March 22, 1996

Oliver Garcia, Esq.

Williams & Connolly

725 Twelfth Street, NW

Washington, DC 20005

Re: Follow-up to Freedom of Information Act Appeal

(Your March 6, 1996 Letter)

Dear Mr. Garcia:

This is in response to your March 6, 1996 letter which set forth several concerns with our February 27, 1996 reply to your Freedom of Information Act (FOIA) appeal. We are treating your March 6 letter as a request for reconsideration of our February 27 response.

Your first concern was with our representation of the date of receipt of your appeal letter. Your appeal letter was dated January 24, 1996. You noted in your March 6 letter that the appeal was hand-delivered to the NCUA on January 24. Enclosed with the March 6 letter was a copy of the delivery sheet signed, on January 24, by the security officer in the lobby of our building. We made an error in calculating the twenty days for responding to your appeal by using January 29 as the date of receipt instead of January 24. This was an unintentional administrative error.

Your next concern addresses our reliance on the case of Ripskis v. Dept. of Housing and Urban Development, 746 F.2d 1 (D.C. Cir. 1984). We incorrectly cited this case as weighing in favor of non-disclosure of information rather than disclosure of information in an exemption 6 FOIA situation. Although I am at a loss to explain how this unfortunate error occurred, it was just that, an unfortunate error. Ripskis holds that the clearly unwarranted language of exemption 6 weights the scales in favor of disclosure rather than non-disclosure. According to the language of exemption 6, the privacy interest will prevail and documents will not be disclosed if disclosure would "constitute a clearly unwarranted invasion of personal privacy," (5 USC 552(b)(6), emphasis added). Unless the invasion of personal privacy was clearly unwarranted, a public interest, if one is found, would outweigh the privacy interest and documents should be disclosed. We note that the court in Ripskis balanced the scales in favor of non-disclosure, that is, it found a clearly unwarranted invasion of personal privacy. As noted in our February

27 response, we believe that "the balance of xxxxx privacy interest against any public interest is clearly in favor of his privacy." at p. 2, emphasis added.

We cited McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994) for the premise that a general public interest in mere allegations of wrongdoing does not outweigh an individual's privacy interest in unwarranted association with such allegations. You pointed out that McCutchen interprets exemption 7(C) rather than exemption 6 and hence cannot not be relied upon. We acknowledge that McCutchen does not apply to exemption 6 and our reliance on it was misplaced. Other caselaw applies a standard similar to that set out in McCutchen to an exemption 6 case. (*See* Carter v. U.S. Department of Commerce, 830 F.2d 388 (D.C. Cir. 1987) where the court held that disclosure of certain information concerning records of dismissed federal employee investigations would create a clearly unwarranted invasion of personal privacy pursuant to exemption 6. The court held that the documents should not be released.) Carter was decided prior to the Supreme Court decision of Department of Justice v. Reporters Committee for Freedom of the Press, 109 S. Ct. 1468 (1989). The Reporters Committee case narrowed the public interest used in the balancing test from the particular purposes for which the information is sought to the nature of the requested documents and their relationship to the public interest generally. Reporters Committee 109 S. Ct. at 1480-81.

Upon reconsideration of xxxxx privacy interest and its balance against the public interest in disclosure of certain records, we have made a determination to release certain records. Certain other records remain withheld pursuant to exemption 6. Our original February 27, 1996 response with the corrections noted above continues to apply to the documents withheld.

Our reconsideration is based on the nature of some of the responsive records and their availability to the public. Certain cases in which xxxxx was involved have been decided by the federal courts. These cases are either reported decisions or are accessible through Westlaw or other legal databases. We have determined that although xxxxx has a strong privacy interest in these matters, the cases are a matter of public record and we are required to provide access to them through the FOIA. These records do not meet the practical obscurity standard as set forth in the Reporters Committee case. Enclosed are copies of Mann v. Carver, 644 F.Supp. 129 (E.D. Missouri, 1986); International Union v. Auto Glass Employees FCU et al., 858 F.Supp. 711 (M.D. Tenn. 1994) and its 6th Circuit Court of Appeals decision; and the unpublished district court decision Allen et al v. CNS FCU (South Carolina District, Charleston Division (8/24/94)) and its 4th Circuit Court of Appeals decision captioned Huggins v. Apperson, (unpublished decision, *see* 69 F.3d 533, 4th Cir. S.C.).

You asked in your original December 21, 1995 FOIA request that you be provided with an estimate of the amount of fees if locating or duplicating records would exceed $25.

We note that in light of your very broad FOIA request, there are thousands of potentially responsive documents relating to the above-noted cases. Many of the documents have

been sent to several different archive locations and some are retained by private counsel hired by NCUA. These documents would need to be located, duplicated and redacted. It would take numerous hours just to determine the cost involved in generating the releasable portions of documents. We request that you review the enclosed cases and then notify us if you wish to further pursue your original request or if you wish to narrow the request. We will then estimate the time and cost of responding to the request.

As noted in the last paragraph of our February 27 letter, 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). Your appeal rights run from the date of this letter rather than from February 27.

Sincerely,

Robert M. Fenner

General Counsel

Enclosures

GC/HMU:bhs

96-0315

SSIC 3212