

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF SAINT CROIX

TEA GARDEN OF RATTAN, INC.,

Plaintiff,

Civ. No. 2000/175

v.

UNITED STATES OF AMERICA,
U.S. SMALL BUSINESS ADMINISTRATION,
BEAL BANK, FSB, ANDREW BEAL,
LLP MORTGAGE LTD., and PROPERTY
ACCEPTANCE CORP., and ARNOLD ROSENTHAL
In His Individual Capacity Only,

Defendants.

COUNTERCLAIM OF LLP MORTGAGE LTD.

**ORDER REGARDING PLAINTIFF'S MOTION TO COMPEL DEFENDANT
SMALL BUSINESS ADMINISTRATION'S PRODUCTION OF DOCUMENTS**

THIS MATTER is before the Court on plaintiff's motion to compel defendant Small Business Administration [SBA] to produce certain documents. SBA has filed its opposition and plaintiff filed a reply.

Plaintiff's complaint charges the federal defendants with "reverse redlining"; i.e., discrimination in the granting of home mortgages where the lender targets certain neighborhoods and communities for onerous lending practices. *See, National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981(3d Cir. 1980). Plaintiff claims that its offer to compromise an SBA loan was sidetracked and delayed because of discrimination. Plaintiff claims that as a result, it is being forced into foreclosure.

In support of its allegation that SBA and Rosenthal deliberately mishandled its offer in compromise, plaintiff seeks a "Letter and Recommendation" written by Ruth Rivera of the SBA District Office in San Juan, Puerto Rico addressed to Rosenthal.¹ Plaintiff also seeks an SBA 327 Report (Change in Loan Status) authored by Wayne Biggs, Liquidation Specialist in the SBA St. Croix office.

SBA resists production of the documents on the grounds that they are subject to the deliberative process privilege and should not be disclosed. In support, SBA submits the affidavit of Calvin Jenkins, SBA's Deputy Associate Administrator for Capital Access Programs. Jenkins avers that after review of the document, Mr. Biggs' report was an analysis of the offer in compromise from a defaulting borrower; that the report was "advisory only"; and that final decision making authority rested with Headquarters Claims Review Committee. SBA argues that disclosure would chill candid communication within the agency.²

DISCUSSION

¹In its Reply, plaintiff states that on March 28, 2003, SBA produced a facsimile of Ruth Rivera's letter to Arnold Rosenthal. Accordingly, the only document remaining to be produced is the 327 Report authored by Wayne Biggs.

²Jenkins notes that only those portions of such report containing Biggs' analysis and judgment have been withheld. (Exh.1 to SBA's Response, par. 9).

The deliberative process privilege allows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Cobell v. Norton*, 2003 WL 255970 *1 (D.D.C. Feb. 5, 2003) quoting *In re Sealed Case*, 121 F.3d 729, 737-38 (D.D.C. 1997). The Court of Claims in *Kaiser Alum. & Chem. Corp. v. United States*, 157 F.Supp. 939, 945-46 (Ct.Cl. 1958), described the rationale underlying the rule:

"Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good all. There is a policy involved in this claim of privilege for this advisory opinion-the policy of open, frank discussion between subordinate and chief concerning administrative action.
"

A document must meet two requirements for the privilege to apply. First, it must have been generated before the adoption of the agency's policy or decision. *In the Matter of Liquidation of Integrity Insurance Co.*, 754 A.2d 1177, 1182 (Sup.Ct. N.J. 200). In other words, it must have been prepared in order to assist an

agency decision-maker in *arriving* at a decision. *Cobell*, 2003 WL 255970 at *2. Second, it must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. Thus, the privilege assumes that the information was relied upon in reaching a decision. *Id.* Some additional guidelines have also emerged regarding the types of documents falling within the privilege. For example, intra-agency communications from subordinate to superior are generally considered deliberative while discussions of objective facts are not. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 88 (1973) *superseded by statute on other grounds*. Moreover, documents which reveal the personal opinions of the writer fall within the ambit of the privilege. *United States v. Nixon*, 418 U.S. 683, 705 (1974).

Nevertheless, the privilege is a qualified one and a litigant may obtain the information upon a showing of substantial or compelling need. *In the Matter of Liquidation of Integrity Insurance Co.*, 754 A.2d at 1182. In determining whether a litigant has sustained the burden of overcoming the deliberative process privilege, federal courts consider the following factors: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the

extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. See *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

Here, SBA argues that the 327 Report is a recommendation as to how the SBA's Central Office should respond to plaintiff's second offer in compromise and, as such, is deliberative. Plaintiff counters that it seeks the document in order to prove that the SBA's inordinate delay in responding to plaintiff's offer in compromise was discriminatory and done in bad faith.

The Court finds that the document sought bears some relevance to plaintiff's claim that its offer in compromise was treated in a discriminatory manner. Plaintiff maintains that the process employed by the federal defendants - that of targeting minority business for onerous bank practices - amounted to "reverse redlining" in violation of federal statutes. Plaintiff also maintains that SBA and the Beal defendants manipulated the banking process in order to force certain persons to pay exorbitant fees and other monies to the bank. Thus, a report which includes information regarding plaintiff's loan bears some relevance to the action.

Plaintiff alludes to other evidence of SBA's conduct such as

the letter of Ruth Rivera to Rosenthal which, plaintiff claims, was not acted upon for some fourteen months. This evidence has been made available to the plaintiff. It is clear that the government, through the SBA has a role in the allegations made in this complaint.

The document was prepared by Biggs, a Liquidation Specialist, and directed to his superiors within the SBA. It is likely that the recommendation reflects Mr. Biggs' subjective opinion of the offer in compromise and possibly includes suggestions and a weighing of the pros and cons of the issue. The Court further believes that disclosure of such a document would violate the spirit of the privilege and would temper the candor which is necessary to the agency's deliberative process.

CONCLUSION

The Court finds that the 327 Report requested herein falls within the deliberative process privilege. The SBA has met its burden of showing that the document is deliberative in nature and the plaintiff failed to overcome the presumption of non-disclosure. Plaintiff's assertion of need was not sufficiently compelling. Because the Court finds that the document reveals the agency's decision-making process, it will not be produced.

Accordingly, it is hereby

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ORDERED that the plaintiff's motion to compel the production of documents is DENIED with respect to the 327 Report submitted by Wayne Biggs. Because the letter authored by Ruth Rivera has been produced, plaintiff's motion with respect to its production is rendered MOOT.

Date: April 15, 2003

ENTER:

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

A T T E S T:
Wilfredo F. Morales, Clerk of Court

by: _____
Deputy Clerk

cc: Ernest Batenga, AUSA
Paul A. Covell, Esq.
Francis D'Eramo, Esq.