

September 15, 2005

(b)(6)

Re: Your FOIA Appeal dated August 17, 2005

Dear (b)(6):

On May 10, 2005, you filed a Freedom of Information Act (FOIA) request with NCUA requesting NCUA Executive Director Reports made to the NCUA Board from 1998 to the present. You narrowed your request in a June 16, 2005 letter to Dianne Salva, NCUA's FOIA Officer, limiting your request to Executive Director Reports to the NCUA Board made from March 15, 2005 to the present. We refer to these reports as Management Reports. Ms. Salva responded to your request on August 16, 2005, enclosing 332 pages of Management Reports from March 2005 through June 2005. Redactions were made from the Management Reports pursuant to exemptions 2, 5, 6, & 8 of the FOIA, 5 U.S.C. §552(b)(2), (5), (6), & (8). We received your August 17, 2005 appeal of Ms. Salva's determination on August 19th. You appeal the use of exemptions 2 and 5 to portions of the Management Reports. Your appeal is granted in part and denied in part. Enclosed are 24 pages of the Management Reports. Some of the information originally redacted on these pages pursuant to exemption 2 is now released. Several of these pages are now released without redactions; however, many of the enclosed pages continue to contain redactions made pursuant to exemptions 2, 5, 6, and 8. An explanation of exemptions 2 and 5 follows.

Exemption 2

Exemption 2 of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. §552(b)(2). The courts have interpreted exemption 2 to encompass two distinct categories of information: trivial matters referred to as "low 2" information and more substantial internal matters referred to as "high 2" information. The information from the Management Reports withheld pursuant to exemption 2 is "high 2" information. Crooker v. ATF, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), is the lead case interpreting the "high 2" exemption and it encompasses protection for internal agency information the sensitivity of which is readily recognized. Crooker established a 2-part test for determining which sensitive materials are exempt from mandatory disclosure. The test requires that: 1) a requested document be predominantly internal; and 2) its disclosure significantly risks circumvention of agency regulations or statutes. The Management

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Reports are internal documents so the first test is met. Courts have held that the high 2 exemption can be applied when there is a determination of reasonably expected harm. See Judicial Watch, Inc. v. United States Department of Commerce, 83 F. Supp. 2d 105, 110 (D.D.C. 1999). High 2 has been applied when the consequences of disclosure could be harmful to the effective operation of government offices. Pinnavaia v. FBI, No. 03-112, slip opinion at 8 (D.D.C. Feb. 25, 2004) (withholding of beeper numbers and cell phone numbers). The release of information withheld pursuant to exemption 2 could be harmful to the effective operation of NCUA in that it concerns payment and payroll systems and agency security and infrastructure information, among other things. Hence the information remains protected by exemption 2.

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). Included within exemption 5 is information subject to the deliberative process privilege. The purpose of the deliberative process 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). All three policies enumerated in Russell apply in this case; the deliberative information redacted continues to be withheld pursuant to exemption 5.

Pursuant to 5 U.S.C. 552(a)(4)(B) of the FOIA, 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 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

Enclosures

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2005-APP-00010

