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

* This section primarily includes case law, guidance, and statutes up until June 30, 2024. While some legal authorities after this date may be included, for a comprehensive accounting of all recent court decisions, please visit OIP's Court Decisions webpage (https://www.justice.gov/oip/court-decisions-overview). Please also note that this section generally only includes subsequent case history in the citations when it is relevant to the point for which the case is being cited.

[1] 5 U.S.C. § 552(b)(8) (2018).

[2] Consumers Union of U.S., Inc. v. Heimann, 589 F.2d 531, 533 (D.C. Cir. 1978); accord Pub. Invs. Arb. 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)); Leopold v. DOJ, 628 F. Supp. 3d 275, 285 (D.D.C. 2022) (dictum) (reiterating that Congress created broad definition with broad sweep for Exemption 8), vacated & remanded on other grounds, 94 F.4th 33 (D.C. Cir. 2024); James Madison Project v. Dep't of the Treasury, 478 F. Supp. 3d 8, 14 (D.D.C. 2020) (stating that scope of Exemption 8 is broad).

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

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]

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

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[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); cf. Leopold v. DOJ, 94 F.4th 33, 38 (D.C. Cir. 2024) (holding that agency's "declarations fold a perfunctory assertion of foreseeable harm into their application of Exemption 8 to the entirety of the Report . . . [which] appears to 'ignore that the agency must specifically and thoughtfully' consider foreseeable harm from disclosure of *otherwise-exempt* information"); 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 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 Consumers Union, 589 F.2d at 534 ("[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."); 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 in credit unions, which could be undermined by candid evaluations of financial institutions" and "to ensure that credit unions [or banks] continue to cooperate . . . without fear that their confidential information will be disclosed"); Berliner, Zisser, Walter & Gallegos, P.C. 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]"); 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 the investigated banks'" and secondary purpose of protecting relationship between financial institutions and supervisory government agencies (quoting Consumers Union, 589 F.2d at 534)) (non-FOIA case).

[7] Pub. Invs. Arb. Bar Ass'n v. SEC, 930 F. Supp. 2d 55, 64 (D.D.C. 2013) (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."); Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *12 (D. Minn. Aug. 23, 2007) (same).

"candid evaluations of financial institutions."[8] The secondary purpose is "to safeguard the relationship between the banks and their supervising agencies."[9] Courts have held that banks would be less likely to fully cooperate with federal examiners "[i]f details 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 to serve the policy of promoting "frank cooperation" between banks and agency officials.[11]

The D.C. Circuit has even stated 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

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[8] Nat'l Cmty. Reinvestment Coal., 290 F. Supp. 2d at 135-36; see also Leopold v. DOJ, 628 F. Supp. 3d 275, 286 (D.D.C. 2022) (noting that main purpose of Exemption 8 is to prevent "release of examination reports [that] 'might undermine public confidence and cause unwarranted run on banks'") (internal citation omitted), vacated & remanded on other grounds, 94 F.4th 33 (D.C. Cir. 2024); James Madison Project v. Dep't of the Treasury, 478 F. Supp. 3d 8, 14 (D.D.C. 2020) (concluding that Exemption 8's first purpose is "'to ensure the security of financial institutions by eliminating the risk that disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks . . . might undermine public confidence and cause unwarranted run on banks'") (internal citation omitted).

[9] Consumers Union, 589 F.2d at 534; see also Bloomberg v. SEC, 357 F. Supp. 2d 156, 170 (D.D.C. 2004) (concluding that Exemption 8's dual purposes "would undeniably be served by exempting documents summarizing a meeting at which financial institutions were encouraged to engage in a candid assessment of industry problems and discussions regarding potential self-regulatory responses"); Fagot v. FDIC, 584 F. Supp. 1168, 1173 (D.P.R. 1984) (recognizing secondary purpose "to provide banks and financial institutions supervised by the federal government sufficient assurance of confidentiality to promote full cooperation with the regulatory agencies").

[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 (quoting agency filing)).

[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 Pub. Invs., 930 F. Supp. 2d at 62 (stating that "Exemption 8 extends to any documents received by a financial regulatory agency in the course of its exercising its 'regulatory responsibilities in relation to the financial institutions whose information has been withheld'"), aff'd, 771 F.3d 1, 7 (D.C. Cir. 2014).

bank examiners.[13] Additionally, bank examination reports and related documents prepared by state regulatory agencies have been found protectable.[14] 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[16] – 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.[17] This

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[13] See James Madison Project, 478 F. Supp. 3d at 14 (concluding that "[p]laintiffs do not contest that the exemption is broad, that defendant is a government agency 'responsible for the regulation or supervision of financial institutions,' or that the information they seek relates to information contained in a report the [agency] prepared in relation to an examination it conducted" (quoting plaintiff's filing)); Clarkson v. Greenspan, No. 97-2035, 1998 U.S. Dist. LEXIS 23566, at *24 (D.D.C. June 30, 1998) (holding that Federal Reserve Banks may withhold records of examinations "conducted by or for the Board of Governors of the Federal Reserve System"); Atkinson v. FDIC, No. 79-1113, 1980 WL 355660, at *1 (D.D.C. Feb. 13, 1980) (holding that reports written by agency examiners or by state-created banking authority for agency were properly withheld).

[14] See McCullough v. FDIC, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at *7-8 (D.D.C. July 28, 1980) (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").

[15] Atkinson, 1980 WL 355660, at *1.

[16] 5 U.S.C. § 552(b)(8); see also McKinley v. FDIC, 268 F. Supp. 3d 234, 245 (D.D.C. 2017) (concluding that Exemption 8 "protects all materials that are logically 'related to' these three types of reports" set forth in Exemption 8 statute: examination, operating, or condition reports); Williams & Connolly LLP v. Off. of the Comptroller of the Currency, 39 F. Supp. 3d 82, 90 (D.D.C. 2014) (concluding that "'related to' language casts a wide net of non-disclosure over any documents that are logically connected to an 'examination, operating, or condition report'") (internal citations omitted); Snoddy v. Hawke, No. 99-1636, slip op. at 2 (D. Colo. Dec. 20, 1999) (holding that email, notes, and correspondence pertaining to matters discussed by bank employees and agency officials were properly withheld as "matters prepared by or for the [regulating] agency relating to examination, operating, or condition reports"); Feinberg v. Hibernia Corp., No. 90-4245, 1993 WL 8620, at *5 (E.D. La. Jan. 6, 1993) (determining that "the *supervisory correspondence* between [the financial entity] and the [agency] . . . *that was prepared as a direct result of or in connection with the examination process* does not have to be disclosed").

[17] Atkinson, 1980 WL 355660, at *1; see, e.g., Pub. Invs. Arb. Bar Ass'n v. SEC, 771 F.3d 1, 7 (D.C. Cir. 2014) (holding that "documents the [SEC] collects while examining financial institutions . . . are exempt from disclosure"); Williams & Connolly, 39 F. Supp. 3d at 90 (holding that "'communications between [the agency's] attorneys and supervisory

includes "real-time" information an agency receives about the status of the financial institutions for which it bears responsibility.[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.[19] Furthermore, the D.C. Circuit has found that "'Exemption 8 does not require the [agency] to identify a specific report to which the information relates.'"[20] The exemption has been found to protect bank examination reports and related memoranda relating to insolvency proceedings.[21] Documents pertaining to cease-and-desist orders issued after a bank examination as the result of a closed administrative hearing have also been protected.[22] Finally, reports examining bank compliance with consumer laws[23] and regulations[24] have been held to also "fall[ ] squarely within the exemption."[25]

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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. Invs., 930 F. Supp. 2d at 62 (concluding 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 5 U.S.C. § 552(b)(8))); Biase v. Off. of Thrift Supervision, No. 93-2521, slip op. at 12 (D.N.J. Dec. 16, 1993) (withholding correspondence and memoranda related to examination report regarding possible banking violations); Consumers Union of U.S., Inc. v. Off. of the Comptroller of the Currency, No. 86-1841, slip op. at 2-3 (D.D.C. Mar. 11, 1988) (concluding that reports that "analyze and summarize information concerning consumer complaints" made to agency regarding financial institutions fall within Exemption 8).

[18] McKinley v. FDIC, 744 F. Supp. 2d 128, 144 (D.D.C. 2010) (characterizing information received in "real-time" as "relat[ing] to 'examination, operating, or condition' reports about individual supervised institutions").

[19] Abrams v. Dep't of Treasury, 243 F. App'x 4, 6 (5th Cir. 2007) (rejecting plaintiff's argument that Order of Investigation must directly relate to content of bank examination report, determining 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] Pub. Invs., 771 F.3d at 4 (internal citations omitted); accord Jud. Watch, Inc. v. U.S. Dep't of the Treasury, 796 F. Supp. 2d 13, 37 (D.D.C. 2011) (same).

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

[22] See Atkinson, 1980 WL 355660, at *2.

[23] See id.

[24] See Snoddy v. Hawke, No. 99-1636, slip op. at 2 (D. Colo. Dec. 20, 1999) (holding that email, notes, and other correspondence pertaining to whether bank violated regulation fell within Exemption 8).

[25] Atkinson, 1980 WL 355660, at *2.

The D.C. Circuit broadly construes the term "financial institutions" and has held that it is not limited to "depository institutions."[26] For example, courts have held that the term "financial institutions" includes institutions that provide credit services,[27] the Financial Industry Regulatory Authority (FINRA),[28] debt collectors,[29] investor advisor companies,[30] securities brokers and dealers,[31] and self-regulatory organizations.[32] Moreover, for Exemption 8 to apply, agencies need not "directly regulate or supervise a particular financial institution" but "may still withhold information about that institution under Exemption 8, so long as the withholding agency is one that is 'responsible for the regulation or supervision of financial institutions.'"[33]

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[26] Pub. Citizen v. Farm Credit Admin., 938 F.2d 290, 292 (D.C. Cir. 1991) (per curiam) (defining financial institution as "*[a]ny* organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, business and loan associations, savings and loan companies or associations, and credit unions" (quoting Financial Institutions, Black's Law Dictionary (5th ed. 1979))); see also Ball v. Bd. of Governors of the Fed. Rsrv. Sys., 87 F. Supp. 3d 33, 55-56 (D.D.C. 2015) (defining financial institution as "[a] business, organization, or other entity that manages money, credit, or capital, such as a bank, credit union, savings-and-loan association, securities broker or dealer, pawnbroker, or investment company" (quoting Financial Institutions, Black's Law Dictionary (10th ed. 2014))).

[27] See Pub. Citizen, 938 F.2d at 292 (concluding that "institutions providing credit services . . . are included within the term 'financial institutions'").

[28] See Pub. Invs. Arb. Bar Ass'n v. SEC, 771 F.3d 1, 2 (D.C. Cir. 2014) (holding "that the Financial Industry Regulatory Authority (FINRA), a private organization that oversees security arbitrations" is an institution entitled to Exemption 8 protection).

[29] See Frank LLP v. Consumer Fin. Prot. Bureau, 288 F. Supp. 3d 46, 63 (D.D.C. 2017) (holding that "[d]ebt collectors – as a link in the credit management chain - fit comfortably within [the] scope" of financial institutions).

[30] See Berliner, Zisser, Walter & Gallegos v. SEC, 962 F. Supp. 1348, 1352 (D. Colo. 1997) (observing that "investment advisors, as a matter of common practice, are fiduciaries of their clients who direct, and in reality make, important investment decisions for their clients").

[31] See Feshbach v. SEC, 5 F. Supp. 2d 774, 781 (N.D. Cal. 1997) (holding "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]").

[32] See id.

[33] Pub. Invs. Arb. Bar Ass'n v. SEC, 930 F. Supp. 2d 55, 63 (D.D.C. 2013).

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."[34] 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]."[35] 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 their full cooperation with regulatory agencies without fear that the information provided to the regulatory agency will be disclosed to the public.[36] By contrast, some district courts in other circuits have declined to extend Exemption 8 protection to "purely factual material."[37] 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.[38] When defending Exemption 8 withholdings, the D.C. Circuit has held that an agency must provide sufficient information in its declaration

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[34] Atkinson v. FDIC, No. 79-1113, 1980 WL 355660, at *2 (D.D.C. Feb. 13, 1980).

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

[36] Id.; see also Wachtel v. Off. of Thrift Supervision, No. 90-0833, 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); cf. Leopold v. DOJ, 94 F.4th 33, 38 (D.C. Cir. 2024) (concluding that agency's declaration was insufficient to support agency's argument "that disclosure of any aspect of the Report would chill future cooperation by foreign regulators and financial institutions").

[37] 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) (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. 95-7963, 1995 WL 629002 (S.D.N.Y. Sept. 15, 1997); cf. Schreiber v. Soc'y 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. Rsrv. 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).

[38] See Gavin v. SEC, No. 04-4522, 2007 WL 2454156, at *13 (D. Minn. Aug. 23, 2007) (approving agency's withholdings while noting that facts "must be considered with respect to the overall context of the documents in which they are contained") (internal citation omitted); Marriott Emps.' Fed. Credit Union v. Nat'l Credit Union Admin., No. 96-478, 1996 WL 33497625, at *5 (E.D. Va. Dec. 24, 1996) (holding that while "[p]urely factual material 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").

to explain why this exemption applies and describe the foreseeable harm that would result if this information was released to the public.[39]

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.[40] 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.[41] 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]."[42]

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[39] See Leopold, 94 F.4th at 38 (holding that "[t]he record does not enable this court to conclude that the sequential inquiry was conducted or that the [agency] satisfied its 'independent and meaningful burden' to establish the absence of a material factual dispute that the Report cannot be disclosed without foreseeable harm to an interest protected by Exemption 8" (quoting Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 369 (D.C. Cir. 2021))); James Madison Project v. Dep't of the Treasury, 478 F. Supp. 3d 8, 14 (D.D.C. 2020) (concluding that agency declarations "are sufficient to fulfill the agency's obligation to show with reasonable specificity" that all withheld information could not be further segregated from nonexempt information); McKinley v. FDIC, 268 F. Supp. 3d 234, 246 (D.D.C. 2017) (holding that "this Court simply cannot discern the [agency's] particular justification for seeking to withhold each document"); Jud. Watch, Inc. v. U.S. Dep't of the Treasury, 796 F. Supp. 2d 13, 38 (D.D.C. 2011) (concluding that agency's declarations "establish that the [agency] obtained the information it relayed to the defendant through its monitoring of the condition of the financial institutions it regulates").

[40] 12 U.S.C. § 1831o(k) (2018).

[41] Id. § 1831o(k)(1).

[42] Id. § 1831o(k)(4).