IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S OPPOSITION TO THE GOVERNMENT'S MOTION TO STAY PROCEEDINGS

Plaintiff writes in opposition to the government's motion to stay proceedings, which the government filed yesterday evening, two days before the deadline imposed by the Court for the government's answer to Plaintiff's amended complaint.

This lawsuit seeks to enforce the Department of Justice's legal obligation under the affirmative-disclosure provision of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(2), to proactively disclose the formal written opinions of the Office of Legal Counsel ("OLC") as well as an index of those opinions. The district court dismissed Plaintiff's original complaint without prejudice based on its interpretation of the D.C. Circuit's opinion in *Electronic Frontier Foundation v. Department of Justice* (*EFF*), 739 F.3d 1 (D.C. Cir. 2014). The Court invited Plaintiff to amend its complaint, however, to identify specific sub-categories of the OLC's formal written opinions not controlled by the Court's interpretation of *EFF*. Plaintiff accepted the Court's invitation and amended its complaint on October 27.

The amended complaint differs from the original complaint in two primary ways. First, the amended complaint seeks to enforce only a portion of the request. Plaintiff's request sought the affirmative disclosure of OLC's controlling legal opinions, including but not limited to its

"formal written opinions." *See* Amended Compl. Ex. A, ECF No. 22-2 ("My current request, at a minimum, encompasses the formal written opinions OLC has issued and will issue . . . ."). Plaintiff's original complaint sought to enforce the full extent of that request. *See* Compl. ¶ 1, ECF No. 1. Plaintiff's amended complaint, by contrast, seeks to enforce only a subset of the request, in that it seeks affirmative disclosure only of "formal written opinions of the [OLC] issued to executive branch agencies or to executive branch officials other than the president." Amended Compl. ¶ 1, ECF No. 22. Toward that end, the amended complaint identifies and describes some of the voluminous scholarship documenting the decades-long custom of treating the OLC's formal written opinions as authoritative expressions of law within the executive branch. *See, e.g.*, *id.* ¶¶ 16–32.

Second, the amended complaint describes five sub-categories of the requested OLC opinions that, in Plaintiff's view, are not controlled by the Court's interpretation of *EFF*. *See id.* ¶¶ 35–49. The categories of formal written opinions identified are: (1) opinions resolving interagency disputes, *id.* ¶¶ 35–38; (2) opinions issued to independent agencies, *id.* ¶¶ 39–40; (3) opinions interpreting non-discretionary legal obligations, *id.* ¶¶ 41–44; (4) opinions finding that particular statutes are unconstitutional and that therefore agencies need not comply with them, *id.* ¶¶ 45–46; and (5) opinions adjudicating or determining individual rights, *id.* ¶¶ 47–49. As the Court suggested, Mem. Op. 37, ECF No. 19, the amended complaint also alleges that the OLC has withheld opinions in each of these five categories, and to buttress that allegation, the amended complaint offers evidence of at least one unpublished opinion in each category. *See* Amended Compl. ¶¶ 38, 40, 43, 46, 49.

In short, Plaintiff has now followed the precise path this Court prescribed to cure what the Court determined to be a pleading defect in the original complaint.

The government now moves to stay proceedings and consideration of Plaintiff's amended complaint based on a theory that has no support in law and that would needlessly delay these proceedings without serving any purpose. The government argues that Plaintiff's amended complaint seeks "a different set of records" than did the request, Gov't Mot. 1, that FOIA therefore requires Plaintiff to file and administratively exhaust a new request, *id.* at 6–8, that requiring Plaintiff to do so would "benefit" this litigation, *id.* at 9–10, and that Plaintiff would suffer no prejudice, *id.* As explained below, the government is wrong at every step.

Before addressing the merits of the government's arguments, Plaintiff notes that the urgency of the government's motion is of its own creation. Plaintiff has amended its complaint in the precise manner that this Court proposed in its memorandum opinion of October 6, 2017. *See* Mem. Op. 36–38, ECF No. 19. The government should have anticipated that Plaintiff might follow that course of action. Even once Plaintiff did, the government waited twelve days to ask Plaintiff's position about filing a new request, which Plaintiff provided on November 10. Nonetheless, the government moves this Court to stay proceedings two days before the deadline the Court imposed for the government's answer to the amended complaint, with the apparent expectation that the Court might rule on the motion (and, presumably, that it might do so with the benefit of a response from Plaintiff) during that two-day gap. *See* Gov't Mot. 8 n.*. Respectfully, there was a better course. To the extent the Court converts the government's motion to stay to a motion to dismiss, as the government suggests, *id.*, Plaintiff requests an opportunity to supplement this response, which it prepared as quickly as possible on the abbreviated schedule forced by the timing of the government's motion.

I. Plaintiff's amended complaint does not seek a different set of records than the request, and so there is no need file a new request.

The key premise of the government's motion to stay—that the amended complaint seeks a "different set of records" than did the request, Gov't Mot. 1—is false. The request, dated March 22, 2016, sought, among other things, the OLC's formal written opinions. *See* Amended Compl. Ex. A, ECF No. 22-2. Plaintiff's original complaint sought the affirmative disclosure of the OLC's formal written opinions. Compl. ¶ 31, ECF No. 1. Plaintiff's opposition to the government's motion to dismiss focused on the OLC's formal written opinions. *See, e.g.*, Pl.'s MTD Opp'n 2, 27, ECF No. 11. The Court's opinion resolving the government's motion to dismiss identified the OLC's formal written opinions as an important category of opinions at issue. *See* Mem. Op. 9, ECF No. 19. And now Plaintiff's amended complaint seeks to enforce its request with respect to the OLC's formal written opinions. *See* Amended Compl. ¶ 1, ECF No. 22. In short, Plaintiff's efforts have, since the very beginning, been directed at the OLC's formal written opinions.

The OLC, moreover, has responded to the Plaintiff's request for its formal written opinions. On May 26, 2016, the OLC sent a letter to Plaintiff memorializing its long-held view that the OLC's opinions are not subject to FOIA's affirmative-disclosure provision. *See* Amended Compl. Ex. B, ECF No. 22-3.

This is all that FOIA's requirement of administrative exhaustion demands: Plaintiff filed a request for formal written opinions, the OLC rejected that request on the merits based on its view of the law, and Plaintiff filed suit.[1]

[1] In reality, FOIA's requirement of administration exhaustion demands considerably less. FOIA requesters may go to court to enforce requests under FOIA if an agency fails to respond to the request within the prescribed time, 5 U.S.C. § 552(a)(6)(C), even if the requester has no evidence that responsive records exist or that any records that do exist are not exempt.

Moreover, the Court has effectively addressed the government's jurisdictional argument. The government's motion to dismiss argued that Plaintiff's request presents an "abstract legal question [that] lacks sufficient factual foundation for judicial resolution." Gov't MTD Br. 15, ECF No. 9-1. The Court rejected that argument, finding both that Plaintiff's complaint satisfied the constitutional requirement of injury-in-fact, Mem. Op. 24–25, ECF No. 19, and the prudential requirement of ripeness, *id.* at 26–28. On the latter holding in particular, the Court noted that Plaintiff's request presents "an actual dispute arising from the direct application of OLC's established policy of making available only certain of its legal opinions, and only at its own discretion." *Id.* at 26. The Court also noted that "no further factual development is needed to ascertain the contours of the dispute." *Id.* at 27. In the Court's view, the government's complaint was not jurisdictional, but one going to the plausibility of Plaintiff's claim that the D.C. Circuit's opinion in *EFF* did not address all OLC opinions. In other words, the Court has already ruled that Plaintiff's request for the OLC's formal written opinions presents a dispute within the Court's jurisdiction; Plaintiff's amended complaint seeks to enforce that same request.

II. The amended complaint's identification of sub-categories of formal written opinions does not change the jurisdictional analysis.

The government's actual argument appears to be that because Plaintiff's amended complaint identifies sub-categories of formal written opinions, Plaintiff must file a new request. This argument is wrong for several reasons.

First, the fact that Plaintiff's amended complaint identifies sub-categories of records responsive to the request does not change the request itself. Plaintiff's request remains for the formal written opinions it sought in March 2016, and there is nothing in FOIA that requires requesters to file new requests every time they identify illustrative examples of the records they

believe the government has unlawfully withheld. It is telling that the government cites no legal authority to support this proposition. There is none.

What relevant case law there is contradicts the government's view. FOIA requesters frequently file requests for a broad set of identifiable records and then, during litigation, focus their efforts on sub-categories of records. In long-running FOIA litigation in the Southern District of New York, for example, several organizations filed a request for records relating to three broad categories of information relevant to the post-9/11 "war on terror": "the 'treatment of Detainees in United States custody,' the 'death of Detainees in United States custody,' and the 'rendition of Detainees and other individuals' to countries known to employ torture." *See Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 550 (S.D.N.Y. 2005). After filing suit and "in order to facilitate the government's processing of documents, plaintiffs created a priority list of enumerated documents" which was a "subset" of the records responsive to the original request. *Id.* Since that time, the government has disclosed over 130,000 pages of records in response to that FOIA request,[2] without any suggestion that the requesters were required to submit a new FOIA request identifying their "priority list" of responsive records. The same logic should apply here.

Second, it would be inconsistent with FOIA to require Plaintiff to file a new request to identify responsive sub-categories of its request. FOIA requires only that requesters "reasonably describe[]," 5 U.S.C. § 552(a)(3)(A), the records they seek. Plaintiff's request does so, as the Court effectively held in rejecting the government's original jurisdictional challenge. Mem. Op. 25–27, ECF No. 19. Beyond that, FOIA places the burden *on the government* to search for and identify responsive records: "the burden is on the agency to sustain its action." 5 U.S.C.

[2] *See* Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth*, N.Y. Times, Aug. 29, 2009, http://www.nytimes.com/2009/08/30/world/30intel.html.

§ 552(a)(4)(B). The reason that FOIA places the burden on the government is obvious: only the government is in a position to know what records it has or does not have. "FOIA requesters face an information asymmetry since the agency possesses the requested information and decides whether or not it is disclosed." *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 449 (D.D.C. 2014), *aff'd*, No. 14-5278, 2015 WL 4072055 (D.C. Cir. June 29, 2015). As the D.C. Circuit explained in its seminal decision in *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973): "the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure." To place the burden on the requester, therefore, would provide the government "a nearly impregnable defensive position." *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 145–46 (D.C. Cir. 2006).[3]

For this reason, there is no *statutory* requirement that Plaintiff re-file its request to specify the sub-categories of responsive records it has identified. In the ordinary course, the government—not Plaintiff—would bear the burden of identifying responsive records so long as the request reasonably described the records sought. Here, of course, the Court directed Plaintiff to identify in its amended complaint categories of the OLC's formal written opinions subject to FOIA's affirmative-disclosure provision even under the Court's broad interpretation of *EFF*. Mem. Op. 36–37. Plaintiff respectfully believes the Court erred in requiring Plaintiff to make that showing in its amended complaint, rather than simply in a supplemental brief. In any event, the Court's instruction flows from the specifics of this case, in which the Court has interpreted

[3] FOIA's statutory assignment of the burden to the government applies to all requests under FOIA, including under section 552(a)(2). *See* 5 U.S.C. § 552(a)(4)(B); *Slesin v. Adm'r, Occupational Safety & Health Admin.*, 644 F. Supp. 366, 367–68 (S.D.N.Y. 1986) (Leval, J.) (in an action brought under (a)(2), the agency had the burden to show that a statutory exemption applied per section 552(a)(4)(B)).

EFF to preclude the primary relief sought by Plaintiff's original complaint, and not from any statutory requirement of exhaustion.

Finally, the government has waived its argument that Plaintiff must re-file its request. The OLC's original response to Plaintiff's request was categorical; it restated OLC's view that its opinions are simply not subject to FOIA's affirmative-disclosure provisions. The OLC did not complain that Plaintiff's request failed to adequately identify the records it sought, or that the OLC could not respond to the request absent additional information. The OLC should not be heard now to make that complaint.

III. Requiring Plaintiff to file a new request would serve no purpose and only prejudice Plaintiff.

The government's suggestion that Plaintiff re-file its request would substantially delay these proceedings, and it would do without serving any purpose.

The OLC has taken the categorical view that its opinions are not subject to FOIA's affirmative-disclosure provisions. For that reason, no purpose would be served by forcing Plaintiff to re-file its request. The OLC's legal position is clear, and all that remains is to test that legal theory based on the facts that Plaintiff has newly adduced in its amended complaint. The government gestures at the possibility that the OLC might disclose additional opinions under section 552(a)(2), *see* Gov't Mot. 9, but at most the government is proposing discretionary releases of the illustrative examples of unpublished opinions Plaintiff has cited. To the extent the government suggests it might recognize an affirmative obligation to publish some of its opinions under section 552(a)(2), that representation of counsel flies in the face of the legal arguments the OLC has endorsed throughout this litigation. Also, the government appears to have strategically added to its brief the possibility of disclosure under section 552(a)(2) after having made no mention of it in its original email to Plaintiff's counsel seeking consent to its motion. *Compare*

Gov't Mot. Ex. 1 at 3, ECF No. 23-1 ("Accordingly, submission of a request to OLC may actually result in the release of records to CFA. In particular, at least with respect to the five specific opinions identified, OLC would be able to consider those documents *for discretionary release*." (emphasis added)), *with* Gov't Mot. 9 ("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.").

The government relatedly claims that forcing Plaintiff to re-file its request would "benefit" the Court's consideration of Plaintiff's claims, Gov't Mot. 9, but the government doesn't explain how that could be so given the OLC's categorical view of the inapplicability of FOIA's affirmative-disclosure provision to its formal written opinions. In any event, nothing prevents the OLC from disclosing additional opinions now, during the course of litigation. That happens regularly in FOIA cases. And nothing prevents the OLC from submitting a declaration explaining any refinements in its view of Plaintiff's request or of its obligations under section 552(a)(2). That, too, happens regularly in FOIA cases. It happens regularly, of course, because once a FOIA requester has filed suit to enforce an administratively exhausted request, all further administrative proceedings are channeled through the litigation. Unless there is an actual jurisdictional basis to require the filing of a new request—for example, if the amended complaint sought records not actually sought in the request[4]—there is no basis and no need to restart the process.

The government also suggests that granting the motion would avoid "unnecessary" motion practice. *See* Gov't Mot. 8. Plaintiff agrees that the motion practice the government

[4] *See, e.g.*, *Dockery v. Gonzales*, 524 F. Supp. 2d 49, 52 (D.D.C. 2007) ("to the extent that plaintiff has 'add[ed] more requests' in his first amended complaint, he has not exhausted his administrative remedies by first presenting those requests to the agency and obtaining a decision from the agency" (citation omitted)).

proposes would be unnecessary, but this is because the motion the government proposes to make is meritless. Plaintiff respectfully submits that the Court should address the government's concern over delay by converting its motion to stay to a motion to dismiss and summarily denying it.

Conclusion

Respectfully, the Court should either deny the government's motion for a stay or convert the motion for a stay to a motion to dismiss and deny it.

Respectfully submitted,

/s/ Alex Abdo

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