IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR *IN CAMERA* REVIEW AND LIMITED DISCOVERY

In the Memorandum supporting its pending Motion for Summary Judgment ("FRB MSJ Memo"), defendant, Board of Governors of the Federal Reserve System ("FRB"), attempted to justify the withholding of records under Freedom of Information Act ("FOIA") Exemptions 4 and 5 based on little more than vague characterizations of the nondisclosed documents. *See* FRB MSJ Memo, p. 15-21, 23. In response, plaintiff, Gold Anti-Trust Action Committee, Inc. ("GATA"), asserted that the FRB's broad characterizations of most of the documents were insufficient to justify the claimed exemptions. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment ("GATA Opp."), pp. 28-36, 38-45. Accordingly, GATA requested this Court to review the 20 or so documents *in camera*, to determine for itself if the claimed FOIA exemptions truly apply to these documents. *See* Memorandum of Points and Authorities in Support of Plaintiff's Motion for *In Camera* Review and Limited Discovery ("GATA Memo for Review/Discovery"), pp. 3-4.

Further, in its pending Motion for Summary Judgment, FRB attempted to defend the nature and scope of its search, despite the paucity of records identified. FRB MSJ Memo, pp. 6-10. GATA has explained that it does not believe that the search conducted by the FRB was adequate, as it failed to account for the sources of records not searched, inadequately searched the records of the regional banks, and proved unable to identify numerous documents which almost certainly exist at the FRB. Accordingly, GATA asked the Court to allow limited discovery — no more than 25 interrogatories — so that GATA may be able to test perceived inadequacies in the FRB's search for records responsive to GATA's FOIA request. GATA Memo for Review/Discovery, pp. 4-6.

FRB's Reply Brief in Support of Defendant Board of Governors of the Federal Reserve System's Motion for Summary Judgment and in Opposition to Motion for *In Camera* Inspection and Discovery ("FRB Opp.") both (i) reiterated its request for summary judgment, and (ii) opposed GATA's requests for *in camera* review and limited discovery. This reply addresses only the issues of *in camera* review and discovery, demonstrating that FRB's arguments are unconvincing on both points, and that GATA's requests should be granted for the reasons set forth below, as well as in its pending motion.

A. THE FRB'S ARGUMENTS AGAINST *IN CAMERA* REVIEW ARE NOT PERSUASIVE.

FRB opposes any *in camera* review of any of the documents in question. FRB Opp., pp. 21-24. FRB argues that such review is completely unnecessary in this case, but its assertions do not stand up against the established case law in this Circuit.

Of course, the FRB cannot dispute that FOIA section 552(a)(4)(B), 5 U.S.C. § 552(a)(4)(B), expressly authorizes *in camera* review of withheld documents. And the parties agree that the decision to conduct such a review is within this Court's discretion. *In camera* review is particularly appropriate in two circumstances: (i) when agency affidavits are insufficiently detailed to permit meaningful review of exemption claims without seeing the documents themselves, and (ii) when there is evidence of agency bad faith. *See, e.g.*, Quinon v. FBI, 86 F.3d 1222, 1227 (D.C. Cir., 1996); Carter v. U.S. Department of Commerce, 388 F.2d 388, 392-93 (D.C. Cir. 1987). Additionally, as the court of appeals explained in Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978) (per curiam), the trial court "has discretion to order

in camera inspection on the basis of an uneasiness, on a doubt he wants satisfied[1] before he takes responsibility for a de novo determination." *Id*. at 1195 (footnote added).

The only issue, therefore, is whether the circumstances of this case warrant such a review. In situations analogous to this case, granting the government's summary judgment motion without conducting such a review has been determined to be reversible error. *See, e.g.*, Quinon, 86 F.3d at 1232 (*in camera* inspection required on remand); Allen v. CIA, 636 F.2d 1287, 1299-1300 (D.C. Cir. 1980) (*in camera* inspection required on remand). *See also*

---

[1] There is every reason for the Court to feel unease and have doubt. FRB's response to GATA's request should be viewed in the context of the FRB's widely recognized policy of secrecy, which has been described by a Joint Committee of Congress, in stark terms: "The historical reluctance of central banks to become open and transparent is well known. Many journalists, academics, and Members of Congress have recognized that **secrecy** and **ambiguity** are part of the culture of central banks." *See* Congressional Joint Economic Committee, "Transparency and Federal Reserve Monetary Policy" (Nov. 1997), http://www.house.gov/jec/fed/fed/transpar.pdf, p. 3 (emphasis added).

Moreover, the story of how FRB, or the Fed, "**perpetuated a lie**" and "the deceitful manner in which the Fed **concealed transcripts** of its meetings for 17 years and **misled Congress**" has been detailed in a book by a former senior economist working for Congressman Henry B. Gonzalez (D-TX), Chairman of the House Banking Committee. Robert D. Auerbach, Deception and Abuse at the Fed, (Univ. of Tex. Press, 2008), p. viii, 87 (emphasis added). *See also id.*, pp. 87-105. (Robert Auerbach is now a Professor of Public Affairs at the Lyndon B. Johnson School of Public Affairs at the University of Texas at Austin, and is the author of "Stop the Federal Reserve From Shredding Its Records," Huffington Post (Dec. 9, 2009) http://www.huffingtonpost.com/robert-auerbach/stop-the-federal-reserve_b_385328.html.

Congress is aware that FRB, which is the American central bank, has been allowed to operate without significant or meaningful audit, but comprehensive corrective legislation has not yet been enacted. Congressman Ron Paul (R-TX) introduced legislation that attracted 320 House cosponsors that would direct the Comptroller General to audit the Board of Governors of the Federal Reserve System and the federal reserve banks. *See* H.R. 1207 (111th Congress); *see also* S. 604 (111th Congress) introduced by Senator Bernard Sanders (I-VT) (with 32 Senate cosponsors). However, a limited "one-time" audit of the Fed by the Comptroller General of the United States was authorized in Section 1109 of the 849-page "Dodd-Frank Wall Street Reform and Consumer Protection Act," Pub. L. 111-203 (Jul. 21, 2010) http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 251-53 (D.C. Cir. 1993) (either *in camera* inspection or more detailed affidavits required on remand).

In light of the fact that FOIA exemption claims must be determined *de novo* by the district court, where, as here, the disputed records are not too voluminous and the government's description of the withheld records is lacking, *in camera* review appears to be the preferred and most efficient way of helping to resolve many FOIA disputes. *See, e.g.*, Quinon v. FBI, 86 F.3d at 1227 (D.C. Cir. 1996); Allen v. CIA, 636 F.2d at 1299-1300. *See also* Mays v. DEA, 234 F.3d 1324, 1328 (D.C. Cir. 2002); Juda v. United States Customs Service, 2000 U.S. App. LEXIS 17985 (D.C. Cir. June 19, 2000); Johnson v. Drug Enforcement Administration, 1999 U.S. App. LEXIS 7332 (D.C. Cir. Mar. 2, 1999).

GATA's request that this Court review the disputed documents *in camera* is premised upon the paucity of explication of the documents' content provided by FRB, making a reasonable assessment of FRB's contention that the disputed documents are exempt from disclosure extremely difficult for GATA or this Court. *See, e.g.*, Quinon v. FBI, 86 F.3d at 1229-31 (*in camera* review appropriate where government affidavits are conclusory and insufficiently detailed); Allen v. CIA, 636 F.2d at 1299 (*in camera* inspection most efficient means of resolving dispute as to contents of documents). Indeed, if GATA had been provided sufficient information about the documents being withheld from disclosure by FRB, it either would have been able to move for summary judgment in its own right, or perhaps chosen not to contest FRB's claimed FOIA exemptions.

While FRB concedes that *in camera* review is within this Court's discretion, it argues that the government's showing is such that GATA "is not entitled to *in camera* inspection on

grounds that the Board has not shown the claimed exemptions apply." FRB Opp., p. 23. But that is not correct. For example, FRB's Exemption 5 assertion with respect to at least some of the disputed documents appears to be strained, if not flatly wrong. Furthermore, as discussed in GATA's Memorandum in Opposition, it is almost impossible to tell from FRB's submission, including the Vaughn Index submitted with the Declaration of Alison Thro, whether many of the documents should or should not be considered exempt from FOIA disclosure. *Id*. at 30-36. GATA asks that FRB's contentions not be accepted at face value, and that this Court determine the applicability of the claimed exemptions to the documents after an *in camera* inspection.

GATA's request for *in camera* review in this case asks the Court to look at a relatively few documents/pages, and is appropriate vis-a-vis the number of records in dispute. *See, e.g.*, Quinon v. FBI, 86 F.3d at 1230 (in camera review where only 77 pages of records involved); Lee v. Federal Deposit Insurance Corp., 923 F. Supp. 451, 454 (S.D.N.Y. 1996) (*in camera* review conducted because documents withheld were "not so numerous as to make *in camera* review unduly burdensome"). *See also* Allen v. CIA, 636 F.2d at 1298 ("examination of the documents themselves [when the requested documents are few in number and short in length] will typically involve far less time than would be expended in presentation and evaluation of further evidence."). There are genuine issues regarding certain material facts in this case, and FRB's submission does not permit meaningful review of the government's claimed FOIA exemptions. *See* Plaintiff's Statement of Material Facts As to Which a Genuine Issue Exists In Opposition to Defendant's Motion for Summary Judgment ("GATA Statement of Material

Facts in Dispute").[2] Since the number of disputed records/documents is relatively small, review by this Court is the simplest, most efficient way to go forward in an attempt to resolve the controversy.

FRB contends that GATA has provided "no specific reasons why it believes the Board's *Vaughn* Index is deficient, other than to allege that it is 'conclusory' and 'cannot fairly be relied upon.'" FRB Opp., p. 24. But GATA did that and more, discussing and trying to analyze each of the withheld records. GATA Opp., pp. 30-38. GATA's arguments that the Vaughn Index clearly **is** conclusory, and that the claimed FOIA exemptions simply are not justified based upon the information provided, are supported by the record thus far developed in this case. In its documents opposing FRB's summary judgment motion, GATA attempted to identify various questions left unanswered by FRB's showing in this case to date. *See, e.g.,* GATA Statement of Material Facts in Dispute, pp. 6-8; Declaration of William J. Olson, pp. 5-11.

In opposing GATA's motion for *in camera* review, FRB essentially revisits the details from the Thro Declaration that formed the basis for FRB's summary judgment memorandum, and argues that GATA's demand for additional information relative to the claimed exemptions is not required under the law. GATA submits that, in the absence of a Vaughn Index

---

[2] FRB contends (FRB Opp., p. 23 n.13) that there are no material facts in genuine dispute, and that GATA's Statement of Material Facts in Dispute merely restates "speculative arguments." GATA disagrees. GATA's Statement of Material Facts — based upon the **four supporting declarations** submitted with it — both identifies material factual questions arising from the numerous ways in which the FRB search was inadequate (pp. 1-5) and sets forth the material issues arising from the **inadequacy of the FRB submission** to support the claimed FOIA exemptions (pp. 5-8).

adequately describing the records, along with the reasons for withholding them (including each segregable portion), it is virtually impossible for this Court reasonably to make a *de novo* determination of FRB's claims of exemption. In that situation, this Court has several options, including inspecting the documents *in camera*, requesting further affidavits/declarations from the agency, or allowing GATA discovery. *See*, *e.g.*, Allen v. CIA, 636 F.2d at 1298; Campbell v. U.S. Dep't of Justice, 164 F3d 20, 30-34 (D.C. Cir. 1998).

FRB's opposition to *in camera* review by this Court is based upon its contention that FRB's descriptions and explanations of documents claimed to be exempt demonstrate that the FOIA exemptions apply. The initial question, therefore, concerns the adequacy of FRB's descriptions, and its explanation as to why it believes the documents are exempt from disclosure as claimed. GATA has addressed these matters in detail in its opposition (GATA Opp., pp. 28-36, 38-45), but responds here to the arguments raised in FRB's reply memorandum.

1. FRB's Exemption 5 Claim. Contrary to FRB's assertion (FRB Opp., pp. 12-13), GATA's "primary claim" is not that FRB must identify the specific policy decision being made to invoke FOIA Exemption 5 for pre-decisional, deliberative communications. Rather, GATA's position is that many of the withheld documents seem not to be predecisional or deliberative to any possible policy decision and FRB has failed to explain how they should so relate. In order to make the determination about whether a document such as a background memorandum on a general legal or policy issue is predecisional and deliberative, the agency must provide sufficient, relevant information identifying, *inter alia*, the decision or policy in question, including whether it was adopted or not, and, if it was, the decision document. This

FRB failed to do. Under the FRB's strained position, every substantive document at the FRB could be withheld under Exemption 5 — without even the possibility of any further explanation or *in camera* review.

In this case, FRB has made an Exemption 5 claim with respect to all of the documents it has refused to disclose, generally without identifying the policy issue or decision in question. Without this information, it is impossible to appraise the accuracy of the claimed exemption.[3] Absent a showing that the withheld documents are both predecisional and deliberative, they should be disclosed. Certainly, they should not be deemed automatically exempt from disclosure and immune from *in camera* review.

This Court's decision in Hamilton Securities Group v. HUD, 106 F. Supp. 2d 23 (D.D.C. 2000), *aff'd per curiam*, 2001 U.S. App. LEXIS 4001 (D.C. Cir. 2001), cited by FRB, is not contrary to GATA's position. The relevant Exemption 5 determination in Hamilton — a FOIA case seeking a draft audit report — posited, *inter alia*, that "even if the draft audit itself did not lead to the adoption of a specific government policy, its protection under Exemption 5 is not foreclosed, as long as the document was generated as part of a definable decision-making process." *Id*. at 30.[4] Thus, under Hamilton Securities, FRB must

---

[3] As explained in GATA's Opposition Memorandum (at 27), a document must be related to a policy decision to be deemed deliberative and pre-decisional under FOIA Exemption 5. *See* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. U.S. Dept. of Justice, 591 F.2d 753, 772-74 (D.C. Cir. 1978).

[4] This Court in Hamilton relied upon pertinent language in Petroleum Information Corp. v. U.S. Dep't of the Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992), wherein Exemption 5 was held **not** to apply, the court of appeals stressing that, "[t]o fall within the deliberative process privilege, materials must bear on the formulation or exercise of agency policy-oriented *judgment*," the deliberative process privilege being "centrally concerned with

persuade this Court that the documents it refuses to disclose were part of a definable decision-making process. It has not even attempted to do so with respect to most of the disputed documents in this case. Nor does NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), cited by this Court in Hamilton and relied upon by FRB, help FRB's cause.[5] While the Supreme Court in Sears observed that identifying a specific decision is not necessarily determinative of the existence of an Exemption 5 privilege, that does not dispose of the **requirement that there be a specific agency decision under consideration**; after all, Exemption 5 protects only pre-decisional, deliberative communications.[6] 421 U.S. at 153 n.18. *See also* Hamilton, 106 F. Supp. 2d at 30.

As this Court also noted in Hamilton, the Exemption 5 privilege is "dependent upon the individual document and the role it plays in the administrative process" (*id.*, quoting Coastal States Gas Corp., 617 F.2d at 867). Indeed, this Court in Hamilton explained at some length how the draft audit report at issue in that case differed from the documents at issue in Coastal. Hamilton, 106 F. Supp. 2d. at 30-31. Although **general** legal principles are important in resolving legal disclosure issues, their application obviously depends upon the **particular**

---

protecting the process by which *policy* is formulated." *Id*. at 1435 (italics original). Those questions of **policy** and **judgment**, it is submitted, are critical to an Exemption 5 determination. If, as here, the agency has not provided sufficient information to evaluate them, the claimed exemption should not be upheld.

[5] Indeed, GATA itself relies heavily on the opinion in Sears, as properly understood. *See* GATA Opp., pp. 25-27, 29, 34.

[6] GATA submits that an Exemption 5 privilege should not be accorded to documents said to be drafts if there is no identification of the finalized document — or in the absence of information as to whether a document was finalized (*e.g.*,Vaughn Index Item 20). *See* GATA Opp., p. 27.

documents in issue, and FOIA Exemption 5 cases such as this one must be determined according to the types of records in issue and why they are thought to be exempt. Hamilton and Sears both involved specific, narrow categories of documents, unlike the wide range and disparate nature of several of the documents at issue in this case.

In opposing FRB's motion for summary judgment, GATA demonstrated that the FRB submission simply did not provide enough information on most of the documents in issue to justify an Exemption 5 privilege.[7] In its opposition to GATA's motion for an *in camera* review, FRB has failed to explain why the disputed documents should be considered pre-decisional and/or deliberative. For example, at pages 13 and 14 of its Reply Memorandum, citing Ms. Thro's declaration, FRB says that "documents 1 through 6 are 'various versions of a Board staff memorandum' and comments on that memorandum, 'containing Board staff's analysis of the consequences of the sale of all official gold'" "provided to inform and advise the decision-makers in advance of any decision they may need to consider," that documents 7 and 8 "relate to a review of … currency swap arrangements with foreign central banks," and that documents 9 and 10 "'provide Board staff analysis of governmental gold policies…' and notes and analyses of the views of participants at a G-10 meeting on the subject." These are

---

[7] As this Court observed in Hamilton (106 F. Supp. 2d at 29), reliance on agency affidavits may be appropriate "'if the affidavits describe the documents and the justifications for nondisclosure with reasonably **specific detail**, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.' *Military Audit Project* v. *Casey*, 211 U.S. App. D.C. 135, 656 F.2d 724, 738 (D.C. Cir. 1981)." (Emphasis added.) As GATA previously explained, the Thro declaration submitted by FRB, despite its length, is not sufficient to support FRB's Exemption 5 claims, principally because there is no demonstration that the documents are pre-decisional and/or deliberative. *See* GATA Opp., pp. 28-36.

simply selected quotes from Ms.Thro's declaration, repeating the conclusory arguments already made by FRB in its summary judgment motion. There is no showing whatsoever, however — and Ms. Thro did not make any such showing in her declaration beyond asserting, in some cases, that they were certain types of communications, often directed by staff to superiors — as to precisely why such documents should be considered pre-decisional or deliberative in the context of the subject of the document. Not only is there (at least usually, as far as GATA can determine) no decisional matter at hand, or no policy issue in question, but the documents appear to be, for the most part, pure reportage. Document 12 is said to be a "legal analysis of the 'ability of the Federal Reserve Banks to engage in transactions involving gold…'" FRB Opp., p. 14. How would that document be pre-decisional or deliberative? Document 15 "'identifies issues that would be raised if a swap or repurchase transaction involving Treasury gold were to occur' and contains handwritten notes of a conversation on that subject," *id.*, but why would that be pre-decisional or deliberative, especially if we are to believe the FRB seems never to have even heard of a gold swap? The document's contents would seem to be simply informational. GATA disputes FRB's assertion that the disputed documents "'reflect the personal opinion of the writer rather than the policy of the agency.'" FRB Opp., pp. 15-16. On the contrary, at least several of the documents appear to contain straightforward reporting and analyses — as opposed to personal opinions.

As GATA stated in its opposition memorandum, drafts of responsive letters yet to be sent would appear able to qualify for exemption — at least in part — if they reveal the deliberative processes of staff, if they differ from whatever letters were finally sent, and if the material redacted from those letters is not of a type that should be disclosed even if the

document is considered pre-decisional and/or deliberative. *See* GATA Opp., pp. 35-36. FRB has not explained what material was redacted from those records, however, and GATA would ask the Court to review these to verify that it would be appropriate to withhold the redacted material.

With respect to Vaughn Index Items 11, 13, and 14, FRB claimed FOIA Exemption 5 not only on the pre-decisional-deliberative theory, but also under the attorney-client privilege. Although there is a cursory reference to attorney-client privilege regarding Items 13 and 14 in Ms. Thro's Declaration, *see* Thro Decl., p. 18 ¶ 26, and p. 19 ¶ 28, the attorney-client privilege was not asserted as such in the Vaughn Index itself with respect to those documents. Although FRB argues (FRB Opp., p. 16) that GATA "provides no response" to FRB's attorney-client privilege claim regarding documents 13 and 14, GATA argued that those items should not be protected by Exemption 5, s*ee* GATA Opp., p. 35, and, although it may not be clear, intended to address the attorney-client privilege claim together with its arguments regarding Vaughn Index Item 11. S*ee* GATA Opp., p. 34. Most of the Items in question do not appear to be covered by the attorney-client privilege. In this regard, it should be noted that, although FRB refers expansively to the various Vaughn Index Items as "documents," each such Item is comprised of a number of documents. Thus, Item 11 consists of four documents totaling 17 pages, and only one of the documents — a four-page memo — would appear to be even possibly protected by the attorney-client privilege. GATA submits that FRB has not made a showing of confidentiality sufficient to exempt that document from FOIA disclosure, having adopted the approach rejected by the court of appeals in Mead Data Central v. U.S. Dept. of the Air Force, 566 F.2d 242 (D.C. Cir. 1977):

> The description of documents 1 and 5 gives **no indication** as to the confidentiality of the information on which they are based. It **simply states** the subject, source, and recipient of the legal opinion rendered. In the federal courts the attorney-client privilege does extend to a confidential communication from an attorney to a client, but **only if** that communication is based on confidential information provided by the client. The Air Force has **not shown** that the information on which the legal opinions in documents 1 and 5 were based meets this confidentiality requirement, and since the FOIA places the **burden on the Government** to prove the applicability of a claimed privilege, **the court could not assume** that it was confidential. [*Id*. at 253-54 (footnotes omitted, emphasis added).]

See also Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862-64 (D.C. Cir. 1980). The same problem exists with respect to Vaughn Index Items 13 and 14. There may be some basis for claiming confidentiality of portions of the 4-page memo in Item 11, which, according to Ms. Thro, contains legal advice. However, FRB has not adequately explained why an appreciable portion of that document — rather than merely the few words that are unredacted — could not be disclosed, and it is difficult to see from FRB's submission why any of the other documents under discussion would be considered confidential attorney-client communications.

2. FRB's Exemption 4 claim. FRB claims that disclosure of Vaughn Index Items 7, 8, and 11 — or at least portions of those documents[8] — is prohibited by FOIA Exemption 4, but the documents in question do not appear to qualify for that exemption. FRB continues to argue (FRB Opp., pp. 17-19) that documents 7 and 8 meet one of the three Exemption 4 tests

---

[8] FRB asserts that "the documents provided to plaintiff carefully delineated the portions that were withheld under particular exemptions." FRB Opp., p. 17 n.9. Actually, that "delineation" was meaningless, since virtually every partially redacted document contains so few words — merely stating the claimed FOIA (b)(4) or (b)(5) exemption across the various redacted portions of the documents.

because they were based (to some degree) upon information "obtained from" foreign banks, despite the fact that the documents themselves were created by FRB or its New York counterpart. GATA submits that the law is otherwise. The most recent case of which GATA is aware, Bloomberg, L.P. v. Board of Governors of the Federal Reserve System, 601 F.3d 143 (2d Cir. 2010), is directly on point. And, although the documents involved in each case are different, the Bloomberg decision appears to refute the position advanced by FRB in this case. *See also* Buffalo Evening News v. Small Business Administration, 666 F. Supp. 467 (W.D.N.Y. 1987).

FRB argues that the Bloomberg and Buffalo Evening News decisions are inapposite because they involved "completed transactions." FRB Opp., p. 19 n.10. Actually, here FRB withholds documents from GATA that involve no "transactions" whatsoever. The instant case — like Bloomberg and Buffalo Evening News — involves documents created by FRB (or other federal reserve banks), and apparently no one else, even if some portions of some of the documents are based upon information at one time furnished by foreign banks. The government's arguments against disclosing the information made in Bloomberg and Buffalo Evening News — that the documents contain confidential information submitted by "persons" — are very similar to those made by FRB in this case, and should be rejected.

Commenting on a point made by GATA concerning the alleged "commercial" nature of the documents, FRB states that the fact that foreign banks have an obvious commercial interest in the information they may have provided meets the "commercial information" segment of Exemption 4's tripartite requirement because it was "voluntarily provided." FRB Opp., p. 19. GATA's point is that the information in question — that is, the documents being withheld by

FRB, whether partially based upon information obtained from "persons" in the first instance — is FRB information, compiled by FRB and required to be maintained by FRB under Regulation N. The information cannot be said to have been voluntarily submitted by the information providers. Whether FRB would have had to acquire such information under Regulation N if it had not been submitted by such persons is a significant question that is still in dispute. In arguing against *in camera* review, FRB actually inadvertently demonstrates the inadequacy of its representations, and reveals the need for such *in camera* review.

It is impossible to tell from the documents provided by FRB which "portions"of the disputed documents are in issue here. FRB claims that they are "small portions" (FRB Opp., p. 18), but, as GATA stated in its opposition memo previously filed herein, the withheld portions of all of the documents in question with respect to claimed FOIA Exemption 4 — Item 7, consisting of two documents and totaling 11 pages; Item 8, consisting of two documents and totaling 13 pages; and Item 11, consisting of 4 documents and totaling 17 pages — appear to be in the range of 99 percent. In other words, virtually nothing on these documents was disclosed. Under FRB's theory, the agency could withhold almost any documentation whatsoever on the theory that it included the substance of information "obtained from" a person. GATA submits that these are not documents that should be withheld from disclosure, and that its lack of knowledge as to what types of documents FRB is withholding is further reason for this Court to review the documents *in camera*.

B. THE FRB'S ARGUMENTS IN OPPOSITION TO LIMITED DISCOVERY BY GATA ARE NOT PERSUASIVE.

The FRB denies that its search was inadequate, and believes that GATA has not demonstrated any need for limited discovery to test the adequacy of its search. *See* FRB Opp., pp. 2-12. The FRB's argument is based on Alison Thro's declaration, but it is difficult, bordering on the impossible, for this Court to evaluate the government's claim that the search was reasonable based on that declaration.

Specifically, Ms. Thro reveals that the FRB has no "single central document repository database that contains all of the Board's records," and FRB contends that Ms. Thro and her staff searched in all areas/databases thought likely to contain responsive records. *Id.*, p. 2. GATA submits that where there is no unified document database, it is not enough for the agency simply to offer a conclusory allegation that record systems reasonably likely to produce responsive records was searched. Instead, GATA submits, the FRB should be required to identify the various record repository databases that were deliberately omitted from the search. FRB points out (FRB Opp., p. 4) that GATA cited "no authority for this proposition." However, not all agencies lack unified document databases, and there are numerous cases determining agency searches to be inadequate. *See*, *e.g.*, Steinberg v. Department of Justice, 23 F.3d 548, 551-52 (D.C. Cir. 1994) (agency burden to demonstrate reasonable search based on facts of the case); Banks v. Department of Justice, 538 F. Supp. 2d 228, 238-39 (D.D.C. 2008) (description of search in adequate, *inter alia*, in not adequately explaining means of search and systems of records searched). Moreover, it defies logic — at least in a disputed FOIA case where the nature of the search is in issue — that the agency should not be required

to explain which records databases were omitted. For example, it is clear from Ms. Thro's declaration that — except for contacting "subject matter experts" in both the Legal Division and the Federal Reserve Bank of New York ("FRBNY") who were familiar with gold swaps, who "had been contacted" in connection with GATA's 2007 FOIA request, and who apparently only **manually** searched "their files" for any "new documents" (Thro Decl. ¶ 16) — the records of no federal reserve regional banks (including New York) had the benefit of **computer** searches. There is no additional explanation as to the details of any such searches or the reason for not computer searching any files at the FRBNY or the other federal reserve banks. "Records," as defined in FRB's own regulations, include "all information coming into the possession and under the control of … any Federal Reserve Bank … or [records] …maintained for administrative resons …in official files in … any Federal Reserve Bank…." 12 C.F.R. § 261.2(i)(1)(i-ii). The FRB secretary is the official custodian of all FRB records, including records that are in the possession or control of any federal reserve bank. 12 C.F.R. § 261.3(a). *See* Fox News Network, LLC v. Board of Governors of the Federal Reserve System, 601 F.3d 158, 160-62 (2d Cir. 2010). The federal reserve regional bank files and records are examples of files that were not searched by FRB, without explanation by Ms. Thro. Although FRB now contends (FRB Opp., p. 4) that the federal reserve regional banks would be unlikely repositories of responsive records, that allegation is not sufficient. Furthermore, even the search of FRBNY files believed to be relevant by Ms. Thro was demonstrated to be incomplete, by her own declaration.

FRB contends (FRB Opp., p. 5) that it would be unduly burdensome and unproductive to provide a list of the records databases that are maintained by FRB. Surely, however, this

characterization is overblown, for the FRB, as Ms. Thro and her staff would need to have reviewed a list of all such records databases and then selected some to be searched. This list of records databases exists and could be furnished. Without knowing those databases considered but rejected for inclusion in the search, GATA and this Court should have "substantial doubt" as to the sufficiency of FRB's FOIA search, and summary judgment for FRB would not be proper. *See* Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990). The limited discovery sought by GATA would reveal the databases not searched, so the reasonableness of the search could be evaluated.

Moreover, GATA submitted with its Opposition Memorandum 40 pages of extremely detailed declarations of three individuals with many years of experience and expertise in gold markets (Chris Powell, Adrian Douglas, and James Turk) discussing numerous developments (and documents) since 1990 relative to "gold swaps." Surely, the central bank of the United States must have some of these records in its possession. Through this detailed demonstration of missing documents, it is submitted that GATA established a sufficient predicate to require that FRB explain — by responding to limited discovery — the absence of the types of records that have not yet been identified in response to GATA's FOIA requests. *See* Campbell v. FBI, 164 F.3d 20, 27-29 (D.C. Cir. 1998). Indeed, some of the interrogatories proffered below take, as their starting point, the historic events set out in these three GATA Declarations to test whether the FRB search truly could have found no such documents concerning gold swaps. If limited discovery were permitted, focused interrogatories would be finalized and filed by GATA.

In addition, since filing its three Declarations, GATA has identified another government report which discusses the prevalence of gold swaps internationally:

> Some **central banks** have increasingly decided to manage their **gold** reserves by loaning, leasing, or **swapping their gold** to earn a small profit. The World Gold Council estimates that **70 central banks** currently manage their gold reserves in this manner. [Harold J. Johnson & Gary T. Engel, "International Monetary Fund: Current Financial Situation," U.S. General Accounting Office (July 21, 1999) (emphasis added.)]

It is inconceivable that the General Accounting Office (now Government Accountability Office) could have this knowledge of the "gold swap" operations of some 70 central banks worldwide while the FRB — our nation's central bank — is oblivious to how the other central banks operate, or is without the ability to find documents discussing the subject matter in its files. In view of this GAO Report, the FRB's contention that its search identified no records of gold swaps anywhere in the world since 1990 should be sufficient to be considered prima facie evidence of the inadequacy of the search.[9]

The GAO Report then turns to the situation in the United States: "Although U.S. law does not preclude the loaning, leasing or **swapping of its gold** holdings, the United States has chosen only to monetize its gold [footnote omitted]." *Id.*, p. 20 (emphasis added). "The Secretary of the Treasury is authorized to issue **gold certificates** to the **Federal Reserve** which issues an equivalent credit (at the official price of gold) to a Treasury deposit account. The 1998 Financial Report of the United States Government notes that $11 billion of the U.S. gold

---

[9] The scope of GATA's request clearly encompassed records relating to foreign central banks. The request was for all records relating to or mentioning "gold swaps" from January 1, 1990, to April 14, 2009 (the date of GATA's request), "involving the United States of America," as well as "not involving the United States of America." Complaint, Exhibit A, p. 4.

reserve has been monetized in this fashion." *Id.*, p. 20, n.28 (emphasis added). Should the FRB engage in gold swap arrangements using the Treasury's "gold certificates" as a proxy for gold rather than gold itself, GATA believes that this would constitute a "gold swap" arrangement within the scope of its document request. Whether FRB viewed documents discussing "gold certificate" swaps as being responsive to GATA's request could be revealed in responses to such limited discovery.

GATA is familiar with court decisions finding FOIA searches adequate irrespective of the actual results achieved by the search. However, these cases require that the search be reasonable in the circumstances of the case. *See* GATA Opp., p. 11. Although an agency may not always be required to search every record source — and although it may have discretion to limit its FOIA search to particular sources, such as a central filing system, if additional sources are unlikely to produce responsive records — an agency, such as FRB here, cannot limit its search if there are other record systems that are likely to turn up the information requested. *See, e.g.*, Campbell v. FBI, 164 F.3d at 28-29; Oglesby v. Dep't of Army, 920 F.2d 57, 67-68 (D.C. Cir. 1990). *See also* Oglesby v. Dep't of Army, 79 F.3d 1172 (D.C. Cir. 1996).

GATA has proposed submitting no more than 25 interrogatories to FRB addressing various issues related to FRB's retrieval of responsive documents. FRB has claimed that the declarations of GATA witnesses are speculative and there is no factual dispute. FRB Opp., pp. 21, 23. GATA has developed sample interrogatories to show how discovery would demonstrate the GATA declarations are well founded and support the Plaintiff's Statement of Material Facts as to Which a Genuine Issue Exists. While GATA would reserve the right to edit and finalize its proposed interrogatories if this Court grants leave to file them, it presents

the following as illustrations of the type of questions that it would want answers to, to help evaluate the reasonableness of the FRB's search:

1. A. Please list the name of all agencies, boards, divisions, offices, regional banks, or other entities by whatever name, which are considered to be part of FRB, or subject to FRB's control, which have custody of records that would be considered records possessed or controlled by FRB or subject to production at FRB's request or order.

B. For each such FRB entity, please identify the databases of records which are capable of being searched in response to a FOIA request.

C. Please identify those FRB records databases which were not searched in processing the GATA request for records.

2. A. Please confirm that the Federal Reserve Bank of New York physically holds significant gold on behalf of the owners of that gold.

B. Please confirm that the Federal Reserve Bank of New York has records as to the legal and equitable owners of the gold that it holds.

C. Please confirm that at least some of the gold that it holds is now, or has been since 1990, subject to a "gold swap" agreement.

D. Please confirm the records of the Federal Reserve Bank of New York were not searched in response to the GATA document request, beyond the manual search of individual files described in paragraph 16 of the Alison Thro Declaration in this action.

E. In view of these facts, please explain why the records of the Federal Reserve Bank of New York (pertaining to such agreement(s)) were not searched in response to GATA's request.

3. The Declaration of James Turk filed herein (September 20, 2010) refers to the article"The Macroeconomic Statistical Treatment of Reverse Transactions," a study for the International Monetary Fund, October 2001. Para. 11.a-c. Please state if the FRB maintains files of articles such as this article, and in which records databases would such article mentioning "gold swaps" most likely be found.

4. The report by Harold J. Johnson & Gary T. Engel, International Monetary Fund: Current Financial Situation, U.S. General Accounting Office (Jul. 21, 1999) states that some 70 central banks have engaged in gold swaps. In view of this widespread practice, how could the FRB's search be expanded to identify such records?

5. The Declaration of Adrian Douglas filed herein (September 20, 2010) refers to a statement attributed to Virgil Mattingly, FRB General Counsel, at an

FOMC meeting on January 31, 1995, and to Mr. Mattingly's later recollection of that statement at an FOMC meeting six years later. Para. 11.

A. Aside from the FOMC minutes of those two meetings, please list the FRB records referring to, or relating in any way to, either the January 31, 1995, Mattingly statement or the later Mattingly recollection, or both.

B. If no records are identified, please explain whether any such records ever existed and whether they were destroyed.

6. If gold swap transactions, actual, proposed or hypothetical, were considered or evaluated by FRB, where would records of such transactions most likely be maintained (listing each division/bureau/department, office)?

7. Describe all communications (in the past three years) between FRB and the Department of the Treasury regarding the periodic reporting of gold and/or gold swaps on the Department of the Treasury website. *See*, *e.g.*, http://www.treasury.gov/resource-center/data-chart-center/IR-Position/Pages/20094141418493770.aspx.

8. The Declaration of James Turk filed herein (September 20, 2010) identifies stories in the press concerning recent "gold swap" transactions by the Bank of International Settlements which have occurred **after** the date range of the GATA document request. ¶¶ 6, 11. Please identify where articles on these recent "gold swap" transactions would be maintained in records databases. Can these same records databases be searched for the **earlier** GATA-requested documents?

9. Do you believe there were material deficiencies in the search conducted for the records requested by GATA? If so, please identify what type of search would have resulted in the identification of additional responsive records.

10. Were the persons conducting the search of records at FRB given any instructions by persons within FRB or outside FRB as to how to conduct the search, any limitations on the search, or other matter pertaining to the search?

11. Is there a policy or practice at FRB to omit "gold swap" records from all records indexing systems, or to put such records in a location beyond the reach of FOIA records searches? If so, please describe it completely.

12. Robert Auerbach's book Deception and Abuse at the Fed discusses FRB's unrecorded votes to shred documents (*see* p. 103). Please identify the FRB's records system that lists documents shredded or otherwise destroyed by FRB.

13. The FRB website provides a link to the Appendix to FOMC minutes from November 05, 1991, including a paper entitled "Comments on the USSR Financial Situation" by E.M. Truman, dated November 5, 1991. http://www.federalreserve.gov/monetarypolicy/files/FOMC19911105material.pdf

This paper states:

> The idea of a special credit facility backed by gold was first considered in late September when representatives of the [Russian National Bank] approached the [Bank for International Settlements] concerning a possible financing facility of up to $2 billion based on a **gold swap**.... The Federal Reserve does have the legal authority to deal in gold.... I also would emphasize the sensitive nature of these discussions. [pp. 3-4 (emphasis added).]

A. Does FRB have additional records about the possible plan to use a "gold swap" to provide financial assistance to the USSR, and whether such a plan was ever implemented?

B. Please explain if the description of these discussions as "sensitive" reflected a desire to avoid the American public from knowing that financial aid to the USSR or its successor entities was being considered, and whether such desire precluded disclosure of this plan, either then or now.

CONCLUSION

The parties herein are embroiled in a controversy over whether the records identified by FRB in response to GATA's request are truly exempt from FOIA disclosure and thus being properly withheld. As discussed above, GATA believes that FRB has failed to describe the records listed in its Vaughn index with sufficient particularity to demonstrate that they are being properly withheld under any exemption. GATA submits that *in camera* review of the documents being withheld should be ordered for the Court to make its own *de novo* determination as to whether the claimed exemptions apply.

However, the controversy between the parties also includes a second issue of even greater importance — whether FRB's search was inadequate. For the reasons set out above, it is simply difficult, if not impossible, to believe that FRB identified all responsive records

contained within the FRB files. GATA submits that limited discovery is necessary for GATA to test the nature and scope of the FRB's search.

GATA requests this Court to order *in camera* review, and to authorize limited discovery as requested.

Respectfully submitted,

/s/ William J. Olson
WILLIAM J. OLSON
(D.C. Bar No. 233833)
JOHN S. MILES
(D.C. Bar No. 166751)

HERBERT W. TITUS
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
703-356-5070 (telephone)
703-356-5085 (fax)
wjo@mindspring.com

Counsel for Plaintiff