

January 10, 2007

Ira L. Tannenbaum
Kirkpatrick & Lockhart Nicholson Graham, LLP
1601 K Street, NW
Washington, DC 20006-1600

Re: FOIA appeal dated December 12, 2006

Dear Mr. Tannenbaum:

On November 16, 2006, you made a Freedom of Information Act (FOIA) request for all materials related to the merger of Nationwide Federal Credit Union (FCU) with Nationwide Bank. Staff attorney Linda Dent responded to Suzanne F. Garwood of your law firm on November 27, 2006. You received approximately 62 pages of documents, 3 of those pages with redactions, in response to your request. Approximately 119 pages were withheld in full, including an 88 page valuation report prepared for the FCU in connection with the merger, an 11-page application submitted to the Office of Thrift Supervision (OTS), and a 20-page application submitted to the Federal Deposit Insurance Corporation (FDIC). All redacted and withheld pages were withheld pursuant to exemption (b)(4) of the FOIA, 5 U.S.C. §552(b)(4).

We received your December 12, 2006 FOIA appeal letter, on December 13th. Your appeal is granted in part and denied in part. Enclosed are complete copies of the three pages that were previously redacted. These are the 30-day notice, the 60-day notice and the instructions for voting on the proposed merger. The 88-page valuation report remains withheld pursuant to exemption 4. (See discussion of exemption 4 below.) Copies of the OTS and FDIC applications previously withheld have been forwarded to those agencies for their determination on release since these records consist of standard applications filed with OTS and FDIC. OTS and FDIC, rather than NCUA, should determine their treatment pursuant to the FOIA. (See Rzeslawski v. United States Department of Justice, No. 97-1156, slip op. at 6 (D.D.C. July 23, 1998). FOIA staff from OTS and FDIC will respond directly to you. The contact person at OTS is Marilyn Burton, FOIA Manager, 1700 G Street, NW, Washington, DC 20552; and at FDIC is Fred Fisch, Supervisory Counsel, 550 17th Street, NW, Washington, DC 20429. Copies of the letters we sent to OTS and FDIC are also enclosed (without enclosures).

Mr. Tannenbaum

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Exemption 4

The 88-page valuation report was withheld and continues to be 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 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). The valuation report qualifies as commercial/financial information and 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 valuation report was voluntarily submitted and is categorically protected pursuant to the Critical Mass decision. Therefore, the report continues to be withheld pursuant to exemption 4.

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 the requester resides, where the requester’s principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

/S/

Robert M. Fenner
General Counsel

Enclosures

GC/HMU:bhs
06-1221
07-FOI-00028
07-APP-00002