

Todd Okun, Esq.

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Re: FOIA Appeal, your letter dated February 2, 2000

Dear Mr. Okun:

On December 7, 1999, you filed a Freedom of Information Act (FOIA) Request for the application, NCUA Board Order, all NCUA memoranda concerning the application, and any letters or other documents submitted by third parties concerning the application by Visions Federal Credit Union to convert to a community charter. Dianne Salva, NCUA's FOIA Officer, replied to your request on January 27, 2000. You were provided with over 200 pages of responsive documents. Some of the released pages contained redactions. Approximately 50 pages were withheld in full. The pages withheld in full and redactions were made pursuant to exemptions 4, 5, and 8 of the FOIA. 12 U.S.C. 552(b)(4), (5), and (8). We received your appeal on February 7. Your appeal is granted in part and denied in part. All of the information redacted from the approximately 200 pages released continues to be withheld pursuant to exemptions 4, 5, and 8. Several pages that were previously withheld are being released, some in full, some with redactions. Information is redacted pursuant to exemption 5. The newly released pages are enclosed. A discussion of the applicable exemptions follows.

In your appeal, you specifically asked about the basis upon which the Board Order concerning the Visions application was withheld. There is no Board Order in this case. A Decision and Order is only issued by the Board when it makes a determination on appeal. There is no Decision and Order when the Board makes the initial (and only) NCUA decision on a charter conversion application. We have enclosed a copy of the letter sent by the Region I Director notifying Visions of the Board's action on its conversion application.

Applicable FOIA Exemptions

Exemption 4

The information withheld pursuant to exemption 4 consists of business and marketing plans and budget and financial projections for Visions FCU. Exemption 4 of the FOIA protects two categories of information: (1) trade secrets; and (2) information which is commercial or financial, obtained from a person and privileged or confidential.

5 U.S.C.552(b)(4). All of the information withheld falls within the commercial/financial category. The term "commercial" has been interpreted to include anything "pertaining or relating to or dealing with commerce." American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 870 (2d Cir. 1978). All of the information withheld pursuant to exemption 4 meets the broad interpretation of commercial or financial information. Information "obtained from a person" has been held to include information obtained from a corporation. Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). Information obtained from a credit union meets the standard of obtained "from a person" under Nadler. In Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993), the court established two distinct standards to be used in determining whether commercial/financial information submitted to an agency is "confidential" under exemption 4. According to Critical Mass, information required to be submitted to an agency (which is the case here) is confidential if its release would (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. See National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). We believe the information withheld meets the substantial harm prong of National Parks as noted in Critical Mass.

Exemption 5

The information withheld pursuant to exemption 5 consists of staff opinions and recommendations expressed prior to final action by the NCUA Board. 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). 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). The first and third policies enumerated in Russell apply in this case. The second policy does not apply since the NCUA Board has taken final agency action on the Visions FCU application.

We note that several of the newly released pages (internal memoranda) were previously withheld pursuant to exemption 5. The factual information in the memoranda is now released. Redacted information continues to be withheld pursuant to exemption 5.

Exemption 8

The information withheld pursuant to exemption 8 consists of CAMEL code ratings and other financial condition and examination information including overlap and safety and soundness analyses for Visions FCU, as well as other credit unions within the requested community. 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 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.C. Cir. 1980). Examination information fits squarely within the language of exemption 8. Both purposes outlined in Atkinson are met. Release of the information withheld could reasonably harm the financial security of a credit union and interfere with the relationship between a credit union and NCUA.

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court in the district where the requester's principle 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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