

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, ET AL.)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 04-0814 (HKK)
)	ECF
CENTRAL INTELLIGENCE AGENCY,)	
)	Status Conference Scheduled for Dec. 21, 2006
)	
Defendant.)	
_____)	

DEFENDANT'S MOTION FOR A PROTECTIVE ORDER

Pursuant to Fed. R. Civ. P. 26(c), Defendant Central Intelligence Agency (“CIA” or the “Agency”), through counsel, moves this Court for an order protecting Defendant from improper and premature discovery propounded by Plaintiffs. Specifically, Defendant respectfully requests that the Court enter a protective order providing that Plaintiffs are not entitled to any discovery, including the discovery sought in Plaintiffs’ First Set of Interrogatories, First Request for Production of Documents, Plaintiffs’ Request for Admissions, and Notice of Deposition Taken Pursuant to Rule 30(b)(6),¹ all dated October 3, 2006, and that Defendant, therefore, does not need to respond to Plaintiffs’ discovery, or produce a Rule 30(b)(6) witness in this matter, which was brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552. In support of this Motion, Defendant respectfully refers the Court to the accompanying Memorandum in Support of Defendant's Motion for a Protective Order. A proposed Order consistent with this Motion is attached. Pursuant to Local Rule 7(m) undersigned counsel has conferred with counsel for

¹Plaintiffs Hall and SSR have noticed the deposition in question for November 9, 2006.

Plaintiffs Hall and SSR, Mr. James Lesar, regarding the discovery requests. Mr. Lesar indicates that Plaintiffs Hall and SSR are unwilling to withdraw their requests at this time.

Dated: October 24, 2006

Respectfully submitted,

/s/

JEFFREY A. TAYLOR, D.C. Bar # 498610
United States Attorney

/s/

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Of Counsel:
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Central Intelligence Agency

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

Although the Agency's motion for summary judgment is due in less than one week, Plaintiffs Hall and SSR have propounded discovery, which they should not be permitted to pursue. Therefore, Defendant, pursuant to Federal Civil Procedure Rule 26(c), now moves for a protective order to avoid having to respond to Plaintiffs' First Set of Interrogatories, First Request for Production of Documents, Plaintiffs' Request for Admissions, and Notice of Deposition Taken Pursuant to Rule 30(b)(6), (collectively "Plaintiff's discovery requests") until further order of the Court. A copy of Plaintiff's discovery requests is attached herewith as Exh. A.

Fed. R. Civ. P. 26(c) provides that a court may grant a motion for protective order upon a showing of good cause. The Court should find that good cause exists here. First, discovery generally is not permitted in cases brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Second, Plaintiff seeks discovery, in part, regarding issues that this Court has repeatedly determined are not a subject of this litigation. Finally, Defendant's motion for summary judgment is scheduled to be filed on October 30, 2006, less than one week's time, at

which time certain related issues will be further addressed via a sworn declaration. In the alternative, Plaintiffs' discovery requests, served shortly prior to the filing of the Defendant's impending motion for summary judgment, are premature.

ARGUMENT

Discovery in FOIA actions generally is restricted. See Public Citizen Health Research Group v. FDA, 997 F. Supp. 56, 72 (D.D.C. 1998) ("Discovery is to be sparingly granted in FOIA actions."). Here, Plaintiffs' discovery request relates exclusively to two issues. First, Plaintiffs seeks discovery regarding how fees were assessed in excess of \$29,000.00, and later reduced to \$10,906.33 in Hall v. Central Intelligence Agency, Civ. Action No. 98-1319 ("Hall I"). See Exh. A, generally. Hall and SSR's discovery request on this issue is now the third time in this case that they have sought documents or information related to the Hall I fee estimates. Hall initially filed a Motion to Require CIA to Produce Certain Records, namely, "the records which the CIA previously searched for and requested payment of \$10,906.33 in search fees from Roger Hall." USDC Pacer Dkt. No. 11 at 1, Plaintiff's Motion to Compel. The Court denied Plaintiff's Motion, stating that Hall is not entitled to "resuscitate his previously filed, now dismissed action" and the "documents Hall seeks to have produced 'forthwith' are simply no longer in play." Order dated 13 April 2005 at 11.

Hall and SSR later filed a Motion for an Accounting of Time and Costs of Searches, in which they again sought information regarding the Hall I fee assessments. The Court denied the Motion, stating as follows:

The CIA contends that Hall is not entitled to an accounting for the costs incurred in... the previous action before Judge Friedman.... Noting that this court held that the documents at issue in the previous litigation before Judge Friedman 'are simply no longer in play,' the CIA argues that, *a fortiori*, issues relating to fees associated with that litigation must also no longer be in play. The court agrees. This civil action concerns plaintiffs' 2003 FOIA request; it is hard to understand why this court should address matters involving a different case before a different judge, particularly in light of the fact that Hall already requested an accounting in that previous case. If Hall disagrees with Judge Friedman's decision not to closely scrutinize fees in the action before him, the appropriate response would be to address such disagreement with Judge Friedman or with the D.C. Circuit.

USDC Pacer, Dkt. No. 46, Order dated January 25, 2006 at 6 (emphasis added) (internal citations omitted). The Court made it abundantly clear that Plaintiffs may not re-litigate fee assessment issues in Hall I, and therefore, Plaintiffs are not entitled to discovery on that issue.

In addition to the Hall I fee assessment issue, Plaintiffs also seek discovery regarding searches for records responsive to Item 6 in this litigation. CIA will file its motion for summary judgment by October 30, 2006. In support of that motion, the sworn Declaration of Scott A. Koch, the CIA Information and Privacy Coordinator, will describe the Defendant's search in reasonable detail. Furthermore, on August 15, and October 17, 2006, the Agency forwarded all non-exempt documents responsive to Plaintiffs' Item 6 request.² Copies of cover letters sent with those documents are attached herewith as Exh. B. Therefore, the material Defendant has already provided and will provide within a week, under oath, should obviate the need for discovery, in this matter.

² A Vaughn index setting forth the bases under FOIA for withholding and redacting documents responsive to Item 6 will also be filed in support of Defendant's motion for summary judgment.

In a FOIA case, the defendant can establish the reasonableness of its search by affidavits if they are relatively detailed, non-conclusory, and made in good faith. Weisberg v. Department of Justice, 745 F.2d 1485 (D.C. Cir. 1985). Summary judgment is appropriate where the agency submits a “reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, unless a review of the record raises substantial doubt” about the adequacy of the search. Valencia-Lucena v. United States Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999), quoting Oglesby v. Department of Army, 920 F.2d 57, 68 (D.C. Cir. 1990). In this case, the Declaration of Scott A. Koch, which will be filed with the Court shortly, will meet this standard.

Here, Plaintiffs cannot yet make a showing that the record to be filed as exhibits to Defendant’s impending motion for summary judgment in this case will be insufficient for purposes of resolving the Defendant’s motion. Plaintiffs are, of course, at liberty to oppose the Agency’s motion for summary judgment by arguing that the absence of answers to their proposed interrogatories precludes a finding by the Court or that the Defendant’s search was inadequate or even that the assessment of fees was questionable. However, because Plaintiffs have not even awaited the opportunity to review Defendant’s impending filings, Plaintiffs unreasonably and prematurely make their discovery requests such that Defendant would be required to duplicate efforts.

In light of the Court’s previous rulings, the Plaintiffs are not entitled to engage in discovery on the issues they outline in Exhibit A. Should the Court deem that, for some reason, they may be entitled to pursue the documents, Plaintiffs’ request for discovery at this stage prematurely anticipates discovery that might be had in the event that the Court’s denies

Defendant's motion for summary judgment. All too early, Plaintiffs' request for discovery is inappropriate now. Accordingly, the Court should enter a protective order pursuant to Fed. R. Civ. P. 26(c), barring any discovery in this case until after the Court has had an opportunity to determine whether the Defendant is entitled to summary judgment on the record, after the parties have filed dispositive motions.

CONCLUSION

For the reasons set forth above, the Agency respectfully submits that discovery under the facts and circumstances of these proceedings at this time would be inappropriate and that the Court should grant Defendant's request for a protective order until at least after the Court rules on the Agency's motion for summary judgment, and finds that Plaintiffs have made some showing that discovery is warranted.

Respectfully submitted,

/s/

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/s/

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Of Counsel:
Christian Ricciardiello
Assistant General Counsel
Central Intelligence Agency

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2006, a copy of foregoing Motion for a Protective Order was electronically served on all parties by operation of the Court's electronic filing system.

_____/s/_____
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202-305-4851

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ORDER

Upon consideration of Defendant's Motion for Protective Order, Memorandum in Support, and the entire record in this matter, it is, on this _____ day of _____, 2006, hereby,

ORDERED that Defendant's Motion for Protective Order be and hereby is granted and that discovery in this case shall not be had unless otherwise ordered by this Court.

UNITED STATES DISTRICT JUDGE

Copies via ECF.