IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC LIPTON, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Civil Action No. 17-02588 (JDB)
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' FIRST CLAIM

Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7(d), Defendant, the United States Environmental Protection Agency ("EPA"), respectfully submits this reply in support of its cross-motion for summary judgment.

Argument

Currently before the Court are the parties' cross-motions for summary judgment on the First Claim of Plaintiffs' Complaint (ECF No. 1), which alleges "violation of FOIA by failing to make regularly available a record that has been requested three or more times or is likely to become the subject of repeated requests, as required by 5 U.S.C. § 552(a)(2)(D)." As explained in Defendant's cross-motion for summary judgment (ECF No. 23), the Freedom of Information Act's ("FOIA") reading room provision simply does not require an agency to proactively publish the agency administrator's future calendar entries, which of course have not yet been created, simply because the agency has received three or more requests for the administrator's calendar in the past. Plaintiffs' interpretation of the statute finds no support in the statutory language, legislative history, or case law.

I. The Reading Room Provision Does Not Require EPA to Proactively Publish the Administrator's Future Calendar.

Plaintiffs make the illogical argument that the Administrator's calendar is a single document that is continuously updated and that a FOIA request for the Administrator's calendar under section 552(a)(3) is equivalent to a request for all calendar records, now and forever, which must be continuously updated via the FOIA reading room under section 552(a)(2)(D). *See* Plfs.' Opp. at 10-12. Plaintiffs cannot point to a single case to support their theory, which is not surprising. One can envision numerous unworkable and unintended consequences were Plaintiff's theory to be adopted by the courts - for example, would three or more requests for the Administrator's emails generally or emails on a particular topic specifically require that all future emails be proactively posted in the FOIA reading room? This is not and cannot be what Congress envisioned.[1]

In fact, the language of section 552(a)(2)(D) is unambiguous and straight-forward. Under this provision, frequently requested records are those that (1) "have been released to any person" pursuant to a valid FOIA request *and* (2) that the agency has "determine[d] have become or are likely to become the subject of subsequent requests for substantially the same records" *or* that "have been requested 3 or more times." 5 U.S.C. § 552(a)(2)(D); *see also People for Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric.* ("*PETA*"), 285 F. Supp. 3d 307, 314 (D.D.C. 2018). Thus, section 552(a)(2)(D) is not triggered until a particular record has been requested

[1] As noted below, the parties dispute whether email correspondence generally about meetings are responsive to Plaintiffs' request. Assuming *arguendo* such email records are also responsive to Plaintiffs' request, the impracticality of Plaintiffs' position becomes even more apparent. EPA would then also be required to prospectively publish not only the calendar records themselves, but also all email correspondence relating to possible meetings as well, into the future. EPA staff would henceforth be required under FOIA to spend as much time collecting, reviewing, and producing every email discussing a possible appointment of the Administrator as the time they spent actually planning and executing the appointments themselves.

under FOIA's reactive disclosure provision (*i.e.*, section 552(a)(3)) and released by the agency in response to that request. Future calendar records that have not yet been created do not qualify. *See PETA*, 285 F. Supp. 3d at 315 n.5 (noting that "future records, . . . by virtue of their currently non-existent status have never been released to any person under a valid FOIA request and therefore cannot yet be reading-room documents").

Nowhere do Plaintiffs acknowledge or address EPA's standard policy of posting responsive FOIA records to FOIAonline the first time they are requested, rather than waiting for three or more requests to trigger section 552(a)(2)(D)(ii)(II). *See* Gottesman Decl. ¶ 17. This policy preempts the need to invoke the reading room provision for EPA in cases such as this where EPA is diligently responding to FOIA requests as its workload allows.[2] Indeed, the requested relief is even more unwarranted in light of Plaintiffs' concession that EPA has continued to receive requests for the Administrator's calendar and will, as a practical matter, be continuously responding to those requests and posting the results to FOIAonline for the foreseeable future. Plfs.' Opp. at 15. Nor do Plaintiffs' attempts to construe the legislative history show that EPA's straightforward interpretation of the statute is incorrect. *See United States ex rel Mistick PBT v. Hous. Auth. of City of Pittsburgh*, 186 F.3d 376, 393 (3d Cir. 1999) ("[I]n enacting the 1996 amendment [adding § 552(a)(2)(D)], Congress did not intend to make most materials disclosed through a FOIA request presumptively accessible to the general public, but was only ensuring broad access to 'previously-released records on a popular topic, such as the assassinations of public figures.'") (citing H.R. Rep. No. 104-795, at 21 (1996)). While Plaintiffs

[2] *See, e.g.*, Proactive Disclosure Pilot Assessment, U.S. Department of Justice, Office of Information Policy, p. 6 n.4, available at https://www.justice.gov/oip/reports/proactive_disclosure_pilot_assessment/download, noting that EPA already complies with a "release to one, release to all" policy being studied by the Department of Justice.

may speculate about how they believe prospective disclosure of the calendar might affect EPA's workload or explain how helpful such a position would be to reporters such as themselves who conduct research, they point to no actual legal duty for the agency to do so and ignore basic facts about EPA's compliance with this provision through its use of FOIAonline and its FOIA policy.

II. Plaintiffs' Allegations of Concealment and Delay are both Inaccurate and Irrelevant.

Plaintiffs allege that EPA has produced similar but not identical types of records in response to FOIA requests from different requesters. *See* Plfs.' Opp. at 6-10. Not only are Plaintiffs' allegations of no moment to the legal issues before the Court, but Plaintiffs' allegations also reflect their failure to recognize or acknowledge that the documents cited in the Opposition are simply examples of different types of records that serve different purposes—*i.e.*, emails and email attachments, public online calendar, and official outlook calendar—which were treated separately and appropriately under FOIA for precisely that reason.

First, Plaintiffs compare an excerpt of EPA's response to Sierra Club's FOIA request in *Sierra Club v. EPA*, Civ. A. No. 17-1906 (CKK) (D.D.C. filed Sept. 18, 2017), with a public calendar that EPA publishes online. This is a classic case of comparing apples and oranges, as these are very different records produced for very different purposes. EPA's voluntary publication of a contemporaneous, simplified administrator's calendar on its web site for general public use does not impact FOIA requesters' rights to seek detailed records under the FOIA. Nor does such publication waive the Agency's ability to assert FOIA privileges or exemptions or obligate it to publish a full calendar in its reading room, and likewise its response to a FOIA request for specific communications does not obligate it to modify or change its separate online calendar. *See, e.g., Mehl v. EPA*, 797 F. Supp. 43, 47 (D.D.C. 1992) ("[A]n agency voluntarily

may disclose a portion of an exempt document without waiving the exemption for the entire document."). Put simply, the two are unrelated, despite Plaintiffs' attempts to stitch them together.

Further, Plaintiffs provide the Court with a heavily edited excerpt of the *Sierra Club* FOIA requests to claim that the records produced in that case differ in detail from those produced to Plaintiffs, despite the fact that the *Sierra Club* FOIA requests were more extensive and involved email correspondence related to external meetings, in addition to the official calendar. The full requests can be found at *Sierra Club v. EPA*, Civ. A. No. 17-1906 (CKK), ECF Nos. 1-1 to 1-4. In short, the plaintiff in *Sierra Club* requested not only all calendars but also external communications of the EPA Administrator and several senior agency staff. Given such a broad and multi-part request, the documents attached and cited by Plaintiffs at Second Langford Declaration Exhibits KK and LL, not surprisingly, appear to not actually be "versions of [the Administrator's] calendar" as Plaintiffs claim. Rather, the cited documents are related to emails concerning draft proposals of travel schedules and related arrangements and were plainly still in development. Defendant disputes that such documents are the type of documents that would be responsive to Plaintiffs' FOIA request in this case, and their inclusion here by Plaintiffs as so-called representative samples is at best premature.[3]

Plaintiffs make similarly unsubstantiated claims of government malfeasance with respect to allegations that EPA "sanitized" the calendar. *See* Plfs.' Opp. at 9-10. These claims are both devoid of factual support and irrelevant to Claim 1. To the extent Plaintiffs have objections to the

[3] Plaintiffs sought and obtained, over Defendant's objections, a schedule from this Court that separated the issues in Claim 1 and Claim 2, yet throughout their motion relating to Claim 1 (the reading room claim) Plaintiffs raise issues more properly addressed by the parties in the briefing of Claim 2 (the FOIA request claim).

records that have been produced in response to their FOIA request (Claim 2), EPA will address those concerns in discussions with Plaintiffs or, if the parties are unable to resolve them, in briefing to the Court.[4]

Based on these incomplete, inaccurate, and unsubstantiated claims, Plaintiffs then argue that prospect injunctive relief is justified pursuant to *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988). *See* Plfs.' Opp. at 3-4, 10. However, even assuming, *arguendo*, the facts alleged by Plaintiff, this case is still distinguishable from those found in *Payne Enterprises*.

In *Payne*, officers at Air Force Logistics Command ("AFLC") effectively refused to comply with their FOIA obligations despite orders from the Secretary of the Air Force to disclose documents to the requester. *Payne Enters.*, 837 F.2d at 487. "For almost two years, officers at AFLC bases refused to fulfill Payne's requests for copies of bid abstracts when there was limited competition for a contract, thus forcing Payne to seek administrative review." *Id.* at 494. Although "the Secretary's Office sent letters to AFLC commanders, admonishing them for their refusals to grant Payne's requests because no FOIA exemption applied," "[t]he AFLC officers . . . continued to deny Payne's requests, and the Secretary refrained from taking firm action to end their recalcitrance." *Id.* This is wholly unlike the situation here, where EPA has produced records in response to Plaintiffs' FOIA request (Claim 2 of this action). *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

[4] Further, this Court has long recognized that "newspaper articles and comments are not admissible in evidence as proof of the facts contained therein," *United States v. Jaffe*, 98 F. Supp. 191, 194 (D.D.C. 1951), and Plaintiffs' citation to their own self-serving article does not establish wrongdoing.

discretion."); *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 211 F. Supp. 3d 143, 147 (D.D.C. 2016) (stating that *Payne Enterprises* and its progeny recognize policy and practice clams that involve "more egregious, intentional agency conduct than mere delay"). Quite the opposite, Plaintiffs take pains to document EPA's compliance with other FOIA requests for calendar records of the Administrator. Although Plaintiffs complain that EPA took too long to respond to these requests, delay alone is not actionable under *Payne*. Plaintiffs here can point to little more than processing delay due to the agency's FOIA backlog and Plaintiffs' own exaggerated charges of improper withholdings, which themselves are based on a comparison of productions from different FOIA requests seeking different types of documents. Certainly, the situation presented here does not amount to the egregious circumstances in *Payne Enterprises. See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235, 1246 (D.C. Cir. 2016) (noting that "only a rare instance of agency delinquency in meeting its duties under the reading-room provision will warrant a prospective injunction with an affirmative duty to disclose subject records to a plaintiff").

Regardless, the claim at issue here is one of statutory interpretation, and Plaintiffs' claims fail under any reasonable interpretation of the reading room provision, 5 U.S.C. § 552(a)(2).

CONCLUSION

For the reasons set forth above, as well as in Defendant's cross-motion for partial summary judgment, Defendant respectfully requests that this Court grant partial summary judgment in Defendant's favor with respect to Plaintiffs' First Claim.

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Respectfully submitted,

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