

(b)(6)

November 18, 2002

Re: Your FOIA appeal dated October 17, 2002

Dear (b)(6):

On October 3, 2001, you filed a Freedom of Information Act (FOIA) request concerning an order of prohibition and (b)(6). Dianne Salva, NCUA's FOIA Officer, responded to the request on December 6, 2001. She released 14 pages in their entirety and an additional four pages with redactions. Approximately 191 pages of documents were withheld pursuant to FOIA exemptions 5, 6, and 8. 5 U.S.C. §552(b)(5), (6) and (8). You did not appeal this determination. On August 26, 2002, and September 6, 2002, you filed two separate FOIA requests for information involving the issuance of an order of prohibition and a surety bond claim involving Mr. Volpe. Ms. Salva responded to the two requests together in a letter dated October 7, 2002. No further documents were released because all responsive, releasable documents had been forwarded to you last December. We received your October 17, 2002, appeal on October 22<sup>nd</sup>. Your appeal is denied. The documents continue to be withheld pursuant to exemptions 5, 6, and 8 of the FOIA. An explanation of the exemptions and their applicability to the withheld documents follows.

## 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 and attorney work-product privilege. Documents withheld pursuant to exemption 5 included NCUA staff (including attorney) drafts of documents and recommendations.

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 a final consent prohibition order has been issued.

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). Litigation need never have actually commenced in order to invoke this privilege. Kent Corp. v. NLRB, 530 F.2d 612 (5<sup>th</sup> Cir. 1976). Although ultimately there was no litigation in this case, there was a claim that was likely to lead to litigation. Several documents continue to be withheld pursuant to the attorney work product privilege.

## 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). 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 includes personal information about <sup>(b)(6)</sup> as well as other individuals. It clearly 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 pursuant to exemption 6.

## 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). NCUA examination information is withheld pursuant to exemption 8. It clearly falls 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. EDIC, 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). We believe that the purposes of exemption 8 are met; therefore the documents continue to be withheld pursuant to exemption 8.

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 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

GC/HMU:bhs

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