

November 18, 1997

Re: FOIA Appeal, your letters dated October 2 and October 24, 1997

Dear Mr:

On August 22, 1997, you submitted a request to Terry McGinnis, Director of Supervision at NCUA's Region VI Office, for a complete copy of the April 28, 1997 examination report of LAIRE Federal Credit Union. In the alternative, you requested NCUA authorization to the credit union to release the examination report to you. The Region VI Director responded to your request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552. Your request was denied on September 2, 1997, pursuant to exemption 8 of the FOIA, 5 U.S.C. §552(b)(8). After receiving his response, on September 16, 1997, you wrote back to the Region VI Director. You asked two questions about the "good cause" provision allowing for release of exempt documents set forth in Section 792.4(b)(3)(i) of NCUA's Rules and Regulations, 12 C.F.R. 792.4(b)(3)(i), and posed four additional questions. Before receiving a response to your September 16 letter and in order to preserve your appeal rights, you filed your October 2 appeal with this Office. We received your appeal on October 6, 1997. The Region VI Director responded to your September 16 letter on October 16. You then supplemented your October 2 appeal with an October 24 letter to this Office which we received on October 27. The denial of your FOIA request is upheld pursuant to exemption 8 of the FOIA. The good cause provision described in §792.(b)(3)(i) of the NCUA Regulations is not applicable to your FOIA request. Both exemption 8 and the good cause provision are discussed below.

Exemption 8

Exemption 8 of the FOIA (5 U.S.C. §552(b)(8)) 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.

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 an examination report.

NCUA has incorporated these dual purposes into its regulation. Section 792.3(a)(8) of the NCUA Rules and Regulations (12 C.F.R. §792.3(a)(8)) implements exemption 8 and adds the following:

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.

You have requested the complete examination report, which is exactly the type of information exempt from disclosure pursuant to exemption 8. The examination report contains information concerning the credit union's management, safety and soundness issues, as well as its financial security. Disclosure of the examination report could clearly harm

the financial security of a credit union as well as interfere with the relationship between NCUA and the credit union. Although the examination report does contain some non-financial information, courts do not require agencies to segregate and disclose those portions of documents that are unrelated to the financial condition of the institution. *See Atkinson*. The entire examination report continues to be withheld pursuant to exemption 8.

In the alternative to NCUA releasing the examination report directly to you, you request that NCUA authorize the credit union to release the report to you. NCUA will not authorize such release for the same reasons that the agency will not release it directly to you. The credit union has no authority to release the examination report on its own because the report, although distributed to the credit union, remains the property of NCUA. 12 C.F.R. 792.4(b)(1).

Good Cause Provision

You argue that even if NCUA may withhold the examination report pursuant to exemption 8 of the FOIA, it should be released under the "good cause" language found in the NCUA Rules and Regulations. This section states:

§792.4(b)(3) Exempt records--Disclosure to third parties.

The NCUA Board, or any person designated by it in writing,

may disclose copies of exempt records to any third party

where requested to do so in writing. The request shall:

(i) specify the record or records to which access is

requested; and (ii) give the reasons for the

request. Any NCUA employee authorized to disclose

exempt NCUA records to third parties may disclose the

records only upon determining that good cause exists

for the disclosure. The designated NCUA official shall

impose such terms and conditions as are deemed

necessary to protect the confidential nature of the

record, the financial integrity of any credit union or

other organization or person to which the records

relate, and the legitimate privacy interests of any

individual names in such records.

This provision does not provide a right of limited access to FOIA records nor is it an exception to the FOIA exemptions. Instead, §792.4(b)(3) has been the basis upon which NCUA may release otherwise exempt records, subject to protective terms and conditions, but only when sought by subpoena or similar process within the context of litigation or formal administrative proceedings. A release under this section is not a release under FOIA; the FOIA does not permit imposition of conditions such as limited disclosure. Under the FOIA, once a document is disclosed to one requester, it is available to any requester.

Section 792.4(b)(3) was recently replaced by a new provision setting forth revised requirements for obtaining non-public information with the use of a subpoena. The new final rule removes §792.4(b)(3) from the NCUA Rules and

Regulations. *See* 62 Fed. Reg 56051, 10/29/97, enclosed. Section 792.41 of the new rule states in part:

When does this subpart apply? This subpart applies if you want to obtain nonpublic records or testimony of an NCUA employee for legal proceedings. It doesn't apply to the release of records under the Freedom of Information Act ...

In sum, FOIA does not allow for a limited "good cause" release of exempt information to third parties. NCUA has never released records using such a theory.

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 withheld 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, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner

General Counsel

GC/HMU:bhs

SSIC 3212

97-1011

Enclosure

cc: Region VI Director