

January 15, 2013

Keith Leggett, Vice President and Senior Economist
American Bankers Association
1120 Connecticut Avenue, NW
Washington, D.C. 20036

Re: 2013 – APP – 0001; FOIA Appeal dated December 5, 2012

Dear Mr. Leggett:

On October 1, 2012, you filed a Freedom of Information Act (FOIA) request for copies of communications within a specified date range associated with, but not limited to, certain specified individuals and organizations relating to Technology Credit Union's (TCU) proposed charter conversion to a mutual savings bank. On November 29, 2012, Regina Metz, staff attorney in NCUA's Office of General Counsel, responded to your request, refusing to acknowledge the existence of any responsive documents and indicating that, assuming such material did exist, it would qualify for protection based on exemption 6 of FOIA, 5 U.S.C. §552(b)(6). As explained by Ms. Metz, exemption 6 provides that agencies should withhold from production information that, if released, would constitute an unwarranted invasion of personal privacy. *Id.*

You appealed Ms. Metz's determination by letter dated December 5, 2012 (received December 10, 2012). In your appeal, you indicated your belief that the exemption is inapplicable because the communications (assuming they exist) are not personal in nature. You also stated that the specified individuals were actively and openly engaged in opposing TCU's proposed conversion, including developing a website devoted to opposing the conversion and speaking with representatives of the trade press.

As more fully established below, in refusing to confirm or deny the existence of responsive materials, the initial response was correct. Its reliance on exemption 6, however, was misplaced. Assuming (without confirming) that materials responsive to the request exist, exemptions 5, 7(C), and 8 of FOIA, 5 U.S.C. §§552(b)(5),(7)(C), and (8), support their withholding. Accordingly, your appeal is denied.

Background.

This case involves a proposed conversion of an insured credit union to a mutual savings bank charter, a process that is regulated by the NCUA. See 12 C.F.R. Part 708a. The process entails a membership vote on the question of whether to convert, and NCUA conducts a thorough review of communications by the credit union to be sent to its members describing the proposal to assure that nothing contained in the communications is misleading or inaccurate. Pursuant to our regulation, moreover,

certain specific disclosures must be provided to the membership. In addition, the regulation provides for a mechanism allowing circulation of member-to-member communications concerning issues relating to the proposed conversion.

Exemption 5.

To the extent that responsive materials exist, this exemption would apply to any such material reflecting consideration and evaluation by agency personnel concerning whether TCU was compliant with applicable provisions of Part 708a. Exemption 5 of FOIA shields those deliberations from disclosure. 5 U.S.C. §552(b)(5). Exemption 5 incorporates the privileges available to a governmental agency in civil litigation, notably the deliberative process privilege (sometimes called the executive privilege), the attorney-client privilege, and the attorney work product privilege. *Id.*

To qualify for the deliberative process privilege, an agency must show that the documents are both "pre-decisional" and "deliberative." Documents are pre-decisional when they precede an agency decision and are prepared in order to assist an agency in arriving at its decision, and documents are deliberative when they comprise part of the process by which government decisions are made. *See Phillips v. Immigration and Customs Enforcement*, 385 F. Supp. 2d 296 (S.D.N.Y. 2005). The rationale underlying the privilege is to allow agencies to freely explore alternative avenues of action and to engage in internal debates without fear of public scrutiny. *See Assembly of State of California v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992).

Exemption 7(C).

Exception 7(C) protects information compiled for law enforcement purposes that, if released, "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C). FOIA case law has established that law enforcement includes civil, criminal, and administrative proceedings. *Rugiero v. Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001); *see also Judicial Watch, Inc. v. Rossotti*, 2002 WL 31962775, at *6 (D. Md. Dec. 16, 2002) (ruling that letters written by citizens concerned about plaintiff's compliance with IRS laws were compiled for "civil law enforcement purposes"); *aff'd sub nom. Judicial Watch, Inc. v. United States*, 84 F. App'x 335 (4th Cir. 2004). In the discharge of its oversight role in assuring compliance with its conversion rules and the Federal Credit Union Act, NCUA is engaged in law enforcement within the meaning of this exemption.

The courts have held that all information that "applies to a particular individual" meets the threshold requirement for privacy protection. *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982). In this case, the privacy interest at stake is the ability of an individual to make contact with the government in the law enforcement context anonymously, without fear of harassment or possible retaliation. The privacy interest is not limited to only those matters which involve intimate details of an individual's life; nor does an individual lose his privacy interest under 7(C) because his

identity as a witness may be discovered through other means. See *L & C Marine Transp., Ltd. v. United States*, 740 F.2d 919, 922-23 (11th Cir. 1984).

Furthermore, where, as here, the request is narrowly targeted and by its very terms is limited to information pertaining to identifiable individuals, partial redaction would not be adequate to protect the personal privacy interests at risk. In such cases, the courts have upheld an agency response that neither confirms nor denies the existence of responsive records. See, e.g., *Mueller v. U.S. Dep't of the Air Force*, 63 F. Supp. 2d 738, 744 (E.D. Va. 1999) (noting that when requested documents relate to a specific individual, "deleting [her] name from the disclosed documents, when it is known that she was the subject of the investigation, would be pointless."); see also *Ortiz v. Dep't of HHS*, 874 F. Supp. 570, 574 (D.D.C. 1995); aff'd at 70 F.3d 729 (2d Cir. 1995) (finding that numerous aspects of an anonymous letter, if released, could lead to discovery of the author's identity), and *L & C Marine, supra* (noting that exemption 7(C) protects against disclosure where the information would cause embarrassment because of its intimate nature or because of the fact of the individual's cooperation with the investigation itself.)

FOIA calls for a balancing of the privacy interest against the public interest that would be served through release of the requested documents. The Supreme Court has limited the concept of public interest under FOIA to the statute's "core purpose": shedding light on an agency's performance of its statutory duties. *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). In this case, no public interest in the release of the requested materials (assuming their existence) has been articulated. There has been no suggestion, for example, that the identified individuals made fraudulent allegations in their (presumed) communications, nor has there been any allegation of wrongdoing on the part of NCUA in connection with any of its official actions taken in the context of the TCU conversion process. The particular interest of the requester in the requested materials does not bear on the question of public interest. *Associated Press v. Department of Defense*, 554 F.3d 274, 285 (2d Cir. 2009) (noting that the public interest "cannot turn on the purposes for which the request for information is made" and that "the identity of the requesting party has no bearing on the merits of his or her FOIA request," quoting from *Reporters Committee*, 489 U.S. at 771).

Exemption 8.

Exemption 8 applies to 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). In this case, the agency's entire involvement in the conversion process, as contemplated by Part 708a, including its receipt and disposition of communications, if any, that it may have received in connection with its role in overseeing the conversion, falls within the scope of exemption 8. This includes both any materials submitted by or on behalf of TCU, as well as any communications that may have been received from third parties. All such material constitutes reports pertaining to the operation of TCU that were prepared on

behalf of or for the use of the agency. See *McKinley v. FDIC*, 744 F. Supp. 2d 128, 144 (holding that information obtained through an ongoing supervisory process was sufficient to make the withheld information “related to the examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”)

Courts have interpreted exemption 8 broadly and have declined to restrict its all-inclusive scope. See *Consumers Union of United States, Inc. v. Heimann*, 589 F.2d 531 (D.C. Cir. 1978). Examination reports as well as their follow-up and internal memoranda containing specific information about named financial institutions have been withheld pursuant to exemption 8. See *Atkinson v. FDIC*, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, (D.D.C. Feb. 13, 1980), and *Wachtel v. Office of Thrift Supervision*, No. 3-90-833, slip op. (M.D. Tenn. Nov. 20, 1990). Courts have provided a broad interpretation to this language and have not limited its application to material contained in reports of examination. *Id.* Instead, all records, regardless of the source, of a financial institution’s financial condition and operations that are in the possession of a federal agency responsible for its regulation or supervision are exempt. See *McCullough v. FDIC*, 1980 U.S. Dist. LEXIS 17685, at *7-8 (D.D.C. Jul. 28, 1980). This principle of broadly construing exemption 8 was confirmed in another recent case decided by the federal court in the District of Columbia. See *Judicial Watch, Inc. v. United States Dep’t of the Treasury*, 2011 U.S. Dist. LEXIS 74121, at *39 (D.D.C. July 11, 2011) (holding that information, regardless of the source, that the FDIC obtained through its monitoring of the financial institutions it regulates was protected under exemption 8).

In the context of exemption 8, courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. See *Atkinson* at 4-5.

Pursuant to 5 U.S.C. 552(a)(4)(B) of the 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,

Michael J. McKenna
General Counsel