

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HISTORY ASSOCIATES INCORPORATED,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION,

Defendant.

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

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

The FDIC once again seeks to forestall targeted discovery on History Associates' policy-or-practice claims, but once again it simply ignores the legal and procedural context of this case. The agency recycles its claim that discovery is rare in ordinary FOIA cases but whistles past case law permitting (and the logic compelling) more liberal discovery in policy-or-practice cases. The FDIC points to its pending motion to dismiss but never confronts the factual disputes that preclude resolving this case at the pleading stage. And the agency still refuses to accept the reality that substantial informal discovery *has already occurred* at the Court's direction—which has powerfully confirmed History Associates' policy-or-practice claims. All History Associates seeks now is to complete the picture through surgical additional discovery—one tailored 30(b)(6) deposition, and one request for documents that the agency has already collected—so that the parties can finally brief and the Court can decide the policy-or-practice claims on their merits.

The FDIC seeks to move this case backwards to a now-academic dispute over the adequacy of History Associates' allegations that has been overtaken by events. But the Court should instead move the case forward toward the finish line. History Associates' motion should be granted.

ARGUMENT

I. Limited Additional Discovery Is Appropriate To Resolve This Case

The informal discovery the FDIC produced at this Court’s direction—particularly the agency’s FOIA policy documents and training materials—go far towards corroborating History Associates’ policy-or-practice claims. Limited but important gaps, however, still remain. To fill those gaps, History Associates seeks two targeted items of additional discovery: (1) a narrowly tailored 30(b)(6) deposition that would pin down how the FDIC implements the policy documents it has produced; and (2) a single set of documents the FDIC has already put eyeballs on—the letters the FDIC sent accompanying its invocations of Exemption 8 from 2020 to 2024. None of the FDIC’s objections to these two discrete and necessary items provides any reason to withhold them.

First, the FDIC reprises its generic refrain that courts “typically do not allow discovery in FOIA cases.” Opp. 2; *see also* ECF 55 at 3 (same). That is non-responsive. History Associates’ contention is that targeted discovery is appropriate in this *policy-or-practice* case, not a garden-variety challenge to the denial of a one-off FOIA request. As History Associates has shown, discovery in policy-or-practice cases is commonplace—and necessarily so, because typically the only way for a plaintiff with a plausible policy-or-practice claim to prove it is through discovery. *See* ECF 53 at 5-6 (collecting cases).

The FDIC’s authorities confirm the irrelevance of its broadside argument based on ordinary FOIA cases. The FDIC (again) relies principally on FOIA cases that did *not* involve policy-or-practice claims. Opp. 2 (citing *Freedom Watch, Inc. v. U.S. Dep’t of State*, 179 F. Supp. 3d 121, 127 (D.D.C. 2016); *In re Clinton*, 973 F.3d 106, 113 (D.C. Cir. 2020)). And the rationale courts typically give for deferring discovery in garden-variety FOIA cases—that the case turns on the court’s review of the agency’s affidavit detailing its search procedures and explaining why the withheld records are exempt—is inapposite in policy-or-practice cases that allege breakdowns in

the agency's handling of FOIA requests. The FDIC cites only a single policy-or-practice case in support of its no-discovery rule—an unpublished, out-of-circuit order—and even that decision “summarily” affirmed a district court’s denial of discovery in the particular circumstances of that case. *See Pietrangelo v. U.S. Army*, 334 F. App’x 358, 359, 360 (2d Cir. 2009). By contrast, courts in *this* Circuit (and others) have routinely authorized discovery in FOIA cases raising policy-or-practice claims. *See, e.g., Jud. Watch, Inc. v. United States Dep’t of Homeland Sec.*, 895 F.3d 770, 784 (D.C. Cir. 2018) (remanding for district court to consider “the appropriateness of discovery” in policy-or-practice case); *Swan View Coal. v. Dep’t of Agric.*, 39 F. Supp. 2d 42, 45 (D.D.C. 1999) (authorizing “discovery” upon “policy claim”); *Gilmore v. Dep’t of Energy*, 33 F. Supp. 2d 1184, 1190 (N.D. Cal. 1998) (permitting discovery in “policies and practices” suit).

The FDIC’s generalized no-discovery argument also ignores that the Court has already (twice) ordered discovery in *this* case in support of History Associates’ policy-or-practice claims over the same FDIC objection. ECF 38-1 at 14-17; June 2, 2025 Minute Order. In these circumstances, where the litigation has already proceeded past the pleadings to the agency’s production of material relevant to the FOIA plaintiff’s policy-or-practice claim, no default rule against discovery has any purchase, and there is no reason to stunt discovery artificially when it has already substantially confirmed the plaintiff’s allegations.

Second, the FDIC objects to producing the documents History Associates seeks—but not the 30(b)(6) deposition—because it says doing so would be unduly burdensome. Opp. 4 n.3, 8. That claim of burden lacks credibility. The documents sought are the agency’s own letters invoking Exemption 8 accompanying its FOIA-request denials during a five-year period. The agency issued those documents and has claimed (through its declarant) that it tracks them. It does not claim that it needs to devote agency hours searching for them. Nor are there any apparent privilege

issues: The letters are sent to third-party FOIA requesters (*i.e.*, the public), who have no privacy interest in denials of FOIA requests and who could unilaterally publish them at any time.

The FDIC instead asserts that producing its Exemption 8 denial letters would burden the agency by requiring it to redact “the requester’s address, email and in some instances phone number” from “more than a hundred” denial letters. Opp. 4 n.3. But that task could be completed by a paralegal in hours—not weeks or months—without taxing the agency. The FDIC is more than capable of handling that task without “increas[ing] the FDIC’s FOIA backlog of requests.” *Id.*

The FDIC also argues that the request for the agency’s Exemption 8 denial letters is “unreasonably broad” because it “seek[s] documents related to numerous third parties.” Opp. 8. The agency reasons that “courts cannot adjudicate the propriety of other FOIA responses unless the person that made the request is a party.” *Id.* That response is incoherent. The FDIC has asserted at every turn that policy-or-practice claims require demonstrating what it deems a sufficient pattern across multiple FOIA requests. ECF 72-1 at 25-28, 32, 38-39; ECF 82 at 11-12, 14-18. But the agency now argues that FOIA requests made by third parties are off-limits to discovery because the Court cannot pass upon the validity of the agency’s handling of FOIA requests that were not brought by the same plaintiff. It cites no case establishing any such requirement for policy-or-practice claims. And that putative requirement makes no sense: The point of FOIA policy-or-practice claims is not to reveal a pattern of mishandling requests by a particular party but to bring to light an agency’s entrenched failure or refusal to follow a particular FOIA mandate. The identity of the FOIA requester whose information-seeking efforts were frustrated by the agency is irrelevant to whether the agency has prescribed or adopted a pattern of violating FOIA in the same basic manner.

The agency's position would also gut the policy-or-practice doctrine: The FDIC's position presumes that any FOIA violation by other parties not litigated to final judgment must have been meritless because no court has said otherwise. But the agency's past violations may not have been fully adjudicated because the agency relented or because the requester could not have uncovered the agency's misconduct at the time. The whole point of policy-or-practice claims is to prevent agencies from evading judicial scrutiny of their compliance with the statute by yielding at the eleventh hour or by keeping their noncompliance with FOIA concealed.

The FDIC's no-third-party argument fails in any event on its own terms. It confuses standing to bring a FOIA claim—which generally is limited to the requester—with the scope of discovery in a policy-or-practice claim that is governed by Federal Rule 26 and its capacious relevance standard. *See* Fed. R. Civ. P. 26(b)(1). Evidence tending to prove that an unlawful FOIA policy or practice exists is plainly relevant to the claim and thus a proper subject of discovery.

Third, the FDIC asserts that “no additional discovery—regardless of what it showed—can fix the foundational flaws in the policy-or-practice claims as pled in the Amended Complaint.” Opp. 5-7. That rehash of the FDIC's motion-to-dismiss arguments is equally non-responsive. History Associates does not seek discovery for the Court “to decide the FDIC's motion to dismiss.” Opp. 5. Discovery is needed to prove History Associates' policy-or-practice claims on the *merits*.

II. Discovery Is Appropriate Now Because The FDIC's Motion To Dismiss Is Futile

A. The FDIC's alternative argument that discovery should wait because “a motion to dismiss is pending” is equally meritless. Opp. 4. As this Court and others have recognized, discovery *is* appropriate even while a motion to dismiss is pending if that motion is futile. *See* ECF 76-2 at 45 (Court: “I'm very happy to have pre-motion discovery where I don't think the motion is going to succeed, because I don't like delaying things.”); *IPOC Int'l Growth Fund Ltd. v. Dili-*

gence, LLC, 2006 WL 8460103, at *2 (D.D.C. Oct. 13, 2006) (“[B]are assertions that discovery should be stayed pending dispositive motions that will probably be sustained, are insufficient to justify the entry of an order staying discovery generally.” (citation and ellipsis omitted)).

History Associates has already shown that the FDIC’s motion to dismiss is futile based on the allegations in the amended complaint. ECF 76-1 at 11-30. Nothing in the 36 pages of briefing the FDIC devotes to rehabilitating its motion to dismiss on reply shows otherwise. *See* ECF 82 at 1-2, 8-43. But the agency’s attacks on the complaint’s allegations are misdirected in any event because the *evidence* already uncovered amply establishes the policy-or-practice claims—and at minimum shows that dismissal is unwarranted because any purported pleading defect could easily be cured.

Categorical Exemptions. The FDIC expressly made a “Categorical Determination” in withholding the pause letters. *See, e.g.*, ECF 37-2 at 1. Far from denying that it has such a policy or practice of doing so, the agency has repeatedly defended the legality of that approach—even as applied to the pause letters. *See, e.g.*, ECF 72-1 at 34-35. Even a peek at the policies the agency already produced in this litigation reveals that it treats documents implicating “FOIA Exemption (b)(8)” as categorically “withheld in full,” ECF 53-1 at 31—a fact the agency ignores. And the only non-categorical determinations the agency points to involving bank supervisory documents are its disclosures *in this case* in an effort to stave off sanctions. ECF 82 at 22. The agency’s assertion that it changed its ways under new leadership (*id.*) is at best an issue of fact that must be resolved through a 30(b)(6) deposition, not a basis for dismissal at the pleading stage.

Narrow Construction. As the FDIC admits on reply, language instructing its employees to interpret FOIA requests liberally “*does not appear in its policies or training materials.*” ECF 82 at 32 (emphasis in original). That admission alone makes this claim plausible. The FDIC’s

policies, meanwhile, confusingly tell employees to “only provide what is reasonably interpreted,” without defining what that means. ECF 53-1 at 18. The FDIC claims that it nonetheless “direct[s] FDIC employees to know and adhere to FOIA law.” ECF 82 at 32. But History Associates is entitled to a 30(b)(6) deposition to test that assertion. Merely pointing employees to 5 U.S.C. § 552, for example, would not discharge the agency’s obligations.

Inadequate Searches. 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 also has turned up an implausibly low number of records in response to other crypto-related requests, ECF 37 ¶¶ 100-101, and has not produced a single document from collaboration platforms such as Microsoft Teams, even though the FDIC’s productions repeatedly refer to Teams as a collaboration tool. *E.g.*, FDIC Records—Correspondence Related to Crypto-Related Activities (Feb. 5, 2025), <https://bit.ly/4hu1Vsi>, at 390-91, 404-07, 580-83, 639-41, 746. The policies and training materials produced explain the problem: The FDIC delegates authority to its employees to conduct searches without providing guidance. *E.g.*, ECF 76-3 at 41-44, 109-16.

Inadequate Document Preservation. FDIC counsel has represented to the Court that the agency has no policy of issuing litigation holds in response to FOIA lawsuits generally. ECF 38-1 at 10. And the FDIC nowhere disputes that none of its FOIA policies or training documents instruct FDIC employees to preserve responsive FOIA documents, including during litigation. Although the agency claims to have other document-retention procedures, their adequacy is a disputed fact that should be tested through a 30(b)(6) deposition. *See* ECF 76-1 at 26.

B. The FDIC’s remaining arguments to delay discovery are insubstantial. The FDIC argues the Court might dismiss “some, but not all,” of the policy-or-practice claims. Opp. 3-4. But that hypothetical prospect is no reason to postpone discovery on the claims that *are* likely to

withstand the FDIC’s motion to dismiss. The FDIC also asserts that, even if its motion to dismiss is denied or deemed futile, the Court should wait until the FDIC moves for summary judgment so that the agency can submit supporting declarations. The Court, however, afforded the agency the opportunity to “submit an affidavit with [its] motion to dismiss”—and to skip the motion to dismiss entirely and proceed directly to summary judgment. ECF 76-2 at 62, 65. The FDIC instead elected to drag out this case by filing a standalone motion to dismiss on Count II. And the Court made clear that “if I deny a motion to dismiss on Count 2, then I’m going to allow discovery.” *Id.* at 63.

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This case has already dragged on for more than fourteen months, during which time the Court has already ordered the FDIC to produce its FOIA policies and training materials. The limited discovery that History Associates seeks would resolve the few gaps that remain. The Court should authorize a tailored 30(b)(6) deposition and require the FDIC to produce its Exemption 8 denial letters so that the parties can resolve this case efficiently and expeditiously on cross-motions for summary judgment.

CONCLUSION

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

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Respectfully submitted,

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