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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

JESSE C. TRENTADUE,	:	2:04 CV 00772 DAK
Plaintiff,	:	
vs.	:	**FEDERAL DEFENDANTS' MOTION TO RECONSIDER DISCOVERY ORDER AND REQUEST FOR ORAL ARGUMENT**
FEDERAL BUREAU OF INVESTIGATION and FEDERAL BUREAU OF INVESTIGATION, OKLAHOMA CITY FIELD OFFICE,	:	
Defendants.	:	Hon. Dale A. Kimball

The Federal Bureau of Investigation and the FBI Oklahoma City Field Office (collectively the "FBI") hereby move this Court to reconsider its Memorandum Decision and Order of September 20, 2007 ("Discovery Order") and deny Plaintiff's Motion for Discovery. The grounds for this motion are as follows:

1. This Court's Discovery Order exceeds the permissible scope of discovery under FOIA. Discovery under FOIA is limited to the underlying FOIA issues in the case, i.e., the scope of the agency's search for responsive documents and its indexing and classification procedures. Here, the Court's Discovery Order, permitting Plaintiff to depose Nichols and Hammer, is not limited to the FBI's search for responsive documents or its indexing and classification procedures.

2. This Court lacks jurisdiction to grant Plaintiff's motion for discovery. The Court previously issued a final ruling regarding the adequacy of the FBI searches and its disclosures, when it issued its Amended Order and denied Plaintiff's Rule 59(e) motion. Because all pending issues were resolved at that time, there no longer remains an Article III case and controversy sufficient to confer subject matter jurisdiction on this Court or any judicial function for this Court to perform.

3. Even if the adequacy of the FBI's searches was still at issue, there is no question as to the FBI's good faith sufficient to justify the Court's Discovery Order. This Court has never found that the FBI acted in bad faith and Plaintiff's own speculative criticism of the FBI's searches is insufficient to justify discovery.

4. Finally, Plaintiff's motion to videotape Hammer and Nichols should be denied because the BOP has determined that a video recording poses a threat to the security of the institutions where these individuals are confined.

The FBI requests a hearing on its Motion to Reconsider Discovery Order.

DATED this 31st day of October, 2007.

BRETT L. TOLMAN
United States Attorney

/s/ Carlie Christensen

CARLIE CHRISTENSEN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that a copy of the foregoing Motion to Reconsider was mailed, postage prepaid and/or electronically to all parties named below, this 31st day of October, 2007.

Jesse C. Trentadue
Suitter Axland
8 E. Broadway, Suite 200
Salt Lake City, UT 84111

/s/ Linda Pearson

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

JESSE C. TRENTADUE,	:	2:04 CV 00772 DAK
Plaintiff,	:	
vs.	:	**FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER DISCOVERY ORDER**
FEDERAL BUREAU OF INVESTIGATION and FEDERAL BUREAU OF INVESTIGATION, OKLAHOMA CITY FIELD OFFICE,	:	Hon. Dale A. Kimball
Defendants.	:	

The Federal Bureau of Investigation and the FBI Oklahoma City Field Office (collectively the "FBI") hereby submit this memorandum in support of their Motion to Reconsider this Court's Memorandum Decision and Order of September 20, 2007.

INTRODUCTION

On September 20, 2007, this Court issued a Memorandum Decision and Order ("the Discovery Order") granting Plaintiff's motion for discovery and permitting Plaintiff to take and videotape the depositions of Terry Lynn Nichols ("Nichols"), who is serving a life sentence at FCC Florence; and David Paul Hammer ("Hammer"), who is under a death sentence and confined in Terre Haute, Indiana. See Dkt. No. 113 at 4.[1] Specifically, the Court found that it retained jurisdiction of

[1]All references to this Court's docket will be cited as Dkt. No. ___ at ___.

this case and that by granting Plaintiff's motion to take the depositions of these individuals, Plaintiff may be able to identify the existence of other FBI records responsive to his FOIA request that have not yet been produced. Id. at 3.

As set forth below, this Court should reconsider its Discovery Order and deny Plaintiff's motion because the Order exceeds the permissible scope of discovery under FOIA and is without legal precedent. Discovery under FOIA is limited to the underlying FOIA issues in the case, i.e., the scope of the agency's search for responsive documents and its indexing and classification procedures. Discovery is not permitted when the Plaintiff is using the FOIA lawsuit as a fishing expedition into the investigatory action taken by the agency or other cases unrelated to the FOIA lawsuit. Here, the Court's Discovery Order has the impermissible effect of allowing Plaintiff to depose Nichols and Hammer to conduct discovery into the Oklahoma City bombing investigation. There can be no other purpose since Nichols and Hammer are not employees of the FBI and lack any knowledge of the FBI's search for records or its decisions concerning the disclosure of the requested records. Moreover, the Court's Discovery Order is without legal precedent. This Court did not cite and the FBI has not located any authority which permits the depositions of non-agency personnel in a FOIA case.

Further, this Court should reconsider its Discovery Order and deny Plaintiff's motion because there is no case and controversy here sufficient to confer subject matter jurisdiction. The Court previously ordered and the FBI conducted multiple searches for documents responsive to Plaintiff's FOIA requests, the FBI produced all the responsive documents which it located, and the FBI asserted and the Court upheld the exemptions to disclosure of certain records. The Court issued its final ruling regarding the adequacy of the FBI searches and its disclosures when it issued its Amended

Order and denied Plaintiff's Rule 59(e) motion. Because all pending issues were resolved at that time, there no longer remained an Article III case and controversy sufficient to confer subject matter jurisdiction on this Court or any pending issue on which discovery could be had.

Even if the adequacy of the FBI's searches remained at issue, this Court should still reconsider its Discovery Order and deny Plaintiff's motion because there is no question as to the FBI's good faith sufficient to justify discovery. This Court has never found that the FBI acted in bad faith and Plaintiff's own speculative criticism of the FBI's searches is insufficient to justify discovery. Although Plaintiff claims that the FBI responded in bad faith to his FOIA request, Plaintiff's request simply never sought the records which he now claims the FBI failed to produce.

Finally, this Court should reconsider its Discovery Order and deny Plaintiff's motion to videotape Hammer and Nichols because the BOP has determined that a video recording poses a threat to the security of the institutions where these individuals are confined.

STATEMENT OF FACTS

1. On July 19, 2004 Plaintiff submitted a FOIA request to the FBI seeking a copy of a "memorandum" from former FBI Director Louis Freeh concerning Morris Dees and the Southern Poverty Law Center ("SPLC") dated January 4, 1996. See Dkt. No. 3, Ex. A; Dkt. No. 21, Ex. A. at 2. Plaintiff also requested copies of all other documents which "directly or indirectly report upon, concern, reference, or refer to Morris Dees *and/or* the SPLC's involvement *with and/or connection to* Elohim City, OKBOMB, BOMBROB, Tim McVeigh, Richard Guthrie, Terry Nichols, Dennis Mahon, Robert Miller, Michael Brescia, Peter Langan and/or Andreas Strassmeir including all contacts Dees or the SPLC may have indirectly had with the foregoing through informants." Id. (emphasis added).

2. On July 28, 2004, Plaintiff submitted a second FOIA request to the FBI seeking a copy of an FD-302 which he believed was prepared as the result of a meeting he attended with John Tanner of the Civil Rights Division, Department of Justice; Assistant United States Attorney Jerome Holmes; and FBI Agent Tom Linn on August 12, 1996. See Dkt. No. 3, Ex. C; Doc. No. 21 Ex. C.

3. On August 20, 2004, Plaintiff filed this action pursuant to FOIA seeking disclosure of the records which he requested from the FBI, see Dkt. No. 3 at ¶ 7. On October 20, 2004, Plaintiff filed a Motion for Partial Summary Judgment. See Dkt. No. 8. On November 22, 2004, the FBI filed its opposition to Plaintiff's Motion for Partial Summary Judgment and its own Motion for Summary Judgment. See Dkt. Nos. 13, 14.

4. On May 5, 2005, this Court granted Plaintiff's Motion for Partial Summary Judgment and denied the FBI's Motion for Summary Judgment ("Summary Judgment Order"). See Dkt. No. 31 at 7.

5. On May 19, 2005, the FBI sought modification of the Summary Judgment Order or alternatively, relief from the Summary Judgment Order pursuant to Fed. R. Civ. P. 59(e) and 60(b)(6). See Dkt. Nos. 32-33. On March 29, 2006, this Court issued a Memorandum Decision and Order granting in part and denying in part the FBI's motion. See Dkt. No. 87 at 21.

6. On March 30, 2006, the Court issued an Amended Memorandum Decision and Order ("Amended Order") altering the wording of the second sentence of section III.C.4.a of its original Order. See Dkt. No. 88 at 2 n.1, 15. In all other respects, the Order of March 29, 2006 remained unchanged. See Dkt. No. 88.

7. On April 4, 2006, and again on April 6, 2006, Plaintiff filed a Rule 59(e) motion asking the Court to modify its Amended Order and direct the FBI to conduct a search of the Salt Lake City

Field Office for additional teletypes allegedly referenced in the redacted documents produced by the FBI. See Dkt. Nos. 89 at 2; 90 at 1-2; 91 at 2; 92 at 1-2. Alternatively, Plaintiff requested that if the FBI could not locate the documents in the Salt Lake City Field Office, that the Court direct the FBI to conduct a *manual* search of the OKBOMB file for the additional teletypes. Id. On May 19, 2006, this Court denied Plaintiff's Rule 59(e) motions because the documents requested by Plaintiff were not responsive to his FOIA request. See Dkt. No. 95 at 1.

8. On June 2, 2006, the FBI notified the Court that it had completed the limited search directed by the Court's Amended Order and located one additional document, a June, 1996 teletype. See Dkt. No. 96 at 1-2. The FBI also notified the Court that it produced for Plaintiff, in redacted form, the June, 1996 teletype; those documents previously identified as Exhibits 8, 8b, 9, 9a, 12 and 12a; and the August, 1996 teletype. Id. at 2.

9. Plaintiff did not appeal the Court's Amended Order or its Order of May 19, 2006 denying Plaintiff's Rule 59(e) motions. See Dkt. Nor did Plaintiff challenge the FBI's search results or the validity of the exemptions asserted in its June 2, 2006 production. Id.

10. On February 16, 2007, approximately nine months later, Plaintiff filed his Discovery Motion seeking an order permitting him to depose Nichols[2] and Hammer[3], two inmates currently incarcerated in federal correctional facilities in Florence, Colorado and Terre Haute, Indiana

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[2]Nichols is serving a life sentence for his conviction on conspiracy to use weapons of mass destruction and involuntary manslaughter charges arising from the bombing of the Alfred P. Murrah Federal Building in Oklahoma City which killed 168 people. See U.S. v. Nichols, 169 F.3d 1255, 1260 (10th Cir. 1999).

[3]Hammer received a death sentence for his conviction on first degree murder charges for the strangulation death of Andrew Marti, another inmate. See U.S. v. Hammer, 226 F.3d 229, 230-31 (3rd Cir. 2000).

respectively. See Dkt. 97 at 2. Plaintiff claimed that these individuals could provide "valuable information" pertaining to the Oklahoma City bombing and the FBI's alleged bad faith response to Plaintiff's FOIA requests and this Court's Summary Judgment Order. See Dkt. No. 98 at 4. In support of his motion, Plaintiff filed the Declarations of Nichols and Hammer. See Dkt. Nos. 99; 100.

11. On September 20, 2007, this Court issued its Discovery Order granting Plaintiff's motion for discovery and permitting Plaintiff to take and videotape the requested depositions. See Dkt. No. 113 at 4. Specifically, the Court found that it retained jurisdiction of this case and that by granting Plaintiff's motion to take the requested depositions, Plaintiff may be able to identify the existence of other FBI records responsive to his FOIA request that have not yet been produced. Id. at 3.

ARGUMENT

I. THIS COURT SHOULD RECONSIDER ITS DISCOVERY ORDER AND DENY PLAINTIFF'S MOTION BECAUSE IT EXCEEDS THE PERMISSIBLE SCOPE OF DISCOVERY UNDER FOIA.

This Court should reconsider its Discovery Order and deny Plaintiff's motion because the Order exceeds the permissible scope of discovery under FOIA and is without legal precedent.[4] Discovery is the exception not the rule in FOIA cases. See Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 318 (D.C. Cir 2006); Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) (holding that discovery is generally unavailable in FOIA actions); Judicial Watch, Inc. v. Exp.-

[4]This Court has jurisdiction to reconsider and vacate its Discovery Order because it is an interlocutory order. See Anderson v. U.S. Dep't of Health & Human Svcs., 3 F.3d 1383, 1385 (10th Cir. 1993) (holding that discovery order denying request to take depositions in FOIA action was interlocutory in nature). Such requests rely upon "the inherent power of the rendering district court to afford such relief from interlocutory judgments. . . as justice requires." Greene v. Union Mut. Life Ins. Co. of America, 764 F.2d 19, 22 (1st Cir. 1985); Wanamaker v. Columbian Rope Co., 907 F. Supp. 522, 527 (N.D.N.Y. 1995).

Imp. Bank, 108 F. Supp. 2d 19, 25 (D.D.C. 2000) ("[D]iscovery in a FOIA action is generally inappropriate."). Unlike the broad provisions in the Rules of Civil Procedure which permit discovery on any non-privileged matter relevant to the claim or defense of any party, see Fed. R. Civ. P. 26(b)(1), discovery under FOIA is "limited to the scope of an agency's search [for responsive documents] and its indexing and classification procedures." See Heily v. United States Dep't of Commerce, 69 Fed. Appx. 171, 174 (4th Cir. 2003) (per curiam); Tax Analysts v. IRS, 214 F.3d 179, 185 (D.C. Cir. 2000) (remanding for discovery on "narrow and fact-specific question" concerning disclosability of specific type of document); Judicial Watch, Inc. v. United States Dep't of Commerce, 127 F. Supp. 2d 228, 230 (D.D.C. 2000) (permitting depositions to be taken about parameters of FOIA search); Pub. Citizen Health Research Group v. FDA, 997 F. Supp. 56, 72 (D.D.C. 1998) (holding that discovery is limited to "investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like"); Billington v. Dep't of Justice, 11 F.Supp.2d 45, 72 (D.D.C. 1998) ("Discovery is generally limited to the scope of an agency's search.").

Discovery is not permitted where the plaintiff is using the FOIA lawsuit as a means of questioning investigatory action taken by the agency or the underlying reasons for conducting such investigations. See RNR Enters. v. SEC, 122 F.3d 93, 98 (2d Cir. 1997) (upholding district court's exercise of discretion in denying discovery propounded for "investigative purposes"); Flowers v. IRS, 307 F. Supp. 2d 60, 72 (D.D.C. 2004) (scolding plaintiff, who "may be unhappy with the search results," for seeking discovery in a FOIA case in order to conduct investigation of the agency's rationale for tax audit).

Nor is discovery permitted where the plaintiff is using a FOIA lawsuit "as a fishing expedition" for investigating matters related to separate lawsuits. See Tannehill v. Dep't of the Air Force, No. 87-1335, 1987 WL 25657, at *2 (D.D.C. Nov. 12, 1987) (limiting discovery to determination of FOIA issues, not to underlying personnel decision); Al-Fayed v. CIA, No. 00-2092, slip op. at 17 (D.D.C. Dec. 11, 2000) (terming plaintiff's discovery request "a fishing expedition" and refusing to grant it), aff'd on other grounds, 254 F.3d 300 (D.C. Cir. 2001).

Accordingly, even when discovery is permitted to explore the steps an agency took or might have taken to locate responsive records, discovery is not available as a means of circumventing the limitations of FOIA itself. It cannot be used to allow a FOIA plaintiff to interrogate agency employees, or anyone else, on the various topics, for which the plaintiff sought the records in the first place. FOIA is a device that allows access to records, not to people. See Goldgar v. Office of Administration, 26 F.3d 32, 34-35 (5th Cir. 1994) ("FOIA applies only to information in record form"; if a plaintiff "is not seeking an agency record . . . then he is abusing and misusing the FOIA").

In this case, the Court's Discovery Order exceeds the permissible scope of discovery because it is not limited to the scope of the FBI's search for responsive documents, the FBI's indexing procedures, or any other matter relevant to the FBI's disclosure obligations under FOIA. See Dkt. No. 113. To the contrary, the Discovery Order has the impermissible effect of allowing Plaintiff to depose Nichols and Hammer to conduct discovery into the Oklahoma City bombing investigation. There can be no other purpose since Nichols and Hammer are not employees of the FBI and lack any knowledge of the FBI's search for records or its decisions concerning the disclosure of the requested records. Even Plaintiff has not suggested that the proposed discovery would or could provide

information about the adequacy of the FBI's search for records. Instead, Plaintiff intends to question these witnesses about the underlying subject matter of those records, i.e., the Oklahoma City bombing. See Dkt. No. 98 at 4 (claiming that Nichols and Hammer could provide "valuable information" pertaining to the Oklahoma City bombing); see also Letter to Robert Mueller, dated September 21, 2007 and attached as Exhibit A. Such discovery is not permitted under FOIA.

Further, the Discovery Order is without legal precedent. The Court did not cite and the FBI has not located any authority which permits the depositions of non-agency personnel in a FOIA case. The only court to address this issue rejected an attempt by a FOIA plaintiff to compel the deposition of a private citizen. See Kurz-Kasch v. U.S. Dep't of Defense, 113 F.R.D. 147 (S.D. Ohio 1986). In Kurz-Kasch, the prospective deponent, Mr. Kurak, was not an employee of the Department of Defense, and did not participate in either the search for agency records or the decisions concerning the disclosure of the requested records. Id. at 147. Accordingly, the court concluded that because Mr. Kurak was a private individual "having no official connection with any federal governmental agency," the Court had no jurisdiction under FOIA to enforce the subpoena against Mr. Kurak. Id. at 148.

Likewise in this case, neither Nichols nor Hammer have ever been employed by the FBI, or participated in the search for the FBI's records or the decisions concerning the disclosure of the FBI's records. Accordingly, this Court should reconsider its Discovery Order and deny Plaintiff's motion because the Order exceeds the permissible scope of discovery under FOIA and is without legal precedent.

II. THIS COURT SHOULD RECONSIDER ITS DISCOVERY ORDER AND DENY PLAINTIFF'S MOTION BECAUSE THERE IS NO CASE AND CONTROVERSY SUFFICIENT TO CONFER SUBJECT MATTER JURISDICTION UNDER ARTICLE III.

This Court should also reconsider its Discovery Order and deny Plaintiff's motion because there is no case and controversy sufficient to confer subject matter jurisdiction here. Article III of the Constitution requires that federal courts hear only "Cases" and "Controversies." U.S. Const. art. III, section 2. Federal courts have "no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [them]." Church of Scientology v. United States, 506 U.S. 9, 12 (1992).

In the FOIA context, once an agency releases documents responsive to a FOIA request, there no longer exists a 'case or controversy' sufficient to confer subject matter jurisdiction on the court because the court has no further judicial function to perform. See Bloom v. Soc. Sec. Admin., 72 Fed. Appx. 733, 735 (10th Cir. July 3, 2003); Anderson, 3 F.3d at 1384 ("[i]n general, once the government produces all the documents a plaintiff requests, her claim for relief under the FOIA becomes moot"); Tijerina v. Walters, 821 F.2d 789, 799 (D.C. Cir.1987) (holding that "[h]owever fitful or delayed the release of information under the FOIA may be ... if we are convinced appellees have, however belatedly, released all nonexempt material, we have no further judicial function to perform under the FOIA").

Likewise, when an agency determines that it does not have any documents responsive to the plaintiff's request, the court has no judicial function to perform because the court cannot order the agency to disclose records which it does not have or cannot locate. See Goldgar, 26 F.3d at 34 (5th Cir. 1994) (per curiam) (pointing out that where agency had no records responsive to plaintiff's

request, court had no jurisdiction under FOIA); Wichlacz v. United States Dep't of Interior, 938 F. Supp. 325, 329 n.1 (E.D. Va. 1996) (holding that FOIA action against FBI was moot where FBI determined it did not have responsive documents). Thus, once an agency advises a FOIA requester that the agency released all its responsive records, or does not have, or is unable to locate, responsive records, there is no case or controversy and thus, no judicial function for the court to perform.

In this case, the FBI conducted multiple searches, both voluntarily and pursuant to court orders and located records responsive to Plaintiff's FOIA request. The FBI disclosed, in full or in part, all the responsive records which it located. The FBI asserted and this Court upheld the FBI's assertion of various exemptions to disclosure of those records under FOIA. Based upon this record, the Court ruled on the parties' cross-motions for summary and partial summary judgment and reconsidered its ruling under Rules 59(e) and 60(b). Collectively, these orders resolved the parties' pending claims. Accordingly, there is no longer any case and controversy and no judicial function for this court to perform.

In its Discovery Order, however, the Court concluded that it retained jurisdiction because the case had not been closed and remained on the Court's list of active pending cases. Dkt. No. 133 at 2. Neither of these circumstances is determinative of whether this Court has the requisite "case and controversy" under Article III. Rather, the question is whether there remained any judicial function for the Court to perform.

In this case, the Court issued a final ruling regarding the adequacy of the FBI's searches and the validity of its asserted exemptions when it issued its Amended Order and subsequently denied Plaintiff's Motion to Amend Judgment. See Dkt. No. 95 at 1. At that time, there were no longer any pending issues. Although the Court never entered a separate judgment, under Fed. R. Civ. P.

58(a)(1)(D) and (b)(1), judgment was entered, in effect, when the Court denied Plaintiff's Rule 59(e) motion and entered its Order on the docket. See Whitaker v. Garcetti, 486 F.3d 572, 579 (9th Cir. 2007) (holding that when the parties treat a fully dispositive summary judgment order as if it were a final judgment, the requirement in Rule 58 that the judgment 'be set forth on a separate document' can be waived.") The time for appealing that final judgment expired 60 days later under Fed. R. App 4(a)(1)(b). Once the time expired, the Court's Order was final, there was no further judicial function for this Court to perform, and this case should have been closed.

Further, even if the Court retained jurisdiction to ensure that the FBI complied with its Amended Order, the FBI indicated that it did so on June 2, 2006. See Dkt. No. 96 at 1-2. Thus, a determination as to the adequacy of the FBI's searches in response to Plaintiff's FOIA request was over at this point and there was no further judicial function to perform.

Accordingly, because this Court resolved all pending issues pertaining to the FBI's searches and the validity of its asserted exemptions, there is no case and controversy here and no further judicial function for this Court to perform.

III. THIS COURT SHOULD RECONSIDER ITS DISCOVERY ORDER AND DENY PLAINTIFF'S MOTION BECAUSE PLAINTIFF HAS FAILED TO RAISE A QUESTION AS TO THE FBI'S GOOD FAITH SUFFICIENT TO JUSTIFY DISCOVERY.

Even if there were a case and controversy here sufficient to confer subject matter jurisdiction under Article III, this Court should still reconsider its Discovery Order and deny Plaintiff's motion because there is no question as to the FBI's good faith sufficient to justify discovery. This Court has never found that the FBI acted in bad faith and Plaintiff's own speculative criticism of the FBI's response to Plaintiff's FOIA request is insufficient to justify discovery.

As set forth above, discovery is the exception not the rule in FOIA cases. See Wheeler, 271 F. Supp. 2d at 139 (holding that discovery is generally unavailable in FOIA actions); Judicial Watch, Inc., 108 F. Supp. 2d at 25 ("[D]iscovery in a FOIA action is generally inappropriate."). The only exception to this general limitation on discovery exists when plaintiff raises a question as to the agency's good faith sufficient to impugn its affidavits or provides some evidence that an exemption claimed by the agency should not apply. See Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2nd Cir. 1994) (no discovery if agency satisfies burden unless plaintiff makes a "showing of bad faith on the part of the agency"). A FOIA plaintiff is not entitled to discovery based upon his own "speculative criticism" of the agency's search. See Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 124 (D.C. Cir. 1999) (upholding denial of discovery based on "speculative criticism" of agency's search); Grand Cent. P'ship, 166 F.3d at 489 (finding discovery unwarranted based on plaintiff's "speculation that there must be more documents" and that agency acted in "bad faith" by not producing them).

In its Discovery Order, the Court concluded that discovery was appropriate because Nichols and Hammer might be able to identify the existence of other FBI records responsive to Plaintiff's FOIA request that have not yet been produced. See Dkt. No. 113 at 3. Even if the Court were correct about the deponents' ability to identify the existence of other documents, a dubious proposition, the Court's rationale is in error. Under FOIA, the FBI is not required to locate or produce every document extant. FOIA requires only that an agency make '"a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" Nation Magazine v. United States Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C.

Cir. 1990)). An "agency is not expected to take extraordinary measures to find the requested records." Garcia v. United States Dep't of Justice, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002).

In this case, the FBI conducted multiple searches using methods not only reasonably calculated to produce the requested information, but also extraordinary methods. See Hardy Decl. at ¶ 16; 2nd Hardy Decl. at ¶¶ 8, 9; 3rd Hardy Decl. at ¶¶ 6, 9 fn.5; 4th Hardy Decl. at ¶ 16; 6th Hardy Decl. at ¶7. The FBI is not required to do any more and this Court has declined to order that the FBI do any more presumably based upon the reasonableness of the FBI's prior searches. See Dkt. No. 88 at 21. ("But given the nature of Plaintiff's initial FOIA request and the searches that have been conducted by the FBI thus far, the court declines to order further searches beyond what the court has ordered above.").

Although the Court previously found that the FBI's initial search "was not reasonably calculated to discover the requested documents," Dkt. No. 31 at 5, and expressed concern that documents produced by the FBI referred to other documents that were not produced, see Dkt. No. 113 at 3, this Court also found that the absence of such documents "was not necessarily an indication of bad faith." See Dkt. No 88 at 21. In fact, there is no evidence that documents which were referenced, but not produced, are responsive to Plaintiff's FOIA request or even in existence. Moreover, as the FBI previously explained, a search is not unreasonable simply because it fails to produce all responsive material. See Nation Magazine, 71 F.3d at 892 n.7 ("[T]he failure to turn up [a specified] document does not alone render the search inadequate; there is no requirement that an agency produce all responsive documents.").

Although Plaintiff claims that the FBI responded in bad faith to his FOIA request, Plaintiff's request simply never sought the records which he now claims the FBI failed to produce. Compare

Dkt. No. 3, Ex. A and Dkt. Nos. 97 at; 98 at 2. Plaintiff's FOIA requests did not seek information about an "undercover operative" or any of several militia groups which he now identifies as the Michigan Militia, the Constitution Rangers or the Arizona Patriots. See Dkt. No. 98 at 2. Nor did Plaintiff seek information "related to a failed sting operation" by the SPLC and FBI at Elohim City as he contends. See Dkt. No. 97 at 2.

Likewise, neither Nichols' nor Hammer's declaration raise any issue as to the FBI's good faith in responding to Plaintiff's FOIA request, the adequacy of the FBI's searches, or the validity of its asserted exemptions. Nor does either declaration make any mention of Morris Dees or the SPLC, the individual and entity who were the actual subjects of Plaintiff's FOIA original request. See Dkt. No. 3, Ex. A.

Accordingly, because this Court has not found that the FBI acted in bad faith and Plaintiff has failed to raise a question as to the FBI's good faith sufficient to impugn its affidavits or create a genuine issue as to the reasonableness of the FBI's searches, this Court should reconsider its Discovery Order and deny Plaintiff's motion.

IV. ALTERNATIVELY THIS COURT SHOULD RECONSIDER ITS DISCOVERY ORDER AND DENY PLAINTIFF'S REQUEST TO VIDEOTAPE THESE DEPOSITIONS FOR SECURITY REASONS.

Alternatively, even if this Court is inclined to permit Plaintiff to depose Nichols and Hammer, this Court should still reconsider its Discovery Order and deny Plaintiff's request to videotape their depositions because the Bureau of Prisons ("BOP") has determined that a video recording poses a potential threat to the security of the institutions where these individuals are confined. Specific regulations govern the BOP's management of a federal correction facility and specifically, its search of inmates and visitors, and the supervision of visits and visitors. See

generally, 28 C.F.R. Part 500. Under these provisions, the BOP has the discretion to manage non-inmates, the objects they bring, and their activities, while inside a BOP facility or upon the grounds of any BOP facility. See 28 C.F.R. § 511.10(a). The BOP also has the discretion to approve or deny a request to use recording equipment on institution grounds. If the BOP determines that such a recording poses a potential threat to the institution's security or to the privacy of individuals, including inmates and staff, it may deny the request. See 28 C.F.R. §§ 511.11; 511.12 (prohibiting the introduction of cameras and/or recording equipment into a BOP facility).

In this case, the BOP has determined that allowing recording equipment onto the institution's grounds and into the institutions where these individuals are confined, threatens and is detrimental to the order and security of the prisons and may violate the privacy of others. Accordingly, this Court should reconsider its Discovery Order and deny Plaintiff's request to videotape the depositions of these witnesses.

CONCLUSION

Based upon the foregoing, the FBI respectfully requests that this Court reconsider its Discovery Order and deny Plaintiff's motion. Alternatively, the FBI requests that this Court reconsider its Discovery Order and deny Plaintiff's request to videotape these depositions.

DATED this 31st day of October, 2007.

BRETT L. TOLMAN
United States Attorney

/s/ Carlie Christensen

CARLIE CHRISTENSEN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that a copy of the foregoing Memorandum in Support of Motion to Reconsider was mailed, postage prepaid and/or electronically to all parties named below, this 31st day of October, 2007.

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/s/ Linda Pearson

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September 21, 2007

VIA FACSIMILE & U.S. MAIL
(202) 324-6856

Mr. Robert S. Mueller, Director
Federal Bureau of Investigations
935 Pennsylvania Avenue, NW
Washington, D.C. 20535-0001

RE: *Trentadue v. FBI*
Status Report

Dear Bobby:

I am sending you a copy of the *Order* entered in the above captioned case allowing me to take the videotaped depositions of Terry Lynn Nichols and David Paul Hammer. I am also sending you copies of the sworn *Declarations* from Nichols, Hammer and Peter K. Langan that I submitted in support of my *Motion* to take these depositions. After you read these materials, I bet your sphincter will be tight enough to suck buttermilk.

Semper fi

Jesse C. Trentadue

JCT\glh

Enclosures

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