

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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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 sought records related to statements that EPA Administrator Scott Pruitt made on the CNBC program “Squawk Box” during an appearance on March 9, 2017, not long after he became the EPA Administrator in February of 2017. In that interview, Mr. Pruitt stated, in his official capacity as Administrator of the EPA, that carbon dioxide created by human activity is not the primary driver of global climate change. The March 2017 FOIA request, as modified in response to an EPA request to clarify, seeks:

1. The agency records that Administrator Pruitt relied upon to support his statements in his CNBC interview, “I would not agree that [human activity] is a primary contributor to the global warming that we see,” and “there’s a tremendous disagreement about the impact” of “human activity on the climate.”
2. Any EPA documents, studies, reports or guidance material that support the conclusion that human activity is not the largest factor driving global climate change.

Ex. B, Dkt. 13-4, p. 1.

PEER is thus seeking documents relied upon by the EPA Administrator or supporting his official public statements concerning an issue of major public interest and import. Yet, as of the date of this filing, EPA has produced no records, and has not even searched for any records. Instead, EPA now asserts that the FOIA request is “improper” because it lacks the “reasonable specificity” that would enable a search, and therefore the Agency has no duty to comply. Memo in Support of Defendant’s Motion for Summary Judgment, Dkt. 13-1, p. 2.

EPA's claim is disingenuous, as the Agency has previously indicated that it understands the FOIA request and knows where to search for at least a major portion of the responsive documents. EPA even said it would do so. EPA previously informed the Court that it was prepared to search for any briefing materials that were prepared by Administrator Pruitt or certain members of his staff in the days leading up to the CNBC interview, and that it intended to process the first part of the request in accordance with search parameters that it would send to Plaintiff. At that time, EPA objected to only the second part of the request as "improper." Joint Meet and Confer Statement, October 10, 2017, Dkt. No. 12 at 2-3. EPA also previously directed PEER to certain websites for potentially responsive documents. Yet, EPA now claims that it is impossible to even begin a search for anything in the entire request.

While EPA's admission that it can process the request applies only to Part 1 of the request, it defies logic that EPA could know where and how to search for documents that Administrator Pruitt relied on for his statement that human activity is not the primary driver of climate change, but at the same time be wholly unable to process a request for documents that support a conclusion that human activity is not the primary driver of climate change. In any event, EPA's prior representations to the Court preclude its current claim that it cannot even begin a search for documents responsive to any part of PEER's request.

There is nothing improper about either part of the request and EPA is in violation of FOIA. The Court should grant Plaintiff's Cross-Motion for Summary Judgment, deny Defendant's Motion for Summary Judgment and order EPA to promptly perform a search and produce the documents responsive to PEER's FOIA request.

Factual Background

On March 9, 2017, EPA Administrator Scott Pruitt appeared, in his official capacity, as a guest on the CNBC program “Squawk Box” for an interview. During the interview, he stated that as to carbon dioxide created by human activity “I would not agree that it’s a primary contributor to the global warming that we see.” Dkt. 13-3, p. 2. He also said “there’s a tremendous disagreement about of the impact” of “human activity on the climate...” *Id.* These remarks were made without reference to any data or studies. These remarks also stand in contrast to the published research and conclusions on the EPA’s own web page titled “Causes of Climate Change,” which states that carbon emissions as a result of human activity is likely “the dominant cause of that warming.” Compl., Dkt. 1, p. 4, ¶ 20; *see also*

https://19january2017snapshot.epa.gov/climate-change-science/causes-climate-change_.html

[<https://perma.cc/H7AH-QTS4>] (This is an archive of EPA’s website from January 19, 2017; the page is unavailable on the current EPA website).

On March 10, 2017, PEER filed a FOIA request that sought:

1. The documents that Administrator Pruitt relied upon in making these statements; and
2. Any EPA documents that support the conclusion that human activity is not the largest factor driving global climate change.

Dkt. 13-3, p. 2.

On March 23, 2017, Defendant sent a letter acknowledging receipt of Plaintiff’s request, assigning the request No. EPA-HQ-2017-004787 and granting the requested waiver of fees for the search. Dkt. 1, p. 5, ¶ 22.

Pursuant to 5 U.S.C. § 552(a)(6)(A), Defendant had twenty working days from the date of receipt of the FOIA request to respond or to assert the need for an extension. *See also* 40

C.F.R. § 2.104 (2017). Twenty working days from March 10, 2017 (the date of Defendant's receipt of Plaintiff's request) was April 7, 2017. Plaintiff filed a complaint against Defendant on April 13, 2017, after PEER had not received any records responsive to its FOIA request or any determination from Defendant. Dkt. 1. On July 27, 2017, Defendant answered the complaint. Def. Answer Compl., Dkt. 10.

On July 30, 2017, Defendant addressed the substance of Plaintiff's March 10, 2017 FOIA request for the first time. Defendant's counsel emailed Plaintiff regarding this lawsuit, claiming that the request "does not reasonably describe the records" because "the requests are too broad and lack specificity" and "it appears that your request is intended to force the EPA to answer questions or take a substantive position on issues." Dkt. 13-4, p. 2. Plaintiff responded the same day, offering to grant the EPA an additional 40 days to process the request before asking the court for a briefing schedule, though disagreeing with EPA's assessment of the request. PEER explained that the request did not ask the Agency to answer a question or state a position, but only to produce documents in its possession. Dkt. 3-4, p. 1. Plaintiff narrowed and clarified the requests to read:

- (1) The agency records that Administrator Pruitt relied upon to support his statements in his CNBC interview: "I would not agree that [human activity] is a primary contributor to the global warming that we see," and "there's tremendous disagreement about the impact' of 'human activity on the climate."
- (2) Any EPA documents, studies, reports, or guidance material that support the conclusion that human activity is not the largest factor driving global climate change.

Id.

When the 40 days that PEER had agreed to grant EPA to process the request had expired, EPA still had not conducted any search for responsive documents. Instead, as reflected in the Joint Status Report of October 10, 2017, Dkt. 12, EPA stated that it was then prepared to search

for briefing materials Mr. Pruitt or his staff had prepared prior to his CNBC interview, and was preparing a proposal for specific search terms that would allow it to process the first portion of PEER's request. Dkt. No.12 at 1-2. EPA took the position that only the second part of the request was not a proper FOIA request and could not be processed. EPA asked the court to defer setting a summary judgment schedule until it finished processing the first part of the request, and asked to schedule another Joint Meet and Confer statement in another month, for November 10, 2017. *Id.* at 2.

At that point, the FOIA request had been pending for seven months and EPA had not even begun a search, despite being able to identify certain documents that would be responsive (the briefing materials) and being able to propose search terms for the first part of the request. Plaintiff concluded that that it had already sufficiently clarified the request and that EPA was unreasonably stalling its response, and asked the court to set a summary judgment briefing schedule. Dkt. 12 at 3. By Minute Order on October 11, 2017, the Court set the current briefing schedule.

Since October 10, 2017, when EPA stated it was prepared to do a search for briefing materials and to propose search terms, and then process the first part of the request, EPA has done nothing to further its response to the FOIA request. Instead, it filed a summary judgment motion claiming no obligation to do anything to respond to any part of Plaintiff's FOIA request.

Legal Standard

The fundamental purpose of FOIA is to “assist citizens in discovering ‘what their government is up to.’” *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (citing *Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989)). As the court in *Defenders* stated, “[t]he FOIA strongly favors openness, as

Congress recognized in enacting it that an informed citizenry is ‘vital to the function of democratic society, needed to check against corruption and to hold the governors accountable to the governed.’ As such, disclosure, not secrecy, is the dominant objective of the Act.” 623 F. Supp. 2d at 87 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)).

The Freedom of Information Act requires federal agencies to make a determination on a FOIA request within 20 working days of receipt of the request and to make the requested records promptly available. 5 U.S.C. § 552(a)(3)(A), 552(a)(6)(A)(i) (2012). An agency may extend this time period only in “unusual circumstances” and then only for a maximum of ten additional working days. 5 U.S.C. § 552(a)(6)(B)(i) (2012). The response period may be tolled only if an agency reasonably requests additional information about the request, and only for the period in which the agency is awaiting the information. 5 U.S.C. § 552(a)(6)(A)(ii)(I) and (II).

Agencies have a duty to construe FOIA requests liberally. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. 1995). Furthermore, “the fact that to find the material would be a difficult or time-consuming task is of no importance ... [because t]o deny a citizen that access to agency records which Congress has specifically granted, because it would be difficult to find the records, would subvert Congressional intent to say the least.” *Truitt v. Dep’t of State*, 897 F.2d 540, 545 n.33 (D.C. Cir. 1990) (citations omitted).

Agencies have the burden of proof under FOIA. 5 U.S.C. § 552(a)(4)(B) (“the burden is on the agency to sustain its action.”). “This burden does not shift even when the requester files a cross-motion for summary judgment because ‘the Government ‘ultimately [has] the onus of proving that the [documents] are exempt from disclosure,’ while the ‘burden upon the requester is merely ‘to establish the absence of material factual issues before a summary disposition of the

case could permissibly occur.” *Nat’l Pub. Radio, Inc. v. Fed. Emergency Mgmt. Agency*, 2017 U.S. Dist. LEXIS 192374, *9-10, 2017 WL 5633090 (D.D.C. 2017) (quoting *Pub. Citizen Health Research Grp.*, 185 F.3d 898, 904-05 (D.C. Cir. 1999) (quoting *Nat’l Ass’n of Gov’t Emps. v. Campbell*, 593 F.2d 1023, 1027 (D.C. Cir. 1978)). In meeting its burden, an agency “must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.” *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quoting *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

“FOIA cases typically and appropriately are decided on motions for summary judgment.” *Defs. of Wildlife*, 623 F. Supp. 2d at 87 (citation omitted). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). 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).

Argument

I. EPA’s Failure to Respond to the March 10, 2017 Request is Not Legally Justified

FOIA requires the agency to determine within 20 working days after receipt of a FOIA request whether to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i) (2012). EPA failed to produce or even communicate within that timeframe, only seeking clarifications of the request after Plaintiff had filed suit and the Agency had filed its Answer. Dkt. 13-4, pp. 3-4. EPA to this day has never actually made a formal determination on Plaintiff’s FOIA request, but has taken contradictory positions on its duty to respond in the course of this litigation. EPA claimed in a report to this Court that it could conduct a search for documents responsive to the first part of the

request, specifically identifying Administrator Pruitt's briefing materials as responsive, but that the second part of the request was improper and there could be no response. Dkt. 12.

Contradictorily, in its summary judgment briefing, EPA claimed that it could not respond to any part of the request because it was not a proper request under FOIA. Dkt. 13-1, p. 8.

EPA has not claimed that the time period for its response was extended by unusual circumstances or by its request to clarify the request. In any event, EPA long ago exhausted any extra time-period for unusual circumstances or to await the response to its request for clarification. PEER responded to EPA's request for clarification over three months ago, on August 30, 2017. Dkt. 13-4, p. 1. Nor does EPA claim that it conducted a search but was unable to locate responsive records. Instead, EPA now disclaims any responsibility to respond to the request at all. Dkt. 13-1, p. 8.

II. PEER Propounded a Valid FOIA Request that Reasonably Describes the Records Requested

In order for a FOIA request to be valid, it must "reasonably describe" the records being sought. 5 U.S.C. § 552(a)(3)(A) (2012). To determine whether a request meets this requirement, courts will consider the ability of the agency "to determine precisely what records are being requested." *Tax Analysts v. I.R.S.*, 117 F.3d 607, 610 (D.C. Cir. 1997) (quoting *Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996)). 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." See e.g., *Truitt*, 897 F.2d at 545 n.36, (citing H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), pp. 5-6).

This standard is easily met here. EPA has not produced any evidence, such as a declaration from “a professional employee of the agency who was familiar with the subject area of the request” that the records could not be located with a reasonable amount of effort. Instead, EPA has produced only the Declaration of Brian Hope, Dkt. 13-5, an official in the Office of the Executive Secretariat of the Office of the Administrator, who does not claim to have any knowledge of the subject area of the request, or even to have spoken with anyone who does. He merely makes a conclusory claim that “EPA believes that the requests, as written, still do not enable a professional employee in my staff to conduct a search for responsive Agency records.” Dkt. 13-5 at 6, ¶ 9. Mr. Hope does not explain the basis for his belief.

While agencies may support summary judgment with declarations, those declarations must be detailed rather than conclusory, and must not be called into question by contradictory evidence in the record. *Nat’l Public Radio*, 2017 U.S. Dist. LEXIS 192374, *10 (citations omitted). Here, the declarant’s statement is wholly conclusory, and the record contains the contradictory evidence that EPA does understand PEER’s FOIA request and knows where to search for documents. EPA previously stated that it would search for briefing materials the Administrator or his staff created shortly before his CNBC appearance, and that it would develop search terms to execute the search for the first part of PEER’s request. Dkt. 12. Even in its summary judgment brief, EPA acknowledges that if the request were narrowed to the briefing materials, it would “enable EPA to process the request,” thereby admitting that it could conduct a search and retrieve documents that were responsive to PEER’s request, at least in part. Dkt. 13-1, p. 2.

Therefore, it is apparent that EPA understands the request and can conduct a search at least with regard to Part 1 of the request. And, given the similarity and interrelation of Parts 1

and 2 of the request, it can be assumed that EPA could in fact conduct a search for documents responsive to Part 2, and that the search EPA has admitted it can perform for Part 1 would also return documents responsive to Part 2.

EPA also indicated where responsive documents might be found in referring PEER to a government website containing the collaborative climatological findings and research by EPA and twelve other federal agencies. Dkt. 13-4, p. 2. However, the referenced website directly states that humans *are* the primary driver of global climate change.¹ Therefore, even assuming that it would be a valid response to direct PEER to a website rather than to produce documents, there are no responsive documents there. However, EPA's response regarding the website does illustrate that it knows where to search for responsive documents.

III. PEER's FOIA Requests are Not Disguised Interrogatories

EPA argues that its decision to refuse to search for responsive documents is justified because the requests are in fact interrogatories "under the guise of a FOIA request." Dkt. 13-1 p. 1, 4. Contrary to EPA's claim, it is evident from the content of the requests that they do not amount to "interrogatory-like" questions; nor do they require EPA to perform "research" or "analyze and take a position." *Id.* at 8-10. Instead, PEER asked for existing EPA documents that the Administrator relied on to make his official statements on CNBC, and EPA documents that support the Administrator's stated scientific conclusion that carbon dioxide from human

¹ .See, U.S. Global Change Research Program, <https://www.globalchange.gov/>; *What's Happening & Why*, <https://www.globalchange.gov/climate-change/whats-happening-why> (stating "this warming has been driven primarily by human activity"); see also U.S. Global Change Research Program, *Climate Science Special Report, Fourth National Climate Assessment (NCA4), Volume I (2017) – Executive Summary*, at 1, https://science2017.globalchange.gov/downloads/CSSR2017_PRINT_Executive_Summary.pdf (stating that "[t]his assessment concludes, based on extensive evidence, that it is extremely likely that human activities... are the dominant cause of the observed warming since the mid-20th century. For the warming over the last century, there is no convincing alternative explanation supported by the extent of the observational evidence.").

activities is not the primary driver of climate change. Rather than interpreting the request liberally as required, *see Nation Magazine*, 71 F.3d at 890, EPA has twisted the meaning of the request to justify denying it.

A similar effort was rebuffed by the court in *PEER v. U.S. Int'l Boundary & Water Comm'n*, 842 F. Supp. 2d 219, 224 (D.D.C. 2012). Plaintiff in that case requested, “[a]ll documents that evidence the source of the funds used to pay for representation by Jackson Lewis in the matter concerning *McCarthy v. USIBWC*.” The Court faulted the agency for first refusing to respond at all, and then limiting its search to answering a question that PEER did not ask – “where did the funds come from to pay Jackson Lewis?” *Id.* at 222. The court stated,

The Commission's obligation, under FOIA, was not to construe PEER's request narrowly as a call for the agency's opinion on a question and to produce *some* records supporting that unsolicited opinion; the agency's obligation was to begin a search for “all” the documents it had on the topic, and to set the stage for a reasonable search by identifying the agency components and personnel that might have responsive records.

Id. at 225.

Similarly, EPA in the present action misread PEER’s request as asking for the Agency’s opinion on climate change, rather than for documents that the Administrator relied on or that supported his statements on CNBC. As the court held in *IBWC*, the EPA must not narrowly construe PEER’s request as a question, and is required to perform a proper search under FOIA.

EPA also claims that the request is an interrogatory to Administrator Pruitt about policy matters because PEER suggested that in order to respond to its request, EPA could ask Administrator Pruitt what agency records he relied on to make his statements. Dkt. 13-1, p. 7. However, PEER was not suggesting that EPA query Mr. Pruitt about his views on climate policy, but merely suggesting that he was a likely custodian of the records that he relied on in his

statements on national television, and therefore could assist in locating records responsive to the request. Moreover, the request is not about policy at all. It does not concern a statement by Mr. Pruitt about his position on policy matters such as, for example, whether EPA should expend resources on climate research or on mitigating climate change. Instead, it only seeks EPA documents that support the Administrator's stated scientific conclusion that carbon dioxide in the atmosphere created by human activities is not the primary driver of climate change.

The cases cited by EPA to support its position that PEER's request is an improper interrogatory do not support EPA's case. *Hall & Assocs. v. U.S. EPA*, 83 F. Supp. 3d 92 (D.D.C. 2015), *summarily aff'd*, 2017 U.S. App. LEXIS 18642 (D.C. Cir. 2017), in fact supports the opposite conclusion, that a request clarified in a similar manner to PEER's request here must be answered. In *Hall*, the court ordered EPA Headquarters to process the requests after considering a clarification of what had originally been an interrogatory-like request asking for documents showing that certain statements were incorrect. The court noted that the plaintiff had submitted a clarification to a similar request to Region 1 of EPA, to the effect that it was not seeking for the agency to develop further analysis or opinions, but was looking for existing records that led to the conclusions at issue. Based on that clarification, Region 1 had processed the request. 83 F. Supp. 2d at 103-04. Subsequently, the parties agreed to modify the Headquarters request in the same manner as the Region 1 request, and EPA processed the request and produced responsive documents. *Hall & Assocs. v. EPA*, 210 F. Supp. 3d 13, 17 (D.D.C. 2016).

PEER clarified its request in a very similar manner here, to the effect that it was not seeking EPA positions or opinions, or any new research or analysis, but rather requesting existing documents supporting Administrator Pruitt's public statements.

The contrast is similar with *Jimenez v. Exec. Office for United States Attys.*, 764 F. Supp. 2d 174 (D.D.C. 2011). The EPA argues that by asking for documents that support the conclusion that human activity is not the primary driver of climate change, PEER's FOIA request, like that in *Jimenez*, is compelling EPA to conduct research and to prove or disprove assertions, in this case about the causes of climate change. Dkt. 13-1, p. 8. As explained above, this is not the case and PEER is requesting only existing documents supporting official Agency statements. This case is easily distinguishable from *Jimenez*. There, unlike here, the agency did do a search, but the plaintiff claimed that a particular document that he believed existed was not produced, and that the agency should either produce it or prove that it did not exist. What the court found improper for a FOIA request in *Jimenez* was the attempt to force the agency to research why it could not find a particular document and then prove to him that the record he wanted did not exist. 764 F. Supp. 2d at 180-82. In our case, of course, since there has been no search at all, PEER cannot possibly be asking for an explanation of why certain documents were not found, which was the issue in *Jimenez*.

IV. PEER's FOIA Request is Not Impermissibly Vague or Broad

The PEER FOIA request is also not comparable to that in another case cited by the EPA, *Yagman v. Pompeo*, 868 F.3d 1075 (9th Cir. 2017). In *Yagman*, the plaintiff sought the names and affiliations of the persons to whom President Obama was referring when he said "we tortured some folks." The requester had no evidence that President Obama was referring to specific people who engaged in torture, and offered no direction as to where information about such individuals might be found. The court ruled that the request was too vague because it, "[did] not identify specific persons, much less specific documents, types of documents, or types of information," only who "we" refers to. *Id.* at 1077, 1081. However, the court rejected the

claim made here that the request was really a question disguised as a FOIA request, stating “[t]he fact that Yagman’s request references President Obama’s August 1, 2014 statement does not transform Yagman’s request into a question.” *Id.* at 1080.

The EPA implies that because it references Administrator Pruitt’s statement, PEER’s FOIA request is as vague as the request in *Yagman* and therefore not a proper FOIA request. Dkt. 13-1, p. 7. However, the similarities between the two requests are only superficial, limited to the fact that they both reference statements by government officials. PEER’s request is not impermissibly vague.

To begin with, EPA mischaracterizes PEER’s FOIA request, making it appear vague and broad when it is not. EPA simply misstates the facts when it claims that PEER’s requests 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.’” Dkt. 13-1 at 2. In fact, PEER’s request is focused on the support for a particular scientific conclusion publicly stated by the Administrator with regard to the human contribution to climate change. It does not broadly encompass anything conceivably related to climate change.

EPA also mischaracterizes the request when it states that it would 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 . . .” Dkt. No. 13-1, p. 6. Plaintiff has made no proposition concerning the effect on human activity on climate change, and the request does not broadly request documents could “support, refute, or relate to” anything. Rather, it is the Administrator who drew a conclusion on this subject in a public statement, and Plaintiff merely asks for the EPA documents the Administrator relied on or that support his conclusion.

Likewise, EPA errs when it characterizes the FOIA request as compelling the agency to “refute a conclusion.” *Id.*, p. 7. The request plainly does not ask EPA to refute any conclusion.

EPA also misinterprets the request when it claims that the request actually seeks any documents that may have “played some role in forming [Administrator Pruitt’s] beliefs” on climate change. Dkt. 13-1, p. 10. However, the request is not about how Mr. Pruitt formed his personal “beliefs” on climate change, or for that matter, anything about his beliefs. Rather, the request is for documents he relied on when stating a specific scientific conclusion in his official capacity as Administrator on national television.

With regard to the second part of the request, EPA claims that it “seeks production and evaluation of ‘any EPA documents, studies, reports or guidance materials,’ that contribute to an understanding of the human impact on climate change.” Dkt. 13-1, p. 10. However, PEER’s request in fact was for: “Any EPA documents, studies, reports or guidance material that support the conclusion that human activity is not the largest factor driving global climate change.” It does not ask for any “evaluation,” and is limited to documents that support a specific scientific conclusion voiced by the Administrator in his official capacity. It does not apply broadly to anything that in any way contributes to an understanding of the human impact on climate change.

PEER’s actual FOIA request is much more specific than the request in *Yagman*, and does not require, like the *Yagman* request, that EPA search for “unspecified persons in unspecified locations during a vaguely defined time.” 868 F.3d at 1081. PEER’s request does not, like the *Yagman* request, seek to probe beneath the President’s statement as to who the “we” he referred to was, but only seeks what the Administrator himself relied on when making specific statements, and Agency documents that support the scientific conclusion he publicly stated on behalf of EPA.

In any event, as explained above, EPA's claim that the request is too vague to permit a search is disingenuous since EPA previously stated that it could produce some responsive documents (the briefing materials) and could perform a search for additional responsive documents, at least as to Part 1 of the request.

EPA also claims that the request is impermissibly broad, based on cases so finding with respect to requests for all documents that "relate to" or "pertain to" a particular topic. Dkt. 13-1 at 9-10, *citing e.g. Dale v. IRS*, 238 F. Supp. 2d 99, 104–105 (D.D.C. 2002); and *Vest v. Dep't of Air Force*, 793 F. Supp. 2d 103, 113–115 (D.D.C. 2011). For example, this court found that 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 because "pertain to" and "relate to" are "difficult to define because a record may pertain to something without specifically mentioning it.").

However, PEER's request is not so framed. It does not ask for all documents relating to or pertaining to the topic of climate change. Rather, it asks for documents relied upon by the Administrator to make particular statements and documents supporting a particular scientific conclusion expressed by the Administrator on behalf of EPA.

The cases relied on by EPA do not apply here. In *Vest*, the Plaintiff asked multiple government agencies and military branches for all documents related to two individuals, supplying virtually no context. 793 F. Supp. 2d at 113. Unlike here, in *Vest*, the agencies and military branches all conducted searches, despite having virtually no direction on what they were

searching for or where the information might be. They were granted summary judgment because the court saw no evidence that their searches were deficient. *Id.* 118-20. The issue decided in *Vest* – whether the search was adequate – has no relevance here.

The requests in the other cases cited by EPA were far broader and more amorphous than the request here. In *Freedom Watch*, the Plaintiff was seeking information on companies that had waivers to trade with Iran, but cast such a wide net in its FOIA request that it encompassed, among many other topics, “any and all communications to or from President Obama, his administration, or the White House in general regarding China.” 925 F. Supp. 2d at 59-61. Similarly, the request in *Sack* was for “all records that pertain in whole or part” to a list of closed Inspector General Reports from the CIA, with nothing narrowing the scope. *Sack*, 53 F. Supp. 3d at 163-65. The Court noted that there was no way for the agency to search for documents that do not reference a document but may bear some relation to it. *Id.* at 165.

V. PEER’s Request is as Specific as Possible Given EPA’s Organization

EPA argues that due to the lack of reference to specific departments or custodians for Part 2 of the request, “EPA would not even know where or how to begin searching for documents . . .” Dkt. 13-1 at 10. However, as noted above, EPA has admitted that it knows where to find documents related to the role of humans in climate change, by referring PEER to websites, and by stating that it can devise search terms and perform a search for Part 1 of PEER’s request, which essentially concerns the same topic as Part 2. Thus, it is simply not true that EPA could not know where or how to begin to search, and EPA is required to use the knowledge it does have to conduct a search.

“It is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under [the] FOIA to search barring an undue burden.”

Wilson v. U.S. DOJ, 2017 U.S. Dist. LEXIS 150709, *13 (D.D.C. 2017) (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999)); see also, *Whitaker v. CIA*, 31 F. Supp. 3d 23, 43 (D.D.C. 2014) (holding that an agency cannot, in good faith, ignore clear and certain leads of where to find information related to a FOIA request). Even where a request is broadly for all the information on a subject -- which this one is not -- “the agency is obliged to pursue any ‘clear and certain’ lead it cannot in good faith ignore.” *Whitaker*, 31 F. Supp. 3d at 43 (quoting *Cooper v. Dep’t of Justice*, No. 03-5172, 2004 U.S. App. LEXIS 8135, 2004 WL 895748 at *2 (D.C. Cir. 2004) (per curiam). It is unimaginable that an agency that employs a plethora of climate scientists and other environmental experts is so oblivious to the subject of climate change and EPA research that it cannot make a good faith effort to conduct a search for agency records responsive to PEER’s requests.

Moreover, given that EPA lacks a single division or department that solely addresses climate change, making such a targeted request to particular custodians or departments is impossible. Based on a review of publically available climate research, PEER was unable to discern specifically what department handled climatology, as the numerous reports available on EPA’s website point to agency-wide efforts or reliance upon reports from the United Nations Intergovernmental Panel on Climate Change. The one division with Climate Change in its name, the Climate Change Division in the Office of Air and Radiation, has no links to studies, descriptions, or a mission statement on the current iteration of the EPA website. Moreover, under Administrator Pruitt, EPA is eliminating some of its pre-existing offices dealing with climate change, such as its climate adaption office, at the same time it is claiming that PEER must

identify particular offices.² Therefore, it was impossible for PEER to specify a particular custodian or department for its request.

VI. EPA Public Information is not Responsive to PEER's FOIA Request

While EPA has directed PEER to both the EPA's own website and the U.S. Global Change Research Program website for material responsive to its FOIA request, materials on those websites in fact contradict Administrator's Pruitt's statements to CNBC, and therefore are not responsive to PEER's request. PEER made the request in part because it could find not publicly available information that supported Administrator Pruitt's statements.

Finding EPA information that might be responsive to PEER's FOIA request in a publically available space has been made more difficult, because under Administrator Pruitt, the EPA has removed a large number of relevant climate change documents from its website. This includes the Main EPA Climate Change website (<http://www3.epa.gov/climatechange/index.html>) and the Agency's "Climate Change Science" web-center (<http://www3.epa.gov/climatechange/science/>), which are now redirected to a page stating that such information is being updated to "reflect EPA's priorities under the leadership of President Trump and Administrator Pruitt." However, despite the fact that the redirection page links to an April 28, 2017 press release from the Office of the Administrator explaining that "content related to climate and regulation is also being reviewed," no results of this review have yet been posted.

² See Sierra Club Press Release, "Pruitt Eliminates Climate Adaptation and Threatens Recovery Efforts Amid Two Massive Hurricanes," September 8, 2017, available at <https://content.sierraclub.org/press-releases/2017/09/pruitt-eliminates-climate-adaptation-and-threatens-recovery-efforts-amid-two>.

Moreover, the pages that have been removed but can still be found as archived pages make clear that they do not contain material responsive to PEER's FOIA requests, namely data, studies, or other information that would support Administrator Pruitt's public statement that human activity is not the greatest contributor to climate change. The pages that have been removed which are still catalogued in a January 19, 2017 snapshot archive meant to reflect "historical material." explicitly state:

Recent climate changes, however, cannot be explained by natural causes alone. Research indicates that natural causes do not explain most observed warming, especially warming since the mid-20th century. Rather, it is extremely likely that human activities have been the dominant cause of that warming.

https://19january2017snapshot.epa.gov/climate-change-science/causes-climate-change_.html#ref2. The citation for this statement is to the United Nations' Intergovernmental Panel on Climate Change's "Climate Change 2013: The Physical Science Basis."

Furthermore, the website of the U.S. Government's Global Change Research Program, a joint effort of thirteen different government agencies, also does not contain material responsive to PEER's FOIA request. Upon following this link, the most recent and authoritative material, the "Climate Science Special Report," directly contradicts the announced position of the EPA Administrator, stating that "there is no convincing alternative explanation [to human-driven climate change] supported by the extent of the observational evidence." See U.S. Global Change Research Program, *Climate Science Special Report, Fourth National Climate Assessment (NCA4), Volume I*, <https://science2017.globalchange.gov/>.

Conclusion

Defendant has willfully refused to respond to Plaintiff's request in violation of FOIA, 5 U.S.C. § 552, and the EPA's regulations promulgated thereunder, 40 C.F.R. § 2.100 *et seq.*,

despite the request being entirely proper under FOIA, and despite EPA's earlier admission that it could perform a search for responsive documents.

Accordingly, PEER respectfully requests that the Court deny EPA's summary judgment motion, enter summary judgment in its favor, and order EPA to perform a search and produce the records responsive to its FOIA request.

Respectfully submitted this 11th day of December, 2017

/s/Paula Dinerstein

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