

July 29, 2005

Mr. Christopher W. Bawn  
Attorney at Law  
1013 Tenth Avenue SE  
Olympia, WA 98501

Re: Your FOIA Appeal dated July 6, 2005

Dear Mr. Bawn:

On May 5, 2005, you submitted a Freedom of Information Act (FOIA) request via e-mail. You requested the public portion of any records including reports, examinations, interviews, disclosures, correspondence, e-mail, referrals to enforcement, supervision, complaints, fraud, embezzlement, directives, or other enforcement concerning Generations Credit Union from January 1, 2003 through the date of your request. Dianne Salva, NCUA's FOIA Officer/Staff Attorney, responded to your request on June 29, 2005. The records requested (approximately 1025 pages) were denied pursuant to exemptions (b)(4) and (b)(8) of the FOIA, 5 U.S.C. §552(b)(4) & (8). We received your July 6, 2005 appeal on July 8<sup>th</sup>. Your appeal is granted in part and denied in part. Not all of the approximately 1025 pages of records originally identified in Ms. Salva's letter are responsive to your request. Approximately 225 pages are outside the scope of your request. Enclosed are approximately eighty pages of responsive documents, some of which are redacted in part. The exemptions applicable to the redacted portions are noted on the enclosed pages. The remaining documents (approximately 715 pages) continue to be withheld pursuant to exemptions 4, 5, 6 and 8 of the FOIA. An explanation of the applicable exemptions follows.

#### Exemption 4

Several pages of the withheld documents (including the credit union's business plan) contain financial information about the credit union exempt from disclosure pursuant to exemption 4 of the FOIA. Exemption 4 protects, in part, commercial or financial information obtained from a person and 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 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 corporation. Nadler v. FDIC, 92 F.3d 93, 95

(2d Cir. 1996). Information obtained from a credit union 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). We believe the information withheld meets the more strict substantial harm prong of National Parks as noted in Critical Mass. Therefore, the financial information continues to be withheld pursuant to exemption 4.

#### Exemption 5

Internal memoranda, e-mail and other correspondence are 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. 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). The first and third policies enumerated in Russell apply in this case; internal memoranda, e-mail and other correspondence continue to be withheld pursuant to exemption 5.

#### Exemption 6

The information withheld pursuant to exemption 6 includes addresses and other personal information about credit union officials and members. 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.

### Exemption 8

Credit union examinations as well as various documents generated as a result of examination contacts are withheld pursuant to exemption 8. 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). These documents qualify for withholding pursuant to exemption 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, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, at \*4 (D.D.C. Feb. 13, 1980) 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). Courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. See Atkinson at \*\*4-5. It is appropriate to withhold entire documents pursuant to this exemption. In addition, matters related to an examination, such as its follow-up, have also been held exempt from disclosure. Atkinson at \*\*5-7. Examination reports and related documents prepared by state regulatory agencies have been found protectible under exemption 8. Atkinson at \*4. 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). The purposes of exemption 8 are met; therefore, the examinations and documents generated as a result of the examinations continue to be withheld in their entirety pursuant to exemption 8. We also note that some of the information withheld under exemptions 4, 5, and 6 (as discussed above) is also withheld pursuant to exemption 8 as the information was part of exemption 8 documents.

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 requestor resides, where the requestor's

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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  
05-0710  
2005-APP-00009