

**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)	
)	
Defendants.)	
)	

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

Plaintiff alleges that defendants, the U.S. Departments of State and Treasury, failed to provide estimated release dates for documents responsive to plaintiff’s requests under the Freedom of Information Act (“FOIA”). While plaintiff seeks relief for these claims under the Administrative Procedure Act (“APA”), he concedes that the APA does not provide a cause of action “where adequate remedies are already provided by another statute.” Plaintiff’s Memorandum in Opposition to Defendants’ Motion to Dismiss (“Pl. Opp.”) at 5; see also 5 U.S.C. § 704 (limiting APA review to situations where “there is no other adequate remedy in

court”). However, plaintiff maintains that the remedy offered by the FOIA — the production of any agency records improperly withheld from the plaintiff — is inadequate in this case. See 5 U.S.C. § 552(a)(4)(B). Plaintiff’s argument is without merit, particularly in light of his decision to explicitly seek judicial review under the APA and/or the FOIA. See First Amended Complaint (“First Am. Compl.”) ¶¶ 100-111. In fact, plaintiff’s request for an estimated date of completion, rather than being an end in itself, was prompted by his desire to receive responsive records. The agencies’ disclosure of requested information pursuant to the FOIA would constitute an adequate and complete remedy.

In addition, plaintiff’s reliance on Payne Enters., Inc. v. United States, 837 F.2d 486 (D.C. Cir. 1988) is misplaced. Payne confirmed the Court’s jurisdiction under the FOIA to declare a “sufficiently outrageous” agency policy or practice to be unlawful. See Payne, 837 F.2d at 494. Plaintiff’s Complaint, however, fails to allege the existence of a State or Treasury Department policy or practice of refusing to provide estimated dates of completion upon request. Rather than make that allegation, plaintiff’s Amended Complaint hypothesizes that any regulation, guideline, or policy statement authorizing the challenged agency action at issue would be arbitrary and capricious, and a violation of the FOIA. See First Am. Compl. ¶¶ 104, 110. Insofar as plaintiff’s allegations are wholly speculative, plaintiff fails to plead a cause of action with respect to these claims under either the FOIA or the APA. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (calling for “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face”). Furthermore, because the Complaint does not pinpoint any existing agency regulation, guideline, or policy statement, plaintiff fails to challenge “final agency action” within the meaning of the APA. See 5 U.S.C. §§ 702, 704.

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 Am. Compl. ¶¶ 104, 110, must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

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.

A. The Release of Improperly Withheld Records is an Adequate and Complete Remedy.

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 plaintiff does not dispute that his APA claims are based solely upon alleged violations of the FOIA. Moreover, plaintiff concedes the long line of authority in this Circuit holding that the dismissal of APA claims is appropriate where the FOIA provides an adequate alternative remedy. See Pl. Opp. at 5-6.

Rather, plaintiff asserts that the relief he seeks under the APA is not available under the FOIA. See Pl. Opp. at 6. Citing Public Citizen v. Lew, plaintiff argues that when an agency violates provisions of the FOIA that do not concern the agency's disclosure of documents, relief under the FOIA is incomplete. See Pl. Opp. at 6 (citing Public Citizen v. Lew, 127 F. Supp. 2d 1 (D.D.C. 2000)). In Public Citizen, however, 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 at 9. The FOIA provisions at issue pertained to the agency's obligation to publicize its information systems and indexing processes. In that case, the release of requested records pursuant to the FOIA would not have remedied plaintiff's claimed injury. See id. at 7-9 (internal citation omitted). For that reason, the court found that it had jurisdiction to review defendant's compliance with 5 U.S.C. § 552(g) under the APA. See id.

The FOIA provision at issue here, however, clearly implicates the production of responsive documents. Mr. Muttitt asks the Court to find that defendants violated the FOIA by refusing to provide estimated dates of completion for pending requests. First Am. Compl. ¶¶ 103, 109, 111. Plaintiff did not ask for these dates out of mere curiosity, but rather to anticipate a realistic production schedule. The agencies' failure to provide a definitive time-frame prompted Mr. Muttitt to seek the requested material through litigation. Thus, plaintiff's claimed injuries would be completely redressed via the FOIA's traditional remedy — the release of non-exempt responsive records pursuant to 5 U.S.C. § 552(a)(4)(B). See Defendants' Memorandum in Support of their Motion to Dismiss ("Def. Mem.") at 6 ("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[]" (citing 5 U.S.C. § 552(a)(4)(B))). This is the precise relief plaintiff seeks under the APA. See First Am. Compl. ¶¶ 105, 111.

Plaintiff maintains that defendants' interpretation of the FOIA renders the estimated completion provision superfluous. See Pl. Opp. at 7 ("Nowhere in the FOIA can one find a means to compel an agency to provide a requester with an estimated date of completion."). Plaintiff mistakenly assumes, however, that when Congress amended the FOIA in 2007 to include this customer service provision, it created a right that is subject to a remedy distinct from

the production of records. In fact, the legislative history of this provision indicates that the Senate added this provision to the FOIA to facilitate the release of responsive documents. See S. Rep. No. 110-59, at 3 (2007) (“The OPEN Government Act addresses concerns with lax FOIA enforcement and compliance by helping Americans obtain timely responses to their FOIA requests”) (emphasis added). Moreover, plaintiff’s argument depends upon the unlikely proposition that a requester would sue to obtain an estimated production date without also seeking the release of requested records. Yet plaintiff himself admits that the purpose of his suit is the production of responsive documents from the State and Treasury Departments:

“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).

Therefore, the remedy provided by the FOIA adequately addresses violations of 5 U.S.C. § 552(a)(7)(B), by providing for the release of withheld records — the primary objective of any requester who, like Mr. Muttitt, seeks an anticipated release date. See Garcia v. Vilsack, 563 F.3d 519, 522 (D.C. Cir. 2009) (internal citation omitted) (an alternative review procedure 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”); 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).

Because “the essence of [p]laintiff’s claims . . . is that federal agencies improperly [withheld] documents requested by him,” the Court should review plaintiff’s claims under the

FOIA itself. Thomas v. Fed. Aviation Admin., No. 05-2391, 2007 WL 219988 at *2 (D.D.C. Jan. 25, 2007).

B. Plaintiff's Reliance on Payne Enterprises, Inc. v. United States is Misplaced Because Plaintiff Does Not Allege an Agency "Pattern or Practice" in Violation of the FOIA.

Defendants acknowledge that a Court may award broad equitable relief under the FOIA in exceptional and egregious circumstances. In Payne Enterprises, Inc. v. United States, for example, the D.C. Circuit found that the Air Force Logistic Command's ("AFLC") practice of unjustified delay in releasing bid abstracts violated the FOIA. See 837 F.2d at 494. The court emphasized that the Air Force was following an "impermissible practice in evaluating FOIA requests, and that [plaintiff] would suffer continuing injury due to this practice." 837 F.2d at 491 (internal quotations omitted). The agency's unjustified pattern of non-compliance specifically entitled the plaintiff to declaratory relief: "[s]o long as the agency's refusal to supply information evidences a policy or practice of delayed disclosure . . . a party's challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit." Id.

In contrast to the factual circumstances in Payne, plaintiff's Complaint does not allege that defendants maintain a practice of refusing to provide tentative request completion dates. See Def. Mem. at 6, n. 2. Rather, plaintiff points only to his specific experiences with the State and Treasury Departments. Id.; see also First Am. Compl. ¶¶ 100-103, 106-109. For example, plaintiff states that he requested estimated dates on which the Department of State would complete processing of five discrete FOIA requests. See Pl. Opp. at 3. The agency responded to three of those inquiries, informing plaintiff that while it would not provide a date certain, the agency could pinpoint each request's place in the processing queue. See id. The State Department did not reply to the two remaining inquiries. See id. As to the Department of the

Treasury, plaintiff asked for a tentative production date for the FOIA request that is the subject of his Amended Complaint. See id. at 4. The agency did not respond directly, see id., but produced documents responsive to plaintiff's request on February 23, 2010. Plaintiff has presented no evidence that his singular experience with the Department of the Treasury is part of a larger pattern or practice.

Plaintiff seeks to remedy the deficiencies evident in his First Amended Complaint after having read defendants' procedural arguments. In his opposition brief, plaintiff claims that he has "clearly" alleged the State and Treasury Department's actions are "part of an agency pattern or practice." Pl. Opp. at 9. Plaintiff then cites to the Complaint's Prayer for Relief, which merely asks the Court to order the agencies to amend their regulations, guidelines, and policy statements if any are found to authorize a refusal to provide estimated completion dates. See First Am. Compl. ¶ 111. In addition, plaintiff has improperly supplemented his Complaint with declarations indicating that the State Department has failed to provide completion dates to requesters in the past. Mr. Muttitt had the opportunity to plead a pattern or practice in both his initial and First Amended Complaints. Having failed to do so, however, plaintiff should not be permitted to amend his Complaint a second time through opposition to defendants' motion to dismiss. See Calvetti v. Antcliff, 346 F. Supp. 2d 92, 107 (D.D.C. 2004) (refusing to permit plaintiffs to amend their complaint to properly allege a claim of conversion through opposition to defendants' motion to dismiss) (quoting Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv., 297 F. Supp. 2d 165, 170 (D.D.C. 2003) ("It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.)); see also Crowder v. Bierman, Geesing, & Ward LLC, No. 10-0104 (ESH), 2010 WL 2010851 at *3 (D.D.C. May 20, 2010) (declining to consider additional factual allegations raised in plaintiff's opposition brief because

“even if these allegations were sufficient to state a claim . . . plaintiff may not amend her complaint by the briefs in opposition to a motion to dismiss”).

Because plaintiff did not allege a policy or practice of refusing to provide estimated dates of completion, the equitable relief available under Payne would be inappropriate. See Payne, 837 F.2d at 491 (distinguishing between the issuance of “[a] declaration that an agency's initial refusal to disclose requested information was unlawful, after the agency made that information available, [which] would constitute an advisory opinion in contravention of Article III of the Constitution,” and a grant of equitable relief, following full disclosure, where an agency maintains an otherwise-unreviewable “policy or practice that will impair . . . lawful access to information in the future”). Therefore, the release of non-exempt requested material pursuant to 5 U.S.C. § 552(a)(4)(b) would afford complete relief for the claims asserted at paragraphs 103 and 109.

II. Plaintiff’s 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 readily admits that he is aware of “no specific regulations, guidelines, or policy statements” that authorize the State and Treasury Departments’ failure to provide estimated request completion dates. See Pl. Opp. at 9. Instead, he speculates that if the defendant agencies maintain such regulations, guidelines, or policy statements, they would constitute an unreasonable interpretation of the FOIA. See First Am. Compl. ¶¶ 104, 110 (emphasis added).

By structuring the claims in paragraphs 104 and 110 as a hypothetical, plaintiff ignores the pleading standard established by the Supreme Court in Ashcroft v. Iqbal, 129 S. Ct. at 1950 (2009) (“the plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully”). Plaintiff cites only specific instances of alleged misconduct, and asks the

Court to infer the existence of a regulation or policy statement permitting the agencies to refuse to provide tentative deadlines. According to Iqbal, which requires plaintiffs to raise more than a “plausible inference” of wrongdoing, see id., plaintiff has not pled a cause of action in paragraphs 104 and 110 under either the APA or the FOIA.¹

Moreover, the assertions in paragraphs 104 and 110 do not cite an agency regulation or policy causing plaintiff harm. As such, plaintiff fails to challenge “agency action,” pursuant to §§ 702 and 704 of the APA. See Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 882 (1990) (holding that “the person claiming a right to sue must identify some ‘agency action that affects him in the specified fashion’”); 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).

Finally, and as discussed infra Part I, the agencies’ failure to provide Mr. Muttitt with estimated completion dates should be analyzed under the FOIA. See First Am. Compl. ¶¶ 100-103, 106-109. However, even if the Court decides that bringing these claims under the APA was appropriate, the agencies’ failure to provide a date certain was without “legal

¹ Permitting discovery to explore whether the State or Treasury Departments maintain regulations, guidelines, or policy statements of this nature would be improper. Judicial review under the APA is limited to the administrative record before the court. See Common Sense Salmon Recovery v. Evans, 217 F. Supp. 2d 17, 20 (D.D.C. 2002) (“[i]n the administrative law context courts uniformly have held that discovery typically is not permitted”); see also Marshall Cty. Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (challengers to agency action are not ordinarily entitled to augment the agency’s record with discovery). Similarly, discovery is “not favored in lawsuits under the FOIA,” absent a showing of bad faith on the part of the agency. Judicial Watch, Inc. v. U.S. Dep’t of Justice, 185 F. Supp. 2d 54, 65 (D.D.C. 2002). See also Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) (stating that “discovery is generally unavailable in FOIA actions”); Judicial Watch, Inc. v. Exp.- Imp. Bank, 108 F. Supp. 2d 19, 25 (D.D.C. 2000) (affirming that “discovery in a FOIA action is generally inappropriate”). Plaintiff has alleged no facts to support a finding of bad faith in this case.

consequence,” and cannot constitute “final agency action” under 5 U.S.C. § 704.² See Bennett v. Spear, 520 U.S. 154, 178 (1997) (to be considered final, agency action must “mark the consummation of the agency’s decision-making process,” and “must be one by which rights or obligations have been determined, or from which legal consequences will flow.”) Once the FOIA’s twenty-day response deadline had passed, Mr. Muttitt’s claims were ripe for judicial review. By asserting his right to the requested records under the FOIA in this case, plaintiff was able to secure a production schedule from the State and Treasury Departments for the release of records. The agencies’ initial failure to provide Mr. Muttitt with processing deadlines had no effect on plaintiff’s ability to seek judicial relief under the FOIA for the withholding of records.

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, guidance, or policy statements,” see First Am. Compl. ¶¶ 104, 110, should be dismissed with prejudice.

Dated: June 22, 2010

Respectfully submitted,

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² Furthermore, courts have yet to interpret the nature of an agency’s legal obligations under 5 U.S.C. §552(a)(7)(B)(ii). Presumably, an agency could comply with the FOIA by detailing the requester’s place in the queue and explaining the average time-frame for producing documents once the requester is first in line. As plaintiff concedes, the State Department provided this information to Mr. Muttitt with respect to three of his requests. See Pl. Opp. at 3.

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CERTIFICATE OF SERVICE

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