



Exemption 8

Exemption 8 of the Freedom of Information Act protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."¹

In ruling on the "particularly broad" scope of Exemption 8 the Court of Appeals for the District of Columbia Circuit has declared that "if Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not [the courts'] function, even in the FOIA context, to subvert that effort."² The Court of Appeals for the Fifth Circuit noted that if Congress intended a more narrow interpretation of the exemption's scope, then "it could have easily accomplished that by specifying as much."³ Indeed, the District Court for the District of Columbia has observed that "Congress has left no room for a narrower interpretation of Exemption 8."⁴ As another court has stated: "Exemption 8 was intended by Congress – and has been interpreted by courts – to be very broadly construed."⁵

¹ [5 U.S.C. § 552\(b\)\(8\) \(2012 & Supp. V 2017\)](#).

² Consumers Union of the U.S., Inc. v. Heimann, 589 F.2d 531, 533 (D.C. Cir. 1978); accord Pub. Investors Arbitration Bar Ass'n v. SEC, 771 F.3d 1, 4 (D.C. Cir. 2014) (noting that "this court has explained time and again that Exemption 8's scope is 'particularly broad'" (quoting Consumers Union, 589 F.2d at 533)); see also Sharp v. FDIC, 2 Gov't Disclosure Serv. (P-H) ¶ 81,107, at 81,270 (D.D.C. Jan. 28, 1981).

³ Abrams v. Dep't of Treasury, 243 F. App'x 4, 6 (5th Cir. 2007).

⁴ McCullough v. FDIC, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at *2 (D.D.C. July 28, 1980).

⁵ Pentagon Fed. Credit Union v. Nat'l Credit Union Admin., No. 95-1475, 1996 U.S. Dist. LEXIS 22841, at *11 (E.D. Va. June 7, 1996); see also Consumers Union, 589 F.2d at 534-35 (concluding that Truth in Lending Act, 15 U.S.C. § 1601 (1974), does not narrow Exemption 8's broad language). But see McKinley v. FDIC, 268 F. Supp. 3d 234, 246 (D.D.C. 2017) (holding that "however broad Exemption 8's disjunctive list might sweep, it is not so broad

Courts have consistently discerned two purposes underlying Exemption 8.⁶ The primary purpose of Exemption 8 is to "ensure the security of financial institutions,"⁷ which could be undermined by "unwarranted runs on banks" caused by the disclosure of "candid evaluations of financial institutions."⁸ The secondary purpose of Exemption 8 is to safeguard the relationship between the banks and their supervising agencies.⁹ Courts have held that banks would be less likely to cooperate with federal examiners "if details

as to permit the agency to refuse to identify which of the many grounds within Exemption 8 purportedly applies to each document that the agency seeks to withhold").

⁶ See Pub. Investors Arbitration Bar Ass'n v. SEC, 930 F. Supp. 2d 55, 64 (D.D.C. 2013) ("[T]he primary reason for adoption of [E]xemption 8 was to ensure the security of financial institutions . . . [a] secondary purpose in enacting [E]xemption 8 appears to have been to safeguard the relationship between the banks and their supervising agencies." (quoting Consumers Union, 589 F.2d at 534)), aff'd, 771 F.3d 1 (D.C. Cir. 2014); Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin., 290 F. Supp. 2d 124, 135-36 (D.D.C. 2003) (affirming that two purposes of Exemption 8 are "to safeguard public confidence . . . which could be undermined by candid evaluations of financial institutions" and "to ensure that [banks] continue to cooperate . . . without fear that their confidential information will be disclosed"); Berliner, Zisser, Walter & Gallegos v. SEC, 962 F. Supp. 1348, 1353 (D. Colo. 1997) (delineating Exemption 8's "dual purposes" as "protecting the integrity of financial institutions and facilitating cooperation between [agencies] and the entities regulated by [them]"); Atkinson v. Fed. Dep. Ins. Corp., No. 79-1113, 1980 WL 355660, at *1 (D.D.C. Feb. 13, 1980) (recognizing Exemption 8's dual purposes of protecting security of financial institutions and "promot[ing] cooperation and communication between bank employees and examiners"), appeal dismissed, No. 80-1409, 1980 WL 355810, at *1 (D.C. Cir. June 12, 1980).

⁷ Pub. Investors, 930 F. Supp. 2d at 64 (quoting Consumers Union, 589 F.2d at 534); see also Gregory v. FDIC, 631 F.2d 896, 898 (D.C. Cir. 1980) (per curiam) ("It is clear from the legislative history that the exemption was drawn to protect not simply each individual bank but the integrity of financial institutions as an industry."); Judicial Watch, Inc. v. Dep't of Treasury, 796 F. Supp. 2d 13, 37 (D.D.C. 2011) (same); Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *12 (D. Minn. Aug. 23, 2007) (same).

⁸ Nat'l Cmty. Reinvestment Coal., 290 F. Supp. 2d at 135-36.

⁹ See, e.g., Pub. Investors, 930 F. Supp. 2d at 64; Judicial Watch, 796 F. Supp. 2d at 37; Feinberg v. Hibernia Corp., No. 90-4245, 1993 WL 8620, at *4 (E.D. La. Jan. 6, 1993) (identifying Exemption 8's dual purposes, including primary purpose of protecting operation and condition reports containing frank evaluations of investigated banks and secondary purpose of protecting relationship between financial institutions and supervisory government agencies) (non-FOIA case); Fagot v. FDIC, 584 F. Supp. 1168, 1173 (D.P.R. 1984) (recognizing primary purpose of Exemption 8 in protecting information containing frank evaluations which might undermine public confidence and secondary purpose in protecting relationship between financial institutions and supervisory agencies), aff'd in pertinent part & rev'd in part, 760 F.2d 252 (1st Cir. 1985) (unpublished table decision).

of the bank examinations were made freely available to the public and to banking competitors."¹⁰ Indeed, even records pertaining to banks that are no longer in operation have been protected under Exemption 8 in order to serve the policy of promoting "frank cooperation" between bank and agency officials.¹¹

The D.C. Circuit has gone so far as to state that in Exemption 8, Congress has provided "absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports."¹² Federal agencies have used Exemption 8 to protect bank examination reports prepared by or for federal bank examiners.¹³ Additionally, bank examination reports and related documents prepared by state regulatory agencies have been found protectable under Exemption 8.¹⁴

¹⁰ Consumers Union, 589 F.2d at 534; see also McKinley v. FDIC, 744 F. Supp. 2d 128, 144 (D.D.C. 2010) (agreeing that agency's "ability to gather . . . information in furtherance of its mission to regulate our nation's banking system would inarguably be compromised" if real-time information pertaining to banking institution's failure was released).

¹¹ Gregory, 631 F.2d at 899; accord Berliner, 962 F. Supp. at 1353 (upholding applicability of Exemption 8 to documents relating to company that had "been defunct for at least four years" and declining to adopt argument that passage of time abated "need for confidentiality").

¹² Gregory, 631 F.2d at 898; see also Teichgraeber v. Bd. of Governors, Fed. Reserve Sys., No. 87-2505, 1989 WL 32183, at *1 (D. Kan. Mar. 20, 1989) (noting that "Exemption 8 has been broadly construed, 'to provide absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports'" (quoting Gregory, 631 F.2d at 899)).

¹³ See Clarkson v. Greenspan, No. 97-2035, 1998 U.S. Dist. LEXIS 23566, at *24 (D.D.C. June 30, 1998) (holding that the Federal Reserve Banks may withhold records of examinations "conducted by or for the Board of Governors [of the Federal Reserve System]"); Atkinson, 1980 WL 355660, at *1 (holding that reports written for FDIC examiners for agency, as well as reports prepared by state created banking authority prepared for agency, withholdable under Exemption 8"); see also Snoddy v. Hawke, No. 99-1636, slip op. at 2 (D. Colo. Dec. 20, 1999) (holding that e-mail, notes, and correspondence pertaining to matters discussed by employees of Citibank and Office of Comptroller of Currency were properly withheld as "matters prepared by or for the [regulating] agency . . . [and pertaining to] examination, operating or condition reports"), aff'd on other grounds, 13 F. App'x 768 (10th Cir. 2001); Consumers Union v. Office of the Comptroller of Currency, No. 86-1841, slip op. at 2-3 (D.D.C. Mar. 11, 1988) (finding examination report protectable even if contents originate with consumers rather than financial institutions or regulators).

¹⁴ See McCullough, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at *7 (holding that "Congress intended that the reports and related documents collected by agencies such as the FDIC for their regulatory purposes," which include documents prepared by state agencies, would be protected by Exemption 8); Atkinson, 1980 WL 355660, at *1 (providing protection to "communications between federal and state agencies when the underlying purposes of FOIA were thereby promoted").

As the District Court for the District of Columbia noted, the goals of the exemption are served by withholding such material because of the "interconnected" purposes and operations of federal and state banking authorities.¹⁵

Further, matters that are "related to" such reports – that is, documents that "represent the foundation of the examination process, the findings of such an examination, or its follow-up" – have also been held exempt from disclosure.¹⁶ This includes "real-time" information an agency receives about the status of the financial institutions for which it bears responsibility.¹⁷ Along these lines, the Fifth Circuit has held that Exemption 8 may also protect follow-up items, such as a federal oversight authority's "Order of Investigation," arising from a bank examination.¹⁸ Furthermore, the District Court for the District of Columbia has found that Exemption 8 "does not require the [agency] to identify a specific report to which the information relates."¹⁹ The exemption has been found to protect bank examination reports and related memoranda relating to

¹⁵ Atkinson, 1980 WL 355660, at *1.

¹⁶ Id. at *1-2; see, e.g., Pub. Investors Arbitration Bar Ass'n v. SEC, 771 F.3d 1, 7 (D.C. Cir. 2014) (holding that "documents the [SEC] collects while examining financial institutions [or] any agency it regulates . . . are exempt from disclosure"); Williams & Connolly LLP v. Office of the Comptroller of the Currency, 30 F. Supp. 3d 82, 90 (D.D.C. 2014) (finding that "'communications between [the agency's] attorneys and supervisory employees and the Banks, their proposed independent consultants, and proposed independent counsel as well as internal [agency] and inter-agency discussion of the vetting of independent consultants and independent counsel . . . relate to' a bank examination" and are protected) (internal citations omitted); Pub. Investors, 930 F. Supp. 2d at 62 (finding that "the 'related to' language casts a wide net of non-disclosure over any documents that are logically connected to an 'examination, operating, or condition report'" (quoting Exemption 8)); Biase v. Office of Thrift Supervision, No. 93-2521, slip op. at 12 (D.N.J. Dec. 16, 1993) (withholding correspondence and memorandum related to examination report); Consumers Union, No. 86-1841, slip op. at 2-3 (D.D.C. Mar. 11, 1988) (finding reports that "analyze and summarize information concerning consumer complaints" made to government agency regarding financial institutions fall within Exemption 8).

¹⁷ McKinley, 744 F. Supp. 2d at 144 (characterizing information received in "real-time" as "relat[ing] to 'examination, operating, or condition' reports about individual supervised institutions").

¹⁸ Abrams, 243 F. App'x at 6 (rejecting plaintiff's argument that Order of Investigation must directly relate to content of bank examination report, finding instead that "statute never mentions contents, and only requires that a matter be related to the Report in order to be exempt from production").

¹⁹ Judicial Watch, 796 F. Supp. 2d at 37; see also Pub. Investors, 930 F. Supp. 2d at 62 (same (citing Judicial Watch, 796 F. Supp. 2d at 37)).

insolvency proceedings.²⁰ Documents pertaining to cease-and-desist orders that issue after a bank examination as the result of a closed administrative hearing have also been protected.²¹ Finally, reports examining bank compliance with consumer laws²² and regulations²³ have been held to also "fall[] squarely within the exemption."²⁴

The D.C. Circuit broadly construes the term "financial institutions" and has held that it is not limited to "depository" institutions.²⁵ In turn, the District Court for the District of Colorado relied upon legislative history when ruling that an "investment advisor company" is a "financial institution" under Exemption 8, observing that "investment advisors, as a matter of common practice, are fiduciaries of their clients who direct, and in reality make, important investment decisions."²⁶ The District Court for the Northern District of California, "following the logic" of these earlier cases, broadly held "that the term 'financial institutions' encompasses brokers and dealers of securities or commodities as well as self-regulatory organizations, such as the [National Association of Securities Dealers]."²⁷

²⁰ See Tripati v. DOJ, No. 87-3301, 1990 U.S. Dist. LEXIS 6249, at *2-3 (D.D.C. May 18, 1990).

²¹ See Atkinson, 1980 WL 355660, at *2.

²² Id.

²³ See Snoddy, No. 99-1636, slip op. at 2 (D. Colo. Dec. 20, 1999) (holding that e-mail, notes, and other correspondence pertaining to whether Citibank violated regulation fell within purview of Exemption 8).

²⁴ Atkinson, 1980 WL 355660, at *2.

²⁵ Pub. Citizen v. Farm Credit Admin., 938 F.2d 290, 292 (D.C. Cir. 1991) (per curiam) (concluding that "institutions providing credit services . . . are included within the term 'financial institutions'"); see also, e.g., Frank LLP v. CFPB, 288 F. Supp. 3d 46, 63 (D.D.C. 2017) (finding that "[d]ebt collectors . . . fit comfortably within [the] scope" of financial institutions); Ball v. Bd. of Governors of Fed. Reserve Sys., 87 F. Supp. 3d 33, 55-56 (D.D.C. 2015) (holding that "[b]ank or not, [federal reserve banks] are included in the broader definition of financial institution, which is any 'entity that manages money, credit, or capital'" because they "are hybrid entities, with some public and some private functions, but at least some of their functions are those of a financial institution"); Pub. Investors, 930 F. Supp. 2d at 69 (noting broad definition of "financial institution" under Exemption 8).

²⁶ Berliner, 962 F. Supp. at 1352 (relying on "legislative history of the [Government in the] Sunshine Act" in absence of any "unambiguous definition of financial institutions provided in FOIA's text or legislative history").

²⁷ Feshbach v. SEC, 5 F. Supp. 2d 774, 781 (N.D. Cal. 1997).

The D.C. Circuit has held that "an entire examination report, not just that related to the 'condition of the bank' may properly be withheld."²⁸ The District Court for the District of Columbia has noted the absence of any controlling case law to support a "distinction between factual versus analytical or deliberative material under [Exemption 8]."²⁹ The court reasoned that withholding both factual and other material under Exemption 8 better serves the purposes of safeguarding the "public appearance" of financial institutions and encouraging cooperation between regulatory agencies and financial institutions.³⁰ By contrast, there are some district courts in other circuits which have declined to extend the protection of Exemption 8 to "purely factual material," when analyzing Exemption 8.³¹ Other courts have taken something of a middle ground, refusing to grant automatic protection to factual materials, but ruling that in the context of the specific cases at hand, agency withholdings of factual information had been appropriate.³²

Lastly, it should be noted that a provision of the Federal Deposit Insurance Corporation Improvement Act of 1991 explicitly limits Exemption 8's applicability with

²⁸ Consumers Union, 589 F.2d at 535; see also Atkinson, 1980 WL 355660, at *2 (quoting Consumers Union, 589 F.2d at 535).

²⁹ Bloomberg v. SEC, 357 F. Supp. 2d 156, 170 (D.D.C. 2004).

³⁰ Id. at 170; see also Wachtel v. Office of Thrift Supervision, No. 3-90-833, slip op. at 19-20, 23, 26-28, 30, 33 (M.D. Tenn. Nov. 20, 1990) (concluding that factual material pertaining to financial institution may be withheld).

³¹ Pentagon Fed., No. 95-1476, 1996 U.S. Dist. LEXIS 22841, at *11 (E.D. Va. June 7, 1996) (declining to extend Exemption 8 protection to "purely factual material"); see also Lee v. FDIC, 923 F. Supp. 451, 459 (S.D.N.Y. 1996) (denying protection for information found to be "primarily factual"), dismissed, No. 1:95 CV 7963 (S.D.N.Y. Sept. 15, 1997); cf. Schreiber v. Society for Sav. Bancorp, Inc., 11 F.3d 217, 220 (D.C. Cir. 1993) (declaring, in context of civil discovery, that "bank examination privilege protects only agency opinions and recommendations from disclosure; purely factual information falls outside the privilege") (non-FOIA case); In re Subpoena Served upon Comptroller of Currency & the Sec'y of the Bd. of Governors of the Fed. Reserve Sys., 967 F.2d 630, 634 (D.C. Cir. 1992) ("The bank examination privilege, like the deliberative process privilege, shields from discovery only agency opinions or recommendations; it does not protect purely factual material.") (non-FOIA case).

³² See Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *13 (D. Minn. Aug. 23, 2007) (noting that facts "must be considered with respect to the overall context of the documents in which they are contained" and approving agency's withholding); Marriott Employees' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478-A, 1996 WL 33497625, at *5 (E.D. Va. Dec. 24, 1996) (holding that while "[p]urely factual information does not fall within Exemption 8," agency's withholding was appropriate because "disclosure . . . would undermine the spirit of cooperation between banks and regulating agencies that Exemption 8 attempts to foster").

respect to specific reports prepared pursuant to it.³³ That statute requires all federal banking agency inspector generals to conduct a review and to make a written report when a deposit insurance fund incurs a material loss with respect to an insured depository institution.³⁴ The statute further provides that, with the exception of information that would reveal the identity of any customer of the institution, the federal banking agency "shall disclose any report on losses required under this subsection, upon request under [the FOIA] without excising . . . any information about the insured depository institution under . . . [Exemption 8]."³⁵

³³ 12 U.S.C. § 18310(k) (2012 & Supp. V 2017).

³⁴ *Id.* § 18310(k)(1).

³⁵ *Id.* § 18310(k)(4).