

**Orders on Motions**

2:07-cv-01819-FSH-PS WEINBERG v. VON ESCHENBACH, MD US FOOD AND DRUG  
ADMINISTRATION  
RULE16, SCHEDO

**U.S. District Court**

**District of New Jersey [LIVE]**

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**Case Name:** WEINBERG v. VON ESCHENBACH, MD US FOOD AND DRUG  
ADMINISTRATION

**Case Number:** 2:07-cv-1819

**Filer:**

**Document  
Number:** 21

**Docket Text:**

ORDER denying deft. FDA's [6] Motion to dismiss; staying discovery for a period of 60 days and shall proceed to court mediation; denying deft. FDA's motion for stay of proceedings pending outcome of mediation. Signed by Judge Faith S. Hochberg on 10/10/2007. (nr, )

**2:07-cv-1819 Notice has been electronically mailed to:**

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

WEINBERG,	:	
	:	
Plaintiff,	:	Civil Case No. 07-1819 (FSH)
	:	
v.	:	<b><u>OPINION and ORDER</u></b>
	:	
VON ESCHENBACH, et al.,	:	Date: October 10, 2007
	:	
Defendants.	:	

**HOCHBERG, District Judge**

This matter having come before the Court upon Defendant United States Food and Drug Administration's ("FDA") July 17, 2007 Motion to Dismiss in Part and for a Stay of Proceedings Pending Completion of Search and Production of Documents ("Def. Mot.") and the Court having considered the arguments of the parties on the papers pursuant to Fed. R. Civ. P. 78; and

it appearing that Plaintiff's complaint alleges that Plaintiff has made 10 (ten) FOIA requests, the first occurring October 4, 2004 and the most recent occurring on August 31, 2006; and

it appearing that Plaintiff alleges that Defendant FDA has failed to respond in any way to requests made on November 23, 2004, May 16, 2005, July 21, 2005, February 17, 2006, and August 31, 2006, has failed to timely produce all documents pursuant to requests made October 4, 2004, October 7, 2004, and January 13, 2005, and has acknowledged receipt of

requests made on June 16, 2006, and July 20, 2006, but has yet to produce any documents responsive to those requests; and

it appearing that Defendant's 12(b)(6) Motion to Dismiss Plaintiff's claim with regard to the alleged October 7, 2004 FOIA request is not properly resolved at this time;<sup>1</sup> and

it appearing that under the Freedom of Information Act ("FOIA"), agencies are required to determine within twenty days whether to comply with the FOIA request, 5 U.S.C. § 552(a)(6)(A)(I); and

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<sup>1</sup> Defendant "has found no record of ever having received a request from Plaintiff regarding Vioxx dated October 7, 2004." (Def. Mot. at 18.) Because Plaintiff has failed to attach this request to his submission to this Court, and because Defendant is unable to locate a copy in its own records, Defendant moves to have this portion of Plaintiff's claim dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

Motions to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim result in a determination on the merits at an early stage of a plaintiff's case. See Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). As a result, "plaintiff is afforded the safeguard of having all its allegations taken as true and all inferences favorable to plaintiff will be drawn." Id. In order to survive a 12(b)(6) motion to dismiss, "[t]he plaintiff must allege facts sufficiently detailed to 'raise a right to relief above the speculative level,' and must 'state a claim to relief that is plausible on its face.'" Pronational Ins. Co. v. Shah, No. 07-1774, 2007 WL 2713243, \*1 (E.D. Pa. Sept. 17, 2007) (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007)). At this stage, the Court must determine whether the complaint "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." Haspel v. State Farm Mut. Auto. Ins. Co., No. 06-3716, 2007 WL 2030272, \*1 (3d Cir. July 16, 2007) (quoting Twombly, 127 S. Ct. at 1969).

It is true that "courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint." In re Rockefeller Center Properties, 311 F.3d 198, 216 (3d Cir. 2002) (citing In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1429 (3d Cir. 1997)). However, Plaintiff's claim regarding the alleged October 7, 2004 FOIA request is neither a bald assertion nor a legal conclusion. Further, unlike the cases Defendant cites for the above proposition, Plaintiff's claim does not take place in the context of Fed. R. Civ. P. 9(b), which "imposes a heightened pleading requirement of factual particularity with respect to allegations of fraud." Id. (addressing motion to dismiss in context of Rule 9(b) pleading requirements for securities fraud); see also In re Burlington Coat Factory, 114 F.3d 1410 (3d Cir.) (same). Plaintiff's complaint regarding the alleged October 7, 2004 FOIA request is sufficient to survive Defendant's motion to dismiss. Defendant's argument is more appropriately addressed at the summary judgment stage.

it appearing that “[u]pon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.”

5 U.S.C. § 552(a)(6)(C)(I); and

it appearing that “[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.” Id.; and

it appearing that in Open America v. Watergate Special Prosecution Force, the United States District Court for the District of Columbia determined that “exceptional circumstances” exist when an agency “is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A).” 547 F.2d 605, 616 (D.C. Cir. 1976); and

it appearing that under the Open America standard, an agency requesting a stay must also “show that it ‘is exercising due diligence’ in processing the [backlog of] requests.” Id. at 616; and

it appearing that, in a 1996 amendment, Congress “tightened the standard for obtaining a stay by defining the term ‘exceptional circumstances’ so as to exclude any ‘delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.’” Donham v. U.S. Dept. of Energy, 192 F. Supp. 2d 877, 880 (S.D. Ill. 2002) (quoting 5 U.S.C. § 552(a)(6)(C)(ii)); and

it appearing that other courts to have considered the effect of Congress's 1996 amendment on the Open America standard have concluded that "Congress wrote a tough statute on agency delay in FOIA compliance, and recently made it tougher [with the 1996 amendments]." Fiduccia v. DOJ, 185 F.3d 1035, 1041 (9th Cir. 1999) (cited in Donham, 192 F. Supp. 2d at 882); and

it appearing that the language of Open America – requiring a "deluge[.]...of requests...vastly in excess of that anticipated by Congress" – at least requires a greater number of requests than normal, and that in Open America, for example, "[t]he Department of Justice Appeal's division had handled 100 appeals in the 12 month period prior to the date the FOIA Amendments became effective; in the next 12 months they received 1276. The FBI in calendar year 1974 had received 447 FOIA requests; in 1975, 13,875 requests were received." Open America, 547 F.2d at 617; see also Fiduccia, 185 F.3d at 1042 (holding that "a slight upward creep in the caseload" does not constitute "exceptional circumstances"); Mayock v. Nelson, 938 F.2d 1006, 1008 (9th Cir. 1991) (reversing and remanding district court's refusal to grant Open America stay because district court failed to consider evidence showing an increase in requests from 285 in 1981 to 1607 in 1987); Johnston v. United States, No. Civ. A 93-5606, 1994 WL 533908, 2 (E.D. Pa. Sept. 29, 1994) (noting that "[t]he Bureau currently receives more than 15,000 FOIA requests per year. By comparison, it received only 11,000 per year in the 1980's"); and

it appearing that Defendant FDA has produced no evidence of a "deluge" as required by the Open America standard; and

it appearing that Defendant FDA has instead noted a steadily decreasing number of requests per year, receiving 5,310 requests in 2003, 5,156 in 2004, 4,050 in 2005, 3,335 in 2006, and 918 in the first four months of 2007, at which rate 2007 will continue the downward trend with a total of 2,754 requests for the year. (See Def. Mot. at 23.); and

it appearing that Defendant has also – with one exception – processed a steadily decreasing number of requests each year, beginning with 4,340 requests processed in 2003, 6,800 in 2004, 4,876 in 2005, 3,907 in 2006, and 1,167 in the first four months of 2007, at which rate Defendant will continue the downward trend by processing 3,501 requests by the end of this year. (See Decl. of Nancy Sagler ¶ 19.);<sup>2</sup> and

It appearing, therefore, that the volume of requests is alone insufficient to warrant a stay under the Open America standard; and

it appearing that Defendant also contends that the agency's workload has increased substantially due to non-FOIA document requests from Congress, but that Defendant

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<sup>2</sup> Defendant FDA contends that the number of requests received and processed is “deceptive in that [the numbers] fail to account for how many individual requests are contained within each request” (Def. Mot. at 28 n. 27), and that “many of the FOIA requests that DIDP receives actually contain multiple individual requests for documents,” (Decl. of Nancy Sagler, ¶ 18). These statements alone are not evidence relevant to the Open America analysis. The fact that the Department's statistics fail to take into account the number of requests-within-requests says nothing about whether the number of requests-within-requests has increased in recent years, or whether the increase in requests-within-requests is significant enough to offset the overall decrease in requests. Rather, these statements demonstrate only that the Department does not have, or has chosen not to provide, data on requests-within-requests. Neither Defendant's brief nor its affidavits offer the kind of substantive evidence of a “deluge” sufficient to grant the requested stay.

FDA has pointed to a single – albeit possibly a large<sup>3</sup> – request processed “[b]etween May and July 2006” (see *id.* ¶ 22), without explaining what impact such request could have had on requests made by Plaintiffs beginning in 2004, nor the impact the request had on Plaintiff’s FOIA requests made after processing was complete in July 2006; and

it appearing that Defendant FDA has also suggested that there are “enormous litigation demands on the division” (Def. Mot. at 24), but that Defendant has informed the Court that it currently faces “several third-party subpoenas,” only “three of which require substantial document production.” (See *id.* ¶ 21.);

**IT IS** on this 10th day of October, 2007, thereby

**ORDERED** that Defendant FDA’s Motion to Dismiss in part is hereby **DENIED**; and it is further

**ORDERED** that discovery shall be stayed for 60 days and parties shall proceed to court annexed mediation pursuant to Local Rule 301.1 in order to establish a reasonable schedule for production; and it is further

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<sup>3</sup> Defendant’s brief generally lacks the sort of comparative information that would aid the Court in considering this motion. With regard to this Congressional request, for example, Defendants offer the Court no information as to whether this request is larger than other Congressional requests, or whether such requests are abnormal for Congress. Moreover, this single request – even if it is larger than normal – would not alone support the argument that “[a]nother huge part of [the agency’s] workload recently has been a significant increase since 2004 in the resources it devotes to documents requests made by Congress, foreign, state and local governments, and other federal agencies.” (Def. Mot. at 24.) One request completed over three months does not constitute a “huge part” of the agency’s workload, and it cannot represent a substantial change “since 2004.”

**ORDERED** that Defendant FDA's Motion for a Stay of Proceedings is therefore **DENIED** without prejudice pending the outcome of mediation, at which time Defendant may again move for a stay with proper supporting evidence.

/s/ Faith S. Hochberg

HON. FAITH S. HOCHBERG, U.S.D.J.