

June 23, 1992

(b)(6)

Re: Freedom of Information Act - Appeal (Your June 1, 1992, Letter)

Dear (b)(6):

We received your Freedom Of Information Act (FOIA) appeal, on behalf of your client (b)(6), on June 5, 1992. On May 20, 1992, the National Credit Union Administration denied your request for records concerning stolen funds at Corpus Christi Parish Credit Union. Specifically, you asked for records (1) detailing the discovery of any missing funds and the search for who might have stolen the funds including but not limited to the NCUA Form 2362, Criminal Referral Form; (2) the credit union board meeting minutes detailing the search for and/or apprehension of the perpetrator; and (3) any subsequent letters to the NCUA, the U.S. Attorney, or the FBI detailing whether the money missing had been recovered, and from what source. There were no records concerning the second and third items of your request. We have determined that the records meeting item (1) of your request should be withheld pursuant to FOIA.

ANALYSIS

The first subpart of Exemption 7 of the FOIA, 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. ~522(b)(7); see 12 C.F.R. ~792.3(7)(i). The "enforcement proceedings" to which Exemption 7(A) may have been applicable have been interpreted broadly. Such proceedings have been held to include not only criminal actions, see e.g., *Gould Inc. v. GSA*, 688 F. Supp. 689, 701 (D.D.C. 1988); *National Pub. Radio v. Bell*, 431 F. Supp. 509, 510 (D.D.C. 1977), but regulatory proceedings as well, see e.g., *Injex Indus. v. NLRB*, 699 F. Supp. 1417, 1420 (N.D. Cal. 1986); *Fedders Corp. v. FTC*, 494 F. Supp. 325, 327-28 (S.D.N.Y.), *aff'd mem.*, 646 F.2d 560 (2d Cir. 1980).

With respect to the showing of harm to law enforcement proceedings required to invoke Exemption 7(A), the Supreme Court has rejected the position that "interference" must always be established on a document-by-document basis, and it has held that a determination of the exemption's applicability may be made "generically" based on the categorical types of records involved. *NLRB v. Robbins Tire and Rubber Co.* 437 U.S. 214, 236 (1978). The courts have long accepted that Congress intended that Exemption 7(A) apply "whenever the government's case in court would be harmed by the premature release of evidence or information," *Id.* at 232, or where disclosure would impede any necessary investigation prior to the enforcement proceeding, see *National Pub. Radio v. Bell*, 431 F. Supp. at 514-15. Other courts have ruled that interference has been established where, for example, the disclosure of information could prevent the government from obtaining data in the future. See, e.g., *Crowell & Moring v. Department of Defense*, 703 F. Supp. 1004, 1011 (D.D.C. 1989); *Gould Inc. v. GSA*, 688 F. Supp. at 703; *Nishnic v. Department of Justice*, 671 F. Supp. 776, 794 (D.D.C. 1987).

The exemption has also been held to be properly invoked when release would hinder an agency's ability to control or shape investigations, see, e.g., *J.P. Stevens & Co. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983), enable targets of investigations to elude detection, see, e.g., *Moorefield v. Secret Serv.*, 611 F.2d 1021, 1026 (5th Cir. 1980), suppress or fabricate evidence, see, e.g., *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 312 (D.C. Cir. 1988); *Nishnic v. Department of Justice*, 671 F. Supp. at 794, or prematurely reveal evidence or strategy in the government's case, see, e.g., *Raytheon Co. v. Department of the Navy*, 731 F. Supp. 1097, 1011 (D.D.C. 1989).

In accordance with the above cases, NCUA is withholding the requested information specifically because disclosure of the information could prevent the government from obtaining information in the future. Exemption 7(A) is applicable because Criminal Referral Forms and materials related thereto constitute information compiled for law enforcement purposes, the disclosure of which could reasonably be expected to interfere with law enforcement proceedings.

Pursuant to 5 U.S.C. ~522(a)(4)(B), you, on behalf of your client (b)(6), may seek judicial review of this appeal by filing suit to enjoin NCUA from withholding the documents you requested and to order production of such documents. Such a suit may be filed in United States District Court in the district where your client resides, where your client's principal place of business is located, or in the District of Columbia.

Sincerely,

Robert M. Fenner
General Counsel

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