

The National Security Archive

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February 26, 2003

BY FAX 202-619-8155

John P. Opitz
Assistant General Counsel for
Procurement and Administrative Law
U.S. Department of Housing and Urban Development
Office of General Counsel
Freedom of Information Act Office
451 Seventh Street, SW
Room 10248
Washington, DC 20410

RE: Freedom of Information Act Appeal Number FI-358193
National Security Archive No. 20020523HUD001

Dear Mr. Opitz:

On February 11, 2003 I received your letter dated February 3, 2003. In it you indicate that the above referenced appeal is "premature and cannot be considered" and explain that the U.S. Department of Housing and Urban Development's ("HUD" or the "Department") lack of a response to an FOIA request should not be treated "as a denial of the request." You advise that HUD's regulations provide for an FOIA appeal "only from a written denial of the request." (emphasis in original)

In our view, the lack of a substantive response from HUD within the mandatory 20 business day period set forth in the Freedom of Information Act, 5 U.S.C. §552, ("FOIA") is a constructive denial of our FOIA request and is subject to administrative appeal. Our goal is to have the request processed, however, and not to have time spent on correspondence concerning our differing interpretations of the FOIA. I am sending this letter simply to explain to you our position as to our entitlement to administrative appeal.

First, as you know, Congress adopted the time limit provision in the FOIA "in order to contribute to the fuller and faster release of information, which is the basic objective of the Act." H.R. Rep. No. 876 (1974), reprinted in, 1974 U.S.C.C.A.N. 6285, 6289. A constructive denial occurs when an agency fails within the statutory time period to provide a response that addresses: (1) the agency's determination of whether or not to comply with the request; (2) the reasons for its decision; and (3) notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse. See Oglesby v U. S. Dep't of Army, 920 F.2d 57, 65 (D.C. Cir. 1990) (citing 5 U.S.C. § 552(a)(6)(A)(i)) (additional citations omitted). Here, we have received only an acknowledgment of the request and explanation of HUD's procedures. Thus, HUD's lack of substantive response constitutes a constructive denial.

Second, to be sure, Congress provided that an FOIA requester may be deemed to have constructively exhausted administrative remedies, and entitled to file a lawsuit against the agency, if the 20-day period has passed without a substantive response to the request or a notice advising of a one-time ten day extension of time for "unusual circumstances" from the agency. 5 U.S.C. §552(a)(6)(C)(i); 5 U.S.C. §552(a)(6)(B). The FOIA also permits HUD, however, to treat its constructive denial of an FOIA request as an "adverse determination" under the FOIA that is subject to administrative appeal.¹ See 5 U.S.C. §552(a)(6)(A) (stating agency obligation to respond to the FOIA request within 20 days and providing for the right to appeal "to the head of the agency any adverse determination."). Under this construction of the FOIA, the Department would have the benefit of the additional 20-day appeal period to process the pending FOIA request and would avoid litigation.²

Third, we have submitted FOIA requests covering the same subject as the above referenced request to 34 other government agencies. The vast majority of these agencies already have responded to our requests with responsive records or other substantive responses. We appealed all non-responses or non-substantive responses. Of these nine appeals, seven agencies accepted the appeals and several of these have since completed the processing of the request and provided substantive responses.

Finally, we filed a similar request on January 8, 2003 with HUD regarding records concerning "the March 19, 2002, memorandum issued by White house Chief of Staff, Andrew Card ... regarding records containing information about Weapons of Mass Destruction," to which we already have received a substantive response. See FOIA Request No. FI-366620. The request that is the subject of this appeal is for records concerning "US Attorney General John Ashcroft's October 12, 2001 memorandum on the US Freedom of Information Act." Both requests were simple requests for non-sensitive records that should primarily be maintained within the FOIA office of the Department. We are perplexed that it took HUD only 16 days to respond to FOIA Request No. FI-366620, while 117 days have already passed without any substantive response to the request that is the subject of this letter.

Although I understand the reasoning behind your refusal of the appeal, I urge you to reconsider your position with respect to appeals based on the Department's failure to provide a substantive response within the twenty day statutory time limit. Your construction leaves only the option of filing a lawsuit over the constructive denial of the FOIA request, which does not serve the interest of the Department, the FOIA requester or the courts.

Please feel free to contact me to discuss this matter at (202) 994-7000.

Sincerely,



Meredith Fuchs
General Counsel

¹ In at least one FOIA lawsuit, HUD took the position that an FOIA requester who had not received a substantive response within the statutory time period was required to administratively appeal the matter rather than go directly to court. See Ervine and Assoc., Inc. v. Dunlap, 33 F.Supp.2d 1, 14 (1997) (holding that the FOIA requester was entitled to seek immediate relief in court).

² Indeed, while judicial decisions tend to focus on whether there is subject matter jurisdiction in district court when an agency has failed to meet the FOIA's statutory deadlines, several courts have recognized administrative appeals of constructive denials of FOIA requests. See, e.g., Eison v. Kallstrom, et al., 75 F. Supp. 3d 113, 115 (S.D.N.Y. 1999); Tax Analysts v. Internal Revenue Service, 53 F. Supp. 2d 449, 450 (D.D.C. 1999) (subsequent history omitted).

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FAX COVER SHEET

Date: 2/26/03
To: John P. Opitz, Asst General Counsel
Organization: U.S. Department of Housing & Urb. Devel
From: Meredith Fuchs
Number of pages (including cover sheet) 3

If there is a problem with this transmission, please call us at 202-994-7000 as soon as possible.

Message:

See Attached