

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

NATIONAL SECURITY COUNSELORS, \*

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Plaintiff, \*

\*

v. \*

Case: 1:11-cv-00445 (BAH)

CENTRAL INTELLIGENCE AGENCY, \*

\*

*et al.*,

\*

Defendants. \*

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\* \* \* \* \*

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ PARTIAL MOTION TO  
DISMISS PLAINTIFF’S FIRST AMENDED COMPLAINT**

Plaintiff National Security Counselors (“NSC”) commenced this litigation against Defendant Central Intelligence Agency (“CIA”) pursuant to the Freedom of Information Act (“FOIA”), the Administrative Procedure Act (“APA”), and the Mandamus Act to obtain copies of several different types of records and to compel CIA to reverse several of its patterns or practices that are inconsistent with FOIA.<sup>1</sup> CIA has moved to dismiss the ten “pattern or practice” counts<sup>2</sup> of NSC’s First Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.<sup>3</sup> (Def.’s Mem. Supp. Defs.’ Part. Mot. Dismiss Pl.’s First Am. Compl. [hereinafter CIA’s Mem.] )

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<sup>1</sup> This Motion does not implicate any of the other Defendants.

<sup>2</sup> Counts 4, 11, and 14-21.

<sup>3</sup> The parties have agreed that the eleven remaining counts will be addressed separately in Motions for Partial Summary Judgment.

### **STANDARD OF REVIEW**

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides that a party may move to dismiss a complaint for lack of subject matter jurisdiction. In ruling on a motion to dismiss pursuant to Rule 12(b)(1), a court must accept as true all factual allegations contained in the complaint, and shall construe all inferences in favor of the plaintiff. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). The plaintiff bears the burden of establishing by a preponderance of the evidence that the court has subject matter jurisdiction. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *SAE Productions, Inc. v. FBI*, 589 F. Supp. 2d 76, 80 (D.D.C. 2008).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides a mechanism for testing the legal sufficiency of the factual allegations in a complaint. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Under this rule, a court treats the complaint's factual allegations as true and draws all reasonable inferences in plaintiff's favor. *See Harris v. Ladner*, 127 F.3d 1121, 1123 (D.C. Cir. 1997); *Alexis v. District of Columbia*, 44 F. Supp. 2d 331, 336-37 (D.D.C. 1999). "[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." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Swierkiewicz v. Sorema*, 534 U.S. 506, 515 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

### **ARGUMENT**

As a preliminary note, NSC's First Amended Complaint consists of an interwoven mix of FOIA "records denial" counts and FOIA, APA, and mandamus "pattern or practice" counts.

Each of the “pattern or practice” counts is based on CIA’s actions with respect to the FOIA requests being challenged in the “records denial” counts which immediately precede it. As such, many of the “pattern or practice” counts are for all intents and purposes inseverable from the “records denial” counts upon which they are predicated. In a case such as this, logic would dictate that CIA would first argue that it properly withheld the records sought by NSC, supporting its argument with sworn declarations describing *why* it withheld them, and *then* argue that because its actions were proper under FOIA in those instances, the pattern or practice counts must also be dismissed. Rather than face the Court’s judgment on the merits of its actions, CIA has instead attempted to “put the cart before the horse” and seek a ruling that its patterns or practices are legal before the Court has even reviewed the specifics of the “records denial” counts. (*See* CIA’s Mem. at 10-19.) Therefore, the portions of CIA’s Motion which argue that Counts 4, 11, and 14 should be dismissed for failure to state a claim because CIA’s actions were legal should be denied without prejudice as premature, with instructions given to CIA to not raise the arguments again until it is ready to brief Counts 1-3, 7, and 12-13 in a Motion for Partial Summary Judgment.

Similarly, the portions of CIA’s Motion which argue that all ten counts should be dismissed for failure to demonstrate the existence of a policy should be denied as premature and discovery allowed into the existence and parameters of these alleged policies. *See Gilmore v. DOE*, 33 F. Supp. 2d 1184, 1190 (N.D. Cal. 1998) (ordering expedited discovery regarding agency’s “policies and practices for responding to FOIA requests” after establishing standing and subject matter jurisdiction). As argued below, NSC has satisfied the minimum burden of proof for alleging the existence of these patterns or practices and has satisfied the other requirements for standing and subject matter jurisdiction.

**I. THE COURT HAS SUBJECT MATTER JURISDICTION OVER NSC'S PATTERN OR PRACTICE COUNTS**

CIA's arguments against subject matter jurisdiction fall into two categories: (1) NSC's APA and mandamus counts are precluded because FOIA provides an adequate remedy; and (2) NSC lacks standing to bring any of its pattern or practice counts. These arguments will be addressed in that order.

**A. The Court May Have Standing to Hear NSC's APA and Mandamus Counts**

NSC concedes that the courts in this District are divided in how they approach declaratory relief for FOIA cases in which an ongoing agency pattern or practice is challenged. *Payne Enterprises v. United States* acknowledges the Court's jurisdiction under FOIA to declare a "sufficiently outrageous" ongoing practice to be unlawful even if the agency reversed its position with respect to the FOIA request in question. *See* 837 F.2d 486, 494 (D.C. Cir. 1988). Counts 4, 11, 15, 18, 20, and part of 14 (collectively "*Payne* counts") are based on this legal theory. However, Judge Harris held in *Public Citizen v. Lew*, 127 F. Supp. 2d 1 (D.D.C. 2000), that the APA was the proper source of authority for a declaratory judgment that the agencies in question violated the FOIA provision requiring publication of their "major information systems." *Id.* at 7. Counts 16, 19, 21, and part of 14 (collectively "APA counts") are based on this legal theory.

Similarly, NSC concedes that Count 17 is duplicative of the preceding *Payne* and APA counts. However, this is not a fatal flaw in and of itself. "At this stage of the case, it would be premature and inappropriate to determine whether the relief of mandamus will or will not issue. Certainly whether relief is available under the APA will be relevant to whether the mandamus relief requested will be necessary. It is sufficient to determine that plaintiffs have stated a claim for relief under the mandamus statute. Whether or not plaintiffs will prove that claim remains to

be seen.” *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 44 (D.D.C. 2002); *see also Citizens for Responsibility & Ethics in Wash. v. Exec. Office of the President*, 587 F. Supp. 2d 48, 63 (D.D.C. 2008) (dismissing APA claims but declining to dismiss duplicative mandamus claims). Count 17 is based on this legal theory.<sup>4</sup>

NSC maintains that regardless of which authority the Court prefers to invoke with respect to each alleged pattern or practice, the practical result is a conclusion that the alleged pattern or practice is definitely capable of judicial review and censure. With that in mind, even a finding that the APA or mandamus is inapplicable to a particular pattern or practice cannot justify complete dismissal of the preceding *Payne* count; it can only limit the manner in which that pattern or practice is reviewed to the framework established in *Payne*.

NSC concedes the bulk of CIA’s argument with respect to the applicability of the APA in most circumstances. It is well recognized that the APA does not provide additional remedies where adequate remedies are already provided by another statute. *See Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (“Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action.”); *see also First Nat’l Bank of Scotia v. United States*, 530 F. Supp. 162, 167 (D.D.C. 1982) (“It is . . . well-settled that where Congress has provided an adequate procedure to obtain judicial review of agency action, that statutory provision is the exclusive means of obtaining judicial review in those situations to which it applies.”).

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<sup>4</sup> Defendant also argues that Count 17 should be dismissed because NSC lacks standing (another Rule 12(b)(1) argument) and because Defendant does not have a clear duty to act (a Rule 12(b)(6) argument). As both of these arguments are predicated on findings in Defendant’s favor on the issues of standing and reasonability of the alleged pattern or practice, they do not need to be separately addressed except to note that absent such a finding, Defendant’s mandamus arguments must fail.

However, CIA goes too far in its analysis of the overlap between the APA and FOIA when it states that “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.” (CIA’s Mem. at 3-4 (emphasis added).) NSC concedes the latter, and in fact, does not dispute any of CIA’s characterization of the cases in which the FOIA was held to provide just such an alternative remedy. (*Id.*) In each of the cases cited by CIA, the remedy sought under the APA was in effect the same as the remedy sought under the FOIA. Adverse fee waiver decisions are properly reviewed under FOIA, as are denials of news media status, denials of expedited processing, and all denials of access to records. However, CIA’s statement that the mere fact that an APA claim “is premised on a violation of FOIA” is automatically fatal to that claim is fundamentally incorrect. FOIA does not provide an alternative remedy in *all* cases. As Judge Collyer distinguished, “an APA claim is precluded *where a remedy under FOIA is available.*” *People for the Ethical Treatment of Animals v. USDA*, No. 06-930, 2007 WL 1720136 at \*7 (D.D.C. Jun. 11, 2007). Simply put, there are portions of FOIA that mandate agency action but provide no private cause of action, and because a remedy under FOIA is not available, an APA claim is not precluded.

*Public Citizen v. Lew* addressed one such provision. *See* 127 F. Supp. 2d 1. That case addressed the FOIA provision 5 U.S.C. § 552(g), which mandated that “[t]he head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records of information from the agency, . . . including . . . (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). Despite the traditional

preclusion that the FOIA provides in APA cases, the court held that it had jurisdiction to “review[ ] defendants’ compliance with the FOIA and [Paperwork Reduction Act] provisions under the [APA], which empowers the Court to ‘hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Public Citizen*, 127 F. Supp. 2d at 7 (citations omitted). In *Public Citizen*, the court realized that the court’s ability to order an agency to turn over documents does not rectify all possible violations of the FOIA.

Similarly, parts of the instant case could be read in a similar fashion. CIA suggests that if an agency has adopted a pattern or practice that is inconsistent with FOIA, a requester can always sue to obtain the records in court (as NSC has). CIA may be right. However, the Court could also find that the alleged pattern or practice does not fit squarely within the four corners of FOIA’s remedies, which would remove it from *Payne*-style declaratory relief. Counts 16, alleging a pattern of practice of refusing to provide estimated dates of completion, 19, alleging a pattern or practice of refusing to identify records withheld in their entirety, and 21, alleging a pattern or practice of refusing to invoke exemptions with particularity, are the most likely candidates for such a distinction, focusing as they do on procedural matters. It is just this type of void that the APA and writ of mandamus were designed to fill.

In short, NSC concedes that if the Court finds that a pattern or practice is improper and issues a command to the agency to cease and desist, the Court will likely only take this action under either FOIA (by way of *Payne*), the APA, or mandamus, but not more than one. NSC included multiple options (which overlap in unclear ways in this area of law) simply to give the Court a choice of authorities, so that the Court does not rule that it cannot act because NSC did not invoke the correct authority for the remedy sought. With the exception of Counts 4 and 11,

each pattern or practice was challenged through an identical set of at least two different counts; for each such pattern or practice, all but one of those are bound to be dismissed.

**B. NSC Has Standing to Bring Its Pattern or Practice Counts**

Subject matter jurisdiction to hear challenges to an agency pattern or practice in FOIA cases is typically found where it appears that a FOIA violation has occurred. *See Payne Enters.*, 837 F.2d at 488; *see also Gilmore*, 33 F. Supp. 2d at 1188 (when DOE failed to abide by FOIA time requirements even though exemptions were proper). Therefore, CIA's Motion should be denied as untimely until the alleged FOIA violations themselves have been briefed.

CIA argues that NSC lacks standing for two reasons. First, it raises a hollow argument unsupported by any evidence that the patterns or practices alleged by NSC do not exist. Then it proffers an equally unconvincing argument that NSC has not established a threat of future injury. These arguments will be addressed in turn.

**1. NSC Has Plausibly Alleged the Existence of Six Patterns or Practices**

As an initial matter, the extent of CIA's argument to the contrary is its talismanic attachment of the word "alleged" to any mention of a pattern or practice (even when defending it) coupled with one solitary mention of the somewhat inapposite quote, "[M]ore than a nebulous assertion of the existence of a 'policy' is required to establish standing." (CIA's Mem. at 6-7, quoting *Haase v. Sessions*, 835 F.2d 902, 911 (D.C. Cir. 1987).) However, CIA does not actually state that any of the alleged patterns or practices *do not exist* (although it does argue that Counts 15-17 are unsupported by the evidence), and in fact spends most of the second half of its brief defending them (except for Counts 15-17).

To adequately state a claim challenging an agency pattern or practice, a Plaintiff must only plead enough supporting facts to make the claim plausible. *See Arista Records LLC v. Doe*

3, 604 F.3d 110, 120 (2d Cir. 2010) (explaining that *Twombly* and *Iqbal* only require “factual amplification [where] needed to render a claim plausible”). *Twombly*’s plausibility standard does not prevent “pleading facts alleged upon information and belief” when “the facts are peculiarly within the possession and control of the defendant.” *Id.* As stated by CIA, a plaintiff must show “a *threat of injury* [that is] ‘both real and immediate, not conjectural or hypothetical.’” (CIA’s Mem. at 6, quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-03 (1983) (emphasis added).) As discussed below, NSC has demonstrated a real and immediate *threat of injury*; what it has not demonstrated to CIA’s exacting standards is the specific agency patterns or practices that are *responsible* for the threat. However, in cases where the relevant information is in the exclusive control of the defendant, that is not the requirement. *See, e.g., Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) (holding that pleading upon “information and belief” is appropriate when the information is in the opposing party’s possession); *Johnson v. Johnson*, 385 F.3d 503, 531 n.19 (5th Cir. 2004) (“‘information and belief’ pleadings are generally deemed permissible under the Federal Rules, especially in cases in which the information is more accessible to the defendant.”).

The factual support required to show plausibility of a pattern or practice may require facts indicating the pattern harmed more than one party. However, when alleging facts regarding misconduct toward only one party, more than two instances are generally necessary. *See Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 19 (D.D.C. 2009) (GE alleged pattern or practice of excluding documents from administrative record, but only gave examples from two incomplete records; held GE had not demonstrated the existence of a pattern or practice). The evidence of CIA’s patterns or practices far surpasses these requirements.

Because CIA has only argued in any substantial way that one pattern or practice *may* not exist, NSC will not lay out all the evidence for the existence of all six. Rather, NSC will focus

its argument in this section on CIA's arguments regarding Counts 15-17, which allege a pattern or practice of refusing to provide estimated dates of completion to requesters upon request.

CIA's entire argument on this matter is presented as follows:

NSC alleges that “[o]n 17 November 2010, a CIA representative informed NSC that CIA's new policy was to inform requesters that the estimated date of completion for any given request is two years from the CIA's date of receipt.” This allegation, if accepted as true, would establish that the CIA has a policy of providing estimated completion dates to FOIA requesters.

(CIA's Mem. at 16, quoting First Am. Compl. ¶ 101 [hereinafter FAC].) This argument fails for two reasons. First, it misstates the allegation. The next sentence in NSC's First Amended Complaint reads, “In this conversation, the CIA representative also informed NSC that CIA would not provide estimated dates of completion for appeals.” Therefore, even if the Court finds that CIA has a policy of providing estimated completion dates to FOIA requesters, it *still* cannot dismiss this Count because CIA's policy does not satisfy the requirements of FOIA.<sup>5</sup>

Second, CIA's argument misstates the legal standard. For purposes of a motion to dismiss, the only allegation that must be “accepted as true” is that *a CIA representative informed NSC that CIA had implemented this new policy*. NSC freely concedes this fact; its allegation is that the CIA representative was not accurately representing the agency. As evidence of this allegation, NSC then provided factual evidence to show that this alleged policy was *not* in fact being practiced by CIA.<sup>6</sup> CIA argues that NSC has not provided that the factual evidence did not

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<sup>5</sup> It is interesting to note that this instance is the sole case in both this case and the related case *National Security Counselors v. CIA*, No. 11-444, in which CIA does not attempt to argue that the pattern or practice does not violate FOIA.

<sup>6</sup> NSC can now offer one additional example from yet another requester, attached as Ex. A. This letter, dated three months after the first post-conversation response (James Madison Project) and three weeks after the second post-conversation response (Ravnitzky), also includes the

in fact represent isolated incidents, but again, that is not the standard. At this stage of the litigation, NSC must only allege the existence of a pattern or practice with sufficient factual allegations to make it *plausible*. The Court should therefore deny CIA's Motion on these counts and order discovery into the existence and extent of the alleged pattern or practice.

Therefore, for the reasons stated above, the Court should find that NSC has plausibly alleged the existence of all six patterns or practices.

## **2. NSC Has Established a Threat of Future Injury**

If the Court finds that NSC has plausibly alleged the existence of the above six patterns or practices, NSC must still demonstrate that they are likely to harm it again in order to establish standing. However, CIA's attack on NSC's ability to prove future injury is without merit. NSC must only sufficiently allege that it will file FOIA requests in the future that will cause it to be harmed by each pattern or practice. CIA cites *CREW v. DHS*, 527 F. Supp. 2d 101 (D.D.C. 2007), *American Historical Association v. NARA*, 310 F. Supp. 2d 216 (D.D.C. 2004), and *Quick v. Dep't of Commerce, NIST*, No. 09-2064, 2011 U.S. Dist. LEXIS 37829 (D.D.C. Apr. 7, 2011), for its argument that NSC's statement that it plans to file future FOIA requests is insufficient. (CIA's Mem. at 7-9.) However, the holdings in those cases were much narrower than suggested by CIA, distinguishing them from the instant case.

In *CREW*, the plaintiff was challenging the Secret Service's apparent policy of erasing White House visitor records from its computer system ("WAVES") without complying with the requirements of the Federal Records Act. 527 F. Supp. 2d at 103. The plaintiff argued that it would suffer future injury because it would be deprived of the ability to obtain records from the

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incriminating line, "We regret that we are unable to give you a definite date for your completion and ask for your continued cooperation," that featured so prominently in previous letters.

WAVES system in the future. *See id.* at 105-106. The sole offering it made was that it “will continue to use the FOIA to gain access to agency records that relate to the propriety of government activity.” *Id.* at 106. It did not specify that it would file future requests for records in the WAVES system, or even that it would file future requests with DHS. *See id.* The Court held that the likelihood that: (1) CREW would file another FOIA request (2) with DHS (3) for WAVES records (4) that had been destroyed pursuant to the alleged policy was not sufficiently real or imminent to warrant prospective relief. *See id.*

Similarly, in *American Historical Association*, the plaintiffs were challenging a policy of delaying the release of records of former U.S. Presidents in alleged violation of the Presidential Records Act. *See* 310 F. Supp. 2d at 227. The plaintiffs alleged that because Executive Order 13,233 (“the Bush Order” after President George W. Bush) authorized the National Archives and Records Administration (“NARA”) to delay releasing otherwise releasable Presidential records while they were the subject of a privilege review, that they would continue to face indeterminate delays in accessing the records. *See id.* at 227-28. However, due to its unique fact pattern, *American Historical Association* is distinguishable from virtually every other potential case.

First, by the time the Court issued its opinion, only 74 pages from former President Reagan’s records remained subject to the Bush Order. *Id.* at 228. Second, even though these records and those of President George H. W. Bush would become subject again to the Bush Order in 2005 (twelve years after the end of President Bush’s presidency), at the time of the opinion (March 28, 2004) there was no indication who the President would be when that happened or how the rules may have changed. “Both the former and incumbent presidents may make different decisions about any records whose period of retention under the PRA has ended. Although it would be a coveted talent, the Court cannot predict who the incumbent president will

be in 2005, or what effect, if any the election of 2004 will have on any future application of the Bush Order's provisions." *Id.* It was therefore impossible for the plaintiffs to establish future injury, since they could not even point to currently outstanding requests. "At this stage Plaintiffs have no outstanding requests for presidential records, *because there are no presidential records currently subject to the Bush Order, other than the 74 pages over which privilege has been asserted.*" *Id.* at 228 (emphasis added). Simply put, *American Historical Association* can only be analogized to a very specific scenario in which the alleged policy is currently *incapable* of harming the plaintiff because of temporal restrictions and its existence at the next time it would be so capable is reasonably in doubt because of external factors, such as a hotly-contested Presidential campaign.

Lastly, in *Quick* the plaintiff raised a meritless eleventh-hour argument that the agency had a pattern or practice of not responding to FOIA requests until after the commencement of litigation, despite ample evidence to the contrary. 2011 U.S. Dist. LEXIS 37829, \*32. Judge Kollar-Kotelly detailed how the plaintiff lacked standing on numerous separate counts before even reaching the point of *dicta* highlighted by CIA. *See id.* at \*23-\*33. More extreme than *CREW* and *American Historical Association* before it, the only allegation in *Quick* was that the plaintiff had stated a vague intention to file FOIA requests with the agency at some indeterminate point in the future. The Court rightly found that this claim was not sufficient. However, CIA's implication that any such statement that does not specify with particularity exactly when and why such a filing would occur is too stringent of a test for future injury.

Compared to the very specific fact patterns in these cases, NSC bears a much simpler burden when alleging that it is likely to be subject to future instances of CIA's patterns or practices. First, while NSC admits that it did not explicitly state that it was "a frequent FOIA

requester *of the CIA*,” such was clearly implied by the context in which the claim was made. Since its creation in August 2009, NSC has submitted over a third of all of its FOIA requests to the CIA. In comparison, it has only submitted slightly fewer requests to the CIA than it has to the entirety of both the Department of Justice and Department of Defense combined. NSC has submitted *fifteen* FOIA requests to the CIA since the commencement of this litigation. Given that NSC’s mission statement is in part to obtain records about national security issues, it would be virtually inconceivable for this pattern to *not* continue.

For the reasons stated above, the Court should find that NSC has standing to bring its pattern or practice counts.

## **II. THE ALLEGED PATTERNS OR PRACTICES ARE INCONSISTENT WITH FOIA**

CIA’s Rule 12(b)(6) arguments are a transparent attempt to convince the Court to rule on the reasonability of its FOIA patterns or practices in the abstract without providing any specifics in the form of sworn declarations or concrete examples regarding the respective “records denial” counts. For this reason, if none other, CIA’s Motion should be denied without prejudice until CIA is ready to brief the remaining counts, or, in the alternative, until after NSC has completed discovery into the extent of the alleged patterns or practices.

However, even in the abstract, CIA’s patterns or practices remain inconsistent with FOIA, as is described below.

### **A. Blanket Withholdings of FOIA and Privacy Act Processing Materials**

CIA’s argument that its blanket withholdings are justifiable under FOIA is exactly the type of argument that needs to be briefed in a summary judgment context regarding each request for which it withheld records. The type of sleight-of-hand that CIA is attempting with this

Motion is reminiscent of the days before *Vaughn* indices were required components of any FOIA litigation. Rather than provide a *Vaughn* index detailing the exact ways in which Exemptions (b)(3) and (b)(5) were invoked, which NSC could then challenge with particularity before the Court made an informed decision, CIA is instead positing that blanket withholdings of FOIA request processing materials are justified because *all* “*information pertaining to its processing of FOIA and Privacy Act requests and its FOIA and Privacy Act reference materials* are exempt from disclosure under Section 6 of the CIA Act and FOIA Exemption 3 . . . and *may also be* subject to the deliberative process privilege protected by Exemption 5.” (CIA’s Mem. at 11 (emphasis added).) Such sweeping generalizations have not been seen in FOIA litigation in almost 40 years.

Rather than engage in patent speculation over the types of records being withheld and whether they are appropriately covered by Exemptions (b)(3) or (b)(5), at this stage it is more worthwhile to focus on the specific examples that *are* publicly available of the type of material that is currently subject to these blanket withholdings.

- In response to a FOIA request submitted by the undersigned several years before he chartered NSC, CIA inexplicably deviated from its pattern and released part of the processing notes from Request No. F-2006-01043, attached as Ex. B. This release constitutes the only CIA FOIA processing notes released to any requester of which NSC is aware. The information that was released is revealing in its mundanity:

Case Manager Note: Since the requester is not technically asking for records concerning his immediate family member, fees would normally be charged. However, case manager has already located the article in question. It is 17 pages in length and appears in the most recently published edition of *Studies in Intelligence* (Vol. 50, No. 1, 2006). The

article in question deals with the captivity of two CIA officers by Communist China after the shoot down of their plane over Manchuria in 1952. <redacted> Therefore, given the limited search time required and the small number of pages to be reviewed, believe it is in the best interest of the Agency to exercise its administrative discretion and not charge fees in this particular instance.

(Ex. B at 3.) Logic would dictate that this is not the only such mundane note in all the various FOIA requests for which notes have been processed for release, but for some unknown reason it is the only example released to the public.

- Despite a parallel protective statute known as the National Security Agency Act of 1959, which exempts the National Security Agency (“NSA”) from “any . . . law [which] require[s] the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency” (P.L. 86-36 § 6(a)), NSA has released a vast amount of records responsive to NSC’s requests for FOIA processing notes and reference materials. All of the reference materials have been posted by NSC at [http://www.nationalsecuritylaw.org/document\\_vault.html](http://www.nationalsecuritylaw.org/document_vault.html) under the heading “FOIA/PA Training Materials.” While it is understood that NSA’s actions are not binding on CIA, the records released by NSA *are* indicative of the *types* of records being withheld in their entirety by CIA, and the fact that the CIA Act and the NSA Act are virtually identical (b)(3) withholding statutes serves to illustrate the extreme disconnect between CIA’s withholdings and a reasonable interpretation.

For the reasons discussed above, this pattern or practice is most likely inconsistent with FOIA, but discovery is needed to clarify the exact parameters of this pattern or practice. Alternatively, the Motion should be denied without prejudice until after the filing of the related Motions for Partial Summary Judgment.

**B. *Glomar* Responses to Requests for Records about Referred Requests**

As with the pattern or practice discussed above, this pattern or practice suffers from an overextension of an otherwise sound concept. NSC does not dispute that in some cases, it would be proper for CIA to issue a *Glomar* response to a request for records about a referred request. However, CIA's pattern or practice in this regard has eschewed the "in some cases" for the more expansive "in all cases," which is not supported by FOIA. Even CIA's qualified argument on this point implicitly acknowledges that this is not something that should happen *all of the time*:

Because acknowledging whether responsive CIA-originated documents exist *could* disclose the existence of classified information that the CIA obtained in confidence and provided in confidence to the referring agency, the CIA *may* refuse to confirm or deny the existence or nonexistence of records relating to its processing of FOIA and MDR referrals.

(CIA's Mem. at 14 (emphasis added).) However, by blanketly issuing *Glomar* responses to *all* requests for materials regarding referred requests, CIA is in practice ignoring whether or not the material is classified, or whether or not the material is protected by statute, and adopting a presumption that the mere *existence* of a referred request *for potentially non-exempt material* is itself exempt. Such a policy or practice is not compatible with the case law regarding *Glomar* responses.

CIA also argues that "[t]he statement of another government agency with respect to the existence or nonexistence of CIA information [is] not binding on the CIA and does not waive the CIA's ability to assert an otherwise applicable FOIA exemption to protect CIA information from

disclosure.” (*Id.*) However, this argument is inapposite. NSC is basing its argument on the fact that CIA acknowledged the existence or nonexistence of these referred requests, and that those acknowledgements were unclassified. NSC is willing to assume *arguendo* that CIA’s argument that “statements by other agencies that they have referred FOIA or MDR requests to the CIA are not acknowledgements by the CIA that it possesses documents” has merit. (*Id.*) However, the National Archives and Records Administration released to NSC actual CIA letters marked “Unclassified” which acknowledged the receipt of certain referred requests. CIA itself responded to NSC after the FBI referred certain records to it for review. It is nonsensical to propose that CIA can write an official letter to a requester acknowledging a referred request (or even releasing material), but that if that same requester files a FOIA request for CIA’s processing notes regarding the very same referred request, he will be issued a *Glomar* response. And yet that is CIA’s pattern or practice.

For the reasons discussed above, this pattern or practice is inconsistent with FOIA, but discovery is needed to clarify the exact parameters of this pattern or practice. Alternatively, the Motion should be denied without prejudice until after the filing of the related Motions for Partial Summary Judgment.

**C. Refusal to Identify Documents Withheld in Their Entirety**

CIA’s pattern or practice on this count is in direct violation of several court decisions requiring that agencies provide, at a minimum, a list of any documents that are being withheld. *See Shermco Indus. v. Sec’y of the U.S. Air Force*, 452 F. Supp. 306, 317 n.7 (N.D. Tx. 1978) (“A person cannot effectively appeal a decision about the releasability of documents . . . if he is not informed of at least a list of the documents to which he was denied access . . . and why those decisions were made. Denial of this information would in all likelihood be a violation of due

process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases.”); *see also Va. Transformer Corp. v. DOE*, 628 F. Supp. 944, 947 (W.D. Va. 1986) (“determination” response sent to a person requesting information under FOIA must include at least “a statement of what the agency will release and will not release, including a list of the documents that are releasable and withheld . . . .”), quoting *Shermco; Reith v. IRS*, No. 80-87, 1980 U.S. Dist. LEXIS 14188, \*13 (N.D. Ind. Sept. 10, 1980) (same); *Marschner v. Dep’t of State*, 470 F. Supp. 196, 199 (D. Conn. 1979) (same).

CIA’s reliance on *Bassiouni v. CIA* is inapposite. In *Bassouini*, the court was reviewing a specific “no number, no list” response that CIA made in response to a FOIA request, which CIA had to justify on a case-by-case basis as it would any other withholding decision. *See* 392 F.3d 244, 246-47 (7th Cir. 2004). In comparison, *Shermco* and its progeny set forth a *procedural* requirement for the processing of FOIA requests, which is no more related to a withholding decision than a *Vaughn* index is. Simply put, *Shermco* and its progeny stand for the rule that an agency must supply a requester with something more than a blanket “records were withheld” statement but less than a full *Vaughn* index when issuing an adverse decision, and that failure to do so would rob the requester of his ability to intelligently appeal any decisions at the administrative level.

For the reasons discussed above, this pattern or practice is inconsistent with FOIA.

#### **D. Refusal to Invoke Exemptions with Particularity**

This pattern or practice violates FOIA for the same reason as the one immediately preceding it. Furthermore, while it may be true that “FOIA does not require agencies to specify the exemption under which a deletion is made if including the indication would harm an interest protected by the exemption” (CIA’s Mem. at 18), such an action must be exercised on a case-by-

case basis, and a blanket policy of refusing to do so presumes that *all* indications would harm protected interests, a patent overextension of the FOIA provision.

For the reasons discussed above, this pattern or practice is inconsistent with FOIA.

**CONCLUSION**

For the reasons discussed above, the Court should deny CIA's Motion and order discovery regarding the existence and extent of the alleged patterns or practices.

Date: July 11, 2011

Respectfully submitted,

/s/ Kelly B. McClanahan  
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*Counsel for Plaintiff*

# **EXHIBIT A**

Central Intelligence Agency



Washington, D.C. 20505

7 February 2011

Ms. Katelyn Sack



Reference: F-2010-00048

Dear Ms. Sack:

This acknowledges receipt of your letter dated 24 January 2011, and received in the office of the Information and Privacy Coordinator on 25 January 2011, regarding the status of your Freedom of Information Act request.

We can appreciate your concern with not having received a final response to your request. It is the overwhelming number of requests and their complexity that causes delays in our responses. Our policy is to handle each on a first-in, first-out basis, which we believe is the most equitable for all requesters. Please be assured that your request is still in process. The components processing your request are making every effort to complete them as soon as possible. We regret that we are unable to give you a definite date for your completion and ask for your continued cooperation. Meanwhile, we appreciate your patience while we continue to process your requests.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Viscuso".

Susan Viscuso  
Information and Privacy Coordinator

# **EXHIBIT B**

Central Intelligence Agency



Washington, D.C. 20505

(b)(3)  
(b)(5)(C)

24 May 2006



Reference: F-2006-01043

Dear

The office of the Information and Privacy Coordinator has received your 25 April 2006 Freedom of Information Act (FOIA) request for **an article in the *Studies in Intelligence* publication focusing on CIA intelligence officers Judge John T. Downey and Mr. Richard Fecteau.** We have assigned your request the reference number above. Please use this number when corresponding so that we can identify it easily.

We accept your request and will process it according to the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 431. We will search for the cited CIA-originated record existing through the date of this acceptance letter.

The large number of FOIA requests CIA receives has created unavoidable delays making it unlikely that we can respond within the 20 working days the FOIA requires. You have the right to consider our honest appraisal as a denial of your request and you may appeal to the Agency Release Panel. A more practical approach would permit us to continue processing your request and respond to you as soon as we can. You will retain your appeal rights and, once you receive the results of our search, can appeal at that time if you wish. We will proceed on that basis unless you object.

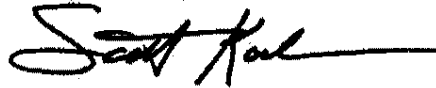
For your information, the FOIA authorizes federal agencies to collect fees for records services. You will note on the enclosed fee schedule that we charge search fees, including computer time where indices are computerized, and copying costs for releasable documents. In accordance with Section (a) of the schedule, search fees are assessable even if no records are found or, if found, we determine that they are not releasable. This means you would be charged even if our search results are negative ~~or if we determine that no information is releasable under the FOIA.~~

APPROVED FOR RELEASE   
DATE: 02-Jun-2009

Based upon the information provided in your letter, we determined that your request would fall into the "all other" fee category, which means that you would be required to pay charges which recover the cost of searching for and reproducing responsive records (if any) beyond the first 100 pages of reproduction and the first two hours of search time, which are furnished without charge. Copying costs are assessed at the rate of ten cents per page.

However, since we believe that fees will be minimal, as an act of administrative discretion, no fees will be charged in this instance.

Sincerely,



Scott Koch  
Information and Privacy Coordinator

Enclosure

[REDACTED]

[REDACTED]

[REDACTED]

**Enclosure:**

--Schedule of Fees

**Case Manager Note:** Since the requester is not technically asking for records concerning his immediate family member, fees would normally be charged. However, case manager has already located the article in question. It is 17 pages in length and appears in the most recently published edition of *Studies in Intelligence* (Vol. 50, No.1, 2006). The article in question deals with the captivity of two CIA officers by Communist China after the shoot down of their plane over Manchuria in 1952.

[REDACTED]

Therefore, given the limited search time required and the small number of pages to be reviewed, believe it is in the best interest of the Agency to exercise its administrative discretion and not charge fees in this particular instance.