UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RYAN SCOVILLE,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF STATE,

Defendant.

Civil Action No. 2:22-cv-00091-NJ

REPLY IN FURTHER SUPPORT OF DEFENDANT'S
PARTIAL MOTION TO DISMISS

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INTRODUCTION

Plaintiff's Third Claim should be dismissed because allegations that the Department of State ("State") has delayed in responding to vastly dissimilar Freedom of Information Act ("FOIA") requests are insufficient to state a "policy or practice claim" under FOIA. In view of the variability of the requests State receives, response times for different requests do not sufficiently suggest the existence of a single actionable policy, practice, or pattern. The cases on which Plaintiff principally relies, *Jud. Watch v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770 (D.C. Cir. 2018), *Hajro v. U.S. Citizenship & Immigr. Servs. ("USCIS")*, 811 F.3d 1086 (9th Cir. 2016), and *Nightingale v. USCIS*, 507 F. Supp. 3d 1193 (N.D. Cal. 2020); *see* Pl.'s Opp'n to Def.'s Partial Mot. to Dismiss (ECF No. 17) ("Pl.'s Opp'n"), at 10-12, are distinguishable from the present case because they involved FOIA requests for substantially similar records as to which the courts held it was evident the agency was applying a consistent policy or practice. Given the complexity and date range of Plaintiff's FOIA request here, the volume and variety of FOIA requests that State receives, and the exigencies of the COVID pandemic, State's delay here is neither unexplained nor unjustified under the statute. Entertaining Plaintiff's claim in these circumstances will necessarily embroil the Court in micro-managing State's FOIA operation, which is not an appropriate role for the Court. Plaintiff's attempt to plead the existence of an unlawful policy by alleging that, with regard to his requests, State failed to comply with the terms of the FOIA statute regarding responses longer than 30 days, also fails. As required, State provided Plaintiff an opportunity to amend or narrow his request to shorten the response time but he never elected to do so. To entertain Plaintiff's policy and practice claim based on claims of delay alone in these circumstances would be inconsistent with existing case law and would force the Court into the awkward and untenable position of managing State's FOIA processing. For these reasons, the Court should dismiss Plaintiff's policy or practice claim.

ARGUMENT

PLAINTIFF'S ALLEGATIONS REGARDING STATE'S RESPONSE TIMES FOR VASTLY DISSIMILAR FOIA REQUESTS DO NOT STATE A VIABLE FOIA POLICY OR PRACTICE CLAIM

Plaintiff seeks to improperly extend the holdings from the D.C. Circuit's decision in *Judicial Watch* and the decisions in *Hajro* and *Nightingale* in the Ninth Circuit beyond the type of unique situations presented in those cases. Specifically, he asks the Court to find that allegations that an agency experiences delays in responding to its complete panopoly of FOIA requests, without more, state a valid policy-or-practice claim. This is not the law. The delay claims found actionable in *Judicial Watch*, *Nightingale*, and *Hajro* concerned situations in which the FOIA requests at issue were both fairly straightforward and substantially similar. The Court should decline to extend the results in those cases beyond those types of situations.

The FOIA requests at issue in *Judicial Watch* were multiple requests for substantially similar records regarding costs incurred by the Secret Service for various VIP travel trips. *Jud. Watch, Inc*., 895 F.3d at 776. The court emphasized that the Secret Service's behavior constituted "repeated" delay, *id.* at 776, 777, 779, 780, 782, 784, in response to requests for "nearly identical" or "the same type of" records. *Id*. at 776, 779, 780. In *Hajro* and *Nightingale*, the court addressed only FOIA requests for alien registration files, or A-Files, and thus found actionable, and granted summary judgment, only as to USCIS's "long-standing pattern or practice of violating FOIA's statutory deadlines *when responding to requests for A-Files*." *Nightingale,* 507 F. Supp. 3d at 1195.

No requests of comparable similarity are present here. The requests submitted by Plaintiff himself involve not only a wide variety of subject matter but also a range of record types, and implicate different offices or division within the State Department—the request at

issue in this case seeks reports regarding transfers of defense articles, Compl. ¶ 13, his prior requests sought records regarding diplomatic appointments, *id.* ¶¶ 27-33, and his other pending request seeks records containing internal State Department legal analysis or discussion using certain search terms. *Id.* ¶ 40 & Ex. H. And, to the extent Plaintiff relies on statistics regarding State's responses to the complete set of requests it receives, that set necessarily encompasses a vast variety of subject matter, volume, record type, and custodial component. State's handling of these disparate requests with no common denominator cannot realistically be considered to suggest the existence of a unified policy, practice, or pattern.

Although less focused on the similarity of the requests, the unpublished decision in *Our Children's Earth Foundation v. National Marine Fisheries Service*, No. 14-1130 SC, 2015 WL 6331268, at *9 (N.D. Cal. Oct. 21, 2015), also did not find a comparable wide-ranging delay claim actionable. That case addressed the FOIA responses only of the National Marine Fisheries Service, a component of the National Oceanic and Atmospheric Administration, itself a component of the Department of Commerce. Although the Fisheries Service cannot be termed "tiny"—it currently has approximately 4,200 staff, *see* https://www.fisheries.noaa.gov/about-us#who-we-are—it certainly does not rival the size and complexity of the entire State Department, with its 69,000 employees and myriad of issues and geographic areas it covers in its work crafting and conducting U.S. foreign policy, *see* https://www.state.gov/about/. The FOIA responses of the Fisheries Service therefore do not match in complexity and variability those of the State Department, and the holding in that case finding an actionable policy or practice of delay in the Fisheries Service's FOIA responses also should not be extended to the circumstances presented here.

The *Judicial Watch* decision also focused on that court's finding that the delay there was "unexplained." *Jud. Watch*, 895 F.3d at 776, 781. Plaintiff argues here that State has similarly "provided . . . no explanation for its extensive delays." Pl.'s Opp'n at 1; *see also id.* at 9, 17 (alleging "prolonged, unexplained delays"); *id.* at 20-23. But, as State set forth its opening brief, the materials cited in the Complaint point to numerous explanations for the delay. *See* ECF No. 13, at 14-16. Not only did State advise Plaintiff in its second response to his request that it needed additional time to respond because it had to obtain records from multiple other offices, Compl. Ex. B, State also later explained that the COVID pandemic was affecting response times. *Id.* Ex. C. Additionally, the FOIA reports cited in the Complaint and in the parties' papers reveal an extensive backlog at State and a growing volume of incoming requests, *see* Pl.s' Opp'n at 6-7, which further explains the delay. The complexity of Plaintiff's requests is yet another reason for delay. Plaintiff's requests are not like those in, for example, *Judicial Watch*, where the requestor had submitted 19 nearly identical, straightforward requests for travel expense information, rendering delays in responding to these requests on their face suspect and unexplained. In contrast, in the request directly at issue in this case, Plaintiff seeks nineteen years' worth of documents, reflecting reports concerning sensitive transfers of weapons required by a statute that has undergone many revisions during the time period in question—a request that on its face suggests a lengthy processing time.

Plaintiff responds to these explanations by arguing that they were not provided in an "actual communication" with him occurring "within the time required by FOIA." Pl.'s Opp'n, at 21-22. But nothing in *Judicial Watch* requires that, for the purposes of addressing a policy or practice claim asserting delay, an agency have "explained" its delay through a required FOIA response letter prior to the complaint having been filed. *Judicial Watch* focuses on whether there

is an explanation for the delay (which exists here), not on whether and when the agency communicated such an explanation to the requestor. Plaintiff also contends that a backlog of FOIA requests is not "a legally sufficient explanation" for the delay but this misses the point; the existence of a backlog demonstrates that the delay is not the result of an agency policy, practice, or pattern of avoiding its FOIA obligations.

To be sure, there is language in *Hajro* and *Nightingale* suggesting that allegations of delay, without more, could state a valid policy or practice claim. *See also Hajro*, 811 F.3d at 1103 ("[W]e have recognized a pattern or practice claim for unreasonable delay in responding to FOIA requests."); *Nightingale*, 507 F. Supp. 3d at 1201 ("[A] FOIA pattern or practice claim can be established through evidence of chronic delay and backlogs."). However, such broad statements must be regarded as dicta even in the circuit for which those decisions are binding. "[B]road language [in a prior opinion] unnecessary to the Court's decision . . . cannot be considered binding authority." *Kastigar v. United States*, 406 U.S. 441, 454–55 (1972). "General language does not decide particular cases, as Holmes liked to say. Judges expect their pronunciamentos to be read in context[.]" *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005) (Posner, J.). Dictum is "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988). When determining whether a statement is dictum, one factor that may be considered is whether "the passage was not grounded in the facts of the case and the judges may therefore have lacked an adequate experiential basis for it." *Id*. at 292–93.

That is the case here with regard to the broad pronouncements upon which Plaintiff relies. A holding that allegations of delay alone are sufficient to state a claim was not necessary to decide the *Hajro* and *Nightingale* cases and such a holding would not have been "grounded in the facts of th[ose] case[s]," because they did not present those types of allegations bur rather asserted delay with regard only to a specific category of requests. Nor, to the extent that those other courts were charactering prior precedent, is that characterization binding. *See Ceron v. Holder*, 712 F.3d 426, 428 (9th Cir. 2013) (holding that "erroneous passing descriptions" of prior case are dicta), *on reh'g en banc*, 747 F.3d 773 (9th Cir. 2014).

The question for this Court at the motion-to-dismiss stage is whether Plaintiff has alleged sufficient facts to "nudge[] [its] claim[] across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In resolving that question, the Court must determine that Plaintiff's allegations about State's handling of past FOIA requests suggest, on their face, that delay may have been the result of a consistent agency policy or practice, rather than the cumulative result of State's disparate processing of thousands of FOIA requests. In *Twombly*, the Supreme Court held that, while parallel conduct may be consistent with an illicit agreement under Section 1 of the Sherman Act, "an allegation of parallel conduct," paired with "a bare assertion of conspiracy[,] will not suffice" to state a claim. *Id*. at 556. Similar logic applies here. Plaintiff's allegations of delay averaged over a vast variety of FOIA requests do not, without more, create a plausible claim that the delay reflects an agency-wide policy, practice, or pattern. There are no allegations that a common factor has led to delayed response rates for all the different types of FOIA requests State receives; in other words, there is no allegation or suggestion of a plausible causative link. In contrast, in cases where courts have found a plausible policy or practice claim, the facts alleged suggested such a causative factor,

either through the similarity or simplicity of the requests, *see supra*, or through agency statements. *See Muckrock, LLC v. Cent. Intel. Agency*, 300 F. Supp. 3d 108, 135 (D.D.C. 2018) (Jackson, J.) (agency used same language regarding requirements for requests seeking email communications its response letters) (cited in Pl.'s Opp'n at 10-11).

That allegations regarding average response times are insufficient to allege the existence of a single policy or practice applicable to all requests is further borne out by the fact that the FOIA statute contemplates that different response times may apply to different requests. In addition to allowing the agency to claim an additional ten days to respond in the case of "unusual circumstances," the statute also provides that "exceptional circumstances" could permit the agency to take longer than thirty days to process a request as long as the agency shows it "is exercising due diligence in responding to the request" and, in the case of a backlog, is making "reasonable progress in reducing [a] backlog of pending requests." 5 U.S.C § 552(a)(6)(C)(i), (ii); *see Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 189 (D.C. Cir. 2013) ("The unusual circumstances and exceptional circumstances provisions allow agencies to deal with broad, time-consuming requests (or justifiable agency backlogs) and to take longer than 20 working days to do so."). Indeed, the statute expressly contemplates that an agency could take hundreds of days to process requests. The statute calls for each agency to submit an annual report to the Attorney General setting out, among other things, the number of requests for which it made a "determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days." 5 U.S.C. § 552(e)(1)(G)(i). The agency must also specify the number of requests it processed within a period of 201-300 business days, 301-400 business days, and greater than 400 business days. *Id*. § 552(e)(1)(G)(ii)-(iv). These provisions are evidence that "Congress thus expressly envisioned that an agency might, with

some regularity, take several hundred days or more—not just twenty days—to process a request." *Jud. Watch*, 895 F.3d at 795 (Srinivasan, J., dissenting). It follows that a complaint cannot state a viable policy-or-practice claim based on the agency's average aggregate response time in responding to a wide variety of requests, some or many of which may be justifiably delayed past twenty or thirty days based on individual facts applicable to each request.

Plaintiff's contention that two of the cases cited by Defendant, *Rocky Mountain Wild, Inc. v. U.S. Forest Serv*., No. 15-cv-0127, 2016 WL 362459 (D. Colo. Jan 29, 2016), and *LAF v. Dep't of Veterans Affairs*, No. 17 C 5035, 2018 WL 314109 (N.D. Ill. June 27, 2018), "fail to provide the support that the Defendant claims they do," Pl.'s Opp'n at 14, is based on misleading quotations from both cases. *Rocky Mountain* did not, as Plaintiff asserts, state that "'a pattern or practice of taking too long to produce documents . . . could support prospective injunctive relief' in some circumstances." Pl.'s Opp'n at 14. The full passage referenced by Plaintiff is:

> Rocky Mountain Wild also generally complains that the Forest Service has a pattern or practice of taking too long to produce documents. (ECF No. 38 at 20, 21.) *Perhaps in some circumstances* this could support prospective injunctive relief, but Rocky Mountain Wild has not assembled a record sufficient to justify it.

2016 WL 362459, at *12 (emphasis added). The court's phrase "[p]erhaps in some circumstances" is much more of a qualifying phrase than acknowledged by Plaintiff's description, which eliminates the "perhaps." And the statement Plaintiff quotes from *LAF*, "courts may enjoin an agency's pattern or practice of unreasonably delaying FOIA responses," (Pl.'s Opp'n at 14), is not a holding in the *LAF* case itself but rather the *LAF* court's parenthetical imprecisely characterizing *another* court's decision.

The results in *Judicial Watch*, *Hajro*, and *Nightingale* are also supported (and distinguished from this case) by the case-specific fact that the requests for similar types of

records at issue in those cases can more easily lend themselves to targeted efforts to "improv[e] records management systems to enable 'prompt' responses." *See Jud. Watch, Inc*., 895 F.3d at 776 (discussing congressional goals). The instant case is an entirely different case, where Plaintiff relies not only on his own disparate FOIA requests but on the entirety of State's FOIA backlog (almost 15,000 requests) as the basis for the alleged policy or practice of delay. Entertaining this claim, as Plaintiff presents it, will necessarily embroil the Court in micro-managing State's FOIA operation as the Court attempts to determine whether an unlawful policy or practice exists and then possibly to craft and enforce suitable injunctive relief. That task will be monumentally more difficult than in cases like *Judicial Watch*, *Hajro*, and *Nightingale. See Our Children's Earth Founf.*, 2015 WL 6331268, at *8-9 (discussing submissions by agency regarding, and efforts by court to correct, FOIA delays at the Fisheries Service); *see also* Fifth Compliance Report, *Nightingale* (filed Mar. 15, 2022) (ECF No. 125) (describing status of agency's compliance with court's injunction to eliminate delays and backlogs in processing FOIA requests for A-Files).[1] Such wholesale, programmatic efforts are generally ill-suited for judicial oversight. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[R]espondent

[1] Plaintiff objects to Defendant's citation of materials from another case, contending that the contents of those records "remain "subject to reasonable dispute'" and therefore are not a proper subject for judicial notice under Federal Rule of Evidence 201. Pl.'s Opp'n at 22 n.9. However, Defendant is not citing these materials from other cases (the declaration cited in Defendant's opening brief and the report cited herein) for the truth of the information presented in those records but rather simply to show the fact that State has provided explanations in contemporaneous cases for its current delays and the fact of ongoing enforcement efforts in *Nightingale*. *See Opoka v. INS*, 94 F.3d 392, 395 (7th Cir. 1996) (citing *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc*., 969 F.2d 1384, 1388 (2d Cir. 1992) ("A court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'")). In any event, whether judicial notice should be taken is a matter of discretion, *Gen. Elec. Cap. Corp. v. Lease Resol. Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997), and the Court should so exercise its discretion here.

cannot seek *wholesale* improvement of [agency] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."). And any attempt to avoid such micromanagement risks devolving at the other extreme into an improper "obey-the-law" injunction. *See E.E.O.C. v. AutoZone, Inc*., 707 F.3d 824, 841 (7th Cir. 2013) (explaining that an "obey-the-law injunction departs from the traditional equitable principle that injunctions should prohibit no more than the violation established in the litigation or similar conduct reasonably related to the violation"); *Patriot Homes, Inc. v. Forest River Hous., Inc*., 512 F.3d 412, 415 (7th Cir. 2008) (striking down injunction that prevented defendant from using plaintiff's trade secrets or confidential information because "the order itself is a little more than a recitation of the law").

Finally, Plaintiff attempts to establish that State has an unlawful policy by alleging that, with regard to his requests, State failed to comply with the terms of the FOIA statute regarding responses longer than 30 days. Pl.'s Opp'n at 20. This argument should also be rejected.

As explained in Defendant's opening brief, in "unusual circumstances," an agency can extend the twenty-day time limit for processing a FOIA request by ten days upon written notice to the requester "setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched." 5 U.S.C. 552(a)(6)(B)(i). Defendant provided such a notice to Plaintiff on March 24, 2020, for the request at issue in this case. Compl. ¶¶ 15-16 & Ex. B.

The FOIA statute also provides as follows:

> With respect to a request for which a written notice under clause (i) [5 U.S.C. § 552(a)(6)(B)(i)] extends the time limits prescribed under clause (i) of subparagraph (A) [5 U.S.C. § 552(a)(6)(A)(i)], the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause 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). Ultimately, the requestor's failure to modify his request can be considered in determining whether "exceptional circumstances" justify an agency's failure to timely respond. *Id.*; *see Sierra Club v. U.S. Dep't of Interior*, 384 F. Supp. 2d 1, 31 (D.D.C. 2004) (finding that "onerous request" and requester's "refusal to reasonably modify it or to arrange an alternative timeframe for release of documents . . . relieved the [agency] of the normal timelines for release of documents under FOIA").

Plaintiff alleges that "[t]he 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)." Pl.'s Opp'n at 5. Plaintiff is mistaken. State's response letter stating that it would need an additional ten days to respond also provides contact information "[i]f you would . . . like to narrow the scope or arrange an alternative time frame to speed its processing." Compl. Ex. B. Plaintiff appears to be complaining that State did not *subsequently* notify him that it was not going to meet the thirty-day deadline and again provide him with a chance to modify his request. But the statute does not appear to require such notice.[2] In any event, the record is clear that State's March 24, 2020,

[2] At a minimum, the above-cited passage from 5 U.S.C. § 552(a)(6)(B)(ii) is ambiguous as to whether such notice is required. The proper meaning of that passage is dependent on what is meant by the phrase "the time limit specified in that clause" and the antecedent of "that clause" is unclear.

email did indicate to Plaintiff that he could modify his request if he wished to reduce the response time, and Plaintiff has never responded to that invitation.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Defendant's opening memorandum (ECF No. 13), Defendant respectfully requests that the Court dismiss the Third Claim of Plaintiff's Complaint.

Dated: June 3, 2022

Respectfully submitted,

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