

December 7, 2010

Jessica A. Shoemaker, Esq.  
(b)(6)

Re: FOIA Appeal dated November 2, 2010

Dear Ms. Shoemaker:

On March 18, 2010, you filed a Freedom of Information Act (FOIA) request for any correspondence, communication, meeting notes or agendas, transcripts, or any other records of any exchanges between the National Credit Union Administration (NCUA) and Centrix Financial (Centrix), various other Centrix-related entities, individuals representing any of those entities, and two listed insurance companies. On April 14<sup>th</sup>, Linda Dent, staff attorney in NCUA's Office of General Counsel, responded to your request, partially granting it. Ms. Dent enclosed a CD containing approximately 1,900 pages, some with partial redactions. NCUA withheld approximately 3,700 pages pursuant to exemptions 4, 5, 6 and 8 of the FOIA, 12 U.S.C. §552(b)(4),(5),(6),and (8). You appealed Ms. Dent's determination on May 13<sup>th</sup>. You noted in your appeal that the bulk of the documents received did not appear to be responsive to your request in that they did not reflect actual exchanges or communications between NCUA and Centrix or one of the other entities or individuals listed in your request.

On June 2<sup>nd</sup>, Hattie Ulan, an attorney in the Office of General Counsel assigned to work on your appeal, contacted you to discuss it. In this conversation and others, Ms. Ulan confirmed that the bulk of both the documents you received and those that were withheld did not reflect communications or exchanges that you had requested. She noted that a few of the withheld documents as well as several additional documents maintained separately were responsive to your March 18<sup>th</sup> request. You agreed to have NCUA review these newly identified documents as a new FOIA request, and asked that NCUA not respond to your May 13<sup>th</sup> appeal until after you had a chance to review the newly identified documents. This agreement was confirmed in writing in my letter to you of June 10, 2010. By letter dated September 30, 2010, Ms. Dent provided our response to this new request, which included 275 pages of material, some of which were partially redacted. NCUA withheld 29 full pages of responsive material in this determination. By letter of November 2, 2010, you wrote to appeal the treatment provided in connection with NCUA's initial and subsequent determinations. This letter constitutes our response to both the May 13 and the November 2 appeals.

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With respect, first, to the initial determination, we have again reviewed both the materials that were provided and the materials that were not produced. As you have noted, the bulk of the material actually provided was not, in fact, responsive to your request. With respect to material that was not responsive, whether or not the material was also properly subject to partial redaction based on the applicable exemptions in FOIA is immaterial. Based on our review, the partial redactions made in connection with the very limited amount of material that was responsive were supportable under the FOIA exemptions identified with each redaction. We have, in addition, again reviewed the 3,700 pages of material that were not produced in the initial determination. Our review indicates that all of these materials were either non-responsive, duplicative of material that was produced in the initial determination, or dealt with as part of the second determination. As with the partial redactions discussed above, the extent to which specific FOIA exemptions were noted in support of entire redactions in connection with material that was not responsive to the request is likewise immaterial. Your appeal, to the extent that it pertains to materials associated with the initial determination, is therefore denied.

With respect to your appeal of the subsequent determination, we have reviewed all of the documents identified pursuant to that production, including materials that were partially or fully subject to redaction. As discussed below, in some cases we have determined that the scope of the initial redaction may appropriately be scaled back, and we have produced some material that had been entirely withheld. Our search was also successful in locating some items, as noted in your appeal, that were identified as enclosures to produced materials but which were not included in the material that was produced. We also found some additional responsive material that was not included in the material that was produced. As a result, we have identified 37 pages of additional material that are responsive to your request, some of which are partially redacted. These materials are enclosed. As described more specifically below, we have withheld in full 36 additional pages of responsive documents, pursuant to exemptions (b)(4),(6) and (8). 5 U.S.C. §§552(b)(4),(6),(8).

In connection with your review of these documents, you should note the following. We acknowledge and have taken into account your argument that the fact Centrix has been bankrupt and out of business for several years ought to bear on the extent and applicability of some exemptions. Accordingly, we have now produced some material that was initially withheld, such as audited financial statements for Centrix for 2003. A similar rationale supports the release of some other materials initially withheld entirely, such as handwritten notes concerning a meeting between NCUA and Centrix personnel held in September of 2002 and a copy of the July 6, 2005, letter to Lyndon Property Insurance Company (Lyndon). We were able to locate all of the attachments identified in the Centrix letter to NCUA of January 7, 2005, including more financial statements of Centrix, which are produced. We have withheld the credit union customer list (another of the attachments, comprising 8 pages), which is exempt from production based on 5 U.S.C. §552(b)(8), pertaining to information about the institutions we regulate. We believe the fact of a credit union's having had a customer relationship with Centrix remains sensitive and the noted exemption supports its non-disclosure. With respect to the SAS 70 Report for 2003, also noted as an attachment to the January 7 letter, this material was included in the initial determination and produced to you as part of that release. We are, therefore, not re-producing it here.

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The fifth document noted as an attachment to the January 7 letter is a loss prevention/reinsurance agreement between two Everest Insurance companies (Everest) and Founders Insurance Company. We are withholding the production of this document, comprising 17 pages, pending receipt of comment from Everest as to its position concerning the release. You should note, in this respect, that the agreement contains commercial information, within the meaning of exemption (b)(4), which was provided to NCUA voluntarily by Centrix with a request that it be preserved in confidence. As such, ordinarily, the document would not be subject to release under FOIA. *Critical Mass Energy Project v. NRC*, 975 F. 2d 871 (D.C. Cir. 1992) (en banc). Even though Centrix is out of business, we believe the proper practice is to notify Everest of the request and solicit its views on release, since its financial interests are also affected. See *Board of Trade v. Commodity Futures Trading Commission*, 627 F. 2d 392, 405 (D.C. Cir. 1980). We have made that request of Everest and will make our final determination after receipt and consideration of its views. We believe similar treatment is warranted with respect to Everest's letter to NCUA dated August 9, 2005. This letter, comprising 7 pages, contains commercial and financial information and was voluntarily provided to NCUA. Under exemption (b)(4), such information would not be releasable under FOIA, insofar as it contains information that the submitter would ordinarily not make public. *Critical Mass, supra*. However, given the passage of time since the date of the letter, and the fact that Centrix is out of business, we are soliciting the views of Everest as to any objections to its release.

You should note that NCUA never did receive a copy of the settlement agreement pertaining to litigation involving Centrix and arising in U.S. District Court for the Southern District of California; accordingly, we have not produced it. Your appeal also discusses a letter dated July 6, 2005, from NCUA to Lyndon. This letter was withheld in its entirety from the materials that were produced to you, based on exemptions (b)(4) and (8). 5 U.S.C. §§552(b)(4),(8). We have reconsidered the applicability of these exemptions to this document and now produce it, subject to certain redactions pertaining to the identity of credit unions, pursuant to exemption (b)(8). Two pages of attachments to the letter, containing information about credit unions and individual borrowers, are withheld entirely, in accordance with exemptions (b)(8) and (b)(6), respectively. We are producing a letter from Lyndon dated October 21, 2005, responding to our July 6 letter, but have withheld the attachments to that letter, which consisted entirely of 2 pages of personal financial information concerning individual credit union members, which is exempt from disclosure under exemption (b)(6). 5 U.S.C. §552(b)(6). We are also producing some additional correspondence we located and some email between our office and representatives of Lyndon that were not included in either the initial or the subsequent determinations, again partially subject to the applicable, noted exemptions.

Finally, we have produced a copy of a draft warning that NCUA had considered using to notify credit unions about the dangers of dealing with Centrix, which document was referenced as an attachment to a July 26, 2005 letter (previously produced) from NCUA to Centrix. Although FOIA does not contemplate the release of draft materials, we are making a discretionary disclosure to you of this document. We are also providing you with a copy of my memorandum of July 12, 2007, to two NCUA Regional Directors, discussing communications between

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NCUA, Centrix, and Lyndon. Although this is an internal document and therefore not, strictly speaking, responsive to your request, we are producing it as a matter of discretion.

Subject to the possibility of our providing you with the additional materials discussed above involving Everest, this letter represents the final agency determination with respect to your appeal. You are entitled to file an action in federal court challenging our determination. 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). You may also consider pursuing an alternative dispute resolution under the auspices of the Office of Government Information Services (OGIS), a newly created arm of the National Archives and Records Administration charged with providing mediation services to resolve disputes between persons making FOIA requests and federal agencies. Using OGIS does not affect your right to pursue litigation. More information may be obtained at [www.archives.gov/ogis](http://www.archives.gov/ogis).

Please contact Ross Kendall at 703-518-6562 if you have any further questions.

Sincerely,

Robert M. Fenner  
General Counsel

Enclosures

GC/RPK:bhs  
10-1114  
10 FOI 00076 and 10-00111  
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