UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 11-951 (CKK)
FEDERAL ELECTION COMMISSION,	)	REPLY
Defendant.	)	

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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July 18, 2011

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CREW has prematurely invoked the jurisdiction of this Court, asking it to intercede in an ongoing administrative matter. Within two days of receiving the FOIA request at issue here, the Commission agreed to provide responsive records. Within three weeks, the Commission had communicated with CREW several times, clearly indicating that it was in the process of responding. And by the time the Commission had moved this Court to dismiss, or in the alternative, to grant summary judgment in its favor, the Commission had provided CREW with all records to which it is entitled. CREW's complaint should be dismissed both because it is moot and because CREW failed to exhaust administrative remedies before bringing suit. CREW's arguments misconstrue what is required of an agency responding to a FOIA request and attempt to convert plaintiff's timeliness case into one about the adequacy of the documents provided. FOIA forecloses such a short-circuiting of the administrative process.

I. CREW'S COMPLAINT SHOULD BE DISMISSED AS MOOT

A. CREW's Cause of Action Challenges the Timing of the Commission's Response

CREW's complaint is moot because it alleges that the Commission has failed to produce any records in response to CREW's FOIA request, but the Commission has now provided all the nonexempt materials to which CREW is entitled. (Federal Election Commission's Memorandum in Support of its Motion to Dismiss or, in the Alternative, for Summary Judgment ("FEC Mem.") at 6.) CREW contends that this case is not moot because the Commission has not proved that it conducted an adequate search or substantiated the FOIA exemptions it has invoked. (Plaintiff's Opposition to Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment ("Opp'n") at 8.) But having brought a complaint alleging that the Commission violated the statutory deadlines set out in FOIA, CREW cannot now contend that its complaint alleges that the Commission's search was inadequate or that the Commission is improperly withholding particular records. By doing so, CREW improperly attempts to expand its complaint to include new allegations of fact and a claim for relief that CREW could not have possibly raised when it filed its complaint.

CREW's one-count complaint alleges that the Commission failed to timely produce any records in response to CREW's FOIA request. But a complaint about the timing of an agency response to a FOIA request becomes moot when the agency provides the records sought. *Voinche v. FBI*, 999 F.2d 962, 963 (5th Cir. 1993); *see also Omari v. Ashcroft*, No. 04-104, 2004 WL 2534229, at *1 (N.D. Tex. Nov. 8, 2004) ("A complaint regarding the timeliness of the production of records pursuant to a request under the Freedom of Information Act is rendered moot when the records are produced."). Since the Commission has completed its production of responsive records, CREW's complaint that it has received nothing is now moot. To the extent

CREW now claims that the Commission is improperly withholding particular records — *i.e.*, those records that it failed to locate because its search was allegedly inadequate, those that the Commission claims are exempt, or those that the Commission otherwise failed to produce — CREW raises new claims outside its complaint that the Court should not consider.[1] *See Voinche*, 999 F.2d at 963 (In a FOIA suit that "challenges only the timeliness of an agency's response, the issue whether the agency's response was adequate is not apposite."). In FOIA actions "based on [2 U.S.C. §] 552(a)(6)(C), the issue is not whether the requestor should have ultimate access to the records. The issue is under what time constraints administrative agencies should be compelled to act by the court . . . ." *Id.* (citation omitted). Because CREW's complaint did not include a challenge to the adequacy of the Commission's search for responsive documents, alleged "facts about the FEC's search" were not improperly omitted from the Commission's motion to dismiss or absent "conspicuously." (Opp'n at 9.) They are simply not at issue here.

CREW has cited no authority to the contrary. Neither *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344 (D.C. Cir. 1983), nor *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885 (D.C. Cir. 1995), involved FOIA plaintiffs that, like CREW, were challenging the timeliness of the agency's response. In *Weisberg*, 705 F.2d at 1347, the plaintiff brought suit seeking various materials that the FBI had withheld under FOIA exemption 7. Similarly, in *Nation Magazine*, 71 F.3d at 887, the plaintiff challenged the Custom Service's claim that its search had revealed no responsive records other than those exempt under FOIA exemption 7.

These cases do not support CREW because its complaint did not challenge the adequacy of the Commission's search or the withholding of particular records. Nor could it have. At the

[1] There can be no dispute that the case is moot with respect to the unredacted portions of the documents CREW has received. *See Hill v. U.S. Air Force*, 795 F.2d 1067, 1069 (D.C. Cir. 1986); *White v. Lappin*, No. 08-1376, 2009 WL 1921337, at *2 (D.D.C. July 2, 2009).

time CREW filed its complaint the Commission had not yet produced any responsive records or claimed any exemptions. *See* Compl. ¶ 24 ("Defendant FEC has neither produced any records to CREW in response to its FOIA request, nor made any explicit and justified claims of statutory exemption."). In its complaint, CREW thus could not have possibly challenged anything but the timing of the Commission's response. *See, e.g., Amaya-Flores v. U.S. Dep't of Homeland Security*, No. 06-225, 2006 WL 3098777, at *3 (W.D. Tex. Oct. 30, 2006) ("[B]ecause at the time the complaint was filed Defendant had not produced *any* records, it is impossible that Plaintiff could have been complaining about the failure to produce particular records.").[2] CREW's claims (Opp'n at 11-12) that there is a live controversy because the Commission failed to produce a *Vaughn* index or detailed declarations explaining the reasons for the claimed exemptions are similarly unavailing. *See Voinche*, 999 F.2d at 963 n.* (upholding denial of request for *Vaughn* index in case brought challenging timing of agency response "[b]ecause the purpose of a *Vaughn* index is to evaluate the adequacy of an agency's response to a FOIA request . . . .").

B. The Completeness of the Record Production Is Not Before the Court

Whether specific records were withheld by the Commission is not at issue in this case about timeliness. CREW contends that the FEC has "failed to produce" materials including metadata, email attachments, and calendars for two Commissioners. (Opp'n at 10-11.) CREW complains that the Commission has withheld portions of various documents pursuant to FOIA

[2] Because the adequacy of the Commission's search is not at issue in this case, any difference between the amount of potentially responsive materials reviewed by the Commission and the number of records eventually provided to CREW is irrelevant. (*See* Opp'n at 19-20.) The Commission's FOIA staff routinely review overinclusive batches of potentially responsive documents that are then culled to those that are actually responsive. The suggestion that a government agency errs by diligently reviewing a large universe of potentially responsive materials would create a perverse incentive for the Commission to limit the scope of its review.

exemptions 2, 4, 6, and 7(C). CREW also suggests that it may yet ask for the document categories it agreed to exclude from the Commission's initial search. *Id*. As explained above, however, *see supra* pp. 2-4, CREW's complaint challenges only the timeliness of the Commission's response, and it does not allege the Commission has withheld specific records under FOIA or that the Commission has improperly invoked FOIA exemptions. These claims are not properly before the Court.

Moreover, CREW would have to exhaust its administrative remedies with respect to these claims before bringing suit. As the Commission explained (FEC Mem. at 6-7), FOIA requesters may not bring suit in federal court until they have actually or constructively exhausted administrative remedies. *See also infra* pp. 5-6. CREW has not, however, exhausted its administrative remedies with respect to any records that CREW believes may have been improperly withheld. If CREW wishes to raise any such claim, it must first file an administrative appeal and give the Commission an opportunity to consider whether these records should in fact be produced.[3]

II. CREW FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES

A. Requiring Exhaustion Would Give the Commission a Chance to Address CREW's Contentions and Conserve Judicial Resources

Exhaustion gives agencies an opportunity to "correct mistakes made at lower levels and thereby obviate[] unnecessary judicial review." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990). As the Commission explained (FEC Mem. at 6-7), requiring potential

[3] CREW criticizes the Commission (Opp'n at 7) for completing its production on the same day as its deadline to file a responsive pleading under FOIA. But CREW itself foreclosed any opportunity to review the document production for completeness before court briefing by filing suit when it did — knowing that the Commission was in the process of responding to its request. If CREW believes additional searching is necessary to fulfill its request, it can make that argument during an administrative appeal.

FOIA litigants to exhaust administrative remedies before bringing suit in federal court also allows senior agency officials to develop a factual record and exercise their discretion. Despite the Commission's agreement to comply with the FOIA request, CREW did not permit the administrative processes to run their proper course. Administrative appeals would in this case have gone to the Commissioners themselves, and they could have had a chance to address CREW's claims of unlawful delay.

Contrary to CREW's argument (Opp'n at 18), the Commission's position here would not permit undue delay. If a requester believes that it has been constructively denied responsive materials, the top decisionmakers at the Commission should be afforded an opportunity to review such a claim and, if necessary, correct it. It is true that an administrative appeal lodged by CREW about the completeness of the response would have been premature until the Commission considered its response complete, as the Commission's FOIA officer indicated in a letter to the plaintiff. (*See* Opp'n at 6.) But if a potential litigant believes that its FOIA request has been constructively denied because the response is untimely, the Commission should have the opportunity to reconsider its response (or lack thereof). *See, e.g.*, *Kowalczyk v. U.S. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) (referencing an administrative appeal of an agency's "apparent denial-by-silence" of a request). Moreover, any denial of an appeal would provide the Court with an administrative decision susceptible to judicial review.

FOIA does not require that documents be provided to a requester within a specific statutory period. Rather, FOIA provides that within 20 days of receipt of a request, an agency must determine and provide notification within twenty days whether it will comply with the request. *See* 5 U.S.C. § 552(a)(6)(A)(i) (Agencies shall determine "whether to comply" with a request and provide notification.); *see also* Department of Justice Guide to the Freedom of

Information Act 59 (2009), *available at* http://www.justice.gov/oip/foia_guide09/procedural-requirements.pdf ("An agency is not necessarily required to release the records within the statutory time limit, but it must make its determination within that time and access to releasable records should, at a minimum, be granted promptly thereafter.") (*citing* 5 U.S.C. § 552(a)(6)(C)(i)). If not, the agency must inform the requester of the reasons for its adverse determination and of the requester's administrative appeal rights. If an agency fails to meet the 20-day deadline, a requester will be deemed to have constructively exhausted administrative remedies and can bring suit, so long as the agency has not responded before the complaint is filed. *See Oglesby*, 920 F.2d at 63 ("[A]n administrative appeal is mandatory if the agency cures its failure to respond within the statutory period by responding to the FOIA request before suit is filed.").

CREW does not dispute that multiple conversations took place between it and the Commission before 20 days had elapsed. CREW instead argues that the Commission failed to respond adequately within the 20-day period because it did not complete production and inform CREW of its appeal rights regarding any withheld material. This is incorrect. CREW conflates (1) what is required of an agency that agrees to comply with a request and is in the process of responding with (2) what is required of an agency that makes an adverse determination regarding a request. FOIA provides that only in the latter situation must an agency inform the requester of its appeal rights.

To trigger the requirement that a requester actually exhaust administrative remedies before bringing suit, all that is required is "a reply from the agency indicating that it is responding to [the] request." *Petit-Frere v. U.S. Attorney's Office for S.D. of Fla.*, 664 F. Supp. 2d 69, 71 (D.D.C. 2009) (quoting *Oglesby*, 920 F.2d at 61). In *Petit-Frere*, the court held that

notifying the requester that his request would be assigned to one of two tracks and take approximately nine months to be processed in the order it was received was a sufficient response to require the requester to actually exhaust administrative remedies before bringing suit. As the Commission explained (FEC Mem. at 9-10), the Commission's response to CREW more clearly indicated that it was in the process of responding to the request than even the agency's response in *Petit-Frere*: before CREW filed suit the Commission had granted CREW a fee waiver, spoken on the phone with CREW at least six times, obtained CREW's agreement to exclude certain categories of documents from the Commission's initial search, informed CREW that the Commission had located thousands of potentially responsive documents that it was in the process of reviewing, and had informed CREW that it would produce documents on a rolling basis.[4] Accordingly, CREW was required to actually exhaust administrative remedies. Because CREW did not do so, its complaint should be dismissed.

B. *Petit-Frere* Is Consistent with Circuit Precedent

The district court's opinion in *Petit-Frere* logically proceeds from the D.C. Circuit's holding in *Oglesby* and does not deviate from it, as CREW suggests (Opp'n at 17). In *Oglesby*, the court held that an administrative appeal is mandatory if an agency responds, even past the statutory period, to a FOIA request before the requester brings suit. 920 F.2d at 63-64. The

[4] CREW claims that it, rather than the Commission, first raised the possibility of a rolling production of responsive materials in a phone call placed by the Commission's FOIA officer to CREW's senior counsel two days after receiving CREW's FOIA request. *Compare* Opp'n at 4-5 *with* FEC Mem. at 3-4. But whether the Commission or CREW first proposed in this March 9, 2011, phone call a rolling production is irrelevant. Even in CREW's version of events, the Commission "agreed" to produce on a rolling basis. (Opp'n at 4-5; Rappaport Decl. ¶¶ 3, 4, 6.) Although the multiple communications between the Commission and CREW more than adequately constitute "a reply from the agency indicating that it [was] responding to [the] request," *Petit-Frere*, 664 F. Supp. 2d at 71, this March 9 agreement to produce on a rolling basis is a sufficient response by itself to require CREW to actually exhaust its administrative remedies before bringing suit.

court explained that once an agency has responded, "Congress intended the administrative route to be pursued to its end." Congress "did not mean for the court to take over the agency's decisionmaking role in midstream or to interrupt the agency's appeal process when the agency has already invested time, resources, and expertise into the effort of responding." *Id*. The holding in *Petit-Frere* furthers these goals. Requiring actual exhaustion once an agency indicates that it is in the process of responding to a request gives an administrative appellate body (in this instance the Commission itself) an opportunity to address claims of unlawful delay or constructive denial prior to being ushered into court.

CREW erroneously suggests (Opp'n at 14-17) that *Petit-Frere* conflicts with *Oglesby*, 920 F.2d 57, and was therefore wrongly decided. But the agency responses at issue here and in *Petit-Frere* "indicating that [the agency] would process the request," *Petit-Frere*, 664 F. Supp. 2d at 72, differ from the adverse determinations at issue in *Oglesby*. FOIA specifies that upon receiving a request, an agency must determine within 20 days whether to comply with the request, at which time the agency shall inform the requester "of such determination and the reasons therefor, and of the right of such person to *appeal to the head of the agency any adverse determination*." 5 U.S.C. § 552(a)(6)(A)(i) (emphasis added). FOIA thus requires agencies to determine within 20 days whether they are going to comply with the request, and if not, to inform a requester of the reasons for its adverse determination and of the requester's administrative appeal rights. As CREW notes (Opp'n at 16-17), the *Oglesby* court held that a letter from the Department of State informing a requester that the agency had found no responsive records did not trigger the actual exhaustion requirement because the letter failed to inform the requester of their appeal rights. The court explained that "[t]he agency has a duty to notify appellant 'of the right . . . to appeal to the head of the agency,' in cases where no records

are found in its response as well as those in which specific records are denied." *Oglesby*, 920 F.2d at 67 (quoting 5 U.S.C. § 552(a)(6)(A)(i)).

Here, however, the Commission did not indicate to CREW that no records were found or that any specific records were to be withheld. Indeed, the Commission made no adverse determination as to CREW's request before CREW filed suit. Accordingly, the Commission was not required to inform CREW its administrative appeal rights, and CREW's argument to the contrary (Opp'n at 17) finds no support in *Oglesby*.

Neither *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52 (D.C. Cir. 1987), nor the Department of Justice's *Guide to the Freedom of Information Act* undermine the holding in *Petit-Frere* or otherwise suggest it was wrongly decided. Both stand for the proposition that an agency's mere acknowledgment is not sufficient to require a requester to actually exhaust administrative remedies. The DOJ Guide notes that agency responses that merely acknowledge receipt of a FOIA request are not "determinations" under the FOIA that deny records or grant appeal rights. Department of Justice Guide to the Freedom of Information Act 743 (2009), *available at* http://www.justice.gov/oip/foia_guide09/litigation-considerations.pdf. Similarly, in *Spannaus*, the court found that a response from the Department of Justice that merely acknowledged the request and informed appellant that it would be forwarded to the FBI was not sufficient to require the requester to actually exhaust administrative remedies. 824 F.2d at 59 and n.9. By comparison, however, the government in *Petit-Frere* clearly indicated more. By informing the requester that providing responsive materials would take approximately nine months, the government in *Petit-Frere* indicated that it had examined the scope of the request as well as the available resources at its disposal and was therefore in the process of responding to

the request.[5] As we have previously explained (FEC Mem. at 9-10), here the Commission provided even more information to CREW than the government had shared in *Petit-Frere*.

CONCLUSION

In sum, the Commission timely agreed to comply with CREW's FOIA request and has since provided responsive records. Therefore, CREW's complaint — which claimed only that the Commission's response was untimely — is not only moot, but also prematurely before the Court as a result of CREW's failure to exhaust administrative remedies. CREW should not be permitted to expand its complaint and bypass FOIA's exhaustion requirements in the context of opposing the Commission's pending motion to dismiss.

Respectfully submitted,

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[5] The court in *Petit-Frere* appears to have considered the nine-month timetable provided by the government when it determined that the government was indeed responding to the request and had thus triggered an actual exhaustion requirement. The court explained, however, that all that was required was "a reply from the agency indicating that it is responding to [the] request," and nowhere held that an agency must estimate a date of delivery in order to "indicat[e] that it would process the request." 664 F. Supp. 2d at 71, 72.

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