IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD ANTI-TRUST ACTION COMMITTEE, INC.,	)	
Plaintiff,	)	
	)	Civil Action No. 09-2436 (ESH)
v.	)	
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. section 552, as amended. Plaintiff, Gold Anti-Trust Action Committee, Inc. ("GATA"), a nonprofit, tax-exempt organization, seeks injunctive relief against defendant, the Board of Governors of the Federal Reserve System (hereinafter "FRB"), for FRB's refusal to identify and disclose certain records concerning "gold swaps" from 1990 to 2009, requested by GATA under FOIA.

FRB claims that a number of records were exempt from disclosure under 5 U.S.C. sections 552(b)(4) and (b)(5), and has filed a motion for summary judgment, accompanied by a memorandum of points and authorities and three declarations, together with a statement of material facts as to which it contends there is no genuine issue.

GATA submits: (i) this memorandum; (ii) the declarations of Chris Powell, Adrian Douglas, and James Turk; (iii) Plaintiff's Statement of Material Facts as to Which a Genuine Issue Exists; and (iv) the Rule 56(f) F.R.Civ.P. declaration of its attorney of record, William J. Olson, in opposition to the FRB's pending motion for summary judgment.

PARTIES AND JURISDICTION

GATA is a nonprofit educational organization incorporated under the laws of Delaware, and is tax-exempt under section 501(c)(3) of the Internal Revenue Code of 1986 and is a public charity. GATA is engaged in a variety of research and public education activities relative to economic and monetary policy, with a particular focus on the role, price, and supply of gold. GATA's activities include, *inter alia,* attempting to monitor the policies and actions of the United States with respect to gold, and educating the public concerning governmental and non-governmental efforts to affect and/or manipulate supply and demand for gold and the price of gold. Complaint ¶ 3.

FRB is an independent board within the Executive Branch of the United States Government. 12 U.S.C. § 241. *See also* Complaint ¶ 4. An agency within the meaning of 5 U.S.C. section 552(f) — established by statute and charged with responsibility for, *inter alia*, conducting the nation's monetary policy by influencing the monetary and credit conditions in the economy, supervising and regulating banking institutions, and providing financial services to depository institutions, the U.S. government, and foreign institutions — FRB has possession of and control over the records, memoranda, reports, documents, publications, and similar papers and files sought by GATA in this action, and is responsible for fulfilling GATA's FOIA request at issue herein. Complaint ¶ 4.

This Court has both subject matter jurisdiction over this action and personal jurisdiction over defendant pursuant to 5 U.S.C. section 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. section 1331. *See* Complaint ¶ 2.

STATEMENT OF FACTS

1. GATA's Initial 2007 FOIA Request.

a. GATA's FOIA Request. By letter dated December 6, 2007, GATA submitted a FOIA request to FRB seeking copies of all records in FRB's possession or control relating to, explaining, denying, or otherwise mentioning "gold swaps" involving the United States of America or any agent thereof, during the time period January 1, 1990 to December 6, 2007, the date of the request.

b. FRB's Response. FRB responded by letter dated April 9, 2008, producing certain records and withholding others.[1] In addition to certain redactions from records that were produced, 137 pages of responsive records were said to be withheld in full. FRB claimed that the withheld records were exempt under 5 U.S.C. sections 552(b)(4), (5), and (6). There was no identification of those documents, however, either in the denial letter of April 9, 2008, or any other document transmitted to GATA, nor was there any reasonable explanation as to the factual basis for any claim of exemption on which such documents were withheld. Complaint ¶ 8.

c. GATA's Administrative Appeal. By letter dated May 5, 2008, GATA appealed the FRB's partial denial of that 2007 FOIA request, challenging the legality of the denial and also submitting that, even if any of the withheld documents arguably were covered by an exemption, the importance of the information being sought with respect to the confidence of the American people in the integrity of the nation's gold stock justified a discretionary release of such documents by the FRB "in the public interest," as authorized by the FRB regulations set forth at 12 C.F.R. section 261.14(c). Alternatively, GATA requested that the FRB provide an index — of the type specified in Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (hereinafter "Vaughn Index") — of any documents completely or partially withheld, identifying the nature and date of each document, the FOIA exemption claimed, and the basis for each such claim.

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[1] The records produced in 2007 were largely correspondence between the FRB and GATA or members of Congress about gold swaps, historic minutes of the Federal Open Market Committee, articles about gold culled from the Internet which are not government documents, and like documents. *See* Olson Decl. ¶ 9.

d. FRB'S Denial of GATA Appeal. By letter dated June 3, 2008, FRB denied GATA's appeal, including GATA's requests for a discretionary release of the documents and a Vaughn Index. Complaint ¶¶ 9-10.

2. GATA's Second (2009) FOIA Request.

a. GATA's FOIA Request. GATA's second FOIA request is set forth in its letter to FRB dated April 14, 2009, seeking the disclosure in a more focused and detailed manner of:

> copies of all records in the possession or control of the Federal Reserve Board relating to, explaining, denying or otherwise mentioning:
> • "**gold swap**,"
> • "**gold swaps**,"
> • "**gold swapped**,"
> • "**proposed gold swap**,"
> • "**proposed gold swaps**," or
> • "**proposed gold swapped**."
> during the time period **January 1, 1990, to the date of this request** either
> (a) **involving** the United States of America, or any department, agency or agent thereof, or
> (b) **not involving** the United States of America. [Complaint ¶ 11 (emphasis original).]

Without limiting its FOIA request, but in an effort to particularize certain categories of records covered by its request, GATA requested copies of 18 specific categories of records. *Id*. GATA's 2009 FOIA request was substantially identical to that submitted by GATA to the FRB in 2007, seeking records relative to "gold swaps" during the stated periods of time, although expanding the scope to include (i) "non-U.S." gold swaps, and (ii) records up to the April 14, 2009 date of the request.

The 2009 request sought all records previously requested (but not produced) in 2007 and expressed its belief that the FRB, in processing GATA's 2007 FOIA request, had not used considerations similar to the guidelines and "presumption of disclosure" principle set forth in

President Obama's January 2009 directive to the heads of the federal executive agencies,[2] GATA requested (i) that the FRB act in accordance with those guidelines in processing GATA's 2009 FOIA request, urging FRB to consider — even if a FOIA exemption technically (and/or arguably) might be assertable with respect to one or more responsive documents — discretionary release of any such documents in accordance with section 261.14(c) of the FRB regulations, since such release would be in the public interest, and (ii) if the records demanded by GATA's FOIA request were not disclosed in full, to provide a Vaughn Index of any documents completely or partially withheld. GATA also requested a fee waiver.

b. FRB's Response. By letter dated August 5, 2009 (Complaint, Exhibit B), FRB responded to GATA's FOIA request, identifying only two responsive records — in addition to the 137[3] pages that had also been withheld by FRB previously in responding to GATA's 2007 FOIA request. The FRB disclosed the two new records, comprised of 173 pages, some of which appeared to GATA to have been redacted — although FRB did not alert GATA that there had

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[2] In his January 21, 2009 Memorandum for the Heads of Executive Departments and Agencies, President Barack Obama issued the following directive:

> The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.... [i]n responding to requests under the FOIA, executive branch agencies ... should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. 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. [74 *Fed. Reg.* 4683-84 (Jan. 26, 2009); http://www.whitehouse.gov/the_press_office/ FreedomofInformationAct/.]

See Complaint ¶ 12. *See also* Attorney General Eric Holder's Memorandum for Heads of Executive Departments and Agencies (March 19, 2009), http://www.usdoj.gov/ag/foia-memo-march2009.pdf; Complaint ¶ 13.

[3] FRB now asserts that the number of pages actually withheld was 144, not 137. *See* Thro Decl. ¶ 9, p. 5.

been any redaction — but FRB refused to disclose any of the 137 (now 144) pages that had been withheld previously in response to GATA's 2007 FOIA request. FRB now claimed that the withheld records were exempt under FOIA exemptions 4 and 5 — 5 U.S.C. sections 552(b)(4) and (b)(5), respectively — but there was no identification of those records, nor was there any reasonable explanation as to the factual basis for any claim of exemption on which such records were withheld. FRB also refused GATA's request for discretionary release of the withheld records, as well as GATA's request for a Vaughn Index. FRB did not respond to GATA's request for a fee waiver.[4] Complaint ¶ 17.

c. GATA's Administrative Appeal. By letter dated August 20, 2009 (Complaint, Exh. C), GATA timely appealed the partial denial of its FOIA request.

d. FRB's Denial of Appeal. GATA's appeal was denied by letter dated September 17, 2009 (Complaint, Exh. D), signed by Kevin M. Warsh, Vice Chairman of the Board of Governors of the Federal Reserve System.[5] That denial letter, *inter alia,* contains FRB's admission that among the documents requested by GATA relating to "gold swaps" being withheld from GATA were documents concerning "swap arrangements with foreign banks," and that these records were being withheld because such information is not of a type "customarily

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[4] By letters dated April 16 and May 12, 2009, FRB acknowledged receipt of GATA's FOIA request, did not respond to the substance of that request or to GATA's request for a fee waiver, and extended the time within which it would respond to that request to May 27, 2009, "in order to consult with another agency or with two or more components of the Board having a substantial interest in the determination of the Board." Complaint ¶ 16. FRB did not seek, or alert GATA to, any further extension of time, although the FRB response was not submitted on May 27, 2009, but rather on August 5, 2009.

[5] Portions of certain documents withheld by the FRB were released subsequent to the filing of this suit by GATA. *See* p. 8, *infra*.

disclosed to the public." Complaint ¶ 19 and Exh. C, p. 2. The FRB denial letter, confirming the FRB's withholding of documents under FOIA Exemptions 4 and 5, refused to address the apparent gaps in the "new" records that had been furnished by FRB, claiming that the records had been obtained from the Federal Open Market ("FOMC"), and that GATA would have to pursue the issue of "gaps" (*i.e.*, redactions) in furnished FOMC records with FOMC.[6] The denial letter also refused to reconsider FRB's position that documents in its possession, but originating with the Treasury Department, were not FRB's responsibility, and now claimed that there were no such documents.

3. Litigation in District Court.

a. GATA's Civil Action. Having exhausted the applicable administrative remedies, GATA filed this civil action in December 2009, requesting this Court to enter judgment in

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[6] GATA's follow-up letter to FRB dated September 30, 2009, seeking reconsideration of that decision, reminded FRB of the following:

> Our FOIA request to the FRB of April 14, 2009 included a request for all records in the possession or control of any FRB subsidiary organizational group or entity, such as a division, department, or committee. Indeed, our FOIA request expressly stated, at page 1 of the letter:
>
> > We are aware that the Federal Reserve System includes other entities such as the Board of Governors, the Federal Reserve Banks, and **the Federal Open Market Committee**. We understand it is possible that certain of the records herein requested could be maintained by one or more of those entities, and not by the Board of Governors of the Federal Reserve System**. We understand, however, that no separate FOIA request is required for those entities** because you will forward any such request to the appropriate entity for processing, and that we will be advised. **Please let us know if this is not correct**. [Emphasis added.]
>
> Despite this statement and request, at no time during the processing of our FOIA request were we advised that records of the **FOMC** were not producible by the FRB itself. Nor was the FRB's denial letter of August 5, 2009 premised in any way on such a position. [Comp., Exh. A, p. 1.]

FRB refused to reconsider its position as requested by GATA.

GATA's favor and order FRB to process the requested records expeditiously and, upon completion of such processing, to disclose the requested records in their entireties and make copies available to GATA as requested in its 2009 FOIA request.

b. FRB's Litigation-Related Release of Documents. Despite its earlier refusals to release the records sued for by GATA, FRB released portions of certain withheld records on June 11, 2010, after the initiation of this litigation, prior to the filing of defendant's motion for summary judgment. A few complete pages of documents were released, but most of the documents were heavily redacted, and that partial release did not satisfy GATA's request for responsive records.[7]

c. FRB's Motion for Summary Judgment. Defendant's only formal response to the Complaint in this Court — it has filed no Answer — is its **Motion for Summary Judgement**, filed on June 21, 2010. Defendant's Motion for Summary Judgment repeats FRB's position, in response to GATA's 2007[8] and 2009 FOIA requests, that the material retrieved by the FRB and withheld from disclosure is exempt from FOIA disclosure pursuant to 5 U.S.C. sections 552(b)(4) and (b)(5). In addition to a supporting **Memorandum of Points and Authorities**, defendant has offered in support of its motion a **Statement of Material Facts as to Which No Genuine Issue Exists**, as well as the **Declarations** of:

- **Alison M. Thro** ("Thro Decl."), an FRB attorney;
- **Timothy Fogarty** ("Fogarty Decl."), an employee of the Federal Reserve Bank of New York ; and

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[7] *See* attached Declaration of William J. Olson ¶ 9.

[8] FRB has apparently abandoned its claim that records were being withheld under **Exemption 6** ("personnel" records), as asserted in response to GATA's 2007 FOIA request.

- **Richard Dzina** ("Dzina Decl."), an employee of the Federal Reserve Bank of New York.

As indicated in its Statement of Material Facts as to Which a Genuine Issue Exists, GATA believes that certain material facts concerning the FRB search are in dispute, as are certain facts relative to the FRB's objections to disclosure, and that summary judgment in favor of defendant should not be granted.[9]

SUMMARY OF ARGUMENT

The FRB has not demonstrated that its search for records responsive to GATA's FOIA requests was adequate. GATA sought all records relative to "gold swaps" for a 20-year period — January 1990 through April 2009 — and the FRB has identified only a very few documents. The FRB has denied that it has more than a few documents even mentioning "gold swaps," which is the essential subject of GATA's FOIA request, for the period 1990 through 2009. And this is so despite the fact that evidence of government intervention in gold markets, including the use of gold swaps, is increasingly well known, as has been documented in the Declarations of Chris Powell, Adrian Douglas, and James Turk. There is serious concern about the adequacy of the FRB search for records responsive to the GATA's FOIA request, and defendant should be required **to conduct an adequate search**. Lastly, there are other FRB divisions and other federal reserve banks that were not asked for records. At a minimum, FRB should be required to explain in more detail how its search was conducted, why additional sources were not consulted, and why it is not in possession of additional records related to gold swaps.

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[9] Contemporaneously with the filing of this Memorandum, GATA filed a Motion for *In Camera* Review and Limited Discovery herein. *See* Olson Decl., ¶¶ 6-11.

Moreover, FRB has not demonstrated that the records admittedly withheld by FRB should not be disclosed, although GATA would relent with respect to certain draft documents if the final copies of those documents are produced. All of the documents withheld under **FOIA exemption 5** should be disclosed because defendant has failed to advance any convincing, non-conclusory reason to withhold them. Although they may appear as possible candidates for exemption as pre-decisional or deliberative, defendant has not made an adequate showing of their claimed pre-decisional or deliberative nature to qualify for exemption. Finally, the documents withheld under **FOIA exemption 4** should be disclosed because defendant has neither presented a convincing case that such documents are confidential nor advanced a convincing reason for withholding them under the other exemption standards.

ARGUMENT

I. NATURE AND STANDARD OF THIS COURT'S REVIEW

Summary judgment is appropriate in a contested FOIA case such as this, as in other litigation, only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). In determining whether a genuine issue of material fact exists, the Court must view all facts in the light most favorable to the non-moving party. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Summary judgment on the basis of agency affidavits in a FOIA case is appropriate only if the affidavits are specific, reasonably detailed and descriptive of the withheld information in a factual and non-conclusory manner, and if there is no contradictory evidence on the record or evidence of agency bad faith. *See, e.g.*, Summers v. Department of Justice, 140 F.3d 1077, 1084 (D.C. Cir. 1998).

When deciding a motion for summary judgment in a FOIA matter, the court reviews the agency's decision *de novo*. Summers v. Department of Justice, 140 F.3d at 1079. *See also* 5 U.S.C. § 552(a)(4)(B). To prevail, an agency must show "beyond material doubt ... that it has conducted a search reasonably calculated to uncover all relevant documents." Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Weisberg v. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Where there is significant doubt as to the sufficiency of the FOIA search, or the Vaughn Index is inadequate, summary judgment for the agency is not proper. Ethyl Corp. v. Environmental Protection Agency, 25 F.3d 1241 (D.C. Cir. 1994); Truitt v. Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990); King v. U.S. Department of Justice, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

II. FRB IGNORED THE PRESUMPTION IN FAVOR OF DISCLOSURE AND CERTAIN OTHER FOIA PRINCIPLES IN RESPONDING TO GATA'S FOIA REQUEST.

A. General FOIA Principles Favoring Disclosure. Under FOIA, every "agency" shall make "available to any person" for "public inspection and copying" all requested records that are not exempt from disclosure under one of FOIA's nine statutory exemptions. *See* 5 U.S.C. §§ 552(a)(3), (a)(4), (b)(1)-(9). FOIA was enacted "to establish a general philosophy of full agency disclosure." Environmental Protection Agency v. Mink, 410 U.S. 73, 80 n.6 (1973); Dep't of the

Air Force v. Rose, 425 U.S. 352, 361-62 (1976). Full disclosure is the official policy of the Executive Branch, as confirmed by President Obama's January 21, 2009 Memorandum for the Heads of Executive Departments and Agencies. *See* footnote 2, *supra*. Although FOIA exemptions exist, they are narrowly construed, *see* Vaughn v. Rosen, 484 F.2d at 823, and the agency has the burden of proving that its decision to withhold a record responsive to a FOIA request is justified. *See* 5 U.S.C. § 552(a)(4)(B). Even if a requested record contains exempt information, it must still release "any reasonably segregable portion" of that record. *See* 5 U.S.C. § 552(b). *See also* Oglesby v. U.S. Dept. of Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Finally, the agency's search for the requested records — although subject to no uniform, precise external standard — must be systematic and reasonable, and the agency's showing in this regard must be sufficient enough to allow the requester to challenge the procedures utilized. *See* Weisberg v. Dept. of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980).

B. Documents Requested by GATA Involve Important Public Issues. The records requested by GATA concern "gold swaps," a term defined in the Declaration of Chris Powell, ¶ 2 and James Turk, ¶¶ 2-4. "Gold swap" is a term of art used in the financial community and the financial press, worldwide, as evidenced by recent stories. *See* Declaration of James Turk, ¶¶ 6-11. Public discussion of "gold swaps" is explained in the Declaration of Chris Powell. *See* Powell Decl., ¶¶ 6-7, 10-14, 18. Gold swaps involve important matters of federal intervention in gold markets about which the public has a right to know. GATA believes that FRB's files must contain information about such transactions — proposed or accomplished — in the financial community during the period in question. However, FRB has furnished very few records relative to "gold swaps" in response to GATA's FOIA requests. Olson Decl. ¶ 9. Indeed, FRB now

contends that most of the records currently at issue in this litigation do not involve "gold swaps" at all. *See* Thro Decl., Exh. 8 (Vaughn Index). Of course, if they do not involve "gold swaps," it is unclear why they were identified at all.

C. FRB's Response to GATA's FOIA Requests Was Inadequate. FRB has failed to act in accordance with the spirit of disclosure that is the foundation of the FOIA (EPA v. Mink, 410 U.S. at 80), and with the presumption of disclosure that was at the heart of President Obama's 2009 call to the heads of his executive agencies. *See* fn 2, *supra.* Examples of this "non-disclosure" spirit are: (i) FRB's consistent refusal to provide GATA with any information concerning the withheld documents — a Vaughn-type Index would have been ideal, but any document descriptions would have helped — during the administrative consideration of GATA's 2007 and 2009 FOIA requests and until well into this litigation; (ii) FRB's apparent refusal to consider seriously, prior to litigation, the discretionary release of many of the documents that FRB refused to disclose; and (iii) disclosing relatively meaningless portions of certain documents, and that only after suit was filed.

III. FRB FAILED TO CONDUCT AN ADEQUATE SEARCH FOR THE RECORDS REQUESTED BY GATA.

Defendant has set forth the steps by which the search was undertaken (*see* Thro Decl. ¶¶ 10-18), and GATA has no specific information with which to contest those statements concerning the number of records actually recovered. While not seeking to attack the good faith or credibility of any FRB employee or representative, GATA submits that the FRB search for records responsive to GATA's FOIA requests was inadequate, with respect to the procedures

employed, the sources from which the FRB claims to have sought records, and certain records that inexplicably have not been located. *See generally* Powell, Douglas, and Turk Declarations.

Obviously, GATA has not had the opportunity to view the records withheld by defendant, and only recently — within this litigation — has GATA been allowed, by virtue of the Vaughn Index furnished by FRB, even to see a description of the various records withheld. At this stage of the litigation, 20 items, consisting of 131 pages of documents, have been withheld, in whole or in part. *See* Thro Decl., Exh. 8.[10] In addition, certain documents that FRB furnished in redacted form — but that FRB considers not its responsibility because they originated with the FOMC — have been withheld.[11]

Most of the withheld records are now said by FRB not to involve gold swaps and thus non-responsive or irrelevant to GATA's FOIA request. *See* Thro Decl., Exh. 8. GATA submits that this raises the question why the records were identified at all in response to GATA's FOIA request, adding to the evidence that FRB's search and response to GATA's FOIA requests were misdirected and inadequate. Based upon the available evidence thus far, including the documents submitted with defendant's motion for summary judgment, the FRB search appears to have been defective or incomplete in the ways described below.

A. The FRB Search Did Not Include All Required Sources. FRB has indicated the various sources from which responsive documents were sought, and states that it searched

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[10] The number of withheld documents was greater at the time GATA filed its complaint because in June, 2010, just prior to the filing of defendant's motion for summary judgement, FRB released various portions of additional records. *See* p. 8, *supra*.

[11] *See* Complaint ¶ 17; Thro Decl. ¶ 8. As discussed at pp. 19-20, *infra*, FRB argues — incorrectly, it is submitted — that it is not responsible for redactions from documents it furnished which originated with FOMC.

"every record system within the Board that was **reasonably likely to produce** responsive documents" (Thro Decl. ¶ 18, p. 10 (emphasis added)). Nevertheless, FRB has proved no clear explanation of its system of records. Thus, for example, there is no FRB showing concerning the record systems that were **not checked** for records responsive to GATA's FOIA request. Also, defendant should be required to conduct a search of FRB records — including those of federal reserve district banks — that were not checked for responsive records.

The FRB responses to GATA's 2007 and 2009 FOIA requests withheld a number of responsive records, but FRB now asserts that most of those withheld had nothing to do with "gold swaps," which was the subject of GATA's request. *See* Vaughn Index (Thro Decl., Exh. 8). FRB has provided no reasonable explanation as to how its search could have identified irrelevant documents as responsive, or why these documents were again withheld as relevant but exempt on appeal, but only now that the case is in litigation are claimed to be irrelevant to GATA's request. It is difficult to evaluate the reasonableness of FRB's search under such circumstances, and FRB's lack of explanation raises questions concerning what instructions were given and/or what procedures were employed in carrying out FRB's search. For example, in contacting "those experts or components/staffs with the Board responsible for the subject matter involved" (Thro Decl. ¶ 11), what instructions were given by FRB's Legal Division? Was the GATA FOIA request itself forwarded to the actual searchers? What search terms were used?[12] FRB has thus far not revealed this information, but GATA submits that it must answer such

[12] *See, e.g.*, the process described (Thro Decl. ¶ 17, p. 10) for the computer search at the FOMC. Even assuming that such a search at FOMC was reasonably calculated to reveal all responsive documents, FRB offers no explanation as to why no similar search was conducted, for example, at FRBNY, *see* Thro Decl. ¶ 5.

questions if it hopes to convince this Court that its search was reasonable. *See, e.g.*, Russell v. CIA, 1996 U.S. Dist. LEXIS 6108 (D.D.C. May 3, 1996).

FRB has disclosed the sources from which it sought records — *see* Thro Decl. ¶¶ 10-18 — but there are other potential sources from which records presumably were not sought. For example, although the FRB apparently sought certain records from the Federal Reserve Bank of New York ("FRBNY") in response to GATA's FOIA request, *see* Thro Decl. ¶ 15, the details of that search by the FRBNY were not detailed,[13] and FRB apparently admits not having sought records from any of the eleven other regional federal reserve district banks. *See* 12 C.F.R. § 261.29(i)(1)(i). *See also* Fox News Network v. Board of Governors of the Federal Reserve ("Fox News v. FRB"), 601 F.3d 158, 162 (2d Cir. 2010), *aff'g* Fox News v. FRB, 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (FRB records include certain records of the 12 FRB district banks).

An agency must demonstrate that it has conducted a "search reasonably calculated to uncover all relevant documents" and that the required search must be shown to be reasonable based upon the circumstances of the particular case. *See, e.g.*, Ethyl Corp. v. EPA, 26 F.3d at 1248; Weisberg v. U.S. Dept. of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). Although not every agency record need necessarily be searched, the agency must search those systems likely to contain information responsive to the FOIA request. *E.g.*, Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 68 (D.C. Cir. 1990). Here, it is submitted that has not been done. To demonstrate the adequacy of a FOIA search, FRB may rely on detailed affidavits or declarations submitted in

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[13] Apparently, the FRBNY employees who have submitted declarations herein — Messrs. Dzina and Fogarty — were not involved in any search at the FRBNY; their declarations address factors related to the claimed FOIA Exemption 4, but not the details of any records search. Ms. Thro did not relate the particular details of any search by FRBNY staff except to indicate that a manual search of certain files was conducted. *See* Thro Decl. ¶ 16.

good faith, *see* McGehee v. CIA, 697 F.2d 1095, 1102 (D.C. Cir. 1983), but that submission must describe "what records were searched, by whom, and through what process," Steinberg v. United States Dep't of Justice, 23 F.3d 548, 552 (D.C. Cir. 1994), including information about the type of search performed and the search terms used, and they must aver that all files likely to contain information responsive to a FOIA request have been searched. *See* Oglesby, 920 F.2d at 68. Defendant's summary judgment submissions in this case do not comport with all of those requirements. GATA submits that the FRB search was therefore faulty, and that the search must be carried out in accordance with the requirements mentioned above. If there is any doubt of the reasonableness of the agency search, of course, summary judgment for the agency would not be appropriate. *See, e.g.*, Truitt v. Department of State, 897 F.2d 540, 542 (1990).

B. FRB Has Failed to Account for Records Originating with FOMC. GATA's 2009 FOIA request was virtually identical to its 2007 FOIA request with respect to the records requested, except for the end date (*i.e.*, April 14, 2009 instead of December 6, 2007), and the fact that it sought records related to non-USA gold swaps. The FRB response to GATA's 2009 FOIA request identified additional records, but the additional records were from the period 1990-1995, and should have been produced in response to the 2007 FOIA request. Furthermore, when asked about the unidentified — but apparent — redactions in the very records that it produced, FRB refused to address the substance of the matter, stating that GATA would be required to submit a FOIA request to the FOMC to find out about the gaps in the 1990-1995 records that had been disclosed to GATA by the FRB. *See* Complaint ¶ 17; Thro Decl. ¶ 8, pp. 4-5. However, GATA's FOIA request to the FRB of April 14, 2009 included a request for all records in the

possession or control of any FRB subsidiary organizational group or entity, such as a division, department, or committee, and expressly stated, at page 1:

> We are aware that the Federal Reserve System includes other entities such as the Board of Governors, the Federal Reserve Banks, and **the Federal Open Market Committee**. We understand it is possible that certain of the records herein requested could be maintained by one or more of those entities, and not by the Board of Governors of the Federal Reserve System**. We understand, however, that no separate FOIA request is required for those entities** because you will forward any such request to the appropriate entity for processing, and that we will be advised. **Please let us know if this is not correct**. [Compl., Exh. A, p. 1, emphasis added.]

Despite this statement and request, at no time during the processing of its FOIA request was GATA advised that records of the FOMC were not producible by the FRB itself. Nor was the FRB's denial letter of August 5, 2009 premised in any way on such a position. *See* Complaint, Exh. B. Even if the FOMC were considered an entirely "separate agency" for FOIA purposes, the procedure followed by the FRB appears to have violated its own regulations, which provide (12 CFR, Chapter II):

> SECTION 261.13—Processing Requests
> * * * * *
> (g) Referral to another agency. To the extent a request covers documents that were created by, obtained from, or classified by another agency, the Board may refer the request to that agency for a response and inform the requester promptly of the referral.

At no time, to the best of GATA's knowledge, did FRB refer GATA's request to FOMC for a separate response. In fact, the opposite seems to have been the case. *See* Comp., Exh. B and D. It is submitted that FRB's refusal to correct the redactions on the FOMC documents was contrary to law, and that FRB was required to disclose the redacted documents in full unless they were

exempt under law. *See, e.g.*, McGehee v. CIA, 697 F.2d at 1109-1110; Truitt v. Dept. of State, 897 F.2d at 542-43.

Now, FRB also contends that the withheld FOMC documents are not responsive to GATA's FOIA request (s*ee* Thro Decl. ¶ 17, p. 10), but FRB does not explain how it knows what is in those records of a supposedly different agency. The FOMC documents are not part of the Vaughn Index submitted by defendant. *See* Thro Decl., Exh. 8.[14]

C. FRB Has Failed to Identify Records that Are Known and Should Have Been Disclosed. In response to GATA's 2007 and 2009 FOIA requests, the FRB has identified very few records — aside from miscellaneous items and correspondence, such as that involving GATA, U.S. congressmen, and other inquirers — mentioning gold swaps. *See* Olson Decl. ¶ 9. This is so despite the clear and continuing references on the FRB website — as well as the website of the Treasury Department — concerning gold swaps. For example, as GATA pointed out in its appeal letter dated August 20, 2009 (Complaint, Exh. E):

> A recent Google search of [the FRB's own website] www.federalreserve.gov for the words "Gold Swaps," for example, revealed the existence of the following document containing the words "gold swaps" that falls within the date range of the request (January 1, 1990 to April 14, 2009):
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> • Brahima Coulibaly, "Effects of Financial Autarky and Integration: The Case of the South Africa Embargo," Board of Governors of the Federal Reserve System, International Finance Discussion Papers, No. 839, Sept. 2005.[15]

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[14] Following FRB's refusal to disclose the FOMC documents, GATA submitted a FOIA request to FOMC, requesting, *inter alia*, the redacted documents withheld by FRB. In denying GATA's FOIA request with respect to the redacted documents, FOMC represented that the withheld documents did not mention gold swaps. However, the basis of the information Ms. Thro used for her assertions concerning the FOMC documents is uncertain.

[15] This FRB Discussion Paper clearly discusses gold swaps, as follows: "The [South African] government had, reportedly, facilitated foreign borrowing by reassuring foreign banks

> This document was neither provided in response to our request nor identified by the FRB as being withheld, and would appear to provide further evidence concerning the apparent inadequacy of the search performed by the FRB. Based upon the FRB's failure to identify that document, as well as the FRB's failure to identify the records (discussed in #3, above) in response to our 2007 FOIA request, we submit that there is substantial evidence concerning the inadequacy of the FRB's searches to date, and that the FRB should be required to provide adequate documentation of its FOIA search methodology, efforts and results with respect to GATA's 2007 and 2009 FOIA requests.

FRB, in its appeal denial of September 17, 2009, responded without any citation of authority that "the Board is not required to provide copies of documents that are already in the public domain, such as on a website, and are reasonably accessible to the requester." Complaint, Exh. D, p. 4. GATA submits that FRB had a duty to provide GATA the record in question, and cannot reasonably defend on the theory that GATA might have located the document itself by a search of the FRB website. Although it may not be absolutely determinative of the issue, FRB's failure in this regard should be considered meaningful evidence that FRB's search was not adequate.

In the letter denying GATA's appeal for "gold swap" records, FRB Vice Chairman Kenneth Warsh pronounced that among the documents being withheld from GATA were documents concerning "swap arrangements with foreign banks," on the basis that such information is not of a type "customarily disclosed to the public." Complaint ¶ 19; Thro Decl. ¶ 8 and Exh. 6. Certainly, this was an admission that the FRB was withholding documents responsive to GATA's FOIA request, which demanded records concerning "gold swaps."

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and by stabilizing the indebtedness through **gold swaps**, or by borrowing from the IMF." P. 5 (emphasis added). Moreover, it is not inconceivable that some of the referenced South African "gold swaps" occurred with the FRB, or that the FRB has records of what these gold swaps were. In either case, the documents should have been disclosed.
http://www.federalreserve.gov/pubs/ifdp/2005/839/ifdp839.htm

Because of FRB's refusal to provide GATA with a Vaughn Index prior to this litigation, it is not certain which specific withheld documents Governor Warsh was referring to in his letter.

D. GATA's Declarations Demonstrate that Gold Swaps Occur. The FRB's Vaughn Index indicates that America's central bank, *see* Fox News v. FRB, 601 F.3d at 159, the FRB, is oblivious to the fact that gold swaps have ever been entered into anywhere in world during the last two decades. This would seem, on its face, a highly dubious proposition, given the enormous professional staff at the FRB.[16] The FRB's own website reveals South Africa gold swap information. *See* p. 19 n.15, *supra*. As discussed below, the declarations of Chris Powell, Adrian Douglas, and James Turk, all knowledgeable about world gold markets, demonstrate that gold swaps are one of the mechanisms used by central banks to conceal interventions into gold markets to suppress the price of gold, and explain where the existence of gold swaps has come to public light and has been acknowledged by central bankers. International gold markets expert James Turk explains that "Gold swaps are generally entered into between central banks or government treasuries. 'Gold swaps' involve a swap, or exchange, of gold for either other gold or currency, with a promise to unwind the transaction at a later time." Turk Decl. ¶ 2. The Department of the Treasury's weekly statement of U.S. International Reserve Position includes a line for "gold (including gold deposits, and, if appropriate, gold swapped." Turk Decl. ¶ 5. The International Monetary Fund published a study in October 2001 explaining, *inter alia*, gold swaps. Turk Decl. ¶ 12. The Bank for International Settlements ("BIS") disclosed recently a

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[16] In 1993, FRB Chairman Greenspan reported to Congressman Henry Gonzales (D-TX) that the FRB employed 360 economists, 11 statisticians, 122 officers, for a total of 493 persons, plus a professional support staff of 237. *See* Robert D. Auerbach, Deception and Abuse at the Fed: Henry B. Gonzalez Battles Alan Greenspan's Bank, Univ. of Tx. Press (2008), pp. 141-42.

380-tonne gold swap with a commercial bank. Turk Decl. ¶ 6. The London Telegraph and Wall Street Journal, and Financial Times all reported on the BIS gold swap. Turk Decl. ¶ 10-11. Newspaper editor Chris Powell explained that at the January 1995 meeting of the FRB's Federal Open Market Committee, the general counsel of the U.S. Federal Reserve Board, J. Virgil Mattingly, explained that the consensus among White House/Treasury/Fed lawyers was that the "gold swaps" entered into by the U.S. Treasury Department's Exchange Stabilization Fund were lawful. Powell Decl. ¶ 6. In July 1998, then FRB Chairman **Alan Greenspan** told Congress "Central banks stand ready to **lease gold** in increasing quantities...." Powell Decl. ¶ 7. In 2003, the annual report of the Reserve Bank of Australia revealed: "Foreign currency reserve assets and gold are held primarily to support intervention in the foreign exchange market...." Powell Decl. ¶ 8. FRB Vice Chairman Kevin Warsh's denial of GATA's 2009 FOIA Appeal for "gold swap" records was denied because "[t]his includes **information relating to swap arrangements with foreign banks** on behalf of the Federal Reserve System and is **not the type of information that is customarily disclosed** to the public. This information was properly withheld from you." Powell Dec. ¶ 18. GATA Director Adrian Douglas explained how in recent Congressional Hearings FRB General Counsel Scott Alvarez has been willing to allow an audit of the physical verification of the nation's gold stocks, but not "any liens, claims or encumbrances against the asset." Douglas Decl. ¶ 16. Also, FRB General Counsel Scott Alvarez testified that "Federal Reserve transactions with foreign governments is disclosed in summary in our balance sheet but also the facilities, the specific swap facilities we have is listed in detail in the information we make available to the public." Douglas Decl. ¶ 17. Further, FRB General Counsel Scott Alvarez offered to provide Congress information about "transactions" where the Federal Reserve has

been involved in the gold market. Douglas Decl. ¶ 18. The pledge of the FRB General Counsel to Congress supports disclosure to GATA of gold swap records in this litigation.

E. FRB's Search Procedures Were Inadequate on Their Face. Defendant's explanation of the FRB search for records in response to GATA's FOIA requests is set forth in the Declaration of Alison M. Thro, Senior Legal Counsel in the FRB's Legal Division, submitted in support of defendant's motion for summary judgment. Ms. Thro admitted that the FRB has no central records repository, and that the response system she employs does not necessarily account for all responsive documents. *See* Thro Decl., 11. And she never listed all of the possible sources of responsive records within the FRB. She described the steps she took to retrieve responsive documents, but she fails to account for the following:

1. Ms. Thro does not account for the various divisions of the FRB or other federal reserve banks where responsive documents may be located.[17] For example, by letter dated May

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[17] The FRB apparently is attempting to sever itself, for FOIA purposes, from its subsidiaries. Despite listing the various steps taken to search for records, defendant does not set forth a comprehensive list of the possible sources of records. *See* Def. Mem. S.J., pp. 6-10. However, the FOMC and the other federal reserve distirct banks are part of the federal reserve system, and should be covered by GATA's FOIA requests. *See, e.g.*, the following extract from the FRB website concerning the structure of the federal reserve system (http://www.federalreserve.gov/pubs/frseries/frseri3.htm):

"**Federal Reserve Banks** operate under the general supervision of the **Board of Governors** in Washington. Each Bank has a nine-member Board of Directors that oversees its operations...

Federal Reserve Banks generate their own income, primarily from interest earned on government securities that are acquired in the course of Federal Reserve monetary policy actions. A secondary source of income is derived from the provision of priced services to depository institutions, as required by the Monetary Control Act of 1980...

Monetary Policy Role
The primary responsibility of the central bank is to influence the flow of money and credit in the nation's economy. The Federal Reserve Banks are involved in this function in several ways. First,

12, 2009, FRB informed GATA that it "was extending its period to respond to the FOIA Request until May 27, 2009 in order to consult with another agency or with two or more components of the Board having a substantial interest in the determination of the request." Thro Decl. ¶ 4, p. 5. But there is no further information about what agency or components were consulted or may have been asked to provide information responsive to GATA's FOIA request.

2. Ms. Thro describes only in a cursory manner whatever search was conducted by FRBNY where apparently no electronic search was performed and certain staff members conducted a manual search of their files. Thro Decl. ¶ 16.

3. There was no search of the other "federal district banks" for responsive records, but there should have been. *See* Fox News v. FRB, 601 F.3d 158, 162 (2d Cir. 2010).

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five of the twelve presidents of the Federal Reserve Banks serve, along with the seven members of the Board of Governors, as members of the **Federal Open Market Committee** (FOMC). The president of the Federal Reserve Bank of New York serves on a continuous basis; the other presidents serve one-year terms on a rotating basis. The FOMC meets periodically in Washington, D.C., and determines policy with respect to purchases and sales of government securities in the open market, actions that in turn affect the availability of money and credit in the economy.

Second, the boards of directors of the Federal Reserve Banks initiate changes in the discount rate, the rate of interest on loans made by Reserve Banks to depository institutions at the "discount window." Discount-rate changes must be approved by the Board of Governors....

Each Federal Reserve Bank has a research staff to gather and analyze a wide range of economic data and to interpret conditions and developments in the economy. This research assists the FOMC in the formulation and implementation of monetary policy. It also contributes to informed decision making by the Federal Reserve Banks in bank supervisory matters and other areas....

The Federal Reserve System, through the Reserve Banks, performs various services for the U.S. Treasury and other government, quasi-government, and international agencies...."

IV. THE DELIBERATIVE PROCESS EXEMPTION — FOIA EXEMPTION 5 — DOES NOT APPLY AS CLAIMED BY DEFENDANT.

Defendant maintains that every single one of the withheld records responsive to GATA's request need not be disclosed because they are deliberative and pre-decisional inter-agency memoranda or other such communications, and that withholding them from the public is countenanced by FOIA exemption (b)(5), 5 U.S.C. §552(b)(5) ("Exemption 5"). GATA submits that Exemption 5 does not apply to certain of the documents, and other documents do not meet the judicially-devised test for exemption.[18]

The Supreme Court has construed Exemption 5 to "exempt those documents, and only those documents, that are normally privileged in the civil discovery context." National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). Accordingly, while the exemption has been held to encompass the attorney work-product, attorney-client, and deliberative process privileges, *see, e.g., id.*, and Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980), defendant must prove two distinct elements with respect to each such record for which Exemption 5 is claimed. As the Supreme Court has put it, "to qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." Department of the Interior v. Klamath Water Users Protective Association, 532 U.S. 1, 8 (2001).

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[18] As indicated below, for example, GATA presumably would have no need to see drafts of a "draft" letter or memo if the letter or memo, as finalized, were produced in Vaughn Index Items 7 and 11. *See* pp. 32, 34, *infra.*

The FRB claims that the documents it seeks to withhold from disclosure are protected by the deliberative process privilege.[19] But the deliberative process privilege shields from mandatory disclosure only communications that are both (i) "predecisional," *i.e.*, that were made during agency consideration of a proposed action, and (ii) "deliberative," in that they "make recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). *See also* Coastal States Corp. v. DOE, 617 F.2d at 867-70. As discussed below, several of the documents for which defendant claims Exemption 5 do not appear to be related to any predecisional, policy matters.[20] The privilege — properly asserted — serves to insure open, uninhibited, and robust debate of various options by eliminating the fear of disclosure of preliminary viewpoints. *See* Coastal States, 617 F.2d at 866. Thus, by shielding predecisional deliberations from public scrutiny, the quality of final governmental decisions presumably would be enhanced. *See* NLRB v. Sears, 421 U.S. at 149-51. However, absent a showing that the withheld documents are both predecisional and deliberative, they should be disclosed. Plaintiff submits that defendant has failed to demonstrate that certain of the documents it seeks to withhold are either predecisional or deliberative.

As discussed below, certain of the documents withheld by FRB do not appear to be predecisional, as there is no description of the decision they preceded or to which they were related. Similarly, it is not clear that certain of the documents contain deliberative information.

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[19] Defendant also claims that the attorney-client privilege applies to two of the documents in the Vaughn Index, Items 11 and 12. *See* Thro Decl. ¶¶ 26-27.

[20] *See, e.g.*, Thro Decl. Exh. 8; Vaughn Index Items 3-4 (finalized version of 2/23/93 memo discussing the drop in gold prices); Item 8 (9-page updated memo discussing issues related to swap arrangements); Item 10 (10-page "notes" of committee meeting); Item 12 (5-page memo containing legal analysis of federal laws).

In addition, Exemption 5 does not always allow for entire documents to be withheld, and factual information that is not deliberative in nature must be disclosed. *See* 5 U.S.C. § 552(b). Although it can be difficult, if not impossible, for a FOIA requester to prove that an undisclosed document contains factual information that should have been disclosed, the breadth of certain redactions in the withheld FRB documents would point to such a conclusion.[21]

To be deliberative and pre-decisional, a document must be related to a policy decision. *See* Coastal States, 617 F.2d at 866; Jordan v. U.S. Dept. of Justice, 591 F.2d 753, 772-74 (D.C. Cir. 1978). And even pre-decisional recommendations, which would otherwise be exempt, lose the protection of the privilege if an agency, in making a final decision, chooses expressly to adopt them or incorporate them by reference. Indeed, Exemption 5 does not apply in the case of "final opinions" which explain agency action already taken or an agency decision already made. *See* Sears, 421 U.S. at 153-54. Nor does the exemption protect a document which is merely peripheral to actual policy formation, and does not "bear on the formulation or exercise of policy-oriented judgment." Ethyl Corp., 25 F.3d at 1248. Asserting this exemption may require a recitation of the relevant facts concerning "the identity and position of the author and any recipients of the document, along with the place of those persons within the decisional hierarchy." *Id*. *See also* Access Reports v. Dep't of Justice, 926 F.2d 1192, 1195 (D.C.Cir. 1991). Where defendant claims a document is deliberative and predecisional, but does not identify the finalized document — or cannot even say that a document was finalized (*e.g.*, Vaughn Index Item 20), GATA submits that the document must be disclosed.

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[21] *See, e.g.*, Vaughn Index Items Nos. 3, 4, and 5 (unknown portions of transmittal memos redacted; virtually all of 9-page analysis redacted).

In this case, the FRB has argued that Exemption 5 bars disclosure of every document withheld because "disclosure of communications such as this would have a chilling effect on intra-agency communications," *see* Def. MSJ, Exhibit 8, Column 2, Documents 1-4, or because "disclosure of communications such as this would have a chilling effect on communications by government employees," *see* Def. MSJ, Exhibit 8, Column 2, Documents 14-20, or words to similar effect. *See also* Thro Decl., ¶¶ 21, 23-30. Defendant's argument is unpersuasive, and it is demonstrably faulty, at least with respect to certain of the documents identified by the FRB, for the reasons set out below:

A. Defendant Has Not Demonstrated That Each of the Withheld Records Is Predecisional and Deliberative

GATA's 2009 FOIA request asked for records during the period January 1, 1990 to April 14, 2009, including the documents that had been withheld by the FRB in response to GATA's similar 2007 FOIA request. As stated above (p. 6, *supra*), in responding to GATA's 2009 FOIA request, the FRB identified no responsive documents, except for (i) documents that had been withheld in response to GATA's 2007 FOIA request, plus (ii) two additional documents retrieved from the FOMC that — without good reason[22] — had not been retrieved in response to GATA's 2007 FOIA request. Later, during the pendency of this litigation, FRB released certain portions of some of the documents that had been withheld, although they were heavily redacted. *See* p. 8, *supra*, Olson Decl. ¶ 9. Defendant now claims that all of the withheld documents and portions of

[22] Defendant claims that the FOMC was contacted in 2009 "in order to ensure that the Board searched all areas" likely to have responsive records (*see* Thro Decl. ¶ 17, Def. MSJ p. 9), but FOMC was also apparently contacted regarding GATA's 2007 FOIA request and it is difficult to imagine when, and for what reasons, FOMC would not be contacted regarding a FOIA request. Furthermore, the FOMC documents were redacted without any explanation to GATA.

documents have been properly withheld under FOIA Exemption 5, since each document reflects the FRB's deliberative process, as "pre-decisional, deliberative communications." *See* Thro Decl., Exh. 8, column 2. In order to support such a position, however, defendant must demonstrate the decision to which the communication relates. Defendant claims that the documents reflect the FRB's formative group thinking in the process of working out its policy and decisions, but in virtually all cases there is no evidence about what the claimed policy and decisions are, or when they were made or finalized, and how, if at all, they are different from the policy and decisions apparently discussed in the withheld documents.

In general, the courts have determined that a document is "deliberative" when it is related in fact to the process by which the particular policy was formulated. *See, e.g.*, Coastal States, 617 F.2d at 866-67; Jordan v. United States Dep't of Justice, 591 F.2d at 774. Relevant factors are whether the document formed a critical or essential link in a specified consultative process, reflects the personal opinions of the writer rather than the policy of the agency, and, if released, would inaccurately reflect or prematurely disclose the views of the agency. Designed to prevent disclosure of documents which would be harmful to the consultative functions of government, it was not intended to prevent disclosure of intra-agency memoranda routinely disclosable in private litigation, nor does it prevent disclosure of documents regarding a decision already reached. *See* NLRB v. Sears, 421 U.S. at 148-152. However, if the document reflects the decision or policy that was adopted, there is no basis for withholding it under Exemption 5. *Id.*, 421 U.S. at 155.

Even if a record is partially exempt under the deliberative process exception, moreover, that exemption does not reach "purely factual" material. EPA v. Mink, 410 U.S. at 87-88

("memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery"). *See also* 5 U.S.C. § 552(b).

With these principles in mind, defendant's claim of pre-decisional, deliberative communications should be examined. Since the documents have not been produced, of course, they must be examined in light of the descriptions and representations concerning the documents set forth in defendant's Vaughn Index. *See* Thro Decl., Exh. 8.

1. **Vaughn Index Items 1-6 (46 pages).** Each of the documents apparently — FRB is not certain about the memo discussed in Item 1 — concerns a 1993 memorandum, entitled "The Drop in the Gold Price Resulting from a Sale of All Official Gold." **Item 1** is an e-mail chain "commenting on and asking questions about" a 1993 memo, said to be concerning a staff memorandum entitled "Gold Price Memo," and responding to such questions. Although FRB claims that the document reflects "pre-decisional, deliberative comments" about a memo to be sent to the FRB, there is no indication that the memo was changed in any way or actually delivered to the FRB, or that any decision or deliberation was involved at all. The memo itself was not produced by the FRB, although the FRB has provided no sufficient explanation as to why not. It is not even clear why the memo is considered a draft, although the redactions to Document 1 could shed light on this. According to the Vaughn Index (item 2, p.1), the memo in **Item 2** "appears to be a later draft of the memorandum identified in the emails identified as item 1, above." Since the memo in Item 2 is represented to be an earlier draft of the memo identified in Item 3, GATA would accept the memo identified in Item 3.

With respect to the memo in **Item 3**, however, entitled "The Drop in Gold Price Resulting from a Sale of All Official Gold," the FRB says that the document is exempt from disclosure because it "provides staff's views on the effects of a hypothetical sale of gold," and that the one-page transmittal memo accompanying it is exempt from disclosure because it "summarizes an issue that may be the subject of further staff study...." These are not valid Exemption 5 defenses. The February 22, 1993 memo, as far as can be determined, is a final product, and is not part of any pre-decisional process. (Indeed, see Item 4, where the same memo is transmitted three years later.) Nor are there any apparent policy deliberations or concerns evident in the defendant's submission. And any "pre-decisional" concerns regarding the one-page transmittal memo are similarly absent. There is no indication in the Vaughn Index that these items are part and parcel of any pre-decisional, deliberative process. The fact that staff wrote them is not a defense to production, unless the documents are deliberative, pre-decisional items with respect to the formulation of policy. *See*, *e.g.*, Coastal States Gas Corp. v. DOE, 617 F.2d at 867; Mead Data Center v. U.S. Dept. of the Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977).

Item 4 is identified as a January 2, 1996 four-page memo and is said to be redacted because it "provides updated analysis and discussion of the subjects covered in [the 1993 memo in Item 3]" and it transmits a copy of that February 22, 1993 memo, proving that the 1993 memo was not pre-decisional. As to the Vaughn Index's claim (Items 3 and 4) that factual material contained in the 1993 memo has been provided to some reasonable extent, it is difficult for GATA to evaluate that claim. However, the factual information provided would not indicate

eligibility for exemption.[23] **Item 5** is a January 24, 1996 cover memo of one page, attaching two documents (the same two as Item 4), and **Item 6** is a copy of the first page of Item 5. There is no basis for the application of Exemption 5; the withheld documents are not said to contain any pre-decisional, deliberative materials, but only "materials...regarding issues of interest to the Board or decisions to be made by the Board," as wells "comments" regarding a Treasury request and Mr. Truman's "candid assessment of the basis of a Treasury decision." Exemption 5 simply does not apply to such matters.

2. **Vaughn Index Items 7-8 (24 pages)**. **Item 7** consists of (i) a 9-page memo to the FRB Chairman from the FRB staff, and (ii) a 2-page transmittal memo, each of which is entitled "Issues Related to Review of System's Swap Arrangements" and dated December 27, 1995. **Item 8** is the same 9-page memo, updated to March 14, 1996, together with a 1-page transmittal memo from the FOMC secretariat to the FOMC. The FRB claims that all of the documents are privileged under Exemptions 4 and 5.[24] It is not clear how the 9-page memo, which is said to discuss currency swap arrangements with foreign banks, would be protected by Exemption 5. There is no pre-decisional, deliberative matters referred to, and Exemption 5 would appear not to apply. Obviously, if the memo in Item 7 is a draft of the memo in Item 8, only the finalized version may need to be produced. However, despite the FRB claim that the memo in Item 7 has been "updated" to the memo in Item 8 (*see* Thro Decl., Exh. 8, p. 6), it is not clear from the FRB submission that the "earlier" memo is a draft. Each memo may have been a final product. As to

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[23] According to the Vaughn Index, the 4-page memo in Item 4 does not appear to be predecisional or deliberative, and the memo it attaches appears to be a final version.

[24] The FRB claim related to Exemption 4 is discussed at pages 38-44, *infra*.

the transmittal memos, the FRB claims that each contains staff analysis, but there is no showing that any such analysis is pre-decisional or deliberative, or that any policy decision concerning these matters was subsequently discussed or reached, or, if reached, was not identical to any staff proposals. It is submitted that Exemption 5 would therefore not apply.

3. **Vaughn Index Item 9 (16 pages)**. A 2-page memo of March 7, 1997, transmitting a "briefing draft" of 14 pages (including 8 pages of charts and graphs, which have been withheld without any purported justification) is said to be exempt because it provides "policy analysis to government decisionmakers." But that is no ground for exemption. The documents are not said to be pre-decisional, and there is no reference to any later decision (which may have been in accord with the draft's recommendations, in which case no exemption would obtain). On their face, it is submitted, the documents are not exempt as claimed by FRB.

4. **Vaughn Index Item 10 (7 pages)**. Similarly, Exemption 5 does not apply to the 1-page memo of April 29, 1997 — which "discusses the circumstances reflected in" the attached 6-page document entitled "Gold and Foreign Exchange Committee Discussion on Gold Market" — as claimed by defendant. The 6-page document — even if not a "verbatim recounting" of the discussion reported on — are simply notes of that discussion, and the transmittal memo is not exempt simply because it "discusses the circumstances" of the discussion reflected in the attachment, or is said to be "analytical." Government communications are not exempt under Exemption 5 simply because they are inter-governmental. They must be deliberative, pre-decisional documents. These clearly are not.

5. **Vaughn Index Item 11 (17 pages).** Again, FRB's claim of exemption under Exemption 5 appears to be off the mark. This 4-page memo of June 9, 1997 transmitting (i) a 9-

page document discussing gold custody services offered by FRBNY, (ii) a 2-page letter from a foreign bank to FRBNY, and (iii) a 2-page staff comment are withheld under the rubric of pre-decisional, deliberative communications. But only the 2-page staff comment could possibly be so classified, and even that document should be produced in light of FRB's failure to disclosure subsequent documents shedding light on what decision was actually made. The Index says nothing about the transmittal memo that would accord the privilege to that document, and certainly the 9-page "discussion" (perhaps "explanation" would be more apt) document would not qualify. Assuming relevant information were provided, the 2-page staff comment could possibly qualify for exemption, but not if the staff comments were in line with the decision actually made. In the absence of such information, all of the documents should be disclosed. *See* NLRB v. Sears, 421 U.S. at 148-55.[25] And defendant's half-hearted attempt to apply Exemption 5 because of the attorney-client privilege surely must fail. *See, e.g.*, Coastal States Gas Corp., 617 F.2d at 854, Mead Data Centers, 566 F.2d at 253.

6. **Vaughn Index Item 12 (5 pages).** This 5-page memo from one FRB attorney to another, concerning "Ability of federal reserve banks to engage in Gold Transactions," is said be pre-decisional, deliberative, and subject to the attorney-client privilege. Again, however, defendant has failed to produce any evidence, or even assertions, about the actual policy that supposedly was discussed, or whether it was in fact adopted — whether in accord with or contrary to the analysis in the memo. The fact that the analysis may have been composed by an attorney, it is submitted, does not help FRB's cause. For example, no information has been

[25] Defendant claims that Item 11 also is privileged under Exemption 4, but it is not. *See* pages 42-45, *infra*.

provided that would indicate such information was confidential. *E.g.*, Coastal States Gas Corp., 617 F.2d at 854.

7. **Vaughn Index Item 13 (2 pages)**. This 2-page assemblage of e-mail traffic, dated May 9-10, 2001, has to do with allegations that the FRB is manipulating the gold market, including the FRB's involvement in gold swaps, and is said to be privileged because it concerns internal communications about how to respond to such allegations. Again, the word "pre-decisional" is used by the FRB, but there is no reference to any subsequent policy or decision that was adopted or rejected. Clearly, Exemption 5 would not apply here, at least on the merely conclusory showing made by the FRB. For example, if the FRB later made a decision concerning how to respond to such allegations (*see* Item 14, below) consistent with the staff recommendations, the documents should be produced. *See* NLRB v. Sears, 421 U.S. at 150-55.

8. **Vaughn Index Item 14 (1 page)**. This 1-page internal communication, dated May 10, 2001, is said to contain advice on how to respond to a letter alleging that FRB is manipulating the gold market. This would not appear to be pre-decisional, but rather reflective of a decision or policy already made, and, if so, Exemption 5 clearly would not apply.

9. **Vaughn Index Item 15 (3 pages)**. This 2-page internal communication, dated May 10, 2001, accompanied by one page of unsigned handwritten notes, supposedly by an attorney, is said to "discuss[] issues that would arise in the case of a potential repo or swap transaction involving Treasury gold." It is allegedly pre-decisional and deliberative, but the FRB has identified no related policy or decision related thereto. And no attorney-client privilege is ever claimed. Exemption 5, therefore, should not apply.

10. **Vaughn Index Items 16-17 (4 pages).** These September 21, 2002 documents, a 1-page draft letter responding to U.S. Senator Judd Gregg (R-NH) concerning U.S. gold reserves, and an August 21, 2002 email exchange between FRB staff and FRBNY staff concerning such responses, are said to be privileged despite the fact that the FRB cannot determine whether the letter as drafted was actually sent. Under these circumstances, it should be presumed that the final letter corresponded to the draft, and the document should be disclosed. The FRB claim of any chilling effect resulting from disclosure, it is submitted, is stretched beyond reason. In any event, in the absence of an adequate showing about the letter actually sent to Sen. Gregg, Exemption 5 should not apply.

11. **Vaughn Index Items 18-19 (4 pages).** Technically, Exemption 5 could be said to apply to these June 2002 draft responses to U.S. Congressman Ron Paul (R-TX), regarding his inquiry as to why members of the IMF are forbidden to link the value of their currencies to gold, in light of the FRB's representation that the redacted portions of the letter that was finalized and sent to Rep. Paul "differ significantly." It is unknown, of course, what the FRB means by the phrase "differ significantly," or why the finalized letter to Rep. Paul was not produced.

12. **Vaughn Index Item 20 (2 pages).** This 2-page draft letter to U.S. Senator Byron Dorgan (D-ND) dated July 5, 2002, regarding the dismissal of a lawsuit is not privileged under Exemption 5 for the same reasons discussed above with respect to Items 16-17. Where the FRB cannot even determine the existence/language of the letter actually sent, if any, it should be presumed that the final letter corresponded to the draft, and the document should be disclosed. The FRB claim of any chilling effect resulting from disclosure, it is submitted, is stretched beyond reason.

B. Even if Pre-Decisional and Deliberative, Release of at least Certain of the Documents is in the Public Interest and Should be Ordered.

In addition to the three documents claimed to be properly withheld from disclosure under FOIA Exemption 4, discussed below, all of the documents and portions of documents in issue in this litigation are being withheld under FOIA Exemption 5 — and without any apparent good reason. The fact that this material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The FRB regulations implementing the FOIA provide that, "Except where disclosure is expressly prohibited by statute, regulation, or order, the Board may release records that are exempt from mandatory disclosure whenever the Board [or other designated person] acting pursuant to this part or 12 CFR part 265, determines that such disclosure would be in the public interest." 12 C.F.R. § 261.14(c). GATA expressly invoked this regulation in its FOIA appeal, and the FRB expressly denied such relief. *See* Complaint, Exhibits C and D. Nevertheless, months after the filing of GATA's Complaint herein, and just prior to the filing of defendant's motion for summary judgment, the FRB released certain portions of the withheld records, although most of those items were heavily redacted. *See* Olson Decl. ¶ 9. GATA submits that much more should have been disclosed — and much sooner.

Unlike certain legal proscriptions against the release of certain information — such as classified information — there is no legal impediment to discretionary release of information which technically could be withheld under FOIA Exemption 5. In the case of FOIA Exemption 5, the entire matter should be determined by weighing the public interest in obtaining the information against any likely detriment in light of the information being released. In this case, any such detriment is hard to imagine based upon what FRB has argued thus far. Moreover, FRB

would have no legitimate concern that, in exercising its administrative discretion with respect to particular information, it would be impairing its ability to invoke applicable FOIA exemptions for any arguably similar information in the future. *See, e.g.*, Dept. of the Air Force v. Rose, 425 U.S. 352 (1976); Mobil Oil Corp. v. EPA, 879 F.2d 698 (9th Cir. 1989). *See also* Mehl v. EPA, 797 F. Supp. 43, 47 (D.D.C. 1992).[26]

V. DEFENDANT HAS FAILED TO DEMONSTRATE THAT THE DOCUMENTS WITHHELD BY REASON OF FOIA EXEMPTION 4 ARE PROTECTED FROM DISCLOSURE.

Defendant argues that three documents the FRB seeks to withhold from disclosure — which it claims are relevant to "currency swaps," but not "gold swaps" — are exempt from disclosure under FOIA **Exemption 4** (5 U.S.C. § 552(b)(4)), as well as Exemption 5. *See* Def. MSJ, pp. 21-29; Thro Decl. Exh. 8, pp. 5-6, 8 (Items 7, 8, and 11). As indicated above, most of the documents are not exempt from disclosure under Exemption 5, and GATA submits that Exemption 4 offers no protection either.

Under Exemption 4, the documents in question are designated in the Vaughn Index as:

- **Item 7** (a December 27, 1995 transmittal memorandum attaching a 9-page memorandum to the FRB chairman from FRB staff concerning currency swap arrangements);
- **Item 8** (an updated version of that same December 27, 1995 memorandum with a one-page transmittal), and
- **Item 11**, consisting of 17 pages, including:

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[26] Although FRB appears to be ignoring the "new transparency" directive of President Obama, it is not the only federal agency so acting. *See, e.g.*, "Agencies less open than Obama promised," Sharon Thiemer (AP) (Mar. 17, 2010) (http://www.philly.com/inquirer/world_us/88050832.html) (archived by Google).

> (i) a 4-page memo to the FRB regarding a request by the FRBNY to open a **Special Purpose Gold Custody account** to facilitate a swap arrangement between a foreign central bank and a U.S. bank, as well as
> (ii) a 9-page document discussing **gold custody services** offered by the FRBNY and proposing changes that would allow **swaps**, and
> (iii) a 2-page staff comment about the proposed arrangement.

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Defendant makes no claim that any trade secret is involved, so it is necessary to consider whether disclosure would reveal exempt "commercial or financial information" under the test adopted by the D.C. Circuit in National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), and refined in National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976), and Gulf & Western Industries v. United States, 615 F.2d 527 (D.C. Cir. 1979). The issue is purely one concerning commercial/financial information that the FRB maintains is confidential. Such information falls within the commercial/financial prong of Exemption 4 only if the government is able to demonstrate that it is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. *See* Public Citizen Health Research Group v. Food and Drug Administration, 704 F.2d 1280, 1290-91 (D.C. Cir. 1983); National Parks v. Morton, 498 F.2d at 766.

Vaughn Index Items 7, 8, and 11 are among the documents withheld from GATA until the filing of this litigation, and ultimately provided "in part" in June 2010, just prior to the filing of defendant's motion for summary judgment. *See* Olson Decl. p. 2, n.1. All three items are said to have been "**redacted**." *See* Thro Decl., Exh. 8, pp. 5-6 (emphasis added). This is a bit of an understatement, as there are **virtually no words on most pages**, except for a statement of the

FOIA exemption claimed.[27] All three documents are said to relate to **currency swap** arrangements of the United States, and not to relate to **gold swap** arrangements, although it is not clear whether any of the documents makes mention of gold swap arrangements. *See* Thro Decl., Exh. 8.

For the records to be exempt, that statute provides that defendant has the burden of demonstrating that the responsive records contain (i) information that was obtained from a person, (ii) which information is commercial or financial, and (iii) which information is privileged or confidential. *Id. See* 5 U.S.C. § 552(b)(4). GATA submits that the defendant has not made such a showing in this case.

(i) **Obtained from a person**. The first requirement precludes Exemption 4 protection for any information generated by the federal government. The Vaughn Index reveals that Items 7, 8, and 11 were not provided by a "person," but were created by FRB or the FRBNY. *See* Exhibit 8 to Def. MSJ, pp. 5-6 (Vaughn Index Items 7, 8 and 11). *See, e.g.*, Bloomberg, L.P. v. Board of Governors of the Federal Reserve, 601 F.3d 143, 148-49 (2d Cir. 2010); Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 469 (W.D.N.Y. 1987). FRB claims that such documents include or relate information provided by foreign central banks ("FCBs"), but this does not change the fact that the records in question appear to have been created by FRB and/or the FRBNY. To the extent that the records contain and disclose information provided by FCBs, it could possibly be

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[27] Item 7 also contains an opening paragraph and an exhibit indicating extant "swap arrangements" as of December 29, 1995; Item 8, dated March 15, 1996, contains a transmittal memo and the same exhibit as revealed in Item 7; and Item 11 contains one sentence and a footnote from a June 9, 1997 transmittal memo. The redactions on these documents would appear to be in the 99 percent range. As indicated above (pp. 32-33), all three documents are said to be pre-decisional, but it is not apparent to what, and Exemption 5 clearly should not apply.

considered information obtained from a "person"; however, in such circumstances, a substantial portion of the records obviously could be provided. FRB here has provided virtually none of the information in question. *See* Olson Decl. ¶ 9.

(ii) **Commercial or financial information.** It is unclear why the FRB, as a government agency, would be engaged with FCBs in commercial transactions involving gold which are not disclosed to the public. Much — but presumably not all — of the information disclosed in Items 7, 8, and 11 may appear to be commercial in nature, since the general subject matter appears to be arrangements between FRB or FRBNY and FCBs. Even if the term "commercial or financial" is given broad meaning, a showing that these documents fall in that category is still required for Exemption 4 protection. *See, e.g.*, National Parks v. Kleppe, 547 F.2d at 684-85. Here, defendant has attempted to group all of the record information under one category — commercial — but it seems clear that there are other interests at stake. For example, some of the information was provided by FRBNY to comply with Regulation N, indicating important regulatory interests.[28] Even if the documents were deemed to be commercial information for purposes of Exemption 4, they do not appear to meet the test of confidentiality required in order to be considered privileged from disclosure under FOIA Exemption 4.

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[28] Regulation N provides in pertinent part, for example (12 C.F.R. § 214.2), that "each Federal Reserve Bank shall promptly submit to the Board of Governors of the Federal Reserve System in writing full information concerning all existing relationships and transactions of any kind heretofore entered into by such Federal Reserve Bank with any foreign bank or..." so that FRB "may perform its statutory duty of exercising special supervision over all relationships and transactions of any kind entered into by any Federal Reserve Bank with any foreign bank or banker or with any group of foreign banks or bankers ...." *See also* 12 CFR § 214.4(a) (FRB permission required to open accounts with FCBs).

(iii) **Privileged or confidential**. As discussed above, assuming this Court were to determine that the documents in question were considered to have been provided by a "person," and even if the information were considered to be commercial in nature for purposes of Exemption 4, such information would not be protected from disclosure under Exemption 4 unless it were deemed privileged or confidential. PCHRG, 704 F.2d at 1290-91. The first inquiry under this standard is whether the information was voluntarily submitted to the government. *See* Nat'l. Assoc. of Home Builders v. Norton, 309 F.3d 26, 28-29 (2002). GATA submits that it was not. None of these documents appears to be confidential in any privileged sense of that word. For example, Item 11 is a 9-page document discussing gold custody services offered by the FRBNY which should not be considered confidential for purposes of Exemption 4. As far as can be determined from defendant's submissions, these documents concern a 1995 request to open an account that would appear to allow for gold swaps, and the FRB documents simply discuss the FRB and/or FRBNY arrangements — existing and proposed — with respect to such accounts. Apparently, the documents do not contain any information about whether the proposed arrangement was approved.[29] Even if the foreign bank's identity were considered confidential, it could be redacted. Nothing in the defendant's submission would appear to justify a "confidential" designation for Item 11.

It is important to focus, of course, upon precisely what information is being discussed. To the extent that the information in question is not commercial information provided by a "person," but rather regulatory information compiled by FRB, FRB has failed the Exemption 4

[29] Indeed, it is difficult to understand why other, later documents concerning this proposed gold custody account arrangement were not found and disclosed.

test. However, if the information is "commercial" and was provided by a "person," the focus becomes whether the material was submitted "voluntarily." *See* Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992). FRB argues that the records in question — or at least certain information reflected in those records — were submitted voluntarily. But that argument is based upon the simple fact that the FCBs were not required to enter into certain transactions needing FRB approval. *See* Def. Mem. S.J., pp. 26-27; Dzina Decl. ¶ 12; Fogarty Decl. ¶ 11. Surely it does not apply here, where, if the FCBs elected to enter into such transactions, the parties were required to provide the information to FRB. *See* 12 C.F.R. §§ 214.2; 214.4(a).[30] In other words, FRB cannot credibly argue that the information in question — which FCBs (and/or the federal reserve bank they were transacting with) were obliged to reveal to the FRB under Regulation N — would be considered voluntarily submitted for purposes of withholding from disclosure under FOIA. Indeed, although the decision of a FCB to enter into a swap agreement might be considered voluntary, the submission of information required by the FRB in order for such an arrangement to become legally possible certainly cannot be considered voluntary.[31]

FRB invests a good part of its brief in trying to convince this Court that the FCB information was provided voluntarily, but then, in recognition of the language of Regulation N, argues that it does not matter, and that even if the information was required to be furnished (per

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[30] 12 C.F.R. section 214.4(a) provides: "(a) No Federal Reserve Bank shall enter into any agreement, contract, or understanding with any foreign bank or banker or with any group of foreign banks or bankers or with any foreign State without first obtaining the permission of the Board of Governors of the Federal Reserve System."

[31] Defendant's argument that revelation of certain of the information would result in a drop-off of "program effectiveness" (Dzina Decl. ¶ 12; Fogarty Dec. ¶ 15-16) is speculative and should be rejected. *See* Bloomberg, L.P. v. Board of Governors, 649 F. Supp. 262, 278-79 (S.D.N.Y 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

Regulation N), Exemption 4 still should apply, on the theory that, otherwise, the effectiveness of a government program would be impaired. *See* Def. Mem. S.J., p. 29 n.8. GATA submits that there has been no convincing showing that any government program would be impaired by disclosure of the information FRB seeks to withhold. The Dzina and Fogarty declarations merely recite the unsurprising surmise that — despite the fact that account information is indeed sometimes disclosed to the public — arbitrary disclosure of certain matters without a FCB's consent could have a negative effect on relationships with FCBs. However, FRB has made no showing to GATA or to this Court what information would be disclosed and why reasonable portions of the documents could not be segregated and withheld while other portions could be disclosed. In fact, virtually no portions of these documents have been disclosed. Defendant's declarations and legal brief speak in generalities, leaving an "all-or-nothing" impression that appears unreasonable in light of the information that is known. A closer look, however, would seem to leave room for some disclosure. Mr. Fogarty, for example, says that "portions of Document 11 identify particular FCBs and the details of transactions or account arrangements...." Fogarty Decl. ¶ 4, p. 2. Mr. Dzina offers similar language with respect to Items 7 and 8. *See* Dzina Decl. ¶ 4, pp. 2-3. The Vaughn Index, however, indicates a "paper ... that examines some of the issues involved in a thorough review of the existing Federal Reserve swap arrangements." Thro Decl., Exh. 8, Item 7. There follow a number of pages with nothing at all disclosed, and an exhibit, at the end, that details the FCB names and agreed amounts of existing swap agreements. *Id.* GATA submits that the defendant's documents do not adequately explain what it is that FRB does not want to disclose, nor why certain significant portions of Items 7, 8, and 11 could not be disclosed even if particular FCB arrangements are kept secret. It would appear, however, that

FRB's arguments are similar to those recently rejected by the Second Circuit, and they should be rejected here as well. *See* Bloomberg, L.P. v. Board of Governors of the Federal Reserve System, 601 F.3d at 149-51.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD ANTI-TRUST ACTION COMMITTEE, INC.,	)	
Plaintiff,	)	
	)	Civil Action No. 09-2436 (ESH)
v.	)	
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
Defendant.	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH A GENUINE ISSUE EXISTS
IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Gold Anti-Trust Action Committee ("GATA"), pursuant to Local Civil Rule 7(h)(1), submits the following statement of material facts as to which plaintiff submits a genuine issue exists, in opposition to defendant's motion for summary judgment herein. Plaintiff believes that the factual matters set forth are in dispute and that, absent discovery and/or a further showing by defendant on such matters, such disputes preclude entry of summary judgment in favor of either party herein. The disputed facts are as follows:

1. The Federal Reserve Board ("FRB"), in conducting its search in response to GATA's FOIA request of April 14, 2009, did not seek records from all sources likely to have records responsive to GATA's request. *See* Complaint ¶ 20. This allegation of fact is supported by paragraph 7 of the Declaration of William J. Olson ("Olson Decl.") submitted by GATA, and is at odds with the Memorandum in Support of Defendant's Motion for Summary

Judgment ("Def. Mem. S.J.") and the Declaration of FRB legal counsel Alison M. Thro ("Thro Decl.").

Explanation of the Dispute: Defendant has alleged (Def. Mem. S.J. pp.6-11; Thro Decl. ¶¶ 10-18) that FRB's search was complete, or at least reasonably calculated to produce all responsive documents. GATA contends that it was not, and asserts that there are certain other possible sources of responsive information. *See* GATA Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment ("GATA Mem. Opp."), pp. 13-24. *See* Olson Decl. ¶ 7. GATA has submitted the declaration of its counsel, William J. Olson, pursuant to Rule 56(f), F.R. Civ. P., indicating the need for discovery on this point. The essence of the disputed factual matter is as follows:

Ms. Thro nowhere describes comprehensively the FRB system of records, including agency divisions as well as record-keeping systems, from which records could have been sought. Rather, for the most part, Ms. Thro describes only the entities and/or records systems from which she — or her staff — sought records. *See* Thro Decl. ¶¶ 10-18.

According to her declaration, Ms. Thro or others sought records from the following four sources:

- Legal Division FOIA staff members at FRB re GATA's 2007 FOIA request (Thro Decl. ¶ 12);
- Office of the Secretary (OSEC) at FRB to search electronic database ("FIRMA") and records in FRB's FOI Office (Thro Decl. ¶¶ 13-15)[1];

[1] Ms. Thro indicated that certain FIRMA files were not searched, based upon her belief that such files were not "reasonably likely to include information related to gold

- "Subject matter experts" in the FRB Legal Division and at the Federal Reserve Bank of New York ("FRBNY"), who are said to have conducted a "manual search of their files" (Thro Decl. ¶ 16.); and
- Staff in the Secretariat of the Federal Open Market Committee ("FOMC"), which are said to have "conducted a computerized search of both the Secretariat's internal document library, the Board's public website, and the FOMC's FOIA log (Thro Decl. ¶ 17).[2]

GATA submits that the above sources do not fairly represent "every record system within the Board that was reasonably likely to produce responsive documents" as alleged by FRB (Thro Decl. ¶ 18). One obvious missing item is the electronic file database at the FRBNY. Another is a search of all data at the other federal reserve banks.[3] Indeed, GATA contests the

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swaps…" (Thro Decl. ¶ 15, p. 8), but the basis for her conclusory exclusion of this category of records was not revealed.

[2] Interestingly, one of the items of complaint in GATA's letter of August 20, 2009, appealing FRB's partial denial of GATA's FOIA request was an item — not produced by FRB, and retrieved by GATA from the electronic website — expressly discussing "gold swaps." FRB's appeal denial letter of September 17, 2009 dismissed that GATA objection on the unsupported theory that FRB had no obligation to produce documents accessible to the public, as well as the theory that missing a document did not prove a faulty search. *See* Complaint, Exh. D.

[3] The FRB website highlights the following introductory information relative to the 12 federal reserve district banks:

"To carry out the day–to–day operations of the Federal Reserve System — the nation's central bank — the United States has been divided into twelve Federal Reserve Districts, each with a Reserve Bank. Reserve Banks provide many services to depository institutions and to the public, such as processing electronic payments, currency, and checks. They carry out many of the System's responsibilities for supervising banks. They also help in framing monetary policy, in part by reporting on economic developments in their regions.

determination by Ms. Thro and perhaps others that certain electronic files in FIRMA were not likely to contain responsive documents (Thro Decl. ¶ 15, p. 8). *See* GATA Mem. Opp., p. 16. There may be other missing items, as well. GATA is not even certain that FRB searched for all "gold swap" records, or limited its search to those involving the United States. *See* Olson Decl. ¶ 7. In any event, it is important for FOIA requesters to know — if there is to be a limitation on an agency's record search — what record systems are available for search, and which of those record systems were excluded from the search.

2. FRB, in retrieving records in response to GATA's FOIA request of April 14, 2009, did not obtain records responsive to GATA's request that generally are known to exist and must be in the possession or control of FRB. *See* Complaint ¶ 18 and Exhibit C. This allegation of fact, which also may go to the adequacy of the FRB search, is supported by the Declarations of Chris Powell, Adrian Douglas, and James Turk submitted by GATA, and is at odds with the arguments of defense counsel (Def. Mem. S.J. pp. 6-11), and the Declaration of FRB legal counsel Alison M. Thro.

Explanation of the Dispute: Defendant asserts the reasonableness of its search (Def. Mem. S.J. pp. 6-11; Thro Decl. ¶¶ 10-18) without regard to whether that search reasonably accounted for all responsive documents. As GATA pointed out in its administrative appeal, for example, FRB did not even disclose the existence of a 2005 paper — accessible on the FRB website — that expressly references "gold swaps." GATA has submitted the declarations of

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As required by the Federal Reserve Act of 1913, each of the Reserve Banks is supervised by a board of nine directors who are familiar with economic and credit conditions in the district. Similarly, each of the twenty-five Reserve Bank Branches has a board of five or seven directors who are familiar with conditions in the area encompassed by the Branch."

Chris Powell, Adrian Douglas, and James Turk, which refer to a number of documents involving "gold swaps," copies of which GATA believes the FRB must have within its possession or control. Again, the declaration of GATA's counsel, pursuant to Rule 56(f), Fed. R. Civ. P., indicates the need for discovery on this point.

3. Many of Vaughn Index Items 1-20 are not predecisional, deliberative documents. As pointed out in GATA's memorandum of points and authorities in opposition to defendant's motion for summary judgment, a number of the items claimed by defendant to be exempt as pre-decisional and deliberative under FOIA Exemption 5 do not appear to qualify for that exemption. *See* GATA Mem. Opp., pp. 28-36. In addition to GATA's legal arguments, an examination of the actual documents may be determinative of some of the issues involved. For example, as GATA has pointed out, the memorandum which is part of Vaughn Index Item 2 may indeed be a deliberative, pre-decisional draft of the memo which is part of Vaughn Index Item 3, in which case only the finalized memorandum may need to be produced. *See* GATA Mem. Opp., pp. 30-31. Similarly, the memorandum identified in Vaughn Index Item 7 may be a pre-decisional draft of that "finalized" in Item 8, in which case only the finalized version may need to be produced. *See* GATA Mem. Opp., p. 32. For the factual, as well as legal, reasons asserted by GATA (*see* GATA Mem. Opp., pp. 33-35), the same rationale applies to most of the documents identified as Vaughn Index Items 9-12.

GATA submits that most of these disputed questions can only be resolved by this Court after an *in camera* review of the limited number of documents withheld, as the court did in Lee v. Federal Deposit Insurance Corp., 923 F. Supp. 451 (S.D.N.Y. 1996), finding that "the

documents that were withheld are not so numerous as to make *in camera* review unduly burdensome." *Id*. at 454.

4. Vaughn Index Items 7, 8, and 11 were not voluntarily submitted by a person, and should not be considered confidential for purposes of FOIA Exemption 4. For the reasons set forth in its memorandum of points and authorities in opposition to defendant's motion for summary judgment, GATA submits that there are genuine issues concerning the facts asserted by FRB in support of its claim that Vaughn Index Items 7, 8, and 11 are privileged under FOIA Exemption 4. *See* GATA Mem. Opp., pp. 38-45. As GATA explained, FRB's declarations and legal brief speak in generalities, leaving an "all-or-nothing" impression that appears unreasonable in light of the information that is described in the Vaughn Index and in light of FRB's lack of a reasonable explanation concerning what it is that FRB does not want to disclose, and why certain significant portions of Items 7, 8, and 11 could not be disclosed even if particular FRB arrangements must be kept secret. GATA submits that this Court's *in camera* review of the documents, if the Court deems such a review appropriate, would help resolve the controversy.

5. Certain other factual allegations of defendant concerning the withheld documents are disputed by GATA. At pages 7-13 (paragraphs 16-30) of its Statement of Material Facts Not in Genuine Dispute ("Def. SOMF"), defendant recites a litany of purported facts, most from the declaration of Alison Thro, FRB legal counsel who assisted with the response to GATA's 2009 FOIA request. Many of the allegations of fact in those paragraphs cannot be admitted or denied by GATA because in some cases they are combined factual/legal questions, and in others they go to the very substance of the documents that are being withheld by FRB, and

would require seeing the document to make a judgment about the truth of the FRB assertion. GATA offers three examples:

a. GATA disputes FRB's assertion, concerning all of the withheld documents, that "[a]s to documents redacted, the portions released consisted of the names of the author(s) and recipient(s) of the document, information concerning the subject matter of the document, and factual material that was not subject to an exemption and that was segregable from the deliberative material withheld." That assertion could only be verified by reviewing the document itself, which is one of the reasons why GATA is seeking an order requiring FRB to furnish the documents for an *in camera* review by this Court. *See* Declaration of William J. Olson ¶ 6.

b. Similarly, assertions in defendant's SOMF that Vaughn Index Items 1-12 "contain staff analysis and recommendations concerning matters of interest to the Board and the FOMC in carrying out their statutory functions relating to the setting or consideration of economic and monetary policy," and that their disclosure "would discourage frank, open discussions on matters of policy between subordinates and supervisors," and "could result in premature disclosure of proposed policies before they are adopted and could create public confusion by suggesting reasons and rationales for government decisions that were not in fact the basis for those decisions" (Def. SOMF ¶ 18) are more akin to legal argument than factual assertion; obviously, without seeing the documents, GATA cannot respond in full, except to say that it challenges those FRB assertions, and similar assertions made by the defendant in its SOMF. *See* Declaration of William J. Olson ¶ 6.

c. Lastly, defendant's assertions concerning Vaughn Index Item 15 — said to be "a September 17, 2001 draft document entitled 'Confidential Draft: Potential repo/swap involving Treasury gold'" — are that it is unsigned, but contains handwritten notes, and FRB admits that it does not know but merely surmises that this was a "preliminary draft document exchanged between an attorney and his or her supervisor," that it was "prepared in anticipation of it being relied on in making decisions and contains the analysis and thought process of the parties drafting and commenting on it," and that its release "would have a chilling effect on the deliberative communications among agency staff." *See* Def. SOMF ¶ 21, pp. 9-10. Records responsive to FOIA requests are to be disclosed unless the basis for an exemption is demonstrated, and a basis may not be merely surmised.

Respectfully submitted,

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