No. ___

IN THE
Supreme Court of the United States

VERN MCKINLEY,
Petitioner,

v.

BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 5 U.S.C. § 552(b)(5), which incorporates the privileges that the Government enjoys in the pretrial discovery context into the Freedom of Information Act, requires a government agency to make a specific showing of harm to properly withhold material under the deliberative process privilege.

PARTIES TO THE PROCEEDINGS

Petitioner Vern McKinley is a former employee of the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, and the Office of Thrift Supervision. Since 1999, he has served as a consultant, legal advisor and regulatory policy expert on financial sector issues for governments in the United States, China, Nigeria, Indonesia, Ukraine, Kazakhstan, Latvia, the Philippines, Yugoslavia (now Montenegro), Kenya, Eastern Caribbean Currency Union, Belarus, Morocco, Sudan, Libya, Afghanistan, Armenia, Kosovo, and Tajikistan. He also has completed a book on the history of bailouts in the United States.

Petitioner initiated the proceedings below by filing a complaint under the Freedom of Information Act against respondent Board of Governors of the Federal Reserve System in the United States District Court of the District of Columbia. The District Court granted the Board of Governors of the Federal Reserve System's motion for summary judgment and dismissed the case. Petitioner McKinley appealed the District Court's ruling to the United States Court of Appeals for the District of Columbia Circuit, which affirmed the District Court's grant of summary judgment. Petitioner is not a publicly-owned corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Vern McKinley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

DECISIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit, published as *McKinley v. Board of Governors of the Federal Reserve System*, 647 F.3d 331 (D.C. Cir. 2011), is reprinted in the Appendix (App.) at 3a. The decision of the United States District Court of the District of Columbia, published as *McKinley v. Federal Deposit Insurance Corporation*, 744 F. Supp. 2d 128 (D.D.C. 2010), is reprinted at App. 26a.

JURISDICTION

Petitioner's petition for rehearing *en banc* was denied by the United States Court of Appeals for the District of Columbia Circuit on July 29, 2011. App. 59a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

5 U.S.C. § 552(b) of the Freedom of Information Act provides in pertinent part:

(b) This section [providing for public access to government records] 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.

STATEMENT

1. On March 14, 2008, the Board of Governors of the Federal Reserve System ("the Board") officially convened and took the extraordinary and unprecedented action of authorizing the Federal Reserve Bank of New York to extend credit to JPMorgan Chase to provide a temporary loan to Bear Stearns to enable it to meet its financial obligations and to avoid filing for bankruptcy. *McKinley v. FDIC*, 744 F. Supp. 2d 128, 133 (D.D.C. 2010) (App. 27a). Several months later, the Board released the minutes of its March 14, 2008 meeting. The minutes only 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*. at 137 (App. 30a). Nowhere did the Board identify the specific evidence it considered or how it analyzed this evidence.

2. Given the extraordinary nature of this transaction and the lack of any public explanation of the underlying justifications for the Bear Stearns bailout, Petitioner Vern McKinley submitted a Freedom of Information Act ("FOIA") request to the Board in an effort to discover "what the Government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 780 (1989) (App. 31a). In response, the Board produced only 48 pages in their entirety and withheld 190 pages in their entirety or in part under Exemption 5 of the FOIA. *McKinley*, 744 F. Supp. 2d at 133-134 (App. 32a).

3. The Board subsequently moved for, and the District Court granted, summary judgment. *Id.* at 145 (App. 58a). The District Court ruled that all material may be properly withheld under the deliberative process privilege of Exemption 5. App. 49a.

4. On appeal, the D.C. Circuit affirmed. App. 1a. In doing so, it held, "The Congress enacted FOIA Exemption 5, however, precisely because it determined that disclosure of material that is both predecisional and deliberative does harm an agency's decisionmaking process." *McKinley v. Board of Governors of the Federal Reserve System*, 647 F.3d 331, 338 (D.C. Cir. 2011) (App. 19a). In other words, the court ruled that a government agency's assertion of the deliberative process privilege of Exemption 5 does not require a specific showing of harm.

5. On July 29, 2011, the D.C. Circuit denied Petitioner McKinley's petition for rehearing *en banc.* App. 59a.

REASONS FOR GRANTING THE PETITION

Exemption 5 of the FOIA allows a government agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). In 1975, this Court ruled that Exemption 5 "incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Bd. v.*

Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975). It affirmed its ruling in 1984. *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 799, 802 (1984) ("The Legislative history of Exemption 5 indicates that Congress intended to incorporate governmental privileges."). Left open were the questions of which governmental privileges are incorporated and what a government agency must demonstrate to properly withhold material under those privileges.

At issue today is the governmental privilege commonly referred to as the deliberative process privilege. Petitioner does not dispute that a government agency may properly invoke the deliberative process privilege in the context of the FOIA. Rather, Petitioner requests that this Court grant certiorari to address the question of whether a government agency must demonstrate harm to properly withhold material under the deliberative process privilege of Exemption 5.

Despite the plain language of Exemption 5 and this Court's precedent, the D.C. Circuit has created a different, relaxed two-prong test that a government agency must satisfy to withhold material in the FOIA context. Under the common law deliberative process privilege, the Government is required to demonstrate that the withheld material is predecisional and deliberative and that the release of such material will harm agency decisionmaking. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In other words, the Government is required to make a specific showing of harm. The D.C. Circuit has abandoned the three-prong test required

of the Government in the non-FOIA context and has adopted a relaxed, two-prong test that does not require a government agency to make a specific showing of harm. *McKinley*, 647 F.3d at 338 (App. 19a).

By removing the requirement that a government agency must make a specific showing of harm under the deliberative process privilege of Exemption 5, the D.C. Circuit has created a sweeping exemption, causing the FOIA to become more of a withholding statute than a disclosure statute. *See Milner v. Dep't of the Navy*, 562 U.S. ___, 2011 U.S. LEXIS 2101, at *30 (Mar. 7, 2011). Petitioner therefore requests that this Court grant certiorari to affirm its reading of Exemption 5 to incorporate the common law deliberative process privilege and to dispose of the different, relaxed test created by the D.C. Circuit.

I. FOIA Mandates that the Courts Must Adhere to the Plain Meaning of the Language Used by Congress.

As this Court recently reiterated, the FOIA was enacted to overhaul an earlier public records provision that had become more of "a withholding statute than a disclosure statute." *Milner*, 2011 U.S. LEXIS 2101 at *6 (*quoting Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973)). For the FOIA to escape this same fate, 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 the exemptions and maintain FOIA's status as a disclosure statute, this Court explained that the lower courts should adhere to the plain meaning of the language used by Congress. *Id*. at 17; i*d*. 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)).

In addition, the role of the courts 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. If an exemption does not permit the withholding of information that the government believes is in the country's interest to withhold, "the Government may of course seek relief from Congress." *Id*. at *34. This Court concluded, "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*.

II. The Common Law Deliberative Process Privilege Indisputably Requires a Specific Showing of Harm.

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other

than an agency in litigation with the agency." 5 U.S.C. § 552 (b)(5). Based on the plain meaning, this Court has recognized that Exemption 5 "incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Bd.*, 421 U.S. at 184; *see also Mink*, 410 U.S. at 91 ("It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the ***same*** flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies.") (emphasis added). This Court has affirmed this view in the past 30 years. *Weber Aircraft Corp.*, 465 U.S. at 799 (FOIA Exemption 5 "incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context.") (citations omitted); *see also U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 11-12 (1988). Similarly, this Court has recognized that "[t]he Legislative history of Exemption 5 indicates that Congress intended to incorporate governmental privileges." *U.S. v. Weber Aircraft Corp.*, 465 U.S. at 802.

In the non-FOIA context, this Court has held that for the Government to properly claim the deliberative process privilege it must demonstrate that the "***disclosure of [the withheld material] would be injurious to the consultative functions of government***." *Sears, Roebuck & Co.*, 421 U.S. at 149 (*quoting Kaiser Aluminum & Chem. Corp. v. U.S.*, 157 F. Supp. 939 (Ct. Cl. 1958) (emphasis added)); *see also Mink*, 410 U.S. at 86. Also,

numerous circuits have adopted the three-prong test that requires the Government to make a ***specific showing of harm*** in the non-FOIA context. *See Providence Journal Co. v. United States Dep't of Army*, 981 F.2d 552, 562 (1st Cir. 1992); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 881 (5th Cir. 1981); *Olson Rug Co. v. NLRB*, 291 F.2d 655, 661 (7th Cir. 1961); *Assembly of California v. United States Dep't of Commerce*, 968 F.2d 916, 922-923 (9th Cir. 1992); *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).

The D.C. Circuit succinctly explained this well-established, common law deliberative process privilege as requiring the Government to include "a description of the documents involved, a statement by the department head that she has reviewed the documents involved, ***and an assessment of the consequences of disclosure of the information.***" *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 405 (D.C. Cir. 1984) (emphasis added). Based on this Court's precedent as well as rulings from numerous circuits, it is clear that the deliberative process privilege enjoyed by the Government in the pretrial discovery context requires a specific showing of harm.

III. The D.C. Circuit Has Created a Different, Relaxed Test for the Deliberative Process Privilege in the FOIA Context.

The D.C. Circuit's ruling in *McKinley* makes clear that, in the FOIA context, a government agency is not required to make a specific showing of harm to properly withhold material under the deliberative process privilege. *McKinley*, 647 F.3d at 338 (App. 19a). This relaxed, two-prong test has also been recognized by other circuits. *See Florida House of Representatives v. United States Dep't of Commerce*, 961 F.2d 941, 948 (11th Cir. 1992) (The D.C. Circuit "has expressed its lingering skepticism of whether a fact-specific 'chilling inquiry' is 'necessary to support nondisclosure under Exemption 5.'") (*quoting Quarles v. Department of Navy*, 893 F.2d 390, 393 (D.C. Cir. 1990)); *see also Trentadue v. Integrity Committee*, 501 F.3d 1215, 1227 (10th Cir. 2007) (Under the deliberative process privilege of Exemption 5, "two requirements are clear: Privileged documents must be both predecisional and deliberative.").

In other words, in light of the D.C. Circuit's ruling in *McKinley*, it is clear that, in the FOIA context, a government agency is only required to satisfy the relaxed, two-prong test that does not require it to make a specific showing of harm to properly withhold material under the deliberative process privilege. Petitioner therefore requests that this Court grant certiorari to require that a government agency, in the FOIA-context, satisfy the

three-prong test that exists in the pretrial discovery context. *McKinley*, 647 F.3d at 338 (App. 19a).

By eliminating one of the elements of the common law deliberative process privilege, the D.C. Circuit has created a different, relaxed test exclusive to the FOIA context. Such a new test is contrary to the plain language of 5 U.S.C. § 552(b)(5) and in direct contradiction with this Court's precedent that FOIA Exemption 5 does not create any new governmental privileges. FOIA Exemption 5 only incorporates those privileges that exist in the pretrial discovery context.

IV. The D.C. Circuit's Relaxed, Two-Prong Test Eviscerates the FOIA as a Disclosure Statute.

This case presents an important question of federal law because the D.C. Circuit's ruling in *McKinley* eliminates an element of the well-established common law deliberative process privilege. In doing so, the D.C. Circuit has eviscerated the FOIA as a disclosure statute by contradicting the plain meaning of the statute and this Court's precedent that FOIA Exemption 5 only incorporates the privileges that the Government enjoys in the pretrial discovery context. By abandoning the three-prong test required of the Government in the non-FOIA context and by not requiring a government agency in the FOIA context to make a specific showing of harm, the D.C. Circuit has relaxed the standard under which a government

agency may properly withhold material from the public.

Under the relaxed, two-prong test, it is foreseeable that a government agency will assert the deliberative process privilege over almost all material. Without a specific showing of harm, a government agency only needs to demonstrate that the withheld material is predecisional and deliberative. This relaxed, two-prong test can be easily satisfied.[1] Therefore, if this Court does not grant certiorari and overturn the lower court's ruling, the deliberative process privilege of Exemption 5 will remain "a sweeping exemption" and the FOIA will continue as less of "a disclosure than a withholding statute." *Milner*, 2011 U.S. LEXIS 2101 at *30.

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[1] For example, if an employee transmits a record that indicates how many reams of paper were used the month before and the supervisor uses that record to decide how many reams to purchase the following month, that record arguably could be, and will most likely be, withheld under the deliberative process privilege even though there is no possibility that the release of that record would harm the government agency's decisionmaking process.

CONCLUSION

Based on its ruling in *McKinley*, it is clear that the D.C. Circuit has failed to narrowly construe FOIA Exemption 5 and has created a sweeping exemption. It has abandoned the three-prong test required of the Government in the non-FOIA context and, instead, has adopted a relaxed, two-prong test that does not require a government agency in the FOIA context to make a specific showing of harm. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5353 **September Term 2010**
Filed On: June 3, 2011

Vern McKinley,

Appellant

v.

Board of Governors of the Federal Reserve System,

Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cv-01263)

Before: HENDERSON, GARLAND and GRIFFITH, *Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

Date: June 3, 2011

Opinion for the court filed by Circuit Judge Henderson.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 21, 2011 Decided June 3, 2011

No. 10-5353

VERN MCKINLEY,
APPELLANT

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cv-01263)

Michael Bekesha argued the cause for the appellant. *Paul J. Orfanedes* was on the brief.

Samantha L. Chaifetz, Attorney, United States Department of Justice, argued the cause for the appellee. *Tony West*, Assistant Attorney General, *Beth S. Brinkmann*, Deputy Assistant Attorney General, *Mark B. Stern*, Attorney, *Katherine H. Wheatley*, Associate General Counsel, Board of Governors of the Federal Reserve System, and *Yvonne F. Mizusawa*, Senior Counsel, were on the

brief. *R. Craig Lawrence*, Assistant United States Attorney, entered an appearance.

Before: HENDERSON, GARLAND and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: In December 2008 Vern McKinley (McKinley) submitted a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to the Board of Governors of the Federal Reserve System (Board) seeking information related to the Board's March 14, 2008 decision to authorize the Federal Reserve Bank of New York (FRBNY) to provide a temporary loan to The Bear Stearns Companies Inc. (Bear Stearns) through an extension of credit to JPMorgan Chase & Co. (JP Morgan). The Board produced documents in response to McKinley's request but withheld others pursuant to FOIA Exemptions 4, 5, 6 and 8. McKinley filed suit in district court to compel disclosure of the withheld documents. He now appeals the district court's entry of summary judgment in favor of the Board.

I.

We begin with a brief overview of the Federal Reserve System before describing the events surrounding the Board's March 14, 2008 loan decision and McKinley's FOIA request.

A. Overview of Federal Reserve System

The Congress created the Federal Reserve System in 1913 to serve as the nation's central bank. It is not a single entity "but rather a composite of several parts, both public and private, organized on a regional basis with a central governmental supervisory authority." *Reuss v. Balles*, 584 F.2d 461, 462 (D.C.Cir. 1978). Two of the parts are relevant here—the Board and the Federal Reserve Banks (Reserve Banks). The Board, composed of seven members appointed by the President and confirmed by the Senate, is the central supervisory authority of the Federal Reserve System. 12 U.S.C. § 241. There are currently twelve Reserve Banks, each located and operating within a specific region of the country.[1] A bank organized under the laws of any State or the District of Columbia may apply to the Board to join the Federal Reserve System. 12 U.S.C. § 321. On joining, the bank purchases stock of the Reserve Bank responsible for the region of the country where the bank is located and thereby becomes a member bank. *Id.* Additionally, all national banks, that is, banks chartered under the National Bank Act of 1864 (formerly Act of June 3, 1864, ch. 106, 13 Stat. 99) (codified as amended in scattered sections of 12 U.S.C.); *see Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 640 (D.C. Cir. 2000) ("The National Bank Act of 1864 . . . , as amended, provides for the chartering of national banks."), must join the Federal Reserve System by

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[1] The Board can readjust the federal reserve districts, subject to the requirement that there be at least eight and no more than twelve. 12 U.S.C. § 222.

purchasing stock of the Reserve Bank located in its district. 12 U.S.C. § 222. The Reserve Banks, then, "are private corporations whose stock is owned by the member commercial banks within their districts." *Comm. for Monetary Reform v. Bd. of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 540 (D.C. Cir. 1985). Accordingly, they have the power to make contracts, to sue and be sued, to appoint a president and vice presidents, to prescribe bylaws and to perform other acts consistent with a private corporation. 12 U.S.C. § 341.

Notwithstanding the foregoing powers, the Board exercises significant supervisory authority over the Reserve Banks. For example, the Board appoints three of the nine directors of each Reserve Bank, 12 U.S.C. § 302; the Board approves the compensation a Reserve Bank pays to its directors, *id.* § 307; the Board approves each Reserve Bank's selection of its president and first vice president, *id.* § 341; the Board can suspend or remove any officer or director of a Reserve Bank, *id.* § 248(f); and the Board can "examine at its discretion the accounts, books, and affairs of each Federal reserve bank and of each member bank and . . . require such statements and reports as it may deem necessary," *id.* § 248(a)(1). The Reserve Banks are authorized to lend money to member banks. *Id.* § 343. "In unusual and exigent circumstances, the [Board] . . . may authorize any Federal reserve bank" to lend money to a nonmember institution. *Id.* § 343(A). Before doing so, however, the Reserve Bank must "obtain evidence that [the institution] is unable to secure adequate

credit accommodations from other banking institutions." *Id.*

B. Bear Stearns Financing and FOIA Request

In early March 2008 the Board became aware that Bear Stearns, an important participant in many financial markets, was experiencing severe liquidity problems and might soon declare bankruptcy. Stefansson Decl. ¶ 7.[2] Bear Stearns was a holding company comprised partly of registered broker-dealers and, as such, was regulated by the United States Securities and Exchange Commission (SEC), not the Board. Winter Decl. ¶¶ 10-11.[3] Moreover, because Bear Stearns was not a depository institution, it was ineligible to borrow through the Federal Reserve's regular short-term lending program. Stefansson Decl. ¶ 7. The tools with which the Board could respond to Bear Stearns's liquidity problems were accordingly limited. Believing that a Bear Stearns bankruptcy would have far-reaching and negative effects on financial markets, however, the Board and Reserve Bank staff surveyed those institutions subject to the Board's regulation to assess their exposure to Bear Stearns. *Id.* ¶ 8. In particular, they sought to ascertain the exposure of

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[2] Coryann Stefansson is an Associate Director of the Board's Division of Banking Supervision and Regulation, a position she has held since May 2007. Previously she was an FRBNY Assistant Vice President in Bank Supervision and Regulation from 1998 until 2007. Stefansson Decl. ¶ 1.

[3] Margaret Winter is the FOIA and Privacy Act Officer of the United States Securities and Exchange Commission. Winter Decl. 1.

large complex banking organizations (LCBOs).[4] *Id.* On March 13, 2008 the SEC notified the Board and the FRBNY that Bear Stearns had inadequate resources to meet its obligations and planned to declare bankruptcy the following morning. *Id.* ¶ 7 The Board met the following day—March 14—and determined "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 financing to Bear Stearns through an arrangement with JPMorgan Chase & Co." Thro Decl. Ex. A (minutes of Board 3/14/08 meeting).[5] The Board accordingly authorized the FRBNY to extend credit to JP Morgan to allow JP Morgan to provide a temporary loan to Bear Stearns. The FRBNY, in turn, approved the loan.[6] The loan

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[4] "LCBOs are characterized by the scope and complexity of their domestic and international operations; their participation in large volume payment and settlement systems; the extent of their custody operations and fiduciary activities; and the complexity of their regulatory structure, both domestically and in foreign jurisdictions. To be designated as an LCBO, a bank holding company or foreign banking organization supervised by the Federal Reserve must meet specified criteria to be considered a significant participant in at least one critical or other key financial market." Stefansson Decl. ¶ 3.

[5] Alison Thro is "the most senior attorney in the Board's Legal Division responsible for reviewing FOIA requests." Thro Decl. ¶ 1.

[6] The FRBNY made the loan through JP Morgan because Bear Stearns was not a depository institution and therefore was not

allowed Bear Stearns to avoid filing for bankruptcy but, on March 16, the Board and the FRBNY authorized a second loan to JP Morgan to facilitate JP Morgan's acquisition of Bear Stearns.

In December 2008 McKinley submitted to the Board a FOIA request for "further detail on information contained in the [March 14, 2008] minutes of the Board." Thro Decl. Ex. A (FOIA request). He specifically sought "any supporting memos or other information that detail 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." *Id.*

After having received no response from the Board by July 2009, McKinley filed a complaint in district court seeking a declaratory judgment that FOIA entitles him to disclosure of the information he requested and seeking disclosure of that information. Compl. ¶¶ 36-47. The Board then produced 120 pages of previously released or publicly available documents on August 11, 2009. *McKinley v. FDIC*, 744 F. Supp. 2d 128, 133 (D.D.C. 2010). On

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eligible to receive funds directly from the FRBNY's discount window. Stefansson Decl. ¶ 7. "The Discount Window is the long-standing program through which the twelve Federal Reserve Banks make short term loans (often overnight) to depository institutions, and it can serve as an emergency, back-up source of liquidity for borrowing depository institutions that lack other options." *Bloomberg, L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 145-46 n.1 (2d Cir. 2010) (internal quotation marks omitted).

September 30, 2009 the Board produced an additional forty-eight pages in full and twenty-seven pages with information redacted. *Id.* It also identified and withheld 163 pages pursuant to FOIA Exemptions 4, 5, 6 and 8. *Id.* Eight of the 163 withheld pages originated with the SEC and the Board referred the disclosure determination regarding those documents to the SEC.[7] *Id.* The remaining withheld pages contain information collected and used by the Board and the FRBNY to assess the exposure of regulated financial institutions to Bear Stearns as well as communications between Board and FRBNY personnel. *See* Thro Decl. ¶¶ 17-23 (describing withheld documents); Stefansson Decl. 12-14 (same). On January 7, 2010 the SEC informed McKinley that it was withholding the eight documents referred to it by the Board pursuant to FOIA Exemptions 5 and 8. Winter Decl. ¶ 5.

The Board moved for summary judgment on February 1, 2010 and McKinley filed a cross-motion for summary judgment. The Board produced a *Vaughn* index identifying the withheld material by document (rather than page), briefly describing the withheld material and listing the FOIA exemption pursuant to which the document was withheld. *See Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973). McKinley does not challenge the Board's withholding of five documents pursuant to FOIA

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[7] McKinley does not discuss the SEC documents on appeal and has thus waived any challenge to the withholding of those documents. *See New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (argument not raised in opening brief waived).

Exemption 6. He challenges only the Board's reliance on FOIA Exemptions 4, 5 and 8. The district court held that the withheld documents are protected from disclosure by FOIA Exemption 5 or, in the alternative, by Exemption 8 and granted summary judgment in favor of the Board. *McKinley*, 744 F. Supp. 2d at 135-45. The court did not address the applicability *vel non* of FOIA Exemption 4.[8] *Id.* at 145. McKinley timely filed a notice of appeal.

II.

We review the district court's grant of summary judgment de novo. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1111-12 (D.C. Cir. 2007). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

FOIA requires federal agencies to disclose records upon request unless the records fall within one or more enumerated exemptions. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); *see* 5 U.S.C. § 552. The exemptions are narrowly construed so as not to "'obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " *Klamath*, 532 U.S. at 8 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). The relevant exemption is Exemption 5, which allows an agency to withhold disclosure of a

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[8] McKinley's complaint originally included FOIA claims against the Federal Deposit Insurance Corporation but they were ultimately dismissed as moot. *McKinley*, 744 F. Supp. 2d at 131 n.1 (internal citations omitted).

record if the record meets two requirements: (1) it is an "inter-agency or intra-agency memorandum[] or letter[]" that (2) "would not be available by law to a party other than an agency in litigation with the agency."[9] 5 U.S.C. § 552(b)(5). McKinley argues the withheld material fails to satisfy both requirements.

A. Inter-Agency or Intra-Agency Memoranda

The Board concedes that the Federal Reserve Banks, including the FRBNY, are not federal agencies and therefore the withheld documents are not inter-agency memoranda. The Board further concedes that the Reserve Banks are not components of the Board, which concession would appear to disqualify the withheld documents from constituting intraagency memoranda or letters. Under the "consultant corollary" to Exemption 5, however, we interpret "intra-agency" "to include agency records containing comments solicited from nongovernmental parties." *Nat'l Inst. of Military Justice v. U.S.Dep't of Defense* (*NIMJ*), 512 F.3d 677, 680, 682 (D.C. Cir.), *cert. denied*, 129 S. Ct. 775 (2008). "When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document

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[9] Because we conclude that Exemption 5 shields from disclosure all of the withheld documents, we do not reach the applicability *vel non* of Exemption 8, which allows an agency to withhold disclosure of a record "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)(8).

to be an 'intraagency' memorandum for purposes of determining the applicability of Exemption 5." *Id.* at 680 (quoting *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980)). Thus we held in *NIMJ* that the consultant corollary protected opinions and recommendations submitted by non-governmental lawyers to the United States Department of Defense regarding the establishment of military commissions to try suspected terrorists after the September 11, 2001 attacks. *Id.* at 678-79.

McKinley does not dispute the "consultant corollary" but challenges its application to the withheld documents on two grounds. First, in reliance on the holding in *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), he argues the Board failed to demonstrate that the FRBNY's interest is identical to that of the Board. At issue in *Klamath* was a FOIA request submitted to the United States Department of the Interior's Bureau of Indian Affairs (Bureau) seeking disclosure of communications between the Bureau and certain Indian tribes—namely, six documents prepared by Indian tribes at the Bureau's request and one document prepared by the Bureau, all of which related to the allocation of water rights among competing users/uses. 532 U.S. at 6. The United States Supreme Court held that the requested documents were not protected from disclosure under Exemption 5. The Court noted that in the "typical" case in which a court applies the consultant corollary, "the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." *Id.* at 11.

"[The consultant's] only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id.* The Indian tribes, by contrast, "necessarily communicate with the Bureau with their own, albeit entirely legitimate, interests in mind." *Id.* at 12. Although that "fact alone distinguishes tribal communications from the consultants' examples recognized by several Courts of Appeals," the Court explained that the "distinction is even sharper, in that the [Indian] Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone." *Id.* Lest there be any confusion, the Court restated the "dispositive point": "that the apparent object of the Tribe's communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily adverse to the interests of competitors." *Id.* at 14.

Unlike the Indian tribes, the FRBNY "[did] not represent an interest of its own, or the interest of any other client, when it advise[d] the [Board]" on the Bear Stearns loan. *Id.* at 11. As McKinley's counsel acknowledged at oral argument, the FRBNY is an "operating arm" of the Board. Oral Arg. 11:00-11:05. McKinley nonetheless claims that the FRBNY represented its own interest in its consultations with the Board regarding Bear Stearns because the FRBNY had an independent statutory duty to "obtain evidence that [Bear Stearns was] unable to secure adequate credit accommodations from other banking institutions" before making the loan. *See* 12 U.S.C. § 343(A). That the FRBNY had to obtain such

evidence before it could approve the loan authorized by the Board does not mean its interest diverged from the Board's interest, however, and to claim otherwise, we believe, misconstrues the nature of the Federal Reserve System. The Board, together with the Federal Open Market Committee—a body composed of the Board members and five presidents or first vice presidents of the Reserve Banks, 12 U.S.C. § 263—are statutorily mandated to "maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates," 12 U.S.C. § 225a. *See Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 277-78 (3d Cir. 2006) ("The individual Federal Reserve Banks serve as the foundation for the Federal Reserve System. . . . The individual Federal Reserve Banks carry out the monetary policy . . . formulated [by the Federal Open Market Committee]. The Board . . . loosely oversees the Federal Reserve Banks' operations."), *cert. denied*, 549 U.S. 1115 (2007). Board regulations make clear that "[t]he Federal Reserve System extends credit with due regard to the basic objectives of monetary policy and the maintenance of a sound and orderly financial system." 12 C.F.R. § 201.1(b). As noted, the Board and Reserve Banks work together "to assist in achieving national economic goals through [the Reserve System's] influence on the availability and cost of bank reserves, bank credit, and money." *Reuss v. Balles*, 584 F.2d 461, 462 (D.C. Cir. 1978). "The key to success of the [Reserve] System is harmonious interaction between

and among [its] component parts." *Id.* Statutes, regulations and case law make clear, therefore, that the Board and the Reserve Banks share a common goal, namely "the maintenance of a sound and orderly financial system." 12 C.F.R. § 201.1(b). That the Congress requires both the Board and the relevant Reserve Bank (here, FRBNY) separately to determine that the loan made to Bear Stearns through JP Morgan promotes the maintenance of a sound and orderly financial system does not mean that the Board's and the FRBNY's interests diverged in deciding to make the loan.

McKinley also claims the Board failed to show it solicited the withheld material from the FRBNY as our precedent requires. *See, e.g.*, *NIMJ*, 512 F.3d at 680 ("[A]n agency record . . . submitted by outside consultants as part of the deliberative process[] and . . . *solicited by the agency* [is] an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5." (emphasis added) (internal quotation marks omitted)); *id.* at 681, 683; *Ryan*, 617 F.2d at 790 (withheld records "were generated by an initiative from the Department ofJustice, i.e., the questionnaire sent out by the Department to the Senators"). The Stefansson declaration, however, adequately demonstrates that the Board solicited the material from the FRBNY. When news of Bear Stearns's financial straits reached the Board, it began to focus on the effects of a Bear Stearns bankruptcy on the financial markets and particularly on LCBOs and other organizations supervised by the Board. Stefansson Decl. ¶ 8. The Board acted against a "backdrop" of significant

turmoil and uncertainty in the financial markets. *Id.* ¶ 7.

> The deterioration of the U.S. housing market late in the summer of 2007 precipitated a sharp rise in uncertainty in financial markets about the value of structured or securitized assets. As demand for these products fell, funding pressures increased for a variety of financial institutions. As uncertainty grew over the magnitude of losses at financial institutions, these institutions became unwilling to lend to each other even against high-quality collateral, asset prices fell, and the availability of borrowing declined significantly. As a result, financial institutions faced severe liquidity pressures. These pressures accelerated rapidly between mid-January and mid-March 2008 . . . If left unabated, this dynamic posed a risk of widespread insolvencies and severe and protracted damage to the financial system and, ultimately, to the economy as a whole.

Id. ¶ 6. The Board thus found itself reacting to what it believed to be an emergency, as evidenced by its decision "to provide temporary *emergency* financing to Bear Stearns." Thro Decl. Ex. A (minutes of Board 3/14/08 meeting) (emphasis added). "[A]s part of the Board's consideration of potential responses to Bear Stearns' [sic] funding difficulties" and "in accordance with well-established supervisory processes, Board and Reserve Bank staff responsible for LCBO

supervision surveyed the LCBOs for purposes of assessing the LCBOs' real-time exposures to Bear Stearns." *McKinley*, 744 F. Supp. 2d at 136 (quoting Stefansson Decl. ¶ 8). The monitoring of LCBOs and advising the Board of their financial condition "is administered at the Federal Reserve Banks." Stefansson Decl. ¶ 2; *see also* 12 U.S.C. § 248(a)(1) (Board may "examine at its discretion the accounts, books, and affairs of each Federal reserve bank and of each member bank and . . . require such statements and reports as it may deem necessary"); *id.* § 325 (Federal Reserve member banks are "subject to examinations made by direction of the [Board] or of the Federal reserve bank by examiners selected or approved by the [Board]"); *id.* § 483 ("Every Federal reserve bank shall at all times furnish to the [Board] such information as may be demanded concerning the condition of any member bank within the district of the said Federal reserve bank."). Thus, to aid in its deliberative process, the Board sought information from the FRBNY about the financial condition and exposures of institutions monitored by the FRBNY. The FRBNY did not simply provide the information, unprompted, to the Board.

Accordingly, we conclude the withheld material constitutes "intra-agency memorandums or letters" under FOIA Exemption 5. We turn now to the second prong of Exemption 5.

B. Deliberative Process Privilege

Intra-agency memoranda are exempt from disclosure under Exemption 5 only if they "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 the second requirement of Exemption 5, the record must be non-disclosable "under one of the established civil discovery privileges—here, under the 'deliberative process' privilege." *NIMJ*, 512 F.3d at 680 n.4 (citing *Klamath*, 532 U.S. at 8-9). "To qualify for Exemption 5 protection under the deliberative process privilege, 'an agency's materials must be both "predecisional" and a part of the "deliberative process." ' " *Id.* (quoting *Formaldehyde Inst. v. Dep't of Health & Human Servs.*, 889 F.2d 1118, 1121 (D.C. Cir. 1989)). McKinley acknowledges that the withheld material is predecisional but argues that the record is "deliberative" only if its disclosure would harm the agency's decisionmaking process. The Congress enacted FOIA Exemption 5, however, precisely because it determined that disclosure of material that is both predecisional and deliberative *does* harm an agency's decisionmaking process. As we have explained, Exemption 5

> was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity. In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary

> consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.

Ryan, 617 F.2d at 789-90; *see also Klamath*, 532 U.S. at 8-9 ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." (internal quotation marks and citations omitted)); *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 129 (D.C. Cir. 2005) (deliberative process privilege "'reflect[s] the legislative judgment 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.' " (alteration in original) (quoting *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997))); *Formaldehyde*, 889 F.2d at 1125 ("'[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the *detriment of the decisionmaking process*.' " (ellipsis and emphasis in original) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975))); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d

854, 866 (D.C. Cir. 1980) (deliberative process privilege protects documents "which would inaccurately reflect or prematurely disclose the views of the agency"). Our role is not to second-guess that congressional judgment on a case-by-case basis. Attempting to do so, moreover, would prove impracticable:

> It would be impossible for courts to administer a rule of law to the effect that some but not all information about the decisional process may be disclosed without violating Exemption 5. Courts would become enmeshed in a continual process of estimating or, more accurately, guessing about the adverse effects on the decisional process of a great variety of combinations of pieces of information. That would inevitably lead courts on some occasions to undercut legitimate Exemption 5 protections. Indeed, such a procedure would not result in a rule at all. Agencies would have to pass on requests wholly impressionistically, subject to the impressionistic second-guessing of the courts. That is hardly a satisfactory or efficient way of implementing FOIA.

Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc).

Moreover, the Board has demonstrated that disclosure of the withheld material would "discourage candid discussion within the agency and thereby undermine the agency's ability to perform

its functions." *Formaldehyde*, 889 F.2d at 1122 (internal quotation marks omitted). As part of the "bank supervisory process," "[s]upervised institutions frequently provide [Board and Reserve Bank examiners] with detailed, highly sensitive commercial information . . . that they do not customarily disclose to the public," disclosure of which "is likely to cause substantial competitive harm to the LCBOs." Stefansson Decl. ¶ 15. For example, an LCBO competitor could use the information "to assess sensitive trading relationships and credit relationships" and could "exploit the information . . . to weaken a specific entity and cause weaknesses in its liquidity position" by "pull[ing] or accelerat[ing] funding facilities the competitor had outstanding to the LCBO." *Id.* A competitor could also "use the data to underbid the LCBO in the private funding markets." *Id.* Information that revealed the LCBO faced a "funding shortage" could "cause some retail and commercial customers to move their business to other banks and may cause analysts to downgrade the LCBO's stock." *Id.* In short, information collected by the Board and Reserve Banks from supervised institutions could harm those institutions if disclosed to the public. For that reason, "[s]upervised institutions rely on bank supervisors to protect the confidentiality of information obtained through the supervisory process" and "are willing to provide this information because they know that the supervisors will maintain its confidentiality." *Id.* The Board and Reserve Banks "rely on the willingness of supervised institutions to provide full information in order to assure a robust supervisory environment." *Id.* If

supervised institutions no longer believe the Board could or would maintain the confidentiality of information it collects through the supervisory process, they would be less willing to provide the Board with the information it needs "to assure a robust supervisory environment." Disclosure of the type of information withheld here, therefore, "would impair the Board's ability to obtain necessary information in the future[] and could chill the free flow of information between the [supervised] institutions and the Board and Reserve Bank[s]." *Id.*; *see also* Winter Decl. ¶ 7 ("Release of this type of information would have an inhibitive effect upon the development of policy and administrative direction. In my opinion, SEC employees would hesitate to offer their candid opinions to superiors or coworkers, as well as colleagues in other federal agencies, if they knew that their opinions of the moment might be made a matter of public record at some future date.").

C. Attorney Work Product Privilege

The Board also withheld one document under Exemption 5 pursuant to the attorney work product privilege. *See Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) ("FOIA Exemption 5 incorporates the work-product doctrine and protects against the disclosure of attorney work product."). "The work-product doctrine shields materials 'prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or

agent).'" *Id.* (quoting Fed. R. Civ. P. 26(b)(3)). According to the Board, the withheld document "was prepared by FRBNY attorneys in anticipation of litigation by Bear Stearns shareholders related to the Board's authorization to extend credit to [Bear Stearns] indirectly through [JP Morgan]." *Vaughn* Index Doc. No. 38 (Joint Appendix 97). On appeal, McKinley argues only that the FRBNY does not come within the consultant corollary and for that reason the Board cannot claim the attorney work product privilege. Having concluded that the FRBNY did indeed act as a consultant to the Board, we reject McKinley's argument. The FRBNY, acting as the Board's consultant, prepared the withheld document for the Board in anticipation of litigation. *Id.* Accordingly, the Board properly withheld the document under Exemption 5.[10]

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[10] In *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143, 145-46, 147 (2d Cir. 2010), the Second Circuit recently held that records regarding loans made by the twelve Reserve Banks to certain private banks in April and May 2008—specifically "the name of the borrowing bank, the amount of the loan, the origination and maturity dates, and the collateral given"—cannot be withheld under FOIA Exemption 4. The Board argued before the district court that the withheld records were exempt from disclosure under Exemption 5 but declined to appeal the district court's adverse ruling on Exemption 5. *Id.* at 146. Thus, the Second Circuit did not address the applicability *vel non* of Exemption 5 to the requested records. *Id.* at 146-47. Although the district court held the requested records were not protected under Exemption 5, it did not address the issues relevant here. The court accepted—because Bloomberg did not dispute—the Board's assertion that the withheld records were inter-agency or intra-agency memorandums or letters. *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F.Supp. 2d 262, 280-81

For the foregoing reasons, we affirm the district court's grant of summary judgment to the Board.

So ordered.

(S.D.N.Y. 2009). Furthermore, the Board did not rely upon the deliberative process privilege. *Id.* at 281-82.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERN McKINLEY,	)	
Plaintiff,	)	
v.	)	No. 09cv1263 (ESH)
FEDERAL DEPOSIT INSURANCE CORPORATION	)	
and	)	
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
Defendants.	)	

2010 U.S. Dist. LEXIS 103045

September 29, 2010, Decided
September 29, 2010 Filed

COUNSEL:

For VERN MCKINLEY, plaintiff: Paul J. Orfanedes, Michael Bekesha, JUDICIAL WATCH, INC., Washington, D.C.

For FEDERAL DEPOSIT INSURANCE CORPORATION and BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, defendants: Mark B. Stern, Samantha L. Chaifetz, attorneys, Civil Appellate Staff, U.S. Department of Justice, Washington, D.C.

JUDGES: Ellen Segal Huvelle, United States District Judge
OPINION BY: Ellen Segal Huvelle

OPINION:

MEMORANDUM OPINION

Plaintiff Vern McKinley brings this action against the Board of Governors of the Federal Reserve System ("Board") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq*.[1] Plaintiff seeks access to documents related to the Board's March 14, 2008 decision to authorize the Federal Reserve Bank of New York ("FRBNY") to extend credit to JP Morgan Chase to provide temporary emergency financing to The Bear Stearns Companies Inc. ("Bear Stearns"). In response to plaintiff's FOIA request, the Board produced a number of documents, but withheld or redacted others pursuant to FOIA Exemptions 4, 5, and 8. 5

[1] The complaint previously included FOIA claims against the Federal Deposit Insurance Corporation ("FDIC"). (Complaint, July 8, 2009 [dkt. #1].) However, after the withheld material was publicly released, the pending motions pertaining to those FOIA claims were denied as moot and the FDIC was dismissed as a defendant. (Minute Order, Sept. 3, 2010.)

U.S.C. § 552(b)(4)(5) & (8). Before the Court are the parties' cross-motions for summary judgment. For the reasons stated herein, the Court will grant the Board's motion for summary judgment and deny plaintiff's motion.

BACKGROUND

The Federal Reserve System is composed of the Board and twelve regional Federal Reserve Banks. The Board is a federal agency composed of seven members appointed by the President and confirmed by the Senate. (Pl.'s Statement of Material Facts ("Pl.'s Statement") ¶ 2 (Mar. 8. 2010); Def.'s Resp. to Pl.'s Statement ("Def.'s Resp.") at ¶ 2 (Apr. 22, 2010).) It supervises and regulates the operation of the Federal Reserve System, promulgates and administers regulations, and plays a major role in the supervision and regulation of the United States banking system. (Pl.'s Statement ¶ 3; Def.'s Resp. at 2.) For example, the Board is "authorized and empowered . . . (1) [t]o examine at its discretion the accounts, books, and affairs of each Federal reserve bank and of each member bank and to require such statements and reports as it may deem necessary" and "(2) [t]o require any depository institution specified in this paragraph to make, at such intervals as the Board may prescribe, such reports of its liabilities and assets as the Board may determine to be necessary or desirable to enable the Board to discharge its responsibility to monitor and control monetary and credit aggregates." 12 U.S.C. § 248. It is not, however, authorized to extend credit. (Pl's Statement ¶ 14; Def.'s Resp. at 4.)

The twelve regional Federal Reserve Banks serve as the operational arm of the nation's central banking system. (Pl.'s Statement ¶ 2; Def.'s Resp. at 2.) They receive no appropriated funds from Congress, but rather are capitalized by required contributions from member banks. (Pl.'s Statement ¶ 11; Def.'s Resp. at 4.) Each bank is a separate corporation that issues stock held by depository institutions within its district; each has its own 9-member board of directors, six of whom are elected by member banks within the district, and three of whom are appointed by the Board; and each acts as a depository for banks within its district, a lender to eligible institutions through its "discount window," a clearing agent for checks, and fulfills other responsibilities for banks within the district. (Pl.'s Statement ¶¶ 6, 8, 9; Def.'s Resp. at 3.) The regional banks, unlike the Board, are authorized to extend credit. (Pl.'s Statement ¶ 14; Def.'s Resp. at 4.)

In early March 2008, the Board became aware of potential liquidity problems at Bear Stearns, a holding company comprised of a number of different financial institutions. (Decl. of Coryann Stefansson ("Stefansson Decl.") ¶ 7; Decl. of Margaret Celia Winter ("Winter Decl.") ¶ 11.) On Thursday, March 13, 2008, Bear Stearns' liquidity declined to levels that were inadequate to cover its maturing obligations. (Stefansson Decl. ¶ 7.) That evening, the United States Securities and Exchange Commission ("SEC") notified both the Board and the FRBNY, one of the twelve regional banks, that as things stood Bear Stearns "would have to file for bankruptcy protection the next day." (*Id.*) "In response to the rapidly evolving crisis, Board staff

and staff of the FRBNY began collecting and sharing real-time data on the exposure of various financial institutions to Bear Stearns, as well as other information and analyses, to assess the gravity of Bear Stearns' situation, the possible impact of a Bear Stearns bankruptcy on financial institutions and markets, and the Board's possible policy responses." (Def.'s Statement of Material Facts ("Def.'s Statement") ¶ 9 (Feb. 1, 2010 (citing Stefansson Decl. ¶¶ 7-10).) Among other actions, the Board surveyed the Large Complex Banking Institutions (LCBOs) under its supervision to assess their exposure to Bear Stearns. (Stefansson Decl. ¶ 8.) The information gathered was disseminated and discussed among Board members and other Federal Reserve staff. (*Id.* ¶ 9.)

Ultimately, the Board concluded that "a sudden disorderly failure of Bear Stearns would have had unpredictable, but severe, consequences on the functioning of financial markets." (*Id.* ¶¶ 9,10.) However, "[b]ecause Bear Stearns was not a depository institution, it was not eligible to obtain financing directly from the FRBNY's discount window." (*Id.* ¶ 7.) Citing these "unusual and exigent circumstances" and its authority under section 13(3) of the Federal Reserve Act (Decl. of Alison Thro ("Thro Decl."), Ex. A, at 3), the Board agreed, as reflected in the minutes of its meeting on the morning of March 14, 2008, "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 financing to Bear Stearns through an arrangement with JPMorgan Chase & Co." (*Id.*; Stefansson Decl. ¶ 10.) Specifically, the Board authorized the 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. (Thro Decl., Ex. A.). The FRBNY decided to extend the loan, and Bear Stearns did not file for bankruptcy.[2]

On December 17, 2008, plaintiff submitted the following FOIA request to the Board:

> I am requesting further detail on information contained in the following minutes of the Board of Governors of the Federal Reserve dated March 14, 2008:
>
> http://www.federalreserve.gov/newsevents/press/other/other20080627a1.pdf
>
> The source of this power is Section 13(3) of the Federal Reserve Act. In particular, I am requesting any supporting memos or other information that detail 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.

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[2] On March 16, 2008, the Board authorized the FRBNY to extend a second loan to JP Morgan Chase in connection with its acquisition of Bear Stearns. (Thro Decl. ¶ 3.).

(*Id.*)

In responding to plaintiff's request, Board staff reviewed "a document repository containing over 28,000 pages of information." (*Id.* ¶¶ 4, 5.) On August 11, 2009, the Board produced 120 pages of previously released or publicly available documents. (*Id.* ¶ 9 & Ex. D.) On September 30, 2009, the Board identified an additional 238 pages of responsive documents. (*Id.* ¶ 10.) From this universe, the Board produced 48 pages in full, produced 27 pages with information redacted, and withheld 163 pages in full, including 8 pages containing information about the financial condition of Bear Stearns that had originated with the SEC, which the Board referred to the SEC for final disposition.[3](*Id.*). The Board based its withholdings and redactions on FOIA Exemptions 4, 5, 6, and 8. (*Id.*). On January 7, 2010, the SEC informed plaintiff that it considered the documents referred to it by the Board protected from disclosure under FOIA Exemptions 5 and/or 8. (Winter Decl. ¶ 5.) The Board has produced a *Vaughn* Index, identifying the withheld material by "Item" number (1-38), "Bates" number(s), physical location on the page (where necessary), a description of the withheld material, and the "basis for withholding." (Thro Decl., Ex. F ("*Vaughn* Index").)[4]

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[3] The documents produced in full have Bates numbers ending in 02-03, 06, 10, 14-16, 18-19, 24-28, 36-37, 40, 42, 45-50 and 215-238; the withheld and redacted pages have Bates numbers ending in 01, 04-05, 07-09, 11-13, 17, 20-23, 29-35, 38-39, 41, 43-44, 51-214.

[4] A single Item number may include multiple pages or a single redaction on a page.

Defendant has moved for summary judgment, contending that its application of FOIA exemptions was proper. (Def.'s Mot. for Summ. J., Feb. 1, 2010). Its motion is supported by declarations from Alison M. Thro, Senior Counsel in the Board's Legal Division, Coryann Stefannson, Associate Director of the Board's Division of Banking Supervision and Regulation, Margaret Celia Winter, Freedom of Information Act and Privacy Act Officer at the SEC, and Michelle A. Danis, senior financial economist in the Broker-Dealer Risk Office of the SEC Division of Trading and Markets ("Danis Decl."). (*Id.*; Def.'s Opp'n & Reply, Apr. 22, 2010.). Plaintiff does not dispute defendant's application of FOIA Exemption 6 (Item #'s 2, 3, 19, 25, and 28), but challenges the applicability of FOIA Exemptions 4, 5 and/or 8 (Item #'s: 1, 4-22, 24, 26-27, 29-38),[5] and cross-moves for summary judgment.[6] (Pl.'s Cross-Mot. for Summ. J., Mar. 8, 2010).

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[5] On January 28, 2010, after initially withholding it, the Board produced Item #23 (Bates # 0046). (Thro Decl. ¶ 11.).

[6] Plaintiff's response to defendant's Statement of Material Facts states that he "disputes that the Board has satisfied its burden of demonstrating that it conducted an adequate search." (Pl. Statement of Material Facts ¶ 3.) However, plaintiff fails to support this statement with any legal argument, so the Court need not consider the adequacy of the search.

ANALYSIS

I. STANDARD OF REVIEW

The Court may grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating an absence of a genuine issue of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Factual assertions in the moving party's affidavits may be accepted as true unless the opposing party submits his own affidavits or declarations or documentary evidence to the contrary. *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992).

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (citations omitted). "In a FOIA case, summary judgment may be granted to the government if 'the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.'" *Fischer v. U.S, Dep't of Justice*, 596 F. Supp. 2d 34, 42 (D.D.C. 2009) (quoting *Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d 3, 11 (D.D.C. 1998))). "An agency that has withheld responsive documents pursuant to a FOIA exemption can carry its burden to prove the applicability of the claimed exemption by affidavit."

Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009) (citing *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003)). "Summary judgment is warranted on the basis of agency affidavits when the affidavits describe 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." *Id.* (quoting *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984)); *see also Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir.1981); *Larson*, 565 F.3d at 862.[7]

"FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Security Studies*, 331 F.3d at 925 (citing *John Doe Agency*, 493 U.S. at 152). "While these exemptions are to be 'narrowly construed,' *FBI v. Abramson*, 456 U.S. 615, 630, courts must not fail to give them 'a meaningful reach and application,' *John Doe Agency*, 493 U.S. at 152." *Id.* Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Larson*, 565 F.3d at 862

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[7] FOIA provides district courts the option to in camera review, 5 U.S.C. § 552(a)(4)(B), but "it by no means compels the exercise of that option." *Larson*, 565 F.3d at 862 (internal citations and quotations omitted). To the contrary, although district courts possess broad discretion regarding whether to conduct in camera review, "[w]hen the agency meets its burden by means of affidavits, in camera review is neither necessary nor appropriate." *Id.*

(quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)).

II. FOIA Exemption 5

FOIA Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552 (b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standard that would govern litigation against the agency that holds it." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *see EPA v. Mink*, 410 U.S. 73 (1973); *NLRB v. Sears*, 421 U.S. 132, 148 (1975). Among the privileges incorporated by FOIA Exemption 5 are the "deliberative process" privilege and the "attorney work product" privilege. *Klamath*, 532 U.S. at 8; *see Loving v. Dep't of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008); *Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006)). The Board claims that Exemption 5 protects from disclosure all of the material plaintiff seeks (Item #'s 1, 4-22, 24, 26-27, 29-38). Plaintiff challenges the Board's reliance on Exemption 5 on several grounds, each of which is addressed below.

A. Inter-Agency/Intra-Agency Communications

Plaintiff argues that Item #'s 1, 4-6, 10-12, 14, 20-21, 26-27, 29-34, 36, 37, and 38 are not "inter-agency" or "intra-agency" communications because they are "records and information exchanged by officials of the Board and employees of the FRBNY" or "records or information exchanged between the SEC and the FRBNY" and the FBRNY is not a government agency. (Pl. Mem. at 27.) The Board concedes that FRBNY is not a government agency, but argues that Exemption 5 applies nonetheless under the "consultant corollary," pursuant to which "intra-agency" and "inter-agency" communications include "agency records containing comments solicited from non-governmental parties . . . whose counsel [an agency] sought." *Nat'l Institute of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677, 680 (D.C. Cir. 2008); *see also Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) ("When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5."); *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 129 (D.C. Cir. 2005) (documents prepared by presidentially-established policy group and held by eight different federal agencies were nonetheless "intra-agency" records because group was created solely to advise the President).

Plaintiff does not dispute the existence of a "consultant corollary," but argues that defendant has not demonstrated that the records at issue were "created at the request of the agency [the Board] and 'for the purpose of aiding the agency's deliberative process.'" (Pl.'s Reply at (quoting *Nat'l Institute of Military Justice*, 512 F.3d at 681).) Plaintiff argues that the Board has failed to make the necessary showing because "[n]owhere does the Board assert that it asked the FRBNY to gather and discuss data with the Board" and "the Board [does not] assert that the FRBNY gathered data for the purpose of aiding the Board's deliberative process." (Pl. Reply at 11-12.) Plaintiff's argument conveniently overlooks the Stefansson Declaration, which includes those precise assertions. (Stefansson Decl. ¶ 8.) For example, in her declaration, Stefansson, an Associate Director in the Board's Division of Banking Supervision and Regulation and a participant in the March 13-14, 2008 events, states that:

> 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 with well-established supervisory processes, Board and Reserve Bank staff responsible for LCBO supervision surveyed the LCBOs for purposes of assessing LCBOs' 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.

(Stefansson Decl. ¶ 8.) This statement more than satisfies defendant's burden to show that the records and information exchanged by the Board and the FBRNY were "documents . . . submitted by non-parties in response to an agency's request for advice." *Nat'l Institute of Military Justice*, 512 F.3d at 681; *see also Formaldehyde Inst. v. Dep't of Health & Human Servs.*, 889 F.2d 1118 , 1123 (D.C. Cir. 1989) ("Whether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations." (internal quotations omitted)).

Plaintiff also suggests that the consultant corollary cannot apply here because the FBRNY's interests "are not identical to the Board." According to plaintiff, the FRBNY's interests diverge from the Board's interests because "in enacting Section 13(3) of the Federal Reserve Act, Congress gave the Board the power to authorize Federal Reserve Banks, such as the FRBNY, to extend loans to non-banks in 'unusual and exigent circumstances,' but it gave the Federal Reserve Banks the final say as to whether to actually extend such loans." (Pl's Mem. at 4.) Moreover, "[b]efore the loan could be extended, the 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.'" (*Id.* (quoting 12 U.S.C. § 343).) Thus, plaintiff

concludes, "[t]he FRBNY's role . . . is fundamentally different from that of an outside consultant. The FRBNY, as a private corporation engaged in the business of banking, has its own interests and obligations in the commercial activity of extending loans." (Pl's Mem. at 3-4.) Accepting plaintiff's description as accurate, it does not necessarily follow, as plaintiff asserts, that "it is likely that the FRBNY gathered data in furtherance of its own interests: to determine whether it would extend an emergency loan to Bear Stearns." Pl. Reply at 12.) More importantly, the critical inquiry is not whether FRBNY's interests were at all times identical to the Board's, but rather whether the FRBNY "d[id] not represent an interest of its own, or the interest of any other client, when it advise[d] the [Board]," such that its "only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Klamath*, 532 U.S. at 10-11. Under those circumstances, records submitted by an outside consultant "'play[] essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done,' notwithstanding the consultants 'were independent contractors and were not assumed to be subject to the degree of control that agency employment could have entailed' and they were not necessarily 'devoid of a definite point of view.'" *Nat'l Institute of Military Justice*, 512 F.3d at 682 (quoting *Klamath*, 532 U.S. at 10). Here, the declarations and the documents adequately establish 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. (*See*, *e.g.*, Stefansson Decl. ¶ 7 ("SEC notified the Board and the Federal Reserve Bank of New York . . . that Bear Stearns funding resources were inadequate to meet its obligations"); *id.* ¶ 8 ("in accordance with well-established supervisory processes, Board and Reserve Bank staff responsible for LCBO supervision surveyed the LCBOs for purposes of assessing the LCBOs real-time exposure to Bear Stearns"); *Vaughn* Index at 2 (Item #1) (e-mail conveyed information re supervised institutions exposure to Bear Stearns); *Vaughn* Index at 5 (Item #4) (same); *Vaughn* Index at 7 (Item #6) (e-mail conveying information re supervised institutions' attempts to limit exposure to Bear Stearns).

Accordingly, the Court concludes that Item #'s 1, 4-6, 10-12, 14, 20-21, 26-27, 29-34, 36, 37, and 38 are inter or intra-agency documents within the meaning of Exemption 5.

B. Applicability of Deliberative Process Privilege

With one exception, *see infra* § II.C, all of the Board's Exemption 5 claims rest on the deliberative process privilege. The deliberative process privilege "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Klamath*, 532 U.S. at 8 (quoting *NLRB v. Sears*, 421 U.S. at 150.) The privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of

discovery and front page news, and its object is to enhance 'the quality of agency decisions.'" *Id.* (quoting *NLRB v. Sears*, 421 U.S. at 151.); *see Mead Data Cent. v. Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (purpose is to protect the "quality of administrative decision-making [which] 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"); *Dudman Commc'n Corp. v. Dep't of the Air Force,* 815 F.2d 1565, 1568 (D.C. Cir.1987) (privilege "rests most fundamentally on the belief that were agencies forced to 'operate in a fishbowl,' the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer").

For the deliberative process privilege to apply, the material must be both "predecisional" and "deliberative." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008). A document is predecisional if it is "generated before the adoption of an agency policy." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir.1980). To demonstrate that a document is predecisional, the burden is on the agency to "establish[ ] what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Id.* at 868. A document is deliberative if it "reflects the give-and-take of the consultative process." *Id.* at 866. The deliberative process privilege generally does not cover the purely factual portions of documents, except in cases where the factual material "is so inextricably intertwined with the deliberative

sections of documents that its disclosure would inevitably reveal the government's deliberations.*" In re Sealed Case*, 121 F.3d at 737; *Quarles v. Dep't of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) ("disclosure of certain factual information can "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"); *Dudman,* 815 F.2d at 1568.

Plaintiff challenges the Board's invocation of the deliberative process privilege on two grounds: (1) that the Board improperly withheld purely factual information; and (2) the Board fails to show that release of the withheld material will cause "harm" to the deliberative process.[8]

1. Factual Information

The Board states up front that it has withheld "certain factual material that is itself deliberative." (Mem. in Support of Def.'s Mot. for Summ. J. at 15.) Plaintiff challenges this claim on the ground that the Board "has not demonstrated that disclosure of the factual material at issue -- financial statistics,

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[8] At one point plaintiff also asserts that "the deliberative process privilege is a "qualified privilege and can be overcome by a sufficient showing of need." (Pl.'s Mem. & Opp'n at 28 (quoting *In re Sealed Case*, 121 F.3d at 737).) However, it is well-established that "[a] court's decision in a discovery case may rest in part on an assessment of the particularized need of the party seeking discovery, but in a FOIA suit, the court does not consider the needs of the requestor." *See EPA v. Mink*, 410 U.S. at 86.

pricing and exposure data, and the identities of various financial institutions -- by itself will reveal any deliberations or judgment calls by Board officials in deciding to authorize an emergency loan to Bear Stearns." (Pl. Mem. & Opp'n at 29.) Plaintiff directs the Court's attention to three examples of what he considers improperly withheld factual information (Items 13[9], 16[10], and 20[11]).[12] Plaintiff argues that

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[9] Item 13 is an email from a Board analyst on March 13, 2008, at 5:40 p.m. that states, "Here are exposures to [Bear Stearns] that I have now." The *Vaughn* index describes the withheld material as "Identification of LFIs and the nature and scope of their exposure to BS."

[10] Item No. 16 is an email from a Board official on March 13, 2008, at 10:18 p.m. that, "Gov. Kohn and I are still in the office . . . Based on [Bear Stearns] global operations, do you know if anyone has talked with the [Financial Services Authority] in London? [REDACTED MATERIAL] We have pulled together the exposure #s of the [Large Financial Institutions] to [Bear Stearns] but information is from the last monthly reports." *Vaughn* index describes the withheld material as "five sentences" that "describe[] a conversation between Scott Alvarez, General to the Board, and a member of Board staff, regarding the projected regulatory response to BS's funding position, and a Board staff member's subsequent contact with another federal agency concerning the situation at BS."

[11] Item No. 20 is an email from a Board official on March 14, 2008, at 5:48 a.m. that states: "I just got off a call with folks at [the FRBNY]. Below is a chart with exposures. I'm on my way into the office." The *Vaughn* index describes the withheld material as a "table," that "identifies BS's projected cash flows, as well as FRS-supervised LFIs with exposure to BS and the relative size of the exposure to the institution in question."

[12] Plaintiff also refers to Item 19, but item 19 is simply the redaction of a personal cell phone number. The attachment to

"[i]f anything, the factual data the Board seeks to withhold from Plaintiff reflects a frantic scramble on the evening of March 13, 2008 and in the early morning of March 14, 2008 to gather as much raw data as possible, not any careful or considered culling of facts that would reveal the exercise of agency judgment." (Pl. Mem. & Opp'n at 30.)

The Board responds that plaintiff "fails to perceive that the very act of the Board (or in certain cases, the Securities & Exchange Commission) reaching out to request specific financial information from specific institutions was itself a part of the deliberative process." (Board Opp'n & Reply at 2.) As an example, the Board points to Item 8, from which the Board withheld "the identities of two financial firms and one regulated financial institution" because they "reveal[] the identities of institutions that FRS staff considered to be systemically important or whose failure could have systemic consequences to the financial system . . . ." (Thro Decl., Ex. F, Item 8.) As explained by the Board:

> "In other words, there were certain financial institutions whose failure (possibly prompted by a Bear Stearns bankruptcy) the Board believed could have ripple effects across the financial system at large. The possible impact of a Bear Stearns bankruptcy on these institutions played an important part in the Board's deliberations leading to its decision to authorize the Temporary Loan, see Stefansson Decl., ¶ 8, and revealing their

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the e-mail –the spreadsheet showing Bear Stearns exposure" – is the document (Item #20; Bates # 00041) that is withheld.

> names would be tantamount to revealing the Board's decision making process."

(Def.'s Opp'n & Reply at 11.) In support of its argument, the Board cites two cases: *Quarles v. Dep't of the Navy*, 893 F.2d 390 (D.C. Cir. 1990), and *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974.) In *Quarles*, the court upheld the withholding of certain cost estimates made by agency officials because the estimates themselves reflected the exercise of the agency's judgment. In *Montrose*, the court upheld the withholding of factual summaries made by an agency official based on evidence entered into the lengthy record of a public hearing. Plaintiff contends that the present case "differs substantially" from *Quarles* and *Montrose* because all that he seeks released is "raw market data." The Court disagrees.

Having reviewed the Items plaintiff identifies as improperly withheld and the entire record, the Court is persuaded that defendant has adequately established that disclosing the withheld factual material would reveal the Board's deliberative process. In *Montrose*, the court observed that "[t]he work of the assistants in separating the wheat from the chaff is surely just as much part of the deliberative process as is the later milling by running the grist through the mind of the administrator." *Montrose*, 491 F.2d at 71. Similarly here, as defendant puts it, "[t]he work of Board and FRBNY staff in reaching out and culling certain financial statistics and exposure data, and the identities of certain financial institutions, for consideration by the Board from the mass of data

available to it is itself deliberative." (Def.'s Opp'n & Reply at 11.) For example, the Thro declaration describes Item #13, among others, as a document "conveying or discussing data gathered by Reserve Bank examiners concerning supervised financial institutions and their exposure to Bear Stearns" and declaring that the "information was gathered for and communicated to and discussed by Board members and Board and Reserve Bank staff in connection with the Board's decision . . . because it bore on the significant issue of the potential consequences of a Bear Stearns bankruptcy on individual financial institutions and firms and then-fragile financial markets." (Thro Decl. ¶ 17.) Items #16 and #20, among others, are described as e-mails "conveying market developments and analyses related to a potential bankruptcy by Bear Stearns; methods of obtaining information regarding financial institutions' exposure to Bear Stearns; proposed regulatory responses to the situation; and arguments and considerations regarding the need for the Temporary Loan" and that "this information and these analyses were considered by the Board and staff advising the Board as part of the ongoing process of deliberation." Accordingly, the Court is "convinced" that disclosure of the requested "factual summar[y] prepared [for] decisionmakers" "'would expose [the Board's] decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Quarles*, 893 F.2d at 392 (quoting *Dudman*, 815 F.2d at 1568).

2. Harm to Decision-Making Process

Plaintiff also argues that defendant has failed to establish the applicability of the deliberative process privilege because defendant has not demonstrated "that disclosure of the withheld records or information would cause harm to its decision-making process." (Pl. Mem. & Opp'n at 30.) However, once it has been shown that a document is both predecisional and deliberative, no such showing is legally required.

Plaintiff bases his argument on the following language from *Mead Data*, 566 F.2d at 258: "An agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of FOIA." Plaintiff fails to acknowledge, however, that the court in *Mead Data* made this statement in considering whether Exemption 5 could ever apply to an agency's negotiation proceedings with an outside party – i.e. to material that was indisputably not part of the agency's internal deliberative process. *Id.* at 257-58. The court held that in order for Exemption 5 to apply, the agency would have to show "that the threat of disclosure of negotiation proceedings would so inhibit private parties from dealing with the Government that agencies must be permitted to withhold such information in order to preserve their ability to effectively arrange for contractual agreement." *Id.* It was only in this context that the court suggested that "more than conclusory allegations of possible harm" were required. *Id.* In contrast, in that same

decision, the court upheld the applicability of Exemption 5 to other documents where the record established that those documents were both "predecisional" and "part of the deliberative process." *Id.*

Here, defendant has both "establish[ed] what deliberative process is involved, and the role played by the documents in issue in the course of that process." *See Coastal States*, 617 F.2d at 868 (D.C. Cir. 1980.) Having established that the withheld documents were both "predecisional" and "deliberative," defendant is not also required to establish that the release of the withheld documents or material would cause "harm" to the decision-making process.

C. Applicability of Attorney Work Product Privilege

The Board has withheld Item 38 based on the attorney work product component of Exemption 5. "The work-product doctrine shields materials 'prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).'" *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005) (quoting Fed. R. Civ. P. 26(b)(3)) Tax Analysts v. IRS, 117 F.3d 607, 620 (D.C.Cir. 1997). "The purpose of the privilege, however, is not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself." *Coastal States*, 617 F.2d at 864. While there

is no requirement that actual litigation be pending, "at the very least some articulable claim, likely to lead to litigation, must have arisen." *Id.* "[T]he Supreme Court has made clear [that] the doctrine should be interpreted broadly and held largely inviolate." *Judicial Watch*, 432 F.3d at 371 (citing *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)). Thus, "[a]ny part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under exemption 5." *Id.* at 371 (quoting *Tax Analysts*, 117 F.3d at 620). "In other words, factual material is itself privileged when it appears within documents that are attorney work product. If a document is fully protected as work product, then segregability is not required." *Id.*

The document withheld by the Board as attorney work product is a "draft affidavit . . . conveyed by a FRBNY attorney to Board attorneys." (*Vaughn* Index at 39; *see also* Thro Decl. ¶ 22.) According to defendant, the affidavit was "prepared by FRBNY attorneys in anticipation of litigation by Bear Stearns shareholders related to the Board's authorization to extend credit to [Bear Stearns] indirectly through [JP Morgan Chase]." (*Id.*)

Plaintiff first argues that as the document was prepared by an FRBNY attorney, it is not the work product of the Board's attorney. However, as discussed above, because FRBNY personnel were acting as consultants to the Board, the work product of an FRBNY attorney conveyed to the Board is properly withheld under Exemption 5. *Cf. National Institute of Military Justice*, 512 F.3d at 684-85 &

n.10 (Exemption 5 applies to communications between an agency and "individual non-government lawyers" pursuant to the "consultant corollary" principle); *see also Hanson v. U.S. Agency for Intern. Development*, 372 F.3d 286, 294 (4th Cir. 2004) ("The government has the same right to undisclosed legal advice in anticipation of litigation as any private party. And there is nothing in FOIA that prevents the government from drawing confidential counsel from the private sector. Allowing disclosure here would impair an agency's ability to prepare effectively for litigation with private parties and thereby thwart its ability to discharge its functions in the public interest.")

Plaintiff's second argument is that the Board has not met its burden to show that there was "some articulable claim, likely to lead to litigation." (Pl's. Mem. & Opp'n at 31 (quoting *Coastal States*, 617 F.2d at 865).) The Court disagrees. The Thro Declaration describes the withheld document as an affidavit "setting out the factual considerations and legal analyses" that had been "presented orally to the Board prior to its decision" and prepared due to the Board's concern about "possible litigation stemming from the Board's decision." (Thro Decl. ¶ 22.) Moreover, the Board has submitted affidavits establishing that "stockholders of Bear Stearns had 20 filed several lawsuits in March 2008 in the Delaware Court of Chancery and in the Supreme Court of the State of New York seeking to enjoin JP Morgan, Chase & Co.'s merger with Bear Stearns." (Def.'s Reply at 16.) Indeed, as the Board points out, "the brief from the Delaware Chancery litigation provided to the Plaintiff specifically mentions

'critical actions by the Federal Reserve Bank of New York' that led to the merger. (*Id*. (internal quotations omitted).) Accordingly, the Court is convinced that "it was entirely reasonable for the Board to anticipate that it, and/or the FRBNY, might be drawn into litigation by Bear Stearns shareholders, and to prepare for the possibility of litigation." (*Id.*)

III. FOIA Exemption 8

In addition to FOIA Exemption 5, defendant relies on FOIA Exemption 8 as an alternate basis for withholding thirteen Items (Item #'s 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 21, and 22). FOIA Exemption 8 provides that an agency may withhold information 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). The Board cites Exemption 8 in declining to produce e-mails or tables (or portions thereof) that contained information furnished to the Board by financial institutions regulated by the Board. (Thro Decl. ¶ 17; Stefansson Decl. ¶¶ 2, 4, 13-15.) Specifically, the Board withheld the identity of institutions with exposure to Bear Stearns, the amount of such exposure, and/or the activities these institutions had taken to limit their exposure to Bear Stearns. (See Thro Decl. ¶ 17; Steffanson Decl. ¶ 15.) Similarly, the Board withheld under Exemption 8 information the SEC gathered from Bear Stearns "in connection with its supervision and regulation of Bear Stearns." (Winter Decl. ¶ 9; *see also* Thro Decl. ¶¶ 10, 11, 18.) Plaintiff

challenges all of defendant's Exemption 8 withholdings.

FOIA Exemption 8 serves two purposes: (1) to ensure the security of financial institutions by eliminating the risk that disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks that might undermine public confidence and cause unwarranted runs on banks; and (2) to safeguard the relationship between the banks and their supervising agencies because if details of the bank examinations were made freely available to the public and to banking competitors, banks would cooperate less than fully with federal authorities. *See Public Citizen v. Farm Credit Admin.*, 938 F.2d 290, 291 (D.C. Cir. 1991); *Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978); *see also Nat'l Cmty. Reinv. Coal. v. Nat'l Credit Union Admin.*, 290 F. Supp. 2d 124, 135-36 (D.D.C. 2003)

Although generally FOIA exemptions are to be "narrowly construed," *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *Wolf*, 473 F.3d at 374, it is well-established that Exemption 8's scope is "particularly broad." *Consumers Union*, 589 F.2d at 534. In *Consumers Union*, the D.C. Circuit considered FOIA Exemption 8 for the first time and concluded that "[i]f the Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not our function, even in the FOIA context, to subvert that effort." *Id.* Subsequent decisions have reaffirmed that Exemption 8 "provide[s] absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of

examination, operating or condition reports." *Gregory v. Fed. Deposit Ins. Corp.*, 631 F.2d 896, 898 (D.C. Cir. 1980).

Plaintiff acknowledges that Exemption 8 was "crafted broadly," but argues that the Board has not met its obligation to provide "'a relatively detailed justification, 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.'" (Pl.'s Mem. at 32 (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987).) Specifically, plaintiff faults the Board for not identifying the specific "report" to which the information relates.[13]

The Board's affidavits establish that the Board's bank supervisory process "is one of continual interaction and information-sharing by regulated entities with their bank supervisors" (Stefansson Decl. ¶ 15); that the withheld materials "constituted part of a fast moving, real-time effort by the Board to monitor the possible impact of a Bear Stearns bankruptcy filing on financial institutions regulated by the Board" (Stefansson Decl. ¶¶ 4-5, 15; Thro Decl. ¶ 17); that "Federal Reserve examiners utilizing the Board's supervision authority obtained information from various LCBOs regarding their exposure to Bear Stearns in an effort to gauge possible impact of a Bear Stearns bankruptcy on regulated financial institutions" (Stefansson Decl. ¶

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[13] It is true, as plaintiff points out, that the *Vaughn* index makes no mention of examination, operating, or condition reports with respect to its reasons for withholding Item #'s 4, 5, 6, 9, 10, 13, 17, 18, 21, 22, and 24. However, defendant remedies this omission in its affidavits.

14); that the information was provided based on strict assurances of confidentiality (Stefansson Decl. ¶¶ 14-15; Thro Decl. ¶ 17); and that the Board created or obtained these documents as part of its "continuous" supervision of institutions it supervised, in the hectic days and hours during which the Board and its staff strove to assess the impact of a possible disorderly failure of Bear Stearns. (Stefansson Decl. ¶¶ 4-8, 15; Thro Decl. ¶ 17.) Similarly, the affidavits establish that Bear Stearns was supervised by the SEC as part of its CSE[14] program, which "was designed to monitor for financial or operational weakness in a CSE holding company or its unregulated affiliates that might place the U.S.-regulated broker-dealers and other regulated entities at risk" (Winter Decl. 10); and that the SEC obtained the withheld information in connection with its supervision and regulation of Bear Stearns (Danis Decl. ¶¶ 4-5; *see also Vaughn* Index at 11-12 (Items 10 and 11).)

Under these circumstances, and given the Board's statutory authority to "require such statements or reports as it may deem necessary," 12 U.S.C. § 248(a), the Board contends that the information it was receiving in "real-time" about what financial significance a Bear Stearns failure would have for a given institution and financial markets more generally is properly characterized as related to "examination, operating, or condition" reports about individual supervised institutions. (*See* Stefansson Decl. ¶ 8.) The Court agrees. Given the breadth of

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[14] The CSE program "allowed the [SEC] to supervise certain broker-dealer holding companies, including Bear Stearns, on a consolidated basis." (Winter Decl. ¶ 10.)

Exemption 8, and the Board's and the SEC's undisputed regulatory responsibilities in relation to the financial institutions whose information has been withheld, these affidavits are sufficient to establish that the Board properly withheld the above-described information as "*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); *see also Teichgraeber v. Board of Governors of the Federal Reserve System*, 1989 WL 32183 (D. Kan. 1989) ("Because plaintiff has not controverted defendant's assertion that the documents are directly based upon examination and investigation reports, the court must give effect to the plain meaning of Exemption 8 and grant defendant's motion.")

Plaintiff's contention that "Congress cannot have intended the term 'report' as used in Exemption 8 to have such an overarching meaning" is made without citation to any authority. Indeed, plaintiff's position is undermined by the fact that it is well-established that Exemption 8 is to be broadly construed. *See*, e.*g.*, *Consumers Union*, 589 F.2d at 534; *Gregory*, 631 F.2d at 898. Moreover, plaintiff's suggested limitation on the scope of Exemption 8 would lead to an outcome that is inconsistent with the one of the two purposes of Exemption 8 – to ensure "frank cooperation between bank officials and regulated entities." *Gregory*, 631 F.2d at 899; *see also Consumers Union*, 589 F.2d at 534 (second purpose is "to safeguard the relationship between the banks and their supervising agencies"); *Nat'l Cmty. Reinv. Coal.*, 290 F. Supp. 2d at 135-36 (one purpose of

Exemption 8 is to "to ensure that [banks] continue to cooperate . . . without fear that their confidential information will be disclosed.") As the court in *Consumers Union* observed, "[i]f details of the bank examinations were made freely available to the public and to banking competitors, . . . banks would cooperate less than fully with federal authorities." *Consumers Union*, 589 F.2d at 534. Based on its examination of the record, the Court agrees that the Board's "ability to gather such information in furtherance of its mission to regulate our nation's banking system would inarguably be compromised if such information were now released." (Def.'s Mem. at 26.) As that outcome is precisely what Exemption 8 is designed to avoid, the Court is persuaded that the Board properly withheld documents under Exemption 8.

IV. REMAINING ISSUES

In addition to its more general arguments, plaintiff also challenges the withholding of specific records. In a number of instances, plaintiff's points simply restate arguments addressed above. As for the remaining arguments, the Court has reviewed the record and finds no merit to plaintiff's arguments. In addition, having concluded that the Board properly claimed both FOIA Exemptions 5 and 8, the Court need not address whether Exemption 4 also justified withholding certain Items.

Finally, the Court has an affirmative obligation to address the issue of segregability *sua sponte*. *Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177

F.3d 1022, 1028 (D.C. Cir. 1999). FOIA requires that an agency produce "any reasonably segregable portion" of a record that is not exempt from disclosure. 5 U.S.C. § 552(b). According to the Thro Declaration, she, "working with at least two other attorneys in the Board's Legal Division, . . . reviewed the responsive documents for potentially exempt information." (Thro Decl. ¶ 14.) She avers that "[e]ach page was carefully reviewed, and the redactions were highly circumscribed" and that "[p]ages were withheld in full only when they contained no reasonably segregable nonexempt material." (*Id.*) The *Vaughn* index provides detailed descriptions of each document and portions that are withheld either in part or in whole. The Court has reviewed the *Vaughn* index and is satisfied that defendant has produced all reasonably segregable nonexempt material.

CONCLUSION

Having considered the pleadings and the entire record herein, and for the foregoing reasons, the Court concludes that the Board properly withheld documents pursuant to FOIA Exemptions 5 and 8. Accordingly, an accompanying Order grants defendant's motion for summary judgment and denies plaintiff's cross-motion.

Dated: September 29, 2010

ELLEN SEGAL HUVELLE

United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5353 **September Term 2010**

1:09-cv-01263-ESH

Filed On: July 29, 2011

Vern McKinley,

Appellant

v.

Board of Governors of the Federal Reserve System,

Appellee

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk