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,	**Case No. 18-0114 (KBJ) (consolidated with 18-2737)**
Defendant.	

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 Complaints in 18-0114 and 18-2737 contain similar claims 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 (Case No. 18-0114) and "Claim II" and "Claim III" (Case No. 18-2737) Are Moot.

In 18-0114, Counts II-III assert claims 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. Similar claims are asserted in Claim II and Claim III of 18-2737 with respect to a subsequent FOIA request submitted by CREW.

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 because HUD determined that the records sought could be searched for and produced electronically. Accordingly, although HUD maintains its position that the fee waiver denials were appropriate based on the criteria in the applicable regulations, Plaintiffs ultimately are not being charged for the processing of their requests because of the manner in which the responsive records are maintained. Thus, 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. at 22) 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 in 18-0114 or Claims II and III in 18-2737. That is so even though, under that scenario, Plaintiffs also would not have received all requested documents at the time the 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 23) 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 and 20 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 provide the results electronically and, for those reasons, 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 "not . . . moot" the claims asserted in Counts II-IV and Claims II and III. (Opp. at 23-24) But those counts do not assert any claim concerning the adequacy of HUD's search, nor have Plaintiffs amended the Complaints in either action 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).

When HUD raised similar arguments in its original motion to dismiss Case No. 18-0114, Plaintiffs failed to avail themselves of this option and instead chose to litigate the motion to dismiss

based on the Complaint as pled. Similarly, after the instant motion to dismiss was filed raising a similar mootness argument, CREW filed an opposition instead of seeking to amend the Complaint in either of the pending cases.

"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.[1] *Nat'l Sec. Counselors v. CIA*, 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.") Accordingly, the Court should evaluate the issue of mootness within the narrow framework that has been pled in both Complaints that are at issue. Both Complaints are limited to the question of the denial of fee waiver requests. Neither asserts any claim that documents have been wrongly withheld under FOIA or that an inadequate search has been conducted. Accordingly, the status of the processing of the requests is irrelevant to the question of whether the counts that are addressed to the distinct issues of fee waiver denial and news media status are moot.

[1] Plaintiffs acknowledge in their opposition, for instance, that HUD provided an interim response to FFRF's Revive Us 2 request by letter dated February 6, 2018, which included a release in part of responsive records. (Opp. at 13 and Ex. E to Opp.) Although HUD filed its original motion to dismiss in March 2018, Plaintiffs never sought to amend their Complaint to challenge any aspect of that interim response but instead litigated that motion based on the Complaint as originally pled.

Plaintiffs argue against mootness by relying on a single sentence from the request for relief at the end of the two Complaints in which they ask the Court to "[r]etain jurisdiction of this action to ensure no agency records are wrongfully withheld[.]" (Opp. at 23-24 and n. 34) 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 23-24) 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. v. Mass. Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997).

Finally, Plaintiffs allege that the "voluntary cessation" exception to mootness rescues these specific claims. But Plaintiffs' reliance on that exception with respect to counts II-IV (Case No. 18-0114) and Claims II and III (Case No. 18-2737) is misplaced. As regards those specific counts, Plaintiffs are not seeking to enjoin future agency activity but are seeking specific relief in the form of the granting of their fee waiver requests and, as to CREW, treatment as a representative of the news media. As the decision in *Hall* establishes, those claims are moot now that the HUD has advised Plaintiffs that they will not be charged fees in connection with the processing of their requests. *Hall*, 437 F.3d at 99.

Plaintiffs' argument for application of the "voluntary cessation" exception, moreover, is not addressed to these specific counts, which are the focus of Defendant's mootness argument, but instead to the distinct "pattern and practice" claim asserted in the initial count of both Complaints.

Specifically, Plaintiffs argue that "HUD has not established a reasonable expectation that the challenged conduct – denying fee waivers to non-profit requesters unless and until they sue – will not reoccur" and that "[a]ll indications are that HUD will continue its unlawful practices absent the judicial relief sought here." (Opp. at 24-25) But these arguments are addressed to the distinct "pattern and practice" claim that is *not* the subject of Defendant's mootness argument. (Mot. to Dismiss at 7) Thus, Plaintiffs' arguments on the "voluntary cessation" exception are misplaced and do not rescue Counts II-IV (Case No. 18-0114) and Claims II-III (Case No. 18-2737) from dismissal on mootness grounds.

II. The "Pattern and Practice" Claim Should Be Dismissed For Failure To State A Claim

Count I of the Complaint in Case No. 18-0114 purports to assert a "pattern and practice" claim because HUD denied on varied grounds two fee waiver requests by CREW and two by FFRF both initially as well as on administrative appeal. Similarly, Claim I of the Complaint in Case No. 18-2737 purports to assert a "pattern and practice" claim because HUD denied a subsequent fee waiver request by CREW in connection with a different FOIA request both initially as well as on administrative appeal.[2] As the actual correspondence between the requesters and HUD reflects (which correspondence is incorporated by reference in the Complaint), the proffer made by the requester in support of the fee waiver request and the basis for HUD's denial varied among these five requests.

[2] CREW adds the allegation in Case No. 18-2737 that part of the alleged pattern and practice is that HUD ultimately decides to release records without charge only after suit is filed. (Case No. 18-2737, Compl. ¶ 86) That allegation, however, is not part of the "pattern and practice" alleged in Case No. 18-0114.

As explained in Defendant's motion, context is critical here. 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 five denials. Of the five 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 was 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)

Plaintiffs thus are left to support their claim based on HUD's response to the three fee waiver requests made by CREW (two at issue in Case No. 18-0114 and one at issue in Case No. 18-2737), a sample size that is too small to allow for a plausible inference of an actionable policy, pattern, or practice in violation of FOIA. CREW's first request sought communications between Secretary Carson's wife and son and certain HUD officials; 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; and the third request (the one at issue in Case No. 18-2737) sought copies of records sufficient to show Secretary Carson's scheduled meetings, appointments, and scheduled events for a three day period of July 16, 2018 through July 18, 2018. (Ex. 11-12; Ex. 17 to Mot. to Dismiss) In each instance, HUD denied the fee waiver request on the basis that

CREW's assertions of a public interest were too conclusory in nature. (Ex.13, 14 and 18 to Mot. to Dismiss) Although CREW identifies similarities in the language of the three letters, such similarities on three isolated occasions do not raise a plausible inference of a policy, pattern, or practice. Moreover, in affirming those decisions on appeal, HUD provided reasons for upholding the denials that were tailored to each request, further rendering any such inference implausible. (Ex. 15-16, 19 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 also have failed to identify any case authority recognizing a "pattern and practice" claim in the context of fee waiver denials generally, or under analogous facts involving, as here, the agency's issuance of prompt responses – both initially and at the administrative appeal level – to fee waiver requests that explain the basis for the denial. Plaintiffs fail even to acknowledge the D.C. Circuit's recent decision in *Judicial Watch v. DHS*, 895 F.3d 770 (D.C. Cir. 2018), which held that, for a complaint to assert a plausible policy or practice claim, the complaint must allege "prolonged, unexplained delays in producing non-exempt records that could signal the agency has a policy or practice of ignoring FOIA's requirements. . . . [T]he plaintiff must allege a pattern of prolonged delay amounting to a persistent failure to adhere to FOIA's requirements and that the pattern of delay will interfere with its right under FOIA to promptly obtain non-exempt records from the agency in the future." *Id.* at 780. Prior to *Judicial Watch*, the D.C. Circuit had

recognized the possibility of a "policy or practice" claim in *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988) in the extreme situation in which an agency abdicated its obligation to produce non-exempt records under FOIA. *Id.* at 491; *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.").

Whether a policy or practice claim can be asserted in the limited context of fee waiver denials has not been addressed in this Circuit,[3] and Plaintiffs have cited no authority on that question. However, to the extent such a claim might theoretically exist, it would appear to fall outside the standard articulated in *Judicial Watch* absent plausible allegations that the agency engaged in a "pattern of prolonged delay" in responding to a fee waiver request in a manner that amounted to a "persistent failure to adhere to FOIA's requirements" and that the pattern of delay "interfere[d]" with the requester's "right under FOIA to promptly obtain non-exempt records from the agency in the future."

HUD demonstrated in its motion to dismiss that this standard has not been met here. Other than characterizing HUD's articulation of the standard as "manufactured" (Opp. at 25), Plaintiffs have failed to explain how the facts pled in the two Complaints at issue (as properly supplemented

3 The few cases that have touched on the issue, have resolved the question on procedural deficiencies, and thus did not reach the question of whether such a claim was cognizable in the fee waiver denial context. For instance, in *Coleman v. DEA*, 134 F. Supp. 3d 294 (D.D.C. 2015), the plaintiff asserted a policy or practice claim with respect to a fee waiver denial, but the Court held that plaintiff lacked standing to assert such a claim on the basis that plaintiff's allegations of potential future injury were speculative. *Id.* at 307. In *Muttitt v. Department of State*, 926 F. Supp. 2d 284 (D.D.C. 2013), the Court held that plaintiff had failed to assert a policy or practice claim for denial of fee waivers in its complaint and could not raise the issue belatedly at the summary judgment stage. *Id.* at 295.

by the actual correspondence incorporated by reference in the pleadings) fall within the standard articulated in *Judicial Watch.*[4] Notably, Plaintiffs fail even to cite *Judicial Watch* in their opposition.

As explained in Defendant's motion, the facts at issue here fall outside the *Judicial Watch* standard. First, Plaintiffs have not alleged that HUD engaged in a "pattern of prolonged delay" in responding to the fee waiver requests in a manner that amounted to a "persistent failure to adhere to FOIA's requirements." To the contrary, Plaintiffs acknowledge that HUD both responded to the fee waiver requests and did so promptly, typically within one week of the submission of the request. (*e.g.*, Opp. at 4-5 (one week response time)). HUD also promptly responded to Plaintiffs' administrative appeals of the denials. Although Plaintiffs disagree with HUD's analysis in each of the five denials (both initially and on appeal), a disagreement on the application of the public interest criteria in HUD's regulations on different evidentiary records also does not constitute a "persistent failure to adhere to FOIA's requirements."

Second, Plaintiffs have not alleged that a pattern of delay will "interfere" with their "right under FOIA to promptly obtain non-exempt records from the agency in the future." As already addressed, Plaintiffs have failed to allege any pattern of delay in resolving their fee waiver requests, and therefore, the Court need not reach this distinct prong of the *Judicial Watch* standard.

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4 To the extent Plaintiffs allege in their opposition brief that they have not received final responses in connection with the FOIA requests at issue (Opp. at 13-14), those allegations are irrelevant to the pattern and practice claim because that claim is focused solely on the fee waiver denials that HUD issued. Plaintiffs have neither pled nor argued that any alleged delay in the processing of their requests bears any plausible relationship to HUD's denial of their fee waiver requests. For instance, neither CREW nor FFRF has alleged that they lacked the resources to pay for processing fees. In any event, with respect to the five requests at issue, HUD has advised Plaintiffs that it is processing the requests without charge.

Nevertheless, this prong of the standard is not met for an additional reason. Specifically, although Plaintiffs assert in their opposition an alleged delay in the processing of their requests (Opp. at 13-14), they have neither pled nor argued that any such delay bears any plausible relationship to HUD's denial of their fee waiver requests. For instance, neither CREW nor FFRF has alleged that they lacked the resources to commit to the payment of processing fees while they sought judicial resolution of the fee waiver denials. To the contrary, they both acknowledge that they have the choice of paying the fee to obtain the requested records. (Compl. (18-0114) ¶¶ 5, 7) FFRF, moreover, alleges that it is an organization with over 31,000 members. (*Id.* ¶ 6) Although Plaintiffs argue that the Court should not take judicial notice of the evidence of CREW's financial condition noted in Defendant's motion (Opp. at 25), it remains Plaintiffs' burden to plead facts that satisfy the requisite legal standard. In the context of this case, that standard requires some allegation that could plausibly lead to the inference that HUD's prompt denial of Plaintiffs' fee waiver requests will somehow interfere with their ability to obtain access to the requested records, as well as records that might be sought in the future. Because Plaintiffs have made no such allegations (and HUD did not delay in resolving the fee waiver requests in any event), they have failed to state a pattern and practice claim.

Ultimately, Plaintiffs misunderstand applicable law when they characterize the standard advanced by Defendant for a "pattern and practice" claim as being "manufactured" 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

to act on isolated occasions. *See Del Monte Fresh Produce*, 706 F. Supp. 2d at 120. Plaintiffs rely for their position on *Muttit v. U.S. Central 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. U.S. EPA*, 279 F. Supp. 3d 121, 155 (D.D.C. 2017) (no pattern and practice claim where the agency "took steps to communicate with [the requester] about the pending FOIA requests"); *see also, 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 it 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. Instead, it can consider the actual documents themselves, which are incorporated by reference in the Complaints. In considering those documents, the Court need not at this stage determine whether HUD's position was correct in each of the five instances. Contrary to Plaintiffs' contention, moreover, HUD was not "invit[ing] the court to evaluate the merits of its fee waiver denials" by observing that "'HUD provided a reasoned decision for denying those . . . appeals.'" (Opp. at 31-32) That observation instead is relevant because the distinct reasoning in each of the administrative appeal decisions demonstrates that HUD applied the applicable criteria on different records and based on different underlying facts. Thus, the record is not reflective of an abdication of any duty. At most, it reflects Plaintiffs'

disagreement with HUD's decision in each instance. That is insufficient 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.").

Plaintiffs contend that HUD's characterization of the examples set forth in the Complaint as "isolated instances" is contrary to the allegations as pled, which Plaintiffs claim "tell[] a story of an agency that, following 'an *overarching FOIA policy,*' reflectively and repeatedly denies public interest fee waivers notwithstanding the extensive, detailed justifications the requesters offer." (Opp. at 28) But, in making this argument, Plaintiffs are exaggerating the facts before the Court. For instance, of the five requests at issue, two were by FFRF and, far from containing "detailed justifications" for the requested fee waiver, those requests were boilerplate: "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) To the extent CREW contends that its requests were more detailed than the ones submitted by FFRF, HUD provided explanations for its decision on CREW's requests that were tailored to the arguments raised by CREW. And, although Plaintiffs also allege in the Complaints a few examples in which two other public interest organizations requested fee waivers from HUD that were denied, those examples – even if they could be

considered relevant to the issue[5] – likewise 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.[6]

Moreover, in ruling on a motion to dismiss, the Court can take judicial notice of HUD's annual FOIA reports, which demonstrate that, in each of the two fiscal years encompassing the waiver requests at issue, approximately one-third of fee waiver requests that resulted in a decision were granted by HUD. *See* 2017-18 FOIA Report (available at: https://www.hud.gov/program_offices/administration/foia/foiarpts) [7] Accordingly, Plaintiffs have failed to plausibly plead a viable policy or practice claim.

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[5] An agency's alleged treatment of other FOIA requesters is irrelevant 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").

[6] For instance, in *American Society for Prevention of Cruelty to Animals* ("*ASPCA*") *v. HUD*, 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*, 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 reconsidered its position and determined that it should have granted ASPCA's fee waiver request. (Case No. 17-912, ECF No. 6 ¶ 4) In *Public Citizen*, the parties appeared to resolve the fee issue without court intervention. (Case No. 17-2582, ECF No. 10 ¶ 5)

[7] These statistics report on the number of fee waiver requests for which a decision issued, not necessarily the total number of fee waiver requests actually received.

CONCLUSION

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

Respectfully submitted,

JESSIE K. LIU
D.C. BAR # 472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Civil Chief

By: /s/
JEREMY S. SIMON, D.C. BAR #447956
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2528
Jeremy.simon@usdoj.gov