

February 22, 2005

Ms. Patricia Somlo
Williams Kastner & Gibbs, PLLC
888 SW Fifth Avenue, Suite 600
Portland, OR 97204-2025

Re: Your FOIA Appeal dated January 26, 2005

Dear Ms. Somlo:

On December 27, 2004, you wrote to NCUA's Office of General Counsel requesting any and all documents regarding the proposed merger of the Portland Teachers Credit Union and the Oregon Community Credit Union. Your request for documents was made pursuant to the Freedom of Information Act (FOIA). Dianne M. Salva, NCUA, FOIA Officer/Staff Attorney, responded to your FOIA request on January 24, 2005. Ms. Salva released approximately 210 pages responsive to your request. Partial redactions were made to some of the documents released pursuant to exemptions 4, 6, and 8 of the FOIA (5 U.S.C. §552(b)(4), (6), & (8).) No documents were withheld in full. We received your January 26, 2005 appeal of Ms. Salva's determination on January 31, 2005. You have not appealed the application of the exemptions to the redacted documents you received. You believe that certain documents requested were withheld in full. As noted, no documents were withheld in full. We have now determined that 58 pages of additional documents not originally reviewed are responsive to your FOIA request. Hence your appeal is granted. We have reviewed these documents for release pursuant to your appeal. Approximately 34 pages are now released, some with redactions pursuant to exemptions 4, 5, and 8 of the FOIA (5 U.S.C. §552(b)(4), (5), & (8)). Approximately 24 pages are withheld in full pursuant to exemptions 5 and 8. The newly released pages are enclosed. The applicable exemptions indicate redacted/withheld pages. A short explanation of the applicable exemptions follows.

Exemption 4

Credit union commercial information was withheld from one document 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 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 stricter substantial harm prong of National Parks as noted in Critical Mass. Therefore, the commercial information is withheld pursuant to exemption 4.

Exemption 5

Information contained in internal memoranda, e-mail, phone notes, and regional summaries 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, 1048 (D.C. Cir. 1982). The first and third policies enumerated in Russell apply in this case; therefore the information noted is withheld pursuant to exemption 5.

Exemption 8

Portions of credit union examinations as well as examination information found in other documents 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).

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Examination reports and related documents prepared by state regulatory agencies as well as those prepared by federal agencies are protectible under exemption 8. Atkinson v. FDIC, No. 79-1113, 1980 U.S. Dist. LEXIS 17793 at *4 (D.D.C. Feb. 13, 1980). Examinations and examination related information fits squarely within 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 at *4. Courts have interpreted exemption 8 broadly and have generally not required agencies to segregate and disclose portions of documents unrelated to the financial state of the institution. Atkinson at **4-5. It is appropriate to withhold entire documents pursuant to this exemption. We believe that the purposes of exemption 8 are met; therefore, credit union examinations and examination information is withheld in its entirety pursuant to exemption 8.

In your appeal letter you requested an index of any withheld information. The types of information withheld and the applicable FOIA exemptions are set forth above. Courts have held that an index is not required during the administrative process. Such indices are not generally required in FOIA litigation until the filing of summary judgment motions.

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 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
05-0201