

FOIA Appeal: Loan Servicer's Notes & Tenant Identities

Legal Opinion: GMP-0077

Index: 7.350, 7.360

Subject: FOIA Appeal: Loan Servicer's Notes & Tenant Identities

May 13, 1992

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Dear Mr. Becker:

This is in response to your letter of January 3, 1992 requesting administrative review under the Freedom of Information Act (FOIA) of the December 18, 1991 partial denial issued by the Columbus Office. According to your letter, you are legal counsel for the Agler Green Cooperative. On December 4, 1991, you requested "a copy of every written document prepared or utilized in the conducting and tallying of the survey taken on October 21 and 22, 1991" of residents of the Agler Green Cooperative. The survey concerned the state of Agler Green after the Department limited the participation of the old Board of Directors. In response to your request, Robert Dolin, Manager, Columbus Office, supplied you with all releasable information in the Columbus Office files regarding the survey. However, he withheld office staff notes, reviews and recommendations concerning the survey under FOIA's Exemption 5, and the individual residents' responses under Exemption 6.

I have determined to affirm the initial denial by the Columbus, Ohio Office.

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. 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).

There were no written reviews and recommendations withheld by the Columbus Office. The handwritten notes involve observations of the Loan Servicer written in the margins of the

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survey and constitute predecisional deliberative material. The notes relate to the Department's decisionmaking process regarding the evaluation and appointment of a new Board of Directors for Agler Green. As such, the information is exempt from disclosure under Exemption 5. Moreover, we believe that release of predecisional information would inhibit Departmental employees from expressing their open and candid views regarding future policy advice and recommendations. Therefore, I am affirming the initial denial under Exemption 5.

I have also determined to affirm the non-disclosure of the names and other identifying information regarding residents of Agler Green who responded to the Department's survey. This material is protected under FOIA's Exemption 6 which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The U.S. Supreme Court in *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 598 (1982) held that the term "similar files" would be interpreted broadly to encompass any information "which applies to a particular individual" regardless of the label of the file in which the information is contained. 456 U.S. at 601-602. Information contained in personnel, medical or similar files may be withheld if its disclosure would violate the individual's personal privacy. This determination requires a balancing of the public interest in disclosure of the information, if any, against the invasion of privacy resulting from disclosure. See *Washington Post v. Department of Health and Human Services*, 690 F.2d 252, 258 (D.C. Cir. 1982); *Department of the Air Force v. Rose*, 425 U.S. 352, 372-373 (1976).

I do not find an overriding public interest for disclosure of the information.

The disclosure of the identities and response of residents in the Agler Green project would not reveal anything about Government operations and, therefore, fails to meet the standard expressed in *Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773, (1989) (hereinafter "Reporters Committee"), which establishes a framework for analyzing the public interest under Exemption 6. Also note that the survey of Agler Green residents was made on the Government's explicit promise that the identities and responses would remain anonymous and confidential. Release of the names and responses of residents who expressed their views on living conditions in Agler Green could also subject these individuals to future harassment or retaliation.

Pursuant to the Department's regulations at 24 C.F.R. 15.21, I have determined that the public interest in disclosure

of the identities and responses of residents to the survey does not outweigh the privacy interests of the individuals and

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militates against release of the withheld information. I have also determined, pursuant to 24 C.F.R. 15.21, that the public interest in protecting the deliberative process militates against disclosure of HUD staff handwritten notes, reviews and recommendations. Therefore, I have determined to affirm the initial denial under Exemptions 5 and 6.

You have a right to judicial review of this determination under 5 U.S.C. 552(a)(4).

Very sincerely yours,

C. H. Albright, Jr.
Principal Deputy General Counsel