



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

KEVIN M. WARSH
MEMBER OF THE BOARD

September 17, 2009

Mr. William J. Olson
William J. Olson, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615

Dear Mr. Olson:

This is in response to your letter dated and received by the Board's Freedom of Information office on August 20, 2009, in which you appeal, on behalf of the Gold Anti-Trust Action Committee ("GATA"), pursuant to 12 CFR 261.13(i), the determination of the Secretary of the Board ("Secretary") on your request under the Freedom of Information Act ("the Act" or "FOIA"), 5 U.S.C. § 552. By letter dated April 14, 2009, you requested documents from January 1, 1990, to the date of your letter, "relating to, explaining, denying or otherwise mentioning: 'gold swap'; 'gold swaps'; 'gold swapped'; 'proposed gold swap'; 'proposed gold swaps'; or 'proposed gold swapped', either involving the United States of America, or any department, agency or agent thereof, or not involving the United States of America." Your request also includes eighteen other categories of documents, generally relating to gold swaps, including numerous documents from the Department of the Treasury ("Treasury") as well as documents relating to your near-identical FOIA request regarding gold swaps from December 6, 2007.¹

¹ Among other things, the eighteen other categories of documents requested include "all records of FOIA requests submitted by other persons which requested records involving: (a) the GATA FOIA request of December 6, 2007 or (b) the records provided to GATA in response to its FOIA request of December 6, 2007 since December 6, 2007." Your request also seeks copies of all FOIA requests made by persons or entities other than GATA for records relating to "gold swap," "gold swaps," or "gold swapped" since January 1, 1990. The Secretary informed you that the Board has not received any FOIA requests for records requested by

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Staff's search disclosed documents that were responsive to your request. By letter dated August 5, 2009, the Secretary informed you that staff had searched Board records and made suitable inquiries and found two additional documents, in addition to those that were responsive to your December 6, 2007 FOIA request. These two documents, consisting of 173 pages, were provided to you in their entirety. The Secretary informed you that all other responsive documents contained information that was exempt from disclosure under exemptions 4 and 5 of FOIA, 5 U.S.C. §§ 552(b)(4) and (b)(5), respectively. The Secretary further informed you that the documents containing the exempt information had been reviewed in accordance with subsection (b) of FOIA and that no reasonably segregable nonexempt information was found. Accordingly, 137 full pages were withheld from you, in like fashion to your earlier request.

You appealed this determination by letter dated and received by the Board's Freedom of Information office on August 20, 2009. I interpret your appeal as (1) requesting the Board to reevaluate the Secretary's determination that the claimed exemptions provide valid bases for withholding the information, (2) challenging Board staff's search in response to your request, (3) requesting that the Board provide documents originating from Treasury, (4) requesting that the Board make a discretionary release of information even if the Board determines the documents are covered by an exemption, and (5) requesting the Board to provide a Vaughn index of the withheld information.

Information in the possession of an agency is exempt from disclosure if it falls within one or more of the enumerated FOIA exemptions. See 5 U.S.C. §§ 552(b)(1)-(9). Exemption 4 permits agencies to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Information is exempt from disclosure if disclosure is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. See National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

GATA or provided to GATA. The Board also has not received any subsequent requests for records pertaining to the topics listed in your request. Accordingly, the Secretary informed you that the Board does not have any records responsive to this portion of your request. I have confirmed the Secretary's determination regarding the lack of any subsequent request for records regarding gold swaps since December 2007.

In connection with your appeal, I have confirmed that the information withheld under exemption 4 consists of confidential commercial or financial information relating to the operations of the Federal Reserve Banks that was obtained within the meaning of exemption 4. This includes information relating to swap arrangements with foreign banks on behalf of the Federal Reserve System and is not the type of information that is customarily disclosed to the public. This information was properly withheld from you.

Exemption 5 of FOIA permits agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption includes documents that embody the "deliberative process" of the agency before reaching a decision, in order to encourage honest and frank communication within the agency. See, e.g., National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 114, 118-20 (9th Cir. 1988). Exemption 5, therefore, covers "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). "[E]ven factual segments of documents are protected by Exemption 5 from disclosure if the manner of selecting or presenting those facts would reveal the deliberat[ive] process, or if the facts are 'inextricably intertwined' with the policy making process." Jowett, Inc. v. Department of Navy, 729 F. Supp. 871, 877 (D.D.C. 1989). "Exemption 5 serves a number of purposes among which [is] the prevention of premature disclosure of proposed policies before they have been finally formulated or adopted." Wolfe v. Department of Health and Human Serv., 839 F.2d 768, 775 (D.C. Cir. 1988).

I have confirmed that information withheld from you under exemption 5 in this case is both predecisional and deliberative within the meaning of exemption 5. Accordingly, this information was properly withheld.

As previously noted, the Secretary provided you with 173 pages of documents responsive to your request. You state that these documents appear to be redacted. I have confirmed that these documents were provided to you as they were found in our files, without having been redacted by Board staff. These documents consist of notes for and meeting transcripts of the Federal Open Market Committee ("FOMC") and originated from individuals acting in their capacity as FOMC staff, not Board staff. The FOMC is a separate entity for FOIA purposes with its own systems of records and FOIA regulation. Any redactions were made

by FOMC staff, and Board FOIA staff received the documents in redacted form. Therefore, you may wish to contact the FOMC directly at the address below should you wish to request the unredacted portions of these documents.

Federal Open Market Committee
Carol R. Low
Secretariat Assistant
20th Street and Constitution Avenue, N.W., Mail Stop 55
Washington, D.C. 20551

With regard to these same 173 pages of documents, you also state that they were responsive to, but not produced, in response to an earlier FOIA request from GATA. You state that “this is evidence of the FRB’s failure to adequately search and/or disclose responsive documents. . . .” You also cite to a Board staff discussion paper mentioning gold swaps that you found on the internet via a Google search, and which was not disclosed in response to your initial request, as further evidence of the inadequacy of the initial search.² Failure to conduct an adequate and proper search to locate responsive records would provide a basis for an appeal, and your appeal questions the adequacy and propriety of Board staff’s initial search.

The Board’s Rules Regarding Availability of Information require staff to conduct, in response to an initial request under FOIA, an appropriate and reasonable search, by manual or automated means, of the Board’s official files and any other files containing Board records in existence on the date of receipt of the request as seem reasonably likely in the particular circumstances to contain information of the kind requested. 12 C.F.R. § 261.2(n)(1); 12 C.F.R. § 261.13(f). Under FOIA, the Board is not required to provide copies of documents that are already in the public domain, such as on a website, and are reasonably accessible to the requester. 5 U.S.C. § 552(a)(2)-(3). In this instance, the Board staff discussion paper was posted directly to the Board’s public website.³ In any case, the disclosure of additional responsive documents would not undermine the reasonableness of staff’s initial search. See, e.g., Meeropol v. Meese, 790 F.2d 942, 952-953 (D.C. Cir. 1986).

² Brahim Coulibaly, “Effects of Financial Autarky and Integration: The Case of the South Africa Embargo,” Board of Governors of the Federal Reserve System, International Finance Discussion Papers, No. 839, Sept. 2005.

³ <http://www.federalreserve.gov/pubs/ifdp/2005/839/ifdp839.htm>

The Secretary also informed you that you “may wish to contact Treasury directly for assistance with your request for records that originated with or are located on the Treasury website.” You mistakenly assert in your appeal that this statement “acknowledges that (the Board) has copies of records ‘that originated with or are located on the Treasury website.’” In fact, staff’s search of Board records did not locate any such documents, and the Secretary’s statement was simply to inform you of the correct agency to which you should direct that portion of your request. Accordingly, any queries relating to this portion of your request should be directed to Treasury for any documents in the possession of that agency.

With respect to your request for a descriptive index of the withheld information, it is well settled that a FOIA requester is not entitled to receive a Vaughn Index during the administrative process. See, e.g., Schwarz v. United States Dep’t of Treasury, 131 F. Supp. 2d 142, 147 (D.D.C. 2000); Crooker v. CIA, No. 83-1426, slip op. At 3 (D.D.C. September 28, 1984). Accordingly, the Board is under no obligation to provide you with a Vaughn Index, and I decline to do so in connection with this appeal.

Based on a de novo review of the Secretary’s decision, and on the recommendation of counsel regarding the legal issues involved, I affirm the Secretary’s decision to withhold information from you under exemptions 4 and 5 of FOIA for the reasons stated above. Moreover, in light of the nature of the withheld information, it would not be appropriate to make a discretionary release of such information. Accordingly, your appeal is denied. If you believe that the Board is withholding information from you contrary to your legal rights, you may seek judicial review of my decision in an appropriate United States District Court pursuant to 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink, appearing to read "K M W" with a long horizontal flourish extending to the right.