May 7, 2014

Ms. Leigh Anne Terry
Senior Administrator
Callahan & Associates
1001 Connecticut Avenue, NW
Suite 1001
Washington, D.C. 20036

Dear Ms. Terry:

Re: 2014-APP-00002- FOIA Appeal dated April 4, 2014

By letter of January 15, 2014, you submitted a Freedom of Information Act (FOIA) request seeking certain information pertaining to a legal opinion obtained by the NCUA in connection with its development and adoption of an amendment to its credit union service organization (CUSO) rule. By letter of January 30, 2014, Regina Metz, staff attorney in NCUA's Office of General Counsel, notified you that certain aspects of your request had been improperly structured under FOIA, and you submitted a revised request by letter of March 6, 2014.

By letter of March 21, 2014, Ms. Metz responded to you and advised that your request was granted in part. Ms. Metz provided you with approximately 14 pages of responsive documents, of which 11 contained one or more redactions. Approximately 22 pages of responsive material were withheld in full, based on one or more FOIA exemptions as codified at 12 U.S.C. §§552(b)(4), (5), (6) and (8). As explained by Ms. Metz, exemption 4 protects from disclosure trade secrets and commercial or financial information obtained from a person, which is considered privileged or confidential; exemption 5 protects from disclosure inter-agency and intra-agency memoranda that would not be available by law to a party in litigation with the agency; exemption 6 directs agencies to withhold information that, if disclosed, would constitute an unwarranted invasion of personal privacy; and exemption 8 provides for withholding of 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 April 4, 2014 (received by us on April 9th). In your appeal, you challenge the decision to withhold the legal opinion, which you assert was explicitly relied upon by members of the NCUA Board in determining to vote in favor of adopting the amendments to the CUSO rule. In your view, withholding the opinion and the legal reasoning concerning the statutory authority on which the rule is based is contrary to the open meeting process and inconsistent with the concept of transparent and open government. You assert that without access to the opinion, credit unions will be unaware of the scope or basis of NCUA's authority to issue the rule, which will leave them "no opportunity to provide alternative interpretations or to know the constraints, if any, on this secret interpretation of the agency's

power." You assert that the agency's action in issuing the rule on the basis of this opinion is inconsistent with the Administrative Procedure Act, due process requirements in rulemaking, and fundamental democratic principles of open government. Finally, you have asserted that the withholding of the opinion is inconsistent with the provisions of 12 C.F.R. §792.11, which is NCUA's regulation implementing the FOIA exemptions.

Your appeal is denied. Exemption 5 of FOIA permits an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Courts have interpreted exemption 5 to encompass the traditional common law privileges against disclosure, including the work-product doctrine, and executive, deliberative process and attorney-client privileges. *See, e.g., Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999). The legal opinion that is the subject of this appeal qualifies for withholding pursuant to this exemption, both as privileged attorney work product and as privileged attorney-client communication.

To qualify for the work product privilege, a document must have been prepared in anticipation of litigation. However, courts have not construed the privilege so narrowly as to protect only work product related to specific cases currently in litigation. *See Delaney, Migdail, & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C.Cir.1987) (court rejected a "blanket rule" that work product privilege applies only to specific claims and litigation); *see also Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C.Cir. 1992) (noting that work product protection "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated "); *Hunt v. U.S. Marine Corps*, 935 F.Supp. 46, 52 (D.D.C. 1996) (quoting *Schiller* ). As explained by the U.S. Court of Appeals for the D.C. Circuit, the government is permitted to withhold such records under the attorney work product privilege, including documents "advis[ing] the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome." *Delaney*, supra, at 127.

In this case, the agency had received a large volume of exceptionally negative comments in response to its proposal to make certain changes to its CUSO rule. The principal aspect of those changes was to extend certain regulatory requirements and to establish new reporting requirements. Comments challenging the statutory basis for these provisions were received, and speculation in the trade press suggested that the prospect of litigation challenging the agency was quite real. Before developing and issuing its final rule, the agency commissioned an outside law firm to evaluate potential challenges that were likely and to advise us on available defenses to such challenges. As such, the opinion falls squarely within the scope and rationale for the work product privilege.

A recent decision by the Federal district court in the District of Columbia involved circumstances quite similar to the present case. The Environmental Protection Agency (EPA) had issued a proposed "Endangerment Finding" concerning the hazardous effects on human health of certain greenhouse gases. The proposal was the first step in the development of a regulation on the issue. The agency received hundreds of negative comments challenging the basis for the Endangerment Finding and its statutory foundation. In response to a FOIA request, EPA

withheld certain internal legal memoranda that had been prepared in connection with the development of the final Endangerment Finding. Upholding the EPA's reliance on exemption 5 and the work product privilege, the court found that that the documents were properly withheld. The court determined that the agency had shown that the documents in question had been prepared to help the EPA prepare its response to a flood of comments attacking the proposed Endangerment Finding. As such, the court characterized the documents as entitled to protection under the work product privilege; i.e., documents that clearly anticipate legal challenges to the Agency's finding and seek to pre-emptively defend against them by crafting the strongest possible counter arguments for use in responding to the comments. *See Shurtleff v. United States Environmental Protection Agency*, 2013 WL 5423963, at *10 (D.D.C. 2013). The legal opinion in question in this appeal falls squarely within this rationale. Unlike the deliberative process privilege, which is also included within exemption 5, attorney work product does not lose its exempt status even if the document in question has formed the basis for final agency action. *Iglesias v. CIA*, 525 F.Supp. 547, 559 (D.D.C.1981) (noting that whether the document in question may have become the basis for final agency action is irrelevant for the purposes of the work-product privilege); *see also Exxon Corp. v. F.T.C.*, 476 F.Supp. 713, 726 (D.D.C. 1979).

The legal opinion also qualifies for withholding as privileged attorney-client communication, another common law privilege incorporated into FOIA's exemption 5. The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services. The privilege also protects communications from attorneys to their clients if the communications rest on confidential information obtained from the client. *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (internal citations omitted). Such confidential communications are shielded from disclosure in order to encourage full and frank discussion between the client and his legal advisor. *Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Indeed, as the Supreme Court has phrased it, "[t]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Limitations on the attorney-client privilege have therefore necessarily been construed narrowly. *See, e.g., Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982). Courts have uniformly held that federal agencies may enter into privileged attorney-client relationships with their lawyers. *See, e.g., Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (it is "clear that an agency can be a 'client' . . . within the . . . privilege").

As discussed above, in this case the agency had reason, based on the nature and extent of negative comments received in response to its proposal to extend its CUSO rule, to solicit and obtain expert legal advice to guide it through the process of developing a defensible final rule. Communications shared with retained counsel concerning potential problems with the rule were provided on a confidential basis. The advice received, in the form of the legal opinion, reflects and incorporates those confidences. Notwithstanding Board Member Fryzel's reference to the opinion in the course of the NCUA Board's November 2013 public meeting, the opinion has been shared only among those agency personnel whose official duties and responsibilities involve the development of the CUSO rule. Accordingly, the attorney-client communication

privilege as incorporated into exemption 5 is applicable and supports the withholding of the legal opinion. 5 U.S.C. §552(b)(5).

Aside from your letter's general statement that the withholding of the legal opinion is inconsistent with 12 C.F.R. §791.11 (NCUA's rule implementing the FOIA exemptions), the other arguments in your letter are, in terms of the FOIA and the availability of exemption 5, irrelevant. You should note, however, that the preamble to the final rule makes very clear both the scope of the rule and the legal authority on which it is founded. Furthermore, the agency fully complied with the requirements of the Administrative Procedure Act in publishing a proposed rule, soliciting comments, and considering those comments in the development of the final rule. *See* 5 U.S.C. §553. With regard to the concerns you have identified relative to open meetings and concepts of open and transparent government, the preamble to the final rule makes very clear the agency's views regarding the need for the rule and the legal authority on which it is based. There is nothing secret about the agency's views or its approach to regulating in this area. Should any entity affected by the rule wish to challenge either the statutory basis for the rule or the sufficiency of the procedure by which the rule was adopted, it is free to do so. We note, in this respect, that insofar as the (b)(5) exemptions to the FOIA are intended to incorporate the common law privileges that apply in litigation, any party electing to pursue a legal challenge to the rulemaking would likewise be unsuccessful in seeking to obtain a copy of the legal opinion through that avenue.

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

GC/RPK:bhs
14-FOI-0027; 2014-APP-0002

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