



## National Credit Union Administration

June 5, 2013

Mr. Steven Gelber  
Gelber Realty Corporation  
10940 Wilshire Boulevard, Suite 2250  
Los Angeles, CA 90024

Re: 2013 – APP – 0004; 2013-APP-00004 - FOIA Appeal dated May 7, 2013

Dear Mr. Gelber:

On October 29, 2012, you filed a Freedom of Information Act (FOIA) request seeking copies of materials relating to certain properties (Properties) in San Dimas, California owned by the National Credit Union Administration and administered by NCUA's Asset Management and Assistance Center. By email message on November 2, 2012, and in subsequent conversations with NCUA personnel, you modified your request by altering its scope, in certain respects, so as to limit it to certain communications among identified individuals within specified time frames and subject matters.

In four separate letters sent between January and April, 2013, Regina Metz, staff attorney in NCUA's Office of General Counsel, responded to your request. In her first letter, dated January 18, 2013, Ms. Metz provided you with six pages comprising the contract for broker representation in connection with the sale of the Properties. On February 6, 2013, Ms. Metz provided you with 34 pages comprising the winning proposal for broker representation, which had been submitted by the commercial brokerage firm CBRE. On April 5, 2013, she provided you with 28 pages of responsive materials, some of which were partially redacted, based on exemptions in the FOIA pertaining to privileged inter-agency and intra-agency communications (exemption (b)(5)) and personal privacy considerations (exemption (b)(6)). 5 U.S.C. §§552(b)(5), (6). Finally, on April 26, 2013, she provided you with another 70 pages of responsive materials, some of which were partially redacted, based on the exemptions noted above and FOIA exemption (b)(4), which limits the disclosure of confidential or privileged material of a commercial or financial nature obtained from third parties. 5 U.S.C. §552(b)(4). In addition, Ms. Metz noted that some of the materials qualified for withholding based on an exemption in the Privacy Act that pertains to materials compiled in reasonable anticipation of a civil action or proceeding. 5 U.S.C. §552a(d)(5). Ms. Metz also explained that approximately 100 pages of responsive materials were withheld in full based on one or more of the identified exemptions.

You appealed Ms. Metz's determination by letter dated May 7, 2013. In your appeal, you questioned the applicability of the noted exemptions and stated that you had no way of determining whether the withheld materials actually qualified for withholding based on them. You also questioned the applicability of the Privacy Act exemption, and you stated that exemption (b)(6), pertaining to personal privacy, should have no applicability here because the

underlying subject matter of the request involved commercial real estate. Finally, you speculated that exemptions (b)(4) and (b)(5) may not be applicable in certain areas pertinent to the request since the information should be available as “work product of awarded contracts.”

Your appeal is granted in part. As contemplated by the FOIA and in accordance with NCUA’s regulation governing requests for information, 12 C.F.R. Part 792, the agency views the administrative appeal process as an opportunity to review the initial determination and to determine whether corrective steps are necessary or appropriate. We have reviewed all of the responsive material in the file that was either partially or fully withheld. Of the materials fully withheld, we have determined that approximately 50 pages of material did not qualify for withholding in full based on the specified exemption(s). Copies of these materials (some of which contain partial redactions) will be provided to you under separate cover. The other aspects of your appeal, including your question concerning the applicability of the Privacy Act, are addressed below.

#### Exemption (b)(6)

This section excludes from FOIA's production mandate “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. §552(b)(6). Courts have noted that this exemption is consistent with FOIA's purpose of ensuring government accountability by publicizing “official information that sheds light on an agency's performance of its statutory duties.” *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (internal citations omitted). As explained by the Supreme Court, this purpose “is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.” *Id.* The Supreme Court has also broadly construed the threshold requirement concerning the types of files in which the materials in question must appear. “Similar files” can include any “[g]overnment records on an individual which can be identified as applying to that individual.” *U.S. Dep't of State v. Washington Post, Co.*, 456 U.S. 595, 602 (1982).

The application of exemption (b)(6) in this case was limited to the redaction of certain personal information about individuals, both within and outside the agency, such as personal email addresses and personal telephone numbers. Release of this information would shed no light on how the agency conducts its official business, but could result in unwarranted and unwelcome exposure of personal information of the affected individuals. Weighing these considerations, as FOIA requires, the balance is properly struck in favor of withholding this information. Accordingly, this aspect of your appeal is denied.

#### Privacy Act

NCUA’s approach in responding to requests submitted under FOIA by individuals seeking access to records that relate or pertain to themselves is to consider whether access to responsive material is supportable under either FOIA or the Privacy Act. An individual may have greater rights of access to information about himself under the Privacy Act than an ordinary member of

the public might have to the same material under FOIA. Furthermore, the Privacy Act specifies that an agency may not rely on an exemption contained in the FOIA to withhold from an individual any record that is otherwise accessible to such individual under the Privacy Act. 5 U.S.C. §552a(t)(1).

As Ms. Metz noted in her fourth and final response to you, the Privacy Act itself contains some exceptions that can affect an individual's access to information. The Privacy Act provides, in pertinent part, that an individual's right of access to records maintained in a system of records does not extend to any information compiled in reasonable anticipation of a civil action or proceeding. 5 U.S.C. §552a(d)(5). As courts have noted, this exception is analogous to, but broader than, the attorney work product privilege. See *Hernandez v. Alexander*, 671 F.2d 402 (10<sup>th</sup> Cir.1982).

Ms. Metz's analysis regarding the terms of the Privacy Act was correct. However, in accordance with guidelines issued by the U.S. Office of Management and Budget, the Privacy Act is limited in its scope and application to individuals acting in a personal capacity as opposed to an entrepreneurial or commercial capacity. See OMB Privacy Act Guidelines, 40 Fed.Reg. 28591 (1975).<sup>1</sup> Courts have noted that corporations or sole proprietorships are not "individuals" and thus lack standing to raise a claim under the Privacy Act. See *St. Michael's Convalescent Hosp. v. State of Cal.*, 643 F.2d 1369, 1373 (9th Cir. 1981); *Cell Associates, Inc. v. National Institutes of Health*, 579 F.2d 1155, 1157 (9th Cir. 1978) (holding that a corporation is not an "individual" within the meaning of the statute). Insofar as your relationship with the NCUA in this case was commercial in nature, conducted by you through a corporation, the Privacy Act has no application and Ms. Metz's letter should not have made reference to it or relied on it to support withholding of records in this case.

#### Exemptions (b)(4) and (b)(5)

A substantial amount of the materials withheld in this case were considered exempt from disclosure based on these exemptions. 5 U.S.C. §§552(b)(4), (5). As noted above, based on our administrative review of this case, we determined that a substantial portion of the materials that were initially withheld in full could have been released, and those materials are being provided to you. As more fully discussed below, however, exemption (b)(5) has some continued applicability in this case and continues to support the withholding of certain responsive materials or portions of them.

As explained by Ms. Metz, 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. 5 U.S.C. §552(b)(5).

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<sup>1</sup> See also legislative history of the Privacy Act, which indicates that Congress intended to distinguish between the "rights which are given to the citizen as an individual under this Act and the rights of proprietorships, businesses and corporations which are not intended to be covered by this Act." S.Rep. 1183, 93 Cong., 2d Sess. 79 (1974); 4 U.S.Code Cong. and Admin.News, p. 6993 (1974).

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, and 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). The internal case developed by agency personnel evaluating the competing bidders seeking the brokerage contract, as well as email communications among agency staff discussing the same, meet this rationale and therefore qualify for withholding. Certain other deliberations among agency personnel and reflected in email concerning strategic and operational decisions affecting the listing and sale of the Properties also qualify for withholding under this exemption and so continue to be withheld.

In addition to the deliberative process privilege, exemption (b)(5) incorporates the common law privileges protecting attorney-client communications and attorney work product. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). NCUA retained the services of attorney Steven Camp, a partner in the Dallas law firm Gardere Wynne Sewell, to represent it in connection with certain aspects of its ownership and disposition of the Properties, and also consulted in-house attorney Robert Roach. To the extent that written or electronic communications between NCUA and its counsel are responsive to your request, exemption (b)(5) supports their continued withholding in this case.

You should note, finally, that included among the materials that were identified as withheld in full in response to your request are several pages that were either duplicative or outside the scope of the request. We continue to withhold these materials.

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 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,



Michael J. McKenna  
General Counsel

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(with  
attachments)  
6-7-13 via  
Fed Ex