



BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

JEROME H. POWELL
MEMBER OF THE BOARD

January 2, 2013

Matthew Lee, Esq.
Inner City Press/Fair Finance Watch
P.O. Box 580188
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Bronx, New York 10458

Re: *Appeal of Freedom of Information Act Request No. 2012-322*

Dear Mr. Lee:

This letter responds to your April 29, 2012, appeal of the withholding of documents responsive to your request dated April 10, 2012, that sought:

All records in the possession of the FRS concerning Capital One's compliance, since the FRB's approval order on Capital One – ING DIRECT, including with Capital One's commitments to open branches and lend \$180 billion.

In a letter to you dated April 26, 2012, the Associate Secretary of the Board determined that approximately 2,210 pages of material were responsive to your request and would be withheld in their entirety in accordance with exemptions 4, 5, and 8 of the Freedom of Information Act ("Act"), 5 U.S.C. §§ 552(b)(4), (b)(5) and (b)(8). The information was described as consisting of (1) progress reports, non-public business plans, and other confidential financial materials submitted by Capital One to Federal Reserve examiners; (2) staff's interagency communications, analyses, and recommendations regarding compliance with the Approval Order; and (3) bank examination reports and other supervisory documents used by staff at the Reserve Bank to monitor Capital One's compliance with commitments and activities related to the Approval Order. Finally, the Associate Secretary determined that, in accordance with 5 U.S.C. § 552(b), no reasonably segregable portions were identified.

On a de novo review, I am upholding the Associate Secretary's determination. The material that the Board or a Reserve Bank collects in its review of an institution's compliance is by definition supervisory in nature, and protected from disclosure under exemption 8 of FOIA, 5 U.S.C. § 552(b)(8). This exemption thus applies to virtually all of the material identified above. Staff's analysis of the information is protected under exemption 5 as pre-decisional deliberative material, and other portions of the material withheld consists of confidential commercial information protected under exemption 4. These exemptions are discussed more fully below.

Exemption 4

Exemption 4 of FOIA permits agencies to withhold “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). Courts have construed this exemption to permit agencies to withhold information if disclosure is likely (1) to affect the reliability or availability of information the agency would receive in the future, or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.¹ Confidential commercial information and other information proprietary to Capital One that was obtained as part of the supervisory compliance review may be withheld pursuant to exemption 4.

Exemption 5

Exemption 5 of FOIA permits agencies to withhold “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). This exemption includes documents that embody the “deliberative process” of the agency before reaching a decision, in order to encourage honest and frank communication within the agency.² Exemption 5 thus covers “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”³ Even factual segments of documents are protected by Exemption 5 from disclosure if the manner of selecting or presenting the facts would reveal the deliberative process, or if the facts are “‘inextricably intertwined’ with the policymaking process.”⁴ Information gathered by supervisory staff for purposes of their internal analyses and any associated internal communications may be withheld pursuant to exemption 5.

Exemption 8

Exemption 8 permits agencies to withhold information “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”⁵ The courts have broadly construed this exemption.⁶ Information gathered by supervisory staff for the purpose of reviewing Capital One’s compliance with the Board’s February 14, 2012, Approval Order may be withheld pursuant to exemption 8.

Segregability

The Act requires the Board to disclose “any reasonably segregable portion of the record” after appropriate application of the Act’s exemptions. 5 U.S.C. § 552(b). If, however,

¹ See *Nat’l Parks and Conservation Assoc. v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

² See, e.g., *Nat’l Wildlife Fed’n v. United States Forest Serv.*, 861 F.2d 1114, 1118-20 (9th Cir. 1988).

³ *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

⁴ *Jowett, Inc. v. Dep’t of Navy*, 729 F. Supp. 871, 877 (D.D.C. 1989).

⁵ 5 U.S.C. § 552(b)(8).

⁶ *Gregory v. FDIC*, 631 F.2d 896 (D.C. Cir. 1980); *McKinley v. FDIC*, 744 F. Supp. 2d 128, 142-44 (D.D.C. 2010), *aff’d* on other grnds sub nom. *McKinley v. Bd. of Governors*, 647 F.3d 331 (D.C. Cir. 2011).

nonexempt material is so “inextricably intertwined” with exempt material that disclosure of it would leave only “an essentially meaningless set of words and phrases,” then the entire document may be withheld.⁷ From the approximately 2,210 pages of information gathered for supervisory and examination purposes, no segregable information was identified for release.

Conclusion

Upon a de novo review of materials identified as responsive to your initial request, and upon consideration of the advice of counsel, I am upholding in full the determination of the Associate Secretary regarding the withholding of information pursuant to exemptions 4, 5, and 8. These materials were all gathered for supervisory purposes and so may be withheld pursuant to exemption 8. In addition to being exempt pursuant to exemption 8, many of these documents consist of sensitive proprietary and commercial confidential information that may be withheld pursuant to exemption 4, while others involve internal communications and analyses by supervisors regarding the information they are reviewing that may be withheld pursuant to exemption 5. I am also upholding in full the Associate Secretary’s determination that the material was appropriately evaluated pursuant to 5 U.S.C. § 552(b) and that no reasonably segregable material was identified. Accordingly, your appeal is denied in full. If you believe that the Board is withholding information from you contrary to your legal rights, you may seek judicial review of my decision in an appropriate United States District Court pursuant to 5 U.S.C. § 552(a)(4)(B).

Sincerely,



⁷ Missouri Coal. for the Env’t Found. v. U.S. Army Corps of Eng’rs, 542 F.3d 1204, 1212 (8th Cir. 2008) (quoting Mead Data Ctr., Inc. v. U.S. Dep’t of the Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977)).