

December 19, 2008

Louis N. Haas, Esquire
Haas Najarian LLP
58 Maiden Lane, 2nd Floor
San Francisco, CA 94108

Re: FOIA Appeal dated December 8, 2008

Dear Mr. Haas:

On October 6, 2008, you made a Freedom of Information Act (FOIA) request for a copy of all communications and documents relating to Kaiperm Federal Credit Union contained in NCUA's files, including any of its regional offices, originated during the time period from September 9 through October 6, 2008. We received your request on October 8th. Staff attorney Linda Dent responded to your request on November 7th releasing 30 pages, some of which were partially redacted, and withholding 19 full pages 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 December 8th appeal on December 10th. You appeal the application of the exemptions to the pages that were withheld in full. You also believe you should have been given more specificity concerning the types of documents withheld. Your appeal is denied. We address the specific exemptions as well as your argument for more specificity in the types of documents withheld below.

Nature of Material Withheld

You seem to argue that because we did not give you a page-by-page listing of records withheld and the exemption(s) applicable to each, NCUA has waived its right to use those exemptions. The law does not require us 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) as well as your right to appeal and the name and title of the person(s) responsible for the denial. 5 U.S.C. §552(a)(6)(A)(i), (a)(6)(C)(i). All of the required information was given to you in Ms. Dent's letter. A specific 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 note that the responsive records withheld include e-mail, internal NCUA memoranda, NCUA routing sheets some with internal notations, a draft letter, and schedule F to the Purchase and Assumption Agreement that you received.

As noted, the documents were withheld pursuant to exemptions 2, 4, 5, 6 and 8 of the FOIA. Some of the documents contained information withheld pursuant to more than one of the noted exemptions. The exemptions are discussed below.

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, at least one of the documents that contained low 2 information also contained information withheld under exemptions 5. (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 data concerning Kaiperm FCU including Schedule F to the Purchase and Assumption Agreement. 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 commercial/financial information continues to be withheld pursuant to exemption 4.

Exemption 5

Internal notations, memoranda, e-mail, and a draft letter 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

Minimal information including a few home and e-mail addresses was 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). 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

Information withheld pursuant to exemption 8 consists of credit union examination and related information, found in internal memoranda and other documents. 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. Courts have held that information pertaining to closed financial institutions can be withheld to serve the purposes of exemption 8. Gregory v. FDIC 631 F.2d 896, 899 (D.C. Cir. 1980). The information withheld is within the scope of exemption 8 pursuant to Consumers Union, McCullough and Gregory. Withholding the information meets the purposes of exemption 8; therefore, the information continues to be withheld pursuant to exemption 8. We also note that some of the material withheld pursuant to exemption 8 is also 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 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,

/S/

Robert M. Fenner
General Counsel

GC/HMU:bhs
08-1215
09-FOI-00007
09-APP-00005