

May 11, 2011

Mr. Brian Smith  
LexisNexis Courtlink Document Retrieval  
13427 N.E. 16th Street, Suite 100  
Bellevue, WA 98005

RE: 11-FOI - 0024; 2011 – APP – 00006

Dear Mr. Smith:

By letter dated November 16, 2010, your firm submitted a Freedom of Information Act (FOIA) request seeking copies of all non-publically available documents and materials developed and maintained by NCUA in connection with two NCUA Docket numbers: 09-0029-CO, pertaining to U.S. Central Federal Credit Union, and 09-0030-CO, pertaining to Western Corporate Federal Credit Union (the Credit Unions). Your request specifically included, without limitation, (i) correspondence between the NCUA and the Credit Unions, their officers, directors, employees, agents or representatives; (ii) correspondence between the NCUA and any third party regarding the Credit Unions; and (iii) all documents produced by the NCUA to the director and officer defendants in connection with two matters in litigation: *Corporate America Credit Union v. Herbst*, 09-CV-02126 and *National Credit Union Administration v. Siravo*, 10-CV-01597.

By letter dated March 15, 2011, NCUA Staff Attorney Linda Dent wrote to your firm and advised that the request was being denied in full. Ms. Dent's letter stated the information you sought would be exempt from disclosure under exemptions 4, 5, 6, 7(C) and 8 of the FOIA. 5 U.S.C. §§552(b)(4),(5),(6),(7)(C) and (8). As explained by Ms. Dent, subsection (b)(4) protects from disclosure trade secrets and commercial or financial information obtained from a person that is considered privileged or confidential. Subsection (b)(5) protects from disclosure inter-agency and intra-agency memoranda which would not be available by law to a party in litigation with the agency. Subsection (b)(6) permits agencies to withhold information the disclosure of which would constitute an unwarranted invasion of personal privacy. Subsection (b)(7)(C) protects from disclosure law enforcement information which could reasonably be expected to constitute an unwarranted invasion of personal privacy. Subsection (b)(8) protects matters that are 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.

You filed an appeal by letter dated April 14, 2011. In your appeal, you questioned how every one of the documents identified by Ms. Dent as responsive to your request could

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conceivably have been protected by one or more of the cited exemptions. Your letter recites to policy pronouncements by President Obama and Attorney General Holder concerning the FOIA and suggests, in light of these, that NCUA should reevaluate its position. Your letter also asserts that NCUA ought to provide you with an index that describes each particular document being withheld and the basis on which an identified exemption applies to it. Your letter goes on to discuss your view as to the scope and general applicability of each of the noted exemptions, but concludes, as to each, that NCUA has not provided sufficient information about the responsive documents to enable you to make a determination about the applicability of that exemption.

As contemplated by the FOIA and in accordance with NCUA's regulation governing requests for information, 12 C.F.R. Part 792, the agency views the administrative appeal process as an opportunity to review the initial determination and to determine whether corrective steps are necessary or appropriate. Such a review begins, necessarily, with a determination as to the scope and content of the initial request. In this case, it appears that on initial review we may have misunderstood or misinterpreted the initial request. Consequently, while our reliance on the stated exemptions may have been appropriate based on our initial understanding of the request, in fact, as more fully developed below, another exemption applies, in full, to the request.

The request identifies two agency docket numbers and refers to materials "developed and maintained" by NCUA in connection with those docket numbers. Ms. Dent mistakenly understood those docket numbers to refer to the initial agency determinations to place each of the Credit Unions into conservatorship. In fact, however, as we presume you are aware, the two docket numbers refer to administrative Orders of Investigation, each signed on behalf of the NCUA Board by me as General Counsel on July 1, 2009. The operative language in each is essentially identical: both Orders authorize the agency, through named individuals, to investigate:

[W]hether, in connection with the business of [the Credit Unions or their affiliates] any person or entity is about to engage in, is engaging in, or has engaged in conduct, practices or transactions that constitute: (1) an unsafe or unsound practice; (2) a violation of the Federal Credit Union Act or any Federal or State statutes, or regulations promulgated thereunder; or (3) a breach of fiduciary duty; or (4) a financial risk to [the Credit Unions or their members] or to the National Credit Union Share Insurance Fund.

Pursuant to these Orders, investigations involving both Credit Unions are currently underway. Your request seeks information and materials developed and maintained by NCUA in connection with these investigations.

Exemption 7(A) of the FOIA provides, however, that an agency need not release information "compiled for law enforcement purposes" to the extent that the release of such information "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. §552(b)(7)(A). As more fully developed below, the language of

this exemption applies directly to the circumstances of this case and provides authority for the withholding in full of the responsive documents in the agency's possession. Your appeal is, accordingly, denied in full.

*Law enforcement purposes.* Applicability of the exemption is determined through a two-step analysis, the first of which is to establish whether a law enforcement proceeding is pending or prospective. The NCUA is an independent regulatory agency within the executive branch, charged with enforcement of the Federal Credit Union Act and regulations promulgated thereunder. 12 U.S.C. §§1751 et seq.; 12 CFR Parts 700 - 797. This includes, for example, the prosecution of administrative enforcement actions designed to prohibit unsafe or unsound actions by insured credit unions or their officers and employees, and the assessment of civil money penalties for violations of law, regulation or agency order. 12 U.S.C. §1786. It should be noted, in this respect, that there is no requirement in the FOIA limiting the applicability of Exemption 7(A) to agencies or investigations involving criminal law enforcement; civil enforcement of the type NCUA is engaged in also qualifies for the exemption. See, e.g., Rugiero v. Department of Justice, 257 F. 3d 534, 550 (6<sup>th</sup> Cir 2001)(explaining that Exemption 7 applies not only to criminal enforcement actions but to "records compiled for civil enforcement purposes as well").

In this case, non-public investigations are underway, supported by the Orders of Investigation issued under the two docket numbers identified in your request. A significant volume of material has been produced in response to administrative subpoenas issued pursuant to the Orders. Consideration is being given to potential enforcement actions involving individuals and other entities, as well as the possibility of claims involving civil liability based on breach of duties, fraud and/or gross negligence.

*Potential harm to the proceedings.* The second step of the analysis calls for an evaluation of the potential impact of a release of materials comprising the investigation. If release of the documents can reasonably be expected to undermine or hamper the proceedings, the exemption applies and release is not required. 5 U.S.C. §552(b)(7)(A). In this case, until such time as determinations are made concerning parties and theories of liability, it is clear that the premature release of the information and material that has been collected could undermine the proceedings. Premature release could show, for example, the areas on which the agency is focusing, the potential universe of defendants, the types of evidence the agency views as most important, and the potential theories of liability, at a time when the agency has not refined or finalized its evaluation or reached its conclusions. Such premature disclosure could be of significant value to parties having potentially adverse interests in the matter. It could, moreover, harm the agency's ability to develop and present its best case, on its timetable, using its best judgment concerning the evidence and the law. In addition, it would almost certainly have the effect of making the collection of further information and obtaining the cooperation of potential witnesses much more difficult.

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Case law on this point is clear: Exemption 7(A) applies whenever the agency's case in court could be harmed by the premature release of evidence or information, N.L.R.B. v. Robbins Tire and Rubber Co., 437 U.S. 214, 232 (1978), or when disclosure could impede any necessary investigation prior to the enforcement proceeding. See, e.g., Judicial Watch v. Department of Justice, 306 F. Supp 2d 58, 75-76 (D.D.C. 2004) (observing that releasing documents during the course of an investigation could damage the agency's ability to obtain information).

Case law is also clear that Exemption 7(A) is entitled to a broad interpretation and application. The government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding. The court will generally uphold application of the exemption if the judge is able to make a generic determination that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings. Barney v. I.R.S., 618 F.2d 1268, 1273 (8th Cir. 1980) (internal quotation marks and citations omitted); see also Lewis v. I.R.S., 823 F.2d 375, 379 (9th Cir. 1987); Wright v. O.S.H.A., 822 F.2d 642, 646 (7th Cir. 1987). As shown above, these criteria are met in this case.

Accordingly, to the extent documents have been developed and are maintained by the agency pursuant to the two docket numbers you have identified, Exemption (7)(A) of the FOIA is applicable and the materials will not be produced. You should note, in this respect, that to the extent responsive materials were produced or made available to parties involved in *Corporate America v. Herbst*, 09 CV 02126, the same were produced in accordance with Subpart C of Part 792 of NCUA's regulations and were subject to a protective order ensuring their confidentiality. See 12 C.F.R. 792, Subpart C. Accordingly, their status as non-public documents, entitled to protection under Exemption 7(A), is not affected by that treatment. Finally, you should also note that discovery has not yet begun in *NCUA v. Siravo*, 10-CV-01597; no documents have been produced to the defendants, and so there are no responsive documents concerning that aspect of your request.

The failure of the Credit Unions, two of the largest wholesale institutions in the country, created significant disruption and caused substantial losses throughout the credit union industry, affecting both natural person and corporate credit unions. NCUA has already produced and made public a substantial volume of information about the disruption in the corporate credit union industry and its impact. For example, Material Loss Reports prepared by the agency's Inspector General concerning each Credit Union are posted on the agency website, and another entire section of the website is devoted to discussing the agency's plan for the resolution of the corporate credit union system. The materials you have sought, however, fall outside those categories and are, for the reasons identified herein, exempt from disclosure.

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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

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11-0432  
GC/RPK/bhs