

May 25, 1994

Brad R. Wright, Esq.
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Re: Freedom of Information Act - Appeal (Your April 26, 1994 Letter)

Dear Mr. Wright:

On March 30, 1994, Stuart Englert, a journalist with the Idaho Post Register, requested under the Freedom of Information Act (FOIA), any and all correspondence to or from Westmark Federal Credit Union (Westmark), between 1985 and 1991, pertaining to the credit union's financial position, outstanding and overcharged loans, and plans for informing and reimbursing its customers of the same. By letter dated April 15, 1994, NCUA's Region VI Director denied Mr. Englert's request, stating that the documents responsive to the request were exempt from disclosure pursuant to exemptions 5 and 8 of the FOIA. We received your appeal of the denial on behalf of the Post Register on May 3, 1994. The denial is reversed in part (with regard to portions of the telephone log) and affirmed in part (with regard to all other documents). The redacted portions of the telephone logs are enclosed. The most recent financial performance report (FPR) for Westmark is also enclosed. The FPR was not identified as a responsive document in the April 15, 1994 denial.

In his response letter to Mr. Englert, the Region VI Director noted six categories of documents responsive to the FOIA request. Each category of documents and the applicable FOIA exemption(s) are discussed below.

1. Telephone notes between the credit union's examiner and supervisor (and other NCUA staff) and
2. Telephone notes between the examiner and the credit union staff.

A log was maintained by the NCUA examiner summarizing telephone conversations between the examiner and other NCUA employees concerning Westmark. This same log includes summaries of telephone conversations between the NCUA examiner and Westmark staff.

Exemption 5 of the FOIA (5 U.S.C. _552(b)(5)) exempts information contained in:

inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.

This exemption has been construed to exempt those documents normally privileged in the civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The most commonly invoked privilege incorporated within exemption 5 is the deliberative process privilege. Three policy purposes have been held to constitute the bases for this 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. See *Russell v. Department of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

NCUA's regulation implementing exemption 5 is found in Section 792.3(a)(5) of the NCUA's Rules and Regulations (12 C.F.R. 792.3(a)(5)). This Section repeats the FOIA exemption and adds the following:

This exemption preserves the existing freedom of Administration officials and employees to engage in full and frank written or taped communications with each other and with officials and employees of other agencies. It includes, but is not limited to, inter-agency and intra-agency reports, memoranda, letters, correspondence, work papers, and minutes of meetings, as well as staff papers prepared for use within the Administration or between the Administration and other governmental agencies.

Exemption 8 of the FOIA (5 U.S.C. 552(b)(8)) exempts from disclosure information:

Contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

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 an institution's stability; and (2) to promote cooperation and communication between employees and examiners. See *Atkinson v. FDIC*, 1 GDS 80,034 (D.D.C. 1980). Either purpose is sufficient reason to withhold a document. Courts do not require agencies to segregate and disclose those portions of documents that are unrelated to the financial condition of the institution. See *Atkinson*. NCUA has incorporated these dual purposes into its regulation. Section 792.3(a)(8) of NCUA's Regulations, which implements exemption 8, adds the following explanatory language:

This includes all information, whether in formal or informal report form, the disclosure of which would harm the financial security of credit unions or would interfere with the relationship between NCUA and credit unions.

The summaries of conversations between NCUA staff include policy discussions as well as information concerning NCUA examination and the financial condition of Westmark. Disclosure of this information could affect Westmark's stability. These portions of the log fall within exemptions 5 and 8 of the FOIA. Portions of the log of conversations between the NCUA examiner and credit union staff concern the financial condition of Westmark. Disclosure of these summaries could impact on cooperation and communication between credit union employees and examiners as well as have an effect on the credit union's stability. These portions of the telephone log are withheld pursuant to exemption 8 of the FOIA. The information subject to exemptions 5 and 8 as well as information not relevant to the FOIA request has been redacted from the telephone log. The remaining portions of the telephone log are provided.

3. Internal memos providing status reports on the credit union to NCUA management; 4. Examination reports of the credit union; and 5. Quality Control Report Reviews of the examination reports.

These documents are all either examination reports, or follow-ups thereto. They are being withheld in their entirety pursuant to exemption 8 of the FOIA. See above discussion of exemption 8 and *Atkinson* case.

6. NCUA Board Action Memorandum and attachments thereto.

The Board Action Memorandum (BAM) contains information relating to examinations and follow-up supervisory contacts with Westmark. It is withheld in its entirety pursuant to exemption 8 of the FOIA. See discussion of exemption 8 above. There are two attachments to the BAM. The first contains information relating to the examination and financial condition of Westmark. It is withheld in its entirety pursuant to exemption 8.

The second attachment consists of several legal opinions obtained by Westmark. Exemption 4 of the FOIA (5 U.S.C. 552(b)(4)) protects:

trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.

Courts have interpreted the terms "commercial" and "person" very broadly. Commercial includes 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 contained in the attorneys' opinions is commercial information in that it deals with Westmark's business. The term "person" refers to a wide range of entities, including a corporation. See *Comstack International, Inc. v. Export-Import Bank*, 464 F. Supp. 804,806 (D.D.C. 1979). Whether the attorneys' opinions are considered obtained from either a lawfirm or Westmark, they qualify as being obtained from a person. Attorneys' opinions have been held to be privileged under the attorney/client privilege and protected from disclosure by exemption 4 of the FOIA. See *Indian Law Resource Center v. Department of the Interior*, 477 F. Supp. 144, 148, (D.D.C 1979). The attorneys' opinions are therefore protected in their entirety pursuant to exemption 4.

As noted above, the most recent financial performance report (FPR) for Westmark (covering the period from December 1989 until December 1993) is also enclosed. The FPR was not identified in the April 15, 1994 denial letter

as responsive to the FOIA request. However, upon further review we have identified it as a responsive document since it does address the financial condition of the credit union. Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of the determination of your 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 the United States District Court in the district where your client resides, where your client's principal place of business is located, the District of Columbia, or where the requested documents are located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner
General Counsel

Enclosures

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