

FOIA Appeal: Housing Development Grant Info.

Legal Opinion: GMP-0055

Index: 7.320, 7.350

Subject: FOIA Appeal: Housing Development Grant Info.

February 13, 1992

Fred T. Finney, Esq.
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P.O. Box 70519
Albany, Georgia 31707-0009

Dear Mr. Finney:

This is in response to your September 24, 1991 Freedom of Information Act (FOIA) appeal. In a letter dated September 5, 1990, you requested documents pertaining to HUD's decision to rescind its Housing Development Grant (HODAG), which was awarded to the City of Albany, Georgia for the Dunes East Project. Gail L. Lively, former Director, Executive Secretariat, in a letter dated August 29, 1991 (FOIA Control No. FI-244898K), provided you with 64 pages of documentation but withheld memoranda and other documents under Exemption 5 of the FOIA.

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).

The deliberative process privilege of Exemption 5 does not pertain to purely factual matters which are contained in the internal memoranda. If the information is severable and does not compromise the private remainder of the documents, the segregable portion may be released. *EPA v. Mink*, 410 U.S. 73, 91, (1973). I have determined that some documents can be released in their

entirety and that factual matters in other documents are segregable and, therefore, can be released to you. However, the specific staff recommendations will continue to be withheld as

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predecisional advice under Exemption 5. I am also withholding the originator and concurrence lists from one document under Exemption 2, 5 U.S.C. 552(b)(2), which exempts from disclosure trivial administrative data. The decision and rationale with respect to each item withheld is enclosed and designated as List 1.

Your appeal also asserts that the Department's August 29, 1991 response failed to account for other numerous documents, including site inspection reports and photographs. It is my understanding that staff in the Office of the Assistant General Counsel for Personnel and Ethics Law previously advised you that, since the Dunes East Project is located in the State of Georgia, you may wish to initiate a separate FOIA request to the Department's Atlanta Regional Office.

As a result of our review of the Dunes East Project files maintained by the Headquarters Office Development Grant Division, we have located additional documents, including site inspection reports and photographs. I have determined that some of this information can be released in response to your FOIA appeal. However, we are withholding two "draft" letters as predecisional material exempt from disclosure under the FOIA's Exemption 5. My decision with respect to the additional documents is provided in the enclosed List 2. Pursuant to 24 C.F.R. 15.21, I have determined that the protection of the deliberative process militates against the release of the withheld documents under Exemption 5.

The remainder of the documents in the Headquarters Office pertain to the grant application process for the Dunes East Project and are unrelated to your FOIA request. Since these documents were not responsive to your initial request, they were not provided to you by the Executive Secretariat. However, for your information, I have included a list of these documents in the enclosure designated as List 3.

You are entitled to judicial review of this decision under 5 U.S.C. 552(a)(4). Copies of the released documents in Lists 1 and 2 are enclosed.

Very sincerely yours,

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

Enclosures

cc: Freda Nicolosi, Development Grant Division

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Yvette Magruder, Executive Secretariat
Raymond C. Buday, Jr., 4G