

November 6, 2001

Todd A. Okun, Esq.
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Re: FOIA Appeal, your letter dated October 3, 2001

Dear Mr. Okun:

On August 3, 2001, pursuant to the Freedom of Information Act (FOIA), you requested all documents relating to NCUA's determination concerning a particular credit union's equity share program. Dianne Salva, NCUA's FOIA Officer, responded to your request on September 25, 2001. You received four responsive documents (approximately 33 pages). Approximately 22 pages of responsive documents (including several pieces of correspondence and two internal memoranda) were withheld pursuant to exemptions 5 and 8 of the FOIA. Your appeal is granted in part and denied in part.

Three documents are released in full and seven documents are released with redactions. One of the documents released with redactions is a letter from Robert Fenner to James Blaine, dated September 14, 2001. This letter was not part of the documents reviewed in response to your initial request. The redacted information on the released pages and the two internal memoranda previously withheld continue to be withheld pursuant to exemptions 4, 5, and 8 of the FOIA. An additional internal memo written after Ms. Salva's September 25 response is being withheld pursuant to exemptions 5 and 8 of the FOIA. The newly released documents are enclosed. The applicable exemptions are discussed below.

Exemption 4

A few redactions from the released documents were made pursuant to exemption 4. Exemption 4 of the FOIA protects two categories of information: (1) trade secrets; and (2) commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. 552(b)(4). The information redacted pursuant to exemption 4 falls into the category of commercial/financial information. The term "commercial" has been interpreted to include anything "pertaining or relating to or dealing with commerce." American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 870 (2d Cir. 1978). The information withheld pursuant to exemption 4 meets the broad interpretation of commercial or financial information. Information "obtained from a person" has been held to include information obtained from a corporation. Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). Information obtained from a credit union meets the standard of obtained "from a person" under Nadler. In Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993), the court established two distinct standards to be used in determining whether commercial/financial information submitted to an agency is "confidential" under exemption 4. According to Critical Mass, information required to be submitted to an agency (which is the case here) is confidential if its release would (1) impair the Government's ability to obtain necessary information in the

future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. See National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). We believe the information withheld meets the substantial harm prong of National Parks as noted in Critical Mass.

Exemption 5

Three internal memoranda (the two previously withheld and the more recent memorandum written after Ms. Salva's September 25 response) are withheld pursuant to exemptions 5 and 8. These three memoranda total approximately 15 pages. 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 policies apply to various portions of the three internal memoranda withheld in this case.

Exemption 8

Portions of the three internal memoranda are also withheld pursuant to exemption 8 of the FOIA. Exemption 8 (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). Information in the internal memoranda is related to the regulation and supervision of the credit unions involved in the equity program. Release of this type of information could cause the harms noted above.

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 principal 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
01-1029
SSIC 3212
FOIA 01-360