
Barbara W. Wall
Vice President
Associate General Counsel

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January 31, 2008

Freedom of Information Act Appeal

VIA FACSIMILE (202) 872-7565
AND U.S. MAIL

Freedom of Information Office
Board of Governors of the Federal Reserve System
20th and C St, NW
Washington, DC 20551

Dear Sir or Madam:

I am writing you on behalf of Paula Lavigne and The Des Moines Register to appeal the decision not to release records requested under the Freedom of Information Act.

In a January 7, 2008, letter, Ms. Lavigne requested a copy of a database containing records of average credit score by census tract that the Federal Reserve System obtained from one or more credit bureaus and has used in preparing public reports.

According to your response, dated January 17, 2008, the information is exempt from disclosure under exemption 4 of the Act, which protects information that is "privileged or confidential." Copies of the original request and the Department's response are enclosed.

The seminal case on Exception 4 remains *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), which constructs a two-part test for determining whether a record is exempt: information is confidential if disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information is obtained." *Id.* at 770. While the D.C. Circuit later modified the decision, most courts have continued to rely solely on *National Parks*. See, e.g., *Lahr v. NTSB*, 453 F.Supp.2d 1153, 1175-76 (C.D. Cal. 2006) ("The only test the Court may apply is that found in *National Parks*."); *N.Y. Pub. Interest Research Group v. EPA*, 249 F.Supp.2d 327, 335 (S.D.N.Y. 2003) ("no other circuit court has expressly adopted *Critical Mass*"); *Comdisco v. Gen. Serv. Admin.*, 864 F.Supp. 510, fn. 3 (E.D. Va. 1994) ("[I]t is doubtful the Fourth Circuit would be persuaded to embrace the *Critical Mass* standard.").

The first prong requires proof that the submitter would be less likely to provide the information to the government if disclosure was allowed. In the case at hand, we see no conceivable scenarios under which public disclosure of the requested records would jeopardize the agency's ability to obtain this information in the future merely because of a promise of confidentiality to the submitter – especially in light of the fact that the Federal Reserve already uses this information in public reports, *See, Dow Jones Co. v. FERC*, 219 F.R.D. 167, 178 (C.D. Cal 2003) (Promises of confidentiality are not dispositive of qualification for Exemption 4).

The second prong of substantial competitive harm is not met here either. This portion of the two-part test requires “persuasive evidence that disclosure . . . would place the submitter at a competitive disadvantage.” *Comdisco*, 864 F.Supp at 516. We understand the data in question is gathered from all the major credit bureaus; thus any release would affect all competitors equally, leaving none at a competitive disadvantage. Additionally, because the data is averaged across census tracts and consists of many variables, there is little chance of a competitor being able to reverse engineer any of the formula used to calculate the credit scores, one of the chief concerns raised about release of data. *Id.* at fn. 6; *Acumenics Research & Tech. v. U.S. Dep't of Justice*, 843 F.2d 800, 808 (4th. Cir. 1988).

As you know, if the *Des Moines Register* were to file a complaint challenging the denial the burden would be on the Federal Reserve System to justify its use of an exception to the FOIA; in this case, you would need to prove that the records requested are in fact confidential. 5 U.S.C. § 552(a)(4)(B). For the above reasons, the agency cannot meet the burden and the responsive records should be released.

I will be awaiting your reply within 20 business days, as required by statute. Thank you for your assistance.

Sincerely,

Barbara W. Wall

Enclosures

cc: Paula Lavigne
Carolyn Washburn

bcc: Mark Faris
Thomas Mittenzwei