[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5353

VERN McKINLEY

Plaintiff-Appellant,

v.

BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM

Defendant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT VERN McKINLEY

Paul J. Orfanedes
Michael Bekesha
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172

Counsel for Plaintiff-Appellant

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Cir. R. 28(a)(1), counsel provides the following information as to parties, rulings, and related cases:

(A) Parties and Amici

The following parties, interveners, and amici curiae appeared, or sought to appear, below:

Plaintiff: Vern McKinley

Defendant: Federal Deposit Insurance Corporation

Defendant: Board of Governors of the Federal Reserve System

The following parties, interveners, and amici curiae are before this Court on appeal:

Plaintiff-Appellant: Vern McKinley

Defendant-Appellee: Board of Governors of the Federal Reserve System

(B) Ruling under Review

The ruling under review is the Opinion and Order of the United States District Court for the District of Columbia (Huvelle, J.) decided on September 29, 2010. The ruling can be found at Joint Appendix, page 120, and is published as *McKinley v. FDIC*, 2010 U.S. Dist. LEXIS 103045 (D.D.C. 2009).

(C) Related Cases

Judicial Watch does not believe that there are any related cases within the meaning of Local R. 28(a)(1)(C).

/s/ Michael Bekesha

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GLOSSARY OF ABBREVIATIONS

Bear Stearns	The Bear Stearns Companies Inc.
The Board	The Board of Governors of the Federal Reserve System
The District Court	The U.S. District Court for the District of Columbia
FOIA	Freedom of Information Act
FRBNY	Federal Reserve Bank of New York
JPMorgan	JPMorgan Chase Bank
Opinion	Memorandum Opinion of U.S. District Judge Ellen Segal Huvelle

JURISDICTIONAL STATEMENT

Jurisdiction in the District Court was based upon the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291. This appeal is timely because the District Court entered its final judgment on September 29, 2010 (JA 146), and pursuant to Fed. R. App. 4(a)(1)(B), a timely notice of appeal was filed on October 19, 2010. JA 147.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Federal Reserve Bank of New York is an outside consultant for the purpose of the "intra-agency communication" requirement of FOIA Exemption 5.

2. Whether the Board of Governors of the Federal Reserve System has satisfied its burden of demonstrating that the release of the withheld material would harm its decision making process as to invoke the deliberative process privilege of FOIA Exemption 5.

3. Whether the Board of Governors of the Federal Reserve System has satisfied its burden of demonstrating that the withheld material was contained in or related to examination, operating or condition reports as to invoke FOIA Exemption 8.

STATUTES AND REGULATIONS

5 U.S.C. § 552(b):

This section does not apply to matters that are –

> **(5)** 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;
>
> **(8)** 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;

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT OF THE CASE

This appeal concerns the first of what became a series of bailouts contemplated or undertaken by the federal government during the financial crisis of 2008. On March 14, 2008, the Board of Governors of the Federal Reserve System ("the Board") officially convened to authorize the Federal Reserve Board of New York ("FRBNY") to extend credit to JPMorgan Chase Bank ("JPMorgan") on a nonrecourse basis to provide emergency financing to The Bear Stearns Companies Inc. ("Bear Stearns"). Memorandum Opinion of U.S. District Judge Ellen Segal Huvelle ("Opinion"), dated September 29, 2010, at 4 (JA 123). The Board took what then-FRBNY President Timothy Geithner described as the "extraordinary step" of invoking its powers under section 13(3) of the Federal Reserve Act because Bear Stearns was not a depository institution and, consequently, was not eligible to obtain financing directly from FRBNY's discount window. In lay terms, "the Board authorized [] FRBNY to extend credit to JP Morgan Chase to provide a temporary loan to Bear Stearns to enable it to meet its financial obligations and to avoid filing for bankruptcy." *Id*. After the authorization was granted, FRBNY, a private bank, decided to extend credit to JPMorgan. *Id*.

On June 27, 2008, the Board released the minutes of its March 14, 2008 meeting. The minutes disclosed only that "given the fragile condition of the

financial markets at the time, the prominent position of Bear Stearns in those markets, and the expected contagion that would result from the immediate failure of Bear Stearns, the best alternative available was to provide temporary emergency funding to Bear Stearns through an arrangement with JPMorgan Chase." *Id*. Among other findings, the minutes summarily stated that the Board had concluded that "unusual and exigent circumstances existed" and that "Bear Stearns, and possibly other primary securities dealers, were unable to secure adequate credit accommodations elsewhere." *Id*. Nowhere did the Board identify the specific evidence it considered or how it analyzed this evidence.

Given the extraordinary nature of this transaction and the lack of any public explanation of the underlying justifications for the Bear Stearns transaction, Vern McKinley submitted a Freedom of Information Act ("FOIA") request to the Board. After the commencement of this litigation, on September 30, 2009, the Board identified 238 pages of responsive material. Opinion at 5 (JA 124). Of those pages, the Board produced 48 pages in their entirety and 27 pages in part. *Id*. It also withheld 163 pages in their entirety. *Id*. The Board subsequently moved for summary judgment, asserting that it had satisfied its statutory obligations under FOIA. *Id*. at 5-6 (JA 124-125). McKinley opposed the Board's motion and simultaneously cross-moved for summary judgment, challenging the applicability of the Board's claims of FOIA Exemptions 4, 5, and 8. *Id*. at 6 (JA 125).

On September 29, 2010, the U.S. District Court for the District of Columbia ("the District Court") granted the Board's motion for summary judgment and denied McKinley's cross-motion. *Id*. at 26 (JA 145). The District Court specifically found that the Board satisfied its burden of establishing that it withheld material properly pursuant to FOIA Exemptions 5 and 8. *Id*. Because the Board had claimed FOIA Exemption 5 over all of the withheld material, the District Court did not address whether the Board properly withheld material pursuant to FOIA Exemption 4. *Id*.

STATEMENT OF FACTS

On December 17, 2008, McKinley submitted a FOIA request to the Board seeking access to records detailing "the 'expected contagion that would result from the immediate failure of Bear Stearns' and the related conclusion that 'this action was necessary to prevent, correct, or mitigate serious harm to the economy or financial stability' as described in the meeting minutes" released on June 27, 2008. Opinion at 4-5 (JA 123-124). After the commencement of this litigation, on September 30, 2009, the Board identified 238 pages of responsive material. *Id.* at 5 (JA 124). Of those pages, the Board continues to withhold 27 pages in part and 163 pages in their entirety. *Id*. At issue here are those 190 pages of responsive material.

SUMMARY OF THE ARGUMENT

For the Board to properly withhold responsive material pursuant to FOIA Exemption 5, it must first demonstrate that the material originated within a government agency or, at a minimum, a non-interested, outside consultant from which it solicited advice. In this case, the Board has failed to demonstrate that it asked FRBNY to prepare or provide material to the Board. Nor has the Board demonstrated that FRBNY prepared material for the purpose of aiding the Board's deliberative process. In fact, it is likely that FRBNY prepared material in furtherance of its own interests: to determine whether it would extend an emergency loan to Bear Stearns. Since the Board has failed to show that the communication between the Board and FRBNY was, in fact, "intra-agency communication," FOIA Exemption 5 cannot and does not protect the requested material from disclosure.

The Board also has failed to show that the withheld material is deliberative. The law of this Circuit is clear. For the Board to withhold material pursuant to the deliberative process privilege, it must demonstrate that the release of such material would harm its decision making process. The Board has not presented any such evidence. The Board therefore has failed to satisfy its burden.

With respect to FOIA Exemption 8, the Board has not demonstrated that the withheld material is contained in or related to examination, operating or condition

reports. Instead, the Board maintains that FOIA Exemption 8 should be interpreted to protect from disclosure any and all financial information it receives from a financial institution. Such argument cannot withstand the fundamental principle that FOIA exemptions must be narrowly construed.

Since the Board has failed to satisfy its burden under FOIA, the Board must produce all responsive material to McKinley.

ARGUMENT

I. Standard of Review.

District court decisions on summary judgment motions in FOIA cases are reviewed *de novo*. *Sussman v. United States Marshals Service,* 494 F.3d 1106, 1111-1112 (D.C. Cir. 2007) (*citing Sample v. Bureau of Prisons,* 466 F.3d 1086, 1087 (D.C. Cir. 2006)).

II. The Board Has Failed to Establish that FOIA Exemption 5 Applies to the Withheld Material.

FOIA Exemption 5 allows an agency to withhold material that is "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). To satisfy this exemption, a government agency must show that the source of the withheld material is a government agency and that the withheld material falls within the ambit of a privilege against discovery. *Department of the Interior v. Klamath Water Users Protective Association,* 532 U.S. 1, 8 (2001). In this

matter, the discovery privilege that the Board attempts to invoke is the deliberative process privilege.

A. The Board has not demonstrated that FRBNY is an outside consultant as to satisfy the "intra-agency communication" requirement of FOIA Exemption 5.

Within the scope of FOIA Exemption 5, before an agency can assert that the withheld material falls within the ambit of a privilege against discovery, it must first demonstrate that the communication is "inter-agency or intra-agency communication." *Id*. (explaining that the demonstration that a communication is an "inter-agency or intra-agency communication" "is no less important than" the showing that the material falls within the ambit of a privilege against discovery). It is undisputed that FRBNY is not a government agency and that the communication between the Board and FRBNY was not "inter-agency communication." Opinion at 9 (JA 128). Moreover, it is undisputed that FRBNY is not a component of the Board (*Id.* at 2 (JA 121)) and that the communication between the Board and FRBNY does not satisfy the traditional definition of "intra-agency communication." Therefore, the Board was required to assert a novel argument to try to justify its withholdings pursuant to FOIA Exemption 5. Notably, the Board was completely silent on the issue in its Motion for Summary Judgment. It was only after McKinley raised the issue in his Opposition and Cross-Motion for Summary Judgment that the Board even attempted to assert that communication

between the Board and FRBNY was protected from disclosure pursuant to the "consultant corollary." In other words, after realizing it was unlawfully withholding material, the Board had to improvise. In doing so, it asserted a makeshift position unsupported by the law of this Circuit.

The Supreme Court has held that communication between a government agency and an outside consultant may constitute an "intra-agency communication" if "the consultant does not represent an interest of its own . . . when it advises the agency." *Klamath*, 532 U.S. at 11. Moreover, the consultant's only obligations must be to the "truth and its sense of what good judgment calls for" in order for the communication to be covered by the privilege. *Id*. The consultant must "function[] just as an employee would be expected to do." *Id.*

In *Klamath*, an Indian tribe submitted to a government agency material that discussed issues related to water rights of the tribe. *Id.* at 13. Subsequently, a FOIA requester sought access to that material, and the agency denied its request by asserting that the Indian tribe was an outside consultant of the agency and FOIA Exemption 5 applied. The Supreme Court disagreed. The Supreme Court held that the Indian tribe was not an outside consultant and the communication between it and the government agency was not protected by FOIA Exemption 5 because the Indian tribe had interests distinct from that of the government agency. *Id*. at 14 (The Indian tribe was "pressing its own view of its own interest in its

communications with" the government agency.). Or, as this Court succinctly explained in *National Institute of Military Justice v. United States Department of Defense*, "Unlike the Indian tribes in *Klamath*, the individuals [that the government agency] consulted had no individual interests to promote in their submissions." 512 F.3d 677, 683 (D.C. Cir. 2008). For FRBNY's communication with the Board to be protected under the consultant corollary, FRBNY's interests could not be any different from those of the Board.

However, the Board has not demonstrated that FRBNY communicated with the Board without unique interests of its own. Section 13(3) of the Federal Reserve Act gives the Board the power to authorize Federal Reserve Banks, such as FRBNY, to extend loans to non-banks in "unusual and exigent circumstances" and gives the Federal Reserve Banks the final say as to whether to actually extend such loans. Before the loan could be extended, FRBNY was required by law to make its own finding, specifically, that the recipient of the prospective loan "is unable to secure adequate credit accommodations from other banking institutions." Opinion at 10-11 (JA 129-130). In other words, FRBNY had its own interests when it communicated with the Board because Section 13(3) gave FRBNY, not the Board, final decision making authority.

In other words, FRBNY's interests are fundamentally different from that of an outside consultant.[1] FRBNY, as a private corporation engaged in the business of banking, has its own interests and obligations in the commercial activity of extending credit. *Id*. at 10-11 (JA 129-130). If the interests of the various banks of the Federal Reserve System were the same as the interests of the Board, Congress would have authorized the Board to extend credit directly. Similarly, even if the Board authorizes the extension of credit, FRBNY is not required to extend the credit. Whether credit is extended is determined by business practices and what is best for FRBNY. *Id* at 11 (JA 130).

The Board does not refute the distinct interests of FRBNY as defined by Section 13(3). Nor does it present any evidence to demonstrate that FRBNY was not "pressing its own view of its own interest in its communications with" the Board. *Klamath*, 532 U.S. at 14. Although the Board provided no evidence of such, the District Court found that the "FRBNY was not representing an interest of its own when it advised the Board, but rather it was simply assisting the Board's evaluation of the Bear Stearns situation." Opinion at 12 (JA 133). The District Court relied on the following statement: "[I]n accordance with well-established

[1] The Board's own regulations state that it may delegate authority but only "by published order or rule." 56 C.F.R. § 265.1. The process of gathering and discussing data which may be used in a determination to authorize FRBNY to extend a loan is not contained in the functions delegated to Federal Reserve Banks. *See* 56 C.F.R. § 265.11.

supervisory processes, Board and [FRBNY] staff responsible for [large complex banking organizations ("LCBO")] supervision surveyed the LCBOs for purposes of assessing LCBO's real-time exposure to Bear Stearns." *Id*. (*quoting* Declaration of Coryann Stefansson at ¶ 8 (JA 101-102)). Yet, that passage quite clearly does not state that FRBNY "was not representing an interest of its own" or that it "was simply assisting the Board."

Not only has the Board failed to demonstrate that FRBNY was not representing any interests of its own when it communicated with the Board about Bear Stearns, but the Board also has failed to demonstrate that the withheld material was solicited from FRBNY by the Board. Recently, this Court held that "intra-agency communication" includes "agency records containing comments solicited from non-governmental parties . . . whose counsel [an agency] sought." *National Institute*, 512 F.3d at 680. In other words, communication between a government agency and an outside consultant is only "intra-agency communication" if it was solicited by the agency and "for the purpose of aiding the agency's deliberative process." *Id*. at 681 (internal citations omitted).

Once again, the Board has not presented any evidence to satisfy its burden. It has not shown that it solicited advice from FRBNY at all. Nor has it presented any evidence that the communication was created at the request of the Board.

Finally, nowhere does the Board demonstrate that FRBNY communicated with the Board for the purpose of aiding its deliberative process.

In finding that the communication between the Board and FRBNY was "intra-agency communication," the District Court apparently relied on broad and inconclusive assertions presented in a declaration attached to the Board's Motion for Summary Judgment. Opinion at 10-12 (JA 129-131). It found that the following testimony adequately showed that the withheld material was submitted by FRBNY "in response to" the Board's "request for advice" (*Id*. at 10 (JA 129)):

> Board members and Board staff were concerned about the effects a Bear Stearns bankruptcy would have on financial markets given the prominent position of Bear Stearns in those markets. We were also concerned about the impact a Bear Stearns bankruptcy filing would have on individual LCBOs [large complex banking organizations] and smaller institutions supervised by the Board and other financial entities not supervised by the Board. As a result, in accordance with well-established supervisory processes, Board and [FRBNY] staff responsible for LCBO supervision surveyed the LCBOs for purposes of assessing LCBO's real-time exposure to Bear Stearns. This action was taken as part of the Board's consideration of potential responses to Bear Stearns' funding difficulties.

Id. (*quoting* Declaration of Coryann Stefansson at ¶ 8 (JA 100-101)). Yet, nowhere in that passage does Ms. Stefansson testify that the Board asked FRBNY for advice. Nor does the passage assert that FRBNY provided advice to the Board. Ms. Steffanson simply states that staff for both the Board and FRBNY "surveyed" the situation. Based on the above, the Board's staff and FRBNY's staff could have

been "surveying" the data simultaneously, but independently, and with different interests at stake.

In sum, nowhere does the Board demonstrate that it asked FRBNY to gather and discuss data with the Board. Nor does the Board demonstrate that FRBNY gathered data for the purpose of aiding the Board's deliberative process. In fact, FRBNY gathered data in furtherance of its own interests: to determine whether it would extend an emergency loan. Since the Board has failed to demonstrate that the communication between the Board and FRBNY was, in fact, "intra-agency communication," FOIA Exemption 5 does not protect the withheld material from disclosure. The Board must therefore produce all responsive material to McKinley.

B. The Board has failed to demonstrate that the release of the withheld material would harm its decision making process as to invoke the deliberative process privilege of FOIA Exemption 5.

Even if this Court were to hold that the withheld material is "intra-agency communication," the Board has failed to demonstrate that the material is protected from disclosure pursuant to the deliberative process privilege.[2] For a government

[2] The District Court also found that Document Number 38, a memorandum prepared by a FRBNY attorney, was properly withheld pursuant to the attorney work product doctrine. Opinion at 19-21 (JA 138-140). The court based its decision on its finding that "FRBNY personnel were acting as consultants to the Board." *Id*. at 20 (JA 139). Since the Board has not shown that FRBNY was acting as an outside consultant, Document Number 38 is not attorney work product of the Board. If the protections of the attorney work product doctrine even apply,

agency to properly withhold material pursuant to the deliberative process privilege, the agency must demonstrate that the material would "reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). Further, the material must be "predecisional and it must be deliberative." *Id*. (citations omitted). At issue here is whether the Board has sufficiently shown that the disclosure of the withheld material would harm its decision making process.[3]

The law of this Circuit is clear. The deliberative process privilege only protects "predecisional communications from disclosure so as to prevent injury to the quality of agency decisions." *Horowitz v. Peace Corps*., 428 F.3d 271, 276 (D.C. Cir. 2005). Starting in 1987 with *Dudman Communications Corporation v. Department of Air Force*, this Court has consistently held that courts must "focus less on the nature of the materials sought and more on the effect of the materials'

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they belong to FRBNY, not the Board. FRBNY is not a party to this litigation and has not invoked the doctrine's protections. *See, e.g., United States v. American Telephone and Telegraph Company*, 642 F.2d 1285, 1297 (D.C. Cir. 1980).

[3] The District Court incorrectly found that the Board was not required to establish that the release of the withheld documents or material would cause harm to the decision-making process. Opinion at 18-19 (JA 137-138). Under the law of this Circuit, material is only considered to be "deliberative" if an agency demonstrates that disclosure of the material would harm its deliberative process.

release." 815 F.2d 1565, 1568 (D.C. Cir. 1987). More succinctly, the key question in determining if material is deliberative is

> whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.

Horowitz, 428 F.3d at 276 (*quoting Dudman Comm. Corp.*, 815 F.2d at 1568); *see also, Formaldehyde Institute v. Department of Health and Human Services*, 889 F.2d 1118, 1123-1124 (D.C. Cir. 1989) ("The pertinent issue is what harm, if any, the [document's] release would do to [an agency's] deliberative process."); *Access Reports v. Department of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991) ("The 'key question' in identifying 'deliberative' material is whether disclosure of the information would 'discourage candid discussions'"). Therefore, in order for a government agency to properly withhold material pursuant to the deliberative process privilege of FOIA Exemption 5, the agency must demonstrate that such material "would actually inhibit candor in the decision making process if available to the public." *Army Times Publication Company v. Department of the Air Force*, 998 F.2d 1067, 1072 (D.C. Cir. 1993); *Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 778 (D.C. Cir. 1988) ("The burden of demonstrating that disclosure would be likely to have adverse effects on agency decisionmaking falls on the government.").

Moreover, an agency "cannot meet its statutory burden of justification by conclusory allegations of possible harm." *Mead Data Central, Inc. v. United States Department 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 the FOIA." *Id.* Such can be done through declarations or testimony. In *Horowitz*, this Court concluded that the requested material was properly withheld pursuant to the deliberative process privilege only after reviewing testimony that showed "making [the withheld] documents publicly available would deter [individuals] from creating them and deprive such officials of the benefit of review and comment from other departments." *Horowitz*, 428 F.3d at 276-277. Similarly, in *Formaldehyde Institute*, this Court held that the withheld records were properly exempt from disclosure pursuant to the deliberative process privilege only after it reviewed indisputable evidence "that disclosure of reviewers' comments would seriously harm the deliberative process." 889 F.2d at 1124. In that case, the government agency produced declarations asserting that the

> release of reviewers' editorial comments would very likely have a chilling effect on either the candor of potential reviewers of government-submitted articles or on the ability of the government to have its work considered for review at all. Furthermore, a government author is likely to be less willing to submit her work to a refereed journal at all if critical reviews could come to light somewhere down the line.

Id.

Contrary to the well-established precedent of this Court, the Board has not even attempted to demonstrate that disclosure of the withheld material "would actually inhibit candor" or otherwise harm its decision making process. Rather, its declarations merely allege that the withheld material is deliberative. Declaration of Alison Thro at ¶ 17 (JA 37-38) ("Because this information was considered by Board members and Board and Reserve Bank staff as part of the process of deliberation leading up to the Board's decision to extend the Temporary Loan, I considered it exempt under Exemption 5"); *Id.* at ¶ 19 (JA 38) ("Because I was informed by staff who participated in the deliberations that this information and these analyses were considered by the Board and staff advising the Board as part of the ongoing process of deliberation leading up to the decision to authorize the Temporary Loan, I considered these documents to be pre-decisional"); *Id*. at ¶ 22 (JA 40-41) ("[T]hese factual considerations and legal analyses were presented orally to the Board prior to its decision and were later reduced to writing. Because these documents reflect pre-decisional, deliberative considerations, I considered them to be exempt from disclosure under FOIA Exemption 5"). Quite clearly, the Board has failed to satisfy its burden to demonstrate that disclosure would be likely to have adverse effects on agency decisionmaking. *Wolfe*, 839 F.2d at 778.[4]

[4] As this Court has explained, courts cannot "mechanically apply the fact/opinion test." *Wolfe*, 839 F.2d at 774; *Petroleum Information Corporation v. United States Department of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992)

To be protected by the deliberative process privilege, the Board must show that disclosure of the withheld material would discourage candid discussions and would harm its decision making process. The Board has failed to make this required showing. The deliberative process privilege therefore does not protect the withheld material from disclosure, and the Board must produce all responsive material to McKinley.

III. The Board Has Failed to Demonstrate that the Withheld Material Was Contained in or Related to Examination, Operating or Condition Reports as to Invoke FOIA Exemption 8.

Exemption 8 provides that an agency may withhold material that is "contained in or related to the examination, operating or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). While Exemption 8 appears to have been crafted broadly, a broad application of the exemption does not eliminate an agency's obligation to provide "a relatively detailed justification,

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(Precedent "caution[s] against fact/opinion characterization as the way to decide the full range of Exemption 5 cases."). Instead, courts "must examine the information requested in light of the policies and goals that underlie the deliberative process privilege." *Wolfe*, 839 F.2d at 774. The District Court incorrectly applied a factual versus opinion analysis in sustaining the Board's claim of the deliberative process privilege. Since the Board did not provide any evidence that the disclosure of the withheld material would expose its decision making process in such a way as to discourage candid discussion and thereby undermine its ability to perform its functions, the distinction between facts and opinion is irrelevant. The Board must produce all material that it has withheld pursuant to the deliberative process privilege.

specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *King v. United States Department of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) (*quoting Mead Data*, 566 F.2d at 251). In other words, simply making a FOIA Exemption 8 assertion is not sufficient.

Yet, the Board did just that when it attempted to invoke FOIA Exemption 8. The Board has failed to demonstrate that the withheld material relates to a specific examination, operating or condition report. The Board has done no more than baldly assert that the withheld information "is related to examination, operating or condition reports." Declaration of Alison Thro at ¶ 17 (JA 36-37).

Instead of satisfying its burden by providing evidence that the withheld material relates to an actual report, the Board argues that any financial information it obtains in its supervisory capacity from or about any financial institution necessarily constitutes or relates to a "report" for purposes of Exemption 8. Such a construction of the term "report" is not consistent with the plain meaning of Exemption 8. *See Hammontree v. National Labor Relations Board,* 894 F.2d 438, 441 (D.C. Cir. 1990) (*citing Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842-843 (1984)). Congress cannot have intended the term "report" as used in Exemption 8 to have such an overarching meaning.[5]

[5] The Federal Financial Institutions Examination Council was statutorily

If, in the alternative, it is the Board's argument that the various email and attached tables are not contained in or relate to "examination, operating or condition reports," but themselves constitute such reports, then the Board's claims fail for another reason. While Exemption 8 may have been crafted broadly, it is not without limits. Such reports have a clear and definite meaning. *See, e.g., In re: Franklin National Bank Securities Litigation*, 478 F. Supp. 577, 579 (E.D.N.Y. 1979) (describing the bank examination process generally and the contents of "Reports of Examination" generated as part of that process).

Moreover, the Supreme Court has recognized that FOIA exemptions are limited in scope and 'do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). To construe FOIA Exemption 8's use of the term "examination, operating or condition reports" as the District Court does would ignore the plain language of the exemption and the ordinary meaning of its terms. It also would be antithetical to the mandate that FOIA exemptions be construed narrowly. *Rose*, 425 U.S. at 361. Because the Board has not sufficiently shown that the withheld

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created in 1979 and is a "formal interagency body empowered to prescribe uniform principles, standards, and *report forms for the federal examination of financial institutions*," including the Federal Reserve and the FDIC. *See* FFIEC homepage at http://www.ffiec.gov/about.htm (emphasis added). This suggests that the financial industry uses a formal system of examination, operating or condition reports and does not define examination, operating and condition reports to mean any and all communicated financial information.

material is contained in or related to examination, operating or condition reports, it must produce all responsive material to McKinley.

CONCLUSION

For the foregoing reasons, McKinley respectfully requests that this Court reverse the District Court's order granting the Board's motion for summary judgment and denying McKinley's cross-motion for summary judgment and remand for further proceedings.

Dated: January 28, 2011

Respectfully submitted,

Paul J. Orfanedes

/s/ Michael Bekesha

Michael Bekesha
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 4,982 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Michael Bekesha

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January 2011, I filed via the CM/ECF system and by hand (the original and eight copies of) the foregoing **BRIEF OF APPELLANT VERN McKINLEY** with the Court and served via the CM/ECF system and by First-Class U.S. Mail (two copies of) the foregoing **BRIEF OF APPELLANT VERN McKINLEY** to:

Samantha L. Chaifetz
Mark B. Stern
U.S. Department of Justice, Civil Appellate Staff
950 Pennsylvania Ave., N.W.
Washington, DC 20530

/s/ Michael Bekesha