

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

_____)	
NATIONAL SECURITY COUNSELORS,)	
)	
Plaintiff,)	
)	
v.)	No. 1:11-cv-00443 (BAH)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant,)	
_____)	

**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS CLAIMS
ONE AND TWO OF PLAINTIFF’S COMPLAINT**

INTRODUCTION

Plaintiff National Security Counselors (“NSC”) filed this action against the Central Intelligence Agency (“CIA”), asserting claims under the Freedom of Information Act, 5 U.S.C. § 552; the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et. seq.*; the Federal Declaratory Judgment Act, 28 U.S.C. § 2201; and the All Writs Act, 28 U.S.C. § 1651.

CIA now moves to dismiss Claims One and Two of NSC’s complaint under Federal Rules of Civil Procedure 12(b)(1) and (6) for lack of jurisdiction and failure to state a claim. NSC’s first cause of action, a FOIA records-denial claim, fails because it is based on a FOIA request filed by another organization. Because standing to bring a FOIA action is limited to the party who filed the contested FOIA request, NSC lacks standing to bring its claim. NSC’s second cause of action, challenging the CIA’s policy of refusing to recognize the assignment of FOIA rights, similarly fails. NSC brings its challenge under the FOIA, the APA, and the All Writs Act. But, as the FOIA only creates legal rights for those who file FOIA requests, and NSC

did not file the FOIA requests at issue, NSC cannot show the injury-in-fact necessary to establish standing. Even if NSC had standing to bring its second claim, that claim should be dismissed under Rule 12(b)(1) for lack of subject-matter jurisdiction and under Rule 12(b)(6) for failure to state a claim.

BACKGROUND

In April 2008, the James Madison Project (“JMP”) submitted a FOIA request to the CIA seeking eleven articles that were originally published in the CIA journal *Studies in Intelligence*. Compl., ¶6. Kel McClanahan, JMP’s Director of FOIA Operations, filed the request on JMP’s behalf. Id. The CIA assigned the request number F-2008-01105 and, on February 27, 2009, released to JMP ten responsive articles. Id. at ¶ 7. Five of the articles contained redactions based on FOIA exemptions (b)(1), (b)(2) and (b)(3). Id. at ¶ 8. On April 13, 2009, JMP administratively appealed the CIA’s invocation of the FOIA exemptions. Id. at ¶ 8.

On July 31, 2009, Mr. Mclanahan left JMP and chartered NSC, the plaintiff in this action. Id. at ¶ 11. On May 25, 2010, NSC sent a letter to the CIA, claiming that JMP had assigned it all rights in FOIA request F-2008-01105. Id. at ¶ 13. NSC also sought to amend the appeal JMP had filed challenging the CIA’s invocation of FOIA exemptions. Id. NSC claims that, in June 2010, it was informed that the CIA does not recognize the assignment of FOIA rights. Id. at ¶ 15.

On February 28, 2011, NSC filed this suit against the CIA. Compl. NSC’s complaint contains three causes of action. Id. The first is a FOIA records denial claim in which NSC asserts that the CIA has withheld information that it should have provided to NSC in response to FOIA request F-2008-01105. Id. at ¶¶ 5-17. The second cause of action is a

“FOIA/APA/MANDAMUS” claim challenging the CIA’s alleged policy of not recognizing the assignment of FOIA rights. *Id.* at ¶¶ 18-28. The third cause of action is a FOIA constructive denial claim based on a FOIA request that NSC submitted to the CIA in May of 2010. *Id.* at ¶¶ 29-33.¹

STANDARD OF REVIEW

When a defendant brings a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of establishing by a preponderance of the evidence that the court has subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In determining whether the plaintiff has carried its burden, the Court must accept as true all of the factual allegations contained in the complaint. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997). A core element of the case-or-controversy requirement is that a plaintiff must establish that it has standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In order to satisfy the “irreducible constitutional minimum of standing,” a plaintiff must demonstrate: (1) that it has suffered injury in fact, an actual or imminent invasion of a legally protected, concrete and particularized interest; (2) a causal connection between the alleged injury and the defendant's conduct at issue; and (3) that it is “likely,” not “speculative,” that the court can redress the injury. *Id.* at 560–61.

¹ The CIA is not moving to dismiss Claim Three at this time. The parties have conferred regarding this claim and will set a summary judgment briefing schedule at the appropriate time if necessary.

“To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, acceptable as true, to state a claim to relief that is plausible on its face.” Anderson v. Holder, 691 F. Supp. 2d 57, 61 (D.D.C. 2010) (brackets omitted). A court considering a Rule 12(b)(6) motion must construe the complaint in the light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. In re United Mine Workers of Am. Employee Benefit Plans Litig., 854 F. Supp. 914, 915 (D.D.C. 1994). However, where the well-pleaded facts do not permit a court, drawing on its judicial experience and common sense, to infer more than the “mere possibility of misconduct,” the complaint has not shown that the pleader is entitled to relief. Ashcroft v. Iqbal, ---U.S. ---, 129 S.Ct. 1937, 1949, 1950, 173 L.Ed.2d 868 (2009).

ARGUMENT

1. NSC lacks standing to challenge the denial of a FOIA request it did not submit.

Under the FOIA, “any person” may request documents from a government agency. 5 U.S.C. § 552(a)(3). If the agency determines that it will not comply with the FOIA request, it must notify “the person making such request” of its decision and the “right of such person to appeal” the decision within the agency. 5 U.S.C. § 552(a)(6)(A)(i). If the agency denies an appeal, it must “notify the person making such request of the provisions for judicial review” of the agency’s decision not to comply with the FOIA request. 5 U.S.C. § 552(a)(6)(A)(i).

Based on this language, “[a]ny person who submitted a FOIA request for existing documents that the petitioned agency denied has standing to bring a FOIA challenge.” Three Forks Ranch Corp. v Bureau of Land Mgmt., 358 F. Supp. 2d 1, 2 (D.D.C. 2005). “The requester is injured-in-fact for standing purposes because he did not get what the statute entitled

him to receive.” Zivotofsky ex rel. Ari Z. v. Sec’y of State, 444 F.3d 614, 617-18 (D.C. Cir. 2006). Conversely, “courts have held that a plaintiff whose name does not appear on a FOIA request lacks standing to challenge its denial, because she has not made a formal request within the meaning of the statute and, therefore, has not administratively asserted a right to receive the documents in the first place.” Feinman v. FBI, 680 F. Supp. 2d 169, 173 (D.D.C. 2010) (quotations omitted); see, e.g., SAE Productions, Inc. v. F.B.I., 589 F. Supp.2d 76, 80 (D.D.C.2008) (finding that a corporation lacked standing where the corporation’s president did not indicate that he was submitting the FOIA request on the corporation’s behalf); Three Forks Ranch, 358 F. Supp.2d at 3 (holding plaintiff lacked standing to bring FOIA claims where “it is not clear that the request is being made on behalf of” the plaintiff).

NSC does not allege in its complaint that its name appeared on the FOIA request that is at issue in Claim One – FOIA request F-2008-01105. That request was filed by JMP, and NSC does not have a legally enforceable interest in it. Without a legal interest, NSC cannot show that it has suffered an injury-in-fact and cannot establish standing to challenge the CIA’s decision to invoke FOIA exemptions in its response to FOIA request F-2008-01105. Because NSC does not have standing to bring Claim One, that claim should be dismissed for lack of jurisdiction.

2. NSC cannot create standing by claiming it was assigned FOIA rights.

NSC attempts to address its lack of standing by claiming that it was assigned JMP’s FOIA rights to request F-2008-01105. But the FOIA does not speak to the assignment of FOIA rights and both case law and strong policy concerns counsel against permitting such assignments. In a recent case in this district, Judge Huvelle declined to permit the assignment of FOIA rights. Feinman, 680 F.Supp. 2d at 176. In reaching her decision, Judge Huvelle noted that the identity

of a FOIA requester is important when agencies are determining whether fees should be assessed for the costs of searching, duplicating, and reviewing requested information. Id. at 175.

Permitting the assignment of FOIA rights could undermine the FOIA fee structure by “allowing requesters who need not pay certain fees to ‘share’ their status, via assignment, with potential plaintiffs who would otherwise be required to those fees.” Id. Allowing the assignment of FOIA rights could also complicate agency decisions regarding whether to invoke exemptions based on privilege protections, as certain privileges should not be invoked against “first party” requesters. Id.

In addition, Judge Huvelle observed that assignments “would multiply opportunities for mistakes and mischief, particularly since FOIA requests need not be made with the assistance of counsel” and provided several examples of the types of problems that permitting the assignment of FOIA rights could create. Id. Many FOIA administrators are already overworked, and it would be unreasonable to force them to verify the validity of every claimed assignment. Id. Ultimately, Judge Huvelle concluded that “the agency’s burden to verify the validity of an assignment in each instance is greater than the minimal burden on any given assignee to make her own FOIA request.” Id.

Defendants have not found any cases permitting the assignment of FOIA rights, and, as Judge Huvelle observed, strong public policy considerations weigh against permitting such assignments. Feinman, 680 F.Supp.2d at 176 (“Neither the Court nor the parties have located any cases on point, but strong policy concerns counsel against permitting assignments.”). There is nothing stopping NSC from filing a FOIA request with the CIA identical to request F-2008-01105. And if it were to do so, NSC would clearly have standing to challenge any exemptions

the CIA might assert in response. But NSC does not have standing to challenge the denial of a FOIA request it did not submit and should not be allowed to manufacture standing by claiming that it was assigned JMP's FOIA rights.

3. NSC does not have standing to bring its second claim because it cannot establish an injury-in-fact.

In its second claim, NSC challenges the CIA's alleged policy of not recognizing the assignment of FOIA rights. But NSC does not have standing to bring that claim because it cannot show that it has suffered an injury-in-fact. To establish that it has suffered an injury-in-fact, a plaintiff must show "an actual or imminent invasion of a legally protected, concrete and particularized interest." Lujan, 504 U.S. at 561. The FOIA grants parties that file FOIA requests a legal interest in receiving the information they have requested. See Zivotofsky, 444 F.3d at 617-18. If the request is denied, the requester suffers an injury-in-fact for standing purposes because the denial harms the requester's legal interest in receiving the information. Id.

In Claim Two, NSC asserts that it was injured by the CIA's alleged policy because it was forced to file this lawsuit to validate its interests in F-2008-01105. Compl., ¶ 25. NSC also claims that the CIA's alleged policy will harm it in the future because "JMP assigned its rights in a total of five (5) CIA request to NSC." Id. at ¶ 25. But because it did not submit the FOIA requests it references, NSC lacks a legal interest in receiving information responsive to those requests. And as established above, NSC should not be allowed to acquire FOIA interests by alleging that it was assigned them by the actual FOIA requester. Because NSC does not have any enforceable rights or interests in the FOIA requests it references in Claim Two, it cannot establish that the CIA's alleged policy has harmed or will harm "a legally protected, concrete and particularized interest." Lujan, 504 U.S. at 561. As NSC cannot establish an injury-in-fact,

it does not have standing to bring its second claim and that claim should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

4. Even if NSC had standing, the Court does not have jurisdiction to hear the APA and Mandamus components of NSC's claim.

NSC has packaged Claim Two as a “FOIA/APA/Mandamus” claim. Compl.1. Yet even if NSC had standing to bring this claim, the Court would not have jurisdiction to hear NSC’s APA and Mandamus challenges. The Administrative Procedure Act allows for judicial review only of “final agency action[s] for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. This Court has repeatedly held that an APA claim must be dismissed if it either is premised on a violation of FOIA or seeks relief that can be obtained through a FOIA claim. See, e.g., Kenney v. U.S. Dep’t of Justice, 603 F. Supp. 2d 184, 190 (D.D.C. 2009) (“Plaintiff’s claim that the [Defendant] improperly withheld agency records that were responsive to his FOIA request is, of course, reviewable under the FOIA itself. Accordingly, plaintiff does not also have access to judicial review under the APA.” (internal citations omitted)); Sierra Club v. U.S. Dep’t of the Interior, 384 F. Supp. 2d 1, 30 (D.D.C. 2004) (“The FOIA itself provides an adequate remedy for Plaintiffs’ claims and separate APA review is not available.”); see also, e.g., Physicians Comm. for Responsible Med. v. U.S. Dep’t of Health and Human Servs., 480 F. Supp. 2d 119, 121 n.2 (D.D.C. 2007) (dismissing APA claim because “[a]lthough the APA governs judicial review generally of ‘final agency action,’ review under the APA is limited to those agency actions for which there is no adequate remedy in court. There is, of course, an adequate remedy in court under FOIA.” (internal citations omitted)); Edmonds Inst. v. U.S. Dep’t of the Interior, 383 F. Supp. 2d 105, 111 (D.D.C. 2005) (holding that “review under the APA is unavailable” where “[t]he FOIA statute offers a clear and simple remedy for” the alleged

“agency non-compliance with the FOIA”). NSC’s second claim suffers both these infirmities; it is premised on alleged violations of the FOIA and seeks relief that could be obtained under the FOIA. Because the FOIA offers an adequate remedy in Court, NSC’s APA claim should be dismissed.

Similarly, mandamus is a drastic remedy that is only to be invoked in extraordinary circumstances; it is only available if (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff. Fornaro v. James, 416 F.3d 63, 69 (D.C.Cir. 2005). None of those requirements is met here. NSC does not have a clear right to relief; the CIA does not have a clear duty to act; and there is another adequate remedy available under the FOIA.

5. Even if NSC could overcome its jurisdictional shortcomings, it has failed to state a claim upon which relief can be granted.

Even if NSC can show that the CIA has a policy of not recognizing the assignment of FOIA rights, such a policy would be consistent with the only case to have addressed the assignment of FOIA rights. See Feinman, 680 F. Supp. 2d at 176 (“Neither the Court nor the parties have located any cases on point, but strong policy concerns counsel against permitting assignments.”). As the CIA’s alleged policy does not violate the FOIA or any rights or interests created under it, NSC cannot show that it has been or will be harmed or is entitled to relief. Accordingly, Claim Two should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

CONCLUSION

For all the reasons stated above, Counts One and Two of NSC’s complaint should be dismissed.

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Respectfully submitted,

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