RECORD NO. 12-5004

ORAL ARGUMENT SCHEDULED FOR OCTOBER 16, 2012

In The
United States Court of Appeals
For The District of Columbia Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff – Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant – Appellee,

PUBLIC CITIZEN, *et al.*,

Amici Curiae for Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

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CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FOIA	Freedom of Information Act
JA	Joint Appendix

SUMMARY OF THE ARGUMENT

This dispute centers on the meaning of a phrase of the FOIA requiring responding agencies to determine within 20 working days of receiving a request "whether to comply" with the request and to communicate that determination "immediately" to the requester, together with the reasons for the determination and notice of administrative appeal rights. 5 U.S.C. § 552(a)(6)(A)(i). The FEC claims to have satisfied this provision here by a series of communications over a several month period that culminated in an agreement on the scope of the initial search the FEC would conduct, together with the agency's agreement that when it produced documents at some unidentified future date or dates, it would do so on a rolling basis. The facts and timing of these communications are not in dispute. Instead, the parties disagree on whether they triggered the requirement that CREW refrain from filing suit until it had exhausted administrative remedies.

For multiple reasons, the FEC's interpretation must fail. First, it conflicts directly with the express statutory language and purpose of the FOIA, as reflected in the entirety of the provision at issue and the larger statute of which it is a part. A plain language approach requires the Court to accord the word "comply" its dictionary definition of "complete, perform what is due."[1] Applied here, the FEC was required to advise CREW immediately and expressly whether it would

[1] Merriam-Webster's Collegiate Dictionary 255 (11th ed. 2006).

"perform what is due," by giving CREW the documents it was requesting. It is undisputed that at no point prior to CREW filing suit did the FEC so advise CREW.

In fact, the FEC was not capable of making that determination until after the parties had agreed on the scope of the initial search, the agency had completed its search for responsive documents, and had reviewed all responsive documents to determine whether it would redact any information under claims of exemption. The FEC did not "complete" these actions until after CREW filed its lawsuit. By contrast, its interim steps of advising CREW on procedural matters, such as the granting of CREW's request for a fee waiver and the agency's agreement to produce documents on a rolling basis, did not address in any way the substantive issue of what those documents produced on a rolling basis would be, the extent to which they would satisfy CREW's request, and whether the FEC would redact any information from any of the documents. As such, the procedural determinations the FEC made fall far short of a determination "whether to comply."

Moreover, as implemented here, the FEC's interpretation of what constitutes a determination "whether to comply" creates a process that runs directly contrary to that dictated by the FOIA. Under section 552(a)(6)(A)(i), *at the same time* an agency determines "whether to comply" and "immediately" so advises the requester, the agency also must provide the reasons for the determination, and

advise the requester of the right to file an administrative appeal. Here, however, the FEC engaged in a multi-step process stretched over a period of time. It started with a series of communications over the course of several months addressing only procedural aspects of the request. This was followed by several partial productions of responsive documents several months later and after CREW filed suit, and ended with the agency advising CREW of its right to administratively appeal the agency's multiple withholdings. The FEC's failure to provide "immediate[]" notice to CREW of its administrative appeal rights at the time the FEC made what it deems a determination "whether to comply" is fatal to its claim to have satisfied section 552(a)(6)(A)(i).

The FEC's construction also undermines several other key provisions added to the FOIA to address agency delays in responding based on an inability to complete review of all potentially responsive documents. The *Open America* stay provision, 5 U.S.C. § 552(a)(6)(C)(i), and the "unusual circumstances" provision, 5 U.S.C. § 552(a)(6)(B)(i), provide safety valves for agencies that cannot meet the 20-day time to respond. Both, however, would have no continued vitality if agencies could meet their responsibility to make a determination on "whether to comply" simply by notifying a requester the agency is in receipt of the request and intends to process it at some point in time.

For its part, the FEC argues an interpretation of section 552(a)(6)(A)(i) requiring agencies to do more than tell a requester they are in receipt of the request that they will process at some point in time would render superfluous the FOIA provision for expedited treatment and its requirement that agencies assign tracking numbers to requests older than 10 days. In fact, it is the FEC's arguments that, if accepted, would render these provisions superfluous.

The FEC's policy arguments fare no better. While exhaustion of administrative remedies serves many laudable interests, in enacting the FOIA Congress balanced those interests against the interests of requesters in having prompt access to the documents they seek. This balance resulted in the FOIA's constructive exhaustion provision, which provides an exception to actual exhaustion even if the agency will be deprived of an opportunity to review in the first instance objections a requester may have to what the agency produced and how it conducted its search. At bottom, many of the FEC's arguments are with the FOIA itself, and the strict time limits it imposes on agencies to process requests. Those arguments are more appropriately addressed to Congress, not this Court.

ARGUMENT

I. UNDER THE FOIA THE FEC WAS REQUIRED WITHIN 20 DAYS TO DETERMINE AND ADVISE CREW WHETHER THE AGENCY WOULD GIVE CREW THE DOCUMENTS IT SEEKS.

A. The Plain Language Of The FOIA Required The FEC To Advise CREW Within 20 Days Of Receiving CREW's Request Whether The FEC Would Give CREW The Documents It Seeks.

In essence, this case revolves around the meaning of four simple words: "determine . . . whether to comply," 5 U.S.C. § 552(a)(6)(A)(i). That meaning dictates whether CREW was required to exhaust administrative remedies before filing suit, as the FEC claims, or whether CREW could instead utilize the FOIA's constructive exhaustion provision, 5 U.S.C. § 552(a)(6)(C)(i), which allows a requester to file suit when the agency has not complied with its obligations under section 552(a)(6)(A). As CREW demonstrated in its opening brief, the plain language of this phrase, the meaning of the words around it, and the larger statute of which it is a part express a requirement that within 20 business days an agency in receipt of a FOIA request process the request and tell the requester whether the agency will give the requester the documents it seeks. Further, when advising the requester of this determination, the agency must *at the same time* provide the requester with the reasons for the agency's determination and applicable

administrative appeal rights. No other interpretation squares with the statutory language or purpose.

Nevertheless, the FEC advances an interpretation that reduces the phrase "determine . . . whether to comply" to the requirement that an agency merely tell the requester, in advance of actually processing any aspect of the request, whether the agency will, at some point, process the request coupled with any procedural decisions the agency has reached. The FEC purports to derive this interpretation from a "plain language" approach it claims gives the four-word phrase its "'ordinary, contemporary, common meaning.'" FEC Br. 26, 27 (citation omitted).[2] Tellingly, the FEC cites no support for this "ordinary, contemporary, common meaning," and more critically ignores the central word of this phrase: "comply." Instead, the FEC focuses on the word "determination," even though the parties agree the FOIA required the FEC to make a "determination" within 20 business days of receiving CREW's FOIA request.[3]

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[2] FEC Br. refers to the brief of the Federal Election Commission.

[3] The FEC also seems to be suggesting that if an agency uses magic words indicating it "will comply," the agency will have satisfied its obligations under section 552(a)(6)(A)(i), regardless of what the agency intends by that statement. The mandatory requirements of the FOIA, however, are not so easily circumvented by elevating form over substance. Only a response indicating the agency will or will not provide the requester all of the requested documents indicates whether the agency "will comply."

What the parties dispute is the nature of that determination, and whether it was satisfied here when the FEC, over the course of several months, committed to a process of rolling production for any documents it produced. That dispute is resolved by reference to the key statutory word "comply," which describes the contents of the required determination. The dictionary – the best source for a word's "plain meaning" – defines "comply" as follows:

> to complete, perform what is due . . . to conform, submit, or adapt (as to a regulation or to another's wishes) as required or requested . . .

Merriam-Webster's Collegiate Dictionary at 255. Applying this plain meaning here, the FEC was required within 20 days of receiving CREW's FOIA request to inform CREW whether the agency would "conform" with CREW's request by giving CREW that to which it "is due" or which CREW had "requested," specifically the documents delineated in CREW's FOIA request. Anything less falls short of the required determination.

It is undisputed that at no time prior to CREW filing suit did the FEC specifically advise CREW the agency would produce all or even some identified subset of the documents CREW had requested. Instead, in a series of communications the FEC advised CREW of the following: (1) it was granting CREW's request for a fee waiver (JA 14, ¶ 4); (2) when the FEC produced documents, it would do so on a rolling basis (JA 43-44, ¶ 4); (3) the agency was

excluding certain documents identified by CREW from its initial search, after which CREW would follow up with further clarification whether additional searches are needed to satisfy its request (JA 32); (4) following CREW's clarification of the scope of its request the FEC had begun the process of locating and reviewing potentially responsive documents (JA45-46, ¶¶ 6-10); and (5) as of May 9 – ten days prior to CREW filing suit – the agency had not completed its review of documents identified as responsive to the initial search (JA 45-46, ¶¶ 11-13).[4] All of these communications centered on the procedural aspects of satisfying CREW's request: the process it would use to produce documents, whether it would charge CREW search and production costs, and the scope of the search the agency would conduct. By contrast, the agency made no commitments on whether it would satisfy the substantive aspects of CREW's request.[5]

Indeed, it was not until the FEC had located and reviewed all responsive documents that the agency was even in a position to advise CREW of its determination "whether to comply." Until that point, there was no bounded

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[4] *See also* FEC Br. at 18-19 (same).

[5] Curiously, the FEC points to what it labels as "CREW's concession . . . that the Commission had 'explicit[ly] agree[d] with CREW on the procedure for complying with the request," FEC Br. at 20 (citing CREW Br. at 11) as support for its claim to have complied with the requirements of section 552(a)(6)(A). Yet it is precisely this agreement on procedural matters only that illustrates why the FEC had not made a determination "whether to comply" before CREW filed suit.

universe of documents to review and determine whether they were responsive and whether entire documents, or parts of documents, were exempt from disclosure. Here, that point occurred one month after CREW filed suit, when the agency determined to withhold some responsive information under claims of exemption, provided CREW with a written explanation of what it had determined and why, and advised CREW of its right to file an administrative appeal of the agency's adverse determinations.[6] *See* JA 31-33. Together these components comprise the determination required by 5 U.S.C. § 552(a)(6)(A)(i).[7]

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[6] The FEC takes issue with the characterization of these actions as constituting a "denial" in part of CREW's request. FEC Br. at 20 n.6. But the FEC's letter of June 23, 2011 speaks for itself and identifies quite clearly redactions the agency made from documents responsive to CREW's request. Those redactions of requested material include "commercial information" purportedly exempt under FOIA Exemption 4, law enforcement information purportedly exempt under FOIA Exemption 7(C), and information alleged to implicate personal privacy purportedly exempt under FOIA Exemption 6. JA 32-33. Under any conceivable construction of the FOIA, the agency's actions constitute a "denial," at least in part.

[7] To be clear, CREW is not arguing that the requisite determination "whether to comply" must be accompanied by a production of all of the documents the agency has decided to release, as the FEC suggests. *See*, *e.g.*, FEC Br. at 27-28. It just so happens that here, the FEC decided to combine its notice of whether it would comply – a notice that identified what the agency would and would not be releasing and why and CREW's administrative appeal rights – with the actual production of documents. The FOIA requires only that an agency produce documents "promptly" after making a determination "whether to comply." 5 U.S.C. § 552(a)(6)(A)(i).

To otherwise construe the FEC's pre-litigation communications as a determination "whether to comply" runs directly contrary to the FOIA. At the same time an agency determines "whether to comply," the agency must "*immediately*" advise the requester of its determination, provide the reasons for the determination, and advise the requester of the right to file an administrative appeal. 5 U.S.C. § 552(a)(6)(A)(i); *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 66 (D.C. Cir. 1990). Here, the FEC did not take these steps immediately or concurrently, but instead engaged in a multi-step process stretched over a period of time that: started with a series of communications addressing procedural aspects of the request; was followed by notice months later, after CREW filed suit, of what the agency was producing and withholding; and ended with a final production and notice to CREW of its right to administratively appeal the agency's adverse determinations.[8] As such, they fall short of the immediate and concurrent notice the statute mandates. *See id.*; *see also Taylor v. Appleton*, 30 F.3d 1365 (11th Cir. 1994).[9]

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[8] The FEC preceded this notice of its determination to comply with two earlier letters providing some of the documents CREW seeks. Both letters expressly stated they did not constitute "a final agency decision . . . subject to appeal." JA 38, 41.

[9] In *Taylor*, the agency had sent the requester a series of three letters: the first advised him which office was processing his request; the second produced documents; and the third explained exemptions the agency was claiming and advised the requester of the agency's appeal procedures. 30 F.3d at 1368-69.

The FEC's approach also is unworkable as a practical mater. Neither the district court below nor the FEC has defined what precise set of factors constitute the required determination of "whether to comply," instead describing a series of actions over a period of months. The FEC in fact eschews a "bright-line rule," claiming the exhaustion requirement is not triggered by "any single communication or particular subset of communications." FEC Br. at 20. But this leaves agencies and requesters alike to guess at what set of circumstances is sufficient to constitute a determination "whether to comply" that triggers the requester's obligation to exhaust administrative remedies before filing suit.

Such uncertainty in the FOIA agency process is precisely what Congress sought to avoid. Toward that end, the statute states very specifically what an agency must do and when. The statute's time limits were adopted "'in order to contribute to the fuller and faster release of information, which is the basic objective of the Act.'" *Oglesby*, 920 F.2d at 64, n.8 (citing H.R. Rep. No. 93-876 (1974)). Similarly, Congress added the constructive exhaustion provision to "spur . . . the agencies to respond within the ten-day deadline." *Id.* *See also* H.R. Rep. No. 93-879, at 126 (1974) ("It is the intent of this bill that the affected

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The Eleventh Circuit characterized only the third and final letter – sent after the requested had filed suit – as complying with the requirements of 5 U.S.C. § 552(a)(6)(A), as only this letter "inform[ed] Taylor of his right to an administrative appeal." *Id.* at 1369.

agencies be required to respond to inquiries and administrative appeals within specific time limits."). In other words, Congress meant what it said when it provided a deadline by which agencies must respond to FOIA requests. The uncertainty the FEC seeks to inject through a multi-step process that ignores statutorily imposed deadlines conflicts directly with Congress' intent.

In sum, the failure of the FEC and the district court here to "identify any single communication or particular subset of communications that was sufficient to trigger the exhaustion requirement," FEC Br. at 21, is fatal to the FEC's claim that CREW was required to exhaust administrative remedies before filing suit.

B. No Binding Precedent Supports The FEC's Interpretation Of Its Obligations Under The FOIA.

In support of its statutory construction argument, the FEC relies on several district court cases here and in another district it claims compel the conclusion CREW was required to exhaust administrative remedies before filing suit. These cases, none of which are binding on this Court, are either wrongly decided or stand for a different proposition than the FEC claims. In addition, they are countered by other decisions from this district and elsewhere.

First, the FEC cites *Love v. FBI*, 660 F. Supp. 2d 56 (D.D.C. 2009), to support its claim an agency's notice of its determination "whether to comply" need not include the reasons for the determination and notice of appeal rights. FEC Br.

at 22. The facts of *Love* do not bear out this interpretation, as the requester had failed to comply with the requirements of the agency administrative process. The declaration of John W. Kornmeier, on which the *Love* court relied,[10] explains the requester never responded to a letter from the Executive Office of U.S. Attorneys advising the requester his estimated fees would exceed $25, and seeking his agreement to pay the fees or reformulate his request.[11] Similarly, the declaration of William C. Little, Jr. from the Drug Enforcement Agency, on which the *Love* court also relied,[12] states the agency denied the request at issue because it "did not reasonably describe records . . . was not filed in accordance with agency rules, and it did not include a promise to pay or request for a waiver of fees."[13] Further, the DEA never received "the plaintiff's certificate of identity or a reformulated request."[14] Thus, *Love* stands for the well documented proposition that a requester

[10] 660 F. Supp. 2d at 58.

[11] Declaration of John W. Kornmeier at ¶ 7, *Love v. FBI*, 660 F. Supp. 2d 56, Dkt. 18-2.

[12] 660 F. Supp. 2d at 58.

[13] Declaration of William C. Little, Jr. at ¶ 16, *Love v. FBI*, 660 F. Supp. 2d 56, Dkt. 18-1.

[14] *Id.* at ¶ 17.

who fails to comply with agency requirements for processing a request cannot avail itself of the FOIA's constructive exhaustion procedures.[15]

The FEC also relies on *Cabreja v. U.S. Citizenship & Immigration Services*, where the court noted the FOIA "does not require an agency to *produce* within 20 days the results of a search . . ." 2008 U.S. Dist. LEXIS 94262, *2 (D.D.C. Nov. 19, 2008) (emphasis added). Here, of course, CREW does not argue the FEC was required to produce all responsive documents within 20 days, just advise CREW whether the agency would be producing the requested documents. Moreover, the court's failure in *Cabreja* to find constructive exhaustion is hardly surprising given the plaintiff's failure to perfect its request by providing the requested certification, one of the required steps in the administrative process.

On the other hand, a number of cases have addressed the issue presented here and concluded a FOIA plaintiff has constructively exhausted administrative remedies where the agency failed to perform all that section 552(a)(6)(A)(i) requires within 20 days. For example, in *Thomas v. Department of Health & Human Services*, 587 F. Supp. 2d 114 (D.D.C. 2008), the court found neither a

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[15] *See also* U.S. Dep't of Justice, Guide to the Freedom of Information Act, 744-48 (2009) and cases cited therein (enumerating circumstances where requesters have not constructively exhausted their administrative remedies because of their failure to follow administrative processes, including, *inter alia*, failure to provide proof of identity, failure to "reasonably describe" requested records, and failure to comply with fee requirements).

letter from the agency advising the plaintiff the agency had received his FOIA request, nor a subsequent letter advising the request was in a queue and would be processed on a "'first-in, first-out'" basis required the plaintiff to exhaust administrative remedies before filing suit. *Id.* at 116. As the court explained, neither communication stated whether the agency "would comply with the request," and neither advised the plaintiff "of his appeal right." *Id.* at 116, 117. This was so even though the "nature" of the second letter "could reasonably be understood to imply that the FDA intended to conduct a search for responsive records." *Id.* at 116. *See also Accuracy in Media, Inc. v. Nat'l Transp. Safety Bd.*, 2006 U.S. Dist. LEXIS 21532, *13 (D.D.C. March 29, 2006) (plaintiff found to have constructively exhausted administrative remedies because the agency had not "complied" with his request before he filed suit, even though the agency had already acknowledged receipt of his FOIA request and informed him which office was processing the request); *Taylor*, 30 F.3d at 1369.

Here, too, at least some of the communications from the FEC to CREW could be understood as implying the FEC intended to conduct a search for records responsive to CREW's request. But absent an explicit statement from the FEC that it intended to comply with the request by providing CREW the documents it seeks and informing CREW of its right to appeal an adverse decision to the agency

head, CREW was not required to exhaust administrative remedies before filing suit.

C. The FEC's Interpretation Of Its Statutory Obligations Under The FOIA Would Undermine Numerous Provisions Of The Statute.

CREW demonstrated in its opening brief, with support from both the language and legislative history of the FOIA, how the FEC's interpretation of its obligation to determine "whether to comply" would nullify other key provisions of the statute and conflict with the FOIA's purpose. The FEC offers no compelling arguments in response, instead advancing a contorted interpretation of these provisions in a futile effort to reconcile them with its flawed interpretation of section 552(a)(6)(A)(i).[16] Principles of statutory construction require this Court to reconcile all provisions of the FOIA in one harmonious whole. *See*, *e.g.*, *Bhd. of Locomotive Eng'rs v. Atchison, T. & S.F.R.R.*, 516 U.S. 152, 157-58 (1996).

Congress provided agencies unable to meet the statute's strict time limit for making a determination "whether to comply" two safety valves: access, in appropriate circumstances, to an *Open America* stay where a requester has filed

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[16] Elsewhere, the FEC argues this Court cannot consider the legislative history because the meaning of the phrase "determine . . . whether to comply" is plain. FEC Br. at 30. The Supreme Court has recognized, however, that a "proper construction frequently requires consideration of [a statute's] wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve." *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968).

suit after constructively exhausted administrative remedies, and the ability in "unusual circumstances" to secure an additional ten days to make a determination whether to comply while the matter is still before the agency. As CREW has explained, interpreting the obligation to determine "whether to comply" as requiring only that an agency advise a requester it intends to process a request, with no specifics on what the agency will and will not produce, renders each of these safety valves a nullity.

In response, the FEC argues the *Open America* stay remains available where an agency either fails to respond at all, or indicates only "it is 'processing' the request." FEC Br. at 35. But that essentially is what the FEC indicated to CREW here, reinforcing the point that if such notification satisfies section 552(a)(6)(A)(i), the *Open America* provision – expressly designed to "allow the agency additional time to complete its review of the records"[17] – serves no purpose. Accordingly, under "a cardinal principle of statutory construction," the FOIA should not be construed to render this provision "superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

The FEC also has failed to demonstrate how its interpretation of "whether to comply" can be reconciled with the "unusual circumstances" provision of the FOIA. As CREW has explained, Congress enacted this provision expressly to

[17] 5 U.S.C. § 552(a)(6)(C)(ii).

help agencies unable to meet the then-ten-day limit for processing requests. *See*, *e.g.*, S. Rep. No. 104-272, at 16 (1996). That agencies may require even more time beyond the additional ten days afforded by the "unusual circumstances" provision to search for, collect, and review responsive documents (FEC Br. at 36) is an argument better addressed to Congress as a reason to change the existing law, not to this Court as a reason to not give effect to the plain language of the statute.[18] *See Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1271 (2011) (where "Congress has not enacted the FOIA [provision] the Government desires . . . [w]e leave to Congress, as is appropriate, the question of whether it should do so.").

The FEC also has failed to respond substantively to the fact that if its interpretation of "determine . . . whether to comply" is accepted, agencies need not use either of the safety valves Congress provided and could, instead, unilaterally grant themselves an indefinite extension simply by indicating an intent to process a request at some point in time. That the FEC here did not grant itself an "indefinite extension," but rather one of several months (notwithstanding the FOIA's command to determine whether it would provide the requested documents within 20 days), does not negate this possibility. Moreover, Congress' focus went well beyond agencies that were taking an "indefinite" period of time to determine

[18] The FEC's argument rings particularly hollow given its failure to avail itself here of either the *Open America* stay or the unusual circumstances provision.

whether to comply; Congress expressed concern about the predominate number of agencies that were taking longer than ten days, the statutory time limit then in place for making that determination. *See*, *e.g.*, Hearing on S. 1940 before the Subcomm. on Tech. & the Law of the S. Comm. on the Judiciary, 102d Cong. 4 (1992) (statement of Sen. Patrick Leahy); S. Rep. No. 104-272, at 16.

For its part, the FEC argues construing section 552(a)(6)(A) as requiring an agency to notify a requester within 20 days whether it will give the requester the documents it seeks would nullify other provisions of the FOIA, including the requirement that agencies made records available "promptly," 5 U.S.C. § 552(a)(3)(A). But this misapprehends CREW's argument, which is not that agencies must produce all documents within 20 days, but that agencies must within 20 days make a determination whether they will give requesters the documents they are seeking.

The FEC's contention that the FOIA provision requiring agencies to assign tracking numbers to requests and afford requesters access to information about the status of their requests, 5 U.S.C. § 552(a)(7)(B)(ii), would be rendered superfluous also must fail, as it too rests on the flawed view that CREW's construction of section 552(a)(6)(A) would require agencies to produce all responsive documents within 20 days. Moreover, requiring agencies to estimate a date of completion, as section 552(a)(7) requires, provides requesters with useful information, even if the

estimated date is outside the statutory time limits. With this information, a requester can decide whether to invoke the statute's constructive exhaustion or whether to narrow its request to ensure a faster processing time.

Finally, the FEC argues the FOIA's provision for expedited processing, which commands an agency to process expedited requests "as soon as practicable," 5 U.S.C. § 552(a)(6)(E)(iii), would make no sense because the requirement that agencies process requests within 20 days mandates a shorter processing time than does the phrase "as soon as practicable." Again, however, the FEC misapprehends the meaning of the FOIA's expedited processing provision. While the FOIA does not define "as soon as practicable," the legislative history of this provision

> makes clear that, although Congress opted not to impose a specific deadline on agencies processing expedited requests, its intent was to 'give the request priority for processing *more quickly than otherwise would occur*.'

Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 39 (D.D.C. 2006) (*EPIC*) (quoting S. Rep. No. 104-272, at 17 (1996) (emphasis in original)). Accordingly, as the *EPIC* court concluded, "the phrase 'as soon as practicable,' in the context of a provision of FOIA allowing for *expedited* processing, cannot be interpreted to impose a lower burden on the agency than would otherwise exist." *Id.* (emphasis in original).

D. The FEC's Policy Arguments Present No Persuasive Reason To Deviate From The FOIA's Plain Language And Legislative Intent.

Having failed to demonstrate as a matter of statutory construction why the FEC's pre-litigation response to CREW satisfied 5 U.S.C. § 552(a)(6)(C), the FEC falls back on policy arguments about the laudable purposes exhaustion of administrative remedies serve and the threat of increased litigation if CREW's position is accepted. Neither, however, provides a persuasive reason to deviate from the plain language and clear legislative intent behind the FOIA provision at issue.

First, CREW does not dispute the salutary purposes served by the general requirement to exhaust administrative remedies. In the FOIA, however, Congress balanced those interests against the interests of requesters in having prompt access to the documents they seek. This balance resulted in the FOIA's constructive exhaustion provision, which provides an exception to actual exhaustion even if the agency will be deprived of an opportunity to review in the first instance objections a requester may have to what the agency produced and how it conducted its search. In this way, the FOIA serves the "interests of timely disclosure" by "permit[ting] early 'accrual' of a cause of action." *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987). As such, "[t]he FOIA is considered a

unique statute because it recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines." *Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) (citing *Spannaus*, 824 F.2d at 58). Where, as here, a requester meets the requirements of the FOIA's constructive exhaustion provision, the requester is free to proceed to litigation even if it denies the agency an opportunity to first address the requester's claims.[19]

Second, the FEC raises the specter of requesters overwhelming the courts with lawsuits if section 552(a)(6)(C) is interpreted as requiring agencies to advise requesters within 20 days whether or not the agencies will produce the requested documents. But, as case law and Department of Justice guidance confirm,[20] the construction CREW advances here is one courts and agencies alike have accepted for years.

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[19] For these reasons, the FEC's repeated disparagement of CREW for "filing suit prematurely" and thereby failing to present its complaints first to the FEC, FEC Br. at 34, is entirely misplaced. CREW was entitled to rely on the FOIA's constructive exhaustion provision, and once litigation had commenced, continuing with the administrative process would have been duplicative and a waste of resources. Moreover, at the time CREW filed suit, the FEC had yet to produce a single document. Accordingly, there was nothing for CREW to discuss with the FEC's FOIA officer and no adverse determination to appeal.

[20] *See* U.S. Dep't of Justice, Guide to the Freedom of Information Act, 743; Memorandum from Janet Reno, Attorney General to the Heads of Departments and Agencies, regarding the Freedom of Information Act (Oct. 4, 1993) (quoted in S. Rep. No. 104-272, at 16; H.R. Rep. No. 104-795, at 13 (1996)).

Moreover, in point of fact requesters, even those who have waited far more than 20 days, rarely file lawsuits, and there is nothing to suggest they would do so more frequently under CREW's interpretation. Data compiled by the Department of Justice indicates in Fiscal Year 2010, the entire federal government processed 600,849 requests.[21] At the same time according to the Department, a total of 282 FOIA lawsuits were "received" in FY2010.[22] Most likely the number of lawsuits filed in FY2010 based on constructive exhaustion is well below the total of 282. In other words, the actual data does not bear out the FEC's fears that recognizing CREW properly invoked the FOIA's constructive exhaustion provision will open the floodgates to massive numbers of new FOIA lawsuits.

Finally, the facts here illustrate the FEC's concerns are misplaced. CREW did not file suit on the 21st day following the agency's receipt of its FOIA request. Instead, it waited two and one-half months before filing suit, and did so only after the agency repeatedly missed deadlines by which it had promised to produce documents and a timetable for its production. At that point, with no documents in hand, no notice of what the FEC would produce or when, CREW decided to

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[21] Department of Justice, Summary of Annual FOIA Reports for Fiscal Year 2010, at 3 (available at http://www.justice/gov/oip.foiapost/fy2010-ar-summary.pdf).

[22] List of Freedom of Information Act Cases Received in 2010 (available at http://www.justice.gov/oip/cy10/received-2010.pdf).

invoke the remedy Congress provided for requesters in this very situation, a lawsuit in district court. As this chain of events illustrates, CREW did not rush into court at the first opportunity, but instead gave the FEC multiple opportunities to meet its responsibilities under the FOIA.

CONCLUSION

For the foregoing reasons and those set forth in CREW's opening brief, this Court should reverse the judgment of the district court and remand this case for consideration of the merits of CREW's claims.

Respectfully submitted,

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Dated: July 24, 2012

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 24th day of July, 2012, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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