

July 21,1997

Mark J. Kuhar, Esq.

Knox McLaughlin Gornall & Sennett, P.C.

120 West 10th Street

Erie, Pa 16501-1461

Re: FOIA Appeal, your letter dated June 20, 1997

Dear Mr. Kuhar:

On May 6, 1997, you submitted a Freedom of Information Act (FOIA) request to NCUA's Region II Director on behalf of the Warren Area Federal Credit Union (the credit union). You requested copies of the March 17, 1997 complaint filed by two credit union members regarding the credit union practices and the April 24, 1997 letter responding to that complaint authored by two NCUA examiners. You also requested copies of all other obtainable documents in the possession of NCUA regarding this matter. The Region II Director denied your request on May 29, 1997. The March 17 complaint was denied pursuant to exemptions 6 and 7(C) of the FOIA. The other documentation requested was denied pursuant to exemptions 5 and 8 of the FOIA. Documentation responsive to your request consists of the March 17 complaint; the

May 7 agency response to the complaint (the April 24 document that you request is a memorandum concerning NCUA investigation of the complaint rather than a response to the complaint); and the April 24 memoranda and various workpapers prepared by NCUA examiners. We received your June 20 appeal on June 23. In a July 17 telephone conversation with Hattie Ulan of this Office, you agreed to limit your FOIA appeal to the March 17 complaint and NCUA's May 7 NCUA response to the complaint. You may reinstate your appeal for the additional documents noted above at any time. Your appeal is granted in part and denied in part. The two responsive documents (with minor redactions) are enclosed. Information was redacted pursuant to exemptions 6 and 7(C) of the FOIA, as explained below.

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). The information withheld pursuant to exemption 6 consists of names of the complainants, references to persons about whom allegations are made as well as the persons subject to the allegations. The court in Strout v. United States Parole Commission, 40 F.3d 136 (6th Cir. 1994) held that individuals who write to the government expressing personal opinions generally so do with some expectation of confidentiality; their identities, but not necessarily the substance of their letters, should be withheld. Although you know the names of some or all of the complainants, we believe the names should be protected since once release is made to you under the FOIA, the information is in the public domain. The same release would then have to be made to any requester under the FOIA. The court in Hudson v. Department of the Army, No. 86-1114, slip op. at 6 (D.D.C. July 3, 1991) held that "where there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain. We believe there would be an invasion of privacy (subject to exemption 6 protection) if the names were released to some other FOIA requester or by a FOIA requester to another individual.

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).

According to the courts, 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 (D.C. Cir. 1987). We believe there is minimal, if any, public interest in release of the personal information withheld. Therefore the balance weighs in favor of protecting the personal information.

Exemption 7(C)

Exemption 7(C) is the law enforcement counterpart to exemption 6, providing protection from disclosure of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy." The law to be enforced within the meaning of "law enforcement purposes" includes both civil and criminal statutes, *see* Rural Housing Alliance v. USDA, 498 F.2d 73 (D.C. Cir. 1974). NCUA has authority to enforce the Federal Credit Union Act which is a civil statute (*see* title II of the Federal Credit Union Act, 12 U.S.C. et seq.). Comparing it with exemption 6, exemption 7(C)'s language establishes a lesser burden of proof to justify withholding information in two distinct respects. The omission of the word "clearly" (which modifies "unwarranted" in exemption 6) from the language of exemption 7(C) eases the burden of the agency (*see* Computer Professionals for Social Responsibility v. United States Secret Service, 72 F.3d 897 (D.C. Cir. 1996)) and the use of the wording "could reasonably be expected to constitute" an invasion of personal privacy in contrast to exemption 6's "would reasonably constitute" such an invasion provides a lesser standard for the government to meet. United States Department of Justice v. Reporters Committee for the Freedom of the Press, 489 U.S. 749 (1989). We believe that the information should be withheld pursuant to exemption 6 of the FOIA. Exemption 7(C) provides further support and a lesser standard for withholding personal information.

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

SSIC 3212

97-0645

Enclosures

cc: Region II Director