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June 12, 2015

VIA EMAIL

Chairman Jason Chaffetz
Committee on Oversight and Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515-6143

Re: Request for Information on Potential FOIA Reforms

Dear Chairman Chaffetz:

Thank you for the opportunity to provide the Committee with Public Citizen's views on potential improvements to the Freedom of Information Act (FOIA) and agencies' compliance with it. We strongly support H.R. 653, the FOIA Act, particularly its narrowing of Exemption 5 and its amendment to FOIA's fee-shifting provision to require an award of fees and costs in all cases in which a FOIA plaintiff substantially prevails. As the Committee contemplates future FOIA legislation, we hope that it will consider the recommendations below.

For more than 40 years, Public Citizen has used FOIA to further its role as a government watchdog, and Public Citizen attorneys have litigated more significant open government cases than any firm or organization in the country. Today, Public Citizen remains a frequent FOIA requester, and we continue to provide legal representation to a variety of organizations, community groups, journalists, academics, and other individuals seeking to obtain information under FOIA.

Public Citizen believes that some FOIA exemptions should be narrowed through future legislation to ensure that the public has meaningful access to government information. In particular, we support the elimination or, at a minimum, dramatic narrowing of Exemption 8, which was intended to protect from disclosure certain banking records but which experience has demonstrated is unnecessary and detrimental. We also support narrowing Exemption 4, which protects certain commercial and financial information, and Exemption 6, which protects information the disclosure of which would result in a clearly unwarranted invasion of personal privacy.

I. Exemption 8

FOIA Exemption 8 protects from disclosure information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an

agency responsible for the regulation or supervision of financial institutions.”¹ When Congress enacted the exemption in 1967 at the behest of the financial industry and regulators, Exemption 8 was thought to be necessary to protect the security and integrity of banks. Over time, however, the exemption has been used to withhold information that should be public, and experience shows that the exemption is not necessary.

As one federal judge recently noted, when Congress adopted Exemption 8, it “was drafting under the principal assumption that it was regulating a world largely consisting of banks and like financial institutions.”² Yet the financial world and its regulators have undergone a dramatic transformation since that time, and courts have given the exemption a “broad, all-inclusive scope” that encourages withholding in circumstances for which the interests motivating Exemption 8 are not present.³ For example, Exemption 8 has been used to cut off public access to information about banks’ compliance with the Truth in Lending Act,⁴ information about non-depository institutions,⁵ information held by an agency that does not even regulate the financial institution in question,⁶ information about *closed* banks where, by default, concerns about financial security simply do not apply,⁷ and information obtained through an agency’s supervisory process even when the agency cannot identify any report to which the information relates.⁸

Exemption 8 has also scuttled public oversight of the federal government’s recent handling of the 2008 financial crisis and other critical issues. Courts have upheld agencies’ reliance on Exemption 8 to withhold information about the bailout of Bear Stearns and AIG, the Troubled Asset Relief Program (TARP), and conflicts of interest among securities analysts and potential regulatory responses.⁹ The D.C. Circuit recently approved of using Exemption 8 to withhold records relating to the Securities and Exchange Commission’s (SEC) oversight of an arbitration program facilitated by FINRA, a self-regulatory organization responsible for enforcing securities laws against member broker-dealers.¹⁰ The court held that, at least with

¹ 5 U.S.C. § 552(b)(8).

² *Pub. Investors Arbitration Bar Ass’n v. SEC*, 771 F.3d 1, 9 (D.C. Cir. 2014) (Rogers Brown, J., concurring).

³ *Gregory v. Fed. Deposit Ins. Corp.*, 631 F.2d 896, 898 (D.C. Cir. 1980).

⁴ *Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d 531 (D.C. Cir. 1978).

⁵ *Pub. Citizen v. Farm Credit Admin.*, 938 F.2d 290, 293 (D.C. Cir. 1991).

⁶ *Id.*

⁷ *Gregory*, 631 F.2d at 898.

⁸ *Judicial Watch, Inc. v. Dep’t of Treasury*, 796 F. Supp. 2d 13, 38 (D.D.C. 2011).

⁹ *See Ball v. Bd. of Governors of Fed. Reserve Sys.*, No. 13-603, 2015 WL 1507766 (D.D.C. Mar. 31, 2015); *Judicial Watch*, 796 F. Supp. 2d at 18; *McKinley v. FDIC*, 744 F. Supp. 2d 128, 133 (D.D.C. 2010), *aff’d on other grounds*, *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331 (D.C. Cir. 2011); *Bloomberg, L.P. v. SEC*, 357 F. Supp. 2d 156, 169 (D.D.C. 2004).

¹⁰ *Pub. Investors Arbitration Bar Ass’n*, 771 F.3d at 8.

respect to the SEC, Exemption 8 applies without regard to whether withheld information is financial in nature or whether the institution that submitted the information is acting in a regulatory capacity, rather than as a private financial institution. The court also concluded that Exemption 8 permitted the withholding of documents regarding the SEC's response to consumer complaints about the fairness of FINRA's arbitration program. In her concurrence, Judge Janice Rogers Brown urged Congress to revisit Exemption 8, at least as it applies to the SEC, and questioned the wisdom of the court precedents that dictated the result in that case. She noted that "[i]t bodes ill for rebuilding civic trust that Exemption 8 could be employed to permanently shroud both the possible reckless conduct by regulated financial institutions and the particulars of sweeping agency intrusions into the sphere of the financial marketplace."¹¹

In addition to permitting withholding that is not in the public's interest, Exemption 8 is also unnecessary. Exemption 4 already protects confidential commercial and financial information, including trade secrets. Exemption 5 protects the internal deliberations of government employees, including bank examiners. And Exemption 6 protects certain personal, private information maintained by financial institutions about consumers. Exemption 8 is nothing more than a blanket excuse for financial regulators to withhold large categories of information from the public.¹² It should be repealed or, at a minimum, significantly narrowed.

II. Exemption 4

Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."¹³ The D.C. Circuit—which hears the majority of appeals in FOIA cases—has interpreted the term "confidential" to provide unnecessarily broad protection to financial or commercial materials submitted to the government. The exemption should be narrowed to ensure that it does not shroud in secrecy important information about the government's oversight of corporations.

Specifically, the term "confidential" has been interpreted to mean different things based on whether a submitter provides information to the government voluntarily or involuntarily. Information that a company submits *involuntarily* (that is, when the submission is required of the company) is considered confidential if disclosure is "likely either '(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial

¹¹ *Id.* at 10 (Rogers Brown, J., concurring).

¹² Indeed, even after Congress amended the Dodd-Frank Act to ensure that the SEC could not withhold under Exemption 8 "all information provided to the [SEC] in connection with its broad examination and surveillance activities," 156th Cong. Rec. S6889 (statement of Sen. Leahy), the SEC has taken the position that Exemption 8 protects all documents that are in the SEC's "examination office as a result of an examination." Oral Argument, *Pub. Investors Arbitration Bar Ass'n v. SEC*, 771 F.3d 1 (D.C. Cir. 2014), at 19:12 - 19:48, available at <http://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?OpenView&count=100&SKey=201409>; see also *id.* at 20:09 - 20:20 (SEC attorney stating that if a document about FINRA "has come to the SEC through the SEC's examination authority, we do believe that Exemption 8 protects all of those materials").

¹³ 5 U.S.C. § 552(b)(4).

harm to the competitive position of the person from whom the information was obtained.”¹⁴ In contrast, to determine whether *voluntarily* submitted records are confidential, courts generally ask only whether the records are “of a kind that the provider would not customarily make available to the public.”¹⁵

The less stringent test for voluntarily submitted information should be abolished because it does not require a true showing of confidentiality or any showing that disclosure “will significantly harm some relevant private or governmental interest.”¹⁶ Indeed, it represents a “virtual abandonment of federal court scrutiny . . . for Government withholding of commercial or financial materials submitted voluntarily.”¹⁷ In this respect, Exemption 4’s application to voluntarily submitted information is *more* protective of commercial information than FOIA Exemption 6 is of certain personal, private information belonging to individuals, to which a public balancing test at least applies.¹⁸ Amending Exemption 4 to abolish the test for voluntarily submitted information (so that all records would be subject to the test currently applied to required submissions) would not hamper the government’s ability to obtain necessary information from companies, as the existing standard for involuntarily submitted information already incorporates that consideration.

III. Exemption 6

Exemption 6 exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”¹⁹ Courts applying this exemption balance the privacy interest that would be compromised by disclosure against the public’s interest in the requested information.

Under the language of Exemption 6, “unless the invasion of privacy is ‘clearly unwarranted,’ the public interest in disclosure must prevail.”²⁰ “Congress’s choice of the ‘clearly unwarranted’ standard was a ‘considered and significant determination.’”²¹ The standard

¹⁴ *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc) (quoting *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

¹⁵ *Baker & Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312, 320 (D.C. Cir. 2006) (quoting *Critical Mass*, 975 F.2d at 872).

¹⁶ *Critical Mass*, 975 F.2d at 885 (Bader Ginsburg, J., dissenting) (internal quotation marks omitted).

¹⁷ *Id.* at 886.

¹⁸ *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 175 (1991).

¹⁹ 5 U.S.C. § 552(b)(6).

²⁰ *Ray*, 502 U.S. at 177.

²¹ *Wash. Post Co. v. U.S. Dep’t of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 378 n.16 (1976)).

instructs the court “to tilt the balance (of disclosure interests against privacy interests) in favor of disclosure.”²²

Although, “under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act,”²³ courts have repeatedly interpreted Exemption 6 in expansive ways not justified by FOIA. Courts have done so in three ways. First, courts have broadly interpreted the phrase “similar files” in Exemption 6’s threshold language—“personnel and medical files and similar files”—to include all information that “applies to a particular individual.”²⁴ Second, courts have adopted an overbroad definition of privacy. The D.C. Circuit has stated, for example, that “Exemption 6 is designed to protect personal information in public records, even if it is not embarrassing or of an intimate nature.”²⁵ Finally, courts have taken a narrow view of what should be weighed on the public interest side of the balancing test. They have held that “the only relevant ‘public interest in disclosure’ to be weighed in this balance is the extent to which disclosure would . . . ‘contribut[e] significantly to public understanding of the operations or activities of the government.’”²⁶ Moreover, courts have been known to take cramped views even of when information sheds light on government activities.²⁷

Because of the overbroad view of privacy, agencies often redact information from documents that reveals only that someone witnessed an event or works on a topic—nothing about the person’s personal life. And because of the narrow view of the public interest, courts will find that there is no public interest in the documents unless they provide information about what the government itself is doing, even if the records are highly informative on another topic of great public concern. Under such circumstances, courts will find that the privacy interest (though small) outweighs the public interest (though large).

We recommend narrowing Exemption 6 so that it is returned to the limited exemption it was meant to be. In particular, we recommend clarifying that people do not have a privacy interest in every single piece of information that concerns them, and expanding what counts as a

²² *Id.* at 261 (citations omitted).

²³ *Id.*

²⁴ *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982).

²⁵ *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 877 (D.C. Cir. 1989).

²⁶ *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989)).

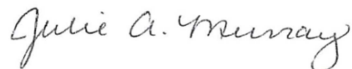
²⁷ *See, e.g., Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 195 (2d Cir. 2012) (finding “no appreciable public interest” in the disclosure of names of people working in certain government agencies, even though plaintiffs had explained how such information would help shed light on why the agencies undertook certain action, provide understanding of career progression in the federal government, and help uncover unethical or illegal agency activities); *Consumers’ Checkbook Ctr. for the Study of Servs. v. U.S. Dep’t of Health & Human Servs.*, 554 F.3d 1046, 1056 (D.C. Cir. 2009) (finding no public interest in disclosure of certain Medicare claims data, including diagnosis codes and procedure codes, submitted to the government by physicians in several localities).

public interest in disclosure to include all of the public's interests in the requested records, including interests beyond understanding the operations or activities of the government.

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Again, we appreciate the opportunity to provide you with our thoughts on additional areas of improvement for future FOIA reform. Please do not hesitate to contact us if we can be of assistance.

Sincerely,



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