

(b) (6) & (7)(C)

Re: FOIA Appeal, your letter dated July 12, 2001

Dear (b) (6) & (7)(C)

On May 24, 2001, you wrote to NCUA's Inspector General requesting agency records pursuant to the Freedom of Information Act (FOIA). You requested:

1) all reports, summaries or correspondence related to the

(b) (6) & (7)(C)

2) all reports to follow thereafter; and 3) all records, including but not limited to all of

(b) (6) & (7)(C)

and all other statements and documents used as evidence in preparing the above requested reports. On June 25, 2001, Sharon Separ, Counsel to the Inspector General, informed you that you would receive a response to your request on or before July 6, 2001. On July 6, 2001, Ms. Separ responded to your request, granting your request in part and denying it in part. We received your July 12, 2001, appeal of Ms. Separ's determination on July 13. Your appeal is granted in part and denied in part.

With regard item 1) above, Ms. Separ neither confirmed nor denied the existence of responsive documents. She noted that if there were records responsive to your request, such records would be exempt pursuant to exemptions 6 and 7(C), (D), & (E) of the FOIA, 5 U.S.C. 552(b)(6) and (7). Your appeal is denied with respect to this portion of your request. Ms. Separ did acknowledge the existence of a draft audit report. The draft report was withheld pursuant to exemption 5 of the FOIA, 5 U.S.C. 552(b)(5). The Office of the Inspector General issued the final audit

(b)(6) & (7)(C)

A copy of the final report is enclosed. With regard to item 2) above, Ms. Separ denied the request, noting that the FOIA does not compel agencies to comply with requests for records not yet created. We have treated this portion of your request as withdrawn. With regard to item 3) above, Ms. Separ provided you with approximately 41 pages of memoranda, statements and reports of your interviews; some pages contained redactions. Redactions were made pursuant to exemptions 6 and 7(C), (D) & (E) of the FOIA. Additional records were withheld pursuant to exemptions 6 and 7(C), (D), & (E) of the FOIA. Your appeal is denied with respect to this portion of your request.

The basis for denied portions of your appeal, including a discussion of the applicable exemptions and other issues, follows.

Freedom of Information Act - General

You asked whether information released to one individual would automatically be available to any other FOIA requestor. As you may know, one generally does not look to the identity of the individual FOIA requestor to make a determination on

whether documents are released or withheld. The purpose for which records are sought has no bearing on the merits of the request. See United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989). Generally, if documents are released to one FOIA requester, they are available to any requester. However, there is an exception to this general rule. Information that would be withheld from any other FOIA requestor pursuant to exemptions 6 and/or 7(C) of the FOIA (privacy exemptions) is released to the individual whose privacy interest is at stake. In other words, we do not use these FOIA exemptions to protect an individual's privacy from himself.

Request for Future Reports, Withdrawal of Portions of Request (b) (6) & (7)(C)

In item 2) above, you requested future Inspector General reports concerning the individuals and subjects outlined in your request. Ms. Separ denied this portion of your request stating that FOIA requesters may not compel agencies to make automatic releases of records as they are created. This is a correct statement of case law interpreting the FOIA. See Mandel Grunfeld & Herrick v. United States Customs Service, 709 F.2d 41, 43 (11th Cir. 1983). This means that requests cannot properly be made for "future" records not yet created. In your July 12 appeal, you withdraw this portion of your request, assuming Ms. Separ is correct in her statement of the law. We have treated this portion of your request as withdrawn.

You also state that you would withdraw your requests in item 3) above

(b) (6) & (7)(C)

or any other FOIA requestors. Pursuant to FOIA privacy exemptions 6 and 7(C) and relevant case law (see below), generally an individual's statement would only be released to the individual who gave the statement, with any necessary redactions to protect others' privacy. It is the policy of the Office of Inspector General to release a statement only to the individual who gave the statement. In addition,

(b) (6) & (7)(C)

However, we cannot make the promise that the documents will never be released. Although unlikely, there may be some future proceeding, including litigation, where one or more of the documents would be released, either in part or in full.

In addition to your FOIA appeal, a large portion of your letter concerns

(b) (6) & (7)(C)

The FOIA only addresses release of government records and exemptions thereto. It does not provide a forum for (b) (6) & (7)(C)

Exemptions 6 and 7(C)

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). An investigation by NCUA's Inspector General qualifies as law enforcement for purposes of exemption 7(C).

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. The public interest has been limited to the core purpose of the FOIA: information that will shed light on an agency's performance of its statutory duties. United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). Although there may be some public interest in disclosing personal information, in this case, an individual's privacy interests clearly outweigh any public interest in disclosure. The withheld information meets the requirement for exemption 6 protection. The standard for withholding information pursuant to exemption 7(C) is somewhat lower than the standard for exemption 6. Disclosure need only reasonably be expected to constitute an invasion of privacy. Exemption 7(C) allows for more categorical withholding of information than does exemption 6. See Reporters Committee, infra, and SafeCard Services v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1991). The standard for withholding information for both exemptions 6 and 7(C) is met.

Exemption 7(D)

Exemption 7(D) authorizes the withholding of records or information compiled for law enforcement purposes which "could reasonably be expected to disclose the identity of a confidential source ...which furnished information on a confidential basis... 5 U.S.C. 552(b)(7)(D). Sources' identities are protected where there is an express promise of confidentiality (see Rosenfeld v. United States Department of Justice, 57 F.3d 803, 814 (9th Cir. 1995) or "under circumstances from which such an assurance could be reasonably inferred." See Senate Conference Report No. 93-1200, at 13

(b) (6) & (7)(C)

The standard of exemption 7(D) has been met and the documents continue to be withheld.

Exemption 7(E)

Exemption 7(E) authorizes the withholding of all law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." The first clause of this exemption allows for a categorical withholding of certain investigative procedures. Summers v. United States Department of Justice, No. 87-3168, slip op. at 11, 12, 15 (D.D.C. 4/19/2000). The second clause protects guidelines the release of which could cause a circumvention of the law. The Inspector General found this exemption applicable. Further explanation of specific

guidelines or techniques could cause the harm protected by the exemption.

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 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

Enclosure
GC/HMU:bhs
01-0740
SSIC 3212