

September 16, 1997

Re: FOIA Appeal, your letter dated August 7, 1997

Dear:

On June 24, 1997, you submitted a request for certain documents from NCUA's

Region I Office. The documents requested included correspondence and logs of telephone conversations between North Attleboro FCU and NCUA concerning a complaint made by you. The Region I Director responded to your request on July 24, 1997, pursuant to the Freedom of Information Act (FOIA). The correspondence (dated 6/14/96, 9/13/96 and 9/25/96) was provided in full. We have located one additional piece of correspondence dated 9/4/96. This letter from the Region I Director to the FCU was originally copied to you, but we have enclosed an additional copy as it is responsive to your FOIA request. All of the responsive telephone logs were provided. The only redactions made from the telephone logs were to two dated July 30, 1996 and August 1, 1996. The portions redacted were withheld pursuant to exemption (b)(5) of the FOIA. On August 7, 1997 you wrote to NCUA's General Counsel appealing the Region I decision to redact information from the two telephone logs and requesting further documentation from NCUA. You wrote a second letter on August 7 to NCUA's Region I Office requesting additional documentation similar to that requested in your letter of appeal to the General Counsel. The Region I Office responded to your request on August 20, 1997. Therefore, we will not address your request for further documentation, but rather only your appeal of the redaction of information from the telephone logs dated July 30 and August 1, 1996. We have determined that some of the redacted information should be released. New copies of the two telephone logs are enclosed. The telephone log dated 7/30/96 is released with no redaction. The last two paragraphs of the 8/1/96 log continue to be withheld pursuant to exemption (b)(5) of the FOIA as explained below.

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 consists of a portion of a telephone log concerning your complaint about the FCU.

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). Any one of the following three policy purposes have been held to constitute a basis 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). We believe that the second and third policy purposes are met in withholding the redacted information.

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. As the purposes and requirements of exemption 5 are met in this case, the portion of the log redacted continues to be withheld pursuant to exemption 5 of the FOIA. Exemption 5 does not always allow for documents to be withheld in full (factual information that is not deliberative in nature must be disclosed, *see Mapother* at 1538 - 40), factual information in the telephone log is now being released.

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 portion of the document withheld and to order production of the document. Such a suit may be filed in the U.S. 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 Va.)

Sincerely,

Robert M. Fenner

General Counsel

GC/HMU:bhs

SSIC 3212

97-0818

Enclosures

cc: Region I Director