

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: January 11, 2010 Decided: March 19, 2010)

Docket No. 09-3795-cv

FOX NEWS NETWORK, LLC,

Plaintiff-Appellant,

— V. —

BOARD OF GOVERNORS OF THE FEDERAL
RESERVE SYSTEM.

Defendant-Appellee.

Before: JACOBS, Chief Judge, LEVAL and HALL,
Circuit Judges.

Plaintiff Fox News Network, LLC, appeals from a

judgment entered July 30, 2009 in favor of defendant Board of Governors of the Federal Reserve System by the United States District Court for the Southern District of New York (Hellerstein, J.) in a suit brought to enforce a Freedom of Information Act request for information relating to lending conducted by the twelve regional Federal Reserve Banks. For

1 the reasons stated today in the tandem case, Bloomberg L.P.
2 v. Bd. of Governors of the Fed. Reserve Sys., F.3d ,
3 No. 09-4083-cv, (2d Cir. March 19, 2010), the disputed
4 information was not exempt from disclosure under Exemption 4
5 of the Freedom of Information Act. We hold here that while
6 the records of the twelve regional Federal Reserve Banks do
7 not automatically become records of the Board, certain
8 records of the Federal Reserve Banks are records of the
9 Board and must be searched. The district court's judgment
10 is vacated and the case is remanded.

11

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13
14 DENNIS JACOBS, Chief Judge:
15

16 The Federal Reserve System--the central bank of the
17 United States--is composed of twelve regional Federal
18 Reserve Banks and the defendant-appellee Board of Governors
19 of the Federal Reserve System ("Board") in Washington, D.C.
20 The Board is a federal agency that (among other things)
21 supervises the operations of the twelve Federal Reserve
22 Banks.

23 Plaintiff Fox News Network, LLC, ("Fox News") submitted
24 two Freedom of Information Act ("FOIA") requests to the
25 Board in November 2008. The first sought the names of all
26 the private banks that received loans from the twelve
27 Federal Reserve Banks (under all of their lending programs)
28 from August 2007 to November 2008, and the collateral the
29 banks provided. The second sought the names of the

1 borrowing banks, the amount they borrowed, and the
2 collateral pledged as to all loans made by the twelve
3 Federal Reserve Banks during September and October 2008.
4 The Board denied these requests in January 2009, noting that
5 while it possessed some responsive records, it was
6 withholding the requested information under Exemptions 4 and
7 5 of FOIA. During its search for documents responsive to
8 the FOIA requests, the Board determined that it had no
9 information about the collateral used by borrowing banks to
10 secure specific loans, and that such information would be
11 held by the Federal Reserve Bank that made each loan. But
12 since the Board is of the view that the relevant records of
13 the Federal Reserve Banks are not records of the Board, the
14 Board concluded that a FOIA request to the Board did not
15 require the Board to search for them--and no search was
16 conducted.

17 Fox News brought suit in the United States District
18 Court for the Southern District of New York (Hellerstein,
19 J.) to compel disclosure of the Board's documents and a
20 search of documents in the hands of the Federal Reserve
21 Banks. Following cross motions for summary judgment, the
22 district court ruled in favor of the Board, holding both

1 that the records maintained by the Board are properly exempt
2 from disclosure under FOIA Exemption 4, and that the Board
3 was not required to search records maintained by the Federal
4 Reserve Banks. Fox News Network, LLC v. Bd. of Governors of
5 the Fed. Reserve Sys., 639 F. Supp. 2d 384, 394, 401
6 (S.D.N.Y. 2009). The district court's opinion did not
7 discuss Exemption 5, and on appeal the Board argues only the
8 applicability of Exemption 4.

9 For the reasons stated in the tandem case, Bloomberg
10 L.P. v. Board of Governors of the Fed. Reserve Sys., ____
11 F.3d ___, No. 09-4083-cv, (2d Cir. March 19, 2010), the
12 information unambiguously at issue in the Fox News requests
13 --the identity of the borrowing bank, the dollar amount of
14 the loans, the collateral securing the loans, and the loan
15 origination and maturity dates--is not protected from
16 disclosure by Exemption 4. The Board is therefore required
17 to disclose responsive records it had previously deemed
18 exempt; we vacate the district court's judgment and remand
19 to the district court to order the Board to disclose the
20 previously withheld responsive information.

21 Still at issue is whether the Board adequately searched
22 its records and the records of the twelve Federal Reserve

1 Banks in response to these FOIA requests. Fox News argues
2 that: (1) the Board was required to search the loan records
3 of each of the twelve Federal Reserve Banks, and (2) the
4 Board misconstrued Fox News's FOIA requests in the Board's
5 search of its own records.

6 As the district court concluded, not all lending
7 records of the twelve Federal Reserve Banks necessarily
8 become records of the Board. However, Board regulations
9 provide that some records at the Federal Reserve Banks--
10 those kept at the Federal Reserve Banks under certain
11 conditions for "administrative reasons"--are records of the
12 Board; these must be searched. We remand to the district
13 court to order further searches and to determine if the
14 fruits of those searches must be disclosed. The district
15 court did not reach the question of whether the Board
16 misconstrued the scope of the Fox News FOIA requests (the
17 district court having ruled these documents would be exempt
18 from disclosure in any instance); we remand for further
19 consideration of that question as well.

20

I

22 Barring a relevant exemption, an agency must disclose

1 responsive "agency records" in order to comply with a FOIA
2 request. See 5 U.S.C. § 552(a)(4)(B); see also Carney v.
3 U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994). Fox
4 News argues on appeal that all of the lending records of the
5 twelve Federal Reserve Banks are "agency records" of the
6 Board within the scope of FOIA. See 5 U.S.C. §
7 552(a)(4)(B). Materials are agency records under FOIA if:
8 (1) the agency created or obtained the relevant records, and
9 (2) the agency is in control of the documents at the time of
10 the FOIA request. U.S. Dep't of Justice v. Tax Analysts,
11 492 U.S. 136, 144-45 (1989). Under the Board's regulations,
12 "[t]he Secretary of the Board . . . is the official
13 custodian of all Board records, including records that are
14 in the possession or control of the Board, any Federal
15 Reserve Bank, or any Board or Reserve Bank employee." 12
16 C.F.R. § 261.3(a). Since the Board is the "custodian" of
17 "Board records" that are in the hands of the Federal Reserve
18 Banks, such records must be searched by the Board pursuant
19 to FOIA. It remains to be determined which Federal Reserve
20 Bank records are "Board records" that the Board must search.

21 Fox News argues that the responsive loan records are
22 among those records held at the Federal Reserve Banks that

1 are also records of the Board. By regulation, records of
2 the Federal Reserve Banks become records of the Board when
3 they are created pursuant to the "performance of functions
4 for or on behalf of the Board" or when they "are maintained
5 for administrative reasons in the regular course of business
6 in official files in any division or office of the Board or
7 any Federal Reserve Bank in connection with the transaction
8 of any official business." 12 C.F.R. § 261.2(i)(1)(i-ii).

9 (The full text of the regulation is set out in the margin).¹

10 A declaration submitted by the attorney for the Board
11 in charge of processing FOIA requests states that the Board
12 interprets the qualifier "for or on behalf of the Board" to
13 describe a function performed by the Federal Reserve Bank
14 "under delegated authority from the Board." Supp. Decl. of
15 Alison M. Thro ¶ 3. The Board cites no written or published
16 expression of this internal policy or interpretation, or any

¹ "Records of the Board include . . . all information coming into the possession and under the control of the Board, any Board member, any Federal Reserve Bank, or any officer, employee, or agent of the Board or of any Federal Reserve Bank, *in the performance of functions for or on behalf of the Board* that constitute part of the Board's official files; or [records] *[t]hat are maintained for administrative reasons in the regular course of business in official files in any division or office of the Board or any Federal Reserve Bank in connection with the transaction of any official business.*" 12 C.F.R. § 261.2(i)(1)(i-ii) (emphases added).

1 prior application of it. It is therefore uncertain how much
2 deference it commands or deserves.

3 In any event, it seems clear from the statutory scheme
4 that enacted the Federal Reserve System that the lending
5 activities of the Federal Reserve Banks do not take place
6 "on behalf of" or under the "delegated authority" of the
7 Board. The Board itself has no power to make a loan to any
8 bank, and does not authorize each loan made by the Federal
9 Reserve Banks. The power to make loans is explicitly
10 granted by statute only to the Federal Reserve Banks
11 themselves. 12 U.S.C. § 347b(a). In that way, "Congress
12 divided the powers of the Federal Reserve System between the
13 Board, which is a federal agency, and the [Federal Reserve
14 Banks], which were established as regional banks. . . . The
15 Federal Reserve [System] is structured to empower local
16 institutions to lend, while permitting federal oversight."
17 Fox News Network, LLC v. Bd. of Governors of the Fed.
18 Reserve Sys., 639 F. Supp. 2d 384, 396 (S.D.N.Y. 2009). "It
19 is evident from the legislative history of the Federal
20 Reserve Act that Congress did not intend to give the federal
21 government direction over the daily operation of the
22 [Federal] Reserve Banks." Lewis v. United States, 680 F.2d

1 1239, 1241 (9th Cir. 1982). Since the Board neither issues
2 nor authorizes the specific loans that Fox News seeks
3 documentation of, we agree that the Federal Reserve Banks
4 did not issue each loan on "behalf of the Board," or under
5 the "delegated authority" of the Board.²

6 However, "Records of the Board" also include such
7 records that "are maintained for administrative reasons in
8 the regular course of business in official files in any
9 division or office of the Board or any Federal Reserve Bank
10 in connection with the transaction of any official
11 business." 12 C.F.R. § 261.2(i)(1)(ii). The Board argues
12 briefly that it interprets this regulation as well to
13 include only those records created "under delegated
14 authority from the Board." This interpretation does not
15 withstand scrutiny. The context and phrasing of the
16 regulation gives no support for the proposed limitation. As

² Judge Leval does not concur in this paragraph. In his view, it is unnecessary to answer in this appeal whether lending by the Federal Reserve Banks is done "for or on behalf of" the Board. Fox News has made clear that all it seeks in its FOIA demand is the identities of the borrowing banks and the terms of the loans. All such information will be contained in records "maintained for administrative reasons in the regular course of business in official files in . . . [a] Federal Reserve Bank." Accordingly all the information in the Federal Reserve Banks that is sought in this case is contained in documents which are subject to production by the Board.

the district court held in Bloomberg--without appeal from the Board on that point--this regulation provides that certain records of the twelve Federal Reserve Banks are records of the Board and those records must be searched.

Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.,
649 F. Supp. 2d 262, 274 (S.D.N.Y. 2009).

7 To fully comply with the Fox News FOIA requests, the
8 Board must search records of the twelve Federal Reserve
9 Banks that are maintained for administrative reasons, in the
10 regular course of business, in the Board's official files or
11 by any Federal Reserve Bank, and in connection with the
12 transaction of any official business. And responsive
13 documents identified in that search must be produced unless
14 shielded by some FOIA exemption. We remand to the district
15 court to order the Board's further searches and to determine
16 if the results of those searches must be disclosed.

II

19 Fox News also argues that the Board improperly narrowed
20 the scope of its FOIA requests with regard to collateral
21 pledged by borrowing banks. According to Fox News, it
22 requested not only collateral associated with specific loans

1 (which is held only by the Federal Reserve Banks), but also
2 general collateral information (which is held by the Board
3 itself).³ The Board claims that while it possesses some
4 general information of this sort--such as the collateral
5 that depository institutions have on deposit in "pledge
6 accounts," which is eligible to be posted as collateral for
7 a Discount Window loan--it does not believe such information
8 was within the scope of the Fox News requests. The Board
9 argues that it properly interpreted the requests to seek
10 only specific collateral pledged for specific loans. That
11 information is held only at the Federal Reserve Banks.

12 This issue was not decided below because the district
13 court ruled categorically that collateral information is
14 protected from disclosure by Exemption 4. It is unclear if
15 such general collateral information was requested, or
16 whether, under Bloomberg L.P. v. Board of Governors of the
17 Fed. Reserve Sys., ____ F.3d ___, No. 09-4083-cv, (2d Cir.

³ The first Fox News request initially sought, in relevant part, "an accounting of the collateral provided by these [borrowing] institutions in exchange for lending." This request was later arguably broadened to "seek[] an accounting of the collateral provided by these [borrowing] institutions"--a formulation that is less transaction specific. The second Fox News request sought, in relevant part, "records sufficient to identify all collateral pledged by each . . . institution" that "participated in any Fed[eral Reserve System] lending program."

1 March 19, 2010), such information could be withheld. We
2 decline to decide these questions in the first instance and
3 remand to the district court for judgment on this point
4 consistent with our opinion.

5

CONCLUSION

7 We vacate the district court's judgment for the
8 foregoing reasons and those stated in the tandem case,
9 Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.,
10 ___ F.3d ___, No. 09-4083-cv, (2d Cir. March 19, 2010). We
11 remand to the district court to order the Board's further
12 disclosure and further searches, and to determine if what is
13 discovered in further searches must be disclosed. We also
14 remand to the district court for initial consideration as to
15 whether the Board properly construed the scope of the FOIA
16 requests and searched its own records in response, and
17 whether materials that may be found must be disclosed.