June 30, 2011

Robert B. Pomerenk, Esq.
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5335 Wisconsin Avenue, NW, Suite 780
Washington, D.C. 20015

RE: 11-FOI - 00107; 2011 – APP – 00007

Dear Mr. Pomerenk:

By electronic mail message dated May 10, 2011, Gary Lax of your firm submitted a Freedom of Information Act (FOIA) request seeking, in the context of the voluntary merger of Syracuse Federal Credit Union (Syracuse) with and into Summit Federal Credit Union (Summit), any information relating to whether Syracuse and/or Summit had any executive contracts, agreements, or understandings, written or oral, that required a payout, including retirement benefits, to an existing manager and/or senior staff member or senior management employee. The request also sought information relating to any employment arrangements that would be provided to employees, including managers and senior management employees, of Syracuse.

By letter dated May 12, 2011, NCUA Staff Attorney Linda Dent wrote to your firm and advised that the request was being denied in full. Ms. Dent's letter explained that the merger between Syracuse and Summit was voluntary in nature and indicated that the agency would neither confirm nor deny the existence of any of the requested records. Her letter went on to indicate that, to the extent that such records may exist, they would be subject to withholding from disclosure based on one or more exemptions to the FOIA. Ms. Dent's letter cited to exemption (b)(4), which protects from disclosure trade secrets and commercial or financial information obtained from a person that is considered privileged or confidential. 5 U.S.C. §552(b)(4). She also cited to exemption (b)(6), which permits agencies to withhold information the disclosure of which would constitute an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(6).

You filed an appeal by letter dated June 9, 2011. In your appeal, you characterized the agency's initial response as arbitrary and capricious, to the extent that it reflected a failure of the agency to conduct a diligent search for records that are responsive to your request. You also questioned whether the records, to the extent they may exist, would in fact be exempt in their entirety from disclosure based on the noted exemptions. Finally, your appeal argued that the position reflected in Ms. Dent's letter disregards the guidance provided by U.S. Attorney General Eric Holder to agency and department heads concerning a presumption of openness that the Attorney General believes ought to guide the government in preparing responses to FOIA requests.

Your appeal is denied. As discussed below, the circumstances of this case are such that the agency's refusal to acknowledge whether responsive documents exist (which is

not the same as failing to conduct a search for responsive documents) was warranted and appropriate. Furthermore, a partial redaction would not have been effective in protecting the privacy interests at stake in this case. In a similar vein, the type of agency discretion referred to by the Attorney General in his directive to agency and department heads is neither applicable nor appropriate in cases in which there are privacy interests of third parties at stake, as there are in this case.

Your letter reflects what appears to be an incorrect assumption concerning the nature of the documents that form the basis for your request. In accordance with part 708b of NCUA's rules, proponents of a merger involving federally insured credit unions are required to obtain the approval of the agency to the merger and must provide certain materials to the agency in connection with obtaining that approval. 12 C.F.R. Part 708b. Your request assumes that the rule requires the merger partners to include in these materials contracts and other documents reflecting financial commitments made to senior management concerning either severance or terms of continued employment. In fact, no such requirement is contained in the rule.[1]

Properly understood, your request actually seeks personal information about a relatively small group of individuals, specifically, financial information pertaining to their employment. To the extent that the information described in your request exists, its disclosure would constitute a clearly unwarranted invasion of personal privacy. Exemption 6 of the FOIA 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). Given that the individuals whose circumstances are implicated by your request are private citizens, not federal employees, it is beyond dispute that they have a privacy interest in the terms of their employment, particularly as it may relate to financial arrangements such as retirement, severance, etc.

Under certain circumstances, merely indicating to a third party whether a particular record exists can have consequences that impair an individual's privacy interest. Where, as here, the request is narrowly targeted and by its very terms is limited to privacy-sensitive information pertaining to identifiable individuals, partial redaction would not be adequate to protect the personal privacy interests at risk. In such cases, the courts have upheld an agency response that neither confirms nor denies the existence of responsive records. *See, e.g.,* Mueller v. U.S. Department of the Air Force, 63 F. Supp. 2d 738, 744 (E.D. Va. 1999) (noting that when requested documents relate to a specific individual, "deleting [her] name from the disclosed documents, when it is known that she was the subject of the investigation, would be pointless.")

The foregoing analysis is supported further by case law that has developed under Exemption 6 concerning evaluation of the public interest. The FOIA calls for a balancing analysis and a consideration of whether a countervailing public interest in the

[1] The agency did propose an amendment to the merger rule that would have required disclosure of certain types of merger related compensation; *see* 72 Fed.Reg. 20067, April 23, 2007. However, the rule was never finalized.

information exists that should be given precedence over protecting an identified privacy interest. Courts have held that the interest of the public is limited to access to information or material that will shed light on how the government performs its statutory duties. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989).

In this case, that interest is entirely absent. As noted, NCUA's merger rule does not require that merger partners provide this type of information to the agency before obtaining its approval of the merger. There was, moreover, no financial assistance or support provided by the agency to either merger partner in connection with the transaction. The information you have sought, to the extent it exists, pertains exclusively to personal, financial arrangements that may have been developed for or on behalf of private individuals in the employ of either merger partner. Accordingly, the balance should be struck in favor of withholding information, to the extent that it may exist. *See, e.g.,* Consumers' Checkbook, Center for the Study of Services v. HHS, 554 F. 3d 1046, 1051(D.C. Cir.2009) ("[I]nformation about private citizens . . . that reveals little or nothing about an agency's own conduct does not serve a relevant public interest under FOIA.")(internal citations omitted).

Exemption 4 of the FOIA also has applicability to this case. 5 U.S.C. §552(b)(4). As noted above, NCUA's merger rule does not require that the type of information you have sought be provided by merger partners seeking agency approval for their proposed merger. Therefore, to the extent information responsive to your request is in the possession of the agency, it would only be as a result of having been provided voluntarily by either or both merger partners. In accordance with controlling case law, financial information voluntarily provided to an agency is exempt from disclosure under FOIA if it is of a type that the provider would ordinarily preserve in confidence and not make public. Critical Mass Energy Project v. NRC, 975 F. 2d 871 (D.C. Cir 1992). Since the information involved in this case falls into that category, another basis is present for withholding it, to the extent the information exists.

Finally, a review of our files reveals that agency personnel did consider and evaluate certain financial aspects of the transaction as part of their deliberation concerning whether the agency should approve the merger. Documents reflecting that analysis include some material that is arguably responsive to your request. However, Exemption 5 of the FOIA shields those deliberations, consisting of 9 pages, from disclosure. 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. Id.

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). The email communications among agency staff discussing financial aspects of the merger meet this rationale and therefore qualify for withholding.

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

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11-0622
GC/RPK/bhs