

Re: FOIA Appeal, your letter dated March 22, 2000

Dear:

On December 24, 1999, you filed a Freedom of Information Act (FOIA) request for copies of all reports and other writings concerning 1) the analysis of data which was part of NCUA Investigation No. 97-06; and 2) the analysis of data which was part of NCUA's response to your November 2, 1999, complaint against . Dianne Salva, NCUA's FOIA Officer, responded to your request on March 16, 2000. Approximately 51 pages of documents were identified as responsive to part 1) of your request. These documents consist of internal memoranda, and drafts thereof, and various correspondence. These responsive documents were withheld pursuant to exemptions 5 and 8 of the FOIA and subsection (d)(5) of the Privacy Act. In response to part 2) of your request, you received approximately 69 pages of documents. Six additional pages were withheld pursuant to subsection (d)(5) of the Privacy Act. We received your March 22 appeal on March 24. Your appeal is granted in part and denied in part. One page responsive to part 1) of your request (previously withheld pursuant exemption 8 of the FOIA) is now released and enclosed. The remaining documents continue to be withheld pursuant to exemptions 5 and 8 of the FOIA and subsection (d)(5) of the Privacy Act. We have identified several additional documents responsive to part 1) of your request. These documents are also withheld pursuant to exemptions 5 and 8 of the FOIA and subsection (d)(5) of the Privacy Act. The documents and the applicable exemptions are discussed below.

Additional Responsive Documents

We have identified approximately 35 pages of additional documents responsive to your FOIA request. The majority of these documents are the handwritten notes of the attorneys who worked on Investigation 97-06. Also included are a few pages of internal memoranda and one short e-mail. As noted above, all of

these documents are withheld pursuant to exemptions 5 and 8 of the FOIA and subsection (d)(5) of the Privacy Act.

Exemption 5 of the FOIA

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 USC 552(b)(5). Included within exemption 5 is information subject to the deliberative process privilege and the attorney work-product privilege. Most of the responsive documents are withheld pursuant to the attorney work product privilege of exemption 5 and subsection (d)(5) of the Privacy Act. (See discussion below.) A few pages are withheld pursuant to the deliberative process privilege of exemption 5. The information withheld pursuant to the deliberative process privilege consists of staff opinions and recommendations prior to final agency action. The purpose of this 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. The second policy does not apply since Investigation 97-06 is closed.

The attorney work product privilege protects documents and other memoranda prepared by an attorney in contemplation of litigation. The privilege applies to civil, criminal and administrative proceedings. Exxon Corp. v. Department of Energy, 585 F. Supp. 690, 700 (D.D.C. 1983). In exemption 5 cases involving the deliberative process privilege, it is the general rule that factual material must be separated out from deliberative material and disclosed. This disclosure rule does not apply to the attorney work-product privilege. In Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987), the court rejected a factual/deliberative distinction and approved withholding witness statements in their entirety. In addition, the Supreme Court has held that termination of litigation does not vitiate the protection for material otherwise properly categorized as attorney work-product. There is no temporal limitation on work-product protection under the FOIA. FTC v. Grolier, 462 U.S. 19 (1983). The fact that NCUA has decided not to pursue Investigation 97-06 any further does not affect the applicability of the attorney work-product privilege of exemption 5.

Subsection (d)(5) of the Privacy Act

Pursuant to the Privacy Act, a system of records means a group of records from which information can be retrieved by an individual's name or some other

identifier. 5 U.S.C. 552a(a)(5). Section (d) of the Privacy Act, 5 U.S.C. 552a(d), addresses access to information contained within a system of records. Unless subject to an exemption, individuals have access to information about themselves contained within a system of records. Subsection (d)(5) provides an exemption from individual access "to any information compiled in reasonable anticipation of a civil action or proceeding." This provision has been held to be similar to the attorney work-product privilege of exemption 5 of the FOIA. See Martin, supra. The courts have interpreted Section (d)(5) of the Privacy Act broadly. It has been interpreted to extend to records compiled in anticipation of civil proceedings, including quasi-judicial proceedings, whether or not by attorneys. Crooker v. Marshals Service, No. 85-2599, slip op. at 2-3 (D.D.C. Dec. 16, 1985) and Martin, supra.

Exemption 8 of the FOIA

The information withheld pursuant to exemption 8 consists of a discussion of examination issues found in internal memoranda. These memos are also withheld pursuant to exemption 5. Exemption 8 of the FOIA,

5 U.S.C. 552(b)(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.

Courts have held that documents related to reports withheld under exemption 8 may also be exempt from disclosure. Documents concerning a report's follow-up as well as internal memoranda that contain specific reference about a named financial institution can be withheld pursuant to exemption 8. See Atkinson v. FDIC,

1 GDS 80,034, at 80,102 (D.D.C. 1980) and *Wachtel v. Office of Thrift Supervision*, No. 3-90-833 (M.D. Tenn. 11/20/90). Although the memos do contain some non-financial information, courts do not require agencies to segregate and disclose those portions of documents that are unrelated to the financial condition of the institution. See Atkinson. Hence, the memos are withheld in full pursuant to exemption 8.

Pursuant to 5 U.S.C 552(a)(4)(B) (FOIA) and 552a(g) of the Privacy Act, 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 in the district where you

reside, where your principle 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

GC/HMU:bhs

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