

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION CENTER)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 10-0196(RMU)
)	
NATIONAL SECURITY AGENCY)	
)	
and)	
)	
NATIONAL SECURITY COUNCIL)	
)	
Defendants.)	

PLAINTIFF’S OPPOSITION TO DEFENDANTS’ PARTIAL MOTION TO DISMISS

Plaintiff the Electronic Privacy Information Center (“EPIC”) opposes Defendants’ March 25, 2010 partial motion to dismiss. This lawsuit challenges the National Security Agency’s (“NSA’s”) referral of EPIC’s Freedom of Information Act (“FOIA”) request to the National Security Council (“NSC”) and the NSC’s failure to respond.

EPIC has brought the relevant parties before the Court. Either the NSA or NSC is required to respond to EPIC’s FOIA request. Dismissal of the NSC would deprive the Court of the opportunity to fully adjudicate the present dispute. Further, it would risk a result in which neither the NSA nor the NSC is required to respond to EPIC’s FOIA request. Such an outcome violates the FOIA and basic principles of fairness.

Defendants' motion should be denied because:

1. The NSC is a proper party to this action based on the NSA's FOIA referral to the NSC;
2. EPIC was not required to resubmit its FOIA request to the NSC after the NSA referred EPIC's request; and
3. EPIC's Administrative Procedure Act ("APA") claim does not duplicate its FOIA claims. Rather, it alleges a violation of a freestanding agency regulation governing referral, precisely the sort of APA challenge this Court adjudicated, in conjunction with related FOIA claims, in *Snyder v. CIA*, 230 F. Supp. 2d 17 (D.D.C. 2002).

FACTS

This memorandum of points and authorities opposes the Defendants' motion to dismiss counts II and IV of EPIC's Complaint, including all claims against defendant NSC. EPIC filed a request under the FOIA on June 25, 2009 with defendant NSA ("EPIC's FOIA Request"). EPIC's FOIA Request seeks, among other documents, "the text of the National Security Presidential Directive 54, otherwise referred to as Homeland Security Presidential Directive 23." Complaint at ¶ 15.

EPIC filed numerous administrative appeals with the NSA, culminating in the NSA's referral of the above-quoted portion of EPIC's request to the NSC and notification to EPIC that "the subject document has been referred to the National Security Council for review and direct response to you." Complaint at ¶ 42. Neither the NSA nor the NSC responded within the statutory deadline. 5 U.S.C. § 552(a)(6)(A) (2009). EPIC filed suit in this Court on February 4, 2010. Defendants filed a partial motion to dismiss on March 25, 2010, accompanied by a Memorandum in Support of Defendants' Partial Motion to Dismiss ("Motion").

ARGUMENT

I. THE COMPLAINT STATES A CLAIM AGAINST THE NSC BECAUSE DEFENDANTS HAVE REPRESENTED THAT THE NSC IS SUBJECT TO THE FOIA

While the NSC has traditionally not been held subject to direct requests for records under the Freedom of Information Act, the question of whether the NSC must comply with a FOIA request referred to it by an agency is, to counsel's knowledge, one of first impression. EPIC's claim against the NSC (Count III) should not be dismissed, because the NSA's referral to the NSC obligated the NSC to respond to EPIC's FOIA request. If the Court dismisses the NSC from this matter, it will permit the U.S. Government to maintain a clearly contradictory position: (1) that the NSA properly referred EPIC's request to another "agency;" and (2) that the NSC is not an "agency" subject to FOIA. A dismissal would allow Defendants to effectively toss EPIC's FOIA Request down a procedural black hole, with neither Defendant required to disclose an agency record that they both possess.

Defendants argue that the NSC is not required to respond to FOIA requests submitted directly to the agency. EPIC does not disagree. In this case, however, EPIC did not submit a FOIA request to the NSC. Instead, EPIC sought agency records in the possession and control of the NSA, which referred the request to the NSC "for review and direct response [to EPIC]." Complaint at ¶ 42. Every case cited in the Motion involves a FOIA request that had been submitted directly to the NSC. *See Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996), *Citizens for Responsibility & Ethics in Wash.*, 566 F.3d 219 (D.C. Cir. 2009).

In determining whether an entity is subject to the FOIA, this circuit has recognized that the government's own conduct should be taken into account. *See Armstrong*, 90 F.3d at 565; *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971). Here, all government conduct with

respect to EPIC's FOIA Request has treated the NSC as subject to the statute. The NSA's own regulations only allow the NSA to refer FOIA requests to third parties insofar as those third parties are also agencies subject to the FOIA:

Records or portions thereof originated *by other agencies* or information of primary interest to other agencies found in NSA/CSS records shall be handled as follows:

- (1) The *originating agency's FOIA Authority* shall be provided with a copy of the request and the stated records.
- (2) The requester shall be advised of the referral, except when notification would reveal exempt information.

32 C.F.R. § 299.5(k) (2009) (emphasis added). By treating the NSC as if it were an agency subject to the FOIA and assuring EPIC that the NSC would "review" the request and provide a "direct response," the government has represented that the NSC is subject to the FOIA with respect to this request, and EPIC and the courts should be able to rely on this representation.

Even in its memorandum supporting this motion to dismiss, the government cites precedent that only applies to agencies subject to the FOIA. *See* Motion at 5 n.4 (citing *Schoneman v. FBI*, 2009 U.S. Dist. LEXIS 22060, at *19 (D.D.C. Mar. 19, 2009) for the proposition that agencies may refer requests for material if that material "originates from *another agency*" (emphasis added)).

Defendants argue that the court should ignore the government's representations to this effect because "[a]n agency may not confer power upon itself." Motion at 5 (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-375 (1986)). But in the case cited, the Court determined that the agency in question had attempted to preempt a state law in the face of an express Congressional denial of that power. *La. Pub. Serv. Comm'n* at 374. Responding to requests is not a power granted by the Freedom of Information Act to qualifying agencies. Rather it is a responsibility imposed upon agencies by Congress. Prior to the *Armstrong*

decision, the NSC voluntarily responded to certain FOIA requests, even while asserting that it was not subject to the statute's requirement to do so. *Armstrong*, 90 F.3d at 557, 566. Certainly the government would not take the position that voluntarily responding to requests in this manner constitutes illegally "confer[ring] power upon itself" in a way that "overrides congressional intent and the holdings of the D.C. Circuit." Motion at 5.

This circuit has recognized that the purpose of allowing agencies to refer requests to each other is to "significantly improve[] the quality of the process whereby the government determines whether all or portions of responsive documents are exempt from disclosure." *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C. Cir. 1983), *vacated in part and aff'd in part*, 712 F.2d 1076 (D.C. Cir. 1983). Referrals that do not include a reasonable showing that they have improved the quality of process are improper. *Id.* The impact on the requester is paramount in analyzing the propriety of referrals. Any improvements to the process must be weighed against the burden on the requestor as a result of the referral. "At the extreme, a procedure that, in practice, imposed very large burdens on requesters (e.g., by compelling them to pay huge processing costs or to submit separate requests to a number of independent bodies) or that resulted in very long delays would be highly difficult to justify." *Id.*

The government argues that the "NSA's referral to the NSC is properly considered a referral" of the type approved by this circuit and notes that these kinds of referrals are performed "as a matter of routine administrative practice." Motion at 5 n.4. Yet if referrals that result in long delays are "highly difficult to justify" according to *McGehee*, the FOIA cannot allow the government to refer a request from one agency to another, and then assert that the recipient agency has no obligation to respond.

II. THE COMPLAINT STATES A CLAIM AGAINST THE NSC BECAUSE THE NSA REFERRED EPIC'S FOIA REQUEST TO THE NSC

If the Court finds that the NSC is subject to the FOIA in this matter, the NSA's referral of EPIC's FOIA Request to the NSC provides a basis for EPIC's suit against the NSC. The Motion argues that EPIC cannot maintain a suit against the NSC "because Plaintiff has never submitted a FOIA request to the NSC." Motion at 6. Defendant's position is incorrect.

No authority suggests that a FOIA requester must re-submit a request after the recipient agency refers the request to a second agency. To the contrary, an agency referral requires the second agency to respond to the requestor. *Schoenman v. FBI*, 2009 U.S. Dist. LEXIS 22060 at *20 (D.D.C. Mar. 19, 2009).

an agency may, in processing a FOIA or PA request, find responsive material that actually originates from another agency ... when that occurs, the agency receiving the FOIA or PA request forwards, or "refers," the document(s) at issue to the second agency, which then becomes responsible for directly responding to the requester as to those documents.

Id. at *20-21. *See also McGehee*, 697 F.2d at 1111 ("To minimize the burden on the requester, this notification and referral would be accorded the status of a FOIA request; the person seeking information would thereby be relieved of the duty to submit a separate demand to the originating agency."); *Keys v. DHS*, 570 F. Supp. 2d 59, 69 (D.D.C. 2008) (finding that an agency improperly withheld records when it refused to disclose documents that were responsive to a referred FOIA request absent "a separate FOIA request.").

Indeed, this Court regularly adjudicates lawsuits brought by FOIA requesters against agencies that received FOIA requests through the referral process, but were never directly served with a FOIA request by the requester. *See, e.g., Physicians for Human Rights v. DOD*, 2009 U.S. Dist. LEXIS 121331 at *4 n2 (D.D.C. Dec. 30, 2009); *Schoenman v. FBI*, 604 F. Supp. 2d 174,

178 (D.D.C. 2009); *Antonelli v. BATFE*, 555 F. Supp. 2d 16 (D.D.C. 2008); *Duncan v. DEA*, 2007 U.S. Dist. LEXIS 38769 (D.D.C. May 30, 2007).

The Court should reject Defendants' suggestion that FOIA requesters must scamper about the federal bureaucracy, directly resubmitting FOIA requests to agencies that have already received identical referrals. Such a holding would lack basis in statute or case law. Further, it would significantly impair requesters' "ability to obtain the records or significantly increase the amount of time [they] must wait to obtain them," a result criticized by the D.C. Circuit in *McGehee. McGehee*, 697 F.2d at 1110.

The cases cited in the Motion are inapposite. *Hidalgo* stands for the proposition that FOIA requesters must exhaust their administrative remedies before they sue.¹ *Hidalgo v. FBI*, 344 F.3d 1256 (D.C. Cir. 2003). However, *Hidalgo* did not involve a referral of a FOIA request from one agency to another, and the Court did not discuss any resubmission requirement for referred FOIA requests. Similarly, *Bruzon v. DEA*, *Ramstack v. Dep't of the Army*, and *Church of Scientology v. IRS* did not involve agency referrals. *Bruzon v. DEA*, 576 F. Supp. 2d 1 (D.D.C. 2008); *Ramstack v. Dep't of the Army*, 607 F. Supp. 2d 94 (D.D.C. 2009); *Church of Scientology v. IRS*, 792 F.2d 146 (D.C. Cir. 1986). These authorities may support the proposition that exhaustion of administrative remedies is important in FOIA cases. But they did not require EPIC to resubmit its FOIA request to the NSC after the NSA referred EPIC's request to the NSC.

¹ The Motion argues that EPIC failed to exhaust its administrative remedies because it did not submit "a FOIA request to [the NSC] prior to the initiation of a lawsuit against that agency." Motion at 6. The Motion does not argue that EPIC failed to exhaust its administrative remedies as to the NSC following the referral. EPIC notes that even if it were required to exhaust such remedies, EPIC constructively exhausted its remedies as to the NSC because it filed this suit more than twenty working days after the NSC received the referral. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (holding a requester is considered to have constructively exhausted administrative remedies and may seek judicial review immediately if . . . the agency fails to answer the request within twenty days); see also 5 U.S.C. § 552(a)(6)(C) (2009).

III. PLAINTIFF'S ADMINISTRATIVE PROCEDURE ACT CLAIM SHOULD NOT BE DISMISSED

The Defendants' motion incorrectly asserts that EPIC's APA claim (Count IV) is premised on a FOIA violation and, thus, is not reviewable by this Court. In fact, EPIC's APA claim does not arise from a facial violation of the FOIA statute; EPIC's claim challenges the NSA's compliance with a freestanding agency regulation, 32 C.F.R. § 286.4. EPIC's APA claim arises from this regulation, and not a FOIA provision. EPIC's Count IV is, in fact, a paradigmatic APA claim, "The reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law.*" 5 U.S.C. § 706. The agency's action in this case was not in accordance with law, because it violated Section 286.4.

Courts often adjudicate lawsuits involving related APA claims and FOIA claims. In fact, this Court adjudicated a lawsuit involving both FOIA claims and an APA challenge to an agency's FOIA referral regulation – the very claims at issue in this action – in *Snyder v. CIA*, 230 F. Supp. 2d 17 (D.D.C. 2002). In another case, the Government even argued that a challenge to agency regulations concerning processing of FOIA requests must be brought under the APA rather than the FOIA. *Or. Natural Desert Ass'n v. Locke*, 572 F.3d 610, 618 (9th Cir. 2009).

The Government relies on *Kenney v. DOJ*, 603 F. Supp. 2d 184 (D.D.C. 2009), *Sierra Club v. DOI*, 384 F. Supp. 2d 1 (D.D.C. 2004), *Physicians Comm. for Responsible Med. v. HHS*, 480 F. Supp. 2d 119 (D.D.C. 2007), and *Edmonds Inst. v. DOI*, 383 F. Supp. 2d 105 (D.D.C. 2005) to support the proposition that EPIC's claim is "premiered on a violation of FOIA." Motion at 7-8. EPIC's claims are distinguishable from the cases cited in the Motion. The cited cases did not involve challenges to freestanding agency regulations. Rather, the Motion relies on authorities in which plaintiffs raised a variety of claims based only on the FOIA: the agency

wrongly withheld documents, failed to respond, or denied fee waivers. In contrast, EPIC's APA claim is premised on the NSA's violation of its own CFR.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this Court to enter an order denying Defendants' partial motion to dismiss.

Respectfully submitted,

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*Mr. Kaprove is barred in the Commonwealth of Virginia, Ms. McCall is barred in the State of Pennsylvania.