

November 4, 2008

Robert Lewis  
Law Offices of Ira S. Newman  
98 Cutter Mill Road, Suite 441 south  
Great Neck, NY 11021

Re: FOIA Appeal

Dear Mr. Lewis:

On August 29, 2008, you submitted a Freedom of Information Act (FOIA) request for information concerning whether Bay Ridge Federal Credit Union had ever applied for, or received any waiver, pursuant to §723.10(h) of NCUA's member business loan regulation (12 C.F.R. §723.10(h)), or any other statute or regulation, to increase their aggregate net member business loan balance to any one member or group of associated members pursuant §723.8. If any waivers were received, you also wanted to know the terms of the waiver, including the members or group of associated members to which the waiver or waivers apply, the maximum aggregate net member loan balance to any one member or group of associated members under the waiver or waivers, the date the waiver or waivers were granted and whether the waiver or waivers are currently in effect. Linda Dent of this Office responded to your request on September 29, 2008. Your request was granted in part and denied in part. Approximately ten pages of documents were withheld pursuant to exemptions 4, 5, and 8 of the FOIA. 5 U.S.C. §552(b)(4), (5), and (8). In lieu of providing documents, Ms. Dent provided you with narrative information concerning the waivers granted. The identity of members receiving waivers and well as other information concerning the waivers was withheld pursuant to exemption 4 and 8. We received your October 7<sup>th</sup> appeal on October 15<sup>th</sup>. You believe that exemption 4 and 8 should not be applied to records withheld. You have not appealed the application of exemption 5. You also request that additional information concerning the waivers be explained to you. Your appeal is denied; the records continue to be withheld pursuant to exemptions 4, 5, and 8 of the FOIA. Exemptions 4 and 8 and additional information pertaining to your appeal are discussed below.

Although Ms. Dent responded to your FOIA request by setting forth a narrative rather than providing redacted documents, NCUA is not required to answer questions posed as a FOIA request. Zemansky v. EPA, 767 F.2d 569, 574 (9<sup>th</sup> Cir. 1985). The FOIA does not require NCUA to respond to requests by creating records. Poll v. U.S. Office of Special Counsel, No. 99-4021, 2000 WL 14422, at \*5 n.2 (10<sup>th</sup> Cir. Jan. 10, 2000). Ms. Dent responded in a narrative form because the responsive documents include information outside the scope of your request or are otherwise exempt. The additional explanation that you request in your appeal (specifics about how loans subject to waiver affected business loan limits) is information that is withheld pursuant to exemption 4. Therefore the specific explanation you request is not being given.

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#### Exemption 4

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). “Financial information” has been held to include economic data generated by corporations or other business entities as well as personal financial information. Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C.Cir. 1974). The requested information meets the commercial/financial standard. 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. Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). The requested information was originally obtained from the credit union. The fact that this same information appears in the waiver generated by NCUA does not change the fact that the information was obtained from a person. The requested information 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 believe that the stricter standard applied for information required to be submitted is met in this case. Release of the requested specific business loan information could impair NCUA’s ability to obtain necessary information in the future.

#### Exemption 8

Some of the information withheld was a direct result of information originally found in an 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). 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.

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Atkinson v. FDIC, No. 79-1113, 1980 U.S. Dist. LEXIS 17793, at \*4 (D.D.C. Feb. 13, 1980).

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). The findings of an examination or its follow-up have been held exempt from disclosure. Atkinson. Some of the responsive information was found in a follow-up to an examination. This requested information continues 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 the requester resides, where the requester's 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  
08-1026