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-cv-0114 (KBJ)**
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant United States Housing and Urban Development ("HUD"), by and through undersigned counsel, moves pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss the above-captioned action.

The Complaint contains four counts under the Freedom of Information Act ("FOIA"). Three of the counts (Counts II-IV) are moot and should be dismissed on that basis.[1] Those counts are limited to asserting a claim for improper denial of fee waiver requests (Counts II-III) and a claim for improper denial of media requester status (Count IV). These counts are now moot because, after the filing of this lawsuit, HUD has notified Plaintiffs that no fees will 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.

1 Motions to dismiss on grounds of mootness "'are properly brought under Rule 12(b)(1) of the Federal Rules of Civil Procedure.'" *La Botz v. FEC*, 2014 U.S. Dist. LEXIS 101445, at *8, *15 (D.D.C. July 25, 2014).

The remaining count (Count I) purports to assert an "impermissible policy, pattern and practice" of denying fee waivers to public interest organizations. That count should be dismissed for failure to state a claim because Plaintiffs have failed to plausibly plead conduct that rises to the level necessary to assert such a claim.

STANDARD OF REVIEW

I. Rule 12(b)(1) Standard

When reviewing a Rule 12(b)(1) motion to dismiss, "the court must accept the complaint's well-pled factual allegations as true and draw all reasonable inference in the plaintiffs favor." *Thompson v. Capitol Police Bd.*, 120 F. Supp. 2d 78, 81 (D.D.C. 2001); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999). At the same time, "[t]he court is not required, however, to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations." *Rann v. Chao*, 154 F. Supp. 2d 61, 64 (D.D.C. 2001), *aff'd*, 346 F.3d 192 (D.C. Cir. 2003). Plaintiff must carry the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Thompson*, 120 F. Supp. 2d at 81; *Vanover*, 77 F. Supp. 2d at 98. In determining whether jurisdiction exists, a court may look beyond the allegations of the complaint, consider affidavits and other extrinsic information, and ultimately weigh the conflicting evidence. *See Herbert v. Nat'l Acad. of Sci.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

II. Rule 12(b)(6) Standard

A Rule 12(b)(6) motion tests the sufficiency of a complaint. In resolving a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court will treat the complaint's factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Sullivan-Obst v. Powell*, 300 F. Supp. 2d 85, 91 (D.D.C. 2004). However, the complaint must appear plausible on its face and

raise a reasonable expectation that discovery will produce supporting evidence. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In *Twombly*, the Court stated that while there was no "probability requirement at the pleading stage," *id*. at 556, to survive a Rule 12(b)(6) motion to dismiss, the facts alleged in the complaint must be sufficient "to state a claim for relief that is plausible on its face." *Id*. at 570. The Court referred to this newly clarified standard as the "plausibility standard." *Id*. at 560-61 (abandoning the "no set of facts" language from *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

The Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), further clarified the plausibility pleading standard, explaining that it "demands more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." *Id*. at 678. "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id*.

On a motion to dismiss under Rule 12(b)(6), 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 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.")

ARGUMENT

I. Counts II-IV Should Be Dismissed As Moot.

Plaintiffs, Citizens for Responsibility and Ethics in Washington ("CREW") and Freedom from Religion Foundation ("FFRF"), submitted in total four distinct FOIA requests to HUD and in each of their requests sought a fee waiver. (Compl. ¶¶ 18-19, 27-28, 39-40, and 46-47). HUD denied Plaintiffs' requests for fee waivers and upheld those decisions following administrative appeals by Plaintiffs. (Compl. ¶¶ 21, 24, 30, 36, 41, 45, 48, 52)

In its two FOIA requests to HUD, CREW also asked to be treated as a representative of the news media (Compl. ¶¶ 20, 29). The Complaint alleges that, as of the date of the filing of the lawsuit, HUD had not responded to CREW's request to be treated as a representative of the news media. (Compl. ¶¶ 26, 38)

Following the filing of this lawsuit, HUD determined that no fee would be charged for any of the four underlying FOIA requests at issue. In letters dated March 15, 2018 to FFRF and March 20, 2018 to CREW, HUD advised 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 attached hereto).

In light of the decision by HUD not to charge fees for any of the underlying FOIA requests, counts II-IV should be dismissed as moot. "The rule against deciding moot cases forbids federal courts from rendering advisory opinions or 'deciding questions that cannot affect the rights of litigants in the case before them.'" *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006) (citations omitted). In *Hall*, the Court dismissed as moot Hall's challenge to the agency's denial of his

FOIA fee waiver request after the agency decided to release records to Hall without seeking payment from him. *Id.* Because Hall "already has 'obtained everything that [he] could recover . . . by a judgment of this court in [his] favor,'" there was no case or controversy before the Court. Here, as in *Hall*, HUD has decided to release records to Plaintiffs without seeking payment from them. Accordingly, Counts II-III – which assert claims for improper denial of a fee waiver request – are moot. *Id.* ("We find that the CIA's decision to release documents to Hall without seeking payment from him moots Hall's arguments that the district court's denial of a fee waiver was substantively incorrect."); *Houser v. Church*, 271 F. Supp. 3d 197, 204 (D.D.C. 2017) (dismissing as moot denial of fee waiver count based on *Hall*).

The Court in *Hall* also held that the requester's media status claim was moot by virtue of the agency's decision to release documents without payment. In *Hall*, the plaintiff had argued that the media status claim fell within an exception to the mootness doctrine because it was capable of repetition were Hall to seek a fee waiver on that basis in the future. However, even "[a]ssuming in Hall's favor that the matter is capable of repetition," the Court "fail[ed] to see how the issue has any tendency to evade review" because "[d]enials of fee waivers do not seem inherently of such short duration that they cannot ordinarily be fully litigated before their cessation." *Hall*, 437 F.3d at 99. The same analysis applies here to CREW's claim that it was improperly denied media requester status (Count IV).

Accordingly, Counts II-IV are moot and should be dismissed because there is no actual controversy before the Court to adjudicate. *See also Davis v. FEC*, 554 U.S. 724, 732-33 (2008) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (citation omitted); *FEC v. Wis.*

Right to Life, Inc., 551 U.S. 449, 461-62 (2007) ("Article III's 'case-or-controversy requirement subsists through all stages of federal judicial proceedings . . . [I]t is not enough that a dispute was very much alive when suit was filed.'"); *Nat'l Parks Conservation Ass'n v. Dep't of Interior*, 794 F. Supp. 2d 39, 44 (D.D.C. 2011) ("If . . . an agency does respond to a petition, even after a suit to compel a response is filed, such a suit is rendered moot.").

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

Plaintiffs allege in Count I that HUD has adopted and engaged in a policy and practice of violating FOIA's fee waiver provisions by (1) refusing to grant fee waivers to non-profit, public interest organizations that allegedly satisfy all of the statutory and regulatory criteria for a public interest fee waiver; (2) allegedly making an initial decision to deny requested public interest fee waivers by using boilerplate language and failing to address the showings made by the requester; and (3) allegedly affirming denials on appeal in broad conclusory terms. (Compl. ¶¶ 72-74). Although this claim is not subject to the same mootness considerations as Counts II-IV, *Ctr. for Biological Diversity v. EPA*, 2017 U.S. Dist. LEXIS 159654, Case No. 16-175, at *60 n. 20 (D.D.C. Sept. 28, 2017), it should be dismissed under Rule 12(b)(6) because Plaintiffs' allegations do not rise to the level of extreme non-responsiveness required to assert a "pattern and practice" claim.

The D.C. Circuit in *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988), has recognized the possibility of a "policy or practice" claim for the violation of the procedural requirements of FOIA during the processing of requests. *Id.* at 491. Such claims, however, have been limited by courts to extreme situations in which an agency largely abdicates its obligations under FOIA. *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."). Such 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").

Here, Plaintiffs' purported pattern and practice claim is asserted in the context of a fee waiver analysis that 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. Although FOIA requesters must ordinarily pay reasonable charges associated with processing their requests, FOIA requires that an agency waive fees for processing a FOIA request when "[1] disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and [2] is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *Research Air, Inc. v. Kempthorne*, 589 F. Supp. 2d 1, 8 (D.D.C. 2008) (citing *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)); *VoteHemp, Inc. v. Drug Enforcement Admin.*, 237 F. Supp. 2d 55, 58-59 (D.D.C. 2002). The requester bears the burden of demonstrating that both requirements of this two-pronged analysis are satisfied. *Larson*, 843 F.2d at 1483; *Judicial Watch, Inc. v. DOJ*,

185 F. Supp. 2d 54, 60 (D.D.C. 2002).

HUD's regulations identify four factors that HUD considers in evaluating whether the requester has met its burden of satisfying the first-prong of the analysis (*i.e.*, the public interest prong):

> (i) The subject of the requested records should concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear, not remote or attenuated.
>
> (ii) The disclosable portions of the requested records should be meaningfully informative about government operations or activities and "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such increased understanding, where nothing new would be added to the public's understanding.
>
> (iii) The disclosure should contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.
>
> (iv) The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, should be enhanced by the disclosure to a significant extent. However, HUD will not make value judgments about whether information at issue is "important" enough to be made public.

See 24 C.F.R. §15.106(k)(2).

Case law, moreover, provides guidance in applying these factors. *See, e.g.*, *Perkins v. United States Dep't of Veteran Affairs*, 754 F. Supp. 2d 1, 7 (D.D.C. 2010) ("The Court finds that while the ITC's training plan reports, training cost reports, and other training reports technically concern government operations, they do not, 'in any readily apparent way,' contribute to an understanding of government operations or activities.") Courts, for instance, require more than conclusory allegations by requesters to meet their burden. *Nat'l Security Counselors v. DOJ*, 848

F.3d 467, 474 (D.C. Cir. 2017) ("Here, while NSC provided some barebones indication of how it intended to use its requested information, it similarly failed to provide sufficiently specific and non-conclusory statements demonstrating its ability to disseminate the disclosures to a 'reasonably broad audience of persons interested in the subject.'"); *Perkins*, 754 F. Supp. 2d at 8 ("Merely stating one's intention to disseminate information does not satisfy this factor; instead, there must be some showing of one's ability to actually disseminate the information.").

It is within this multi-faceted and case-specific framework that Plaintiffs purport to assert a "pattern and practice" claim based on a sample size of four denials, all of which are incorporated by reference in the Complaint and, therefore, can be considered by the Court in deciding a motion to dismiss under Rule 12(b)(6). *Lipton*, 135 F. Supp. 2d at 186. As a review of those requests and HUD's responses reflect, Plaintiffs have not plausibly pled that HUD has engaged in a pattern, policy or practice of abdicating its obligations in evaluating fee waiver requests.

Of the four fee waiver requests at issue, two were submitted by FFRA. Each of FFRA'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 hereto) 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)

Although FFRF provided more information in its appeal of these decisions, HUD provided a reasoned decision for denying those appeals. As to the first FOIA request, which sought information about a Cabinet bible study, HUD explained that the request did not relate to HUD operations or activities as would be required to warrant a fee waiver. (Ex. 9) As to the second

request, which sought information about the "Revive Us 2" event and Secretary Carson's daily schedule from October 24, 2017, HUD explained that the request failed to meet two of the four criteria under the public interest test. (Ex. 10) Specifically, HUD explained that FFRF failed to demonstrate how it would disseminate the information to a broad audience outside its organization and also relied on conclusory assertions to contend that the information would contribute significantly to public knowledge. (*Id.*) Although FFRF may disagree with HUD's analysis, HUD's decisions were tailored to the specific requests at issue and thus cannot be characterized as a policy, pattern or practice of abdicating its obligation to consider FFRF's fee waiver requests.

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. 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) In each instance, HUD denied the fee waiver requests on the basis that CREW's assertions of a public interest were too conclusory in nature. (Ex.13 and 14) 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 did not provide the same rationale for the denials, further rendering any such inference implausible. For instance, in upholding the denial of the fee waiver for CREW's first request, HUD explained that "you have only speculated that Secretary Carson's wife and son have an influence over agency matters" but have provided

"no compelling facts to support this claim aside from the presence of Secretary Carson's wife at the agency and his son reportedly showing up on email chains and appearing at the department." (Ex. 15) HUD explained that mere speculation was not sufficient to meet CREW's burden to show that the requested information "will contribute to a greater understanding on the part of the public at large." (*Id.*) In upholding the denial of the fee waiver in the second request, HUD stated that CREW's assertions were too conclusory. (Ex. 16)

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.[2] 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 v. United States Cent. Command*, 813 F. Supp. 2d 221, 231 (D.D.C. 2011) ("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

2 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) However, 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"). Moreover, as Plaintiffs' own allegations reflect, those examples involve FOIA requests involving distinct subject matters and different grounds asserted by HUD for denying the requested fee waivers. None involves a situation in which HUD abdicated all responsibility in responding to a fee waiver request. Accordingly, for these reasons and the other reasons set forth above, these additional examples fail to plausibly plead an actionable policy, pattern or practice violation.

violation FOIA.").

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed.

Respectfully submitted,

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