



U.S. Department of Justice

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Southern District of New York*

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December 28, 2017

By ECF and Electronic Mail

The Honorable Andrew L. Carter, Jr.
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Knight First Amendment Institute at Columbia University v. United States Department of Homeland Security, et al.*, 17 Civ. 7572 (ALC)

Dear Judge Carter:

This Office represents the United States Department of Homeland Security, United States Customs and Border Protection, United States Immigration and Customs Enforcement (“ICE”), United States Citizenship and Immigration Services, United States Department of Justice, and United States Department of State (collectively, “Defendants”) in the above-referenced Freedom of Information Act (“FOIA”) action. I write respectfully to request a conference in connection with ICE’s proposed motion to dismiss¹ for failure to exhaust administrative remedies, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).²

On or about August 7, 2017, plaintiff Knight First Amendment Institute at Columbia University (“Plaintiff”) served identical FOIA requests on Defendants. *See* Complaint, Dkt. No. 1, at ¶ 7. On September 29, 2017, ICE responded to the FOIA Request. *See id.* at ¶ 8. In that response, ICE stated that it had received the FOIA Request and searched “the ICE Office of Policy and Office of The Principal Legal Advisor for records responsive to [the] request.” *See* Letter dated September 29, 2017, attached hereto as Exhibit A. ICE further stated that the search resulted in the retrieval of 1666 responsive pages, that ICE had reviewed those pages, and that ICE had determined to release 13 pages in their entirety. *See id.* In addition, ICE explained that it was withholding the remaining 1653 pages pursuant to FOIA Exemptions 5, 6, 7(C), and 7(E), and described the bases for applying each of those exemptions. *See id.* Finally, ICE stated, “If you are not satisfied with the response to this request, you have the right to appeal following the

¹ Simultaneously with this letter, all Defendants except ICE have filed an Answer to the Complaint. Pursuant to this Court’s Individual Practices, Rule 2.A, this letter serves to stay ICE’s time to respond to the Complaint.

² “Although courts in this circuit are in accord that exhaustion of administrative remedies is a precondition to suit under FOIA, it is unclear whether exhaustion is a jurisdictional precondition.” *Torres v. Dep’t of Homeland Sec.*, No. 09 CIV. 8640 RJS KNF, 2010 WL 4608431, at *4 (S.D.N.Y. Nov. 2, 2010) (citing *Robert VIII v. Dep’t of Justice*, 193 Fed. App’x 8, 9 (2d Cir. 2006)), *subsequently aff’d*, 441 F. App’x 812 (2d Cir. 2011). Accordingly, ICE proposes to move under both Rules 12(b)(1) and 12(b)(6).

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procedures outlined in the DHS regulations at 6 C.F.R. § 5.9,” and provided the contact information for such an appeal. *Id.*

On October 4, 2017, without having filed an administrative appeal with the agency, Plaintiff filed this lawsuit. Plaintiff belatedly filed an administrative appeal on December 22, 2017, more than two months after filing this action. As a result, Plaintiff failed to exhaust its administrative remedies before filing suit, and this complaint should be dismissed.

Plaintiff Has Failed To Exhaust Administrative Remedies

“Exhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)). This requirement permits “the top managers of an agency to correct mistakes made at lower levels and thereby obviates unnecessary judicial review.” *Oglesby*, 920 F.2d at 61. Section 552(a)(6)(A) “specifically provides for an administrative appeal process following an agency’s denial of a FOIA request,” mandating that the agency: (i) first determine within twenty days whether to comply with a request and provide notice of the right to appeal, and (ii) decide any appeal within twenty days and provide notice of the right to judicial review. *See* 5 U.S.C. § 552 (a)(6)(A)(i), (ii); *see also* 6 C.F.R. § 5.8(e). As a result, “Courts have consistently confirmed that the FOIA requires exhaustion of this appeal process before an individual may seek relief in the courts.” *Oglesby*, 920 F.2d at 61-62 (citing *Dettmann v. U.S. Department of Justice*, 802 F.2d 1472, 1477 (D.C. Cir. 1986); *Stebbins v. Nationwide Mutual Insurance Co.*, 757 F.2d 364 (D.C. Cir. 1985); *Brumley v. U.S. Department of Labor*, 767 F.2d 444, 445 (8th Cir. 1985); *United States v. United States District Court*, 717 F.2d 478, 480 (9th Cir. 1983); *Hedley v. United States*, 594 F.2d 1043, 1044 (5th Cir. 1979)); *see also Robert v. Department of Justice*, 193 F. App’x 8, 9 (2d Cir. Apr. 11, 2006) (dismissing case where plaintiff did not administratively appeal agency’s denial before filing suit); *Ruotolo v. Department of Justice*, 53 F.3d 4, 8 (2d Cir. 1995) (“the denial of requested information must be appealed to the head of an agency”) (citing *Oglesby*, 920 F.2d at 61-62).

Further, even if an agency failed to timely respond to a FOIA request, once an agency does respond and plaintiff has not yet filed suit, plaintiff must nevertheless pursue administrative remedies before commencing litigation.³ *See Oglesby*, 920 F.2d at 63-64 (“an 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”); *New York Times Co. v. U.S. Department of Labor*, 340 F. Supp. 2d 394, 397-98 (S.D.N.Y. 2004) (noting that “where an agency responds to a FOIA request late, but before suit is filed, actual exhaustion must be pursued before the requester may seek judicial relief” as the court otherwise lacks jurisdiction). This requirement permits the

³ The agency’s response must include the reasons for the agency’s determination and the right of the FOIA requester to seek assistance from the FOIA Public Liaison of the agency. *See* 5 U.S.C. § 552(a)(6)(i). In the case of an adverse determination, the response must provide “the right of [the requester] to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services.” 5 U.S.C. § 552(a)(6)(ii). ICE’s September 29, 2017, response complied with those requirements. *See* Exhibit A.

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agency to, among other things, “correct or rethink initial misjudgments or errors,” or “revise [] responses in light of intervening responses to the same FOIA request by other agencies,” *Oglesby*, 920 F.2d at 65, thus conserving party and judicial resources.

Accordingly, because ICE responded to Plaintiff’s FOIA request before Plaintiff commenced this action, the complaint against ICE should be dismissed for failure to exhaust administrative remedies.

In light of this administrative bar, ICE will not process Plaintiff’s belated administrative appeal while litigation as to the initial FOIA request is pending. So that this litigation can be resolved, and thus ICE can process the appeal, the parties are conferring regarding a proposed, possibly expedited schedule for ICE’s motion to dismiss, if convenient for the Court. The parties will provide a proposed schedule forthwith.

Thank you for your consideration of this matter.

Respectfully,

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