February 7, 2011

Mr. Anderson Edwards
(b)(6)

Re: 2011 – APP – 0002; FOIA Appeal dated January 3, 2011

Dear Mr. Edwards:

On November 23, 2010, our office received your request under the Freedom of Information Act (FOIA) for materials related to a complaint asserted against the Nominating Committee of Tyndall Federal Credit Union (FCU) around March of 2010. You had initially filed your request with NCUA's Office of Inspector General. That Office, which has authority under FOIA that is independent of NCUA, responded to you on November 23, 2010, by noting that it did not have any responsive documents but indicating that it was forwarding your request to NCUA's Office of General Counsel for further review and evaluation. On December 2, 2010, Linda Dent, staff attorney in NCUA's Office of General Counsel, responded to your request, partially granting it. Ms. Dent provided you with 2 pages of material, each with partial redactions; 27 pages of responsive material were withheld in full. As explained by Ms. Dent, the redacted and withheld material qualified for protection under one or more of exemptions 2, 4, 5, 6 and 8 of the FOIA, 12 U.S.C. §§552(b)(2),(4),(5),(6),and (8).

You appealed Ms. Dent's determination by letter dated January 3, 2011 (received January 10th). In your appeal, you have indicated your belief that, notwithstanding the applicable exemptions of FOIA, there must be more information that should be released.

Your appeal is denied. As more fully established below, all of the pages withheld from production are exempt from disclosure based on one or more specific exemptions contained in the FOIA, as identified in Ms. Dent's initial response letter. Furthermore, some of the material withheld is also subject to withholding under exemption 7(C). 5 U.S.C. §552(b)(7)(C). The applicable exemptions are discussed below.

<u>Exemptions 6 and 7(C).</u>

These are related exemptions that exist to protect personal privacy interests of individuals against unwarranted invasion. 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).

An instructive case providing guidance on the facts involved in this appeal is Ortiz v. Dept. of HHS, 874 F. Supp. 570 (D.D.C., 1995); aff'd at 70 F.3d 729 (2d Cir. 1995). In that case, Ms. Ortiz sought access to a letter about her sent anonymously to the Department of Health and Human Services. The letter led to a criminal investigation about Ms. Ortiz and, although she was never charged with criminal wrongdoing, she wanted a copy of the letter, so that she could indentify its author. The agency, citing the privacy interest of the author in remaining anonymous, withheld production of the letter, which Ms. Ortiz challenged in court. The judge in the case found in favor of the agency and concluded, first, that the author of the letter had a legitimate, defensible privacy interest in remaining anonymous. The court found that the privacy interest that Exemption 7(C) protects from disclosure encompasses not only the intimate details of an individual's life but also information that he or she could reasonably assert an option to withhold from the public at large because of its possible adverse effect. Id, at 575.

The court went on to recognize that a source in a government investigation (e.g., someone like the individual whose complaint to NCUA's Regional Office led the Regional Director to commission an investigation by the FCU's supervisory committee in this case) has a substantial privacy interest in keeping his or her participation in the investigation private. *See* Dunkelberger v. Department of Justice, 285 U.S. App. D.C. 85, 906 F.2d 779, 781 (D.C. Cir. 1990). Moreover, the court noted, a source also has a strong privacy interest in not being unnecessarily questioned or harassed by those who look unfavorably upon law enforcement officials or by private litigants in civil suits incidentally related to the investigation. Ortiz, supra, at 575.

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 latter provision establishes a lesser burden of proof to justify withholding in two respects. The omission of the word "clearly" from 7(C) stems from recognition that law enforcement records can be inherently more invasive of privacy than "personnel and medical and similar files." Cong. News Syndicate v. Department of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977). Moreover, the risk of harm standard under 7(C) is lower, requiring only an assessment by the agency that release "could reasonably be expected to" result in the breach of a privacy interest, as opposed to the more concrete "would" standard applicable in the case of exemption 6. The agency is thus afforded greater latitude in protecting privacy interests in the law enforcement context. Washington Post

Co. v. Department of Justice, No. 84-3581, 1987 U.S. Dist. LEXIS 14936, at 32 (D.D.C. 1987)(magistrate's recommendation), adopted (D.D.C. Dec. 15, 1987), rev'd on other grounds, 863 F. 2d 96 (D.C. Cir. 1988).

The standard for determining the public interest to be balanced against the competing privacy interest is specifically limited to the FOIA's core purpose: shedding light on an agency's performance of its statutory duties. Only the interest of the general public, and not that of the private litigant, is relevant to this inquiry. *See* Kiraly v. FBI, 728 F.2d 273, 276 (6th Cir. 1984). Thus, the fact that you might have a personal reason for seeking the information does not enter into the balancing process. Viewed in this light, there is minimal, if any, public interest in disclosing the material received by the Regional Office that gave rise to the request for an investigation, since it bears not at all on the question of how the agency is performing its statutory duties.

We have determined that segregation of the material covered by these two exemptions is not possible in this case. Given the subject matter of the material, we are not able to segregate out portions, such as the name and address of the author, while making the balance of the material available, since doing so is likely to compromise the privacy interest of the author. See Alirez v. NLRB, 676 F.2d 423 (10th Cir., 1982). That case quotes with approval a District Court ruling involving a document produced by an employee and sought by his employer pursuant to FOIA:

> [T]he problems in undertaking to decide which portions of an employee's statement may be released to his employer without revealing that employee's identity are enormous, if, indeed, not insoluble. Merely deleting the name from the statement would not insure against identification, since the employee's narrative, or part of it, may be such that the employer could identify the employee involved, or could narrow the group down to two or three employees. Moreover, it is doubtful whether the court could select which portions to release with the degree of certainty required adequately to protect the interests of employees who wish to avoid identification.

Harvey's Wagon Wheel, Inc. v. NLRB, 91 L.R.R.M. 2410, 2415 (N.D.Cal.1976), remanded in part on other grounds, 550 F.2d 1139 (9th Cir. 1976). The reasoning articulated by the court in that case has equal applicability here.

Exemption 8.

In addition to the related privacy interest exemptions discussed above, some of the material covered by this appeal constitutes information that should be withheld pursuant to exemption 8. 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). In this case, the agency's response to the incoming complaint was to request that the FCU's supervisory committee conduct an investigation and report

back to the Regional Director. Both the report of investigation and the background material used in its preparation are, therefore, reports pertaining to the operation of the FCU that were prepared on behalf of and for the use of the agency.

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).

The courts have discerned two major purposes, each of which is present in this case, for exemption 8 from its legislative history:

- to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability; and
- to promote cooperation and communication between employees and examiners. *See* Atkinson v. FDIC at 4.

The information withheld in this case is within the scope of exemption 8, in accordance with Consumers Union and McCullough. Withholding the information meets the purposes of exemption 8; therefore, the information continues to be withheld.

In the context of exemption 8, 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. Moreover, in this case there is a likelihood, as discussed above, that an attempt to segregate and release some portions of the material could result in an inadvertent breach of privacy interests. These considerations support the initial determination by the agency that this material should be withheld in full.

Additional Exemptions. Exemptions 6, 7(C), and 8, as discussed above, are fully supportive of the agency's determination to withhold responsive documents in this case. Additional support for the withholding of some of the material is provided under exemption 4, which applies to the extent that the material contains commercial or financial information obtained from a person (including, as in this case, from the FCU) that is considered privileged or confidential. Given that the investigation conducted in this case was done at the request of the Regional Director, the report of that investigation was, arguably, turned over to the Regional Director involuntarily. As such, preservation of its confidentiality will help to assure the government's ability to obtain this type of information in the future. Exemption 4 exists for this purpose and is

applicable here. *See* National Parks & Conservation Assn. v Morton, 498 F. 2d 765 (D.C. Cir. 1974); *cf.* Critical Mass Energy Project v. NRC, 975 F. 2d. 871 (D.C. Cir. 1992). In addition, two pages of responsive material also qualified for withholding under exemption 5, which exempts from disclosure documents that would not be subject to discovery pursuant to the rules of civil litigation procedure. Included within the scope of that exemption are agency materials that are pre-decisional in nature; i.e., documents generated as part of a continuing process of agency decisionmaking. *Guide to the Freedom of Information Act*, Department of Justice (2009 Edition), p. 370; Casad v. HHS, 301 F. 3d 1247 (10th cir., 2002). Accordingly, these materials continue to be withheld in this case.[1]

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

GC/RPK:bhs

11-FOI-0027; 2011-APP-00002

OGC 11-0120

[1] The material contained on these two pages is non-substantive and could have easily been excluded as non-responsive to the request.