[ORAL ARGUMENT SCHEDULED FOR APRIL 21, 2011]

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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In *Milner v. Department of the Navy*, the United States Supreme Court recently reiterated that the Freedom of Information Act ("FOIA") was enacted to overhaul an earlier public records provision that had become more of "a withholding statute than a disclosure statute." 562 U.S. ___, 2011 U.S. LEXIS 2101, *6 (2011) (*quoting Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973)). For FOIA to escape this same fate, the Supreme Court noted that the nine exemptions contained therein must be interpreted narrowly. *Id*. (The exemptions are "explicitly made exclusive and must be narrowly construed." (internal citations omitted)); *Id*. at *16 ("We have often noted 'the Act's goal of broad disclosure' and insisted that the exemptions be given a 'narrow compass.'"). To avoid overly expansive applications of FOIA's exemptions and maintain FOIA's status as a disclosure statute, the Supreme Court explained that the lower courts should adhere to the plain meaning of the language used by Congress. *Id*. at *17; *Id*. at *30 (holding that an odd reading of the plain language "would produce a sweeping exemption, posing the risk that FOIA would become less a disclosure than a withholding statute." (internal citations omitted)). The Supreme Court further explained, "The judicial role is to enforce that congressionally determined balance rather than . . . to assess case by case, department by department, and task by task whether disclosure interferes with good government." *Id*. at *18. In

conclusion, the Supreme Court re-emphasized that the role of the courts is to apply the law as written. It succinctly declared:

> If these or other exemptions do not cover records whose release would threaten the Nation's vital interests, the Government may of course seek relief from Congress. All we hold today is that Congress has not enacted the FOIA exemption the Government desires. We leave to Congress, as is appropriate, the question of whether it should do so.

Id. at **34-35.

The Supreme Court was addressing the government's overly expansive application of FOIA Exemption 2. Yet, it easily could have been expounding upon the arguments raised by Appellee Board of Governors of the Federal Reserve System ("the Board") with respect to its assertion of FOIA Exemptions 5 and 8 in this litigation. As Appellant Vern McKinley demonstrated in his opening brief, the Board is attempting to turn FOIA into a withholding statute by construing both Exemption 5 and Exemption 8 beyond their plain meaning. If FOIA is to maintain its status as a disclosure statute and not a withholding statute, the Board's claims must be rejected.

ARGUMENT

I. The Board Has Not Demonstrated that the FRBNY Is an Outside Consultant So As To Satisfy the "Intra-Agency Communication" Requirement.

As McKinley demonstrated in his opening brief, the Board has not presented any evidence to satisfy its burden of proving that its communications with the

Federal Reserve Bank of New York ("FRBNY") constitute "intra-agency communications" for purposes of the deliberative process privilege. The Board has not shown that it solicited the withheld data, information, or advice from the FRBNY at all. Nor does the Board demonstrate that the FRBNY communicated with the Board for the purpose of aiding the Board's deliberative process. The law of this Circuit is clear: only material "submitted by non-agency parties in response to an agency's request for advice" fall under "intra-agency communication." *National Institute of Military Justice v. U.S. Department of Defense*, 512 F.3d 677, 681 (D.C. Cir. 2008). Communications between a government agency and an outside consultant are only "intra-agency communication" if solicited by the agency and "for the purpose of aiding the agency's deliberative process." *Id*. at 681 (internal citations omitted). In other words, unsolicited data, information, or advice offered to a government agency is not an intra-agency communication protected by the deliberative process privilege.

In its brief, the Board continues to rely on the broad and inconclusive assertion that "in accordance with well-established supervisory processes, Board and [the FRBNY] staff responsible for LCBO [large complex banking organizations] supervision surveyed the LCBOs for purposes of assessing LCBO's real-time exposure to Bear Stearns." Appellee's Brief at 24 (*quoting* Declaration of Coryann Stefansson at ¶ 8 (JA 100-101)). Yet, as McKinley illustrated in his

opening brief, nowhere in this passage does Ms. Stefansson testify that the Board solicited the withheld data, information, and advice from the FRBNY. The Board's failure to make this evidentiary showing is fatal to its argument that the FRBNY was acting as a consultant to the Board and that the withheld data, information, and advice provided by the FRBNY to the Board constitute "intra-agency" communications protected from disclosure by Exemption 5's deliberative process privilege.

It is undisputed that in some instances the FRBNY is required by law to provide data and information to the Board. Yet, those instances are specific and defined by law. In attempting to expand the "consultant corollary" to include the relationship between the Board and the FRBNY, however, the Board glosses over and generalizes this relationship instead of citing a concrete statute or regulation that specifically required the FRBNY to provide the Board with the data and information the Board now seeks to withhold from McKinley. Even if the Board could demonstrate that some specific statute or regulation required the FRBNY to provide this *data* or *information* to the Board, information and data are obviously different from advice, analysis, or opinions. The FRBNY therefore would not have been required to provide the Board with any of the advice, analyses, or opinions that the Board now seeks to withhold from McKinley. *See* Appellee Brief at 23-24. Any such advice, analyses, or opinions still would not constitute "intra-

agency" communications for purposes of Exemption 5's deliberative process privilege. In other words, because the advice, analyses, or opinions are not material that the law required FRBNY to provide to the Board, the Board cannot withhold that same material from McKinley under Exemption 5.

In this regard, the Board argues, "Indeed, nowhere is coordination between the Federal Reserve Board and the Reserve Banks more central and more apparent than in the extension of credit . . . pursuant to Section 13(3) of the Federal Reserve Act. The statute requires the Board and the Federal Reserve Bank to act together in order to make a loan." Appellee's Brief at 27. Yet, nowhere does the statute require any such "coordination" between the two entities. In its entirety, Section 13(3) states:

> In unusual and exigent circumstances, the Federal Reserve Board [Board of Governors of the Federal Reserve System], by the affirmative vote of not less than five members, may authorize any Federal reserve bank, during such periods as the said board may determine, at rates established in accordance with the provisions of section 14, subdivision (d) of this Act [12 USCS § 357], to discount for any participant in any program or facility with broad-based eligibility, notes, drafts, and bills of exchange when such notes, drafts, and bills of exchange are indorsed or otherwise secured to the satisfaction of the Federal reserve bank: *Provided*, That before discounting any such note, draft, or bill of exchange, the Federal reserve bank shall obtain evidence that such participant in any program or facility with broad-based eligibility is unable to secure adequate credit accommodations from other banking institutions. All such discounts for any participant in any program or facility with broad-based eligibility shall be subject to such limitations, restrictions, and regulations as the Federal Reserve Board [Board of Governors of the Federal Reserve System] may prescribe.

12 U.S.C. § 343(A). The statute has two clearly delineated aspects. It grants authority to the Board to authorize any Federal Reserve bank to discount notes, drafts, and bills of exchange in unusual and exigent circumstances. It also requires that, before a Federal Reserve bank may extend credit authorized by the Board, the Federal Reserve bank must obtain evidence that the recipient is unable to secure adequate credit accommodations from other banking institutions. It does not require coordination, even if coordination may occur or is desirable.

Finally, and as demonstrated in McKinley's opening brief, because the Board failed to demonstrate that the FRBNY's interests are identical to those of the Board, the FRBNY cannot be deemed a government "consultant" for purposes of Exemption 5's deliberative process privilege. *Department of the Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1 (2001). The Board attempts to skirt around this issue by making the argument that, because the FRBNY ultimately decided to extend emergency credit to JPMorgan under Section 13(3), the interests of FRBNY and the Board must have been the same. That, quite simply, is not the proper analysis under well-established precedent. The appearance in hindsight that interests may have been similar does not demonstrate that the interests were, in fact, the same. Instead, the law requires that, for the "consultant corollary" to apply, the third party or non-governmental agency which the government agency consulted must have "no individual interests to promote in

their submissions" to the agency. *National Institute*, 512 F.3d at 683. Consequently, for the FRBNY's communications with the Board to be protected under the "consultant corollary," the FRBNY's interests could not be any different from those of the Board. The Board has not presented any evidence to demonstrate that the FRBNY "had no individual interests to promote," and Section 13(3) clearly shows that the Board and the FRBNY obviously had different statutory roles to play in extending emergency credit to JPMorgan, if not different interests. *Id*. Again, the Board's argument fails for a lack of proof.

In sum, nowhere does the Board demonstrate that it solicited data, information, or advice from the FRBNY. Nor does the Board demonstrate that the FRBNY gathered data and information and provided advice to the Board for purposes of aiding the Board's deliberative process. Finally, the Board has failed to demonstrate that the FRBNY had no individual interests to promote. Since the Board has failed to demonstrate that the communication between the Board and the FRBNY was, in fact, "intra-agency communication," FOIA Exemption 5's deliberative process privilege does not protect the withheld material from disclosure. The Board therefore must produce the withheld material to McKinley.

II. The Board Has Failed To Demonstrate that Release of the Withheld Material Would Harm its Decision Making Process.

In his opening brief, McKinley demonstrated that, for material to be withheld under the deliberative process privilege, it must be "predecisional and it

must be deliberative." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citations omitted). In finding that withheld material is, in fact, deliberative, "the key question in Exemption 5 cases is whether the disclosure of the material 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 v. Peace Corps.*, 428 F.3d 271, 276 (D.C. Cir. 2005) (*quoting Dudman Communications Corporation v. Department of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)); *see also Mead Data Central, Inc. v. U.S. Department of the Air Force*, 566 F.2d 242, 259 (D.C. Cir. 1977) (An agency "cannot meet its burden of justification by conclusory allegation of possible harm" but must "show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA.").

The Board would have the Court ignore this often repeated language. In claiming that no showing of harm is required under the deliberative process privilege, the Board misconstrues McKinley's argument. McKinley does not assert that, in addition to finding withheld material to be deliberative and predecisional, a court also must find that the release of the withheld material would cause harm. Rather, McKinley argues that the law of this Circuit has defined "deliberative" to mean that the release of the withheld material would expose an agency's decision making process in such a way as to cause harm. McKinley is

not asking the Court to add a new, third prong to the Exemption 5 deliberative process privilege analysis. Rather, he is applying this Court's pre-existing definition of the current, two prong test.

In this regard, McKinley demonstrated that – at least as far back as 1987 – this Court rejected a rigid distinction between "factual" and "deliberative" material and "began to focus less on the nature of the materials sought and more on the effect of the material's release." *Dudman Communications Corp.*, 815 F.2d at 1568. Thus, for the deliberative process privilege to be defined in any other way would be contrary to this Court's long-established precedent. Because the Board made no effort to show that its decision-making process would suffer if the material requested by McKinley was released, the Board has failed to sustain its burden of demonstrating that deliberative process privilege applies.[1] Responsive material withheld pursuant to Exemption 5's deliberative process privilege must be produced to McKinley.

[1] The Board failed to make this required showing with respect to all of its deliberative process privilege claims, including its withholding of the identities of particular financial institutions that the Board may have discussed. Thus, the Board's assertion that McKinley failed to challenge the District Court's ruling regarding the withholding of these identities is plainly incorrect. *See* Brief of Appellee at 28, n.12.

III. The Board Has Failed To Sufficiently 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) (emphasis added). In his opening brief, McKinley demonstrated that the Board has failed to sufficiently demonstrate that the withheld material was contained in or relates to a specific examination, operating or condition report. In response, the Board simply says that it does not have to make so specific of a showing. The Board argues that its invocation of FOIA Exemption 8 is proper because the withheld material is similar to material that may be withheld pursuant to Exemption 8 and that disclosure of the material would undermine the Board's ability to gather information in the future. Appellee's Brief at 34-35. The Board's construction of Exemption 8 would swallow FOIA completely. It "would produce a sweeping exemption, posing the risk that FOIA would become less a disclosure than a withholding statute." *Milner*, 562 U.S. ___, 2011 U.S. LEXIS at *30.

In *Milner*, the Supreme Court held that under FOIA Exemption 2, which protects from disclosure material that is "related solely to the internal personnel rules and practices of an agency," the Department of the Navy could not lawfully

withhold "predominately internal material" of which "disclosure would risk circumvention of the law." *Id*. at **8-9. The Supreme Court "through the simple device of confining the provision's meaning to its words" held that FOIA Exemption 2 must be read narrowly to only authorize government agencies from withholding material related to personnel. *Id*. at *17.

Similarly, FOIA Exemption 8 must be applied as written. Congress specifically chose to use the words "contained in or related to the examination, operating or condition reports" when it constructed the exemption. If Congress had wanted to authorize a government agency to withhold any and all information regardless of how or where it was held, Congress could have crafted FOIA Exemption 8 accordingly. If the Board believes that disclosure of the type of material at issue "would undermine the frank cooperation between bank officials and regulated entities," (Appellee's Brief at 35), then the Board should ask Congress for authorization to withhold such information. As Exemption 8 currently is written, however, the Board cannot lawfully withhold the requested material.

Finally, an agency must provide a relatively detailed justification for why a particular exemption is relevant. *Morley v. Central Intelligence Agency*, 508 F.3d 1108, 1122 (D.C. Cir. 2007) (*quoting King v. United States Department of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987)) (internal quotation marks omitted). "Barren

assertions that an exempting statute has been met cannot suffice to establish that fact." *Founding Church of Scientology of Washington, D.C., Inc. v. National Security Agency*, 610 F.2d 824, 831 (D.C. Cir. 1979). Moreover, an agency cannot meet its obligation simply by quoting the language of an exemption. *See, e.g.*, *Army Times Publishing Company v. Department of the Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993) (discussing how affidavits that merely parrot the statutory language is insufficient). As is evident from the declarations submitted by the Board, the Board has supported its claims of exemption by presenting evidence that simply parrots the language of FOIA Exemption 8. *See, e.g.*, Declaration of Coryann Stefansson at ¶ 14 (JA 100) ("This information was contained in or related to examination, operating or condition reports prepared by, or on behalf of, or for the use of an agency (Board) responsible for the regulation or supervision of financial institutions."). Not only does Stefansson not testify to which specific examination, operating or condition report the information was contained in or related to, she does not even testify to whether the information was contained in an examination, operating or condition report ***or*** was related to such a report.

In sum, the Board has not sufficiently shown that the withheld material is contained in or related to examination, operating or condition reports. Moreover, it has presented declarations that do no more than quote the language of FOIA

Exemption 8. Therefore, the Board must produce the requested material to McKinley.

CONCLUSION

The Board seeks to extend FOIA Exemptions 5 and 8 beyond their well-established boundaries and without the requisite factual predicates. As the Supreme Court recently reaffirmed, however, FOIA is meant to be a disclosure statute, not a withholding statute, and the Board's arguments would turn FOIA into a withholding statute. For the reasons set forth in McKinley's opening brief and the additional reasons set forth above, 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: March 18, 2011

Respectfully submitted,

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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 3,016 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 18th day of March 2011, I filed via the CM/ECF system and by hand (the original and eight copies of) the foregoing **REPLY BRIEF OF APPELLANT** with the Court and served via the CM/ECF system and by First-Class U.S. Mail (two copies of) the foregoing **REPLY BRIEF OF APPELLANT** to:

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