



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

ADDRESS OFFICIAL CORRESPONDENCE
TO THE BOARD

June 2, 2021

Mr. Austin Evers
American Oversight
1030 15th Street, NW
Suite B255
Washington, DC 20005

Re: *Appeal of Freedom of Information Act Request No. F-2020-00129*

Dear Mr. Evers:

This is in response to your email message dated and received by the Board's Information Disclosure Section ("IDS") on December 17, 2020, in which you appeal, pursuant to 12 C.F.R. § 261.14(a), the determination of the Assistant Secretary of the Board ("Assistant Secretary") to deny your request for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

Background

By facsimile dated March 4, 2020, and received by IDS on March 5, you sought the following information from January 28, 2020, through the date of the search:¹

The outbreak of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, has been declared a public health emergency at both the national and international levels. Since late 2019, the virus has spread to dozens of countries, sickened tens of thousands of people, and resulted in thousands of deaths. This is a rapidly evolving situation that is demanding coordinated attention and action across the federal government. Yet the Trump administration has so far failed to ensure timely availability of testing kits for healthcare providers, prevented health experts from speaking about the growing crisis, and removed information on the spread of the virus from public

¹ Please be advised that the date staff initiated their search, March 10, 2020, was used as the cut-off date for your request.

health resources. American Oversight seeks records with the potential to shed light on this matter. [Specifically, you sought:]

All daily briefings or situation reports (or other similar updates designed to keep leadership apprised of breaking events) prepared for, or otherwise provided to, the leadership of your agency [Chairman Jerome Powell and Vice Chairman Richard H. Clarida] that contain information regarding the ongoing coronavirus outbreak.

By letter dated May 28, 2020, the Deputy Secretary of the Board (“Deputy Secretary”) informed you that staff had searched Board records and consulted with knowledgeable staff but had not located any documents responsive to your request. The Deputy Secretary advised that, because your request stated that you are interested in receiving records with the potential to shed light on whether the Trump administration “failed to ensure [the] timely availability of testing kits . . . , prevented health experts from speaking about the growing crisis, and removed information on the spread of the virus from public health resources,” only daily briefings or situation reports intended to convey updates on health issues related to the spread of the coronavirus outbreak were considered to be responsive to the request.

By email message dated and received by IDS on June 19, 2020, you appealed the Deputy Secretary’s determination that no responsive records existed and questioned the adequacy of the search for such documents. You advised that the Board “[imposed] a subject matter limitation that American Oversight had not included in its request language” by “[limiting] its search to records providing ‘updates on health issues related to the spread of the coronavirus outbreak.’” You further advised that the Board “has not shown that it has conducted an adequate search.”

By letter dated September 21, 2020, the Assistant Secretary informed you that, as you had clarified the subject matter of your request, your appeal was being treated as a request for reconsideration of your original FOIA request. *See* 12 C.F.R. § 261.14(c). Accordingly, the Assistant Secretary advised you that Board staff conducted a search of Board records and consulted with knowledgeable staff about your request. Based on information provided in your June 19 letter, the Assistant Secretary informed you that staff searched for any briefings, reports, or similar updates prepared for Chair Powell and Vice Chair Clarida that contain information regarding the coronavirus outbreak and that staff located documents responsive to your request. However, the Assistant Secretary advised that the responsive documents consisted of internal communications and memoranda (opinions, analyses, and recommendations of Board staff), as well as confidential supervisory information related to the Board’s supervision and examination of regulated financial institutions. The Assistant Secretary informed you that this information was subject to withholding and was withheld pursuant to exemptions 5 and 8

of the FOIA, 5 U.S.C. §§ 552(b)(5) and (b)(8), respectively. The Assistant Secretary also determined that the information should be withheld because it was reasonably foreseeable that disclosure would harm an interest protected by an exemption described in subsection (b) of the FOIA, 5 U.S.C. § 552(b). Finally, the Assistant Secretary advised that the responsive documents were reviewed under the requirements of subsection (b), but no reasonably segregable nonexempt information was found. Accordingly, approximately 135 pages of information were withheld from you in full.²

By email message dated and received by IDS on December 17, 2020, you appealed the Assistant Secretary’s determination. First, you argued that “[t]he Federal Reserve cannot generically invoke Exemptions 5 and 8 to withhold information, but instead must explain why each withholding has specifically occurred.” Second, you stated, “[t]he Federal Reserve must explain how releasing the withheld information would cause foreseeable harm.” Third, you asserted, “responsive records are likely to contain significant quantities of ‘purely factual’ information, to which the deliberative process privilege does not apply. . . [and] [i]t is difficult to believe that all of the factual material provided to Federal Reserve leadership regarding the coronavirus outbreak derived from or related to bank examinations.” Fourth, you stated “[t]he Federal Reserve has failed to disclose reasonably segregable information or explain why it cannot do so.”

Upon a de novo review, I find that three (3) pages of information previously withheld under exemption 5 may be released to you. However, for the reasons discussed below, I affirm the Assistant Secretary’s determination regarding the remaining 133 pages of information withheld pursuant to exemptions 5 and 8. I also find that the determination to withhold these documents under exemptions 5 and 8 was appropriately explained to you; the determination that it was reasonably foreseeable that disclosure of these documents would harm an interest protected by an exemption described in subsection (b) of the FOIA, 5 U.S.C. § 552(b) was correct; and the determination that no reasonably segregable nonexempt information exists in these documents was also correct.

² The Assistant Secretary’s initial determination letter noted that approximately 135 pages of information were withheld from you in full. Upon review, I have determined that 136 pages of information responsive to this request were withheld from you in full under the FOIA.

The Exemption Determinations

This section is responsive to parts one and three of your appeal. Information in the possession of an agency is exempt from disclosure if it falls within one or more of the enumerated FOIA exemptions.³

Exemption 5

Exemption 5 of the 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.”⁴ This exemption includes documents that embody the “deliberative process” of the agency before reaching a decision, and maintaining the confidentiality of these documents encourages honest and frank communication within the agency.⁵ Thus, exemption 5 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.”⁶ “[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 policy-making process.’”⁷

Upon review, I find that three (3) pages of emails related to coronavirus cases outside of China may be released to you with the exception of an email address, which will continue to be withheld pursuant to exemption 6, 5 U.S.C. § 552(b)(6).⁸ The remaining information being withheld pursuant to exemption 5 consists of internal communications reflecting staff analyses, opinions, and recommendations related to the coronavirus outbreak. Specifically, this information is comprised of internal memoranda, email updates, briefing notes, and meeting materials on the coronavirus outbreak that were produced by Board staff for consideration by and to inform policy decisions of Chair Powell and Vice Chair Clarida. I have determined that this information is predecisional and deliberative and that disclosure would have a chilling effect on internal agency discussions. Thus, the information falls within the deliberative-process privilege

³ 5 U.S.C. §§ 552(b)(1)-(9).

⁴ 5 U.S.C. § 552(b)(5).

⁵ See, e.g., *Nat’l Wildlife Fed’n v. U. S. Forest Serv.*, 861 F.2d 1114, 1117-1120 (9th Cir. 1988).

⁶ *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

⁷ *Jowett, Inc. v. Dep’t of Navy*, 729 F. Supp. 871, 877 (D.D.C. 1989) (citing *Ryan v. Dep’t of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980)).

⁸ Further discussion of the three (3) pages being released to you can be found in the segregability section below.

protected by exemption 5. Accordingly, for these reasons, I affirm the Assistant Secretary's decision to withhold this information.

Exemption 8

Exemption 8 of the FOIA 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.”⁹ Exemption 8 serves two purposes: “(1) to ensure the security of financial institutions by eliminating the risk that disclosure of examination, operation and condition reports containing frank evaluations of the investigated banks ... might undermine public confidence ...; and (2) to safeguard the relationship between the banks and their supervising agencies”¹⁰

The courts have held that the scope of exemption 8 is “particularly broad”¹¹ and that “the ‘related to’ language [of exemption 8] casts a wide net of non-disclosure over any documents that are logically connected to an ‘examination, operating or condition report.’”¹² Moreover, the United States District Court for the District of Columbia has noted the absence of any controlling case law to support a “distinction between factual versus analytical or deliberative material under [exemption 8].”¹³

The information being withheld under exemption 8 consists of confidential supervisory information that was derived from the Federal Reserve's ongoing supervision of its financial institutions. Specifically, this information consists of a supervisory update provided to Chair Powell and Vice Chair Clarida concerning how the Federal Reserve's supervised institutions were being affected by, and responding to, the coronavirus outbreak. Accordingly, I find that this information falls squarely within the broad scope of exemption 8. Public release of such information could impair the free flow of information between the Federal Reserve System and the institutions it supervises, which is critical to the effective operation of the supervisory process. Accordingly, I affirm the

⁹ 5 U.S.C. § 552(b)(8).

¹⁰ *McKinley v. FDIC*, 744 F. Supp. 2d 128, 142-43 (D.D.C. 2010), *aff'd on other grounds sub nom.*; *McKinley v. Bd. of Governors*, 647 F.3d 311 (D.C. Cir. 2011) (citing *Public Citizen v. Farm Credit Admin.*, 938 F.2d 290, 291 (D.C. Cir. 1991)); *see also Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978); and *Nat'l Cmty. Reinv. Coal. v. Nat'l Credit Union Admin.*, 290 F. Supp. 2d 124, 135-36 (D.D.C. 2003).

¹¹ *McKinley v. FDIC*, 744 F. Supp. 2d at 143 (quoting *Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d at 534).

¹² *Pub. Inv'rs Arbitration Bar Ass'n v. SEC*, 930 F. Supp. 2d 55, 62 (D.D.C. 2013) (quoting exemption 8).

¹³ *Bloomberg v. SEC*, 357 F. Supp. 2d 156, 170 (D.D.C. 2004).

Assistant Secretary’s decision to withhold this information in full, pursuant to exemption 8.

Explanation of Exemption Determinations

When an administrative agency makes a determination to withhold responsive records under the FOIA, it is required to notify the requester of its decision to withhold the records, as well as provide the underlying reasons for the determination.¹⁴ Courts have consistently held, however, that “[a]gencies need not provide a Vaughn Index until ordered by a court after the plaintiff has exhausted the administrative process.”¹⁵ While you assert that the “[t]he Federal Reserve cannot generically invoke the deliberative process privilege under Exemption 5 in order to withhold information, but instead must explain why each withholding has specifically occurred[,]” I find that the Assistant Secretary’s September 21, 2020, letter adequately explained the Board’s determination and the reasons for withholding the information.

Foreseeable Harm

This section specifically addresses part two of your appeal. Under the FOIA, an agency may withhold responsive records if they fall under a FOIA exemption and the agency reasonably foresees that disclosure would harm an interest protected by the exemption.¹⁶ In reviewing the information being withheld under exemption 5, I find that it is reasonably foreseeable that the release of this information would harm an interest protected by this exemption, namely the interest of promoting the full and frank exchange of ideas in the course of the agency’s deliberative process. Further, for the information being withheld under exemption 8, I find that it is reasonably foreseeable that the release of this information could, as noted above, impair the free flow of information between the Federal Reserve System and the institutions it supervises. Accordingly, I affirm the Assistant Secretary’s decision that it was reasonably foreseeable that disclosure of this information would harm an interest protected by an exemption described in subsection (b) of the FOIA, 5 U.S.C. § 552(b).

¹⁴ 5 U.S.C. § 552(a)(6)(A)(i).

¹⁵ *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995); *see also Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1189 (N.D. Cal. 2006) (granting summary judgment because, *inter alia*, “[i]nitial agency responses to FOIA requests are not required to contain a Vaughn index”); *Schaake v. IRS*, No. 91-958, 1991 U.S. Dist. LEXIS 9418, at *9-10 (S.D. Ill. June 3, 1991) (ruling that court “lacks jurisdiction” to require agency to provide Vaughn Index at either initial request or administrative appeal stages); *SafeCard Servs. v. SEC*, No. 84-3073, 1986 U.S. Dist. LEXIS 26467, at *5 (D.D.C. Apr. 21, 1986) (noting that requester has no right to Vaughn Index during administrative process), *aff’d* on other grounds, 926 F.2d 1197 (D.C. Cir. 1991).

¹⁶ 5 U.S.C. § 552(a)(8)(A)(i)(I).

Segregability

This section specifically addresses part four of your appeal. In connection with your appeal, I have also considered the Assistant Secretary's determination that no reasonably segregable nonexempt information exists. The FOIA requires the Board to disclose "[a]ny reasonably segregable portion of a record" after appropriate application of the FOIA's exemptions.¹⁷ However, "even 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 policy-making process.'"¹⁸ Further, the United States District Court for the District of Columbia has noted the absence of any controlling case law to support a "distinction between factual versus analytical or deliberative material under [exemption 8]."¹⁹

Upon review, I find that three (3) pages of information previously withheld under exemption 5 can be released to you, as the information is of the type that its release would not reveal the deliberative processes of the Board. For the remaining information being withheld under exemption 5, I find that the disclosure of this information would reveal pre-decisional staff analysis, including the deliberative process involved in selecting information to present to the Board members for their consideration, and therefore, it is exempt from disclosure. Further, I find that the protection afforded by exemption 8 extends to factual, as well as analytical or deliberative material, and therefore, the information subject to withholding under exemption 8 is also exempt from release. Accordingly, I affirm the Assistant Secretary's determination that there was no reasonably segregable nonexempt information in the remaining 133 pages of withheld information.

Conclusion

Based on a de novo review of the Assistant Secretary's decision, and for the reasons stated above, I make the following findings:

- (1) three (3) pages of information previously withheld under exemption 5 may be released to you, with the exception of an email address, which will continue to be withheld under exemption 6;
- (2) the Assistant Secretary's decision to withhold the remaining documents responsive to your request pursuant to exemptions 5 and 8 was correct, and this determination was appropriately explained to you;

¹⁷ 5 U.S.C. § 552(b).

¹⁸ *Jowett* at 877, (citing *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980)).

¹⁹ *Bloomberg* at 170.

(3) the Assistant Secretary's decision that it was reasonably foreseeable that the release of these documents would harm an interest protected by an exemption described in subsection (b) of the FOIA, 5 U.S.C. § 552(b), was correct; and

(4) the Assistant Secretary's decision that there was no reasonably segregable nonexempt information in these documents was also correct.

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).²⁰

Sincerely,



Ann E. Misback
Secretary of the Board

²⁰ Please note that you may also contact the Board's FOIA Public Liaison, Ms. Candace Ambrose, at 202-452-3684, for further assistance. Additionally, you may contact the Office of Government Information Services ("OGIS") at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 202-741-5770 or toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Coronavirus cases outside of China (update: 03/09/2020)

From: Irene Ezran <irene.a.ezran@frb.gov>
To: Richard Clarida (b)(6)
Date: Mon, 09 Mar 2020 16:47:45 -0400
Attachments: 2020-03-09 Total Coronavirus Cases Outside of China.xlsx (17.86 kB)

INTERNAL FR/OFFICIAL USE // FRSONLY

Hi Rich,
I hope you're doing well.

Attached is an update on the number of [Coronavirus cases outside of China](#). I will continue to send updates on a weekly basis (if this is helpful). Please let me know if you need anything else.

Best regards,
Irene

From: Irene Ezran
Sent: Wednesday, March 4, 2020 1:49 PM
To: Richard Clarida (b)(6)
Subject: RE: can you download this data in excel (and update weekly)

INTERNAL FR/OFFICIAL USE // FRSONLY

Hi Rich,
Attached is the data in the chart that you sent me below. I will send you weekly email updates with the latest data, but of course please feel free to reach out if you also need this data on any particular day.

Best regards,
Irene

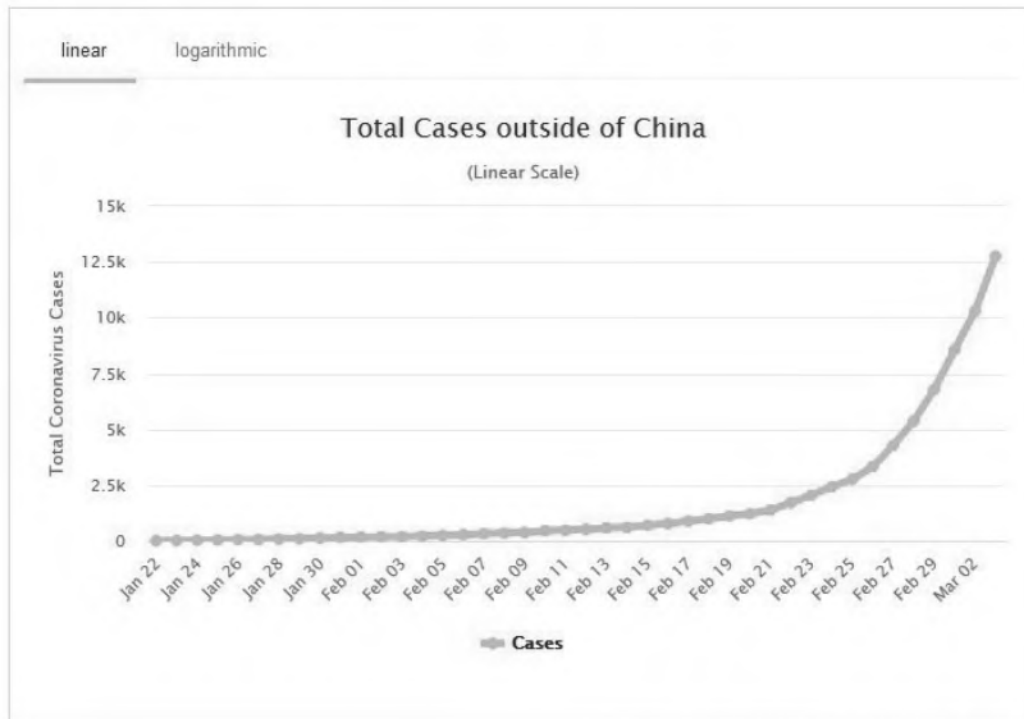
From: Richard Clarida (b)(6)
Sent: Wednesday, March 4, 2020 11:00 AM
To: Irene Ezran <irene.a.ezran@frb.gov>
Subject: can you download this data in excel (and update weekly)

PERSONAL/NONWORK // EXTERNAL

Total Cases excluding mainland China

See also:

- [Distribution of cases outside of China](#)



Source: Worldometer - www.worldometers.info

Date **Total Coronavirus Cases Outside of China**

1/22/2020	9
1/23/2020	15
1/24/2020	30
1/25/2020	40
1/26/2020	56
1/27/2020	66
1/28/2020	84
1/29/2020	102
1/30/2020	131
1/31/2020	159
2/1/2020	173
2/2/2020	186
2/3/2020	190
2/4/2020	221
2/5/2020	248
2/6/2020	278
2/7/2020	330
2/8/2020	354
2/9/2020	382
2/10/2020	461
2/11/2020	481
2/12/2020	526
2/13/2020	587
2/14/2020	608
2/15/2020	697
2/16/2020	781
2/17/2020	896
2/18/2020	999
2/19/2020	1,124
2/20/2020	1,212
2/21/2020	1,385
2/22/2020	1,715
2/23/2020	2,055
2/24/2020	2,429
2/25/2020	2,764
2/26/2020	3,332
2/27/2020	4,288
2/28/2020	5,373
2/29/2020	6,789
3/1/2020	8,564
3/2/2020	10,298
3/3/2020	12,746
3/4/2020	14,905
3/5/2020	17,873
3/6/2020	21,399
3/7/2020	25,404
3/8/2020	29,256

