

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Dave Levinthal, et al.,

Plaintiffs,

v.

Federal Election Commission,

Defendant.

Civil Action No. 15-1148 (JEB)
ECF

**PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, Dave Levinthal and the Center for Public Integrity, move for summary judgment pursuant to Federal Rule of Civil Procedure 56 and oppose Defendant's Motion for Summary Judgment. Plaintiff's Memorandum of Points and Authorities, Statement of Material Facts as to Which There Is No Genuine Issue and a proposed Order accompany this motion.

Respectfully submitted,

/S/

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March 11, 2016

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

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, to secure the production of certain agency records from the Federal Election Commission (FEC), the Defendant, concerning commissioners' official schedules.

After unexplained delays in processing Plaintiffs' FOIA request, Defendant produced documents responsive to the request but produced no calendar records for three of the six commissioners. Plaintiffs do *not* seek production of the records that Defendant characterizes as "personal calendars." However, Defendant has admitted the existence of additional records concerning the schedules of these three commissioners. These are uncontestably agency records responsive to Plaintiffs' request, but Defendant has not produced them.

BACKGROUND

Plaintiffs Dave Levinthal and the Center for Public Integrity are engaged in investigative journalism. Mr. Levinthal's assignments include covering the Federal Election Commission and the influence of money in federal politics. By email dated August 14, 2014, Plaintiffs requested from Defendant

[A]ny and all scheduling documents and/or records — be them in paper or electronic form — used by FEC commissioners. Such documents should include, but not be limited to, calendars, schedules, emails, and itineraries that list or account for commissioners' meetings, whereabouts or travels when conducting government business or traveling to/from engagements or duties involving government business.

The request covered the timeframe October 21, 2013, through August 14, 2014. (*See* Decl. Katie A. Higginbotham ¶ 2, Feb. 10, 2016.)

Although FOIA generally requires an agency determination within 20 business days (5 U.S.C. § 552(a)(6)(A)(i)), Defendant did not produce any responsive records until May 19, 2015 (*see* Higginbotham Decl. ¶ 8), more than nine months after the request. This batch of records concerned one of the six FEC commissioners. When additional records were not forthcoming, Plaintiffs filed this lawsuit, on July 20, 2015. Defendant produced additional responsive records on August 27, September 14, and October 14, 2015 (*see* Higginbotham Decl. ¶ 8).

Plaintiffs noted that Defendant did not produce any records from the calendars of Commissioners Hunter, Petersen, and Walther, and asked Defendant for an explanation. Defendant responded: “Neither Commissioner Hunter, nor Commissioner Walther, nor Vice Chair Petersen maintains a calendar that constitutes an agency record subject to FOIA.” (Letter from Greg J. Mueller to Peter Newbatt Smith (Dec. 4, 2015), attached as Exh. A to Decl. of Greg J. Mueller, Feb. 12, 2016.)

Plaintiffs informed Defendant that Plaintiffs would not seek judicial review except on the issue of whether “calendars and/or other scheduling information for Commissioners Hunter, Petersen and Walther” are “contained in any agency records” (Email from Peter Newbatt Smith to Greg J. Mueller (Dec. 10, 2015), attached as Exh. B. to Mueller Decl.)

ARGUMENT

I. LOTUS NOTES MEETING NOTIFICATIONS ARE RESPONSIVE AGENCY RECORDS

With its Motion for Summary Judgment, Defendant for the first time disclosed that Commissioners Hunter, Petersen and Walther each “occasionally receive notifications of meetings through the agency's Lotus Notes software”¹ (Decl. of Caroline C. Hunter ¶ 5, Feb. 11, 2016; Decl. of Matthew S. Petersen ¶ 5, Feb. 11, 2016; and Decl. of Steven T. Walther ¶ 5, Feb. 11, 2016 (“... notifications of internal meetings ...”).)

Defendant has not produced records of these meeting notifications. The Declaration of Katie A. Higginbotham, describing Defendant’s search process, makes no mention that the agency’s information technology staff were asked to conduct an electronic search for responsive records — only that commissioners were asked “to search their paper and electronic files” (Higginbotham Decl. ¶ 5.)

These meeting notifications are obviously agency records, sent between agency officials, relating to agency business, and using the agency’s computer system. They are likewise clearly responsive to Plaintiffs’ FOIA request, as would be any other calendar information contained in or sent through Lotus Notes, such as meeting invitations and responses to invitations. Defendant has no justification for not producing them.

II. “PERSONAL CALENDARS”

Plaintiffs do not seek production of the records that Defendant has characterized as “personal calendars.”

¹ Lotus Notes has been renamed “IBM Notes.” (See “IBM Notes,” <http://www-03.ibm.com/software/products/en/ibmnotes>, accessed March 11, 2016.) Plaintiff will follow Defendant’s convention in continuing to refer to the software as “Lotus Notes.”

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment and deny Defendant's Motion for Summary Judgment.

Respectfully submitted,

/S/

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**PLAINTIFF’S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Civil Rule 7(h), Plaintiff submits the following statement of material facts as to which there is no genuine issue, in support of Plaintiff’s Motion for Summary Judgment, and in opposition to Defendant’s Motion for Summary Judgment:

1. By email dated August 14, 2014, Plaintiffs requested from Defendant, pursuant to the Freedom of Information Act,

[A]ny and all scheduling documents and/or records — be them in paper or electronic form — used by FEC commissioners. Such documents should include, but not be limited to, calendars, schedules, emails, and itineraries that list or account for commissioners' meetings, whereabouts or travels when conducting government business or traveling to/from engagements or duties involving government business.

The request covered the timeframe October 21, 2013, through August 14, 2014. (*See* Decl. of Katie A. Higginbotham ¶ 2, Feb. 10, 2016.)

2. The only issue in this lawsuit that Plaintiffs continue to contest is whether “calendars and/or other scheduling information for Commissioners Hunter, Petersen and Walther” are “contained in any agency records” (Email from Peter Newbatt Smith to Greg J. Mueller (Dec. 10, 2015), attached as Exh. B. to Decl. of Greg J. Mueller, Feb. 12, 2016.)

3. Commissioners Hunter, Petersen and Walther each “occasionally receive notifications of meetings through the agency's Lotus Notes software ...” (Decl. of Caroline C. Hunter ¶ 5, Feb. 11, 2016; Decl. of Matthew S. Petersen ¶ 5, Feb. 11, 2016; and Decl. of Steven T. Walther ¶ 5, Feb. 11, 2016 (“... notifications of internal meetings ...”).)

4. Defendant has not searched for, and has not produced, records of notifications of meetings sent through Lotus Notes software or similar records. (Higginbotham Decl.)

Respectfully submitted,

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