

April 29, 1996

(b)(6)

Re: Freedom of Information Act Appeal

(Your April 1, 1996 Letter)

Dear (b)(6)

On February 24, 1996, you filed a Freedom of Information Act (FOIA) request with Nicholas Veghts, NCUA's Region IV Director. You requested copies of all NCUA records involving the United Telephone Credit Union (hereinafter credit union) and yourself. The credit union was previously insured by the National Credit Union Share Insurance Fund (NCUSIF). NCUSIF insurance was canceled effective October 31, 1985. Region IV responded to your request on March 13, 1996. Copies of most of the documents that were in the canceled charter file were forwarded per your request. Certain documents were withheld pursuant to exemptions 5, 6 and 8 of the FOIA, 5 U.S.C. 552(b)(5), (6) and (8). We received your April 1, 1996 appeal on April 4. Your appeal is granted in part and denied in part.

In your appeal letter you state your belief that there are a substantial number of documents that were not produced. You seem to be questioning the accuracy of the FOIA search rather than the use of FOIA exemptions to withhold documents. We will first address the FOIA search.

United Telephone Credit Union is a state chartered credit union that was insured by the NCUSIF until October 31, 1985. NCUA has not had any supervisory authority over the credit union since that time. According to normal operating procedures, Region IV sent its credit union files to a remote storage site several years ago. Upon receipt of your FOIA request, Region IV contacted the storage site. Due to the age of the records, they had been destroyed. The Region did locate one credit union file that was maintained in their office. Most of the contents of that file were sent to you with the Region's March 13 response. The only documents that you did not receive were those withheld pursuant to FOIA exemptions. All existing documents responsive to your FOIA request were reviewed. Although you do not specifically question the withholding of documents pursuant to the FOIA exemptions, we will address the documents withheld and the applicable exemptions.

Exemption 5

Several documents were withheld pursuant to exemption 5 of the FOIA. Some of the documents were draft versions of correspondence that were never finalized or sent. Other documents were internal memoranda withheld pursuant to both exemptions 5 and 8 of the FOIA. 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). 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 information must be predecisional and it must be deliberative. Mapother v. Department of Justice, 3 F.3d 1533 (D. C. 1993). Information in the draft correspondence is clearly predecisional as it was never finalized and sent. The drafts also contain deliberative information. The internal memoranda withheld contain predecisional and deliberative information. 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). Portions of one document withheld pursuant to exemption 5 have been redacted and the redacted document is released. Other exemption 5 documents are released in full due to the fact that they are so old the information no longer needs to be protected from disclosure. The documents are enclosed.

Exemption 8

Examination and examination related documents were withheld pursuant to exemption 8 of the FOIA. Exemption 8 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).

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). Section 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). In keeping with the expansive construction of exemption 8, the Atkinson case held that agencies are not required to segregate and disclose portions of documents unrelated to the financial state of the institution. Examination reports and related information as well as one letter have been withheld from disclosure. Exemption 8 has been used to withhold portions of other documents that contain specific information about named financial institutions. Wachtel v. Office of Thrift Supervision, No. 3-90-833 (M.D. Tenn. Nov. 20, 1990.) We believe that the purposes of exemption 8 are met. Except for a balance sheet and income statement that are enclosed, documents withheld by Region IV pursuant to exemption 8 continue to be withheld in their entirety.

We note that exemptions 5 and 8 apply regardless of the fact that you are seeking documents that concern your own credit union. Under the FOIA, once documents are made available to one requester, they are generally available to any other requester. We cannot make a disclosure to limited parties pursuant to the FOIA. We also note that exemption 6

was used in the Region's response to your FOIA request. Upon further review, we have determined that exemption 6 is not applicable to the documents withheld pursuant to your FOIA request.

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,

Robert M. Fenner

General Counsel

Enclosures

GC/HMU:bhs

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