

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

NATIONAL SECURITY COUNSELORS, \*

\*

Plaintiff, \*

\*

v. \*

Civil Action No. 1:11-cv-00444 (BAH)

CENTRAL INTELLIGENCE AGENCY, \*

\*

Defendant. \*

\*

\* \* \* \* \*

**PLAINTIFF’S MOTION FOR A STAY OF BRIEFING OF PORTIONS OF  
DEFENDANT’S PARTIAL MOTION TO DISMISS PLAINTIFF’S  
FIRST AMENDED COMPLAINT**

Plaintiff hereby respectfully requests a stay of the briefing of the portions of Defendant’s Partial Motion to Dismiss Plaintiff’s First Amended Complaint (filed May 27, 2011) which allege that Plaintiff has failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure for Counts 2-4 and 11-13 of Plaintiff’s First Amended Complaint (“FAC”) on the basis of the reasonableness of the alleged policies. Plaintiff requests that the Court stay the briefing on these issues until briefing has been completed on Defendant’s forthcoming Motion for Partial Summary Judgment<sup>1</sup> on Counts 1, 8, 9, and 10 of the FAC.

Plaintiff has good cause to request this stay. Counts 2-4 of the FAC are challenges to Defendant’s policy, pattern, or practice that was used to reach the determination it made with respect to the FOIA request that is the subject of Count 1, and Counts 11-13 are challenges to Defendant’s policy, pattern, or practice that was used to reach the determinations it made with respect to the FOIA requests that are the subject of Counts 8-10. As of this writing, Defendant

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<sup>1</sup> The parties have not yet established a briefing schedule for any Summary Judgment motions.

has provided neither Plaintiff nor the Court with no information regarding the reasons for its determinations with respect to these four FOIA requests, information which it asserts it is not required to provide until it submits a Motion for Partial Summary Judgment and accompanying sworn declarations.<sup>2</sup> Until Defendant files this Motion, then, Plaintiff is left arguing the impropriety of an apparent pattern or practice without knowing exactly what the parameters of said pattern or practice *are*.

By asking the Court to rule on the respective reasonableness of these practices before providing the Court any information *about* the practices, Defendant has “put the cart before the horse” and turned the entire concept of *Payne*-style review (*Payne Enters. v. United States*, 837 F.2d 486 (D.C. Cir. 1988)), which traditionally renders a judgment on a particular action before reaching the question of whether the action was the result of a pattern or practice, and whether said pattern or practice was “outrageous” enough to warrant declaratory or injunctive relief, on its head. Until more information is provided about Defendant’s specific actions and the reasons for them, arguing over the reasonableness of an ambiguous policy, pattern, or practice of unknown scope would be nothing more than an exercise in speculation. Moreover, if the Court *were* to rule on the reasonableness of either of these practices before Defendant filed its Motion for Partial Summary Judgment on Counts 1, 8, 9, and 10, Defendant would certainly argue that those Counts should also be dismissed without review in light of the Court’s opinion on the policy behind Defendant’s actions, thereby successfully evading *any* judicial review of any of its specific actions on this issue.

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<sup>2</sup> Since the pending Motion is seeking dismissal under Rules 12(b)(1) and 12(b)(6), as opposed to summary judgment under Rule 56, declarations from agency officers would be out of place in this briefing in any case.

Were the Court to grant this Motion, the briefing on Defendant's Partial Motion to Dismiss Plaintiff's First Amended Complaint would be limited to the following:

1. All of Defendant's Rule 12(b)(1) arguments;
2. All of Defendant's arguments regarding Counts 5-7, 14-16, and 21 of the FAC;  
and
3. Defendant's Rule 12(b)(6) arguments regarding Counts 3-4 and 12-13 of the FAC  
which allege that FOIA provides an adequate alternative remedy.

Defendants oppose this Motion. A proposed Order also accompanies this Motion.

Date: June 9, 2011

Respectfully submitted,

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