January 25, 2013

Craig Linder, Esq.
Counsel
Dow Jones & Company
1211 Avenue of the Americas
7th Floor Legal
New York, NY 10036

Re: 2013 – APP – 0002; FOIA Appeal dated December 22, 2012

Dear Mr. Linder:

On April 5, 2012, James Grimaldi, a reporter for *The Wall Street Journal*, filed a Freedom of Information Act (FOIA) request seeking copies of contracts, agreements, engagement letters, or similar documents between the NCUA Board and outside counsel that represented NCUA (acting in any capacity, including liquidating agent) in reaching settlements with Citicorp, Deutsche Bank Securities, and HSBC, regarding potential claims relating to the sale of residential mortgage-backed securities to five failed wholesale (corporate) credit unions. Mr. Grimaldi also requested all documents that indicate, reference, or show, in any way, the fees, compensation, cost, or expenses paid to the law firms involved in those settlements. He also requested all records regarding any bidding, request for proposals, or anything regarding an interview or selection process. At the time of the initial request, Mr. Grimaldi was employed by *The Washington Post.*

On November 28, 2012, Regina Metz, staff attorney in NCUA's Office of General Counsel, responded to the request. Ms. Metz provided approximately 70 pages of responsive materials, some of which were partially redacted, and she indicated that another 90 pages were being withheld in full. As explained by Ms. Metz, the withheld materials qualified for withholding under one or more FOIA exemptions, as codified at 5 U.S.C. §§ 552(b)(4), (5), and (6). Ms. Metz correctly noted that exemption (b)(4) protects from disclosure trade secrets and confidential or privileged commercial or financial information obtained from a person. Exemption (b)(5) protects from disclosure information that may be withheld under the deliberative process privilege or under civil discovery, attorney-client, or attorney-work product privileges. Exemption (b)(6) provides that agencies should withhold from production information that, if released, would constitute an unwarranted invasion of personal privacy.

You appealed Ms. Metz's determination by letter dated December 22, 2012 (received December 27, 2012). In your appeal, you asserted that NCUA had withheld in full certain documents for which FOIA provides no basis for withholding. In particular, you challenged whether any of the cited exemptions provide any authorization for NCUA to withhold retention agreements between the agency and two identified law firms, whether such agreements are in place between the firms and the agency on its own behalf or in its capacity as liquidating agent for certain credit unions.

As a preliminary matter, please note that the initial response erroneously characterized the number of documents that were withheld in full. Of the ninety documents that were withheld in full, fifty-eight were, in fact, non-responsive to the initial request and should not have been included in the file or identified as having been withheld. We apologize for this oversight.

Exemption 5 of FOIA is applicable to these circumstances and supports the initial determination to withhold production of the legal services agreement (LSA) in place between the NCUA and the identified law firms. With regard to the LSA, however, the initial response applied exemption 5 too broadly. As a result, some segments of the LSA should not have been withheld. We have enclosed a copy of the LSA, with only those portions entitled to protection under exemption 5 redacted. As more fully established below, the exemption extends to the remaining material and supports its continued withholding.

Exemption 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. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

We note that fee arrangements between an attorney and client generally are not protected by the attorney work-product privilege. *See Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 304 (3d Cir. 1999) (holding that fee arrangement between County and law firm not covered by attorney-client or attorney work-product privilege) and *Murray v. Stuckey's Inc.*, 153 F.R.D. 151, 153 (N.D. Iowa 1993) (noting that, as a general matter, fee arrangements are not covered by the attorney-client or attorney work-product privilege).

Courts have acknowledged, however, that the disclosure of fee arrangements has "the potential for revealing confidential information along with unprotected fee information." In such circumstances, courts have recognized that additional analysis is warranted to determine if the release of a fee contract could potentially disclose confidential information. *See In re Grand Jury Subpoenas*, 906 F.2d 1485, 1492 (10th Cir. 1990). For example, the court in *Indian Law Resource Center v. Dep't of the Interior*, 477 F. Supp. 144 (D.D.C. 1979), recognized that there are some circumstances in which a fee arrangement could

be protected under a claim of privilege. Refusing to require the disclosure of fee statements prepared by counsel in that case, the court noted

> [t]he vouchers reveal strategies developed by Hopi counsel in anticipation of preventing or preparing for legal action to safeguard tribal interests. Such communications are entitled to protection as attorney work-product.

Id. Although the court in that case held that the retention agreements and fee schedules were not entitled to protection based on the work-product privilege, the agreements in that case were not developed in anticipation of particular litigation. Rather, they were devised to govern the terms of representation relating to a variety of advisory, transactional, and other roles. In this case, the LSA was developed in anticipation of pursuit of specific claims against specific defendants. *See Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir.1999) (recognizing that writings that reveal "the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the [attorney-client] privilege").

In this case, elements of the LSA, such as provisions disclosing the process by which the agency will come to its decisions on significant aspects of the litigation, fall within the scope of both the attorney-client and the attorney work-product privileges. The LSA also reflects the financial resources available to the agency as liquidator to pursue significant claims against the largest financial institutions in the world, a fact that necessarily has implications for litigation decisions and strategy. Much as an attorney makes judgments as to the value of a claim and the particular legal issues involved in a case, the same analysis of the claim is undertaken when determining what sort of fee arrangement to enter into regarding representation for that claim. Courts have acknowledged that decisions respecting the allocation of fees between client and counsel may be reflective of the attorney's and client's judgments as to the risks involved in the litigation and likely outcomes. *See Jones v. Dominion Res. Services, Inc.*, 601 F. Supp. 2d 756, 762 (S.D.W. Va. 2009).

In a case factually similar to the present appeal involving the Resolution Trust Corporation (RTC), acting in its capacity as receiver for a failed bank, RTC rejected a FOIA appeal and declined to release information relating to fees and invoices submitted by retained counsel. RTC's decision on the appeal noted that "[d]isclosure of attorney fee information would place the RTC at a severe disadvantage, amounting to an egregious intrusion into the RTC's litigation preparations, case strategy and theories in active litigation." *See* Freedom of Information Act Appeal No. RTC-93-A043, November 12, 1993.

RTC relied on the reasoning in *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.* to support its contention that fee statements and bills can be reflective of attorney work-product, and thus protected from disclosure under exemption 5. 139 F.R.D. 609 (E.D.Pa. 1991). In *Rhone-Poulenc*, plaintiff propounded discovery asking defendant to identify the amount, if any, of reserves defendant had set aside to

satisfy a potential adverse judgment. *Id.* at 611. The court refused to compel the defendant to answer, reasoning that the reserve figures reflected the attorneys' impressions of the case and their evaluations of the claims raised, and as such were protected by the attorney work-product privilege. *Id.* at 614-5.

As the *Rhone-Poulenc* court explained, "[e]stablishing the value of a claim is analytically complex, requiring an assessment of the body of evidence and the particular legal issues involved in each case, as well as an evaluation of the case's strengths and weaknesses." *Id.* at 614. The court noted that "[t]he litigation's ultimate cost to the client has great significance in determining whether a lawsuit will be tried or settled and, if settled, for what amount." *Id.* Finally, the court explained "a party, in managing its litigation, should not be forced to provide materials to its opponent that necessarily reflect its lawyers' mental impressions regarding the litigation and containing its agents' mental impressions concerning the cost of the litigation." *Id.* at 615.

Although documents reflecting reserve amounts are different from the documents sought in this case, a similar rationale applies. Reserve amounts necessarily reflect the attorneys' valuation of claims and defenses. The decision concerning the terms and dimensions of a fee arrangement entails a similar analysis concerning the value of the claim and the risks involved in its pursuit. As such, information concerning the fee arrangement is reflective of the mental impressions of the attorneys regarding the strengths and weaknesses of the case, and thus is privileged as attorney work-product.

In his initial request, Mr. Grimaldi emphasized that he was not seeking access to materials regarding ongoing litigation, strategy or process. You should note, however, that NCUA is actively pursuing nine cases involving claims and defenses that are similar, if not identical, to those involved in the three settled cases that form the background of this FOIA appeal. The defendants in one such case have filed an interlocutory appeal to the 10th Circuit challenging a District Court judge's decision on the availability to the NCUA of certain procedural protections. Defendants contend that comments by NCUA concerning the nature of the retention agreement support their position that the lower court was wrong. It is foreseeable that, if the LSA were made public, the defendants will contend that it constitutes an "admission" and attempt to use it in the litigation against NCUA.[1]

Other responsive material in this case, consisting of internal memoranda developed by NCUA attorneys and containing legal advice or discussing and recommending alternative approaches to the representation question, was properly withheld based on the deliberative process privilege afforded by exemption 5. To qualify for the deliberative process privilege, an agency must show that the documents are both "pre-decisional" and "deliberative."

---

[1] *See NCUA Board v. Nomura Home Equity Loan, Inc., et al.*, Nos. 12-3295 and 12-3298, Appellants' Brief at 42 and 43 and footnote 9.

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). This rationale has direct applicability to the circumstances surrounding these documents and supports their withholding in this case.

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

12-FOI-00061; 2013-APP-00002

Enclosure