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

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

Defendant Federal Deposit Insurance Corporation ("FDIC") opposes Plaintiff History Associates Incorporated's ("HAI") Motion for Leave to Take Discovery ("Motion") on HAI's policy-or-practice claims.

In a Freedom of Information Act ("FOIA") case, discovery is rare. In the infrequent cases where discovery has been granted, it is almost always after courts resolve any motions to dismiss and are faced with a Rule 56(d) motion for discovery following the submission of a motion for summary judgment with an accompanying affidavit or declaration by the government.[1]

Far from being "futile," as HAI alleges in its motion (Motion at 1-2, 8-9, Dkt. No. 77), the FDIC's motion to dismiss demonstrates that HAI has failed to plead a policy-or-practice claim. HAI's Opposition tacitly recognizes these shortcomings and requests further discovery in

[1] HAI does not cite a single FOIA case where discovery has been authorized while a motion to dismiss was pending.

an extra-procedural effort to amend the deficient complaint with the hypothetical fruits of that discovery. But the fundamental problem with HAI's policy-or-practice claims lies in its FOIA requests and the FDIC's responses to those requests. *See, e.g., Citizens for Resp. & Ethics in Wash. v. Dep't of Just.*, 772 F. Supp. 3d 1, 12 (D.D.C. 2025) ("*CREW*") ("For a pattern to be substantively sufficient it should 'concern [] repeated requests for a narrowly defined class of documents.'"). The claims fail because HAI has not pled the requisite numerosity, similarity between requests, or similarity in the agency's responses. Discovery will not change this.

ARGUMENT

I. HAI'S MOTION IS PREMATURE

Courts typically do not allow discovery in FOIA cases. *E.g.*, *Freedom Watch, Inc. v. U.S. Dep't of State*, 179 F. Supp. 3d 121, 127 (D.D.C. 2016) (stating that discovery is "generally inappropriate in a FOIA case" (citation omitted)); *In re Clinton*, 973 F.3d 106 (D.C. Cir. 2020) ("[D]iscovery in a FOIA case is 'rare.'" (quoting *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006))). Though HAI argues that "[d]iscovery is the norm in policy-or-practice cases," it cites no persuasive authority that would support a blanket carve-out of this type of FOIA claim from all others—especially when a motion to dismiss is pending. Motion at 8, Dkt. No. 77. The Federal Rules of Civil Procedure and this Court's local rules do not distinguish between different types of FOIA cases noting that FOIA cases are exempt from the requirements of Federal Rule of Civil Procedure 26(f) and Local Civil Rule 16.3. *See* Local Civ. R. 16.3(b)(10) ("The requirements of this Rule and of Fed. R. Civ. P. 16(b) and 26(f) . . . shall not apply in . . . FOIA actions."). And to these ends, the principle has been

applied to policy-or-practice claims. *Pietrangelo v. U.S. Army*, 334 F. App'x 358, 360 (2d Cir. 2009).[2]

The *CREW* litigation is instructive. As discussed in the FDIC's pending motion to dismiss, the *CREW* court partially granted and partially denied the Department of Justice's ("DOJ") motion to dismiss a policy-or-practice claim. *CREW*, 772 F. Supp. 3d at 17-18; FDIC Mem. in Support of the FDIC's Mot. for Summ. J. on Count I and Mot. to Dismiss Count II of Plaintiff History Associates Incorporated's Am. Compl. ("FDIC Brief"), at 28-29, Dkt. No. 72-1. DOJ then filed an answer to the counts that survived. The Court entered an order noting that FOIA cases are exempt from Rule 26(f) and Local Rule 16.3 requirements and instructed the parties to file a joint status report on how to proceed. *CREW v. U.S. Dep't of Just.*, No. 24-1497 (LLA), 2025 WL 1302393, at *1 (D.D.C. May 5, 2025). DOJ has since filed a motion for summary judgment on the remaining counts and CREW has until September 2, 2025 to file its opposition, cross motion, and/or motion for discovery.

Applying the *CREW* court's approach here makes practical sense. The FDIC's motion to dismiss, combined with its motion for summary judgment on the underlying FOIA claim, would resolve the entire case, rendering discovery unwarranted. *See Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (holding that district court correctly deferred discovery in a FOIA case while deciding a motion to dismiss raising threshold issues). But even if the Court only dismissed

[2] HAI previously argued that the Second Circuit denied discovery in the *Pietrangelo* case because that court had "not yet recognized or articulated the inquiry relevant to a pattern or practice claim in the FOIA context." Dkt. No. 56 at 2. But the Second Circuit made that observation when upholding the district court's dismissal of the plaintiff's pattern-or-practice claim. *Pietrangelo*, 334 F. App'x at 360. And the court made no indication that this observation affected its decision to uphold the district court's *separate* decision to deny the plaintiff's motion for discovery—which was grounded in whether the plaintiff had "ma[d]e a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations." *Id.*

some, but not all, of the four categories claimed by HAI, that ruling could have a significant impact on the scope of summary judgment briefing and the necessity or contours of further discovery. For example, if the Court were to agree with the FDIC that one alleged example of a categorical denial is insufficient, FDIC Brief at 31-32, Dkt. No. 72-1, or that under existing Supreme Court precedent categorical denials are permissible on a case-by-case basis, *id*. at 34-35, there would be no need for the production of Exemption 8 letters from third parties that HAI seeks.[3]

Moreover, HAI's cited cases do not stand for the proposition that discovery is appropriate for a FOIA policy-or-practice claim when a motion to dismiss is pending. *See Jud. Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 776-78, 784 (D.C. Cir. 2018) (stating the district court could consider appropriateness of discovery after agency had already filed an answer, motion to dismiss, and motion for judgment on the pleadings); *IPOC Int'l Growth Fund Ltd. v. Diligence, LLC*, No. 06-1109, 2006 WL 8460103 (D.D.C. Oct. 13, 2006) (case not involving FOIA or policy-or-practice claim); *Swan View Coal. v. Dep't of Agric.*, 39 F. Supp. 2d 42 (D.D.C. 1999) (docket shows that motion for discovery filed on same day as motion to dismiss denied in part); *Gilmore v. U.S. Dep't of Energy*, 33 F. Supp. 2d 1184, 1185, 1189-90 (N.D. Cal. 1998) (discovery ordered only after initial motions for summary judgment and motion to dismiss on subject matter jurisdiction grounds, while allowing discovery before a further summary

[3] HAI asserts that production of more than a hundred additional documents would be simple. *See* Motion at 7-8, Dkt. No. 77. This is incorrect. FDIC FOIA responses are addressed to the requester and include the requester's address, email and in some instances phone number. Where this information constitutes personally identifiable information ("PII") this would need to be redacted from the letters and responses. The FDIC respectfully submits that diverting resources to redact PII on these documents would increase the FDIC's FOIA backlog of requests. If the court is inclined to grant discovery, the FDIC respectfully submits it should make clear that the new discovery request, which is essentially a new FOIA request, should be processed in the order in which it was received.

judgment motion where plaintiff filed a Rule 56 statement); *Smith v. U.S. Immigr. & Customs Enf't*, No. 16-cv-02137, 2018 WL 3069524 (D. Colo. June 21, 2018) (no discussion of pre-answer discovery and docket shows that discovery ordered after motion to dismiss and answer).[4] It is not. HAI identifies no compelling reason—factual or legal—for this Court to depart from well-trodden procedural practice regarding FOIA cases. Any discovery should, at a minimum, await resolution of the FDIC's dispositive motion.

The *Judicial Watch* case cited by HAI is in fact in line with the FDIC's position. In that case, the plaintiff opposed the agency's Rule 12(c) motion to dismiss a policy-or-practice claim and concurrently moved for discovery. *Jud. Watch, Inc.*, 895 F.3d at 777. The D.C. Circuit reversed the granting of the motion to dismiss but *then* remanded the case to "determine, in the first instance, the appropriateness of discovery." *Id*. at 784.

II. NO DISCOVERY IS NECESSARY TO DECIDE THE FDIC'S MOTION TO DISMISS

Furthermore, 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. *Wash. Lawyer's Comm. for Civil Rights & Urban Affs. v. U.S. Dep't of Just.*, __ F.4th __, No. 24-5127, 2025 WL 2088557, at *7-8 (D.C. Cir. July 25, 2025) (declining to decide whether the "FOIA-specific discovery standard applies to policy or practice claims in the same way it does to other FOIA cases," and affirming denial of discovery where plaintiff advanced an "erroneous theory").

[4] The docket in the *Smith* case also shows that the district court denied the plaintiff's initial motion for leave to take discovery without prejudice on grounds that the court had not resolved the agency's pending motion to dismiss for lack of subject-matter jurisdiction. Order, *Smith v. U.S. Immig. & Customs Enf't,* No. 16-cv-02137 (D. Colo. Mar. 14, 2017), Dkt. No. 43 (also striking motion for lack of conferral under local rule).

As described in the FDIC's memorandum in further support of its motion to dismiss Count II, HAI has not sufficiently alleged a formal or informal policy of the FDIC on any of its four policy-or-practice claims. *See, e.g.*, Mem. in Opp'n to History Associates' Cross-Mot. for Summ. J. on Count I and in Further Support of the FDIC's Mot. to Dismiss Count II of the Amended Complaint ("FDIC Reply") at 9-10, Dkt. No. 82. And, in the absence of any policy, courts have identified four relevant criteria informing whether a plaintiff pleads sufficient facts to allow the reasonable *inference* that the agency has adopted an unlawful FOIA policy, pattern, or practice: (1) numerosity, (2) similarity between its requests, (3) similarity in the agency's responses, and (4) unlawfulness. *See CREW*, 772 F. Supp. 3d at 12; *Khine v. U.S. Dep't of Homeland Sec.*, 334 F. Supp. 3d 324, 333 (D.D.C. 2018), *aff'd*, 943 F.3d 959 (D.C. Cir. 2019); *see also* FDIC Brief at 25-26, Dkt. No. 72-1. As the FDIC's other filings discuss, neither the Amended Complaint nor the FDIC's written FOIA policies and training materials (to the extent this Court considers material outside the Amended Complaint when resolving the FDIC's motion to dismiss) support HAI's ability to state any of its four policy-or-practice claims. FDIC Brief at 25-42, Dkt. No. 72-1; *see also* FDIC Reply at 9-33, Dkt. No. 82.

HAI asserts that discovery will fill alleged "important gaps" in the record. *See* Motion at 4-8. But every one of HAI's arguments focuses *only* on the fourth criterion—whether the FDIC engages in unlawful practices.[5] As the FDIC explains elsewhere, criteria like numerosity and similarity remain highly relevant when evaluating the plausibility of whether HAI has a "reasonable expectation that the alleged [FOIA] violation will recur." *See Payne Enters., Inc. v. United States*, 837 F.2d 486, 491-92 (D.C. Cir. 1988) (citation omitted); FDIC Reply at 10-12,

[5] To be clear, the FDIC has not engaged in unlawful FOIA practices. *See, e.g.*, FDIC Brief at 30-31, 34-35, 40-42, Dkt. No. 72-1; FDIC Reply at 18-21, Dkt. No. 82.

Dkt. No. 82 (discussing role that these criteria play in evaluating policy-and-practice claims and why HAI's allegations come up short). And HAI's requested discovery cannot help in these regards; additional discovery will not change the number of FOIA requests, the content of those requests, or the FDIC's responses to them.

As just one example, consider HAI's alleged "narrow construction" practice claim. For that claim, HAI argues that it needs discovery to explore whether the FDIC instructs its employees to construe FOIA requests liberally. *See* Motion at 5, Dkt. No. 77. Specifically, HAI asks for a Rule 30(b)(6) deposition to probe the instructions that FDIC employees are given with respect to how to "reasonably interpret" a request. *Id*. According to HAI, this discovery would speak to whether the FDIC's instruction "is consistent with the FDIC's obligation to liberally construe FOIA requests." *Id*. But such discovery would not shed light on whether HAI had submitted enough requests to lay the foundation to infer a pattern of FDIC conduct sufficient to state a claim. Indeed, Plaintiff cites two examples in support of the FDIC's alleged practice of narrowly construing FOIA requests, one of which HAI declined to seek traditional administrative or judicial review on. *See* FDIC Brief at 25, Dkt. No. 72-1; FDIC Reply at 19, Dkt. No. 82. Because HAI cannot rely on the latter to plead a policy-or-practice claim, FDIC Reply at 15, Dkt. No. 82, its narrow-construction claim effectively cites a lone alleged FOIA violation, which "is insufficient as a matter of law" to state a policy-or-practice claim. *Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 231 (D.D.C. 2011). That number is a fact that is known and will not change regardless of what discovery is conducted.[6] Moreover, for the lone alleged

[6] HAI makes an extra-procedural effort to avoid this result through an implausible series of negative implications supposedly stemming from the *absence* of language in the FDIC's written FOIA policy and training materials. *See* HAI's Memorandum at 22, Dkt. No. 76-1. These materials—and HAI's ensuing logical leaps—do not give HAI an escape hatch from Rule

FOIA violation, and under new leadership, the FDIC conducted an exhaustive search and production well beyond the requirements of FOIA.

HAI's requested discovery is also unreasonably broad—seeking documents related to numerous third parties. FOIA claims are personal to the FOIA requestor. They cannot be asserted by others; courts cannot adjudicate the propriety of other FOIA responses unless the person that made the request is a party. *See, e.g.*, *Smallwood v. Dep't of Just.*, 266 F. Supp. 3d 217, 220 (D.D.C. 2017) (party that did not make FOIA request does not have standing to sue agency). HAI's desire to base its claim not on how the FDIC has handled its FOIA requests, but rather on how the FDIC has handled past FOIA requests (all of which occurred during a previous administration and when the agency was under different leadership),[7] goes well beyond the contours of previously litigated policy-or-practice claims. *See, e.g.*, *CREW*, 772 F. Supp. 3d 1 (litigation over 9 FOIA's specific to the parties); *Wash. Lawyers Comm.*, 2025 WL 2088557 (litigation over 40 FOIA requests submitted by the party); *Jud. Watch, Inc.*, 895 F.3d 770, 778 (specific to party); *Payne*, 837 F.2d 486 (all FOIAs submitted by party).

CONCLUSION

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

12(b)(6). Nor do they remove the need for this Court to consider other criteria like numerosity when assessing whether the Amended Complaint states a claim.

[7] *See* FDIC Reply at 39-40, Dkt. No. 82.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2025, I caused a true and correct copy of the foregoing to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing.

/s/ Michael K. Morelli
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