

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DAVRIC MAINE CORPORATION, et al.,)
)
 Plaintiffs)
)
 v.)
)
 UNITED STATES POSTAL SERVICE,)
)
 Defendant)

Docket No. 99-380-P-H

RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS

Contending that the plaintiffs’ claim under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, is moot and that this court therefore lacks subject matter jurisdiction over the claim, the defendant moves this court to dismiss this action. I recommend that the court deny the motion.

I. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(1). When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). The court does not draw inferences favorable to the pleader. *Hodgdon v. United States*, 919 F. Supp. 37, 38 (D. Me. 1996). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and*

Procedure § 1350 at 213 (2d ed. 1990); see *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

II. Background

The complaint makes the following relevant factual allegations. On November 3, 1999 the plaintiffs served requests on the defendant for the production of documents pursuant to FOIA. Complaint (Docket No. 1) ¶ 7. All of the requested documents were public records and related to the defendant's selection of a site for a new processing and distribution center for which land owned by plaintiff Davric Maine Corporation had been under consideration. *Id.* ¶¶ 4, 10. When the plaintiffs filed this action on December 21, 1999, the defendant had not responded to the plaintiffs' FOIA requests. Docket; Complaint ¶ 13. Alleging that the time allowed for response to the FOIA request had expired, the complaint seeks injunctive relief ordering the production of the requested documents and payment of the plaintiffs' attorney fees and costs. Complaint at [4].

In support of its motion to dismiss, the defendant contends that it responded to the plaintiffs' FOIA request by letter dated January 27, 2000, Attachment A to Defendant's Motion to Dismiss (Docket No. 3), and that the plaintiffs are now required to exhaust administrative remedies within the Postal Service before this court may exercise jurisdiction over their claims, *id.* at 2-3. The defendant has also provided an explanation of its delay in responding to the request. Declaration of Louis J. Norris, Attachment B to Defendant's Motion to Dismiss.

Pointing out that they had not received any documents as of February 15, 2000, the plaintiffs respond that the defendant's failure to provide a timely response serves as constructive exhaustion of administrative remedies even when the agency serves a FOIA response after suit has been filed,

that the response was not provided in good faith, and that this court must in any event retain jurisdiction to resolve their claim for costs and attorney fees. Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss (Docket No. 5) at [4].

III. Discussion

The Freedom of Information Act provides, in relevant part, as follows:

(a) Each agency shall make available to the public [certain specified] information . . .

* * *

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * *

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall —

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination;

* * *

(B)(i) In unusual circumstances . . . the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

* * *

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the

agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

* * *

(b) This section does not apply to matters that are —

* * *

(3) specifically exempted from disclosure by statute . . .

5 U.S.C. § 552.

In its response to the plaintiffs' request, the defendant declined to make certain documents available, relying on 39 U.S.C § 410, which provides, in relevant part:

(a) Except as provided by subsection (b) of this section . . . no Federal law dealing with [certain things], including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) section 552 (public information) . . .

* * *

(c) Subsection (b)(1) of this section shall not require the disclosure of —

* * *

(2) information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed; . . .

In support of its motion to dismiss, the defendant relies on *Voinche v. FBI*, 999 F.2d 962 (5th Cir. 1993). In that case, the Fifth Circuit held, with a minimum of discussion, that when a federal agency responded to a FOIA request after suit had been filed due to the agency's failure to respond

within the FOIA time limits, the plaintiff was required to “challenge[] the adequacy of the [agency’s] response administratively,” and upheld summary judgment in the agency’s favor because “a suit pursuant to § 552(a)(6)(C) challenges only the timeliness of an agency’s response.” 999 F.2d at 963.

The plaintiff relies on *Pollack v. Department of Justice*, 49 F.3d 115 (4th Cir. 1995), in which the Fourth Circuit held that an agency that fails to respond to a FOIA request before suit is filed “may not insist . . . that administrative remedies be exhausted,” *id.* at 118, and that the fact that “further agency activity was taking place” on the request “while [the] enforcement action was pending in court” did not deprive the court of jurisdiction, *id.* at 119.¹ I am persuaded by the more extensive discussion of this issue in *Pollack* that the defendant’s provision of a response to the plaintiffs’ FOIA request after this action was filed does not divest this court of jurisdiction over the plaintiffs’ claim. In addition, the plaintiffs’ complaint cannot be read to challenge only the timeliness of the defendant’s response or to be limited to a claim under 5 U.S.C. § 552(a)(6)(C). FOIA clearly provides authority for the courts to order the production of records improperly withheld, 5 U.S.C. § 552(a)(4)(B), authority which cannot be construed as limited to consideration of the timeliness of the agency’s response. The defendant chose not to respond to the plaintiffs’ FOIA request in a timely manner and not to invoke the provision of FOIA allowing it to seek a modification of the plaintiffs’ request, 5 U.S.C. § 552(a)(6)(B)(ii)-(iii). While the plaintiffs could

¹ The plaintiffs state that two other circuits agree with *Pollack*, Plaintiffs’ Opposition at [7], but in fact each of those two opinions holds only that, where a plaintiff chooses to wait for an agency response to his FOIA request beyond the statutory deadline, he must actually exhaust his administrative remedies before a federal court has jurisdiction to review the agency’s response. *Taylor v. Appleton*, 30 F.3d 1365, 1369 (11th Cir. 1994); *Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 64 (D.C. Cir. 1990). While these holdings are not inconsistent with *Pollack* (and, as noted by the *Taylor* court, 30 F.3d at 1369, not necessarily inconsistent with *Voinche*), they are distinguishable from *Pollack* and from the instant case. *See also McDonnell v. United States*, 4 F.3d 1227, 1240 (3d Cir. 1993).

not have known when they filed their complaint that the defendant would in fact withhold some of the documents they requested, they should not be forced to undergo administrative appeals procedures within the Postal Service, with their inevitable delays in the final resolution of disputes over specific documents, on a schedule determined by the Postal Service's flouting of the statutory requirements.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 3rd day of March, 2000.

*David M. Cohen
United States Magistrate Judge*