

Legal Opinion: GMP-0126

Index: 7.350

Subject: FOIA Appeal: Incorporation by Reference

October 29, 1992

John J. Knapp, Esq.
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Washington, D.C. 20004

Dear Mr. Knapp:

This is in response to your Freedom of Information Act (FOIA) appeal dated August 6, 1992. Your client, Broad-Elm Realty Co., owner of a multifamily rental project covered by a mortgage insured under Section 223(f) of the National Housing Act, requested all analyses and work papers involved in HUD's consideration of a rent increase request for Skyview Towers in Woodside, New York, (Proj. No. 012-11093). You appeal the denial by Michael Carlson, Freedom of Information Act Officer, New York Regional Office, dated July 10, 1992. Mr. Carlson withheld the "Rent Computation Worksheet" (HUD Handbook 4350 Chng-49, Chapt. 7, Appendix 5, pp. 4-7) and related internal work papers under Exemption 5 of the FOIA.

I have determined to affirm the initial denial.

Exemption 5 of the FOIA, 5 U.S.C. Section 552(b)(5), 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." The Supreme Court has construed Exemption 5 as encompassing the advice, opinions and recommendations of staff members in the agency decision-making process. *NLRB v. Sears, Roebuck and Co.*, 421 U.S. 132 (1975).

The request for a rent increase for Skyview Towers was denied by David Buchwalter, Chief, Loan Management Branch, in a letter to Broad-Elm Realty Co., dated February 6, 1992. Mr. Buchwalter's determination stated that "evaluation of project income and expenses has not demonstrated an increase to be warranted." We are advised that the project's allowed projected expenses for 1992 in relation to its project income did not justify a rental increase. The New York Regional Office would be willing to meet with you to discuss the reasons for the rejection of Skyview Towers' rent increase application. You should contact Mr. Buchwalter if you desire such a meeting.

The withheld documents were properly exempted from disclosure under Exemption 5. They are not final opinions, but represent advice and evaluations for the Chief of the Loan Management Branch in his decision-making process to consider a rent increase for Skyview Towers. See *Orion Research Inc. v. Environmental Protection Agency*, 615 F.2d 551 (1st Cir. 1980)

withholding under Exemption 5 intra-agency memoranda written by the monitoring project officer to the contracting officer in connection with evaluating proposals submitted for a government contract. See also Professional Review Organization of Florida, Inc. v. U.S. Department of Health and Human Services, 607 F. Supp. 423 (D.D.C. 1985).

You submit that, since the February 6, 1992 letter did not disclose the basis for Mr. Buchwalter's determination to deny the rent increase, he seemingly adopted his staff's calculations. You believe that, under these circumstances, these calculations lose their predecisional character and cannot be withheld under Exemption 5.

Mr. Buchwalter's determination did not adopt or incorporate by reference the Rental Computation Worksheet or other internal work papers. Two cases you assert in support of such an adoption or incorporation by reference are inapposite. In *American Society of Pension Actuaries v. IRS*, 746 F. Supp. 188 (D.D.C. 1990) the court considered that interpretive memoranda from agency attorneys, which explained agency policy during the course of an audit, were not protected by the deliberative process privilege of Exemption 5. *Id.* at 869. This is not the case here. The internal calculations sought are plainly predecisional and deliberative.

In *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854 (D.C. Cir. 1980), the court found that, by inclusion of an IRS budget estimate in the Treasury Department's published explanation of the President's Budget, the Government had adopted the analytic computations for this estimate. *Id.* at 191, 192. Here, there were no specific figures or calculations expressed in Mr. Buchwalter's determination, but rather a concise, declaratory statement of his decision. His decision stands on its own and the Department is not required to provide further supplement or support for its decisions. See, *Mead Data Central v. U.S. Dept. of Air Force*, 575 F.2d 932 (D.C. Cir. 1978), agencies cannot be required to explain their decisions for the benefit of FOIA litigants or open their files in order for a litigant to obtain an explanation for the decision.

Pursuant to 24 C.F.R. Section 15.21, I have determined that the public interest in protecting predecisional agency deliberations militates against release of the withheld information.

The FOIA under 5 U.S.C. Section 552(a)(4)(B) provides for judicial review of this determination.

Very sincerely yours,

George L. Weidenfeller
Deputy General Counsel (Operations)

cc: John Deller, 2G
Michael Carlson