

December 16, 1997

Re: FOIA Appeal, your letter dated November 25, 1997

Dear :

After exchanging several pieces of correspondence with NCUA's Region VI, on October 12, 1997, you submitted a Freedom of Information Act (FOIA) request to Daniel Murphy, the Region VI Director, for five separate items including: 1) a copy of NCUA's April 28, 1997 examination report of LAIRE Federal Credit Union; and 2) copies of NCUA standards for home equity line of credit (HELOC) plans and when the standards were promulgated to LAIRE Federal Credit Union. You noted in your request that the examination report was exempt from disclosure under the FOIA pursuant to exemption 8, 5 USC 552(b)(8), codified in Section 792.3(a)(8) of the NCUA Rules and Regulations, 12 CFR 792.3(a)(8). You requested the documents pursuant to the "good cause" provision found in the §792.4(b)(3) of the NCUA Regulations. Terry McGinnis, the Acting Region VI Director, responded to your request in a letter dated October 29, 1997. The October 29 response was followed by a short clarifying letter on November 14, 1997. Although some records were provided, the examination report was withheld pursuant to exemption 8 of the FOIA, 5 U.S.C. §552(b)(8), and was not released pursuant to the "good cause" provision found in §792.4(b)(3) of NCUA's Regulations. Mr. McGinnis discussed, in general terms, risk elements for HELOC programs.

We received your November 25, 1997 FOIA appeal on November 28, 1997. You have appealed the denial of the examination report noted in item 1) above and stated that the Acting Regional Director did not address item 2) in his October 29 response. The denial of your FOIA request for the examination report is upheld pursuant to exemption 8 of the FOIA. The good cause provision described in §792.4(b)(3) of the NCUA Regulations is not applicable to your FOIA request. In addition, the NCUA Board recently removed §792.4(b)(3) from the NCUA Regulations. Although you do not seem to be questioning the examination report being withheld pursuant to exemption 8, both exemption 8 and the good cause provision are discussed below. We will also clarify the discussion of item 2) in the Acting Regional Director's October 29 response. The pages of the Examiner's Guide discussing second mortgages and HELOCs are enclosed.

Exemption 8

Exemption 8 of the FOIA (5 U.S.C. §552(b)(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.

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 an examination report.

NCUA has incorporated these dual purposes into its regulation. Section 792.3(a)(8) of the NCUA Rules and Regulations (12 C.F.R. §792.3(a)(8)) implements exemption 8 and adds the following:

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.

You have requested the complete examination report, which is exactly the type of information exempt from disclosure pursuant to exemption 8. The examination report contains information concerning the credit union's management, safety and soundness issues, as well as its financial security. Disclosure of the examination report could clearly harm the financial security of a credit union as well as interfere with the relationship between NCUA and the credit union. Although the examination report does contain some non-financial information, courts do not require agencies to segregate and disclose those portions of documents that are unrelated to the financial condition of the institution. *See Atkinson*. The entire examination report continues to be withheld pursuant to exemption 8.

Good Cause Provision

You acknowledge that NCUA may withhold the examination report pursuant to exemption 8 of the FOIA, however, you believe it should be released under the "good cause" language found in the NCUA Rules and Regulations. This section states:

§792.4(b)(3) Exempt records--Disclosure to third parties.

The NCUA Board, or any person designated by it in writing,

may disclose copies of exempt records to any third party

where requested to do so in writing. The request shall:

(i) specify the record or records to which access is

requested; and (ii) give the reasons for the

request. Any NCUA employee authorized to disclose

exempt NCUA records to third parties may disclose the

records only upon determining that good cause exists

for the disclosure. The designated NCUA official shall

impose such terms and conditions as are deemed

necessary to protect the confidential nature of the

record, the financial integrity of any credit union or

other organization or person to which the records

relate, and the legitimate privacy interests of any

individual names in such records.

This provision does not provide a right of limited access to FOIA records nor is it an exception to the FOIA exemptions. Instead, §792.4(b)(3) has been the basis upon which NCUA may release otherwise exempt records, subject to protective terms and conditions, but only when sought by subpoena or similar process within the context of litigation or formal administrative proceedings. A release under this section is not a release under FOIA; the FOIA does not permit imposition of conditions such as limited disclosure. Under the FOIA, once a document is disclosed to

one requester, it is available to any requester.

Section 792.4(b)(3) was recently replaced by a new provision setting forth revised requirements for obtaining non-public information with the use of a subpoena. The new final rule removes §792.4(b)(3) from the NCUA Rules and Regulations. *See* 62 Fed. Reg 56051, 10/29/97, enclosed. Section 792.41 of the new rule states in part:

When does this subpart apply? This subpart applies if you want to obtain nonpublic records or testimony of an NCUA employee for legal proceedings. It doesn't apply to the release of records under the Freedom of Information Act ...

In sum, FOIA does not allow for a limited "good cause" release of exempt information to third parties. NCUA has never released records using such a theory.

Standards for Loan Programs

In your October 12 FOIA request you asked for copies of NCUA standards for home equity line of credit (HELOC) plans and when the standards were promulgated to LAIRE Federal Credit Union. In your appeal you state that the Acting Region VI Director did not address this item in his October 29 response. NCUA has not issued such standards. However, the risk elements for HELOC programs are discussed in the second full paragraph of page 2 of the October 29 response (copy enclosed). It is also noted that more specific information and guidance about criteria used for evaluating loan programs is found in the NCUA Examiner's Guide, which you can order. Enclosed are copies of the provisions in the Examiner's Guide addressing second mortgages and HELOCs. The Guide contains a much fuller discussion of real estate lending.

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 withheld 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, 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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97-1203

Enclosures