



Exemption 8

Exemption 8 of the FOIA 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

This exemption received little judicial attention during the first dozen years of the FOIA's operation. The only significant decision during that period was M.A. Schapiro & Co. v. SEC, in which the District Court for the District of Columbia held that national securities exchanges and broker-dealers are not "financial institutions" within the meaning of the exemption.² Fourteen years later, after passage of the Government in the Sunshine Act³ -- the legislative history of which broadly defines the term "financial institutions" -- this same court concluded "that Congress has never acceded to the Shapiro court's restrictive census of 'financial institutions' for purposes of FOIA's Exemption 8."⁴ Further, the court held that Congress "has since given sufficient indication that it expects securities exchanges to be numbered among [financial institutions]" in the context of Exemption 8 of the FOIA.⁵ As a result, subsequent attempts by FOIA requesters to have courts rely on the ruling in M.A. Schapiro have been unsuccessful.⁶

¹ 5 U.S.C. § 552(b)(8) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

² 339 F. Supp. 467, 470 (D.D.C. 1972).

³ 5 U.S.C. § 552b (2006).

⁴ Mermelstein v. SEC, 629 F. Supp. 672, 674 (D.D.C. 1986).

⁵ Id.

⁶ See Feshbach v. SEC, 5 F. Supp. 2d 774, 781 (N.D. Cal. 1997) (rejecting argument that court should follow M.A. Schapiro definition of term "financial institutions" because "the same
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Instead, courts interpreting Exemption 8 have largely declined to restrict the "particularly broad, all-inclusive" scope of the exemption.⁷ 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."⁸ The Court of Appeals for the Fifth Circuit -- in finding that the exemption should be broadly interpreted -- 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."⁹ As another court has stated: "Exemption 8 was intended by Congress -- and has been interpreted by courts -- to be very broadly construed."¹⁰

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."¹¹ Similarly, in a major Exemption 8 decision, the D.C. Circuit broadly construed the term "financial institutions" and held that it is not limited to "depository" institutions.¹² In turn, the District Court for the

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district court [had] noted [in Mermelstein] that [M.A. Schapiro] was no longer good law"); Berliner, Zisser, Walter & Gallegos v. SEC, 962 F. Supp. 1348, 1351 n.5 (D. Colo. 1997) (likewise rejecting narrow reading of term "financial institutions" because court in Mermelstein had noted that "subsequent passage of the Sunshine Act" rendered decision in M.A. Schapiro "no longer good law").

⁷ Consumers Union of the U.S., Inc. v. Office of the Comptroller of the Currency, No. 86-1841, slip op. at 2 (D.D.C. Mar. 11, 1988); see McCullough v. FDIC, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at *2-3 (D.D.C. July 28, 1980) (observing that "Congress has left no room for a narrower interpretation of Exemption 8"). But see Forest Guardians v. U.S. Forest Serv., No. 99-615, slip op. at 51 (D.N.M. Jan. 29, 2001) (declaring that Exemption 8 does not "shield everything banking institutions accumulate . . . that might be reviewed in the process of a bank examination," and opining that "[s]uch a vague and sweeping definition of what Exemption 8 encompasses can only be regarded as antithetic to . . . FOIA's disclosure requirements"), appeal dismissed voluntarily, No. 01-2296 (10th Cir. Nov. 21, 2001).

⁸ Consumers Union of the U.S., Inc. v. Heimann, 589 F.2d 531, 533 (D.C. Cir. 1978); see also Sharp v. FDIC, 2 Gov't Disclosure Serv. (P-H) ¶ 81,107, at 81,270 (D.D.C. Jan. 28, 1981); McCullough, 1980 U.S. Dist. LEXIS 17685, at *2-3.

⁹ Abrams v. Dep't of Treasury, 243 F. App'x 4, 6 (5th Cir. 2007).

¹⁰ 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).

¹¹ Gregory v. FDIC, 631 F.2d 896, 898 (D.C. Cir. 1980); see also Clarkson v. Greenspan, No. 97-2035, 1998 U.S. Dist. LEXIS 23566, at *24 (D.D.C. June 30, 1998) (extending Exemption 8 protection to records of examinations conducted by Federal Reserve Banks for Board of Governors of Federal Reserve System), summary affirmance granted, No. 98-5349, 1999 WL 229017, at *1 (D.C. Cir. Mar. 2, 1999).

¹² Pub. Citizen v. Farm Credit Admin., 938 F.2d 290, 293-94 (D.C. Cir. 1991) (per curiam)
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District of Colorado relied upon that D.C. Circuit decision 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."¹³ 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]."¹⁴

Courts have consistently discerned two purposes underlying Exemption 8¹⁵ -- a primary purpose of "ensur[ing] the security of financial institutions," which could be undermined by disclosure of information containing frank evaluations of such institutions, and a secondary purpose of safeguarding "the relationship between the banks and their supervising agencies."¹⁶ Accordingly, different types of documents have been held to fall within the broad

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(holding that National Consumer Cooperative Bank (NCCB) is "financial institution" for purposes of Exemption 8 and that exemption protects audit reports prepared by Farm Credit Administration (FCA) for submission to Congress regarding NCCB, even though FCA does not regulate or supervise NCCB).

¹³ 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").

¹⁴ Feshbach, 5 F. Supp. 2d at 781.

¹⁵ See 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, 962 F. Supp. at 1353 (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. FDIC, No. 79-1113, 1980 WL 355660, at *1 (D.D.C. Feb. 13, 1980) (recognizing Exemption 8's 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).

¹⁶ Consumers Union, 589 F.2d at 534 (identifying primary reason for adoption of Exemption 8 as protecting disclosure of examination, operation, and condition reports -- which, if disclosed, might undermine public confidence in financial institutions -- and secondary reason as safeguarding relationship between supervisory agencies and banks, because banks would be less likely to cooperate with federal examiners if examinations were freely available to competitors and to public); 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

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confines of Exemption 8.

First, federal agencies have withheld bank examination reports prepared by federal bank examiners.¹⁷ 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 in a number of cases.¹⁸ 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 where a formal investigation was initiated.¹⁹

The District Court for the District of Columbia has held that "an entire examination report, not just that related to the 'condition of the bank' may properly be withheld."²⁰ Exemption 8 has also been employed to withhold portions of documents -- such as internal memoranda and policy statements -- that contain specific information about the financial

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(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).

¹⁷ See Sharp, 2 Gov't Disclosure Serv. (P-H) at 81,270; Atkinson, 1980 WL 355660, at *1; see also Clarkson, No. 97-2035, slip op. at 14-15 (D.D.C. June 30, 1998) (holding that Board of Governors of Federal Reserve System may withhold records of examinations prepared by Federal Reserve Banks); cf. Feinberg v. Hibernia Corp., No. 90-4245, 1992 WL 54738, at *6-7 (E.D. La. Mar. 9, 1992) (noting, in context of civil discovery dispute in lawsuit unrelated to FOIA, that "[t]here is no question that the bank examination reports themselves fall within the purview" of what would be protected by Exemption 8) (non-FOIA case).

¹⁸ Atkinson, 1980 WL 355660, at *1-2; see, e.g., Parsons v. Freedom of Info. Act Officer, Office of Consumer Affairs SEC, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) (summarily holding that "all communication[s] between" SEC and National Association of Securities Dealers (NASD), including "any SEC audits" of NASD, "were exempt from disclosure"); Biase v. Office of Thrift Supervision, No. 93-2521, slip op. at 12 (D.N.J. Dec. 16, 1993); Teichgraeber v. Bd. of Governors, Fed. Reserve Sys., No. 87-2505, 1989 WL 32183, at *1 (D. Kan. Mar. 20, 1989); Consumers Union, No. 86-1841, slip op. at 2-3 (D.D.C. Mar. 11, 1988); Folger v. Conover, No. 82-4, slip op. at 5-8 (E.D. Ky. Oct. 25, 1983); Sharp, 2 Gov't Disclosure Serv. (P-H) at 81,270-71; cf. In re Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983) (citing Exemption 8 as support for conclusion that agency's questioning of bank employees is to be shielded from civil discovery) (non-FOIA case).

¹⁹ 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").

²⁰ Atkinson, 1980 WL 355660, at *2.

condition of named financial institutions.²¹

Despite the generally broad application of Exemption 8, courts have found limits to its interpretation. The District Court for the District of New Mexico, for example, considered the breadth of its protection in a case involving agreements with financial institutions that allow farmers to execute waivers placing their federal grazing permits in escrow as collateral for farm financing.²² The court declined to extend Exemption 8 protection to these agreements, finding that the banks' expansive view "would shield everything banking institutions accumulate if any possibility existed [that] the information might be reviewed in the process of a bank examination."²³ The court concluded that while Exemption 8 "completely protects reports of or related to a bank examination, it is not correct that every piece of paper in a bank's records are protected as a result."²⁴

Bank examination reports and related documents prepared by state regulatory agencies have been found protectible under Exemption 8 on more than one ground. As the District Court for the District of Columbia has found, the purposes of the exemption are served by withholding such material because of the "interconnected" purposes and operations of federal and state banking authorities.²⁵ In a later case, that court held that "all records, regardless of the source, of a bank's financial condition and operations and in the possession of a federal agency 'responsible for the regulation or supervision of financial institutions,' are exempt."²⁶

²¹ See 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).

²² Forest Guardians, No. 99-615, slip op. at 3-5 (D.N.M. Jan. 29, 2001) (explaining role of agency, Farm Credit Banks, and escrow agreements in agricultural financing).

²³ Id. at 51 (noting that banks' "vague and sweeping" definition is contrary to broad disclosure requirements of FOIA).

²⁴ Id. at 52.

²⁵ Atkinson, 1980 WL 355660, at *1.

²⁶ McCullough, 1980 U.S. Dist. LEXIS 17685, at *7; 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); Clarkson, No. 97-2035, slip op. at 15 (D.D.C. June 30, 1998) (finding that records of examinations conducted by Federal Reserve Banks for the Board of Governors of the Federal Reserve System were properly withheld because "examinations were done by or for the agency responsible for regulating Reserve Banks"); Consumers Union, No. 86-1841, slip op. at 2-3 (D.D.C. Mar. 11, 1988) (finding examination report protectible even if contents originate with consumers rather than financial institutions or regulators). But see Forest Guardians, No. 99-615, slip op. at 51 (D.N.M. Jan. 29, 2001) (rejecting agency's argument that because Farm Credit Administration is financial institution responsible for regulating Farm Credit Banks, and escrow waivers submitted by lenders contained information contained in or related to

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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.²⁷ The exemption has been found to protect even bank examination reports and related memoranda relating to insolvency proceedings.²⁸ Documents relating to cease-and-desist orders that issue after a bank examination as the result of a closed administrative hearing have also been protected.²⁹ Reports examining bank compliance with consumer laws and regulations have been held to also "fall squarely within the exemption."³⁰

Moreover, in keeping with this expansive construction of Exemption 8, courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial state of the institution. As one court has observed, "an entire examination report, not just that related to the 'condition of the bank' may properly be withheld."³¹ Although some courts have declined to extend the protection of Exemption 8 to "purely factual material,"³² the District Court for the District of Columbia has consistently protected factual

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bank examination or condition reports, those escrow waivers fall within Exemption 8: "Were the argument to be taken as meritorious, it would shield everything banking institutions accumulate if any possibility existed the information might be reviewed in the process of examination.").

²⁷ 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").

²⁸ See, e.g., Tripathi v. DOJ, No. 87-3301, 1990 U.S. Dist. LEXIS 6249, at *2-3 (D.D.C. May 18, 1990).

²⁹ See, e.g., Atkinson, 1980 WL 355660, at *2.

³⁰ Id.; see also 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); Consumers Union, No. 86-1841, slip op. at 2-3 (D.D.C. Mar. 11, 1988) (finding that reports fall within Exemption 8 "because they analyze and summarize information concerning consumer complaints"); cf. 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).

³¹ Atkinson, 1980 WL 355660, at *2; cf. Fagot v. FDIC, No. 84-1523, slip op. at 5-6 (1st Cir. Mar. 27, 1985) (finding that portion of document which does not relate to bank report or examination cannot be withheld); Wachtel, No. 3-90-833, slip op. at 17 (M.D. Tenn. Nov. 20, 1990) (holding that "if the dual purposes of Exemption 8 can be served by simply redacting the identity and any identifying information of any specific institution mentioned in the document, redaction should be performed and the document, as edited, should be released").

³² Pentagon Fed., No. 95-1476, slip op. at 9 (E.D. Va. June 7, 1996) (declining to extend Exemption 8 protection to "purely factual material"); see Lee v. FDIC, 923 F. Supp. 451, 459 (S.D.N.Y. 1996) (likewise denying protection for information found to be "primarily factual"), dismissed, No. 1:95 CV 7963 (S.D.N.Y. Sept. 15, 1997); cf. Schreiber, 11 F.3d at 220 (declaring,

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material, most recently in its decision in Bloomberg v. SEC,³³ where it noted the absence of any controlling case law to support a "distinction between factual versus analytical or deliberative material under [Exemption 8]."³⁴ 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.³⁵

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 respect to specific reports prepared pursuant to it.³⁶ That statute requires all federal banking agency inspectors general 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.³⁷ 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 the report upon request under [the FOIA] without excising . . . any information about the insured depository institution under [Exemption 8]."³⁸

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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, 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).

³³ 357 F. Supp. 2d 156 (D.D.C. 2004).

³⁴ Id. at 170 (reasoning that withholding both factual and other material under Exemption 8 better serves its twin purposes of safeguarding public stature of financial institutions and encouraging cooperation between regulatory agencies and their regulated institutions).

³⁵ 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").

³⁶ 12 U.S.C. § 1831o(k) (2006).

³⁷ Id. § 1831o(k)(1).

³⁸ Id. § 1831o(k)(4).