UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and CHARLES SAVAGE, Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.	ECF CASE 10 Civ. 7920 (RPP)

DEFENDANT'S REPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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PRELIMINARY STATEMENT

Defendant the Federal Bureau of Investigation (the "FBI" or the "Government") by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this reply memorandum of law in further support of its cross-motion for summary judgment with respect to selected documents under the Freedom of Information Act, 5 U.S.C. § 522 ("FOIA"), and its motion to dismiss under Federal Rule of Civil Procedure 12(b)(1).

Plaintiffs have agreed to dismiss Count II of their complaint, which relates to the FBI's Shooting Incident Review Team reports ("SIRT Request"). *See* Pls.' Mem. of Law in Reply in Further Support of Their Mot. for Summ. Judg. and in Opp. to Def.'s Cross-Mot. ("Pls.' Reply") at 3 n.1. As a result, the remaining disputed issue before the Court is Plaintiffs' erroneous assertion that this Court has jurisdiction to render an advisory opinion regarding the FBI's initial withholding of statistics on the aggregate results of investigative "assessments" conducted by the FBI pursuant to Attorney General Guidelines ("Assessment Statistics Claim"), even though Plaintiffs' FOIA claim as to the Assessment Statistics ("Assessment Statistics Request") was mooted by the Government's release of the requested information. Moreover, while the parties were briefing the instant motion, Plaintiffs filed a second FOIA request ("Second Statistics Request") with the FBI on April 14 and 15, 2011, seeking statistics on various categories of assessments conducted by the FBI during various time periods. *See* Declaration of Charles Savage dated April 15, 2011 ("Savage Decl.") ¶ 12 & Ex. E; Declaration of Dennis J. Argall dated April 28, 2011 ("Argall Decl.") ¶ 6 & Exs. A & B. Although the FBI is still in the process of searching for documents responsive to that request, Plaintiffs suggest, absent any factual basis, that "the unlawful conduct complained of by NYT will continue" if the Court declines to issue a

ruling that the withholdings asserted for a specific request in *this* case were improper. *See* Pls.' Reply at 8-9.

A straightforward application of the law compels dismissal for lack of subject matter jurisdiction of Plaintiffs' FOIA claim with respect to the Assessment Statistics. First, the law is clear that a FOIA claim – including one for declaratory relief − is mooted by the release of documents sought by the FOIA requestor, and that this Court cannot render an advisory opinion with respect to the Government's initial withholdings of the Assessment Statistics under Exemptions 2 and 7(E). Second, to the extent Plaintiffs wish to use *this* action to guarantee the full release of the information sought in a second FOIA request just submitted on April 14 and 15, 2011, they cannot do so through an impermissible end-run around FOIA's administrative exhaustion requirement based on mere speculation that "unlawful conduct complained of by NYT will continue." *See* Pls.' Reply at 9. Under the law, a FOIA requester must exhaust administrative remedies, or otherwise be deemed to have constructively exhausted, prior to seeking judicial review. Plaintiffs have done neither. Requiring Plaintiffs to exhaust administrative remedies serves the salutary purposes underlying the exhaustion doctrine: that is, to provide the FBI with an opportunity to exercise its discretion and expertise on the matter, and conserve judicial resources by enabling agency supervisors to rectify any erroneous denials of meritorious requests.

Therefore, this Court should grant both the Government's cross-motion for summary judgment on Plaintiffs' FOIA claims with respect to the SIRT Request and the Assessment Statistics Request, and the Government's Rule 12(b)(1) motion to dismiss Plaintiffs' FOIA claim with respect to the Assessment Statistics Request.

ARGUMENT

THIS COURT LACKS JURISDICTION TO DECIDE WHETHER THE INFORMATION REQUESTED BY THE ASSESSMENT STATISTICS REQUEST IS RELEASABLE UNDER FOIA AFTER THE FBI HAS FULLY COMPLIED WITH THE REQUEST

A. No Exceptions to the Mootness Doctrine Apply

Because the FBI has now released the documents sought by their complaint, Plaintiffs cannot meet their burden of establishing that subject matter jurisdiction exists over their complaint. *See Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). Indeed, as Plaintiffs have not rebutted, numerous cases in this and other Circuits make clear that FOIA confers jurisdiction on this Court to enjoin the FBI from "withholding agency records and to order the production of any agency records improperly withheld," such that the release of information responsive to a request moots the underlying claim and the Court's jurisdiction to provide further relief under FOIA. *See* Def.'s Mem. of Law in Opp. to Pl.'s Mot. for Summ. J. ("Def.'s Br.") at 13-14 (citing cases); *see also Isasi v. Office of the Attorney Gen.*, No. 09-5122, 2010 WL 2574048, at *1 (D.C. Cir. June 2, 2010) ("The FOIA claim against the agency was properly dismissed as moot, because the two pages appellant had requested were subsequently released to him in their entirety…."); *Armstrong v. Executive Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1996) (government's release of document at issue "moots the question of the validity of the original exemption claim"); *Anderson v. U.S. Dep't of Health & Human Servs.*, 3 F.3d 1383, 1384 (10th Cir. 1993) (same).

In response, Plaintiffs argue that even if all the relief sought in their FOIA complaint has been satisfied, the Assessment Statistics Claim falls under an exception to the mootness doctrine, which involves defendants that voluntarily discontinue a challenged action to avoid judicial review even if their conduct was capable of recurring. *See* Pls.' Reply at 4-5 (citing cases). This doctrine does not support Plaintiffs' contention here.

As a preliminary matter, Plaintiffs rely on cases applying the voluntary cessation doctrine to non-FOIA claims with entirely dissimilar facts and where, unlike here where the requested documents have irreversibly been released, there was a legitimate reason to believe that the challenged action would be reinstated. *See Parents Involved in Comty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007) (holding that 14th Amendment equal protection claim challenging school district's use of racial "tiebreakers" to determine school assignments was not mooted by district's cessation of racial tiebreaker practice pending the outcome of litigation); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283 (2001) (holding that challenge brought by unsuccessful renewal applicant of adult business license was moot after petitioner withdrew its application and closed its business); *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 193 (2000) (holding that citizens' suit for Clean Water Act penalties against polluter for violations of environmental permit could be mooted by polluter's subsequent voluntary compliance with its permit if it was "absolutely clear" that the "permit violations could not reasonably be expected to recur"), *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-90 (1982) (holding that challenge to constitutionality of prohibitions and restrictions in municipal ordinance was not moot, even where the city amended the ordinance while the case was pending before the Sixth Circuit, because the city could re-enact the challenged provision later); *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 202-03 (1968) (holding that civil antitrust complaint filed by Government against export association and five of its members was not mooted by the defendant association's subsequent dissolution and the amendment of a regulation); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953) (holding that civil enforcement actions brought by Government against corporate defendants for violations of the Clayton Act were not mooted by defendants' cessation of illegal activity).

Nor is there merit to Plaintiffs' assertion that courts have declined to dismiss FOIA cases as moot even after the agency has released the requested documents in advance of a ruling, "if the agency's policy or practice remains in place." *See* Pls.' Reply at 6. Again, the cases cited by Plaintiffs are simply not on point, because they support a different proposition − that an agency's release of documents under FOIA does *not* moot a tandem claim or claims asserted under other statutes challenging Government action or inaction. For example, in *Payne Enters. Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988), plaintiff filed a FOIA action seeking an order to compel the Air Force to supply him with copies of bid abstracts. *Id.* at 487. The D.C. Circuit observed that, aside from FOIA, plaintiff's complaint cited the federal question statute, the federal mandamus statute, and the All Writs Act, which the court collectively construed as a "claim of 'unreasonable agency delay.'" *Id.* at 487 n.1. Although the Air Force moved to dismiss plaintiff's lawsuit as moot because the agency eventually released the bid abstracts and promised to grant future requests for bid abstracts, the D.C. Circuit held that these acts did "not render moot [plaintiff's] challenge to the Air Force's practice of *unjustified delay*." *Id.* at 488 (emphasis added).

Similarly, in *Oregon Natural Desert Ass'n v. Gutierrez*, 409 F. Supp. 2d 1237 (D. Or. 2006), plaintiff challenged certain agency regulations under FOIA and Section 706(2) of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, which allows a court to overturn an agency action or decision if it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Id.* at 1242 (citing 5 U.S.C. § 706(2)(A)). Although the Government moved to dismiss plaintiff's claims as moot because the agency had produced all responsive documents under FOIA, the court denied the motion because "the release of documents did not moot the claim that the agency policy or practice impaired the party's lawful access to information in the future." *Id.* at 1245 (quoting *Payne Enters.*, 837 F.2d at 491).

Likewise, in *Center for Biological Diversity v. Gutierrez*, 451 F. Supp. 2d 57 (D.D.C. 2006), plaintiff asserted a FOIA claim and claims under Section 706(1) and 706(2) of the APA, contending that the agency's delays in processing plaintiff's FOIA requests and appeals "establish a pattern and practice of unresponsiveness in violation of the [APA]." *Id.* at 64, 69 (citing 5 U.S.C. § 706(1), (2)(A)). Because "a party's challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit," the court rejected the agency's arguments and held that that Counts IV and V of plaintiff's complaint – the *APA claims* – were not moot. *Id.* at 64, 70 (quoting *Payne Enters.*, 837 F.2d at 491).

Here, by contrast, Plaintiffs' complaint in this case asserts only a claim under FOIA, which provides only prospective relief – *i.e.*, the production of requested documents – and the complaint asserts no other claim under any other statute that awards declaratory relief through a successful challenge of an agency's policies, practices, or timeliness with respect to the general processing and release of documents under FOIA.

B. Plaintiffs Have Failed to Establish a Pattern or Practice That Warrants the Application of the Voluntary Cessation Doctrine

To the extent the voluntary cessation doctrine applies to this case, Plaintiffs present no evidence of either a "pattern" or a "policy or practice" that will negatively impact Plaintiffs' access to FBI data in the future. Instead, Plaintiffs cite only a single oral representation made by an Assistant United States Attorney that "the FBI was not taking the position that FOIA required the release of the Assessment Statistics" that were the subject of the instant complaint. *See* Declaration of David McCraw dated April 15, 2011 ("McCraw Decl.") at ¶ 5. This single statement, which was a response to counsel's inquiry regarding the FBI's initial application of two FOIA exemptions to a specific document expressly requested by Plaintiffs, is plainly insufficient to establish a "pattern" that merits the application of the voluntary cessation doctrine here.

Although Plaintiffs speculate that the FBI's decision to release the Assessment Statistics was made "only hours" after the Supreme Court's decision on FOIA Exemption 2 in *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 2011 U.S. LEXIS 2101 (2011), *see* Pls.' Reply at 9, the document was, in fact, released after further thorough review by operational internal units within the FBI, which determined that the information could be released without harming an interest protected by either Exemptions 2 or 7(E). *See* Argall Decl. ¶ 3. In addition, the FBI has only begun to search for documents responsive to the Second Statistics Request and thus cannot ascertain whether responsive documents even exist, and whether any responsive documents can be released in full, or may contain information subject to any FOIA Exemptions. *Id.* ¶¶ 7-8. Finally, it is impossible and unreasonable for the FBI to concede or agree in advance that statistics for different categories of assessments for criminal activity and natural security throughout different time periods (which are distinct from the information sought in the Assessment Statistics Request) would not trigger any applicable FOIA exemption, because the two requests are separate from and do not overlap with each other. *Id.* ¶¶ 6, 8. Accordingly, Plaintiffs' FOIA claim as to the Assessment Statistics must be dismissed for lack of subject matter jurisdiction because Plaintiffs have failed to articulate an "unlawful policy" of the FBI, and have not shown that the FBI will "continue" to engage in any so-called "unlawful conduct," in a way that warrants declaratory relief for an already-moot claim. *See Long v. U.S. Dep't of Justice*, 450 F. Supp. 2d 42, 62 (D.D.C. 2006) (declining to apply voluntary cessation doctrine and dismissing FOIA claim as moot after Government released the records at issue, because, as here, plaintiffs were "challenging the application of a *specific* FOIA exemption to *specific* records in the context of a *specific* FOIA request," and "there is no indication" that the Government "intends to assert unsupported Exemption 5 claims in the future") (emphasis in original).

C. Plaintiffs Cannot Seek an Advisory Opinion on the Merits on the FBI's Previously Asserted Exemptions

Despite having already received and published the Assessment Statistics, *see* Savage Decl. ¶ 8 & Ex. C, Plaintiffs persist in seeking a judicial finding "that documents showing the number of assessments conducted by the FBI are public records pursuant to FOIA." *See* Pls.' Reply at 4. However, FOIA does not provide the Court with jurisdiction to issue a declaratory judgment that Defendants' initial refusal to disclose the information was unlawful, after the agency has made that information available. *See, e.g., Payne Enters.*, 837 F.2d at 489 ("A declaration that an agency's initial refusal to disclose requested information was unlawful, after the agency made that information available, would constitute an advisory opinion in contravention of Article III of the Constitution.") (citing *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 91 (D.C. Cir. 1986)); *Riser v. U.S. Dep't of State*, No. 09-3273, 2010 WL 4284925, at *7 (S.D. Tex. Oct. 22, 2010) (declining plaintiff's request for declaratory judgment that agencies improperly withheld records that were later produced, because "claim for declaratory relief is now moot"); *Cornucopia Inst. v. U.S. Dep't of Agric.*, 560 F.3d 673, 676 (7th Cir. 2009) (affirming district court's dismissal of FOIA claim as moot after agency produced the requested documents, despite plaintiff's insistence that court was "free to issue a declaratory judgment that the [agency] violated FOIA," because plaintiff "does not seek any response to its FOIA request beyond what it already has received"); *Nat'l Security Archive v. CIA*, 564 F. Supp. 2d 29, 34 (D.D.C. 2008) (declining to enjoin the CIA to treat plaintiff as a representative of the news media for all future FOIA requests, because "any attempt by this Court at this time to 'prevent the CIA from *future* illegal conduct' would amount to providing the parties an advisory

opinion.") (emphasis in original). Accordingly, Plaintiffs' request for declaratory relief has been mooted by the FBI's release of the Assessment Statistics.[1]

D. Plaintiffs Must Exhaust Their Administrative Remedies Under FOIA Before This Court Can Exercise Subject Matter Jurisdiction Over Any Claims Related to the Second Statistics Request

To the extent Plaintiffs are asserting claims regarding the Second Statistics Request, this Court lacks jurisdiction to grant relief because Plaintiffs have not exhausted their administrative remedies under FOIA.

"[E]xhaustion of administrative remedies is a mandatory prerequisite to a lawsuit under FOIA." *Wilbur v. CIA*, 355 F.3d 675, 676 (D.C. Cir. 2004) (per curiam) (citation and internal quotation marks omitted); *see* 5 U.S.C. § 552(a)(6)(A)-(C) (requester is deemed to have exhausted administrative remedies when agency exceeds 20-day time limit for its initial response to a request, or 20-day limit for adjudicating an administrative appeal of the response to the request, or its 10-day extension, if any, of either time limit); 6 C.F.R. § 5.9(c) ("If you wish to seek review by a court of any adverse determination, you must first appeal it under this section."); 28 C.F.R. § 16.9(c) (same). Relatedly, courts have found it "impermissible" for a FOIA requester "to expand a FOIA request after the agency has responded and litigation has commenced." *Gillin v. IRS*, 980 F.2d 819, 823 n.3 (1st Cir. 1992); *see also Thomas v. Office of U.S. Attorney*, 171 F.R.D. 53, 55 (E.D.N.Y. 1997); *Pray v. DOJ*, 902 F. Supp. 1, 2-3 (D.D.C.

[1] One outlier decision from the Northern District of Ohio, cited by Plaintiffs in their brief, did hold that plaintiff "remains entitled to a declaration" of whether the agency's initial refusal to produce booking photographs requested by plaintiff violated FOIA, even after the agency had produced those photographs. *See* Pls.' Reply at 7-8 (citing *Beacon Journal Publishing Co. v. Gonzalez*, No. 05CV1396, 2005 WL 2099787, at *2 (N.D. Ohio Aug. 30, 2005). The Court should not follow *Beacon Journal*'s holding, which is contrary to those of circuit and district courts around the country that have consistently held that an agency's production of disputed documents renders the underlying FOIA claim moot and precludes declaratory relief, *see supra* Point I.A & C.

1995) (disallowing request made in response to summary judgment motion), *aff'd in part & remanded in part on other grounds*, No. 95-5383, 1996 WL 734142, at *1 (D.C. Cir. Nov. 20, 1996).

Exhaustion serves several important purposes. As a general matter, exhaustion provides the agency "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. Dept. of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)). Moreover, the administrative appeals process affords agencies the opportunity to "correct or rethink initial misjudgments or errors," thus obviating the need for judicial review by the courts. *Taylor v. Appleton*, 30 F.3d 1365, 1369 (11th Cir. 1994). Accordingly, any judicial review regarding any documents responsive to the Second Statistics Request must and should wait until the FBI has an opportunity to locate and review and documents responsive to that request, *see* Argall Decl. ¶ 8, and after Plaintiffs have fully exhausted their administrative remedies with the FBI and have filed suit with this Court to the extent they disagree with the agency's final determination.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for summary judgment and grant the Government's cross-motion for summary judgment and its motion to dismiss for lack of subject matter jurisdiction.

Dated: New York, New York
April 29, 2011

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