

June 29, 2005

Leon Brickman, Esq.
16 Court Street
Brooklyn, NY 11241

Re: Your FOIA Appeal dated May 31, 2005

Dear Mr. Brickman:

On February 8, 2005, you requested from the NCUA Asset Management and Assistance Center (AMAC) information and records regarding the now liquidated Midwood Federal Credit Union (FCU). You requested information concerning the closing of Midwood FCU, NCUA's audit (examination) of Midwood FCU, a list of names and addresses of Midwood FCU's officers and directors, as well as any information on the misfeasance of the officers and directors, NCUA action concerning the misfeasance and recovery, and action taken in connection with Midwood FCU's surety bond. By letter dated March 14, 2005, AMAC provided you with a list of the names of the officers of Midwood FCU just prior to the time it was placed into conservatorship (November 2004). AMAC withheld the addresses of the officers as well as all other information requested. On March 22, 2005, you wrote another letter to AMAC, invoking the Freedom of Information Act (FOIA) as the means of requesting the records you had previously requested in your February 8th letter to AMAC. Your FOIA request was forwarded to NCUA's Office of General Counsel for a response. Dianne Salva, NCUA's FOIA Officer, responded to your request on May 18, 2005. All of the documents responsive to your request, other than the names of Midwood FCU officers which were provided previously, were withheld pursuant to exemptions 6 and 8 of the FOIA, 5 U.S.C. §552(b)(6) & (8).

On May 12, 2005, you again wrote to AMAC, requesting the names and addresses of officers, directors and managers of Midwood FCU for the years 1999 – 2004. As noted above, AMAC has already provided you with the names of Midwood officers in place at the time Midwood FCU was placed into conservatorship. Your request for Midwood officials from 1999 – 2003 will be treated as a separate FOIA request. NCUA's FOIA officer will respond to the request separately from this response to your appeal.

We received your May 31, 2005 appeal of Ms. Salva's May 18th determination on June 1st. We have identified 124 pages of records responsive to your request, included the last NCUA examination of Midwood FCU and a staff memorandum concerning Midwood's liquidation, with attachments. Your appeal is granted in

part and denied in part. Most of the responsive records continue to be withheld in full. Records are withheld pursuant to exemptions 4, 5, 6, 7(A) & 8 of the FOIA.

Enclosed are 11 pages of responsive records. Some of the enclosed pages contain redactions with applicable FOIA exemptions noted. Enclosed is the Notice of Revocation of Charter and Involuntary Liquidation of Midwood FCU (3 pages released in full); a portion of an NCUA staff summary on Midwood's involuntary liquidation (3 pages containing redactions); Midwood FCU's statement of financial condition (1 page released in full); a 1 page memo on the involuntary liquidation dated December 22, 2005 (released in full); the 1 page Notice concerning Midwood FCU's liquidation (released in full); and a portion of a 1 page letter sent to CUNA Mutual Group. Also enclosed is a list of directors that predates the names AMAC listed in its March 14th letter to you. Zundel Zelmanovitch, whose name does not appear in AMAC's March 14th letter, was a director but left the board at some point in 2004 and was replaced by Steven Hersko, whose name appears on AMAC's March 14th list. Board member's addresses and account information has been redacted pursuant to exemption 6 of the FOIA. All other responsive records are withheld in full.

An explanation of the applicable FOIA exemptions follows.

Exemption 5

Internal memoranda are withheld pursuant to exemption 5. The memoranda are also withheld pursuant to exemption 8 because they contain exemption 8 information. See discussion of exemption 8 below. Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 U.S.C. §552(b)(5). Included within exemption 5 is information subject to the deliberative process privilege. The purpose of the deliberative process privilege is "to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Any one of the following three policy purposes have been held to constitute a basis for the deliberative process privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982). The first and third policies enumerated in Russell apply in this case; internal memoranda are withheld pursuant to exemption 5.

Exemption 6

The information withheld pursuant to exemption 6 includes the home addresses of the former directors of Midwood FCU as well as personal information on former members of Midwood FCU. Some of this personal information is also withheld under exemption 8 because it is found in exemption 8 documents. See discussion of exemption 8 below. Exemption 6 protects information about an individual in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The courts have held that all information that applies to a particular individual meets the threshold requirement for privacy protection. United States Department of State v. Washington Post Co., 456 U.S. 595 (1982). Once a privacy interest is established, application of exemption 6 requires a balancing of the public's right to disclosure against the individual's right to privacy. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). The withheld information meets the requirement for exemption 6 protection. There is minimal, if any, public interest in disclosing this personal information. The individuals' privacy interests outweigh any public interest in disclosure.

Exemption 7(A)

Information concerning law enforcement investigations concerning Midwood FCU is withheld pursuant to exemption 7(A). Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information...could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). Criminal, civil and regulatory proceedings have all been held to be law enforcement proceedings for purposes of this exemption. Rosenglick v. IRS, No. 97-747-18A, 1998 U.S. Dist. LEXIS 3920, at *6 (M.D. Fla. Mar. 10, 1998). A two-step test is necessary in order to determine the applicability of exemption 7(A). First, a law enforcement proceeding must be pending or proceeding; and second, release of information about it could reasonably be expected to cause some articulable harm. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978). Release of the type of information withheld could clearly interfere with pending proceedings. Therefore responsive documents are withheld pursuant to exemption 7(A).

Exemption 8

The NCUA examination report of Midwood FCU as well as internal memoranda are withheld pursuant to exemption 8 of the FOIA. Exemption 8 applies to 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." 5 U.S.C. 552(b)(8).

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The courts have discerned two major purposes for exemption 8 from its legislative history: 1) to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability; and 2) to promote cooperation and communication between employees and examiners. See Atkinson v. FDIC, 1 GDS 80,034, at 80,102 (D.C. Cir. 1980). Courts have interpreted exemption 8 broadly and have declined to restrict its all-inclusive scope. Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531 (D.C. Cir. 1978). Courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. See Atkinson at 80,103. It is appropriate to withhold entire documents pursuant to this exemption. Exemption 8 has also been employed to withhold internal memoranda that contain specific information about named financial institutions. Wachtel v. Office of Thrift Supervision, no. 3-90-833, slip op. (M.D. Tenn. Nov. 20, 1990). As you know, Midwood FCU has been liquidated and is no longer in existence. Courts have held that records pertaining to a financial institution no longer in operation can be withheld pursuant to exemption 8. Gregory v. FDIC, 631 F.2d 896 (D.C. Cir. 1980). We believe that the purposes of exemption 8 are met; therefore, the examination report and internal memoranda continue to be withheld pursuant to exemption 8.

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 the requestor resides, 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,

/S/

Robert M. Fenner
General Counsel

Enclosures

GC/HMU:bhs

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2005-APP-00006