

Report for Recommendation 95-1

**Reexamining the Freedom of Information
Act's Exemption [8]**

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

I. INTRODUCTION AND SUMMARY	215
II. AT THE AGENCIES	221
A. Bank Examinations: Purposes, Kinds of Information	221
B. Practice on Confidentiality	227
C. The Agencies' Experience with [8]	230
D. State Agencies' Experience	232
III. BANK EXAMINATIONS IN THE CONGRESS	237
A. Independent of FOIA	237
B. [8]'s Legislative History	238
C. Since FOIA's Original Enactment	248
IV. COMPARING BANK EXAM REPORTS' FOIA UNAVAILABILITY WITH AVAILABILITY OF OTHER AGENCIES' INSPECTION REPORTS	255
V. CHANGES IN PUBLIC INFORMATION ABOUT BANKS	260
A. Securities Disclosure Requirements	263
VI. BANK EXAM REPORTS IN THE COURTS	268
A. FOIA cases involving [8]	268
B. Non-FOIA Cases, Involving Discovery of Exam Reports	271
VII. BANK EXAMINATIONS GO PUBLIC: THREE EPISODES	274
VIII. OTHER MATTERS	275
A. Should CAMEL Ratings Be Disclosable?	275
B. Agency Records Other Than Exam Reports	277
C. What of Closed Banks?	278
IX. NEW SAFEGUARD AGAINST REGULATORY LAXNESS: REVIEW BY IGS	280
X. SHOULD [8] BE REPEALED OR AMENDED? IF IT WERE, HOW MUCH DIFFERENCE WOULD THAT MAKE?	288
A. Scholarly Commentary	288
B. [8] in Relationship to Exemptions (4), (5), (6) and (7)	290
XI. CONCLUSIONS AND RECOMMENDATIONS	294
APPENDICES	302



I. Introduction and Summary

Since FOIA's enactment in 1966, exemption (8) (hereafter, "[8]") has been unchanged:

[These disclosure provisions] do not apply to matters that are... (8) 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[.]

Although [8]'s words are unchanged, there have been efforts to amend it. In 1989, the Community Reinvestment Act of 1977 (CRA) was amended to mandate disclosure of information—from bank examination reports—about compliance with CRA, a statute aimed at encouraging provision of credit to low- and moderate-income neighborhoods. That CRA amendment was enacted after an effort in the House to amend [8] by lifting the exemption not merely with respect to CRA but more broadly. So although [8]'s words are unchanged, there has been relevant change in another statute, just as is true of other aspects of FOIA. And as recently as 1992, the Senate gave broad support to a bill to amend [8] to remove the exemption for bank examination reports on failed banks.¹

Efforts to amend or narrow [8] have centered mainly on the following issues. It has been urged that examination reports should not be exempt as to—

1) Banks that are closed or have received financial assistance from the FDIC or FSLIC.

2) Information about performance under any statute designed (a) to prevent discriminatory lending practices based on race or gender; or (b) to promote Truth in Lending or similar policies that do not bear upon the bank's safety and soundness.

¹"Banks," for the sake of brevity in this Report, refers to both banks and thrift institutions, unless otherwise indicated.

Also, examination information is the focus of this Report. Though [8] covers not only exam reports but also operating and condition reports (quarterly statements of income and expense, and of assets and liabilities), much of which are routinely public, the non-public parts of those latter reports have information that is from exam reports or very similar to such information, and thus can be grouped with "exam reports." It would be appropriate to amend [8] to bring it precisely into line with the current practice on operating and condition reports, but such an amendment would effect no actual change in practice, and so can await a general modernizing of FOIA.

Information other than that in (or similar to) exam reports, is considered further in §VIII.B.

3) Any matter that falls outside the generally applicable exemption (4)² It is argued that, given FOIA's basic purpose, it is not appropriate to make any special restriction on "commercial and financial information."

4) Less frequently, there has been disagreement over whether a particular agency or institution is "an agency responsible for regulation or supervision."

5) Last, and with special force in recent years, is the further argument bearing on the first issue above but not limited to that: At least since the emergence of our extraordinarily costly problems with many savings and loans and banks, it has been argued forcefully that the public interest requires fuller disclosure of examination report information, for two reasons: (a) to provide the public with fuller information about problem situations, and (b) to increase the accountability of the banking regulators. Such arguments, and efforts to implement such views, were energetically pressed by then-Senator Timothy Wirth (D. Colo.), who in 1991-92 secured broad Senate support for his bill.

In what context shall we view such issues, in thinking about what is "the public interest" here? Discussions over the last eleven months³ at meetings of the ACUS Committee and with Committee members, agency personnel, banking lawyers, FOIA users, etc., have seemed to me to assume a tripartite context: FOIA requesters, the agencies, and the banks that are either submitters of, or the subject of, agency records. It seems to me important to keep in mind the full congeries of interests or "players"—an unusually full array—involved here. First, in addition to the usual responsibility for protecting the public interests within the agencies' delegated authority, the banking agencies not only regulate but also "supervise," i.e., have a perhaps uniquely close involvement with the regulated firms; that supervisory authority exists because banks have a truly unique and central role in the economy; and in addition to regulation and supervision there is the responsibility to protect the deposit insurance fund. Second, banks, like any other private firms, are a cluster of interests: 1) insured depositors; 2) uninsured depositors, 3) bond-holders and other creditors; 4) borrowers, 5) bank personnel; and 6) stockholders.

As in any such situation, interests both converge and conflict. FOIA, for me, is a statute whose contributions hugely outweigh its costs, whether in dollars or otherwise. But whatever one's view of FOIA,⁴ one cannot assume that FOIA

²Exemption (4) is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Discussion of how [8] relates to exemptions (4), (5), (6) and (7) is below in §X.B.

³The first draft of this Report was submitted October 1, 1993; it was referred to the Rulemaking Committee a few months later.

⁴See e.g., Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, March/April 1982 at 14, 15: (FOIA is "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost Benefit Analysis Ignored.")

requesters aim only at holding government accountable. For example, FDA's massive volume of FOIA requests is well known to include frequent, routine efforts by regulated firms to learn about their competitors; that is understandable in the FDA setting of constant filings for new drug and similar applications. I doubt that banks would have similar incentives to file FOIA requests about their banking competitors. But the fact that banks are uniquely vulnerable to bad news and rumors, because of the volatility of their deposits, makes me expect that repeal of [8] may unleash a panoply of problematic uses of FOIA by investors, short-sellers, media, frustrated borrowers and perhaps some competitors. While a speculative risk of such problematic uses would not, standing alone, support keeping [8] in the law, it seems worth taking into account.

Of course any such "separating Cain from Abel when it comes to FOIA requesters" in order to disfavor requesters whose purpose is anything other than holding government accountable, is not the approach of the statute—agencies are not authorized to withhold records because of their judgment about how the requester might use them. But the Court is now disfavoring purposes other than holding government accountable, *Dep't. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), with "an enormous impact on FOIA jurisprudence," see e.g. *Dep't. of Defense v. F.L.R.A.*, 114 S.Ct. 1006 (1994).⁵ Like other strong believers in FOIA, I disagree totally with this latest decision narrowing FOIA⁶; but I see no gain in trying to amend the statute in a way that will most likely unleash requests which in the main (and perhaps overwhelmingly) will be just the type that seems to be pushing the courts toward constricting FOIA. Given all the information publicly available on banks and thus on their regulation (see §V), and given the defiantly detailed quality of exam reports and similar information, I conclude that there is neither need for a FOIA free of [8] to enhance accountability nor likelihood that it would, but large likelihood that such an amendment would bring undesired problems.

Coming to how [8] has fared in the courts: 21 FOIA cases, starting with a 1978 watershed decision from the D.C. Circuit, reflect efforts to secure

⁵The first quotation is from James T. O'Reilly, letter to author, Aug. 29, 1994. The second is from his June 1994 Supplement to his *FEDERAL INFORMATION DISCLOSURE* (2d ed.), vol. 2, at 25-31. The O'Reilly letter commenting on the paragraph in text above, included this: "The 'unleash[ing of] a panoply of problematic use[r]s' like locusts upon all other regulated entities is a fact of life. Ability of others to cash in on FOIA's value as a method of gaining commercial intelligence has not chastened the press, or made the press less supportive of FOIA. The press, bemused by the ancillary tag-along commercial requester whose use now dwarfs that of the press, does not object. The role that FOIA can play is what the Old Testament called one prophet, 'the affliicer of the comfortable.' I'm a for-prophet advocate!"

⁶Since the Court's first FOIA case, *EPA v. Mink*, 410 U.S. 73 (1973)—which decided against disclosure and was overruled by Congress as part of the 1974 amendments to FOIA—the Court has decided against disclosure another 24 times, for disclosure five times. (Three other cases cannot be so flatly categorized: *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *NLRB v. Sears, Roebuck*, 421 U.S. 132 (1975); and *Renegotiation Bd. v. Bannercroft Clothing Co.*, 415 U.S. 1 (1974).)

information despite [8]. As was said in a concurring opinion in that 1978 case, [8] does not “[sit] entirely comfortably with the broad thrust of the FOIA....” Nonetheless, [8] has proven a clear and simple barrier to disclosure; indeed, there are fewer cases about [8] than about any other exemption except (9).⁷

In addition to those FOIA cases, a distinguishable but larger body of cases deals with efforts to discover information from exam reports, in the course of lawsuits involving banks. The results in those cases, more varied than in the FOIA cases, are considered below. Does the fact that in some cases examination information is found discoverable, suggest there should also be more availability under FOIA? I believe not, because of four distinctions set forth below, §VI.B.

As for the agencies themselves: Data are presented (Appendix 3) on the number of FOIA requests and denials at the Federal Deposit Insurance Corp. (FDIC), Federal Reserve Board (FRB or Fed), Office of the Comptroller of the Currency (OCC), and Office of Thrift Supervision (OTS); on those agencies’ denials, wholly or partly, based on [8]; and on their appeals. Here noting only the data for 1992: the four agencies received 30,434 total FOIA requests; denials totaled 1,303, of which 35% involved [8]. There were 156 internal agency appeals involving [8]; in 97 of those, denials were reversed or modified.

As for agency practice: “The policy of protecting confidentiality of examination reports goes back over 125 years to the establishment of the national banking system.”⁸

In line with the agencies’ steadfast official insistence on the importance of preserving the confidentiality of examination reports—even, e.g., to the extent of unusual safeguards surrounding how GAO conducts oversight audits pursuant to a 1982 statute, see §III.A.—interviews with agency personnel produced uniform, unqualified opposition to any change “relaxing” [8] in any way. Among practitioners and other interested persons, somewhat more diverse views were found, unsurprisingly. The effort to gather views of persons most likely to differ from officials’ views, included a questionnaire (see appendix 4) sent to the 50 persons whose 1993 FOIA requests to the Federal Reserve Board had been denied (wholly or partly) because of [8].

Summary Conclusions and Recommendations

The author recommends that [8] should not be amended, for 10 reasons:

1. The gains from public availability of exam reports and related information is marginal at best. Unlike earlier eras, the soundness and operating

⁷The exemption provided by (9) is for “geological and geophysical information and data, including maps, concerning wells.” The number of cases on [8] is about one-quarter of the next more litigated exemption. See Dept. of Justice, *Freedom of Information Act Guide & Privacy Act Overview* (Sept. 1992 ed.), 218-20.

⁸OCC, Historical Overview, 1 (undated internal memorandum on file with author).

performance of banks are the subject of mountains of data made publicly available, routinely and readily, pursuant to the requirements of regulatory and securities laws.

Further, such data are incomparably more reliable for public comprehension of any specific bank or group of banks—or for evaluation of regulatory performance—than are raw exam reports and similar information. The routinely available data are also incomparably more useful for comparability among banks, because purposefully compiled and designed for such use. And without comparability, query whether there is any comprehensibility.

2. As for the gains that public availability of exam reports might bring by rendering bank examiners and regulators more accountable: The case for accountability is obvious, the question is whether this step would help. I believe it would not, because:

(a) If exam reports were publicly available, they would be written differently.

(b) Given the bank-specific information already publicly available—from which robust and full inferences may be made about regulatory supervision of each bank—would more than marginal enhancement be added by FOIA-availability of exam reports?

(c) Exam information is bank-specific. Accountability is better promoted by focus on the adequacy of the regulators' overall approach, systems and methods of implementation, and regulations and policies.

(d) To the extent that review of bank-specific information may throw light on regulatory performance, among the most illuminating situations are bank failures. Since 1993 we have, pursuant to 1991's FDIC Improvement Act ("FDICIA"), mandated review of such situations by the relevant agency's Inspector General (see §IX below). Useful as is such a step, many observers might seek more public review, a view with which I agree. But FOIA is an inefficient and insufficient mode of securing such further review; I suggest instead more systematic outside review (below).

3. Any bank about which exam information is released, faces several risks:

(a) The most familiar concern is "a run on the bank" by ordinary depositors.

(b) No attention has been given to the modern versions of that familiar concern: access to credit from other banks in the federal funds market, and access to large deposits that move with high volatility in international money markets.

(c) Given that the very mission of exam reports is to stress what needs correction, and given that exam information is not uniform as is publicly released information, there is risk from misunderstanding of exam information. Misunderstanding of their safety and soundness is a particular danger for banks, because they are subject not merely to the normal volatility of investors' reactions

(protection against which is not a regulatory concern) but also the far greater volatility of their large deposits. Banks' unique vulnerability to such volatility at the core of their operations raises an unusual risk that some FOIA requesters might have self-serving reasons to dramatize and distort the information they secure.

In addition to those risks to a bank whose exam report is disclosed, banks other than that bank may be at risk because of the unique inter-relatedness of banks. Examples are given below in contrasting banks with FDA-regulated firms, §IV.

4. For individuals and firms, privacy interests are at stake. Exam reports often have important, sometimes dramatic, information about the finances and even reputation of not only bank personnel but also borrowers. Redaction is not an adequate answer, since in the case of many banks (especially in smaller communities) identification may be discernible from such basic facts as a loan's size, timing or other aspects. Similarly in the case of corporate borrowers, loans from even the largest banks may convey to knowledgeable competitors and security analysts information about the borrower's activity that may injure the borrower.

5. Consideration of changing [8] must take into account the problem of procedural protection (i.e., "reverse-FOIA") for the borrowers or bank personnel or whoever else might be the subject of negative comments in an exam report.

6. The importance of preserving undiminished the cooperation and candor between bank personnel and examiners has been stressed since the first court decisions on [8], and as recently as 1992.

The bank examination and supervisory process is different enough from other agencies' inspections to account for the difference in FOIA-availability of exam/inspection reports and related information. Consideration of FDA inspection reports, and their availability, is presented below, §IV.

7. In 1991 and 1992, the Senate debated whether, in the case of closed banks, there is less justification for preserving exam confidentiality. Congress' not passing an amendment seems sound, given (a) the chilling effect on the interplay between examiners and troubled banks that would be likely if exam information were FOIA-available; and (b) the possible difficulties that FOIA-availability would create for agency efforts to sell such banks' loans or the banks themselves.

8. Since FOIA's original enactment, some people have argued that [8] is superfluous, or is unjustifiable special treatment, given the availability of exemption (4). It is not superfluous: First, because [8] covers matter not covered by (4). Second, because [8] is so clear and well-understood by the officials and the affected private sector. Third, because even if all information secured from banks were potentially within (4), whether or not (4) applies would involve

record-by-record determinations. Though that type of burden does not in itself justify categorical non-disclosure as under [8], that work-load does seem weighty if it would produce very little more disclosure than is produced by the current clearer and simpler categorical treatment.

Not only exemption (4) but also (5), (6) and (7) would come into play for record-by-record determinations if [8] were dropped, see §X.B. below.

As for whether [8] is unjustifiable: As long as there is reason to continue the unique regulatory regime of bank "supervision and regulation," there is also reason to protect the regime's efficiency and effectiveness by shielding against random disclosure of whatever happens to be in an exam report or related records, whenever a member of the public happens to call for its disclosure.

9. A separate question arises over information about compliance with laws that do not go to the banks' safety and soundness, like Truth in Lending. In 1977 when Congress rejected a change regarding Truth in Lending compliance, and again in 1989 when it adopted a tailored method for disclosure regarding Community Reinvestment Act compliance, Congress showed that if more disclosure is desired on a matter, there are more appropriate modes than blunderbuss treatment of [8].

10. Finally, assuming that [8] is not repealed or amended, three potentially fruitful steps are worth considering for agency action:

(a) Recognize [8]'s special status and avoid broad applications of it. In fact, there is reason for concern about whether the bank agencies are unduly restrained about implementing FOIA's disclosure orientation, see Section V.A.

(b) Experiment with non-FOIA disclosure to make available information covered by [8]. Perhaps it would be useful to try, (although I end up skeptical), e.g., making information ordinarily non-disclosed available after a substantial interval (say, five years) and on only selected banks, e.g., ones that had consented.

(c) Continue the newly-established (since this study began) routine of quarterly meetings between FOIA administrators at FDIC, FRD, OCC and OTS.

II. At the Agencies

A. Bank Examinations: Purposes, Kinds of Information

The first point to make about bank examinations is that they are not audits. Audits are conducted by certified public accountants, with a single and largely stand-alone purpose: to gather evidence to verify and express an opinion on an entity's financial statements and the degree of compliance with established criteria such as generally accepted accounting principles, for the benefit of investors and others who may rely on financial statements. An auditor's opinion

on the financial statements is usually a one-page document that is later published with the financial statements in the institution's annual report to shareholders. In addition, CPAs are required to report material weaknesses to management orally or in confidential management letters.

While audits are not intended to detect all fraud, errors, irregularities, or illegal acts, audit standards require that audits be designed to provide reasonable assurance of detecting material misstatements of financial statements due to any such events. The auditor has a search responsibility for illegal acts having a direct and material effect on the financial statements. The auditor also has an investigation and reporting responsibility for any illegal acts that come to the auditor's attention, unless clearly inconsequential. The auditor must express a qualified or adverse report if any act has not been properly accounted for or disclosed in the financial statements. And the auditor must consider withdrawing from an engagement if the client does not take the appropriate remedial action; a withdrawal would trigger the SEC Form 8-K reporting requirement. Auditors need not report such an event to regulators directly.

Although there are some similarities between audits and bank exams, exams have different objectives and focus.

In the first place, exams do not stand alone but are a major fact-finding arm of the relatively unique task of bank supervision. Exams have three main objectives: (1) to evaluate a bank's soundness and compliance with law; (2) to permit the agency⁹ responsible for supervising that bank to evaluate the bank's management, including its board; and (3) to identify and follow up on areas needing corrective action by management to strengthen the bank, improve its performance, and assure its compliance with law.¹⁰ Underlying those objectives are the fundamental purposes of protecting depositors and the public interest in bank safety and soundness—an interest arising not only from deposit insurance

⁹In most cases, "agencies" rather than "agency," although normally one agency is the primary supervisor. For example, for national banks, both the OCC and the FDIC are responsible; if the national bank is part of a bank holding company, the Fed also is responsible in part. While a state-chartered bank might be supervised only by its state agency, the great majority are FDIC-insured and of course many are within bank holding companies.

The web of interlocking responsibility is a perennial subject of reform—e.g., as recently as 1993, Congressional hearings were held on proposals to realign these agencies. But this Report's focus on examination reports is not affected by which federal agency is examining.

In addition to the three bank-supervising agencies are the OTS, which is covered in this report, and the National Credit Union Administration, the Farm Credit Administration and Resolution Trust Company, which are not covered. Given NCUA's notably lesser size, it was omitted in the belief that it would not present different issues or aspects. FCA is omitted as because of its differences. RTC was omitted because its FOIA situation is "derivative," i.e., involves OTS or FDIC documents. In 1991, RTC received 0 (zero) FOIA requests; in 1990, 51.

¹⁰These objectives are stated at the opening of the Comptroller's Handbook for National Bank Examiners, March 1990, §1, p. 1. Consider: the Handbook is three inches thick; more than one inch of pages are needed to cover the categories of, and details about, assets examined.

but also from the unique interrelatedness among banks and their central importance to borrowers, therefore to the economy.

Examiners use the auditors' reports as one of their tools, but do not use audit procedures. Examiners evaluate the prudence of practices, adherence to law, adequacy of liquidity and capital, quality of assets and earnings, nature of operations, adequacy of financial reports, and internal control and audit systems.

In the second place, while audits and exams are similar in that both have established criteria for evaluation, exam criteria are more loose-fibered, dealing rather broadly with quality of management and risk assessments of business decisions and operations; and dealing with evaluation of a sample of loans (often a large number) for not only the relevant financial facts about the loans and borrowers but also such less objective matters as the borrowers' character and reputation. The examiners' mandate has nothing to do with protecting the interest of investors.

In earlier days, exams were "snapshots" periodically produced by examiners on-site at the bank, often for extensive periods. Noted just below is a 1975 examination of Chase Manhattan that involved 20 examiner-years. Today, because of banking's increasingly complex and increasingly rapidly changing nature, combined with computer technology, the on-site exam is merely a part (often a narrowly focused part as distinct from a "full-scope" exam) of overall supervisory monitoring. Moreover, today exams are tailored to specific bank situations: some banks may have examiners on-site throughout a period of difficulty, others may be examined only once in about two years, and 11 multinational national banks, because of their sheer size, complexity, and significance in the banking system, have full-time "resident" examiners.¹¹

Unlike auditors, examiners are not only free to express, but expected to express what one judge described as "candid opinions, good or bad, correct or incorrect"¹² on all notable aspects of the examined bank. A compellingly concrete example of findings in an exam report that would be inconceivable coming from auditors, is the following from the 1975 examination of the Chase

¹¹ From testimony of Comptroller of the Currency Robert L. Clarke, Hearing on Adequacy of Examination Levels and Compensation, House Committee on Banking, Finance and Urban Affairs, March 22, 1989, 6-7:

We keep examination staff on full-time duty at 11 of the country's largest national banks. Together, these 11 multinational banks account for approximately 35%—more than a third—of the assets of the national banking system. Our continuous presence provides us with greater knowledge of the day-to-day managerial decisions at these complex institutions than we would otherwise be able to have. In doing so, it increases our sensitivity to the general condition of these institutions.

Like those banks' full-time "resident" examiners, the NRC has "resident" inspectors at nuclear utilities. Differences between the two regimes are considered in §IV below.

¹²U.S. v. Provident National Bank, 41 F.R.D. 209, 210 (E.D. Pa. 1966).

Manhattan Bank—a report that, along with another on Citibank, was misappropriated or leaked and became The Washington Post's lead front-page story and so a cause célèbre for a while. (For more about that event, see below, Section VII.)

The 1975 Chase Manhattan exam report, the product of 20 examiner-years of work, rated the Chase's overall condition "poor" despite "good" earnings. It said—

—operating conditions were "horrendous;"

—one department was "operating chaotically with a decided lack of internal control, effective management, and adequate staff;"

—a "deplorable condition, causing payment delays, incorrect information, and generally slow service has resulted in poor customer relations and undoubtedly a loss of business;"

—few current financial statements of borrowers could be found, and those found were often "illegible, incomplete, or inconsistent for comparative analysis;"

—while Chase had undergone a number of management reorganizations recently, they had not produced the desired results;

—Last, when some of the problems were pointed out to the bank, "much difficulty was encountered in convincing senior management of the magnitude of these deficiencies and possible impact...on the bank's financial statement."¹³

Today's examiners, I am told, would not use language like "horrendous" or "deplorable," since the target audience is the bank's board of directors. (Let it be emphasized that the reports go to the boards; that examiners meet with the boards; and that the board minutes must record the directors' discussion of the report.) Today, taking the FHLBB's 1988 exam report on the notorious failed Lincoln Savings, we find the thrift described as

¹³Ronald Kessler, Citibank, Chase Manhattan on U.S. 'Problem' List, THE WASH. POST, Jan. 11, 1976, p. 1 (banner headlined); Jan. 13. pp. 1, A6.

Lest one hasten to the view that if such conditions are found, there is more public interest in disclosing the exam report than in withholding it, consider that two days later, the Post published a letter from John Kenneth Galbraith: "When you published your story Sunday, I had just finished [writing] a piece.... On the basis of streetside information picked up around New York and Boston, it said almost exactly what you had said about Chase Manhattan. Perhaps exceptionally, I had not the slightest thought that I was being original." Jan. 13, 1976, p. A18.

an association that is managed in an aggressive, risk prone manner that has resulted in a level of problem assets that severely strains capital and places the continued viability of the association in jeopardy without immediate changes in philosophy[; thus] the future of the institution is at risk

...The Board...has failed in its responsibilities to provide for an adequate monitoring process.... In addition, the independence of the Board is questioned.... In addition to these deficiencies the Board and management have engaged in activities that are considered to possess an inordinate amount of risk....¹⁴

The purpose and conduct of examinations has rarely been put more concisely than by Judge D.H. Ginsburg in 1992¹⁵:

However denominated, the bank examination privilege is firmly rooted in practical necessity. Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. The success of the supervision therefore depends vitally upon the quality of communication between the regulated banking firm and the bank regulatory agency. This relationship is both extensive and informal. It is extensive in that bank examiners concern themselves with all manner of a bank's affairs: Not only the classification of assets and the review of financial transactions, but also the adequacy of security systems and of internal reporting requirements, and even the quality of managerial personnel are of concern to the examiners.

A fuller description by Judge Weinstein¹⁶ (though less recent, not less accurate) adds notable points:

¹⁴Exam report summary pp. 1, 1.2 Digging deeper into that 3-inch-thick report does not change or add to the flavor.

The Lincoln exam was far from typical: examiners from nine different FHLBank districts were utilized; there were four examiners-in-charge, from four separate districts, with the lead examiner-in-charge a Supervisory Agent. The 13-page cover letter conveying the report to the directors called not only for a special meeting of the board to review the report, but also for a reply from the board, signed by each of the directors, setting forth the corrective actions that would be undertaken. Letter of Dec. 20, 1988, from Darrel W. Dochow, Acting Principal Supervisory Agent.

¹⁵In re Subpoena Served upon Comptroller of Currency, 967 F.2d 630 (D.C. Cir.)("Fleet Financial").

¹⁶In re Franklin Nat. Bank Securities Lit., 478 F.Supp. 577, at 579, 583 (E.D.N.Y. 1979).

Each examination is supervised by an examiner in charge and conducted by a team of national bank examiners and Assistant National Bank Examiners....¹⁷ On bank premises the examiners inspect bank documents, interview bank employees, officers, and directors, and observe bank operations;...

Reports of Examination collect and evaluate the findings. Each report contains two sections, the open section ("white pages") and the closed section ("yellow pages"). The open section compiles the basic data of the report: it includes, for example, a Consolidated Statement of Condition, the examiner's comments and observations, and financial data supporting the figures on the consolidated income statement.¹⁸ The only evaluative or analytical material in the open section is found in the "Page 2 Comments," the examiner's "Comments on Matters Requiring Attention." The closed confidential section evaluates these basic findings and data; it includes "the examiner's evaluation of the condition, management, earnings, capital, internal controls, ownership, and future prospects of the bank." H.R.Rep. No. 94-1669, (Adequacy of the Office of the Comptroller of the Currency's Supervision of Franklin National Bank), 94th Cong., 2d Sess. 11 (1976).¹⁹

...Closed or confidential sections are contained on forms entitled "Confidential Memorandum to the Comptroller of the Currency." The initial page of these forms lists questions calling for the examiner's comments on precisely specified problem areas: whether the examiner "regard[s] the management as safe;" whether "the directors exercise reasonable and independent supervision over the bank's affairs;" whether the bank has violated statutes forbidding

¹⁷Author's fn.: National banks are examined almost entirely by OCC only; in addition, 309 national banks were examined by FDIC in 1992. State-chartered banks that are members of the Federal Reserve System are examined by both their state agencies and the FRS. State-chartered non-member banks are examined by both their state agencies and the FDIC.

OCC employs 2,871 examiners, with responsibility for 3,300 national banks (total assets, about \$2,100 billion). FDIC employed about 3130 examiners, engaged almost entirely in examining about 7,000 state-chartered banks that are not FRS members, plus about 500 state-chartered savings banks. FRB employed about 1350 examiners, with responsibility for 957 state-chartered member banks (total assets, \$638 billion) and 6,348 bank holding companies (total assets, \$3,366 billion). OTS employs 972 examiners, engaged primarily in examining 1,733 thrifts with assets of \$780 billion.

¹⁸Author's fn.: The report begins, when transmitted to the bank, with a letter to the board of directors, summarizing the results and stating the composite rating assigned to the bank.

¹⁹Author's fn.: Today, there is no confidential section, at least in OCC reports. The entire exam report goes to the bank, although agency memoranda and correspondence may not.

“unsafe or unsound practices;” and whether the examiner “consider[s] the bank solvent.” Subsequent pages, entitled “General Remarks,” allow the examiner to comment on the broader topics of: (i) “Conditions of the Bank;” (ii) “Management;” (iii) “Earnings;” (iv) “Capital;” (v) “Internal Control and Audit Procedures;” (vi) “Ownership;” and (vii) “Future Prospects.” The examiner is instructed to begin “each heading with a descriptive word covering the over-all condition such as Excellent, Good, Fair, or Poor.”

B. Practice on Confidentiality

Consider, before examining the agencies' administration of [8], how long-standing and deep are these agencies' views about the confidentiality of exam reports. These views illuminate the reasons for [8]'s inclusion, without objection, in FOIA.

The policy of protecting confidentiality of examination reports goes back over 125 years to the establishment of the national banking system. The policy was publicly stated by Comptroller of the Currency John P. Knox in his annual report in the year 1881. Subsequent Comptrollers of the Currency and Secretaries of the Treasury have reemphasized the policy in Congressional testimony and in other public statements.²⁰

The solidity of the agency view comes through in the famous 1913 Money Trust Investigation:

Mr. [Samuel] Untermyer [counsel for the committee]: Is the information gathered by your examiners regarded as secret?

Mr. [Lawrence] Murray [Comptroller of the Currency]: It has always been regarded by the office as confidential.

Mr. Untermyer: Well now, confidential as against whom?

Mr. Murray: We have never even produced the reports of the examiners in court. We were subpoenaed to produce them at one time, and we asked the judge to rule whether or not we

²⁰OCC, Historical Overview, *supra* n. 1.

should obey under the law as it existed, and he ruled that those reports need not be produced in court under the subpoena."²¹

In 1976, FDIC Chairman Robert E. Barnett stated the need for this confidentiality in a speech to the CPA Society and the Robert Morris Associates:

[W]e consider the examination report part of a confidential process. Bankers are willing to discuss frankly the weaknesses in their loans because they are confident that anything told to an examiner will be treated in confidence. Bank examination represents an independent assessment of a bank's condition by a trained professional. The necessary information gathering and loan discussion are facilitated because the banker views it as a cooperative affair rather than an adversary process. Time and money can be saved if this cooperation continues, and our career examiner employees are convinced that the data gathered through this process and the criticism extended by our examiners are both honest and thorough. If the confidentiality is lost or the process becomes adversary, there quite possibly would be a deterioration in the quality of examinations.²²

That same year, in a rather confrontational Hearing (for reasons explained below, see §VII) before a House Government Operations Committee subcommittee, First Deputy Comptroller of the Currency Robert Bloom expanded on why

[i]f the rules are changed to require public disclosure of what is in the examination report, there is no doubt that we will be hampered considerably in obtaining a complete picture of national banks.

My point is that if you had a report which was a public report it would be a different report... . The report that you get by an examiner's talking to a banker in confidence and the report you will get by an examiner's talking to a banker on the record is going to be a different report. In my opinion, the total efficiency of regulation will be lowered, not increased.

At the present time, the bank examiner, unlike any other Federal agency official that I know of, will walk into a bank and

²¹ Subcommittee of the House Banking and Currency Committee, Money Trust Investigation, Part 1, 1391 (1913).

²²*Ibid.*

the banker will let him roam around that bank and let him look at anything he wants without the bank's counsel at his elbow. If an IRS agent walks in or if an [FTC] agent walks in or if an SEC agent walks in, the first thing the businessman is going to do is call his lawyer. And the whole thing is a very arm's-length operation.

Bank examination by tradition, but for good and sufficient reasons I believe, has evolved in a completely different direction. ...I would say that before you discard [that tradition], you had better take a look at some of its advantages. It has the advantage of providing the Government with a picture three times every two years of what is going on inside a bank. You will never get this by any public disclosure system.

I am not saying that banks should not disclose. They should. And they do—almost all of the financial numbers in the bank. But when you are talking about this personal interrelationship between bank examiners and bankers, you are talking about something else. *You are talking about a subjective process basically. And it will change if it is public.*

The bank examiner isn't going to say the same thing for public distribution that he says for the Comptroller's eyes only. I am not saying that it couldn't work that way, but it will not be the same system....²³

Mr. Bloom later explained why, in his view, exam information would not be a useful addition to the already public information about banks' finances:

[T]he information we have is so detailed that it couldn't possibly be of use or even feasible to publish.

Our [exam] report is pages and pages of analysis of bank borrowers—the companies that borrow from banks. This is what the statute says should not be disclosed under penalty of fine or of imprisonment.²⁴ That is information not about the bank, but about the bank's assets which are loans. In other words, it is the financial condition and everything else about the borrowers of the bank. That is the bulk of our report....²⁵

²³Subcommittee on Commerce, Consumer and Monetary Affairs, Oversight Hearings into the Effectiveness of Federal Bank Regulation, Jan. 20, 1976, 1, 3, 26-7 (emphases added).

²⁴The statute to which he referred, and similar statutes, are noted below, §III.A.

²⁵*Id.* at 29.

What is to be made of these statements by agency officials? I do not dismiss them as special, self-protective pleading, but even if one does, they establish two important points. First, even if one discounts the officials' statements as overdrawn (I do not believe they are), still, insofar as they are not overdrawn but valid, *pro tanto* there will be losses in the exam process. Second, even if the officials' views are wholly wrong, they do indicate how examiners and their supervisors will most likely react to FOIA-availability of exam reports. That is, even if there ought to be no difference on exam reports as a result of changing [8], indeed "it would be a different report." That would be a loss. This is not to say that the loss is preclusive. But one should risk such loss only if persuaded that lowering the effectiveness and efficiency of examinations and reports matter less than do the interests underlying FOIA generally.

C. The Agencies' Experience with [8]

Virtually all of the [agencies] have promulgated regulations that essentially parrot the provisions of the FOIA itself.... The[se include] regulations, which outline situations where the agency may discretionarily disclose exempt examination reports [such as] disclosure to the bank's agent; disclosure to a parallel state agency; disclosure to other federal banking agencies; disclosure where criminal irregularities are being investigated; disclosure of reports to the data center; and disclosure pursuant to a valid court order.²⁶

Only two notes need be added. First, disclosure pursuant to court orders has been contested in a number of litigations involving, for example, stockholders' class action suits against bank managements. These cases, which are very distinguishable from FOIA cases but relevant in evaluating whether [8] should change, are considered below, see Section VI.B.

Second, as part of their effort to keep exam reports confidential, every agency places on the front of the report a legend like the one recently quoted in a decision denying discovery (in a private securities fraud suit):

The Report and other information forwarded to the savings and loan association "remains the property of the [FHLBB] and, except as otherwise provided...no person, agency or authority to whom the information is available, or any

²⁶BRAVERMAN AND CHETWYND, INFORMATION LAW (1985), v. 1, 483-4. All these regulations are in 12 CFR: FDIC's, §309; FRS's, §261; OCC's, §4; OTS's, §506.

officer, director or employee thereof, shall disclose any such information.²⁷

The OCC regulations concerning disclosure of bank examination reports [subject] those who violate its provision to a statutory [criminal] penalty.²⁸

Almost every private practitioner and bank consultant interviewed for this Report told of efforts to get copies of exam reports in connection with work as the bank's own counsel or consultant. In every case in which inquiries were made to regional offices or lower-level officials, the answer was that no one outside the bank could even see the exam report. In every such case, inquiries to higher-level officials made clear that persons acting as agents of the bank could, if the bank believed it necessary for work on behalf of the bank, have copies of the reports.

As for FOIA requests, figures on total volume, and on requests involving [8] and appeals, are detailed in Appendix 3.

The Federal Reserve Board readily provided (pursuant to my request) computer "logs" reporting on all FOIA requests involving [8], including any internal appeals, from 1989 to July 22, 1993. No other agency could provide similar information. To the FRB's 50 1993 requestors, I sent a letter with four questions (see Appendix 4) and received 11 responses (out of 47 requests, since three letters were "Return to Sender...."). While the rate of response seems good, albeit lower than I had hoped for, a summary of the responses seems sufficient.

First, two responders sent voluminous correspondence. One of those two seems worth recounting. J.C. Lewis, formerly a member of the House Banking Committee staff, in April 1993 made a FOIA request to OCC for "the data and analysis...relating to the Interagency Policy Statement on Credit Availability...published on March 10, 1993." OCC furnished some documents and replied that since another one had been created by FRB, the request had been forwarded to FRB. The FRB, relying on [8], denied the request. Mr. Lewis immediately appealed that denial, with a full explanation, and three months later the FRB Vice Chairman upheld the denial, relying not only on [8] but also on exemption (5).

It is inappropriate for me to second-guess that denial, and even if it were not inappropriate I lack sufficient information, and even if I had all the information it would go beyond the proper mission of this Report to get into the handling of any one specific request. Further, in the course of the author's work on this Report,

²⁷In re Atlantic Financial Federal Securities Litigation, 1992 WL 50074 (E.D. Pa.), at 2.

²⁸Feinberg v. Hibernia Corporation, 1992 WL 54738, at *6 (E.D. la.).

The criminal provision is 18 USC § 641. The regulations invoking it, in the case of OCC, are 12 CFR §§ 4.18(c) and 18.9; see similarly FDIC's 12 CFR § 309.6.

no agency seemed remotely as responsive and impressively well-organized in its FOIA implementation, as FRB.

Nonetheless, the author believes it worth noting Mr. Lewis' experience, for two reasons. First, reliance on [8], followed up by reliance on (5), may seem to some outsiders as an undue readiness to rely on [8]. (If any reader infers that this is a negative comment on FRB's treatment of the request, the author can only repeat the prior paragraph.) Second, Mr. Lewis sent the author a letter about FOIA which seems too impressive to leave in files—see Appendix 5 for excerpts.

As for other survey respondents, at least two requesters were not satisfied with the clarity of reasons for their denial. One requester who appealed twice, and so secured some additional information, believed the denial on [8] erred, but would not urge modifying [8]; instead, "change the FOIA response regulations to encourage persons handling FOIA requests to be fully responsive unless there is a clear case that release...will damage the Government." Another requester, a multinational bank employee who had been on the FRB staff, made repeat requests for monthly "currents," an internal document about recent General Counsel actions. This person believes those documents are valuable, understands why they are often withheld but regrets that they are not more available. A third requester, from a major law firm:

Cannot say how highly I think of [the] FRB FOIA office. Absolutely top notch, the best I ever dealt with, pleasant, timely, give reasons that are succinct and communicate, even give advice to try again because document may become available, and in such situations even keep the request in action file. Richmond FRBank far less helpful.

What conclusion does the survey suggest? If one assumes that the most likely responders are people who are angry or want change, the survey makes little if any case for change. But whatever one's assumptions, there are too few responses here to establish any notable conclusion.

D. State Agencies' Experience

Thanks to the unstinting aid and support of the Conference of State Bank Supervisors staff, responses were secured from 12 states' agencies about their experience and views: California, Florida, Illinois, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Texas, Virginia, Washington and Wisconsin. These States were selected to assure the inclusion of ones that I believe are noted for their strong orientation in favor of disclosure, as well as other major States. For that questionnaire, see Appendix 6.

Before reciting the survey results, note—for sheer interest—an episode recounted by Sidney Bailey, Virginia's Commissioner of Financial Institutions. In the late 1980's, a financial institution in Virginia sued an author and a magazine for publishing an article that named that institution among others in "weakened" condition, based on information from a commercial rating service. Defense counsel subpoenaed recent exam reports, whereupon the agency recovered from the institution all copies of the subpoenaed reports. Commissioner Bailey was summoned to show cause why he was not in contempt, but the judge brushed aside Bailey's effort to explain that nondisclosure was needed less to protect the institution than the privacy interests of borrowers. Seeing no alternative, Bailey went to the bench to show the judge one of the reports in question, which—

against all odds, contained a classification of a loan to the judge, with a considerable amount of detail about the reasons for the classification of the loan as substandard. "The court's recognition of the justification for confidential treatment of [exam] reports came fairly soon...."

With regard to the survey's first response, eleven of the 12 respondent states never give out exam reports or similar information to private persons (other than at the examined institution). Their non-disclosure does not include possible protected responses to court subpoenas or other legal discovery requirements; but none of the 12 had had any experience with such responses that they deemed pertinent. (Illinois noted that it always "require[s]...a protective order...")

Florida, pursuant to a 1992 statute, does release upon request redacted exam reports on failed banks after one year, if there is no on-going investigation. This enactment was a result of the decennial review of the banking code. Until a very recent major request, fewer than six requests had been received. That recent request sought all exam reports on banks that failed since 1982. Only one bank has failed since this law was passed, so there is almost no experience with how the potential public disclosure of reports at failed banks may affect examinations at problem banks.

Also on failed banks, but very different from releasing exam reports or similar information and instead similar to the federal agencies' FDICIA requirement for Inspector General reports, Oregon has a statute that authorizes the agency, in the case of failed banks, to release to the public information deemed to be in the public interest.²⁹ That statute was a response to a "financial massacre" in 1979-83, when about one-third (or 30) of the state-chartered banks failed and another 15 were the subject of agency-supervised mergers (but since the end of 1987, no failure has occurred). A handful of such releases were issued.

²⁹Ore. Stat. 706.720 (4).

Washington State and Florida have divulged composite CAMEL ratings in the aggregate (for all banks in the state) to the legislature, to provide them with a measure for determining the state of the industry. No specific bank names or ratings were divulged. Similarly, Wisconsin "in years past" disclosed

the number of banks on the agency's 'watch list' [just as federal agencies have done], or those with a CAMEL rating of less than three.... As the watch list shrank, the practice of reporting such numbers ended since it was believed the media/public might be able to determine the handful of banks under close watch by reviewing performance data contained in call reports.

However, with the advent and proliferation of bank rating services such as IDC, Sheshunoff, Bauer and VeriBanc, the public and media now have greater capacity than ever before to assess a bank's health.

Next, the state agencies' second response, on whether those agencies had experienced any pressure to release the kinds of information covered by [8], New York and Pennsylvania have had pressure from community groups and state legislators for material concerning CRA compliance. And in Oregon around 10 years ago, the leading newspaper made some attempts to secure disclosure.

The third response: In only two of the 12 states has there been a leak or inadvertent release of information. First, in a New England state, in 1988 a director of a state-chartered credit union leaked portions of an exam to the media, which reported the credit union's low rating; "a minor depositor run ensued." Second, in Virginia, a radio news announcement about the closing of a small bank was made the day prior to the scheduled closing, which caused a "fairly serious run on deposits [the] next morning, making hasty emergency measures necessary."

Coming last to the state supervisors' views. Perhaps the most important point, stressed by California, New York, and Pennsylvania (here quoting California):

[A]ny change in [8] would have a definite impact on how the Department interacts with federal banking agencies in regulating the Department's licensees. Presently, the Department closely coordinates its examination and regulatory actions with the [FDIC] and [FRB]. Such concurrent examinations result in a sharing of work product derived during the examination, as well as the resulting reports of examination. All such information, documentation and report sharing is

dependent upon the knowledge that the shared information will be held in confidence by the receiving regulator.

Depending upon the extent of the amendment to [8], the Department would no longer have the assurance that such shared information will be confidential. If [8] were repealed in its entirety, it is possible all such information, including the Department's reports of examination, would have to be produced under a FOIA request. The Department would have to carefully reconsider its sharing of information with the federal agencies for the following reasons.

First, as discussed above, the records held by the Department are generally considered confidential, and the Department has a vested interest in preserving that claim of confidentiality. That interest would be jeopardized if the Department shared confidential information with the federal regulators knowing the shared information would be subject to public scrutiny.

Second, there are potential legal ramifications. It is possible that the courts could rule that such a transfer of information by the Department may be viewed as a knowing waiver of our claim of confidentiality with regard to that information under [a California statute], as well as violating the prohibitions against releasing personal information contained in [another statute]. Such court rulings would be based on the Department violating the intent of those laws when it transfers information knowing it will be released to the public by the federal banking agencies. Individuals found to violate the [second statute] may be subject to fines and imprisonment.

For those reasons, a modification or repeal of [8] would cause the Department to severely restrict the types and amounts of information it would transmit to those federal agencies.

From the federal agencies' perspective, if the Department is reluctant to share information with the agencies, there would appear to be little benefit for those agencies to share documentation and information with the Department. The result would most likely be a straining of relations between state and federal agencies, leading to uneven and spotty regulation of banks. In that same vein, costs to all agencies could rise in the state and federal agencies would no longer use each other's examinations, resources, and reports to satisfy their examination and regulatory needs.

In sum, any amendment or repeal of Exemption 8 would result in a change in the way in which the Department shares information with federal banking agencies. Such a change in operations would most likely result in less efficient regulation of California state licensed banks.

Many states stressed (quoting Texas)—

the chilling effect on the free expression of opinions and criticisms by bank examiners. One may speculate about bank runs and the like, but the effect on the examiners would be immediate, predictable, and detrimental to good regulation.

And a third point (quoting Florida): “exam reports would have to undergo additional review by legal staff. And in some degree toned down to take into account department liability regarding disclosure.” Texas also made that latter point and closed their letter with this: “Our resources are stretched enough as it is without having to fend off litigants who were mentioned in examination reports.”

Three more views—

Illinois wrote: “If [8] was repealed or substantially modified, our Agency would be compelled to modify our [exam reports] in order to prevent disclosure of critical confidential information. The impact upon the regulatory process would be that the institutions that we supervise might not receive the feedback they need from the examination process.”

Another state concluded, after noting the deep problems of the 1980s: “The recovery or the necessary closing were accomplished, and in the worst case, in an orderly manner, because of the absence of ‘runs on the bank.’ The requirement of divulging the reports of examination will disenfranchise the one element necessary to the success of our workout strategy—time.”

Last, Wisconsin concluded: “We see no value in repealing [8]. This is clearly one case where the release of now-protected information to the public would benefit few and potentially hurt many.”

III. Bank Examinations in the Congress

A. Independent of FOIA

The agency officials' emphasis on the confidentiality of exam information is supported and reflected in a statute that dates back at least 80 years that holds that criminal sanctions expressly prohibit any bank examiner from disclosing (without official permission) the names of borrowers or the collateral for loans, 18 USC §1906.

A second statute plainly indicates agency authority over whether to disclose. Since 1875, the Comptroller has had authority to publish the exam report on any national bank that does not comply, within 120 days after notification, with the Comptroller's recommendations or suggestions based on an exam. 12 USC §481. But my best efforts unearthed no knowledge of this provision ever having been used.

Four post-FOIA statutes are relevant. Two of them reflect and support the agencies' emphasis on protecting confidential information relating to bank customers. First, the Right to Financial Privacy Act of 1978 (12 USC §3401) outlines numerous restrictions on the disclosure of financial records held by bank employees and federal regulatory authorities. It also imposes affirmative duties on government and bank officials to safeguard individuals' financial records, and also allows bank customers to recover civil penalties from "[a]ny agency or department of the United States or financial institution obtaining or disclosing financial records" in violation of the Act.

Similar limitations appear in a 1982 statute aimed at assuring oversight, via GAO audits, of bank examinations (31 USC §714). This requires, among other limitations on the GAO, that GAO workpapers "shall remain in the [audited] agency," "except for the temporary removal of workpapers...that do not identify a customer of an open or closed bank....," §714(d)(2).

Since 1989, the agencies are required to publish monthly their formal actions dealing with troubled or failed banks. First, in 1989, FIRREA (Financial Institutions Reform Recovery and Enforcement Act) amended the Federal Deposit Insurance Act (12 USC §1818(u)) to require disclosure of all final enforcement orders. In 1990, that requirement was broadened to include "any written agreement or other written statement for which a violation may be enforced," unless the agency "in its discretion" determines that publication would be contrary to the public interest.³⁰

³⁰And since 1988, OCC has required "annual disclosure statements" of financial condition and operations, by all national banks not covered by securities disclosure requirements. 12 CFR Part 18.

And 1991's Federal Deposit Insurance Corporation Improvement Act (FDICIA) provides that if an insured bank fails, the Inspector General of the primary agency must, within six months: formally review the causes of failure and the supervision; provide the review report to the GAO and Congress; and make it available under FOIA.³¹

B. [8]'s Legislative History

Exemption [8] originated in a July 15, 1964 letter from Federal Reserve Board Chairman William McC. Martin to Senator Edward Long, Chairman of the Judiciary Subcommittee. This letter, noting earlier letters and meetings between Board and Subcommittee staff, stated that the addition of several exemptions to the FOIA bill did not "relieve the Board's concern regarding the possibility" that disclosure would be required for exam reports and

portions of reports of condition submitted to the Board by [the] member banks, and various operating reports, either required to be submitted or voluntarily submitted by the [Federal Reserve] Banks.... While the Board is aware that a liberal interpretation of exemptions "(4) trade secrets; [and (5) or (7)]" might exempt documents of the nature aforementioned, it is the Board's judgment that sufficient uncertainty in the regard exists as to require the Board's opposition to the subsection as presently worded.³²

Chairman Martin's letter recounted that when the Board's view had been voiced by Board staff, Subcommittee staff had requested that the Board suggest language that would "offer to the Board the assurance of exemption from publication consistent with the Board's functions and the public's right to reasonable access to the Board's records." Martin's letter closed setting out a suggested new exemption [8], "to serve the legitimate interests of the public and of the several agencies responsible for the regulation and supervision of financial institutions." The sole difference between the language of [8] suggested in that letter and of today's [8] is that the letter referred to "any" agency, while the statute now says "an" agency.

³¹12 USC §1831o.

³²Martin letter, 1-2. Although this letter apparently is not in the legislative history, it is referred to in Chairman Martin's later letter of March 10, 1965 to House Government Operations Committee Chairman William Dawson, Hearings on Federal Public Records Law, 89th Cong., 1st Sess. parts 1 and 2 (1965) (hereinafter "1965 House Hearings"), at 247.

Exemption (4) expanded to almost its final language on July 22, see text at note 80 below. The final, enacted version of (4) first appeared (so far as we can tell) in October 1965, n. 92 below.

The only other references to [8] in the legislative history, as set forth below, are two witnesses' comments when they were first handed the language at a 1964 hearing, brief references in letters from banking agencies, and brief references in the final Committee Reports.

FOIA emerged from Congressman John Moss' efforts over several years to increase the availability of government records, combined with Senate efforts to amend the Administrative Procedure Act of 1946.³³ The original bill that became FOIA contained only what were eventually enacted as exemptions (1), (3) and (5); those three did not touch bank information.³⁴ Although only one official close to bank regulation testified at Senate Hearings in October 1963, the Hearings included letters from the bank regulators, expressing concerns about the lack of an exemption for such material.³⁵

The Chairman of the Federal Reserve Board wrote (July 11, 1963) that the existing APA Section 3 granted agencies the right to determine whether there was good cause to withhold information, and claimed that this authority was "vital to the Board's effective performance of statutory functions relating to supervision and regulation of commercial banks."³⁶

Similarly, the Chairman of the Federal Home Loan Bank Board wrote (July 12, 1963) expressing concern that disclosure of financial institution information "might precipitate runs and pressures on such institutions which could threaten the entire economic structure of the country."³⁷ The Board suggested that the Committee consider

the inclusion of a provision making an exception for matters relating to the condition or affairs of financial institutions, where the agency having authority with respect to the

³³ H. Rep. No. 95-793, A Citizen's Guide on How to Use [FOIA] and the Privacy Act in Requesting Government Documents, 5 (Nov. 2, 1977); Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, U.S. Senate, 93rd Cong., 2d Sess., Introductory Discussion of the Legislative History of [FOIA], 8 (1974) (hereinafter *FOIA Source Book*).

³⁴ However, exemption (3), which until 1974 authorized withholding of any matter "specifically exempted from disclosure by statute," arguably may have related to bank information, as noted by one witness, see the 1963 testimony of Treasury General Counsel Belin, below, text at n. 39. And see the Treasury statement Belin submitted to a Senate Hearing in 1964, below, text at n. 68.

Further, in the 1963 Senate Hearings (p. 91), Committee Counsel Fensterwald said: "When this bill (S. 1666) was drafted, it was the view of some of the sponsors that most of the agencies that require an exemption had it by specific statute. As it turns out, we find many of them do not."

In short, there was so little reference to any "exemption (3) statute" that we may assume it was of no consequence.

³⁵ Hearings on the Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1963) (hereinafter *1963 Hearings*).

³⁶ *1963 Hearings* at 293.

³⁷ *Id.* at 292.

examination, regulation, or supervision of such institutions determines that disclosure of such matters would not be in the public interest.”³⁸

While testifying before the committee on October 31, 1963, Treasury General Counsel G. Andelot Belin discussed his concerns about public access to bank examination reports.³⁹ He explained that national bank examiners go into a bank and

stay for quite a long time and they investigate all the loan credit files to see whether a loan is good, whether the bank has been provident and wise in extending the thing in the first place, and in keeping up-to-date credit information, and a bank can ask just about anything they want from a person to evaluate a loan. Then if it gets underwater they can ask even more. The criticism part of that report, for example, contains specific detailed criticisms of the X-Y-Z loan and the A-B-C loan for all these reasons. Now that is a very specific detailed document which I don't think any of you or any of us would want to be made public.⁴⁰

Belin also stated that he did not believe that the information in bank examination reports was protected from disclosure by another statute, with two exceptions: (1) he noted 18 USC §1905, “which as you know is our general governmental criminal statute about disclosure of confidential information generally....;” and (2) he noted also section 1906, which “actually also deals specifically with disclosure of information by a bank examiner.” But,

One of our troubles is, we don't know the effect of [the bill and exemption (3)] on 18 USC 1905, because that has that important exception in it that you are not supposed to do this except as provided by law. It is at least arguable that specifically what [the bill] does is to provide by law that we have to disclose these things.⁴¹

However, in 1964 Belin pointed to another statute, as noted below, in the text accompanying footnote 65.

The FDIC's Director (the Chairmanship was then vacant) expressed his personal views that the proposed amendments' impact “would be in direct

³⁸*Id.*

³⁹*Id.* at 172.

⁴⁰*Id.* at 190.

⁴¹*Id.* at 190-91.

conflict with the established practices that are deemed a requirement to the proper administration and supervision of insured banks and contrary to the public interest."⁴²

Shortly after the 1963 Hearings, Treasury General Counsel Belin responded to the Committee's request that the Committee members "be supplied with information which would disclose the types of files which the Treasury and its various bureaus keep which contain information about private citizens, the disclosure of which might be harmful to those citizens."⁴³ In his response, Belin listed the types of information that should be protected, including the "explicit exceptions protecting from public inspection records of the following types:...(g) Bank information."⁴⁴

Additional Senate Hearings were held on July 21, 22 and 23, 1964.⁴⁵ For these Hearings, an April 20 subcommittee revision of the bill, dated April 20, 1964, was used.⁴⁶ That version contained seven exemptions including an exemption [4] which said in its entirety: "trade secrets."⁴⁷

At this point, the sequence of events and of versions of the bill becomes a little puzzling. Apparently on the second day of the subcommittee Hearings, July 22, a full Senate Judiciary Committee Report reported favorably on S. 1666, including a fuller exemption [4]: "trade secrets and other information obtained from the public and customarily privileged or confidential."⁴⁸ In that same July 22 Report, exemption [8] appeared—just as finally enacted—for the first time so far as we can discover.⁴⁹ (But no exemption [9] was in yet.)⁵⁰

The letters and prepared statements in these July Hearings were written without knowledge of [8]. However, on the second day of the Hearings, OCC's Chief Counsel Robert Bloom and one other witness addressed themselves to [8].

Bloom's "off-the-cuff reaction" to the new provision he had just read was that "exception [sic] 8, while it goes a long way toward exempting documents in

⁴²*Id.* at 239 (letter of November 7, 1963).

⁴³*Id.* at 224 (letter of November 13, 1963).

⁴⁴Belin specified also: "... (e) Individual financial and securities records, such as Treasury checks and registered bonds, including savings bonds. (f) Business records of individuals and firms, not only as to trade secrets and such matters but other business and financial data. (g)... (h) Information submitted on the basis of its being held confidential." *Id.* at 226.

⁴⁵Hearings on the Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (1964) (hereinafter *1964 Hearings*).

⁴⁶*Id.* at 1.

⁴⁷*Id.* at 3.

⁴⁸S. Rep. No. 1219, 88th Cong., 2d Sess. 2 (1964). Reprinted in *FOIA Source Book* at 86, 87. The final, enacted version of exemption [4] first surfaced on October 4, 1965 in S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

⁴⁹S. Rep. No. 1219 at 3, reprinted in *FOIA Source Book* at 88.

⁵⁰*Id.*

our Office, does not cover some large categories of records such as those in connection with applications for new banks, branches or mergers.”⁵¹ He was concerned about this because “the applicants are usually prominent men in the community and we would never get an application, I do not [sic] think, if they felt that every part of our files which contain intimate personal information” might be disclosed.⁵² Bloom said that bank reports should be kept confidential because

[t]he release of such information to an unsophisticated public could, through misunderstanding, undermine confidence and cause unwarranted runs on banks.... The mere possibility that the types of information just discussed would be made available to its competitors and the general public would make bankers most reluctant to cooperate with our examiners and seriously hamper the Comptroller in the exercise of his assigned duties.”⁵³

Bloom presented Comments by OCC reiterating the concern that disclosure “would completely destroy the relationship between the banks and their Federal supervisors.”⁵⁴

One other witness referred to [8]—counsel for the National Rural Electric Cooperative Association (NRECA), Charles Robinson.⁵⁵ (NRECA is a national organization of rural electric cooperatives, which have a “special borrower-lender relationship” with REA, the Federal Rural Electrification Administration.⁵⁶) NRECA’s prepared statement discussed the confidentiality of loan applications submitted to REA and the concern that if such information was made available to competitor cooperatives it could be “used to harm or destroy the applicant cooperative.”⁵⁷ Robinson testified that if such information were released “the ability of the borrowers to stay in business will be seriously jeopardized.”⁵⁸ Noting the addition of [8], he said:

I do not know what particular problem that language is aimed at. I assume it might be aimed at the Federal Reserve System or the Federal Deposit Insurance Corporation or something of that sort. But I think it goes to a special relationship, a financial relationship between a Government

⁵¹ *1964 Hearings* at 178-79.

⁵² *Id.* at 184.

⁵³ *Id.* at 186.

⁵⁴ *Id.* at 191.

⁵⁵ *Id.* at 274.

⁵⁶ *Id.* at 275.

⁵⁷ *Id.* at 276.

⁵⁸ *Id.* at 279.

agency and a group of citizens or a corporation with which that agency may be dealing. I seriously suggest, Mr. Chairman, that with respect to a loan program where the very existence of the borrower in those programs is dependent on a confidential relationship between it and the Government, similar language be inserted in the bill to cover that situation.⁵⁹

As mentioned earlier, these July Hearings include several letters written before the Hearings. The FHLBB Chairman, writing six months earlier, reiterated the concerns he had conveyed a year earlier: "[t]he delicate nature of financial institutions and the necessity for public confidence in them has resulted in a recognition of the frequent need for confidential investigations and information."⁶⁰ He included an FHLBB statement that "[t]he possible damage to institutions resulting from such a course is a matter for grave concern; not only might public confidence be undermined but information about institutions' operations that is customarily regarded as confidential would become available to competitors."⁶¹

Similarly, a July 1, 1964 letter from FRB Chairman Martin repeated his concern that the bill would "result in detriment to the public interest and impairment of the Board's effectiveness as a regulatory and supervisory body and as an instrument of national economic policy."⁶²

The FHLBB Chairman wrote again on July 20, 1964, after reviewing the April 20, 1964 version of the bill with seven exemptions:

[I]t would appear that reports of examination of financial institutions under the jurisdiction of the Board and various other reports and information submitted to the Board are not exempt. It is the opinion of the Board that such unlimited public access to information of this nature requires opposition to the subsection as presently worded.⁶³

And Treasury General Counsel Belin testified again, on July 22,⁶⁴ when for the first time he saw the April 20 committee print; but, unaccountably, he did not see (or at least did not refer to) the new exemption [8] that Bloom and Robinson commented on that same day.⁶⁵ The Treasury submitted a detailed statement

⁵⁹*Id.* at 278.

⁶⁰1964 Hearings at 419 (letter of December 6, 1963).

⁶¹*Id.*

⁶²*Id.* at 515, 516 (letter of July 1, 1964).

⁶³*Id.* at 514.

⁶⁴*Id.* at 168.

⁶⁵*Id.* at 176.

dated "July, 1964,"⁶⁶ discussing the seven exemptions. That statement declared exemption (4), covering simply "trade secrets,"

too limited to reach the confidential business information which the Department understands that the subcommittee staff agrees should be protected.... The Department strongly recommends that exemption (4) should be revised to exempt "records, or parts thereof, which contain information obtained from the public which is customarily privileged or otherwise confidential."⁶⁷

Treasury found the proposed seven exemptions gravely inadequate to protect from indiscriminate disclosure various types of documents and records in the Treasury Department which have long been recognized as legitimately and necessarily entitled to confidentiality.⁶⁸

The Department referred to the Federal Reports Act of 1942⁶⁹ in which "Congress expressly recognized this need for confidentiality in its exemption of various Treasury records."⁷⁰ According to Treasury (without citation or quotation), the legislative history of that Act showed that certain information should not be disclosed "except in accordance with the Treasury Department's own regulations on disclosure."⁷¹ Treasury believed that the following reasons in support of that 1942 exemption still held true: "the private character of much of this information and the injury to essential Government operations which would result from indiscriminate disclosure."⁷² Specifically dealing with OCC's national bank records, Treasury noted that they "have always been deemed confidential with respect to disclosure to members of the public.... The protection of these records from indiscriminate disclosure is essential to the proper supervision of the national banks."⁷³ In conclusion, Treasury stated that

unless this subsection is amended to contain a generalized exemption for records which must be kept confidential in the public interest, or the individual exemptions are greatly extended..., the Department considers it essential that there be

⁶⁶*Id.* at 177A.

⁶⁷*Id.* at 177C.

⁶⁸*Id.* at 177D.

⁶⁹ 5 USC 139-139(f). This provision is no longer law, but we have been unable to find just when it was repealed or amended.

⁷⁰ 1964 *Hearings* at 177D.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at 177E.

an exception for the types of records similar to those exempted in the Federal Reports Act; namely, records relating to fiscal, monetary, foreign economic, national banking and internal revenue operations of the Treasury Department.⁷⁴

The American Bankers Association also sent a statement to the Committee,⁷⁵ discussing the contents of a bank examination report:

The comments in the report concerning management, practices, and policies are views, opinions, and conclusions of the examiner. The examination report usually contains a special section covering personal affairs of bank employees.⁷⁶

The ABA expressed its concerns about possible disclosure of such reports:

Because of the understanding that the contents of such examination reports and such other records will be held confidential, the officials of the bank feel free to disclose to the examiner facts having a bearing upon the bank's loans, general conditions, problems, operating and investment practices, and loan and credit policies, and the examiner feels free to offer suggestions, comments and criticisms on the affairs of the bank, its personnel, and problems. This freedom of expression on the part of both the bankers and the examiner would be destroyed if the records should be circulated out of the customary bank supervisory channels.⁷⁷ If details concerning a customer's loans and financial affairs are made public, it may result in the customer losing business and could conceivably have a drastic impact on his business prospects.⁷⁸

No change was made in the language of [8] as it had been suggested by the FRB on July 22, 1964, and the Senate passed S. 1666 on July 28.⁷⁹ The House took no action prior to adjournment. In the next Congress, an amended version of S. 1666 was introduced on February 17, 1965 as S. 1160⁸⁰ and H.R. 5012.⁸¹ These bills contained eight exemptions, including an expanded [4], exempting

⁷⁴*Id.*

⁷⁵*Id.* at 549 (letter of July 27, 1964).

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹110 Cong. Rec. 17086 (1964). The Senate reconsidered S.1666 three days later, but passed it again unchanged. 110 Cong. Rec. 17666 (1964).

⁸⁰S. 1160, 89th Cong., 1st Sess. (1965) introduced by Senator Long et al.

⁸¹H.R. 5012, 89th Cong., 1st Sess. (1965) was introduced by Representative Moss.

"trade secrets and commercial or financial information obtained from the public and privileged or confidential."⁸²

The House held hearings on H.R. 5012 in March and April 1965.⁸³ The Hearings included a letter from FRB Chairman Martin dated March 10, 1965, responding to questions posed by the House subcommittee.⁸⁴ He noted that the language of exemption [8] is

identical with language that the Board proposed to be added to S. 1663. This proposal, with explanatory comments, was submitted to Chairman Long of the Senate Subcommittee on Administrative Practice and Procedure, by letter of July 15, 1964.⁸⁵

However, Martin went on to state that the original APA "adequately and reasonably secured" the "public's right of access to Government records and information."⁸⁶

The FDIC Chairman also responded to the subcommittee's questions and reflected "upon the concept of confidentiality which has traditionally attended the exercise of supervisory powers over banks in general."⁸⁷

The Treasury's letter to the House subcommittee said of [8] that it "considers this exemption necessary."⁸⁸ And [8] drew the following in a letter from the FHLBB:

all matters relating to the condition or affairs of financial institutions should be exempt from disclosure where the agency having authority with respect to the examination, regulation or supervision of such institutions determines that disclosure would not be in the public interest. The present bill, by limiting the exemption to such matters as are "contained in or related to examination, operating, or condition reports" as set forth in the bill, falls short of what the Board believes is needed in this connection for the protection of the public.⁸⁹

⁸²S. 1160 at 5, H.R. 5012 at 3.

⁸³1965 House Hearings.

⁸⁴*Id.* at 247 (letter of March 10, 1965).

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.* at 435 (letter of March 17, 1965).

⁸⁸*Id.*

⁸⁹*Id.* at 243-44 (letter of March 30, 1965).

The Senate held hearings on S. 1160 on May 12, 13, 14 and 21, 1965.⁹⁰ Again NRECA counsel Robinson testified. While pleased with the expansion of [4] to include "commercial or financial information," he was concerned about the requirement that the information be "privileged or confidential."

The trouble with the language in exemption No. 4 as it now stands is that it must be privileged and confidential, but nobody knows what that means. So let the REA administrator and the borrowers decide what is privileged and confidential....⁹¹

He also submitted a NRECA statement suggesting that (4) be revised to read: "trade secrets and commercial, technical and financial information submitted and received as privileged or confidential."⁹²

FHLBB Acting Chairman Michael Greenebaum wrote the Senate Committee noting "with favor" the addition of [8] and the expansion of [4]. However, he set forth other objections to the bill and concluded that "the Board opposes the adoption of [the bill] for the reasons set forth herein as well as the basic shortcomings stated in [earlier] letters...."⁹³

On October 4, 1965, the Senate Committee reported its final amendments to S. 1160, with nine exemptions.⁹⁴ In (4), the words "the public" were changed to "any person," giving (4) its final form: "trade secrets and commercial or financial information obtained from any person and privileged or confidential." And [8] remained unchanged. The Senate passed this bill on October 13, 1965,⁹⁵ the House on June 20, 1966.⁹⁶

The Senate and House Reports' total comments on [8] are as follows. The Senate stated that [8] is:

directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by, on behalf of, or for the use of such agencies.⁹⁷

⁹⁰Hearings on Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965).

⁹¹*Id.* at 337, 346-47.

⁹²*Id.* at 356.

⁹³*Id.* at 462-63 (letter of April 26, 1965).

⁹⁴S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

⁹⁵111 Cong. Rec. 26821 (1965).

⁹⁶112 Cong. Rec. 13661 (1966).

⁹⁷S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965), reprinted in FOIA Source Book at 45.

And the House Report said:

This exemption is designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm.⁹⁸

It may be of interest to note that the Wall Street Journal's report of FOIA's unanimous passage in the House was headlined "'Freedom of Information' Bill Passes House as Bureaucrats Get Some Escape Clauses." The article's only reference to [8], however, was the inclusion of "the files of bank supervisors" in a summary list of the exemptions.⁹⁹

A year after passage, the Attorney General issued a Memorandum to assist agency compliance.¹⁰⁰ The Memorandum's comments on [8] included the House Report sentence just noted, plus this:

An earlier version of exemption (4) protected trade secrets, but made no mention of financial information and would not have protected information developed by agency investigators and examiners, as distinguished from information "obtained from the public." Exemption (4), as enacted, however, covers commercial and financial information.... Exemption (8) emphasizes the intention of the revision to protect information relating to financial institutions which may be prepared for or used by any agency responsible for the regulation or supervision of such institutions."¹⁰¹

C. Since FOIA's Original Enactment

In a sense, this is summed up as "the dog that didn't bark." As noted by a leading secondary source, "[t]he absence of congressional dissatisfaction...is at least suggested by the lack of revision of this exemption in the 1974 FOIA

⁹⁸H. Rep. No. 1497, 89th Cong. 2d Sess. 11 (1966), reprinted in *FOIA Source Book* at 32.

⁹⁹WALL ST. J., June 21, 1966, at ___. Similarly, an article in the University of Missouri Journalism School's publication said that "special interests were able to convince the Congress to add" [8] and [9]. S. J. Archibald, *It's Codified...But It Is Not Automated*, Freedom of Information Center Report, 6, 7 (July 1967).

¹⁰⁰Attorney General, United States Department of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967), reprinted in *FOIA Source Book* at 194.

¹⁰¹*Id.* at 38, reprinted in *FOIA Source Book* at 237.

overhaul and the absence from any of the recently introduced bills to amend the FOIA of any proposal that Exemption 8 be deleted."¹⁰²

However, that comment was written in 1985. Since that time, "the dog has not barked" even louder. Before treating a 1989 effort that succeeded in amending a related law, and a 1991-92 effort that failed, it is important to stress the significance of the dog's not barking in 1976, when some FOIA amendments were made. That year opened with an unprecedented confrontation between a House Government Operations subcommittee (on Commerce, Consumer, and Monetary Affairs) and the bank regulators. This included a subcommittee effort to subpoena specific banks' exam reports; the event is recounted below in Section VII. The author is struck that even that confrontation did not lead, so far as can be learned, to even the introduction of a bill to amend [8].

That same subcommittee was involved in another "dog not barking" event in 1977; though the Members were the same, the matter was entirely different. The subcommittee, concerned about compliance with the Truth in Lending Act—

considered...whether the overall degree of truth-in-lending compliance should be disclosed to the public. Because truth-in-lending compliance examinations are conducted at irregular intervals and do not cover all the kinds of creditors subject to the Act, the subcommittee concluded that disclosure of overall compliance by individual creditors is a matter that should be studied further.... In States where all creditors are subjected to similar compliance examinations, disclosure...appears to be worthwhile. [Connecticut is considering a disclosure policy.] The subcommittee applauds such efforts and hopes they will provide insights into improving Federal enforcement procedures.¹⁰³

Coming to a 1989 effort to amend [8]: Congressman Conyers introduced a bill to provide for disclosure of reports on federally insured depository institutions "that have been liquidated or have received financial assistance from the FDIC or the FSLIC" and also "reports that provide a federal banking agency's assessment of [an insured] institution's performance under any statute designed to prevent discriminatory lending practices based on race or gender." The proposal's primary target was information on bank compliance with the Community Reinvestment Act of 1977.

As consumer groups and community organization leaders testified and the Congressman put it, "there is no excuse for blocking public access to agency

¹⁰²BRAVERMAN AND CHETWYND, *supra* n. 26, at 478.

¹⁰³H. Rep. No. 95-280, 95th Cong. 1st Sess., May 10, 1977, at 25.

documents that deal with...compliance with consumer protection and anti-discrimination laws." Ralph Nader testified that "[A]t a minimum, [8] should be amended to serve *only* the legitimate interest of protecting the solvency and soundness of financial institutions."¹⁰⁴

This effort culminated in amending the CRA, adding the requirement that—
upon the conclusion of each examination...the...agency shall prepare a written evaluation of the institution's record of meeting the credit needs of its entire community, including low and moderate-income neighborhoods.¹⁰⁵

The new written evaluation is to have a public section, stating the agency's (a) conclusions "for each assessment factor identified in the regulations," (b) discussion of the facts and (c) rating of the institution and basis for the rating.¹⁰⁶

As a result of the 1989 CRA amendment, the banking agencies now issue a monthly list of named banks' ratings on CRA compliance,¹⁰⁷ and banks are required to display full signs, on bank premises, announcing the availability of the bank's CRA report.¹⁰⁸ In July 1993, though not a direct result of the 1989 amendment but rather reflecting the public interest in CRA compliance, President Clinton instructed bank regulators "to devise new 'performance based' CRA standards."¹⁰⁹

The CRA amendment seems to the author precisely the right way to make exam information public. That is, once it is determined that some specific category of information in exam reports should be public, then a special report drawing upon the exam reports (however burdensome such special reporting may

¹⁰⁴The bill's words are quoted from Note, *Developments Under [FOIA]—1989*, 1990 DUKE L.J. 1113, 1116, 1149-51.

Some of the legislative history of the Conyers effort is puzzlingly elusive. Despite thorough hunting by author and Georgetown Law Library staff, it appears that the hearing was never printed. For an account of the hearing, see BNA Banking Report, 6-12-89, 1277. Also, although the Duke Note cites a House Report, no such report has been found.

The proposal about liquidated banks seems not to have gone forward at all until Senator Wirth made a similar effort, see text below.

After the House Committee had not adopted the Conyers proposal to strengthen CRA disclosure, four Members included their dissents in H.R. REP. NO. 101-54(I), on FIRREA (Financial Institutions Reform, Recovery and Enforcement Act), 101st Cong. 1st Sess. (1989), 337-8, 348. The House adopted the proposal, as did the Conference, H.R. CONF. REP. NO. 101-222, Aug. 4, 1989, 432, 499-500.

¹⁰⁵12 USC §2906.

¹⁰⁶The confidential section includes all references that identify customers, employees and whistleblowers; and statements "which, in the judgment of the agency, are too sensitive or speculative in nature to disclose to the institution or the public." The agency has discretion to disclose the confidential section to the institution, not including any whistle-blower identification.

¹⁰⁷See, e.g., FDIC News Release, FDIC Issues June List of Banks Examined for Community Reinvestment, PR-82-93, 7-08-93.

¹⁰⁸12 C.F.R. §§25.5, 25.6.

¹⁰⁹*Simplifying CRA*, CONG. Q., July 17, 1993, __.

be) presents none of the concerns over disclosing exam reports themselves. Also, such special reports facilitate comparability. Still further, they allow routine, easy availability to all potentially interested persons, which is superior for such information to the episodic nature of FOIA availability. Thus, the CRA route is recommended for adapting to any other category of information for which disclosure is sought.

In 1991 and 1992, Senator Wirth attempted to secure passage of a Bank and Thrift Disclosure Act that did not directly address [8] but instead provided, in its 1992 version, that the agencies would be required to make public the exam reports for the five years preceding a bank's failure or receipt of federal aid. This requirement would apply only to closed banks. Detailed safeguards against improper disclosure were included: a) consultation with the FDIC or RTC was required before disclosure; b) if an agency found that disclosure would seriously threaten an open bank, disclosure could be delayed one year; c) if an agency found an ongoing investigation would be hindered, disclosure could be delayed two years, or longer if a criminal investigation was involved and the Attorney General concurred; and d) all identifying information on non-affiliated persons would be deleted, and on affiliated parties, all information not relevant to the relationship with the bank. The bill also directed GAO to make selective audits of disclosed exam reports.¹¹⁰

Senator Wirth stated forcefully the reasons for his bill in the course of a 1991 hearing on the failure of the Bank of New England. [The author has tried to set forth Senator Wirth's position quite fully lest the author's summarization distort, given the author's disagreement with the Senator's proposal notwithstanding agreement with the Senator's concern.]

Here we have an enormous amount of taxpayer money going down the chute. In this situation, \$227 million to seven major borrowers, the public doesn't know who it is... [T]axpayers across the country...would be outraged by what goes on. And an enterprising Boston Globe investigatory group might want to examine what happened and where \$2.5 billion of taxpayer money went.

But they can't find out.

We go to the administration and we say, will you make this information public, and the administration says, no, no, you

¹¹⁰S. 2290, 102d Cong. 2d. Sess. (1992). The far briefer 1991 version did not include the safeguards. It was offered as an amendment on the floor, Congressional Record, S10371, July 18, 1991. When a motion to end debate was offered, 57 Senators voted against cloture, and the amendment was thereupon withdrawn, S10404. There was no hearing on the proposal either year.

can't do that. We've tried amendments on the floor and all the Republicans vote against making this information public.

Now what's wrong? Not only...do we have potentially a major coverup going on from the regulators, who obviously don't want this information out because if it comes out, the delinquency that we've been talking about this morning on behalf of the regulators isn't going to be made known.

The public can't find out. It's the public's money and they can't find out, and the administration is stonewalling over there because I'll betcha there are a series of deals being cut in this thing.¹¹¹

In a more confrontational exchange during the hearings to confirm William Taylor as FDIC chairman, Senator Wirth added:

Now, if stonewalling is too strong a word, I will accept another description of this. Let's say we have heard nothing constructive...from any of the regulatory agencies except [the SEC].¹¹²

Earlier in 1991, a joint letter from the Secretary of the Treasury, Chairmen of the Federal Reserve System and the FDIC, the Comptroller, and OTS Director, stated their reasons for opposing disclosure of exam reports:

The examination report can provide a complete picture of a financial institution's health only if the information it contains is complete, and completeness relies on candid communications.... Concern that examination reports might be publicly released at some time in the future would inhibit candid discussion...and would lead depository institutions to deny or rationalize identified problems rather than admit and correct them.

This would damage the ability of the agencies to supervise...because we rely to a significant extent on the candid views expressed in the examination process. In our view, adoption of [the proposal] would ultimately cause a greater risk to the insurance fund and the taxpayer.

¹¹¹Senate Banking Committee Hearings, Sept. 19, 1991, at 248.

¹¹²Senate Banking Committee Hearings, Sept. 24, 1991, at 44.

Release...could cause undue harm to borrowers and customers. Many borrowers, including those whose loans may be criticized, do not cause losses for a bank. Disclosing the names of borrowers whose loans are criticized...could also impair the ability of a borrower with a single bad loan to obtain credit for other business interests....¹¹³

In 1992, in a similar joint letter, the agencies said public release "would convert the examination process into an adversarial procedure...." Further, the agencies stressed that under the newly enacted FDICIA section 38k, when an insured bank fails, the primary regulatory agency's Inspector General must review the causes of the failure and the supervision by the agency.¹¹⁴

Senator Wirth met the objections to his proposal, as follows:

Some examination reports will, in retrospect, look bad after an institution has failed. I'm sure there are reports that regulators hope will never see the light of day. Other reports, no doubt, will show examiner warnings that should have been heeded. Lax supervision did play a role in the S&L crisis....

I agree that examination reports of healthy financial institutions should be private. That's why I have not proposed a broader disclosure requirement for all examination reports....

We should remember that banks are not a typical private business. They receive significant benefits from taxpayer support and guarantees.... With this kind of government backing, thrift and bank problems are a legitimate public concern....

I agree that customer privacy is a legitimate concern. ...[R]egulators are directed to [redact] the names of customers who are not affiliated [and] information about insiders...if it is not relevant to the relationship between the insider and the institution.

¹¹³Letter to Senator Jake Garn, July 30, 1991. *Id.* at 162.

¹¹⁴Unpublished letter to Hon. Chalmers Wylie, Ranking Minority Member, House Committee on Banking, Finance and Urban Affairs, Apr. 9, 1992 (in author's files).

The American Bankers Association, in a letter to Senate Banking Committee Chairman Donald Riegle, said "Unfortunately, in recent years, [the historical] form of give-and-take has been severely restricted, and the examination process has become much more confrontational, even in the case of thousands of well-run institutions in this country. For example, increasingly institutions feel the need to involve attorneys in the process. This change in the examination process has exacerbated the regulatory burden on the industry...." Unpublished letter of March 23, 1992, from Edward L. Yingling, Executive Director, Government Relations (in author's files).

...The fact that a report will become public should not affect the role of examiners and bank regulators in this process. If anything, examiners will have a greater incentive to identify problems while bank employees will have an incentive to move to correct them. Public disclosure should encourage no one to hide problems; it only makes the eventual exposure of such efforts more likely. If an institution is disposed to hide problems from regulators, it will try to do so whether we have disclosure or not. If an institution wants to cooperate, the possibility of future disclosure will not make it any less likely to do so.

Disclosure should not only promote more thorough bank examinations, but also fairer examinations. Some bankers have complained that examiners act arbitrarily....

Public disclosure can act as a forceful deterrent. Both bankers and regulators should know that the public will examine their actions and hold them accountable when banks fail....

It may not be a bad thing if the examination process changes somewhat as a result....

Finally, charges that public disclosure will radically alter the examination process presume that examiners and institutions will behave as if a significant number of reports will be made public. This shouldn't be the case. Even in today's climate, most financial institutions don't fail.¹¹⁵

The author disagrees with the corrective step Senator Wirth proposed, for the reasons stated in Conclusions, below, and two additional reasons. First, the proposition that the impact on the exam process will be limited because most banks don't fail, rests on the assumption that only a very small number of banks will fear they might fail, and all others would be unconcerned and so unaffected in their behavior during exams. Second, if one does agree with Senator Wirth's prediction as to the limited impact that disclosure would have on the conduct of exams, then the author suggests the following: Just in case the Senator is wrong and the agencies are right, an experiment should be conducted with some appropriate sample of banks, before putting the entire examination process at risk.

Given the views Senator Wirth was expressing, it seems especially significant that he does agree that examination reports of healthy financial

¹¹⁵These quotations (emphases added) are taken from Senator Wirth's "Talking Points" document for discussion of S. 2290, generously provided by his former staff (in author's files).

institutions should be private. That's why I have not proposed a broader disclosure requirement for all examination reports.

IV. Comparing Bank Exam Reports' FOIA Unavailability with Availability of Other Agencies' Inspection Reports

Although a particular inspection report done by any agency might be exempt from disclosure because of exemption (7), the norm is availability and the obvious question is why bank exam reports should differ. For comparative purposes, inquiry was begun into FAA, FDA, and NRC practices, but full inquiry went forward on only FDA, since the comparison with FDA set up what seemed the key point that would emerge from any comparison.¹¹⁶ Also, FDA has long been one of the most FOIA-active agencies and in many ways is a model, perhaps the leader, in FOIA compliance and full reporting on FOIA activity. Before noting specific comparisons between the FDA and bank situations, and qualifications on just how available FDA reports are, consider the following example.

Assume that FDA inspectors find serious problems at a drug company's plant, or at a company that is the sole source of a vaccine, or at a blood bank that is the sole local supplier. Assume further that the inspection report (a "483") is very soon after the inspection disclosed to a FOIA-requester, and becomes the subject of news stories. Assume last that many customers of the company or blood bank halt all buying from that source. Serious as the impact on the

¹¹⁶Detailed comparative questions were submitted to FDA, FAA and NRC; NRC's answers and material, and substantial FAA material, were reviewed. While there might be marginal gains from full inquiry into those agencies' inspection picture, preliminary review suggested that even if some added value might result, it would be at the price of undue detail and length.

Further, the FAA inspections seemed even more fact-specific than the FDA, thus in a sense comparing bank exams and FAA inspections seems *a fortiori* from the comparison with FDA.

NRC's inspection reports are FOIA-available, but the agency fought and won an eight-year litigation to avoid disclosure of related investigation reports by an industry organization after Three Mile Island, the Institute of Nuclear Power Operations (INPO), *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992)(en banc). About a year after plaintiffs had lost, they published an analysis of leaked INPO reports on 56 nuclear plants in 31 States, and claimed that "[a]nalysis of these documents reveals that the NRC consistently failed to address issues raised in all...areas evaluated by the INPO reports." *Hear No Evil, See No Evil, Speak No Evil: What the NRC Won't Tell You about America's Nuclear Reactors* (December 1993), 1. As a result, NRC received inquiries from Members of Congress, and Chairman Selin responded at length to show that NRC reports and "INPO evaluation differ significantly in their scope and detail. In comparing [the overall assessments of one plant], we conclude that our assessments are in substantial agreement." Letter to Senator Lieberman, March 31, 1994, 1. That comparison, on just one plant, required 25 pages. A second, lesser reason for not going into further detail on NRC was the considered comment of Associate General Counsel William Olmstead, in ACUS Committee discussion, that NRC reports had become more "genteel" since becoming publicly available.

company itself is, and whatever problems some of the customers may confront, it is hard to imagine any impact on other companies or other blood banks—indeed, the most likely impact is that they gain new customers.¹¹⁷

Contrast the situation if the public becomes fearful about a bank. Banks are intricately interdependent, at least as a) in correspondent banking and clearing relationships, b) as depositors in and lenders to each other, and c) as joint holders of loans to third-party borrowers. Anyone at all familiar with bank failures or near-failures knows of the strong ripple effect, sometimes nationally and beyond, more often regionally or only locally—“a chain of risks linking financial institutions and corporations throughout the world...”¹¹⁸ For example, the Continental Illinois (ConIll) was rescued by the FRB and OCC on the brink of failure precisely because of the fear that a few hundred banks would go down with it.¹¹⁹ Comptroller Conover said:

We debated at some length on how to handle the Continental situation.... Participating...were the directors of the FDIC, the Chairman of the [Fed] and the Secretary of the Treasury. In our collective judgment, had Continental failed...we could very well have seen a national, if not an international, financial crisis the dimensions of which were difficult to imagine. None of us wanted to find out.¹²⁰

Indeed, ConIll itself had gone to the brink because of its involvement with loans originated by a small Oklahoma bank, Penn Square, and ConIll's review of such loans was relied on by still more banks participating in those loans. An earlier example includes the failure of a little bank in Germany that severely destabilized foreign exchange markets. And recently when Bank of New England failed, there was a region-wide crisis in confidence not only among depositors but in the region's business generally, as well as international difficulties because of

¹¹⁷This should not be read as minimizing the impacts if the affected company is a sole source or, say, a testing laboratory important to many companies. Without at all denying that such situations present acute problems, they are not the norm but the exception.

An industry-wide problem did arise in the notorious “Tylenol scare,” because new fears about the security of packaging affected all over-the-counter medicines. But it is hard to conceive of such an event not being public, and that problem drew extraordinarily quick corrective action. I see no general pertinence of that situation for our purposes.

¹¹⁸Felix Rohatyn, *World Capital: The Need and the Risks*, N.Y. REVIEW, July 14, 1994, 48, 52.

¹¹⁹ConIll held deposits from 2,299 other banks, 976 of which had exposure above the federally insured ceiling. The deposits of each of 66 banks exceeded their equity capital, and another 113 had deposits equaling 50-100% of their equity capital. Hearings on Continental Illinois Corp., House Banking Committee, 98th Cong. 2d Sess., 80, 287, 434-5 (1984).

¹²⁰*Id.* at 287-8.

the bank's off-balance-sheet activity.¹²¹ The point is that any public disclosure about one bank, will—not may—impact other banks, therefore other depositors, other borrowers, and other participants in financial markets. It follows that the consequences of a FOIA disclosure about bank X, are dimensionally different from the consequences of similar disclosure about a drug or food company or airline, etc. Which is why we have the special treatment reflected in exemption [8]. At bottom, it is the ripple or domino effect of shaking public confidence in a bank, so different from the firm-specific impacts in other industries, that is the reason why banks are subject to such intensive supervision as well as regulation. It could be argued that this concern is taken too far if applied to exempt every bank from FOIA, but the difficulties of a case-by-case approach seem overwhelming. True, even with that approach, exemption would be clear from the outset for major banks; but a) if information were to remain confidential about all major banks, would the change in exemption [8] be meaningful, since it is regulation of the major banks that matters most? b) On literally thousands of banks it is almost impossible to predict what ripples might flow from failure. c) Ripple effects will differ greatly and unpredictably in different economies (not only national cycles but, say, farm area droughts, or defense cutbacks). d) The competitive impacts of sporadic, "raw" disclosures on some banks compared to only systematic disclosure on others brings an unlevel playing field. e) It is the tiny banks with the least ripple effect that are most vulnerable of all to misunderstanding of "raw" examination evaluations.

Several contrasts between the FDA inspection reports and bank exam reports can be drawn. The first contrast bears directly and obviously on the difference in FOIA treatment: FDA inspection reports have far less non-objective and far more factual-type information, compared with the opinion-laden evaluations that characterize bank exam reports. For example, the sole expression of opinion found in a very small sample of FDA "483" reports and "Establishment Inspection Reports"¹²² (fuller documents written afterward), was found in a report on an inspection of a Rhone-Poulenc Rorer plant in France. The inspector gave his view of the hotel and restaurant, a recital entirely reasonable, given the location, to facilitate subsequent inspections. But how different from something like the opening of the July 1988 exam report on Lincoln Savings & Loan that states that "[t]he results depict an association that is managed in an aggressive, risk prone manner that has resulted in a level of problem assets that

¹²¹The "demise of [this] relatively modest sized regional US bank" had international ripple effects because the \$33-billion-asset bank also had \$36 billion in derivative contracts. "It took many weeks for monetary authorities in the US and abroad to arrange in an orderly way for other investors to take over the contracts and to avoid significant losses to creditors." Rohatyn, n. 116, above.

¹²²The "483" reports are one or a few pages, handwritten, that the inspector gives to the "inspectees" when the inspection ends. The "Establishment Inspection Reports" are fuller documents.

severely strains capital and places the continued viability of the association in jeopardy. Without immediate changes in philosophy, the future of the institution is at risk.... The Board of Directors has failed in its responsibilities....”

Also, the FDA reports I reviewed seem skeletal in important regards. For example, a blood bank inspection report states that the prior inspection uncovered serious deficiencies that may represent a “significant health hazard,” and that efforts were made to correct the deficiencies, but that there are still problems, and nothing is said about what corrective efforts were made, or by whom, or how adequately.¹²³ Or, a much more detailed report that refers to “an overall lack of proper supervision of the facility’s operations,” gives nothing on the causes of the problems or plans for correction.¹²⁴

The second contrast also bears directly on the difference in FOIA treatment. Unlike FDA inspection reports, exam reports include considerable input from the examiners’ superiors, sometimes even their views. Repealing [8] would lead not so much to disclosure as to a mountainous, fruitless task of case-by-case decisions whether other exemptions apply.

The third contrast points up how different bank “supervision” is—to use the word of art these agencies always twin with “regulation”—from other agencies’ regulation. FDA “483” reports are given, as an inspection ends, to the highest company representative at the closing conference. Bank exam reports go to boards of directors and are supposed to be discussed by the board, with minutes recording that discussion.¹²⁵ Indeed, examiners come to a board meeting to discuss even “clean” exams even at top-rated banks, let alone in all situations that involve even informal recommendations for modest corrective steps. Nor is the supervisory relationship limited to examination reports: e.g., it is hard to imagine other regulatory agencies publishing anything like the OCC’s 1987 *THE DIRECTOR’S BOOK: THE ROLE OF A NATIONAL BANK DIRECTOR*, providing “in-depth, practical guidance for meeting the duties and responsibilities of the job.”¹²⁶

This contrast does not necessarily indicate a lower level of seriousness for the FDA reports. FDA-regulated entities are subject to law that includes strict criminal liability. Drug companies are constantly seeking new approvals, and for

¹²³Interstate Blood Bank, Inc., 1/7-24/1991.

¹²⁴Plasma Alliance, Inc. 2/21-31/1991.

¹²⁵This should not be read as making the argument (though some might so argue) that the board-level review of exam reports is a self-regulatory safeguard reducing the need for public accountability via FOIA. I reject that argument for two reasons: a) I take as a fact that too many boards are too far from independent, and b) even vigorous, independent boards are supposed to serve the bank and its stockholders, which may diverge from the public interest in assuring vigorous supervision by agency regulators.

¹²⁶See George W. Coombe, Jr., *Book Review: The Directors Book*, PREVENTIVE LAW REPORTER, 16 (Summer 1993).

most FDA-regulated firms, bad publicity can inflict severe competitive injury.¹²⁷ But note that exam reports may comment on the competence and/or integrity of bank personnel—including outside directors—who are subject to being suspended and even barred from banking.¹²⁸ That adds personal privacy concerns (as noted elsewhere in this study) that cut against disclosure, concerns that at the very least make the redaction workload much more substantial than at the FDA, where—contrary to the image of total openness—it is necessarily significant.

This difference in who receives exam or inspection reports is a notable difference in the two processes. I believe it bears on FOIA availability because it shows that the examiners' aim their reports not only at their own superiors, but at the banks' highest level in order to increase the likelihood that official intervention will be less necessary or, if still necessary, more effective. This is at the heart of bank supervision, and the integrity and bluntness of the messages sent needs to be preserved.

The last contrast shows merely that FDA reports are not as available via FOIA as appears at first blush. FDA "Establishment Inspection Reports" (EIRs) are never sent to the inspected firm, although after some substantial interval they become available via FOIA. The delay in availability is grounded in exemption (7), i.e., until it is clear what if any enforcement action will be taken, the EIRs are not available. Given the understandably microscopic percentage of actions that are even potential criminal matters, and the small percentage that result in any substantial civil action, members of the FDA bar believe that the delay in availability is not justified, but merely reflects differences of enforcement orientation between FDA regional offices and Washington.¹²⁹ The delay seems

¹²⁷Nonetheless, it seems hard to understand why such reports are not automatically sent to at least the company's CEO, an easy step that could make a big difference in large companies that are always open to the danger that a local or unit manager might try to "work out" problems without risking trouble from superior officers.

¹²⁸If proceedings are brought to suspend or prohibit, that is a matter of public record. But when such proceedings are only under consideration, the privacy concern, let alone the enforcement concerns, are overriding—and within the report itself, there is no opportunity to rebut.

¹²⁹Consider:

<u>Drugs—category of Action</u>	<u>FY 1992</u>	<u>FY 1993</u>
Inspections	3,882	3,846
Adverse Findings	1,974 (54%)	2,242 (58%)
Warning Letters	373 (10%)	501 (13%)
Seizures	43	32
Recalls	524	326
Prosecutions	32	21
Injunctions	7	6
<u>Devices—Category of Action</u>	<u>FY 1992</u>	<u>FY 1993</u>
Inspections	3,120	3,278
Adverse Findings	1,564 (50%)	1,825 (56%)
Warning Letters	547 (18%)	542 (17%)

more puzzling because the substance of the EIR surely is revealed to the company itself in the 483 at the end of the inspection, and the 483 is available within three weeks via FOIA.¹³⁰ In any event, whether or not the delayed availability of the EIRs is justified, of course there is a major difference between making inspection reports available a year, say, after an inspection, or much earlier. In short, the less available are the formal 483s, the more EIRs are only "sort of" FOIA-available.¹³¹

A comparison of FDA inspection reports with bank exam reports shows dramatic differences in what such reports contain. But, even if there were no such differences, the consequences of public disclosure of negative official views of a bank—views, it must always be remembered, that are the "raw" observations, un rebutted, of on-the-scene examiners and their immediate superiors, written with the goal of pressing bank management to make changes—would have negative impacts not only on the examined bank, but on other banks, firms and individuals.

V. Changes in Public Information About Banks

Starting two years before FOIA was enacted, changes in both law and practice have brought into the public domain financial information about banks to an extent that, in an earlier era, was inconceivable. By 1976, Citicorp's chairman wrote that "since...1969, the amount of space in [our] annual report devoted to financial disclosure has multiplied five times."¹³²

The first of the four main changes came in 1964. Amendments to the Securities Exchange Act amendments included for the first-time requirements for routine, regulated disclosure to investors and potential investors, by all banks or bank holding companies with at least \$1,000,000 in assets and 500 or more

(..continued)

Seizures	45	29
Recalls	456	463
Prosecutions	1	3
Injunctions	8	6

Inspections, "Violative" Firms Both Rise as Warning Letters Fall, DICKINSON'S FDA REVIEW, 1 (June 1994).

¹³⁰It is worth distinguishing between the 483 itself (which does not contain any comments by superiors), and the cover page attached by the inspector's superior, stating the superior's recommendation as to what (if any) official action is called for. Understandably, the inspected companies would like to see this, and equally understandably, the recommendation falls squarely within exemptions (5) and (7). For speeding up FOIA availability, perhaps the 483 without the cover page should be immediately available.

¹³¹Recently it was learned that 34% of FDA "warning letters" (sent after an inspection that finds problems requiring at least that enforcement step), were not FOIA-available although supposed to be. New internal monitoring has begun to end that problem. Dickinson's FDA Review, 1 (June 1994).

¹³²William I. Spencer, *The Problems of Bank Disclosure*, THE WASH. POST, Feb. 25, 1976, A15.

stockholders (originally, 750 stockholders). This is examined more fully below, in Section A.

The second change, which was in 1975, involved the near-bankruptcy of New York City. Major banks for the first-time released information about the composition of their municipal bond portfolios.

Starting in the mid-1970's, the bank agencies published quarterly "peer group" data comparisons, making it possible for regulators, bankers and anyone else interested to evaluate a bank's strength and performance compared to institutions that are "peers" because of their comparable size and location (or in the case of multi-nationals, their market). For one example of how revealing such data are, see how they foretold the failure of the Bank of New England, §VIII. Gradually, more and more banks have included peer-group comparisons in their own reporting to shareholders. Such data are digested and disseminated by an army of securities analysts and by firms that specialize in analyzing and publishing all available bank data, not merely for investors but also for large depositors who go to great lengths to stay apprised of the soundness of the banks they use. Thanks to deposit insurance, small depositors have little need for such publications, but they are readily available. For a fuller picture of such comparative data, Appendix 1 presents excerpts from one of the leading firms that assembles and publishes all available data.

Since 1991's FDICIA established new capital requirements, every bank draws unprecedented attention in its disclosures to the amounts and composition of its capital.

Some who would amend [8] seek to increase public information about banks, which they believe is inadequate. In addition or independently, others seek to increase public awareness of regulators' supervision of banks in order to increase regulatory accountability. The first concern can be satisfied by seeing how much information about banks is readily available. The second concern can be satisfied by considering (a) how well regulatory performance can be inferred and evaluated from the already available public information about banks' safety and soundness, and (b) how much better that purpose is served by use of systematic information rather than by such episodic and variable information as exam reports and similar materials. As for bank and regulatory performance on matters other than safety and soundness, we have targeted additional public information, like the special reports on compliance with the Community Reinvestment Act, see Section III-C.

The best way to convey how full the information available on banks now is, and how that fullness has grown and grown, is to list the changes in the annual reports of Citicorp, our largest bank, since 30 years ago. Although that bank's reports are not totally typical of all banks, they are typical of the large banks and, more to the point, they were no more or less typical 30 years ago—so their

change demonstrates concretely what has happened to bank disclosure. See Appendix 2.

On every insured bank, a quarterly "Uniform Bank Performance Reports" is available (in paper or computer tape, at low cost), giving not only 13 pages of FDIC data on the bank but also comparing those data to the bank's "peer group."

There are 25 such groups for commercial banks and four for savings banks, differentiated by asset size and region; for each group, there is a report on averages (about 310 pages) and on distribution by percentiles (about 390 pages). Also, separate state-by-state reports are available on both averages and distributions. All these reports cover at least the latest quarter and the year-earlier quarter, and the prior five year-end periods.

Consider the differences between episodic disclosure, such as by release of exam reports, and in the alternative systematic disclosure—standardized, routinized, generally applicable and reliable for comparisons—as under securities disclosure requirements or under the bank agencies' quarterly publications on "peer groups," giving several hundred data items for several score different groups of banks, clustered by asset size and location.

Exam reports

- a. one-bank
- b. episodic even
- c. focused largely on criticism of matters needing correction
- d. judgment calls, with little or no response from bank (often there is response, but in later correspondence, not in exam report)
- e. possible errors not only in judgment but even in facts
- f. "raw" info, maybe reviewed closely, but unscreened for public consumption
- g. varies by examiners, by their supervisors, and by level of openness of bank's representatives

Systematic disclosure

- a. peer-group comparison
- b. *all* key aspects; and within single bank routinely released, so far less likely to be misunderstood or sought and used for one-time self-serving purposes
- c. just facts, Sgt. Friday
- d. just facts, Sgt. Friday
- e. inevitably some typos, rarely worse
- f. required by law or GAAP, and all data fully screened for comprehensibility
- g. uniform

Our securities disclosure requirements (or any standardized disclosure) are the product of collective design and experience, aimed at producing reliable, comparable information for public consumption. In contrast, reliance on single-bank data may be unsound for public evaluation of even that single bank, even if one assumes counter-factually that there are no material differences between examiners, e.g., in level of experience, or thoroughness, or relationship with bank management. The bank may have problems that are its own or its region's or the result of external economic factors; or from one year to another, there may be large differences in a bank's situation; or an exam report done at the bottom of an economic cycle may be very different from another bank's exam only months earlier or later. Even a full-scope exam in one bank may concentrate on aspects different from another full-scope exam (even when the banks are of the same size and CAMEL rating and in the same region), since exams are "risk focused," i.e., exams are not designed for balanced coverage but rather concentrate on problems that surfaced in previous exams or other monitoring. And as mentioned so often, the exam report and any follow-up correspondence are written not for public consumption but to accomplish what the supervisors believe must be said to assure that bank management understands clearly the steps that the agency believes needed to enhance or maintain the bank's level of soundness.

And what of examiners' working papers, what of copies of bank records that become part of the exam records? If exam reports are "raw" information, as the agencies insist, how shall we label such pre-report materials—or more to the point, will they too be available under FOIA, unless found, after record-by-record analysis.

The short of it is that today, there is a veritable Mississippi of standardized data routinely flowing to the public in direct, mandated periodic releases by banks, as well as from reports banks periodically file with the agencies—all compiled and arrayed for comparability and easy use, by a number of private data services, such as Sheshunoff and SNL Securities.

A. Securities Disclosure Requirements

In 1964, amendments to the Securities Exchange Act ended, for banks and bank holding companies with at least \$1,000,000 in assets and 500 stockholders, the 30-year-old exemption of banks from the disclosure regime applicable to other corporations.¹³³ As a result, securities disclosure requirements cover 80% of all bank assets, though that covers only 616 of the 8,518 bank holding companies and independent banks; and covers 64% of the assets of all non-mutual thrifts

¹³³§12(i), 15 USC §781(i).

(49% of all thrifts), held by 440 of the 458 non-mutual thrifts.¹³⁴ Others familiar with banking agree with my sense that the above proportions of assets covered seems lower than we believe to be accurate, but one can say only that we're certain of this much coverage, and it may be even higher.

However, while the SEC directly regulates disclosure by bank or thrift holding companies, non-holding-company depositories are regulated by the primary supervisory agency. Those agencies both administer the requirements and are responsible for promulgating regulations "substantially similar" to those promulgated by the SEC.¹³⁵

Clearly beyond the scope of this paper are such questions as whether the time has come for non-mutual thrifts or small institutions to be covered by securities disclosure requirements; and whether the responsibility for administering disclosure requirements should continue to be divided between the SEC and the bank agencies. Thanks to the thorough 1992 study just cited, ACUS has already given full attention to those questions.

Three other questions are pertinent here. First, as to the "covered" banks, do the securities disclosure requirements suffice, as written and implemented, or would FOIA-availability of supervisory agency documents about those banks serve as a constructive addition? Second, in particular, is the securities disclosure requirement that all material information be made public being satisfied when it comes to statements and informal actions by bank supervisory agencies, e.g., criticism in an exam report or informal recommendations of corrective steps? Third, so long as some banks are not covered by securities disclosure requirements, should agency records on at least those institutions be FOIA-available?

Clear away that last question first. While perhaps some would argue that the non-covered banks constitute a stronger case for FOIA-availability, several reasons cut against that. First, the very fact that these are the smallest institutions makes regulatory performance here inevitably quite secondary to the responsibilities at larger institutions.¹³⁶ Second, the nature of such small banks

¹³⁴SNL Securities, *Bank Securities Monthly*, March 1994, 8; and *Monthly Market Report*, April 1994, 11. These are the figures for all publicly traded banks and thrifts, including ones listed only in the "pink sheets." Thus the figures on precisely what proportions are covered by securities disclosure requirements may differ, but would increase the figures for all that are actively enough traded to be included here.

Data on the proportions of banks and thrifts covered appear to be completely unknown at the SEC, the supervising agencies, or at other secondary sources.

¹³⁵"This requirement does not apply if the agencies publish...findings and reasons...that implementation of such regulations '[is] not necessary or appropriate in the public interest or for the protection of investors,'" Michael P. Malloy, *Administration of the Securities Exchange Act of 1974 by the Federal Bank Regulatory Agencies*, Report for ACUS (Apr. 1992), at 4.

¹³⁶This is my own view, based on numerous discussions with informed people. Some agency officials and some others have expressed disagreement, even great dismay, at the suggestion that a little

sharply heightens privacy concerns about release of exam reports or similar records, whether the information is about bank customers or bank personnel. Finally, it would seem anomalous to exempt such banks from standardized disclosure, but make them vulnerable to public availability of information that remains confidential for other banks. So we can put aside the non-covered banks, and focus on the covered ones.

As for whether FOIA-availability would be a constructive addition to the securities disclosure regime, we should start out noting the substantial basis for querying whether those agencies "are adequately fulfilling their responsibilities under" the Securities Exchange Act.¹³⁷ Professor Michael P. Malloy concluded that "the system is not...working."¹³⁸ Put aside aspects like those agencies' "inordinate delay" in promulgating "substantially similar" regulations (as much as five to seven years [!]).¹³⁹ Pertinent to our study is Malloy's finding of—

a degree of institutional bias against the disclosure approach to regulation...may still be evident in each agency taken as an institutional whole. It is almost a truism of federal bank regulatory law and lore that the regulatory style is one that relies on the confidential resolution of supervisory and enforcement problems, almost to the exclusion of public disclosure....¹⁴⁰

Although Malloy noted that "the federal bank regulatory system, in certain selective areas, is beginning to rely increasingly on the principle of public disclosure,"¹⁴¹ there are recent plain indications that the preference for confidentiality may prevail even when it makes little or no sense. Under 1991's FDICIA amendment adding §38 to the Federal Deposit Insurance Act, five capitalization categories were established ("prompt corrective action"): well capitalized, adequately capitalized, undercapitalized, significantly undercapitalized and critically undercapitalized. Each bank agency was responsible for regulations defining those categories. FDICIA also established risk-related deposit insurance, with assessments based in substantial part on the capitalization category.¹⁴² Which of the five capitalization categories a bank falls

(.continued)

bank might not get as much attention—even, of course, proportionate to asset size—as a large bank. I cannot help believing that any sound priority-setting, any sound allocation of limited priorities, must attend more to whatever might cause the most trouble.

¹³⁷Michael P. Malloy, *Administration of the Securities Exchange Act of 1974 by the Federal Bank Regulatory Agencies*, Report for ACUS, p. 2.

¹³⁸*Id.* at 34.

¹³⁹*Id.* at 35 and 29-32.

¹⁴⁰*Id.* at 37.

¹⁴¹*Id.* at 39.

¹⁴² FDICIA §302.

in is obvious from data that are fully disclosed. Both that category and the insurance assessment rate are clearly material information and are in fact routinely disclosed in securities disclosure materials. Yet the regulations make the assessment rates exempt from disclosure under FOIA, and prohibit disclosures of capital categories. And the regulations further provide: "Unless permitted by the OTS or otherwise required by law, no savings association may state in any advertisement or promotional material its capital category...."¹⁴³ There may be justification for barring use in advertising of information that is routinely available in securities disclosures; but the regulations go further against disclosure, indeed, go so far that they seem unrealistic and understandably not honored in practice.

Such recent indication of discomfort with disclosure only reinforces the bank agencies' long-standing reputation for devotion to confidentiality. As suggested above, that perspective raises concern about whether the supervisors' views of a bank (when those views may not have reached such formal status as an enforceable written agreement, which must be published) are deemed material information that must be disclosed, as often as should occur. A former thrift regulator, leading practitioner C. Thomas Long, poses the problem:

This concern is exacerbated when one considers that one of the most important influences in the success or failure of a financial institution is the regulatory environment in which it operates (including the impact of particular regulations or supervisory pronouncements on its activities and its ability to comply with those requirements). The tension between disclosure to security holders of all material information on the one hand and the need to maintain in confidence bank supervisory material on the other is made all the more severe when one realizes that the two policies provide negative feedback from a business viewpoint: thus, the worse the impact of an event (regulatory or otherwise) on the financial condition or results of operation, or viability of an issuer of securities, the greater the need for a prompt disclosure to shareholders; on the other hand, the more adverse the information about a bank, the greater the likelihood the adverse information will cause a run or otherwise affect the viability of the institution before regulators can take action to correct it.... This schizophrenic approach to bank regulation and disclosure obligations persists

¹⁴³12 CFR §§327.3(i) and 325.101(e)(FDIC); 12 CFR Part 565.1(e)(OTS).

to this day, and indeed, can be said to be worse than at any other time.¹⁴⁴

A recent example of "regulatory materiality" is the SEC's pending administrative proceeding against Bank of Boston for misstating or improperly omitting such material facts as these: An OCC examination in late 1988 noted that the bank's real estate loan portfolio had deteriorated, and in follow-up correspondence, OCC said that the levels of criticized assets were unsatisfactorily high; in early 1989, OCC conducted a targeted exam of the loan portfolio, then recommended corrective steps in the bank's system for evaluating loan risk; and as a result, the bank did take steps that had a material unfavorable impact on the bank's condition and earnings. Yet the bank's discussion and analysis in its disclosure documents used "language almost identical to that contained" in earlier reports, a "mechanical repetition [that] was materially misleading."

Assume, just for the purpose of this Report, that the Bank of Boston example is a typical situation in which there should be more disclosure of supervisory views or steps that don't reach the formal level triggering required disclosure by the agency.¹⁴⁵ Should the fuller disclosure be via FOIA? If our interest is in "prompt disclosure to stockholders," then FOIA seems too fortuitous, the better answer seems to clarify, amplify and/or better administer the standard of materiality. The Bank of Boston situation presses obvious questions: does the standard need change? Is there a need for more effective sharing of bank supervisory information with the SEC, and/or the need perhaps to reconsider whether the bank agencies' supervisory responsibilities are inconsistent with their being primarily responsible for securities disclosure on non-holding company banks? However one answers those questions, relying on FOIA to serve the stockholders' interest would be inefficient and often would not serve at all.

What of the value of FOIA disclosure of such material information to add accountability? Here too FOIA seems too fortuitous. The better answer would be

¹⁴⁴CAPITAL FORMATION BY BANKS, THRIFTS, AND THEIR CORPORATE AFFILIATES, 2 (1993).

Query whether the need for early disclosure is not substantially reduced by the "prompt corrective action" provisions of FDICIA §131, FDIA §38, e.g. prohibiting capital distributions or payment of fees to controlling persons, or restricting asset growth or affiliate transactions. See the seven-page listing of such provisions in Keith R. Fisher, *Mergers and Acquisitions of Banks and Savings Institutions* (1993), at 3:141-147.

Query too how much banks differ from many other regulated firms in terms of the potential for significant "regulatory materiality." E.g., with a public utility, there is also a strong case for full disclosure of the views of both federal and state regulators.

¹⁴⁵Such an assumption leads at once into line-drawing problems that show the difficulties opened up by treating the supervisors' non-formal steps as "material facts." If a bank's loan portfolio is sub-standard and an examiner says so, is that a material fact requiring timely public disclosure?

Such difficulties need not be resolved here, since deciding issues of securities law goes beyond the scope of this report, and since my whole point is that even if such facts should be disclosed, FOIA is not the appropriate disclosure vehicle.

to amend the FIRREA requirement for monthly publication of "any written agreement or other written statement for which a violation may be enforced."¹⁴⁶ If the bank agencies were directly responsible for publishing "any supervisory information that is not otherwise public and is material to the bank's condition or operations," we would get either from the banks' securities disclosures, or from the agencies, all the needed information—and if not, and if foreseeable problems surface later, then the burden would be on the agency to show that it had not fallen down.

VI. Bank Exam Reports in the Courts

A. FOIA cases involving [8]

The paucity of decisions about [8] stems in part from the thoroughness, clarity and dispositiveness of the first two appellate decisions. The 21 cases on [8] are listed at the end of this section.

In the watershed decision, the D.C. Circuit interpreted [8] as a broad barrier.¹⁴⁷ The case arose from a FOIA request by Consumers Union for documents relating to banks' compliance with the Truth in Lending Act, after it appeared that examination of New England banks had revealed significant noncompliance. The Comptroller of the Currency denied the request, resting on [8] among other exemptions; but the court decision turned on [8]. The court, after noting that FOIA exemptions are construed narrowly, found "that the documents in issue fit precisely and exactly within the statutory definition."¹⁴⁸ Answering plaintiff's argument that Congress' purpose was only to ensure the security of financial institutions, the court found that the disclosure sought implicated just that purpose as well as Congress's secondary purpose, to safeguard the relationship between banks and their supervising agencies. Further, the court found no evidence that Congress intended a limit on [8]; and that in the course of Congress' 1976 FOIA amendment process, the House Committee had considered whether [8] should apply to Truth in Lending compliance records and concluded expressly that the question needed to be "studied further."¹⁴⁹ In closing, the court noted plaintiff's argument that the result "runs counter to the spirit of the FOIA and to the need for full implementation of credit practices fair to consumers;" noted "suggestions that exemption [8] is both overbroad and

¹⁴⁶See paragraph preceding text at note 28 above. The agencies have discretion to determine that publication would be contrary to the public interest.

¹⁴⁷Consumers Union of U.S. v. Heimann, 589 F.2d 531 (1978).

¹⁴⁸*Id.* at 533.

¹⁴⁹*Id.* at 535.

superfluous" [citing commentators]; but ended with the lower court's conclusion that "[i]f this is an unfortunate result, recourse is to the Congress..."¹⁵⁰

The *Consumers Union* decision gained force from the reluctant separate concurrence by Judge Skelly Wright, reaching the same result although he found questionable what the majority "casts as inevitable and obviously correct." However, he went on that "the matter is...in serious need of legislative attention" for four reasons: the exemption was "somewhat inconsistent with the philosophy behind FOIA;" the tradition of confidentiality was irrelevant; there were reasons to discount fear of damage to the bank-regulator relationship; and Truth in Lending compliance would be retarded.¹⁵¹

The second key decision came one year later, after District Judge Richey had held [8] inapplicable to closed banks—"Congress could not have intended bank records to be forever sealed."¹⁵² Judges Robb, Mikva and Gesell reversed per curiam.

The exemption was drawn to protect not simply each individual bank but the integrity of financial institutions as an industry.... [L]iquidation may leave a trail of legal controversies.... In view of these practical exigencies, frank cooperation between bank officials and the FDIC is needed. Financial examination into all loans and banking relationships takes place as the agency searches for the causes of the closed bank's distress and negotiates to protect the interests of depositors and borrowers. Congress may be presumed to have been aware that records of these activities require the same protection as that afforded to the FDIC's dealings with open banks under the exemption.¹⁵³

Subsequent decisions about [8] can, with two exceptions, simply be listed, see below at end of this section. The first exception is exemplary rather than important in itself: in an unpublished decision, Judge Oberdorfer upheld a FOIA denial by the FDIC, based on [8], although he found "a bit broad" the agency interpretation that the documents were "related to" exam reports.¹⁵⁴

The last notable decision is one by the D.C. Circuit in 1991, again involving a denial based on [8] and again sustaining the denial.¹⁵⁵ The issues here turned

¹⁵⁰At 535.

¹⁵¹At 535, 541.

¹⁵²*Gregory v. FDIC*, 470 F.Supp. 1329, 1333 (D.D.C. 1979), *rev'd*, 631 F.2d 896 (D.C. Cir. 1980).

¹⁵³*Id.*, at 898-9.

¹⁵⁴*Sharp v. FDIC*, 2 GOV'T DISCLOSURE SERV. ¶81,107 (D.D.C. 1980).

¹⁵⁵*Public Citizen v. Farm Credit Admin.*, 938 F.2d 290 (D.C. Cir. 1991).

on whether the National Consumer Cooperative Bank was a "financial institution" for purposes of [8], and whether the Farm Credit Administration was "an agency responsible for the regulation or supervision of financial institutions." The NCCB had been created by Congress to provide credit to nonprofit cooperatives; it received no deposits. The FCA annually reported to Congress on its credit examinations of the NCCB, but had no authority to regulate or supervise it. Public Citizen sought access to such reports.

Rejecting Public Citizen's argument that [8] reflected a concern that disclosure of exam reports could "undermine public confidence and cause unwarranted runs on banks," the court relied on its 1978 and 1979 precedents that Congress's purpose was not so limited. Further, the court noted that NCCB was authorized to issue notes, bonds and debentures and borrow in the financial markets. Since the FCA exam reports "discuss the quality of the NCCB's loans, internal controls, and management practice and structure," these "frank evaluations... may undermine public confidence and investment in the NCCB.... These potential consequences of disclosure may also strain the cooperation... that is essential to the examination process."¹⁵⁶

In short, the cases have established that [8] has at least these purposes:

- 1) To protect against undermining the confidence of depositors.
- 2) To protect against undermining the confidence of investors.
- 3) To achieve those protections not merely for individual banks, but for the industry.
- 4) To protect against undermining cooperation and candor between banks and the examiners and regulators.

A fifth purpose is plain from other relevant sources that go back long before FOIA: the protection of confidential information relating to bank customers. See the statutes of 1913, 1978 and 1982, above Section III.A.

All Cases About [8]

The main ones:

- Consumers Union v. Heimann, 589 F.2d 531 (D.C. Cir. 1978).
- Gregory v. FDIC, 631 F.2d 896 (D.C. Cir. 1980).
- Public Citizen v. Farm Credit Admin., 938 F.2d 290 (D.C. Cir. 1991).
- Sharp v. FDIC, 2 Govt. Disclos. Svc. ¶81,107 (D.D.C. 1980).

Other cases:

- Feinberg v. Hibernia Corp., 1993 WL 8620 (E.D.La.).
- In re Sunrise Securities Litigation, 109 B.R. 658 (E.D.Pa. 1990).

¹⁵⁶*Id.* at 293.

- Tripati v. US DOJ, 1990 US Dist. LEXIS 6249 (D.D.C.).
- Jackson v. First Fed. Sav. of Arkansas, 709 F.Supp. 887 (E.D. Ark. 1989).
- FRB v. Teichgraeber, 1988 WL 188328, 1989 WL 32183 (D.Kan.).
- Mermelstein v. SEC, 629 F.Supp. 672 (D.D.C. 1986).
- Fagot v. FDIC, 584 F.Supp. 1168 (D.P.R. 1984)(bank director and counsel sues FDIC for invasion of privacy and seeks disclosure of documents concerning his work as counsel; summary judgment for defense).
- Dannhausen v. First Nat. Bank of Sturgeon Bay, 538 F.Supp. 551, (E.D. Wis. 1982).
- Atkinson v. FDIC, 1 G.D.S. ¶80,034 (D.D.C. 1980).
- McCullough v. FDIC, 1 G.D.S. ¶80,194 (D.D.C. 1980).
- Kaye v. Burns, 411 F.Supp. 807 (S.D.N.Y. 1976)(denying plaintiff's attorney's fees because withholding disclosure had a reasonable basis).
- M.A. Schapiro v. SEC, 339 F.Supp. 467 (D.D.C. 1972).
- Unpublished and not in LEXIS or WESTLAW but listed in DOJ, Freedom of Information Act Guide & Privacy Act Overview (Sept. 1992), 218-20:Consumers Union v. OCC (D.D.C., March 11, 1980); Folger v. Conover (E.D. Ky., Oct. 25, 1983); Goldberg v. DOJ (C.D. Cal., June 26, 1978); Goldberg v. US (C.D. Cal., June 10, 1976); Wachtel v. OTS (M.D. Tenn., Nov. 20, 1990).*

B. Non-FOIA Cases, Involving Discovery of Exam Reports

Another relevant source is worth fuller examination. This is the line of non-FOIA litigations of many types, in which discovery efforts are made to secure exam reports or exam information. As stated in the most significant recent such case, "the courts have long recognized that the report of a bank examiner is protected by a qualified privilege."¹⁵⁷ This 1992 D.C. Circuit decision involved a subpoena by plaintiffs in a shareholder class action against a bank holding company, for exam reports and related material. The trial court had ordered production, saying "I wouldn't turn these over if [the agencies] didn't give it [sic] to the banks.... Everybody has it at the bank, except the shareholders."¹⁵⁸ The court of appeals' reversal noted that the bank examination privilege is not absolute but rather a balancing of such factors as relevance, need, and "the

¹⁵⁷*Fleet Financial, supra* n. 15, at 633, citing a 1939 D.C. Circuit decision, which itself referred back to a 1912 opinion of the Attorney General and to 1913 testimony by the Comptroller of the Currency in a House hearing, *see above* at n. 20.

¹⁵⁸*Id.* at 632-3, 635.

possibility of future timidity by government employees who will be forced to recognize that their secrets are violable."¹⁵⁹

While discovery requests are understandably less frequent than FOIA requests, here too the agencies have governing regulations.¹⁶⁰ For example, the FDIC authorizes its general counsel to produce exempt records in response to subpoenas or court orders so long as the general counsel believes the necessary protection of confidentiality is assured.¹⁶¹

Although the agencies often resist disclosure efforts to secure exam information in the course of litigation—claiming an official information privilege—their record of success here is not as complete as in the FOIA cases.¹⁶² Just as many of these discovery cases often cite FOIA exemption [8] simply as statutory recognition of the interests in confidentiality of exam information,¹⁶³ the similarities and differences between the discovery situation and FOIA are illuminating. Indeed, the author believes that these differences add persuasively to the case against amending [8].

First, in all instances¹⁶⁴ in which discovery of exam information is ordered, protective orders are entered so that the disclosure is controlled as to who has access and what use can be made of the information.

The parties...have entered into a confidentiality agreement, endorsed by the court...stipulating *non-party* shall be used solely for that information designated as confidential by any party or purposes of the litigation and not disclosed to others, and that any confidential information filed with the court shall be under seal.¹⁶⁵

As one court put it in ordering production of some of the OCC documents sought: "These reports are relevant...and, with the implementation of

¹⁵⁹*Id.* at 634, quoting Judge Weinstein, *Franklin Nat'l Bank*, *supra* n. 16, at 583.

¹⁶⁰"In 1991, over 75 subpoenas and administrative requests, including requests and subpoenas associated with shareholders' derivative suits, were filed with the (Federal Reserve) Board's General Counsel." Affidavit of Vice Chairman David W. Mullins, Jr., In re: Subpoena Duces Tecum Served on the Board of Governors, Misc. Docket No. 92-0365, *Schreiber v. Society for Savings Bancorp.* (D.Conn. Case No. H-90-48), at 7.

¹⁶¹12 CFR §309.6(c)(8). See also the OCC's, 12 CFR §4.19; the FRB's, 12 CFR §261.14; and OTS's, 12 CFR _____.

¹⁶²See, e.g., *Principe v. Crossland Savings*, 1993 WL 249122 (E.D.N.Y.); *Denny v. Carey*, 78 F.R.D. 370 (E.D. Pa. 1978); *Franklin Nat. Bank*, *supra* n. 15.

¹⁶³See, e.g., *Franklin Nat. Bank*, *supra* n. 16, at 580; *Hartigan v. FHLBB*, 746 F.2d 1300 (7th Cir. 1984); *Matter of Verrazzano Towers*, 7 B.R. 648, 651 (Bankr. Ct. E.D.N.Y. 1980).

"Exemption from [FOIA], however, does not create independently any evidentiary privilege...." *Denny v. Carey*, 78 F.R.D. 370 (E.D. Pa. 1978).

¹⁶⁴I have found no instance that is even implicitly contrary.

¹⁶⁵*Walsh v. Chittenden Corp.*, 799 F.Supp. 405, 409 (D.Vt. 1992).

protective measures, production will not be inimical to the public interest."¹⁶⁶ A magistrate stressed the point:

The documents...shall be held under seal pending further order.... Counsel for the parties and for the Comptroller shall attempt in good faith to agree upon a suitable protective order.... It should be emphasized that the undersigned is not authorizing the public disclosure of these documents.¹⁶⁷

Second, in discovery situations there has been an adjudicated finding of a specific need for production, even rising to "the paramount interest of the Government in having justice done between litigants".¹⁶⁸ In ordering production in a securities litigation over a major bank failure, Judge Weinstein said this:

Accurate judicial factfinding is [a] predominant [interest]. This factor is powerful in a [securities litigation] situation like that presented here, where no satisfactory alternative source of information exists.... The pendency of criminal proceedings...underscores the indispensability of the Examination Report's account of the past; the principal figures in that prosecution assert their Fifth Amendment privilege against testifying. The Examination Reports thus offer an essential alternative eyewitness view. The information in the reports is relevant to numerous issues in the litigation; the litigant's claim of need is concrete, not abstract.

The judge then gave examples, at length, of that need and relevance.¹⁶⁹ Similarly, another court ordered production of examination information about particular loans (in an action against former officers and directors for mismanagement because of large losses), because the court found the exam reports "extremely relevant" as "one of the key issues in the litigation is how a reasonable person would have assessed the condition of the bank's energy portfolio..."¹⁷⁰

Third, redaction may be necessary before producing information in discovery situations. But the fact that litigation is under way, often involving the agency as a party, assures a full focus on just what is to be redacted, and assures

¹⁶⁶*Provident National Bank*, *supra* n. 12, at 210. See also, e.g., *Franklin Nat. Bank*, *supra* n. 16, at 589.

The protective order in *In re Sunrise Securities Litigation*, 109 B.R. 658, 667 (E.D. Pa. 1990) gave a large role to the FHLBB's judgment as to what documents required treatment as confidential.

¹⁶⁷*Delozier v. First Nat'l Bank of Gatlinburg*, 113 F.R.D. 522, 526-7 (E.D. Tenn. 1986).

¹⁶⁸*Fleet*, *supra* n. 15, at 634, quoting precedents.

¹⁶⁹*Franklin Nat'l Bank*, *supra* n. 16, at 586-7.

¹⁷⁰*Seafirst Corp. v. Jenkins*, 644 F.Supp. 1160, 1162 (W.D. Wash. 1986).

also that the burden of redaction is imposed for what a court has found to be appropriate needs.

Last, consider the impact of the possibility of disclosure on how examiners write reports in the first place. To the extent that reports would be available under FOIA, the author agrees with the agency arguments that most examiners, most of the time, will be far less likely to write what one District Judge described as "candid opinions, good or bad, correct or incorrect."¹⁷¹ Instead, exam reports will be written with acute awareness that any report (even batches of reports) may be drawn into the public domain by someone acting entirely on her or his own. In contrast, disclosure in discovery is (1) rare; (2) does not occur until the agency has been heard in court; (3) occurs only because a court has found a need that outweighs the need for confidentiality; and (4) is subject to protective orders.

Thus, the disclosure situation is distinguishable from the FOIA situation in ways that strongly support [8].

VII. Bank Examinations Go Public: Three Episodes

On three occasions the author has found, bank exam reports became public, twice by court clerks' errors and once by a leak to *The Washington Post*.

The first two are not documented; they can be quickly told. One involved a Federal Reserve exam report produced, pursuant to order, in District Court in Philadelphia.¹⁷² Despite a protective order limiting access, inadvertently the court clerk's office gave the report, upon request, to a Philadelphia Inquirer reporter. The report was about the First Pennsylvania Bank, for a number of years the subject of considerable public interest, and so the report—although it was at least four years old—drew major local coverage. There were no notable consequences. (To document this would require going to the Philadelphia Inquirer files in Philadelphia.)

The second episode involved a small national bank in Alaska in 1980 or 1981. A recent exam report produced under seal was inadvertently placed with other documents available to the public, was found there by a reporter, and here too, drew major local coverage. Again the bank was one about which concerns were widespread, and although a run was feared, no notable consequences ensued. (Whether a trip to Alaska would find relevant files is unknown.)

In contrast, the last episode, in 1976, apparently resulted from a deliberate leak to the *Washington Post* of the latest (1975) exam reports on Citibank and Chase Manhattan, as well as at least one Federal Reserve Board memo about Chase (reprinted in full). The flavor and some of the detail of the Chase report

¹⁷¹US v. Provident National Bank, *supra* n. 12, at 210.

¹⁷²Denny v. Carey, *supra* n. 158, 159.

has been noted above, see Section II.A. The Washington Post banner-headlined story was followed up by more stories (e.g., on Kuwaiti and Japanese deposits) and editorials; vehement statements from OCC, the Federal Reserve Board, the banks, etc.; and Senate and House hearings.

Citicorp stock, the day after the Post's first story, was the most active issue on the NYSE; after opening down 1 3/8, it closed down 1/2, at 29 7/8. Chase closed down 1/2 at 27 1/2, having opened down 7/8. Both banks reported "no particular problem...no unusual withdrawals by depositors, and no difficulty in raising funds in the money market at the favorable rates usually accorded...."¹⁷³ The only subsequent events (apart from much editorializing, and letters, pro and con) were two: (1) the leak or misappropriation was investigated by the agencies and referred to DOJ Criminal Division; and (2) after a House Government Operations subcommittee voted to subpoena reports from the OCC, the full Committee rejected the request "for the first time in the chairman's memory," perhaps in part because the agencies had, for the first time, agreed to a GAO audit.¹⁷⁴

VIII. Other Matters

A. Should CAMEL Ratings Be Disclosable?

Substantial parts of the argument against disclosing exam reports are that the reports include a) information and evaluations of loans, i.e. about borrowers and b) opinion, often quite subjective, about any (even all) aspects of the bank. Thus, the argument goes, non-disclosure for one thing protects privacy interests of third parties and of bank personnel, and for another avoids inhibiting examiners from writing reports that say what they believe needs saying.

But exam reports have what may at first blush seem an apparently totally objective final bottom line, the single-digit composite CAMEL rating, or the five single-digit numbers for each of the five CAMEL components: Capital adequacy, Asset quality, Management/administration, Earnings and Liquidity.¹⁷⁵ Each component and the composite gets a 1-5 rating, 1 being highest. The CAMEL is not merely the summing-up of the exam report for communication to the bank,

¹⁷³Hobart Rowen, *Senate Banking Quiz Set*, WASH. POST, Jan. 13, 1976, pp. 1, A6.

¹⁷⁴The investigation is noted by Deputy Comptroller Bloom, Hearings, *supra* n. 23, at 16. For the decision against issuing a subpoena, see C. Babcock, *Panel Rejects Subpoena of Data on Two Banks*, WASH. POST, Mar. 26, 1976, A2.

¹⁷⁵The banks' boards receive only the composite rating.

For fuller statement of the factors that comprise each component, see OCC Examining Circular 159, Dec. 10, 1979 and the attached Uniform Financial institutions Rating System. And for bank holding companies, the Fed uses BOPEC: Bank subsidiaries, Other subsidiaries, Parent company, Earnings, Capital. The last two are on a consolidated basis.

but is central in bank supervision. With respect to each specific bank, the rating helps determine the frequency of future examinations and the intensity of off-site monitoring. With respect to the industry generally, the ratings are a clear and constant indication of overall health, valuable not only to the supervisors themselves but to anyone concerned about such matters.

“Management,” obviously, reflects much less objective evaluation and factors than the other four components, but there is a spectrum of degrees of objectivity even among those other four: most objective is the earnings component, with the liquidity less objective, the capital still less objective because it may be so effected by the least objective component—asset quality, which includes evaluations of not only the terms and payment status of many loans but also of many borrowers’ financial condition, the quality of collateral, etc. Bank rating services’ quarterly reports, using routinely available data, do present CAMEL-type bottom-lines for each of the components other than “management,” on (from one of those services) 10,833 banks, 1,668 thrifts and 609 savings banks.¹⁷⁶ However, those estimates clearly may diverge from the agencies’ actual ratings.

The fact that the rating for “Management” is not a measurable or objective figure although stated as a simple number—and that three other components are somewhere between the objectivity of Earnings and the non-objectivity of the “Management” rating—is only a minor argument against disclosing any or all of the CAMEL, considering the weightier arguments toward that same conclusion.

The first reason against disclosure is that so much of the information is already publicly available, so little would be added. But what would be added—here consider just disclosure of the regulators’ view of the bank’s management—is the next argument against disclosure: Bank managements already care mightily about their CAMEL rating, even though it isn’t public and cannot lawfully be disclosed, precisely because it is the bottom line that stands out in their board of directors’ review of the exam report.¹⁷⁷ If the CAMEL becomes public, the bank would have that much more incentive to push, on every arguable or marginal rating, for the better number (if the ratings are public, could the banks use them in advertising?); and worse, the regulators would have to take into account that a low rating may exacerbate a bank’s problems—even a mere lowering from prior ratings might do so. As with any categorical rating, inevitably many situations are marginal. In such situations, surely we want the regulators to come down finally with the rating they believe most conducive to preserving and promoting

¹⁷⁶See Appendix 1 for excerpts from Sheshunoff Bank Quarterly. All institutions it reports on are federally insured.

¹⁷⁷For recent appeals of CAMEL ratings to the OCC’s new ombudsman, see n. 188 below.

safety and soundness, without any concern about the fact that the rating itself might cause outsiders to overreact to a negative, or less positive, rating.

Easily, then, one concludes it would be counter-productive to make CAMEL ratings FOIA-available, given how little would be added by disclosing the ratings, and how likely disclosure would be to work against a key goal of disclosure, probably *the* key goal—promoting vigorous regulatory action to protect the public interest.

But isn't there a valid public interest in knowing how regulators view a bank? At least investors have an interest in knowing such information; all members of the public stand to gain if we encourage banks to compete for favorable regulatory evaluations; and the regulators themselves will have a new incentive to eschew evaluations any more optimistic than publicly-known data warrant. Such reports would be something like the new reports for disclosing banks' Community Reinvestment Act compliance.¹⁷⁸ Having a separate report for public dissemination reduces the likelihood of any gilding or "genteeling" of exam reports to make them fit for public consumption. But here again, I come out (though there is nothing I less like to admit) for the status quo. First, there is an important distinction from the CRA situation: There is a direct and lively local community interest in information about CRA performance, and therefore the disclosure has a genuine audience and good likelihood of promoting better performance. Second, we already have a method for making public material information, including any material change in bank regulators' evaluations: SEC disclosure. If we want more disclosure of such evaluations, the most direct method would seem to be adjusting the definition of "material" to make sure it picks up whatever we want disclosed, as noted in §V.A, above. (Recall that we already require monthly publication, by the regulators, of all formal enforcement actions.¹⁷⁹)

B. Agency Records Other Than Exam Reports

Clear as I find the case against FOIA-availability of exam reports, the diversity of other types of records makes generalization, and thus any conclusion, more difficult. For such records—from exam follow-up correspondence with specific banks to general studies or memoranda (some of which, but not all, may draw on data from exam reports)—the agencies may invoke [8] with a frequency or readiness that reflects their long-standing reservations about the value of disclosure. As noted above in discussing bank agency administration of securities

¹⁷⁸ See §III.C. above.

¹⁷⁹ See paragraph preceding text at n. 28 above.

disclosure requirements, few if any observers view these agencies as disclosure-oriented.

But we face two questions: How to decide whether, when [8] is invoked to withhold records other than exam reports and similar material, the invocation was correct; or, more to the point, how to decide whether [8] is used relatively often or relatively rarely to withhold records of a type that other agencies would disclose? Second, even if [8] were invoked more than is proper, how do we draft the amendment of [8] that would cut back some protection but preserve it where it is needed?

Appended to this report is a letter from one FOIA requester, former Congressional aide Jake Lewis, who believed that his request for a study was improperly denied. Assume *arguendo* that he was right: of course a single matter doesn't make the case for amendment. Rather, one would need a review of a substantial sample of records on which FOIA requests had been denied. Assume that I, or I and a member of the ACUS Committee or staff, were to undertake such a review, would we be able to form a judgment about the four agencies' FOIA administration that would be clear enough and defensible enough to advance the dialog, let alone to make the case for or against amendment?

When substantive categorizing seems unmanageable, administrative lawyers naturally turn to procedural devices. That is why requests that have been denied may be appealed within the agency. In fact, about one-third of the denials based on [8] are appealed, and over two-thirds of those appeals are successful (see Appendix 3). If the availability of appeals is deemed insufficient, perhaps the agencies might follow OCC's lead in having an ombudsman,¹⁸⁰ and OCC's ombudsman and any others might be authorized to handle not only "appeals" from regulated institutions, but also from FOIA requesters and other citizens.

C. What of Closed Banks?

It is imperative to avoid the error of hindsight in considering the closed-bank situation. There is no sign over any bank that X years later, it will close—which means that exchanges will be inhibited in many, many more banks than will in fact ever close. In addition, it is especially when closing is imminent or has occurred that there is particular need for candid communication from bank personnel, for four reasons: sound wind-up of that bank's affairs; sale of the bank and/or its assets at prices and a pace that protect the deposit insurance fund; possible civil litigation over the failure; and possible enforcement actions against some of the bank personnel.

¹⁸⁰See n. 188 below.

Braverman and Chetwynd, quoted below (§X.A), note the overlap between [8] and exemption (4) but conclude that closed-bank information needs protection

to promote cooperation between the failing bank and its supervising agency at a time when the need for candor and cooperation is particularly acute and in recognition of the sensitivity that data relating to a closed bank may have in the context of the bank's liquidation and the legal controversies that may clothe the bank's demise.¹⁸¹

Another twist usually overlooked in thinking about closed banks is that often three agencies are involved: for national banks, OCC and FDIC and, if the bank is large, the Fed and the relevant Reserve Bank because of potential lending to the bank from the discount window; for state member banks, the state agency, FDIC and again, possibly the Fed and Reserve Bank. The exchanges among those agencies are separable from exam reports themselves, but largely inseparable from the information in exam reports. Perhaps exemption (5) would apply to some of those exchanges; certainly there is value in protecting candid exchanges in such situations, sometimes crisis-laden, always delicate. And certainly the notion that the closed-bank setting is a simple one, for which [8] is unneeded or even inappropriate, seems wrong.

Of course a bank's being closed eliminated many of the reasons underlying [8]. By no means does it eliminate all. Florida's new statute may well help us reconsider the closed-bank situation, but it is too new to help now. And last, the best reasons for getting disclosure about closures have led to the new safeguard treated in the next section.

In our Committee discussions, one member said that there is no reason to fear that disclosure of reports of failed banks will cause the report to be written more gently for public consumption, because the examiners' obvious incentives are to be tough. I agree with that, as far as it goes. But that misses three crucial matters.

First, examiners and supervisors engaged in coping with a problem bank, which by definition may well fail, seem bound to be affected by the fact that their report will be public if failure occurs. Thus, they have no incentive to "genteel" anything, but what of their incentive to show how tough they were? Problem bank situations present terribly difficult judgment calls, i.e., how much to toughen, how much to forbear, where if anywhere to be flexible. Even if potential release would not inhibit examiners' calling the shots as they see them, surely it would cause more measured, slower action just when the need is most acute for best judgment decided and stated quickly.

¹⁸¹*Id.* at 482.

Numerous major banks, healthy today, like Maryland National, Midlantic and Shawmut, survive because the supervisors made the right calls in such situations. Given the terrible difficulty of such situations; given the fact that every notable failure is the subject of public reports by IGs; given GAO's particularistic oversight on such situations—given all that, is there enough gain in making public the exam reports themselves? The gain must be great enough to justify risking some failures that may occur because the impending public disclosure may add, in the time-constrained cauldron of tough calls, unprecedented concern among the regulators about c.y.a.

Second, people unfamiliar with exam reports may not appreciate all of what is meant by calling the reports "raw information." Examiners occasionally make mistakes, sometimes improperly and unfairly faulting persons or practices. (One concise, simple, clear example of error: I have seen a report that faulted a bank for holding funds in a money market mutual fund, because—the report said—that fund might be volatile. That examiner thought all types of mutual funds were the same; and this was several years ago, before the devilish derivatives fell upon us; and the fund in question was as solid as money market funds get.) Any banking lawyer can give striking examples of errors in reports.

If failed banks' reports were released, simple fairness (and perhaps due process) would seem to require that any such reports may be accompanied by a response from the bank/bank officials. At present, such responses are written for agency-eyes-only; much redaction would likely be needed. And if there are such responses, won't they be written with an eye toward future litigation, not only with the agencies but with private suits? (And if the agency wanted to spend the resources, could it respond to the response?) Last, remember that often three agencies are involved when a bank is on the brink—which surely compounds these problems.

Third, many agency lawsuits after a bank failure are settled, with the bank and/or its officials more willing to settle because they prefer to keep some of the facts out of the public eye. If the reports are going to be made public automatically, there will be less incentive to settle. Is the FOIA gain worth the public's loss in quicker and perhaps better settlements that are sought to benefit the public?

Florida's new statute may well help us reconsider the closed-bank situation, but it is too new to help now. And last, the best reasons for getting disclosure about closures have led to the new safeguards treated in the next section.

IX. New Safeguard Against Regulatory Laxness: Review by IGs

Since 1993, if a depository institution fails and causes a material loss to a deposit insurance fund, the inspector general of the relevant regulatory agency must review the agency's supervision to 1) ascertain why the failure resulted in a material loss to the fund, 2) make recommendations for preventing such losses in the future, and 3) make its report public.¹⁸² Two such reports have been done, one on a FRB-supervised bank that failed the day after this requirement became effective, the second a "Pilot Loss Review" by the Treasury Department's IG on a thrift that had failed in 1991. In addition, this section considers the learning from earlier bank failures.

This section aims at two questions. First, given the information newly available in such IG reports, what do we learn about whether failures and losses might have been avoided or reduced if there had been public access to the exam reports or other materials? Second, how well does the new IG report process work to reveal regulatory flaws that may have contributed to the failures? A major basis for the advocacy of amending [8] has been that public disclosure will operate to improve examination and supervision: the public would be able to point to regulatory laxness or breakdowns, whether it be supervisors who fail to follow up on problems found by examiners, or inadequate examination in the first place. Of course the advocates' goal is not to discover where to point with blame, but rather to encourage regulators to do more to prevent problems.

Although it is not within this report's task to evaluate the new IG review process itself, some such comments may be needed and in any event are inevitable. Both IG Reports include responses, and concurrence—and in the case of the FRB, some disagreement—from the relevant officials. Both agencies had already taken, or are taking, corrective steps. (On a few lesser matters, differences between the FRB IG and FRB staff were left unresolved, which is immaterial if the FRB's follow-up is as expected.)

The 1993 bank failure was caused by a major criminal fraud by an investment adviser to the bank, evading detection by full-scope and also properly targeted exams as well as off-site monitoring by Reserve Bank and Colorado examiners; Price Waterhouse also missed the fraud, as did many other customers of the perpetrators. The IG found the level of supervision appropriate though it faulted the examiners for failing to identify "weakness in the bank's internal

¹⁸²FDICIA (the Federal Deposit Insurance Corporation Improvement Act of 1991) §131, adding a new section, "Prompt Corrective Action," §38(k), effective for material losses occurring on or after July 1, 1993. A deposit insurance fund loss is "material" if it exceeds the greater of \$25,000,000 or 2% of the institution's assets when assistance began. §38(k)(2)(B).

controls,” going on to stress that “because of the nature of the fraud, there is no guarantee that it would have been uncovered even if our recommendations had been in place prior to [the] failure.”¹⁸³

I see no way in which simple public disclosure of either the exam report or any other documents noted by the IG, would have helped, even marginally, to avoid the loss or improve regulation. (However, if bank-regulatory disclosure requirements included public reporting on two points that seem worthy of such disclosure, that might have helped in this situation and certainly might prevent recurrences. This point is treated below in my fuller comment on that situation and that IG report.)

As for the 1991 thrift failure, “FHLBB could have been more proactive in its supervision.... Specifically, FHLBB examiners should have identified and curbed [the] poor lending practices.... Such identification would have permitted FHLBB to initiate enforcement actions sooner than actually occurred.”¹⁸⁴ This thrift’s failure was a classic of its era: high concentration in high-yield, high-risk construction and real estate loans; a board dominated by a real estate developer; rocket-like growth from its 1981 beginning with \$3 million in assets, to \$1.4 billion in 1989; income primarily from loan origination fees; deposits that as early as 1982 were over 80% in high-rate jumbos. Last, “FHLBB examiners were ill-prepared and overwhelmed by the sophistication of new lending and investment schemes. There was also a shortage of skilled examiners as low salaries and a growing industry drained the available pool of talent to supervise the increasing number of problem thrifts.”¹⁸⁵

Here too, I see no way in which fuller public disclosure of bank agency documents would have helped. It is crucial to note that just before this thrift’s explosive growth peaked, it became publicly traded. Thus, not only were the key data that would have shown trouble—concentration of assets, sources of income, cost of deposits—readily available to any member of the public, but there was substantial incentive for members of the public to monitor the thrift’s health. (If any of the key data were not available, that is a flaw in SEC requirements that calls for correction directly, not via FOIA.) In fact, the thrift’s stock price alone signaled the trouble. The initial offering was in August 1986, at \$9 per share; the failure occurred in March 1991. Consider the clear message from these stock prices for County Federal Savings Bank, Santa Barbara:

¹⁸³FRB Office of IG, Report on the Failure of Jefferson Bank & Trust, opening letter to Chairman Greenspan (December 1993). The estimated loss to FDIC: \$41 million.

¹⁸⁴Treasury Dept. Office of IG, Pilot Material Loss Review Under FDICIA: County Federal Savings Bank, Santa Barbara, Calif., letter to OTS Acting Director, 2 (March 1994). RTC estimated the loss at \$176 million.

¹⁸⁵*Id.* at 20.

<u>Date</u>	<u>Price</u>
Year-end 1986	\$6.00
Year-end 1987	\$4.75
September 30, 1988	\$4.00
Year-end 1988	\$2.75
September 30, 1989	\$3.875
Year-end 1989	\$1.875
September 30, 1990	\$0.75
Year-end 1990	\$0.50.

Further, the IG's finding that the supervision and examination should have been better than they were, warrants only two comments. First, as noted above, this failure was a classic of that awful era. Second, as the IG concluded, "The many supervisory policy and procedural improvements made since these two deficiencies occurred should prevent their recurrence."¹⁸⁶

Even if the reader agrees that in those two situations, FOIA would not have helped at all, the reader may be concerned about the sufficiency of the IG review process. That is, how well does this change in our legal structure buttress the efficacy of regulation? I believe the new "Prompt Corrective Action" requirement of IG review does reduce the case for amending [8]; and since I have had to examine the IG Reports, a few further comments seem appropriate even if I risk going beyond my task. Comment may be brief indeed on the Treasury IG's Report, given that it evaluated a failure caused by problems that were terrible but on which the barn door has been rebuilt. To the above, one can add only the conclusory view that the IG's Report is exemplary in its thoroughness and pointedness.

The Report on the 1993 bank failure, also exemplary in thoroughness and pointedness, seems understandably more notable. Before specifying the regulatory weaknesses to which the FRB's IG pointed, let me stress that the IG's conclusion seems unassailable: the fraud might have succeeded even without these weaknesses. Nonetheless, the flaws allowed "weak controls over [the bank's] investment and trading activities" to "create an environment that [the perpetrators] were able to exploit."¹⁸⁷ First, the flaws above and beyond the particular exam: 1) The concentration of assets involved in the trading account were "well above supervisory policy limitations," one of several "examiner red flags" as the IG called them,¹⁸⁸ one that should have cried for supervisory intervention; 2) The Board's Commercial Bank Examination Manual was obsolete in that it failed to make clear that trading accounts needed as full

¹⁸⁶Report, *supra* n. 3, at 2.

¹⁸⁷*Id.* at 78.

¹⁸⁸*Id.* at 16.

examination and safeguards as investment accounts; 3) Reserve Banks could cut back on examination steps set forth in the Manual; 4) This Reserve Bank had eliminated steps not pertinent "to a majority of the banks." But the Bank, its examiners, and even the IG, failed to see that however sound a generally-applicable cut-back might be, steps unnecessary at most banks might be crucial at banks that differed from the majority; 5) Reflecting an attitude and approach rather than flawed policy or process, when asked why there had been no follow-up inquiry into the bank's high dependence on trading profits for its earnings, "the examiner replied that...she was looking at the securities gains from an earnings perspective, i.e., how the bank's earnings were improving and how the securities were contributing to that improvement, rather than from a trading perspective."¹⁸⁹ One would think that it would be no news to anyone remotely involved in finance, that trading profits today may be trading losses tomorrow; yet even the FRB staff's response to the IG seems to believe that since the trading involved U.S. Government securities, there was little (or at least less) danger. Last, coming to the specific exam, there were serious flaws but Price Waterhouse's audit suffered similarly (it was a limited-scope audit, but that does not exonerate for these flaws).

(The failure might have been avoided, or minimized, if bank-regulatory or SEC disclosure requirements included public reporting of two points that seem worthy of such disclosure, and which might have helped in this situation, and which certainly might prevent recurrences. Specifically, the bank had a board audit committee chaired by an employee of the outside investment advisory firm responsible for the large activity that turned out to be fraudulent; the bank had no other internal auditing.¹⁹⁰ Second, the activity that turned out to be fraudulent

¹⁸⁹*Id.* at 63-64. As noted earlier, the IG reports included responses from agency staff. One of the FRB staff response's points was that this item had nothing to do with the bank's failure, and involved only the unwinding of a repo.

¹⁹⁰FDICIA requires audit committees comprised of directors independent of management; for banks with more than \$3 billion in assets, the audit committee members must have relevant expertise and cannot be large customers of the institution. Query whether "customers" is defined broadly enough to keep audit committees free of persons like the trouble-maker here.

There is an obviously strong case for public disclosure of loans to, and also "related interests" of, banks' key personnel. At present, public disclosure is required for loans in amounts greater than \$500,000 or 5% of the bank's capital (whichever is less) extended to executive officers and 10% stockholders, but that does not cover non-loan "related interests," 12 CFR 215.11(b). In addition, banks must keep non-public records of extensions of credit to directors, executive officers, and 10% shareholders, §215.8. In addition are the SEC proxy rules.

The above requirements may be too narrow to meet the obviously strong case for disclosure: apparently there is no public disclosure requirement indicating, e.g., in the case of key directors, what other relationships they have with the bank. But the answer, even more obviously, seems not to lie in resort to FOIA, but rather in amending the disclosure regulations to provide uniform disclosure assuring uniform treatment and therefore comparability, thus the greatest likelihood of reducing problematic conduct.

involved 29% of the bank's assets, a concentration the IG deemed "well above the supervisory policy limitations."¹⁹¹)

Summing up, the new FDICIA requirement of IG review holds promise, well borne out by the first two IG Reports. And going by the situations covered in these Reports, it seems that FOIA disclosure of exam reports and related documents would do nothing to reveal regulatory inefficacy or laxness.

However, two "buts...." First, "[b]ut review by IGs isn't as independent as is needed for this kind of matter." That is a reasonable view, since every effort to assure accountability has some strengths and weaknesses. Consider FOIA availability: a) How much would availability of exam reports improve oversight of bank regulators—how much would fortuitous disclosure of situation-specific details add, given all the data already available on banks, data more objective than any exam report on just how well the bank is faring vis-à-vis its peers? b) Would there be enough improvement to outweigh the problems that come with making the reports publicly available? Though the IG review seems to me a clear step forward, I would agree with anyone who argues that it does not suffice. But as I see it, if there is to be additional oversight—and surely there is a strong case for more than after-the-failure analysis of what went wrong—it requires something like an advisory committee bringing a mix of expert, systematic and independent review, rather than the fortuitous and episodic.¹⁹²

Second, "[b]ut two IG reviews are surely too little basis for any general judgment." Undeniably—indeed, the GAO entitled a 1991 report, *Bank Supervision: OCC's Supervision of the Bank of New England was Not Timely or Forceful*.¹⁹³ It is sadly true, not only about one bank or one agency, that bank

¹⁹¹*Id.* at 18. Here again, there may well be a case for requiring disclosure of, e.g., concentrations above (say) 20% of assets, but again, that seems not at all as susceptible to revision by changing FOIA, but rather calls for consideration of changing regulations on routine disclosure.

¹⁹²An outstanding recent advance was the Comptroller's 1993 appointment of an Ombudsman reporting directly to the Comptroller and empowered to supersede—with the Comptroller's consent—any agency decision or action in appealable matters. In 18 appeals filed by banks, they have won six full successes (e.g., two up-gradings of CAMEL, two up-gradings of CRA ratings) and two partial successes. OCC, Appeals Process, 13 Quarterly J. 61 (March 1994), and up-date from Rosa Koppel, OCC Litigation Division Assistant Director, July 21, 1994.

Certainly ACUS and any administrative law academic applauds the creation of such an office, and it detracts nothing from that applause to note that this step forward is almost entirely different from the kinds of steps sought by proponents of FOIA availability to make the process more open and more accountable to concerns of affected persons other than banks. A 1994 statutory provision requires each Federal banking agency to appoint an ombudsman. Pub. L. 103-325.

¹⁹³Report GAO/GGD-91-128, to the Chairman, Senate Banking Committee, September 1991. As recently as February 1993, GAO released critical reports on Bank Examination Quality at each of the four agencies, e.g., OCC Examinations Do Not Fully Assess Bank Safety and Soundness. The reports are summarized in *Bank and Thrift Regulation: Improvements Needed in Examination Quality and Regulatory Structure*, GAO/AFMD-93-15. My experience with GAO reports, specifically on bank regulation since about 20 years ago as well as more generally, keeps me from regarding such reports as gospel. Recalling my work on bank regulation years ago, including work with Senator Proxmire's and

regulation (not merely examination) in the 1980's was not admirable, a tale that needs no re-run here. But our question is what light those situations throw on whether FOIA availability would help. I submit that the answer to that comes from the facts that the public already has more than enough data on banks to be on notice that X bank is sliding or in trouble. Consider the following on Bank of New England, which failed in January 1991:

Stock Prices (closing bids)	Real estate loans (% of assets)	Const. & Dev. loans (% of assets)
	<u>...as percents of same at peer banks...</u>	
	end-1984: 48%	end-1984: 72%
	1985: 60%	1985: 90%
end-1986: \$32.75	1986: 8%	1986: 124%
1987: 25	1987: 155%	1987: 149%
1988: 22	1988: 155%	1988: 190%
Q3, 1989: 20.75		
end-1989: 9.38	1989: 27%	1989: 208%
Q1, 1990: 4.63		
Q2, 1990: 3.13		
Q3, 1990: 1.63		
Q4, 1990: 0.69	1990: 148%	1990: 248%

Comparative data like those fill 14 small-print pages, but no one needs anything more than the last two columns to know—and be warned—how much farther than comparable banks BNE went into real estate loans, particularly into the riskiest type of such loans. No more information was needed to explain the stock price slide, i.e., that BNE had made a bet on real estate dramatically different from peer banks, and if New England real estate turned down, BNE might well too.

Such comparative data are available on all banks, and in addition SEC disclosure requirements apply to all banks that have above \$1,000,000 in assets and 500 stockholders. (See Section V.B.) Those data on Bank of New England

(.continued)

Congressman Reuss's Banking Committees (including testifying before Proxmire on a GAO study of bank examination), I cannot help reading with total *deja vu*—to GAO's credit—their 1993 studies' emphasis that "the foundation of the supervisory process is anticipatory supervision, requiring a thorough knowledge of the bank's policies, procedures, practices and controls.... [E]xaminers did not comprehensively review controls at 13 of the 14 large banks sampled or at 6 of the 7 small banks...." Report GAO/AFMD-93-14, at 3. "[R]egulators thoroughly reviewed internal controls for only 1 of the 58 bank and thrift examinations it reviewed." Report GAO/AFMD-93-15, at 5.

Assuming one concluded that GAO was more right than wrong and that bank examination still suffers from the severe flaw of underemphasizing banks' control systems, I can only repeat the point in text above: if any help from outside the agencies is sought, it should be "expert and systematic" as well as independent.

are here to exemplify the objective, unarguable information already public, giving more than enough to alert the public so they may protect themselves and so they may hold the regulators' feet to the fire. And as much as public disclosure can serve as an incentive for vigorous regulation, it already is in place on all banks and thrifts of any size. Whatever the reasons some bank may fall from health, the regulators already know that their performance is on public view every time.

Let us turn from the handful of four failures noted above to a sample studied in *An Evaluation of the Factors Contributing to the Failure of [171] National Banks* by OCC in 1988, covering also 51 rehabilitated banks that went through similar circumstances as well as 38 banks healthy throughout the same period. The study has one finding that may be surprising and certainly is illuminating. Its main findings are unsurprising. At the failures, examiners had found: 1) nearly 60% had uninformed or inattentive boards, compounded by over-aggressiveness at 80%; 2) CEOs "clearly lacked the capability, experience or integrity necessary," at 63%; 3) insider abuse was significant at 35%; and 4) 73% operated in significantly depressed economic conditions, another 15% in marginally depressed conditions. In short, internal rot and external storms can be fatal.

That study's illuminating finding—at first perhaps surprising, but not after a moment's reflection—stems from the fact that OCC had taken administrative action against almost identical proportions of the failures and the rehabilitated banks.

	<u>Failures</u>	<u>Rehabilitated</u>
Memorandum of understanding	14%	12%
Formal agreement	46%	47%
Cease and desist order	75%	69%

But 59% of the failures were guilty of unacceptable degrees of compliance with the administrative action, compared to 14% of the rehabilitated banks. Only 6% of the failures complied acceptably, compared to 45% of the rehabs. This differential in response to forceful supervision offers two lessons. The first lesson is relevant to banks and regulation, but not our purposes: internal rot in the midst of external trouble is not easy to turn around.

But the second lesson seems important for our project: some banks in trouble will go down, some can be brought back by a combination of internal resilience and supervisory vigor. How would the potential for rehabilitation be impacted by public disclosure of examiners' negative reports? I can see no reasons to believe that publicity would increase the likelihood of rehabilitation, and several reasons to believe that it would hurt.

By no means does this leave the public shielded from the facts about banks in trouble. Rather, the public gets not merely signals but all the information it needs, thanks to a) the securities laws' routine, full, systematic and objective

disclosure system; and b) monthly publication of all supervisory written agreements, cease and desist orders, and other immediately enforceable supervisory actions.¹⁹⁴ What the public does not have are exam reports and follow-up correspondence, materials that are almost entirely the mere “raw” findings and judgments of the examiner on the scene and her immediate supervisor, materials written with the aim of pressing bank management to make changes. Once again, I submit that making such documents public will either damage the banks, their personnel, their borrowers—and other banks, etc.—or in order to avoid such damage, the documents will be written differently with the inescapable consequence that the agency will find it harder to convey to the bank the facts and the judgments that they most need to be told, forcefully.

We have episodes showing how well any interested persons know of problems at specific banks. As Congressman Jim Leach said in hearings only days after The Bank of New England failure,

everybody in the industry knew [it] was bordering on insolvency. I mean everybody. Without listing the name of the bank, even the statistics your agency puts out indicated that in all probability this bank would have to be dealt with.¹⁹⁵

Or 20 years ago, when The Washington Post front-paged exam reports on Citibank and Chase Manhattan that had been leaked, John Kenneth Galbraith wrote that “streetside information” had led him to write, before the Post stories, an almost identical article—“I had not the slightest thought that I was being original.”¹⁹⁶

X. Should [8] be Repealed or Amended? If it Were, How Much Difference Would That Make?

A. Scholarly Commentary

Commentary on [8] has been brief indeed: Two comments in passing, the year after enactment, by Kenneth Davis and a student note; and two more in current treatises on disclosure.

¹⁹⁴The appropriate bank agency is to publish monthly any written enforcement agreement, statement, or final order, unless the agency finds publication “contrary to the public interest.” 12 USC §1818(u), P.L. 101-647 (1990).

¹⁹⁵Hearing, House Committee on Banking, Finance and Urban Affairs, Jan. 9, 1991, at 49.

¹⁹⁶*Supra*, n. 13.

The inimitable Davis treatment:

We must be extremely careful or the facts about financial institutions might become known! We want the public to know the truth about almost all our institutions, but not about our financial institutions! At least, so says Congress, and what it says is the law. What it says is also in keeping with banking tradition, although that tradition rests heavily on facts of a former day such as uninsured bank accounts and runs on banks. The law is clear, but I still wish the lobbyists for the banking agencies had been less effective.

My opinion is that Congress should not have provided that such a report is exempt from required disclosure. The other banking agencies are similarly maintaining systems of secret facts, secret law, and secret policy, and the eighth exemption will encourage such tendencies.

The eighth and ninth exemptions, about financial institutions and wells, respectively, are both broader than is necessary to accomplish their purposes.¹⁹⁷

And a Georgetown Law Journal note:

While this [narrow exemption...may have been a significant limitation in the version of the bill first introduced into Congress, the amendment of exemption (b) to include 'commercial or financial information' made this section superfluous.¹⁹⁸

"[A] superfluous holdover" is James T. O'Reilly's label for [8], as recently as last year:

The exemption may have outlived its usefulness as the bank and savings and loan problems of the late 1980s cost taxpayers billions of dollars. The actual condition of a financial institution would be highly relevant to consumer confidence, as all agree. Proponents of change argued the relevance is so great that disclosure represents a more appropriate balancing of the competing interests; with disclosure, better follow-up of inspectional observations will occur and greater confidence in bank regulatory agencies will be fostered. Opponents cited the

¹⁹⁷K.C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 801, 807 (1967).

¹⁹⁸Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO.L.J. 18, 50 (1967).

need for candor in frank evaluations of the bank conditions.... [C]hange at some future point will occur, for the erosion of public confidence in financial institutions has eroded any claim that special benefits to the public arise from the retention of this special interest exemption.¹⁹⁹

Similarly, Burt Braverman and Frances Chetwynd:

There is no doubt that Exemption 8 overlaps substantially with Exemption 4.... One explanation that has been offered is that initially Exemption 4 protected only trade secrets.... [I]t is important to note that [the final version] will not always overlap fully; there are circumstances under which information covered by Exemption 8 might not be protected by Exemption 4. For example, where disclosure of information concerning a closed bank is sought.... Thus, [Exemption 8] is not superfluous. Furthermore, the absence of congressional dissatisfaction with this overlap is at least suggested by the lack of revision...and the absence from any of the recently introduced bills...of any proposal that Exemption 8 be deleted.²⁰⁰

B. [8] in Relationship to Exemptions (4), (5), (6) and (7)

The issue those views pose is this: If [8] were gone, to what extent would exemptions (4), (5), (6) and (7) replace it as the basis for denying requests for documents presently covered by [8]?²⁰¹ It seems clear that most, or at least a great deal of the records currently covered by [8] would still be subject to withholding under other exemptions. Some would not: Closed-bank information would fall outside whatever coverage exemption (4) might provide for open-bank information; and information about compliance with such statutes as Truth in Lending and the Community Reinvestment Act might well fall outside any exemption other than [8].

¹⁹⁹FEDERAL INFORMATION DISCLOSURE (2d ed.), v. 2, pp. 18-3, 18-4 (1992).

²⁰⁰INFORMATION LAW, v. 1, 477-8 (1985).

²⁰¹Exemption (3) is not a likely basis, as shown by a change in agency position during FOIA's enactment, §III.B above. In 1963, the Treasury general counsel noted another statute in passing, repeated in a Treasury statement in 1964, to support the argument that Congress had recognized the importance of confidentiality for bank agency records, thus providing a basis for withholding bank agency records under exemption (3). But Treasury cited only the Federal Reports Act of 1942. In the subsequent stages of the legislative history, the reference was not repeated, nor was there any other reference to any other statutes. And that once-mentioned statutory provision is no longer law.

Consider first the information that would be substantially covered by other exemptions. If repeal of [8] resulted largely in simply shifting the basis for denying disclosure to other exemptions, two questions arise:

1. Would repeal be worth the effort? That depends on one's view of how valuable it would be to have publicly available whatever would not be covered by those other exemptions. Also, of course, repealing [8] might go beyond mere excision of the current exemption. Instead, there might be a new provision directing explicitly that certain categories of documents would no longer be exempt.

2. After [8]'s repeal, any records that would or might fall under the other exemptions most likely would involve record-by-record evaluation, instead of the current categorical blanketing by [8]. Administrative burden is, for those of us who are fundamentally pro-FOIA, not a strong argument.²⁰² However, it would be ostrich-like to ignore the balancing question: would the administrative burden imposed by repeal of [8] be justified by the extent to which more records would be available?

For me, the answer to that balancing is clearly negative.

Exemption (4) protects confidential commercial or financial information obtained from a person outside the Government, if disclosure would cause substantial competitive harm to the person who submitted the information to the Government.²⁰³ All banks and holding companies supervised by the federal banking agencies are required to submit to examination,²⁰⁴ so the substantial competitive harm test would apply to information secured from banks and used in exam reports or elsewhere. However, the need to prove substantial competitive harm would produce great uncertainty in the minds of bankers who are expected to be candid and forthcoming in dealing with agency examiners and supervisors. The banker and the official will not know during their exchanges (which are

²⁰²But see Scalia, n. 4 above: FOIA is "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost Benefit Analysis Ignored."

²⁰³National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test also protects commercial or financial information if disclosure would impair the government's ability to obtain such information in the future. That "impairment prong" of the test is not pertinent here, where the agencies have the power to require disclosure of the information. *Landfair v. Dept. of Army*, 645 F.Supp. 325, 328 (D.D.C. 1986). However, disclosure might be denied if the agency could show that disclosure might affect the reliability of the data secured by the government, *Washington Post Co. v. HHS*, 690 F.2d 252, 268-9 (D.C. Cir. 1982). For present purposes and for simplicity, I assume that the agencies could make no such showing. However, I expect that there might well be efforts at such a showing.

National Parks also protected information voluntarily submitted to the Government. As to such information, the *National Parks* test was recently modified in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993). Since bank information submitted in connection with exams is not voluntarily submitted, *Critical Mass* is not applicable.

²⁰⁴See 12 USC §§ 248(a), 325, 326, 481, 1464(d), 1467(c), 1756, 1820(b), 1844(c), 3102(b) and 3105(c).

usually largely oral) whether some future agency or Justice Department attorney would be able to prove a likelihood of substantial competitive harm should the information the official is seeking be requested under FOIA. Moreover, portions of the exam reports or other records may be found to be not commercial or financial in character, or particular information may be deemed too stale for protection under the substantial competitive harm test.

Exemption (5) also would protect at least parts of reports of examination and follow-up correspondence. Two problems arise. First, the distinction that often arises under this exemption, whereby "facts" are not exempt but "opinions" are, to protect the official deliberative process.²⁰⁵ Second, the District of Columbia Circuit recently held that reports of examination benefit from a qualified privilege that is separate and distinct from the deliberative process privilege (*In Re Subpoena Served upon Comptroller of the Currency*, 967 F.2d 630 (D.C. Cir. 1992), *Schreiber v. Society for Savings Corporation*, 11 F.3d 217 (D.C. Cir. 1993)). However, for this qualified privilege also, much is made of the distinction between privileged "opinion" and non-privileged "facts." Making the matter less clear, the D.C. Circuit pointed out in *In Re Subpoena* that the privilege protects (inter alia) communications between examiners and banks, 967 F.2d at 633-634, although those communications are largely factual. Thus the formulation of the privilege in *In re Subpoena* and, more forcefully, in *Schreiber* as not covering facts, leaves open serious questions about both the bank examination privilege and the deliberative process privilege for protecting exam reports under (5).

Of course exam reports are laden with facts gathered by the examiners. However, the agencies contend strongly that the facts marshaled in these reports reflect examiners' judgments as to what is and is not important in evaluating the bank, and whether particular supervisory action is necessary. The agencies contend—consistent with the principles set forth in *Montrose Chemical Corporation v. Train*, 491 F.2d 63 (D.C. Cir. 1974), and more recently in *Mapother v. Department of Justice*, Nos. 92-5261, 92-5262 (September 17, 1993)—that the "facts" marshaled in reports of examination and inspection are exempt under (5) on the basis of both the examination report privilege and the deliberative process privilege. The civil discovery decisions cited above, however, leave open the question whether this view will be accepted by the courts. (There is a far stronger case for ordering disclosure of exam reports in civil discovery situations than in FOIA, as discussed more fully in Section VI-B, dealing with such situations.) The D.C. Circuit has said "it is appropriate for the District Court to consider the possibilities of redaction and a protective order to

²⁰⁵For an example of the difficulty of that distinction, see the 7-5 split in *Wolfe v. Department of Health and Human Services*, 839 F.2d 768 (D.C. Cir. 1988)(en banc).

minimize any harm that might otherwise result from compelling disclosure of bank examination information." 967 F.2d at 634. Of course, protective orders are unavailable under FOIA.

Would (5) apply to the examiners' own work papers? And would (5)—or (4)—apply to copies of bank records, to notes about exchanges with bank personnel, etc., that become part of the examiners' records? With such documents, the task of item-by-item review looms even larger.

Last, (5) would apply—or certainly be the subject of strong arguments by the agencies—to exchanges between examiners and higher supervisory officials in the course of follow-up to examinations.

Exemption (6) might protect information regarding loans to individuals that are written up and criticized in particular reports of examination.²⁰⁶ In some situations, redaction might meet the privacy concern, but in many smaller bank situations, identification of the borrower would be possible from such facts as the loan's purpose or size or timing. Thus, redaction is at best an incomplete answer; further, it is bound to involve the burden not merely of redaction itself but of controversy and litigation over whether redaction suffices. X loan—that the regulatory judgment is particularly subject to question. Yet if this judgment is exempted from disclosure, much of the whole effort to use FOIA to increase accountability fails.

Exemption (7) protects information contained in records compiled for law enforcement purposes. Accordingly, (7) would apply if the examination might lead to an enforcement action. "Enforcement" would likely include a significant number, albeit a minor fraction, of all exams and follow-ups, since "enforcement" would include all the written agreements or statements that, under 1989's FIRREA, must be published by the agency, see Section III.A above. As noted in the discussion of FDA inspection reports (Section IV), long delays occur between the time an inspection is written up, if it recommends some enforcement action, and the time the enforcement decision is made; those delays have the result of greatly delaying FOIA-availability.

Even if all records currently covered by [8] were, after [8]'s repeal, still covered by some other exemption, reaching that result would involve record-by-record work diverting official and private resources from more productive FOIA administration, let alone other purposes. Not merely record-by-record review would be necessary: if [8] were repealed and all reliance placed on the other exemptions, we would lose [8]'s clarity, thus simplicity and efficiency. Few who are familiar with exemption (4) will claim clarity for it, and though the other exemptions are not as problematic as (4) they are not remotely as simple as [8].

²⁰⁶See the episode recounted by Virginia's Commissioner Bailey, §II.D above.

Moreover, whatever the extent of the overlap between [8] and other exemptions, it is fortuitous, whereas [8]'s enactment and its success in flatly repelling amendment efforts by a few Members of Congress, reflect a public policy that goes back over 100 years: the need to preserve the effectiveness of bank examination and related supervisory exchanges between banks and the agencies. Exemption (4) addresses only the commercial interest of the bank or holding company; (5) protects only the agency deliberative processes; (6) protects only parts of the exam reports and follow-up, significant as those parts are; (7) protects only the enforcement process. None of those exemptions protect the strong interest in preserving the unique supervisory process that has been in place so long because they have been deemed necessary in light of this industry's uniqueness.

Coming last to information now covered by [8] but which seems to fall outside the coverage of the other exemptions. As to closed banks, exemption (4) would not apply because no substantial competitive harm to a closed bank could ever be shown. Above in Section VIII.C is a brief statement of why, although the fact that a bank is closed utterly eliminates many of the concerns underlying [8], by no means does it eliminate all.

Another category of information covered by [8] but probably not by other exemptions is information about compliance with such statutes as Truth in Lending and the Community Reinvestment Act. Congress has shown, by recently rejecting the proposal to disclose exam reports on CRA compliance and instead requiring special new reports from exam information, that even when disclosure of exam report information is deemed desirable, making public the exam reports themselves is found undesirable.

We may close with James O'Reilly's point about the unprecedentedly huge, painful reasons for public concern about our financial institutions' soundness. Unquestionably correct, but it does not follow that making exam reports public would reduce the likelihood of future failures or losses or increase agency accountability, as I try to show at many points. Despite our severe suffering from problems in banks and thrifts, disclosure of exam reports is neither solution nor prevention.

XI. Conclusions and Recommendations

1. The gains from public availability of exam reports and similar information are marginal at best. Unlike earlier eras, the soundness and operating performance of depository institutions are the subject of mountains of data made publicly available pursuant to the requirements of regulatory and securities laws. Such data, the product of periodic and routine release, are

detailed and are comparable among peer institutions, thanks to an elaborate mesh of legal requirements and accounting and industry practices. Further, in addition to routine media coverage of the highlights of such data, a number of private firms provide a great variety of compilations and analyses of such data. Thus, 1) interested investors can secure more information than most prudent investors, even institutional ones, can digest; 2) large depositors (who have needs not shared by small, insured depositors) and others who may want fuller information than the media provide can secure analyses tailored for their use ; and 3) persons interested in appraising regulatory performance are well-armed, far better armed than they would be by the defiantly detailed and non-comparable single-bank information they would find in exam reports.

Of course exam reports contain factual information—as well as much else, as noted below—the release of which might in some instances unquestionably add, sometimes importantly, to the publicly available information. I have no doubt there are such instances. However, given the elaborate, sophisticated, constantly and widely monitored flow of financial data about banks, it is hard to believe that there will be many such instances, let alone many in which the newly available information would matter. Therefore, the possibility or even probability of FOIA-availability adding value, requires assuming that (a) sufficiently significant information will be released (b) sufficiently frequently, so as to outweigh (c) the significance and the frequency of the harms—more fully noted below—inescapable in a regime of routine availability. I see no basis for those assumptions, and thus no need for any balancing.

2. As for the gains that public availability of exam reports might bring by rendering examiners and supervisors more accountable. The case for more accountability is obvious, the question is whether this step would help. I believe it would not, for four reasons.

First, if exam reports were publicly available, they would be written differently.²⁰⁷ One cannot help being skeptical about whether the public would learn anything the bank agencies might prefer to withhold. Instead, the agencies would find new methods to communicate to banks what the agency officials believed the banks had to be told although it would be counterproductive to place the communication in the public domain. Thus, key information would remain beyond public reach—rightly, I believe—but bank supervision would be less efficient.

Second, to the extent that public awareness of bank-specific information helps hold regulators accountable for sound treatment of particular banks, surely

²⁰⁷In an ACUS Rulemaking Committee meeting, a committee member who is a high official of an agency whose inspection reports are FOIA-available, said the reports had become more “genteel.” See *above*, n. 114.

the thoroughness and volume of the bank-specific information that is already publicly available, enhances accountability. *Could* any more than marginal enhancement be added by FOIA-availability of exam reports?

Third, even if exam reports were not written at all differently after they were made publicly available, one must ask, "accountable for what?" Exam reports cannot reveal what regulators entirely miss, but only what they find. If the concern is that regulators fail to realize the significance of what they find, will the FOIA requesters be people who are likelier to understand the findings, and will the new public airing be timely enough to be useful? If the concern is that regulators realize the significance of what they find but fail to urge appropriate corrective steps or fail to act forcefully enough to assure corrective action, then the question of timeliness of the FOIA-requester's intervention is acute, even assuming that the regulatory failure is so clear that it would not withstand public disclosure. If the concern is that the general public should be able to get full information about a bank that failed or needed financial assistance, we come to the issue about availability of reports on failed, closed or aided banks. That issue is treated separately below, Conclusion 7.

Fourth, exam information is bank-specific. Much of the goal of accountability (perhaps even most) aims at the adequacy of the regulators' overall approach, systems and methods of implementation, and regulations and policies. How much more public awareness of such matters would flow from releasing exam reports? The author believes there would be more gain in accountability if the public gave more attention to—focusing only on examinations—such matters as these: what do examiners examine for; how often and with what personnel; what are the examiners' training, compensation and turnover; etc. For example, at risk of going beyond the author's mission in this report, an annual report from each agency detailing the facts on such questions, would enhance accountability with respect to examinations.

In short, FOIA-availability of exam reports will do little if anything to increase accountability, and there are other, far better, ways to increase it.

3. Any bank about which examination information is released faces several risks:

(a) The most familiar concern is "a run on the bank" by ordinary depositors. Although that fear is probably exaggerated, the fact remains that it is a real fear in the minds of the supervisors who produce exam reports, many bankers, and perhaps many depositors. Given the reality of that fear, given also the possibility that there might be an occasional run, and given the further possibility that a run precipitated by other events might be wrongly attributed to the release of exam information in an effort to deflect from the actual causes, the obvious question is

whether these concerns are outweighed by the gains from disclosure. I believe they are not.

(b) No attention has been given to the modern versions of that familiar concern. Usually, the concern takes the form, consciously or not, of imagining ordinary depositors lined up for withdrawals. Vastly different from that picture is today's reality. Aside from the depositors' view of a bank, its reputation is crucially important for its access to credit from other banks in the federal funds market. And for large banks, especially money-center and multinational banks, reputation even in remote foreign markets is crucially important. Such banks compete for large depositors, and deal with enormous number of wire transfers of enormous sums, much deposited only overnight, and with international capital flows—constant, instantaneous and often volatile. Huge proportions of those depositors instantly move deposits if a shadow of riskiness arises about a bank. Whatever one's view of old-fashioned local bank runs, there is an obvious and substantial cost to rendering large banks vulnerable to the surprises that might arise from FOIA-released exam reports.

(c) Bank examiners are more likely to raise questions about the unusual or innovative, than about the standard and familiar. That applies to both the kinds of transactions, and the kinds of management and systems, a bank may undertake. Whatever one's view of how much bankers innovate, any step that may inhibit innovativeness has a strike against it.

(d) A special risk inheres in FOIA-availability for exam reports, as distinct from other forms of disclosure of bank information. If public disclosure is mandated for all (or appropriate categories of) banks, then all data released are routine and uniform, therefore comparable. Consider the contrasts with releases under FOIA:

(1) There are bound to be differences among exam reports—not merely because of differences among regions and among examiners, but also precisely because exams of different banks, especially at different times, concentrate on different matters.

(2) The very *raison d'être* of exams is to focus on problems, obviously setting up a distortedly negative view for anyone unfamiliar with exam reports.

(3) Since banks are mightily affected by external economic facts of life, unroutinized, selective disclosure might in certain periods give a picture of weakness that in fact is not the fault of the particular bank, but rather shows that the bank has been doing its job: lending at what are normally prudent levels of risk.

(4) We cannot ignore the possibility that FOIA requesters of bank exam reports might include a few irresponsible journalists seeking sensation, and even worse, competitors or other persons seeking negative publicity about a bank for personal or financial gain or vindictiveness. The author, a true believer in FOIA,

can think of no other general area that presents so much reason for skepticism about the possible motivations for FOIA requests.

(e) It is not only the bank whose exam report is released that is at risk from such a release: banks are uniquely inter-dependent. See Section IV, contrasting banks and FDA-regulated firms.

4. For individuals and firms, privacy interests are at stake. Exam reports are not limited to financial information about the bank. Banks customarily have, and exam reports may give, detailed information about directors, officers, and managerial personnel; borrowers; and large depositors. The importance Congress has attached to privacy for bank customers is clear from the Right to Financial Privacy Act of 1978.

(a) Bank personnel have the obvious personal privacy interest in any revelation of financial information about them. In addition, examiners' standard operating procedure includes evaluating and commenting on the performance of bank personnel, from the board level down. Again, the personal privacy interest seems obvious.

(b) For prudent lending, banks need information about borrowers' finances and, often, character, reputation, etc. Such information is kept current; it is often more up-to-date than what may be publicly known about the particular borrower.

Exam reports often give considerable attention to particular loans. Of course it would be possible to redact names before furnishing an exam report to a FOIA requester. Other identifying information could also be redacted, but there are two problems: (i) Often a loan's very size, timing, terms or kind (e.g., construction loans or inventory loans) identify the borrower, especially if the bank-borrower relationship is known (as it very often is in the case of borrowers that are publicly held corporations), or if the bank operates in a small community or with a particular category of borrowers; and (ii) it follows from (i), that the redacting will involve burden and possible controversy.

It is not only the interests of borrowers that must be considered, since many borrowers secure loans from more than one bank. If an exam report on Bank A comments negatively on a loan outstanding to Borrower X, that has implications for every other bank (and there may be many) participating in the same loan.²⁰⁸

²⁰⁸This is not a minor or infrequent problem. The Federal Reserve staff comments explaining their opposition to Senator Wirth's proposal to require disclosure of exam reports on closed banks (see §III.C. above), included this:

...In most [exams], lengthy write-ups are included...; and the details of particular extensions of credit are fully set forth, including collateral positions, financial statements, and the prospects for collection.

In [this hypothetical], the examiner determines that a fully performing loan to a company, which is 30% owned by a bank director, shows some signs of deterioration, as well as documentation deficiencies, such as an outdated appraisal. The examiner

5. What of procedural protection for the borrowers, or bank personnel, or whoever might be the subject of negative comments in an exam report? That is, "reverse-FOIA" problems enter. Consider that (a) examiners have unlimited access to bank records, (b) the whole purpose of the examination is to produce candid evaluations, (c) many of the examiners' judgments are far from objective and (d) all of the examiners' comments are subject to response from the bank—let alone possible rebuttal by, say, a borrower. Given all that, if exam reports were simply available to FOIA requesters, we would encounter "reverse-FOIA" problems far more acute than all previous such problems.

6. The importance of preserving undiminished the cooperation and candor between bank personnel and examiners has been stressed since the first court decisions on [8], and as recently as 1992.²⁰⁹ Of course banks are required to submit to examination, and to respond fully. No less of course, there is a spectrum of degrees and shades of cooperation and candor. For examination efficiency, let alone its effectiveness, anyone advocating any step that might cool or cloud the working relationship bears a great burden of persuasion.

7. What of exam reports on closed banks? (Section VIII.C.) Whether in such cases there is less justification for preserving exam confidentiality was hotly controverted in the Senate in 1991 and 1992. The failure to pass an amendment seems sound, given (a) the chilling effect on the interplay between examiners and troubled banks that might occur if exam information were FOIA-available; and (b) the possible difficulties created for agency efforts to sell such banks' loans or the banks themselves. Disclosure of such reports was the goal of Senator Wirth's 1991-2 bills, see Section III.C.

Further, since 1991, substantial information on insured banks that failed is made public pursuant to FDICIA's requiring a special report by the primary agency's IG, see Section IX.

(..continued)

adversely classifies the loan as "Substandard," which is the least severe adverse loan classification, due to the slight potential for a loss associated with the loan.

The director's company operates nationwide and borrows from several others banks.... These loans are also performing satisfactorily.

The bank fails two years after the examiner classifies the bank's loan to its insider's related [company]. There is no relationship between the bank's failure and the insider's loan.

...Unfortunately, there is no nationwide database available...against which [to] check the status of all loans to the director's company. [Thus, w]ithout an intense, on-site scrutiny of every borrower whose loans may be included in a publicly released report...we simply cannot determine the effect of the public release on any open insured [bank]....

Memorandum of March 13, 1992 (in author's files).

²⁰⁹ See the D.C. Circuit's *Fleet Financial*, n. 15, at 633-4. This is not a FOIA case but one involving discovery in the course of private litigation; the pertinence of such cases is stated at §V.B.

8. Is [8] superfluous, or unjustifiable special treatment, given the availability of exemption [4]? As discussed in Section X:

(a) Exemptions (4), (5), (6) and (7) cover much but not all information that [8] covers.

(b) [8] is categorical, whereas those other exemptions will require record-by-record review. Also, [8] is clear and both bankers and officials are familiar with it, whereas the most pertinent other exemption, (4) is less clear, to say the least. As for the view that banks should not be more protected from disclosure than other private commercial firms, this proposition has powerful initial appeal, even more so after the disastrous problems and costs suffered because of unsound thrifts and banks.

Indeed, even without that disaster, the mere fact of federal deposit insurance and likelihood of ultimate taxpayer support establish the enormous public interest in banks' soundness.

However, the question is not whether there is a special, acute public interest in bank soundness...which is undeniable. The question is whether the public interest is served by making exam reports more publicly available.

Other private firms are not subjected to any regulatory supervision remotely like the bank examination process. As long as there is reason to continue this unique regulatory regime, there is also reason to protect the regime's efficiency and effectiveness from random disclosure of whatever happens to be in an exam report whenever some member of the public happens to call for its disclosure. That is, if the public interest in banks warrants fuller public disclosure, as it well may—indeed, as Congress has repeatedly determined, going by the new statutes and practice since 1964—the way to proceed is not by making exam reports FOIA-available, but by requiring focused disclosure either of existing data, or of special, new reports from exam information, such as now required by the 1989 amendment to CRA for performance regarding community investment.

9. What of information about compliance with laws that do not go to the banks' safety and soundness, like Truth in Lending? Congress showed in 1977 when it rejected a change regarding Truth in Lending compliance, and in 1989 when it adopted a superior method to secure disclosure regarding Community Reinvestment Act compliance, that amending [8] is not an effective answer if more disclosure is desired on such matters.

An additional reason for not disclosing exam reports on compliance with such statutes is clear from a 1977 House Report and from the author's interviews with private counsel familiar with exam reports. As noted (Section III.C), in 1977 a House Government Operations subcommittee concerned about enhancing compliance with Truth in Lending, decided that disclosing exam report information "should be studied further." The subcommittee noted "there appears

to be a lack of congressional guidance as to what distinguishes 'substantive' and 'technical' violations."²¹⁰

When private counsel were asked about this issue, the uniform response was that examiners are not expert enough in these statutes' complexities to avoid errors, and given the mission of exams, they err on the side of citing violations. Some of the private counsel argued that half to two-thirds of the violations of such statutes that are cited in exam reports err.

Given the 1977 conclusion of the House subcommittee, combined with these current opinions, the CRA method seems unarguably superior, for any additional exam information to be disclosed.

Last: Assuming that [8] is not amended, three potentially fruitful steps are worth considering for agency action:

(a) Recognize [8]'s special status and avoid broad applications of it (and see (c) below).

(b) Experiment with non-FOIA disclosure to make available information covered by [8], either by special reports as is required by the 1989 CRA amendment, or for exam-related internal information that is aggregated.

(c) The banking agencies have started (since work began on this Report) a quarterly meeting of their FOIA officials. Surely that is a commendable step toward not only efficiency, but also increasing the likelihood that policies for implementing FOIA, and perhaps even some specific matters, will have newly-enhanced care.

²¹⁰House Report. 95-280, n. 101 above, at 27-8.

Appendices[†]

Appendix 3: Data on FOIA Requests

Data on FOIA Requests to FDIC, FRB, OCC, OTC*					
Totals for 4 Agencies	Total Requests Received	Total Denials	Denials based on (8)	Appeals	Denials on Appeal
1992	30,434	1303 (4.3%)	455 (34.9%)	156 (34.3%)	59 (28.0%)
1991	25,129	1230 (4.9%)	407 (33.1%)	125 (31.0%)	45 (36.0%)
1990**	9,012	846 (9.4%)	318 (37.6%)	84 (26.4%)	32 (38.1%)
1989**	7,433	717 (9.6%)	248 (35.0%)	58 (23.4%)	36 (62.1%)
1988**	6,878	818 (11.9%)	235 (29.0%)	61 (26.0%)	21 (34.4%)

* Source: Annual FOIA Reports of FDIC, FRB, OCC, OTC.

** OTS data not available.

FDIC--Data on FOIA Requests Involving Exemption (8)*					
	Total Requests Received	Total Denials	Denials based on (8)	Appeals	Denials on Appeal
1992	2,046	534 (26.1%)	138 (25.8%)	76	17
1991	1,861	447 (24.0%)	129 (28.9%)	62	13
1990	1,364	369 (27.1%)	166 (45.0%)	44	13
1989	993	219 (22.1%)	133 (60.7%)	24	15
1988	841	244 (29.0%)	122 (50.0%)	23	9

* Source: Annual Reports.

[†] Appendices 1, 2, and 4-6 were omitted from this edition. For complete text of these appendices, see Roy A. Schotland, *Re-examining the Freedom of Information Act's Exemption 8: Does It Give an Unduly "Full Service" Exemption for Bank Examination Reports and Related Material?*, 9 ADMIN. L.J. AM. U. 43, 150 (1995).

FRB--Data on FOIA Requests Involving Exemption (8) *					
	Total Requests Received	Total Denials	Denials based on (8)	Appeals	Denials on Appeal
1992	5,666	346 (6.1%)	31 (9.0%)	22	5
1991	5,174	368 (7.1%)	34 (9.2%)	13	2
1990	4,616	294 (6.4%)	28 (9.5%)	15	5
1989	4,306	383 (8.9%)	30 (7.8%)	16	8
1988	4,231	389 (9.2%)	16 (4.1%)	16	0

* Source: Annual FOIA Reports.

OCC--Data on FOIA Requests Involving Exemption (8) *					
	Total Requests Received	Total Denials	Denials based on (8)	Appeals	Denials on Appeal
1992	3,142	189 (6%)	118 (62.4%)	23	17
1991	2,902	166 (5.7%)	99 (59.6%)	15	11
1990	3,032	183 (6.0%)	124 (67.8%)	25	14
1989	2,134	115 (5.4%)	85 (73.9%)	18	13
1988	1,806	185 (10.2%)	97 (52.4%)	22	12

* Source: Annual FOIA Reports.

OTS--Data on FOIA Requests Involving Exemption (8)*					
	Total Requests Received	Total Denials	Denials based on (8)	Appeals	Denials on appeal
1992	19,580	234 (1.2%)	168 (71.8%)	36	20
1991	15,292	249 (1.0%)	145 (58.2%)	35	19

* Source: Annual FOIA Reports. OTS data not available 1988-1990.

