

Caryl A. Wheeler, Senior Legal Assistant
Mark Fajfar, Special Counsel
Fried, Frank, Harris, Shriver & Jacobson, LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505

Re: FOIA Appeal dated October 20, 2006

Dear Ms. Wheeler and Mr. Fajfar:

On May 12, 2006, Ms. Wheeler made a Freedom of Information Act (FOIA) request for all documents concerning or related to: 1) identified litigation involving DFCU Financial Federal Credit Union (the DFCU Litigation); 2) contacts or communications with any of twelve named persons regarding DFCU, the DFCU litigation, DFCU Owners United, or credit union conversions to another type of financial institution generally; and 3) FOIA requests relating to DFCU, its attorneys, and other related parties. Staff attorney Linda Dent responded to your request on October 5, 2006. You received approximately 70 pages in response to your request. Only a few minor redactions were made from the pages you received including redaction of brief internal notes, e-mail addresses and one home address and telephone number. These redactions were made pursuant to exemptions (b)(5) and (b)(6) of the FOIA, 5 U.S.C. §552(b)(5) & (6). (See discussion of exemptions below.) Approximately 242 pages of responsive documents were withheld in full. The documents were withheld pursuant to exemptions (b)(4), (5), (6), and (8) of the FOIA.

We received your October 20, 2006 FOIA appeal letter, without noted enclosures, on October 20th. We received the enclosures to your appeal on October 23rd. You appeal Ms. Dent's response in the following aspects: 1) the response should have provided some indication of the nature of the material that was withheld; 2) the response should have provided segregable portions of the requested records that did not contain protected information; 3) the response should have provided substantiation of the fee for professional hours in relation to coordination/approval/denial; and 4) the response should have provided all of the information responsive to your FOIA request. Your appeal is granted in part and denied in part. Discussed below are the first three aspects of your appeal. The fourth aspect of your appeal asks that all requested information be provided. We address why various records were withheld in our specific discussion of applicable FOIA exemptions below. Approximately 24 additional pages are released (some in full, most in part with portions redacted) and are enclosed. The remaining approximately 218 pages withheld and the redacted portions of the 24 pages released remain withheld pursuant to exemptions 4, 5, 6 and 8 of the FOIA.

Nature of Material Withheld and Segregable Portions of Responsive Records

In your appeal, you request an index of the withheld material that lists briefly the nature of each document that has been withheld and the provision of the FOIA under which such document qualifies for protection. This is known as a Vaughn index. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). It is well-settled law that a requester is not entitled to receive a Vaughn index during the administrative process. Schwarz v. United States Department of Treasury 131 F. Supp. 2d, 142 (D.D.C. 2000). Courts generally do not require the submission of a Vaughn index prior to the time at which a dispositive motion (motion for summary judgment) is filed. Tannehill v. Department of the Air Force, No. 87-1335, slip op. at 1 (D.D.C. Aug. 20, 1987). Hence we have not prepared a Vaughn index at this time. We do note that most of the responsive records withheld consist of e-mail and traditional correspondence both within NCUA staff and between NCUA staff and other parties, drafts of various NCUA documents, and internal memoranda. With regard to NCUA contacts or communications with the twelve parties named in your initial request, we found no NCUA contacts or communications with J. Ronald Unger, Thomas Maylan, James Blaine or Wendell "Bucky" Sebastian involving DFCU, the DFCU litigation, DFCU Owners United or the conversion of credit unions to another type of financial institution. We did find responsive records to the other categories of your request; all records not provided are withheld pursuant to the exemptions discussed below. Most of the 24 newly released pages contain portions of pages previously withheld in full. These are the segregable portions of records that are not protected by a FOIA exemption.

Substantiation of Fee for Professional Hours

You requested substantiation for the \$1000 fee for professional staff hours spent on coordination/approval/denial of your FOIA request. As you know, NCUA charges \$50 per hour for certain professional time spent on an initial FOIA request. The \$1000 fee, as noted on the invoice you received, was for 20 hours of professional time spent on coordination/approval/denial of your request. NCUA professional staff spent in excess of 20 hours on coordination/approval/denial of this request. Although you received 70 pages of responsive documents and approximately 242 pages were withheld, Ms. Dent reviewed several hundred additional pages of potentially responsive documents that were gathered from multiple offices. Each document was individually reviewed. A determination first had to be made whether each document was responsive to one of the 17 categories of documents that you requested. Once documents were determined to be responsive, Ms. Dent considered whether the documents should be released (in full or in part) or withheld pursuant to one of the FOIA exemptions. This process was a time consuming one and it took Ms. Dent in excess of 20 hours to complete.

As noted, the documents both fully withheld as well as portions of documents not released were withheld pursuant to exemptions 4, 5, 6 and 8 of the FOIA. Many of the documents contained information withheld pursuant to more than one of the noted exemptions. The exemptions are discussed below.

Exemption 4

Commercial and financial information (mostly in the form of e-mail and traditional correspondence between NCUA staff and other parties) was withheld pursuant to exemption 4 of the FOIA. Exemption 4 protects, in part, commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. §552(b)(4). The information withheld pursuant to exemption 4 falls into the category of commercial/financial information. The term “commercial” has been broadly interpreted to include anything “pertaining or relating to or dealing with commerce.” American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 870 (2d Cir. 1978). Information “obtained from a person” has been held to include information obtained from a wide range of entities including individuals, associations, corporations and public and private entities, other than agencies. Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). All of the commercial/financial information withheld pursuant to exemption 4 meets the standard of obtained “from a person” under Nadler. In Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993), the court established two distinct standards to be used in determining whether commercial/financial information submitted to an agency is “confidential” under exemption 4. According to Critical Mass, information that is voluntarily submitted is categorically protected provided it is not customarily disclosed to the public by the submitter. Information required to be submitted to an agency is confidential if its release would (1) impair the Government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. See National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The commercial/financial information withheld was voluntarily submitted and is categorically protected pursuant to the Critical Mass decision. Therefore, the commercial/financial information continues to be withheld pursuant to exemption 4.

Exemption 5

Internal notations, memoranda, e-mail, correspondence, drafts of NCUA documents and predecisional documents were 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 U.S.C. §552(b)(5). Included within exemption 5 is information subject to the deliberative process privilege, attorney work product privilege and attorney client 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 to various documents withheld pursuant to the deliberative process privilege of exemption 5 in this case. In addition, this privilege protects not merely documents, but also the integrity of

the deliberative process itself where the exposure of that process would result in harm. See National Wildlife Federation v. United States Forest Service 861 F.2d 1114, 1119 (9th Cir. 1988) and Greenberg v. United States Department of Treasury, 10 F. Supp. 2d 3, 16, n.19 (D.D.C. 1998). Therefore the material withheld pursuant to the deliberative process privilege of exemption 5 remains exempt from disclosure.

The attorney work product privilege protects documents prepared by an attorney in contemplation of litigation. Hickman v. Taylor, 329 U.S. 495 (1947). Courts have accorded the work-product protection to materials prepared by non-attorneys who are supervised by attorneys. Hertzberg v. Veneman, 273 F. Supp. 2d 67, at 76 (D.D.C. 2003). The privilege attaches when a claim, likely to lead to litigation, has arisen. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980). NCUA attorneys and a paralegal have been involved in preparing work in contemplation of litigation involving DFCU. These attorney-generated documents continue to be withheld pursuant to the attorney work product privilege.

The attorney-client privilege concerns confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. Mead Data Center, Inc. v. United States Department of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). This privilege, unlike the attorney work product privilege, is not limited to the context of litigation. See Mead at 252-253. Communications between NCUA attorneys and their NCUA clients continue to be withheld pursuant to this privilege of exemption 5.

Exemption 6

Home addresses, e-mail addresses and telephone numbers were withheld pursuant to exemption 6. Exemption 6 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 that applies to a particular individual meets the threshold requirement for privacy 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, 372 (1976). The withheld information meets the requirement for exemption 6 protection. There is minimal, if any, public interest in disclosing this personal information. The individuals' privacy interests outweigh any public interest in disclosure. Therefore the personal information continues to be withheld pursuant to exemption 6.

Exemption 8

Documents withheld pursuant to exemption 8 consist of e-mail and correspondence pertaining to exemption 8 information. Exemption 8 applies to 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). 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). In general, all records, regardless of the source, of a financial institution's financial condition and operations that are in the possession of a federal agency responsible for their regulation or supervision are exempt. McCullough v. FDIC, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at **7-8 (D.D.C. July 28, 1980). See also Snoddy v. Hawke, No. 99-1636, slip op. at 2 (D. Colo. Dec. 20, 1999). Courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. See Atkinson v. FDIC, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, at *4-5 (D.D.C. Feb. 13, 1980). Therefore any document withheld pursuant to exemption 8 can be withheld in full. 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 at *4. The responsive records concern DFCU's operations and are in the possession of NCUA. They are within the scope of exemption 8 pursuant to Consumers Union and McCullough. Withholding the responsive documents meets the purposes of exemption 8. Therefore, the documents continue to be withheld pursuant to exemption 8.

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,

Michael J. McKenna
Deputy General Counsel

Enclosures

GC/HMU:bhs
06-1027
06-FOI-00179
07-APP-00001