

December 22, 2008

(b)(6)

Re: FOIA Appeal dated November 18, 2008

Dear (b)(6):

You filed a Freedom of Information Act (FOIA) request on September 2, 2008 and a Privacy Act request on October 4, 2008. You requested various records related to the merger of Metropolitan Baptist Church Federal Credit Union and HEW Federal Credit Union. Linda Dent, NCUA staff attorney, responded to both requests in one response dated October 22, 2008. Your request was granted in part and denied in part. You received 10 pages of documents, some of which were partially redacted. Twenty-two pages were withheld in full. Pages withheld in full and redactions were made pursuant to exemptions 4, 5, 6, and 8 of the FOIA, 5 U.S.C. 552(b)(4), (5), (6), & (8).

We received your November 18, 2008 appeal on November 20th. In addition to appealing the denial of records, you asked several questions pertaining to your request and Ms. Dent's response. Your appeal is denied pursuant to exemptions 5, 6 and 8; the exemptions are discussed below. There were no documents or redactions made pursuant to exemption 4. We have also addressed the other items you raise in your appeal. We note that in general the FOIA provides for access to government records and the Privacy Act provides for maintaining the privacy of government records. These Acts do not require an agency to address other substantive concerns.

In the second paragraph of your appeal you address item a. of your initial request: a copy of the ballots cast for accounts 1405 and 1860 allegedly voted by (b)(6). Ms. Dent responded that no records were located in response to this item. You state that you believe the ballots are in the possession of the Region II Director. We reviewed the records held by Region II and did not find copies of the ballots cast for accounts 1405 and 1860.

We are unclear exactly what you are requesting in the third paragraph of your appeal. You refer to the 10 partially redacted pages you received and state these pages "are not from the ballots as requested but are from the supposedly validated mailing list ..." The only ballots mentioned in your original FOIA request were those cast by Mrs. Weston as noted in the above paragraph. You did not request copies of any other ballots. We note here that if ballots were requested and located, they would probably be withheld pursuant to exemption 6 (the privacy exemption). The ballots may be subject to other exemptions as well.

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In the fourth paragraph of your appeal you request "a listing of the 22 pages withheld responsive to items b through e and cite the specific FOIA/Privacy exemption for each item." First, under the Privacy Act, records are generally only disclosed to the person about whom the records pertain. Records are only released pursuant to a particular exemption. Under the FOIA, we are not required to give a description of the documents withheld at this point, only an estimate of the amount of records (22 pages) 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 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 the types of records withheld pursuant to each exemption discussed below.

In the fifth paragraph of your appeal, you state that you requested items a through f (of your original request) from the credit union president; he denied your request and you submitted a response to the denial to which he has not replied. In the seventh paragraph of your appeal, you asked for an explanation of the discrepancy in the numbers of members voting on the merger issue. Neither the Privacy Act nor the FOIA provide any remedy for these two issues.

In the sixth paragraph of your appeal, you request the names of all persons voting in the March 29, 2008 merger election rather than how the votes were cast. This information is withheld pursuant to exemption 6 discussed below.

Exemption 5

Internal e-mail, telephone notes and notations on other 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. 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 policy enumerated in Russell applies to the documents withheld pursuant to the deliberative process privilege of exemption 5 in this case. Therefore the

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material withheld pursuant to the deliberative process privilege of exemption 5 remains exempt from disclosure.

Exemption 6

Names of members who voted and their credit union account numbers and e-mail addresses were withheld pursuant to exemption 6. 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. Individuals' privacy interests outweigh any public interest in disclosure. Therefore the personal information continues to be withheld pursuant to exemption 6.

Exemption 8

Documents withheld pursuant to exemption 8 consist of correspondence and email concerning examination of the credit union. 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). 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 v. FDIC, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, at *4-5 (D.D.C. Feb. 13, 1980). 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. Even records of financial institutions that are no longer in operation can be withheld pursuant to exemption 8 in order to serve the policy of promoting "frank cooperation" between the institution and agency officials. Gregory v. FDIC, 631 F.2d 896, 899 (D.C.Cir. 1980). The records withheld are within the scope of

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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.

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

GC/HMU:bhs
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