UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al. **Plaintiffs,** **v.** **UNITED STATES HOUSING AND URBAN DEVELOPMENT,** **Defendant.**	)	**Case No. 18-cv-0114 (KBJ)**

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant United States Housing and Urban Development ("HUD"), by and through undersigned counsel, replies as follows to the opposition filed by Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Freedom From Religion Foundation ("FFRF").

As explained in Defendant's motion, the Complaint asserts four counts under the Freedom of Information Act ("FOIA"), all of which pertain in some respect to HUD's denial of Plaintiffs' requests for a fee waiver. None of the counts asserts that HUD has improperly withheld documents under FOIA or failed to conduct an adequate search for records under FOIA and none seeks to compel the production of records under FOIA. Instead, the claims asserted in the Complaint are narrowly focused on the fee waiver issue. It is in that narrow context that Defendant's motion to dismiss should be evaluated.

I. Counts II-IV Are Moot.

Counts II-III assert a claim only for the improper denial of Plaintiffs' fee waiver requests and Count IV asserts that the denial of CREW's request for media status was improper. However, after the filing of this lawsuit, HUD notified Plaintiffs that no fees would be charged for the processing of the underlying FOIA requests that are the subject of those counts. Accordingly, there is no case or controversy for the Court to resolve on the fee waiver issue or the related question of media requester status and those counts should be dismissed as moot. *Hall v. CIA,* 437 F.3d 94, 99 (D.C. Cir. 2006); *Houser v. Church,* 271 F. Supp. 3d 197, 204 (D.D.C. 2017) (dismissing as moot denial of fee waiver count based on *Hall*).

Plaintiffs' arguments to the contrary fail to acknowledge the limited nature of their claims. Plaintiffs first contend that HUD's "stated intention" not to charge fees is insufficient to moot these counts because Plaintiffs have not yet obtained all requested documents. (Opp. 19) Whether or not HUD has produced all responsive documents, however, is immaterial to the fee waiver issue. HUD has advised Plaintiffs that no fees will be charged for the processing of responsive documents. Plaintiffs are thus in the same position as if HUD had granted the fee waiver request at the outset. In such case, HUD also would have stated the intention not to charge fees prior to the processing of records and Plaintiffs would have had no basis to assert the claims set forth in Counts II-IV. That is so even though, under that scenario, Plaintiffs also would not have received all requested documents at the time fee waiver was granted and instead would be relying on HUD's "stated intention" not to charge fees.

Plaintiffs also contend that HUD's explanation for not charging fees "illustrates just how uncertain the outcome here is" as to whether Plaintiffs will receive all documents that they have

requested. (Opp. at 19) HUD's letters to Plaintiffs explained that "upon further review of your request, . . . [t]he search can be performed using HUD's automated e-discovery system and the results can be provided to you electronically, so no fees are required for search time, document review, or duplication." (Ex. 1-4 to Mot. to Dismiss). Thus, as reflected in those letters, HUD has determined that it can conduct an adequate search for responsive documents using its automated e-discovery system and, for that reason, has advised Plaintiffs that no fees will be charged for search time, document review or duplication.

In their opposition, Plaintiffs suggest that such a search would be inadequate and contend that the potential for a dispute over the adequacy of the search renders the claims asserted in Counts II-IV "far from moot." (Opp. at 19-20) But those counts do not assert any claim concerning the adequacy of HUD's search, nor have Plaintiffs amended the Complaint to assert such a claim. Under Rule 15(a)(1) of the Federal Rules of Civil Procedure, a plaintiff can amend its complaint once as a matter of course within a defined time period of a motion to dismiss in lieu of filing an opposition. *See* Fed.R.Civ.P. 15(a)(1)(B). Plaintiffs, however, failed to avail themselves of this option and instead only speculate about potential future claims in their opposition brief. "It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Coleman v. Pension Benefit Guar. Corp.,* 94 F. Supp. 2d 18, 24 n.8 (D.D.C. 2000). And, having elected to oppose the motion, rather than amend, "the plaintiff assumes the risk that the court will grant the motion" based on the Complaint as actually pled. *Nat'l Sec. Counselors v. C.I.A.*, 960 F. Supp. 2d 101, 135 n.11 (D.D.C. 2013) ("A plaintiff is not entitled simply to have its proverbial cake and eat it too by first opposing a motion to dismiss on the merits (thereby forcing the court to

resolve the motion to dismiss), and then, upon losing the motion, amend its complaint to correct the very deficiencies it refused to acknowledge previously.")

Finally, Plaintiffs argue against mootness by relying on a single sentence from the request for relief at the end of their Complaint in which they ask the Court to "[r]etain jurisdiction of this action to ensure no agency records are wrongfully withheld[.]" (Opp. at 20, citing Compl. at 22 ¶ 10) Citing this sentence, Plaintiffs contend that "even if HUD eventually moves beyond its mere promise to use its e-discovery system, plaintiffs' claims will not be moot unless and until HUD can show it has not wrongfully withheld any requested document." (Opp. at 20) This argument fails for the same reason addressed above. Plaintiffs have not asserted any claim for the wrongful withholding of records and the hypothetical possibility of such a claim in the future is not a basis for the Court to retain jurisdiction over this lawsuit. Courts, moreover, are reluctant to "revive an otherwise moot case based on a claim . . . wrested from a general prayer for relief." *See Thomas R.W. by and through Pamela R. v. Massachusetts Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997). For these reasons, and those set forth in Defendant's motion to dismiss, Counts II-IV should be dismissed as moot.

II. Count I Should Be Dismissed For Failure To State A Claim

Count I of the Complaint purports to assert a "pattern and practice" claim because HUD denied on varied grounds two fee waiver requests by CREW and two by FFRF. As explained in Defendant's motion, a fee waiver analysis involves the consideration of multiple factors as applied to the particular FOIA request at issue and the evidence (or lack thereof) submitted by the requester in support of the particular fee waiver request. It is within that multi-faceted and case-specific framework that Plaintiffs purport to assert a "pattern and practice" claim based on a sample size

of four denials.

Of the four denials at issue, moreover, two pertain to fee waiver requests that were submitted by FFRF and which were obviously deficient on their face. Each of FFRF's fee waiver requests were limited to the following conclusory assertion: "We request a waiver of fees because of our nonprofit status and because release of these records is in the public interest. The subject of the request is a matter of concern to FFRF members, HUD personnel, and the public." (Ex. 5-6 to Mot. to Dismiss) HUD properly responded to FFRF that its bare assertion of a public interest was too conclusory to satisfy the applicable criteria for a waiver. (Ex. 7-8 to Mot. to Dismiss) Although FFRF provided more information in its appeal of these decisions, HUD provided distinct, reasoned decisions for denying those appeals that were tailored to the specific requests and thus cannot be characterized as a policy, pattern or practice of abdicating its obligation to consider the requested waivers. (Ex. 9-10 to Mot. to Dismiss)

Plaintiffs thus are left to support their claim based on HUD's response to the two fee waiver requests made by CREW, a sample size that is too small to allow for a plausible inference of an actionable policy, pattern or practice in violation of FOIA.[1] CREW's first request sought communications between Secretary Carson's wife and son and certain HUD officials, and the second request sought records regarding authorization for, and the cost of, Secretary Carson's use of non-commercial aircraft for official travel since his confirmation. (Ex. 11-12 to Mot. to Dismiss) In each instance, HUD denied the fee waiver requests on the basis that CREW's

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[1] HUD's 2017 FOIA annual report indicates that the agency received 117 requests for fee waivers and that approximately one-third of those requests were granted. *See* 2017 FOIA Report (available at: https://www.hud.gov/program_offices/administration/foia/foiarpts) Plaintiffs' small sample size, therefore, is not sufficient to raise an inference of a policy, pattern or practice of summarily denying fee waiver requests.

assertions of a public interest were too conclusory in nature. (Ex.13 and 14 to Mot. to Dismiss) Although CREW identifies similarities in the language of the two letters (Compl. ¶ 30), such similarities on two isolated occasions do not raise a plausible inference of a policy, pattern or practice. Moreover, in affirming those decisions on appeal, HUD provided different reasons for upholding the denials, further rendering any such inference implausible. (Ex. 15-16 to Mot. to Dismiss)

Plaintiffs' allegations thus fall far below the threshold required for an alleged policy, pattern or practice violation of FOIA. Even if the Court were to assume that HUD erred in its determination as to any or all of the fee waiver requests at issue (which HUD denies), an alleged error in applying the four public interest criteria in a few discrete instances, on different records and based on different underlying facts, fails to plausibly plead an actionable claim.

Plaintiffs respond to these arguments by first contending that HUD's characterization of the "examples set forth in the Complaint" as "isolated instances" is "untethered from any factual record before the Court." (Opp. at 21) To the contrary, HUD's arguments are based on the facts actually pled by CREW and FFRF to the extent applicable to them, which concern four fee waiver denials (two pertaining to FFRF and two pertaining to CREW). Although Plaintiffs also allege in the Complaint a few examples in which two other public interest organizations requested fee waivers from HUD that were denied (Compl. ¶¶ 53-70), an agency's alleged treatment of other FOIA requesters is not relevant to assessing whether the Plaintiffs in this case were themselves subject to an impermissible policy, pattern or practice. *See, e.g., Cause of Action v. Eggleston,* 224 F. Supp. 3d 63, 71 (D.D.C. 2016) (proper focus is on the handling of FOIA requests "actually at issue in this case"). Accordingly, the proper focus is on the four denials at issue which, as

explained above, constitute isolated instances based on different records that fail to raise an inference of an impermissible policy, pattern or practice.

Second, even if the denial of fee requests made by different public interest organizations not parties to this case could be relevant to the inquiry, those examples involve FOIA requests involving distinct subject matters, different submissions in support of the fee waiver, and different grounds asserted by HUD for denying the requested waivers.[2] Ultimately, none involves a situation in which HUD abdicated all responsibility in responding to a fee waiver request.

Plaintiffs misunderstand applicable law when they characterize the standard advanced by Defendant for a "pattern and practice" claim as setting a "manufactured threshold." In the cases that have found a pattern and practice claim to have been adequately pled, the facts as alleged raised a plausible inference that the agency failed in more than an isolated way to comply with its obligations under FOIA. In other words, the facts suggest a recurring abdication by the agency of its obligations under FOIA, not merely that the agency erred in fulfilling its obligations or failed

[2] For instance, in *American Society for Prevention of Cruelty to Animals v. HUD* ("*ASPCA*"), Case No. 17-912 (RDM), the ASPCA sought information regarding HUD's policy of exempting housing authorities participating in a particular program from federal laws and regulations permitting residents to have pets. HUD ultimately denied the fee waiver request on the basis that the plaintiff failed to substantiate its ability to disseminate the information such that the disclsoure could "contribute to an understanding of the public at large", offering three justifications for that determination. (Case No. 17-912, Compl. ¶¶ 28-31 and Ex. M to the Compl.). In *Public Citizen, Inc. v. HUD* ("*Public Citizen*"), Case No. 17-2582 (RC), the plaintiff sought information about the travel costs of two HUD Secretaries (current Secretary Carson and former Secretary Donovan). HUD ultimately denied that request on the basis that plaintiff failed to demonstrate that the information would contribute significantly to the public's understanding of HUD's activities. (Case No. 17-2582, Compl. ¶ 10) In neither case, moreover, was there a judicial determination that HUD had erred in its analysis. In *ASPCA*, HUD itself determined that it should have granted ASPCA's fee waiver request. (Case No. 17-912, ECF No. 6 ¶ 4) In *Public Citizen*, the parties also appeared to resolve the fee issue without court intervention. (Case No. 17-2582, ECF No. 10 ¶ 5)

to act on isolated occasions. *See 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 Freedom of Information requests based on invocation of inapplicable statutory exemptions rather than the delay of an action over which the agency had discretion."). Plaintiffs rely for their position on *Muttit v. U.S. Cent. Command,* 813 F. Supp. 2d 221 (D.D.C. 2011) (Opp. at 24-25), but that case also involved an agency's repeated failure to fulfill an obligation under FOIA. *See id.* at 230 (agency repeatedly failed to give requester an estimated completion date as required by FOIA).

Pattern and practice claims do not arise when, as here, Plaintiffs merely identify isolated instances in which an agency allegedly erred in making a discretionary determination under FOIA. *See Ctr. for Biological Diversity v. United States EPA*, 2017 U.S. Dist. LEXIS 159654, Case No. 16-175, at *61 (D.D.C. Sept. 28, 2017); *see also See, e.g., Cause of Action v. Eggleston,* 224 F. Supp. 3d 63, 71 (D.D.C. 2016) (finding allegations insufficient to state a pattern and practice claim and that "the Court is not required to, and does not, accept Plaintiff's conclusory and unsupported allegation that its requests have been delayed for illicit purposes and not as a result of legitimate efforts to review requested records").

Although an agency is required to consider a fee waiver request when made, the application of the four public interest factors involves agency decisionmaking. It is dependent on an assessment of the FOIA request, the basis asserted for the fee waiver in the request, and any supporting documentation. Although an agency may err in applying these factors to a particular set of circumstances, such an error does not give rise to a pattern and practice claim. Only when an agency engages in a pattern of abdicating its responsibilities under FOIA can such a claim arise. *See Scudder v. CIA,* 281 F. Supp. 3d 124, 129 (D.D.C. 2017) (dismissing "pattern and practice"

claim based on observation that "'isolated mistakes by agency officials'" are not sufficient and that "the type of conduct alleged by Plaintiffs is a far cry from the egregious and intentional conduct implicated in prior policy or practice claims").

Here, the facts as alleged do not give rise to a plausible inference that HUD engaged in a pattern of abdicating its responsibility to consider the fee waiver requests. Under a Rule 12(b)(6) standard, the Court is not limited to the allegations in the Complaint, but also can consider documents incorporated by reference in the Complaint or matters about which the Court can take judicial notice. *See EEOC 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.")

Thus, the Court is not limited to Plaintiffs' self-serving characterization of their fee waiver requests and the responses by HUD, but can consider the actual documents themselves, which are incorporated by reference in the Complaint. In considering those documents, the Court need not at this stage determine whether HUD's position was correct in each of the four instances. Instead, what is relevant at this stage is that those documents show that HUD applied the applicable criteria on different records and based on different underlying facts. The record, in other words, is not reflective of an abdication of any duty, but at most of Plaintiffs' disagreement with HUD's decision in each instance. That is not sufficient to state a pattern and practice claim.

Ultimately, HUD responded to the fee waiver requests and in each instance provided an

explanation for the denials. Consequently, this case falls far short of the degree of abdication of duty required to support a policy, pattern or practice claim. *See, e.g, Muttit,* 813 F. Supp. 2d at 231 ("The Court concludes that an allegation of a single FOIA violation is insufficient as a matter of law to state a claim for relief based on a policy, pattern, or practice of violation FOIA.").

CONCLUSION

For the foregoing reasons, and those set forth in Defendant's motion, the Complaint should be dismissed.

Respectfully submitted,

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