

D. Ronald Ryland, Esq.

Sheppard, Mullin, Richter & Hampton

Seventeenth Floor

Four Embarcadero Center

San Francisco, CA 94111

Re: Freedom of Information Act - Appeal

(Your July 25, 1995 Letter Concerning

the Merger of Engineers and Lockheed

Federal Credit Unions)

Dear Mr. Ryland:

On May 23, 1995, Joseph Melchione (your co-counsel in this matter) filed a Freedom of Information Act (FOIA) request for copies of all documents filed by Lockheed Federal Credit Union (Lockheed FCU) and/or Engineers Federal Credit Union (Engineers FCU) in connection with the merger of the two credit unions. The FOIA request was made on behalf of Public Works Credit Union and was filed with NCUA's Region VI Office in Concord, California. On June 29, 1995, NCUA's Region VI Director Daniel Murphy filed a Declaration with the United States District Court, Northern District of California, in the case of Public Works Credit Union v. NCUA. Several of the documents responsive to the FOIA request were attached as exhibits to the Declaration. By letter dated July 5, 1995, Robert Blatner for Region VI Director Daniel Murphy, responded to Mr. Melchione's FOIA request. Several responsive documents were sent to Mr. Melchione. Fourteen documents were withheld in full and one document was withheld in part under several different exemptions to the FOIA. We received your July 25 appeal on August 1, 1995. We note that your appeal was sent to the United States Attorney in San Francisco rather than to NCUA's Office of General Counsel as required by Section 792.6(a)(1) of the NCUA Regulations (12 CFR 792.6(a)(1)). You have numbered the documents withheld in Mr. Blatner's letter as items 1 -15. You have been provided with items 1 - 3 as exhibits to the Declaration. You are appealing the denial of eight of the fifteen documents withheld. These documents are identified as items 4 - 10 and 15. Your appeal is granted in part and denied in part. Some of the documents originally withheld are released, others are released in part with portions redacted. Other documents continue to be withheld pursuant to exemptions of the FOIA. Newly released documents are enclosed.

Each of the previously withheld documents is identified by the number you assigned it and is discussed separately below.

4. Analyst's Merger Cover Sheet. This document was withheld pursuant to exemption 2 of the FOIA. Upon review, we have determined that the document does not contain exemptible information. The merger cover sheet is enclosed.

5. SE (Supervisory Examiner) Johnson's Memorandum, dated May 16, 1995. This internal NCUA memorandum discusses assessment of the merger and was withheld pursuant to exemptions 2 and 5 of the FOIA. Upon review, we have determined that portions of this memorandum can be released. There are portions of the memorandum that continue to be withheld pursuant to exemptions of the FOIA. This document contains information on Engineers FCU's examination rating and other examination related and financial condition information. Such information is withheld pursuant to exemption 8 of the FOIA (5 U.S.C. 552(b)(8)). Exemption 8 of the FOIA 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 examination information. The NCUA regulation implementing exemption 8 of the FOIA is found at 12 C.F.R. 792.3(a)(8). Sections 792.3(a)(8) repeats exemption (8) and states:

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.

Therefore examination information contained in this memorandum has been withheld pursuant to exemption (8).

This memorandum is not a statement of final agency policy nor is it a final agency decision. It contains information subject to the deliberative process privilege (exemption 5 of the FOIA - 5 U.S.C. 552(b)(5)). Credit union board members' as well

as the supervisory examiner's thoughts about the merger are reflected in this memorandum. The purpose of this privilege is "to prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). Disclosure of predecisional thoughts could cause such injury. Therefore, portions of the memorandum continue to be withheld pursuant to exemption 5 of the FOIA. We do not believe that exemption 2 is applicable to this memorandum.

Sections of the memorandum subject to exemption 5 and 8 have been redacted. The redacted memorandum is enclosed.

6. NCUA Merger Facts, dated 5/23/95. This internal NCUA memorandum was withheld pursuant to exemption 2 of the FOIA. This memorandum is a discussion of the financial condition of the credit union and is withheld pursuant to exemption 8 of the FOIA, *see* discussion above. Courts do not require agencies to segregate and disclose those portions of documents that are unrelated to the financial condition of the institution pursuant to exemption 8. *See Atkinson*. This document is withheld in its entirety pursuant to exemption 8 rather than exemption 2.

7. RD Murphy's Memorandum, dated 5/25/95. This internal NCUA memorandum was withheld pursuant to exemption 2 of the FOIA. It continues to be withheld pursuant to exemption 5 rather than exemption 2 of the FOIA. Although this memorandum was drafted after the merger decision, we do not believe it should be released as post-decisional. Rather, the memorandum concerns follow-up issues and it is not a final agency decision. It is therefore withheld pursuant to exemption 5, *see* above for discussion of exemption.

8. NCUA Route Slip, dated 3/29/95. This document was withheld pursuant to exemption 2 of the FOIA. Upon review, we have determined that the document does not contain exemptible information. The route slip is enclosed.

9. and 10. Examiner's Contact Information - Financial Performance Report and examination data summary for

Lockheed FCU and Engineers FCU. These documents were withheld pursuant to exemption 8 of the FOIA. They contain financial condition and examination information and continue to be withheld in their entirety pursuant to exemption 8. *See* discussion above.

15. Lockheed's Response Letter, dated April 27, 1995. Portions of this document were withheld pursuant to exemption 4 of the FOIA. Exemption 4 of the FOIA covers two categories of information: (1) trade secrets; and (2) information which is commercial or

financial, obtained from a person and privileged or confidential. 5 U.S.C. 552(b)(4). You question how the information withheld could be a trade secret. The information withheld is not a trade secret, rather it is commercial/financial information about the credit union.

The courts have interpreted what is included as commercial/financial information broadly. Courts have held that the term "commercial" includes anything "pertaining or relating to or dealing with commerce." American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 870 (2d Cir. 1978). The information withheld is clearly commercial information. The information was obtained from a person as it is included in a letter to NCUA from the Regional Manager of Lockheed FCU. The court in Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993), set forth different tests for confidentiality for information that is voluntarily submitted and information that is required by an agency to be submitted. It held that voluntarily provided information is " 'confidential' for the purpose of exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Critical Mass at 879. We do not believe that the commercial information would be released to the public by Lockheed FCU. The court held that information required to be submitted is confidential if it meets one of the two prongs of National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The information is confidential under National Parks if its release would (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks at 770. We believe that release of the information could impair NCUA's ability to obtain information in the future. Although we believe the information was submitted voluntarily, the standard for both voluntarily submitted information and NCUA required information is met in this instance. Hence we believe the redacted information should continue to be withheld pursuant to exemption 4.

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of this determination by filing suit to enjoin NCUA from withholding the documents you requested and to order production of the 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 documents are located (the Eastern District of Virginia.)

Sincerely,

James J. Engel

Acting General Counsel

Enclosures

GC/HMU:bhs

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