

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

ROGER HALL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 04-814 (HHK/JMF)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
	)	

**MEMORANDUM OPINION and ORDER**

This matter was referred to me for resolution of Defendant’s Motion for a Protective Order (“Defs. Mot.”). For the following reasons, the motion will be granted.

**I. Procedural Background**

This case involves a request made on February 7, 2003, pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), by plaintiffs Roger Hall (“Hall”), Studies Solutions Results, Inc., and Accuracy in Media to the Central Intelligence Agency (the “CIA”) for documents relating to prisoners of war and others missing in action during the Vietnam War era. Hall v. Cent. Intelligence Agency, No. 04-CV-0814, 2006 WL 197462, at \*1 (D.D.C. Jan. 25, 2006). The request includes a demand for materials relating to the search for similar information pursuant to prior similar requests by plaintiff Roger Hall in 1994 and 1998, which resulted in litigation that was ultimately dismissed as constructively abandoned because Hall failed to commit to paying for the search he requested. Id. at \*1-2.

The CIA responded to Plaintiffs’ FOIA request over a year later, on June 15, 2004, and indicated it would not produce certain documents requested pursuant to specific FOIA exemptions. Id. at \*2. On October 3, 2006, Plaintiffs served discovery on the CIA, including

interrogatories, requests for production of documents, requests for admissions, and notices of deposition. Defs. Mot. at 1. On October 24, 2006, the CIA filed the instant motion, and on October 30, 2006, the CIA filed Defendant's Motion to Dismiss and for Partial Summary Judgment ("Defs. Mot. Dismiss"). Two weeks later, Judge Kennedy stayed a response to the motion to dismiss pending a decision on Defendant's motion for a protective order. See Minute Order, 11/14/2006.

## **II. Discovery in FOIA Actions**

The FOIA confers upon each requester a right to a reasonable search for relevant documents. Judicial Watch v. U.S. Dep't of Commerce, 34 F. Supp. 2d 28, 46 (D.D.C. 1998). The court may award summary judgment solely on the basis of information provided by the agency in affidavits or declarations when the affidavits or declarations describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C.Cir.1981); see also Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C.Cir.1973), cert. denied, 415 U.S. 977 (1974). Such affidavits or declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." SafeCard Services, Inc. v. Sec. Exch. Comm'n, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal citations omitted).

Thus, discovery in FOIA cases is rare. See Citizens for Responsibility & Ethics in Washington v. Nat. Indian Gaming Comm'n, 467 F. Supp. 2d 40, 55-56 (D.D.C. 2006); Wheeler v. Cent. Intelligence Agency, 271 F. Supp. 2d 132, 139 (D.D.C. 2003). Limited discovery has been allowed upon a showing of bad faith by the agency, such as illegal destruction of

documents, Judicial Watch, 34 F. Supp. 2d at 46, or where a material conflict arises in agency affidavits, Long v. U.S. Dep't of Justice, 10 F. Supp. 2d 205, 210 (N.D.N.Y. 1998). In this Circuit, discovery is denied when the plaintiff's efforts represent no more than "bare hope of falling upon something that might impugn the affidavits." Founding Church of Scientology v. Nat'l Sec. Agency, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979). Whether to permit discovery in FOIA actions is within the sound discretion of the trial court. Broadrick v. Executive Office of the President, 139 F. Supp. 2d 55, 63 (D.D.C. 2001).

### **III. Discovery Is Premature**

Defendant has filed a motion for dismissal in this case, which includes both a sworn statement detailing the agency's search in response to the Plaintiffs' FOIA request and a Vaughn index stating which documents were withheld from disclosure on the basis of statutory exemptions to FOIA. See Defs. Mot. Dismiss, Ex. 2, Decl. of Scott A. Koch; Defs. Mot. to Dismiss, Ex. 17, Vaughn Index for Documents Responsive to Item 6 of Plaintiffs' 7 February 2003 FOIA Request. Therefore, discovery at this point is premature. If, in deciding the summary judgment motion, the court is convinced that the agency's affidavits establish the sufficiency of the search, then discovery into the adequacy of the agency search is not necessary. See Judicial Watch, Inc. v. Dep't of Def., No. 05-CV-0390, 2006 WL 1793297, at \*4 n.4 (D.D.C. Jun. 28, 2006). If the response is found insufficient, then the court may order additional disclosures, eliminating the need for any discovery. Discovery should therefore be stayed until the court determines whether the Vaughn index and agency affidavit are adequate to decide whether to grant summary judgment.

**IV. Conclusion**

As discovery is premature prior to deciding the sufficiency of the government's disclosure, the Defendant's Motion for a Protective Order [#53] is hereby **GRANTED**. No discovery shall proceed until the court decides Defendant's Motion for Dismissal and for Partial Summary Judgment.

**SO ORDERED.**

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN M. FACCIOLA  
UNITED STATES MAGISTRATE JUDGE

Dated: April 11, 2007