

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Renee Kay Martin, et al.,

Plaintiffs,

v.

United States of America, et al.,

Defendants.

Case No. 3:22-cv-136

**UNITED STATES' RESPONSE TO
PLAINTIFF'S OBJECTION TO
REPORT AND RECOMMENDATION**

The United States of America¹ by Mac Schneider, United States Attorney for the District of North Dakota, and Michael D. Schoepf, Assistant United States Attorney, submits this Reply to the Response to the Report and Recommendation submitted by Plaintiff Renee Kay Martin (“Martin”). See Doc. 90. Martin’s response and objection to the Report and Recommendation should be overruled, and the Court should enter an Order adopting the Report and Recommendation, granting the motions to dismiss, and dismissing Martin’s Complaint without prejudice.

Martin filed a response and objection to the Court’s Report and Recommendation on March 13, 2024. In her response, Martin argues that the Court should not dismiss the Complaint until Martin has been provided a copy of an alleged FBI report concerning the incident. She also argues that she personally met with an FBI agent and assistant U.S. attorney before filing her Complaint, and that the requirement to present an administrative claim to the agency before seeking relief in federal Court should be excused based on that meeting. Relatedly, she argues

¹ This brief is submitted on behalf of the United States of America and the named federal defendants, to the extent they are sued in their official capacities, because a suit against an employee of the United States in that employee’s official capacity is a suit against the United States. See 28 U.S.C. §§ 2675(a) and 2679(b)(1); Coleman v. Espy, 986 F.2d 1184, 1189 (8th Cir. 1993).

she has made a Freedom of Information Act (“FOIA”) “motion” for the alleged FBI report and that the Court should not rule on the motions to dismiss until the FBI report has been produced.²

None of Martin’s objections justify rejecting the Report and Recommendation.

With respect to Martin’s claim under the Federal Tort Claims Act (“FTCA”), the recommendation that the Court grant the motion to dismiss for failure to exhaust administrative processes should be upheld. Martin’s in-person meeting with an FBI agent and assistant U.S. attorney is not relevant to the administrative requirement that her claim be presented to and denied by the agency before filing in Court. 28 U.S.C. 2675(a) (“An action shall not be instituted [under the FTCA] unless the claimant shall have first presented the claim to the appropriate Federal agency *and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.*” (emphasis added)); see also McNeil v. United States, 508 U.S. 106, n.1, 111–13 (1993) (affirming the statutory command that an administrative claim must be received and finally denied before filing the claim in Court) (citations omitted); Farmers State Sav. Bank v. Farmers Home Admin., 866 F.2d 276, 277 (8th Cir. 1989) (stating that an FTCA administrative claim must be in writing) (citations omitted). Here, United States Magistrate Judge Alice Senechal has concluded in her Report and Recommendation that no written claim

² At several times in her brief, Martin emphasizes that she believes the Department of Justice (“DOJ”), and not the Department of the Interior (“DOI”), is the appropriate agency to exercise jurisdiction over her administrative tort claim. The United States continues to believe that the administrative tort claim was appropriately processed by forwarding it from DOJ to DOI. All the federal law enforcement officers on the scene at the time of the shooting were employed by the DOI. Furthermore, regardless of which agency processed the claim, it remains deficient because Martin did not identify the source of her authority to present claims on behalf of the decedent’s estate or his minor children. See Denial Letter (Doc. 60-2). It is also deficient in that she failed to wait for it to be processed before filing her claim in Court. The defects in the administrative claim justify dismissing the civil action regardless of which agency processed the claim.

was submitted that included proof of Martin's legal authority to act on behalf of the decedent's estate. Report and Recommendation at 6–7. That conclusion should be upheld.

Indeed, Martin does not challenge the Magistrate Judge's recommendations other than to argue the in-person meeting was sufficient. However, an in-person meeting cannot replace the written claim, and Martin cites no authority suggesting otherwise. See Farmers State Sav. Bank v. Farmers Home Admin, 866 F.2d 276 at 277. More importantly, submitting the written claim is only the first step; Martin still needed to wait for a final denial "in writing" from the agency before filing in Court. 28 U.S.C. 2675(a). Because her claim was not denied "in writing," and six months had not passed since it was filed, her Complaint was premature. See McNeil, 508 U.S. 106, n.1, 111–13 (citations omitted). The recommendation to dismiss the FTCA claims for failure to present and exhaust her administrative claim must be upheld.

Martin next argues that the Court should not rule on the Motions to Dismiss until after she has had a chance to review an alleged FBI report regarding the incident. Specifically, Martin contends the FBI has prepared a report of its investigation into the incident, that Martin has requested the report through FOIA, and her claims should not be dismissed until she receives a response to her FOIA request. The argument is not relevant to the claims pleaded in the Complaint or the suggestions for disposition of the case contained in the Report and Recommendations.

First, there is no pending claim under FOIA. See Complaint (Doc. 1). Martin's Complaint focused on her allegations that federal, state, and local law enforcement officers allegedly violated the rights of the decedent. The Complaint alleges that FOIA requests were made to a local entity, the BIA, and the DOJ. See id. at pp. 10, 12. It does not allege that the BIA, FBI, or any other federal agency violated FOIA in any way. See id. Nor has Martin sought to amend her

pleading to add a claim under FOIA. The statute provides that a person may bring an action in district court to compel production of agency records improperly withheld. See 5 U.S.C. 552(a)(4)(B). No such action has been pleaded and therefore Martin’s arguments regarding FOIA are not relevant.

Moreover, Martin’s claims regarding FOIA are waived because they were asserted for the first time in her response and objection to the Report and Recommendation. As noted above, there is no FOIA claim in her Complaint, and she did not raise FOIA in response to the motions to dismiss. There is nothing in the Report and Recommendation suggesting there are pending FOIA issues. She should not be allowed to present new information or argument for the first time in her objection to the Report and Recommendation. See Ridenour v. Boehringer Ingelheim Pharmaceuticals, Inc., 679 F.3d 1062, 1066–67 (8th Cir. 2012) (holding that a party waives arguments not raised before the magistrate judge who later issues a report and recommendation) (citations omitted); Murr v. United States, 200 F.3d 895, 902, n.1 (6th Cir. 2000) (noting that while review of a report and recommendation is de novo, “absent compelling reasons,” district courts will not review new information not presented to the magistrate judge) (citations omitted). There is no reason to set that rule aside in this case. The motions to dismiss were fully briefed before the Report and Recommendation was issued. No new issues should be introduced or considered by the Court at this stage of the case.

For the foregoing reasons, the United States respectfully requests that the Court overrule Martin’s objection to the Report and Recommendation, grant the United States Motion to Dismiss, and dismiss all claims against the United States and Reed Messman, Kelan Gourneau, Michael Slater, Evan Parisien, Earl Charbonneau, and Heather Baker in their official capacities.

Dated: March 20, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2024, the following document(s):

United States' Response to Plaintiff's Objection to Report and Recommendation

was filed electronically with the Clerk of Court through ECF on March 20, 2024, was copied and mailed by first class mail, postage paid to the following non-ECF participant:

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