

**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,)	
)	

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

In its Partial Motion to Dismiss, Defendant Central Intelligence Agency (“CIA”) established that NSC’s claims that are not directly tied to specific Freedom of Information Request (“FOIA”) requests – Counts 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, and 21 – should be dismissed on multiple grounds. First, NSC’s Administrative Procedure Act (“APA”) and Mandamus claims should be dismissed because NSC has an adequate remedy under the FOIA. Second, NSC lacks standing to bring its policy challenges because its allegations are not sufficient to show the real and immediate danger of future injury necessary to establish standing to seek prospective relief. Third, even if NSC’s allegations are accepted as true, its policy challenges fail to state plausible claims for relief.

In its Opposition, NSC acknowledges that its FOIA, APA and Mandamus Counts are duplicative but argues that it is entitled to policy review under at least one of the three statutes. But NSC’s argument cannot overcome the defects in its claims. NSC has not pled and cannot show that the CIA has engaged in the type of consistent, intentional violations of the FOIA that

demonstrate an inability or unwillingness on the part of the agency to change policies or practices that are inconsistent with the FOIA and trigger FOIA policy and practice review. NSC has also failed to explain why APA and Mandamus review are not precluded by NSC's ability to challenge the CIA's FOIA policies by filing records denial claims.

NSC attempts to remedy the deficiencies in its standing to seek prospective relief by alleging that it has taken actions since filing the complaint that demonstrate a real and immediate danger of future injury. But standing is determined based on the facts as they existed when the complaint was filed, and NSC's post-complaint actions are irrelevant to whether it has standing to bring its claims. Finally, NSC attempts to rebut the CIA's argument that NSC has failed to state plausible claims for relief by citing to inapposite case law and making sweeping policy arguments. But NSC fails to address the controlling statutes, regulations and cases cited in the CIA's motion and is unable to show why its claims should not be dismissed under Rule 12(b)(6).

Because NSC is not entitled to policy and practice review under the FOIA, APA or Mandamus Act, the Court should dismiss NSC's policy counts. But even if the Court determines that NSC can get policy review under one of the three statutes, it should still dismiss the policy claims because NSC lacks both constitutional and prudential standing and has failed to state plausible claims upon which relief can be granted.

I. NSC Is Not Entitled to Policy Review under the FOIA, APA, or Mandamus Act.

In its Partial Motion to Dismiss, the CIA established that NSC's APA and Mandamus counts should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction because

there is another adequate remedy under the FOIA.¹ In its Opposition, NSC offers only a tepid rebuttal, asserting that the Court “may” have jurisdiction² to hear its APA and Mandamus claims. Opposition at 4. Rather than meeting its burden of showing that the Court has jurisdiction over its claims, See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992), NSC argues that it brought duplicative claims under the FOIA, APA and Mandamus Act “simply to give the Court a choice of authorities.” Opposition at 7-8. NSC’s assertion that it is entitled to pursue its policy challenges under at least one of the three statutes it has invoked is insufficient to establish that the Court has jurisdiction over its APA and Mandamus counts and is legally incorrect.

As an initial matter, NSC is not entitled to policy and practice review under the FOIA. Prospective relief under the FOIA is available only in extraordinary circumstances. NSC argues that it may be entitled to FOIA policy and practice review based on the D.C. Circuit’s decision in Payne Enter. v. United States, 837 F.2d 486 (D.C. Cir. 1988). Opposition at 4-8. But the Payne Court was clear that FOIA plaintiffs are only entitled to prospective relief when an agency is unwilling or unable to end a policy that violates the FOIA. 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

¹ CIA also showed that NSC’s Mandamus counts should be dismissed because NSC does not have a clear right to relief and the CIA does not have a clear duty to act. These arguments, however, related to the merits of NSC’s Mandamus counts and are more properly raised under Rule 12(b)(6). See In re Medical Reimbursement Litigation, 414 F.3d 7, 10 (D.C. Cir. 2005).

² Although NSC actually argues that “[t]he Court may have standing to hear NSC’s APA and Mandamus Counts,” Opposition at 4, its arguments appear to more accurately directed at whether the Court has *jurisdiction* to hear its APA and Mandamus counts.

had effectively been using the “FOIA offensively to hinder the release of non-exempt documents.” Id. at 495 (quoting Long v. IRS, 693 F.2d 907, 910 (9th Cir.1982)). Because the Air Force appeared to be both unable and unwilling to end the practice, the Court concluded that the plaintiff was entitled to prospective relief: “The Secretary’s inability to deal with [the Air Force Logistic Command] officers’ noncompliance with the FOIA, and the Air Force’s persistent refusal to end a practice for which it offers no justification, entitle Payne to declaratory relief .” Id. As explained in the CIA’s Partial Motion to Dismiss and again below, the alleged policies and practices that NSC challenges in this action do not violate the FOIA. But even if they did, NSC has not alleged and cannot show that the CIA would be unable or unwilling to change its policies if they were determined to be unreasonable through the litigation of FOIA records denial claims. Accordingly, NSC has not stated claims for prospective relief under the FOIA, and its FOIA policy and practice claims should be dismissed.

In its Opposition, NSC argues that if its FOIA policy and practice counts are dismissed, it is entitled to policy review under either the APA or Mandamus Act. Opposition at 7. But NSC’s argument is inconsistent with the APA and Mandamus Act and the cases interpreting them. Neither APA nor Mandamus review is available if there is another adequate remedy. See Kenney v.U.S. Dep’t of Justice, 603 F. Supp. 2d 184, 190 (D.D.C. 2009) (“[T]he APA provides for judicial review of final agency action only where ‘there is no other adequate remedy in a court.’ 5 U.S.C. § 704. Plaintiff’s claim that the EOUSA improperly withheld agency records that were responsive to his FOIA request is, of course, reviewable under the FOIA itself. See 5 U.S.C. § 552(a)(4)(B). Accordingly, plaintiff does not also have access to judicial review under the APA.”); Auburn Regional Medical Center v. Sebelius, 686 F.Supp. 2d 55, 71 (D.D.C. 2010)

(“ Under 28 U.S.C. § 1361, a court has jurisdiction to grant mandamus relief only 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.*’”) (emphasis added). In this action, NSC acknowledges that “[e]ach of the ‘pattern or practice’ counts is based on Defendant’s actions with respect to the FOIA requests being challenged in the ‘records denial’ counts which immediately precede it.” Opposition at 2. NSC does not explain, however, why its FOIA records denial counts, which challenge the same policies and practices as its policy counts but are based on specific FOIA requests, are not adequate remedies in court that preclude APA or Mandamus review.

The cases NSC cites in its Opposition do not support its claim that it is entitled to policy review under the APA or Mandamus Act. In arguing that its Mandamus counts should not be dismissed, NSC cites to Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 44 (D.D.C. 2002) and Citizens for Responsibility & Ethics in Wash. v. Exec. Office of the President, 587 F. Supp. 2d 48, 63 (D.D.C. 2008). Tellingly, neither of these cases addresses a Mandamus count brought to remedy a violation of the FOIA. Rather both cases address Mandamus counts brought to remedy violations of statutes that did not provide remedies for the violations. Judicial Watch, 219 F. Supp. 2d at 33 (Mandamus claim brought to remedy violation of the Federal Advisory Committee Act, 5 U.S.C. App. 2, which does not provide a private right of action); C.R.E.W., 587 2d at 62 (Mandamus claim brought to remedy violation of the Federal Records Act, which plaintiffs argued did not provide an “administrative means to challenge the defendants’ failure to comply” with the Act). The FOIA, on the other hand, permits a FOIA requester who believes that an agency has wrongfully withheld documents to bring a FOIA

records denial claim in federal court. See 5 U.S.C. § 552(a)(4)(B). The availability of a FOIA denial of records claim has led Courts in this district to conclude that “[t]he exclusive nature of the FOIA precludes mandamus relief.” Pickering-George v. Registration Unit, DEA/DOJ, 553 F.Supp.2d 3, 4 n.1 (D.D.C.2008); see also Taitz v. Obama, 707 F.Supp.2d 1, 5 (D.D.C 2010) (“Furthermore, her mandamus claim merely rehashes the claim she made under FOIA, and as another judge of this Court has noted, ‘[t]he exclusive nature of the FOIA precludes mandamus relief.’”) (quoting Strunk v. U.S. Dep’t of State, 693 F.Supp.2d 112, 113 n. 1 (D.D.C.2010) (Leon, J.)).

NSC’s citations with regard to its APA counts are equally unconvincing. While “NSC concedes the bulk of Defendant’s argument with respect to the applicability of the APA in most circumstances,” Opposition at 5., it cites to Public Citizen v. Lew, 127 F. Supp.2d 1 (D.D.C. 2010), as an example of a case in which the Court conducted APA review of an alleged violation of the FOIA. In Lew, however, the plaintiff alleged violations of FOIA § 552(g) that were outside the scope of FOIA records denial claims. Id. at 9 (“Other FOIA actions outside the scope of § 552(a)(4)(B), however, are reviewed under the standards set forth in § 706 of the APA.”). In this case, NSC has brought FOIA denial claims that challenge the same policies and practices that are at issue in its APA claims. Because NSC has an adequate remedy available under the FOIA, its APA claims should be dismissed. 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.”).

As NSC has failed to state a claim for FOIA policy review and is not entitled to policy review under the APA or Mandamus Act because the FOIA provides an adequate remedy in the form of records denial claims, the Court need go no further and should grant the CIA’s Motion and dismiss Counts 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, and 21.

II. NSC Lacks Both Constitutional and Prudential Standing to Bring Its Policy Claims.

The CIA established in its Partial Motion to Dismiss that NSC’s policy claims should be dismissed because NSC has not met its burden of establishing that it has standing to seek prospective relief. NSC responded in its Opposition by addressing at length an argument that the CIA did not make and attempting to use actions it has taken since filing its complaint to plug the gaps in its argument that it has sufficiently alleged a concrete threat of imminent future harm. Because standing is determined when a complaint is filed, NSC’s attempts to manufacture standing through actions it has taken since filing the complaint should be rejected, and its policy and practice claims should be dismissed.

In determining whether a plaintiff has met its burden of establishing standing, 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).

Accordingly, the CIA did not argue in its motion that the policies and practices that NSC alleges in its complaint do not exist.³ Such an argument, challenging NSC’s ability to prove its

³ The CIA did argue with respect to Counts 14, 15 and 16, that NSC’s own allegations show that the CIA does not have a policy of refusing to work with and offer suggestions to potential requesters. See Part III(E).

allegations, would be more appropriately presented to the Court in a motion for summary judgment. Nevertheless, NSC devoted seven pages of its Opposition to trying to prove the existence of the policies and practices alleged in its complaint. Opposition at 8-15. As those pages are not relevant to any of the arguments made in the CIA's Motion, they will not be addressed further here.

NSC then turns to the CIA's argument that it has not alleged a real and immediate danger of future injury sufficient to establish standing to seek prospective relief. See Chang v. United States, 738 F. Supp. 2d 83, 88 (D.D.C. 2010). Opposition at 15. NSC begins by attempting to distinguish the cases the CIA cited in its Partial Motion to Dismiss. First, NSC addresses this Court's decision in CREW v. U.S. Department of Homeland Security, 527 F. Supp. 2d 101 (D.D.C. 2007). NSC argues that CREW is different than this action because in CREW the plaintiff relied solely on an allegation that it was "subject to a continuing injury" because it would "continue to use the FOIA to gain access to agency records that relate to the propriety of government activity." Id. at 106; Opposition at 16. The plaintiff's allegation in CREW, however, is remarkably similar to NSC's allegation in this case: "As a frequent FOIA requester, NSC stands to continue to be harmed by this ongoing practice in the future." Compl. ¶¶ 12, 14, and 15. Neither allegation evinces a concrete plan to submit future FOIA requests to the defendant agencies that are likely to implicate the challenged policies and neither allegation is sufficient to establish standing to seek prospective relief.

NSC then turns to American Historical Association v. National Archives and Records Administration, 310 F. Supp. 2d 216 (D.D.C. 2004), and argues that the Court's decision was based on a specific fact pattern that is not present here. NSC is undoubtedly correct that the

Court in American Historical Society was faced with a claim involving the Presidential Records Act, not the FOIA, and the circumstances surrounding the case differ from those present here. But the American Historical Society Court's decision that the "significant likelihood" that the plaintiff would again seek access to presidential records and again be subject to delays in receiving them was insufficient to demonstrate a future injury that is "sufficiently imminent, and not conjectural and hypothetical," is directly applicable here, where NSC is attempting to rely on a similar allegation to establish standing to seek prospective relief. Id. at 228.

The decisions in CREW and American Historical Society are reinforced by the Court's recent decision in Quick v. Dep't of Comm., --- F.2d ----, 2011 WL 1326928 (D.D.C. April 7, 2011). In Quick, the plaintiff attempted to establish standing to pursue pattern and practice claims by alleging that he planned to submit FOIA requests to the defendant agencies in the future. The Court considered the plaintiff's allegations and concluded that the Supreme Court has foreclosed plaintiffs from relying on such speculative claims to establish standing:

Meanwhile, to the extent Quick seeks to establish his standing to pursue his "pattern or practice" claim by his passing allegation that he "plans to file additional FOIA requests to the NIST in the future," the Supreme Court has foreclosed that route: "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the [requisite] 'actual or imminent' injury."

Quick, --- F.2d ----, 2011 WL 1326928, *11 (quoting Lujan, 504 U.S. at 564). Rather than relying on a general allegation that he was a frequent FOIA requester, like NSC has in this action, the plaintiff in Quick alleged that he planned to file additional FOIA requests with the defendant agency. Yet the Court still concluded that the plaintiff had failed to show an actual or imminent injury and lacked standing to seek prospective relief. Like the plaintiff in Quick, NSC

has failed to claim the type of concrete plans required to establish standing to seek prospective relief.

After attempting to distinguish CREW and American Historical Society, NSC tries to address the deficiencies in its pleadings by alleging that it has taken actions since filing its complaint that show a real and imminent threat or future harm. For example, on pg. 18 of its Opposition, NSC alleges that it “has submitted *fifteen* FOIA requests to the CIA since the commencement of this litigation.” (emphasis in original). Later, on the same page, NSC claims that it “has filed several FOIA requests for aggregate data with other agencies during this litigation.” And, on page 19, NSC alleges that it “submitted two more requests since the commencement of this litigation for material that Defendant determined to ‘not reasonably describe the records sought.’”

These allegations of post-complaint actions, however, are not relevant to whether NSC has standing to seek prospective relief. “As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint.” Kitty Hawk Aircargo, Inc. v. Chao, 418 F.3d 453, 460 (5th Cir. 2005); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 n.4 (1992) (“The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.”); White v. Lee, 227 F.3d 1214, 1243 (9th Cir. 2000) (“Standing is examined at the commencement of the litigation”); Park v. Forest Serv. of the United States, 205 F.3d 1034, 1037 (8th Cir.2000) (“We do not think, however, that the actual use of checkpoints in 1997, 1998, and 1999 is relevant on the issue of standing because all of these events occurred after [the plaintiff] filed her original complaint”); Perry v. Arlington Heights, 186 F.3d 826, 830 (7th Cir.1999) (“Because standing goes to the jurisdiction of a

federal court to hear a particular case, it must exist at the commencement of the suit.”).

Accordingly, NSC cannot mask the deficiencies in its pleadings through post-complaint actions.

Put simply, NSC did not allege and has not shown that at the time it filed its complaint it had concrete plans to file specific FOIA requests with the CIA that would implicate the challenged policies or practices. Without that showing, NSC cannot establish the real and imminent threat of future harm that is required for standing to seek prospective relief and its policy and practice claims should be dismissed.

Even if the Court concludes that NSC has constitutional standing to bring its policy counts, it should dismiss NSC’s policy and practice claims because NSC lacks prudential standing. “Prudentially, the ripeness doctrine exists to prevent the courts from wasting [their] resources by prematurely entangling ourselves in abstract disagreements.” National Treasury Employees Union v. U.S., 101 F.3d 1423, 1431 (D.C. Cir. 1996). In testing whether the facts of a particular case meet that standard of ripeness, courts apply “a two-part analysis, evaluating ‘[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.’” Id. (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). In this case, NSC’s general policy and practice claims are not based on specific FOIA requests or discrete actions the CIA has taken and are too abstract to present the Court with issues that are fit for judicial decision. Moreover, neither party will be appreciably harmed by a withholding of court consideration of NSC’s policy claims, as any harm that NSC may have suffered from the alleged policies or practices can be remedied through the FOIA denial of records counts that NSC has included in its complaint. As NSC’s policy counts are too hypothetical to present the Court with issues that are fit for judicial decision and neither party will be harmed by the

withholding of court consideration, NSC's claims are not ripe and should be dismissed for lack of prudential standing.

III. NSC Has Failed to State Claims Upon Which Relief Can be Granted.

In its Partial Motion to Dismiss, the CIA established that to survive a motion under Rule 12(b)(6), a plaintiff must state a plausible claim for relief and that NSC has failed to meet that burden with its "policy and practice" counts. In its Opposition, NSC cites to a no-longer-applicable standard for surviving motions to dismiss and fails to show that it has stated plausible claims for relief. Accordingly, NSC's policy and practice claims should be dismissed under Rule 12(b)(6) for failure to state claims upon which relief can be granted.

A. NSC Must State a Plausible Claim to Relief.

In its Opposition, NSC cites to Conley v. Gibson, 355 U.S. 41 (1957) for the proposition that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief." Id. at 45-46; Opposition at 2. But the Supreme Court, in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), addressed the "no set of facts" language from Conley and explained that "after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." Id. at 563. In lieu of the "no set of facts" test, the Supreme Court has explained that in order to survive a motion to dismiss, a plaintiff must state a claim that is plausible on its face. Ashcroft v. Iqbal, ---U.S. ---, 129 S.Ct. 1937, 1949, 150 L.Ed.2d 868 (2009) (quotation marks omitted). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged. *Id.* (quotation marks omitted). Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.* (quotation marks omitted). To survive the CIA's partial motion to dismiss, NSC must have stated plausible claims for relief. Because its policy and practice claims do not meet that standard, they should be dismissed.

B. NSC Is Not Required to Create Records to Respond to NSC's Requests for Aggregate Data.

In Counts 2, 3, and 4 of its First Amended Complaint, NSC alleges that the CIA has a policy of refusing to provide aggregate data and that the CIA's alleged policy violates the FOIA. In its Partial Motion to Dismiss, the CIA explained that Counts 2, 3, and 4 should be dismissed for failure to state a claim because, even if the CIA has a policy of refusing to produce aggregate data, such a policy would not violate the FOIA, which does not require agencies to create new records to satisfy FOIA requests. In support of its position, the CIA cited to published opinions from the United States Supreme Court, Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980) ("The Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained."), the D.C. Circuit, Yeager v. DEA, 678 F.2d 315, 321 (D.C. Cir.1982) ("It is well settled that an agency is not required by FOIA to create a document that does not exist in order to satisfy a request. A requester is entitled only to records that an agency has in fact chosen to create and retain."), and the United States District Court for the District of Columbia, Frank v. U.S. Dept. of Justice, 941 F.Supp. 4, 5 (D.D.C. 1996) (explaining that agencies are "not required, by FOIA or by any other statute, to dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers [a] plaintiff's question.").

NSC responded in its Opposition by first alleging that the CIA is capable of creating documents that would be responsive to its requests for aggregate data and pointing to a specific document that it attached to its Opposition as proof. Opposition at 21. But NSC's argument addresses the wrong question. The CIA has never argued that it could not assign a researcher to search its documents and databases, collect and analyze the information she finds, and create records that would be responsive to NSC's requests for aggregate data. Rather, the CIA argues that it is not required under the FOIA to conduct research and create new records to respond to FOIA requests for aggregate data.

NSC then turns to the case law. But rather than distinguishing or even acknowledging the binding Supreme Court and D.C. Circuit case law cited in the CIA's motion, NSC cites to three unpublished district court decisions from the District of Colorado, Northern District of California, and the District of Columbia. The Court should rely on the binding precedent from the Supreme Court and D.C. Circuit, however, which explains that agencies are not required to create new records to respond to FOIA requests, and dismiss Counts 2, 3, and 4 of NSC's complaint for failure to state a claim.

C. The FOIA Does Not Require Agencies to Accept Administrative Appeals of Determinations that Requests are Improper.

In Counts 5, 6, and 7, NSC alleges that the CIA has a policy of denying administrative appeals to requesters whose FOIA requests are deemed improper and that the alleged policy violates the FOIA. In its Partial Motion to Dismiss, CIA established that Courts 5, 6, and 7 should be dismissed because even if the CIA does have a policy of refusing to accept administrative appeals of determinations that requests are improper, such a policy would not violate the FOIA. The CIA supported its argument with citations to the FOIA, the applicable

regulations, and applicable case law. NSC's only response is a policy argument that it would be better for requesters if agencies accepted appeals of determinations that requests are improper because it would force agencies to create an administrative record documenting their decisions. Regardless of whether NSC's policy argument has merit or not, it has no bearing on whether the FOIA actually requires the CIA to provide administrative appeals of decisions that requests are improper. NSC's Opposition does not address the provisions of the FOIA, applicable regulations, or case citations set forth in the CIA's motion and does not show that agencies are required under the FOIA to provide administrative appeals of determinations that FOIA requests are improper. Accordingly, Counts 5, 6, and 7 should be dismissed for failure to state a claim.

D. The CIA Can Consider the Configuration of Its Record System in Determining Whether a FOIA Request Adequately Describes the Documents Sought.

In Counts 11, 12, and 13, NSC alleges that the CIA has a policy of citing to the configuration of its records as a factor in determining that FOIA requests are improper because they do not reasonably describe the records sought, and that the CIA's alleged policy violates the FOIA. In its Partial Motion to Dismiss, the CIA established that Counts 11, 12, and 13 should be dismissed because, even if the CIA has a policy of citing to the configuration of its records system as a factor in determining whether FOIA requests are proper, such a policy would not violate the FOIA. The CIA supported its argument by citing to a CIA regulation that permits the agency to consider the configuration of its records systems in determining whether a FOIA request "reasonably describes" the records sought. CIA FOIA Regulation 32 CFR 1900.12(a) (reasonably describe "means that documents must be described sufficiently to enable a professional employee familiar with the subject to locate the documents with a reasonable effort.

Commonly this equates to a requirement that the documents must be locatable through the indexing of our various systems.”). The CIA also relied on two decisions from this Court explaining that agencies can properly consider the configuration of their records systems when determining whether a FOIA request reasonably describes requested documents. See Assassination Archives and Research Center, Inc. v. C.I.A., 720 F. Supp. 217, 219 (D.D.C. 1989) (“[A]gencies are not required to maintain their records or perform searches which are not compatible with their own document retrieval systems.”); Blakey v. Department of Justice, 549 F. Supp. 362, 366-67 (D.D.C.1982) (“The FOIA was not intended to compel agencies to become ad hoc investigators for requesters whose requests are not compatible with their own information retrieval systems.”), aff’d 720 F.2d 215 (D.C. Cir.1983) (modified on other grounds).

In its Opposition, NSC fails to address the cases that the CIA cited and instead provides lengthy passages of legislative history, none of which directly mention whether an agency can consider the configuration of its records in determining whether a FOIA request reasonably describes the records sought. Opposition at 22-26. NSC also examines the history of and proposed amendments to CIA FOIA Regulation 32 CFR 1900 and provides a citation to an exhibit containing “nineteen of the Defendant’s most egregiously questionable determinations that requests allegedly failed to reasonably describe the records sought.” Opposition at 25-26. None of NSC’s citations or arguments show that agencies violate FOIA when they consider the configuration of their information systems when determining whether a request reasonably describes the documents requested or adequately responds to the CIA’s arguments to the contrary. Accordingly, Counts 11, 12 and 13 should be dismissed for failure to state a claim.

E. The CIA Works with Potential FOIA Requesters to Help Them Formulate Proper Requests.

In Claims 14, 15, and 16, NSC alleges that the CIA has a policy or practice of violating its regulation, which states that the Agency will consider communications that do not adequately describe the records sought as statements of interest and will work with and offer suggestions to the potential requester in order to define a request properly. See 32 CFR §1900.12(c). In its Partial Motion to Dismiss, the CIA identified examples from NSC's own complaint where the CIA determined that an NSC FOIA request did not adequately describe the records sought and sent NSC a letter with request-specific suggestions in order to help it define a proper request. Based on the allegations in its own complaint, NSC cannot establish that the CIA has a practice of failing to work with and offer suggestions to potential requesters to help them define proper requests.

NSC's rebuttal consists almost entirely of a citation to a state court case from Ohio that addresses a provision of the Ohio Code regarding requirements for educators. Opposition at 27. With this inapposite citation, NSC appears to be arguing that sending potential requesters a letter with suggestions for defining a proper request is not "working with" the requester as required by the CIA regulation. See Motion at 18-19. NSC's argument is inconsistent with the plain meaning of the words "work with" and common sense. Accordingly, Counts 14, 15, and 16 of NSC's complaint should be dismissed for failure to state a plausible claim for relief.

F. The CIA's Alleged Policy of Using a Date-of-Response-Letter Search Cut-Off Is Reasonable and Consistent with the FOIA.

In Count Twenty-One Twenty-One, NSC alleges that the CIA has adopted a policy of imposing date-of-response-letter search cut-off dates and that the CIA's alleged policy violates

the FOIA. In its Partial Motion to Dismiss, the CIA established that Count Twenty-One should be dismissed because even if the CIA has adopted a policy of imposing date-of-response-letter search cut-off dates, such a policy would be reasonable and consistent with the FOIA. In support of the CIA's argument, it cited to the D.C. Circuit's statement in Public Citizen v. Dep't of State, 276 F.3d 634, 643 (D.C. Cir. 2002), that "specific circumstances in some agencies may render an across-the-board rule reasonable," and explained that because the CIA is a large agency that receives a substantial volume of FOIA requests, its specific circumstances would render an across-the-board date-of-response-letter search cut-off reasonable and consistent with the FOIA.

In its Opposition, NSC concedes that "there may be an agreeable across-the-board cut-off date that would also meet Defendant's needs but suggests that the cut-off date should be the day the agency begins actively searching for responsive documents. Opposition at 28. NSC does not explain, however, why its suggested cut-off date is preferable or, more importantly, why the CIA's alleged cut-off date violates the FOIA. Because the CIA has shown that an across-the-board date-of-response-letter search cut-off date would be reasonable and consistent with the FOIA, Count Twenty-One should be dismissed for failure to state a claim.

CONCLUSION

NSC's counts that are not tied to specific FOIA requests – Counts 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, and 21 – should be dismissed because NSC is not entitled to "policy and practice" review under the FOIA, the APA, or the Mandamus Act. Yet even if policy and practice review was available under one of those statutes, NSC's "policy and practice claims would still be subject to dismissal because NSC lacks standing to seek prospective relief and has failed to state claims upon which relief can be granted.

Dated: June 21, 2011

Respectfully submitted,

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