

EXHIBIT C

CAPUDER FAZIO GIACOIA LLP

ATTORNEYS AT LAW
90 BROAD STREET
NEW YORK, NEW YORK 10004-2627

TELEPHONE
(212) 509-9595

TELECOPIER
(212) 509-9597

April 18, 2016

**BY EMAIL AND
FIRST CLASS MAIL**

FDIC Legal Division
FOIA/PA Group
550 17th Street, N.W.
Washington, DC 20429

Re: **FOIA Appeal**
FDIC FOIA Request Log Number 16-0162

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

Dear Sir or Madam:

This is an appeal under the Freedom of Information Act, 5 U.S.C. § 552.

On February 29, 2016 I made a FOIA request to your agency for the complete transcript of a public trial held on January 11-14, 2016 in case number FDIC-14-119k and exhibits marked and introduced at the trial. On March 9, 2016, the FDIC, acting through Jerry Sussman, Sr. FOIA Specialist in the FOIA/Privacy Act Group denied my request on the ground that "Records as requested could reasonably be expected to interfere with law enforcement proceedings" and invoked FOIA Exemption 7(A), 5 U.S.C. §552(b)(7)(A). My request was made on line and a copy of the denial (which sets forth the records I requested) accompanies this letter.

The records I requested are subject to release under FOIA and, respectfully, may not validly be withheld by any of the Act's exemptions. In particular, the invocation of Exemption 7(A) is entirely conclusory and on the facts of this case, unreasonable and against public policy.

If the law enforcement proceedings alluded to by Mr. Sussman's denial involve someone *other* than Mr. Raice (who was the subject of the trial), the FDIC has

FOIA Appeal
FDIC FOIA Request Log No. 16-0162

Page 2 of 3
April 18, 2016

not specifically pinpointed the subject or target of its investigation. On the contrary, the underlying events that were the subject of the trial in question concern the Park Avenue Bank, which was closed over six years ago, on March 12, 2010. While several investigations were commenced at the time, to our knowledge all have been resolved apart from that concerning Mr. Raice.

The trial was, as noted, public, and all documents admitted in evidence were shown on multiple, large displays around the entire courtroom. There were a number of spectators present, in addition to me, throughout the trial. The FDIC had the authority to close the proceedings. 12 C.F.R. § 308.33 (“hearings shall be open to the public, unless the FDIC, in its discretion, determines that holding an open hearing would be contrary to the public interest”). The agency’s election to go forward in a public forum further supports the conclusion that no law enforcement proceedings targeted to *other* individuals would be placed at risk by release of the transcript and exhibits.

For the only person subject to an actual, identified investigation, Mr. Raice, the protective purpose of the exemption is inapplicable.

Exemption 7(A)’s purpose is “to prevent disclosures which might prematurely reveal the government’s cases in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence.” *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 658 F. Supp. 2d 217, 225, 229-30 (D.D.C. 2009). (quoting *Maydak v. U.S. Dep’t of Justice*, 218 F.3d 760, 762 (D.C. Cir. 2000)).

Mr. Raice already has access to the very records requested. Consequently, it is not credible that release of the records at issue would interfere with future proceedings involving Mr. Raice. *See Campbell v. Dep’t of Health & Human Servs.*, 682 F.2d 256, 260, 265 (D.C. Cir. 1982) (holding government failed to explain how information “could reveal the direction of the investigation to [the target] or alert it to anything it does not know already.”) As a result, the fact that the proceedings involving Mr. Raice are not yet concluded is also an insufficient basis to invoke the exemption.

Mr. Raice was present throughout the trial, as were the lawyers representing him. Mr. Raice not only heard all testimony live, and testified himself, he and his lawyers had pre-marked copies of exhibits and saw them on the screens. Moreover, many of the exhibits were from Mr. Raice’s own files or were from files of Park Avenue Bank, which he represented and many of those exhibits were shown to have

FOIA Appeal
FDIC FOIA Request Log No. 16-0162

Page 3 of 3
April 18, 2016

been distributed to or seen by Mr. Raice during the course of his representation. 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 Mr. Raice.

In the event you conclude that consideration of this appeal involves a discretionary assessment, we urge strongly that discretion be exercised to allow release of the transcript and exhibits. The President has urged all agencies to “adopt a presumption in favor of disclosure” and that in the “face of doubt, openness prevails.” Here, the events on trial occurred primarily in 2007 to 2009. The disclosure in a public forum of stale information while the only known subject of any law enforcement proceedings was personally present and has post-trial access to the transcript and exhibits means these records no longer have any operational value.

Mr. Sussman referred to authorization of my client, Deep Woods Holdings, LLC and its manager, who were referred to in the trial. We have not made this request under the Privacy Act, but under FOIA alone, and thus there is no basis to require authorization.

In sum, I ask that you reverse the decision denying me access to this material and grant my original request.

I would appreciate your expediting the consideration of my appeal.

Very truly yours,

A handwritten signature in black ink, appearing to read 'DC' followed by a stylized flourish.

Douglas Capuder

DC/sj
Encl.



Federal Deposit Insurance Corporation
550 17th Street, NW, Washington, DC 20429-9990

Legal Division

March 9, 2016

Douglas Capuder, Esquire
Capuder Faxio Giacoia LLP
90 Broad Street
New York, New York 10004-2627

RE: FDIC FOIA Request Log Number 16-0162

Dear Mr. Capuder:

This is in response to your February 29, 2016 Freedom of Information Act (FOIA) request for

[1] 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[; and]

[2] complete copies of the exhibits marked or introduced at the trial.

You stated that "[t]he trial was open to the public held in a courtroom of the United States District Court, Eastern District of New York. I was personally present throughout the trial. Trial exhibits were posted on large LCD displays that were visible to me and others throughout the courtroom." You further stated that "I am an attorney representing Deep Woods Holdings, LLC. Both Deep Woods and its manager Donald G. Glascoff, Jr., were referred to throughout the trial. They have authorized release to me of the material requested here."¹

The proceeding about which your request seeks information is ongoing, and a final decision and order has not yet been made.² Your request seeks records which, if they existed and could be located, would have been compiled for law enforcement purposes. At this time, the production to you of any such Records as requested could reasonably be expected to interfere with law

¹ By separate letters of February 24, 2016, the FDIC made its final response to your two earlier requests for similar or related information (FDIC FOIA Request Log Nos. 16-0130, and 16-0148). Both letters suggested that, if you submit a new FOIA request, you should include authorizations for the disclosure of information to you in accordance with applicable requirements. I note that your latest request was not accompanied by any authorizations for the disclosure of information to you. However, in light of the FDIC's final determination of this request, the absence of authorizations for the disclosure of information is immaterial.

² As you may be aware, final decisions and orders made by the FDIC in formal enforcement actions against financial institutions that are regulated by the FDIC or against their affiliated parties, including final orders and notices of charges are made publicly under subsection (a)(2) of the FOIA, 5 U.S.C. §552(a)(2). The "FDIC Enforcement Decisions and Orders" (ED&O) contains the full text of the formal enforcement actions. The ED&O is publicly available on the FDIC's website, www.fdic.gov, at <https://www5.fdic.gov/EDO/index.html>. After the final decision and order is made in the enforcement proceeding about which you requested information, the final decision and order will be publicly available on the FDIC's website under subsection (a)(2) of the FOIA.

enforcement proceedings. Therefore, your request is being denied under FOIA Exemption 7(A), 5 U.S.C. §552(b)(7)(A).

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.

This letter constitutes formal notification that your request has been denied. You have the right to appeal this determination to the FDIC's General Counsel within 30 business days following receipt of this letter. If you decide to appeal, please submit your appeal in writing to the General Counsel. Your appeal should be addressed to the FOIA/PA Group, Legal Division, FDIC, 550 17th Street, NW, Washington, D.C. 20429. Please refer to the log number and include any additional information that you would like the General Counsel to consider.

The processing of this request now has been completed. This request was processed at no cost to you.

If you have any questions about this matter, you may reach me by telephone at: 703-562-2039.

Sincerely,

/signed/

Jerry Sussman, Sr. FOIA Specialist
FOIA/Privacy Act Group