UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERN MCKINLEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 10-00420 (EGS)
	)	
FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Vern McKinley, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendant Federal Deposit Insurance Corporation. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment, Plaintiff's Local Civil Rule 7(h) Statement of Material Facts Not in Dispute, and Declaration of Vern McKinley.

Dated: April 13, 2011

Respectfully submitted,

Paul J. Orfanedes (D.C. Bar No. 429716)

/s/ Michael Bekesha
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Plaintiff,	)	
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FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
	)	
	)	
Defendant.	)	
	)	

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

Plaintiff Vern McKinley, by counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully submits this memorandum of law in opposition to Defendant Federal Deposit Insurance Corporation's motion for summary judgment and in support of Plaintiff's cross-motion for summary judgment. As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Background.

As set out in prior briefing, because of the unprecedented nature of the response by the Federal Deposit Insurance Corporation ("FDIC") to the financial crisis of 2008-2009 and the continuing lack of transparency with respect to the government's actions, Plaintiff, a private citizen, served three Freedom of Information Act ("FOIA") requests on the FDIC in December 2009 in an effort to discover "what the Government is up to." *U.S. DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 800 (1989). One of Plaintiff's requests sought records from Defendant regarding its October 2008 decision to create a "Temporary Liquidity Guarantee

Program" to provide financial support to banks, thrift institutions, and certain bank holding companies. Plaintiff's other two requests sought records from Defendant regarding its decisions in November 2008 and January 2009 to extend such support to Citigroup, Inc. and Bank of America Corp., respectively. Each request specifically asked for "any information available" on these determinations. Memorandum Opinion, dated December 23, 2010, Docket Entry No. 17 ("Opinion"), at 2.

Plaintiff initiated this lawsuit on March 15, 2010, after Defendant failed to respond to his requests. On April 15, 2010, one month after Plaintiff filed suit and approximately one week before Defendant was required to respond to Plaintiff's Complaint, Defendant produced six documents, comprising 102 pages of heavily redacted meeting minutes and memos, in response to Plaintiff's requests.

Shortly thereafter, Defendant moved to dismiss Plaintiff's Complaint, and Plaintiff cross-moved for summary judgment. Following briefing of both motions, the Court denied Defendant's motion to dismiss and granted Plaintiff's motion for summary judgment in part. Defendant subsequently released the improperly withheld portions of the documents. On February 23, 2011, the Court ordered the parties to brief what appears to be the only remaining issue in this litigation: whether Defendant has satisfied its obligation to conduct reasonable searches for documents responsive to Plaintiff's requests. Plaintiff submits that the answer is no.

II. Argument.

A. Defendant must demonstrate that its searches were reasonable.

In its December 23, 2010 Memorandum Opinion, the Court, in granting Plaintiff's motion for summary judgment regarding the adequacy of Defendant's searches, stated:

> The FDIC must either (1) conduct a new search (or searches) for the records sought by the plaintiff to ensure the search is adequate

> consistent with governing caselaw; or (2) provide the Court with declarations from which the Court can find that the declarants have personal knowledge that the search methodology, procedures, and searches actually conducted were reasonably designed to locate documents responsive to plaintiff's requests.

Opinion at 10-11. Defendant chose not to conduct new searches. Instead, it submitted declarations in an attempt to justify its prior searches for records responsive to Plaintiff's requests. While Plaintiff does not contest that the declarants have personal knowledge of Defendant's search methodology and procedures or that searches were actually conducted, the declarations fail to satisfy Defendant's burden of demonstrating "beyond material doubt that its search[es were] 'reasonably calculated to uncover all relevant documents.'" *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*quoting Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)).

B. The FDIC has failed to conduct adequate searches.

When courts analyze whether an agency performed an adequate search, courts do not assess "whether any further documents might conceivably exist." *Weisberg v. U.S. Department of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (*quoting Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982)). Instead, courts generally evaluate "whether the government's search for responsive documents was adequate." *Weisberg*, 705 F.2d at 1351. "'The adequacy of an agency's search is measured by a standard of reasonableness' and is 'dependent upon the circumstances of the case.'" *Id.* (*quoting McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983) and *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979)).

Specifically, an agency "must make a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information

requested, and it cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Nation Magazine*, 71 F.3d at 890 (internal citations omitted). Based on the declarations submitted by Defendant, it is evident that Defendant's searches were inadequate. Moreover, Defendant improperly limited its searches to only one system of records even though Defendant easily could have searched other systems that likely contain additional, requested records.

Plaintiff's requests seek any and all information available regarding the October 2008 decision to create the Temporary Liquidity Guarantee Program, the November 2008 decision to extend assistance to Citigroup, and the January 2009 decision to extend assistance to Bank of America. In response, Defendant provided only a single set of minutes and a single supporting memorandum for each of the three determinations. Defendant did not produce any email correspondence, meeting notes, or other memoranda. Nor did Defendant assert that it was withholding any such records under claims of exemption.

Defendant attempts to blame Plaintiff, a private citizen, for Defendant's inadequate searches. FDIC's Memorandum in Support of Motion for Summary Judgment ("Def's Mem.") at 7 ("Very simply, if Plaintiff . . . wanted email correspondence, meeting notes, or memoranda from 'FDIC officials' dating from *before* the Board meetings . . . he should have asked for that information. He did not.").[1] Yet, as the Court has noted, "[P]laintiff specifically asked for 'any information available' on [the three] determinations." Opinion at 2. Plaintiff did not limit his requests to just minutes and supporting memoranda. He asked Defendant to produce *all* records related to Defendant's actions. Plaintiff's requests described exactly records he was seeking.

[1] Defendant also implies that Plaintiff knew what specific records to request because Plaintiff read the GAO report on the issue. Yet, Plaintiff submitted his three FOIA requests in December 2009. The GAO report was not published until April 2010. Therefore, Plaintiff had no way of knowing exactly which records existed at the time of his request.

Yet, even if the Court determines that Plaintiff's requests did not reasonably include these additional records – and Plaintiff does not concede that the requests do not do so – Defendant nevertheless had "a duty to construe [the] request[s] liberally." *Nation Magazine*, 71 F.3d at 890.

Moreover, Defendant has presented no evidence that it did not understand Plaintiff's FOIA requests to include these additional records. Nor has Defendant demonstrated that Plaintiff's requests were defective. According to Defendant's own regulations, if a request does not reasonably describe the records requested, Defendant may return the request and specify the deficiency. 12 C.F.R. § 309.5(c). Defendant never took any such action. Instead, for the first time since Plaintiff submitted his requests more than 17 months ago, Defendant claims in a declaration by Fredrick L. Fisch that Plaintiff's requests are "overbroad and failed to reasonably describe the records sought." Declaration of Fredrick L. Fisch at ¶¶ 12, 18, and 25. Even though Defendant claims that the requests failed to reasonably describe the requested records, it also incongruously claims that "Plaintiff was seeking information on a specific action taken by the FDIC Board of Directors on a specific date." *Id*.

The law of the Circuit is clear: "The linchpin inquiry is whether the agency is able to determine precisely what records are being requested." *Yaegar v. Drug Enforcement Administration*, 678 F.2d 315, 326 (D.C. Cir. 1982). Based on Mr. Fisch's declaration it is apparent that Defendant understood which records Plaintiff was seeking. *Id*. ("It is clear in this case that the [agency] knew 'precisely' which of its records had been requested and the nature of the information sought from those records."). Plaintiff was seeking any information regarding three specifically-identified determinations of Defendant. Opinion at 2. Defendant simply failed to conduct reasonable searches for all of the records Plaintiff requested. Defendant has not

demonstrated that its searches were reasonable, and, therefore, it is not entitled to summary judgment.

Along with asserting for the first time that it does not understand Plaintiff's FOIA requests, Defendant asserts that searching only one system of records was reasonable. Defendant is wrong. As Plaintiff demonstrated previously, the few records that Defendant produced to Plaintiff demonstrate the inadequacy of Defendant's searches. For example, with respect to the TLG Program, the meeting minutes produced by Defendant refer to a study performed by Defendant's own staff:

> Mr. Brown then stated that *a recent study by [FDIC] staff* on the effect of a run on uninsured deposits on economic activity indicates that a 5 percent run would reduce GDP growth by 1.16 percent per annum in a normal economy while the same run on a stressed economy could decrease GDP growth by as much as 1.96 percent per annum.

Minutes of the Meeting of the Board of Directors of the FDIC, October 13, 2008, Bates No. 56470. This study is clearly responsive to Plaintiff's request, and it should have been produced. At a minimum, the study should have been identified in the *Vaughn* index if Defendant seeks to withhold it under claim of exemption.

To try to justify its failure to produce records such as the study, Defendant argues that "an agency is not required to delve into the documents they locate to seek out clues to other responsive documents." Def's Mem. at 7. In support of its assertion, Defendant cites one paragraph – out of context – from *Kowalczyk v. Department of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996). After stating that an agency "is not required to speculate about potential leads . . . and is not obligated to look beyond the four corners of the request for leads to the location of responsive documents[,]" the Court in *Kowalczyk* concluded:

> This is not to say that the agency may ignore what it cannot help but know, but we suspect that it will be the rare case indeed in which an agency record contains a lead so apparent that the Bureau cannot in good faith fail to pursue it.

Id. The Court was correct. It is a rare case for an agency to flatly fail to perform its statutorily required duty. Yet, Defendant's conduct in this matter is that rare case.

Contrary to Defendant's assertions, Plaintiff has not asked Defendant to "chase rabbit trails that may appear in documents." Def's Mem. at 8. "Chasing rabbit trails" is colloquially understood to mean an exercise in futility. In other words, "chasing rabbit trails" is often used to describe the wasting of time and energy to pursue leads that will go nowhere – or even everywhere. Plaintiff, instead, requests that Defendant conduct searches reasonably designed to locate documents responsive to his requests. Opinion at 10. Since the above-referenced study is mentioned prominently in a responsive record identified by Defendant, Defendant would not have wasted time and energy pursuing a lead that went nowhere. Defendant could have easily asked Richard A. Brown, Chief Economist in the Division of Insurance and Research, for the study. Mr. Brown is the staff member who referenced the study during the October 13, 2008 Meeting of the Board of Directors. Minutes of the Meeting of the Board of Directors of the FDIC, October 13, 2008, Bates No. 56470. Obviously, such an inquiry would not have been anything close to chasing rabbit trails.

Similarly, it is also obvious that other systems of records in addition to the records of the Executive Secretary System ("ESS") are likely to contain records responsive to Plaintiff's requests. Each set of minutes produced by Defendant begins with a list of the names of the meeting participants as well as their titles and the component of Defendant that they represent. Similarly, each case memorandum produced by Defendant begins with the names, titles, and departments of the individuals who prepared and received the case memoranda. In other words,

the lists of names, titles, and components of the participants and the authors and recipients of the case memoranda make it clear that Defendant could have easily ascertained which other systems of records needed to be searched to locate all responsive records. Specifically, such other systems of records would include, at a minimum, the following divisions of Defendant, which are listed on each case memorandum: (1) the Division of Resolutions and Receiverships; (2) the Division of Supervision and Consumer Protection; (3) the Division of Insurance and Research; and (4) the Office of the General Counsel. Because of the extraordinary nature of the actions taken by Defendant during the height of the financial crisis – including committing trillions of dollars of taxpayer funds to assist financial institutions in an attempt to restore order to credit markets – it is inconceivable that officials and staff members who participated in meetings and prepared or received the case memoranda had no prior knowledge of the topics discussed and possessed no records on the issues and the decisions to be made. Once again, such an inquiry would not have been anything close to chasing rabbit trails.

Because at least one other record exists that is responsive to Plaintiff's requests – the study referenced in the minutes to the October 13, 2008 meeting – it is irrefutable that Defendant has not produced all responsive records. Moreover, Defendant has not shown that its search was reasonable in light of the study. *Perry*, 684 F.2d at 128 ("Perhaps most troublesome in gauging the adequacy of the agency's search is the fact that additional documents were found and released after affidavits were executed by federal officials stating that no further records responsive to appellant's request remained in agency control."). Therefore, Defendant has failed to satisfy its burden of demonstrating that its search for records responsive to Plaintiff's requests was adequate and should conduct a new search for all responsive records and produce all non-exempt, responsive records to Plaintiff.

III. Conclusion.

For the foregoing reasons, Plaintiff respectfully requests that Defendant's motion for summary judgment be denied and that Plaintiff's cross-motion for summary judgment be granted.

Dated: April 13, 2011

Respectfully submitted,

Paul J. Orfanedes (D.C. Bar No. 429716)

/s/ Michael Bekesha
Michael Bekesha (D.C. Bar No. 995749)
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
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FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
	)	
Defendant.	)	
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PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE AND PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Vern McKinley, by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this response to Defendant's Statement of Material Facts Not in Genuine Dispute and Plaintiff's Statement of Material Facts Not in Genuine Dispute in Support of Plaintiff's Cross-Motion for Summary Judgment:

I. Plaintiff's Response to Defendant's Statement of Material Facts Not in Genuine Dispute.

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed.

6. Undisputed.

7. Undisputed.

8. Undisputed.

9. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

10. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

11. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

12. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

13. Undisputed.

14. Undisputed.

15. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the

"asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

16. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

17. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

18. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

19. Undisputed.

20. Undisputed.

21. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

22. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the

"asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

23. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

24. Plaintiff lacks knowledge to confirm or deny whether such an event occurred. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" as between a FOIA requester and an agency in FOIA cases).

II. Plaintiff's Statement of Material Facts Not in Genuine Dispute in Support of Plaintiff's Cross-Motion for Summary Judgment.

For his own LCv.R. 7.1(h) statement of material facts not in genuine dispute, Plaintiff respectfully refers the Court to Defendant's statement and Plaintiff's response thereto, set forth above.

Dated: April 13, 2011

Respectfully submitted,

Paul J. Orfanedes (D.C. Bar No. 429716)

/s/ Michael Bekesha
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Attorneys for Plaintiff

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Plaintiff,	)	Civil Action No. 10-00420 (EGS)
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v.	)	
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FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
	)	
	)	
Defendant.	)	
	)	

[PROPOSED] ORDER

Upon consideration of Plaintiff's Cross-Motion for Summary Judgment against Defendant Federal Deposition Insurance Corporation ("FDIC"), Defendant FDIC's opposition thereto, and the entire record herein, it is hereby ORDERDED that:

1. The Cross-Motion is granted.

Dated:

_____
The Hon. Emmet G. Sullivan, U.S.D.J.