
Barbara W. Wall
Vice President
Associate General Counsel

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February 10, 2009

VIA FIRST-CLASS MAIL

Manager, Disclosure Services and Administrative Operations
Communications Division
Mail Stop 3-2
Office of the Comptroller of the Currency
Washington, DC 20219

Re: Freedom of Information Act request denial

To Whom It May Concern:

I represent USA TODAY, and I write to appeal your Jan. 16, 2009 partial denial of reporter Kathy Chu's Nov. 13, 2008 Freedom of Information Act request. USA TODAY appeals both the redaction of identifying information from written correspondence and the withholding of documents related to the retail sweep program.

Releasing the information is both appropriate and expedient, given President Obama's unmistakable instruction that government err on the side of openness. As you know, the President has directed that the FOIA "be administered with a clear presumption: In the face of doubt, openness prevails." Memorandum on the Freedom of Information Act, 74 Fed. Reg. 15, 4683 (Jan. 26, 2009). This instruction is unambiguous: "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." *Id.* Your partial denial was contrary to the spirit of open government described in the President's directive. You cited numerous FOIA exemptions as sufficient reason for withholding information, yet you failed to provide *any* analysis as to why these exemptions apply.

In redacting the banks' identifying information from the written correspondence and withholding unspecified documents, you cited three FOIA exemptions: 5 U.S.C. 552(b)(4), which pertains to trade secrets or commercial financial information, furnished in confidence, that relates to the business, personal, or financial affairs of any person; 5 U.S.C. 552(b)(5), which relates to an intra-agency or interagency memorandum or letter not routinely available by law to a private party in litigation; and 5 U.S.C. 552(b)(8), which relates to examination, operating, or condition reports prepared by agencies that regulate financial institutions. Your letter utterly fails to demonstrate how any of these three exemptions require the redaction of bank names.

The letters that your office provided, with the identifying information redacted, do not contain trade secrets or commercial financial information provided by a person that would be covered under 552(b)(4). The letters involve routine information about government regulation. They do

not contain financial information provided by the banks. *See Philadelphia Newspapers, Inc. v. Dep't of Health & Human Servs.*, 69 F. Supp. 2d 63, 67 (audit documents created by HHS not financial information "obtained from a person"); *Maydak v. Dep't of Justice.*, 254 F. Supp. 2d 23, 49 (D.D.C. 2003) (agency staff member's meeting notes do not fall within exemption because that exemption does not apply to information generated by government that is not "obtained from a person"). The documents requested by USA TODAY are related to government supervision and regulation, not confidential, commercial information. Your agency has failed to demonstrate how supervision of a government program in any way involves the sort of trade secrets covered by this exemption.

You also did not explain how 552(b)(5)'s exemption for inter-agency memorandums or inter-agency memorandums applies to this information. This correspondence is between the Comptroller's office and individual financial institutions. Nothing in the plain language of the statute indicates that this exemption applies to communications between an agency and an outside party. *See Federal Open Mkt. Comm v. Merrill*, 443 U.S. 340, 352 (1979) ("Exemption 5 was intended to allow an agency to withhold *intra-agency memoranda* which would not routinely be disclosed to a private party through the discovery process in litigation with the agency) (emphasis added, citation and internal quotation marks omitted).

Nor is redaction required by 552(b)(8). The narrow exemption applies only to 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." *See, e.g., Gregory v. FDIC*, 631 F.2d 896 (D.C. Cir. 1980) (FDIC bank examiner report covered by Exemption 8). The letters in this FOIA request do not involve routine bank examination, regulation, or inspections, for which this exemption is intended. They involve government retail sweep programs.

You have not provided a single reason as to why any of this very basic information should be redacted and withheld under the three FOIA exemptions. Because you are unable to do so, you should immediately provide the documents that you withheld and copies of the letters without redaction.

Further, even if your agency is unwilling to reconsider its position, I ask that you provide an index of those records deemed exempt. Your agency denied access to responsive records without providing so much as a general characterization of what those records are. I therefore request that you provide a written index of the documents that the Comptroller has deemed exempt from disclosure, as required under *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Such an index must "describe each document or portion thereof withheld." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

I look forward to your prompt reply.

Sincerely,

Barbara W. Wall

Cc: Kathy Chu
Jeff Kosseff