

August 24, 1995

Stanley P. Spence, Esq.

Vice President and Associate General Counsel

Pentagon Federal Credit Union Box 1432

Alexandria, Virginia 22313

Sent via FAX and US Mail

Re: Freedom of Information Act - Appeal

(Your July 28, 1995 Letter)

Dear Mr. Spence:

On May 31, 1995, you filed a Freedom of Information Act (FOIA) request for copies of all minutes, Board Action Memoranda (BAMs) and supporting documents for NCUA Board meetings from September 1, 1994 to May 30, 1995 where Capital Corporate Credit Union (CapCorp) was an issue or was discussed. You also requested copies of all notation votes or other supporting documentation relating to CapCorp during the same time period. You specifically mentioned the following dates: December 2, 1994; January 31, 1995; and April 7, 1995. On July 13, 1995, Richard S. Schulman, NCUA's FOIA Officer, responded to your request. Your request was denied pursuant to exemptions 4, 5 and 8 of the FOIA. 5 U.S.C. 552(b)(4), (5), and (8). In his response, Mr. Schulman stated that the proposed merger plan was denied pursuant to exemptions 4 and 8; BAMs and supporting documents were denied pursuant to exemptions 5 and 8; and notation votes, memoranda and closed board meeting minutes were denied pursuant to exemption 8. On July 31, 1995, Mr. Schulman reconsidered your May 31 request and released the NCUA Board notation vote sheet dated April 12, 1995 and a redacted segment of the transcript of the April 7, 1995 closed NCUA Board meeting. In addition, other documents concerning CapCorp have been released to you outside of your FOIA request.

We received your July 28 appeal on August 2, 1995. Your appeal is granted in part and denied in part. Several documents withheld pursuant to your original request are now released and enclosed. They are as follows: the notation vote sheet dated 12/1/94; the notation vote sheet dated 12/8/94; Order of Conservatorship dated 1/31/95; letter from Richard Johnson (President/CEO of WesCorp) to Allen Carver at NCUA, dated 1/30/95; letter from Nancy Stubbs (Chairman of CapCorp) to member credit union CEOs, dated 1/30/95; letters from J. Leonard Skiles, Agent for the Conservator of Cap Corp, to member credit unions dated 1/31/95, 2/2/95, 2/14/95 and 3/2/95; and CapCorp Statements of Financial Condition and Statements of Income, dated 2/28/95 and

3/31/95. Aside from the notation vote sheets, the documents now released were not specifically identified in Mr. Schulman's July 13, 1995. They were part of the supporting documentation attached to various BAMs and other memoranda. All other documents continue to be withheld pursuant to exemptions 4, 5, and 8 of the FOIA.

Although you argue that all documents withheld should be disclosed, you also request that we provide a list of withheld documents, the applicable FOIA exemptions and NCUA's nondisclosure justification for each document withheld. This is known as a Vaughn Index; it was fashioned by the court in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). Courts have held that a Vaughn Index is not required until a FOIA case has reached a certain stage in litigation (usually with the agency's motion for summary judgment). Miscavige v. IRS, 2 F.3d 366 (11th Cir. 1993). Hence a Vaughn Index is not yet required. We have, however, provided you with the following list of the withheld documents and the FOIA exemption(s) applicable to each document. An explanation of the applicable exemptions, in narrative form, appears after the listing.

Document Identification and Date Exemption(s)

1. Memo to NCUA Board - re waiver of borrowing limitation - dated 12/9/94	5 and 8
2. Memo to NCUA Board - re request for delegation for conservatorship - dated 12/1/94	5 and 8
3. BAM to place CapCorp into conservatorship and approve purchase and assumption - dated 4/12/95	5 and 8
4. Closed NCUA Board meeting minutes - re CapCorp report - dated 10/27/94	5 and 8
5. BAM re waiver from divestiture for CMOs - dated 10/26/94	5 and 8
6. Closed NCUA Board meeting minutes - re administrative action - dated 1/31/95	5 and 8
7. Confidential Order of Conservatorship - dated 1/31/95	8
8. Chart - CapCorp problems - dated 1/31/95	8
9. BAM re CapCorp conservatorship, waivers, 208 assistance - dated 1/31/95	5 and 8
10 - 18. Attachments to above BAM	
10. WesCorp merger proposal	4, 5 and 8
11. WesCorp ALM Audit conducted for NCUA by Sendero	4, 5, and 8
12. Comment letter to NCUA from US Central - dated 1/23/95 and memo from US Central to Corporate members re merger between CapCorp and WesCorp - dated 1/23/95	4
13. Comment letter from corporate forum	4
14. NCUA's counterproposal to WesCorp with letter - dated 1/25/95	5 and 8
15. WesCorp's response to counterproposal - dated 1/26/95	4
16. Summary of conservatorship options	5 and 8
17. Summary of liquidation options	5 and 8
18. MCSD/uninsured loss analysis	8
19. Letter from Allen Carver (NCUA) to WesCorp CEO Johnson - dated 1/30/95	4 and 8
20. WesCorp business plan for merger - undated	4 and 8
21. Letter from CapCorp to Allen Carver - dated 1/31/95	4 and 8
22. Closed NCUA Board meeting minutes - re CapCorp borrowing from CLF - dated 1/27/95	5 and 8
23. CapCorp letter requesting investment waiver - dated 10/18/94	4
24. NCUA letter denying waiver request - dated 10/27/94	4 and 8
25. CapCorp fact sheet - undated	8
26. Closed NCUA Board meeting minutes - re CapCorp conservatorship - dated 12/2/94	8
27. Closed NCUA Board meeting minutes - re CapCorp borrowing from CLF - dated 12/14/94	8
28. Memo to Board - re CapCorp borrowing from CLF - dated 12/14/94	5 and 8
29. Letter from Carver to CapCorp - re Self Help Plan - dated 1/30/95	5 and 8
30. Self Help Plan	4
31. Closed NCUA Board meeting minutes - re purchase and assumption - dated 4/7/94	5 and 8

32. BAM to place CapCorp into voluntary liquidation and approval of purchase and assumption - dated 4/5/95	5 and 8
33. - 41. Attachments to above BAM	
33. Case Summary	5 and 8
34. Draft Purchase and Assumption Agreement	5 and 8
35. Information on financial condition	4 and 8
36. Member account information	8
37. Information from Mid-Atlantic Corporate - dated 3/30/95	4
38. Information from Southeast Corporate - dated 3/31/95	4
39. Callahan Trust investment information	4
40. Blackrock Financial Report - dated 3/15/95	4 and 8
41. CapCorp security inventory report - dated 1/31/95	4 and 8
42. Analysis of Corporate Credit Unions - dated 3/2/95	8

Exemption 4

Exemption 4 of the FOIA covers two categories of information: (1) trade secrets; and (2) information which is commercial or financial, obtained from a person and privileged or confidential. 5 U.S.C. 552(b)(4). The information withheld pursuant to exemption 4 includes merger proposals and counterproposals, financial audits, business plans, an investment waiver request and reply, and financial information concerning credit unions other than CapCorp. All of this information is commercial/financial, no trade secrets are involved. Some of the information is withheld only pursuant to exemption 4, other information is withheld pursuant to exemption 4 as well as exemptions 5 and/or 8.

The courts have interpreted what is included as commercial/financial information broadly. Courts have held that the term "commercial" includes 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 information withheld is clearly commercial information. The courts have also interpreted the term "person" broadly. Information obtained from a corporation is included as information obtained from a person. Goldstein v. HHS, No. 92-2013, slip op. at 4 (S.D. Fla. May 21, 1993).

The court in Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993), set forth different tests for confidentiality for information that is voluntarily submitted and information that is required by an agency to be submitted. It held that voluntarily provided information is " 'confidential' for the purpose of exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Critical Mass at 879. We believe that the information withheld under exemption 4 would not be customarily released to the public by the submitters. The court held that information required to be submitted is confidential if it meets one of the two prongs of National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The information is confidential under National Parks if its release would (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks at 770. We believe that release of the commercial/financial information withheld would impair NCUA's ability to obtain information in the future. The documents withheld pursuant to exemption 4 include both voluntarily submitted information as well as information required to be submitted. The standard for both voluntarily submitted information and NCUA required information is met in this instance. Hence the documents noted above under exemption 4 continue to be exempt from disclosure.

Exemption 5

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency."

5 U.S.C. 552(b)(5). Information withheld pursuant to exemption 5 in this case includes various memoranda to the NCUA Board (including Board Action Memoranda which are memoranda prepared for closed NCUA Board meetings), closed NCUA Board meeting minutes, the merger proposal and counter proposal, various audits performed by third parties at NCUA's request, the draft purchase and assumption agreement, a case summary and options for conservatorship and liquidation.

The courts have interpreted exemption 5 expansively to include documents generated outside of an agency. Documents generated by consultants outside an agency are typically found to qualify for protection under exemption 5 because agencies have a special need for the opinions and recommendations of temporary consultants. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). Hence, information provided by third parties at NCUA's request can be withheld pursuant to exemption 5.

Included within exemption 5 is information subject to the deliberative process privilege. The purpose of this privilege is "to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Three policy purposes have been held to constitute the bases for the deliberative process privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982).

The courts have established two fundamental requirements for the deliberative process privilege to be invoked. The communication must be predecisional and it must be deliberative. Mapother v. Department of Justice, 3 F.3d 1533 (D. C. 1993). The information withheld is both predecisional and deliberative. None of the information withheld is contained in final opinions of the NCUA. Although exemption 5 does not always allow for entire documents to be withheld (factual information that is not deliberative in nature must be disclosed, *see* Mapother at 1538 - 40), all documents withheld pursuant to exemption 5 are also being withheld pursuant to exemption 8. As discussed below exemption 8 does not require redaction of documents.

We believe that all purposes and requirements of exemption 5 are met in this case. Disclosure of predecisional thoughts included in various memoranda, Board meeting minutes, draft agreements and proposals, and audit recommendations could cause injury to the quality of agency decisions. Therefore the information described above continues to be withheld pursuant to exemption 5 of the FOIA.

Exemption 8

Exemption 8 of the FOIA exempts 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). Information withheld pursuant to exemption 8 includes the material noted under exemption 5 above as well as the Confidential Order of Conservatorship, a chart noting CapCorp problems, analysis of loss, various letters, member account information and an analysis of corporate credit unions.

The courts have discerned two major purposes for exemption 8 from its legislative history: 1) to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability; and 2) to promote cooperation and communication between employees and examiners. *See* Atkinson v. FDIC, 1 GDS 80,034, at 80,102 (D.D.C. 1980). Either purpose is sufficient reason to withhold examination information. The NCUA regulation implementing exemption 8 of the FOIA is found at 12 C.F.R. 792.3(a)(8). Sections 792.3(a)(8) repeats exemption (8) and states:

This includes all information, whether in formal or informal report form, the disclosure of which would harm the financial security of credit unions or would interfere with the relationship between NCUA and credit unions.

Courts have interpreted exemption 8 broadly and have declined to restrict its all-inclusive scope. Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531 (D.C. Cir. 1978). Examination reports as well as matters that are related to such reports (the findings of an examination and its follow-up) have been withheld from disclosure. See Atkinson at 80,102. Exemption 8 has been held to apply to internal memoranda that contain specific information about named financial institutions. Wachtel v. Office of Thrift Supervision, No. 3-90-833, slip op. (M.D. Tenn. Nov. 20, 1990). Records pertaining to a financial institution no longer in operation can be withheld pursuant to exemption 8. Gregory v. FDIC, 631 F.2d 896 (D.C. Cir. 1980). In addition, courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. See Atkinson at 80,103. It is appropriate to withhold entire documents pursuant to this exemption. We believe that the purposes of exemption 8 are met, therefore information contained in the above noted documents continues to be withheld pursuant to exemption (8).

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of this determination by filing suit to enjoin NCUA from withholding the documents you requested and to order production of the documents. Such a suit may be filed in the United States District

Court in the district 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.)

Sincerely,

James J. Engel

Acting General Counsel

Enclosures

GC/HMU:bhs

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