

January 9, 2001

Mr. Andrew Kaminski

110 Greenpoint Avenue

Brooklyn, NY 11222

Re: FOIA Appeal, your letter dated December 4, 2000

Dear Mr. Kaminski:

We received your December 4, 2000, Freedom of Information Act (FOIA) appeal on December 8, 2000. In your appeal, you reference Dianne Salva's (NCUA's FOIA Officer) response to you dated November 2, 2000. Ms. Salva's November 2<sup>nd</sup> letter was a final response to two of your FOIA requests, one dated August 13<sup>th</sup> and another dated August 16, 2000. You received an interim response from Ms. Salva to your August 13<sup>th</sup> request, dated October 6, 2000. (See discussion below.) The November 2<sup>nd</sup> response specifically responded to your August 16<sup>th</sup> request and noted that no additional documents were found responding to your August 13<sup>th</sup> request. Included with the November 2<sup>nd</sup> letter were 8 documents (for a total of 43 pages) sent in response to your August 16<sup>th</sup> request concerning NCUA's investigation of Currency Transaction Reporting Act violations by Polish and Slavic Federal Credit Union (P & S FCU). Twenty-four documents were withheld. You returned the 8 documents noting they were already in your possession for "many, many months and are totally inadequate to satisfy" your request. You also returned the invoice (bill for \$413) enclosed with the November 2<sup>nd</sup> letter. The FOIA Officer is not aware of what documents you already possess. Unless you specifically exclude certain responsive documents in a FOIA request, all responsive, releasable documents and appropriate charges therefore will be forwarded to you. You remain responsible for the charges set forth in the invoice. We have not treated this portion of your letter as part of your FOIA appeal.

You note in your letter that you are appealing NCUA's response to your request for documents concerning the selection of the Advisory Board to P & S FCU. This is an appeal of Ms. Salva's October 6, 2000, response to your August 13, 2000, request. Your appeal specifically states you seek records of any information concerning qualification for and, instructions regarding those to be denied eligibility to the Advisory Board, and any information specifically concerning you and the Advisory Board selection process. Your August 13, 2000, request also included records concerning selection of the board of directors of P & S FCU (put in place when the FCU was released from conservatorship). You received 16 documents totaling approximately 56 pages in response to your August 13<sup>th</sup> request. Several of the released pages had information redacted. Thirty-three documents totaling 113 pages were withheld. All redactions and pages withheld in full were made pursuant to exemptions 5, 6, 7(C), & 8 of the FOIA. 5 U.S.C. 552(b)(5), (6), (7)(C) & (8). Your appeal is granted in part and denied in part. A portion of one page and four complete pages are released and enclosed. Redacted and withheld information continues to be withheld pursuant to exemptions 5, 6, 7(C) & (8). A discussion of the types of information withheld and the applicable exemptions follows. We also note that approximately 29 of the 113 pages withheld were not specifically responsive to your August 13<sup>th</sup> FOIA request and this appeal. Information concerning selection of the Advisory Board and the board of directors for P & S FCU was not contained in those 29 pages.

Exemption 5

The information withheld pursuant to exemption 5 includes internal correspondence (including e-mail) and memoranda, and drafts of memoranda and letters. 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 selection of the Advisory Board and board of directors has already taken place.

### Exemption 6

The information withheld pursuant to exemption 6 includes home addresses, telephone numbers and biographical and interview information of those who applied to be on the Advisory Board. Personal information on former officials was also withheld. Exemption 6 protects information about an individual in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The courts have held that all information that applies to a particular individual meets the threshold requirement for privacy protection. United States Department of State v. Washington Post. Co., 456 U.S. 595 (1982). Once a privacy interest is established, application of exemption 6 requires a balancing of the public's right to disclosure against the individual's right to privacy. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). The withheld (and redacted) information meets the requirement for exemption 6 protection. There is minimal, if any, public interest in disclosing this personal information. The individuals' privacy interests outweigh any public interest in disclosure.

## **Exemption 7(C)**

The information withheld pursuant to exemption 7(C) includes personal information on former credit union officials. Exemption 7(C) protects information compiled for law enforcement purposes that, if released, "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). FOIA case law has established that law enforcement includes civil and criminal statutes, as well as statutes authorizing administrative (regulatory) proceedings. Center for National Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974). NCUA proceedings (e.g. investigation and conservatorship proceedings) qualify as law enforcement for purposes of exemption 7. In SafeCard Services v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1989), the court held that the categorical withholding of information that identifies third parties in law enforcement records is appropriate. The balancing used for exemption 6 material is not necessary for withholding information pursuant to exemption 7(C). Personal information on former credit union officials continues to be withheld pursuant to exemption 7(C).

## **Exemption 8**

The information withheld pursuant to exemption 8 includes information on the financial condition of the P & S FCU, including safety and soundness and CAMEL code information. Exemption 8 of the FOIA 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." 5 U.S.C.

552(b)(8). 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, 80,102 (D.C. Cir. 1980). The information withheld 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 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

Enclosures

GC/HMU:bhs

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