

June 28, 2005

Ms. Colleen M. Kelley
National President
The National Treasury Employees Union
1750 H Street, NW
Washington, DC 20006

Re: Your FOIA Appeal dated May 31, 2005

Dear Ms. Kelley:

On February 2, 2005, you filed a Freedom of Information Act (FOIA) request with NCUA's Office of General Counsel requesting eight categories of information for each NCUA National Treasury Employees Union (NTEU)-represented bargaining unit employee. The categories of information requested were name, duty station, occupation, position occupied, service computation date, organization title, office e-mail address, and office telephone number. You requested that the information be provided in an electronic format. Dianne Salva, NCUA's FOIA Officer, responded to your FOIA request on April 29, 2005. Ms. Salva enclosed a CD-ROM containing the first six categories of requested information for bargaining unit employees in a database format. She also enclosed a hard copy of NCUA's telephone directory with home addresses and home telephone numbers redacted pursuant to exemption 6 of the FOIA, 5 U.S.C. §552(b)(6). The telephone directory contained employees' office telephone numbers, your seventh category of requested information. Ms. Salva did not provide you with employees' e-mail addresses (your eighth category of requested information). The telephone directory contains information on all NCUA employees, not just bargaining unit employees. E-mail addresses are withheld pursuant to exemption 2 of the FOIA, 5 U.S.C. §552(b)(2). We received your May 31, 2005 appeal of Ms. Salva's determination on May 31st. You appeal NCUA's failure to provide office telephone numbers in electronic format and NCUA's withholding of employees' e-mail addresses. Your appeal is granted in part and denied in part. The redacted NCUA telephone directory previously provided in hard copy is now provided as a pdf file on the enclosed CD-ROM. The e-mail addresses continue to be withheld pursuant to exemption 2 of the FOIA.

Format of Requested Information

In your February 2, 2005 FOIA letter, you requested that information be provided for bargaining unit employees in an electronic format, that each category be provided in a separate field, and that it be provided in a format that could be read

without first breaking a code. The six categories of information provided to you with Ms. Salva's April 29th response was provided for bargaining unit employees only in a database format. NCUA maintains these categories of information in a database format.

Your appeal letter did not specify the type of electronic format requested for employee telephone numbers. On June 23rd Hattie Ulan of this Office spoke to Pat Wynns of NTEU to clarify the format requested. Ms. Wynns indicated that NTEU wanted the telephone numbers in either an excel or database format. She also noted that providing office telephone numbers for all NCUA employees (both bargaining unit and non-bargaining unit) was acceptable, as long as a code was provided indicating who is and is not in the bargaining unit. NCUA does not maintain employees' office telephone numbers in a database or excel or other spreadsheet format, nor do we segregate out office telephone numbers of bargaining unit employees from non-bargaining unit employees. Ms. Salva provided you with the NCUA telephone directory as that is where employee telephone numbers are maintained. We maintain an electronic version of the telephone directory for publication purposes. Enclosed is a CD-ROM containing a pdf file of the NCUA telephone directory that was previously provided to you in hard copy.

According to Section (a)(3)(B) of the FOIA, NCUA "shall provide the record in any form or format requested ... if the record is readily reproducible ... in that form or format." 5 U.S.C. 552(a)(3)(B). Reasonable efforts will be made to convert a record from its existing format to a requested format. The FOIA does not require agencies to create records to respond to a request. See Poll v. United States Office of Special Counsel, No. 99-4021, 2000 WL 14422 at 5 n.2 (10th Cir. Jan. 10, 2000). In this case, it would take NCUA professional staff many hours to take the existing record (NCUA telephone directory) and produce the database or spreadsheet requested. It is beyond the readily reproducible standard set forth in the FOIA. We believe the request would entail creating a new record rather than merely converting an existing record to another format. The request is beyond the scope of the FOIA.

E-mail Addresses - Exemption 2

Exemption 2 of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. §552(b)(2). The courts have interpreted exemption 2 to encompass two distinct categories of information: trivial matters referred to as "low 2" information and more substantial internal matters referred to as "high 2" information. Crooker v. ATF, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), is the lead case interpreting the "high 2" exemption and it encompasses protection for internal agency information the sensitivity of which is readily recognized. Crooker

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established a 2-part test for determining which sensitive materials are exempt from mandatory disclosure. The test requires that: 1) a requested document be predominantly internal; and 2) its disclosure significantly risks circumvention of agency regulations or statutes. Courts have held that the high 2 exemption can be applied when there is a determination of reasonably expected harm. See Judicial Watch, Inc. v. United States Department of Commerce, 83 F. Supp. 2d 105, 110 (D.D.C. 1999). High 2 has been applied when the consequences of disclosure could be harmful to the effective operation of government offices. Pinnavaia v. FBI, No. 03-112, slip opinion at 8 (D.D.C. Feb. 25, 2004) (withholding of beeper numbers and cell phone numbers). Once a release of employee e-mail addresses is made to one requester, it would be available to any potential requestor. NCUA has no control over how the e-mail addresses would be used by any requestor. This presents numerous potential problems, including risk of a flood of e-mails to employees, and security problems including the costs of dealing with viruses and spam. E-mail addresses are being withheld pursuant to exemption 2 for these reasons.

Pursuant to 5 U.S.C. 552(a)(4)(B) of the FOIA, you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court where you (the requestor) reside, where the requestor's principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner
General Counsel

Enclosure (CD-ROM)

GC/HMU:bhs
05-0557
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