

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

NATIONAL INSTITUTE OF MILITARY JUSTICE,	:	
	:	
Plaintiff,	:	ECF
	:	
v.	:	Civil Action No. 04-312-RBW
	:	
U.S. DEPARTMENT OF DEFENSE,	:	
	:	
Defendant.	:	

**REPLY TO PLAINTIFF’S OPPOSITION TO
DEFENDANT’S MOTION FOR PROTECTIVE ORDER**

Presently pending before the Court is defendant’s Motion for Summary Judgment, filed September 30, 2004. See Docket No. 18. Plaintiff not yet responded to that motion. However, prior to the filing of defendant’s motion, plaintiff served discovery on defendant. The discovery was served on defendant in anticipation of the assertion by defendant of the attorney-client privilege in this Freedom of Information Act law suit. See Attachment 1 of Defendant’s Motion for Protective Order. Docket No. 19. Defendant did not assert this privilege.

Although plaintiff has now withdrawn all of its discovery, except two interrogatories, it continues to assert a need for responses to those two. See Plaintiff’s Opposition to Defendant’s Motion for Protective Order (Pl. Opp.) at pp. 3-4. The two interrogatories are:

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.

Docket No. 19 at p. 2.

Plaintiff now asserts that it needs the responses for two primary reasons, not related to any privilege asserted. It alleges that it must have the responses because: 1) only a few documents have been located and therefore there must have been an inadequate search; and 2) there is evidence of bad faith. Pl. Opp. at pp. 2-3.

1. Adequacy of the Search

Because only a few documents have been found by defendant in response to plaintiff's FOIA request, plaintiff claims that the search was inadequate. It rests this assertion on its statement that "it is implausible that a group of at least 11 lawyers would generate only two pieces of paper. *Id.* at p. 3. It urges the Court to permit it to discover the names of other lawyers who may have consulted with DoD in writing or otherwise in order to determine whether an adequate search was conducted. It simply believes that there are more records to be found and provides no affidavits or other documentation to support this extraordinary request. In contrast, a review of the sworn declaration of Mr. Aly attached to defendant's dispositive motion, reflects that an adequate search was conducted and all records located were processed for possible release under the Freedom of Information Act.

Moreover, as Mr. Aly states in the attached Second Declaration of Stewart Aly, "[t]he office where responsive documents are likely to be located do not keep their files by the names of

submitters or other correspondents.” Exhibit 1 at ¶ 3. Therefore, plaintiff is requesting that a useless undertaking be ordered. In any event, “[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search . . . are sufficient to sustain the agency's burden. . . . [A]ccordingly, discovery relating to the agency's search . . . generally is unnecessary if the agency's submissions are adequate on their face. When this is the case, the district court may `forgo discovery and award summary judgment on the basis of affidavits.' . . . In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations . . .” Carney v. DOJ, 19 F.3d 807, 812 (2nd Cir.) cert. denied 513 U.S. 823 (1994); see also, Kay v. Federal Communication Comm’n, 976 F.Supp. 23, 34, n.35 (D.D.C. 1997)(“discovery should be denied [in a FOIA case] if the district court determines that plaintiff merely desires discovery as a means of finding ‘something that might impugn the affidavits’ submitted by the agency.”)

2. Plaintiff’s Allegations of Bad Faith

Plaintiff attempts to argue that there is evidence of bad faith in this case because defendant initially determined that some documents were not responsive and then changed its mind and because Mr. Aly’s declaration appears to reflect an inconsistency with the numbers of documents. In order to address these charges, defendant submits the attached Second Declaration of Mr. Aly. First, Mr. Aly explains that he believed, based on the description of the documents sought, that certain documents were not responsive to plaintiff’s FOIA request. Exhibit 1 at ¶ 3. Before defendant’s Vaughn Index was filed, Mr. Aly reconsidered his views and the documents originally determined to be nonresponsive were processed as part of the

defendant's FOIA response and discussed in the Vaughn Index and supporting declaration. The charge of a "groundless ploy" is meritless and supported by no credible evidence offered by plaintiff that would cast doubt on the good faith efforts of defendant.

Now, plaintiff latches on to an inconsistency in Mr. Aly's declaration that it claims also shows bad faith on the part of defendant. That inconsistency involves the description of only three documents (Doc. 3-5) in ¶ 21 of his declaration which references five documents. The whole of plaintiff's argument on this consists of its statement that

. . . defendant's Vaughn declarant states that 'the search for documents located five documents containing communications to or from several experienced lawyers.' Aly Declaration ¶ 21. In the next sentence he states that 'These documents are described in detail in the index at Tab C; they are documents 3 through 5.'

Plaintiff asserts that "[i]n the space of one sentence, five documents shrink to three." Mr. Aly explains the discrepancy as follows:

4. When the search was performed, five documents were located which I determined to be non-responsive. In the course of preparing the declaration previously filed in this case I changed that determination and decided to review the documents and release those to which no FOIA exemption applies. I attempted to explain in paragraph 11 of my previous declaration that two of these documents were released along with the declaration:

In the final action on this request, I have attached to this declaration three Tabs with additional documents released at this time in whole or in part. Tab D has 14 pages which I initially determined to be non-responsive, as explained below in paragraph 21. Persona information has been redacted from one of these pages.

These two sentences described Tab D which was attached to the declaration. Tab D contains fourteen pages released with the declaration which comprise the two documents located during the search which I determined could be released. They

were combined into one Tab for the release.

5. I neglected to mention in paragraph 21 of the previous declaration that two of the documents originally determined to be non-responsive were released in full in Tab D. Exhibit 1, hereto at ¶¶ 4 & 5. Accordingly, the five documents did not shrink to three as suggested by plaintiff, but two were actually released and were found in Tab D. Accordingly, there has been no showing of bad faith on the part of defendant.

Conclusion

For the reasons set forth herein and in defendant's motion for protective order, it is respectfully requested that said motion be granted and discovery be stayed pending further order of this Court.

Respectfully submitted,

KENNETH L. WAINSTEIN, D.C. BAR # 451058
United States Attorney

R. CRAIG LAWRENCE, D.C. BAR # 171538
Assistant United States Attorney

CLAIRE WHITAKER, Bar #354530
Assistant United States Attorney
555 4th St., N.W. Room 10-917
Washington, D.C. 20530
(202) 514-7137

CERTIFICATE OF SERVICE

_____ I hereby certify that the foregoing *Reply to Plaintiff's Opposition to Defendant's Motion to Quash Plaintiff's Subpoena* was served by e-filing, this 28th day of October 2004, addressed to:

MARK H. LYNCH
PHILLIP E. DUBÉ
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

CLAIRE WHITAKER
Assistant U.S. Attorney