

April 16, 2001

(b)(6)

Re: FOIA Appeal, your letter dated March 15, 2001

Dear (b)(6):

On February 7, 2001, pursuant to the Freedom of Information Act (FOIA) and the Privacy Act, you requested documents on behalf of your client,

(b)(6) FOIA

You specifically identified three of NCUA's systems of records that might contain responsive records. You received two responses to your request.

(b)(7)(A) FOIA & (k)(2) Privacy

On March 9, 2001, Dianne Salva, NCUA's FOIA Officer, responded, enclosing several documents. Six documents, totaling approximately 93 pages, were withheld pursuant to FOIA exemptions 5, 6, and 7(A). 5 U.S.C. 552(b)(5), (6), and (7)(A). We received your March 15, 2001, appeal of Ms. Salva's determination on March 19, 2001. Your appeal is granted in part and denied in part. The newly released documents (a magazine article and information obtained from the internet totaling approximately 35 pages) are enclosed. The remaining documents (approximately 56 pages) continue to be withheld pursuant to exemptions 5, 6, and 7 of the FOIA, as discussed below.

Privacy Act

As noted above, both your initial request and appeal were made pursuant to the Privacy Act, in addition to the FOIA. The only responsive records that were found within NCUA's systems of records were forwarded to you with Ms. Salva's March 9, 2001 response. No records within a system of records identified for (b)(6) FOIA were withheld. All documents withheld were withheld pursuant to the FOIA. Therefore there is nothing to be appealed pursuant to the Privacy Act.

Freedom of Information Act

The documents withheld pursuant to the FOIA consist of internal memoranda, memoranda and drafts thereof, e-mail and minutes from a meeting. As you may know, one generally does not look to the identity of the individual FOIA requester to make a determination on whether documents are released or withheld. The purpose for which records are sought has no bearing on the merits of the request. See *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989). If documents are released to one FOIA requester, they are available to any requester pursuant to the FOIA.

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, 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). All three policy reasons apply to the documents withheld.

Exemptions 6 and 7(C)

Exemption 6 of the FOIA 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). Exemption 7(C) is the law enforcement counterpart to exemption 6. It provides protection for law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). FOIA case law has established that law enforcement includes civil and criminal statutes, as well as statutes authorizing administrative (regulatory) proceedings. *Center for National Policy Review on Race and Urban Issues v. Weinberger*, 502 F.2d 370, 373 (D.C. Cir. 1974). NCUA proceedings (e.g. investigation proceedings) qualify as law enforcement for purposes of exemption 7(C).

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 standard for withholding information pursuant to exemption 7(C) is somewhat lower than the standard for exemption 6. Disclosure need only reasonably be expected to constitute an invasion of privacy and balancing against the public interest is not required. See *Reporters Committee, supra*, and *SafeCard Services v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1989). The withheld information meets the requirement for exemption 6 protection. Although there may be some public interest in disclosing this personal information, an individual's privacy interests clearly outweigh any public interest in disclosure. The standard for withholding information for both exemptions 6 and 7(C) is met.

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).

(b)(7)(A) FOIA

(b)(7)(A) FOIA Release of the type of information withheld could clearly interfere with pending proceedings. Therefore the documents continue to be withheld pursuant to exemption 7(A).

Exemption 7(D)

Exemption 7(D) authorizes the withholding of "records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source ... which furnished information on a confidential basis... 5 U.S.C. 552(b)(7)(D). Sources' identities are protected wherever there is an express promise of confidentiality or "under circumstances from which such an assurance could be reasonably inferred." See Senate Conference Report No. 93-1200, at 13. The circumstances of this case indicate that there was a reasonable assurance of confidentiality given. Further explanation could breach such confidentiality. The standard of exemption 7(D) has been met and the documents continue to be withheld.

Pursuant to 5 U.S.C. 552(a)(4)(B), 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 the requester's 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

Enclosures
GC/HMU:bhs
01-0354
SSIC 3212
FOIA 01-134
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