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

DEFENDANT FEDERAL DEPOSIT INSURANCE CORPORATION'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO TAKE DISCOVERY

Defendant Federal Deposit Insurance Corporation ("FDIC") opposes Plaintiff History Associates Incorporated's ("HAI") premature Motion for Leave to Take Discovery ("Motion"), which deviates greatly from the procedures for conducting discovery in Freedom of Information Act ("FOIA") cases. In FOIA litigation, the rules of procedure—and thus the course of proceedings—differ from the procedural rules applicable to other civil disputes. Significantly, defendants bear the burden of proof. *See* 5 U.S.C. § 552(a)(4)(B). Therefore, plaintiffs typically are granted discovery *after*—not before—courts resolve motions to dismiss or the agency files an answer and a motion for summary judgment with an accompanying affidavit or declaration.[1] But granting HAI's motion at this preliminary stage of the proceedings would be extraordinary in any

[1] *E.g.*, *Taylor v. Babbitt*, 673 F. Supp. 2d 20, 23 (D.D.C. 2009) ("[I]n the exceptional case in which a court permits discovery in a FOIA action, such discovery should only occur after the government has moved for summary judgment[.]"); *Murphy v. FBI*, 490 F. Supp. 1134, 1136 (D.D.C. 1980) ("Whether the instant case warrants discovery is a question of fact that can only be determined after the defendants file their dispositive motion and accompanying affidavits."); *see also Cole v. Rochford*, 285 F. Supp. 3d 73, 77 (D.D.C. 2018) ("In determining whether limited discovery may be appropriate, a court typically evaluates an agency's affidavits regarding its search; where such affidavits are 'reasonably detailed' and 'submitted in good faith,' discovery is ordinarily denied." (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991))).

litigated setting because it would "force[]" the FDIC "to expend significant resources responding to discovery requests" even though the agency has not yet filed an answer, a motion to dismiss, or a motion for summary judgment. *See Guttenberg v. Emery*, 26 F. Supp. 3d 88, 99 (D.D.C. 2014).

This Court lifted the stay at HAI's request, returning this lawsuit to the litigation processes that normally occur in FOIA cases. The parties have agreed that the next step in that process—the FDIC filing its answer or notice of motion to dismiss—will take place on or before April 24, 2025. Allowing HAI to seek pre-answer discovery in the form of a Rule 30(b)(6) deposition would upend the established framework of FOIA cases and impose potentially avoidable delays and costs on the parties and the Court. *See, e.g.*, *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) ("In order to justify discovery *once the agency has satisfied its burden*, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations . . . ." (emphasis added)).

Even setting aside that HAI's motion is premature, it also is substantively deficient in overlooking facts showing that the FDIC—consistent with its repeated and forthright representations to HAI and this Court—has met its legal obligations and has processed HAI's FOIA request in good faith. As detailed on the docket, the FDIC has taken exhaustive and voluntary investigative efforts to narrow the issues in this litigation and to address HAI's concerns. *See* Dkt. Nos. 50, p. 6-12 (summarizing diligence); 48, ¶¶ 24-29 (summarizing investigative steps); 38-2 (detailing FDIC responses to "information requests"). Just because these efforts failed to satisfy HAI does not mean the agency acted in bad faith or that premature discovery is warranted at this stage.[2]

[2] As noted in previous filings, the FDIC stands ready to submit the redacted documents for *in camera* review and believes that process could narrow the issues in this case.

ARGUMENT

I. HAI's Motion Is Premature.

Courts typically do not allow discovery in FOIA cases.[3] And while that principle appears most frequently in the context of FOIA claims seeking agency records, courts have also applied it in cases raising policy-or-practice claims.[4]

Even when a court allows discovery related to a FOIA policy-or-practice claim, that discovery is subject to the limits and requirements of Federal Rule of Civil Procedure 56(d).[5] Rule 56(d) discovery requests require movants to "submit an affidavit which states with particularity why additional discovery is necessary" and meeting three criteria set forth in the rule.[6]

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[3] *E.g.*, *Freedom Watch, Inc. v. U.S. Dep't of State*, 179 F. Supp. 3d 121, 127 (D.D.C. 2016) (noting that discovery is "generally inappropriate in a FOIA case"); *In re Clinton*, 973 F.3d 106, 113 (D.C. Cir. 2020) ("[D]iscovery in a FOIA case is 'rare.'" (quoting *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006))).

[4] *Pietrangelo v. U.S. Army*, 334 F. App'x 358, 360 (2d Cir. 2009) (affirming district court's denial of motion for discovery on a FOIA pattern-or-practice claim where the agency produced adequate affidavits because the plaintiff "did not make an adequate showing of bad faith" that was "sufficient to impugn" the affidavits).

[5] *Am. Oversight v. EPA*, 386 F. Supp. 3d 1, 14 n.8 (D.D.C. 2019) (stating that plaintiff should comply with Rule 56(d) to obtain discovery in a FOIA policy-or-practice case); *Am. Ctr. for L. & Just. v. U.S. Dep't of State,* 289 F. Supp. 3d 81, 93 (D.D.C. 2018) (denying Plaintiff's request for discovery under Rule 56(d) in a FOIA policy-or-practice case because "Plaintiff's request seems little more than the proverbial fishing expedition."); *Wash. Lawyers' Comm. for Civil Rights & Urban Affs. v. U.S. Dep't of Just.*, No. 23-1328, 2024 WL 1050498, at *11-12 (D.D.C. Mar. 10, 2024) (denying request under Rule 56(d) in FOIA policy-or-practice case where the plaintiff "ha[d] suggested nothing to rebut the presumption of good faith afforded to defendant's declarations or to alter crediting [the agency]'s explanations for the [issues] about which plaintiff complains in responding to FOIA requests"); *see also Gilmore v. U.S. Dep't of Energy*, 33 F. Supp. 2d 1184, 1185 (N.D. Cal. 1998) (motion for discovery following denial of summary judgment); *Smith v. U.S. Immigr. & Customs Enf't*, No. 16-cv-02137-WJM-KLM, 2018 WL 3069524, at *1 (D.D.C. June 21, 2018) (ordering discovery after denying agency's motion to dismiss and following agency's filing of an answer).

[6] The criteria are: (1) "[I]t must outline the particular facts the non-movant intends to discover and describe why those facts are necessary to the litigation"; (2) "it must explain why the non-movant

At a minimum, courts resolve threshold issues—including those raised in a motion to dismiss—*before* entertaining requests for discovery. *See Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (holding that district court correctly deferred discovery in a FOIA case while deciding motion to dismiss raising threshold issues). This approach makes practical sense. Motions to dismiss potentially narrow the issues in the case, rendering discovery on excluded issues unnecessary, while motions for summary judgment give plaintiffs and courts the chance to consider the agency's supporting declarations and affidavits, which may assuage underlying concerns related to how an agency processed the request. *See Crestek, Inc. & Subsidiaries v. IRS*, 322 F. Supp. 3d 188, 200 (D.D.C. 2018) (discovery in a FOIA case is "rare").[7]

HAI identifies *no* case where a court has ordered pre-answer discovery.[8] And it identifies no compelling reason for this Court to depart from that established approach here. Although the

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could not produce the facts in opposition to the motion for summary judgment"; and (3) "it must show the information is in fact discoverable." *United States ex rel. Folliard v. Gov't Acquisitions, Inc.*, 764 F.3d 19, 26 (D.C. Cir. 2014) (quoting *Convertino v. U.S. Dep't of Just.*, 684 F.3d 93, 99 (D.C. Cir. 2012) (cleaned up)).

[7] *See also, e.g.*, *Taylor*, 673 F. Supp. 2d at 23 ("[I]n the exceptional case in which a court permits discovery in a FOIA action, such discovery should only occur after the government has moved for summary judgment[.]"); *Krieger v. Fadely*, 199 F.R.D. 10I, 14 (D.D.C. 2001) (stating that discovery in FOIA cases should "ordinarily occur after the government moves for summary judgment"); *Murphy v. FBI*, 490 F. Supp. 1134, 1136 (D.D.C. 1980) ("Whether the instant case warrants discovery is a question of fact that can only be determined after the defendants file their dispositive motion and accompanying affidavits.").

[8] *Jud. Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 777-78 (D.C. Cir. 2018) (stating the district court could consider appropriateness of discovery after agency had already filed an answer, motion to dismiss, and motion for judgment on the pleadings); *Cole v. FEMA*, 340 F.R.D. 485, 486-87 (D.D.C. 2022) (motion for discovery filed at the summary judgment stage); *Jett v. FBI*, 241 F. Supp. 3d 1, 4 (D.D.C. 2017) (authorizing discovery after multiple rounds of summary-judgment briefing); *Swan View Coal. v. Dep't of Agric.*, 39 F. Supp. 2d 42 (D.D.C. 1999) (docket showing that motion for discovery filed after motion to dismiss denied in part and answer filed); *Jud. Watch v. U.S. Dep't of Comm.*, 34 F. Supp. 2d 28, 33 (D.D.C. 1998) (authorizing discovery after multiple rounds of summary-judgment briefing); *Jud. Watch v. U.S. Dep't of State*, No. 13-1363, 2016 WL 10770466 (D.D.C. Aug. 19, 2016) (docket showing that motion for discovery filed

FDIC expects the facts to show that no discovery is warranted, HAI can file an appropriately tailored and supported motion for discovery if Count II of the amended complaint reaches the cross-motion for summary judgment stage. But doing so now would put the cart before the horse.

II. The FDIC Has Processed HAI's Request in Good Faith.

In FOIA cases, once a court has assessed whether an agency has met its burden under FOIA, discovery is permitted "only upon a showing that the agency acted in bad faith." *See, e.g.*, *Bonfilio v. OSHA*, 320 F. Supp. 3d 152, 157 (D.D.C. 2018). This includes in policy-or-practice cases. *See Am. Ctr. for L. & Just.*, 289 F. Supp. 3d at 92. In these circumstances, the burden falls on plaintiffs to raise a "sufficient question" of bad faith, though the court "may still accord agency affidavits a presumption of good faith in such cases." *Id.*

Typically, the cases where courts order limited discovery involve situations where there was "record evidence that the agency intentionally destroyed responsive records *after* someone submitted a FOIA request." *See Bonfilio*, 320 F. Supp. 3d at 157 (emphasis added). That record evidence does not exist here. Indeed, at the last meet and confer HAI confirmed that it has no evidence of document destruction. Dkt. No. 48, ¶ 27. Despite no credible evidence of document destruction, the FDIC has taken and subsequently detailed its good-faith efforts to collaborate with HAI in the parties' joint status reports, *see* Dkt. Nos. 38, 44 ,48, and other agency filings, *see* Dkt. No. 50, the following bullet points summarize the FDIC's due-diligence efforts in investigating HAI's allegations to date:

- The FDIC identified the appropriate system of record (the Regional Automated Document Distribution database or "RADD") and, through interviewing relevant employees, confirmed (1) that the RADD is backed-up every 24 hours and (2) any

at the summary judgment stage); *CREW v. U.S. Dep't of Just.*, No. Civ. 05-2078 (EGS), 2006 WL 1518964 (D.D.C. June 1, 2006) (docket showing that motion for discovery filed after agency had filed an answer to the requestor's complaint).

document deleted from the RADD is nevertheless archived and preserved in retrievable form. Dkt. No. 38-1, 12:14-17.

- Per FDIC Record Retention Schedule EIS 1022.02.02, all correspondence to and from institutions in the RADD and RADD archive must be retained for 30 years. *Id.* at 12:17.

- The FDIC voluntarily reviewed all archived documents from the RADD's bank correspondence folder between November 8, 2023 and January 23, 2025, for over 100 banks and found no additional responsive documents. *See* Dkt. Nos. 38, ¶ 14; 44 ¶ 8.

- In response to HAI's hypothetical concern as to whether "it is possible" to permanently delete a document from the RADD database with there being no record of the deletion, the FDIC investigated and confirmed that only "[a] very small group of employees, contractors, and former contractors have or had the requisite permissions to permanently delete documents from the RADD archive during the relevant time period." Dkt. No. 48, ¶ 26; *see also* Dkt. No. 44, ¶ 18.

- After interviewing all members of this group but one—Michael Williams—the FDIC has "not identified any unlawful deletion of documents from the RADD." Dkt. No. 48, ¶ 26.

These actions do not show an agency "attempting to thwart its FOIA obligations" or "engag[ing] in a deliberate effort to prevent the requested documents from being produced." *Gawker Media, LLC v. U.S. Dep't of State*, 266 F. Supp. 3d 152, 160 (D.D.C. 2017). They reveal an agency going above and beyond what is required under FOIA. *Cf. Mil. Audit Proj. v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981) (according the government's affidavits "substantial weight" and finding "no indication of bad faith" where "there [wa]s every indication that the government ha[d] attempted to comply with the appellants' requests to the maximum extent consistent with national security").

Lastly, HAI's motion spends several pages reciting alleged issues with the FDIC's FOIA policies and practices. Dkt. No. 53, at 6-9. For example, HAI criticizes the FDIC's Risk Management Supervision policy ("RMS manual") on FOIA Exemption (b)(8) because it describes the exemption as "all-inclusive." *Id.* at 6-7. Although not necessary to a decision on the present

motion, that language reflects decades-old caselaw cited approvingly in the Department of Justice's FOIA Guide.[9] HAI also criticizes the RMS manual for containing a bullet saying there is "no duty to segregate factual from analytical or deliberative material when applying Exemption 8." Dkt. No. 53, at 7. Although the FDIC has decided to go above the requirements of the FOIA in this matter, the language complained of also parrots language in the Department of Justice's FOIA Guide, which cites a variety of published decisions on the issue.[10] To be sure, the Department of Justice's FOIA Guide notes that some district courts outside the D.C. Circuit have taken a different approach,[11] but it is difficult to see how an excerpt that is consistent with published decisions, and the Department of Justice's FOIA Guide, can constitute an unlawful pattern or practice. In any event, this issue also goes to the plausibility of the claims in Count II, or the merits of the dispute.

[9] "In ruling on the 'particularly broad' scope of Exemption 8, the Court of Appeals for the District of Columbia Circuit has declared that if 'Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not [the courts'] function, even in the FOIA context, to subvert that effort.'" Dep't of Just. Guide to FOIA, Exemption 8, at 1 (2025 ed.), https://www.justice.gov/jmd/media/1239296/dl?inline (citing *Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d 531, 533 (D.C. Cir. 1978) and *Pub. Invs. Arb. Bar Ass'n v. SEC*, 771 F.3d 1, 4 (D.C. Cir. 2014) ("[T]his court has explained time and again that Exemption 8's scope is 'particularly broad.'" (citation omitted)).

[10] Dept. of Just. Guide to FOIA, Exemption 8 at 7 ("The D.C. Circuit has held that 'an entire examination report, not just that related to the 'condition of the bank' may properly be withheld.' The District Court for the District of Columbia has noted the absence of any controlling case law to support a 'distinction between factual versus analytical or deliberative material under [Exemption 8].' The court reasoned that withholding both factual and other material under Exemption 8 better serves the purposes of safeguarding the 'public appearance' of financial institutions and encouraging their full cooperation with regulatory agencies without fear that the information provided to the regulatory agency will be disclosed to the public.").

[11] *Id.*

CONCLUSION

The FDIC respectfully requests that the Court deny HAI's Motion for Leave to Take Discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2025, I caused a true and correct copy of the foregoing to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing.

/s/ Lina Soni
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