

09-4083-cv(L)

09-4097-cv(CON)

United States Court of Appeals
for the
Second Circuit

BLOOMBERG, L.P.,

Plaintiff-Appellee,

– v. –

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant-Appellant,

THE CLEARING HOUSE ASSOCIATION L.L.C.,

Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR *AMICI CURIAE* ADVANCED PUBLICATIONS, INC.,
AMERICAN SOCIETY OF NEWS EDITORS, DOW JONES &
COMPANY, INC., GANNETT COMPANY, INC., HEARST
CORPORATION, MAGAZINE PUBLISHERS OF AMERICA, INC.,
NATIONAL NEWSPAPER ASSOCIATION, REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS, REUTERS AMERICA LLC, THE
ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES, THE
ASSOCIATED PRESS, THE NATIONAL CONFERENCE OF EDITORIAL
WRITERS AND THE NEW YORK TIMES CO., (“PRESS AMICI”),
IN SUPPORT OF PLAINTIFF-APPELLEE**

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Advance Publications, Inc. has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

The American Society of News Editors

The American Society of News Editors has no parent corporation and does not issue any stock.

The Association of Alternative Newsweeklies

AAN has no parent corporation and does not issue any stock.

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INTEREST OF *AMICI CURIAE*

Amici curiae are national and local news organizations, non-profit associations representing news gatherers, and trade groups whose journalists and members regularly gather and disseminate news and information to the public through their newspapers, magazines, television and radio stations, and via the Internet (the “Press Amici”).¹ The Press Amici and their members regularly investigate and report on the actions of government, including federal regulators such as appellant Board of Governors of the Federal Reserve System (“Board”). To do their job, Press Amici necessarily rely on the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a) *et seq.*, to uncover information about the actions of government. They have significant experience with the application of FOIA and its exemptions, and an ongoing stake in the proper interpretation of the disclosure obligations imposed by FOIA on federal agencies.

Press Amici also have a substantial interest in the specific information the Board seeks to conceal from the public in this case. They have reported extensively on the major economic collapse that began in late 2007, the credit and

¹ The Press Amici are: Advance Publications, Inc., The American Society of News Editors, The Association of Alternative Newsweeklies, Associated Press, Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, The Magazine Publishers of America, The National Conference of Editorial Writers, The National Newspaper Association, The New York Times Company, Reporters Committee for Freedom of the Press, and Reuters America LLC. A description of each of the Press Amici is set forth in the Addendum to this Brief.

liquidity crises experienced by the financial markets, the housing downturn and, in particular, the government's efforts to address these problems through the Federal Reserve Board. The public has an overriding interest in disclosure of basic facts surrounding the Board's unprecedented authorization of new lending programs as part of this effort. Under these programs, the Federal Reserve Banks ("FRBs") supervised by the Board have loaned *more than \$2 trillion*, and have done so without disclosing the recipients of these enormous sums or the terms of their loans. Disclosure of this basic information is essential to fulfill FOIA's core purpose—opening agency action "to the sharp eye of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989).

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29, all parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

1. FOIA's Exemption 4 protects confidential commercial and financial information provided to the Government if disclosure would cause substantial competitive harm to the entity that provided it. To apply this exemption properly, a court must weigh the public's interest in disclosure against its potential to cause competitive harm. In this case, the enormous public interest in knowing how the Board implemented massive, unprecedented lending programs compels disclosure of the reports at issue, even if the Board had met its burden to demonstrate that

their disclosure was likely to cause the type of competitive injury addressed by Exemption 4. The Board’s refusal to disclose the names of borrowers renders public oversight of its actions impossible— it prevents any assessment of the effectiveness of the Board’s actions and conceals any collusion, corruption, fraud or abuse that might have occurred. Under Exemption 4, the public interest in disclosure should trump any demonstrated risk of harm to the borrowers.

2. The Board failed to establish that its “Remaining Term Reports” fall within the scope of Exemption 4 in any event. Most of the limited information in the reports about the emergency lending programs was not “obtained from a person” and the identity of a borrower is not “confidential” within the meaning of Exemption 4. To be “confidential” in this context requires that disclosure is likely to cause substantial *competitive* harm, and no such harm was demonstrated by the Board. The Board’s broader reading of Exemption 4 to include any information that might damage a company’s reputation is inconsistent with the narrow purpose of this exemption, and would allow any regulator to withhold important information about its actions involving an identifiable business. The narrow exemption to protect competition would swallow the rule requiring disclosure of government actions.

3. Even under the Board’s reading of Exemption 4, its evidence of potential reputational harm is insufficient because it is purely speculative. Courts

routinely reject agency arguments based on such generalities, and the Board’s claims here are particularly suspect because they contradict its prior public statements and defy common sense.

4. The Board is mistaken in contending that Exemption 4 applies in the absence of competitive harm to a private entity if disclosure would inhibit the effectiveness of a regulatory program. The “program effectiveness” theory has nothing to do with the purpose of Exemption 4—to protect the confidential financial information of private citizens—and has never been accepted by this Court. To the extent the theory has any merit, it has no proper application where an entity’s disclosure of information to an agency is not voluntary, and here disclosing the identity of the borrowing bank was a mandatory condition to obtaining a loan.

ARGUMENT

I.

THE SUBSTANTIAL PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS ANY ESTABLISHED RISK OF COMPETITIVE HARM

Straining to establish some error of law, the Board asserts that the district court misinterpreted Exemption 4 and applied the wrong legal test. (Bd. Br. at 25-30.) It did not. The district court construed Exemption 4 in a manner that gives full force to the statutory language, furthers the legislative purpose, and complies with controlling precedent. Its decision should be affirmed.

The “Remaining Term Reports” the district court ordered to be disclosed summarize the lending of the Federal Reserve Banks under three programs launched by the Board in response to the economic collapse that began in 2007. The reports present data generated by each of the FRBs documenting their own lending. They identify who received the money, at what interest rates, which Board program funded the loan, and when it would be repaid. (A-33, ¶ 11.) The reports were prepared by the Board, for the Board and document exactly what the Board was up to.

As demonstrated by Appellee Bloomberg L.P. (“Bloomberg”), the Remaining Term Reports lie wholly outside the narrow limits of Exemption 4. Except for the names of specific borrowers, the data in the Remaining Term Reports was not provided to the Board by a “person” as the exemption requires (Bloomberg Br. at 14-27), and a borrower’s name is not “confidential” under Exemption 4 because its disclosure is not likely to cause substantial *competitive* harm (Bloomberg Br. at 27-52; *see also, infra* at 15-19). The Board argues that Exemption 4 more broadly permits it to withhold information that could cause *reputational* harm, but even if its position had merit, the district court should still be affirmed. Under Exemption 4, a court must weigh the risk of substantial harm to a “person” against the public interest in disclosure. Here, the overwhelming public interest in knowing basic information about the Board’s distribution of \$2.2

trillion in taxpayer funds—who received the money and on what terms—compels the release of the Remaining Term Reports.

A. The Public Interest Should Properly Be Weighed In Applying Exemption 4

FOIA’s core purpose is to enable citizens to learn “what their government is up to” by shedding “light on an agency’s performance.” *Reporter’s Committee*, 489 U.S. at 773; *Hopkins v. U.S. Dep’t of Housing & Urban Dev.*, 929 F.2d 81, 87 (2d Cir. 1991). FOIA seeks “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.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) (FOIA informs citizens “to promote honest and open government”). In introducing the legislation that would become FOIA, Senator Edward Long quoted James Madison to explain the importance of access to information in a democracy:

Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.

S. Rep. No. 89-813, at 2-3 (1965).

FOIA thus embodies the principle that access to information about government is “a structural necessity in a real democracy.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). The Act adopts “as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies.” *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999); *see also* H.R. Rep. No. 88-1219 at 4 (1964) (because “an informed electorate is so vital,” the law must “affirmatively provide[.]... a policy of disclosure”). FOIA requires every federal agency to make its records “promptly available to any person,” 5 U.S.C. § 552(a)(3)(A), unless they fall within one of the nine specific exemptions. *See La Raza*, 411 F.3d at 355.

Congress understood in enacting FOIA that some information should properly be withheld from disclosure to avoid inflicting unreasonable injury on private individuals and businesses, so it carved out exemptions protecting certain personal information of individuals (Exemptions 6 and 7(C)) and certain competitively-sensitive information of commercial entities (Exemption 4). In so doing, Congress intended to balance these interests of private parties against the overarching public interest in keeping a clear eye on the actions of government. *See, e.g.*, S. Rep. No. 89-813 at 3 (1965) (“Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.”)

The interpretation of Exemption 4 cannot be divorced from FOIA's fundamental purpose. Exemption 4 authorizes an agency to withhold "trade secrets and commercial or financial information obtained from a person" if that information is "privileged or confidential." 5 U.S.C. § 552(b)(4). Information is "confidential" within the meaning of Exemption 4 if its disclosure is likely to cause "substantial harm to the competitive position of the person from whom the information was obtained." *Continental Stock Transfer & Trust Co. v. SEC*, 556 F.2d 373, 375 (2d Cir. 1977) (emphasis added; citing *Nat'l Parks & Conserv. Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)); see also *Inner City Press v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006) (same).²

While this Court has yet to address the issue, the "confidentiality" inquiry under Exemption 4 necessarily requires a court to "balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information." *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994). A finding of *substantial* competitive harm sufficient to withhold information under Exemption 4 can only properly be made by weighing the harm likely to befall a specific business against the public interest in disclosure.

² As construed by this Court, information is "confidential" under Exemption 4 in two situations, if disclosure would (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial competitive harm. *Id.* Only the second prong was asserted by the Board. See SPA-37.

Id.; accord *Wash. Post Co. v. U.S. Dep't of Health & Human Svcs.*, 865 F.2d 320, 323, n.4, 327 (D.C. Cir. 1989) (balancing public interest under “impairment” prong of Exemption 4 confidentiality). Exemption 4 requires a court to “balance [the] pros and cons of disclosure in any particular case.” *Wash. Post Co.*, 865 F.2d. at 327; see also *McDonnell Douglas Corp. v. U.S. Dep't of Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004) (weighing under exemption 4 whether disclosure would enhance public knowledge about the workings of government and the expenditure of funds); *Public Citizen Health Research Group v. NIH*, 209 F. Supp. 2d 37, 45 (D.D.C. 2002) (reaffirming the “central role a rough balancing must play between the private and public interests” under Exemption 4).³

Disclosure is favored under FOIA where it “contribut[es] significantly to public understanding” of government activity (*U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 495 (1994)), opens government conduct “to the sharp eye of public

³ In *Fox News Network, LLC v. Board of Governors of the Federal Reserve System* (09-3795-cv), also pending before this Court, the Board cites *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999) for the proposition that the “public interest” is irrelevant under Exemption 4. (Bd. Br. in *Fox News* at 27, n.14). *Public Citizen* says no such thing. Plaintiff there argued that disclosure of drug applications filed by pharmaceutical companies would help to “safeguard public health,” and the court rejected *this* public interest as relevant under FOIA. FOIA seeks to disclose information about “what the government is up to,” but the applications would reveal only what the drug companies were up to. 185 F.3d at 904. *Public Citizen* holds only that a court can not consider “collateral benefits” unrelated to government activity, and subsequent D.C. Circuit cases confirm that the public interest in disclosure of *government action* is indeed properly considered under Exemption 4. See, e.g., *McDonnell Douglas Corp.*, 375 F.3d at 1193.

scrutiny” (*Reporters Committee*, 489 U.S. at 774), and adds “to the public’s understanding of how [an agency] performed its duties” (*Wood v. FBI*, 432 F.3d 78, 88 (2d Cir. 2005)). This Court should construe Exemption 4 to recognize that FOIA’s “strong presumption in favor of disclosure” will in some situations “trump[]” a commercial entity’s right to confidentiality. *GC Micro Corp.* 33 F.3d at 1115.

B. Overwhelming Public Interest Compels Disclosure of the Board’s Lending Activity

The public interest in disclosure in this case could hardly be greater. The Board has lent out more than \$2 trillion under the lending programs documented in the Remaining Term Reports. Despite this massive outlay, the public knows little about who has received these funds or the terms of their loans. *See, e.g.*, Ron Paul & Jim DeMint, “Americans Deserve a Transparent Fed,” *The Wall Street Journal*, Nov. 19, 2009, at A21. While the Board releases aggregate data (*e.g.*, http://www.federalreserve.gov/monetarypolicy/bst_ratesetting.htm#1a), it refuses to reveal any transaction-level data identifying where money has gone. Without this information, it is impossible to monitor the Board’s actions, and FOIA’s core purpose is defeated.

The enormous public interest in this information is reflected in repeated calls by elected officials for transparency at the Board. In April 2009, the Senate passed a non-binding resolution specifically calling on the Board “to disclose the names of

institutions that receive emergency loans.” Mark Felsenthal, “Senate OKs measure calling on Fed to name firms,” *Reuters*, Apr. 2, 2009. A subsequent bipartisan letter to the Board from 12 Senators underscored that “American taxpayers’ funds have been placed at risk,” and protested that the American people deserve to know how these funds were used. *See* News Release, “Senators Call on Fed To Release Emergency Assistance Information,” July 31, 2009.⁴

Individual lawmakers have spoken out specifically about the need for disclosure of the Board’s actions. The Chair of the House Financial Services Committee expressed the views of many colleagues in protesting that: “You don’t have a right to go to a federal agency, borrow money [and] keep it secret forever.”⁵ Senator Jim Bunning, a minority member of the Senate Banking Committee, has made the same point: “the taxpayers have a right to know exactly who they are giving this money to and how much.”⁶ Senator Jim Webb was even more succinct: “[C]onsider 10 words: The American people deserve to know where their money went.” 155 Cong. Rec. S4250, April 2, 2009. Many other lawmakers have expressed similar views. For example:

⁴ Internet links to the cited press releases and similar documents can be found in the Table of Authorities.

⁵ Rep. Barney Frank (D-MA), quoted in Sudeep Reddy, “Fed Weighs Naming Borrowers,” *The Wall Street Journal*, Sept. 26, 2009, at A2.

⁶ *See* News Release, “Bunning: It’s Time for the Fed to Come Clean,” Apr. 2, 2009.

- Senator John Cornyn: “There cannot be accountability in government and in our financial institutions without transparency. Many of the financial problems we are facing today are the direct result of too much secrecy and too little accountability.”⁷
- Rep. Ron Paul: “There really is no viable reason to continue to withhold from the American people the names of firms receiving Federal Reserve assistance and the amount of money they receive.”⁸
- Rep. Walter B. Jones: “When taxpayer dollars are used to bail out financial institutions, the American people deserve full disclosure on who receives those funds and under what terms.”⁹

Particularly given the public controversy surrounding whether some institutions are “too big to fail,” the public interest in the Board’s actions remains acute. *See, e.g.,* Edmund L. Andrews, “Bernanke Says Fed Should Have Done More,” *The New York Times*, Dec. 3, 2009, at B1.

In his program on CNN, Lou Dobbs polled viewers about whether the Board should identify its borrowers, with this result:

Let’s go to the poll results. Only 99 percent of you say the Federal Reserve should be required to identify the recipients of the \$2 trillion in rescue funds. We’ll pass this along to our buddy, Hank Paulson, down at the Treasury Department, maybe Ben Bernanke at the fed, give them a little something to chew on, remind them what country they’re living in.

⁷ News Release, “Sen. Cornyn Calls On Federal Reserve To Make Public Key Information Surrounding Taxpayer-Funded Loans,” Nov. 12, 2008.

⁸ Ron Paul, “The Fed Should Be More Transparent,” *Politico*, Oct. 19, 2009.

⁹ News Release, “Jones Applauds Court Decision Ordering Fed to Disclose Emergency Loan Details,” Aug. 15, 2009.

Lou Dobbs Tonight, *CNN* television broadcast, Nov. 10, 2008. This unscientific poll reflects a broad public outrage that the Board can keep its actions secret, even long after the fact. In the words of former Labor Secretary Robert Reich:

The secrecy is unnecessary. . . . Congress and the public need to know what the Fed, with the ever-creative Bernanke at its lead, are up to. Never underestimate the power of public knowledge and opinion. . . . And don't underestimate the importance to our economy of knowing who and what is getting Fed assistance, and in what form.¹⁰

See also, e.g., Maria Newman, “Blog Talk: Jobs and the Economy,” *The New York Times* Caucus Blog, Dec. 3, 2009 (the Board is “a public institution that should be accountable to the American people”); Susan G, “Too big to fail. Or to pay taxes. Or to be identified,” *Daily Kos*, Nov. 10, 2008 (“You are not allowed to know where your money is going, fellow citizens . . . Just shut up, pay up and quit whining . . .”). As the Supreme Court has said, “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

While the potential harm in disclosing the information sought by Bloomberg is entirely speculative, the public benefits could not be more concrete. Disclosure

¹⁰ Robert Reich, “Why the Senate Should Confirm Bernanke But Make the Fed More Accountable Too,” *The Huffington Post*, Aug. 25, 2009.

will allow the public to know whether the lending accomplished its objectives and to hold the Board accountable. As a senior analyst at OMB Watch has explained: “Transparency – especially with the bailouts – is essential to good governance. . . . Without understanding how the funds are being used it becomes impossible to judge the value of the bailout policy.” Miranda Fleschert, “Federal Reserve Locks Vault on Bailout Records,” *The News Media & the Law*, Fall 2009 (Vol. 33, No. 4) (reporting comments of Craig Jennings). And without disclosure, there is no way to guard against collusion, corruption, fraud or abuse.¹¹

Given the obvious need for taxpayers to know that their funds are handled responsibly, Congress is required under the Constitution to account to the people for all “receipts and expenditures of all public money.” Const., Art. I, § 9, clause 7. FOIA demands no less from the Board.

¹¹ The same public interest in disclosure exists in the *Fox News Network* case before this Court. Even if the documents sought but Fox News fall within the scope of Exemption 4, as here, the public interest vastly outweighs any potential reputational harm that might be caused by identifying the borrowers using the new Board lending facilities. Moreover, the *Fox* decision failed to conduct the *de novo* review required by FOIA and uncritically accepted the Board’s conclusory assertions of harm (*see infra* at 19-25); failed to restrict Exemption 4 to information obtained “from a person” and disclosures causing *competitive* harm (*infra* at 15-19); and improperly accepted the Board’s theory that Exemption 4 protects information that might affect an *agency’s* effectiveness, something wholly outside of its scope (*infra* at 25-27).

II.

THE BOARD FAILED TO MEET ITS BURDEN TO DEMONSTRATE THAT EXEMPTION 4 EVEN APPLIES

Exemption 4 authorizes agencies to withhold trade secret-type information provided to them by private individuals and businesses—it does *not* authorize agencies to withhold information about their own activities, even if the information might be commercially sensitive. The Board unquestionably failed to meet its burden to demonstrate that this exemption applies to its Remaining Term Reports.

A. The Remaining Term Reports Do Not Fall Within The Scope of Exemption 4

As demonstrated by Bloomberg (Bloomberg Br. 14-26), the only information “obtained from” the borrower in this case was its name, and the district court correctly found Exemption 4 inapplicable to this piece of information because its disclosure was not likely to cause substantial competitive harm to the borrowing bank. (SPA-36-42.) The Board and Clearing House distort this aspect of the district court’s holding by contending that it required a showing of “certain” harm. (Bd. Br. at 29-30; Cl. Hse. Br. at 32-35.) It did not. The district court cited and applied the “likely” to cause “substantial” harm standard adopted by this Court in *Continental Stock*—the standard that all parties agree is controlling.¹²

¹² The Clearing House criticizes the district court’s citation to *Iglesias v. CIA*, 525 F. Supp. 547 (D.D.C. 1981) saying Chief Judge Preska erroneously required proof of *certain* harm. But *Iglesias* makes clear that its “imminence” standard requires no such thing—the term is meant to prevent agencies from withholding

Appellants' primary argument is that the district court improperly required a demonstration of substantial harm from the affirmative use of the disclosed information by *competitors*, rather than from a potential impact on reputation. (SPA-40.) The district court's reading of Exemption 4 is precisely right. Exemption 4 is aimed at protecting information whose disclosure would harm the "competitive position" of the individual or entity providing the information to the government. *Inner City Press*, 463 F.3d at 244; *Cont'l Stock*, 566 F.2d at 375. It seeks to prevent the misuse of confidential information by others for *competitive* purposes. *See, e.g., Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291, n.30 (D.C. Cir 1983); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154, n.158 (D.C. Cir. 1987).¹³

Typically, Exemption 4 applies in cases where the disclosure of pricing, sources, customer lists, or similar information would enable a competitor to obtain an unfair advantage. *See, e.g., Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 354 F.3d

information based upon "generalized allegations" and "surmise" about potential competitive injury, rather than a concrete showing that some specific harm is likely. 525 F. Supp. at 558-59.

¹³ *Accord In Def. of Animals v. U.S. Dep't of Agric.*, --F. Supp. 2d--, 2009 WL 2974764, at *3 (D.D.C. Sept. 18, 2009); *Freeman v. Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178, 1190-91 (D. Or. 2007); *Physicians Comm. for Responsible Med. v. NIH*, 326 F. Supp. 2d 19, 25-26 (D.D.C. 2004); *Ctr. to Prevent Handgun Violence v. U.S. Dep't of Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997); *Pub. Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 415, n.30 (D.D.C. 1997); *Martech USA, Inc. v. Reich*, 1993 WL 1483700, at *1-2 (N.D. Cal. Nov. 24, 1993).

1072, 1079-81 (9th Cir. 2004) (Exemption 4 applied where information sought could allow competitors to “underbid”); *Gulf & Western Indus., Inc. v. United States*, 615 F.2d 527, 529-30 (D.C. Cir. 1980) (Exemption 4 applied to request for competitor’s “profit rate, actual loss data” and similar information that would allow plaintiff to “calculate [its competitor’s] future bids and its pricing structure”). No potential for such competitive harm exists here.

Appellants urge this Court to adopt a far broader construction, arguing that information may be considered “confidential” under Exemption 4 any time an agency official believes its release has the potential to cause “harm” to the marketplace reputation of the “person” from whom it was obtained. (Bd. Br. at 18-35; Cl. Hse. Br. at 38-48.)¹⁴ This reading of the exemption would eviscerate the limits Congress intended.

Courts have widely recognized that information that “could damage plaintiff’s reputation . . . is not the type of competitive harm protected by

¹⁴ *Amici* ABA makes an additional argument that disclosure would be contrary to the policy behind FOIA Exemption 8, which exempts 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.” Exemption 8 “shields from discovery only agency opinions or recommendations; it does not protect purely factual material.” *Lee v. FDIC*, 923 F. Supp. 451, 459 (S.D.N.Y. 1996) (citing *In re Subpoena Served Upon the Comptroller of Currency, and Sec. of Board of Governors*, 967 F.2d 630 (D.C. Cir. 1992)). The Remaining Term Reports are factual not deliberative. Moreover, Exemption 8 may also be overridden “when the public’s interest in effective government would be furthered by disclosure.” *Id.*

[Exemption 4],” which instead addresses the “harm flowing from the affirmative use of proprietary information.” *Martech*, 1993 WL 1483700, at *2. *See also Pub. Citizen Health Research Group v. FDA*, 964 F. Supp. at 415, n.2 (“adverse public reaction” to information is not a “competitive injury” protected by Exemption 4); *Donovan*, 830 F.2d at 1154 (“unfavorable publicity” is not a “competitive harm”); *Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm’n*, 750 F.2d 1394, 1402 (7th Cir. 1984) (the “competitive harm that attends any embarrassing disclosure” does not trigger Exemption 4).¹⁵

If potential reputational injury suffices to invoke Exemption 4, almost any adverse information about an identifiable business could be withheld. The narrow “confidential” exemption would swallow the broad disclosure rule, and regulators would be permitted to conduct large portions of their activity entirely outside public view. As the district court recognized “the Exemption cannot stand such inflation.” (SPA-41.)

¹⁵ Appellants cite *Nadler v. FDIC*, 92 F.3d 93 (2d Cir. 1996) as suggesting that injury need not come from the use of information by a direct competitor, but the case is entirely inapposite. In that case, disclosure of a joint venture agreement involving a bank that was later seized by the FDIC “would not enlighten the public as to how the government in its sovereign capacity regulates deposit insurance,” since the FDIC was standing in the shoes of a private party. *See* 899 F. Supp. 158, 164 (S.D.N.Y. 1995); 92 F.3d at 96-97.

B. The Board Did Not Establish Any Likely, Specific Harm to a Source of Information

Even if the “stigma” that is the focus of the Board’s attention could be considered the type of competitive harm protected by Exemption 4 (and it cannot), the Board failed to demonstrate that any such stigma is likely to exist.

1. The Board’s “evidence” of stigma is nothing but speculation.

Appellants put forward no real evidence to substantiate their claim that a failure-inducing “stigma” attaches to banks that borrow from Board facilities. They rely purely on speculation. *See* Bloomberg Br. at 31-33. For example, Board economist Brian Madigan suggests that a bank’s customers and counterparties “may draw adverse inferences” from a decision to borrow from an FRB discount window, because such borrowing might imply that the bank did not have access to “ordinary, market sources of funding on a short term basis.” (A-74, ¶¶ 17-18.) But he offered no specific facts or examples to support his suspicions (*see* A-71-78), and the Board itself acknowledges that banks borrow through the discount window for many good reasons when they are not “experiencing underlying financial problems.” (Bd. Br. at 19 & n.10.)

The district court was correct in dismissing such speculation as inadequate. Because FOIA imposes an obligation of *de novo* review on the courts, an agency’s determinations must be supported by evidence, and the agency’s views are to be accorded no deference. 5 U.S.C. § 552(a)(4). Agencies must back up their claims

of competitive harm with proof— “[c]onclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency’s decision to withhold requested documents.” *Public Citizen*, 704 F.2d at 1291. In *Miami Herald Publishing Co. v. U.S. Small Business Administration*, 670 F.2d 610, 614 (5th Cir. 1982), for example, the Fifth Circuit rejected the SBA’s claims that the disclosure of loan information could cause competitors to take advantage of the “economic condition” of the borrowing company, finding “unsupported speculation about the business world generally” to be wholly insufficient. Courts widely, and rightly, reject the type of conclusory claims of harm provided by the Board. *See, e.g., In Def. of Animals v. NIH*, 543 F. Supp. 2d 70, 79 (D.D.C. 2008) (courts “routinely reject Exemption 4 arguments that are grounded in generalizations”); *Brownstein Zeidman & Schomer v. Dep’t of Air Force*, 781 F. Supp. 31, 33 (D.D.C. 1991) (alleged competitive harm under Exemption 4 rejected as “speculative”); *Nadler*, 899 F. Supp. at 162 (requiring more than “ritual and unsubstantiated incantations” to satisfy Exemption 4); *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir. 1985) (finding agency’s “speculative testimony” insufficient).¹⁶

¹⁶ Courts have likewise held that FOIA generally does not permit an agency to withhold information on the grounds that it promised confidentiality or the submitting party expects it. *See New York Public Interest Research Group v. EPA*, 249 F. Supp. 2d 327, 336 (S.D.N.Y. 2003); *see also, e.g., Center for Public Integrity v. Dep’t of Energy*, 191 F. Supp. 2d 187, 195 (D.D.C. 2002) (“the test of

Indeed, there is substantial reason to look behind Appellant’s overheated claims of stigma. First, comments by the Board itself belie its argument of stigma:

- “‘There is no reason to believe there would be stigma associated with the use of this facility,’ a Fed official told a media briefing.” Greg Ip and Joellen Perry, “Central Banks Launch Effort to Free Up Credit – Fed Extends \$40 Billion,” *The Wall Street Journal*, Dec. 13, 2007, at A1.
- “[Board] officials told major banks that discount window borrowing would be viewed as a sign of strength, not weakness.” Louis Uchitelle, “Fearing Slide in Economy, Fed Cuts Its Discount Rate,” *The New York Times*, August 18, 2007, at A1. *See also* Edmund L. Andrews, “Fed Seeks a Delicate Balance As Investors Clamor for Action,” *The New York Times*, August 22, 2007, at A1 (Board officials say “no stigma” associated with discount window lending).

Second, borrowers have freely divulged their borrowings from emergency lending facilities, and have suffered no untoward consequences. *See, e.g.*, Serene Ng and Susanne Craig, “Stepping Up to the Fed’s Window,” *The Wall Street Journal*, March 20, 2008, at C1 (Morgan Stanley discloses \$2 billion in discount window borrowing); Eric Dash, “Four Major Banks Tap Federal Reserve for Financing,” *The New York Times*, April 23, 2007, at C10 (country’s four biggest banks “each borrowed \$500 million from the Federal Reserve”).

Third, the structure of the Board’s lending programs mitigates any risk of stigma. The current lending facilities encourage *mass* participation in the

confidentiality is an objective one, and the parties’ expectations are not determinative”). Otherwise, agencies could effectively circumvent FOIA by unilaterally promising confidentiality. (*See also* Bloomberg Br. at 50-52.)

programs, and according to one analyst, “everybody wants access to government funding.” Robin Sidel & Jon Hilsenrath, “AmEx Gets Access to Bailout Funds,” *The Wall Street Journal*, Nov. 11, 2008, at C1 (reporting comments of Craig Maurer, an analyst at Calyon Securities). *See also id.* (““Given the continued volatility in the financial markets, we want to be best positioned to take advantage of the various programs the federal government has introduced or may introduce to support U.S. financial institutions,’ Kenneth Chenault, AmEx chairman and chief executive said in a statement Monday night.”) This widespread participation in the lending the programs further belies any claim of “stigma.”

As an economist at the London School of Economics has observed:

[E]mpirical support for the stigma hypothesis is sadly lacking, . . . [T]he true reasons for the unwillingness of the central banks to make public the identities of the banks using their liquidity or lending facilities have nothing to do with stigma. . . . [I]t is partly just the manifestation in this particular setting of a long-standing central bank obsession with secrecy and confidentiality.

Willem Buiter, “Stigma, Schmigma,” *Financial Times* Maverecon blog, Dec. 1, 2008.

2. After-the-fact “evidence” of harm advanced by the Clearing House is inapposite.

The Clearing House spends much of its Brief attempting to supplement the record with tales of past bank runs it says were caused by fears about a bank’s financial health, citing runs on failed or nearly-failed institutions such as

Countrywide Financial, Bear Stearns, and IndyMac (Cl. Hse. Br. at 19-20). No one is contesting that bank runs sometimes happen (such as when investors *lack* sufficient information about a bank's health, causing them to speculate). But the Clearing House does not articulate the reasons behind those runs, let alone establish that they were caused by the disclosure of *truthful* information about a bank's borrowing. The examples put forward shed no light on the question before the Court: whether a bank run is *likely* to result from the disclosure a bank has borrowed from federal credit facilities under current circumstances.¹⁷

Appellants' claim of stigma is built upon the premise that members of the public (including market analysts, investors, and the like) are too stupid to understand that borrowing from the Board's facilities does not mean that an institution is in trouble—urging essentially that the country's financial system needs to run on secrecy. If this were so, virtually all information about a bank's

¹⁷ The Clearing House advances two anecdotes involving discount window borrowing, but neither is instructive. First, it asserts that Citibank's borrowing at the discount window in the 1990s sparked runs at offices in Asia, but cites only a rumor that this might have occurred. (Cl. Hse. Br. at 11, citing A-76, ¶ 22.) Second, it cites a run on the U.K. bank Northern Rock "after the BBC reported that [it] had asked for and received emergency financial support from the Bank of England" (Cl. Hse. Br. at 18), but a 181-page report by the House of Commons analyzing the myriad reasons for the run concluded that the bank erred by "failing either to make an announcement earlier in the week or to put in place adequate plans for handling press and public interest in the support operation." House of Commons Treasury Committee Report, "The Run on the Rock," Jan. 26, 2008, at ¶ 148. (*See also* Bloomberg Br. at 42 n.15). The example suggests that misinformation and a lack of reliable information are the true causes of bank runs.

dealings should be kept secret, because anything that could lead to a question might cause investor panic. *See, e.g.*, Cl. Hse. Br. at 20-21 (suggesting that a run occurred because a Congressman “rais[ed] concerns about [IndyMac’s] solvency”); at 21 (suggesting that a run on Washington Mutual occurred because of “reports of the firm’s subprime exposure”). This approach to bank regulation defies common sense.

This paternalistic view is also discredited by the record evidence demonstrating that markets thrive on transparency. As Bloomberg establishes, “markets fail when there is a high level of uncertainty,” and a “better-informed market is a better-functioning market.” (Bloomberg Br. at 44-46.) Others have echoed this view. The CEO of Citigroup has written:

Markets cannot clear without transparency. We all know that and yet we’re seeing again the consequences of a lack of full transparency. . . . Transparency must also include public disclosures to investors about pertinent risk and financial information that give the market a chance to make informed judgments. Moreover, transparency means that systemically significant institutions . . . should meet robust information requirements . . .

Vikram Pandit, “Toward a Transparent Financial System,” *The Wall Street Journal*, June 27, 2008, at A11. *See also*, *The Wall Street Journal* (editorial), “Busting Bank of America,” Apr. 28, 2009, at A14 ([T]ransparency . . . is a vital

source of investor confidence”); A-129, ¶ 24 (“markets fail when there is a high level of uncertainty” and would benefit from “greater levels of disclosure”).

Appellants’ arguments based on public ignorance provide no substitute for “adequate documentation of the specific, credible, and likely reasons why disclosure ... would actually cause substantial competitive injury to [the bank].” *Lee*, 923 F. Supp. at 455.

C. The Board’s Theory of “Regulatory Effectiveness” Has Nothing To Do With Exemption 4’s Narrow Objective

The Board alternatively seeks to convert Exemption 4 from the protection of confidential business information in the hands of an agency to the protection of the agency itself under a “program effectiveness” theory. Under this theory Exemption 4 may be invoked to protect “a governmental interest in administrative efficiency and effectiveness.” (Bd. Br. at 31-39; Cl. Hse. Br. at 45-48.) Although the D.C. Circuit has accepted this theory in limited circumstances, this Court has declined to do so, and should not adopt the theory here. *See Nadler*, 92 F.3d at 96.

A court is obligated to construe FOIA exemptions narrowly. *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (FOIA’s disclosure obligation is to be construed “broadly,” and its exemptions “narrowly”); *LaRaza*, 411 F.3d at 355-56 (same). It thus makes little sense to expand an exemption that seeks to protect private citizens into an exemption that protects an agency. On its face, Exemption 4 covers only “trade secrets and commercial or financial

information obtained from a person” and its legislative history “firmly supports the inference that [Exemption 4] is intended for the benefit of persons who supply information.” *Nat’l Parks I*, 498 F.2d at 770. Neither Exemption 4 or any other FOIA exemption authorizes an agency to withhold information for “administrative efficiency and effectiveness,” and the nine statutory exemptions are “exclusive.” *FLRA v. U.S. Dep’t of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992).

This issue need not be decided here, however, because even if a “program effectiveness” exemption did exist, it would not apply to in this case. The theory has been applied to avoid discouraging private persons from submitting sensitive information to the government *voluntarily*; it does not apply where the information *must* be provided. *See, e.g., 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve*, 721 F.2d 1, 10 (1st Cir. 1983). Data that is submitted to the government in exchange for some benefit is not “voluntarily submitted.” As explained in *Freeman v. Bureau of Land Management*, 526 F. Supp. 2d 1178, 1187 (D. Or. 2007), information is not submitted voluntarily where the private person “did not provide [it] to the government for altruistic reasons, as a public spirited citizen, or even in the spirit of cooperation,” but rather so as to get some benefit in return. “Given the extraordinary benefits [the submitter] hopes to gain by virtue of his [submission], disclosure . . . is unlikely to deter [him], or

others similarly situated, from providing such data to the government in the future.” *Id.*

In this case, borrowers submit information on a loan application in exchange for the “extraordinary benefit” of a government loan. It would defy common sense to accept Appellants’ theory (Bd. Br. at 33-35) that borrowers would rather forgo the low-interest loans entirely (risking, for example, having to conduct “fire-sales” of their assets) than risk adverse publicity. *See, e.g., Buffalo Evening News, Inc. v. Small Business Administration*, 666 F. Supp. 467 (W.D.N.Y. 1987) (rejecting SBA’s argument that borrowers would forgo loans for fear of being thought of as “financially unstable”).

Simply put, the “program effectiveness” exception does not exist and, if it did, would not apply here.

CONCLUSION

For each and all the foregoing reasons, the decision of the district court narrowly construing the scope of FOIA Exemption 4 should be affirmed.

Dated: New York, NY
December 14, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6786 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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ADDENDUM

AMICI CURIAE

The *Press Amici* are as follows:

- a. **Advance Publications, Inc.:** Advance Publications, Inc., directly and through its subsidiaries, publishes over 20 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many internet sites and has interests in cable systems serving over 2.3 million subscribers.
- b. **The American Society of News Editors:** The American Society of News Editors is a nonprofit professional organization founded in 1922. With a nationwide and international membership of approximately 600 daily news editors, its mission includes assisting journalists in providing an unfettered and effective press in the service of the American people.
- c. **The Association of Alternative Newsweeklies:** The Association of Alternative Newsweeklies (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of 7 million and a reach of over 25 million readers.
- d. **Associated Press:** The Associated Press is a mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP

gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations and to thousands of other customers in all media formats across the United States and throughout the world.

e. **Dow Jones & Company, Inc.:** Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, *WSJ.com*, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

f. **Gannett Co., Inc.:** Gannett Co., Inc. is an international news and information company that publishes 84 daily newspapers in the United States, including *USA TODAY*, as well as nearly 850 non-daily publications. Gannett also owns 23 television stations and numerous websites that are integrated with its publishing and broadcasting operations.

g. **The Hearst Corporation:** Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco*

Chronicle and *Albany Times Union*; as well as interests in an additional 43 daily and 74 non-daily newspapers owned by MediaNews Group, which include the *Denver Post* and *Salt Lake Tribune*; nearly 200 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E, History and ESPN; as well as business publishing, including a minority joint venture interest in Fitch Ratings; Internet businesses, television production, newspaper features distribution and real estate.

h. The Magazine Publishers of America: The Magazine Publishers of America, Inc. (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 240 domestic publishing companies that produce more than 1,400 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

i. The National Conference of Editorial Writers: The National Conference of Editorial Writers is a professional association of editorial writers, editorial page editors, op/ed editors, columnists, bloggers, journalism professors

and others who are dedicated to improving the craft and upholding the standards of opinion journalism. The nonprofit organization was founded in 1947 and represents nearly 400 members in the United States and several other countries.

j. The National Newspaper Association: The National Newspaper Association is a not-for-profit trade association representing the owners, publishers and editors of America's community newspapers. The National Newspaper Association has represented community newspapers since 1885. Its members are weekly and small daily newspapers serving local communities throughout the United States.

k. The New York Times Company: The New York Times Company is the owner of *The New York Times*, *The Boston Globe*, *The International Herald Tribune*, 15 other newspapers, and more than 50 websites, including NYTimes.com, About.com, and Boston.com.

l. Reporters Committee for Freedom of the Press: The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors which works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment litigation since 1970.

m. Reuters America LLC: Reuters America LLC serves the financial markets and news media with real-time, high-impact, multimedia news and

information services and is part of Reuters, the world's largest international news agency. Through Reuters.com and affiliated websites around the world and via multiple platforms including online, mobile, video and outdoor electronic displays, Reuters provides trusted, unbiased, professional-grade business news, financial information, market data and national and international news directly to an audience of business professionals around the world. In addition, Reuters publishes a portfolio of market-leading titles and online services, providing authoritative and unbiased market intelligence to investment banking and private equity professionals.

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF SERVICE
BY OVERNIGHT FEDERAL
EXPRESS NEXT DAY AIR**

I, _____, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On December 14, 2009

deponent served the within: **Brief for Press Amici in Support of Plaintiff-Appellee**

Upon:

SEE ATTACHED SERVICE LIST

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York, and served electronically via email.

Sworn to before me on December 14, 2009

Maryna Sapyelkina
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
Commission Expires Nov. 13, 2011

Job # 226887

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