

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**FILED**

JUL - 8 2009

Clerk, U.S. District and  
Bankruptcy Courts

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VERN McKINLEY  
20745 Ashburn Station Place  
Ashburn, VA 20147

*PRO SE*

Plaintiff

v.

FEDERAL DEPOSIT  
INSURANCE CORPORATION  
550 17<sup>th</sup> St., NW  
Washington, DC 20429-9990

Case: 1:09-cv-01263  
Assigned To : Huvelle, Ellen S.  
Assign. Date : 7/8/2009  
Description: FOIA/Privacy Act

BOARD OF GOVERNORS OF  
THE FEDERAL RESERVE SYSTEM  
20<sup>th</sup> and C Street, NW  
Washington, DC 20551

Defendants  
-----X

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action by Plaintiff Vern McKinley pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, seeking to vindicate the public's right to obtain government records maintained by the Federal Deposit Insurance Corporation (the "FDIC") and the Board of Governors of the Federal Reserve System (the "Fed"), agencies of the United States government, concerning the FDIC's and the Fed's use of public funds to intervene in the operations of private financial institutions.

2. The FDIC and the Fed have invoked long-dormant powers in their efforts to stabilize the financial system over the past one and a half years. The government documents that Mr. McKinley seeks are central to understanding and assessing the government's

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response to the ongoing financial crisis in the United States as the Congress contemplates further changes in financial sector regulation and authorities.

3. In response to the crisis, the FDIC has relied on one of its powers of intervention granted under the Federal Deposit Insurance Act, commonly known as open bank assistance (OBA), in order to bail out private financial institutions designated by the FDIC as systemically important. The Fed has used an analogous power whereby it is granted authority under the Federal Reserve Act to intervene in unusual and exigent circumstances (UEC). These bailouts are an alternative to closing a financial institution outright through receivership or bankruptcy. The FDIC and Fed have the power to inject public funds or otherwise intervene in the operations of so-called systemically important financial institutions. The FDIC and Fed claim that all manner of serious adverse effects on economic conditions and financial stability or contagion would flow from not intervening in this manner. However, despite the manifest public interest in such matters, no institution-specific information has been publicly provided on these expected negative consequences. Thus, while these transactions expose the public to large financial risks, the FDIC and Fed have not given specific information regarding the negative consequences that would have flowed from allowing the institutions to fail outright.

4. As part of his ongoing research on this issue, Mr. McKinley sought access to this information under the FOIA. To date, the FDIC has provided the requested documents, but the complete redaction of key, requested information is to such an extent as to eviscerate the usefulness of these documents and thus what was provided does not represent the requested information from the initial FOIA request. The Fed has not provided any documents. Consequently, Mr. McKinley brings this suit to compel the

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Appendix?*

FDIC and Fed to discharge their obligations under FOIA, so that the public can be informed of how the FDIC and Fed are safeguarding public resources.

#### JURISDICTION AND VENUE

5. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States, in particular, 5 U.S.C. § 552. In addition, this Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), under which “the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant,” because it is where the agency records are situated.

6. Venue is proper in this District pursuant to 5 U.S.C. § 552(a)(4)(B) because it is the United States District Court in the District of Columbia.

#### PARTIES

7. Plaintiff Vern McKinley is a private citizen residing in Ashburn, Virginia. Mr. McKinley has worked in the areas of banking supervision and liquidation, deposit insurance and central banking for the past 24 years, including as an employee of the FDIC and Fed. Based on his work experience, Mr. McKinley has had a number of professional articles published, primarily by the Cato Institute, a think tank located in Washington, D.C. Research for his most recent such work for Cato Institute with co-author Gary Gegenheimer, “Bright Lines and Bailouts,” led him to make this FOIA information request of the FDIC and Fed.

8. Defendants FDIC and the Fed are agencies of the United States of America, and have possession and control of the records that Mr. McKinley seeks. In the interest of preserving resources and because of the similar legal issues and emergency responses to address systemic institutions, the claims against defendants have been combined into one complaint. Defendant FDIC is the federal deposit insurer in the United States. According to the FDIC, it is an independent agency created by the Congress whose mission is to maintain stability and public confidence in the nation's financial system by insuring deposits, examining and supervising financial institutions for safety and soundness and consumer protection, and managing receiverships. Defendant Fed is the central bank of the United States. According to the Fed, it was founded by Congress to provide the nation with a safer, more flexible, and more stable monetary and financial system.

#### FACTS

##### The FDIC's Open Bank Assistance Powers

9. The FDIC has a number of options under law to intervene in the operations of a troubled insured financial institution. The vast majority of such institutions are resolved through outright closure. Open bank assistance (OBA) allows the FDIC to make loans to, make deposits in, purchase the assets or securities of, assume the liabilities of, or make contributions to any insured depository institution. By taking one of these options over outright closure, the institution usually remains open as a going concern. This is sometimes referred to as a financial institution bailout because this approach generally inures to the benefit of creditors, shareholders or counterparties.

10. The FDIC was granted the power of OBA in 1950. OBA has been used sparingly since that time, with the most extensive previous use of the power before the current

crisis being during the financial crisis of the 1980s. The largest and most well known case of OBA prior to the current financial crisis was in 1984 and involved Continental Illinois, a very large Chicago-based financial institution which was resolved by the FDIC at a cost of approximately \$1 billion.

11. After the experience with Continental Illinois and other OBA transactions during the 1980s and early 1990s, a number of legislative changes were made to the OBA powers of the FDIC in 1991 as part of the Federal Deposit Insurance Corporation Improvement Act (FDICIA). These changes limited the ability of the FDIC to invoke the power except where it is the least costly means to resolve an institution or if the outright closure poses systemic risk and would lead to serious adverse effects on economic conditions or financial stability. Two-thirds of the FDIC Board of Directors, two-thirds of the Board of Governors of the Federal Reserve, and the secretary of the Treasury in consultation with the President must make such a systemic risk determination in order to invoke OBA. Documentation mandates were also imposed and the Comptroller General of the United States must review and report to the Congress on the determination.

12. The FDIC's OBA power was long dormant throughout the remainder of the 1990s and up through mid 2008. The first time the FDIC Board considered using the reformulated OBA power was for a proposed purchase by Citigroup Inc. of Wachovia Bank, N.A. (hereinafter, "Wachovia Bank transaction"). As part of the transaction, the FDIC would enter into a loss sharing arrangement on a pre-identified pool of \$312 billion of loans. Citigroup Inc. would absorb up to \$42 billion of losses on the pool and the FDIC would absorb losses beyond that. This transaction was approved at a special meeting of the Board of Directors of the FDIC on September 29, 2008.

The Fed's Authority Under Unusual and Exigent Circumstances

13. The Fed has a number of options under law to intervene in the operations of a troubled financial institution. Under the Fed's powers under UEC it may lend to any individual, partnership or corporation when that entity is unable to secure adequate credit accommodations from other banking institutions. By taking this option over outright closure or bankruptcy, the institution usually remains open as a going concern. As in the case of OBA, this is sometimes referred to as a bailout because this approach generally inures to the benefit of creditors, shareholders or counterparties.

14. The Fed was granted the power to lend in UEC in 1932. Lending in UEC has been used sparingly since that time, with the most extensive use of the power before the current crisis being during the Depression of the 1930s.

15. The Fed's power under UEC was long dormant throughout the remainder of the 20<sup>th</sup> Century and up through early 2008. The Fed considered using the power during the current crisis in combination with a proposed purchase by JPMorgan Chase of Bear Stearns (hereinafter, "Bear Stearns transaction"). As part of the transaction, the Federal Reserve Bank of New York offered a \$29 billion credit guarantee on a non-recourse basis. This transaction was approved at a meeting of the Fed on March 13, 2008.

Freedom of Information Act Requests

16. On November 18, 2008, Mr. McKinley submitted to the FDIC through the FDIC's website at <http://www2.fdic.gov/efoiarequest/index.asp> an electronic FOIA request seeking certain records related to the approval of the Wachovia Bank transaction; and on December 17, 2008, Mr. McKinley submitted to the Fed through the Fed's website at <http://www.federalreserve.gov/generalinfo/foia/default.cfm> an electronic FOIA request

seeking certain records related to the approval of the Bear Stearns transaction (collectively, "Requested Records").

17. The request to the FDIC stated: "The source of this power is Section 13(c) of the FDI Act (12 U.S.C. 1823(c)). There is a requirement that under this section under the emergency determination there must be a finding of 'serious adverse effects on economic conditions or financial stability' if the action is not taken. I would like any information available on this determination such as meeting minutes or supporting memos of how this determination was made."

18. The request to the Fed stated: "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" (quoting from the March 13, 2008 meeting minutes).

19. The public has a significant and legitimate interest in the FDIC's and the Fed's conduct with respect to the public funds involved.

20. Based on the response by the FDIC, the FDIC possesses the Requested Records. No response has been received from the Fed.

21. The FDIC and the Fed are obligated to release the Requested Records under FOIA, unless it can show that the records are exempt from disclosure.

#### To Date the FDIC Has Not Provided the Requested Information

22. Under FOIA, the FDIC was required to respond to the request within 20 business days after the date on which Mr. McKinley submitted the request (November 18, 2008).

23. After both verbal and electronic communications with Jerry Sussman, FOIA Specialist, Mr. McKinley was informed that the requested information would be most efficiently satisfied by securing the minutes of the FDIC Board Meeting from September 29, 2008 during which the relevant discussion regarding the Wachovia purchase by Citigroup, Inc. was undertaken.

24. On January 13, 2009 the FDIC responded by letter from Frederick L. Fisch, Supervisory Counsel in the FOIA/Privacy Act Group that the request for the meeting minutes had been wholly denied based on exemptions in the Government in the Sunshine Act. The letter also noted that Mr. McKinley had the right to appeal this determination to the FDIC's General Counsel within 30 business days following the receipt of the letter.

25. On January 28, 2009 Mr. McKinley filed an appeal to the FDIC's General Counsel detailing his arguments that the decision to withhold the minutes in their entirety was:

- An overly-broad application of the Government in the Sunshine Act;
- Not in keeping with the Congressional intent as evidenced by the plain language of the FDICIA of 1991;
- Inconsistent with the historical precedent of information disclosed by the FDIC regarding analogous open bank assistance (OBA) agreements, specifically in the case of the resolution of Continental Illinois;
- Inconsistent with the practices of the Board of Governors of the Federal Reserve under their analogous power contained in Section 13(3) of the Federal Reserve Act as they have disclosed the relevant minutes in their entirety.

26. On February 17, 2009 the FDIC responded by letter from Charles L. Cope, Senior Counsel in the FDIC's Legal Division. A copy of the minutes of the board meeting was



provided with what the FDIC referred to as “appropriate redactions.” The minutes were completely and entirely redacted with regard to the specific information requested by Mr. McKinley citing exemptions in the Government in the Sunshine Act. The FDIC did not provide the information requested in the original FOIA request, but for the most part only the details that had been previously made publicly available. This limited disclosure was a great deal less information than that provided in the case of Continental Illinois. The letter from Mr. Cope also noted that because the FOIA appeal had been denied in part, judicial review was available pursuant to 5 U.S.C. § 552(4)(B).

27. Mr. McKinley has exhausted his administrative remedies.

28. Mr. McKinley has a statutory right to the Requested Records.

To Date the Fed Has Not Provided the Requested Information

29. Under FOIA, the Fed was required to respond to the request within 20 business days after the date on which Mr. McKinley submitted the request (December 17, 2008).

30. On January 16, 2009 the Fed responded by mail to Mr. McKinley by extending the period for their response until February 2, 2009 reportedly in order to consult with another agency or with two or more components of the Board having a substantial interest in the determination.

31. Three months passed after this extended date and in early May 2009 Mr. McKinley contacted the Fed by phone and he was told that he could expect a response by early June 2009.

32. On June 11, 2009 the Fed responded by mail to Mr. McKinley that they anticipated being able to complete their review by June 30, 2009. Mr. McKinley called the Fed FOIA Office on July 1, 2009 to check on the status of the request and his call was not returned.

33. To date, more than six months have passed since Mr. McKinley's initial FOIA request, and he has not received the requested information from the Fed.

34. Mr. McKinley has exhausted his administrative remedies.

35. Mr. McKinley has a statutory right to the Requested Records.

FIRST CAUSE OF ACTION

(Request for declaratory judgment under 28 U.S.C. § 2201)

36. Mr. McKinley repeats, realleges and incorporates the allegations in the foregoing paragraphs as though fully set forth therein.

37. FOIA mandates public disclosures by the FDIC and the Fed of the Requested Records.

38. The FDIC and the Fed have not provided the Requested Records to Mr. McKinley in a form that gives him the requested information.

39. An actual and justiceable controversy exists as to whether the FDIC and Fed have violated FOIA.

40. Mr. McKinley seeks declaratory judgment that FOIA entitles him to the Requested Records and that the FDIC and the Fed should produce those records containing the requested information immediately.

SECOND CAUSE OF ACTION

(Request the records improperly withheld in violation of FOIA)

41. Mr. McKinley repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth therein.

42. Mr. McKinley seeks disclosure of, and access to, the Requested Records.

43. The FDIC and the Fed have not provided the information requested in the FOIA filing.

44. Mr. McKinley has exhausted his administrative remedies with respect to receiving a response to the Request.

45. FOIA mandates public disclosure by the FDIC and the Fed of the Requested Records.

46. The FDIC's and the Fed's failure to make the Requested Records promptly available to Mr. McKinley violates 5 U.S.C. § 552(a)(3)(A).

47. Upon substantially prevailing, Mr. McKinley should be awarded his attorneys' fees and other litigation costs under 5 U.S.C. § 552(a)(4)(E).

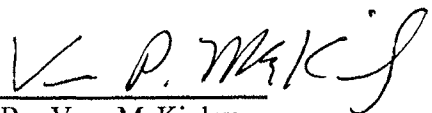
**PRAYER FOR RELIEF**

WHEREFORE, Mr. McKinley requests that this Court:

48. Order the FDIC and the Fed to make the Requested Records containing the requested information immediately available to Mr. McKinley; and

49. Grant such other and further relief as this Court may deem just and proper.

Dated: Washington, DC  
July 8, 2009



By: Vern McKinley  
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(703) 470-9893

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