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Checks and Balances: Using the Freedom of Information Act to Evaluate the Federal Reserve Banks

Kara Karlson

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Checks and Balances: Using the Freedom of Information Act to Evaluate the Federal Reserve Banks

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CHECKS AND BALANCES: USING THE FREEDOM OF INFORMATION ACT TO EVALUATE THE FEDERAL RESERVE BANKS

Kara Karlson+ *

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+ In loving memory of my father, Neil G. Karlson.
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INTRODUCTION

After the financial meltdown of 2008, the Federal Reserve System went from being a collection of technocrats who maintained balance in the markets with limited, deliberate action,¹ to the EMIs of the financial sector.² By bailing out Bear Stearns³ and American International Group

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² See Steven M. Davidoff & David Zaring, Regulation by Deal: The Government’s...
(AIG)\(^4\) while watching Lehman Brothers collapse,\(^5\) the Federal Reserve dramatically increased its role as a major financial player, determining which companies were too big to fail and what steps would be taken to ensure the survival of select firms.\(^6\) Typically, this process took place with extremely limited oversight and often no more than forty-eight hours of deliberation.\(^7\)

As a reaction to the unprecedented actions taken by the Federal Reserve System, two news organizations—Bloomberg\(^8\) and Fox News\(^9\)—sued the Federal Reserve Board (Board) in Washington, D.C. under the Freedom of Information Act (FOIA) for records regarding bailout activities.\(^10\) The New York Federal Reserve Bank, a separate entity from the Board\(^11\) that

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\(^4\) See Response to the Financial Crisis, 61 ADMIN. L. REV. 463, 477 (2009) (outlining the process the New York Federal Reserve Bank used to procure a $30 billion loan for Bear Stearns over the course of one night). See generally DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE’S WAR ON THE GREAT PANIC 127–149 (2009) (recounting the various tactics used by the Federal Reserve to respond to the rapidly changing financial conditions during the collapse).


\(^6\) See supra note 2, at 498–99 (presenting the evolving deal between the New York Federal Reserve Bank and AIG, which included increasing liquidity support from $173.1 billion in November to $182.5 billion by March 2009).

\(^7\) See supra note 2, at 20 (describing Secretary Paulson’s reticence to be responsible for another bailout and the rapid collapse of Lehman after a suitable buyer could not be found).

\(^8\) See, e.g., id. at 158–159 (highlighting the extremely brief period and limited oversight that guided the Board and the New York Federal Reserve Bank in the decision to save Bear Stearns and arguing that the Bear Stearns bailout set the new standard for too big to fail).

\(^9\) See supra note 2, at 4 (noting that the Board and Banks

\(^10\) See supra note 2, at 4 (noting that the Board and Banks

\(^11\) See supra note 2, at 4 (noting that the Board and Banks
has not been subject to FOIA in the past,\(^\text{12}\) possessed some information sought by the news organizations in the two cases. In *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*,\(^\text{13}\) the District Court for the Southern District of New York ordered the Board to turn over the requested information,\(^\text{14}\) in *Fox News Network, L.L.C. v. Board of Governors of the Federal Reserve System*,\(^\text{15}\) the same court held that FOIA exemption four\(^\text{16}\) supported the Board’s decision to withhold the information.\(^\text{17}\) Both cases avoided determining whether the Federal Reserve Banks (Banks) were agencies under FOIA, although *Fox* implied that the Banks were not.\(^\text{18}\) The Second Circuit also declined to rule on the agency status of the Banks when considering *Bloomberg* and *Fox*.\(^\text{19}\)

The Banks, like the Board of Governors of the Federal Reserve\(^\text{20}\) and the Federal Open Market Committee (FOMC),\(^\text{21}\) should be considered agencies under FOIA. The Banks exercise powers—from implementing the federal funds rate to determining minimum reserve balances for member banks—that have a direct impact on this country’s monetary policy and consumer credit.\(^\text{22}\) The Banks’ ability to affect the financial well-being of every citizen, in addition to the responsibility to carry out the Board’s directives,\(^\text{23}\) suffices to bring them under the ambit of FOIA. Even when

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\(^{12}\) See *Bloomberg*, 649 F. Supp. 2d at 266 (acknowledging that the Board and Federal Open Market Committee are both agencies, but that the Federal Reserve Banks consider themselves separate organizations not subject to FOIA).

\(^{13}\) 649 F. Supp. 2d 262 (S.D.N.Y. 2009), aff’d, 601 F.3d 143 (2d Cir. 2010).

\(^{14}\) Id. at 282.

\(^{15}\) 639 F. Supp. 2d 384 (S.D.N.Y. 2009), vacated, 601 F.3d 158 (2d Cir. 2010).

\(^{16}\) See infra notes 134–144 and accompanying text for a discussion on exemption four.

\(^{17}\) See *Fox*, 639 F. Supp. 2d at 400-01 (refusing to order the Board to disclose its responsive records on the ground that the Board had satisfied its burden of showing substantial competitive harm would result to the borrowers if the records were made public).

\(^{18}\) See generally *Bloomberg*, 649 F. Supp. 2d at 265–66 (discussing the agency status of the Banks obliquely, but deciding that determining the Bank’s status was not necessary to resolve the case presented); *Fox*, 639 F. Supp. 2d at 390–91 (same).


\(^{20}\) *PURPOSES & FUNCTIONS*, supra note 1, at 4; see also *FOIA Serv. Ctr.*, The Fed. Reserve Bd., http://www.federalreserve.gov/generalinfo/FOIA/servicecenter.cfm (last visited August 30, 2010) (publishing the names and contact information of FOIA officers at the Board and outlining the process for making FOIA requests to the Board).


\(^{23}\) See *PURPOSES & FUNCTIONS*, supra note 1, at 37–38 (explicating the role of the
required to submit to FOIA disclosure, however, the Banks could still use exemptions four and five to withhold information during negotiations, but would not be able to prevent the disclosure of historical information without showing imminent, specific harm to the Banks’ borrowers.

This Comment outlines the applicability and appropriateness of applying FOIA to actions taken by individual Banks in the Federal Reserve System. Part I.A discusses the history of the Board and Banks with a focus on the evolution of the Federal Reserve powers and the utilization of section 13(3) in 2008. Part I.B presents the history and purposes of FOIA and the Federal Reserve Banks as a transmission mechanism for monetary policy, as the Board sets the policy for the federal funds rate and the Banks act on the market to meet those objectives. The Supreme Court recognized the Banks’ open market operations, or buying and selling government securities in the open market, as the “most important monetary policy instrument of the Federal Reserve System.” Merrill, 443 U.S. at 343.

24. See Merrill, 443 U.S. at 361–64 (holding that the current Domestic Policy Directives are analogous enough to the process of awarding contracts to allow protection from disclosure under FOIA’s exemption five, but not deciding the issue because the record was not sufficiently developed); see also Flathead Joint Bd. of Control v. U.S. Dep’t of the Interior, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004) (ruling that exemption four protected information about a tribe’s water rights because that information was instrumental in assuring that the tribe had an equitable bargaining position to receive the best return on that resource).

25. See Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (affirming the lower court’s judgment that the evidence the corporation provided to show “substantial competitive harm” would result from disclosure was sufficient to prohibit the FDA’s disclosure of the information under exemption four); Iglesias v. CIA, 525 F. Supp. 547, 559 (D.D.C. 1981) (remanding the decision because the agency provided only very brief descriptions of the documents requested, and these descriptions were insufficient to establish the agency’s claim that competitive harm would result from disclosure); Bob Ivry, Fed Should Keep Emergency Lending Secret, Banks Vow to Tell Supreme Court, BLOOMBERG (Apr. 14, 2010), http://www.bloomberg.com/apps/news?pid=20601087&sid=ax8ulGXswn4E (reporting that the Clearinghouse Association, an organization made up of the top banks that joined the Board as defendants in the Fox News lawsuit, will fight the FOIA suit to the Supreme Court because the borrowers face competitive harm if the information is disclosed).


methods the courts use when applying FOIA to agencies. Part II argues that the Banks are agencies under FOIA because they are independent from the executive, exercise governmentally related authority, and are more similar to agencies than non-agencies.

After determining that the Banks are agencies under FOIA, Part III argues that FOIA requires disclosure of Bank records in most instances, with exemptions four and five applicable to Bank records only in narrow circumstances. Specifically, Part III.A utilizes the test expounded in National Parks & Conservation Association v. Morton to analyze exemption four claims and demonstrate that the information the Banks receive from the institutions they regulate would continue to be accurate despite FOIA disclosure, and that the Banks cannot uphold their burden to prove that disclosure would harm the private firms. Part III.B analyzes the application of exemption five to historical records, and argues that the data sought does not violate the deliberative process privilege because the disclosure of the records of the Banks’ prior decisions will not result in premature disclosure or hamper open policy discussion. Exemption five also will generally not protect Bank records under the confidential commercial information privilege, because the possibility of premature disclosure affecting the government’s ability to interact in the market is not

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29. See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (holding that FOIA is necessary to ensure that the country’s leaders act at the consent of the governed); Dept’ of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (noting that despite the nine exemptions to FOIA, the presumption is in favor of disclosure). But see Merrill, 443 U.S. at 362–364 (remanding for a more complete record, but arguing that agency records did come under the umbrella of certain FOIA exemptions because the release of those records would likely harm the FOMC’s ability to influence monetary policy).

30. See infra Part II (analyzing the Banks’ independent authority, arguing that banks are more similar to agencies like the FOMC than non-agencies like stock exchanges, and arguing on policy grounds that requiring the Banks to adhere to FOIA will prevent overreaching by the Banks).

31. See infra Part III (scrutinizing FOIA’s exemptions four and five and determining that factual, historical information cannot be withheld by the Banks without a showing of imminent financial harm).

32. 498 F.2d 765 (D.C. Cir. 1974).

33. See infra Part III.A (demonstrating that the information the Banks receive would be unaffected by disclosure, and therefore exemption four does not require withholding).

34. See infra Part III.B (examining whether the information qualifies for disclosure under either the deliberative process privilege or confidential commercial information privilege of exemption five and concluding it does not).
implicated when the government has already acted on the disclosed information. Finally, this Comment concludes that without transparency, the very power the Banks use to stabilize the economy may undermine market balance.

I. BACKGROUND

Congress established the Federal Reserve System in the early 1900s as a thoroughly debated response to a series of panics that threatened to cripple the financial system. Similarly, legislators enacted FOIA after hard lobbying, despite President Johnson’s reservations about the disclosure requirements. While the Federal Reserve System was established almost fifty years prior to FOIA, the power invested in the central banking system lends itself to public oversight because Congress enacted FOIA to ensure disclosure of information that affects the public—just like the records that the Banks maintain. This section separately discusses the evolution of the Federal Reserve System and FOIA.

A. The History of the Federal Reserve System

The Federal Reserve System has been intertwined with financial panics since its inception after the Panic of 1907. The original purposes of the Federal Reserve Act (FRA) were to establish a system of twelve Banks, create a central Board to oversee the regional Banks, produce a market for re-discounted commercial paper, create a more effective supervisory organization for banks, and maintain an elastic currency. The executive

35. See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 363 (1979) (arguing that if the disclosure of information would harm the FOMC’s ability to further its federal mandate, the information should fall under FOIA’s exemption); see also Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (holding that the government’s ability to gather accurate information in the future from the concessioners is not harmed by disclosure, because those businesses must disclose it or forego government favor), aff’d in part, rev’d in part sub nom. Nat’l Parks & Conservation Ass’n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976).

36. See Davidoff & Zaring, supra note 2, at 511–12 (highlighting the near collapse of the Mitsubishi take-over bid because the repeated intervention by the Board in other firms left investors unsure of the security of their interests).

37. PURPOSES & FUNCTIONS, supra note 1, at 1–2.

38. Cf. Lyndon B. Johnson, Statement by the President Upon Signing S. 1160 (July 4, 1966) (indicating that there were exceptions to the public’s right to know and that nothing in FOIA should be construed as prohibiting the President from exercising confidentiality).

39. See FOIA GUIDE, supra note 28, at 1 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)) (noting that multiple courts have interpreted FOIA to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed”).

40. See HACKLEY, supra note 26, at 10 (stating that the legislators repeatedly referred to panics during the drafting of the FRA and even believed the Act would make it “impossible [to have] another panic in this country”).

branch does not have to authorize the decisions of the Board, but the Board is subject to regulation by Congress.\footnote{42} The Board supervises the actions of the Banks.\footnote{43}

When Congress drafted the original FRA, it attempted to minimize the concentration of power by separating the central bank into two different strata:\footnote{44} the Board of Governors in Washington, D.C., and the Banks located in twelve districts throughout the country.\footnote{45} The President appoints, and the Senate confirms, members of the Board to fourteen-year terms.\footnote{46} The Board supervises the Banks and directs monetary policy, primarily by setting the federal funds rate through the FOMC.\footnote{47} The Banks, on the other hand, supervise actions in their districts including distributing currency, regulating member banks and bank holding companies, and serving as a depository for banks in each district.\footnote{48} Unlike the members of the Board, three members of each Reserve Bank board are bankers chosen by bankers, three members are “non-bankers” chosen by bankers, and the Board chooses three members to represent the public.\footnote{49}

While the core purposes and responsibilities of the Board and the Banks have not changed much over the years, the tools the Reserve System can use to further those purposes have expanded significantly.\footnote{50} As a result of the Great Depression,\footnote{51} the FRA was amended in 1932 to include section 13(3), a provision that allows the Board to act in concert with the Banks:

> In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System . . . may authorize any Federal Reserve Bank . . . to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange when . . . indorsed or otherwise secured . . . Provided . . . the Federal Reserve Bank shall obtain

\footnote{42}{PURPOSES & FUNCTIONS, supra note 1, at 2–3.} \footnote{43}{12 U.S.C. § 248(a); PURPOSES & FUNCTIONS, supra note 1, at 4.} \footnote{44}{See SPENCER & HUSTON, supra note 26, at 9 (discussing the division of power as a method to limit the power of “Wall Street” and the East Coast banker and allow local banks outside the financial center to have some influence).} \footnote{45}{12 U.S.C. §§ 222, 223; PURPOSES & FUNCTIONS, supra note 1, at 6.} \footnote{46}{12 U.S.C. § 241; PURPOSES & FUNCTIONS, supra note 1, at 4.} \footnote{47}{PURPOSES & FUNCTIONS, supra note 1, at 3–4.} \footnote{48}{Id. at 6.} \footnote{49}{12 U.S.C. § 302. The “non-banker” requirement is quite flexible. For example, Richard Fuld, a “non-banker” on the New York Federal Reserve Bank board was the CEO of Lehman Brothers, and one of the members picked by the Federal Reserve Board to represent the public was former CEO and current board member of Goldman Sachs Stephen Friedman. WESSEL, supra note 2, at 155.} \footnote{50}{See Walker F. Todd, FDICIA’s Emergency Liquidity Provisions, 29 ECON. REV. FED. RESERVE BANK OF CLEVELAND 16, 17–20 (1993) available at http://www.clevelandfed.org/research/Review/1993/93-q3-todd.pdf (reviewing the evolution of powers under the FRA, and predicting that the most recent amendment at the time, the Federal Deposit Insurance Corporation Improvement Act of 1991, would result in the Reserve System exercising even more power).} \footnote{51}{Emergency Relief and Construction Act of 1932, ch. 520, 47 Stat. 709 (1932).}
evidence that such individual, partnership, or corporation is unable to secure adequate credit accommodations from other banking institutions.  

This passage allowed the massive lending programs that were initiated after the near-collapse of Bear Stearns and AIG.  

Before section 13(3), the power vested in the Federal Reserve System was limited by Congress to lending to member banks. After this amendment, the Federal Reserve had the authority to lend to “any individual, partnership, and corporation” whenever there were “unusual and exigent circumstances” and the entity in question could not get funding elsewhere. Under section 13(3), the Banks made loans throughout the 1930s to 123 individuals, partnerships, or corporations for a total of $1.5 million, with the single largest loan totaling $300,000. It was more than seventy years before the Federal Reserve System used this power again, this time to facilitate the acquisition of Bear Stearns by JPMorgan Chase in 2008 by authorizing a $29 billion loan.  

Then, in 1991, an amendment to the FRA tucked away inside a bill to overhaul the Federal Deposit Insurance Corporation (FDIC) allowed the Banks nearly unlimited authority in determining acceptable collateral. The real bills doctrine was the basis of the original lending structure of the FRA, and required that any collateral received in return for central bank

52. 12 U.S.C. § 343 (emphasis added). Congress originally enacted this amendment on July 21, 1932 as an added paragraph to the Federal Reserve Act. Id.  

53. See Sept. 16 Release, supra note 27 (utilizing the power under section 13(3) to provide financing to AIG); Mar. 14 Minutes, supra note 27, at 2–3 (authorizing the New York Federal Reserve Bank to provide emergency liquidity through section 13(3) to JPMorgan Chase for its acquisition of Bear Stearns and to provide liquidity to other primary dealers chosen by the Bank and approved by the Board Chairman).  

54. See 12 U.S.C. § 343 (allowing lending only to member banks in section 13(2) of the FRA, until section 13(3) was passed in 1932); see also HACKLEY, supra note 26, at 5 (explaining that the Great Depression led to changes in the FRA in the 1930s to allow the Federal Reserve System to lend to persons and companies that were not member banks).  


56. WESSEL, supra note 2, at 160. The total lending program carried out by the Federal Reserve System in response to the Great Depression would equal twenty-five million dollars in today’s funds. Id. But see HACKLEY, supra note 26, at 135, 144 (highlighting competing lending programs available during the Great Depression, which may have weakened the demand for Federal Reserve lending).  

57. Mar. 14 Minutes, supra note 27, at 2; see also HACKLEY, supra note 26, at 130 (noting that the power of section 13(3) was only used during the Great Depression, although it was activated after a credit crisis during the 1960s).  


lending be as liquid as cash. U.S. Treasury bonds are an example of collateral that would satisfy the real bills doctrine, however, the mortgage-backed securities and other toxic assets given to the New York Federal Reserve Bank in 2008 in return for section 13(3) lending would not have satisfied the real bills doctrine. By differentiating the collateral requirements in section 13(3) from the other collateral requirements of the FRA, the 1991 amendment effectively quashed the real bills doctrine for section 13(3) lending. Senator Christopher Dodd included this amendment to give the Federal Reserve more flexibility to provide liquidity in times of financial crises, as the FRA now only requires the loans to be secured “to the satisfaction” of the individual Banks.

The expansion of lending authority has also resulted in a minimal expansion in the frequency with which the Board has to report its activities to the political branches. Originally, the Board was not required to report to Congress at all. Congress expanded this reporting requirement to semi-annually, and finally, in the wake of the recent spate of section 13(3) lending, Congress passed the Emergency Economic Stability Act of 2008, which included a provision requiring the Board to report to Congress

60. See Todd, supra note 50, at 17–18 (outlining the evolution of lending under section 13(3), from a very limited provision that only allowed lending to member banks, to an expanded power that allowed lending to “individuals, partnerships, and corporations” that could provide collateral secured to the satisfaction of the Bank).
61. See Hackley, supra note 26, at 38 (defining instruments that satisfy the real bills doctrine as self-liquidating and arising from real commercial transactions).
62. See Todd, supra note 50, at 18–19 (explaining how the elimination of the real bills doctrine was driven by companies whose balance sheets would not allow the company to provide collateral that would satisfy the doctrine).
63. See 137 Cong. Rec. 36, 131–32 (Nov. 27, 1991) (statement of Sen. Dodd) (articulating that this amendment was introduced to provide the Reserve System with more tools to fight economic downturns).
64. Id. But see Damian Paletta & Jon Hilsenrath, Senate Democrats Seek Sweeping Curbs on Fed, WALL ST. J., Nov. 11, 2009, at A2 (reporting Sen. Dodd’s proposed legislation to strip the Federal Reserve Board of almost all of its lending and supervisory powers to vest them in a new agency).
within seven days of making section 13(3) loans. The Act also requires the Board to periodically report to Congress on the status of the loan, the total value of the collateral, and the cost to the taxpayer. However, Congress may withhold all of these disclosures from the public at the request of the Board Chairman.

B. The History of FOIA and the Development of Agency Status

While many of the elements codified in the FRA had previously existed in some form, the power in FOIA was novel. FOIA gives citizens the opportunity to “know what their government is up to.” Since FOIA’s initial enactment, Congress has continued to expand FOIA’s disclosure requirements and procedural protections for requesters. Courts have struggled to define what entities constitute an agency under FOIA, comparing the powers and characteristics of the disputed entity with the statute and other agencies in lieu of adopting a standard test.
makers have also struggled to keep a tight rein on what information agencies can legally exempt from disclosure, and Congress has amended FOIA to deal with backlogs of information requests.

I. The legislative history of FOIA
Congress enacted FOIA in 1966 to “ensure an informed citizenry.” FOIA divides executive agency records into two sub-categories: information that must be automatically published—for example, agency rules—and information that the public may request, such as unpublished agency opinions. The nine exemptions to disclosure that are included in FOIA may protect both classes of information from disclosure. However, Congress specified that FOIA does not authorize any additional withholding of information outside the nine explicit exemptions.

After acknowledging that the disclosure provisions of the Administrative Procedure Act (APA) were preventing disclosure, Congress enacted FOIA to encourage public access to government information. FOIA remedied many of the failings of the disclosure requirements of the APA by specifically enumerating nine generally exclusive exemptions from disclosure. FOIA also includes a private right of action to allow judicial review of agency determinations against disclosure.


82. 5 U.S.C. § 552(d) (“This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.”).

83. See 112 CONG. REC. 13,641–43 (June 20, 1966) (statement of Rep. Moss) (commenting on the lengthy process that was required to pass FOIA and the tension between legislators on how best to amend the APA to facilitate disclosure); see also FOIA GUIDE, supra note 28, at 4 (noting that the APA had been used by agencies in many instances to withhold information).

Throughout the 1970s, Congress repeatedly amended FOIA to strengthen the disclosure requirements and limit the exemptions. The first major modification to FOIA limited the national security exemptions and expanded procedural protections for requesters. Next, Congress expanded the disclosure requirements of FOIA by limiting the ability of agencies to incorporate the non-disclosure portions of other statutes into FOIA determinations. The judiciary assisted the development of FOIA as a liberal disclosure statute by holding that FOIA presumed maximum disclosure, and required agencies to reveal information they could separate from a larger record that FOIA otherwise protected.

In the ensuing decades, public accessibility to agency records through FOIA continued to improve, with changes in the procedural protections and clarification regarding the extent of exemptions. The Electronic No. 110-175, 121 Stat. 2524 (2007) (providing nine very narrow exemptions and stating that FOIA does not authorize any additional withholding); see also Sears, Roebuck & Co., 421 U.S. at 136 (reiterating that FOIA requires disclosure unless the agency can show that the information it wants to withhold falls within the specific FOIA exemptions). But see 5 U.S.C. § 552(c) (authorizing agencies to respond to requests for some law enforcement information as though that information does not exist).

89. See John Doe Agency v. John Doe Corp., 493 U.S. 146, 150–51 (1989) (overruling and remanding the circuit court’s permanent stay on the requested Vaughn index solicited by a defense contractor under investigation by the government). Although the corporation used FOIA to seek records regarding the investigation against it, the Court stressed that FOIA stands for public disclosure and the “law enforcement exemption” did not necessarily protect these records. Id. at 151; see also U.S. Dep’t of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (holding that FOIA’s exemptions do not alter the fundamental disclosure function of the act); Memorandum from Attorney Gen. Holder to Heads of Executive Dep’ts & Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at http://www.justice.gov/ag/foia-memo-march2009.pdf [hereinafter Memorandum from the Attorney General] (arguing that FOIA encourages the basic American principle of open government).
91. See, e.g., Presidential Memorandum, supra note 76, at 4683 (continuing the predominant legislative and judicial pattern of expanding disclosure by urging agencies that “in the face of doubt, openness prevails”).
92. See Mink, 410 U.S. at 91 (requiring information in protected records to be disclosed
Freedom of Information Amendment of 1996\textsuperscript{93} required agencies to provide records electronically whenever possible.\textsuperscript{94} The 1996 overhaul included a transition to providing universal access to electronic records, implemented review reforms, and attempted to eliminate the backlog of FOIA requests.\textsuperscript{95} Finally, the passage of the OPEN Government Act of 2007\textsuperscript{96} increased the efficiency of FOIA with a number of procedural changes, including request tracking and rules on how government contractors must maintain records.\textsuperscript{97}

2. The courts grapple with defining agency under FOIA using independent, governmental authority to determine agency status

To be subject to FOIA, an entity must be a federal executive agency.\textsuperscript{98} Due to FOIA’s broad definition of the term agency, the exact contours of the applicability of the statute to different entities have been fiercely litigated.\textsuperscript{99} Examples of an agency under FOIA include the Board of Governors of the Federal Reserve\textsuperscript{100} and federal departments.\textsuperscript{101} Conversely, sentencing commissions,\textsuperscript{102} presidential offices such as the Office of Administration or other presidential task forces,\textsuperscript{103} and other

if the non-protected information is reasonably segregable from the protected information); Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973) (creating the “Vaughn index,” or a summary of the requested records).
94. Id. § 5, 110 Stat. at 3050.
95. Id. But see PETE WEITZEL, SUNSHINE IN GOVERNMENT INITIATIVE, FEWER REQUESTS, FEWER RESPONSES, MORE DENIALS 2–4 (2009), available at http://www.sunshineingovernment.org/stats/highlights.pdf (outlining the increasing number of backlogged FOIA requests and declining funding agencies are dedicating to respond to FOIA requests in 2008).
98. Id. The statute defines “agency” to “include[] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” Id.
99. See Energy Research Found. v. Def. Nuclear Facilities Safety Bd., 917 F.2d 581, 584–85 (D.C. Cir. 1990) (ruling that the Defense Nuclear Facilities Safety Board’s responsibility to evaluate and recommend nuclear plant safety policy solidified the Board’s role as an agency); Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971) (deciding that the OST was an agency under FOIA because it was responsible for advising federal science and technology policy); Lee Constr. Co. v. Fed. Reserve Bank of Richmond, 558 F. Supp. 165, 178–79 (D. Md. 1982) (deciding that although a close question, the Banks are agencies under FOIA).
entities that do not exercise significant authority independent of the president are not agencies under FOIA. Courts have avoided expressing a single definition for the term agency. Instead, courts have opted for a fluid definition that considers a number of factors.

Courts use a totality of circumstances analysis, evaluating factors such as whether the agency exercises authority independent of the executive, to determine whether an entity qualifies as an agency under FOIA. One of the major cases to address FOIA’s definition of agency, Soucie v. David, dealt with whether an entity organized by the president was subject to FOIA disclosures. In Soucie, the D.C. Circuit explained that the Office of Science and Technology (OST) was an agency under FOIA because it exercised authority independent of the President, including but not limited to advising other federal agencies on scientific policy. In making the agency determination, the court considered the scope and purpose of the organization’s authority and its own disclosure regulations. In this case, when the OST was created, it published notices in the Federal Register pursuant to APA regulations, which bolstered the court’s conclusion that the OST was an agency. The fact that the OST acted as an agency was one of the factors—but not the sole factor—that the court used to support its decision to apply agency status to the OST. Finally, the Soucie court reasoned that withholding information from the public about a public science foundation was antithetical to the purpose of creating the

(1980) (holding that an entity with the sole function of advising and assisting the President is not an agency).

104. See, e.g., Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (noting that if the “sole function” of the OST were to “advise and assist the president,” it might not be considered a separate agency); see also Kissinger, 445 U.S. at 156 (relying on the legislative history of FOIA to hold that the telephone records requested when Kissinger was Assistant to the President did not qualify as agency records because the conversations in question took place when Kissinger acted in his capacity of Presidential adviser).


107. See, e.g., id. (determining that the court must make agency determinations on a case-by-case basis due to the varied structures of different organizations). Important factors have included whether the entity in question has any power to enact policy with the force of law, id., and whether the entity is subject to federal day-to-day governance, Rocap v. Indiek, 539 F.2d 174, 180 (D.C. Cir. 1976).

108. See, e.g., Soucie, 448 F.2d at 1073 (finding the OST to be an agency even though it lacked primary functions of an administrative entity).

109. 448 F.2d 1067 (D.C. Cir. 1971).

110. Id. at 1072.

111. Id. at 1073–74.

112. Id. at 1074–75.

113. Id. at 1075 (noting that the OST provided information to the public in 32 Fed. Reg. 11,060 (July 27, 1967)).

114. Id.
organization; therefore, the totality of circumstances converged to uphold the agency determination. More recently, in *Citizens for Responsibility & Ethics in Washington v. Office of Administration,* the D.C. Circuit examined whether a court’s determination that an entity was an agency necessarily made all branches of that entity a federal agency equally subject to FOIA disclosure when the branches of that entity served different purposes. Citizens for Responsibility and Ethics in Washington ("CREW") requested a number of alleged missing White House emails, along with an explanation of the process that the Office of Administration’s staff would use to locate them. Despite the Office of Administration’s argument that it could not procure the records by FOIA’s deadline, CREW insisted that the Office produce the information by that deadline, and sued when the agency did not provide the information in time. Once the suit began, the Office of Administration disclosed the requested records based on administrative discretion, arguing that it was not an agency under FOIA when it served in an archivist capacity because it was acting directly as assistant to the president.

The CREW court decided that when determining whether a specific unit within an agency is subject to FOIA, it must analyze whether the unit exercises authority independent of the president. The court held the Office of Administration served an assistive function similar to the White House Residence staff in *Sweetland v. Walters,* and was not an agency because the support provided by the unit was limited to administrative functions. The court defined administrative functions as actions with the

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115. *Id.* at 1080.
116. See *id.* at 1075 (explaining the numerous factors that weigh in favor of finding that the OST satisfies the definition of agency under FOIA).
117. 566 F.3d 219 (D.C. Cir. 2009).
118. See *id.* at 220 (questioning whether the Office of Administration unit of the Executive Office of the President must be an agency because the Executive Office of the President is specifically enumerated as an agency under FOIA).
119. *Id.*
120. *Id.* at 220–21.
121. *Id.* at 221.
122. *Id.* at 222. The court analyzed decisions that have examined whether other agencies were federal agencies to find that independent authority is a significant factor. *Id.* The court noted that the President’s personal staff, OST, OMB, and Council on Environmental Quality qualified as agencies under FOIA, while the Council of Economic Advisors, President Ronald Reagan’s Task Force for Regulatory Relief, and the National Security Council were not agencies under FOIA. *Id.* at 222–23.
123. 60 F.3d 852 (D.C. Cir. 1995) (per curiam).
sole purpose of advising or assisting the President, and held that the task of filing and retrieving presidential emails serves the sole purpose of assisting the President. The court also noted that the Office of Administration’s previous actions that indicated it considered itself an agency were irrelevant. Because the court determined the Office of Administration was not an agency, the court did not have to examine the Office’s request to withhold the records under FOIA’s exemptions.

3. After defining an entity as an agency, courts analyze the applicability of FOIA exemptions to the information the agency seeks to withhold

Despite FOIA’s presumption in favor of disclosure, federal agencies can withhold information from the public when the agency can show that at least one of FOIA’s nine exemptions applies. The Board usually claims exemptions four and five, which deal with trade secrets or confidential commercial information and inter- or intra-agency memoranda, respectively. Both exemptions prevent disclosure in an attempt to foster open discussion about policy-making.

Exemption four protects trade secrets and commercial or financial information, obtained from a person, that is privileged or confidential. FOIA narrowly defines “trade secret” as a commercially valuable plan or

125. *Sweetland*, 60 F.3d at 854 (citing the FOIA statute and case law to outline when an executive department would not be an agency under FOIA).
126. *CREW*, 566 F.3d at 223 (comparing the retrieval of emails with the actions of non-agency staff in *Sweetland* who assisted the President with household maintenance and ceremonies).
127. *Id.* at 224–25.
128. *See id.* at 226 (holding that because the Office of Administration is not an agency, it does not have to comply with FOIA).
131. 5 U.S.C. § 552(b)(4) (”[T]rade secrets and commercial or financial information obtained from a person and privileged or confidential.”).
132. *Id.* § 552(b)(5) (”[T]rade secrets and commercial or financial information obtained from a person and privileged or confidential.”).
instrument that is the product of “substantial effort.” Records that do not fit the definition of trade secret can still meet the alternative “commercial or financial” requirement of exemption four. The “from a person” requirement usually is easily met, with entities from individuals, to corporations, to banks qualifying as persons under FOIA. Records produced by the government can still meet the “submitted by a person” requirement of the exemption if the information is merely a regurgitation of information procured from a person.

Courts struggle the most with determining whether information meets the final criteria of exemption four—confidentiality. The courts have determined that when the government requires a person to divulge information, the information is considered confidential if its disclosure would impair the government’s ability to procure similar information in the future, or if its disclosure would result in significant competitive harm to the person who disclosed it. However, if a person voluntarily supplies the information, it is considered confidential and protected from disclosure only if the submitter customarily would not disclose it.

Exemption five recognizes that although the government has an interest in maintaining open deliberative processes, the privacy interests of the government are not the same as private entities; thus, FOIA only allows

136. See Am. Airlines, Inc. v. Nat’l Mediation Bd., 588 F.2d 863, 869–70 (2d Cir. 1978) (holding that information about a labor union was commercial in nature because it affected the ability of the union to maintain representation, despite the fact that American Airlines did not seek the information about the union to make a profit). But see Nat’l Ass’n of Home Builders v. Norton, 309 F.3d 26, 38–39 (D.C. Cir. 2002) (maintaining that an information exchange agreement whereby the federal government gave money to a state in exchange for information regarding the presence of pygmy owls was not commercial or financial in nature because the primary function of the program was conservation).
137. See 5 U.S.C. § 551(2) (defining “person” in the APA to include corporations).
139. See, e.g., OSHA Data/CIH, Inc. v. U.S. Dep’t of Labor, 220 F.3d 153, 162 n.23 (3d Cir. 2000) (reasoning that because the information supplied by the government was so intermixed with information from a private-sector company that the information was supplied by a person and could not be disclosed).
140. See, e.g., Critical Mass Energy Project v. Nuclear Regulatory Comm’n, 975 F.2d 871, 878–79 (D.C. Cir. 1992) (en banc) (discussing the different factors and interests that are considered in confidentiality claims).
141. 5 U.S.C. § 551(2).
142. See Critical Mass, 975 F.2d at 879 (drawing a distinction between information that is required, where the National Parks test is used, and voluntarily-supplied information, which cannot be disclosed if the person providing it would not normally offer it to the public).
144. Critical Mass, 975 F.2d at 879.
withholding of those documents not normally discoverable in litigation.\textsuperscript{145} First, a court must determine whether the information qualifies as an “inter-agency or intra-agency memo.”\textsuperscript{146} If the record qualifies, the court then determines whether the information would be “routinely” or “normally” disclosed in civil litigation.\textsuperscript{147} Courts usually find information is privileged if it falls into one of the following categories: deliberative process, attorney work product, or attorney-client content.\textsuperscript{148} The protections included in exemption five incorporate document protection provided by both statutes and case law.\textsuperscript{149} The Supreme Court also recognized that the legislative history of exemption five implied a narrow confidential commercial information privilege.\textsuperscript{150}

\textbf{C. The Courts Have Not Resolved Whether the Federal Reserve Banks are Agencies Under FOIA}

The judicial response to the agency question as applied to the Banks has been mixed.\textsuperscript{151} Even after requiring the parties to brief the issue, some courts have avoided the agency question.\textsuperscript{152} The District Court of Maryland definitively ruled on whether the Banks are agencies for FOIA purposes in \textit{Lee Construction Co. v. Federal Reserve Bank of Richmond},\textsuperscript{153} 5 U.S.C. § 552(b)(5) (“[I]nter-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.”).

\textsuperscript{145} See Ryan v. Dep’t of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980) (“Congress apparently did not intend ‘inter-agency or intra-agency’ to be rigidly exclusive terms.”).


\textsuperscript{147} FOIA GUIDE, supra note 28, at 359.

\textsuperscript{148} See United States v. Weber Aircraft Corp., 465 U.S. 792, 800–01 (1984) (scrutinizing the decision in \textit{Merrill} to determine the exact contours of the confidential commercial information privilege and determining that the privilege includes statutory and common law privileges).


\textsuperscript{151} See Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262, 276 (S.D.N.Y. 2009) (agreeing with the Board’s argument that because Bloomberg did not serve a FOIA request on the New York Federal Reserve Bank and because Bloomberg did not argue that the Bank and the Board were the same agency that the agency issue was irrelevant to the case), aff’d, 601 F.3d 143 (2d Cir. 2010); see also \textit{Sibille v. Fed. Reserve Bank of N.Y.}, 770 F. Supp. 134, 138 (S.D.N.Y. 1991) (assuming without deciding that the Reserve Bank was an agency for FOIA purposes but holding that because the personnel records were not used by the Bank, they were not agency records subject to FOIA).

\textsuperscript{152} 558 F. Supp. 165 (D. Md. 1982).
holding that the Banks were agencies after a private company sued to get information on the process of awarding contracts.154 However, Lee Construction has been largely ignored, and the courts that have examined this issue have been “far from unanimous.”155

The judiciary’s confused stance on the agency status of Banks is apparent, even among decisions from the same court.156 For instance, the District Court for the Southern District of New York did not tackle the issue of whether the New York Federal Reserve Bank is an agency under FOIA in Bloomberg, instead ruling that because the Board must produce Board records located at the Bank, examination of the Bank’s agency status was not required.157 Conversely, a different judge on the same court ruled in Fox that, under the Board’s interpretation of its regulations, the records at the New York Federal Reserve Bank were not agency records of the Board.158 The Fox court also reasoned that the Banks are not agencies because Congress established them as entities separate from the Board and they exercise authority independent of the Board.159 During the oral arguments before the Second Circuit that consolidated Fox and Bloomberg, there was almost no mention of the agency question.160 The Second Circuit opinion in Bloomberg specifically noted that the opinion does not determine whether the Banks are government agencies under FOIA.161 The confusion among courts regarding FOIA’s relationship to the Reserve Banks is unnecessary, as the Banks clearly come under the ambit of FOIA.162 While federal district courts have issued conflicting rulings on the agency question, this Comment argues that the Federal Reserve Banks

154. See id. at 176–79 (explaining the various factors the court considered in making its determination, including delegation of powers from the Board to the Banks, supervision of private banks, and independent authority).
156. Compare Bloomberg, 649 F. Supp. 2d at 276 (arguing that the Bank’s status as an agency need not be determined because the records in possession of the New York Federal Reserve Bank qualify as Board records), with Fox, 639 F. Supp. 2d at 395 (accepting that the New York Federal Reserve Bank, as an entity separate from the Board, is not an agency under FOIA).
158. Fox, 639 F. Supp. 2d at 396.
159. Id. at 395–96.
160. See generally Webcast: Freedom of Information Cases (2d Cir. Jan. 11, 2010) (oral argument) available at http://www.c-spanarchives.org/program/291182-1 (focusing primarily on whether the loan applications were received from a person and the applicability of exemptions four and eight).
162. 5 U.S.C. § 551(1) (2006) (“[A]gency’ means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . .”).
II. THE FEDERAL RESERVE BANKS ARE GOVERNMENT AGENCIES, AND THEREFORE SUBJECT TO FOIA

The Banks, although distinct from the Board in Washington, should be treated as agencies under FOIA because of their sweeping powers to control monetary policy and carry out Board directives. Courts find that entities are agencies under FOIA when the entity exercises sufficient authority independent of the executive and its actions are governmentally-related. The Banks exercise a great deal of independent authority when influencing monetary policy, from setting lending rates to valuing collateral when lending. Particularly relevant in the recent crisis was the governmentally-related authority exercised by the New York Federal Reserve Bank, the entity that determined which companies were “too big to fail,” and thus deserving of emergency lending. Conversely, if the Banks are not agencies, the Board would be able to circumvent the requirements of FOIA by outsourcing much of its monetary policy functions. Finally, due to the limited court supervision of the Banks, 

163. See infra Part II (explaining that Reserve Banks are agencies under FOIA because they exercise authority independent of the executive, are empowered with governmentally related power, and are more similar to other agencies than non-agencies).
164. See infra Part III (arguing that Bank records should not be withheld under exemption four because the bank cannot show borrowers will suffer substantial competitive harm, and that exemption five does not protect the records because the Banks’ records do not qualify under the deliberative process privilege or the narrow commercial confidential information privilege).
165. See PURPOSES & FUNCTIONS, supra note 1, at 6 (stating the functions of the Federal Reserve Banks include currency distribution, bank and financial institution regulation, and administering credit functions in each district).
166. See, e.g., Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (holding the OST exercised sufficient independent authority in setting the national science agenda to be considered an agency for FOIA purposes).
167. Lassiter v. Guy F. Atkinson Co., 176 F.2d 984, 991 (9th Cir. 1949) ("[T]he authority to act with the sanction of government behind it determines whether or not a governmental agency exists.")
169. See Mar. 14 Minutes, supra note 27, at 2 (authorizing the New York Federal Reserve Bank to extend section 13(3) lending to Bear Stearns and any other primary dealers with the approval of the Chairman of the Federal Reserve Board).
170. See Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment at *14–15, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (No. 08 Civ. 9595) (arguing that the Board did not have to search the New York Federal Reserve Bank’s records because the Board had not used them in its Bear Stearns’ lending determination), aff’d, 601 F.3d 143 (2d Cir. 2010).
171. See Huntington Towers, Ltd. v. Franklin Nat’l Bank, 559 F.2d 863, 868 (2d Cir. 1977) (explaining that the courts would not interfere with the Federal Reserve System’s decisions regarding monetary policy and thus would not review the decisions of the Federal Reserve Bank and Office of Comptroller of the Currency to place Franklin National Bank
public policy is best served by the indirect supervision provided by the
public through FOIA.

A. The Banks are Independent from the Executive and Exercise
Governmentally-Related Authority in a Manner Sufficient to Qualify Them
as FOIA Agencies

The Banks should qualify as agencies under FOIA because they exercise
authority independent of the executive, limited authority independent of the
Board, and possess the power to regulate. Courts have examined a
number of factors to determine whether an entity is an agency, as
recognized in Soucie v. David. In Soucie, the D.C. Circuit held that the
OST was a federal agency because it exercised governmental authority
independent of the executive and advised federal decision-making, despite
the fact that the OST did not have any rule-making authority. Similarly,
the Bank’s lack of rule-making authority is not dispositive of the agency
determination. The Banks exercise authority that is similar enough to
rule-making to weigh in favor of affording them agency status. The
other governmentally-related functions carried out by the Banks, such as
the lender of last resort function served by section 13(3), also militate in
favor of agency status. Finally, the responsibilities vested in the
into receivership, how the agencies timed the loan decision, and the amount of loans
provided).

172. See PURPOSES & FUNCTIONS, supra note 1, at 6 (describing the functions of the
Banks in contrast with the powers exercised by the Board over them); see also Fox, 639 F.
Supp. 2d at 388–89 (noting the independence exercised by the Banks, and relating that
independence to the historical battle between the Hamiltonian view of centralized banking
and the Jeffersonian view of decentralized banking).

173. See PURPOSES & FUNCTIONS, supra note 1, at 6 (including the power to regulate
state member banks as one of the powers of the Banks).

174. See Soucie v. David, 448 F.2d 1067, 1073–75 (D.C. Cir. 1971) (holding that the
OST is an agency under FOIA because, among other things, the agency has authority
independent of the executive branch to recommend and evaluate scientific policy, even
though it does not have its own rule-making authority, and because the OST at one time
published its own FOIA compliance measures).

175. Id.

176. See id. at 1073 (expressing that while the APA was formed to assist the regulation
of agencies in their rule-making and adjudication, the fact that an entity may do neither of
those tasks does not automatically exclude agency status); see also Lee Constr. Co. v. Fed.
Reserve Bank of Richmond, 558 F. Supp. 165, 179 (1982) (indicating that although the
Banks have no rule-making authority, the other powers the Banks have authority to use
gives them agency status under FOIA).

1987) (explaining that the actual notice received by the savings and loan associations would
be sufficient to give the agency decision the same force as publication, and after the savings
and loan attempted to comply with the regulations, they had no right to appeal them as
unpublished rules).

and exigent” circumstances upon Board approval).

179. Cf. Soucie, 448 F.2d at 1075 (holding that the OST was an agency based on the
Banks, the circumstances of the FRA’s history, and the public purpose the Banks serve, all indicate that the Banks exercise sufficient governmentally-related authority to be considered agencies under FOIA.

1. The Banks exercise authority independently of the executive

The primary factor in determining the status of an entity is whether it exercises authority independent of the executive, and the Banks have always enjoyed autonomy. The D.C. Circuit in Soucie determined that the OST was an agency, primarily because it exercised authority independent of the executive. The principal autonomous function Congress authorized the Banks to exercise is the discretion to make a loan. Although some lending functions, like those under section 13(3), must be authorized by the Board, the decision whether to provide liquidity under the Banks’ day-to-day operation rests solely with each Bank. The board members of the individual Banks set the policy, and the staff members of each Bank, none of whom are appointed or controlled by Congress or the President, set the final loan parameters. The Board
chooses only a third of the Bank board members, ensuring maximum independence from the political branches.\footnote{191}{Id. § 302.}

The Board lacks independent lending authority;\footnote{192}{See id. § 343 (authorizing only the Banks to lend at the discount window).} therefore, the Reserve System’s role as lender of last resort for financial firms has cemented the importance of the Banks as entities that exercise authority independently.\footnote{193}{See Hackley, supra note 26, at 197 (noting the increasing role of the Federal Reserve System as lender of last resort); Wessel, supra note 2, at 140–42 (explaining the process through which the Banks became the lender of the last resort to the world, when the Board guaranteed dollars to foreign banks); Davidoff & Zaring, supra note 2, at 476–77 (documenting the role the New York Federal Reserve Bank played in thwarting a Bear Stearns bankruptcy through its lending power).} Although the use of section 13(3) authority requires authorization from the Board, the New York Federal Reserve Bank was the entity that actually loaned the money to Bear Stearns and AIG.\footnote{194}{Davidoff & Zaring, supra note 2, at 477. Although the Banks must secure authorization for the use of section 13(3) funds from the Board, this does not undercut the Banks’ independent authority because once the authorization is given the Banks exercise almost unfettered discretion to expand the loans. Mar. 14 Minutes, supra note 27, at 2. The Board is sufficiently separate from the Banks to allow them to maintain independence. See 12 U.S.C. § 248(j) (enabling the Board to “exercise general supervision” over the Reserve Banks).} The New York Federal Reserve Bank was also the agency that valued the collateral offered by these companies, and verified that the companies could not obtain financing elsewhere.\footnote{195}{Id. § 343.} These powers, in addition to the day-to-day exercise of discount window lending that controls the federal funds rate,\footnote{196}{See Purposes & Functions, supra note 1, at 27 (explaining that the Board sets interest rates, and then the New York Federal Reserve Bank buys and sells U.S. Treasury bonds to achieve that rate).} are the tools independently exercised by the Banks to control federally mandated monetary policy.\footnote{197}{See id. at 3 (discussing the voting structure for the FOMC, which consists of representatives from the New York Federal Reserve Bank and a sampling of the other Banks and noting that the FOMC “oversees open market operations, which is the main tool used by the Federal Reserve to influence overall monetary and credit conditions”).}

Unlike the federal entity in CREW, the Banks provide no administrative support to the White House, and thus exercise sufficient independent authority as FOIA agencies.\footnote{198}{Id. at 222–23.} While the Office of Administration in CREW provided direct administrative support to the president by archiving presidential email,\footnote{199}{Id. at 224.} the Banks do not provide information directly to the executive.\footnote{200}{See 12 U.S.C. § 248(a) (allowing the Board to review the records of Reserve Banks at any time); Lee Constr. Co. v. Fed. Reserve Bank of Richmond, 558 F. Supp. 165, 177 (D. Md. 1982) (stating that the Banks are under the direct supervision of the Board, an independent executive agency).} The connection, if any, between the Banks and the President
is extremely attenuated, as the Banks provide information to the Board and FOMC. It is these federal agencies and the Department of the Treasury that are beholden to the President. Furthermore, it is the Board and other bankers, not the executive, that appoint the Bank board members which adds another layer of attenuation between the executive and the Banks. The authority exercised by the Banks outside the direction or discretion of the executive weighs in favor of holding that the Banks are agencies under FOIA.

2. The Soucie test demonstrates that the Banks’ lack of rule-making authority does not preclude the Banks from agency status.

The Banks’ role in advising the formation of federal monetary policy satisfies the Soucie test for a federal agency, despite the fact that the Banks have no rule-making authority. Although the OST did not have the power to promulgate rules, the Soucie court held that the OST met the requirements for agency classification because the OST’s mandate to evaluate science programs and inform other federal agencies about scientific and technological advancements strongly affected federal policy. Likewise, the Banks gather massive amounts of data that informs the FOMC and the Banks use that data to evaluate their own lending strategies.

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201. See Purposes & Functions, supra note 1, at 10–11 (noting that certain Bank expenditures are subject to specific Board approval).

202. 12 U.S.C. §§ 241, 242 (authorizing the President to appoint the seven Board members and designate one as the Chairman of the Board); id. § 246 (granting the Secretary of the Treasury the authority to supervise the Board in any functions where the Board and Department of Treasury’s authority might conflict); id. § 247a (requiring the Board to deliver annual reports to Congress); Act to Establish the Treasury Department, 1 Stat. 67 (1789) (authorizing the President to remove the Secretary of the Treasury from office).

203. See 12 U.S.C. § 302 (separating the nine board members into three classes).


205. See, e.g., Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (analyzing the authority exercised by the OST, and determining that the powers the OST used were sufficiently independent of the executive to define the OST as a FOIA agency); Lee Constr. Co. v. Fed. Reserve Bank of Richmond, 558 F. Supp. 165, 174 (D. Md. 1982) (explaining the reasoning in Soucie, which held that determining whether an entity exercises independent authority was a critical part of the agency determination).

206. See Soucie, 448 F.2d at 1073 (clarifying that although the primary purpose of the APA is to govern rule-making and adjudication by agencies, a lack of either does not free an agency from the transparency-increasing purposes of FOIA).

207. Id. at 1075.

208. Purposes & Functions, supra note 1, at 10 (stating that the boards of the Banks collect economic data from their regions to provide to the Board and FOMC).

209. Id. at 11 (specifying that the data informs the Banks’ interest rates decisions).
authority, this fact alone is not dispositive as to agency status because there are a number of entities classified as agencies that have no rule-making authority of their own.\textsuperscript{210}

The similarities between the purposes and functions of the Banks and the OST indicate that the Banks should disclose their records per FOIA guidelines.\textsuperscript{211} The Soucie court focused on the OST’s leadership in the implementation of the scientific policy in the country and coordination of government policies and budgets.\textsuperscript{212} Similarly, the Banks collect information from member financial institutions, and through the Banks’ participation in the FOMC, apprise the Board of the country’s financial situation and synchronize the monetary policy effort.\textsuperscript{213} The OST also works with the private sector, just as the Banks work with private financial institutions, to maximize the public benefit in their respective sectors.\textsuperscript{214} Finally, both entities evaluate the quality and effectiveness of federal programs; the OST evaluates science programs while the Banks evaluate monetary policy.\textsuperscript{215}

The supervision the Banks exercise over member banks and bank holding companies in each district eclipses the Banks’ lack of rule-making authority when making an agency determination.\textsuperscript{216} As an example of the

\textsuperscript{210} See supra note 206 (stating that entities that do not perform rule-making can still be classified as agencies); see also Larche v. Hannah, 176 F. Supp. 791, 796 & n.15 (W.D. La. 1959) (specifying that the U.S. Commission on Civil Rights, which evaluates and advises other agencies but does not have rule-making authority is an agency), adopted in 177 F. Supp. 816, 819 n.5 (W.D. La. 1959) (three-judge court), rev’d on other grounds, 363 U.S. 420, 441, 452–453 (1960).


\textsuperscript{212} See supra text accompanying note 206 (observing that the Bank’s role in advising the formation of federal monetary policy qualified them as a federal agency under the Soucie test); see also 42 U.S.C. § 6614(a)(8) (empowering the OST to determine and provide for the scientific and technological needs of the government).

\textsuperscript{213} See PURPOSES & FUNCTIONS, supra note 1, at 2–5 (describing the relationship between the Board and the Banks and distinguishing the responsibilities between the two branches of the System).

\textsuperscript{214} See 42 U.S.C. § 6602 (authorizing the OST to help federal agencies and commercial enterprises determine appropriate science policy); CARNELL ET AL., supra note 71, at 48–50 (illustrating how private banks serve as a transmission route of monetary policy); About OSTP, THE WHITE HOUSE, http://www.whitehouse.gov/administration/eop/ostp/about (last visited July 20, 2010) (outlining briefly the OST’s role in coordinating science and technology policies between government agencies and within the private sector).

\textsuperscript{215} See 42 U.S.C. § 6602 (authorizing the OST to evaluate scientific programs for the President, federal agencies, and private corporations); 12 U.S.C. § 225(a) (requiring the Federal Reserve System to act to maintain prices and economic growth while limiting unemployment).

\textsuperscript{216} Cf. PURPOSES & FUNCTIONS, supra note 1, at 6 (listing “supervising and regulating” financial institutions as one of the responsibilities of the Banks).
control the Banks have over the businesses they regulate, the Banks ensure that local financial institutions maintain minimum balances in their Bank accounts and are responsible for regulating member banks.\textsuperscript{217} The Banks’ \textit{de facto} control over firms is sufficient to prove agency status because rule-making authority is not required for agency status.\textsuperscript{218} For example, in \textit{FDIC v. Philadelphia Gear Corp.},\textsuperscript{219} the FDIC did not publish any rules determining how letters of credit would be treated under the deposit insurance scheme,\textsuperscript{220} but the Supreme Court gave the agency considerable deference and agreed with the FDIC that securitized letters of credit were not deposits.\textsuperscript{221} Likewise, while the regulatory authority of the Banks is not the same as publishing regulations in the Federal Register,\textsuperscript{222} it is a similar exercise of authority because private companies recognize and acquiesce to the Banks’ requirements.\textsuperscript{223}

3. \textit{The Banks qualify as agencies because they exercise extensive government-like authority over monetary policy and the private firms in each district.}

The other major factor in determining agency status is whether the actions carried out by the entity are governmentally related.\textsuperscript{224} In interpreting FOIA, courts have relied on legislative history indicating that Congress intended the term agency to include entities that perform governmental functions and maintain information that is of public interest.\textsuperscript{225} As the Board admits, the Banks are the “operating arms” of the Federal Reserve System.\textsuperscript{226} Banks have the power to regulate banks, gather fiscal data, and recommend and implement federal monetary policies.\textsuperscript{227}

\begin{itemize}
\item \textsuperscript{217} See 12 U.S.C. § 372 (requiring banks to retain funds in certain ratios).
\item \textsuperscript{218} See supra note 206 (reiterating that the APA governs non-rule-making entities).
\item \textsuperscript{219} 476 U.S. 426 (1986).
\item \textsuperscript{220} See id. at 438 (noting “that exclusion by the FDIC is nonetheless long-standing and consistent”).
\item \textsuperscript{221} See id. at 439 (granting deference to the FDIC’s interpretation of the relevant statue, although it had not “been reduced to a specific regulation”).
\item \textsuperscript{222} See 12 U.S.C. § 248(k) (allowing the Board to delegate all functions except rule-making authority to the Banks).
\item \textsuperscript{223} Cf. Haralson v. Fed. Home Loan Bank Bd., 678 F. Supp. 925, 926–27 (D.C. Cir. 1987) (explaining that because the savings and loan associations contesting the new regulations had actual notice of the approximate substance of the new rate regulation, and the associations had attempted to comply with the regulations, they had no right to appeal despite the fact the regulations had not been published in the Federal Register); Giles Lowery Stockyards, Inc. v. Dep’t of Agric., 565 F.2d 321, 326 (5th Cir. 1977) (holding that the Department of Agriculture was not required to publish auction rates for stockyard property because the stockyard already knew the process used to determine rates).
\item \textsuperscript{224} 5 U.S.C. § 551(1) (2006) (defining “agency” as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency”).
\item \textsuperscript{225} See H.R. REP. NO. 93-876, at 8 (1974) (expanding the definition of agency).
\item \textsuperscript{226} PURPOSES & FUNCTIONS, supra note 1, at 10.
\item \textsuperscript{227} See id. at 10–12 (comparing the interactions of the Banks and the FOMC).
\end{itemize}
These powers are shared with other agencies like the FOMC. Furthermore, the level of public interest—a factor for defining agency—is demonstrated by the numerous FOIA requests the Board has received and bolstered by the volumes of information published thus far on the 2008 financial collapse. The congressional response to the Federal Reserve’s actions also indicates both the high level of authority the Board wielded in the crisis and increased public interest.

The Constitution gives Congress the authority to coin and regulate the value of currency, demonstrating that the Bank’s ability to print money is a governmentally related power. In *McCulloch v. Maryland* the Supreme Court supported this power by ruling that authority explicitly given to Congress by the Constitution included the plenary power to do whatever was “necessary and proper” to give effect to those enumerated responsibilities, including the chartering of a central bank. The fact that the Banks are split into twelve districts and are separate from the central Board is not dispositive on the issue of governmentally related authority, as the Board admits that the Banks are the “operating arms” of the Board, without which the Board could not carry out its policies.

The creation of the Federal Reserve System also suggests that Congress vested governmental authority within the Banks. Congress passed the

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228. Id.

230. See, e.g., JOSEPH TIBMAN, THE MURDER OF LEHMAN BROTHERS (2009) (describing the fall of Lehman Brothers and the role of the firm’s bankruptcy in the financial crisis of 2008); WESSEL, supra note 2 (explaining the role of the Federal Reserve and the Banks in attempting to stop the deterioration of the financial markets during the crisis).

231. See Restoring America Financial Stability Act of 2009 (Discussion Draft 2009) (restructuring the financial oversight of the financial sector, including a reduction in the Federal Reserve’s power and the creation of new oversight agencies) available at http://banking.senate.gov/public/_files/AY009D44.xml.pdf; see also Paletta & Hilsenrath, supra note 64, at A2 (explaining the effects of Dodd’s bill on the regulatory structure of the financial sector).

232. U.S. CONST. art. 1, § 8, cl. 5.
234. Id. at 324–26.
235. See PURPOSES & FUNCTIONS, supra note 1, at 6, 10–11 (explaining the vital role the Banks serve implementing the policy directives of the Board and FOMC, arguably the most important actions being the sale and purchase of U.S. securities and lending at the Discount Window).

236. See ROBERT LATHAM OWEN, NATIONAL ECONOMY AND THE BANKING SYSTEM OF
FRA to shift central banking power back to the government in response to the private financial sector solutions hammered out in the wake of the Panic of 1907, when no government agency existed to mitigate the results of the financial collapse.\textsuperscript{237} During the Panic of 1907, J.P. Morgan directed the effort to stem the crash, and was recognized as the man who saved Wall Street.\textsuperscript{238} Congress created the National Monetary Commission to design a central bank to limit reliance on purely private responses.\textsuperscript{239} While the initial report, created by bankers, recommended complete private control of the system,\textsuperscript{240} the final legislation instead empowered a board appointed by the President to control central banking functions.\textsuperscript{241} Legislators created the Federal Reserve System as a backlash to private control of the banking sector; they intended that the Banks, as an integral part of the Federal Reserve System, have governmentally-related authority.\textsuperscript{242} Although the shareholders of the Banks are private bank and bank holding companies in each district, Congress chartered the Banks to serve the public purpose of functioning as the operational arms of the Board,\textsuperscript{243} endowing the Banks with governmental authority despite private ownership. The Eighth Circuit, in Missouri, ex rel Garstang v. United States Department of the Interior,\textsuperscript{244} held that private ownership of an agency does not automatically result in non-agency status.\textsuperscript{245} Moreover, stock ownership in the Banks, unlike stock ownership in most companies,
does not confer investment rights or control.\textsuperscript{246} Finally, all assets collected by the Banks, after satisfying operational costs, are paid to the U.S. Treasury, not back to stockholders.\textsuperscript{247} The definition of agency supplied by FOIA supports viewing the privately controlled Banks as arms of the government because it includes, in addition to executive agencies, “government corporation(s)” and “government controlled corporation(s)”\textsuperscript{248}

Financial firms\textsuperscript{249} and the courts\textsuperscript{250} have acquiesced to the Banks’ exercise of authority despite the fact that the Banks lack rule-making authority, providing the Banks with a \textit{de facto} governmental power.\textsuperscript{251} In \textit{Haralson v. Federal Home Loan Bank Board},\textsuperscript{252} a loan company claimed that an appraisal rule used by the Federal Home Loan Bank Board did not comport with FOIA because there was no opportunity for public comment and the rule was not published in the Federal Register.\textsuperscript{253} The District Court for the District of Columbia ruled, however, that the loan company’s acceptance of the new rate regulation resulted in the requirement attaining the same force as if the agency had published the regulation.\textsuperscript{254} In the

\setcounter{footnote}{246}

\footnotetext{246. Id.}

\footnotetext{247. See \textit{PURPOSES \& FUNCTIONS}, supra note 1, at 11 (recording that as of 2009, about ninety-five percent of the funds raised by the Banks had been paid to the Treasury).}

\footnotetext{248. 5 U.S.C. § 552(f)(1) (2006); see also Montgomery v. Sanders, No. 3:07-cv-470, 2008 WL 5244758, at *6 (S.D. Ohio Dec. 15, 2008) (holding a defense contractor was not a “government-controlled corporation” under FOIA because the federal government did not exercise sufficient control over the contractor’s operations). But see Lee Constr. Co. v. Fed. Reserve Bank of Richmond, 558 F. Supp. 165, 177 (D. Md. 1982) (emphasizing that although the Banks are controlled by private entities, the Banks are agencies because the Board exercises such dominant control over them).}

\footnotetext{249. See Davidoff \& Zaring, supra note 2, at 480–81 (explaining the deal brokered by the New York Federal Reserve Bank and the Board initially required the Bear Stearns shareholders to accept only two dollars per share, but after that plan was foiled, the Bank increased the sale price and permitted JP Morgan Chase shareholders to vote on the Bear Stearns acquisition again a year later).}

\footnotetext{250. See Huntington Towers, Ltd. v. Franklin Nat’l Bank, 559 F.2d 863, 868 (2d Cir. 1977) (arguing that it is not for the courts to determine whether the actions taken by the Federal Reserve System or the Treasury Department were justified where those actions “concerned the operation and stability of the nation’s banking system”); \textit{In re Bear Stearns Cos. S’holder Litig.}, No. 3643-VCP, 2008 WL 959992, at *2 (Del. Ch. Apr. 9, 2008) (allowing the Bear Stearns deal, brokered by the Board and New York Federal Reserve Bank, to go through despite concerns that it violated shareholders’ rights recognized under Delaware law because the court refused to countermand the Federal Reserve).}

\footnotetext{251. Cf. Haralson v. Fed. Home Loan Bank Bd., 678 F. Supp. 925, 926–27 (D.D.C. 1987) (allowing the actual notice received by the banks to apply with the same force as publishing those regulations in the Federal Register). The court held that although the collateral valuation process recorded by the agency did not state that R41 could be used to value collateral, because that was the historical practice of the agency, the public had sufficient notice due to its past use or by looking at different valuation options available to the agency. Id.}

\footnotetext{252. Id.}

\footnotetext{253. Id. at 926–27.}

\footnotetext{254. Id.}
recent financial crisis, institutions that were not subject to the regulations of
the Federal Reserve opened their books to the New York Federal Reserve
Bank and accepted the Bank’s requirements.\textsuperscript{255} Even the courts have
refused to interfere with deals brokered by the Banks,\textsuperscript{256} reinforcing the
Banks’ \textit{de facto} governmental power and demonstrating the full force of
the governmentally related authority wielded by the Banks that non-
agencies do not possess.\textsuperscript{257}

\textbf{B. The Banks are More Similar to Federal Agencies Than Non-Agencies.}

When compared to other financial institutions, the Banks are more
similar to the Board and FOMC, which are agencies,\textsuperscript{258} and less similar to
organizations like the New York Stock Exchange (NYSE), which is not an
agency.\textsuperscript{259} To determine agency status, courts often compare the entity in
dispute with agencies established by statute or precedent.\textsuperscript{260} The Board and
the FOMC are both units in the central banking system that direct national
monetary policy.\textsuperscript{261} Likewise, the Banks function as the operational arms

\textsuperscript{255} See \textit{Wessel}, supra note 2, at 217–18 (listing the financial sector companies that
transformed themselves during the financial meltdown from companies regulated by the
SEC to bank holding companies that voluntarily submitted to regulation for the option of
calling upon the Federal Reserve as a lender of last resort); \textit{see also} \textit{Davidoff & Zaring,
supra} note 2, at 493–95 (discussing the role the Federal Reserve’s examination of Lehman
Brothers’ and AIG’s financials played in determining the response to each company).

\textsuperscript{256} See \textit{Huntington Towers, Ltd. v. Franklin Nat’l Bank}, 559 F.2d 863, 868 (2d Cir.
1977) (alleging that the New York Federal Reserve Bank, FDIC, and Office of the
Comptroller of the Currency actively prevented the disclosure of Franklin National Bank’s
faltering financial condition). This case is the result of the crash of Franklin National Bank,
the New York Federal Reserve Bank’s $1.7 billion loan to the failing institution, and the
federal banking regulator’s sluggish response that ultimately failed to save the bank. \textit{Id.} at
865. Up until the 1980s, this was the largest banking failure in the nation’s history. \textit{Id.}

\textsuperscript{257} \textit{Cf.} \textit{Lassiter v. Guy F. Atkinson Co.}, 176 F.2d 984, 991 (9th Cir. 1949) (describing
an agency as an entity that has the force of government backing up the entity’s actions); \textit{see also}
2 \textit{Kenneth Davis, Administrative Law Treatise} § 1.2 (1978) (highlighting that the
first edition of this treatise defined agency as “a governmental authority, other than a court
and other than a legislative body, which affects the rights of private parties through either
adjudication or rulemaking”). But see \textit{Grumman Aircraft Eng’g Corp. v. Renegotiation Bd.},
482 F.2d 710, 714 n.13 (D.C. Cir. 1973) (noting that the definition of agency in the first
edition of the treatise may be overly-restrictive in light of the expansive statutory
definition).

(1979) (holding that the “FOMC is clearly an ‘agency’” under FOIA, but giving no further
explanation); \textit{see also} 12 C.F.R. § 261.1(a)(1)(2009) (recognizing that the Board is subject
to FOIA).

\textsuperscript{259} \textit{See} Indep. Investor Protective League \textit{v. N.Y. Stock Exch.}, 367 F. Supp. 1376,
1377 (S.D.N.Y. 1973) (indicating that the NYSE is a not-for-profit corporation).

\textsuperscript{260} \textit{See} \textit{Soucie v. David}, 448 F.2d 1067, 1073 n.16–17 (D.C. Cir. 1971) (determining
the OST was an agency by comparing the functions of the OST with other cases that
decided whether the entity that received a FOIA request was or was not an agency). The
court also examined the Congressional history and records from the creation of the OST to
find that it was an agency. \textit{Id.} at 1074–75.

\textsuperscript{261} \textit{Purposes & Functions, supra} note 1, at 3.
of the Board, and are extensions of the Board and FOMC that implement and execute the desired monetary policy promulgated by those agencies.\textsuperscript{262} On the other hand, the Banks are unlike the NYSE, in that the NYSE is a group of traders gathered to make a profit by trading in stocks and bonds.\textsuperscript{263} The SEC regulates the NYSE, but the regulators do not require the NYSE to take specific actions to further national financial goals.\textsuperscript{264} This comparison to other similar financial institutions illustrates that the Banks are more comparable to government agencies in purpose and function than they are to private entities,\textsuperscript{265} and thus should be considered agencies for the purposes of FOIA.

Despite concerns that using FOIA to examine Banks could lead to an unwarranted expansion of disclosure of private records,\textsuperscript{266} the Banks are sufficiently distinguishable from private financial institutions to require the Banks to adhere to FOIA without opening the financial transactions of private entities that cannot act with the force of government to public scrutiny.\textsuperscript{267} The primary distinguishing factor is that the Banks exercise regulatory authority over other banks at the behest of the Board, a power other private banks do not share.\textsuperscript{268} While Congress chartered the Banks to serve a public purpose,\textsuperscript{269} the legislative history surrounding the FRA

\begin{itemize}
  \item \textsuperscript{263} See Indep. Investor Protective League, 367 F. Supp. at 1377 (explaining that the NYSE is a non-profit company in New York).
  \item \textsuperscript{264} See id. (holding that the NYSE is not an agency under FOIA, and has no authority to set national policy).
  \item \textsuperscript{265} Compare PURPOSES \& FUNCTIONS, supra note 1, at 6 (explaining the role the Banks play in the Federal Reserve System and in setting national monetary policy), with Indep. Investor Protection League, 367 F. Supp. at 1377 (discussing the regulatory control the SEC has over the NYSE, and the NYSE’s inability to control policy as a private firm).
  \item \textsuperscript{266} See Kristen Elizabeth Uhl, Comment, The Freedom of Information Act Post-9/11: Balancing the Public’s Right to Know, Critical Infrastructure Protection, and Homeland Security, 53 Am. U. L. Rev. 261, 289–90 (2003) (remarking on the reluctance of private companies to work with the federal government to protect infrastructure from terrorist attacks because the companies worry that FOIA could force disclosure of information that would subject them to liability). Some businesses have argued in favor of a special FOIA exemption to protect this kind of information. Id.
  \item \textsuperscript{267} See 12 U.S.C. §§ 342–347 (2006) (listing the powers of the Banks, such as maintaining minimum reserve balances, discounting commercial paper, and serving as a lender of last resort to individuals, partnerships, and corporations, and stating that all of these are services the Banks offer member banks); CARNELL ET AL., supra note 71, at 13 (explaining the history of central banking in the United States, and the role of the Banks, which are unlike other financial firms that are members of the Reserve System but not one of the twelve Banks).
  \item \textsuperscript{268} See 12 U.S.C. § 248(j) (asserting that the Board has the authority to direct the Banks).
  \item \textsuperscript{269} See 12 U.S.C. § 225a (recognizing the goals of the Federal Reserve System as “maximum employment, stable prices, and moderate long-term interest rates”).
\end{itemize}
indicates that Congress and the public had a clear understanding that the public interest was not the primary goal of the private banking system. Finally, regardless of agency status, FOIA’s exemption eight protects the examination reports banks provide to their regulators, which protects private companies from unwarranted disclosures while still requiring transparency from the agency.

C. Reserve Banks Should be Subject to FOIA Because the Banks Could be Used by the Board to Improperly Prevent the Disclosure of Information with Little Oversight

Acknowledging that the Federal Reserve Banks are agencies under FOIA would prevent the Board from obstructing disclosure by shifting records to the Reserve Banks. Unlike private companies that cannot exercise authoritative power over others, the Board can give general guidelines to the Banks and allow the Banks to exercise regulatory power and spend funds without exposing any of that information to public scrutiny. One of the Board’s central arguments against producing the records Bloomberg requested was that the Board did not actually use those records.

270. See H.R. Rep. No. 63-69, at 3–4 (1913) (highlighting the role the free banking system played in the financial turmoil in the early 1900s, and mentioning specific times when the banks had acted in self-preservation, against public interests); see also SPENCER & HUSTON, supra note 26, at 9 (noting that “Villainous Wall Street” was in fact losing its position of dominance over finance when Congress signed the FRA into law). The act was considered a “triumph for the popular will and a defeat of Wall Street.” Id.

271. 5 U.S.C. § 552(b)(8) (2006) (“[S]hall not apply to records . . . 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.”); see also 12 U.S.C. § 1831o(k) (limiting exemption eight to specific reports prepared pursuant to bank examination, and specifically requiring the release of information as long as the release of the requested information would not link the records to a named institution); Clarkson v. Greenspan, No. 97-2035, 1998 U.S. Dist. LEXIS 23566, at *24 (D.D.C. June 30, 1998) (extending the protection of exemption eight to cover the bank examination reports submitted to the Board). But see Marriott Employees’ Fed. Credit Union v. Nat’l Credit Union Admin., No. 96-478-A, 1996 WL 33497625, at *5 (E.D. Va. Dec. 24, 1996) (arguing that exemption eight does not protect everything that might be disclosed in a bank examiner’s report, like factual information)(citing In re Subpoena Served Upon Comptroller of Currency, and Sec’y Bd. Of Governors of the Fed. Reserve Sys., 967 F.2d 630, 634 (D.C. Cir. 1992)).

272. Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment, supra note 170, at 46 (arguing that because the Board did not use the information compiled by the New York Federal Reserve Bank, the Board did not have the requested records and was not required to obtain them).

273. 12 U.S.C. § 301; accord Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment, supra note 170, at 46 (arguing the Board was only required to turn over records it actually used, and stating that the Board did not use the responsive records the Bank possessed).

274. See Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment, supra note 170, at 46 (explaining that the New York Federal Reserve Bank had obtained the information in its own capacity to make loans under section 13(3) after authorization from the Board); see also Amended and Supplemental Complaint for
However, the records Bloomberg sought were critical in evaluating the collateral provided to the New York Federal Reserve Bank, and thus under the FRA must have been examined by the Bank. Agencies cannot be allowed to circumvent their FOIA responsibilities by delegating information gathering and executory responsibilities to an entity outside the reach of FOIA. In this case, as so much of the authority by statute rests with the Federal Reserve Banks, the exercise of that power should be open to public scrutiny under FOIA.

The courts generally have been reticent to review the decisions of the Federal Reserve Banks, which indicates a need for the public to act as stewards of the taxpayers’ investments by having access to information. When the Federal Reserve rescued a failing bank in 1974, the Second Circuit ruled that unless there was “clear evidence of grossly arbitrary or capricious action” it was not for the courts to scrutinize the Bank’s decision. Even the Delaware courts, well-known for their expertise in business law, have refused to insert themselves into the New York Federal Reserve Bank’s deal-making, despite circumstances that arguably violated state law.

Declaratory and Injunctive Relief at 8, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve System, 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (No. 08 CV 9595) (reciting the Board’s response to the FOIA request that stated that the Board did not use or rely on the requested records from the New York Federal Reserve Bank, and therefore did not have to submit them to Bloomberg), aff’d, 601 F.3d 143 (2d Cir. 2010).

275. See Amended and Supplemental Complaint for Declaratory and Injunctive Relief, supra note 274, at 6–7 (listing the records requested from the Board including the method the Board used to value collateral and a list of that collateral).

276. See 12 U.S.C. § 343 (requiring the emergency loans to be secured to the satisfaction of the Federal Reserve Bank that provides the loan).

277. Cf. Office of Management and Budget Circular A-76, 48 Fed. Reg. 37,110 (1983) (delineating the requirements for private companies to undertake responsibilities generally held by the executive); Harold J. Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, 85 N.W. U. L. Rev. 62, 63–65 (1999) (describing the emerging pattern of Congress delegating authority to private enterprises and arguing that even if delegation to multiple agencies is acceptable under the separation of powers doctrine, the delegation of power completely separate from the federal government is unacceptable).

278. See 12 U.S.C. § 343 (requiring the Reserve Bank to analyze and hold adequate security for emergency loans).

279. See Huntington Towers, Ltd. v. Franklin Nat’l Bank, 559 F.2d 863, 868 (2d Cir. 1977) (explaining that absent arbitrary and capricious action on the part of the Board, the decision to rescue a financial firm or allow it to fail would not be reviewed by the courts).

280. See, e.g., Letter from James Madison to W.T. Barry (Aug. 4, 1822), in The Forging of American Federalism: Selected Writing of James Madison, 337 (Saul K. Padover ed., 1953) (expressing the opinion that a republican form of government requires the populace to arm itself with information about its leaders).

281. Huntington Towers, 559 F.2d at 868.

282. See In re Bear Stearns Cos. S’holder Litig., C.A. No. 3643-VCP, 2008 WL 959992, at *6 (Del. Ch. Apr. 9, 2008) (admitting that the state courts would not interfere with the Federal Reserve System’s deal-making with Bear Stearns because the court would not
The public is the best line of defense against overreaching by the Banks because courts give the Banks wide latitude\textsuperscript{283} and Congress requires only meager reports from the Board;\textsuperscript{284} therefore, the Banks should be subject to FOIA as a policy matter. The courts have repeatedly emphasized the important role FOIA plays in keeping the public informed and involved.\textsuperscript{285} Legal scholars have noted that public transparency is particularly important in the bailout context to ensure confidence in the faltering markets.\textsuperscript{286} Public oversight through FOIA would allow the Banks to protect government interests, while providing the courts an opportunity to review agency operations without interfering with the Bank’s primary policy maneuvers.\textsuperscript{287} Even if the Banks are subject to FOIA as agencies, they will still be able to take advantage of FOIA exemptions, which can protect some Bank decisions from scrutiny without ensuring total lack of review.\textsuperscript{288}

III. BANK RECORDS MUST BE DISCLOSED UNLESS THE BANKS CAN SHOW THAT THE INFORMATION FITS THE NARROW REQUIREMENTS OF EXEMPTIONS FOUR AND FIVE

To complete the argument in favor of disclosure, it is important to analyze the limited withholding opportunities provided by exemptions four and five, the two FOIA exemptions the Board relies on\textsuperscript{289} to prevent contribute to the uncertainty in the financial markets).

\textsuperscript{283} See, e.g., Huntington Towers, 559 F.2d at 868 (refusing to subject the Federal Reserve’s decision to reassessment unless it was clearly arbitrary and not in the public’s best interest).


\textsuperscript{285} See Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 171–72 (2004) (arguing that FOIA and transparency are not “mere formalities”); U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (stating that FOIA allows citizens to question what their government is doing); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (reasoning that disclosure allows the governed to check corruption); see also Presidential Memorandum, supra note 76 (emphasizing that disclosure is necessary in a representative government because transparency is required for accountability).

\textsuperscript{286} Anson Cain, Congress’s First Recipe to Bail Out the Financial Institutions of the United States is Leaving the Taxpayers with a Sour Taste in Their Mouths, 29 J. Nat’l Ass’n Admin. L. Judiciary 213, 272 (2009).

\textsuperscript{287} See 5 U.S.C. § 522(a)(4)(B) (2006) (enabling a FOIA requester to sue in federal district court to enjoin the agency from withholding records, and authorizing the district court to conduct a de novo review of the agency’s determination that the records are subject to withholding).

\textsuperscript{288} See 5 U.S.C. § 552(b) (entitling agencies to withhold information that falls under one of the nine specific exemptions to FOIA).

\textsuperscript{289} See Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 398, 402 (S.D.N.Y. 2009) (affirming the Board’s decision to withhold the requested information under exemption four, and therefore not reaching the exemption five question), vacated, 601 F.3d 158 (2d Cir. 2010); Answer ¶ 50, Bloomberg L.P. v. Bd. of
disclosure of information. 290 Only after the Banks are found to be federal agencies must the Banks depend on the nine statutory exemptions included in FOIA to prevent the disclosure of information. 291 The burden would be on the Banks to prove that at least one of the FOIA exemptions allows them to continue to withhold the requested information. 292 The Bank could make a valid argument for using exemption four and exemption five to protect some of its information for a specific period. 293 Nevertheless, an agency must divulge the requested information when the reason for the exemption expires. 294 The application of exemptions four and five to Bank records would be appropriate only when imminent, specified harm would be likely to result. As an initial matter, exemption four would properly apply only to information that is being used to make future lending decisions to prevent putting the Banks or financial firms at a disadvantage. 295 Once this period has passed, the Banks would be required to disclose the information as it would be unlikely to impair the flow of future information, 296 and the spread of this information would be more likely to assist than harm the commercial position of the company that secured the loan. 297 Finally,

Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (relying on exemptions four and five in denying all of Bloomberg’s FOIA claims), aff’d, 601 F.3d 143 (2d Cir. 2010).

290. See Soucie v. David, 448 F.2d 1067, 1077–78 (D.C. Cir. 1971) (allowing information to be withheld under FOIA’s fourth exemption only if the requested records fall within the narrow scope of trade secrets or confidential information, and under the fifth exemption only if the records are inextricably intertwined with policy-making and deliberation); see also 5 U.S.C. § 552(b)(4)–(5) (authorizing agencies to withhold information only under limited circumstances).

291. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975) (holding that only records listed in the nine exemptions are subject to withholding, and only after the agency shows that the records sought qualify for the exemption).

292. Id.; see also FOIA GUIDE, supra note 28, at 4–5 (contrasting FOIA with the arguably failed disclosure provisions of the APA).

293. See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 359 (1979) (reasoning that limited withholding is acceptable for certain periods of time when the information is critical to ongoing negotiation or governmental functions); see also S. Rep. No. 88-1219, at 6–7, 13–14 (1964) (stating that FOIA should not be used to interfere with the ongoing, frank deliberations of government agencies).

294. See Merrill, 443 U.S. at 359 (specifying that the exemption is narrowly construed).

295. See Starkey v. U.S. Dep’t of Interior, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002) (explaining that disclosing information about the water resources of the tribe would put the tribe at a disadvantage when negotiating, and holding that the information could be withheld as commercial or financial information under FOIA’s exemption four).

296. See Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (holding that the test for confidentiality for exemption four is whether the information will impair the ability of the government to collect necessary information in the future or if it would cause substantial competitive harm to the “person” disclosing the information), aff’d in part, rev’d in part sub nom. Nat’l Parks & Conservation Ass’n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976).

297. Cf. WESSEL, supra note 2, at 24–25 (illustrating that without a bailout, Lehman was forced into bankruptcy).
exemption five would not usually protect the information on the Bank’s daily operations from disclosure under FOIA because the information would normally be disclosed during civil litigation.\textsuperscript{298}

A. \textit{FOIA Exemption Four Should Not Apply to Historical Records Unless the Board or Bank Shows Imminent, Non-Speculative Danger to the System’s Ability to Influence Monetary Policy}

While FOIA would protect some of the Banks’ records, at least for a time, exemption four would not allow the Banks to withhold information indefinitely without explaining the rationale for the refusal to disclose.\textsuperscript{299} Exemption four protects information that is a trade secret or business or commercial information that is obtained from a person and is confidential.\textsuperscript{300} The records maintained by the Banks that serve the public purpose of monetary policy administration are necessarily economic in nature; therefore, the records easily meet the exemption four threshold requirement of commercial or financial documents provided by a person.\textsuperscript{301} However, by applying the \textit{National Parks} test,\textsuperscript{302} it becomes apparent that the Banks should not withhold this information, as it is not likely to harm the commercial interests of the financial institutions that disclose the information the Banks possess.\textsuperscript{303}

1. \textit{Information requested from the Banks fits the commercial or financial in nature requirement of exemption four}

The information collected by the Banks easily qualifies as commercial or financial in nature. Unlike the court in \textit{National Association of Home

\begin{itemize}
\item \textsuperscript{298} See 5 U.S.C. § 552(b)(5)(2006) (authorizing withholding of information if it would not normally be discoverable during the course of civil litigation). See \textit{generally} FOIA \textit{GUIDE}, supra note 28, at 357–416 (discussing the different civil privileges that can be used to protect information from disclosure under FOIA, namely attorney-client, attorney work product, and deliberative process).
\item \textsuperscript{299} See Presidential Memorandum, supra note 76 (stating that agencies should take an affirmative position toward disclosure, and presume disclosure of information).
\item \textsuperscript{300} 5 U.S.C. § 552(b)(4).
\item \textsuperscript{301} See In Def. of Animals v. Dep’t of Health & Human Servs., No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at *2, *29 (D.D.C. Sept. 28, 2001) (finding that listing the financial position of the companies was sufficient to meet the commercial or financial information obtained from a person requirement).
\item \textsuperscript{302} See Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (evaluating confidentiality by the ease with which the government could retrieve necessary information in the future, and whether disclosing that information would cause substantial competitive harm to the firm disclosing it), aff’d in part, rev’d in part sub nom. Nat’l Parks & Conservation Ass’n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976).
\item \textsuperscript{303} Cf. GARY H. STERN & RON J. FELDMAN, TOO BIG TO FAIL: THE HAZARDS OF BANK Bailouts 33–37 (2004) (providing examples of how a financial institution’s designation as too big to fail can positively affect it in a number of ways, including a better credit rating and better interest rates than those financial institutions that are not too big to fail).
\end{itemize}
Builders v. Norton, 304 which held that the information in question was not commercial or financial in nature because the motive for the transaction was conservation, 305 the information collected by the Banks is fiscal in nature. 306 The financial nature of this information is demonstrated by its purpose of regulating those entities and providing services that are commercial, such as processing checks and distributing funds. 307 Finally, as the financial information collected has a direct effect on the lending opportunities offered by banks, 308 due to the Banks’ control over minimum deposits and interest rates, 309 it is so intimately connected with commerce that it satisfies the commercial or financial in nature requirement of FOIA’s exemption four. 310

2. The information is not confidential under FOIA because the quality and quantity of information the Banks receive would be unaffected by disclosure

As regulator and lender of last resort, the Banks require information from banks and bank holding companies. 311 Thus, the National Parks test for confidentiality—whether disclosure is likely to impair the flow of future information and whether it would harm the commercial position of the provider—applies. 312 Because the future stream of information the

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304. 309 F.3d 26 (D.C. Cir. 2002).
305. See id. at 38–39 (holding that the information sought about the distribution of pygmy owls in exchange for federal dollars was not commercial or financial in nature because its purpose was conservation, rather than profit).
307. Compare id. (expounding that the commercial or financial in nature requirement for exemption four covered, inter alia, contract negotiations and other instrumentality related to commerce), with Nat’l Ass’n of Home Builders, 309 F.3d at 38–39 (refusing to describe information sought for conservation purposes as commercial or financial in nature).
308. As “person” in exemption four includes companies, the fact that the information is collected by the Banks from bank holding companies and banks satisfies the “from a person” requirement of exemption four. 5 U.S.C. § 552(b)(4) (2006).
309. See PURPOSES & FUNCTIONS, supra note 1, at 3 (explaining the various methods of control Banks exercise over lending through reserve requirements, contractual clearing balances, and discount window lending).
310. 5 U.S.C. § 552(b)(4); see Am. Airlines, Inc., 588 F.2d at 870 (“Commercial’ surely means pertaining or relating to or dealing with commerce.”).
312. See Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (holding that confidential material, as determined by impairment of the government’s ability to get similar information in the future or the potential for substantial harm to the provider of information, may not be disclosed under FOIA), aff’d in part, rev’d in part sub nom. Nat’l Parks & Conservation Ass’n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); see also Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 247–48 (2d Cir. 2006) (reasoning that it would harm the ability of the Federal Reserve to get information from private banks if those banks knew that information about their clients would be disclosed to the Board, because the Board could be forced to release that
Banks would need access to is required financial data provided to regulate banks or to provide emergency financial liquidity, it is unlikely that disclosure would harm the Federal Reserve System’s access to that information in the future.

Due to the important services the Banks provide, it is unlikely that the quantity or quality of the information provided by financial firms will deteriorate if FOIA requires disclosure. For example, the records sought in the Bloomberg and Fox lawsuits concerned section 13(3) lending. Public disclosure of this information is not likely to affect the reliability of the data because if a bank overvalues itself, it will not be able to get lending in the future. As demonstrated by Lehman Brothers, however, companies that the Banks consider overly leveraged run the risk of having the Bank refuse to lend.

Information concerning the financial stability of banks and the collateral offered to secure Bank loans is required by law. The courts have recognized that legally required disclosure makes it more likely that the government will be able to obtain similar, accurate information in the

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313. See Critical Mass Energy Project v. Nuclear Regulatory Comm’n, 975 F.2d 871, 878–80 (D.C. Cir. 1992) (en banc) (refining the standard of confidentiality by ruling there is a higher threshold for disclosure when the information is voluntarily supplied to the government, and a lower threshold when that information is required by the government).

314. See Sandy Smith, Bank of America Posts $2.2 Billion Loss for Year, HULIQ.COM, Jan. 20, 2010, http://www.huliq.com/8738/90658/bank-america-posts-22-billion-loss-year (noting a dramatic improvement in Merrill Lynch, which was purchased in 2008 following rumors that it was next in line to fail after Lehman Brothers). But see Instant View: Bank of America Reports Q4 Loss, FINANCIAL POST, Jan. 19, 2010, http://www.financialpost.com/news-sectors/story.html?id=2463163 (explaining that Bank of America’s yearly loss is due at least in part to the four billion dollars the bank made in TARP repayments). The banking giant would have had only a 192-million-dollar loss without the TARP repayments. Id.


316. See 12 U.S.C. § 343 (allowing lending only if the bank cannot get lending elsewhere and the circumstances requiring the Federal Reserve loan are “unusual and exigent”).

317. See id. (requiring the loan to be secured to the satisfaction of the Bank in addition to “unusual and exigent circumstances,” including no available credit on the private markets); WESSEL, supra note 2, at 24 (explaining that the Federal Reserve let Lehman fail because its collateral was “worthless”).

future. The court in National Parks reasoned that because concessioners wanted to continue operating in the parks, they would continue to provide accurate information despite FOIA disclosure. Similarly, it is in the best interest of the banks to provide accurate information to the Banks, because the Banks have broad authority to punish private companies that provide inaccurate information, and section 13(3) lending is provided only on a very specific basis.

The Board’s argument that the information was confidential commercial information protected by an “explicit understanding” between the Banks and the financial firms because its disclosure would identify borrowers, fails to properly interpret Buffalo Evening News, Inc. v. Small Business Administration. In Buffalo Evening News, a newspaper sued the Small Business Administration (SBA) for information on the amount borrowed and the status of loans made by the SBA to a region afflicted by a natural disaster. The District Court for the Western District of New York required the SBA to disclose the information because the court decided the financial information did not implicate any of the business’ confidential information. Despite the Board’s assertion that these FOIA requests are “readily distinguishable” from Buffalo Evening News because of the alleged understanding of confidentiality between the Banks and the loan recipients, the identity of the recipient was publicly available prior to the FOIA requests in many cases, such as Bear Stearns. Furthermore, the
Board’s argument fails to address the National Parks confidentiality test\(^\text{331}\) that would oblige the Banks to disclose the information because the loan recipients are required to provide that information to the Bank, thus demonstrating that the information is not confidential\(^\text{332}\) despite any implicit understandings between the Banks and financial firms.

3. **The possibility of competitive harm is insufficient to support withholding the information**

The disclosure of historical information provided to the Banks does not provide a sufficient showing of imminent, specified harm to the commercial position of the private party supplying the information, as required to meet the second condition of the National Parks confidentiality test.\(^\text{333}\) The agency must show that the private party would suffer imminent, specific harm;\(^\text{334}\) mere “embarrassing publicity” is insufficient to prevent disclosure.\(^\text{335}\) Aside from vague assertions of possible harm to firms that have borrowed from the Banks, the Board offers no specific arguments about what kind of harm may befall the information providers.\(^\text{336}\) FOIA exemptions require the government agency to bear the burden of demonstrating harm when withholding information.\(^\text{337}\) In

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\(^{331}\) See Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (outlining how the courts should analyze whether information is confidential and should be withheld under exemption four), aff’d in part, rev’d in part sub nom. Nat’l Parks & Conservation Ass’n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976).

\(^{332}\) Cf. id. (explaining that information that is required of private entities by the government agency is not confidential under exemption four because an agency’s disclosure of required information under FOIA will not interfere with the government’s ability to obtain similar information in the future).

\(^{333}\) See id. (holding that information can be withheld under exemption four if disclosure of that information is likely to impair the flow of future information or harm the commercial position of the private party disclosing that information).

\(^{334}\) See Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (deciding that the “voluminous” reports offered by the health device manufacturing company were enough to prohibit disclosure under FOIA, and requiring more than generalized assertions to satisfy exemption four’s confidential requirement, while noting that the court does not have to set up an elaborate mathematical formula for determining competitive harm); Iglesias v. CIA, 525 F. Supp. 547, 558–59 (D.D.C. 1981) (determining that without more than cursory and generic descriptions of the withheld documents, the court could not determine whether the documents should be withheld).

\(^{335}\) Pub. Citizen Health Research Grp., 704 F.2d at 1291 n.30.

\(^{336}\) See Defendant Board of Governors Reply, supra note 324, at 18–19 (expressing the opinion that the companies seeking help from the Federal Reserve would be viewed as weak, but providing limited details about what particular financial or competitive harm this would cause).

\(^{337}\) See Critical Mass Energy Project v. Nuclear Regulatory Comm’n, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc) (reasoning that if an agency argues that information is confidential under exemption four because it was voluntarily submitted and would not
response to Bloomberg’s FOIA request, the Board argued that disclosing the requested information would result in the public viewing the borrowing institutions as weak, and possibly causing a “run” on the institution.338

Courts have refused to grant exemptions for broad assertions without any evidence as to why harm would result and a full evidentiary showing of imminent harm.339 For instance, general descriptions of the document sought and a conclusory assertion that competitive harm is likely to result are insufficient to justify withholding, although the agency does not have to prove actual harm is guaranteed to result.340 Unlike the loans made by the Export-Import Bank of the United States, in which private companies competed internationally for private contracts and dealt with a number of regulatory bodies, the Banks are responsible for dealing only with domestic banks.341 Furthermore, the harm the Export-Import cases attempted to prevent by withholding information would have jeopardized specific deals between domestic companies and foreign companies that the American government supported.342 On the other hand, generalized concern, such as a non-specific concern that there might be a bank run, has not been sufficient to withhold information.343 Therefore, the Board’s claims that the disclosure of Bank information could possibly result in the public viewing the firms that participated in the assistance program as weak are insufficient to carry the confidentiality burden prescribed by the courts.344

The Banks will not be able to establish that the disclosure of historical information poses a specific threat to the commercial banks that would warrant withholding the information, as the available data indicates the

usually be disclosed by the private entity, the agency bears the burden of establishing the private entity’s customary handling procedures for that information); Wash. Research Project, Inc. v. Dep’t of Health, Educ., & Welfare, 504 F.2d 238, 244–45 (D.C. Cir. 1974) (holding that the agency failed to demonstrate that the information requested was commercial or financial in nature, and therefore the information was not protected by exemption four).

338. Defendant Board of Governors Reply, supra note 324, at 18–19.

339. See Iglesias, 525 F. Supp. at 558–59 (describing the minimal evidence presented by the agency and holding that without more, the agency could not withhold the information that it received under the premise that it would cause competitive harm).

340. Id.


342. See Stone, 552 F.2d at 133–37 (determining that the Soviet Union’s Bank of Foreign Trade is a “person” under FOIA after a senate candidate attempted to get information from the Export-Import Bank about a deal between the Bank of America and a bank in the USSR); Judicial Watch, 108 F. Supp. 2d at 38 (holding that the Export-Import bank properly withheld all the information except resumes under exemptions four and five).

343. Cf. Iglesias, 525 F. Supp. at 558–59 (holding that the agency’s general description of the oil reserves and warehouse lease agreements was insufficiently detailed to allow the court to determine if the information was confidential).

344. See id. (accentuating the need for more than just general, conclusory statements about competitive harm which might result due to disclosure of information).
funds put the banks in a more advantageous commercial position.\textsuperscript{345} The records requested from the Banks, like the information requested in \textit{Federal Open Market Committee of the Federal Reserve System v. Merrill}, deal with past events.\textsuperscript{346} The Supreme Court supported the disclosure of historical information in \textit{Merrill} if the likelihood of harm to the FOMC’s ability to control monetary policy by disclosing past information was minimal, and there was no indication that a competitor could use that information to its advantage.\textsuperscript{347} Similarly, this rationale militates in favor of requiring the Banks to disclose their historical records.\textsuperscript{348} The generally positive earnings for companies that borrowed from the Bank undercuts the Board’s assertions that companies that borrow at the liquidity trough appear weak.\textsuperscript{349} In instances like the quasi-compulsory Troubled Asset Relief Program (TARP) bailout,\textsuperscript{350} only very large firms received funding,\textsuperscript{351} which often led to positive financial outcomes, such as a more favorable credit rating for the “too big to fail” firms.\textsuperscript{352} As the

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\item \textsuperscript{345} Cf. Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (explaining that even when the government has no interest in maintaining secrecy, the right to confidentiality may still be invoked by the company that provided the information), aff’d in part, rev’d in part sub nom. Nat’l Parks & Conservation Ass’n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976).
\item \textsuperscript{346} See 443 U.S. 340, 347–48 (1979) (noting that the law student plaintiff requested the Domestic Policy Directives of January and February 1975, in March of that year).
\item \textsuperscript{347} Id. at 363.
\item \textsuperscript{348} See id. at 346 (allowing for the disclosure of FOMC deliberative data within one to two months after the policy had been instituted).
\item \textsuperscript{351} See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 3, 122 Stat. 3765 (2008) (enabling only financial firms that were established before the passage of the act and had “significant operations” in the United States to participate in the bailout).
\item \textsuperscript{352} See \textit{STERN & FELDMAN}, supra note 303, at 17–19 (defining the phrase “too big to fail” and detailing some of the implicit benefits of that presumed designation).
\end{enumerate}
\end{footnotesize}
authorization for emergency lending under section 13(3) focused on the interconnectedness of Bear Stearns and the other firms that received funding, the benefits of being identified as “too big to fail,” including beneficial credit rating treatment and better interest rates, would likely be a result of being publicly identified as a recipient of Bank funding.

Another lesson from Merrill was the Supreme Court’s refusal to adopt an “effectiveness” test for confidentiality. The D.C. Circuit formulated this test in the first Critical Mass decision, only to have it vacated en banc. The Court in Merrill, likewise, refused to allow an agency to declare information confidential solely because the agency believed that disclosure of the information could harm the effectiveness of the agency’s aims. Although the Board argues that disclosure of information indicating that certain firms are in distress would jeopardize those banks and the system because such firms would then refuse to borrow, if this argument were adopted it would allow agencies to exempt by fiat any information the agency can plausibly argue would result in less effective agency action. Multiple courts have rejected this stretching of FOIA as being contrary to the purposes of the statute, and the empirical evidence that is available shows that however plausible the claim that releasing information is detrimental to the effectiveness of the Federal Reserve System’s policies, those predictions have not been borne out.

353. See Mar. 14 Minutes, supra note 27, at 2 (documenting that the need for the lending was predicated on “the fragile condition of the financial markets” and the possibility of “contagion” to other firms if Bear Stearns fell).
354. See Stern & Feldman, supra note 303, at 33–37 (illustrating how the “too big to fail” designation often results in a better credit rating, and therefore better interest rates, than other institutions that are not in the same strata).
357. Merrill, 443 U.S. at 353–354.
358. Defendant Board of Governors Reply, supra note 324, at 18–19; cf. id. at 353 (stating the FOMC’s argument that being required to immediately disclose information would harm its policies).
359. See id. at 353–54 (rejecting the argument set forth by the FOMC that would allow the agency to delay disclosure of information that would be routinely discoverable in litigation if the agency determined that releasing the information would reduce the effectiveness of the policy).
361. See infra Part III.A.iii (outlining the evidence, including the positive effects of “too big to fail” status and the fact that banks that accepted emergency liquidity lending are becoming more financially stable).
Despite the Board’s arguments that FOIA requesters will not be able to demonstrate the requisite showing of harm, the available data indicate that the financial system positively responded to public disclosure of Federal Reserve lending activities. The Board in *Bloomberg* assailed the plaintiff’s economic expert, claiming that although the expert’s testimony was “voluminous,” the expert failed to examine whether releasing the withheld information would cause commercial harm to the borrowers. The expert did, however, examine the only data available: the effect of disclosure on the few firms that had publicly admitted to accepting Bank funds at the time, and the effect of regulatory action against banks. Regulatory warnings against banks are sparked by undercapitalization, which is similar to the conditions that prompted Federal Reserve action in 2008. More recent experience bolsters the argument that releasing information does not harm borrowers, as the New York Federal Reserve Bank argued that national security concerns protected emails between the Bank and AIG. After congressional committee hearings, AIG released the emails with no detectable negative consequences.

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362. *See Defendant Board of Governors Reply, supra* note 324, at 21–22 (contending that Bloomberg’s petition incorrectly relied on information regarding disclosures made by troubled financial institutions to the FDIC and SEC instead of information directly on point).

363. *See id. at 21-23 (observing that the plaintiff’s evidence showing that the disclosure of information was not harmful was based on SEC filings and FDIC reviews of financial institutions); Tim Paradis, *Dow ends above 11,000 for first time in 18 months*, AP, Apr. 12, 2010, available at [http://finance.yahoo.com/news/Dow-ends-above-11000-for-apf-1835028992.html?x=0](http://finance.yahoo.com/news/Dow-ends-above-11000-for-apf-1835028992.html?x=0) (demonstrating that two weeks after the New York Federal Reserve Bank made public disclosures of all the Maiden Lane information and the Dow rose).*

364. *Defendant Board of Governors Reply, supra* note 324, at 22.

365. *Id. at 21–23 (maintaining that Bloomberg’s experts only analyzed unrelated information, such as information disclosed by private entities to the SEC and FDIC, and arguing that the fact that the private entities in those cases were not harmed does not prove that the New York Federal Reserve Bank’s borrowers would not be harmed).*

366. *Id.*

367. *See 12 U.S.C. § 1831 (2006) (authorizing bank regulators to act when bank capital falls below a specific level, depending on the bank’s assets); CARNELL ET AL., supra note 71, at 256–65, 285–92 (illustrating how to calculate the leverage ratio and risk adjusted capital ratio of a bank, and explaining the regulatory consequences for the five different capital classes). Prompt corrective action measures for undercapitalized institutions includes conservatorship and receivership. *Id. at 291.*

368. *See Davidoff & Zaring, supra* note 2, at 476, 491–92, 495 (detailing the capital crunch at Bear Stearns, Lehman Brothers, and AIG, resulting primarily from an inability to raise short-term capital, and leading directly to the business’ being unable to continue functioning unless liquidity was secured); see also *WESSEL*, supra note 2, at 153–54 (chronicling the depletion of Bear Stearns’ daily operating capital from $18 billion in liquid cash and securities to less than $2 billion in twenty-four hours).*

369. *See Matthew Jaffe, AIG Bailout, Geithner Blasted Hard on Capitol Hill, ABC News, Jan. 27, 2010, [http://abcnews.go.com/Business/geithner-paulson-head-hill-defend-aig-bailout/story?id=9669321](http://abcnews.go.com/Business/geithner-paulson-head-hill-defend-aig-bailout/story?id=9669321) (recounting the content of e-mails that were obtained after the New York Federal Reserve Bank was served with a subpoena, which instructed the SEC to keep the AIG files with national security information and to obtain Bank approval before*
The disclosures the New York Federal Reserve Bank made in response to Bloomberg and Fox have not crippled the financial system.\textsuperscript{373} The Second Circuit dismissed the conclusory opinions furnished by the Board that disclosure of the loan information would harm private financial firms and the system as a whole and affirmed the disclosure of the Maiden Lane records.\textsuperscript{374} Eleven days after the Second Circuit’s ruling, the New York Federal Reserve Bank released the records sought by Fox News and Bloomberg.\textsuperscript{375} Despite the unfettered public access to the asset portfolios held in the Maiden Lane special purpose vehicles,\textsuperscript{376} and detailed financial analysis showing the significant losses in credit ratings these assets have been subjected to during the crisis,\textsuperscript{377} the financial system and the firms that disclosing any information relating to AIG); see also Hugh Son & Michael J. Moore, \textit{AIG Took Four Tries on Filing as Fed Asked to Withhold Data}, BLOOMBERG BUS. W.K., Jan. 21, 2010, http://www.businessweek.com/news/2010-01-21/aig-took-four-tries-on-filing-as-fed-asked-to-withhold-data.html (revealing that AIG attempted to make disclosures regarding the Maiden Lane III facility four times, and the New York Federal Reserve Bank redacted much of it).

370. \textit{See Factors Affecting Efforts to Limit Payments to AIG Counterparties}, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM (Jan. 27, 2010), http://oversight.house.gov/index.php?option=com_jcalpro&Itemid=49&extmode=view&extid=111 (then click link that says “Click Here”).

371. But see id. at 4:25–36 (“As one New York Fed staffer put it: ‘Any public disclosure by AIG is still subject to Fed approval.’”).

372. \textit{Id.} at 1:31–1:38 (stating that after AIG was required to divulge information, “nothing happened”).


377. \textit{See, e.g.,} The Aleph Blog, \textit{Thoughts on Maiden Lane III}, http://alephblog.com/2010/04/04/thoughts-on-maiden-lane-iii (Apr. 4, 2010) (analyzing the portfolios held by the Maiden Lane facilities, and noting, among other facts, that the average
The New York Federal Reserve Bank, the most powerful operational arm of the Federal Reserve System, demonstrated confidence in the strength of the market during the current shaky financial climate by releasing information on section 13(3) lending. Courts should adhere to their precedent of reluctance to intervene in the financial affairs of the Federal Reserve System and allow the System to determine the best methods to use to deal with the economy. The New York Federal Reserve Bank’s willingness to provide market information confirms that the information does not pose a threat of harm to the borrowers or the efficiency of the government lending program, and therefore should not be exempted from disclosure.

Finally, the separate cases of Bear Stearns and Lehman Brothers illustrate that the Federal Reserve System’s decision to lend does not harm, but in fact supports, a financial firm’s competitiveness. In March of 2008, the Federal Reserve System intervened in the Bear Stearns collapse, effectively finding a buyer and negotiating an acceptable share price in addition to stripping toxic assets from Bear Stearns’ balance sheet.

While the New York Federal Reserve Bank undertook this action after the beginning of the subprime crisis and the economy as a whole would
continue to falter, the financial response to the action was generally supportive. As a result of the successful acquisition of Bear Stearns by JP Morgan Chase, trillions of dollars of derivative contracts did not go into default, Bear Stearns’ investors retained some equity, and enough of the toxic debt was removed from the acquired balance sheet to allow JP Morgan Chase to function. Conversely, there was no rescue buyer for Lehman Brothers, despite the Federal Reserve System’s efforts to find one. Not only did the bankruptcy eliminate Lehman Brothers’ equity, but some see the collapse of Lehman Brothers as the catalyst for the acceleration of the financial meltdown starting in September of 2008. This case study in the management of the recent crisis demonstrates that the Federal Reserve System’s decision to lend gave a competitive advantage to borrowers and thus is not confidential under exemption four.


387. See, e.g., Paul Krugman, What Didn’t Happen, N.Y. TIMES, Jan. 17, 2010, at A21, available at http://www.nytimes.com/2010/01/18/opinion/18krugman.html (arguing that while the decision to stimulate the economy with government spending programs was the right choice, the stimulus packages did not spend enough).

388. See WESSEL, supra note 2, at 264 (explaining the initial positive economic outcomes of the Bear Stearns loan in stabilizing the economy); Davidoff & Zaring, supra note 2, at 480–83 (detailing the steps taken to save Bear Stearns and noting that Bear Stearns was only sustained by the emergency lending offered by the Federal Reserve System).

389. See WESSEL, supra note 2, at 17–20 (illustrating the Federal Reserve System’s fruitless efforts to find a buyer for Lehman Brothers, including an offer to sell the financial firm to the British company, Barclays). While the British banking regulator killed the Barclays acquisition of Lehman Brothers, Barclays later purchased the remnants of Lehman for $1.75 billion. Id. at 20.

390. See id. at 20 (stating that Lehman Brothers signed bankruptcy papers in September 2008).

391. See id. at 20 (referring to September 14—the day that the Lehman Brothers signed bankruptcy papers—as “a day that will live in financial infamy,” as it “coincided with, or triggered, a devastating intensification of the Great Panic”); Davidoff & Zaring, supra note 2, at 493 (specifying that Lehman Brothers sold for the “fire-sale price” of two hundred and fifty million dollars).

392. Compare Davidoff & Zaring, supra note 2, at 483, & n.77 (indicating that Bear Stearns still exists as part of JP Morgan Chase, JP Morgan Chase’s acquisition bid closed successfully in May, and that the stockholder’s claims were dismissed after a failed attempt at an injunction to prevent the acquisition), with WESSEL, supra note 2, at 20 (stating that Lehman Brothers was wound up after declaring bankruptcy).
B. FOIA’s Exemption Five Offers Only Limited Withholding Options, as the Type of Information Controlled by the Banks is Routinely Discoverable in Civil Litigation

In addition to the not meeting the protective requirements of exemption four, the Banks should release requested historical, factual information under exemption five. Exemption five protects inter- or intra-agency memos that are not routinely discoverable during the course of litigation. Courts have included information produced by outside consultants when defining inter- or intra-agency memos. The initial issue when applying exemption five is to determine whether the records sought satisfy the definition of inter- or intra-agency memos; a number of the relevant records would be classified as either inter-agency memos between the Banks and the Board or intra-agency memos within the Banks. Next, the fact that these records are not routinely withheld from litigating parties, as they do not satisfy deliberative process privilege or other claims for

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393. See Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969) (specifying the purpose for exemption five as the uninhibited exchange of ideas within governmental agencies but warning that this purpose tends to include a desire to over-expand the exemption to withhold information that should be disclosed).

394. 5 U.S.C. § 552(b)(5) (2006); see also United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984) (clarifying that exemption five includes privileges in both statute and case law); FTC v. Grolier, Inc., 462 U.S. 19, 26 (1983) (noting that courts do not have to rely solely on the privileges found in Federal Rule of Civil Procedure 26(b)(3) because the exemption allows only for protection of documents that are not routinely discoverable, which may result in more documents being disclosed under FOIA than discovered under Rule 26(b)(3)).

395. See Hanson v. U.S. Agency for Int’l Dev., 372 F.3d 286, 292 (4th Cir. 2004) (allowing documents prepared by an outside company that had contracted with the agency to be considered a memo for FOIA exemption five analysis); CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1162 (D.C. Cir. 1987) (arguing that records from outside companies may still qualify as inter- or intra-agency memos because government agencies should be encouraged to employ outside expertise when more specialized knowledge is required); see also FOIA GUIDE, supra note 28, at 360–65 (explaining the different cases that have defined the contours of what is considered an inter- or intra-agency memo).

396. 5 U.S.C. § 552(b)(5), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007); see also Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1191–92 (N.D. Cal. 2006) (agreeing with the agency’s decision to protect the information provided by an outside auditing firm after finding that the records qualified as an intra-agency memo).

397. Cf. Ackerly, 420 F.2d at 1338–39, 1341–42 (exempting “internal working papers” that included opinion or policies and remarking the request for records of phone calls between agencies regarding the dangers of carbon tetrachloride and investigations related to deaths possibly caused by the chemical).

398. See Russell v. Dep’t of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (holding that the deliberative process privilege ensures open discussions within and between agencies, prevents premature disclosure of information, and protects the public from confusion); see also Mapother v. Dep’t of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (defining the privilege as one that “protects [discussions] that are both pre-decisional and deliberative”); Judicial Watch of Fla., Inc. v. U.S. Dep’t of Justice, 102 F. Supp. 2d 4, 16 (D.D.C. 2000) (refusing to limit the deliberative process privilege strictly to those circumstances where the decision process is still on-going).
confidentiality, reinforce the argument against withholding the information. Finally, as premature disclosure is not likely when the Banks have already made a decision, exemption five does not allow withholding of the records.

1. **Bank records satisfy the inter- or intra-agency memoranda threshold**

The records generated by the Banks in the course of regulating monetary policy in the United States satisfy the threshold of inter- and intra-agency memos for exemption five when that information is used within the Banks, and between the Banks and the Board or FOMC. For example, the District Court for the District of Columbia in *Physicians Committee for Responsible Medicine v. NIH* found a record to be an intra-agency memo when the requested information was a loan application that the agency used to evaluate competing claims for a loan. Similarly, the Banks use the information provided to them to evaluate companies and federal monetary policy in a similar context to information provided for a competitive loan. Because these records are used for a public purpose and are shared among agencies to effect that purpose, they meet the standard of inter- and intra-agency memos.

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400. *See Schell v. U.S. Dep’t of Health & Human Servs.*, 843 F.2d 933, 940 (6th Cir. 1988) (stating that a decision is pre-decisional when it is considered by an agency employee prior to actual decisions being made).

401. *See 5 U.S.C. § 552(b)(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”); see also FOIA GUIDE, supra note 28, at 360–61 (describing the determination of whether a record qualifies as inter- or intra-agency as the threshold question for application of exemption five).*


403. *See id. at 29–30 (holding that information was not protected under exemption five because the information was submitted not as an inter- or intra-agency memo or deliberative process, but as a competitive bid to obtain a grant).*

404. *See PURPOSES & FUNCTIONS, supra note 1, at 6, 10–11 (detailing the types of information that the Banks use).*

405. *See HACKLEY, supra note 26, at 2 (reporting that the Federal Reserve Banks were formed for a public purpose); PURPOSES & FUNCTIONS, supra note 1, at 10–11 (illustrating the dependency of the Board on the information supplied by the Banks for financial information regarding the Banks’ different regions, which is then used by the Board and FOMC to formulate monetary policy).*

406. *See Ryan v. Dep’t of Justice*, 617 F.2d 781, 789–90 (D.C. Cir. 1980) (ruling that inter- and intra-agency memo should be defined based on the plain meaning of the words); *see also* U.S. Dep’t of the Interior v. **Klamath Water Users Protective Ass’n**, 532 U.S. 1, 12, 14 (2001) (articulating that exemption five does not apply to the information shared between the Native American tribe and the Department of the Interior because the tribe obtained and released that information on its own behalf). *Klamath* recognizes that the records of independent consultants can be intra-agency memos when the consultant is working on behalf of the agency. *Id at 12.*
2. **Deliberative process privilege does not protect historical Bank records**

The deliberative process privilege does not protect the Banks’ records that are historical in nature because the Banks have already publicly disclosed their general decision.⁴⁰⁷ The deliberative process privilege protects open policy discussions between agency employees (and those constructively defined as employees for FOIA purposes), prohibits premature disclosure, and avoids confusing the public.⁴⁰⁸ The test is whether the information is pre-decisional and deliberative.⁴⁰⁹

One of the purposes of the deliberative process privilege is to ensure that government agency personnel can participate in open discussion without interference or fear of disclosure.⁴¹⁰ The deliberative process privilege fosters communication between subordinates and their superiors.⁴¹¹ Unlike the suggested policy changes in *Schell v. U.S. Department of Health & Human Services*,⁴¹² which were protected,⁴¹³ the requested information regarding section 13(3) lending is largely factual, including what companies received funding, how much, and on what collateral.⁴¹⁴ Although a request for purely factual information is not per se determinative of whether the deliberative process privilege applies, it plays the largest role in assessing whether disclosing information would impinge on open policy discussion in a way that violates FOIA.⁴¹⁵ While disclosure

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⁴⁰⁹.*See* *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975) (holding that the agency must show that the withheld information was used in the policy-making process in order for the information to be considered part of the deliberative process privilege).

⁴¹⁰.*See* *Russell*, 682 F.2d at 1048 (outlining the reasons for the deliberative process privilege, including protecting the integrity of the decision-making process and allowing for open discussion); *see also* *Kidd v. Dep’t of Justice*, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting records that would disclose the thought process of agency employees when devising agency policy).

⁴¹¹*Schell v. U.S. Dep’t of Health & Human Servs.*, 843 F.2d 933, 939 (6th Cir. 1988); *see also* *H.R. REP. NO. 89-1497* at 10, *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427–28 (noting that it is difficult to have frank deliberations if those communications will be judged before a final decision is made).

⁴¹². 843 F.2d 933 (6th Cir. 1988).

⁴¹³*See* id. at 941–42 (ruling that the records sought outlined suggested agency improvements were exactly the type of records that exemption five was enacted to protect).

⁴¹⁴*See* Amended and Supplemental Complaint for Declaratory and Injunctive Relief, *supra* note 274, at 6–7, 9 (asking for the names of loan recipients, and a listing of the collateral posted for the deal the Federal Reserve System brokered between JP Morgan Chase and Bear Stearns).

⁴¹⁵*See* *EPA v. Mink*, 410 U.S. 73, 89 (1973) (reporting that factual requests are generally not subject to withholding under exemption five of FOIA); *see also* *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (explaining that in certain circumstances, even factual inquiries may be proper to withhold under exemption five). *But see* *Vaughn v. Rosen*, 523 F.2d 1136, 1145
of meeting minutes discussing whether funding should or should not be given to a particular institution might be protected under FOIA,\textsuperscript{416} the resultant transactional facts of a deal are not policy or opinion,\textsuperscript{417} and are not protected by exemption five.\textsuperscript{418}

At the very least, the records requested regarding the Banks’ lending determinations are not pre-decisional.\textsuperscript{419} Only after a Bank has made a loan can others request records about that loan.\textsuperscript{420} For example, the information sought in Bloomberg and Fox was not deliberative, as all the records requested were fact-based, and asked for specific names of institutions and specific collateral values, not information on discussions or policy formation between the Banks’ employees or others.\textsuperscript{421} The decision to use section 13(3) is disclosed in minutes to Congress by the Board almost immediately,\textsuperscript{422} unlike the records at issue in Merrill that could have been maintained in secrecy until new policies were instituted.\textsuperscript{423} Courts have generally held that disclosure of historical fact is not premature; therefore, exemption five does not authorize withholding based on a FOIA request about information regarding loans made in the past.\textsuperscript{424}

(D.C. Cir. 1975) (noting that sometimes the disclosure of policy deliberations would not alter the deliberative process, and therefore are susceptible to disclosure).

416. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 152 (1975) (refusing to extend exemption five to cover post-decisional records that did not influence policy because the public is especially interested in scrutinizing the rationale behind agency decisions).

417. See Schell, 843 F.2d at 940 (citing Mink, 410 U.S. at 89) (“[FOIA] would not protect ‘purely factual, investigative’ material.”). But see Mead Data Cent., Inc., 566 F.2d at 256 (ruling that in some instances, even “purely factual material” may qualify for withholding under exemption five).

418. See Schell, 843 F.2d at 942–43 (articulating that the records requested from the agency were protected by exemption five because they were part of the on-going “give-and-take” and contained information that was the advice of one party to another, weighing the policy consequences of a number of alternatives).

419. See Sears, Roebuck & Co., 421 U.S. at 152 n.19 (admitting that while distinguishing pre- and post-decisional documents based on whether a final agency determination has been made is not always a clear test, it will generally serve the interests of exemption five because the disclosure of a final agency decision is unlikely to inhibit policy discussion).

420. Cf. id. (identifying post-decisional determinations as those that illustrate the decision reached and provide guidance for similar situations in the future).

421. See Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 388 (S.D.N.Y. 2009) (“Fox seeks disclosure of borrower’s names, loan amounts, and pledged collateral for the loans made under these new programs.”), vacated, 601 F.3d 158 (2d Cir. 2010); Amended and Supplemental Complaint for Declaratory and Injunctive Relief, supra note 274, at 6–7 (requesting factual information about loans made during a certain time period in the past).


Even under a more expansive definition of pre-decisional, which examines the process the information serves, the records withheld by the Banks are not protected. Information is not exempt from disclosure every time the agency formulates it prior to a final decision; how the information contributes to the larger agency decision-making process can also render it protected as pre-decisional. In Access Reports v. Department of Justice, the Department of Justice (DOJ) protected a document created by a staff attorney that assessed the practical effect of a proposed FOIA amendment on over two hundred news articles written through information obtained through FOIA. The report at issue in Access Reports was created by a subordinate for his superiors to use when they were questioned about FOIA’s amendments. The data requested from the Banks is distinguishable from the information in Access Reports, as it can be limited to facts such as the identity of the borrowing institution and the amount loaned, instead of implicating a deliberative process, such as how the Banks select the timing of market intervention or how the Banks set interest rates.

Although collateral valuations are more likely than basic loan facts to qualify as protected under the deliberative process privilege, requiring pre-defined instead of ad hoc collateral valuations would not violate FOIA. During the 2008 crisis, the definition for acceptable collateral

61 OKLA. L. REV. 371, 379 (2008) (summarizing the method used by the Court in Sears, Roebuck & Co. to determine whether information is post-decisional and therefore discomposable).

425. See Access Reports v. Dep’t of Justice, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (utilizing a test that incorporates the role records play in the formation and reformation of agency policy to determine whether the suggested agency changes submitted by staffers should be disclosed).

426. See id. at 1196–97 (holding that the agency must show how the memo was pre-decisional either by pinpointing a decision the records pre-dated or showing how those records influence government opinion to qualify for the exemption).

427. See id. at 1196 (deciding that deliberative records can include records that were used to form a single decision, as well as records that form the basis for multiple actions or the policy of the agency).

428. Id. at 1192.

429. Id. at 1193.

430. Id.

431. Compare Amended and Supplemental Complaint for Declaratory and Injunctive Relief, supra note 274, at 6–7 (requesting solely factual information from an agency under a FOIA request by a news organization, with Access Reports, 926 F.2d at 1193 (analyzing the effect amendments to FOIA would have had on published news stories in a memo by a lawyer responding to a request from his employer).

432. Cf. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975) (defining the primary purpose for exemption five as ensuring the integrity of the policy-making process and including in that process the protection of policy makers).

433. See id. at 151–54 (examining the legislative history of FOIA to conclude that decisions that have already been made have no need of exemption five protections and that public policy militates strongly for the release of that information because the public is
under the Banks’ lending programs expanded considerably. After the Board authorized the loan for Bear Stearns, for example, the New York Federal Reserve Bank was encouraged to cobble together the required collateral to make the deal work. By approving regulations on the process used to value collateral prior to initiating lending, the Board can prevent post-authorization collateral improvisation by the Banks. In addition, as exemption five authorizes disclosure of final policy, the use of a standardized collateral valuation process that is formulaic and not policy determinative would not qualify for protection under exemption five. 

Despite the valuation process’ resemblance to a deliberative process, collateral valuations would not be protected under exemption five because a pre-crisis final valuation process determination is more similar to a final rule than to policy-making, and its disclosure would not harm the deliberative process. Unlike the data the court did not disclose in Access Reports, which was prepared in response to questions regarding policy before Congress changed FOIA, the collateral valuation process should be disclosed prior to its use so all stakeholders—the Board, the public, and the financial firms—are on even ground. While the Banks would not


436. See Wessel, supra note 2, at 172 (noting that not until March 28, a full fourteen days after the Board’s approval of the section 13(3) action, was the collateral for the Bear Stearns deal identified).

437. Cf. 5 U.S.C. § 552(a)(1)(C) (2006) (mandating agencies publish their rules in the Federal Register); id. § 552(a)(2) (obliging the agency to disclose other documents and opinions that are not rules upon request).

438. Id. § 522(a)(2); see also Sears, Roebuck & Co., 421 U.S. at 151–53 (highlighting a myriad of other cases that uphold the disclosure of final agency determinations).

439. See Sears, Roebuck & Co., 421 U.S. at 150–51 (reasoning that it is human nature to “play[] it safe” before a decision is made if the deliberations will be subject to scrutiny). See id. at 150–52 (specifying that exemption five does not protect the information used to formulate an agency decision after the decision is final).

440. See 110 CONG. REC. 17,086 (1964) (recording the original exemption five as applying only to the “consideration and disposition of adjudicatory and rulemaking matters”).

441. See Sears, Roebuck & Co., 421 U.S. at 150–53 (outlining the reasons that the information informing a final agency decision is not protected under exemption five, but pre-decisional deliberations are protected).


have to disclose deliberations prior to determining the process used to value collateral.\footnote{Contra Sears, Roebuck & Co., 421 U.S. at 153–54 (ruling that exemption five can never apply to final agency determinations).} Once that process is finalized, it should be disclosed because it is then like an agency rule.\footnote{See id. at 153 (noting that Congress created FOIA, in part due to an aversion for “secret [agency] law,” and thus, agency determinations that carry the force of law may not be withheld under exemption five (quoting Kenneth Culp Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 797 (1967) (alteration in original))).} Furthermore, as the same valuation process will be equally applicable to all borrowers, it is more like the decision in \textit{NLRB v. Sears, Roebuck & Co.},\footnote{See id. at 155 (distinguishing the information sought by Sears from information protected by exemption five because once the General Counsel made the decision not to move forward with a labor complaint, the Regional Director was required to follow that order by the General Counsel).} because once the valuation process has been decided, the discretion of the agency employee is limited.\footnote{Cf. id. at 361–62 (comparing the Domestic Policy Directives with contract negotiations to determine that the policy directives do come within the scope of information that could be protected as confidential commercial information under exemption five, but noting that even if the information is within that scope, automatic protection does not follow).} As the court noted in \textit{Sears, Roebuck & Co.}, disclosure of employee decisions after policy is adopted will not limit or harm the deliberative process because the agency is required to support its own rules.\footnote{Id. at 161. See id. at 149 (exempting “documents, and only those documents, normally privileged in the civil discovery context”).} 

3. \textit{The implied confidential commercial information privilege derived from exemption five will not protect the Banks’ information}

Courts have recognized, in addition to the deliberative process privilege, that documents may be protected under exemption five by a limited confidential commercial information privilege.\footnote{Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 356 (1979).} The Supreme Court first recognized this “confidential . . . commercial information” privilege in \textit{Merrill}.\footnote{See id. at 356–59 (reflecting on the case law and legislative history that led to the inclusion of a narrow confidential commercial privilege for contract agreements and other similar negotiations).} Despite the sensitive nature of financial information, records that are historical and factual do not generally qualify for the narrow protection courts have extrapolated from the legislative history of exemption five.\footnote{Cf. id. at 361–62 (comparing the Domestic Policy Directives with contract negotiations to determine that the policy directives do come within the scope of information that could be protected as confidential commercial information under exemption five, but noting that even if the information is within that scope, automatic protection does not follow).} 

Historical, factual information held by the Banks is not eligible for withholding under exemption five because it is not “confidential” under this exemption.\footnote{Id. at 161. See id. at 149 (exempting “documents, and only those documents, normally privileged in the civil discovery context”).} The \textit{Merrill} Court agreed with the FOMC that the
protection of Rule 26(c)(7) of the Federal Rules of Civil Procedure, which allows a district court to prevent discovery of a trade secret or other commercial information for “good cause,” was a proper privilege to include in FOIA’s exemption five.\textsuperscript{454} The Merrill Court also looked to legislative history, including the hearings before the House and Senate committees to support a narrow protection for confidential commercial information.\textsuperscript{455} The Court restrained its interpretation of the exemption to include only confidential commercial information that the government used in the process of awarding a contract.\textsuperscript{456} Despite this limitation, providing a loan and awarding a contract are sufficiently analogous that this exemption could allow the Banks to withhold information.\textsuperscript{457}

The purpose for the limited confidential commercial information exemption is to protect the government’s competitive position or prevent disclosure that would endanger the realization of an agreement.\textsuperscript{458} The plaintiff in Merrill was requesting information regarding the ongoing operations of the FOMC, not historical data.\textsuperscript{459} The Court ruled that exemption five protects the government as an “ordinary buyer or seller.”\textsuperscript{460} The Court then upheld the narrow application of confidential commercial information in exemption five in Merrill because, it argued, the tactics employed by the FOMC to regulate the market are like a buy-sell contract with a broker.\textsuperscript{461} To avoid the concerns of premature disclosure, the information Banks should disclose under FOIA would only be historical in nature, and thus Merrill would not preclude this information from disclosure.\textsuperscript{462} The narrow exemption outlined in Merrill does not apply to historical information from the Federal Reserve System regarding its section 13(3) power, as the possibility for post-decisional competitive harm due to FOIA disclosure is slight.\textsuperscript{463} Congress mandates reports within

\begin{footnotesize}
\textsuperscript{454} Id. at 355–56.  
\textsuperscript{455} Id. at 357–59.  
\textsuperscript{456} Id. at 360.  
\textsuperscript{457} See id. at 361–62 (analogizing the Domestic Policy Directives to a buy-sell order, allowing the policy directives to be considered the type of information that may be protected under the Court’s narrow reading of commercial confidential information under exemption five).  
\textsuperscript{458} See id. at 360 (delineating the proper application of the confidential commercial privilege incorporated into exemption five by outlining the reasons for the privilege).  
\textsuperscript{459} Id. at 347.  
\textsuperscript{460} See Gov’t Land Bank v. Gen. Servs. Admin., 671 F.2d 663, 665 (1st Cir. 1982) (interpreting the scope of protection under exemption five under Merrill).  
\textsuperscript{461} Merrill, 443 U.S. at 361.  
\textsuperscript{462} Cf. id. at 353–54 (discussing the reasonableness of the FOMC’s regulations that allow it to forgo publishing policy decisions until after they have taken effect).  
\textsuperscript{463} See Gov’t Land Bank, 671 F.2d at 665 (explaining that the competitive harm that would result to the government was the same as that of an ordinary market actor if the agency was forced to disclose the records and noting that FOIA was never intended to harm the government’s bargaining position).
\end{footnotesize}
seven days of section 13(3) lending, and although the reports lack detail, those reports supply sufficient information to render any information subsequently disclosed under FOIA at most ancillary as a cause of competitive harm.\textsuperscript{464}

CONCLUSION

The Banks have operated—and continue to operate—with unprecedented opacity.\textsuperscript{465} The Founders took pains to ensure that the purse strings of the country were controlled by a body of divergent interests;\textsuperscript{466} to allow individuals protected from political upheavals to print money is contrary to this country’s basic principles.\textsuperscript{467} The veil of uncertainty under which the Banks continue to operate has actually put some deals, like the Mitsubishi take-over, at risk because investors have watched the government-like Federal Reserve System act seemingly at random.\textsuperscript{468} It was only the Board’s promise to abide by a specific course of action that saved the deal, demonstrating the value of transparency if only on the micro-economic level.\textsuperscript{469}

To condone, by inaction, the ability of a government agency to withhold information about its core purpose—directing the monetary policy of the United States—by outsourcing the work, while maintaining the power to

\textsuperscript{464} See Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988) (reasoning that because Hercules’ contract acquisition process was not competitive, Hercules failed to show, in this reverse FOIA case, that the release of information regarding the contract would cause substantial competitive injury); Gulf & W. Indus., Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1980) (requiring substantial competitive harm, as demonstrated by actual competition between two companies or a company and an agency and a “likelihood of substantial competitive injury”).

\textsuperscript{465} Compare Monetary Policy and the State of the Economy, Part I: Hearing Before the H. Comm. on Financial Servs., 111th Cong. 63–66 (2009)(statement of Ben S. Bernanke, Chairman, Board of Governors of the Federal Reserve System) (mentioning briefly the effect of the various lending programs on the economy and steps the Board is taking to increase transparency), with Burrough, supra note 3 (reporting the fall of Bear Stearns and the steps taken by the Federal Reserve System in detail).

\textsuperscript{466} See THE FEDERALIST NO. 51 (James Madison) (delineating the separation of powers between branches and between the two houses of Congress and discussing the divergent views of the different states).

\textsuperscript{467} Cf. FOIA GUIDE, supra note 28, at 1–2 (citing various sources indicating the importance of FOIA in maintaining an informed citizenry and functioning republican form of government).

\textsuperscript{468} See Davidoff & Zaring, supra note 2, at 512 (promising Mitsubishi’s purchase of interest in Morgan Stanley would not be diluted if the Federal Reserve System had to act).

\textsuperscript{469} See id. (illustrating that after the bailout of Bear Stearns and AIG and the surrender of Lehman Brothers, the investors at Mitsubishi invoked the materially adverse clause in the take-over contract because they were unsure whether their share of the investment would be altered without consent in the event that the Federal Reserve System had to take emergency measures with the company).
control policy, undermines the purpose of a free government. Agencies arose after the Great Depression, at least in part, to manage the financial struggles facing Americans, and FOIA was created to ensure that the broad powers delegated to those agencies, whose employees were insulated from the political process, were not abused. The same logic dictates that the Banks should be considered agencies, as the Banks are also products of financial difficulties and staffed with employees largely removed from the political branches.

As agencies of the government, the Banks would still have access to the limited exemptions under FOIA. To benefit from the exemptions, the Banks would be required to show specific, imminent harm when the information sought is factual and historical in nature. Otherwise, disclosure of this information would not implicate either exemption four or exemption five. The structure of FOIA has maintained the effectiveness of government while ensuring maximum disclosure for nearly fifty years.

470. See Memorandum of Points and Authorities in Support of the Defendant’s Motion for Summary Judgment at 14–15, supra note 166 (arguing that the information at the New York Federal Reserve Bank should not be disclosed because they are not agency records under FOIA).

471. See Inaugural Address, 2 PUB. PAPERS 11, 13 (March 4, 1933) (“Our greatest primary task is to put people to work. . . . It can be accomplished in part by direct recruiting by the Government itself, treating the task as we would treat the emergency of a war, but at the same time, through this employment, accomplishing greatly needed projects to stimulate and reorganize the use of our natural resources.”); see also Associated Press, Some New Deal Agencies May Be Made Permanent, THE PALM BEACH POST, Dec. 28, 1935, at 1 (discussing the requests of New Deal agency heads, which were created to fight the economic downturn, for Congress to renew the agencies’ authorization).

472. See FOIA GUIDE, supra note 28, at 4 (explaining how FOIA arose from the APA, which had been created to promote disclosure after the rise of agencies in the 1930s).

473. See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) (illustrating that the withholding provisions of FOIA are discretionary, not mandatory); see also Memorandum from the Attorney General, supra note 89.


475. See supra Part III (discussing the purposes for FOIA’s exemptions and concluding that in most circumstances the information requested from the agency does not qualify as confidential and thus should be disclosed under FOIA).

476. 5 U.S.C. § 552(b)(4),(5).