UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HISTORY ASSOCIATES INCORPORATED,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

Case No. 1:24-cv-1857-ACR

HISTORY ASSOCIATES' REPLY IN SUPPORT OF MOTION FOR LEAVE TO TAKE DISCOVERY

The FDIC's opposition to History Associates' motion for leave to take discovery demonstrates its profound misunderstanding and abuse of FOIA. From its incorrect assertion (Opp. 1) that "the rules of procedure" in FOIA litigation "differ from the procedural rules applicable to other civil disputes," to its suggestion (Opp. 3, 5) that discovery is available only *after* the FDIC has moved for summary judgment—and even then only if History Associates can demonstrate bad faith—the FDIC's arguments badly misread FOIA and the cases interpreting it. Discovery is necessary and appropriate in this FOIA policy-or-practice case. And given that this Court already ordered the parties to engage in informal discovery and that any motion to dismiss from the FDIC would be futile, formal discovery should proceed now.

ARGUMENT

I. Discovery Is The Norm In FOIA Policy-Or-Practice Cases

As History Associates explained in its motion, in FOIA policy-or-practice cases, discovery is the rule—not the exception, as the FDIC asserts. *See* Mot. 5-6 (collecting cases). That is because policy-or-practice claims inherently involve factual disputes about what the agency is doing

behind closed doors when it processes a FOIA request. The only way to prove whether the FDIC is, for example, instructing employees to assert Exemption 8 categorically, or inadequately instructing employees on their obligation to preserve responsive records, is through discovery.

The FDIC does not explain how policy-or-practice claims like the ones here *could* be resolved without discovery. Instead, it retreats to the general proposition that "[c]ourts typically do not allow discovery in FOIA cases." Opp. 3. But the FDIC relies almost exclusively on FOIA cases that did *not* involve policy-or-practice claims. *See* Opp. 3 n.3 (citing *Freedom Watch, Inc. v. U.S. Dep't of State*, 179 F. Supp. 3d 121, 127 (D.D.C. 2016); *In re Clinton*, 973 F.3d 106, 113 (D.C. Cir. 2020)). The reason for deferring discovery in garden-variety FOIA cases—*i.e.*, that the case turns on the court's review of the agency's affidavit explaining its search and why the withheld records are exempt (and potentially in camera review of the records)—has no application to policy-or-practice claims.

None of the handful of the FDIC's cases involving policy-or-practice claims supports the agency's position. To the contrary, one of its cases expressly recognizes that, while "discovery is generally 'disfavored' in mine-run FOIA cases … [t]he scales may shift" in favor of discovery "in a FOIA policy-or-practice suit." *Am. Ctr. for L. & Just. v. United States Dep't of State*, 289 F. Supp. 3d 81, 92 (D.D.C. 2018). And the only policy-or-practice case the FDIC cites for the proposition that discovery typically is not allowed in FOIA cases—an unpublished, out-of-circuit summary order—says nothing of the sort. *See Pietrangelo v. U.S. Army*, 334 F. App'x 358, 360 (2d Cir. 2009). That non-precedential per curiam order "summarily" affirmed a district court's denial of discovery in the particular circumstances of that case. *Id.* at 359, 360. The order noted, moreover, that the Second Circuit at that time had "not yet recognized or articulated the inquiry relevant to a pattern or practice claim in the FOIA context." *Id.* The court's disposition denying discovery

thus sheds no light here, and if anything further confirms that policy-or-practice FOIA cases are not similarly situated to run-of-the-mill FOIA cases.

In this Circuit, by contrast, policy-or-practice claims and the legal principles that govern them are well-established, and discovery in such cases is normal. *See Jud. Watch, Inc. v. United States Dep't of Homeland Sec.*, 895 F.3d 770, 784 (D.C. Cir. 2018); *Swan View Coal. v. Dep't of Agric.*, 39 F. Supp. 2d 42, 45 (D.D.C. 1999). This Court should reject the FDIC's invitation to break from that precedent by applying an inapt, unduly stringent standard for discovery.

II. Discovery Is Warranted In This Case

Discovery is warranted in this policy-or-practice case. As History Associates has explained, the FDIC's conduct in this case, its responses to History Associates' other FOIA requests, and its written FOIA policies all strongly suggest that the agency has four unlawful FOIA policies or practices. And the FDIC's actions and the information it has revealed to date raise additional questions that can be answered only through discovery. *See* Mot. 6-10.

The FDIC's main response is that assessing the validity of its FOIA policies is "not necessary to a decision on the present motion." Opp. 6-7. But that misses the point. History Associates is not asking the Court to rule on the legality of the FDIC's policies at this stage. The issue now is instead merely whether History Associates has shown enough smoke to warrant discovery into whether there is a fire. The amended complaint and discovery motion amply do so.

Far from demonstrating that the policies and practices History Associates has alleged are insufficient even to merit discovery, the FDIC's defense of its actions does the opposite. For example, instead of disavowing the alleged practices of improperly applying Exemption 8 in blanket fashion and failing to segregate non-exempt information, the agency *embraces* them. Citing a self-serving Department of Justice FOIA manual, the FDIC endorses the propositions that Exemption 8 is "all-inclusive" and that the agency need not "segregate factual from analytical or deliber-

ative material when applying Exemption 8." Opp. 6-7. Those positions are wrong in their own right and lack a sound legal basis; notably, the cited portions of the DOJ FOIA manual rely on only cases predating the FOIA Improvement Act of 2016, which heightened the standard for withholding material by requiring an agency to evaluate each segregable portion of a responsive document to determine whether "disclosure would harm an interest protected by" Exemption 8. 5 U.S.C. § 552(a)(8)(A)(i)(I), (ii). But the Court need not decide today the parties' dispute over those legal questions. The key point for present purposes is that the FDIC's invocation of and reliance on Executive Branch guidance blessing the very practices History Associates alleges are unlawful here is *more* reason for discovery into the FDIC's actual conduct—not less.

Unable to rebut the need for discovery in this case, the FDIC tries again to move the goalposts. It contends that "discovery is permitted 'only upon a showing that the agency acted in bad faith,'" including (it asserts) in "policy-or-practice cases." Opp. 5 (quoting *Bonfilio v. OSHA*, 320 F. Supp. 3d 152, 157 (D.D.C. 2018)). But the FDIC cites no policy-or-practice case holding as much. Instead, its cases hold only that "a sufficient question of bad faith" is *one* justification for discovery, but they acknowledge that there may be others. *Am. Ctr. for L. & Just.*, 289 F. Supp. 3d at 86 (D.D.C. 2018); *see also id.* at 92 (citing *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 2006 WL 1518964, at *2-3 (D.D.C. June 1, 2006) (discovery is proper "when a factual dispute exists" and the government's affidavits cannot resolve the issue)); *Pietrangelo*, 334 F. App'x at 360 (citing *Carney v. U.S. Dep't of Just.*, 19 F.3d 807, 812 (2d Cir. 1994) (discovery is justified when "summary judgment is otherwise inappropriate")). Proving the point, courts have permitted discovery in policy-or-practice cases *without* any showing of bad faith. *See, e.g.*, *Gilmore v. U.S. Dep't of Energy*, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998); *Swan View Coal.*, 39 F. Supp. 2d at 45; *Smith v. U.S. Immigr. & Customs Enf't*, 2018 WL 3069524, at *3 (D. Colo. June 21, 2018).

But even if bad faith were needed, there is ample evidence of it here. This Court already expressed "concern[] with what appears to be FDICs lack of good-faith" in making redactions. Dec. 12, 2024, Minute Order. The FDIC has yet to explain why it interpreted History Associates' request "way too narrowly, in a way that's … almost laughable," ECF 37-1 at 3—an interpretation the agency's counsel who signed the appeal-denial decision could not explain. Nor has the FDIC explained why it required multiple court orders for the agency to uncover the full set of pause letters. *See* Mot. 8. The FDIC, through its conduct, has forfeited the benefit of the doubt here.

III. Discovery Should Proceed Now

The FDIC's argument that discovery is premature fares no better and ignores the case's advanced posture. The FDIC acts as if this case is in its incipient stages. But the FDIC has dragged it on for more than nine months. And the Court ordered the parties months ago to participate in an informal discovery process in which the FDIC could provide History Associates information needed to pursue its policy-or-practice claims. But the FDIC's obstruction brought that informal process to an impasse, and History Associates asked the Court to lift the stay and end that effort. As History Associates explained, that process did not function as an adequate substitute for formal discovery as the Court intended. ECF 49 at 2-7. And History Associates made clear that, once the stay was lifted, it intended to "investigate its claims through appropriate discovery, including a 30(b)(6) deposition." *Id.* at 7. Now that the Court has lifted the stay, the logical next step is to move forward to formal discovery. Moving *backward* to square one and forestalling discovery makes no sense.

The FDIC argues (Opp. 3) that any discovery must wait until the FDIC moves for summary judgment because discovery in FOIA cases is "subject to the limits and requirements of Federal Rule of Civil Procedure 56(d)." That is incorrect. Discovery in *all* civil cases is subject to Rule 56(d), yet the norm is for plaintiffs and defendants to conduct discovery *before* summary judgment.

See, e.g., *LanQuest Corp. v. McManus & Darden LLP*, 796 F. Supp. 2d 98, 100 (D.D.C. 2011) ("Summary judgment is generally appropriate only after the non-moving party has been afforded an adequate opportunity to conduct discovery."). Determining *without* discovery whether a genuine dispute of material fact exists would be an empty exercise. The cases the FDIC cites (Opp. 3 n.5) all happened to involve motions for discovery under Rule 56(d), but none suggests that discovery in FOIA cases *must* proceed that way. *See Am. Oversight v. United States EPA*, 386 F. Supp. 3d 1, at 14 n.8; *Am. Ctr. for L. & Just,* 289 F. Supp. 3d at 85; *Wash. Lawyers' Comm. for Civil Rights & Urban Affs. v. U.S. Dep't of Just.*, 2024 WL 1050498, at *12 (D.D.C. Mar. 10, 2024); *Gilmore*, 33 F. Supp. 2d at 1189. Confirming as much, one of the FDIC's cases granted a "Motion for Leave to Take 30(b)(6) Deposition" that was *not* brought under Rule 56(d). *Smith*, 2018 WL 3069524, at *1, *3 n.2 (D. Colo. June 21, 2018). In any event, given all that History Associates has shown concerning the FDIC's problematic FOIA practices, the FDIC's insistence on Rule 56(d) niceties is nothing more than a housekeeping quibble.

Finally, the FDIC's forthcoming response to the amended complaint is no reason to delay discovery. Courts generally stay discovery only when "a motion that would be thoroughly dispositive of the claims in the Complaint is pending." *Dist. Title v. Warren*, 2015 WL 12964658, at *3 (D.D.C. June 15, 2015). And "[b]are assertions that discovery should be stayed pending dispositive motions that" a party speculates "will probably be sustained, are insufficient to justify the entry of an order staying discovery generally." *IPOC Int'l Growth Fund Ltd. v. Diligence, LLC*, 2006 WL 8460103, at *2 (D.D.C. Oct. 13, 2006) (citation and ellipsis omitted). Here, the FDIC has not even said that it will move to dismiss or on what grounds. And given History Associates' well-pleaded allegations of serious FOIA misconduct—buttressed by the FDIC's actions in this litigation and its confirmatory internal FOIA guidance, Mot. 6-10—any argument that the case

should not survive the pleading stage is "unlikely to succeed on the merits" and so cannot support a stay. *Warren*, 2015 WL 12964658, at *4. This Court should order discovery now.

CONCLUSION

The Court should permit History Associates to serve requests for production and interrogatories and order the FDIC to make a witness available for a 30(b)(6) deposition.

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Respectfully submitted,

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