



## Recommendation 95-1

### **Application and Modification of Exemption 8 of the Freedom of Information Act**

(Adopted January 19, 1995)

#### *Background*

The Freedom of Information Act (FOIA), 5 U.S.C. Sec. §552, generally mandates public access to records in the possession or control of federal agencies, whether the records are generated by the agency or obtained by it from other sources. The Act contains nine exemptions, each of which authorizes but does not require the agency to protect from disclosure certain types of information. Exemption 8 permits agencies responsible for the regulation or supervision of financial institutions to protect from disclosure matters contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the agency.

Exemption 8 provides an unusual level of protection to banks and bank regulatory agencies.<sup>1</sup> Except for Exemption 9, dealing with geological and geophysical information, no other FOIA exemption is industry- or agency-specific. In light of the change in the regulatory environment of financial institutions since the passage of the FOIA in 1966, the Conference has reviewed whether this broad exemption continues to be justified. The upheaval faced by financial institutions in the last decade and the number of such institutions that have failed makes availability of information relating to the regulation of that segment of the economy of particular interest. A substantial amount of taxpayer money has been spent to alleviate problems relating to financial institutions.

Exemption 8 covers a wide range of documents, primarily operating reports, condition reports, and examination reports of financial institutions. Operating and condition reports are largely public financial statements submitted by the bank to the agency, although they also may include some nonpublic information. Examination reports are the written statements prepared by the agency's examiners evaluating the bank's operations and practices, but they are not audit reports. Examination reports include, among other things, information about an institution's portfolio of loans, the strength of its management, and areas that may need corrective action to improve its safety, soundness, and compliance with law. While bank

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<sup>1</sup> The use of the term "bank" herein is intended to refer to all financial institutions whose information is subject to Exemption 8. Likewise, the term "bank regulatory agency" refers to any agency responsible for the regulation or supervision of financial institutions.



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regulatory agencies encourage examiners to make their reports candid, careful, and complete, the reports often include preliminary analysis and commentary. The examination report (known in some agencies as the “open” portion) is made available to the bank, on the condition that it is not disclosed outside the bank. The agencies retain the supporting information for the report (which in some agencies is known as the “closed” portion). Most agencies also include in the examination report and disclose to the bank what is known as a CAMEL rating: a composite summary in numerical form of key components of the examination—Capital, Asset quality, Management, Earnings, and Liquidity. There are also ratings for each factor in the closed portion.

### *Justification for Scope of Exemption 8*

The Administrative Conference has always endorsed the FOIA concept of disclosure of government records<sup>2</sup> while recognizing the need to balance competing concerns.<sup>3</sup> Thus, it concludes that, while the basic protection of confidential and sensitive data relating to open banks should continue, where documents or information in agencies' possession are already public or relate to an institution no longer operating, the public interest in disclosure outweighs the potential harm from such disclosure.

Exemption 8's protection of operating, condition and examination reports is generally seen as serving three primary purposes: (1) It protects banks—including both the examined bank and those that have relationships with it—from substantial harm that might be caused by disclosure of information and opinion about their condition; (2) It facilitates the free exchange of information between bank personnel and examiners and encourages bank examiners to be candid, and as necessary, immediately responsive, in their assessments of a bank's financial position and operation; and (3) It protects the privacy of bank customers (e.g., depositors and borrowers).

Bank regulators and the institutions they regulate and/or supervise have generally asserted the need to protect both the candor of examination reports and the non-adversarial nature of the relationship between examiners and financial institution officials. In particular, they have

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<sup>2</sup> See ACUS Recommendation 71—2, “Principles and Guidelines for Implementation of the Freedom of Information Act.” See also Presidential Memorandum for Heads of Departments and Agencies, The Freedom of Information Act (Oct. 4, 1993) (Policy statement on the use of the FOIA encouraging agencies to disclose agency records in the absence of any clear harm); Attorney General's Memorandum for Heads of Departments and Agencies, The Freedom of Information Act (Oct. 4, 1993).

<sup>3</sup> See ACUS Recommendation 82—1, “Exemption (b)(4) of the Freedom of Information Act,” Recommendation 83-4, The Use of the Freedom of Information Act for Discovery Purposes.”



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expressed concern that disclosure of sensitive adverse information -- especially preliminary data, information, and conclusions—could reduce the candor of the examiners' comments and analysis, and inhibit bank officials from offering open access to their records and from being frank and open in their discussions with the examiners. Examination reports, they point out, are intended to draw the attention of bank management to actual and potential problems as quickly as possible.

The exemption is also aimed at protecting the stability of financial institutions by preventing the inappropriate disclosure of information relating to the soundness of the institution, as reflected in examination reports and in operating and condition reports. The expressed concern is to avoid “runs on the bank,” as well as other adverse impacts—e.g., short-term liquidity problems, volatility in cost of funds, reduced access to credit or to depositors. Nondisclosure is further justified on grounds that harmful overreactions based on incomplete data are likely to outweigh any public benefits. Financial institutions are also by their nature interrelated, in the sense that an adverse impact on one may have broad and possibly severe adverse implications for others. Moreover, the need for disclosure is diminished insofar as the public already receives, as a result of various banking and securities law requirements, a substantial amount of detailed, comparable information about banks.

Finally, there is a critical interest in protecting the privacy of those doing business with a financial institution. Examiners evaluate samples of loans. Information that might permit identification of the borrowers and other customers, as well as information about their financial situation and soundness, may appear in examination reports. There seems little doubt that information that might identify customers generally should be exempt from disclosure.<sup>4</sup>

### *Proper Scope of Exemption 8*

Because of these considerations, the Conference believes that Exemption 8's provisions should be retained for “matters that are contained in or related to examination \* \* \* reports” pertaining to open banks. The continued protection of examination reports of open institutions seems appropriate under the current regulatory regime.

Congress should, however, limit the exemption's coverage with respect to information in operating and condition reports that is publicly available. Almost all of the information contained in operating and condition reports (i.e., quarterly statements of income and

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<sup>4</sup> Protection of a customer's privacy interest may require redaction of more than a customer's name; other characteristics of the loan might reveal customer identifications.



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expenses, assets and liabilities) is currently in the public domain. As a result, bank regulatory agencies generally do release such information even though it may literally fit within Exemption 8. There is, therefore, no reason to retain this portion of the exemption insofar as it permits nondisclosure of publicly available data.

The more difficult question is whether the protection of other information covered by Exemption 8 continues to be warranted. Although the Conference concludes that examination reports with respect to open institutions should remain protected, it believes that examination reports (including all CAMEL ratings) of closed institutions that have failed should not be exempt from disclosure. (Closed institutions that did not fail would be treated like open institutions for this purpose.<sup>5</sup>)

The deposit insurance program gives the public (and the taxpayers) a particular interest in knowing what caused a bank to fail and whether regulatory oversight was adequate or effective.<sup>6</sup> Release of examination report information is unlikely to cause any harm to the institution itself once it is closed; nor is there any ongoing relationship between the examiner and the bank officials that would be jeopardized by disclosure. The examiners' concern about protecting candor is sharply reduced for banks that are closed.<sup>7</sup> Further, the disclosure of such information pertaining to closed banks would, of course, continue to be subject to other FOIA exemptions.<sup>8</sup>

Nonetheless, to further ensure that disclosure will not cause undue harm, the Conference recommends that certain limitations be placed on disclosure of examination reports of closed banks that have failed. Disclosure concerning a failed bank that could reasonably be expected to impair the solvency of an open bank or efforts to sell the failed institution or its assets should be delayed. Similarly, disclosure should be delayed where it could reasonably be expected to interfere with an ongoing civil or criminal investigation. Information relating to specific loans or

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<sup>5</sup> The Conference does not seek to define when a closed bank would be deemed to have failed. As discussed below, among the bases for recommending that information about closed failed banks be available under FOIA are the role of government oversight and impacts on taxpayers.

<sup>6</sup> While Congress has mandated reports by the agency's Inspector General for certain bank failures after July 1, 1993 (see Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. Sec. 1831o(k)), disclosure of the underlying data, if requested, may provide a useful validation or check on such reports.

<sup>7</sup> Despite recent history, the vast majority of all financial institutions do not fail. This recommendation, therefore, addresses only the disclosure on request of examination reports of a narrow group of banks where the justification for release of the data is especially compelling.

<sup>8</sup> Among the potentially relevant exemptions are Exemptions 4 (confidential commercial or financial information), 5 (agency pre-decisional documents), 6 (personal privacy), and 7 (investigative reports).



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other information that would identify customers could be redacted. Moreover, in cases where either the Federal Deposit Insurance Corporation or the Resolution Trust Corporation is involved in responding to the bank's failure, other bank regulatory agencies should consult with them before releasing examination reports.

Separately, the Conference also proposes that Congress consider whether Exemption 8 should continue to apply to situations where examination or other reports of financial institutions are prepared by agencies having no authority to regulate or otherwise supervise those institutions.<sup>9</sup> Especially where the financial institutions do not accept deposits from the public and there is no applicable deposit insurance, Congress should review whether the policies underlying the Exemption apply.

If Congress believes that additional information relating to financial institutions would improve accountability and oversight or provide for a better-informed marketplace, the Conference recommends that Congress consider using the approach taken in the Community Reinvestment Act, where specific, focused, published reports have been required.<sup>10</sup>

### *Administration of Exemption 8*

There are a number of actions bank regulatory agencies can take under their current authority to improve implementation of Exemption 8. Several bank regulatory agencies have already implemented many of them, and the Conference recommends their consideration by all. As a first step, agencies that regulate or supervise financial institutions should ensure that information that is otherwise publicly available is not treated as exempt under the FOIA. For example, as noted, operating and condition reports contain information that appears largely to be publicly available from other sources. To the extent that this and other information currently withheld under Exemption 8 is otherwise available and can be separated from sensitive data, agencies should release such information. Agencies should also continue to review their data collection forms and information-gathering documents and design them so that confidential information is collected separately and can be easily segregated from information that could be disclosed.

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<sup>9</sup> See, e.g., *Public Citizen v. Farm Credit Administration*, 938 F.2d 290 (D.C. Cir. 1991) (Reports of FCA regarding the National Consumer Co-op Bank covered by Exemption 8).

<sup>10</sup> The Community Reinvestment Act, 12 U.S.C. Sec. 2906, requires reports concerning credit made available by banks in low and moderate income areas. See also the Federal Deposit Insurance Corporation Improvement Act of 1991, which requires reports by the agency's Inspector General for each bank failure after July 1, 1993.



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Several bank regulatory agencies now participate in an interagency FOIA group. The Conference lauds this effort, and encourages all bank regulatory agencies to coordinate their application of the exemption and its scope, in order to ensure that similar documents are treated similarly. In doing so, agencies should keep in mind the FOIA's intent to allow the public to know what agencies are doing to the greatest extent possible. Agencies generally should presume, for example, that if one agency releases a particular type of document, such documents should be released by all other agencies if requested. Agencies also should avoid routinely exempting documents that are "related to" examination reports without carefully evaluating whether the information could be disclosed. Even though an examination report itself may be nondisclosable, not all portions of all documents related to it are necessarily also nondisclosable.

Bank regulatory agencies should also consider using the ombudsmen recently mandated by statute<sup>11</sup> to inquire into citizen concerns about handling FOIA requests and to recommend solutions or possible systemic improvements. The Conference has previously stated that use of alternative means of dispute resolution should be explored in resolving FOIA disputes.<sup>12</sup>

Agencies generally have the discretion to release requested information even if it is otherwise exempt under the FOIA. Pending Congressional action on the recommendations to modify Exemption 8, the bank regulatory agencies should implement the recommendations independently and, in any case, they should experiment with the release of examination reports for large failed banks. This would provide information to the public about the banks for which the largest amounts of money (and potentially, public funds) are at stake, and would provide an opportunity for determining whether such release has any significant untoward effects.

### **Recommendation**

I. As applied to open financial institutions and closed financial institutions that have not failed, the provisions of Exemption 8 of the Freedom of Information Act should be retained for "matters that are contained in or related to examination \* \* \* reports." The Conference

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<sup>11</sup> The Office of the Comptroller of the Currency has an ombudsman, whose current responsibilities include involvement in banks' challenges to their CAMEL ratings. The recently enacted Pub. L. No. 103-325 requires each federal banking agency to appoint an ombudsman to deal with complaints from the public about regulatory activities.

<sup>12</sup> Administrative Conference Statement 12, 1 CFR 310.12 (1993). It has also recommended the use of ombudsmen more generally in federal agencies. Administrative Conference Recommendation 90-2, "The Ombudsman in Federal Agencies," 1 CFR 305.90-2 (1993).



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concludes that bank regulatory agencies should continue to have discretion to withhold such examination reports, because, among other reasons, (a) disclosure of material relating to supervision and regulation of open financial institutions might have an adverse impact on the supervisory and regulatory process and on the banks themselves,<sup>13</sup> (b) such disclosure also might have an adverse economic impact on other banks, due to the unique interrelationship of such institutions, and (c) a substantial amount of related information is already otherwise available.

II. A. In order to ensure that information about banks is not unreasonably withheld, Congress should limit the exception to disclosure in Exemption 8 as follows:

1. As applied to closed institutions that have failed, examination reports and CAMEL ratings should not be exempt from disclosure, except that disclosure should be delayed where it could reasonably be expected to (a) impair the solvency of an open bank or an agency's efforts to sell the closed bank or its assets, or (b) interfere with an ongoing civil or criminal investigation. Records identifying specific loans or customers could be redacted,<sup>14</sup> and prior consultation with other agencies with jurisdiction over such a closed bank should be required.

2. As applied to all financial institutions, operating and condition reports should not be exempt from disclosure insofar as they contain or are based on publicly-available information.

B. Congress should also consider whether Exemption 8 should continue to apply to examination or other reports of financial institutions prepared by agencies having no authority to regulate or otherwise supervise those institutions, especially where the financial institutions do not accept deposits from the public.

III. To the extent that Congress determines that additional information relating to the regulation or examination of financial institutions should be publicly available to enhance accountability and oversight, it should provide for preparation of special public reports and

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<sup>14</sup> This recommendation does not seek to alter the applicability of other FOIA exemptions or of notice requirements such as those set out in Executive Order 12600 (relating to predisclosure notification for confidential commercial information).



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analyses, or for other mechanisms specifically designed to provide the necessary information to the public on a systematic basis.<sup>15</sup>

IV. Agencies with supervisory or regulatory responsibilities relating to financial institutions should continue to review ways to improve their administration of the Freedom of Information Act.

A. Bank regulatory agencies should implement the following practices:

1. Information subject to Exemption 8 should be withheld only insofar as necessary to protect the efficacy of the examination process and the privacy of sensitive data and to avoid adverse economic impacts on other banks. Agencies should not withhold information on the basis that it is “related to” operating, condition or examination reports unless they determine that nondisclosure is properly justified.

2. Information that is already publicly available should not be treated as exempt from disclosure. For example, agencies should continue, in response to FOIA requests, to release operating and condition information submitted by financial institutions that is publicly available.

3. To facilitate the disclosure of releasable information, agencies should, to the extent feasible, design data-collection forms or other information-gathering mechanisms in order to separate disclosable and nondisclosable information.

4. Agencies authorized to rely on Exemption 8 should continue to develop a coordinated approach for releasing information, so that the public receives uniform treatment for similar data or types of documents.

5. Agencies should consider using their ombudsmen to inquire into citizen concerns about handling of FOIA requests and to recommend solutions or possible systemic improvements.<sup>16</sup>

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<sup>15</sup> For an illustration of such a report, see the Community Reinvestment Act, 12 U.S.C. Sec. 2906 (reporting on supply of credit by banks in low and moderate income areas).

<sup>16</sup> See Pub. L. No. 103—325, which requires each federal banking agency to appoint an ombudsman. See Administrative Conference Recommendation 90—2, “The Ombudsman in Federal Agencies,” 1 CFR 305.90—2 (1993).





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B. In light of their discretion to release even otherwise exempt information in response to requests under the FOIA, bank regulatory agencies should implement the recommendations set forth in Part II(A). In any case, agencies should, on an experimental basis, immediately make the disclosures recommended therein with respect to large failed financial institutions.

### **Citations:**

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