

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

SOUTHEASTERN LEGAL
FOUNDATION INC.,

PLAINTIFF,

v.

UNITED STATES DEPARTMENT
OF JUSTICE,

DEFENDANT.

Civil Action No.

1:19-cv-03429-MHC

**DEFENDANT'S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION TO DISMISS**

Defendant has moved the Court to dismiss Plaintiff's Complaint (the "Complaint") pursuant to Federal Rules of Civil Procedure 12(b)(1). The Complaint should be dismissed because Defendant has responded to Plaintiff's Freedom of Information Act ("FOIA") Request and thus, Plaintiff has received the relief that it requested in the Complaint.

INTRODUCTION

Plaintiff Southeastern Legal Foundation ("Plaintiff" or "SLF") filed a complaint in this Court pursuant to the FOIA seeking access to certain records. Doc. 1 at ¶ 4. Previously, on or about May 24, 2019, Plaintiff had submitted a FOIA request to

the Federal Bureau of Investigation (“FBI”). The FOIA request sought the following:

All records regarding, reflecting, or relating 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 FISA application and renewals or the Section 702 violations the government orally advised the FISC about on October 24, 2016;

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

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.

Doc. 1 at ¶ 12.

At the time that Plaintiff filed the Complaint, the Federal Bureau of Investigation (“FBI”) had not released any records relating to Plaintiff’s FOIA request and had not issued a final determination regarding Plaintiff’s FOIA request. During the course of the litigation, the FBI completed its search for records

responsive to Plaintiff's FOIA request and responded to the request. *See* Exhibit 1.¹ Specifically, the FBI informed Plaintiff that it was "unable to identify records responsive to" the FOIA request. *Id.* Because the search requested by Plaintiff in the FOIA request and the Complaint has been conducted, Plaintiff's claim is now moot.

STANDARD OF REVIEW

A. Standard of Review on a Rule 12(b)(1) Motion.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) attacks the existence of subject matter jurisdiction. A district court may inquire into the basis of its subject matter jurisdiction at any stage of the proceedings. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).² "If the court determines at

¹ A document attached to the pleadings as an exhibit may be considered by the Court without converting the motion to dismiss to a motion for summary judgment if the document "is central to the plaintiff's claim and the authenticity of the document is not challenged[.]" *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002); *see also Atwater v. NFL Players Assoc.*, 2007 U.S. Dist. LEXIS 23371, at *7 (N.D. Ga. March 29, 2007) ("[A] complaint need not even mention or attach a document in order for the court to consider the document at the motion to dismiss stage, if the document is central to the plaintiff's claims and not disputed in terms of its authenticity.").

² Decisions of the Fifth Circuit issued on or before September 30, 1981, are binding as precedent in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

any time that it lacks subject matter jurisdiction, [it] must dismiss the action.” FED. R. CIV. P. 12(h)(3).

A party may attack subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) based on either a facial attack or a factual attack. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). “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.” *Id.* at 1529 (citations omitted). A defendant may also bring a “factual attack” challenging “the existence of subject matter jurisdiction in fact, irrespective of the pleadings.” *Id.* In contrast to a facial attack, when a factual attack is brought a court has wide discretion to consider affidavits and documents outside the complaint, if warranted. *Menchaca*, 613 F.2d at 511. A motion to dismiss based on mootness grounds is a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See GEICO Gen. Ins. Co. v. Farag*, 597 F. App’x 1053, 1054-55 (11th Cir. 2015) (“[W]hen a district court disposes of a case on justiciability grounds, we treat the district court’s determinations as if it was a ruling on a motion to dismiss for lack of subject matter jurisdiction. . . , even if the district court mistakenly has labeled its ruling a grant of summary judgment.”).

ARGUMENT AND CITATION TO AUTHORITY

Under FOIA, “each agency, upon 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 when the agency improperly withholds records, 5 U.S.C. § 552(a)(4)(B), but once a person receives the information they have requested, their FOIA claim becomes moot. *Lovell v. Alderete*, 630 F.2d 428, 430-31 (5th Cir. 1980) (“The record clearly shows that Lovell has received all of the information he sought. . . . Even though the information he sought. . . was delivered late, Lovell now has all of the information he requested. . . . The district court correctly dismissed both actions for mootness to the extent that documents were sought.”); *Von Grabe v. U.S. Dep’t of Homeland Sec.*, 440 F. App’x 687, 688 (11th Cir. 2011) (“If a person receives all the information he has requested under FOIA, even if the information was delivered late, his FOIA claim is moot to the extent such information was sought.”); *Sands v. United States*, 1995 U.S. Dist. LEXIS 9252, *8 (S.D. Fl. June 16, 1995) (“If upon initiation of a lawsuit it is determined that no documents responsive to a FOIA request have been withheld, the litigation should be dismissed as the claim for relief under FOIA

becomes moot.”); *see also Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982); *Better Gov’t Ass’n v. Dep’t of State*, 780 F.2d 86, 91 (D.C. Cir. 1986).

Here, Plaintiff submitted a FOIA request to the FBI on or about May 24, 2019. Doc. 1 at ¶ 11. Plaintiff then filed the Complaint on July 30, 2019, wherein Plaintiff requested that the Court direct Defendant to “conduct searches for any and all records responsive to the FOIA Request.” *Id* at ¶ 25. Defendant has conducted a search of places reasonably expected to have records responsive to Plaintiff’s FOIA request and were unable to identify any records responsive to Plaintiff’s request. *See* Exhibit 1. Defendant’s search was completed on or about December 11, 2019 and official notification of the results of the search has been sent to Plaintiff. *Id*. Therefore, Plaintiff has received all of the information that was sought through the FOIA request and has received the relief requested in the Complaint. For that reason, the Complaint should be dismissed pursuant to Federal Rule of Procedure 12(b)(1), as the Complaint is now moot. *Lovell*, 630 F.2d at 430-31.

CONCLUSION

For the above and foregoing reasons, the Complaint should be dismissed pursuant to Federal Rule of Procedure 12(b)(1) for lack of subject-matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Local Rules 5.1 and 7.1D, that the foregoing motion and brief have been prepared using Book Antiqua, 13 point font.

/s/ Samuel H. Williams

SAMUEL H. WILLIAMS

Assistant United States Attorney

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CERTIFICATE OF SERVICE

I certify that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

December 12, 2019.

/s/ Samuel H. Williams

SAMUEL H. WILLIAMS

Assistant United States Attorney