

June 4, 2010

Giuseppe S. Giardina  
Husch Blackwell Sanders LLP  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105

Re: FOIA Appeal dated May 21, 2010

Dear Mr. Giardina:

In a letter dated April 5, 2010, you made a Freedom of Information Act (FOIA) request for four categories of documents concerning Corporate America Credit Union (CACU), U.S. Central Federal Credit Union (U.S. Central). You specifically requested:

1. Any documents submitted by U.S. Central requesting a waiver of §704.3(c)(6)(i) of the NCUA Regulations (12 C.F.R. §704.3(c)(6)(i)) relating to paid-in-capital (PIC);
2. Any documents granting U.S. Central a waiver of §704.3(c)(6)(i) relating to PIC;
3. Any documents submitted by CACU requesting a waiver of §704.3(c)(6)(i) relating to paid-in-capital (PIC); and
4. Any documents granting CACU a waiver of §704.3(c)(6)(i) relating to PIC.

On May 6<sup>th</sup>, Linda Dent, staff attorney in NCUA's Office of General Counsel, denied your request in full pursuant to exemptions 4, 5, and 8 of the FOIA. 5 U.S.C. §§552(b)(4), (5) and (8). You appealed Ms. Dent's denial on May 21<sup>st</sup>. Your appeal is denied in full pursuant to exemptions 4, 5, and 8.

We note that on December 23, 2009, you requested records in 15 different categories, some of which overlapped with the four categories of records requested above (the subject of this appeal). Ms. Dent denied your December 23<sup>rd</sup> request in full on February 26, 2010 and we responded to your appeal of the denial on May 4, 2010. Documents responding and withheld to item 12 of your December 23<sup>rd</sup> request (those relating to U.S. Central's PIC II offering in 2008) consisted of several pages of correspondence as well as approximately 1400 kilobytes of records. These same documents respond to items 1 and 2 above and they remain withheld. We also noted that we had no responsive records to item 4 of your December request: "filings made by CACU to NCUA regarding PIC III offering in 2009." We stated that CACU did submit a proposal, but nothing formally regarding PIC III. This CACU proposal, although not responsive to item 4 of your December 23<sup>rd</sup> request, is responsive to item 3 above since the request concerns a PIC waiver, but it is not specifically limited to PIC III in 2009. The CACU proposal remains withheld. We note that there are no records responsive to item 4 above because NCUA has never granted CACU a waiver relating to PIC.

In your appeal you request that the denial be reversed, or in the alternative we provide an index of the responsive documents withheld along with the applicable statutory exemption. A specific listing of the nature of records withheld with 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. See 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 an agency is not required to provide a 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. Dent's letter.

As noted above, the documents were withheld pursuant to exemptions 4, 5 and 8 of the FOIA. Some of the documents contained information withheld pursuant to more than one of the noted exemptions. The exemptions are discussed below.

#### Exemption 4

Information withheld pursuant to Exemption 4 includes financial information concerning CACU and U.S. Central FCU. 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). 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, 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 8

Information withheld pursuant to exemption 8 consists of credit union examination related information, found in internal memoranda, e-mail and correspondence. 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. Certain examination related records, such as e-mail, internal memoranda and correspondence

was withheld in full pursuant to exemption 8; some of these records contain information withheld pursuant to other exemptions.

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. All of the examination related records 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,

/s/

Robert M. Fenner  
General Counsel

Enclosures

GC/HMU:bhs  
10-0558FOIAAppeal  
10-FOI-00092