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Re: FOIA Appeal, your letter dated July 26, 2001

EXEMPTIONS 6 and 7(C)

On February 7, 2001, your law firm, on behalf of _____) filed a Freedom of Information Act (FOIA) request for the following two categories of documents: 1) any report(s) related to EXEMPTIONS 6 and 7(C)

_____ by the NCUA Office of Inspector General (OIG); and 2) any records related to EXEMPTIONS 6 and 7(C) by any of the following persons: Carolyn Jordan, Sherry Turpenoff, and Mark Treichel. You renewed your February 8, 2001 request on May 15, 2001. The Office of Inspector General was responsible for responding to category 1) of your request and Dianne Salva, NCUA's FOIA Officer, was responsible for responding to category 2) of your request. Sharon Separ of the OIG initially responded to you on February 20, 2001, withholding all responsive documents. She responded to your renewed request on June 27, 2001, enclosing redacted copies of EXEMPTIONS 6 and 7(C)

Ms. Salva initially responded to your request on March 9 and responded to your renewed request on June 29, 2001, enclosing several documents with each response. You appealed Ms. Salva's March 9 response on March 15 and received a response to that appeal dated April 16. We note that the category 2) documents (those addressed by Ms. Salva and subject to your March 15 appeal) are the subject of FOIA litigation against NCUA and are not part of this appeal. We received your July 26 appeal on July 26. You state in this letter that you are appealing Sharon Separ's response of June 27, 2001. We reviewed the category 1) documents EXEMPTIONS 6 and 7(C) that were enclosed with Ms. Separ's June 27, 2001 response) for purposes of this appeal.

Your appeal is granted in part and denied in part. Minor redactions from two pages of EXEMPTIONS 6 and 7(C) were made inadvertently and are now released. The pages are enclosed. The newly released material is underlined. The redacted portions of these two pages and all other redactions from pages you received with Ms. Separ's June 27 response continue to be withheld pursuant to exemptions (b)(5), (6) and (7)(C), (D), & (E) of the FOIA as explained below.

Exemption 5

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). All three policy reasons apply to some of the redactions made.
EXEMPTIONS 6 and 7(C)

the NCUA, they can be withheld pursuant to the deliberative process privilege of exemption 5. See Ahearn v. U.S. Army Materials and Mechanics Research Center, 580 F.Supp. 1405 (Mass. Dis. 1984). In addition,
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protected from disclosure pursuant to exemption 5. See United States v. Weber Aircraft Corporation, 465 U.S. 792 (1984) and Ahearn v. U.S. Army Materials and Mechanics Research Center, 583 F.Supp. 1123 (Mass Dis. 1984).

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).

EXEMPTIONS 6 and 7(C) 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. There was either an express promise of confidentiality or a reasonable assurance of confidentiality given to all sources whose information EXEMPTIONS 6 and 7(C) was redacted based on this exemption. Further explanation could breach such confidentiality. The standard of exemption 7(D) has been met.

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 your client resides, where his 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
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