

May 3, 2006

Ms. Catherine Mabrey  
(b)(6)

Re: Your FOIA Appeal received April 10, 2006

Dear Ms. Mabrey:

On January 23, 2006, you e-mailed staff at NCUA's Asset Management and Assistance Center requesting certain records. On January 30, 2006, following up on your e-mail, you filed a Freedom of Information Act (FOIA)/Privacy request for copies of your file from Diakonia Credit Union. Dianne Salva responded to your request on March 1, 2006, enclosing approximately 168 pages of responsive documents. Two documents were withheld pursuant exemptions 5 and 8 of the FOIA, 5 U.S.C. §552(b)(5) and (8). We received your undated appeal April 6, 2006. You appeal the withholding of the two documents. Your appeal is granted in part and denied in part. Enclosed is one of the pages previously withheld. The second document continues to be withheld pursuant to exemptions 5 and 8 of the FOIA. An explanation of exemptions 5 and 8 follows.

#### 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; the deliberative information withheld continues to be withheld pursuant to exemption 5.

## 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). 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). 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). Courts have generally not required agencies to segregate and disclose portions of documents unrelated to the financial condition of the institution. See Atkinson No. 79-1113, 1980 U.S. Dist. LEXIS 17793, at \*4-5 (D.D.C. Feb. 13, 1980). 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 at \*4. Some of the information on the withheld document concerns a credit union’s financial condition. The purposes of exemption 8 are met; therefore, the document (one page) continues to be withheld pursuant to exemption 8.

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 you reside, where your principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner  
General Counsel

Enclosure

GC/HMU:bhs  
06-0415  
06-FOI-00050