

June 3, 2009

Thomas J. Alagna, CPA  
6701 Penn Avenue South, Suite 200  
Richfield, MN 55423

Re: FOIA Appeal dated May 5, 2008

Dear Mr. Alagna:

On April 7, 2009, you made a Freedom of Information Act (FOIA) request for a copy of the Net Worth Restoration Plan (NWRP) submitted by City-County Federal Credit Union along with NCUA's response to the NWRP. Linda Dent of our Office denied your request in full on April 28, 2009. Approximately 70 responsive pages consisting of the NWRP and NCUA's response thereto were withheld pursuant to exemption 8 of the FOIA, 5 U.S.C. §552(b)(8). We received your May 5, 2009 appeal on May 12<sup>th</sup>. Your appeal is denied. We note that there are approximately 88 responsive pages, rather than the 70 pages noted in Ms. Dent's response. The additional documents consist of a supplement to the NWRP submitted by City-County Federal Credit Union. In addition to exemption 8's applicability to all of the records withheld, exemptions 4 and 6 are also applicable to portions of the documents withheld as explained below.

#### Exemption 4

Information withheld pursuant to Exemption 4 includes the credit union's financial projections, statements of its financial condition, and contingency and business planning information. Exemption 4 protects, in part, commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. §552(b)(4). The term "commercial" has been broadly 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). All information withheld meets this standard of commercial/financial information. Information "obtained from a person" has been held to include information obtained from a wide range of entities including individuals, associations, corporations and public and private entities, other than agencies. Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). All of the commercial/financial information withheld pursuant to exemption 4 meets the standard of obtained "from a person" under Nadler. In Critical Mass Energy Project v. NRC, 975 F.2d 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 that is voluntarily submitted is categorically protected provided it is not customarily disclosed to the public by the submitter. Information required to be submitted to an agency 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 have looked to the stricter two-prong National Parks standard to determine whether the commercial/financial information should be withheld pursuant to exemption 4 since the NWRP was required to be submitted. We believe that release of the commercial/financial information would impair NCUA's authority to obtain necessary information in the future and may cause substantial harm to City-County Federal Credit Union. The financial/commercial information meets the standard is withheld pursuant to exemption 4 as well as exemption 8.

#### Exemption 6

We note that only a minimal amount of loan identifying information is 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). It includes any personal information. 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. Therefore the minimal personal information is withheld pursuant to exemption 6. The information is also withheld pursuant to exemption 8.

#### Exemption 8

All of the responsive records were withheld pursuant to exemption 8. As noted above, they consist of the NWRP submitted by City-County Federal Credit Union, a supplement thereto, and NCUA's response to the NWRP. 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 at \*4-5. 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

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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 NWRP, its supplement and NCUA's response thereto are within the scope of exemption 8 pursuant to Consumers Union and McCullough. Withholding the responsive documents meets both of the purposes of exemption 8. Therefore, the documents continue to be withheld pursuant to exemption 8. As explained above, portions of the withheld records are also withheld pursuant to exemptions 4 and 6. The portions withheld pursuant to exemptions 4 and 6 are also 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  
09-0529  
09-FOI-00112  
09-APP-00009