

November 9, 2000

Mr. Nicholas Tomassoni

Re: FOIA fee waiver appeal, your letter of October 16, 2000

Dear Mr. Tomassoni:

On August 26, 2000, you filed a Freedom of Information Act (FOIA) request for documents concerning Warren Area Federal Credit Union. On September 20, 2000, Dianne Salva, NCUA's FOIA Officer, wrote to you seeking your agreement to pay the estimated \$450 in charges to process your request. Ms. Salva also asked if you wished to narrow your request in order to reduce the charges. You responded on September 24, 2000, slightly narrowing your request and requesting a waiver of all charges associated with your request. You believe a waiver is appropriate because disclosure will be in the public interest and will benefit members of the credit union. Ms. Salva denied your request for a fee waiver on October 6, 2000. We received your appeal of the fee waiver denial on October 19, 2000. You state you are entitled to a waiver of fees because "disclosure of the requested documents is in the public interest, especially the members of the credit union." You also note that you have no commercial interest in release of the documents. Your appeal is denied as explained below.

The FOIA provides that fees can be lowered or waived if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(iii). Section 792.27 of NCUA's FOIA regulation restates this test and sets forth the factors NCUA will consider in making a determination on a fee waiver request. 12 C.F.R. §792.27. NCUA will first determine: 1) whether the subject of the requested records concerns government operations or activities; 2) whether disclosure will contribute to an understanding of government operations or activities; 3) whether disclosure will contribute to the public understanding; and 4) whether disclosure is likely to contribute significantly to the public understanding of government operations or activities. (See 12 C.F.R. §792.27(a)(1) - (4).) Courts have held that it is the requestor's burden to establish that the statutory standard of public interest is met. Conclusory statements are insufficient to make the public interest showing. McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987) and Oglesby v. U.S. Department of the Army, 920 F. 2d 57 (D.C. Cir. 1990). Your statement, without any backup whatsoever, that disclosure is in the public interest, especially the members of the credit union, is conclusory and clearly fails the public interest standard. We also note that the public interest refers to a broader audience than one requestor or a narrow segment of interested persons. See Carney v. United States Department of Justice, 19 F.3d 807 (2d Cir. 1994). Your statement that disclosure is in the interest of the credit union's members further supports our conclusion that the public interest standard is not met. The courts have also indicated that a requestor should have the ability and intention to disseminate requested information to the interested public. See McClellan. You do not address your ability to disseminate the information.

Once the public interest standard is met, NCUA Regulations require that we determine: 1) whether the requestor has a commercial interest in the disclosure; and if so 2) that the public interest outweighs the requestor's commercial interest. (See 12 C.F.R. §792.27(b)(1) – (2).) You note that you have no commercial interest in the documents. Since you have not met the public interest standard,

we need not address the issue of commercial interest and whether it outweighs the public interest.

Although the appeal of your fee waiver denial is denied, your request for documents remains open pending your agreement to pay the cost of its processing. The revised cost estimate (as noted in Ms. Salva's letter of October 6, 2000) is \$360. Please contact Ms. Salva within 10 days of the date of this letter with your agreement to pay the estimate in order for your FOIA request to be processed. You must agree to pay the estimated cost, whether the information you are seeking is determined to be either released or is withheld pursuant to one or more of the FOIA exemptions. If you do not contact Ms. Salva within 10 days, the file on your request will be closed.

Pursuant to 5 U.S.C. §552(a)(4)(A) and (B), you may seek judicial review of this fee waiver 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 documents are located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner
General Counsel

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