UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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

MEMORANDUM OF LAW

I. Introduction.

In its Combined Reply in Support of its Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment ("Def's Reply"), Defendant Federal Deposit Insurance Corporation ("FDIC") confuses the issue before this Court. On February 23, 2011, the Court ordered the parties to brief whether the FDIC has satisfied its obligation to conduct reasonable searches for records responsive to Plaintiff's requests. In its opening brief, the FDIC defined the issue as: "The real point of contention here is the decision by FDIC's FOIA staff in each instance to search for responsive records only in the [Executive Secretary Section]." Memorandum in Support of Summary Judgment (Def's Mem.") at 4. Now, the FDIC asserts that the issue is whether it "reasonably interpreted Plaintiff's FOIA requests in determining the scope

of the searches." Def's Reply at 4. Yet, these are two different issues with two different standards.

Instead of further confusing the two issues and treating them as one, Plaintiff will address each issue individually. In doing so, Plaintiff will demonstrate that the FDIC improperly narrowed the scope of Plaintiff's requests and subsequently failed to conduct reasonable searches for records responsive to Plaintiff's requests.

II. The FDIC's Interpretation of Plaintiff's Requests was Not Reasonable.

The first issue that the Court must address is whether the FDIC's interpretation of Plaintiff's requests was reasonable. In December 2009, Plaintiff served three FOIA requests on the FDIC related to the financial crisis of 2008 and 2009. One of Plaintiff's requests sought records from the FDIC regarding its October 2008 decision to create a "Temporary Liquidity Guarantee Program" to provide financial support to banks, thrift institutions, and certain bank holding companies. Plaintiff's other two requests sought records from the FDIC regarding its decisions in November 2008 and January 2009 to extend such support to Citigroup, Inc. and Bank of America Corp., respectively. More specifically, each request asked for:

> **[A]ny information available on this determination such as meeting minutes or supporting memos.**

Complaint at ¶¶ 8-10 (emphasis added). The FDIC argues that it reasonably interpreted Plaintiff's requests to be seeking "the material that the FDIC Board of Directors relied upon at those meetings in taking those actions." Def's Reply at 8. In other words, the FDIC narrowed Plaintiff's three requests to only a subset of what Plaintiff requested. Yet, the FDIC's narrowing of Plaintiff's requests is in direct contradiction to this circuit's precedent. More specifically, the circumstances before this Court are nearly identical to the circumstances in *Lacedra v. Executive*

Office for United States Attorneys, 317 F.3d 345 (D.C. Cir. 2003). In *Lacedra*, the plaintiff sent a FOIA request asking for copies of:

> **[A]ll documents pertaining to my case** that was prosecuted by your office, entitled United States vs. Glenn P. LaCedra, 96-10074 RCL[.] **Specifically I am requesting the following below**; Documents and Information on
>
> 1. Any and all inducements and rewards offered to the chief government witnesses Susan Yodlin and Jennifer Brown, including Government provided beeper service, cellular phone service and fees paid in my case for any, and all information or for testifying against me.
>
> 2. All scientific fingerprinting results from the inside of the black electrical tape that was attached to the device, and any documents concerning the known or unknown identities of such.

Id. at 346 (emphasis added). The agency interpreted the request as seeking only the two enumerated categories of documents. *Id*. at 347. The plaintiff disagreed. He asserted that the request sought "all documents pertaining to" his criminal case and that the agency's interpretation ignored that language found in his letter. Moreover, the plaintiff argued that if his request was determined to be ambiguous, the agency was obliged by *Nation Magazine v. United States Customs Service*, 71 F.3d 885 (D.C. Cir. 1995) to interpret his request liberally in favor of disclosure. *Id*. at 347-348. In other words, the plaintiff argued that the agency had unreasonably narrowed his request.

The U.S. Court of Appeals for the District of Columbia agreed with the plaintiff. The Court held:

> To be sure, LaCedra's request is not a model of clarity. The first portion, "I wish to obtain a copy of all documents pertaining to my case," is in considerable tension with the second, "Specifically I am requesting the following below." Nevertheless, LaCedra's request is reasonably susceptible to the broader reading. The drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a

> specific subset thereof. We think it improbable, however, that a person who wanted only the subset would draft a request that, like LaCedra's, first asks for the full set. The EOUSA's interpretation -- that the request for "all documents pertaining to my case that was prosecuted by your office" identifies the location where the subset of documents may be found -- is simply implausible. In view of the Government's obligation under the law of this circuit "to construe a FOIA request liberally," *Nation Magazine*, 71 F.3d at 890, we think it is also wrong.

Id. at 348. In other words, although the plaintiff had asked for "all documents pertaining to [his] case" as well as stating that he was "[s]pecifically . . . requesting the following" subset of documents, the Court held that the agency had an obligation to liberally construe the request. The only reasonable interpretation, therefore, was to give meaning to the entire request. The agency therefore was ordered to search for "all documents pertaining to" the plaintiff's criminal case.

Unlike the requester in *Lacedra*, Plaintiff here did not use language that could be implied to suggest that his requests sought specific types of records. Here, Plaintiff asked for "any information available on this determination **such as** meeting minutes or supporting memos." Plaintiff's requests used the phrase "such as" to assist the FDIC in locating possible responsive records. He did not limit his request to a specific subset of records. Therefore, in light of *Nation Magazine* and the similar set of circumstances in *Lacedra*, the FDIC has unreasonably interpreted Plaintiff's requests to be limited to the material that the FDIC Board of Directors relied upon at the specified meetings.

III. The FDIC has failed to conduct adequate searches.

The second issue that the Court must address is whether the FDIC has conducted adequate searches. As stated above, the FDIC improperly narrowed Plaintiff's requests. Because of this fact alone, the FDIC has not conducted adequate searches. The FDIC only

searched the Executive Secretary Section for the minutes and the case memorandum for each of the determinations. Since a reasonable interpretation of the requests requires the FDIC to conduct searches for any information available on the three determinations, in each instance, the FDIC must search more than just the Executive Secretary Section.

As Plaintiff explained in his Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment ("Pl's Mem."), the D.C. Circuit has held, "'The adequacy of an agency's search is measured by a standard of reasonableness' and is 'dependent upon the circumstances of the case.'" *Weisberg v. U.S. Department of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (*quoting McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983) and *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 834 (D.C. Cir. 1979)). The circumstances of the case are not in dispute. Plaintiff sent three FOIA requests seeking any and all information available regarding the October 2008 decision to create the Temporary Liquidity Guarantee Program, the November 2008 decision to extend assistance to Citigroup, and the January 2009 decision to extend assistance to Bank of America. The FDIC immediately located the minutes and the case memorandum for each of those determinations. As Plaintiff demonstrated in his opening brief – and not disputed by the FDIC in its Reply – the minutes and the case memoranda, at a minimum, clearly suggest that other records exist that are responsive to Plaintiff's request. Or, more specifically, it is reasonable to conclude that other records exist based on the circumstances.

Each set of minutes produced by the FDIC begins with a list of the names of the meeting participants as well as their titles and the component of the FDIC that they represent. Similarly, each case memorandum produced by the FDIC begins with the names, titles, and departments of the individuals who prepared and received the case memoranda. Because of the extraordinary

nature of the actions taken by the FDIC during the height of the financial crisis, it is inconceivable that officials and staff members who participated in meetings and prepared or received the case memoranda had no prior knowledge of the topics discussed and possessed no records on the issues and the decisions to be made. Based on these circumstances, it is reasonable to conclude that adequate searches for responsive records would have included searches for records created and/or used by officials and staff members of the various departments within the FDIC who participated in the three determinations.[1] The FDIC therefore should conduct a new search for all records responsive to Plaintiff's actual requests and not just records responsive to the FDIC's unreasonable interpretation of Plaintiff's requests.

IV. Conclusion.

For the reasons set forth in Plaintiff's opening memorandum and the additional reasons set forth above, the FDIC's motion for summary judgment should be denied and Plaintiff's cross-motion for summary judgment should be granted and the FDIC should be compelled to conduct reasonable searches for records responsive to Plaintiff's requests and produce all non-exempt, responsive records to Plaintiff.

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[1] The FDIC's discussion of whether the "study" referenced in the TLGP case memorandum is responsive is entirely misplaced and irrelevant. Def's Reply at 13-15. In his opening brief, Plaintiff discussed the "study" solely to show that the few records that the FDIC did produce to Plaintiff demonstrate the inadequacy of the FDIC's searches. Contrary to the FDIC's assertions, the issue is not whether the study is responsive. For the FDIC to determine whether it is "clear or certain that the referenced 'study' would be considered responsive" or that "Plaintiff already has all of the information on the study that is relevant to the Board determination on the TLGP[,]" the FDIC would first have to conduct a search for the record. *Id*. It is that precise action that Plaintiff requests that the FDIC undertake. Plaintiff has not asked that this Court order the FDIC to produce any records that fall outside the scope of Plaintiff's requests for any and all information available regarding the October 2008 decision to create the Temporary Liquidity Guarantee Program, the November 2008 decision to extend assistance to Citigroup, and the January 2009 decision to extend assistance to Bank of America. Plaintiff simply requests that the FDIC satisfy its statutory obligation and conduct reasonable searches for responsive records.

Dated: May 20, 2011

Respectfully submitted,

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