

March 27, 2015

SENT BY E-MAIL

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

Dear Ms. Terry:

Re: 2015-APP-00002

By letter of January 14, 2015, you submitted a Freedom of Information Act (FOIA) request. You requested a list of all credit unions and other entities or individuals that were issued claim or liquidation certificates from NCUA as a result of the conservatorship and liquidation of U.S. Central Federal Credit Union (U.S. Central). You requested that the listing include the name of the organization, the amount of the claim and, where there is more than one claim held by the credit union or organization, an indication of the priority of the claims.

By letter of February 25, 2015, Regina Metz, staff attorney in NCUA's Office of General Counsel, responded to your request and advised that your request was granted in part. Ms. Metz first explained that FOIA does not require the agency to conduct research or analysis, respond to questions, or create records. Her letter then referred you to NCUA's website, from which access to Form 5310 call reports filed by federally insured corporate credit unions may be obtained. Ms. Metz explained that information may be reviewed on the Form 5310 showing amounts held by the several corporate credit unions in the form of paid-in capital and membership capital of U.S. Central. In her letter, Ms. Metz specifically identified the schedule and accounts from the Form 5310 that contained the responsive information. Ms. Metz declined to provide information about any other entities or individuals, based on exemption 8 of FOIA. That exemption provides for withholding 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).

You appealed Ms. Metz's determination in an email message to us on March 9, 2015. In your appeal, you asserted that Ms. Metz's February 25th letter is not responsive to your request. In support of your assertion, you stated that total amounts listed on the schedules and accounts specified by Ms. Metz do not, for any pertinent time frame, equal the amount shown on a separate report, prepared by NCUA's Asset Management and Assistance Center (AMAC), representing allowed shareholder claims against the liquidation estate of U.S. Central¹ (AMAC Report).

¹ Your March 9th email also makes a separate, new request under FOIA for copies of receiver's certificates sent to shareholders of U.S. Central. In a telephone conversation you had on March 12, 2015, with Ross Kendall, NCUA

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In fact, however, the information conveyed in Ms. Metz's February 25th letter is responsive to your request. From the NCUA website, data reported on the Form 5310 call reports prepared by federally insured corporate credit unions can be accessed as of specified dates, ranging from January 2003 through December 2014. The date used in the AMAC Report to populate the shareholder category of allowed claims against the liquidation estate of U.S. Central is November 2008. Referring to that date for the Form 5310 call report data, and capturing the amounts carried by any given corporate credit union on schedule A-3, lines 4(h) and 4(j), reveals the value of the investment that that particular corporate credit union had in U.S. Central. This figure does correspond directly to the information contained in the AMAC Report.² The reason the sum of all of the corporate credit union investments, as taken from the November 2008 Form 5310 call report data, does not equal the aggregate amount listed on the AMAC Report for shareholder claims is because the AMAC Report also includes shares owned by entities other than federally insured corporate credit unions.

Ms. Metz's February 25th letter explained that the shareholder information for entities other than corporate credit unions was being withheld based on exemption 8 of FOIA. As her letter correctly noted, exemption 8 of the FOIA provides for protection against release of 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). 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). The fact that an institution has been closed for liquidation does not, in itself, render the exemption inapplicable. *Gregory v. FDIC*, 631 F. 2d 896, 899 (D.C. Cir. 1980).

Your appeal did not challenge the applicability of exemption 8 as described by Ms. Metz. Furthermore, although not cited by Ms. Metz in her February 25th letter, exemption 4 of FOIA is also applicable in this case and supports the withholding of this information. Exemption 4 protects commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. §552(b)(4). The term "commercial" has been broadly interpreted to include anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Board*, 588 F. 2d 863, 870 (2d Cir. 1978). The investments made by these entities in U.S. Central easily fit within this definition.

As established by the D.C. Circuit Court of Appeals, the test for determining whether commercial or financial information obtained by an agency is "confidential" for purposes of the exemption turns on whether the information in question was produced voluntarily. *Critical Mass Energy Project v. NRC*, 975 F. 2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). In that case, the court held that information voluntarily submitted to an agency is categorically

Special Counsel to the General Counsel, Mr. Kendall advised you that appeals are handled separately from initial requests and that you would need to submit that request, separately, to NCUA if you want to have it considered under FOIA.

²Three adjustments relative to the November 2008 Form 5310 figures were made in the AMAC Report. Reductions in membership capital held by Corporate One FCU and System United FCU totaling \$7.4 million were made on the AMAC Report to reflect subsequent capital withdrawals by those entities. The AMAC Report reflects an increase in the amount of membership capital held by Western Corporate FCU of approximately \$8.9 million, reflecting a subsequent capital investment it made in U.S. Central.

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protected, provided that “it is of a kind that the provider would not customarily release to the public.” *Id.* at 879–880. In this case, each of the entities making an investment in U.S. Central did so voluntarily. The details concerning its investment in a financial institution would not, ordinarily, be the type of information released to the public, particularly after the investment had become worthless. Although the liquidation of U.S. Central occurred involuntarily, when the initial investments were made the entities were entitled to expect their account information would be kept in confidence. Accordingly, information regarding the investments made by entities other than federally insured corporate credit unions qualifies for withholding under exemption 4. 5 U.S.C. §552(b)(4); *see Nikelsberg v. FDIC*, 640 F. Supp. 2d 55 (D.D.C. 2009) (court applied *Critical Mass* to find account information involving an insolvent bank in receivership confidential.).

Notwithstanding the foregoing, however, NCUA believes a partial release of responsive information may successfully be accomplished in this case without undermining the applicable exemptions. Attached is a one-page listing of amounts reflected on U.S. Central’s books and included within the totals for membership capital in the AMAC Report held by entities other than federally insured corporate credit unions. The names of the entities and a column showing account numbers have been redacted, but the dollar amounts are shown. As you will note, none of these entities held amounts denominated as paid-in capital.

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

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; Toll-free: 877-684-6448
Fax: 202-741-5769

Sincerely,

Michael J. McKenna
General Counsel

Attachment
15-FOI-0018; 2015-APP-0002
15-0318