

October 2, 1992

Steven R. Bisker
616 South Washington Street
Alexandria, Virginia 22314

Re: Freedom of Information Act Appeal (Your September 11, 1992, Letter)

Dear Mr. Bisker:

We received your Freedom of Information Act ("FOIA") appeal on September 14, 1992. On August 18, 1992, the National Credit Union Administration's ("NCUA") Freedom of Information Officer, Benny R. Henson, denied your request for a copy of the Special Actions Policy Statement and Processing Manual. The Office of Administration withheld the requested document pursuant to Section 552(b)(2) of the FOIA. The denial is affirmed. We have determined that the documents meeting your request should be withheld pursuant to FOIA.

ANALYSIS

Although your original request was denied pursuant to exemption 2 of FOIA (5 U.S.C. 522(b)(2)), exemption 5 of FOIA (5 U.S.C. 522(b)(5)) contains the proper rationale for withholding the document. The document requested has not been adopted in final form. Exemption 5 exempts information contained in:

(5) inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency.

The courts have held that Exemption 5 was intended by Congress to protect consultant functions of government, and such protection extends to documents reflecting advisory opinions, recommendations and deliberations compromising part of the process by which government decisions are formulated. *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The most commonly invoked privilege incorporated within Exemption 5 is the deliberative process privilege. Three policy purposes have been consistently held to constitute the basis for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosures of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

NCUA's regulation implementing Exemption 5 is found at Section 792.3(a)(5) of NCUA's Rules and Regulations (12 C.F.R. 792.3(a)(5)). This Section repeats the FOIA exemption and adds the following:

This exemption preserves the existing freedom of Administration officials and employees to engage in full and frank written or taped communications with each other and with officials and employees of other agencies. It includes, but is not limited to, inter-agency and intra-agency reports, memoranda, letters, correspondence, work papers, and minutes of meetings, as well as staff papers prepared for use within the Administration or between the Administration and other governmental agencies.

Since the document responsive to your request is a draft document and has not been adopted by the agency it is withheld pursuant to Exemption 5. We decline to comment on whether Exemption 2 would apply to the requested document if it is subsequently adopted by the agency.

Pursuant to the Freedom of Information Act (See 5 U.S.C. ~522(a)(4)(B)), you may seek judicial review of this suit by filing suit to enjoin the NCUA from withholding the documents you requested and to order production of these records. Such a suit may be filed in the District Court of the United States in the district where the requestor resides, where his principal place of business is located, or in the District of Columbia.

Sincerely,

Robert M. Fenner

General Counsel

GC/MM:sg

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