

April 9, 2014

Ms. Leigh Anne Terry
Senior Administrator
Callahan & Associates
1001 Connecticut Avenue, NW
Suite 1001
Washington, D.C. 20036

Dear Ms. Terry:

Re: 2014-APP-00001- FOIA Appeal dated March 7, 2014

By letter of January 15, 2014, you submitted a Freedom of Information Act (FOIA) request. You requested a listing of home-based credit unions containing the following information: charter or insurance certificate number, credit union name, charter date (or date insured if state charter date is unavailable), and closing date (month/year) of most recent NCUA or state exam. By letter of February 10, 2014, Regina Metz, staff attorney in NCUA's Office of General Counsel, responded to your request and advised that your request was denied in full. Ms. Metz indicated that three full pages of responsive material were being withheld, based on exemption 8 of FOIA, 12 U.S.C. §552(b)(8). This exemption provides for withholding of matters that are 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.

You appealed Ms. Metz's determination by letter dated March 7, 2014 (received by us on March 11th). In your appeal, you assert that the request was incorrectly denied and that the information being sought had already been provided to other parties, including specifically a national credit union trade association. Your letter indicates your belief that this trade association has shared the information with third parties and that the information was used in the preparation of comments submitted to NCUA in response to a recent proposed rule on the issue of home-based credit unions. You indicate that the trade association has confirmed in writing that it did receive the information.¹

As Ms. Metz's letter correctly noted, exemption 8 of the FOIA provides for protection against release of 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). 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*, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, (D.D.C. Feb. 13, 1980), and *Wachtel v. Office of Thrift Supervision*, No. 3-90-833, slip op. (M.D. Tenn. Nov. 20, 1990).

¹ In your appeal, you also made a separate request for other materials. That request is being reviewed separately from this appeal.

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In this case, as more fully documented in a proposed rulemaking issued by the NCUA Board in December 2013, the agency has identified a number of operational and risk management concerns associated specifically and uniquely with home-based credit unions. 78 FR 77608 (Dec. 24, 2013). It can be seen that a listing of such credit unions, prepared by agency personnel in connection with the development of the proposed rule, qualifies as an “operating . . . report” within the meaning and scope of exemption 8. Similarly, the information you have sought pertaining to the date on which the most recent examination was completed is clearly information that is “related to examination . . . reports” and so was properly withheld.

Furthermore, despite the implication in your letter, the agency has not waived its ability to rely on exemption 8. Agencies will be deemed to have waived the application of an otherwise applicable exemption in cases where it can be shown that the agency has already officially released the information being sought into the public domain. However, the courts have consistently held that the burden of showing that the withheld information has been officially disclosed falls on the party seeking the release. *See James Madison Project v. NARA*, 2002 WL 31296220, at*1 (D.C. Cir. 2002) (holding that a FOIA plaintiff “bears the burden of showing that the specific information at issue has been officially disclosed”). In addition, the FOIA plaintiff has the burden of showing that the material being sought is actually in the public domain. The United States Court of Appeals for the D.C. Circuit has held that “an agency may waive its claim that information is exempt from disclosure if a FOIA plaintiff carries his burden of pointing to specific information in the public domain that appears to duplicate what is being withheld.” *Assassination Archives & Research Ctr. v. Central Intelligence Agency*, 334 F.3d 55, 60 (D.C. Cir. 2003) (internal citations omitted); *see also Cottone v. Reno*, 193 F.3d 550, 554–55 (D.C. Cir. 1999) (indicating that a prerequisite to finding waiver is some showing that “the information sought is truly public and that the requester receive no more than what is publicly available”).

Notwithstanding the foregoing, however, NCUA is cognizant of the spirit of openness that underlies FOIA. NCUA is also sensitive to the guidance reflected in Attorney General Holder’s Memorandum for Heads of Executive Departments and Agencies dated March 19, 2009, in which the Attorney General encouraged agencies to consider whether a discretionary release of information could be made despite the technical applicability of an exemption in a given case. NCUA concludes that the circumstances here present such a case. Accordingly, we are providing you with a listing containing the names of home-based credit unions and their respective charter numbers. You should note that some of the credit unions named on the listing may have undergone organizational or structural changes since the date it was prepared, approximately four months ago.

In connection with this discretionary release, NCUA notes the following significant factors as having a bearing on its decision. There is substantial public interest in home-based credit unions, given the proposed rulemaking referenced above. In connection with that undertaking, the agency has already disclosed both the existence and the number of home-based credit unions, along with a thorough discussion of the operational issues the agency regards as significant. Identifying such institutions by name reveals nothing confidential about them. While it is arguable that individuals whose residence also serves as the principal location of a credit union have some expectation of privacy regarding their home, the fact that a credit union operates from

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that address is no secret, certainly not with respect to members of the credit union and others with whom the credit union routinely interacts.

We conclude, on balance, that a discretionary release of a listing of names and charter numbers of home-based credit unions is appropriate. We have not included the date on which the charter was granted or insurance certificate issued, since this information is publicly available from the agency's website. You should note, moreover, that the agency continues to rely on and apply exemption 8 with respect to information pertaining to the date on which the most recent examination was completed. Accordingly, that information is not being produced.² Finally, you should note that this discretionary release in no way constitutes a waiver of the agency's ability to rely on exemption 8 in the future with respect to other requests, nor does this discretionary release extend beyond the materials specifically identified herein. *See Mobil Oil Corporation v. EPA*, 879 F.2d 698 (9th Cir. 1989), in which the court held that the discretionary release of certain documents waives FOIA exemptions only for those documents released.

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).

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001 E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Sincerely,

Michael J. McKenna
General Counsel

Attachment
14-FOI-0028; 2014-APP-0001
14-0406
SSIC 3212

² NCUA's current policy is to perform an examination of every federal credit union during each calendar year.