IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN FOUNDATION, INC., Plaintiff, v. FOOD & DRUG ADMINISTRATION and DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendants.	Civil Action No. 16-781 (APM)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS COMPLAINT

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INTRODUCTION

The Food and Drug Administration (FDA) determined years ago that the curricula vitae (CVs) of its advisory committee members are frequently requested records under the Freedom of Information Act (FOIA). Consistent with its statutory duty to post frequently requested records online, FDA posts members' CVs on its website. FDA has adopted a practice, however, of redacting on the CVs information that FOIA does not permit FDA to redact. The very purpose of a CV is for the author to share information with others, but FDA redacts information as being "confidential" and an "invasion of personal privacy." Plaintiff Public Citizen brought this case to challenge FDA's unlawful policy and practice.

Public Citizen's complaint pleads three claims for relief. The first claim alleges that FDA is improperly withholding under FOIA copies of the unredacted CVs that Public Citizen requested in a FOIA request submitted more than two years ago. Compl. (Dkt. No. 1) ¶ 47. The second claim alleges that FDA's policy and practice of redacting non-exempt information from the CVs of advisory committee members that FOIA requires it to make available electronically violates FOIA, 5 U.S.C. § 552(a)(2), and states a claim under FOIA and the Administrative Procedure Act (APA), 5 U.S.C. § 706 (providing for judicial review of agency action that is arbitrary and capricious or not in accordance with law). Compl. ¶¶ 48-52. The third claim alleges that if no adequate alternative remedy is available, FDA's unlawful policy and practice warrants relief in the nature of mandamus, 28 U.S.C. § 1361. Compl. ¶ 55. Defendants FDA and Department of Health and Human Services (HHS) (referred to collectively herein as "FDA") have moved to dismiss the second and third claims of Public Citizen's complaint. *See* Defs.' Partial Mot. to Dismiss Compl. (Dkt. No. 7); Defs.' Mem. In Support of Defs.' Partial Mot. To

Dismiss Compl. at 2 (Dkt. No. 7-1) ("FDA Mem."). FDA's motion should be denied because Public Citizen's complaint has adequately stated a claim for relief from FDA's unlawful policy and practice under each of three alternative theories—FOIA, the APA, and the Mandamus Act.

First, FDA inaccurately asserts that Public Citizen failed to adequately allege that FDA has a statutory duty to post the CVs online. In fact, the complaint's allegation is clear, and, as the complaint states, FDA concedes that the CVs are frequently requested records, triggering a statutory duty to post them online and redact on them only information that falls within a FOIA exemption.

Second, although D.C. Circuit law recognizes that the district courts have authority to order prospective declaratory and injunctive relief on a claim alleging that an agency's policy or practice violates FOIA, decisions in this Circuit set forth various avenues for obtaining that relief. Public Citizen therefore pleaded in the alternative each of the three recognized avenues. FDA's attempt to graft onto a policy and practice claim the additional requirements that the practice be "egregious" and that the plaintiff have already successfully litigated the merits of the underlying practice are contrary to the law of this Circuit. Public Citizen is entitled to relief for FOIA's policy and practice violation under one of the three alternative grounds: FOIA, the APA, or the Mandamus Act. Although throughout its motion, FDA asserts both that FOIA provides an adequate alternative remedy and that FOIA does not permit the Court to remedy a policy and practice claim, FDA cannot have it both ways. If FOIA cannot do the job, then the APA or the Mandamus Act fills the gap. Whether this Court determines its power comes from FOIA, the APA, or the Mandamus Act, Public Citizen's policy and practice claim should not be dismissed. Finally, FDA's motion is premised on the faulty notion that disclosure of the particular CVs that

Public Citizen requested more than two years ago would provide an adequate remedy for FDA's policy and practice violation. But disclosure of those CVs, which do not include all current advisory committee members, would not relieve the harm Public Citizen suffers from FDA's ongoing practice of unlawfully concealing non-exempt information on the CVs of advisory committee members. Similarly, the notion that serial FOIA requests would provide an adequate remedy is not only belied by the facts of this case, but, if accepted, would render the requirement that agencies proactively post frequently requested records unenforceable.

The Court should deny FDA's partial motion to dismiss.

LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff need only plead "enough facts," accepted as true, "to state a claim to relief that is plausible on its face" and to "nudge[]" the claims "from conceivable to plausible." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007); Fed. R. Civ. P. 12(b)(6). "In evaluating a Rule 12(b)(6) motion, the Court must construe the complaint 'in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged.'" *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (quoting *Schuler v. United States,* 617 F.2d 605, 608 (D.C. Cir. 1979)).

"At the pleading stage, plaintiffs may plead inconsistent alternative theories of liability even if they can only recover under one." *Adm'rs of the Tulane Educ. Fund v. Ipsen Pharma, S.A.S.*, 771 F. Supp. 2d 32, 41 (D.D.C. 2011). As the D.C. Circuit has explained, pursuant to Federal Rule of Civil Procedure 8(d), "a complaint may contain alternative theories, and if one of

the theories can survive a Rule 12(b)(6) motion, the district court cannot dismiss the complaint." *Croixland Props. Ltd. P'ship v. Corcoran*, 174 F.3d 213, 218 (D.C. Cir. 1999).

ARGUMENT

I. Public Citizen's Complaint Adequately Alleges That FOIA Requires FDA To Post The CVs Online.

Public Citizen adequately pleaded facts showing that FDA posts the CVs on its website because it is required to by law, not because it has "voluntarily" chosen to disclose them. As Public Citizen's complaint states, FDA's index of frequently requested records designates all advisory committee materials posted on FDA's website, including the CVs, frequently requested records that FDA must disclose under sections 552(a)(2)(D)-(E). *See* Compl. ¶¶ 6-8, 15-17 (setting forth the statutory framework and stating facts showing that FDA has determined that the CVs are frequently requested records under FOIA).

A. FOIA requires agencies to make publicly available by electronic means "copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D); *see* Compl. ¶ 6. Agencies must make frequently requested records created on or after November 1, 1996, available online, 5 U.S.C. § 552(a)(2)(D)-(E), with redactions only as permitted under § 552(b). In other words, under these provisions, once the agency "determines" that certain records qualify as "frequently requested records," FOIA requires the agency to make those records publicly available online, subject only to FOIA's nine specified exemptions. Highlighting the importance of the proactive online disclosure requirement, another

provision of FOIA, unmentioned in FDA's motion, requires the agency to publish online "a general index" of its frequently requested records, and to update the index "quarterly or more frequently." *Id*. § 552(a)(2)(E).

Public Citizen's complaint alleges that FDA's statutorily required index of frequently requested records is available at FDA's online Electronic Reading Room, Compl. ¶ 16, where FDA explains that the index "contains categories of frequently requested FDA documents," *id.*; *see* Electronic Reading Room, FDA, http://www.fda.gov/RegulatoryInformation/foi/ElectronicReadingRoom/default.htm (last updated Mar. 31, 2016). One of those categories of frequently requested documents as identified by FDA (outside of litigation) is "Advisory Committees," and FDA links from that index item to a page of advisory committee materials that includes the CVs of committee members. Compl. ¶ 17. Indeed, FDA has for years conceded that the advisory committee materials are frequently requested records, designating them as such in its online index of frequently requested records since at least June 2009. *See* Electronic Reading Room, FDA, https://web.archive.org/web/20090603203651/http://www.fda.gov/RegulatoryInformation/FOI/ElectronicReadingRoom/default.htm (link to archived FDA Electronic Reading Room index from June 3, 2009). Consequently, there can be no serious dispute that Public Citizen adequately pleaded that FDA must post the CVs online under section 552(a)(2)(D). Compl. ¶ 17.

Claiming that it posts the members' CVs "voluntarily" and that Public Citizen "has not plausibly alleged that [FDA] is actually *required* to do so under § 552(a)(2)(D)," FDA Mem. at 12 & n.4, 15 n.5 (emphasis in original), FDA relies entirely on a letter from Sarah Kotler, FDA's Deputy Director, Division of Freedom of Information, to Public Citizen, *see id.*, Ex. A. However,

the Court must "assume the[] veracity" of Public Citizen's "well-pleaded factual allegations," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), that FDA has determined that the CVs are frequently requested records under section 552(a)(2)(D). Compl. ¶ 17. Even if the Court thought that Ms. Kotler's letter raised a question about whether FDA's own statutorily required index is accurate, FDA's position could not be credited here, at the motion to dismiss stage, as its "evidence" contradicts the facts pleaded in the complaint. *See Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008) ("[T]he court must assume 'all the allegations in the complaint are true.'" (quoting *Twombly,* 550 U.S. at 555)). At most, the letter would create an issue to be resolved through discovery.

B. FDA asserts that "plaintiff has not even alleged … that the CVs made available on the agency's website have been 'released' to another FOIA requester at all" and, therefore, that Public Citizen "cannot show that the provision creates any obligations with respect to these documents." FDA Mem. at 14. This argument is a red herring. FDA has the statutory duty to determine what records are frequently requested records and to post those records online, with redactions only as authorized by FOIA. 5 U.S.C. § 552(a)(2)(D), § 552(b); *see infra*, Part II. Moreover, FDA must inform the public through an online index which records it has determined are frequently requested. 5 U.S.C. § 552(a)(2)(D)-(E). The complaint's allegations that FDA's "general index" of frequently requested records, required by section 552(a)(2)(E), includes the committee member CVs settles any question about whether Public Citizen has adequately alleged that FDA is required to post these CVs under FOIA.

FDA complains that the "Advisory Committees" link in the index "does not appear to link directly to the CVs at all" but only "indirectly." FDA Mem. at 12 n.4. Even putting aside the

obvious—that FDA, not Public Citizen, designed FDA's Reading Room website—this argument is meritless. To begin with, the logical conclusion from FDA's reasoning would be that, because a range of advisory committee materials are accessed from the "Advisory Committees" link on the frequently requested records index, *none* of those materials are necessarily frequently requested. That notion makes a mockery of the statutorily required index. Furthermore, FDA's determination that *all* advisory committee materials linked from the index are "frequently requested records," including CVs, meeting agendas, and meeting materials, demonstrates the significant public interest in advisory committee records.

Because FDA, outside of the litigation context, has conceded that the records are frequently requested and so informed the public through the required index, FDA should not be permitted to shift the burden to Public Citizen to prove that FDA's determination was correct. (At a minimum, FDA's concession is more than sufficient to defeat its motion to dismiss.) FDA's suggestion to the contrary would set an insurmountable hurdle to challenging an agency's compliance with the frequently requested records provision.

II. FDA's Redactions To Frequently Requested Records Must Be Justified By FOIA's Exemptions.

FDA claims that "plaintiff has not plausibly alleged a deprivation of any right conferred by [§ 552(a)(2)(D)]," asserting that all the "frequently requested records" provision requires is disclosure of the records, "already processed and 'released,' in the form in which they have been released, which of course may contain redactions." FDA Mem. at 13. However, as the complaint explains (¶ 8), FDA is authorized to redact frequently requested records only to protect information that falls within a FOIA exemption.

By its terms, FOIA exemptions in section 552(b) apply to any records released under FOIA. Section 552(b) states: "This section does not apply to matters that are" encompassed within one of the nine listed FOIA exemptions. "This section" refers to section 552, which includes the proactive disclosures required under (a)(1) and (a)(2), as well as the responsive disclosures made pursuant to a specific request under (a)(3). *See Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 n.23 (1979) (explaining that FOIA's exemptions may protect information disclosed pursuant to § 552(a)(2)); *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 183 n.21 (1975) (noting that the exemptions may apply to records subject to disclosure under section 552(a)(2)); *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request*, OIP Guidance, Off. Info. Pol'y, U.S. Dep't of Just., https://www.justice.gov/oip/oip-guidance-5 (last updated Oct. 5, 2015) ("The FOIA's nine exemptions apply as appropriate to any records that are required to be disclosed under any of the provisions of the FOIA, including the proactive disclosure subsections.").

Because FDA has determined that the CVs are frequently requested records, FDA, pursuant to section 552(a)(2)(D), must post the records and may redact them only as permitted under one of FOIA's nine exemptions. Accepting the notion that frequently requested records could be posted with redaction of *non-exempt* information would defeat the purpose of FOIA's proactive disclosure requirement, which is intended to eliminate the need for repeated FOIA requests for frequently requested and non-exempt records and information. *See* H.R. Rep. No. 104-795, at 21 (1996). Public Citizen adequately alleged that FDA routinely redacts non-exempt information on advisory committee member CVs. Compl. ¶¶ 18, 21-22.

III. Public Citizen Adequately Pleaded That FDA Has An Unlawful Policy And Practice Of Redacting Non-Exempt Information From The CVs And That Public Citizen Is Entitled To Relief Under Each Of Three Alternative Legal Theories.

Because of uncertainty in the D.C. Circuit on the extent to which FOIA gives courts the power to order prospective relief for a violation of FOIA, Public Citizen pleaded three theories in the alternative. Public Citizen's complaint adequately alleges that FDA has an unlawful policy or practice that violates FOIA, § 552(a)(2), and that Public Citizen is entitled to prospective injunctive or declaratory relief under either FOIA, the APA, or the Mandamus Act. Compl. ¶¶ 48-52, 53-56.

FOIA grants federal courts the power 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). The D.C. Circuit and Supreme Court have interpreted this judicial review provision as granting federal courts a broad range of equitable powers beyond ordering an agency to disclose improperly withheld records. The Supreme Court has explained that the "broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions," in addition to other factors, show that "there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19-20 (1974). The "courts have a duty to prevent" agency actions that "violate the intent and purpose of the FOIA." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 488 (D.C. Cir. 1988) (quoting *Long v. IRS,* 693 F.2d 907, 910 (9th Cir. 1982)). In furtherance of this duty, the D.C. Circuit has awarded declaratory relief to a plaintiff in a FOIA case brought to challenge the Air Force's unlawful practice of withholding non-exempt bid abstracts until the requester filed an

administrative appeal. *Id*. And that court has directed an agency to conduct an additional search for records responsive to a FOIA request, *Morley v. CIA*, 508 F.3d 1108, 1120 (D.C. Cir. 2007), and ordered an agency to grant a FOIA requester a fee waiver, *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1315 (D.C. Cir. 2003). This Court has explained that FOIA's "use of the conjunctive 'and'" in its judicial review provision "suggests that district courts have the power to issue injunctive relief beyond merely compelling disclosure of records." *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, No. 13-CV-01291, __ F. Supp. 3d __, 2016 WL 912167, at *8 (D.D.C. Mar. 7, 2016) (*"CREW"*).

Although it is well established that courts have the power to grant a broad range of equitable relief to remedy agency violations of FOIA, what remains unsettled is the "scope of the equitable powers available under the FOIA." *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 265 (D.D.C. 2012); *see also Tax Analysts v. IRS*, 117 F.3d 607, 610 & n.4 (D.C. Cir. 1997) (acknowledging that the extent of the courts' remedial powers under FOIA is an open question in this Circuit); *Pub. Citizen, Inc. v. Lew*, 127 F. Supp. 2d 1, 9 (D.D.C. 2000) (holding that the court would review under the APA, not FOIA, the claim that the agency had violated FOIA by not preparing and making available an index of its major information systems pursuant to 5 U.S.C. § 552(g)). In light of the "uncertainty" as to the extent of the relief available under FOIA itself, *Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 229 (D.D.C. 2011), Public Citizen pleaded its policy and practice claim in the alternative under FOIA, the APA, and the Mandamus Act.

If Public Citizen cannot get the prospective injunctive relief it seeks under FOIA, the APA claim stands, and if it cannot get that relief under the APA, the mandamus claim stands.

A. Public Citizen Adequately Alleged That It Is Entitled To Relief Under FOIA.

1. The D.C. Circuit has long recognized that a plaintiff may assert a claim that an agency has adopted a policy or practice that violates FOIA, separate and apart from a claim for the release of particular requested records that the agency has withheld from the complainant under FOIA. As that court explained in *Payne*, "[s]o long as an agency's refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials, a party's challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit." 837 F.2d at 491 (footnote omitted). To state a claim for an unlawful policy or practice, "a plaintiff must plausibly demonstrate that: (1) the agency in question has adopted, endorsed, or implemented a policy or practice that constitutes an ongoing failure to abide by the terms of the FOIA; and (2) the plaintiff will suffer continuing injury due to this practice." *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 253 (internal quotation marks and citation omitted).

Public Citizen pleaded adequate facts alleging that FDA has a practice of redacting non-exempt information from advisory committee members' CVs that FDA is required to post online, Compl. ¶¶ 14, 18, 20, 21, that this practice is ongoing, *id.* ¶¶ 22-23, that Public Citizen seeks timely access to the CVs of advisory committee members for its advocacy on the proper functioning of advisory committees, *id.* ¶¶ 24-26, and that "Public Citizen and others will continue to be denied timely information about advisory committee members to which Public Citizen is lawfully entitled and that is needed to enable Public Citizen and the public effectively to assess the backgrounds and potential biases of advisory committee members," *id.* ¶ 23. *See also id.* ¶¶ 18-23 (setting forth facts showing FDA's unlawful policy or practice of redacting

non-exempt information from the CVs of advisory committee members it is required to post online); *id*. ¶ 17 ("FDA has determined that the CVs are 'frequently requested records' under 5 U.S.C. § 552(a)(2)(D)"); *id*. ¶ 50 ("FDA's policy and practice of redacting non-exempt information from the CVs of advisory committee members that it must make electronically available violates FOIA, 5 U.S.C. § 552(a)(2)"). In light of these allegations of FDA's unlawful practice of redacting non-exempt information from the CVs, FDA's assertion that Public Citizen "alleges no such identifiable policy or practice," FDA Mem. at 12, or that Public Citizen "has not alleged a violation of" section 552(a)(2)(D), *id.*, are baseless.

FDA claims that Public Citizen has not alleged "the sort of egregious 'policy or practice' that would support a claim under *Payne Enterprises* and its progeny." *Id.* at 14. As an initial matter, FDA's policy of redacting non-exempt information from these CVs *is* egregious, because the information is so plainly non-exempt and because FDA wastes resources redacting information—including information publicly available elsewhere, *including on defendant Department of Health and Human Services' own websites*—about the backgrounds of individuals who influence regulatory decisions about important consumer products such as medications, medical devices, and foods. In any event, "egregiousness" is not an element of a policy and practice claim under *Payne* or its progeny. *Payne*, 837 F.2d at 491; *Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012) (evaluating policy and practice claim under *Payne* and not requiring a showing of egregiousness).

FDA wrongly contends that Public Citizen must first have litigated the validity of the redactions in the 2014 CVs before challenging FDA's ongoing policy and practice. *See* FDA Mem. at 15 ("Indeed, so far as appears from the complaint, the validity of the agency's

redactions has not yet even been tested in litigation, let alone conceded."). If FDA wanted to first justify its redactions in litigation, it should have filed an answer to the complaint, not this motion to dismiss. Furthermore, the theory that an individual FOIA claim and a policy and practice challenge must proceed seriatim in separate lawsuits makes no practical sense and is contrary to the *Payne* line of cases. *See Newport Aeronautical Sales*, 684 F.3d at 164 (in case initially brought both to challenge denial of specific FOIA requests and to challenge agency's policy and practice, holding policy and practice claim was not moot even after agency produced the individual records sought); *Muttitt*, 813 F. Supp. 2d at 224, 231 (in case brought both to challenge an agency's failure to produce records under FOIA and to challenge the agency's policy and practice of violating the requirement to provide time estimates for FOIA responses, holding that the policy and practice claim survived motion to dismiss without first adjudicating the merits of the non-disclosure claim); *cf. Competitive Enter. Inst. v. EPA*, __ F. Supp. 3d __, No. CV 15-0346 (ABJ), 2016 WL 355067, at *5 (D.D.C. Jan. 28, 2016) (in case brought to challenge agency's schedule for releasing voluminous records in response to a particular FOIA request, where the complaint did not plead a claim that an agency policy or practice would impair plaintiff's lawful access to records in the future, dismissing the complaint as moot after the parties agreed to a production schedule).

2. Confusingly, FDA asserts that the APA and Mandamus Act claims should be dismissed because FOIA provides an adequate alternative remedy, but FDA also contends that FOIA does not empower a court to provide prospective injunctive relief to enforce § 552(a). FDA Mem. at 10 & n.3. Citing to *Kennecott Utah Copper Corp. v. United States Department of the Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996), FDA claims that "FOIA itself does not

authorize a court to order publication of records." FDA Mem. at 10 n.3. However, as this Court has explained, "*Kennecott* addressed whether a district court has the authority to compel an agency to 'publish' materials in the Federal Register, as required by Section 552(a)(1)" and "did not address the scope of a district court's authority to afford relief for a violation of Section 552(a)(2)." *CREW*, 2016 WL 912167, at *8 n.5. Thus, *Kennecott* does not speak to the court's authority to order the relief sought in this case, where Public Citizen seeks an order enjoining FDA from unlawfully redacting the CVs, in violation of section 552(a)(2) and § 552(b). *See* Compl. "Prayer For Relief" at 12. Such relief easily falls within the bounds of FOIA's judicial review provision granting federal courts the power to "to enjoin the agency from withholding agency records." 5 U.S.C. § 552(a)(4)(B); *see also Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 76 F. Supp. 3d 184, 193 (D.D.C. 2014) (reviewing under FOIA a claim that the agency violated § 552(a)(2)(A), which requires proactive disclosure of final opinions and orders).

FDA is also wrong to suggest that this Court decided in *CREW* that FOIA "only authorizes courts to order production of specifically requested records, and not to require the agency to proactively disclose records on an ongoing basis." FDA Mem. at 10. To the contrary, both parties in *CREW* took the position that FOIA did not allow the court to order the agency to proactively disclose certain legal opinions under section 552(a), and thus this Court did not decide whether FOIA authorized a court to require proactive disclosure of records under that provision. 2016 WL 912167, at *8. Instead of endorsing the view that FOIA did not provide an avenue for prospective relief under section 552(a), this Court cautioned that it was "far from convinced that the parties are correct about the limited extent of the court's remedial authority

under FOIA." *Id.* The Court explained that FOIA's statutory language "suggests that district courts have the power to issue injunctive relief beyond merely compelling disclosure of records." *Id.* In reaching that conclusion, this Court relied in part on the D.C. Circuit's recognition that "FOIA imposes no limits on courts' equitable powers in enforcing its terms." *Payne*, 837 F.2d at 494 (citing *Renegotiation Bd. v. Bannercraft Clothing Corp.*, 415 U.S. at 19-20), *quoted in CREW*, 2016 WL 912167, at *8.

Following *Payne*, courts have held that FOIA empowers them to grant prospective declaratory and injunctive relief from policies and practices that violate FOIA. In *Muttitt*, for example, the court held that it had "the power under FOIA and *Payne*" to provide declaratory and prospective injunctive relief on a claim that the agency's policy or practice of refusing to provide time estimates for responses violated FOIA. 813 F. Supp. 2d at 229; *see also Newport Aeronautical Sales*, 684 F.3d at 163-64 (reviewing under FOIA a claim seeking declaratory relief from the agency's practice of refusing to disclose certain information allegedly in violation of FOIA); *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 266 (holding that the court had the power under FOIA to order declaratory and injunctive relief on plaintiff's policy-or-practice claims alleging procedural violations of FOIA).

B. Public Citizen Adequately Alleged That It Is Entitled To Relief Under The APA.

In the complaint, Public Citizen alleged that FDA's policy and practice of redacting non-exempt information from CVs that are frequently requested records violates § 552(a)(2) of FOIA and thus constitutes final agency action that is arbitrary and capricious and not in accordance with law under the APA, 5 U.S.C. § 706. Compl. ¶ 50. If the prospective and declaratory injunctive relief Public Citizen seeks on its policy and practice claim is *not* available under

FOIA, then "there is no other adequate remedy," 5 U.S.C. § 704, and the Court may "hold unlawful and set aside" the agency's unlawful policy and practice under the APA, *id.* § 706. *See Nat'l Sec. Counselors*, 898 F. Supp. 2d at 266 (dismissing APA claims only as to those policy-or-practice claims as to which the court determined it had "the power under FOIA and *Payne* to provide the requested declaratory and injunctive remedies") (internal quotation marks omitted); *cf. CREW*, 2016 WL 912167, *8 (dismissing APA claim alleging ongoing violation of § 552(a)(2)(A), (B), because FOIA provided adequate remedy).

FDA repeatedly overlooks that Public Citizen's second claim seeks relief under FOIA, as well as under the APA. Federal Rule of Civil Procedure 8(d) permits a party to plead in the alternative and to state inconsistent claims, and provides that "[i]f a party makes alternative statements, the pleading is sufficient if any one of them is sufficient." Fed. R. Civ. P. 8(d)(2). And "a plaintiff 'need not use particular words to plead in the alternative as long as it can be reasonably inferred that this is what [it was] doing.'" *McNamara v. Picken*, 950 F. Supp. 2d 125, 128-29 (D.D.C. 2013) (quoting *G–I Holdings, Inc. v. Baron & Budd,* 238 F. Supp. 2d 521, 536-37 (S.D.N.Y. 2002)). "Since the relevant paragraphs of the . . . Complaint allege violations of both the APA and FOIA in the alternative, this Court's determination that relief under the APA is precluded because the same relief is available under FOIA [would have] little practical effect on the nature of the plaintiff's claims in this action." *Muttitt*, 813 F. Supp. at 231 n.5. Therefore, if the Court agrees with FDA that "an adequate alternative remedy clearly exists here, under FOIA," FDA Mem. at 2, it necessarily must deny FDA's motion with respect to the second claim for relief.

C. Public Citizen Adequately Alleged That It Is Entitled To Relief Under The Mandamus Act.

Public Citizen also adequately alleged that, "if no other adequate remedy is available to Public Citizen to compel the action required of FDA by law," it is entitled to "relief in the nature of mandamus" under the Mandamus and Venue Act, 28 U.S.C. § 1361. Compl. ¶ 55. "Pursuant to this act, a district court may grant mandamus relief if (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10 (D.C. Cir. 2005) (internal quotation marks omitted).

Public Citizen alleged that (1) Public Citizen has a statutory right to the online CVs with redactions only for information that falls within one of FOIA's exemptions, Compl. ¶¶ 53-54, (2) defendants have "a nondiscretionary duty under 5 U.S.C. § 552(a)(2) to make the CVs available for public inspection by electronic means" and with only those redactions that are justified by FOIA, *id.* ¶ 54, and (3) Public Citizen seeks this relief only if no other adequate remedy is available, *id.* ¶ 55. Moreover, at the motion to dismiss stage, "it would be premature and inappropriate to determine whether the relief of mandamus will or will not issue. . . . It is sufficient to determine that plaintiffs have stated a claim for relief under the mandamus statute." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 44 (D.D.C. 2002). Thus, if the Court holds that the relief sought by Public Citizen is unavailable under FOIA and the APA, it should deny FDA's motion with respect to the third claim for relief.

IV. The Relief Public Citizen Seeks In Its First Claim Is Not An Adequate Alternative Remedy For Its Policy And Practice Claims.

FDA alleges that Public Citizen's APA and Mandamus Act claims should be dismissed because they "seek the precise relief that is available under FOIA, and that plaintiff seeks in this very lawsuit—disclosure in full of the CVs of FDA advisory committee members." FDA Mem. at 9. FDA is correct that the APA and Mandamus Act claims seek the same relief sought under FOIA as to FDA's unlawful policy and practice. If the Court holds that the policy-and-practice violation is actionable and remediable under FOIA, the alternative APA and Mandamus Act claims are not needed because an adequate remedy is available. If, however, by moving to dismiss the second and third claims, which include a FOIA claim to redress the policy and practice violation, FDA means to suggest that relief sought on the *first* claim—the challenge to the redactions made in response to the May 2014 FOIA request—would provide the precise relief sought in the policy and practice claims, FDA is wrong. The first claim does not address FDA's unlawful policy and practice, and providing complete relief under that claim—disclosure in full of the CVs posted online at a particular point in time—would not resolve Public Citizen's claim that FDA's unlawful policy and practice continues to "impair" Public Citizen's "lawful access to information in the future." *Payne*, 837 F.2d at 491.

A. The first claim for relief seeks a declaration that FDA's withholding of the records requested in response to the May 2014 FOIA request is unlawful under section 552(a)(3) and an order that Defendants make the records available within 14 days. Compl. "Prayer For Relief" at 11-12. The second and third claims seek prospective declaratory and injunctive relief: a declaration "that Defendants' policy and practice of redacting non-exempt information from

advisory committee members' CVs that Defendants make electronically available is unlawful under 5 U.S.C. § 552(a)(2)," and an order to "[s]et aside" that policy and practice, and an order requiring "Defendants to make electronically available to the public in their entirety the CVs of all current and future advisory committee members." *Id.* at 12. The relief sought in the first claim is thus distinct from that sought in the second and third; it is not "relief of the same genre." *Garcia v. Vilsack,* 563 F.3d 519, 522 (D.C. Cir. 2009) (internal quotation marks omitted).

The law of this Circuit contradicts FDA's argument that the first claim seeks the same relief as the policy-and-practice claim. Generally, "[i]t is well-established that if a plaintiff challenges both a specific agency action and the *policy* that underlies that action, the challenge to the policy is not necessarily mooted merely because the challenge to the particular agency action is moot." *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1428 (D.C. Cir. 1994). And specifically with respect to FOIA, *Payne* explains that an agency's release of the particular records a party requested under FOIA does not resolve the party's claim that the agency has adopted a policy or practice that "will impair the party's lawful access to information in the future." 837 F.2d at 491. *See also Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 91 (D.C. Cir. 1986) (holding that agency's reversal of particular FOIA fee waiver denials mooted the plaintiffs' challenge to the agency fee waiver policy as applied to those fee waiver requests, but did not moot the plaintiffs' additional claim that the agency's FOIA fee waiver policy was facially invalid).

In light of *Payne*, courts in this Circuit recognize that disclosure of specific requested records does not resolve the controversy where the plaintiff also challenges an agency's ongoing policy or practice that allegedly violates FOIA. *See, e.g.*, *Muttitt*, 813 F. Supp. 2d at 227 ("The

Court disagrees that disclosure of the requested records alone would provide an adequate remedy where an agency has a policy of routinely ignoring the requirement to provide time estimates as required by 5 U.S.C. § 552(a)(7)(B)."); *Newport Aeronautical Sales*, 684 F.3d at 164 (disclosure of unredacted copies of requested records did not moot plaintiff's claim that agency's policy of denying requests for certain types of records violated FOIA). Similarly here, disclosure of the discrete set of requested CVs would leave Public Citizen's policy and practice claim unresolved, because FDA continues to unlawfully redact these frequently requested records. Indeed, FDA stated to Public Citizen that it "will not be revising [its] web pages so that all of the CVs of advisory committee members are posted without redaction." FDA Mem., Ex. A.

FDA's contention that relief under the first claim would resolve the policy and practice claim is at bottom an argument that section 552(a)(2)(D) is judicially unenforceable, because an adequate remedy for violating that provision "must include the possibility of equitable relief directing a habitually noncompliant agency to comply" with its requirements. *Muttitt*, 813 F. Supp. 2d at 227 (rejecting argument that disclosure of the requested records alone would adequately remedy agency's practice of routinely violating § 552(a)(7)(B)(ii), which requires agency to provide estimated response date upon request, because that argument would allow the agency to ignore its statutory duties). Otherwise, the statutory "requirement" would instead be merely "optional and judicially unenforceable." *Id.* Accordingly, here, there can be no adequate remedy if the requirement that the agency post frequently requested records without redacting non-exempt information goes unenforced by the Court.

B. Citing *CREW,* FDA suggests that filing serial FOIA requests and lawsuits is an adequate alternative remedy to seeking prospective injunctive relief for an agency's violation of

section 552(a)(2). FDA Mem. at 9-10. On this point, *CREW* is inapposite. In that case, the plaintiff filed suit only under the APA, claiming that the Department of Justice had violated FOIA by failing to make the legal opinions of its Office of Legal Counsel (OLC) publicly available under 5 U.S.C. § 552(a)(2)(A) and (a)(2)(B). *CREW*, 2016 WL 912167, at *1. This Court concluded that, *assuming* that both parties were correct that FOIA authorized it only to order disclosure of specifically requested records, "in this case, FOIA provides an adequate remedy," because "an order directing OLC to disclose requested opinions would remedy the 'informational harm' Plaintiff claims to have suffered." *Id.* at *8.

To begin with, in *CREW*, this Court concluded only that disclosure of OLC opinions through FOIA requests was an adequate alternative remedy to that plaintiff's APA lawsuit, not that the Court lacked authority to order broader other forms of relief under FOIA or that such relief would in fact be the remedy if the plaintiff were to re-file its case under FOIA and prevail on its claim that the agency had violated section 552(a)(2). *Id.* This Court left open the question of what relief it could award under FOIA. *See id.* ("The court need not, however, decide the extent of a district court's equitable powers under FOIA's remedial scheme . . . ."). Here, should the Court determine that FOIA authorizes it to order the prospective relief sought by Public Citizen, and thus that the APA and mandamus claims are unnecessary, the second claim for relief survives the motion to dismiss. For unlike the plaintiff in *CREW*, Public Citizen pleaded in the alternative, under FOIA, the APA, and the Mandamus Act.

In addition, here, unlike in *CREW*, disclosure of the requested CVs would not remedy the harm that Public Citizen suffers, because FDA continues to unlawfully redact posted CVs, even two years after Public Citizen submitted its FOIA request. The plaintiff in *CREW* sought an order

requiring publication—a disclosure of the same sort as would be made in response to individual FOIA requests. In contrast, Public Citizen challenges unlawful redactions on CVs that FDA is *already* publishing online, and the ongoing dispute is as to the lawfulness of redactions—a dispute that will be renewed, not resolved, with every individual request. FDA's posting of the CVs online with unlawful redactions over the past two years is akin to FDA releasing the CVs in response to individual FOIA requests with the same unlawful redactions again and again. In this regard, this case resembles *Payne*, in which the D.C. Circuit denounced the agency's practice of repeatedly withholding non-exempt records in response to individual requests and requiring the plaintiff to file administrative appeals before releasing the records. The court held that release of the specific requested records was not enough to remedy the harm from this unlawful practice. *Payne*, 837 F.2d at 494. "Congress did not intend for" an agency "to use the FOIA offensively to hinder the release of non-exempt documents." *Id.* (quoting *Long v. IRS*, 693 F.2d at 910). FOIA sets out the process for releasing these CVs, but FDA refuses to follow it.

Finally, FDA's suggestion that serial lawsuits would remedy FDA's ongoing unlawful practice flies in the face of Congress's determination of the need for the "frequently requested records" provision, which Congress enacted to "help to reduce the number of multiple FOIA requests for the same records requiring separate agency responses." H.R. Rep. No. 104-795, at 21 (1996). Serial requests would also be ineffective here because FDA's response to FOIA requests is so woefully delayed. Indeed, although Public Citizen submitted its FOIA request for the CVs over 25-months ago, Compl. ¶ 27, FDA's largest Center, the Center for Drug Evaluation and Research, has not yet responded, *id*. ¶ 43, and FDA's second largest Center, the Center for Devices and Radiological Health, responded only this month. The CVs that FDA has released

contain the sorts of unlawful redactions Public Citizen challenges in this suit. *Id*. ¶¶ 31, 37, 39. And defendant HHS has not responded to Public Citizen's appeal from the responses of two FDA Centers—an appeal submitted in September 2014. *Id.* ¶¶ 32-33, 45. FDA's lengthy lag-times are not isolated incidents of delay. *See* U.S. Dep't of Health & Human Servs., *HHS Fiscal Year 2015 Freedom of Information Annual Report*, http://www.hhs.gov/foia/reports/annual-reports/2015/index.html (last reviewed Feb. 5, 2016) (stating that "average number of days" for FDA to process "complex" request is 186).[1]

Accordingly, FDA cannot credibly suggest that the harm to Public Citizen is adequately remedied by serial FOIA requests that may not be fully processed for more than two years, followed by administrative appeals that receive no substantive response at all. The futility of obtaining the requested unredacted CVs through individual requests results as well from the fact that the membership of an advisory committee changes over time, so some individuals who were members at the time of a request would no longer be advisory committee members by the time FDA gets around to responding to a request—a response containing unlawful redactions of the sort that prompted Public Citizen's request for "unredacted" records. *See* Compl. ¶ 40 (explaining that because it took the Center for Biologics Evaluation and Research (CBER) "over 378 business days to produce the CVs, well over half of the individuals whose CVs CBER released are no longer serving on CBER advisory committees"). And after FDA's delayed release and the HHS appeal process, Public Citizen would then have to litigate the unlawful

[1] HHS defines a "complex" request to mean a "request that an agency using multi-track processing places in a slower track based on the high volume and/or complexity of the records requested." U.S. Dep't of Health & Human Servs., *HHS Fiscal Year 2015 Freedom of Information Annual Report*. Given its redaction policy with regard to CVs, FOIA requests for the CVs would fall into this category, as the processing of Public Citizen's request reflects.

redactions. Filing serial FOIA requests would thus leave Public Citizen in the same position it is in now: unable to obtain non-exempt information about the backgrounds of *current* advisory committee members. *Id*. ¶ 23; *see Payne*, 837 F.2d at 494 ("The fact that Payne eventually obtained the information it sought provides scant comfort when stale information is of little value yet more costly than fresh information ought to be."). In short, the notion that serial requests provide an adequate remedy for the problem at issue in this case is Kafkaesque.

CONCLUSION

For the foregoing reasons, the Court should deny FDA's partial motion to dismiss.

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Respectfully submitted,

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