GC/RPK:bhs
SSIC 3212

April 2, 2015

SENT BY E-MAIL

Laura Nagel, Esq.
Alan Lescht & Associates, PC
1050 17th Street, NW, Suite 400
Washington, DC 20036

Dear Ms. Nagel:

RE: 2015 – APP – 0001

You submitted a Freedom of Information Act (FOIA) request, received by NCUA on January 21, 2015, on behalf of your client, XXXXXX, seeking copies of documents relating to a Management Inquiry generated following a complaint initiated by XXXXXX regarding her supervisor.

By letter dated February 4, 2015, NCUA staff attorney Regina Metz advised you that your request was denied in full. Ms. Metz declined to confirm whether documents responsive to your request exist for privacy reasons. Assuming such documents do exist, Ms. Metz's letter indicated that exemptions 6 and 7(C) of the FOIA would support withholding such materials.[1]

You appealed Ms. Metz's determination by letter dated March 6, 2015 (received by us after business hours on that date; effectively, March 9th). In your appeal, you challenge Ms. Metz's statement that an overwhelming public interest in the identified documents must be demonstrated before they are properly releasable. Instead, you assert that the proper test in balancing whether a privacy interest should be protected is whether disclosure of the documents would contribute significantly to public understanding of the operations or activities of the government. You also assert that the release of documents related to an investigation of your client's complaint about her supervisor meets this standard and would shed light on agency management and personnel practices. Particularly, you assert that release of the documents is warranted because it would provide information as to the performance by management and staff of their duties, and would reveal information supporting or contradicting any allegations of retaliation against staff who initiated the complaint or made allegations against management during the investigation. You state that non-disclosure of the information would have a chilling effect on employees that might be contemplating complaints against agency management but who were dissuaded by a

[1] As Ms. Metz explained, exemption 6 permits agencies to withhold information the disclosure of which would constitute an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(6). Exemption 7(C) provides protection for materials compiled for law enforcement purposes if release of the materials could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(7)(C).

perception that no changes would result and that they might themselves be subject to retaliation. Finally, you question whether exemption 7(C) was properly invoked.

Based on our review, we have concluded that exemption 7(C) is not applicable to the facts of this case. That exemption 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). It is well established that "law enforcement" for purposes of the exemption is not limited to the criminal law, but also includes civil, criminal and administrative proceedings. *Rugiero v. Department of Justice*, 257 F.3d 534, 550 (6th Cir. 2001); *Rural Housing Alliance v. USDA*, 498 F. 2d 73, 81 (D.C. Cir. 1974) (noting that law enforcement purposes include both civil and criminal purposes).

In this case, the threshold requirement that the materials in issue would have been compiled for law enforcement purposes is not met. The test for applicability of exemption 7(C) requires that the acts investigated must be ones which could, if proved, result in civil or criminal sanctions. *Stern v. FBI*, 737 F. 2d 84, 90 (D.C. Cir. 1984) (internal citations omitted). While your client did make specific allegations of harassment, she did not allege that any particular statute or regulation had been violated. In accordance with agency policy, as reflected in NCUA Instruction 1235.08 (July 6, 2006), NCUA commissioned an investigation in response to the allegations. In the absence of a claim that a particular statutory or regulatory provision had been violated, however, the investigation and the materials generated from it would not constitute materials compiled for law enforcement purposes within the meaning of exemption 7(C). *See Stern, supra*, at 90 (noting that an investigation into alleged employee misconduct that does not constitute a violation of law does not meet the 7(C) standard).

Notwithstanding the foregoing, considerations of personal privacy and the required balancing of public and private interests in accordance with exemption 6 requires withholding in full. In addition, as a result of our review in connection with the appeal, we have determined that any responsive material would also be subject to withholding under exemption 5. Each of the exemptions is discussed below.

Exemption 6

This exemption exists to protect personal privacy interests of individuals and exempts from disclosure information about an individual contained in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). Implementing this statutory exemption, NCUA's FOIA regulation specifically acknowledges a privacy interest is present in

> [F]iles containing reports, records, or other material pertaining to individual cases in which disciplinary or other administrative action has been or may be taken.

12 C.F.R. §792.11(a)(6)(iii). The courts have held that all information that "applies to a particular individual" meets the threshold requirement for privacy protection, and includes any "detailed Government records on an individual which can be identified as applying to that individual." *U.S. Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982); *see also Ferrigno v. U.S. Department of Homeland Security*, No. 09-5878, 2011 WL 1345168 (S.D.

N.Y.) at *8 (noting that "[a]dministrative investigative files that included the names of the subject of the investigation, witnesses, and investigative personnel are 'similar' to personnel and medical files for the purpose of Exemption 6"); *also Associated Press v. Department of Defense*, 549 F. 3d 62, 65 (2d Cir. 2008) (noting that "[t]he privacy interests protected by the exemptions to FOIA are broadly construed.")

Moreover, information acquired in connection with the investigation was obtained under an express assurance of confidentiality from the employees who were interviewed. All such participating employees have a legitimate expectation that their contribution to the investigation will remain private, including their opinions and characterizations of fellow employees and supervisors. *See, e.g.*, *McCann v. HHS*, No. 10-1758, 2011 WL 6251090, at *3 (D.D.C. Dec. 15, 2011) (finding that assertion of exemption 6 to protect identities of "individuals who provided information to an investigator who was conducting an investigation into Plaintiff's HIPAA complaint" was appropriate); *see also Ferrigno*, *supra*, at *8. (S.D.N.Y. Mar. 29, 2011) (finding that the witnesses and the investigator in an employment-related harassment complaint had "more than a de minimis privacy interest" in the report of investigation, since being identified as part of the complaint "could subject them to embarrassment and harassment").

In your appeal, you have not challenged the assertion of privacy interests in the identified materials or the applicability of exemption 6. Instead, you have challenged whether Ms. Metz properly articulated and applied the correct standard in balancing the protection of the privacy interests against the public interest in a release of the documents. Under an exemption 6 analysis, the identified privacy interest must be balanced against the public interest in obtaining access to the information. While your appeal letter correctly notes that the public interest in release of the materials need not be "overwhelming," your reliance on the 9th Circuit's decision in *Local 598 v. Department of Army Corps of Engineers*, 841 F. 2d 1459, 1463 (9th Cir. 1988) is misplaced. As the 9th Circuit itself recognized, the standard applied in that case, involving review of a District Court's failure to award attorney's fees to a labor union, has been rejected by the Supreme Court. *See Painting Industry of Hawaii Market Recovery Fund v. U.S. Department of the Air Force, et al.* 26 F.3d 1479, 1484 n. 5 (9th Cir. 1994) (noting that the analysis in *Local 598*, predicated on the assumption that the public interest in the enforcement of the labor laws constitutes a cognizable public interest under FOIA, is inconsistent with standards set forth in subsequent Supreme Court opinions.).

In balancing the privacy interest in withholding requested documents against the public interest in their release, the Supreme Court has made it very clear that the concept of public interest under FOIA is limited to the "core purpose" for which Congress enacted it. *See U.S. Dep't of Justice v. Reporter's Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). Thus, the only relevant "public interest in disclosure" to be weighed in this balance is the extent to which disclosure would serve that core purpose: "contribut[ing] significantly to public understanding *of the operations or activities of the government." Id.* at 775 (emphasis in original). The Court elaborated on this point by noting that the pertinent public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would "she[d] light on an agency's performance of its statutory duties" or otherwise let citizens know "what their government is up to." *Id.* at 773. The Court expressly reiterated this standard and its application

to exemption 6 cases in *U.S. Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994).

The burden of establishing that disclosure of personal information would serve a public interest cognizable under FOIA is on the party requesting disclosure. *Associated Press v. Department of Defense*, *supra*, at 66. Furthermore, that interest, while it need not necessarily be "overwhelming," must be significant, an interest more significant than having the information for its own sake, and the requester must show that the information is likely to advance that interest. *Martin v. U.S. Dep't of Justice*, 488 F. 3d 446, 458 (D.C. Cir. 2007) (internal citations omitted).

Here, the subject of the investigation is a career employee holding a XXXXXX position within an internal, support unit of the agency. Allegations leveled against the subject by your client are that her management style is overbearing and micro-managing to the point of oppressiveness and therefore constitutes harassment. In this respect, the information sought sheds little, if any, light on the agency's fulfillment of its statutory mandate. *See Schonberger v. National Transportation Safety Board*, 508 F. Supp. 941 (D.D.C. 1981) (court found that privacy interest of supervisor who was subject of grievance procedures outweighed public release of grievance file); *Cotton v. Adams*, 798 F. Supp. 22, 27 (D.D.C. 1992) (noting that courts have "routinely held there is no great public interest in the alleged malfeasance or negligence of agency employees who do not occupy positions of public trust."). Case law makes clear that only the interest of the general public, and not that of the private litigant, is relevant to this inquiry. *See Reporter's Committee for Freedom of the Press*, *supra*, at 771-72 (public interest balancing should not include consideration of the requester's particular purpose in making the request); *see also Kiraly v. FBI*, 728 F.2d 273, 279 (6th Cir. 1984) (FOIA is not intended to be an administrative discovery statute for the benefit of private parties); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 165 n. 10 (1975) (FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants"). Thus, the fact that your client initiated this investigation and may have a personal reason for seeking the information has no bearing on the balancing process.

The generalized public interest you have described in knowing whether agency management and staff are performing at an acceptable level of competence is insufficient to overcome the privacy interests that pertain to the requested materials. Furthermore, there is no evidence to support your suggestion that there may be instances of personnel violations, including harassment and discrimination, and retaliation against staff by management.

Exemption 5

Although not cited by Ms. Metz in her February 4th letter, exemption 5 of FOIA is also applicable in this case and supports the withholding of the documents you have requested, to the extent that such documents may exist. Exemption 5 protects from public disclosure inter-agency or intra-agency communications 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). The traditional understanding and interpretation of exemption 5 is that it 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.

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. *Phillips v. Immigration and Customs Enforcement*, 385 F. Supp. 2d 296, 302-03 (S.D. N.Y. 2005). The rationale underlying the privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny. *See Assembly of State of Cal. v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992).

In this case, responsive documents, to the extent they exist, were generated expressly to enable senior NCUA managers to understand the circumstances involving personnel practices within one of its operating departments. The views and experiences of various employees were solicited specifically for the purpose of informing senior management concerning the environment within the department, in order that senior management might deliberate and consider what, if any, corrective action might be warranted. As such, the material would fall squarely within the deliberative process component of exemption 5. It should be noted, in this respect, that the failure of the agency to actually reach and adopt a final policy or position with respect to an issue under deliberation does not render those deliberations less worthy of protection under this exemption. *NLRB v. Sears, Roebuck & Co., supra,* at 151 n. 18 (1975) (extending protection to records that are part of the decision-making process even where process does not produce an actual decision by the agency).

Two additional considerations are noteworthy. First, because the supervisor who is the subject of the investigation has been identified by name in the request, redactions to remove specific references to her name would be meaningless. Accordingly, responsive material, if any, has been withheld in full, without partial redaction. *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"). Second, to the extent your client or any other member of the public seeks information about complaints against the agency, including discrimination claims and claims of harassment, the agency compiles and reports statistical data on its website pursuant to Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No Fear Act), Pub. L. 107-174 (2002).

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 your client resides, where her principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001 E-mail: ogis@nara.gov
Web: https://ogis.archives.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Sincerely,

Michael J. McKenna
General Counsel

15-FOI-0027; 2015-APP-0001
15-0303