NOT YET SCHEDULED FOR ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5339

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY

Defendant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT JUDICIAL WATCH, INC.

Lauren M. Burke
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172
lburke@judicialwatch.org

Dated: April 21, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

* Authorities upon which Judicial Watch chiefly relies are marked with asterisks.

RULES AND STATUTES

* Authorities upon which Judicial Watch chiefly relies are marked with asterisks.

GLOSSARY OF ABBREVIATIONS

JW Brief	Brief of Appellant Judicial Watch, Inc.
DHS	U.S. Department of Homeland Security
DHS Brief	Brief for Appellee
District Court	U.S. District Court for the District of Columbia
FOIA	Freedom of Information Act
JA	Joint Appendix
Opinion	Memorandum Opinion of U.S. District Judge Richard J. Leon

SUMMARY OF THE ARGUMENT

Plaintiff's Complaint alleges sufficient facts, when accepted as true and construed in the light most favorable to Plaintiff, to support its policy and practice claim. Defendant's conduct is ongoing and continues to harm Plaintiff warranting the equitable relief Plaintiff seeks. The U.S. District Court for the District of Columbia should be reversed, and the case should be remanded for further proceedings.

ARGUMENT

I. Plaintiff's Policy and Practice Claim Is Sufficiently Supported and Warrants Further Development

Defendant's arguments rely on the contention that Plaintiff's complaint fails to point to or identify an official policy or practice by Defendant. See DHS Brief at 12. It is simply not true that Plaintiff, at the pleading stage, must specifically identify a specific, illegal conduct to bring a policy and practice claim against an agency. Plaintiff can prevail against a Defendant if it can show an agency has "adopted, endorsed, or implemented" an unlawful policy or practice. *Muttitt v. U.S. Dep't of State*, 926 F.Supp.2d 284, 293 (D.D.C. 2013). To show such conduct, it is necessary to work through the litigation and discovery process.

Defendant contends that "Plaintiff alleges no facts supporting its claim, and publicly available reports furnish no basis for its assertion that it is the victim of a peculiar policy or practice." DHS Brief at 14. However, the facts provided in its

complaint clearly support Plaintiff's allegation that Defendant's conduct is not that of a diligent agency. 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. JA 4, 11-12. 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; (2) Plaintiff was personally harmed by the alleged policy or practice; and (3) Plaintiff has a sufficient likelihood of future harm by the policy or practice. JA 7, 9. Furthermore, Plaintiff's Complaint identifies at least 5 prior instances in which Defendant "fail[ed] to issue determinations in response to similar VIP, travel-related FOIA requests within the time period required by FOIA, causing Plaintiff to bring suit in order to obtain the requested records." JA 6.

Defendant's failure to abide by FOIA obligations is not an isolated event. Plaintiff provided nearly 30 instances of identical, unlawful FOIA violations by defendant in processing Plaintiff's requests to sufficiently allege a policy or practice at this stage of litigation. Defendant asserts that "[a] policy-or-practice injunction is warranted only where there is a 'systematic agency abuse or bad faith.'" DHS Brief at 16 *citing Gilmore v. National Sec. Agency*, No. 94-16165, 1995 WL 792079, at *1 (9th Cir. Dec. 11, 1995) *unpublished). Here, Plaintiff has clearly described ongoing practice as well as injury which it continues to suffer.

Therefore, Plaintiff's complaint more than meets the requirements to adequately plead a policy and practice claim.

Plaintiff's policy and practice claim is amply supported by the allegations that, between July 2014 and August 2015, Plaintiff submitted 19 travel-related FOIA requests to Defendant, but Defendant failed to issue a determination on a single one of Plaintiff's request. JA 6-7; 11-12.

On May 6, 2016, Plaintiff filed another Complaint alleging 5 more instances of delayed disclosure of travel-related records requested under FOIA. *Judicial Watch, Inc. v. U.S. Department of Homeland Security*, Case No. 16-0863 (D.D.C.). The subject requests were served between October 13, 2015 and March 28, 2016.[1] Despite its denial, Defendant's pattern and practice of delayed disclosure obviously continues. The failure to respond in a timely manner to 24 consecutive requests plainly constitutes more than an isolated mistake by an agency official. The May 6, 2016 Complaint provides additional, factual support for Plaintiff's assertion that Defendant has a policy and practice of delayed disclosure. This continued conduct clearly shows that judgment on the pleadings was inappropriate and that these cases require further inquiry and discovery.

[1] The October 13, 2015 request was not "ripe" at the time the November 10, 2015 lawsuit was filed. The others, dated January 4, 2016, January 6, 2016, February 18, 2016, and March 28, 2016, had not yet been served.

Based on the facts provided in the pleadings, the court certainly can infer that this is not a matter of a few "isolated incidents," but rather a policy or practice regarding FOIA requests submitted by Plaintiff. *See Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1987). Plaintiff should have the opportunity to take discovery and obtain admissible evidence in support of its claim.

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 v. U.S. Citizenship and Immigration Services*, 807 F. 3d 1054 (9th Cir. 2015). Plaintiff alleged this to be the case, has demonstrated a factual basis for its claim, and must be allowed discovery 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.

Judicial Watch's asserted reason for DHS's egregious, repeated violation of its FOIA obligations – that there is an unlawful policy and practice in place – can be reasonably inferred and is well supported by the detailed description of 19 FOIA requests provided in Judicial Watch's Complaint. *See Sparro v. United Air Lines, Inc*. 216 F.3d 1111, 1113 (D.C. Cir. 2000).

Although parties typically do not engage in the normal civil discovery process in FOIA litigation, discovery is permitted in certain circumstances. *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").

Discovery is meant to allow a party to uncover facts which might prove the claims alleged. *Washington v. Cameron*, 411 F.2d 705, 710-11 (D.D.C. 1969). Plaintiff, like most civil litigant plaintiffs, is limited in the facts and evidence at its

disposal. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" between a FOIA requester and an agency in FOIA cases). It is only through discovery in the litigation process that further facts and evidence are drawn out to fully develop the record to support Plaintiff's claim. "[I]t must be remembered that the entitlement to discovery occurs when there has emerged a genuine issue of material fact which can only be resolved by an evidentiary hearing." *Asarco, Inc. v. EPA*, No. Civ.A.08-1332 EGS-JMF, 2009 U.S. Dist. LEXIS 37182 (D.D.C. Apr. 28, 2009). Here, Plaintiff has specifically identified a genuine issue of material fact upon which it seeks discovery – whether Defendant has a policy and practice in place regarding Plaintiff's FOIA requests. Plaintiff's properly pled pattern and practice claim falls within the norms of the regular civil litigation process, including engaging in discovery to develop the factual dispute at issue for the Court's determination. *Id*.

Plaintiff asserts that discovery is necessary to develop and resolve the question of whether the agency has an unlawful policy and practice regarding Plaintiff's FOIA requests. There is a clear need to gain insight and answers to the agency's FOIA processing policies and procedures considering the 19 FOIA requests that Defendant failed to respond to over a period of 2 years, and the expediency with which requested records were produced after Plaintiff filed its

lawsuit, and Plaintiff should be given the opportunity to show Defendant's behavior amounts to more than just systemic limitations. "The factual record must be developed appropriately and Plaintiff should be permitted to engage in discovery to provide deeper documentation for the Court to make [a] determination." *Judicial Watch, Inc. v. Dep't of State,* C.V. 14-1242 (RCL) (D.D.C. March 29, 2016).

"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.'" *Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 293 (D.D.C. 2013) (*quoting Payne Enterprises*, 837 F.2d at 491). Plaintiff has clearly met this burden. Plaintiff's claim falls squarely within the requirements of *Payne Enterprises*. There is no heightened pleading threshold for a policy and practice claim as suggested by Defendant. Whether Plaintiff will succeed on its policy and practices claim is to be developed through discovery and litigation.

Discovery, not dismissal, 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 is clearly warranted. Specifically, discovery should be pursued 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.

II. Equitable Relief is Appropriate

Here, Plaintiff's claim is precisely the "circumstance[]…where an agency simply refuses to conform its action to the known requirements of the [FOIA] in order to deter requests for information by repetitive litigation, that would tempt a court to use any or all of the usual weapons in the arsenal of equity." *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 264 (D.D.C. 2012) (*quoting Research Project, Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 252 (D.C. Cir. 1974)). Plaintiff's complaint alleges multiple facts that indicate the agency's conduct is willful and deliberate.

The *Payne* court was quite clear: "The FOIA imposes no limits on courts' equitable powers in enforcing its terms." 837 F.2d at 494 (specifically noting that the district court's decision not to grant equitable relief in *Payne* was actually an abuse of discretion). *See also Nat'l Sec. Counselors*, 898 F.Supp.2d at 264. The

Payne court's reliance on *Long v. IRS*, 693 F.2d 907 (9th Cir. 1982) supports plaintiff's claim for equitable relief here (noting "Congress did not intend for the IRS, or any other agency, to use the FOIA offensively to hinder the release of non-exempt documents…It was the IRS' abuse of this scheme that forced the appellants to bring several lawsuits to obtain release of the documents…These unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses.").

The courts in *Muttitt* and *Nat'l Security Counselors* have further reiterated that "the Court has the power to enjoin a FOIA procedural violation under the equitable jurisdiction of the FOIA itself so long as that violation was 'in connection with the processing of the plaintiff's FOIA requests.'" *Nat'l Sec. Counselors*, 898 F.Supp.2d at 265 (*quoting Muttitt*, 813 F.Supp.2d at 229). "This Court stated in *Muttitt* that, even though a policy or practice 'would not necessarily result directly in [the] withholding [of agency records],' it nevertheless falls within the Court's broad equitable powers under the FOIA." Id. (*quoting Muttitt*, 813 F.Supp.2d at 228-29 & n.4).

In seeking injunctive or declaratory relief, a plaintiff "must show [it] is suffering an ongoing injury or faces an immediate threat of injury." *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 260 (D.D.C. 2012) *citing Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011). A plaintiff challenging an alleged

policy or practice of a government agency must demonstrate that it is "'realistically threatened by a repetition of [its] experience.'" *Id*. (*citing Haase v. Sessions*, 835 F.2d 902, 910-11 (D.C. Cir. 1987)). This threat must be "real and immediate," or, alternatively, "realistic[]" in nature. *Id*. (*internal citations ommitted*). Here, Plaintiff not only asserts that there is a "threat of repetition" and that it is "likely to be subjected to the policy again," but actually has been subjected to Defendant's continued policy and practice. *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 260 (*citing Haase*, 835 F.2d at 911). Plaintiff's complaint contains "more than a nebulous assertion of the existence of a 'policy'" and Plaintiff was forced to file suit again to receive records for five additional travel-related FOIA requests that Defendant failed to make determinations on over a period of 6 months. *See* Plaintiff's Motion for Leave to File Supplement (ECF No. 20).[2]

FOIA grants federal courts jurisdiction to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). The D.C. Circuit in *Payne*, however, held that "[t]he FOIA imposes no limits on courts' equitable powers in enforcing its terms," and where an agency's actions in response to a FOIA request "violate the intent and purpose of the FOIA . . . the courts have a

[2] *Judicial Watch v. U.S. Department of Homeland Security* (15-863) is the related case before Judge Leon in District Court. The case is presently stayed pending the outcome of this appeal.

duty to prevent these abuses." *Payne*, 837 F.2d at 494; *see also Wash. Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 252, (D.C. Cir. 1974) ("One can imagine circumstances, such as where an agency simply refuses to conform its action to the known requirements of the [FOIA] in order to deter requests for information by repetitive litigation, that would tempt a court to use any or all of the usual weapons in the arsenal of equity." (internal quotation marks omitted)). Therefore, although the language of the FOIA could be read strictly to limit the equitable powers of federal courts to enjoining the agency from withholding records and ordering production of improperly withheld records, the D.C. Circuit and the U.S. Supreme Court have interpreted those equitable powers more broadly. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19-20 (1974) (holding that "[t]he broad language of the FOIA," among other factors, demonstrate that "there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court"). The scope of the equitable powers available under the FOIA is nevertheless still unclear because the D.C. Circuit has yet to specify the breadth of *Payne*-style relief. The only concrete guidance has been from *Payne* itself, which stated that FOIA policy-or-practice claims extend to any "failure to abide by the terms of the FOIA." *Payne*, 837 F.2d at 491. This Court has previously held that "where a plaintiff challenges an alleged pattern and practice of violating procedural requirements of FOIA in connection

with the processing of the plaintiff's FOIA requests[,] the Court has the power under FOIA and *Payne* to provide the requested declaratory and injunctive remedies." *Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 229 (D.D.C. 2011); *see also Feinman v. FBI*, 713 F. Supp. 2d 70, 78 (D.D.C. 2010) (dismissing APA policy or practice claim because "the relief available under FOIA is of the 'same genre' as the relief available under the APA"). Thus, under *Muttitt*, the Court has the power to enjoin a FOIA procedural violation under the equitable jurisdiction of the FOIA itself so long as that violation was "in connection with the processing of the plaintiff's FOIA requests." *Muttitt*, 813 F. Supp. 2d at 229. Indeed, this Court stated in *Muttitt* that, even though a policy or practice "would not necessarily result directly in [the] withholding [of agency records]," it nevertheless falls within the Court's broad equitable powers under the FOIA. *Id*. at 228-29 & n.4. *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 264-65 (D.D.C. 2012).

CONCLUSION

For the reasons set forth in Judicial Watch's opening brief and the additional reasons set forth above, the District Court should be reversed, and the case should be remanded for further proceedings.

Dated: April 21, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ *Lauren M. Burke*

Lauren M. Burke
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172
lburke@judicialwatch.org

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 3,497 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Lauren M. Burke

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2017, I filed via the CM/ECF system the foregoing **REPLY BRIEF OF APPELLANT JUDICIAL WATCH, INC.** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused eight copies to be delivered to the Clerk of Court via hand delivery.

/s/ Lauren M. Burke