

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. AUSTIN FITTS,

Movant,

Case No. _____

v.

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT,

Respondent.

MEMORANDUM OF LAW IN SUPPORT
OF C. AUSTIN FITTS' MOTION TO CHALLENGE

The July 7, 1997 subpoena served on Citibank, NA by the U.S. Department of Housing and Urban Development, Office of Inspector General ("OIG") further expands that agency's 23-month practice of harassment against C. Austin Fitts and her companies, Hamilton Securities Group, Inc. and Hamilton Securities Advisory Services (collectively, "Hamilton"). The subpoena also reveals OIG's willingness to use any means available to avoid the reasonable restraints that may be imposed upon it by this Court since the Court assumed responsibility for issues relating to the OIG's 1996 and 1997 administrative subpoenae.

The Right to Financial Privacy Act

The Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422, "permits individuals to contest Government access to certain records held by banks and other financial institutions." Hancock v. Marshall, 86 F.R.D. 209, 210 (1980). As expressed succinctly by

the U.S. Court of Appeals for the Tenth Circuit, “[t]he RFPA was enacted in response to a pattern of government abuse in the area of individual privacy and was intended to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity by requiring federal agencies to follow established procedures when seeking a customer’s financial records.” Anderson v. La Junta State Bank, 115 F.3d 756, 758 (10th Cir. 1997) (quoting Neece v. IRS, 922 F.2d 573, 575 (10th Cir. 1990)).

The Act provides that within 10 days of service or 14 days of mailing of a subpoena, the customer may file a motion to quash in the appropriate district court. 12 U.S.C. § 3410(a). “If the customer’s motion satisfies the threshold standard set forth in 12 U.S.C. § 3410(a), then the court must order the Government authority to file a sworn response.” Hancock, 86 F.R.D. at 210. The Court should grant the motion to quash if the movant establishes that he or she is a customer of the financial institution from which the financial records have been sought and the financial records sought are not relevant to a legitimate law enforcement inquiry. 12 U.S.C. § 3410(a); Hancock, 86 F.R.D. at 210.

The customer’s motion should be adjudicated when “his affidavit presents a *prima facie* case of impropriety.” 86 F.R.D. at 211. Specifically the House Report accompanying the Right to Financial Privacy Act of 1978 states that the customer must make merely an initial factual showing.

This section does not require a detailed evidentiary showing or require that the customer prove there is no legitimate law enforcement purpose for the Government’s attempt to obtain records. However, it does require the customer to state facts to support his position. For example, he may state that to the best of his knowledge and belief he has no connection to the matters under investigation; he has not committed an offense

related to the investigation; or that he is the subject of harassment as shown by prior unsuccessful attempts to obtain his records.

H.R.Rep.No. 1383, 95th Cong., 2d Sess. 53 (1978) U.S. Code Cong. & Admin. News 1978, pp. 9273, 9325.

Ms. Fitts is the "Customer"

In her sworn statement, C. Austin Fitts first establishes that she is the customer of Citibank, NA whose records are being requested by OIG; hence, she has standing to challenge the subpoena. "Customer," as defined in 12 U.S.C. § 3401(5), means

any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name.

Ms. Fitts and her personal accountant, Patty Kemmerer, CPA (d/b/a Donna Miller & Associates), opened account No. 61540390 at Citibank on July 25, 1997 so that Ms. Kemmerer could service Ms. Fitts' personal financial accounting needs. Ms. Fitts has been the sole account holder although Ms. Kemmerer has had Power of Attorney to sign checks on her behalf.

The Records are not Related to a Legitimate Inquiry

Ms. Fitts sworn statement also sets forth facts supporting her contention that the financial records sought from Citibank are not relevant to any legitimate law enforcement inquiry. She states that the Citibank account was maintained solely for her own personal accounting needs and was never utilized for or by Hamilton. Moreover, the account was not opened until more than two years after the alleged events complained of in the Ervin lawsuit. Ms. Fitts then describes how, in the context of the three OIG administrative subpoenae

previously served on Hamilton and the OIG's relentless expansion of those subpoenae over the past 23 months, the Citibank subpoena reflects a continued pattern of harassment by the OIG. Additional subpoenae such as the one served on Ms. Fitts' elderly uncle further highlight the OIG's predilection for discovery "fishing expeditions" regardless of the tremendous burdens imposed on individuals subject to the irrelevant discovery.

For all of the reasons set forth in the sworn statement of C. Austin Fitts and this memorandum of law, Ms. Fitts respectfully requests that the Court grant her motion to challenge the OIG subpoenae; quash the subpoena; and provide whatever additional relief the Court may deem appropriate.

Respectfully submitted,

July 21, 1998



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CERTIFICATE OF SERVICE

I have mailed or delivered a copy of this Motion, Memorandum of Law, and Sworn Statement of C. Austin Fitts to the following on July 21, 1998:

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