

Legal Opinion: GMP-0144

Index: 7.350
Subject: FOIA Appeal: Decisional Document

January 26, 1993

Susan M. Hull, Esq.
Jenkins & Gilchrist
1445 Ross Avenue
Suite 3200
Dallas, Texas 75202-2799

Dear Ms. Hull:

This is in response to your Freedom of Information Act (FOIA) appeal dated November 17, 1992. You appeal the denial dated October 22, 1992 to Craig Flournoy, Dallas Morning News, from Rachel V. Calvillo, Regional Information Officer, Fort Worth Regional Office. Ms. Calvillo withheld two intra-office memoranda and a copy of an electronic mail message under Exemption 5 of the FOIA. You appeal the denial of the two intra-office memoranda.

I have determined to affirm, in part, and reverse, in part, 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 . . . in litigation with the agency." 5 U.S.C. 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).

Ms. Calvillo withheld two records under Exemption 5 as intra-agency, predecisional memoranda:

1. Memorandum from Sam Moseley, Regional Administrator, to Joseph G. Schiff, Assistant Secretary for Public and Indian Housing, dated July 23, 1991, Subject: Documentation and Information to Support Requested Waivers for the Implementation of the Lakewest Revitalization Plan in West Dallas (Proj. TX009011) Dallas Housing Authority, Dallas, Texas;

2. Memorandum from Mr. Schiff to Mr. Moseley, dated September 6, 1991, Subject: Lakewest Revitalization Plan (Dallas).

I have determined to affirm the initial denial of the July 23, 1991 memorandum under the deliberative process privilege of Exemption 5. The memorandum provides, for Headquarters' consideration, the analysis and recommendation of the Regional Administrator concerning waivers for the implementation of the Lakewest Revitalization Plan by the Dallas Housing Authority, including waiver of the Department's Performance Funding System regulation, 24 C.F.R. Part 990, and the Department's Utility Allowance regulation, 24 C.F.R. Part 965. As such, the memorandum is a predecisional document involved in the Department's deliberative process for approval of the Lakewest Revitalization Plan and it is exempt from disclosure under Exemption 5. I have also determined, pursuant to 24 C.F.R. Section 15.21, that the protection of the deliberative process militates against disclosure of the July 23, 1991 memorandum.

I am reversing the initial denial and releasing a copy of the memorandum dated September 6, 1991. The memorandum provides Departmental guidance and decisions on the Lakewest Revitalization Plan. The memorandum, therefore, constitutes a decisional document which cannot be withheld under Exemption 5. See, *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971) disclosing information involving "orders and interpretations which [the agency] actually applies to cases before it." A copy of the September 6, 1991 memorandum is enclosed.

Please be advised that you are entitled to judicial review of this determination under 5 U.S.C. Section 552(a)(4). Judicial review of my action on this appeal is available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, or in the judicial district where the records you seek are located.

Sincerely,

George L. Weidenfeller
Deputy General Counsel (Operations)

Enclosure

cc: Yvette Magruder
William J. Daley, 6G