

December 7, 2004

Frank D. Ferris, National Executive Vice President
The National Treasury Employees Union
1750 H Street, NW
Washington, DC 20006

Re: Your FOIA Appeal Dated November 5, 2004.

Dear Mr. Ferris:

From September 1, 2004, through September 24, 2004, you filed several requests with the National Credit Union Administration (NCUA) under the Freedom of Information Act (FOIA) for various records. You asked for a waiver of fees in connection with each of these FOIA requests. On October 6, 2004, Ms. Diane Salva, the NCUA FOIA officer, declined to waive the fees associated with any of these FOIA requests. On November 5, 2004, you appealed Ms. Salva's determination. First, you ask that NCUA grant fee waivers for the FOIA requests. In the alternative, if NCUA does not grant the fee waivers, you ask that NCUA classify your organization, the National Treasury Employees Union (NTEU), as an "other" requester rather than a "commercial" requester. Third, you ask that NCUA provide a detailed statement of associated costs. Each of your requests is addressed separately below.

Fee waiver

The FOIA provides that fees may be lowered or waived "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. §552(a)(4)(iii). Section 792.27 of NCUA's FOIA regulation restates this test and sets forth the factors NCUA considers in making a determination on a fee waiver request. 12 C.F.R. §792.27(a). NCUA will first determine: (1) whether the subject of the requested records concerns government operations or activities; (2) whether disclosure will contribute to an understanding of government operations or activities; (3) whether disclosure will contribute to the public understanding; and (4) whether disclosure is likely to contribute significantly to the public understanding of government operations or activities. Id.

After reviewing your FOIA requests, your request for fee waiver in those requests, and the additional information provided in your appeal letter, we conclude that you have not met the fee waiver requirements. In particular, and

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as discussed below, you have not demonstrated that your use of the information is likely to contribute significantly to the public understanding of NCUA.

First, you have not provided sufficient evidence that you will disseminate the information to the public. Your original FOIA request letters emphasized the perceived value of the requested information to your members as a reason to grant the fee waiver. Dissemination of information to your members is not sufficient to satisfy the public dissemination requirement.¹ In your appeal letter, you indicate that you provide information to the general public through news releases to the media and through your website and intend to disseminate the requested information through those outlets. Providing information to the media, by itself, is insufficient to establish the requisite public distribution. Larson v. CIA, 644 F.Supp. 15, 19 n.3 (D.D.C. 1987), aff'd 843 F.2d1481 (D.C. Cir. 1988). We reviewed your website for evidence that you have published similar information about other agencies with NTEU-organized employees and examined all the links from the home page. We also ran key word searches using terms from your FOIA request like “position descriptions,” “critical job elements,” “disciplinary letters,” “travel vouchers,” and “affirmative action.” We determined that you have not posted documents like those requested from NCUA or analysis of such documents. We did not find evidence that you have or will provide such information to the general public. We believe the purpose of your requests is as you stated originally, namely, to serve your members by contributing to NTEU’s overall understanding of government operations. Accordingly, we conclude that disclosure will not contribute significantly to public understanding of government operations or activities.

Second, it is not clear how the information requested, even assuming you made it available to the public, is likely to add to the public understanding of NCUA. All federal agencies have the types of documents and information you requested, and the fact that the NCUA maintains and uses such documents is already a matter of public record. You state generally that the information requested concerns the “equal treatment of NCUA employees” and the “equal application of personnel practices and policies.” The inference is that you are looking for evidence of unequal treatment at NCUA. Your appeal letter, however, does not make any specific claims of unequal treatment or indicate how the requested

¹ National Treasury Employees Union v. Griffin, 811 F.2d 644, 648-49 (D.C. Cir. 1987). In your appeal, you also cite to a provision of the Federal Service Labor-Management Statute that states labor organizations in the civil service serve the “public interest.” 5 U.S.C. §7101(a). Public interest as a factor in determining a fee waiver under FOIA, however, focuses on whether the disclosure is likely to contribute to public understanding, not whether the requester, itself, is an entity that serves a public interest. Neither your request nor your appeal establishes a link between disclosure to you and a significant benefit to the general public.

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information will likely demonstrate such unequal treatment. As stated by the District Court for the District of Columbia when considering a similar FOIA fee waiver request by another federal union:

Society undoubtedly has an interest in discovering and subjecting unlawful agency action to public scrutiny, but the Union's allegations of malfeasance here are too ephemeral at the moment to warrant such a search at public expense without further reason to suppose that the corruption suspected will be found.

AFGE v. United States Dep't of Commerce, 623 F.Supp. 1272, 1278 (D.D.C. 1986), aff'd on other grounds, 907 F.2d 203 (D.C.Cir. 1990). Accordingly, you have not met the burden of demonstrating how the information requested is likely to add anything to the existing public understanding of NCUA.

Category of requester.

NCUA regulations provide several fee categories for different types of FOIA requesters. 12 C.F.R. §792.20. Commercial requesters pay full fees for search, review, and duplication. News media and certain educational and scientific institutions pay only for duplication and get the first 100 pages free. Requesters that are not commercial requesters and not news media, educational, or scientific requesters are placed in an "others" category and pay for duplication and search, but get 100 pages free and two hours of free search time.

NCUA regulations state that a commercial use request "means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester . . ." 12 C.F.R. §792.20(a). Ms. Salva determined that NTEU was a commercial requester for purposes of these FOIA requests because it requested the information as a service to its members provided in exchange for the dues paid by members and that this constitutes a commercial product. In its appeal, NTEU argues that it is a news media requester. 12 C.F.R. §792.20(d). In the alternative, NTEU argues that it should be charged fees as an "other" requester.

News media requesters are those "actively gathering the news for an entity that is organized and operated to publish or broadcast news to the public." 12 C.F.R. §792.20(d). NTEU does not meet this definition. NTEU's primary function is to represent its members, not to educate or inform the public. Any press function it performs is only incidental to its primary function.

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We also see no reason to classify NTEU as an “other” requester instead of a “commercial requester.” While there is little in the way of legislative history or case law that helps define the meaning of “commercial” in the requester context, there is case law that explores the concept of “commercial” as used in FOIA exemption four. 5 U.S.C. §552(b)(4). The Second Circuit Court of Appeals has considered whether information provided by a union to the government would be exempt from release to a third party because it was commercial or financial information protected by exemption four. In that context, the Second Circuit stated:

Evidently the district court thought . . . that the information sought is not commercial or financial because the [International Brotherhood of Teamsters] does not have profit as its primary aim. This interpretation gives much too narrow a construction to the phrase in question. "Commercial" surely means pertaining or relating to or dealing with commerce. Labor unions, and their representation of employees, quite obviously pertain to or are related to commerce and deal with the commercial life of the country.

American Airlines vs. National Media Board, 588 F.2d 863, 870 (2d Cir. 1978). We believe your stated intent to use the requested information to represent your members is for a commercial purpose, supporting our conclusion that your FOIA requests are commercial use requests. Accordingly, we deny your request to be classified as an “other” requester.

Additional Information About Fee Estimates.

You have asked for more information about how we estimated the fees. We have provided more detail in the matrix below:

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Log#	Date	Description of Request	Estimated Search/Review Fees
261	9-7-04	All personnel regulations	10 hrs profes. staff @ \$50/hr = \$500 10 hrs clerical staff @ \$19/hr = \$190 Total = \$690
270	9-8-04	All employee position descriptions	20 hrs profes. staff @ \$50/hr = \$1000 10 hrs clerical staff @ \$19/hr = \$190 Total = \$1190
271	9-9-04	All bargaining unit employee performance standards	22 hrs profes. staff @ \$50/hr = \$1100 10 hrs clerical staff @ \$19/hr = \$190 10 hours computer search time = \$560 Total = \$1850
273	9-13-04	All disciplinary letters over 5 years	30 hrs profes. staff @ \$50/hr = \$1500 Total = \$1500
277	9-21-04	All health and safety inspection forms and safety complaints over 3 years	6 hrs clerical staff @ \$19/hr = \$114 Total = \$114
282	9-23-04	All grievance files over 2 years	30 hrs profes. staff @ \$50/hr = \$1500 5 hrs clerical staff @ \$19/hr = \$95 Total = \$1595

You have also asked us about duplication charges. We charge for duplication as described in §729.19(c) of our regulations. 12 C.F.R. §729.12(c). For additional information about NCUA FOIA fees, go to our website at <http://www.ncua.gov/FOIA/feesched.html>.

We have suspended processing of the FOIA requests outlined in Ms. Salva's letter of October 22, 2004. Please advise us in writing if you agree to pay all the

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fees associated with your various FOIA requests. When we receive your written agreement we will reinitiate the processing of these FOIA requests.

Sincerely,

Robert M. Fenner
General Counsel

GC/PMP:bhs
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