

November 29, 2011

Geoffrey H. Hopper, Esq.
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Re: 2011 – APP – 0010; FOIA Appeal dated October 26, 2011

Dear Mr. Hopper:

On June 16, 2011, we received your Freedom of Information Act (FOIA) request. Your request sought a copy of all documents, letters, correspondence, and e-mails related to the selection, submission, investigation, and denial of XXX (b)(6) as SVP/CFO of XXX (b)(6) Credit Union, to include NCUA Form 4063, along with documents generated as a result of communications with XXX's (b)(6) former employer, XXX (b)(6) Credit Union.

On July 8, 2011, Linda Dent, staff attorney in NCUA's Office of General Counsel, provided an interim response to you, confirming that we would be processing the request under both FOIA and the Privacy Act, since the request pertained to records about your client. On September 30, 2011, Ms. Dent responded to your request, granting it in part. She provided you with approximately 100 pages of documents that were responsive to your request. The agency withheld approximately 60 full pages of records pursuant to one or more FOIA exemptions, codified at 5 U.S.C. §§552(b)(4), (5), (6), and (8).

You filed an appeal of this partial denial by letter dated October 26, 2011, which we received on October 31, 2011. In your appeal, you first question whether the agency's denial provided sufficient justification for how and why the specified exemptions apply to the specific documents that were withheld. Your appeal goes on to challenge or question the applicability of each of the specified exemptions to the withheld documents.

Your appeal is denied. As more fully established below, none of the points you have asserted in support of your appeal is sufficient to overcome the noted exemption's applicability in this case. First, with respect to your argument about the lack of specific justification as to how a particular exemption applies to a specific document, you should note that case law provides that a specific index identifying each of the documents being withheld (known as a "Vaughn Index") is not available to a requester under FOIA at the administrative stage of the process. *Schwarz v. United States Department of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000). See also *Bangoura v. U.S. Dep't of the Army*, 607 F. Supp. 2d 134, 143 n.8 (D.D.C. 2009) (noting that an agency is not required to provide Vaughn Index prior to filing of lawsuit).

The majority of the responsive documents withheld in this case are excerpts from reports of examination conducted by NCUA examiners of XXX (b)(6) Credit Union. The excerpts, which include specific examiner findings, pertain to the time period around when XXX (b)(6) served as that credit union's chief financial officer. These findings were reviewed and considered by agency personnel as part of their evaluation of XXX (b)(6) suitability for a similar position at another credit union that was experiencing financial difficulty, as required by the Federal Credit Union Act and NCUA regulations. 12 U.S.C. §1790a; 12 C.F.R. 701.14.

Exemption 8 of FOIA applies directly to this examination material. The exemption 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). Drawing from applicable legislative history, courts have discerned two major purposes, each of which is present in this case, for exemption 8:

- to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability; and
- to promote cooperation and communication between employees and examiners. See *Atkinson v. FDIC*, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, (D.D.C. 1980).

Courts have interpreted exemption 8 broadly and have declined to restrict its all-inclusive scope. See *Consumers Union of United States, Inc. v. Heimann*, 589 F.2d 531 (D.C. Cir. 1978). Examination reports, as well as their follow-up and internal memoranda containing specific information about named financial institutions, have been withheld pursuant to exemption 8. See *Atkinson v. FDIC*, *supra*, and *Wachtel v. Office of Thrift Supervision*, No. 3-90-833, slip op. (M.D. Tenn. 1990). In general, all records, regardless of the source, of a financial institution's financial condition and operations that are in the possession of a federal agency responsible for its regulation or supervision are exempt. See *McCullough v. FDIC*, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at 7-8 (D.D.C. 1980). This principle of broadly construing exemption 8 was confirmed in another recent case decided by the federal court in the District of Columbia. See *Judicial Watch, Inc. v. United States Dep't of the Treasury*, 2011 U.S. Dist. LEXIS 74121 (D.D.C. 2011).

In addition to examination material, four other responsive documents are being withheld pursuant to this exemption. Three of these are communications from a credit union to an agency representative containing operational and financial data about a supervised institution. The fourth, which is also subject to withholding based on exemption 5, discussed more fully below, contains analysis by an agency employee of information contained in an exam report. As such, all of these documents fall within the scope of the exemption.

Exemption 4 of FOIA applies to, and provides additional support for, the withholding of one of these documents. Exemption 4 serves to protect commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. §552(b)(4). This particular document contains financial and operational information about an insured credit union that was provided to the agency pursuant to its regulatory authority over the institution. In accordance with exemption 4, information provided involuntarily by a third party to an agency may be considered confidential, and withheld on that basis, if its release would tend to impair the government's ability to obtain reliable information. See *Critical Mass Energy Project v. NRC*, 975 F. 2d 871 (D.C. Cir. 1992)(en banc). As noted above, the document also qualifies for protection under exemption 8 as well.

Other responsive documents in this case that have been withheld are exempt from disclosure pursuant to exemption 5 of FOIA. As Ms. Dent's initial determination letter to you correctly recited, this exemption protects from public disclosure inter-agency or intra-agency communications which would not be available by law to a party other than an agency in litigation with the agency. 5 U.S.C. §552(b)(5). Exemption 5 incorporates the privileges available to a governmental agency in civil litigation, notably the deliberative process privilege (sometimes called the executive privilege), the attorney-client privilege, and the attorney work product privilege.

To qualify for the deliberative process privilege, an agency must show that the documents are both "pre-decisional" and "deliberative." Documents are pre-decisional when they precede an agency decision and are prepared in order to assist an agency in arriving at its decision. Documents are deliberative when they comprise part of the process by which government decisions are made. See *Phillips v. Immigration and Customs Enforcement*, 385 F. Supp. 2d 296 (S.D.N.Y. 2005). The rationale underlying the privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny. See *Assembly of State of Cal. v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). Other acknowledged policy purposes for the exemption are to protect against premature disclosure of proposed policies before they are actually adopted and to protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for an agency's action. See, e.g., *Russell v. Dep't of the Air Force*, 682 F. 2d 1045, 1048 (D.C. Cir. 1982).

As you know, the background of this case is the agency's consideration and evaluation of XXX (b)(6) suitability to serve as a senior official at a troubled credit union. Except for the correspondence from XXX (b)(6) himself and the formal notice letters sent directly to him conveying the agency's initial and final determinations, virtually everything else in the file consists of materials prepared by or consulted by agency personnel in formulating a recommendation concerning whether to approve XXX (b)(6) proposed service. The prepared materials are deliberative in nature and precisely the type of documents for which exemption 5 was designed.

Geoffrey H. Hopper, Esq.

November 29, 2011

Page 4

Finally, you should note that portions of two documents withheld in accordance with exemptions 5 and 8, respectively, also were properly withheld in accordance with exemption 6, which serves to protect against unwarranted invasions of personal privacy. 5 U.S.C. §552(b)(6). In accordance with this exemption, we withheld two personal telephone numbers contained in the documents.

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

/S/

Michael J. McKenna
General Counsel

2011 – APP – 0010; 2011 – FOIA – 00006

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