



LEGAL SERVICES CORPORATION
400 Virginia Ave., S.W., Washington, D.C. 20024-2751

Writer's Direct Telephone
(202) 863-1839

March 29, 1991

Fred Diamondstone, Esq.
2007 Smith Tower
Second Ave. & Yesler
Seattle, WA 98104

RE: Your Freedom of Information Act ("FOIA")
Appeal of February 19, 1991.

Dear Mr. Diamondstone:

This is in response to your FOIA appeal of February 19, 1991, which was received by the Legal Services Corporation ("LSC" or "Corporation") on February 25, 1991. Your appeal relates to the January 8, 1991 partial denial of access by the Corporation's FOIA office to records pertaining to John Midgley and Evergreen Legal Services ("ELS").

Your appeal asserts that: 1) the records you requested should be released pursuant to the Privacy Act; 2) exemption (b)(5) does not allow withholding of purely factual material, 3) exemption (b)(7) does not apply to material related to finalized investigative proceedings as opposed to enforcement proceedings; 4) LSC has not considered releasing segregable portions of the record, and 4) you are due a more in-depth explanation of the rationale for withholding.

The records at issue deal with an ongoing investigation of an LSC grant recipient and generally consist of internal memoranda, draft monitoring reports, team interview notes and staff work product. In light of the provisions of 5 U.S.C. §552 and 45 C.F.R. Part 1602, and after review of the records, I find that the 400 pages withheld are generally protected from disclosure. The records are not subject to Privacy Act disclosure, and consist of predecisional and deliberative documents whose release would injure the quality of the Corporation's decisions and could reasonably be expected to

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interfere with law enforcement proceedings. However, I also find that some factual parts of the records can reasonably be segregated and released for your review. An in-depth explanation is provided below.

PRIVACY ACT

The records are not releasable under the Privacy Act, 5 U.S.C. §552a, because the Privacy Act does not apply to LSC. The Privacy Act applies only to federal agencies and LSC is not a federal agency. The LSC Act specifically provides that LSC is not to be considered a "department, agency or instrumentality of the Federal Government." 42 U.S.C. §2996(e)(1). You assert that because the Privacy Act incorporates the definition of agency from FOIA and LSC is subject to FOIA, LSC must also be subject to the Privacy Act. LSC is not subject to FOIA because it falls within FOIA's definition of "agency." LSC is subject to FOIA only because the terms of the LSC Act explicitly provide a FOIA exception to the directive in the LSC Act that LSC not be considered an "agency" of the federal government.

Nor is the fact that FOIA defines an "agency" as "any Government corporation [or] Government controlled corporation" relevant. The LSC Act plainly states that the Corporation is not to be considered an agency of the federal government, no matter how "agency" is defined except for FOIA and several other exceptions not here relevant. In any event, the definition of "government corporation" which is found in the U.S. Code in the Government Corporation Control Act, 31 U.S.C. §9101 et seq., is accompanied by an exclusive list of entities falling within the definition. LSC is not among them. 31 U.S.C. §9109.

SECTION (b) (5) EXEMPTION

FOIA's (b)(5) exemption protects agency records that are predecisional and deliberative in order "to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).¹ Section (b)(5) records are protected from release even after a final report or decision has been made because release would chill staff's future ability to be frank

¹ This policy protects against premature disclosure of proposed policies before they are finally adopted; promotes frank, open discussions among agency staff on matters of policy; and protects against public confusion resulting from disclosure of rationales and information not ultimately the grounds for an agency's action. See, e.g., Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 845, 866 (D.C. Cir. 1980); Jordan v. Department of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc).

and open during the deliberative process. LSC, for example, has historically exempted from public review predecisional individual or team or draft monitoring reports. Release would destroy monitors' willingness to submit honest evaluations and recommendations if they knew their work would ultimately be subject to FOIA.

Section (b)(5) does not protect purely factual matters or factual portions of otherwise deliberative memoranda, however, and FOIA requires that reasonably segregable factual portions of (b)(5) records be released.² Nevertheless, agencies may withhold factual material in deliberative documents when a document employs specific facts out of a larger group of facts so that the selection of specific facts is deliberative in nature, would expose the exercise of judgment by agency personnel, and would permit indirect inquiry into the mental processes of agency personnel. Montrose Chemical Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974); Williams v. Department of Justice, 556 F. Supp. 63-65 (D.D.C. 1982). Factual information may also be withheld when the information is so inextricably connected to the deliberative material that its disclosure would expose or cause harm to the agency's deliberations. Wolfe v. The Department of Health and Human Services, 839 F.2d 768, 774-76 (D.C. Cir. 1988) (en banc).

As for the documents you have requested, I have determined that some of the factual information is so intertwined with the deliberative material that revealing it would be tantamount to revealing LSC's deliberations. Those factual portions that do not pose such a threat, I have decided to disclose.

SECTION (b)(7) EXEMPTION

FOIA (b)(7) exemption protects from disclosure information whose release could reasonably be expected to interfere with law enforcement proceedings, including administrative and regulatory proceedings. See, e.g., Williams v. I.R.S., 479 F.2d 317, 318 (3rd Cir.) cert denied, 414 U.S. 1024 (1973). Unlike (b)(5) documents, these records are generally not exempt from disclosure when the investigation is final.

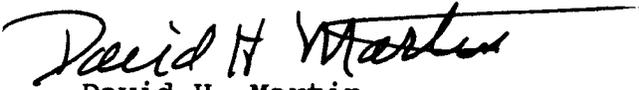
The documents you have requested, in spite of your assertion otherwise, are predecisional since the investigation is still

² Exemption (b)(7), on the other hand, permits the withholding of these documents until the investigatory process is final. I have decided, nevertheless, to release those factual portions that will not unduly interfere with that process.

ongoing.³ Premature release of the records could reasonably be expected to interfere with LSC's enforcement proceedings and would threaten the deliberative process established by LSC. In addition, public confusion would be caused and public acceptance and belief in the legal services program would be threatened if concerns about a grantee's actions were made public before a final determination on the existence of a violation had been made.⁴ However, as I have already explained, I have decided to release those factual portions that do not threaten the deliberative process or the ongoing investigation.

You have the right to seek judicial review of this decision by filing a complaint in the federal court in the district where you reside, in the district where you have your principal place of business, or in the District of Columbia. See 5 U.S.C. §552(a)(4).

Very truly yours,


David H. Martin
President

³ There has been no final determination on preliminary findings issued by Susan Sparks, Manager of Monitoring, Compliance, and Review Division. The findings are still preliminary and are presently under review for comment by ELS.

⁴ Because the ultimate objective of exemption (5) is to protect the deliberative process, courts focus more on the effect of the material's release and less on the material sought. Schell v. Health and Human Services, 843 F.2d 933, 940 (6th Cir. 1988).



LEGAL SERVICES CORPORATION

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May 1, 1991

Fred Diamondstone, Esq.
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Seattle, WA 98104

RE: Your Freedom of Information Act ("FOIA")
Appeal

Dear Mr. Diamondstone:

This letter is in reply to your letter of April 16, 1991, acknowledging receipt of documents in a partially redacted format, and also stating your belief that:

the Corporation still is not specifying the claimed exemption nor is it providing a brief explanation as to how that exemption applies.

We have interpreted your letter to be a request for a reconsideration of our response to your appeal of February 19, 1991. Accordingly, we reviewed our complete response, specifically, my letter of March 29, 1991, plus all subsequent letters from the Office of the General Counsel, looking in particular at the deficiencies you report. We have now determined that we followed standard FOIA appeal procedures and, as I promised in my letter of March 29, 1991, released all reasonably segregable portions of responsive documents. Moreover, my letter of March 29, 1991, as well as each subsequent response, cited the appropriate statutes and statutory language covering any documents or portions of documents withheld. Thus, I am satisfied that our responses to you were correct and that no additional action is required on our part.

In an effort to address your concerns, however, I have asked the FOIA Office to provide you with another set of the post-appeal documents already released to you. Please note that each page is now marked with the appropriate reason(s) for

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withholding: outside scope [of request]; exempt pursuant to 5 U.S.C. §552(b)(5), pertaining to internal memoranda that are predecisional and deliberative; exempt pursuant to 5 U.S.C. §552(b)(7)(A), pertaining to ongoing enforcement proceedings. Although the LSC regulations that conform to the U.S. Code citations are not marked on each page, you should be aware that 45 C.F.R. §1602.9(a)(4) corresponds to 5 U.S.C. §552(b)(5) and that 45 C.F.R. §1602.9(a)(6)(i) corresponds to 5 U.S.C. §552(b)(7)(A).

I hope this response satisfies your concerns. As I indicated in my letter of March 29, 1991, you have the right to seek judicial review of this decision by filing a complaint in the federal court in the district where you reside, in the district where you have your principal place of business, or in the District of Columbia. See 5 U.S.C. §552(a)(4).

Very truly yours,


David H. Martin
President

Enclosures