

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DOUGLAS CAPUDER,

PLAINTIFF,

– AGAINST –

FEDERAL DEPOSIT INSURANCE CORPORATION,

DEFENDANT.

Civ. Action No.

**COMPLAINT FOR
RELIEF UNDER FOIA**

This pleading (the “Complaint”) describes the claims of Plaintiff against Defendant. Plaintiff’s attorneys, Capuder Fazio Giacoia LLP, prepared this Complaint. Plaintiff respectfully requests that this pleading be so construed as to do substantial justice.

NATURE OF THIS ACTION

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, for injunctive and other appropriate legal and equitable relief, seeking disclosure and release of agency records improperly withheld from Plaintiff by Defendant Federal Deposit Insurance Corporation (“FDIC”).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

THE PARTIES

3. Plaintiff is an individual with his principal place of business in the City, County and State of New York.

4. Defendant FDIC is an agency of the United States government within the meaning of 5 U.S.C. § 552(f)(1).

THE REQUESTED RECORDS IN ISSUE

5. The FDIC has pursued assessment of a civil money penalty in a proceeding titled *In re Pinchus D. Raice, individually, and as an institution-affiliated party of The Park Avenue Bank, New York, New York (In Receivership) (Insured State Nonmember Bank)* Case number FDIC-14-119k.

6. On February 29, 2016, Plaintiff filed online with the FDIC a request (the “Request”) for the following documents (the “Requested Records”):

A complete copy of the transcript of the trial held January 11-14, 2016 in this case: *In re Pinchus D. Raice, individually, and as an institution-affiliated party of The Park Avenue Bank, New York, New York (In Receivership) (Insured State Nonmember Bank)*; Case number: FDIC-14-119k.

Complete copies of the exhibits marked or introduced at the trial.

Text of Request annexed hereto as Exhibit A.

7. The Request also noted that “[t]he trial was open to the public held in a courtroom of the United States District Court, Eastern District of New York. [Plaintiff]

was personally present throughout the trial. Trial exhibits were posted on large LCD displays that were visible to [Plaintiff] and others throughout the courtroom.” *Id.*

AGENCY RESPONSE

8. By letter dated March 9, 2016, the FDIC denied the Request based only upon FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). The FDIC response is annexed as Exhibit B. According to an FOIA Specialist in the FDIC’s FOIA Privacy Act Group, “Exemption 7(A) permits the withholding of records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement record or information could reasonably be expected to interfere with enforcement proceedings.”

THE FOIA APPEAL

9. Pursuant to FOIA, Plaintiff transmitted an appeal letter, dated April 18, 2016 (the “Appeal Letter”), to the FDIC challenging the agency’s denial of the Request. A copy of the Appeal Letter is attached as Exhibit C.

10. The Appeal Letter noted that the FDIC had identified no specific law enforcement proceeding involving any person, other than the individual who was the subject of the trial generating the Requested Records. Moreover, the Appeal Letter stated that the events giving rise to the trial concerned the Park Avenue Bank, which was closed over six years ago, in the first quarter of 2010.

11. The Appeal Letter further noted that because the FDIC had not invoked its authority to close the proceedings the agency's election to go forward in a public forum further supports the conclusion that no law enforcement proceeding would be placed at risk by release of the Requested Records.

12. The Appeal Letter made clear that denying access to the Requested Records could not serve the purposes of Exemption 7(A) because the only person known to be subject to an ongoing investigation had access to the Requested Records. At the close of trial the Judge set a schedule for post-trial briefing that in part took into account preparation of the transcript for distribution to attorneys for the FDIC and the individual subject to the trial.

13. Moreover, the individual subject to the trial had been present throughout the trial, as were his lawyers; he not only heard all testimony live, and testified himself, he and his lawyers had pre-marked copies of exhibits (proposed and admitted) and saw them on the display screens in the courtroom; and in fact, from the testimony and colloquy, it was clear that many of the exhibits were from the individual's own files or were from files of Park Avenue Bank, which he had represented, and many of those exhibits were shown to have been distributed to or seen by the individual during the course of his representation, all as stated in the Appeal Letter.

THE FINAL AGENCY DETERMINATION

14. The FDIC denied the appeal by letter dated May 16, 2016 (annexed as Exhibit D).

15. Accordingly, Plaintiff has fully exhausted his administrative remedies for his FOIA request, and now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.

CLAIM FOR DISCLOSURE

16. Plaintiff incorporates and realleges in full paragraphs 1-15 of this Complaint as if fully set forth herein.

17. The FDIC has possession and control of the Requested Records.

18. The FDIC, as an agency subject to FOIA, 5 U.S.C. § 552(f), must disclose in response to a FOIA request any disclosable record in its possession at the time of the request, *id.* § 552(a)(3), and provide a lawful reason for withholding any materials as to which it is claiming an exemption, *id.* § 552(a)(6)(A)(i).

19. No FOIA exemption applies to the Requested Records and the FDIC has failed to invoke any lawful FOIA exemption in response to the Request.

20. The FDIC's failure to disclose the Requested Records violates FOIA.

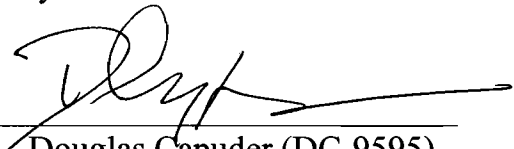
RELIEF REQUESTED

Wherefore, Plaintiff respectfully requests that this Court:

- (A) Order Defendant to disclose the Requested Records to Plaintiff and enjoin Defendant from withholding the Requested Records from Plaintiff;
- (B) Award Plaintiff's counsel its costs and reasonable attorneys' fees in this action; 5 U.S.C. § 552(a)(4)(E)(i); and
- (C) Grant such other, further and different relief at law or in equity as the Court may deem just and proper.

Dated: New York, New York
June 15, 2016

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