

June 25, 1998

Mr. Charles W. Filson

Callahan and Associates

1001 Connecticut Avenue, NW

Suite 1001

Washington, DC 20036

Re: FOIA Appeal, your letter dated May 27, 1998

Dear Mr. Filson:

On March 24, 1998, you submitted a Freedom of Information Act (FOIA) request to Becky Baker, Secretary of the NCUA Board, for copies of any material presented to the NCUA Board that illustrate Central Liquidity Facility (CLF) lending from 1979 through 1983. You identified four federal credit unions (Mather FCU, Mare Island FCU, Eglin FCU, and Chattanooga TVA FCU) you believed to be participants in the CLF lending program. You also requested agency records concerning special lending programs developed to help credit unions that were affected by the Penn Square Bank liquidation. Dianne Salva, NCUA Staff Attorney, responded to your request on April 27, 1998. Your request concerning three of the named credit unions was denied pursuant to exemptions 5 and 8 of the FOIA (5 USC 552b(5) and (8)). As noted in Ms. Salva's letter, responsive documents consisted of four Board Action Memoranda (BAMs) and their attachments. No information was found on Mare Island FCU. Ms. Salva's response also indicated that more information was needed in order to search our files concerning the Penn Square failure. Your appeal was hand delivered on May 28, 1998. You provided no additional information on the Penn Square failure so we assume you are not pursuing that part of your request at this time. We have identified two additional responsive BAMs with attachments: Mather FCU dated March 25, 1982; and Chattanooga TVA Employees FCU dated October 13, 1982. The denial of your FOIA request is upheld pursuant to exemptions 5 and 8 of the FOIA. Both 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). This exemption is incorporated into NCUA's Rules and Regulations at 12 CFR 792.11(a)(5). Discussion in the BAMs themselves as well as internal memoranda attached to the BAMs are withheld pursuant to exemption 5 in this case.

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).

In your appeal you state you do not believe the policy purposes outlined in the Russell case continue to be valid reasons to exempt records, since the records requested are at least seventeen years old. We disagree. We believe that the first and third policy purposes continue to be met in withholding the memoranda. In support of the first purpose

noted above, policy discussions between subordinates and superiors may be stifled if employees are aware that records of discussions are being released under the FOIA. The fact that the discussions took place several years ago has little or no bearing on this basis for withholding the information. Similarly in support of the third purpose, we do not believe that the passage of time diminishes public confusion that might result from disclosure of reasons that were not ultimately the grounds for an action taken by NCUA.

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 memoranda continue 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). However, exemption 8 does allow for entire documents to be withheld.

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 792.11(a)(8) of the NCUA Rules and Regulations 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.

The requested information concerns several credit unions involved in CLF lending programs. Matters that are related to examination reports (e.g., determinations regarding assistance) can be withheld from disclosure pursuant to exemption 8. *See* Atkinson. The BAMs and their attachments concern matters clearly within exemption 8. Safety and soundness issues are discussed. Disclosure of the records could clearly harm the financial security of the credit unions as well as interfere with the relationship between NCUA and credit unions. In addition, courts have held that 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). We do not believe the passage of time significantly diminishes the rationale for withholding the information pursuant to exemption 8. Although the documentation 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 BAMs and their attachments continue to be withheld in their entirety pursuant to exemption 8.

In your appeal, you describe the purpose of your FOIA request. You state you will use the information requested to develop case studies which demonstrate that the types of assistance provided by the CLF over the years are not available from other lending sources. The case studies will be used to demonstrate the unique role which the CLF fills in the credit union community and the need for its continued existence.

A FOIA requester's basic rights to access are neither increased nor decreased by virtue of having a greater interest in the records than that of an average member of the general public. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143, n.10 (1975). Under the FOIA, once a document is disclosed to one requester, it is available to any requester. We believe that documents requested should remain exempt from disclosure because of the potential harm disclosure could cause, as discussed above.

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

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