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Source of document: FDIC, Legal Division
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[FDIC's Electronic Request Form](#)

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Via Electronic Mail & U.S. Mail

October 17, 2012

Re: *Appeal No. 12-0043-A*
Original Request: FOIA Log Nos. 12-0715 and 12-0718
FOIA/PA Group Responses: August 8, 2012 and September 6, 2012
Date of Appeal Letter: September 8, 2012

This is in response to your September 8, 2012 letter appealing the Federal Deposit Insurance Corporation's (FDIC's) September 6, 2012 final response to your request for records that you submitted pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). In your original FOIA request you sought copies of seven specifically identified FDIC internal manuals.

By letters dated August 8, 2012 and September 6, 2012, FDIC FOIA/Privacy Act Group (FOIA Group) staff provided you with approximately 1,103 pages of non-exempt material responsive to your request. Staff further advised you that some of the items you requested were duplicative and that one of the manuals you had identified could not be located. Finally, staff advised you that one of the items you requested, *FDIC's Legal Division Closing Manual*, was protected from disclosure in its entirety pursuant to exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). This determination was the sole basis for your appeal.

After considering your appeal in light of the FOIA and applicable case law, I am granting your appeal in part and denying it in part. As explained in more detail below, I find that while the *FDIC's Legal Division Closing Manual* consists primarily of privileged information that is protected from disclosure pursuant to FOIA exemption 5, certain portions may be segregated and released.

Exemption 5

FOIA exemption 5 permits the withholding of inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency. This includes information contained in internal communications which relate to pre-decisional staff opinions, recommendations, and discussions of policy alternatives (deliberative process privilege information), documents and other memoranda prepared by an attorney in contemplation of litigation (attorney-work product information), confidential communications between an attorney and the agency (attorney-client privilege information), and confidential communications relating to law enforcement matters (law enforcement/investigative privilege

information). The courts have interpreted FOIA exemption 5 to include all privileges available in civil discovery. *Tax Analysts v. IRS*, 294 F.3d 71, 76 (D.C. Cir. 2002); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1185 (D.C. Cir. 1987). We have determined that the *Legal Division Closing Manual* includes information subject to the two privileges addressed below.

1. Work Product Privilege

The government is permitted to withhold records under the attorney work product privilege, including documents “advis[ing] the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome.” *Soghoian v. U.S. Dep’t of Justice*, -- F.Supp.2d --, 2012 WL 3090309, *7 (D.D.C. July 31, 2012) (quoting *Delaney, Migdail, & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir.1987)). “Work product protection extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated.” *Id.* (quoting *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992)). The *Legal Division Closing Manual* is an internal agency record developed to provide guidance, establish policy and recommend procedures to FDIC lawyers on a variety of issues, including prospective litigation, that pertain to bank closings. As such, it is covered by the attorney work product privilege.

2. Deliberative Process Privilege

“The deliberative process privilege exempts from disclosure those documents that contain deliberations comprising part of a process by which governmental decisions and policies are made.” *Electronic Frontier Found. v. Dep’t of Justice*, -- F.Supp.2d --, 2012 WL 4319901, *6 (D.D.C. Sept. 21, 2012). A document is deliberative if it “makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). As described above, the *Legal Division Closing Manual* reflects the internal consultative process by which FDIC lawyers make decisions and execute policy in connection with the bank closing process. See *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981). For this reason, most of the material included in the *Legal Division Closing Manual* is exempt from disclosure under exemption 5.

With transparency in mind, the FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b) (modifying all FOIA exemptions listed in § 552(b)). Thus, the responding agency must also evaluate each withheld document for reasonably segregable non-exempt material. *Tax Analyst v. IRS*, 391 F.Supp.2d 122, 128 (D.D.C. 2005).

In this case, after examining the contents of *Legal Division Closing Manual*, we find that the cover page and the index can be readily disclosed. These materials, consisting of 2 pages, are enclosed with this response. We have further determined that because no other portions can be meaningfully extracted and disclosed, the remaining contents of the *Legal Division Closing Manual* must be withheld pursuant to FOIA exemption 5 of the FOIA. See, e.g., *Delta Ltd. v. U.S. Customs & Border Prot. Bureau*, 384 F. Supp. 2d 138, 151-52 (D.D.C. 2005) (finding that

factual portions of records were too closely mixed in with deliberative portions and therefore were not releasable).

For the reasons discussed above, your appeal is granted in part and denied in part. Because you did not get access to all of the information sought, you may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink that reads "Barbara Sarshik". The signature is written in a cursive style with a large initial 'B' and a distinct 'S'.

Barbara Sarshik
Senior Counsel

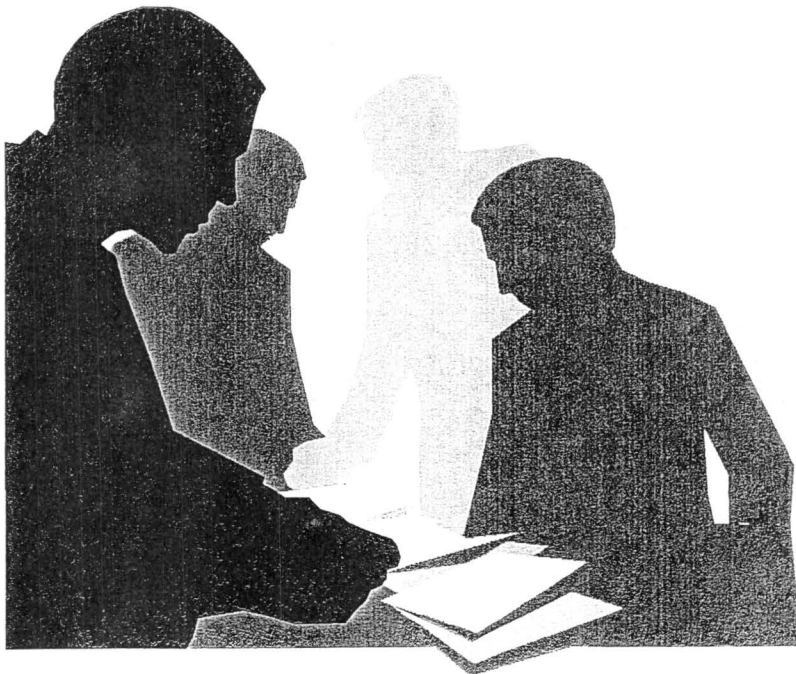
Enclosures



FDIC

Federal Deposit Insurance Corporation

Legal Division Closing Manual



June 1999

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