UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DETENTION WATCH NETWORK and CENTER FOR CONSTITUTIONAL RIGHTS,

Plaintiffs,

- against -

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

No. 14 Civ. 583 (LGS)

ECF Case

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT UNITED STATES DEPARTMENT OF HOMELAND SECURITY'S MOTION TO DISMISS

PREET BHARARA
United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2741
Facsimile: (212) 637-2750
E-mail: natalie.kuehler@usdoj.gov

NATALIE N. KUEHLER
Assistant United States Attorney
- Of Counsel -

Defendant United States Department of Homeland Security ("DHS") respectfully submits this memorandum of law in support of its motion to dismiss all claims against DHS for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), or, in the alternative, for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[1]

PRELIMINARY STATEMENT

Plaintiffs Detention Watch Network ("DWN") and Center for Constitutional Rights ("CCR" and, together with DWN, "Plaintiffs") filed this lawsuit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, against United States Immigration and Customs Enforcement and DHS for failure to produce records in response to a FOIA request. Plaintiffs' claims against DHS, however, must fail, because they were never administratively exhausted.

BACKGROUND

A. Plaintiffs' FOIA Request and Court Proceedings

On December, 2013, DHS received a FOIA request from Plaintiffs seeking a vast array of records relating to Defendants' relationship with private prison corporations and their implementation of what Plaintiffs refer to as the Detention Bed Mandate. *See* Declaration of James V.M.L Holzer, dated March 5, 2013, (the "Holzer Decl.") ¶ 9 and Ex. A (FOIA Request dated November 25, 2013, the "FOIA Request"). The 8-page, single-spaced FOIA Request seeks the release of records that Plaintiffs grouped into nine different substantive categories, several of which contain multiple subparts. *Id.* Four of the categories, for example, request all paper or electronic records "related to" or "about" press communications, releases from detention due to budget constraints or loss of funding, ICE or DHS communications with "local, state or Congressional officials or law enforcement agencies" related to the monetary impact or

[1] This motion is filed solely on behalf of defendant DHS, and seeks no relief as to claims against defendant Immigration and Customs Enforcement.

contractual implications of detaining individuals, and "the relationship between ICE and private prison corporations." *Id.*

On December 6, 2013, DHS sent Plaintiffs a letter acknowledging receipt of their FOIA Request, and advising Plaintiffs that their Request did not comply with DHS FOIA regulations because it was "too broad in scope or did not specifically identify the records which you are seeking," and therefore did not enable government employees to locate the records. *Id.* ¶ 10 and Ex. B. The letter stated that the FOIA Request would be administratively closed unless a response providing a more detailed description of the records sought was provided within 30 days. *Id.* ¶ 11 and Ex. B. DHS received no further communications from Plaintiffs in connection with their FOIA Request, and closed its file on the Request on January 8, 2014. *Id.* ¶¶ 13, 14. Plaintiffs did not submit any administrative appeal of DHS's decision. *Id.* ¶¶ 15. Instead, on January 30, 2014, Plaintiffs filed a complaint in this lawsuit, followed eleven days later by a motion for a preliminary injunction.

ARGUMENT

The Court Should Dismiss the Complaint Against DHS for Failure to Exhaust

A. Governing Legal Standards

In considering a motion to dismiss pursuant to Rule 12(b)(6), a court must accept as true the well-pleaded factual allegations set forth in the complaint and draw all reasonable inferences in favor of the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). In so doing, the Court need not give "credence to plaintiff's conclusory allegations" or legal conclusions offered as pleadings. *Cantor Fitzgerald v. Lutnick*, 313 F.3d 704, 709 (2d Cir. 2002) (internal quotation marks omitted). Indeed, the court should begin by "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. 679. If

well-pleaded factual allegations exist, the court must then determine whether they plausibly give rise to an entitlement for relief. *Id.*

When determining the sufficiency of a claim for Rule 12(b)(6) purposes,

> consideration is limited to the factual allegations in plaintiffs' . . . complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.

Brass v. Am. Film Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993). Where a Rule 12(b)(6) motion is based on a plaintiff's failure to exhaust administrative remedies, the Court may consider agency proof that the plaintiff did not exhaust those remedies without converting the motion from one for dismissal under Rule 12(b)(6) to a motion for summary judgment. *See Holowecki v. Federal Express Corp.*, 440 F.3d 558, 565 (2d Cir. 2006) ("In reviewing the Rule 12(b)(6) ruling, it is proper for this court to consider the plaintiffs['] relevant filings with the EEOC . . ., none of which were attached to the complaint, because the Holowecki plaintiffs' [sic] rely on these documents to satisfy the ADEA's time limit requirements."), *aff'd*, 552 U.S. 389, 128 S. Ct. 1147 (2008); *Marshall v. Nat. Assoc. of Letter Carriers*, Nos. 00 Civ. 3167 (LTS), 01 Civ. 3086 (LTS), 2003 WL 223563, at *8 n.3 (S.D.N.Y. Feb 3, 2003) (considering Precomplaint Counseling Form, EEO Complaint, EEO agency's final decision, and EEOC decision in granting a Rule 12(b)(6) motion to dismiss); *cf. Thomas v. Westchester County Health Care Corp.*, 232 F. Supp. 2d 273, 276 (S.D.N.Y. 2002) (considering records from state administrative proceedings in dismissing a Title VII case under Rule 12(b)(6)).

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the plaintiff bears the burden of establishing that jurisdiction exists by a preponderance of the evidence. *Makarova v. United States*, 201 F.3d 110,

113 (2d Cir. 2000). In ruling on such a motion, a court may consider evidence outside the pleadings without converting the motion to dismiss into a motion for summary judgment. *Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002).

B. Plaintiffs' Failure to Exhaust their Claims Against DHS Requires Dismissal

Plaintiffs failed to exhaust their administrative remedies against DHS as required under FOIA. Exhaustion is "a mandatory prerequisite to a lawsuit under FOIA[.]" *Wilbur v. CIA*, 355 F.3d 675, 676 (D.C. Cir. 2004) (per curiam); *see also Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994) ("The FOIA clearly requires a party to exhaust all administrative remedies before seeking redress in federal courts.") (internal citations omitted); *NAACP Legal Def. & Educ. Fund v. HUD*, No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at * 3 (S.D.N.Y. Nov. 30, 2007) ("FOIA requires the exhaustion of administrative remedies as a precondition to suit") (internal quotations and citations omitted); *Sussman v. U.S. DOJ*, No. 03 Civ. 3618 (DRH) (ETB), 2006 WL 2850608, at *4 (E.D.N.Y. Sept. 30, 2006) ("[U]nder the FOIA, administrative remedies must be exhausted prior to judicial review."); *Kennedy v. U.S. DHS*, No. 03-CV-6076 (CJS) (FE), 2004 WL 2285058, at *5 (W.D.N.Y. Oct. 8, 2004) ("[P]laintiff's failure to exhaust bars judicial review."). Exhaustion allows "the agency [] an opportunity to exercise its discretion and expertise on the matter and make a factual record to support its decision." *Wilbur*, 355 F.3d at 677 (internal quotations and citations omitted).

An appeal is an essential part of administrative exhaustion in a FOIA case. *See Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 61–62 (D.C. Cir. 1990). The right to administratively appeal an adverse determination is set forth in Section 552(a)(6)(A) and agency regulations. *See* 5 U.S.C. § 552(a)(6)(A); *see also* 6 C.F.R. § 5.9 (setting forth DHS appeal regulations). DHS's regulations require that adverse determinations be appealed in writing to DHS's Office of

Information and Privacy ("OIP") prior to seeking review by a court. *See* 6 C.F.R. § 5.9. "Courts have consistently confirmed that the FOIA requires exhaustion of this appeal process before an individual may seek relief in the courts." *Oglesby*, 920 F.2d at 61–62. Accordingly, "foregoing an administrative appeal will preclude the requester from ever bringing suit on that [FOIA] request because the individual will not have exhausted his administrative remedies." *Id*. at 65; *see also Hogan v. Huff*, No. 00 Civ. 6753 (VM), 2002 WL 1359722, at *5-6 (S.D.N.Y. June 21, 2002) ("Courts have consistently held that FOIA requires completion of [the agency's] appeals process before an individual may seek judicial relief.").

There are two separate and distinct statutory deadlines that are relevant to the exhaustion analysis presented in this case. The first deadline concerns a request for expedited processing of the FOIA request. If the request seeks expedited treatment, the agency must determine whether to grant expedition, and provide notice of its determination, within ten days of receiving the request. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I). The second deadline concerns the requester's substantive FOIA request. An agency typically has twenty working days after receipt of a FOIA request to respond to that request. *See* 5 U.S.C. § 552(a)(6)(A)(i). The agency may extend this deadline up to ten working days if presented with "unusual circumstances." 5 U.S.C. § 552(a)(6)(B)(i). Thus, upon receipt of an expedited processing request for documents under FOIA, an agency must decide within ten calendar days whether to grant or deny the expedited treatment request and, independently of the expedited treatment request, must also determine and notify the requester within twenty working days (or thirty working days, if an extension is required) whether it will comply with the underlying demand to provide substantive documents. The requester must administratively appeal DHS's decisions regarding expedited processing and

the substance of the request if he or she "wish[es] to seek review by a court of any adverse determination." 6 C.F.R. § 5.9(c).

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*, 920 F.2d at 61 (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*, 30 F.3d at 1369. Although FOIA also specifies limited circumstances under which a requester will be deemed to have "constructively exhausted" administrative remedies, this type of exhaustion is only available if an agency has failed to meet the applicable statutory deadline for responding. *See Spannaus v. U.S. DOJ*, 824 F.2d 52, 58 (D.C. Cir. 1987); 5 U.S.C. § 552(a)(6)(C)(i) ("[a]ny person making a request to any agency for records under . . . 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.").

While courts agree that a failure to exhaust administrative remedies requires dismissal, they disagree on a question that has no practical significance for purposes of this motion, namely, whether the resulting dismissal is for lack of subject matter jurisdiction under Rule 12(b)(1), or for failure to state a claim under Rule 12(b)(6). We are unaware of a definitive ruling by the Second Circuit on this question; the D.C. Circuit has held that such dismissals are properly under Rule 12(b)(6), *see Hildalgo v. FBI*, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003) (opining that the exhaustion requirement is not jurisdictional because "the FOIA does not unequivocally make it so," but then explaining that exhaustion is required if "'the purposes of

exhaustion' and the 'particular administrative scheme' support such a bar" (quoting *Oglesby*, 920 F.2d at 61)),[2] while other courts, including the Third and Ninth Circuits in reported decisions, have imposed or affirmed such dismissals under Rule 12(b)(1), *see McDonnell*, 4 F.3d at 1240 & n.9 (Third Circuit affirmance of dismissal for lack of subject matter jurisdiction because plaintiff failed to exhaust administrative remedies; noting that under FOIA failure to exhaust does not "per se" deprive court of jurisdiction but that non-exhaustion is a "prudential consideration that the court takes into account in deciding whether to exercise subject matter jurisdiction"); *Trenerry v. IRS*, No. 95-5150, 1996 WL 88459, at *1 (10th Cir. Mar. 1, 1996) (district court lacked subject matter jurisdiction "where plaintiff has failed to exhaust her administrative remedies"); *Hymen v. MSPB*, 799 F.2d 1421, 1423 (9th Cir. 1986) (same); *Robert VIII v. Dep't of Justice*, No. 05-CV-2543, 2005 WL 3371480, at *7 (E.D.N.Y. Dec. 12, 2005) (court "lacks subject matter jurisdiction over a requester's claim where the requester has failed to exhaust the administrative remedies provided under the FOIA statute"), *aff'd as modified on other grounds*, 2011 WL 3890446 (2d Cir. Sept. 6, 2011).

Here, whether the Court construes the administrative exhaustion requirement as a jurisdictional or a prudential prerequisite to suit, the outcome is the same: Plaintiff's failure to actually or constructively exhaust their claims compels dismissal of this action against DHS. DHS's time to act on Plaintiffs' FOIA Request began running on December 2, 2013, the day it actually received the Request. 6 C.F.R. § 6(b). DHS responded to the Request on December 6,

---

[2] *See also, e.g.*, *Taylor*, 30 F.3d at 1367 n.3 (unexhausted FOIA claim "should have been dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted"); *Scherer v. Balkema*, 840 F.2d 437, 443 (7th Cir. 1988) (ruling that plaintiff failed to state a claim when he failed to allege exhaustion of administrative remedies); *Jones v. Dep't of Justice*, 576 F. Supp. 2d 64, 66 (D.D.C. 2008) ("It is settled in this circuit, however, that exhaustion of administrative remedies in a FOIA case is *not* a jurisdictional bar to judicial review . . . the matter is properly the subject of a motion brought under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.") (emphasis in original; citation omitted).

2013. Holzer Decl. ¶¶ 10-11. DHS's timely response advised Plaintiffs that their Request was overly broad and insufficiently defined under DHS's FOIA regulations, and would be closed without further action by Plaintiffs for that reason. *See* Holzer Decl. ¶¶ 14-16. Plaintiffs never appealed this determination. *Id.* Plaintiffs' claims against DHS must, therefore, be dismissed for failure to exhaust. *See Oglesby*, 920 F.2d at 61-62; *Lowe v. DEA*, Civil Action No. 06-1133 (CKK), 2007 WL 2104309, at *6 (D.C.C. July 22, 2007) (finding that agency's timely FOIA response triggered requester's obligation to seek administrative review prior to filing suit in district court).

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint against Defendant DHS should be dismissed in its entirety.

Dated: New York, New York
March 5, 2014

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: */s/ Natalie N. Kuehler*

NATALIE N. KUEHLER
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2741
Facsimile: (212) 637-2750
E-mail:natalie.kuehler@usdoj.gov