UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, *et al.*,	)	
	)	
Plaintiffs,	)	Status Conf. Scheduled for May 11, 2007
	)	
v.	)	Civil Action No. 04-0814 (HHK/JMF)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	ECF
	)	
Defendant.	)	
	)	

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR A PROTECTIVE ORDER

INTRODUCTION

In Plaintiffs' Opposition to Defendant's Motion for a Protective Order, Plaintiffs argue that their discovery requests relate not to issues that this Court has repeatedly determined are not a subject of this litigation, namely the calculation of fees in *Hall I*, but to the adequacy of the CIA's search for documents responsive to Item 6 of their February 7, 2003 request. Plaintiffs base their entire argument on their assertion that the CIA has accounted for only two documents related to the assessment of fees in response to Item 6. This assertion is incorrect, and demonstrates a failure by Plaintiffs to even read the documents and pleadings at issue in this litigation, at best. Because their entire argument that discovery is necessary rests upon the assertion that accounting for only two documents in response to Item 6 is dispositve of the CIA's inadequate search, and that assertion is wholly misplaced, Plaintiffs' argument fails on its face.

I. Plaintiffs' Claim for Permission to Engage in Discovery, Based on an Incorrect Assertion About the Two Documents, is Untenable.

On October 3, 2006, Plaintiffs Roger Hall and Studies Solutions Results, Inc. ("Plaintiffs"), served the CIA with a Notice of Deposition, request for production of documents,

request for admissions, and interrogatories. Plaintiffs seek to depose all CIA officers who have any knowledge regarding the varying calculations of search fees incurred in *Hall I*, seek documents related to calculating search and copying fees in general, and seek documents related to CIA's calculation of fees in *Hall I*. On October 24, 2006, the CIA filed its Motion for Protective Order ("Opening Brief"), arguing, in part, that Plaintiff should not be permitted to seek discovery regarding issues that this Court has repeatedly determined are not at issue in this litigation.

In the Synopsis section of Plaintiffs' Opposition to Defendant's Motion for Protective Order ("Plaintiffs' Opposition"), Plaintiffs allege that they are entitled to such discovery because CIA's response to Item 6 indicates that its searches for responsive documents were inadequate. Specifically, Plaintiffs claim that CIA produced only two documents in response to Item 6 related to the estimate or assessment of fees in *Hall I*: letters sent to Hall in 1994 and 1995. Plaintiffs then allege that CIA's failure to account for records regarding how the *Hall I* fees were calculated, "raises the possibility that the fees assessed for the *Hall I* requests were concocted out of whole cloth or greatly inflated to obstruct access to the records he sought." Plaintiffs' Opposition at 2. Contrary to Plaintiffs' assertions, the CIA has produced much more than just two documents in response to Item 6. The Agency also has specifically accounted for documents regarding how fees were calculated in *Hall I*, leaving allegations that such fees were "concocted out of whole cloth" and the conclusion that the Item 6 search was inadequate without any bases whatsoever.

In their Opposition, Plaintiffs correctly recount that the parties agreed that by August 15, 2006, CIA would make available to plaintiffs documents responsive to Item 6, insofar as that

item seeks records relating to the assessment of fees. Plaintiffs' Opposition at 3. Plaintiffs also correctly state that by letter dated August 15, 2006, the CIA released letters dated May 28, 1994 and March 22, 1995 in response to this part of Plaintiffs' item 6 request. *Id*. However, curiously that is where the accuracy of Plaintiffs' allegations ends.

Plaintiffs fail to inform the Court that on October 10, 2006, through undersigned counsel, the CIA informed Plaintiffs that the CIA would be producing additional documents responsive to Item 6 within a week. Consistent with its notice to Plaintiffs, by letter dated October 17, 2006, the CIA supplemented its Item 6 response by providing eighteen additional documents responsive to Item 6. *See* Exh. B of Opening Brief. Five documents were provided in their entirety, and thirteen contained redactions on the basis of various FOIA exemptions. The October 17, 2006 letter also indicated that still more documents were withheld in their entirety on the basis of FOIA exemptions (b)(1), (b)(2), (b)(3), (b)(5), and (b)(6). *Id*. Less than two weeks later, on October 30, 2006, as an attachment to its Partial Motion for Summary Judgment, CIA filed a *Vaughn* index describing the exempt material and the bases for the exemptions. *See* USDC Pacer Dkt. No 54, Exh. A.

In addition to the eighteen documents provided on October 17, 2006, the *Vaughn* Index further supplemented the CIA's Item 6 response by indicating that additional documents were withheld in their entirety. The *Vaughn* index provided detailed descriptions of the withheld documents. Specifically, the descriptions clarified that nine of the withheld documents, consisting of approximately 35 pages of material, were related to search costs, fee calculations, fee estimates, or the downward fee adjustment from at least $29,000.00 to $10,906.33 in *Hall I*. For example, document number four in the CIA's *Vaughn* Index is described as follows:

> This five-page document located in a CIA Attorney's litigation file consists of the following pages stapled together: a) one-page of attorney handwritten-notes regarding a change in the calculation of fees; b) a two-page attorney type-written description of search time and fee calculations; and c) two one-page e-mails dated 18 December 2003 and 27 March 2003. The 18 December 2003 e-mail is between two CIA officers with attorney handwritten notes and discusses a correction in the calculation of fees in the first Hall litigation matter. The 27 March 2003 e-mail from a CIA officer to CIA attorneys discusses the same subject.

Id.

Similarly, document number eight in the CIA's *Vaughn* index consists of "CIA attorney handwritten notes dated 25 March 2003 regarding a correction to fee calculations." *Id*.

All of this material was withheld on the basis of FOIA exemption (b)(5) because it is protected by the attorney-client communications privilege, the attorney work-product privilege, or the deliberative process privilege. *Id*. Therefore, contrary to Plaintiffs' assertions, Plaintiffs did receive documents related to the calculation of fees, not because the fee calculations "were concocted out of whole cloth" nor because the CIA's search was inadequate. Rather, the CIA's *Vaughn* index makes clear that its Item 6 search identified documents related to the calculation of fees in *Hall I*, but the documents were properly withheld pursuant to FOIA exemption (b)(5). To the extent that Plaintiffs believe that such documents are not properly exempt, that is an issue to be resolved at the summary judgment stage, as is the case generally in FOIA litigation. Accordingly, Plaintiffs' allegation of inadequacy of the search or fabrication does nothing to support Plaintiffs' contention that discovery is appropriate now.

Without question, Plaintiffs knew or should have known that such documents were identified by CIA's search and accounted for in the *Vaughn* index. First, in an attempt to comply with Rule 7(m), undersigned counsel spoke to Plaintiffs' attorney on or about October 10, 2006, and indicated that discovery was premature because the CIA would be supplementing its Item 6

response within a week. Plaintiffs' counsel agreed to a delay until he received the CIA's supplemental response, at which time he could ascertain whether the discovery request should be withdrawn. Second, in its Motion for Protective Order, the CIA specifically stated that a *Vaughn* index describing the withheld material would be filed as part of the CIA's motion for summary judgment. *See* Opening Brief at fn 2. Finally, of course, the actual *Vaughn* Index was filed as part of Defendant's Partial Motion for Summary Judgment on October 30, 2006, a full two weeks before Plaintiffs filed their Opposition, which failed to even acknowledge that CIA provided anything in response to Item 6 after the CIA's initial August 15, 2006 response. Given this history, it is difficult to imagine why Plaintiffs' Opposition would fail to acknowledge the supplemental response to Item 6 and the *Vaughn* index. Regardless, Plaintiffs' Opposition is virtually entirely based on the premise that because the CIA accounted for only two documents regarding the assessment of fees in *Hall I*, there exists an inference that the CIA's search was not adequate; and therefore Plaintiffs are entitled to discovery[1] on that issue. The premise is wholly incorrect. Consequently, the argument that Plaintiffs are entitled to discovery at this time fails on its face.

a. <u>The Adequacy of CIA's Search for Item 6 Documents</u>.

To the extent that the Court is inclined to consider the adequacy of the search for Item 6, based on the *Vaughn* index and the Koch declaration, Defendant's Motion for Summary Judgment is still pending and not yet fully briefed. Without the benefit of the parties' positions

[1] In their Opposition, Plaintiffs argue that *summary judgment* should not be granted due to the alleged inadequacy of the search for Item 6. Plaintiffs' Opposition at 16-17. It is unclear why a summary judgment motion, not yet fully briefed, should inform the decision of this Court on the discovery issue at hand.

and complete briefing, it seems that addressing the issue would be premature, at this stage.

Alternatively, should the Court wish to address the issue at this time, in order to obtain discovery in a FOIA case, the Plaintiffs "must establish how the specific discovery requested would create a genuine issue of material fact." *Morley v. CIA*, 2006 WL 280645 (D.D.C. Feb. 6, 2006) (quoting *Center for National Security Studies*, 2002 U.S. Dist. LEXIS 2983 at *5.) In *Morley*, "The court noted that the Court may accept the affidavits offered by an agency in support of its motion for summary judgment without pre-summary judgment discovery, where such affidavits are made in good faith and provide reasonable detail regarding the conduct of the search for the requested documents." *Morley*, 2006 WL 280645 at *1 (internal quotation marks omitted.) (citing *Broaddrick v. Exec. Office of the President*, 139 F.Supp.2d 55, 64 (D.D.C. 2001). The *Morley* court then noted that there is no basis for discovery where a plaintiff "has shown no bad faith or circumstances warranting an inference of bad faith." *Morley* 2006 WL 280645 at * 1 (citing *Wheeler v. CIA*, 271 F.Supp.2d 132, 139 (D.D.C. 2003).

Additionally, plaintiff in *Baker & Hostetler LLP v. U.S. Dept. of Commerce*, --- F.3d ----, 2006 WL 3751451, (D.C. Cir. Dec. 22, 2006), insisted that the department's alleged bad faith in responding to its FOIA requests warranted discovery. *Baker* 2006 WL 3751451 at *5. The D.C. Circuit Court disagreed and upheld the District Court's finding that plaintiff had offered no evidence of bad faith to justify additional discovery. *See also, Carney v. Dept. of Justice*, 19 F.3d 807, 812 (2d Cir.1994), and *Assassination Archives & Research Ctr. v. CIA*, 177 F.Supp.2d 1, 8 (D.D.C.2001) ("[A] mere assertion of bad faith is not sufficient to overcome a motion for summary judgment.") (citing *Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C.Cir.1979)).

In this case, Plaintiffs have made no showing of bad faith. They simply misinform the

Court about the number of documents released, without an affidavit,[2] and suggest that the Court draw a negative inference therefrom. Plaintiffs' Opposition at 2 and 14-17. Because Plaintiffs have failed to show any evidence of bad faith, Defendant's Motion for a Protective Order should be granted.

b. No Discovery Should be Permitted in a FOIA Matter, Permitting Plaintiffs to Engage in a Needless Fishing Expedition.

The court may deny a FOIA plaintiff's discovery request "when the plaintiff's efforts represent no more than a bare hope of falling upon something that might impugn the affidavits." *Broaddrick* 139 F.Supp.2d at 64 (internal citations omitted.) Here, Plaintiffs clearly state that they require discovery because of the alleged inadequate search conducted by the Agency for Item 6. *See e.g.* Plaintiff's Opposition at 1 and 13. Plaintiffs acknowledge that the Agency has provided the Court with the sworn declaration of the Chief of the division responsible for directing searches of CIA records systems. Plaintiffs' Opposition at 15 and Koch Decl. ¶ 3.

The question before the Court now concerns the validity of Plaintiffs' discovery requests, not whether summary judgment is appropriate in favor of the Agency. Plaintiffs here should not be permitted to engage in discovery when (1) this Court "has continued to affirm the proposition that FOIA actions are typically resolved without discovery," (*Morley* 2006 WL 280645 at * 1 (string cites omitted)); and (2) when the Agency has submitted a sworn declaration, attached to Defendant's Motion for Summary Judgment, which is not yet fully briefed, (*See* USDC Pacer Docket Sheet). It is clear that Plaintiffs' contention that they should be permitted to engage in

[2] In *Morley*, the plaintiff provided the Court with an affidavit regarding why he needed the discovery. *Morley* 2006 WL 280645 at * 1. Here, no such document has been provided.

full discovery,[3] because they have allegedly only received two documents, represents only a naked hope of stumbling upon some evidence that might discredit Mr. Koch's declaration. Therefore, Defendant's Motion for a Protective Order should be granted.

II. Plaintiffs May Not Engage in Discovery Regarding Hall I-Related Fee Matters Previously Addressed by the Court.

Without the benefit of Plaintiffs' flawed allegation that the CIA's Item 6 search was inadequate, the only possible remaining justification for the discovery requests is to ascertain how fees were calculated, and then adjusted, in the *Hall I* litigation. However, this Court has on two previous occasions rejected Plaintiffs' attempts to bring documents and issues from the *Hall I* litigation into this litigation. In its denial of Plaintiffs' Motion for an Accounting of Time and Costs of Searches, in which Plaintiffs also sought information regarding the *Hall I* fee assessments, this Court stated as follows:

> 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 (internal citations omitted).

Especially after Plaintiffs based their Opposition to Defendant's Motion for Protective Order almost entirely on a misleading and incomplete recitation of the record to support an

---

[3] Plaintiffs have not only propounded written discovery, but have also requested to depose agency officials. *See* Opening Brief, Exh. A.

inference that the CIA's Item 6 search was inadequate, this Court should, for the third time, reject Plaintiffs' attempt to re-litigate issues regarding fees in the *Hall I* litigation.

CONCLUSION

For all the foregoing reasons, Defendant's Motion for a Protective Order should be granted.

Respectfully submitted,

/s/

Dated: December 28, 2006.

JEFFREY A. TAYLOR, D.C. Bar No. 498610
United States Attorney

_____/s/_____
RUDOLPH CONTRERAS, D.C. Bar No. 434122
Assistant United States Attorney

_____/s/_____
MERCEDEH MOMENI
Assistant United States Attorney
Civil Division
555 4th Street, NW
Washington, DC 20530
Tel: (202) 305-4851
(202) 514-8780 (facsimile)

Of Counsel:
Christian Ricciardiello, Esq.
Office of the General Counsel
Litigation Division
Central Intelligence Agency

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2006, I caused the foregoing Reply in Support of Defendant's Motion for a Protective Order to be served on counsel of record, via the Courts ECF system.

/s/

MERCEDEH MOMENI, D.C.
Assistant United States Attorney
555 4th Street, NW
Civil Division
Washington, DC 20530
(202) 305-4851
(202) 514-8780 (facsimile)