IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SOUTHEASTERN LEGAL FOUNDATION, INC.,	
Plaintiff,	**CIVIL ACTION FILE**
v.	**NO. 1:19-CV-3429-MHC**
UNITED STATES DEPARTMENT OF JUSTICE,	
Defendant.	

ORDER

Plaintiff Southeastern Legal Foundation, Inc. ("SLF") brings this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel Defendant United States Department of Justice ("DOJ") to produce records responsive to SLF's May 24, 2019, request for documents. See Compl. [Doc. 1]. Before the Court is DOJ's Motion to Dismiss [Doc. 12].

I. BACKGROUND[1]

SLF submitted a FOIA request to the Federal Bureau of Investigation ("FBI") on May 24, 2019. Compl. ¶ 3. In the request, SLF sought:

> All records regarding, reflecting, or related to any orders, opinions, decisions, sanctions, or other records related to any investigation or finding by the Foreign Intelligence Surveillance Court (FISC), any other court, any state licensing bar, any disciplinary committee, or any other entity, that any attorney violated the FISC Rules of Procedure or applicable Rules of Professional Conduct in connection with the Carter Page [Foreign Intelligence Surveillance Act ("FISA")] application and renewals or the Section 702 violations the government orally advised the FISC about in October 2016;
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> All records regarding, reflecting or related to any orders, opinions, decisions, sanctions, or other records finding by the FISC, any other court, any state licensing bar, any disciplinary committee, or any other entity, that any attorney violated or did not violate FISC Rule of Procedure 13, specifically, in connection with the Carter Page FISA application and renewals or the Section 702 violations the government orally advised the FISC about on October 24, 2016; and
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> All records regarding, reflecting or related to any referral or complaint made to any attorney disciplinary body for conduct related to the Carter Page FISA application and renewals or the Section 702 violations the government orally advised the FISC about on October 24, 2016.

Id. ¶ 12.

[1] Because this case is before the Court on motions to dismiss, the facts are presented as alleged in the Complaint. See Silberman v. Miami Dade Transit, 927 F.3d 1123, 1128 (11th Cir. 2019) (citation omitted).

The FBI received SLF's request on May 28, 2019. Id. ¶ 14. SLF received a letter from the FBI dated June 17, 2019, indicating that the request had been designated as "FOIA Request 1439393-000." Id. ¶ 15. Thirty-one days passed with no response to the request, and on July 30, 2019, SLF filed its Complaint. Id. ¶ 16. At the time SLF filed its Complaint, the DOJ had failed to produce any requested records or respond in any other way within the twenty-day time limit provided by the FOIA. Id. ¶¶ 5, 18.

Based on the foregoing, SLF asserts a FOIA claim, alleging that the DOJ violated FOIA by failing to respond or produce any non-exempt records responsive to SLF's request. Compl. ¶¶ 19-23. SLF requests, in relevant part, that this Court enter an order: (1) directing the DOJ to preserve all potentially responsive records; (2) directing the DOJ to conduct searches responsive to SLF's FOIA request; (3) directing the DOJ to produce by a certain date any non-exempt records responsive to its request; and (4) enjoining the DOJ from continuing to withhold responsive records.[2] Id. ¶¶ 24-27.

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[2] The Court finds that SLF has constructively exhausted its administrative remedies. FOIA requires exhaustion of administrative remedies as a condition precedent to filing suit in the district court, Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994), and the burden is on the plaintiff to prove such exhaustion, Roman v. Nat'l Reconnaissance Office, 952 F. Supp. 2d 159, 165 (D.D.C. 2013) (citing Brown v. F.B.I., 793 F. Supp. 2d 368, 380 (D.D.C. 2011)). SLF alleges that it exhausted its administrative remedies because "[the DOJ] was required to make

On December 12, 2019, the DOJ moved to dismiss SLF's Complaint as moot under Federal Rule of Civil Procedure 12(b)(1).[3] Def.'s Mem. of Law in Supp. of its Mot. to Dismiss ("Def.'s Mem.) [Doc. 12-1] at 1. The DOJ attached to its motion the response to SLF's FOIA request. Ex. 1 to Mot. to Dismiss ("FBI Req. Resp.") [Doc. 12-2]. The FBI Request Response, dated December 11, 2019, states that the agency "conducted a search of the places reasonably expected to have records. However, we were unable to identify records responsive to your

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a final determination of SLF's FOIA Request within the time limits set by FOIA," and that such "determination was due by July 29, 2019." Compl. ¶ 22. The DOJ does not dispute this allegation.

"Constructive exhaustion occurs when certain statutory requirements are not met by the agency," such as when "the agency fails to comply with the applicable time limit provisions of this paragraph." Taylor, 30 F.3d at 1368 (quoting 5 U.S.C. § 552(a)(6)(C)). An agency has twenty days after receiving a FOIA request to determine whether to comply with the request and to notify the requester of the determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i). Here, there is no dispute that the DOJ failed to respond prior to the filing of the Complaint on July 30, 2019, and its response sent almost six months later does not preclude judicial review. Cf. Taylor, 30 F.3d at 1369 (citing Oglesby v. United States Dep't of Army, 920 F.2d 57 (D.C. Cir.1990)) (adopting the rationale of the United States Court of Appeals for the District of Columbia Circuit, when it held that the right to judicial review based on constructive exhaustion would lapse if an agency belatedly responded to a request before the suit was filed).

[3] The Court notes that, between SLF's filing of the Complaint on July 30, 2019, and the DOJ's filing of its Motion to Dismiss on December 12, 2019, the DOJ filed two consent motions for extensions of time to answer [Docs. 8 & 10].

request." FBI Req. Resp. at 1. The FBI also notified SLF that it could seek an appeal of the response within ninety (90) days of the date of the letter. Id. at 2.

In response to the Motion to Dismiss, SLF provided the Court with the Declaration of Kimberly S. Herman, an attorney for SLF, who stated that, on November 21, 2019, the FBI informed her that the "FBI limited its search to the FBI's National Security and Cyber Law Branch [("NSCLB")], and that the 'NSCLB routed the search request to subject matter experts within NSCLB most familiar with the Carter Page FISA.'" Decl. of Kimberly S. Herman (Jan. 9, 2020) ("Herman Decl.") [Doc. 15-1] ¶ 10. As a result of this search, the FBI was unable to locate any records responsive to SLF's request. Id. ¶ 11. Herman notified the FBI that "SLF disputed the adequacy of the FBI's search and we agreed that SLF would provide the FBI with a list of custodians believed to have records responsive to SLF's request and a corresponding list of search terms by December 2, 2019," which Herman did. Id. ¶¶ 12-13. Nevertheless, by December 12, 2019, the FBI had notified SLF that the FBI was unable to identify any records responsive to the request and that it "formally rejected SLF's response to their preliminary no records determination and SLF's proposed search parameters." Id. ¶¶ 16-17.

II. LEGAL STANDARD

Under Rule 12(b)(1), a claim may be dismissed for "lack of jurisdiction over the subject matter." FED. R. CIV. P. 12(b)(1). When a defendant challenges subject matter jurisdiction, the plaintiff bears the burden to establish that jurisdiction exists. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Attacks on subject matter jurisdiction come in two forms: facial and factual. Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A., 104 F.3d 1256, 1260-61 (11th Cir. 1997). "Facial attacks on the complaint require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." Lawrence v Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (quotations and citation omitted) (alterations accepted). In such cases, the plaintiff is "afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion—the court must consider the allegations of the complaint to be true." Id. (citing Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir. 1981)[4]).

[4] In Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued before October 1, 1981.

"Factual attacks, on the other hand, challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." Id. (quotations and citation omitted). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Lawrence, 919 F.2d at 1529 (quoting Williamson, 645 F.2d at 413). A court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." See Lawrence, 919 F.2d at 1529 (quoting Williamson, 645 F.2d at 412-13); see also Lee-Lewis v. Kerry, No. 2:13-CV-80, 2016 WL 6647937, at *3 (S.D. Ga. Nov. 8, 2016) (citations and quotations omitted).

> A court has "broad discretion to consider relevant and competent evidence" to resolve factual issues raised by a Rule 12(b)(1) motion. Finca Santa Elena, Inc. v. U.S. Army Corps of Engineers, 873 F. Supp. 2d 363, 368 (D.D.C. 2012) (citing 5B Charles Wright & Arthur Miller, Fed. Prac. & Pro., Civil § 1350 (3d ed. 2004)); see also Macharia v. United States, 238 F. Supp. 2d 13, 20 (D.D.C. 2002) (in reviewing a factual challenge to the truthfulness of the allegations in a complaint, a court may examine testimony and affidavits), aff'd, 334 F.3d 61 (2003). In these circumstances, consideration of documents outside the pleadings does not convert the motion to dismiss into one for summary judgment. Al–Owhali v. Ashcroft, 279 F. Supp. 2d 13, 21 (D.D.C. 2003).

Richardson v. Bd. of Governors of the Fed. Reserve Sys., 248 F. Supp. 3d 91, 97 (D.D.C. 2017); but see Lee-Lewis, 2016 WL 6647937, at *3 n.1 (using the doctrine

of incorporation-by-reference to decline plaintiffs' request to convert the agency's motion to dismiss into a motion for summary judgment).

III. DISCUSSION

The DOJ contends that SLF's Complaint should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) because the DOJ has responded to SLF's FOIA request, making the Complaint moot. Def.'s Mem. at 6.

The purpose of the FOIA "is to encourage public disclosure of information so citizens may understand what their government is doing." Office of Capital Collateral Counsel, N. Region of Fla. v. U.S. Dep't of Justice, 331 F.3d 799, 802 (11th Cir. 2003). Under the FOIA, "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). A plaintiff may seek an injunction against an agency in the district court if the agency improperly withholds records. 5 U.S.C. § 552(a)(4)(B). "Jurisdiction under this statute is based upon the plaintiff's showing that an agency has improperly withheld agency records." Brown v. U.S. Dep't of Justice, 169 F. App'x 537, 540 (11th Cir. 2006) (quoting Kissinger v. Reporters Comm. For Freedom of the Press, 445 U.S. 136, 150 (1980)).

Generally, once an agency has responded to a FOIA request and produced records responsive to that request, there is no further statutory function for the federal courts to perform. Def.'s Mem. at 5-6. However, the production of documents in FOIA cases does not automatically render the case moot if the plaintiff still has a "cognizable interest in having a court determine the adequacy of the agency's search for records." Brustein & Manasevit, PLLC v. United States Dep't of Educ., 30 F. Supp. 3d 1, 6 (D.D.C. 2013) (quoting Conservation Force v. Ashe, 979 F. Supp. 2d 90, 93-97 (D.D.C. 2013)).

> Thus, when a plaintiff maintains a challenge to the adequacy of the agency's search, even if responsive records were produced, the challenge will be sufficient to reject the motion to dismiss on grounds of mootness. See, e.g., Short v. U.S. Army Corps of Eng'rs, 593 F. Supp. 2d 69, 72 n. 5 (D.D.C. 2009) ("Because [plaintiff] challenges the adequacy of the search, the motion to dismiss as moot must be denied."); Nw. Univ. v. USDA, 403 F. Supp. 2d 83, 85-86 (D.D.C. 2005) (refusing to dismiss action as moot despite belated release of documents because plaintiff challenged adequacy of defendant's document production); Yonemoto v. Dep't of Veterans Affairs, 686 F.3d 681, 689 (9th Cir. 2011) ("A FOIA claim is not moot, for example, if the agency produces what it maintains is all the responsive documents, but the plaintiff challenges whether the [agency's] search for records was adequate.") (internal quotations marks omitted) [overruled on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin., 836 F.3d 987 (9th Cir. 2016)].

Brustein, 30 F. Supp. 3d at 6 (emphasis added). See also Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1243 (11th Cir. 2008) ("Generally, FOIA cases should be handled on motions for summary judgment once the

documents in issue are properly identified.") (quoting Miscavige v. I.R.S., 2 F.3d 366, 369 (11th Cir. 1993)).

As an initial matter, the DOJ's Motion to Dismiss under Rule 12(b)(1) is a factual challenge to SLF's Complaint because it relies on facts outside the four corners of the Complaint. See Mot. to Dismiss; see also Morrison v. Amway Corp., 323 F.3d 920, 924 n.5 (11th Cir. 2003) (noting that the appellees' motion to dismiss was a factual attack on the complaint because it "did not assert lack of subject matter jurisdiction solely on the basis of the pleadings"). To determine whether the controversy is still alive, the Court must examine what occurred after the filing of SLF's Complaint, including the nature of the DOJ's eventual response to its FOIA request and whether SLF challenges the adequacy of the search.

In response to the Motion to Dismiss, SLF requests that the Court deny the DOJ's motion because it has challenged the adequacy of the FBI's search. Resp. in Opp'n to Mot. to Dismiss ("Pl.'s Resp.") [Doc. 15] at 2. This Court agrees. Herman's Declaration shows that SLF challenged the adequacy of the FBI's records search as soon as it received a response from the FBI.[5] Herman Decl.

[5] The Court notes that the DOJ also provided a declaration, by David M. Hardy, the Section Chief of the Record/Information Dissemination Section, Information Management Division of the FBI [Doc. 20-1], to speak to the adequacy of the FBI's search for records responsive to SLF's FOIA request. Because this declaration addresses only the adequacy of the search, a question which this Court

¶¶ 10-12. SLF's Response makes clear that it continues to maintain a cognizable interest in having the Court determine the adequacy of the DOJ's search for records. Pl.'s Resp. at 2, 4-5; see also Corbett v. Trans. Sec. Admin., 968 F. Supp. 2d 1171, 1189 (S.D. Fla. 2012) (quoting McKinley v. FDIC, 756 F. Supp. 2d 105, 111 (D.D.C. 2010) (citations omitted)) ("Although the agency has released portions of certain agency documents, [the issues of whether the records were adequate and whether the agency released all nonexempt material] remain in dispute, and the Court has jurisdiction to hear these claims."). Moreover, there is no dispute that that SLF has challenged the FBI's search's adequacy or that the FBI Request Response constitutes the DOJ's entire response to SLF's FOIA request. See Pl.'s Resp.; Reply Br. in Supp. of Def.'s Mot. to Dismiss ("Def.'s Reply") [Doc. 20]. Thus, SLF's Complaint is not moot. See Brustein, 30 F. Supp. 3d at 6.

SLF also asks this Court to apply the summary judgment standard to the Motion to Dismiss. See Pl.'s Resp. at 13-15. Relying on Lawrence, 919 F.2d at 1530, and Eaton v. Dorchester Dev., Inc., 692 F.2d 727, 733 (11th Cir. 1982), SLF contends that the summary judgment standard applies because the DOJ's factual

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does not reach in ruling on the Complaint's mootness, the Court need not consider it for the purposes of this Order.

challenge to the Complaint is intertwined with the merits of SLF's claim. Id. at 13-14. SLF's argument goes too far.

The standard applied to Rule 12(b)(1) motions permits consideration of outside evidence, including affidavits and testimony, without a conversion to summary judgment. See Richardson, 248 F. Supp. 3d at 97. However, SLF's reliance on Lawrence and Eaton is misplaced because the determination of whether this case is moot is not intertwined with the merits of the adequacy of the FBI's search. For purposes of Defendant's Motion to Dismiss, the Court need only decide whether SLF challenged the adequacy of the DOJ's search for records without opining on the merits of that challenge.

SLF further contends that the summary judgment standard applies because "FOIA cases typically and appropriately are decided on motions for summary judgment." Defs. of Wildlife v. U.S. Border Patrol, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (citing Bigwood v. U.S. Agency for Int'l Dev., 484 F. Supp. 2d 68, 73 (D.D.C. 2007)). While this may be true, in the cases cited by SLF, either the merits were intertwined with the jurisdictional issues, or at least one party had moved alternatively or separately for summary judgment in addition to the motion to dismiss. See Wheeler v. Hurdman, 825 F.2d 257, 259-60 (10th Cir. 1987); Brayton v. Office of U.S. Trade Representative, 641 F.3d 521, 527 (D.C. Cir.

2011); Miccosukee Tribe, 516 F.3d at 1265; Miscavige, 2 F.3d at 369; Greenberger v. I.R.S., 283 F. Supp. 3d 1354, 1366 (N.D. Ga. 2017). Neither DOJ nor SLF have so moved.[6] Thus, the Court declines SLF's request to apply a summary judgment standard or to convert the DOJ's Motion to Dismiss into a motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendant United States Department of Justice's Motion to Dismiss [Doc. 12] is **DENIED**.

IT IS SO ORDERED this 28th day of July, 2020.

Mark H. Cohen

MARK H. COHEN
United States District Judge

[6] In reply, DOJ argues that its Motion to Dismiss should, in the alternative, be converted into a motion for summary judgment. Reply Br. in Supp. of Def.'s Mot. to Dismiss [Doc. 20] at 4-5. To permit DOJ to, in effect, amend its motion to dismiss in a reply brief would fly in the face of settled practice in this Circuit, which is not to permit a party to raise arguments for the first time in a reply brief. See United States v. Oakley, 744 F.2d 1553, 1556 (11th Cir. 1984) ("Arguments raised for the first time in a reply brief are not properly before the reviewing court."); Murphy v. Farmer, 176 F. Supp. 3d 1325, 1342 (N.D. Ga. 2016) ("It is common practice for the Court not to hear arguments raised for the first time in a reply brief.") (citation omitted). Moreover, as previously stated, the issue before this Court at this stage of the proceedings is whether there was a challenge to the adequacy of the search, not whether the search in fact was adequate.