October 17, 2007

[redacted]

Re: FOIA Appeal dated September 24, 2007

Dear [redacted]

On June 12, 2007, you made a Freedom of Information Act (FOIA) request for: 1) permanent records of you and your late husband's accounts with [redacted] Federal Credit Union from March 1996 until January 1997; 2) if destroyed, records of the destruction dates and signatures; 3) all records that are not permanent, if destroyed, the dates and signatures; and 4) all investigative reports of NCUA in Atlanta and Alexandria pertaining to your complaint through those offices. Staff attorney Linda Dent replied to your request on September 19, 2007. Thirty six pages of documents were supplied, some with redactions. Sixty three pages of documents were withheld in full, including duplicate pages, intra-agency memoranda and supervisory related materials. The information was withheld pursuant to exemptions 5, 6, and 8 of the FOIA, 12 U.S.C. §552(b)(5), (6), and (8).

We received your September 24, 2007 FOIA appeal on September 27th. You do not state any specific authority or provide any basis to substantiate your appeal. Your letter states a request for the following records under FOIA appeal: individual share and loan records for you, [redacted] the index of all records destroyed and verification by the supervisory committee, annual audit by the supervisory committee, and examinations by NCUA of these four accounts; supervisory records of account verification; and application for membership and joint share agreements with signature cards. It is not clear to us if you are requesting additional records as well as appealing Ms. Dent's September 19th denial. We are responding to your appeal only as it pertains to the records responsive to your June 12, 2007 request. If you wish to request records in addition to those noted in 1) – 4) in the first paragraph of this letter, please submit a new original request specifically noting the records you seek. Your appeal of the records withheld pursuant to your request of June 12, 2007 is denied. We address why various records were withheld in our specific discussion of applicable FOIA exemptions 5, 6, and 8

below. First, we note that it may appear from Ms. Dent's response there were more responsive records to your request than there actually were. This is because duplicate pages were included in the number of pages withheld. You received 36 responsive pages (some with redactions) and 63 pages were withheld in full; 99 pages in all, including duplicates. However, 42 of the 63 pages withheld were duplicates (some of pages withheld, some of pages released). Once you subtract the duplicate pages from the total number of pages, you get the total number of responsive pages, 99 – 42 = 57. You received 36 out of a total of 57 responsive pages.

As noted, the documents both fully withheld as well as the redacted portions of the 36 pages released were withheld pursuant to exemptions 5, 6 and 8 of the FOIA. Many of the documents contained information withheld pursuant to more than one of the noted exemptions. The exemptions are discussed below.

Exemption 5

Internal notations, memoranda, and e-mail were withheld pursuant to 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 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 policy enumerated in Russell applies to the documents withheld pursuant to the deliberative process privilege of exemption 5 in this case. Therefore the material withheld pursuant to the deliberative process privilege of exemption 5 remains exempt from disclosure.

Exemption 6

Home addresses, telephone numbers, credit union account numbers and social security numbers were withheld pursuant to 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). 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. Individuals' privacy interests outweigh any public interest in disclosure. Therefore the personal information continues to be withheld pursuant to exemption 6.

Exemption 8

Documents withheld pursuant to exemption 8 consist of supervisory related materials related to [redacted] Federal Credit Union. 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). 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). In general, all records, regardless of the source, of a financial institution's financial condition and operations that are in the possession of a federal agency responsible for their regulation or supervision are exempt. McCullough v. FDIC, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at **7-8 (D.D.C. July 28, 1980). *See* also Snoddy v. Hawke, No. 99-1636, slip op. at 2 (D. Colo. Dec. 20, 1999). Courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. *See* Atkinson v. FDIC, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, at *4-5 (D.D.C. Feb. 13, 1980). Therefore any document withheld pursuant to exemption 8 can be withheld in full. 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 at *4. The responsive records concern [redacted] Federal Credit Union's operations and are in the possession of NCUA. They are within the scope of exemption 8 pursuant to Consumers Union and McCullough. Withholding the responsive documents meets the purposes of exemption 8. 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 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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