

September 3, 2002

(b)(6)

Re: Your Freedom of Information Act appeal dated 8/16/02

Dear (b)(6):

On June 26, 2002, you wrote to NCUA's Region I Office requesting a copy of a September 11, 2001, letter from Wendy L. Brown and Paul Lane to NCUA's Region I Office regarding a complaint you filed against Mount Vernon Federal Credit Union. Mount Vernon FCU was merged into Educational & Governmental Employees FCU, effective July 1, 2001. The September 11<sup>th</sup> letter was referenced in Ms. Brown's October 4, 2001, letter to you acknowledging your complaint. Region I forwarded your June 26<sup>th</sup> request to NCUA's FOIA Officer at our central office in Alexandria, VA. Paul Peterson responded to your request on July 18, 2002. The requested letter and its enclosures (approximately 14 pages) were withheld pursuant to exemptions 4, 6, and 8 of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(4), (6), and (8). You wrote to Mr. Peterson on August 16, 2002, appealing the denial. You do not question any of the FOIA exemptions noted in Mr. Peterson's July 18<sup>th</sup> denial letter. Rather, you state that you have never been sent any communication with reference to your complaint against Mount Vernon FCU. You believe that as a former member of the board of directors of Mount Vernon FCU, you are entitled to a reply. As a result of your complaint, NCUA staff completed an investigation. On December 10, 2001, NCUA wrote to you regarding the results of its investigation. A copy of the December 10<sup>th</sup> letter is enclosed. The September 11<sup>th</sup> letter and its attachments continue to be withheld pursuant to exemptions 4, 6, and 8 of the FOIA. Your appeal is denied. An explanation of the exemptions follows.

#### Exemption 4

Some information contained in the withheld letter and its enclosures was withheld pursuant to exemption 4. Exemption 4 of the FOIA protects, in part, commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. 552(b)(4). The information withheld pursuant to exemption 4 falls into the category of commercial/financial information. 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 pursuant to exemption 4 meets the broad interpretation of commercial or financial information. Information "obtained from a person" has been held to include information obtained from a corporation. Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). Information obtained from a credit union meets the standard of obtained "from a person" under Nadler. In Critical Mass Energy Project v. NRC, 975 F2d 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/financial information submitted to an agency is "confidential" under exemption 4. According to Critical Mass, information required to be submitted to an agency (which is the case here) is confidential if its release would (1) impair the

Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. See National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). We believe the information withheld meets the substantial harm prong of National Parks as noted in Critical Mass. Therefore, the information continues to be withheld.

#### Exemption 6

The information withheld pursuant to exemption 6 consists of personal and salary information about employees. 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). 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 the personal information withheld. Therefore, the information continues to be withheld.

#### Exemption 8

The September 11<sup>th</sup> letter and its enclosures were withheld pursuant to exemption 8. Exemption 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." 5 U.S.C. 552(b)(8). The September 11<sup>th</sup> letter and its enclosures were prepared when NCUA notified Educational & Governmental Employees of FCU of your complaint to NCUA and are a part of NCUA's investigation into the complaint. The withheld documents are part of a report prepared on behalf of NCUA, the agency responsible for the regulation of federal credit unions. They clearly fall within exemption 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). 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 this case, as previously noted, Mount Vernon FCU is no longer in existence in that it has been merged into Educational and Governmental Employees FCU. 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

September 11<sup>th</sup> letter and its enclosures continue to be withheld pursuant to exemption 8. Exemptions 4 and 6 are applicable to portions of the withheld information, as discussed above. The entire letter, with its enclosures, is withheld pursuant to exemption 8.

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, 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  
02-0829  
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FOIA 02-289