

June 19, 2013

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

Re: 13 – FOI – 00071; 2013 – APP – 0005

Dear Mr. Leggett:

By letter dated April 5, 2013, you filed a Freedom of Information Act (FOIA) request involving a Letter of Understanding and Agreement between NCUA and Telesis Credit Union (Telesis) entered in June 2010 and amended in May 2011 (collectively, the LUA). You requested that NCUA either post a copy of the LUA on its website or provide your organization with a copy.

On April 30, 2013, Regina Metz, staff attorney in NCUA's Office of General Counsel, responded to your request, denying the request in full. Ms. Metz advised that 14 pages of documents responsive to your request had been located but were being withheld, based on one or more of FOIA exemptions 4, 5 and 8, codified at 5 U.S.C. §§552(b)(4),(5),(8). Ms. Metz correctly noted that exemption 4 protects from disclosure trade secrets and confidential or privileged commercial or financial information obtained from a person. Exemption 5 protects from disclosure inter-agency or intra-agency memoranda which would not be available by law to a party in litigation with the agency. Exemption 8 protects from disclosure matters that are 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.

You appealed Ms. Metz's determination by letter dated May 17, 2013 (received May 21st). In your appeal, you argued that the initial request was improperly denied based on a provision in the Federal Credit Union Act that calls for the NCUA Board to publish final enforcement actions. In your view, the LUA is such an action and should be released publicly. Your appeal goes on to discount any possible reason for delaying the requested release, based on the fact that Telesis has failed and is out of business.

As more fully established below, the determination made in the initial response to withhold the requested materials was correct. Exemption 8 fully supports the withholding of the LUA. 5 U.S.C. §552(b)(8). Accordingly, your appeal is denied.

NCUA, like the other federal depository institution regulatory agencies, administers an examination and supervision program for insured credit unions that is characterized by progressive enforcement measures that range from informal to formal. Informal measures include written directives embodied in an examination report or supervision contact, letters from the regional director, and commitments reflected in writing signed by the credit union's board

and management officials. Should these measures prove ineffective in securing required improvement or corrective action, NCUA has the option to rely on more formal enforcement methods, including cease and desist orders, civil money penalties, removal actions, and orders permanently prohibiting individuals from serving in a management capacity with insured depository institutions. *See* 12 U.S.C. §1786; 12 C.F.R. Part 747.

Federal law specifies that final orders issued by the NCUA Board in connection with formal enforcement actions must be made public. 12 U.S.C. §1786(s)(1). The same statute also mandates publication of written agreements for which a violation may be enforced by the Board, except in certain limited circumstances. *Id.* The LUA at issue in this case is not an order issued in connection with a formal enforcement proceeding, nor is it a written agreement that is specifically enforceable by the NCUA Board. Instead, the LUA is a supervisory tool that memorializes a commitment undertaken by the management of Telesis to take affirmative steps to address concerns identified by the examiner during the immediately preceding examination. NCUA's Regional Director, acting in concert with the California Department of Financial Institutions, determined that the nature and severity of the problems confronting Telesis, although already documented in the report of examination, warranted a relatively more formal acknowledgement and a more concentrated plan to address them. Properly understood, the LUA is an extension of the report of examination produced by NCUA and California examiners of Telesis effective as of December 31, 2009, reflecting the heightened concern of the regulators about problems with the institution and the need for focused, remedial efforts to address them. As such, the LUA falls squarely within the scope of FOIA's exemption 8.

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). As noted above, the LUA is an outgrowth of Telesis's last examination. It reiterates findings noted by the examiners and outlines remedial actions to be taken, within specified time frames, to address the identified concerns. The LUA constitutes a report pertaining to the operation of Telesis that was prepared on behalf of or for the use of the agency, and therefore it is exempt from release based on exemption 8. *See McKinley v. FDIC*, 744 F. Supp. 2d 128, 144 (D.D.C. 2010) *aff'd sub nom. McKinley v. Bd. of Governors of Fed. Reserve System*, 647 F.3d 331 (D.C. Cir. 2011) (holding that information obtained through an ongoing supervisory process was sufficient to bring the withheld information within the scope of the exemption).

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 not limited the application of exemption 8 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

Mr. Keith Leggett

June 19, 2013

Page 3

17685, at *7-8 (D.D.C. Jul. 28, 1980). In the context of exemption 8, courts have generally not required agencies to segregate and disclose those portions of documents that are unrelated to the financial condition of the institution. *See Atkinson* at *4-5.

In this case, much of the material comprising the LUA is in the nature of confidential, financial information involving Telesis and, as such, would also qualify for protection under exemption 4. 5 U.S.C. §552(b)(4). Because of the breadth of exemption 8, however, and because the responsive material in this case falls squarely within the scope and rationale of that exemption, we need not address exemption 4's applicability. *See Public Investors Arbitration Bar Association v. SEC*, 2013 U.S. Dist. LEXIS 35175 (D.D.C. Mar. 14, 2013) (applying a broad reading of the scope of exemption 8).

Your appeal notes that Telesis is now out of business, having been put into liquidation by NCUA in June 2012. You suggest that this factor supports the release of the requested material, since the failure of Telesis renders moot any threat to its safety and soundness on account of the release of the LUA. Courts have refused, however, to limit the applicability of exemption 8 to records that involve only open, operating institutions. As noted by the Court of Appeals for the D.C. Circuit, the language in the exemption is clear and its application to records involving a closed institution is consistent with the policy underlying the exemption, which is to "protect not simply each individual bank but the integrity of financial institutions as an industry." *Gregory v. FDIC*, 631 F.2d 896, 898-99 (D.C. Cir. 1980); *see also Berliner, Zisser, Walter & Gallegos, P.C. v. SEC*, 962 F. Supp. 1348, 1353 (D. Colo. 1997) (refusing to impose a judicial limitation concerning the length of time that must pass before exemption 8 should no longer apply to records from a closed institution).

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 in which the complainant resides or has its principal place of business, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Michael J. McKenna
General Counsel

GC/RPK:bhs

13 – FOI – 00071; 2013 – APP – 0005

13-0614