IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS PENDING SUBMISSION AND EXHAUSTION OF FOIA REQUEST

The Government moved to stay proceedings in this case pending Plaintiff Campaign for Accountability (CFA) submitting and exhausting a FOIA request for the new set of records described in its Amended Complaint. *See* ECF No. 23. CFA has now filed an opposition, *see* ECF No. 24, but that opposition only highlights why a stay is appropriate here. Rather than getting bogged down in a debate about whether CFA's initial request properly raised and adequately exhausted a claim for the records now described in CFA's Amended Complaint—*i.e.*, rather than engaging in unnecessary motion-to-dismiss briefing that would not move this case any closer to resolution of the merits—it makes far more sense, both legally and practically, for CFA simply to submit a new request for the records now described in its Amended Complaint.

Notably, CFA's opposition does not dispute that OLC has not yet been provided a meaningful opportunity to address and provide its position 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). Nor does CFA's opposition dispute that allowing OLC to provide its position on these issues would benefit the Court's ultimate review of CFA's claims. At a minimum, then, the Court should grant the Government's alternative request—*i.e.*, for a short extension of time to allow OLC

to respond to CFA regarding the records described in the Amended Complaint within twenty business days, and then for the Government's response to the Amended Complaint to be due ten business days later. CFA's opposition provides no basis for why the Court should deny that alternative request.

In addition to the above, and in recognition of the desire to move expeditiously regarding this case, the Government respectfully submits this reply memorandum to respond to several discrete points raised in CFA's opposition.

1. CFA does not deny that submission of a request for records is a jurisdictional pre-requisite even in cases arising under § 552(a)(2), nor does it deny that exhaustion of any such request is also required. CFA contends, however, that it need not submit a new request because its original request was "directed at the OLC's formal written opinions," and the Amended Complaint likewise "seeks to enforce its request with respect to the OLC's formal written opinions." CFA's Opp. at 4. As an initial matter, that argument mischaracterizes the clarity associated with CFA's prior request, which CFA consistently refused to limit only to formal opinions. *See* Compl. (ECF No. 1) ¶ 35 (requesting an injunction for OLC opinions "whether formal or informal"); CFA's Opp. to MTD (ECF No. 11) at 27-28 (arguing that informal opinions may also "fall within § 552(a)(2)").

In any event, CFA's opposition provides yet another reason why CFA should be compelled to submit a new FOIA request. Specifically, CFA's opposition clarifies that CFA, in effect, is still seeking to pursue the broad FOIA claim that this Court has already held to be foreclosed. In granting CFA leave to file an Amended Complaint, this Court required that "any amended complaint that CfA chooses to file must identify an ascertainable record or category of records that is plausibly subject to the reading-room requirement and that OLC has failed to make publicly available." MTD Op. (ECF No. 19) at 30. CFA's Amended Complaint identifies five particular

categories. *See* Am. Compl. ¶¶ 35-49. Critically, however, in CFA's view these categories are merely "illustrative examples," CFA's Opp. at 5, and CFA's actual claim is that OLC must disclose *all* of its formal opinions except those provided to the President. *See id.* at 2 (citing Am. Compl. ¶ 22).

That broader claim—in which the five categories are only "illustrative examples"—is squarely foreclosed by this Court's prior ruling on the motion to dismiss. *See* MTD Op. (ECF No. 19) at 28-35. CFA's desire to continue advancing this broader claim thus provides an additional reason why CFA should be directed to submit a new request—*i.e.*, the need to ensure clarity about what exactly CFA is now seeking, and to ensure that CFA's claims are properly limited to "ascertainable record[s] or category of records" as this Court previously instructed. Both the parties and this Court would benefit from having a non-litigation document (*i.e.*, a new FOIA request) clearly defining the scope of records CFA believes must be disclosed, consistent with this Court's prior opinion. Focusing the issues and providing such clarity is indeed one of the central purposes of the exhaustion requirement.

2. CFA also argues against the need to submit a new request by analogizing this case to one where the scope of a FOIA request is narrowed by the parties during the course of litigation. *See* CFA's Opp. at 5-8. It is true that such narrowing sometimes occurs in FOIA cases, and that such narrowing typically does not require submission of a new request. In such routine cases, however, the narrowing is permissible only because the initial request was sufficiently concrete—*i.e.*, exhaustion of the broader request already provided the agency with adequate opportunity to address the narrower set of records encompassed within the broader request.

Here, in contrast, the initial request provided no meaningful opportunity for OLC to respond or address the particular categories of records that CFA now contends must be disclosed.

Notably, CFA does not contend that its prior request for "controlling legal advice" put OLC on notice that what was *really* at issue were the five categories of formal opinions that the Amended Complaint now describes. The breadth and unbounded nature of the initial request precluded OLC from meaningfully addressing the documents now described in the Amended Complaint.

Unlike a case where a party submits a request for records on discrete topics and then narrows that request further, *see* CFA's Opp. at 6 (discussing *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005)), this case is closer to one where the initial request was essentially so vague as to be meaningless. For example, imagine a requester who submits a request to an agency for "all important documents." Even if the party later seeks to narrow that request to discrete categories—and even if those discrete categories would undoubtedly qualify as "important documents"—surely a court would not hold that the initial request was sufficiently concrete to fulfill FOIA's exhaustion requirement, *i.e.*, to provide the agency with "an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Oglesby v. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990); *cf. Dale v. IRS*, 238 F. Supp. 2d 99, 105 (D.D.C. 2002) (FOIA request failed to reasonably describe the records sought and thus was "fairly subject to dismissal on that basis notwithstanding the later success of the IRS search efforts").

That is effectively what CFA is attempting to accomplish here: to rely on a broad, unbounded request as having adequately exhausted the complete range of documents that could possibly fall within that request. This Court should not countenance such an approach, particularly because even CFA does not contend that its prior request provided OLC with a meaningful opportunity to address the particular categories of records now described in the Amended Complaint. Having acknowledged that FOIA requires a request and exhaustion even for claims

arising under § 552(a)(2), CFA should not now be permitted to adopt an approach that would subvert those requirements.

3. CFA argues that the Government "has waived its argument that Plaintiff must re-file its request" by not objecting that CFA's initial request "failed to adequately identify the records it sought, or that the OLC could not respond to the request absent additional information." CFA's Opp. at 8. But the Government indeed objected by arguing that CFA's claim was so abstract it was not even capable of judicial resolution. *See* Gov't's MTD Mem. (ECF No. 9-1) at 15-19.

CFA elsewhere acknowledges the Government's ripeness argument, and contends that the Court's rejection of that argument means the Court has already ruled that the initial FOIA request was adequate. *See* CFA's Opp. at 5. But the Court did not reject the ripeness argument because it approved of the initial request; the Court instead held that "what the government has characterized as a jurisdictional 'ripeness' problem is really nothing other than the sort of pleading failure that warrants dismissal under Rule 12(b)(6)." MTD Op. at 24. When the Court discussed CFA's pleading defect, moreover, the Court made clear that the prior request and Complaint did *not* encompass the narrower categories CFA relied upon at the motion-to-dismiss hearing (and which CFA again relies upon in the Amended Complaint). As the Court stated, "[t]hese delineated categories of records do not appear in CfA's complaint as the basis for CfA's claims," and "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)." *Id.* at 36 & n.12. CFA has no response to this conclusive language in the Court's prior opinion.

4. CFA argues that filing a new request would serve no purpose because "[t]he OLC has taken the categorical view that its opinions are not subject to FOIA's affirmative-disclosure provisions." CFA Opp. at 8. But as discussed at length at the motion-to-dismiss hearing, that is

not OLC's position, s*ee* MTD Hr'g Tr. at 27-28, 40, which OLC's response to the initial request makes clear. *See* ECF No. 9-4 at 1-2 (stating that "OLC's advice is *ordinarily* covered by the attorney-client and deliberative process privileges," but that "[i]f OLC were to conclude . . . that the Department had an obligation under 5 U.S.C. § 552(a)(2) to make a particular opinion publicly available, we would do so" (emphasis added)). And even if OLC were defending a categorical position (which it is not), this Court's review of that claim would still benefit from allowing OLC to articulate its reasoning with respect to each of the five categories of records now described in the Amended Complaint—*i.e.*, why each category of records is exempt from § 552(a)(2).

5. In the face of OLC's statement that submitting a new request might actually result in the disclosure of some of the requested documents—*i.e.*, might provide some of the very relief requested in the Amended Complaint—CFA rather curiously resists providing OLC that opportunity. CFA accuses the Government of "strategically" referencing potential disclosure of documents under § 552(a)(2) instead of just OLC's discretionary-release policy, *see* CFA Opp. at 8, but that reference was nothing more than what OLC said eighteen months ago in response to CFA's initial request: when OLC reviews documents requested under FOIA, it reviews the documents for potential disclosure pursuant to both § 552(a)(2) and OLC's discretionary-release policy. *See* ECF No. 9-4 at 2 ("If OLC were to conclude during the publication review process, the FOIA response process, or at any other time that the Department had an obligation under 5 U.S.C. § 552(a)(2) to make a particular opinion publicly available, we would do so at that time.").

More fundamentally, it is immaterial whether the requested documents are disclosed pursuant to § 552(a)(2) or OLC's discretionary-release policy. CFA's injury giving rise to this lawsuit is a lack of access to documents, and disclosure of those documents redresses that injury regardless of OLC's internal rationale for the disclosure. *See Kennecott Utah Copper Corp. v.*

Dep't of the Interior, 88 F.3d 1191, 1203 (D.C. Cir. 1996). And in terms of the benefit to this lawsuit, disclosure of documents would narrow the range of dispute between the parties, and provide a more concrete factual foundation for evaluating CFA's ultimate claims. CFA's opposition provides no persuasive reason to force OLC to respond to the Amended Complaint, rather than provide OLC an opportunity to process a request for the records described in the Amended Complaint (and thereby potentially disclose some of those records).

6. Finally, in terms of timing, CFA accuses the Government of delay in filing its motion to stay. *See* CFA Opp. at 3. As the meet-and-confer correspondence reflects, however, the Government began conferring with counsel for CFA about a potential stay of proceedings on November 8, 2017—more than a week before the Government's deadline for responding to the Amended Complaint, and only eight business days after CFA filed its Amended Complaint. *See* ECF No. 23-1. The Government was entitled to an adequate amount of time to review the Amended Complaint and confer internally regarding what should happen next in the case; eight business days was not an unreasonable amount of time, particularly given that the Amended Complaint contained five new categories of records, three of which were never before mentioned in the context of this case.

With respect to how this case should proceed going forward, both parties agree that, given the unique circumstances of this case, litigating a motion to dismiss over exhaustion is a needless burden and waste of time and resources. *See* CFA's Opp. at 10. Critically, however, CFA's assertion that such a motion would be "meritless," *id.*, is not itself a way to avoid litigation over the question. The only way to avoid time-consuming and burdensome motion-to-dismiss briefing over that question is to eliminate its relevance—*i.e.*, by staying proceedings pending submission and exhaustion of a new request. CFA does not dispute that this stay would be relatively short

given FOIA's deadlines of twenty business days for responding to a request and any appeal of that request. Thus, a stay of proceedings is amply justified here.

At a minimum, as discussed above, the Court should extend the Government's response deadline for thirty business days, which would at least provide OLC an opportunity to respond to CFA regarding the new categories of records described in the Amended Complaint. Even if the Court does not require CFA to submit a new FOIA request, CFA's opposition does not provide any reason why a short extension would be inappropriate. And this short extension would at least allow OLC an opportunity to articulate its position regarding the records described in the Amended Complaint, which would itself significantly assist the Court in its ultimate review of CFA's claims.

CONCLUSION

For the foregoing reasons, this Court should stay proceedings pending CFA's submission and exhaustion of a FOIA request with OLC for the records described in the Amended Complaint. Alternatively, this Court should extend the Government's deadline for responding to the Amended Complaint for thirty business days, until January 3, 2018.

Dated: November 17, 2017

Respectfully Submitted,

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