

Robert M. Krasne, Esq.

Williams & Connolly

725 Twelfth Street, NW

Washington, DC 20005

Re: Freedom of Information Act Appeal

(Your April 22, 1996 Letter)

Dear Mr. Krasne:

On November 15, 1995, you wrote to Richard Schulman, NCUA's Freedom of Information Act (FOIA) Officer, requesting documents in seven different categories pursuant to the FOIA. Responsive documents were provided to you in letters dated November 27, 1995 and January 26, 1996. You appealed the determination on your FOIA request on February 14, 1996. With your agreement, the February 14 appeal was treated as a continuance of your November 15 FOIA request since there were additional documents that had not been provided with Mr. Schulman's earlier responses. You received additional documents from Mr. Schulman in a letter dated March 22. On April 17, 1996, documents previously withheld pursuant to exemption 4 were released to you after submitters of the information had the opportunity to comment on its release. On April 22, 1996, you wrote to reassert your appeal as noted in your February 14, 1996 letter. We note that many documents and portions of documents that were originally either not identified as responsive to your request or withheld pursuant to various exemptions at the time you filed your appeal (February 14, 1996) have since been identified and released. Your appeal is denied pursuant to exemptions 4, 5, and 8 of the FOIA. Each exemption is discussed separately below.

Exemption 4

The information withheld pursuant to exemption 4 consists mostly of documents (or portions of documents) responsive to categories 1. and 2. of your initial FOIA request - that is information concerning corporate credit union waiver requests and NCUA action on such requests. Materials submitted with waiver requests include current credit union investments, fixed assets, reserves, and borrowings; strategies and projections involving those areas and their impact on the financial well being of the credit unions; and additional commercial and financial information about the submitting credit unions. 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). All of the information withheld 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/financial 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). All commercial/financial information withheld has been obtained from a "person" in accordance with exemption 4.

According to the court in Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993), voluntarily submitted information is afforded broader protection under exemption 4 of the FOIA than information that is required by an agency to be submitted. The court 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. The credit union submitters of the exemption 4 documents have specifically requested that the information remain confidential. It is clear that the exemption 4

information would not be customarily released to the public by the submitters. Hence, voluntarily submitted information remains exempt from disclosure.

The Critical Mass court also 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 meets both of the tests of National Parks. It is not necessary to determine whether the documents withheld pursuant to exemption 4 were voluntarily submitted or were required to be submitted. The standards for both voluntarily submitted information and NCUA required information have been met. The documents withheld 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 several memoranda to the NCUA Board concerning corporate credit union waiver requests; various closed NCUA Board meeting minutes and a merger proposal and counterproposal concerning CapCorp Federal Credit Union; an audit of a proposed merger partner for CapCorp FCU; and additional documents concerning CapCorp FCU and its conservatorship. All of the CapCorp documents were withheld pursuant to exemption 8 in addition to exemption 5.

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 under exemption 5 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), as noted above, the CapCorp documents withheld pursuant to exemption 5 are also withheld pursuant to exemption 8. Exemption 8 does not require redaction of documents, *see* discussion below. Memoranda to the NCUA Board concerning corporate credit union waiver requests have not been withheld in full pursuant to exemption 5. Portions of those documents have been released.

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 CapCorp material noted under exemption 5 above as well as a chart noting CapCorp problems, a CapCorp fact sheet and analysis of loss. You note in your appeal your concern that exemption 8 is not applicable to the information requested. There are many documents (or portions of documents) containing information that are withheld pursuant to exemption 8. Most of this information concerns CapCorp Federal Credit Union and its conservatorship rather than the other corporate credit unions that requested various waivers under the corporate credit union regulation. However, some information in memoranda to the NCUA Board concerning other corporate credit union waiver requests is exemption 8 information. We reassert the applicability of exemption 8 to these documents.

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,

Robert M. Fenner

General Counsel

GC/HMU:bhs

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