

REDACTED VERSION

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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HAMILTON SECURITIES GROUP, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 99-1563
	:	(SS)
UNITED STATES DEPARTMENT OF	:	
HOUSING AND URBAN DEVELOPMENT,	:	
OFFICE OF INSPECTOR GENERAL	:	
	:	
Defendant.	:	

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MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF DEFENDANT'S MOTION TO DISMISS  
AND FOR SUMMARY JUDGMENT

I. Introduction

On June 16, 1999, plaintiff, Hamilton Securities Group, Inc. filed this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, alleging that the defendant, the United States Department of Housing and Urban Development ("HUD"), Office of Inspector General ("OIG"), has improperly withheld records prepared and accumulated by OIG's auditors in Denver, Colorado. Complaint, ¶¶ 53-62. For the reasons set forth below, the defendant's motion to dismiss and for summary judgment should be granted.

Briefly stated, defendant's motion should be granted because: (1) this Court lacks subject matter jurisdiction over a portion of plaintiff's complaint because plaintiff failed to exhaust its administrative remedies; and (2) judgment should be granted to the defendant because it has properly withheld the

requested documents. The records plaintiff seeks are subject to the deliberative process privilege, and, exempt from disclosure under 5 U.S.C. § 552a(b)(5). In addition, the requested documents are part of an on-going law enforcement investigation, and thus, exempt from disclosure under 5 U.S.C. § 552a(b)(7)(A) because release of the documents could harm an ongoing investigation.

## II. Facts

On July 13, 1998, in the context of another civil action, Susan Gaffney v. The Hamilton Securities Group, Inc., et al., Civil Action No. 98-92 (SS),<sup>1</sup> plaintiff submitted a letter to Judith Hetherton, Counsel to the Inspector General, stating that:

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<sup>1</sup> Susan Gaffney v. The Hamilton Securities Group, Inc., et al., is a subpoena enforcement proceeding before this Court. Pursuant to the Government's petition for summary enforcement, on December 18, 1998, this Court issued an order enforcing six administrative subpoenas *duces tecum* that OIG had issued to Hamilton and Hamilton Securities Advisory Services, Inc., (*i.e.*, three virtually identical subpoenas to each entity). Pursuant to that order, co-Special Masters, Irving M. Pollack and Laurence Storch, are monitoring production under the subpoenas. On February 18, 1999, Hamilton and Hamilton Securities Advisory Services, Inc., appealed that order to the Court of Appeals for the District of Columbia Circuit. On July 2, 1999, the D.C. Circuit summarily affirmed that order. On May 7, 1999, Hamilton and Hamilton Securities Advisory Services, Inc., filed with this Court an exception to the co-Special Masters' rejection of claims of attorney-client privilege with respect to 17 documents that are responsive to the administrative subpoenas. This Court held a hearing on the matter on June 17, 1999. On July 20, 1999, this Court requested additional evidence and set a hearing for July 27, 1999, which has been postponed.

During our meeting last week, I again asked you whether or not you would produce a copy of the Denver audit of Hamilton, and you responded by asking that I put that request in writing. I am now doing so. Please provide me with a copy of the Denver audit.

See Declaration of Darlene Hall ("Hall Declaration"), ¶ 3, Exhibit 1.<sup>2</sup> The "Denver audit" was an audit of certain aspects of HUD's loan sale program. See Declaration of Kathryn Kuhl-Inclan ("Inclan Declaration"), ¶ 4. Pursuant to OIG practice, Ms. Hetherington forwarded plaintiff's request to the OIG FOIA Officer for treatment as a FOIA request. See Hall Declaration, ¶ 3.

By letter dated July 20, 1998, the OIG FOIA Officer responded to plaintiff's letter. Id. ¶ 4, Exhibit 2. The OIG FOIA Officer advised plaintiff that the OIG did not possess or control "a copy of the Denver audit of Hamilton," and that the OIG had not conducted such an audit. Id. The OIG FOIA Officer added, however, that the OIG would construe plaintiff's FOIA request to be a request for a copy of the partial, draft audit report of HUD's loan sales program. The OIG FOIA Officer further explained to plaintiff that an audit of HUD's loan sales program

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<sup>2</sup> Technically, plaintiff's counsel submitted the FOIA request, and he did not formally state that he was acting on behalf of another party until August 20, 1998, and then asserted that he was acting on behalf of an entity with a name different from that of the plaintiff in this case. Defendant is not objecting that plaintiff was not a party to the FOIA request at issue here because it was aware that Mr. McManus was representing the plaintiff in litigation at the time that the FOIA request and the appeal were submitted. Contra McDonnell v. United States, 4 F.3d 1227, 1236-39 (3<sup>rd</sup> Cir. 1993) (affirming the district court's decision that a plaintiff lacked standing because his signature did not appear on the FOIA request subject to judicial review).

was commenced but not completed by OIG's Rocky Mountain District Office of Audit, and that documents compiled or created in connection with the audit had been incorporated into the law enforcement investigative files associated with an ongoing OIG investigation of HUD's loan sales program. The OIG FOIA Officer, on behalf of the Assistant Inspector General for Audit and the Assistant Inspector General for Investigations, then denied plaintiff's request for records, as follows:

Accordingly, the draft audit report, which pertains to only a part of the audit, is being withheld under 5 U.S.C. §§ 552(b)(5) and (b)(7)(A). These provisions protect intra-agency communications subject to the deliberative process privilege, records subject to the law enforcement investigative files privilege, and records or information compiled for law enforcement purposes, which if released could reasonably be expected to interfere with a pending or prospective law enforcement proceeding.

Id. Finally, the OIG FOIA Officer advised plaintiff that, pursuant to 24 C.F.R. § 2002.25, it could seek administrative review by the Inspector General of the denial of its FOIA request "if a written appeal is filed within 30 days from the date of this letter." Id.

Thirty-one (31) days later, by letter dated August 20, 1999, plaintiff appealed the denial of his FOIA request. Id., ¶ 5, Exhibit 3. This appeal challenged the OIG's assertion of FOIA exemptions (b)(7)(A) and (b)(5) to the extent that it related to the deliberative process privilege. Id.

The Inspector General denied plaintiff's appeal on September 15, 1998. Id. ¶ 6, Exhibit 4. Plaintiff's appeal was denied

both on procedural grounds and on the merits. Regarding the procedural grounds, the Inspector General determined that plaintiff's appeal was untimely, and that he had failed to challenge one of the exemptions upon which the OIG had based the initial denial of his FOIA request (*i.e.*, the investigative files privilege under exemption (b)(5)). With respect to the merits, the Inspector General determined that the partial, draft audit report "is without a doubt . . . subject to the deliberative process privilege," and that it "was incorporated into the law enforcement investigative files associated with an ongoing OIG investigation, and its disclosure could reasonably be expected to interfere with the investigation." *Id.* This action followed.

### III. Argument

#### A. Plaintiff's Complaint Should Be Dismissed, In Part, For Lack of Subject Matter Jurisdiction

Under the Freedom of Information Act (hereinafter "FOIA"), administrative remedies must be exhausted prior to judicial review. 5 U.S.C. §552(a)(6); Oglesby v. United States Department of the Army, 920 F.2d 57, 65 (D.C. Cir. 1990); American Federation of Government Employees v. United States Department of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990); Spannaus v. United States Department of Justice, 824 F.2d 52, 57-59 (D.C. Cir. 1987); Stebbins v. Nationwide Mutual Ins. Co., 757 F.2d 364, 366 (D.C. Cir. 1985). Indeed, where a FOIA plaintiff attempts to obtain judicial review without first properly undertaking full and timely administrative exhaustion, his

lawsuit is subject to dismissal for lack of subject matter jurisdiction. See Dettman v. United States Department of Justice, 802 F.2d 1472, 1477 (D.C. Cir. 1986); Brumley v. United States Department of Labor, 767 F.2d 444, 445 (8th Cir. 1985).

As a necessary component of exhausting one's administrative remedies, a FOIA requestor must file an administrative appeal within the time limits specified in the agency's FOIA regulations. Oglesby v. United States Department of the Army, 920 F.2d at 65 & n.9. Plaintiff's failure to do so is a failure to exhaust administrative remedies, and bars a complaint in district court. Oglesby v. United States Department of the Army, 920 F.2d at 65; Dettman v. United States Department of Justice, 802 F.2d at 1477.<sup>3</sup>

Also, plaintiff's complaint appears to seek documents well beyond the scope of its FOIA request to the OIG. As stated above, in its FOIA request, plaintiff specifically sought "a copy of the Denver audit of Hamilton" and nothing else. See Hall Declaration, ¶ 3, Exhibit 3. Here, plaintiff appears to seek

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<sup>3</sup> Plaintiff failed to meet the deadline for filing its administrative appeal. In accordance with the FOIA, 5 U.S.C. § 552(a)(3) and (a)(4), OIG published regulations that mandate that review is available only if a written request for review is filed within 30 days after issuance of the written denial. See 24 C.F.R. Part 2002. See generally 49 Fed. Reg. 11165 (Mar. 26, 1984). OIG responded to plaintiff's FOIA request on July 20, 1998. Plaintiff belatedly filed its appeal on the 31<sup>st</sup> day, August 20, 1998. The OIG denied plaintiff's FOIA appeal on this basis. It also denied plaintiff's appeal because plaintiff failed to challenge one of the exemptions upon which the OIG initially denied the FOIA request, i.e., the investigative files privilege.

(in addition to the draft audit) all paperwork prepared by the Denver audit team. See Complaint, ¶ 53 and Request for Relief, ¶ (b). To the extent plaintiff seeks anything other than the Denver draft audit report in this matter, it cannot do so because it has not exhausted its administrative remedies with respect to those documents, and thus, this Court does not have jurisdiction over that portion of the plaintiff's complaint.

B. Defendant's Motion For Summary Judgment Should Be Granted.

In a lawsuit brought under the Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. § 552 (1988), summary judgment is appropriate if the declarations submitted in support of the motion "describe the documents and justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." Shaw v. United States Dep't of State, 559 F. Supp. 1053, 1056 (D.D.C. 1983) (quoting Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981)). If the declarations submitted meet this standard, "then the court need not question their veracity and must accord them substantial weight in its decision." Schlessinger v. CIA, 591 F. Supp. 60, 64 (D.D.C. 1984) (citing Taylor v. Department of Army, 684 F.2d 99, 106-07 (D.C. Cir. 1982)). Because the declarations submitted herewith meet this standard, summary judgment for defendant is appropriate.

1. Exemption (b)(5) properly protects HUD's drafts of the report of the incomplete audit.

Exemption 5 encompasses "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552 (b)(5). It exempts those documents normally privileged in the civil discovery context. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 704-705 (D.C. Cir. 1971). The language of the statute unequivocally incorporates all civil discovery rules into FOIA Exemption 5. Martin v. Office of Special Counsel, 819 F.2d 1181, 1185 (D.C. Cir. 1987); see also Badhwar v. Department of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987).

The deliberative process privilege is designed to "prevent injury to the quality of agency decisionmaking." NLRB v. Sears, Roebuck, 421 U.S. at 151. Thus, the privilege protects not just particular documents, but also the integrity of the deliberative process itself when the exposure of that process would result in harm. E.g., National Wildlife Fed'n v. Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) ("ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process"). The deliberative process privilege protects documents and other memoranda prepared during the agency's decision-process, and constitutes "the 'generally . . . recognized' privilege for 'confidential inter-agency advisory opinions'. . . the disclosure

of which would be injurious to the consultative functions of government. . ." NLRB v. Sears, Roebuck & Co., 421 U.S. at 151. Its purpose, therefore, is to prevent injury to the quality of agency decisions. Id. The privilege protects the consultative functions of the Government by preserving the confidentiality of opinions, recommendations, and deliberations that constitute part of the process by which government decisions are made and Government policies are formulated. Jordan v. United States Dep't of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978) (en banc).

In Carl Zeiss, this Court explained another policy underlying the privilege:

The judiciary, the courts declare, is not authorized "to probe the mental processes" of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others-- results demanded by exigencies of the most imperative character. No judge could tolerate an inquisition into the elements comprising his decision--indeed, "[s]uch an examination of a judge would be destructive of judicial responsibility"--and by the same token "the integrity of administrative process must be equally respected." (footnotes omitted).

Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325-26 (D.D.C. 1966), aff'd on opinion below, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967).

For a document to be covered by the deliberative process privilege, two requirements must be satisfied: First, it must be predecisional, i.e., "antecedent to the adoption of agency policy." Jordan v. Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc). In determining whether a document is

predecisional, the Supreme Court has held that an agency need not identify a specific decision in connection with which a document is prepared. NLRB v. Sears, Roebuck & Co., 421 U.S. at 151 n.18. The Court recognized that agency deliberations do not always ripen into agency decisions, and that ultimately the privilege is meant to protect the decisional process, rather than any particular document or decision. Id.; see also Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("Congress enacted Exemption 5 to protect the executive's deliberative processes -- not to protect specific materials."). It is sufficient for the agency to establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." Coastal States Gas Corp., 617 F.2d at 868.

Second, the document must be deliberative in nature, i.e., it must be "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, 1143-44 (D.C. Cir. 1975). Deliberative documents frequently consist of "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 U.S. at 150. Thus, the exemption covers recommendations, draft documents, proposals, analyses, suggestions, discussions, and other subjective documents that reflect the give-and-take of the consultative process. Coastal States Gas Corp., 617 F.2d at 866.

Additionally, deliberative documents are protected against disclosure when, as here, they reflect the personal opinions of the writer rather than the policy of a government agency. Coastal States Gas Corp., 617 F.2d at 866. Release of one employee's opinion, expressed to his fellow employees, as to what an agency practice might be does not amount to a pronouncement of agency policy that must be disclosed to the public. Release of the preliminary advice and opinions of individual government employees would often confuse, rather than clarify, the public perception of the position of a government agency. Russell v. Department of the Air Force, 682 F.2d 1045, 1048-1049 (D.C. Cir. 1982); Fisher v. Department of Justice, 772 F. Supp. 7, 10-11 (D.D.C. 1991), aff'd, 968 F.2d 92 (D.C. Cir. 1992).

Here, there is no question that Exemption 5 applies to the drafts of the report of the incomplete audit regarding HUD's loan sale program. First, the report is plainly predecisional. The audit of HUD's loan sale program was suspended and has never been completed. See Inclin Declaration, ¶ 4. The documents that the plaintiff seeks are merely drafts of the unfinished audit, which would require substantial additional work before a final audit could be issued. See Inclin Declaration, ¶¶ 3, 4 and 7.

OIG procedures applicable to audit reports prepared and issued during the relevant time period, OIG Manual Chapter 2130 (January 1988), required that all audit reports issued by District audit offices, inter alia, had to be reviewed and approved by the District Inspector General. Id. ¶ 5. All findings and

recommendations prepared by staff auditors and/or intermediate-level supervisory staff were in effect recommendations to District Inspectors Generals concerning what OIG's official findings and recommendations should be. Id. In the instant case, the District Inspector General did not sign off on or otherwise approve of the incomplete audit of HUD's loan sale program. Id. ¶ 6. In fact, there is no evidence that the District Inspector General even reviewed the drafts or the working papers evidencing the audit work. Id. At bottom, the drafts of the incomplete audit do not represent the official position of OIG. Id. ¶ 3. Under these circumstances, there is no question that the drafts at issue are predecisional.

In addition, the drafts are also deliberative in nature. Drafts in and of themselves are considered to be deliberative and exempt from disclosure under Exemption 5. Drafts are exempt because they "reflect the personal opinions of the writer rather than the policy of the agency." Coastal States Gas Corp., 617 F.2d at 866. Several auditors prepared the drafts and intermediate supervisors appear to have reviewed them. See Inklan Declaration, ¶ 6. The reports contain their notes, suggestions and comments on the incomplete audit to be considered by one another and the then District Inspector General. Id., ¶ 6. Where an employee writes a draft document and the agency uses a consultative process (e.g., circulating the draft for comments or clearance) to determine what the final version should include, then the draft is exempt. Russell, 682 F.2d at 1048-49; Lead

Industries Ass'n v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979). Stated differently, the very process by which a draft evolves into a final document constitutes a deliberative process.

In short, the drafts of the report of the unfinished audit are plainly predecisional and deliberative, and thus, they are exempt from disclosure under Exemption 5. Therefore, this Court should grant the defendant's motion for summary judgment.

2. The requested records are protected from disclosure by Exemption (b)(7)(A) Of the FOIA.

Exemption 7(A) permits the withholding of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The applicability of Exemption 7 requires a two-step analysis: 1) whether a law enforcement proceeding is pending or prospective; and 2) whether release of information about it could reasonably be expected to cause some articulable harm. See Kay v. Federal Communications Commission, 976 F. Supp. 23, 37 (D.D.C. 1997), aff'd, 172 F.3d 919 (D.C. Cir. 1998).

Initially, an agency may invoke Exemption 7(A) to protect pending investigations or ongoing enforcement proceedings. National Labor Relations Board v. Robbins Tire and Rubber Company, 437 U.S. 214, 220 (1978). Exemption 7(A) has been recognized to apply where proceedings remain pending (Robbins Tire, 437 U.S. at 220; Doe v. Dept. of Justice, 1987 WL 17072 at

\* 2 (D.D.C. 1987)); or where the proceeding is fairly regarded as prospective or as preventative. See e.g., Manna v. United States Department of Justice, 51 F.3d 1158, 1164 (3d Cir. 1995), cert denied, 516 U.S. 975 (1995) (ruling that where "prospective criminal or civil (or both) proceedings are contemplated," information is protected from disclosure); Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987) (recognizing that Service Lookout Book, containing "names of violators, alleged violators and suspected violators," is protected as proceedings clearly are at least prospective against each violator); Ehringhaus v. FTC, 525 F. Supp. 21, 22-23 (D.D.C. 1980) (stating that Exemption 7(A) applies when enforcement proceedings is "in prospect.")

Even when an investigation is dormant, Exemption 7(A) has been held to be applicable because of the possibility that the investigation could lead to a "prospective law enforcement proceeding." See National Public Radio v. Bell, 431 F. Supp. 509, 514-515 (D.D.C. 1977) (explaining although investigation is "dormant" it "will hopefully lead to a `prospective law enforcement proceeding'"). In addition, even after an investigation is closed the exemption may be applicable if disclosure could be expected to interfere with a related, pending enforcement proceeding. See Solar Sources, Inc. v. United States, 142 F.3d 1020, 1035 (7th Cir. 1998) (holding that although four defendants "had pleaded guilty to criminal charges filed against them," antitrust investigations remained ongoing as to other defendants); Kansi v. United States Department of Justice,

1998 WL 413578 at \*\* 1-2 (D.D.C. July 17, 1998) (rejecting claim that "harm in the form of witness tampering cannot occur because witnesses have already testified;" "potential for interference with witnesses and highly sensitive evidence that drives the 7 (A) exemption . . . exists at least until the plaintiff's conviction.") The "law enforcement proceedings" to which Exemption 7(A) may be applicable have been interpreted broadly to include not only criminal actions but also civil actions. See e.g. Manna, 51 F.3d at 1165 (disclosure would interfere with contemplated civil proceedings).

Once an agency demonstrates that an enforcement proceeding is pending, the agency must further demonstrate that release of the documents is likely to cause some distinct harm. See Kay, 976 F. Supp. at 38, citing, Campbell v. HHS, 682 F.2d 256, 258 (D.C. Cir. 1982). In this regard, it is well-recognized that Congress intended that Exemption 7(A) apply "whenever the government's case in court would be harmed by the premature release of evidence or information." See Robbins Tire, 437 U.S. at 232; Mapother v. Department of Justice, 3 F.3d 1533, 1543 (D.C. Cir. 1993) (holding that release of prosecutor's index of all documents he deems relevant would provide "critical insights into [government's] legal thinking and strategy."); Durham v. United States Postal Service, 1992 WL 700246 at \*1 (D.D.C. 1992) (deciding that release of investigative memoranda, witness files, and electronic surveillance material would substantially interfere with pending homicide investigation by impeding

government's ability to prosecute its strongest case), aff'd, No. 92-5511 (D.C. Cir. July 27, 1993). Exemption 7(A) also applies when disclosure would impede any necessary investigation prior to the enforcement proceeding. See e.g. Solar Sources, 142 F.3d at 1039 (stating that disclosure could interfere by revealing "scope and nature" of investigation). In short, an agency may invoke Exemption 7(A) when either the government's case in court could be harmed or the investigation for an imminent proceeding may be harmed. See Kay, 976 F. Supp. at 38, citing, Campbell, 682 F.2d at 258; North v. Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989).

An agency may establish interference by showing that the release of the records would reveal the scope, direction and nature of its investigation (North v. Walsh, 881 F.2d at 1097) or would hinder the agency's ability to control or shape the investigation. See Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996) (holding that release could "reveal much about the focus and scope" of investigation). It could also establish interference by demonstrating that release of the records may give the requester earlier and greater access than otherwise possible. Robbins Tire, 437 U.S. at 241. In this regard, FOIA cannot be used as a discovery tool. Robbins Tire, 437 U.S. at 242, n.23. An agency may further establish interference by demonstrating that premature release of the records could give a litigant the ability to construct defenses to avoid the charges entirely. Robbins Tire, 437 U.S. at 241-242; North, 881 F.2d at 1097.

In Kay, supra, this Court considered whether disclosure of

documents would harm the ongoing show cause proceeding. The Court found that the FCC had established sufficient harm by showing that disclosure would: (1) give plaintiff insight into the evidence against him; (2) allow the plaintiff to discern the focus of the investigation; (3) assist in circumventing the investigation; and (4) potentially create witness intimidation and discourage future witness cooperation.

Here, there is no question that the drafts of the report of the unfinished audit are protected from disclosure under Exemption 7(A). The drafts are part of a larger investigation concerning HUD's note sale program that involves both civil and criminal allegations, and they are relevant to this investigation. See Declaration of R. Joseph Haban ("Haban Declaration"), ¶¶ 5 and 7. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

More specifically, on June 5, 1996, Ervin and Associates filed a civil complaint in this Court against the United States, HUD, HUD's Secretary, the Small Business Administration ("SBA"), the SBA Administrator, and Helen Dunlap, the former Deputy Assistant Secretary for Operations within HUD's Office of Housing-Federal Housing Administration. See Ervin and Associates v. Dunlap, Civil Action No. 96-1253 (Ervin Complaint). This complaint alleges that there was corruption and favoritism in the procurement of services associated with HUD's sale of defaulted mortgage notes. See Haban Declaration, ¶ 3. The complaint, which sues Ms. Dunlap in her individual capacity, also alleged that HUD, through Ms. Dunlap, and its financial advisor, Hamilton Securities Group, Inc. (plaintiff in this case) and Hamilton

Securities Advisory Services, Inc. (both hereinafter referred to as "Hamilton") used Hamilton's control over HUD's note sales process to embark on a complex scheme to deliver huge block of discounted multi-family and single family HUD-owned notes to prominent Wall Street firms. Id.

[REDACTED]

[REDACTED] Thereafter, the OIG commenced an investigation. This investigation includes an examination of the allegations contained in the Ervin complaint [REDACTED] as numerous other allegations that have arisen during the course of the investigation. Id. In February of 1997, materials relating to the Rocky Mountain District's audit work regarding HUD's note sales program were incorporated into the investigative file associated with HUD's note sale program, and this material remains in that file to date. See Haban Declaration, ¶ 7.

Disclosure of records contained in the investigative file before the conclusion of the investigation of HUD's note sales program could reasonably be expected to interfere with the investigation by, inter alia, prematurely revealing the scope, focus, evidence and potential witnesses in the investigation. Id. ¶ 8. In particular, the materials relating to the Rocky

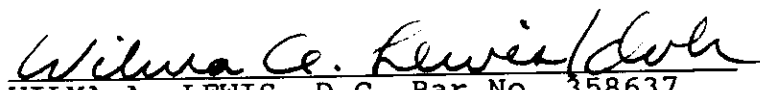
Mountain District's audit work on HUD's note sale program (that are part of the investigative file) contain the names and statements of witnesses who the audit staff interviewed as well as the audit staff's preliminary thoughts and conclusions. These names and conclusion have provided and may continue to provide leads to the investigators throughout the investigation. Id. Consequently, disclosure of witness identities and preliminary conclusions could enable individuals to forecast and thus obstruct the investigator's activities, to destroy or tamper with evidence and to harass or otherwise tamper with such witnesses. Id.


At bottom, the drafts of the report of the unfinished audit are exempt from disclosure pursuant to Exemption 7(A) because disclosure of this record could reasonably be expected to interfere with enforcement proceedings. Thus, the defendant's decision to withhold the draft reports of the incomplete audit was proper, and this Court should grant the defendant's motion for summary judgment.

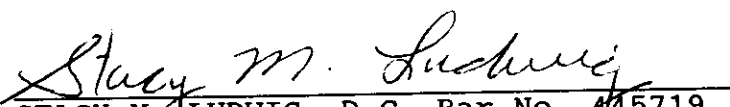
IV. Conclusion

Wherefore, for the foregoing reasons, the defendant's motion to dismiss or, in the alternative, for summary judgment should be granted.

Respectfully submitted,

  
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