



BETTER MARKETS

December 14, 2020

Mr. Matthew Luecke
Deputy Secretary
Federal Open Market Committee
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Part 271: Rules Regarding Availability of Information

Dear Mr. Luecke:

Better Markets¹ appreciates the opportunity to comment on the above proposal (“Proposal” or “Release”),² issued by the Federal Open Market Committee (“FOMC” or “Committee”) of the Federal Reserve System (“Federal Reserve” or “Board”) regarding amendments to the Committee’s regulations implementing the Freedom of Information Act (“FOIA”). The Proposal would streamline, reorganize, and revise the Committee’s FOIA rules to clarify procedures for requesting documents; to revise certain definitions to be consistent with language in FOIA and Department of Justice (“DOJ”) guidance; and to conform to the Committee’s current FOIA practice.

As explained below, while the particulars of the Proposal appear unobjectionable, the Committee, and the Federal Reserve, should take steps, whether within this rulemaking or otherwise, to ensure that its FOIA rules, policies, and practices are consistent with appropriate governmental policies favoring transparency.³

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans’ jobs, savings, retirements, and more.

² 85 Fed. Reg. 65,262 (Oct. 15, 2020).

³ Transparency is not only a critical tool of good governance generally, but is critical to quality financial regulation, supervision, and enforcement specifically, and consistent with the objectives of FOIA, Better Markets has consistently advocated for greater transparency and accountability, including by making FOIA requests of our own, *see* Press Release, Better Markets Sends FOIA to SEC (Oct. 18, 2018), <https://bettermarkets.com/newsroom/better-markets-sends-foia-sec>, pushing for stronger FOIA rules, Better Markets, Letter on CFTC FOIA Regulations (Aug. 21, 2017),

BACKGROUND AND SUMMARY

With the passage of FOIA in 1966, Congress established a policy of openness with respect to information within the control of the Executive Branch, and a presumption that such records should be accessible to the American public. Under FOIA, anyone can request government documents without any specific need or reason. It has become indispensable for maintaining a government that is transparent and accountable to the people it serves. Representative John Moss, a leading proponent of the FOIA bill, offered a clear statement of the statute’s rationale during floor consideration:

[O]ur system of government is based on the participation of the governed, and as our population grows in numbers it is essential that it also grow in knowledge and understanding. We must remove every barrier to information about—and understanding of—Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship.⁴

The Supreme Court aptly observed that the “[p]urpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption.”⁵

While the public’s statutory right to access information is not absolute, over time concerns began to grow that some agencies were overusing FOIA exemptions that allow information to be withheld from disclosure. Additionally, backlogs slowed the public’s vital access to agency documents.⁶

In response to these concerns, the Obama Administration issued a memorandum which implemented a presumption of openness to agency documents.⁷ This presumption was then

<https://bettermarkets.com/rulemaking/better-markets-comment-letter-cftc-foia-regulations>, and successfully litigating to secure the release of documents agencies and companies had sought to conceal from the public. *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 663 (D.C. Cir. 2017)

⁴ 112 Cong. Rec. 13,641-43(1966).

⁵ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

⁶ U.S. Department of Justice, Office of Information Policy, *Summary of Annual FOIA Reports for Fiscal Year 2013*, July 23, 2014, <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fy2013-annual-report-summary.pdf>.

⁷ The Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, President Barack Obama (Jan. 21, 2009).

codified by Congress in the FOIA Improvement Act, along with provisions limiting agencies' use of exemptions and creating procedures that make requesting documents more efficient.⁸

Unfortunately, while there have been some improvements to the FOIA process as a result of these developments, the robust transparency contemplated by FOIA has not been fully realized across the government, particularly with respect to information that may cast the government in a negative light.⁹

The Proposal seeks to “set forth more clearly the procedures for requesting access to documents that are records of the Committee under FOIA.”¹⁰ This includes revisions to “certain definitions to be consistent with language from the FOIA and DOJ guidance,” which will primarily incorporate “requirements found in the FOIA Improvement Act of 2016.”¹¹ The Proposal would also reorganize the Federal Reserve’s FOIA regulations. While many of the changes appear to be non-substantive, some may impact how FOIA requests are processed—for example, the Federal Reserve proposes “clarifying that its time period for responding to a request begins when it receives a perfected request that includes all required information.”¹²

COMMENTS

The Proposal, as far as it goes, is largely unremarkable and unobjectionable. And since an effective FOIA regime requires, in part, that the procedures for seeking access to documents be clear, well-organized, and fully aligned with the statute, the Proposal represents enhancements. However, all federal agencies, including the Federal Reserve, should revisit their FOIA practices to ensure that those practices reflect a commitment to transparency and openness. Our comments below set forth some of the general principles that should guide the Board’s FOIA Office and that, as appropriate, should be reflected in its rules, guidance, and internal and external policies. As appropriate, we also explain how specific aspects of the Proposal could be improved by adherence to these principles.

- **Establish An Affirmative Commitment to Transparency:** The Committee and the Federal Reserve should establish, either directly in its FOIA rules, or in its guidance and policies and procedures, a commitment to transparency consistent with the letter and spirit of President Obama’s 2009 FOIA memorandum. That memorandum, which as

⁸ FOIA Improvement Act of 2016, Public Law 114–185, 130 Stat. 538 (June 30, 2016).

⁹ American Bar Association, Freedom of Information Act Flaws Need Fixing, Experts Say (Aug. 4, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/08/freedom_of_informati/.

¹⁰ Release at 65,262.

¹¹ Release at 65,262.

¹² Release at 65,263.

noted above was codified in the FOIA Improvement Act of 2016, established a “clear presumption” of openness and transparency. Formalizing this as Board policy would demonstrate the Board’s commitment to transparency and good governance, and provide a marker for accountability by which to judge the Board’s level of transparency.

- **Commit to Construing Exemptions Narrowly:** Consistent with President Obama’s 2009 FOIA memorandum, exemptions to FOIA disclosure should be construed narrowly and only when truly necessary. This should particularly be the case with respect to Exemption 5, the so-called “deliberative process privilege.” This exemption does not serve to protect the privacy interest of citizens, critically valuable trade secrets of companies, or other truly private information. Instead, it protects only the government itself. And while some applications of the deliberative process exemption (such as drafts of documents), far too often “agencies stretch the exemption to inappropriately cover other information, such as records that may paint the agency in a bad light, records that reveal problems, and records that contain embarrassing information.”¹³
- **Commit to Construing Requests Favorably:** The Committee and the Federal Reserve should not treat FOIA requesters as if they are adverse parties in litigation. Rather, requests should be construed favorably, and in a manner that will give the requester as much information as possible at minimum expense and delay. To that end, one of the proposed revisions would “clarify[] that [the] time period for responding to requests begins when [the Board] receives a perfected request that includes all required information.”¹⁴ If finalized, this provision could become a method for the Board to delay its FOIA obligations by requiring that requesters dot every “i” and cross every “t.” Instead of this stringent requirement, the time period for a response to a request should begin when the Federal Reserve receives a substantially complete request with all necessary information to allow the Federal Reserve to locate the requested documents.

CONCLUSION

We hope you find these comments helpful.

Sincerely,

¹³ NICK SCHWELLENBACH & SEAN MOULTON, PROJECT ON GOVERNMENT OVERSIGHT, THE “MOST ABUSED” FREEDOM OF INFORMATION ACT EXEMPTION STILL NEEDS TO BE REINED IN (Feb. 6, 2020), <https://www.pogo.org/analysis/2020/02/the-most-abused-foia-exemption-still-needs-to-be-reined-in/>.

¹⁴ Release at 65,263

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