BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

DIVISION OF MONETARY AFFAIRS

Date: November 12, 1993

To: Federal Open Market Committee

From: Gary Gillum GPG

Subject:

For your files, attached is a hard copy of material on public release of information about FOMC meetings that was sent to you by fax earlier today.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

DIVISION OF MONETARY AFFAIRS

Date: November 12, 1993

To: Federal Open Market Committee

From: Messrs. Mattingly and Kohn

Subject: Public Release of Information About FOMC Meetings

Attached are two documents for use as background for the Committee's discussion on November 16 regarding public release of information about deliberations at past and future FOMC meetings. One is a memorandum from Virgil Mattingly summarizing the implications of FOIA and the Federal Records Act for the issues under consideration, and his conversations with the Justice Department and the National Archives about these matters. The second memo gives a variety of options for the Committee to consider with respect both to the disposition of existing transcripts and the possible more detailed reporting of Committee deliberations going forward. We intend to brief the Committee on the merits of these various options Tuesday.

A memorandum from Normand Bernard giving a section of raw transcript from 1978 and both a "lightly edited" transcript and a memorandum of discussion derived from that raw transcript will be included with the bluebook package sent by express mail tonight.

November 12, 1993

TO: FOMC

SUBJECT: Public Access to Transcripts of FOMC meetings

FROM: Virgil Mattingly

This memorandum summarizes the relevant requirements of the Freedom of Information Act ("FOIA") and the Federal Records Act and staff's preliminary discussions with the Department of Justice and the National Archives regarding the impact of these statutes on the issue of public access to transcripts or other detailed documents relating to FOMC meetings.

Freedom of Information Act

FOIA requires that all agency records be disclosed to the public upon request, except records that are covered by one of the Act's nine exemptions.[1/] These exemptions permit, but do not require, the agency to withhold information from the public. Two of the Act's disclosure exemptions are relevant to the unedited transcripts or other detailed documents such as a Memorandum of Discussion type document if prepared by the Committee. Exemption 4, which protects trade secrets and confidential commercial information obtained from outside the Government, may be used to protect foreign central bank information as well as any confidential information obtained from individual businesses. Exemption 5, which protects privileged information in internal documents, may be used to withhold information that reflects the Committee's deliberative process.

[1/] The Committee is subject to FOIA and has its own regulation establishing procedures implementing FOIA.

Exemption 5 is based on the belief that disclosure of the process by which an agency arrives at its decisions or policies would inhibit frank and open discussion to the detriment of the quality of decisionmaking within the government. This exemption includes the actual deliberations of Committee members as well as the opinions, advice, recommendations and judgements of members and staff.[2/] The deliberative process privilege does not protect purely factual material, however. Facts must be disclosed if they are reasonably segregable from deliberative material. Facts need not be disclosed if disclosure would expose the deliberative process.

The question of whether the Committee's former Memoranda of Discussion must be disclosed to the public under FOIA was addressed by a United States District Court in Merrill v. Federal Open Market Committee. The Court ruled that the Committee must disclose only the factual, nondeliberative portions of the Memoranda. Because the Memoranda were overwhelmingly deliberative, only a relatively small portion of the two Memoranda at issue in that case were actually disclosed without a time lag.[3/]

[2/] In order to be protected, the information must be both predecisional and deliberative.

[3/] Those portions included information regarding attendance at meetings, the directive (which was already public), other specific Committee actions, including votes, and a small number of sentences and sentence fragments throughout the Memoranda that were not deemed deliberative by the Committee. Confidential factual information, such as that from foreign central banks or individual business sources, was withheld under exemption 4.

To date the Committee has received six FOIA requests for its unedited transcripts. Some of these requests seek all transcripts for the past 17 years, while others seek only the transcripts for recent years. Unless other arrangements can be made with the requestors, the Committee staff will be required to review each transcript line by line to determine what portions must be disclosed and what may be withheld.

In an Executive Memorandum dated October 4, 1993, President Clinton announced a new government policy that is designed to promote the greatest possible disclosure of information to the public under FOIA. The essential point of the policy is that government agencies should not automatically withhold information simply because they are authorized to do so under FOIA. Rather, agencies must make discretionary disclosures of exempt information whenever they can do so without harming important governmental interests. In a simultaneously issued letter, the Attorney General advised agencies that the Department of Justice will no longer defend the withholding of information merely because there is a substantial legal basis for doing so under FOIA. The Attorney General stated that the Department would defend nondisclosure only where the agency reasonably foresees that disclosure would be harmful to an interest protected by the exemption. The memoranda from the President and Attorney General are attached.

Staff spoke with the Justice Department officer who is responsible for administering this new policy.[4/] Staff described the Committee's unedited transcripts, how they came to be prepared, and the timing and contents of the Minutes the Committee currently makes public. We also described the reasons why the Committee believes that disclosure of transcripts would damage its deliberative process and thus its policy-making ability, as well as the other reasons for nondisclosure set out in Chairman Greenspan's letter to Representative Neal.

The Department's representative advised that the Administration's policy requires agencies to consider carefully in each case the need to withhold exempt information. He acknowledged, based on the staff presentation of the Committee's concerns, that the FOMC appeared to have done so. He cautioned that no final decision could be made by the Department until after a thorough evaluation of the matter.

Based on this meeting and the reaction of the Department's representative to the information supplied by staff, we believe the Department would defend a Committee decision to withhold deliberative portions of the transcripts, particularly the more recent transcripts. The Department's representative emphasized, however, the Committee's obligation to review each transcript requested under the Act and to segregate and disclose nondeliberative materials and materials that were already public.

[4/] The Department's representative with whom staff spoke is a career officer and the co-director of the Department's Office of Information and Privacy.

This generally positive response may not reflect the Department's final view, however, with regard to the older transcripts.

We were told that the age of particular documents might be a factor of concern to the Department in determining whether to defend an agency's decision to withhold exempt information under the Administration's new policy. The observation was made that seventeen-year-old deliberative material might not be sensitive. In this regard, the Committee's policy with respect to the former Memoranda of Discussion was to release them to the public with a five-year lag. It is possible that this former policy would be used in argument against the Committee's position that its deliberative process would be harmed by disclosure of transcripts that are more than five years old. There are, however, important differences between the unedited transcripts and the Memoranda of Discussion, which could argue for a longer lag than five years.

As a final matter, FOIA protects only information that has not otherwise been made public. Thus, if the Committee were to release an edited transcript or Memorandum of Discussion type record, a request for access to the unedited transcript, if it were kept, might be difficult to deny since the substance of the deliberative process had already been disclosed. The ability of the Committee to discard the tapes and raw transcripts once an edited transcript or Memoranda of Discussion had been approved by the Committee would be governed by the Federal Records Act.

Federal Records Act

The Federal Records Act requires that agency records may be destroyed only in accordance with a schedule that has been approved by the Archivist of the United States.[5/] The Archivist may approve a schedule for disposition of specific records only after notice and opportunity for public comment.[6/]

Material that is classified as a "permanent" record of an agency may not be disposed of and must be transferred to the Archivist within 30 years. Material that is transferred to the Archivist as a permanent record is ordinarily accessible by the public.

In order to determine what action the Archivist might take with regard to the disposition of the unedited FOMC meeting transcripts, staff consulted the Director of the Records Appraisal and Disposition Division of the National Archives and Records Administration ("NARA"). Although the Director said he could not provide definitive conclusions without additional review, he did provide some general guidance. He stated initially that, based on descriptions in recent newspaper

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[5/] For purposes of this Act, the term "records" is defined expansively to include all books, papers, electronic and other documentary materials made or received by an agency of the United States in connection with the transaction of official business and is preserved or is appropriate for preservation by the agency as evidence of its policies, decisions, procedures, operations or functions.

[6/] The Archivist has also published a number of general disposition schedules that authorize agencies to dispose of certain classes of materials common to most agencies. None of these schedules appear to cover the transcripts.

reports, the unedited meeting transcripts appear to be "records" under the Federal Records Act. One of the most important factors the Archivist considers in making this determination is the historical value of the documents. NARA has now sent the attached letter stating that the transcripts appear to fall within the definition of records in the Federal Records Act. The letter states that because of the public interest in the transcripts and their value for historical and other research, NARA recommends that the FOMC maintain the documents until appropriate standards have been developed and approved under the Federal Records Act for the ultimate disposition of the transcripts.

During staff's discussion with the Director, he said the NARA might consider a proposed disposition schedule under which the unedited transcript of an FOMC meeting would be disposed of after an edited transcript of the meeting is made, if the edited transcript includes all matters of substance contained in the unedited version. He also stated that possibly the unedited transcripts could be dispensed with if a detailed memorandum of the meeting that met this requirement was prepared. According to the Director, allowing the unedited transcripts not to be retained might be justified by viewing them as merely drafts of the final, edited versions. In addition, the edited transcript or detailed memorandum would have to include any confidential financial information discussed at the meeting. This confidential information, however, could be deleted from any

transcript that was made available to the public, at least until the document is sent to Archives after 30 years.[7/]

The Director cautioned that he was giving only his preliminary and very tentative views and that NARA's final decision could be made only after a thorough evaluation of the proposal. In this regard, it should be noted that NARA has ruled that electronic recordings and transcripts used to comply with the Government in the Sunshine Act are permanent records and may not be disposed of even though the Sunshine statute allows them to be discarded after two years.

[7/] This same procedure was followed when Memoranda of Discussion were released to the public. Confidential information was deleted from the public document.

THE WHITE HOUSE

WASHINGTON

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

I am writing to call your attention to a subject that is of great importance to the American public and to all Federal departments and agencies -- the administration of the Freedom of Information Act, as amended (the "Act"). The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration.

For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.

The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. As Vice President Gore made clear in the National Performance Review, the American people are the Federal Government's customers. Federal departments and agencies should handle requests for information in a customer-friendly manner. The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation.

I therefore call upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General, which is attached.

Further, I remind agencies that our commitment to openness requires more than merely responding to requests from the public. Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure compliance with both the letter and spirit of the Act.

William Jefferson

Office of the Attorney General
Washington, D. C. 20530

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

President Clinton has asked each Federal department and agency to take steps to ensure it is in compliance with both the letter and the spirit of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Department of Justice is fully committed to this directive and stands ready to assist all agencies as we implement this new policy.

First and foremost, we must ensure that the principle of openness in government is applied in each and every disclosure and nondisclosure decision that is required under the Act. Therefore, I hereby rescind the Department of Justice's 1981 guidelines for the defense of agency action in Freedom of Information Act litigation. The Department will no longer defend an agency's withholding of information merely because there is a "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.

To be sure, the Act accommodates, through its exemption structure, the countervailing interests that can exist in both disclosure and nondisclosure of government information. Yet while the Act's exemptions are designed to guard against harm to governmental and private interests, I firmly believe that these exemptions are best applied with specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure in each particular case.

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.

It is my belief that this change in policy serves the public interest by achieving the Act's primary objective -- maximum responsible disclosure of government information -- while preserving essential confidentiality. Accordingly, I strongly encourage your FOIA officers to make "discretionary disclosures"

whenever possible under the Act. Such disclosures are possible under a number of FOIA exemptions, especially when only a governmental interest would be affected. The exemptions and opportunities for "discretionary disclosures" are discussed in the Discretionary Disclosure and Waiver section of the "Justice Department Guide to the Freedom of Information Act." As that discussion points out, agencies can make discretionary FOIA disclosures as a matter of good public policy without concern for future "waiver consequences" for similar information. Such disclosures can also readily satisfy an agency's "reasonable segregation" obligation under the Act in connection with marginally exempt information, see 5 U.S.C. § 552(b), and can lessen an agency's administrative burden at all levels of the administrative process and in litigation. I note that this policy is not intended to create any substantive or procedural rights enforceable at law.

In connection with the repeal of the 1981 guidelines, I am requesting that the Assistant Attorneys General for the Department's Civil and Tax Divisions, as well as the United States Attorneys, undertake a review of the merits of all pending FOIA cases handled by them, according to the standards set forth above. The Department's litigating attorneys will strive to work closely with your general counsels and their litigation staffs to implement this new policy on a case-by-case basis. The Department's Office of Information and Privacy can also be called upon for assistance in this process, as well as for policy guidance to agency FOIA officers.

In addition, at the Department of Justice we are undertaking a complete review and revision of our regulations implementing the FOIA, all related regulations pertaining to the Privacy Act of 1974, 5 U.S.C. § 552a, as well as the Department's disclosure policies generally. We are also planning to conduct a Department-wide "FOIA Form Review." Envisioned is a comprehensive review of all standard FOIA forms and correspondence utilized by the Justice Department's various components. These items will be reviewed for their correctness, completeness, consistency, and particularly for their use of clear language. As we conduct this review, we will be especially mindful that FOIA requesters are users of a government service, participants in an administrative process, and constituents of our democratic society. I encourage you to do likewise at your departments and agencies.

Finally, I would like to take this opportunity to raise with you the longstanding problem of administrative backlogs under the Freedom of Information Act. Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies -- especially

those dealing with high-volume demands for particularly sensitive records -- maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem -- one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.

It is my hope that we can work constructively together, with Congress and the FOIA-requester community, to reduce backlogs during the coming year. To ensure that we have a clear and current understanding of the situation, I am requesting that each of you send to the Department's Office of Information and Privacy a copy of your agency's Annual FOIA Report to Congress for 1992. Please include with this report a letter describing the extent of any present FOIA backlog, FOIA staffing difficulties and any other observations in this regard that you believe would be helpful.

In closing, I want to reemphasize the importance of our cooperative efforts in this area. The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all Federal agencies as we make government throughout the executive branch more open, more responsive, and more accountable.

November 12, 1993

Alternatives for Release of Information About FOMC Meetings

I. Past Meetings, from 3/76 to 9/93

A. Alternatives[1]

1. No release of past transcripts until the transcripts (with or without light editing) are transferred to the National Archives after 30 years.
2. Raw transcripts--no editing--released after 10 to 15 years with deletion of confidential information from central banks or individual businesses.
3. Lightly edited transcripts--correction of obvious errors and deletion of confidential information--released after appropriate time lag (from three to four years to possibly as long as 10 years), and disposal of raw transcripts. Transcripts could be published by Federal Reserve or simply made available to interested parties upon request as unofficial documents.
4. Memoranda of Discussion--much heavier editing, e.g., to rearrange syntax and sentences making arguments more coherent and to delete extraneous material, and placed in third person--released after appropriate time lag (perhaps three to five years) and with deletion of confidential information and disposal of raw transcripts.

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1. All alternatives apply to conference calls for which we have transcripts as well as regular meetings.

B. Options for Review by Participants

1. By all living participants.
2. By all participants still in Federal Reserve System.
3. By secretariat staff only.

Note: Presumably those reviewing would need to see the entire edited document to get the context of their remarks. Any document released should note on its cover whether it had been reviewed by participants and if so by whom.

C. Release Schedule

1. Might depend on degree of editing required.
2. Could include most recent year to conform to minimum lag requirement plus a few years from older transcripts.
3. Could start at 1976 and work forward until lag constraint.

II. Future Meetings, from 11/93 Onwards

A. Alternatives

1. Current minutes with no taping of meetings and therefore no transcript. (If a tape or transcript were made Archivist is unlikely to allow disposal.)
2. Enhanced minutes--attribution of policy position for all members--with no tape or transcript.
3. Current minutes on current schedule plus MoD, with disposal of tape and transcript after MoD approved, published with appropriate time lag (perhaps three to five years).
4. Current minutes on current schedule plus lightly edited transcript, with disposal of tapes and raw transcripts after approval of edited version, released with appropriate lag (same as for MoD or possibly longer).

B. Review

1. All records (transcripts, MoDs, or minutes) would be reviewed by FOMC.
2. Under all options, confidential information (e.g., from central banks or individual businesses) would not be released until documents were turned over to Archivist in 30 years.

C. Legislation: Should the Federal Reserve seek or offer no objection to appropriate legislation to protect its records for a time?