IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERN McKINLEY,	)	
	)	
Plaintiff,	)	Civil Action No. 09-1263 ESH
	)	
v.	)	
	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,	)	
	)	
Defendants.	)	
______________________________	)	

PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT FEDERAL DEPOSIT INSURANCE CORPORATION

Plaintiff Vern McKinley, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby moves for partial summary judgment against Defendant Federal Deposit Insurance Corporation. As grounds therefore, Plaintiff respectfully refers the Court to the accompanying Memorandum of Law in Opposition to Defendant FDIC's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Partial Summary Judgment and Plaintiff's Response to Defendant FDIC's Statement of Material Facts and Plaintiff's Statement of Material Facts as to Which There is No Genuine Issue.

Dated: November 25, 2009

Respectfully submitted,

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Attorneys for Plaintiff

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Plaintiff,	)	Civil Action No. 09-1263 ESH
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Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT FDIC'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Vern McKinley, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submits this memorandum of law in opposition to the motion for summary judgment of Defendant Federal Deposit Insurance Corporation ("FDIC") and in support of his cross-motion for partial summary judgment against the FDIC. As grounds thereof, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Introduction.

This case implicates the quintessential purpose behind FOIA – piercing the veil of government secrecy and opening agency action to the light of public scrutiny – a purpose recognized and promoted by President Barack Obama himself. *See* Memorandum of Points and Authorities in Support of FDIC's Motion for Summary Judgment ("FDIC Mem.") at 2; *see also* *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

On September 29, 2008, the FDIC's Board of Directors voted to provide "open bank assistance" to facilitate Citigroup, Inc.'s acquisition of Wachovia Bank, N.A. ("Wachovia'), the nation's fourth largest bank in terms of market value, which was in danger of failing. Specifically, the FDIC agreed to absorb a share of possible losses on a $312 billion pool of loans in exchange for receiving $12 billion in preferred stock and warrants from Citigroup, Inc. to compensate taxpayers for bearing this risk. *See* FDIC Mem., Exhibit 2. In order to provide this assistance, the FDIC was required by law to make a determination that the assistance was necessary to avoid or mitigate "serious adverse effects on economic conditions or financial stability." *See* 12 U.S.C. § 1823(c)(4)(G). Four days later, on October 3, 2008, Wachovia spurned Citigroup, Inc.'s acquisition in favor of an acquisition by Wells Fargo & Co. that did not require any government assistance. Approximately two months later, in late November 2008, Citigroup, Inc. received its own "bailout" from the FDIC, the Federal Reserve, and the U.S. Department of the Treasury.

At issue in this litigation are Plaintiff's efforts to obtain information from the FDIC about its determination that this "open bank assistance" was necessary to avoid or mitigate "serious adverse effects on economic conditions or financial stability."

II. <u>Factual Background</u>.

On November 18, 2008, Plaintiff served a FOIA request on the FDIC seeking access to information about the FDIC's September 29, 2008 determination. *See* FDIC Mem., Exhibit 1. In December 2008 and early January 2009, Plaintiff exchanged emails and had at least one telephone conversation with an FDIC FOIA specialist about the request. *See* Declaration of Vern McKinley ("McKinley Decl."), attached hereto as Exhibit 1, at ¶ 11. He also received one telephone message from the FDIC's FOIA specialist. *Id*. The FDIC claims that, during a telephone conversation with the FDIC's FOIA specialist on December 18, 2008, Plaintiff limited the scope of his request to the minutes of the September 29, 2008 meeting of the FDIC's Board of Directors ("Minutes") only. *Id.* Plaintiff denies this telephone conversation took place. *See* McKinley Decl. at ¶ 11.

On January 13, 2009, the FDIC responded to Plaintiff's request by denying release of the Minutes in their entirety. FDIC Mem., Exhibit 3. The FDIC cited several exemptions set forth in the Government in the Sunshine Act, 5 U.S.C. § 552b, ("Sunshine Act") to try to justify its complete denial of Plaintiff's request. *Id.*

On January 28, 2009, Plaintiff administratively appealed the denial of his request. *Id.* at Exhibit 4.

On February 17, 2009, the FDIC responded to Plaintiff's administrative appeal by producing a heavily-redacted copy of the Minutes. *Id.* at Exhibits 5, 6. All substantive information responsive to Plaintiff's request had been withheld. *Id.*

Having exhausted his administrative remedies, Plaintiff filed suit on July 8, 2009. *See* Docket Entry #1. On August 12, 2009, the FDIC answered Plaintiff's Complaint, asserting that several exemptions from both the Sunshine Act and FOIA justified its withholdings. *See* Docket Entry #9.

On August 28, 2009, the FDIC provided Plaintiff with a supplemental response: a heavily-redacted copy of a Case Memorandum that, although it had been expressly incorporated into the Minutes, had not been previously provided to Plaintiff. *See* FDIC Mem., Exhibits 7, 8. Rather than Sunshine Act exemptions, the FDIC asserted that FOIA exemptions justified its redactions of the Case Memorandum. *Id.*

Neither of the heavily-redacted records shed any meaningful light on the basis for the FDIC's statutorily required determination that "open bank assistance" was necessary to avoid or mitigate "serious adverse effects on economic conditions or financial stability." *Id.*

III. **Argument**.

A. **Summary Judgment Standard**.

FOIA generally requires complete disclosure of requested agency information unless the information falls into one of FOIA's nine clearly delineated exemptions. 5 U.S.C. § 552(b); *see also Rose*, 425 U.S. at 360-61 (1976) (discussing the history and purpose of FOIA and the structure of FOIA exemptions). In light of FOIA's goal of promoting a general philosophy of full agency disclosure, the exemptions are construed narrowly. *United States Dep't of Justice v. Tax* Analysts, 492 U.S. 136, 151 (1989). "[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *United States Dep't of State v. Ray*, 502 U.S. 164, 173 (1991).

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, agency decisions to "withhold or disclose information under FOIA are reviewed *de novo*." *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp.2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. United States Dep't of Justice,* 745 F.2d 1476, 1485 (D.C. Cir. 1984).

For an agency to prevail on a claim of exemption, it must "prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978). "Reliance on 'agency affidavits is warranted if the affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Sciba v. Bd. Of Governors of the Federal Reserve System*, 2005 U.S. Dist. LEXIS 45686, *4 (D.D.C. 2005) (*quoting Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

Finally, an agency must demonstrate that, even where particular exemptions properly apply, all non-exempt information has been segregated and disclosed. *Sussman v. U.S. Marshals Service*, 494 F. 3d 1106, 1116 (D.C. Cir. 2007); *Shurberg Broadcasting of Hartford v. FCC*, 617 F. Supp. 825, 828 (D.D.C. 1985). A segregability determination is absolutely essential to any FOIA decision. *See Summers v. Dep't of Justice*, 140 F.3d 1077, 1081 (D.C. Cir. 1998).

B. The FDIC Failed to Conduct an Adequate Search.

As an initial matter, an agency must demonstrate that it has conducted "a search reasonably calculated to uncover all relevant documents." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994), *quoting Weisberg*, 745 F.2d at 1485. The FDIC admits that it did not conduct an adequate search for records responsive to Plaintiff's November 18, 2008 request. *See* FDIC Mem. at 4. The FDIC claims it did so based on the assertion that, during a December 18, 2008 telephone conversation with the FDIC's FOIA specialist, Plaintiff limited his FOIA request to the meeting minutes. *Id.* This assertion is wrong because Plaintiff has testified that the conversation did not take place. *See* McKinley Decl. at ¶ 11.

In addition, the only purported evidence put forward by the FDIC regarding the alleged December 18, 2008 telephone conversation is the declaration of Frederick L. Fisch, Supervisory

Counsel in the FDIC's FOIA/Privacy Act Group. In his declaration, Fisch testifies that, following a telephone conversation between Plaintiff and FDIC's Senior FOIA Specialist Jerry Sussman, Plaintiff and Sussman understood that the FDIC would conduct a search for the Minutes only.[1] *See* Declaration of Frederick L. Fisch ("Fisch Decl.") at ¶ 11. Fisch's testimony about what Sussman "understood" following the alleged conversation with Plaintiff is nothing more than a backdoor attempt to introduce inadmissible hearsay evidence. It is also clear from Fisch's declaration that Fisch has no personal knowledge about any such alleged telephone conversation between Plaintiff and Sussman. Absent is any declaration from Sussman himself. No effort is made to explain why Sussman himself could not submit a declaration of his own. Because Fisch's testimony about the alleged conversation between Sussman and Plaintiff is not admissible evidence, the FDIC cannot rely on it for purposes of its summary judgment motion. Fed.R.Civ.P. 56(e). Because the FDIC has failed to present any proper evidence about the alleged conversation, it cannot even be said that there is a genuine dispute of material fact about the conversation. The only evidence properly before the court is Plaintiff's declaration denying that the alleged conversation took place and denying further that he ever narrowed the scope of his request to the Minutes only.[2]

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[1] Fisch does not testify about the date of the alleged conversation. The FDIC asserts in its memorandum and its statement of material facts that the alleged conversation took place on December 18, 2008. It cites its Answer in support of the proposition that the alleged conversation took place on December 18, 2008. *See* Answer of Federal Deposit Insurance Corporation at ¶ 23.

[2] Nor is it idle speculation that additional, responsive records exist. The FDIC asserts that "[a]nalyses, opinions, and recommendations concerning the Citigroup proposal were prepared by FDIC staff and presented to the FDIC Board of Directors in the form of [the Case Memorandum]." *See* Statement of Material Facts in Support of FDIC's Motion for Summary Judgment at ¶ 2. It would seem very likely that additional responsive records exist that were used to prepare the Case Memorandum.

C. The FDIC Failed to Meet its Burden of Withholding Records Under the Sunshine Act and FOIA.

The primary purpose behind both the Sunshine Act and FOIA is open government -- to "make the government more fully accountable to the people." *Common Cause v. Nuclear Regulatory Comm.*, 674 F.2d 921, 928 (D.C. Cir. 1982). Asserting exemptions under either statute must be done narrowly, so that disclosure can be accomplished to the greatest extent possible. *Id*. at 929; *Rose*, 425 U.S. at 361. In addition, under both the Sunshine Act and FOIA, the agency bears the burden of establishing the propriety of an exemption. *Ray*, 502 U.S. at 173 (applying FOIA); *Common Cause*, 674 F.2d at 929 (apply the Sunshine Act).

The FDIC differentiates between the Minutes and the Case Memorandum. It applies a Sunshine Act analysis to the Minutes and a FOIA analysis to the Case Memorandum. It was error to do so.

The Minutes themselves expressly state that the Case Memorandum is a *part of* the Minutes:

> Documents and materials relevant to the Board's consideration of the foregoing are marked an (sic) exhibit for identification, are filed in the jacket of this meeting, and, by reference, are made part of these minutes and the permanent files of the Board of Directors.

See FDIC Mem., Ex. 6 at p. 56409. In addition, given the FDIC's claim that Plaintiff narrowed his request to the Minutes only, it is inconsistent for the FDIC to treat the Case Memorandum as a separate document. Obviously, if the Case Memorandum was a separate document, then the FDIC would not have produced the record to Plaintiff in light of its claim that Plaintiff limited his request to the Minutes only. The Case Memorandum is a part of the Minutes, and, consequently, the exemptions of the Sunshine Act should govern both records. The Case Memorandum should be analyzed under Sunshine Act exemptions only, not under FOIA exemptions. However, even if the Court analyzes the Case Memorandum under FOIA's exemptions, it is clear that the FDIC improperly withheld responsive information under either statute.

1. The FDIC Improperly Withheld Information <u>Pursuant to Exemption 4 of the Sunshine Act</u>.

Exemption 4 of the Sunshine Act exempts from production information that is "likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552b(c)(4). The FDIC asserts that the information it redacted pursuant to this Exemption is "commercial or financial" information. *See* FDIC Mem. at 9. The FDIC also asserts that the information was provided to it voluntarily "in large part," and, therefore, falls under the test articulated in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) *cert. denied*, 507 U.S. 984. *Id*. at 10. The *Critical Mass* confidentiality test holds that information is exempt from production if it is the type of information not customarily disclosed to the public by the person who provided the information. *Critical Mass Energy Project*, 975 F.2d at 879.

As an initial matter, the FDIC provides no evidentiary support for its claim that the information that is the subject of its Exemption 4 withholdings was provided to it "voluntarily" by Wachovia, Citigroup, Inc., Wells Fargo & Co., and an unidentified institution. While the FDIC cites specific portions of two declarations submitted in support of its summary judgment motion, none of these citations reference whether the information was provided "voluntarily." Nor has Plaintiff been able to identify any other evidentiary support in the FDIC's submissions that supports this proposition. In addition, it seems unlikely that a failing bank seeking financial assistance from the FDIC, or a bank seeking financial assistance from the FDIC to acquire a failing bank, submits financial information to the FDIC "voluntarily." This is especially the case here because the FDIC was determining whether such assistance is necessary to avoid or mitigate "serious adverse effects on economic conditions or financial stability." *See* 12 U.S.C. § 1823(c)(4)(G). Essentially, the FDIC was determining whether Wachovia was "too big to fail." Under such circumstances, it strains credulity for the FDIC to assert that the information it claims to have received from Wachovia, Citigroup, Inc., and Wells Fargo & Co. was provided "voluntarily." *See* Declaration of Christopher J. Spoth ("Spoth Decl.") at ¶¶ 7-11 and 25.[3]

In addition to this most basic, initial failure of proof, the FDIC's Exemption 4 assertion fails because of an additional lack of any evidence that the information at issue is the type of information that the submitter does not customarily disclose to the public. *Critical Mass Energy Project*, 975 F.2d at 879. Instead, the FDIC repeats, mantra-like, the following boilerplate assertion:

> Exemption 4 applies because the redacted material refers to confidential commercial or financial information received from Wachovia [or Citigroup, Inc., Wells Fargo & Co., or an unidentified institution].

Fisch Decl. at ¶¶ 21, 22, 24, 25, 28, and 31. Nor does the FDIC's assertion that "many of the facts" contained in the Minutes and the Case Memorandum "were derived from confidential commercial and financial information obtained from Wachovia, Citigroup, and Wells Fargo" provide any further evidentiary support in support of its Exemption 4 withholdings. *See* Spoth

[3] Plaintiff assumes that the reference in paragraph 25 of the Spoth Declaration to a September 29, 2009 meeting of the FDIC Board of Directors is a typographical error and that the intended date was September 29, 2008, the date of the meeting at issue in Plaintiff's request.

Decl. at ¶¶ 15 and 20. Such conclusory, generalized assertions are inadequate to satisfy an agency's burden of demonstrating that a claimed exemption applies. *See, e.g., Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

While the FDIC also asserts that the information at issue may be withheld from Plaintiff under Exemption 4 if its submission was obligatory (*see* FDIC Mem. at 11, n.8, *citing National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), this assertion suffers from a lack of proof as well. In order to prevail on such a claim, the FDIC would have to show not only that submission of the information was obligatory, but also that subsequent disclosure of the information would (1) impair the Government's ability to obtain necessary information in the future or (2) cause substantial competitive harm to the person or entity from whom the information was obtained. *Critical Mass Energy Project*, 975 F.2d at 877-78; *National Parks & Conservation Ass'n*, 498 F.2d at 770. The FDIC summarily asserts, without providing any evidentiary support whatsoever, that the institutions in question are "likely to suffer substantial competitive harm if propriety information or other information revealing their financial condition is disclosed and becomes available to their competitors." *See* FDIC Mem. at 11 n.8. Again, "conclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents." *Public Citizen Health Research Group*, 704 F.2d at 1291.

Additionally, while it may be accurate that the FDIC need not provide evidence of actual competitive harm to prevail on this type of Exemption 4 claim, it is required to show evidence of "actual competition and the likelihood of substantial competitive injury." *Public Citizen Health Research Group*, 704 F.2d at 1291, *quoting Gulf & Western Industries v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979). Again, the FDIC provides no evidence of any actual competition and makes only conclusory, generalized, and unsupported assertions of harm. "Conjecture, without evidence of imminent harm, simply fails to meet [an agency's] burden of showing that Exemption 4 applies." *Bloomberg L.P. v. Board of Governors of the Federal Reserve,* 2009 U.S. Dist. LEXIS 74942, *47 (S.D.N.Y. August 24, 2009).

Finally, the FDIC asserts that its "legitimate interest in the effectiveness of its resolution function" would be impaired if the information at issue was disclosed. *See* FDIC Mem. at 11, n.8. While this Court has accepted impairment of an agency's "program effectiveness" as satisfying Exemption 4 where the submission of the information at issue was obligatory, the program must be statutorily mandated. *Public Citizen Health Research Group v. Nat'l Institutes of Health,* 209 F. Supp.2d 37, 52 (D.D.C. 2000). Not only has the FDIC asserted that the submission of the information was voluntary, but it fails to identify any specific statutory mandates that it claims would be impaired. Rather, it points to specific paragraphs in the Spoth Declaration which, again, provide only conclusory allegations of harm and generalized statements about the current economic climate. *See* FDIC Mem. at 11, n.8, *citing* Spoth Decl. at ¶¶ 26, 28, and 29. Consequently, the FDIC failed to satisfy this application of Exemption 4 as well.

2. The FDIC's Exemption 8 Redactions <u>Place All of Its Redactions in Doubt</u>.

FOIA's Exemption 8 is identical to the Sunshine Act's Exemption 8 – both exempt from disclosure information "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)(4); 5 U.S.C § 552b(c)(8). The FDIC redacted information from the Minutes pursuant to the Sunshine Act's Exemption 8, and it redacted information from the Case Memorandum under FOIA's Exemption 8.

Plaintiff does not dispute that redaction of such information from the Minutes or the Case Memorandum may be appropriate. However, inconsistencies in some of the FDIC's redactions raise substantial questions about whether the FDIC has invoked Exemption 8 properly.

The FDIC produced two copies of a resolution of the Board of Directors, a proposed resolution and the resolution that was actually adopted. The proposed resolution was produced as part of the Case Memorandum (*see* FDIC Mem, Exhibit 8), and the adopted resolution was produced as part of the Minutes. *See* FDIC Mem., Exhibit 6, pp. 56406-09. The later-produced, proposed resolution is the more heavily redacted of the two records. A comparison of the two records reveals some of what the FDIC seeks to withhold under Exemption 8:

- that Wachovia and its related banks "are in danger of default;"
- that the FDIC's Division of Resolution and Receivership ("DRR") has "solicited bids from financial institutions for the resolution of the Banks;"
- that DRR "received no closed bank proposals for the resolution of the Banks;"
- that the Board has been advised that the "Citi bid will be less costly than other bid received and that it represents the least costly of the available methods of resolving the systemic risks presented by the failure of the Banks;"

It is not readily apparent how the above-referenced material could be characterized as information contained in or related to "examination, operating, or condition reports" protected by both FOIA Exemption 8 and the Sunshine Act Exemption 8. In fact, the information appears to be so generic that the FDIC apparently did not consider it worth redacting on February 17, 2009, when it produced the Minutes to Plaintiff. The FDIC's claim that these redactions are "moot" fails to address why it redacted the information from the Case Memorandum produced to Plaintiff on August 28, 2009, more than six months after it had already produced this same information to Plaintiff when it produced the Minutes. Far from being "moot," the redactions place all of the FDIC's claims of exemption in doubt.

3. The FDIC Improperly Withheld Information Under Sunshine Act Exemption 9(A)(ii).

Sunshine Act Exemption 9(A)(ii) exempts information the "premature" disclosure of which would "significantly endanger the stability of any financial institution" 5 U.S.C. §552b(c)(9)(A)(ii). Plaintiff has found no reported case law applying Sunshine Act Exemption 9(A)(ii), and none has been cited by the FDIC. Nonetheless, as with FOIA there is a presumption of openness, and the Sunshine Act's exemptions are construed narrowly. *Public Citizen*, 703 F. Supp. at 118-19 (applying Sunshine Act Exemption 9(B)). An agency must establish the applicability of the Sunshine Act's narrowly construed exemptions "by demonstrating specifically the individualized and particularized basis" on which it seeks to withhold information from the public. *Id.* at 119.

The FDIC asserts that producing the Minutes and Case Memorandum in full would "pose a real and present danger of misrepresentation, incorrect analyses, and misguided advice, leading to actions that would destabilize financial institutions." *See* FDIC Mem. at 14. While it states that "a time may come when disclosure of the FDIC's analyses, opinions, and discussions will not directly impact financial markets and public perceptions," it claims that, fourteen months later, that time has not yet come. *Id.* The FDIC's attempt to invoke the Sunshine Act's Exemption 9(A)(ii) suffers from the same fundamental lack of proof that defeats its other claims of exemption. Its claims are simply too generalized and conclusory to satisfy its substantial burden of proof.

Again, the FDIC refers to the Spoth and Fisch declarations for evidentiary support for its legal argument. These declarations fail to provide any such support. Spoth asserts that the redacted information includes "information about banks that are currently open and operating, and information about financial and economic factors that are critical to the health of a large number of financial institutions." *See* Spoth Decl. at ¶ 28. He claims that "[d]isclosure of this information now is likely to cause depositors, investors, businesses, other banks, and the public to call into question the viability of institutions susceptible to weaknesses." *Id.* Spoth also asserts that disclosure of the redacted information would "effectively undermine confidence; adversely affect decision-making by banks, investors, and depositor (sic); impair the resolution process, and create a real and substantial risk of destabilizing healthy institutions and causing troubled institutions to fail." *Id.* at ¶ 29. However dire his predictions, Spoth fails to explain how disclosure of the redacted information would cause any of the purported harm about which he is concerned.[4] He also makes no attempt to distinguish the withheld information from the great mass of other financial and economic data available at the time of the September 29, 2008 meeting or currently.

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[4] Spoth's testimony to this effect does not reference any specific exemptions or cross-reference any specific, redacted information. Plaintiff assumes Spoth is referring to the FDIC's Exemption 9(A)(ii) claim.

For every assertion of the Sunshine Act's Exemption 9(A)(ii), Fisch makes the same nebulous, boilerplate claim:

> [D]isclosure of information regarding financial institutions that are currently open and operating would result in news reports, commentary, advice, and speculation that would be likely to undermine confidence, adversely affect decision-making by banks, investors, and depositors, and create a real and substantial risk of destabilizing healthy institutions and further endangering troubled institutions.

See Fisch Decl. at ¶ ¶ 20-27, 29-32; *see also* Spoth Dec. at ¶ 29. Not only is this alleged harm generalized and conclusory, but there often does not appear to be any direct connection between the description of the information being withheld and "currently open and operating" financial institutions.[5] By way of example, the redacted information at issue in paragraph 20 is identified as follows:

> [C]omments . . . describing staff opinion on the consequences of using a particular type of resolution transaction with Wachovia, staff's recommendation regarding the bid of Citigroup, and staff estimates regarding losses to the Deposit Insurance Fund as a result of the Transaction.

See Fisch Decl. at ¶ 20. Likewise, the redacted information at issue in paragraph 22 is described as "comments . . . opining on the consequences of using a particular type of resolution transaction with Wachovia." *Id.* at ¶ 22. The redacted information at issue in paragraph 29 is described as "comments by John V. Thomas, Deputy General Counsel, concerning the treatment of equity holders and senior subordinated debt holders under the proposed transaction." *Id.* at ¶ 29. The redacted information at issue in paragraph 30 is described as a discussion about "litigation risk, a special assessment on the depository institutions industry, and the involvement

[5] For all intents and purposes, Wachovia itself no longer exists, as it has become a part of Wells Fargo & Co.

of the Department of the Treasury." *Id.* at ¶ 30. The redacted information at issue in paragraph 32 is described as follows:

> [C]omments by Sheila C. Bair, Chairman of the FDIC Board of Directors, concerning her views of the staff proposal, the views of the Board of Directors of the Federal Reserve System and the Department of the Treasury, the importance of the matter to the Office of the Comptroller of the Currency, and the difficulty of the process.

Id. at ¶ 32. Even if the redacted material actually contained any information about "currently open and operating" financial institutions, which does not appear to be the case based on the FDIC's own declarations, concern about "premature disclosure" has long since passed. The FDIC's argument appears to be little more than the assertion that the information should continue to be withheld, more than a year after determination to extend open bank assistance to Wachovia, because it says so.

The FDIC's fear of "news reports, commentary, advice, and speculation" argument must be balanced against the purposes sought to be achieved by FOIA and the Sunshine Act. *Public Citizen*, 703 F. Supp. at 127. An "informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed" (*see NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978)), outweighs vague and unsubstantiated fears of "news reports, commentary, advice, and speculation," which are already ubiquitous in any event. Fisch Decl. at ¶ 20. A determination by the FDIC to extend billions of dollars worth of open bank assistance to a failing financial institution *should* be subject to news reports, commentary, and advice, especially where more than a year has passed since the determination was made. Disclosing the reasoning behind the FDIC's determination will help to *end* speculation about the FDIC's reasoning. Indeed, in *Public Citizen*, the Court found:

> It is reality that public disclosure by these government officials, in this forum or any other public forum, *may* engender *some* speculation and *may* have some unknown and unquantifiable effect on various markets. But this effect (and it would speculation (sic) to expect that the effect would always be negative) must be balanced against the open society and unfettered public debate on important national issues upon which our democracy is founded. Although defendants vigorously assert a concern that open meetings will create rampant speculation, they are hard pressed to dispute that partial information, inaccurate rumors, and even, on occasion, leaks, that often emanate from secrecy and closed-door meetings, can be far more encouraging of speculation than full, open disclosure.

Public Citizen, 703 F. Supp. at 127 (emphasis in original). The Court's findings in *Public Citizen* are as applicable to the FDIC today as they were twenty years ago.

Finally, this obviously is not the first economic crisis during which the FDIC has had to deal with failing banks. *See* McKinley Decl. at ¶ 13. Nor is it likely to be the last time it considers the use of open bank assistance. During the period of the 1980s and early 1990s, a period when nearly 3,000 financial institutions failed or were provided financial assistance, Continental Illinois National Bank ("Continental") was on the brink of failure. *Id.* at ¶ 14. The threat presented by a failure of Continental was unprecedented, and, in May 1984, the FDIC Board of Directors approved open bank assistance for Continental. *Id*.

Based on the Spoth Declaration, it would be logical to infer that the FDIC did not release information about the details of the Continental resolution until the number of bank failures, assistance transactions, and problem banks had subsided and the FDIC Deposit Insurance Fund balance was restored to a positive balance. *Id.* at ¶ 17. In reality, however, the FDIC released detailed information about the open bank assistance it provided to Continental a mere five months after doing so despite the fact that the crises continued for several more years. *Id.* at ¶¶ 13-18. The information released by the FDIC about Continental is very similar to the types of information Plaintiff is seeking from the FDIC about the open bank assistance it was prepared to extend to Wachovia. *Id*. at ¶ 18. Plaintiff is aware of no evidence demonstrating that the FDIC's release of information, during an ongoing financial crisis, about the open bank assistance it provided to Continental in any way undermined the stability of Continental or any other financial institution. *Id.* Nor has the FDIC provided any such evidence. As shown by the example of Continental, the FDIC's claim that the "premature" disclosure of the information in question will "significantly endanger the stability of any financial institution" is unfounded.

4. The FDIC Improperly Withheld Information Under FOIA Exemption 5.

As demonstrated above, because the Case Memorandum was expressly made a part of the Minutes, only the Sunshine Act's Exemptions should be applied to the Case Memorandum. Because the Sunshine Act contains no deliberative process exemption, all of the information redacted by the FDIC pursuant to FOIA Exemption 5 should be released to Plaintiff.

Even if the court were to apply FOIA Exemption 5 to the Case Memorandum, the FDIC still has failed to satisfy its burden of showing that the exemption applies. The deliberative process exemption exempts from disclosure inter-agency or intra-agency records that constitute advisory opinions and materials reflecting deliberative or policy-making decisions. *In re Sealed Case*, 121 F.3d, 729, 737 (D.C. Cir. 1997). Congress adopted Exemption 5 in recognition of the merits of arguments from the Executive Branch that the quality of administrative decision-making would be seriously undermined if agencies were forced to "operate in a fishbowl" because the full and frank exchange of ideas on legal or policy matters would be impossible. *Mead Data Central, Inc. v. U.S. Dep't of the Army*, 566 F.2d 242, 256 (D.C. Cir. 1977). A decision that certain information falls within Exemption 5 should therefore rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency. *Id.*

Proper application of Exemption 5 requires that the material at issue be both predecisional and deliberative. *Id.* In addition, "[t]he deliberative process exemption exists to prevent injury to agency decision-making." *U.S. Postal Service*, 297 F. Supp.2d at 259. Such harm cannot merely be presumed. *Id*. "An agency cannot meet its statutory burden of justification by conclusory allegations of possible harm." *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977). "It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of FOIA." *Id.*

The deliberative process exemption generally does not apply to purely factual material unless it is so inextricably intertwined with the deliberative sections of a record that disclosure of the factual material would inevitably reveal the government's deliberations as well. *Id.* Many of the FDIC's descriptions of its redactions to the Case Memorandum appear to be of a factual or historical nature. For example, the FDIC describes the redacted material as "Wachovia's risk profile, liquidity, assets, liabilities, creditworthiness and stock value," "the involvement of Citigroup and Wells Fargo," "the condition of Wachovia," and "Wachovia's loan portfolio." Fisch Decl. at ¶ ¶ 35, 36, 38. Bids, proposals, assets, liabilities, portfolios, and similar materials are not the type of information properly exempted pursuant to the deliberative process privilege. *Mead* Data Central, 566 F.2d at 257-58 (information exchanged during contract negotiations not necessarily covered by Exemption 5).

In addition, the FDIC has not even attempted to make any showing of harm to its decision-making process, much less show by specific and detailed proof that such harm would result if the redacted information were to be disclosed. Again, it merely recites, ad nauseam, the following boilerplate sentences each of the eight times it tries to invoke deliberative process:

> This material is predecisional in that it was presented to the Board prior to the decision on Wachovia. It is deliberative in that it consists of analysis and opinion in support of staff recommendations directly related to the Board's deliberations and decision on Citigroup's proposed acquisition of Wachovia.

Fisch Decl. at ¶¶ 34, 35, 36, 37, 38, 39, 40, and 41. Because of the complete absence of any showing of harm, the FDIC's assertion of the deliberative process exemption cannot be sustained. *Mead Data Central*, 566 F.2d at 258.

Finally, the deliberative process privilege is a "qualified privilege and can be overcome by a sufficient showing of need." *In re Sealed Case*, 121 F.3d at 737. Courts should conduct a case-by-case analysis to balance the competing interests, "taking into account factors such as 'the relevance of the evidence,' 'the availability of other evidence,' 'the seriousness of the litigation,' 'the role of the government,' and the 'possibility of future timidity by government employees.'" *Id*. at 737-38, *quoting In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630 (D.C. Cir. 1992) (internal quotations omitted)).

The FDIC itself takes note of the "current economic climate of unprecedented government bailouts at taxpayer expense." FDIC Mem. at 3. The taxpayer-funded bank bailouts have already cost hundreds of billions of dollars, and some experts suggest the total will reach trillions. The Minutes and Case Memorandum, and any other responsive information, are absolutely crucial to the public's understanding of what the FDIC is "up to." Additionally, there is no alternate source of information regarding the FDIC's September 29, 2008 decision to provide open bank assistance. The FDIC certainly has not demonstrated that any such alternative source exists.

D. <u>The FDIC Has Failed to Meet its Segregability Burden</u>.

The segregability analysis required by FOIA and the Sunshine Act cannot be understated. In *Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977), the Court held that "even where specific exemptions apply, the agency is required to conduct a segregability analysis and determine if any non-exempt portions of the record can be released." This requirement is so essential that, "before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld … [and] [i]f the district court approves withholding without such a finding, remand is required even if the requester did not raise the issue of segregability before the court." *Sussman*, 494 F.3d at 1116 (internal citations omitted).

Neither the FDIC's motion nor its supporting declarations state whether the FDIC has disclosed all reasonably segregable information. It appears to have failed to do so. For example, viewing the redacted records themselves, it appears unlikely that three and half consecutive pages could contain no reasonably segregable information – particularly in light of the FDIC's questionable application of Exemption 8 and the inapplicability of FOIA Exemption 5. *See* FDIC Mem, Exhibit 8 at pp. 9-12. All reasonably segregable, non-exempt information must be disclosed.

IV. <u>Conclusion</u>.

For the foregoing reasons, the FDIC's motion for summary judgment should be denied and partial summary judgment should be entered in Plaintiff's favor. The FDIC should be required to search for and produce any and all records responsive to Plaintiff's request that are not subject to a proper claim of exemption. Plaintiff also respectfully requests that any remaining questions as to the proper application of the FDIC's claims of exemption should be resolved by the Court *in camera*.

Dated: November 25, 2009

Respectfully submitted,

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERN McKINLEY,	)	
	)	
Plaintiff,	)	Civil Action No. 09-1263 ESH
	)	
v.	)	
	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT FDIC'S STATEMENT OF MATERIAL FACTS AND PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Plaintiff Vern McKinley, by counsel and pursuant to LcvR 56.1, respectfully submits the following response to Defendant Federal Deposit Insurance Corporation's ("FDIC") Statement of Material Facts as to Which There is No Genuine Issue:

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed.

6. Undisputed.

7. Undisputed.

8. Undisputed.

9. Undisputed.

10. Undisputed.

11. Objection; inadmissible hearsay; lack of personal knowledge; denied as that Plaintiff agreed to narrow the scope of the search during a telephone call on December 18, 2008. *See* McKinley Decl. at ¶ 11.

12. Undisputed.

13. Undisputed.

14. Undisputed.

15. Undisputed.

16. Undisputed.

17. Undisputed.

18. Undisputed.

19. Undisputed.

Plaintiff respectfully submits the following statement of material facts as to which there is no genuine issue:

1. Plaintiff denies that, during a December 18, 2008 telephone call with FDIC Senior Freedom of Information Act Specialist Jerry Sussman, he agreed to limit the scope of his Freedom of Information Act request to the minutes of the September 29, 2008 meeting of FDIC Board of Directors only. *Id.*

Dated: November 25, 2009

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