

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

NATIONAL SECURITY COUNSELORS,)	
)	
Plaintiff,)	
)	
v.)	No. 1:11-cv-00444 (BAH)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant,)	
)	

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

INTRODUCTION

Plaintiff National Security Counselors (“NSC”) filed this action against the Central Intelligence Agency (“CIA”), asserting twenty-one Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and FOIA-related claims. Thirteen of those claims challenge alleged CIA policies or practices, rather than the Agency’s response to specific FOIA requests. On May 27, 2011, CIA moved to dismiss the thirteen “policy and practice” claims, providing three alternative grounds for dismissal. First, CIA argued that the policy and practice claims brought under the Administrative Procedure Act (“APA”) and Mandamus Act should be dismissed because NSC had failed to establish that it is entitled to APA or Mandamus review.¹ Second, CIA argued that

¹ NSC’s Counsel contacted Defense Counsel to clarify that although he listed CIA’s APA and Mandamus arguments as Rule 12(b)(6) arguments in NSC’s Stay Motion and Proposed Order, he was referring to the Rule 12(b)(1) APA and Mandamus arguments that were raised as the first grounds for dismissal in CIA’s Motion to Dismiss.

the policy and practice claims should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction because the future injuries that NSC alleges are too speculative to present a case or controversy as required by the Constitution. Third, CIA argued that NSC's policy and practice claims should be dismissed under Rule 12(b)(6) because they fail to state a claim upon which relief can be granted.

NSC now asks the Court to stay briefing on some of CIA's Rule 12(b)(6) arguments because the policy and practice claims at issue are related to separate FOIA denial and constructive denial claims in NSC's Complaint. NSC argues that the Court should first receive the CIA's Motion for Summary Judgment on the denial and constructive denial claims because the litigation of those claims will provide both NSC and the Court with the information necessary to properly adjudicate the Rule 12(b)(6) arguments CIA raised in its motion to dismiss. But NSC's motion underscores that it has failed to properly plead policy and practice claims and lacks standing to seek prospective relief. As staying this action until the parties have submitted summary judgment motions on the FOIA denial and constructive denial claims will not fix the flaws in NSC's policy and practice claims, the Court should deny NSC's motion for a stay and grant the CIA's motion for summary judgment on NSC's policy and practice claims.

ARGUMENT

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 879 n. 6 (1998). In determining whether to grant a stay, “the [C]ourt, in its sound discretion, must assess and balance the nature and substantiality of the injustices claimed on either side.” Gordon v. FDIC,

427 F.2d 578, 580 (D.C. Cir. 1980). The party requesting a stay must make out a “clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.” Feld Entm't v. Am. Soc'y for the Prevention of Cruelty to Animals, 523 F.Supp.2d 1, 2–3 (D.D.C. 2007).

NSC argues that the Court should stay consideration of some of CIA’s 12(b)(6) arguments for dismissal of NSC’s policy and practice claims because NSC cannot properly respond to those arguments until the parties have submitted briefing on related FOIA denial and constructive denial claims. The only case that NSC cites in its Stay Motion is Payne Enter. v. United States, 837 F.2d 486 (D.C. Cir. 1988). But NSC’s reliance on Payne is misplaced. In Payne, the Air Force acknowledged that for almost two years it had a policy and practice of improperly refusing to release documents in response to the plaintiff’s FOIA requests until the plaintiff went through a lengthy administrative appeal process. Id. at 494. The D.C. Circuit observed that the Air Force had effectively been using the “FOIA offensively to hinder the release of non-exempt documents” and concluded that in such extreme situations equitable relief was appropriate. Id. at 495 (quoting Long v. IRS, 693 F.2d 907, 910 (9th Cir.1982)). NSC has not pled and cannot show that the CIA has participated in this type of consistent, intentional violation of the text and spirit of the FOIA. Moreover, summary judgment briefing on a handful of related FOIA denial and constructive denial claims will not cure the deficiencies in NSC’s practice and policy claims. As policy and practice review is not appropriate in this case, NSC’s motion for a stay should be denied, and its policy and practice claims should be dismissed.

NSC’s motion also highlights another problem with its policy and practice claims: they are too speculative and conjectural to be adjudicated independently. NSC acknowledges as

much in its motion: “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.” Motion for Stay, Dkt No. 11, pg. 2. To have standing to seek the type of prospective relief that NSC seeks in its policy and practice claims, a plaintiff must show a threat of injury that is “both real and immediate, not conjectural or hypothetical.” City of Los Angeles v. Lyons, 461 U.S. 95, 102-03 (1983). As demonstrated by its stay motion, NSC cannot make that showing, and its policy and practice claims should be dismissed.

Staying consideration of CIA’s Rule 12(b)(6) arguments until the Court has adjudicated the FOIA denial and constructive denial claims will not fix the flaws in NSC’s policy and practice claims. As such, the stay NSC seeks would be both unnecessary and futile.

CONCLUSION

For the reasons set forth above, NSC’s motion to stay consideration of certain of CIA’s 12(b)(6) arguments should be denied.

Dated: June 17, 2011

Respectfully submitted,

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