UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAI, PLAINTIFF, vs. TRANSPORTATION SECURITY ADMINISTRATION, DEFENDANT.	)	Case No. 14-cv-403 (ESH)

MOTION TO STRIKE COMPLAINT AND TO DISMISS IN PART

Defendant, by and through undersigned counsel, moves pursuant to Rules 8, 12(b)(6) and 12(f) of the Federal Rule of Civil Procedure to strike the Complaint in this action and to dismiss in part. The grounds for this motion are set forth more fully in the accompanying memorandum. A proposed order is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE AND TO DISMISS IN PART

Pursuant to Rule 8(a) in conjunction with Rule 12(f) of the Federal Rules of Civil Procedure, Defendant Transportation Security Administration ("TSA"), by and through undersigned counsel, moves the Court to strike the Complaint because it is unnecessarily voluminous and most of the 241 paragraphs in the Complaint are redundant, argumentative, assert legal conclusions, and/or otherwise pertain to matters that fall outside the narrow issues presented in an action for the release of records under the Freedom of Information Act ("FOIA") and/or Privacy Act.

In addition, Defendant moves to dismiss any claim asserted in the Complaint based on an alleged FOIA request dated November 23, 2013, on the basis that the alleged request was not a new FOIA request but redundant of prior requests seeking the same information. Accordingly, TSA properly did not treat the November 23, 2013 "request" as a FOIA request and any claim based on that alleged request should be dismissed.

For the foregoing reasons, the Complaint should be stricken and Plaintiff afforded a designated period of time to file an amended Complaint that complies with Rule 8(a), omits the

extraneous matters identified herein, and that is otherwise consistent with any prior order of the Court, as well as any order dismissing any claims as requested herein.

INTRODUCTION

The Complaint asserts claims against TSA based on four requests made under FOIA and/or the Privacy Act to TSA between February and March of 2013.[1] Two of the requests relate to specific incidents involving Plaintiff that Plaintiff alleges occurred between December 2010 and January 2013 at TSA checkpoints at three different airports. (Compl. ¶ 44, 61) The third request seeks a copy of any contract or agreement with other agencies regarding surveillance footage at a particular airport. (*Id*. ¶ 54) The fourth request seeks a voluminous amount of material regarding TSA policies and procedures. (*Id.* ¶ 64.)

Despite the narrow issues presented by this action, the Complaint is over 30 pages long and consists of 241 paragraphs. Many of the paragraphs in the Complaint are argumentative, assert legal conclusions, are redundant of prior allegations, and/or otherwise pertain to matters that go beyond the narrow issues that may be presented in this action. The Court should strike these allegations under Rule 12(f) because they do not comply with the requirement in Rule 8(a) that the Complaint consist of "a short and plain statement of the claim" and otherwise involve "redundant" and "immaterial" matters.

The Complaint also references what Plaintiff contends was a "FOIA" request dated November 23, 2013. (Compl. ¶¶ 95, 115.) By this allegation, Plaintiff is referring to an email dated November 23, 2013 that he has attached to other filings in this matter and which, therefore, is now a matter of record in this case. (ECF No. 28-3, at Page 11 of 14.) That email was not

[1] One of the requests referenced in the Complaint (Request No. 13-375) was closed and then later re-opened under a new number (Request No. 13-414). (Compl. ¶ 53) Accordingly, Request Nos. 13-375 and Request No. 13-414 are the same requests.

treated as a new FOIA request by TSA. The portion of that email directed to the FOIA office seeks the same information sought by Plaintiff in two of his prior requests. (*Id.*) Indeed, Plaintiff acknowledges in his Complaint that the November 2013 email "clearly incorporated and reiterated the contents of Sai's previous requests" (Compl. ¶ 115) and TSA responded to the November 23 email, not by assigning it a new request number, but by stating that it was looking into the status of Plaintiff's "open requests." (ECF No. 28-3 at Page 12 of 14.) Thus, TSA did not treat that aspect of the November 2013 email as a new FOIA request and it was not entered in TSA's FOIA system as a new request.

The remainder of the November 23, 2013 email is not a FOIA request and is expressly not directed to the FOIA office. To the contrary, the remaining portion of the email is expressly directed to a different office within TSA (the office that handles civil rights complaints) and is seeking from that office an administrative response to Plaintiff's grievance filed under the Rehabilitation Act. That portion of the email states in relevant part:

> Dear TSA ODPO, External Compliance, & CRL divisions --
>
> You have repeatedly exceeded *all* of your statutorily mandated response times under the ADA, Rehabilitation Act, and under your own 180--day formal resolution deadline (which was itself 4 months late in being initiated). You have said that you have in fact written a response, but you have so far refused to release it to me, despite having plainly admitted fault on national TV months ago.
> At this point I have unquestionably exhausted all administrative remedies and am entitled to immediately file suit against you without any further delay or administrative appeal.

(ECF No. 28-3, at Page 11 of 14). Thus, this request is made under the "ADA" and "Rehabilitation Act" and seeks an administrative response to Plaintiff's claims under those statutes. It is not a FOIA request.

Since the filing of the Complaint, Plaintiff has filed numerous motions, including as to certain relief requested in the Complaint. These motions have been denied. Among other things, the Court has denied Plaintiff's motion for preliminary injunction, Plaintiff's motion to expedite, and Plaintiff's motion for leave to amend to add additional claims and to add two additional parties (the Massachusetts Port Authority ("Massport") and the Capital Region Airport Commission ("CRAC")). (ECF Nos. 35, 42, 49) The Court also has denied Plaintiff's motions for sanctions and motions to compel discovery responses. (ECF Nos. 45, 43, 44, 48) On the issue of discovery, moreover, the Court has granted Defendant's motion for a protective order to preclude discovery in this action absent a Court order. (ECF No. 43)

The Court previously stayed Defendant's obligation to answer or otherwise respond to the Complaint pending a decision on Plaintiff's motion for leave to amend. In its order denying the motion for leave to amend, the Court ordered the Defendant to respond to the Complaint on or before August 11, 2014.

ARGUMENT

I. The Court Should Strike the Complaint With Leave for Plaintiff to File an Amended Complaint that Complies with Rule 8 and Omits Extraneous Matters.

The District Court has the discretion to strike "from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Pro. 12(f). Rule 12(f), moreover, is "not only the appropriate remedy" for striking such extraneous matters, but "'also is designed to reinforce the requirement in Rule 8(e) that pleadings be simple, concise, and direct.'" *In re Merrill Lynch & Co., Inc. Research Reports Sec. Lit.*, 218 F.R.D. 76, 78 (S.D.N.Y. 2003) (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1380 (2d ed. 1990)).

A motion to strike is an appropriate response to a complaint when, as here, the complaint is "'neither short nor plain,' but rather a 'repetitive discursive and argumentative account of the alleged wrongs suffered by the plaintiff.'" *Ciralsky v. CIA*, 355 F.3d 661, 669 (D.C. Cir. 2004). In *Ciralsky*, the D.C. Circuit held that the District Court acted within its "considerable discretion" in striking a complaint not once, but twice, for failing to comply with the "short and plain statement" requirement of Rule 8. "As the initial complaint weighed in at 119 pages and 367 numbered paragraphs," the Court observed that the striking of that complaint "was hardly a harsh judgment." *Id.* The Court also commented approvingly on the District Court's "disposition: the court did not dismiss the case, but rather gave the plaintiff 21 days to 'eliminate[]' the 'excess' and to file an amended complaint 'that complies with Rule 8(a)(2)." *Id.*

The Court also approved of the District Court's disposition regarding the amended complaint that was filed after the original complaint had been stricken. The amended complaint still consisted of 61 pages and 105 paragraphs and thus was found by the District Court to still violate Rule 8. The Court found that the District Court had "reasonable grounds" to dismiss the case without prejudice because the amended complaint remained "'prolix and burdened with a bloated mass of unnecessary detail.'" *Id.* The Court observed that an unnecessarily voluminous complaint "is more than simply a matter of aesthetics" because "'unnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it.'" *Id.*

Other courts have granted motions to strike under similar circumstances while affording the plaintiff a designated amount of time to file an amended pleading conforming with Rule 8. *See, e.g., In re Merrill Lynch*, 218 F.R.D. at 79 (striking portions of complaint that spans 98 pages and contains 367 separate paragraphs); *Boyajian v. Town of Plainville*, 2011 U.S. Dist.

LEXIS 14168, at *3-5 (D. Conn. Feb. 14, 2011) (striking complaint, with leave to re-file an amended complaint conforming with Rule 8, based on redundant, immaterial and confusing allegations); *Phan v. Best Foods International Inc.*, 2014 U.S. Dist. LEXIS 104192, at *25 (N.D. Cal. July 29, 2014) (striking complaint, with leave to re-file an amended complaint that "omits all failed claims and irrelevant allegations"); *Witherspoon v. Philip Morris*, 964 F. Supp. 455, 468 (D.D.C. 1997) (striking portions of complaint, with leave to file amended pleading, that are "unnecessarily voluminous"); *Ausherman v. Stump*, 643 F.2d 715, 716 (10th Cir. 1981) (holding that a plaintiff's "rambling narration" constituted a violation of Federal Rule of Civil Procedure Rule 8(a)).

The same result should apply here. As reflected on the addendum that is attached as an exhibit to this motion,[2] numerous paragraphs in the Complaint have no bearing on the narrow issues presented in a FOIA and/or Privacy Act suit for the release of records. Several paragraphs consist of conclusions of law or amount to argument rather than allegations of relevant facts. Numerous paragraphs are redundant of previously asserted paragraphs. Certain paragraphs assert allegations regarding the conduct of state entities which this Court has found, in its decision denying Plaintiff's motion for leave amend (ECF No. 49), are not proper parties in this FOIA action. Other paragraphs pertain to Plaintiff's distinct claim under the Rehabilitation Act which is not at issue in this action. Still other paragraphs pertain to matters that already have been the subject of previously filed motions in this case (such as, for instance, a motion to expedite or to compel discovery) and adjudicated adversely to Plaintiff.

[2] The attached addendum is intended to be illustrative of the extensive amount of immaterial and/or redundant matters alleged in the Complaint. It is not intended to be an exhaustive list of all immaterial or redundant matters, or other pleading defects, and Defendant reserves the right to raise other issues – both as to the specific paragraphs listed in the addendum as well as to allegations in other paragraphs of the Complaint – at an appropriate time, including in response to any amended pleading that may be filed.

Plaintiff also alleges an entitlement to monetary damages under the Privacy Act when those damages are not available under the provision of the Privacy Act applicable to this action. (*E.g.*, Compl. ¶¶ 2, 203, 237). A request by an individual for records about himself is made pursuant to section (d)(1) of the Privacy Act, 5 U.S.C. § 552a(d)(1). When an agency refuses to comply with a request made under that section, the Privacy Act affords the individual a cause of action against the agency, 5 U.S.C. § 552a(g)(1)(B), and, in such a case, "the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him." 5 U.S.C. § 552a(g)(3)(A) (referring to the relief available in any suit brought under the provisions of subsection (g)(1)(B)).

The provisions of the Privacy Act providing for actual damages (including the $1,000 statutory minimum) pertain to suits brought under a different provision of the Privacy Act, 5 U.S.C. § 552a(g)(4)(A) (referring to subsection (g)(1)(C) or (D)), that are not applicable here. *See, e.g., Thurston v. U.S.*, 810 F.2d 438, 447 (4th Cir. 1987) ("The privacy act allows for actual damages or minimum statutory damages of $1000.00 in suits brought under subsection (g)(1)(C) or (D) if the court determines that the agency acted intentionally or willfully. . . . The privacy act does not provide for statutory damages in the type of suit Thurston brought, a suit under subsection (g)(1)(B)" alleging "that the Postal Service failed to honor her request to see her records.")

Similarly, Plaintiff seeks to recover his "attorneys' fees" in this action. (*E.g.*, Compl. ¶ 141, 193, 236) However, Plaintiff is not an attorney (*id.* ¶ 6) and is proceeding *pro se*. *See, e.g., Benavides v. BOP*, 993 F.2d 257, 258-60 (D.C. Cir. 1993) ("Non-attorney pro se litigants may not recover attorney's fees under the Freedom of Information Act.")

Finally, to the extent Plaintiff is challenging whether information that has been withheld constitutes Sensitive Security Information ("SSI") – *see, e.g.,* Compl. ¶¶ 50, 86, 116, 118 – this Court lacks jurisdiction to adjudicate that issue. *See* 49 U.S.C. § 46110(a) (designation of SSI reviewable only in Court of Appeals); *see also Robinson v. Napolitano, et al*., 689 F.3d 888 (8th Cir. 2012); *MacLean v. DHS*, 543 F.3d 1145 (9th Cir. 2008); *Chowdhury v. Northwest Airlines Corp*., 226 F.R.D. 608, 614 (N.D. Cal. 2004). All such allegations, therefore, should be stricken for this additional reason.

Accordingly, the Complaint should be stricken because it is unnecessarily voluminous and is riddled with immaterial and redundant allegations. The Court, moreover, should afford Plaintiff a designated period of time to file an amended pleading that conforms with Rule 8, omits all redundant and immaterial matters, and otherwise conforms to the Court's prior rulings as well as any ruling dismissing any claims as requested herein.

II. Any Claim Regarding The Alleged November 23, 2013 FOIA Request Should Be Dismissed.

A Rule 12(b)(6) motion tests the legal sufficiency of a complaint. In ruling on a motion to dismiss, the Court "must construe the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations." *Jovanovic v. US-Algeria Bus. Council*, 561 F. Supp. 2d 103, 110 (D.D.C. 2008). However, the Court may consider, in addition to the facts alleged in the complaint, documents either attached to, or incorporated into the complaint by reference, as well as matters of which it may take judicial notice. *See E.E.O.C. v. St. Francis Xavier Parochial Sch.,* 117 F.3d 621, 624-25 (D.C. Cir. 1997); *see also Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182, 186 (D.D.C. 2001) ("[T]he court may consider the defendants supplementary material without converting the motion to dismiss into one for summary judgment. This Court has held that where a document is

referred to in the complaint and is central to the plaintiff's claims, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment.")

Plaintiff attempts to assert a claim based on an email dated November 23, 2013 that he characterizes as a FOIA request. (Compl. ¶ 95) Plaintiff contends that TSA "failed to give Sai a case number for the 2013-11-23 request," that the"10 calendar day deadline elapsed [for TSA] to respond to Sai's 2013-11-23 expedited processing request" and TSA "improperly responded and/or failed to timely respond" to that alleged request (*id.* ¶ 97, 98, 113).

The alleged November 23, 2013 "request" was, in fact, an email that Sai acknowledges in his Complaint "clearly incorporated and reiterated the contents of Sai's previous requests." (Compl. ¶ 115) While the email also allegedly requested the "unreleased Rehabilitation Act responses" (*id.*), that aspect of the email was not directed to the FOIA office, but to the office within TSA that handles Rehabilitation Act claims. (ECF No. 28-3, at Page 11 of 14.) To the extent the email could otherwise be interpreted as requesting "all records held by TSA about Sai" as alleged in the Complaint (Compl. ¶ 115), such a request would be improper. *See, e.g.*, *McKinley v. FDIC,* 807 F. Supp. 2d 1, 6-7 (D.D.C. 2011) (request asking for "any information available" is "analogous to requests for records that relate 'in any way' to a person or event, which courts have repeatedly found to be overly broad and unreasonable"); *Latham v. U.S. Dep't of Justice*, 658 F. Supp. 2d 155, 161 (D.D.C. 2009) (plaintiff's request for records pertaining 'in any form or sort' to plaintiff was overly broad and burdensome and was "not a proper FOIA request").

The email also did not comply with 6 C.F.R. § 5.21(d), which provides that "when you make a request for access to records about yourself, you must verify your identity. You must

state your full name, current address, and date and place of birth. You must sign your request and your signature must either be notarized or submitted by you under 28 U.S.C. 1746 . . . ." The referenced provision, 28 U.S.C. § 1746, requires that unsworn declarations under penalty of perjury be properly executed with a signature. Accordingly, the email which lacks an actual signature does not constitute a proper FOIA request for this additional reason. (ECF No. 49, Mem. Op. at 7) ("[s]ubmission of a request via e-mail, without an attached declaration satisfying 28 U.S.C. § 1746, is insufficient under the regulation" and "any claims related to those requests are subject to dismissal for failure to exhaust administrative remedies").

Although not attached to the Complaint, the November 23, 2013 email is incorporated by reference in the Complaint and is a matter of record in this action of which this Court can take judicial notice. *See, e.g., Ward v. D.C. Dep't of Youth Rehab. Servs.,* 768 F. Supp. 2d 117, 119 (D.D.C. 2011) ("In deciding a motion brought under Rule 12(b)(6), a court . . . may consider . . . 'the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint,' . . . or 'documents 'upon which the plaintiff's complaint necessarily relies' even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss'") (citations omitted); *Western Wood Preservers Inst. v. McHugh,* 2013 U.S. Dist. LEXIS 102186, at *12-13 (D.D.C. July 22, 2013) (same).

Because this email "clearly incorporated and reiterated the contents of Sai's previous requests" (Compl. ¶115), that email was not treated as a new FOIA request by TSA and, as Sai acknowledges in his Complaint, was not assigned a FOIA request number (*id.* ¶ 97). TSA responded to the November 23 email, not by assigning it a new request number, but by stating that it was looking into the status of Plaintiff's "open requests." (ECF No. 28-3 at Page 12 of 14.) Thus, TSA properly did not treat that aspect of the November 2013 email as a new FOIA

request and it was not entered in TSA's FOIA system as a new request. Accordingly, because the November 23, 2013 email does not constitute a distinct FOIA request, any claim asserted in the Complaint based on that email should be dismissed.

Thus, to the extent the Court strikes the Complaint and affords Plaintiff leave to amend, any amended pleading should be limited to the four FOIA requests referenced (by FOIA request number) in paragraph 105 of the Complaint, and not include any claim based on the alleged November 23, 2013 request.

CONCLUSION

For the foregoing reasons, Defendant's motion to strike and dismiss in part should be granted.

Respectfully submitted,

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