

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FOX NEWS NETWORK, LLC,

Plaintiff,

-against-

BOARD OF GOVERNORS
OF THE FEDERAL RESERVE
SYSTEM,

Defendant.

Case No.

COMPLAINT

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INTRODUCTION

1. Plaintiff Fox News Network, LLC, owner of the Fox Business Network (“Fox Business”) brings this action against defendant Board of Governors of the Federal Reserve System (the “Federal Reserve”), an agency of the United States government, to vindicate its right under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to obtain government records regarding the use of federal funds under lending programs administered by the Federal Reserve. The present action concerns two different FOIA requests: one transmitted electronically via the Federal Reserve’s web site on November 10, 2008 (FOIA Request No. 2009100073) (the “First FOIA Request”) and one transmitted by facsimile (FOIA Request No. 2009100106) (the “Second FOIA Request”), along with a request for “expedited processing,” on November 18, 2008.

2. Fox Business requested these records because, as a member of the news media, it has a responsibility to inform the public about the management of programs having a vital effect on the American financial system and, by extension, on the global economy. With respect to the Second FOIA Request, Fox Business also sought expedited processing pursuant to 5 U.S.C.

§552(a)(6)(E) because of the self-evident importance of the timely dissemination of information in this rapidly changing economic and political landscape.

3. Despite the obvious importance of the information requested and the even more obvious need for timely responses, the Federal Reserve did not respond to the Second FOIA Request within the ten-day expedited period set forth in 5 U.S.C. § 552(a)(6)(E)(ii)(I), and it has not responded to the First FOIA Request at all in complete violation of the twenty-business-day time constraint established by 5 U.S.C. § 552(a)(6)(A)(1). Furthermore, the response Fox Business finally received to its Second FOIA Request was wholly unsatisfactory in that it denied access to *all* records and information that was not previously published on the basis of claimed exemptions which, Fox Business believes, are not applicable.

4. Fox Business has brought this action to obtain judicial relief from the Federal Reserve's failure to respond to the First FOIA Request and from its untimely and improper response to the Second FOIA Request.

5. The need to provide the public with the information contained in the requested records is especially urgent in light of the immediate crisis in the financial markets and its effect on the national economy. This crisis, which has repeatedly been referred to as a "global economic meltdown," is widely viewed as having been triggered in large part by excesses in the banking industry -- the very industry that is the recipient of the Federal Reserve loans at issue in Fox Business's two FOIA Requests. Public confidence depends, in large measure, upon the availability of information about the government's use of federal funds to ameliorate the present difficulties in the financial sector. Likewise, an informed public is essential to the national debate about the Federal Reserve that is currently being conducted in Congress and the media.

Accordingly, there is a compelling and immediate need for the documents Fox Business has sought.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552.

7. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

8. Inasmuch as the Federal Reserve did not meet its legal duty to respond to Fox Business's two FOIA Requests within the required time, Fox Business is relieved of any obligation to exhaust administrative remedies and is now entitled to appeal directly to the Court to enforce the dictates of FOIA pursuant to 5 U.S.C. § 552(a)(6)(C).

THE PARTIES

9. Fox News Network, LLC, which owns Fox Business Network, is a Delaware limited liability company with its principal place of business located at 1211 Avenue of the Americas, New York, New York. The Fox Business Network is a 24/7 cable news network that disseminates business news and information ("Fox Business").

10. Defendant Federal Reserve is an agency of the United States and has possession and control of the records that Fox Business is seeking. As the central bank of the United States, the Federal Reserve's responsibilities fall into four general areas: (i) conducting the nation's monetary policy by influencing money and credit conditions in the economy in pursuit of full employment and stable prices; (2) supervising and regulating banking institutions to ensure the safety and soundness of the nation's banking and financial system and to protect the credit rights of consumers; (3) maintaining the stability of the financial system and containing systemic risk that may arise in financial markets; (4) providing certain financial services to the U.S.

government, to the public, to financial institutions, and to foreign official institutions, including playing a major role in operating the nation's payment systems.

BACKGROUND

11. Among the methods used by the Federal Reserve to regulate the banking and financial system is to lend money to private financial institutions, primarily through its lending facilities. Under this system, the Federal Reserve loans money to depository institutions, *i.e.*, commercial banks, savings and loan associations, savings banks and credit unions, which obtain funds principally from deposits by the public.

12. Upon information and belief, in an effort to improve market liquidity and overall market functioning, in or about August 2007, the Federal Reserve expanded its discount window lending by increasing loan terms from overnight to as much as 90 days. In addition, the Federal Reserve added three new lending facilities: (a) the Primary Dealer Credit Facility, (b) the Term Securities Lending Facility and (c) the Term Auction Facility.

13. According to the Federal Reserve, these initiatives have lengthened the duration of access to liquidity, broadened the types of eligible collateral, expanded the range of eligible counterparties and reduced the cost of borrowing from the Federal Reserve.

14. Upon information and belief, the average outstanding amounts under the Federal Reserve's lending programs increased from approximately \$1 million during the week of August 8, 2007 to \$187 billion by the end of 2008. Information concerning the amount, nature and quality of the collateral that secures the Federal Reserve's lending is not presently publicly available.

15. The amounts loaned to private institutions by the Federal Reserve under its various programs are public assets.

16. Fox Business submits that in light of the American public's stake in the lending activities of the Federal Reserve, the public is entitled to be informed of the manner in which such lending is implemented and secured.

FOX BUSINESS'S FOIA REQUESTS

A. The First FOIA Request

17. On November 10, 2008, Fox Business submitted its First FOIA Request via the Federal Reserve's website at federalreserve.gov/generalinfo/foia/EFOIAForm.cfm.

18. The First FOIA Request sought "the names of institutions receiving Federal Reserve lending from programs including but not limited to the following: Regular OMOs; Single-Tranche OMO Program; Discount Window; Term Discount Window Program; Term Auction Facility; Primary Dealer Credit Facility; Transitional Credit Extensions; ABCP Money Market Liquidity Facility; Securities Lending; Term Securities Lending Facility; Term Securities Lending Facility Options Program; and any other Federal Reserve lending facility not mentioned above." The First FOIA Request also requested "an accounting of the collateral provided by these institutions in exchange for the lending."

19. By letter dated the same day, the Federal Reserve acknowledged having received the First FOIA Request on November 10, 2008.

20. On November 18, 2008, Fox Business sent the Federal Reserve a letter to "clarify and narrow" the First FOIA Request (the "November 18, 2008 Letter"). The November 18, 2008 Letter stated that Fox Business was seeking "the names of institutions receiving Federal Reserve lending pursuant to any Federal Reserve lending facility" and "an accounting of the collateral provided by these institutions," with the request limited to "all Federal Reserve lending that

occurred between August 2, 2007 and November 17, 2008.” Finally, the November 18, 2008 Letter stated that the requester “will pay all fees incurred in the processing of [the] request.”

21. Apart from its November 10, 2008 acknowledgment letter, The Federal Reserve has not given any response at all to Fox Business’s First FOIA Request.

B. The Second FOIA Request

22. On November 18, 2008, Fox Business faxed and sent by UPS overnight mail the Second FOIA Request, which was entitled “Freedom of Information Act Request and Request for Expedited Processing” (“Second FOIA Request”). The Second FOIA Request was properly addressed to the Freedom of Information Office, Board of Governors of the Federal Reserve System, 20th and Constitution, NW, Washington DC 20551. The fax confirmation receipt confirms that the Federal Reserve received the Second FOIA Request on November 18, 2008.

23. The Second FOIA Request asks for documents “[f]or the months of September 2008 and October 2008” identifying “all institutions that have participated in any Fed[ederal Reserve] lending program, including, but not limited, to Regular OMO, Single Tranche OMO, Discount Window, Term Discount Window Program, Term Auction Facility, Primary Dealer Credit Facility, Transitional Credit Extensions, ABCP Money Market Fund Liquidity Facility, Securities Lending, Term Securities Lending Facility, and the Term Securities Lending Facility Options Program.”

24. The Second FOIA Request also asks for records showing (a) the amounts borrowed by each named institution, (b) the collateral pledged by each institution, and (c) the collateral held by the Federal Reserve at the close of business on November 14, 2008.

25. With respect to the request for expedited processing pursuant to 5 U.S.C. §552(a)(6)(E)(v)(II), Fox Business is a member of the news media as defined in 12 CFR §

261.2(l) and is primarily engaged in the dissemination of information to the public as referred to in 5 U.S.C. § 552(a)(6)(E)(v)(II). As to the urgency of its request, Fox Business stated:

Fox News's requests concern matters of current exigency to the American public. Specifically, the American public has a compelling need to be immediately and fully informed about the Fed's current practices of lending public money to private financial institutions and the quality of the pledged collateral, in particular. The current financial crisis in America is impacting all Americans. For example, the widespread financial turmoil is resulting in increased joblessness and housing foreclosures, and is causing significant losses in personal and retirement savings. This financial turmoil is rapidly changing and spreading such that increasing numbers and varieties of private entities are seeking public financial assistance from the Fed. Public confidence in the Fed's lending practices is important to the stability and recovery of the American financial system. Thus, the American public has a compelling need for the requested information so that it can ensure that its interests are being safeguarded.

Any delay in the release of the requested information would significantly compromise the American public's ability to assess the Fed's lending practices on an ongoing basis. In addition, any delay would disrupt the public's ability to make its views known to public officials. Significantly, any delay will undermine public confidence in the integrity and reliability of the Fed which will further erode the American financial system.

26. In addition to the foregoing, Fox Business "agree[d] to pay reasonable fees for the requested records" and indicated that a response was expected "within ten (10) calendar days."

27. By letter dated November 20, 2008 (the "Federal Reserve's November 20, 2008 Letter"), the Federal Reserve acknowledged receipt of the FOIA Request. The "Federal Reserve's November 20, 2008 Letter" stated, incorrectly, that the Second FOIA Request was received on November 20, 2008.

28. In fact, the Second FOIA Request was received by fax on November 18, 2008. Consequently, the Federal Reserve was required to provide a substantive determinative response on or before November 28, 2008 pursuant to 5 U.S.C. § 552(a)(6)(E)(ii)(I). The Federal Reserve failed to do so by this statutory deadline.

29. By letter dated December 1, 2008 (the “December 1, 2008 Federal Reserve Letter”), the Federal Reserve belatedly advised Fox Business that it had “determined to grant expedited treatment” and that the Second FOIA Request would be “processed . . .” as soon as practicable.

30. On December 18, 2008, rather than supplying the requested records, the Federal Reserve sent Fox Business a letter “extending the period for [its] response until January 6, 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” (the “December 18, 2008 Federal Reserve Letter”). No other explanation of the need for such a delay was provided.

31. By letter dated January 6, 2009 (the “January 6, 2009 Federal Reserve Letter”), the Federal Reserve acknowledged that responsive records existed, but asserted that such records “contain[ed] or consist[ed] of the following kinds of exempt information: trade secrets and commercial or financial information obtained from a person and privileged or confidential; and inter-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” The January 6, 2009 Federal Reserve Letter also stated that “no reasonably segregable nonexempt information was found.” Finally, with respect to the request for “records sufficient to identify all collateral held by the [Federal Reserve] at the close of business on November 14, 2008 . . . [including] information sufficient to match the institutions with the collateral they pledged,” the January 6, 2009 Federal Reserve Letter asserted that, despite “suitable inquiries,” the Federal Reserve “did not locate any information within [its] control . . . that is responsive to [the] request.”

32. In addition to invoking the specific exemptions from disclosure set forth in 5 U.S.C. § 552(b) (4) and (5), the January 6, 2009 Federal Reserve Letter contained a lengthy

discussion of the agency's view of the need to protect borrowing banks from public disclosure and opined that "confidentiality in this instance ultimately advances the interests of taxpayers, preserving the integrity and effectiveness of financial stability measures and, in the long term, preserving an opportunity for maximum recovery by the Federal Reserve Banks in the event of a default by an individual borrower." The Federal Reserve stated its support for non-disclosure despite its acknowledgment in this very same letter that because of current market conditions, there have been "increasing calls by the media, members of Congress, and the public for enhanced transparency, with disclosure characterized as especially important given the interests of and risks to taxpayers."

FIRST CAUSE OF ACTION

(For a Declaration that Fox Business is Entitled to Disclosure of the Records Requested in its First FOIA Request)

33. Fox Business repeats and realleges all of the allegations contained in paragraphs 1-32 as if fully set forth herein.

34. Fox Business has complied in all respects with the substantive and procedural rules governing request for records under FOIA as required by 5 U.S.C. §552(a)(3).

35. As a result of the Federal Reserve's failure to meet its statutory deadline under 5 U.S.C. § 552(a)(6)(A)(i), Fox Business is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

36. An actual and justiciable controversy exists as to whether the Federal Reserve has violated FOIA by failing to respond to Fox Business's First FOIA Request within the required time and by failing to provide the requested records.

37. Upon information and belief, the records sought in the First FOIA Request exist and are in the custody and control of the Federal Reserve.

38. Upon information and belief, there are no statutory exemptions that are applicable to the records sought in the First FOIA Request.

39. As a result of the foregoing, Fox Business is entitled to a declaration that the Federal Reserve must immediately comply with its First FOIA Request.

SECOND CAUSE OF ACTION

(For an Injunction Compelling Immediate Production of the Records Requested in the First FOIA Request)

40. Fox Business repeats and realleges all of the allegations contained in paragraphs 1-39 as if fully set forth herein.

41. As a result of the foregoing, Fox Business is entitled to an injunction compelling the Federal Reserve to immediately produce the records request in the First FOIA Request.

THIRD CAUSE OF ACTION

(For a Declaration that Fox Business is Entitled to Expedited Processing of the Second FOIA Request)

42. Fox Business repeats and realleges all of the allegations contained in paragraphs 1-41 as if fully set forth herein.

43. Fox Business is a member of the news media as defined in 12 CFR § 261.2(l) and is primarily engaged in the dissemination of information to the public as referred to in 5 U.S.C. § 552(a)(6)(E)(v)(II).

44. There exists a compelling need for and an urgency to inform the public about the information sought in Fox Business's Second FOIA Request as is required by 5 U.S.C. § 552(a)(6)(E).

45. Fox Business has complied in all respects with the substantive and procedural rules governing request for records under FOIA as required by 5 U.S.C. § 552(a)(3).

46. As a result of the Federal Reserve's failure to meet its statutory deadlines under 5 U.S.C. § 552(a)(6)(E)(ii)(I), Fox Business is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

47. An actual and justiciable controversy exists as to whether the Federal Reserve has violated FOIA by failing to respond to Fox Business's request for expedited processing within the required time, and by failing to produce any documents or information within the required time.

48. As a result of the foregoing, Fox Business is entitled to a declaration that its Second FOIA Request be afforded expedited processing.

FOURTH CAUSE OF ACTION

(For an Injunction Compelling Expedited Processing of the Second FOIA Request)

49. Fox Business repeats and realleges all of the allegations contained in paragraphs 1-48 as if fully set forth herein.

50. As a result of the foregoing, Fox Business is entitled to an injunction compelling the Federal Reserve to afford its Second FOIA Requests expedited processing.

FIFTH CAUSE OF ACTION

(For a Declaration that Fox Business is Entitled to the Records Sought in Its Second FOIA Request)

51. Fox Business repeats and realleges all of the allegations contained in paragraphs 1-50 as if fully set forth herein.

52. As a result of the Federal Reserve's failure to meet its statutory deadline under 5 U.S.C. § 552(a)(6)(E)(ii)(I), Fox Business is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(E)(iii).

53. Upon information and belief, the records sought in Fox Business's Second FOIA Request exist and are in the custody and control of the Federal Reserve.

54. Upon information and belief, the records sought in Fox Business's FOIA Second Request are not trade secrets; nor are they commercial or financial information obtained from a person that makes them privileged or confidential. Therefore, the records sought are not exempt from disclosure under 5 U.S.C. §552(b)(4).

55. Upon information and belief, the records sought in Fox Business's FOIA Second Request are not inter-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency and are therefore not exempt from disclosure under 5 U.S.C. §552(b)(5).

56. Upon information and belief, to the extent that some of the records requested in the Second FOIA Request are subject to exemption under 5 U.S.C. §552(b)(4) or (5), there is reasonably segregable nonexempt information that must be disclosed.

57. Upon information and belief, the Federal Reserve does have within its custody and control some "records sufficient to identify all collateral held by the [Federal Reserve] at the close of business on November 14, 2008 . . . [including] information sufficient to match the institutions with the collateral they pledged." In fact, it defies common sense – and raises serious public policy concerns -- to suggest that the Federal Reserve has no records of pledged collateral.

58. An actual and justiciable controversy exists in that the Federal Reserve has failed to disclose the records sought in Fox Business's Second FOIA Request although it has a statutory obligation to do so.

59. As a result of the foregoing, Fox Business is entitled to a declaration that the Federal Reserve is obligated to provide it with copies of the records sought in Fox Business's FOIA Second Request.

SIXTH CAUSE OF ACTION

(For an Injunction Requiring the Federal Reserve to Comply with Fox Business's Second FOIA Request on an Expedited Basis)

60. Fox Business repeats and realleges all of the allegations contained in paragraphs 1-59 as if fully set forth herein.

61. As a result of the foregoing, Fox Business is entitled to an injunction compelling the Federal Reserve to provide Fox Business with copies of the records sought in its Second FOIA Request.

REQUESTED RELIEF

WHEREFORE, Fox Business requests that the Court:

(A) Declare that the Fox Business is entitled to disclosure of the records sought in its First FOIA Request;

(B) Issue an injunction compelling the Federal Reserve to immediately produce the records requested in the First FOIA Request;

(C) Declare that Fox Business is entitled to the expedited processing of its Second FOIA Request;

(D) Declare that the Fox Business is entitled to disclosure of the records sought in its Second FOIA Request;

(E) Issue an injunction compelling the Federal Reserve to produce the records requested in the Second FOIA Request on an expedited basis;

(F) Award Fox Business reasonable attorney fees and other litigation costs under 5 U.S.C. § 552(a)(4)(E)(i)-(ii); and

(G) Grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
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