

May 24, 2000

Randall P. Whatley, President

Cypress Media Group

P.O. Box 53198

Atlanta, GA 30355

Re: FOIA Appeal, your letter dated April 26, 2000

Dear Mr. Whatley:

On February 29, 2000, you filed a Freedom of Information Act (FOIA) request for copies of documents in seven categories concerning a training contract advertised as RFP NCUA-99-R-0009. Your fifth category was a request for "a copy of all notes from conversations with or other information gathered from conversations with references that were contacted for Cypress Media Group, Inc." Dianne Salva, NCUA's FOIA Officer, responded to your request on April 13, 2000. Enclosed with Ms. Salva's response were documents (some with redactions) responsive to all but the fifth category noted above. There are six pages of documents responsive to the fifth category of your request. These pages were withheld in full pursuant to exemptions 4 and 5 of the FOIA. We received your April 26 appeal on May 1. In your appeal you request information (Who was the source of a "lukewarm" reference and what did this person say that was construed to be lukewarm?) that is found on two of the six pages that were withheld. Your appeal is granted in part and denied in part. The two pages are released with redactions. The information redacted is withheld pursuant to exemptions 4, 5, and 6 of the FOIA.

The answers to questions redacted on the enclosed pages are withheld pursuant to exemptions 4 and 5. The redacted material was used in preparing the evaluation sheets that you received. The contact person's name, company and telephone number are withheld pursuant to exemption 6.

## Exemption 4

Exemption 4 of the FOIA protects (1) trade secrets and (2) information which is commercial or financial, obtained from a person and privileged or confidential.

5 U.S.C. 552(b)(4). The redacted information falls within the commercial category. The term "commercial" has been interpreted to include anything "pertaining or relating to or dealing with commerce." American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 870 (2d Cir. 1978). The information withheld meets the broad interpretation of commercial. The information was obtained from an individual. In Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993), the court established two distinct standards to be used in determining whether commercial information is "confidential" under exemption 4. According to Critical Mass, information voluntarily submitted to an agency is categorically protected provided it is not customarily disclosed to the public by the submitter (the supplier of the information). In this case the information is a reference on Cypress from a party to whom Cypress had previously supplied services. It was voluntarily submitted. A reference of this type would not customarily be disclosed to the public by the submitter and is therefore properly withheld pursuant to exemption 4.

## Exemption 5

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 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, rank 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 redacted information was used in preparation of the evaluation sheets. Policy reasons (1) and (3) enumerated in Russell apply in this case. The second policy does not apply since NCUA has already made a decision on the contract about which you request.

## Exemption 6

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 exemption 6 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 personal information withheld clearly meets the threshold standard. There is minimal, if any, public interest in disclosing this personal information. The individual's privacy interests outweigh any public interest in disclosure.

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 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

GC/HMU:bhs

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Enclosure