



**UNITED STATES OF AMERICA**

**OFFICE OF FEDERAL HOUSING AND OPPORTUNITY DEVELOPMENT**

**ENTERPRISE OVERSIGHT**

**In the Matters of** )  
 )  
**Franklin D. Raines** )  
 )  
**J. Timothy Howard** )  
 )  
**Leanne G. Spencer** )  
 )  
**Respondents** )

**Notice No. 2006-1**

**Order Regarding Respondents' Motions to Strike OFHEO's Second Set of Document Requests**

Respondents have separately filed motions in opposition to OFHEO's Second Set of Document Requests, seeking to strike or limit the requests. After careful consideration of all filings submitted in connection with this issue,<sup>1</sup> for the reasons which follow, each Respondent's motion is DENIED and Respondents are directed to provide the documents responsive to OFHEO's requests within 4 (four) weeks of the date of this Order.<sup>2</sup>

Raines' motion asserts that the request lacks a statutory or regulatory basis, and assuming there is one, the discovery is not narrowly tailored to fit OFHEO's claimed need for the documents. Raines' Motion at 2.<sup>3</sup> Alternatively, Raines and the other Respondents submit that, for varying reasons, this discovery should be postponed until liability is established.<sup>4</sup>

<sup>1</sup>In addition to the separately filed motions, the Court also considered OFHEO's Opposition to the motions, Respondents' separate Replies thereto, and OFHEO's Surreply.

<sup>2</sup>Although Raines' filings in this instance requested oral argument, nothing was offered to explain what that exercise would accomplish. The Court considered each of the arguments presented by all sides, determined them to be articulately stated, and concluded that oral argument would serve no useful purpose.

<sup>3</sup>Oddly, despite Raines' assertions, he is willing to identify asset transfers exceeding \$75,000, maintaining that this will provide "information sufficient to determine if he has taken steps artificially to deflate his net worth." Raines' Motion at 3. Thus, implicitly, in the Court's view, Raines concedes that OFHEO's concern over artificial deflation of his net worth is legitimate, with the distinction between the views being who should control the threshold amount for inquiry.

<sup>4</sup>The Court, in another OFHEO matter, considered the bifurcation claim. Indeed the Court itself raised the issue as a query to the parties. However, upon due consideration, it rejected the

Expounding upon its contention that OFHEO lacks the statutory authority to obtain the requested financial documents, Raines raises the importance of privacy for his personal financial information, with incantations to the Fourth Amendment. It notes that the statute "does not list a respondent's wealth as an appropriate factor for consideration." *Id.* at 5. Raines also submits that the "other factors" for the Director to consider, per 12 U.S.C. § 4636(c)(2), does not encompass "information for the sole purpose of determining the subpoenaed person's net worth." *Id.* at 6, citing *Resolution Trust Corp. v. Walde*, 18 F.3d 943 (D.C. Cir. 1994), and *Resolution Trust Corp. v. Grant Thornton*, 41 F.3d 1539 (D.C. Cir. 1994), (emphasis added). As with the other Respondents, Raines asserts that the financial documents sought have "no bearing on the issue of liability" and that the regulations cannot rescue, that is, expand, the authority under the statute, and in any event, the regulations do not purport to permit such discovery. *Id.* at 7-8,<sup>5</sup>

While Respondent Spencer joins and adopts Raines' arguments, his counsel, citing 12 C.F.R. § 1780.26(b), also asserts that "the personal information sought . . . is not within the scope of discovery permitted by OFHEO's own regulations, which allow discovery only into information 'materially relevan[t] to the merits of the pending action.'" Spencer also contends that the possible disqualification of the OFHEO Director is another reason to strike the document request. Spencer Motion at 2. Within the motion, Spencer asserts that the role of the Presiding Officer (i.e. this Court), is limited to a "merits proceeding" which involves record "assembl[ing] and certif[y]ing to the Director." *Id.* at 5. Under Spencer's view, the Court is limited to the merits "and not to the calculation of any penalties." *Id.* Accordingly, Spencer argues the determination of any civil monetary penalty does not come into play until the Court delivers the case to the Director. Implicitly, this argument suggests that any penalty determination is bifurcated from "the merits proceeding" and is a matter solely for the Director to consider.

Howard's Counsel also joins in the arguments made by Raines' Counsel, but emphasizes the view that the requests are not materially relevant to the merits of the action. To arrive at this view, Howard asserts that the financial information has "no bearing on, much less 'material relevance' to the truth or falsity of the substantive allegations contained in the Notice of Charges." Howard Motion at 2. As one example, to OFHEO's request for Howard's tax returns for the past five years, Howard contends that his tax returns have "no significance to the charges . . . which do not include claims related to tax fraud or tax evasion." *Id.* at 3. Like Spencer, Howard also maintains that the Court "plays no role in determining the amount of a CMP." *Id.* at 5.

OFHEO's Opposition notes that, in a similar discovery request sought by OFHEO, this Court as well as the judge who preceded the undersigned, in that matter, upheld the right to such discovery. *In the Matter of Brendsel and Clarke*, HUDALJ 04-056-NA, Notice Nos. 2003-2, and 2003-3, and HUDALJ 04-057-NA, Orders of January 10, 2006 and October 4, 2006. OFHEO

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idea of bifurcation.

<sup>5</sup>Although Raines anticipates that OFHEO will point to the deterrence and hardship considerations, it peremptorily replies that deterrence can "only be judged by the by the absolute size of the penalty in relation to Mr. Raines's compensation from Fannie Mae . . . [not] by its subjective impact on [his] personal finances." *Id.* at 9. As to the hardship aspect, Respondent contends that is entirely within Raines control "to submit whatever information *he* believes establishes hardship." *Id.* (emphasis added).

asserts that the discovery it seeks is also consonant with its regulatory authority and "other banking agencies from which OFHEO's authority is patterned." OFHEO Opposition at 1.

Consistent with this Court's ruling in the *Brendsel and Clarke* matter, the information sought by OFHEO is discoverable at this stage of the proceeding. The Court construes 12 U.S.C. § 4636(c) and 12 C.F.R. § 1780.1 as providing authority for this ruling. The statute expressly authorizes the Director, through the promulgation of regulations, to consider "any other factors" deemed to be appropriate to the penalty. 12 U.S.C. 4636. These include deterrence, "injury to the public," "any attempts at concealment," and loss or risk of loss to the Enterprise.<sup>6</sup> With respect to these provisions, it is noted that, in evaluating deterrence as well as circumstances of hardship and a respondent's candor after the fact, in order for OFHEO, and this Court, to form a knowledgeable assessment of those considerations, one must have an accurate understanding of a respondent's financial circumstance. This assessment necessarily includes learning if a respondent has made attempts at concealment of finances.<sup>7</sup> The Court does not agree with Raines' interpretation of either *Walde* or *Thornton* and it specifically concurs with OFHEO's views regarding those cases. Certainly the information sought has material relevance to this proceeding, both with regard to a CMP and equitable relief. Further, the Court does not agree that its role is limited to determining liability. Rather, should liability be found present, the Presiding Officer's responsibilities include issuing recommended sanctions, which include equitable remedies and an assessment of an appropriate civil penalty.<sup>8</sup>

**So Ordered.**

*William B. Moran*  
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 William B. Moran  
 United States Administrative Law Judge

Dated: May 25, 2007  
 Washington, DC

<sup>6</sup>Raines asserts that the Presiding Officers' holdings in the *Brendsel* matter dealt only with OFHEO's legal entitlement and need for financial documents but not the "relevance and burden of OFHEO's document requests inquiry by inquiry." The response to this is that the Court has here conducted such a review by considering Raines' arguments at pages 11 through 20 of Raines' Motion to Strike or Limit, OFHEO's specific responses, in its Opposition, at pages 15 through 24, and Raines Reply Memorandum at pages 6 through 12. That review does not alter this Order.

<sup>7</sup>Although Respondent Raines has also asserted that disclosure would "risk[] a chilling of unencumbered associational choices," the Court considers that the protective order which has been issued will protect confidentiality. Raines' Reply Memorandum at 13. Further, OFHEO has endorsed the idea of closing the hearing, assuming a motion is filed for that purpose, when the Respondents' financial information is about to be disclosed. Beyond those protections, the Court offers the option to any of the Respondents to redact disclosure of identification of any "political and religious associations" but not the financial amounts associated with such associations, as long as the Court is simultaneously provided with an unredacted version, listing those associations, for its *in camera* review.

<sup>8</sup>The Court read, but consciously ignores the back and forth expressed by the parties about the 'meet and confer' discussions.