

May 23, 2002

Matthew E. Assad
Morning Call
515 Main Street
Bethlehem, PA 18018

Re: FOIA Appeal, your letter dated April 24, 2002

Dear Mr. Assad:

On March 2, 2002, you sent Dianne Salva, NCUA's Freedom of Information Act (FOIA) Officer, via facsimile, a request for all memos, correspondence, letters, reports and audits concerning the liquidation of the Padua Credit Union located in Easton, PA, including the audit and audit summary report generated by Carver and Carver Associates. Ms. Salva responded to your request on April 8, 2002, enclosing a copy of the liquidation order. The remaining 732 pages of responsive documents were withheld pursuant to exemptions 5, 6, 7(A) & (C) and 8 of the FOIA. Your appeal is granted in part and denied in part. Fourteen pages of newly released documents are enclosed. The remaining approximately 718 pages continue to be withheld pursuant to the exemptions noted above, as discussed below. The documents withheld include examination information, its follow-up and work papers, audit reports, NCUA staff memoranda and correspondence.

Exemption 5

The information withheld pursuant to exemption 5 includes internal correspondence (including e-mail) and memoranda, and drafts of memoranda and correspondence concerning the problems and ultimate liquidation of the credit union, as well as bond claim information. 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 and attorney work-product 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. The second policy does not apply since the credit union has already been liquidated.

The attorney work product privilege protects documents prepared by an attorney in contemplation of litigation. Hickman v. Taylor, 329 U.S. 495 (1947). The privilege attaches when a claim, likely to lead to litigation, has arisen. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980). A bond claim has

been filed in this case. If the bond is not paid, or not paid in full by the insurance company, it could lead to litigation. Several documents are withheld pursuant to the attorney work product privilege.

Exemptions 6 and 7(C)

The information withheld pursuant to exemptions 6 and 7(C) includes names and other identifying information of credit union borrowers (many of whom were delinquent) and personal information about certain credit union officials. 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). Exemption 7(C) protects information compiled for law enforcement purposes that, if released, “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, criminal and administrative proceedings. Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974). 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. In SafeCard Services v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1989), the court held that the categorical withholding of information that identifies third parties in law enforcement records is appropriate. The balancing used for exemption 6 materials is not necessary for withholding information pursuant to exemption 7(C). Hence, all personal information withheld is exempt pursuant to exemption 7(C).

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 administrative proceedings have all been held to be law enforcement proceedings for purposes of this exemption. See Center for National Policy Review, above. 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 contemplated (Mapother v. Department of Justice, 3 F.2d 58 (D.C. Cir. 1984)); and second; release of information about it could generally interfere with enforcement proceedings. Wichlacz v. United States Department of Interior, 938 F. Supp. 325, 331 (E.D. Va. 1996). The two-part test is met in this case. Therefore the documents continue to be withheld pursuant to exemption 7(A).

Exemption 8

Exemption 8 applies to the vast majority of documents withheld. These include examination reports and their follow-up, memoranda and correspondence relating

to examinations, and examination work papers. Many of these exemption 8 documents are also withheld pursuant to the other exemptions discussed above. Exemption 8 of the FOIA 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). 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). Examination reports as well as matters that are related to such reports (the findings of an examination and its follow-up) have been withheld from disclosure. See Atkinson at 80,102. Exemption 8 has been held to apply to 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). 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). In addition, 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. We believe that the purposes of exemption 8 are met; therefore the above noted documents continue to be withheld pursuant to exemption (8).

We note that some of the examination and audit information reviewed and withheld was several years old and may not be specifically responsive to your request. Since this information is either not responsive or not responsive and exempt from disclosure pursuant to exemption 8, no further records are provided.

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 your principal 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
02-0474
SSIC 3212
FOIA 02-158