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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

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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

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").

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holes.³ It is significant that this court pointed to the legislative history of the FOIA -- specifically, to evidence that Congress intended through Exemption 9 to protect the oil and gas exploration and extraction industry from unfair competitive harm by "speculators" -- in support of its decision to order the release of generalized well data where a competitive harm argument could not readily be supported.⁴

Two recent decisions, however, give greater depth to Exemption 9. In Starkey v. United States Department of Interior⁵ the District Court for the Southern District of California held that information related to the presence of groundwater -- including "ground water inventories, [water] well yield in gallons per minute, and the thickness of the decomposed granite aquifer" -- was exempt from disclosure under both Exemption 4⁶ and Exemption 9.⁷ Though the court discussed the two exemptions separately, with Exemption 9 receiving very little analysis, it emphasized that "water is a precious, limited resource" and that release of well data would place one party at a

³ 603 F. Supp. 117, 122 (D.S.D. 1984) (requiring government to disclose number, locations, and depths of proposed uranium exploration drill holes in national forest under federally approved program, and noting that this geological exploration information "falls short of the technical and scientific information envisioned by Congress").

⁴ Id. (stating that disclosure of "exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration" (citing H.R. Rep. No. 89-1497, at 9 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2428)); see also Admin. Procedure Act: Hearing on S. 1160, S. 1336, S. 1758 and S. 1879 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong. 536-38 (1965) (statement of W. Oil & Gas Ass'n) (lobbying for protection of information furnished to government by oil and gas industries, resulting in later adoption of Exemption 9, despite proposed Exemption 4's protection of confidential commercial information, due to concerns that Exemption 4 might be narrowly construed); cf. Petroleum Exploration v. Comm'r, 193 F.2d 59, 62 (4th Cir. 1951) (recognizing commercial value of information related to mineral exploration and extraction) (non-FOIA case); Prohosky v. Prudential Ins. Co. of Am., 584 F. Supp. 1337, 1340 (N.D. Ind. 1984) (acknowledging longstanding legal doctrine that subterranean water, oil, and natural gas are considered to be "ferae naturae" until actually pierced with well) (non-FOIA case).

⁵ 238 F. Supp. 2d 1188 (S.D. Cal. 2002).

⁶ 5 U.S.C. § 552(b)(4) (protecting "trade secrets and commercial or financial information [that is] obtained from a person [and that is] privileged or confidential").

⁷ 238 F. Supp. 2d at 1196 (affirming action of agency in withholding commercially sensitive portions of "preliminary draft supplemental environmental assessment" related to groundwater tables and wells).

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disadvantage in negotiations over its use.⁸

In National [sic] Resources Defense Council v. DOD,⁹ the District Court for the District of Columbia made it clear that the FOIA does not distinguish between well information pertaining to privately and publicly owned water wells.¹⁰ Rejecting the plaintiff's claim that a statement in Exemption 9's legislative history seemed to favor such a distinction,¹¹ it relied on the well-known legal principle that "reference to legislative history is inappropriate when the text of the statute is unambiguous."¹² By emphasizing the text of the FOIA over its legislative history, it clearly diverged from the Black Hills Alliance court's analysis and broadened Exemption 9's potential scope. Two other decisions have mentioned Exemption 9, both did so in the context of the regulation of natural gas producers; however, neither case discussed its scope or application in significant detail.¹³

Thus, the relatively few cases decided under Exemption 9 to date suggest that its boundaries are not defined clearly by the type of information protectible, and only broadly by the type of well.¹⁴ In fact, what is

⁸ Id. at 1195.

⁹ 388 F. Supp. 2d 1086 (C.D. Cal. 2005).

¹⁰ Id. at 1107-08.

¹¹ Id. at 1108 (noting plaintiff's reliance on H.R. Rep. No. 89-1497, at 11 (1966), which states that Exemption 9 was created because geological maps based on explorations by private oil companies were not "covered" by existing "trade secrets" laws).

¹² Id. (quoting United States v. Sioux, 362 F.3d 1241, 1246-47 (9th Cir. 2004)).

¹³ See Superior Oil Co. v. FERC, 563 F.2d 191, 203-04 & n.20 (5th Cir. 1977) (accepting without discussion that agency may choose to withhold information concerning regulated natural gas exploration and production by private companies under Exemption 9, but ruling that agency also may make discretionary disclosure of certain information despite risk of competitive harm) (non-FOIA case); Pennzoil Co. v. Federal Power Comm'n, 534 F.2d 627, 629-30 & n.2 (5th Cir. 1976) (ruling without significant discussion that Exemption 9 may allow, but does not require, agency to withhold information concerning natural gas "reserve data" reported by regulated private companies) (non-FOIA case); see also Ecee, Inc. v. FERC, 645 F.2d 339, 348-49 (5th Cir. 1981) (holding requirement that producers of natural gas submit confidential geological data to be valid) (non-FOIA case).

¹⁴ See Superior Oil Co., 563 F.2d at 197 (natural gas exploration expenditure data); Pennzoil Co., 534 F.2d at 629 (natural gas reserve estimate data); Nat'l Res. Def. Council, 388 F. Supp. 2d at 1107-08 (public and private water well location map data); Starkey, 238 F. Supp. 2d at 1195 (water

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clear from the Exemption 9 decisions thus far is that courts have applied it to all types of wells and to various information about these wells.¹⁵ It also is reasonable to assume that both agencies and courts may apply Exemption 9 to protect well data in other compelling circumstances, such as when Exemption 9 protection is necessary to guard against an attack upon pooled natural resources intended to cause harm to the public.¹⁶

EXCLUSIONS

In amending the Freedom of Information Act in 1986, Congress created a novel mechanism for protecting certain especially sensitive law enforcement matters, under subsection (c) of the Act.¹ These three special protection provisions, referred to as record "exclusions," expressly authorize federal law enforcement agencies, for especially sensitive records under certain specified circumstances, to "treat the records as not subject to the requirements of [the FOIA]."² Today, more than twenty years after the creation of these special record exclusions, it must be remembered that the procedures that are required to properly employ them still are by no means straightforward and must be implemented with the utmost care.³ Any agency considering employing an exclusion or having a question as to their

¹⁴(...continued)

table levels and well-yield data); Black Hills Alliance, 603 F. Supp. at 122 (uranium exploration test drilling data).

¹⁵ Id.

¹⁶ See Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1321-22 (D. Utah 2003) (finding that disclosure of "inundation maps" could reasonably be expected to place at risk lives of individuals in downstream areas, which would be flooded by breach of dams, through increasing risk of terrorist attack on dams) (Exemption 7(F)); cf. White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002), reprinted in FOIA Post (posted 3/21/02) (emphasizing "obligation to safeguard" homeland security-related records).

¹ See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18-30 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum]; cf. NARA v. Favish, 541 U.S. 157, 169 (evincing the Supreme Court's reliance on "the Attorney General's consistent interpretation of" the FOIA in successive such Attorney General memoranda), reh'g denied, 541 U.S. 1057 (2004).

² 5 U.S.C. § 552(c)(1), (c)(2), (c)(3) (2000 & Supp. IV 2004); see Tanks v. Huff, No. 95-568, 1996 WL 293531, at *5 (D.D.C. May 28, 1996), appeal dismissed, No. 96-5180 (D.C. Cir. Aug. 13, 1996).

³ See Attorney General's 1986 Amendments Memorandum at 27 n.48.