

November 17, 1998

Joseph s. Melchione

Todd A. Okun

550 North Brand Boulevard, Suite 550

Glendale, CA 91203

Re: FOIA Appeal, your letter dated October 12, 1998

Dear Mssrs. Melchione and Okun:

On August 17, your client Roger Ballard (the President/CEO of Network Federal Credit Union), filed a Freedom of Information (FOIA) request for "all information including summaries, attachments, analysis, and any other information submitted to the General Counsel's office for evaluation of our conversion request." Jane Walters, the Region VI Director, responded to the request on September 16. Some records were released in full, some released in part, and some withheld in full. Six documents were withheld pursuant to exemption 4, eight documents were withheld pursuant to exemption 5, and 6 documents were withheld pursuant to exemption 8 of the FOIA, 5 USC 552(b), (4), (5), and (8).

We received your appeal on October 19. In your appeal you ask that we release any factual information from the documents withheld pursuant to exemptions 4 and 5. You do not request release of the documents withheld pursuant to exemption 8. Your request is granted in part in that some factual information is now being released. The documents are now released in part with redactions. The newly released documents are enclosed. Exemption 6, rather than exemption 4, applies to the redacted documents that were originally withheld in full pursuant to exemption 4. Exemptions 5 and 8 apply to the redacted documents that were originally withheld pursuant to exemption 5. The documents and applicable exemptions are explained below.

The six documents originally withheld pursuant to exemption 4 (and now withheld in part pursuant to exemption 6) were telephone contact records of calls made by NCUA staff to area credit unions regarding their position on Network's proposed conversion and whether or not each of those credit unions requested an exclusion clause if the community charter is granted. These are the documents described under the first bullet in Ms. Walters' September 16 letter to Mr. Ballard. These documents are now released in part. Enclosed are two sets of the six telephone contact records. The first set discloses the position of each credit union on the conversion and exclusion clause issues. The name of each credit union appears on this set, the name of the individual contacted is redacted. The second set contains only the handwritten notes of NCUA staff reflecting comments made by the individuals contacted. The names of the credit union and the individuals contacted is redacted pursuant to exemption 6 to protect the individuals' privacy.

Each of the eight documents withheld pursuant to exemption 5 is described separately. These are the same documents described under the second bullet in Ms. Walters' September 16 letter to Mr. Ballard.

1. B-1 form - released in part, portion withheld pursuant to exemption 5.
2. June 17, 1998 memo from Regional Director Jane Walters - released in part, portion withheld pursuant to exemption 5.
3. Board Action Memorandum - released in part; portions withheld pursuant to exemption 5.
4. Regional Summary - released in part; portions withheld pursuant to exemptions 5 and 8. The enclosed document contains some information on Network's business and marketing plans and budget. This type of information is normally subject to exemption 4 of the FOIA (commercial/financial information). It is released to you because you represent the submitter of the information. This exemption 4 information will not be released to the general public without the permission of the submitter.
5. Record of telephone call to United Services of America FCU - released in part, portion withheld pursuant to

exemption 5.

6. Memo from examiner regarding conversion request - released in part, portions withheld pursuant to exemptions 5 and 8.
7. June 29, 1998 memo from Office of General Counsel - released in part, portions withheld pursuant to exemption 5.
8. July 2, 1998 memo from Office of Examination and Insurance - released in part, portions withheld pursuant to exemptions 5 and 8.

### Exemption 5

Staff recommendations in the Regional Summary, intra-agency memos, and the draft Board Action Memorandum constitute the information withheld pursuant to exemption 5. Some factual information contained in the Regional Summary and the Board Action Memorandum continues to be withheld pursuant to 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 USC 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). Any one of the following three policy purposes have been held to constitute a basis 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). We believe that all three policy purposes exist for withholding the predecisional recommendations and internal discussions in this case.

As noted, some factual information continues to be withheld. Courts interpreting exemption 5 have recognized there are instances where factual information can be withheld. The act of selecting specific facts out of a larger group of facts for inclusion in a document can be deliberative in nature. In such a case, the facts themselves would be subject to exemption 5. *See* Montrose Chemical Corporation v. Train, 491 F.2d 63 (D.C. Cir. 1974). Certain factual information from the Board Action Memorandum and the Regional Summary have been redacted as deliberative in nature under Montrose. This information continues to be withheld pursuant to exemption 5.

### Exemption 6

The names of individuals who expressed their opinions are withheld pursuant to exemption 6. Exemption 6 of the FOIA permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of person privacy." 5 USC 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). 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. 352,373 (1976). Courts have held that individuals expressing their opinions to the government generally do so with some expectation of confidentiality; their identities, but not necessarily the substance of their letters, should be withheld. Strout v. United States Parole Commission, 40 F.3d 136 (6<sup>th</sup> Cir. 1994). We believe the disclosure of the opinions and comments of the credit union staff, without identifying them, strikes the appropriate balance between the public's right to disclosure and the individuals' right to privacy.

### Exemption 8

Information concerning the financial condition of Network FCU and information concerning the safety and soundness of other credit unions is the information withheld pursuant to 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 USC 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 to withhold the information. Exemption 8 has been employed to withhold portions of documents other than examination reports, such as 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). Disclosure of portions of the memoranda containing exemption 8 information (portions of documents 4, 6, and 8 above) could harm the financial security of the credit union(s) addressed. The standard to withhold the information pursuant to exemption 8 is met.

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court in the district where the requester resides, where the requester's principle 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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Enclosures

cc: Region VI Director