

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

CAMPAIGN FOR ACCOUNTABILITY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:16-cv-1068 (KBJ)
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
)	

**DEFENDANT’S MOTION TO STAY PROCEEDINGS PENDING SUBMISSION AND
EXHAUSTION OF FOIA REQUEST, AND MEMORANDUM IN SUPPORT**

Through this lawsuit, Plaintiff Campaign for Accountability (CFA) seeks to compel the Office of Legal Counsel (OLC) to disclose certain records pursuant to the Freedom of Information Act’s (FOIA’s) affirmative-disclosure provisions, 5 U.S.C. § 552(a)(2). CFA submitted an initial request for records to OLC, but this Court dismissed CFA’s Complaint founded on that request. *See* Mem. Op. (ECF No. 19). CFA has now filed an Amended Complaint seeking a different set of records. *See* Am. Compl. (ECF No. 22) ¶¶ 34-49. Because OLC has not yet had an opportunity to process or respond to CFA’s new claim—and FOIA requires that agencies be provided an opportunity to respond to requests for records—this case should be stayed for the short period of time necessary for CFA to submit (and exhaust) a new request to OLC for the set of records described in CFA’s Amended Complaint.

As discussed further below, this short stay of proceedings would avoid unnecessary motion-to-dismiss briefing, and would assist the Court’s ultimate review of CFA’s claim. In particular, allowing OLC to process and respond to a new request from CFA may result in the disclosure of documents to CFA. At a minimum, allowing OLC to respond would further the

purposes of exhaustion, by providing this Court with a more robust foundation on which to evaluate CFA's new claim and clarifying OLC's position regarding the particular categories of records now requested from OLC.

To the extent the Court is not inclined to stay proceedings, Defendants respectfully request, in the alternative, an extension of 30 business days—until January 3, 2018—for their deadline to respond to the Amended Complaint. During this time, OLC would provide a response to CFA regarding the new set of records described in the Amended Complaint. Specifically, OLC would provide a response to CFA within twenty business days (by December 18, 2017), and the Government's response to the Amended Complaint would then be due ten business days later (on January 3, 2018).

Plaintiffs cannot articulate any prejudice from either of the Government's requests. Indeed, allowing OLC to respond to a new request for records from CFA would only benefit CFA by avoiding unnecessary motion practice and potentially resulting in the disclosure of documents. Accordingly, there is ample cause for staying, or at least extending, the Government's response to the Amended Complaint.

BACKGROUND

This case began with CFA submitting a letter to OLC requesting that OLC disclose “all unpublished OLC opinions that provide controlling legal advice to executive branch agencies” pursuant to FOIA's affirmative-disclosure provision, 5 U.S.C. § 552(a)(2). ECF No. 9-3 at 2. CFA stated that the “request, at a minimum, encompasses the formal written opinions OLC has issued and will issue[.]” *Id.* OLC responded to CFA's request, stating that OLC generally “provides confidential legal advice within the Executive Branch,” and “[a]s such, OLC's advice is ordinarily covered by the attorney-client and deliberative process privileges, and is therefore exempt from mandatory disclosure under the FOIA[.]” *See* ECF No. 9-4 at 1.

Following that response, CFA filed a Complaint seeking to enforce its request. *See* Compl. (ECF No. 1) ¶ 6 (“In a letter dated March 22, 2016, CfA asked OLC to abide by its legal responsibilities pursuant to 5 U.S.C. § 552(a)(2) to make available . . . all unpublished OLC opinions that provide controlling interpretations of legal authority to executive branch agencies[.]”). The Government moved to dismiss the Complaint, arguing, *inter alia*, that CFA had not plausibly alleged that OLC had failed to disclose advice documents subject to § 552(a)(2). *See* MTD Mem. (ECF No. 9-1) at 19-40.

Following briefing and argument, this Court granted the Government’s motion to dismiss. The Court held that “CfA has not identified an ascertainable set of OLC opinions that OLC has withheld from the public and that is also plausibly subject to the FOIA’s reading-room requirement.” ECF No. 19 at 3. Thus, CFA’s Complaint failed to state a valid claim for relief.

The Court’s opinion also noted that CFA, at oral argument, had tried to “identify[] two discrete subsets of OLC opinions that, according to CfA, . . . must be made available to the public.” *Id.* at 36. But those “delineated categories of records do not appear in CfA’s complaint as the basis for CfA’s claims,” and therefore “CfA’s oral assertion . . . cannot be the means by which CfA alleges a plausible violation of the reading-room provision.” *Id.* The Court therefore dismissed the Complaint, but granted CFA leave to file an Amended Complaint to “cure the fatal pleading defect”—*i.e.*, to “add allegations of specific, ascertainable categories of records that CfA believes are subject to the reading-room requirement and that OLC has failed to make publicly available.” *Id.* at 37.

Following the Court’s decision on the motion to dismiss, CFA filed its Amended Complaint. The Amended Complaint states that “[t]his lawsuit concerns only . . . formal written opinions issued to executive branch agencies or to executive branch officials other than the

president,” Am. Compl. ¶ 33, and in particular five categories of such formal opinions: opinions resolving interagency disputes; opinions issued to independent agencies; opinions interpreting non-discretionary legal obligations; opinions finding that particular statutes are unconstitutional and that therefore agencies need not comply with them; and opinions adjudicating or determining private rights. *See id.* ¶¶ 35-49. None of those categories were previously identified in CFA’s original request. And within the five categories, CFA now identifies five particular OLC opinions that CFA believes have not yet been made public. *See id.* ¶ 38 n.36; ¶ 40 n.38; ¶ 44 n.41; ¶ 46 n.43; and ¶ 49 n.45.

The Government’s response to CFA’s Amended Complaint is currently due Friday, November 17, 2017. *See* Order (ECF No. 20). Following CFA’s filing of its Amended Complaint, counsel for the Government contacted counsel for CFA to discuss a stay of proceedings pending CFA’s submission of a new FOIA request to OLC for the records described in the Amended Complaint. *See* Meet & Confer Corresp. (attached hereto as Exh. 1). CFA declined the Government’s suggestion that CFA submit a new FOIA request. *See id.* Pursuant to Local Civil Rule 7(m), counsel for the Government then inquired about CFA’s position on the relief requested in this motion. CFA stated that it opposed such relief. *Id.*

ARGUMENT

This Court should grant a brief stay of proceedings pending CFA’s submission (and exhaustion) of a new FOIA request to OLC for the records now described in the Amended Complaint. In FOIA cases, including cases under § 552(a)(2), plaintiffs are required to submit an appropriate request for records and agencies are entitled to an opportunity to respond to those requests for records. OLC plainly has not been provided a meaningful opportunity to address the categories of records now described in CFA’s Amended Complaint—*i.e.*, five discrete categories of OLC opinions. Accordingly, a stay of proceedings pending submission of a new request for

these records would avoid unnecessary motion-to-dismiss briefing based on CFA's failure to exhaust this new request for a different set of records. Moreover, allowing OLC to process and respond to CFA's request would potentially result in the disclosure of documents to CFA, and would at a minimum provide this Court a more solid foundation on which to ultimately evaluate CFA's claim. Particularly because this brief stay would not prejudice Plaintiffs in any way, it is amply justified here.

I. Granting A Stay of Proceedings Would Avoid Unnecessary Motion Practice

Absent a stay allowing CFA to submit and exhaust a new FOIA request, the Government would be compelled to move to dismiss CFA's Amended Complaint: in the Government's view, CFA has not submitted a proper FOIA request for the records now described in the Amended Complaint. To avoid this unnecessary motion-to-dismiss briefing, the Court should grant a brief stay of proceedings pending CFA's submission of a FOIA request to OLC for the new set of records.

A. Before a FOIA lawsuit may be filed, it is a jurisdictional pre-requisite that a requester submit to the agency a valid request for the records sought. That is true even when a plaintiff seeks to enforce the affirmative-disclosure provisions of 5 U.S.C. § 552(a)(2). *See, e.g., Prisology, Inc. v. Fed. Bureau of Prisons*, 852 F.3d 1114, 1117 (D.C. Cir. 2017) ("As to FOIA § 552(a)(2), our decisions dealing with the enforcement of this subsection have not discussed standing. But in each such case the plaintiff made a request of the agency and the agency denied the request."); *CREW v. Dep't of Justice*, 164 F.Supp.3d 145, 154 (D.D.C. 2016) (explaining that § 552(a)(2) can be enforced by submitting a request under either § 552(a)(3) or "directly under Section 552(a)(2), so long as the request, like those made under Section 552(a)(3), is for 'identifiable' records"), *aff'd*, 846 F.3d 1235 (D.C. Cir. 2017).

This obligation to submit—and exhaust—a request for records, even under § 552(a)(2), is confirmed by FOIA’s plain language. The statute explicitly contemplates the submission of requests under all three of FOIA’s access provisions—including the affirmative disclosure provision, § 552(a)(2)—and spells out procedures for exhausting administrative remedies with respect to each such request. *See* 5 U.S.C. § 552(a)(6)(A) (setting forth time limits applicable to any “request for records made under *paragraph (1), (2), or (3) of this subsection*” (emphasis added)); *id.* § 552(a)(6)(C)(i) (“Any person making a request to any agency for records *under paragraph (1), (2), or (3) of this subsection* shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.” (emphasis added)); *see also Animal Legal Def. Fund v. Dep’t of Agric.*, 2017 WL 2352009, at *6 (N.D. Cal. May 31, 2017) (“Plaintiffs’ argument that there is no requirement to exhaust administrative remedies when seeking to enforce section 552(a)(2) is not supported by the language of FOIA or the precedent plaintiffs cite. Plaintiffs were required to exhaust administrative remedies.”).

B. CFA does not dispute that, prior to filing suit, FOIA requires plaintiffs seeking to enforce § 552(a)(2) to submit and exhaust a request for records. *See* Exh. 1. Instead, CFA argues that it, in effect, already exhausted the claims in its Amended Complaint through its initial request for records. *See id.* This argument is meritless.

As an initial matter, this Court already decided that CFA’s prior request did not adequately encompass narrower categories of records. In ruling on the Government’s motion to dismiss, the Court specifically held that the two narrower categories of records that CFA sought to rely on—opinions issued resolving inter-agency disputes, and opinions issued to independent agencies—“do not appear in CfA’s complaint as the basis for CfA’s claims.” ECF No. 19 at 36; *see also id.*

at 36 n.12 (“nowhere does the complaint suggest that OLC’s opinions in such cases are the opinions that must be made available pursuant to section 552(a)(2)”). Given that this Court already concluded that (at least) two of the five categories articulated in the Amended Complaint were *not* part of the prior round of litigation, CFA cannot rely on its prior request as having adequately exhausted its new claim with respect to those specified categories.

Moreover, the plain terms of CFA’s prior request confirms that it did not provide OLC an adequate opportunity to process or respond to these narrower categories of records. CFA’s prior request sought disclosure of “all unpublished OLC opinions that provide controlling legal advice to executive branch agencies[.]” ECF No. 9-3 at 2. The breadth and abstract nature of that request hardly afforded OLC an adequate opportunity to consider and respond to the much more discrete categories of records that CFA now focuses on in its Amended Complaint. Indeed, CFA consistently refused to define the exact contours of its prior request. *See, e.g.*, CFA’s MTD Opp. (ECF No. 11) at 27-28. CFA is not excused from properly presenting its current, narrower request to the agency simply because it previously submitted a broad, unbounded request. Indeed, this Court rejected CFA’s claim based on that request because of its generalized nature and CFA’s failure to identify discrete categories of records plausibly subject to § 552(a)(2).

C. Because CFA has not submitted (and exhausted) a valid FOIA request for the new set of records described in the Amended Complaint, the Government would typically move to dismiss the Amended Complaint on that basis. This case, however, has a unique procedural posture: the initial FOIA request was submitted almost twenty months ago; the parties have already litigated one motion to dismiss; and following that motion to dismiss, the Court expressly permitted CFA the opportunity to amend its Complaint to try to bring a cognizable claim.

In these circumstances, Defendant believes it would be a waste of the parties' (and the Court's) resources to litigate a motion to dismiss over a threshold question—*i.e.*, whether CFA's initial FOIA request was sufficient to exhaust the claims that CFA now seeks to bring in its Amended Complaint. Regardless of the outcome of that motion to dismiss, such motion practice would itself be a burden on the parties (and the Court) and would delay resolution of CFA's claims. Rather than litigate this threshold legal question, in this unique posture Defendant believes it would be more efficient simply to stay proceedings for the short time necessary to allow CFA to submit (and exhaust) a FOIA request for the records described in the Amended Complaint.

Indeed, submission and exhaustion of a request under FOIA would almost certainly be faster than litigation (and decision) on a motion to dismiss. After CFA submits its new request, OLC would respond within the 20 business-day window provided by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i). Any appeal would also be required to be decided within 20 business days. *Id.* § 552(a)(6)(A)(ii). A stay of proceedings to allow CFA to submit a new request to OLC, therefore, would almost certainly move this case towards resolution faster than if the parties litigated a motion to dismiss over whether a proper request has yet been submitted.

Accordingly, in order to avoid this unnecessary motion-to-dismiss briefing, this Court should stay proceedings for the brief period necessary for CFA to properly submit (and exhaust) a FOIA request for the records described in its Amended Complaint.*

* To the extent the Court does not rule on this motion prior to the Government's current deadline for responding to the Amended Complaint of November 17, 2017, and the Court believes a response to the Amended Complaint is required notwithstanding the pendency of this motion, Defendants respectfully request that this filing—in particular the discussion in this Part I—be construed as a motion to dismiss for failure to submit a valid FOIA request for the records described in the Amended Complaint.

II. A Stay of Proceedings Would Also Benefit This Court's Ultimate Resolution of the Claims in this Case

Because OLC has not yet had the opportunity to process and respond to a properly submitted FOIA request for the specific categories of records described in the Amended Complaint, staying proceedings would also benefit resolution of this case by providing the Court with a fuller foundation for ultimately evaluating CFA's claims. At present, there is no record of OLC's views on whether (and if so when) each of the five categories of opinions described in the Amended Complaint must be disclosed under § 552(a)(2). This Court's consideration of CFA's claims would certainly benefit from allowing OLC to process a request from CFA and thereby respond with the agency's position on each category.

Indeed, OLC's processing of CFA's request may even result in the disclosure of documents to CFA. At least with respect to the five specific opinions identified in CFA's Amended Complaint, OLC would be able to process and consider whether to disclose those opinions either pursuant to § 552(a)(2) or OLC's discretionary release policy. *See* ECF No. 9-4. Disclosure of any of the OLC opinions would potentially narrow the range of dispute between the parties, and at a minimum would provide a more concrete foundation to assist the Court in evaluating CFA's claims.

Courts routinely stay FOIA cases pending the agency's consideration of a request and the agency's response regarding what documents (if any) it is willing to disclose. Although this case arises in an unusual posture, the underlying principle is the same: it does not make sense to proceed with merits litigation over a FOIA claim until after the agency is given an opportunity to provide its views on whether the requested documents may be disclosed.

Given that a short stay of proceedings may result in the disclosure of documents and would also provide this Court with a better record for evaluating CFA's claim, such a stay would benefit all parties involved. Certainly Plaintiffs cannot identify any prejudice resulting from the stay

(particularly given that any delay would be attributable, at least in part, to their own past pleading choices). As a practical matter, then, it makes eminent sense—for both the parties and the Court—to stay proceedings pending submission and exhaustion of a request to OLC for the records described in the Amended Complaint.

III. At a Minimum, the Court Should Extend the Deadline for Defendant’s Response to the Amended Complaint Until After OLC Responds Regarding the New Categories of Records

Even if the Court were not inclined to stay proceedings in order for CFA to submit (and exhaust) a new request to OLC, at a minimum the Court should extend the current deadline for Defendants’ response to the Amended Complaint until January 3, 2018. That short extension would at least allow OLC to provide a response to CFA regarding the new categories of records described in the Amended Complaint. Under this approach, OLC would respond to CFA regarding the categories of records described in the Amended Complaint within twenty business days of the current deadline of November 17 (*i.e.*, by December 18, 2017). The Government’s response to the Amended Complaint would then be due ten business days later (*i.e.*, on January 3, 2018).

This approach would not substantially delay this case, and would at least provide OLC an opportunity to provide its views regarding the categories of records described in the Amended Complaint. *See* Part II, *supra*. To be clear, this approach would not resolve the potential jurisdictional defect associated with CFA not having submitted a valid FOIA request regarding these records. *See* Part I, *supra*. Thus, a stay is still the better approach. At a minimum, however, the Court should extend Defendant’s deadline for responding to the Amended Complaint until January 3, 2018, in order to allow OLC the opportunity to address the new categories of records described in the Amended Complaint.

CONCLUSION

The Court should stay proceedings in this case pending CFA's submission and exhaustion of a FOIA request to OLC for the records described in the Amended Complaint.

Dated: November 15, 2017

Respectfully Submitted,

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