Legal Opinion Letter

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RESOLVING A FOIA "CATCH-22": D.C. CIRCUIT ADDRESSES IMPEDIMENT TO ACCESSING GOVERNMENT INFORMATION

by
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Although the Freedom of Information Act (FOIA) was enacted decades ago, confusion apparently reigned within federal agencies about what precisely the statute requires them to do within 20 business days. In a lawsuit brought by Citizens for Responsibility and Ethics in Washington (CREW) against the Federal Election Commission (FEC), the U.S. Court of Appeals for the D.C. Circuit resolved this question in an opinion issued April 2, 2013.[1] The court accepted CREW's argument that because the FEC had failed to make the determination required by the FOIA within 20 business days, CREW could properly rely on the FOIA's constructive exhaustion provision to file suit in district court.

CREW's lawsuit was based on a FOIA request to the FEC for records pertaining to communications between the three Republican commissioners and outside individuals and entities. The FEC immediately acknowledged receipt of CREW's request, and the parties had several conversations during the next few weeks about the scope of the request and how the FEC should prioritize its search. The FEC agreed to provide documents on a rolling basis and initially agreed to give CREW a schedule for production, but failed to honor that agreement. More than two months later, when the FEC had yet to produce a single document or a timetable for production, CREW sued alleging the FEC had wrongfully withheld documents under the FOIA. Once in litigation, the FEC began to produce documents and, after three separate productions, moved to dismiss the complaint on the basis that CREW had failed to exhaust administrative remedies. The district court agreed, concluding the agency had made the "determination" the FOIA requires by committing to produce documents on a rolling basis, thereby forcing CREW to go through the administrative appeal process before filing suit.

On appeal, the D.C. Circuit reversed, finding the exhaustion issue hinged on whether the FEC's administrative response qualifies as a "determination" under the FOIA. The relevant statutory language mandates that within 20 days of receiving FOIA requests agencies "determine . . . whether to comply with such request," and notify the requester immediately 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." 5 U.S.C. § 552(a)(6)(A)(i). After examining this language, the FOIA's legislative history, and the structure of the statute as a whole, the appellate court concluded a "determination" within the meaning of the FOIA requires an agency in receipt of a FOIA request to do three separate things within 20 business days: (1) "gather and

[1] *CREW v. Fed. Election Comm'n*, 711 F.3d 180 (D.C. Cir. 2013). The district court decision is found at 839 F. Supp. 2d 17 (D.D.C. 2011).

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review" responsive documents; (2) "determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents"; and (3) "inform the requester that it can appeal whatever portion of the 'determination' is adverse." 711 F.3d at 188.

The D.C. Circuit based its decision on four factors. First, in making a determination, the FOIA requires an agency to notify the requester "of the reasons therefor." The court reasoned this makes sense only if the agency has decided whether to produce the requested documents and thereby has reasons to offer. Second, the FOIA requires an agency when making a determination to notify the requester of appeal rights. Again, this makes sense only if there is something to appeal, *i.e.*, if the agency actually has denied some aspect of the request. Third, the FOIA contains a safety valve in its "unusual circumstances" provision, which permits an agency in certain circumstances to extend by 10 working days the 20-day response period. This provision would be unnecessary under the government's interpretation, as an agency could instead procure an indefinite extension merely by promising to produce non-exempt documents at some time in the future. Fourth, the FOIA provides for additional time for an agency to complete its review of documents once in litigation if the agency can show "exceptional circumstances." Again, this provision would be redundant under the government's theory of what the FOIA requires as a "determination."

The impact of this decision is best understood by considering what a victory for the government would have meant. The FEC argued the FOIA's determination provision required only that it tell the requester within 20 business days the agency intended to produce non-exempt responsive documents and claim exemptions at some unidentified time in the future. According to the FEC, if an agency has done this, a requester cannot file suit in district court until it has exhausted the administrative appeal process – something it cannot do until the agency finishes processing the request, has turned over all non-exempt documents, and has advised the requester what documents it is withholding and why. Had the court accepted the agency's interpretation, requesters could have been placed in limbo for months, if not years, awaiting final action by the agency, with no ability to seek judicial relief in the interim. Or, as the D.C. Circuit framed it, the FEC's interpretation creates a "Catch-22" that leaves the requester with nothing to appeal administratively, "because the agency has not provided the necessary information," yet without resort to the courts, "because the requester has not appealed within the agency." 711 F.3d at 186. Agencies could have delayed responding indefinitely simply by sending letters to requesters acknowledging receipt of their requests and promising to process the requests at some future date. Such a result would have made a mockery of the FOIA's 20-day requirement, and eviscerated the FOIA's constructive exhaustion provision.

Agencies likely will complain, as did the FEC here, that the court's interpretation places a burden on them they cannot realistically satisfy within 20 business days. The D.C. Circuit addressed this concern, noting it "agree[d] entirely with the FEC on this point." 711 F.3d at 190. The court went on to note, however, that the FOIA "recognizes and accommodates that reality," by according agencies that can show unusual circumstances an additional 10 days, and allowing agencies facing exceptional circumstances to stay litigation in order to complete processing. *Id.* Ultimately, the court said, if the executive branch is unhappy with the statute Congress drafted, its remedy is to seek new legislation.

The government's position in this case not only lacked legal merit, but also reflects an attitude about the FOIA that cannot be reconciled with memoranda issued by both the president and attorney general directing that the FOIA be implemented with a presumption of disclosure. Perhaps the greatest impediment to a more transparent government is the inordinate delay FOIA requesters face at nearly every agency. Judicial review often provides the only method to prod agencies into producing records or holding them accountable for their failure to do so. In an ideal world, judicial review would not be necessary. Unfortunately, the real world of FOIA is far from ideal, but the D.C. Circuit's opinion in *CREW v. FEC* restores some parity to the process.

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