

March 28, 2011

Ms. Anna Mendez
(b)(6)

Re: 2011 – APP – 0003; FOIA Appeal dated March 4, 2011

Dear Ms. Mendez:

On February 16, 2011, we received your Freedom of Information Act (FOIA) request, which had been forwarded to us by Senator Diane Feinstein. Your request identified two National Credit Union Administration (NCUA) examiners by name and sought information concerning complaints filed against them, including the initial date(s) thereof, and any specific action(s) taken against them by NCUA. On March 1, 2011, Linda Dent, staff attorney in NCUA's Office of General Counsel, responded to your request by advising that NCUA would neither confirm nor deny the existence of records responsive to your request. As explained by Ms. Dent, any such records, to the extent they exist, would be exempt from disclosure pursuant to exemption 6 of the FOIA, 12 U.S.C. §552(b)(6). This exemption provides that agencies are permitted to withhold information the disclosure of which would constitute an unwarranted invasion of personal privacy.

You appealed Ms. Dent's determination by letter dated March 4, 2011 (received March 8th). In your appeal, you indicate that you are not seeking personnel or medical files, and you also assert that the agency ought to be able to simply delete or segregate from the materials any information that would constitute an unwarranted invasion of privacy. Finally, your letter describes why you believe your request is in the public interest, in that you think it may help to establish a pattern of conduct that the agency is failing to properly address.

Your appeal is denied. As more fully established below, none of the points you have asserted in support of your appeal is sufficient to overcome the noted exemption's applicability in this case.

Exemption 6 of the FOIA is designed to protect personal privacy interests of individuals against unwarranted invasion. The exemption 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). It should be noted that information need not specifically be located in a personnel or medical file to warrant protection under this exemption. The courts have given the language "similar files" a broad interpretation. See, for example, United

States Department of State v. Washington Post Co., 456 U.S. 595 (1982), in which the court held that all information that "applies to a particular individual" meets the threshold requirement for privacy protection. A federal judge in another case, in which the requester had sought information concerning a disciplinary action involving a named individual, concluded that the information would likely be located in that individual's personnel file. The judge went on to note that, even were a matter relating to the discipline of an employee insufficient in and of itself to be constituted as "part of a personnel file," there seems little doubt it could readily be characterized as a "similar file" within the purview of Exemption 6. Shonberger v. NTSB, 508 F. Supp 941 (D.D.C. 1981).

You should also note that federal employees do not, by virtue of their employment as public servants, forfeit their legitimate expectations of privacy. Mueller v. U.S. Department of the Air Force, 63 F. Supp. 2d 738 (E.D. Va. 1999). Courts have recognized the interest of federal employees, particularly those not holding a high level or managerial position, in having matters involving disciplinary issues or allegations of misconduct remaining confidential and private. Hunt v. Federal Bureau of Investigation, 972 F. 2d 286, 288 (9th Cir. 1984).

Having identified a legitimate expectation of privacy in the type of documents you have described (without confirming whether or not such documents actually do exist in this case), the process described in the FOIA calls for the balancing of that privacy expectation against the legitimate public interest in the release of the files. 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. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989). 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).

The fact that you might have a personal reason for seeking the information (assuming it exists) does not enter into the balancing process. Viewed in this light, there is minimal, if any, public interest in materials (if any) disclosing whether or not there may be allegations of wrongdoing against the identified employees, or records describing disciplinary actions involving them, in agency files. Such documents (even assuming they exist) shed essentially no light on how the agency performs its functions. Information that reveals little or nothing about an agency's own conduct does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. Beck v. Department of Justice, 997 F. 2d 1489, 1493 (D.C. Cir. 1993). It is noteworthy, in this respect, that you have not identified any evidence that would indicate there is any reason to believe the agency is somehow deficient in its handling of disciplinary matters affecting its employees.

Your letter asserts that redaction of personal information from the files (assuming they exist) ought to be possible and should be done in this case. However, your request

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itself identified the two examiners by name. Accordingly, since the subject of the request is already known, any attempt at redaction of identifying characteristics from the materials would be a meaningless exercise. Hunt v. Federal Bureau of Investigation, 972 F. 2d 286, 288 (9th Cir. 1984). The combination of the particular subject matter of your request, along with your identification by name of the affected individuals, called for the type of response initially provided to you by Ms. Dent, in which she neither confirmed nor denied whether responsive records exist. See Antonelli v. Federal Bureau of Investigation, 721 F. 2d 615, 617 (7th Cir. 1983) (concluding that “in some instances even acknowledging that certain records are kept would jeopardize the privacy interests that the FOIA exemptions are intended to protect.”).

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-0007; 2011-APP-00003