

**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' CROSS-MOTION
FOR SUMMARY JUDGMENT ON COUNT I AND OPPOSITION
TO THE FDIC'S MOTION FOR SUMMARY JUDGMENT ON COUNT I AND
MOTION TO DISMISS COUNT II**

Plaintiff History Associates cross-moves for entry of summary judgment on Count I of the amended complaint, opposes the FDIC's motion for summary judgment on Count I, and opposes the FDIC's motion to dismiss Count II. Accompanying this filing is a supporting memorandum, a counter-statement of disputed facts and additional statement of material facts not in dispute, and a proposed order.

Date: July 30, 2025

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF HISTORY ASSOCIATES' CROSS-MOTION FOR
SUMMARY JUDGMENT ON COUNT I, IN OPPOSITION TO THE FDIC'S MOTION
FOR SUMMARY JUDGMENT ON COUNT I, AND IN OPPOSITION TO THE FDIC'S
MOTION TO DISMISS COUNT II**

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Exhibit B	Excerpts of FDIC's FOIA Training Slides

INTRODUCTION

Coinbase commenced this FOIA campaign (through History Associates) to bring to light Operation Choke Point 2.0—an effort by Defendant FDIC and other agencies in the prior Administration to debank and cripple the crypto industry. Although the FDIC initially stonewalled, this Court’s orders forced the agency to release crucial records revealing the government’s attempt to exile crypto companies from banks and traditional financial services. Those records revealed, in the current FDIC Acting Chair’s own words, that banks’ efforts to engage with crypto companies “were almost universally met with resistance” by the FDIC—“ranging from repeated requests for further information, to multi-month periods of silence as institutions waited for responses, to directives from supervisors to pause, suspend, or refrain from expanding all crypto- or blockchain-related activity.”¹ Those revelations have opened a window for the public into the federal government’s unlawful debanking efforts—exactly the kind of transparency FOIA was enacted to foster.

The FDIC’s actions before and during this litigation, however, have uncovered unlawful policies or practices that the FDIC systematically applies to FOIA requests. History Associates therefore amended its complaint to assert FOIA policy-or-practice claims and seek declaratory and injunctive relief preventing the FDIC from using its unlawful policies or practices to stymie History Associates’ other, related FOIA requests pending before the FDIC. Information subsequently disclosed by the FDIC in this litigation—including its FOIA policies and manuals—has only confirmed Coinbase’s concerns. Targeted discovery is needed to complete the puzzle and would enable the Court to resolve this controversy on the merits once and for all.

But the FDIC now seeks to avoid accountability for its FOIA missteps by moving for a pleading-stage dismissal of History Associates’ fact-laden FOIA policy-or-practice claims. Rather

¹ Press Release, FDIC Releases Documents Related to Supervision of Crypto-Related Activities (Feb. 5, 2025), <https://bit.ly/3IBscbz>.

than resolve the dispute efficiently in light of the record already partially developed—as History Associates proposed and the Court suggested at the most recent hearing—the FDIC insists on threshold litigation over the adequacy of History Associates’ amended complaint. That effort fails.

The FDIC makes two basic arguments for dismissing History Associates’ policy-or-practice claims on the pleadings. Neither has merit. First, the FDIC argues that History Associates has failed to plausibly allege a single unlawful FOIA policy or practice. But its argument rests entirely on a heightened pleading standard of the FDIC’s own invention. Under the actual pleading standard, History Associates’ policy-or-practice allegations pass with flying colors. And they would survive even the FDIC’s manufactured, arbitrarily heightened test. The corroborating evidence that the FDIC (under the Court’s orders) has provided to History Associates since the filing of the amended complaint only further confirms those allegations.

Second, the FDIC argues that the policy-or-practice claims are prudentially unripe. But the FDIC’s central contention—that History Associates’ claims impermissibly focus on the FDIC’s *future* noncompliance with FOIA—miscasts the policy-or-practice claims. History Associates challenges the FDIC’s *existing* unlawful FOIA policies that the agency *has* applied and is *currently* applying to History Associates’ pending requests. That is a concrete legal dispute requiring this Court’s intervention. The FDIC’s ripeness argument is also at war with the purpose of the policy-or-practice doctrine: to ensure agencies’ future compliance with FOIA even when they seek to strategically moot FOIA cases by producing the requested documents in litigation.

In addition to seeking dismissal of the FDIC’s policy-or-practice claims, the FDIC asks the Court to bless the agency’s over-redactions of the pause letters that prompted this litigation. But in two discrete but critical respects, the agency’s redactions remain overreaching. This Court should review and reject the FDIC’s omissions.

The parties' positions on the proper handling of History Associates' FOIA request in this case and others in the pipeline are far apart. But the question of which path forward would be most efficient and lead most directly to resolution of the merits—reflecting the already-disclosed facts and the narrow subset necessary to complete the picture—is not close. After all, even if the Court deemed History Associates' policy-or-practice allegations deficient, the information uncovered since the filing of the operative complaint would entitle History Associates to file a further amended complaint. The Court should avert that needless threshold skirmishing. It should deny the FDIC's motions to dismiss and for summary judgment and order targeted discovery.

BACKGROUND

A. The FDIC Categorically Denies History Associates' FOIA Request for Pause Letters

For several years, federal financial regulators, including the FDIC, engaged in a coordinated effort to strangle the crypto industry. ECF 37 ¶¶ 2, 35-41. A key part of the government's war on crypto was Operation Choke Point 2.0—an effort by the FDIC and other federal regulators to prevent banks from offering or engaging in digital-asset activities and to deprive the crypto industry of the banking services it needs (like most businesses) to operate. *Id.* ¶¶ 5, 42-48.

Seeking to bring the FDIC's role in that unlawful scheme to light, Coinbase retained Plaintiff History Associates to file a series of FOIA requests seeking records from the FDIC related to digital assets. ECF 37 at 1. One of those requests sought “pause letters” that the FDIC sent to supervised financial institutions, asking them to pause crypto-related activities indefinitely. *Id.* ¶¶ 2, 55-65. The FDIC's Office of Inspector General had revealed the existence of the pause letters in an October 2023 report, in which it criticized the letters as inconsistent with previous FDIC guidance on crypto-related activities. *Id.* ¶¶ 2, 43-46. History Associates submitted a FOIA request seeking copies of “all ‘pause letters.’” *Id.* ¶¶ 8, 56.

But even though the OIG’s report had already revealed the existence of the pause letters—and had even quoted from them—the FDIC refused even to confirm their existence. Instead, the FDIC “categorically denied” the FOIA request without even “search[ing] for records responsive to” it. FDIC Mot. 12. The agency’s denial letter stated that, “[b]y its very nature, the information that you requested, if it exists and could be located, ... would be exempt from disclosure under FOIA Exemptions 4 and 8,” which cover confidential commercial information and matters related to bank examination, operating, or condition reports, respectively. ECF 37-2 at 1 (citing 5 U.S.C. § 552(b)(4), (8)). The denial letter also included a boilerplate statement that “it is reasonably foreseeable that disclosure would harm an interest protected by” a FOIA exemption. *Id.*

History Associates administratively appealed the FDIC’s denial. ECF 37 ¶ 59. In response, the FDIC defended its categorical determination. The FDIC stated that its initial denial letter “was based upon a determination that the type of records being requested would be exempt, rather than making exemption determinations on a document-by-document basis.” ECF 37-3 at 6. The agency then attempted to justify that approach under Exemption 8 alone by citing case law approving narrow categorical denials under other FOIA exemptions. *Id.* at 5-6 & n.13. Purporting to apply that case law, the FDIC asserted that a categorical determination was appropriate here “[g]iven the description of the ‘pause letters’ in the OIG report” as “supervisory guidance from the FDIC.” *Id.* at 7. Based on that description, the FDIC concluded, “there is no question that the ‘pause letters’ would ... fall entirely within the ‘all-inclusive’ scope of Exemption 8 and would not include any segregable, non-exempt material,” obviating the need for the agency even to review the documents individually (or even search for them). *Id.*

The FDIC also declined to review the pause letters individually to assess whether the agency could disclose any information without harming an interest protected by Exemption 8, as

required by the FOIA Improvement Act of 2016. 5 U.S.C. § 552(a)(8)(A)(i); ECF 37-3 at 7. It instead concluded, again based solely on the description of the pause letters, that disclosure of the letters “would, necessarily,” “harm important interests protected by FOIA Exemption 8.” ECF 37-3 at 7.

B. This Court Rejects The FDIC’s Categorical Determination And Repeatedly Orders The Agency To Produce Redacted Pause Letters

History Associates sued the FDIC for unlawfully withholding the pause letters in June 2024. ECF 1. In its answer and in an initial filing in this case, the FDIC stood by its categorical withholding of the pause letters under Exemption 8. ECF 13 at 7.

This Court disagreed. At the first pre-motion conference in this case, the Court stated that it was “hard to believe that there’s nothing in the letters that can’t be shown if you have redactions.” ECF 25-1 at 9. The Court therefore instructed the FDIC to produce a Vaughn index and redacted pause letters. *Id.* at 9-10, 14-18. But the FDIC initially produced only a Vaughn index and refused to produce *any* redacted pause letters, prompting this Court to reinforce its prior order. Nov. 4, 2024 Minute Order.

In November 2024, the FDIC produced 23 redacted pause letters, which confirmed that the agency’s categorical withholding was inappropriate. Yet those letters were so heavily redacted that, following an in camera review, this Court expressed “concern[] with what appears to be FDICs lack of good-faith effort in making nuanced redactions” and ordered the FDIC to “re-review the documents” and “make more thoughtful redactions.” Dec. 12, 2024 Minute Order.

C. The FDIC’s Subsequent Productions Reveal Additional Fundamental Problems With The FDIC’s FOIA Processes

In January 2025, the FDIC produced revised versions of the pause letters with fewer redactions—a subset of which History Associates continues to challenge as inconsistent with FOIA. *See, e.g.*, ECF 37 ¶ 72; *infra* 36-43. But that production brought to light additional, even more

fundamental problems with the FDIC’s treatment of the pause-letter request. First, the revised production contained two additional pause letters, revealing that the agency’s first search was inadequate. *See* ECF 37 ¶ 74. Second, the FDIC revealed that it had adopted an untenable reading of the scope of the FOIA request. History Associates sought “[c]opies of all ‘pause letters’ described in the OIG report,” but the FDIC narrowly construed the request to be for only pause letters “shared with the OIG.” *Id.* ¶ 75 (emphasis omitted). Those revelations—as well as public allegations of document destruction aired elsewhere—gave History Associates concern that the FDIC’s response to the pause-letter request was still incomplete and a product of unlawful FOIA policies or practices.

During a January 2025 hearing held to address these issues (among others), this Court asked the FDIC “[w]ho took the incredibly narrow illogical view of [History Associates’] FOIA request.” ECF 37-1 at 3. Yet even the FDIC official who had signed the FOIA appeal-denial decision, who argued for the FDIC at that hearing, was unable to answer. *Id.* This Court also asked the FDIC whether it had put in place a litigation hold to protect the documents subject to the FOIA request. *Id.* at 5. The FDIC admitted that it had not done so—an admission it confirmed in a later hearing while also indicating that it lacks any policy of issuing litigation holds in response to FOIA requests or even FOIA litigation. *Id.*; ECF 38-1 at 9. The Court then ordered the FDIC to produce any remaining pause letters. ECF 37-1 at 24; Jan. 22, 2025 Minute Order.

D. The FDIC’s Additional Documents Reveal An Anti-Crypto Campaign And Draw Scrutiny From The Public And Congress

The FDIC’s subsequent production confirmed the inadequacy of the agency’s prior efforts. On February 5, the FDIC (under new leadership) produced 790 pages of additional documents, including numerous additional pause letters. *See* ECF 32. The FDIC’s Acting Chair also issued a statement explaining that the “documents ... show that requests from these banks were almost

universally met with resistance, ranging from repeated requests for further information, to multi-month periods of silence as institutions waited for responses, to directives from supervisors to pause, suspend, or refrain from expanding all crypto- or blockchain-related activity.” Press Release, FDIC Releases Documents Related to Supervision of Crypto-Related Activities (Feb. 5, 2025), <https://bit.ly/3IBscbz>.

The release received substantial news coverage. *See, e.g.*, Jeff Gapusan, *Operation Chokepoint 2.0: FDIC Documents Confirm Crypto Bias*, Forbes (Feb. 5, 2025), <https://bit.ly/4eZH9T>; *FDIC Releases Documents on Crypto Supervision of Banks*, American Bankers Association Banking Journal (Feb. 5, 2025), <http://bit.ly/4fhe5oc>. And Congress subsequently held hearings on topics related to the pause letters. *See* Operation Choke Point 2.0: The Biden Administration’s Efforts to Put Crypto in the Crosshairs, Hearing Before H. Comm. on Fin. Servs., 117th Cong. (Feb. 6, 2025); Investigating the Real Impacts of Debanking in American, Hearing Before S. Banking Comm. (Feb. 5, 2025).

E. History Associates’ Amended Complaint Challenges The FDIC’s Redactions And Unlawful FOIA Policies Or Practices

The revelations of the FDIC’s disconcerting handling of the pause-letter FOIA request gave rise to serious concerns about the FDIC’s approach to FOIA requests more generally—of acute interest to Coinbase and History Associates, which have many other crypto-debanking-related requests still pending before the FDIC (among other agencies). With the Court’s leave, History Associates filed an amended complaint. Jan. 22, 2025 Minute Order; ECF 37. The amended complaint alleges—based on the FDIC’s handling of this and other FOIA requests History Associates has filed, ECF 37 ¶¶ 96-105—that the FDIC has four unlawful FOIA policies or practices:

1. an unlawful policy or practice of making blanket assertions that bank supervisory records are categorically subject to Exemption 8 and therefore purportedly immune to disclosure. ECF 37 ¶ 120.

2. an unlawful policy or practice of construing FOIA requests narrowly, rather than liberally as FOIA requires. *Id.* ¶ 121.
3. an unlawful policy or practice of failing to conduct a search reasonably calculated to uncover all responsive records within the agency’s possession or control. *Id.* ¶ 122.
4. an unlawful policy or practice of failing to take necessary steps to ensure that records responsive to FOIA requests are properly preserved, including implementing litigation holds when a FOIA suit is brought. *Id.* ¶ 123.

The amended complaint also continues to press the original claim for the pause letters—now limited to challenging the FDIC’s unwarranted redactions. Specifically, the amended complaint alleges that the FDIC improperly continues to redact information not protected by FOIA, including “the names of public blockchains that the banks were seeking to use.” ECF 37 ¶ 114.

F. The Court Orders An Information-Sharing Process That Eventually Yields Evidence Corroborating History Associates’ Policy-or-Practice Claims

At a February 2025 hearing, this Court stayed the FDIC’s deadline to answer the amended complaint so that the parties could engage in an informal information-sharing process with swift, biweekly productions. *See* ECF 38-1 at 15, 17. The Court observed that the agency at that juncture seemed to have changed tack and “been properly motivated now, both by a new chair and some press as to their practices, to work cooperatively with” History Associates on resolving its policy-or-practice claims. *Id.* The Court also stated that, if “during the course of that cooperation” History Associates is “not satisfied that [it is] getting the full story, then certainly come back to me and I’m happy to order a 30(b)(6) [deposition] very quickly.” *Id.* at 15.

For most of the information-sharing process, the FDIC was unwilling to cooperate in giving History Associates the information needed to investigate its policy-or-practice claims. *See* ECF 44 at 9-13; ECF 48 at 2-6. But at the eleventh hour—after History Associates had moved to lift the stay—the FDIC produced certain of its internal divisions’ FOIA policies. *See* ECF 53-1.

Those policies corroborated History Associates' allegations and raised additional questions warranting further investigation. For example, a FOIA policy of the FDIC's division of Risk Management Supervision states that any responsive document implicating "FOIA Exemption (b)(8)" should be "withheld in full," and that the FDIC has "[n]o duty to segregate factual from analytical or deliberative material" when applying Exemption 8. ECF 53-1 at 18, 29, 32. That supports History Associates' allegation that the FDIC has a policy of categorically denying requests under Exemption 8. The policies also indicate that it is the responsibility of FDIC "employees in the divisions and offices" to interpret FOIA requests and search for responsive records, but do not instruct them to construe requests liberally or on proper search techniques. *Id.* at 120-21. And the policies say nothing at all about employees' duty to preserve records subject to FOIA requests or reference *any* policy with respect to instituting and abiding by litigation holds.

G. The FDIC Files A Motion To Dismiss The Policy-or-Practice Claims

After this Court dissolved the stay at History Associates' request, the parties offered competing proposals for resolving this case. History Associates filed a motion for tailored document discovery and a targeted 30(b)(6) deposition and proposed proceeding thereafter with cross-motions for summary judgment, which would comprehensively resolve the case after one set of briefing. ECF 53, 60. The FDIC, by contrast, proposed proceeding piecemeal by filing a motion to dismiss History Associates' policy-or-practice claims and a motion for summary judgment on the pause-letter claim. ECF 57.

At a pre-motion conference, this Court stated that it had "a hard time understanding how I'm going to be able to" resolve the case "on 12(b)(6)" because History Associates' policy-or-practice allegations are "rife with factual determinations." Ex. A at 24. The Court suggested that the FDIC could "just do summary judgment all at once" so that there would be "a lot less briefing." *Id.* at 66. The Court further explained that it was "very happy to have pre-motion discovery where

I don't think the motion is going to succeed," *id.* at 45, and thus ordered the FDIC to produce additional documents related to the policy-or-practice claims (including FOIA training materials) in advance of filing its motion, *see* May 29, 2025 Minute Order.

The FDIC produced the additional documents on July 7. Those documents further support History Associates' claims, including by failing to instruct employees to interpret FOIA requests liberally. On July 9, the FDIC elected to proceed with its piecemeal approach to resolving this case by filing a motion to dismiss History Associates' policy-or-practice claims along with a motion for summary judgment on the pause-letter claim. ECF 72.

LEGAL STANDARD

"In evaluating a motion to dismiss," the court determines whether the plaintiff has pleaded "the elements" of its claim "with adequate factual support to state a claim to relief that is plausible on its face." *Sanchez v. Off. of State Superintendent of Educ.*, 45 F.4th 388, 395 (D.C. Cir. 2022) (internal brackets, quotation marks, and citations omitted). "[T]he court must accept the plaintiff's factual allegations as true and draw all reasonable inferences in the plaintiff's favor." *Id.* In the context of a FOIA "policy or practice claim," the plaintiff must allege facts "that could signal the agency has a policy or practice of ignoring FOIA's requirements." *Jud. Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 780 (D.C. Cir. 2018).

"Summary judgment may be granted only when the moving party ... is able to show that there is 'no genuine dispute as to any material fact.'" *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 584 (D.C. Cir. 2020) (quoting Fed. R. Civ. P. 56(a)). In FOIA cases, that requires the agency "to establish beyond factual dispute that its failure to produce responsive records"—or "any reasonably segregable portion of a record"—"comes outside the mandate of FOIA ... by a factually indisputable right to protection under one of the statutory exemptions." *Id.* at 583-84 (brackets and citation omitted).

ARGUMENT

I. This Court Should Deny The Motion To Dismiss The Policy-or-Practice Claims

History Associates has more than adequately pleaded that the FDIC's mistreatment of the pause-letter request at issue here stemmed from unlawful agency FOIA policies or practices. And History Associates' challenges to those discrete policies and practices are ripe for judicial resolution. More fundamentally, the FDIC's code-pleading attacks on History Associates' policy-or-practice allegations have been overtaken by *evidence* surfaced through informal discovery directed by the Court. The FDIC's motion inefficiently invites the Court to ignore that already-developed evidence and to indulge the fiction that the agency's actual FOIA policies and practices are still under shroud. Instead of accepting that invitation to move the case pointlessly backwards, the Court should direct the FDIC to comply with History Associates' contemporaneous motion for targeted discovery, and then decide the case on cross-motions for summary judgment.

A. History Associates Has Amply Alleged Its Policy-or-Practice Claims

The FDIC principally contends that the amended complaint's examples of the FDIC's applying unlawful FOIA policies are not numerous or similar enough to substantiate the four alleged unlawful policies or practices. But the FDIC's invented "numerosity" and "similarity" requirements are meritless and mistake *one* way to show a policy or practice—by establishing a "pattern"—for the *exclusive* way to do so. Under the correct standard, the amended complaint alleges more than enough facts to show what matters: The FDIC's mistreatment of the pause-letter FOIA request stems not from an isolated mistake, but from unlawful policies or practices that will affect History Associates' currently pending FOIA requests. In any event, the amended complaint meets the FDIC's contrived pleading requirements as well. The agency's written policies obtained during the information-sharing process (which, if needed, a further amended complaint could easily incorporate) confirm that showing and underscore the futility of the FDIC's motion.

1. The FDIC's Motion Is Premised on an Erroneous Pleading Standard

The FDIC hinges its Rule 12(b)(6) argument on the notion that, “in order to plead a policy or practice claim,” a plaintiff “must establish (1) numerosity, (2) similarity between its requests, (3) similarity in the agency’s responses, and (4) an unlawful FOIA practice” that violates “binding precedent.” FDIC Mot. 26, 34; *see also id.* at 27-42. But there is no support in FOIA, Rule 12(b)(6), or controlling precedent for any (let alone all) of those pleading requirements.

Under Rule 12(b)(6), all a plaintiff must do to survive a motion to dismiss is plead the elements of a claim “with adequate factual support to state a claim to relief that is plausible on its face.” *Sanchez v. Off. of State Superintendent of Educ.*, 45 F.4th 388, 395 (D.C. Cir. 2022) (citation and quotation marks omitted). A claim “is facially plausible when the complaint contains factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citation and quotation marks omitted).

The D.C. Circuit set forth the contours of a FOIA policy-or-practice claim long ago in *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988): “So long as an agency’s refusal to supply information evidences a policy or practice” of “some ... failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials, a party’s challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit.” *Id.* at 491 (footnote omitted); *see also Jud. Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 895 F.3d 770, 777-78 (D.C. Cir. 2018) (describing *Payne* as “settled law”). A FOIA plaintiff can obtain a declaration that the agency has an ongoing policy or practice of violating FOIA and an injunction prohibiting the agency from applying that policy or practice going forward. *See Payne*, 837 F.2d at 495 (remanding “with instructions to enter a declaratory judgment for Payne”); *Jud. Watch*, 895 F.3d at 777 (FOIA “does not limit the district court’s inherent injunctive powers”). The policy-or-practice doctrine thereby prevents agencies from “escap[ing] judicial review of its

compliance with FOIA” by simply “mooting the litigation” by releasing the documents at issue (as the FDIC sought to do here). *Jud. Watch*, 895 F.3d at 779, 782.

The pleading standard for policy-or-practice claims tracks the nature of the claim. As the D.C. Circuit has explained, a “plaintiff states a plausible policy or practice claim under *Payne* by alleging” facts “that could signal the agency has a policy or practice of ignoring FOIA’s requirements” that “will interfere with [the plaintiff’s] right under FOIA to promptly obtain non-exempt records from the agency in the future.” *Jud. Watch*, 895 F.3d at 780. In other words, to survive a motion to dismiss, a plaintiff need only allege facts plausibly suggesting that an agency’s response to a FOIA request could be a manifestation of an unlawful policy or practice rather than an “isolated mistak[e] by agency officials.” *Id.* at 778.

The FDIC mistakenly attempts to superimpose additional pleading requirements, but none is grounded in the law. It claims that a plaintiff must (1) identify at least three FOIA requests (2) that seek a “narrowly defined class of documents,” (3) that elicited similar responses from the agency, and (4) that reflect a policy “contrary to ‘binding precedent.’” FDIC Mot. 25-26, 34 (citation and emphasis omitted). Those invented requirements lack any legal basis and make little sense.

For example, of course a plaintiff asserting a policy-or-practice claim must identify a FOIA policy or practice that is unlawful. But there is no heightened, qualified-immunity-style requirement that the alleged FOIA policy already be foreclosed by controlling case law. Nor would such a requirement advance the core purpose of policy-or-practice claims of preventing an agency from evading judicial review of FOIA violations by belatedly disclosing the records at issue. Indeed, that requirement would insulate an unlawful but novel FOIA policy or practice from review.

The purported requirements that a plaintiff identify “numerous” and “similar” FOIA requests fare no better. Those invented pleading requirements derive from the FDIC’s mistaken view that a FOIA plaintiff must establish a “pattern” in order to plausibly allege an unlawful FOIA policy or practice. FDIC Mot. 25. To be sure, showing a pattern of agency misconduct is one way a plaintiff can plausibly allege a policy-or-practice claim. *See, e.g., Citizens for Resp. & Ethics in Washington v. U.S. Dep’t of Just.*, 772 F. Supp. 3d 1, 12 (D.D.C. 2025) (“CREW”); *Am. Ctr. for L. & Just. v. FBI*, 470 F. Supp. 3d 1, 6 (D.D.C. 2020). And to be clear, History Associates *has* adequately alleged a pattern of misconduct here, as explained below, *infra* 26-30. But the FDIC cites no case holding that a pattern of three or more similar FOIA denials is the *only* way to plausibly allege an unlawful FOIA policy or practice.

Nor could that be the law, since there are many ways that an agency’s denial of even a single FOIA request “could signal” that “the agency has a policy or practice of ignoring FOIA’s requirements.” *Jud. Watch*, 895 F.3d at 780. For example, an agency’s denial letter might refer to a written policy. *See, e.g., Newport Aeronautical Sales v. Dep’t of Air Force*, 684 F.3d 160, 163-64 (D.C. Cir. 2012) (explaining that a written policy—“Directive 5230.25”—established the agency’s policy of denying FOIA requests for information subject to the Directive). Or an agency’s legal analysis justifying its denial might indicate that it has adopted a policy or practice inconsistent with FOIA—as the FDIC did in its categorical application of Exemption 8 here. *See infra* 15-18. Or an agency’s “unexplained” delays in processing FOIA requests could reveal an unlawful policy or practice. *Jud. Watch*, 895 F.3d at 780.

The bottom line is that, contrary to the FDIC’s contention, there is more than one way to plausibly allege an unlawful FOIA policy or practice. Any set of facts that, taken as true, permits

the plausible inference that the agency's FOIA violation was the result of a policy or practice rather than an "isolated mistak[e]" gets the plaintiff past the pleading stage. *Payne*, 837 F.2d at 491.

2. History Associates' Allegations Plausibly Allege Unlawful Policies or Practices

Measured by the proper pleading standard, History Associates' amended complaint easily passes muster for each of the four alleged unlawful policies or practices. The evidence that History Associates has already gathered through this Court's orders about the agency's actual policies and practices both confirms those allegations and demonstrates the futility and inefficiency of the FDIC's effort to quibble with the adequacy of the pleadings at this stage of the case.

a. The FDIC Unlawfully Makes Categorical Determinations When Applying Exemption 8

The amended complaint plausibly alleges that the FDIC has: (1) a policy or practice of making categorical determinations under Exemption 8, at least when responding to requests (like the pause-letter request) that seek bank supervisory documents, and (2) that the agency's policy or practice violates FOIA. That suffices to state the Exemption 8 policy-or-practice claim.

The FDIC has a policy of making categorical determinations under Exemption 8. The FDIC's written decisions responding to the pause-letter request, attached as exhibits to the amended complaint, suffice on their own to plausibly allege that the FDIC has a policy or practice of making categorical determinations under Exemption 8 for bank supervisory documents.

The FDIC does not dispute that it made a categorical withholding determination, both in its initial denial letter and in its denial of History Associates' administrative appeal. Nor could it. In the initial denial letter, the agency refused to disclose a single word of any pause letter (or even search for them) on the ground that a pause letter, "[b]y its very nature," would be "exempt from disclosure under" Exemption 8. ECF 37-2 at 1. And in its appeal-denial letter, the FDIC acknowledged that its initial "decision to withhold was based upon a determination that the type of records

being requested would be exempt, rather than making exemption determinations on a document-by-document basis.” ECF 37-3 at 6.

The FDIC defended its categorical withholding in terms suggestive of a broader policy. In multiple paragraphs of legal analysis in its appeal-denial letter—including a section titled “Categorical Determination”—the agency claimed broad authority under Supreme Court and D.C. Circuit precedent to deny FOIA requests categorically. ECF 37-3 at 6. And the FDIC asserted that it could exercise that authority here “[g]iven the description of the ‘pause letters’ in the OIG report” as “supervisory guidance from the FDIC.” *Id.* at 7. Based on that description, the FDIC concluded that “there is *no question* that the ‘pause letters’ would ... fall entirely within the ‘all-inclusive’ scope of Exemption 8 and would not include any segregable, non-exempt material.” *Id.* (emphasis added). The agency thus did not view this as a borderline case for applying the categorical approach, notwithstanding the large amounts of segregable information the FDIC subsequently disclosed.

Throughout this litigation, moreover, the agency has never argued that this categorical determination was an “isolated mistak[e].” *Payne*, 837 F.2d at 491. To the contrary, the FDIC has steadfastly claimed that it has expansive authority to deny FOIA requests categorically under Exemption 8—including that it need not search for documents it believes to be categorically exempt. *E.g.*, FDIC Mot. 34-35 (defending categorical approach); *id.* at 12 n.6 (contending that “not conducting a search when the agency believes the documents are categorically exempt from disclosure is not improper or illegal”). The FDIC also has refused to acknowledge that its categorical determination was inappropriate *even as to the pause letters*, despite the segregable information it has since disclosed. Instead, the agency asserts that all of its disclosures in this case were “discretionary” rather than compelled by FOIA. *E.g.*, *id.* at 2, 3, 6, 10; *see also* ECF 72-2 at 3-5.

The agency's continued defense of its categorical approach makes this case analogous to *Newport Aeronautical*, where the existence of a written policy, codified in a regulation, sufficed to allege the agency had an improper FOIA policy or practice. *See* 684 F.3d at 163-64. In both cases, the agency's defense of its practice—by reference either to a regulation or to purportedly supportive case law—plausibly established that the agency's decision was not an isolated mistake, but rather the result of a deliberate, generally applicable decision about how to respond to certain FOIA requests. If the FDIC continues to believe that it is consistent with FOIA for the agency to withhold “supervisory guidance from the FDIC” based solely on the descriptions of the documents—and that the pause letters are *unquestionably* categorically exempt—it is hard to imagine why the agency would not be routinely applying that categorical approach to all bank supervisory documents. After all, it is far easier for the agency to deny FOIA requests categorically rather than searching for responsive documents and reviewing them for segregable information.

The FOIA policies that History Associates has obtained from the FDIC since filing the amended complaint confirm what the FDIC's words and actions in this case suggest. For example, the FDIC produced a policy of its division of Risk Management Supervision, which “maintains the supervisory correspondence that go back and forth with banks,” like the pause letters. ECF 37-1 at 7. That policy states that any responsive document implicating “FOIA Exemption (b)(8)” should be “withheld in full.” ECF 53-1 at 32 (“withheld in full, i.e. citing FOIA Exemption (b)(8)”). The same policy also states that the FDIC has “[n]o duty to segregate factual from analytical or deliberative material” when applying Exemption 8 and describes Exemption 8 in sweeping terms—calling it “all-inclusive” and the FDIC's “own FOIA exemption ... to maintain the confidentiality of [its] work.” *Id.* at 18, 29. Another policy the FDIC has produced reveals that a

FOIA officer can seek permission to “respond without searching for or locating the records” if the officer believes the records will fall categorically within Exemption 8. *Id.* at 178-79.

Although such evidence is unnecessary at the motion-to-dismiss stage, it underscores that the FDIC’s effort to dismiss this case on the pleadings is an empty exercise. Rather than tussle over the plausibility of allegations that have since been corroborated and bolstered by actual evidence of the FDIC’s FOIA policies, the parties should proceed with targeted additional discovery to complete the record on the scope of the FDIC’s policies, as History Associates has explained in its contemporaneously filed motion for discovery. The parties could then litigate, and the Court could definitively resolve, the merits in cross-motions for summary judgment.

The FDIC’s Exemption 8 policy is unlawful. The FDIC’s policy of categorically denying FOIA requests under Exemption 8 is unlawful because it “ignor[es] FOIA’s requirements.” *Jud. Watch*, 895 F.3d at 780. In the FOIA Improvement Act of 2016, Congress put an end to the kind of blunderbuss rejection of FOIA requests the FDIC undertook here and that its policy directs its staff to apply. That enactment requires agencies to “take reasonable steps necessary to segregate and release nonexempt information,” and it forbids them from “withhold[ing] information” unless “the agency reasonably foresees that disclosure would harm an interest protected by an exemption.” 5 U.S.C. § 552(a)(8)(A). It is typically impossible for an agency to evaluate whether reasonably segregable information exists or whether disclosing it would be harmless if the agency does not conduct the kind of “document-by-document” review that the FDIC admittedly refused to conduct here. ECF 37-2 at 1. Deciding that an entire category of records contains no segregable portions that must be disclosed based merely on the “type of records” often will result in the agency withholding information that FOIA requires it to disclose, as this case demonstrates.

In arguing otherwise, the FDIC relies on cases upholding categorical denials under Exemptions 5 and 7. See FDIC Mot. 34-35 (citing *U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 777 (1989); *FTC v. Grolier Inc.*, 462 U.S. 19, 27-28 (1983); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 241 (1978)). But those cases approved categorical determinations for narrow sets of documents. *Robbins Tire* involved “witness statements in pending unfair labor practice proceedings.” 437 U.S. at 236. *Reporters Committee* concerned “law enforcement records or information about a private citizen . . . when the request seeks no ‘official information.’” 489 U.S. at 780. And *Grolier* involved only attorney “work-product materials.” 462 U.S. at 27.

None of those cases approaches the circumstances here. History Associates plausibly alleges (and the evidence supports) that the FDIC has a policy of categorically denying requests seeking any bank-supervisory documents. By the FDIC’s own reckoning, that category encompasses nearly *two million* documents at the FDIC alone—and likely millions more at other federal regulators with supervisory relationships. FDIC Mot. 12 n.7.

Carving out such a sweeping category of documents from the 2016 amendment’s segregability and foreseeable-harm requirements would neuter them as applied to Exemption 8. It would also be wildly overinclusive, as demonstrated by the many redactions of innocuous material the FDIC made to the supervisory documents it produced in this case. Under the FDIC’s approach, all of the information it disclosed in response to this Court’s orders—disclosures that prompted congressional hearings—could be forever withheld from public view. That is flatly inconsistent with FOIA’s purpose of “open[ing] agency action to the light of public scrutiny.” *U.S. Dep’t of Just. v. Tax Analysts*, 492 U.S. 136, 142 (1989).

The FDIC suggests that the “breadth” of Exemption 8 justifies a broad categorical approach, FDIC Mot. 34, but it cites no case under Exemption 8 approving the kind of expansive

categorical approach that History Associates has plausibly alleged here. Indeed, the *only* case the agency cites that has approved a categorical determination under Exemption 8 predates the FOIA Improvement Act of 2016. *Pub. Invs. Arb. Bar Ass'n v. SEC*, 930 F. Supp. 2d 55, 60 (D.D.C. 2013). And even that case involved discrete categories of documents, such as those related to the SEC's review of FINRA's "selection, appointment, and replacement" of FINRA arbitrators, its "pre-approval background check[s] on arbitrator applicants," and its processes for "deciding causal challenges to an arbitrator's appointment." *Id.* No case supports the FDIC's policy of refusing to review all bank supervisory documents for non-exempt or harmless information.

b. The FDIC Fails to Construe FOIA Requests Liberally

The amended complaint also more than adequately alleges that the FDIC has a policy or practice of failing to construe FOIA requests liberally. The D.C. Circuit has repeatedly held that, although a FOIA "requester must 'reasonably describe[]' the records sought, 5 U.S.C. § 552(a)(3), an agency also has a duty to construe a FOIA request liberally." *Nation Mag., Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (citing, e.g., *Truitt v. Dep't of State*, 897 F.2d 540, 545 (D.C. Cir. 1990)); *see also Inst. for Just. v. IRS*, 941 F.3d 567, 572 (D.C. Cir. 2019) ("our case law has often repeated that an agency has a duty to construe a FOIA request liberally" (quotation marks omitted)); *Callaway v. U.S. Dep't of Treasury*, 2009 WL 10184495, at *1 (D.C. Cir. June 2, 2009) (per curiam) (summarily vacating summary judgment granted to agency for failure to liberally interpret the FOIA request). That requirement derives from "the liberal standard for identification [of records] that Congress intended" in FOIA. *Truitt*, 897 F.2d at 545 (quoting S. Rep. No. 93-854, 93d Cong., 2d Sess. 10 (1974)). The FDIC does not deny that it has an obligation to construe FOIA requests liberally. It argues only that History Associates has failed to sufficiently allege an agency policy or practice of construing requests more narrowly than FOIA requires. But History Associates' allegations easily clear that bar.

The agency's treatment of History Associates' pause-letter request is a case in point. The FDIC construed History Associate's request for "[c]opies of all pause letters described in' the OIG report" as confined to seeking only copies of pause letters *shared with* the OIG in preparing its report. ECF 37 ¶ 97. As this Court recognized, that was a "narrow" and "illogical view" of the request. ECF 37-1 at 3. And it was a view endorsed not by a low-level FOIA employee but by the FDIC's senior counsel in this case, who signed the agency's appeal-denial letter. *See* ECF 37-3 at 8; FDIC Mot. 46. As the FDIC's later productions revealed, its narrow construction led it to miss numerous pause letters. *See, e.g.*, FDIC Records—Correspondence Related to Crypto-Related Activities (Feb. 5, 2025), <https://bit.ly/4hu1Vsi> ("Feb. 5 Production"), at 3, 6, 11, 22, 29, 37, 45, 58, 72, 75, 87, 94, 99, 116, 119, 137, 164, 173, 189, 198, 238, 246, 252, 270.

But, although the FDIC's handling of the pause-letter request is a stark example, it is not alone. History Associates also has alleged that the FDIC narrowly construed one of History Associates' separate crypto-debanking-related FOIA requests. ECF 37 ¶ 98. Although that request sought *all* agency communications related to a particular crypto-related policy statement, the FDIC interpreted the request to seek only documents and communications of "the FDIC Board of Directors and/or FDIC Staff who would be reasonable custodians of the requested documents." ECF 37-7. That unilaterally adopted, narrow construction, which resulted in the agency finding "no records" in response to the request, *id.*, bolsters the plausible inference that the FDIC's failure to liberally construe the pause-letter request was not an isolated mistake but rather a manifestation of an agency practice of narrowly construing requests.

The evidence that History Associates has obtained from the FDIC since amending the complaint confirms again History Associates' allegations that these cramped constructions of FOIA requests stem from systemic dysfunction. A necessary first step for an agency to comply with

FOIA's requirement to construe requests liberally is for the agency to instruct its employees reviewing FOIA requests that they must construe requests liberally. An agency's duty to "construe a FOIA request liberally," *Nation Mag.*, 71 F.3d at 890, is critical to preventing frustration of FOIA's purposes. But that obligation may not be obvious to agency staff not steeped in FOIA case law. For an agency to discharge that duty, the agency must therefore ensure that its employees are aware of and understand that requirement—through training, guidance, or otherwise. Yet the FDIC's policies and training materials say *nothing* about construing requests liberally. Nor do they convey the substance of the liberal-construction requirement—for example, by telling employees to adopt a broader interpretation of a request over a narrower one when in doubt.

To the contrary, the FDIC's policies are at best confusing and at worst push employees towards disclosing *less* than FOIA requires. For example, the policy of the FDIC's division of Risk Management Supervision instructs FOIA employees to "only provide what is 'reasonably interpreted,'" and it then points employees to the policy's appendix for the definition of "reasonably interpreted." ECF 53-1, at 19. But while the appendix indeed lists "reasonably interpret" as a defined term, it provides no *definition*, *id.* at 49—an omission the agency has confirmed is no fluke, ECF 70 ¶ 26 ("there is no final version of the policy that defines the requested terms"). A FOIA employee easily could understand that policy to require putting a thumb on the scale *against* production, or at a minimum interpreting the request neutrally, rather than interpreting it liberally as FOIA demands.

Thus, although History Associates' pleadings more than suffice on their own, the supporting evidence History Associates has since obtained both confirms that the FDIC systematically fails to comply with FOIA's liberal-construction requirement and all but guarantees that the FDIC will not be able to dismiss this policy-or-practice claim on the pleadings.

c. The FDIC Inadequately Searches for Responsive Records

The amended complaint further adequately alleges a policy or practice of failing to conduct adequate searches in response to FOIA requests. Once an agency properly construes the scope of a FOIA request, it must make “a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 584 (D.C. Cir. 2020). The FDIC does not dispute that FOIA requires it to conduct a reasonable search, and History Associates has plausibly alleged that the agency has a policy or practice of failing to discharge that duty.

Once again, the agency’s response to the pause-letter request here is illustrative. It took *four* court orders and *six* productions for the FDIC to identify and produce all documents responsive to History Associates’ relatively narrow pause-letter request. The FDIC found 23 pause letters in its first search in November, then 25 in January, and later *dozens* more.²

And, once again, the pause-letter request is not alone. History Associates has alleged that the FDIC turned up an implausibly low number of records in response to several separate requests related to other crypto-debanking-related issues. ECF 37 ¶¶ 100-101. For example, the FDIC found zero records discussing a highly publicized Federal Reserve crypto-related policy statement that mentioned the FDIC 20-plus times. ECF 37-11. The FDIC also has not produced a single document from collaboration platforms such as Microsoft Teams in response to any of History Associates’ FOIA requests, ECF 37 ¶ 101, despite its productions repeatedly referring to Teams. *E.g.*, Feb. 5 Production at 390-91, 404-07, 580-83, 639-41, 746. Together, these instances are more than enough to allege a policy or practice of conducting insufficient searches.

² See Sept. 18, 2024 Minute Order; Nov. 4, 2024 Minute Order; Dec. 12, 2024 Minute Order; Jan. 22, 2025 Minute Order.

The FDIC argues that courts have often rejected the inference that an agency's search was inadequate because it failed to turn up records. FDIC Mot. 40-42. That may be true when courts are evaluating the adequacy of a search in response to a single FOIA request. *See, e.g., Watkins L. & Advoc., PLLC v. U.S. Dep't of Just.*, 78 F.4th 436, 444 (D.C. Cir. 2023); *Clemente v. FBI*, 867 F.3d 111, 118 (D.C. Cir. 2017). But here, the question is whether the FDIC's clearly inadequate search for pause letters was an isolated mistake or the result of an agency policy or practice. In that context, additional examples of the agency turning up an implausibly low number of records at least raise an inference of an insufficient search process.

That pleading-stage inference has already been bolstered by the FDIC's subsequently produced policies. The FDIC apparently assigns FOIA requests to "employees in the divisions and offices [to] conduct the searches" for responsive records. ECF 53-1, at 120-21; *see also* Ex. B, at 68 (training slide explaining that "Identified [record] Custodians ... conduct search" in the FOIA-request work flow). But, just as its policies and training materials do not instruct those employees to construe requests liberally, they likewise fail to instruct employees on how to conduct proper searches. For example, neither the policies nor training materials instruct employees on how to construct search terms, provide guidance on which document repositories to search for different kinds of requests, or explain how to search the FDIC's various record repositories. *See* Ex. B, at 41-44, 109-16. Given such threadbare guidance, FDIC staff cannot be "reasonably expected to produce the information requested." *Evans*, 951 F.3d at 584.

d. The FDIC Lacks Adequate Document-Preservation Procedures

Finally, History Associates has plausibly alleged that the FDIC has a policy or practice of failing to take the steps necessary to ensure that records responsive to FOIA requests are properly preserved. The FDIC does not dispute that an agency must preserve documents that are the subject of pending FOIA requests. *See Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir.

2009) (agency cannot “intentionally transfer[] or destroy[] a document after it has been requested under FOIA”). That obligation is heightened once a FOIA request becomes the subject of FOIA litigation. In those circumstances, like any party facing actual or imminent litigation, the agency must “prevent the destruction of” the responsive “documents by issuing a litigation hold on the documents.” *United States ex rel. Miller v. Holzmann*, 2007 WL 781941, at *2 n.2 (D.D.C. Mar. 12, 2007); *see also Nunnally v. District of Columbia.*, 243 F. Supp. 3d 55, 73 (D.D.C. 2017) (“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”). Failing to do so can constitute “negligent conduct” that “should be deemed sanctionable.” *Holzmann*, 2007 WL 781941, at *2 n.2.

History Associates’ amended complaint plausibly alleges that the FDIC lacks sufficient preservation mechanisms. Its senior counsel acknowledged that a litigation hold was not instituted in response to this lawsuit and was unaware that litigation holds are required once a FOIA lawsuit is initiated. *See* ECF 37 ¶ 103; ECF 37-2 at 5-8. Subsequent to the filing of the amended complaint, moreover, FDIC counsel represented to the Court that the agency has no policy of issuing litigation holds in response to FOIA lawsuits generally—albeit based on the mistaken understanding that FOIA cases are APA cases. *See* ECF 38-1 at 10 (FDIC Counsel asserting that “in APA cases where there is a closed record the FDIC does not routinely issue legal holds”). *But see* 5 U.S.C. § 552(a)(4)(B) (providing for a “de novo” determination of whether the agency must produce the records). And that representation is confirmed by the FDIC’s policies and training materials, which say nothing about instituting litigation holds or otherwise preserving documents.

The FDIC argues that this claim must fail unless History Associates alleges that the agency in fact “failed to preserve or deliberately destroyed documents” responsive to one of its requests.

FDIC Mot. 29. But that misunderstands the policy or practice at issue. History Associates is not alleging that the FDIC has a policy or practice of destroying responsive documents, but rather that it has inadequate document-preservation measures in place, which in turn creates an undue risk that documents will be lost. Alleging actual document destruction is not necessary to plausibly plead that the agency’s document-preservation process is defective.

The FDIC also suggests that a litigation hold is unnecessary because the agency’s RADD database has a 30-year retention policy. FDIC Mot. 31. But the nature of that database’s retention policy is a factual question that cannot be resolved on the pleadings. And regardless, the FDIC overstates RADD’s protections. RADD’s retention policy has an exception with a much shorter retention schedule for certain “workpapers.” ECF 72-9, at 2. The agency says that exception is “not relevant here” but provides no further explanation. ECF 72-4 ¶ 21. The retention schedule also states that copies of documents imported into RADD should not be deleted if “subject to a preservation notice or legal hold”—indicating that the FDIC recognizes that litigation holds are appropriate to ensure preservation of documents even for records within RADD in at least some circumstances. ECF 72-9 at 1. The FDIC also admits that certain “employees, contractors, and former contractors can permanently delete documents from the RADD and its archive.” FDIC Mot. 13 n.8. And the agency nowhere suggests that *other* FDIC databases—for example, Microsoft Teams chat logs—have comparable retention policies. As History Associates has explained in its motion for discovery, these unanswered factual questions (among others) demand a targeted 30(b)(6) deposition. They are not grounds for dismissal on the pleadings.

3. History Associates’ Allegations Also Satisfy the FDIC’s Invented Pleading Requirements

Although the foregoing more than suffices to show that History Associates has plausibly pleaded each policy-or-practice claim under the governing standards, History Associates’ amended

complaint would also meet the FDIC's invented policy-or-practice pleading standard. For each of the policy-or-practice claims, History Associates has alleged numerous instances of the FDIC violating FOIA in similar ways when responding to crypto-debanking-related FOIA requests.

Numerosity. The FDIC first contends that a policy-or-practice plaintiff must point to “repeated requests.” FDIC Mot. 25-26 (emphasis omitted) (quoting *CREW*, 772 F. Supp. 3d at 12). History Associates has done that. It has alleged two instances of the FDIC categorically withholding bank supervisory documents, two instances of the FDIC failing to construe requests liberally, and four instances of the FDIC inadequately searching for documents (including multiple rounds of inadequate searches in this case alone). See ECF 37 ¶¶ 93-101. As for document preservation, the FDIC has conceded that it has a policy of refusing to issue litigation holds across the board. See *supra* 25.

The FDIC therefore tries to ratchet up its numerosity requirement. It first asserts that “two FOIAs are not enough to establish numerosity.” FDIC Mot. 31; see also *id.* at 27-28, 33, 35. But the agency provides no sound basis for its at-least-*three*-FOIAs rule. It points to an inapposite Supreme Court decision stating that, “[i]n common parlance, two of anything do not generally form a ‘pattern.’” *Id.* at 28 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985)). But that decision was interpreting a statute that used the word “pattern” (“pattern of racketeering activity” in RICO). Nothing in FOIA or D.C. Circuit precedent uses the word “pattern” in defining a policy-or-practice claim. See *supra* 14. The FDIC also cites *Khan v. U.S. Dep’t of Homeland Sec.*, 2023 WL 6215359 (D.D.C. Sept. 25, 2023), in support of its at-least-three-FOIAs rule. But *Khan* held only that two languishing FOIA requests did not suffice to plausibly allege an agency practice “of untimely adjudication of FOIA requests,” given that the agencies “had responded to” six of the plaintiff’s eight requests. *Id.* at *6-7 (quotation mark omitted). The agency’s reliance

on *CREW*, 772 F. Supp. 3d 1, is equally misplaced. There, the court in dicta cited *Khan*, and expressed “doubt as to whether only two separate instances could amount to a detectable pattern.” *Id.* at 16. As discussed, however, that doubt is unwarranted and flows from a misreading of *Khan* and misplaced focus on the word “pattern.”

Attempting to move the goalposts still further, the FDIC argues that a denial of a FOIA request cannot count toward its contrived three-FOIA-denials threshold unless the plaintiff appealed the denial within the agency. FDIC Mot. 35-38. But that conflates the requirements for obtaining judicial relief for a particular FOIA request (administrative exhaustion) with the standard for pleading an unlawful FOIA policy or practice. Policy-or-practice claims focus on an agency’s conduct, and an agency’s handling of a request in an initial decision can reflect its policy or practice no less than its adjudication of an administrative appeal. Indeed, *Payne*, the leading policy-or-practice case, involved an agency’s practice of denying requests on invalid grounds that were repeatedly (but belatedly) corrected on administrative appeal. 837 F.2d at 489. Disregarding FOIA denials that are not administratively appealed would also eviscerate the policy-or-practice doctrine. Many unlawful practices—including failing to interpret FOIA requests properly, to conduct adequate searches, or to preserve records—may not be apparent from the face of the FOIA-request denial and may not alert the requester of the basis to appeal.

Similarity of requests. The FDIC’s second proffered pleading requirement—“similarity between its requests”—likewise is satisfied here. FDIC Mot. 26. As this Court recognized at the May 29, 2025 pre-motion conference, all of the FOIA requests that History Associates filed with the FDIC are similar in that they seek “crypto-related information.” Ex. A at 25. More specifically, as History Associates explained in the amended complaint, the requests all seek to unearth

information about “Operation Choke Point 2.0—a coordinated effort” by “federal financial regulators” to “cut off the digital-asset industry from the banking sector.” ECF 37 ¶ 38.

The FDIC’s argument (Mot. 33) that the only similarity between the requests is that “each happens to make high-level references to crypto or digital assets” is belied by the text of the requests. *See* ECF 37-2; ECF 37-4; ECF 37-7; ECF 37-9; ECF 37-11. And more broadly the FDIC’s argument contradicts its own cited cases, which hold that requests are sufficiently similar to plausibly allege a pattern of misconduct so long as they “[a]re about the same *subject matter*.” *CREW*, 772 F. Supp. 3d at 12 (emphasis added) (six requests seeking “publicly disclosed investigations into third parties” were sufficiently similar). The crypto-debanking-related requests that History Associates submitted to the FDIC certainly satisfy that “same subject matter” standard.

Similarity of responses. The FDIC’s third manufactured pleading requirement—“similarity in the agency’s responses,” FDIC Mot. 26—also provides no basis for dismissing any of History Associates’ policy-or-practice claims. Consider the agency’s two categorical Exemption 8 determinations alleged in the amended complaint. When withholding both the pause letters and the meeting minutes of its Crypto Asset Working Group, the FDIC relied on Exemption 8 to withhold the records in full without considering whether it had to disclose any segregable portions of those records. The FDIC’s argument (Mot. 31-32) that it did not make a categorical determination—despite withholding the meeting minutes in full—is a quintessential factual dispute that cannot be resolved on a motion to dismiss. The fact that on administrative appeal its senior counsel in this case remanded the request to the FOIA officer with instructions to conduct an unspecified “further assessment”—which has languished with no progress for six months—only raises further questions about the propriety of the initial decision. ECF 37-6.

The FDIC's responses to the remaining requests also share similar traits discussed above. The agency adopted unilateral and textually unjustifiable narrowing constructions of two of History Associates' FOIA requests without consulting History Associates. *See supra* 21. Its four inadequate searches were sufficiently similar in the only way they could be—they all produced an implausibly low number of responsive documents. *See supra* 23. And the FDIC's apparent policy of failing to implement litigation holds across the board is definitionally similar. *See supra* 25.

Violates binding precedent. Finally, even if History Associates had to show that the FDIC's policies or practices violated "binding precedent"—a qualified-immunity-style requirement that the agency nowhere justifies—History Associates has done so. The FDIC does not dispute that binding precedent requires it to: (1) construe FOIA requests liberally, (2) conduct reasonable searches in response to FOIA requests, and (3) take steps to preserve documents that are subject to FOIA requests. And binding precedent holds that a categorical approach may be used "[o]nly when the range of circumstances included in the category characteristically supports an inference that the statutory requirements for exemption are satisfied." *Nation Mag.*, 71 F.3d at 893 (quotation marks and brackets omitted). That is not the case for the FDIC's broadly constructed category of all bank supervisory documents.

4. If The Court Dismisses any Policy-or-Practice Claims, History Associates Should Be Granted Leave to Amend its Complaint

If the Court determines that History Associates has not adequately pleaded any of its policy-or-practice claims, dismissal should be without prejudice and with leave to amend. "Leave to amend a complaint 'shall be freely given when justice so requires,' Fed. R. Civ. P. 15(a), and dismissal with prejudice should be granted only when the trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency."

Jarrell v. U.S. Postal Serv., 753 F.2d 1088, 1091 (D.C. Cir. 1985) (some quotation marks omitted); *see Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006) (same).

That is not the case here. Since filing the amended complaint, History Associates has received from the FDIC copies of its written policies and training materials, which (as discussed) corroborate History Associates' allegations. If this Court finds any deficiency in the allegations in the amended complaint, the proper remedy would be to allow History Associates to amend the complaint to conform to the since-obtained evidence. That would "allow[] maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities," as the Federal Rules envision. *Belizan*, 434 F.3d at 583 (quotation marks omitted); *see, e.g.*, Fed. R. Civ. P. 1, 15(a)(2), (b)(1).

But the Court need not and should not go through the empty exercise of dismissing the amended complaint just so that History Associates can amend it again to incorporate evidence that is already before the Court. The far more efficient course is to deny the agency's motion to dismiss, allow the targeted additional discovery History Associates needs (as identified in its contemporaneous motion for discovery), and proceed to cross-motions for summary judgment.

B. The Policy-or-Practice Claims Are Ripe

The FDIC separately seeks to avoid confronting History Associates' policy-or-practice claims on the merits by contending that they are prudentially unripe for judicial review. That contention is meritless. The prudential ripeness doctrine requires a court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967). And the second of those factors comes into play "only if the fitness of the issue for judicial resolution is in doubt." *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 739 n.13 (D.C. Cir. 1990) (per curiam). Both factors strongly favor

reaching the merits of History Associates’ policy-or-practice claims. The FDIC’s contrary arguments would, again, largely nullify the D.C. Circuit’s policy-or-practice doctrine.

1. The Policy-or-Practice Claims Are Fit for Judicial Review

The “fitness requirement is primarily meant to protect ‘the agency’s interest in crystallizing its policy before that policy is subjected to judicial review and the court’s interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting.’” *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012). That factor focuses on whether the disputed issue is “legal” rather than factual, “whether consideration of the issue would benefit from a more concrete setting, and whether the agency’s action is sufficiently final.” *Id.*

The FDIC does not dispute that this case presents legal questions. And for good reason: To resolve policy-or-practice claims, the court must decide whether the agency’s policies or practices that the plaintiff alleges and eventually proves violate FOIA. And as explained above, that is true of each of the FDIC’s policies and practices that History Associates has alleged: (1) categorically denying FOIA requests for bank supervisory documents under Exemption 8; (2) failing to instruct its employees to construe FOIA requests liberally; (3) failing to provide guidance to employees on how to conduct searches; and (4) refusing to implement litigation holds or otherwise take adequate steps to preserve records subject to a FOIA lawsuit. Those policies and practices “cannot be lawful under any circumstances” and thus are ripe for judicial review. *Cause of Action Inst. v. U.S. Dep’t of Just.*, 999 F.3d 696, 704 (D.C. Cir. 2021).

That those legal questions embed factual questions about the existence of the policies or practices changes nothing relevant to ripeness. Every policy-or-practice claim requires proof that an agency in fact has an unlawful policy or practice, yet the D.C. Circuit has rejected ripeness challenges to policy-or-practice cases as far back as *Payne*. *See* 837 F.2d at 492-94; *see also SOME, Inc. v. Hanover Ins. Co.*, 2021 WL 2935893, at *6 n.2 (D.D.C. July 13, 2021) (“[O]bvi-

ously prudential deferral is not necessary simply because factual disputes require resolution.”). Those subsidiary factual questions do not change the ultimate inquiry: whether the agency’s acts or omissions add up to an unlawful FOIA policy or practice—the kind of fundamentally legal question courts resolve every day.

Here, moreover, the embedded factual questions are concrete. To decide them, this Court will need to examine specific examples of FOIA denials, the FDIC’s written policies, and other evidence establishing the existence of the FDIC’s existing policies and practices. There is nothing theoretical or abstract about that inquiry.

The FDIC argues that its processing of certain requests “remains ongoing” and that “facts have not developed to the point that Plaintiff can identify a sufficient number of past examples to support a policy or practice claim.” FDIC Mot. 42-43. But that is just a recast version of the FDIC’s argument for a heightened pleading standard, and it fails for the same reasons already discussed.

The FDIC also contends that History Associates’ “apprehension that the agency maintains policies or practices that *may* lead to future noncompliance” is too “amorphous” a “basis for a FOIA policy or practice claim.” FDIC Mot. 43. But as the FDIC recognizes in the previous sentence of its brief, History Associates is not pointing to possible future noncompliance in the abstract. Rather, History Associates has alleged that it will be harmed because it “‘has pending and soon-to-be-submitted FOIA requests with FDIC that are likely to be subject to the FDIC’s unlawful policies or practices.’” *Id.* (quoting ECF 37 ¶ 124). It is well settled that such allegations establish History Associates’ standing to challenge an agency’s policies or practices. *See, e.g., Tipograph v. Dep’t of Just.*, 146 F. Supp. 3d 169, 176 (D.D.C. 2015) (“One way for a plaintiff to make this showing [of standing] is to ‘demonstrate that [it has] pending FOIA requests that are

likely to implicate the policy or practice.” (citation and emphasis omitted)). But if those same allegations sufficient to support standing also rendered the claims unripe, the policy-or-practice doctrine would be self-defeating.

Equally unavailing is the FDIC’s contention that History Associates’ claims are unripe because they are “premised on future events” that ““may not occur as anticipated.”” FDIC Mot. 45 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). History Associates alleges that the FDIC has *existing* unlawful FOIA policies and practices that the agency is *currently* applying to History Associates’ pending FOIA requests. That those policies and practices may also be applied in the future only increases the need for judicial review of History Associates’ claims today.

Finally, the FDIC argues that the “alleged practices are too broad to assess in the abstract.” FDIC Mot. 44. But the FDIC can make that argument only by mischaracterizing the alleged unlawful policies and practices. History Associates is not alleging that it is unlawful for Exemption 8 to be “applied broadly,” *id.*, but rather that the FDIC may not reflexively make categorical determinations under Exemption 8 for all bank supervisory documents. Likewise, History Associates is not alleging that the FDIC must refrain from construing FOIA requests “more narrowly than a requester would prefer” or from using a “search approach with which the requester disagrees.” *Id.* Instead, History Associates alleges merely that the FDIC must provide *some* guidance to its employees about FOIA’s liberal-construction standard and how to reasonably search for responsive documents. Nor is History Associates arguing that the FDIC’s document-preservation practices are “universally unlawful,” *id.*, but instead that it violates FOIA for the FDIC to refuse to implement litigation holds or other adequate preservation measures in response to FOIA lawsuits. Properly construed, the alleged policies and practices are concrete and fit for judicial review.

2. Dismissal Would Cause Hardship to History Associates

Because the “issue[s] [are] fit for judicial decision,” this Court “need not evaluate the hardship to the parties” and can “proceed” to decide “the merits.” *Beach Commc’ns, Inc. v. FCC*, 959 F.2d 975, 986 n.18 (D.C. Cir. 1992) (quotation marks omitted). But even if the fitness question were close and required consideration of hardship, History Associates “has demonstrated sufficient hardship to outweigh any institutional interests in the deferral of review.” *Payne*, 837 F.2d at 493 (quotation marks omitted).

Payne is dispositive on this point. There, the D.C. Circuit held that the alleged unlawful FOIA policy had a “direct and immediate impact” that “rises to the level of hardship” because “Payne relies heavily and frequently on FOIA to conduct work that is essential to the performance of certain of [its] primary institutional activities.” 837 F.2d at 494 (quotation marks omitted). So too for History Associates—which is in the business of submitting FOIA requests, ECF 37 ¶ 15—and Coinbase, which (through History Associates) has turned repeatedly to FOIA to bring to light undisclosed agency hostility toward digital assets. History Associates and Coinbase thus have an especially strong “interest in prompt consideration of allegedly unlawful agency action.” *Muckrock, LLC v. CIA*, 300 F. Supp. 3d 108, 121 (D.D.C. 2018).

The FDIC argues that delay will cause no harm because History Associates need only “file another suit.” FDIC Mot. 45 (quoting *Cause of Action Inst.*, 999 F.3d at 705). But if the FDIC has its way, filing another FOIA lawsuit would not result in any changes to the agency’s unlawful policies or practices. Instead, the agency could moot case after case by simply disclosing the requested documents (after drawn-out litigation and court orders compelling disclosure) without changing its unlawful policies and practices. That outcome is precisely what policy-or-practice claims are designed to prevent.

Moreover, there is urgency to the debanking-related FOIA requests that Coinbase engaged History Associates to submit. History Associates filed its requests years ago in order to shed light on the FDIC's role in the federal government's war on crypto under the prior Administration. The documents disclosed during this litigation have advanced Congress's and the public's understanding of Operation Choke Point 2.0 and have led to congressional hearings and reform efforts. *See supra* 7. And debate is ongoing now in Congress and the public square about how to regulate digital assets. History Associates and Coinbase accordingly need to pursue their FOIA requests for further disclosures *now* to facilitate the regulatory and legislative changes necessary to ensure that federal banking regulators do not backslide into debanking industries they disfavor. That too is a "sufficient hardship to outweigh any institutional interests in the deferral of review." *Payne*, 837 F.2d at 493 (quotation marks omitted).

II. The Court Should Grant History Associates Summary Judgment On Count I And Require The FDIC To Remove Certain Redactions From The Pause Letters

On Count I—which challenges the FDIC's response to the pause-letter FOIA request—History Associates has largely prevailed, and the remaining dispute is narrow. As a result of this Court's orders, the FDIC belatedly fulfilled its statutory obligation to search for and produce redacted records responsive to History Associates' pause-letter request. History Associates does not contest most of the redactions to the letters the FDIC has produced. But History Associates does dispute whether the FDIC's redactions of two discrete categories of information from the pause letters comport with FOIA: (1) the amount of the percentage cap imposed by a bank on deposits from crypto companies; and (2) the names of public blockchains the banks proposed to use.³

³ The particular examples of those redactions History Associates has identified are listed in Appendix A, but the FDIC should be ordered to reveal *all* information falling within the categories History Associates has identified.

FOIA does not permit the FDIC to redact those two categories of information. The FDIC has not met its burden to show that the redacted information is subject to a FOIA exemption and that its disclosure would result in any harm to an interest protected by a FOIA exemption. The Court therefore should require the FDIC to re-produce all of the pause letters without redacting those two categories of information.⁴

A. The FDIC Bears the Burden To Justify Its Redactions

FOIA creates a “strong presumption in favor of disclosure.” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). As amended in 2016, it requires an agency to disclose “[a]ny reasonably segregable portion of a record” unless that portion is exempt from disclosure *and* its disclosure “would harm an interest protected by the exemption.” 5 U.S.C. § 552(a)(8)(A)(i), (b). “Congress added the distinct foreseeable harm requirement to foreclose the withholding of material unless the agency can ‘articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld.’” *Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021) (quoting H.R. Rep. No. 391, 114th Cong., 2d Sess., at 9 (2016)).

The FDIC bears the burden of proof on both aspects. “[I]n order to be entitled to summary judgment, the [FDIC] need[s] to establish beyond any genuine dispute that the” redacted information can be withheld under FOIA. *Evans*, 951 F.3d at 586. That means it must “show that a [redaction] fits within the exemption.” *Watkins L.*, 78 F.4th at 451. And the agency must “identify the nature of the harm and show that it will likely result from disclosure of the particular infor-

⁴ However the Court resolves Count I, History Associates intends to seek attorneys’ fees under FOIA because it “has substantially prevailed” by virtue of the FDIC’s production of the redacted pause letters, 5 U.S.C. § 552(a)(4)(E)(i), regardless of whether those products were in response to the Court’s orders or reflected “voluntary or unilateral” action by the agency, *id.* § 552(a)(4)(E)(ii).

mation the [FDIC] seek[s] to withhold.” *Hum. Rts. Def. Ctr. v. U.S. Park Police*, 126 F.4th 708, 714 (D.C. Cir. 2025).

B. The FDIC Has Not Met Its Burden To Justify Its Redaction Of Two Categories Of Information

The FDIC seeks to withhold the redacted information under Exemptions 4 and 8. FDIC Mot. 15-20. Exemption 4 covers “matters that are ... trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). Exemption 8 applies to “matters that are ... 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.” *Id.* § 552(b)(8).⁵ To justify the redactions, the FDIC must establish that disclosing the redacted information would foreseeably “harm an interest protected by” Exemptions 4 or 8. *Id.* § 552(a)(8)(A). The FDIC has failed to carry that burden with respect to two discrete categories of information.

1. Disclosing the Two Categories of Information Would Be Harmless

The FDIC cannot show that any harm would follow from disclosing the two categories of currently redacted information: (1) the numerical percentage deposit cap imposed by a bank on deposits from crypto companies; and (2) the names of public blockchains banks proposed to use.

Percentage cap. The FDIC cannot justify its redaction of the numerical percentage deposit cap imposed by a bank on deposits from crypto companies. *See, e.g.*, ECF 48-2 at 51 (bank “placed a cap on digital asset-related deposits to [redacted] of total deposits”). The FDIC has disclosed the *existence* of the deposit cap but continues to redact the *percentage* of the cap. The percentage of the cap could provide important evidence of the FDIC’s debanking activities—for example, if

⁵ The FDIC also argues (FDIC Mot. 20-21) that certain redacted information is protected by Exemption 6, which applies to certain “personnel ... files.” 5 U.S.C. § 552(b)(6). But that exemption appears to be inapplicable to the two categories of information that History Associates is challenging.

it corroborates public reporting that the FDIC informally imposed a 15% crypto deposit cap on banks. *See, e.g.,* Veronica Irwin, *Regulators Are Limiting Banks Serving Crypto Clients. Does That Violate the Law?*, Unchained (Oct. 8, 2024), <https://bit.ly/41zFvPs>.

The FDIC's motion nowhere defends its redaction of the deposit-cap percentage, even though History Associates has repeatedly argued that the redaction is "unjustified." *E.g.*, ECF 48 at 6-7; ECF 44 at 4-5. In a prior filing, however, the agency argued that the percentage of the cap can be withheld under FOIA because the percentage "was, in this case, self-imposed and shared in a bank-authored document," rendering it per se "confidential and proprietary business information ... exempt from disclosure under FOIA Exemptions 4 and 8." ECF 48 at 13. But even if the percentage cap were "self-imposed" by financial institutions—rather than a result of the FDIC's pressure tactics—the agency has already disclosed the *existence* of the deposit cap. And it has never explained why the percentage of the cap should be treated differently under FOIA.

At a minimum, it is hard to see how disclosing the cap's percentage could possibly "harm an interest protected by" Exemptions 4 or 8 now that the existence of the cap has been revealed. 5 U.S.C. § 552(a)(8)(A). There is no reason to believe that revealing the numerical percentage of the cap materially increases the risk of the bank being identified or would harm the FDIC's supervisory relationship with any bank. The FDIC certainly has offered no such explanation.

Public blockchains. The FDIC also impermissibly redacted the names of public blockchains. A public blockchain is a digital ledger that publicly records digital-asset transactions on the Internet and runs blockchain-based applications. *See* Coinbase, *What Is a Blockchain?*, <http://bit.ly/4faayHW>. It is not a company, but rather open-source software that can be used by anyone with an Internet connection and is often operated in a decentralized manner. By design, public blockchains have no relationship with any bank or the FDIC and are used by millions of

people and institutions. *See* Ledger Academy, *What Is a Public Blockchain?*, <http://bit.ly/4mlehF7>. Major public blockchains include Bitcoin, Ethereum, Solana, and the XRP Ledger. A private blockchain, by contrast, is a digital ledger that sometimes *does* have an identifiable owner.

In several records, the FDIC redacted the name of the public blockchain that the bank was proposing to use in order to offer crypto-related products or services. For example, one record states that a bank’s proposed crypto token “will operate on the [redacted] a decentralized public Blockchain, rather than on the [redacted], a private, permissioned Blockchain.” ECF 27-2 at 11; *see also id.* at 24-25 (referring to a “public [redacted] blockchain”).

As with the percentage of the deposit cap, the FDIC’s motion nowhere justifies its redactions of the names of public blockchains, even though History Associates has repeatedly objected to those redactions. *See* ECF 44, at 4; ECF 48, at 6-7. Nor is any justification apparent. Revealing that a bank planned to use a particular public blockchain (like Ethereum) is roughly akin to revealing that the bank intended to use a specific browser (like Google Chrome). Both are simply pieces of software used by millions of people and businesses for various purposes, except that a public blockchain is even *more* widely available because of its permissionless, decentralized nature. That a bank intended to use a particular public blockchain would reveal nothing about the bank’s identity, because anyone can use that same public blockchain. That is especially true because the FDIC *prevented* the banks from actually using these blockchains. Nor would it reveal anything about what the bank intended to do with the blockchain (since public blockchains support many applications). Thus, the FDIC cannot meet its burden of showing that disclosing the names of public blockchains would “harm an interest protected by” Exemptions 4 or 8. 5 U.S.C. § 552(a)(8)(A).

2. The FDIC's Declarations Are Too Generic To Establish Foreseeable Harm

In an effort to meet its burden under FOIA, the FDIC has submitted three declarations by FDIC employees that purport to explain why the cited FOIA exemptions apply and why disclosure of the redacted information would harm an exemption-protected interest. But where, as here, an agency seeks to rely on a declaration to meet its burden of proof under FOIA, the declaration must provide a “detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document.” *Watkins L.*, 78 F.4th at 451. The agency also must explain “the nature of the harm” it believes will “result from disclosure of the particular information the agenc[y] seek[s] to withhold.” *Hum. Rts. Def. Ctr.*, 126 F.4th at 714. An “overly vague or sweeping [affidavit] will not, standing alone, carry the government’s burden.” *Larson v. Dep’t of State*, 565 F.3d 857, 864 (D.C. Cir. 2009). Here, the FDIC’s conclusory declarations do not justify its redactions.

Two of the declarations assert (in the same formulaic terms) that “divulging the names of the banks or altering the redactions in the documents released to Plaintiff in a manner that would allow identification of the names of the banks or their potential customers or business partners would negatively affect the FDIC’s supervisory relationships with both the institutions whose name was divulged and banks in general.” ECF 72-7 ¶ 6; ECF 72-8 ¶ 6. The third declaration avers that “removing the redactions applied under FOIA Exemptions 4 and 8 would increase the likelihood of revealing the identity of banks and third-parties with which banks were engaged.” ECF 72-4 ¶ 30.

The declarations are insufficient to justify the two categories of redactions to which History Associates objects for the simple reason that they do not address those specific redactions at all. That failure to “correlat[e] ... the particular part[s] of [the] withheld document[s]” with the claimed

exemptions violates FOIA. *Watkins L.*, 78 F.4th at 451. The FDIC had every opportunity to address those redactions. History Associates objected to the redactions in the amended complaint, *see* ECF 37 ¶ 72, and in later joint status reports, *see* ECF 44 at 4; ECF 48 at 6-7. And were there any doubt, the FDIC could have asked which redactions History Associates intended to challenge. Instead, the FDIC opted to prepare declarations seeking to justify thousands of unchallenged redactions, which were bound to be “overly vague.” *Larson*, 565 F.3d at 864.

The declarations’ lack of specificity also means that they necessarily fail to articulate how disclosing those categories of “particular information” would harm an interest protected by Exemption 4 or 8. *See Hum. Rts. Def. Ctr.*, 126 F.4th at 714. The two materially identical declarations assert that the FDIC’s supervisory process would be harmed *if* a bank’s name were “divulg[ed]” or redactions were altered in a manner that revealed “the names of the banks or their potential customers or business partners.” ECF 72-7 ¶ 6. But they say nothing about *whether* altering any specific redactions would lead to the identification of banks or their business partners, let alone that revealing a deposit-cap percentage or the name of public blockchains would do so.

The third declaration makes a blanket assertion that “removing the redactions” would “increase the likelihood” of identifying banks or third-party partners. ECF 72-4 ¶ 30. But “[n]owhere does the [d]eclaration use reasonably specific detail to demonstrate that the information withheld logically” would have that effect. *Watkins L.*, 78 F.4th at 451 (quotation marks omitted). Instead, the declaration appears to make that assertion as to all of the redactions throughout the hundreds of pages of documents—precisely the sort of “overly ... sweeping” assertion that cannot carry the government’s burden. *Larson*, 565 F.3d at 864.

The declaration also cites a law-firm webinar in which attorneys claimed to have used a large-language artificial-intelligence model to determine the identity of one bank that received a

pause letter. ECF 72-4 ¶ 31 (citing *Using AI and Other Modern Tech: Analyzing the FDIC Pause Letters*, RegReform, Davis Wright Tremaine Webinar (Mar. 14, 2025), <https://bit.ly/4fhvuNp>). The attorneys, however, did not identify the bank or the pause letter analyzed, so there is no way of knowing whether the law firm succeeded in correctly identifying the bank. And it is well known that large language models “regularly get basic facts wrong” and, as some have put it, “hallucinat[e].” Ben Fritz, *Why Do AI Chatbots Have Such a Hard Time Admitting ‘I Don’t Know’?*, Wall. St. J. (Feb. 11, 2025), <http://bit.ly/4kF1YSG>; see also Cade Metz & Karen Weise, *A.I. Is Getting More Powerful, But Its Hallucinations Are Getting Worse*, N.Y. Times (May 6, 2025), <https://bit.ly/4nOeqSU>.

But even if other information that the FDIC has already disclosed has been used to identify a bank, it does not follow that the percentage of a deposit cap or the name of a public blockchain likewise could be used to do so, and the FDIC has not explained why it would. An agency cannot discharge its “independent and meaningful burden” of articulating an exemption-related harm from disclosure by simply incanting “artificial intelligence.” *Reps. Comm.*, 3 F.4th at 369. That is far too “speculative” a basis for the FDIC “to withhold information.” *Id.* (quoting S. Rep. No. 4, 114th Cong., 1st Sess., at 8 (2015)).

CONCLUSION

The Court should deny the FDIC’s motion to dismiss Count II, grant History Associates summary judgment as to Count I, and order the FDIC to release the January 3, 2025, and revised February 21, 2025, productions without redacting the information set forth above.

Date: July 30, 2025

Respectfully submitted,

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APPENDIX

The table below lists representative examples of each category of redactions within the documents the FDIC has produced to date that violate FOIA.

Category of Redactions	Excerpts of Redactions	Record Cite
The percentage cap imposed by a bank on deposits from crypto companies	“placed a cap on digital asset-related deposits to [redacted] of total deposits”	ECF 48-2 at 51
	“limits Digital Asset on balance sheet deposits to [redacted] of total deposits”	ECF 48-2 at 67
	“on balance sheet deposits from clients in the digital assets vertical are limited to no more than [redacted] of on balance sheet deposits”	ECF 48-2 at 81
	“[redacted] limit for on-balance sheet deposits”	ECF 48-2 at 91
	“limits its total Digital Asset business deposit exposure to [redacted] of total Deposits”	ECF 48-2 at 92
Names of public block-chains	“will operate on the [redacted] a decentralized public Blockchain”	ECF 27-2 at 11
	“mitigate potential risks posed by the public [redacted] Blockchain”	ECF 27-2 at 24
	“whether there are any dependencies on the public [redacted] blockchain”	ECF 27-2 at 25

Exhibit A

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

1			
2			
3	HISTORY ASSOCIATES INCORPORATED,)	CIVIL NO.:
4	Plaintiff,)	24-1857-ACR
5	vs.)	
6	FEDERAL DEPOSIT INSURANCE)	
7	CORPORATION,)	
8)	May 29, 2025
9	Defendant.)	Washington, D.C.
10)	11:00 a.m.

Transcript of Pre-motion Conference
Before the Honorable Ana C. Reyes
United States District Judge

APPEARANCES:

For the Plaintiff: Denis Nicholas Harper, Esquire
Jonathan C. Bond, Esquire
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Federal Deposit Insurance Corporation
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Also present: Michael Williams, via Zoom

Reported by: Christine T. Asif, RPR, FCRR
Federal Official Court Reporter
333 Constitution Avenue, NW
Washington, D.C. 20001
(202) 354-3247

Proceedings recorded by machine shorthand; transcript produced
by computer-aided transcription

1 lawyer on his other issues?

2 MR. BENTON: Yes, Your Honor.

3 THE COURT: All right. I'm limiting it to the
4 lawyers involved in this litigation. And we will have -- I'm
5 getting confirmation from FDI counsel that we will have
6 Mr. Dober replaced on the other matter that you have, so you
7 can email FDIC directly through that. You shouldn't have any
8 need to reach out to the FDI counsel on this case or about
9 this case or about the allegations in this case. Does that
10 make sense?

11 MR. WILLIAMS: I understand that, but I also have
12 originating process against Mr. Dober individually, a lawsuit
13 that's pending to be filed, and I'll need to serve that on
14 Mr. Dober. So in terms of doing that, how would you like me
15 to handle that?

16 THE COURT: Well, you can serve -- of course you can
17 serve Mr. Dober and after that, you'll have to contact him
18 through his attorney.

19 MR. WILLIAMS: Understand. Thank you, Your Honor.

20 THE COURT: All right. All right. Thank you,
21 Mr. Williams.

22 (Mr. Williams not present.)

23 THE COURT: All right. Who wants to go first? Can
24 someone just update me on where we are and what's going on in
25 this case before we get into the argument, just where are

1 we.

2 MR. HARPER: Sure, Your Honor. Nick Harper again
3 for History Associates.

4 So as Your Honor will recall at the February 11
5 hearing, so we filed an amended complaint asserting policy or
6 practice claims based on the FDIC's conduct in this
7 litigation. During the February 11th hearing, Your Honor
8 ordered an informal information sharing process. That lasted
9 for several weeks. You know, I said we understood it, that
10 one of the purposes of that process was to get to the bottom
11 of our policy or practice claims. We, for, I'd say,
12 95 percent of that process, we got nothing about that from the
13 FDIC at the very tail end of it, sort of after we had already
14 asked the Court to end it. We ended up getting actual FOIA
15 policies that the FDIC gave us that it says are the relevant
16 policies here from 17 of its subcomponents.

17 And so now the question is where does the case go
18 from here? And our position is the FDIC has asked if they can
19 move to dismiss our amended complaint, and we just think this
20 case has sort of moved past the pleading stage because we now
21 have the policies. And a policy or practice case should be
22 about the policies. So we think that all that's left to know,
23 is this the full universe of the policies, how does the FDIC
24 implement these policies, and are they lawful. And we think
25 that should be resolved through targeted discovery, including

1 a tailored 30(b)(6) deposition and then cross-motions for
2 summary judgement. We think that's the most efficient way to
3 resolve this case expeditiously.

4 THE COURT: Hold on. Let's just -- how did -- how
5 did we get to -- wasn't there some issue with they didn't get
6 you -- do you have all the documents now that you claim you
7 should have from the original FOIA request?

8 MR. HARPER: So yeah, as to Count 1, I think
9 they've -- we do not dispute that they provided the full
10 universe of documents. We still dispute some of the
11 redactions, and we can talk about that but --

12 THE COURT: I'd really rather not. I'd rather you
13 guys figure it out. But go ahead.

14 MR. HARPER: Okay. So that's as to the document
15 production on Count 1. But Count 2 of our amended complaint
16 is the policy or practice claims and as to that count, they
17 provided us what they said are all the relevant policies.
18 We're not sure they are based on our review of the policies,
19 but it's at least many of the agency's FOIA policies. In our
20 view, they strongly confirm our policy or practice claims as
21 we explained in our --

22 THE COURT: So what is your policy? Like from
23 reviewing the policies from what you know, what's your
24 position as to what they're doing wrong?

25 MR. HARPER: So there's a number of things. There's

1 four things. First is, they are categorically withholding
2 documents under Exemption 8. So what happened in response to
3 our pause letter request, and you can see this --

4 I'll slow down.

5 (Discussion held off the record.)

6 MR. HARPER: So if you look at -- I think it's
7 Exhibit C to our amended complaint, you see the appeal denial
8 letter, that we filed an administrative appeal; they denied
9 it. And in that letter, they have a section called
10 Categorical Determination, where they say, you know, we are
11 determining, instead of reviewing document by document to
12 determine whether these documents should be withheld under
13 FOIA, these documents are just in a category that necessarily
14 must be withheld under FOIA, and they categorically do not
15 have segregable information, they categorically do not have
16 information that -- all the information within them would
17 cause foreseeable harm to an exemption-related interest. So
18 we just think that sort of categorical type of determination
19 is not permissive under FOIA.

20 THE COURT: Okay. Got it. Second.

21 MR. HARPER: Second, they have a -- we think they
22 have a policy of, at a minimum, failing to instruct their FOIA
23 officers to construe FOIA requests liberally, which is what's
24 required under FOIA, under D.C. Circuit precedent. I think
25 that was illustrated by sort of the narrow construction of our

1 request in this case.

2 THE COURT: Does their policy say something
3 different?

4 MR. HARPER: So the policy -- the troubling thing is
5 the policies say nothing about this. They don't tell their
6 FOIA officers apparently to construe requests liberally, and
7 if they're not telling them that, I'm not sure why FOIA
8 officers would do that. They're not going to give --

9 THE COURT: Okay. Third.

10 MR. HARPER: So third is, they -- we are concerned
11 their search processes are deficient; they're not conducting
12 reasonable searches in response to requests. And I think this
13 was demonstrated by the fact that it took six productions,
14 essentially, for them to get the full scope of documents
15 responsive to our requests.

16 THE COURT: But do their policies on their face
17 indicate that they had bad search policies?

18 MR. HARPER: So this is where we have the least
19 information. The policies, as we understand it, based on our
20 review --

21 THE COURT: You are going to have to slow down.

22 MR. HARPER: Sorry.

23 As we understand it, based on our review of the
24 policies, there is a legal division within the FDIC called
25 FOIA PA, and they sort of supervise the process, but

1 ultimately, the search is done by one of the 17 subcomponents
2 of the agency. And as we read the policies, there's really
3 very little guidance about how those subcomponents should be
4 doing the searching. So we just don't know. We think this is
5 one of the reasons we need discovery, to see if there is --
6 you know, a 30(b)(6) deposition could tell us is there
7 anything they're doing systematically wrong that's resulted in
8 them failing to find the full set of documents responsive to
9 our pause letter request until they have -- you know, they
10 went through the process six times.

11 THE COURT: All right. Fourth.

12 MR. HARPER: So fourth is document preservation.
13 This is really just their failure to issue litigation holds in
14 response to FOIA requests and FOIA litigation. And I think
15 that they've said they don't -- at least they indicated they
16 don't have any such policy. We don't think that's
17 consistent with FOIA.

18 THE COURT: I mean, I know I'm the one who brought
19 this up, so I'm not trying to be a jerk, but is there a court
20 case that says they have to? What's the usual practice in
21 FOIA cases?

22 MR. HARPER: So the D.C. Circuit's *Chambers* decision
23 I think says that the Agency cannot destroy or, you know,
24 transfer away documents after a FOIA request has been filed.
25 So we think they have to take some steps to preserve documents

1 responsive to FOIA requests that are in their custody. We
2 just don't -- you know, I think that's typically done with
3 litigation holds. I don't think there's a case saying you
4 absolutely need a litigation hold, but you need something, and
5 we don't think they have anything.

6 THE COURT: Okay. Remind me, didn't I order some
7 productions by some dates and then they asked for an extension
8 and then they sort of basically blew by the extension and then
9 I had to like say now or else? Did that -- was that this
10 case?

11 MR. HARPER: Yes -- well, what happened in this case
12 was there was -- it's kind of a saga, but at the beginning,
13 you ordered them to produce the pause letters, redacted pause
14 letters, along with a Vaughn index. They produced just the
15 Vaughn index. Then we asked the Court to reinforce its order.
16 The Court reinforced its order. They produced the pause
17 letter with redacted -- very heavy redactions. Then the Court
18 reviewed a sample of those in camera and said --

19 THE COURT: I was unhappy.

20 MR. HARPER: -- they, you know, reflected a lack of
21 good faith.

22 THE COURT: I'm remembering.

23 MR. HARPER: They came back. They produced more
24 letters, not only -- I think there were 23 originally. They
25 found two new letters. They produced letters with lesser

1 redactions. Then it was revealed that they had narrowly
2 construed our requests to only be asking --

3 THE COURT: Yeah.

4 MR. HARPER: And so they ended up -- you ended up
5 ordering them to produce the full set of documents. That's
6 when the administration change came in, and they, you know,
7 produced, eventually, the full set of documents. But there
8 were dozens more pause letters within the ultimate
9 production.

10 THE COURT: All right. And do you have -- do you
11 believe -- or do you have all the responsive documents now, or
12 no?

13 MR. HARPER: I think -- in terms of responsive to
14 our pause letter request, yeah, I think we do have the full --
15 we think the full universe of documents.

16 THE COURT: So when does a pattern and policy claim
17 become moot under FOIA? Because, I mean, isn't your claim
18 moot?

19 MR. HARPER: So putting aside the redactions issue,
20 which we still have some quibbles with the redactions, so I
21 don't think that claim is moot even, but if we assume it were
22 moot, that doesn't moot out the policy or practice claim,
23 because the D.C. Circuit has held that so long as you are
24 subject to these policies or practices once, and you have
25 reasonable likelihood of being subject to them again, and we

1 do, we have nine pending requests with the Agency, we are --
2 History Associates is a type of company that files FOIA
3 requests. That doesn't moot out the case. That's the *Payne*
4 decision from the D.C. Circuit.

5 THE COURT: Okay.

6 All right. Counsel.

7 MS. STRIPPOLI: Your Honor, Briena Strippoli on
8 behalf of FDIC.

9 Your Honor, the biggest thing we're looking for at
10 this juncture is to essentially file a motion to dismiss on
11 failure to state a claim.

12 THE COURT: Yeah, no, I know. But I mean, I'm
13 having a hard time understanding how I'm going to be able to
14 do that on 12(b)(6). I mean, everything he just said is rife
15 with factual determinations.

16 MS. STRIPPOLI: Well, Your Honor, the proper course
17 on this, we believe that we would have, and I can present some
18 of those arguments to you.

19 THE COURT: You can say whatever you want.

20 MS. STRIPPOLI: So, for example, there are, as
21 Mr. Harper mentioned, four, essentially, claims of alleged
22 unlawful conduct.

23 THE COURT: Right.

24 MS. STRIPPOLI: For each one of those, there isn't
25 enough stated in the complaint to survive. In order to --

1 they cite to five different FOIA examples to show their
2 pattern or practice. For each one, for each pattern and
3 practice claim, there are certain elements that need to be
4 met. Numerosity, it can't be just one to set a pattern or
5 practice. In fact, this Court has held two is insufficient.
6 Two, there needs to be a similarity in request. Three, a
7 similarity in response. This is sort of the apples to apples,
8 not apples to oranges.

9 THE COURT: Well, I think their similarity is we
10 want crypto-related information, and the response is you're
11 not giving it to them unless you get seven or eight orders
12 from me, which I have to say is, frankly, really annoying, but
13 that's not your fault. But go ahead.

14 MS. STRIPPOLI: So if we walk through each of their
15 subclaims, though, for example, on the failure to preserve,
16 they only cite to this case. So they automatically fail the
17 Numerosity point. For the subclaim of overuse of
18 categorically withholding documents under Exemption 8, they
19 again only cite to two instances. So they cite to FOIA 1 and
20 FOIA 2. So FOIA 2 is interdivisional charter and meeting
21 notes. So that fails again on the Numerosity figure. FOIA 1
22 and FOIA 2 are not examples of categorical denials under the
23 exemptions. That's just a misrepresentation of the record.

24 THE COURT: Say more about that.

25 MS. STRIPPOLI: Okay. So on -- FOIA 2 was not a

1 categorically denied, and therefore, not an example of a
2 pattern or practice. FOIA 2 sought both the charter and
3 meeting notes. FDIC searched, reviewed, and partially
4 released records to the charter. That's not a categorical
5 denial if you're releasing some of the records.

6 THE COURT: Okay.

7 MS. STRIPPOLI: FDIC initially withheld meeting
8 minutes pursuant to Exemptions 5 and 8. And withholding was
9 not a categorical denial. So unlike FOIA 1, where it was
10 remanded to assess the initial determination, this was
11 remanded on the administrative record. FOIA 1, which is this
12 case, the pause letters, was first denied categorically to --
13 pursuant to exemptions 4 and 8; and, second, ultimately, we
14 made several discretionary releases totaling over 200 records
15 and 800 documents.

16 THE COURT: That was after I stepped in.

17 MS. STRIPPOLI: Even if -- even if we had numerical
18 sufficiency --

19 THE COURT: I'm sorry, that was a question. That
20 was after I stepped in that you produced the FOIA 1 documents;
21 is that right?

22 MS. STRIPPOLI: Yes, Your Honor, the -- so we did
23 produce the 20- -- there was -- he is correct about the
24 production of 23, which was an administrative oversight, and
25 it should have been the 25 initial letters in response to the

1 OIG report.

2 THE COURT: Okay. You need to slow down too,
3 because even I'm having a hard time keeping up.

4 MS. STRIPPOLI: My apologies.

5 We did initially submit those -- the 25, but wanted
6 to point out a clarification, and we're happy to also submit
7 this to the Court. We did submit a redacted version of the
8 OIG report, but we can submit an unredacted version. And what
9 it says is we're looking at 24 institutions. So when the
10 request said we want the letters of the ones that -- that's
11 why the number initially we construed as that.

12 THE COURT: Okay.

13 MS. STRIPPOLI: And it wasn't until later, when this
14 Court said, hey, you need to look broader than just what the
15 four corners of that request says and that we actually want
16 something larger than that, that we went back and broadened
17 it. We sua sponte broadened it in like a second -- we
18 construed it essentially like a second FOIA request, where we
19 said, okay, we're going to go ahead and look at that in a
20 broader sense where we're not going to limit it on the time
21 frame. So the OIG report was from March 2022 to May 2023.

22 THE COURT: Okay. Hold on, hold on. I just need to
23 catch up with you. So this is just the explanation between
24 the 23 and the 25.

25 MS. STRIPPOLI: Yes, correct.

1 THE COURT: You weren't acting in bad faith.

2 MS. STRIPPOLI: I can -- I can certainly go back to
3 what we were on this, but this was just an explanation on like
4 when you asked what prompted the broader scope. And I also
5 wanted to clarify --

6 THE COURT: It wasn't just two documents; right?
7 Wasn't it like a whole slew of documents?

8 MS. STRIPPOLI: Your Honor, the request for what --
9 the actual first initial FOIA request was for the documents
10 that the OIG report considered as pause letters.

11 THE COURT: Okay. So, stop. You really need to --
12 both of you really need to slow, down because if I'm like -- I
13 talk faster than anyone I know. And if I think you guys are
14 talking too fast for me to like keep up, then she's -- you're
15 just -- I mean, you can talk fast, that's fine, but then
16 you're just not going to get a record. And that's not good
17 for anyone. And she's going to get really upset. So everyone
18 just take a beat.

19 Why don't -- I think I'm a little bit lost between
20 you two, so why don't we just take a step back.

21 MS. STRIPPOLI: Sure.

22 THE COURT: Okay. You want a motion to dismiss on
23 each of their new claims.

24 MS. STRIPPOLI: We want a motion to dismiss on their
25 Count 2.

1 THE COURT: Two.

2 MS. STRIPPOLI: Which is their pattern and
3 practice.

4 THE COURT: Okay.

5 MS. STRIPPOLI: And we believe we can file such
6 motion under 12(b)(6), failure to state a claim, because each
7 of their essentially alleged unlawful practices --

8 THE COURT: And there's four.

9 MS. STRIPPOLI: -- of which there are four.

10 THE COURT: Yes.

11 MS. STRIPPOLI: And which they cite five FOIA
12 examples to support their pattern and practice claim.

13 THE COURT: Okay.

14 MS. STRIPPOLI: For each one, we can show that they
15 do not meet the criteria for a pattern or practice claim.

16 THE COURT: All right. So let's start with their
17 first one. Let's just do this again.

18 MS. STRIPPOLI: Sure.

19 THE COURT: I'm sorry.

20 Can I get that notepad, please.

21 MS. STRIPPOLI: So the first claim is a failure to
22 preserve.

23 THE COURT: Okay. So --

24 MS. STRIPPOLI: That's their first alleged
25 practice.

1 THE COURT: All right. So why do you think that
2 that's not a pattern or practice?

3 MS. STRIPPOLI: To support that in their amended
4 complaint, they only cite to FOIA 1, which is this case --

5 THE COURT: FOIA 1. And you have FOIA 1 and FOIA 2
6 that you talk about; right?

7 MS. STRIPPOLI: But that's for a separate alleged --

8 THE COURT: Separate case.

9 MS. STRIPPOLI: Yes.

10 THE COURT: Okay.

11 MS. STRIPPOLI: So for the failure to preserve, the
12 first of four alleged unlawful, they only cite to FOIA 1.

13 THE COURT: All right.

14 MS. STRIPPOLI: There's a requirement for a pattern
15 or practice to have more than one.

16 THE COURT: Got it. Claim 2.

17 MS. STRIPPOLI: Okay. For two, which I will
18 categorize, for shorthand, as overuse of categorical
19 withholding of documents for Exemption 8.

20 THE COURT: That's your shorthand?

21 MS. STRIPPOLI: Yeah.

22 THE COURT: Okay. Why don't we just say
23 categorical.

24 MS. STRIPPOLI: Okay, all right.

25 THE COURT: Categorical ban, why do they not make

1 this claim for that?

2 MS. STRIPPOLI: To support this, they cite to FOIA 1
3 and FOIA 2.

4 THE COURT: Okay.

5 MS. STRIPPOLI: FOIA 1 is, again, this case, with
6 pause letters.

7 THE COURT: Right.

8 MS. STRIPPOLI: FOIA 2 is the interdivisional
9 charter and meeting notes.

10 THE COURT: Okay.

11 MS. STRIPPOLI: First, two instances is insufficient
12 for a pattern or practice.

13 THE COURT: Okay.

14 MS. STRIPPOLI: That's the *Kahn* decision. Second,
15 FOIA 1 and two are not examples of categorical denials under
16 Exemption 8. If you actually go to the documents, you will
17 see that they are not denials. So, for example, for FOIA 2,
18 it was not categorically denied and is, therefore, not an
19 example of a pattern or practice.

20 THE COURT: Was FOIA 1 categorically denied?

21 MS. STRIPPOLI: Initially, yes, but it was
22 eventually ultimately made a lot of discretionary releases
23 that we talked about in this case --

24 THE COURT: But that's after I ordered you to do
25 it.

1 MS. STRIPPOLI: Right, which is --

2 THE COURT: Okay. All right. So that doesn't
3 really do much for me.

4 All right. Claim 3.

5 MS. STRIPPOLI: Well, in addition to those two, even
6 if numerically sufficient --

7 THE COURT: Uh-huh.

8 MS. STRIPPOLI: -- and even if they were
9 representative, right?

10 THE COURT: Uh-huh.

11 MS. STRIPPOLI: They're different requests. So
12 they're asking for different types of documents that are kept
13 in different locations that are applied in different
14 exemptions. So, again, this is not comparing apples to
15 apples.

16 THE COURT: But the question is whether or not
17 they're a categorical ban or not, right, and initially, for
18 FOIA 1, there was a categorical ban; right?

19 MS. STRIPPOLI: But there's not another example of
20 that.

21 THE COURT: You know what, I bet you a lot of
22 money -- like I don't know, I'll bet you a pizza, that if I
23 went and just randomly picked five FDIC FOIA responses, that
24 there would be categorical bans in all of them.

25 So, Claim 3.

1 MS. STRIPPOLI: I guess the last one, however, for
2 this, which is, again, for the Claim 2, is that the pattern
3 itself is not particularly violative of FOIA, which is the
4 last requirement for the pattern or practice, right. It
5 doesn't matter unless it's that actual unlawful pattern or
6 practice. And we cite to both the D.C. Circuit case as
7 repeatedly emphasize the breadth of the Exemption 8. And also
8 this district court has precedent expressly permitting
9 Exemption 8 categorical denials, and that's the *Public*
10 *Investors Arbitration Bar*. The case cite is 930 F.Supp.2d 55,
11 and it's a D.D.C. decision from 2013.

12 THE COURT: Okay.

13 MS. STRIPPOLI: The third one, which, for shorthand,
14 we'll call failure to conduct a reasonably calculated
15 search.

16 THE COURT: You don't really do well with summaries,
17 do you? How about inadequate search?

18 MS. STRIPPOLI: Okay. Inadequate search. This one
19 they cite --

20 THE COURT: You know, you work with the government,
21 you don't get paid by the hour.

22 MS. STRIPPOLI: This one they cite four examples, so
23 FOIA 1, this case; FOIA 3, which is the blog post
24 communication; FOIA 4, which is the joint statement on
25 liquidity risks; and, FOIA 5, which is the Federal Reserve's

1 policy statement.

2 THE COURT: Seems like a lot to me.

3 MS. STRIPPOLI: I'm sorry?

4 THE COURT: Go ahead.

5 MS. STRIPPOLI: So again, in this one, it's
6 numerically insufficient because two of the four were never
7 appealed. So plaintiff failed to exhaust the administrative
8 remedies, and that precludes the argument that the responses
9 to these two FOIAs was lawful.

10 THE COURT: Okay.

11 MS. STRIPPOLI: And even if FOIA 1, 3, 4, and 5 are
12 considered, FOIA 1 is moot, and FOIA 3 and 4 and 5 are
13 supported only by conclusory assertions.

14 THE COURT: Okay.

15 MS. STRIPPOLI: And then, lastly, there's no
16 practice based on four dissimilar requests and their
17 dissimilar treatments. So we can walk through and I can say
18 how those are all different.

19 THE COURT: Okay.

20 MS. STRIPPOLI: Yup, okay.

21 And then, lastly, for this same subclaim, we take
22 the position that History Associates failed to allege that the
23 practice, if it exists, is unlawful.

24 THE COURT: I'm sorry. So what was Claim 4? So I
25 have failure to preserve, categorical use, inadequate search,

1 and I forget, what was number four?

2 MS. STRIPPOLI: So I was still finishing up on the
3 rationale for three --

4 THE COURT: Oh, all right.

5 MS. STRIPPOLI: -- and then the fourth one, which
6 was construing FOIA requests too narrowly, they cite to FOIA 1
7 and 3.

8 THE COURT: Okay.

9 MR. STRIPPOLI: So again, Numerosity issue. Two
10 instances is insufficient for a pattern or practice.

11 FOIA 1 and 3 are too dissimilar to adequately allege
12 FDIC narrowly construes requests.

13 THE COURT: Well, I think their point is, is that
14 they don't know what you do because you don't tell people what
15 to do. Right? That's your point?

16 MR. HARPER: Yes.

17 THE COURT: Yes.

18 They say you have a policy, and it says to FOIA
19 people, look at the documents and see if they're responsive,
20 but you don't go on to say that they're supposed to, you know,
21 basically construe these things liberally; if there's a close
22 call, it goes to production as opposed to nonproduction. I
23 mean, I think that's their point.

24 MS. STRIPPOLI: But again, the way this is supposed
25 to be set up is -- with the complaint is these have to be

1 specifically alleged. They don't get discovery and then get
2 to amend the complaint yet again to properly allege this. So
3 they're putting the cart before the horse in the procedure
4 here.

5 And also, I think it's very important to note that
6 discovery in FOIA cases is rare. It's disfavored.

7 THE COURT: Well, they say it's rare in, you know,
8 you didn't get me X document cases, but it's not rare in
9 pattern or practice cases.

10 MS. STRIPPOLI: That's wholly unsupported. If you
11 go to the cases that they cite to, one is from the D.C.
12 Circuit that was remanded to see if discovery was appropriate.
13 Discovery was not ultimately conducted. It --

14 THE COURT: Which case was that?

15 MS. STRIPPOLI: That, I believe, was a *Judicial*
16 *Watch* decision.

17 THE COURT: Okay.

18 MS. STRIPPOLI: And then the second --

19 THE COURT: Say no more.

20 MS. STRIPPOLI: And then the second decision -- so
21 that's not an example of it. They have one other case in D.C.
22 Circuit, the *Swan* case. And then they cite out-of-circuit
23 cases, so an ND CAL case and a District of Colorado case.
24 Meanwhile, this Court has a myriad of cases, pattern and
25 practice cases, where discovery was denied. And I can list

1 those off for you if you'd prefer.

2 THE COURT: No, it's in your briefing; right?

3 MS. STRIPPOLI: What's that?

4 THE COURT: It's in your briefs.

5 MS. STRIPPOLI: So actually, some of them are, the
6 *Washington*, but there are also additional ones that, when we
7 had their reply, we did some additional research and found.

8 THE COURT: Okay. All right. Well, I'll let you
9 put something in if you want on that.

10 Okay. Could I see you again, please.

11 What's your remedy if I find that there's a pattern
12 or practice? What's your remedy?

13 MR. HARPER: Declaratory and/or injunctive relief.

14 THE COURT: Okay. I mean, but I'm not going to be
15 able to say you guys can never again have any categorical
16 denials; right?

17 MR. HARPER: No, I think with respect to that --

18 THE COURT: Or like I can't declare do an adequate
19 search and they're already supposed to be doing that.

20 MR. HARPER: No, I think what -- the declaratory
21 relief we'd be looking for, I think we differ, obviously, for
22 the pattern or practice, but I think with respect to the
23 categorical assertion, our position is they're reflexively
24 making categorical withholdings under Exemption 8. And I
25 think the declaratory/injunctive relief we would be looking

1 for is to say you can't, under FOIA, reflexively categorically
2 withhold documents.

3 THE COURT: They're going to say we're not doing
4 that.

5 MR. HARPER: Well, that's what this is all about, is
6 trying to figure out whether they are doing that.

7 THE COURT: Well, like if I -- like if I gave you a
8 30(b)(6) on this issue, what would your questions be? Because
9 they're not going to put up someone on a 30(b)(6). You're
10 going to say do you categorically deny things? No.

11 MR. HARPER: Well, I think --

12 THE COURT: Or in bad faith, no.

13 MR. HARPER: So I think we would want, as I
14 mentioned at the outset, some tailored document discovery plus
15 a targeted 30(b)(6) deposition. I think the document
16 discovery could, as Your Honor suggested, ask for a sample of
17 FOIA responses in which they have categorical language in
18 them, and we could see how often they do this.

19 THE COURT: Under a FOIA, you guys have a -- don't
20 you guys -- I mean, not all the -- I mean, back when I was
21 litigating, usually agencies will have a FOIA library, where
22 they say here's your FOIA responses. Like you could just go
23 to them right now if you wanted and just like, you know,
24 have -- you know, I'm sure you have summer interns. Have
25 someone just go through them.

1 MR. HARPER: So I believe -- and I'll take another
2 look, but I believe they have a FOIA, library where they put
3 in the documents that have been released, but I don't believe
4 they have --

5 THE COURT: Well, let's figure it out.

6 MR. HARPER: -- the letters.

7 THE COURT: Let's see. Do you guys know off the top
8 of your head?

9 MS. STRIPPOLI: Yes, Your Honor, we do have a FOIA
10 reading room. My understanding -- and it is public. My
11 understanding is not every FOIA request goes on that, but when
12 they have enough interest, and I, unfortunately, don't know
13 the number of that, but I think it's maybe over five requests
14 or something -- I can clarify -- but then they get loaded
15 onto -- because there's enough, you know, desire to see the
16 request, they make it public.

17 THE COURT: All right. I just got to your reading
18 room. Reading room, see how simple that was.

19 MS. STRIPPOLI: Additionally, Your Honor, you know,
20 under the statute, we are required to produce to Congress our
21 annual reporting, which also has some statistics and numbers
22 that might be relevant.

23 THE COURT: Well, it does look like it's only the --
24 it's only the responses and not the request on the reading
25 room.

1 I mean, how difficult would it be for you all just
2 to get them the letters with respect to the things that are on
3 the reading room?

4 MR. HARPER: Are you talking to the FDIC?

5 THE COURT: Yeah, I think they're conferring with
6 each other.

7 MS. STRIPPOLI: I believe, Your Honor, if you --

8 THE COURT: You need to go to the mic, because
9 otherwise she can't hear you.

10 MS. STRIPPOLI: Sure. My apologies.

11 I believe if you scroll a little further down, there
12 are logs that you might be able to access that might have that
13 information.

14 THE COURT: Oh. Well, here you go. I mean, it
15 seems like you can go through these logs at the bottom of the
16 reading room. It says -- for example, it has an ID number,
17 received date, publication and related record, search deposits
18 granted in part, denied in part. It says full denial, full
19 denial, no records.

20 MR. HARPER: So, Your Honor, what we're looking for
21 is, I think, what would be supportive of our policy or
22 practice, and we have a lot already, but I think what we're
23 looking for, in addition to that, is like the appeal denial
24 letter that we got, which says -- that has this legal analysis
25 explaining why they're asserting a categorical determination,

1 they're doing a categorical withholding. I don't think the
2 FOIA logs are going to explain that they use a categorical
3 withholding FOIA in withholding the documents in full. So
4 that's the sort of thing we would be looking for.

5 THE COURT: Do you have one of those with you? Can
6 I take a look at it?

7 MR. HARPER: Yeah.

8 Ignore my scribblings, but it has -- and so just
9 to --

10 THE COURT: Hold on. I'm not criticizing you, but
11 it never fails to amaze me, literally 99 times out of a
12 hundred I ask to see a document, I get the document, I start
13 reading, and the person immediately starts talking. I don't
14 know why that is. But anyway, I need a minute.

15 MR. HARPER: So I think this is also relevant to
16 some of the points that opposing counsel is making about the
17 numerosity requirement. I don't think that there is a
18 numerosity requirement for policy or practice claims. The
19 relevant question is, at the pleading stage, whether we
20 plausibly alleged that facts that could signal that the Agency
21 has an unlawful policy or practice. And I think just looking
22 at this appeal denial letter is enough on its own. I mean,
23 the Agency says it's doing this. It believes it's lawful. It
24 said again today that it believes this is lawful. If it
25 believes --

1 THE COURT: -- Supreme Court opinion proposition
2 that it is lawful, at least with respect to certain
3 exemptions.

4 MR. HARPER: Yeah, not to Exemption 8. The Supreme
5 Court decisions, I believe, also predate the amendments to
6 FOIA that require the foreseeable harm analysis.

7 THE COURT: All right.

8 MR. HARPER: The one thing I would say, though,
9 just -- I'm happy to respond to each one of those.

10 THE COURT: No.

11 MR. HARPER: Okay. But I think the overarching
12 point is just that I think, you know, focusing on the
13 pleadings just seems a bit theoretical here, now that we
14 actually have policy documents, as we explained in our motion,
15 that strongly supports these claims beyond what we said in the
16 pleadings.

17 THE COURT: All right. Well, I'm taking failure to
18 preserve off the table, because I'm not sure sort of what the
19 legal requirements are there. If you want to bring it back up
20 later in terms of discovery, let me know. By taking it off
21 the table, I mean not discovery now.

22 MR. HARPER: Okay.

23 THE COURT: So that leaves you with overuse of
24 categorical documents, inadequate searches, and too narrow. I
25 mean, I don't know what more documents or discovery you would

1 need on too narrow. You would just show me the policy and say
2 the policy doesn't have some magic language on it that it
3 needs to have; right?

4 MR. HARPER: So I can tell you, just overarching,
5 what discovery we're looking for. The document discovery
6 would be, we want to know is this the full set of policies,
7 are there any more policies. And I think the one gap we have
8 is that they have this FOIA PA group, their legal group, that
9 oversees this process. As far as I can tell, we didn't get
10 any policies in from that group, internal policies anyway.

11 THE COURT: Okay. Is there any internal policies in
12 that group?

13 MS. STRIPPOLI: Can you repeat --

14 MR. HARPER: The FOIA PA, legal FOIA team that
15 oversees the FOIA process, are there any policies that it has,
16 internal policies, about how they conduct the FOIA process.

17 MS. STRIPPOLI: Is this mic on? Can I use this to
18 respond?

19 So with regards to the FOIA documents that we
20 produced to them, during that sort of informal exchange, we
21 produced an FDIC directive on the Freedom of Information Act
22 request on February 19th. Then we produced an FDIC
23 directive --

24 THE COURT: Okay. That's -- great. Thank you for
25 producing everything you produced. My question is: Did you

1 produce things from this legal PA group, yes or no?

2 MS. STRIPPOLI: So I'm not sure the legal PA group
3 you're referring to is the FOIA group overall.

4 MR. HARPER: It's just referred to as FOIA PA in
5 some of these policy documents.

6 MS. STRIPPOLI: So we produced all -- we did a
7 search of the main FOIA group and asked for them to review and
8 produce all FDIC-wide policies. We produced those to
9 plaintiff. And then in addition to that, we went through and
10 for the 17 different divisions and offices, we pooled them and
11 asked them do you have any policies, and we also produced
12 those to plaintiff's counsel.

13 THE COURT: I mean, it seemed like a pretty good
14 good faith effort to me.

15 MR. HARPER: If they're representing that there's no
16 other -- I mean, I think these policies, as they are, strongly
17 support our claims. If they're saying there's no other
18 policies out there, that's fine. I find it a little hard to
19 believe that PA group does not -- if it oversees --

20 THE COURT: What is the PA group?

21 MR. HARPER: Again, this is how I understand it.
22 There's a -- within the legal division, there's a group called
23 FOIA PA, FOIA-PA, and that group sort of gets the FOIA
24 requests, hands them out to the subcomponents of the FDIC to
25 process, and then those subcomponents process them, send them

1 back to FOIA PA, and FOIA PA is like ultimately responsible
2 for responding.

3 THE COURT: Is FOIA PA sort of that big group thing
4 that you were talking about, the sort of master group?

5 MS. STRIPPOLI: That's the FOIA Privacy Act group,
6 yes.

7 THE COURT: Okay.

8 MS. STRIPPOLI: And so -- but, you know, Your Honor,
9 I think this is why it's important that we're getting out of
10 order here, is because if we have --

11 THE COURT: No, it's -- no, no, it's not, it's not
12 important that we're getting out of order. I'm staying in the
13 order I want to stay in.

14 MS. STRIPPOLI: Oh, not you, Your Honor. It's -- I
15 guess my one point that I would like to make, though, is that
16 we need to make sure that like if we were allowed to actually
17 file an affidavit, we could explain this organization, we
18 could explain the policies. And then if they had an issue,
19 they can file a Rule 56(d) affidavit or motion for discovery.
20 But right now, it's premature. I mean, they have not cited a
21 single case where preanswer discovery was permitted.

22 THE COURT: Okay. So I litigated for 22 years, so
23 you're talking to the wrong audience. Because I'm very happy
24 to have pre-motion discovery where I don't think the motion is
25 going to succeed, because I don't like delaying things. And

1 right now, I'm not -- obviously, I'm not prejudging anything.
2 This is just my initial determination to decide whether or not
3 discovery should move forward. All right?

4 So just to be absolutely clear, I'm the wrong
5 audience on -- and I'm sorry, you just got stuck with me.
6 Should have had somebody else. I'm just the wrong audience on
7 no matter what, come what may, discovery doesn't start until
8 after the motion to dismiss is decided, because I just think
9 that's entirely inefficient, and that's one of the reasons
10 cases take forever.

11 But she does -- I mean, I didn't -- she does raise a
12 good point. Why not -- I mean, why don't we take that interim
13 step? They can, you know -- they can just file an affidavit
14 saying here's what we do, here's the documents we've given
15 you, we don't have any others.

16 MR. HARPER: So I think it would be -- so I guess
17 putting the policies aside, there's other things that we know
18 exist that we haven't gotten.

19 THE COURT: Like what?

20 MR. HARPER: There are training materials. We asked
21 for those during the informal information sharing process. We
22 didn't get them. These are referenced -- some training
23 materials are referenced in the policy documents themselves.
24 Some of the policies don't like -- don't say anything about
25 liberally construing FOIA requests, and so we want to know, do

1 any of your training materials say anything about that. And
2 that's stuff they should be able to provide.

3 THE COURT: They're not -- I can tell you right now
4 there's literally nothing in their documents that say you
5 should liberally construe FOIA requests. Because they're not
6 going to sort of send people to like produce documents without
7 some guidepost and just throw everything in. Their documents
8 aren't going to say that.

9 Your documents don't say that, right, or do they? I
10 mean, maybe they do.

11 MS. STRIPPOLI: Your Honor, I -- I -- they say like
12 do not know, but I would not suspect that they would.

13 THE COURT: Yeah, all right.

14 So you know.

15 MR. HARPER: Well, I -- it sounds like they don't
16 know, but I think that is something that would be relevant to
17 proving that these policies or practices exist. You know, the
18 training materials are a relevant piece of that. And then the
19 only other thing is just a 30(b)(6) deposition to understand
20 how the Agency interprets its policies. So just to give you
21 an example --

22 THE COURT: But it's going to -- it's going to
23 depend on the person interpreting them, other than what's in
24 the policies; right?

25 MR. HARPER: Well, under -- yeah, interpreting and

1 how they interpret and apply the policies and practice, I
2 think. So I just want to give you an example. The first
3 policy that they gave us, which is at -- it's at Exhibit A to
4 our motion for discovery. It's this policy from RMS, which is
5 the division that, as I understand it, maintains
6 correspondence with -- between the FDIC and banks. That's the
7 division that handled our FOIA request.

8 THE COURT: Okay.

9 MR. HARPER: And its policy seems to us, strongly to
10 suggest that it has basically a blanket policy of withholding
11 documents categorically under Exemption 8. So we want to
12 understand like is that -- is that what the language in the
13 policy means, is that how you're applying it in practice, and
14 we think a 30(b)(6) deposition would get to the bottom of
15 that.

16 And there -- there are other things as well. I
17 mean, like the search -- the inadequate search process. We
18 just don't understand how the Agency could have -- I mean,
19 putting aside the administrative mess up that opposing counsel
20 was referencing earlier, there were many other times when the
21 Agency kept finding more and more documents. We don't
22 understand what went wrong, but a 30(b)(6) deposition would be
23 an easy way for the Agency to explain this is how we do
24 searches, this is how we -- you know, this is the process we
25 undertook in this case.

1 THE COURT: Have they told you -- have you not told
2 them what process you took? Have you not told them what
3 process you took in this case?

4 MS. STRIPPOLI: Your Honor, well, I mean, through
5 the informal process of the joint status reports, we've
6 constantly had weekly and biweekly meetings where we told them
7 every step of the way what we were doing --

8 THE COURT: All right. So they told you.

9 MR. HARPER: So I still don't think that -- at least
10 I don't fully understand how we got from 23 letters to all the
11 letters we have now and how --

12 THE COURT: How many do we have now?

13 MR. HARPER: I believe it's -- well, it's at least
14 25, plus I think there's at least a couple dozen more or a
15 dozen more. I forget.

16 THE COURT: Well, I'll tell you how they got from
17 there to here. It's really simple. You all brought a
18 lawsuit. That's how you got from there to here. I got heated
19 under the collar about it, they went back and they looked more
20 carefully.

21 MR. HARPER: Right, but even -- even once they were
22 under the microscope, it's still they were finding more and
23 more documents, and we just don't understand how --

24 THE COURT: It's the government, I mean -- all
25 right.

1 MR. HARPER: We don't think that we need significant
2 discovery here. We think we just need a tailored -- really
3 tailored document discovery, asking for a few additional
4 things. If they say they have nothing, then it should be very
5 straightforward, and they say -- they produce nothing and then
6 we just proceed to summary judgment on, you know, what we have
7 now. We think that is enough for us. But we think we have
8 the right to fully prove our claims through discovery.

9 THE COURT: All right. If you -- if you had narrow
10 document discovery, what would you ask for?

11 MR. HARPER: We would ask for the remaining -- any
12 remaining policies that are relevant to these policy -- or
13 practices, practice claims. We would ask for training
14 materials. There are a couple of other items in the policies
15 that they gave us that were not produced that we would ask
16 for. So one of them is a redaction cheat sheet that's
17 mentioned in the policies. Another is the foreseeable harm
18 standard that's completely redacted in those policies. So
19 that's, I think, the documents we would ask for.

20 THE COURT: All right.

21 MR. HARPER: And then we would also ask for a
22 sam- -- like I mentioned earlier, a sample of responses,
23 assuming we can't just find those online, a sample of response
24 letters that applied in categorical determination.

25 And then -- and then, yeah, that's the document

1 discovery. And then I think we would add, once we have that,
2 we would have a -- I think it's pretty typical, a tailored
3 deposition asking them about those policies.

4 THE COURT: All right. Ms. Soni, could I see you,
5 please. Is it Soni or Soni?

6 MS. STRIPPOLI: Strippoli.

7 THE COURT: Totally wrong. I'm so sorry.
8 Strippoli.

9 MS. STRIPPOLI: No worries.

10 THE COURT: Come on up.

11 MS. STRIPPOLI: Your Honor, I wanted to address a
12 couple things. So first off, the larger amount of documents
13 that we ended up producing weren't just all pause letters.
14 They were discretionary releases because in the spirit of
15 transparency --

16 THE COURT: Slow down.

17 MS. STRIPPOLI: In the spirit of transparency, and
18 in an effort to, you know, take into account the new
19 leadership and desires, we ended up producing discretionary
20 documents that we thought that History Associates would be
21 interested in. These include things such as internal
22 memoranda which were --

23 THE COURT: Okay. You're like telling me no good
24 deed goes unpunished. Sorry. You're saying no good deed goes
25 unpunished.

1 MS. STRIPPOLI: Yes, Your Honor, but I also wanted
2 to explain that it was much broader than just pause letters
3 that were produced.

4 THE COURT: Okay. Understood.

5 MS. STRIPPOLI: Second, as far as the timing, I do
6 understand your concern, and we think we've been very willing
7 and trying to be accommodating on moving this case along very
8 quickly.

9 THE COURT: Well, I mean, maybe I'm thinking of the
10 wrong case, but didn't I have to put in a few orders? Was
11 this -- am I just thinking of the wrong case, where --

12 MS. STRIPPOLI: In the initial phases, I think with
13 regards to the 23 letters and 25 letters --

14 THE COURT: I thought you guys -- was it the other
15 case? Was it the other History Associates case where the
16 government asked for an extension, I gave it, then the
17 government blew by that extension, then it asked for another
18 extension. I think I said yes, but this is it, and then you
19 blew by that one. Is that this case, or is that a different
20 case?

21 MR. HARPER: The SEC case.

22 THE COURT: What's that?

23 MR. HARPER: The SEC case.

24 THE COURT: Oh, that's a different case, okay, all
25 right. Got it. SEC bad, FDIC good. Got it.

1 MS. STRIPPOLI: So with regards to the timing, you
2 know, we would be prepared to file our motion to dismiss
3 within two weeks. And that, you know, I think would be a
4 normal sequencing. If we follow the case law, the FOIA case
5 law basically says you would get through if -- you know,
6 presumably, if we prevail on that, then that would dispose of
7 this entire case, which is why we're also advocating summary
8 judgment on Count 1 at the same time. In this vein, it goes
9 to Your Honor's like, you know, desire for efficiency. So
10 that could resolve the entire case just alone on that. And
11 also --

12 THE COURT: I'm just having trouble seeing how
13 you're going to win on the motions on the other counts. It
14 just seems like it's just fraught with factual questions. And
15 I understand your points and you're making great points. I
16 mean -- but let me ask you this: I assume as between a
17 30(b)(6) or limited document productions, you would prefer
18 limited document productions?

19 MS. STRIPPOLI: Well, Your Honor, I believe we would
20 prefer to do a motion for summary judgment --

21 THE COURT: I know what you want. Understood.
22 Don't bite the hypothetical.

23 MS. STRIPPOLI: Okay.

24 THE COURT: You get one of two choices. I'm not
25 saying you're going to -- I'm not saying I'm going to award

1 either. I'm just trying to figure out where everybody is. As
2 between document -- limited document request or 30(b)(6), you
3 would prefer limited document request, yes?

4 MS. STRIPPOLI: Yes, Your Honor, I believe that's
5 what we would take.

6 THE COURT: All right. Okay. With respect to
7 trying to figure out if there are any remaining policies, how
8 much work would that be for you all? I mean, that -- I mean,
9 I assume that wouldn't be very much; right?

10 MS. STRIPPOLI: As far as written policies?

11 THE COURT: Right.

12 MS. STRIPPOLI: Yes, Your Honor, I wouldn't imagine
13 that would be a huge lift because we've already -- believe
14 we've done an exhaustive effort on this.

15 THE COURT: All right. If he identifies for you two
16 or three specific documents that are referenced in the
17 materials, that wouldn't be that hard to look for; right? You
18 can either find them or you can't.

19 MS. STRIPPOLI: Correct, Your Honor.

20 THE COURT: Instead of saying all redacted cheat
21 sheets, if he says there's this training pol- -- there's this
22 document and it referenced this redacted cheat sheet, you
23 should be able to get those; right? That won't be too heavy
24 of a lift?

25 MS. STRIPPOLI: Presumably, if the document exists,

1 which if it's referenced, it should.

2 THE COURT: Okay. All right.

3 MS. STRIPPOLI: And then -- sorry, Your Honor. Go
4 ahead.

5 THE COURT: The training materials, are there
6 training materials, like are there things other than the
7 policies and procedures?

8 MS. STRIPPOLI: So, Your Honor, I wanted to clarify
9 a factual issue on that. If you actually go to Exhibit 44-3,
10 on page 6, it recounts essentially what was History
11 Associate's second informal discovery request of the FDIC.
12 And specifically, they wrote, "Please confirm whether the FDIC
13 has any other written policies regarding those four issues and
14 provide them if they exist. If the FDIC does not have any
15 other written policies, please provide copies of any materials
16 used to train FOIA officers."

17 We subsequently produced, on March 6th and April
18 1st, written policies. So we construed that as that they are
19 no longer requesting.

20 THE COURT: That's a fair -- that's a fair point.

21 MS. STRIPPOLI: And they had never renewed that
22 request. And so when they say in their brief that we never
23 responded to certain requests, including the request for
24 materials used to train employees, we just believe that's
25 categorically untrue.

1 THE COURT: Okay. Hold on. Give me that --

2 MS. STRIPPOLI: Sure. It's exhibit --

3 THE COURT: Hold on.

4 MS. STRIPPOLI: We have a hard copy, Your Honor, if
5 that's easier.

6 THE COURT: Oh, yeah, yeah. Thank you. I moved
7 away from the docket, unfortunately.

8 MS. STRIPPOLI: It's under the --

9 THE COURT: Highlighted?

10 MS. STRIPPOLI: -- information, No. 3.

11 THE COURT: Yeah, yeah.

12 I mean, she does raise an excellent point.

13 MR. HARPER: Your Honor, can I find it?

14 THE COURT: Quickly. And make sure you're at a mic.

15 MR. HARPER: Sure.

16 THE COURT: Stay up. Stay up, ma'am.

17 MS. STRIPPOLI: Okay.

18 MR. HARPER: So I guess two things. I have to look
19 back at the request. I believe that we also -- we again asked
20 for training materials, but I have to double-check that. But
21 either way, we didn't get policy -- I mean, they gave us
22 policies, but the policies don't address certain issues like
23 how to construe FOIA requests, whether they issue litigation
24 holds.

25 THE COURT: Got it. Okay.

1 How -- how much work would it get -- would it be to
2 like track down the training materials? I mean, are -- is
3 there like a database of them, or just it's on random people's
4 emails? Do you know?

5 MS. STRIPPOLI: I do not know the answer to that. I
6 think it would depend on the scope of what the -- that's a
7 very broad request for training materials, so I think it would
8 need to be narrowed for me to actually assess the scope of it.
9 We'd probably need to go back and consult with our clients who
10 possess those before I can give an answer to the Court.

11 I just want to emphasize, though, that this is
12 extremely unorthodox to have this happen, and the only times
13 that it has is when they've shown bad faith, right, that this
14 occurs before we get to the Rule -- you know, summary judgment
15 and Rule 56(d) motions. And there's a reason for that, right.
16 There's -- that ability to submit that declaration is what
17 provides the material facts for dispute that then -- for
18 example, if we ended up being able to come forward with an
19 affidavit that said this is no longer or policy or practice,
20 maybe it was in the past, but it's not in the future, case law
21 has shown that that severs.

22 So until we actually are able to present and fully
23 be able to present that to the Court, it's -- discovery is
24 premature. And not to say they wouldn't get the opportunity
25 then if a genuine issue of material fact exists post that

1 motion for summary judgment affidavit. That's the remedy
2 where they can file the 56(d) affidavit at that time.

3 THE COURT: Okay. Do you want to say that again?

4 MS. STRIPPOLI: Sorry?

5 THE COURT: That's okay. All right. I got you.

6 All right. Here's what we're going to do. Of
7 course, you can file your motion to dismiss, and you can file
8 a summary judgment motion at the same time. You work out a
9 briefing schedule for these guys. And then work with
10 Ms. White to get a hearing on the books, say, two or three
11 weeks after the reply briefs come in. And you guys just
12 figure out that timing. I don't care when you guys do what.

13 In the interim, I am going to ask you to look for
14 the remaining policies. And also I'm -- the plaintiffs are
15 going to give you -- right now, you've just given me two
16 documents of the ones that you've identified. There might be
17 one or two others, but I'm not going to get -- she's not going
18 to get a list of like 20 documents; right?

19 MR. HARPER: No.

20 THE COURT: Okay.

21 So he's going to give you a list by Tuesday of the
22 very specific documents that they want, along with the --
23 where he got the information of them.

24 I am going to ask you to go to your head FDIC FOIA
25 group and ask them for any written training materials, not

1 emails, explanations, but training materials that they've used
2 within the last three years. So that should narrow the scope
3 some. And you don't have to go to every single individual
4 office. Just go to the main FDI FOIA place and ask them. If
5 they say they're all with the subcategories, then I want you
6 to ask two or three of them for the subcategories of them and
7 submit those training materials.

8 And then after you've done one, two, and three, of
9 course, submit to them an affidavit with anything you want to
10 say, including we've now given you all the policies, we've now
11 given you the specific documents you've asked for, or if there
12 are no remaining policies, obviously, that they don't exist,
13 there's no more, and with respect to the training materials,
14 that you did what the Court asked with respect to searching
15 for those. Okay?

16 MS. STRIPPOLI: Can you say the last part?

17 THE COURT: So the affidavit, I just want you to --
18 I just want the affidavit to say the Court said produce any
19 remaining policies. We have confirmed that there are none or
20 we found two more, here they are, and there are no others.
21 Okay?

22 With respect to the training materials and the
23 affidavit, say we did what the Court asked. We checked with
24 the head FOIA group if there are any written training
25 materials. And by written, I mean like a PowerPoint, or a

1 here's how you do it, here's a how-to, not some newbie asked
2 someone in an email, how do I do X, Y or Z, and there's a
3 response. That's not what I mean. I mean just actual
4 training materials for the last three years. If it's easier
5 to search without a date restriction, that's fine too. I just
6 think that's easier for you all. And then an affidavit that
7 you asked for these documents, specifically, here they are, or
8 we can't find them. All right?

9 I'm not going to get into sampling right now,
10 because I just don't want to -- I think that that is going to
11 create too much of an issue as to how much is statistically
12 significant and how much isn't. And I'm going to put off a
13 30(b)(6) now pending your review of those documents.

14 If after you get their affidavits and their summary
15 judgment motion, you feel like you have to file a Rule 56,
16 what is it (e), for more documents, then I'll take that up at
17 that time, including the 30(b)(6), if you need that to reply
18 to the summary judgment. If that occurs, obviously, the
19 briefing schedule that you all would have agreed to would be
20 moot. Well, no, I guess you would file that, they would file
21 a reply as to that, and I guess you would get your surreply on
22 that. But either way, I just want this teed up, sort of so
23 this doesn't just keep hanging around, you know, as
24 efficiently as we can.

25 I understand your point about the motion to dismiss.

1 And obviously, I haven't read papers on a motion to dismiss.
2 The reason I have these pre-motion conferences is because
3 every once in a while I can tell people here's what I'm
4 thinking even though I don't know, and that gives you a
5 better -- that gives the parties a better idea of sort of
6 whether or not they should try to working something out and if
7 you can't, it also gives you a better idea of what I'm looking
8 at and what I'm looking for. And in particular, what I'd be
9 looking for on a motion to dismiss is not just here's these
10 cases and they say X, but how you're actually grappling with
11 the fact that I guess at the end of the day, they are claiming
12 that you're doing X, and you're saying we don't do X, and to
13 me that's an example of a not motion to dismiss. All right.
14 Does that make sense to everybody?

15 MS. STRIPPOLI: Yes. One clarification, Your Honor.
16 So what we're going to propose that we file is a motion to
17 dismiss on Count 2.

18 THE COURT: Okay.

19 MS. STRIPPOLI: And motion for summary judgment on
20 Count 1.

21 THE COURT: But what about 3 and 4? Oh, 2 has the
22 four things.

23 MS. STRIPPOLI: So two -- exactly -- has -- they're
24 alleging four --

25 THE COURT: Yeah, yeah. Okay. All right.

1 MS. STRIPPOLI: Yes, correct.

2 THE COURT: Got it. Okay.

3 MS. STRIPPOLI: And so what we would envision as the
4 normal procedure after that was if our motion fails, let's say
5 our motion to dismiss fails, and so Count 2 survives, then it
6 would go to a motion for summary judgment on Count 2. Then
7 they -- if after we've submitted our affidavit, then after
8 that, they can basically submit their Rule 56(d).

9 THE COURT: If your motion to dismiss failed, what
10 would you have summary judgment on? Like you wouldn't need
11 discovery from them; right?

12 MS. STRIPPOLI: No, but in the normal course of how
13 FOIA proceeds, the government then submits a summary judgment
14 motion which would be -- so on Count 2, then, we would have
15 summary judgment. So --

16 THE COURT: I mean, if I'm going to deny a motion to
17 dismiss on Count 2, and there's no new evidence, then I'm also
18 going to deny a summary judgment motion. I don't
19 understand.

20 MS. STRIPPOLI: Well, because on a motion to
21 dismiss, we can't submit an affidavit; right.

22 THE COURT: Okay. You can submit an affidavit with
23 your motion to dismiss, how's that? I will -- I will consider
24 it.

25 MS. STRIPPOLI: And it won't convert it? I mean, I

1 guess that's -- that's the concern, is -- so if it converts it
2 to a motion for summary judgment, I mean, that's a completely
3 different pleading. And so one would be a failure to state a
4 claim and then if that survives, then we can like -- I'm
5 sorry, if that fails, then, eventually, we would get to our
6 count on like the pattern or practice, and we would be able to
7 submit an affidavit saying why we either don't have a policy
8 or practice or why we've changed that or whatever it is.

9 THE COURT: I got it. You don't want to have to
10 file your affidavit before I decide the motion to dismiss.

11 MS. STRIPPOLI: Correct, Your Honor.

12 THE COURT: All right. Fine. You can file your
13 motion to dismiss. If it's denied -- I mean, if I deny a
14 motion to dismiss on Count 2, then I'm going to allow
15 discovery. I mean, I'm --

16 MS. STRIPPOLI: The case law is very clear that in
17 FOIA cases, whether it's pattern or practice or not, that we
18 would be able to rely basically on whether there's a genuine
19 issue of material fact as supported by the declaration
20 submitted by the agency.

21 THE COURT: Right.

22 MS. STRIPPOLI: So if it's nonconclusory, if it's
23 specific, and if it like resolves all, you know, genuine
24 issues of material fact, then the motion for summary judgment
25 should be granted and no discovery should be allowed. At that

1 time, if they get to -- both the Court and History Associates
2 reviews our affidavit and says, hey, we actually think that
3 there are, you know, these outstanding questions, that's when
4 they file their Rule 56(d) saying we want discovery on things
5 that we can't --

6 THE COURT: I thought -- but -- well, hold on. Hold
7 on. I thought with respect to a Vaughn index, the Vaughn
8 index was made -- I mean, if that's what you're talking about,
9 or an affidavit along those lines, that's made before summary
10 judgment. They get to look at it and then you decide whether
11 you guys want to go to summary judgement. Is that -- do I
12 have that wrong?

13 MR. HARPER: I think that's right.

14 MS. STRIPPOLI: So the Vaughn index would reply to
15 Count 1, which would be the adequacy of the search and the --

16 THE COURT: Basically what you're saying is you want
17 sort of a Vaughn index on the pattern and practice. You want
18 to have someone put in an affidavit that says here's what we
19 do, this is legal, therefore, we're entitled to summary
20 judgment; right?

21 MS. STRIPPOLI: I mean, it would basically defend
22 the pattern or practice claim.

23 THE COURT: Right.

24 MS. STRIPPOLI: Whichever way that takes. And that
25 might take on different things. For example, it might say

1 that we are no longer engaged in that pattern or practice, or
2 we never engaged in that pattern or practice.

3 THE COURT: Right. And I'm just -- and here's the
4 thing, and I know this because I'm having an evidentiary
5 hearing on a FOIA case, I don't have to accept all that as
6 true. They get to challenge it.

7 Now, I know -- I know what you're going to tell me,
8 Courts usually take it as true, Courts usually don't allow
9 discovery, et cetera, et cetera, et cetera. I got it. I've
10 also researched this extensively recently for a different
11 case, and I'm telling you the D.C. Circuit has -- and Sam
12 actually is on this other case.

13 Right?

14 The D.C. Circuit has remanded on FOIA summary
15 judgment because there are factual issues in dispute, which
16 makes total sense to me as someone who's litigated for a long
17 time.

18 So by all means, file your current summary judgment
19 on Count 1. File a motion to dismiss on Count 2. If you want
20 to go ahead and file summary judgment on Count 2, probably
21 going to be easier and better for you. I'm telling you right
22 now what I'm not going to do is get a summary judgment motion
23 with an affidavit from you all that says X, Y, Z and just
24 accept it as true without giving them an opportunity to test
25 that. That's just not going to happen. Okay?

1 So, I mean, if it were me, I would just do summary
2 judgment all at once. Obviously, you're under no obligation
3 to do that. You guys do you. I will handle whatever you guys
4 do and how you decide to do it. But it's going to, I think,
5 going to involve a lot less briefing and -- for you all than
6 doing it separately.

7 But I understand from your perspective, you want to
8 file the motion to dismiss because there is a chance, I mean,
9 there is a chance, a serious chance that I might grant it
10 because I haven't seen all the briefing yet. But, you know,
11 that's a strategy call and a resources call for you all.
12 Okay?

13 MR. HARPER: Can I just ask a question -- two
14 clarifying questions?

15 So first is, they're going to make the judgment call
16 about what motion to file, but I just wanted to clarify, in
17 the interim, they should be collecting the documents that
18 you --

19 THE COURT: Yeah, you guys have to produce them to
20 them in like 30 days or something.

21 MR. HARPER: Okay. Yeah, I was just going to ask --

22 THE COURT: I mean, before their opposition is due,
23 you should produce those small set of documents that they've
24 asked for.

25 MR. HARPER: Okay.

1 THE COURT: So whatever briefing schedule you come
2 up with, you guys have to get them the documents at least a
3 week before.

4 MR. HARPER: The other thing is --

5 THE COURT: I don't think it's going to take too
6 long to get these, so I can't imagine you're going to need
7 very much time.

8 Okay. Go ahead.

9 MR. HARPER: The only other thing was on the
10 preservation issue, which you said you're putting aside, I
11 understood you to mean putting aside for purposes of
12 discovery?

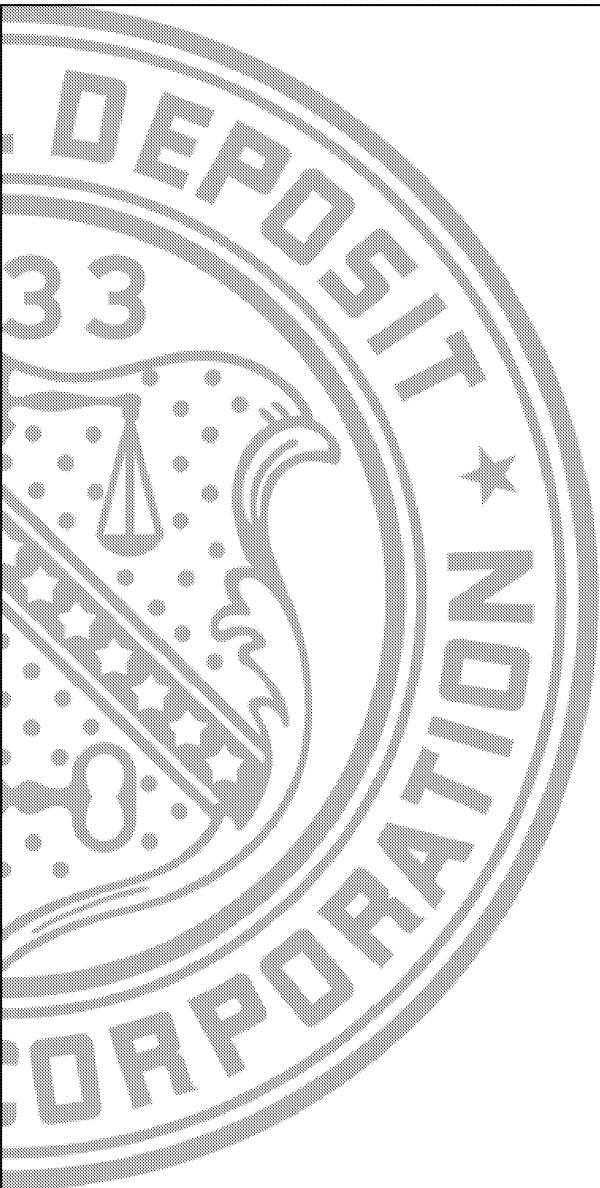
13 THE COURT: Right.

14 MR. HARPER: Okay. That's it.

15 THE COURT: Okay. Anything else?

16 I will say that as I recall, I was not particularly
17 pleased with FDIC early on, but I do feel like you all have
18 done a lot of work to try to get it right and to move this
19 along, and you've acted in, I think, serious good faith since
20 earlier in this litigation. And I am appreciative of that. I
21 am cognizant that you, in good faith, worked to get them a lot
22 of documents and that you, in good faith, went and did your
23 searches. I believe you when you say that you provided
24 discretionary documents that you thought that they would want
25 but weren't necessarily called for by their FOIA request. So,

Exhibit B



Freedom of Information Act (FOIA)

Training Session for RMS

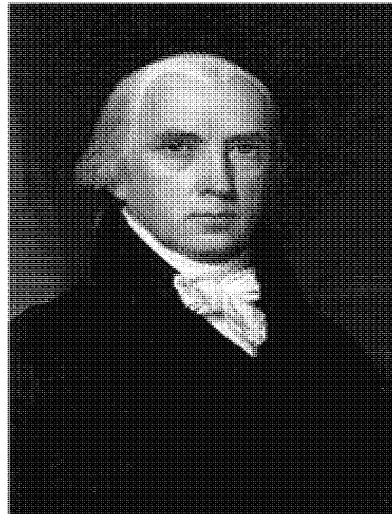
October 5, 2022



Freedom of Information Act 5 U.S.C. 552

“Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both”

— **James Madison**



footer edit 2

Freedom of Information Act

5 U.S.C. 552

The Freedom of Information Act provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exceptions or by one of three special law enforcement record exclusions.

What is a valid FOIA request?

FDIC FOIA

Regulations 12 C.F.R. § 309.5

- Must be in writing
- Must be from a “person”
- Must have a reasonable description of records being sought

Agency Records

The FOIA permits a person to request access to agency records.

- Records that we created or obtained during the course of our operations and activities AND are in our control at the time we receive a FOIA request



Is it a valid FOIA request?

- A phone call from a journalist asking a question
- A written request seeking documents from our public website
- A written request from John Smith for reasonably described FDIC documents
- A written request for reasonably described records from another federal agency
- A written request for reasonably described records from a fugitive

Reasonable Interpretation vs Clarification

- In some instances, we may be able to reasonably interpret broad requests.
- In other instances, we need to clarify/limit the scope with the requester.
- In both instances, we may rely on you!

Time Limits for Responding to a Request

- 20 working days to respond
- In “unusual circumstances” agency may extend time limit by 10 days by giving written notice to requester
- Requesters can ask for expedited processing
- Requester can sue if response deadlines are not met



Fees

FOIA Requester Fee Categories

- Commercial Use Requester
- Educational institutions, non-commercial scientific institutions
- News media
- All others

FDIC Fee Schedule -

<https://www.fdic.gov/foia/fees.html>

Fee Estimates

FOIA Exemptions

Exemption Two

Records related solely to the internal personnel rules and practices of the FDIC.

Exemption Three

Records specifically exempted from disclosure by statute

Exemption Four

Trade secrets and commercial or financial information obtained from a person that is privileged or confidential.

Exemption Five

Interagency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the FDIC.

Exemption Six

Personnel, medical, and similar files (including financial files) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Exemption Seven

Records compiled for law enforcement purposes

Exemption Eight

Records that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC or any agency responsible for the regulation or supervision of financial institutions.

Exemption 4, 5 U.S.C. § 552(b)(4)

Exemption 4 requires the withholding of trade secrets, and confidential or privileged commercial or financial information that was submitted by a person.

Foreseeable harm analysis

Exemption 4

Privileged

Exemption 5, 5 U.S.C. § 552(b)(5)

Exemption 5 permits the withholding of inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency (i.e., information that is privileged to the FDIC).

Foreseeable harm analysis

Privileged

Exemption 6, 5 U.S.C. § 552(b)(6)

Exemption 6 requires the withholding of personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Examples:

- Personally Identifiable Information (PII) of FDIC employees, contractors, bank customers , bank officials
- Any information that may imply PII

Foreseeable harm analysis

Exemption 6

Privileged

Exemption 8, 5 U.S.C. § 552(b)(8)

Exemption 8 permits the withholding of information contained in, or related to, the examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC in its regulation or supervision of financial institutions.

Examples:

- Report of Examinations (ROE)
- Any information within a document that is from the ROE
- Documents between financial institution and FDIC directly related to supervision/regulation

Foreseeable harm analysis

Exemption 8

Privileged

Preparation for an Appeal/Litigation

- Sound administrative record
 - Adequate Search
 - Reasonably Segregable
 - Weighing of Foreseeable Harm (documented)

Appeals and Litigation

- Right to file an administrative appeal within 90 days
 - Only can appeal adverse determinations
- Corp Lit handles appeals
- De Novo review
- Review of administrative record and documents (if applicable)
- Corp. Lit. may coordinate with FOIA Group and/or Division FOIA Coordinators and SMEs
- Appeal is either affirmed or overturned
- After appeal, the requester can bring a lawsuit in federal district court

FDIC FOIA Contacts

FOIA OFFICIALS

Harrel Pettway, General Counsel/Chief FOIA Officer

M. Anthony Lowe, FDIC Ombudsman, FOIA Public Liaison

FOIA/PA GROUP

Sarah Cunanan, Supervisory Counsel

Partap Verma, Privacy Counsel

Jeannette Wise, FOIA Counsel

Felice Rosser, FOIA Technician

Alisa Colgrove, GIS

Natasha Smith, GIS

Lisa Snider, GIS

Michael Toland, GIS

If you want to know more about the FOIA

FDIC FOIA Regulations, 12 CFR § 309.5

FDIC Circular 1023.1, Procedures for Processing FOIA Requests

Office of Information Policy, Department of Justice - Guide to the Freedom of Information Act

<https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

Go to FLX and search “FOIA” DOJ Video Training Classes

FOIA Training for Professionals

(3 hours)

FOIA Training for All Employees

(1 hour)



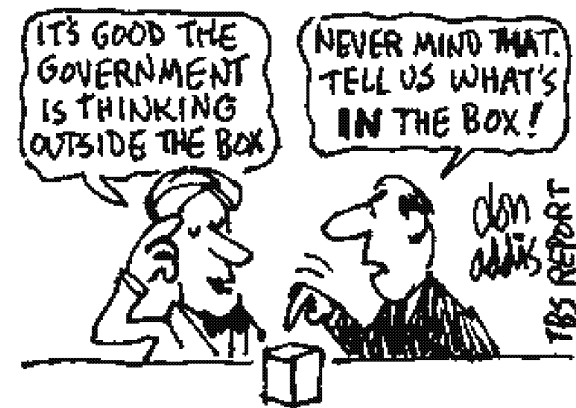
Freedom of Information Act



Freedom of Information Act

5 U.S.C. 552

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Who Can Make a FOIA Request and What Can Be Requested?

Who?

Any person, regardless of citizenship

Corporations, state, local, and foreign governments

Requesters generally do not have to explain the reason behind the request

What?

Agency Records--includes any information (paper or electronic) created by or under the control of the agency at the time of the request (we do not answer question/do research)

Includes records held by contractors

Includes Teams chats

Generally, doesn't include text messages on work cell phone—unless there is an indication you were conducting work through text

Doesn't include your Outlook calendar

Is Request Reasonably Described?

Too broad? Doesn't concern records that the FDIC would keep.

Sometimes the FOIA Staff can make this determination

Sometimes we need help from the FOIA Coordinator

Search for Responsive Records

- Agency must conduct a reasonable search
- FOIA/PA Group Identified Divisions/Offices with Equities
- Division/Office Coordinators Determine Locations/SMEs, Run Search, Review Records (time frame/subject matter)
- The fact that the agency did not locate all requested records does not cast doubt on otherwise reasonable search
- Coordinators review for Exemptions

FOIA Exemptions

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Michael Toland, GIS

DRR FOIA COORDINATOR

Debi Hodes

If you want to know more about the FOIA

Go to FDIC Learn

search “FOIA”

DOJ Video Training Classes

FOIA Training for Professionals

(3 hours)

FOIA Training for All Employees

(1 hour)



Freedom of Information Act (FOIA)

Bi-Annual Training Seminar

February 7, 2023





Opening Remarks

**General Counsel & Chief FOIA
Officer – Harrel M. Pettway**

**Supervisory Counsel,
FOIA/Privacy Act Group – Sarah
Cunanan**





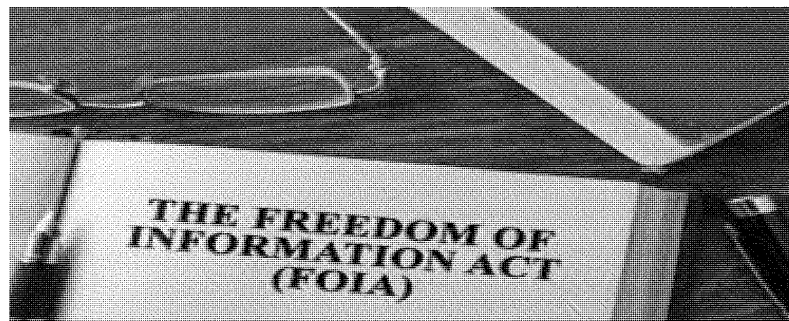
Module 1

Reviewing & Evaluating FOIA Requests



Freedom of Information Act 5 U.S.C. 552

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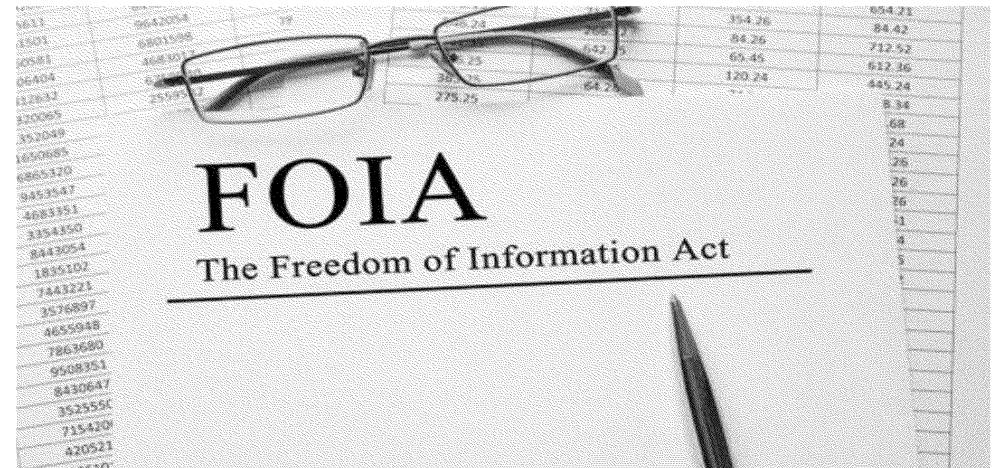


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*FDIC Fee Schedule -
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Fee Estimates



designed by freepik.com

Is it a valid/proper FDIC FOIA request?

- A phone call from a journalist asking a question
- A emailed request seeking documents from our public website
- A written request from John Smith for reasonably described FDIC documents
- A written list of questions from a foreign national
- A written request for reasonably described records from another federal agency
- A written request for reasonably described records from a fugitive
- A written request from the State of Virginia for reasonably described records



Module 2

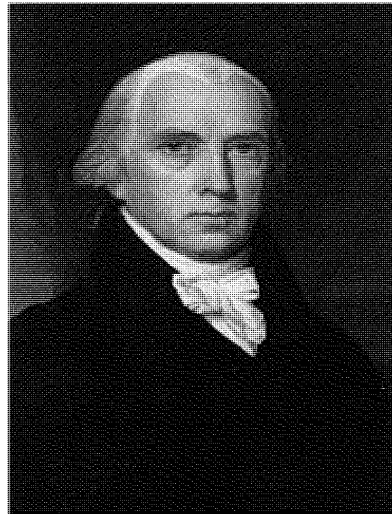
Conducting a Reasonable FOIA Search



Freedom of Information Act 5 U.S.C. 552

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Module 3

SecureRelease™ Topics

- Proactive Disclosures
- Division Folders
- Review Tier – FOIA Coordinator
- SecureRelease™ Support
- SecureRelease™ Login Reminders



Proactive Disclosures – (a)(2) Records

- New capability to update your proactive disclosures/(a)(2) records posting in SecureRelease.
- No need to wait for emails at the end of Fiscal Year for Annual FOIA Report.

Non-responsive, proprietary and confidential business information regarding Secure Release

Proactive Disclosures (Continued)

- .Under Project Setup Click on A2 Postings
- Find your Division/Office, click on edit to update number of postings and weblinks

Non-responsive, proprietary and confidential business information regarding Secure Release

Division Folders

Remember to upload responsive records into your Division Folder.

Non-responsive, proprietary and confidential business information regarding Secure Release

Review Tier – FOIA Coordinator Box

In the case of more than one Division Review, we have now included two FOIA Coordinators Boxes in the Review Tier.

Non-responsive, proprietary and confidential business information regarding Secure Release

SecureRelease™ Support

- Email: securereleasesupportteam@deloitte.com
 - Cc: Alisa Colgrove & Michael Toland
- Phone Number: 844-919-0718
- You should receive a ticket number for your reported issue(s)
 - If you do not, please contact Alisa and Michael via email

SecureRelease™ Login Reminders

1. Click on “New Appointment.”
2. Type in your subject, *i.e.*, “Log into SecureRelease™.”
3. Click on “Recurrence.”
4. Enter “Recurrence Pattern:”
 - a. Click in the “Weekly” radio button.
 - b. Enter “2” in “Recur every _ week(s) on:”
 - c. Check the “Wednesday” check box.
5. For “Range of recurrence,” click on the “No end date” radio button.
6. Click on “OK.”
7. Click on “Save & Close.”

SecureRelease™ Login Reminders

The screenshot shows the Outlook 'New Appointment' dialog box. The subject is 'Log into SecureRelease™'. The recurrence is set to 'Weekly' with a pattern of '2' weeks. The start and end times are both set to 'Wed 2/1/2023 9:00 AM'. The 'Recurrence' button is circled in red. The 'Subject' field is also circled in red. A list of instructions is provided at the bottom of the dialog.

February 2023

SU	MO	TU	WE	TH	FR	SA
29	30	31	1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28				

March 2023

SU	MO	TU	WE	TH	FR	SA
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	1
2	3	4	5	6	7	8

Subject: Log into SecureRelease™

Location:

Start time: Wed 2/1/2023 9:00 AM All day event

End time: Wed 2/1/2023 9:00 AM

1. Click on "New Appointment."
2. Type in your subject, *i.e.*, "Log into SecureRelease™."
3. Click on "Recurrence."
4. Enter "Recurrence Pattern:"
 - a. Click in the "Weekly" radio button.
 - b. Enter "2" in "Recur every _ week(s) on:"
 - c. Check the "Wednesday" check box.
5. For "Range of recurrence," click on the "No end date" radio button.
6. Click on "OK."
7. Click on "Save & Close."

Other Calendars:

- Rosser, Felice L.
- Smith, Natasha C.
- Snider, Lisa M.
- Verma, Partap S.
- Wise, Jeannette
- Other Calendars
- Shared Calendars

SecureRelease™ Login Reminders (continued)

Appointment Recurrence

Appointment time

Start: 9:00 AM

End: 9:00 AM

Duration: 0 minutes

Recurrence pattern

Daily

Recur every 2 week(s) on:

Weekly

Sunday Monday Tuesday Wednesday

Monthly

Thursday Friday Saturday

Yearly

Range of recurrence

Start: Wed 2/1/2023

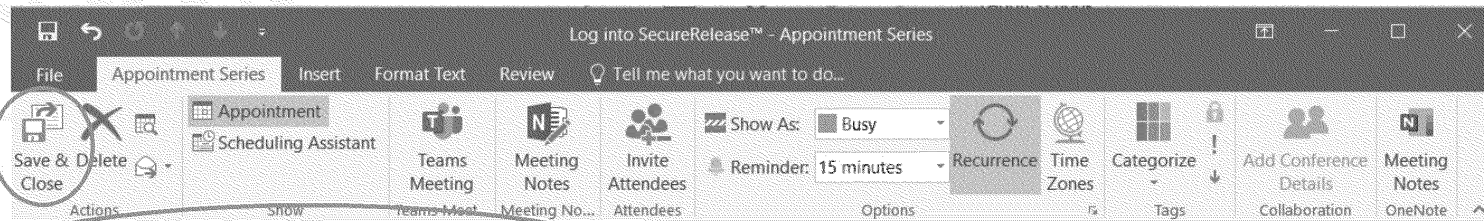
No end date

End after: 10 occurrences

End by: Wed 4/5/2023

OK Cancel Remove Recurrence

SecureRelease™ Login Reminders (continued)



Subject

Location

Recurrence Occurs every 2 week(s) on Wednesday effective 2/1/2023 at 9:00 AM

1. Click on "New Appointment."
2. Type in your subject, *i.e.*, "Log into SecureRelease™."
3. Click on "Recurrence."
4. Enter "Recurrence Pattern:"
 - a. Click in the "Weekly" radio button.
 - b. Enter "2" in "Recur every _ week(s) on:"
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6. Click on "OK."
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Module 4

Applying the Foreseeable Harm Standard



Attorney General's Memorandum

- Signed March 15, 2022
- Information that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure.
- In case of doubt, openness should prevail.

FOIA Exemptions

Exemption Two

Records related solely to the internal personnel rules and practices of the FDIC.

Exemption Three

Records specifically exempted from disclosure by statute

Exemption Four

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Exemption Five

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Exemption Six

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Exemption Seven

Records compiled for law enforcement purposes

Exemption Eight

Records that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC or any agency responsible for the regulation or supervision of financial institutions.

Exemption 4: Foreseeable harm analysis

Privileged

Exemption 5: Foreseeable harm analysis

Privileged

Exemption 6: Foreseeable harm analysis

Privileged

Exemption 8: Foreseeable harm analysis

Privileged



Module 5

Pertinent FOIA Case Law



If you want to know more about the FOIA

- FDIC FOIA Regulations, 12 CFR § 309.5
- FDIC Circular 1023.1, Procedures for Processing FOIA Requests
- Office of Information Policy, Department of Justice - Guide to the Freedom of Information Act

<https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

Additional FOIA Training

Go to FLX and search “FOIA” DOJ Video Training Classes (To be updated soon)

[FOIA Training for Professionals](#) (3 hours)

[FOIA Training for All Employees](#) (1 hour)

DOJ Office of Information and Policy (OIP) FOIA Training:

<https://www.justice.gov/oip/training>

American Society of Access Professionals (ASAP)

<https://www.accesspro.org/>



FOIA Training Seminar

Questions & Answers



FDIC FOIA Contacts

FOIA OFFICIALS

Harrel Pettway, General Counsel/Chief FOIA Officer

M. Anthony Lowe, FDIC Ombudsman, FOIA Public Liaison

FOIA/PA GROUP

Sarah Cunanan, Supervisory Counsel

Partap Verma, Privacy Counsel

Jeannette Wise, FOIA Counsel

Felice Rosser, FOIA Technician

Alisa Colgrove, GIS

Natasha Smith, GIS

Lisa Snider, GIS

Michael Toland, GIS



FOIA Highlights

Jeannette Wise, Senior Attorney
FOIA/PA Group



Overview of the Typical FOIA Request Work Flow

1. Receipt of Request
2. FOIA GIS Analysis
3. Assignment to Office FOIA Coordinator for Search and Review
4. Identified Custodians (SMEs) conduct search
5. SMEs coordinates with FOIA Coordinator and makes redaction recommendations to FOIA Coordinator
6. FOIA Coordinator reviews those records and ingests all potentially responsive records into SecureRelease
7. Request Returned to GIS/FOIA Group for Final Review
8. Response Provided to Requester

Other FOIA Work Flow Considerations

- Requested Information Must be Sufficiently Described to Perform a Reasonable Search
- Search Should Not be Unduly Burdensome
- Requester Must Agree to Pay Applicable Fees

Legal Division FOIA Coordinators

- Counsels: Sonya Levine and Kaye Allison

- Paralegals: Melody Monroe, Rhonda Herrington, and Stephanie Hearn

Note: Each unit in the Legal Division has a designated POC to work with the Office FOIA Coordinators

Why We Search for Records, Even if We Know they Will be Exempt under the FOIA

Unless Records are Particularly Sensitive, All Potentially Responsive Records Should be Searched for and Provided/Uploaded for Review

- Ensures a Complete Administrative Record in case of Appeal or Litigation
- Ensures Adequate Preservation of the Records required by the FOIA records Retention Period
- FOIA Group Needs to be Able to Review the Records
- Consistency
- Segregability Requirements

FOIA Searches for Receivership Records in FBDS

- Not all FBDS Records are Subject to the FOIA
 - The only FBDS records deemed subject to the FOIA are records the FDIC has processed, reviewed, relied upon, or is using in some capacity to perform our work.
 - Determined on a case by case basis
 - Position is Consistent with the meaning of “Agency Record” under the FOIA
- Notable exception – WAMU Records

Examples of Requests Received Seeking Receivership Related Records

- Executed Purchase and Assumption Agreements
- Requests from Law Firms seeking records regarding the FDIC's role as a receiver. Ex. demand letters, correspondence, FDIC claims against directors or officers of the bank, "15 day letters" or documents related to the FDIC's enforcement capacity
- Note: FOIA is occasionally Used to Supplement Discovery/Doesn't Matter Under the FOIA Why you are Making the Request
 - Particularly important for Coordination between SMEs and Legal FOIA Coordinator if there is an Ongoing Investigation or Litigation

NONPUBLIC//FDIC INTERNAL ONLY

Freedom of Information Act (FOIA)

Refresher Training for the Office of the Ombudsman

May 8, 2024

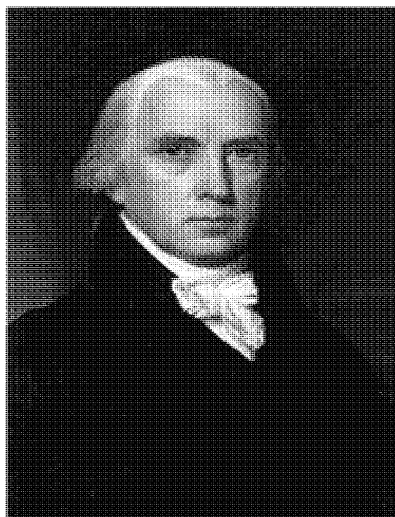


NONPUBLIC//FDIC INTERNAL ONLY

Freedom of Information Act 5 U.S.C. 552

“Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both”

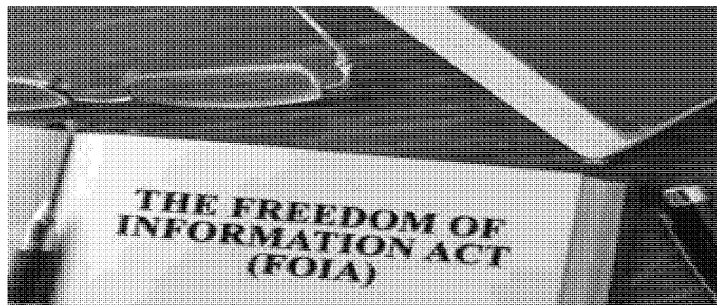
— **James Madison**



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Freedom of Information Act 5 U.S.C. 552

The Freedom of Information Act provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exceptions or by one of three special law enforcement record exclusions.



NONPUBLIC//FDIC INTERNAL ONLY

Agency Records

The FOIA permits a person to request access to agency records.

- Records that we created or obtained during the course of our operations and activities AND are in our control at the time we receive a FOIA request



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Reasonable Interpretation vs Clarification

- In some instances, we may be able to reasonably interpret broad requests.
- In other instances, we need to clarify/limit the scope with the requester.

NONPUBLIC//FDIC INTERNAL ONLY

Time Limits for Responding to a Request

- 20 working days to respond
- In “unusual circumstances” agency may extend time limit by 10 days by giving written notice to requester
- Requesters can ask for expedited processing
- Requester can sue if response deadlines are not met



NONPUBLIC//FDIC INTERNAL ONLY

Fees

FOIA Requester Fee Categories

- Commercial Use Requester
- Educational institutions, non-commercial scientific institutions
- News media
- All others

FDIC Fee Schedule -

<https://www.fdic.gov/foia/fees.html>



Fee Estimates

NONPUBLIC//FDIC INTERNAL ONLY

Communication with Requesters

Written:

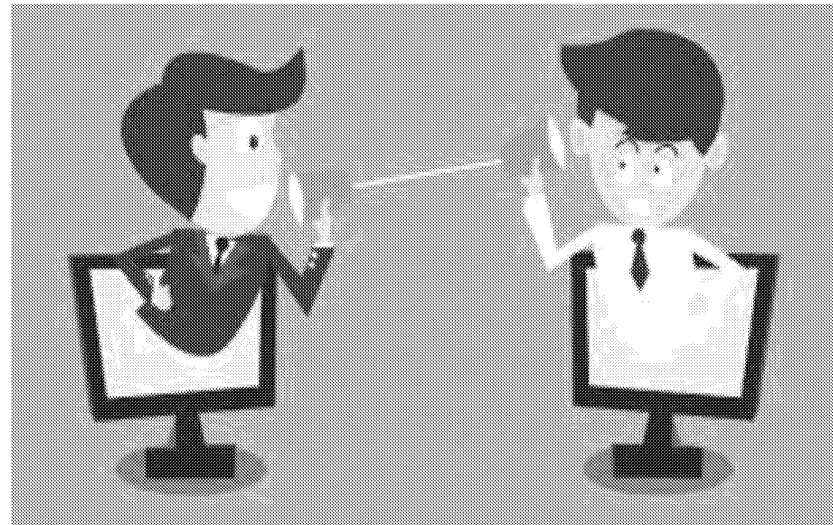
- Acknowledgement Letter
- Abatement Letters
- Extension Letter
- Status Checks

Phone:

- Status Checks
- Clarification

SecureRelease Portal:

- Visibility of FOIA throughout lifecycle
- Status Checks



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Foreseeable Harm Analysis

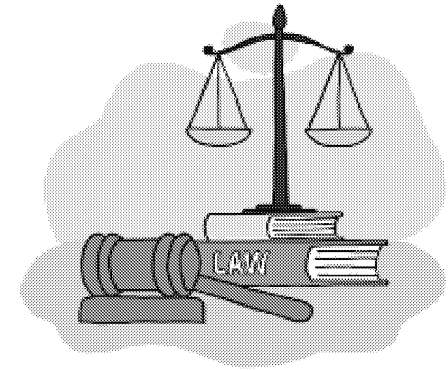
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NONPUBLIC//FDIC INTERNAL ONLY

Appeals and Litigation



- Right to file an administrative appeal within 90 days
 - Only can appeal adverse determinations
- Corp Lit handles appeals
- De Novo review
- Review of administrative record and documents (if applicable)
- Corp. Lit. may coordinate with FOIA Group and/or Division FOIA Coordinators and SMEs
- Appeal is either affirmed or overturned
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Khurram Ali, GIS
Sarah Hayden, GIS
Clayton Day, GIS
Alicia Marable, Senior Attorney (Detail)
Loredana Kratzer, Paralegal Specialist (Detail)

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NONPUBLIC//FDIC INTERNAL ONLY

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Refresher Training for the Chicago Region Staff

July 24, 2024

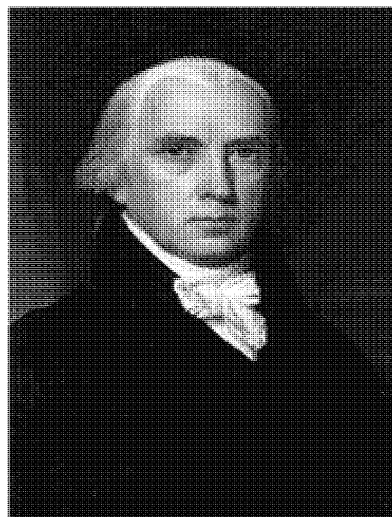


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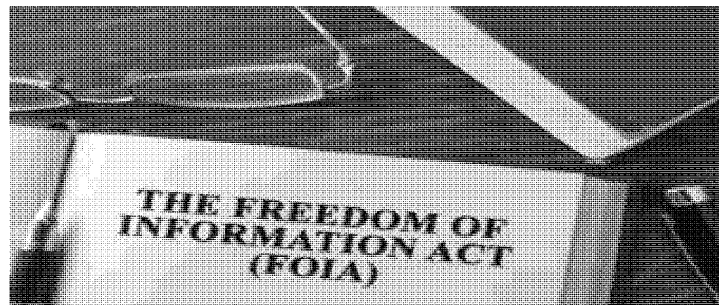
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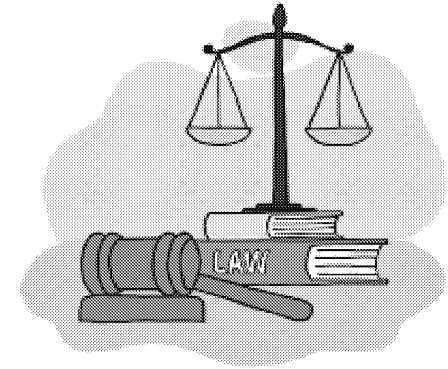
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(3 hours)

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(1 hour)

NONPUBLIC//FDIC INTERNAL ONLY

Freedom of Information Act (FOIA)

Bi-Annual Training Seminar

March 12, 2025

9:00am – 12:15pm



NONPUBLIC//FDIC INTERNAL ONLY



Opening Remarks

**Thomas S. Johnson Jr,
Senior Counsel, Opinions
& Research Unit**



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Module One

FOIA Exemption 8 – Bank Supervision & Oversight



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FOIA Exemption 8

Protects matters that are:

"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."

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FOIA Exemption 8

Two Purposes:

1. Ensure the security of financial institutions which could be undermined by unwarranted run on banks caused by the disclosure of candid evaluations of financial institutions.
2. Safeguard the relationship between the banks and their supervising agencies.

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FOIA Exemption 8

Courts have found protection to extend to:

- Submissions by State regulatory agencies
- Banks no longer in operation
- Follow-up information – federal oversight arising from a bank's examination
- Reports examining bank's compliance with consumer laws and regulations

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FOIA Exemption 8

The term "financial institutions" is not limited to "depository" institutions:

- Institutions that provide credit services
- FINRA
- Debt collectors
- Investor advisor companies
- Security brokers & dealers
- Self-regulatory institutions

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FOIA Exemption 8

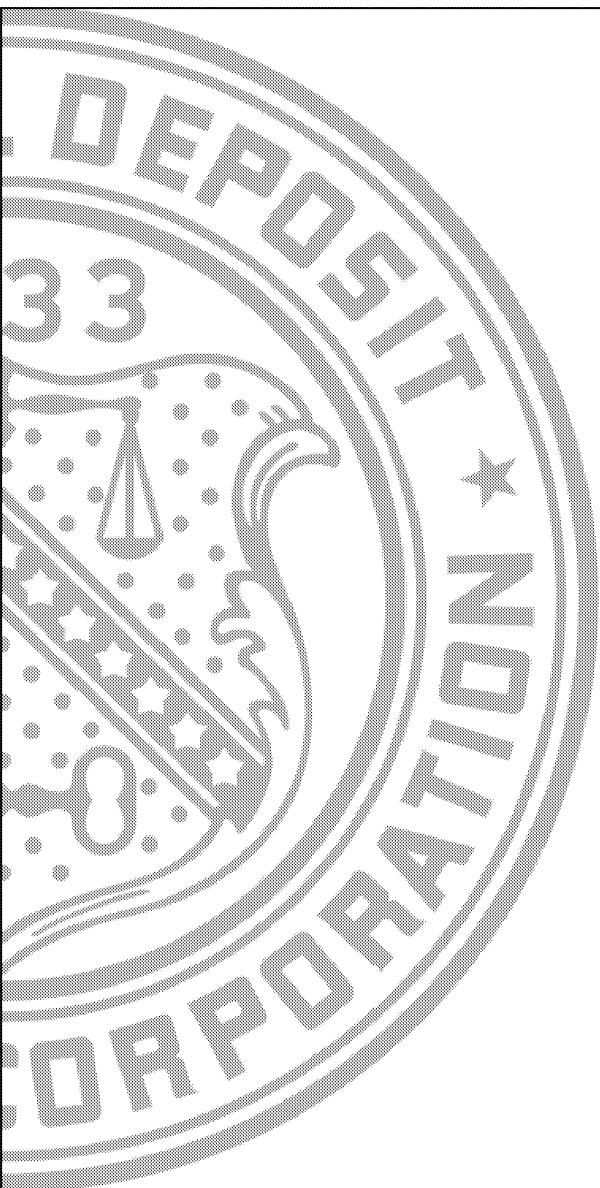
Recent Case Law

- Jason Leopold, ET AL *v.* DOJ, No. 19-3192, 2022 WL 4299993 (D.D.C. Sept. 19, 2022) (Contreras, J.)
- Jason Leopold & BuzzFeed, Inc *v.* DOJ, No. 22-5300, 2024 WL 875794 (D.C. Cir. Mar. 1, 2024) (Rodgers, J.)

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Module Two

Reasonable Search Under FOIA



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Is the FOIA Request Perfected?

- Must follow the FDIC FOIA Regulations:
- 12 C.F.R. §309.5
- Must be in writing
- Must be from a “person”
- Must have a reasonable description of records being sought

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Reasonable Interpretation vs Clarification

- In some instances, we may be able to reasonably interpret broad requests.
- In other instances, we need to clarify/limit the scope with the requester.
- In both instances, we may rely on you!

NONPUBLIC//FDIC INTERNAL ONLY

Agency Records

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- Records that we created or obtained during the course of our operations and activities **AND** are in our control at the time we receive a FOIA request

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Examples of Agency Records

Agency Records:

- FDIC Legal Internal or Public Memoranda
- RMS supervisory files
- DRR Receivership files
- FDIC contracts

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Definition of Search

The FOIA defines the term "search" as "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request"

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Reasonable Search

The test for adequacy of a search is a “reasonableness” standard

Search Locations

Search locations can vary based on the request but may include:

- Outlook Email
- OneDrive
- Shared Drives
- FDIC Databases
- Paper Records – Less Common

15-Minute Break



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Module Three

SecureRelease™ Topics

- Searches within SecureRelease™
- Friendly Reminders



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SecureRelease™ Support

- Email:
securereleasesupportteam@deloitte.com
 - Cc: Alisa Colgrove, Sarah Haydon & Christine Grauer
- Phone Number: 844-919-0718

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Module Four

FOIA Fees & Fee Estimates



Three Categories of Requesters

- Commercial Use
- “Preferred Status”:
 - Educational Institutions
 - Noncommercial Scientific Institutions
 - Representatives of the News Media
- All others

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Commercial-Use Requester

- A request made by, or on behalf of someone “who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester.”
- Placement in this category is based on the *use* to which the requester will put the information and not their identity.

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Representative of the News Media

“[A]ny person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”

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Representative of the News Media

Key Elements for Determination - Look at requester's **overall activities.**

1. Gathering information of potential interest to segment of the public.
2. Using editorial skills to turn raw material into distinct work.
3. Disseminating that work to an audience

Representative of the News Media

As to *gathering information*, the D.C. Circuit has ruled this fee category is focused:

- “on the nature of the *requester*, not its request.”
- A case-by-case approach is not always necessary.

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Representative of the News Media

As to *distribution of the work*, posting on a website can qualify as distribution.

- Size of audience does not matter.
- Not necessary to have track record if there are firm plans.
- Fact-based determination based on past record, current operations, and future plans.

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Two Other “Preferred” Fee Statuses

1. Noncommercial scientific institution: Institution operated solely for the purpose of conducting scientific research not intended to promote any particular product or industry.
2. Educational institutions: Schools, including vocational schools, which operate a program of “scholarly research.”

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All Other Requesters

Anyone who does not fit in the other fee categories

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Three Types of Fees

- Search
- Review
- Duplication

[Fees | FDIC.gov](https://www.fdic.gov/foia/fees) - www.fdic.gov/foia/fees

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Fee Assessment Considerations

Statutory Fee Restrictions

Agencies must provide the first 100 pages to “preferred status” and “all other” requesters and the first two hours of search time without cost to “all other” requesters. Commercial Use requesters do not receive either.

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Fee Assessment Considerations

Agency Threshold

Fees are not assessed when the total falls below an agency's cost to process a check.

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Agreement to Pay Fees

- Estimated fees should not be used to discourage requesters from exercising their access rights under the FOIA.
- Fee estimates should be explained and options offered.

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Fee Assessment Considerations

Advance Payment

- Fee estimate exceeds \$250; or
- Requester has previously failed to timely pay a properly assessed fee.

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Aggregation

If an agency reasonably believes that a requester is attempting to divide a request into a series of requests for the purpose of avoiding the assessment of fees, the agency may aggregate those requests and charge accordingly.

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Fee Estimate

May be necessary -

- Commercial Requesters – Agreement to pay is not high enough to process request.
- All Other Requesters – Two hours of search is not enough to locate records.

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Fee Estimate

- Conduct preliminary search to locate estimated volume of records.
- With the assistance of the preliminary search and estimated volume of records, estimate the time to process (final search and review.)
- Send the FOIA/PA Group the estimated number of records/pages and the estimated time of search and review.
- You may consider the FOIA request on hold, until the FOIA/PA Group contacts you to say if the requester agreed to the fees.

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Limitations on Assessing Fees

The FOIA statute contains limitations on how and when agencies can charge certain fees.

General Rule: If the agency fails to comply with any time limit, it may not charge search fees to commercial use or all other requesters, or for requesters with preferred fee status, may not charge duplication fees.

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Exception to the Fee Limitation

Agencies can still charge fees if:

- Timely written notice of unusual circumstances is provided to the requester;
- “more than 5,000 pages are necessary to respond to the request,” and
- The agency discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request.

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Fee Waivers Under the FOIA

“Documents shall be furnished without any charge [or at a reduced rate] ... if disclosure of the information is in the public interest because *it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.*”

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FOIA Fees and Fee Waivers

Sources of Authority/Guidance

- FOIA Statute
- Case Law
- OMB Fee Guidelines
- Agency Regulations – 12 CFR Part 309.5
- DOJ Guide to the FOIA

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Jeopardy

Special FOIA Edition



NONPUBLIC//FDIC INTERNAL ONLY

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Additional FOIA Training

To be updated soon in FLX soon:

FOIA Training for Professionals (3 hours)

FOIA Training for All Employees (1 hour)

DOJ Office of Information and Policy (OIP) FOIA Training:

<https://www.justice.gov/oip/training>

American Society of Access Professionals (ASAP)

<https://www.accesspro.org/>

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FOIA Training Seminar

Questions & Answers



**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' COUNTER-STATEMENT OF DISPUTED FACTS AND
STATEMENT OF ADDITIONAL MATERIAL FACTS NOT IN DISPUTE ON COUNT I**

In support of Plaintiff History Associates' Opposition to the FDIC's Motion for Summary Judgment and Cross-Motion For Summary Judgment on Count I of the Amended Complaint, and pursuant to Local Civil Rule 7(h)(1) and this Court's Standing Order, ECF 6 § 7(j), History Associates respectfully submits this Counter-Statement of Disputed Facts and a Statement of Additional Material Facts Not In Dispute.

COUNTER-STATEMENT OF DISPUTED FACTS

FDIC Statement of Material Fact	HAI Response
<p>1. On November 8, 2023, Plaintiff History Associates Inc. (“Plaintiff”) submitted a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”) to the Federal Deposit Insurance Corporation (“FDIC”).</p> <p>Dkt. No. 37 ¶ 56; Decl. 1 ¶ 9.</p>	<p>Admitted.</p>
<p>2. Plaintiff’s FOIA request sought:</p> <p style="padding-left: 40px;">Copies of all “pause letters” described in the attached October 2023 FDIC Office of Inspector General report titled “FDIC Strategies Related to Crypto-Asset Risks”</p> <p>Dkt. No. 37-2, p.1; Decl. 1 ¶ 9.</p>	<p>Admitted.</p>
<p>3. As described in the OIG Report, the FDIC sent those “pause letters” between “March 2022 and May 2023” as part of the FDIC’s “review of financial institutions’ crypto-related activities[.]”</p> <p>Dkt. No. 37-3 at p. 3; Exhibit 3 at p. 5.</p>	<p>Admitted that this is what the OIG report says.</p>
<p>4. On January 22, 2024, the FDIC denied Plaintiff’s November 8, 2023 FOIA request.</p> <p>Dkt. No. 37-2, p. 1; Decl. 1 ¶ 9.</p>	<p>Admitted.</p>
<p>5. On March 25, 2024, Plaintiff administratively appealed the FDIC’s denial.</p> <p>Dkt. No. 37 ¶ 59; Decl. 1 ¶ 10; Exhibit 1.</p>	<p>Admitted.</p>
<p>6. By letter dated May 8, 2024, the FDIC denied Plaintiff’s administrative appeal.</p> <p>Dkt. No. 37 ¶ 62; Decl. 1 ¶ 10.</p>	<p>Admitted.</p>
<p>7. Plaintiff filed suit in this Court on June 27, 2024 to compel release of the requested documents.</p> <p>Dkt. Nos. 1, 37 ¶ 65.</p>	<p>Admitted.</p>
<p>8. The FDIC filed its answer on August 7, 2024.</p> <p>Dkt. No. 13.</p>	<p>Admitted.</p>

FDIC Statement of Material Fact	HAI Response
<p>9. In its November 4, 2024 Minute Order, the Court ordered the FDIC to “review the 23 pause letters to determine what portions should be redacted and to produce the redacted letters to Plaintiff by November 22, 2024.”</p> <p>November 4, 2024 Minute Order.</p>	<p>Admitted.</p>
<p>10. Pursuant to this Court’s November 4, 2024 Minute Order, the FDIC reviewed the 23 “pause letters” to determine whether any portion of the letters could be segregated and released. The FDIC discretionarily released 23 redacted letters to Plaintiff’s counsel on November 22, 2024.</p> <p>Dkt. No. 26-1.</p>	<p>Admitted in part and denied in part.</p> <p>History Associates admits that the FDIC released 23 redacted letters on November 22, 2024, but History Associates denies that the FDIC did so “discretionarily.” Instead, the FDIC did so due to its obligations under the Freedom of Information Act and this Court’s November 4, 2024 Minute Order.</p> <p>ECF 26 at 1; November 4, 2024 Minute Order.</p>
<p>11. On December 12, 2024, following an <i>in camera</i> review of four letters, the Court ordered the FDIC “to re-review the documents” and release them with new redactions to Plaintiff by January 3, 2025.</p> <p>December 12, 2024 Minute Order.</p>	<p>Admitted.</p>
<p>12. The FDIC re-reviewed the original 23 “pause letters” and two additional letters and discretionarily released all 25 letters with revised redactions to Plaintiff’s counsel on January 3, 2025.</p> <p>Dkt. No. 27-2.</p>	<p>Admitted in part and denied in part.</p> <p>History Associates admits that the FDIC released 25 redacted letters on January 3, 2025, but History Associates denies that the FDIC did so “discretionarily.” Instead, the FDIC did so due to its obligations under the Freedom of Information Act and this Court’s December 12, 2024 Minute Order.</p> <p>December 12, 2024 Minute Order</p>
<p>13. FDIC leadership changed following the change in administrations.</p> <p><i>See, e.g.</i>, Statement from Acting Chairman Travis Hill, FDIC (Jan. 21, 2025), https://www.fdic.gov/news/press-releases/2025/statement-acting-chairman-travis-hill.</p>	<p>Admitted.</p>
<p>14. The FDIC performed numerous searches for documents related to its supervision of crypto-related activities.</p> <p>Decl. 1 ¶¶ 19-22, 24-25; Dkt. Nos. 38 ¶¶ 11, 13-16; 44 ¶¶ 7-8; and 48 ¶¶ 21-22.</p>	<p>Admitted.</p>

FDIC Statement of Material Fact	HAI Response
<p>15. These searches were conducted in the Regional Automated Document Distribution Application (“RADD”).</p> <p>Decl. 1 ¶¶ 19, 24.</p>	<p>History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.</p>
<p>16. RADD is a document imaging, routing, and storage system that captures, indexes, distributes, and electronically stores supervisory business records for covered institutions.</p> <p>Decl. 1 ¶ 19.</p>	<p>Admitted.</p>
<p>17. The RADD is the official recordkeeping system for supervisory business records such as bank correspondence.</p> <p>Decl. 1 ¶ 20.</p>	<p>Admitted.</p>
<p>18. RADD records are subject to a 30-year retention schedule (with some exceptions not relevant here), backed up daily, and retrievable, if necessary, when deleted from the RADD.</p> <p>Decl. 1 ¶ 21; Exhibit 7 at p.2.</p>	<p>History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.</p>
<p>19. On February 5, 2025, the FDIC made a discretionary release of 175 records to the FDIC FOIA Reading Room.</p> <p><i>FOIA Reading Room</i>, FDIC (last visited July 9, 2025), https://www.fdic.gov/foia/foia-reading-room (“FDIC FOIA Reading Room”).</p>	<p>Admitted in part and denied in part.</p> <p>History Associates admits that the FDIC released additional records, including additional pause letters, on February 5, 2025, but History Associates denies that that the release was “discretionary.” The FDIC’s release of additional records was due to its obligations under the Freedom of Information Act and this Court’s January 22, 2025 Minute Order.</p> <p>ECF 31 at 1; January 22, 2025 Minute Order</p>
<p>20. On February 21, 2025, the FDIC discretionarily released 8 additional records to the FDIC FOIA Reading Room.</p> <p>FDIC FOIA Reading Room.</p>	<p>Admitted in part and denied in part.</p> <p>History Associates admits that the FDIC released additional records, including additional pause letters, on February 21, 2025, but History Associates denies that that the FDIC did so “discretionarily.” The FDIC’s release of additional records was due to its obligations under the Freedom of Information Act and this Court’s January 22, 2025 Minute Order.</p> <p>ECF 31 at 3-4; January 22, 2025 Minute Order</p>

FDIC Statement of Material Fact	HAI Response
<p>21. On March 14, 2025, the FDIC re-released its February 21 release with fewer redactions and discretionarily released two more records to the FDIC FOIA Reading Room.</p> <p>FDIC FOIA Reading Room.</p>	<p>Admitted in part and denied in part.</p> <p>History Associates admits that the FDIC released additional records, including additional pause letters, on March 14, 2025 and that it re-released the records released on February 21, 2025, with fewer redactions, but History Associates denies that that the FDIC did so “discretionarily.” The FDIC’s release of additional pause letters was due to its obligations under the Freedom of Information Act and this Court’s January 22, 2025 Minute Order.</p> <p>January 22, 2025 Minute Order</p>
<p>22. On March 14, 2025, the FDIC advised Plaintiff that it had completed its releases in response to its FOIA requests.</p> <p>Dkt. No. 48-1; Decl. 1 ¶ 18.</p>	<p>Admitted.</p>
<p>23. At a May 29, 2025, hearing the Court inquired “do you have all the documents now that you claim you should have from the original FOIA request?” To which Plaintiff’s counsel responded: “as to Count 1, I think they’ve -- we do not dispute that they provided the full universe of documents.” And later in a further response to the Court, Plaintiff’s counsel added: “I think -- in terms of responsive to our pause letter request, yeah, I think we do have the full -- we think the full universe of documents.”</p> <p>May 29, 2025 Hearing Transcript at 18:6-10 and 23:10-15, Exhibit 4 (transcript excerpts).</p>	<p>Admitted.</p>
<p>24. In the aggregate, the FDIC discretionarily released more than 800 pages totaling over 200 records.</p> <p>Decl. 1 ¶ 13; FDIC FOIA Reading Room.</p>	<p>Admitted in part and denied in part.</p> <p>History Associates admits that the FDIC released more than 800 pages totaling over 200 records, but History Associates denies that the FDIC did so “discretionarily.” Instead, the FDIC did so due to its obligations under the Freedom of Information Act and this Court’s orders.</p>

FDIC Statement of Material Fact	HAI Response
<p>25. In these records, the FDIC redacted information pursuant to Exemptions 4, 6, and 8.</p> <p>Dkt. Nos. 28 ¶ 2; 44 ¶ 10, 48 ¶ 21; Decl. 1 ¶ 17.</p>	<p>Admitted in part and denied in part.</p> <p>The FDIC redacted information in the pause letters released on January 3, 2025, pursuant to Exemption 8 only; the FDIC did not claim to redact anything pursuant to Exemptions 4 or 6 until its motion for summary judgment.</p> <p>ECF 28 at 5-7.</p>
<p>26. Redactions applied under FOIA Exemption 4 and 8 include information that would: (a) identify a particular bank; (b) identify third-parties with which a bank had entered into or was considering entering into a business relationship; or (c) divulge confidential commercial information about a bank or third-party.</p> <p>Decl. 1 ¶ 28.</p>	<p>History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.</p>
<p>27. Examples of redactions applied under Exemptions 4 and 8 include: (a) bank names, bank logos, and other information that, alone or in combination with other information, could reasonably reveal an institution's identity, (b) bank-specific business relationships with third parties—actual or contemplated, and (c) records containing information submitted by banks to the FDIC in the course of the FDIC's supervisory activity, including confidential commercial information.</p> <p>Decl. 1 ¶ 28.</p>	<p>History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.</p>
<p>28. Public disclosure of information redacted under Exemptions 4 and 8 would increase the likelihood of revealing the identity of banks and third-parties with which banks were engaged.</p> <p>Decl. 1 ¶ 30; Decl. 2 ¶ 6; Decl. 3 ¶ 6.</p>	<p>Denied.</p> <p>The FDIC has not established, at a minimum, that public disclosure of (1) the percentage cap imposed by a bank on deposits from crypto companies; and (2) the names of public blockchains banks proposed to use would increase the likelihood of revealing the identity of banks.</p> <p>Decl. 1; Decl. 2; Decl. 3</p>

FDIC Statement of Material Fact	HAI Response
<p>29. At least one entity has utilized artificial intelligence to analyze the productions in this case to identify (but not disclose) the underlying banks.</p> <p>Decl. 1 ¶ 31.</p>	<p>Denied.</p> <p>Attorneys at a law firm have stated that they used artificial intelligence to analyze the productions in this case to identify one of the recipient banks, but the attorneys did not reveal the identity of the bank so their assertion cannot be confirmed.</p> <p>Decl. 1 ¶ 31.</p>
<p>30. Public disclosure of information redacted under Exemptions 4 and 8 would foreseeably harm the FDIC's supervisory relationships with banks.</p> <p>Decl. 1 ¶ 31; Decl. 2 ¶¶ 4-7; Decl. 3 ¶¶ 4-7.</p>	<p>Denied.</p> <p>The FDIC has not established, at a minimum, that public disclosure of (1) the percentage cap imposed by a bank on deposits from crypto companies; and (2) the names of public blockchains banks proposed to use would foreseeably harm the FDIC's supervisory relationships with banks.</p> <p>Decl. 1; Decl. 2; Decl. 3.</p>
<p>31. Redactions applied under FOIA Exemption 6 included information pertaining to individuals, personal information, signatures, and work cell phone numbers.</p> <p>Decl. 1 ¶ 29.</p>	<p>History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.</p>
<p>32. Public disclosure of the information redacted under Exemption 6 would foreseeably harm individuals by revealing their personal privacy information.</p> <p>Decl. 1 ¶ 29, 32.</p>	<p>History Associates lacks the information necessary to evaluate this statement of fact, and therefore denies it.</p>
<p>33. All reasonably segregable, non-exempt responsive information subject to FOIA has been produced to the Plaintiff.</p> <p>Decl. 1 ¶ 28; Decl. 2 ¶¶ 5-7; Decl. 3 ¶¶ 5-7.</p>	<p>Denied.</p> <p>The FDIC can reasonably segregate and disclose additional information from the pause letters, including (1) the percentage cap imposed by a bank on deposits from crypto companies; and (2) the names of public blockchains banks proposed to use.</p> <p>ECF 27-2 at 11, 24, 25; ECF 48-2 at 51, 67, 81, 91, 92</p>

STATEMENT OF ADDITIONAL MATERIAL FACTS NOT IN DISPUTE

FDIC Response	HAI Statement of Material Fact
34.	<p>The FDIC disclosed the existence of a deposit cap in records it released on February 21, 2025.</p> <p>ECF 48-2 at 51, 67 81, 91, 92</p>
35.	<p>The FDIC redacted the percentage of the deposit cap from records it released on February 21, 2025.</p> <p>ECF 48-2 at 51, 67 81, 91, 92</p>
36.	<p>Disclosing the existence of the deposit cap did not allow the public to identify the bank at issue or harm the FDIC’s supervisory relationships.</p> <p><i>See Decl. 1; Decl. 2; Decl. 3</i></p>
37.	<p>Disclosing the percentage of the deposit cap would not foreseeably allow the public to identify the bank at issue or harm the FDIC’s supervisory relationships.</p> <p><i>See Decl. 1; Decl. 2; Decl. 3</i></p>
38.	<p>The FDIC required or suggested that the bank impose the deposit cap referenced in the released records.</p> <p>ECF 48-2 at 51, 67 81, 91, 92; Veronica Irwin, <i>Regulators Are Limiting Banks Serving Crypto Clients. Does That Violate the Law?</i>, Unchained (Oct. 8, 2024), https://bit.ly/41zFvPs</p>
39.	<p>The FDIC redacted the names of public blockchains from records released on January 3, 2025.</p> <p>ECF 27-2 at 11, 24, 25</p>
40.	<p>A public blockchain is a digital ledger that publicly records digital-asset transactions on the Internet and runs blockchain-based applications.</p> <p>Coinbase, <i>What Is a Blockchain?</i>, https://tinyurl.com/52ec4ace</p>
41.	<p>A public blockchain is an open-source software protocol that can be used by anyone with an Internet connection and is often operated in a decentralized manner.</p> <p>Coinbase, <i>What Is a Blockchain?</i>, https://tinyurl.com/52ec4ace</p>

FDIC Response	HAI Statement of Material Fact
42.	<p>Disclosing the public blockchains referred to in the records released on January 3, 2025, would not foreseeably allow the public to identify any of the banks at issue or harm the FDIC’s supervisory relationships.</p> <p><i>See Decl. 1; Decl. 2; Decl. 3</i></p>
43.	<p>Large language artificial intelligence models like the one used by the law firm referenced in the FDIC’s declaration are well known to make up facts (i.e. “hallucinate”)</p> <p><i>See Decl. 1 ¶ 31; Ben Fritz, Why Do AI Chatbots Have Such a Hard Time Admitting ‘I Don’t Know’?, Wall. St. J. (Feb. 11, 2025), http://bit.ly/4kF1YSG</i></p>

Date: July 30, 2025

Respectfully submitted,

/s/ Jonathan C. Bond _____

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2025, I caused a true and correct copy of this document to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. I hereby further certify that a true and correct copy of this document was emailed Defendant's counsel pursuant to Section 7(j)(v) of this Court's standing order.

/s/ Jonathan C. Bond

Jonathan C. Bond

**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

[PROPOSED] ORDER

Upon consideration of the parties' cross-motions for summary judgment on Count I of the amended complaint and Defendant's motion to dismiss Count II of the amended complaint, and all accompanying papers, it is:

ORDERED that Plaintiff History Associates Incorporated's motion for summary judgment on Count I is **GRANTED**.

It is **FURTHER ORDERED** that Defendant FDIC shall re-produce the records produced on January 3, 2025, February 5, 2025, February 21, 2025, and March 14, 2025, without redacting the two categories of information identified in History Associates' cross-motion for summary judgment.

It is **FURTHER ORDERED** that Defendant's motion to dismiss is **DENIED**.

SO ORDERED:

Date

HON. ANA C. REYES
United States District Judge