

Harold Violette, President

Fraser Federal Credit Union

534 Main Street

Madawaska, Maine 04756

Re: Freedom of Information Act Appeal

(Your November 21, 1995 Letter)

Dear Mr. Violette:

On August 28, 1995, you wrote to NCUA Region I Director Layne Bumgardner requesting a copy of a letter that NCUA examiner Homer McLemore had written to him concerning the merger of Fraser Federal Credit Union with Northern Maine Credit Union. Your letter was treated as a Freedom of Information Act (FOIA) request and was forwarded NCUA's central office. On October 30, 1995, Richard Schulman, NCUA's FOIA Officer, denied your request pursuant to exemptions 5 and 8 of the FOIA. We received your FOIA appeal on November 27, 1995. Your appeal is granted in part and denied in part. Mr. Schulman's denial is affirmed in part and reversed in part. Portions of the documents continue to be withheld pursuant to exemptions 5 and 8 of the FOIA. Those portions of the documents have been redacted. Copies of the redacted documents responding to your request are enclosed.

In your initial FOIA request and appeal, you request a copy of "correspondence" or a "letter" written by NCUA examiner McLemore to Region I Director Bumgardner concerning the merger of Northern Maine Credit Union into Fraser Federal Credit Union. There is no direct correspondence or letter from Mr. McLemore to Mr. Bumgardner. The following three memoranda, however, address the subject matter of your request and appeal: 1) July 7, 1995 memo from supervisory examiner Dorothy Peacock to Region I Director Bumgardner; 2) June 15, 1995 memo from McLemore to Peacock; and 3) June 12, 1995 memo from McLemore to file. Redacted versions of the three memos are released. The applicable exemptions are discussed below.

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 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 information must be predecisional and it must be deliberative. Mapother v. Department of Justice, 3 F.3d 1533 (D. C. 1993). 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). We have determined that most of the information in the three memoranda is not subject to exemption under the deliberative process privilege. However, a portion of the June 15, 1995 memo is both predecisional and deliberative and continues to be withheld pursuant to exemption 5. The exempt portions of this memo have been redacted.

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).

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 other documents have been withheld from disclosure. Exemption 8 has been used to withhold portions of documents such as internal memoranda that contain specific information about named financial institutions. *Wachtel v. Office of Thrift Supervision*, No. 3-90-833 (M.D. Tenn. Nov. 20, 1990.) The three internal memoranda contain exemption 8 information. We believe that the purposes of exemption 8 are met, and the exemption 8 information contained in the memos has been redacted.

We note that exemptions 5 and 8 apply regardless of the fact that you are seeking documents that concern your own credit union. Under the FOIA, once documents are made available to one requester, they are generally available to any other requester. We cannot make a disclosure to limited parties pursuant to the FOIA.

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 portions of documents you requested and to order production of the complete 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

Enclosures

GC/HMU:bhs

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