

January 28, 1997

Jerome G. Snider

Davis Polk & Wardwell

450 Lexington Avenue

New York, NY 10017

Re: FOIA Appeal

(Your letter dated December 12, 1996)

Dear Mr. Snider:

On September 17, 1996, you filed a request under the Freedom of Information Act (FOIA) for certain documents concerning the NCUA, the Rhode Island Share and Deposit Indemnity Corporation (RISDIC) and Rhode Island credit unions insured by RISDIC that applied for federal share insurance. Richard Schulman, NCUA's FOIA Officer, responded to your request on November 15, 1996. Your request was granted in part and denied in part. We received your appeal of the denied documents on December 13, 1996. We sent you a notice extending the time for a response to your appeal on December 24, 1996. Your appeal is granted in part and denied in part as discussed below. Responsive documents are enclosed. The cost for the enclosed documents is set forth on the enclosed invoice. We have not charged you for new copies of the depositions since you already paid for copies of them.

Original Request

Your requested the following in your September 17, 1996 FOIA request:

1. All documents dated or created in the period September 1, 1990 through July 1, 1991 that refer or relate to reviews, evaluations or examinations conducted in whole or in part by, or on behalf of, the NCUA pertaining to credit unions insured by the Rhode Island Share and Deposit Indemnity Corporation ("RISDIC"), including, but not limited to, Brown University Employees' Credit Union, Central Credit Union, Chariho-Exeter Credit Union, Columbian Credit Union, Davisville Credit Union, Providence Teachers Credit Union and Rhode Island Central Credit Union, all of which were credit unions located and doing business in the state of Rhode Island; and
2. All documents dated or created in the period

September 1, 1990 through July 1, 1991 that refer
or relate to findings, conclusions, or evaluations by,
or on behalf of, the NCUA with respect to RISDIC.

You also asked that NCUA make a representative(s) available to testify about the requested documents and that an index of any denied documents be provided.

Documents responsive to item 1. were withheld pursuant to exemption 8 of the FOIA,

(5 U.S.C. 552(b)(8)). Three redacted depositions and several letters and memoranda were released in response to item 2. The redactions were made pursuant to exemptions 6 and 8 of the FOIA (5 U.S.C. 552(b)(6) & (8)). Neither testimony nor an

index were provided.

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 consisted of examination reports prepared by NCUA examiners when the RISDIC insured credit unions applied for federal share insurance, and, additionally, workpapers, records of action, examiner's contact information and credit union responses to NCUA examinations. We reassert the applicability of exemption 8 to all of these documents. We also note that exemptions 5 and 6 of the FOIA are applicable to portions of some of these documents.

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). Section 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). Records pertaining to a financial institution no longer in operation can be withheld pursuant to exemption 8. *Gregory v. FDIC*, 631 F.2d 896 (D.C. Cir. 1980). 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.

Discretionary Disclosure

Although we believe all of the documents could be withheld pursuant to exemption 8, we have determined to make a discretionary release of some of the documents (with some redactions). The Attorney General has issued a FOIA Memorandum establishing a "foreseeable harm" standard governing the use of FOIA exemptions, regardless of whether the information in question might technically fall within a FOIA exemption. All of the requested records concern examinations of credit unions that have been closed for six years. None of the credit unions examined were ever federally insured, they only applied for federal insurance. We believe that under these particular circumstances, there is limited, if any, foreseeable harm in disclosure of the redacted examination reports. However, we will continue to withhold certain confidential portions of the examinations pursuant to exemption 8. In addition, redactions have been made for information withheld pursuant to exemptions 5 and 6 of the FOIA, as discussed below. Portions of the depositions previously redacted and withheld pursuant to exemption 8 are also being provided at this time. Copies of the redacted examination reports and the depositions previously released (these copies have less information redacted) as well as certain pieces of correspondence not previously provided are enclosed.

We wish to emphasize that the previously withheld examination reports, correspondence, and portions of depositions released today are released solely pursuant to NCUA's discretionary authority. NCUA has not waived its right to invoke exemption 8, or any other exemption, that might be applicable to similar or related information in the future. Courts have held that in no case has the release of certain documents waived the exemption as to other similar documents. On the contrary, courts have generally found that the release of certain documents waives the FOIA exemptions only for those specific documents released. Mobil Oil Corp. v. EPA, 879 F.2d 698 (9th Cir. 1989).

Several hundred pages of documents consist of one credit union's responses to loan exceptions taken by NCUA examiners. Although these documents may technically be responsive to your request and we have included copies of loan exceptions with some of the other credit unions' examinations, we thought it better to provide you with one sample page before staff copied and redacted all of these documents. Portions of the sample document (the first enclosure marked **SAMPLE**) have been redacted pursuant to exemption 6 of the FOIA. Please let us know within ten days of the date of this letter whether or not you wish to have copies of the rest of the loan exception documents. The sample (including the redactions) is representative of what the rest of the documents will look like. You will be charged the applicable rates noted in §792.5(b) of the NCUA Regulations if you wish to have copies of these redacted documents.

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). Information withheld pursuant to exemption 5 in this case includes internal, predecisional memoranda concerning the examination of Rhode Island credit unions applying for federal share insurance. All of these documents were withheld pursuant to exemption 8 in addition to exemption 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 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. The memoranda withheld under exemption 5 are not final opinions of the NCUA. 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), as noted above, the documents withheld pursuant to exemption 5 are also withheld pursuant to exemption 8. Exemption 8 does not require redaction of documents, *see* discussion of exemption 8 above.

We believe that all purposes and requirements of exemption 5 are met in this case. Disclosure of predecisional thoughts included in memoranda, could cause injury to the quality of agency decisions. Therefore, the memoranda continue to be withheld pursuant to exemption 5 of the FOIA.

Exemption 6

Exemption 6 of the FOIA protects all information about an individual in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The courts have held that all information which applies to a particular individual meets the threshold requirement for exemption 6 protection. United States Department of State v. Washington Post Co., 456 U.S. 595 (1982). Most of the information withheld concerns names, account numbers and other information concerning delinquent borrowers. This financial information found in the examination reports clearly meets the threshold requirement for exemption 6 personal information. Once a privacy interest is established, application of exemption 6 requires a balancing of the public's right to disclosure against the individual's right to privacy. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). The public interest in the information is to "shed light on an agency's performance of its statutory duties." United States Department of Justice v. Reporters Committee, 489 U.S. 749 (1989). The burden of establishing that disclosure would serve the public interest is on the requester. Carter v. United States Department of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987). The court in Reporters Committee held that the interest of the individual FOIA requester is not to be considered in the balancing. The privacy interest of the individual is to be balanced against the public interest generally in disclosure. 489 U.S. at 771-772. We believe there is minimal, if any, public interest in disclosure of individual financial information in the examination reports. Therefore, this information is withheld pursuant to exemption 6 of the FOIA and the redacted documents are released.

Waiver

One of the arguments made in your appeal is that NCUA has waived any applicable exemptions since the NCUA examinations of the Rhode Island credit unions you requested were the subject of testimony and public hearings before the Select Commission to Investigate the Failure of RISDIC-Insured Financial Institutions. As noted above, we are releasing portions of the depositions previously withheld. Although we are releasing redacted examination reports, these are released pursuant to our discretionary authority. Our authority to withhold documents was not previously waived due to the fact that public hearings were held on the credit unions that were the subject of those examination reports. We are not aware of a prior release of the examination reports that would subject us to waiver of an applicable exemption.

Vaughn Index

As part of your original FOIA request and this appeal you requested that, to the extent that access is denied to a requested document or to any portion of a document, you be provided with an index containing a description of the deleted material and a statement of the basis for withholding such document or portion of such document. This is typically known as a Vaughn index. With regard to the timing of the creation of a Vaughn index, it is well settled that a requester is not entitled to a Vaughn index during the administrative process. *See e.g. Schaake v. IRS*, No. 91-958, slip op. at 7-8 (S.D. Ill. June 23, 1992). The only statutory requirement applicable to an administrative agency under FOIA is that the requester be informed of the decision to withhold along with the underlying reasons. *See* 5 U.S.C. 552(a)(6)(A)(i) and Judicial Watch, Inc. v. Clinton, 880 F.Supp. 1, 11 (D.D.C. 1995). Courts do not generally require the submission of a Vaughn index prior to the time at which a dispositive motion is filed (normally defendant agency's motion for summary judgment). Efforts to compel a Vaughn index prior to that time are typically denied as premature. Miscavige v. IRS,

2 F.3d 366,369 (11th Cir. 1993). Hence, we are not providing a Vaughn index at this time.

Testimony of NCUA Representative

As part of your original FOIA request and your appeal, you requested that NCUA make one or more representatives with knowledge of the requested documents available for deposition. The FOIA does not require that agency representatives provide testimony regarding requested records. The FOIA only requires that agency records be disclosed unless subject to exemption. Your request for agency testimony concerning requested records pursuant to the FOIA is denied since there is no requirement under FOIA to provide such testimony. We direct you to Part 792, subpart C of the NCUA Rules and Regulations (12 C.F.R. 792.40 - 792.42), which addresses subpoenas served on NCUA officials, employees or agents.

Judicial Review

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 the requester resides, where the requester's 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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