

December 5, 2007

Mr. Bert Ely
Ely & Company
901 King Street
Alexandria, VA 22314

Re: FOIA Appeal, your letter of October 5, 2007

Dear Mr. Ely:

On June 28, 2007, you filed a Freedom of Information Act (FOIA) request via e-mail for certain data on credit union failures. You requested information on liquidations, assisted mergers, purchase and assumptions, and other types of losses from 1970 forward (when the National Credit Union Share Insurance Fund (NCUSIF) commenced operations). NCUA staff attorney Linda Dent sent you some responsive records in the form of an Excel spreadsheet with a letter dated August 15, 2007. Ms. Dent sent you a final response to your request on September 5, 2007, with another Excel spreadsheet enclosed. Ms. Dent noted in the September 5th letter that there were some gaps in the information provided, especially for older liquidations. In addition, reasons for failure of credit unions were withheld pursuant to exemption 8 of the FOIA (5 U.S.C. 552(b)(8)). You appealed Ms. Dent's response on October 5, 2007. You state in your appeal your belief that NCUA maintains further records that are responsive to your request. You also believe that records of a closed financial institution should not be withheld pursuant to exemption 8. On October 22, 2007, you agreed to a one-month delay in a response to your appeal. NCUA has found no further electronic records in response to your request and appeal. Your appeal is denied as explained below.

Search

Both Ms. Ulan and Ms. Dent have had several conversations with you in order to clarify your request and appeal. You told Ms. Ulan you would pursue means outside of NCUA to obtain records, however you have not obtained any additional records. Both Ms. Ulan and Ms. Dent contacted staff within NCUA offices where responsive records would be maintained. Staff indicated that gaps in records for much older liquidations exist because records may have been maintained hard copy only. In addition, NCUA has changed computer systems over the last four or five years. Records for credit unions prior to that time may not be complete due to use of new systems. All available electronic data has been provided. NCUA's Asset Management Assistance Center has now identified over 200 boxes of records that may contain some responsive records.

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The existence of these records was not addressed in Ms. Dent's response to your original request. Ms. Ulan has informed you that these boxes of records exist and you told her that you do not wish to pursue a search of the boxes of records at this time. If in the future you wish to pursue such a search, you will submit a new FOIA request. For your information, hard copy records are eventually sent to a records center and after a certain time period, they are destroyed.

The adequacy of an agency's search under the FOIA is determined by a test of "reasonableness," which may vary from case to case. Zamansky v. EPA, 767 F.2d 569, 571-73 (9th Cir. 1985). The reasonableness of an agency's search depends, in part, on how the agency conducted its search in light of the scope of the request. Hayden v. Department of Justice, No. 03-5078, 2003 WL 22305071, at *1 (D.C. Cir. Oct. 6, 2003). The question is not whether any documents responsive to the request might exist, but rather whether the search for any responsive documents was adequate. We contacted staff responsible for data collection and maintenance several times. We provided staff with copies of your request and appeal and discussed the information requested extensively with them. Staff from these offices has assured us that we have provided you with all available electronic records, except for those withheld pursuant to exemption 8. We believe a reasonable search was conducted.

Exemption 8

As noted above, the reasons for the failure of credit unions were withheld from the electronic records you received. 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). 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. Atkinson v. FDIC, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, at *4 (D.D.C. Feb. 13, 1980).

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). The exemption applies to examination reports as well as memoranda relating to insolvency proceedings. See, e.g., Tripati v. U.S. Department of Justice, No. 87-

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3301, 1990 U.S. Dist. LEXIS 6249, at *2-3 (D.D.C. May 18, 1990). In addition, courts have held that records pertaining to a financial institution no longer in operation can be withheld pursuant to exemption 8 in order to serve the policy of promoting “frank cooperation” between bank and agency officials. Gregory v. FDIC, 631 F.2d 896 (D.C. Cir. 1980), at 899, accord Berliner, Zisser, Walter & Gallegos v. SEC, 962 F. Supp. 1348 at 1353. The records withheld pursuant to exemption 8 are within its scope and continue to be withheld.

Pursuant to 5 U.S.C. 552(a)(4)(B) of the FOIA, you may seek judicial review of the determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court in the district where you reside, where your principle place of business is located, or the District of Columbia.

Sincerely,

Robert M. Fenner
General Counsel

GC/HMU:bhs
07-1009
07-FOI-00154
2008-APP-00002