

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

JUDICIAL WATCH, INC.,)	
)	Civil Action No. 15-cv-1983 (RJL)
Plaintiff,)	
v.)	
)	
UNITED STATES DEPARTMENT)	
OF HOMELAND SECURITY,)	
)	
Defendant.)	
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PLAINTIFF’S MOTION FOR LEAVE TO TAKE DISCOVERY

Plaintiff Judicial Watch, Inc., by undersigned counsel, respectfully moves this Court for an Order, pursuant to Rule 26(b) of the Federal Rules of Civil Procedure, and for good cause, granting Plaintiff leave to conduct discovery on its “policy and practice” claim in this Freedom of Information Act (“FOIA”) lawsuit. Pursuant to Local Rule 7(m), Plaintiff certifies that it discussed this motion with Defendant’s counsel in a good-faith effort to determine whether there is any opposition and to narrow any areas of disagreement. Based on that discussion, Plaintiff understands that Defendants opposes this motion. Plaintiff respectfully submits the attached Memorandum of Law and Proposed Order in support of its motion.

MEMORANDUM OF LAW

I. Procedural Background.

On November 10, 2015, Plaintiff filed a Complaint asserting two claims. Count One consists of a “traditional” FOIA claim, in which Plaintiff sued Defendant for violating its FOIA obligations with respect to nineteen (19) travel-related FOIA requests. Compl. (ECF No. 1) ¶¶ 8, 19-20. Count Two asserts that Defendant has a policy and practice of violating FOIA’s procedural requirements in connection with the processing of Plaintiff’s requests and, in

particular, of regularly failing or refusing to produce requested records or otherwise demonstrate that requested records are exempt from production within the time period required by FOIA or at least within a reasonable period of time. Compl. (ECF No. 1) ¶¶ 22-23.

Defendant answered Plaintiff's Complaint on December 22, 2015, denying Plaintiff's allegation regarding a "policy or practice" of violating FOIA in connection with the processing of Plaintiff's FOIA requests. Def's Answer (ECF Doc. 8).

Defendant subsequently produced records responsive to Secret Service Tracking Numbers 20150067, 20150170, and 2015071 on or about January 13, 2016. Defendant then produced records responsive to Secret Service Tracking Numbers 20141036 and 20150439 on January 15, 2016. Defendant will produce records responsive to the outstanding 14 requests on or before March 18, 2016.

Within one month of Plaintiff filing a lawsuit against Defendant for violating its FOIA obligations, Defendant began producing responsive records to requests made nearly two years earlier. Upon final production, promised by March 18, 2016, Defendant will have produced records responsive to Plaintiff's 19 FOIA requests – submitted over a period of one year from July 2014 through August 2015 – in just 4 months.

On February 12, 2016, Defendant filed a Motion for Judgment on the Pleadings on Plaintiff's "Policy and Practice" Claim. (ECF Doc. 11.) The parties dispute whether discovery is necessary for further litigation regarding Plaintiff's "policy and practice" claim given Defendant's commitment to producing all requested records by or before March 18, 2016

II. Factual Background.

Plaintiff is a not-for-profit, educational organization incorporated under the laws of the District of Columbia. Plaintiff seeks to promote transparency, integrity, and accountability in

government and fidelity to the rule of law. As part of its mission, Plaintiff regularly requests records from federal agencies pursuant to FOIA. Plaintiff analyzes the agencies' responses and disseminates both its findings and the requested records to the American public to inform them about "what their government is up to."

For years, Plaintiff has regularly monitored expenditures of U.S. Government funds on VIP travel. As part of this on-going monitoring, Plaintiff has served numerous FOIA requests on the U.S. Secret Service ("Secret Service"), a component of Defendant, seeking access to records about U.S. Government funds expended on travel by the President, members of the First Family, and other VIPs receiving Secret Service protection. Secret Service records typically include records of expenses incurred for ground transportation, lodging, meals, and other related costs for the VIP and accompanying Secret Service detail. Plaintiff also regularly serves FOIA requests on the U.S. Air Force and other agencies for records about federally-funded, VIP travel. U.S. Air Force records reflect the cost of air travel. Compl. (ECF No. 1) ¶ 5.

Plaintiff typically analyzes the records it receives in response to its requests and issues reports on its findings. Compl. (ECF No. 1) ¶ 6. The Secret Service regularly fails to issue determinations in response to Plaintiff's VIP, travel-related FOIA requests within the time period required by FOIA, causing Plaintiff to bring suit in order to obtain the requested records. Compl. (ECF No. 1) ¶ 7.

During the time period from July 21, 2014 to August 24, 2015, Plaintiff submitted 19 travel-related FOIA requests to the Secret Service as part of Plaintiff's on-going monitoring of federally-funded, VIP travel. All of the requests were identical or nearly identical but for the name of the VIP and the date and/or destination of the travel. Plaintiff's requests sought: "All records concerning use of U.S. Government funds to provide security and/or any other services

to [name of VIP] and any other companions on their [date] trip to [location].” Compl. (ECF No. 1) ¶ 8.

As of November 10, 2015, when Plaintiff filed its Complaint, the Secret Service had not made a determination on a single, travel-related FOIA request served by Plaintiff since July 21, 2014. Compl. (ECF No. 1) ¶ 9. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), the Secret Service was required to determine whether to comply with each request within twenty (20) working days of receipt and to notify Plaintiff immediately of its determination, the reasons therefor, and the right to appeal any adverse determination. In all but two instances, the Secret Service acknowledged receipt of Plaintiff’s request and assigned a tracking number to the request. Compl. (ECF No. 1) ¶ 10. In three instances, the Secret Service provided a further communication about the status of the request, but otherwise failed to issue a determination on whether to comply with the request, produce responsive records, or demonstrate that responsive records were exempt from production under one or more of FOIA’s exemptions. Compl. (ECF No. 1) ¶ 11.

Plaintiff intends to continue submitting identical or nearly identical, travel-related FOIA requests to the Secret Service as part of its on-going efforts to educate and inform the public about “what their government is up to” and promote transparency, integrity, and accountability in government and fidelity to the rule of law. Compl. (ECF No. 1) ¶ 17. Defendant continues to fail to make proper and timely determinations on Plaintiff’s travel-related FOIA requests.¹ As a result, Plaintiff has been, and continues to be, prevented from gathering complete records of

¹ Plaintiff sent a FOIA request to Secret Service on October 13, 2015 seeking information and records regarding President Obama’s October 2015 trip to San Diego, CA. Defendant acknowledged receipt of the request on October 30, 2015 and assigned it File No. 20160177. As of the date of this filing, there has been no further communication regarding the October 13, 2015 request. On January 4, 2016, Plaintiff sent a FOIA request to Secret Service seeking information and records regarding President Obama’s December 2015-January 2016 trip to Honolulu, HI. As of the date of this filing, Defendant has been no response to the January 4, 2016 request either.

federally-funded, VIP travel, and Plaintiff's reports about federally-funded, VIP travel have been incomplete. Compl. (ECF No. 1) ¶ 16.

III. Argument.

A. Legal Standard.

“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Ensuring that agency records be disclosed in a timely manner is important to effectuating the purpose of FOIA. As the legislative history of FOIA makes clear, Congress recognized that delay in releasing information can be “tantamount to denial” of access. *See* H. Rep. No. 876, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News, 6267, 6271. “The value of information is partly a function of time.” *Fiduccia v. U.S. Dep’t of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999). Consequently, agencies are required to determine within twenty days of the receipt of a request for records “whether to comply with such request” and “to immediately notify the person making such request of such determination and the reasons thereof.” 5 U.S.C. § 552(a)(6)(A)(I). This time limit can be extended by ten working days if the agency determines that “unusual circumstances” exist. 5 U.S.C. § 552(a)(6)(B).

Given the unique nature of FOIA litigation, parties typically do not engage in the normal civil discovery process. Discovery is permitted in certain circumstances, however. *See, e.g., Tax Analysts v. Internal Revenue Service*, 214 F.3d 179, 185 (D.C. Cir. 2000) (remanding for discovery on “narrow and fact-specific question” concerning disclosability of specific type of document); *Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 2008 U.S. Dist. LEXIS 111094 (D.D.C. Feb. 11, 2008) (order authorizing jurisdictional discovery in

FOIA/PRA case); *Public Citizen v. Food and Drug Administration*, 997 F.Supp. 56, 72 (D.D.C. 1998) (permitting discovery “investigating the scope of the agency search for responsive documents, the agency’s indexing procedures, and the like”); *see also Heily v. U.S. Dep’t of Commerce*, 69 Fed. App’x 171, 174 (4th Cir. 2003) (per curiam) (explaining that discovery may be permitted regarding the “scope of agency’s search and its indexing and classification procedures”); *Alley v. U.S. Dep’t of Health and Human Services*, 2008 U.S. Dist. LEXIS 106884, **19-20 (N.D. Ala. May 8, 2008) (granting plaintiff leave to conduct limited discovery to flesh out his claim that agency “has a policy of unreasonably denying FOIA requests that take over two hours to process and/or that require it to create computer programming”).

B. Plaintiff Should be Allowed to Conduct Discovery Regarding its “Policy and Practice” Claim.

Plaintiff’s Complaint alleges that Defendant has a policy and practice of ignoring or delaying its responses to Plaintiff’s FOIA requests. Compl. (ECF No. 1) ¶ 22. Defendant denies the existence of such a policy or practice, raising a quintessential factual dispute about an issue central to this lawsuit. Def’s Answer (ECF No. 8) ¶ 22. The fact that Defendant failed to respond to multiple requests within the timeframe and parameters proscribed under FOIA, yet produced records so quickly after litigation was initiated, only confirms the likelihood that Defendant has a policy and practice of ignoring or delaying its responses to Plaintiff’s FOIA requests.

As a result, Plaintiff seeks discovery into Defendant’s handling of Plaintiff’s FOIA requests and, in particular, why so many of Plaintiff’s requests went unanswered for more than a year. The objective of this discovery will be to obtain admissible evidence in support of Plaintiff’s “pattern and practice” claim. Specifically, Plaintiff intends to seek discovery into the number and nature of FOIA requests Defendant receives; Defendant’s processes for responding

to FOIA requests; whether other FOIA requestors experienced the same delays experienced by Plaintiff; the existence of any communications or directives concerning the processing of Plaintiff's FOIA requests; and why or how Defendant was able to provide responses so quickly to the 19 FOIA requests identified in the Complaint when confronted with litigation. Permitting discovery targeted to these factually disputed issues is appropriate and necessary to fully adjudicate Plaintiff's "policy and practice" claim.

C. Plaintiff's "Policy and Practice" Claim is well-supported.

"To state a claim for relief under the 'policy or practice' doctrine articulated in [*Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1987)]... a plaintiff must allege... facts establishing that the agency has adopted, endorsed, or implemented some policy or practice that constitutes an ongoing 'failure to abide by the terms of the FOIA.'" *Mutitt v. Dep't of State*, 926 F. Supp. 2d 284, 293 (D.D.C. 2013) (*quoting Payne Enterprises*, 837 F.2d at 491). Courts have held that a "claim that an agency policy or practice will impair the party's lawful access to information in the future" is valid and justiciable where a plaintiff can show that applicable facts demonstrate its specific injury. *Hajro v. U.S. Citizenship and Immigration Services*, 807 F. 3d 1054 (9th Cir. 2015), *citing Payne Enters., Inc.*, 837 F.2d at 491; *see also Newport Aeronautical Sales v. Dep't of the Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012); *Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991); *Long v. IRS*, 693 F.2d 907, 909-10 (9th Cir. 1982).

Plaintiff's "policy and practice" claim is well-supported. Plaintiff's Complaint identifies 19 travel-related FOIA requests submitted between July 2014 and August 2015 in response to which Defendant did not make a single determination until Plaintiff filed this lawsuit. Compl. (ECF No. 1) ¶¶ 8-12, 14 & Attach. A. Plaintiff's Complaint also alleges that: (1) Defendant's repeated failure to respond was not an isolated incident, but the result of a policy or practice

(Compl. (ECF No. 1) ¶¶ 8-12); (2) Plaintiff was personally harmed by the alleged policy or practice (Compl. (ECF No. 1) ¶ 16); and (3) Plaintiff has a sufficient likelihood of future harm by the policy or practice. Compl. (ECF No. 1) ¶¶ 17, 23. Defendant does not assert that Plaintiff's Complaint does not state a "pattern or practice" claim and admitted in its Answer that it had not issued final responses to any of the 19 requests. Def's Answer (ECF No. 8) ¶ 14. It nonetheless filed a Motion for Judgment on the Pleadings asserting that there are no material facts in dispute and that it is entitled to judgment as a matter of law.² (ECF No. 11-1). Plainly, that motion cannot be adjudicated until Plaintiff has had the opportunity to take discovery and obtain admissible evidence in support of its claim.

Finally, Plaintiff's "policy or practice" claim is not mooted by Defendant's anticipated production of documents by or before March 18, 2016. In *Payne Enters., Inc.*, the Court held that a pattern or practice claim remains viable "[s]o long as an agency's refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials." 837 F.2d at 491; *see also Hajro*, 807 F.3d at 1070. Plaintiff alleged this to be the case, has demonstrated a factual basis for its claim, and must be allowed discovery in order to obtain admissible evidence in support of its claim. Discovery must proceed on Plaintiff's "policy and practice" claim before the Court can adjudicate Defendant's motion for judgment.

II. Conclusion.

For the foregoing reasons, Plaintiff respectfully requests that it be granted leave to take discovery in support of its "policy or practice" claim against Defendant.

Dated: February 22, 2016

Respectfully submitted,

² Pursuant to the Court's February 1, 2016 scheduling order, Plaintiff's response to Defendant's Motion is due by March 11, 2016. Plaintiff intends to address Defendant's argument in full at that time.

/s/ Lauren M. Burke

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