April 27, 2010

Giuseppe S.Giardina
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St. Louis, MO 63105

Re: FOIA Appeal dated March 24, 2010
NCUA OIG response dated March 3, 2010

Dear Mr. Giardina:

In a letter dated December 23, 2009, you made a Freedom of Information Act (FOIA) request for various documents concerning Corporate America Credit Union, U.S. Central Federal Credit Union, and NCUA as identified in a 15-item list. By letter dated February 26, 2010, Linda Dent, staff attorney in NCUA's Office of General Counsel, responded to your request. Because the NCUA Office of Inspector General's (OIG) authority to respond to FOIA requests is independent from NCUA's, your request was also forwarded to NCUA's OIG for response for any responsive documents originated in OIG. Sharon Separ, Counsel to the Inspector General, responded on March 3, 2010 for responsive records originating from OIG. On March 24, 2010, you submitted two appeals, one addressing Ms. Dent's February 26th response and one appealing Ms. Separ's March 3rd response. This letter is responsive to your appeal of Ms. Separ's response. Your appeal of Ms. Dent's response will be handled separately. Ms. Separ identified 35 pages of response documents and all 35 pages were withheld pursuant to exemptions 2, 4, 5, 6, 7(C), and 8 of the FOIA (5 U.S.C. §552(b)(2), (4), (5), (6), 7(C) and (8)). Your appeal is granted in part. Enclosed are two letters (2 pages) which we have determined should have been released. The remaining 33 pages continue to be withheld pursuant to the exemptions noted above. In your appeal you request that the documents either be released or that we describe the withheld material and the statutory basis for the exemptions justifying disclosure. We address the specific exemptions as well as your argument for more specificity in the types of documents withheld below.

In your appeal you request an index of the responsive documents withheld along with the applicable exemption. A specific listing of the nature of records withheld and the applicable FOIA exemptions is known as a Vaughn Index. *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). It is well-settled law that a requester is not entitled to receive a Vaughn index during the administrative process. Schwarz v. United States Department of Treasury 131 F. Supp. 2d, 142 (D.D.C. 2000). *See also* Bangoura v. U.S. Dep't of the Army, 607 F. Supp. 2d 134, 143 n.8 (D.D.C. 2009) (noting that agency not required to provide Vaughn Index prior to filing of lawsuit). When a FOIA request is initially responded to, only an estimate of the amount of records and the reasons for withholding the records (applicable exemptions) as well as the right to appeal and the name and title of the person(s) responsible for the denial are required to be given. 5

U.S.C. §552(a)(6)(A)(i), (a)(6)(C)(i). All of the required information was given to you in Ms. Separ's letter. We note that the responsive records withheld include e-mail, internal NCUA memoranda, and correspondence between a credit union and a state regulatory agency.

As noted, the documents were withheld pursuant to exemptions 2, 4, 5, 6, 7(C) and 8 of the FOIA. Most of the documents contained information withheld pursuant to more than one of the noted exemptions. The exemptions are discussed below.

Exemption 2

The nature of the material withheld under this exemption was limited to agency routing information including NCUA staff e-mail addresses. Exemption 2 of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. §552(b)(2). The courts have interpreted exemption 2 to encompass two distinct categories of information: trivial matters referred to as "low 2" information and more substantial internal matters referred to as "high 2" information. *See* Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information withheld under exemption 2 in this case was "high 2" information. Crooker v. ATF, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), is the lead case interpreting the "high 2" exemption and it encompasses protection for internal agency information the sensitivity of which is readily recognized. Crooker established a 2-part test for determining which sensitive materials are exempt from mandatory disclosure. The test requires that: 1) a requested document be predominantly internal; and 2) its disclosure significantly risks circumvention of agency regulations or statutes. The routing information is internal so the first test is met. Courts have held that the high 2 exemption can be applied when there is a determination of reasonably expected harm. *See* Judicial Watch, Inc. v. United States Department of Commerce, 83 F. Supp. 2d 105, 110 (D.D.C. 1999). High 2 has been applied when the consequences of disclosure could be harmful to the effective operation of government offices. Pinnavaia v. FBI, No. 03-112, slip opinion at 8 (D.D.C. Feb. 25, 2004) (withholding of beeper numbers and cell phone numbers). The release of information withheld pursuant to exemption 2 could be harmful to the effective operation of NCUA in that disclosure might disrupt official business and would serve no public benefit. We note that all of the documents withheld containing high 2 information also contained information withheld under other exemptions. (*See* discussion below.) The routing information continues to be withheld pursuant to exemption 2.

Exemption 4

Information withheld pursuant to Exemption 4 includes financial information concerning Corporate America CU. 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 F2d 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 have looked to the stricter two-prong National Parks standard to determine whether the commercial/financial information should be withheld pursuant to exemption 4. We believe that release of the commercial/financial information would impair NCUA's authority to obtain necessary information in the future. The commercial/financial information continues to be withheld pursuant to exemption 4.

Exemption 5

Internal memoranda and e-mail and a draft letter 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.

Exemptions 6 and 7(C)

Personal information about both credit union officials and NCUA employees 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). Exception 7(C) protects information compiled for law enforcement purposes that, if released, "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). FOIA case law has established that law enforcement includes civil, criminal and administrative proceedings. Rugiero v. Department of Justice, 257 F.3d 534, 550 (6th Cir. 2001), Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370,373 (D.C. Cir. 1974) and Jefferson v. Department of Justice, 284 F. 3d 172, 178 (D.C. Cir. 2002). 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 exemptions 6 and 7(C) requires a balancing of the public's right to disclosure against the individual's right to privacy. The standard of public interest to consider is one specifically limited to the FOIA's core purpose of shedding light on an agency's performance of its statutory duties. Department of Justice v. Reporters Committee for Freedom of the Press, 4889 U.S. 749 (1989). There is minimal, if any, public interest in disclosing this personal information. The individuals' privacy interests outweigh any public interest in disclosure. Therefore the minimal personal information continues to be withheld pursuant to both exemptions 6 and 7(C).

Exemption 8

Information withheld pursuant to exemption 8 consists of credit union examination related information, found in internal memoranda and e-mail. 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. *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.

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

Enclosures
GC/HMU:bhs
10-0357GiardinaFOIAAppealIG
10-FOI-00038; 10-APP-00004