UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DETENTION WATCH NETWORK
and CENTER FOR CONSTITUTIONAL
RIGHTS,

ECF CASE
14-cv-583 (LGS) (RE)

Plaintiffs,

v.

UNITED STATES IMMIGRATION
AND CUSTOMS ENFORCEMENT AGENCY,
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY,

Defendants.
----------X

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT UNITED STATES DEPARTMENT OF HOMELAND SECURITY'S ("DHS") MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs, Detention Watch Network ("DWN") and Center for Constitutional Rights ("CCR") (collectively "Plaintiffs"), oppose the Motion to Dismiss filed by Defendant Department of Homeland Security ("DHS"). DHS' motion, asserting failure to exhaust administrative remedies pursuant to the Freedom of Information Act ("FOIA"), omits several material facts that are fatal to its argument.

First, DHS's motion is premised entirely on the suggestion that DHS made an adverse determination or denial that Plaintiffs were required to appeal, and that Plaintiffs failed to do so. This premise is factually incorrect. The sole document on which DHS rests its motion to dismiss, a letter dated December 6, 2013, explicitly states that it was "not a denial of [Plaintiffs'] request." Thus, it could not have triggered a requirement to appeal. DHS' brief fails to mention this crucial and indeed dispositive fact.

Second, although DHS portrays a response to the December 6, 2013 Letter as a necessary component of administrative exhaustion, DHS did not send the letter by regular postal service, certified return receipt mail, or any private mailing service typically used when serving important documents. Instead, DHS sent an email to Plaintiffs' counsel with no content or identifying signature in the email and no reference to a FOIA request in the subject heading or attachment title. DHS' brief omits these facts. The subject heading of the email and the attachment title contained an abbreviation that Plaintiffs still cannot decipher, and Plaintiffs did not discover the email until the day DHS filed its motion to dismiss, having learned of the existence of the relevant DHS communication the night before, when DHS' counsel first informed Plaintiffs of DHS' intention to file the instant motion. This method of purported service – an empty email message with an

incomprehensible subject heading and attachment title – does not constitute valid notice of any determination, adverse or otherwise, under FOIA.

Third, DHS' motion papers indicate that DHS "administratively closed" Plaintiffs' FOIA Request on January 8, 2014. But DHS failed to inform Plaintiffs that it had done so until March 4, 2014, the night before DHS filed its motion to dismiss and several weeks after Plaintiffs had filed their complaint. DHS' brief fails to mention this fact as well. DHS regulations require the agency to notify requesters of adverse actions, and its failure to do so here is fatal to DHS' argument.

Because DHS neither denied Plaintiffs' FOIA Request nor notified Plaintiffs of such an action within the statutory time frames, Plaintiffs indeed constructively exhausted the administrative process, and the complaint is properly before this Court. But even if the Court were to find that the contents and manner of service of DHS' communications comported with FOIA, prudential considerations counsel against granting DHS's motion. Congress enacted FOIA to provide the public with access to information about the workings of government, and the process is intended to be simple and accessible. Permitting agencies to use such sloppy and obfuscating methods of communication to avoid responding to FOIA requests would undermine the Act's purpose. Moreover, dismissal of the claims against DHS now would not preclude Plaintiffs from pursuing the FOIA Request with DHS, and Plaintiffs would soon file a new complaint, an inefficient and unnecessary outcome. The Court has the power to waive the exhaustion requirement, and should it find that Plaintiffs failed to exhaust, Plaintiffs respectfully request that the Court use that power here.

STATEMENT OF FACTS

Background

Plaintiffs DWN and CCR are non-profit advocacy organizations engaged in extensive work informing the public and engaging in debate regarding immigration detention policy and practice. Plaintiff DWN is a national coalition of organizations and individuals working to expose and challenge the injustices of the U.S. immigration detention and deportation system. Founded in 1997, it is the only national network that focuses exclusively on immigration detention and deportation issues, and is recognized as the primary resource on detention issues by media and policymakers. *See* November 25, 2013 FOIA Request at 6, attached as Exhibit A to Plaintiffs' January 30, 2013 Complaint (hereinafter "Compl."). Plaintiff CCR is a non-profit, public interest, legal, and public education organization that engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights. (Compl. Ex. A at 5).

DHS is a Department of the Executive Branch of the United States tasked with overseeing, *inter alia*, immigration enforcement, border security, immigration detention, and immigration and citizenship benefits. (Compl. ¶ 17). Created in 2003, in just over ten years it has built a reputation as one of the least accessible and least compliant with FOIA. *See* Gavin Baker & Sean Molton, *Making the Grade: Access to Information Scorecard 2014 Shows Key Agencies Still Struggling to Effectively Implement the Freedom of Information Act* (Center for Effective Government, March 2014)[1] (giving DHS the grade of "F" for accessibility and noting that in 2012 it "had significant problems with timeliness in responding to requests and appeals and had large backlogs.")

[1] Available at http://www.foreffectivegov.org/files/info/access-to-information-scorecard-2014.pdf (accessed on March 28, 2014).

Plaintiffs' FOIA Request

On November 25, 2013, Plaintiffs submitted FOIA requests to Immigration and Customs Enforcement ("ICE") and to DHS seeking information regarding ICE's controversial interpretation and implementation of Detention Bed Quota. *See* Compl. ¶ 2, Compl. Ex. A. Plaintiffs' request described in highly specific detail the records they requested, including statistical reports on detention; contracts with private prison corporations; communications regarding specific news articles about the Detention Bed Quota; reports and memoranda regarding the Detention Bed Quota to and from the Secretary of DHS, the Director and/or Acting Director of ICE, Members of Congress and the White House, and leadership at DHS and ICE; records related to the release of detainees due to budget constraints during specific time periods, and communications between ICE, DHS and local, state and Congressional officials regarding detention costs and the need to fill detention beds as a result of contractual obligations. (Compl. Ex. A at 3-5). Plaintiffs also sought expedited processing. (Compl. ¶ 3).

The Request was signed by Plaintiffs' counsel Sunita Patel, a staff attorney at CCR, and requested that any responses be directed to her or to Ian Head, a Legal Worker at CCR. (Compl. Ex. A at 8).

DHS' Response

DHS' Purported Service of Letter Dated December 6, 2013

Plaintiffs were unaware that DHS had sent a letter addressing the substance of the Request and seeking clarification until the evening of March 4, 2014, the day

Defendants' answer was originally due.[2] At 8:19 p.m., Assistant U.S. Attorney Natalie Kuehler informed Plaintiffs' counsel, via email, that DHS would be filing a motion to dismiss the complaint based on "DHS having no record of any communication from you following its December 6, 2013 letter acknowledging receipt of your FOIA request." *See* March 4, 2014 email from Natalie Kuehler to Ghita Schwarz, attached as Exhibit 1 to the Declaration of Ghita Schwarz (hereinafter "Schwarz Decl."). Ms. Kuehler's email added that the "letter noted that the FOIA request as written was too broad to be processed and therefore would be administratively closed if no clarification was received within 30 days. The request was then closed on January 8, and no administrative appeal or communication was received." *Id*.

Although Plaintiffs' counsel had been in discussions with the AUSA regarding the processing of the request for some weeks, this was the first that Plaintiffs' counsel had heard of such a letter or of the January 8 administrative closure. On March 5, 2014, CCR attorney Ghita Schwarz requested that Ms. Kuehler provide a copy of the letter referenced in her March 4 email. (Schwarz Decl. Ex. 2). Ms. Kuehler responded shortly thereafter with an email that attached a document titled "DHS Letter.pdf." *See* Email from Natalie Kuehler to Ghita Schwarz, attached as Schwarz Decl. Ex. 3. Neither Ms. Kuehler's email nor the letter itself contained any indication of how the "DHS Letter.pdf" had been served, if at all.

CCR could locate no hard copy of such a letter, and Defendants never claimed to have mailed one. An extensive search through CCR's electronic files and Outlook email accounts by CCR Legal Worker Ian Head failed to turn up an electronic document with

[2] Defendants had sought and were granted a one-day extension to respond to the complaint.

identical content titled "DHS Letter.pdf." *See* Declaration of Ian Head at ¶¶ 13-14, attached as Schwarz Decl. Ex. 4. But after Mr. Head searched through the deleted email of CCR attorney Sunita Patel, he discovered an unread email with the subject heading "NMI-Not Reasonably Described," which attached a document titled "NMI-Not Reasonably Described.pdf." *Id*. at ¶ 17. The body of the email was completely blank, with no content or return address, much less any reference to "FOIA," or "Request," and it appeared to have been misidentified as spam or junk prior to being deleted. When Mr. Head opened the attachment titled "NMI-Not Reasonably Described," he discovered a letter that appears to be identical in content to the letter titled "DHS Letter.pdf" that had been sent by Ms. Kuehler. *Id*. at ¶ 20. However, the metadata connected to "DHS Letter.pdf" indicated that the document had been modified on February 3, 2014, presumably to change the title to one that would have been more easily recognized as a legitimate electronic correspondence. *See* Declaration of Orlando Gudino at ¶¶ 8-10, attached as Schwarz Decl. Ex. 5.

DHS' Failure to Notify Plaintiffs of an Adverse Determination

The content of the December 6, 2013 Letter – both the version provided by Ms. Kuehler and the attachment titled "NMI-Not Reasonably Described.pdf" – contained no adverse determination regarding Plaintiffs' FOIA Request. Indeed, the letter explicitly stated that it was "not a denial of [the] request." While the letter asserted that Plaintiffs' Request was broad, it did not contain any indication as to what specific aspects of the request were considered overly broad or how portions of the request could be narrowed. *See* Schwarz Decl. Ex. 3, Head Decl. Ex. A. Nor did the letter provide any statutory or regulatory authority to justify administrative closure of a FOIA request based on

purported overbreadth. The letter also contains no indication of the meaning of "NMI," nor do Plaintiffs recognize that term or abbreviation. (Head Decl. at ¶ 18).

Plaintiffs never received, nor does DHS claim to have sent, either electronically or otherwise, any written notification that DHS had in fact made an adverse determination regarding Plaintiffs' FOIA Request or that it had administratively closed the Request on January 8, 2014. Indeed, remarkably for a motion based exclusively on Plaintiffs' alleged failure to appeal an adverse determination, Defendants' papers do not assert that any such written notification exists or specify manner of service.

Plaintiffs formally requested that DHS "re-open" the request via letter to Ms. Kuehler on March 6, 2014. *See* Schwarz Decl. Ex 6.

ARGUMENT

I. PLAINTIFFS CONSTRUCTIVELY EXHAUSTED THEIR ADMINISTRATIVE REMEDIES, BECAUSE DHS DID NOT ISSUE A DETERMINATION REGARDING THEIR REQUEST OR NOTIFY PLAINTIFFS OF THE RIGHT TO APPEAL AN ADVERSE DETERMINATION.

A. Because DHS Did Not Issue Any Determination Regarding Plaintiffs' Request Within the Statutory Time Frames, Plaintiffs Constructively Exhausted Their Administrative Remedies.

Plaintiffs have standing to file suit as they have constructively exhausted their administrative remedies. FOIA requires administrative agencies to "make and communicate its 'determination' whether to comply with a FOIA request . . . within 20 working days of receiving the request, or within 30 working days in 'unusual circumstances.'" *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 182 (D.C. Cir. 2013) (citing 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(B)(i)); *see also Ruotolo v. Dep't of Justice, Tax Div.*, 53 F.3d 4, 8-9 (2d Cir. 1995).

This "determination" involves not merely "express[ing] a future intention to produce non-exempt documents," but "(i) gather[ing] and review[ing] the documents; (ii) determin[ing] and communicat[ing] the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform[ing] the requester that it can appeal whatever portion of the 'determination' is adverse." *CREW*, 711 F.3d at 185. When agencies fail to issue such a determination within the statutory time frames, requesters may seek judicial enforcement of their rights under FOIA. *Id*.

DHS has never made any indication that it completed these statutorily-required steps, and has never communicated any such determination to Plaintiffs. Thus, Plaintiffs were plainly entitled to file suit after the passage of twenty days from receipt of the November 25, 2013 Request. 5 U.S.C. §§ 552(a)(6)(A)(i), (a)(6)(B)(i). Indeed, because Plaintiffs sought expedited processing, and never received any determination on that request, they were entitled to file suit after ten days. 5 U.S.C. § 552 (a)(6)(E).

B. The December 6 Letter on Which DHS Rests its Entire Motion Did Not Trigger a Requirement to Appeal, Because the Letter Stated That It Was "Not a Denial," Failed to Inform Plaintiffs of the Right to Appeal, and Was Never Properly Served.

DHS' motion to dismiss rests entirely on the factually incorrect premise that Plaintiffs did not appeal an "adverse determination" contained in the December 6, 2013 Letter, thus failing to exhaust administrative remedies. *See* Def's Br. at 4 ("[a]n appeal is an essential part of administrative exhaustion in a FOIA case."). But the premise is false, because DHS never issued an adverse determination that would have triggered the requirement to appeal.

FOIA requires that government agencies not only determine within twenty days whether to comply with a request and but also "immediately notify" the requestor of the

determination "and of the right of such person to appeal to the head of the agency any adverse determination." 5 U.S.C. § 552(a)(6)(A)(i). DHS regulations define an "adverse determination" as one that "*den[ies]* a request in any respect." 6 C.F.R. § 5.6(c) (emphasis added). Thus, to trigger the requirement to appeal, agencies must both make clear they are issuing a denial and notify the requester of the right to appeal.

DHS did neither in its December 6 Letter. To the contrary, DHS explicitly stated that the letter was "*not* a denial" (emphasis added). DHS' own statement, which DHS does not cite or quote in its brief, defeats DHS' argument that that an adverse determination had been made. 6 C.F.R. § 5.6(c). The December 6 Letter also did not contain any notice to requesters of a right to appeal, an omission consistent with the fact that the letter did not contain a denial. Yet DHS now attempts to recast its December 6 Letter as a denial requiring appeal, an attempt that flies in the face of its own plain statements. DHS' revision of the facts must be rejected. Because neither an adverse determination nor a notice of the right to appeal such a determination was ever communicated to Plaintiffs, in the December 6 Letter or otherwise, the requirement to appeal was not triggered, and Plaintiffs exhausted their remedies under FOIA. *See Ruotolo*, 53 F.3d at 8-9 (finding constructive exhaustion where agency never informed requester of his right to appeal); *Nurse v. Sec'y of Air Force*, 231 F. Supp. 2d 323, 327 (D.D.C. 2002) (same); *Hudgins v. IRS*, 620 F.Supp. 19, 21 (D.D.C. 1985) (same).

Moreover, given DHS' exclusive reliance on the December 6 Letter for its argument, DHS' moving papers contain no description of how the Letter was served, if at all. "The existence of a letter, of course, does not establish that the letter was actually sent to or actually received by the intended recipient." *Jones v. U.S. Dep't of Justice*, 576 F.

Supp. 2d 64, 67 (D.D.C. 2008). The December 6 Letter that DHS now portrays as crucially important for the purpose of its motion to dismiss was not sent by United States Postal Service or by a private mailing service. Instead, DHS chose to send the Letter to one of the two contacts on Plaintiffs' FOIA request via an email that was entirely blank, devoid even of an identifying signature. The subject heading of the email made no reference to "FOIA," "Request," "Response" or even "Acknowledgment." Instead, both the subject heading and the attachment title used the puzzling phrase "NMI-Not Reasonably Described." Because attachments to blank e-mails from unknown persons with undecipherable subject headings are commonly known to be potential virus hazards, office security policies typically advise against opening such attachments. *See* Gudino Decl. ¶ 5. Likely as a result, the email was not opened until Plaintiffs' counsel was notified, months later, of the existence of a December 6 Letter. (Head Decl. at ¶ 8).

There is a serious imbalance between the extreme relief that DHS seeks from the court and the sloppiness with which it treated the Requestors. If DHS truly intended its letter to communicate a determination that had legal effect, at a minimum, it should have clearly identified the contents of the attachment, used a subject heading that indicated the email's importance, and added an identifying signature in from the sender in the body of the email. Having failed to do so, DHS is now trying to impose an extreme penalty on Plaintiffs on the basis of correspondence that failed to comport with basic business practices.

DHS' papers do not discuss these facts at all, even though the email sent by AUSA Kuehler to Plaintiffs' counsel on March 5 attached a modified letter with a more transparent title ("DHS Letter.pdf" in place of "NMI-Not Reasonably Described.pdf").

Neither the December 6 Letter itself, nor AUSA Kuehler's email, nor the Defendant's brief, nor the Defendant's declaration, say a word about how the December 6 Letter was "sent" to Plaintiffs. *See, e.g.*, Holzer Decl. at ¶¶ 9-13 (stating that DHS "sent" the letter but failing to note the method of service or whether DHS confirmed receipt). Were DHS satisfied that its method of service was adequate, surely it would have described service to the Court. DHS' flawed service does not satisfy the agency's obligation to "notify the requester of [a] determination." 6 C.F.R. 5.6(b),(c).

C. DHS Never Notified Plaintiffs that Their Request Had Indeed Been Closed on January 8, 2014

Because DHS explicitly stated in its December 6 letter that it was "not a denial," the only adverse determination that could be interpreted to trigger the requirement to appeal would have been DHS' actual administrative closure of the request on January 8, 2014. DHS' brief and supporting declarations are silent as to whether DHS provided any notification to Plaintiffs that the request had actually been closed on January 8, 2014. In fact, DHS never did so.

DHS regulations require the agency to "notify the requester of [a] determination in writing" 6 C.F.R. § 5.6(b), (c), and FOIA requires that such notice be provided "immediately." 5 U.S.C. § 552(a)(6)(A)(i). Yet the first time Plaintiffs heard that DHS had administratively closed the request on January 8 was via email from AUSA Kuehler on March 4, the night before DHS filed its motion and long after the twenty days DHS has to make determinations under FOIA. Such a communication, made only after Plaintiffs filed their complaint, cannot constitute proper notification. DHS's failure to

notify Plaintiffs that it had closed the Request on January 8 violated 6 C.F.R. § 5.6 and should dispose of DHS' "failure to exhaust" argument.

D. In Any Case, DHS Was Not Authorized to Administratively Close Plaintiffs' Request for Overbreadth

DHS is not permitted to administratively close requests arbitrarily. Agency actions must be based upon FOIA or the agency's "published rules stating the time, place, fees (if any), and procedures to be followed" within the Federal Register or Code of Federal Regulations. 5 U.S.C. § 552(a)(3)(A) (2012). DHS's regulations specifically allow for administrative closure of claims when fees are not paid, 6 C.F.R. § 5.3(c), but not when requests are considered overly broad. 6 C.F.R. § 5.3(b). In such cases, the regulations merely state that an overly broad request may result in the "agency's response to [the] request . . . be[ing] delayed." *Id.* In short, no authority existed for administrative closure of Plaintiffs' FOIA request. Thus, even if the December 6, 2013 Letter had both communicated a denial of Plaintiffs' request and notified Plaintiffs of the right to appeal, which it did not, the threat to administratively close the request was not authorized by regulation and could not have constituted a proper denial. Similarly, even if DHS had issued a notification of its January 8, 2014 decision to close Plaintiffs' Request, such a decision would not have been authorized under DHS' own regulations.[3]

[3] As Plaintiffs wrote to Defendant on March 6, 2013, Defendant's claim in the December 6 Letter that Plaintiffs' Request was too broad in scope merely recited the statutory standards, and failed to specify what additional information might have been needed or explain why the request is "insufficient" pursuant to 6 C.F.R. § 5.3(b). *See* March 6, 2014 Letter from Ghita Schwarz to Natalie Kuehler, attached as Schwarz Decl. Ex. 6. Further, portions of the December 6 Letter appears to contain boilerplate language, for example reciting regulations that could not conceivably apply to Plaintiffs' request – such as the requirement that FOIA requests not be posed in the form of a question. Not only did the December 6 Letter fail to identify a single non-viable portion of the request, but the agency now concedes that at least some "portions" of the letter are reasonably

II. PRUDENTIAL CONSIDERATIONS AND JUDICIAL EFFICIENCY WEIGH AGAINST GRANTING DHS' MOTION

Exhaustion under FOIA as a prudential rather than jurisdictional requirement. Thus, the Court may waive the exhaustion requirement "under appropriate circumstances." *NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, No. 07-CIV-3378 (GEL), 2007 WL 4233008, at *5 (S.D.N.Y. Nov. 30, 2007); *accord, e.g., Wilbur v. C.I.A.*, 355 F.3d 675, 677 (D.C. Cir. 2004) (waiving exhaustion requirement even though requestor had waited four years to file an administrative appeal). A number of factors make such waiver appropriate here.

First, it is plain that Plaintiffs did not intend to "flout" administrative requirements. *Etelson v. Office of Pers. Mgmt.*, 684 F.2d 918, 925-26 (D.C. Cir. 1982). Plaintiffs quickly responded to a letter from ICE that was nearly identical to the December 6 Letter "sent" by DHS. (Head Decl. ¶¶ 5-6). Plaintiffs would have responded in the same way had they been aware of the existence of the December 6 Letter. In this context, granting DHS' motion would encourage agencies to design their communications to requesters so as to make them unlikely to be opened or read, a result that would "inhibit what is meant to be a simple process to give the people access to records created by their government." *NAACP-LDF*, 2007 WL 4233008, at *5.

Judicial efficiency also weighs in favor of waiving an exhaustion requirement here. On March 6, 2013, one day after receiving a version of the December 6, 2013 Letter via email from Ms. Kuehler, Plaintiffs requested in writing that DHS "re-open" Plaintiffs' FOIA Request. (Schwarz Decl. Ex. 6.) Plaintiffs did so even though DHS had

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described. *See* Decl. of James V.M.L. Holder ¶ 17 (Mar. 4, 2014). There was therefore "no excuse" for failing to honor at least those parts of the request. *See Ruotolo*, 54 F.3d 4, 10 (2d Cir. 1995).

no authority to close the request for overbreadth in the first place. *See* I(D) *supra*. The Dismissal of DHS as a defendant will not preclude Plaintiffs from pursuing their FOIA Request, because "a dismissal based on failure to exhaust is without prejudice to renewal after exhaustion." *Schwarz v. Dep't of Justice*, No. 10-CIV-0562 (BMC), 2010 WL 2836322, at *9 (E.D.N.Y. July 14, 2010), *aff'd*, 417 Fed. App'x 102 (2d Cir. 2011) (waiving exhaustion even though failure to exhaust was "manifest"). Thus, eventually, Plaintiffs will have to file a new federal complaint against DHS alone, even as the case against ICE proceeds before this Court. Dismissal will not prevent DHS from having to comply with the demands of FOIA, and principles of judicial efficiency therefore counsel against granting DHS' motion.

Further, FOIA itself provides that the exhaustion requirement is constructively waived where an agency has not executed its duties within the time limits provided. *Jones*, 576 F.2d at 65-66, citing 5 U.S.C. §§ 552(a)(6)(C)(i). DHS did not provide any response to Plaintiffs' request for expedited processing with the statutorily required ten days, and that failure in and of itself entitled Plaintiffs to seek judicial review. *NAACP-LDF*, 2007 WL 4233008, at *5.

Thus, even if the Court finds that Plaintiffs did not constructively exhaust administrative remedies, prudential considerations weigh in favor of waiving the exhaustion requirement.

CONCLUSION

For all these reasons, Defendant DHS' Motion to Dismiss should be denied.

Date: March 28, 2014

Respectfully submitted,

/s/

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