February 7, 2000

Re: FOIA Appeal, your letter dated January 7, 2000

Dear:

On October 20, 1999, you submitted a Freedom of Information Act (FOIA) request for copies of records regarding NCUA investigation 97-06. You described six documents that you wished to receive. Dianne Salva, NCUA's FOIA Officer, responded to your request on December 7, 1999. The only responsive record found was a certified audit of . The audit was withheld pursuant to exemption 8 of the FOIA

(5 U.S.C. 552(b)(8)) and subsection (k)(2) of the Privacy Act

(5 U.S.C. 552a(k)(2). We received your January 7, 2000 appeal on January 10. Your appeal is denied. The certified audit is withheld pursuant to exemption 8 of the FOIA and subsection (d)(5) (rather than (k)(2)) of the Privacy Act.

Exemption 8 of the FOIA

Exemption 8 of the FOIA (5 U.S.C. 552(b)(8)) applies to 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 pubic 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.C. Cir. 1980). Certified audits, although prepared by outside auditors rather than NCUA examiners, are used by NCUA in its supervision of credit unions. Certified audits fit squarely within the language of exemption 8. Release of a certified audit could reasonably harm the financial security of a credit union and interfere with the relationship between a credit union and NCUA.

Subsection (d)(5) of the Privacy Act

The certified audit report was contained in an NCUA system of records. Section (d) of the Privacy Act (5 U.S.C. 552a(d)) addresses access to information contained within a system of records. Generally, individuals have access to such information. However, subsection (d)(5) states that "nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding." The courts have interpreted this provision broadly. It has been interpreted to extend to records compiled in anticipation of civil proceedings, whether or not by attorneys. Crooker v. Marshals Service, No. 85-2599, slip op. at 2-3 (D.D.C. Dec. 16, 1985). Pursuant to section (d)(5) of the Privacy Act, access to the certified audit is denied.

You state that your right to the certified audit supersedes the applicable provisions of the FOIA and Privacy Act because the audit was central to and substantively impacted NCUA investigation 97-06. We disagree. The purposes of withholding the certified audit pursuant to exemption 8 of the FOIA are clearly met in this case. In addition, Subsection (d)(5) of the Privacy Act provides an applicable exemption preventing you from accessing the audit. You

provide no authority that would supersede NCUA's authority to withhold the audit pursuant to these provisions and we know of none.

Pursuant to 5 U.S.C. 552(a)(4)(B) (FOIA) and 552a(g) (Privacy Act), you may seek judicial review of the determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court in the district where you reside, where your principle place of business is located, the District of Columbia, or where the document is located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner

General Counsel

GC/HMU:bhs

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