UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 04-0814 (HHK)
	:	
CENTRAL INTELLIGENCE AGENCY,	:	
	:	
Defendant	:	

OPPOSITION OF PLAINTIFFS ROGER HALL AND STUDIES SOLUTIONS RESULTS, INC. TO DEFENDANTS MOTION FOR A PROTECTIVE ORDER

SYNOPSIS

While defendant Central Intelligence Agency ("CIA") has made a concerted effort to confuse the matter, the issue presently before the Court, for the first time, is whether plaintiffs should be allowed to take discovery on the adequacy of the CIA's search for some of the records requested by Item six of their February 7, 2003 request. This is the request at issue in this lawsuit. This issue has not previously been considered by this Court.

The CIA has moved for a protective order under Rule 26(c) of the Federal Rules of Civil Procedure, asserting that there is "good cause" for affording plaintiffs the right to take discovery at this time. There is a dispute between the parties as to the adequacy of the CIA's search. The CIA was to have provided plaintiffs with documents which show the basis for three different statements it had made as to the costs incurred by plaintiff Roger Hall ("Hall") in Hall v. Central Intelligence Agency ("Hall I"), Civil Action No.

98-1318. Item six requests documents showing the basis for such fees. The CIA has produced no documents showing the basis for the search fees it represented to the Hall I court had been incurred by Hall. The only two documents it has produced by the CIA in responsive to the costs portion of Item six are two letters it wrote Hall in 1994 and 1995. These letters do not document the basis for any search fees but simply assert that he owed certain minor amounts of copying charges.

It is obvious that an agency cannot assess FOIA search fees without the persons who perform the searches recording their time and transmitting it to the persons who calculate the fee assessment. The failure of the CIA to produce any such records raises the possibility that the fees assessed for the Hall I requests were concocted out of whole cloth or greatly inflated to obstruct his access to the records he sought. If this is the case, it has implications not only for this case but for enforcement of the FOIA's mandate generally. First, however, it must be ascertained whether the CIA conducted an adequate search.

For the reasons set forth below, the CIA's motion for partial summary judgment fails to meet its burden of proof of showing that an adequate search has been conducted. Nor has it otherwise shown that there is "good cause" for denying plaintiffs their opportunity to take discovery on the search issue.

STATEMENT OF THE CASE

On May 26, 2006, the parties agreed that "[o]n or before

August 15, 2006, [the] CIA shall make available to plaintiffs non-exempt documents and a Vaughn Index, if necessary, responsive to item six of plaintiff's February 3, 2003 request, insofar as that item seeks records relating to the assessment of fees."

The part of Item six of plaintiffs' request which related to the assessment of fees for records which Hall had sought in prior requests submitted in 1994 and 1998. It asked for "all records pertaining to the assessment of fees in connection" with those requests, "including but not limited to any itemizations or other records reflecting the time spent on each search, the rate charged for the search, the date and duration and kind of search performed, etc."

By letter dated August 15, 2006, the CIA released two records in responsive to this part of plaintiffs' Item six request. The two documents were letters dated May 28, 1994 and March 22, 1995, which the CIA had sent Hall back then. Not only had Hall already received these letters, but they simply mentioned copying fees which the CIA said he owed for these requests, in the amount of $ 8.30 and $ 71.30, respectively. No records were provided which documented the basis for any fees which Hall was to be charged. None at all.

This complete lack of any documentation for fees which Hall was claimed to owe comes against this background. First, in Hall I, by letter dated May 24, 1999, the CIA asserted that its searches of the Hall I request had taken over 115 hours to locate approximately 400 pages of records or less than 4 pages per hour.

Excluding Hall's two hours of free search time and 100 pages of free copies, it said the fees he owed as of that date came to $4,550.00. See Exhibit 1uu, letter from Lee Strickland to Elaine P. English dated May 24, 1999.. However, while it denied his request for a fee waiver, it said that in an exercise of administrative discretion it would not charge him the fees he had incurred in as a result of its processing of these records. Id.

The CIA's response to the costs portion of item six of the plaintiffs' 2003 request produced no records evidencing the basis for this claim. No records showing how much time was spent searching by whom on what date at what rate have been made available.

A little over a year later, United States District Judge Paul L. Friedman, the Hall I judge, issued an order which, inter alia, required the CIA to submit a supplemental affidavit by October 16, 2000 demonstrating the adequacy of the CIA's search and justified the nondisclosure of any additional records that were discovered. Exhibit 2. On September 18, 2000, the CIA filed a motion to compel Hall to commit to payment of fees "before any additional searches are made." See Exhibit 3.

By order filed July 22, 2002, Judge Friedman entered an order granting the CIA's motion to require Hall to commit to payment of an unspecified amount of search fees and copying costs. The parties were ordered to file a joint report on or before August 26, 2002, "indicating whether or not plaintiff has committed to paying search and copying fees up to a specific amount." See Exhibit 4.

On August 23, 2002, the parties filed their Joint Report. The report stated that Hall "is committed to paying search and copying fees up to $1,000.00. However, he wishes to specify on which of the remaining issues he wants the CIA to focus its searches." See Exhibit 5, The Parties' Joint Report In Response To The Court's Order of July 22, 2002 at 1. The Joint Report further stated that because the CIA had not yet received Hall's search specifications, "it is impossible at this point to set a briefing schedule because it cannot now determine: whether the plaintiff's search specification is appropriate (e.g., within the scope of this Court's August 10, 2000 order); how long the yet-to-be requested search will take, and, how many possibly responsive documents the search may produce." Id. at 1-2.

On January 16, 2003, Judge Friedman issued an order in which he noted that in their Joint Status Report the parties had indicated that Hall had agreed to pay fees up to $1,000, and to inform the CIA "which remaining issues [he] would like [the CIA] to focus on in its search." See Exhibit 6, January 16, 2003 Order. He also noted that although the parties had agreed they would provide the Court with either the CIA's objections to Hall's search specifications or a proposed schedule, the Court had not received any subsequent filings. Accordingly, Judge Friedman ordered the parties to file a joint status report on or before January 31, 2003. Id.

In the parties' Second Joint Report, the CIA claimed that

because the Court's August 10, 2000 order had given it a short time frame to provide the additional information, "in an abundance of caution, in order to well position itself in case the agency lost the fee waiver issue, the agency voluntarily completed most of the searching and processing required by the Court's order . . . ." The Parties Joint Report in Response to the Court's Order of January 16, 2003. at 2. The Agency further asserted that the searching and processing conducted after August 2000 "amounts to at least $29,000." Second Joint Status Report, ¶ 3.

In responding to Item 6 of Plaintiffs' February 7, 2003 request, the CIA has produced no records documenting fees and costs of "at least $29,000" or anything close to it. In fact, it has produced no records at all showing how or when or in what amount any fees or costs were incurred.

Subsequently, on February 7, 2003, he submitted a new FOIA request, Item 6 of which requested the documents which served as the basis for the fees allegedly incurred by Hall in his Hall I requests.

On March 31, 2003, the CIA moved for leave to file a "Notice of Corrected Calculation of Search Fees." In it, the CIA asserted that "some of the fees initially attributed to plaintiff's FOIA request have been mistakenly included in the Government's fee calculation." Although stating that the overall number of hours expended in processing Hall's request remained unchanged, "the Government has determined that the portion of these fees that are attributable to the search for responsive records should be

reduced.." Id. As a result, the CIA advised the court and Hall that "the correct amount of fees incurred by the CIA since August 2000 . . . is $10,906.33." See Exhibit 7.

In responding to Item 6 of plaintiffs' February 7, 2003 request, the CIA has produced no records which document the basis for the reduction in fees from "at least $29,000 to $10,906.33." Not a single document has been produced which reflects the basis for this startling change in the amount of fees allegedly incurred.

In summary, during the pendency of Hall I, the CIA asserted on three different occasions that Hall had incurred specific amounts of costs in connection with his request, but it has produced no documents which provide a basis for any of these figures. Because of that, plaintiffs initiated discovery to ascertain the nature and adequacy of the CIA's search for materials pertaining to that part of Item six relating to costs.

ARGUMENT

I. THE CIA HAS FAILED TO MEET ITS BURDEN OF SHOWING THERE IS GOOD CAUSE TO ISSUE A PROTECTIVE ORDER

A. Standard Governing Issuance of a Protective Order

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the CIA has moved for a protective order against plaintiffs' proposed discovery regarding the adequacy of its search for records responsive to that part of Item 6 of plaintiffs' FOIA request which seeks records reflecting the documentary basis for the CIA's various and varying fee assessments rendered during Hall I. Under Rule 26(c) a Court may protect a party from "annoyance, embarrassment,

oppression, or undue burden or expense. Fed.R.Civ.Pro. 26(c). See Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 789 (1st Cir. 1989), cert. denied, 488 U.S. 1030 (1989))(if good cause is not shown, discovery materials should not receive judicial protection).

The burden of demonstrating good cause rests squarely on the party requesting the protective order. Landry v. Air Line Pilots Assoc., 901 F.2d 404, 435 (5th Cir.) cert. denied, 498 U.S. 895 (1990)(party seeking protective order must show good cause and a specific need for protection; United Phosphorus, Ltd. v. Midland Fumigant, Inc., 164 F.R.D. 245, 247 (D.Kan.1995)(burden of establishing good cause is unambiguously on party seeking order).

Good cause is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. Glenmede Trust Co. v. Thompson, 56 F.3d 456, 483 (3rd Cir.1995). Good cause is not established by merely showing inconvenience and expense. Lehynert v. Ferris Faculty Assoc. MEA-NEA, 556 F.Supp. 316, 318 (W.D.Mich.1983). In this circuit, a district court must articulate its reasons for granting a protective order sufficiently to permit appellate review. E.E.O.C. v. National Children's Center, Inc., 98 F.3d 1406, 1411 (D.C.Cir.1996)(district court failed to make required showing of "good cause" when its protective order contained no discussion of why use of unfiled deposition was required to be restricted).

Here the CIA has made no claim that discovery should be forbidden to protect it from any of the reasons set forth in Rule 26(c)--"annoyance, embarrassment, oppression, or undue burden or

expense," much less met its burden of demonstrating "good cause" by showing that discovery will cause a clearly defined and serious injury. Rather, it has raised four objections of a different nature: (1) discovery is generally not permitted in FOIA cases; (2) plaintiffs' discovery is premature" because this Court has not denied its motion for summary judgment motion; (3) plaintiffs have twice previously sought the materials they are now seeking; and (4) the CIA has conducted an adequate search for Item 6 materials.

These objections to plaintiffs' discovery will be dealt with seriatim below.

B. The D.C. Circuit Has Recognized the Importance of Discovery in FOIA Cases

The CIA contends that "[d]iscovery in FOIA actions is generally restrained." But the D.C. Circuit has on a number of occasions endorsed the importance and appropriateness of discovery in FOIA cases. See, e.g., Weisberg v. U. S. Dept. of Justice, 543 F.2d 308, 311 (D.C.Cir. 1976)("Weisberg I")("plaintiff was entitled to insist on his interrogatories being answered"); Weisberg v. United States Dept. of Justice, 627 F.2d 365 (D.C.Cir.1980)("Weisberg II"); Founding Church of Scientology, Etc. v. Nat. Sec. Agency, 610 F.2d 834 (D.C. Cir.1979). The issue, then, is whether discovery is appropriate in this case.

As the above-cited cases indicate, FOIA cases involving an issue as to the adequacy of an agency's search are more likely to benefit from discovery than other issues in a FOIA cases. But that is what is directly at stake here. Although the CIA claims that it has conducted an adequate search for materials responsive to Item

6 of the request, it has produced no records documenting the basis for any of the three different assertions it made in Hall I as to the amounts of fees owed by Hall.

That such records should exist is obvious. The CIA's own regulations set forth the differing rates that are charged for the different kinds of searches its employees perform. For example, "Clerical/Technical" searches are charged at a rate of $5.00 per quarter hour, whereas those that are "Professional/Supervisory" are charged at $10.00 per quarter hour. See 32 C.F.R. § 1300.13. Some kind of record must be created so that fees can be accurately tabulated. A fortiori is this the case where an agency like the CIA has a decentralized, highly compartmentalized filing system.

In Founding Church of Scientology, supra, the D.C. Circuit observed that "[t]o accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act . . . and if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory."). Id., 610 F.2d at 837-37.

This point has all the more force here because if an agency cannot be required to produce records documenting the basis for its fee claims, then it has been given a free hand to concoct whatever figures it believes will be sufficient to block a requester's

access, thereby completely undermining the disclosure mandate which

Congress created when it enacted the FOIA.

C. Plaintiffs' Discovery is Not Premature, Nor Must It Await a Ruling by the Court on the CIA's Summary Judgment Motion

The CIA argues that plaintiffs' discovery is premature and that any attempt at discovery must await this Court's ruling on its summary judgment motion. There is no basis in law for this argument. When the CIA released the materials it said were responsive to the costs portion of item six and there were no records documenting any of the fees asserted by the CIA in Hall I, it was apparent that there was a material issue of material fact in dispute as to the adequacy of the search. As a result, plaintiffs commenced discovery.

Where such a material fact is in dispute, there is no need to delay discovery. In fact, there are good reasons to get on with it. First, waiting until summary judgment motions have been ruled on simply adds delay and duplication of effort. Discovery will have to await the full briefing and decision on the merits of all the issues presented in the motion for summary judgment. If summary judgment is denied and discovery then permitted, discovery will ensue followed by a re-briefing after discovery is completed. It is simpler, more efficient and less costly for all concerned to take the discovery first and then brief all the issues.

Certainly, there is no legal basis for the CIA's contention that discovery should await this Court's denial of pending motion for summary judgment. Such a position is unsupported by any legal authority and is flatly contradicted by Rule 56(f) itself, which

provides that a court may order a continuance of summary judgment proceedings in order to permit discovery to be had. See Fed.R.Civ. Pro. 56(f)..

The policy underlying this provision is "to provide an additional safeguard against an improvident or premature grant of summary judgment...." Federal Practice and Procedure (Second Ed. 1998), ¶ 2740(footnotes omitted). Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality. Id.

So strong is this policy that courts sometimes enforce it even in circumstances where Rule 56(f) had not been formally complied with. See Miller v. Beneficial Management Corp., 977 F.2d 834 (3d Cir.1992)(district court abused its discretion in denying motion for postponement of ruling on defendant's motion for summary judgment pending completion of essential discovery, even though plaintiff had failed to file the required affidavit but had repeatedly argued in briefs that consideration of the motion for summary judgment should be postponed until crucial depositions had been taken). The District of Columbia Circuit has endorsed this position. See, e.g., First Chicago Int'l v. United Exchange Co., 836 F.2d 1375 (D.C.Cir.1988)(grant of summary judgment without allowing any substantial merits discovery was not justified by plaintiff's failure to file an affidavit showing the need for further discovery, considering that district court had erred in assuming that plaintiff had waived merits discovery, that plaintiff

was not at fault in failing to conduct discovery on the merits, and that the outstanding interrogatories, document requests and deposition subpoenas were sufficient to inform the district court that further discovery was needed).

In view of these authorities and the plain language of Rule 56(f), it is evident that there is no basis for contending that discovery must await a ruling on the CIA's motion for summary judgment.

D. Whether Plaintiffs' Previously Sought to Obtain Records Relating the Fee Assessments in Hall I Is Irrelevant to the Issue Presently Before the Court

The CIA argues that plaintiffs are seeking materials on the fee assessment issues which they have previously sought before. But what is before the Court now is not a request for an accounting of fees which the CIA tried to assess in Hall I but whether the CIA has produced those records responsive to Item six of the request at issue in the instant case. Because the adequacy of the CIA's search for these records is in dispute, discovery is appropriate.

The discovery requests which plaintiffs have submitted are all intended to obtain information which bears on the adequacy of the search issue or is reasonably calculated to lead to the discovery of such information. The CIA has not pointed to any specific discovery requests which are objectionable because they are not reasonably related to efforts to obtain information regarding the adequacy of the CIA's search for materials responsive to Item six.

E. The CIA Has Not Shown that it Conducted an Adequate Search for Records Responsive to Item 6 of Plaintiffs' Request

The CIA contends that it has conducted an adequate search for records responsive to Item 6 of plaintiffs' request. But the Declaration of Scott A. Koch which it submitted in support of its motion for partial summary judgment fails to establish this. To begin with, it fails to comply with the requirement of Rule 56(e) that affidavits submitted in support of a motion for summary judgment be made on personal knowledge. That is, there is no indication that he has personal knowledge of what records, if any, were created which set forth the basis for the fees Hall was told he had to pay, which CIA components created them, whether those units transmitted and/or retained them, or which personnel created, transmitted and/or retained them. It is critical that someone with personal knowledge of such matters set forth the details of the search.

As the D.C. Circuit noted in Weisberg I regarding that plaintiff's request for scientific data on tests performed on items of evidence in the assassination of President John F. Kennedy,

> Surely their existence or non-existence should be determined speedily on the basis of the best available evidence, i.e., the witnesses who had personal knowledge of events at the time the investigation was made.

Weisberg I, 543 F.2d at 311.

Second, while Koch states that "my office" conducted a manual search of Hall's administrative file in the PIPD, which he says is the division which manages the processing of FOIA requests, including any assessment of fees associated with FOIA requests, Koch

Decl., ¶ 32, he also states that "PIPD's administrative files are the systems of records that are most likely to contain documents or information pertaining to the assessment of fees associated with Hall's requests." Id. However, the D.C. Circuit has held that an agency "cannot limit its search to only one records system if there are others that are likely to turn up the information requested." Oglesby v. U.S. Dept. of Army, 920 U.S. 57, 65, (D.C.Cir.1990).

Koch fails to state whether there are any other records systems which are likely to contain such records. For example, might the various components which actually performed the searches have retained copies? Or could they be in the files of an attorney who worked on the case in litigation?

Third, Koch fails to indicate that he took a most logical step in trying to locate records which must have created but were not found in the file examined: he does not state that he talked with the persons who actually conducted the searches to learn what records they created, where and when and to whom they sent them.

To prevail in a FOIA case, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable or is wholly exempt from the Act's inspection requirements." National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C.Cir.1973). Agency affidavits regarding the search for responsive records are inadequate to support summary judgment where they "do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the

plaintiff] to challenge the procedures utilized." Weisberg II, 627 F.2d at 371.

When the adequacy of an agency's search is in dispute, summary judgment is inappropriate as to that issue. See Founding Church of Scientology, supra, 610 F.2d at 836-837.

It is a truism that the issue is not whether documents might exist that are responsive to the request but rather whether the search conducted by the agency was "adequate'." Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C.Cir.1984)(Weisberg III")(emphasis in original); McGehee v. CIA, 697 F.2d 1076, 1101 (D.C.Cir.1983). The test governing the adequacy of an agency's search under the FOIA is one of "reasonableness." Oglesby v. Department of the Army, 920 F.2d 57, 67 n.13 (D.C.Cir. 1990). Meeropol v. Meese, 790 F.2d 942, 956 (D.C.Cir.1986)("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request"). In Truitt v. Department of State, 897 F.2d 540 (D.C. Cir. 1990), the D.C. Circuit expatiated on this standard, stating that:

> It is elementary that an agency responding to a FOIA request must 'conduct[] a search reasonably calculated to uncover all relevant documents,' and, if challenged, must demonstrate 'beyond material doubt' that the search was reasonable. "'The issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate.' The adquacy of an agency's search is measured by a 'standard of reasonableness,' and is 'dependent upon the circumstances of the case.'"

Id., at 542 (footnotes omitted)(emphasis added). If such "doubt" exists as to the adequacy of the search, Truitt counsels, "sum-

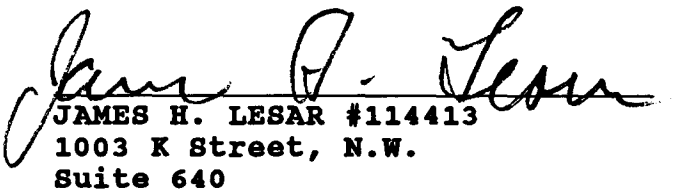
mary judgment for the agency is not proper." Id. (footnote omitted). Where "the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order[,]" Founding Church, supra, 610 F.2d at 836, and the plaintiff is entitled to take discovery on the adequacy of the search. Weisberg II, supra, 627 F.2d at 371.

Here, the CIA has not demonstrated "beyond material doubt," that the search that it conducted was reasonable. Accordingly, plaintiffs should be allowed to pursue discovery as to the search for materials responsive to item six of their request.

CONCLUSION

For the reasons set forth above, the CIA has failed to establish that there is good cause to prevent plaintiffs from taking their proposed discovery. Accordingly, the CIA's motion for a protective order should be denied.

Respectfully submitted,



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