UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, *Plaintiff*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Defendant*.	Civil Action No. 17-0652 (BAH)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiff Public Employees for Environmental Responsibility ("PEER") brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel Defendant U.S. Environmental Protection Agency ("EPA" or "Agency") to release records. The two-part FOIA request relates to statements that EPA Administrator Scott Pruitt made on the CNBC program "Squawk Box" during an appearance on March 9, 2017. PEER asserts that Administrator Pruitt made statements concerning the effect of human activity on climate change. PEER asks EPA to produce any and all documents that the Administrator may have relied upon in making the statements or, even more broadly, that support a conclusion that human activity is not the largest factor driving global climate change.

While posed as a request for records, the two-part request actually asks the Agency to answer questions and identify documents that may prove or disprove a proposition concerning climate change. To be proper, a FOIA request must seek records, nothing more. Plaintiff cannot ask EPA to agree or disagree with an assertion under the guise of a FOIA request. It is apparent

that Plaintiff, as other requestors have tried unsuccessfully to do, is trying to lay a trap. If EPA fails to respond, PEER may allege and the public may assume that EPA cannot disprove the assertion. If EPA responds, EPA is necessarily taking a position about the meaning or significance of the documents and the substantive matters that the documents allegedly support or disprove. Either way, the Agency is being forced to take a position on a policy matter.

Furthermore, to be proper, a request must describe the records sought with reasonable specificity. The two-part request at issue here is massively overbroad, lacks any specificity, and would require the Agency to engage in an endless fishing expedition through any and all Agency files that may conceivably relate to the very broad subject of "climate change."

Although the request is improper on its face, and EPA would have been justified in taking no action at all, EPA nonetheless made efforts to confer with Plaintiff regarding the scope of the improper request in an effort to avoid further litigation. Plaintiff refused to provide further clarity and narrow the request in a manner that would enable EPA to process the request, such as, for example, limiting the request to briefing materials that the Administrator may have used before appearing on the Squawk Box program. Rather, Plaintiff made superficial changes to the wording of the request that do nothing to clarify the requests or cure the fundamental impropriety. Because this is an improper request that did not trigger a duty to comply, Defendant asks the Court to grant this motion and enter summary judgment in its favor.

Factual Background

Defendant respectfully refers the Court to the Statement of Material Facts submitted in support of Defendant's Motion.

Legal Standard

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (citation omitted). A court may grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A "material" fact is one capable of affecting the substantive outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" if there is enough evidence for a reasonable jury to return a verdict for the non-movant. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

FOIA confers jurisdiction on this Court to enjoin an agency from improperly withholding records maintained or controlled by the agency. *See* 5 U.S.C. § 552(a)(4)(B); *McGehee v. C.I.A.*, 697 F.2d 1095, 1105 (D.C. Cir. 1983) (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980)). While federal agencies have an obligation to respond to requests for documents under FOIA, the statute does not mandate that agencies comply with all requests. *Marks v. U.S. Dep't of Justice ("DOJ")*, 578 F.2d 261, 263 (9th Cir. 1978). Rather, an agency's disclosure obligation is only triggered by its receipt of a request that "reasonably describes" the records sought and "is made in accordance with [the agency's] published rules stating the time, place, fees (if any), and procedures to follow." 5 U.S.C. § 552(a)(3)(A); *see also Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 185, n.3 (D.C. Cir. 2013) ("Of course, the duties that FOIA imposes on agencies . . . apply only once an agency has received a proper FOIA request.") (citation omitted).

An agency's obligation to respond to a FOIA request commences upon receipt of a valid request. *Dale v. I.R.S.*, 238 F. Supp. 2d 99, 103 (D.D.C. 2002). A plaintiff's "failure to file a

perfected request therefore constitutes failure to exhaust administrative remedies." *Rodriguez-Cervantes v. U.S. Dep't of Health & Human Servs.*, 853 F. Supp. 2d 114, 117 (D.D.C. 2012). A FOIA suit cannot be sustained when a plaintiff fails to exhaust his administrative remedies. *See Judicial Watch, Inc. v. U.S. Naval Observatory*, 160 F. Supp. 2d 111, 112 (D.D.C. 2001) (*citing Spannaus v. DOJ*, 824 F.2d 52, 58 (D.C. Cir. 1987) ("It goes without saying that exhaustion of remedies is required in FOIA cases.")); *Davis v. F.B.I.*, 767 F. Supp. 2d 201 (D.D.C. 2011) (granting summary judgment for defendants, because the FOIA request failed to reasonably describe the records and, therefore, requester failed to exhaust his administrative remedies).

Argument

I. PEER's Request Does Not Reasonably Describe the Records Sought

Courts have long recognized that agencies are not required to comply when requests made pursuant to FOIA do not reasonably described the records sought and which lack specificity. *See United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 559 (D.C. Cir. 2010), *Mason v. Callaway*, 554 F.2d 129, 131 (4th Cir. 1977). Congressional intent on this point is codified in Section 552(a)(3)(A)(i), which requires that a request "reasonably describe" the records sought. *Dale*, 238 F. Supp. 2d at 104.

To determine whether a request meets this requirement, courts will consider the ability of the agency "to determine precisely what records are being requested." *Id.* (quoting *Tax Analysts v. I.R.S.*, 117 F.3d 607, 610 (D.C. Cir. 1997)). The description of the documents sought in the request must be "sufficient [to] enable [] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Truitt v. Dep't of State*, 897 F.2d 540, 545 n.36 (D.C. Cir. 1990) (quotation marks and

citation omitted); *see also Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000); *Nurse v. Sec'y of Air Force*, 231 F. Supp. 2d 323, 328 (D.D.C. 2002); *Jarvik v. C.I.A.*, 741 F. Supp. 2d 106, 115 (D.D.C. 2010). This is an objective inquiry that does not require the agency or the court to "look beyond the four corners of the request for leads to the location of responsive documents." *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996). It is the requestor's burden to "frame requests with sufficient particularity." *Hall & Assocs. v. EPA*, 83 F. Supp. 3d 92, 102 (D.D.C. 2015) (citing *Judicial Watch, Inc.*, 108 F. Supp. 2d at 27). As explained below, Plaintiff's two-part FOIA request fails to reasonably describe the documents sought and therefore EPA is under no obligation to comply.

A. Plaintiff's Two-Part Request Poses Questions That the Agency Is Not Obligated to Answer

"FOIA only requires that an agency turn over *records*, not that it provide a requester with specific information or answer questions." *Powell v. Internal Revenue Serv.*, 255 F. Supp. 3d 33 (D.D.C. 2017) (emphasis in the original); *see also Willaman v. Erie Bureau of Alcohol Tobacco Firearms & Explosives*, 620 F. App'x 88, 89 (3d Cir. 2015) ("[N]othing in [FOIA] requires answers to interrogatories but rather and only disclosure of documentary matters which are not exempt.") (internal quotations marks omitted); *Rodriguez-Cervantes*, 853 F. Supp. 2d at 117 ("As [plaintiff's] letters merely pose questions . . . they do not constitute valid FOIA requests."); *Jean-Pierre v. Fed. Bureau of Prisons*, 880 F. Supp. 2d 95, 103 (D.D.C. 2012) ("'To the extent that plaintiff's FOIA requests [a]re questions or requests for explanations of policies or procedures, the[y] are not proper FOIA requests.'") (quoting *Thomas v. Comptroller of Currency*, 684 F. Supp. 2d 29, 33 (D.D.C. 2010)); *Jimenez v. Exec. Office for U.S. Attorneys*, 764 F. Supp. 2d 174 (D.D.C. 2011).

In the first part of Plaintiff's request ("First Request"), Plaintiff seeks any and all agency records that Administrator Pruitt "relied upon" when he purportedly made statements on a television program about his belief regarding the effect of human activity on climate change. Even more broadly in the second part of Plaintiff's request ("Second Request"), PEER seeks any and all documents that "support the conclusion" that "human activity is not the largest factor driving global climate change." Def.'s SMF ¶¶ 2, 6.

A description of a requested record is sufficient if it enables a professional employee familiar with the subject area to locate the record with a "reasonable amount of effort." *See, e.g.*, *Truitt*, 897 F.2d at 544–45 (discussing legislative history of 1974 FOIA amendments as related to requirements for describing requested records). Plaintiff's two-part request falls far short of this standard. To the contrary, Plaintiff's FOIA request is so broad and sweeping, and so lacking in specificity, that even a professional agency employee familiar with this subject area could not possibly process the request. Def.'s SMF ¶¶ 3, 8.

While drafted in the guise of FOIA requests, both the First and Second Requests would require EPA to spend countless hours researching and analyzing a vast trove of material on the effect of human activity on climate change. EPA would then need to evaluate whether a particular document supports or refutes, or even relates to, Plaintiff's proposition concerning the effect of human activity on climate change; this evaluation of whether a document is even conceivably responsive is a subjective assessment upon which reasonable minds can differ. It is also outside of the scope of FOIA. *See, e.g.*, *Dale*, 238 F. Supp. 2d at 104. If EPA and other agencies were compelled to investigate, research, and respond to such requests it would reduce government agencies to full-time investigators and researchers, which is not the intent of FOIA. *See Assassination Archives & Research Ctr., Inc. v. C.I.A.*, 720 F. Supp. 217, 219 (D.D.C. 1989)

(explaining that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors); *Bloeser v. DOJ*, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) (reasoning that "[b]ecause 'FOIA' was not intended to reduce government agencies to full-time investigators on behalf of requesters, . . . [t]o the extent that plaintiff can identify documents which he believes exist in a particular office within [DOJ], such identifying information should have been included as part of his original FOIA request"); *Frank v. DOJ*, 941 F. Supp. 4, 5 (D.D.C. 1996) (stating that agency is not required to "dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's questions").

As to the First Request, Plaintiff asserts that "no search is really necessary" because EPA can supposedly ask Administrator Pruitt what agency records he relied upon to make the statements. *See* Jt. Stmt. at 3 (ECF No. 12). But a hallmark of a proper request is that an agency can conduct a reasonable *search* for responsive records; FOIA is not a mechanism to propound interrogatories to agencies or Cabinet-level government officials about policy matters. *See, e.g.*, *Jimenez*, 764 F. Supp. 2d at 182 (*citing Zemansky v. U.S. E.P.A.*, 767 F.2d 569, 573 (9th Cir. 1985)); *see also Yagman v. Pompeo*, 868 F.3d 1075, 1081–82 (9th Cir. 2017) (holding that a request for names and affiliations of individuals potentially referenced in a statement by President Obama was impermissibly vague; and remanding the matter to the District Court for the CIA to further clarify).

Nor is FOIA a means to compel an agency to produce documents that "refute" a statement or position. To "refute a conclusion" an agency must first research an issue, analyze documents, and adopt a position. By producing documents, or by not producing documents, the agency is being compelled to take a position and make an affirmative statement as to what this

material does or does not demonstrate. The Agency is not obligated to respond to questions, requests for research, or demands that the Agency prove or disprove assertions in response to a FOIA request. *Hall & Associates*, 83 F. Supp. 3d at 102; *Jimenez*, 764 F. Supp. 2d at 182. Nor is the Agency obligated to generate explanatory materials. *Anderson v. DOJ*, 518 F. Supp. 2d 1, 10 (D.D.C. 2007); *Zemansky*, 767 F.2d at 573. In sum, these are not requests that describe records with reasonable specificity. *See Judicial Watch, Inc.*, 108 F. Supp. 2d at 27–28 (ruling that request did not reasonably describe records sought because plaintiff "fail[ed] to state its request with sufficient particularity").

The *Hall & Associates* case is particularly instructive. *See Hall & Assocs.*, 83 F. Supp. 3d at 102. In *Hall & Associates*, EPA had received a letter from the plaintiff alleging that EPA had engaged in scientific misconduct. EPA denied the claims and responded by letter that there was no evidence that it had engaged in such misconduct. That led the plaintiff to submit a request under FOIA asking EPA to produce all records or factual analyses that showed certain, detailed statements to be "incorrect." In effect, the plaintiff had attempted to use FOIA to force EPA to rebut the plaintiff's original scientific misconduct allegations or admit it was unable to do so. The *Hall & Associates* court agreed with EPA that these were impermissible interrogatories for which EPA had no duty to respond:

> At best, the . . . [r]equests as originally written could be construed as questions or interrogatory-like requests, asking EPA to agree or disagree with the various contentions of the Coalition under the guise of a FOIA request.
>
> At worst, the requests were designed as a trap: either EPA produced or created documents disproving the Coalition's accusations, or the Coalition would assume based on the lack of response that EPA could not disprove them . . . EPA properly construed them as not adequately describing the records sought, and EPA thus had no obligation to process the . . . [r]equests as originally worded.

Id. at 102.

Here, as in *Hall & Associates*, PEER asks EPA to conduct analysis and research to determine which, if any, documents might be responsive to its interrogatory-like request. Yet PEER's request here is even less specific and thus more problematic than the requests at issue in *Hall & Associates*. Rather than addressing specific allegations about a particular scientific matter, PEER asks the Agency to produce any and all materials that the Administrator "relied upon" to make statements about the vast subject of climate change or that "support" his views on the matter. This is a reprise of *Hall & Associates* and presents the very same "Catch-22" for the Agency. It is not a valid request, and the Agency should not be required to analyze and take a position about what conclusions all of the documents in its possession potentially related to climate change may or may not support.

B. Plaintiff's Request Lacks Specificity and is Impermissibly Broad

In addition to the interrogatory-like nature of the request, Plaintiff's request is simply too broad and non-specific to be processed by EPA. It is the requester's responsibility to frame requests with sufficient particularity so that the agency may determine precisely what records are being requested. *Yeager v. Drug Enf't Admin.*, 678 F.2d 315 (D.C. Cir. 1982). Courts have deemed FOIA requests overbroad and thus invalid where they seek "all records" related to a subject matter but not to a specific office or custodian. *See, e.g.*, *Dale*, 238 F. Supp. 2d at 104–105; *Vest v. Dep't of Air Force*, 793 F. Supp. 2d 103, 113–115 (D.D.C. 2011). For example, a request for all documents that "relate to" a particular topic is "inevitably" "overbroad since life, like law, is a seamless web, and all documents relate to all others in some remote fashion." *Freedom Watch, Inc. v. Dep't of State*, 925 F. Supp. 2d 55, 61 (D.D.C. 2013); *see also Sack v. Cent. Intelligence Agency*, 53 F. Supp. 3d 154, 164 (D.D.C. 2014) (deeming request for "all records" that "pertain to" a particular topic overbroad, and noting that the phrases "pertain to" or

"relate to" are "difficult to define because a record may pertain to something without specifically mentioning it.").

This Court has also recognized that where a FOIA request is vague or unclear, "an agency processing a FOIA request is not required to divine a requester's intent." *Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003). "[A]n agency is not required to have 'clairvoyant capabilities' to discover the plaintiff's need." *Hall & Assoc.*, 83 F. Supp. 3d at 102 (quoting *Hudgins v. I.R.S.*, 620 F. Supp. 19, 21 (D.D.C. 1985)). Plaintiff's First Request for records that Administrator Pruitt "relied upon" to support his statements fails to reasonably describe the records. For instance, how is one to even know precisely what documents one relies upon in forming one's beliefs? Suppose the Administrator reviewed an article or paper about climate change months, or even years, prior to his appearance. Would such an article be responsive? Must the Administrator identify every paper he has ever reviewed on climate change that may have played some role in forming his beliefs, and then determine if these papers are "agency records"? The request itself provides no basis to search except to engage in this sort of questioning on Plaintiff's behalf, which the FOIA does not obligate EPA to do.

The Second Request provides an even stronger example of the request's impermissible overbreadth. Here, Plaintiff seeks production and evaluation of "*any EPA documents, studies, reports, or guidance material*" that contribute to an understanding of human impact on climate change. The request is not limited to any particular custodians, time frame, and has no other limiting criteria. EPA would not even know where or how to begin searching for documents for such a broad, sweeping request. *See Dale*, 238 F. Supp. 2d at 104–105; *Sack*, 53 F. Supp. 3d at 163. For this reason, too, the two-part request is improper and Defendant is entitled to summary judgment.

Conclusion

Plaintiff's FOIA request is an attempt to force an agency to answer questions, conduct research, and take substantive positions on matters of public policy. This is an inappropriate and impermissible use of FOIA. Accordingly, EPA respectfully requests that the Court enter summary judgment in its favor.

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Respectfully submitted,

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