

MEMORANDUM FOR: ALL FHEO FIELD OFFICE STAFF
OFFICE OF ENFORCEMENT AND PROGRAMS STAFF

FROM: Carolyn Y. Peoples, Assistant Secretary for Fair Housing and Equal Opportunity, E

SUBJECT: Treatment of Testing Evidence in Fair Housing Complaint Investigations

The purpose of this memorandum is to set forth the procedures investigators from HUD's Office of Fair Housing and Equal Opportunity ("FHEO investigators" or "investigators") will follow when investigating a Fair Housing Act ("Act") complaint based in whole or in part on testing. Testing is a critical tool in the fight against housing discrimination. This guidance seeks to insure that FHEO investigators nationwide will adopt a uniform approach to investigations where testing has been conducted with respect to the housing practices of a respondent. Complainants and testing organizations will know what information FHEO investigators will request to be able to fully evaluate the testing conducted. Additionally, this memorandum will inform all parties and the public how FHEO will handle testing information at three stages of the investigative process: intake, investigation, and after case closure. As set forth in detail below, some testing information will be retained in the Evidentiary Section of the investigative file and other testing information in the Deliberative Section¹ to protect proprietary information. All information shall be entered appropriately into TEAPOTS.²

¹ At various times FHEO staff have called the "Deliberative Section" of a hard copy of the Title VIII investigative file the "Working Papers" section. This section typically contains the investigative plan, documentation pertaining to conciliation discussions, pre-decisional assessments of the case such as deliberative memoranda, calculations of damages, and materials pertaining to anonymous witnesses.

² For example, the TEAPOTS system has a "Deliberative Impressions/Opinions" section in which investigator impressions, opinions and material pertaining to anonymous witnesses is maintained.

I. Background

This memorandum supplements FHEO's Title VIII Complaint Intake, Investigation and Conciliation Handbook ("Handbook 8024.01").³ Paragraph 5-7 of the Handbook provides an overview of testing and provides guidance on identifying at intake complaints that are appropriate for testing. FHEO continues to recognize that "testing may serve as a particularly effective investigative tool during intake." Handbook 8024.01 at page 5-44. This memorandum covers an aspect of testing that the Handbook does not reach: the processing of complaints aggrieved persons file with HUD that are based in whole or in part on testing conducted either before or after complaint filing. (The procedures set forth in this memorandum apply irrespective of the timing of the testing.)

This memorandum supersedes in their entirety the FHEO memoranda issued on August 18, 1999, and January 11, 2000, which address the subject matter of this memorandum. More specifically, FHEO will no longer follow the "review and return" policy set forth in those memoranda. FHEO will retain all material related to testing in either the Evidentiary or Deliberative Sections of the investigative file. This alternative approach continues to recognize and protect the sensitive nature of some testing-related material. The procedures established herein also promote efficient and effective investigation of cases containing testing evidence. This enables FHEO to make its independent assessment of all the relevant testing evidence.

This memorandum does not cover the use of testing information during the conciliation process. FHEO is required by statute to attempt to resolve fair housing complaints it investigates through conciliation. Handbook 8024.01 (Chapter 11, Conciliation) sets forth the statutory and regulatory parameters for conciliation, but also acknowledges the conciliator's broad discretion to select from the full range of dispute resolution techniques to seek voluntary resolution of complaints. A key decision facing the conciliator is whether to reveal portions of the Evidentiary Section of the investigative file to the parties. (*See* Handbook 8024.01 at ¶ 11-21.) A conciliator must assess the facts and circumstances of each complaint to determine what approach and techniques are most likely to result in a resolution providing individual relief and vindication of the public interest in fair housing. This memorandum restores this crucial flexibility, and thus eliminates the specific procedures the August 19, 1999, and January 11, 2000 memoranda imposed with respect to conciliations involving testing evidence.

II. Testing Evidence at the Intake Stage

FHEO Intake Analysts are responsible for collecting and assessing information to determine whether HUD has jurisdiction to investigate. Complaints that are supported by testing evidence in whole or in part must also meet the jurisdictional requirements that apply to all complaints (*See* Handbook 8024.01 ¶ 4-7, "Collecting Complaint Information," and Chapter 3, Jurisdiction.)

³ We will determine in coming months the best procedure for incorporating this guidance into the Handbook.

Confidentiality of tester identity is an issue that comes up in complaints that are supported by testing evidence. HUD recognizes that if an individual's identity as a tester becomes public, the individual's ability to participate in future tests is jeopardized. While disclosure of tester identity may occur if a case proceeds to litigation, Intake Analysts have a duty to safeguard the confidentiality of a tester's identity.⁴ Specifically, at this stage, Intake Analysts must not require that a complaint or complaint narrative include tester names, addresses, telephone numbers, e-mail addresses or any other information that could reasonably identify tester identities. Notwithstanding these intake procedures, Intake Analysts shall inform complainants and testing organizations that the testers will be interviewed during FHEO's investigation.

To assure that HUD has sufficient information to establish jurisdiction in cases that are based solely on testing, individual tester complainants and complainant testing organizations should, at a minimum, provide information about the testing in the form of a summary.⁵ Intake Analysts may request the following information if it is not included in the summary: date(s) of test, time(s) of test, name of site tested, address of site tested, name of agent(s) contacted, tester(s) characteristics (e.g., protected class), a description of what transpired during the test, and information regarding whether the respondent is covered by the Act. Intake Analysts will not require tester identity to be revealed at this time.

Intake Analysts shall notify complainants that during the investigation stage they will be required to produce additional testing material. Intake Analysts should also inform complainants that during the investigation HUD will require the production of material pertaining to all other tests that relate to the complaint, regardless of the results of those tests. Information concerning other tests is required for FHEO to assess the testing evidence supporting the pending complaint.

In instances when a fair housing organization is a complainant, Intake Analysts should seek evidence of the organization's internal authority to file a complaint (e.g., board minutes or a letter from the appropriate board officer authorizing the filing of the complaint in the name of the organization). During the course of the investigation, FHEO, in consultation with Regional Counsel, will resolve any issues regarding the organization's standing to file with HUD.

III. Testing Evidence During the Investigation

The purpose of the complaint investigation is to obtain sufficient evidence to determine whether or not there is reasonable cause to believe that a violation of the Act has occurred, or is about to occur. FHEO investigators are responsible for collecting and analyzing available factual evidence that is relevant to the complainant's allegation(s), as well as to the respondent's defense(s). (*See Handbook 8024.01, Chapter 7, "Planning and Conducting the Investigation."*)

⁴ There is no such duty when the tester is a complainant.

⁵ Disclosure of "test summaries" that testing organizations prepare to analyze the results of tester contacts is optional. If such a test summary is attached to the HUD-903, it will be treated as part of the complaint allegations and provided to all parties during the course of complaint notification.

Such factual evidence includes interviews of parties and witnesses; documents, records, and other items obtained from parties, witnesses, and other sources; and the results of reviews, inspections, and analyses conducted by HUD. In this regard, complaints based in whole or in part on testing should be treated no differently than other complaints.

To enable HUD to accurately assess the full evidentiary weight of testing, complainants and testing organizations should be prepared to provide copies of the following testing material to HUD: tester profiles; test reports; test coordinator logs; debriefing forms; test narratives; any materials a tester received from the tested housing provider; testing methodology;⁶ and other documents related to the tests. The FHEO investigator will place these documents, except for the “testing methodology,” in the Evidentiary Section of the investigative file. Organizational complainants, however, may redact these documents in order to protect the identities of their testers. The testing methodology documents shall be placed in the Deliberative Section of the investigative file.

FHEO investigators must conduct their own independent analyses of all evidence, including testing material, regardless of whether a testing organization has provided its own analysis of that material. Furthermore, the FHEO investigator must interview all testers and test coordinators. The investigator’s questions about testing methodology and the test coordinators’ answers will be placed in the Deliberative Section of the investigative file. No discussion of the complainant or organization’s testing methodology will be included in the Final Investigative Report (FIR) or in the Determination.

To protect the identity of testers during investigation, testers will be treated as “anonymous witnesses.” Tester interview reports will be maintained in the Evidentiary Section of the investigative file. (*See Handbook 8024.01 ¶ 7-6, “Documenting the Investigation.”*) However, those reports must be redacted to omit the name, address, telephone number, and title of the tester. This information shall be maintained in the “Deliberative Section” of the investigative file. Information that would reveal the identity of testers must also be omitted from the Final Investigative Report and the Determination.

HUD encourages complainants to cooperate with the fact-finding process by voluntarily disclosing all evidence that is necessary to complete the investigation, and reach a factual determination. The procedures and criteria for administrative closures for failure to cooperate (Handbook 8024.01, Chapter 9 at ¶ 9-2.A.2, “Failure to Cooperate”) apply to both individual and organizational complainants. Specifically, as in all cases, HUD cannot administratively close a complaint for failure to cooperate “if there is sufficient evidence for a determination to be made, or if the necessary information can be acquired from other sources.”

⁶ For purposes of this guidance, “testing methodology” includes the following documents: site and respondent selection criteria, choice of type of test(s) to be conducted, tester training materials, and tester procedures.

IV. Protections for Testing Information Provided During an Investigation

If the Department receives a request for information or material relating to a Title VIII case, whether or not the case is based in whole or in part on testing, the rules under the Freedom of Information Act (“FOIA”) will apply. Additionally, the Act and HUD’s implementing regulations require that upon completion of the investigation, HUD is required to give the parties a copy of the Final Investigative Report. Often the response to a request for information depends on the timing of the request and the status of the requester.

Open Cases

“Open” cases include those that have not been administratively closed, successfully conciliated, withdrawn, dismissed as a result of a no cause determination, and a charge has not been issued as the result of a reasonable cause determination. In these instances, FHEO’s investigation of the complaint is ongoing, thus the case is open.

As a general rule, FHEO may not release information collected during the investigation while the case is open. This is consistent with the FOIA exemption relating to law enforcement activities such as open investigations. 5 U.S.C. 552(b)(7)(A); 24 C.F.R. 15.3(a)(7).

There are two exceptions to this general rule. First, **a party** is entitled to receive a copy of any document that it submitted to FHEO during the investigation of the complaint. Second, during conciliation, the FHEO conciliator may opt to use the strategy of revealing portions of the Evidentiary Section of the investigative file to the parties. This type of disclosure additionally may occur during an investigation when an FHEO investigator questions a party or a witness about a document or a statement contained in a document. These types of disclosures of documents or information in the Evidentiary Section of the file are appropriate while an investigation is open. (*See Handbook 8024.01, ¶ 7-30, “Follow-Up and Final Interviews with Complainant and Respondent.”*) For example, if a statement in the respondent's answer is inconsistent with the testing evidence submitted by the complainant, in an effort to resolve the contradiction, the investigator may discuss the testing evidence with the respondent. Consistent with this guidance, the investigator may not show the testing evidence to the respondent. Unless there is prior written approval by the submitting party, a document contained in the Deliberative Section of the investigative file cannot be shown to any party or witness.

Closed Cases

“Closed cases” are those cases that have been administratively closed, successfully conciliated, withdrawn, or dismissed as a result of a no reasonable cause determination, and

those cases in which a charge has been issued and either an administrative or a judicial decision has been rendered.⁷

In response to a FOIA request, HUD may assert the “trade secrets” exemption, 24 C.F.R. § 15.3(b)(4), and refuse to turn over testing methodologies. Tests conducted under HUD’s Fair Housing Initiatives Program also may be withheld under 24 C.F.R. § 15.3(b)(2). FHEO also considers whether the “law enforcement purposes” exemption, 24 C.F.R. § 15.3(a)(7), applies to any material relating to testing contained in the investigative file.

Upon receipt of a request under FOIA or the Act, FHEO will review all material in the investigative file to determine if any of the exemptions set forth in 5 U.S.C. § 552(b) and 24 C.F.R. § 15.3(a) bar disclosure to a requester. HUD’s regulations also require disclosure of non-exempt portions of a record or document when they can be reasonably segregated. 24 C.F.R. § 15.3(b). Even investigative material in the Deliberative Section must be reviewed to determine if (1) an exemption should be claimed over any document or portion of a document, and (2) whether exempt material can be redacted from the non-exempt portions of the record.

FHEO has set up procedures in Sections II and III of this memorandum for placement of testing material that is likely to be confidential or proprietary in the Deliberative Section of the investigative file. These procedures are designed to safeguard the material from inadvertent disclosure and also to preserve the ability of the provider of the information to assert privileges they believe apply to that material. FHEO recognizes that there could be instances when the Department disagrees with the conclusion of a person or organization submitting testing material that it is exempt from FOIA disclosure. To assure that the rights of the submitter are fully protected, FHEO encourages a person or organization submitting information it considers proprietary to request a designation of confidentiality when it submits the information or shortly thereafter. The request for this designation should consist of:

- 1) An authorized statement or a certification giving the facts and the legal justification for the request and stating that the information has not been made public; and
- 2) A clear designation of the information considered to be confidential.

24 C.F.R. § 15.108(b)(2). This request for designation will be placed with the document in the Deliberative Section of the investigative file. Thereafter, if a FOIA request is made for the document, the Department will follow its procedures set forth in 24 C.F.R. § 15.108(c)-(g). These procedures (see Appendix) will insure that the submitting party has a full opportunity to protect the information that it believes is confidential, proprietary or otherwise privileged.

⁷ Cases in which a charge has been issued but in which no judicial decision has been issued fall into neither the “open” nor “closed” case category. In those cases, requests for the Final Investigative Report (FIR) from a complainant, respondent, or an authorized representative of either shall be automatically honored. The completed FIR must be released without any deletions or omissions. FHEO shall refer requests from any person for any other portion of the investigative file to the Office of General Counsel.

Since this memorandum supersedes previously released guidance, I appreciate your assistance in distributing this memorandum to FHAPs, FHIPs, and the public. Questions concerning this memorandum should be directed to the Deputy Assistant Secretary for Enforcement and Programs at (202) 619-8046, extension 7004.

APPENDIX

24 C.F.R. § 15.108 What are HUD's policies concerning designating confidential commercial or financial information under Exemption 4 of the FOIA and responding to requests for business information?

(a) *HUD's general policy concerning business information which may be considered as confidential commercial or financial information.*

Except as provided in this section or otherwise required by law, HUD officers and employees may not disclose business information which is considered as confidential commercial or financial information to anyone other than to HUD officers or employees who are properly entitled to the information to perform their official duties.

(b) *How does a submitter make a claim that business information is confidential commercial or financial information?*

(1) If you are a submitter, you may request confidential treatment of business information at the time the information is submitted to HUD or within a reasonable time after it is submitted.

(2) To obtain a designation of confidentiality, you must:

- (i) Support your request with an authorized statement or a certification giving the facts and the legal justification for your request and stating that the information has not been made public; and
- (ii) Clearly designate the information that you consider confidential.

(3) Your designation of confidentiality will expire 10 years after the date the information was submitted to HUD, unless you have provided a reasonable explanation for a later expiration date.

(c) *How will HUD respond to a request for business information?*

If the information requested has been designated in good faith by the submitter as information to be protected under 5 U.S.C. 552(b)(4) ("Exemption 4") or if HUD has reason to believe that the information may be protected by Exemption 4, HUD shall:

(1) Unless an exception in paragraph (c)(2) of this section applies, promptly notify the submitter about the request or the administrative appeal and give the submitter 10 working days to submit a written objection to disclosure. HUD will describe the requested business information or will provide copies of all or a portion of the records;

(2) If any of the following circumstances apply, HUD will not notify the submitter:

- (i) HUD determines that the information should not be disclosed;
- (ii) The information has been published lawfully or has been made

available officially to the public;

- (3) A law other than FOIA requires HUD to disclose the information;
 - (4) A HUD regulation requires HUD to disclose the information. The regulation must:
 - (i) Have been adopted pursuant to notice and public comment; and
 - (ii) Specify narrow classes of records submitted to HUD that are to be released under the FOIA.
- (d) *Notice to requester.*

At the same time HUD notifies the submitter, HUD will also notify the requester that the request is subject to the provisions of this section and that the submitter is being afforded an opportunity to object to disclosure of the information.

- (e) *Opportunity to object to disclosure.*

If the submitter timely objects to disclosure, HUD will consider the submitter's objections, but will not be bound by them. HUD generally will not consider conclusory statements that particular information would be useful to competitors or would impair sales, or other similar statements, sufficient to justify confidential treatment. Information provided by a submitter or its designee may itself be subject to disclosure under the FOIA.

- (f) *Notice of intent to disclose.*

If after considering the submitter's objections, HUD decides to disclose business information over the objection of a submitter, HUD will send a written notice of intent to disclose to both the submitter and the requester. HUD will send these notices at least 10 working days before the specified disclosure date. The notices will include:

- (1) A statement of the reasons why HUD rejected the submitter's disclosure objections;
- (2) A description of the business information to be disclosed; and
- (3) A disclosure date.

(g) *What other policies apply to a submitter?*

(1) *HUD notice of FOIA lawsuit.* HUD will promptly notify the submitter of any suit to compel HUD to disclose business information.

(2) *Determination of confidentiality.* HUD will not determine the validity of any request for confidentiality until HUD receives a request for disclosure of the information.

(3) *Current mailing address for the submitter.* Each submitter must give HUD a mailing address for receipt of any notices under this section, and must notify HUD of any change of address.