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

JESSE C. TRENTADUE, Plaintiff, vs. UNITED STATES CENTRAL INTELLIGENCE AGENCY, FEDERAL BUREAU OF INVESTIGATION, and FEDERAL BUREAU OF INVESTIGATION'S OKLAHOMA CITY FIELD OFFICE, Defendants.	: : : : : : : : :	Case No: 2:08-CV-788 CW-SA DEFENDANT FBI'S COMBINED OPPOSITION TO PLAINTIFF'S MOTIONS TO COMPEL PRODUCTION OF (1) MURRAH BUILDING SURVEILLANCE TAPES AND RELATED EVIDENTIARY DOCUMENTS AND (2) ORIGINAL HANGER DASH BOARD CAMERA VIDEOTAPE AND RELATED EVIDENTIARY DOCUMENTS

INTRODUCTION

Defendant the Federal Bureau of Investigation ("FBI") and FBI's Oklahoma City Field Office (collectively, "FBI") hereby submit this consolidated opposition to Plaintiff's Motion to Compel Production of Murrah Building Surveillance Tapes and Related Evidentiary Documents (dkt. #48) and Plaintiff's Motion to Compel Production of Original Hanger Dash Board Camera Videotape and Related Evidentiary Documents (dkt. #51). This is an action under the Freedom

of Information Act ("FOIA"), 5 U.S.C. § 552, in which Plaintiff requested agency records from the FBI.[1] The FBI produced portions of responsive documents and withheld and redacted other portions pursuant to specific statutory exemptions under the FOIA. Plaintiff has now filed two discovery motions requesting that this Court order the FBI to produce material that he claims was improperly omitted from the FBI's FOIA response. Specifically, he seeks videotapes from surveillance cameras on the exterior of the Murrah Federal Building in Oklahoma City, which he claims the FBI should have found and included among the group of videotapes that he was sent in response to his FOIA request; as well as a videotape from the dashboard camera of Oklahoma Highway Patrol Officer Charlie Hanger on the date that Officer Hanger arrested Timothy McVeigh, claiming that the videotape that the FBI already sent him was somehow altered from the original; and related records.

However, it is inappropriate, in a FOIA case, to seek discovery of the very records that are the subject of the FOIA request underlying a plaintiff's suit. The FBI has provided Plaintiff with a final response to his FOIA request and anticipates filing a detailed declaration and Vaughn Index describing the FBI's search for responsive records and explaining the basis for any claimed exemptions, together with a Motion for Summary Judgment, on a date agreed upon by the parties pursuant to an anticipated summary judgment briefing schedule. Plaintiff has offered no persuasive reason why this Court should resort to the extraordinary measure of allowing discovery in a FOIA case before the FBI has an opportunity to file its summary judgment papers

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[1]Plaintiff's Motions to Compel concern the FOIA response of defendant FBI and is not addressed to the FBI's codefendant the CIA. This Court granted summary judgment in favor of the CIA by Order dated March 26, 2010. This memorandum in opposition is therefore filed on behalf of defendant FBI.

– which in the typical case provide both the plaintiff and the court with all the information necessary to assess the validity of an agency's FOIA response.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed this FOIA action on October 10, 2008, originally naming only the Central Intelligence Agency ("CIA") as defendant in connection with Plaintiff's FOIA request to the CIA. On November 11, 2008, Plaintiff filed an Amended Complaint, adding the FBI as defendant in connection with Plaintiff's separate FOIA request to the FBI, which sought (1) copies of surveillance video footage taken in the vicinity of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995, the date of the Oklahoma City bombing; (2) copies of all videotapes collected by the FBI or others in Oklahoma between April 15 and April 19, 1995, as part of the Oklahoma City bombing investigation; (3) "a copy of the videotape taken from the Oklahoma Highway Patrol Officer Charlie Hanger's patrol car, which recorded the arrest of Timothy McVeigh on April 19, 1995" ("Hanger videotape"); and (4) copies of all reports describing or referencing the FBI's acquisition of these videotapes. Amended Complaint ("Am. Comp.") ¶ 19 & ex.9.

The FBI located and released a copy of the Hanger videotape on January 23, 2009. See Exhibit A. The FBI did not claim any exemptions with respect to this videotape and released it in full. Id. Plaintiff subsequently narrowed his two other requests for videotapes to those taken on the morning of April 19, 1995, from a list that Plaintiff provided of buildings in the vicinity of the Murrah Building. Pl. Mot. to Compel, Doc. #48, ex. 1. On May 28, 2009, the FBI sent Plaintiff 164 pages of material that it had located and determined was responsive to Plaintiff's requests for reports, with isolated words and phrases redacted pursuant to FOIA exemptions

(b)(3), (b)(6), and (b)(7)(C). See Plaintiff's Notice of Release, Doc. #23. On June 23, 2009, and July 16, 2009, the FBI also sent Plaintiff 29 additional videotapes that it had located and determined were responsive to Plaintiff's requests for videotapes. See Exhibits B-C. The FBI did not claim any exemptions with respect to these videotapes and released all 29 in full. See id. The FBI's final release of videotapes on July 16, 2009, completed its direct response to Plaintiff's FOIA requests.[2] See Exhibit C.

Following the FBI's release of the above-described documentation and videotapes, Plaintiff has not indicated any objection to the exemptions that the FBI claimed with respect to its redaction of material in the documentation (which were the only redactions that the FBI made in its FOIA response). However, Plaintiff has sent undersigned counsel a number of letters in which he suggests that, despite the FBI's assertion to the contrary, the Hanger videotape was not released in full, and that videotapes other than those that were released must exist. Plaintiff has now filed two Motions to Compel pursuant to Fed. R. Civ. P. 37(a), seeking to employ this discovery mechanism as a means of forcing the FBI to produce what Plaintiff believes he should have received in response to his FOIA requests – namely, (1) an "unredacted" version of the Hanger videotape, and (2) videotapes from surveillance cameras at the Murrah Federal Building, along with associated documentation.

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[2]As indicated in its May 28, 2009, letter accompanying its release of documentation, the FBI also referred some of the documents that it located to other agencies for direct response to Plaintiff. On August 21, 2009, the Federal Emergency Management Agency ("FEMA") sent Plaintiff its response regarding 35 pages of documents referred to it from the FBI. See Exhibit D (indicating the 35 pages were released in part, with redactions pursuant to FOIA Exemption (b)(6)). By letter dated April 29, 2010, the FBI provided Plaintiff with the document that it had referred to the General Services Administration ("GS"), noting exemptions had been asserted by both the FBI and the GSA. See Exhibit E. As indicated in this letter, the processing of Plaintiff's request was fully complete with the release of this document. Id.

ISSUE PRESENTED

The issue presented by Plaintiff's two Motions is whether Plaintiff can appropriately utilize Rule 37(a) Motions to Compel in a FOIA case, where Plaintiff does not seek to compel Defendant the FBI to respond to a discovery request (and no such request has been made) but instead seeks to compel production of the very records that he claims he should have received in response to his FOIA request, and where Defendant the FBI has not yet submitted its anticipated motion for summary judgment, together with its Vaughn Index and declaration, in which it plans to fully describe its search for responsive records and the basis for its claimed exemptions – the only issues before the Court in this FOIA case.

ARGUMENT

I. PLAINTIFF'S MOTIONS SHOULD BE DENIED BECAUSE FOIA CASES TYPICALLY DO NOT INVOLVE DISCOVERY BUT INSTEAD ARE DECIDED ON SUMMARY JUDGMENT BASED ON AGENCY AFFIDAVITS, WHICH ARE ENTITLED TO A PRESUMPTION OF GOOD FAITH

As this Court has recently explained, the FOIA, 5 U.S.C. § 552, "'generally requires federal agencies to disclose agency records to the public upon request, subject to nine exemptions that protect certain types of documents from disclosure.'" Order of March 26, 2010, 2010 WL 1257758, at *2 (quoting Stewart v. U.S. Dep't of Interior, 554 F.3d 1236, 1239 (10th Cir. 2009)). When an agency releases records responsive to a FOIA request, it must indicate any portion of the record that has been redacted pursuant to any of these nine exemptions. 5 U.S.C. § 552(b).[3] When an agency's response to a FOIA request is challenged in district court, the court reviews de novo whether the government has properly withheld records, and the government bears the burden of justifying nondisclosure. See 5 U.S.C. § 552(a)(4)(B); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989). The issues in a FOIA case are thus essentially twofold: First, a plaintiff may contend that the agency has not conducted an adequate search for records responsive to the FOIA request, and second, a plaintiff may challenge the agency's assertion of an exemption pursuant to § 552(b).

In regard to the first issue, the relevant inquiry "is not whether there exist further

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[3]The applicable language states:

> The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

5 U.S.C. § 552(b).

documents responsive to a FOIA request but whether the agency conducted a reasonable search for responsive documents." Trentadue v. FBI, 572 F.3d 794, 807 (10th Cir. 2009). In other words, as long as an agency conducts an adequate search, it is irrelevant that the agency did not find a particular record that the FOIA requestor had hoped would be found, or did not find as many records as the requestor had expected. As the Tenth Circuit has held, when rejecting Plaintiff's discovery motion in connection with a previous FOIA request, "an agency's search for records need only be 'reasonable' in scope and intensity." Id. at 797 (emphasizing again that "the focal point of the judicial inquiry [in a FOIA case] is the agency's search process, not the outcome of its search"); see also, e.g., Rein v. U.S. Patent & Trademark Off., 553 F.3d 353, 362 (4th Cir. 2009) ("We begin with the guiding principle that the FOIA does not require a perfect search, only a reasonable one.").

Discovery is generally unavailable in FOIA litigation; instead, the well-established procedure in FOIA cases is for the agency to file a motion for summary judgment together with agency affidavits that describe the search that it conducted in response to the plaintiff's FOIA request and explain the basis for any asserted exemptions.[4] E.g., Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (per curiam) ("The peculiarities inherent in FOIA litigation, with the responding agencies often in sole possession of requested records and with information searches conducted only by agency personnel, have led federal courts to rely on government affidavits to determine whether the statutory obligations of the FOIA have been met."). Indeed, the Tenth

[4]The agency's affidavits and Vaughn Index, in which it describes the documents found and any applicable exemptions, essentially constitute the administrative record for purposes of a FOIA case. As indicated in Fed. R. Civ. P. 26(a)(1)(B)(i) and DUCivR 16-1(a)(1)(A)(vi), such actions are exempt from normal discovery requirements.

Circuit expressly recognized, in Trentadue, that "declarations and affidavits are the widely accepted, even the preferable, means for an agency to respond to concerns about the adequacy of a FOIA search," and that "the agency may rely on" such declarations and affidavits as long as they "provide reasonable detail of the scope of the search." Trentadue, 572 F.3d at 807 (internal quotation omitted). Moreover, such declarations and affidavits "are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." Id. at 808 (quoting SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991)); accord Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) (internal quotation omitted); see also Sephton v. FBI, 442 F.3d 27, 29 (1st Cir. 2006) (upholding district court's determination that the plaintiff failed "to rebut the presumption of good faith that FOIA attaches to agency affidavits"); Mace v. EEOC, 197 F.3d 329, 330 (8th Cir. 1999) (per curiam) (recognizing agency affidavits are entitled to deference, and that the "burden is on [the] requester to rebut agency affidavits by showing lack of good faith"); Meeropol v. Meese, 790 F.2d 942, 952 (D.C. Cir. 1986) (similar).

Thus, "'[d]iscovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face, and a district court may forgo discovery and award summary judgment on the basis of submitted affidavits or declarations.'" Trentadue, 572 F.3d at 807 (quoting Wood v. FBI, 432 F.3d 78, 85 (2d Cir. 2005)).[5] Based on this principle, the Tenth Circuit in Trentadue overturned

[5]See also Nolan v. Dep't of Justice, 973 F.2d 843, 849 (10th Cir.1992) ("[T]he district court acted well within its discretion in deferring discovery so as to determine the propriety of the [Privacy Act] exemptions."). Other Circuits are in agreement on this point. In addition to the Second Circuit's decision in Wood, cited in Trentadue, see Lane v. Dep't of Interior, 523 F.3d 1128, 1134 (9th Cir. 2008) (recognizing that in FOIA cases, "discovery is limited because the

the district court's order granting Plaintiff's discovery request because the FBI's affidavits in that case adequately demonstrated that the FBI's search for responsive records was reasonable. Trentadue, 572 F.3d at 807.

In sum, under the well-established procedure described above, in a FOIA case an agency should first be given an opportunity to file a motion for summary judgment, with an accompanying agency declaration, before a plaintiff's discovery request is even entertained. "If a court is satisfied that the affidavits supplied by the agency meet the established standards for summary judgment in a FOIA case and that plaintiff has not adequately called these submissions into question, no factual dispute remains, and discovery is inappropriate." Pub. Citizen Health Research Group v. FDA, 997 F. Supp. 56, 72-73 (D.D.C. 1998), rev'd in part on other grounds by 185 F.3d 898 (D.C. Cir. 1999); see also Radcliffe v. IRS, 536 F. Supp. 2d 423, 434 (S.D.N.Y. 2008) ("If an agency demonstrates [through its declaration] that it has conducted a reasonable search for relevant documents, it has fulfilled its obligations under FOIA and is entitled to summary judgment on the issue."). Even where an agency's declaration is deemed inadequate, a court will most often simply request a more detailed declaration. E.g., Schwarz v. FBI, No. 98-4036, 1998 WL 667643, at *1-2 (10th Cir. Sept. 17, 1998) (describing procedural history in which district court initially denied summary judgment to FBI but later granted summary judgment to FBI based on its submission of a more detailed affidavit, and upholding district court's judgment); Prison Legal News v. Lappin, 603 F. Supp. 2d 124, 129 (D.D.C. 2009)

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underlying case revolves around the propriety of revealing certain documents"); Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 318 (D.C. Cir. 2006) ("Discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." (internal quotation omitted)).

(ordering agency to either "conduct anew its searches for the records sought by the plaintiff or submit an [additional] affidavit" demonstrating that the agency "employed search methods reasonably likely to discover records response to the plaintiff's request and . . . that the responsive documents and parts of documents not provided to the plaintiff have properly been withheld under the FOIA exemptions claimed by the [agency]").

Here, the FBI anticipates filing a motion for summary judgment, together with an accompanying Vaughn Index and a detailed agency declaration that describes the FBI's search for records responsive to Plaintiff's FOIA request, pursuant to a summary judgment briefing schedule that the FBI is prepared to propose in consultation with Plaintiff. Because discovery will most likely prove inappropriate and unnecessary in light of the FBI's anticipated submission, the FBI should be given the opportunity to proceed through the standard FOIA summary judgment process before any demands for discovery are considered.

II. PLAINTIFF'S MOTIONS TO COMPEL SHOULD BE DENIED BECAUSE THEY ARE NOT VALID RULE 37 REQUESTS BUT INSTEAD SEEK PRODUCTION OF THE VERY RECORDS THAT PLAINTIFF SOUGHT IN THE FOIA REQUESTS AT ISSUE IN THIS CASE

The Court should also deny Plaintiff's Motions because they are not proper discovery motions in any event. While Plaintiff has ostensibly filed his two Motions to Compel under Fed. R. Civ. P. 37(a), they cannot be considered proper Rule 37 motions because they do not relate to any underlying discovery request. Instead, Plaintiff has merely asked the Court to compel production of the very records that he apparently believes the FBI should have found and released to him in response to his FOIA requests. This maneuver should be rejected because it would "turn FOIA on its head, awarding [Plaintiff] in discovery the very remedy for which it

seeks to prevail in the suit." Tax Analysts v. IRS, 410 F.3d 715, 722 (D.C. Cir. 2005).

Rule 37(a) allows a party to file a motion to compel disclosures required under Rule 26(a), or to compel a discovery response when the opposing party has failed to comply with its discovery obligations. See Fed. R. Civ. P. 37(a). Plaintiff's Motions do not seek 26(a) information, nor do they relate to any deposition, interrogatory, or other discovery mechanism that has been employed in this litigation. Rather, Plaintiff's Motions follow on a series of letters that he has sent to undersigned counsel, in which he has expressed his conviction, first, that, despite the FBI's indication that it released the Hanger videotape in full, without withholding any information as exempt pursuant to § 552(b), the Hanger videotape has in fact been edited; and second, that, despite the FBI's indication that it has released all videotapes that it found responsive to Plaintiff's request, additional videotapes – specifically videotapes from the surveillance cameras of the Murrah Federal Building – must exist. Both Plaintiffs' letters and the instant Motions essentially contest the adequacy of the FBI's search and/or question the FBI's good faith in its response, but, as explained above, those issues are properly addressed through the summary judgment briefing process, when the FBI will submit a declaration that describes in detail the search that it conducted.

Indeed, the materials that Plaintiff has submitted in support of his Motions, which appear to be offered in an attempt to prove that the Hanger videotape should contain additional footage that was not included in the copy that Plaintiff received, and that videotapes from Murrah Federal Building surveillance cameras should exist, are of limited, if any, relevance to any issue that is legitimately before the Court in a FOIA case. As explained above, the only issues that can appropriately be the subject of dispute in regard to an agency's FOIA response are, first, whether

the agency conducted an adequate search for responsive records, and, second, whether any exemptions that the agency claimed, pursuant to 5 U.S.C. § 552(b), in order to redact material from its release were properly invoked. E.g., Iturralde v. Comptroller of Currency, 315 F.3d 311, 313 (D.C. Cir. 2003) (explaining that where an agency's "invocation of various exemptions" was no longer at issue, the "only issue" remaining was whether the agency "conduct[ed] an adequate search"). Because an agency's search need only be "reasonable," courts have repeatedly recognized that "the failure of an agency to turn up one specific document in its search does not alone render a search inadequate." Id.; see also Trentadue, 572 F.3d at 807 (the only relevant question in a FOIA case "is not whether there exist further documents responsive to a FOIA request but whether the agency conducted a reasonable search for responsive documents"); Lahr, 569 F.3d at 987 (recognizing that an agency "is not required by the [FOIA] to account for documents which the requester has in some way identified if it has made a diligent search for those documents in the places in which they might be expected to be found"). Because the adequacy of the FBI's search is the real issue here, any potential relevance that the material submitted by Plaintiff might have can only be evaluated after the FBI has an opportunity to describe, in its declaration attached to its anticipated Motion for Summary Judgment, the search that it conducted. Even then, the question will be whether the FBI conducted a reasonable search, and as long as it did so, the FBI has no obligation to account for any records that Plaintiff believes should have been found, but were not.[6]

[6]Even if the Court ultimately determined that the FBI had not conducted an adequate search, the only relief that Plaintiff could actually obtain is that the FBI might be required to conduct a more thorough search for records responsive to Plaintiff's FOIA requests. The FBI cannot be ordered to release videotapes that it is unable to locate through a reasonable search.

These principles, together with the fact that Plaintiff's Motions are entirely unconnected to any ongoing discovery in this case, should lead the Court to conclude that Plaintiff's Motions are inappropriate. Moreover, numerous courts have recognized that a plaintiff in a FOIA case cannot seek to compel, through discovery, the contents of the very records that are the subject of the underlying FOIA request. E.g., Lane, 523 F.3d at 1134 (upholding the district court's denial of a discovery request where the plaintiff "appeared to be requesting via discovery the very information that is the subject of the FOIA complaint" (internal quotation omitted)); Tax Analysts, 410 F.3d at 722 ("The courts must not grant FOIA plaintiffs discovery that would be tantamount to granting the final relief sought." (internal quotation omitted); Local 3, Intern. Broth. of Elec. Workers, AFL-CIO v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988) (rejecting plaintiff's Rule 37 motion to compel where the requested production of documents "would essentially grant Local 3 the substantive relief it requests" in the lawsuit); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1343 (S.D. Fla. 2005) ("[W]here discovery is aimed at obtaining the documents or information at issue [in a FOIA case], it is not allowed."). Indeed, a discovery request that provides parties with "all the disclosure to which they would be entitled in the event they prevail on the merits" is "anything but appropriate." Cheney v. United States Dist. Court, 542 U.S. 367, 388 (2004). Accordingly, Plaintiff's Motions to Compel should be denied.

CONCLUSION

For the reasons set forth above, Defendant the FBI respectfully requests that Plaintiff's Motions to Compel be denied and that, instead, the parties be permitted to confer and submit to the Court a proposed summary judgment briefing schedule.

DATED this 7th day of May, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2010, I caused a true and correct copy of the foregoing document to be served by first class mail, postage prepaid, and/or through the Court's electronic filing system, on plaintiff, proceeding *pro se*, at the address listed below:

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