



BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

JEROME H. POWELL
MEMBER OF THE BOARD

July 19, 2012

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Dear Mr. Lee:

This is in response to your e-mail message dated July 8, 2012, in which you appeal, pursuant to 12 C.F.R. § 261.13(i), the decision of the Associate Secretary of the Board ("Associate Secretary") to deny, in part, your request for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

I. *Background*

By e-mail message dated and received by the Board's Freedom of Information office on February 17, 2012, you requested:

All withheld portions of the applications by BB&T to acquire BankAtlantic,¹ and all FRS communications and records concerning this proposed transaction, including e-mails, memos, etc.

By letter dated June 6, 2012, the Secretary of the Board ("Secretary") informed you that some of the responsive documents gathered in response to your FOIA request contained information exempt from disclosure under exemptions 4, 5, 6, and 8 of FOIA, 5 U.S.C. §§ 552(b)(4), (5), (6), and (8). The Secretary advised you that all reasonably segregable nonexempt information would be provided; that approximately 156 full pages and portions of other pages would be

¹ On February 3, 2012, you requested a copy of these applications from the Federal Reserve Bank of Richmond.

withheld; that the nature and amount of information being withheld would be evident from the face of the documents being provided; and that additional responsive information had been referred to the Federal Deposit Insurance Corporation ("FDIC") for disposition.

By e-mail dated June 17, 2012, and received by the Board's Freedom of Information office on June 18, 2012, you appealed the Secretary's determination to withhold information under FOIA in response to your initial request.

By letter dated June 29, 2012, the Associate Secretary informed you that additional facts that were not known at the time of the Secretary's determination had come to light. The Associate Secretary advised that certain information redacted from the documents that were initially provided to you would be released and that the applicability of the exemptions previously cited had been reconsidered and, where appropriate, modified.

In addition, the Associate Secretary's letter of June 29, 2012, informed you that additional information responsive to your request had been located. The Associate Secretary advised that an additional 178 pages from the information initially withheld in full and the supplemental information subsequently located would be released to you. The Associate Secretary further advised you that 53 full pages and portions of additional pages would be withheld under exemptions 4, 5, 6, and 8 of FOIA, 5 U.S.C. §§ 552(b)(4), (5), (6), and (8), respectively.

By e-mail dated July 8, 2012, and received by the Board's Freedom of Information office on July 9, 2012, you appealed the Associate Secretary's determination to withhold information pursuant to exemptions 4, 5, and 8 of FOIA. Specifically, you appealed the following items:

- Item 1: The 53 pages withheld in full;
- Item 2: The October 28, 2011, "update on Project Palm" that was withheld in part;
- Item 3: Information about the December 2, 2011, call that was withheld in part;
- Item 4: The E-Apps notifications of December 13, 2011, and December 16, 2011, that were withheld in part;
- Item 5: The e-mails from Alison Thro to Derald Seid on December 16, 2011, and the e-mail from Wayne Cox to Beverly Smith on January 25, 2012, that were withheld in part; and

Item 6: All withholdings concerning the extension of the comment period, including but not limited to the February 6, 2012, and February 7, 2012, e-mails.

For the reasons discussed below, I affirm, in part, the Secretary's decision to withhold information pursuant to exemptions 4, 5, and 8 of FOIA, 5 U.S.C. §§ 552(b)(4), (b)(5), and (b)(8). I have also determined that certain limited information previously withheld pursuant to exemption 5 can be released.

II. *The Exemption Determinations*

Information in the possession of an agency is exempt from disclosure if it falls within one or more of the enumerated FOIA exemptions. 5 U.S.C. §§ 552(b)(1)-(9).

Exemption 4

Exemption 4 of FOIA permits agencies to withhold "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."² Courts have construed this exemption to permit agencies to withhold information if disclosure is likely (1) to affect the reliability or availability of information the agency would receive in the future, or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.³

Portions of Items 1 and 2 were withheld on the basis of exemption 4. Based on a de novo review of this material, I have determined that it consists of nonpublic financial information, business plans relating to the acquisition, confidential business and strategic plans, and considerations related to litigation proceedings. Accordingly, the Associate Secretary's decision to withhold the above information under exemption 4 of FOIA is affirmed.

Exemption 5

Exemption 5 of FOIA permits agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption includes documents that embody the "deliberative process" of the

² 5 U.S.C. § 552(b)(4).

³ See National Parks and Conservation Assoc. v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

agency before reaching a decision, in order to encourage honest and frank communication within the agency. See, e.g., National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1118-20 (9th Cir. 1988). Exemption 5 thus covers "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). "[E]ven factual segments of documents are protected by Exemption 5 from disclosure if the manner of selecting or presenting [the] facts would reveal the deliberat[ive] process, or if the facts are 'inextricably intertwined' with the policymaking process." Jowett, Inc. v. Dep't of Navy, 729 F. Supp. 871, 877 (D.D.C. 1989).

Upon de novo review, I have determined that additional information previously withheld under exemption 5 may be released. This information is found in Items 1, 4, 5, and 6 and includes certain administrative aspects of the application process, as well as some factual details regarding the application that are not confidential. The information being released to you consists of e-mails that coordinate meeting times, describe transaction filings and discuss comment period timings and news articles. These documents will be provided to you under separate cover.

The remaining documents and portions of documents withheld under exemption 5, contained in Items 1, 3, 4, 5, and 6, consist of communications among FRS personnel reflecting staff's preliminary assessments regarding the proposed transaction, staff's strategies for processing the application, and internal draft documents. In particular, they include e-mail communications among Board and Reserve Bank staff that consist of deliberations, recommendations and draft memos. Consistent with exemption 5, these documents are inter-agency or intra-agency records and are predecisional and deliberative within the meaning of exemption 5. Accordingly, I have determined that this information should continue to be withheld under exemption 5.

Exemption 8

Exemption 8 permits agencies to withhold information "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."⁴ The courts have broadly construed this exemption.⁵

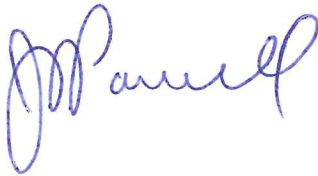
⁴ 5 U.S.C. § 552(b)(8).

Portions of Items 1 and 5 were withheld on the basis of exemption 8. Based on a de novo review of this material, I have determined that it consists of or refers to bank examination reports and ratings gathered by staff of the Federal Reserve Bank of Richmond and the Board, as well as confidential information generated as part of the Federal Reserve System's supervisory responsibilities. Accordingly, the Associate Secretary's decision to withhold this information under exemption 8 of FOIA is affirmed.

III. *Conclusion*

Based on a de novo review of the Associate Secretary's decision, and on the recommendation of counsel regarding the legal issues involved, I make the following findings: (i) certain limited information that was previously withheld under exemption 5 may be released; and (ii) the Associate Secretary's decision to withhold other information from you under exemptions 4, 5, and 8 was correct. Accordingly, your appeal is granted in part and denied in part. If you believe that the Board is withholding information from you contrary to your legal rights, you may seek judicial review of my decision in an appropriate United States District Court pursuant to 5 U.S.C. § 552(a)(4)(B). The Board's Freedom of Information office will provide you, under separate cover, with a copy of the documents being made available pursuant to this appeal.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Paul", is written below the word "Sincerely,".

⁵ Gregory v. FDIC, 631 F.2d 896 (D.C. Cir. 1980); McKinley v. FDIC, 744 F. Supp. 2d 128, 142-44 (D.D.C. 2010), *aff'd* on other grounds sub nom. McKinley v. Bd. of Governors, 647 F.3d 331 (D.C. Cir. 2011).