

September 26, 1994

(b)(6)

Re: Freedom of Information Act - Appeal (Letter not dated)

Dear (b)(6):

On July 26, 1994, you filed a Freedom of Information Act (FOIA) request for a copy of Form 2141 (Confidential Section) of the NCUA examination report for the Central Florida Educators Federal Credit Union. You requested an examination report with an effective date of July 30, 1990. The effective date of the 1990 examination report was June 30 rather than July 30. By letter dated August 1, 1994, Richard S. Schulman, NCUA's Freedom of Information Officer, denied your request based on exemption 8 of the Freedom of Information Act (12 U.S.C. 552(b)(8)). We received your undated letter appealing the denial on September 9, 1994. The denial is upheld pursuant to exemption 8 as discussed below.

Before discussing exemption 8, we note that you address exemption 5 in your appeal letter. 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). Mr. Schulman's August 1, 1994 denial was based solely on exemption 8, exemption 5 was not part of the basis of the denial. We therefore will restrict our discussion to exemption 8.

Exemption 8 of the FOIA (5 U.S.C. 552(b)(8)) exempts 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.

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 an examination report.

NCUA has incorporated these dual purposes into its regulation. Section 792.3(a)(8) of NCUA's Rules and 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.

Courts do not require agencies to segregate and disclose those portions of documents that are unrelated to the financial condition of the institution. See *Atkinson*. The document you requested (Form 2141) fits squarely within exemption 8 of the FOIA. This section of a credit union's examination report contains information regarding the institution's stability and management. The information, if disclosed, could harm the financial security of a credit union as well as interfere with the relationship between NCUA and a credit union.

You note in your appeal letter that exemption 8 of the FOIA has been primarily applied to documents submitted to the Comptroller of the Currency (the regulator of national banks) and hence is not applicable in this situation since the Comptroller of the Currency is not involved in the regulation or supervision of credit unions. Exemption 8 specifically applies to financial institutions and the agency responsible for their regulation and supervision, it is not limited to national banks. Exemption 8 applies to credit union examination reports maintained by the NCUA.

You also argue that since a credit union is not a member of the general public, disclosure of the document requested to the credit union itself would not cause the harms protected by exemption 8. The identity of the FOIA requester is not relevant in this situation. Once a document is disclosed to one FOIA requester, it is available to any such requester. Therefore the document is protected by exemption 8.

We note further that the credit union does not have a right to the document under the Privacy Act (5 U.S.C. _552a). The Privacy Act generally entitles individuals to access their own records which are contained in a system of records. The Privacy Act defines an individual as a "citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. _552a(a)(2). The Privacy Act defines a system of records as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. _552a(a)(5). A credit union does not qualify as an individual under the Privacy Act. Furthermore, the information requested is not contained in an agency system of records.

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of the determination of your 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 the United States District Court in the district where you reside, where your principal place of business is located, the District of Columbia, or where the requested documents are located (the Eastern District of Virginia.).

Sincerely,

Robert M. Fenner
General Counsel

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