UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT
OFFICE OF THE CLERK
BYRON WHITE U.S. COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257
(303) 844-0544
FAX: (303) 844-0545

Barbara A. Schermerhorn
Clerk of Court

Stephen P. Armitage
Staff Attorney

July 9, 1999

TO: All Recipients of the Captioned Order and Judgment
RE: BAP No. UT-98-088, In re Olsen
Filed June 24, 1999; Hon. Tom R. Cornish, authoring

Please be advised of the following correction to the captioned decision:

Page 5, third paragraph, first sentence: The phrase "Judge Arthur Votolato, a Bankruptcy Judge in Maine", is amended to read "Judge Arthur Votolato, a Bankruptcy Judge sitting by designation in Maine".

If you received a hard copy of the decision, please make this correction to your copy.

Very truly yours,

Barbara A. Schermerhorn
Clerk

By:
Deputy Clerk

FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
June 24, 1999
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE PAULA M. OLSEN, formerly known as Paula M. Wilson, Debtor.	BAP No. UT-98-088
PAULA M. OLSEN, Appellant, v. STEPHEN W. RUPP, Trustee, Appellee.	Bankr. No. 92-26309 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before BOHANON, ROBINSON, and CORNISH, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

This court has before it for review the order of the bankruptcy court granting the chapter 7 trustee's Motion to Excuse Compliance with 11 U.S.C. §704(7) of the Bankruptcy Code. For the reasons set forth below, we affirm the order of the bankruptcy court excusing the trustee's compliance with §704(7).

BACKGROUND

On two separate occasions, the chapter 7 trustee ("Rupp") conducted Rule

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

2004 examinations of Ms. Olsen's brother, Dennis Mason. The purpose was to gain Mr. Mason's knowledge of specific assets Ms. Olsen failed to disclose. The trustee held the first examination on June 12, 1996, while the second examination took place on June 20, 1996. Both examinations were recorded.

Some two years later, Ms. Olsen requested access to the Mason audiotapes. Ms. Olsen made the request in writing on October 29, 1998. Ms. Olsen believed that "courtesy dictated" that Rupp release the tapes to her. Rupp refused to give Ms. Olsen the audiotapes. Ms. Olsen gave no reason other than mere curiosity for wanting the tapes in the first place. The trustee believed the tapes had no relevance to any pending matter in the bankruptcy case but that Ms. Olsen's attempts to retrieve the tapes were motivated by an intent to obstruct or burden the administration of the estate. This belief was predicated on the request coming after the trustee had filed a Notice and Motion for Approval of Administrative Claims, Final Disbursement of Property and Funds and Abandonment of Property, Objection to Claims and a Final Report which was set for hearing on November 30, 1998. Following the denial, Ms. Olsen replied with a request for transcripts or tapes under the Freedom of Information Act ("FOIA") (5 U.S.C. §552). In response, Rupp filed a Motion to Excuse Compliance under 11 U.S.C. §704(7). Judge Allen granted the Motion to Excuse Compliance. Ms. Olsen appealed.

JURISDICTION

This court, with the consent of the parties, has jurisdiction to hear appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. §158; Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1(a). The bankruptcy court's order is a final order. Neither party has opted to have this appeal heard by the United States District Court. 28 U.S.C. §158; Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1(a) and (d). As a result, this court has jurisdiction to hear this appeal.

STANDARD OF REVIEW

Orders handed down by the bankruptcy court are subject to three standards of review. When making factual determinations, the standard to apply is whether the determination was "clearly erroneous." *Taylor v. IRS,* 69 F.3d 411 (10th Cir. 1995). A clearly erroneous factual determination is made when the court can, with conviction, say that a mistake has been committed. *Gillman v. Scientific Research Prods. Inc. (In re Mama D'Angelo, Inc.)*, 55 F.3d 552 (10th Cir. 1995). De novo review is required of the court when findings of fact are premised on improper legal standards or on proper legal standards that are improperly applied. *Sender v. Johnson (In re Hedged-Invs. Assocs., Inc.),* 84 F.3d 1267 (10th Cir. 1996). De novo review will also be exercised over any conclusion of law made by the bankruptcy court. *Hall v. Vance,* 887 F.2d 1041 (10th Cir. 1989). If questions are a mixture of law and fact and legal principles are the primary consideration, de novo review is required by the bankruptcy court. *Heins v. Ruti-Sweetwater, Inc. (In re Ruti-Sweetwater, Inc.),* 836 F.2d 1263 (10th Cir. 1988).

DISCUSSION

1) Court's decision to excuse compliance with 11 U.S.C. §704(7).

Section 704(7) of the Bankruptcy Code states that one duty of the trustee is to furnish information regarding the estate or its administration to any requesting party in interest. The only caveat to this is if the court orders otherwise. Part of the trustee's investigation may include a Rule 2004(b), Fed. R. Bankr. P., examination of the debtor or any other entity having information relating to the "acts, conduct or property or to the liabilities and financial condition of the debtor, or any matter which may affect the administration of the debtor's estate, or the debtor's right to discharge." *See In re Financial Corp. of Am.,* 119 B.R. 728, 733 (Bankr. C.D. Cal. 1990). Rule 2004 has a broad scope and extends to third parties who deal with the debtor. *In re Wilcher,* 56 B.R. 428, 433 (Bankr.

N.D. Ill. 1985). Sometimes, however, the scope is so broad that the examination is described as a fishing expedition. *In re Ecam Publications, Inc.,* 131 B.R. 556, 559 (Bankr. S.D.N.Y. 1991).

In the Olsen case, Rupp met the requirements for conducting a Rule 2004 examination of Mr. Mason. Mr. Mason was a third party with knowledge of his sister's assets. Even though the tapes were not "relevant or of assistance in any matter pending in the case," the 2004 examinations were proper due to the examination's broad scope.

This court does not dispute that Rule 2004 examinations are public proceedings. *In re Symington,* 209 B.R. 678, 693 (Bankr. D. Md. 1997). Historically, the creditor or the debtor himself have been given the opportunity to view testimony from such proceedings as well as a chance to view any books or records in the possession of the trustee. *In re Saur,* 122 F. 101 (S.D.N.Y. 1903). The *Symington* court recognized the compelling need for providing information to interested parties. *Symington,* 209 B.R. at 694. However, the court indicated that privacy interests can outweigh the compelling need to gain access to the information. *Id.* at 695. *Baltimore Sun Corp. v. Astri Inv., Management and Sec. Corp. (In re Astri Inv., Management and Sec. Corp.),* 88 B.R. 730, 741 (Bankr. D. Md. 1988), suggested that restricting access is permitted if essential to preserving some higher value.

The trustee indicated to Ms. Olsen and to the court that the 2004 examinations were irrelevant to any pending matter in the case. He feared disclosure of the examinations might prolong the bankruptcy proceeding. At the motion hearing, the trustee stated that he feared violence might occur if the tapes were released to Ms. Olsen. Ms. Olsen did not demonstrate a compelling need for the tapes. Mere curiosity is outweighed by her brother's safety and by the possibility of a prolonged bankruptcy proceeding.

Courts suggest that Ms. Olsen should not have access to the tapes. *In re Drexel Burnham Lambert Group, Inc.,* 123 B.R. 702 (Bankr. S.D.N.Y. 1991), held that the movant was entitled to the production of documents under a Rule 2004 examination. However, the burden required a showing of good cause for producing documents and was not met by a mere showing that producing the documents would not impede justice. Good cause exists if requested documents are necessary to help establish a claim or if undue hardship or injustice will result if the documents are not produced. *Id.* at 712.

Olsen may need the tapes for future litigation, but if she had knowledge of the need during the original proceedings, the facts surrounding the request should have been presented at the bankruptcy court hearing and not on this appeal. This court finds that mere curiosity is not cause to give Ms. Olsen access to the tapes.

Judge Arthur Votolato, a Bankruptcy Judge sitting by designation in Maine, issued a similar order to Judge Allen's order. In the order in *In re Petit,* 1996 WL 277970 (Bankr. D. Me., May 10, 1996), Judge Votolato granted an ex parte motion to conduct a Rule 2004 examination. Due to the sensitive nature of the information sought by the trustee and the debtor's propensity to hinder and delay proceedings, the Judge ordered the trustee to be relieved of his §704(7) duty.

Consideration was given to the scope and the public nature of the 2004 examination. Good cause could not be shown for Ms. Olsen's entitlement to the tapes. Section 704(7) gives the court discretion to decide whether the trustee should furnish information concerning the estate to a party in interest. The exact language contained in §704(7) states: "unless the court orders otherwise." Under the circumstances, we will not reverse Judge Allen's order excusing Rupp from compliance with §704(7) of the Bankruptcy Code.

2) Applicability of the Freedom of Information Act.

Olsen claims that 5 U.S.C. §552 requires that the chapter 7 trustee give her access to tapes or transcripts of Rule 2004 examinations. We find no basis to apply the FOIA in this case.

The purpose of the FOIA is to inform the public about government operations and not to benefit private litigants. *Ellis v. United States,* 941 F. Supp. 1068, 1078 (D. Utah 1996). Olsen's reasons for wanting the documents were strictly personal. In statements to the court and in letters to the trustee, she indicated a mere curiosity as to how her brother answered the trustee's questions in the 2004 exams. It would be far-fetched to say the purpose of the FOIA is met in Olsen's case.

In order for the FOIA to apply, the chapter 7 trustee must also be considered an "agency." An agency, as defined in 5 U.S.C. §551(1), is "each authority of the government of the United States, whether or not it is within or subject to review by another agency." The FOIA uses a narrow definition of agency. 5 U.S.C. §552(e). An FOIA agency includes an executive department, military department, government corporation, or other establishment of the government (including the executive office of the President), or any independent regulatory agency. *Lee Constr. Co., Inc. v. Federal Reserve Bank,* 558 F. Supp. 165, 174 (D. Md. 1982).

Lee Construction used the amended definition of "agency," but also applied the common law tests associated with the broader agency definition. Four tests have been developed to refine the broader definition. Test one considers the entity's authority to act with the sanction of the government behind it. *Ellsworth Bottling Co. v. United States,* 408 F. Supp. 280, 282 (W.D. Okla. 1975). Test two considers the entity's authority in law to make decisions. *Pub. Citizen Health Research Group v. Dep't of Health, Educ. & Welfare,* 668 F.2d 537, 541 (D.C.

Cir. 1981). Test three provides for an agency if the entity has substantial independent authority in the exercise of specific functions. *Conservation Law Found. of New England, Inc. v. Harper,* 587 F. Supp. 357, 364 (D. Mass. 1984). Test four provides for an administrative agency, for the purposes of the Administrative Procedures Act, where substantial "powers to act" with respect to individuals are vested. *Lee Constr. Co.,* 558 F. Supp. at 174. The importance of the tests is demonstrated by recent cases that have found that any general definition of the term agency is of limited utility. *Washington Research Project, Inc. v. Dep't of Health, Educ. & Welfare,* 504 F.2d 238,245-46 (D.C. Cir. 1974).

The chapter 7 trustee does not fall within any of the above-mentioned tests. Panel trustees make only limited decisions. Just because panel trustees have some decision making power, this does not mean that they are classified as a government agency. See *Pub. Citizen Health Research Group*, 558 F.2d at 543. For example, *In re Hughes Drilling Co.,* 75 B.R. 196, 197 (Bankr. W.D. Okla. 1987), classified a panel trustee as "a representative of the estate, not an officer, agent or instrumentality of the United States." Panel trustees are also given specific duties but do not have substantial independent authority to carry out specific functions. They are governed by the guidelines set forth by the United States Trustee.[1] The panel trustee has some power to act in an individual's interest, but not substantial power. The substantial "powers to act" are again in the hands of the U. S. Trustee. For these reasons, the chapter 7 trustee does not meet the definition of an agency. The FOIA does not apply.

---

[1] However, the U.S. Trustee has been held to be an agency. *In re Vance*, 120 B.R. 181 (Bankr. N.D. Okla. 1990). We find *Vance* to be distinguishable from the present case. *Vance* involved a U.S. Trustee, but the FOIA was not at issue. The broader definition of agency in 5 U.S.C. §551(a) was the only definition applied to the U.S. Trustee.

CONCLUSION

For the reasons stated, it is hereby ordered that the order of the bankruptcy court excusing trustee's compliance with §704(7) of the Bankruptcy Code is **affirmed**.