

EXHIBIT D



FDIC

Federal Deposit Insurance Corporation
3501 Fairfax Drive, Arlington, VA 22226

Legal Division

May 16, 2016

By Electronic Delivery to dc@cfgny.com

Douglas Capuder, Esq.
Capuder Fazio Giacoia LLP
90 Broad Street
New York, New York 10004-2627

Re: *FOIA Appeal No. 16-0005-A*
Original Request: FOIA Log No. 15-0162
Date of FOIA/Privacy Act Unit Response: March 9, 2016
Date of Appeal Letter: April 18, 2016

Dear Mr. Capuder:

This responds to your letter appealing the FDIC's denial of your above-referenced request under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). That request sought:

We request 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.

We also request complete copies of the exhibits marked or introduced at the trial.

The 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.

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.

In response to your request, staff of the FDIC's FOIA/Privacy Act Unit notified you that

The proceeding about which your request seeks information is ongoing, and a final decision and order has not yet been made. 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 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.

(Footnote omitted.) In your appeal, you assert that Exemption 7(A) is inapplicable here because the hearing was open to the public, the exhibits were publicly displayed on large screens, and the subject of the action, Mr. Raice, already has access to the records you are requesting. You state that for those reasons, disclosure of information already provided to the public and available to the subject of the action would not be reasonably expected to interfere with enforcement proceedings.

We have determined that, for the reasons discussed below, your appeal is denied because the records you seek are not the kind required to be made available to individual requesters under paragraph (a)(3) of the FOIA, 5 U.S.C. § 552(a)(3). However, in accordance with statutory requirements and FDIC standard practice, the materials you requested will be made available for public inspection and copying once a final decision has been made and published by the FDIC Board of Directors.

12 U.S.C. § 1818(u)(3)

Availability under the FOIA of transcripts of administrative hearings relating to FDIC enforcement matters, such as the matter described in your FOIA request, is governed by 12 U.S.C. § 1818(u), "Public disclosures of final orders and agreements," and specifically paragraph (3), which provides:

(3) Transcript of hearing

A transcript that includes all testimony and other documentary evidence shall be prepared for all hearings commenced pursuant to subsection (i) of this section. A transcript of public hearings shall be made available to the public pursuant to section 552 of Title 5.

12 U.S.C. § 1818(u)(3).

This section specifies that transcripts (including all testimony and documentary evidence) "shall be made available *to the public* pursuant to section 552 of Title 5," that is, the FOIA. It does not expressly state which part of FOIA applies; however, the FOIA makes a clear distinction between information that "[e]ach agency shall make available *to the public*" or "shall make available for *public* inspection and copying," and information to be made available in response to "a request for records" from "any person" or a "requester." *See, e.g.,* 5 U.S.C. § 552(a)(1), (2); (3)(A), (B), (C). *See also Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996) (FOIA distinguishes between records withheld from a complainant and records withheld from the public).

Under paragraphs (a)(1) and (a)(2), the FOIA lists certain categories of information that the agency is to proactively make available to the public. Following those provisions, subparagraph (3)(A) of the FOIA states: "*Except with respect to the records made available under paragraphs (1) and (2) of this subsection, . . . each agency, upon any request for records . . . shall make the records promptly available to any person.*" (Emphasis added.)

Because 12 U.S.C. § 1818(u)(3) provides that transcripts "shall be made available to the public pursuant to section 552 of Title 5," it is clear that 1818(u)(3) is referring to 5 U.S.C. § 552(a)(1) or (2), rather than to making transcripts available to a "person" or a "requester" by means of a FOIA request under paragraph (a)(3). Paragraph (u)(3) does not specify whether transcripts are to be made available under paragraph (a)(1) of the FOIA, which provides for publication in the *Federal Register*, or (a)(2), which provides that information is to be made available for public inspection and copying. However, because a hearing transcript and exhibits from an administrative adjudication are dissimilar to the categories of information listed in (a)(1), but do relate to "final opinions [and] orders, made in the adjudication of cases," a category under (a)(2), it is reasonable to interpret 1818(u)(3) as referring to (a)(2).

For these reasons, your request seeks information that falls within 5 U.S.C. § 552(a)(2). The response of the FOIA/Privacy Group, at footnote 2, describes the FDIC's process for making such information available to the public:

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.

FDIC Regulations Concerning Transcripts

Paragraph (a)(2) of the FOIA provides that records will be made available for public inspection and copying "in accordance with published rules." Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, P.L. No. 101-73 (Aug. 9, 1989) (FIRREA), section 916 (12 U.S.C. § 1818 note),¹ the FDIC and other agencies established the

¹ Section 916 of FIRREA provides:

Before the close of the 24-month period beginning on the date of the enactment of this Act, the appropriate Federal banking agencies (as defined in section 3(q) of the Federal Deposit Insurance Act) and the National Credit Union Administration Board shall jointly

(1) establish their own pool of administrative law judges; and

Office of Financial Institution Adjudication (OFIA) and developed detailed published rules setting out procedures applicable to administrative hearings before OFIA. See 12 C.F.R. Part 308. With regard to transcripts of public hearings, the following provisions of those rules are pertinent:

12 C.F.R. § 308.5(a) provides: "The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay."

12 C.F.R. § 308.10(a) provides: "Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 308.25 and 308.26, shall be filed with the OFIA, except as otherwise provided."

12 C.F.R. § 308.35(b) provides: "The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion."

12 C.F.R. 308.37(a)(1) provides: "Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed."

12 C.F.R. 308.38(a) provides: "Within 45 days after expiration of the time allowed for filing reply briefs under § 308.37(b), the administrative law judge shall file with and certify to the Executive Secretary, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order."

12 C.F.R. § 308.105 provides: "The Executive Secretary is the official custodian of the record when no administrative law judge has jurisdiction over the proceeding. As the official custodian, the Executive Secretary shall maintain the official record of all papers filed in each proceeding."

Taken together, these rules establish the authority of the administrative law judge over the proceedings and any documents and other materials "filed" with the administrative law judge; establish that the transcript of a public hearing in the adjudication is under the control of the administrative law judge until such time as he or she has certified the record of the proceeding to

(2) develop a set of uniform rules and procedures for administrative hearings, including provisions for summary judgment rulings where there are no disputes as to material facts of the case.

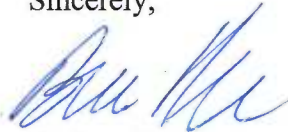
the Executive Secretary; and reaffirms that the Executive Secretary is not the official custodian of the record while an administrative law judge has jurisdiction over the proceeding.

This proceeding is currently under the jurisdiction of the administrative law judge. Therefore, the transcript and exhibits are not yet available, but “shall be made available to the public,” 12 U.S.C. § 1818(u)(3), “in accordance with published rules” of the FDIC, 5 U.S.C. § 552(a)(2), after the proceeding has been concluded.

Conclusion

For the reasons discussed above, your appeal is denied. Because your FOIA appeal did not result in access to the records sought, you may seek judicial review in the United States District Court under 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Barbara Katron
Senior Counsel