

January 3, 2002

(b)(6)

Re: Your FOIA appeal dated November 28, 2001

Dear (b)(6) :

On September 27, 2001, you sent an e-mail to NCUA's Freedom of Information Act (FOIA) Officer requesting all NCUA system e-mails dated between April 30, 1997 and October 12, 1997, sent from or received by Robert Schafer, Daniel J. Buckley, and Pete Majka, relating to: 1) the U.S. Office of Personnel Management's (OPM) July 29 – 31, 1996 DEU Review of NCUA's Hiring Practices; or 2) OPM's Report of a Delegated Examining Oversight Review dated June 16 – 20, 1997. You requested that all fees associated with processing your request be waived. Dianne Salva, NCUA's FOIA Officer, responded to your request on October 15, 2001. Your request for a fee waiver was denied. We received your November 28, 2001 appeal on December 4. You appeal the denial of the fee waiver. Your appeal is denied.

Before specifically addressing the fee waiver denial, we would like to clarify an issue raised in your appeal letter. You note that you have submitted at least three previous FOIA requests to NCUA concerning the same OPM Reports noted in your current appeal, and NCUA never before raised the issue of your ability to disseminate the information requested. Your ability to disseminate information requested is a factor to be considered in determining whether a fee waiver request will be granted. Your earlier FOIA requests did not involve a request for a fee waiver. They were FOIA requests that could be completed by NCUA within the two hours of free search time allowed for the category of "other requestors." See chart in Section 792.20 of NCUA Rules and Regulations, 12 CFR §790.20.

As noted in Ms. Salva's letter, the individual employees named in your request found no responsive e-mails in either their paper or computer files. In addition, our Office of Human Resources (OHR) found no responsive e-mails within their files. The individual employees named all worked in NCUA's Office of Corporate Credit Unions (OCCU) during the time period noted in your request. The OCCU employees noted that they did not have access to the OPM reports during the time period requested, therefore they would have no e-mails on the reports. Staff from OHR confirmed that OCCU staff did not have access to the OPM reports during the time period requested. We did not undertake a full-scale electronic search of all agency e-mails for the time period requested due to the remote possibility that there are any responsive e-mails and the cost of such a search. As a general rule, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." Weisberg v. United States Department of Justice, 705 F.2d 1344 (D.C. Cir. 1983). We believe that an appropriate search was made and no responsive e-mails were found. Although we believe the search was adequate and that no further electronic search is necessary, we would undertake an electronic search of all NCUA e-mails for the time period if you agree to pay for the search. As noted, your appeal for a fee waiver for the search is denied as more fully explained below.

The FOIA provides that fees can be lowered or waived if "disclosure of the

information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(iii). Section 792.27 of NCUA’s FOIA regulation restates this test and sets forth the factors NCUA will consider in making a determination on a fee waiver request. 12 C.F.R. §792.27. NCUA will first determine: 1) whether the subject of the requested records concerns government operations or activities; 2) whether disclosure will contribute to an understanding of government operations or activities; 3) whether disclosure will contribute to the public understanding; and 4) whether disclosure is likely to contribute significantly to the public understanding of government operations or activities. (See 12 C.F.R. §792.27(a)(1) - (4).) Courts have held that it is the requestor’s burden to establish that the statutory standard of public interest is met. Slater v. Executive Office for United States Attorneys, No. 98-1663, 1999 U.S. Dist. LEXIS 8399, at 13 (D.D.C. 5/2/99). You did not address the public interest standard in you initial request, however, you do address the standard in your letter of appeal. Courts have indicated that in order for the public to benefit from disclosure of information, a requestor should have the ability and intention to disseminate requested information to the interested public. McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987) and Oglesby v. U.S. Department of the Army, 920 F. 2d 57 (D.C. Cir. 1990). Although you make an argument that there is a public interest in any responsive records, you have not indicated an ability to disseminate any responsive records. Hence, the public interest standard has not been met.

Once the public interest standard is met, NCUA Regulations require that we determine: 1) whether the requestor has a commercial interest in the disclosure; and if so 2) that the public interest outweighs the requestor’s commercial interest. (See 12 C.F.R. §792.27(b)(1) – (2).) You note in both your original request and your appeal that you have no commercial interest in the records. We need not address your commercial interest and whether or not the public interest outweighs your commercial interest since you have not established the necessary public interest standard.

Although the appeal of your fee waiver denial is denied, your request for documents remains open pending your agreement to pay the cost of a search for records. Ms. Salva’s letter of October 15, 2001 noted that the cost to process your request would be approximately \$4640. We have again contacted staff responsible for processing a search and they have noted that \$4640 is a conservative estimate. The actual cost may well exceed \$4640. You are responsible for search costs even if no responsive records are found. Please contact Ms. Salva within 10 days of the date of this letter with your agreement to pay the estimate in order for your FOIA request to be processed. You must agree to pay the estimated cost, whether or not responsive documents are found and whether any responsive documents are determined to be either released or withheld pursuant to one or more of the FOIA exemptions. We would again note that it is unlikely that this search would produce any responsive records. If you do not contact Ms. Salva within 10 days, the file on your request will be closed.

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 you reside, where your principal place of

business is located, or the District of Columbia.

Sincerely,

James J. Engel
Acting General Counsel

GC/HMU:bhs
01-1209
SSIC 3212
FOIA 01-431

cc: Dianne Salva, FOIA Officer