

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

NATIONAL SECURITY COUNSELORS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:11-cv-00445 (BAH)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
DEFENSE INTELLIGENCE AGENCY,	)	
DEPARTMENT OF JUSTICE, DEPARTMENT	)	
OF STATE, NATIONAL SECURITY AGENCY,	)	
and OFFICE OF THE DIRECTOR OF	)	
NATIONAL INTELLIGENCE,	)	
	)	
Defendants.	)	
	)	
	)	

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

In their Partial Motion to Dismiss, Defendants established that NSC’s claims that are not directly tied to specific Freedom of Information Request (“FOIA”) requests – Counts 4, 11, 14, 15, 16, 17, 18, 19, 20, and 21<sup>1</sup> – 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.

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<sup>1</sup> All of these claims are directed against the Central Intelligence Agency (“CIA”).

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 then argues that it has shown a sufficient threat of future injury to have standing to seek prospective relief. But NSC fails to persuasively distinguish the analogous cases Defendants' cited in their Motion or identify cases in support of its position. Finally, NSC attempts to rebut Defendants' argument that NSC has failed to state plausible claims for relief by citing to material outside of the complaint, relying on inapposite case law, and making sweeping policy arguments. But NSC fails to address the controlling statutes, regulations and cases cited in Defendants' 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, the remaining policy claims should still be dismissed because NSC lacks standing to seek prospective relief and has failed to state plausible claims for relief.

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

In its Partial Motion to Dismiss, Defendants 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.<sup>2</sup> In its Opposition, NSC offers only a tepid rebuttal, asserting that the Court “may” have jurisdiction<sup>3</sup> 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. 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

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<sup>2</sup> Defendants 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).

<sup>3</sup> 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 Defendants’ 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 policy and practice counts are dismissed under FOIA, it is nonetheless 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 CIA’s actions with respect to the FOIA requests being challenged in the ‘records denial’ counts which immediately precede it.” Opposition at 3. 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 under FOIA for 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 Defendants’ Motion and dismiss Counts 4, 11, 14, 15, 16, 17, 18, 19, 20, and 21.

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

Defendants established in their Partial Motion to Dismiss that NSC’s policy claims should be dismissed because NSC has not met its burden of establishing that it has constitutional 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 distinguish the case law Defendants cite in their motion. But NSC fails to distinguish the analogous cases Defendants rely on or to identify cases that support its claims to standing. Accordingly, Counts 4, 11, 14, 15, 16, 17, 18, 19, 20, and 21 should be dismissed because NSC lacks standing to seek prospective relief.

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, Defendants did not argue in their motion that the policies and practices that NSC alleges in its complaint do not exist.<sup>4</sup> Such an argument, challenging NSC’s ability to prove its allegations, would be more appropriately presented to the Court in a motion for summary

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<sup>4</sup> Defendants did argue with respect to Counts 15, 16 and 17, that NSC’s own allegations show that the CIA does not have a policy of refusing to provide requesters with estimated dates of completion. See Part III(C).

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 Defendants' 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 constitutional 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 Defendants cited in their 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.

Finally, NSC attempts to distinguish this Court's recent decision in Quick v. Dep't of Comm., --- F.2d ----, 2011 WL 1326928 (D.D.C. April 7, 2011). In Quick, a FOIA plaintiff brought FOIA policy and practice claims and attempted to establish standing to seek prospective relief based on an allegation that he planned to file FOIA requests with the defendant agency in the future. The Court examined Supreme Court case law and determined that the plaintiff's allegation was insufficient to establish standing to seek prospective relief:

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 v. Defenders of Wildlife, 504 U.S. 555, 564 (1992)). The insufficient allegation in Quick – that the plaintiff planned to file additional FOIA requests with the agency – is more detailed and concrete than the allegation that NSC relies on in this case: "[a]s a frequent FOIA requester, NSC stands to continue to be harmed by this ongoing practice in the future." See Compl. ¶¶ 36, 80, 97, 106, 110, 121, 125, 132, and 136. NSC acknowledges in its Opposition, that the Quick Court was correct to conclude that the

plaintiff's allegation was insufficient to establish standing, Opposition at 13, but tries to diminish the import of the Court's decision by claiming that Court's discussion of standing was dicta. Id. NSC is incorrect, as the Quick Court relied on its decision regarding the plaintiff's standing as a basis for denying his cross motion for summary judgment, Quick, 2011 WL 1326928, \*11, and fails to show why this Court should not adopt the Quick Court's analysis in this matter.

After trying unsuccessfully to distinguish CREW, American Historical Society, and Quick, NSC attempts 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. On pg. 14 of its Opposition, NSC alleges that it "has submitted *fifteen* FOIA requests to the CIA since the commencement of this litigation." (emphasis in original). This allegation of post-complaint action, however, is 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 Plausible Claims for Relief.**

In its Partial Motion to Dismiss, Defendants 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, 1950, 173 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 to not meet that standard, they should be dismissed.

**B. The CIA’s Alleged Policy of Applying Blanket Withholdings to FOIA and Privacy Act Materials is Consistent with the FOIA.**

In Claims 4 and 11, NSC alleges that the CIA has a policy or practice of improperly applying blanket exemptions to “all information pertaining to an agency’s processing of FOIA and Privacy Act requests,” Complaint at ¶ 35, and “all FOIA/[Privacy Act] reference materials.” *Id.* at ¶ 79. NSC also claims that the alleged policy violates the FOIA. *Id.* at ¶¶ 36, 80. In their Partial Motion to Dismiss, Defendants established that even if NSC’s factual allegations are accepted as true, the CIA’s alleged policy would be consistent with the FOIA. Defendants explained that Exemption 3 covers records that are exempted from disclosure under a statute and showed that information pertaining to the CIA’s processing of FOIA and Privacy Act requests and the CIA’s FOIA and Privacy Act reference materials are exempt from disclosure under the Central Intelligence Agency Act of 1949 (“CIA Act”).

Rather than citing to cases or statutes or attempting to argue that the records at issue are not covered by the CIA Act, NSC devotes its rebuttal to casting aspersions at the CIA, alleging that the agency is attempting “a slight-of-hand” and making “sweeping generalizations that have not been seen in FOIA litigation in almost 40 years.” Opposition at 14, 15. NSC also provides excerpts from a document that the CIA released several years ago in response to a FOIA request and an internet citation to documents the National Security Agency has released. These documents are both irrelevant and outside the scope of Rule 12(b)(6) review. See e.g., Carson v.

Sim, — F.Supp.2d —, 2011 WL 1526976, \*3 (D.D.C. April 22, 2011) (“In deciding a motion brought under Rule 12(b)(6), a court does not consider matters outside the pleadings.”).

Finally, NSC concludes that “[f]or 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.” Opposition at 17 (emphasis added). “[D]iscovery in a FOIA action is generally inappropriate,” Judicial Watch, Inc. v. Export-Import Bank, 108 F.Supp.2d 19, 25 (D.D.C.2000), and NSC should not be permitted to stave off dismissal of its defective FOIA claims with an unsupported request for discovery. As NSC has failed to show that it has stated a claim on which relief can be granted, Counts 4 and 11 of its amended complaint should be dismissed.

**C. The CIA Can Properly Issue Glomar Responses to Requests for Information Regarding FOIA and MDR Referrals from Other Agencies.**

In Claim 14, NSC alleges that the CIA has a policy or practice of improperly giving “a Glomar response to any request for information pertaining to FOIA and Mandatory Declassification Review (“MDR”) requests referred to the CIA by other government agencies.” Complaint at ¶ 95. NSC then alleges that the alleged policy violates the FOIA. Id. at ¶ 97. In their Partial Motion to Dismiss, Defendants established that even if NSC’s allegations are accepted as true, the alleged policy does not violate the FOIA. Defendants explained that under Exemption 3 and the CIA Act, information pertaining to FOIA and MDR requests from other agencies is exempt from disclosure and properly the subject of Glomar responses.

In its Opposition, NSC claims that the CIA’s “policy or practice is not compatible with the case law regarding Glomar responses.” Opposition at 17. Yet NSC fails to cite to even one case in support of its claim. Tellingly, NSC’s entire rebuttal to Defendants’ argument

concerning Glomar responses is devoid of citations to cases or statutes. As Defendants have shown that the CIA's alleged policy of issuing Glomar responses to FOIA requests for information pertaining to FOIA and MDR review request from other agencies would not violate the FOIA, and NSC has failed to rebut that showing, the Court should dismiss Count 14 for failure to state a claim.

**D. NSC Has Failed to State a Claim that the CIA has a Policy of Refusing to Provide Completion Dates.**

In Counts 15, 16, and 17, NSC alleges that the CIA has a policy or practice of refusing to provide FOIA requesters with estimated dates of completion in violation of FOIA Section 552(a)(7)(B). Defendants in their Partial Motion to Dismiss showed that NSC also alleged in its complaint that a CIA representative informed NSC that the CIA has a policy of informing requesters that the estimated date of completion for any given request is two years after the request was submitted. Complaint at ¶ 101. If this allegation is accepted as true, it shows that the CIA does in fact have a policy of providing estimated dates of completion and completely undermines NSC's claim that the CIA has a policy of refusing to provide FOIA requesters with estimated dates of completion.

In its Opposition, NSC counters that what it is alleging is that the CIA representative was not accurately representing the agency. Opposition at 10. The context that NSC now attempts to give its allegations, however, is not apparent from the face of NSC's complaint. Because a Rule 12(b)(6) motion tests the allegations as they appear in the complaint, NSC's post-complaint justification for its contradictory allegations is irrelevant. See Carson, — F.Supp.2d —, 2011 WL 1526976, \*3 (D.D.C. April 22, 2011) (“In deciding a motion brought under Rule 12(b)(6), a court does not consider matters outside the pleadings.”). Because NSC alleged in its own

complaint that a CIA representative told it that the agency had a policy of providing estimated dates of completion, Counts 15, 16, and 17 should be dismissed for failure to state a claim.

**E. The CIA Can Properly Refuse to Identify Withheld Documents When Appropriate.**

In Counts 18, 19, and 20, NSC alleges that the CIA has a policy or practice of refusing to identify withheld records at the administrative stage and that the alleged policy violates the FOIA. In their Partial Motion to Dismiss, Defendants showed that agencies can properly issue “no number, no list” responses when appropriate. In support of its position, the CIA cited to a 2004 decision by the Seventh Circuit, Bassiouni v. C.I.A., 392 F.3d 244 (7th Cir. 2004), which explained in detail why “no number, no list” responses are proper under the FOIA and actually benefit requesters who would otherwise receive *Glomar* responses. In its Opposition, NSC cites to a string of inapposite cases, all of which are at least 25 years old. See Shermco Indus. v. Sec’y of the U.S. Air Force, 452 F. Supp. 306, 317 n.7 (N.D. Tx. 1978); Va. Transformer Corp. v. DOE, 628 F. Supp. 944, 947 (W.D. Va. 1986); Marschner v. Dep’t of State, 470 F. Supp. 196, 199 (D. Conn. 1979). None of the cases cited by NSC analyzes a “no number, no list response” or is directly relevant to the issue presented here. As NSC has not supplied persuasive contrary authority, the Court should follow the Seventh Circuit’s opinion in Bassiouni and dismiss Counts 18, 19, and 20 of NSC’s complaint for failure to state a claim.

**F. The CIA Can Properly Refuse to Invoke Exemptions with Particularity When Appropriate.**

In Counts 20 and 21, NSC alleges that the CIA has a policy or practice of invoking exemptions on a document level without indicating which exemptions apply to particular

redactions and that the alleged policy violates the FOIA. In their Motion, Defendants showed that agencies may appropriately invoke exemptions on a document level based on FOIA Section 552(b), which states that “[t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. 5 U.S.C. § 552(b) (emphasis added). Rather than attempt to show that this section of the FOIA does not apply or should be read differently, NSC provides only a conclusory assertion that Defendants’ interpretation is a “patent over extension of the FOIA” Opposition at 20. NSC also claims without explanation that exemption decision should be made a case-by-case basis. *Id.* at 19, 20. As Defendants have shown that the alleged policy and practice would not violate the FOIA, and NSC has failed to show why Defendants are incorrect, the Court should dismiss Counts 20 and 21.

### CONCLUSION

NSC’s counts that are not tied to specific FOIA requests – Counts 4, 11, 14, 15, 16, 17, 18, 19, 20, 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 both constitutional and prudential standing and has failed to state plausible claims for relief.

Dated: June 21, 2011

Respectfully submitted,

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