



# WHERE DID THE TARP MONEY GO?: FREEDOM OF INFORMATION SUIT TO DISCLOSE RECIPIENTS ADVANCES

by  
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Bloomberg L.P. won its Freedom of Information Act suit against the Board of Governors of the Federal Reserve System in late August, but the “financial transparency” battle to learn the identities of companies that obtained emergency funds from the government is not over yet. The Fed appealed the ruling on September 30.

The case began when, in April and May of 2008, Bloomberg reporters Mark Pittman and Craig Torres asked the Federal Reserve Board (“the Board”) to disclose records under FOIA relating to the \$2 trillion in taxpayer-funded emergency lending programs. Bloomberg sought details on the amounts issued to individual companies, the terms and rates of the loans, the collateral posted and the names of loan recipients.

The Board denied the requests claiming that the records sought by Bloomberg did not constitute “records of the Board” because they were housed at the Federal Reserve Bank of New York (“FRBNY”) which, argued the Board, is not an agency and thus not subject to FOIA. The Board also contended that even if the records are considered agency records subject to FOIA, they should be withheld under Exemption 4, which protects trade secrets and confidential commercial information, and Exemption 5, which can prevent disclosure of inter- or intra-agency memoranda. The case hinged on whether the Board is required to search records held at the FRBNY when responding to a FOIA request and, if so, whether Exemptions 4 and 5 apply to the requested information.

*What constitutes an agency record?* Bloomberg filed its FOIA suit in November 2008, not only asking that the Board hand over the records in its possession it deemed exempt, but also seeking to compel the Board to search additional records housed at the FRBNY. The Board had initially searched only its own internal records.

A brief background is important to understanding the dispute over whether records located at the FRBNY are subject to a FOIA request directed at the Board. The Federal Reserve System serves as the Central Bank of the United States, and is comprised of the Federal Reserve Board — a federal agency located in Washington, D.C — and 12 regional Federal Reserve Banks. Congress has oversight over the entire system.

The Federal Reserve Banks, however, consider themselves private corporations with private funding. They possess some powers distinct from those of the Board, and they do not publish any FOIA regulations. But the Federal Reserve Bank’s “discount window lending program,” which is the subject of Bloomberg’s FOIA request, is regulated by the Board.

Chief Judge Loretta Preska of the Southern District of New York agreed that certain records maintained by the FRBNY constitute agency records belonging to the Board, and that those records must be searched in order to comply with Bloomberg’s FOIA request.

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In her August 24 ruling in favor of Bloomberg, Judge Preska held that the Board had conducted an inadequate search because it had not searched any records stored at the FRBNY. Judge Preska noted that if a record is kept in the Board's official file at any Federal Reserve Bank, and the Secretary of the Board is the official custodian of that record, then it qualifies as a Board "agency record," regardless of the subject matter.

**Exemption 4: Does negative = confidential?** Even if the records housed at the FRBNY constitute agency records, the Board argued, it can refuse to hand them over to Bloomberg under Exemption 4 to FOIA. Exemption 4 protects trade secrets and commercial or financial information from disclosure, so long as the material is privileged or confidential.

The test for whether information is "confidential" turns on whether disclosure would cause substantial harm to the borrowers' competitive position. The Board maintained that disclosure of the information would indeed cause substantial competitive harm to the borrowers by triggering a public stigmatization of those institutions, a plummet in stock prices, a loss of confidence by market analysts, and ultimately runs on the banks and collapse of some of the nation's leading financial institutions.

But Judge Preska said the Board failed to meet its burden of establishing imminent competitive harm, and that negative information isn't necessarily confidential. The Board's arguments dealt mainly with how borrowers' customers might view them in a "weakened condition," but said nothing about how the borrowers' competitors would affirmatively use the information against them. "[T]he risk of looking weak to competitors and shareholders is an inherent risk of market participation; information tending to increase that risk does not make the information privileged or confidential under Exemption 4," she said.

**Exemption 5: Are they or aren't they?** In direct conflict with its position that the FRBNY is not an agency for FOIA purposes, the Board made a befuddling argument with respect to Exemption 5, contending that the records are inter-agency memoranda protected from disclosure. Exemption 5 only protects those documents that are normally privileged within the context of civil discovery. The judge held that because the records would not be available to anyone other than an agency in litigation with the agency, Exemption 5 did not apply.

**What's next?** Judge Preska ordered the Board to release the withheld documents, and to search the "records of the Board" located at the FRBNY. On August 28, however, she stayed her ruling pending the Board's appeal, which was filed September 30 with the U.S. Court of Appeals for the Second Circuit in New York. On September 18, Judge Preska granted the motion of the Clearing House Association, L.L.C. to intervene in the Bloomberg case, despite Bloomberg's objection. The Clearing House, the nation's oldest bank association, represents the interests of financial institutions including Bank of America Corp., Citigroup Inc., JPMorgan Chase Inc., and Wells Fargo & Co. Clearing House joined the suit as an appellant alongside the Board, claiming its members relied on the promise of confidentiality when participating in the emergency lending programs.

Solicitor General Elena Kagan authorized the appeal on behalf of the Obama administration, a result Bloomberg prepared for. Matthew Winkler, editor-in-chief of Bloomberg News, said "journalistic skepticism" told him that failure to appeal on the part of the Board "might be wishful thinking. Our reaction was 'on to the next' when we saw the results. Let's go forward unafraid."

This push for secrecy from the Federal Reserve System contrasts sharply with President Obama's campaign promises for increased government transparency. "It's disappointing," said Winkler. "If the issue is transparency, then we have difficulty understanding what motivates anyone seeking transparency, advocating transparency, [to] descending secrecy and opacity. To us, at least, that's the issue," he said. "Americans have the right to know how they became involuntary investors in this unprecedented bailout."

As freedom of information advocates await the final word on the Bloomberg case, they are also keeping an eye on financial transparency suits by Fox News and *The New York Times*. A New York federal judge ruled against Fox News in July, coming down exactly opposite Judge Preska on the issue of whether the Board is required to search the FRBNY for agency records requested under FOIA. Fox News appealed that decision in September, placing it neck-in-neck with Bloomberg in taking the financial transparency issue to the Second Circuit. The *New York Times* case is still pending in the Southern District of New York before Judge Naomi Buchwald.