

March 27, 1997

Cheryl K. Zemelman

Davis Polk & Wardwell

450 Lexington Avenue

New York, NY 10017

Re: FOIA Appeal

(Your March 10, 1997 Letter)

Dear Ms. Zemelman:

This is in response to your March 10, 1997 appeal pursuant to the Freedom of Information Act (FOIA). On December 12, 1996, Jerome Snider of your law firm appealed a denial of certain records pursuant to the FOIA. In processing the appeal, we identified examination records of Providence Teachers State Credit Union that had been sent to our archives and appeared to be responsive to the original request. These records had not been previously identified. Once the records were retrieved from archives, the newly identified records, with some redactions, were sent to Mr. Snider on February 18, 1997. Redactions were made pursuant to exemptions 6 and 8 of the FOIA (12 U.S.C. 552b(6) and (8)). You have now appealed our decision to withhold information pursuant to exemptions 6 and 8 of the FOIA. Your appeal is denied as discussed below.

As you can see from the records sent to you with our February 18 letter, very little material was redacted and withheld. No documents were withheld in full. The redacted information consists of names identifying borrowers (exemption 6) and CAMEL code information on the credit union (exemption 8).

Exemption 6

Exemption 6 of the FOIA protects information about an individual in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The courts have held that all information which applies to a particular individual meets the threshold requirement for exemption 6 protection. United States Department of State v. Washington Post Co., 456 U.S. 595 (1982). As noted above, the information withheld pursuant to exemption 6 consists of names of borrowers. The redacted information clearly meets the threshold requirement for exemption 6 personal information. Once a privacy interest is established, application of exemption 6 requires a balancing of the public's right to disclosure against the individual's right to privacy. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). The public interest in the information is to "shed light on an agency's performance of its statutory duties." United States Department of Justice v. Reporters Committee, 489 U.S. 749 (1989). The burden of establishing that disclosure would serve the public interest is on the requester. Carter v. United States Department of Commerce, 830 F.2d 388, 391 (D.C. Cir. 1987). The court in Reporters Committee held that the interest of the individual FOIA requester is not to be considered in the balancing. The privacy interest of the individual is to be balanced against the public interest generally in disclosure. 489 U.S. at 771-772. We believe there is minimal, if any, public interest in disclosing the names of individual borrowers. The individual borrowers' privacy interest clearly outweighs any public interest in disclosure. Therefore, this information continues to be withheld pursuant to exemption 6 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 consists of the CAMEL code ratings assigned to the credit union. The ratings were assigned by NCUA examiners when Providence Teachers State Credit Union (a RISDIC insured credit union) applied for federal share insurance. We reassert the applicability of exemption 8 to the redacted CAMEL codes.

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). 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. 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.

Discretionary Disclosure

The examination reports and related documents released on February 18 were released solely pursuant to NCUA's discretionary authority. NCUA has not waived its right to invoke exemption 8, or any other exemption, that might be applicable to similar or related information in the future. Courts have held that in no case has the release of certain documents waived the exemption as to other similar documents. On the contrary, courts have generally found that the release of certain documents waives the FOIA exemptions only for those specific documents released. *Mobil Oil Corp. v. EPA*, 879 F.2d 698 (9th Cir. 1989).

Judicial Review

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 portions of documents withheld and to order production of the complete documents. Such a suit may be filed in the United States District Court in the district where the requester resides, where the requester's 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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