

February 28, 2017

SENT BY E-MAIL AND REGULAR MAIL

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Silver Spring, MD 20902

Dear XXXX:

RE: 17 – FOI – 00020; 2017 – APP – 0002

You submitted a Freedom of Information Act (FOIA) request, received by NCUA on January 23, 2017, seeking a copy of a written report and a related PowerPoint presentation describing the results of a stress test conducted on behalf of NCUA. The stress test and related materials concern an evaluation of the financial condition and operations of five large, natural person credit unions required by NCUA regulations to undergo annual stress testing.¹

By letter of February 2, 2017, NCUA's FOIA Officer responded to you and advised that your request was denied in full, based on exemptions 4 and 8 of FOIA.² As explained by the FOIA Officer, exemption 4 protects from disclosure trade secrets and commercial or financial information obtained from a person that is considered privileged or confidential. Exemption 8 supports the withholding 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.

You appealed the FOIA Officer's determination by email dated February 2, 2017. Your appeal does not question the applicability of the exemptions as noted by the FOIA Officer. You have, however, challenged the determination to withhold responsive documents in full. You suggest that portions of the responsive materials might be segregable and therefore releasable, notwithstanding the applicability of the noted exemptions.

Your appeal is denied in full. Ordinarily, FOIA does call for agencies to segregate and release portions of responsive documents to which a specified exemption may not apply, such as purely factual information contained in a document that also contains exempt information. In this case,

¹ See 12 C.F.R. Part 702, Subpart 5.

² 5 U.S.C. §§552(b)(4), (8).

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however, the applicability and breadth of exemption 8 overrides that convention and supports the withholding in full.

The plain language of the exemption extends to “condition reports” prepared on behalf of or for the use of agencies such as the NCUA, which is charged with the oversight and supervision of federally insured credit unions.³ Furthermore, the plain language extends the exemption not only to such reports, but also to materials “related to” them.⁴ On its face, the request you submitted identified the written stress test report and the PowerPoint presentation prepared by an outside contractor selected by NCUA to conduct a financial evaluation of the five largest natural person credit unions currently in operation. There is no question but that the report you have identified and the related PowerPoint presentation are precisely the type of documents covered by exemption 8.

Although generally exemptions to FOIA are to be narrowly construed, courts have repeatedly recognized the broad scope that Congress accorded exemption 8.⁵ Exemption 8’s “related to” language casts a wide net of non-disclosure over any documents that are logically connected to an “examination, operating, or condition report.”⁶ Furthermore, unlike the other exemptions contained in FOIA, exemption 8 describes a category of records rather than the subject matter which each individual record contains. In such circumstances, therefore, segregation of the “non-exempt” portion of the document is not possible. No part of the report or related material can be separated from its essential character, on which its exemption depends.⁷

The focus of this response has been on exemption 8, insofar as its breadth is entirely dispositive of the issues on appeal. As noted by the FOIA Officer in her February 2nd letter, exemption 4 remains applicable as well.

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).

³ 5 U.S.C. §552(b)(8).

⁴ *Id.*

⁵ *See, e.g., Gregory v. FDIC*, 631 F. 2d 896, 898 (D.C. Cir. 1980) (indicating that “Congress looked to the nature and source of the material and determined to provide absolute protection regardless of the circumstances underlying the regulatory agency’s receipt or preparation of examination, operating or condition reports,” leaving “no room for a narrower interpretation”); *Consumers Union of the U.S. v. Heimann*, 589 F. 2d 531, 533 (D.C. Cir. 1978) (“Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, [and] it is not our function, even in the FOIA context, to subvert that effort.”); *see also McKinley v. FDIC*, 744 F. Supp. 2d 128, 143 (D.D.C. 2010) (“Although generally FOIA exemptions are to be narrowly construed, it is well-established that Exemption 8’s scope is particularly broad.”) (internal citations omitted).

⁶ *Public Investors Arbitration Bar Assn. v. SEC*, 930 F. Supp. 2d 55, 62 (D.D.C. 2013); *affirmed* 771 F. 3d 1, 4 (D.C. Cir. 2014) (noting that “this court has explained time and again that Exemption 8’s scope is ‘particularly broad’”), quoting *Consumers Union, supra*.

⁷ *See generally Public Investors, supra*, at 71, in which the district court noted in a similar case involving the SEC that the scope of the request, insofar as it specifically sought a financial condition report and related material, rendered all potentially responsive materials exempt from disclosure under exemption 8.

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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

Attachment

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17-0247