

You specifically referenced and attached the Attorney General's Memorandum on the FOIA in your appeal. Although this memorandum is primarily focused on openness, it also states that "the obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example ... personal privacy ... The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failure might be revealed..." In this case, the vast majority of information withheld is withheld pursuant to the privacy exemption, exemption 6. NCUA is protecting the privacy of FCU members and officials, not protecting itself.

Exemption 4

Information withheld pursuant to Exemption 4 includes commercial and financial data about Polish and Slavic FCU and the Polish and Slavic Center. 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). Since the commercial/financial information withheld was submitted in the form of member complaints, it was voluntarily submitted. This information is categorically protected because it would not be customarily disclosed to the public by the submitter. The commercial/financial information continues to be withheld pursuant to exemption 4.

Exemption 5

Internal notations, memoranda, e-mail, and draft correspondence 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

As noted above, member complaints and NCUA responses thereto constitute the majority of records withheld and these records are withheld pursuant to exemption 6. Information including names, home and e-mail addresses, telephone numbers and other identifying information, as well as the substantive information in the complaints and responses thereto 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 personal information withheld 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. The personal information continues to be withheld pursuant to exemption 6. In some of the documents, almost all of the information is personal information subject to exemption 6. Once all of the personal information is redacted, there is no information of substance left; hence the entire documents have been withheld.

We also note that the majority of courts to have considered the issue have held that individuals who write to the government expressing personal opinions generally do so with some expectation of confidentiality. Their identities, but not necessarily the substance of their letters, are ordinarily withheld. See, e.g. Lakin Law Firm, P.C. v. FTC, 352 F.3d 1122, at 1125 (7th Cir. 2003). However, in this case, both the identities as well as the substance of the complaints have been withheld because the identities of the complainants could be identified by the nature of the complaints and the limited universe of individuals about whom you request records.

Exemption 8

Information withheld pursuant to exemption 8 consists of information related to credit union examinations, found in correspondence, 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.

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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. The information withheld is within the scope of exemption 8 pursuant to Consumers Union and McCullough. 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,

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GC/HMU:bhs
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