

March 4, 1991

Bruce C. Landis, Staff Writer  
The Providence Journal-Bulletin  
75 Fountain Street  
Providence, Rhode Island 02902

Re: Freedom of Information Act - Appeal

Dear Mr. Landis:

This will acknowledge receipt of your Freedom of Information Act ("FOIA") appeal. Although your letter was dated September 18, 1990, it was postmarked January 30, 1991 and we received it on February 4, 1991.

On January 23, 1991, the National Credit Union Administration (NCUA) denied your request (dated January 11, 1991) for copies of all applications for federal share insurance filed with NCUA's Region I by Rhode Island financial institutions during the past five years, and all related correspondence and documents, including responses by NCUA. That denial is affirmed in part and reversed in part. Upon review of your request, we have determined that the documents described therein, with the exception of portions of the applications for federal share insurance, should be withheld pursuant to FOIA.

#### ANALYSIS

With the exception of applications for federal share insurance filed by various credit unions, the documents you seek are within the scope of exemption 8 of FOIA (5 U.S.C. 552(b)(8)). Exemption 8 exempts from disclosure 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. Section 792.3(a)(8) of the National Credit Union Administration Rules and Regulations (the "Regulations") (12 C.F.R. ~792.3(a)(8)) implements exemption 8 and adds the following: This includes all information, whether in formal or informal report form, the disclosure of which would harm the financial security of credit unions or would interfere with the relationship between NCUA and credit unions. 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.D.C. 1980). Either purpose is sufficient reason to withhold a report. Even records relating to financial institutions that are no longer operating may be withheld, in order to further the policy of promoting "frank cooperation" between officials of financial institutions and government agencies. *Gregory v. FDIC*, 631 F.2d 896, 899 (D.C. Cir. 1980). Exemption 8 has been given a very broad interpretation and all-inclusive scope by the courts. See, *McCullough V. FDIC*, 1 GDS `80,184 (D.D.C. 1980). Records including the findings of examinations are exempt. *Atkinson*, supra. Inasmuch as NCUA responses are based upon the results of the examination process, they are exempt from disclosure. Courts do not require agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. An entire report relating to the financial condition of the institution may be withheld pursuant to exemption 8. See *Atkinson*, 1 GDS at 80,103. We believe both purposes of exemption 8 are met by all documents meeting your request, except for portions of the applications for federal share insurance. Therefore, the documents responsive to your request are withheld pursuant to exemption 8, except as discussed below. Portions of the applications are exempt in part under exemption 4 (5 U.S.C. ~552(b)(4)) and exemption 6 (5 U.S.C. ~552(b)(6)) of FOIA. Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person [which is] privileged or confidential." Section 792.3(a)(4) of the Regulations (12 C.F.R. ~792.3(a)(4)) elaborates upon exemption 4, stating that records may not be disclosed if they are: Records which contain trade secrets and commercial or financial information which relate to the business, personal or financial affairs of any person, are furnished to NCUA, and are confidential or privileged. Applications for federal share insurance clearly contain financial information. Those portions of such applications that contain information meeting the test of confidentiality are protected by exemption 4. The standard for confidentiality was set forth in *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). There, the term "confidential" was read to protect not only private but governmental interests. The court promulgated the following test for determining confidentiality: To summarize,

commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. Aside from any question of harm to the credit unions involved, disclosure of most of the information contained in the applications would inevitably compromise NCUA's ability to obtain necessary information in the future. The commercial and/or financial information contained in the application is withholdable under exemption 4. Exemption 6 of FOIA protects information about individuals contained in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." The Supreme Court has broadly construed the term "similar files," holding that all information that "applies to a particular individual" meets the threshold for exemption 6 protection. *Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). The applications contain certain information relating to individual loans (specifically, account numbers, amounts and addresses of collateral real estate) disclosure of which would violate individual privacy interests. Such information is within the scope of exemption 6. Once a privacy interest is established which brings the requested information under exemption 6, the agency must weigh the individual's interest in privacy against the public interest (if any) in disclosure of the particular material. Neither the identity of the requester nor the purpose for which the request is made is relevant to the agency's determination. *Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468, 1480 (1989). Moreover, the only "public interest" relevant to the issue is that behind the enactment of FOIA, that is, the interest in "shed[ding] light on an agency's performance of its statutory duties." *Id.* at 1485. We do not believe that there is any recognizable, proper public interest in loan information pertaining to particular individuals. In any event, we find that the privacy interest of such individuals in that information outweighs any public interest that may exist. Such information is exempt from disclosure under exemption 6. Unlike exemption 8, exemptions 4 and 6 require the agency to produce those portions of the documents in question not within the scope of the exemptions. While some of the information contained in the applications for federal share insurance is exempt from disclosure under exemptions 6 and 4 of FOIA, portions of those applications are not so protected. Therefore, you are entitled to redacted copies of applications for federal share insurance. However, upon being advised by Marcia Sarrazin of NCUA's Region I of the anticipated cost of locating and copying the appropriate documents, you indicated that you did not wish to pay the expected amount. In a subsequent telephone conversation with Staff Attorney Margaret Suuberg of this Office on February 27, 1991, you indicated that you did not wish to have any of the documents determined by this Office to be disclosable under FOIA sent to you at this time. You stated that upon review of this decision on your appeal and discussion with your superiors, you would determine which, if any, of the available documents you wished to receive and would send a letter to Associate General Counsel Hattie Ulan advising her of your decision. Therefore, in accordance with your express instructions, we are not producing any documents for you at this time. The documents determined by this Office to be available under FOIA are presently at NCUA's Region I Office. Upon receipt of your further instructions as discussed above, the appropriate documents will be sent directly to you. A billing statement for the cost involved in processing your request will be enclosed with those documents. Pursuant to 5 U.S.C. ~552(a)(4)(B), you may seek judicial review of this appeal by filing suit to enjoin NCUA from withholding the documents you requested and to order production of such documents. Such a suit may be filed in United States District Court in the district where you reside, where your principal place of business is located, or in the District of Columbia.

Sincerely,

Robert M. Fenner  
General Counsel

GC/MRS:sg  
SSIC 3212  
91-0201

cc: Marcia Sarrizin, Region I\_