UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RYAN SCOVILLE, Plaintiff, v. U.S. DEPARTMENT OF STATE, Defendant.	Civil Action No. 2:22-cv-91-NJ ECF Case

PLAINTIFF'S OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS

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INTRODUCTION

The Freedom of Information Act stands as the nation's guarantee of government transparency for its citizens. The law entitles anyone to request a document and receive it promptly, enabling civic engagement and effective democratic oversight. Yet the State Department routinely violates the deadlines imposed by FOIA. It provides documents months or even years too late, hobbling the ability of people like Ryan Scoville, a professor at Marquette University Law School, to learn what the government is doing.

This case seeks to restore the public's ability to keep tabs on the State Department by ensuring the department comes into compliance with the law's requirements. Prof. Scoville has repeatedly suffered years of delay as he has waited for the department to respond to his requests. The State Department has provided Prof. Scoville no explanation for its extensive delays. Data from the State Department itself show that it treats other requesters no better, with nearly 15,000 requests still pending beyond the period allowed by FOIA and even responses to simple requests taking many times longer than the law allows.

Fortunately, there is a way to remedy the State Department's widespread disregard of the law's requirements. A policy-or-practice claim enables a requester like Prof. Scoville to seek an injunction requiring the department to come into compliance with FOIA. All that is required to state the claim are allegations of prolonged, unexplained delays.

Prof. Scoville has adequately pleaded his claim that the State Department has a policy or practice of delay in violation of FOIA's timing requirements. The Defendant's motion to dismiss the claim should be denied.

BACKGROUND

A. FOIA's Purpose and Its Mandate for "Prompt" Agency Responses

In enacting the Freedom of Information Act, Congress created a tool for anyone to learn about their government's actions — and it intended that information to be available in a timely manner, before it becomes outdated or irrelevant. The Act declares all agency records to be presumptively open to the public and available to anyone simply by submitting a request, so long as the record is not subject to one of the Act's narrow exemptions. 5 U.S.C. §§ 552(a)(3)(A), (b). The "basic purpose" for creating this important transparency tool was "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). In short, FOIA is how Americans can determine for themselves what their government is doing — without having to take the government's word for it.

To promote its democratic and accountability goals, FOIA sets strict time limits for agencies to respond to requests. The Act requires agencies to "determine" within 20 business days after receipt of the request "whether to comply with such request," and then immediately notify the requester of both the agency's decision and the requester's opportunity to appeal it. 5 U.S.C. § 552(a)(6)(A)(i). To make the required determination, the agency "must at least indicate . . . the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 182-83 (D.C. Cir. 2013) (Kavanaugh, J.). After making that determination, the agency "shall make the records promptly available" if it did not do so at the same time as the determination. 5 U.S.C. § 552(a)(3)(A). Then-Judge Kavanaugh, writing for the D.C. Circuit, explained that "promptly" "typically would mean within days or a few weeks of a

'determination,' not months or years." *Citizens for Resp. & Ethics in Washington*, 711 F.3d at 188.

Agencies may extend the 20-day determination deadline by an extra 10 days if they provide the requester with written notice of "unusual circumstances," 5 U.S.C. § 552(a)(6)(B)(i), which the Act defines as circumstances in which it is "reasonably necessary" to (1) search offices separate from the one processing the request, (2) process "a voluminous amount of separate and distinct records," or (3) consult with another agency or multiple agency subcomponents (although such consultation "shall be conducted with all practicable speed"), 5 U.S.C. § 552(a)(6)(B)(iii). If the agency still cannot complete its determination within the 10 additional days, it "shall notify" the requester and "shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request." 5 U.S.C. § 552(a)(6)(B)(ii).

Thus, even when "unusual circumstances" exist, the agency must complete its determination within the extended 30-day deadline, or else give the requester an opportunity to limit the scope of the request so that it can be processed within the 30 days or agree upon an alternate deadline. In any event, the agency remains obligated to "make the records promptly available." 5 U.S.C. § 552(a)(3)(A).

These statutory deadlines are key to FOIA's functioning. Routinely forcing requesters to wait months or years for records means the information will often be outdated or no longer relevant. Congress established these short FOIA deadlines because it recognized that "information is often useful only if it is timely." H. Rep. No. 93-876, at 126 (1974), as reprinted in 1974 U.S.C.C.A.N. 6267, 6271. Oftentimes, "[l]ong delays in access can mean no access at

all." H. Rep. No. 104-795, at 16 (1996), as reprinted in 1996 U.S.C.C.A.N. 3448, 3459. Protracted delays substantially impair FOIA's goal of enabling people "to hold the governors accountable to the governed." *See Robbins Tire*, 437 U.S. at 242.

B. The State Department Delays Suffered by Prof. Scoville and Others

Despite the statutory deadlines, Prof. Scoville has experienced a series of years-long, unexplained delays in seeking information from the State Department, and tens of thousands of other requesters have experienced the same thing.

Prof. Scoville filed a FOIA request with the State Department on March 4, 2020. Compl. ¶ 13, ECF No. 1; Compl. Ex. A, ECF No. 1-1 (the "request"). The request sought particular reports that State is statutorily required to submit to Congress concerning transfers of "defense articles" — military equipment — to other countries. *Id.* The request identified the specific reports it sought by reference to both the statutory provision requiring their submission to Congress and the subject matter of the reports. *Id.* On March 24, Prof. Scoville received an acknowledgment of his request, which also claimed the existence of "unusual circumstances" because the agency had to "search for and collect requested records from other Department offices or Foreign Service posts." Compl. ¶¶ 15-16; Compl. Ex. B, ECF No. 1-2.

Prof. Scoville then heard nothing more from the State Department for nearly a year. Compl. ¶ 18. In February 2021, his counsel proactively emailed the agency to ask the status of the response. The State Department did not reply. Compl. ¶¶ 19-20. Only after a phone call and yet another email did the agency provide an "estimate" that it would complete processing Prof. Scoville's request on March 8, 2023 — almost three years after the State Department's extended "unusual circumstances" deadline had passed. Compl. ¶¶ 20-21; Compl. Ex. C, ECF No. 1-3.

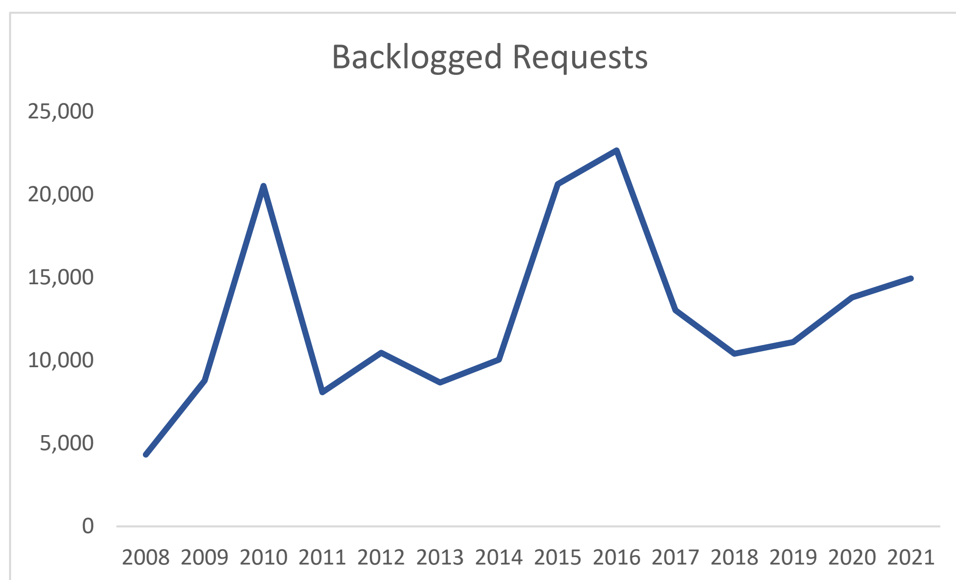
The State Department never provided Prof. Scoville an opportunity to limit the scope of the request under 5 U.S.C. § 552(a)(6)(B)(ii).

This was neither the first nor the last time that Prof. Scoville's FOIA requests to the State Department faced extended delay. As detailed in the Complaint and its exhibits, Prof. Scoville has submitted five other requests in addition to the one at issue in this case. Compl. ¶¶ 27-33; 40-41. All but the most recent, which was filed in August 2021 and is still awaiting a response, Compl. ¶¶ 40-41, encountered substantial delays ranging from just under two years to six years, Compl. ¶¶ 30, 32-33. The table below summarizes the key dates for each request and the time Prof. Scoville has had to wait for the State Department to complete its response *after* FOIA's extended deadline had expired.

Date of Request	20-Day Response Deadline	"Unusual Circumstances" Extended Deadline	State Dept. Completed Response	Length of Delay After Extended Deadline Expired
Apr. 16, 2014[1]	May 14, 2014	May 29, 2014	May 2018	4 years
Mar. 10, 2016[2]	April 7, 2016	April 21, 2016	Apr. 2022	6 years
Oct. 21, 2016[3]	Nov. 21, 2016	Dec. 6, 2016	Dec. 2019	3 years
Feb. 17, 2018[4]	March 20, 2018	April 3, 2018	Jan. 2020	21 months
Mar. 4, 2020[5]	April 1, 2020	April 15, 2020	Not yet complete	Ongoing; more than 2 years
Aug. 16, 2021[6]	Sept. 14, 2021	Sept. 28, 2021	Not yet complete	Ongoing; more than 9 months

[1] Compl. ¶¶ 29-30 & Ex. F, ECF No. 1-6.
[2] Compl. ¶¶ 31-33 & Ex. G, ECF No. 1-7. Although the March 10, 2016 request was ongoing when the Complaint in the instant case was filed, the State Department has since completed its response.
[3] *Id.*
[4] *Id.*
[5] Compl. ¶ 13 & Ex. A, ECF No. 1-1.
[6] Compl. ¶¶ 40-41 & Ex. H, ECF No. 1-8.

These delays are not unique to Prof. Scoville or the specific subject matter of his requests. Data from the State Department itself[7] show that delays are widespread and lengthy. Compl. ¶¶ 34-39. The State Department's backlog — defined as the number of FOIA requests that are still pending "beyond the statutory timeframe for a response"[8] — reached 14,941 in Fiscal Year 2021, the most recent data available.[9] That was an increase of more than 1,000 from the year before.[10] The State Department's data show the number of backlogged requests has remained above 10,000 since 2013.[11]



Meanwhile, the average response time for even the simplest category of requests has remained far beyond FOIA's statutory deadline. Last year, it took the State Department an

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[7] As the Defendant acknowledges, Def.'s Mem. in Support of Partial Mot. to Dismiss ("Mem."), ECF No. 13, at 14, the State Department's annual FOIA reports are incorporated into the Complaint by reference. *See* Compl. ¶¶ 34-39 & fn. 1; *see also Milwaukee Police Ass'n v. Flynn*, 863 F.3d 636, 640 (7th Cir. 2017) (the Court "may take into consideration documents incorporated by reference to the pleadings") (citation omitted).

[8] Freedom of Information Act Annual Report: Fiscal Year 2021, U.S. Dep't of State, at 7, https://foia.state.gov/Learn/Reports/Annual/2021.pdf.

[9] *Id.* at 29. The Fiscal Year 2021 report was published after Prof. Scoville filed the Complaint, but all of the State Department annual reports were incorporated by reference in the Complaint. *See* Compl. ¶ 34 & n.1. The Defendant references the same report. Mem. at 14 n.3.

[10] Freedom of Information Act Annual Report: Fiscal Year 2020, U.S. Dep't of State, at 37, https://foia.state.gov/Learn/Reports/Annual/2020.pdf.

[11] *See* chart on following page.

average of 80 days to process “simple” requests, which it categorizes “based on the low volume and/or simplicity of the records requested.”[12] For “expedited requests” the State Department took an average of 464 days,[13] even though these are requests where the State Department itself has found that a failure to provide information quickly “could reasonably be expected to pose an imminent threat to the life or physical safety of an individual” or “impair substantial due process rights,” or that the information is “urgently needed” by an individual primarily engaged in the dissemination of information to the general public.[14]

The State Department’s history of FOIA processing shows that while its backlog and processing times vary from year to year, they never come close to meeting the statute’s requirements. Compl. ¶ 39.

				Average Number of Days to Response to:		
Fiscal Year[15]	**Requests Received**	**Requests Processed**	**Backlogged Requests**	**Simple Requests**	**Complex Requests**	**Expedited Requests**
2008	5,909	5,577	4,327	115	275	201
2009	10,717	6,024	8,784	103	384	164
2010	30,206	18,386	20,519	144	284	435
2011	14,298	26,836	8,078	155	342	926
2012	18,521	15,343	10,464	88	559.9	760.4
2013	18,753	21,097	8,669	106	532.8	405
2014	19,696	18,094	10,045	90	534.8	385.6
2015	24,837	14,002	20,626	111	511	102
2016	27,961	15,482	22,664	342	517	139
2017	7,688	21,736	13,021	390.2	650.4	416.1
2018	8,448	10,928	10,400	408.9	461.4	435.6
2019	8,589	6,545	11,106	74.5	171	479.4
2020	9,019	7,041	13,798	86.7	350	399.4
2021	10,683	9,505	14,941	80	267	463.8

[12] Freedom of Information Act Annual Report: Fiscal Year 2021, U.S. Dep’t of State, at 9, 22, https://foia.state.gov/Learn/Reports/Annual/2021.pdf.
[13] *Id.* at 22.
[14] Expedited Processing, U.S. Dep’t of State, https://foia.state.gov/request/Handling.aspx.
[15] Data in this table come from State Department annual reports, available at https://foia.state.gov/Learn/Reports.aspx.

As a result of these extensive delays in obtaining information from the State Department, Prof. Scoville filed suit on January 25, 2022. The Complaint contains three claims. The first two relate specifically to the March 2020 request, Compl. ¶¶ 43-46, and the Defendant is not seeking to dismiss them, Def.'s Mem. in Support of Partial Mot. to Dismiss ("Mem."), ECF No. 13, at 1. The third claim, which is the sole subject of the Defendant's motion to dismiss, alleges the State Department has a policy or practice of delay in violation of FOIA's timing requirements. Compl. ¶¶ 47-50.

LEGAL STANDARD

To survive a motion to dismiss, a complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). That includes pleading facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible when a complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This "reasonable inference" standard "do[es] not ask did these things happen; instead, 'the proper question to ask is still *could* these things have happened.'" *Olson v. Champaign Cnty., Ill.*, 784 F.3d 1093, 1099, 1100 (7th Cir. 2015) (quoting *Carlson v. CSX Transportation, Inc.,* 758 F.3d 819, 827 (7th Cir. 2014)) (additional internal quotation marks omitted). The standard "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence supporting the plaintiff's allegations." *Id.* (quoting *Brooks v. Ross,* 578 F.3d 574, 581 (7th Cir. 2009)) (additional internal quotation marks omitted).

In deciding this motion, the Court must "accept the allegations in the plaintiff's complaint as true and draw all reasonable inferences in plaintiff's favor." *Bilek v. Fed. Ins. Co.*, 8 F.4th 581, 584 (7th Cir. 2021). In addition to the allegations in the Complaint, the Court "may take

into consideration documents incorporated by reference to the pleadings." *Milwaukee Police Ass'n v. Flynn*, 863 F.3d 636, 640 (7th Cir. 2017) (quoting *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991)). It may also take judicial notice of facts contained in a public record if the facts are "both 'not subject to reasonable dispute' and either 1) 'generally known within the territorial jurisdiction of the trial court' or 2) 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Gen. Elec. Cap. Corp. v. Lease Resol. Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997) (quoting Fed. R. Evid. 201(b)).

ARGUMENT

Prof. Scoville's Complaint properly states a claim based on the State Department's pattern or practice of FOIA delays.[16] The Complaint alleges a pattern of prolonged, unexplained delay in the Defendant's FOIA responses, which is all that is needed to state a policy-or-practice claim. Courts do not require plaintiffs to allege that the delays are intentional, or the result of a formal policy or agency misconduct. Allegations of prolonged delay alone are enough to state the claim. This Court should therefore deny the Defendant's motion to dismiss the policy-or-practice claim and allow discovery to proceed.

I. ALLEGATIONS OF PROLONGED, UNEXPLAINED DELAYS ARE SUFFICIENT TO STATE A POLICY-OR-PRACTICE CLAIM

A claim that an agency has a policy or practice of violating FOIA may be based exclusively on the agency's prolonged, unexplained delays in responding to requests. The

[16] The State Department does not challenge this court's jurisdiction or Prof. Scoville's standing to bring the policy-or-practice claim. For good reason. The Court has subject-matter and personal jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). And a plaintiff establishes standing in a policy-or-practice suit by showing "(1) the agency's FOIA violation was not merely an isolated incident, (2) the plaintiff was personally harmed by the alleged policy, and (3) the plaintiff himself has a sufficient likelihood of future harm by the policy or practice." *Hajro v. Citizenship & Immigr. Servs.*, 811 F.3d 1086, 1103 (9th Cir. 2016). Prof. Scoville has demonstrated all three. The State Department's delays are extensive; they are far from isolated. Prof. Scoville has personally suffered harm by being forced to wait years for the documents. And he has additional requests pending in addition to the one at issue in this lawsuit — with more requests likely in the future as they become necessary for his academic research — so he is likely to suffer future harm.

Defendant's argument that delays alone cannot form the basis of a policy-or-practice claim is not supported by the case law.

A. The Case Law Makes Clear That Policy-or-Practice Claims May Be Based on Prolonged and Persistent Delays

In the D.C. Circuit — which the Defendant praises for its "'substantial expertise' in FOIA matters," Mem. at 9 n.2 — "it is settled law that informal agency conduct resulting in long delays in making requested non-exempt records available may serve as the basis for a policy or practice claim." *Jud. Watch, Inc. v. Dep't of Homeland Sec.*, 895 F.3d 770, 777-78 (D.C. Cir. 2018). The same holds in the only other circuit to have addressed the issue. *Hajro v. Citizenship & Immigr. Servs.*, 811 F.3d 1086, 1103 (9th Cir. 2016) ("[W]e have recognized a pattern or practice claim for unreasonable delay in responding to FOIA requests."). Courts use the phrases "policy or practice" and "pattern or practice" to mean the same thing, *see id.*, and they recognize that a plaintiff may allege a "policy or practice" by pleading the existence of a pattern, *Jud. Watch*, 895 F.3d at 780. No circuit court disagrees that delayed responses may form the basis of a policy-or-practice claim.

District courts have repeatedly recognized policy-or-practice claims based on agency delays, allowing such claims to progress past the motion-to-dismiss stage. *E.g.*, *Nightingale v. U.S. Citizenship & Immigr. Servs.*, 507 F. Supp. 3d 1193, 1201 (N.D. Cal. 2020), *appeal dismissed sub nom.*, 2021 WL 3674656 (9th Cir. July 30, 2021); *Muckrock, LLC v. Cent. Intel. Agency*, 300 F. Supp. 3d 108, 135 (D.D.C. 2018) (Jackson, J.); *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, No. 14-1130 SC, 2015 WL 6331268, at *9 (N.D. Cal. Oct. 21, 2015).

This widespread agreement is for good reason: delay-based policy-or-practice claims provide one of the only routes for requesters and courts to ensure agencies adhere to FOIA's

timing requirements. Quoting the foundational D.C. Circuit decision that established the existence of policy-or-practice claims, Judge Ketanji Brown Jackson wrote that "the D.C. Circuit meant what it said when it held that 'courts have a duty to prevent [an agency from] abus[ing]' the FOIA by adopting a policy that unreasonably and improperly delays the disclosure of records." *Muckrock*, 300 F. Supp. 3d at 135 (quoting *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)) (alterations in original). The case law firmly establishes that a policy-or-practice claim may be premised on agency delay alone.

B. Plaintiff Need Only Plead the Existence of Prolonged, Unexplained Delays

To state a policy-or-practice claim based on agency delay, a plaintiff only needs to allege "prolonged, unexplained delays in producing non-exempt records that could signal the agency has a policy or practice of ignoring FOIA's requirements." *Jud. Watch*, 895 F.3d at 780; *see also Nightingale*, 507 F. Supp. 3d at 1201 ("[A] FOIA pattern or practice claim can be established through evidence of chronic delay and backlogs."). To do that, the D.C. Circuit explains that the allegations must include "a pattern of prolonged delay amounting to a persistent failure to adhere to FOIA's requirements and that the pattern of delay will interfere with [the plaintiff's] right under FOIA to promptly obtain non-exempt records from the agency in the future." *Jud. Watch*, 895 F.3d at 780.

No other allegations are required. At the motion-to-dismiss stage, the court looks only to whether the allegations are enough that they "*could signal* the agency has a policy or practice of ignoring FOIA's requirements." *Jud. Watch*, 895 F.3d at 780 (emphasis added). Prof. Scoville is *not* required to allege the cause of the delay or the existence of a specific, formal policy. "[T]he D.C. Circuit has long rejected any notion that a regulation or other formal agency policy statement is a necessary prerequisite to a policy-or-practice claim under the FOIA." *Muckrock*, 300 F. Supp. 3d at 130. Even if "the practice at issue is informal, rather than crystalized in

regulation or an official statement of policy," that "is irrelevant" in evaluating the claim. *Jud. Watch*, 895 F.3d at 778 (quoting *Payne*, 837 F.2d at 491). Similarly, he is not required to allege any "egregious agency action." *Jud. Watch*, 895 F.3d at 781; *Nightingale*, 507 F. Supp. 3d at 1200 (rejecting defendants' claim "that plaintiffs must clear an 'extraordinarily high bar'").

The Defendant claims that *Judicial Watch* requires allegations of "intentional conduct," Mem. at 10, but it does nothing of the sort. The D.C. Circuit in that case *overturned* a district court decision that required the plaintiff to allege "intentional agency conduct." *Jud. Watch*, 895 F.3d at 781 (quoting *Jud. Watch, Inc. v. Dep't of Homeland Sec.*, 211 F. Supp. 3d 143, 147 (D.D.C. 2016)). It also rejected the district court's demand that the plaintiff "'establish *why* the requests were delayed or *how* the delays were the result' of an agency policy or practice." *Id.* at 782 (quoting *Jud. Watch*, 211 F. Supp. 3d at 146). Instead, the circuit court recognized that injunctive relief may be appropriate in policy-or-practice cases even when delays are caused by such unintended conditions as "staffing shortages and work overload." *Id.* at 783; *see also Nightingale*, 507 F. Supp. 3d at 1207, 1213-14 (granting summary judgment on delay-based policy-or-practice claim and issuing injunction despite no finding of intentional agency action). That makes good sense, since a practice or a pattern that systemically violates FOIA is just as injurious to requesters' rights whether it was adopted intentionally or not.

The principal case that the Defendant cites for the supposed "intentional conduct" requirement, *American Center for Law and Justice v. Department of State*, provides little support. That decision, from 2017, relies extensively on the district court decision in *Judicial Watch* that the D.C. Circuit later overturned. *See Am. Ctr. for L. & Just. v. Dep't of State*, 249 F. Supp. 3d 275, 283-86 (D.D.C. 2017). It also quotes *Payne* for the supposed rule that agency action must be "sufficiently outrageous," *id.* at 281, yet that phrase came from the D.C. Circuit's

description of the *lower court's* holding in that case, which the circuit proceeded to reject, *Payne*, 837 F.2d at 494. In short, the case law does not require Prof. Scoville to plead intentional conduct on the part of the State Department.

In any event, FOIA puts the burden squarely on the agency, not the requester, to explain the cause of its delays. 5 U.S.C. § 552(a)(4)(B) (in a FOIA lawsuit, "the burden is on the agency to sustain its action"). Requiring a requester to explain in the pleadings why an agency has a pattern of delay would improperly shift the agency's burden. *Jud. Watch*, 895 F.3d at 782 (district court incorrectly "shifted to the requesting party the burden that FOIA places on the agency to explain its delay in making requested records available"). Instead, "prolonged, unexplained delays" *alone* are enough "to draw the reasonable inference that the [agency] has adopted a practice of delay." *Id.* at 780-81; *accord Hajro*, 811 F.3d at 1103-04; *Nightingale*, 507 F. Supp. 3d at 1201; *Muckrock*, 300 F. Supp. 3d at 130-31.

C. Defendant's Authorities Do Not Support Its Claim That More Than Persistent Delay Must Be Alleged to Survive a Motion to Dismiss

Nothing in the *Judicial Watch* decision — the only circuit decision addressing the pleading requirements for a policy-or-practice claim based on delay — suggests that its holding on the elements required to state a claim is limited to its facts, and no other court has read it that way. The decisions cited by the Defendant purportedly requiring additional allegations beyond repeated, prolonged, and unexplained delays are inapposite for several reasons.

First, all but two of the Defendant's authorities were decided before *Judicial Watch* clarified the pleading requirements for delay-based policy-or-practice claims in July 2018. *See Rocky Mountain Wild, Inc. v. Forest Serv.*, No. 15-cv-0127, 2016 WL 362459 (D. Colo. Jan. 29, 2016); *Cause of Action Inst. v. Eggleston*, 224 F. Supp. 3d 63 (D.D.C. 2016); *Am. Ctr. for L. & Just. v. Dep't of State*, 249 F. Supp. 3d 275 (D.D.C. 2017); *Roseberry-Andrews v. Dep't of*

Homeland Sec., 299 F. Supp. 3d 9 (D.D.C. March 13, 2018); *LAF v. Dep't of Veterans Affs.*, No. 17 C 5035, 2018 WL 3148109 (N.D. Ill. June 27, 2018). Indeed, several of those decisions relied on the now-overturned district court opinion in *Judicial Watch. See Cause of Action*, 224 F. Supp. 3d at 72 (citing overturned opinion for the proposition that "delay alone" is not an actionable policy or practice); *Am. Ctr. for L. & Just.*, 249 F. Supp. 3d at 283-86 (citing overturned opinion for several claims, including that the plaintiff "cannot rest on the mere fact of delay alone" and that the plaintiff must "establish why the requests were delayed or how the delays were the result" of a policy or practice); *Roseberry-Andrews*, 299 F. Supp. 3d at 21 (same).

Second, all the decisions either fail to provide the support that the Defendant claims they do, or they rely on very different facts than are present here. For instance, far from supporting the Defendant's contention that a policy-or-practice claim cannot rely on delay alone, *Rocky Mountain Wild* actually recognizes that it can. The court stated that "a pattern or practice of taking too long to produce documents . . . could support prospective injunctive relief" in some circumstances, but it concluded that the plaintiff had not "assembled a record sufficient" to prevail on summary judgment. *Rocky Mountain Wild*, 2016 WL 362459, at *12. In *LAF*, where the plaintiff alleged the agency had a "practice of responding to dual FOIA/Privacy Act requests only under the Privacy Act," the Northern District of Illinois nevertheless acknowledged that "courts may enjoin an agency's pattern or practice of unreasonably delaying FOIA responses." *LAF*, 2018 WL 3148109, at *3, *6 (citing *Evans v. Dep't of Interior*, 135 F. Supp. 3d 799, 833 (N.D. Ind. 2015)).

In *Cause of Action*, the plaintiff tried to base its policy-or-practice claim "on a single incident." 224 F. Supp. 3d at 71-72. It is a similar story for the Defendant's only two post-

Judicial Watch decisions. In *American Center for Law and Justice v. FBI*, the plaintiff alleged just three instances of delay — which the court characterized as only "a modest pattern," 470 F. Supp. 3d at 8, and which are far from the allegations in this case concerning years' worth of data on tens of thousands of delayed requests and Prof. Scoville's own half-dozen requests. And in *Telematch*, the evidence at summary judgment showed that the agency responded to "simple" requests in an average of 4.25 days and to "complex" requests in an average of 28.57 days. *Telematch, Inc. v. Dep't of Agric*., No. 19-2372, 2020 WL 7014206, at *12 (D.D.C. Nov. 27, 2020). Such delays are within FOIA's timing requirements, and they are tiny compared to the State Department's delays here.

None of the decisions that the Defendant cites disputes the pleading requirements stated in *Judicial Watch*, and none changes the Rule 12 standards. None requires that Prof. Scoville allege more than he has already — repeated, prolonged, and unexplained delays.

D. FOIA Does Not Limit Courts' Injunctive Power

Courts have repeatedly dismissed the Defendant's argument that policy-or-practice claims like this one, and the injunctions they seek, are "inconsistent with FOIA's statutory scheme." Mem. at 16. In fact, "FOIA imposes no limits on courts' equitable powers in enforcing its terms." *Payne*, 837 F.2d at 494. The Supreme Court has explained that, "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). As FOIA gives no "clear[ ] command to the contrary," courts retain their full power to issue injunctive relief in FOIA cases.

The government defendant in *Judicial Watch* made the same flawed argument as the State Department does here, claiming that FOIA contains an exclusive remedy for agency delay. *Compare* Mem. at 16 ("[T]he penalty for failure to adhere to the timelines is set forth in the

statute itself, providing that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court."), *with Jud. Watch*, 895 F.3d at 779-80 (rejecting the defendant's claim that the only remedy for FOIA delays is that "the requesting party may file a lawsuit without exhausting the administrative remedy"). The argument was wholly unsuccessful.

The D.C. Circuit in *Judicial Watch* found that interpretation "untenable" because it would "render[] FOIA's mandate of 'prompt' response . . . a dead letter" and because it was "inconsistent with Congress's remedial purpose in enacting FOIA to enhance government transparency." *Jud. Watch*, 895 F.3d at 780. It would also impose needless litigation costs on requesters, forcing them to go to court every time an individual request was delayed and foreclosing any opportunity to prevent future harms. Such a system would additionally drive up costs for the government and courts, as they would face countless cases that could have been prevented by a single successful policy-or-practice claim. Ironically, the added litigation would also divert agency resources from responding to long-delayed FOIA requests, exacerbating the problem rather than solving it.

The Defendant's reliance on *Citizens for Responsibility and Ethics in Washington v. FEC* on this point is misleading. The decision did not address policy-or-practice claims *at all*. It simply reiterated that when an agency fails to respond within the FOIA deadline, the requester can go to court without first exhausting the administrative appeal process that FOIA otherwise requires. *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). Any notion that *CREW* held constructive administrative exhaustion is the only potential "penalty" for repeated FOIA violations, or that policy-or-practice claims are barred, is baseless. Indeed, both the majority and concurring opinions in *Judicial Watch* repeatedly cited

CREW favorably while concluding that a policy-or-practice claim seeking injunctive relief was available. *See Jud. Watch*, 895 F.3d at 782, 784 & 785 (Pillard, J., concurring).

Outside the D.C. Circuit, courts are similarly consistent that "[i]n utilizing its equitable powers to enforce the provisions of the FOIA, the district court may consider injunctive relief where appropriate. Moreover, where the district court finds a probability that alleged illegal conduct will recur in the future, an injunction may be framed to bar future violations that are likely to occur." *Long v. I.R.S.*, 693 F.2d 907, 909 (9th Cir. 1982); *see also Nightingale*, 507 F. Supp. 3d at 1213-14 (granting injunctive relief in delay-based policy-or-practice case); *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, No. 14-1130 SC, 2015 WL 6331268, at *9 (N.D. Cal. Oct. 21, 2015) (granting limited injunction and ordering defendant to explain why the court should not grant broader injunction). The allegations in this case frame a prime case for injunctive relief: The State Department's regular violations of FOIA are likely to recur in the future without intervention from the Court. Just as the case law is clear that a policy-or-practice claim may be premised on delay alone, it is also clear that this Court may provide injunctive relief.

II. THE COMPLAINT ADEQUATELY STATES A DELAY-BASED POLICY-OR-PRACTICE CLAIM

The Complaint adequately alleges "prolonged, unexplained delays in producing non-exempt records" and therefore states a claim that the Defendant has a policy-or-practice of violating FOIA's timing requirements. *Jud. Watch*, 895 F.3d at 780. Prof. Scoville has suffered extensive delays with six requests, and the State Department's own data show that the delays apply not only to thousands of requesters in addition to him, but also to the *average* requester. The State Department has not provided any permissible explanation. Prof. Scoville therefore has more than adequately stated a policy-or-practice claim.

A. The Complaint Alleges Prolonged Delays

The delays Prof. Scoville suffered are well beyond the 30-day extended deadline provided by FOIA and are more than enough to meet the pleading requirement. State's response to the request at issue in this lawsuit is delayed more than two years so far. Compl. ¶¶ 13-21, 25. Among Prof. Scoville's other requests, the *shortest* delay he has experienced was 21 months, while the longest was six years. Compl. ¶¶ 29-33.

Shorter delays than this have formed the basis for successful policy-or-practice claims. *See, e.g.*, *Jud. Watch*, 895 F.3d at 784 ("[T]aking hundreds of days to process requests is [not] a permissible interpretation of an agency's obligations under FOIA."); *Our Children's Earth*, 2015 WL 6331268, at *8 (granting declaratory and injunctive relief for the plaintiff on policy-or-practice claim based on delays "ranging but not limited to 4 days, 18 days, 51 days, 9 months, 10 months, and ongoing"); *Nightingale*, 507 F. Supp. 3d at 1203 (granting summary judgment for the plaintiffs where evidence showed delays ranging from three to 24 months).

The State Department suggests that the delays Prof. Scoville is suffering are less severe because he allegedly lacks a "vital need" for the documents, Mem. at 12, but that is not the standard. Neither FOIA nor the case law imposes any need-based exemption to the statutory deadlines. In *Long*, where the requester sought "instructions to IRS data processing personnel regarding . . . the analyses to perform on data" — with no indication of a "vital need" for such instructions — and suffered delays of as much as 17 months, the Ninth Circuit stated that "[t]hese 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." *Long*, 693 F.2d at 908, 910. The court concluded that it was "clear that injunctive relief is appropriate in this case to prevent the prolonged delays." *Id.* at 910.

The State Department's own statistics reinforce the fact that it has a practice of prolonged delay. Compl. ¶¶ 34-39. Even responses for "simple" requests took an average of 80 days in 2021[17] — four times as long as the 20 days that FOIA permits. By definition, few if any of these "simple" requests would involve "unusual circumstances," so these requests could not qualify for FOIA's extended deadline of 30 days. The delays are much worse for the other categories of requests: an average last year of 267 days for "complex" requests and 464 days for "expedited" requests.[18]

One of the Defendant's own authorities, *Telematch*, highlights by contrast just how extreme the State Department's delays are. In that case, the court concluded (at the summary judgment stage) that the defendant agency did not have a policy or practice of "delayed disclosure" because it responded to "simple" FOIA requests in an average of 4.25 days, and to "complex" requests in an average of 28.57 days. *Telematch, Inc. v. Dep't of Agric.*, No. 19-2372, 2020 WL 7014206, at *12 (D.D.C. Nov. 27, 2020). The State Department's delays are far, far longer. By any measure, these are "prolonged," "unreasonable" delays and are not "a permissible interpretation of an agency's obligations under FOIA." *See Jud. Watch*, 895 F.3d at 781, 784.

The statute, congressional intent, and case law all make clear that such long delays cannot be tolerated, and they demand injunctive relief. When Congress set the current 20-day deadline in 1974, its amendments "were deliberately drafted to *force increased expedition* in the handling of FOIA requests." *Id.* at 781 (quoting *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 617 (D.C. Cir. 1976) (Leventhal, J., concurring in the result)) (emphasis in original). Both Congress and the courts have repeatedly recognized the importance of prompt responses to

[17] Freedom of Information Act Annual Report: Fiscal Year 2021, U.S. Dep't of State, at 22, https://foia.state.gov/Learn/Reports/Annual/2021.pdf.
[18] *Id.*

FOIA requests, since "information is often useful only if it is timely." *Nightingale*, 507 F. Supp. 3d at 1197 (quoting H. Rep. No. 93-876, at 126 (1974), as reprinted in 1974 U.S.C.C.A.N. 6267, 6271). As a result, "the purpose of the time limit was to require agencies to respond to inquiries . . . within specific time limits." *Id.* Forcing requesters to wait months or years longer than FOIA allows means that requesters lose their right to obtain records promptly and the public loses its ability to keep meaningful watch over the government.

As alleged in the Complaint, the State Department's responses to Prof. Scoville's requests, and to requests overall, are exceedingly delayed. Compl. ¶¶ 25, 30-37. This allegation clearly satisfies the "prolonged" pleading requirement for a policy-or-practice claim.

B. The Complaint Alleges Unexplained Delays

The complaint also adequately pleads that the delays are "unexplained." While the State Department told Prof. Scoville that "unusual circumstances" exist due to "the need to search for and collect requested records from other Department offices or Foreign Service posts," Compl. Ex. B, ECF No. 1-2, such circumstances only provide the agency with an extra 10 days to respond. 5 U.S.C. § 552(a)(6)(B)(i); *see Gatore v. Dep't of Homeland Sec.*, 177 F. Supp. 3d 46, 54 (D.D.C. 2016) ("FOIA's 'unusual circumstances' provision only allows an additional ten-working-day extension, i.e., from twenty to thirty working days."). By the time the 30-day "unusual circumstances" deadline expired, the State Department had offered Prof. Scoville no explanation for why the delay continued. Compl. ¶ 18. The further delay was unexplained.

To the extent the agency wanted to avail itself of FOIA's provisions for responses that take longer than 30 days, it failed to comply with *any* of the relevant requirements. In such circumstances, the agency "shall notify" the requester and either allow the requester "to limit the scope of the request so that it may be processed within" 30 days or arrange "an alternative time

frame for processing the request." 5 U.S.C. § 552(a)(6)(B)(ii). The State Department did none of that.

The same pattern holds for Prof. Scoville's other requests. For his April 2014 request, the State Department offered no explanation for its continuing delay. Compl. Ex. F, ECF No. 1-6, at ¶¶ 15-16; *see also Scoville v. Dep't of State*, No. 1:17-cv-00951 (D.D.C. May 19, 2017), ECF Nos. 1-2 & 1-3 (State Department correspondence providing no explanation). It also provided no explanation for its delays with his March 2016 request, Compl. Ex. G, ECF No. 1-7, at ¶¶ 7-8; *Scoville v. Dep't of State*, No. 1:19-cv-01987 (D.D.C. Jul 3, 2019), ECF Nos. 1-2, 1-3 & 1-4 (State Department correspondence providing no explanation); or his October 2016 request, Compl. Ex. G, ECF No. 1-7, at ¶¶ 15-17; *Scoville*, No. 1:19-cv-01987, ECF No. 1-6 (same); or his February 2018 request, Compl. Ex. G, ECF No. 1-7, at ¶¶ 19-21. The State Department failed to follow FOIA's requirements in the same way in response to Prof. Scoville's most recent request, submitted in August 2021. Compl. ¶¶ 40-41.

The State Department argues that some of these delays were adequately explained — not through any "actual communications with Plaintiff," but rather because "the nature of the FOIA requests" themselves somehow should have alerted Prof. Scoville to the reason for the delay. Mem. at 13-14. That is simply not compatible with FOIA's requirement that the agency "shall notify" the requester. 5 U.S.C. § 552(a)(6)(B)(ii); *see also Jud. Watch*, 895 F.3d at 774 (the agency may only extend its response deadline "upon explaining the circumstances to the requester"). Anything short of "actual communications with Plaintiff," which the State Department did not do, fails to meet the requirement.

With respect to his March 2020 request, after being contacted by Prof. Scoville's counsel, the State Department for the first time — a year after the request was filed — stated that due to

Covid-19, resources were limited and there would be a delay in processing the request. Compl. Ex. C, ECF No. 1-3. These after-the-fact statements do not meet its FOIA obligations as they were not provided to Prof. Scoville within the statute's time requirements. *See Gatore*, 177 F. Supp. 3d at 55 ("[T]he defendant cannot simply fail to seek relief from the statutory deadline as provided by the FOIA, and then seek to justify its delay only through [later] arguments.").

Notably, even if those explanations *had* been provided within the time required by FOIA, they do not provide a legally sufficient explanation for the delay. "[A] defendant's failure to produce documents due to backlog or administrative issues does not constitute a 'reasonable basis in law.'" *Virginia-Pilot Media Cos. v. Dep't of Just.*, 147 F. Supp. 3d 437, 445-46 (E.D. Va. 2015) (quoting *Jarno v. Dep't of Homeland Sec.*, 365 F. Supp. 2d 733, 740 (E.D. Va. 2005)). As the court in *Nightingale*, writing in the midst of the Covid pandemic, explained: "Although courts recognize that resources for FOIA compliance may be 'heavily taxed by the quantity and depth of FOIA requests (especially in light of budget constraints that limit personnel and resources assigned to an agency), that does not grant the agency carte blanche to repeatedly violate congressionally mandated deadlines.'" *Nightingale*, 507 F. Supp. 3d at 1198 (quoting *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, No. 14-1130 SC, 2015 WL 4452136, at *8 (N.D. Cal. July 20, 2015)); *see also id.* at 1206 (noting agencies could "seek congressional funding" if resources were too limited). Indeed, the defendants in *Nightingale* cited Covid as one reason for their resource constraints and lengthy backlogs. Defs.' Cross-Mot. for Summ. J., ECF No. 75, at 14-15, *Nightingale v. Citizenship and Immigration Servs.*, No. 3:19-cv-03512 (N.D. Cal.), Still, the court rejected those claims, granted plaintiffs' motion for summary judgment on its policy-or-practice claim, and granted plaintiffs' request for injunctive relief.

Citing its Fiscal Year 2020 annual report, the State Department also invokes a barrage of considerations that it says explain its pattern of consistent delay.[19] Mem. at 15. Some of these simply reflect what FOIA requires every agency to do in response to every request, such as conducting a "review to determine whether any information must be withheld under one of the nine FOIA exemptions," *id.*, and are not any "unusual circumstance" that can justify delay. *See* 5 U.S.C. § 552(a)(6)(B)(iii). And while the need to "consult with other, and at times multiple, federal agencies," Mem. at 15, *can* constitute an unusual circumstance, the State Department did not invoke it here.[20]

Simply put, the delays alleged in Prof. Scoville's Complaint are unexplained.

C. The Subject Matter of the Requests Does Not Affect Plaintiff's Claim

Although Prof. Scoville seeks various types of documents with his requests, that makes no difference with respect to his policy-or-practice claim. Neither the D.C. nor the Ninth Circuit has ever "articulated a 'single subject' or 'single type of request' requirement for a policy-or-practice claim." *Am. Ctr. for L. & Just. v. Fed. Bureau of Investigation*, 470 F. Supp. 3d 1, 6 (D.D.C. 2020). Even if they had, the Complaint alleges the State Department responds late to requests across the board, regardless of their subject matter. The State Department's own statistics show it has a backlog of nearly 15,000 as of 2021, and even "simple" requests take it an

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[19] In addition to the annual report, the State Department relies on a declaration filed in another case. Mem. at 14-15. This is improper; the declaration is not a document the Court may consider in deciding a motion to dismiss. Unlike the State Department annual reports, the declaration was not incorporated into the Complaint by reference. It is also not a proper subject for judicial notice under Rule 201, since its contents remain "subject to reasonable dispute" and are neither "'generally known within the territorial jurisdiction of the trial court' [nor] 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Gen. Elec. Cap. Corp. v. Lease Resol. Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997) (quoting Fed. R. Evid. 201(b)).

[20] The State Department suggests that such a need may be present here. Mem. at 15. But the State Department has never invoked it in any communications with Prof. Scoville. This is rank speculation, was not alleged in the Complaint, and is inappropriate on a motion to dismiss.

average of 80 days, so requests seeking a wide range of material necessarily face the same extensive delays.

A "single subject" requirement would arbitrarily bar plaintiffs who seek different types of records as part of their work from bringing a policy-or-practice claim, despite experiencing repeated and extreme FOIA delays. While *Judicial Watch* noted the similarity of the requests in that case, nothing in the court's holding or reasoning hinged on that fact. It is not a requirement courts impose. For instance, in *Our Children's Earth*, the Plaintiff had submitted four complex requests seeking documents in a range of subjects. *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, 85 F. Supp. 3d 1074, 1081-82 (N.D. Cal. 2015) (describing the records at issue in *Our Children's Earth*, 2015 WL 6331268). The requests ranged from one seeking documents "related to impacts on the Steelhead and two other species . . . stemming from Stanford's Lake Water System," while another sought solicited documents "pertaining to the Fisheries Service's general policy toward search cutoff dates for FOIA searches." *Id.* The court nevertheless granted declaratory and injunctive relief to the plaintiff on its policy-or-practice claim. *Our Children's Earth,* 2015 WL 6331268, at *9.

To the extent some courts have identified the similarity of requests as "a factor [they] take into consideration," they have done so to help them determine whether the delays were merely "isolated mistakes." *Am. Ctr. for L. & Just.*, 470 F. Supp. 3d at 6. After all, if the agency responded in a similar way to similar requests, that could aid the court in deciding whether "the [agency] has adopted—formally or informally—a practice of delay, or whether the complaint alleges merely isolated mistakes by agency officials." *Id.* (cleaned up). But no court has required that the requests be similar. And in this case, Prof. Scoville has provided ample allegations to

show that the agency's pattern of delay extends well beyond a few "isolated mistakes." A policy cannot be isolated if it affects tens of thousands of requesters, including the average requester.

Indeed, the similarity of requests is immaterial because Prof. Scoville alleges the State Department has a policy or practice of delaying responses to FOIA requests across the board, *no matter the types of records* at issue. By the State Department's own measures, the number of requests facing unlawful delay is huge and increasing. Compl. ¶¶ 34-39. The State Department's total number of backlogged requests, which it defines as requests that are pending "beyond the statutory timeframe for a response," is nearly 15,000 for the most recent year.[21] The trend line is rising. *See* Background § B, *supra*. State's total backlog last year — which was greater than the *entire number of requests it received* that year — shows that its policy or practice of delay applies across the board, regardless of the request's subject matter. *See Our Children's Earth*, 2015 WL 6331268, at *8 (finding that "a backlog of over 100 cases to so dramatically reduce [was] itself a red flag indicating the potential for FOIA compliance issues."). The data demonstrate that without judicial intervention, the State Department will not come into compliance with FOIA's requirements on its own.

Just as courts do not impose a "single subject" pleading requirement, they also do not require the existence of any "intentional conduct." *See* § I(B), *supra*; *see also Jud. Watch*, 895 F.3d at 782 (district court incorrectly "shifted to the requesting party the burden that FOIA places on the agency to explain its delay in making requested records available"). Even so, the Complaint does plead intentionality. Any fair reading of the data, showing lengthy delays and thousands upon thousands of backlogged requests continuing year after year, would conclude that these delays are the intended result of agency action. Otherwise, there is no reasonable basis

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[21] Freedom of Information Act Annual Report: Fiscal Year 2021, U.S. Dep't of State, at 7, 29, https://foia.state.gov/Learn/Reports/Annual/2021.pdf.

to believe that an agency with a $53 billion annual budget[22] would be so unable to come into compliance with the law. *See Olson v. Champaign Cnty., Ill.*, 784 F.3d 1093, 1099 (7th Cir. 2015) (holding that factual allegations were enough to plead intentional conduct, noting "[a] claim should survive a Rule 12(b)(6) motion to dismiss if the complaint contains well-pled facts . . . that permit the court to infer more than the mere possibility of misconduct"). At the pleading stage, when the plaintiff cannot yet access the agency's internal communications, policies or statistics, those allegations are sufficient to plead intentional conduct. *See Bausch v. Stryker Corp.*, 630 F.3d 546, 561 (7th Cir. 2010) ("[A] plaintiff's pleading burden should be commensurate with the amount of information available to them.").

Nevertheless, neither the subject matter of Prof. Scoville's requests nor the State Department's intent are relevant to stating a policy-or-practice claim. *Iqbal-Twombly* and the policy-or-practice case law do not require plaintiffs to make such allegations. And as a matter of logic, they could not — the prolonged delays are clear, but a plaintiff could not be expected to know the internal reasons of the State Department.

Prof. Scoville's allegations are sufficient to state a claim that the Defendant has a policy or practice of delaying FOIA responses beyond the time permitted by FOIA.

CONCLUSION

Prof. Scoville is only required to plead the existence — not the cause — of "prolonged, unexplained delays" to state a claim that the State Department has a policy or practice of delay in its FOIA responses. He has pleaded more than enough to state the claim. Prof. Scoville's own history of years-long delays without legally cognizable explanation, along with the State Department data showing tens of thousands of other requesters who are subjected to similarly

[22] State Dep't Congressional Budget Justification, Fiscal Year 2023, at 9, https://www.state.gov/wp-content/uploads/2022/03/FY-2023-Congressional-Budget-Justification_Final_03282022.pdf.

unlawful delays, show that the Defendant has a policy or a practice of delay in violation of FOIA's requirements. The Court should deny the Defendant's motion to dismiss.

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Respectfully submitted,

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[23] This brief does not purport to represent the institutional views of Yale Law School, if any.