

July 2, 2001

EXEMPTION 6

Re: FOIA Appeal, your letter dated May 29, 2001

Dear M :

EXEMPTION 6

On April 10, 2001, you made a request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, and Privacy Act, (PA) 5 U.S.C. 552a. On May 15, Dianne Salva, NCUA's FOIA Officer, responded to your request, enclosing 61 pages of responsive documents. One 5-page document was identified and withheld pursuant to exemptions 7(A), 7(C), and 8 of the FOIA and exemption (k)(2) of the PA. The withheld document was found in NCUA's system of records number 8 entitled, "Investigative Reports Involving Any Crime, Suspected Crime or Suspicious Activity Against a Credit Union, NCUA." We received your May 29, 2001, appeal on June 4, 2001. In addition to appealing the FOIA officer's determination to withhold the 5-page document, you request that NCUA investigate EXEMPTIONS 7(A) & 8 in relation to its release of your financial transactions at the FCU to your former employer, and hold accountable the EXEMPTION 7(A) & 8 FCU agents who perpetrated the release. Your appeal for release of the 5-page document is denied pursuant to exemptions 6, 7(A) and 7(C) of the FOIA and subsection (k)(2) of the PA as explained below. As noted in Ms. Salva's letter, NCUA has already processed your request for investigation through its Region VI Office. There is no administrative review process for this procedure.

Exemption 7(A) - FOIA

Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information...could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). Criminal, civil and regulatory proceedings have all been held to be law enforcement proceedings for purposes of this exemption. Rosenglick v. IRS, No. 97-747-18A, 1998 U.S. Dist. LEXIS 3920, at \*6 (M.D. Fla. Mar. 10, 1998). A two-step test is necessary in order to determine the applicability of exemption 7(A). First, a law enforcement proceeding must be pending, proceeding or prospective; and second, release of information about it could reasonably be expected to cause some articulable harm. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) and Manna v. United States Department of Justice, 51 F.3d 1158 (3<sup>rd</sup> Cir. 1995). There is a reasonable possibility of a prospective proceeding given the nature and age of the document withheld, so the first test is met. Release of the type of information withheld could clearly interfere with prospective proceedings. Therefore the documents continue to be withheld pursuant to exemption 7(A).

## Exemptions 6 and 7(C) - FOIA

Exemption 6 of the FOIA 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). Exemption 7(C) is the law enforcement counterpart to exemption 6. It provides protection for law enforcement information the disclosure of which "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).

The privacy interests to be protected are not your interests, since you are making the information request. Rather, the privacy interests of other parties named in the withheld document are those protected. 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 standard for withholding information pursuant to exemption 7(C) is more easily met than the standard for exemption 6. Disclosure need only reasonably be expected to constitute an invasion of privacy; balancing against the public interest is not required. *See* United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) and SafeCard Services v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1989). The withheld information meets the requirement for exemption 6 protection. Although there may be some public interest in disclosing this personal information, an individual's privacy interests, especially in a law enforcement related document, clearly outweigh any public interest in disclosure. The standard for withholding information for both exemptions 6 and 7(C) is met.

## Exemption 8 - FOIA

Exemption 8 of the FOIA protects matters that are "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 withheld document, although not prepared

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. The purposes of the exemption are also 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.

## Subsection (k)(2) - PA

Subsection (k)(2) of the PA provides that agencies may exclude a system of records from its disclosure provisions if the system contains "investigatory material compiled for law enforcement purposes." 5 U.S.C. 552a(k)(2). As noted above, the withheld document was found in NCUA system of records - 8 Investigative Reports Involving Any Crime, Suspected Crime or Suspicious Activity Against a Credit Union. NCUA has excluded this system from the disclosure provisions of the PA. (*See* 5 U.S.C. 552a(d)(1).) The document

withheld contains investigatory material compiled for law enforcement purposes. Enclosed is a copy of the Federal Register publication concerning system 8.

Pursuant to the FOIA and PA (5 U.S.C. 552(a)(4)(B) of the FOIA and 5 U.S.C. 552a(g) of the PA), 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 where the requester resides, where the requester's 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  
01-0602 SSIC 3212  
FOIA 01-228

Enclosure