In sum, Exemption 7(F) has proven to be of great utility to law enforcement agencies, given the lessened "could reasonably be expected" harm standard now in effect.[27] It will apply whenever an agency determines that there is a reasonable likelihood that disclosure risks physical harm to anyone.[28]

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]

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[26](...continued)
695631, at *6 (D.D.C. Sept. 29, 1998) (reiterating that it is not in public interest to disclose identities of law enforcement officers); Franklin, No. 97-1225, slip op. at 15 (S.D. Fla. June 15, 1998) (magistrate's recommendation) (finding that "it is in the public interest" to protect names of DEA agents), adopted (S.D. Fla. June 26, 1998).

[27] See, e.g., Spirko v. USPS, 147 F.3d 992, 994 (D.C. Cir. 1998) (protecting handwritten notes about suspects); Brady-Lunny, 185 F. Supp. 2d at 932 (recognizing risk to physical safety present in inmate populations, "given inmates' gang ties, interest in escape, and motive for violence against informants and rivals"; finding that disclosure of detainees' names could threaten security); L.A. Times, 442 F. Supp. 2d at 900 (finding that disclosure of private security contractor (PSC) company names could reasonably be expected to endanger lives of military personnel, PSC employees, and civilians in Iraq); Blanton, 182 F. Supp. 2d at 86 (withholding the identities of "non-law enforcement persons who assist the government in its criminal investigation (such as persons in the Witness Protection Program)"); Garcia, 181 F. Supp. 2d at 373 (protecting the personal information of any of the agents or other witnesses whose identities are contained in a file); Crompton, No. 95-8771, slip op. at 16 (C.D. Cal. Mar. 26, 1997) (finding withholding of agents' names, signatures, and identifying information proper).

[28] See Attorney General's 1986 Amendments Memorandum 18 & n.34 (Dec. 1987) (suggesting that Exemption 7(F) as amended be applied whenever there is any likelihood of harm); see also, e.g., Dickie v. Dep't of the Treasury, No. 86-649, slip op. at 13 (D.D.C. Mar. 31, 1987) (upholding application of Exemption 7(F) as amended based upon agency judgment of "very strong likelihood" of harm); see also FOIA Update, Vol. XV, No. 2, at 3; Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01) (emphasizing federal government's commitment to enhancing effectiveness of law enforcement agencies).

[1] 5 U.S.C. § 552(b)(8) (2000 & Supp. IV 2004).

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 Act[3] -- the legislative history of which broadly defines the term "financial institutions" -- that same court disavowed its early narrow interpretation of the term and held that stock exchanges qualify as "financial institutions" under Exemption 8.[4] As a result, subsequent attempts by FOIA requesters to have courts rely on the ruling in M.A. Schapiro have been unsuccessful.[5]

Instead, courts interpreting Exemption 8 have largely declined to restrict the "particularly broad, all-inclusive" scope of the exemption.[6] The Court of Appeals for the District of Columbia Circuit has led the way by declaring 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."[7] As another court has

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

[3] 5 U.S.C. § 552b (2000 & Supp. III 2003).

[4] Mermelstein v. SEC, 629 F. Supp. 672, 673-75 (D.D.C. 1986).

[5] 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 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 cramped 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").

[6] 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); 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).

[7] 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

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stated: "Exemption 8 was intended by Congress -- and has been interpreted by courts -- to be very broadly construed."[8]

Indeed, 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."[9] 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.[10] In turn, the District Court for the 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."[11] 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 organiza-

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[7](...continued)
*2-3.

[8] Pentagon Fed. Credit Union v. Nat'l Credit Union Admin., No. 95-1475, slip op. at 8-9 (E.D. Va. June 7, 1996); accord Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (emphasizing importance of protecting institutional and commercial information); *FOIA Post*, "New Attorney General Memorandum Issued" (posted 10/15/01) (discussing the need for agencies to fully, deliberately, and carefully consider the institutional, commercial, and personal privacy interests that can be implicated by any disclosure of government information).

[9] Gregory v. FDIC, 631 F.2d 896, 898 (D.C. Cir. 1980); see also Clarkson v. Greenspan, No. 97-2035, slip op. at 14-15 (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 (D.C. Cir. Mar. 2, 1999).

[10] Pub. Citizen v. Farm Credit Admin., 938 F.2d 290, 293-94 (D.C. Cir. 1991) (per curiam) (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).

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

tions, such as the [National Association of Securities Dealers]."[12]

Courts have consistently discerned two purposes underlying Exemption 8[13]-- a primary purpose of "ensur[ing] the security of financial institutions," which could be undermined by frank evaluations of such institutions, and a secondary purpose of safeguarding "the relationship between the banks and their supervising agencies."[14] Accordingly, different types of documents have been held to fall within the broad confines of Exemption 8.

First and foremost, the authority of federal agencies to withhold bank examination reports prepared by federal bank examiners has not been questioned.[15] Further, matters that are "related to" such reports -- that is,

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[12] Feshbach, 5 F. Supp. 2d at 781.

[13] 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").

[14] 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 (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).

[15] 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

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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] Likewise, Exemption 8 has been employed to withhold portions of documents -- such as internal memoranda and policy statements -- that contain specific information about named financial institutions.[17]

Bank examination reports and related documents prepared by state regulatory agencies have been found protectible under Exemption 8 on more than one ground. The purposes of the exemption are plainly served by withholding such material because of the "interconnected" purposes

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[15](...continued)
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 the context of a civil discovery dispute in a lawsuit unrelated to the 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).

[16] Atkinson, 1980 WL 355660, at *1; 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"); Abrams v. Office of the Comptroller of the Currency, No. 05-2433, 2006 WL 1450525, at *4 (N.D. Tex. May 25, 2006) (ruling that OCC Order of Investigation was withholdable even if it lacked "direct connection" with examination report, so long as it was "related to" such examination report); 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). But see Forest Guardians, No. 99-615, slip op. at 51-52 (D.N.M. Jan. 29, 2001) (declining to extend Exemption 8 protection to escrow waivers, and ruling they are not "reports of or related to a bank examination").

[17] 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) (protecting portions of documents containing information about two named financial institutions -- specifically, names of institutions, names of officers and agents, any references to their geographic locations, and specific information about their financial conditions).

and operations of federal and state banking authorities.[18] In one case, a state agency report, transferred to a federal agency strictly for its confidential use and thus still within the control of the state agency, was held as a threshold matter not even to be an "agency record" under the FOIA subject to disclosure.[19] In general, "all records, regardless of the source,"[20] concerning "a bank's financial condition and operations [that are] in the possession of a federal agency 'responsible for the regulation or supervision of financial institutions,' are exempt."[21]

Indeed, even records pertaining to banks that are no longer in operation can be withheld under Exemption 8 in order to serve the policy of promoting "frank cooperation" between bank and agency officials.[22] The ex-

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

[19] McCullough, 1980 U.S. Dist. LEXIS 17685, at *7-8.

[20] Id. (quoting Admin. Procedure Act: Hearing on S. 1663 Before the Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary, 88th Cong. 2d Sess. 179 (1964)); see also Consumers Union, No. 86-1841, slip op. at 2-3 (D.D.C. Mar. 11, 1988) (finding examination report protectible even if its contents originate with consumers rather than financial institutions or regulators).

[21] McCullough, 1980 U.S. Dist. LEXIS 17685, at *7-8 (quoting Admin. Procedure Act: Hearing on S. 1663 Before the Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary, 88th Cong. 2d Sess. 179 (1964)); see also Snoddy v. Hawke, No. 99-1636, slip op. at 2 (D. Colo. Dec. 20, 1999) (holding that electronic 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 the "examinations were done by or for the agency responsible for regulating Reserve Banks"). But see Forest Guardians, No. 99-615, slip op. at 51 (D.N.M. Jan. 29, 2001) (rejecting the agency's argument that because the Farm Credit Administration is a financial institution responsible for regulating Farm Credit Banks, and escrow waivers submitted by lenders contained information contained in or related to 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.").

[22] Gregory, 631 F.2d at 899; accord Berliner, 962 F. Supp. at 1353 (upholding applicability of Exemption 8 to documents relating to company

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emption protects even bank examination reports and related memoranda relating to insolvency proceedings.[23] Documents relating to cease-and-desist orders that issue after a bank examination as the result of a closed administrative hearing are also properly exempt.[24] Also, reports examining bank compliance with consumer laws and regulations have been held to "fall squarely within the exemption."[25]

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."[26] Although some courts have declined to extend the protection of Exemption 8 to "purely factual material,"[27] the District Court for the District of Columbia has consist-

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[22](...continued)
that had "been defunct for at least four years" and declining to adopt argument that passage of time abated "need for confidentiality"). But cf. In re Sunrise Sec. Litig., 109 B.R. 658, 664-67 (E.D. Pa. 1990) (holding that Federal Home Loan Bank of Atlanta could not rely upon regulation implementing Exemption 8 as independent evidentiary "bank examination privilege," and finding that even under more general "official information privilege" there exists no absolute protection for internal working papers and other documents generated in government's examination of failed bank) (non-FOIA case).

[23] See, e.g., Tripati v. U.S. Dep't of Justice, No. 87-3301, 1990 U.S. Dist. LEXIS 6249, at *2-3 (D.D.C. May 18, 1990).

[24] See, e.g., Atkinson, 1980 WL 355660, at *2.

[25] 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 (2000), does not narrow Exemption 8's broad language).

[26] Atkinson, 1980 WL 355660, at *2. But see 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); see also FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation").

[27] 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
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ently protected factual material, most recently in its decision in Bloomberg v. SEC,[28] where it pointedly noted the absence of any controlling case law to support a "distinction between factual versus analytical or deliberative material under [Exemption 8]."[29] Relying on an earlier decision of the same court, Bloomberg made clear that any consideration of the bank examination privilege has no place in an Exemption 8 case.[30] Indeed, in light of the broad construction traditionally given to Exemption 8,[31] its underlying purposes,[32] and the distinct possibility that the bank examination privilege is most aptly considered under Exemption 5,[33] at least for records that qualify

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[27](...continued)
7963 (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, 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).

[28] 357 F. Supp. 2d 156 (D.D.C. 2004).

[29] Id. at 170.

[30] See id. (citing Nat'l Cmty. Reinvestment Coal., 290 F. Supp. 2d at 136 n.5).

[31] See, e.g., Consumers Union, 589 F.2d at 533 (emphasizing that courts should not "subvert" Congress's "intentionally and unambiguously crafted . . . broad, all-inclusive definition" in Exemption 8 context).

[32] See Bloomberg, 357 F. Supp. 2d 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); cf. 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) (protecting factual information, despite the court's belief that Exemption 8 generally does not shield factual information, because "disclosure of [the particular information at issue] would undermine the spirit of cooperation between banks and regulating agencies that Exemption 8 attempts to foster").

[33] See, e.g., United States v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984) (recognizing that Exemption 5 applies to both statutory and common law privileges and that it is not limited to those listed in Exemption 5's legislative history); Burka v. HHS, 87 F.3d 508, 516 (D.C. Cir. 1996) (construing Exemption 5 to cover those privileges mentioned in FOIA's legislative history and "other generally recognized civil discovery protections"); In re Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 633
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as inter-agency or intra-agency records under Exemption 5's threshold requirement,[34] Bloomberg reflects a strongly protective approach for the treatment of factual material under Exemption 8.

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.[35] 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.[36] 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]."[37]

EXEMPTION 9

Exemption 9 of the FOIA covers "geological and geophysical information and data, including maps, concerning wells."[1] This exemption has rarely been invoked or interpreted,[2] so its contours remain to be fully defined. As few courts have examined Exemption 9 in any depth, it is still not clear exactly what types of geological or geophysical information are protected from disclosure under the exemption, or whether it was intended to apply to all types of "wells."

More than twenty years ago, one court held in Black Hills Alliance v. United States Forest Service that Exemption 9 applies only to "well information of a technical or scientific nature," and not to general mineral exploration data -- such as the location, depth, or number of exploration drill

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[33](...continued)
(D.C. Cir. 1992) (observing that courts have "long recognized" bank examination privilege).

[34] 5 U.S.C. § 552(b)(5).

[35] 12 U.S.C.A. § 1831o(k) (2001 & West Supp. 2006).

[36] Id. § 1831o(k)(1).

[37] Id. § 1831o(k)(4).

[1] 5 U.S.C. § 552(b)(9) (2000 & Supp. IV 2004).

[2] See, e.g., Nat'l Broad. Co. v. SBA, 836 F. Supp. 121, 124 n.2 (S.D.N.Y. 1993) (noting merely that document withheld under Exemption 4 "also contains geographic or geological information which is exempted from disclosure pursuant to FOIA Exemption 9").