UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 00-1849 JR
DEPARTMENT OF JUSTICE, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER, AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO STAY PROCEEDINGS PENDING DISCOVERY

On August 9, 2001, plaintiff moved to stay proceedings on defendants' motion for summary judgment, pending limited discovery relating to the adequacy of defendant FBI's search for records responsive to plaintiff's FOIA request concerning the Carnivore surveillance system. Defendants opposed the motion and moved for a protective order barring discovery. Plaintiff now responds and reiterates its need for, and entitlement to, the discovery it seeks.

ARGUMENT

The gist of plaintiff's motion to stay proceedings pending discovery is that the adequacy of defendant FBI's document search cannot be fully assessed when, in the face

of affirmative indications of overlooked, responsive material, the record contains no reasonable explanation for that obvious failure. In opposing discovery, defendants generate quite a bit of smoke but shed no light on the issue before the court. Their submission is most notable for what it does not assert: that additional responsive documents of the kind described by plaintiff do not exist.[1] Rather, defendants seek to foreclose any inquiry into a search process that was clearly inadequate. In so doing, they confuse the applicable precedents; mischaracterize the discovery plaintiff seeks; and propose an alternative procedure that would severely disadvantage plaintiff and waste judicial resources.

I. Discovery is Appropriate in a Case Like This, Where the Agency Has Not Met its Burden of Demonstrating a Reasonable Search

To meet its obligations under FOIA, the "defending agency must prove that each document that falls within the class requested either has been produced, is unidentifi-

[1] In its motion, plaintiff noted the complete absence of any retrieved documents addressing the legal and policy issues surrounding the development and use of Carnivore. Plaintiff's Motion to Stay Proceedings Pending Discovery ("Pl. Mot.") at 9-14.

able, or is wholly exempt from the [FOIA's] inspection requirements." Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (quoting National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)). As part of its obligation to account for all responsive material, "the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (citations omitted). The determination of a search's reasonableness "is dependent on the circumstances of each case." Spannaus v. CIA., 841 F. Supp. 14, 16 (D.D.C 1993) (citation omitted).

Ignoring the case-by-case nature of the relevant inquiry, defendants cite a number of cases which are largely irrelevant to the circumstances presented here. Some of defendants' cases do not even involve search issues, but do contain language that supports plaintiff's position. See, e.g., Public Citizen Health Research Group v. FDA, 997 F. Supp. 56, 72 (D.D.C. 1998) (discovery sought to challenge exemption claim; in language quoted by

defendants, court stated that "Discovery is to be sparingly granted in FOIA actions;" in language omitted by defendants, court continued: "Typically, it is limited to investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like") (emphasis added; citation omitted);[2] Local 3, International Brotherhood of Electrical Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988) ("Discovery in a FOIA action is permitted in order to determine whether a complete disclosure of documents has been made") (emphasis added).[3]

Defendants' other cases involve agency searches that, under the specific circumstances presented, were found to be adequate and discovery was thus disallowed. Those cases are clearly distinguishable from the situation here. For

[2] Defendants' Opposition to Plaintiff's Motion to Stay Proceedings Pending Discovery ("Def. Opp.") at 3.

[3] Id. at 6-7. See also Simmons v. United States Department of Justice, 796 F.2d 709 (4th Cir. 1986) (discovery sought to challenge national security exemption claim) (cited in Def. Opp. at 5); Military Audit Project v. Casey, 656 F.2d 724, 751 (D.C. Cir. 1981) (discovery sought to challenge national security exemption claim; "[i]n national security cases, some sacrifice to the ideals of the full adversary process are inevitable") (footnote omitted) (cited in Def. Opp. at 5, 6); Pollard v. FBI, 705 F.2d 1151 (9th Cir. 1983) (no search issue) (cited in Def. Opp. at 7); Animal Legal Defense Fund, Inc. v. Department of the Air Force, 44 F. Supp.2d 295 (D.D.C. 1999) (no search issue; no discovery sought) (cited in Def. Opp. at 7).

instance, in Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986),[4] a long-running controversy over a substantial number of documents, the district court had earlier "issued an order permitting the plaintiffs to depose six named FBI agents and one named DOJ official," id. at 947. Subsequent "motions for leave to conduct additional depositions" were denied. Id. at 960 (emphasis added). The court of appeals also noted that

> [a] series of informal meetings and communications between the parties have served to resolve many of appellants' inquiries and concerns, and many additional records have been turned over as a result. These frequent exchanges have served many of the same functions in this litigation as would depositions.

Id. at 961 n.9.[5]

In SafeCard Services, Inc. v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991),[6] the controversy involved the SEC's obligation to retrieve documents that had been sent to the Federal Records Center ("FRC"). In

[4] Def. Opp. at 4.

[5] In contrast, defendant FBI has expressed no similar willingness to seek "additional records" in response to the "inquiries and concerns" of plaintiff in this case. See Pl. Mot. at 7-8 (noting plaintiff's communications with defendants concerning the adequacy of the search).

[6] Def. Opp. at 5.

affirming the district court's denial of plaintiff's discovery request, the D.C. Circuit noted that SEC personnel

> repeatedly, over the course of several months, asked the FRC to search for the files that [plaintiff] had requested but that SEC records listed as being in the FRC's custody. . . .
>
> Having taken all of the steps within its power to retrieve the files from the FRC, the SEC fulfilled its burden of conducting a search reasonably calculated to discover the documents requested. . . . [D]iscovery will not lie against the SEC in order to inquire into the workings of the FRC, and [plaintiff] has made no effort to gain discovery directly from the FRC.

Id. at 1201-1202 (emphasis added).[7]

In Zhdanov v. Department of State, Civil Action No. 00-0371, 2000 U.S. Dist. LEXIS 13828 (D.D.C. Sept. 21, 2000), this court recently assessed the adequacy of a search and found that the agency had "conducted a search reasonably calculated to uncover all documents responsive

[7] See also Hunt v. United States Marine Corps, 935 F. Supp. 46, 50 (D.D.C. 1996) (cited in Def. Opp. at 5), where "[d]efendants demonstrated . . . that they performed a comprehensive search for all the requested documents by directing plaintiff's requests to the four agency offices reasonably expected to hold the responsive information," and where agency declarant "conducted a personal search" to seek additional responsive material.

to plaintiffs' FOIA request." The court detailed the agency's efforts:

> Not only were several State Department offices searched, but former and current officials who had specific knowledge of the subject matter of plaintiffs' request were contacted for assistance in identifying where relevant records might be located. All office safes in the Office of Russian Affairs within the Bureau of Economic Affairs were searched thoroughly several times, and all records manifests for the relevant time period were examined. In the Office of the Assistant Legal Advisor for International Claims and Investment Disputes, files were searched and former employees were contacted because of information contained in responsive documents located in the Office of Russian Affairs. The Department also searched its central foreign policy file for official record copies of incoming and outgoing departmental communications, including telegrams between the Department and foreign service posts, memoranda of conversations, and interoffice memoranda.

Id. at *2. Upon that showing of agency diligence, the court found that "[n]o 'substantial doubt' has been raised about the adequacy of the search" and denied plaintiff's request for discovery. Id. at *3.

In this case, defendant FBI has clearly failed to "conduct[] a search reasonably calculated to uncover all documents responsive to [plaintiff's] FOIA request," and as plaintiff reiterates below, plaintiff has "demonstrate[d]

some substantial discrepancy between the defendants' actions and words." Goland v. CIA, 607 F.2d 339, 352 n.78 (D.C. Cir. 1976), cert. denied, 445 U.S. 927 (1980). As such, plaintiff is entitled to the limited discovery it seeks.

II. Plaintiff Has Demonstrated a Need for Discovery into the Reasonableness of Defendant FBI's Search

As plaintiff set forth in its opening brief, defendant FBI conducted a search that was not reasonably calculated to locate all (or even most) agency records concerning Carnivore. Its initial automated search of its Central Records System proved wholly inadequate to locate relevant documents. Pl. Mot. at 4-5. A subsequent inquiry to the Electronic Surveillance Technology Section ("ESTS") yielded a substantial amount of material characterized as "loose documentation." Id. at 5. After ESTS personnel indicated that a contractor was involved in the project, an inquiry to the FBI's Contracts Unit resulted in the location of 92 pages of responsive material. Id. at 6. That was the sum of the Bureau's efforts, despite affirmative indications (which should have been apparent to the FBI) that other

Bureau components were likely to possess relevant information.

As detailed in plaintiff's motion and supporting declaration of counsel, the Congressional testimony of FBI and Justice Department officials demonstrates that Carnivore was the subject of consideration and review in Bureau and DOJ components that deal with legal and policy matters (as opposed to the FBI's technical components which were the sole focus of the search). Pl. Mot. at 8-12; Declaration of David L. Sobel ("Sobel Dec.") at 2-3. A review of Carnivore commissioned by the FBI similarly indicates such legal and policy consideration. Pl. Mot. at 12-13; Sobel Dec. at 3. Yet defendant FBI never endeavored to query any Bureau component that might have knowledge of those legal and policy deliberations, and even today obstinately refuses to venture beyond the unduly narrow confines of its initial search.

Defendants' response to plaintiff's citation of these affirmative indications of overlooked material is to assert that plaintiff is belatedly offering a "clarification" or "supplementation" of its FOIA request. Def. Opp. at 13.

In fact, plaintiff stands by the adequacy and accuracy of its request for "all FBI records" concerning Carnivore, Exhibit A to Declaration of Scott A. Hodes ("Hodes Dec."), and is merely pointing to facts that should have been well-known to the Bureau at the time that it claims to have initiated its search on July 28, 2000. Def. Opp. at 13-14. Indeed, the FBI's failure to take that information into account when it conducted its search strongly supports the conclusion that the search was not "reasonable."

There was nothing obscure about the subject of plaintiff's request. Defendant FBI presumably knew that there were significant legal and policy controversies surrounding Carnivore when it granted expedited processing of the request under DOJ regulations, 28 CFR 16.5(d)(1)(iv), as involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." Plaintiff had provided defendants documentation of the extensive media coverage of the Carnivore system and cited public questions that had been raised about the potential abuse of the Carnivore system.

Plaintiff also submitted to defendants a transcript of the hearing held on July 24, 2000, before the House Judiciary Subcommittee on the Constitution titled, "Fourth Amendment Issues Raised by the FBI's 'Carnivore' Program." Nonetheless, defendant FBI failed to query such obvious components as the Office of Public and Congressional Affairs and the Office of General Counsel (despite the fact that the FBI's General Counsel testified at that hearing).[8]

Notwithstanding defendants' attempt to muddy the waters, the relevance of the discovery plaintiff seeks is clear. The preparation of the Congressional testimony referring to FBI and DOJ reviews of Carnivore's legal and policy implications undoubtedly involved access to documents that detailed those efforts. Likewise, the independent technical review team was clearly provided documents that formed the basis for its findings. FBI and DOJ personnel familiar with those matters presumably are aware of responsive material that has somehow alluded those

[8] Plaintiff was advised of defendants' decision to grant expedited processing in a letter from John M. Kelso, Jr., Chief of the FBI's Freedom of Information-Privacy Acts Section which, significantly, is part of the Office of Public and Congressional Affairs. Exhibit C to Hodes Dec. Mr. Kelso presumably had actual knowledge of the materials plaintiff submitted in support of its request for expedited processing.

responsible for conducting the search at issue here. Defendants' belief that such an obvious and reasonable inquiry is beyond the scope of their obligations under FOIA underscores the need for discovery -- plaintiff seeks to resolve questions that defendant FBI apparently has never itself bothered to ask.[9]

As this court has held, "a requestor can avert a granting of summary judgment by demonstrating some reason to think that the documents would have turned up if the agency had looked for them." Greenberg v. Department of Treasury, 10 F. Supp. 2d 3, 19 (D.D.C. 1998) (citations omitted). It is precisely such a showing that plaintiff

[9] In keeping with their apparent lack of clarity with respect to the reasonable manner in which to have conducted the search, defendants complain that "plaintiff did not specify the location(s) that it wished the defendant to search" and did not "provide specific search instructions to the FBI." Def. Opp. at 12. Defendants cite no authority establishing such an obligation, and there is none. Prior to its receipt of defendants' pleadings, plaintiff would not have assumed that it, as an outside party, would have been in a better position than the Bureau itself to ascertain the likely locations of information that concerned a highly controversial initiative and that formed the basis for the Congressional testimony of FBI officials. In any event, the FBI was on notice of the July 24, 2000, House Judiciary Committee hearing at which FBI Assistant Director Donald M. Kerr and FBI General Counsel Larry R. Parkinson testified, if for no other reason than the fact that plaintiff cited the hearing in support of its expedition request.

believes it will make if permitted to conduct the discovery it seeks.

III. Plaintiff Has Followed the Appropriate Procedure by Moving to Stay Proceedings Pending Discovery

Defendants assert that plaintiff "has not made an adequate showing, required by Rule 56, as to what facts 'essential' to justify its opposition to defendant's [sic] summary judgment motion it could not obtain to date," Def. Opp. at 8-9, and suggest that "there is no reason why plaintiff cannot respond to the host of [non-search] issues raised and briefed in defendants' motion," id. at 10. Both arguments lack merit.

First, plaintiff's reliance upon Rule 56(f) is in keeping with longstanding authority in this circuit setting forth the need for discovery when the adequacy of an agency's FOIA search is called into question. See Pl. Mot. at 16-19 and cases cited therein. Contrary to defendants' assertion, plaintiff has amply demonstrated its need for limited discovery. In Richardson v. National Rifle

Association, 871 F. Supp. 499, 501-502 (D.D.C. 1994), which defendants cite,[10] this court stated:

> Under Rule 56(f), the Court upon request may defer ruling on a summary judgment motion and allow the non-moving party an opportunity through limited discovery to obtain information relevant to an issue of material fact he maintains is in dispute. The party opposing summary judgment and seeking deferral, usually but not invariably by motion and affidavit, must (i) alert the Court to the need for further discovery and (ii) demonstrate, either through an affidavit or other documents such as opposing motions and outstanding discovery requests, how additional discovery will enable it to rebut the movant's allegations of no genuine issue of fact. A Rule 56(f) affidavit or other material supporting the motion must provide reasons why the non-moving party cannot present facts in opposition and how additional discovery will provide those facts, not simply assert that "certain information" and "other evidence" may exist and may be obtained through discovery.

(citations omitted; emphasis added).

Plaintiff has clearly explained "how additional discovery will enable it to rebut [defendants'] allegations" that the FBI conducted an adequate and reasonable search, and has not "simply assert[ed] that 'certain information' and 'other evidence' may exist." At the risk of redundancy, plaintiff reiterates that

[10] Def. Opp. at 9.

information concerning the preparation of (1) the FBI's and DOJ's Congressional testimony on Carnivore, and (2) the independent technical review of the system, will likely provide facts indicating the existence of documents not located during the course of the FBI's cursory search. Coupled with information concerning the search methodology employed by defendant FBI, such information is likely to rebut defendants' assertion of a reasonable search.

As to defendants' suggestion that plaintiff should respond to the non-search issues raised in their motion for summary judgment, such a course would be unfair to plaintiff and wasteful of judicial resources. As plaintiff has previously noted, the adequacy of defendant FBI's search bears directly upon "the merits of the exemption claims invoked with respect to those documents that the agency located and withheld." Pl. Mot. at 19; see also id., n.10. See Coastal Corp. v. Department of Energy, 496 F. Supp. 57 (D. Del. 1980) (information relating to agency search "may have some bearing upon the merits of the agency's claims of exemption").

A bifurcated procedure whereby plaintiff would be required to address defendants' exemption claims before the search issue is resolved would also unduly burden the court. If, as plaintiff believes likely, additional responsive material is located as a result of further inquiry into defendant FBI's search, defendants' proposal would require the parties and the court to revisit the exemption issues with respect to that newly retrieved material. The preferable and sensible approach would be to defer consideration of defendants' exemption claims until plaintiff and the court are assured that defendant FBI has accounted for all responsive material.[11]

Conclusion

For the foregoing reasons, as well as those set forth in plaintiff's opening brief, the court should grant

[11] It is somewhat ironic that defendants now seek to rush forward with proceedings on their summary judgment motion. It took defendant FBI more than a year to process fewer than 2000 documents and prepare a summary judgment motion, notwithstanding the fact that the agency had agreed to "expedite" processing. Having waited that long for defendants to bring the case to a posture in which the adequacy of the FBI search can finally be tested, plaintiff submits that it is entitled to take the steps necessary to ensure a full and fair adjudication of its statutory rights.

plaintiff's motion to stay proceedings pending discovery and deny defendants' motion for a protective order.[12]

Respectfully submitted,

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[12] Absent plaintiff's motion to stay proceedings, its response to defendants' motion for summary judgment would have been due on September 6, 2001. Upon the resolution of plaintiff's motion, plaintiff's counsel will endeavor to stipulate a revised briefing schedule with defendants' counsel. Such stipulation will take into account the nature of further proceedings as determined by the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of plaintiff's opposition to defendants' motion for a protective order and reply in support of plaintiff's motion to stay proceedings pending discovery has been served on Lisa Barsoomian, Assistant U.S. Attorney, 555 4th Street, N.W., 10th Floor, Washington, DC 20001, by facsimile and first-class mail this 24th day of August, 2001.

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DAVID L. SOBEL