

November 19, 2002

J. Michael Young

(b)6

Re: Your FOIA appeal dated October 28, 2002

Dear Mr. Young:

Beginning with your letter of September 17, 2002, there has been a series of correspondence between you and Alonzo Swann, NCUA's Region III Director, concerning NCUA's position on your employment as a CEO within the credit union industry and your access to information concerning NCUA's position. On October 14th, 2002, you filed a request for information NCUA used as the basis for the opinion stated in Mr. Swann's September 25th letter to you. Your request was considered under the Freedom of Information Act (FOIA), 5 U.S.C. §552. Mr. Swann denied your FOIA request on October 17th. The only document responsive to your request was a 3-page internal NCUA memorandum. The memorandum was withheld pursuant to exemption 8 of the FOIA. You again wrote to Mr. Swann on October 23rd, indicating that your October 14th request was made under the Privacy Act, 5 U.S.C. §552a, rather than the FOIA. Mr. Swann responded on October 31st, noting that in order to respond to a Privacy Act request, you must identify the system(s) of records under the Privacy Act that should be searched pursuant to your request. Mr. Swann further noted that if he did not hear back from you within 30 days, your file would be closed. On November 4th, you responded to Mr. Swann's October 31st letter. However, you failed to mention any systems of records. Unless you contact Mr. Swann and identify the system(s) of records to be searched, your Privacy Act request will be considered closed.

On October 28th, you appealed the Region III Director's October 17th denial of your October 14th FOIA request. Your October 28th FOIA appeal is denied pursuant to exemptions 5 and 8 of the FOIA, as outlined below. We also explain the applicability of the Privacy Act to your requests.

Privacy Act

In your October 23rd letter to Mr. Swann, you assert your understanding that the Privacy Act allows an individual both access to information about him/herself as well as an opportunity to refute any incorrect information. This is correct; however, an individual's access and correction rights under the Privacy Act are limited to information that is found within a system of records. *See* 5 U.S.C. §552a(d). Mr. Swann enclosed a list of NCUA's systems of records with his October 31st letter to you. As noted above, you did not identify any systems of records to be searched. We note that the information withheld pursuant to exemptions 5 and 8 of the FOIA is not found within a system of records.

Exemption 5

As noted above, the document withheld is a 3-page internal memorandum. 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 the deliberative process 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 are applicable in this case. The memorandum is withheld pursuant to exemption 5 of the FOIA.

Exemption 8

Exemption 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.” 5 U.S.C. §552(b)(8). Internal memoranda that contain specific reference about a named financial institution can be withheld pursuant to exemption 8. *See Atkinson v. FDIC*, 1 GDS 80,034, at 80,102 (D.D.C. 1980) and *Wachtel v. Office of Thrift Supervision*, No. 3-90-833 (M.D. Tenn. 11/20/90). Although the internal memorandum withheld does contain some non-financial information, courts do not require agencies to segregate and disclose those portions of documents that are unrelated to the financial condition of the institution. *See Atkinson*. In addition, as discussed above, the internal memorandum is also withheld pursuant to exemption 5.

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*. Courts have interpreted exemption 8 broadly and have declined to restrict its all-inclusive scope. *Consumers Union of United States, Inc. v. Heimann*, 589 F.2d 531 (D.C. Cir. 1978). We believe that the purposes of exemption 8 are met. Therefore the internal memorandum continues to be withheld pursuant to exemption 8.

Pursuant to 5 U.S.C. 552(a)(4)(B) of the FOIA, 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 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

GC/HMU:bhs

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