

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND)
ETHICS IN WASHINGTON)
1400 Eye Street, N.W., Suite 450)
Washington, D.C. 20005)

Plaintiff,)

v.)

Civil Action No.

BOARD OF GOVERNORS OF THE)
FEDERAL RESERVE SYSTEM)
20th Street and Constitution Avenue, N.W.)
Washington, D.C. 20551)

Defendant.)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, challenging the final determination of the Board of Governors of the Federal Reserve System (“the Board”) in response to the request of plaintiff for disclosure of records concerning those entities to which the Board has provided loans and/or financial assistance under the Federal Reserve Act or any other authority of the Board.

2. This case seeks declaratory relief that the Board is in violation of the FOIA, 5 U.S.C. §§ 552(a) and (b), for failing to conduct an adequate search and wrongfully withholding responsive records, and injunctive relief ordering the Board to conduct an adequate search and provide the requested records in their entirety.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the Board pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction

over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

4. Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) is a nonprofit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials. CREW seeks to empower citizens to have an influential voice in government decisions and in the governmental decision-making process through the dissemination of information about public officials, federal agencies and entities, and their actions. To advance its mission, CREW uses a combination of research, litigation, and advocacy. As part of its research, CREW uses government records made available to it under the FOIA.

5. CREW has invested considerable organizational resources in pushing the U.S. government to take issues of ethics and responsibility seriously. CREW monitors closely the laws and rules applicable to government agencies and government officials.

6. CREW is harmed by the Board’s failure to conduct an adequate search in response to CREW’s FOIA request and its wrongful withholding of records because those failures hamper CREW’s ability to satisfy the compelling public need for full, accurate, and current information on how the Board has distributed more than \$2 trillion to private financial institutions as part of its expanded lending programs. Absent this critical information, CREW cannot advance its mission of educating the public to ensure the public continues to have a vital voice in

government and, in particular, in how taxpayer funds are allotted in this time of great financial crisis.

7. Defendant Board is an agency within the meaning of 5 U.S.C. § 552(f) and 5 U.S.C. § 702. The Board is the federal agency with possession and control of the requested records and is responsible for fulfilling plaintiff's FOIA request.

STATUTORY FRAMEWORK

The Freedom of Information Act

8. The FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

9. An agency must respond to a party making a FOIA request within 20 working days, notifying that party of at least the agency's determination whether or not to fulfill the request and of the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

10. An agency must conduct a search for responsive records, which the FOIA defines as "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." 5 U.S.C. § 552(a)(3)(D).

11. An agency must produce all responsive records except to the extent they, or any portion thereof, fall into one of nine specified exemptions. 5 U.S.C. § 552(b).

12. An agency must respond to a FOIA appeal within 20 working days, notifying the appealing party of the agency's determination to either release the withheld records or uphold the denial. 5 U.S.C. § 552(a)(6)(A)(ii).

13. An agency's denial of an administrative appeal exhausts a requester's administrative remedies. Taylor v. Appleton, 30 F.3d 1365, 1368 (11th Cir. 1994); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61-62 (D.C. Cir. 1990).

14. This Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

FACTS UNDERLYING PLAINTIFF'S PRAYER FOR RELIEF

15. During the past two years the Board has taken a number of steps in response to the ongoing financial and economic crisis. These steps include the creation of a number of new lending facilities, including the Primary Dealer Credit Facility ("PDCF"), the Term Asset-Backed Securities Loan Facility ("TALF"), the Term Auction Facility ("TAF"), the Term Securities Lending Facility ("TSLF"), the Commercial Paper Funding Facility ("CPFF"), and the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility ("AMLF"). The Board also has made changes to the Discount Window ("DW") lending.

16. These actions were designed to enhance the stability of the financial system, increase the willingness of financial institutions to extend credit, and ease conditions in inter-bank lending markets.

17. According to the Board, providing short-term credit to financial institutions through these measures exposes the Board to minimal credit risk, particularly because the loans the Board makes are short-term, over-collateralized, and made with recourse to the borrowing entity. Private institutions seeking to use the Board's lending facilities must post collateral to the Board in exchange for the loan of government funds.

18. By letter dated February 4, 2009, Sen. Bernard Sanders (I-VT) requested that Board Chairman Ben S. Bernanke provide him with information about the trillions of dollars of loans and other assistance the Board has provided financial institutions and other entities. The requested information includes the identities of the businesses, individuals, or entities to which the Board has provided assistance over the last two years; the type of assistance provided; the value or amount of that assistance; the terms of any expected repayment; and the specific rationale for providing the assistance. As Sen. Sanders noted, “Given the size of these commitments it is incomprehensible that the American people have not received specific details about them.”

19. During testimony before the Senate Budget Committee on March 3, 2009, Chairman Bernanke refused to identify the financial institutions that have received taxpayer-backed loans and other financial assistance from the Board, claiming that revealing such information would be “counterproductive.”

20. On July 31, 2009, a group of 11 senators wrote another letter to Chairman Bernanke requesting the names of financial institutions that received assistance from the Board and the amount each received.

21. To date the Board has not provided Sen. Sanders or the other 11 senators referred to in paragraphs 18 and 20 with the information they requested.

22. By contrast, the Treasury Department has identified the banks and other financial institutions that have received bailout funds from Treasury. For example, Treasury publishes on its website the names of all the entities that have received Trouble Asset Relief Program

(“TARP”) assistance, how much each entity received, and when these entities paid back the assistance.

23. In addition, the American Recovery and Reinvestment Act of 2009 (“ARRA”) requires recipients of recovery funds to submit quarterly reports detailing the funds received and how they were spent and requires each agency to post these reports on-line within 30 days of their receipt. ARRA also establishes the Recovery Accountability and Transparency Board and requires that Board to post reports on-line detailing potential management and funding problems.

24. In May 2009, the Board made public the results of the Supervisory Capital Assessment Program (“SCAP”), the so-called “stress tests.” The tests were designed to determine whether the nation’s largest banks were sufficiently capitalized to weather an economic downturn steeper than projected and emerge with the continued ability to lend money. The published results include detailed estimates of potential losses at specified banks, and revealed other vulnerabilities individual banks faced, such as the percentage of credit card default specified banks could experience under a worst-case scenario.

25. The Board explained the decision to publish the test findings “stemmed from the belief that greater clarity around the SCAP process and findings will make the exercise more effective at reducing uncertainty and restoring confidence in our financial institutions.”

Plaintiff’s FOIA Request and the Board’s Response

26. On August 31, 2009, plaintiff sent a FOIA request by facsimile to defendant Board seeking records, regardless of format and including electronic records and information, identifying each business, individual, or entity to which the Board has provided loans and/or other financial assistance from March 3, 2009 to the present under the third undesignated section

13 of the Federal Reserve Act, 12 U.S.C. § 343, or any other authority of the Board, including the DW and the TAF. For each recipient of such financial assistance CREW requested: (1) the type of financial assistance provided; (2) the value or amount of the financial assistance provided; (3) the date on which the assistance was provided; (4) the specific terms of any expected repayment, including the repayment time period, interest rates and charges, collateral, and limitations on executive compensation and dividends; (5) the rationale for providing each instance of financial assistance; (6) all forms and other records submitted by the entities as part of the application for assistance; (7) all receipts and other records given to the entities as part of the application for assistance; and (8) the Federal Reserve Bank (“FRB”) district from which each instance of financial assistance originated. CREW also requested all databases and spreadsheets that summarize the loans and/or financial assistance. CREW further requested all daily reports on the DW, TAF, and other special facilities referenced in the Board’s response to CREW’s earlier FOIA request for similar information.

27. By letter dated September 29, 2009, the Board asserted it conducted a search of Board records for the identities of borrowers, the amount borrowed, and the origination date and days to maturity for each loan, and located more than 64 linear inches of records. The Board withheld all of these records, which the Board described as: (1) reports from each business day from August 20, 2007 to August 31, 2009 with information on DW lending, the TAF, and other special facilities in operation during that period; (2) daily activity reports on the PDCF, CPFF, and AMLF; (3) weekly reports on the CPFF; (4) two daily activity reports on the TSLF; (5) select reports assessing results of TAF auctions; (6) monthly subscription reports on the TALF; (7) portions of weekly market metrics chart packed on the lending facilities; (8) weekly primary

dealer tri-party collateral reports; (9) four email messages with limited information on participants in special purpose vehicles established as part of the MMIFF; (10) records on Maiden Lane I, II, and III that include CUSIP-level details on specific securities used as collateral for specific borrowings; and (11) select records on TALF and AMLF that include issuer-specific details.

28. The Board withheld these responsive records under 5 U.S.C. §§ 552(b)(4) (“Exemption 4”) and (b)(5) (“Exemption 5”).

29. According to the Board, financial institutions “may be extremely concerned about the stigma of borrowing” at the discount window and thus may avoid borrowing “at virtually any cost” if they believe the fact of their borrowing would be made public. As a result, the Board argues, keeping information secret about individual transactions is essential to the utilization and functioning of the discount window.

30. The Board also contended, with no further explanation, that “[c]onfidentiality of these data also protects borrowers against substantial commercial or financial harm.”

31. The Board further asserted it “searched Board records” for records responsive to several categories of the request. The Board did not provide any information about those searches, including which records it searched or the search terms it used. Nor did the Board specify whether or not it searched Board records held by the individual FRBs.

CREW’s Administrative Appeal and the Board’s Response

32. CREW timely filed an administrative appeal of the Board’s initial determination on October 9, 2009, based on the Board’s improper withholding of responsive records under FOIA Exemptions 4 and 5, and on the Board’s failure to conduct an adequate search.

33. As CREW explained in its appeal, Exemption 4 does not apply to information the Board received from the FRBs because they are agencies and not persons. Exemption 4 only authorizes withholding of information obtained from a person. The Board maintained in its initial determination that it merely accesses or receives select data from the FRBs, which are, as a matter of law, agencies and not persons. See 5 U.S.C. § 551(2); Lee Constr. Co. v. Fed. Reserve Bank of Richmond, 558 F. Supp. 165, 179 (D. Md. 1982) (holding an FRB is an agency under the APA).

34. CREW further explained disclosure would not impair the effectiveness of the Board's programs because the Board's claims are based on speculation and directly contradicted by other federal assistance programs established to relieve the financial crisis. The Board's wholly speculative claims of harm cannot sustain an Exemption 4 claim. Moreover, the Board's claims are contradicted by programs such as TARP, where the federal government has disclosed the kind of information CREW seeks without impairing the program's effectiveness.

35. CREW also noted in its appeal the Board failed to articulate how disclosure would cause substantial competitive harm to the recipients of loans and/or assistance, relying instead on conclusory and generalized allegations of harm. Exemption 4 only protects against harm flowing from the affirmative use of proprietary information by competitors. As CREW explained, the Board failed to demonstrate how competitors of the recipients of assistance would affirmatively use the information to cause harm. Furthermore, the Board's claim of harm from the stigma of being identified publicly as a recipient of financial assistance is factually wrong.

36. CREW also explained the public's interest in disclosure outweighs any alleged competitive harm or impairment of program effectiveness. The requested information will shed

light on the processes the Board uses in determining those financial institutions that receive loans and other forms of financial assistance from the Board and whether these obligations are being made prudently and in the best interests of the American taxpayers. These interests go to the heart of why the FOIA was enacted and outweigh any alleged harm from disclosure.

37. CREW also explained the Board's failure to identify any civil discovery privilege that applies to the withheld records fails to satisfy its burden under Exemption 5.

38. CREW also appealed the Board's failure to conduct an adequate search based on its failure to indicate whether the Board searched Board records in the possession of the FRBs.

39. On November 3, 2009, the Board denied CREW's administrative appeal and affirmed its initial determination.

40. With regard to Exemption 4, the Board stated disclosure "likely would cause substantial competitive harm to the financial institutions that obtained the loans," and "would also impair the Board's ability to perform important statutory responsibilities."

41. The Board also affirmed its initial decision to withhold records under Exemption 5, asserting for the first time that the privilege recognized in FOMC v. Merrill, 443 U.S. 340 (1979), applies to the withheld records.

42. With regard to the adequacy of its search, the Board contended it did not search Board records in the possession of the FRBs because they were not reasonably likely to contain information of the kind requested.

43. CREW has now exhausted its administrative remedies.

PLAINTIFF'S CLAIMS FOR RELIEF

CLAIM ONE

(Failure to Conduct an Adequate Search)

44. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

45. Plaintiff submitted a request that reasonably described the records sought and was made in accordance with the Board's published rules.

46. In response, the Board failed to conduct a search reasonably calculated to uncover all responsive agency records.

47. Therefore, the Board violated FOIA's mandate to search for responsive records. 5 U.S.C. §552(a)(3)(D).

48. Plaintiff is entitled to injunctive and declaratory relief with respect to the search for the requested records.

CLAIM TWO

(Wrongful Withholding of Non-Exempt Records)

49. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

50. Plaintiff properly asked for records within the custody and control of the Board.

51. The Board wrongfully relied on Exemption 4 to withhold responsive agency records.

52. The Board wrongfully relied on Exemption 5 to withhold responsive agency records.

53. Therefore, the Board violated FOIA's mandate that an agency must produce all responsive records except to the extent they, or any portion thereof, fall into one of nine specified exemptions. 5 U.S.C. § 552(b).

54. Plaintiff is entitled to injunctive and declaratory relief ordering the disclosure of all requested records.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

- (1) Issue a declaration that plaintiff is entitled to an adequate search of all the Board's records, including the Board's records in the possession of the FRBs;
- (2) Issue a declaration that plaintiff is entitled to disclosure of the requested records and to have make copies made available to it by the Board;
- (3) Order the Board to conduct an adequate search of all the Board's records, including the Board's records in the possession of the FRBs;
- (4) Order the Board upon completion of such an adequate search to disclose the requested records and make copies available to plaintiff;
- (5) Award plaintiff reasonable attorneys' fees and litigation costs in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (6) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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