UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURENCE M. BALL, Plaintiff, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Defendant.	Civil Action No. 13-cv-0603 Judge Colleen Kollar-Kotelly

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff Laurence M. Ball hereby moves for summary judgment in this case brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, on the ground that there is no genuine issue of disputed material fact and that plaintiff is entitled to judgment as a matter of law. Defendant Board of Governors of the Federal Reserve System (Board) has not demonstrated that the withheld records are exempt from disclosure under 5 U.S.C. § 552(b)(4), (5), and (8). Accordingly, judgment should be entered for plaintiff.

In support of this motion and in opposition to defendant's motion for summary judgment, plaintiff submits the accompanying Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, Plaintiff's Statement of Genuine Issues and Response to Defendant's Statement of Material Facts Not in Dispute, Plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue, the Declaration of Jehan A. Patterson and exhibits annexed thereto,

the Declaration of Laurence M. Ball and exhibit annexed thereto, and a proposed order. Plaintiff also relies on those portions of defendant's declarations as cited herein.

Respectfully submitted,

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Dated: October 15, 2013

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS, AND RULES

MISCELLANEOUS

INTRODUCTION

In this Freedom of Information Act (FOIA) case, Professor Laurence M. Ball seeks two legal memoranda setting forth the justifications of the Board of Governors of the Federal Reserve System (the Board) for its 2008 authorizations for the Federal Reserve Bank of New York (FRBNY) to extend tens of billions of dollars in emergency loans to rescue Bear Stearns & Co. and American International Group (AIG) from financial collapse. Professor Ball also seeks the listing and valuation of assets posted as collateral for each loan. Economists, including Professor Ball, consider the Board's rescues of these institutions to be among the most momentous, and debated, economic policy decisions since World War II. Indeed, the statutory authority on which the Board relied to approve these loans had not been exercised since the 1930s. Yet the Board has refused to make its justification for these loans, or the collateral posted, publicly available, so it is impossible for the public to evaluate whether or not the Board acted properly to avoid another Great Depression and to debate how sensible laws or policies can be developed to guide the Board's actions in the next financial crisis.

The Board claims that the memoranda are exempt pursuant to the deliberative process and attorney-client privileges of FOIA Exemption 5 and that the collateral listings are exempt as materials related to bank examination reports under FOIA Exemption 8. In addition, the Board claims that certain pages within the AIG memorandum are protected from disclosure because they constitute confidential commercial or financial information under Exemption 4. The Board's exemption claims are meritless. With regard to the memoranda, the deliberative process privilege does not apply to agency records that have been adopted effectively as the agency's working law. Here, Board officials have made public statements affirming that these loans satisfied the criteria set forth in Section 13(3) of the Federal Reserve Act, and the Board's

General Counsel testified that the memoranda should be accorded deference as the statutory interpretations of an "expert agency." Shielding these memoranda from disclosure, then, would result in a body of secret law that has dictated past Board actions and may guide future regulatory responses. The Board's alternative argument that the Bear Stearns memorandum is subject to the attorney-client privilege fails because the Board has not demonstrated that any confidential information contained in the document concerns the agency.

With regard to the collateral lists, for the Board to prevail on its withholding, the Court would have to hold that the FRBNY is a financial institution within the meaning of Exemption 8. That position cannot be reconciled with the exemption's plain meaning, statutory objectives, or the practical and economic distinctions between Federal Reserve Banks and conventional financial institutions, including the types of entities that have been recognized as financial institutions by courts in FOIA cases.

Finally, the Board's claim that part of the AIG memorandum is exempt under Exemption 4 fails for two reasons. First, the information concerning AIG was generated within the agency as part of its decision to authorize the loans and thus was not obtained from a person, as required for a document to be covered by Exemption 4. Second, because the Board erroneously asserts that the information was provided voluntarily, it failed entirely to address its burden for withholding mandatory information under *National Parks & Conservancy Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The Board cannot meet that burden because disclosure is neither likely to impair the Board's ability to obtain necessary information in the future from prospective loan applicants nor likely to cause substantial competitive harm to AIG, as the withheld information was publicly disclosed in AIG's regulatory filings and bears little resemblance to AIG's competitive position today. Moreover, even if the information had been provided

voluntarily, the Board has not produced any credible evidence that it is the sort of information that would not customarily be disclosed to the public by the submitter.

The Court should deny the Board's motion for summary judgment, grant Professor Ball's motion for summary judgment, and order the disclosure of the requested records.[1] Further, because the Board failed to search the FRBNY's records in response to the FOIA request, the Court should order the Board to conduct an adequate search for all responsive records.

BACKGROUND

I. The Federal Reserve System

The nation's Federal Reserve System is comprised of the Board and twelve regional Federal Reserve Banks.[2] Together, they exercise regulatory authority over certain financial institutions, develop and implement monetary policy, and act as banker to depository institutions and to the federal government. Ball Declaration ¶ 12. Both national and state chartered banks become members of the Federal Reserve System by purchasing stock in their regional Federal Reserve Banks. 12 U.S.C. §§ 222, 321.

The Federal Reserve Banks play special roles within the Federal Reserve System to promote the policy objectives and central banking functions of the Board. Ball Decl. ¶ 13. For example, the presidents of the Federal Reserve Banks serve, with the Governors of the Board, on the Federal Open Market Committee (FOMC), which develops the nation's monetary policy. *Id.* The monetary policy serves as the vehicle to advance the Federal Reserve System's objectives of price stability, maximum employment, and stability of the financial system. *Id.*; *see also* 12

[1] Professor Ball does not challenge the Board's application of Exemption 8 to portions of Document 2.

[2] Board of Governors of the Federal Reserve System, *How is the Federal Reserve System structured?*, http://www.federalreserve.gov/faqs/about_12593.htm.

U.S.C. § 225a. The FRBNY, alone among the regional banks, implements FOMC policies through open-market operations comprised of the purchases and sales of government and agency securities, which directly control the monetary base (the sum of currency in circulation and reserves of depository institutions). Ball Decl. ¶ 13. By manipulating the monetary base, the FOMC influences interest rates and the level of lending by commercial banks. *Id.* Through these channels, the FOMC affects the levels of output, unemployment, and inflation in the economy. *Id.* Federal Reserve Banks also supervise and regulate member banks—in part by conducting bank examinations—issue and retire currency, and purchase and sell foreign currency as agents for the United States Department of Treasury. *Id.* ¶ 14.

II. The Federal Reserve's Section 13(3) Authority

In 1932, during the Great Depression, Congress amended the Federal Reserve Act, 12 U.S.C. § 221 *et seq.* to add paragraph 3 to Section 13 to allow the Board to authorize Federal Reserve banks to extend emergency loans to "any individual, partnership, or corporation" in "unusual or exigent circumstances."[3] In the following four years, the nation's twelve Federal Reserve banks made approximately 123 loans totaling $1.5 million pursuant to this new statutory authority.[4] After this initial use, the Federal Reserve System did not lend again under Section 13(3) for over 70 years. Patterson Decl. ¶ 2 & Ex. A at 3. At the time of the 2008 financial crisis, Section 13(3) provided, in relevant part:

> In unusual or exigent circumstances, the Board of Governors of the Federal Reserve System, … may authorize any Federal Reserve bank, during such periods as the said board may determine, … to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange when such notes, drafts, and bills of exchange are indorsed or otherwise secured to the satisfaction of the Federal

[3] David Fettig, *The History of a Powerful Paragraph*, The Region, June 1, 2008, http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3485.

[4] *Id.*

> Reserve bank; Provided, That … the Federal Reserve bank shall obtain evidence that such individual, partnership, or corporation is unable to secure adequate credit accommodations from other banking institutions.

12 U.S.C. § 343 (2008).[5]

On March 16, 2008, the Board invoked Section 13(3) to authorize a $29 billion loan by the FRBNY to a limited liability company, Maiden Lane LLC, that the FRBNY established to acquire approximately $30 billion worth of troubled assets from Bear Stearns, a large investment bank and brokerage firm.[6] On September 16, 2008, acting pursuant to Section 13(3), the Board authorized the FRBNY to extend a loan of up to $85 billion to AIG, a large insurance company, through a revolving credit facility that was secured by "substantially all" of AIG's assets. Roseman Decl. ¶ 10.

III. The Board's Public Statements About Exercising Its Section 13(3) Authority

Board officials made a number of public statements regarding the Board's authorization of emergency credit to rescue Bear Stearns and AIG, among other financial institutions, under Section 13(3). On the same day it authorized the AIG loan, the Board issued a press release in which it stated that it had "determined, in current circumstances, [that] a disorderly failure of AIG could add to already significant levels of financial market fragility and lead to substantially higher borrowing costs, reduced household wealth, and materially weaker economic performance." Patterson Decl. ¶ 3 & Ex. B. Board Vice Chairman Donald L. Kohn echoed these sentiments in testimony before the Senate Committee on Banking, Housing, and Urban Affairs,

[5] Congress subsequently amended Section 13(3) as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1101(a), 124 Stat. 1376, 2113 (2010).

[6] Board of Governors of the Federal Reserve System, *Bear Stearns, JPMorgan Chase, and Maiden Lane LLC,* http://www.federalreserve.gov/newsevents/reform_bearstearns.htm. JPMorgan Chase Bank, N.A. (JPMorgan) furnished a $1 billion loan to Maiden Lane that was subordinate to the FRBNY's $29 billion loan. *Id.* Maiden Lane acquired these assets to facilitate JPMorgan's merger with Bear Stearns, which faced imminent bankruptcy. *Id.*

stating, "[T]he prospect of AIG's disorderly failure posed considerable systemic risks … as a consequence of its significant and wide-ranging operations. Such a failure would also have further undermined business and household confidence …." *Id.* ¶ 4 & Ex. C at 2. In testimony to the House Committee on Financial Services in February 2009, Board Chairman Bernanke described the Board's authorization of these loans to "stabilize systemically critical financial institutions" as "essential to protect the financial system as a whole." *Id.* ¶ 2 & Ex. A at 3. According to a report to Congress by the Board about the Maiden Lane loan, "[t]he sudden imminence of insolvency for Bear Stearns, the large presence of Bear Stearns in several important financial markets … and the potential for contagion to similarly situated firms … if Bear Stearns were suddenly unable to meet its obligations to counterparties" supported the Board's determination "that unusual and exigent circumstances existed" to justify the extension of emergency credit pursuant to Section 13(3). *Id.* ¶ 5 & Ex. D at 2-3.

In July 2010 testimony to the Financial Crisis Inquiry Commission (FCIC), the Board's General Counsel, Scott Alvarez, specifically discussed legal memoranda prepared in connection with lending programs authorized pursuant to the Board's Section 13(3) authority, including the memoranda requested by Professor Ball.[7] During his testimony, he suggested that the memoranda should receive deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> Q: Would it be the case that insofar as these kinds of memoranda and decisions interpret what are admittedly relatively vague terms of [Section] 13(3), do you guys regard that as worthy of *Chevron* deference?
>
> A: Absolutely. Now, even I will admit that *Chevron* deference is strongest when there's a rulemaking involved, and this wasn't a rulemaking, but we are an expert

[7] *See* Caperton Decl. ¶ 9 (explaining that, because he was present at Alvarez's testimony before the FCIC, he "was familiar with these two memos … and located what I believed to be the correct documents").

> agency interpreting our own statute and we have a long history in these interpretations, so I think we would get some deference.

Patterson Decl. ¶¶ 6-7.

IV. Plaintiff's FOIA Request

Professor Ball is an Economics Professor at Johns Hopkins University whose research interests include unemployment, inflation, and fiscal and monetary policy. Ball Decl. ¶¶ 2, 5. Professor Ball is researching the Board's decision to rescue financial institutions such as Bear Stearns and AIG but not to rescue Lehman Brothers from financial collapse in 2008. *Id.* ¶ 8. Professor Ball seeks to determine the reasons for the Board's actions, particularly its different treatment of AIG, Bear Stearns, and Lehman Brothers. *Id.* The Board has asserted that the loans to AIG and Bear Stearns were legal under Section 13(3) but that it determined that a loan to Lehman Brothers would have been illegal. *Id.* The lack of a detailed public explanation for why certain loans were legal or detailed information about the collateral available to AIG, Maiden Lane, or Lehman Brothers, however, makes it difficult for economists and historians to judge whether the Board's actions during the financial crisis were appropriate as both matters of policy and law. *Id.*

Having learned from Alvarez's testimony to the FCIC that the Board wrote legal memoranda to address its Section 13(3) obligations, Professor Ball submitted a FOIA request to the Board in October 2012, seeking both memoranda and a listing and valuation of the specific assets pledged as collateral for each loan to Maiden Lane and AIG. Ball Decl. ¶¶ 9-10; Caperton Decl. ¶ 5 & Ex. A. In December 2012, the Board denied Professor Ball's request, stating that it was withholding the memoranda pursuant to FOIA Exemptions 4, 5, and 8, and withholding the collateral information pursuant to FOIA Exemption 8. Ball Decl. ¶ 10; Caperton Decl. ¶ 6 & Ex. B. In response to Professor Ball's timely appeal, the Board again refused to disclose the

responsive records, although it reversed its prior decision to withhold the memorandum concerning the Board's statutory authority to extend credit to Maiden Lane under FOIA Exemptions 4 and 8. Ball Decl. ¶ 10; Caperton Decl. ¶ 8 & Exs. C & D. However, the Board continues to maintain that the Maiden Lane memorandum (Document 1) is exempt under both the deliberative process and attorney-client privileges, that the AIG memorandum (Document 2) is exempt in its entirety under the deliberative process privilege, that certain portions of the memorandum are exempt because they contain commercial or financial information about AIG that is confidential under Exemption 4 and information about Board-regulated financial institutions' exposure to AIG holdings under Exemption 8, and that the collateral listings for each loan (Documents 3 and 4) are exempt because they relate to Board examinations of the FRBNY in connection with the Maiden Lane and AIG loans, respectively.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact," Fed. R. Civ. P. 56, with all reasonable inferences to be drawn in favor of the non-movant. *Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 514 (D.C. Cir. 1996). In FOIA cases, the agency bears the burden of proving that a requested record is exempt from disclosure. *Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 869 (D.C. Cir. 2010) (citation omitted). This Court reviews the agency's claimed exemptions *de novo*. 5 U.S.C. § 552(a)(4)(B). The requested records must be disclosed "where the government does not carry its burden of convincing the court that one of the statutory exemptions apply." *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

ARGUMENT

FOIA is intended to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted), by ensuring "that the public has access to all government documents, subject to only nine specific limitations, to be narrowly interpreted." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). At issue here are withholdings under Exemptions 4, 5, and 8.

I. Neither the Deliberative Process Privilege Nor the Attorney-Client Privilege Applies to Documents 1 and 2.

An agency may withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" pursuant to Exemption 5. 5 U.S.C. § 552(b)(5). The exemption provides "protections traditionally afforded certain documents pursuant to evidentiary privileges in the civil discovery context … [such as] the attorney-client privilege … or the executive deliberative process privilege." *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001) (citation and internal quotation marks omitted). The Board has failed to demonstrate that Exemption 5 applies to either Document 1 or 2.

A. Documents 1 and 2 Are Not Protected by the Deliberative Process Privilege Because They Constitute the Board's Working Law.

1. The deliberative process privilege applies to "government materials which are both predecisional and deliberative." *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997) (citation and internal quotation marks omitted). The agency bears the burden of demonstrating that "the materials were generated *before* the adoption of an agency policy and reflect [] the give-and-take of the consultative process." *Id.* (citation and internal quotation marks omitted). The

privilege is intended to "'protect[] against premature disclosure of proposed policies' and 'protect[] against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact ultimate reasons for the agency's action.'" *Id.* at 618 (quoting *Coastal States*, 617 F.2d at 866). The privilege does not, however, "apply to final agency actions that constitute statements of policy or final opinions that have the force of law." *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981). The "reasons which … supply the basis for an agency policy actually adopted … if expressed within the agency, constitute the 'working law' of the agency." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975). "[A]n agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983) (citing *Coastal States*, 617 F.2d at 867). Disclosure of such agency records works a "lesser injury to the [agency's] decisionmaking process" and serves an "increased public interest in knowing the basis for agency policy already adopted." *Sears*, 421 U.S. at 152. Thus, for example, in *Schlefer*, the D.C. Circuit held that, because the Maritime Administration regarded legal memoranda interpreting federal maritime statutes in connection with loan requests as "definitive rulings on the legal questions they decide," they were not protected by the deliberative process privilege. 702 F.2d at 237.

Here, the Board's General Counsel, Scott Alvarez, testified before the FCIC that the memoranda were entitled to deference under *Chevron*. Patterson Decl. ¶¶ 6-7. *Chevron* refers to the two-step analysis that a court undertakes to assess whether to defer to an agency's construction of a statute; the analysis begins by considering the statute's plain meaning and then,

if the meaning is ambiguous, considers whether the agency's construction is reasonable. *Chevron*, 467 U.S. at 842-43. The assertion that the memoranda are entitled to *Chevron* deference provides insight on the Board's treatment of Documents 1 and 2. Because the Board believes that its construction of Section 13(3) as applied to the Board's rescues of Bear Stearns and AIG would be entitled to *Chevron* deference by a court, the Board plainly considers Documents 1 and 2 to be the Board's "definitive rulings on the legal questions they decide." *Schlefer*, 702 F.2d at 237. Thus, Alvarez's statement regarding Documents 1 and 2 establishes these documents as the Board's "working law," *Sears*, 421 U.S. at 153, and they cannot be shielded from disclosure under Exemption 5.

In addition, although public statements by other Board officials, including Chairman Bernanke, do not expressly refer to the memoranda, they describe the disruptive effects that the failures of Bear Stearns and AIG would have on financial markets, businesses, and households and thus why the Board believed its use of its Section 13(3) authority to grant the loans to Maiden Lane and AIG was justified. *See supra* at 5-6 (citing Patterson Decl. ¶¶ 2-5 & Exs. A-D). The strong likelihood of disruptive consequences would have formed the factual basis for the Board's finding that "unusual and exigent circumstances" existed as required by Section 13(3), a prerequisite to the Board's authorization of the loans. It would strain credulity for the Board to contend that Documents 1 and 2, the final (or last) versions of memoranda interpreting the Board's authority under Section 13(3) and referenced in Alvarez's testimony to the FCIC, do not furnish the basis of the Board's various public statements in support of its approval of the loans, including a press release issued the same day as the Board's authorization of the loan to AIG. *See Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 827 F. Supp. 2d 242, 259 (S.D.N.Y. 2011) (finding agency's public statements espousing the

conclusions of a memorandum just days after its completion to be "persuasive … circumstantial evidence" that "the analysis in the [m]emorandum seems to be the only rationale that the agency could have relied upon and adopted as the legal basis for the policy.").

Plaintiff is not aware of any federal cases that have interpreted the "unusual or exigent circumstances" or "secured to the satisfaction of" clauses of Section 13(3). The absence of case law about these important statutory clauses makes the Board's working law on this topic particularly important to understanding how the Board has interpreted the scope of its emergency lending authority.

2. The Board's attempt to characterize Documents 1 and 2 as predecisional and deliberative fails for two reasons. First, the Board's reliance on the holdings in *McKinley v. FDIC*, 744 F. Supp. 2d 128 (D.D.C. 2010) (*McKinley I*), *aff'd*, 647 F.3d 331 (D.C. Cir. 2011) and *McKinley v. Board of Governors of the Federal Reserve System*, 849 F. Supp. 2d 47 (D.D.C. 2012) (*McKinley II*) is misplaced. As the Board concedes, Document 1 was not requested by the plaintiff in *McKinley I*, in which the records sought concerned an earlier Board-authorized loan to Bear Stearns (for that reason, Document 2, which relates to the AIG loan, was also not at issue). *McKinley I*, 744 F. Supp. 2d at 131; Def.'s Mem. of Points and Authorities in Supp. of Mot. For S.J. (Def.'s Mem.) 17. And in *McKinley II*, in which the records sought concerned the Board's deliberations about the failures of AIG and Lehman Brothers, 849 F. Supp. 2d at 52, the court had no occasion to address the Board's withholding of Document 2 because the plaintiff did not challenge the application of Exemption 5 to that record (because Document 1 pertains to the Board's actions with respect to Bear Stearns, it was not requested in *McKinley II*). Def.'s Mem. 22.

Second, a document that "is predecisional at the time it is prepared … can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States*, 617 F.2d at 866. Moreover, the fact that Document 2 remained in draft form, Caperton Decl. ¶ 26, does not "make it automatically privileged under the deliberative process privilege." *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004) (citing *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982)). Thus, even if the Court credits the facts stated in the Caperton declaration (which relies largely on the holdings in the *McKinley* cases and the declarations submitted by the Board in those cases), *see* Caperton Decl. ¶¶ 19-21, 25-26, the Board's public statements strip these records of their predecisional status because the Board has adopted them as its agency position on the interpretation of Section 13(3) as applied to Bear Stearns and AIG. Disclosure of these memoranda would neither prematurely reveal any proposed policies nor "mislead[] the public by dissemination of … reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Tax Analysts*, 117 F.3d at 618 (holding that memoranda stating agency's legal position could not be withheld under deliberative process privilege).

Because the Board has failed to prove that Documents 1 and 2 are predecisional, exempting these records would allow the Board to thwart FOIA's objectives by maintaining "a body of secret law." *Schlefer*, 702 F.2d at 244 (citation omitted). Accordingly, the Court should reject the Board's contention that the deliberative process privilege applies to Documents 1 and 2.

B. Document 1 Is Not Protected by the Attorney-Client Privilege Because the Factual Material Did Not Come From the Agency.

An agency may invoke the attorney-client privilege to withhold "a confidential communication from an attorney to a client, but only if that communication is based on confidential information provided by the client." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977). Where the client is an agency, the confidential information must *concern the agency* to be protected by the attorney-client privilege. *See Tax Analysts*, 117 F.3d at 619 (holding that attorney-client privilege could not apply to legal memoranda "based upon information obtained from taxpayers"); *Schlefer*, 702 F.2d at 245 (holding that agency counsel memoranda were outside the scope of the attorney-client privilege because the factual information contained in the documents was provided by a third party and did "not contain any confidential information *concerning the Agency*.").

The Board provides no evidence that Document 1 contains confidential client information that would subject it to the attorney-client privilege. Rather, the Board contends that Document 1 contains "factual considerations and legal analysis presented orally to the Board." Caperton Decl. ¶ 22. Given that Section 13(3) required that the Board authorize emergency lending only in "unusual or exigent circumstances," that any emergency loans be "secured to the satisfaction" of the Federal Reserve Bank extending the credit, and that the Federal Reserve Bank "obtain evidence" that the debtor "is unable to secure adequate credit accommodations from other banking institutions," it is reasonable to infer that the facts set forth in Document 1 concerned, not the Board, but Bear Stearns and other institutions in the financial markets that had exposure to Bear Stearns. Indeed, this inference is confirmed by the Board's description of its information-gathering with respect to the Maiden Lane loan, which included a survey of large complex banking organizations (LCBOs) "for purposes of assessing the LCBOs' real-time exposures to

Bear Stearns" and collection of reports that "[m]any firms had started pulling back from doing business with Bear Stearns … and some large investment banks stopped accepting trades that would expose them to Bear Stearns regardless of the collateral that Bear Stearns could provide." Stefansson Decl. ¶¶ 7-8. Because the Board has not demonstrated that Document 1 contains "any confidential information *concerning the Agency*," *Schlefer*, 702 F.2d at 245, the attorney-client privilege does not apply to Document 1.

II. Exemption 8 Cannot Apply to Records of a Federal Reserve Bank in Dual Capacities as a Supervising Authority and Regulated Financial Institution.

Exemption 8 permits agencies to withhold "matters … contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). Courts interpret the term "financial institution" as distinct from the clause "agency responsible for the regulation or supervision of financial institutions." *See, e.g.*, *Mermelstein v. SEC*, 629 F. Supp. 672, 673 (D.D.C. 1986) ("It is undisputed that the SEC is an agency responsible for the supervision of the BSE …. The only question … is … one of law, namely, whether or not the BSE is a 'financial institution' within the meaning of Exemption 8"); *see also Pub. Citizen v. Farm Credit Admin.*, 938 F.2d 290, 293 (D.C. Cir. 1991) (focusing on whether "financial institution" is subject of examination, operating, or condition reports). The Board's reliance on Exemption 8 rests on two inconsistent theories concerning the role of a Federal Reserve Bank in the regulatory process. To begin with, the Board seeks to withhold certain information in Document 2 that "consists of the names of Board-regulated financial institutions with large credit exposures to AIG obtained by *the FRBNY in its supervisory capacity* to gauge the risk to these institutions from a possible AIG collapse." Def.'s Mem. 24 (emphasis added) (as noted earlier, *supra* 3.n1, Professor Ball does not challenge the application of Exemption 8 to the

information in Document 2). Simultaneously, the Board seeks to withhold Documents 3 and 4 (the collateral listings for the Maiden Lane and AIG loans) because the Board obtained these documents in the course of its examinations of "*a regulated financial institution (the FRBNY)*." Def.'s Mem. 25 (emphasis added). Although the D.C. Circuit has held that Exemption 8 has a "broad, all-inclusive scope," *Gregory v. FDIC*, 631 F.2d 896, 898 (D.C. Cir. 1980), its reach is not limitless. *McKinley v. FDIC*, 756 F. Supp. 2d 105, 115 (D.D.C. 2010) (citation omitted). The Board's position that the FRBNY is both a regulator and a regulated financial institution does not pass muster as a matter of statutory construction or logic. Exemption 8 does not apply to Documents 3 and 4 because the FRBNY is not a financial institution for purposes of the exemption.

The Board fails to cite any case law holding that a Federal Reserve Bank is a financial institution for FOIA purposes, and Plaintiff is not aware of any cases holding that it is. Further, contrary to the Board's assertion, the courts that have examined whether particular entities are financial institutions have not espoused a "broad definition of that term," Def.'s Mem. 27, but rather have conducted a fact-specific analysis limited to the particular institution at issue in each case. For example, *Farm Credit Administration*, 938 F.2d at 292 (D.C. Cir. 1991), stands for the unremarkable proposition that the term "financial institution" is not limited to depository institutions. There, the court relied on Black's Law Dictionary's definition of "financial institutions," defined in part to "include *[a]ny* organization authorized to do business under state or federal laws relating to financial institutions including … credit unions," to hold that the records of the National Consumer Cooperative Bank (NCCB), a non-depository institution created by Congress, were exempt from disclosure under FOIA. *Id.* Although the court found noteworthy that the NCCB was authorized to do business under Title 12 of the United States

Code, which relates to banks and banking, *id.*, that point cannot be dispositive here—by that standard, the Board itself could be a financial institution simply because it was created by the Federal Reserve Act, 12 U.S.C. § 241, an illogical position that the Board has not suggested.

Other cases, including those that the Board cites, have relied on a definition of "financial institutions" proffered by the legislative history of the Sunshine Act, 5 U.S.C. § 552b, which specifically included the entities at issue in each case. *See Berliner, Zisser, Walter & Gallegos, P.C. v. SEC*, 962 F. Supp. 1348, 1352 (D. Colo. 1997) (holding that investment advisors were financial institutions under Exemption 8); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 781 (N.D. Cal. 1997) (upholding application of Exemption 8 to brokers and dealers of securities and commodities on basis of Sunshine Act's legislative history); *Mermelstein*, 629 F. Supp. at 674-75 (D.D.C. 1986) (relying on Sunshine Act's legislative history to hold that "financial institution" includes securities exchange). Moreover, the Board's reliance on *Public Investors Arbitration Bar Association v. SEC*, 930 F. Supp. 2d 55 (D.D.C. 2013) (appeal pending), is inapposite. There, not only was it undisputed by the parties that a self-regulatory organization was a financial institution, 930 F. Supp. 2d at 62, but the language that the Board cites in its brief regarding Congress's "expansive definition" of financial institutions refers not to Exemption 8 generally, but to a 2010 amendment to the Securities Exchange Act of 1934 that provided a more specific definition of "financial institution" for certain entities regulated by the Securities and Exchange Commission. *Id.* at 69 (citing 15 U.S.C. § 78x(e)).

If this Court were to adopt the definition of "financial institutions" contained in the legislative history of the Sunshine Act, a Federal Reserve Bank would not be covered by this definition. The Senate Report defined financial institution to include:

> banks, savings and loan associations, credit unions, brokers and dealers in securities or commodities, such as the New York Stock Exchange, investment

> companies, investment advisors, self-regulatory organizations subject to 15 U.S.C. § 78(s) and institutional managers as defined in 15 U.S.C. § 78m(f).

Berliner, 962 F. Supp. at 1351 (quoting S. Rep. No. 94-354, at 24 (1975)) (emphasis omitted). Although this definition refers to "banks," the Federal Reserve Act treats Federal Reserve Banks differently than "banks." *See* 12 U.S.C. § 221 (defining "reserve bank … to mean Federal reserve bank" as distinct from "bank," "national bank," and "member bank"). Thus, casting a Federal Reserve Bank as a "financial institution" pursuant to the definition proffered by the Sunshine Act's legislative history would be "inconsistent with the [Board's] enabling statute," *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 345 (D.C. Cir. 2011), and should be rejected.

Moreover, the Federal Reserve Act makes clear that a Federal Reserve Bank performs functions and has obligations that extend beyond those types of institutions that have been found to be financial institutions under the case law on which the Board relies. As part of the Federal Reserve system, the Federal Reserve Banks engage in, among other things, the formulation and implementation of the nation's monetary policy at the direction of the Federal Open Market Committee, on which representatives of the Federal Reserve Banks serve, 12 U.S.C. § 263(a)-(b), examine state banks that are members of the Federal Reserve system, 12 U.S.C. § 325, and act as fiscal agents for the United States, 12 U.S.C. § 391; *see also* Ball Decl. ¶¶ 13-14 (discussing the Federal Reserve Banks' role in issuing and retiring currency and purchasing and selling foreign currency on behalf of Treasury Department). By contrast, entities that have been found to be financial institutions by other courts do not participate in making or implementing monetary policy, do not regulate depository institutions, do not examine financial firms, and do not issue currency or engage in foreign exchange trades on behalf of the Treasury Department. Ball Decl. ¶ 15. Indeed, even the Board's witness declarations are replete with

references to the FRBNY's supervisory authority and functions, which have no analogue among banks in the private or not-for-profit sectors. *See, e.g.,* Caperton Decl. ¶ 29 (referring to information "obtained by FRBNY in a supervisory capacity from supervised financial institutions"); Ashton Decl. ¶ 9 (citing "FRBNY's unique involvement in, and knowledge of, the financial markets through its conduct of open market operations and intervention in foreign exchange markets on behalf of the Federal Reserve System"); Foley Decl. ¶ 6 ("FRB supervisory staff surveyed the LCBOs for purposes of assessing their real-time exposures to AIG and Lehman Brothers.").

Further, the Board offers no articulable standard by which to define financial institution, other than to say that the Federal Reserve Banks engage in lending activities. Def.'s Mem. 27 (citing Roseman Decl. ¶ 3). This standard is untenable. By this measure, federal agencies subject to FOIA (such as the Department of Education, which originates educational loans, the Federal Emergency Management Agency, which extends emergency loans to local governments afflicted by disasters, or the Department of Agriculture, which makes loans to low-income individuals or families to purchase homes in rural areas) would be considered financial institutions for purposes of Exemption 8.[8] The Board also ignores that the Federal Reserve Banks' lending activities are undertaken to promote the stability of the American financial system—a wholly different motivation than the profit-seeking that animates the lending activities of conventional financial institutions. Ball Decl. ¶ 16.

[8] U.S. Department of Education, *Federal Student Aid*, http://studentaid.ed.gov/types/loans/subsidized-unsubsidized; Federal Emergency Management Agency, *Community Disaster Loan Program*, http://www.fema.gov/community-disaster-loan-program; U.S. Department of Agriculture, HAD Direct Housing Loans, http://www.rurdev.usda.gov/HAD-Direct_Housing_Loans.html (agency website currently unavailable due to federal government shutdown).

That the Federal Reserve Banks are not financial institutions for purposes of Exemption 8 is reinforced by consideration of the purposes underpinning the exemption. The exemption was enacted because of "concern that disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks might undermine public confidence and cause unwarranted runs on banks … [and] to safeguard the relationship between the banks and their supervising agencies." *Farm Credit Admin.*, 938 F.2d at 293 (quoting *Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978)). The Board argues only that disclosure of Documents 3 and 4 would undermine Exemption 8 by "chill[ing] the frank exchange of information between the FRBNY and [the Board] that is necessary for the Board effectively to perform its function as supervisor and regulator of the FRBNY." Def.'s Mem. 29 (citing Roseman Decl. ¶ 12). But Sections 11(a)(1) and 11(j) of the Federal Reserve Act, 12 U.S.C. §§ 248(a)(1) & (j), enable the Board to "examine at its discretion" the records of, and to exercise general supervision over, each Federal Reserve Bank. The Board provides no evidence and points to no provision in the Act that suggests that a Federal Reserve Bank has the option of declining to provide information that the Board determines "in its discretion" to examine, 12 U.S.C. § 248(a)(1). Indeed, given the policy and central banking functions accorded to Federal Reserve Banks within the Federal Reserve system, there is no need for the Board to promise confidentiality to obtain information from a Federal Reserve Bank. Ball Decl. ¶ 17. Thus, the concern that disclosure of Documents 3 and 4 would undermine the relationship between the Board and the FRBNY is unfounded.

Further, excluding the Federal Reserve Banks from the definition of "financial institution" would not thwart the primary purpose of Exemption 8, which is to "ensure the security of financial institutions," *Judicial Watch, Inc. v. Dep't of Treasury*, 796 F. Supp. 2d 13,

37 (D.D.C. 2011) (citing *Consumers Union*, 589 F.2d at 534), by protecting "the sensitive details [of regulated institutions that] could, if indiscriminately disclosed, cause great harm." *Consumers Union*, 589 F.2d at 534 n.10 (citation omitted). "Congress was concerned that release of bank examination and operating reports could endanger the fiscal well-being of the subject banks … [and] that disclosure … would be grossly unfair and in violation of basic principles of competition." *Id.* at 537, 540 (Wright, J., concurring) (internal citation and quotation marks omitted). Courts have thus applied Exemption 8 to information that could "undermine public confidence and investment" in the regulated institution, *Farm Credit Admin.*, 938 F.2d at 293, compromise negotiations "to protect the interests of depositors and borrowers" of a failed institution and subject the bank to "a trail of legal controversies to be resolved among officers, directors and depositors," *Gregory*, 631 F.2d at 899, or cause "public confidence in the … industry [to] suffer great harm if personal information that investors reveal in confidence to their investment advisor becomes available to the public through a FOIA request." *Berliner*, 962 F. Supp. at 1352.

Disclosure of Documents 3 and 4 would not cause any of these harms to a Federal Reserve Bank. A Federal Reserve Bank's powers derive from its ability to influence economic output, unemployment, and inflation through its implementation of monetary policy, an ability that financial institutions in the private and non-profit sectors lack. Ball Decl. ¶¶ 13, 19. Thus, private or non-profit financial institutions could not use a Federal Reserve Bank's disclosed information to perform a function uniquely accorded to a Federal Reserve Bank by the Federal Reserve Act (and because there is only one Federal Reserve Bank in each of the twelve geographic districts designated by the Board, the Federal Reserve Banks do not compete with each other, as each is responsible for performing central banking and supervisory functions in its

district). *Id.* ¶ 19. Further, the Federal Reserve Banks do not depend upon any external source for their funding; they fund themselves by the interest earned on government and agency securities purchased through open-market operations and, therefore, have no need to be concerned that disclosure will undermine investment in the Banks. *Id.* ¶ 20; *Farm Credit Admin.*, 938 F.2d at 293. Nor is there a danger that disclosure will cause member banks to withdraw from the Federal Reserve System. The Federal Reserve Act requires national banks to be members of the Federal Reserve System, 12 U.S.C. § 222, and membership affords state chartered banks "an association with the general reputation and public trust the Federal Reserve enjoys as [the] country's central bank,"[9] and "the ability to engage in activities to the same extent as national banks."[10] For these reasons, neither statutory purpose of Exemption 8 supports extending the exemption's scope to include a Federal Reserve Bank.

Finally, if the Board's argument that a Federal Reserve Bank is both a financial institution and supervisor under FOIA is taken to its logical extreme, the Board could prevent disclosure of any record simply by passing it through a Federal Reserve Bank and argue, depending on the context, that the record belongs to a Board-regulated financial institution or was obtained by the Federal Reserve Bank in its supervisory capacity. This theory would work serious injury to FOIA's purpose of "open[ing] agency action to the light of public scrutiny," *Rose*, 425 U.S. at 361, and should be rejected.

[9] Federal Reserve Bank of Dallas, *Banking Supervision & Regulation*, http://www.dallasfed.org/banking/apps/faq.cfm.

[10] Federal Reserve Bank of Philadelphia, *How to Become a Member*, http://www.phil.frb.org/bank-resources/supervision-and-regulation/banking-applications/membership.cfm.

III. Exemption 4 Is Inapplicable To Withhold AIG's Information in Document 2.

Under Exemption 4, an agency may withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The agency is required to show that the information "(1) involves trade secrets or is commercial or financial, (2) is obtained from a person, and (3) is privileged or confidential." *Soghoian v. OMB*, -- F. Supp. 2d --, 2013 WL 1201488, at *3 (D.D.C. Mar. 26, 2013) (citing *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)). The Board's claim that certain information about AIG contained in Document 2 falls under Exemption 4 fails because the information neither was obtained from a person nor is confidential.

A. The Information Concerning AIG Was Generated by the Board.

The Board cannot invoke Exemption 4 to withhold "information generated by the government because such information is not 'obtained from a person' within the meaning of the statute." *Maydak v. U.S. Dep't of Justice*, 254 F. Supp. 2d 23, 49 (D.D.C. 2003) (citation omitted) (Exemption 4 not satisfied where agency had not demonstrated that staff member's meeting notes containing discussion of corporation's report was information "obtained from a person"). Rather, the information here is similar to that at issue in *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143 (2d Cir. 2010). There, the Second Circuit held that "documents that show what loans the Federal Reserve Banks actually made" constituted information that was "generated within a Federal Reserve Bank upon its decision to grant a loan," explaining that, "[t]he fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA." *Id.* at 148.

Here, the Board's declarations make clear that the information in Document 2 about AIG was generated by and within the Board and FRBNY. Document 2 was created to "analyze and assess the extent and implications of the imminent financial crisis facing AIG …. Federal Reserve officials sought to form an opinion about the extent of the financial pressures facing the company, about the availability and effectiveness of any financial assistance from the private sector …, about the likelihood and effectiveness of any regulatory relief the company may receive …, and the potential for widespread effects on the financial system and economy in general from AIG's financial troubles and possible collapse." Ashton Decl. ¶ 7; *see also id.* ¶ 9 (recounting information provided by the FRBNY regarding the effects that not making the loan would have on financial institutions and markets). The Board analyzed information about AIG and the financial markets within the context of fulfilling its statutory obligations under Section 13(3). The information about AIG was not simply "information collected and slightly reprocessed by the government," *Bloomberg*, 601 F.3d at 148, but analysis generated within the agency in the course of authorizing an emergency loan. Thus, the Board has not satisfied its burden of demonstrating that the information it seeks to withhold in Document 2 was "obtained from a person" within the meaning of Exemption 4.

B. The Information Concerning AIG Is Not Confidential.

Under the test set forth in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc), commercial or financial information that is provided on a voluntary basis is considered confidential if "it is of a kind that [the provider] customarily withholds from the public." By contrast, commercial or financial information that is provided on an involuntary basis is confidential only where "disclosure would be likely either '(1) to impair the Government's ability to obtain necessary information in the

future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Id.* at 878 (quoting *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)). Because the information concerning AIG was necessary to obtain an emergency loan from the government, the question whether this information is confidential within the meaning of Exemption 4 must be analyzed under the *National Parks* test. The Board has failed even to address, much less satisfy, its burden under the *National Parks* test.

To determine whether information was provided involuntarily, "actual legal authority, rather than parties' beliefs or intentions, governs judicial assessments of the character of the submissions." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 149 (D.C. Cir. 2001). "A submission is compelled when the government requires a private party to submit information as a condition of doing business with the government." *Biles v. Dep't of Health & Human Servs.*, 931 F. Supp. 2d 211, 220 (D.D.C. 2013) (applying *National Parks* test to data required to be submitted to agency pursuant to statute); *see also McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 895 F. Supp. 316, 318 (D.D.C. 1995) ("The issue is not whether MDA was required to contract with NASA …. The focal point here is the information itself, and NASA required that the contract itemize the prices for specific services."). The Board contends that it gathered information about AIG for "several purposes under section 13(3)," and that this information was required "[b]efore extending credit under section 13(3)." Charlton Decl. ¶ 6. Thus, the information at issue, to the extent that it was obtained from AIG, was not voluntarily provided.

The Board's failure to address whether the withheld information is confidential under either prong of the *National Parks* test alone warrants denial of its summary judgment motion on its Exemption 4 claim. Even had the Board attempted to meet its burden under that test, however,

it could not do so. Because Section 13(3) sets forth certain criteria that must be met before the Board can authorize emergency lending—including the existence of "unusual or exigent circumstances" and that any loan be "secured to the satisfaction" of the Federal Reserve Bank—the Board's ability to obtain the information it deems necessary to satisfy its Section 13(3) obligations in the future will not be impaired if Document 2 were released. *See Biles*, 931 F. Supp. 2d at 220 (finding that agency would be able to continue obtaining requested information notwithstanding disclosure because data was required to be furnished pursuant to statute). Nor is it likely that the reliability of information that the Board will be able to obtain will be diminished if the information is disclosed in this case. If the Board determines that the information it receives to aid in its Section 13(3) analysis is unreliable, it presumably will decline to authorize an extension of credit. *See Pub. Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 415 (D.D.C. 1997) (rejecting argument that disclosure of drug company data submitted to agency as part of drug approval process would impair quality of future information provided). A financial firm, particularly one of AIG's stature and size, would not risk bankruptcy over the possibility that the information it provides to obtain emergency credit might be disclosed in response to a FOIA request. Ball Decl. ¶ 22.

Further, it is unlikely that the disclosure of the information in Document 2 will cause AIG substantial competitive harm. Under this prong, the Board must show that the competitive harm "flow[s] from the affirmative use of proprietary information by competitors." *United Techs. Corp. v. Dep't of Defense*, 601 F.3d 557, 563 (D.C. Cir. 2010) (quoting *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987)). According to the Board, the withheld information concerns "the liquidity and capital structure of various AIG subsidiaries and affiliates, the company's deliberations regarding its failed efforts to secure various forms of

funding commitments, and the imminence of an AIG bankruptcy filing in the absence of a massive provision of liquidity." Charlton Decl. ¶ 7. Information concerning AIG's lack of liquidity, its capital structure, and the strong likelihood of a bankruptcy filing was disclosed in AIG's 2008 regulatory filings. Ball Decl. ¶ 23. Moreover, AIG's difficulties were widely reported in the press at the time, and disclosure of its failed deliberations with sources of private sector funding would have added only marginally more information than what AIG's competitors already knew about the company's financial condition. *Id.* Because "[p]ublic availability of information defeats an argument that the disclosure of information would likely cause competitive harm," *Biles*, 931 F. Supp. 2d at 225 (citation and internal quotation omitted), the Board could not show that competitors likely could use the information contained in Document 2 to cause AIG substantial competitive harm.

To the extent that the information in Document 2 concerns AIG's positions in derivatives contracts in September 2008, Def.'s Mem. 25, most of those positions were terminated with the proceeds of another FRBNY loan. Ball Decl. ¶ 23. Because AIG is no longer party to these contracts, disclosure of this information would be of no use to a competitor seeking to exploit an advantage. *Id.* That possibility is rendered even more remote by the fact that the information contained in Document 2 is now over five years old. Because of financial assistance by the Board (including other loans made subsequent to the September 16, 2008 transaction at issue in this case), injections of capital into AIG by the Treasury Department pursuant to the Troubled Asset Relief Program, and a major restructuring of the firm, AIG's competitive position is very different today. *Id.*

Even if this Court deemed AIG to have voluntarily submitted the information and applied the *Critical Mass* test, the Board's Exemption 4 claim would still fail. The Board's conclusory

assertion that "AIG, a public company with a fiduciary duty to its shareholders, would not customarily disclose to the public the type of information [contained in Document 2]," Charlton Decl. ¶ 7, is belied by the fact that much of this information is material to investors and that AIG, therefore, both was required to, and did, disclose this information in its public securities filings. Ball Decl. ¶ 23.

Because the Board has not demonstrated that the information in Document 2 regarding AIG is confidential under either the *National Parks* or *Critical Mass* standards, the Court should reject the Board's Exemption 4 claim.

IV. The Board's Search Was Inadequate.

FOIA requires an agency's search to be "reasonably calculated to discover the requested documents," *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991), with an inadequate search amounting to an improper withholding. *Scaff-Martinez v. Drug Enforcement Admin.*, 770 F. Supp. 2d 17, 21 (D.D.C. 2011) (citation omitted). An agency is required to search all record systems that are "likely to produce responsive documents." *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The Board's FOIA regulations provide that "[r]ecords of the Board include: (i) … all information coming into the possession and under the control of the Board, any Board member, *any Federal Reserve Bank*, … in the performance of functions for or on behalf of the Board that constitute part of the Board's official files; or (ii) [t]hat are maintained for administrative reasons in the regular course of business in official files in any division or office of the Board or *any Federal Reserve Bank* in connection with the transaction of any official business." 12 C.F.R. § 261.2(i)(1) (emphasis added).

According to the Caperton and Roseman declarations, the Board searched only the records of various Board divisions in response to Professor Ball's FOIA requests. Caperton Decl.

¶¶ 9-16 (describing Board's search); Roseman Decl. ¶ 2 (explaining that she was responsible for searching for responsive records within Board Division of Reserve Bank Operations and Payment Systems). As a result, it only located an incomplete collateral listing for the FRBNY's loan to AIG. *See* Roseman Decl. ¶ 11 (noting that Document 4 is "an incomplete point-in-time working document used to track some, but not all, pledged collateral."). Because the Board made no attempt to search the FRBNY for records within the meaning of 12 C.F.R. § 261.2(i)(1), its search was inadequate. *See Fox News Network, LLC v. Bd. of Gov. of the Fed. Reserve Sys.*, 601 F.3d 158, 162 (2d Cir. 2010) (remanding to the district court to order the Board to search for responsive records at the Federal Reserve Banks); *Bloomberg L.P. v. Bd. of Gov. of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 274 (S.D.N.Y. 2009) (finding Board's search inadequate where Board had not searched any FRBNY records). Had the Board properly searched all record systems that are "likely to produce responsive documents," *Oglesby*, 920 F.2d at 68, it might have uncovered a complete collateral listing for the AIG loan among the FRBNY's records. Accordingly, the Court should order the Board to conduct an adequate search for all responsive Board records, including any maintained at the FRBNY.

CONCLUSION

For the foregoing reasons, this Court should grant Professor Ball's motion for summary judgment and deny the Board of Governors of the Federal Reserve System's motion for summary judgment.

Respectfully submitted,

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Dated: October 15, 2013

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURENCE M. BALL, Plaintiff, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Defendant.	Civil Action No. 13-cv-0603 Judge Colleen Kollar-Kotelly

PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

1. Plaintiff Laurence M. Ball submitted a FOIA request to the Board of Governors of the Federal Reserve System (the Board) seeking the legal memoranda that set forth the justifications under Section 13(3) of the Federal Reserve Act, 12 U.S.C. § 343, for the Federal Reserve Bank of New York's (FRBNY) 2008 loans to Maiden Lane LLC (in connection with the Board's rescue of Bear Stearns & Co.) and American International Group (AIG). Professor Ball also sought a listing and valuation of the specific assets pledged as collateral for each loan. Ball Decl. ¶¶ 9-10; Caperton Decl. ¶ 5 & Ex. A.

2. The Board denied Professor Ball's FOIA request. Ball Decl. ¶ 10; Caperton Decl. ¶ 6 & Ex. B.

3. Professor Ball appealed the denial, which the Board affirmed in part and reversed in part. However, the Board determined that it would not release any information to Professor Ball. Ball Decl. ¶ 10; Caperton Decl. ¶ 8 & Exs. C & D.

4. Board officials have made a number of public statements regarding the Board's authorization of emergency credit to Maiden Lane and AIG under Section 13(3) of the Federal Reserve Act. On September 16, 2008, the same day it authorized the AIG loan, the Board issued a press release in which it stated that it had "determined, in current circumstances, [that] a disorderly failure of AIG could add to already significant levels of financial market fragility and lead to substantially higher borrowing costs, reduced household wealth, and materially weaker economic performance." Patterson Decl. ¶ 3 & Ex. B.

5. On March 5, 2009, Board Vice Chairman Donald L. Kohn testified before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, stating, "[T]he prospect of AIG's disorderly failure posed considerable systemic risks … as a consequence of its significant and wide-ranging operations. Such a failure would also have further undermined business and household confidence …." Patterson Decl. ¶ 4 & Ex. C at 2.

6. In February 2009 testimony to the U.S. House of Representatives Committee on Financial Services, Board Chairman Bernanke described the Board's authorization of these loans to "stabilize systemically critical financial institutions" as "essential to protect the financial system as a whole." Patterson Decl. ¶ 2 & Ex. A at 3.

7. The Board's General Counsel, Scott Alvarez, specifically cited the legal memoranda requested by Professor Ball in July 2010 testimony to the Financial Crisis Inquiry Commission (FCIC). In response to a question, he stated that the memoranda were entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the memoranda set forth an expert agency's statutory interpretation. Patterson Decl. ¶¶ 6-7.

8. The Board and the twelve Federal Reserve Banks (collectively, the Federal Reserve System) exercise regulatory authority over certain financial institutions, develop and implement monetary policy, and act as banker to depository institutions and to the federal government. Ball Decl. ¶ 12 & n.4.

9. The Federal Reserve Banks play a special role within the Federal Reserve System to promote the policy objectives and central banking functions of the Board. Ball Decl. ¶ 13. For example, the presidents of the Federal Reserve Banks serve, with the Governors of the Board, on the Federal Open Market Committee (FOMC), which develops the nation's monetary policy. *Id.* & n.5. Monetary policy is the vehicle by which the Federal Reserve System advances its objectives of price stability, maximum employment, and overall stability of the financial system. *Id.* & n.6.

10. Alone among the Federal Reserve Banks, the FRBNY implements FOMC policies through open-market operations comprised of the purchases and sales of government and agency securities, Ball Decl. ¶ 13 & n.7; Ashton Decl. ¶ 9, which determine the monetary base (the sum of currency in circulation and reserves of depository institutions). By manipulating the monetary base, the FOMC influences interest rates and the level of lending by commercial banks. Through these channels, the FOMC's actions affect the levels of output, unemployment, and inflation in the economy. Ball Decl. ¶ 13 & n.8.

11. The Federal Reserve Banks also supervise and regulate certain state and national banks—in part by conducting bank examinations—issue and retire currency, and purchase and sell foreign currency as agents for the United States Department of Treasury. Ball Decl. ¶ 14 & n.9; Ashton Decl. ¶ 9; Foley Decl. ¶ 3.

12. Unlike Federal Reserve Banks, the entities that have been found to be financial institutions for purposes of FOIA Exemption 8 that the Board cites in its motion papers—the National Consumer Cooperative Bank, investment advisors, and securities brokers and dealers—do not participate in making or implementing monetary policy, do not regulate depository institutions, do not examine financial firms, do not issue currency, and do not engage in foreign trades on behalf of the Treasury Department. Ball Decl. ¶ 15.

13. A Federal Reserve Bank engages in lending to promote the stability of the American financial system and does not earn profits. Ball Decl. ¶ 16 & n.11-12. By contrast, conventional financial institutions make lending decisions based on their assessments of the profitability of those loans. *Id.* ¶ 16 & n.10.

14. Provision of information by a Federal Reserve Bank to the Board is not voluntary. Accordingly, there is no need for the Board to promise confidentiality to obtain information from a Federal Reserve Bank. Ball Decl. ¶ 17.

15. A Federal Reserve Bank does not have the same motivation to withhold information from the Board that a conventional financial institution might have, which is to protect sensitive commercial information. Ball Decl. ¶ 17.

16. Conventional financial institutions do not play a role in developing and implementing monetary policy, and therefore cannot compete with a Federal Reserve Bank's powers to influence economic output, unemployment, and inflation. Ball Decl. ¶ 19.

17. The Federal Reserve Banks do not compete with each other. Ball Decl. ¶ 19 & n.13.

18. A Federal Reserve Bank does not depend on any external source for its funding. Ball Decl. ¶ 20.

19. A Federal Reserve Bank funds itself by the interest earned on government and agency securities purchased through open-market operations. Ball Decl. ¶ 20 & n.14.

20. A financial firm, particularly one of AIG's stature and size, *see* Ashton Decl. ¶ 6, would not choose bankruptcy over the possibility that the information it provides to obtain emergency credit might be disclosed one day in response to a FOIA request. Id. ¶ 22.

21. AIG disclosed information concerning its lack of liquidity, its capital structure, and the strong likelihood of a bankruptcy filing in its 2008 regulatory filings. Id. ¶ 23 & n.15.

22. AIG's difficulties in obtaining private sector funding sufficient to address its liquidity pressures were widely reported in the press in September 2008. Ball Decl. ¶ 23 & n.16.

23. Most of AIG's positions in derivatives contracts (a type of financial instrument whose value is tied to the performance of an underlying asset) as of September 2008 were terminated with the proceeds of another FRBNY loan. Ball Decl. ¶ 23 & n.17. Therefore, AIG is no longer a party to those contracts. *Id.*

24. AIG's competitive position is very different today than it was in September 2008 because of financial assistance authorized by the Board (including other loans subsequent to the September 16, 2008, transaction at issue in this case), injections of capital into the company by the Treasury Department pursuant to the Troubled Asset Relief Program, and a major restructuring of the firm. Ball Decl. ¶ 23 & n.18-20.

25. The Board's FOIA regulations provide that Board records include those "(i) … coming into the possession and under the control of … any Federal Reserve Bank … in the performance of functions for or on behalf of the Board that constitute part of the Board's official files; or (ii) That are maintained for administrative reasons in the regular course of business in official files in … any Federal Reserve Bank …." 12 C.F.R. § 261.2(i)(1). The Board made no

attempt to search the FRBNY for any Board records within the meaning of 12 C.F.R. § 261.2(i)(1). Caperton Decl. ¶¶ 9-16; Roseman Decl. ¶ 2.

Respectfully submitted,

s/ Jehan A. Patterson

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Dated: October 15, 2013

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURENCE M. BALL, Plaintiff, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Defendant.	Civil Action No. 13-cv-0603 Judge Colleen Kollar-Kotelly

PLAINTIFF'S STATEMENT OF GENUINE ISSUES AND RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Plaintiff does not believe that there are genuine issues of material fact in this case. Plaintiff believes that the case can be decided on the facts set forth in his own statement of material facts, filed October 15, 2013, and on the cases and argument set forth in the Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment.

Plaintiff responds to defendant Board of Governors of the Federal Reserve System's Statement of Material Facts Not In Dispute filed by as follows:

1. Undisputed.

2. The second sentence of paragraph 2 is undisputed. Plaintiff disputes the remainder of paragraph 2 on the basis that it sets forth legal conclusions rather than statements of material fact.

3. Plaintiff has insufficient information to know whether the Board conducted a thorough search in its Division of Reserve Bank Operations and Payment Systems (RBOPS) for records responsive to Items 3 and 4 of plaintiff's FOIA request and whether RBOPS was the only division of the Board reasonably likely to have documents responsive to Items 3 and 4 of plaintiff's FOIA request and, on that basis, disputes paragraph 3.

4. The first sentence of paragraph 4 is disputed as to the Board's assertion that it conducted a thorough search because a thorough search for responsive records should have included a search of the Federal Reserve Bank of New York's (FRBNY) files. As to the second sentence, plaintiff has insufficient information to know whether Documents 3 and 4 are the only Board records responsive to Items 3 and 4 of his FOIA request and, on that basis, disputes the second sentence of paragraph 4.

5. Plaintiff disputes this paragraph on the basis that it sets forth legal conclusions rather than statements of material fact.

6. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that the paragraph is material, plaintiff has insufficient information about what Board staff heard regarding Bear Stearns's liquidity problems or the concerns of Board members and staff about the effects of a Bear Stearns bankruptcy to know whether these statements are true, and on that basis, disputes paragraph 6.

7. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that the paragraph is material, plaintiff has insufficient information about the actions of the staff of the Board and the FRBNY to know whether the statements are true, and on that basis disputes paragraph 7, except it is undisputed that on March

14, 2008, the Board authorized the FRBNY to extend an emergency, temporary loan to Bear Stearns through JPMorgan Chase.

8. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that the paragraph is material, it is undisputed that on March 16, 2008, the Board authorized the FRBNY to make a non-recourse loan to Maiden Lane to acquire certain assets of Bear Stearns and that the Bear Stearns assets that were acquired secured the loan to Maiden Lane. As to the remainder of the paragraph, plaintiff has insufficient information about the market pressures that Bear Stearns faced, whether JPMorgan Chase was the only viable bidder to acquire Bear Stearns, what JPMorgan Chase's beliefs were about its ability to acquire Bear Stearns, what types of assets secured the emergency loan to Maiden Lane, and when the loan to Maiden Lane closed to know whether these statements are true, and on that basis disputes the remainder of paragraph 8.

9. The first sentence of Paragraph 9 is disputed as to the Board's assertion that Document 1 recounts the Board's staff pre-decisional advice and recommendations that played a part in the Board's decision-making process on the basis that this sentence sets forth a legal conclusion rather than a statement of material fact. The remainder of paragraph 9 is undisputed.

10. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that this paragraph is material, plaintiff has insufficient information about whether Document 1 is modeled on and substantially similar to document 35 in prior FOIA litigation involving the Board, whether much of the legal discussion in the two memoranda is substantially similar, and whether the memoranda are similar in every important respect to know whether these statements are true, and, on that basis, disputes the first, fourth,

and fifth sentences of paragraph 10. The second and third sentences of paragraph 10 are undisputed.

11. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that this paragraph is material, the second sentence of paragraph 11 is undisputed. Plaintiff has insufficient information about how FRBNY and Board officials learned about AIG's liquidity crisis and what actions they took to address the liquidity crisis to know whether these statements are true and, on that basis, disputes the first and third sentences of paragraph 11.

12. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that this paragraph is material, plaintiff has insufficient information about what Board officials did to form an opinion about the issues it identified to know whether these statements are true and, on that basis, disputes this paragraph.

13. Undisputed.

14. The second and third sentences of paragraph 14 are undisputed. The first and fifth sentences of paragraph 14 are disputed as to the Board's assertion that Document 2 played a role in the Board's deliberations on the basis that these sentences set forth a legal conclusion rather than a statement of material fact. The fourth sentence is disputed as to the Board's assertion that the process of circulating and commenting on the draft of Document 2 informed Board's staff's thinking regarding the unfolding AIG liquidity crisis on the basis that it sets forth a legal conclusion rather than a statement of material fact, except plaintiff has insufficient information to know whether the statement that Document 2 was never put in final form for the Board is true, and on that basis, disputes that assertion in the fourth sentence of paragraph 14.

15. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that this paragraph is material, plaintiff has insufficient information about whether Document 2 is substantially the same, but an updated draft, of document 753-764 in prior FOIA litigation involving the Board and, on that basis, disputes the first sentence and that portion of the third sentence of paragraph 15 asserting that it is. The second sentence and that portion of the third sentence describing the documents' same dates, authors, recipients, and subject and differences are undisputed.

16. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that this paragraph is material, this paragraph is undisputed.

17. This paragraph is disputed on the basis that whether the information is confidential, whether the information was obtained from AIG, whether the information was provided on a voluntary basis, and whether AIG would customarily disclose this information to the public are legal conclusions rather than statements of material fact.

18. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that this paragraph is material, the first sentence of paragraph 18 is disputed as to the Board's assertion that it serves as financial institution supervisor and regulator of Federal Reserve Banks on the basis that this sentence sets forth a legal conclusion rather than a statement of material fact. As to the second sentence, plaintiff disputes the assertion that Federal Reserve Banks are financial institutions on the basis that this assertion sets forth a legal conclusion rather than a statement of material fact but does not dispute that Federal Reserve Banks make loans, hold accounts, and provide cash, check, and electronic payment services to depository institutions.

19. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that this paragraph is material, plaintiff has insufficient information to know whether the first three sentences of paragraph 19 describing the functions and responsibilities of RBOPS are true and, on that basis, disputes these statements. Plaintiff disputes the fourth sentence of paragraph 19 as to the assertion that the Board's reports are bank examination reports on the basis that this sentence sets forth a legal conclusion rather than a statement of material fact.

20. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that this paragraph is material, plaintiff has insufficient information about whether RBOPS was preparing to conduct reviews of the FRBNY's management and operation of Maiden Lane and the AIG revolving credit facility in 2009 and in mid-2010 to know whether these statements are true and, on that basis, disputes this paragraph.

21. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that this paragraph is material, plaintiff has insufficient information about the purposes for which RBOPS obtained Documents 3 and 4 from the FRBNY to know whether these statements are true and, on that basis, disputes this paragraph.

22. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that this paragraph is material, plaintiff disputes the first sentence of paragraph 22 as to the Board's assertion that it is financial institution supervisor and regulator of the FRBNY on the basis that this sentence sets forth a legal conclusion rather than a statement of material fact. Plaintiff has insufficient information about whether RBOPS staff obtained Documents 3 and 4 from the FRBNY and, on that basis, disputes that portion of the first sentence of paragraph 22. Plaintiff has insufficient information about how RBOPS used

Documents 3 and 4 in relation to its review of FRBNY's management and administration of Maiden Lane and the AIG credit facility, whether the FRBNY provided Documents 3 and 4 to RBOPS on condition that they would remain confidential, and how RBOPS maintains documents in its files to know whether these statements are true and, on that basis, disputes the second, third, and fourth sentences of paragraph 22. Plaintiff disputes the second sentence of paragraph 22 as to the Board's assertion that it used Documents 3 and 4 in its preparation of bank examination reports on the basis that this sets forth a legal conclusion rather than a statement of material fact. Plaintiff disputes the Board's assertion in the third sentence of paragraph 22 that Documents 3 and 4 would be used only for bank examination purposes on the basis that it sets forth a legal conclusion rather than a statement of material fact. Plaintiff disputes the Board's assertion in the fourth sentence of paragraph 22 that Documents 3 and 4 are bank examination workpapers because it sets forth a legal conclusion rather than a statement of material fact. The fifth sentence of paragraph 22 is disputed on the basis that it sets forth a legal conclusion rather than a statement of material fact.

Respectfully submitted,

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