constitute predecisional deliberative material. These records are part of the Agency decision-making process regarding the investigation, case analysis and disposition of the Title VIII complaint. As such, the information is protected and, thus, exempt from disclosure under the FOIA's Exemption 5. Release of the predecisional information would harm the Agency's deliberative process by inhibiting employees from expressing open and candid views in predecisional reviews and recommendations. In addition, this material does not contain factual information which is reasonably segregable for release. Therefore, I am affirming the denial of this information under Exemption 5.

Pursuant to 24 C.F.R. Section 15.21 I have determined that the public interest in protecting the deliberative process militates against disclosure of the information listed above.

Please be advised that you are entitled to judicial review of this determination under 5 U.S.C. Section 552(a)(4).

Very sincerely yours,

George L. Weidenfeller  
Deputy General Counsel (Operations)

cc: Yvette Magruder