IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	Civil Action No. 09-1537 (PLF)
	)	
v.	)	
	)	
FEDERAL HOUSING FINANCE AGENCY,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Federal Rule of Civil Procedure 56, respectfully submits this opposition to the motion for summary judgment filed by Defendant Federal Housing Finance Agency ("FHFA") and cross moves for partial summary judgment. As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Introduction.

At issue in this Freedom of Information Act ("FOIA") lawsuit is whether FHFA, the federal agency that has custody and control of the records of Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Company ("Freddie Mac"), must comply with a FOIA request for records relating to those previously independent entities. Until they were seized by FHFA in September 2008, Fannie Mae and Freddie Mac were private corporations with independent directors, officers, and shareholders. Since that time, FHFA, a federal agency subject to FOIA, has assumed full legal custody and control of the records of these

previously independent entities. Hence, these records are subject to FOIA like any other agency records.

As no disputes of material fact exist as to the legal custody and control of the requested records, FHFA's motion should be denied. Plaintiff's motion for partial summary judgment as to this straightforward legal issue should be granted in Plaintiff's favor.

II. Factual Background.

Plaintiff is seeking records relating to Fannie Mae and Freddie Mac's political activities prior to their collapse and seizure by FHFA in September 2008. Fannie Mae and Freddie Mac are well known for their political influence, reportedly spending nearly $200 million over ten years on campaign contributions and lobbying. *See* Lisa Lerer, "Fannie, Freddie Spent $200M to Buy Influence," *Politico.com* (July 16, 2008). As a part of Plaintiff's investigation of Fannie Mae, Freddie Mac and the broader financial crisis, Plaintiff sent a FOIA request to FHFA on May 29, 2009, seeking access to the following records from 2005 to the present:

a. Any and all Freddie Mac and/or Fannie Mae records concerning political campaign contributions.

b. Any and all Fannie Mae and/or Freddie Mac records concerning policies, stipulations, and/or requirements concerning campaign contributions.

FHFA refused to process Plaintiff's request, claiming that while Fannie Mae may possess documents responsive to Plaintiff's request, FHFA was not required to produce any such documents. FHFA did not respond as to whether Freddie Mac might possess responsive documents. After a timely administrative appeal was denied by FHFA, this lawsuit was filed.

III. Argument.

A. Applicable Legal Standard.

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, agency decisions to "withhold or disclose information under FOIA are reviewed de novo by this court." *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, a court must view the facts in the light most favorable to the requestor. *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

As set forth by the U.S. Supreme Court, materials requested under FOIA are "agency records" if they are (1) either created or obtained by the agency, and (2) under agency control at the time the FOIA request is made. *Dep't of Justice v. Tax Analysts* 492 U.S. 136, 144-45 (1989) ("*Tax Analysts*"). Importantly, the burden falls on the agency to establish that documents are not agency records. 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)).

B. FHFA Has No Authority to Refuse to Comply With Its Obligations Under FOIA.

The federal statute authorizing FHFA's seizure of Fannie Mae and Freddie Mac specifically provides that FHFA assumes full management and operational control over the two

previous independent entities. *See* 12 U.S.C. § 4617.[1] As FHFA concedes, once it became conservator, it assumed "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); Def.'s Br. at 5. Moreover, FHFA does not dispute that it 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); Def.'s Br. at 14 n. 11. Under the plain language of these statutes, once Fannie Mae and Freddie Mac were seized by FHFA, the entities' records transferred to the custody and control of the agency. The records, therefore, were in the custody and control of FHFA at the time of the FOIA request. Accordingly, FHFA has no basis for refusing to comply with Plaintiff's FOIA request.

First, the requested records constitute "agency records" as defined in *Tax Analysts*. The key factor in whether an agency has "obtained" a document is whether it is in the actual custody of the agency. *Wolfe v. HHS*, 711 F.2d 1077, 1080 (D.C. Cir. 1983) (finding that the agency "must actually have custody of the documents.") (citing *Forsham v. Harris*, 445 U.S. 169, 185 (1980)). Here, it is undisputed that FHFA has assumed full legal custody of the requested records. The agency "obtained" the records pursuant to the statute that plainly granted it "title to the books, records, and assets" of Fannie Mae and Freddie Mac.

Furthermore, FHFA had full "control" over the requested records at the time of the FOIA request. The Supreme Court has defined "agency control" in the following way: "[b]y control we

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[1] By statute, FHFA had sole discretion to place Fannie Mae and Freddie Mac into conservatorship. 12 U.S.C. § 4617(a). Upon doing so, the powers of the directors, officers, and shareholders were transferred to FHFA. *See, e.g.,* Exh. 1 ("Fact Sheet: Questions and Answers on Conservatorship," Federal Housing Finance Agency, available at www.fhfa.gov). As conservator, FHFA controls and directs operations of Fannie Mae and Freddie Mac. *Id.* at p. 2. In addition, all powers of stockholders are suspended until the conservatorship is terminated. *Id.* at p. 3.

mean that the material have come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 145. Again, under the plain language of the statute, FHFA has complete management control of the previously independent Fannie Mae and Freddie Mac and custody of their records. The powers of Fannie Mae and Freddie Mac's prior directors, officers, and shareholders have been transferred entirely to FHFA. In addition, Congress specifically transferred the "records" of Fannie Mae and Freddie Mac to FHFA. Hence, the records have "come into the agency's possession" as part of FHFA official duties. In every meaningful way, FHFA is in control of the records.[2]

Signficantly, the FHFA does not dispute that it has the capability to search for and produce records responsive to the FOIA request. Defs. Br. at 12-13. Furthermore, FHFA does not explain why the Court should look beyond the plain statutory language vesting FHFA with custody and control of the records. Instead, FHFA tries to draw an analogy to other federal agencies that have acted as receivers for failed financial institutions, arguing that FHFA has

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[2] The test set forth by the D.C. Circuit to determine whether requested documents are under agency control further illustrates FHFA's control of the requested records. Under the test, a court must balance four factors under a totality of the circumstances test: (1) "the intent of the document's creator to retain or relinquish control over the records," (2) "the ability of the agency to use and dispose of the records as it sees fit," (3) "the extent to which the agency personnel have read or relied upon the document," and (4) "the degree to which the document was integrated into the agency's record system or files." *United We Stand Am. v. IRS*, 359 F.3d 595, 599 (D.C. Cir. 2004); *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). While the first and third factors are less relevant due to the unique circumstances of this case, the two other factors weigh heavily in favor of a finding of agency control. As the legal custodian of Fannie Mae and Freddie Mac's records, FHFA has an unfettered ability to use and dispose of the records in any manner. Similarly, the requested records are part of the agency's files by the simple fact that the agency has legal custody of all the records. Taken together, these factors further demonstrate the agency's full control over the records.

merely "stepped into the shoes" of those entities. Defs. Br. at 11 (citing *O'Melveny & Myers v. FDIC*, 512 U.S. 70 (1994); *Nadler v. FDIC*, 899 F. Supp. 158 (S.D.N.Y. 1995)). Not only do these cases fail to support FHFA's "step into the shoes" theory, but the cases actually confirm Plaintiff's position that the agency should not be allowed to "step out of" its responsibilities under FOIA.

First, *O'Melveny* is readily distinguishable from this case, as a different statute relating to the FDIC was at issue. More importantly, the statute interpreted in that case did not involve a transfer of title to all the books and records of the financial institution to the agency, nor did it involve the applicability of FOIA to the agency or the financial institution.

The more relevant case relied on by FHFA is *Nadler v. FDIC*, in which a FOIA request was at issue. In that case, the plaintiff sought records from the FDIC of a failed bank in receivership. The agency complied with the FOIA request, produced certain records, and asserted a FOIA exemption for the remainder of the records. Ultimately, the agency's withholding was upheld by the district court and, on appeal, by the Second Circuit. *See Nadler v. FDIC*, 92 F.3d 93 (2d Cir. 1996). *Nadler*, therefore, demonstrates, contrary to FHFA's assertion, that FOIA requests for agency records of an institution in receivership are entirely proper. Other courts have similarly considered and ruled upon FOIA claims for agency records of institutions in receivership or otherwise under the control of a federal agency. *See Nikelsberg v. FDIC*, 640 F. Supp. 2d 55 (D.D.C. 2009) (Robertson, J.) (ruling on claims of exemption under FOIA for information regarding banks in receivership); *Lepelletier v. FDIC*, 23 Fed. Appx. 4 (D.C. Cir. 2001) (FDIC provided names of depositors at banks in receivership in response to FOIA request); *McAllister v. Resolution Trust Corp.*, 201 F.3d 570 (5th Cir. 2000) (RTC provided information in

response to FOIA for information on creditors of S&L for which RTC was receiver).

As these cases demonstrate, FHFA's theory of "stepping into the shoes" of an institution does not relieve the agency from its responsibilities under FOIA. Nor do these cases, including *Nadler*, show that, as FHFA contends, compliance with FOIA "would do nothing to foster the purposes of FOIA" (Defs. Br. at 11). In fact, in each of these cases, the agency properly processed the FOIA request. FHFA has demonstrated no reason why this case is different.

FHFA's assertion that compliance with FOIA may somehow "harm" the agency's "mission of seeking to restore the Enterprises to financial health" is entirely misplaced. Plaintiff's FOIA request seeks records relating only to political activities of Fannie Mae and Freddie Mac, not sensitive commercial or proprietary information. In any event, once FHFA has processed Plaintiff's request, FHFA will be able to assert any appropriate exemptions under FOIA for information properly withheld under FOIA.

Based on the plain language of the statute, FHFA has full custody and control of the requested records. The undisputed facts demonstrate that the requested records are, in fact, agency records properly subject to FOIA.

C. The Public Interest Is Served By Finding That the Requested Records Are Subject to FOIA.

Finally, FHFA claims that the purposes of FOIA would not be furthered by finding the requested records are "agency records." Defs. Br. at 15. On the contrary, the records are undoubtedly of substantial public interest. The takeover and bailout of Fannie Mae and Freddie Mac are matters of significant public concern.[3] The history of political contributions by these

[3] Taxpayers have already spent more than $111 billion bailing out Fannie Mae and Freddie Mac. *See* Anthony Randazzo, "Bulldozing the Dream," *The Washington Times* (March

entities – the subject of Plaintiff's request – is a critical component of understanding how Fannie Mae and Freddie Mac operated.

FHFA's suggestion that responding to Plaintiff's FOIA request would pose "significant expense to these struggling companies" or otherwise interfere with its role as conservator should be rejected outright. Defs Br. at 15-16. FHFA cannot choose unilaterally to exempt itself from FOIA, any more than FHFA can choose to ignore any other law it deems contrary to its goals. *Id.* (citing 12 U.S.C. § 4617(f)). Nor can FHFA credibly assert that a simple document search is too "expensive" for the agency and its multi-billion dollar wards. The records sought by Plaintiff concern political activities that the FHFA itself claims have ceased. *See* Def.'s Statement of Material Facts, Exh 4 at 9. Hence, complying with Plaintiff's FOIA request can hardly be said to risk interference with any ongoing attempt to stabilize Fannie Mae and Freddie Mac.

CONCLUSION

For the reasons set forth above, the Court should deny FHFA's motion for summary judgment and grant Plaintiff's motion for partial summary judgment.

Dated: March 5, 2009

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4, 2010). The Congressional Budget Office estimates that losses at Fannie Mae and Freddie Mac will cost taxpayers another $290 billion in 2010. *Id.*