

Trump Administration Releases Data on “Colossal” COVID Loan Programs

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The U.S. District Court for the District of Columbia ordered the Trump Administration to release the names of and amounts borrowed by the recipients of more than half a trillion taxpayer dollars in COVID-related financial relief under the Small Business Administration’s Paycheck Protection Program (“PPP”) and the Economic Injury Disaster Loans (“EIDL”) program. Eleven national news organizations requested this data under the Freedom of Information Act (“FOIA”) and sued when the agency refused to fully disclose it despite initially pledging to do so. [WP Co. LLC v. SBA](#), No. 20-cv-1240, 2020 U.S. Dist. LEXIS 206836 (D.D.C. Nov. 5, 2020).

Background

In March 2020, as COVID began slowing and then shuttering large sectors of the U.S. economy, the federal government passed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, the centerpiece of which was the creation of the PPP, designed to provide small businesses enough funds to cover up to eight weeks of expenses. Those funds were disbursed through loans that would be forgiven if used primarily to keep workers employed. The SBA ultimately approved more than half a trillion dollars in loans under the PPP and several hundred billion more in EIDL loans, totaling to a “colossal” \$713 billion in public funds – more than the federal government spent on Medicaid in all of Fiscal Year 2018.

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Controversies quickly surrounded the loan programs. Many small businesses were unable to secure assistance in the first round of PPP loans, while public companies and other seemingly well-capitalized businesses – notably including Shake Shack and the Los Angeles Lakers – received significant funds, some of which were returned following public outcry. Potential borrowers appeared to be hindered in their efforts to secure loans due to race or geography. And malefactors began defrauding the programs, leading to dozens of prosecutions that the SBA’s Inspector General called “the smallest, tiniest piece of the tip of the iceberg.”

Plaintiffs – The Washington Post, Bloomberg, Dow Jones, ProPublica, The New York Times, ABC News, American City Business Journals, CNN, NBC News, The Associated Press, and The Center for Investigative Reporting – each submitted FOIA requests to the SBA in April and May of 2020 seeking records concerning these loan programs. The SBA either failed to respond or issued boilerplate responses stating that, at some point in the future, it hoped “to turn [its] efforts to providing loan specific data to the public.” On May 12, 2020, five of those news organizations filed suit, challenging the SBA’s constructive denial of two requests and its denial of expedited processing of several others. Six additional news organizations subsequently

joined the lawsuit and the full group of eleven Plaintiffs filed an amended complaint on May 29, 2020.

The Court subsequently ordered the SBA to issue a final response to the Plaintiffs' FOIA requests and to produce any responsive non-exempt records. Citing FOIA Exemptions 4 and 6, for loans of \$150,000 or more the SBA released recipient names and addresses, but provided only "ranges" of loan amounts, and for loans of less than \$150,000 the agency released precise dollar amounts but withheld borrower names and street addresses. In this way the SBA avoided providing both the size of the loan and the name of the borrower for any of the millions of COVID-related loans that the SBA had guaranteed.

The parties subsequently cross-moved for summary judgment as to whether the SBA's withholdings were justified under Exemptions 4 and 6. Briefing closed in September 2020.

The Court's Opinion

On November 5, 2020, Judge James E. Boasberg granted Plaintiffs' cross-motion for summary judgment and ordered the SBA to "release the names, addresses, and precise loan amounts of all individuals and entities that obtained COVID-related loans pursuant to the Paycheck Protection Program and Economic Injury Disaster Loans program." In doing so the Court eviscerated the SBA's arguments under Exemptions 4 and 6.

On Exemption 4, the SBA had asserted that releasing the actual dollar amounts of loans greater than \$150,000 would indirectly disclose confidential commercial information, on the theory that loan amounts could be used to reverse-engineer the borrower's total payroll. The Court concluded that this argument relied on "fundamentally flawed" assumptions that caused "the agency's entire theory" to "collapse" when subjected to scrutiny. The Court also noted that, even if the loan amounts could allow calculation of payroll information, the agency still could not withhold such information under Exemption 4 because the loan applications clearly notified potential borrowers that their names and loan amounts would be public record under FOIA.

On Exemption 6, the SBA had claimed that releasing the names of borrowers for loans of less than \$150,000 would constitute an unwarranted invasion of personal privacy. The Court first recognized that borrowers had barely any privacy interest at stake because of the FOIA disclaimers on the loan applications, and it rejected the SBA's excuse that those disclaimers had been copied and pasted "in haste," emphasizing that "any carelessness that the agency now cites cannot alter the fact that it explicitly told potential borrowers that their identities and loan amounts would be disclosed, thereby lessening their expectation of privacy."

The Court then concluded that the public interest in disclosure "dramatically" outweighed these limited privacy interests given the SBA's "awesome statutory responsibility to administer the

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federal government’s effort at keeping the nation’s small businesses afloat amidst an economic and health crisis of unprecedented proportions.” The Court stressed that releasing the loan data will “enable meaningful evaluation of whether the PPP and EIDL program are being operated consistent with applicable legal constraints; whether funds have been distributed fairly, equitably, and devoid of fraud; and whether the programs are achieving their purpose,” and that disclosure “would thus reveal a vast array of previously unknown information concerning a substantial component of a government aid program of massive proportions.”

Two similar FOIA cases also seeking COVID loan data from the SBA – one filed in the Northern District of California by the American Small Business League and the other filed in the Central District of California by Southern California Public Radio – were stayed pending resolution of the case before Judge Boasberg. Those stays have since been lifted and the two matters remain pending as of this writing.

SBA’s Unsuccessful Stay Motion and Subsequent Disclosure

Judge Boasberg initially ordered the SBA to release the complete loan information by November 19, 2020. The SBA moved to stay that order pending appeal and sought a temporary administrative stay while that stay motion was pending. The Court granted the temporary stay, and Plaintiffs opposed a longer stay pending appeal. The Court subsequently ordered the SBA to proceed with disclosure, concluding that a stay pending appeal “would deprive the public of information critical to an ongoing national debate of considerable importance, as well as basic details surrounding an unprecedented federal relief effort financed by taxpayer dollars.”

Briefing is now underway on the only remaining issue in the matter: Plaintiffs’ motion for attorneys’ fees and costs.

On December 1, 2020, the SBA released the complete loan records. Based on the new data, the Washington Post reported that “more than half of the money from the [PPP] went to just 5 percent of the recipients,” and NBC News reported that “over 25 PPP loans worth more than \$3.65 million were given to businesses with addresses at Trump [Organization] and Kushner [Companies] real estate properties,” and that 15 of those borrowers “self-reported that they only kept one job, zero jobs or did not report a number at all.”

Briefing is now underway on the only remaining issue in the matter: Plaintiffs’ motion for attorneys’ fees and costs, which the Court may award to the prevailing party in a FOIA case.

Plaintiffs WP Company LLC d/b/a The Washington Post, Bloomberg L.P., Dow Jones & Company, Inc., Pro Publica, Inc., The New York Times Company, American Broadcasting Companies, Inc. d/b/a ABC News, American City Business Journals, Inc., Cable News Network, Inc., NBCUniversal Media, LLC d/b/a NBC News, The Associated Press, and The Center for Investigative Reporting d/b/a Reveal were represented by Charles D. Tobin, Maxwell S. Mishkin, and Kristel Tupja of Ballard Spahr LLP. Defendant the Small Business Administration was represented by Indraneel Sur and James Bickford of the U.S. Department of Justice.