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

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Jehan A. Patterson
DC Bar No. 1012119
Adina H. Rosenbaum
DC Bar No. 490928
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

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Counsel for Plaintiff

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INTRODUCTION

Plaintiff Professor Ball established in his motion for summary judgment that the documents he seeks from defendant Board of Governors of the Federal Reserve System (Board) are not exempt from disclosure under Freedom of Information Act (FOIA) Exemptions 4, 5, and 8 (with the exception of certain information within Document 2 that the Board withholds pursuant to Exemption 8), and that the Board failed to conduct an adequate search for responsive Board records that are maintained at the Federal Reserve Bank of New York (FRBNY). The Board's response does not demonstrate otherwise.

As Professor Ball explained in his opening papers, various statements by the Board make plain that the Board adopted both the rationales and conclusions of Documents 1 and 2 (legal memoranda that justified the Board's exercise of its Section 13(3) of the Federal Reserve Act, 12 U.S.C. § 343, authority to extend loans to Maiden Lane LLC and American International Group, respectively) as its working law, and thus that the deliberative process privilege cannot be invoked to withhold these records. The Board's attempt to minimize the import of statements made by its General Counsel, Chairman, and Vice Chairman, as well as statements it made in reports and press releases, is unpersuasive. Similarly, the Board has not refuted Professor Ball's argument that, because the confidential information in Document 1 concerns third parties and not the Board, the attorney-client privilege does not apply.

Further, Documents 3 and 4 (lists of collateral securing the loans to Maiden Lane and AIG that were purportedly obtained during a Board examination of the FRBNY) are not protected from disclosure under Exemption 8 because a Federal Reserve Bank is not a "financial institution" within the meaning of that exemption. The Board's response fails to explain how

deeming the FRBNY to be a financial institution accords with the exemption's text and statutory objectives.

In addition, in his opening papers, Professor Ball explained that approximately two pages in Document 2 concerning AIG could not be withheld under Exemption 4 because the information was neither obtained from a person nor confidential under the two-pronged test governing mandatory submissions of information set forth in *National Parks Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The Board's arguments in opposition fail because, as the Board's own declarations establish, the information contained in Document 2 was generated by the agency and, to the extent that any information was obtained from a person within the meaning of FOIA, the Board required that information to be submitted for it to make its decision to authorize the loan to AIG pursuant to Section 13(3).

Finally, the Board's arguments that it conducted an adequate search for all responsive records are without merit because the Board has not demonstrated that comprehensive lists of the collateral securing the Maiden Lane and AIG loans maintained at the FRBNY are not "records of the Board," as that term is defined by its regulations. Nor has the Board established that these collateral lists are not agency records for purposes of FOIA.

ARGUMENT

I. Documents 1 and 2 Are Not Shielded from Disclosure Under Exemption 5.

In his opening papers, Professor Ball explained that Documents 1 and 2 are not protected by the deliberative process privilege because the Board adopted these memoranda as its working law on the interpretation of Section 13(3) as applied to the loans it authorized to Maiden Lane and AIG, respectively. Further, Professor Ball demonstrated that, according to the Board's own declarations, Document 1 does not contain confidential information concerning the Board and,

therefore, cannot be withheld under the attorney-client privilege. In response, the Board asserts that there is no evidence in the record—neither statements by the Board nor by its General Counsel—that signifies adoption of the memoranda as working law. This contention, however, relies on a mischaracterization of the General Counsel's statements and a discounting of Board members' congressional testimony and other public statements. Moreover, the Board's argument that Document 1 is subject to the attorney-client privilege is based on a conclusory statement from the Caperton declaration and is belied by the description of the information contained in the document offered by the Board's other declarants.

A. The Board's Public Statements Establish That Documents 1 and 2 Were Adopted as the Agency's Working Law.

The deliberative process privilege, which 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), cannot be invoked to withhold agency records that "constitute the 'working law' of the agency," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975). The public has a strong interest "in knowing the basis for agency policy … adopted," *id.* at 152, and the notion of "a body of 'secret law,' used by [an agency] in the discharge of its regulatory duties and in its dealings with the public" runs antithetical to FOIA's objectives, *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983) (citation omitted). Professor Ball's opening papers cited, as evidence of the Board's adoption of Documents 1 and 2 as its working law, statements by the Board's General Counsel, Scott Alvarez, that the records were entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as the Board's interpretation of a provision of its own enabling statute. Professor Ball also stated that various public statements by the Board—including a press release announcing the AIG loan, a report to Congress about the Bear Stearns transaction, and

congressional testimony by the Board's Chairman and Vice Chairman—that described the factors and market events that led the Board to conclude that "unusual and exigent circumstances" under Section 13(3) existed for the agency's authorization of the emergency loans to Bear Stearns and AIG were evidence of the Board's adoption of Documents 1 and 2 as agency policy. Pl.'s Mem. in Support of Cross Mot. for Summ. J. (Pl.'s Mem.) 5-6.

The Board attempts to minimize the import of Alvarez's statements to the Financial Crisis Inquiry Commission (FCIC) by asserting that his statements concerned "similar memoranda," Def.'s Combined Reply in Support of Mot. for Summ. J. and in Opp. to Pl.'s Cross Mot. for Summ. J. (Def.'s Combined Reply) 7, rather than Documents 1 and 2 specifically. This contention mischaracterizes both Alvarez's statements and the Board's own declarations. As a broader excerpt of Alvarez's statements provides, the Board wrote "a Bear Stearns memo … [and] an AIG memo, we did one for each extension [of credit under Section 13(3)]." Supp. Caperton Decl. ¶ 3. Professor Ball's FOIA request specifically sought the Bear Stearns and AIG memoranda cited by Alvarez, *see* Caperton Decl. Ex. A, and the Caperton declaration submitted with the Board's opening papers makes clear that Caperton located Documents 1 and 2 as responsive to the FOIA request based on his recollection of Alvarez's FCIC interview. *See* Pl.'s Mem. 6 n.7 (citing Caperton Decl. ¶ 9). Accordingly, the Board errs in denying that Alvarez cited Documents 1 and 2 in his FCIC interview. *See* Def.'s Response to Pl.'s Statement of Material Facts Not in Dispute ¶ 7.[1]

Next, the Board contends that, because it prepared "separate memo[randa] for each Section 13(3) transaction," Alvarez's statement that Documents 1 and 2 should be afforded

[1] Because Professor Ball's "factual assertion[] … [is] uncontroverted," the Court should deem admitted plaintiff's Statement of Material Fact ¶ 7. *Hunter v. Rice*, 480 F. Supp. 2d 125, 130 (D.D.C. 2007) (citing L. Civ. R. 7(h)).

Chevron deference does not establish the records as the agency's working law. Def.'s Combined Reply 8. But determination of whether an agency has adopted the rationales and conclusions of a document as its working law requires the Court to evaluate all relevant facts and circumstances. *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 357 n.5 (2d Cir. 2005) (citing *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 678 (D.C. Cir. 1981)). Here, the Board's General Counsel attested to the Board's treatment of Documents 1 and 2 as the statutory interpretations of an expert agency before a commission convened to investigate the causes of the 2008 financial crisis and the actions that regulators took to address that crisis. That a separate memorandum was written to support each exercise of the Board's Section 13(3) authority, *see* Def.'s Combined Reply 8, has no bearing on the fact that the Board adopted Documents 1 and 2 as its interpretation of Section 13(3) as applied to the Maiden Lane and AIG transactions.[2]

Further, the Board's assertion that the documents do not express the agency's policies, *id.*, is undermined by the fact that its General Counsel cited these memoranda in public statements approximately two years after the memoranda were written. *See La Raza*, 411 F.3d at 357 n.6 ("[E]ven assuming *arguendo* that these employees do not themselves have the power to adopt or incorporate the [Office of Legal Counsel] Memorandum, their statements serve as evidence of the Department's position on the matter."). Indeed, the fact that the Board's General Counsel believes Documents 1 and 2 to be entitled to *Chevron* deference is evidence that the agency itself views the rationales and conclusions expressed in these records to be controlling on the statutory interpretation issue, because only adopted policies would be accorded such

[2] Moreover, given the terms of Section 13(3) in effect at the time, which required in relevant part the existence of "unusual or exigent circumstances" before the Board could authorize the extension of credit and that each loan to be extended be "secured to the satisfaction" of the Federal Reserve Bank, the Board would be unlikely to generate a single memorandum interpreting Section 13(3).

deference. *See Tax Analysts*, 117 F.3d at 617 (holding that legal memoranda that state the agency's legal position and "[r]epresent[] the considered view of the Chief Counsel's national office on significant tax law issues" are neither predecisional nor deliberative). The memoranda thus meet *Schlefer*'s description of "secret law, used by [an agency] in its dealings … with the public," 702 F.2d at 244 (citation and internal quotation marks omitted), warranting disclosure under FOIA.

Likewise, the Board's assertion that it made only "general statements" concerning the use of its Section 13(3) authority, Def.'s Combined Reply 9, glosses over the details—such as the consequences of failures of both Bear Stearns and AIG for consumer and business confidence, financial market stability, and economic performance—provided in a contemporaneous press release announcing the AIG loan, testimony, and reports that led the Board to conclude that "unusual or exigent circumstances" existed to authorize each transaction and that each loan was "secured to the satisfaction of" the FRBNY within the meaning of Section 13(3). Pl.'s Mem. 5-7 (citing Patterson Decl. ¶¶ 2-5 & Exs. A-D). This Court may consider these public statements as evidence of the Board's adoption of the rationales and conclusions expressed in Documents 1 and 2, although the statements do not expressly refer to the memoranda. *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) (relying on agency's public statements as circumstantial evidence of adoption of legal memorandum as policy).

None of the cases cited by the Board compels a different conclusion. Unlike here, the evidence in those cases did not show that the agency had adopted the reasoning of the records as its working law. Indeed, in several of the cases upon which the Board relies, the agency presented affirmative evidence that the records had *not* been adopted as agency policy. *See*

Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 185 (1975) (deposition testimony by Board chairman stating that agency did not ratify or adopt any memoranda by staff); *Casad v. HHS*, 301 F.3d 1247, 1252 (10th Cir. 2002) (discussing evidence that requested record was important, but not dispositive, consideration in director's funding decisions); *Mayer, Brown, Rowe & Maw v. IRS*, 537 F. Supp. 2d 128, 134-35 (D.D.C. 2008) (supplemental declaration by agency official stating that she was unaware that withheld documents had been adopted or were treated as agency policy); *cf. McKinley v. Bd. of Gov. of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 63 n.14 (D.D.C. 2012) (plaintiff offered no evidence that withheld records were adopted as agency policy); *Trans Union LLC v. FTC*, 141 F. Supp. 2d 62, 71 (D.D.C. 2001) (same). Although Professor Ball agrees with the Board that it does not bear the burden of proving non-adoption, the Board nonetheless has failed to rebut affirmative evidence that Documents 1 and 2 were adopted by the Board as its working law with respect to the Section 13(3) loans extended to Maiden Lane and AIG. Thus, Documents 1 and 2 cannot be withheld under the deliberative process privilege.[3]

B. The Board Has Not Established That the Confidential Information in Document 1 Concerned the Agency, as Necessary to Invoke the Attorney-Client Privilege.

In his opening papers, Professor Ball argued that the confidential information contained in Document 1, as described by the Board's declarants, concerned Bear Stearns's financial

[3] Professor Ball has demonstrated that Documents 1 and 2 were adopted by the Board as its working law regarding the interpretation and application of Section 13(3) with respect to the Maiden Lane and AIG transactions and therefore must be disclosed in their entirety. Accordingly, the Court need not consider the Board's alternative argument, raised for the first time in its reply papers, that the factual information contained in Document 2 was "inextricably intertwined with deliberative material" that would require withholding of even the factual information pertaining to AIG. *See* Def.'s Combined Reply 20 n.11. But even if the Court were inclined to consider the argument, the Board offers only conclusory assertions that fall well short of meeting its burden of showing that none of the information in Documents 1 and 2 can be reasonably segregated and disclosed.

condition and the exposure of other financial firms in the marketplace to Bear Stearns, rather than the Board itself, and that the memorandum thus could not be withheld under the attorney-client privilege. Pl.'s Mem. 14-15 (citing Stefansson Decl. ¶¶ 7-8). In response, the Board contends that the information contained in Document 1 concerns "the Board's *own legal authority* under Section 13(3) to extend the Maiden Lane loan, and not a ruling confined to a third party's legal situation." Def.'s Combined Reply 11. The Board's brief cites the Caperton declaration and the *Vaughn* index as support for this argument, but those documents merely assert that the memorandum "recounts legal advice and recommendations." Caperton Decl. ¶ 11; *see id.* Ex. E at 1 ("The confidential legal advice recounted in the memo concerns the Board's legal authority under Section 13(3)."). These statements are *legal* conclusions about the information contained in Document 1. Significantly, the Board offers no response to Professor Ball's argument that "the factual considerations," Caperton Decl. ¶ 22, set forth in the memorandum concern third parties. As Professor Ball explained in his opening brief, any discussion of the Board's legal authority under Section 13(3) necessarily involves consideration of factors external to the agency, because the statutory provision requires a finding of "unusual or exigent circumstances," that no other means of financing is available to the debtor, and that any loan authorized by the Board be "secured to the satisfaction of" the Federal Reserve Bank extending the credit. Pl.'s Mem. 14.

The Board's reliance on *Gold Anti-Trust Action Committee, Inc. v. Board of Governors of the Federal Reserve System*, 762 F. Supp. 2d 123, 137 (D.D.C. 2011), is misplaced. Nothing in that decision suggests that the memorandum at issue there contained the sort of detailed factual information concerning third parties that Document 1 contains. Moreover, the court concluded

that the document was subject to the attorney-client privilege only after reviewing the record *in camera*, a benefit that has not been afforded the Court here. *Id.*

Because Document 1 fits squarely within *Schlefer*'s holding that the attorney-client privilege does not extend to legal memoranda that do not "contain any confidential information *concerning the Agency*," *Schlefer*, 702 F.2d at 245, and the Board has not demonstrated otherwise, this Court should reject the Board's attempt to withhold Document 1 under the attorney-client privilege.

II. The Board Has Not Demonstrated That the Federal Reserve Banks Are Financial Institutions Within the Meaning of Exemption 8.

In his motion for summary judgment (at pages 15-22), Professor Ball argued that Documents 3 and 4—the listing and valuation of the collateral used to secure the loans made to Maiden Lane and AIG—could not be withheld under Exemption 8 because the FRBNY (from which the records were obtained by the Board) was not a "financial institution" for the purpose of Exemption 8. Specifically, Professor Ball argued that nothing in FOIA's text or consideration of a Federal Reserve Bank's varied functions supported construing "financial institution" so broadly as to encompass Federal Reserve Banks, which occupy a unique place within the Federal Reserve System as both banker to member banks and supervisor of regulated institutions. Further, Professor Ball argued that disclosure of Documents 3 and 4 would not undermine either purpose of Exemption 8, nor had the Board demonstrated that it would, thus reinforcing his argument that the plain text of Exemption 8 excludes Federal Reserve Banks from falling within the scope of "financial institution." Moreover, as Professor Ball explained, the Board's position that a Federal Reserve Bank is both a financial institution and a supervisor of financial institutions for purposes of Exemption 8 is internally inconsistent and antithetical to FOIA's objective to promote government transparency. The Board's opposition papers contend that there

is nothing inconsistent about its theory that Federal Reserve Banks are both financial institutions and supervisors for Exemption 8 purposes, but the Board never explains why. More significantly, the Board has not met its burden of establishing that Documents 3 and 4 are records of a "financial institution" within the meaning of Exemption 8, which defeats the Board's motion for summary judgment.

The Board continues to assert that the Federal Reserve Banks' lending activities make them "financial institutions in their own right," Def.'s Combined Reply 12, but notably fails to respond to Professor Ball's argument that these activities alone cannot be the defining characteristic of a financial institution for Exemption 8 purposes. *See* Pl.'s Mem. 19 & n.8 (noting that, by this measure, federal agencies that make loans such as the Department of Education, Federal Emergency Management Agency, or the Department of Agriculture, also would be considered financial institutions, a result at odds with the fact that these agencies themselves are subject to FOIA's disclosure requirements). Nor does the Board have any response to Professor Ball's argument that the Federal Reserve Banks' lending activities are distinguishable from those of a private sector bank because they are undertaken to promote the stability of the financial system rather than to seek profit. *Id.* 19. Instead, the Board contends that Federal Reserve Banks are "private corporations whose stock is owned by the member commercial banks within their districts," Def.'s Combined Reply 12 (quoting *McKinley v. Bd. of Gov. of the Fed. Reserve Sys.*, 647 F.3d 331, 333 (D.C. Cir. 2011)), without explaining this point's significance to the Board's argument. In any event, as the Board's website makes clear, "owning Reserve Bank stock is quite different from owning stock in a private company. The Reserve Banks are not operated for profit, and ownership of a certain amount of stock is, by law, a condition of membership in the [Federal Reserve] System. The stock may not be sold, traded,

or pledged as security for a loan."[4] But even if stock ownership in a Federal Reserve Bank were the same as stock ownership in a private company, which the Board admits is not the case, the objectives of a Federal Reserve Bank's banking functions are sufficiently dissimilar to those of private sector entities to preclude extending the scope of "financial institution" under Exemption 8 to Federal Reserve Banks.

Moreover, the Board's contention that the Federal Reserve Banks' other functions, such as implementing monetary policy or acting as fiscal agents for the Treasury Department, are "irrelevant" to the issue whether a Federal Reserve Bank should be considered a financial institution for Exemption 8 purposes because lending under Section 13(3) is a "traditional 'banking' function," Def.'s Combined Reply 13, is both unpersuasive and factually incorrect. The Board does not explain why these other functions are irrelevant and fails to respond to Professor Ball's arguments that these functions counsel against treating a Federal Reserve Bank as a financial institution under Exemption 8. Further, the Board's assertion that the loans forming the basis of the records at issue in this case were the result of "traditional" banking activity is undermined by the terms of Section 13(3), which make clear that a Federal Reserve Bank acts as a lender of last resort in "unusual or exigent circumstances," 12 U.S.C. § 343 (2008), stepping in only where no private sector financing is available. *See id.* (authorizing lending only after "the Federal Reserve bank … obtain[s] evidence that such individual, partnership, or corporation is unable to secure adequate credit accommodations from other banking institutions").

The Board asserts that "financial institution" has been defined broadly by courts, but as Professor Ball explained in his motion for summary judgment, the several cases that have construed this clause have done so by applying the definition of "financial institution" contained

[4] Board of Governors of the Federal Reserve System, *Who owns the Federal Reserve?*, http://www.federalreserve.gov/faqs/about_14986.htm (last visited December 18, 2013).

in either Black's Law Dictionary or the legislative history of the Sunshine Act to the entity under consideration. Pl.'s Mem. 16-17. Professor Ball's opening papers demonstrated why a Federal Reserve Bank fails to meet either definition, *see id.* at 17-18, and the Board's opposition does not challenge this argument. In addition, contrary to the Board's assertion, *Clarkson v. Greenspan*, Civ. No. 97-2035, 1998 U.S. Dist. LEXIS 23566 (D.D.C. June 30, 1998), did not hold that the Federal Reserve Banks were financial institutions for Exemption 8 purposes. Rather, *Clarkson* held that audits of the Federal Reserve Banks could be withheld as examination reports conducted by or on behalf of the Board in its capacity as an agency responsible for supervising the Federal Reserve Banks. *Id.* at *24. The court assumed without deciding that the Federal Reserve Banks were financial institutions on the basis of a lone comment in the legislative history of the Federal Reserve Act that the Federal Reserve Banks were to act as the "bankers' banks," *id.* (citing H. Rep. No. 69, 63rd Cong., 1st Sess. 32, 36 (1913)) (internal quotation marks omitted)—a statement made nearly twenty years prior to a significant expansion of the powers of the Board and the Federal Reserve Banks as a result of the enactment of Section 13(3) during the Great Depression. Reliance on *Clarkson*, then, would be a thin reed on which to hold that Federal Reserve Banks are financial institutions under Exemption 8.

The Board's reliance on *Public Investors Arbitration Bar Ass'n v. SEC*, 930 F. Supp. 2d 55 (D.D.C. 2013), is also misplaced. *See* Def.'s Combined Reply 13 n.5. The Board cites this decision to argue that "[n]othing in the text of exemption 8 limits its protection to materials related to examinations of certain lines of a financial institution's business." *Id.* That argument, however, assumes the answer to the question whether a Federal Reserve Bank is in fact a financial institution under Exemption 8. The Board's citation to its statutory authority to examine the Federal Reserve Banks, 12 U.S.C. § 248(a)(1), as support for its assertion that the Board "is

the financial institutions supervisor for the [Federal Reserve Banks]," *id.* 15, fails for the same reason. Although the Board has supervisory authority over the Federal Reserve Banks, that does not render the latter financial institutions for FOIA purposes.

Finally, the Board has no rebuttal to Professor Ball's arguments that disclosure of Documents 3 and 4 will not thwart the twin purposes of Exemption 8. Significantly, the Board concedes that a Federal Reserve Bank cannot decline an examination by the Board,[5] but nonetheless continues to assert conclusorily that disclosure of the requested records would have a "chilling effect … on the supervisory relationship." Def.'s Combined Reply 14. The Board also insists that its assertion is "uncontroverted," *id.*, ignoring entirely Professor Ball's explanation of why disclosure would have no chilling effect, *see* Pl.'s Mem. 20; Ball Decl. ¶ 17.

Moreover, as Professor Ball argued in his opening papers, disclosure of Documents 3 and 4 (or any examination records of the Federal Reserve Banks) would not undermine public confidence in the Federal Reserve Banks because they face no private sector competition and membership in the Federal Reserve System is required for certain bank entities and affords great benefits to others that join voluntarily. Pl.'s Mem. 21-22. The Board's papers are silent on this point.

Because the Board has failed to demonstrate that a Federal Reserve Bank is a financial institution within the meaning of Exemption 8, this Court should grant Professor Ball's motion for summary judgment and order the disclosure of Documents 3 and 4.

[5] Accordingly, this Court should deem admitted paragraph 14 of Professor Ball's statement of material facts, notwithstanding the Board's purported dispute of this material fact. *See Hunter*, 480 F. Supp. 2d at 130.

III. The Board Has Failed to Meet Its Burden of Demonstrating That Exemption 4 Applies to Certain Information Contained in Document 2.

In his motion for summary judgment, Professor Ball argued that the Board could not withhold approximately two pages of information about AIG in Document 2 under Exemption 4 because the information was neither obtained from a person nor confidential. Specifically, Professor Ball argued that the information was generated by the Board as part of its determination that it had a legal basis to authorize the AIG loan and that, to the extent that any withheld information actually was provided by AIG to obtain an emergency loan, the Board failed to establish the information's confidentiality under the *National Parks* standard governing mandatory submissions of information. *See* Pl.'s Mem. 23-28. In response, the Board contends that it gathered information from AIG on a voluntary basis and asserts that application of the test for voluntary provisions of information to the government set forth in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), applies. The Board's arguments are meritless.

First, the Board cites the Charlton declaration, which describes the collection of "critical, real-time information" from AIG, to support its claim that the withheld information in Document 2 came from AIG. *See* Def.'s Combined Reply 21 (citing Charlton Decl. ¶¶ 3, 7). But the fact that the Board gathered information from AIG as part of its efforts to address AIG's financial difficulties does not mean that the information contained in Document 2 was obtained from AIG, a distinction that the Caperton declaration recognizes. Contrary to the Board's characterization that "information concerning specific details of AIG's derivatives and liquidity positions was included 'by way of background discussion' in Document 2," *id.* (citing Caperton Decl. ¶ 31), that portion of the Caperton declaration actually provides that Document 2 "contains approximately two pages of background discussion *that was based on* … commercial and

financial information provided by AIG." Caperton Decl. ¶ 31 (emphasis added); the declaration does not say that the document itself contained that information. As Professor Ball explained in his opening papers, Document 2 analyzes (as of September 2008) AIG's financial condition, the prospect of private sector financing and regulatory relief available to the company, and the implications of AIG's financial collapse for the financial markets and economy. Pl.'s Mem. 23-24 (citing Ashton Decl. ¶¶ 7, 9). Disclosure of the Board's analysis may reveal information about AIG, but that "does not mean that such information was *obtained from* [AIG] within the meaning of FOIA." *Bloomberg, L.P. v. Bd. of Gov. of the Fed. Reserve Sys.*, 601 F.3d 143, 148 (2d Cir. 2010).

The cases on which the Board relies do not provide any support for its argument. In two of the cases, the court held that portions of an agency report that "contained information supplied by [an outside party] or from which information supplied by [an outside party] could be extrapolated" were obtained from a person within the meaning of Exemption 4, but the information withheld in those cases is dissimilar to the type of analysis that the Board's declarants assert is contained in Document 2. *See Gulf & Western Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) (describing the withheld portions of the record as including "actual costs for units produced, actual scrap rates, break-even point calculations, and actual cost data" (internal quotation marks omitted)); *Gold Anti-Trust Action Comm.*, 762 F. Supp. 2d at 139 (withheld information concerned names of a foreign central bank and counterparties to potential deals, and details of proposed transactions). And in *Soucie v. David*, 448 F.2d 1067, 1071 (D.C. Cir. 1971), the D.C. Circuit decided only that the document at issue was an agency record within the meaning of FOIA and remanded the case to the district court to determine whether the agency's Exemption 4 withholding was proper.

Second, to the extent that information was obtained from AIG, the Board argues that AIG's provision of that information was voluntary because the Board did not regulate or supervise AIG in 2008, and thus lacked legal authority to compel AIG to submit the information. Def.'s Combined Reply 23. Further, the Board contends that, because Section 13(3) neither specified "the type of evidence necessary for a finding that the entity was unable to secure adequate credit accommodations elsewhere" nor "create[d] a statutory obligation for an applicant to submit specific information to the lending [Federal Reserve Bank]," there is "no basis to conclude" that any of the information was required to authorize the loan. *Id.* 24. The Board's argument that this Court should apply the *Critical Mass* standard governing disclosure of voluntary submissions of information to the government ignores the fact that, without providing this information, AIG would not have been able to obtain the emergency funding necessary to avoid insolvency and financial collapse. Caperton Decl. ¶ 29 (discussing consequences of AIG collapse on other institutions in the market); Ashton Decl. ¶ 6 (referring to AIG's "impending liquidity crisis"). That neither Section 13(3) nor the Board's Regulation A, 12 C.F.R. § 201.4(d), specifies the type of information required before a Federal Reserve Bank extends emergency credit does not alter the fact that the information submitted was necessary "as a condition of" obtaining a government loan. *Biles v. HHS*, 931 F. Supp. 2d 211, 220 (D.D.C. 2013) ("Information is considered 'required' if any legal authority compels its submission, including informal mandates that call for the submission of the information as a condition of doing business with the government." (quoting *Lepelletier v. FDIC*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997), *rev'd in part on other grounds*, 164 F.3d 37 (D.C. Cir. 1999))); *Pub. Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 414 n.1 (D.D.C. 1997) ("Information is submitted involuntarily … if it is supplied pursuant to … some less formal mandate.").

As the Board's declarants make clear, the Board considered the information it gathered necessary "to meet the statutory prerequisites of [S]ection 13(3)." Caperton Decl. ¶ 11; Charlton Decl. ¶ 6 (describing information gathered as necessary to Board's "determination whether or not to authorize the FRBNY to extend a loan to AIG[,] … whether or not adequate credit was available to AIG from other banking institution[s][,] … [and] whether AIG had sufficient lendable collateral to support a loan of the magnitude it required to meet its expenses."). To adopt the Board's position that the absence of definite statutory or regulatory criteria governing information submissions renders "voluntary" any and all information submitted would run contrary to established case law. Indeed, under the Board's formulation, certain of the information at issue in *National Parks* would be deemed voluntarily submitted even though the D.C. Circuit there found the information submitted to be a condition precedent to operating concessions in the national parks, *see Nat'l Parks*, 498 F.2d at 770, an odd result given that the *Critical Mass* court made clear it was not "repudiat[ing] any part of [its] holding" in *National Parks*. *Critical Mass*, 975 F.2d at 879.

Thus, *National Parks* is the proper test to apply here. The Board's opposition papers make no attempt to satisfy its burden that the information is confidential and should be withheld pursuant to *National Parks*. As Professor Ball explained in his motion for summary judgment, disclosure of AIG's commercial or financial information contained in Document 2 will neither impair the Board's ability to obtain necessary information in the future nor cause AIG substantial competitive injury.[6] Pl.'s Mem. 25-27.

[6] Among other things, Professor Ball argued that the age of the information at issue (five years) rendered disclosure less likely to cause AIG substantial competitive harm. Pl.'s Mem. 27. In response, the Board asserts that "companies such as AIG would be less willing voluntarily to supply confidential commercial information to the Board if they believed that the Board would at some point deem the information 'stale' and decide to release it to the public." Def.'s Combined

Moreover, even if the information had been submitted voluntarily and the *Critical Mass* test applied, the Board continues to assert conclusorily that the information is of a kind that "AIG … would not customarily disclose to the public," Def.'s Combined Reply 25, without rebutting Professor Ball's argument that the information at issue was material to investors and that AIG would have disclosed it in its public securities filings. Pl.'s Mem. 27-28. Instead, the Board characterizes Professor Ball's argument as consisting of "vague allegations [that] fall far short of meeting his burden that 'specific information in the public domain that *appears to duplicate* that being withheld' was released by AIG, as needed to waive exemption 4." Def.'s Combined Reply 21 n.13. In fact, however, Professor Ball identified specific pages within AIG's 2008 Form 10-K that disclosed the information at issue. *See* Ball Decl. ¶ 23 & n. 15.

Further, the Board's reliance on *Public Citizen v. Department of State*, 276 F.3d 634 (D.C. Cir. 2002), is misplaced. As the court there made clear, a FOIA requester bears the burden of identifying specific information in the public domain "because the task of proving the negative—that information has *not* been revealed—might require the government to undertake an exhaustive, potentially limitless, search." *Id.* at 645 (citation and internal quotation marks omitted). That concern is notably absent here because Professor Ball has identified AIG's 2008 Form 10-K as a source of publicly available information. The Board's silence in response should preclude finding in its favor that the withheld information is of the type that would not customarily be disclosed to the public.

Accordingly, regardless of which test is applied, this Court should reject the Board's argument that the withheld information is confidential under Exemption 4.

Reply 25 n.17. This statement is unsupported, conclusory, and wholly speculative. Moreover, it is unresponsive to Professor Ball's arguments (Pl.'s Mem. 26) that disclosure would not impair the Board's ability to obtain necessary information in the future.

IV. The Board Did Not Conduct an Adequate Search for Complete Collateral Lists in Response to Professor Ball's FOIA Request.

In his motion for summary judgment, Professor Ball argued that an adequate search in response to his FOIA request for a listing and valuation of collateral securing the AIG loan should have included any Board records housed at the Federal Reserve Bank of New York within the meaning of 12 C.F.R. § 261.2(i)(1). That regulation provides, in relevant part, that Board records "include: (i) … all information 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) [t]hat are maintained for administrative reasons in the regular course of business in official files in … any Federal Reserve Bank in connection with the transaction of official business." In its opposition papers, the Board contends that any lending records of the Federal Reserve Banks, including those generated pursuant to Section 13(3), are not Board records because the Federal Reserve Banks do not engage in lending "for or on behalf of the Board" within the meaning of 12 C.F.R. § 261.2(i)(1)(i), and the records are not part of the files that a Federal Reserve Bank "maintain[s] for administrative reasons" under 12 C.F.R. § 261.2(i)(1)(ii). Def.'s Combined Reply 17-18. Further, the Board contends that these records are not "agency records" within the meaning of FOIA because the Board neither created nor obtained them, did not possess them at the time of Professor Ball's FOIA request, and did not use them in the performance of its official functions. *Id.* 18-19. Each of these arguments fails.

The Board contends that the question whether detailed collateral lists are Board records under 12 C.F.R. § 261.2(i)(1)(i) is resolved by the Second Circuit's decision in *Fox News Network, LLC v. Board of Governors of the Federal Reserve System*, 601 F.3d 158 (2d Cir. 2010). That case is inapposite. There, the court considered lending records generated pursuant to

12 U.S.C. § 347b, which permits "[a]ny Federal Reserve [B]ank, … [to] make advances to any member bank …." By its terms, "[t]he power to make loans is explicitly granted by statute only to the Federal Reserve Banks themselves." *Fox News*, 601 F.3d at 161 (citing 12 U.S.C. § 347b(a)). By contrast, Section 13(3), the authority under which the loans underlying the records sought in this case were made, requires the Board's authorization prior to any extension of credit. *See* 12 U.S.C. § 343 (2008). Indeed, the Ashton declaration states that "[t]he statutory criteria in effect required the Board and FRBNY to act together to make a loan." Ashton Decl. ¶ 9. Thus, the language of Section 13(3) is clear that Board action is required before a Federal Reserve Bank may lend under this provision and the Board has interpreted the statute accordingly. As a result, the Court should not credit the Board's post hoc, self-serving statement that "records at the FRBNY regarding assets pledged to the FRBNY for loans extended under [S]ection 13(3) are the FRBNY's records of its own commercial activities conducted under independent grants of statutory authority from Congress to the [Federal Reserve Banks]." Supp. Caperton Decl. ¶ 5.

The Second Circuit in *Fox News* did not have to reach the Board's argument that its interpretation of 12 C.F.R. § 261.2(i)(1)(i)—that is, that the phrase "for or on behalf of the Board" refers to "functions performed by the Reserve Banks *under delegated authority* from the Board," Def.'s Combined Reply 17 n.8 (citing Supp. Thro Decl. ¶ 3) (emphasis added)—was entitled to deference. *See Fox News*, 601 F.3d at 161 ("The Board cites no written or published expression of this internal policy or interpretation, or any prior application of it. It is therefore uncertain how much deference it commands or deserves."). Even if the Board's interpretation were correct or warranted deference, a Federal Reserve Bank's extension of credit under Section 13(3) is made pursuant to "delegated authority from the Board." Supp. Thro Decl. ¶ 3. Thus, the

FRBNY records concerning the extension of credit should be considered Board records, even under the Board's reading. The Court should therefore order the Board to conduct an adequate search of any Board records at the FRBNY.

The Court also need not defer to the Board's interpretation of what it means for records to be "maintained for administrative reasons" at a Federal Reserve Bank under 12 C.F.R. § 261.2(i)(1)(ii). Neither the Frierson nor the Johnson declaration attached to the Board's opposition papers "cites [any] written or published expression of this internal policy or interpretation, or any prior application of it," *Fox News*, 601 F.3d at 161, although both declarations were furnished after the Second Circuit's decision and could have addressed the court's concerns.

Finally, the Board's argument that any detailed collateral lists that are responsive to Professor Ball's request and in the possession of the Federal Reserve Bank of New York are not agency records is without merit. Determination of whether a record is an agency record for FOIA purposes requires evaluation of "'a variety of factors surrounding the creation, possession, control, and use of the document.'" *Judicial Watch, Inc. v. Secret Serv.*, 726 F.3d 208, 217 (D.C. Cir. 2013) (quoting *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006)). These include four factors that the D.C. Circuit considers "to determine whether an agency has sufficient control over a document to make it an agency record." *Id.* at 218 (citation and internal quotation marks omitted). These are: "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files." *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996). The agency bears the burden

of demonstrating that the requested records are not agency records. *Judicial Watch*, 726 F.3d at 220.

The Board has failed to meet its burden to demonstrate that any detailed collateral lists responsive to the fourth part of Professor Ball's FOIA request are not agency records. The Board relies primarily on the supplemental Caperton declaration to assert that, "with the exception of Documents 3 and 4, responsive records of specific assets pledged as collateral for the AIG Loan and the Maiden Lane Loan were not created or obtained by Board staff, nor in Board staff's possession at the time of the FOIA request, nor were they used by Board staff in the performance of any official Board functions." Def.'s Combined Reply 19 (citing Supp. Caperton Decl. ¶ 6). But the supplemental Caperton declaration on this point is replete with legal conclusions and devoid of any facts that would sustain the agency's burden. For instance, Caperton states that "[e]arly on in [the Board's] search for records responsive to plaintiff's FOIA Request I concluded that the detailed, granular records responsive to Items 3 and 4 would be records of the FRBNY, not records of the Board." Supp. Caperton Decl. ¶ 6. But Caperton does not explain how he arrived at this conclusion. His declaration does not include, for example, the identities of the individuals who created these records or whether the Board exercised any supervision or control over the creation of these records. *See Burka*, 87 F.3d at 515 (holding that agency's "extensive supervision and control … over collection and analysis of the data indicates that these [private] firms acted on behalf of HHS in creating the tapes"). Further, Caperton's supplemental declaration includes no facts that would allow this Court to evaluate the four *Burka* factors to determine whether the Board had the requisite control over the collateral lists. *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 480 (2d Cir. 1999) ("In this case, those facts [concerning

the issue whether requested documents were agency records] have been distilled and conclusions reached not by the district court, but by … an affiant lacking personal knowledge.").

The lack of evidence on these issues is not merely academic. As stated on page 20, *supra*, any loans extended by a Federal Reserve Bank pursuant to Section 13(3) required the Board's authorization. Drawing all reasonable inferences in favor of Professor Ball on the issue whether detailed collateral lists are agency records, *Burka*, 87 F.3d at 514, the Court should conclude that the Board exercised some supervision and control with respect to the generation of these collateral lists. *See Consumer Fed'n*, 455 F.3d at 287 ("We must nonetheless be careful to ensure that [t]he term 'agency records' … not be manipulated to avoid the basic structure of FOIA: records are presumptively disclosable unless the government can show that one of the enumerated exemptions applies." (citation and internal quotation marks omitted)). Thus, the Court should reject the Board's argument and hold that these records are agency records under FOIA.

CONCLUSION

For the foregoing reasons and those stated in Professor Ball's memorandum in support of his motion for summary judgment, 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,

/s/ Jehan A. Patterson
Jehan A. Patterson
DC Bar No. 1012119
Adina H. Rosenbaum
DC Bar No. 490928
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff

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