

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL INSTITUTE OF MILITARY JUSTICE)	
)	
)	
Plaintiff,)	Civil Action No.: 04-0312 (RBW)
)	
v.)	
)	
UNITED STATES DEPARTMENT OF DEFENSE)	
)	
)	
Defendant.)	
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DEFENDANT'S MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 26(c), Fed. R. Civ. P., defendant U.S. Department of Defense hereby moves for a protective order that it not be required to respond to plaintiff's pending discovery request. Discovery is not warranted in this case which is brought pursuant to the Freedom of Information Act ("FOIA").

Plaintiff has agreed to withdraw all discovery propounded except for two interrogatories seeking information in addition to the information provided as a result of defendant's response to plaintiff's FOIA request, supporting declaration and *Vaughn Index*. The reasons supporting this motion are more fully set forth in the Memorandum of Points and Authorities filed herewith. A proposed order is also submitted.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF DEFENDANT DEPARTMENT OF DEFENSE'S
MOTION FOR A PROTECTIVE ORDER**

Defendant respectfully files this Memorandum in support of its Motion for Protective Order in this Freedom of Information Act (“FOIA”) case. Presently pending before the Court is defendant’s Motion for Summary Judgment, filed September 30, 2004. See Docket Nos. 18.

Plaintiff has served a request for admissions, a request for production of documents and interrogatories. By letter of September 3, 2004, plaintiff indicated that its discovery was “prompted by defendant’s assertion that certain documents responsive to plaintiff’s FOIA request are protected by the attorney-client privilege, . . . [and] as they [discovery] seek basic information that is essential to litigating the existence of an attorney-client relationship.” See Attachment 1. Because defendant did not rely on the attorney-client privilege in its dispositive motion, defendant believed that the requested discovery was moot. By letter of October 1, 2004, and telephone call on October 4, 2004, defendant’s counsel sought to confirm this understanding. In response to that inquiry, plaintiff has

indicated that all discovery propounded to defendant is now withdrawn, except for two interrogatories, i.e.,

1. Identify all Subject Lawyers in addition to Griffin Bell, William Coleman, Lloyd Cutler, Mark Hoffman, Bernard Meltzer, Newton Minow, Terrence O'Donnell, William Webster, and Ruth Wedgewood.

[and]

7. With respect to each communication to or from one of the Subject Lawyers concerning the Subject Materials, identify

(a) When, where, how, and through what medium the communication was made;

(B) All officers or employees of the Department of Defense who were parties to the communications; and

(C) Any individuals who were not officers or employees of the United States Government who were parties to the communication.

This request goes far beyond plaintiff's FOIA request by seeking additional information and records not subject to the search for responsive records. Defendant submits that this discovery should be disallowed.

ARGUMENT

Discovery is extremely restricted in FOIA actions. See Public Citizen Health Research Group v. FDA, 997 F.Supp. 56, 72 (D.D.C. 1998); aff'd in part, reversed in part, 185 F.3d 898 (D.C. Cir. 1999); Katzman v. Freeh, 926 F.Supp. 316, 319 (E.D.N.Y. 1996). Although discovery is sometimes permitted with respect to the scope of an agency's search, its indexing and classification procedures, and similar factual matters, see Weisberg v. Department of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980); Schaffer v. Kissinger, 505 F.2d 389, 391 (D.C. Cir. 1974); Exxon Corp. v. FTC, 384 F.Supp. 755, 760 (D.D.C. 1974), the government must first be permitted to submit its dispositive motion and supporting affidavits and have an opportunity to rebut allegations that its affidavits are

insufficient. Military Audit Project v. Casey, 656 F.2d 724, 750 (D.C. Cir. 1981); Founding Church of Scientology v. Marshals Serv., 516 F.Supp. 151, 156 (D.D.C. 1980). Discovery should be denied altogether if the Court is satisfied from the agency's affidavits that no factual disputes remain. Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), vacated in part, reh'g denied, 607 F.2d 367 (D.C. Cir. 1979). Nothing in plaintiff's discovery request addresses any factual matters that are properly at issue in this case. Moreover, there has been no ruling on defendant's dispositive motion. The proposed discovery, therefore, is clearly inappropriate.

The Court has broad discretion to manage the discovery process, Zerilli v. Smith, 656 F.2d 705, 710 (D.C. Cir. 1981), and discovery should be deferred if there is a possibility that the case can be resolved without it. Maresse v. American Academy of Orthopedic Surgeons, 706 F.2d 1488, 1497 (7th Cir. 1983); Groves v. United States, 533 F.2d 1376, 1380 (5th Cir. 1976).

Accordingly, the Court should reject plaintiff's requests for discovery as improper.

CONCLUSION

For the above reasons, defendant respectfully requests that this Court grant its Motion for Protective Order and disallow any discovery pending further order of this Court after consideration of defendant's motion for summary judgment.

Respectfully submitted,

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