

(b)(6)

Re: Freedom of Information Act Appeal

(Your letter dated August 31, 1995)

Dear (b)(6)

On June 7, 1995, your filed a Freedom of Information Act (FOIA) request for documents relating to a complaint made by (b)(6) (your client) concerning Parishioners Federal Credit Union. On June 19, 1995, Daniel Murphy, NCUA Region VI Director, denied your request pursuant to exemptions 5 and 8 of the FOIA. Although all of the responsive records were exempt from the FOIA, Mr. Murphy supplied you with a FOIA Request Inventory listing the responsive records. The inventory notes six responsive documents, dated from May 16, 1994 to September 2, 1994. You wrote to Richard Schulman, NCUA's FOIA Officer, on June 28, 1995, requesting that an NCUA employee submit an affidavit attesting to the first date of contact between (b)(6) and the NCUA. Mr. Schulman responded on August 15, 1995, declining your request for an affidavit. We received your August 31, 1994 FOIA appeal on September 6, 1995. You state that you are only appealing the denial of the documents dated in May 1994. These documents are identified in the inventory as 1- memo to Supervisory Examiner, dated 5/20/94; 2- Report from General Counsel, dated 5/17/94; and 3- Phone note, dated 5/16/94. All three documents were denied pursuant to exemption 5. The denial is upheld on appeal, pursuant to exemptions 5 and 7 of the FOIA.

Timeliness of Appeal

Section 792.6(a)(2) of the NCUA FOIA Regulations requires that a FOIA appeal "must be in writing and filed within 30 days from receipt of the initial determination."

12 CFR 792.6(a)(2). Mr. Murphy sent out the initial determination denying your FOIA request on June 19, 1995. This appeal was not filed until August 31, 1995, well past the 30-day limit. You did, however, correspond with Mr. Schulman in an attempt to avoid an appeal. Since your appeal was filed within 30 days of Mr. Schulman's response to you (dated August 15, 1995), we will consider this appeal as being timely filed.

Applicable Exemptions

We believe that the documents were properly withheld pursuant to exemption 5 of the FOIA. However, exemption 7 of the FOIA is also applicable to the withheld documents.

The following discussion addresses both exemptions.

Exemption 5

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). Included within exemption 5 is information subject to the deliberative process privilege. 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). Three policy purposes have been held to constitute the bases for the deliberative process privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to

protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982).

The courts have established two fundamental requirements for the deliberative process privilege to be invoked. The communication must be predecisional and it must be deliberative. Mapother v. Department of Justice, 3 F.3d 1533 (D. C. 1993). The information withheld is both predecisional and deliberative. None of the information withheld is contained in final opinions of the NCUA.

We believe that all purposes and requirements of exemption 5 are met in this case. Disclosure of predecisional thoughts included in various memoranda, Board meeting minutes, draft agreements and proposals, and audit recommendations could cause injury to the quality of agency decisions. Therefore the information described above continues to be withheld pursuant to exemption 5 of the FOIA.

Exemption 7

Exemption 7(C) of the FOIA protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy ..." 5 U.S.C. 552(b)(7). The three documents withheld that you are appealing clearly meet the standards of exemption 7.

They are records or information that were compiled for law enforcement purposes. Courts have held that the "law" to be enforced includes both civil and criminal statutes, as well as statutes authorizing administrative (regulatory) proceedings. See Cappabianca v. Commissioner, United States Customs Service, 847 F. Supp. 1558 (M.D. Fla. 1994) and Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974). NCUA has all three types of authority pursuant to various provisions of the Federal Credit Union Act (see e.g. Sections 120, 202, 205, & 206 of the Federal Credit Union Act, 12 U.S.C. 1766, 1782, 1785 & 1786). The documents withheld were part of NCUA's law enforcement function. Release of these documents could constitute an unwarranted invasion of personal privacy. Courts have held that in recognition of the strong privacy interests inherent in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records will be appropriate under exemption 7(C). SafeCard Services, SEC, 863 F.2d 96 (D.C. Cir. 1988).

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,

Robert M. Fenner

General Counsel

GC/HMU:bhs

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