



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

August 11, 1977

STRICTLY CONFIDENTIAL (FR)
CLASS I - FOMC

TO: Federal Open Market Committee

FROM: Murray Altmann *M.A.*

Attached is a memorandum from the Committee's General Counsel, dated August 11, 1977, and entitled "Freedom of Information Act Request for the 1972 Memoranda of Discussion."

It is contemplated that this memorandum will be discussed in executive session at the forthcoming meeting of the Committee.

Attachment



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STRICTLY CONFIDENTIAL (FR)
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To: Federal Open Market
Committee

Subject: Freedom of Information
Act Request for the 1972 Memoranda
of Discussion

7802
From: Messrs. O'Connell &
Siciliano*

ACTION REQUESTED: Decision, following upon a Freedom of Information Act ("FOIA") request, of whether to release in full, or in part,^{1/} the Memoranda of Discussion of the Federal Open Market Committee for the year 1972.

BACKGROUND: By letter dated June 10, 1977 (Attachment A), John Herbers, an editor of The New York Times, following an oral request initially made by a Times reporter, requested the Committee's Secretary to allow him to examine the "minutes" of the FOMC for the year 1972. The request was filed with the Secretary pursuant to the Freedom of Information Act ("FOIA") and in accordance with the procedures set out in Part 271.4(c) of the Committee's Rules Regarding Availability

*/ Mr. Stephen L. Siciliano is a Senior Attorney on the Board's staff who has been assigned by the Board's General Counsel principal responsibility for Freedom of Information Act requests.

1/ The meaning of "in full" and "in part" is explained in the alternative actions portion of this memorandum.

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of Information. The Secretary denied Mr. Herbers' request on June 27, 1977 (Attachment B), on the authority of section (b)(5) of the FOIA, which exempts from disclosure material consisting of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."^{2/} In an appeal dated July 11, 1977 (Attachment C), Mr. Herbers requested review of the Secretary's decision to deny him access to the Memoranda of Discussion. By letter dated August 8, 1977 (Attachment D), Governor Coldwell denied the request on the basis of sections (b)(4) and (5) of the FOIA. Section (b)(4) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Members will note the advice given to Mr. Herbers in Governor Coldwell's letter of the Chairman's intention to place before the FOMC for determination the release question raised by Mr. Herbers' request. Note further that under the FOIA, Governor Coldwell was required to advise no later than August 8 of his decision on Mr. Herbers' appeal. For this reason, that response preceded presentation of the issue to the Committee.

DISCUSSION: In a suit arising out of a request for access to the Committee's Memoranda of Discussion of certain meetings held in 1975, a United States District Judge recently held that reasonably segregable facts contained in such documents must be disclosed to members of the public upon request. However, the question of what portions of the

^{2/} Mr. Broida's letter distinguishes Minutes of Action from Memoranda of Discussion and advises Mr. Herbers that he may have the former, but not the latter.

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Memoranda must be disclosed pursuant to this standard was not finally resolved in the lawsuit.^{3/}

We believe that the Memoranda of Discussion requested by Mr. Herbers are substantially exempted from the disclosure requirements of the FOIA by exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The following materials contained in the Memoranda of Discussion are clearly protected by exemption 5:

1. Materials consisting of the deliberations of Committee members and their alternates;
2. Materials consisting of recommendations, opinions, and judgments presented by members of the FOMC, or by Reserve Bank staff for the FOMC's consideration;
3. Nonexempt factual materials not reasonably segregable from the above.

Although the legal issue is not free from doubt, factual information obtained in confidence from a foreign central bank may be protected by exemptions 5 and 4 in the FOIA if the Committee believes that such information is needed by the FOMC and that disclosure would impair the Committee's ability to obtain such information from foreign central banks in the future. In addition, selected facts marshalled by staff

^{3/} The District Court Judge subsequently ordered a very broad disclosure of all material in the Memoranda; but the Committee appealed. After the parties agreed to a much more limited disclosure in settlement of the case, the District Court Judge entered an order approving the settlement and the appeal was dismissed. The parties stipulated that the settlement may not be construed as a resolution of any legal issue raised in the suit.

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members, and presented with or in support of staff recommendations, opinions and judgments, may be protected by exemption 5 on the theory that disclosure would indicate which facts are deemed most pertinent by the staff, thereby revealing staff judgment. However, courts have restricted use of this theory to instances where the factual material sought has otherwise been disclosed to the public; in such instances the courts have apparently been satisfied that sanctioning the agency's withholding of the facts would not constitute an undue deprivation to the public.

In the previous lawsuit, pursuant to a negotiated agreement of settlement, the Committee disclosed factual portions of the January and February 1975 Memoranda, including portions that most likely would be exempt under the above analysis. In total, only limited portions of the subject Memoranda were disclosed; and many of the disclosures--removed as they were from context--were unintelligible and, quite simply useless to anyone seeking to learn the Committee's full deliberative process, including such matters as the views of its members and staff, or even its methods of operations. Although such disclosures satisfied the public interest group which previously sued the Committee, we believe that Mr. Herbers' interest in this material is more substantive and that he would not be satisfied by review of the kind of document previously disclosed by the Committee.

Following informal discussion with the attorney in the Department of Justice responsible for Freedom of Information litigation, during which discussion he was advised of the intended denial by Governor Coldwell of Mr. Herbers' appeal, the Department of Justice attorney indicated that he did not concur in the proposed denial of

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Mr. Herbers' appeal. While conceding that the subject Memoranda were substantially exempt from the disclosure requirements of the FOIA, Department counsel stated his belief that no harm to the public interest would result from disclosure at this time since present Committee policy requires release of these Memoranda in the near future. Accordingly, pursuant to procedures established by the Department for its representation of agencies in FOIA cases, Department counsel advised that the Department will not represent the Committee in any litigation flowing from a denial of the request.^{4/}

Should Herbers seek judicial review of the denial of his request, upon direction of the FOMC, its position would be defended in court by Committee counsel--presumably composed, as in the Merrill case, of attorneys who are Committee officers, in conjunction with Board and System attorneys, all of whom have had previous litigation experience involving the Freedom of Information Act. Thus, the Department's action in declining to represent the FOMC in court is not

^{4/} In a recent letter to all Federal agencies, Attorney General Griffin Bell advised that henceforth four criteria would be used by the Department in determining whether denial of an FOIA request merits defense by the Justice Department. These criteria are: (a) whether the agency's denial seems to have a substantial legal basis, (b) whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies, (c) whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and (d) whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria. Although these criteria are not premised upon statutory grounds, they nevertheless are being followed by the Department. In the matter of the subject request, these criteria were determined by the Chairman of the Department's Freedom of Information Act Committee, not to have been satisfied.

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decisive as to the Committee's posture; however, it is our judgment that the Committee would be substantially aided in any litigation by the co-representation of the Department's counsel. Further, we believe that the absence of the Department's representation, and its apparent significance, would not escape the court's attention. This fact could, we believe, impact adversely on the FOMC's ultimate position in such litigation. It follows, of course, that avoidance of the possibility of such adverse occurrence, hopefully as a result of a decision by Herbers not to litigate, is highly desirable and would be encouraged by some form of release action by the Committee.

ALTERNATIVES AVAILABLE TO COMMITTEE: The options available to the Committee with respect to the FOIA request would appear to be as follows:

(1) In light of the impending release of the Memoranda in January of 1978, the Committee could decide to comply with the FOIA request and in a form of public release, provide the requested access to the text of the 1972 Memoranda of Discussion, subject to removal of sensitive "foreign entries". This form of response would preclude a later allegation of "selective access" to the 1972 Memoranda.

(2) The Committee could give The New York Times access to the Memoranda, for use in preparation of the article, but not actually publicly release the material.

(3) The Committee could review its five-year disclosure policy and release to the public all Memoranda for the period 1972

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through 1975 (subject to appropriate deletion), thus avoiding the problem of future individualized FOIA requests of this nature.

(4) The Committee could decline to take any action to change its five-year disclosure policy, thus leaving unaffected the consequence of the appellate denial issued on the Committee's behalf by Governor Coldwell. Under this approach, Mr. Herbers could, at a minimum, demand that there be transmitted to him all reasonably segregable non-exempt portions of the Memoranda--even though the material would be of little use to him. Preparation of such material would prove to be administratively burdensome but any refusal to provide the information would be difficult to defend in litigation. It was consideration of the latter point that prompted inclusion in Governor Coldwell's response to Mr. Herbers a statement of recognition of his right to demand segregation of factual material. Hopefully, the manner of expression to Mr. Herbers will discourage such demand.

In its consideration of alternative (4), the Committee might assume, arguendo, that The New York Times would seek judicial review of the Committee's denial of access to the Memoranda (Attachment D)--an action, not presently anticipated as probable, but, of course, possible. In such event the Committee would have 30 days under the FOIA to file an answer or other responsive pleading. That same period of time could be used by the Committee to reconsider its denial position with the possibility that then existing factors might impel a change in position with respect to access to the Memoranda in question.

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RECOMMENDATION: The legal issues presented are relatively few and are believed to be subordinate to policy considerations to be undertaken by the Committee. Looking to Committee action from among the alternatives presented that would provide the strongest legal position for the Committee, we recommend against alternative (2). Committee action adopting alternative (4) would, we believe, place the Committee in no substantially different position from a legal viewpoint than that resulting from Governor Coldwell's denial action. Obviously, Herbers might have been "on the fence" regarding pursuit of judicial review following receipt of the denial affirmation, a position from which he might affirmatively move should alternative (4) be the Committee's action. However, as mentioned, alternative (4) should reasonably be read as affording an opportunity, should litigation be instituted, for the Committee to re-examine its position in the light of then existing circumstances. This re-examination could be effected prior to the time that a court calendar would require submission of the Committee's formal pleadings.

Alternatives (1) and (3) appear to offer maximum assurance against litigation flowing from the Herbers request. Adoption of alternative (1) could trigger requests for the remaining Memoranda (1973-75 and January-March 1976). Alternative (3) would, of course, render moot all precedential problems suggested by alternative (1).