[SCHEDULED FOR ORAL ARGUMENT ON MAY 10, 2011]

NO. 10-5349

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

FEDERAL HOUSING FINANCE AGENCY

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

Paul J. Orfanedes
James F. Peterson
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. FHFA Has Both Custody and Control of the Requested Records . . . 1

II. Application of FOIA to the Requested Records Is Entirely Appropriate 4

CONCLUSION 8

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Consolidated Rail Corp. v. United States,
896 F.2d 574 (D.C. Cir. 1990) 5

Consumer Fed'n of Am. v. Dep't of Agric.,
455 F.3d 283 (D.C. Cir. 2006) 3

**Department of Justice v. Tax Analysts*,
492 U.S. 136 (1989) 2, 5

United We Stand Am., Inc. v. IRS,
359 F.3d 595 (D.C. Cir. 2004) 3

* Authorities chiefly relied upon are marked with an asterisk.

Statutes and Other Authorities

5 U.S.C. § 552(b)(4) 6

5 U.S.C. § 552(b)(8) 6

12 U.S.C. § 4617 1

12 U.S.C. § 4617(b)(2)(A)(i) 1, 4

12 U.S.C. § 4617(b)(2)(A)(ii) 1, 2, 4

12 U.S.C. § 4617(f) 7

S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965) 5

INTRODUCTION

As demonstrated in Judicial Watch's opening brief, the requested records in this FOIA case were transferred by a clear statutory directive to the custody and control of the Federal Housing Finance Agency ("FHFA"). In response, the agency offers a host of reasons purportedly demonstrating why the statute transferring the records does not mean what it actually says. None of these arguments have merit or provide sufficient reason for the Court to look beyond the plain language of the statutory provisions at issue.

ARGUMENT

I. FHFA Has Both Custody and Control of the Requested Records.

It is uncontested that, pursuant to a plain statutory directive, FHFA has full management and operational control over Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Company ("Freddie Mac"). 12 U.S.C. § 4617. In addition, FHFA has "all rights, titles, powers, and privileges of [Fannie Mae and Freddie Mac], and of any stockholder, officer, or director . . . ." *Id.* at § 4617(b)(2)(A)(i). And most significantly, FHFA has "title to the books, records, and assets of any other legal custodian of" Fannie Mae and Freddie Mac. 12 U.S.C. § 4617(b)(2)(A)(ii). Because of these plain statutory directives, the requested records have been transferred by law to the custody and control of

FHFA. Furthermore, because the records were in the custody and control of FHFA at the time of Plaintiff's FOIA request, the records are "agency records" subject to FOIA.

FHFA argues that the plain language of these statutes does not mean what it says, asserting that the statutes do not transfer ownership, but only provide a "mere right of access" to the requested records. Brief for the Appellee ("App. Br.") at 16, 25. Again, the plain language of these statutes provides far more than a right of access, it provides that title to the books and records of the enterprises is passed to FHFA. The agency has full legal custody of the requested records as it "obtained" all of the enterprises records by the plain terms of the statute granting it title to the records of the enterprises. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989); 12 U.S.C. § 4617(b)(2)(A)(ii).

FHFA next asserts that, despite the plain language of the statute, it does not exercise "control" over the requested records. App. Br. at 18. The agency claims that records of the enterprises "did not automatically convert" into agency records. *Id.* at 19-20. As Judicial Watch has demonstrated, however, in every meaningful way and in this unique circumstance, FHFA is lawfully in control of the requested records.

Even if, as FHFA claims, agency employees have "not read or relied" on the requested records – the third prong of the Court's four-part test – this alone is far from dispositive. App. Br. at 19-21; *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 599 (D.C. Cir. 2004). As demonstrated in Judicial Watch's opening brief (pp. 8-13), agency use of the records is only one of the four factors of the four-part test, the other three of which weigh heavily in favor of finding the records are under "agency control."[1] Most significantly, however, and undisputed by FHFA, none of the cases applying the four-part test involve records that had been transferred to an agency by the plain language of a statute. *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006) (noting that the court's totality of the circumstances test seeks to vindicate Congress' purpose "to open agency action to the light of public scrutiny") (internal quotation omitted). By a plain statutory directive, lawful control of the requested records was transferred to FHFA.

For the first time on appeal, FHFA claims that this plain statutory language transferring title to FHFA actually means something else. App. Br. at 28. The agency asserts that the latter part of the provision transferring "title to the books,

---

[1] It is difficult to understand how the agency could have put an end to political activities of the enterprises, as it claims, without at least once consulting the records of their activities. At a minimum, it has acknowledged issuing directives to the enterprises on the same subject matter as Judicial Watch's request.

records, and assets *of any other legal custodian*, " refers back to the books and records of some other unspecified custodian. *Id.* This reading of the statute was never argued by FHFA before the district court, nor did either of the representatives of the enterprises submitting declarations on behalf of the agency suggest such an interpretation. JA 22-27. Nor was this interpretation plausible enough that the district court even considered it an issue.

In any event, when read in the full context of 12 U.S.C. § 4617(b)(2), it is clear that the "Agency" "shall . . . succeed to . . . (ii) title to the books, records, *and* assets of any other legal custodian of such regulated entity." (Emphasis added.) This section, together with the prior clause (12 U.S.C. § 4617(b)(2)(A)(i)), cleary sets forth the general authority of FHFA, and confirms that title to the records passes to FHFA wherever the records may be found. This is the natural reading of this provision and FHFA offers no sufficient reason for the Court to look beyond it.

II. Application of FOIA to the Requested Records Is Entirely Appropriate.

Looking beyond the plain statutory directive, FHFA asserts several reasons that Congress could not actually have intended for the records of the formerly independent government sponsored enterprises to be subject to FOIA. FHFA claims that if Congress had intended FOIA to apply to the requested records it

would surely have said so. App. Br. at 31. It did say so. The language transferring title of the records of the entities to FHFA is quite specific. There is no reason to look beyond the plain language of these statutes. *Consolidated Rail Corp. v. United States*, 896 F.2d 574, 578 (D.C. Cir. 1990) ("The plain meaning of legislation should be conclusive, except in the 'rare' cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.") (citations omitted). Significantly, the burden remains at all times on an agency to establish that documents are not agency records. *Tax Analysts*, 492 U.S. at 142 n.3 ("The burden is on the agency to demonstrate, not the requestor to disprove, that the materials sought are not 'agency records' . . .") (citing S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965)). FHFA has not done so.

FHFA also points to a "variety of statutorily mandated reports and data from the enterprises" to suggest that Congress intended to limit the scope of information available to the public concerning the enterprises. App. Br. at 32-34. In addition to being entirely speculative, this argument simply cannot be correct. Many federal agencies are tasked with issuing regular reports or other information to the public. This does not mean that all other records of the agency are therefore exempt from FOIA. An agency record is subject to disclosure unless a specific exemption applies. FHFA cannot point to any such exemption here.

FHFA next argues FOIA cannot apply because it would "expose all the corporate records" and "business strategies" of the enterprises. App. Br. 17, 36. The agency claims, with great hyperbole, that if the requested records in this case are "agency records," it will "lay open forty years of the enterprises' business records and proprietary business information for inspection by lenders, competitors, and others." *Id.* at 36. On the contrary, a ruling that the records are "agency records" will only mean that the agency must process Judicial Watch's FOIA request. As with any FOIA request, the agency will have ample opportunity to assert any proper exemptions necessary to protect just such information. *See, e.g.*, FOIA Exemption 4 (5 U.S.C. § 552(b)(4))(protecting trade secrets and commercial and financial information); Exemption 8 (5 U.S.C. § 552(b)(8))(protecting information "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"). FHFA's entirely exaggerated claim of the harm that results from its sensitive business information being exposed is nothing more than a red herring.

FHFA's claim that responding to Judicial Watch's FOIA request would pose "significant expense to these struggling companies" or otherwise interfere with its role as conservator should be rejected outright. App. Br. at 37. It is

simply idle speculation for FHFA to assert that a simple document search is too "expensive" for the agency and its multi-billion dollar wards. The records sought by Judicial Watch concern political activities that FHFA itself claims have ceased. *See* JA 31 (Def.'s Statement of Material Facts, Exh 4 at ¶ 11). Hence, complying with Judicial Watch's FOIA request can hardly be said to risk interference with any ongoing attempt to stabilize Fannie Mae and Freddie Mac.

Finally, FHFA's claim that this Court is barred from applying FOIA in this case on the basis that it would interfere with the conservatorship is particularly misplaced. App. Br. at 38-39 (citing 12 U.S.C. § 4617(f)). FHFA cannot choose unilaterally to exempt itself from FOIA, any more than FHFA can choose to ignore any other law it happens to believe is contrary to its goals.

CONCLUSION

For the reasons above and in its opening brief, Judicial Watch respectfully requests that the Court reverse the district court's decision below, enter judgment in favor of Judicial Watch, and remand this matter for further proceedings.

March 21, 2011

Respectfully submitted,

/s/ Paul J. Orfanedes

/s/ James F. Peterson

JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.App.P. 32(a)(7)(c) and D.C. Cir. Rule 32(a)(2), the attached principal brief is proportionally spaced, has a typeface of 14 points and contains 1,992 words, as counted by the word-processing system used to prepare the brief.

March 21, 2011 /s/ James F. Peterson

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2011, the foregoing REPLY BRIEF OF APPELLANT was filed via the CM//ECF system and served by the CM/ECF system and by first-class U.S. mail (two copies), postage prepaid, on the following:

Mark R. Freeman
Mark B. Stern
U.S. Department Of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Room 7228
Washington, DC 20530

/s/ James F. Peterson