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Appraisal Subcommittee

Federal Financial Institutions Examination Council

September 26, 1997

Donald E. Kelly
Vice President
The Appraisal Institute
2600 Virginia Avenue, N.W.
Suite 200
Washington, D.C. 20037

Dear Mr. Kelly:

Thank you for your September 4, 1997 letter "requesting that the Appraisal Subcommittee ["ASC"] make available [under the Freedom of Information Act ("FOIA")] a copy of the "Task Force Report on the Understandability and Enforceability of USPAP" as delivered to the Appraisal Standards Board of The Appraisal Foundation." The ASC has the "Task Force Report" in its files. We received your request by fax on September 4th and, on September 18, 1997, received, again by fax, a "Request for Confidential Treatment" from W. David Snook, Chair of the Appraisal Standards Board ("ASB"). A copy of Mr. Snook's letter is enclosed. As discussed in more detail below, the ASC is denying your request.

First, we believe that the Task Force Report is not a document covered by FOIA. The U.S. Supreme Court has stated that "FOIA's basic policy . . . focuses on the citizen's right to be informed about what their government is up to. Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however is not fostered by the disclosure of information . . . that reveals little or nothing about the agency's own conduct." *Department of Justice v. Reporters Committee for the Freedom of the Press*, 489 U.S. 749, 773 (1989). Disclosure of the Task Force Report would reveal "little or nothing" about the ASC conduct.

Second, even if the Task Force Report were considered an ASC document within the meaning of FOIA, the document would be exempt from disclosure under the "confidentiality" provision of FOIA. Section (b)(4) of 5 U.S.C. 552 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The Task Force Report was submitted to the ASC with a cover page stating, in bold letters, that it was confidential. When the ASC staff requested a copy of the Task Force Report, and the ASB agreed to submit it, that agreement was based on the understanding that the copy would remain confidential.

As you know, the ASB is part of a private, not-for-profit, educational organization, the Appraisal Foundation. Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, ("Title XI") recognized, among other things, the ASB's role as *the* national standards making entity for appraisers when they perform appraisals in connection with federally related transactions. The Federal financial institutions regulatory agencies, the ASC, appraisers and State appraiser regulatory agencies ("State agencies") all depend on the ASB to perform its responsibilities under Title XI in an atmosphere conducive to free deliberation and the voluntary undertaking of initiatives to address industry/regulatory issues. This ability of the ASB to take on important issues voluntarily, such as those discussed in the Task Force Report, is

critical. Because of the voluntary nature of the ASB's specific activities and the fact that the Task Force Report was voluntarily provided to the ASC, the appropriate test for nondisclosure is whether the Task Force Report is information "of a kind that the provider would not customarily release to the public." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C. Cir. 1992), *cert.denied.*, 113 S. Ct. 1579 (1993). It is clear to us that the ASB considers the Task Force Report as a document not customarily releasable to the public. From reviewing the Report, we have concluded that the ASB's position is valid. Therefore, the Task Force Report is exempt from disclosure under 5 U.S.C. 552(b)(4).

Second, the Task Force Report is exempt from disclosure under Exemption 6 (5 U.S.C. 552(b)(6)). Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The ASB represented in its Request for Confidential Treatment that release of the Report "would harm the individuals who provided . . . the information" contained in the Report. While redaction of the names of the persons involved could reduce the likelihood of such harm, the smallness of the group preparing the Report, the nature of the stated positions, and the public knowledge of who participated in the Task Force and their areas of expertise could easily lead someone to infer the identities of the persons taking various positions. Therefore, redaction as a method to protect the individuals involved would not be appropriate. For these same reasons, we are prohibited from releasing the Task Force Report by the Privacy Act of 1974, 5 U.S.C. 552(a) and 12 CFR part 1102, subpart C, thereunder.

Third, the Task Force Report is exempt from disclosure under 5 U.S.C. (b)(7)(A). That section protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such . . . records or information . . . (A) could reasonably be expected to interfere with enforcement proceedings." The Uniform Standards of Professional Appraisal Practice ("USPAP"), as adopted by the ASB, in effect, *is* State law by operation of Title XI. In other words, State certified or licensed appraisers, who are found by State agencies to violate USPAP, may lose their livelihood and, in some instances, may be guilty of criminal acts. At this time, many ongoing enforcement actions exist in the States. The disclosure of the Task Force Report, in our view, would very well hinder those proceedings and result in confusion in how to apply USPAP.

Finally, if the ASB were deemed to be performing quasi-governmental standards making functions by working on the USPAP Enforceability and Understandability Project, the Task Force Report clearly would be exempt from disclosure under 5 U.S.C. (b)(5). Exemption 5 covers documents that are an "an inter-agency or intra-agency memorandum or letter which would not be available by law to a party other than as an agency in litigation with the agency." The Task Force Report is very similar to a discussion paper. It discusses the pro's and con's of various positions and presents options to the ASB, the decisionmaker. The Report clearly is part of a "work in progress" that is under active ASB deliberation. Releasing that Report would interfere with the ASB's deliberative process.

If you consider any of the above to be an improper denial of your request, you may, under 5 U.S.C. 552(a)(6) and 12 CFR part 1102, subpart D (which incorporates 12 CFR § 1101.4(b)(3)(iii)), appeal to the ASC's Chairman at the address on this letterhead. Any appeal should be filed with us in writing and should state the circumstances and reasons or arguments in support of the appeal and the date of the original request and the date of this initial ruling. The

appeal must be made within 35 days of the date of this letter and should be marked "Freedom of Information Appeal," "FOIA Appeal," or the like on the envelope.

If you have any questions, please do not hesitate to contact Marc Weinberg, the ASC's General Counsel.

Sincerely,

Ben Henson
Executive Director