(b)(6)

Re: Freedom of Information Act Appeal

(Your letter dated November 15, 1995)

Dear (b)(6):

On October 9, 1995, you filed a Freedom of Information Act (FOIA) request with NCUA's Region III Office. Timothy McCollum, Acting Regional Director for Region III, responded to your request on October 19, 1995. Your request was denied pursuant to exemption 8 of the FOIA. We received your November 15 appeal on November 22, 1995. You note that the October 19 letter from Mr. McCollum indicated that there were enclosures, however no enclosures were included with the response. The "Enclosures" notation on the October 19 letter was in error. There were no enclosures missing from the response. Your FOIA request was denied in full. Your appeal is denied and Mr. McCollum's October 19 denial is upheld pursuant to exemptions 5 and 8 of the FOIA as discussed below.

Background

In February of 1995 you resigned your position as chairman of the supervisory committee of the Federal Credit Union. On February 9, 1995, you wrote to Mr. McCollum, informing him of your resignation and setting forth several concerns you had with the credit union and its management team, noting that these concerns were the reasons for your resignation. You requested that the NCUA investigate your concerns and allegations. Upon receipt of your February letter, the NCUA examiner for FCU contacted you and told you that your concerns would be addressed in next annual examination to take place in August, 1995. On May 15, 1995, you wrote to the Chairman of the NCUA again requesting a review of your concerns and allegations. The NCUA examiner met with you on July 31, 1995, and at the same time began annual examination. On September 8, 1995, upon completion of examination which included the investigation of your allegations, Mr. McCollum wrote to you stating that your concerns had been investigated and that NCUA concerns were addressed. You indicate in your appeal that the investigation of your allegations is separate from the annual examination and the results of the investigation should not be withheld as part of the examination.

Documents responding to your FOIA appeal include both internal NCUA memoranda (exemption 5 documents) and examination documents (exemption 8 documents). We believe that all of these responsive documents should be withheld pursuant to exemption 8. The exemption 5 documents are related to examination reports and therefore should be withheld pursuant to exemption 8. We have included a discussion of exemption 5 because the internal memoranda are also exempt pursuant to exemption 5. There is one additional document withheld pursuant to exemption 5, that is a draft of the September 8, 1995 letter you received from Mr. McCollum.

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). The documents withheld pursuant to exemption 5 consist of three memoranda from the NCUA examiner carrying out the investigation and a draft letter to you (draft of 9/8/95 letter to you from Mr. McCollum).

Included within exemption 5 is information subject to the deliberative process privilege. The purpose of this privilege is "to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Three policy purposes have been held to constitute the bases 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 courts have established two fundamental requirements for the deliberative process privilege to be invoked. The communication must be predecisional and it must be deliberative. Mapother v. Department of Justice, 3 F.3d 1533 (D. C. 1993). The information withheld is both predecisional and deliberative. Although exemption 5 does not always allow for entire documents to be withheld (factual information that is not deliberative in nature must be disclosed, *see* Mapother at 1538 - 40) the three memoranda withheld pursuant to exemption 5 are also withheld pursuant to exemption 8. Exemption 8 does not require redaction of documents, *see* discussion below.

The draft of the September 9, 1995 letter is withheld in its entirety since you received the final version of the letter. The draft is clearly a predecisional document.

We believe that all purposes and requirements of exemption 5 are met in this case. Disclosure of predecisional thoughts included in the memoranda and draft letter could cause injury to the quality of agency decisions. Therefore the information described above is withheld pursuant to exemption 5 of the FOIA.

Exemption 8

Exemption 8 of the FOIA exempts 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). Information withheld pursuant to exemption 8 includes the memoranda noted under exemption 5 above as well all information contained in the annual NCUA examination which was completed on August 23, 1995.

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, 1 GDS 80,034, at 80,102 (D.D.C. 1980). Either purpose is sufficient reason to withhold examination information. The NCUA regulation implementing exemption 8 of the FOIA is found at 12 C.F.R. 792.3(a)(8). Sections 792.3(a)(8) repeats exemption 8 and states:

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.

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). Examination reports as well as matters that are related to such reports (the findings of an examination and its follow-up) have been withheld from disclosure. *See* Atkinson at 80,102. Exemption 8 has been held to apply to internal memoranda that contain specific information about named financial institutions. Wachtel v. Office of Thrift Supervision, No. 3-90-833, slip op. (M.D. Tenn. Nov. 20, 1990). In addition, courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. *See* Atkinson at 80,103. It is appropriate to withhold entire documents pursuant to this exemption.

You indicate in your appeal that the information you requested has been withheld because the investigation was made a part of annual examination. You imply that the results of the investigation would have been made available to you pursuant to the FOIA had the investigation been done apart from the annual examination. We disagree. Exemption 8 applies to "examination, operating or condition reports." Its coverage is not limited to the annual examination. The

courts have not limited exemption 8 to any specific type of examination. The investigation results would have been withheld pursuant to exemption 8 if the investigation had been separate from the annual examination.

We believe that the purposes of exemption 8 are met, therefore information contained in the above noted documents continues to be withheld pursuant to exemption (8).

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of this determination by filing suit to enjoin NCUA from withholding the documents you requested and to order production of the documents. 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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