

November 19, 2008

Gregory Taylor, Associate General Counsel
American Bankers Association
1120 Connecticut Avenue, NW
Washington, DC 20036

Re: FOIA Appeal dated September 29, 2008

Dear Mr. Gregory:

On May 14, 2008, you made a Freedom of Information Act (FOIA) request for documents reflecting final agency approval and all documents actually considered by NCUA in approving underserved areas for nineteen federal credit unions. You subsequently modified your request eliminating two credit unions from the list and correcting the indicated underserved areas for two others. Linda Dent of our Office provided interim responses to you on June 18, 2008, August 29, 2008, and September 29, 2008. Ms. Dent provided a final response on September 30, 2008, enclosing approximately 1346 pages, some of which were partially redacted, and withholding approximately 723 complete pages. Information was withheld pursuant to exemptions 2, 4, 5, 6, and 8 of the FOIA. 5 U.S.C. §552(b)(2), (4), (5), (6), and (8). We received your September 29, 2008 appeal on September 30th. You appeal both the applicability of the exemptions and the lack of specificity concerning the types of documents withheld. Your appeal is denied. We address specific exemptions as well as your argument for more specificity in the types of documents withheld below.

Nature of Material Withheld

Although you do not specifically request a document-by-document listing of records withheld, you state that you cannot identify the types of materials that have been withheld, even in the most general of terms. We are not required to give a description of the documents withheld at this point, only an estimate of the amount of records and the reasons for withholding the records (applicable exemptions). A listing of the nature of records withheld and the applicable FOIA exemptions is known as a Vaughn index. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). It is well-settled law that a requester is not entitled to receive a Vaughn index during the administrative process. Schwarz v. United States Department of Treasury 131 F. Supp. 2d, 142 (D.D.C. 2000). Courts generally do not require the submission of a Vaughn index prior to the time at which a dispositive motion (motion for summary judgment) is filed. Tannehill v. Department of the Air Force, No. 87-1335, slip op. at 1 (D.D.C. Aug. 20, 1987). We do note that most of the responsive records withheld consist of examination reports and other materials concerning

credit union examinations, e-mail and traditional correspondence both within NCUA staff and between NCUA staff and other parties, drafts and internal memoranda concerning the credit unions, and commercial/financial information concerning the credit unions found in applications and other submissions to NCUA .

As noted, both the documents fully withheld and the portions of documents not released were withheld pursuant to exemptions 2, 4, 5, 6 and 8 of the FOIA. Many of the documents contained information withheld pursuant to more than one of the noted exemptions. The exemptions are discussed below.

Exemption 2

We first note that minimal information was withheld pursuant to Exemption 2. The nature of the material withheld under this exemption was limited to agency routing information. Exemption 2 of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. §552(b)(2). The courts have interpreted exemption 2 to encompass two distinct categories of information: trivial matters referred to as "low 2" information and more substantial internal matters referred to as "high 2" information. See Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information withheld under exemption 2 in this case was "low 2" information. In addition, the documents that contained low 2 information also contained information withheld under other exemptions, most notably CAMEL code information subject to exemption 8, (See discussion below.) Since there was no substantive information withheld pursuant to exemption 2, we have determined not to go through the process of producing those documents, redacting out information withheld pursuant to other exemptions and granting a discretionary release of routing information. The routing information continues to be withheld pursuant to exemption 2.

Exemption 4

Information withheld pursuant to Exemption 4 includes financial projections of the credit unions, statements of financial condition, comparative balance sheets, income and expense statements and business and marketing plans. It is not the type of credit union financial information available on NCUA's website. Exemption 4 protects, in part, commercial or financial information obtained from a person that is privileged or confidential. 5 U.S.C. §552(b)(4). The term "commercial" has been broadly 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). All information withheld meets this standard of commercial/financial information. Information "obtained from a person" has been held to include information obtained from a wide range of entities including individuals, associations, corporations and public and private entities, other than agencies. Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). All of the commercial/financial information withheld pursuant to exemption 4 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 have looked to the stricter two-prong National Parks standard to determine whether the commercial/financial information should be withheld pursuant to exemption 4. We believe that release of the commercial/financial information would impair NCUA’s authority to obtain necessary information in the future. The financial information continues to be withheld pursuant to exemption 4. We note that in making the decision to withhold information pursuant to exemption 4 we received input from the credit unions submitting the information pursuant to the submitter notice requirements of NCUA’s FOIA regulation. (See §792.29 of NCUA Regulations, 12 C.F.R. §792.29.)

Exemption 5

Internal notations, memoranda, e-mail, correspondence, and predecisional documents were 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, attorney work product privilege and attorney client privilege. The information withheld in this case falls under 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). Policies (1) and (3) as enumerated in Russell apply to the documents withheld pursuant to the deliberative process privilege of exemption 5 in this case. Therefore the material withheld pursuant to the deliberative process privilege of exemption 5 remains exempt from disclosure.

Exemption 6

Like exemption 2, very little information was withheld pursuant to exemption 6 in this request. A minimal amount of information consisting of home addresses, telephone numbers and e-mail addresses were withheld pursuant to exemption 6. We note that exemption 6 information is not limited to personal information of agency or NCUA personnel. 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). It includes any personal information. 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. Therefore the minimal personal information continues to be withheld pursuant to exemption 6.

Exemption 8

Documents withheld pursuant to exemption 8 consist of credit union examination reports, other examination information, as well as e-mail and correspondence based on or pertaining to examination information. 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). Examination reports as well as their follow-up and internal memoranda containing specific information about named financial institutions have been withheld pursuant to exemption 8. See Atkinson v. FDIC, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, (D.D.C. Feb. 13, 1980) and Wachtel v. Office of Thrift Supervision, No. 3-90-833, slip op. (M.D. Tenn. Nov. 20, 1990). 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). 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. Therefore any document withheld pursuant to exemption 8 can be withheld in full. 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. The examination records and related information withheld are within the scope of exemption 8 pursuant to Consumers Union and McCullough. Withholding the responsive documents meets the purposes of exemption 8. Therefore, the documents continue to be withheld pursuant to exemption 8. We also note that much of the material withheld pursuant to exemption 8 also contains information withheld pursuant to other exemptions discussed in this appeal. Any record which contains exemption 8 information is withheld in full.

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

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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

GC/HMU:bhs
08-1050
08-FOI-00086
08-APP-00003