April 18, 2011

Joshua Berman, Esq.
Natural Resources Defense Council
1200 New York Avenue, N.W., Suite 400
Washington, DC 20005

RE: 2011 – APP - 00004

Dear Mr. Berman:

On February 8, 2011, you submitted a request under the Freedom of Information Act (FOIA), by which you sought to obtain copies of all records, generated before July 6, 2010, in the possession or control of the NCUA reflecting communications between the NCUA and the Federal Housing Finance Agency and/or the Office of the Comptroller of the Currency regarding Property Assessed Clean Energy (PACE) energy efficiency retrofit programs, together with any responses or attachments.

On March 9, 2011, Linda Dent, staff attorney in NCUA's Office of General Counsel, responded to your request and indicated that your request was denied in full. Ms. Dent's letter indicated that the withheld information qualified for protection pursuant to exemptions 2 and 5 of the FOIA, 12 U.S.C. §§552(b)(2),(5). Ms. Dent's letter explained that exemption 2 permits withholding of records specific to individual employees if disclosure would disrupt the effective operation of government offices. Exemption 5 protects from disclosure inter-agency and intra-agency memoranda which would not be available by law to a party in litigation with the agency.

By letter dated March 18, 2011, you appealed the determination by Ms. Dent. Your letter (received by us on March 21) asserts that Ms. Dent's response insufficiently described how the cited exemptions specifically apply to the responsive documents in this case. Your letter also asserts, based on the Supreme Court's recent ruling in *Milner v. Department of Navy,* No. 09-1163, 2011 WL 767699 (March 7, 2011), that Ms. Dent's reliance on exemption 2 is improper and overstated. Your appeal is granted in part and denied in part. In addition, as discussed below, we have elected to release some documents as a matter of discretion.

The review prompted by your appeal confirmed that many of the documents that we initially determined to be responsive are, in fact, not NCUA agency records within the meaning of FOIA. Many of the documents were generated by the Federal Housing Finance Administration (FHFA) and the Comptroller of the Currency (OCC) and, although in our possession, were subject to disclaimers and restrictions concerning the confidentiality of the material. We have forwarded these records to the FHFA and OCC with a request that their FOIA Officer review them, determine which of them, if any, are

subject to release under FOIA, and to respond to you directly. You should anticipate hearing directly from those agencies reasonably soon. For your knowledge, we forwarded thirty-six pages to the OCC and eighty-four to FHFA. As more fully discussed below, we have determined that some of the other responsive documents in our possession fall either entirely or partially within the application of exemption 5. We continue to withhold the exempt portion of these records.

We do not quarrel with your characterization of the impact of the Supreme Court's recent decision in the *Milner* case. As the Court's opinion now makes clear, exemption 2 of FOIA is limited in its application to circumstances that involve personnel or human resources matters of an agency, and may no longer be invoked to support the withholding of material on the basis that its release would disrupt the effective operation of government offices. The Court's ruling effectively puts an end to the "high 2" gloss on the exemption, on which some agencies, including NCUA, had relied in making determinations to withhold certain documents or portions thereof in certain circumstances. We acknowledge that, as clarified by the Supreme Court, exemption 2 does not support the determination to withhold any material in this case.

The remaining relevant FOIA exemption in this case, therefore, is exemption 5. As Ms. Dent's initial determination letter to you correctly recited, this exemption protects from public disclosure inter-agency or intra-agency communications which would not be available by law to a party other than an agency in litigation with the agency. 5 U.S.C. §552(b)(5). Exemption 5 incorporates the privileges available to a governmental agency in civil litigation, notably the deliberative process privilege (sometimes called the executive privilege), the attorney-client privilege, and the attorney work product privilege.

To qualify for the deliberative process privilege, an agency must show that the documents are both "pre-decisional" and "deliberative." Documents are pre-decisional when they precede an agency decision and are prepared in order to assist an agency in arriving at its decision, and documents are deliberative when they comprise part of the process by which government decisions are made. *Phillips v. Immigration and Customs Enforcement*, 385 F. Supp. 2d 296 (S.D. N.Y. 2005). The rationale underlying the privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny. *See Assembly of State of Cal. v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). Other acknowledged policy purposes for the exemption are to protect against premature disclosure of proposed policies before they are actually adopted and 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. *See, e.g., Russell v. Dep't of the Air Force,* 682 F. 2d 1045, 1048 (D.C. Cir. 1982). It should be noted, in this respect, that the failure of the agency to actually reach and adopt a final policy or position with respect to an issue under deliberation does not render those deliberations less worthy of protection under this exemption. *NLRB v.Sears, Roebuck & Co.,* 421 U.S. 132, 151,

note 18 (1975) (extending protection to records that are part of the decisionmaking process even where process does not produce an actual decision by the agency).

In accordance with the foregoing, many of the responsive documents in this case are subject to the exemption. Your request sought records reflecting communications among the NCUA, the FHFA and the OCC concerning a federal program designed to encourage homeowners to obtain solar panels and other energy-efficient devices for retrofit onto their homes. A principal characteristic of the program was that financing for the installation of these types of devices would be made available to homeowners through a process that could undermine the priority of any mortgage already in existence on the property. As federal regulatory agencies having supervisory oversight over entities that either make or purchase first mortgages, NCUA, FHFA and OCC all had a direct interest in the program and, more specifically, in developing a policy to educate the institutions we regulate, as well as the federal Department of Energy, concerning the safety and soundness risks presented by the program.

During the time frame identified by your request, such a policy was being developed, with drafts in circulation and comments from agency staff concerning many aspects of the policy. The email messages back and forth among agency staff, and the communications within the NCUA among its own staff, were all developed as part of the policy formulation process. As such, these are precisely the type of communications that fall within the scope of exemption 5. Drafts of an interagency policy statement, in the form of a joint letter to the Secretary of the Department of Energy, including versions showing comment and suggestions for edits, are likewise within the scope of the exemption. As the Court in *Russell v. Dep't of the Air Force, supra at 1048,* noted*:* "Failure to provide the protections of (b)(5) to the . . . editorial review process would effectively make such discussion impossible." *See also Dudman Communications Corp. v. Dep't of the Air Force,* 815 F. 2d 1565 (D.C. Cir. 1987) at 1569: ("[T]he disclosure of editorial judgments – for example, decisions to insert or delete material or to change a draft's focus or emphasis – would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work.") Accordingly, responsive documents in our possession (aside from those, discussed above, which we have forwarded to FHFA and OCC for evaluation) reflecting pre-decisional, deliberative communications continue to be withheld. Where appropriate we have made partial redactions in documents and have released the portion not entitled to protection under exemption 5.

We have released and enclosed herewith eleven pages of documents that are responsive to your request; some of these have partial redactions. It is quite possible that FHFA and OCC will determine that many of the documents we forwarded to them for review and consideration (which constitute the majority of the documents in this case) may be released as well. Finally, in the event you have not seen these, we have enclosed copies of a July 15, 2010 press release and an agency "Regulatory Alert," also dated in July of 2010, each of which deal with the PACE program. These documents, which are publicly available, are not directly responsive to your request but we are

hopeful they provide you with some background and insight into the concerns of the agency over the impact of the PACE program.

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

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