UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SOUTHERN ENVIRONMENTAL LAW CENTER,

Plaintiff,

v.

FEDERAL HIGHWAY ADMINISTRATION,

Defendant.

CIVIL ACTION NO.
1:13-CV-2073-RLV

O R D E R

The plaintiff, Southern Environmental Law Center ("SELC"), requested information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, from the defendant, the Federal Highway Administration ("FHWA"), regarding a transportation project in Georgia. SELC also sought a waiver of the fees associated with its request, claiming that disclosure of the information was in the public's interest as required by FOIA's fee waiver provision, id. § 552(a)(4)(A)(iii). FHWA's denial of this request has prompted this suit. Before the court are the parties' cross-motions for summary judgment [Doc. Nos. 10 and 11].

I. Facts

SELC is a nonprofit public interest law firm that works to advance the public interest in sustainable transportation

strategies. Specifically, SELC (1) analyzes transportation policies and projects that adversely impact the natural environment, public health, and quality of life, (2) disseminates information to the public to inform debate about such policies and projects, and (3) interacts with government officials to advance sustainable transportation policies.

On November 1, 2011, September 28, 2012, and December 13, 2012, SELC requested records relating to FHWA's oversight and funding of the Northwest Corridor Managed Lane Project ("NWCP"), a billion dollar transportation project. According to SELC, the project is "precedent-setting . . . in a number of respects, including its complexity, expense, financial structure, tolling policy, potential impact to the state's credit, and the hundreds of thousands of commuters it would directly affect daily." Because dissemination of the requested information would serve the "public interest," 5 U.S.C. § 552(a)(4)(A)(iii), SELC sought a fee waiver in connection with each request. FHWA denied all three fee waiver requests.

The content of the September 28, 2012 fee waiver request is particularly important.[1] In this action, SELC claims this request

[1] Because the records requested in November 1, 2011, and December 13, 2012, are "either moot or untimely," SELC has not

was unlawfully denied. SELC's September 2012 request sought five categories of documents, including:

> 1. E-mail correspondence from September 1, 2012, to September 28, 2012, relating to the NWCP;
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> 2. Documents from January 1, 2012, to September 28, 2012, relating to the anticipated toll revenue from the NWCP,
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> 3. Documents from January 1, 2012, to September 28, 2012, relating to any Transportation Infrastructure Finance and Innovation Act ("TIFIA") loan or grant contemplated for the NWCP;
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> 4. Documents from January 1, 2012, to September 28, 2012, relating to any Grant Anticipation Revenue Vehicle ("GARVEE") bonds contemplated for the NWCP; and
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> 5. Documents discussing the applicability of the decision by the United States Court of Appeals for the Fourth Circuit in N.C. Wildlife Fed'n v. North Carolina DOT, 677 F.3d 596 (4th Cir. 2012), to the NWCP.

In the September 2012 request letter, SELC explained in detail how each category of documents requested would benefit the public. SELC also discussed its ability and intent to disseminate the requested information and highlighted a number of methods it uses for communicating information to the public, including its website, periodic newsletters, reports synthesizing information obtained

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brought claims for their unlawful denial. The November 1, 2011 and December 13, 2012 requests, however, are relevant for SELC's claim that FHWA engaged in a "pattern and practice" of unlawfully denying SELC's fee waiver requests.

through public records requests, press releases, and social media platforms. According to SELC, all of the requested documents are of "great importance and interest to the general public."

On October 31, 2012, FHWA denied SELC's fee waiver request. According to FHWA, SELC had not demonstrated it was entitled to a fee waiver for the following reasons: (1) SELC had not stated with *specificity* how the records included in its request would contribute to the public's understanding of government operation; (2) SELC had not "demonstrated how making this project information available . . . primarily on its website . . . [would] contribute to the understanding of the public at large"; (3) SELC had not demonstrated how the request would contribute *significantly* to the public's understanding, in light of the "extensive information" about the project already available to the public; and (4) "there is potential for SELC litigation involving this project," which may constitute a commercial interest.

On December 6, 2012, SELC timely submitted an administrative appeal. In the month following, SELC received no response. On January 31, 2013, SELC contacted FWHA to request written confirmation that the search fees associated with the September 2012 request would be waived because the appeal had not been

answered within the statutory deadline.[2] By letter dated February 1, 2013, FHWA advised SELC that the appeal had been docketed and assigned an appeal number.

Because FHWA failed to respond to the administrative appeal within the statutory time frame, SELC constructively exhausted the available administrative remedies. See 5 U.S.C. 552(a)(6)(C)(i) ("Any person making a request . . . for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions . . . ."). As a result, SELC properly brought this action. SELC's complaint claims FHWA unlawfully (1) denied SELC's fee waiver request in September 2012, (2) imposed search costs pursuant to 5 U.S.C. 552(a)(4)(A)(viii), and (3) engaged in a pattern and practice of unlawful denial of fee waiver requests. Before the court are cross-motions for summary judgment.

II. Legal Standard

Summary judgment is appropriate "if 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).

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[2] "An agency shall not assess search fees . . . if the agency fails to comply with any time limit . . . if no unusual or exceptional circumstances . . . apply to the processing of the request." 5 U.S.C. 552(a)(4)(A)(viii).

Judicial review of a FOIA fee waiver decision is *de novo* and limited to the record before the agency. 5 U.S.C. § 552(a)(4)(A)(vii). The record before the agency consists of the initial FOIA request, the agency's response, and any subsequent materials related to the administrative appeal.

III. Discussion

A. FOIA Fee Waiver Request

Under the FOIA, a government agency must provide documents for no charge or at a reduced rate "if 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 is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). Thus, the court's analysis contains two prongs: (1) whether the disclosure commercially benefits the requester; and (2) whether the disclosure is in the public interest.

The fee requester retains the burden of demonstrating that the standard for obtaining an FOIA fee waiver is met, Forest Guardians v. U.S. Dep't of Interior, 416 F.3d 1173, 1177 (10th Cir. 2005), and the request must be "reasonably specific and nonconclusory." Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1310 (D.C. Cir. 2003). The standard, however, is to be "liberally construed in

favor of waivers of noncommercial requesters." McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1985) (statement of Sen. Leahy)).

In denying the fee waiver request, FHWA stated "there is some indication that SELC's FOIA request may have a commercial interest that would be furthered by the requested disclosure . . . ." In briefing, however, this argument was abandoned.[3] As such, the only issue before the court is whether the disclosure of the requested information is in the public interest. According to United States Department of Transportation guidelines, six factors are relevant in this determination:

> 1. Whether the subject matter of the requested records concerns the operations or activities of the Federal government;
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> 2. Whether the disclosure is likely to contribute to an understanding of Federal government operations or activities;
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> 3. Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
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> 4. Whether the contribution to public understanding of Federal government operations or activities will be significant;

[3] In its Answer, FHWA admitted that SELC is a noncommercial requester.

> 5. Whether the requestor has a commercial interest that would be furthered by the requested disclosure; and
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> 6. Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure that disclosure is primarily in the commercial interest of the requestor.
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> 49 C.F.R. § 7.44(f).

FHWA argues SELC failed to satisfy the second and fourth factors.[4] Specifically, FHWA asserts SELC failed to identify with "reasonable specificity" how the requested information would contribute to the general public's understanding and failed to explain how any contribution to public understanding would be "significant." For the reasons discussed below, the court does not agree.

1. Contribution to Public's Understanding of Government Operations

SELC requested five categories of documents and explained in detail how each category would benefit the public in the request letter. The first category of documents included e-mails from September 1, 2012, to September 28, 2012. As SELC explained, the public has an interest in this time period because it

[4] Although the parties organized their arguments around these factors, the court emphasizes that these factors simply provide guidance in agency fee waiver determinations. The legal standard for a fee waiver is expressed in 5 U.S.C. § 552(a)(4)(A)(iii).

> covers a number of important decision points for the project including the cancellation of the previous public private partnership arrangement, formulation of the current public private partnership arrangement, the commitment of additional state resources to cover the resulting funding cap, public acceptance of another [high occupancy toll] lane project in the region, and the region's recent transportation sales tax vote.

The second category of documents, which relate to the project's toll revenue projections, "will demonstrate the degree to which the project is funded by toll revenues versus public funds, as well as the amount of financial risk the state is undertaking in guaranteeing the toll-backed securities." The third category of documents, which relate to the TIFIA loan, will explain how the NWCP "will meet the TIFIA criteria, why [the NWCP] was invited to apply for the loan over other projects, and decisions necessary to obtain the loan." The fourth category of documents, which relate to GARVEE bonds, will provide "an assessment of the financial risk attendant in that decision." Lastly, in N.C. Wildlife Fed'n v. North Carolina DOT, 677 F.3d 596 (4th Cir. 2012), the Fourth Circuit rejected an environmental review performed by the FHWA on a toll road project, finding the agency had improperly modeled the projects effects. According to SELC, the fourth category of documents, which relate to this decision, will explain "[w]hether

a similar methodology was used . . . [, which] would be of interest to the general public."

For these reasons, the court concludes SELC identified with adequate specificity how the requested information would contribute to the general public's understanding of the NWCP.

2. Significance of Contribution to Public Understanding

To qualify for a fee waiver, a requester must show that the contribution to public understanding of government is likely to be "significant." 5 U.S.C. § 552(a)(4)(A)(iii). Neither the statutory language nor the United States Department of Transportation's implementing regulation, 49 C.F.R. § 7.44, provide any guidance as to what constitutes a "significant" contribution. FHWA avers SELC has not demonstrated how the requested information will "significantly" contribute to public understanding of the NWCP because "extensive public information" is already available.

Notably, FHWA does not allege the information requested is already in the public domain.[5] Instead, FHWA simply emphasizes that extensive information *about* the NWCP is already available to the public. Public availability of information, however, diminishes the

[5] This is unsurprising because SELC expressly limited its request to documents containing nonpublic information.

significance of the disclosure when "the *requested information* has already been made public." Citizens of Responsibility and Ethics of Wash. v. U.S. Dep't of Health & Human Servs., 481 F. Supp. 2d 99, 110 (D.D.C. 2006); see also Comty. Legal Servs., Inc. v. U.S. Dep't of Health & Human Servs., 405 F. Supp. 2d 553, 559 (E.D. Pa. 2005). The fact that general information about the NWCP is already available does not diminish the significance of the nonpublic information sought by the SELC.[6] As such, there is no basis for the court to conclude that the documents SELC seeks contain information that is already publicly available, such that the significance of their disclosure is diminished.

Having concluded the information sought by SELC is "likely to contribute significantly to public understanding of the operations or activities of the government," 5 U.S.C. § 552(a)(4)(A)(iii), the court holds disclosure is in the public interest. Accordingly, summary judgment on Count One is granted in favor of SELC, and FHWA

[6] Moreover, the court notes that "even if some of the requested information is publicly available in synthesized form, there exists some significant benefit to public understanding if the plaintiff requests raw information from the agency to synthesize it and perform a public oversight function." Cause of Action v. Fed. Trade Comm'n, 961 F. Supp. 2d 142, 156 (D.D.C. 2013).

is directed to grant SELC's fee waiver request.[7]

B. Pattern and Practice

SELC alleges FHWA engaged in a pattern and practice of misapplying the FOIA and untimely responding to SELC's appeals. Specifically, SELC argues FHWA's actions demonstrate a pattern and practice of misapplying the FOIA by: (1) failing to consider the specific documents requested; (2) failing to consider materials submitted by the requester; (3) relying upon boilerplate denial language; (4) relying upon speculation and conjecture; and (5) misinterpreting the statute, regulations, and applicable case law. SELC seeks both declaratory and injunctive relief.

The United States Supreme Court has stated that "[e]ven when an agency does not deny a FOIA request outright, the requesting party may still be able to claim 'improper' withholding by alleging that the agency has responded in an inadequate manner." U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 151 n.12 (1989). Therefore, other circuits and district courts have concluded that

[7] In Count Two of the complaint, SELC argues that even if the court concludes the fee waiver should not be granted, FHWA must still waive search costs because it failed to respond to SELC's fee waiver appeal within the statutory deadline. See 5 U.S.C. 522(a)(4)(A)(viii). Because SELC is entitled to a fee waiver, there is no need to address this claim.

a plaintiff may bring an independent claim alleging a pattern and practice of violating the FOIA. See, e.g., Mayock v. Nelson, 938 F.2d 1006, 1007-08 (9th Cir. 1991); Payne Enters., Inc. v. United States, 837 F.2d 486, 491 (D.C. Cir. 1988); Nkihtaqmikon v. Bureau of Indian Affairs, 493 F. Supp. 2d 91, 114 (D. Me. 2007). The Eleventh Circuit Court of Appeals, however, has not yet addressed a pattern and practice claim in the FOIA context. As such, this court will look to other circuits for guidance.

A plaintiff asserting a pattern and practice claim must demonstrate that an agency "adopted, endorsed, or implemented a policy or practice that constitutes an ongoing 'failure to abide by the terms of the FOIA.'" Nat'l Sec. Counselors v. CIA, 931 F. Supp. 2d 77, 90 (D.D.C. 2013) (quoting Payne Enters., 837 F.2d at 491). After reviewing the record and the applicable case law, the court is not convinced that FHWA's responses represent the type of impermissible pattern and practice the law contemplates. Payne Enterprises, a case SELC cites, demonstrates the difference between a true "pattern and practice" case and the instant case. In Payne Enterprises, a company that sold "information and advice about Government contracts to prospective contractors" had made repeated FOIA requests to officers at the Air Force Logistics Command ("AFLC") for copies of bid abstracts. Payne Enters., 837 F.2d at

487. Because the competition for contracts was limited, and in order to keep the contract bids low, the AFLC refused to release the information to the plaintiff. In each case, however, the Secretary of the Air Force released the information on administrative appeal, "admonishing" the AFLC officers for their conduct. Id. at 494. The District of Columbia Circuit Court of Appeals held that "the Secretary's inability to deal with AFLC officers' noncompliance with the FOIA, and the Air Force's persistent refusal to end a practice for which it offers no justification, entitle Payne to declaratory relief." Id. Even though the plaintiff eventually received the information, Payne Enterprises concluded it was still entitled to judgment in its favor because the delayed release of the information rendered it essentially useless for its purposes. In this court's view, the situation presented here simply does not amount to the egregious circumstances in Payne Enterprises. Accordingly, summary judgment on Count Three is granted in favor of FHWA.

IV. Conclusion

SELC's motion for summary judgment [Doc. No. 10] is GRANTED in part and DENIED in part. FHWA's motion for summary judgment [Doc. No. 11] is GRANTED in part and DENIED in part. Summary judgment on Count One is granted in favor of SELC, summary judgment on Count

Three is granted in favor of FHWA, and summary judgment on Count Two is denied as moot.

SO ORDERED, this 29th day of May, 2014.

Robert L. Vining, Jr.

ROBERT L. VINING, JR.
Senior United States District Judge