How Pattern or Practice Claims Can Clear a Path for Structural FOIA Reform

Andrea DenHoed & Anna Selbrede

Yale University

Abstract

This paper introduces readers to FOIA policy or practice claims and provides advice on how to litigate them. First recognized by the D.C. Circuit in 1988, these claims allow FOIA requesters to seek judicial intervention beyond the provision of particular records. Specifically, claimants can seek injunctions to change agency policies that have caused records to be improperly withheld in the first place. This paper covers the origins and basic contours of policy or practice claims. It then addresses the doctrinal and practical difficulties that accompany claims aimed at delays caused by agency FOIA backlogs. Finally, the authors offer a case study from their experience litigating *Scoville v. Department of State* in the Eastern District of Wisconsin.

I. Introduction

For the past sixty years, the Freedom of Information Act has been the cornerstone of U.S. transparency law. The statute establishes a strongly pro-disclosure records regime and grants courts the power to enforce it. Yet, in the years since its enactment, FOIA's promises have become bogged down in agency inefficiency, neglect, and evasion. It has become commonplace to hear commentators from across the political spectrum refer to the whole FOIA scheme as "broken."[1]

If FOIA is to remain viable for the next sixty years, a course correction is needed. The question, then, is whether this correction requires an overhaul by Congress or whether the statute as it exists today might contain the seeds of its own renewal. This paper pursues the latter possibility by exploring the potential power of FOIA policy or practice claims. These claims, first recognized by the DC Circuit in 1988, provide a legal mechanism for requesters to ask courts for relief that reaches to the root causes of habitual agency FOIA violations. Yet this claim is rarely utilized in litigation, and the doctrine surrounding it is underdeveloped.

This paper aims to acquaint readers—and particularly potential litigants—with the basic contours of the policy or practice claim. The paper proceeds in three parts. The first part covers the origins of the policy or practice claim and outlines its basic structure. These claims are rooted in the broad equitable powers courts hold to enforce FOIA, and they first developed in response to agency actions designed to evade judicial review. Understanding the origins of the claim is helpful in understanding the reasoning that underlies it.

The second part explores a particularly thorny—but potentially powerful—subset of policy and practice claims: those based on disclosure delays caused by agency backlogs. Agency backlogs have increased significantly in recent years, making long waits past the statutory deadline an exceedingly common experience. Policy or practice claims are theoretically well suited to addressing this issue, but in practice litigants have often run up against hesitant courts and muddled doctrine. We explain some of the common sources of confusion that tend to impede claims.

The final part offers a case study of an ongoing policy or practice case, *Scoville v. Department of State*, which the authors have been closely involved in litigating. The case offers an inside view of considerations and determinations policy and practice litigators might face. We explain how we constructed a legal argument to synthesize existing doctrine. We also share key facts unearthed during discovery and how we used them to demonstrate that the State Department's delays were tied to an underlying policy or practice.

Realizing the latent power of policy and practice claims depends on litigators and courts taking up the task of developing the doctrine. It is our hope that by introducing readers to the foundation and pitfalls of these claims, this paper can help push the case law in the direction of coherence and disclosure.

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[1] STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 34 (2016), https://oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf; Amanda Athanasiou, *FOIA Appeals Fail so Often, Taxpayers See a Broken System*, TAX NOTES (Apr. 2, 2025), https://www.taxnotes.com/featured-news/foia-appeals-fail-so-often-taxpayers-see-broken-system/2025/04/01/7rsr0; Anne Weismann, *The FOIA Is Broken, But Is It Beyond Repair?*, CITIZENS FOR RESPONSIBILITY & ETHICS IN WASH. (June 30, 2020), https://www.citizensforethics.org/reports-investigations/crew-investigations/the-foia-is-broken-but-is-it-beyond-repair/; C.J. Ciaramella, *Abolish FOIA*, REASON (Dec. 2024) ("The federal FOIA law is broken and should be replaced with something better.").

II. The Origin and Structure of Policy or Practice Claims

A. Courts' Power to Enforce FOIA

When the Freedom of Information Act was first passed into law, in 1966,[2] it represented a revolution in transparency law, largely thanks to its provision for court oversight and enforcement.[3] Before FOIA, disclosure was governed by Section 3 of the APA, which contained no meaningful enforcement provisions,[4] leaving the availability of records "illimitably subject to the petulant discretion of bureaucrats," as one early commentator put it.[5] FOIA, by contrast, gave courts the final say on when records were to be produced, granting them *de novo* review of failures to produce records and placing the burden on the agency to defend the withholding.[6]

Indeed, the first time Congress amended FOIA, it was to affirm the power of courts to enforce the statute. Specifically, the amendments were a response to the 1973 Supreme Court decision *Environmental Protection Agency v. Mink*, which held that courts did not have power under FOIA to review the executive's classification decisions, and thus could not force the disclosure of records withheld under Exemption 1, which covered records designated as secret for national security reasons.[7] The very next year, however, Congress changed the statute to override the Court's decision. Passed amid widespread concerns about executive secrecy in the wake of Watergate, the 1974 amendments affirmed *de-novo* judicial review even for classified documents and specifically allowed courts to conduct in-camera inspection to determine if records were properly withheld under the agency's claimed exemption.[8]

Recognizing that disclosure requirements were meaningless without disclosure deadlines, Congress also added timelines to the statute. Agencies were given ten days to process FOIA requests, twenty days to process administrative appeals, and a one-time, ten-day extension for "unusual circumstances," such as when the response required searching off-site records or consulting with another agency.[9] (These deadlines were extended in 1996, giving agencies twenty days to respond to initial requests, with an additional ten days available in "unusual circumstances" if the agency sends a written notice to the requester.[10]) Gerald Ford, who had been in office only a few months at that time, vetoed the 1974 amendments, objecting specifically to the statute's strict deadlines and to the power it gave courts to review executive

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[2] *See* Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250, 250 (1966).
[3] John C. Brinkerhoff Jr., *FOIA's Common Law*, 36 YALE J. ON REGUL. 575, 607 (2019) ("Rather, FOIA represented a sea change in the law. In stark contrast to the preexisting regime, it demanded that courts control information disclosure, an area previously subject to executive discretion.").
[4] Martin E. Halstuk and Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government Is Up To*, 11 COMMUNICATION LAW AND POLICY 551, 521–22 (describing the vague terms and loopholes in APA Section 3, which enabled agencies to withhold documents at will); Env't Prot. Agency v. Mink, 410 U.S. 73, 79 (1973) ("Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute.").
[5] Gregory L. Waples, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895, 908 (1974).
[6] *Mink*, 410 U.S. at 79 (citing the original FOIA statute).
[7] *Id.*
[8] *See* C.I.A. v. Sims, 471 U.S. 159, 189 (1985).
[9] *See* 5 U.S.C. § 552(a)(6) (2018).
[10] *See* Delcianna J. Winders, *Fulfilling the Promise of EFOIA's Affirmative Disclosure Mandate*, 95 DENV. L. REV. 909, 917 (2018).

decisions[11]. But Congress promptly overrode the veto, and the amendments cemented the statutory groundwork for courts to play an active role in enforcing FOIA.[12]

The statute makes it easy for record-seekers to get into court. In situations where the requester believes records have been improperly withheld—for instance, if she suspects that the agency did not complete an adequate search for responsive records or that the records she received are overly redacted—she may may file an appeal to the agency. If the appeal is denied, or if the agency takes more than twenty days to respond, the requester may go to a federal district court, which may compel the agency to disclose the records.[13] Likewise, if the agency takes more than twenty days to respond to an initial request (or thirty days in "exceptional circumstances") the requester is "deemed to have exhausted his administrative remedies" and may take the request straight to court.[14]

Once presented with a FOIA claim, courts have broad equitable power to craft relief.[15] The statute explicitly gives courts jurisdiction to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."[16] In the early days of FOIA, some argued that this statutory provision limited the courts to ordering the production of documents. But the Court rejected this view in *Renegotiation Board v. Bannercraft Clothing Company*, decided in early 1974.[17] The Court reasoned that the statute's broad language and "obvious emphasis on disclosure" indicated that Congress meant only to affirm, not limit, the equitable enforcement power of the courts.[18] Thus, although judicial relief under FOIA usually consists of an order to release records, courts have been known to grant other remedies as well, such as ordering an agency to conduct a more thorough search for responsive records,[19] or staying a administrative procedure pending the disclosure of records.[20]

B. Deriving the Policy or Practice Claim

FOIA pattern and practice claims derive from the court's broad equitable power to enforce the statute. These claims arose at the intersection of FOIA's judicial oversight provisions and federal mootness doctrine.[21] In a typical FOIA claim, a requester asks the court to intervene

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[11] Kimberlee N. Ried, *1974 FOIA Amendments Mark Golden Anniversary*, NATIONAL ARCHIVES (Nov. 21, 2024), https://foia.blogs.archives.gov/2024/11/21/1974-foia-amendments-mark-golden-anniversary/.
[12] Halstuck & Chamberlin, *supra* note 4, at 534.
[13] *See* 5 U.S.C. § 552(a)(6) (2018).
[14] *Id.*
[15] Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 94 (1974).
[16] 5 U.S.C. § 552(a)(4)(B).
[17] In *Bannercraft*, the plaintiffs were national defense contractors who were seeking 1) to have the federal Renegotiation Board enjoined from withholding records regarding its decision to recommend against renewing the plaintiffs' contracts and 2) to have the contract renegotiation process stayed until the records had been provided. *Bannercraft*, 415 U.S. at 4. The government argued that the second type of relief was not available because the statute mentioned only compelling the disclosure of documents, indicating that courts lacked the power to enforce the statute by other means. *Id.* at 17. The court strongly rejected this view, citing "The broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions." *Id.* at 19. The court did not ultimately reach the question of whether and when a court might enjoin agency action pending the resolution of a FOIA request, because it considered the plaintiffs' particular request to be a use of FOIA to circumvent the administrative process required under the Renegotiation Act.
[18] *Id.* at 19.
[19] Morley v. C.I.A., 508 F.3d 1108, 1129 (D.C. Cir. 2007).
[20] Columbia Packing Co. v. U.S. Dep't of Agric., 563 F.2d 495 (1st Cir. 1977).
[21] Courts vary in their use of the terms "policy or practice claim" and "pattern or practice claim." This paper uses them interchangeably.

regarding a particular request, suing to enjoin the agency from improperly withholding the particular records at issue.[22] If, however, the agency provides the records before the court reaches a decision, the claim becomes moot, since a court cannot issue a merely advisory opinion on the withholding of records that are no longer being withheld.[23] Eventually, courts began hearing cases where an agency would repeat the same FOIA violation multiple times but evade judicial oversight by mooting any resulting lawsuit by producing the records before the court could address the violation. The policy and practice claim arose to provide recourse in these situations.

The seminal FOIA pattern or practice case (and the first to name the claim) was *Payne Enterprises v. United States*, which was decided by the D.C. Circuit in 1988.[24] The plaintiff, Payne Enterprises, was a company that regularly submitted FOIA requests to Air Force Logistics Command (AFLC) bases for copies of bid abstracts, which contained information about bids the government had received for certain contracts.[25] Usually, Payne received the abstracts without an issue. However, for contracts that had few bidders, officers at the AFLC bases would withhold the records, out of concern that if the successful bidders knew that they had little or no competition, they would raise their prices in the future. The officers pointed to Exemptions 4 (for trade secrets) and 5 (for deliberative process) to justify the withholding. Every time this happened, Payne appealed to the Secretary of the Air Force, who, every time, instructed the AFLC bases to release the records because they did not fall under the claimed exemptions.[26] The bases would release the bid abstracts after the Secretary instructed them to do so, only to turn around and withhold the next batch of low-competition abstracts Payne requested, necessitating another appeal.[27] Eventually, Payne filed suit, asking the court to enjoin the officers' practice of withholding low-competition bid abstracts.[28] The trial court dismissed the suit, and Payne appealed to the D.C. Circuit.[29]

The circuit court's opinion in *Payne* speaks to two central features of the FOIA pattern or practice claim. First, it addressed to the mootness issue. The government argued that the claim was moot because Payne had ultimately received all the records it requested. The court rejected this argument, holding that an agency could not use record production to moot a case where the plaintiff had challenged not the withholding of particular records but the underlying practice that caused the withholding.[30] On this point, the court cited *Better Government Association v. Department of State*, a proto-pattern or practice case that did not use that terminology but, rather,

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[22] *See* 5 U.S.C. § 552(a)(4)(B) (2018).
[23] *See* Payne Enterprises, Inc. v. United States, 837 F.2d 486, 490-91 (D.C. Cir. 1988) (quoting Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982) ("It is, of course, true that, 'however fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform" with respect to the particular records that were requested.").
[24] *Id.*; *see also* Scoville v. U.S. Department of State, No. 22-CV-91, 2022 WL 3601596, at *4 (E.D. Wis. Aug. 23, 2022) ("I begin with *Payne*, the D.C. Circuit's seminal case recognizing these claims."). However, both *Long v. U.S. Internal Revenue Service*, 693 F.2d 907 (9th Cir. 1982), and *Better Government Association v. Department of State*, 780 F.2d 86, 91 (D.C. Cir. 1986), were versions of policy or practice cases without using the formal term.
[25] *Id.* at 489-90.
[26] *Id.* at 489.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 490.
[30] *Id.* at 491.

characterized the claim as a facial challenge to the agency's practices that survived even when the plaintiff's as-applied claim for specific documents had been mooted. [31]

Second, *Payne* addressed when a remedy might be warranted in a policy or practice case. The *Payne* district court had held that no relief was appropriate because the agency's conduct was "not sufficiently outrageous" to merit judicial intervention.[32] The circuit court focused not on the outrageousness of the agency's behavior but rather on the strong likelihood of future violations. It held that, as a matter of law, declaratory relief was warranted based on the agency's persistent refusal to change its behavior and the failure of the Secretary to institute changes after being made aware of the pattern of violation.

Further, the court remanded with instructions to consider the propriety of injunctive relief.[33] On this issue, the court quoted another proto-pattern or practice case, *Long v. U.S. Internal Revenue Service*,[34] which was decided by the Ninth Circuit in 1982. The plaintiff alleged that the I.R.S. repeatedly and purposely withheld certain records, without claiming any exemptions, until the requestor brought suit, at which point the agency would voluntarily release the records, thus mooting the claim. The agency claimed that by withholding without naming an exemption, it reserved the right to claim that the records were exempt in the future. The court declared that, even when the agency had ceased its illegal behavior by providing requested documents, courts ought to consider the likelihood of the violative policy recurring by "weighing the good faith of any expressed intent to comply, the effectiveness, if any, of the discontinuance and the character of past violations."[35] Accordingly, in *Payne*, the D.C. Circuit instructed the lower court to consider the likelihood of recurrence—a consideration in which the Air Force's stated intention to change its behavior was to be weighed but was not dispositive.[36]

Since *Payne*, policy and practice claims have been recognized by the Ninth Circuit[37] and by district courts across the country.[38] Other circuits have acknowledged the possible viability of the claim without actually deciding the issue.[39]

C. Applying Policy or Practice Claims

The basic outline of a pattern or practice claim, as it emerges from *Payne* and the cases to follow, is this: When an agency has improperly withheld records requested under FOIA, and that withholding is part of a larger policy or pattern of behavior that is likely to cause the requestor to

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[31] 780 F.2d 86, 91 (D.C. Cir. 1986).
[32] *Payne*, 837 F.2d at 494 (citing Payne Enterprises v. United States, Civ. No. 86-1987 (D.D.C. Nov. 17, 1986)).
[33] *Id.* at 495.
[34] 693 F.2d 907 (9th Cir. 1982).
[35] *Id.* at 909.
[36] *Payne*, 780 F.2d at 72.
[37] *See, e.g.*, Hajro v. Citizenship and Immigr. Svcs., 811 F.3d 1086, 1103 (2016); Washington Lawyers' Committee for Civil Rights and Urban Affairs v. U.S. Dep't of Just., 145 F.4th 64, 73 (D.C. Cir. 2025).
[38] *See, e.g.*, Nightingale v. U.S. Citizenship & Immigration Servs., 507 F. Supp. 3d 1193, 1213-14 (N.D. Cal. 2020); LAF v. Dep't of Veterans Affairs, No. 17-C-5035, 2018 WL 3148109 (N.D. Ill. June 27, 2018); Evans v. U.S. Dep't of Interior, 125 F. Supp. 3d 799, 833 (N.D. Ind. 2015); Thompson v. U.S. Just. Dep't, No. 1:23-CV-69, 2023 WL 5493591, at *4 (W.D.N.C. Aug. 24, 2023); Alley v. United States Dep't of Health & Hum. Servs., No. CV-07-BE-0096, 2010 WL 11561222, at *4 (N.D. Ala. Sept. 30, 2010).
[39] *See, e.g.*, Libarov v. U.S. Immigration & Customs Enforcement, 138 F.4th 1010, 1017 (7th Cir. 2025); Empower Oversight Whistleblowers & Research v. National Institutes of Health, 122 F.4th 92, 102 (4th Cir. 2024); Lybarger v. Cardwell, 577 F.2d 764, 767 (1st Cir. 1978) ("There may very well be circumstances in which prolonged delay in making information available or unacceptably onerous opportunities for viewing disclosed information require judicial intervention.").

suffer the same harm in the future, courts have the power to grant prospective relief via an injunction on the pattern or practice underlying the violation.[40]

Muckrock v. CIA, a 2018 case from the D.C. district court, offers a clear-cut example of the sort of agency behavior courts can address via policy or practice claims.[41] In *Muckrock*, the plaintiff submitted a number of requests for electronic communication records to the CIA, which responded by saying that it could not process requests that did not contain "the specific 'to' and 'from' recipients, time frame and subject" of each requested communication.[42] Muckrock argued that this reasoning constituted a "per se" policy in violation of FOIA's requirements.[43] After the suit was filed, the CIA provided Muckrock with the requested records.[44] The agency denied that it had the policy Muckrock alleged. Further, it argued that it would be inappropriate for the court to grant relief since the requested records had been provided, and, were the violation to recur, Muckrock could procure an adequate remedy by suing for that new request.[45]

The court, in an opinion by then-judge Ketanji Brown Jackson, rejected both arguments. First, the court held that the agency did not need to acknowledge that a policy existed for it to be subject to a policy or practice challenge.[46] This holding built on a principle established in *Payne* that "[t]he fact that the practice at issue is informal, rather than articulated in regulations or an official statement of policy, is irrelevant to determining whether a challenge to that policy or practice is moot."[47] In *Muckrock*, the pattern evident in the plaintiff's own experiences was enough to establish the existence of the alleged per-se policy. Courts sometimes differ on what exactly a plaintiff needs to show to demonstrate that an agency has an unacceptable policy or practice, but it is well established that the policy need not be formal or official to qualify.[48] As the *Muckrock* court observed, to hold otherwise would allow agencies to repeatedly violate FOIA and then dodge suit by denying that the policy exists or arguing that the pattern of violation did not result from an official policy.[49]

Second, the court affirmed its ability to grant prospective relief through an injunction on the agency practice that had caused the unlawful withholding. To establish standing for a pattern or practice case, a plaintiff must show not only that they were harmed by the withholding of a particular set of records but also that they will suffer harm in the future if the practice does not change. Usually, this standing can be established by demonstrating that plaintiff has filed or plans to file more FOIA requests that will be improperly withheld because of the agency's objectionable practice.[50] This future harm to the plaintiff is also what lays the foundation for

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[40] *See, e.g.*, Nightingale v. U.S. Citizenship and Immigration Servs., 507 F. Supp. 3d 1193, 1196, 1200 (N.D. Cal. 2020) (granting injunctive relief); Ray v. Dep't of Justice, 770 F. Supp. 1544, 1552 (S.D. Fla. 1990) (ordering a FOIA office to "comply with [FOIA] time requirements").
[41] Muckrock, LLC v. Cent. Intel. Agency, 300 F. Supp. 3d 108 (D.D.C. 2018).
[42] *Id.* at 129.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 130.
[47] *Id.* (quoting *Payne Enterprises v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988)).
[48] *See Payne*, 837 F.2d at 491 (holding that whether a policy is informal is irrelevant in a policy or practice analysis).
[49] *Muckrock*, 300 F. Supp. 3d at 130 ("The CIA is wrong to insist that an agency can divest a plaintiff of standing to challenge an alleged policy pertaining to FOIA requests merely by disclaiming any policy and/or altering its behavior in the context of the particular case.").
[50] *Id.* at 134 ("[S]o long as the plaintiff has made plausible allegations that an illegal policy exists, and that the plaintiff has not only been subjected to it at some point in the past but also likely will be subjected to it again in the future, there is a justiciable case or controversy that the plaintiff can pursue in federal court.").

courts to offer relief. Without a forward-looking injunction, the only way for requesters to seek relief from the effects of bad agency practices is to file a suit each time their requested records are improperly withheld because of the practice—and it is precisely this need for constant litigation that policy or practice claims are meant to prevent.[51] As then Judge Jackson explained in *Muckrock*, "Indeed, the very injury that a FOIA policy-or-practice lawsuit seeks to remedy *is* the unreasonable delay that results from an agency's seriatim application of an unlawful policy or practice during the processing of FOIA requests."[52]

D. Structuring a Policy or Practice Claim

In summary, FOIA policy or practice claims have a few distinguishing features that plaintiffs should be aware of.

Standing. To bring a conventional (non-policy or practice) FOIA claim regarding specific records, a plaintiff must show that they suffered an injury in the form of improperly withheld agency records.[53] To bring a *policy or practice claim*, they must show 1) that the improper withholding was part of a larger pattern and not an isolated incident, 2) that their injury was caused by this larger pattern or policy, and 3) that they are likely to suffer future injuries of the same type.[54]

As the Ninth Circuit observed in *Hajro v. U.S. Citizenship and Immigration Services*, the first prong of the inquiry overlaps with the merits inquiry, in which the court must determine the actual nature and legality of the policy or practice at issue.[55] Simply to establish standing, however, it is enough for a plaintiff to demonstrate that they have been subject to the same policy or practice multiple times, or that others have had the same experience.[56] Thus in *Muckrock*, it was sufficient that the nonprofit had submitted multiple requests with similar results, or in *National Security Counselors* that it had "already submitted fifteen FOIA requests to the CIA" and these requests "were likely to implicate the claimed policies and practices at issue because the pending and future requests appear to be of the same character" as the prior ones relating to the policy claim.[57] The second prong is more straightforward, as generally parties can allege a policy tailored enough to be linked to their injury. And courts have long held that delayed release of records are themselves an injury for standing purposes.[58] The third prong goes to the likelihood of bringing future requests. The simplest example to illustrate it is *Hajro*, whether the Ninth Circuit determined the immigrant plaintiff no longer had standing because he was not going to request future immigration-related files when he had already been granted legal status.[59]

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[51] *Id.* at 134Indeed, the very injury that a FOIA policy-or-practice lawsuit seeks to remedy *is* the unreasonable ***135** delay that results from an agency's seriatim application of an unlawful policy or practice during the processing of FOIA requests, so the CIA's insistence here that individual lawsuits to remedy future harm are available to MuckRock as a plaintiff who is perpetually aggrieved by the alleged illegal FOIA policy makes little sense.

[52] *Id.* at 135-35. Judge Jackson continues, "In other words, as far as the delay injury is concerned, individual FOIA lawsuits concerning an agency's treatment of particular requests do not provide *any* remedy, let alone an *adequate* one." *Id.* at 135.

[53] Hajro v. U.S. Citizenship and Immigration Services, 811 F.3d 1086, 1103 (9th Cir. 2016).

[54] *Id.*

[55] *Id.* at 1104.

[56] *Id.* at 1103-04.

[57] *See* Muckrock, LLC v. Cent. Intel. Agency, 300 F. Supp. 3d 108 (D.D.C. 2018); National Security Counselors v. Cent. Intel. Agency, 898 F. Supp. 2d 233, 260-63 (D.D.C. 2012).

[58] *See* Gilmore v. U.S. Dep't of Energy, 33 F. Supp. 2d 1184 (9th Cir. 1998).

[59] *Hajro*, 811 F.3d at 1107.

Merits. The merits inquiry of a pattern or practice case largely revolves around the question of whether the agency has an impermissible practice, as alleged by the plaintiff. Sometimes, this boils down to the question of whether the policy or practice in question is impermissible. For instance, in 2019, the Ninth Circuit decided *Animal Legal Defense Fund v. U.S. Department of Agriculture*, in which the ALDF challenged the department's interpretation of a FOIA provision that instructs agencies to expedite requests where the requestor has demonstrated compelling need to acquire the records in order to prevent harm to "an individual."[60] The ALDF argued that "individual" should be read to include animals.[61] Specifically, the claim was based on a request concerning a tiger named Tony, but the ALDF was able to demonstrate that a policy or practice existed by pointing to other instances where expedited processing to prevent harm to an animal had been denied.[62] On the merits, however, the court determined that no impermissible pattern or practice had occurred because the definition of "individual" in the FOIA statute did not refer to animals.[63]

In other cases, courts focus on determining whether a policy or practice exists at all. In some cases, the existence of the policy is clear because the agency stands by it, like the legal argument in ALDF.[64] Oftentimes, however, the challenged practice is not an official policy but rather a pattern of behavior. *Payne* laid the groundwork for defining "policy or practice" by distinguishing such behaviors from "isolated mistakes by agency officials."[65] So plaintiffs generally need to show a pattern of violations that are unified by some underlying choice by the agency that has caused those violations. As an example, in the 2019 case *American Oversight v. U.S. Environmental Protection Agency*, the plaintiff alleged that the EPA had a policy or practice of not responding to requests that did not include specific key words or search terms.[66] The court noted that such a policy would violate FOIA but found that the plaintiff had not sufficiently demonstrated the existence of such a policy by pointing to three requests that were actually rejected for distinct reasons.[67] On this basis, the court found that there was no policy or practice on the merits.

Relief. Courts may provide declaratory or injunctive relief as they deem proper, although they often do not, as discussed in Part III below. As a general matter, courts awards injunctive relief when there is "a probability that alleged illegal conduct will recur in the future."[68] Courts look to the "likelihood of recurrence," the "good faith of any expressed intent to comply," and the "effectiveness, if any, of the discontinuance and the character of past violations."[69] In the analysis, the "prime consideration" is on the "effect of the public of disclosure or nondisclosure."[70] Courts may issue a declaratory judgment by considering "whether a judgment

[60] American Legal Defense Fund v. U.S. Dep't of Agriculture, 933 F.3d 1088, 1090-91 (9th Cir. 2019).
[61] *Id.* at 1092-93.
[62] *Id.* at 1096.
[63] *Id.*
[64] *see also* Newport Aeronautical Sales v. Dep't of Air Force, 684 F.3d 160 (D.C. Cir. 2012) (pattern or practice claim based on conflicting interpretations of Exemption 3).
[65] Payne Enterprises, Inc. v. United States, 837 F.2d 486, 491 (D.C. Cir. 1988).
[66] American Oversight v. U.S. Environmental Protection Agency, 386 F. Supp. 3d 1, 8 (D.D.C. 2019).
[67] *Id.* at 9.
[68] Nightingale v. U.S. Citizenship and Immigration Services, 507 F. Supp. 3d 1192, 1207-08 (quoting Long v. U.S. I.R.S., 693 F.2d 907, 909 (9th Cir. 1982)).
[69] *Id.*
[70] *Id.*

will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings."[71]

III. Severe Backlogs and The Difficulty of Delay-Based FOIA Claims

A. The Problem of Backlogs

Although the FOIA statute sets strict time limits on processing requests, agencies regularly blow past these deadlines, often by months or even years. A primary reason for these timing violations is that many agencies carry enormous (and growing) backlogs of requests. According to a 2024 Government Accountability Office report on FOIA backlogs, in 2022, the government-wide FOIA backlog contained 200,000 requests.[72] Agencies cite three main contributors to this problem.[73] First, the number and complexity of requests has increased over the years. ("Complex" requests are those that seek an unusually high number of records or require additional steps complete, such as needing to search records held in multiple officers.[74]) Second, agencies report that they do not have enough FOIA staff to keep up with requests, or that staff are pulled away from FOIA processing by other duties. Third, FOIA-related litigation places additional demands on agencies' processing capabilities. The litigation problem is particularly thorny, and particularly relevant to policy and practice claims. Agencies often have to prioritize records that are subject to lawsuit in order to comply with court orders. As a result, litigation can be a way for a requester to jump to the head of the line, so requesters have an incentive to litigate. In order to keep up with litigation demands, agencies often shift resources away from regular FOIA processing.[75] One agency head interviewed by the GAO reported that litigated requests represented 1 percent of the agency's total requests but took up almost 90 percent of processing resources.[76] Meanwhile, this shift of resources leaves non-litigated requests languishing in the backlog, creating more delays that further incentivize litigation. In effect, agencies can get caught in a backlog-litigation death spiral of delay violations.

Policy or practice claims should be well suited to addressing the backlog problem. The claim is crafted precisely to end the need for repetitive litigation over the same FOIA violation. Accordingly, courts could cut short the death spiral by offering relief that applied not just to a particular delayed request but to the underlying cause of the delay. Theoretically, there is no reason that claims based on backlog-caused delay should be treated any differently from those springing from other types of violations. For instance, in *Better Government Association*, the plaintiffs challenged a set of nonbinding fee-waiver guidelines issued by the Department of Justice and being used by the Departments of State and Interior.[77] The FOIA statute granted agencies some discretion in determining when to waive fees on record requests that were in the "public interest," but the plaintiffs argued that the factors the agencies were using to determining

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[71] Our Children's Earth v. National Marine Fisheries Service, No. 13-3465, 2015 WL 4452136, at *9 (N.D. Cal. July 20, 2015) (quoting *National Resources Defense Council*, 966 F.2d 1299)).

[72] U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106535, FREEDOM OF INFORMATION ACT: ADDITIONAL GUIDANCE AND RELIABLE DATA CAN HELP ADDRESS AGENCY BACKLOGS 1 (2024), https://www.gao.gov/assets/gao-24-106535.pdf; *see also id.* at 7 ("Generally, a request is considered backlogged if it is pending beyond the statutory time frames.").

[73] *Id.* at 13.

[74] *Id.* at 6.

[75] *Id.* at 19.

[76] *Id.*

[77] Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 89 (D.C. Cir. 1986).

what records were in the public interest were out of line with FOIA's requirements.[78] The circuit court remanded the issue with instructions for the lower court to "ascertain whether FOIA requires DOJ to provide more or different substantive standards to regulate fee waiver determinations under FOIA."[79] Similarly, allegations of backlog-caused delays could prompt courts to examine the agency's processing standards to determine whether they are calculated to comport with FOIA's timing requirements. In practice, however, delay-based policy and practice claims have struggled to find a footing, as courts and litigants have encountered both doctrinal confusion and practical issues in applying them to delay-based violations. We outline these difficulties in turn.

B. Doctrinal Confusion

Translating policy or practice doctrine to delay-based claims has proven difficult. Two things make such claims somewhat unwieldy. First, unlike cases where agencies have an improper fee waiver policy or repeatedly apply a certain exemption incorrectly, the existence of widespread delays caused by a backlog is not, itself, able illustrate that an agency has a policy or practice of violating FOIA. For instance, the backlog could be caused by a sudden uptick in processing requirements prompted by a highly publicized news story.[80] Or the agency might be in the process of implementing a concerted and effective policy to reduce its backlog that is not yet reflected in the numbers. Second, the fact is that almost every agency has a backlog, so courts are put in the position of differentiating backlogs that spring from a policy or practice from those that do not. Neither of these barriers is insurmountable, yet the dicta that has developed around delay-based claims has sown confusion about what it takes to sustain them. Furthermore, the two primary circuits that have recognized pattern and practice claims have developed somewhat disparate approaches to delay-based claims, and no court has established a clear test. As a result of all of this, many key concepts in a delay-based policy or practice suit remain vague or ambiguous. After outlining the difference in standards, we categorize the leftover ambiguities into two distinctions.

1. Disparate Standards

The DC and Ninth Circuits are the only circuits in the country to have fully recognized the viability of pattern and practice claims. The two circuit courts themselves have heard only a handful of these cases since the claim was first named, in 1988, so the doctrine has been slow to congeal. When it comes to delay-based claims in particular, the two circuits have historically taken different approaches, though they have converged somewhat in recent years. As a general matter, the Ninth Circuit has been slightly more prone to focus on equitable factors and less on pinning down the precise nature of the policy or practice behind the violation. The D.C. Circuit, until 2018, was highly resistant to entertaining delay-based claims unless the plaintiff could show that the delay was caused by an intentional violation of FOIA's timing requirements.

The Ninth Circuit has historically taken the more expansive approach to policy or practice. There, courts have more expressly allowed cases premised exclusively on an

[78] *Id.* at 95.
[79] *Id.* at 96.
[80] *See, e.g.*, State Department Chief Freedom of Information Act Officer Report Annual Report, U.S. DEP'T OF STATE 2-3 (MARCH 2016) (noting that the State Department directed significant resources away from processing FOIA requests to process "approximately 55,000 pages of former Secretary of State Hillary Rodham Clinton's emails").

established pattern of delay, without requiring plaintiffs to demonstrate a nefarious reason behind the delay. *Long v. U.S. Immigration and Revenue Service* provided a baseline, holding that "Congress did not intend for the IRS, or any other agency, to use the FOIA offensively to hinder the release of non-exempt documents."[81] In *Long*, the court reversed a denial of injunctive relief based on the fact that the plaintiffs had waited seventeen months to receive their records.[82] Although the delay there was considered intentional, which is rarely the case today, the court did not hinge its reasoning on this fact, and the case can be construed broadly to allow courts to focus largely on the likelihood of future harm when deciding whether to offer relief.

Courts have done just that—at least at the district court level. In 2015, the Northern District of California granted nonprofit *Our Children's Earth* a declaratory judgment that the Fisheries Service had a policy or practice of timing violations for all requests in the office.[83] The court made this decision based on widespread delay alone, relying on "a backlog of over 100 cases," which was "itself a red flag indicating the potential for FOIA compliance issues."[84] This was then "confirmed by . . . affidavits, briefs, FOIA response letters, and inconsistencies within . . . documentation."[85] As a result, the court focused its inquiry more on the backlog at the merits stage, rather than seeking a clear underlying policy causing that delay, although the underlying causes did come into play at the injunctive relief stage.

The Northern District again recognized a policy or practice in 2020 in *Nightingale v. U.S. Citizenship and Immigration Services*, granting declaratory and injunctive relief for a class of requesters impacted by delays in immigration file processing across ICE and USCIS offices.[86] The opinion in *Nightingale* focuses heavily on the timing violations themselves, finding an "'unmistakable history of failing to make timely determinations on [immigration file] FOIA requests."[87] The court placed charts outlining this history and increasing backlog within the opinion and also referenced a history of prior suits that had failed to alter the agency's practice.[88] Further, the court noted that the agency had failed to take steps to ask for increased resources to respond to predictable increases in requests.[89] The court contrasted these facts with FOIA's stringent statutory framework allowing only twenty days to respond and the serious impact of delayed disclosure to immigration cases.[90] Both *Nightingale* and *Our Children's Earth* quoted *Long* to explain their need to intervene, stating that "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses."[91] For *Nightingale*, this duty included an order to "adhere to FOIA timing requirements," to "eliminate the backlogs" within sixty days, and to file "quarterly compliance reports" with the court.[92]

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[81] Long v. U.S. I.R.S., 693 F.2d 907, 910 (9th Cir. 1982).
[82] *Id.*
[83] Our Children's Earth Found v. Nat'l Marine Fisheries Serv., No. 14-1130, 2015 WL 6331268, at *9 (N.D. Cal. Oct. 21, 2015).
[84] *Id.* at *8.
[85] *Id.*
[86] Nightingale v. U.S. Citizenship & Immigration Servs., 507 F. Supp. 3d 1193, 1213-14 (N.D. Cal. 2020).
[87] *Id.* at 1201-02.
[88] *Id.* at 1202-04.
[89] *Id.* at 1206.
[90] *Id.* at 1197-1202.
[91] *Id.* at 1211 (quoting *Long*, 693 F.2d at 910); Our Children's Earth Foundation v. National Marine Fisheries Serv., 85 F. Supp. 3d 1074, 1089 (Mar. 30, 2015).
[92] *Id.* at 1213-14.

The D.C. Circuit, in contrast to the Ninth Circuit, historically tended to cabin opportunities for delay-based claims, even though it recognizes policy and practice claims generally. Despite the broad language in *Payne*, D.C. district courts prior to 2018, set a high bar and often refused to recognize delay-based claims at all. Judges held that "delay alone, even repeated delay, was not the type of illegal policy or practice that is actionable under *Payne Enterprises*."[93] Trial courts often indicated that claims alleging "egregious, intentional agency conduct" were actionable while those based on "mere delay" were not.[94] Where plaintiffs could not point to a definite policy of intentionally disregarding FOIA's timing requirements, some judges would dismiss delay-based cases at the motion to dismiss stage for failure to state a claim outright.[95]

In 2018, the D.C. Circuit reversed this categorical bar in *Judicial Watch v. Department of Homeland Security*, holding that "informal agency conduct resulting in long delays in making requested non-exempt records available may serve as the basis for a policy or practice claim."[96] In *Judicial Watch*, the plaintiffs had filed multiple lawsuits regarding a number of FOIA requests that went unanswered past the statutory deadlines. Judicial Watch did not argue any that official policy or agency misconduct had caused these violations.[97] Rather, the organization alleged that the agency's policy or practice was to "violate[] FOIA's procedural requirements by regularly failing to either produce requested records or make a determination regarding their availability in accord with FOIA's timetables."[98] The court explained that *Payne* had already come to this conclusion when it noted that there "may very well be circumstances in which prolonged delay in making information available . . . require[s] judicial intervention."[99] After all, the court noted, "[i]t would be ironic if a policy or practice claim could be based on misapplication of a FOIA exemption . . . , but not on an agency's total disregard of the obligations mandated by Congress."[100] The Circuit Court remanded to the district court with instructions to determine whether the violations were caused by a "lack of due diligence" and how the agency "intends in the future to conform to FOIA's mandate to make requested non-exempt records 'promptly available.'"[101]

Post-*Judicial Watch*, plaintiffs in the D.C. Circuit can state a 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."[102] The D.C. Circuit requires two showings: first, a plaintiff must "allege a pattern of prolonged delay amounting to a persistent failure to adhere to FOIA's requirements," and second, they must allege "that the pattern of delay will interfere with its right under FOIA to promptly obtain non-exempt records

[93] Cause of Action Inst. v. Eggleston, 224 F. Supp. 3d 63, 72 (D.D.C. 2016); *see also* Del Monte Fresh Produce N.A. v. United States, 706 F. Supp. 2d 116, 120 (D.D.C. 2010) ("*Payne Enterprises* regards the repeated denial of [FOIA] requests based on the invocation of inapplicable statutory exemptions rather than delay of an action over which the agency had discretion.").
[94] Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec., No. 15–1983, 211 F. Supp. 3d 143, 147, 2016 WL 5660233, at *3 (D.D.C. Sept. 29, 2016).
[95] *Id.*
[96] Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec., 895 F.3d 770, 778 (D.C. Cir. 2018).
[97] *Id.* at 779.
[98] *Id.* at 774.
[99] *Id.* (quoting Payne Enterprises, Inc. v. United States, 837 F.2d 486, 491 (D.C. Cir. 1988)).
[100] *Id.* at 782.
[101] *Id.* at 783-84.
[102] *Id.* at 779-80.

from the agency in the future."[103] These standards are still not good tests because they are vague, and it is unclear what is necessary to meet them.

2. Common Sources of Doctrinal Confusion

As a general matter, it is not enough for a plaintiff to simply point to a few scattered instances of delay to establish an agency policy or practice. On the other hand, Plaintiffs need not point to an official policy behind the violation. Yet, for cases that fall between these two extremes, courts may reject claims for an inadequate showing without articulating what exactly would be required. Additionally, courts are inconsistent regarding what showing is required at each stage of litigation.

a) Surviving a Motion to Dismiss and the Motion for Summary Judgment

It is not uncommon for courts to scramble the standards for different stages of litigation when it comes to delay-based pattern or practice claims. Some of this confusion springs from the lack of definitive precedent. In the D.C. Circuit, for instance, courts have opposing interpretations of what *Judicial Watch* means for the motion to dismiss stage, and there remains no clear rule for how to evaluate the merits at the summary judgment stage. The Ninth Circuit similarly has a dearth of tidy tests. In the absence of clearly defined standards, courts often construct tests extrapolated from (but not firmly established by) the existing case law.

Judicial Watch established that, at the motion to dismiss stage, plaintiffs needed only point to a pattern of agency behavior that "could signal the agency has a policy or practice of ignoring FOIA's requirements.[104] Before *Judicial Watch*, a pattern of delay was not generally, on its own, enough to posit a policy or practice.[105] Since then, several D.C. district courts have properly recognized that *Judicial Watch* lowers the bar for surviving a motion to dismiss and allows for claims based on a pattern of delay.[106] Still, it can be hard to discern where exactly the bar landed. How many violations must a plaintiff show? And how similar must those violations—or the records they affect—be? One DC district court has stated that, even after *Judicial Watch*, plaintiffs cannot "rely on missed deadlines alone."[107] In that case, the court declared that a pattern of three missed deadlines was not enough to establish policy or practice where the plaintiff did not "consistently identify or describe the offensive practice."[108]

There is even less clarity in the doctrine on a motion for summary judgment. The D.C. Circuit affirmed the lack of a summary judgment standard in July 2025, holding that it did not

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[103] *Id.* at 780.
[104] *Id.*
[105] *See* Cause of Action Inst. v. Eggleston, 224 F. Supp. 3d 63, 72 (D.D.C. 2016) ("[D]elay alone, even repeated delay, is not the type of illegal policy or practice that is actionable.").
[106] *See, e.g.*, Frost Brown Todd LLC v. Center for Medicare and Medicaid Services, No. 21-2784, 2024 WL 450056 (D.D.C. Feb. 5, 2024) (denying a motion to dismiss a delay-based policy or practice claim because "this court is bound by *Judicial Watch*," and "the D.C. Circuit unequivocally concluded that in this circuit it is settled law that informal agency conduct resulting in long delays in making requested non-exempt records available may serve as the basis for a policy or practice claim") (cleaned up); Washington Lawyers' Committee for Civil Rights and Urban Affairs v. U.S. Department of Justice, No. CV 23-1328, 2024 WL 1050498, at *9 n.6 (D.D.C. Mar. 10, 2024), *aff'd*, 145 F.4th 63 (D.C. Cir. 2025) (noting that plaintiff's claim would survive a motion to dismiss because it "essentially mimics that filed in *Judicial Watch*").
[107] *See, e.g.*, American Center for Law & Justice v. Federal Bureau of Investigation, 470 F. Supp. 3d 1, 8 (D.D.C. 2020).
[108] *Id.*

need to "spell out here the precise legal standard because [Plaintiff's] legal theory fail[ed] regardless."[109] The court did create a window for the standard, finding that "good faith is *not enough* to entitle the government to summary judgment," but noting that an agency must be "delinquent or recalcitrant" and "staffing shortages and work overload do not by themselves necessarily render injunctive relief inappropriate."[110] The court there decided that a particular argument about the tracking scheme at the Bureau of Prisons was incorrect as a matter of law, meaning there was no underlying basis for the delay claim.[111] This reasoning exemplifies the vague policy or practice standard for the circuit, and even the appellate court found no need to convey it. It is only clear for now that the fact of delay itself is insufficient for passing a motion for summary judgment, even if it could get a plaintiff past a motion to dismiss—and sometimes to injunctive relief in the Ninth Circuit.

In the absence of a clear standard, the D.C. district courts invoke a variety of additional factors for delay-based claims. Judges continue to seek from plaintiffs some "fact or statement to establish *why*" agencies have missed deadlines "or *how* that failure [could be] the result of an either formal or informal [agency] policy or practice to violate FOIA's requirements."[112] This language appears to rely more heavily on the "policy" portion of policy or practice. For the same reason, courts have added a numerosity requirement, stating that "a small number of episodes" is not enough to raise "a reasonable inference that the agency subscribes to any policy or practice of violating the statute."[113] Regardless of number, courts also look to the "similarity of the underlying requests," although they recognize that there has never been a "single subject" or "single type of request" requirement per se.[114] Further, D.C. district courts are more sympathetic to agency budget constraints, saying that there can be no policy or practice from "an inevitable but unintended delay attributable to a lack of resources."[115] For all these reasons, it is very possible in D.C. courts for an agency to have delayed responses but be very far from a delay-based claim.[116]

As a result of these disparate tests in the two circuits that regularly hear policy or practice claims, other courts pull dicta from both circuits in a piecemeal manner, sometimes conflating the motion to dismiss with the motion for summary judgment standards. Rather than recognize any policy or practice claim outright, courts tend to dismiss claims on the facts, determining that they would not meet the standard for a policy or practice even if the circuit did decide to recognize the claim. The District of Colorado, for example, dismissed a delay-based claim relying on D.C. Circuit-like reasoning. The court found that the plaintiff did not allege either "any specific policy underpinning [the agency's] delays," or a series of delay from requests that were "sufficiently uniform, straightforward, or simple," so the "delayed responses" could not "by

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[109] *Washington Lawyers' Committee for Civil Rights and Urban Affairs*, 145 F.4th at 70.
[110] *Id.* (emphasis added and internal quotation marks omitted).
[111] *Id.* at 72.
[112] Dalal v. U.S. Department of Justice, No. CV 16-1040, 2024 WL 5505361, at *7 (D.D.C. Dec. 31, 2024) (quoting Roseberry-Andrews v. DHS, 299 F. Supp. 3d 9, 21 (D.D.C. 2018) (internal quotation marks omitted)).
[113] American Center for Law & Justice v. FBI, 470 F. Supp. 3d. 1, 8 (D.D.C. 2020) (rejecting policy or practice claim for three violations).
[114] *Id.*
[115] *Dalal*, 2024 WL 5505361, at *7 (quoting *Roseberry-Andrews*, 299 F. Supp. 3d at 21).
[116] *See, e.g.*, *id.* at *9 (holding that "Dalal has not come close to establishing a policy or practice of unlawful delay," despite the fact that the agency "was delayed in making determinations and in releasing records in response to some of his requests").

themselves, give rise to a plausible inference" of a policy or practice.[117] The District of Connecticut imported a requirement that delay be "wholly unjustified" or "unreasonable" in addition to "prolonged" to dismiss its own claim.[118] By contrast, the Western District of North Carolina allowed a delay-based claim to proceed past a motion to dismiss, relying primarily on analogies to *Judicial Watch*, which also citing both Second Circuit and Ninth Circuit caselaw.[119]

b) Winning on the Merits or Awarding Relief

Courts also tend to conflate the merits of a case with the relief question. In each policy or practice case, there is both a merits question as a matter of law *and* a separate relief inquiry. In *Payne*, the D.C. Circuit held as a matter of law that the plaintiff was entitled to declaratory relief, and it remanded for inquiry into the "propriety of injunctive relief" as well.[120] *Judicial Watch* referenced in dicta one standard for injunctive relief, asking whether the "agency's conduct . . . demonstrates a lack of due diligence and is so delinquent or recalcitrant as to warrant injunctive relief because ordinary remedies, such as a production order . . . would be inadequate to overcome an agency practice."[121] Because no courts in the D.C. Circuit have granted summary judgment—let alone injunctive relief—on a delay-based claim, the Ninth Circuit is the best demonstration of this confusion.

Courts in the Ninth Circuit have awarded both injunctive and declaratory relief. For injunctive relief, much like *Judicial Watch*, courts require some showing that there is a strong likelihood of the violation recurring. *Nightingale* had overwhelming evidence to demonstrate this, including a long history of pattern or practice lawsuits on the same issue in the Northern District of California with no resolution and a class already certified because "noncitizens nationwide experience significant delays" in these FOIA cases.[122] From this information, the court could grant injunctive relief, after a full analysis of "Defendant's Efforts to Increase Efficiencies" that nonetheless were not enough to reduce the delays.[123] *Our Children's Earth*, by contrast, ordered declaratory relief without injunctive relief because "several pieces of information suggest[ed] that insofar as there may have been a pattern-and-practice, it [was] being corrected."[124]

Even the Ninth Circuit has not always followed this analysis, conflating the factors for relief with those that go toward the merits. An unreported Ninth Circuit case affirmed a district court's grant of summary judgment to the agency in a short opinion reviewing only for abuse of discretion.[125] In the case, *Ecological Rights Foundation v. U.S. Environmental Protection Agency*, the court explained that the EPA had "acted in good faith and is taking concrete steps to reduce its FOIA backlog," which it considered enough to allow the district court to decline injunctive relief. The court also affirmed the denial of declaratory relief based on a more fact-

[117] Friends of Animals v. United States Bureau of Land Mgmt., No. 23-CV-00350-NYW-KAS, 2023 WL 10367406, at *4 (D. Colo. Nov. 8, 2023).
[118] Stroud v. Fed. Bureau of Prisons, No. 3:22-CV-00799, 2023 WL 4405657, at *10 (D. Conn. July 7, 2023).
[119] Thompson v. U.S. Just. Dep't, No. 1:23-CV-69, 2023 WL 5493591, at *4 (W.D.N.C. Aug. 24, 2023).
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[121] Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec., 895 F.3d 770, 783 (D.C. Cir. 2018).
[122] Nightingale v. U.S. Citizenship and Immigration Servs., 507 F. Supp. 3d 1193, 1196, 1200 (N.D. Cal. 2020).
[123] *Id.* at 1207-08.
[124] Our Children's Earth Found v. Nat'l Marine Fisheries Serv., No. 14-1130, 2015 WL 6331268, at *8 (N.D. Cal. Oct. 21, 2015).
[125] Ecological Rights Foundation v. U.S. Environmental Protection Agency, No. 22-15936, 2023 WL 4342100, at *4.

specific inquiry with similar logic, concluding that the lack of "deliberate[]" delay was enough to prevent the need for any equitable relief.[126] This finding departs from prior caselaw. *Our Children's Earth*, for example, had allowed a declaratory judgment for past conduct without a need for deliberate delay and regardless of the agency's improvements at that point. Much of the evidence the district court rejected in *Ecological Rights* also aligned with the evidence that was sufficient for the merits of summary judgment in *Nightingale*. The plaintiff pointed to multiple affidavits "detailing EPA's delays," the EPA's "backlog of 2,272 FOIA requests" which was about the same ratio as the year before.[127] *Nightingale* had similar evidence, and the court explained that arguments about good faith "confuse[s] whether the evidence supports a finding of a pattern or practice of FOIA violations with the basis for injunctive relief."[128] The *Ecological Rights* court nonetheless avoided finding for the plaintiff and instead looked to the continued progress and good faith demonstrated to eliminate the backlog in the future.[129]

A recent denial of summary judgment in the Southern District of New York also exemplifies this issue. In *Reclaim the Records v. United States Citizenship & Immigration Services*, the Southern District of New York denied summary judgment on a delay-based policy or practice claim based on a heavy reliance on the factors that more appropriately fit into the injunctive relief analysis.[130] The court fully recognized that the agency did not meet timing deadlines, but it determined that this practice just "reflects the quotidian reality of an agency contending with, and working through, a floor of FOIA requests that have crested anew each year."[131] As a result, the court this was "thus not a case of 'unexplained agency delay'" sufficient for summary judgment, because "the explanation for delay sounds in staffing and budgetary limitations, not recalcitrance or disobedience."[132]

The court in *Reclaim the Records* pulled here from the reasoning in *Judicial Watch*, but it was conflating injunctive relief and the merits to do so—in fact "recalcitrance and obedience" come directly from the injunctive relief portion of the opinion. Ironically, *Reclaim the Records* concerned USCIS, which is the same agency at issue in *Nightingale* where the court did award injunctive relief, but the court does not reference that case at all. This conflation allowed the agency past summary judgment despite clear violations. As both *Nightingale* and *Our Children's Earth* stated, even if "resources for FOIA compliance may be heavily taxed by the quantity and depth of FOIA requests (especially in light of budget constraints that limit personnel and resources assigned to an agency), that does not grant the agency carte blanche to repeatedly violate congressionally mandated deadlines."[133] Instead, courts have ruled that "it is incumbent on agencies to inform Congress of the additional resources needed to fully comply with the FOIA."[134]

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[126] *Id.*
[127] Ecological Rights Foundation v. U.S. Environmental Protection Agency, 607 F. Supp. 3d 979, 1005 (N.D. Cal. 2022).
[128] Nightingale v. U.S. Citizenship and Immigration Servs, 507 F. Supp. 3d 1193, 1204 (N.D. Cal. 2020).
[129] *Ecological Rights Foundation*, 607 F. Supp. at 1005.
[130] Reclaim the Recs. v. United States Citizenship & Immigr. Servs., No. 23 CIV. 1997 (PAE), 2025 WL 936924, at *9 (S.D.N.Y. Mar. 27, 2025).
[131] *Id.*
[132] *Id.*
[133] *Nightingale*, 507 F. Supp. 3d at 1198 (quoting Our Children's Earth Found v. Nat'l Marine Fisheries Serv., No. 14-1130, 2015 WL 6331268, at *8 (N.D. Cal. Oct. 21, 2015)).
[134] *Id.* (quoting Gilmore v. U.S. Dep't of Energy, 33 F. Supp. 2d 1184, 1188 (N.D. Cal. 1998).

B. Practical Issues

In addition to doctrinal difficulties, two primary practical issues make courts unwilling or unable to order relief for delay-based claims.

1. Deference to Agencies

The first practical issue is a common difficulty in litigating against the federal government—especially on a FOIA issue. John Brinkerhoff calls it "FOIA's common law," drawing on the concept of "administrative common law."[135] Brinkerhoff explains that this "policy-centered approach" allows judges to "evolve doctrine beyond (or around) statutory text," where they "justif[y] many of their interpretations by openly embracing prudential values such as 'common sense,' reasonableness,' 'a practical approach,' '[a] moment's reflection,' and an aversion to 'unnecessarily wooden' interpretations.'"[136] Within this scheme, he argues that judges apply FOIA exemptions in a deferential matter, tending to show an aversion to potentially infringing on agencies' discretion, despite the intention of FOIA more broadly to support a presumption *in favor of* disclosure.[137] Delay-based policy and practice holdings can be viewed as an extension of FOIA common law—despite clear statutory deadlines and congressional amendments reflecting their seriousness, along with facts demonstrating consistent violations, courts still use prudential reasoning to avoid holding agencies accountable. Doctrinally, the unwillingness to find a policy or practice violation in *Release the Records* is a good example of this, and so is the repeated invocation of new "plus" factors courts have begun to require beyond just delay.

The deference to agencies in FOIA cases is exacerbated in this context because delay-based policy and practice claims are functionally agency deadline litigation, an area of law also known for its deference to agencies. A broad variety of literature recounts the growth of administrative statutory deadlines in the 1970s and the litigation that followed.[138] Instead of demanding compliance with stringent court orders, judges instead regularly invoked their discretion in equitable relief to effectively extend noncompliance. Seminal D.C. Circuit deadline decisions demonstrated that regardless of what a statute may say, equitable discretion often will favor the agency.[139] This tendency aligns well with courts' hesitance to provide injunctive relief in the face of clear delay. It is both awkward as a separation of powers matter and also difficult to order relief when factually it seems like the agency cannot comply, and the court does not have all the information to suggest a solution.

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[135] Brinkerhoff Jr., *supra* note 3, at 615.
[136] *Id.*
[137] *Id.* at 612.
[138] The typical administrative law deadline claim is an Administrative Procedure Act (APA) claim that an agency has failed to promulgate a rule by the deadline established by statute. Here, a court can "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (2018). Research on the topic ranges from broad analysis of courts' decisions to enforce deadlines in the face of resource constraints to narrower applications to particular statutes. *See, e.g.*, Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 467 (2008); Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1384 (2011); Caitlin A. Bubar, *Improving Statutory Deadlines on Agency Action: Learning from the Sec's Missed Deadlines Under the Jobs Act*, 92 TEX. L. REV. 995, 1015 (2014) (deadline for rulemaking set for the Securities and Exchange Commission).
[139] *See, e.g.*, Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (announcing a six-part test to determine "whether the agency's delay is so egregious as to warrant mandamus").

2. Lack of Discovery

The second practical issue derives from the intersection of a classic FOIA practice and a recent agency litigation strategy. The classic FOIA practice is a lack of discovery. Generally, "discovery in individual FOIA cases is rare"[140] and it is "disfavored in mine-run FOIA cases."[141] This presumption makes policy or practice claims difficult because courts require some showing to prove discovery is necessary. Even where a D.C. district court acknowledged that there is a difference between a policy or practice claim and an exemption-based FOIA claim, the court held the plaintiff to a high standard and denied its motion for discovery.[142] Comparing exemption-based claims to policy or practice claims, the court determined that the agency's activities must "raise a sufficient question of bad faith on the part of the government . . . to warrant further exploration through discovery."[143] In the overall context (again, without discovery), the plaintiff only had evidence of significant delays, which the court considered to be insufficient to meet the bad faith showing. As a result, again in an example of FOIA common law, the court denied the discovery motion and granted the government's summary judgment one.

A recent agency litigation strategy to motion for both dismissal and summary judgment at the same time compounds this problem. In the case discussed above, plaintiffs had been in court three times: first the court dismissed its complaint without prejudice, then the court allowed its claim past the motion to dismiss on an amended complaint, and finally the court denied its request for discovery and ended the litigation altogether.[144] Rather than deal with these repeated motions over multiple years, the government has taken to skipping the motion to dismiss stage altogether The D.C. Circuit implicitly blessed this approach in the July 2025 decision, *Washington Lawyers' Committee for Civil Rights and Urban Affairs v. U.S. Department of Justice*.[145] The court noted that it has "yet to address whether the standard for discovery differs in a FOIA policy or practice case," but it decided that it would not reach the question because plaintiff's claim failed as a matter of law regardless.[146]

At the district court level, the lack of discovery continues to be very common. *Reclaim the Records* in the Southern District of New York is one recent example of this. The plaintiffs there did not move for discovery, instead choosing to cross move for summary judgment, opposing the agency's motion to dismiss or for summary judgment in the alternative.[147] As a result, the court bypassed the potential for the suit to at least survive a motion to dismiss.

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[140] Washington Lawyers' Committee for Civil Rights and Urban Affairs v. U.S. Dep't of Just., 145 F.4th 64, 73 (D.C. Cir. 2025) (quoting the district court's reasoning).
[141] American Center for Law & Justice v. U.S. Dep't of State, 289 F. Supp. 3d 81, 92 (D.D.C. 2018).
[142] *Id.* at 92.
[143] *Id.* at 92 (quoting Citizens for Responsibility & Ethics in Washington v. Dep't of Just., No. 05-2078, 2006 WL 1518964, at *2-3 (D.D.C. June 1, 2006).
[144] *See* Am. Ctr. for L. & Just. v. Dep't of State, 249 F. Supp. 3d 275, 286 (D.D.C. 2017) (*ACLJ I*, dismissing complaint without prejudice); Am. Ctr. for L. & Just. v. Dep't of State, 254 F. Supp. 3d 221, 227 (D.D.C. 2017) (*ACLJ II*, denying motion to dismiss amended complaint); Am. Ctr. for L. & Just. v. Dep't of State, 289 F. Supp. 3d 81, 93 (D.D.C. 2018) (*ACLJ III*, granting government's motion for summary judgment).
[145] *Washington Lawyers' Committee for Civil Rights and Urban Affairs*, 145 F.4th at 69 ("The Committee pleaded a valid claim that the Bureau maintained a policy or practice of violating FOIA, but more is needed to survive summary judgment.").
[146] *Id.* at 73.
[147] Reclaim the Recs. v. United States Citizenship & Immigr. Servs., No. 23 CIV. 1997 (PAE), 2025 WL 936924, at *1 (S.D.N.Y. Mar. 27, 2025).

Through this technique, agencies streamline the process, avoid any discovery issues, and provide an easy avenue for courts to shut down claims quickly.

As a result of these difficulties, often there is no recourse for claims against an agency with a predictably out of control backlog, and litigators face many difficulties trying to get claims past these barriers. We recount our experience and some solutions we found in the next section.

IV. *Scoville*: A Case Study of Delay-Based Policy and Practice Claims

In January 2021, the Media Freedom and Information Access Clinic at Yale Law School, filed a complaint in the Eastern District of Wisconsin on behalf of Professor Ryan Scoville, seeking relief from a years-long wait for responses to his FOIA requests to the Department of State.[148] As the complaint highlighted, "Professor Scoville [was] far from alone."[149] In addition to seeking responses to his own FOIA requests, Professor Scoville also made a delay-based policy or practice claim. The complaint alleged that "State systematically disregards its FOIA obligations — and therefore blocks effective public scrutiny — by regularly ignoring FOIA's timing requirements," and it sought an order "compel[ing] State to correct its policy or practice of impermissible delays."[150]

Many teams of law students and supervisors worked on *Scoville v. Department of State*, bringing it from claim generation to the motion for summary judgment and beyond. The authors joined the case during the discovery stage in 2024. Our experience litigating *Scoville* exposed us to the widespread confusion and difficult logic of policy or practice claims, but it also helped us formulate a coherent approach to synthesizing the doctrine and bringing delay-based claims. We hope outlining our process and arguments can help clarify these claims for litigants, agencies, and judicial staff alike.

A. Background on Our Case

Professor Scoville is a law professor at Marquette University Law School.[151] In his research on international law and foreign relations, he regularly requests documents from the State Department, and those requests had languished for years at the time of his complaint.[152] The State Department had a documented history of delayed responses to FOIA requests at the time of the complaint as well, including nearly 14,000 backlogged requests at the end of fiscal year 2020, and "at least 10,000 backlogged requests every year since 2013."[153]

The Clinic filed the case in the Eastern District of Wisconsin, where Professor Scoville resides.[154] This court is in the Seventh Circuit, which had not and still as of today has neither recognized nor prohibited policy or practice claims.[155] At least two district courts in the circuit,

[148] Complaint at 1, Scoville v. U.S. Dep't of State, No. 22-cv-91 (E.D. Wis. Jan 25, 2022).
[149] *Id.*
[150] *Id.* at 2.
[151] *Id.*
[152] *Id.* at 3, 6.
[153] *Id.* at 7.
[154] *Id.* at 2.
[155] *See* Libarov v. U.S. Immigration & Customs Enforcement, 138 F.4th 1010, 1017 (7th Cir. 2025) (Referencing prior Seventh Circuit cases where the court "left open the possibility that plaintiffs may obtain declaratory or other equitable relief from an agency's persistent FOIA violations," but deciding that was not the case on the facts at issue).

however, had recognized that policy and practice claims were possible.[156] On the whole, filing in a circuit beyond the D.C. or Ninth provided a relative blank slate to allow a judge to approach policy or practice claims without binding precedent forcing a certain standard. The case was assigned to Magistrate Judge Nancy Joseph.

In October 2022, Magistrate Judge Nancy Joseph denied the State Department's partial motion to dismiss the suit for failure to state a claim on the policy or practice issue.[157] The decision demonstrates how Professor Scoville adequately alleged each step in a policy or practice suit. The court does not expressly address standing, but it can be implied from the reasoning. Professor Scoville is a repeat FOIA requester to State who intends to make more requests in the future, so he "reasonably expects that he will continue to experience unreasonable, unexcused delays with future FOIA requests."[158] On the merits, the court synthesized *Judicial Watch*, *Payne*, and *American Center for Law and Justice v. FBI* to hold that "delay or backlog, in and of itself" could not be "sufficient to state a policy or practice claim."[159] Instead, the court required that a plaintiff "plead *some* specific facts that indicate that the agency's FOIA violation was not an isolated event but indicates a pattern or practice of violating FOIA."[160] The court listed a number of ways to plead this, such as evidence of being "subjected to a FOIA violation more than once" or "provid[ing] the court with affidavits of people similarly situated to the plaintiff who were also harmed by the pattern or practice."[161] For Professor Scoville, the court determined that the first option was met—he had "submitted FOIA requests to the State in April 2014, March 2016, October 2016, February 2018, March 2020, and August 2021, and the State has failed to comply with FOIA for each request without proper excuse."[162]

The holding on standing allowed Professor Scoville to proceed to discovery on his policy or practice claim. This fact in itself is unusual and likely a benefit of litigating in the Eastern District of Wisconsin, rather than D.D.C., where discovery is less common. Discovery was long, extending from October 2022 until the motion for summary judgment was filed, in February 2025. The discovery process was also notable in that it included depositions of two senior leaders in FOIA processing at the State Department.

Several useful facts emerged from discovery. Perhaps most centrally, we were able to examine the State Department's backlog reduction plan, which had been instituted in 2020 in response to a Government Accountability Office request.[163] The backlog was supposedly calculated to eliminate the department's backlog by 2027, yet, in the five years since the plan

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[156] *See* Scoville v. U.S. Department of State, No. 22-CV-91, 2022 WL 3601596, at *1 (E.D. Wis. Aug. 23, 2022) ("[S]everal district courts in this circuit have acknowledged the viability of such claims under the court's broad equitable power to enforce FOIA.); *see also* LAF v. Dep't of Veterans Affairs, No. 17-C-5035, 2018 WL 3148109 (N.D. Ill. June 27, 2018); Evans v. U.S. Dep't of Interior, 125 F. Supp. 3d 799, 833 (N.D. Ind. 2015). Another district court also considered but rejected a policy or practice claim from a pro se plaintiff. *See* O'Neill v. United States Dep't of Just. Exec. Off. for United States Att'ys, No. 18-CV-396, 2020 WL 905869, at *8 (W.D. Wis. Feb. 25, 2020).

[157] Scoville v. U.S. Department of State, No. 22-CV-91, 2022 WL 3601596, at *1 (E.D. Wis. Aug. 23, 2022) (Order denying government's motion to dismiss the policy or practice claim).

[158] *Id.* at *8.

[159] *Id.* at *7.

[160] *Id.*

[161] *Id.*

[162] *Id.* at *8.

[163] *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment on Claim Three at 28, Scoville v. U.S. Dep't of State, No. 22-cv-91 (E.D. Wis. Feb. 18, 2025) [hereinafter Scoville Motion for Summary Judgment].

[163] *Id.*

was instituted and our motion for summary judgment was filed, the backlog had ballooned by approximately 10,000 requests.[164] The reasons for this failure were clear in the plan: the department had based its calculations on an estimate that State would receive 8,100 new requests every year. This was despite the fact that the average number of requests in the previous two years had already exceeded 8,100 and the number had been steadily rising for many years. We confirmed in depositions that the Department knew about this steady rate, that these numbers had received no formal assessment before the plan was implemented, and that the plan had not been adjusted even in the face of its clear failure to reduce the agency's backlog.[165] To us, the agency's fatally flawed backlog reduction plan was evidence that state had disregarded any ambition to come into compliance with FOIA's timing requirements by reduce its backlog. In our motion for summary judgment, we identified the plan as evidence that the Departments delays were indeed tied to an identifiable policy or practice on the part of State.

Another interesting fact that emerged from discovery was that in 2017 the State Department undertook a project it called the "FOIA Surge."[166] During the Surge, State dedicated significant financial and personnel resources to clearing its FOIA backlog. For as long as it lasted (about a year) the Surge was successful—the department significantly increased its processing rate and ultimately achieved a 40% reduction in its backlog. Rather than continuing this success, State ended the Surge and the backlog began to swell again. We used the Surge to demonstrate that State could, when it wished, implement effective policies to better comply with FOIA.[167] Instead, as in *Nightingale*, the agency had relied on "a patchwork of short-term fixes" that had no hope of achieving long-term, sustainable compliance.[168]

B. Defining a Delay-Based Policy or Practice Claim

We defined the standard for delay-based policy and practice claims through "the three Ps"—an agency has a pattern or practice of violating FOIA's timing requirements if delays are *prolonged*, *persistent*, and *pervasive*.[169] This approach synthesizes prior successful delay-based claims. A delay is prolonged where it "fall[s] outside the bounds of FOIA's timing requirements," persistent where it is "not a fluke or temporary circumstances but . . . rather part of an established track record of timing violations," and pervasive where the violations are "common across multiple requesters."[170]

We chose this approach for a variety of reasons. It provides a clear test beyond the more general principle of recurring violations, and it does so in a delay-specific way. This rule allows courts to compare claims to a more detailed standard, which is also a synthesis of successful cases across circuits. The prolonged element derives directly from *Payne*'s recognition of a cause of action for "prolonged delay in making information available," and the D.C. Circuit cited the

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[164] *Id.*
[165] Plaintiff Ryan Scoville's Statement of Proposed Material Facts in Support of Motion for Summary Judgment, at 34, 36-37, Scoville v. U.S. Dep't of State, No. 22-cv-91 (E.D. Wis. Feb. 18, 2025) [hereinafter Scoville Statement of Proposed Material Fact].
[166] Scoville Motion for Summary Judgment, *supra* note 163, at 30.
[167] *Id.* at 31 (citing S. Yuba River Citizens League, 2008 WL 2523819, at * 13 ("An agency always has the manpower and power to do what it believes must be done.")).
[168] *Id.* at 30 (citing Nightingale v. U.S. Citizenship and Immigration Services, 507 F. Supp. 3d 1193, 1206 (N.D. Cal. 2020)).
[169] *See* Scoville Motion for Summary Judgment, *supra* note 163, at 15.
[170] *Id.*

term twelve times in *Judicial Watch*.[171] The fact that delays are prolonged underlines the magnitude of the plaintiff's injury and the need for relief. Persistence also comes from the phrasing in *Judicial Watch*, which requires a "persistent failure to adhere to FOIA's requirements" to state a claim.[172] *Nightingale* too referenced the agency's "persistent failures" to respond to requests in a timely manner.[173] Persistence ensures that a plaintiff cannot rely on anomalous backlog or individual delay in isolation, but instead these delays must occur over time, including often some indications that this delay will continue. Pervasiveness accounts for court's recent concern about "similarity of underlying requests," numerosity, and "single subject" requirements.[174] For an overall delay claim like *Scoville* or *Our Children's Earth*, the evidentiary support can be across the agency, but it does need to account for a representative quantity to ensure that the delay is not isolated. Pervasiveness can also be used to distinguish cases based on widespread, backlog-caused delays from those such as *American Center for Law and Justice v. FBI*, in which the plaintiff unsuccessfully alleged a policy or practice based on three requests of different types that the agency treated in different ways.

To establish all three factors, we drew from the plaintiff's own experiences, the experiences of other requesters such as scholars and reporters as recounted in affidavits for this case, and State's own data. A litigant unable to get discovery could conduct similar research by examining agency annual FOIA reports and collecting affidavits to represent experiences beyond the plaintiff's alone.

C. Seeking Injunctive Relief

Importantly, the three Ps are a test for the merits of the claim, whether there is a policy or practice of delay, but there is an additional, separate standard for injunctive relief. As we explained in our motion for summary judgment, injunctive relief is appropriate when there is "some cognizable danger of recurrent violation, something more than a mere possibility," since "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses."[175] The test for this is generally agreed upon: courts look to "(1) character of past violations, (2) *bona fides* of attempts to remedy the violation, and (3) public impact of the FOIA violations."[176]

The novel aspect of our injunctive relief argument was the way we framed the evidence proving that there will be recurring noncompliance. To make sense of delay-based claims, the fact that there is a policy or practice of delay goes entirely to the merits "three Ps" analysis. The agency's attempts to remedy these violations or claims regarding future policies go toward injunctive relief. Otherwise, as the court referenced in *Nightingale*, a court is confusing "whether the evidence supports a finding of a pattern or practice of FOIA violations with the basis for injunctive relief."[177] Many of the additional factors courts have added to undermine delay-based policy or practice claims similarly go towards injunctive relief. These include arguments that an

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[171] Payne Enterprises, Inc. v. United States, 837 F.2d 486, 491 (D.C. Cir. 1988); Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec., 895 F.3d 770, 776-84 (D.C. Cir. 2018).
[172] *Judicial Watch*, 895 F.3d at 780.
[173] Nightingale v. U.S. Citizenship & Immigration Servs., 507 F. Supp. 3d 1193, 1200-01 (N.D. Cal. 2020).
[174] *See e.g.*, American Center for Law & Justice v. FBI, 470 F. Supp. 3d. 1, 8 (D.D.C. 2020) (rejecting policy or practice claim for three violations).
[175] Scoville Motion for Summary Judgment, *supra* note 163, at 18-19 (citing *Nightingale*, 507 F. Supp. 3d at 1211).
[176] *Id.* at 19 (citing *Judicial Watch*, 895 F.3d at 780; *Nightingale*, 507 F. Supp. 3d at 1208-11.
[177] Nightingale v. U.S. Citizenship and Immigration Servs, 507 F. Supp. 3d 1193, 1204 (N.D. Cal. 2020).

agency is working "diligently," that the violations are not "unexplained," or that there is bad faith.

The State Department's failures provide a strong example of this. Not only did they have a prolonged, persistent, and pervasive delay, but they also were operating under a Backlog Reduction Plan that provided no indication of an intention to exit this status.[178] Even without an indication of bad faith, the State Department had previously implemented an effective program like the Surge to remedy prior violations, but it ultimately abandoned it with no immediate replacement.[179] And despite bona fide concerns about resource constrains, the Department provided no evidence of attempts to secure the resources necessary to address these issues in the future.[180] These circumstances left the State Department in its own death spiral, too slow to respond to a case before the statutory deadline, thus leading to increases in FOIA litigation and court orders to produce documents, which in turns require the prioritization of litigation cases, leading to more delays and more litigation.[181] All these events together, paired with the high public interest in receiving documents from a cabinet-level office such as State, indicate that injunctive relief is necessary and appropriate to remedy the FOIA violation.

V. Conclusion

To prepare our draft of the motion for summary judgment in *Scoville*, our clinical supervisors asked us to bring to the next meeting a summary of the elements for a policy or practice claim. Typically, one can find the elements for a claim very quickly, often searching a statute or pulling standards from case law. Instead, we came to the meeting with a series of disparate court decisions, a few quotes, and nothing approaching a defined set of factors. It took us many hours of scribbling on blackboards to deconstruct and synthesize the doctrine in order to make legal sense of concepts such as "mere delay"[182] or a "likelihood of recurrence."[183] The ultimate result of all our research and puzzling was what we believe is a sensible approach to delay-based policy or practice claims—one that we hope will clarify the doctrine for others and inspire confidence in the potential of delay-based claims.

Courts have long held that "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and courts have a duty to prevent these abuses."[184] Pattern or practice claims provide a means to tap into the broad equitable power of the judicial branch and ensure that FOIA provides meaningful transparency for years to come.

[178] *Id.* at 28.
[179] *Id.* at 30.
[180] *Id.* at 31.
[181] *See id.* at 33.
[182] Judicial Watch, Inc. v. U.S. Dep't of Homeland Security, 895 F.3d 770, 783 (D.C. Cir. 2018).
[183] Long v. U.S. Internal Revenue Service, 693 F.2d 907, 909 (9th Cir. 1982).
[184] *Id.* at 910.