UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICA FIRST LEGAL FOUNDATION,

Plaintiff,

v.

ANTHONY COLEY, *in his official capacity as Director, Office of Public Affairs, United States Department of Justice*, *et al*,

Defendants.

Civil Action No. 21-cv-3024 (TSC)

MEMORANDUM OPINION

Plaintiff America First Legal Foundation ("America First") has sued Defendants Anthony Coley, Director of the Office of Public Affairs for the U.S. Department of Justice ("DOJ"), and DOJ itself, for two claims arising under the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552. America First claims that DOJ wrongly denied three of its requests for expedited processing. Compl. ¶¶ 44-47, ECF No. 1. It also claims that those three denials amount to DOJ engaging in a "policy or practice" of denying it expedited processing. *Id.* ¶¶ 48-52. DOJ has moved to dismiss Count two of the Complaint for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants' Partial Motion to Dismiss, ECF No. 6 ("Motion to Dismiss"). For the reasons set forth below, DOJ's motion will be GRANTED.

I. BACKGROUND

FOIA provides for public access to federal agency records. If a FOIA request meets certain statutory or regulatory criteria, it must be processed in an "expedited" manner. 5 U.S.C.

§ 552(a)(6)(E). DOJ regulations, which both reiterate and expand upon the statutory criteria, require DOJ to process requests on an expedited basis if they involve:

> (i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
>
> (ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information;
>
> (iii) The loss of substantial due process rights; or
>
> (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

28 C.F.R. § 16.5(e).

America First—a nonprofit based in Washington, D.C.—filed three FOIA requests with DOJ during August and October of 2021. Compl. ¶¶ 1, 17. On August 31, it requested "records relating to the DOJ's involvement in the airlift of individuals out of the Afghanistan and into the United States." *Id.* ¶ 20. The same day, America First also requested "records relating to the [DOJ Civil Rights Division] Voting Section and its conduct with respect to the State of Georgia's election integrity measures." *Id.* ¶ 24. And on October 7, it requested records "relating to the Attorney General's October 4 [2021] Memorandum" regarding threats against school administrators, board members, teachers, and staff. *Id.* ¶ 29. In each instance, America First also requested expedited processing but did not receive it, including on appeal within DOJ. *Id*. ¶¶ 21-23, 26-28, 30-43.[1]

[1] DOJ's Motion to Dismiss states that "On November 16, 2021, DOJ's Public Affairs Office determined that all FOIA requests related to the October 4, 2021 memorandum were to be granted expedition pursuant to § 16.5(d)(1)(iv). As a result, Plaintiff's FOIA request will receive expedited handling." Motion to Dismiss at 4 n.1. This was apparently news to America First, which stated in response that the "footnote in Defendants' motion is the first and only indication [it] has received that DOJ had reversed itself as to the October 4

America First brought this suit on November 15, 2021. Its Complaint asserts two claims for relief. First, it asserts that "defendants wrongfully denied" it expedited processing for all three FOIA requests, in violation of 5 U.S.C. § 552(a)(6)(E)(i). Compl. ¶¶ 44-47. Second, it argues that "Defendants have adopted and are engaged in a pattern or policy of denying" it expedited processing "because it seeks records likely to cast the Biden Administration in a negative light on matters of intense public concern, media interest, and political consequence." *Id.* ¶ 49. In support of this latter claim, America First alleges that DOJ's denials used "boiler plate language" and "broad conclusory terms" without "addressing [its] specific arguments and authorities." *Id.* ¶¶ 50-51. It also alleges that the Departments of Defense, State, and Homeland Security granted it expedited processing "for substantively identical requests" to their DOJ request regarding Afghanistan. *Id.* ¶ 7. Furthermore, "[s]ince the Biden Administration took office, Defendants have not fulfilled any FOIA requests from" America First. *Id.* ¶ 10.

II. LEGAL STANDARD

A. Failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible when it alleges sufficient facts to permit the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," so allegations "merely consistent with" liability "stop[] short of the line

Memorandum FOIA request, and AFL has received no other such communications." Opposition to Defendants' Partial Motion to Dismiss at 9. America First appears to accept that reversal as true for the sake of at least one argument, however. *See id.* at 15.

between possibility and 'plausibility of entitlement to relief.'" *Id*. (quoting *Twombly*, 550 U.S. at 557).

B. Agency policy or practice in violation of FOIA

Under D.C. Circuit precedent, plaintiffs may bring claims regarding not only "a *specific request* under the FOIA," but also "an agency *policy or practice* [that] will impair the party's lawful access to information in the future." *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) (emphasis in original); *see also Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012); *Jud. Watch, Inc. v. United States Dep't of Homeland Sec.*, 895 F.3d 770 (D.C. Cir. 2018). "The fact that the practice at issue is informal, rather than articulated in regulations or an official statement of policy, is irrelevant." *Payne*, 837 F.2d at 491. But the "agency's refusal" must "evidence[] a policy or practice" of failing "to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials." *Id.*

III. ANALYSIS

A. DOJ's three denials

America First's policy or practice claim is based on DOJ's three denials of request for expedited processing. For several reasons, those denials do not adequately support the inference that DOJ is specifically targeting America First. To begin, three is a "small sample size" from which to infer a policy or "persistent practice." *Am. Ctr. for L. & Just. v. Fed. Bureau of Investigation*, 470 F. Supp. 3d 1, 7 (D.D.C. 2020) ("*ACLJ 2020*"); *see Judicial Watch*, 895 F.3d at 780 (requiring a plaintiff to allege "a pattern . . . amounting to a persistent failure to adhere to FOIA's requirements"). Plaintiffs do not identify, and the court is not aware of, any case that has inferred a FOIA policy or practice violation from so few instances. To the contrary, judges in this district have dismissed claims derived from similar numbers. In *ACLJ 2020*, the plaintiff "discern[ed] a pattern from three alleged lapses," but the court concluded that they did not "allow

the required inference" of a policy or practice. 470 F. Supp. 3d at 6. And in an earlier case involving the same plaintiff, another judge held that a "sampler of four" pled violations was "not enough" to support that claim. *Am. Ctr. for L. & Just. v. United States Dep't of State*, 249 F. Supp. 3d 275, 285 (D.D.C. 2017) ("*ACLJ 2017*"). At least thus far, practice or policy claims have only survived motions to dismiss when supported by larger numbers of alleged violations. *See, e.g.*, *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Hous. & Urb. Dev.*, 415 F. Supp. 3d 215, 224 (D.D.C. 2019) ("*CREW*") (finding five incidents sufficient, and identifying another case doing the same). While there is no magic number at which violations evince a policy or practice, the paucity of alleged violations here makes any inference correspondingly less reasonable. *See id.*[2]

The fact that the three requests concern completely unrelated subject matter also undermines America First's claim in Count two. *Payne* emphasizes that "isolated mistakes" do not constitute a policy or practice, 837 F.2d at 491, and the "strikingly different subject matter and scope" of America First's FOIA requests belies the suggestion that "the agency's behavior stems from a considered decision," *ACLJ 2020*, 470 F. Supp. 3d at 6. The nature and focus of the records at issue vary dramatically between America First's Afghanistan, Voting Section, and October 4 Memo requests. *See* Compl. ¶¶ 20, 24, 29. "This contrasts markedly with *Payne*, *Newport*, and *Judicial Watch*, each of which concerned repeated requests for a narrowly-defined class of documents (bid abstracts, technical information concerning military equipment, and VIP travel expenses)." *ACLJ 2020*, 470 F. Supp. 3d at 6.

[2] If DOJ has indeed granted expedited processing for America First's request related to the October 4, 2021 memorandum, *see supra* n.1, then only two alleged denials remain to support the inference of a DOJ policy or practice, making that inference still less reasonable.

America First's contrary arguments are not persuasive. It observes, for instance, that there are no bright-line rules requiring that alleged FOIA violations number more than three or involve the same subject matter to successfully plead a practice or policy claim. Opposition to Partial Motion to Dismiss at 13-14, ECF No. 8 ("Opposition"). Although that may be true, both the quantity of alleged violations and their similarity bear on whether they produce a pattern, *see ACLJ 2020*, 470 F. Supp. 3d at 6-8—and, as explained above, they fail to do so here.

America First argues that there are similarities between the requests: Each (1) "relates to an evolving story of pressing and immediate concern to the American public, the subject of exceptional media interest, and an object of congressional oversight," Compl. ¶ 2, and (2) is "likely to cast the Biden Administration in a negative light," *id.* ¶ 49. This makes their requests akin to those in *CREW*, which were "likely to cast the agency or HUD Secretary Ben Carson in a negative light." 415 F. Supp. 3d at 225 (citation and quotation marks omitted). The first similarity is too abstract and subjective to be a useful point of comparison; any number of FOIA requests with nothing else in common could be said to share those features. As to the second similarity, the alleged requests here are not comparable to those in *CREW*. There, each request dealt specifically with Secretary Ben Carson—his family, his travel, and his calendar. *Id.* at 218-20. No such nexus exists between America First's requests. The fact that they all involve the Biden Administration—that is to say, all the operations of the entire executive branch across years—is, again, too "high[a] level of generality" to support the inference of a particularized policy or practice within DOJ. *ACLJ 2020*, 470 F. Supp. at 7.

B. <u>Other allegations</u>

America First also points to several other allegations that it claims support Count two, but ultimately none grant it plausibility.

First, America First claims that DOJ's denials used "boiler plate language" and "broad conclusory terms" that failed to address its "specific arguments and authorities." Compl. ¶¶ 50-51. This allegation is contradicted, in part, by DOJ's actual denials and decisions on internal appeal attached to the Complaint. With respect to the Afghanistan request, at least, DOJ identified and considered the nature of the request and the requestor, along with the showings they made or failed to make, and how those matched up with the legal criteria for expedited processing. *See* Compl., Ex. 1, at 18-19 (initial denial); *id.*, Ex. 2, at 1-2 (appeal denial). But the broader problem with America First's challenge is that while the denials may mean that America First "*cannot* know precisely *why* expedited processing was denied in any given case," Opposition at 15 (emphasis in original), they do not provide any evidence that the missing "why" was a DOJ practice or policy targeting America First. This allegation therefore does not move Count two any closer to plausibility.

Second, America First points to its allegation that the "Departments of Defense, State, and Homeland Security" granted expedited processing for its equivalent requests to them related to Afghanistan. Compl. ¶ 7. But while that allegation reveals that DOJ reached a different conclusion than other agencies with regard to those requests, and even assuming America First is right that DOJ alone erred, the inter-Department differences do not give any indication that DOJ's decision was anything besides an "isolated mistake[]." *Payne*, 837 F.2d at 491. Indeed, as DOJ points out, the difference between those agencies—also headed by political appointees—undercuts America First's suggestion that their denials were politically motivated. As a result, this allegation does not increase Count two's plausibility, either.

Third, America First proffers as evidence of policy and practice the fact that "[s]ince the Biden Administration took office, Defendants have not fulfilled any FOIA requests from [it]."

Compl. ¶ 10. That allegation is beside the point. Count two asserts that DOJ's unlawful practice or policy relates to the denial of expedited processing, not the fulfilling of FOIA requests.

Finally, America First's opposition briefing attempts to make the best of DOJ's revelation that it ultimately did, in fact, grant expedited processing for all FOIA requests related to the October 4, 2021 memorandum—including America First's. *See supra* n.1. America First contends that DOJ's "unexplained reversal" with respect to that request came only "after being sued" by America First, and therefore confirms that DOJ and Director Coley were systematically denying its requests for political reasons. Opposition at 15. That argument fails even on its own terms. DOJ evidently granted expedited processing for the October 4, 2021 memorandum on November 16, one day after the Complaint in this case was filed, but several days before it had been served. *See* ECF Nos. 1, 3. And DOJ made that decision with respect to all FOIA requests regarding the memorandum, not just America First's. This undercuts any notion that DOJ was reacting to America First's lawsuit, as well as America First's claim that it was specially disfavored by DOJ. To the extent that this apparent post-Complaint development is relevant at all, then, it makes Count two even less plausible.

* * *

In sum, America First has failed to plead facts sufficient to support the reasonable inference that DOJ has a policy or practice of denying its requests for expedited processing. The denials of three such requests, covering largely unrelated subject matters, may be "consistent with" that inference. *Iqbal*, 556 U.S. at 678. But they "do not permit the court to infer more than the mere possibility," *id.* at 679, that DOJ is "regularly failing," *Judicial Watch*, 895 F.3d at 774, to grant meritorious requests for expedited processing from America First "because it seeks records likely to case the Biden Administration in a negative light on matters of intense public

concern, media interest, and political consequence," Compl. ¶ 49. Nor do any of the Complaint's other allegations make that claim "plausible on its face," *Iqbal*, 556 U.S. at 678, or diminish "more likely explanations," *id.* at 681, such as DOJ's allegedly wrongful denials being "isolated mistakes by agency officials," *Payne*, 837 F.2d at 491. *See ACLJ 2017*, 249 F. Supp. at 285-86 ("With so few anecdotes at play, other benign and 'more likely explanations' readily take the fore." (quoting *Iqbal*, 556 U.S. at 681)). The court will accordingly dismiss Count two.

IV. CONCLUSION

For the foregoing reasons, Defendants' Partial Motion to Dismiss will be **GRANTED**. The court will dismiss Count two of the Complaint without prejudice. An Order will be issued contemporaneously with this Memorandum Opinion.

Date: September 30, 2022

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge