

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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S.A. LUDSIN & CO.,

96 CV 5972

97 CV 784

Plaintiff,

MEMORANDUM

AND

ORDER

-against-

U.S. SMALL BUSINESS ADMINISTRATION,
Defendant.

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STEVEN A. LUDSIN, ESQ.
P.O. Box 5050
East Hampton, New York 11937-5050
for plaintiff.

ZACHARY W. CARTER, ESQ.
United States Attorney
Eastern District of New York
(William Young, of counsel)
1 Pierrepont Plaza, 11th Floor
Brooklyn, New York 11201
for defendant.

NICKERSON, District Judge:

Plaintiff S.A. Ludsin & Company (S.A. Ludsin)
brought these two actions against defendant Small
Business Administration, a federal agency, pursuant to
the Freedom of Information Act, 5 U.S.C. § 552. In 96-
CV-5972 plaintiff seeks descriptions, photographs, and

appraisals of assets being liquidated by the Small Business Administration, and has asked that he be provided this information without paying a fee for its production. In 97-CV-784 plaintiff seeks to compel the Small Business Administration to release a comprehensive report of research findings and analytic models outlining potential options for sale of assets held by the Small Business Administration. The Small Business Administration has moved for summary judgment in both cases.

I

The record shows the following facts. S.A. Ludsin is a company that in 1995 obtained a one-year contract to market and sell certain real estate on behalf of the Small Business Administration. That contract was not renewed.

In January 1996 plaintiff submitted an unsolicited proposal for marketing and sale of other assets being liquidated by the Small Business Administration's

Investment Division, Office of Liquidation. The Small Business Administration rejected this proposal.

Undaunted, plaintiff by letter dated May 8, 1996 requested a "list of assets and the descriptions, photos and appraisals of the assets being liquidated by the Investment Division, Office of Liquidation," pursuant to the Freedom of Information Act. The Small Business Administration advised plaintiff on August 20, 1996 that a payment of \$21,780 would be required in order to process his request. That fee was estimated based on 1200 hours of work at \$18.00 per hour and 10 cents per page for copying an estimated 1800 pages. Plaintiff filed the complaint in 96-CV-5972 on December 9, 1996, seeking a waiver of this fee.

Around the same time, plaintiff made a second request concerning the assets being liquidated by the Small Business Administration. By letter dated September 18, 1996 he requested a copy of a report created by Woodmont Asset Management, Inc. on behalf of the Small Business Administration. The purpose of the report was to study, make findings, develop analytical

models and make recommendations regarding the methodology by which the Small Business Administration might best conduct sales of all or some portion of its asset portfolio. The Small Business Administration commissioned the Woodmont study in order to assist it in evaluating the feasibility of the sale of assets. The Small Business Administration rejected plaintiff's request for a copy of this study, and plaintiff filed the complaint in 97-CV-784 on February 18, 1997 seeking an order that the report be disclosed.

II

The Small Business Administration imposed a fee of \$21,780 to produce the descriptions, photographs, and appraisals sought by plaintiff in 96-CV-5972 pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), which provides:

Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

In order to obtain a fee waiver, plaintiff must demonstrate (1) that the information he seeks will contribute significantly to public knowledge, and (2) that it is not primarily in his commercial interest.

Agency fee waiver denials are reviewed de novo, but the scope of this Court's review is limited to the record before the agency. 5 U.S.C. § 552(a)(4)(A)(vii). There is no indication in the agency record that the plaintiff made any showing that the information at issue would benefit the public. In his initial request submitted on May 8, 1996, plaintiff did not offer any explanation for why he was seeking the information. He stated in his July 26, 1996 and September 16, 1995 letters that disclosure "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government," but he does not elaborate on what contribution the information will make. Mere recitation of the statute does not satisfy the plaintiff's burden.

Plaintiff also fails to show that the request was not made for commercial purposes. Plaintiff argues that because the Small Business Administration would not grant him a contract to sell the assets of which he seeks descriptions, photos and appraisals, he does not have a commercial interest in the information. This clearly is not the case. Plaintiff's requests in both suits before this Court show that he is trying mightily to obtain a contract to sell these items on behalf the Small Business Administration, and seeks information to help him achieve that end. A "commercial requester" is defined in 13 C.F.R. § 102.8(d) as "anyone seeking information for commercial, trade, or profit interests of the requester or someone he or she is trying to help." Plaintiff qualifies as a commercial requester and must foot the bill for the information that he seeks without any subsidy from the public coffers.

III

The Freedom of Information Act requires agencies to make public final opinions and orders in adjudicated

cases, as well as statements of policy and interpretations which have been adopted by the agency. 5 U.S.C. § 552(a)(2). But the Act's "Exemption 5" excludes from this requirement all "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." 5 U.S.C. § 552(b)(5).

One of the civil discovery privileges specifically comprehended by Congress in this exception was the "deliberative process" or "executive" privilege, which protects the decisionmaking processes of the executive branch "in order to safeguard the quality and integrity of governmental decisions." Hopkins v. U.S. Dep't of Hous. and Urban Dev., 929 F.2d 81, 85 (2d Cir. 1991). To qualify for the deliberative process privilege, a document must be "predecisional," or "prepared in order to assist an agency decisionmaker in arriving at his decision." Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975). The document must also be "deliberative," or "actually . . . related to the process by which policies are formulated."

Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 774
(D.C. Cir. 1978) (en banc).

Because agencies commonly need recommendations from hired consultants, courts have determined that documents generated outside the agency but created pursuant to the request of the agency qualify as inter-agency memoranda for purposes of Exemption 5. See Ryan v. Dep't of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980).

Applying these principles to the Woodmont study, this Court finds that the study is protected by the deliberative process privilege. The Woodmont study was commissioned with the specific purpose of assisting the Small Business Administration in evaluating the feasibility of the sale of all or some portion of its assets. The Small Business Administration has not yet made a final determination whether it can dispose of its assets in a financially advantageous manner. The study is both "deliberative" and "predecisional" within the meaning of Exemption 5.

IV

Summary judgment in favor of the defendant is granted in both 96-CV-5972 and 97-CV-784.

So ordered.

Dated: Brooklyn, New York
April 21, 1998

Eugene H. Nickerson

Eugene H. Nickerson, U.S.D.J.