

May 16, 2017

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

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RE: 17 FOI – 00007; 17 – App – 00003

Dear XXXX:

By undated letter received by NCUA on November 9, 2016, you submitted a request under the Freedom of Information Act (FOIA) seeking to obtain copies of documentation pertaining to NCUA's involvement, in its capacity as Liquidating Agent for Taupa Lithuanian Credit Union (Taupa), as a claimant in the receivership proceedings for Atlantic Bullion and Coin, Inc. (ABC). Those proceedings are pending in Federal District Court in South Carolina, Anderson/Greenwood Division. You requested copies of "all records" pertaining to the receivership proceedings. Alternatively, you suggested that NCUA might provide you with an index of documents relating to this matter in order that you might better qualify your search, assuming such an index existed.

By letter of November 16, 2016, NCUA's FOIA Officer acknowledged receipt of your request. In her letter, the FOIA Officer outlined an expected time frame for NCUA's response, and also explained that she had been unable to make contact with you by telephone to clarify your request. By letter of January 24, 2017, the FOIA Officer issued NCUA's response to your request. Citing four different exemptions, the FOIA Officer denied the request in full. You filed an appeal of the denial by letter dated April 15, 2017 (received by us on April 19th).

Your appeal is granted in part. I have enclosed 5 pages of responsive material, comprising a settlement agreement between NCUA, in its capacity as Liquidating Agent for Taupa, and Beattie Ashmore, duly appointed receiver for Ronnie Gene Wilson¹ and ABC. The settlement agreement represents the consummation of negotiations between NCUA and the receiver over the status and priority of NCUA's claim in the receivership proceedings and resolves the dispute between the parties about the need for the receiver to submit a claim in the liquidation proceedings involving Taupa.

¹ Mr. Wilson was the owner of Atlantic Bullion and Coin, Inc.

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Our review of the appeal materials you submitted indicates that your interest is focused on the claim that you assert was filed by the receiver in the Taupa liquidation proceedings. You have referred specifically to an Order entered on May 4, 2016 by the district judge presiding over the ABC receivership. In that Order, the judge directed the receiver for ABC to pursue an administrative remedy by filing a claim with NCUA, in its capacity as Liquidating Agent for Taupa. Your appeal characterizes your request as seeking "records concerning this process." More specifically, you also indicate in your appeal that you had requested "documents from the agency concerning a claim to be made to [NCUA] acting in its capacity as liquidating agent for Taupa." Your appeal goes on to expressly assume that such a claim was in fact made by the receiver, and you argue that any records documenting the allowance or disallowance of the claim by the Liquidating Agent would be disclosable under FOIA. Your appeal speculates, in the event the receiver had elected to appeal an initial turndown of its claim to the NCUA Board, that the Board's decision on the appeal would also be disclosable under FOIA. Your appeal concludes by contesting the applicability of the several exemptions cited by the FOIA Officer in her January 24th letter to the documents comprising the claim that you assume was filed by the receiver for ABC in the Taupa liquidation.

In fact, however, no such claim was ever actually filed with Taupa. Instead, the receiver and NCUA entered into negotiations that led to the settlement agreement. NCUA takes the view that the settlement agreement is responsive to your request, insofar as it takes the place of an actual claim by the receiver in the liquidation proceedings. We note that, although the settlement agreement was apparently not filed with the court overseeing the receivership proceedings, counsel for the parties advised the judge of the settlement and the judge did approve of it.

We have withheld 108 pages of responsive documents in this case based on exemption 5 of FOIA.² As you have noted in your appeal materials, 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.³ 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.⁴ Documents in our file, including email analyzing and evaluating the prospects for settlement, meet this rationale and therefore qualify for withholding. Our file also includes communications to and from outside counsel retained by NCUA to represent the Liquidating Agent for Taupa, advising on the procedure for perfecting Taupa's claim in the receivership proceedings and on responding to the receiver's arguments challenging the priority of the claim.

² 5 U.S.C. §552(b)(5).

³ *Phillips v. Immigration and Customs Enforcement*, 385 F. Supp. 2d 296 (S.D. N.Y. 2005).

⁴ *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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These documents meet the criteria established for the attorney-client or work product privileges and so qualify for withholding.⁵

We are also releasing sixteen additional pages of responsive, non-exempt material; from this we have withheld a portion of one page containing proprietary wire transfer instructions which is non-responsive to your request and therefore exempt from release.

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

Attachments

17-0561

⁵ 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”). 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”).