

UNITED STATES OF AMERICA
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT
OFFICE OF GENERAL COUNSEL

In The Matter Of:

FRANKLIN D. RAINES

J. TIMOTHY HOWARD

LEANNE G. SPENCER

Notice Number 2006-1

ORDER REGARDING RESPONDENT RAINES' SUBPOENA REQUEST

On January 31, 2007, by letter to the Court, Counsel for Franklin D. Raines applied for the issuance of document subpoenas to four third parties. Following that, on February 13th, the Court issued the requested subpoenas for three of the third parties, but elected to defer a determination regarding the subpoena request for Deloitte & Touche USA LLP. Respondent's application relates that "Deloitte & Touche served as OFHEO's accounting consultant throughout the special examination and served as Fannie Mae's auditor for the purposes of its recent accounting restatement." January 31st Letter at 1.

The Court was the first to express concern over this subpoena request, noting this at the February 7, 2007 Scheduling Conference. Subsequent to that Conference, OFHEO has submitted two letters relating to this issue, dated February 15th and February 20, 2007 and Counsel for Mr. Raines submitted a letter on February 21, 2007. The Court has considered these letters, including the parties' views on the role of the Court in issuing subpoenas.

OFHEO contends that "Raines' proposed nonparty subpoena to Deloitte & Touche seeks documents that are under the control and subject to the privileges of OFHEO, a party." OFHEO letter of February 20, 2007 at page 2. Respondent focuses upon the Court's responsibility to issue such subpoenas promptly, unless one or more of the terms of the applicable regulation, 12 C.F.R. § 1780.28, apply and the Court determines to either refuse to issue the subpoena or to "issue it in a modified form upon such conditions as may be determined by the presiding officer." Such a decision to deny or limit the requested document subpoena is to be based upon the

conclusion that there is not a valid basis for its issuance or upon determining that it is unreasonable, oppressive, excessive in scope, or unduly burdensome. Respondent also contends that OFHEO does not have standing to limit or otherwise object to the subpoena application, contending that only Deloitte and Touche can move to quash or limit the subpoena. If that occurs, Respondent can *then* “respond to such a motion, and, *if appropriate*, OFHEO may assert any applicable privileges in accordance with [its] Rules of Practice and Procedure and the Scheduling Order.” Respondent’s Letter at 1. (emphasis added).

The dilemma, it seems to the Court, is that if it were to agree that OFHEO has no standing to object, it would be possible that, in this instance, Deloitte & Touche, would not have grounds to object to documents in *its* possession, and for which *it* could not assert a privilege, but that OFHEO could object to providing copies or originals of the *same* documents which is in its possession. Thus, the result could be, in theory, if the Court were to accept Respondent’s position, that OFHEO could not object now, but that, once the subpoenas were issued, Deloitte & Touche could not object either, as no basis for claiming a privilege would not be theirs to assert. The unacceptable result would be that a party could obtain potentially privileged documents simply by employing a particular strategy. The Court does not believe that it was intended that such a result occur.

While it *may* be true that OFHEO does not, in a technical sense, have standing to object to the application for the document subpoena to Deloitte & Touche, there is nothing to prevent any party from *informing* the Court of concerns regarding a particular matter. Therefore, it welcomes the comments of a potentially impacted party to inform the Court’s sound judgment. This is consistent with the broad authority granted to the Court pursuant to 12 C.F.R. § 1780.5(a) and (b). While the Court notes that such input is valuable in informing its decisions, it recognizes that, per 12 C.F.R. § 1780.28, it is ultimately the Court’s responsibility to make its independent determination regarding these nonparty subpoena issues, and that is exactly what the Court is doing in this instance – exercising its judgment. Thus, the Court, implementing the provision,

has determined that there is an issue regarding the "valid basis" for part of the subpoena and that, for the same reasoning, it is unreasonable and excessive in scope. Accordingly, the Court issues the subpoena for Deloitte & Touche but modifies the subpoena by deleting requests 2, 3 and 6.

Further, while the Court assumes that each of the documents sought that the Court has determined to be inappropriate are also within OFHEO's possession *and* that each such document *will be listed* on an OFHEO privilege log, *it expressly requires OFHEO to confirm that this is in fact the case. Accordingly,, OFHEO is directed to promptly confirm whether the Court's assumption is correct or not.* In this way, ultimately, the Court will be able to determine whether it is appropriate for each document to be released or not. This process may include an *in camera* review of any such challenged documents.

Accordingly, *in the modified form* reflected in the "Subpoena – Document Request" which is attached to this Order, the Court issues the subpoena for Deloitte & Touche.

SO ORDERED

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: February 27, 2007
Washington, D.C.

In the Matter of Franklin D. Raines, J. Timothy Howard, Leanne G. Spencer
Notice No. 2006-1

CERTIFICATE OF SERVICE

I certify that a true copy of the **Order Regarding Respondent Raines' Subpoena Request**, dated February 27, 2007 was sent in the following manner to the addressees listed below:

Copy by Regular Mail and facsimile to:

OFHEO:

David A. Felt, Esq.
Deputy General Counsel
Office of Federal Housing Enterprises Oversight
1700 G Street N.W.
Washington, D.C. 20552

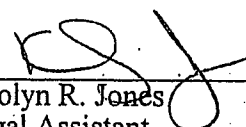
Joseph Aronica, Esq.
Duane Morris, LLP
1667 K St. N.W.
Washington, DC 20006

Respondents:

Steven Salky, Esq.
Eric Delinsky
Zuckerman Spaeder LLP
1800 M Street, N.W., Suite 1000
Washington, DC 20036
(*Counsel for J. Timothy Howard*)

David Krakoff, Esq.
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(*Counsel for Leanne G. Spencer*)

Kevin Downey
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(*Counsel for Franklin Raines*)



Knolyn R. Jones
Legal Assistant

Washington, DC
February 27, 2007