

February 7, 1996

Mr. William Alston

Re: FOIA Appeal

(Your December 28, 1995 Letter)

Dear Mr. Alston:

You have written to the NCUA several times over the past few months concerning a Freedom of Information Act (FOIA) request. Your first request in our file, dated October 20, 1995, is addressed to Supervisor Andrews. You requested a copy of "Section 748.0(A) in relation to the Arlington School's Federal Credit Union" for the year 1994. Jane Walters, NCUA Region II Director, responded to your request on November 1, 1995, enclosing a copy of Part 748 of the NCUA Rules and Regulations, 12 CFR 748. On November 7, 1995, you wrote to Ms. Walters, requesting NCUA form 2362, the criminal referral form, filed by Arlington Schools Federal Credit Union in March 1994. Ms. Walters responded on November 30, 1995, denying your request for the criminal referral form pursuant to exemptions 6 and 7(C) of the FOIA. On December 5, 1995, you again requested Part 748 of the NCUA Regulations and NCUA form 2362 as filed by Arlington Schools Federal Credit Union. Perhaps you had not yet received Ms. Walters' November 30 response. Ms. Walters responded again on December 22, 1995, enclosing a second copy of Part 748 and denying the request for form 2362 pursuant to exemptions 6 and 7(C) of the FOIA. We received your December 28, 1995 appeal on January 10, 1996. In your appeal you clarify that your request included the written security program for Arlington Schools Federal Credit Union required by Part 748.0, in addition to the regulation itself. This was not clear from any of your earlier requests. Your appeal is denied pursuant to exemption 7 of the FOIA as explained below. We have enclosed a blank copy of NCUA form 2362, for your information.

Written Security Program

Section 748.0(a) of the NCUA Rules and Regulations, 12 CFR 748.0(a), requires each federally insured credit union to develop a written security program. The NCUA does not require that the security program be submitted to the NCUA. The NCUA does not have a copy of the program for Arlington Schools Federal Credit Union. Therefore it is not an existing NCUA agency record that is subject to the FOIA.

Criminal Referral Form - NCUA Form 2362

Before discussing exemption 7 specifically, we note that the instructions on the criminal referral form state:

the report is confidential pursuant to applicable

provisions of the Privacy Act, 5 USC Section 552a,

and the Freedom of Information Act,

5 USC Section 552. Accordingly, the report and the

information that it contains may be shared with

appropriate law enforcement agencies consistent with

applicable laws and regulations.

This notice is included to inform financial institution officials filing the form to disclose it only to appropriate law enforcement agencies and also to ensure them that the information they provide in the form will only be disclosed to the appropriate officials.

Exemption 7

Exemption 7(D) of the FOIA protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (D) could reasonably be expected to disclose the identity of a confidential source ... and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation ... information furnished by a confidential source." 5 U.S.C. 552(b)(7).

The first clause of exemption 7(D) protects against disclosure of information pertaining to confidential sources. No balancing of the public interest is involved under exemption 7(D). *See Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994). Exemption 7(D) has been interpreted broadly by the courts. Part of the rationale for exemption 7(D) is to ensure that cooperating citizens will not be harassed and will continue to cooperate. *Helmsley v. United States Dept. of Justice*, No. 90-2413, slip op. at 13 (D.D.C. Sept. 24, 1992). Exemption 7(D) is intended to avert the drying up of sources. *Providence Journal Co. v. United States Dept. of the Army*, 981 F. 2d 552 (1st Cir. 1992). More than the name and address of a confidential source may be withheld. Courts have held that an agency may withhold any portion of a document that would reveal the identity of the confidential source. *Church of Scientology v. IRS*, 816 F. Supp. 1138 (W.D. Tex. 1993). Various portions of form 2362 are withheld pursuant to exemption 7(D) to protect the identity of a confidential source.

The second clause of exemption 7(D) protects information compiled in the course of a criminal investigation. The information on the form 2362 was submitted for use in a criminal investigation. The language of this exemption as well as the courts' interpretation of it indicate that all source provided information is protected. *See Irons v. FBI*, 880 F.2d 1446, 1448 (1st Cir. 1989). Therefore, the requested form 2362 is withheld in its entirety pursuant to the criminal investigation provision of exemption 7(D).

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 document you requested and to order production of the document. 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,

Robert M. Fenner

General Counsel

Enclosure

GC/HMU:bhs

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