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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JEFFREY NATHAN LEWIS,

Plaintiff,

v.

**FEDERAL AVIATION
ADMINISTRATION,**

Defendant.

Civil No. 3:11-cv-01458-AC

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S SUPPLEMENTAL
DOCUMENTS**

Defendant Federal Aviation Administration (“FAA”), by S. Amanda Marshall, United States Attorney for the District of Oregon, through Assistant U.S. Attorney Kevin Danielson, submits this response to “Plaintiff’s Documents Responsive to Judge Acosta’s Request.” CR 45.

Introduction

Previously, the FAA has argued that Plaintiff failed to exhaust his administrative remedies by failing to pay the search fees or appealing the agency’s refusal to waive the fees. CR 39, pp.7-8. At oral argument on December 11, 2012, Plaintiff was allowed to submit additional evidence to establish that he appealed FAA’s determination of the cost of the search for FOIA Request No. 2010-3323; No. 2010-4091; No. 2010-5324; and No. 2011-6114. CR 43. In support of his position, Plaintiff has submitted additional documents to the Court. CR 45. Plaintiff has offered to withdraw FOIA Request No. 2010-5324 and No. 2010-5390 from his complaint. CR 45, pp. 5-6.

Argument

In FOIA cases, exhaustion of administrative remedies is generally required before filing suit so that the agency has an opportunity to exercise its expertise and discretion on the matter and also to make a factual record to support its decision. *Flaherty v. President of the United States*, 796 F. Supp. 2d 201, 206 (D.D.C. 2011). For these reasons, FOIA incorporates a procedure for administrative appeals which allows the top managers of an

agency to correct lower level mistakes and avoid litigation. *Jones v. U.S. Dept. of Justice*, 653 F. Supp. 2d 46, 49 (D.D.C. 2009). “Any decision by an agency adverse to a requester must be appealed and resolved before it is entertained by a federal court; a federal district court is not the forum for the initial determination of a FOIA requester’s challenge to an agency’s decision.” *Id.*

“A FOIA requester is deemed to have failed to exhaust administrative remedies whenever he does not comply with the fee requirements.” *Jones*, 653 F. Supp. 2d at 49. “Paying fees, receiving a fee waiver, or appealing a refusal to waive fees is necessary for plaintiff to exhaust administrative remedies.” *Island Film, S.A. v. Dept. of the Treasury*, 768 F. Supp. 2d 286, 288 (D.D.C. 2011).

The FAA’s appeal procedures for FOIA requests are set forth in 49 C.F.R. § 7.21. The procedure for appeals also includes “[w]hen a request for a waiver of fees pursuant to § 7.44 has been denied in whole or in part, the requestor may appeal the denial.” 49 C.F.R. § 7.21(b).

In connection with FOIA Request No. 2010-3323; No. 2010-4091; and No. 2011-6114, the FAA has submitted the relevant documents including Plaintiff’s appeals. CR 30-2; 30-3, and 30-6. The FAA cannot find in these documents where Plaintiff appealed the amount of the search fees. In addition, the documents currently submitted by Plaintiff do not establish that he appealed the amount of the search fees for the relevant FOIA

requests. Accordingly, because Plaintiff did not administratively appeal the amount of the search fees, he has not exhausted his administrative remedies for FOIA Request No. 2010-3323; No. 2010-4091; and No. 2011-6114, and those claims should be dismissed.

Conclusion

Plaintiff's has failed to exhaust his administrative remedies for FOIA Request No. 2010-3323; No. 2010-4091; and No. 2011-6114 and summary judgment should be granted in favor of the FAA.

Respectfully submitted this 27th day of December 2012.

S. AMANDA MARSHALL
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District of Oregon

/s/ Kevin Danielson
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Assistant United States Attorney
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of **DEFENDANT'S RESPONSE TO PLAINTIFF'S SUPPLEMENTAL DOCUMENTS** was sent by first-class mail and deposited in the United States Mail at Portland, Oregon, on December 27, 2012, addressed to:

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Plaintiff, *Pro Se*

/s/ Deanne Bateson
DEANNE BATESON
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CERTIFICATE OF SERVICE