ORIGINAL

In the

Supreme Court of the United States

FEDERAL OPEN MARKET COMMITTEE
OF THE FEDERAL RESERVE SYSTEM,

Petitioner,

vs.

DAVID R. MERRILL,

Respondent.

Case No. 77-1387

Washington, D. C.
December 6, 1978

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FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, Petitioner,	:	
v.	:	Case No. 77-1387
DAVID R. MERRILL, Respondent.	:	

Washington, D. C.

Wednesday, December 6, 1978

The above-entitled matter came on for argument at 1:31 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNWUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner

VICTOR H. KRAMER, ESQ., 600 New Jersey Avenue, N.W., Washington, D. C.; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-1387, Federal Open Market Committee of the Federal Reserve System v. David R. Merrill.

Mr. Geller, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

This cases arises under the Freedom of Information Act. But unlike the other cases this Court has considered involving the Act, here the government is not contending that certain agency documents are not disclosable to the public. What we are contending is that the Act grants the District Court discretion in an appropriate case to delay the public release of agency documents for a reasonable period of time, just like in civil discovery, where the immediate release of those documents would prevent or impair the effectuation of an important governmental policy.

We also contend, of course, that this is an appropriate case for the exercise of that discretion. Now, the particular documents and agency involved here are the so-called domestic policy directives --

QUESTION: Let me ask you a question, Mr. Geller,

about the discretion contention. Here the District Court simply required the production of the documents, didn't it?

MR. GELLER: Yes.

QUESTION: And so I take it your contention is that the discretion could only be exercised in one way in this particular case.

MR. GELLER: No. The District Court took the position that it had no discretion because the Act required immediate disclosure. The Act is not allowing it to weigh the interests of the government in a temporary withholding of the documents against the interests of the public in gaining immediate access to those documents. It our position that the Act does grant the District Court that discretion and indeed we assume that if this Court adopts that submission, the appropriate disposition would be a remand to the District Court for determination whether to exercise that discretion in this case.

QUESTION: So you don't claim that it comes under any of the exemptions?

MR. GELLER: We do. We claim that it falls clearly within Exemption 5, and we construe Exemption 5 to accord the District Court discretion, as I have said, in an appropriate case to decide whether or not to release otherwise disclosable documents, where the government has made a showing of harm from the immediate release.

QUESTION: You said exclusively on Exemption 5.

MR. GELLER: That's correct.

QUESTION: Not on 4 or 8?

MR. GELLER: No. The only exemption we are relying on in this Court is Exemption 5.

QUESTION: Well, the section dealing with exemptions beginning, "This section does not apply to matters that are," and then 5 says, "inte -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." Now, where does the District Court's discretion stem from?

MR. GELLER: We believe it comes from the language "would not be available to a party...in litigation with the agency" which we think what Congress intended was to mirror the practice under civil discovery. I think this Court has held that on several occasions, and I hope to get to that a little later in the argument. Of course, in civil discovery, the court would engage frequently in a balancing process when it is not dealing with documents that are subject to an absolute privilege or documents not subject to any privilege whatsoever. There is a whole middle ground in which it has to weigh the competing interests, and we claim that the same analysis should spply under the Freedom of Information Act.

QUESTION: Mr. Geller, while we have you interrupted, is the stay order still in effect?

MR. GELLER: The stay order is still in effect, that is correct.

Now, before turning to the specific FOI exemption that we claim is applicable in this case, which is Exemption 5, I would like to begin by briefly explaining the importance of the Open Market Committee's policy functions, how the domestic policy directives relate to those functions, and why the premature release of these sensitive documents would severely frustrate implimention of the committee's policies.

The Federal Reserve System is, of course, the Nation's central bank and it helps to achieve the country's economic goals through its influence on monetary policy, that is, the availability and cost of bank reserves, bank credit and money.

The system essentially has three main goals and three main tools with which to accomplish these goals. First is the setting of the discount rate which is the rate that is charged member banks on borrowing from the Regional Federal Reserve Bank. The second tool is the board's power to change reserve requirements, that is, the percentage of reserves that member banks must hold in back of deposits. And the final monetary tool of the system, and the one that concerns us here today is the power to engage in so-called open market operations, that is, the purchase or sale of large amounts of securities, principally United States government securities in the open

market.

Simply stated, when the Federal Reserve System buys securities, it increases the total volume of bank reserves because the Fed's payment for the securities is ordinarily deposited in the seller's bank account and is credit to that bank's reserve account in its Regional Reserve Bank, and conversely when the system sells securities the sales price typically is deducted from the reserve account of the buyer's bank and this decreases the volume of reserves held by that bank.

Now, these changes in the volume of bank reserves obviously influences the ability of these banks to make loans and investments which in turn has a substantial effect on the availability of money and the level of interest rates.

The open market operation's tool is by far the Federal Reserve System's most important monetary policy instrument. Open market operations are extremely flexible, unlike the other tools I have mentioned, and they need to be used to the extent and only to the extent necessary to accomplish the system's short or long-term monetary policy goals.

As a result, while the discount rate and reserve requirements are changed only occasionally, the Fed enters the market on virtually every business day and either buys or sells millions of dollars worth of securities, depending upon what monetary goal it is trying to accomplish.

Now, the organ of the Federal Reserve System that is responsible for directing these open market operations is the petitioner in this case, the Federal Open Market Committee. The committee is composed of twelve members, the seven Governors of the Federal Reserve Board and five representatives of the Regional Reserve Banks. The committee meets approximately once a month. Its meetings begin with a run-down of general economic developments and a consideration of what economic developments might arise in the immediate future, and at the end of the meeting the system decides what its plans for the open market operations in the up-coming month should be, and these plans are embodied in the Domestic Policy Directive, the subject of this litigation, which is adopted by the Open Market Committee at the conclusion of its monthly meeting.

QUESTION: We can, under your theory, legitimately have access to that information now?

MR. GELLER: During the one-month period that the Domestic Policy Directive is in effect, only employees of the Federal Reserve System with the need of access to that directive have access to that directive, which would be the account manager who actually does the buying and selling of the open market -- of securities in the open market.

QUESTION: How many people?

MR. GELLER: I would say it is just a handful of

people and generally high officials of the Federal Reserve System. It is a very small number of people that have actual access to the Domestic Policy Directive during the one month of its effectiveness.

Now, the directive takes the form of instructions to the system's account manager in New York. He is an official of the Federal Reserve Bank of New York, and he does the actual buying and selling of these securities in the open market.

These instructions state what the Federal Open Market Committee's general monetary policy goals for the up-coming month are. And what is more important, the directive also specifically notes what the committee's objectives are for the rate of growth of the Nation's money supply and what the permissible fluctuation of the so-called federal funds rate in the up-coming month is according to the committee.

The federal funds rate is the interest rate that member banks charge each other for overnight loans, and it is an extremely sensitive and accurate barometer of tightness or ease in the economy in regard to the availability of money.

The account manager begins to implement the directive immediately upon its adoption. The committee has always kept these Domestic Policy Directives confidential during the one-month period of their effectiveness. The current practice is to delay disclosure of the directive until a few days

following the next month's committee meeting.

QUESTION: Mr. Geller, do you think that knowledgeable observers of the market reactions will know what is going on after a few days, however, when the Fed gets into the market?

MR. GELLER: I don't think so. They can make -- knowledgeable market observers can make educated guesses based upon the account manager's buying or selling of securities in the open market on a daily basis, but there is a certain level of uncertainty that attaches to their observations, undertainty that wouldn't exist if the directive was made public, and that uncertainty is very important because it dampens economic activity and it prevents these market observers from entering the market in a major way.

More important, I don't think that just looking at the account manager's daily buying or selling would give you an accurate picture of what the directive is likely to be because most of the account manager's daily buying or selling may not be pursuant to the directive. In other words, it may not be for the purpose of accomplishing the goals set forth in the directive; it may be simply a response to something that has happened that day in the market. Let me give you an example.

Let's assume that for a number of reasons there is a temporary glut of money in the market, maybe because of

changes in Treasury balances at the Federal Reserve Banks or because of the float. There is more money in the market than the Fed expected. Now, when that happens, interest rates might be expected to drop because more money is available. The account manager sees developments and might well decide to sell securities, in other words to take money out of the market. Now, this would not be for the purpose of raising interest rates, it would be merely to keep interest rates constant in a situation in which they might otherwise drop. So that if someone merely looked at what the account manager did in the market that day, which is to sell large amounts of securities, he might get the impression that the directive is telling the account manager to attempt to raise interest rates, whereas that wouldn't be an accurate picture, the account manager is merely attempting to meet developments that have occurred in the market.

Now, as I was saying, the directive is kept secret until a few days following the next month's meeting. At that point, the directive for the month just ended is made available to the public and it is published in the Federal Register. Thus, for example, the Domestic Policy Directive adopted at the committee's meeting on October 17, 1978, was released to the press on November 24, 1978, and was sent to the Federal Register on November 29, 1978.

The primary reason for this delay in publication has

always been the committee's concern that advanced public notice of its open market policy decisions would create excessive reactions or other disturbances in the securities market that would interfere with the committee's ability to implement its open market decisions. There would be a so-called announcement effect as market participants attempted to realize financial gains in anticipation of the committee's purchases or sales or securities in the up-coming month.

Now, this is spelled out at greater length in our brief and in the affidavit submitted to the District Court, but let me give the Court just one example.

The Federal Open Market Committee each month buys or sells literally billions of dollars worth of government securities. Let's assume that it was known that in the month to follow the committee intended to attempt to raise the federal funds rate which, as I said, is the interest rate at which banks lend money to each other on an overnight basis. Market investors could reasonably assume, if they had access to this directive, that to raise the federal funds rate, the committee would seek to decrease available reserves, which would mean that the Fed would be engaging in the sale or large amounts of securities. Armed with this knowledge, it is likely that many investors would react immediately by also selling government securities, and this would tend to depress securities prices and inflate interest rates unnaturally and,

as we have explained in our brief, these sudden movements in security prices and interest rates might be larger than the committee contemplated and might even be beyond the ability of the committee to control on occasion. At the very least, these market reactions would make it immeasurably harder for the committee to accomplish gradually what it set out to do that month.

QUESTION: Mr. Geller, of course that is the view of the agency, but it is not a universally held view, is it?

MR. GELLER: Well, the --

QUESTION: For example, Milton Friedman would disagree, I guess.

MR. GELLER: The respondents have never rebutted that showing.

QUESTION: Milton Friedman would disagree, would he not?

MR. GELLER: Excuse me? I'm sorry.

QUESTION: Milton Friedman would disagree?

MR. GELLER: Milton Friedman -- well, Milton Friedman, the statements that respondents have quoted from time to time from Milton Friedman really relates to the committee's claim that the immediate disclosure of these domestic policy directives would allow market spectulators to make immense profits, unjust profits, and there is some dispute as to that. But there is I think not a great amount of

dispute that the immediate release of these domestic policy directives might well hinder the committee's ability to carry out its monetary policy goals, which of course is a separate point.

QUESTION: Suppose these are sophisticated people dealing with economic forces, I suppose if it were a given premise that these policy directives would be disclosed then the policy directive might be a little different in order to achieve the result that was desired --

MR. GELLER: Well, it may not --

QUESTION: -- knowing that the public would know about this and that they would augment the effect and therefore the policy directive would discount that.

MR. GELLER: I think that that is not as easily done as --

QUESTION: Well, this is all difficult, as far as I am concerned. I assume we are dealing with experts.

MR. GELLER: I think, Mr. Justice Stewart, that your example is an excellent reason why this type of information falls within Exemption 5. Exemption 5, as this Court said in Sears, was meant to protect the ability of federal agencies to make decisions, and that ability may be hindered not only by the release of pre-decisional materials but, as I am going to get to in a minute, it can be hindered by the premature release of final decisions themselves. I think, as you

correctly assessed, if these directives, if the committee knew that these directives were going to be made public prematurely in their view they would take a lot of other measures that might well skew their decision-making process.

QUESTION: Well, the directive would be published, it would be decided upon and then it would become the directive and in light of the fact it would be public knowledge and therefore the directive would be different in substance.

MR. GELLER: Well, I think there is a limit to how different the directives can be and still accomplish the goals which the directive now accomplishes.

QUESTION: Instead of the committee buying "X" billions of dollars, they buy one-half of "X", assuming that -- and assume that the speculators and the public will buy the other half.

MR. GELLER: I think it wouldn't work quite that way.

QUESTION: Undoubtedly it is not that simple.

(Laughter)

QUESTION: Is it enough for your case that nobody, no one can predict with any certainty what would be the consequences of disclosure?

MR. GELLER: Well, that is correct.

QUESTION: That there are serious consequences, isn't that enough for you?

MR. GELLER: I think that is. It is certainly one

major part of our argument. It is not the end of our argument, but I think it is certainly the beginning of our argument, that there would-- there is likely to be some deleterious consequencesto the policy decisions of the Federal Open Market committee if there was premature disclosure.

I should add here at this point that the regulations of the committee, 12 CFR 271.5, that allow for this delayed access to the Domestic Policy Directives were not promulgated in response to the Freedom of Information Act and not promulgated in response to the suit. They date back, we have been able to date them back in published form to 1946. I am sure they date back even ten years earlier to when the committee was formed.

There has been a consistency of view among the many hundreds of members of the committee and the Federal Reserve Board that secrecy is an essential element of the Federal Open Market Committee's ability to carry out its statutory requirements.

QUESTION: But isn't it also true that there are some alumnae who disagree?

MR. GELLER: Well, I think there may well be some confusion here. There is more disagreement I think about the so-called memoranda of discussion which were really minutes of the meeting of each Federal Open Market Committee meeting and which the Federal Open Market Committee was releasing --

QUESTION: No, I am confining my comment just to the announcement of the specific policy that will be followed during the ensuing thirty days. Is it not correct that there is expert opinion that, although there would be consequences from immediate disclosure, those consequences would be beneficial, there is a respectable body of opinion that way? Now, maybe that doesn't control it, but there is --

MR. GELLER: That is true, there are certain economists who have taken that view. Basically --

QUESTION: Including alumnae of the Federal Reserve Board?

MR. GELLER: Well, there is Governor Maisel, right.

Of course, the District Court and the Court of Appeals decided this case on the assumption that there would be harm to the Federal Open Market Committee and that --

QUESTION: It seems to me, as the Chief Justice suggested to you, that your argument would be the same even if you acknowledge that there could be a legitimate difference of opinion on this point.

MR. GELLER: I think that is --

QUESTION: Therefore, I don't understand why you are spending so much time trying to convince us of one side or the other of an irrelevant debate.

MR. GELLER: Well, I think if the argument that there would be harm here was totally fanciful, it might be a different

situation. But let me get to this lawsuit, which began in May --

QUESTION: Mr. Geller, could I ask you one more question. Suppose this group met weekly instead of monthly and the lag were only seven days instead of thirty, would you be making the same argument?

MR. GELLER: We would be making the same argument, although perhaps the need for secrecy -- no one is suggesting that it has to be announced the minute it is adopted. There has to be some lag in publication time, and if the time between meetings was sufficiently small, then perhaps the current directive would never have to be published in the Federal Register immediately upon its adoption.

QUESTION: I suppose your opposition would say still that it affected its academic needs?

MR. GELLER: I am sure he would.

The issue in this case then is whether the Freedom of Information Act invariably requires the government agency to divulge its policy decisions as soon as they have been adopted, even in instances where immediate disclosure would prevent those decisions from ever being successfully carried out.

It is the government's position that the Act does not require that harsh result and that the District Court has discretion under Exemption 5 to delay the release of agency

documents in such a situation for a reasonable period of time, even though the documents may embody a final policy decision that might at some point have to be disclosed.

The courts below rejected this contention primarily because they viewed Exemption 5 as directed only to pre-decisional memoranda, agency memoranda. The District Court and the Court of Appeals viewed the Domestic Policy Directive not as pre-decisional but as the committee's final policy decision.

But while it is certainly true that the prime motivation for the exemption was to prevent public access to internal non-final communications, the disclosure of which would injure an agency's decision-making process, we believe it is equally true that that was not the exemption's only purpose.

Prior to the passage of the FOIA, a number of federal agencies complained to Congress that their policy decisions could be adversely affected not only by the release of predecisional materials but also by the premature release of the final agency decisions themselves. For instance, one example that was given by the Defense Department and the General Services Administration is that those agencies on occasion issue instructions to their employees on how much, for example, to pay, what the maximum to pay would be for materials or real estate or things like that, and the agencies

were afraid if they had to release those decisions after they were made but before they were carried out, that is before the sales purchases were consummated, that their plans would be severely frustrated, and it is not hard to imagine why.

It is also of more than passing interest here today that Congress at that time was also informed of the serious problems that were likely to occur if the Federal Open Market Committee's policy decisions concerning purchase or sales of securities in the open market had to be prematurely disclosed.

Now, the House and Senate committee reports on the FOIA state that Exemption 5 was drafted to meet those concerns. The reports indicate that premature disclosure of final agency plans and not just the disclosure of internal agency materials generated before an agency's plans were finalized were meant to be covered by the exemption.

This congressional intent is also clearly reflected we think in the language of the exemption itself. Exemption 5 as finally drafted permits the non-disclosure of "inter-agency or intra-agency memorandums or letters which would not be available to a party...in litigation with the agency."

Congress had been concerned only with preventing public access to pre-decisional memoranda. This obviously would have been a rather peculiar way of achieving that result.

QUESTION: Well, it is a rather peculiar way of

achieving any result, isn't it, that litigation --

MR. GELLER: I think it is a rather sensible way, Mr. Justice Rehnquist, because Congress couldn't anticipate every situation that might arise in which a plaintiff under the FOIA might seek access to some internal governmental memorandum. But Congress did, as this Court said in EPA v. Mink, legislate against the backdrop of the enormous case law under civil discovery procedures and therefore --

QUESTION: What analogy do you draw? You talk about litigation with an agency. You have to envision some hypothetical case in which the agency is the defendant and someone else is the plaintiff. You have no idea what the subject matter of the litigation is. Do you limit it just to privileges that are recognized in every discovery situation, or do you interpret it in terms of a rule to compel disclosure under Rule 26?

MR. GELLER: Yes, we think that Congress said as much.

QUESTION: Well, the question was in the disjunctive.

MR. GELLER: This Court said in EPA v. Mink and in subsequent cases that Congress, when adopting Exemption 5, legislated against the backdrop of civil discovery of law, meant to allow the government to take advantage of any recognized privilege available under either case law or statute and utilized in civil discovery, and that the District Court

should -- and let me quote what the Court said in EPA v. Mink. "The exemption," wrote the Court, "contemplates that the public's access to internal memoranda will be governed by the same flexible common-sense approach that has long governed private parties discovery of documents involved in litigation with government agencies."

QUESTION: Does that go beyond claims of privilege at common law that would be recognized in discovery?

MR. GELLER: Yes. I think that what Congress -- there are three types of documents. There are documents that would always be discoverable in litigation with the government, they are not subject to any privilege whatsoever. There are other types of documents that you could never discovery in litigation against the document because there is an absolute privilege that attaches to them.

Now, there is a large body of material that falls somewhere in between that may or may not be discoverable in litigation against the government, depending upon the relative needs of the plaintiff and the defendant, if the defendant is a government agency.

Now, we think that what Congress intended, and we think there is much in the legislative history and in this Court's opinions construing Exemption 5 which supports this, what Congress intended that the District Court would engage in is the same sort of balancing process when confronted with

an FOIA request for that type of material. What he would balance is the government's need, the government's need for secrecy. And I should emphasize here that the government is not contending that these documents need never be disclosed. We are only suggesting that because of important government interests, they need to be disclosed immediately but rather should only be disclosed four weeks after they are adopted.

What would be weighed against the interest that the government puts forward in support of limited non-disclosure would be the public interest, not the interest of the individual FOIA litigant in gaining access to these particular documents. It is clear that under the FOIA, you are not allowed to inquire into the interests of a particular plaintiff who has made the FOIA request. But I think it is clear that you have to inquire in order to engage in the balancing process, into what the public interest is in --

QUESTION: Well, this hypothicates the government being on one side and the public interest being on the other.

MR. GELLER: I think that is what the FOIA contemplates under Exemption 5 and in dealing with a document which is not subject to an absolute privilege or not totally unprivileged when it falls in this middle ground. I think the Court said in Bannercraft that the focus of the FOIA surely is on disclosure but it is not disclosure for the benefit of the particular plaintiff who has made the FOIA request, it is

disclosure for the benefit of the public.

QUESTION: Well, Mr. Geller, suppose the Court of Appeals was wrong in saying that 26(c)(7) doesn't apply to any kind of a governmental entity, which I guess it decided, didn't it?

MR. GELLER: Yes.

QUESTION: Suppose it is wrong in that and that we say that the government in an FOIA case can take advantage of 26(c)(7), then any other litigant can take advantage of it? Suppose it was decided that this was not confidential commercial information?

MR. GELLER: I think if the --

QUESTION: Suppose it was decided that way, you wouldn't nevertheless argue that it would be nondiscoverable under some other rule, would you?

MR. GELLER: Yes, I think -- well, just in civil litigation, you needn't pick only one discovery provision and rely totally on that.

QUESTION: I know, but when you move to some other rule, the heart of your argument is the need for secrecy.

MR. GELLER: Again --

QUESTION: And if it were decided that 26 (c)(7) wouldn't protect it, it seems to me your argument is utterly destroyed. But I am not suggesting that 26(c)(7) would be decided that way.

MR. GELLER: But there are other provisions of section 26.

QUESTION: Like what?

MR. GELLER: Like section 26(c)(2), for example.

QUESTION: What about it?

MR. GELLER: We suggest -- section 26(c)(2) grants the District Court discretion in a civil --

QUESTION: But the heart of your argument there is the need for secrecy.

MR. GELLER: The heart of our argument is that the District Court under the FOIA when a claim under Exemption 5 is raised, just like in civil discovery, the District Court must assess the relative benefits to the public of immediate disclosure -- and we are not talking here again about total non-disclosure, just the delay, a short delay in disclosure -- against the government's interest in limited, temporary non-disclosure.

Now, if that arose in the context of civil litigation in a suit by Mr. Merrill against the Federal Open Market Committee, in civil litigation not involving FOIA, the court might well decide under Rule 26(c)(2), which allows the District Court to delay disclosures for short periods of time, not to order the immediate release of the Domestic Policy Directive because of the serious government harm that would ensue.

QUESTION: Because of the need for secrecy?

MR. GELLER: Temporary secrecy.

QUESTION: In which event, you would think that he was protected under (c)(7), a fortiori.

MR. GELLER: It may not fall within (c)(7). We are not here litigating --

QUESTION: What, it isn't confidential commercial information?

MR. GELLER: Well, the Court of Appeals suggested that that is not available to the government. We are not suggesting that that is correct. All we are suggesting here is that --

QUESTION: As a matter of fact, I thought you were suggesting that it is incorrect.

MR. GELLER: We have put forward a number of privileges that would be available to the government in civil discovery.

QUESTION: Including that one?

MR. GELLER: Including that one. And what we are suggesting is that the District Court should have viewed this case as if it arose in the context of a civil litigation in which the plaintiff sought discovery of materials.

QUESTION: I understand that. Now, suppose you are right that (c)(7) does apply to the government in a case like this, and suppose that the government shows its confidential

commercial information. Is the District Court nevertheless privileged then to say, well, I am going to balance a little bit here and I am --

MR. GELLER: If there is an absolute privilege available to the government, but no --

QUESTION: Well, is (c)(7) absolute or isn't it, if it is confidential?

MR. GELLER: Well, the language of section (c)(7) suggests that it --

QUESTION: So there isn't any more room for balancing if (c)(7) applies and there is confidential commercial information here --

MR. GELLER: You have to look at the preface to section 26(c) which suggests that all of the (1) through (8) or whatever it is in section 26(c) privileges, may or may not be applied by the court based on the balancing of a number of different considerations not enumerated in this specific subsection.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Geller.

Mr. Kramer.

ORAL ARGUMENT OF VICTOR H. KRAMER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KRAMER: Mr. Chief Justice, and may it please the Court:

I should like to begin my presentation by talking

about the law of this case and the posture of that law as we stand here today.

This case has been briefed in three courts and as a result the issue for decision by this Court, the legal issue for decision is quite narrow. We originally wanted the memoranda of discussion of the members of the Federal Open Market Committee at which the Domestic Policy Directive was formulated. We abandoned that demand in the District Court because we became convinced, particularly after close examination of this Court's opinion in the Sears case, that that was precisely the type of document that Exemption 5 is designed to protect from disclosure how any agency achieves its opinion, its order or its policy statement is beyond discovery under the Freedom of Information Act. But what the order is, what the opinion says, and what the policy is is disclosable and Exemption 5 does not apply to such type of document. That does not mean --

QUESTION: What if at the end of each discussion, they followed the practice -- not under any statute but just the practice of saying this is subject to reexamination every Thursday afternoon at our meeting and until the final day of announcement, then would it be open?

MR. KRAMER: No, Your Honor. The Domestic Policy Directive is adopted at this meeting and occasionally --

QUESTION: I am proposing that they don't adopt it

but they say here is what we think we are going to do, but we will meet every Thursday at 3:00 o'clock and sort of listen to the wind and what is going on in the market and what is going on in Iran and Zurich and London and take another look.

MR. KRAMER: That would not be covered by subsection (a)(2)(B) of the Act. Inoth er words, that is not this case. It might or might not --

QUESTION: Well, would it be available on your theory?

MR. KRAMER: It would not be available on our theory. It might be available on some other theory applying the Freedom of Information Act, but that is not the theory on which we seek these documents. And if that is how domestic policy --

QUESTION: What I really meant was would it be available at all, not necessarily just on your view of the matter --

MR. KRAMER: I think it might be. I would have ot know a little bit more --

QUESTION: Even though it is not a final action?

MR. KRAMER: It would be available not as policy, it would be available as the prevailing rule as to any piece of government --

QUESTION: It isn't a ruling yet. By terms, it is tentative, preliminary, not final, subject to review.

MR. KRAMER: If the Court please, Mr. Chief Justice, I am saying it would not be available under the first subsection of the Act, which directs that all policy statements be made available, but it might be discoverable. You couldn't require the government to publish it, but it might be discoverable by a citizen asking for it the next day or the next year. That was all I was talking about.

QUESTION: Well, the answer would be no decision has been made, nothing is final, we are still talking about it.

MR. KRAMER: Well, I think that you can obtain under the Freedom of Information Act lots of papers that do not constitute final decisions, that was all I was saying. But it isn't our case here, our case here depends solely upon the concession by the government that this is the policy statement of the Federal Open Market Committee.

QUESTION: Well, my hypothetical was aimed at what the government might do if you prevailed, and --

MR. KRAMER: I understand, Mr. Chief Justice, and I want to keep my options open, too. I don't know what they are going to do, if Your Honors affirm, as we say. They might not have it in writing, and then, of course, the Freedom of Information wouldn't apply because it only applies to records.

Turning now if I may to the legal posture of the case, it is important to bear in mind that the sole defense in this Court advanced by this defendant here today is that the

Freedom of Information Act permits an agency to defer disclosure of a policy statement until that policy is no longer in effect if disclosure would seriously impair implementation of the policy. And it says, moreover, that the sole basis for that disclosure is to be found in Exemption 5.

We respectfully disagree with that contention because we say that this Court in the Sears case said that Exemption 5 was designed to protect agency deliberations, a kind of specialized application if you will of the doctrine of executive privilege.

What we seek is the statement in writing of the policy itself, not how it came to be adopted.

QUESTION: Mr. Kramer, suppose in a Federal Tort Claims Act case which the government is defending, so presumably it is not under the law enforcement exemption, the section chief, after conference with his associates in the department, sends a letter of instruction to the U.S. Attorney in the field saying reject the plaintiff's offer of $50,000, make a counter offer to him of $35,000 and try to settle for $40,000. Now, that decision has been made, the U.S. Attorney in the field is simply carrying out instructions. Do you think a Freedom of Information Act plaintiff could come in and ask to see a copy of that letter before the settlement conference was over?

MR. KRAMER: I dislike not answering questions

categorically, Mr. Justice Rehnquist. The only answer is that this case has nothing to do with that type of document. This case --

QUESTION: It does have something to do with your insistence that Sears, Roebuck is limited to pre-decisional conferences because my hypothesis, the policy is already adopted, it simply hasn't been effectuated.

MR. KRAMER: My argument is confined to statements of agency policy, and I am saying that they are not protected by Exemption 5. Now, I recognize the difficulty with Exemption 5, and I am flattered by these questions but I cannot settle the meaning of that exemption today. I can only tell you what its application is to government policy statements, and that is why I am hesitating to answer your question.

Certainly, the statement you refer to would not have to be published, that is clear.

QUESTION: But lots of stuff, as you pointed out in response to the Chief Justice, doesn't have to be published, but is nontheless discoverable.

MR. KRAMER: That's right. I don't for a minute suggest that Your Honor's question is not a deeply important one. I merely say that this case does not -- deciding this case does not involve addressing that issue.

QUESTION: Well, wouldn't it be literally incredible to think that Congress intended the publication of the kind of

letter I have in mind?

MR. KRAMER: It would be difficult. Incredible I think is too strong, but difficult I would say.

QUESTION: How about irrational?

MR. KRAMER: No, I don't think it would be irrational, if Your Honor please, any more than I think the snail darter case was irrational, although I thought it was extreme. I mean the snail darter statute, excuse me, not the opinion.

(Laughter)

QUESTION: What is $150 million compared with $1 billion in possibility of market problems? $150 million is small change.

MR. KRAMER: Compared with the billions here?

QUESTION: Yes.

MR. KRAMER: Well, if Your Honor please, we simply don't know what the effect would be.

QUESTION: If you want to find out.

MR. KRAMER: If Your Honor would like me to address that subject, I will be happy to do so.

QUESTION: No, we had better wait for Milton Friedman for that.

QUESTION: Well, I didn't mean address the merits of it, because I am ignorant. I don't know, and I don't see how the Court could tell.

QUESTION: Well, Mr. Kramer, you are defending the

Court of Appeals' opinion, however, that says that Federal Rule of Civil Procedure 26(c)(7) is not applicable to the government?

MR. KRAMER: Yes. Yes, and I agree with that.

QUESTION: Suppose it were?

MR. KRAMER: Suppose it were?

QUESTION: Yes. Suppose the Court of Appeals is wrong, you conceive that?

MR. KRAMER: I can conceive of it as an academic question, yes. In the first place, I don't think this, by any stretch of imagination, can be called commercial information.

I again want to get back if I can to --

QUESTION: What would we do if we disagreed with the Court of Appeals on this issue, would we remand it or would we decide here that --

MR. KRAMER: Then you would have to -- if you disagreed and you thought that it was subject to some recognized privilege under Exemption --

QUESTION: Well, what if we just decided that the Court of Appeals was wrong and that 26(c)(7), what if we decided that it was available to the government in an appropriate case?

MR. KRAMER: You would still say that none of these privileges applies to a policy statement.

QUESTION: Because no policy statement can possibly

be confidential commercial information?

MR. KRAMER: Yes, that is one argument, but no policy statement is exempted under Exemption 5. May government policy statements are exempt under the Act, if it would impair foreign relations or national security, exempt under one. If it relates to the internal pay policy of an agency solely, exempt under 2. If it is specifically exempted by statute, exempt under 3. If it would impair the enforcement of a criminal prosecution, exempt under 7. My point is --

QUESTION: So no policy can contain confidential information within the meaning of 26(c)(7)?

MR. KRAMER: I sam saying that no statement of policy can find any exemption under Exemption 5 from prompt publication. That is our position, and I believe it to be sound.

Now, petitioner challenges our interpretation of the Sears opinion.

QUESTION: Is that the way you read the Court of Appeals opinion, by the way?

MR. KRAMER: No.

QUESTION: No, it is not?

MR. KRAMER: No, it is not. It is not. This whole matter was argued in the Court of Appeals, in part as I am arguing before you, and the Court of Appeals in its wisdom chose to follow the more conservative course outlined in its

opinion.

I rely very strongly, if the Court please -- I hope I am correct in doing so -- on Your Honor's very carefully constructed opinion --

QUESTION: Thank you very much.

MR. KRAMER: You are welcome, sir -- in the Sears case. To me, to take an exemption as vague as Mr. Justice Rehnquist pointed out in Exemption 5 and make the sense out of it that I think was made in the Sears case is --

QUESTION: Well, it isn't so vague insofar as Exemption 5 picks some specific privilege available in civil litigation.

MR. KRAMER: Well, the government, of course, here hasn't done that in our opinion, it hasn't picked any specific privilege. Furthermore, it --

QUESTION: It has, it relies on 26(c)(7).

MR. KRAMER: Yes. Which one is (7), is that the commercial --

QUESTION: That is as specific as you can be. That is confidential commercial information.

MR. KRAMER: Yes, and I believe it clear that policies of a federal agency are not to be --

QUESTION: But that is your only answer to that.

MR. KRAMER: Well --

QUESTION: I mean, it is certainly not because of

vagueness or anything, there is a specific privilege.

MR. KRAMER: And I also have an even more conservative answer, Mr. Justice White. They haven't been able to point to a single case where any government commercial information was privileged from production if it amounted to a government policy.

QUESTION: Well, maybe it was never challenged.

MR. KRAMER: Well, that is always possible. The older the Republic gets, the more likely that it would have occurred.

QUESTION: Well, at least here is one.

MR. KRAMER: You are right, sir. Here is one on either the Court of Appeals theory or mine, that you have to look at some other exemption when you are seeking to exempt from prompt publication any agency's policy, not any agency's decision on how much it is going to pay for real estate.

QUESTION: What about a Justice Department policy that we will under no circumstances settle a Tort Claims Act suit for more than $100,000, sent to all 93 U.S. Attorneys around the country?

MR. KRAMER: That is a closer one. That might well not be protected under Exemption 5. Now, whether it will be protected under some other exemption, I doubt, but I am not sure. Was it a criminal --

QUESTION: No, a Federal Tort Claims Act suit, as I

have always understood it, is civil.

MR. KRAMER: Yes, not under Exemption 5. If you conclude, as I do, hearing Your Honor's description of the document, that it is a statement of the government's policy.

Now, my brother in his reply brief makes a distinction in attempting to distinguish the Sears opinion between legal policy and economic policy, and he says that the Court, in writing the Sears case, was thinking of legal policy. And he points out and to an exent that it is a play on the word "direct," but he does say with some at least partial accuracy that the Federal Open Market Committee's policy does not have a direct impact on an identifiable individual.

I find that distinction one without a difference. I can imagine no agency policy of any U.S. agency having a greater impact on the lives of the citizens of this country than that of the Federal Open Market Committee. That is the purpose of their policy statements, to effect the interest rates in this country. The Federal Open Market Committee's operations or objectives are in the newspapers constantly. This is a matter that affects the value of the dollar, the value of the wage earner's money and the value of the investor's accrued savings. So I don't think we can dispose of the case by saying economic policy is to be distinguished from legal policy because legal policy refers to specified individuals, whereas this is a different type of government

activity.

I submit that the argument that is being advanced here today by the Fed is but a highly camouflaged version of the argument that was made to withhold records under the Act that preceded the Freedom of Information Act. The argument is that it is contrary to the public interest to release these documents, and it was the very purpose of these amendments adopted in 1966, it was their very purpose to get rid of the public interest type of argument and instead to have more precise exemptions determine what is to be disclosed and what is not.

QUESTION: Well, was their purpose sort of to define the public interest, isn't that correct?

MR. KRAMER: That is another way of putting it, yes, I accept that, Mr. Justice Stewart. Yes, Mr. Justice Powell?

QUESTION: I suggest you answer Mr. Justice Stewart first and then come back to me.

QUESTION: He did.

MR. KRAMER: I did, yes.

QUESTION: I was going to ask whether Mr. Merrill is still a law student at Georgetown University.

MR. KRAMER: No, he is not. He is a member of the bar of the District of Columbia.

QUESTION: What is his interest in this information at this time?

MR. KRAMER: I haven't asked him because the Act doesn't require that I ask him, but I assume that he has no greater interest than those persons who filed the amicus brief in this case. At the time, of course, he was a student.

QUESTION: Anyone, without rg ard to whatever interest he may have, may bring a cause of action?

MR. KRAMER: Under my theory of what the Act provides, yes, Mr. Justice Powell. All questions of standing and that sort of thing are out.

QUESTION: This is what permits some enterprising people to collect a lot of government information, assemble it and classify it and sell it under the Act. There is no prohibition of that kind.

MR. KRAMER: That's right, Your Honor. I assure you that --

QUESTION: They can do it for idle curiosity and even if they can't understand the information after they get it.

MR. KRAMER: That is absolutely true, Your Honor. Of course, it isn't true here, you can be assured that the financial page of every newspaper in the country will carry it.

QUESTION: Well, we were addressing ourselves to the party in the case.

MR. KRAMER: Yes.

QUESTION: The party need not be able even to understand it.

MR. KRAMER: That's correct, Your Honor. By the way, I am not sure -- and I want to be very candid about it -- I am not sure even the Court can understand these domestic policy directives. There is one in the record beginning at page 60, and it is very esoteric language. But I am told that these words have meaning to monitorists and economists and to traders in the market and that they will know what they mean upon reading it at once.

QUESTION: Well, suppose the Labor Board decides to order the regional director to file a complaint and they write him a letter and say we talked this all over and our policy now is so-and-so file this complaint, is that discoverable? I mean, that is exempted, isn't it?

MR. KRAMER: Well, it is certainly not a statement of policy within the meaning of subsection (a) --

QUESTION: So your answer is yes, it is within Exemption 5?

MR. KRAMER: I believe so.

QUESTION: Because it doesn't finally dispose of anything, it just sets the government on a course of action, namely litigation.

MR. KRAMER: Precisely.

QUESTION: So if the government adopts -- it has a meeting and it says we are going to embark on a course of action right now and here is what we are going to do, we are

going to order our open market operator for the next two or three months to do so and so. Well, it doesn't finally dispose of any case, it doesn't finally dispose of any course of action, it is an initiation of a course of action.

MR. KRAMER: I don't read subection (a)(2)(B) in its phrase "statements of policy" to make a distinction between the type of --

QUESTION: Whether it is a misnomer or not, you must agree that it is an initiation of a course of action by the government.

MR. KRAMER: Well, Your Honor --

QUESTION: These are statements of policy, aren't they?

MR. KRAMER: I would prefer to look at the policy itself.

QUESTION: I know you do, but I am just asking you if whatever you look at, doesn't it set the government on a course of action?

MR. KRAMER: Yes, but it --

QUESTION: And it doesn't finish it, it just starts it.

MR. KRAMER: Well, only in the sense that nothing is ever finished that any agency does, if the Court please.

QUESTION: Well, I don't know. That is just exactly the line that was drawn in the Sears case which you think was

so carefully constructed.

MR. KRAMER: Yes, I do. I do, and I --

QUESTION: That is exactly the line that the opinions that finally dispose of the case, like opinions not to file a complaint, they are discoverable. But opinions and statements of policy, if you want to call them that, saying file, are not discoverable.

MR. KRAMER: That is correct, Your Honor, and I, of course, would not be foolish enough not to say, arrogant to argue with the Court as to the meaning of the opinion. But I do want to emphasize that in one sense every government policy dictates a course of action, that is what a policy statement is. So we must look closely I think at the type of record that we are talking about.

And if you will turn to page 65 and look at one of these policy directives, this is an old one --

QUESTION: You told me I couldn't understand it anyway.

MR. KRAMER: Well, you couldn't understand the details, but you certainly could understand that the board is saying that this is their policy: "It is the policy of the Federal Open Market Committee, while resisting inflationary pressures" -- I am reading at the top of page 67 -- "and working toward equilibrium in the country's balance of payments, to foster financial conditions conducive to cushioning

recessionary tendencies and stimulating economic recovery."

QUESTION: That sounds like a statement from the White House Press Office.

(Laughter)

MR. KRAMER: Well, it may well be. The Fed, of course, is an independent agency with great powers not too dissimilar from those of the Chief Executive, but it certainly is a statement of policy on which future action is based.

QUESTION: Are you claiming only under subsection (2) here rather than under subsection (3) as well? Are you claiming that this is discoverable because it is a statement of policy or are you claiming that it is a record which an agency has a copy of?

MR. KRAMER: It is both. We are claiming under both, that we could have -- if a citizen or person asks for it, it must be produced.

QUESTION: It wouldn't have to be a statement of policy to come under (3), would it?

MR. KRAMER: That is correct, Your Honor, precisely.

QUESTION: But they are both subject to Exemption 5?

MR. KRAMER: Absolutely, sir. Absolutely. And it is our position that any statement of an agency policy which dictates future conduct by the agency cannot be exempt under 5, although it may be under 1, 2, 3, or 7.

Now, if the Court please, I want to perhaps reiterate

but emphasize that if this Court agrees that we must determine whether publication of a policy promptly would impair an agency's implementation of that policy, that we will then have to have the case remanded for trial below. You have the experts whose opinions have been cited on the one side, and you have the Fed people very sincerely on the other.

And it is a matter I should think of great seriousness I suppose that we will introduce under the Freedom of Information Act a trial in District Courts every time an agency makes a claim that prompt publication of its policies will impede implementation, because the other side, the plaintiff, will marshall his experts or her experts in an effort to prove that it will not impede government policy.

And so we will have introduced into the federal courts a new type of protracted complex litigation in which the agency is pitted, the agency's experts are pitted against the person, the newspaperman, the student, corporation experts to determine whether in fact prompt publication will --

QUESTION: But this is an intra-agency memorandum, is it not? Or inter-agency?

MR. KRAMER: Intra-agency.

QUESTION: Intra-agency.

MR. KRAMER: Yes.

QUESTION: So it has to be tested anyway by whether it will be available in civil litigation.

MR. KRAMER: That is Exemption 5.

QUESTION: Yes.

MR. KRAMER: Yes, Your Honor, and the other side --

QUESTION: Doesn't that require a fair -- that is going to require some litigation.

MR. KRAMER: I don't think so. They haven't --

QUESTION: You don't have a lawsuit the way you would normally have so the District Court could say a snap judgment, I know enough about this lawsuit, it is burdensome, I won't require it, it is not burdensome, I will require it. He has got to almost hypothicate a lawsuit with the same sort of facts that you say would have to go back for trial.

MR. KRAMER: Not quite, Your Honor. I was referring to the broad issues of the type cited in each side's brief in this case, in which their experts said would impede effective market regulation, that our experts said would make for a better market to publish promptly, and so on.

QUESTION: Is your situation different from the one hypothesized by Mr. Justice Rehnquist in that in a lawsuit there is a reason for trying to get information, or presumably there is a reason, you don't spin your wheels trying to get irrelevant information. Here you have already said that it is just idle curiosity that is enough to get the information.

MR. KRAMER: Oh, no. I said that was the law, but I didn't say that our curiosity was idle.

QUESTION: I know, but not that yours, except present company, but idle curiosity is enough to support the claim by all other claimants.

MR. KRAMER: Yes, I would assume, however, that people who file FIOA lawsuits for reasons of idle curiosity would not be able to man the type of offensive hearing that would be required if the government's test, the committee's test in this case is adopted, because, you see, their test is not absolute that they can defer willy-nilly until a policy is no longer in effect. Their test is that if it will impair the implementation of the policy, and that they have to prove if it is relevant. They have never had a chance to prove that because the District Court and the Court of Appeals said that is irrelevant. But if it is relevant, I would assume that we are not out of court, we go back to the District Court for a trial of some kind on that issue in which there will be a battle of experts, I can assure this Court, theirs against ours.

It just strikes me as when you contemplate that as a solution, it seems to achieve a result which could not have been intended and certainly is not one of the objectives of the Freedom of Information Act.

If the Court please, the Act in some respects is fast achieving an importance, that is part of the Act, akin to some constitutional provisions. And one of the cardinal

principles of the Act as we read it is that all government policy statements, all agency policy statements not specifically exempted by the Act are to be promptly published. And if the Court please, it seems to me that is a very good doctrine. It seems to me that in a democratic society that the notion that people governed have a right to know what the policies of the agencies governing them are, is a reasonable doctrine and a good doctrine, and that is all that this case seeks.

QUESTION: Even if we wholly disagreed with you and found that it was completely unreasonable, we are nonetheless duty-bound to follow the statute, whatever it --

MR. KRAMER: Oh, yes, Mr. Justice Stewart. I am just saying that I read -- and I believe with good cause --

QUESTION: The question is whether we agree with you strongly or disagree with you strongly, the question is what does the statute provide or require.

MR. KRAMER: Absolutely, that's right.

QUESTION: I take it your reference to the snail darter case meant that you regard this statute as on the same level of wisdom as the statute in that case?

MR. KRAMER: Not quite, Your Honor, but I said that if it occurs to the Court as it does to the government that the result reached under the statute in this case is not wise, that this is the type of statute that it is the duty of the

Congress to correct. Of course, we think the result reached below was very wise, but if you differ with us --

QUESTION: Yes, but we have no provision for remanding the case to Congress.

MR. KRAMER: Congress has pending before it, let me assure Your Honor, a bill which has gone nowhere while this case was pending, which would exempt under Exemption 3 this type of record. I can assure the Court, and my brother on the other side, that Congress will promptly consider that bill at the conclusion of the proceedings in this case.

QUESTION: Depending perhaps on what we do here.

MR. KRAMER: If the judgment is affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

(Whereupon, the above-entitled case was submitted.)

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