UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL INTEGRITY PROJECT and CHESAPEAKE CLIMATE ACTION NETWORK, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No. 1:18-cv-1952 (JDB)

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANT'S PARTIAL MOTION TO DISMISS

INTRODUCTION

In the spring of 2018, while defendant EPA[1] was experiencing a significant increase in the number of FOIA requests received by the EPA Office of the Administrator (AO), plaintiffs submitted three FOIA request to the EPA AO. As to two of these FOIA requests, plaintiffs have not yet received a final determination from the EPA, although the agency has notified plaintiffs as to where each request sits in the EPA AO's processing queue, noting the "sharp increase in requests" the agency has received, and provided plaintiffs with an estimated date by which the agency will complete processing each request. As to their third FOIA request, plaintiffs received a final determination from the EPA within seven weeks of submitting their request, but are dissatisfied with the agency's response. On the basis of these three requests, plaintiffs assert a "policy or practice" claim under the FOIA (Count III), alleging that responses to their FOIA requests have been intentionally and unduly delayed by an agency policy whereby the EPA provides senior leadership within the agency, including political leadership, the opportunity to review records responsive to pending FOIA requests before those records are disclosed to the public. Also on the basis of these requests, plaintiffs bring a claim that the agency's "failure to timely respond to Plaintiffs' FOIA requests is a violation of the FOIA" (Count I).

As defendant demonstrated in its opening memorandum, Counts I and III must be dismissed because plaintiffs rely on flawed legal arguments and have failed to plead sufficient factual matter to plausibly demonstrate that they are entitled to relief. Notwithstanding these fatal flaws, plaintiffs ask this Court to take the rare steps of allowing discovery on their FOIA claims and ordering prospective relief under the FOIA.

[1] Unless otherwise indicated, all terms and abbreviations correspond to those in defendant's Memorandum of Points and Authorities in Support of Its Partial Motion to Dismiss, ECF No. 10 (Def.'s Mem.), filed on October 23, 2018.

Plaintiffs' extraordinary requests should be rejected because under D.C. Circuit precedent, the agency policy plaintiffs seek to challenge does not constitute a failure to abide by the terms of the FOIA. Further, plaintiffs' claims should be dismissed because this is not, as plaintiffs suggest, a case where "there are two alternative explanations, one advanced by [defendant] and the other advanced by [plaintiff], both of which are plausible." *See* Plaintiffs' Opposition to Defendant's Partial Motion to Dismiss, ECF No. 11 (Pls.' Br.) at 4 (quoting *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015)); *see also id.* at 5. Rather, as defendant argued in its opening memorandum and as further explained below, even with all inferences construed in plaintiffs' favor, the complaint fails to "plead 'enough facts to state a claim to relief that is plausible on its face' and to 'nudge[] [plaintiffs'] claim across the line from conceivable to plausible." *Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 225 (D.D.C. 2011) (quoted in Pls.' Br. at 11).

And even if the Court agreed that plaintiffs had satisfied the minimum pleading obligations under Federal Rule of Civil Procedure 12(b)(6), this Court should dismiss Count III of plaintiffs' complaint for an additional, independent reason: on November 16, 2018, the EPA issued a new Awareness Notification Process for Select Freedom of Information Act Releases ("Awareness Notification Process") which took immediate effect and "controls and supersedes any prior process, procedure, guidance, or instruction, either formal or informal, to the extent such is inconsistent with the awareness notification process described." *See* Exhibit at 1. Thus, even if plaintiffs' complaint can reasonably be read to plausibly allege a policy or practice claim under the FOIA arising out of an awareness review policy in place at the EPA prior to November 16, 2018, the Awareness Notification Process makes clear that any such policy is no longer

operative. Accordingly, Count III is now moot and should be dismissed.[2]

For all of these reasons, and for the reasons provided in defendant's opening memorandum, this Court should dismiss Counts I and III.

ARGUMENT

I. COUNT I SHOULD BE DISMISSED.

In Count I of their complaint, plaintiffs seek relief for defendant's alleged "failure to timely respond to Plaintiffs' FOIA requests," and in Count II, plaintiffs seek relief for defendant's alleged improper withholding of responsive records. Compl. ¶¶ 94, 96. As defendant argued in its opening memorandum, the Court should dismiss Count I because (1) the failure to process FOIA requests within 20 days, in and of itself, does not constitute a violation of the FOIA; and (2) Count I does not seek – and, on the basis of Count I, a court could not order – any relief other than that sought in Count II. *See* Def.'s Mem. at 10-12. In their opposition, plaintiffs do not respond to defendant's argument that Count I does not add anything to their complaint that is not covered by Count II. Instead, they argue simply that Count I should not be dismissed under Rule 12, which requires only that "'the court can ascertain from the face of the complaint that *some* relief can be granted.'" *Id.* (quoting *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985)). But because Count I does not state a valid claim for specific relief that is not duplicative of Count II, Count I should be dismissed.

As a matter of judicial economy, courts should dismiss claims that are duplicative of other claims. *See, e.g.*, *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 81 (D.D.C. 2010);

[2] As noted, the Awareness Notification Process was issued and took effect on November 16, 2018, after defendant had filed its opening memorandum and plaintiffs had filed their opposition. Consequently, defendant would not oppose a motion by plaintiffs to file a surreply limited to addressing the significance of the Awareness Notification Process as relates to Count III of plaintiffs' complaint.

see also WMI Liquidating Trust v. Fed. Deposit Insur. Corp., 110 F. Supp. 3d 44, 59 (D.D.C. 2015) (noting that courts have discretion to dismiss duplicative claims). Claims are duplicative when they "stem from identical allegations, that are decided under identical legal standards, and for which identical relief is available." *Wultz*, 755 F. Supp. 2d at 81.

As D.C. Circuit precedent makes clear, the FOIA's 20-day timeline – and an agency's failure to meet that timeline – simply sets forth a condition that must be met before a court may exercise or retain jurisdiction over the underlying FOIA claim. *CREW*, 711 F.3d at 189-90 ("penalty" for agency's nonadherence to the FOIA's timelines "is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court."); *EPIC*, 15 F. Supp.3d at 41 ("*CREW* makes clear that the impact of blowing the 20-day deadline relates only to the requestor's ability to get into court."). The FOIA does not provide for waiver as a consequence for an agency's failure to make a "timely" determination, and it certainly does not require immediate production of documents; rather, once a lawsuit is filed, the agency "may continue to process the request," but will do so under the court's supervision. *CREW*, 711 F.3d at 189. By contrast, the FOIA, by its terms, authorizes a court to order the disclosure of responsive records improperly withheld, 5 U.S.C. § 552(a)(4)(B), which is precisely the relief sought in Count II. Compl. ¶¶ 95-98.

In that regard, because failure to process FOIA requests within 20 days, in and of itself, does not constitute a violation of the FOIA, *see* Def.'s Mem. at 10-12, but only triggers the exhaustion requirement before a requester can file suit in district court, *see CREW*, 711 F.3d at 189, Count I does not actually raise a legal claim independent of Count II. And because through Count II, the district court has jurisdiction to supervise the agency's processing of plaintiffs' FOIA requests and, if plaintiffs are successful on that claim, the court can issue an order to

disclose the responsive records improperly withheld, 5 U.S.C. § 552(a)(4)(B), there is no conceivable additional relief under the FOIA that plaintiffs could obtain under Count I but not under Count II. Accordingly, this Court should dismiss Count I. *See Rodriguez v. Lab. Corp. of Am. Holdings*, 13 F. Supp. 3d 121, 128 (D.D.C. 2014) (dismissing one count of complaint where that count "does not present any legal or factual theories that are not already subsumed in" another count of the complaint).

II. PLAINTIFFS HAVE FAILED TO ALLEGE A VALID "POLICY OR PRACTICE" CLAIM.

In Count III, plaintiffs bring a FOIA "policy or practice" claim arising out of the EPA's provision to senior leadership within the agency, including political leadership, of the opportunity to review records responsive to pending FOIA requests before those records are disclosed to the public. Plaintiffs allege that the EPA's awareness review policy "serves no legitimate purpose except to unlawfully delay Plaintiffs' access to non-exempt public records in violation of FOIA's . . . statutory requirements." Compl. ¶ 104. In its opening memorandum, defendant argued that the "policy or practice" claim asserted in Count III must be dismissed under Rule 12(b)(6) for two, independent reasons: (1) because plaintiffs have failed to identify a policy or practice that constitutes a "failure to abide by the terms of the FOIA," *see Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 293 (D.D.C. 2013) (quoting *Payne Enters.*, 837 F.2d at 491); and (2) because plaintiffs have failed to allege facts showing that an awareness review policy has been the cause of delays in the EPA's responses to plaintiffs' FOIA requests, or that responses to FOIA requests plaintiffs plan to submit to the EPA in the future will be unlawfully delayed by the complained-of policy. Plaintiffs' opposition fails to defeat either argument.

A. The Policy Plaintiffs Challenge Cannot Support a Policy or Practice Claim Under Circuit Precedent.

First, plaintiffs' argument that they have identified a policy or practice[3] that constitutes a "failure to abide by the terms of the FOIA," *Muttitt*, 926 F. Supp. 2d at 293, rests on plaintiffs' misreading of the relevant case law, including the D.C. Circuit's recent decision in *Judicial Watch v. U.S. Department of Homeland Security*, 895 F.3d 770 (D.C. Cir. 2018). As defendant explained in its memorandum, the D.C. Circuit has made clear that the impact of an agency's failure to meet the 20 working day timeline is only that the requestor may sue in district court, and accordingly, does not on its own constitute an actionable FOIA violation. *See* Def.'s Mem. 13 (citing *EPIC*, 15 F. Supp.3d at 41; *CREW*, 711 F.3d at 189; *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 794 (D.C. Cir. 2018) (Srinivasan, J., dissenting) (relying in part on *CREW*, 711 F.3d at 185, 189-90 for the proposition that "a lapse of the twenty-day period cannot itself amount to a FOIA violation"), *petition for reh'g filed* Oct. 2, 2018). Despite defendant's string-cite, Def.'s Mem. 13, plaintiffs claim that "it is unclear to what precedent Defendant refers" in making its argument and assert that "the law of this Circuit plainly states the opposite." But in support of their argument that D.C. Circuit precedent "states the opposite," plaintiffs quote not the holding of the *Judicial Watch* opinion but a portion of that decision wherein the court simply restates the defendant agency's argument in that case (and which is,

[3] Defendant does not dispute that the EPA affords senior leadership, including political leadership, within the agency the opportunity to review records responsive to pending FOIA requests before those records are released to the public. *See, e.g.*, Def.'s Mem. 5-6; *see also* Pls.' Br. 11-15. What defendant disputes is that (1) the EPA's awareness review constitutes a violation of the FOIA so as to support a policy or practice claim under the FOIA, and (2) plaintiffs have pleaded sufficient facts to support the plausible inferences necessary to support a policy or practice claim under the FOIA, including that the complained-of policy has been the cause of delays in the EPA's responses to plaintiffs' FOIA requests, or that responses to FOIA requests plaintiffs plan to submit to the EPA in the future will be unlawfully delayed by the complained-of policy. *See infra* at 6-15.

moreover, fully consistent with, and not oppositional to defendant's argument). 895 F.3d at 779 ("The Secret Service . . . has treated its non-responsiveness to Judicial Watch's requests as consistent with FOIA: When an agency fails 'promptly' to produce requested non-exempt records or invoke an exemption within statutory timetables, the requesting party may file a lawsuit without exhausting the administrative remedy.").

Plaintiffs' further argument that "[u]nreasonable delay is . . . the precise 'ongoing "failure to abide by the terms of the FOIA"' contemplated by *Payne*" also misreads the cases on which it relies. *See* Pls.' Br. 31. In support of this point, plaintiffs cite *Muttitt v. Department of State*, 926 F. Supp. 2d 284, 293 (D.D.C. 2013), but the quotation in the parenthetical actually is found in *American Center for Law and Justice v. United States Department of State*, 249 F. Supp. 3d 275, 283 (D.D.C. 2017) ("*ACLJ*"). In *ACLJ*, in granting the defendant's Rule 12(b)(6) motion to dismiss the plaintiff's policy or practice claim, the court found that plaintiff's complaint "nowhere . . . actually articulate[s] some agency-wide 'intent[ ]' to delay, some 'determin[ation]' that State would pass over the Act's time limits, or even that Defendant has taken some informal stance that across-the-board delay is the new operating procedure" but "instead obliquely alleges that State 'has a reputation for flaunting [*sic*] and disregarding its public accountability and FOIA obligations.'" 249 F. Supp. 3d at 283-84. Plaintiffs here similarly cannot articulate that the complained-of policy was adopted with the *intent to* delay and their claim should similarly be dismissed. And the erroneously cited *Muttitt* decision says nothing about an allegation of unreasonable delay satisfying a plaintiff's obligation to allege an ongoing failure to abide by the terms of the FOIA to bring a policy or practice claim under *Payne*. Rather, in *Muttitt*, the plaintiff argued that the defendant agency had a "policy or practice of improperly denying requests for expedited processing and fee waivers" (not a policy or practice of delay), but the

court rejected plaintiff's argument because plaintiff failed to even state a separate cause of action for any such policy or practice. 926 F. Supp. 2d at 292-93. In other words, *Muttitt* is wholly irrelevant.

Nor did the D.C. Circuit, in *Tax Analysts v. U.S. Department of Justice*, 845 F.2d 1060 (D.C. Cir. 1988), *aff'd*, 492 U.S. 136 (1989), "recognize[]" anything with respect to delay in an agency's response to a FOIA request. Rather, that case concerned whether an "agency could in all cases deny access to records otherwise disclosable on the ground that they are available elsewhere." *Id.* at 1065. The D.C. Circuit there "h[e]ld that in response to a FOIA request, an agency must *itself* make disclosable agency records available to the public and may not on grounds of administrative convenience avoid this statutory duty by pointing to another public source for the information." *Id.* at 1067 (emphasis in original). The court said absolutely nothing about whether an agency policy that might have some delaying effect on a requester's access to records could qualify as an ongoing "failure to abide by the terms of the FOIA" as required under *Payne* to support a policy or practice claim.[4]

Finally, plaintiffs' reading of the recent *Judicial Watch* decision does not compel a finding that the complaint here states a policy or practice claim under *Payne*. Plaintiffs recite two rules found in the *Judicial Watch* decision: (1) the holding, also announced in *CREW*, that

[4] Plaintiffs cite one additional case, *Aviation Consumer Action Project v. Commercial Aeronautics Board*, 418 F. Supp. 634 (D.D.C. 1976), in support of their argument that the District Court for the District of Columbia has held that an agency rule that resulted in a 1-5 day delay in disclosure of responsive records violates the FOIA. The strength of the reasoning in *Aviation Consumer Action Project*, and Plaintiffs' implication that this case is meaningful precedent, is belied by the fact that undersigned counsel was unable to identify, in broad searches of the Westlaw database, a single instance in which this decision has been cited for any proposition by any court anywhere. Moreover, because every other decision cited by either party in this case post-dates *Aviation Consumer Action Project*, to the extent *Aviation Consumer Action Project* is inconsistent with the D.C. Circuit decisions that defendant has relied on, *see, e.g.*, *CREW*, 711 F.3d at 189, it can be considered effectively overruled.

"an agency's failure to adhere to statutory timeframes . . . permits a plaintiff to bring suit," Pls.' Br. 34; and (2) the holding that "a plaintiff 'states a plausible policy or practice claim under *Payne* by alleging prolonged, unexplained delays in producing non-exempt records that could signal the agency has a policy or practice of ignoring FOIA's requirements,'" Pls.' Br. 32 (quoting *Judicial Watch*, 895 F.3d at 780). Defendant does not dispute that these holdings are precedential in this Circuit. Rather, defendant's argument is that neither helps plaintiffs' complaint survive under Rule 12(b)(6). The first holding does not concern the viability of policy or practice claims but simply speaks to the fact that an agency must meet the FOIA's 20-day statutory timeline if it wishes to invoke administrative exhaustion as a bar to the requester filing suit in federal court. *See CREW*, 711 F.3d at 189; *EPIC*, 15 F. Supp.3d at 41. And plaintiffs' allegations do not fall within the second holding: as explained in Def.'s Mem 15, plaintiffs have not alleged repeated prolonged and *unexplained* delays in the EPA's response to their FOIA requests. Rather, plaintiffs' allegations are that the EPA has given plaintiffs repeated updates about the status of their requests. *See id.*; *id.* at 6-8. Moreover, the explanations the EPA has given plaintiffs do not "signal the agency has a policy or practice of ignoring FOIA's requirements." *Judicial Watch*, 895 F.3d at 780. Rather, they explain that the extended processing time for FOIA requests to EPA AO are due to the "significant increase in FOIA requests" facing the agency since January 2017, and not a result of any ignorance of FOIA's requirements by the agency. Compl. Ex. H, at ECF p. 3-4; Compl. Ex. N, at ECF p. 4.[5] To the contrary, records attached to the complaint further document steps the agency has taken to improve and streamline its procedures in response to its heightened FOIA burdens. *See* Def.'s

[5] On the basis of these very documents attached to plaintiffs' complaint, plaintiffs' assertion that defendant has "'flipp[ed] to the requester the burden that FOIA places on the agency to explain its delay,'" Pls.' Br. 21 (quoting *Judicial Watch*, 895 F.3d at 784), cannot be countenanced.

Mem. 4-6; Compl. Ex. C, at 2-3 (describing FOIA Expert Assistance Team AO Centralization Pilot Project). Plaintiffs have offered no reason to read *Judicial Watch* so broadly as to allow a policy or practice claim to go forward on the bare allegations in plaintiffs' complaint. *See* Def.'s Mem. 15-16.

B. Plaintiffs Have Failed to Allege Sufficient Facts to Support a Policy or Practice Claim.

Even if the challenged awareness review policy could be considered the type of ongoing violation of the FOIA that suffices to support a policy or practice claim under D.C. Circuit precedent, plaintiffs' policy or practice claim must nonetheless be dismissed for failure to plead the necessary factual allegations to establish all of the elements of such a claim.

"To state a claim for relief under the 'policy or practice' doctrine articulated in *Payne* . . . a plaintiff must allege, inter alia, facts establishing that the agency has adopted, endorsed, or implemented some policy or practice that constitutes an ongoing 'failure to abide by the terms of the FOIA.'" *Muttitt*, 926 F. Supp. 2d at 293 (D.D.C. 2013) (quoting *Payne Enterprises*, 837 F.2d at 491). Moreover, "to have standing to challenge an alleged 'policy or practice,' a plaintiff must allege that it was subject to the practice challenged." *See Nat'l Sec. Counselors v. C.I.A.*, 931 F. Supp. 2d 77, 92 (D.D.C. 2013) ("even assuming that an alleged policy or practice exists and some FOIA requesters may have been subject to that policy, FOIA plaintiffs must establish that they have personally been subject to the alleged policy to have standing to challenge it."). But here, as defendant explained in its opening memorandum, the complaint contains no *factual* allegations plausibly establishing (1) that the FOIA requests plaintiffs submitted to the EPA have been affected by such a policy, or (2) that responses to FOIA requests they plan to submit to the EPA in the future will be unlawfully delayed by such a policy. *See* Def.'s Mem. 17-21. Accordingly, plaintiffs' claim must be dismissed.

Plaintiffs spend the bulk of their 35-page brief discussing hearsay statements in two letters from a member of Congress that discuss several alleged EPA FOIA review policies and practices and statements and emails concerning EPA's handling of certain FOIA requests, in support of their argument that awareness review has resulted in intentional, undue delays in the agency's FOIA responses. Pls.' Br. 12-16, 21-30; Compl. Exs. A & R. Even if this evidence constituted "enough factual matter," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007), to "plausibly demonstrate[,]" *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 253, that the EPA's awareness review has been implemented with the intent to delay in violation of the FOIA, plaintiffs' policy or practice claim would still fail. This is because plaintiffs have not offered any factual matter plausibly demonstrating that FOIA requests they submitted to the EPA have been delayed – intentionally or otherwise – by awareness review, as they must to bring their claim. *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 263 (D.D.C. 2012) (holding that to bring a FOIA policy or practice claim, plaintiffs must "allege[] that [they] have been subject to the . . . policy [they] seek to challenge").

As to two of plaintiffs' requests, EPA-HQ-2018-005041 and EPA-HQ-2018-006648, as the evidence attached to plaintiffs' complaint demonstrates, the agency has advised the plaintiffs that as a result of the "significant increase in FOIA requests [that EPA AO has experienced] since the start of this administration," these requests were behind more than 1100 requests in the agency's processing queue and, accordingly, the agency stated that it estimated that the processing time for each of these requests was "388 working days." Def.'s Mem. 6-8; Compl. Ex. H, at ECF p. 3-4; *id.* at Ex. N, at ECF p. 4. Thus, while the agency's communications with the plaintiffs regarding requests EPA-HQ-2018-005041 and EPA-HQ-2018-006648 indicate that the agency's responses to those requests will be delayed beyond the statutory timeline, they do

not support a plausible inference that plaintiffs' requests have been affected by the EPA's awareness review. To the contrary, in light of (1) the agency's acknowledgement that more than 1100 FOIA requests are ahead of plaintiffs' requests in the agency's processing queue, (2) the agency's estimated completion dates for plaintiffs' requests of August 2019 and October 2019, and (3) the evidence attached to plaintiffs' complaint showing that awareness review takes place after the FEAT has completed its review and processing of the responsive material during the final 48 hours before the material is released to the requester, it is highly implausible that plaintiffs' requests have yet been subjected to the awareness review policy described in plaintiffs' complaint. *See* Compl. Ex. H, at ECF p. 3-4; *id.* at Ex. N, at ECF p. 4.; *id.* at Ex. O; *id.* at Ex. Q.

Plaintiffs are thus left to support their inference that their "requests have experienced significant delays which cannot be explained by a FOIA 'backlog'" with only a single example, which cannot alone suffice to show that an agency policy has been implemented with the intent and practical effect of delaying FOIA responses. Pls.' Br. 17-19. Moreover, the single example they cite, FOIA request number EPA-HQ-2018-005878, does not support their allegation that awareness review has resulted in *delays* to FOIA responses: the EPA issued a final determination as to that request less than six weeks (and only 27 business days) after the request was submitted, and released records to the requester in two batches, both within eight weeks of the agency's receipt of the request. *See* Def.'s Mem. 6-7; Compl. Ex. K, at 3, 6. And plaintiffs' complaint about the agency's handling of request EPA-HQ-2018-005878 is not that awareness review unduly delayed a response but that the agency allegedly denied "the portion of the . . . request seeking 'politically charged' external communications from *this* Administration without any explanation" and then failed to respond to the plaintiffs' requests for clarification as to the

agency's response. In that regard, neither the agency's handling of request EPA-HQ-2018-005878, nor the plaintiffs' complaints about that handling, support an inference that this request was affected by an awareness review policy that had the purpose (or effect) of intentional undue delay. Thus, the factual allegations proffered by plaintiffs in their complaint and the attachments thereto not only do not support any plausible inference that plaintiffs' requests have been intentionally delayed via awareness review, but they in fact directly dispute such an inference. On this basis alone, plaintiffs' policy or practice claim must fail. *See Quick v. U.S. Dep't of Commerce, Nat. Inst. of Standards & Tech.*, 775 F. Supp. 2d 174, 187 (D.D.C. 2011) (dismissing plaintiff's policy or practice claim because "even assuming that individuals other than [the plaintiff] may have been subject to the alleged 'pattern or practice,' the record is clear that [the plaintiff] was not").

Plaintiffs' policy or practice claim additionally fails because plaintiffs have not offered any factual matter plausibly demonstrating that responses to FOIA requests they plan to submit to the EPA in the future will be unlawfully delayed by the challenged awareness review policy and, in fact, they could not do so. First, although in their opposition, plaintiffs' assert that they "have pleaded more than enough facts to support the 'reasonable inference' that EPA's 'political awareness review' policy or practice remains in effect," Pls.' Br. 20, they cannot escape the concession in their complaint that they do not even know "whether [the complained-of] policy or practice remains in place at EPA." Complaint ¶ 5. This concession is fatal to plaintiffs' claim. *See Judicial Watch*, 895 F.3d at 780 (reaffirming holding in *Payne* that to "state[] a plausible policy or practice claim" a plaintiff must allege "that the pattern of delay will interfere with its right under FOIA to promptly obtain non-exempt records from the agency in the future").

And second, even if this concession were not fatal to plaintiffs' claim, their challenge to

the EPA's awareness review practices described in the complaint and attachments thereto is now moot. This is because, on November 16, 2018, the EPA issued a new Awareness Notification Process for Select Freedom of Information Act Releases ("Awareness Notification Process") which took immediate effect and "controls and supersedes any prior process, procedure, guidance, or instruction, either formal or informal, to the extent such is inconsistent with the awareness notification process described." *See* Exhibit at 1. Pursuant to the Awareness Notification Process, for FOIA requests that are identified for "awareness notification," after a FOIA determination has been made by the "Action Office" (the organizational unit charged with responsibility for responding to the FOIA request), EPA senior leadership will be afforded a short "awareness notification period" to review the documents to be released before the determination is issued to the requester. *Id.* at 1-3.[6] At the conclusion of the awareness notification period, "the Action Office shall issue the Agency's FOIA determination . . . promptly, but in no event later than one business day following completion of the . . . awareness notification period." *Id.* at 3. The Awareness Notification Process makes clear that the policy it outlines is not undergirded by an intent to delay. *See, e.g.*, *id.* at 1 ("This awareness notification process is not an approval process, nor does this process alter or eliminate any part of the

[6] Pursuant to the Awareness Notification Process, the duration of the "awareness notification period" is "up to three business days." *Id.* at 3. Defendant recognizes that documents attached to plaintiffs' complaint reflect that in June 2017, the duration of the EPA's awareness review period was up to 48 hours. *See* Compl. Ex. O (email to FOIA Coordinators about "awareness review" asking that "copies of pending FOIA releases" be sent "48 hours before the release" and noting that where "a deadline . . . makes 48 hours impractical" "awareness review can be expedited"). Because both time periods are *de minimus*, and neither time period, even if it were to occur after FOIA's statutory timeline has run, would in and of itself constitute delay that is "undue," defendant maintains that the difference between 48 hours and three business days is not legally significant. As explained *supra* at 7, for a policy that results in some delay to support a FOIA policy or practice claim, it must reflect "some agency-wide 'intent[]' to delay," *ACLJ*, 249 F. Supp. 3d at 283, and, the Awareness Notification Process makes clear that any such intent is absent from the new process, *see infra* at 14-15.

Agency's existing procedures for collecting, reviewing or redacting documents, or preparing responses to FOIA requests."); *id.* (noting that "[t]he aspects of the awareness notification process described in paragraphs 1 through 3 . . . run concurrently with the Action Office's preparation of the FOIA response"); *id.* at 3 ("The awareness process . . . does not affect the statutory timelines or, when applicable, litigation deadlines facing the Agency."). Even if the complaint can reasonably be read to plausibly allege that, prior to November 16, 2018, the EPA had in place an awareness review policy that intentionally and/or unduly delayed responses to FOIA requests (which it cannot), or even to raise questions about awareness review at the EPA, the issuance of the Awareness Notification Process clearly moots any claims arising out of such allegations or questions. In that regard, the Awareness Notification Process provides yet another independent reason to dismiss plaintiffs' policy or practice claim.

CONCLUSION

For the foregoing reasons and for the reasons stated in the defendant's opening memorandum, this Court should dismiss Counts I and III of the complaint.

Dated: November 20, 2018

Respectfully submitted,

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

November 16, 2018

OFFICE OF THE
ADMINISTRATOR

MEMORANDUM

SUBJECT: Awareness Notification Process for Select Freedom of Information Act Releases

FROM: Ryan Jackson
Chief of Staff

TO: General Counsel
Assistant Administrators
Inspector General
Chief Financial Officer
Associate Administrators
Regional Administrators
Regional Counsels
Deputy Regional Counsels
FOIA Coordinators

Earlier this week, in a November 13, 2018, memorandum to all staff, Acting Administrator Wheeler reaffirmed the agency's commitment to transparency, noting that the Freedom of Information Act is both a statutory obligation and an important tool for promoting transparency and building public trust in agency actions.

For years, spanning several Administrations, senior leaders at the U.S. Environmental Protection Agency have been notified of the imminent release of information through FOIA. This "awareness notification process" is intended to inform senior officials of the release of information through FOIA that may be of particular interest to the press, the public and/or Congress. Indeed, having such awareness has allowed agency senior leadership to respond efficiently to inquiries about such releases. In an effort to ensure consistency and provide clarity, this memorandum sets forth the awareness notification process to be followed at the agency.

This awareness notification process is not an approval process, nor does this process alter or eliminate any part of the agency's existing procedures for collecting, reviewing or redacting documents, or preparing responses to FOIA requests. Consistent with the agency's FOIA policy and procedures, FOIA staff, program staff and program managers will continue to determine whether information should be released or withheld under FOIA's exemptions. The awareness notification process described below is effective immediately and controls and supersedes any prior process, procedure, guidance or instruction, either formal or informal, to the extent such is

inconsistent with the awareness notification process described below. The aspects of the awareness notification process described in paragraphs 1 through 3 below will run concurrently with the Action Office's[1] preparation of the FOIA response.

PROCESS

1. The National FOIA Office will provide a list of select FOIA requests received that week to the Director of the Office of Executive Secretariat, the Associate Administrator for the Office of Public Affairs and the Associate Administrator for the Office of Congressional and Intergovernmental Relations, with a courtesy copy to the deputy in each of those three offices.

2. As promptly as possible but within five business days of transmittal of the list, the OEX Director and the OPA and OCIR Associate Administrators, or their designees, will notify the National FOIA Office Director, or designee, identifying any specific FOIA requests for which they would like to receive an awareness notification.

3. For those FOIA requests identified for awareness notification, the National FOIA Office Director or Assistant Directors, or their designees, will promptly indicate in FOIAonline that the FOIA response will require an awareness notification. The National FOIA Office Director, or designee, will also notify the Deputy Assistant Administrator or Deputy Regional Administrator of the Action Office by email, specifying which FOIAs have been identified for awareness notification.

4. Following Action Office management approval of the FOIA determination, in accordance with applicable authorities,[2] and prior to issuing the determination, the Action Office shall prepare an "awareness notification email" containing the following information:
   - The name of the Action Office;
   - The FOIAonline tracking number;
   - The name of the requester/organization;
   - The date the FOIA request was perfected;
   - A brief description of the request, as clarified/modified;
   - Whether the response is interim or final;
   - The number of documents and/or pages to be released;
   - An attachment of, or link to, the documents to be released;
   - A list of offices with an equity in the documents and a statement that those offices have reviewed the relevant documents; and
   - The name of the manager responsible for making the FOIA determination.

   A copy of the email will be saved in FOIAonline.

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[1] The Action Office, as defined in EPA's Procedures for Responding to Freedom of Information Act Requests CIO 2157-P-01.1, is the organizational unit that has responsibility for responding to a FOIA request.

[2] *See* 5 U.S.C. § 552(a)(6)(A)(i), 40 C.F.R. §§ 2.103(b), 2.104(h), and EPA Delegation of Authority 1-30 Freedom of Information (12/15/2016); *see also* EPA Freedom of Information Act Policy CIO 2157.1 (09/30/2014) and EPA Procedures for Responding to Freedom of Information Act Requests CIO 2157-P-01.1 (09/30/2014).

5. The Action Office will send the "awareness notification email" to the OEX Director and Deputy Director, the National FOIA Office Director and Assistant Directors, the OPA and OCIR Associate Administrator and Deputy Associate Administrator, the Deputy Assistant Administrator or Deputy Regional Administrator of the Action Office and the individual assigned to the request in FOIAonline.

6. The recipients of the "awareness notification email" will have up to three business days following transmission of that email to review the documents to be released. There is no requirement for the recipients of the awareness notification email to respond or otherwise take action. After 4 p.m. on the third business day after transmission of the awareness notification email, the Action Office shall issue the Agency's FOIA determination. The determination should be issued promptly, but in no event later than one business day following completion of the three-day awareness notification period. After issuance, the determination should be properly documented in FOIAonline.

The awareness process discussed above does not affect the statutory timelines or, when applicable, litigation deadlines facing the agency.

As Acting Administrator Wheeler shared in his November 13, 2018, memorandum, the EPA is committed to conducting its business in an open and transparent manner and will continue to take steps to improve the efficacy and efficiency of its FOIA process. I look forward to working with all of you to make the EPA a flagship example of transparent, efficient and effective government.

cc: Andrew R. Wheeler
Henry Darwin