

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

_____)	
GREG MUTTITT)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:10-cv-00202 (EGS)
)	
UNITED STATES CENTRAL)	
COMMAND,)	
)	
and)	
)	
UNITED STATES DEPARTMENT)	
OF DEFENSE)	
)	
and)	
)	
UNITED STATES DEPARTMENT)	
OF STATE)	
)	
and)	
)	
UNITED STATES DEPARTMENT)	
OF THE TREASURY)	
)	
Defendant.)	
_____)	

**MEMORANDUM IN SUPPORT OF DEFENDANTS’ PARTIAL MOTION TO DISMISS
PLAINTIFF’S FIRST AMENDED COMPLAINT**

This action arises out of several requests for documents from United States Central Command and the Departments of Defense, State, and Treasury pertaining to the development of Iraqi oil policy, and made pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* On February 5, 2010, plaintiff Greg Muttitt filed a Complaint challenging defendants’ non-disclosure of documents responsive to his FOIA requests. In Counts 25 and 26 of the Complaint, plaintiff asserts that defendants, the U.S. Department of State and Department of the

Treasury, violated the FOIA and Administrative Procedure Act (“APA”), 5 U.S.C. § 701, et seq., when they refused to provide estimated deadlines for releasing responsive non-exempt records.

Plaintiff fails to state a claim upon which relief may be granted under the APA.

Plaintiff’s claims are based on the agencies’ failure to disclose tentative production dates in violation of 5 U.S.C. § 552(a)(7)(B). These allegations explicitly assert injury under the FOIA itself and may not be brought under the APA, which provides for judicial review only where there is “no other adequate remedy in court.” See 5 U.S.C. § 704. Furthermore, plaintiff argues that any regulation, guidance, or policy authorizing the agency action(s) at issue would be arbitrary and capricious under the APA and a violation of the FOIA. Plaintiff’s Complaint, however, points to no regulation, guidance, or policy statement causing him harm. These claims do not state a viable cause of action under either statute, and plaintiff is entitled to no relief. Accordingly, plaintiff’s APA claims against the State and Treasury Departments as well as any claims regarding unspecified “regulations, guidelines, or policy statements,” see First Amended Complaint (“First Am. Compl.”) ¶¶ 104, 110, must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

BACKGROUND

I. Procedural History

Plaintiff initiated this action by filing a Complaint on February 5, 2010, which all defendants answered on April 12, 2010. Defendants Department of State and Department of the Treasury simultaneously filed a Partial Motion to Dismiss plaintiff’s APA claims for failure to state a cause of action under Rule 12(b)(6). See Fed. R. Civ. P. 12(b)(6). On May 2, 2010, plaintiff amended his Complaint and the parties agreed that briefing on Defendants’ Partial

Motion to Dismiss would proceed without change. However, the Court issued an Order on May 18, 2010, which indicated that, in light of plaintiff's Amended Complaint, the briefing had become disjointed. The Court declared that Defendants' Partial Motion to Dismiss was moot and requested that defendants file a dispositive motion in response to plaintiff's First Amended Complaint by June 1, 2010. Consequently, this Partial Motion to Dismiss addresses the APA and FOIA claims asserted in "Causes of Action" 25 and 26 of plaintiff's First Amended Complaint. See First Am. Compl. ¶¶ 100-111.¹

II. Factual Background

Plaintiff submitted several FOIA requests to the Department of State between April and November 2009, all of which focused on the development of the Iraqi oil and gas industry. These requests related specifically to the development of Iraqi oil law, advice by U.S. officials to the Iraq Ministry of Oil, and the work of Meghan O'Sullivan in Iraq. First Am. Compl. ¶¶ 48, 56, 65, 73, 84. Plaintiff made a similar request to the Department of the Treasury on August 15, 2009, seeking documents on the subject of oil and gas and the Preparatory Meeting of the International Compact for Iraq. First Am. Compl. ¶ 89.

In early November 2009, plaintiff allegedly inquired as to a tentative release date for documents from each agency. First Am. Compl. ¶¶ 100, 106. According to the Complaint, the State Department responded that it could "not give a definitive timeframe for the processing of a request." Id. ¶ 101. The Department of the Treasury did not respond to plaintiff's inquiry directly, see id. ¶ 107, but produced documents responsive to plaintiff's request on February 23, 2010. At the time of plaintiff's requests for deadlines, both the State and Treasury Departments were working to process responsive records.

¹ The remaining causes of action (1-24) are addressed in defendants' Answer to plaintiff's First Amended Complaint, which was filed simultaneously with this Partial Motion to Dismiss.

Plaintiff asks this Court to find that the State and Treasury Departments violated the APA and/or the FOIA by refusing to provide plaintiff with FOIA request completion dates. See First Am. Compl. ¶¶ 100, 101, 102, 106, 107, 108, 111; see also 5 U.S.C. § 552(a)(4)(B); 5 U.S.C. § 706(2)(a). The Complaint seeks a declaration that any agency regulation, guideline, or policy statement authorizing the defendants' actions — though plaintiff challenges no specific provision — amounts to an unreasonable interpretation of the FOIA. First Am. Compl. ¶¶ 104, 110, 111. Plaintiff demands that this Court order defendants to provide estimated dates of completion upon request in the future and to amend its regulations, guidelines, and policy statements accordingly. First Am. Compl. ¶ 111.

III. Standard(s) of Review

Federal Rule of Civil Procedure 12(b)(6) provides a mechanism for testing the legal sufficiency of the factual allegations in a Complaint. See Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002). Under this rule, a court treats the Complaint's factual allegations as true and draws all reasonable inferences in plaintiff's favor. See Harris v. Ladner, 127 F.3d 1121, 1123 (D.C. Cir. 1997); Alexis v. District of Columbia, 44 F. Supp. 2d 331, 336-37 (D.D.C. 1999). Rule 12(b)(6) calls for "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Consistent with that standard, "[a] court must dismiss a [C]omplaint where, even assuming all the factual allegations are true, the plaintiff has failed to establish a right to relief based upon those facts." Gregg v. Barrett, 771 F.2d 539, 547 (D.C. Cir. 1985); see also Weyrich v. New Republic, Inc., 235 F.3d 617, 623 (D.C. Cir. 2001).

ARGUMENT

I. Plaintiff's APA Claims Challenging Agency Action as a Violation of the FOIA Must be Dismissed Because the FOIA Provides Plaintiff an Adequate Alternative Remedy.

Plaintiff brings APA claims pursuant to 5 U.S.C. § 702, which provides for judicial review and a waiver of sovereign immunity for a person “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” Review under the APA, however, is expressly limited to “final agency action for which there is no other adequate remedy in court.” 5 U.S.C. § 704. The Supreme Court has explained that this provision precludes judicial review of conduct that is subject to an alternative “special and adequate review procedure.” See, e.g., Bowen v. Massachusetts, 487 U.S. 879, 904 (1988). An alternative review procedure, according to the D.C. Circuit, will be deemed adequate, even where it does “not provide relief identical to relief under the APA, so long as it offers relief of the same genre.” See Garcia v. Vilsack, 563 F.3d 519, 522 (D.C. Cir. 2009) (internal citations omitted); see also Women's Equity Action League v. Cavazos, 906 F.2d 742, 750-51 (D.C. Cir. 1990) (holding that APA review is unavailable where another statute provides an adequate remedy); Council of and for the Blind of Del. Cty. Valley, Inc. v. Regan, 709 F.2d 1521, 1531 (D.C. Cir. 1983) (denying APA review because individual suit against a third party was possible even where suit against federal agency would afford more systemic relief).

In accordance with these principles, district courts in this Circuit foreclose APA review where an alternative avenue of relief is available under the FOIA. See, e.g., Feinman v. FBI, No. 09-2047 (ESH), slip op. at 10 (D.D.C. May 26, 2010) (dismissing plaintiff's APA claims because the “statutory and equitable remedies available to [plaintiff] under FOIA would provide the same relief from the alleged policies as would the APA”); Kenney v. U.S. Dep't of Justice, 603 F.

Supp. 2d 184, 190 (D.D.C. 2009) (holding that plaintiff could not bring an APA action for improper withholding of records because relief was possible under the FOIA itself); Phys. Comm. for Responsible Med., v. Dep't of Health & Human Servs., 480 F. Supp. 2d 119 (D.D.C. 2007) (dismissing challenge to denial of fee waiver request under the APA because there is an adequate remedy in court under FOIA for a fee waiver denial); Thomas v. Fed. Aviation Admin., No. 05-2391, 2007 WL 219988 at *2 (D.D.C. Jan. 25, 2007) (finding that the APA did not apply because “[t]he essence of [p]laintiff’s claims . . . is that federal agencies improperly [withheld] documents requested by him”).

In this case, plaintiff’s APA claims rest solely upon alleged FOIA violations. Plaintiff maintains that both the State and Treasury Departments abused their discretion when they refused to provide an estimated release date for requested records. See First Am. Compl. ¶¶ 100-103, 106-109. In so doing, plaintiff argues, the agencies ignored their statutory obligations under 5 U.S.C. § 552(a)(7)(B). See id.

The relief that plaintiff seeks is therefore available under the FOIA itself. This Court has jurisdiction to declare the agency’s actions unlawful under the FOIA and, if appropriate, to order the release of wrongfully withheld material. See 5 U.S.C. § 552(a)(4)(B); see also Payne Enter., Inc. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988) (the FOIA “imposes no limits on courts’ equitable powers in enforcing its terms.”) (citation omitted).² Plaintiff Muttitt’s request

² The broad, equitable relief established under Payne, however, would likely be inappropriate in this case. In Payne, the D.C. Circuit instructed the district court to declare that the Air Force Logistic Command’s (“AFLC”) challenged practice of refusing requests for bid abstracts on contracts violated the FOIA. See Payne, 837 F.2d at 494. The court held that the AFLC’s unlawful conduct, as demonstrated by the “AFLC officers’ noncompliance with the FOIA, and the Air Force’s persistent refusal to end a practice for which it offers no justification,” was “sufficiently outrageous” to warrant declaratory relief that the AFLC’s ongoing actions were unlawful. Id. (emphasis added).

Conversely, plaintiff in this case has not alleged that defendants maintain a practice of refusing to provide estimated request completion dates. The Complaint points only to Mr.

for an estimated date of completion was prompted by his desire to receive responsive records. His primary objective remains the release of the documents requested from the State and Treasury Departments, the remedy established at 5 U.S.C. § 552(a)(4)(B). Plaintiff reveals as much in his First Amended Complaint:

“Because of the [agencies’] violation of FOIA, Muttitt has been forced to litigate to receive the requested records in a timely fashion. Had [the agencies] provided him with the estimated dates of completion he requested, he may have decided not to bring suit on one or more Causes of Action listed herein . . .”

First Am. Compl. ¶¶ 105, 111 (emphasis added).

The remedy provided by the FOIA adequately addresses violations of 5 U.S.C. § 552(a)(7)(B), by providing a mechanism for the release of withheld records — the ultimate goal of any requester seeking an anticipated release date. For that reason, this case is distinguishable from those upholding APA review of FOIA violations where the statutory provision at issue does not concern the agency’s disclosure of documents. In Public Citizen v. Lew, for example, plaintiffs alleged a violation of 5 U.S.C. § 552(g), which mandated that the head of each agency make the following materials publicly available: “(1) an index of all major information systems of the agency; (2) a description of major information and record locator systems maintained by the agency; and (3) a handbook for obtaining various types and categories of public information from the agency . . .” 5 U.S.C. § 552(g); see also Public Citizen, 127 F. Supp. 2d 1, 9 (D.D.C. 2000). Because this provision of the FOIA pertained to the publication of agency information systems and indexing processes, FOIA’s traditional remedy — the disclosure of improperly withheld material — was deemed inappropriate. See Public Citizen, 127 F. Supp.

Muttitt’s specific experiences with the State and Treasury Departments, and nowhere does plaintiff suggest that these incidents amounted to an unlawful pattern or regular procedure. As such, Payne is inapplicable.

2d at 7-9 (internal citation omitted). Instead, the court found that it had jurisdiction to review defendant's compliance with 5 U.S.C. § 552(g) under the APA. See id.

Public Citizen's rationale does not apply to plaintiff's claims under 5 U.S.C. § 552(a)(7)(b), a provision of the FOIA that directly concerns the release of responsive material. As the court in Thomas explained, where, as here, plaintiff's claims are based entirely on violations of the FOIA, APA review is unavailable. See Thomas, 2007 WL 219988 at *2. Therefore, the court should "construe [the] case as a FOIA action." Id.

II. Plaintiff's APA and/or FOIA Claims Challenging Unspecified Regulations, Guidelines, or Policy Statements Must Be Dismissed Because Plaintiffs Have Not Satisfied the Pleading Requirements of Fed. R. Civ. P. 8, and Do Not Challenge "Final Agency Action" Within the Meaning of the APA.

Plaintiff hypothesizes that if the State or Treasury Departments maintain regulations, guidelines, or policy statements that authorize the FOIA violations he alleges, these regulations, guidelines, or policy statements would constitute an unreasonable interpretation of the FOIA.

A. Plaintiff's Complaint Does Not Plead a Cause of Action Under Either the APA or the FOIA.

As an initial matter, plaintiff has not satisfied the pleading standard established by the Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). In Iqbal, for example, the Supreme Court found that the Complaint, which alleged that FBI officials arrested him pursuant to an unconstitutional discriminatory policy, were conclusory and did not comply with Rule 8. See id. at 1951; see also Fed. R. Civ. P. 8(2). According to the Court, "[e]ven if the [C]omplaint's well-pleaded facts gave rise to a plausible inference that Iqbal's arrest was the result of unconstitutional discrimination, that inference alone would not entitle him to relief." Iqbal, 129 S. Ct. at 1941. The Court went on to hold that "[t]he plausibility standard . . . asks for more than a sheer possibility that a

defendant has acted unlawfully.” *Id.* at 1949; *see also* *Gregg*, 771 F.2d at 547 (a “court must dismiss a [C]omplaint where, even assuming all of the factual allegations are true, the plaintiff has failed to establish a right to relief based on those facts”). Like the situation in *Iqbal*, plaintiff Muttitt’s allegations in paragraphs 104 and 110 do no more than raise the possibility of agency misconduct. Plaintiff identifies neither an agency regulation nor a policy that authorizes a violation of 5 U.S.C. § 552(a)(7)(B). Rather, plaintiff argues that if such a regulation or policy exists, it would be arbitrary and capricious, and a violation of the FOIA. *See* First Am. Compl. ¶¶ 104, 110. This is precisely the type of “naked assertion” that *Iqbal* guards against.

B. Plaintiff Does Not Challenge “Final Agency Action” Within the Meaning of the APA.

Because plaintiff does not cite an existing agency regulation, guideline, or policy causing him harm, he fails to challenge “agency action,” and does not state a claim under §§ 702 and 704 of the APA. According to § 702 of the APA, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review.” 5 U.S.C. § 702. Agency action is defined by the APA as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). As the Supreme Court has held, under the terms of the APA, “the person claiming a right to sue must identify some ‘agency action’ that affects him in the specified fashion.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882 (1990) (emphasis in original); *see also* *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (plaintiff must “direct its attack against some “particular ‘agency action’ that causes it harm”) (quoting *Lujan*, 497 U.S. at 891). *See also, e.g., Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) (stating that federal courts are not authorized to review agency policy choices in the abstract).

Section 704 of the APA imposes an additional limitation, permitting judicial review only where the agency action in question is “final.” See 5 U.S.C. § 704. To be considered final, agency action must “mark the ‘consummation’ of the agency’s decisionmaking process,” and “be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” Bennett v. Spear, 520 U.S. 154, 178 (1997). In Lujan, the Court found that the “land withdrawal review program” that plaintiffs had challenged was not an identifiable agency action for purposes of review under the APA. See 497 U.S. at 898-99. According to the Court, plaintiffs could not “demand a general judicial review of the [agency’s] day-to-day operations.” Id. at 899. Likewise, the D.C. Circuit has consistently ruled that 5 U.S.C. § 704 bars challenges that are not directed at particular final agency actions. See, e.g., Fund for Animals, 460 F.3d at 18 (citation omitted) (recognizing that the term agency action is not “so all-encompassing as to authorize judicial review over everything done by an administrative agency”); Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin., 452 F.3d 798, 806-7 (D.C. Cir. 2006) (to be reviewable under the APA, challenged action must mark the consummation of agency’s decision-making process and have legal consequences).

Plaintiff’s challenge in this case falls far short of the “final agency action” standard announced in Lujan and clarified by Bennett. Plaintiff’s Complaint does not pinpoint a specific agency action — let alone a final agency action — by either defendant agency that permits a refusal to provide estimated document production dates.³ Instead, plaintiff frames his claim as a hypothetical, stating that should this Court find that the agencies maintain certain regulations or policies, they would amount to unreasonable interpretations of the FOIA. The APA’s limited

³ Furthermore, the agency actions plaintiff proposes to challenge have no meaningful “legal consequences.” Bennett, 520 U.S. at 178. Plaintiff had a right to judicial review after the agencies failed to respond to his requests within the statutory time-frame. The agencies’ failure to provide a date certain had no effect on plaintiff’s ability to seek relief under the FOIA for the withholding of records.

judicial review provision does not permit claims that merely speculate as to unlawful agency action. Because plaintiff fails to allege any concrete regulation, policy statement, or guideline that constitutes an abuse of discretion under the FOIA, plaintiff cannot maintain a cause of action with respect to these claims.

CONCLUSION

For the reasons set forth above, defendants' Partial Motion to Dismiss Plaintiff's Complaint should be granted. Plaintiff's APA claims, as well as any claims regarding unspecified "regulations, guidelines, or policy statements," see First Am. Compl. ¶¶ 104, 110, should be dismissed with prejudice.

Dated: June 1, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 1, 2010, a copy of the foregoing Partial Motion to Dismiss was served upon counsel of record by electronic means through electronic filing:

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