

December 1, 2000

Todd A. Okun  
Styskal, Wiese & Melchione, LLP  
550 North Brand Boulevard, Suite 550  
Glendale, CA 91203

Re: FOIA Appeal, your letter dated November 13, 2000

Dear Mr. Okun:

On October 10, 2000, you filed a Freedom of Information Act (FOIA) request for: 1) the NCUA Board Order approving the City of San Francisco for a community charter; 2) the application submitted for the community charter; and 3) the Board Action Memorandum concerning NCUA Board approval of the community charter. San Francisco Federal Credit Union applied for and then appealed the Region's denial of its request for a community charter conversion for the City of San Francisco.

You specifically stated in your request that you were not asking for any confidential financial or business information. You received a response to your request from Dianne Salva, NCUA's FOIA Officer, on October 30, 2000. You were provided with approximately 290 pages of responsive documents. Ten of these pages contained redactions. In addition, approximately 38 pages were withheld in full. The information was withheld pursuant to exemptions 4, 5 and 8 of the FOIA. 12 U.S.C. 552(b)(4), (5), & (8). Fifteen of the pages withheld in full constitute the business and marketing plan portions of the application package; five pages contain additional commercial and financial information about the applicant credit union. One redaction on a page you received was of confidential commercial information. These 20 pages and one redaction were withheld pursuant to exemption (4) of the FOIA. Since your request specifically excluded financial and business information, we need not discuss exemption 4 since the information withheld was actually not responsive to your request.

We have reviewed the remaining pages withheld in full (approximately 18) and the redactions made on the pages you received (approximately 290 pages released, 10 pages with redactions). Your appeal is granted in part and denied in part. The pages withheld in full consisted of internal memoranda attached to the Board Action Memorandum. They were withheld pursuant to exemptions 5 and 8 of the FOIA. Portions of seven of these pages are now released with redactions. One page is released in full. Exemptions 5 and 8 continue to apply to the redacted portions and pages withheld. The newly redacted pages and one full page are enclosed. Exemptions 5 and 8 continue to apply to all of the information redacted from previously released pages. These exemptions are discussed below.

Although not specifically requested, Ms. Salva addressed the NCUA Board meeting minutes in her response. The minutes were not complete at the time of your request, however, they are now available. The portion of the minutes of the September 7, 2000, open Board meeting where the San Francisco Federal Credit Union appeal was discussed is now enclosed.

## Exemption 5

The information withheld pursuant to exemption 5 consists of staff opinions and recommendations contained in internal memoranda 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 San Francisco FCU application and appeal.

As noted above, the newly released redacted pages (internal memoranda) were previously withheld in part pursuant to exemption 5. Factual information in the memoranda is now released.

## Exemption 8

The information withheld pursuant to exemption 8 consists of CAMEL code ratings and other financial condition and examination information found in the application package and various internal memoranda. 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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