

Janine R. Menhennet, Esq.

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Re: Freedom of Information Act Appeal -

(Your letter dated November 15, 1995)

Dear Ms. Menhennet:

On September 1, 1995, Patrick Carey of your lawfirm filed a Freedom of Information Act (FOIA) request with Daniel Murphy, NCUA Region VI Director. The request was forwarded to NCUA's Central Office. Richard Schulman, NCUA's FOIA Officer, responded to the request on October 26, 1995. Mr. Schulman denied the request in full pursuant to exemptions 2, 5, 6, 7(C), 7(D), and 8 of the FOIA. The denial was also made pursuant to the "no disclosure without consent" rule of the Privacy Act (12 USC 552a(b)). We received your November 15 appeal on November 22, 1995. Your appeal is granted in part and denied in part. Mr. Schulman's October 26 denial is affirmed in part and reversed in part. Documents are withheld pursuant to exemptions 5, 6, 7, and 8 of the FOIA and redacted documents are enclosed as explained below.

Background

The request was for "all records in the possession of the NCUA regarding any complaints or allegations regarding , Federal Credit Union in Burbank, that have been received between January 1, 1994 and the present" (September 1, 1995). Included with your appeal was a Privacy Act Request from for all such records. Documents responding to the FOIA request include an NCUA routing slip (exemption 2), internal memoranda, an internal report and a draft document (exemptions 5, 6, and 7), and a follow-up examination report (exemption 8).

Exemption 2

An NCUA routing slip was withheld pursuant to exemption 2 of the FOIA, 5 USC 552(b)(2). Exemption 2 exempts from mandatory disclosure records "related solely to internal personnel rules and practices of an agency." The courts have interpreted exemption 2 to encompass two distinct categories of information: trivial matters referred to as "low 2" information; and more substantial internal matters referred to as "high 2" information. The routing slip was withheld under the low 2 interpretation of the exemption. Low 2 information includes file numbers, mail routing stamps and data processing notations. Although the routing slip does include some low 2 information, we have decided to use our discretionary authority and release it. Handwritten notes on the route slip are withheld pursuant to exemption 5 (*see* discussion below). A redacted copy of the route slip is enclosed.

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). The documents withheld pursuant to exemption 5 include several internal memoranda, a draft letter which was never sent and the handwritten notes on the route slip referred to above. Except for the handwritten notes on the route slip, portions of these exemption 5 documents are also exempt pursuant to exemptions 6 and 7 of the FOIA (*see* discussion below).

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 information must be predecisional and it must be deliberative. Mapother v. Department of Justice, 3 F.3d 1533 (D. C. 1993). The handwritten notes and most of the information contained in the memoranda are withheld pursuant to the deliberative process privilege. The draft letter continues to be withheld in full. Exemption 5 does not always allow for entire documents to be withheld (factual information that is not deliberative in nature must be disclosed, *see* Mapother at 1538 - 40). Portions of the memorandum dated July 24, 1994 are factual rather than deliberative. In addition, some of the information concerns personally (*see* discussion of exemption 6 below) and should be disclosed to her. The exempt portions of this memorandum as well as those portions that are not responsive to the FOIA request have been redacted. A copy of the redacted memorandum is enclosed. The other documents continue to be withheld pursuant to exemption 5 of the FOIA.

Exemption 6

Exemption 6 permits the government to withhold all information about individuals in "personnel, medical and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 USC 552(b)(6). There is exemption 6 information concerning as well as several other individuals in internal memoranda as well as the follow-up examination report. All of the exemption 6 information is also withheld pursuant to exemption 7(C). Exemption 7(C) provides a broader privacy exemption (*see* discussion below). Therefore, only a limited discussion of exemption 6 is provided. Application of exemption 6 requires a balancing of the public's right to disclosure against the individual's right to privacy. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). According to the courts, the public interest in the information is to "shed light on an agency's performance of its statutory duties." Department of Justice v. Reporter Committee for Freedom of the Press, 489 U.S. 749, 773 (1989). The information on individuals other than is clearly personal, it concerns employment, loans and other personal finances. The public interest in this information is minimal. This information continues to be withheld pursuant to exemption 6 (and exemption 7(C)).

Enclosed with your appeal was a Privacy Act Request signed by for all information concerning her. The September 1, 1995 FOIA request did not identify as the requester. We will consider as the requester for purposes of this appeal. Generally, exemption 6 (and 7(C)) does not apply to the individual about whom the requested information concerns. Therefore, we are releasing a redacted copy of the memorandum containing information concerning . This is the same memorandum (dated July 24, 1994) that is partially released as discussed under exemption 5 above.

Exemption 7

Exemptions 7(C) and (D) of the FOIA protect 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... [or] could reasonably be expected to disclose the identity of a confidential source ..." 5 U.S.C. 552(b)(7).

The exemption 7 information requested is contained in internal NCUA memoranda, a draft letter and a follow-up NCUA examination report.

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.

Exemption 7(C) protects privacy interests. Release of these documents could constitute an unwarranted invasion of personal privacy. As noted above, a privacy interest exists in the financial and other personal records of individuals other than 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 v. SEC, 863 F.2d 96 (D.C. Cir. 1988). As discussed under exemption 6, personal information concerning is now released because is the requester. It would not be released to another requester.

Exemption 7(D) protects against disclosure of information pertaining to confidential sources. No balancing of the public interest is involved under exemption 7(D). *See Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994). More than the name and address of a confidential source may be withheld. Courts have held that an agency may withhold any portion of a document that would reveal the identity of the confidential source. Church of Scientology v. IRS, 816 F. Supp. 1138 (W.D. Tex. 1993). Much of the information found in the internal memoranda could be used by to identify the source of the information. This information is therefore withheld pursuant to exemption 7(D).

Exemption 8

Some of the information requested is found in an NCUA examination follow-up report. 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.
5 U.S.C. 552(b)(8).

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.

Courts have interpreted exemption 8 broadly and have declined to restrict its all- inclusive scope. Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531 (D.C. Cir. 1978). Examination reports as well as matters that are related to such reports (the findings of an examination and its follow-up and internal memoranda) have been withheld from disclosure. (*See Atkinson* at 80,102.) In addition, courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. *See Atkinson* at 80,103. It is appropriate to withhold entire documents pursuant to this exemption.

We believe that the purposes of exemption 8 are met, therefore information contained in the examination follow-up continues to be withheld pursuant to exemption (8).

Privacy Act

Mr. Schulman's October 26 letter included the "no disclosure without consent" rule of the Privacy Act as an additional basis of denial of your FOIA request. The Privacy Act is only triggered when information is found in a system of records, that is "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 USC 552(a)(5). None of the documents responding to the FOIA request are found within a system of records. Therefore the Privacy Act is not triggered. We note that the "no disclosure without consent" provision of the Privacy Act is found at 5 USC 552a(b) rather than 5 USC 552(a)(2) as cited in Mr. Schulman's letter.

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

Enclosures

GC/HMU:bhs

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