

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

|                                      |   |                           |
|--------------------------------------|---|---------------------------|
| <b>KEY BANK OF MAINE, INC.,</b>      | ) |                           |
|                                      | ) |                           |
| <b>Plaintiff</b>                     | ) |                           |
|                                      | ) |                           |
| <b>v.</b>                            | ) | <b>Civil No. 91-362-P</b> |
|                                      | ) |                           |
| <b>UNITED STATES SMALL BUSINESS)</b> | ) |                           |
| <b>ADMINISTRATION,</b>               | ) |                           |
|                                      | ) |                           |
| <b>Defendant</b>                     | ) |                           |

**MEMORANDUM DECISION ON CROSS-MOTIONS FOR  
JUDGMENT ON THE BASIS OF A STIPULATED RECORD <sup>1</sup>**

In this Freedom of Information Act action, the plaintiff, Key Bank of Maine, Inc. ("Key Bank"), seeks an order requiring the United States Small Business Administration ("SBA") to produce certain documents in its possession, or withheld portions thereof, for inspection and copying.<sup>2</sup> This matter is now before the court on cross-motions for judgment on a stipulated record. This procedural device allows the court to resolve any lingering issues of material fact in reaching its decision on the merits. *Boston Five Cents Sav. Bank v. Secretary of the Dep't of Hous. & Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985).

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<sup>1</sup> Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

<sup>2</sup> The United States Department of Justice, initially joined as a defendant, has since been dismissed by agreement.

## FACTUAL BACKGROUND

The stipulated facts, insofar as relevant to this decision, are as follows. In November 1986 Catherine Duffy Petit and certain entities owned by her initiated suit against Key Bank and others in Maine Superior Court (York County) asserting fraud and other claims arising from a September 1979 loan, guaranteed by the SBA, made for the purpose of assisting one of Petit's companies in the acquisition of the so-called Old Orchard Beach park and pier. In that pending action Petit seeks damages exceeding \$100 million for loss of the park and pier in bankruptcy, loss of profits and business opportunities and damage to her personal and business reputation.

On September 21, 1988 counsel for Key Bank and Petit reviewed the SBA's files regarding the September 1979 loan and a subsequent disaster loan made by the SBA directly to another of Petit's companies for the purpose of replacing a pier destroyed in a winter storm. At the time of the review, the SBA had removed from its files certain documents, including those at issue here, which it maintained were exempt from disclosure under the Freedom of Information Act, 5 U.S.C. ' 552 ("FOIA" or "Act").

On August 14, 1990 Key Bank received from the SBA a formal denial of its request for disclosure of the withheld documents. On or about August 28, 1990 Key Bank appealed to the agency's Freedom of Information Act Office. That office then conducted an administrative review addressing 143 documents. Thereafter fifty of the documents were released to Key Bank in full. The balance, however, were withheld in full or in part assertedly pursuant to Exemptions 3, 4, 5 and/or 6 of the Act.

The SBA subsequently released additional documents in order to narrow the issues for trial in this matter. A list of twenty documents still sought by Key Bank after this last release by the SBA is

attached as Exhibit 6 to the stipulations filed on May 13, 1992. *See* Docket No. 18. The SBA has filed a declaration of Beverly K. Linden, chief of its Office of Freedom and Information/Privacy Acts, ("Linden Affidavit") (Docket No. 22) and a Vaughn Index<sup>3</sup> (Docket No. 23), and has submitted copies of all of the disputed documents for the court's *in camera* review.<sup>4</sup> Since then document 11 has been released in its entirety and is no longer in dispute. *See* Letter of Mark S. O'Brien, Esq. to the clerk dated May 28, 1992. There is now a total of eighteen documents that I must rule on.<sup>5</sup> The SBA

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<sup>3</sup> *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

<sup>4</sup> The sealed package includes a substituted document 101 in original and redacted form. *See* Letter of Mark S. O'Brien, Esq. to the clerk dated May 21, 1992.

<sup>5</sup> Key Bank originally asserted that a nineteenth document, document 19 in fact, was also in contention. The SBA has submitted both redacted and unredacted versions of this document for the court's *in camera* review. It should be noted, however, that the SBA failed to include this document in its Vaughn Index leaving the court with no guidance as to the reasons and arguments for withholding it. Further, in its Supplemental Memorandum (Docket No. 28) the SBA does not list document 19 as among those presently in contention and, moreover, calculates the number of documents in dispute to be eighteen. I therefore assume that the SBA has fully disclosed document 19. If it has not, it must now do so since it has clearly failed to satisfy its burden of establishing exemption status under the

continues to argue that these documents, or at least portions of them, are exempt from disclosure pursuant to subsections 552(b)(4) ("Exemption 4"), 552(b)(5) ("Exemption 5") and/or 552(b)(6) ("Exemption 6") of the FOIA.<sup>6</sup>

## DISCUSSION

The FOIA was designed to expose the operations of federal agencies to public scrutiny without endangering efficient administration, as a means of deterring the development and application of a body of "secret law." *Providence Journal Co. v. United States Dep't of the Army*, No. 92-1166, 1992 U.S. App. LEXIS 32325, at \*5-6 (1st Cir. Dec. 8, 1992) (citing *United States Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)). An agency which seeks to withhold information from the public bears the burden of overcoming the Act's presumption of disclosure. See 5 U.S.C. § 552(a)(4)(B). This burden is difficult to satisfy because the explicit exemptions to disclosure in the Act are construed narrowly and any doubts that arise are customarily resolved in favor of disclosure. *Id.* at \*6; *Curran v. Department of Justice*, 813 F.2d 473, 473-74 (1st Cir. 1987). A court must make a *de novo* determination as to the validity of the agency's exemption claim. 5 U.S.C. § 552(a)(4)(B);

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FOIA.

<sup>6</sup> Throughout this opinion I will identify the various documents by reference to the same numbers utilized by the parties during the course of this litigation. I note further that of the eighteen documents that remain at issue, five have been completely withheld (documents 2, 43, 45, 73 and 129) and portions of the other thirteen have been withheld through redaction (documents 9, 10, 18, 22, 23, 24, 82, 99, 100, 101, 106, 113, 134).

*Providence Journal Co.*, No. 92-1166, 1992 U.S. App. LEXIS 32325, at \*6. The SBA argues that Exemptions 4, 5 and/or 6 apply in some fashion to the documents now in issue.

#### Exemption 4

Exemption 4 exempts from the broad disclosure requirements of the FOIA matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The Court of Appeals for the First Circuit has adopted the standard that commercial or financial information is confidential only if disclosure is likely (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *9 to 5 Org. for Women Office Workers v. Board of Governors*, 721 F.2d 1, 5 (1st Cir. 1983) (quoting *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks I*), *aff'd in part and rev'd in part sub nom. National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*National Parks II*)).

In analyzing these two alternative grounds, the court in *9 to 5* stated that the emphasis should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality." *Id.* at 10. The court went on to explain that "[t]he inquiry in each case should be whether public disclosure of the requested commercial or financial information will harm an identifiable private or governmental interest which the Congress sought to protect by enacting exemption 4 of the FOIA." *Id.* The *9 to 5* court emphasized that the burden clearly rests with the agency to identify the particular interest, and also, to demonstrate how that interest will be harmed

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<sup>7</sup> In this regard the *9 to 5* court was quite liberal in its construction of the exemption, even allowing for government interests that went beyond the two identified in *National Parks I*.

by public disclosure of the specific information which has been requested." *Id.* With respect to the second alternative, a likelihood of substantial competitive harm to the person from whom the information is obtained, "[a]ctual competition and the likelihood of substantial competitive injury is all that need be shown." *Gulf & Western Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1980).

The SBA has submitted a fairly lengthy and explicit Vaughn Index which details the documents it is withholding, indicates which exemptions it believes apply to each document and explains why in its view application of the exemptions is valid. The SBA argues that several of these documents are covered by Exemption 4 and thus should be withheld from disclosure. Of the documents the SBA seeks to protect from disclosure under this exemption, four involve information that was turned over to the SBA by private credit reporting agencies.<sup>8</sup> The SBA states in its Vaughn Index that "it is unlikely that credit reporting services would do business with the government if the results of its investigations were publicly disclosed." Vaughn Index at 2 (unnumbered). The SBA goes on to explain that, to the extent that persons seeking credit information would utilize the government, rather than the credit agency, as a source of information, the profitability of the credit agency would be impaired." *Id.* The SBA then adds that its contracts with the credit reporting agencies "assure that information obtained from the agency and submitted to the government will not be disclosed." *Id.* It also emphasizes these arguments in its Memorandum of Law in Support of its Cross-Motion for Judgment (Docket No. 21).

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<sup>8</sup> Documents 2, 43, 73 and portions of 113 fall into this category. The need for these credit reports is quite apparent inasmuch as the purpose of the SBA is to facilitate the making of loans to credit-worthy small businesses.

In support of these arguments the SBA has submitted the Linden Affidavit. In this affidavit the chief of the SBA's Office of Freedom of Information/Privacy Acts states that "it is my understanding that the Agency's contracts with credit companies prohibit the release of information obtained from a credit company." Linden Affidavit & 5. In the very next paragraph Linden asserts that "[t]he documents which remain in issue in this suit, and the reasons for the assertion of an exemption from release with respect to those documents, are described in the 'Vaughn Index' which is appended hereto." *Id.* & 6.

Key Bank argues that the mere allegation of future harm to the SBA's ability to access credit agency reports or the private credit agencies themselves is not sufficient to carry its burden under Exemption 4. Further, the bank contends that Linden's statement concerning the SBA's inability to release information received from credit companies, based as it is on her "understanding," is also insufficient.

Required as I am to construe the Act's general disclosure requirement broadly and the exemptions narrowly, I agree that the SBA has not carried its burden regarding these credit agency reports. To begin with, in her affidavit Linden offers only her understanding, but does not state as fact, that the SBA's contracts with credit companies generally, and Crediscope and Dun & Bradstreet in particular, prohibit the release of information obtained from them. Moreover, promises of confidentiality do not themselves carry the day. *See 9 to 5*, 721 F.2d at 10. What we are left with on the critical issue of the potential harm to the agency that will result from disclosure, *id.*, are the suggestions found in the Vaughn Index that it is "unlikely" that credit agencies would do business with the government if the results of their investigations were publicly disclosed and that the profitability of these agencies would be impaired if persons could seek credit information generated by them through the government. These speculative assertions will not support Exemption 4 claims, to say nothing of

the fact that the intimation regarding impairment of profits in no way speaks to the ability of affected credit agencies to continue to exist and supply needed data notwithstanding any such misuse of their work-product. Finally, the notion that those who are in need of credit information will use the government as a source in order to save costs belies common sense. Generally, when such information is needed it is needed on a timely basis. It is inconceivable that many in such a position would waste precious time taking the FOIA route not even knowing what the government has or is willing to disgorge. Accordingly, I conclude that the SBA is not entitled to Exemption 4 protection as to documents 2 (one page credit report), 43 (four page Dun & Bradstreet report), 73 (one page Dun & Bradstreet report) and part of 113 (SBA Form 720, Loan Officer's Report).<sup>9</sup>

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<sup>9</sup> On page 3, three bracketed areas in section titled ``APPLICANT.''

I reach the same conclusion with respect to the two remaining documents. The Vaughn Index contains no explanation whatever justifying the withholding of redacted information in document 22<sup>10</sup> on Exemption 4 grounds. *A fortiori*, the SBA has not satisfied its burden. As for document 23,<sup>11</sup> the SBA has provided only the conclusory statement that "[t]he redacted material contains opinions concerning the personal financial information of Catherine Duffy Petit, disclosure of which would likely cause injury to Ms. Petit and which would impede the government in its planning concerning collection of the CDP, Inc. loan." Vaughn Index at 4 (unnumbered). No financial information itself has been redacted. The SBA does not adequately explain what injury would likely occur from disclosure of the redacted material or how this injury would come about. Nor does the SBA reveal what "actual competition" exists. *See Gulf & Western*, 615 F.2d at 530. In this instance as well, the SBA has not met its burden.<sup>12</sup>

### Exemption 5

Exemption 5 creates an exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption thus protects from disclosure agency documents that would not

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<sup>10</sup> Redacted are handwritten notes on a purchase-offer letter dated January 12, 1984 from Maine Beverage Container Service, Inc. to Robert Mitchell of Pepperell Trust Company concerning real estate in Old Orchard Beach.

<sup>11</sup> Report of Sale dated 4/9/84 from loan officer to chief of the SBA's Liquidation Division.

<sup>12</sup> In any event, the stipulated record now includes a recently unearthed 1988 document executed by Petit authorizing the SBA to permit Key Bank's attorney in the pending state court litigation to review all of the records then maintained by it in Augusta concerning Petit and her corporations. *See* second attachment to letter of Julianne Cloutier, Esq. to the clerk dated November 6, 1992; Amended Stipulated Record & 5. The SBA has not come forward with any evidence indicating that this authorization is no longer valid. Petit's authorization negates the SBA's argument that disclosure of the redacted opinions would likely cause injury to her.

be obtainable by a private litigant in an action against the agency under normal discovery rules (e.g., attorney-client, work-product, executive privilege)." *Providence Journal Co.*, No. 92-1166, 1992 U.S. App. LEXIS 32325, at \*7. The SBA in this case argues that these privileges apply to some of the information sought by Key Bank.

Whether material contained in inter- or intra-agency documents is protected under the attorney-client privilege or work-product doctrine is determined by applying the same analysis used in conventional discovery disputes regarding these matters. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975). The SBA claims that portions of document 134 are exempt under both. After reviewing the unredacted version of document 134, I agree. The redacted portions are thus protected under Exemption 5.<sup>13</sup>

The analysis of what material is protected as part of an agency's internal "deliberative process" is slightly more complex. The First Circuit has recognized that a document is protected under the deliberative-process privilege of Exemption 5 if it is "both 'predecisional' and 'deliberative.'" *Providence Journal Co.*, No. 92-1166, 1992 U.S. App. LEXIS 32325, at \*8-9. In defining this deliberative process the Supreme Court has held that Exemption 5 calls for "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." *Sears, Roebuck & Co.*, 421 U.S. at 153 (citation omitted). More specifically, the documents withheld must reflect the give-and-take of the consultative process. *See Providence Journal Co.*, No. 92-1166, 1992 U.S. App. LEXIS 32325, at \*7-8; *see also Schell v. United*

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<sup>13</sup> The SBA also argues that this material falls under the executive or "deliberative process" privilege, discussed *infra*, and I agree with this assertion as well.

*States Dep't of Health & Human Servs.*, 843 F.2d 933, 940 (6th Cir. 1988) ("The key question in Exemption 5 cases [is] whether disclosure of materials would expose an agency's decision-making process in such a way as to discourage discussion within the agency.") (quoting *Dudman Communications Corp. v. Department of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). The exemption, therefore, does not apply to communications directed to or from outside persons. *County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040-41 (1st Cir. 1981). As with the other exemptions, courts are expected to construe Exemption 5 "as narrowly as is consistent with efficient Government operation." *Providence Journal Co.*, No. 92-1166, 1992 U.S. App. LEXIS 32325, at \*8 (quoting *EPA v. Mink*, 410 U.S. 73, 89 (1973)).

The First Circuit has identified three elements that must be present before a document will be considered "predecisional." First, the agency must "pinpoint the specific agency decision to which the document correlates." *Providence Journal Co.*, No. 92-1166, 1992 U.S. App. LEXIS 32325, at \*9. Second, it must "establish that its author prepared the document for the purpose of assisting the agency official charged with making the agency decision." *Id.* Finally, the agency must "verify that the document precedes, in temporal sequence, the decision" to which it relates." *Id.* (quoting *Senate of Puerto Rico v. Department of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987)).

Taking the two requirements of "predecisional" and "deliberative" together, courts have found Exemption 5 to cover such materials as "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Schell*, 843 F.2d at 940; *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

As with Exemption 4, an agency invoking Exemption 5 "bears the burden of establish[ing] [its] right to withhold evidence from the public." *Senate of Puerto Rico*, 823 F.2d at 585 (quoting

*Coastal States Gas Corp.*, 617 F.2d at 861). Generally, conclusory assertions of privilege will not suffice to carry this burden, *id.*, although they may not necessarily foreclose it either in circumstances where the documents have been submitted for *in camera* review, the court chooses to review them and they disclose enough on their face to allow for an informed assessment of the applicability of Exemption 5, *see Schell*, 843 F.2d 940 n.5; *9 to 5 Org. for Women Office Workers v. Board of Governors*, 547 F. Supp. 846, 847-49 (D. Mass. 1982).

My conclusions respecting the SBA's Exemption 5 claims are bottomed on my *in camera* review of the documents as well as the explanations offered by the SBA in its Vaughn Index. Twelve documents, or portions thereof, are at issue. I deal with each of them in turn.<sup>14</sup>

In document 9 (SBA Form 1117, Loan Officer's Report), the SBA has redacted portions on all three pages based on Exemption 5. I find that the materials redacted at the bottom of page one fall within the exemption and are thus protected from disclosure. On page two I conclude that the last sentence falling under the section "Pro Forma Comments" does not reveal anything about the agency's decision-making process and thus this sentence must be disclosed. The other redacted portions of page two are protected under Exemption 5 and the SBA does not have to disclose them. I

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<sup>14</sup> Although the burden is on the agency to convince this court that the various exemptions apply, I need not leave my common sense at the door. Several of the documents are quite clear on their face as to who wrote them, where they fit in the decision-making process and the extent to which they contain personal opinion that is helpful to that process. The SBA has provided a fairly thorough Vaughn Index to aid this court in determining whether the agency has in fact correctly invoked the various exemptions. In reaching my conclusions on these materials, I have taken the documents as I have found them and then compared them to the claims being made by the agency.

also find all of the redacted material on page three of this document to be protected under Exemption 5.

I reach a similar conclusion with respect to document 10. Document 10 is a two page SBA Form 1180 titled "Summary Management Rating." It contains numerical ratings of the experience of the management of CDP, Inc., one of Catherine Petit's companies. All rating points and a social security number have been redacted from page one.<sup>15</sup> I conclude that the points are part of the SBA's deliberative process and are therefore exempt from disclosure.

Document 18 is a one page<sup>16</sup> handwritten memorandum regarding a meeting of SBA personnel to review a purchase offer. Redacted from the memorandum are the last three sentences and the author's signature. The first two redacted sentences consist of the author's opinion concerning the agency's ability to protect its secured position in the affected real estate. Offered as part of the deliberative process, this information is exempt under Exemption 5. However, the last sentence of the redacted portion is simply a factual statement of events and reveals nothing about the agency's position. Neither it nor the signature is entitled to Exemption 5 protection. I therefore order the SBA to disclose this last sentence as well as the signature.

As noted earlier in connection with my evaluation of Exemption 4 claims, document 22 is a

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<sup>15</sup> The plaintiff no longer seeks disclosure of the social security number contained in this document. See Plaintiff Key Bank of Maine, Inc.'s Reply to Defendant SBA's Motion for Judgment at 5 n.\* ("Plaintiff's Reply Memorandum") (Docket No. 25).

<sup>16</sup> The list of documents in dispute attached to the stipulations as Exhibit 6 erroneously states that this is a two page document.

two page purchase-offer letter from Maine Beverage Container Services, Inc. to Robert Mitchell of Pepperell Trust Company concerning real estate in Old Orchard Beach and reflecting several handwritten notes. Key Bank has indicated that it has not received any portion of this document. The SBA has submitted to the court redacted and unredacted versions implying that it has turned over at least part of this document to the plaintiff. Of course, the plaintiff is entitled to the letter itself since, as one between two third-parties, it does not qualify for Exemption 5 protection. Key Bank is also entitled to at least the redacted notes version of the letter since the SBA does not claim exemption status for the unredacted notes. The agency argues that the single redacted note falls within Exemption 5 because it consists of commentary by one of its officials to a loan officer concerning the history of the proposal and as such forms a part of the agency's opinion-making process regarding the acceptance or rejection of the purchase offer. My reading of the redacted note makes clear to me that it is not what it is represented to be. In the absence of anything further from the agency, I conclude that it has failed to satisfy its burden regarding this document. Accordingly, I order the SBA to disclose document 22 in its entirety.

Document 23, also previously reviewed in the context of Exemption 4, is a one page Report of Sale from a loan officer to the chief of the SBA's liquidation division. Redacted and withheld from Key Bank is a handwritten comment concerning collateral which does set forth the writer's opinion. I conclude that it qualifies for Exemption 5 protection and need not be disclosed.

Document 24 is a two page liquidation plan on SBA Form 1300 titled "Action Plan Report." I find the material redacted in the "Comment" section of the first page, all but the first word redacted under date of February 9, 1986 on the second page and all that is redacted under date of February 3, 1987 on the second page eligible for Exemption 5 protection as deliberative and predecisional opinion. However, redacted on the second page under date of August 24, 1983, February 19, 1986

(first word only) and March 20, 1986 are statements of fact only which are not entitled to Exemption 5 protection. These redactions shall be disclosed to Key Bank.

I conclude that the redactions appearing on documents 82, 99, 100, 101, 106 and 129 based on Exemption 5 are what the SBA has represented them to be and that they are entitled to Exemption 5 protection for the reasons given by the SBA. I reach the same conclusion regarding all but the last redaction appearing on the fifth and last page of document 113. The unredacted version submitted to the court for *in camera* review does not include the redacted material and the redaction is, in any event, unmarked to indicate whether exemption is claimed under Exemption 4, 5 or 6. As a consequence, the SBA has failed to carry its burden and I accordingly order that this redacted piece be disclosed.

### **Exemption 6**

Exemption 6 creates an exemption for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Again, the burden of showing that the exemption applies is on the agency. *FLRA v. United States Dep't of Navy*, 941 F.2d 49, 55 (1st Cir. 1991). The First Circuit has acknowledged that "[b]y restricting the reach of exemption 6 to cases where the invasion of privacy caused by disclosure is not only unwarranted but *clearly* so, Congress has erected an imposing barrier to nondisclosure under this exemption." *Id.* (quoting *Kurzon v. Department of Health & Human Servs.*, 649 F.2d 65, 67 (1st Cir. 1981) (emphasis in original)). Thus, "Congress has weighted the balance . . . heavily in favor of disclosure." *Kurzon*, 649 F.2d at 67. In *Kurzon*, the First Circuit stated that the "common denominator of files covered by exemption 6 has been described as the extent to which they contain 'intimate details' of a 'highly personal' nature." *Id.* at 68. The inquiry under Exemption

6 is, accordingly, a two-step process. First, does a privacy interest exist that Congress intended to protect? *Id.* at 67. If so, does that interest outweigh the public interest in disclosure? *Id.*

The SBA has provided this court with little evidence supporting its assertions that disclosure of the material it is withholding on Exemption 6 grounds would deprive Petit of a privacy interest in the material. As noted earlier, Petit has specifically authorized the SBA to disclose all of its records concerning her and her companies to Key Bank. In doing so, she has waived any privacy interest she may have had in that information.<sup>17</sup> As a consequence, the SBA is ordered to disclose to Key Bank those redacted portions of documents 9 and 24 withheld on Exemption 6 grounds (except that it need not disclose the redacted material in document 9 under the heading "Pro Forma Comments" since I have concluded that it is properly withheld on Exemption 5 grounds) and all of documents 2 and 45. It need not disclose the material redacted from document 113 on Exemption 6 grounds since Key Bank has indicated that it no longer seeks disclosure of these addresses, social security numbers and net worth figures. *See* Plaintiff's Reply Memorandum at 5 n.\*. Nor need it disclose the point information redacted from document 10 because I have already found the same to be exempt under Exemption 5.

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<sup>17</sup> It should also be noted that some of the data that the SBA argues is personal to Petit is actually material found in public records, such as her past real estate holdings, and thus has never been deserving of privacy protection.

## **RELIEF**

The cross-motions for judgment on a stipulated record are *GRANTED* in part and *DENIED* in part consistent with the foregoing. In sum, the SBA shall produce for inspection and copying by Key Bank documents 2, 43, 45 and 73 in their entirety (and document 19 to the extent it has not already been produced) and shall produce as well those portions of documents 9, 18, 22, 24 and 113 previously furnished in redacted form but as to which I have found either that the SBA has failed to satisfy its burden or concluded that they do not qualify for exemption protection. The SBA need not produce document 129 or the redacted portions of documents 10, 18, 23, 24, 82, 99, 100, 101, 106, 113 and 134 which I have concluded do qualify for exemption protection.

Since Key Bank has substantially prevailed, I assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in this case. *See* 5 U.S.C. ' 552(a)(4)(E). Key Bank shall prepare a proposed award of attorney fees reflecting its work on the issues on which it has prevailed and present it to the SBA's lawyers for review within 14 days. The proposed award shall be filed with the court by February 1, 1993. If the lawyers are unable to agree, they shall file by that date respective statements concerning the reasons why they cannot agree.

***IT IS SO ORDERED.***

***Dated at Portland, Maine this 31st day of December, 1992.***

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***David M. Cohen***  
***United States Magistrate Judge***