

**IN THE 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 FDIC’S PRE-MOTION NOTICE AND REQUEST FOR CONFERENCE

This is a lawsuit under the Freedom of Information Act (FOIA). Plaintiff History Associates Incorporated (HAI) made a FOIA request to defendant Federal Deposit Insurance Corporation (FDIC). FDIC denied the request and, citing FOIA Exemption 8,¹ denied HAI’s subsequent administrative appeal, leading to this action. Pursuant to section 7(f) of the Court’s Standing Order in Civil Cases, the FDIC now requests a pre-motion conference to discuss the FDIC’s proposed motion for summary judgment pursuant to Fed. R. Civ. P. 56 and HAI’s anticipated cross-motion for summary judgment.

I. BACKGROUND

Between March 2022 and May 2023, as part of the FDIC’s review of financial institutions’ crypto-related activities, the FDIC sent letters to supervised financial institutions

¹ Exemption 8 concerns matters “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” 5 U.S.C. § 552(b)(8).

asking them to pause from proceeding with planned activities or expanding existing crypto-related activities and to provide additional information so that the FDIC might assess the safety and soundness, consumer protection, and financial stability implications of such activities before providing supervisory feedback. In October 2023, the FDIC's Office of Inspector General (OIG) issued a report referencing these communications as "pause letters."

On November 8, 2023, HAI submitted a FOIA request for the "pause letters." On January 22, 2024, the FDIC denied HAI's request pursuant to FOIA Exemptions 4 and 8. On March 25, 2024, HAI administratively appealed FDIC's denial. The FDIC denied the administrative appeal on May 8, 2024, pursuant to FOIA Exemption 8.

HAI filed suit in this court on June 27, 2024, to compel release of the requested documents. HAI's Complaint argues that FOIA Exemption 8 does not apply to the "pause letters," but, if it did, portions of the documents are reasonably segregable. Complaint at ¶¶68-69. In the event the "pause letters" are not segregable, the Complaint alleges that release is warranted because the FDIC failed to show foreseeable harm. *Id.* at ¶71. The FDIC answered on August 7, 2024, denying each of these claims.

II. STANDARD OF REVIEW

FOIA cases are "typically and appropriately" decided on motions for summary judgment. *Life Extension Found., Inc. v. I.R.S.*, 915 F. Supp. 2d 174, 179 (D.D.C. 2013), *aff'd*, 559 F. App'x 3 (D.C. Cir. 2014) (citing *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 87 (D.D.C. 2009)). In a FOIA case, the Court determines the matter *de novo*. 5 U.S.C. § 552(a)(4)(B). To prevail, the agency must demonstrate that a claimed FOIA exemption applies to any records withheld; that it is reasonably foreseeable that harm would result from the disclosure of withheld information, 5 U.S.C. § 552(a)(8)(A)(i)(I); and that any reasonably

segregable non-exempt information has been provided. *Id.* at (a)(8)(A)(ii)(II), (b) (un-numbered paragraph following (b)(9)). “In a FOIA case, a court may award summary judgment solely on the basis of information provided by the agency in declarations when the declarations describe ‘the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.’” *Moore v. Bush*, 601 F.Supp.2d 6, 12 (D.D.C. 2009), quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

III. CLAIMS AT ISSUE

A. The FDIC states that the “pause letters” are correspondence between financial institutions and an agency responsible for the regulation or supervision of those financial institutions; that the “pause letters” specifically concern the risk to the safety and soundness of those institutions posed by crypto-asset activities; and that the “pause letters” discuss details of the specific activities of each financial institution and supervisory interactions between each institution and the FDIC. As such, the “pause letters” consist of supervisory information “contained in or related to examination, operating, or condition reports” and reflect exactly the type of information Congress “intentionally and unambiguously” intended to protect under the “particularly broad” terms of FOIA Exemption 8. *Consumers Union of United States, Inc. v. Heimann*, 589 F.2d 531, 533 (D.C. Cir. 1978).

B. The FDIC states that it is reasonably foreseeable that disclosure of the “pause letters” would cause harm to the recipient financial institutions by revealing to the public and their competitors the institutions’ specific operations, business, and marketing plans and specific areas of safety and soundness concerns by regulators. Further, disclosure would foreseeably

harm the ability of the FDIC and other regulators to carry out their supervisory role by invading the confidential and candid back-and-forth between financial institutions and regulators. *Id.* at 534.

C. The FDIC states that Exemption 8 is an exception to the general rule that FOIA exemptions are construed narrowly. *Judicial Watch, Inc. v. Dept. of Treasury*, 796 F.Supp.2d 13, 37 (D.D.C. 2011); *McKinley v. FDIC*, 744 F.Supp. 2d 128, 143 (D.D.C. 2010). Because all of the information in the “pause letters” is “contained in or related to” examination, operating, or condition reports concerning financial institutions and is covered by Exemption 8, there is no reasonably segregable information.

Dated: September 4, 2024

Respectfully submitted,

ANDREW J. DOBER, D.C. Bar # 489638
Senior Counsel

/s/ Daniel H. Kurtenbach

DANIEL H. KURTENBACH

Counsel

LINA SONI

Counsel

3501 N. Fairfax Drive

Arlington, VA 22226

(571) 286-0401

dkurtenbach@fdic.gov

*Attorneys for the Federal Deposit Insurance
Corporation*