UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACQUELINE STEVENS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 C 2725
	)	
U.S. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT,	)	Judge Rowland
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO MOTION TO AMEND COMPLAINT

Introduction

Courts should not allow plaintiffs to amend their complaints if amendment would be futile, and it would be futile to allow plaintiff Jacqueline Stevens's motion to amend her complaint in this Freedom of Information Act case, because the proposed amendments do not allege a viable claim and would not survive summary judgment even if they did. ICE has been diligently processing and producing responsive records over the past 17 months and has substantially decreased its FOIA backlog during that time. The court should deny Stevens's motion.

Background

Stevens filed this FOIA lawsuit in 2020, making two general allegations. Count 1 alleges that ICE has violated FOIA by not producing records in response to six FOIA requests. Compl. ¶¶ 64-70. Count 2 alleges that ICE has a pattern or practice of violating FOIA by not producing records within the statutory time period. *Id.* ¶¶ 71-77.

Since this lawsuit was filed, ICE has produced more than 5,900 pages of records responsive to the FOIA requests described in Count 1. After ICE objected to Stevens's discovery requests

relating to Count 2 (the pattern-or-practice claim), Stevens moved to compel. Dkt. 16. The court denied the motion but allowed Stevens an opportunity to seek leave to amend Count 2 to try to allege a viable pattern-or-practice claim. Dkt. 24-25.

Stevens has now moved for leave to file an amended complaint to add "additional factual allegations" to Count 2 (the pattern-or-practice claim) and to add a new count, Count 3, which purports to state a claim under the Administrative Procedures Act. Dkt. 28.

Argument

The court should deny Stevens's motion to amend her complaint. A court may allow an amended complaint "when justice so requires," Fed. R. Civ. P. 15(a)(2), but that standard is not met where the proposed amendment would be futile. *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819-20 (7th Cir. 2007) (finding no abuse of discretion in denying motion to amend complaint where proposed new claim would not survive summary judgment). Stevens's proposed amendments would be futile because, as explained below, they do not allege a viable claim and would not survive summary judgment even if they did.

I. Futility of Amending Count 2

Allowing Stevens to amend Count 2 as she proposes would be futile. The proposed Count 2 does not allege a viable pattern-or-practice claim any more than her initial effort did, and even if it did, it would not survive summary judgment.

A. FOIA's Purpose and Function

FOIA provides a means for the public to access federal records, subject to certain exemptions. 5 U.S.C. § 552. Upon receipt of a properly submitted request, an agency generally must determine within 20 business days "whether to comply" with the request and must notify the

requestor of its determination. *Id.* § 552(a)(6)(A)(i). An agency may extend this deadline by ten business days in "unusual circumstances." *Id.* § 552(a)(6)(B)(i).

If the agency fails to make a determination within the relevant time period, the requester "shall be deemed to have exhausted his administrative remedies with respect to such request" and may seek relief from a court to "order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(6)(C)(i), (a)(4)(B). The only "penalty" for failing to meet FOIA's deadlines "is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court." *CREW v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013). Once in court, if the agency "can show exceptional circumstances exist" and that the agency "is exercising due diligence in responding to the request," the court may retain jurisdiction while allowing the agency "additional time to complete its review" of a request. 5 U.S.C. § 552(a)(6)(C)(i). As explained below, ICE has established that exceptional circumstances exist and that it has exercised due diligence.

Ordinarily, FOIA lawsuits are litigated based on individual FOIA claims, which become moot once the agency provides the requested documents. *Payne Enters., Inc. v. United States*, 837 F.2d 486, 490-91 (D.C. Cir. 1988). But in limited circumstances, some courts have recognized a narrow exception to that principle, in the form of a "pattern or practice" claim. *E.g., Hajro v. USCIS*, 811 F.3d 1086, 1103 (9th Cir. 2016) (allowing pattern-or-practice claim where agency had a policy of refusing to expedite certain types of requests). A plaintiff alleging a pattern-or-practice claim must prove that the agency has adopted an unlawful "policy or practice" that "will impair the party's lawful access to information in the future." *Id.* Stevens cannot meet that bar.

B. High Bar for Alleging "Pattern or Practice" of Violating FOIA

A plaintiff must clear an extraordinarily high bar to succeed on a pattern-or-practice claim. Simply alleging that an agency frequently suffers from delays is not enough. *ACLJ v. FBI*, 2020 WL 3605624, *5 (D.D.C. July 2, 2020) (finding plaintiffs had failed to state pattern-or-practice claim because "there is little, if anything, beyond the delays themselves that 'could signal the agency has a policy or practice of ignoring FOIA's requirements'") (citing *Judicial Watch v. DHS*, 895 F.3d 770, 780 (D.C. Cir. 2018)); *ACLJ v. State*, 249 F.Supp.3d 275, 283 (D.D.C. 2017) ("Courts have thus recognized a plaintiff cannot rest on the mere fact of delay alone to establish a [pattern-or-practice] claim.") (quotation omitted); *Cause of Action Inst. v. Eggleston*, 224 F.Supp.3d 63, 72 (D.D.C. 2016) (finding that "delay alone, even repeated delay, is not the type of illegal policy or practice that is actionable").

Instead, to be viable, a pattern-or-practice claim must involve repeated agency conduct that is *unjustified* and *unexplained*—not simply routine delay. *Payne Enters.*, 837 F.2d at 494; *Judicial Watch*, 895 F.3d at 780-84; *Long v. IRS*, 693 F.2d 907 (9th Cir. 1982); *see also Porup v. CIA*, 2020 WL 1244928, *3 (D.D.C. Mar. 16, 2020); *Nat'l Sec. Counselors v. CIA*, 898 F.Supp.2d 233, 248 (D.D.C. 2012) ("courts have tended to accept such claims only when an accumulation of FOIA violations reasonably reveals some set of inopportune agency behaviors").

For examples of the type of egregious conduct that might support a pattern-or-practice claim, consider *Long* and *Payne, supra*. In *Long*, the IRS admitted to a practice of making spurious FOIA exemption claims and requiring the requester to file suit before it would release documents. 693 F.2d at 908. In *Payne*, officers at an Air Force base refused to fulfill requests for copies of bid abstracts for almost two years, even though no FOIA exemption applied, and even though each time the Secretary of the Air Force had released the information on administrative appeal. 837

F.2d at 494. After even an admonishment from the Secretary of the Air Force was still not enough to prompt compliance, the D.C. Circuit held that the Air Force had a pattern or practice of violating FOIA based on the Secretary's "inability to deal with" the officers' "noncompliance" and the Air Force's repeated refusal to end a practice for which it offered "no justification." *Id.*

In the years since *Payne*, courts have explained that *Payne* is limited to egregious cases involving unlawful practices, not routine agency delays in responding to FOIA requests. For example, in *Competitive Enter. Inst. v. EPA*, 153 F.Supp.3d 376 (D.D.C. 2016), the court dismissed a pattern-or-practice claim that alleged "slow-walking" in response to FOIA requests. *Id.* at 386 ("the complaint does not contain any facts indicating that the records responsive to this request were withheld based on an underlying practice of discrimination against this plaintiff or that any ongoing impropriety exists"). The court found that the allegations were not analogous to those in *Payne*, in which officials had withheld records "even after the withholding had been found to be unlawful." *Id.* at 385-86; *Del Monte Fresh Produce v. United States*, 706 F.Supp.2d 116, 120 (D.D.C. 2010) (noting that *Payne* involved the "repeated denial" of FOIA requests "based on the invocation of inapplicable statutory exemptions rather than delay"); *Rocky Mountain Wild v. U.S. Forest Serv.*, 2016 WL 362459, *11-12 (D. Colo. Jan. 29, 2016) (emphasizing that even "repeated failure" to comply with FOIA's timeliness requirement is not comparable to the behavior in *Payne*).

An example of the type of egregious scenario that does reach the *Payne* threshold for a viable pattern-or-practice claim is *Judicial Watch v. DHS*, 895 F.3d 770 (D.C. Cir. 2018). The plaintiff there had, for years, monitored governmental expenditures by submitting FOIA requests to the Secret Service for information on the use of government funds for "VIP" travel. *Id.* at 773. The plaintiff resorted to suing—five times in a three-year span—and each time Secret Service

produced the records, mooting the lawsuits. *Id.* After these lawsuits, the plaintiff submitted 19 more FOIA requests, and the Secret Service again took no action. *Id.* at 776. The plaintiff filed another lawsuit, this time alleging a pattern-or-practice claim. *Id.* The D.C. Circuit found that the plaintiff had brought a "plausible" claim, noting the history of the plaintiff's having had to file a total of six lawsuits relating to the same subject matter, lawsuits that turned out to be an "empty gesture in terms of preventing future delays." *Id.* at 780-82; *see also Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012) (pattern-or-practice claim was viable where Air Force had unlawful policy of withholding certain documents with "no intention of abandoning that policy").

In sum, the three prime examples of a viable pattern-or-practice claim in the D.C. Circuit—*Payne*, *Judicial Watch*, and *Newport*—and the example from the 9th Circuit, *Long*, all involved a narrowly defined class of documents: bid abstracts, technical information concerning military equipment, VIP travel expenses, and IRS instructions regarding statistical tabulations to measure taxpayer compliance. They show that a pattern-or-practice claim is viable in the wake of repeated, unexplained, and unjustified conduct regarding records with a particular subject matter. *See ACLJ v. FBI*, 470 F.3d 1, 7-8 (D.C. Cir. 2020) (noting that a pattern-or-practice claim "has never been inferred" from the fact that an agency, "like many agencies engaged in repeat litigation with regular FOIA litigants, has violated FOIA multiple times in different ways"). Routine delay is simply not enough.

C. Inadequate Allegations in Stevens's Proposed Count 2

The allegations in Stevens's proposed Count 2 do not come close to alleging a viable pattern-or-practice claim. She has simply alleged routine delay by ICE in processing FOIA

requests, which is not enough. And a pattern-or-practice injunction would be improper in this context any event.

1. No Pattern or Practice of Violating FOIA Alleged

The essence of the allegations in Stevens's proposed Count 2 is that ICE consistently fails to make determinations on FOIA requests within 20 business days. Dkt. 28-1 ¶¶ 91, 94, 104. But as explained above, a history of failing to meet FOIA's deadlines is insufficient to support a pattern-or-practice claim. Indeed, ICE is aware of *no* pattern-or-practice claim in *any* jurisdiction that has succeeded on the basis of delay alone. *See ACLJ v. State*, 249 F.Supp.3d 275, 283 (D.D.C. 2017) (courts "have thus recognized a plaintiff cannot rest on the mere fact of delay alone to establish" a pattern-or-practice claim) (quotation omitted). No surprise, then, that courts routinely reject pattern-or-practice claims where plaintiffs show no more than ordinary delay or a history of delay. *E.g.*, *Cause of Action Inst. v. Eggleston*, 224 F.Supp.3d 63, 72 (D.D.C. 2016) ("delay alone, even repeated delay, is not the type of illegal policy or practice that is actionable"); *ACLJ v. FBI*, 2020 WL 3605624, *5 (D.D.C. July 2, 2020) (dismissing pattern-or-practice claim for failure to state a claim where plaintiffs had alleged "little, if anything, beyond the delays themselves").

Stevens tries another angle when she proposes to allege that ICE's various field offices "slow-walk" productions and "delay proceedings." Dkt. 28-1 ¶ 93. But this attempt to describe "repeated, unexplained conduct" is merely a conclusion, unsupported by the factual content that is required for a claim to be cognizable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The only basis for the allegation Stevens offers is a *single judge's* exasperated comment in response to a particular situation. Dkt. 28-1 ¶ 93. A single instance does not constitute a pattern or practice. *E.g.*, *Competitive Enter. Inst. v. EPA*, 153 F.Supp.3d 376, 386 (D.D.C. Jan. 28, 2016) (dismissing pattern-or-practice claim alleging "slow-walking" in response to FOIA requests where the

complaint lacked "any facts" indicating that responsive records were "withheld based on an underlying practice of discrimination against this plaintiff or that any ongoing impropriety exists").

Stevens also seeks to allege that ICE "persistently fails" to request funds from Congress to allow it to meet its FOIA deadlines. Dkt. 28-1 ¶ 92. This proposed allegation raises separation-of-powers concerns that further counsel against allowing the amendment, because "it is not the role of the judiciary to question how executive agencies request and allocate resources, absent some compelling evidence of purposeful conduct." *Dem. Fwd. Found. v. DOJ*, 354 F.Supp.3d 55, 62 (D.D.C. 2018); *Edmond v. U.S. Att'y*, 959 F.Supp. 1, 3 n.2 (D.D.C 1997) ("This Court is not prepared . . . to second-guess decisions by the executive and legislative branches on administrative support and funding for the processing of FOIA requests in the absence of some evidence that the cooperative branches sought to circumvent the law.").

2. Futility of Amendment in Any Event

Even if Stevens had proposed to allege a viable pattern-or-practice claim (she has not), the amendment would be futile in any event, because it would not survive summary judgment. *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819-20 (7th Cir. 2007) (finding no abuse of discretion in denying motion to amend complaint where proposed new claim would not survive summary judgment). To see why the proposed claim would not survive summary judgment, the court need refer only to the attached declaration from the supervisory paralegal specialist in ICE's FOIA Office, which shows that ICE does *not* "slow-walk" productions or "delay" processing. Ex. A.

As the declaration explains, ICE has been deluged with FOIA requests in recent years, with the number of requests increasing by 240% from Fiscal Year 2017 to Fiscal Year 2020. Ex. A ¶ 6. ICE has processed this onslaught of requests at an *extremely* impressive rate: in FY 2020 alone, ICE received 114,475 FOIA requests, and yet ICE's current backlog is a fraction of that, at only

7,941 requests. Ex. A ¶¶ 4-5. That is not "slow-walking," but rather an extraordinarily successful effort to process requests in as timely a manner as possible in the face of an overwhelming number of requests. An amended complaint would be futile if it would not survive summary judgment, *King*, 496 F.3d at 819, and Stevens's allegation that ICE "slow-walks" its FOIA requests would plainly not survive summary judgment in the face of ICE's declaration. (As the court knows, FOIA cases are typically resolved on summary judgment on the basis of agency declarations.)

Stevens's proposed allegation that ICE does not list "compliance with the deadline for FOIA adjudication" in its "yearly department goals" despite its "ballooning backlog" fares no better when compared to the declaration. Dkt. 28-1 ¶ 99. Stevens says that ICE's backlog was 2,818 requests at the start of Fiscal Year 2020, was 5,666 by August 11, 2020, and was 12,847 by the end of the fiscal year, and that the backlog has continued to increase. Dkt. 28-1 ¶ 101. But as the attached declaration shows, ICE's current backlog is 7,941, which is significantly *down* from the backlog of 12,847 that Stevens alleges existed at the end of FY 2020. Ex. A ¶ 4. On the face of the numbers, ICE is making significant progress in working through its backlog, particularly considering that ICE received *114,475* FOIA requests in FY 2020 alone. Ex. A ¶ 5. ICE does not need to list "compliance" in its written "goals" in order to continue that progress.

Stevens also proposes to allege that Congress clarified in 1996 that "predictable agency workload" does not constitute the type of exceptional circumstance that could justify delay, unless the agency demonstrates reasonable progress in reducing its backlog. Dkt. 28-1 ¶ 97. But again, the attached declaration shows that ICE *has* made progress in reducing its backlog. Ex. A ¶¶ 4-6.

3. Further Futility of Injunction

Another reason amendment would be futile is that even an injunction in Stevens's favor would also be futile. ICE is already doing everything practicable to comply with FOIA's deadlines, and allowing Stevens to pursue a pattern-or-practice claim would not improve those efforts. Indeed, allowing Stevens to amend her complaint would simply require ICE to devote time and resources to the additional litigation rather than to its FOIA backlog. Although Stevens may wish to focus the court's attention on the fact that ICE does not always respond to FOIA requests within 20 business days, FOIA simply cannot be read without some recognition of the burdens facing federal agencies and their good-faith efforts to overcome those burdens. Otherwise, the majority of federal agencies would be liable for pattern-or-practice violations of FOIA, given the undisputed existence of government-wide FOIA backlogs. *E.g.*, *ACLJ v. State*, 289 F.Supp.3d 81, 84 (D.D.C. 2018) ("Although the Freedom of Information Act requires agencies to issue decisions on requests for documents within twenty working days, few departments consistently meet this deadline."); *CREW v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013) ("it would be a practical impossibility for agencies to process all [FOIA] requests completely within twenty days. . . . We are intimately familiar with the difficulty that FOIA requests pose for executive and independent agencies.") (quotation omitted); *Cohen v. FBI*, 831 F.Supp. 850, 853-54 (S.D. Fla. 1993) (courts "cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of requests received within the time constraints imposed by FOIA").

Moreover, an injunction ordering ICE to comply with FOIA's 20- and 30-business-day deadlines—which is what Stevens would be seeking—would constitute an impermissible "obey the law" injunction. *EEOC v. AutoZone*, 707 F.3d 824, 841 (7th Cir. 2013). Such an injunction

would also effectively write the "exceptional circumstances" provision out of FOIA. On top of that, compliance would be impossible. ICE, like most of the rest of the federal government, simply does not have the resources to meet the 20- and 30-day deadlines 100% of the time. No matter what any court were to order, ICE will inevitably receive requests that it cannot process within 20 or 30 business days, and an injunction would simply set ICE up for failure, even though ICE is already making every effort to meet FOIA's deadlines. *Am Hosp. Ass'n v. Price*, 867 F.3d 160, 167 (D.C. Cir. 2017) ("a court may not require an agency to render performance that is impossible").

Again, as the attached declaration shows, any delays by ICE in meeting FOIA's deadlines are the product not of unjustified or unexplained neglect, but rather the inescapable mathematics of ever-increasing and ever-more-complex requests, coupled with ICE's finite resources. Ex. A ¶¶ 4-25. Litigation over a pattern-or-practice claim is not needed to coerce ICE to comply with FOIA's deadlines—ICE is already doing what it can. *See ACLJ v. State*, 289 F.Supp.3d 81, 91 (D.D.C. 2018) (finding "no need" for an injunction in light of government's "good faith efforts to come up with ways to reduce its backlog and respond promptly").

The remedy for an agency's failure to make a determination on a FOIA request within the statutory timeframe—which is what Stevens alleges happened here—is the right to sue, as Stevens has now done. *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013) ("If the agency does not adhere to FOIA's explicit timelines, the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court."). Indeed, FOIA offers "its own mechanism for disciplining an agency's unjustified conduct" in individual cases: fee awards. *ACLJ*, 470 F.Supp.3d at 8; *see also Davy v. CIA*, 550 F.3d 1155, 1162 (D.C. Cir. 2008) (noting that one factor favoring a fee award is "whether the agency's opposition to disclosure had a

reasonable basis in law, and whether the agency had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior") (citations and quotations omitted).

II. Futility of Alleging Count 3

Allowing Stevens to amend her complaint to allege her proposed Count 3 would be similarly futile. The proposed Count 3 alleges that ICE has violated the Administrative Procedures Act by not taking "reasonable measures to reduce and prevent backlogs," a practice that Stevens calls arbitrary and capricious and that she says has "thwarted" FOIA's "very purpose." Dkt. 28-1 ¶¶ 109-114. But a plaintiff may not pursue an APA claim where FOIA provides an adequate remedy, and FOIA already provides an adequate remedy for the "genre" of violation that Stevens attempts to allege in Count 3 (read: a pattern-or-practice allegation).

For starters, FOIA is *part of* the APA, not a separate statute that an agency could violate in addition to violating the APA. *Whitaker v. DOC*, 970 F.3d 200, 205 (2d Cir. 2020) ("although the term APA is not commonly used to refer to FOIA, the Supreme Court has explained that the statute known as FOIA is actually part of the Administrative Procedure Act") (quotation and alteration omitted). And the APA limits the government's waiver of sovereign immunity and the attendant review of agency actions under the APA to situations where there is "no other adequate remedy in court." 5 U.S.C. § 704. Here, FOIA provides an adequate remedy, and courts have uniformly rejected FOIA plaintiffs' efforts to allege APA claims in addition to FOIA claims. *Walsh v. VA*, 400 F.3d 535, 538 (7th Cir. 2005) (APA "does not provide an alternate means" for FOIA plaintiff "to keep his suit alive"); *Cent. Platte Nat'l Res. Dist. v. USDA*, 643 F.3d 1142, 1149 (8th Cir. 2011) ("duplication would result" if FOIA and APA claims were both allowed); *Elec. Privacy Info. Ctr. v. NSA*, 795 F.Supp.2d 85, 96 (D.D.C. 2011) (dismissing APA claim because "adequate relief is available under FOIA without recourse to the APA"); *Feinman v. FBI*, 713 F.Supp.2d 70,

76 (D.D.C. 2010) ("This Court and others have uniformly declined jurisdiction over APA claims that sought remedies available by FOIA.").

Stevens might argue that FOIA does not provide an adequate remedy for her precisely because she has been unable to allege a viable pattern-or-practice claim under FOIA. But adequacy of remedy "does not depend on a party's ability to prevail on the merits—if it did, every party that lost a non-APA-based appeal of an agency decision would be entitled to a duplicative APA claim, precisely the outcome that § 704 seeks to prevent." *Rimmer v. Holder*, 700 F.3d 246, 261 (6th Cir. 2012) (affirming dismissal of FOIA plaintiff's APA claim). For a cause of action to provide an adequate remedy as far as Section 704 is concerned, a court need only be able to provide the plaintiff "relief of the same genre," not necessarily "relief identical to relief under the APA." *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (quotation omitted); *Feinman*, 713 F.Supp.2d at 77 (rejecting plaintiff's argument that his APA claim was viable because he was challenging the agency's "procedural policies" rather than its substantive FOIA determinations, because the relief available under FOIA "is of the 'same genre' as the relief available under the APA"). Here, the court need only look at the allegations in Stevens's proposed Counts 2 and 3 to see that she is seeking the same relief in both counts.

Conclusion

For the above reasons, the court should deny Stevens's motion for leave to amend her complaint.

Respectfully submitted,

JOHN R. LAUSCH, Jr.
United States Attorney

By: s/ Alex Hartzler
ALEX HARTZLER
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 886-1390
alex.hartzler@usdoj.gov

Exhibit A

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF ILLINOIS
10
11 EASTERN DIVISION
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JACQUELINE STEVENS,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendant.

No. 20 C 2725

Judge Rowland

DECLARATION OF KORRINA STEWART

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF KORRINA STEWART

I, Korrina Stewart, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a Supervisory Paralegal Specialist of the Freedom of Information Act Office (the "ICE FOIA Office") at U.S. Immigration and Customs Enforcement ("ICE"). The ICE FOIA Office is responsible for processing and responding to all Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *amended by* the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, and Privacy Act of 1974 (the "Privacy Act"), 5 U.S.C. § 552a, requests received at ICE. I have held this position since May 1, 2021. I am the ICE official responsible for supervising the ICE FOIA Litigation Team's responses to requests for records in litigation under the FOIA, the Privacy Act, and other applicable records access statutes and regulations. Prior to formally taking this position, I was the acting litigation team supervisor and supported the FOIA Officer with the office's special projects since July of 2020.

2. My official duties and responsibilities include the oversight and supervision of the ICE FOIA Litigation Team. The Litigation Team is responsible for picking up the case when a complaint is filed and seeing it through to completion. Depending on what is alleged in the complaint, the Litigation Team will conduct a search, gather responsive records, go through the records for responsiveness, process productions, and release records with applicable withholdings to the plaintiff or plaintiff's counsel. My team is comprised of FOIA Paralegal Specialists. Due to my experience and the nature of my official duties, I am familiar with ICE's procedures for responding to requests for information pursuant to provisions of the FOIA and the Privacy Act.

3. I make this declaration in support of Defendant's response to Plaintiff's motion to file a first amended complaint to add (1) additional factual allegations to Count II in support of a request for declaratory and injunctive relief pertaining to an alleged pattern and practice of ICE responses to FOIA requests and (2) a count under the Administrative Procedures Act related to a backlog of unprocessed FOIA requests and

1 agency remands. I make this declaration in my official capacity based on my personal
2 knowledge, my review of records kept by ICE in the ordinary course of business, and
3 information provided to me by other ICE employees in the course of my official duties.
4
5 **I. RECENT STATISTICS REGARDING FOIA REQUESTS SUBMITTED TO**
6 **ICE**

7 4. As of February 24, 2022, the ICE FOIA Office is processing approximately
8 8,931 open FOIA requests addressing a backlog of 7,941 requests.[1] There were
9 approximately 160 open federal district court cases, and 70 cases in active record
10 production. While the number of pages processed and released fluctuate each month, for
11 snapshot purposes, in February 2022 the ICE FOIA Litigation Team reviewed
12 approximately 27,669 pages of records and released 14,931 pages to
13 requesters/plaintiffs.

14 5. Beginning in fiscal year ("FY") 2018, the ICE FOIA Office experienced a
15 substantial and dramatic increase in the number of FOIA requests received by ICE
16 compared to previous years. In FY 2015, the ICE FOIA Office received 44,748 FOIA
17 requests; 63,385 FOIA requests were received in FY 2016. The number of requests
18 received briefly decreased in FY 2017 to 47,893 but was then followed by a spike of
19 70,267 FOIA requests in FY 2018. In FY 2019, that number climbed to a total of
20 123,370 requests received and in FY 2020 the ICE FOIA Office received 114,475 FOIA
21 requests.

22 6. Between FY 2017 and FY 2020, the ICE FOIA Office experienced
23 approximately a 240% increase in FOIA requests. This dramatic increase in ICE FOIA's
24 workload is attributed to an increase in the number of referrals ICE received from
25 USCIS and the increased public interest in the Department's operations as they pertain to
26 recent Presidential and/or Executive Orders and subsequent guidance from the Secretary
27
28

[1] Backlog case are those that have been pending for over 20 days.

of Homeland Security. According to Syracuse University's FOIA Project, during the month of November 2021, federal district courts saw a total of 56 new FOIA lawsuits filed under 5 U.S.C. 552. As of December 14, 2021, the total overall reported FOIA filings for the last 12 months were 652.[2]

II. ICE FOIA OFFICE'S STAFF LEVELS AND WORKLOAD

7. In addition to the increasing volume of FOIA requests, ICE has also experienced an increase in the complexity of FOIA requests, both in terms of volume and substance. For example, it is now not uncommon to see FOIA requests with 50 to 60 sub-parts comprising several pages, searches of numerous program offices, and a universe of records that has thousands of pages to review and process. These FOIA requests take considerably longer to process due to extensive searches and the intricacy of the documents and/or data produced. In FY 2019, one FOIA requester alone – a data clearing house – filed more than 370 FOIA requests seeking extensive data extracts. In FY 2020, the same requester filed more than 480 similar FOIA requests.

8. All these factors have nearly doubled the ICE FOIA Office's overall workload since FY 2017. In response to the increasingly heavy workload, the ICE FOIA Office has adopted the court-sanctioned practice of generally handling backlogged requests on a "first-in, first-out basis," which ensures fairness to all FOIA requestors by not prioritizing one request over another. This practice applies to requests that are in litigation. The reason for this is that the principle of fairness to all requestors would be jeopardized were a requestor permitted to "jump the line" simply by virtue of filing a case in U.S. District Court. Generally, the only exception to this is where a court orders processing at rates above the ICE FOIA Office's current processing rate for all cases. In FY 2020, the ICE FOIA Office closed 79,081 cases and 17,060 referrals from USCIS.

---

[2] The FOIA Project Freeing Information through Public Accountability (December 14, 2021) http://foiaproject.org/2021/12/14/november-2021-foia-litigation-with-five-year-monthly-trends/.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

9. The ICE FOIA Office currently has 20 FOIA specialists dedicated to processing FOIA requests solely at the administrative level. The processors are responsible for responding to the original FOIA requests and, if necessary, reprocessing remands on appeal. In FY 2020, these FOIA processors completed and closed out 79,081 FOIA requests.

10. Additionally, the ICE FOIA Office has the Litigation Processing Unit comprised of experienced paralegal specialists who are exclusively entrusted with processing records in litigation under FOIA and the Privacy Act.

11. From November 2020 to early 2021, the ICE FOIA Litigation Processing Unit was staffed with three full-time paralegals. One paralegal, who temporarily assumed the supervisory role, had limited time to process records for production. This left the team with two paralegals dedicated to processing records and one paralegal serving as acting Litigation Team Supervisor.[3]

12. In early 2021, one additional full-time paralegal joined the team. This left the team with three paralegals dedicated to processing records and one paralegal serving as acting Litigation Team Supervisor.

13. In April 2021, two additional full-time paralegals joined the team and a full time supervisory paralegal was onboarded allowing the then acting supervisory paralegal to resume duties as a paralegal dedicated to processing records. This left the team with six paralegals dedicated to processing records and one Litigation Team Supervisor.

14. I took extended leave from July 2021 until December 6, 2021. On August 1, 2021, the Deputy FOIA Officer was onboarded and assumed the role of Litigation Team Supervisor while I was out on extended leave. This left the ICE FOIA Litigation Processing unit with six paralegals dedicated to processing records and one Litigation Team Supervisor.

---

[3] The staffing numbers and statistics provided reflect the status of the agency as of the date of this declaration. These numbers are subject to change based on changes to agency resources and litigation workloads.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

15. Between December 2021 and January 2022, the team experienced several staffing changes. This left the team with three paralegals dedicated to processing records, one paralegal on extended leave, and one Litigation Team Supervisor.

16. In February 2022, an internal ICE FOIA processor joined the Litigaiton Team. Most recently, two detailees from other program offices within ICE joined the Litigation Team for 120 days to process records.

III. CURRENT WORKLOAD OF THE ICE FOIA LITIGATION PROCESSING UNIT

17. A consequence of the increasing complexity and volume of ICE FOIA's workload and backlog (*see* paragraphs 4-11) is that more of those FOIA requests become subject to litigation in U.S. District Court.

18. The ICE FOIA Litigation Processing Unit's workload has increased such that it is currently processing approximately 160 active FOIA litigations as of the date of this declaration and of which approximately 70 have rolling productions. ICE's normal processing rate for cases in litigation is 500 pages per month per case. This yields a monthly litigation review of approximately 35,000 pages and an average of 13,500 pages released every month. Based on this workload, each paralegal reviews approximately 11,600 pages per month.

19. Additionally, there are cases added each month which increase the case list and resulting productions. With the monthly additions, the three (3) full-time paralegals currently employed within the ICE FOIA Litigation Processing Unit will be required to process nearly 40,000 pages per month and in excess of 13,000 pages per month per paralegal. These page-count numbers do not take into account the additional FOIA lawsuits that require a single production versus rolling productions.

20. The ICE FOIA Litigation Processing Unit also drafts, assigns, and tracks any and all searches for responsive documents concerning FOIA litigations. The FOIA litigation search taskings frequently span dozens of ICE program and field offices and

1 require the Unit to keep track of hundreds of thousands of responsive records, as well as
2 the documentation from searches of the program offices and field offices.
3 21. The ICE FOIA Litigation Processing Unit has collateral duties, in addition
4 to processing documents pursuant to litigation. For example, the processing unit
5 prepares various reports for statical tracking responds to Congressional inquiries, redacts
6 Prison Rape Elimination Act reports, sends out FOIA Exemption (b)(4) submitter notices
7 on relevant cases, and manages consults and referrals from other agencies as they are
8 received. Additionally, the processing unit supports attorneys in the ICE Office of the
9 Principal Legal Advisor with federal FOIA litigation, by assisting in the creation of
10 *Vaughn* indexes, reviewing declarations, and coordinating on joint status reports to the
11 Court.
12 22. The ICE FOIA Litigation Processing Unit also manages a host of
13 administrative duties, including (but not limited to) monitoring the ICE FOIA inbox
14 (which receives from 12,000 -18,000 emails annually), processing all classified consults
15 and referrals, scheduling productions, preparing clearance e-mails, and corresponding
16 with requesters.
17 23. Each member of the ICE FOIA Litigation Processing Unit processes
18 records daily but the number of pages processed significantly varies depending on the
19 complexity of the records, and they are still required to keep up with their collateral and
20 administrative duties.
21 24. In order to meet its obligations for all cases in litigation by ensuring that all
22 of the FOIA matters progress, and each requester receives a response, the ICE FOIA
23 Office typically cannot process more than 500 pages per month per case. Any increase
24 in production for one case will inevitably hinder ICE FOIA's ability to process records
25 for production in other matters.
26 25. Moreover, the ICE FOIA Office typically cannot *produce* a set number of
27 pages per month. Depending on the volume of records located in the search tasking
28 phase of the administrative stage and/or FOIA litigation, if the Court would order ICE

FOIA to *produce rather than a review/process* a certain number of pages per month, it is entirely plausible that the processors would have to review hundreds, or even thousands, of additional pages on top of the 500 pages that are attainable, in order to get to the requisite *production* number. ICE FOIA is incapable of achieving this outcome based on finite resources, competing priorities, litigation and non-litigation deadlines, and the sheer volume of overall work.

IV. PROGRESS ON THE INSTANT CASE

26. ICE has conducted multiple searches in response to Plaintiff's six FOIA requests in this current lawsuit, and has gathered approximately 14,688 potentially responsive pages.

27. At a pace of processing at least 500 pages per month, the 14,688 potentially responsive pages would take 29-30 months to process. Defendant has processed and released 13 productions of documents to Plaintiff as of February 2022 and plans to release another production this month.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 7, 2022, at Manassas, VA.

Korrina Stewart, Supervisory Paralegal Specialist
Freedom of Information Act Office
U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009