

GC/RPK:bhs

February 21, 2017

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

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RE: 16 FOI – 00056; 17 – App – 00001

Dear XXXX:

You submitted a request under the Freedom of Information Act (FOIA) on July 28, 2016, by which you sought to obtain copies of documentation submitted in support of the merger between Belvoir Federal Credit Union (Belvoir) and Pentagon Federal Credit Union (Pentagon), including the certification of the vote by Belvoir. You also sought copies of any additional correspondence between NCUA and Belvoir relating to the merger.

NCUA's FOIA Officer provided an initial acknowledgement and response by letter of August 4, 2016, which included three responsive records that were characterized as immediately available. The letter also sought contact information for you. You responded by letter of August 17, 2016, in which you provided contact information. Your letter reiterated your interest in receiving materials submitted in support of the merger, including specifically the certification of the vote.

By return letter of August 26, 2016, the FOIA Officer advised you that additional time to process the request was required, and also that a notice to parties that may have submitted confidential information was required as well. The letter explained that such parties are given an opportunity to review the materials they submitted and to object to their release, based on the applicability of certain exemptions contained in the FOIA. This letter also suggested you consider approaching either NCUA's Office of Consumer Protection [subsequently re-named the Office of Consumer Financial Protection and Access] or NCUA's Ombudsman to the extent you had concerns about the way the merger was conducted.

You wrote back in September indicating that your primary concern was the receipt of the requested documents. Additional materials were provided to you by the FOIA Officer as attachments to emails sent on September 15 and October 5, 2016. In the latter email, you were advised that some responsive documents were being withheld based on exemptions 4 and 8 of the FOIA.

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You responded by letter of November 2, 2016, in which you reiterated your request for the withheld documents, including specifically the certification of the vote. By letter of November 16, 2016, the FOIA Officer advised that the search for responsive records was ongoing. The FOIA Officer also explained that any documents that had not been submitted to NCUA, such as minutes of the special meeting, would not be agency records subject to FOIA. The letter reiterated the process by which submitters of information are provided an opportunity to object to the release of materials that qualify as confidential. Finally, the FOIA Officer wrote to you on December 9, 2016, providing some additional responsive materials and advising you that certain documents that were responsive to your request were being withheld pursuant to exemptions 4 and 8 of FOIA.

You wrote two letters on January 18, 2017. The first was a letter to the FOIA Officer seeking clarification as to whether certain specific documents would be provided, and if not, a specific listing of what was not being provided. The second was a letter addressed to then-NCUA Chairman Rick Metsger, in which you expressed your frustration with the FOIA process and your concern as a former member of Belvoir about the way in which the merger with Pentagon had been consummated. In response, I wrote to you on January 26, 2017, and indicated that we would view your January 18th letter to the Chairman as an appeal under FOIA. I also indicated that I would refer your letter to NCUA's Ombudsman for a review of the NCUA's process in connection with the merger. I understand that the Ombudsman has been in contact with you. This letter serves as NCUA's response to your appeal under FOIA.

Your appeal is granted in part. I have enclosed 93 pages of responsive material, including documents submitted to NCUA with the initial merger plan, the vote certification, and documents pertaining to certifying the completion of the merger, along with related correspondence. Please note that these materials include all of the responsive materials we have in our files that were submitted by the merger partners seeking NCUA approval of this merger. For the sake of convenience and clarity, I have provided these to you on a comprehensive basis, even though some of these materials have already been provided to you by the FOIA Officer.

We are withholding ten pages of responsive material comprising internal staff memoranda that reflect review and analysis performed by NCUA personnel concerning whether NCUA should approve the merger. As stated by the FOIA Officer in her responses dated October 5 and December 9, 2016, these materials are exempt from disclosure based on exemption 8 of FOIA.¹ We are also withholding six pages of material that were created several months after the conclusion of the merger. These materials, in the form of correspondence, are also exempt from disclosure based on exemption 8.²

As correctly noted by the FOIA Officer, exemption 8 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

¹ 5 U.S.C. §552(b)(8).

² *Id.*

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institutions.”³ Courts have interpreted exemption 8 broadly and have declined to restrict its all-inclusive scope.⁴ Examination reports as well as their follow-up and internal memoranda containing specific information about named financial institutions have been withheld pursuant to exemption 8.⁵ Indeed, the “related to” language in the text of the exemption casts a wide net of non-disclosure to any documents that are logically connected to an examination, operation, or condition report.⁶

Your appeal did not challenge the applicability of exemption 8 as described by the FOIA Officer. Furthermore, although not cited by the FOIA Officer, exemption 5 of FOIA is also applicable in this case and supports the withholding of the ten pages of internal staff memoranda.⁷ 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. 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.⁸ 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.⁹ The internal memoranda among agency staff analyzing and evaluating the merger meet this rationale and therefore qualify for withholding.

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).

³ *Id.*

⁴ See *Consumers Union of United States, Inc. v. Heimann*, 589 F. 2d 531 (D.C. Cir. 1978).

⁵ See *Atkinson v. FDIC*, No. 79-1113, 1980 WL 355660 (D.D.C. Feb. 13, 1980).

⁶ See *Public Investors Arbitration Bar Ass’n v. SEC*, 930 F. Supp. 2d 55, 62 ((D.D.C. 2013). For a more thorough discussion of the breadth of exemption 8, see generally *Department of Justice Guide to the Freedom of Information Act*, <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

⁷ 5 U.S.C. 552(b)(5).

⁸ *Phillips v. Immigration and Customs Enforcement*, 385 F. Supp. 2d 296 (S.D. N.Y. 2005).

⁹ See *Assembly of State of Cal. v. United States Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992).

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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

Attachments

17-0234