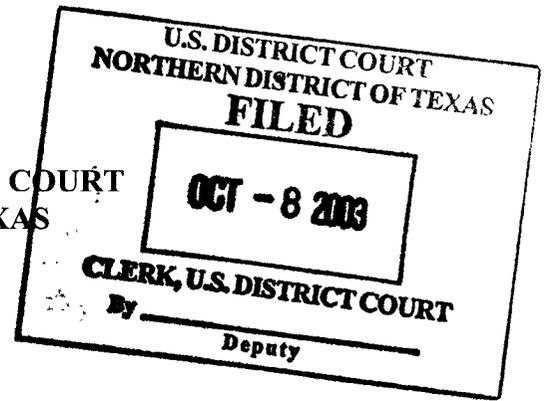


Original

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



ROBERT P. POTTS, et al.,
Plaintiffs,

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v.

Civil Action No. 3:02-CV-1599-M

UNITED STATES DEPARTMENT OF
THE TREASURY,
Defendant.

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

Pursuant to the District Court’s Order of Reference, entered July 22, 2003, “Defendant’s Motion to Dismiss,” filed July 1, 2003, is before this Court for hearing, if necessary, and for recommendation. The Court held a hearing on this matter on August 14, 2003. Having considered the arguments of the parties in connection with the pleadings, the Court hereby **RECOMMENDS** that the motion be **GRANTED** to the extent discussed below and that the case be **DISMISSED without prejudice**.

I. Background

On July 26, 2002, Plaintiffs Oswaldo Cajas, Matilde Cajas, Robert Potts and Store Decor Company, Inc. (collectively “Plaintiffs”) filed a Complaint pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, against Defendant, the United States Department of the Treasury (“Defendant”). The following facts are undisputed.

1. On May 15, 2002, Plaintiffs Robert Potts and Store Decor Company, Inc. requested by letter that their Internal Revenue Service (“IRS”) administrative files for the tax periods 1999 and 2000 be produced, of which Defendant acknowledged receipt on May 20, 2002;

2. On May 29, 2002, Plaintiffs Oswaldo and Matilde Cajas requested by letter that their IRS administrative files for the tax periods 1996 through 2000 be produced, of which Defendant acknowledged receipt on June 10, 2002;
3. In its June 12, 2002 letter to Robert Potts and Store Decor Company, Inc., and in its July 18, 2002 letter to Oswaldo and Matilde Cajas, Defendant stated that it could not meet the statutory time limits, and requested additional time to locate and consider releasing the IRS records covered in the FOIA requests;
4. Defendant has provided numerous documents to Plaintiffs regarding their FOIA requests;
5. Plaintiffs have no knowledge of and cannot point the Court to any particular document that Defendant has withheld concerning Plaintiffs' multiple FOIA requests.

Defendant moves this Court to dismiss the current action as moot because the Internal Revenue Service ("IRS") has provided all documents responsive to Plaintiffs' FOIA requests, because Plaintiffs are not challenging the IRS's justifications for withholding certain documents under applicable FOIA exemptions,¹ and because Plaintiffs are satisfied with the disclosures. (D.'s Motion to Dismiss). Defendant therefore seeks dismissal of this case pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

II. Analysis

A. Rule 12(b)(1) Legal Standard

Federal Rule of Civil Procedure 12(b)(1) governs challenges to a court's subject matter

¹ Defendant has properly withheld specific documents with regard to Plaintiffs Potts and Store Decor Company "under FOIA Exemptions 5, 7, and 3, as it incorporates 26 U.S.C. § 6103." (D.'s Original Answer at 2; P.s' Response to D.'s Motion to Dismiss).

jurisdiction. “A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.” *Home Builders Ass’n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996)). In ruling on a motion to dismiss pursuant to Rule 12(b)(1), the court may consider: “(1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir. 1986) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)).

In reviewing a Rule 12(b)(1) motion, however, the court must first determine whether the defendant has made a facial or factual attack on the plaintiff’s complaint. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). A defendant makes a facial attack by merely filing a Rule 12(b)(1) motion, in which case “the trial court is required merely to look to the sufficiency of the allegations in the complaint because they are presumed to be true.” *Id.* On the other hand, a defendant makes a factual attack by submitting “affidavits, testimony, or other evidentiary materials,” in which case a plaintiff must “submit facts through some evidentiary method and has the burden of proving by a preponderance of the evidence that the trial court does have subject matter jurisdiction.” *Id.* Here, Defendant has made a factual attack as it has submitted a declaration in its Reply, and the Court also held an evidentiary hearing concerning the motion to dismiss on August 14, 2003.

B. FOIA Jurisdiction

Jurisdiction in a FOIA suit is based upon the plaintiff showing that an agency has improperly withheld agency records. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136,

150 (1980). If, however, the agency establishes that all responsive records have been released to the requester, the suit should be dismissed on mootness grounds as there is no justiciable case or controversy. *Voinche v. F.B.I.*, 999 F.2d 962, 963 (5th Cir. 1993) (holding that Plaintiff's "claim was rendered moot by the FBI's response to his request."); *Gambini v. United States Customs Serv.*, No. 5:01-CV-300, 2001 U.S. Dist. LEXIS 21336, at *4 (N.D. Tex. Dec. 21, 2001) ("Insofar as Plaintiff is challenging the tardiness of the Customs Service response, or its failure to respond, his claim has been rendered moot by the agency's response to his request...."). Moreover, the Freedom of Information Act requires exhaustion of administrative remedies, with regard to both the timeliness and the adequacy of an agency's response, prior to seeking judicial review. *Voinche*, 999 F.2d at 963; *Gambini*, 2001 U.S. Dist. LEXIS 21336, at *4 ("A claim that an agency has failed to timely respond to a request is, however, distinct from a claim that the agency has denied a party's request for records.").

In *Voinche*, the plaintiff filed a FOIA suit arguing that the Federal Bureau of Investigation had failed to release certain documents pursuant to his FOIA request. *Voinche*, 999 F.2d at 963. The Fifth Circuit affirmed the dismissal of Plaintiff's suit because he "had failed to exhaust his administrative remedies regarding his challenge to the adequacy of the FBI's response to his FOIA request and because [his] suit under § 552(a)(6)(A)(i) had been rendered moot by the FBI's response to his FOIA request." *Id.* Here, Plaintiffs' factual circumstances are analogous to the facts in *Voinche*. To the extent that Plaintiffs' complaint is based on the tardiness of Defendant's response to their FOIA requests,² their claim has been rendered moot because the IRS produced the

² Count one of Plaintiffs' Original Complaint states: "Plaintiffs have a statutory right to release of the records requested from the Department in their May 15 and 29, 2002 letters, and there is no legal basis for the Department's failure to make those records available *promptly*." (P.s' Original Complaint at 4) (emphasis added).

documents.

During the August 14, 2003 hearing, Defendant's counsel stated that the IRS has provided everything to the Cajas's pursuant to their original FOIA request. The Cajas's were not satisfied with the information provided, and then subsequently clarified their request twice, each time asking for more specific documents. Defendant's counsel further stated that the IRS was able to conduct a more thorough search following Plaintiffs' more specific requests. (August 14, 2003 Hearing; D.'s Reply to P.s' Opposition to D.'s Motion to Dismiss, Ex. A). The following exchanges also took place during the August 14, 2003 hearing:

Court: What is it that you think [the IRS has to] produce?

P.s' Counsel: Your honor...we don't know.

D.'s Counsel: The [IRS] has gone above and beyond the terms of the [FOIA] to provide the documents that Plaintiffs requested....

Court: In regards to the defendant's motion to dismiss, [the IRS has] complied with all of your requests.... [E]ach time that [the IRS] went back and researched, you then narrowed the scope of their search.

Court: What haven't they provided?

P.s' Counsel: Your Honor, there is no way to answer that.

Court: Well they've made a diligent search for all of the documents you've requested. Is there something

Additionally, Count two of Plaintiffs' Original Complaint is entitled "Pattern or Practice of *Untimely* Responses to FOIA Requests." (*Id.*) (emphasis added).

out there that you know about that you think [the IRS] should've produced to you?

P.s' Counsel: No, I cannot point the Court to anything in particular. Your Honor, the only reason not to grant the motion to dismiss is the pending attorney's fees request.

(See also D.'s Reply to P.s' Opposition to D.'s Motion to Dismiss, Ex. A)

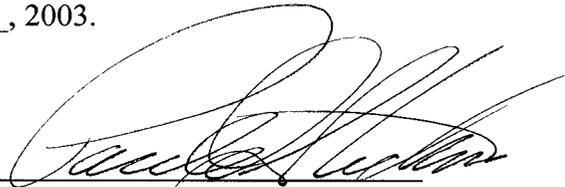
Furthermore, Plaintiffs have failed to submit any evidence of exhausting their administrative remedies regarding the adequacy of Defendant's response to their FOIA requests. The only evidence Plaintiffs put forth in asserting this Court's subject matter jurisdiction is a statement that "[t]he government's Motion to Dismiss is premature."³ (P.s' Response to D.'s Mot. to Dismiss). Interestingly enough, Plaintiffs further *agree with Defendant* that the case is moot and properly subject to dismissal "[w]hen the government eventually provides all of the documents pursuant to a [FOIA] Request, or certifies that it has complied and no documents responsive to the request exists [sic]." (*Id.*). Here, Defendant has done just that, and Plaintiffs have failed to meet their burden in establishing this Court's subject matter jurisdiction.

³ Because Plaintiffs offer nothing in support of this conclusory statement, the Court will infer that it relates to Plaintiffs' pending motions before the Court.

III. Recommendation

For the foregoing reasons, the Court **RECOMMENDS** that “Defendant’s Motion to Dismiss,” filed July 1, 2003, be **GRANTED**. The Court further **RECOMMENDS** that the case be **DISMISSED without prejudice**.

SO RECOMMENDED. October 8, 2003.

A handwritten signature in black ink, appearing to read "Paul D. Stickney", written over a horizontal line.

PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT**

The United States District Clerk shall serve a true copy of these findings, conclusions and recommendation on the parties. Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions and recommendation must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. A party's failure to file such written objections to these proposed findings, conclusions and recommendation shall bar that party from a *de novo* determination by the District Court. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985); *Perales v. Casillas*, 950 F.2d 1066, 1070 (5th Cir. 1992). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).



PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE