UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jacqueline Stevens, Plaintiff, v. U.S. Department of Homeland Security and Immigration and Customs Enforcement, Defendants.	Case No. 20-cv-2725 Judge Mary M. Rowland

ORDER

This Court grants in part and denies in part Plaintiff's motion for leave to amend [28]. Plaintiff is given leave to amend Count II but will not be permitted to add her proposed APA claim in Count III. Plaintiff shall file her amended complaint by April 22, 2022. Defendants shall answer by May 6, 2022.

STATEMENT

In May 2020, Plaintiff Jacqueline Stevens sued Defendants United States Immigration and Customs Enforcement (ICE) and the United States Department of Homeland Security (DHS) for declaratory and injunctive relief under the Freedom of Information Act (FOIA). [1]. According to the complaint, Plaintiff works as a professor and director of the Deportation Research Clinic at Northwestern University. *Id.* ¶ 5. As part of her work at Northwestern, Plaintiff has spent years researching conditions in ICE detention facilities and routinely uses FOIA requests to obtain information pertinent to her research efforts. *Id.* ¶ 9. She alleges that Defendants have failed to disclose all responsive agency records in connection with six FOIA requests she submitted in 2018 and 2019; she also alleges that Defendants have failed to: (1) docket and process Plaintiff's November 22, 2019 FOIA request; (2) timely respond to her March 25, 2019 and November 22, 2019 requests; (3) process on remand and respond to her August 6, 2018, January 19, 2019, and December 16, 2018 requests; (4) provide a legally sufficient appellate response to her November 22, 2019 and August 23, 2018 FOIA requests; and (5) conduct proper searches to locate documents responsive to her six FOIA requests. *Id.* ¶ 67. Plaintiff's complaint asserts two claims for "violation of FOIA" due to Defendants' failures to timely respond to her six FOIA requests (Count I) and "declaratory and injunctive relief against ICE" based

on ICE's alleged "pattern and practice" of delay in adjudicating FOIA requests. (Count II). *Id.* ¶¶ 64–77.

Defendants did not move to dismiss the complaint. Instead, they answered the complaint in July 2020, *see* [7], and since then have made several productions responsive to the FOIA requests on which Plaintiff bases Count I, *see* [13]; [19]. Recently, in January 2022, this Court ordered Defendants to produce documents related to Count I on the twentieth day of each month until they have finished. [25]. Defendants have estimated a year or more of continued production on Count I. *See id.* Although Count I production has been underway, Defendants have maintained an objection to Plaintiff's discovery directed at Count II, arguing, among other things, that Plaintiff's complaint fails to state a viable "pattern or practice" FOIA claim (even though, as stated above, Defendants did not move to dismiss that claim). *See* [20] at 2. Defendants' objection to discovery on Count II prompted Plaintiff to move to compel. *See* [16]. After considering the briefs and hearing from the parties, this Court denied Plaintiff's motion to compel without prejudice [24] and allowed Plaintiff to file a motion for leave to amend her complaint to cure any pleading insufficiencies in Count II. [25]. Plaintiff has moved for leave to add additional factual allegations to support Count II and to add a new proposed Count III, a claim under the Administrative Procedures Act (APA). [28].

Federal Rule of Civil Procedure 15(a)(2) provides that courts "should freely give leave" to amend pleadings "when justice so requires." *See also Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, 15 F.4th 831, 835 (7th Cir. 2021) (noting that Rule 15(a)(2) takes a "liberal approach to granting leave to amend") (quoting *Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 335 (7th Cir. 2018)). Courts may, however, deny leave to amend "where there is a good reason to do so: 'futility, undue delay, prejudice, or bad faith.'" *R3 Composites Corp. v. G&S Sales Corp.*, 960 F.3d 935, 946 (7th Cir. 2020) (quoting *Kreg Therapeutics, Inc. v. VitalGo, Inc.*, 919 F.3d 405, 417 (7th Cir. 2019)).

Defendants argue that amendment would be futile because Plaintiff's proposed amended complaint does not state a viable "pattern or practice" claim nor a cognizable APA claim. [34] at 2, 12. To determine whether amendment would be futile when a case has yet to progress to the summary judgment stage, courts apply "the legal sufficiency standard of Rule 12(b)(6) to determine whether the proposed amended complaint fails to state a claim." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi.& Nw. Ind.*, 786 F.3d 510, 524 (7th Cir. 2015); *see also O'Boyle v. Real Time Resols., Inc.*, 910 F.3d 338, 347 (7th Cir. 2018).

This Court begins with assessing whether Plaintiff's proposed amended Count II states a viable "pattern or practice" FOIA claim. The Seventh Circuit has not yet addressed this particular type of claim, but the Court of Appeals for the D.C. Circuit has determined that a complaint "states a plausible policy or practice claim . . . by

alleging 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, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 780 (D.C. Cir. 2018); *see also O'Neill v. U.S. Dep't of Just. Exec. Off. for U.S. Att'ys*, No. 18-CV-396-JDP, 2020 WL 905869, at *7 (W.D. Wis. Feb. 25, 2020) (applying the D.C. Circuit's standard in *Judicial Watch* in the absence of Seventh Circuit guidance). The complaint must also allege that the "pattern of delay will interfere" with the plaintiff's "right to promptly obtain non-exempt records from the agency in the future." *Jud. Watch*, 895 F.3d at 780.

The proposed amended Count II meets this standard. Plaintiff alleges that, since 2010, Defendants have determined that they do not possess an affirmative obligation to determine FOIA requests within the statutory timeframe, and that this position "permeates ICE FOIA standard operating procedures, its written internal rules, and its uniform practice pertaining to responding to FOIA requests." [21-1] ¶ 91. The amended complaint further cites DHS' own "FOIA Backlog Reduction Plan 2020–2023," in which DHS admits that backlogs "have continued to be a systemic problem." *Id.* ¶ 102. As Plaintiff further alleges, despite its ballooning backlogs, ICE does not include "compliance with the deadline for FOIA adjudication" in its yearly department goals, nor does it use FOIA statutory timeframes as a metric in evaluating employees' and contractors' performances. *Id.* ¶ 99. These allegations plausibly suggest that Defendants maintain a practice of flouting FOIA's timing requirements and that this practice interferes with Plaintiff's right to "promptly obtain non-exempt records in the future." *Jud. Watch*, 895 F.3d at 780 (emphasis added); *see also, e.g.*, *LAF v. Dep't of Veterans Affs.*, No. 17 C 5035, 2018 WL 3148109, at *7 (N.D. Ill. June 27, 2018) (finding that a complaint adequately alleged a deliberate policy or practice "leading to delayed responses and potential withholding of information in the immediate future" based, in part, upon allegations that the defendant purposefully instituted a policy aiming to ignore FOIA's deadlines). Defendants argue that the allegations are insufficient to state a plausible "pattern or practice" claim because they amount to nothing more than accusations of nonactionable "routine delays." [34] at 4. Not so. Plaintiff alleges that Defendants have affirmatively decided that they need not meet statutory timeframes; that DHS has admitted that this failure is a "systemic problem." Taken as true, these allegations suggest more than routine delays; they indicate that Defendants maintain a deliberate policy or practice of ignoring FOIA requirements. *See Jud. Watch*, 895 F.3d at 780.

Defendants also argue that amendment of Count II would be futile because the "pattern or practice" claim could not survive summary judgment. [34] at 8–9. Defendants cite *King v. East St. Louis School District*, where the Seventh Circuit instructed that "amendment is futile if the amended complaint would not survive a motion for summary judgment." 496 F.3d 812, 819 (7th Cir. 2007). In *King*, however, a motion for summary judgment had already been filed and fully briefed before the

plaintiff moved to amend. *Id.* at 814. In that context, the court of appeals determined—based on the full evidentiary record—that the plaintiff's proposed claims could not survive a motion for summary judgment, and thus, that amendment would be futile. *Id.* at 820. Here, in contrast, the parties have not filed dispositive motions and the Court lacks an evidentiary record. Under these circumstances, the "applicable standard is whether the amendment can withstand a motion to dismiss." *Connetics Corp. v. Pentech Pharms., Inc.*, No. 07 C 6297, 2009 WL 1089552, at *2 n.1 (N.D. Ill. Apr. 16, 2009); *see also Duthie v. Matria Healthcare, Inc.*, 254 F.R.D. 90, 95 (N.D. Ill. 2008). As discussed, Plaintiff's proposed Count II withstands a motion to dismiss.

Because this case has not yet progressed to summary judgment, this Court declines to consider a declaration Defendants offer from an employee in ICE's FOIA office. *See* [34] at 8–9. Although Defendants rely on this declaration to challenge Plaintiff's theory that ICE's delays amount to a "pattern or practice," *id.*, this evidence is "better suited to the summary judgment stage, not to a motion to dismiss." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Hous. & Urb. Dev.*, 415 F. Supp. 3d 215, 225 (D.D.C. 2019) (declining to consider materials that the defendant submitted—media stories and internal data—in evaluating whether the plaintiff sufficiently stated a "pattern or practice" claim). For the same reasons, this Court rejects Defendants' argument that Plaintiff's requested injunctive relief is unavailable because "ICE is already doing everything practicable to comply with FOIA's deadlines, and allowing [Plaintiff] to pursue a pattern-or-practice claim would not improve those efforts." *Contra* [34] at 10. Again, Defendants point to their representative's declaration to show that the increasing demand in FOIA requests and their finite resources do not allow them to process requests in a more expedited fashion. *Id.* at 11. Yet at this stage of litigation, this Court cannot consider such evidence. Whether Plaintiff is entitled to an injunction depends on whether her claim ultimately succeeds on the merits, and importantly, whether Plaintiff can demonstrate an irreparable injury, a lack of adequate legal remedy, that the balance of hardships tips in favor of injunctive relief, and that the public interest would not be disserved by a permanent injunction. *See Nat. Res. Def. Council, Inc. v. U.S. Env't Prot. Agency*, 383 F. Supp. 3d 1, 14–15 (D.D.C. 2019) (discussing injunctive relief in the context of a pattern or practice claim) (citing *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)); *see Liebhart v. SPX Corp.*, 998 F.3d 772, 779 (7th Cir. 2021) (discussing elements of injunctive relief). Although, as Defendants point out, Plaintiff ultimately might not demonstrate that the balance of factors favors granting an injunction, this Court cannot say at the pleadings stage that Plaintiff's relief for injunctive relief will not succeed.

Finally, Defendants urge this Court to deny Plaintiff's request to add its proposed APA claim in Count III. [34] at 12–13. This Court agrees with Defendants that amendment of the APA claim would be futile. A "key limitation on the *availability* of review under the APA is the *unavailability* of any 'other adequate

remedy in a court' to challenge the disputed agency action." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 164 F. Supp. 3d 145, 151 (D.D.C. 2016) (quoting 5 U.S.C. § 704), *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 846 F.3d 1235 (D.C. Cir. 2017); *see also Walsh v. U.S. Dep't of Veterans Affs.*, 400 F.3d 535, 537 (7th Cir. 2005) ("Under either statute [the APA or FOIA], [the plaintiff]'s remedy would be what he has already received—a court order requiring total compliance with his request. Thus, the APA does not provide an alternate means for [the plaintiff] to keep his suit alive.").

Plaintiff's proposed APA claim alleges that Defendants acted arbitrarily and capriciously by consistently delaying determinations of FOIA requests. [28-1] ¶¶ 109–15. As discussed, her second FOIA count similarly complains about Defendants' pattern and practice of delay in adjudicating FOIA requests. Plaintiff's proposed amended complaint seeks several forms of relief, including equitable relief. She does not specify which relief relates to the APA count and which relates to the FOIA counts, but that makes no difference because FOIA already provides adequate remedies to redress Plaintiff's alleged injury under the APA by authorizing this Court to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). *See Elec. Priv. Info. Ctr. v. Internal Revenue Serv.*, 261 F. Supp. 3d 1, 12 (D.D.C. 2017) ("There is 'little doubt that FOIA offers an "adequate remedy" within the meaning of section 704 [of the APA],' at least when litigants seeks [*sic*] to 'gain access to . . . records.'" (quoting *Citizens for Resp.*, 846 F.3d at 1245–46 (D.C. Cir. 2017)), *aff'd*, 910 F.3d 1232 (D.C. Cir. 2018); *see also Petrucelli v. Dep't of Just.*, 106 F. Supp. 3d 129, 134 (D.D.C. 2015) ("The plaintiff demands the release of records maintained by various federal government entities under the FOIA, and a claim for the same relief under the APA is therefore superfluous."); *Harvey v. Lynch*, 123 F. Supp. 3d 3, 8 (D.D.C. 2015) (noting that "settled precedent makes clear that a FOIA requester may not seek relief under the APA for a violation of FOIA or the governing FOIA regulations"); *cf. Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1148 (8th Cir. 2011) ("A claimant may simultaneously pursue claims under the APA and FOIA . . . if the requested remedy under the APA includes more than disclosure of documents, such as vindication for a First Amendment violation."). Accordingly, the availability of an adequate remedy under FOIA forecloses Plaintiff's proposed APA claim. Plaintiff's request to add an APA claim in Count III would be futile.

For the reasons explained above, this Court grants in part and denies in part Plaintiff's motion for leave to amend [28]. Plaintiff is given leave to amend Count II but will not be permitted to plead her proposed APA claim in Count III.

E N T E R:

Dated: April 12, 2022

MARY M. ROWLAND
United States District Judge