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Checks and Balances: Using the Freedom of Information Act to Evaluate the Federal Reserve Banks

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Checks and Balances: Using the Freedom of Information Act to Evaluate the Federal Reserve Banks

CHECKS AND BALANCES: USING THE FREEDOM OF INFORMATION ACT TO EVALUATE THE FEDERAL RESERVE BANKS

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⁺ In loving memory of my father, Neil G. Karlson.

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INTRODUCTION

After the financial meltdown of 2008, the Federal Reserve System went from being a collection of technocrats who maintained balance in the markets with limited, deliberate action,¹ to the EMTs of the financial sector.² By bailing out Bear Stearns³ and American International Group

1. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 27–49 (9th ed. 2005), available at http://www.federalreserve.gov/pf/pdf/pf_complete.pdf [hereinafter PURPOSES & FUNCTIONS] (describing the different processes used by the Federal Reserve System to control monetary policy, including the federal funds rate, open market operations, reserve requirements, and discount window lending).

2. See Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's*

(AIG)⁴ while watching Lehman Brothers collapse,⁵ the Federal Reserve dramatically increased its role as a major financial player, determining which companies were too big to fail and what steps would be taken to ensure the survival of select firms.⁶ Typically, this process took place with extremely limited oversight and often no more than forty-eight hours of deliberation.⁷

As a reaction to the unprecedented actions taken by the Federal Reserve System, two news organizations—Bloomberg⁸ and Fox News⁹—sued the Federal Reserve Board (Board) in Washington, D.C. under the Freedom of Information Act (FOIA) for records regarding bailout activities.¹⁰ The New York Federal Reserve Bank, a separate entity from the Board¹¹ that

Response to the Financial Crisis, 61 ADMIN. L. REV. 463, 477 (2009) (outlining the process the New York Federal Reserve Bank used to procure a \$30 billion loan for Bear Stearns over the course of one night). See generally DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE'S WAR ON THE GREAT PANIC 127–149 (2009) (recounting the various tactics used by the Federal Reserve to respond to the rapidly changing financial conditions during the collapse).

3. Davidoff & Zaring, *supra* note 2, at 477; see also Roddy Boyd, *The Last Days of Bear Stearns*, FORTUNE, Mar. 31, 2008, available at http://money.cnn.com/2008/03/28/magazines/fortune/boyd_bear.fortune/ (describing the perilous condition facing Bear Stearns before the Federal Reserve Bank lent the firm funds); Bryan Burrough, *Bringing Down Bear Stearns*, VANITY FAIR, Aug. 2008, at 108, available at http://www.vanityfair.com/politics/features/2008/08/bear_stearns200808?currentPage=1 (highlighting the run on the firm, which was very similar to a traditional bank run).

4. See Davidoff & Zaring, *supra* note 2, at 498–99 (presenting the evolving deal between the New York Federal Reserve Bank and AIG, which included increasing liquidity support from \$173.1 billion in November to \$182.5 billion by March 2009).

5. See WESSEL, *supra* note 2, at 20 (describing Secretary Paulson's reticence to be responsible for another bailout and the rapid collapse of Lehman after a suitable buyer could not be found).

6. See, e.g., *id.* at 158–159 (highlighting the extremely brief period and limited oversight that guided the Board and the New York Federal Reserve Bank in the decision to save Bear Stearns and arguing that the Bear Stearns bailout set the new standard for too big to fail).

7. *Id.*

8. *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 265 (S.D.N.Y. 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

9. *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 388 (S.D.N.Y. 2009), *vacated*, 601 F.3d 158 (2d Cir. 2010).

10. See *Bloomberg*, 649 F. Supp. 2d at 267–68 (requesting the names of the parties, dates, “haircuts,” and valuation of the collateral for the discount window, TALF, and other lending facilities available to private entities and information regarding the collateral Bear Stearns provided for emergency funding from the Reserve Bank); *Fox*, 639 F. Supp. 2d at 388 (asking for borrower's names, loan amounts, and the posted collateral provided for liquidity under the new programs). Other organizations have also sued the Board for information relating to the 2008 section 13(3) bailouts under FOIA. See *id.* at 393 (noting that the Federal Reserve Board had compiled similar information for nineteen other FOIA requests); Complaint for Injunctive and Declaratory Relief at 6–7, *Citizens for Responsibility and Ethics in Wash. v. Bd. of Governors of the Fed. Reserve Sys.*, 669 F. Supp. 2d 126 (D.D.C. 2009) (No. 1:09-cv-02113-RJL) (requesting the names and loan amounts of companies that received federal assistance during 2008).

11. See PURPOSES & FUNCTIONS, *supra* note 1, at 4 (noting that the Board and Banks

has not been subject to FOIA in the past,¹² possessed some information sought by the news organizations in the two cases. In *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*,¹³ the District Court for the Southern District of New York ordered the Board to turn over the requested information;¹⁴ in *Fox News Network, L.L.C. v. Board of Governors of the Federal Reserve System*,¹⁵ the same court held that FOIA exemption four¹⁶ supported the Board's decision to withhold the information.¹⁷ Both cases avoided determining whether the Federal Reserve Banks (Banks) were agencies under FOIA, although *Fox* implied that the Banks were not.¹⁸ The Second Circuit also declined to rule on the agency status of the Banks when considering *Bloomberg* and *Fox*.¹⁹

The Banks, like the Board of Governors of the Federal Reserve²⁰ and the Federal Open Market Committee (FOMC),²¹ should be considered agencies under FOIA. The Banks exercise powers—from implementing the federal funds rate to determining minimum reserve balances for member banks—that have a direct impact on this country's monetary policy and consumer credit.²² The Banks' ability to affect the financial well-being of every citizen, in addition to the responsibility to carry out the Board's directives,²³ suffices to bring them under the ambit of FOIA. Even when

share supervisory and regulatory responsibility, but delineating the separation that exists between the different classes of entities).

12. See *Bloomberg*, 649 F. Supp. 2d at 266 (acknowledging that the Board and Federal Open Market Committee are both agencies, but that the Federal Reserve Banks consider themselves separate organizations not subject to FOIA).

13. 649 F. Supp. 2d 262 (S.D.N.Y. 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

14. *Id.* at 282.

15. 639 F. Supp. 2d 384 (S.D.N.Y. 2009), *vacated*, 601 F.3d 158 (2d Cir. 2010).

16. See *infra* notes 134–144 and accompanying text for a discussion on exemption four.

17. See *Fox*, 639 F. Supp. 2d at 400-01 (refusing to order the Board to disclose its responsive records on the ground that the Board had satisfied its burden of showing substantial competitive harm would result to the borrowers if the records were made public).

18. See *generally Bloomberg*, 649 F. Supp. 2d at 265–66 (discussing the agency status of the Banks obliquely, but deciding that determining the Bank's status was not necessary to resolve the case presented); *Fox*, 639 F. Supp. 2d at 390–91 (same).

19. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010); *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 158, 160 (2d Cir. 2010).

20. PURPOSES & FUNCTIONS, *supra* note 1, at 4; see also *FOIA Serv. Ctr.*, THE FED. RESERVE BD., <http://www.federalreserve.gov/generalinfo/FOIA/servicecenter.cfm> (last visited August 30, 2010) (publishing the names and contact information of FOIA officers at the Board and outlining the process for making FOIA requests to the Board).

21. *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 352 (1979) (“FOMC is clearly an ‘agency’ as that term is defined in the Administrative Procedure Act. 5 U.S.C. §§ 551(1), 552(e).”).

22. See *generally* FED. RESERVE BANK OF S.F., U.S. MONETARY POLICY: AN INTRODUCTION 10–11 (2004) (explaining the functions of the federal funds rate, discount window, and other monetary policy tools on the financial and the real economy).

23. See PURPOSES & FUNCTIONS, *supra* note 1, at 37–38 (explicating the role of the

required to submit to FOIA disclosure, however, the Banks could still use exemptions four and five to withhold information during negotiations,²⁴ but would not be able to prevent the disclosure of historical information without showing imminent, specific harm to the Banks' borrowers.²⁵

This Comment outlines the applicability and appropriateness of applying FOIA to actions taken by individual Banks in the Federal Reserve System. Part I.A discusses the history of the Board and Banks²⁶ with a focus on the evolution of the Federal Reserve powers and the utilization of section 13(3) in 2008.²⁷ Part I.B presents the history and purposes of FOIA²⁸ and the

Federal Reserve Banks as a transmission mechanism for monetary policy, as the Board sets the policy for the federal funds rate and the Banks act on the market to meet those objectives). The Supreme Court recognized the Banks' open market operations, or buying and selling government securities in the open market, as the "most important monetary policy instrument of the Federal Reserve System." *Merrill*, 443 U.S. at 343.

24. See *Merrill*, 443 U.S. at 361–64 (holding that the current Domestic Policy Directives are analogous enough to the process of awarding contracts to allow protection from disclosure under FOIA's exemption five, but not deciding the issue because the record was not sufficiently developed); see also *Flathead Joint Bd. of Control v. U.S. Dep't of the Interior*, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004) (ruling that exemption four protected information about a tribe's water rights because that information was instrumental in assuring that the tribe had an equitable bargaining position to receive the best return on that resource).

25. See *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (affirming the lower court's judgment that the evidence the corporation provided to show that "substantial competitive harm" would result from disclosure was sufficient to prohibit the FDA's disclosure of the information under exemption four); *Iglesias v. CIA*, 525 F. Supp. 547, 559 (D.D.C. 1981) (remanding the decision because the agency provided only very brief descriptions of the documents requested, and these descriptions were insufficient to establish the agency's claim that competitive harm would result from disclosure); Bob Ivry, *Fed Should Keep Emergency Lending Secret, Banks Vow to Tell Supreme Court*, BLOOMBERG (Apr. 14, 2010), <http://www.bloomberg.com/apps/news?pid=20601087&sid=ax8ulGXsw4E> (reporting that the Clearinghouse Association, an organization made up of the top banks that joined the Board as defendants in the Fox News lawsuit, will fight the FOIA suits to the Supreme Court because the borrowers face competitive harm if the information is disclosed).

26. See PURPOSES & FUNCTIONS, *supra* note 1, at ch. 1 (outlining the history and functions of the different parts of the Federal Reserve System); see also ROGER W. SPENCER & JOHN H. HUSTON, *THE FEDERAL RESERVE AND THE BULL MARKETS* 1–6 (2006) (articulating the general course of developments from the passage of the 1913 FRA and the first President of the Federal Reserve Bank of New York Benjamin Strong to Alan Greenspan and the Federal Reserve System's role in mitigating the stock crash of 2002–2003). See generally ROGER T. JOHNSON, *HISTORICAL BEGINNINGS OF THE FEDERAL RESERVE* (1999) (describing the history of the United States' central banking system, from the founding of the First National Bank through the establishment and functioning of the Federal Reserve System); HOWARD HACKLEY, *LENDING FUNCTIONS OF THE FEDERAL RESERVE BANKS: A HISTORY* (1973) (discussing the history of the Federal Reserve Banks and their role in the larger Federal Reserve System).

27. See *infra* Part I.A (explaining that financial panics acted as the impetus for creating the Federal Reserve System, and illustrating how the power of the Reserve System has grown over time); see also Press Release, Bd. of Governors of the Fed. Reserve Sys. (Sept. 16, 2008), available at <http://www.federalreserve.gov/newsevents/press/other/20080916a.htm> [hereinafter Sept. 16 Release] (authorizing a bailout of AIG under section 13(3)); Bd. of Governors of the Fed. Reserve Sys., Meeting Minutes 2 (Mar. 14, 2008) [hereinafter Mar. 14 Minutes] (setting

methods the courts use when applying FOIA to agencies.²⁹ Part II argues that the Banks are agencies under FOIA because they are independent from the executive, exercise governmentally related authority, and are more similar to agencies than non-agencies.³⁰

After determining that the Banks are agencies under FOIA, Part III argues that FOIA requires disclosure of Bank records in most instances, with exemptions four and five applicable to Bank records only in narrow circumstances.³¹ Specifically, Part III.A utilizes the test expounded in *National Parks & Conservation Association v. Morton*³² to analyze exemption four claims and demonstrate that the information the Banks receive from the institutions they regulate would continue to be accurate despite FOIA disclosure, and that the Banks cannot uphold their burden to prove that disclosure would harm the private firms.³³ Part III.B analyzes the application of exemption five to historical records, and argues that the data sought does not violate the deliberative process privilege because the disclosure of the records of the Banks' prior decisions will not result in premature disclosure or hamper open policy discussion.³⁴ Exemption five also will generally not protect Bank records under the confidential commercial information privilege, because the possibility of premature disclosure affecting the government's ability to interact in the market is not

recommendations for the type of loan offered to JPMorgan Chase and authorizing loans to other primary dealers under section 13(3)).

28. See U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 1-7 (2009) [hereinafter FOIA GUIDE] (noting the history of FOIA and the continuing force in favor of disclosure); see also Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171-72 (2004) (noting that FOIA is key to ensuring a well-informed populace). But see Christina E. Wells, "National Security" Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1200-02 (2004) (highlighting the expansion of secrecy, especially as the United States has risen in power over the last sixty years).

29. See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (holding that FOIA is necessary to ensure that the country's leaders act at the consent of the governed); Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (noting that despite the nine exemptions to FOIA, the presumption is in favor of disclosure). But see *Merrill*, 443 U.S. at 362-364 (remanding for a more complete record, but arguing that agency records did come under the umbrella of certain FOIA exemptions because the release of those records would likely harm the FOMC's ability to influence monetary policy).

30. See *infra* Part II (analyzing the Banks' independent authority, arguing that banks are more similar to agencies like the FOMC than non-agencies like stock exchanges, and arguing on policy grounds that requiring the Banks to adhere to FOIA will prevent overreaching by the Banks).

31. See *infra* Part III (scrutinizing FOIA's exemptions four and five and determining that factual, historical information cannot be withheld by the Banks without a showing of imminent financial harm).

32. 498 F.2d 765 (D.C. Cir. 1974).

33. See *infra* Part III.A (demonstrating that the information the Banks receive would be unaffected by disclosure, and therefore exemption four does not require withholding).

34. See *infra* Part III.B (examining whether the information qualifies for disclosure under either the deliberative process privilege or confidential commercial information privilege of exemption five and concluding it does not).

implicated when the government has already acted on the disclosed information.³⁵ Finally, this Comment concludes that without transparency, the very power the Banks use to stabilize the economy may undermine market balance.³⁶

I. BACKGROUND

Congress established the Federal Reserve System in the early 1900s as a thoroughly debated response to a series of panics that threatened to cripple the financial system.³⁷ Similarly, legislators enacted FOIA after hard lobbying, despite President Johnson's reservations about the disclosure requirements.³⁸ While the Federal Reserve System was established almost fifty years prior to FOIA, the power invested in the central banking system lends itself to public oversight because Congress enacted FOIA to ensure disclosure of information that affects the public—just like the records that the Banks maintain.³⁹ This section separately discusses the evolution of the Federal Reserve System and FOIA.

A. *The History of the Federal Reserve System*

The Federal Reserve System has been intertwined with financial panics since its inception after the Panic of 1907.⁴⁰ The original purposes of the Federal Reserve Act (FRA) were to establish a system of twelve Banks, create a central Board to oversee the regional Banks, produce a market for re-discounted commercial paper, create a more effective supervisory organization for banks, and maintain an elastic currency.⁴¹ The executive

35. See *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 363 (1979) (arguing that if the disclosure of information would harm the FOMC's ability to further its federal mandate, the information should fall under FOIA's exemption); see also *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (holding that the government's ability to gather accurate information in the future from the concessioners is not harmed by disclosure, because those businesses must disclose it or forego government favor), *aff'd in part, rev'd in part sub nom.* *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

36. See Davidoff & Zaring, *supra* note 2, at 511–12 (highlighting the near collapse of the Mitsubishi take-over bid because the repeated intervention by the Board in other firms left investors unsure of the security of their interests).

37. PURPOSES & FUNCTIONS, *supra* note 1, at 1–2.

38. Cf. Lyndon B. Johnson, Statement by the President Upon Signing S. 1160 (July 4, 1966) (indicating that there were exceptions to the public's right to know and that nothing in FOIA should be construed as prohibiting the President from exercising confidentiality).

39. See FOIA GUIDE, *supra* note 28, at 1 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) (noting that multiple courts have interpreted FOIA to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed”).

40. See HACKLEY, *supra* note 26, at 10 (stating that the legislators repeatedly referred to panics during the drafting of the FRA and even believed the Act would make it “impossible [to have] another panic in this country”).

41. 12 U.S.C. § 248 (2006); PURPOSES & FUNCTIONS, *supra* note 1, at 2.

branch does not have to authorize the decisions of the Board, but the Board is subject to regulation by Congress.⁴² The Board supervises the actions of the Banks.⁴³

When Congress drafted the original FRA, it attempted to minimize the concentration of power by separating the central bank into two different strata:⁴⁴ the Board of Governors in Washington, D.C., and the Banks located in twelve districts throughout the country.⁴⁵ The President appoints, and the Senate confirms, members of the Board to fourteen-year terms.⁴⁶ The Board supervises the Banks and directs monetary policy, primarily by setting the federal funds rate through the FOMC.⁴⁷ The Banks, on the other hand, supervise actions in their districts including distributing currency, regulating member banks and bank holding companies, and serving as a depository for banks in each district.⁴⁸ Unlike the members of the Board, three members of each Reserve Bank board are bankers chosen by bankers, three members are “non-bankers” chosen by bankers, and the Board chooses three members to represent the public.⁴⁹

While the core purposes and responsibilities of the Board and the Banks have not changed much over the years, the tools the Reserve System can use to further those purposes have expanded significantly.⁵⁰ As a result of the Great Depression,⁵¹ the FRA was amended in 1932 to include section 13(3), a provision that allows the Board to act in concert with the Banks:

In *unusual and exigent* circumstances, the Board of Governors of the Federal Reserve System . . . may authorize *any Federal [R]eserve [B]ank* . . . to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange when . . . indorsed or otherwise secured . . . *Provided*, . . . the Federal [R]eserve [B]ank shall obtain

42. PURPOSES & FUNCTIONS, *supra* note 1, at 2–3.

43. 12 U.S.C. § 248(a); PURPOSES & FUNCTIONS, *supra* note 1, at 4.

44. See SPENCER & HUSTON, *supra* note 26, at 9 (discussing the division of power as a method to limit the power of “Wall Street” and the East Coast banker and allow local banks outside the financial center to have some influence).

45. 12 U.S.C. §§ 222, 223; PURPOSES & FUNCTIONS, *supra* note 1, at 6.

46. 12 U.S.C. § 241; PURPOSES & FUNCTIONS, *supra* note 1, at 4.

47. PURPOSES & FUNCTIONS, *supra* note 1, at 3–4.

48. *Id.* at 6.

49. 12 U.S.C. § 302. The “non-banker” requirement is quite flexible. For example, Richard Fuld, a “non-banker” on the New York Federal Reserve Bank board was the CEO of Lehman Brothers, and one of the members picked by the Federal Reserve Board to represent the public was former CEO and current board member of Goldman Sachs Stephen Friedman. WESSEL, *supra* note 2, at 155.

50. See Walker F. Todd, *FDICIA's Emergency Liquidity Provisions*, 29 ECON. REV. FED. RESERVE BANK OF CLEVELAND 16, 17–20 (1993) available at <http://www.clevelandfed.org/research/Review/1993/93-q3-todd.pdf> (reviewing the evolution of powers under the FRA, and predicting that the most recent amendment at the time, the Federal Deposit Insurance Corporation Improvement Act of 1991, would result in the Reserve System exercising even more power).

51. Emergency Relief and Construction Act of 1932, ch. 520, 47 Stat. 709 (1932).

evidence that such individual, partnership, or corporation is *unable to secure adequate credit* accommodations from other banking institutions.⁵²

This passage allowed the massive lending programs that were initiated after the near-collapse of Bear Stearns and AIG.⁵³

Before section 13(3), the power vested in the Federal Reserve System was limited by Congress to lending to member banks.⁵⁴ After this amendment, the Federal Reserve had the authority to lend to “any individual, partnership, and corporation” whenever there were “unusual and exigent circumstances” and the entity in question could not get funding elsewhere.⁵⁵ Under section 13(3), the Banks made loans throughout the 1930s to 123 individuals, partnerships, or corporations for a total of \$1.5 million, with the single largest loan totaling \$300,000.⁵⁶ It was more than seventy years before the Federal Reserve System used this power again,⁵⁷ this time to facilitate the acquisition of Bear Stearns by JP Morgan Chase in 2008 by authorizing a \$29 billion loan.⁵⁸

Then, in 1991, an amendment to the FRA tucked away inside a bill to overhaul the Federal Deposit Insurance Corporation (FDIC) allowed the Banks nearly unlimited authority in determining acceptable collateral.⁵⁹ The real bills doctrine was the basis of the original lending structure of the FRA, and required that any collateral received in return for central bank

52. 12 U.S.C. § 343 (emphasis added). Congress originally enacted this amendment on July 21, 1932 as an added paragraph to the Federal Reserve Act. *Id.*

53. *See* Sept. 16 Release, *supra* note 27 (utilizing the power under section 13(3) to provide financing to AIG); Mar. 14 Minutes, *supra* note 27, at 2–3 (authorizing the New York Federal Reserve Bank to provide emergency liquidity through section 13(3) to JPMorgan Chase for its acquisition of Bear Stearns and to provide liquidity to other primary dealers chosen by the Bank and approved by the Board chairman).

54. *See* 12 U.S.C. § 343 (allowing lending only to member banks in section 13(2) of the FRA, until section 13(3) was passed in 1932); *see also* HACKLEY, *supra* note 26, at 5 (explaining that the Great Depression led to changes in the FRA in the 1930s to allow the Federal Reserve System to lend to persons and companies that were not member banks).

55. *See* 12 U.S.C. § 343 (requiring certain thresholds be met prior to the initiation of Federal Reserve System emergency lending).

56. WESSEL, *supra* note 2, at 160. The total lending program carried out by the Federal Reserve System in response to the Great Depression would equal twenty-five million dollars in today’s funds. *Id.* *But see* HACKLEY, *supra* note 26, at 135, 144 (highlighting competing lending programs available during the Great Depression, which may have weakened the demand for Federal Reserve lending).

57. Mar. 14 Minutes, *supra* note 27, at 2; *see also* HACKLEY, *supra* note 26, at 130 (noting that the power of section 13(3) was only used during the Great Depression, although it was activated after a credit crisis during the 1960s).

58. Press Release, Fed. Reserve Bank of N.Y., Summary of Terms and Conditions Regarding the JPMorgan Chase Facility (Mar. 24, 2008), *available at* <http://www.newyorkfed.org/newsevents/news/markets/2008/rp080324b.html>.

59. *See* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 473, 105 Stat. 2236 (1991) (eliminating the requirement that the collateral be “of the kinds and maturities made eligible for discount for member banks under other provisions of this act”).

lending be as liquid as cash.⁶⁰ U.S. Treasury bonds are an example of collateral that would satisfy the real bills doctrine;⁶¹ however, the mortgage-backed securities and other toxic assets given to the New York Federal Reserve Bank in 2008 in return for section 13(3) lending would not have satisfied the real bills doctrine.⁶² By differentiating the collateral requirements in section 13(3) from the other collateral requirements of the FRA, the 1991 amendment effectively quashed the real bills doctrine for section 13(3) lending.⁶³ Senator Christopher Dodd included this amendment to give the Federal Reserve more flexibility to provide liquidity in times of financial crises, as the FRA now only requires the loans to be secured “to the satisfaction” of the individual Banks.⁶⁴

The expansion of lending authority has also resulted in a minimal expansion in the frequency with which the Board has to report its activities to the political branches. Originally, the Board was not required to report to Congress at all.⁶⁵ Congress expanded this reporting requirement to semi-annually,⁶⁶ and finally, in the wake of the recent spate of section 13(3) lending,⁶⁷ Congress passed the Emergency Economic Stability Act of 2008, which included a provision requiring the Board to report to Congress

60. See Todd, *supra* note 50, at 17–18 (outlining the evolution of lending under section 13(3), from a very limited provision that only allowed lending to member banks, to an expanded power that allowed lending to “individuals, partnerships, and corporations” that could provide collateral secured to the satisfaction of the Bank).

61. See HACKLEY, *supra* note 26, at 38 (defining instruments that satisfy the real bills doctrine as self-liquidating and arising from real commercial transactions).

62. See Todd, *supra* note 50, at 18–19 (explaining how the elimination of the real bills doctrine was driven by companies whose balance sheets would not allow the company to provide collateral that would satisfy the doctrine).

63. See 137 CONG. REC. 36, 131–32 (Nov. 27, 1991) (statement of Sen. Dodd) (articulating that this amendment was introduced to provide the Reserve System with more tools to fight economic downturns).

64. *Id.* But see Damian Paletta & Jon Hilsenrath, *Senate Democrats Seek Sweeping Curbs on Fed*, WALL ST. J., Nov. 11, 2009, at A2 (reporting Sen. Dodd’s proposed legislation to strip the Federal Reserve Board of almost all of its lending and supervisory powers to vest them in a new agency).

65. Compare Federal Reserve Act of 1913, Pub. L. No. 63-43, ch. 6, § 2, 38 Stat. 251–275 (1913) (lacking any reporting requirements), with 12 U.S.C. § 225b (2006) (requiring semi-annual reporting), and Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343 § 129, 122 Stat. 3765 (2008) (mandating reports to Congress whenever the Board authorizes section 13(3) lending and periodic updates on those loans).

66. 12 U.S.C. § 225b(a).

67. See Press Release, House Fin. Servs. Comm. Chairman Rep. Barney Frank, Frank Statement on TARP Provisions (Oct. 31, 2008) available at http://www.house.gov/apps/list/press/financialsvcs_dem/press103108.shtml (reiterating that Congressional oversight, including hearings in November of 2008, would continue and that the TARP funds should be used only for expanding credit in the retail and commercial markets); see also Alison Fitzgerald, *As ‘Biggest Crisis’ Hit, Congress Held Nose and Backed Bailout*, BLOOMBERG (Oct. 6, 2008), <http://www.bloomberg.com/apps/news?pid=20601109&sid=a2PslgpVvrCI&refer=home> (noting that the initial impetus for the Act was Paulson’s three-page bailout plan to provide liquidity to failing financial firms).

within seven days of making section 13(3) loans.⁶⁸ The Act also requires the Board to periodically report to Congress on the status of the loan, the total value of the collateral, and the cost to the taxpayer.⁶⁹ However, Congress may withhold all of these disclosures from the public at the request of the Board Chairman.⁷⁰

B. The History of FOIA and the Development of Agency Status

While many of the elements codified in the FRA had previously existed in some form,⁷¹ the power in FOIA was novel.⁷² FOIA gives citizens the opportunity to “know what their government is up to.”⁷³ Since FOIA’s initial enactment, Congress has continued to expand FOIA’s disclosure requirements and procedural protections for requesters.⁷⁴ Courts have struggled to define what entities constitute an agency under FOIA, comparing the powers and characteristics of the disputed entity with the statute and other agencies in lieu of adopting a standard test.⁷⁵ Policy-

68. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 129, 122 Stat. 3765 (2008).

69. *Id.*

70. *Id.* § 129(c) (“The information submitted to the Congress under this section shall be kept confidential, upon the written request of the Chairman of the Board, in which case it shall be made available only to the Chairpersons and Ranking Members of the [Senate Committee on Banking, Housing, and Urban Affairs, and the House Committee on Financial Services].”).

71. See RICHARD SCOTT CARNELL ET AL., *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 2–12 (4th ed. 2009) (presenting the history and responsibilities of the First National Bank, Second National Bank, and the Free Banking Era prior to the 1913 FRA); see also JOHNSON, *supra* note 26, at 7–12 (chronicling the history of the two national banks and the National Banking Act of 1863).

72. See FOIA GUIDE, *supra* note 28, at 1 (“The FOIA thus established a statutory right of public access to Executive Branch information in the federal government.”).

73. Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 171 (2004) (quoting U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)).

74. See OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007) (dealing with a number of FOIA administrative procedures, including tracking requests, defining the roles of FOIA officers, and handling agency records in the possession of private contractors, among others); Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, 3049 (1996) (requiring records disclosed under FOIA to be posted online); Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1563-64 (1974) (attempting to expedite cases and eliminate the backlog of FOIA requests and amending FOIA’s law enforcement provision to be narrower in scope, while expanding the procedural safeguards). *But see* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-48, 3207-49 (1986) (expanding the national security and law enforcement exemptions).

75. See 5 U.S.C. § 552(f)(1) (2006) (covering different parts of the executive as government agencies, but exempting entities that are not chartered or controlled by the federal government); *Soucie v. David*, 448 F.2d 1067, 1075–76 (D.C. Cir. 1971) (comparing the OST to the legislative history of the Administrative Procedure Act and determining that the OST is an agency under FOIA without explicitly outlining a test to determine agency status).

makers have also struggled to keep a tight rein on what information agencies can legally exempt from disclosure,⁷⁶ and Congress has amended FOIA to deal with backlogs of information requests.⁷⁷

1. *The legislative history of FOIA*

Congress enacted FOIA in 1966 to “ensure an informed citizenry.”⁷⁸ FOIA divides executive agency records into two sub-categories: information that must be automatically published—for example, agency rules⁷⁹—and information that the public may request, such as unpublished agency opinions.⁸⁰ The nine exemptions to disclosure that are included in FOIA may protect both classes of information from disclosure.⁸¹ However, Congress specified that FOIA does not authorize any additional withholding of information outside the nine explicit exemptions.⁸²

After acknowledging that the disclosure provisions of the Administrative Procedure Act (APA) were preventing disclosure, Congress enacted FOIA to encourage public access to government information.⁸³ FOIA remedied many of the failings of the disclosure requirements of the APA by specifically enumerating nine generally exclusive exemptions from disclosure.⁸⁴ FOIA also includes a private right of action to allow judicial review of agency determinations against disclosure.⁸⁵

76. *See, e.g.*, Memorandum for the Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009), available at http://www.justice.gov/oip/foia_guide09/presidential-foia.pdf [hereinafter Presidential Memorandum] (directing departments that FOIA presumes disclosure, and they must take proactive steps to fulfill it instead of waiting for requests from the public).

77. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996). *But see* Coalition of Journalists for Open Government, *An Opportunity Lost*, at *2 (July 3, 2008) available at http://www.cjog.net/documents/Part_1_2007_FOIA_Report.pdf (surveying agency responses to FOIA requests from 1998 to 2007 and noting that while backlogs have decreased since the record high levels in 2006, one-third of FOIA requests had not been answered as of 2008).

78. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

79. 5 U.S.C. § 552(a)(1), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007).

80. 5 U.S.C. § 552(a)(3).

81. *See* Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 360 n.23 (1979) (acknowledging that automatic disclosures under § 552(a)(2) may still be shielded by the exceptions of § 552(b) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 160 (1975))).

82. 5 U.S.C. § 552(d) (“This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.”).

83. *See* 112 CONG. REC. 13,641–43 (June 20, 1966) (statement of Rep. Moss) (commenting on the lengthy process that was required to pass FOIA and the tension between legislators on how best to amend the APA to facilitate disclosure); *see also* FOIA GUIDE, *supra* note 28, at 4 (noting that the APA had been used by agencies in many instances to withhold information).

84. *See* 5 U.S.C. § 552(b)–(d), amended by OPEN Government Act of 2007, Pub. L.

Throughout the 1970s, Congress repeatedly amended FOIA to strengthen the disclosure requirements and limit the exemptions.⁸⁶ The first major modification to FOIA limited the national security exemptions and expanded procedural protections for requesters.⁸⁷ Next, Congress expanded the disclosure requirements of FOIA by limiting the ability of agencies to incorporate the non-disclosure portions of other statutes into FOIA determinations.⁸⁸ The judiciary assisted the development of FOIA as a liberal disclosure statute by holding that FOIA presumed maximum disclosure,⁸⁹ and required agencies to reveal information they could separate from a larger record that FOIA otherwise protected.⁹⁰

In the ensuing decades, public accessibility to agency records through FOIA continued to improve,⁹¹ with changes in the procedural protections and clarification regarding the extent of exemptions.⁹² The Electronic

No. 110-175, 121 Stat. 2524 (2007) (providing nine very narrow exemptions and stating that FOIA does not authorize any additional withholding); *see also Sears, Roebuck & Co.*, 421 U.S. at 136 (reiterating that FOIA requires disclosure unless the agency can show that the information that it wants to withhold falls within the specific FOIA exemptions). *But see* 5 U.S.C. § 552(c) (authorizing agencies to respond to requests for some law enforcement information as though that information does not exist).

85. 5 U.S.C. § 552(a)(4)(B)–(C).

86. *See* Government in the Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241, 1247 (codified as amended at 5 U.S.C. § 552) (limiting the applicability of other non-disclosure statutes that are relevant to information sought in a FOIA request); Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552) (restricting national security and police exemptions and expanding the procedural rights of FOIA requesters). *But see* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 5 U.S.C. § 552) (expanding law enforcement exemptions).

87. Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552).

88. Government in the Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241, 1247 (codified as amended at 5 U.S.C. § 552).

89. *See* *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 150–51 (1989) (overruling and remanding the circuit court’s permanent stay on the requested *Vaughn* index solicited by a defense contractor under investigation by the government). Although the corporation used FOIA to seek records regarding the investigation against it, the Court stressed that FOIA stands for public disclosure and the “law enforcement exemption” did not necessarily protect these records. *Id.* at 151; *see also* U.S. Dep’t of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (holding that FOIA’s exemptions do not alter the fundamental disclosure function of the act); Memorandum from Attorney Gen. Holder to Heads of Executive Dep’ts & Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf> [hereinafter Memorandum from the Attorney General] (arguing that FOIA encourages the basic American principle of open government).

90. *EPA v. Mink*, 410 U.S. 73, 91 (1973) *superseded by statute*, 5 U.S.C. § 552(b)(1)(B), *as recognized in* *ACLU v. U.S. Dep’t of Def.*, 543 F.3d 59, 76 (2d Cir. 2008); *accord* 5 U.S.C. § 552(b) (2006) (requiring disclosure of nonexempt information that can be separated from protected information).

91. *See, e.g.*, Presidential Memorandum, *supra* note 76, at 4683 (continuing the predominant legislative and judicial pattern of expanding disclosure by urging agencies that “in the face of doubt, openness prevails”).

92. *See Mink*, 410 U.S. at 91 (requiring information in protected records to be disclosed

Freedom of Information Amendment of 1996⁹³ required agencies to provide records electronically whenever possible.⁹⁴ The 1996 overhaul included a transition to providing universal access to electronic records, implemented review reforms, and attempted to eliminate the backlog of FOIA requests.⁹⁵ Finally, the passage of the OPEN Government Act of 2007⁹⁶ increased the efficiency of FOIA with a number of procedural changes, including request tracking and rules on how government contractors must maintain records.⁹⁷

2. *The courts grapple with defining agency under FOIA using independent, governmental authority to determine agency status*

To be subject to FOIA, an entity must be a federal executive agency.⁹⁸ Due to FOIA's broad definition of the term agency, the exact contours of the applicability of the statute to different entities have been fiercely litigated.⁹⁹ Examples of an agency under FOIA include the Board of Governors of the Federal Reserve¹⁰⁰ and federal departments.¹⁰¹ Conversely, sentencing commissions,¹⁰² presidential offices such as the Office of Administration or other presidential task forces,¹⁰³ and other

if the non-protected information is reasonably segregable from the protected information); *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973) (creating the "*Vaughn* index," or a summary of the requested records).

93. Pub. L. No. 104-231, § 1, 110 Stat. 3048 (codified as amended at 5 U.S.C. § 552).

94. *Id.* § 5, 110 Stat. at 3050.

95. *Id.* *But see* PETE WEITZEL, SUNSHINE IN GOVERNMENT INITIATIVE, FEWER REQUESTS, FEWER RESPONSES, MORE DENIALS 2-4 (2009), available at <http://www.sunshineingovernment.org/stats/highlights.pdf> (outlining the increasing number of backlogged FOIA requests and declining funding agencies are dedicating to respond to FOIA requests in 2008).

96. OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2524 (codified as amended at 5 U.S.C. § 552).

97. 5 U.S.C. § 552(f)(1) (2006).

98. *Id.* The statute defines "agency" to "include[] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." *Id.*

99. *See* *Energy Research Found. v. Def. Nuclear Facilities Safety Bd.*, 917 F.2d 581, 584-85 (D.C. Cir. 1990) (ruling that the Defense Nuclear Facilities Safety Board's responsibility to evaluate and recommend nuclear plant safety policy solidified the Board's role as an agency); *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971) (deciding that the OST was an agency under FOIA because it was responsible for advising federal science and technology policy); *Lee Constr. Co. v. Fed. Reserve Bank of Richmond*, 558 F. Supp. 165, 178-79 (D. Md. 1982) (deciding that although a close question, the Banks are agencies under FOIA).

100. *See* 12 C.F.R. § 261.1(c)(2) (2009) (implementing FOIA for the Board of Governors of the Federal Reserve).

101. 5 U.S.C. § 552(f)(1).

102. *Andrade v. U.S. Sentencing Comm'n*, 989 F.2d 308, 309-10 (9th Cir. 1993) (per curiam).

103. *See* *McDonnell v. Clinton*, No. 97-1535, 1997 WL 33321085, at *1 (D.D.C. July 3, 1997) (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150-55

entities that do not exercise significant authority independent of the president¹⁰⁴ are not agencies under FOIA.¹⁰⁵ Courts have avoided expressing a single definition for the term agency.¹⁰⁶ Instead, courts have opted for a fluid definition that considers a number of factors.¹⁰⁷

Courts use a totality of circumstances analysis, evaluating factors such as whether the agency exercises authority independent of the executive, to determine whether an entity qualifies as an agency under FOIA.¹⁰⁸ One of the major cases to address FOIA's definition of agency, *Soucie v. David*,¹⁰⁹ dealt with whether an entity organized by the president was subject to FOIA disclosures.¹¹⁰ In *Soucie*, the D.C. Circuit explained that the Office of Science and Technology (OST) was an agency under FOIA because it exercised authority independent of the President, including but not limited to advising other federal agencies on scientific policy.¹¹¹ In making the agency determination, the court considered the scope and purpose of the organization's authority and its own disclosure regulations.¹¹² In this case, when the OST was created, it published notices in the Federal Register pursuant to APA regulations, which bolstered the court's conclusion that the OST was an agency.¹¹³ The fact that the OST acted as an agency was one of the factors—but not the sole factor—that the court used to support its decision to apply agency status to the OST.¹¹⁴ Finally, the *Soucie* court reasoned that withholding information from the public about a public science foundation was antithetical to the purpose of creating the

(1980)) (holding that an entity with the sole function of advising and assisting the President is not an agency).

104. See, e.g., *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (noting that if the "sole function" of the OST were to "advise and assist the president," it might not be considered a separate agency); see also *Kissinger*, 445 U.S. at 156 (relying on the legislative history of FOIA to hold that the telephone records requested when Kissinger was Assistant to the President did not qualify as agency records because the conversations in question took place when Kissinger acted in his capacity of Presidential adviser).

105. 5 U.S.C. § 552(f)(1).

106. See *Cotton v. Heyman*, 63 F.3d 1115, 1121 (D.C. Cir. 1995) (tracing the evolution of the method for making an agency determination).

107. See, e.g., *id.* (determining that the court must make agency determinations on a case-by-case basis due to the varied structures of different organizations). Important factors have included whether the entity in question has any power to enact policy with the force of law, *id.*, and whether the entity is subject to federal day-to-day governance, *Rocap v. Indiek*, 539 F.2d 174, 180 (D.C. Cir. 1976).

108. See, e.g., *Soucie*, 448 F.2d at 1073 (finding the OST to be an agency even though it lacked primary functions of an administrative entity).

109. 448 F.2d 1067 (D.C. Cir. 1971).

110. *Id.* at 1072.

111. *Id.* at 1073–74.

112. *Id.* at 1074–75.

113. *Id.* at 1075 (noting that the OST provided information to the public in 32 Fed. Reg. 11,060 (July 27, 1967)).

114. *Id.*

organization;¹¹⁵ therefore, the totality of circumstances converged to uphold the agency determination.¹¹⁶

More recently, in *Citizens for Responsibility & Ethics in Washington v. Office of Administration*,¹¹⁷ (“CREW”) the D.C. Circuit examined whether a court’s determination that an entity was an agency necessarily made all branches of that entity a federal agency equally subject to FOIA disclosure when the branches of that entity served different purposes.¹¹⁸ Citizens for Responsibility and Ethics in Washington (“CREW”) requested a number of alleged missing White House emails, along with an explanation of the process that the Office of Administration’s staff would use to locate them.¹¹⁹ Despite the Office of Administration’s argument that it could not procure the records by FOIA’s deadline, CREW insisted that the Office produce the information by that deadline, and sued when the agency did not provide the information in time.¹²⁰ Once the suit began, the Office of Administration disclosed the requested records based on administrative discretion, arguing that it was not an agency under FOIA when it served in an archivist capacity because it was acting directly as assistant to the president.¹²¹

The CREW court decided that when determining whether a specific unit within an agency is subject to FOIA, it must analyze whether the unit exercises authority independent of the president.¹²² The court held the Office of Administration served an assistive function similar to the White House Residence staff in *Sweetland v. Walters*,¹²³ and was not an agency because the support provided by the unit was limited to administrative functions.¹²⁴ The court defined administrative functions as actions with the

115. *Id.* at 1080.

116. *See id.* at 1075 (explaining the numerous factors that weigh in favor of finding that the OST satisfies the definition of agency under FOIA).

117. 566 F.3d 219 (D.C. Cir. 2009).

118. *See id.* at 220 (questioning whether the Office of Administration unit of the Executive Office of the President must be an agency because the Executive Office of the President is specifically enumerated as an agency under FOIA).

119. *Id.*

120. *Id.* at 220–21.

121. *Id.* at 221.

122. *Id.* at 222. The court analyzed decisions that have examined whether other entities were federal agencies to find that independent authority is a significant factor. *Id.* The court noted that the President’s personal staff, OST, OMB, and Council on Environmental Quality qualified as agencies under FOIA, while the Council of Economic Advisors, President Ronald Reagan’s Task Force for Regulatory Relief, and the National Security Council were not agencies under FOIA. *Id.* at 222–23.

123. 60 F.3d 852 (D.C. Cir. 1995) (per curiam).

124. *Citizens for Responsibility & Ethics in Washington v. Office of Administration*, 566 F.3d 219, 224 (D.C. Cir. 2009) [hereinafter CREW].

sole purpose of advising or assisting the President,¹²⁵ and held that the task of filing and retrieving presidential emails serves the sole purpose of assisting the President.¹²⁶ The court also noted that the Office of Administration's previous actions that indicated it considered itself an agency were irrelevant.¹²⁷ Because the court determined the Office of Administration was not an agency, the court did not have to examine the Office's request to withhold the records under FOIA's exemptions.¹²⁸

3. *After defining an entity as an agency, courts analyze the applicability of FOIA exemptions to the information the agency seeks to withhold*

Despite FOIA's presumption in favor of disclosure, federal agencies can withhold information from the public when the agency can show that at least one of FOIA's nine exemptions applies.¹²⁹ The Board usually claims exemptions four and five,¹³⁰ which deal with trade secrets or confidential commercial information¹³¹ and inter- or intra-agency memoranda,¹³² respectively. Both exemptions prevent disclosure in an attempt to foster open discussion about policy-making.¹³³

Exemption four protects trade secrets and commercial or financial information, obtained from a person, that is privileged or confidential.¹³⁴ FOIA narrowly defines "trade secret" as a commercially valuable plan or

125. *Sweetland*, 60 F.3d at 854 (citing the FOIA statute and case law to outline when an executive department would not be an agency under FOIA).

126. *CREW*, 566 F.3d at 223 (comparing the retrieval of emails with the actions of non-agency staff in *Sweetland* who assisted the President with household maintenance and ceremonies).

127. *Id.* at 224–25.

128. *See id.* at 226 (holding that because the Office of Administration is not an agency, it does not have to comply with FOIA).

129. 5 U.S.C. § 552(a)(3)(A) (2006).

130. *See, e.g.*, *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 350 (1979) (arguing that the FOMC could withhold data from release using exemption five); *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 265 (S.D.N.Y. 2009) (rejecting the Board's arguments that the information should be withheld under exemptions four and five of FOIA), *aff'd*, 601 F.3d 143 (2d Cir. 2010); *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 388 (S.D.N.Y. 2009) (stating that the Board sought to withhold all the records it procured under exemption four and five of FOIA), *vacated*, 601 F.3d 158 (2d Cir. 2010).

131. 5 U.S.C. § 552(b)(4) ("[T]rade secrets and commercial or financial information obtained from a person and privileged or confidential.").

132. *Id.* § 552(b)(5) ("[I]nter-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.").

133. *Cf. Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc) (formulating different tests for voluntarily-submitted information and information the government requires as a method to ensure the integrity and quality of information).

134. 5 U.S.C. § 552(b)(4).

instrument that is the product of “substantial effort.”¹³⁵ Records that do not fit the definition of trade secret can still meet the alternative “commercial or financial” requirement of exemption four.¹³⁶ The “from a person” requirement usually is easily met, with entities from individuals, to corporations,¹³⁷ to banks¹³⁸ qualifying as persons under FOIA. Records produced by the government can still meet the “submitted by a person” requirement of the exemption if the information is merely a regurgitation of information procured from a person.¹³⁹

Courts struggle the most with determining whether information meets the final criteria of exemption four—confidentiality.¹⁴⁰ The courts have determined that when the government requires a person¹⁴¹ to divulge information,¹⁴² the information is considered confidential if its disclosure would impair the government’s ability to procure similar information in the future, or if its disclosure would result in significant competitive harm to the person who disclosed it.¹⁴³ However, if a person voluntarily supplies the information, it is considered confidential and protected from disclosure only if the submitter customarily would not disclose it.¹⁴⁴

Exemption five recognizes that although the government has an interest in maintaining open deliberative processes, the privacy interests of the government are not the same as private entities; thus, FOIA only allows

135. Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

136. See *Am. Airlines, Inc. v. Nat’l Mediation Bd.*, 588 F.2d 863, 869–70 (2d Cir. 1978) (holding that information about a labor union was commercial in nature because it affected the ability of the union to maintain representation, despite the fact that American Airlines did not seek the information about the union to make a profit). *But see Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 38–39 (D.C. Cir. 2002) (maintaining that an information exchange agreement whereby the federal government gave money to a state in exchange for information regarding the presence of pygmy owls was not commercial or financial in nature because the primary function of the program was conservation).

137. See 5 U.S.C. § 551(2) (defining “person” in the APA to include corporations).

138. *Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997), *aff’d in part, rev’d in part & remanded on other grounds*, 164 F.3d 37 (D.C. Cir. 1999).

139. See, e.g., *OSHA Data/CIH, Inc. v. U.S. Dep’t of Labor*, 220 F.3d 153, 162 n.23 (3d Cir. 2000) (reasoning that because the information supplied by the government was so intermixed with information from a private-sector company that the information was supplied by a person and could not be disclosed).

140. See, e.g., *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 878–79 (D.C. Cir. 1992) (en banc) (discussing the different factors and interests that are considered in confidentiality claims).

141. 5 U.S.C. § 551(2).

142. See *Critical Mass*, 975 F.2d at 879 (drawing a distinction between information that is required, where the *National Parks* test is used, and voluntarily-supplied information, which cannot be disclosed if the person providing it would not normally offer it to the public).

143. See *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (outlining a test for determining whether commercial or financial information should be considered “confidential”), *aff’d in part, rev’d in part sub nom. Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

144. *Critical Mass*, 975 F.2d at 879.

withholding of those documents not normally discoverable in litigation.¹⁴⁵ First, a court must determine whether the information qualifies as an “inter-agency or intra-agency memo.”¹⁴⁶ If the record qualifies, the court then determines whether the information would be “‘routinely’ or ‘normally’ disclosed” in civil litigation.¹⁴⁷ Courts usually find information is privileged if it falls into one of the following categories: deliberative process, attorney work product, or attorney-client content.¹⁴⁸ The protections included in exemption five incorporate document protection provided by both statutes and case law.¹⁴⁹ The Supreme Court also recognized that the legislative history of exemption five implied a narrow confidential commercial information privilege.¹⁵⁰

C. The Courts Have Not Resolved Whether the Federal Reserve Banks are Agencies Under FOIA

The judicial response to the agency question as applied to the Banks has been mixed.¹⁵¹ Even after requiring the parties to brief the issue, some courts have avoided the agency question.¹⁵² The District Court of Maryland definitively ruled on whether the Banks are agencies for FOIA purposes in *Lee Construction Co. v. Federal Reserve Bank of Richmond*,¹⁵³

145. 5 U.S.C. § 552(b)(5) (“[I]nter-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.”).

146. *See* *Ryan v. Dep’t of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) (“Congress apparently did not intend ‘inter-agency or intra-agency’ to be rigidly exclusive terms.”).

147. *FTC v. Grolier Inc.*, 462 U.S. 19, 26 (1983).

148. FOIA GUIDE, *supra* note 28, at 359.

149. *See* *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800–01 (1984) (scrutinizing the decision in *Merrill* to determine the exact contours of the confidential commercial information privilege and determining that the privilege includes statutory and common law privileges).

150. *See* *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 355–57 (1979) (analyzing the House and Senate reports, and the Federal Rules of Civil Procedure to determine that exemption five contains an implied protection for confidential commercial information outside the more widely-recognized attorney-client privilege).

151. *Compare* *Lee Constr. Co. v. Fed. Reserve Bank of Richmond*, 558 F. Supp. 165, 178–79 (D. Md. 1982) (holding the Federal Reserve Banks are agencies and allowing a private company access to Bank records regarding the Bank’s decision to award a contract to a competitor), *with* *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 391 (S.D.N.Y. 2009) (“The Board, in contrast to the FRBs, is a government agency . . .”), *vacated*, 601 F.3d 158 (2d Cir. 2010).

152. *See* *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 276 (S.D.N.Y. 2009) (agreeing with the Board’s argument that because Bloomberg did not serve a FOIA request on the New York Federal Reserve Bank and because Bloomberg did not argue that the Bank and the Board were the same agency that the agency issue was irrelevant to the case), *aff’d*, 601 F.3d 143 (2d Cir. 2010); *see also* *Sibille v. Fed. Reserve Bank of N.Y.*, 770 F. Supp. 134, 138 (S.D.N.Y. 1991) (assuming without deciding that the Reserve Bank was an agency for FOIA purposes but holding that because the personnel records were not used by the Bank, they were not agency records subject to FOIA).

153. 558 F. Supp. 165 (D. Md. 1982).

holding that the Banks were agencies after a private company sued to get information on the process of awarding contracts.¹⁵⁴ However, *Lee Construction* has been largely ignored, and the courts that have examined this issue have been “far from unanimous.”¹⁵⁵

The judiciary’s confused stance on the agency status of Banks is apparent, even among decisions from the same court.¹⁵⁶ For instance, the District Court for the Southern District of New York did not tackle the issue of whether the New York Federal Reserve Bank is an agency under FOIA in *Bloomberg*, instead ruling that because the Board must produce Board records located at the Bank, examination of the Bank’s agency status was not required.¹⁵⁷ Conversely, a different judge on the same court ruled in *Fox* that, under the Board’s interpretation of its regulations, the records at the New York Federal Reserve Bank were not agency records of the Board.¹⁵⁸ The *Fox* court also reasoned that the Banks are not agencies because Congress established them as entities separate from the Board and they exercise authority independent of the Board.¹⁵⁹ During the oral arguments before the Second Circuit that consolidated *Fox* and *Bloomberg*, there was almost no mention of the agency question.¹⁶⁰ The Second Circuit opinion in *Bloomberg* specifically noted that the opinion does not determine whether the Banks are government agencies under FOIA.¹⁶¹ The confusion among courts regarding FOIA’s relationship to the Reserve Banks is unnecessary, as the Banks clearly come under the ambit of FOIA.¹⁶² While federal district courts have issued conflicting rulings on the agency question, this Comment argues that the Federal Reserve Banks

154. *See id.* at 176–79 (explaining the various factors the court considered in making its determination, including delegation of powers from the Board to the Banks, supervision of private banks, and independent authority).

155. *Schaeffer v. Pub. Employees Retirement Sys.*, 488 N.E.2d 162, 164 (Ohio 1986).

156. *Compare Bloomberg*, 649 F. Supp. 2d at 276 (arguing that the Bank’s status as an agency need not be determined because the records in possession of the New York Federal Reserve Bank qualify as Board records), *with Fox*, 639 F. Supp. 2d at 395 (accepting that the New York Federal Reserve Bank, as an entity separate from the Board, is not an agency under FOIA).

157. *Bloomberg*, 649 F. Supp. 2d at 276.

158. *Fox*, 639 F. Supp. 2d at 396.

159. *Id.* at 395–96.

160. *See generally* Webcast: Freedom of Information Cases (2d Cir. Jan. 11, 2010) (oral argument) available at <http://www.c-spanarchives.org/program/291182-1> (focusing primarily on whether the loan applications were received from a person and the applicability of exemptions four and eight).

161. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 150 n.2 (2d Cir. 2010).

162. 5 U.S.C. § 551(1) (2006) (“[A]gency’ means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . .”).

are agencies under FOIA,¹⁶³ and should only be able to use FOIA's exemptions in narrow circumstances.¹⁶⁴

II. THE FEDERAL RESERVE BANKS ARE GOVERNMENT AGENCIES, AND THEREFORE SUBJECT TO FOIA

The Banks, although distinct from the Board in Washington, should be treated as agencies under FOIA because of their sweeping powers to control monetary policy and carry out Board directives.¹⁶⁵ Courts find that entities are agencies under FOIA when the entity exercises sufficient authority independent of the executive¹⁶⁶ and its actions are governmentally-related.¹⁶⁷ The Banks exercise a great deal of independent authority when influencing monetary policy, from setting lending rates to valuing collateral when lending.¹⁶⁸ Particularly relevant in the recent crisis was the governmentally-related authority exercised by the New York Federal Reserve Bank, the entity that determined which companies were "too big to fail," and thus deserving of emergency lending.¹⁶⁹ Conversely, if the Banks are not agencies, the Board would be able to circumvent the requirements of FOIA by outsourcing much of its monetary policy functions.¹⁷⁰ Finally, due to the limited court supervision of the Banks,¹⁷¹

163. See *infra* Part II (explaining that Reserve Banks are agencies under FOIA because they exercise authority independent of the executive, are empowered with governmentally related power, and are more similar to other agencies than non-agencies).

164. See *infra* Part III (arguing that Bank records should not be withheld under exemption four because the bank cannot show borrowers will suffer substantial competitive harm, and that exemption five does not protect the records because the Banks' records do not qualify under the deliberative process privilege or the narrow commercial confidential information privilege).

165. See PURPOSES & FUNCTIONS, *supra* note 1, at 6 (stating the functions of the Federal Reserve Banks include currency distribution, bank and financial institution regulation, and administering credit functions in each district).

166. See, e.g., *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (holding the OST exercised sufficient independent authority in setting the national science agenda to be considered an agency for FOIA purposes).

167. *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984, 991 (9th Cir. 1949) ("[T]he authority to act with the sanction of government behind it determines whether or not a governmental agency exists.")

168. 12 U.S.C. § 347 (2006); PURPOSES & FUNCTIONS, *supra* note 1, at 6.

169. See Mar. 14 Minutes, *supra* note 27, at 2 (authorizing the New York Federal Reserve Bank to extend section 13(3) lending to Bear Stearns and any other primary dealers with the approval of the Chairman of the Federal Reserve Board).

170. See Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at *14-15, *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (No. 08 Civ. 9595) (arguing that the Board did not have to search the New York Federal Reserve Bank's records because the Board had not used them in its Bear Stearns' lending determination), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

171. See *Huntington Towers, Ltd. v. Franklin Nat'l Bank*, 559 F.2d 863, 868 (2d Cir. 1977) (explaining that the courts would not interfere with the Federal Reserve System's decisions regarding monetary policy and thus would not review the decisions of the Federal Reserve Bank and Office of Comptroller of the Currency to place Franklin National Bank

public policy is best served by the indirect supervision provided by the public through FOIA.

A. *The Banks are Independent from the Executive and Exercise Governmentally-Related Authority in a Manner Sufficient to Qualify Them as FOIA Agencies*

The Banks should qualify as agencies under FOIA because they exercise authority independent of the executive, limited authority independent of the Board,¹⁷² and possess the power to regulate.¹⁷³ Courts have examined a number of factors to determine whether an entity is an agency, as recognized in *Soucie v. David*.¹⁷⁴ In *Soucie*, the D.C. Circuit held that the OST was a federal agency because it exercised governmental authority independent of the executive and advised federal decision-making, despite the fact that the OST did not have any rule-making authority.¹⁷⁵ Similarly, the Bank's lack of rule-making authority is not dispositive of the agency determination.¹⁷⁶ The Banks exercise authority that is similar enough to rule-making to weigh in favor of affording them agency status.¹⁷⁷ The other governmentally-related functions carried out by the Banks, such as the lender of last resort function served by section 13(3),¹⁷⁸ also militate in favor of agency status.¹⁷⁹ Finally, the responsibilities vested in the

into receivership, how the agencies timed the loan decision, and the amount of loans provided).

172. See PURPOSES & FUNCTIONS, *supra* note 1, at 6 (describing the functions of the Banks in contrast with the powers exercised by the Board over them); see also *Fox*, 639 F. Supp. 2d at 388–89 (noting the independence exercised by the Banks, and relating that independence to the historical battle between the Hamiltonian view of centralized banking and the Jeffersonian view of decentralized banking).

173. See PURPOSES & FUNCTIONS, *supra* note 1, at 6 (including the power to regulate state member banks as one of the powers of the Banks).

174. See *Soucie v. David*, 448 F.2d 1067, 1073–75 (D.C. Cir. 1971) (holding that the OST is an agency under FOIA because, among other things, the agency has authority independent of the executive branch to recommend and evaluate scientific policy, even though it does not have its own rule-making authority, and because the OST at one time published its own FOIA compliance measures).

175. *Id.*

176. See *id.* at 1073 (expressing that while the APA was formed to assist the regulation of agencies in their rule-making and adjudication, the fact that an entity may do neither of those tasks does not automatically exclude agency status); see also *Lee Constr. Co. v. Fed. Reserve Bank of Richmond*, 558 F. Supp. 165, 179 (1982) (indicating that although the Banks have no rule-making authority, the other powers the Banks have authority to use gives them agency status under FOIA).

177. Cf. *Haralson v. Fed. Home Loan Bank Bd.*, 678 F. Supp. 925, 926–27 (D.D.C. 1987) (explaining that the actual notice received by the savings and loan associations would be sufficient to give the agency decision the same force as publication, and after the savings and loan attempted to comply with the regulations, they had no right to appeal them as unpublished rules).

178. See 12 U.S.C. § 343 (2006) (granting the Banks the power to lend during “unusual and exigent” circumstances upon Board approval).

179. Cf. *Soucie*, 448 F.2d at 1075 (holding that the OST was an agency based on the

Banks,¹⁸⁰ the circumstances of the FRA's history,¹⁸¹ and the public purpose the Banks serve,¹⁸² all indicate that the Banks exercise sufficient governmentally-related authority to be considered agencies under FOIA.¹⁸³

1. *The Banks exercise authority independently of the executive*

The primary factor in determining the status of an entity is whether it exercises authority independent of the executive, and the Banks have always enjoyed autonomy.¹⁸⁴ The D.C. Circuit in *Soucie* determined that the OST was an agency, primarily because it exercised authority independent of the executive.¹⁸⁵ The principal autonomous function Congress authorized the Banks to exercise is the discretion to make a loan.¹⁸⁶ Although some lending functions, like those under section 13(3), must be authorized by the Board,¹⁸⁷ the decision whether to provide liquidity under the Banks' day-to-day operation rests solely with each Bank.¹⁸⁸ The board members of the individual Banks set the policy, and the staff members of each Bank, none of whom are appointed or controlled by Congress or the President,¹⁸⁹ set the final loan parameters.¹⁹⁰ The Board

following factors: it did not maintain a confidential relationship with the President, it was vested with the power to review and recommend determinations by Congress, and it had considered itself an agency under FOIA).

180. See *infra* Part II.A.iii (arguing that because the Banks, unlike private banks, are vested with the power of lender of last resort and to regulate other banks, they exercise government-like authority and should be considered agencies under FOIA).

181. See *id.* (describing that the FRA evolved out of the Panic of 1907, when J.P. Morgan, a private individual, stopped the financial wreckage at a time when the public's trust in private bankers was low).

182. See *id.* (noting that the Banks, unlike private banks, were founded to serve public functions, like maintaining stable prices and low unemployment).

183. See *Soucie*, 448 F.2d at 1075 (describing a number of different factors that, when taken together, equate to governmental authority sufficient for an agency finding under FOIA).

184. See *Raichle v. Fed. Reserve Bank of N.Y.*, 34 F.2d 910, 914 (2d Cir. 1929) (granting the Banks discretion to refuse credit unless so ordered by the Board, when the only provision that allows the Board to mandate lending is section 11(b), which requires one Bank to rediscount paper to another Bank).

185. *Soucie*, 448 F.2d at 1075.

186. See 12 U.S.C. § 301 (2006) (authorizing the Banks to grant loans and to "grant or refuse" credit); see also HACKLEY, *supra* note 26, at 199 (noting that while the Board has the ability to recommend the withdrawal of credit, the ultimate decision rests with the local Banks).

187. 12 U.S.C. § 343.

188. HACKLEY, *supra* note 26, at 199.

189. See 12 U.S.C. § 302 (explaining the method by which board members of the Banks are chosen: Class A members are bankers chosen by bankers, Class B are non-bankers chosen by bankers, and Class C are members representing the public appointed by the Board).

190. See *id.* § 347 (empowering the Banks to determine what is acceptable collateral for lending programs approved by the Board); *id.* § 343 (restricting discount window lending to the Banks).

chooses only a third of the Bank board members, ensuring maximum independence from the political branches.¹⁹¹

The Board lacks independent lending authority;¹⁹² therefore, the Reserve System's role as lender of last resort for financial firms has cemented the importance of the Banks as entities that exercise authority independently.¹⁹³ Although the use of section 13(3) authority requires authorization from the Board, the New York Federal Reserve Bank was the entity that actually loaned the money to Bear Stearns and AIG.¹⁹⁴ The New York Federal Reserve Bank was also the agency that valued the collateral offered by these companies, and verified that the companies could not obtain financing elsewhere.¹⁹⁵ These powers, in addition to the day-to-day exercise of discount window lending that controls the federal funds rate,¹⁹⁶ are the tools independently exercised by the Banks to control federally mandated monetary policy.¹⁹⁷

Unlike the federal entity in *CREW*, the Banks provide no administrative support to the White House, and thus exercise sufficient independent authority as FOIA agencies.¹⁹⁸ While the Office of Administration in *CREW* provided direct administrative support to the president by archiving presidential email,¹⁹⁹ the Banks do not provide information directly to the executive.²⁰⁰ The connection, if any, between the Banks and the President

191. *Id.* § 302.

192. *See id.* § 343 (authorizing only the Banks to lend at the discount window).

193. *See* HACKLEY, *supra* note 26, at 197 (noting the increasing role of the Federal Reserve System as lender of last resort); WESSEL, *supra* note 2, at 140–42 (explaining the process through which the Banks became the lender of the last resort to the world, when the Board guaranteed dollars to foreign banks); Davidoff & Zaring, *supra* note 2, at 476–77 (documenting the role the New York Federal Reserve Bank played in thwarting a Bear Stearns bankruptcy through its lending power).

194. Davidoff & Zaring, *supra* note 2, at 477. Although the Banks must secure authorization for the use of section 13(3) funds from the Board, this does not undercut the Banks' independent authority because once the authorization is given the Banks exercise almost unfettered discretion to expand the loans. Mar. 14 Minutes, *supra* note 27, at 2. The Board is sufficiently separate from the Banks to allow them to maintain independence. *See* 12 U.S.C. § 248(j) (enabling the Board to “exercise general supervision” over the Reserve Banks).

195. *Id.* § 343.

196. *See* PURPOSES & FUNCTIONS, *supra* note 1, at 27 (explaining that the Board sets interest rates, and then the New York Federal Reserve Bank buys and sells U.S. Treasury bonds to achieve that rate).

197. *See id.* at 3 (discussing the voting structure for the FOMC, which consists of representatives from the New York Federal Reserve Bank and a sampling of the other Banks and noting that the FOMC “oversees open market operations, which is the main tool used by the Federal Reserve to influence overall monetary and credit conditions”).

198. *Id.* at 222–23.

199. *Id.* at 224.

200. *See* 12 U.S.C. § 248(a) (allowing the Board to review the records of Reserve Banks at any time); *Lee Constr. Co. v. Fed. Reserve Bank of Richmond*, 558 F. Supp. 165, 177 (D. Md. 1982) (stating that the Banks are under the direct supervision of the Board, an independent executive agency).

is extremely attenuated, as the Banks provide information to the Board and FOMC.²⁰¹ It is these federal agencies and the Department of the Treasury that are beholden to the President.²⁰² Furthermore, it is the Board and other bankers, not the executive, that appoint the Bank board members,²⁰³ which adds another layer of attenuation between the executive and the Banks.²⁰⁴ The authority exercised by the Banks outside the direction or discretion of the executive weighs in favor of holding that the Banks are agencies under FOIA.²⁰⁵

2. *The Soucie test demonstrates that the Banks' lack of rule-making authority does not preclude the Banks from agency status.*

The Banks' role in advising the formation of federal monetary policy satisfies the *Soucie* test for a federal agency, despite the fact that the Banks have no rule-making authority.²⁰⁶ Although the OST did not have the power to promulgate rules, the *Soucie* court held that the OST met the requirements for agency classification because the OST's mandate to evaluate science programs and inform other federal agencies about scientific and technological advancements strongly affected federal policy.²⁰⁷ Likewise, the Banks gather massive amounts of data that informs the FOMC²⁰⁸ and the Banks use that data to evaluate their own lending strategies.²⁰⁹ Although the Banks have no independent rule-making

201. See PURPOSES & FUNCTIONS, *supra* note 1, at 10–11 (noting that certain Bank expenditures are subject to specific Board approval).

202. 12 U.S.C. §§ 241, 242 (authorizing the President to appoint the seven Board members and designate one as the Chairman of the Board); *id.* § 246 (granting the Secretary of the Treasury the authority to supervise the Board in any functions where the Board and Department of Treasury's authority might conflict); *id.* § 247a (requiring the Board to deliver annual reports to Congress); Act to Establish the Treasury Department, 1 Stat. 67 (1789) (authorizing the President to remove the Secretary of the Treasury from office).

203. See 12 U.S.C. § 302 (separating the nine board members into three classes).

204. *Cf.* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 680 (D.C. Cir. 2008) (describing the various ways Sarbanes-Oxley limits presidential power over the Public Company Accounting Oversight Board and entrusts it with the SEC, but holding that this additional layer of executive power attenuation did not violate the Appointments Clause), *rev'd in part*, 130 S. Ct. 3138, 3164 (2010).

205. See, e.g., *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (analyzing the authority exercised by the OST, and determining that the powers the OST used were sufficiently independent of the executive to define the OST as a FOIA agency); *Lee Constr. Co. v. Fed. Reserve Bank of Richmond*, 558 F. Supp. 165, 174 (D. Md. 1982) (explaining the reasoning in *Soucie*, which held that determining whether an entity exercises independent authority was a critical part of the agency determination).

206. See *Soucie*, 448 F.2d at 1073 (clarifying that although the primary purpose of the APA is to govern rule-making and adjudication by agencies, a lack of either does not free an agency from the transparency-increasing purposes of FOIA).

207. *Id.* at 1075.

208. PURPOSES & FUNCTIONS, *supra* note 1, at 10 (stating that the boards of the Banks collect economic data from their regions to provide to the Board and FOMC).

209. *Id.* at 11 (specifying that the data informs the Banks' interest rates decisions).

authority, this fact alone is not dispositive as to agency status because there are a number of entities classified as agencies that have no rule-making authority of their own.²¹⁰

The similarities between the purposes and functions of the Banks and the OST indicate that the Banks should disclose their records per FOIA guidelines.²¹¹ The *Soucie* court focused on the OST's leadership in the implementation of the scientific policy in the country and coordination of government policies and budgets.²¹² Similarly, the Banks collect information from member financial institutions, and through the Banks' participation in the FOMC, apprise the Board of the country's financial situation and synchronize the monetary policy effort.²¹³ The OST also works with the private sector, just as the Banks work with private financial institutions, to maximize the public benefit in their respective sectors.²¹⁴ Finally, both entities evaluate the quality and effectiveness of federal programs; the OST evaluates science programs while the Banks evaluate monetary policy.²¹⁵

The supervision the Banks exercise over member banks and bank holding companies in each district eclipses the Banks' lack of rule-making authority when making an agency determination.²¹⁶ As an example of the

210. See *supra* note 206 (stating that entities that do not perform rule-making can still be classified as agencies); see also *Larche v. Hannah*, 176 F. Supp. 791, 796 & n.15 (W.D. La. 1959) (specifying that the U.S. Commission on Civil Rights, which evaluates and advises other agencies but does not have rule-making authority is an agency), *adopted in* 177 F. Supp. 816, 819 n.5 (W.D. La. 1959) (three-judge court), *rev'd on other grounds*, 363 U.S. 420, 441, 452–453 (1960).

211. Compare 42 U.S.C. § 6614 (a)(8)–(13) (2006) (establishing that the role of the OST includes determining national science policy and reporting to the political branch about the changes and trends in science policy), with 12 U.S.C. § 225a (2006) (directing that the Federal Reserve System serve the public function of ensuring price stability and low unemployment).

212. See *supra* text accompanying note 206 (observing that the Bank's role in advising the formation of federal monetary policy qualified them as a federal agency under the *Soucie* test); see also 42 U.S.C. § 6614(a)(8) (empowering the OST to determine and provide for the scientific and technological needs of the government).

213. See PURPOSES & FUNCTIONS, *supra* note 1, at 2–5 (describing the relationship between the Board and the Banks and distinguishing the responsibilities between the two branches of the System).

214. See 42 U.S.C. § 6602 (authorizing the OST to help federal agencies and commercial enterprises determine appropriate science policy); CARNELL ET AL., *supra* note 71, at 48–50 (illustrating how private banks serve as a transmission route of monetary policy); About OSTP, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/ostp/about> (last visited July 20, 2010) (outlining briefly the OST's role in coordinating science and technology policies between government agencies and within the private sector).

215. See 42 U.S.C. § 6602 (authorizing the OST to evaluate scientific programs for the President, federal agencies, and private corporations); 12 U.S.C. § 225(a) (requiring the Federal Reserve System to act to maintain prices and economic growth while limiting unemployment).

216. Cf. PURPOSES & FUNCTIONS, *supra* note 1, at 6 (listing “supervising and regulating” financial institutions as one of the responsibilities of the Banks).

control the Banks have over the businesses they regulate, the Banks ensure that local financial institutions maintain minimum balances in their Bank accounts and are responsible for regulating member banks.²¹⁷ The Banks' *de facto* control over firms is sufficient to prove agency status because rule-making authority is not required for agency status.²¹⁸ For example, in *FDIC v. Philadelphia Gear Corp.*,²¹⁹ the FDIC did not publish any rules determining how letters of credit would be treated under the deposit insurance scheme,²²⁰ but the Supreme Court gave the agency considerable deference and agreed with the FDIC that securitized letters of credit were not deposits.²²¹ Likewise, while the regulatory authority of the Banks is not the same as publishing regulations in the Federal Register,²²² it is a similar exercise of authority because private companies recognize and acquiesce to the Banks' requirements.²²³

3. *The Banks qualify as agencies because they exercise extensive government-like authority over monetary policy and the private firms in each district.*

The other major factor in determining agency status is whether the actions carried out by the entity are governmentally related.²²⁴ In interpreting FOIA, courts have relied on legislative history indicating that Congress intended the term agency to include entities that perform governmental functions and maintain information that is of public interest.²²⁵ As the Board admits, the Banks are the "operating arms" of the Federal Reserve System.²²⁶ Banks have the power to regulate banks, gather fiscal data, and recommend and implement federal monetary policies.²²⁷

217. See 12 U.S.C. § 372 (requiring banks to retain funds in certain ratios).

218. See *supra* note 206 (reiterating that the APA governs non-rule-making entities).

219. 476 U.S. 426 (1986).

220. See *id.* at 438 (noting "that exclusion by the FDIC is nonetheless long-standing and consistent").

221. See *id.* at 439 (granting deference to the FDIC's interpretation of the relevant statute, although it had not "been reduced to a specific regulation").

222. See 12 U.S.C. § 248(k) (allowing the Board to delegate all functions except rule-making authority to the Banks).

223. Cf. *Haralson v. Fed. Home Loan Bank Bd.*, 678 F. Supp. 925, 926–27 (D.C. Cir. 1987) (explaining that because the savings and loan associations contesting the new regulations had actual notice of the approximate substance of the new rate regulation, and the associations had attempted to comply with the regulations, they had no right to appeal despite the fact the regulations had not been published in the Federal Register); *Giles Lowery Stockyards, Inc. v. Dep't of Agric.*, 565 F.2d 321, 326 (5th Cir. 1977) (holding that the Department of Agriculture was not required to publish auction rates for stockyard property because the stockyard already knew the process used to determine rates).

224. 5 U.S.C. § 551(1) (2006) (defining "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency").

225. See H.R. REP. NO. 93-876, at 8 (1974) (expanding the definition of agency).

226. PURPOSES & FUNCTIONS, *supra* note 1, at 10.

227. See *id.* at 10–12 (comparing the interactions of the Banks and the FOMC).

These powers are shared with other agencies like the FOMC.²²⁸ Furthermore, the level of public interest—a factor for defining agency—is demonstrated by the numerous FOIA requests the Board has received²²⁹ and bolstered by the volumes of information published thus far on the 2008 financial collapse.²³⁰ The congressional response to the Federal Reserve's actions also indicates both the high level of authority the Board wielded in the crisis and increased public interest.²³¹

The Constitution gives Congress the authority to coin and regulate the value of currency,²³² demonstrating that the Bank's ability to print money is a governmentally related power. In *McCulloch v. Maryland*,²³³ the Supreme Court supported this power by ruling that authority explicitly given to Congress by the Constitution included the plenary power to do whatever was “necessary and proper” to give effect to those enumerated responsibilities, including the chartering of a central bank.²³⁴ The fact that the Banks are split into twelve districts and are separate from the central Board is not dispositive on the issue of governmentally-related authority, as the Board admits that the Banks are the “operating arms” of the Board, without which the Board could not carry out its policies.²³⁵

The creation of the Federal Reserve System also suggests that Congress vested governmental authority within the Banks.²³⁶ Congress passed the

228. *Id.*

229. *See, e.g.*, *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 267–68 (S.D.N.Y. 2009) (discussing a Bloomberg reporter's FOIA request), *aff'd*, 601 F.3d 143 (2d Cir. 2010); *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 391–92 (S.D.N.Y. 2009) (discussing a television network's repeated FOIA requests), *vacated*, 601 F.3d 158 (2d Cir. 2010); *see also* Michael McKee, *Fed Beige Book Says Economy Improved in 10 Districts*, BLOOMBERG BUS. WK., Jan. 13, 2010, available at <http://www.businessweek.com/news/2010-01-13/fed-beige-book-says-economy-improved-in-10-districts-update2-.html> (highlighting the continued expansion of the economy and the increased role of Federal Reserve Bank intervention).

230. *See, e.g.*, JOSEPH TIBMAN, *THE MURDER OF LEHMAN BROTHERS* (2009) (describing the fall of Lehman Brothers and the role of the firm's bankruptcy in the financial crisis of 2008); WESSEL, *supra* note 2 (explaining the role of the Federal Reserve and the Banks in attempting to stop the deterioration of the financial markets during the crisis).

231. *See* Restoring America Financial Stability Act of 2009 (Discussion Draft 2009) (restructuring the financial oversight of the financial sector, including a reduction in the Federal Reserve's power and the creation of new oversight agencies) available at http://banking.senate.gov/public/_files/AYO09D44_xml.pdf; *see also* Paletta & Hilsenrath, *supra* note 64, at A2 (explaining the effects of Dodd's bill on the regulatory structure of the financial sector).

232. U.S. CONST. art. 1, § 8, cl. 5.

233. 17 U.S. (4 Wheat.) 316 (1819).

234. *Id.* at 324–26.

235. *See* PURPOSES & FUNCTIONS, *supra* note 1, at 6, 10–11 (explaining the vital role the Banks serve implementing the policy directives of the Board and FOMC, arguably the most important actions being the sale and purchase of U.S. securities and lending at the Discount Window).

236. *See* ROBERT LATHAM OWEN, *NATIONAL ECONOMY AND THE BANKING SYSTEM OF*

FRA to shift central banking power back to the government in response to the private financial sector solutions hammered out in the wake of the Panic of 1907, when no government agency existed to mitigate the results of the financial collapse.²³⁷ During the Panic of 1907, J.P. Morgan directed the effort to stem the crash, and was recognized as the man who saved Wall Street.²³⁸ Congress created the National Monetary Commission to design a central bank to limit reliance on purely private responses.²³⁹ While the initial report, created by bankers, recommended complete private control of the system,²⁴⁰ the final legislation instead empowered a board appointed by the President to control central banking functions.²⁴¹ Legislators created the Federal Reserve System as a backlash to private control of the banking sector; they intended that the Banks, as an integral part of the Federal Reserve System, have governmentally-related authority.²⁴²

Although the shareholders of the Banks are private bank and bank holding companies in each district, Congress chartered the Banks to serve the public purpose of functioning as the operational arms of the Board,²⁴³ endowing the Banks with governmental authority despite private ownership. The Eighth Circuit, in *Missouri, ex rel Garstang v. United States Department of the Interior*,²⁴⁴ held that private ownership of an agency does not automatically result in non-agency status.²⁴⁵ Moreover, stock ownership in the Banks, unlike stock ownership in most companies,

THE UNITED STATES: AN EXPOSITION OF THE PRINCIPLES OF MODERN MONETARY SCIENCE IN THEIR RELATION TO THE NATIONAL ECONOMY AND THE BANKING SYSTEM OF THE UNITED STATES, S. DOC. NO. 76-23, at 100 (1939) (quoting Woodrow Wilson speaking in support of the Federal Reserve Act in 1913) (“And the control of the system of banking and of issues which our new law is to set up must be public, not private, must be vested in the government itself so that banks may be instruments, not masters, of business and of the individual’s enterprise and initiative.”).

237. See WESSEL, *supra* note 2, at 36–38 (explaining that after the second national bank charter expired in 1832, there was no central banking system in the United States and New York bankers intervened instead).

238. *Id.* at 34. Morgan’s action was also a wake-up call to the nation; as one Senator put it: “We may not always have Pierpont Morgan with us to meet a banking crisis.” *Id.*

239. *Id.* at 37.

240. *Id.* (describing the bankers’ rendezvous on Jekyll Island that precipitated the recommendation). The attendees at this meeting included bankers who would later serve in some capacity in the Federal Reserve System. *Id.*

241. See 12 U.S.C. § 241 (2006) (codifying the 1913 legislation).

242. See OWEN, *supra* note 236, at 100 (citing two statements by President Woodrow Wilson before and after the enactment of the FRA, indicating that he believed the establishment of the central bank conferred governmental authority on those who governed the banks); *cf.* PURPOSES & FUNCTIONS, *supra* note 1, at 6 (expounding the Board functions carried out by the Banks).

243. See HACKLEY, *supra* note 26, at 2 (noting that the Banks’ loans serve the public purpose of increasing available credit that can be extended).

244. 297 F.3d 745 (8th Cir. 2002).

245. *Id.* at 750.

does not confer investment rights or control.²⁴⁶ Finally, all assets collected by the Banks, after satisfying operational costs, are paid to the U.S. Treasury, not back to stockholders.²⁴⁷ The definition of agency supplied by FOIA supports viewing the privately controlled Banks as arms of the government because it includes, in addition to executive agencies, “government corporation(s)” and “government controlled corporation(s).”²⁴⁸

Financial firms²⁴⁹ and the courts²⁵⁰ have acquiesced to the Banks’ exercise of authority despite the fact that the Banks lack rule-making authority, providing the Banks with a *de facto* governmental power.²⁵¹ In *Haralson v. Federal Home Loan Bank Board*,²⁵² a loan company claimed that an appraisal rule used by the Federal Home Loan Bank Board did not comport with FOIA because there was no opportunity for public comment and the rule was not published in the Federal Register.²⁵³ The District Court for the District of Columbia ruled, however, that the loan company’s acceptance of the new rate regulation resulted in the requirement attaining the same force as if the agency had published the regulation.²⁵⁴ In the

246. *Id.*

247. See PURPOSES & FUNCTIONS, *supra* note 1, at 11 (recording that as of 2009, about ninety-five percent of the funds raised by the Banks had been paid to the Treasury).

248. 5 U.S.C. § 552(f)(1) (2006); see also *Montgomery v. Sanders*, No. 3:07-cv-470, 2008 WL 5244758, at *6 (S.D. Ohio Dec. 15, 2008) (holding a defense contractor was not a “government-controlled corporation” under FOIA because the federal government did not exercise sufficient control over the contractor’s operations). *But see Lee Constr. Co. v. Fed. Reserve Bank of Richmond*, 558 F. Supp. 165, 177 (D. Md. 1982) (emphasizing that although the Banks are controlled by private entities, the Banks are agencies because the Board exercises such dominant control over them).

249. See *Davidoff & Zaring*, *supra* note 2, at 480–81 (explaining the deal brokered by the New York Federal Reserve Bank and the Board initially required the Bear Stearns shareholders to accept only two dollars per share, but after that plan was foiled, the Bank increased the sale price and permitted JP Morgan Chase shareholders to vote on the Bear Stearns acquisition again a year later).

250. See *Huntington Towers, Ltd. v. Franklin Nat’l Bank*, 559 F.2d 863, 868 (2d Cir. 1977) (arguing that it is not for the courts to determine whether the actions taken by the Federal Reserve System or the Treasury Department were justified where those actions “concerned the operation and stability of the nation’s banking system”); *In re Bear Stearns Cos. S’holder Litig.*, No. 3643-VCP, 2008 WL 959992, at *2 (Del. Ch. Apr. 9, 2008) (allowing the Bear Stearns deal, brokered by the Board and New York Federal Reserve Bank, to go through despite concerns that it violated shareholders’ rights recognized under Delaware law because the court refused to countermand the Federal Reserve).

251. *Cf. Haralson v. Fed. Home Loan Bank Bd.*, 678 F. Supp. 925, 926–27 (D.D.C. 1987) (allowing the actual notice received by the banks to apply with the same force as publishing those regulations in the Federal Register). The court held that although the collateral valuation process recorded by the agency did not state that R41 could be used to value collateral, because that was the historical practice of the agency, the public had sufficient notice due to its past use or by looking at different valuation options available to the agency. *Id.*

252. *Id.*

253. *Id.* at 926–27.

254. *Id.*

recent financial crisis, institutions that were not subject to the regulations of the Federal Reserve opened their books to the New York Federal Reserve Bank and accepted the Bank's requirements.²⁵⁵ Even the courts have refused to interfere with deals brokered by the Banks,²⁵⁶ reinforcing the Banks' *de facto* governmental power and demonstrating the full force of the governmentally related authority wielded by the Banks that non-agencies do not possess.²⁵⁷

B. The Banks are More Similar to Federal Agencies Than Non-Agencies.

When compared to other financial institutions, the Banks are more similar to the Board and FOMC, which are agencies,²⁵⁸ and less similar to organizations like the New York Stock Exchange (NYSE), which is not an agency.²⁵⁹ To determine agency status, courts often compare the entity in dispute with agencies established by statute or precedent.²⁶⁰ The Board and the FOMC are both units in the central banking system that direct national monetary policy.²⁶¹ Likewise, the Banks function as the operational arms

255. See WESSEL, *supra* note 2, at 217–18 (listing the financial sector companies that transformed themselves during the financial meltdown from companies regulated by the SEC to bank holding companies that voluntarily submitted to regulation for the option of calling upon the Federal Reserve as a lender of last resort); see also Davidoff & Zaring, *supra* note 2, at 493–95 (discussing the role the Federal Reserve's examination of Lehman Brothers' and AIG's financials played in determining the response to each company).

256. See *Huntington Towers, Ltd. v. Franklin Nat'l Bank*, 559 F.2d 863, 868 (2d Cir. 1977) (alleging that the New York Federal Reserve Bank, FDIC, and Office of the Comptroller of the Currency actively prevented the disclosure of Franklin National Bank's faltering financial condition). This case is the result of the crash of Franklin National Bank, the New York Federal Reserve Bank's \$1.7 billion loan to the failing institution, and the federal banking regulator's sluggish response that ultimately failed to save the bank. *Id.* at 865. Up until the 1980s, this was the largest banking failure in the nation's history. *Id.*

257. Cf. *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984, 991 (9th Cir. 1949) (describing an agency as an entity that has the force of government backing up the entity's actions); see also 2 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE § 1.2 (1978) (highlighting that the first edition of this treatise defined agency as “a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking”). *But see* *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 482 F.2d 710, 714 n.13 (D.C. Cir. 1973) (noting that the definition of agency in the first edition of the treatise may be overly-restrictive in light of the expansive statutory definition).

258. See *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 352 (1979) (holding that the “FOMC is clearly an ‘agency’” under FOIA, but giving no further explanation); see also 12 C.F.R. § 261.1(a)(1)(2009) (recognizing that the Board is subject to FOIA).

259. See *Indep. Investor Protective League v. N.Y. Stock Exch.*, 367 F. Supp. 1376, 1377 (S.D.N.Y. 1973) (indicating that the NYSE is a not-for-profit corporation).

260. See *Soucie v. David*, 448 F.2d 1067, 1073 n.16–17 (D.C. Cir. 1971) (determining the OST was an agency by comparing the functions of the OST with other cases that decided whether the entity that received a FOIA request was or was not an agency). The court also examined the Congressional history and records from the creation of the OST to find that it was an agency. *Id.* at 1074–75.

261. PURPOSES & FUNCTIONS, *supra* note 1, at 3.

of the Board, and are extensions of the Board and FOMC that implement and execute the desired monetary policy promulgated by those agencies.²⁶² On the other hand, the Banks are unlike the NYSE, in that the NYSE is a group of traders gathered to make a profit by trading in stocks and bonds.²⁶³ The SEC regulates the NYSE, but the regulators do not require the NYSE to take specific actions to further national financial goals.²⁶⁴ This comparison to other similar financial institutions illustrates that the Banks are more comparable to government agencies in purpose and function than they are to private entities,²⁶⁵ and thus should be considered agencies for the purposes of FOIA.

Despite concerns that using FOIA to examine Banks could lead to an unwarranted expansion of disclosure of private records,²⁶⁶ the Banks are sufficiently distinguishable from private financial institutions to require the Banks to adhere to FOIA without opening the financial transactions of private entities that cannot act with the force of government to public scrutiny.²⁶⁷ The primary distinguishing factor is that the Banks exercise regulatory authority over other banks at the behest of the Board, a power other private banks do not share.²⁶⁸ While Congress chartered the Banks to serve a public purpose,²⁶⁹ the legislative history surrounding the FRA

262. See *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 277 (3d Cir. 2006) (quoting *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 356 (1968) (Marshall, J., dissenting)) (stating that the Federal Reserve Banks were created as the “monetary and fiscal agents of the United States”).

263. See *Indep. Investor Protective League*, 367 F. Supp. at 1377 (explaining that the NYSE is a non-profit company in New York).

264. See *id.* (holding that the NYSE is not an agency under FOIA, and has no authority to set national policy).

265. Compare PURPOSES & FUNCTIONS, *supra* note 1, at 6 (explaining the role the Banks play in the Federal Reserve System and in setting national monetary policy), with *Indep. Investor Protection League*, 367 F. Supp. at 1377 (discussing the regulatory control the SEC has over the NYSE, and the NYSE’s inability to control policy as a private firm).

266. See Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post-9/11: Balancing the Public’s Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 289–90 (2003) (remarking on the reluctance of private companies to work with the federal government to protect infrastructure from terrorist attacks because the companies worry that FOIA could force disclosure of information that would subject them to liability). Some businesses have argued in favor of a special FOIA exemption to protect this kind of information. *Id.*

267. See 12 U.S.C. §§ 342–347 (2006) (listing the powers of the Banks, such as maintaining minimum reserve balances, discounting commercial paper, and serving as a lender of last resort to individuals, partnerships, and corporations, and stating that all of these are services the Banks offer member banks); CARNELL ET AL., *supra* note 71, at 13 (explaining the history of central banking in the United States, and the role of the Banks, which are unlike other financial firms that are members of the Reserve System but not one of the twelve Banks).

268. See 12 U.S.C. § 248(j) (asserting that the Board has the authority to direct the Banks).

269. See 12 U.S.C. § 225a (recognizing the goals of the Federal Reserve System as “maximum employment, stable prices, and moderate long-term interest rates”).

indicates that Congress and the public had a clear understanding that the public interest was not the primary goal of the private banking system.²⁷⁰ Finally, regardless of agency status, FOIA's exemption eight protects the examination reports banks provide to their regulators, which protects private companies from unwarranted disclosures while still requiring transparency from the agency.²⁷¹

C. Reserve Banks Should be Subject to FOIA Because the Banks Could be Used by the Board to Improperly Prevent the Disclosure of Information with Little Oversight

Acknowledging that the Federal Reserve Banks are agencies under FOIA would prevent the Board from obstructing disclosure by shifting records to the Reserve Banks.²⁷² Unlike private companies that cannot exercise authoritative power over others, the Board can give general guidelines to the Banks and allow the Banks to exercise regulatory power and spend funds without exposing any of that information to public scrutiny.²⁷³ One of the Board's central arguments against producing the records Bloomberg requested was that the Board did not actually use those records.²⁷⁴

270. See H.R. REP. NO. 63-69, at 3-4 (1913) (highlighting the role the free banking system played in the financial turmoil in the early 1900s, and mentioning specific times when the banks had acted in self-preservation, against public interests); see also SPENCER & HUSTON, *supra* note 26, at 9 (noting that "Villainous Wall Street" was in fact losing its position of dominance over finance when Congress signed the FRA into law). The act was considered a "triumph for the popular will and a defeat of Wall Street." *Id.*

271. 5 U.S.C. § 552(b)(8) (2006) ("[S]hall not apply to records . . . 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."); see also 12 U.S.C. § 1831o(k) (limiting exemption eight to specific reports prepared pursuant to bank examination, and specifically requiring the release of information as long as the release of the requested information would not link the records to a named institution); Clarkson v. Greenspan, No. 97-2035, 1998 U.S. Dist. LEXIS 23566, at *24 (D.D.C. June 30, 1998) (extending the protection of exemption eight to cover the bank examination reports submitted to the Board). *But see* Marriott Employees' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478-A, 1996 WL 33497625, at *5 (E.D. Va. Dec. 24, 1996) (arguing that exemption eight does not protect everything that might be disclosed in a bank examiner's report, like factual information)(citing *In re Subpoena Served Upon Comptroller of Currency, and Sec'y Bd. Of Governors of the Fed. Reserve Sys.*, 967 F.2d 630, 634 (D.C. Cir. 1992)).

272. Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, *supra* note 170, at 46 (arguing that because the Board did not use the information compiled by the New York Federal Reserve Bank, the Board did not have the requested records and was not required to obtain them).

273. 12 U.S.C. § 301; accord Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, *supra* note 170, at 46 (arguing the Board was only required to turn over records it actually used, and stating that the Board did not use the responsive records the Bank possessed).

274. See Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, *supra* note 170, at 46 (explaining that the New York Federal Reserve Bank had obtained the information in its own capacity to make loans under section 13(3) after authorization from the Board); see also Amended and Supplemental Complaint for

However, the records Bloomberg sought were critical in evaluating the collateral provided to the New York Federal Reserve Bank,²⁷⁵ and thus under the FRA must have been examined by the Bank.²⁷⁶ Agencies cannot be allowed to circumvent their FOIA responsibilities by delegating information gathering and executory responsibilities to an entity outside the reach of FOIA.²⁷⁷ In this case, as so much of the authority by statute rests with the Federal Reserve Banks,²⁷⁸ the exercise of that power should be open to public scrutiny under FOIA.

The courts generally have been reticent to review the decisions of the Federal Reserve Banks,²⁷⁹ which indicates a need for the public to act as stewards of the taxpayers' investments by having access to information.²⁸⁰ When the Federal Reserve rescued a failing bank in 1974, the Second Circuit ruled that unless there was "clear evidence of grossly arbitrary or capricious action" it was not for the courts to scrutinize the Bank's decision.²⁸¹ Even the Delaware courts, well-known for their expertise in business law, have refused to insert themselves into the New York Federal Reserve Bank's deal-making, despite circumstances that arguably violated state law.²⁸²

Declaratory and Injunctive Relief at 8, *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve System*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (No. 08 CV 9595) (reciting the Board's response to the FOIA request that stated that the Board did not use or rely on the requested records from the New York Federal Reserve Bank, and therefore did not have to submit them to Bloomberg), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

275. See Amended and Supplemental Complaint for Declaratory and Injunctive Relief, *supra* note 274, at 6–7 (listing the records requested from the Board including the method the Board used to value collateral and a list of that collateral).

276. See 12 U.S.C. § 343 (requiring the emergency loans to be secured to the satisfaction of the Federal Reserve Bank that provides the loan).

277. Cf. Office of Management and Budget Circular A-76, 48 Fed. Reg. 37,110 (1983) (delineating the requirements for private companies to undertake responsibilities generally held by the executive); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 N.W. U. L. REV. 62, 63–65 (1999) (describing the emerging pattern of Congress delegating authority to private enterprises and arguing that even if delegation to multiple agencies is acceptable under the separation of powers doctrine, the delegation of power completely separate from the federal government is unacceptable).

278. See 12 U.S.C. § 343 (requiring the Reserve Bank to analyze and hold adequate security for emergency loans).

279. See *Huntington Towers, Ltd. v. Franklin Nat'l Bank*, 559 F.2d 863, 868 (2d Cir. 1977) (explaining that absent arbitrary and capricious action on the part of the Board, the decision to rescue a financial firm or allow it to fail would not be reviewed by the courts).

280. See, e.g., Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITING OF JAMES MADISON*, 337 (Saul K. Padover ed., 1953) (expressing the opinion that a republican form of government requires the populace to arm itself with information about its leaders).

281. *Huntington Towers*, 559 F.2d at 868.

282. See *In re Bear Stearns Cos. S'holder Litig.*, C.A. No. 3643-VCP, 2008 WL 959992, at *6 (Del. Ch. Apr. 9, 2008) (admitting that the state courts would not interfere with the Federal Reserve System's deal-making with Bear Stearns because the court would not

The public is the best line of defense against overreaching by the Banks because courts give the Banks wide latitude²⁸³ and Congress requires only meager reports from the Board;²⁸⁴ therefore, the Banks should be subject to FOIA as a policy matter. The courts have repeatedly emphasized the important role FOIA plays in keeping the public informed and involved.²⁸⁵ Legal scholars have noted that public transparency is particularly important in the bailout context to ensure confidence in the faltering markets.²⁸⁶ Public oversight through FOIA would allow the Banks to protect government interests, while providing the courts an opportunity to review agency operations without interfering with the Bank's primary policy maneuvers.²⁸⁷ Even if the Banks are subject to FOIA as agencies, they will still be able to take advantage of FOIA exemptions, which can protect some Bank decisions from scrutiny without ensuring total lack of review.²⁸⁸

III. BANK RECORDS MUST BE DISCLOSED UNLESS THE BANKS CAN SHOW THAT THE INFORMATION FITS THE NARROW REQUIREMENTS OF EXEMPTIONS FOUR AND FIVE

To complete the argument in favor of disclosure, it is important to analyze the limited withholding opportunities provided by exemptions four and five, the two FOIA exemptions the Board relies on²⁸⁹ to prevent

contribute to the uncertainty in the financial markets).

283. See, e.g., *Huntington Towers*, 559 F.2d at 868 (refusing to subject the Federal Reserve's decision to reassessment unless it was clearly arbitrary and not in the public's best interest).

284. See 12 U.S.C. § 225(b) (2006) (requiring semi-annual reports to Congress); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 129, 122 Stat. 3765 (2008) (mandating a report to Congress within seven days of section 13(3) lending, with subsequent periodic reports about the status of the loan after that).

285. See Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171-72 (2004) (arguing that FOIA and transparency are not "mere formalities"); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (stating that FOIA allows citizens to question what their government is doing); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (reasoning that disclosure allows the governed to check corruption); see also Presidential Memorandum, *supra* note 76 (emphasizing that disclosure is necessary in a representative government because transparency is required for accountability).

286. Anson Cain, *Congress's First Recipe to Bail Out the Financial Institutions of the United States is Leaving the Taxpayers with a Sour Taste in Their Mouths*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 213, 272 (2009).

287. See 5 U.S.C. § 522(a)(4)(B) (2006) (enabling a FOIA requester to sue in federal district court to enjoin the agency from withholding records, and authorizing the district court to conduct a de novo review of the agency's determination that the records are subject to withholding).

288. See 5 U.S.C. § 552(b) (entitling agencies to withhold information that falls under one of the nine specific exemptions to FOIA).

289. See *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 398, 402 (S.D.N.Y. 2009) (affirming the Board's decision to withhold the requested information under exemption four, and therefore not reaching the exemption five question), *vacated*, 601 F.3d 158 (2d Cir. 2010); Answer ¶ 50, *Bloomberg L.P. v. Bd. of*

disclosure of information.²⁹⁰ Only after the Banks are found to be federal agencies must the Banks depend on the nine statutory exemptions included in FOIA to prevent the disclosure of information.²⁹¹ The burden would be on the Banks to prove that at least one of the FOIA exemptions allows them to continue to withhold the requested information.²⁹² The Bank could make a valid argument for using exemption four and exemption five to protect some of its information for a specific period.²⁹³ Nevertheless, an agency must divulge the requested information when the reason for the exemption expires.²⁹⁴

The application of exemptions four and five to Bank records would be appropriate only when imminent, specified harm would be likely to result. As an initial matter, exemption four would properly apply only to information that is being used to make future lending decisions to prevent putting the Banks or financial firms at a disadvantage.²⁹⁵ Once this period has passed, the Banks would be required to disclose the information as it would be unlikely to impair the flow of future information,²⁹⁶ and the spread of this information would be more likely to assist than harm the commercial position of the company that secured the loan.²⁹⁷ Finally,

Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (relying on exemptions four and five in denying all of Bloomberg's FOIA claims), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

290. *See Soucie v. David*, 448 F.2d 1067, 1077–78 (D.C. Cir. 1971) (allowing information to be withheld under FOIA's fourth exemption only if the requested records fall within the narrow scope of trade secrets or confidential information, and under the fifth exemption only if the records are inextricably intertwined with policy-making and deliberation); *see also* 5 U.S.C. § 552(b)(4)–(5) (authorizing agencies to withhold information only under limited circumstances).

291. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975) (holding that only records listed in the nine exemptions are subject to withholding, and only after the agency shows that the records sought qualify for the exemption).

292. *Id.*; *see also* FOIA GUIDE, *supra* note 28, at 4–5 (contrasting FOIA with the arguably failed disclosure provisions of the APA).

293. *See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 359 (1979) (reasoning that limited withholding is acceptable for certain periods of time when the information is critical to ongoing negotiation or governmental functions); *see also* S. REP. NO. 88-1219, at 6–7, 13–14 (1964) (stating that FOIA should not be used to interfere with the ongoing, frank deliberations of government agencies).

294. *See Merrill*, 443 U.S. at 359 (specifying that the exemption is narrowly construed).

295. *See Starkey v. U.S. Dep't of Interior*, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002) (explaining that disclosing information about the water resources of the tribe would put the tribe at a disadvantage when negotiating, and holding that the information could be withheld as commercial or financial information under FOIA's exemption four).

296. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (holding that the test for confidentiality for exemption four is whether the information will impair the ability of the government to collect necessary information in the future or if it would cause substantial competitive harm to the "person" disclosing the information), *aff'd in part, rev'd in part sub nom. Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

297. *Cf. WESSEL*, *supra* note 2, at 24–25 (illustrating that without a bailout, Lehman was forced into bankruptcy).

exemption five would not usually protect the information on the Bank's daily operations from disclosure under FOIA because the information would normally be disclosed during civil litigation.²⁹⁸

A. *FOIA Exemption Four Should Not Apply to Historical Records Unless the Board or Bank Shows Imminent, Non-Speculative Danger to the System's Ability to Influence Monetary Policy*

While FOIA would protect some of the Banks' records, at least for a time, exemption four would not allow the Banks to withhold information indefinitely without explaining the rationale for the refusal to disclose.²⁹⁹ Exemption four protects information that is a trade secret or business or commercial information that is obtained from a person and is confidential.³⁰⁰ The records maintained by the Banks that serve the public purpose of monetary policy administration are necessarily economic in nature; therefore, the records easily meet the exemption four threshold requirement of commercial or financial documents provided by a person.³⁰¹ However, by applying the *National Parks* test,³⁰² it becomes apparent that the Banks should not withhold this information, as it is not likely to harm the commercial interests of the financial institutions that disclose the information the Banks possess.³⁰³

1. *Information requested from the Banks fits the commercial or financial in nature requirement of exemption four*

The information collected by the Banks easily qualifies as commercial or financial in nature. Unlike the court in *National Association of Home*

298. See 5 U.S.C. § 552(b)(5)(2006) (authorizing withholding of information if it would not normally be discoverable during the course of civil litigation). See generally FOIA GUIDE, *supra* note 28, at 357–416 (discussing the different civil privileges that can be used to protect information from disclosure under FOIA, namely attorney-client, attorney work product, and deliberative process).

299. See Presidential Memorandum, *supra* note 76 (stating that agencies should take an affirmative position toward disclosure, and presume disclosure of information).

300. 5 U.S.C. § 552(b)(4).

301. See *In Def. of Animals v. Dep't of Health & Human Servs.*, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at *2, *29 (D.D.C. Sept. 28, 2001) (finding that listing the financial position of the companies was sufficient to meet the commercial or financial information obtained from a person requirement).

302. See *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (evaluating confidentiality by the ease with which the government could retrieve necessary information in the future, and whether disclosing that information would cause substantial competitive harm to the firm disclosing it), *aff'd in part, rev'd in part sub nom. Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

303. Cf. GARY H. STERN & RON J. FELDMAN, *TOO BIG TO FAIL: THE HAZARDS OF BANK BAILOUTS* 33–37 (2004) (providing examples of how a financial institution's designation as too big to fail can positively affect it in a number of ways, including a better credit rating and better interest rates than those financial institutions that are not too big to fail).

Builders v. Norton,³⁰⁴ which held that the information in question was not commercial or financial in nature because the motive for the transaction was conservation,³⁰⁵ the information collected by the Banks is fiscal in nature.³⁰⁶ The financial nature of this information is demonstrated by its purpose of regulating those entities and providing services that are commercial, such as processing checks and distributing funds.³⁰⁷ Finally, as the financial information collected has a direct effect on the lending opportunities offered by banks³⁰⁸ due to the Banks' control over minimum deposits and interest rates,³⁰⁹ it is so intimately connected with commerce that it satisfies the commercial or financial in nature requirement of FOIA's exemption four.³¹⁰

2. *The information is not confidential under FOIA because the quality and quantity of information the Banks receive would be unaffected by disclosure*

As regulator and lender of last resort, the Banks require information from banks and bank holding companies.³¹¹ Thus, the *National Parks* test for confidentiality—whether disclosure is likely to impair the flow of future information and whether it would harm the commercial position of the provider—applies.³¹² Because the future stream of information the

304. 309 F.3d 26 (D.C. Cir. 2002).

305. See *id.* at 38–39 (holding that the information sought about the distribution of pygmy owls in exchange for federal dollars was not commercial or financial in nature because its purpose was conservation, rather than profit).

306. Cf. *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978) (declaring that the work of labor unions in “their representation of employees” is commercial in nature).

307. Compare *id.* (expounding that the commercial or financial in nature requirement for exemption four covered, inter alia, contract negotiations and other instrumentalities related to commerce), with *Nat'l Ass'n of Home Builders*, 309 F.3d at 38–39 (refusing to describe information sought for conservation purposes as commercial or financial in nature).

308. As “person” in exemption four includes companies, the fact that the information is collected by the Banks from bank holding companies and banks satisfies the “from a person” requirement of exemption four. 5 U.S.C. § 552(b)(4) (2006).

309. See PURPOSES & FUNCTIONS, *supra* note 1, at 3 (explaining the various methods of control Banks exercise over lending through reserve requirements, contractual clearing balances, and discount window lending).

310. 5 U.S.C. § 552(b)(4); see *Am. Airlines, Inc.*, 588 F.2d at 870 (“‘Commercial’ surely means pertaining or relating to or dealing with commerce.”).

311. 12 U.S.C. § 343 (2006).

312. See *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (holding that confidential material, as determined by impairment of the government's ability to get similar information in the future or the potential for substantial harm to the provider of information, may not be disclosed under FOIA), *aff'd in part, rev'd in part sub nom. Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976); see also *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 247–48 (2d Cir. 2006) (reasoning that it would harm the ability of the Federal Reserve to get information from private banks if those banks knew that information about their clients would be disclosed to the Board, because the Board could be forced to release that

Banks would need access to is required financial data provided to regulate banks or to provide emergency financial liquidity,³¹³ it is unlikely that disclosure would harm the Federal Reserve System's access to that information in the future.

Due to the important services the Banks provide, it is unlikely that the quantity or quality of the information provided by financial firms will deteriorate if FOIA requires disclosure.³¹⁴ For example, the records sought in the *Bloomberg* and *Fox* lawsuits concerned section 13(3) lending.³¹⁵ Public disclosure of this information is not likely to affect the reliability of the data because if a bank overvalues itself, it will not be able to get lending in the future.³¹⁶ As demonstrated by Lehman Brothers, however, companies that the Banks consider overly leveraged run the risk of having the Bank refuse to lend.³¹⁷

Information concerning the financial stability of banks and the collateral offered to secure Bank loans is required by law.³¹⁸ The courts have recognized that legally required disclosure makes it more likely that the government will be able to obtain similar, accurate information in the

information under FOIA); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977) (per curiam) (finding no harm because nearly all of the information sought was already publicly available).

313. See *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878–80 (D.C. Cir. 1992) (en banc) (refining the standard of confidentiality by ruling there is a higher threshold for disclosure when the information is voluntarily supplied to the government, and a lower threshold when that information is required by the government).

314. See Sandy Smith, *Bank of America Posts \$2.2 Billion Loss for Year*, HULIQ.COM, Jan. 20, 2010, <http://www.huliq.com/8738/90658/bank-america-posts-22-billion-loss-year> (noting a dramatic improvement in Merrill Lynch, which was purchased in 2008 following rumors that it was next in line to fail after Lehman Brothers). *But see Instant View: Bank of America Reports Q4 Loss*, FINANCIAL POST, Jan. 19, 2010, <http://www.financialpost.com/news-sectors/story.html?id=2463163> (explaining that Bank of America's yearly loss is due at least in part to the four billion dollars the bank made in TARP repayments). The banking giant would have had only a 192-million-dollar loss without the TARP repayments. *Id.*

315. See *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 266–67 (S.D.N.Y. 2009) (recounting that the Board authorized a New York Federal Reserve Bank loan to JP Morgan Chase for Bear Stearns), *aff'd*, 601 F.3d 143 (2d Cir. 2010); *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 391 (S.D.N.Y. 2009) (seeking records regarding loans made under TALF and other section 13(3) programs), *vacated*, 601 F.3d 158 (2d Cir. 2010).

316. See 12 U.S.C. § 343 (allowing lending only if the bank cannot get lending elsewhere and the circumstances requiring the Federal Reserve loan are “unusual and exigent”).

317. See *id.* (requiring the loan to be secured to the satisfaction of the Bank in addition to “unusual and exigent circumstances,” including no available credit on the private markets); WESSEL, *supra* note 2, at 24 (explaining that the Federal Reserve let Lehman fail because its collateral was “worthless”).

318. See 12 U.S.C. § 343 (“[S]uch notes, drafts, and bills of exchange are indorsed or otherwise secured to the satisfaction of the Federal [R]eserve [B]ank”).

future.³¹⁹ The court in *National Parks* reasoned that because concessioners wanted to continue operating in the parks, they would continue to provide accurate information despite FOIA disclosure.³²⁰ Similarly, it is in the best interest of the banks to provide accurate information to the Banks,³²¹ because the Banks have broad authority to punish private companies that provide inaccurate information,³²² and section 13(3) lending is provided only on a very specific basis.³²³

The Board's argument that the information was confidential commercial information protected by an "explicit understanding" between the Banks and the financial firms³²⁴ because its disclosure would identify borrowers, fails to properly interpret *Buffalo Evening News, Inc. v. Small Business Administration*.³²⁵ In *Buffalo Evening News*, a newspaper sued the Small Business Administration (SBA) for information on the amount borrowed and the status of loans made by the SBA to a region afflicted by a natural disaster.³²⁶ The District Court for the Western District of New York required the SBA to disclose the information because the court decided the financial information did not implicate any of the business' confidential information.³²⁷ Despite the Board's assertion that these FOIA requests are "readily distinguishable"³²⁸ from *Buffalo Evening News* because of the alleged understanding of confidentiality between the Banks and the loan recipients,³²⁹ the identity of the recipient was publicly available prior to the FOIA requests in many cases, such as Bear Stearns.³³⁰ Furthermore, the

319. Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

320. *See id.* (explaining that although annual financial statements and other information may not normally be available for public consumption, the ability of the agency to obtain these records in the future is assured by the alternative of closing the concessioner if it does not comply).

321. *See* 12 U.S.C. § 248(a) (explaining the Board's role as a regulator).

322. *See id.* (empowering the Board to examine the books of depository institutions and impose requirements on them); *id.* § 342 (enabling the Banks to conduct business with other banks only when those banks maintain minimum requirements, such as reserve balances with the regional Bank).

323. *See id.* § 343 (authorizing Banks to lend only in "unusual and exigent circumstances," when the loan is secured to the Bank's satisfaction, and there is a showing that no other credit is available to the ailing financial firm).

324. Defendant Board of Governors of the Federal Reserve System's Reply and Opposition to Plaintiff's Cross Motion for Summary Judgment at 16–17, *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010) [hereinafter Defendant Board of Governors Reply].

325. 666 F. Supp. 467 (W.D.N.Y. 1987).

326. *Id.* at 467–68.

327. *Id.* at 471.

328. Defendant Board of Governors Reply, *supra* note 324, at 16.

329. *Id.* (referring repeatedly to numerous declarations by Board employees indicating that there was an implicit understanding between the Board and those institutions that received lending, and stating that the implicit understanding also extends to confidentiality between the companies and the New York Federal Reserve Bank).

330. Press Release, Bd. of Governors of the Fed. Reserve Sys. (Mar. 14, 2008),

Board's argument fails to address the *National Parks* confidentiality test³³¹ that would oblige the Banks to disclose the information because the loan recipients are required to provide that information to the Bank, thus demonstrating that the information is not confidential³³² despite any implicit understandings between the Banks and financial firms.

3. *The possibility of competitive harm is insufficient to support withholding the information*

The disclosure of historical information provided to the Banks does not provide a sufficient showing of imminent, specified harm to the commercial position of the private party supplying the information, as required to meet the second condition of the *National Parks* confidentiality test.³³³ The agency must show that the private party would suffer imminent, specific harm;³³⁴ mere “embarrassing publicity” is insufficient to prevent disclosure.³³⁵ Aside from vague assertions of possible harm to firms that have borrowed from the Banks, the Board offers no specific arguments about what kind of harm may befall the information providers.³³⁶ FOIA exemptions require the government agency to bear the burden of demonstrating harm when withholding information.³³⁷ In

<http://www.federalreserve.gov/newsevents/press/monetary/20080314a.htm> (stating briefly that the Board unanimously approved the loan to JP Morgan Chase to acquire Bear Stearns).

331. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (outlining how the courts should analyze whether information is confidential and should be withheld under exemption four), *aff'd in part, rev'd in part sub nom. Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

332. *Cf. id.* (explaining that information that is required of private entities by the government agency is not confidential under exemption four because an agency's disclosure of required information under FOIA will not interfere with the government's ability to obtain similar information in the future).

333. *See id.* (holding that information can be withheld under exemption four if disclosure of that information is likely to impair the flow of future information or harm the commercial position of the private party disclosing that information).

334. *See Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (deciding that the “voluminous” reports offered by the health device manufacturing company were enough to prohibit disclosure under FOIA, and requiring more than generalized assertions to satisfy exemption four's confidentiality requirement, while noting that the court does not have to set up an elaborate mathematical formula for determining competitive harm); *Iglesias v. CIA*, 525 F. Supp. 547, 558–59 (D.D.C. 1981) (determining that without more than cursory and generic descriptions of the withheld documents, the court could not determine whether the documents should be withheld).

335. *Pub. Citizen Health Research Grp.*, 704 F.2d at 1291 n.30.

336. *See Defendant Board of Governors Reply*, *supra* note 324, at 18–19 (expressing the opinion that the companies seeking help from the Federal Reserve would be viewed as weak, but providing limited details about what particular financial or competitive harm this would cause).

337. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc) (reasoning that if an agency argues that information is confidential under exemption four because it was voluntarily submitted and would not

response to Bloomberg's FOIA request, the Board argued that disclosing the requested information would result in the public viewing the borrowing institutions as weak, and possibly causing a "run" on the institution.³³⁸

Courts have refused to grant exemptions for broad assertions without any evidence as to why harm would result and a full evidentiary showing of imminent harm.³³⁹ For instance, general descriptions of the document sought and a conclusory assertion that competitive harm is likely to result are insufficient to justify withholding, although the agency does not have to prove actual harm is guaranteed to result.³⁴⁰ Unlike the loans made by the Export-Import Bank of the United States, in which private companies competed internationally for private contracts and dealt with a number of regulatory bodies, the Banks are responsible for dealing only with domestic banks.³⁴¹ Furthermore, the harm the Export-Import cases attempted to prevent by withholding information would have jeopardized specific deals between domestic companies and foreign companies that the American government supported.³⁴² On the other hand, generalized concern, such as a non-specific concern that there might be a bank run, has not been sufficient to withhold information.³⁴³ Therefore, the Board's claims that the disclosure of Bank information could possibly result in the public viewing the firms that participated in the assistance program as weak are insufficient to carry the confidentiality burden prescribed by the courts.³⁴⁴

The Banks will not be able to establish that the disclosure of historical information poses a specific threat to the commercial banks that would warrant withholding the information, as the available data indicates the

usually be disclosed by the private entity, the agency bears the burden of establishing the private entity's customary handling procedures for that information); *Wash. Research Project, Inc. v. Dep't of Health, Educ., & Welfare*, 504 F.2d 238, 244-45 (D.C. Cir. 1974) (holding that the agency failed to demonstrate that the information requested was commercial or financial in nature, and therefore the information was not protected by exemption four).

338. Defendant Board of Governors Reply, *supra* note 324, at 18-19.

339. See *Iglesias*, 525 F. Supp. at 558-59 (describing the minimal evidence presented by the agency and holding that without more, the agency could not withhold the information that it received under the premise that it would cause competitive harm).

340. *Id.*

341. *Stone v. Export-Import Bank of the U.S.*, 552 F.2d 132, 133 (5th Cir. 1977); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 23-24 (D.D.C. 2000).

342. See *Stone*, 552 F.2d at 133-37 (determining that the Soviet Union's Bank of Foreign Trade is a "person" under FOIA after a senate candidate attempted to get information from the Export-Import Bank about a deal between the Bank of America and a bank in the USSR); *Judicial Watch*, 108 F. Supp. 2d at 38 (holding that the Export-Import bank properly withheld all the information except resumes under exemptions four and five).

343. Cf. *Iglesias*, 525 F. Supp. at 558-59 (holding that the agency's general description of the oil reserves and warehouse lease agreements was insufficiently detailed to allow the court to determine if the information was confidential).

344. See *id.* (accentuating the need for more than just general, conclusory statements about competitive harm which might result due to disclosure of information).

funds put the banks in a more advantageous commercial position.³⁴⁵ The records requested from the Banks, like the information requested in *Federal Open Market Committee of the Federal Reserve System v. Merrill*, deal with past events.³⁴⁶ The Supreme Court supported the disclosure of historical information in *Merrill* if the likelihood of harm to the FOMC's ability to control monetary policy by disclosing past information was minimal, and there was no indication that a competitor could use that information to its advantage.³⁴⁷ Similarly, this rationale militates in favor of requiring the Banks to disclose their historical records.³⁴⁸ The generally positive earnings for companies that borrowed from the Bank undercuts the Board's assertions that companies that borrow at the liquidity trough appear weak.³⁴⁹ In instances like the quasi-compulsory Troubled Asset Relief Program (TARP) bailout,³⁵⁰ only very large firms received funding,³⁵¹ which often led to positive financial outcomes, such as a more favorable credit rating for the "too big to fail" firms.³⁵² As the

345. Cf. *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (explaining that even when the government has no interest in maintaining secrecy, the right to confidentiality may still be invoked by the company that provided the information), *aff'd in part, rev'd in part sub nom.* *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

346. See 443 U.S. 340, 347–48 (1979) (noting that the law student plaintiff requested the Domestic Policy Directives of January and February 1975, in March of that year).

347. *Id.* at 363.

348. See *id.* at 346 (allowing for the disclosure of FOMC deliberative data within one to two months after the policy had been instituted).

349. See David Mildeberg, *JPMorgan Chase's Market Value Tops Bank of America (Update2)*, BLOOMBERG, June 4, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1IEBDZG3kFU&refer=home> (highlighting JP Morgan Chase's rise to the most valuable bank by market value over Bank of America less than three months after JP Morgan Chase acquired Bear Stearns with the help of the Federal Reserve); see also Eric Dash, *Profit in 2009 is \$11.7 Billion for JPMorgan*, N.Y. TIMES, Jan. 16, 2010, at B1, available at <http://www.nytimes.com/2010/01/16/business/16morgan.html> (commenting on the surging fourth quarter financial reports from JP Morgan Chase including more than double profits from 2008 and record revenue).

350. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 129, 122 Stat. 3765 (2008); see Elizabeth Hester, *JPMorgan, American Express Will Tap Stock Markets to Repay TARP*, BLOOMBERG, June 2, 2009,

<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=auPg5LveoCvI> (remarking on the steps that JP Morgan Chase and American Express took to repay the TARP loan before it was due and reporting on JP Morgan Chase CEO Jamie Dimon's reference to TARP funds as a financial "scarlet letter"); Erin Nothwehr, *Emergency Economic Stabilization Act of 2008*, UNIV. OF IOWA CTR FOR INT'L FIN. AND DEV., Dec. 2008, <http://www.uiowa.edu/ifdebook/issues/bailouts/eesa.shtml> (summarizing the various provisions of the bailout plan and noting that only firms with "significant operations" in the United States can participate).

351. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 3, 122 Stat. 3765 (2008) (enabling only financial firms that were established before the passage of the act and had "significant operations" in the United States to participate in the bailout).

352. See STERN & FELDMAN, *supra* note 303, at 17–19 (defining the phrase "too big to fail" and detailing some of the implicit benefits of that presumed designation).

authorization for emergency lending under section 13(3) focused on the interconnectedness of Bear Stearns and the other firms that received funding,³⁵³ the benefits of being identified as “too big to fail,” including beneficial credit rating treatment and better interest rates, would likely be a result of being publicly identified as a recipient of Bank funding.³⁵⁴

Another lesson from *Merrill* was the Supreme Court’s refusal to adopt an “effectiveness” test for confidentiality.³⁵⁵ The D.C. Circuit formulated this test in the first *Critical Mass* decision, only to have it vacated en banc.³⁵⁶ The Court in *Merrill*, likewise, refused to allow an agency to declare information confidential solely because the agency believed that disclosure of the information could harm the effectiveness of the agency’s aims.³⁵⁷ Although the Board argues that disclosure of information indicating that certain firms are in distress would jeopardize those banks and the system because such firms would then refuse to borrow,³⁵⁸ if this argument were adopted it would allow agencies to exempt by fiat any information the agency can plausibly argue would result in less effective agency action.³⁵⁹ Multiple courts have rejected this stretching of FOIA as being contrary to the purposes of the statute,³⁶⁰ and the empirical evidence that is available shows that however plausible the claim that releasing information is detrimental to the effectiveness of the Federal Reserve System’s policies, those predictions have not been borne out.³⁶¹

353. See Mar. 14 Minutes, *supra* note 27, at 2 (documenting that the need for the lending was predicated on “the fragile condition of the financial markets” and the possibility of “contagion” to other firms if Bear Stearns fell).

354. See STERN & FELDMAN, *supra* note 303, at 33–37 (illustrating how the “too big to fail” designation often results in a better credit rating, and therefore better interest rates, than other institutions that are not in the same strata).

355. See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 353–354 (1979) (explaining that adopting the “effectiveness” test would give the agency too much power in deciding what information to disclose, in contravention of the purposes of FOIA).

356. See *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc) (affirming the decision in *National Parks* and vacating the opinion in *Critical Mass I* that allowed for an effectiveness test).

357. *Merrill*, 443 U.S. at 353–354.

358. Defendant Board of Governors Reply, *supra* note 324, at 18–19; *cf. id.* at 353 (stating the FOMC’s argument that being required to immediately disclose information would harm its policies).

359. See *id.* at 353–54 (rejecting the argument set forth by the FOMC that would allow the agency to delay disclosure of information that would be routinely discoverable in litigation if the agency determined that releasing the information would reduce the effectiveness of the policy).

360. See, e.g., Pub. Citizen Health Research Grp. v. FDA, 185 F.3d 898, 903–04 (D.C. Cir. 1999) (utilizing *Critical Mass* and *National Parks*); *Critical Mass*, 975 F.2d at 878–79 (overruling *Critical Mass I* and its efficiency test).

361. See *infra* Part III.A.iii (outlining the evidence, including the positive effects of “too big to fail” status and the fact that banks that accepted emergency liquidity lending are becoming more financially stable).

Despite the Board's arguments that FOIA requesters will not be able to demonstrate the requisite showing of harm,³⁶² the available data indicate that the financial system positively responded to public disclosure of Federal Reserve lending activities.³⁶³ The Board in *Bloomberg* assailed the plaintiff's economic expert, claiming that although the expert's testimony was "voluminous,"³⁶⁴ the expert failed to examine whether releasing the withheld information would cause commercial harm to the borrowers.³⁶⁵ The expert did, however, examine the only data available: the effect of disclosure on the few firms that had publicly admitted to accepting Bank funds at the time, and the effect of regulatory action against banks.³⁶⁶ Regulatory warnings against banks are sparked by undercapitalization,³⁶⁷ which is similar to the conditions that prompted Federal Reserve action in 2008.³⁶⁸ More recent experience bolsters the argument that releasing information does not harm borrowers, as the New York Federal Reserve Bank argued that national security concerns protected emails between the Bank and AIG.³⁶⁹ After congressional committee hearings,³⁷⁰ AIG released the emails³⁷¹ with no detectable negative consequences.³⁷²

362. See Defendant Board of Governors Reply, *supra* note 324, at 21–22 (contending that Bloomberg's petition incorrectly relied on information regarding disclosures made by troubled financial institutions to the FDIC and SEC instead of information directly on point).

363. See *id.* at 21–23 (observing that the plaintiff's evidence showing that the disclosure of information was not harmful was based on SEC filings and FDIC reviews of financial institutions); Tim Paradis, *Dow ends above 11,000 for first time in 18 months*, AP, Apr. 12, 2010, available at <http://finance.yahoo.com/news/Dow-ends-above-11000-for-apf-1835028992.html?x=0> (demonstrating that two weeks after the New York Federal Reserve Bank made public disclosures of all the Maiden Lane information and the Dow rose).

364. Defendant Board of Governors Reply, *supra* note 324, at 22.

365. *Id.* at 21–23 (maintaining that Bloomberg's experts only analyzed unrelated information, such as information disclosed by private entities to the SEC and FDIC, and arguing that the fact that the private entities in those cases were not harmed does not prove that the New York Federal Reserve Bank's borrowers would not be harmed).

366. *Id.*

367. See 12 U.S.C. § 1831 (2006) (authorizing bank regulators to act when bank capital falls below a specific level, depending on the bank's assets); CARNELL ET AL., *supra* note 71, at 256–65, 285–92 (illustrating how to calculate the leverage ratio and risk adjusted capital ratio of a bank, and explaining the regulatory consequences for the five different capital classes). Prompt corrective action measures for undercapitalized institutions includes conservatorship and receivership. *Id.* at 291.

368. See Davidoff & Zaring, *supra* note 2, at 476, 491–92, 495 (detailing the capital crunch at Bear Stearns, Lehman Brothers, and AIG, resulting primarily from an inability to raise short-term capital, and leading directly to the business' being unable to continue functioning unless liquidity was secured); see also WESSEL, *supra* note 2, at 153–54 (chronicling the depletion of Bear Stearns' daily operating capital from \$18 billion in liquid cash and securities to less than \$2 billion in twenty-four hours).

369. See Matthew Jaffe, *AIG Bailout, Geithner Blasted Hard on Capitol Hill*, ABC NEWS, Jan. 27, 2010, <http://abcnews.go.com/Business/geithner-paulson-head-hill-defend-aig-bailout/story?id=9669321> (recounting the content of e-mails that were obtained after the New York Federal Reserve Bank was served with a subpoena, which instructed the SEC to keep the AIG files with national security information and to obtain Bank approval before

The disclosures the New York Federal Reserve Bank made in response to *Bloomberg* and *Fox* have not crippled the financial system.³⁷³ The Second Circuit dismissed the conclusory opinions furnished by the Board that disclosure of the loan information would harm private financial firms and the system as a whole and affirmed the disclosure of the Maiden Lane records.³⁷⁴ Eleven days after the Second Circuit's ruling, the New York Federal Reserve Bank released the records sought by Fox News and Bloomberg.³⁷⁵ Despite the unfettered public access to the asset portfolios held in the Maiden Lane special purpose vehicles,³⁷⁶ and detailed financial analysis showing the significant losses in credit ratings these assets have been subjected to during the crisis,³⁷⁷ the financial system and the firms that

disclosing any information relating to AIG); *see also* Hugh Son & Michael J. Moore, *AIG Took Four Tries on Filing as Fed Asked to Withhold Data*, BLOOMBERG BUS. WK., Jan. 21, 2010,

<http://www.businessweek.com/news/2010-01-21/aig-took-four-tries-on-filing-as-fed-asked-to-withhold-data.html> (revealing that AIG attempted to make disclosures regarding the Maiden Lane III facility four times, and the New York Federal Reserve Bank redacted much of it).

370. *See Factors Affecting Efforts to Limit Payments to AIG Counterparties*, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM (Jan. 27, 2010),

http://oversight.house.gov/index.php?option=com_jcalpro&Itemid=49&extmode=view&extid=111 (then click link that says "Click Here").

371. *But see id.* at 4:25–36 (“As one New York Fed staffer put it: ‘Any public disclosure by AIG is still subject to Fed approval.’”).

372. *Id.* at 1:31–1:38 (stating that after AIG was required to divulge information, “nothing happened”).

373. *See* Paradis, *supra* note 363 (demonstrating that two weeks after the New York Federal Reserve Bank made public disclosures of all the Maiden Lane information, the Dow was on the rise); Matt Phillips, *J.P. Morgan Earnings: A Beat!*, WALL ST. J. MARKETBEAT BLOG, (Apr. 14, 2010, 8:27 AM),

<http://blogs.wsj.com/marketbeat/2010/04/14/jp-morgan-earnings-a-beat-2/> (reporting that JP Morgan Chase beat analyst predictions by ten cents a share).

374. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, No. 09-4097-cv (CON), slip. op. at 17–19 (2d Cir. Mar. 19, 2010).

375. Press Release, Fed. Reserve Bank of N.Y., New York Fed Releases Additional Information on Maiden Lane Portfolios (2010),

<http://www.newyorkfed.org/newsevents/news/markets/2010/ma100331.html> [hereinafter NY Fed Maiden Lane Disclosures]; *see also* Scott Lanman, *Fed Releases Details on Bear Stearns, AIG Portfolios*, BLOOMBERG BUS. WK., Mar. 31, 2010, <http://www.businessweek.com/news/2010-03-31/fed-gives-details-on-assets-in-bear-stearns-aig-portfolios.html> (noting that New York Federal Reserve Bank President William Dudley told Congress as recently as March 17 that the Bank would not be disclosing information from the Maiden Lane special purpose vehicles, but posted all the requested information to the Bank website less than two weeks later).

376. FED. RESERVE BANK OF N.Y., Holdings of Maiden Lane LLC as of Jan. 29, 2010, http://www.ny.frb.org/markets/ML_Holdings.pdf; FED. RESERVE BANK OF N.Y., Holdings of Maiden Lane II LLC as of Jan. 29, 2010,

http://www.ny.frb.org/markets/ML_II_Holdings.pdf; FED. RESERVE BANK OF N.Y., Holdings of Maiden Lane III LLC as of Jan. 29, 2010, http://www.ny.frb.org/markets/ML_III_Holdings.pdf.

377. *See, e.g.,* The Aleph Blog, *Thoughts on Maiden Lane III*, <http://alephblog.com/2010/04/04/thoughts-on-maiden-lane-iii/> (Apr. 4, 2010) (analyzing the portfolios held by the Maiden Lane facilities, and noting, among other facts, that the average

received the loans have not suffered as a result of the disclosure.³⁷⁸ The New York Federal Reserve Bank, the most powerful operational arm of the Federal Reserve System, demonstrated confidence in the strength of the market during the current shaky financial climate by releasing information on section 13(3) lending.³⁷⁹ Courts should adhere to their precedent of reluctance to intervene in the financial affairs of the Federal Reserve System and allow the System to determine the best methods to use to deal with the economy.³⁸⁰ The New York Federal Reserve Bank's willingness to provide market information confirms that the information does not pose a threat of harm to the borrowers or the efficiency of the government lending program, and therefore should not be exempted from disclosure.³⁸¹

Finally, the separate cases of Bear Stearns³⁸² and Lehman Brothers³⁸³ illustrate that the Federal Reserve System's decision to lend does not harm, but in fact supports, a financial firm's competitiveness. In March of 2008, the Federal Reserve System intervened in the Bear Stearns collapse, effectively finding a buyer and negotiating an acceptable share price in addition to stripping toxic assets from Bear Stearns' balance sheet.³⁸⁴ While the New York Federal Reserve Bank undertook this action after the beginning of the subprime crisis,³⁸⁵ and the economy as a whole would

rating of the bonds in Maiden Lane are rated B- or lower); Craig Torres et al., *Fed Reveals Bear Stearns Assets Swallowed to Get JPMorgan to Rescue Firm*, BLOOMBERG, Apr. 1, 2010, <http://www.bloomberg.com/news/print/2010-04-01/fed-reveals-bear-stearns-assets-swallowed-to-get-jpmorgan-to-rescue-firm.html> (explicating details of the various Maiden Lane purchases).

378. See Paradis, *supra* note 363 (arguing that the gains in the stock market have occurred in part due to the bailout of Greece and in part because of the recovering markets in the United States).

379. NY Fed Maiden Lane Disclosures, *supra* note 375.

380. Cf. *In re the Bear Stearns Cos. S'holder Litig.*, C.A. No. 3643-VCP, 2008 WL 959992, at *1-2 (Del. Ch. Apr. 9, 2008) (noting that the court will not interfere with the Federal Reserve System's actions to support the nation's financial well-being).

381. Cf. *Huntington Towers, Ltd. v. Franklin Nat'l Bank*, 559 F.2d 863, 868 (2d Cir. 1977) (refusing to examine the actions of the Board and the Office of the Comptroller of the Currency when the agencies put a bank into receivership because it was not the role of the courts to determine the best financial policy for the country).

382. See Burrough, *supra* note 3 (examining the factors leading up to, and the government action in response to, the trouble at Bear Stearns).

383. See WESSEL, *supra* note 2, at 17-20 (sketching the huge losses Lehman suffered prior to collapse, the attempts of the Federal Reserve System to find a buyer, and noting the ultimate bankruptcy of Lehman on Sept. 14, 2008). Wessel also recognizes the day that Lehman Brothers signed bankruptcy papers as the day the "Great Panic" started. *Id.* at 20.

384. See Davidoff & Zaring, *supra* note 2, at 480-83 (disclosing the progression of Bear Stearns' sale price from two dollars a share to ten dollars a share, noting the Board's acquisition of common stock, and explaining that JP Morgan Chase agreed to absorb the first billion dollars in losses on the deal).

385. See Mar. 14 Minutes, *supra* note 27, at 2 (authorizing the New York Federal Reserve Bank to broker the sale of Bear Stearns to JP Morgan Chase in March); Davidoff & Zaring, *supra* note 2, at 471 (observing that the subprime crisis began in 2007, when the

continue to falter,³⁸⁶ the financial response to the action was generally supportive.³⁸⁷ As a result of the successful acquisition of Bear Stearns by JP Morgan Chase, trillions of dollars of derivative contracts did not go into default, Bear Stearns' investors retained some equity, and enough of the toxic debt was removed from the acquired balance sheet to allow JP Morgan Chase to function.³⁸⁸ Conversely, there was no rescue buyer for Lehman Brothers, despite the Federal Reserve System's efforts to find one.³⁸⁹ Not only did the bankruptcy eliminate Lehman Brothers' equity,³⁹⁰ but some see the collapse of Lehman Brothers as the catalyst for the acceleration of the financial meltdown starting in September of 2008.³⁹¹ This case study in the management of the recent crisis demonstrates that the Federal Reserve System's decision to lend gave a competitive advantage to borrowers³⁹² and thus is not confidential under exemption four.

first subprime lender went out of business and others began to fail).

386. See, e.g., Don Lee & Jim Tankersley, *White House Credits Stimulus*, L.A. TIMES, Jan. 13, 2010, at B1, B5, available at <http://articles.latimes.com/2010/jan/13/business/la-fi-jobs13-2010jan13> (stating the unemployment rate and GDP for 2009 did not start growing again until the third quarter of 2009).

387. See, e.g., Paul Krugman, *What Didn't Happen*, N.Y. TIMES, Jan. 17, 2010, at A21, available at <http://www.nytimes.com/2010/01/18/opinion/18krugman.html> (arguing that while the decision to stimulate the economy with government spending programs was the right choice, the stimulus packages did not spend enough).

388. See WESSEL, *supra* note 2, at 264 (explaining the initial positive economic outcomes of the Bear Stearns loan in stabilizing the economy); Davidoff & Zaring, *supra* note 2, at 480–83 (detailing the steps taken to save Bear Stearns and noting that Bear Stearns was only sustained by the emergency lending offered by the Federal Reserve System).

389. See WESSEL, *supra* note 2, at 17–20 (illustrating the Federal Reserve System's fruitless efforts to find a buyer for Lehman Brothers, including an offer to sell the financial firm to the British company, Barclays). While the British banking regulator killed the Barclays acquisition of Lehman Brothers, Barclays later purchased the remnants of Lehman for \$1.75 billion. *Id.* at 20.

390. See *id.* at 20 (stating that Lehman Brothers signed bankruptcy papers in September 2008).

391. See *id.* at 20 (referring to September 14—the day that the Lehman Brothers signed bankruptcy papers—as “a day that will live in financial infamy,” as it “coincided with, or triggered, a devastating intensification of the Great Panic”); Davidoff & Zaring, *supra* note 2, at 493 (specifying that Lehman Brothers sold for the “fire-sale price” of two hundred and fifty million dollars).

392. Compare Davidoff & Zaring, *supra* note 2, at 483, & n.77 (indicating that Bear Stearns still exists as part of JP Morgan Chase, JP Morgan Chase's acquisition bid closed successfully in May, and that the stockholder's claims were dismissed after a failed attempt at an injunction to prevent the acquisition), with WESSEL, *supra* note 2, at 20 (stating that Lehman Brothers was wound up after declaring bankruptcy).

B. FOIA's Exemption Five Offers Only Limited Withholding Options, as the Type of Information Controlled by the Banks is Routinely Discoverable in Civil Litigation

In addition to the not meeting the protective requirements of exemption four, the Banks should release requested historical, factual information under exemption five.³⁹³ Exemption five protects inter- or intra-agency memos that are not routinely discoverable during the course of litigation.³⁹⁴ Courts have included information produced by outside consultants when defining inter- or intra-agency memos.³⁹⁵ The initial issue when applying exemption five is to determine whether the records sought satisfy the definition of inter- or intra-agency memos;³⁹⁶ a number of the relevant records would be classified as either inter-agency memos between the Banks and the Board or intra-agency memos within the Banks.³⁹⁷ Next, the fact that these records are not routinely withheld from litigating parties, as they do not satisfy deliberative process privilege³⁹⁸ or other claims for

393. See *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969) (specifying the purpose for exemption five as the uninhibited exchange of ideas within governmental agencies but warning that this purpose tends to include a desire to over-expand the exemption to withhold information that should be disclosed).

394. 5 U.S.C. § 552(b)(5) (2006); see also *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) (clarifying that exemption five includes privileges in both statute and case law); *FTC v. Grolier, Inc.*, 462 U.S. 19, 26 (1983) (noting that courts do not have to rely solely on the privileges found in Federal Rule of Civil Procedure 26(b)(3) because the exemption allows only for protection of documents that are not routinely discoverable, which may result in more documents being disclosed under FOIA than discovered under Rule 26(b)(3)).

395. See *Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 292 (4th Cir. 2004) (allowing documents prepared by an outside company that had contracted with the agency to be considered a memo for FOIA exemption five analysis); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987) (arguing that records from outside companies may still qualify as inter- or intra- agency memos because government agencies should be encouraged to employ outside expertise when more specialized knowledge is required); see also FOIA GUIDE, *supra* note 28, at 360–65 (explaining the different cases that have defined the contours of what is considered an inter- or intra-agency memo).

396. 5 U.S.C. § 552(b)(5), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007); see also *Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1191–92 (N.D. Cal. 2006) (agreeing with the agency's decision to protect the information provided by an outside auditing firm after finding that the records qualified as an intra-agency memo).

397. Cf. *Ackerly*, 420 F.2d at 1338–39, 1341–42 (exempting “internal working papers” that included opinion or policies and remanding the request for records of phone calls between agencies regarding the dangers of carbon tetrachloride and investigations related to deaths possibly caused by the chemical).

398. See *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (holding that the deliberative process privilege ensures open discussions within and between agencies, prevents premature disclosure of information, and protects the public from confusion); see also *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (defining the privilege as one that “protects [discussions] that are both pre-decisional and deliberative”); *Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 16 (D.D.C. 2000) (refusing to limit the deliberative process privilege strictly to those circumstances where the decision process is still on-going).

confidentiality,³⁹⁹ reinforces the argument against withholding the information. Finally, as premature disclosure is not likely when the Banks have already made a decision,⁴⁰⁰ exemption five does not allow withholding of the records.

1. Bank records satisfy the inter- or intra-agency memoranda threshold

The records generated by the Banks in the course of regulating monetary policy in the United States satisfy the threshold of inter- and intra-agency memos for exemption five when that information is used within the Banks, and between the Banks and the Board or FOMC.⁴⁰¹ For example, the District Court for the District of Columbia in *Physicians Committee for Responsible Medicine v. NIH*⁴⁰² found a record to be an intra-agency memo when the requested information was a loan application that the agency used to evaluate competing claims for a loan.⁴⁰³ Similarly, the Banks use the information provided to them to evaluate companies and federal monetary policy in a similar context to information provided for a competitive loan.⁴⁰⁴ Because these records are used for a public purpose and are shared among agencies to effect that purpose,⁴⁰⁵ they meet the standard of inter- and intra-agency memos.⁴⁰⁶

399. See *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 359–60 (1979) (recognizing a confidential commercial information privilege in exemption five after analyzing the legislative history of FOIA).

400. See *Schell v. U.S. Dep't of Health & Human Servs.*, 843 F.2d 933, 940 (6th Cir. 1988) (stating that a decision is pre-decisional when it is considered by an agency employee prior to actual decisions being made).

401. See 5 U.S.C. § 552(b)(5) (“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”); see also FOIA GUIDE, *supra* note 28, at 360–61 (describing the determination of whether a record qualifies as inter- or intra-agency as the threshold question for application of exemption five).

402. 326 F. Supp. 2d 19 (D.D.C. 2004).

403. See *id.* at 29–30 (holding that information was not protected under exemption five because the information was submitted not as an inter- or intra-agency memo or deliberative process, but as a competitive bid to obtain a grant).

404. See PURPOSES & FUNCTIONS, *supra* note 1, at 6, 10–11 (detailing the types of information that the Banks use).

405. See HACKLEY, *supra* note 26, at 2 (reporting that the Federal Reserve Banks were formed for a public purpose); PURPOSES & FUNCTIONS, *supra* note 1, at 10–11 (illustrating the dependency of the Board on the information supplied by the Banks for financial information regarding the Banks’ different regions, which is then used by the Board and FOMC to formulate monetary policy).

406. See *Ryan v. Dep't of Justice*, 617 F.2d 781, 789–90 (D.C. Cir. 1980) (ruling that inter- and intra-agency memo should be defined based on the plain meaning of the words); see also *U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12, 14 (2001) (articulating that exemption five does not apply to the information shared between the Native American tribe and the Department of the Interior because the tribe obtained and released that information on its own behalf). *Klamath* recognizes that the records of independent consultants can be intra-agency memos when the consultant is working on behalf of the agency. *Id.* at 12.

2. *Deliberative process privilege does not protect historical Bank records*

The deliberative process privilege does not protect the Banks' records that are historical in nature because the Banks have already publicly disclosed their general decision.⁴⁰⁷ The deliberative process privilege protects open policy discussions between agency employees (and those constructively defined as employees for FOIA purposes), prohibits premature disclosure, and avoids confusing the public.⁴⁰⁸ The test is whether the information is pre-decisional and deliberative.⁴⁰⁹

One of the purposes of the deliberative process privilege is to ensure that government agency personnel can participate in open discussion without interference or fear of disclosure.⁴¹⁰ The deliberative process privilege fosters communication between subordinates and their superiors.⁴¹¹ Unlike the suggested policy changes in *Schell v. U.S. Department of Health & Human Services*,⁴¹² which were protected,⁴¹³ the requested information regarding section 13(3) lending is largely factual, including what companies received funding, how much, and on what collateral.⁴¹⁴ Although a request for purely factual information is not per se determinative of whether the deliberative process privilege applies, it plays the largest role in assessing whether disclosing information would impinge on open policy discussion in a way that violates FOIA.⁴¹⁵ While disclosure

407. *See, e.g.*, 12 U.S.C. § 247 (2006) (requiring annual reports to Congress); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 129, 122 Stat. 3765, 3796-97 (2008) (mandating reports to Congress within seven days of emergency lending).

408. *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

409. *See Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (holding that the agency must show that the withheld information was used in the policy-making process in order for the information to be considered part of the deliberative process privilege).

410. *See Russell*, 682 F.2d at 1048 (outlining the reasons for the deliberative process privilege, including protecting the integrity of the decision-making process and allowing for open discussion); *see also Kidd v. Dep't of Justice*, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting records that would disclose the thought process of agency employees when devising agency policy).

411. *Schell v. U.S. Dep't of Health & Human Servs.*, 843 F.2d 933, 939 (6th Cir. 1988); *see also H.R. REP. NO. 89-1497* at 10, *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427-28 (noting that it is difficult to have frank deliberations if those communications will be judged before a final decision is made).

412. 843 F.2d 933 (6th Cir. 1988).

413. *See id.* at 941-42 (ruling that the records sought outlining suggested agency improvements were exactly the type of records that exemption five was enacted to protect).

414. *See Amended and Supplemental Complaint for Declaratory and Injunctive Relief*, *supra* note 274, at 6-7, 9 (asking for the names of loan recipients, and a listing of the collateral posted for the deal the Federal Reserve System brokered between JP Morgan Chase and Bear Stearns).

415. *See EPA v. Mink*, 410 U.S. 73, 89 (1973) (reporting that factual requests are generally not subject to withholding under exemption five of FOIA); *see also Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (explaining that in certain circumstances, even factual inquiries may be proper to withhold under exemption five). *But see Vaughn v. Rosen*, 523 F.2d 1136, 1145

of meeting minutes discussing whether funding should or should not be given to a particular institution might be protected under FOIA,⁴¹⁶ the resultant transactional facts of a deal are not policy or opinion,⁴¹⁷ and are not protected by exemption five.⁴¹⁸

At the very least, the records requested regarding the Banks' lending determinations are not pre-decisional.⁴¹⁹ Only after a Bank has made a loan can others request records about that loan.⁴²⁰ For example, the information sought in *Bloomberg* and *Fox* was not deliberative, as all the records requested were fact-based, and asked for specific names of institutions and specific collateral values, not information on discussions or policy formation between the Banks' employees or others.⁴²¹ The decision to use section 13(3) is disclosed in minutes to Congress by the Board almost immediately,⁴²² unlike the records at issue in *Merrill* that could have been maintained in secrecy until new policies were instituted.⁴²³ Courts have generally held that disclosure of historical fact is not premature; therefore, exemption five does not authorize withholding based on a FOIA request about information regarding loans made in the past.⁴²⁴

(D.C. Cir. 1975) (noting that sometimes the disclosure of policy deliberations would not alter the deliberative process, and therefore are susceptible to disclosure).

416. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975) (refusing to extend exemption five to cover post-decisional records that did not influence policy because the public is especially interested in scrutinizing the rationale behind agency decisions).

417. See *Schell*, 843 F.2d at 940 (citing *Mink*, 410 U.S. at 89) (“[FOIA] would not protect ‘purely factual, investigative’ material.”). But see *Mead Data Cent., Inc.*, 566 F.2d at 256 (ruling that in some instances, even “purely factual material” may qualify for withholding under exemption five).

418. See *Schell*, 843 F.2d at 942–43 (articulating that the records requested from the agency were protected by exemption five because they were part of the on-going “give-and-take” and contained information that was the advice of one party to another, weighing the policy consequences of a number of alternatives).

419. See *Sears, Roebuck & Co.*, 421 U.S. at 152 n.19 (admitting that while distinguishing pre- and post-decisional documents based on whether a final agency determination has been made is not always a clear test, it will generally serve the interests of exemption five because the disclosure of a final agency decision is unlikely to inhibit policy discussion).

420. Cf. *id.* (identifying post-decisional determinations as those that illustrate the decision reached and provide guidance for similar situations in the future).

421. See *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 388 (S.D.N.Y. 2009) (“Fox seeks disclosure of borrower’s names, loan amounts, and pledged collateral for the loans made under these new programs.”), *vacated*, 601 F.3d 158 (2d Cir. 2010); Amended and Supplemental Complaint for Declaratory and Injunctive Relief, *supra* note 274, at 6–7 (requesting factual information about loans made during a certain time period in the past).

422. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 129, 122 Stat. 3765, 3796–97 (2008) (requiring the disclosure of the decision to lend within seven days of lending).

423. See *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 350 (1979) (noting that the FOMC policies prevented disclosure for thirty days).

424. Cf. Amanda Marie Swain, Note, *Trentadue v. Integrity Committee: An Attempt to Reign in the Expansion of the Freedom of Information Act’s 5th Exemption*,

Even under a more expansive definition of pre-decisional, which examines the process the information serves,⁴²⁵ the records withheld by the Banks are not protected.⁴²⁶ Information is not exempt from disclosure every time the agency formulates it prior to a final decision; how the information contributes to the larger agency decision-making process can also render it protected as pre-decisional.⁴²⁷ In *Access Reports v. Department of Justice*,⁴²⁸ the Department of Justice (DOJ) protected a document created by a staff attorney that assessed the practical effect of a proposed FOIA amendment on over two hundred news articles written with information obtained through FOIA.⁴²⁹ The report at issue in *Access Reports* was created by a subordinate for his superiors to use when they were questioned about FOIA's amendments.⁴³⁰ The data requested from the Banks is distinguishable from the information in *Access Reports*, as it can be limited to facts such as the identity of the borrowing institution and the amount loaned, instead of implicating a deliberative process, such as how the Banks select the timing of market intervention or how the Banks set interest rates.⁴³¹

Although collateral valuations are more likely than basic loan facts to qualify as protected under the deliberative process privilege,⁴³² requiring pre-defined instead of ad hoc collateral valuations would not violate FOIA.⁴³³ During the 2008 crisis, the definition for acceptable collateral

61 OKLA. L. REV. 371, 379 (2008) (summarizing the method used by the Court in *Sears, Roebuck & Co.* to determine whether information is post-decisional and therefore disclosable).

425. See *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (utilizing a test that incorporates the role records play in the formation and reformation of agency policy to determine whether the suggested agency changes submitted by staffers should be disclosed).

426. See *id.* at 1196–97 (holding that the agency must show how the memo was pre-decisional either by pinpointing a decision the records pre-dated or showing how those records influence government opinion to qualify for the exemption).

427. See *id.* at 1196 (deciding that deliberative records can include records that were used to form a single decision, as well as records that form the basis for multiple actions or the policy of the agency).

428. *Id.* at 1192.

429. *Id.* at 1193.

430. *Id.*

431. Compare Amended and Supplemental Complaint for Declaratory and Injunctive Relief, *supra* note 274, at 6–7 (requesting solely factual information from an agency under a FOIA request by a news organization), with *Access Reports*, 926 F.2d at 1193 (analyzing the effect amendments to FOIA would have had on published news stories in a memo by a lawyer responding to a request from his employer).

432. Cf. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (defining the primary purpose for exemption five as ensuring the integrity of the policy-making process and including in that process the protection of policy makers).

433. See *id.* at 151–54 (examining the legislative history of FOIA to conclude that decisions that have already been made have no need of exemption five protections and that public policy militates strongly for the release of that information because the public is

under the Banks' lending programs expanded considerably.⁴³⁴ After the Board authorized the loan for Bear Stearns,⁴³⁵ for example, the New York Federal Reserve Bank was encouraged to cobble together the required collateral to make the deal work.⁴³⁶ By approving regulations on the process used to value collateral prior to initiating lending, the Board can prevent post-authorization collateral improvisation by the Banks.⁴³⁷ In addition, as exemption five authorizes disclosure of final policy,⁴³⁸ the use of a standardized collateral valuation process that is formulaic and not policy determinative⁴³⁹ would not qualify for protection under exemption five.⁴⁴⁰

Despite the valuation process' resemblance to a deliberative process, collateral valuations would not be protected under exemption five because a pre-crisis final valuation process determination is more similar to a final rule than to policy-making,⁴⁴¹ and its disclosure would not harm the deliberative process.⁴⁴² Unlike the data the court did not disclose in *Access Reports*, which was prepared in response to questions regarding policy before Congress changed FOIA,⁴⁴³ the collateral valuation process should be disclosed prior to its use so all stakeholders—the Board, the public, and the financial firms—are on even ground.⁴⁴⁴ While the Banks would not

interested in the process used to reach an enacted agency policy).

434. See Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Is Prepared to Expand the Term Asset-Backed Securities Loan (Feb. 10, 2009), available at <http://www.federalreserve.gov/newsevents/press/monetary/20090210b.htm> (approving four new categories of asset backed securities as Term Asset-Backed Lending Facility (TALF) collateral).

435. See 12 U.S.C. § 343 (2006) (delegating authority to determine acceptable collateral to the lending Banks).

436. See WESSEL, *supra* note 2, at 172 (noting that not until March 28, a full fourteen days after the Board's approval of the section 13(3) action, was the collateral for the Bear Stearns deal identified).

437. Cf. 5 U.S.C. § 552(a)(1)(C) (2006) (mandating agencies publish their rules in the Federal Register); *id.* § 552(a)(2) (obliging the agency to disclose other documents and opinions that are not rules upon request).

438. *Id.* § 522(a)(2); see also *Sears, Roebuck & Co.*, 421 U.S. at 151–53 (highlighting a myriad of other cases that uphold the disclosure of final agency determinations).

439. See *Sears, Roebuck & Co.*, 421 U.S. at 150–51 (reasoning that it is human nature to “play[] it safe” before a decision is made if the deliberations will be subject to scrutiny).

440. See *id.* at 150–52 (specifying that exemption five does not protect the information used to formulate an agency decision after the decision is final).

441. See 110 CONG. REC. 17,086 (1964) (recording the original exemption five as applying only to the “consideration and disposition of adjudicatory and rulemaking matters”).

442. See *Sears, Roebuck & Co.*, 421 U.S. at 150–53 (outlining the reasons that the information informing a final agency decision is not protected under exemption five, but pre-decisional deliberations are protected).

443. *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1993 (D.C. Cir. 1991).

444. See Steven C. Carlson & Ernest D. Miller, Comment, *Public Data and Personal Privacy*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 83, 89 (2000) (stating that FOIA ensures fairness, fights corruption, and protects the other rights of citizens).

have to disclose deliberations prior to determining the process used to value collateral,⁴⁴⁵ once that process is finalized, it should be disclosed because it is then like an agency rule.⁴⁴⁶ Furthermore, as the same valuation process will be equally applicable to all borrowers, it is more like the decision in *NLRB v. Sears, Roebuck & Co.*,⁴⁴⁷ because once the valuation process has been decided, the discretion of the agency employee is limited.⁴⁴⁸ As the court noted in *Sears, Roebuck & Co.*, disclosure of employee decisions after policy is adopted will not limit or harm the deliberative process because the agency is required to support its own rules.⁴⁴⁹

3. *The implied confidential commercial information privilege derived from exemption five will not protect the Banks' information*

Courts have recognized, in addition to the deliberative process privilege, that documents may be protected under exemption five by a limited confidential commercial information privilege.⁴⁵⁰ The Supreme Court first recognized this “confidential . . . commercial information” privilege in *Merrill*.⁴⁵¹ Despite the sensitive nature of financial information, records that are historical and factual do not generally qualify for the narrow protection courts have extrapolated from the legislative history of exemption five.⁴⁵²

Historical, factual information held by the Banks is not eligible for withholding under exemption five because it is not “confidential” under this exemption.⁴⁵³ The *Merrill* Court agreed with the FOMC that the

445. *Contra Sears, Roebuck & Co.*, 421 U.S. at 153–54 (ruling that exemption five can never apply to final agency determinations).

446. *See id.* at 153 (noting that Congress created FOIA, in part due to an aversion for “secret [agency] law,” and thus, agency determinations that carry the force of law may not be withheld under exemption five (quoting Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967) (alteration in original))).

447. 421 U.S. 132 (1975).

448. *See id.* at 155 (distinguishing the information sought by Sears from information protected by exemption five because once the General Counsel made the decision not to move forward with a labor complaint, the Regional Director was required to follow that order by the General Counsel).

449. *Id.* at 161.

450. *See id.* at 149 (exempting “documents, and only those documents, normally privileged in the civil discovery context”).

451. *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 356 (1979).

452. *See id.* at 356–59 (reflecting on the case law and legislative history that led to the inclusion of a narrow confidential commercial privilege for contract agreements and other similar negotiations).

453. *Cf. id.* at 361–62 (comparing the Domestic Policy Directives with contract negotiations to determine that the policy directives do come within the scope of information that could be protected as confidential commercial information under exemption five, but noting that even if the information is within that scope, automatic protection does not follow).

protection of Rule 26(c)(7) of the Federal Rules of Civil Procedure, which allows a district court to prevent discovery of a trade secret or other commercial information for “good cause,” was a proper privilege to include in FOIA’s exemption five.⁴⁵⁴ The *Merrill* Court also looked to legislative history, including the hearings before the House and Senate committees to support a narrow protection for confidential commercial information.⁴⁵⁵ The Court restrained its interpretation of the exemption to include only confidential commercial information that the government used in the process of awarding a contract.⁴⁵⁶ Despite this limitation, providing a loan and awarding a contract are sufficiently analogous that this exemption could allow the Banks to withhold information.⁴⁵⁷

The purpose for the limited confidential commercial information exemption is to protect the government’s competitive position or prevent disclosure that would endanger the realization of an agreement.⁴⁵⁸ The plaintiff in *Merrill* was requesting information regarding the ongoing operations of the FOMC, not historical data.⁴⁵⁹ The Court ruled that exemption five protects the government as an “ordinary buyer or seller.”⁴⁶⁰ The Court then upheld the narrow application of confidential commercial information in exemption five in *Merrill* because, it argued, the tactics employed by the FOMC to regulate the market are like a buy-sell contract with a broker.⁴⁶¹ To avoid the concerns of premature disclosure, the information Banks should disclose under FOIA would only be historical in nature, and thus *Merrill* would not preclude this information from disclosure.⁴⁶² The narrow exemption outlined in *Merrill* does not apply to historical information from the Federal Reserve System regarding its section 13(3) power, as the possibility for post-decisional competitive harm due to FOIA disclosure is slight.⁴⁶³ Congress mandates reports within

454. *Id.* at 355–56.

455. *Id.* at 357–59.

456. *Id.* at 360.

457. *See id.* at 361–62 (analogizing the Domestic Policy Directives to a buy-sell order, allowing the policy directives to be considered the type of information that may be protected under the Court’s narrow reading of commercial confidential information under exemption five).

458. *See id.* at 360 (delineating the proper application of the confidential commercial privilege incorporated into exemption five by outlining the reasons for the privilege).

459. *Id.* at 347.

460. *See Gov’t Land Bank v. Gen. Servs. Admin.*, 671 F.2d 663, 665 (1st Cir. 1982) (interpreting the scope of protection under exemption five under *Merrill*).

461. *Merrill*, 443 U.S. at 361.

462. *Cf. id.* at 353–54 (discussing the reasonableness of the FOMC’s regulations that allow it to forgo publishing policy decisions until after they have taken effect).

463. *See Gov’t Land Bank*, 671 F.2d at 665 (explaining that the competitive harm that would result to the government was the same as that of an ordinary market actor if the agency was forced to disclose the records and noting that FOIA was never intended to harm the government’s bargaining position).

seven days of section 13(3) lending, and although the reports lack detail, those reports supply sufficient information to render any information subsequently disclosed under FOIA at most ancillary as a cause of competitive harm.⁴⁶⁴

CONCLUSION

The Banks have operated—and continue to operate—with unprecedented opacity.⁴⁶⁵ The Founders took pains to ensure that the purse strings of the country were controlled by a body of divergent interests;⁴⁶⁶ to allow individuals protected from political upheavals to print money is contrary to this country’s basic principles.⁴⁶⁷ The veil of uncertainty under which the Banks continue to operate has actually put some deals, like the Mitsubishi take-over, at risk because investors have watched the government-like Federal Reserve System act seemingly at random.⁴⁶⁸ It was only the Board’s promise to abide by a specific course of action that saved the deal, demonstrating the value of transparency if only on the micro-economic level.⁴⁶⁹

To condone, by inaction, the ability of a government agency to withhold information about its core purpose—directing the monetary policy of the United States—by outsourcing the work, while maintaining the power to

464. See *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (reasoning that because Hercules’ contract acquisition process was not competitive, Hercules failed to show, in this reverse FOIA case, that the release of information regarding the contract would cause substantial competitive injury); *Gulf & W. Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1980) (requiring substantial competitive harm, as demonstrated by actual competition between two companies or a company and an agency and a “likelihood of substantial competitive injury”).

465. Compare *Monetary Policy and the State of the Economy, Part I: Hearing Before the H. Comm. on Financial Servs.*, 111th Cong. 63–66 (2009)(statement of Ben S. Bernanke, Chairman, Board of Governors of the Federal Reserve System) (mentioning briefly the effect of the various lending programs on the economy and steps the Board is taking to increase transparency), with Burrough, *supra* note 3 (reporting the fall of Bear Stearns and the steps taken by the Federal Reserve System in detail).

466. See THE FEDERALIST NO. 51 (James Madison) (delineating the separation of powers between branches and between the two houses of Congress and discussing the divergent views of the different states).

467. Cf. FOIA GUIDE, *supra* note 28, at 1–2 (citing various sources indicating the importance of FOIA in maintaining an informed citizenry and functioning republican form of government).

468. See Davidoff & Zaring, *supra* note 2, at 512 (promising Mitsubishi’s purchase of interest in Morgan Stanley would not be diluted if the Federal Reserve System had to act).

469. See *id.* (illustrating that after the bailout of Bear Stearns and AIG and the surrender of Lehman Brothers, the investors at Mitsubishi invoked the materially adverse clause in the take-over contract because they were unsure whether their share of the investment would be altered without consent in the event that the Federal Reserve System had to take emergency measures with the company).

control policy, undermines the purpose of a free government.⁴⁷⁰ Agencies arose after the Great Depression, at least in part, to manage the financial struggles facing Americans,⁴⁷¹ and FOIA was created to ensure that the broad powers delegated to those agencies, whose employees were insulated from the political process, were not abused.⁴⁷² The same logic dictates that the Banks should be considered agencies, as the Banks are also products of financial difficulties and staffed with employees largely removed from the political branches.⁴⁷³

As agencies of the government, the Banks would still have access to the limited exemptions under FOIA.⁴⁷⁴ To benefit from the exemptions, the Banks would be required to show specific, imminent harm when the information sought is factual and historical in nature.⁴⁷⁵ Otherwise, disclosure of this information would not implicate either exemption four or exemption five.⁴⁷⁶ The structure of FOIA has maintained the effectiveness of government while ensuring maximum disclosure for nearly fifty years;⁴⁷⁷ the Banks and the public would benefit from its extension.

470. See Memorandum of Points and Authorities in Support of the Defendant's Motion for Summary Judgment at 14–15, *supra* note 166 (arguing that the information at the New York Federal Reserve Bank should not be disclosed because they are not agency records under FOIA).

471. See Inaugural Address, 2 PUB. PAPERS 11, 13 (March 4, 1933) (“Our greatest primary task is to put people to work. . . . It can be accomplished in part by direct recruiting by the Government itself, treating the task as we would treat the emergency of a war, but at the same time, through this employment, accomplishing greatly needed projects to stimulate and reorganize the use of our natural resources.”); see also Associated Press, *Some New Deal Agencies May Be Made Permanent*, THE PALM BEACH POST, Dec. 28, 1935, at 1 (discussing the requests of New Deal agency heads, which were created to fight the economic downturn, for Congress to renew the agencies' authorization).

472. See FOIA GUIDE, *supra* note 28, at 4 (explaining how FOIA arose from the APA, which had been created to promote disclosure after the rise of agencies in the 1930s).

473. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (illustrating that the withholding provisions of FOIA are discretionary, not mandatory); see also Memorandum from the Attorney General, *supra* note 89.

474. See 5 U.S.C. § 552(b) (2006) (listing the nine specific FOIA exemptions).

475. See *supra* Part III (discussing the purposes for FOIA's exemptions and concluding that in most circumstances the information requested from the agency does not qualify as confidential and thus should be disclosed under FOIA).

476. 5 U.S.C. § 552(b)(4),(5).

477. 5 U.S.C. § 552, amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007); see also President Lyndon B. Johnson, FOIA Signing Statement, *supra* note 38 (noting the historic implications of the liberal disclosure provisions of FOIA).