

October 29, 1998

Richard A. Mantey

President/CEO

Ulster Federal Credit Union

P.O. Box 2310

Kingston, NY 12402

Re: Your August 7, 1998 FOIA Appeal - Final Response

Dear Mr. Mantey:

On July 10, 1998, the Concerned Credit Unions of the Hudson Valley (your group) filed a Freedom of Information Act (FOIA) request for the community conversion applications NCUA received from TEG FCU, Hudson Valley FCU and Mid-Hudson Valley FCU. The Acting Regional Director of NCUA's Region I Office denied your request on July 21, 1998. The applications were withheld in full pursuant to exemption 5 of the FOIA. Your group appealed the denial on August 7, 1998. You have agreed to act as liaison for the group. Your appeal is granted in part and denied in part pursuant to FOIA exemptions 4, 6, and 8. As liaison for the group, we are sending you copies of three redacted community conversion applications along with an invoice for the cost of photocopying and secretarial time. A copy of this letter, without the enclosures, will be sent to all members of your group. Thank you again for acting as liaison.

Upon initial review of the appeal, we determined that exemption 5 may not be appropriate to withhold the three applications in full. Because the applications contain information that could be subject to exemption 4 of the FOIA (financial or commercial information that may be privileged), on September 2, 1998, we gave the three credit union applicants (the submitters) an opportunity to comment on any information that could be withheld pursuant to exemption 4. This submitter notice is required by Executive Order No. 12,600 and Section 792.29 of the NCUA Regulations, 12 CFR 792.29. TEG FCU has no objection to release of its entire application; Hudson Valley FCU and Mid-Hudson Valley FCU both believe that various parts of their respective applications should be withheld from disclosure pursuant to exemption 4 of the FOIA. Hudson Valley FCU and Mid-Hudson Valley FCU both submitted responses to the submitter notices outlining their objections.

We have reviewed the community conversion applications in light of all of the FOIA exemptions and the submitters objections pursuant to exemption 4. The applications are released with redactions pursuant to exemptions 4, 6 and 8 of the FOIA as described below. The redacted applications have been reproduced on paper marked DRAFT because they have not yet been acted on by the NCUA. The draft applications are subject to modification by the applicant FCUs. NCUA staff may contact the applicant FCUs to suggest modification during review of the applications.

The enclosed copy of the draft applications indicates where information has been withheld, which FOIA exemption applies, and how many pages have been withheld. A discussion of the information withheld and the applicable exemptions for all three applications follows the listing of information withheld from each application.

TEG FCU application

As noted above, TEG FCU had no objections, pursuant to exemption 4 of the FOIA, to release of its entire application. Certain information in the application is being withheld subject to other FOIA exemptions. Twenty pages of the application are being withheld pursuant to exemption 8 of the FOIA (examination information) and one page of the application is being withheld pursuant to exemption 6 of the FOIA (privacy exemption).

Hudson Valley FCU application

Hudson Valley FCU had objections to release of various sections of its application pursuant to exemption 4 of the

FOIA. We agreed that some of the information should be withheld; other information the credit union objected to is being released. Information from the following sections is being withheld pursuant to exemption 4: one paragraph in section 1; several paragraphs in section 2; parts of charts found in section 5; several pages in section 6; all of section 7; parts of charts found in section 10; most of section 11; all of section 13; and part of section 16. The pages withheld in section 6 are also being withheld pursuant to exemption 6.

Mid-Hudson Valley FCU application

Mid-Hudson Valley FCU also had objections to release of various sections of its application pursuant to exemption 4 of the FOIA. Again, we agreed that some of the information should be withheld; other information the credit union objected to is being released. Information from the following sections is being withheld pursuant to exemption 4: parts of 2 pages from section 1; several pages from section 5; all of sections 6 and 7; and part of Appendices A, C, and H. A July 31, 1998 supplement to the Mid-Hudson Valley application was also submitted.

Attachments C and D to that supplement are also withheld pursuant to exemption 4. Home addresses and identifying numbers found in Appendix C and petitions and telephone surveys found in Appendix D

of the original application are withheld pursuant to exemption 6.

Exemption 4

Information withheld from the Hudson Valley FCU and Mid-Hudson Valley FCU applications pursuant to exemption 4 includes: business and marketing plans; information on credit union organizational structure and management; certain financial information on select employee groups within the field of membership; budget information; member survey results; and credit union financial data broken down by county. Voluntarily submitted community support letters are also withheld.

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 USC 552(b)(4). All of the information withheld is within the commercial/financial category. The term "commercial" has been interpreted to include anything "pertaining or relating to or dealing with commerce", American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 870 (2d Cir. 1978). Information "obtained from a person" has been held to include information obtained from a corporation. Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). All of the information withheld pursuant to exemption 4 meets the broad interpretation of commercial or financial information. Information obtained from credit unions meets the standard of obtained "from a person" under Nadler.

The third requirement of exemption 4 is met if information is "privileged or confidential." In Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993), the court established two distinct standards to be used in determining whether commercial/financial information submitted to an agency is "confidential" under exemption 4. Information which is required to be submitted to a government agency is subject to a stricter standard than information which is voluntarily submitted to an agency. Except for the community support letters which are no longer required to be submitted as part of a community conversion application (*see* IRPS 98-1, 63 Fed. Reg. 4372, 1/29/98), all of the other information withheld pursuant to exemption 4 falls within the required category. Under this stricter "required to be submitted" standard, information 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 all of the required information withheld meets the second prong of National Parks.

Information voluntarily submitted is afforded protection as "confidential" information "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, 975 F2d at 879. As noted in the above paragraph, the community support letters were voluntarily submitted. The credit union submitters (Hudson Valley FCU and Mid-Hudson Valley FCU) claim they would not customarily release the community support letters to the public. We agree that the letters should not be released, at least not before the community conversion

applications are acted upon. These letters are therefore withheld pursuant to the less strict "voluntary" standard set forth in Critical Mass.

Exemption 6

The information withheld pursuant to exemption 6 includes a letter from a credit union member containing personal information, home addresses and identifying numbers and other personal information about credit union board members and management; and identifying details on member petitions and surveys.

Exemption 6 of the FOIA protects information about an individual in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 USC 552(b)(6). The courts have held that all information which applies to a particular individual meets the threshold requirement for exemption 6 protection. United States Department of State v. Washington Post Co., 456 U.S. 595 (1982). Once a privacy interest is established, 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). The information withheld meets the threshold requirement of exemption 6. The Supreme Court has held that the public interest in exemption 6 information is to "shed light on an agency's performance of its statutory duties." United States Department of Justice v. Reporters Committee, 489 U.S. 749 (1989). The burden of establishing that disclosure would serve the public interest is on the requester. Carter v. United States Department of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987). No specific information regarding public interest in the personal information being withheld was submitted. We acknowledge that NCUA did not use exemption 6 in response to your group's original FOIA request. However, most of the draft applications are now being released. We believe the

individuals' privacy interests in the exemption 6 information withheld outweighs any public interest in the information.

Exemption 8

Only the TEG FCU application contained exemption 8 information. The information withheld includes CAMEL ratio and CAMEL code information as well as other information pertaining to the financial stability of the credit union.

Exemption 8 of the FOIA (5 USC 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 90,102 (D.D.C. 1980). Either purpose is sufficient reason to withhold an examination report.

NCUA has incorporated these dual purposes into its regulation. Section 792.11(a)(8) of the NCUA Regulations 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.

Disclosure of the CAMEL and other financial information could affect the financial stability of the credit union. Hence, we have withheld this information pursuant to exemption 8.

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of this determination by filing suit to enjoin the NCUA from withholding the documents withheld and to order production of the documents. Such a suit may be filed in the United States District Court in the district where the requester(s) reside, where requester(s) 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

SSIC 3212

98-0824

Enclosures

cc: Concerned Credit Unions of the

Hudson Valley (w/out enclosures)

Joseph Melchione, Esq. (w/out enclosures)

Joseph Prokop, CEO, TEG FCU (w/out enclosures)