

July 3, 1996

Richard W. Murray

President/CEO

IAG Federal Credit Union

One Interstate Terrace

600 Midland Avenue

Rye, New York 10580-3999

Re: FOIA Appeal - Notice to Requester

(Your May 22, 1996 Letter)

Dear Mr. Murray:

On March 5, 1996, you wrote to NCUA's Region I Director requesting a copy of the accepted bid for the purchase of the liquidated St. Agnes Employees Federal Credit Union. On March 21, 1996, the Region I Director acknowledged receipt of your request and forwarded it to the Office of General Counsel. Although your letter did not frame the request under the Freedom of Information Act (FOIA), it was treated under the FOIA as it was a request for release of an agency record. Since the information requested was submitted by a third party and was arguably confidential commercial or financial information subject to exemption from disclosure, NCUA's FOIA Officer sent the required notice to the submitter of the information. (*See* Section 792.7 of NCUA's Rules and Regulations, 12 C.F.R. 792.7.) Based upon the objections of the submitter and concerns of NCUA's Region I Director, the record requested was withheld pursuant to exemption 4 of the FOIA. The FOIA Officer informed you of the denial of your request in a May 2, 1996 letter.

We received your May 22 appeal on May 28. We now believe that the record that you requested should be released. Since the submitter of the record objected to its release, according to Section 792.7(f) of the NCUA Regulations, we must give both you and the submitter a notice of intent to disclose the record which includes a description of the information to be disclosed, a specified disclosure date and a statement of the reasons for which the submitter's disclosure objection was not sustained. The information to be disclosed is the accepted bid for the purchase of the now liquidated St. Agnes Federal Credit Union. The document to be disclosed is only one page in length. The bid will be disclosed seven business days after the date of this letter. The following discussion addresses the reasons for which the submitter's disclosure objection was not sustained.

Exemption 4 of the FOIA (5 U.S.C. 552(b)(4)) protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." It is uncontested that the accepted bid for the purchase of St. Agnes Employees FCU is commercial/financial information obtained from a person. The issue to be decided is whether this information is privileged or confidential and therefore exempt from disclosure.

According to the court in Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993), voluntarily submitted information is afforded broader protection under exemption 4 of the FOIA than information that is required by an agency to be submitted. Several cases following the Critical Mass decision have interpreted what is meant by "voluntarily submitted" in government contract cases. The courts have noted in these cases that prices submitted in conjunction with a government contract are "required" submissions. *See* Chemical Waste Management, Inc. v. O'Leary, No. 94-2230, (D.D.C. 2/28/95); CC Distributions, Inc. v. Kinsinger, No. 94-1330, (D.D.C. 6/28/95); Lykes Bros. S.S. Co. v. Pena, No. 92-2780, (D.D.C. 9/2/93). The fact that the submitting credit union voluntarily made an offer for the now liquidated credit union (St. Agnes FCU) is not the determining factor in whether

the information was voluntarily or required to be submitted. Rather, once a credit union voluntarily decided to enter a bid, price information was essential in order for a bid to be considered. Therefore the price information was required to be submitted.

The Critical Mass court held that information required to be submitted can be withheld pursuant to exemption 4 of the FOIA if it meets one of the two prongs of National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The information can be withheld under National Parks 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. National Parks at 770. The credit union submitter of the bid specifically requested that the information remain confidential. However, we do not believe that either of the two prongs of National Parks are met in this case. The credit union submitter has not convinced us that disclosure of the bid would cause substantial harm to its competitive position. In addition, we do not believe that disclosure of the bid itself will impair the NCUA's ability to obtain information in the future. Therefore, release of the bid does not

meet either prong of the National Parks test. In light of this analysis, we believe that the bid should be released.

Sincerely,

Robert M. Fenner

General Counsel

GC/HMU:bhs

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