

September 1, 2010

Donald N. Hester
(b)(6)

RE: FOIA Appeal No. 2010-APP-00012

Dear Mr. Hester:

The National Credit Union Administration (NCUA) considers your letter of August 6, 2010, addressed to Staff Attorney Linda Dent, to be an appeal of the initial determination made by Ms. Dent, as reflected in her letter to you of July 30, 2010, denying your request for a waiver of fees under the Freedom of Information Act (FOIA) and NCUA regulations. You made the waiver request in connection with your initial FOIA request, seeking copies of certain records pertaining to the names of Federal credit unions closed for liquidation in Utah during the period of 2008 – 2010.¹

The FOIA provides that fees may be lowered or waived “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. §552(a)(4)(iii). Section 792.27 of NCUA’s FOIA regulation restates this test and sets forth the factors NCUA considers in making a determination on a fee waiver request. 12 C.F.R. §792.27(a). The rule specifies that NCUA will consider the following factors in making its determination of whether the public interest requirement is met:

- (1) Whether the subject of the requested records concerns identifiable operations or activities of the government, with a connection that is direct and clear;
- (2) Whether the disclosable portions of the requested records are meaningfully informative about government operations and activities in order to be likely to contribute to an understanding of government operations or activities. Information already in the public domain, either in a duplicate or substantially identical form where nothing new would be added to the public's understanding, would not be meaningfully informative;
- (3) Whether disclosure of the requested information will contribute to public understanding, meaning a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. Representatives of the news media are presumed to satisfy this consideration; and
- (4) Whether the disclosure is likely to contribute significantly to public

¹ We note that your August 6 letter expanded this request. As discussed in detail in this letter, our determination with respect to the waiver of fees applies equally to the expanded request.

understanding of government operations or activities. The level of public understanding before disclosure must be enhanced by the disclosure to a significant extent.

Id. The rule goes on to describe how, if the public interest requirement is met, the NCUA will then evaluate the question of whether the commercial interest requirement is met.

Applying the foregoing principles to your initial FOIA request and your August 6 letter, we conclude that you have not met the fee waiver requirements. In particular, you have not demonstrated that the information you sought is meaningfully informative about government operations or activities, or that your use of the information is likely to contribute significantly to the public understanding of the operations or activities of the NCUA.

The initial consideration in evaluating a waiver of fees request under FOIA focuses on the subject of the request, which must relate to the operation or activities of the government. In this case, it is clear that action taken by NCUA in resolving insolvent credit unions is a governmental activity. However, the information you sought sheds no light on either the operation or the activities of the government. It is, instead, simply factual information about Utah institutions that have been liquidated by the Agency (or, as per your second request, engaged in a merger). With respect to the first category, the fact that NCUA liquidates insured institutions that have become insolvent (as the FDIC does for insolvent banks) is already public information. With respect to the second category (mergers), such transactions typically occur at the instance of the affected institutions, without specific involvement or direction from the NCUA. Accordingly, the dissemination of that information would not contribute to or enhance the public's understanding of how the agency operates. When the information that is responsive to a FOIA request contains nothing that is meaningfully informative on government operations or activities, then the requested FOIA disclosure would not at all contribute to an understanding of them.

Moreover, the agency routinely issues a press release each time an insured credit union is liquidated. A link to these liquidation press releases dating to 2009 is accessible on our website. Information concerning merger activity is also available on our website. Furthermore, when an insured institution is closed for insolvency, public notice is routinely provided, including by publication and specific notice to members and creditors. 12 C.F.R. §§709.4 (creditors); 745.200 (members). With respect to merger activity, under our rules a federal credit union that merges with another institution must solicit member input on the decision and obtain the approval of a majority of its members who vote. 12 C.F.R. §708b.106. In that sense, therefore, the members of the public most likely to be affected by a merger of a credit union, i.e., its members, have already been made aware of it.

Accordingly, you have not met the burden of demonstrating how the information requested is likely to add significantly to the existing public understanding of the operations or activities of the NCUA. Your assertion to the effect that the information you seek "is in the public interest" is unsubstantiated and in any event does not satisfy the regulatory requirement that the information be meaningfully informative about government operations and activities. In addition, you have failed to provide any indication or assurance that you intend to disseminate the information publicly. Your letter indicates, instead, simply that you may decide to share the information with your local newspaper or write an article yourself. Even if the information were sufficiently meaningful to meet the requirement in the regulation concerning the operations or activities of government, waiver of fees associated with responding to the request is only appropriate where we have some indication that the requester is capable of and intends to make an effective dissemination of the information to a reasonably broad audience of persons interested in the subject.

The third category of information you requested, i.e., a listing of financially troubled institutions, is exempt from disclosure under FOIA based on exemption (8), codified at 5 U.S.C. §552(b)(8); see also NCUA's regulation implementing this provision, 12 C.F.R. §792.11(a)(8). The exemption specifically provides that matters that are "contained in or related to" reports concerning the financial condition of financial institutions regulated by the NCUA are exempt from disclosure. The courts have consistently provided a broad interpretation of this exemption. See, e.g., *Gregory v. FDIC*, 631 F. 2d 896, 898 (D.C. Cir. 1980). Accordingly, the issue of associated fees with respect to this aspect of your request is moot.

You should note that the foregoing analysis is focused on the issue of the public interest aspect of your request. Given our conclusion, we do not reach or address the issue of whether you would use the information for commercial purposes.

As noted in Ms. Dent's letter to you of July 30, 2010, we have suspended processing of your FOIA request pending a resolution of the fee waiver issue. Please advise us in writing if you agree to pay the fees associated with your request. When we receive your written agreement we will reinstate the processing of the FOIA requests. If we have not received anything from you before September 16, we will close our file on this matter.

Sincerely,

Robert M. Fenner
General Counsel