

David M. Steckel, Esq.
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Re: Your FOIA Appeal dated May 9, 2003

Dear Mr. Steckel:

On March 6, 2003, you wrote to Supervisory Examiner John Kutchev on behalf of your client, (b)(6) requesting copies of documents gathered relating to NCUA'S investigation of Patriot Federal Credit Union arising out of an anonymous complaint. The request for documents was a request under the Freedom of Information Act (FOIA). You also raised several questions concerning the investigation. Associate General Counsel Sheila Albin addressed your questions concerning the investigation in a letter dated May 16, 2003. Joy Lee, Associate Regional Director in Region II, responded to your FOIA request on April 2, 2003. Ms. Lee released the anonymous complaint and withheld the remaining responsive documents (approximately 102 pages) under exemptions 4, 5, and 8 of the FOIA (5 U.S.C. §552(b)(4), (5), & (8).) We received your May 9, 2003, appeal of Ms. Lee's determination on May 12. Your appeal is granted in part and denied in part. One page is released with redactions and eleven pages are released without redactions. These twelve pages are enclosed. Two of the pages consist of a February 26, 2002, letter from the credit union to Region II. Although this letter would normally be withheld pursuant to exemptions 4 and 8 of the FOIA, it is being released to you because it was originally copied to (b)(6) The remaining approximately 90 pages are withheld pursuant to exemptions 4, 5, 6 and 8 of the FOIA. A short explanation of the applicable exemptions as well as our response to preliminary issues raised in your appeal letter follows.

Preliminary Issues

You asked that we identify what documents are being withheld. The documents withheld consist of the investigation of the anonymous complaint, internal memoranda and e-mail, and correspondence between various NCUA staff and the credit union concerning the anonymous complaint, its investigation and follow-up. You also asked that if we do not release the documents we meet with you so that you can personally examine the documents. The FOIA does not provide for limited disclosure; rather it "speaks in terms of disclosure and nondisclosure [and] ordinarily does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents." *Julian v. United States Department of Justice*, 806 F.2d 1411, 1419 n.7, (9th Cir. 1986), *aff'd.*, 486 U.S.1 (1988). Once an agency makes a determination to release documents to one individual, they are available to any other requestor. Hence, we cannot allow you to view responsive documents if we determine that they are exempt from release pursuant to one or more of the FOIA exemptions.

Exemption 4

Several of the withheld documents contain financial information about the credit union exempt from disclosure pursuant to exemption 4 of the FOIA. Exemption 4 protects, in part, commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. 552(b)(4). The information withheld 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). 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 F2d 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 that is voluntarily submitted is categorically protected provided it is not customarily disclosed to the public by the submitter. Information required to be submitted to an agency 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 more strict substantial harm prong of *National Parks* as noted in *Critical Mass*. Therefore, the financial information continues to be withheld pursuant to exemption 4.

Exemption 5

Internal memoranda, e-mail and other correspondence are withheld pursuant to 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 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). The first and third policies enumerated in *Russell* apply in this case; internal memoranda, e-mail and other correspondence continue to be withheld pursuant to exemption 5.

Exemption 6

The information withheld pursuant to exemption 6 includes names and personal information about at least one credit union employee other than (b)(6) Exemption 6 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). 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 withheld information meets the requirement for exemption 6 protection. There is minimal, if any, public interest in disclosing this personal information. The individuals’ privacy interests outweigh any public interest in disclosure.

Exemption 8

The supervisory committee investigation and all documents submitted with that investigation are withheld pursuant to 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). The investigation was done by the credit union’s supervisory committee at the request of NCUA. It was done on behalf of NCUA and qualifies as an exemption 8 examination.

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). 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). Courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. See *Atkinson* at 80,103. It is appropriate to withhold entire documents pursuant to this exemption. We believe that the purposes of exemption 8 are met; therefore, the investigation and all the documentation relating to it continue to be withheld in their entirety pursuant to exemption 8. We also note that some of the documents discussed above under exemptions 4, 5, and 6 are also withheld pursuant to exemption 8 as they were part of the investigation and its documentation.

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 where the requestor resides, where the requestor’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

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