

January 11, 2012

Nate Raymond, Senior Reporter
The American Lawyer
120 Broadway, 5th Floor
New York, NY 10271

Re: 2012 – APP – 004; 12 FOI -00017

Dear Mr. Raymond:

On November 15, 2011, we received your Freedom of Information Act (FOIA) request, by which you sought copies of the settlement agreements entered into between NCUA, Citigroup, and Deutsche Bank Securities, as announced in NCUA press releases issued on November 14, 2011. You also sought a waiver of fees associated with the search and duplication of these documents.

On December 1, 2011, Linda Dent, staff attorney in NCUA's Office of General Counsel, responded to your request, denying it in full. Ms. Dent advised that 35 pages of documents responsive to your request had been located but were being withheld, based on exemption 4 of FOIA, codified at 5 U.S.C. §552(b)(4). She also confirmed that your fee waiver request was moot since no fees were incurred.

You filed an appeal of this denial by letter dated December 22, 2011, which we received on December 23, 2011. In your appeal, you asserted that the documents should be released to you because they are a matter of significant public interest. You also asserted that other federal agencies routinely disclose documents like those involved in this case without waiving any confidentiality or privileges. You argued that release of the documents would not result in the disclosure of any substantive legal advice or counsel provided to the agency, and that it would not reveal to the public any detailed financial information involving private individuals. Instead, in your view, release of the documents would simply disclose the terms by which public companies are being permitted to resolve significant disputes.

You enclosed with your appeal copies of various news items and articles describing the settlements between NCUA, Citigroup and Deutsche Bank Securities, which you assert evidences the significance of the public's interest in the issues. You also enclosed copies of other settlement agreements between various government agencies and financial institutions, which you assert supports your view that these two settlement agreements should also be released.

Your appeal is denied. As more fully established below, none of the points you have asserted in support of your appeal is sufficient to overcome the noted exemption's applicability in this case.

The determination as to whether the records you have sought must be released depends on the applicability of one or more of the statutory exemptions contained in FOIA. As Ms. Dent's letter correctly noted, exemption 4 of FOIA protects from disclosure commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. §552(b)(4). Courts have had little difficulty in regarding information as "commercial or financial" if it relates to business or trade. See, e.g., *American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863, 870 (2d Cir. 1978) (standard is defined as including anything "pertaining or relating to or dealing with commerce"); see also *Dow Jones Co. v FERC*, 219 F.R.D. 167, 176 (C.D.Cal. 2002) (information relating "to business decisions and practices regarding the sale of power, and the operation and maintenance" of generators). We think it is readily apparent that documents implementing a financial settlement of claims based on allegedly improper business practices meet this broad test. Insofar as Citigroup and Deutsche Bank Securities are parties to the settlement agreements, it is likewise clear that the commercial information contained in each agreement was obtained from them, within the meaning of the exemption.

The remaining consideration governing the applicability of exemption 4 to this case involves a determination of whether the information contained in the agreements is "privileged or confidential." Judicial interpretation on this point has developed a distinction between information that has been provided to an agency involuntarily versus that which has been provided voluntarily. Where the records in question consist of information provided by a person involuntarily, such as in response to a regulatory requirement, the test for confidentiality requires a showing that its release would (i) impair the government's ability to obtain necessary information in the future; or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Association v. Morton*, 498 F. 2d 765 (D.C. Cir. 1974). Where the information has been provided to the government on a voluntary basis, however, a different test applies. All such information is protected from disclosure if it is the type of information that is not customarily made available to the public by the submitter. See *Critical Mass Energy Project v. NRC*, 975 F. 2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

In this case, the records you have requested are agreements voluntarily reached between the agency and entities that had engaged in business transactions with corporate credit unions that subsequently failed and for which the agency was appointed liquidating agent. The entities entered the agreements willingly, without coercion or compulsion, for the purpose of resolving the uncertainty and expense of potential protracted litigation. Accordingly, the lesser standard governing confidentiality as described in *Critical Mass* is applicable. Furthermore, each entity has explicitly indicated, through language in the agreements, its intention to preserve the

Mr. Nate Raymond
January 11, 2012
Page 3

confidentiality of the agreements and to withhold disclosure of the existence, content and terms of the agreements to any person (excluding its own attorneys and financial advisors), except as may be required by law or as shall be mutually agreed upon in a press release.

In addition to the November 14, 2011 press releases describing the settlements with Citigroup and Deutsche Bank Securities, NCUA has produced and made public a substantial volume of information about the disruption in the corporate credit union industry and its impact. For example, Material Loss Reviews prepared by NCUA's Inspector General concerning each of the five failed corporate credit unions are posted on the agency website, and another entire section of the website is devoted to discussing the agency's plan for the resolution of the corporate credit union system. The materials you have sought, however, fall outside those categories and are, for the reasons identified herein, exempt from disclosure.

Pursuant to 5 U.S.C. §552(a)(4)(B) of FOIA, you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court 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,

/S/

Michael J. McKenna
General Counsel

2012 – APP – 0004; 12 – FOI – 00017

12-0117