

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

MICHAEL J. AGUIRRE,  
*Plaintiff-Appellant,*

v.

UNITED STATES NUCLEAR  
REGULATORY COMMISSION; DOES, 1  
to 10, inclusive,  
*Defendants-Appellees.*

Nos. 20-55177  
20-55179

D.C. Nos.  
3:19-cv-00495-  
BAS-BLM  
3:19-cv-00587-  
BAS-BLM

MICHAEL J. AGUIRRE,  
*Plaintiff-Appellant,*

v.

UNITED STATES NUCLEAR  
REGULATORY COMMISSION,  
*Defendant-Appellee.*

No. 20-55487

D.C. No.  
3:19-cv-01102-  
BAS-BLM

OPINION

Appeal from the United States District Court  
for the Southern District of California  
Cynthia A. Bashant, District Judge, Presiding

Argued and Submitted March 4, 2021  
Pasadena, California

Filed August 23, 2021

Before: Richard C. Tallman and Consuelo M. Callahan,  
Circuit Judges, and Dana L. Christensen,\* District Judge.

Opinion by Judge Callahan

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## SUMMARY\*\*

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### **Freedom of Information Act / Exhaustion**

The panel affirmed the district court's dismissal or summary judgment against all of Michael Aguirre's claims in his Freedom of Information Act ("FOIA") action seeking to obtain from the U.S. Nuclear Regulatory Commission ("NRC") records relating to the San Onofre Nuclear Generating Station.

The panel held that Aguirre failed to constructively or actually exhaust his administrative remedies as to the four FOIA requests at issue in these appeals, and he likewise failed to establish the futility of seeing the NRC's administrative process through to its end. In an issue of first impression in this circuit, the panel joined sister circuits, and held that a requestor must exhaust his administrative remedies under FOIA so long as an agency properly

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\* The Honorable Dana L. Christensen, United States District Judge for the District of Montana, sitting by designation.

\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

responds before suit is filed. The panel held that Aguirre's remaining contentions lacked merit.

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## COUNSEL

Maria C. Severson (argued) and Michael J. Aguirre, Aguirre & Severson LLP, San Diego, California, for Plaintiff-Appellant.

Rebecca Church (argued), Assistant United States Attorney; Katherine Lind Parker, Chief, Civil Division; Robert S. Brewer, Jr., United States Attorney; United States Attorney's Office, San Diego, California; for Defendant-Appellee United States Nuclear Regulatory Commission.

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## OPINION

CALLAHAN, Circuit Judge:

These Freedom of Information Act (FOIA) cases concern Michael Aguirre's repeated attempts to obtain from the U.S. Nuclear Regulatory Commission (NRC) records relating to the San Onofre Nuclear Generating Station. The district court dismissed or entered summary judgment against all of Aguirre's claims for failing to exhaust administrative remedies, and we affirm.

### I.

Over the past few years Aguirre has filed at least fourteen FOIA requests with the NRC, all relating to the San Onofre Nuclear Generating Station and, more specifically, to an August 2018 incident involving a misaligned spent-fuel

canister. While being lowered into a storage vault, the canister became stuck and, for about forty-five minutes, hung suspended over an eighteen-foot drop. The incident caused the NRC to temporarily halt the facility's waste-transfer operations, but to Aguirre's dismay those operations resumed, for a time, in 2019. These consolidated appeals concern four of Aguirre's requests for information.

*A. Request Nos. 154 & 155*

Aguirre submitted the first such request, Request 154, on December 21, 2018. It asked the NRC for records relating to the agency's investigation into the misalignment incident. It further requested records that "the NRC reviewed related to dry cask storage operations." The next day, Aguirre submitted his second request, Request 155, seeking any records showing that Southern California Edison, the facility's owner and the NRC's licensee, reported the defective spent-fuel canister. In both requests, Aguirre expressed his willingness to pay up to \$1,500 for the agency's efforts.

The NRC responded on January 30, 2019, apologizing for the delay and stating that it would produce responsive records by February 28. In its letter, the NRC also informed Aguirre that it had categorized his request as "commercial," meaning that he would be charged for the agency's search-and-review time. A couple weeks later, the NRC followed up that letter with another stating that, because the costs of completing Request 155 exceeded \$250, the agency would not proceed without advance payment. The NRC added that Aguirre's failure to respond by February 20 would lead to the closure of his request.

Aguirre replied on February 14 with what he characterized as an "appeal and request to expedite" his

requests. He protested the NRC's "dilatory response and dilatory timeline" and demanded that the agency assure him within ten days that it would accelerate its production of responsive records. If it did not, he stated, he would sue. Aguirre's letter made no mention of the agency's requirement that he pay in advance for Request 155. The NRC acknowledged but did not otherwise respond to Aguirre's letter.

Later in February the NRC asked Aguirre to clarify the scope of Request 154. By "dry cask storage operations," the agency inquired, did he narrowly mean the handling of the canisters or all activity involving them, including design controls and training? The agency said that Aguirre's answer would help determine the associated processing fees. On February 22, after Aguirre failed to provide payment for Request 155 and clarify Request 154, the agency consolidated the requests for fee purposes and administratively closed them both.

As threatened, Aguirre sued, asking the court to order the production of the sought-after records. The NRC moved for dismissal based on Aguirre's alleged failure to exhaust his administrative remedies. Because the agency attached evidentiary exhibits to its motion, the district court treated it as one for summary judgment, *see* Fed. R. Civ. P. 12(d), which the court granted. Aguirre appealed.

### *B. Request No. 239*

Several days after filing his first suit, on March 19, 2019, Aguirre submitted the third request at issue in this appeal, Request 239. It sought materials regarding a public meeting the NRC was holding later in the month. Aguirre told the agency to produce the records within four days, lest he "be forced to seek immediate judicial relief." The NRC

responded that it could not comply with such a short deadline because its regulations gave the licensee, as the entity from which some records originated, thirty days to object to the disclosure of confidential information. The NRC further asserted that, to expedite his request, Aguirre needed to show a “compelling need” for the information, and in the agency’s view Request 239 presented no such circumstances. The NRC added that it could process the request in the ordinary course.

After the NRC’s meeting took place, the agency asked Aguirre if he still wanted the documents. He said that he did but demanded them by noon of that day. The agency rejected this request as unworkable due to its licensee-review requirements. Dissatisfied, Aguirre filed suit on March 29. The NRC nonetheless continued processing Request 239 and in April provided Aguirre with an interim production of certain relevant records while it waited on the licensee. Although the agency estimated that it would complete its response to Request 239 in May, it wound up taking another few months.

The NRC meanwhile moved to dismiss Aguirre’s second suit, alleging that he had failed to exhaust his administrative remedies. Again converting the NRC’s motion to one for summary judgment, the district court granted it, holding that Aguirre had indeed failed to exhaust by suing the agency before its statutory time to respond had expired. Aguirre appealed.

### *C. Request No. 304*

Aguirre submitted the fourth disputed request, Request 304, on May 28, 2019. It sought records exchanged between the NRC and its licensee “as a result of” other FOIA requests related to the misalignment incident. The NRC responded a

couple weeks later, producing certain documents and withholding others. The next day, Aguirre sued the NRC a third time, seeking to compel the disclosure of withheld records. The agency successfully moved to dismiss that suit for failure to exhaust, Aguirre appealed, and we consolidated his three cases.

## II.

We review de novo summary judgment and dismissal orders. *Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 773 (9th Cir. 2018); *Gingery v. City of Glendale*, 831 F.3d 1222, 1226 (9th Cir. 2016). We likewise review de novo questions concerning FOIA's construction. *TPS, Inc. v. U.S. Dep't of Def.*, 330 F.3d 1191, 1194 (9th Cir. 2003).

## III.

Enacted to “ensure an informed citizenry,” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), FOIA requires federal agencies to disclose information to the public upon request, 5 U.S.C. § 552(a)(3)(A). When an agency receives such a request, it has twenty working days to decide whether to comply and inform the requestor of its decision. *Id.* § 552(a)(6)(A)(i). A requestor dissatisfied with an agency's response can challenge it in court but must first exhaust available administrative remedies, including an appeal within the agency. *Id.* § 552(a)(6)(A)(i)–(ii), (C)(i). This serves to “protect[] administrative agency authority and promot[e] judicial efficiency.” *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). It also allows agencies to correct their mistakes and creates a useful record “should judicial review become necessary.” *Amerco v. NLRB*, 458 F.3d 883, 888 (9th Cir. 2006). Exhaustion under FOIA is a prudential rather than jurisdictional consideration, however, so courts can waive the requirement when, for example, further

administrative proceedings would prove futile. *Yagman v. Pompeo*, 868 F.3d 1075, 1083–84 (9th Cir. 2017).

*A. Request Nos. 154 & 155*

We first address the applicability of FOIA's constructive-exhaustion provision, under which requestors are deemed to have exhausted their remedies when an agency misses a statutory deadline. 5 U.S.C. § 552(a)(6)(C)(i); *see Hajro v. USCIS*, 811 F.3d 1086, 1092 (9th Cir. 2016). The NRC received Aguirre's requests on December 26, 2018, but did not respond to them until January 30, 2019—five days past FOIA's twenty-working-day window. Per Aguirre's understanding of constructive exhaustion, the NRC's initial tardiness freed him from having to further engage with the agency before filing suit, notwithstanding its belated efforts to address his requests.

Courts have, however, rejected this position where, as here, an agency responds late but before the requestor sues. When that occurs, exhaustion is still required. The D.C. Circuit explained the rationale for this rule in *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57 (D.C. Cir. 1990), the leading decision on the point:

We believe that where a requester has chosen to wait past the [twenty]-day period until the agency has responded, Congress intended that the administrative route be pursued to its end. It did not mean for the court to take over the agency's decisionmaking role in midstream or to interrupt the agency's appeal process when the agency has already invested time, resources, and expertise into the effort of responding.



*Id.* at 64. As the *Oglesby* court explained, a contrary rule would “allow[] requestors unhappy with the first level response . . . to go to court months or even years after the agency has responded.” *Id.* at 65. It would further deprive agencies of the chance to ensure uniformity in their treatment of FOIA requests. *Id.* Thus, under *Oglesby*, a requestor in essence waives his right to immediately sue by waiting to do so until after receiving a response from the agency. At that point, he must exhaust.

While we have not addressed the issue, other courts have followed the D.C. Circuit’s lead. The Third Circuit did so in *McDonnell v. United States*, 4 F.3d 1227, 1240–41 (3d Cir. 1993), holding that “once the [agency] responded, [the requestor] once again became obligated to pursue his administrative remedies.” The Eleventh Circuit later adopted this rule in *Taylor v. Appleton*, 30 F.3d 1365, 1369–70 (11th Cir. 1994), as did the Fourth in *Pollack v. DOJ*, 49 F.3d 115, 118 & n.3 (4th Cir. 1995). Our district courts have, in turn, relied on these cases in taking the same approach. *See, e.g., Or. Nat. Desert Ass’n v. Gutierrez*, 409 F. Supp. 2d 1237, 1246 (D. Or. 2006); *Johnson v. Comm’r*, 239 F. Supp. 2d 1125, 1136 (W.D. Wash. 2002). We now join our sister circuits, holding that a requestor must exhaust his administrative remedies under FOIA so long as an agency properly responds before suit is filed.<sup>1</sup>

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<sup>1</sup> Aguirre does not dispute whether the NRC’s correspondence—its earlier letters or its later one consolidating and closing the requests—constituted valid “determinations” for purposes of re-triggering the exhaustion requirement. *See* 5 U.S.C. § 552(a)(6)(A). This case therefore presents no occasion to consider the issue. *See Citizens for Resp. and Ethics in Washington v. FEC*, 711 F.3d 180, 185–86, 185 n.4 (D.C. Cir. 2013) (delineating the requirements for a proper response and noting that the question had not previously arisen).

Applying that rule here, we next consider whether Aguirre actually, as opposed to constructively, exhausted his remedies. With respect to Request 154, summary judgment was appropriate because Aguirre refused to clarify what he meant by dry cask storage “operations.” Trying to assess an appropriate processing fee, the agency supplied him with two possible readings of the term, asking which he intended. Rather than answer this simple question—even to say that, in his view, no clarification was needed—Aguirre balked, remaining silent until after the agency consolidated and closed Requests 154 and 155. At that point Aguirre still could have reached out to the agency or otherwise challenged the closure of his requests. He instead sued, “cut[ting] off the agency’s power to correct or rethink initial misjudgments or errors.” *Oglesby*, 920 F.2d at 64. Under these circumstances, and in keeping with the aims of exhaustion, we agree with the district court that Aguirre’s recalcitrance deprived the NRC of “a fair and full opportunity to adjudicate [his] claims.” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006); *see also Wright v. DOJ*, 379 F. Supp. 3d 1067, 1077 (S.D. Cal. 2019) (“Given the opportunities given to [the requestor] to clarify his broad request and his failure to do so, [the agency] did not have an obligation to respond . . .”).

Summary judgment was also appropriate as to Request 155. FOIA requires that requests be made “in accordance with published rules” setting forth applicable processing fees. 5 U.S.C. § 552(a)(3)(A). The statute also allows agencies to require prepayment of fees exceeding \$250. *Id.* § 552(a)(4)(A)(v). Consistent with that authority, the NRC’s FOIA regulations provide that “[i]f the fee is determined to be in excess of \$250, the NRC *will* require an advance payment.” 10 C.F.R. § 9.40(d) (emphasis added). And when a requestor fails to pay required fees, he fails to

exhaust. *See, e.g., Oglesby*, 920 F.2d at 66 (“Exhaustion does not occur until the required fees are paid or an appeal is taken from the refusal to waive fees.”); *Pollack*, 49 F.3d at 119–20 (characterizing the payment of fees as a “statutory obligation”).

Here, the NRC acknowledged Aguirre’s willingness to pay up to \$1,500 but informed him that, because processing costs totaled \$563.60, he would have to pay in advance. The agency added that failing to do so would lead to the closure of his case. Aguirre responded with a letter attacking the agency’s delayed response and production timeline, but nowhere did he dispute the agency’s fee determination. Nor did he ever pay the \$563.60; narrow his request to avoid the \$250 threshold, *see* 10 C.F.R. § 9.40(c); or seek a fee waiver, *see id.* §§ 9.40(g), .41, .43. Given his failure to pursue these options, the agency properly closed his request.

Disagreeing, Aguirre seizes upon language in the NRC’s rules suggesting that the agency can process requests when a requestor *agrees* to pay the estimated fees. *See* 10 C.F.R. § 9.40(e). In Aguirre’s view, because he initially confirmed his willingness to pay for Requests 154 and 155, he satisfied the regulatory requirements and thus exhausted his remedies. The problem, however, is that Aguirre never raised this argument before the agency. Had he done so, he could have learned, before going to court, that the regulation does not support his position. To the contrary, it provides that “[u]nless a requester has agreed to pay the estimated fees *or, as provided for in paragraph (d) of this section, the requester has paid an estimated fee in excess of \$250*, the NRC may not begin to process the request.” *Id.* (emphasis added). As noted, paragraph (d) requires advance payment for requests exceeding \$250 in fees. *Id.* § 9.40(d). So a requestor’s commitment to pay will often suffice, but when

estimated fees exceed \$250, the NRC cannot start processing until paid. The agency's approach here comported with these rules.<sup>2</sup>

*B. Request No. 239*

Aguirre also failed to exhaust his remedies as to Request 239. As explained, FOIA gives agencies twenty working days to respond to requests and requires parties to administratively appeal agency determinations before turning to the courts. Yet Aguirre waited just ten days before suing the NRC and never internally appealed the adequacy of the agency's eventual production. His lawsuit was thus premature. *See In re Steele*, 799 F.2d 461, 466 (9th Cir. 1986) (requiring requestors to "comply fully with agency procedures"); *see also Weisberg v. DOJ*, 745 F.2d 1476, 1497 (D.C. Cir. 1984) (holding that the requestor pretermitted the administrative process by filing suit before the agency had time to respond).

Aguirre protests that exhaustion is not required when seeking review of an agency's refusal to expedite a request. Whether or not that is true,<sup>3</sup> the argument is misplaced here. Neither Aguirre's complaint nor his briefing before the district court challenged the denial of his expedition request. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d

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<sup>2</sup> Although FOIA seemingly bars tardy agencies from charging certain fees in the first place, *see* 5 U.S.C. § 552(a)(4)(A)(viii)(I), Aguirre failed to raise this issue below and in his opening brief on appeal. Furthermore, and in any event, Aguirre never raised or exhausted this issue with the NRC.

<sup>3</sup> Some courts have indeed exempted expedited-processing claims from FOIA's exhaustion requirement. *See, e.g., ACLU v. DOJ*, 321 F. Supp. 2d 24, 28–29 (D.D.C. 2004).

536, 546 n.15 (9th Cir. 1991) (“It is well established that an appellate court will not reverse a district court on the basis of a theory that was not raised below.”). Indeed, nowhere did Aguirre invoke the FOIA provision allowing courts to review such claims. *See* 5 U.S.C. § 552(a)(6)(E)(iii). And instead of arguing that exhaustion was excused due to the assertion of an expedited-processing claim, he contended only that further dealings with the agency would have proved futile. The district court rightly rejected this argument. The NRC engaged with Aguirre throughout the process, provided him with an interim production while it waited on its licensee, and eventually completed its response. These actions refute Aguirre’s conclusory contention that the agency harbored a predetermined intent to deny him relevant records.<sup>4</sup>

### C. Request No. 304

For similar reasons, we affirm the dismissal of Aguirre’s suit concerning Request 304. The NRC completed processing that request on June 11, 2019, and Aguirre sued the agency the very next day, challenging its production as incomplete. But seeing as he proceeded straight to court without having administratively appealed the agency’s

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<sup>4</sup> At any rate, insofar as Aguirre *did* challenge the NRC’s refusal to expedite Request 239, that claim likely became moot once the agency issued its final response. *See* 5 U.S.C. § 552(a)(6)(E)(iv) (divesting courts of jurisdiction “to review an agency denial of expedited processing . . . after the agency has provided a complete response to the request”); *see also Al-Fayed v. CIA*, 254 F.3d 300, 302 & n.1 (D.C. Cir. 2001).

response, this lawsuit, too, was premature.<sup>5</sup> *See Oglesby*, 920 F.2d at 69.

#### *D. Other Issues*

Aguirre's remaining contentions lack merit. He faults the NRC for not preparing a *Vaughn* index—a government affidavit “identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption.” *Lahr v. NTSB*, 569 F.3d 964, 989 (9th Cir. 2009) (discussing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)). *Vaughn* indices are not required in every case, however. Their function is to help courts review whether agencies properly withheld records. *See Lewis v. IRS*, 823 F.2d 375, 380 (9th Cir. 1987). Here, given Aguirre's failure to exhaust, the district court had no need to reach that question. Accordingly, a *Vaughn* index would not have served any purpose, and Aguirre's request for one was properly denied.

Aguirre also disputes the district court's refusal to judicially notice transcripts of NRC meetings that, in his view, evince “questionable conduct” between the agency and its regulated licensee. He states that this information contextualizes his need for the NRC's records and establishes the futility of exhaustion. But Aguirre does not develop this argument, and the court did not abuse its discretion in finding the proffered documents irrelevant to the purely procedural issues before it.

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<sup>5</sup> Aguirre amended his complaint concerning Request 304 to allege facts concerning three separate FOIA requests. While he argues that these requests establish his attempts to obtain records without judicial intervention, they say nothing of whether he exhausted his remedies as to Request 304, specifically.

Finally, Aguirre's claims are not saved by his vague assertion that the NRC has a "pattern or practice" of improperly delaying its production of responsive records. Although pattern-or-practice claims are viable under FOIA, and can survive even an agency's production of documents, *see Hajro*, 811 F.3d at 1103, Aguirre does not adequately allege such a claim. His complaints seek orders requiring the NRC to disclose records responsive to his specific requests, rather than injunctive relief against the agency's handling of FOIA requests more generally. *Cf. id.* (describing the hallmarks of pattern-or-practice claims). In the same vein, he discusses the NRC's purported pattern or practice only in arguing that exhaustion here would have been futile, rather than as showing that he will face restricted access to information in the future. *Cf. id.*

#### IV.

In conclusion, Aguirre failed to constructively or actually exhaust his administrative remedies as to the four FOIA requests at issue in these appeals, and he likewise failed to establish the futility of seeing the NRC's administrative process through to its end. We therefore affirm.

**AFFIRMED.**