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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' REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS 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 reply memorandum in further support of their Motion to Reconsider this Court's Memorandum Decision and Order of September 20, 2007 ("Discovery Order").

INTRODUCTION

This Court should reconsider its Discovery Order and deny Plaintiff's motion to take videotaped depositions of Terry Lynn Nichols ("Nichols") and David Paul Hammer ("Hammer"). *See* Dkt. No. 113 at 4.[1] As the FBI previously explained, (1) the Discovery Order exceeds the permissible scope of discovery under FOIA because it is not limited to the underlying FOIA issues in the case, i.e., the scope of the FBI's search for responsive documents and its indexing and

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

classification procedures; (2) the Court lacks jurisdiction to order discovery because there is no remaining case and controversy; all pending issues were resolved when the Court issued its final ruling regarding the adequacy of the FBI's searches and disclosures; (3) the 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; and (4) the Bureau of Prisons ("BOP") has determined that a videotaped deposition poses a threat to the security of the institutions where Nichols and Hammer are confined. *See* Dkt. No. 115.

As set forth below, Plaintiff's opposition to the FBI's reconsideration motion lacks merit because it fails to address any of the FBI's substantive contentions as set forth above. Further, Plaintiff's claim that the FBI's reconsideration motion is procedurally deficient is meritless. The FBI's motion was timely filed and does not improperly reargue previously litigated matters.

ARGUMENT

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

As the FBI previously demonstrated, 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). Although discovery is permitted under FOIA, it is generally "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).[2] In this

[2]Plaintiff claims that the FBI has retreated from its earlier position that discovery was not available under FOIA at all. *See* Dkt. No. 123 at 5. Plaintiff is simply incorrect. The FBI has consistently acknowledged the limited availability of discovery under FOIA, but asserted that it was not available *here* because Plaintiff's request was not limited to discovering the scope of the FBI's search for responsive documents, the FBI's indexing procedures, or any other matter

case, the Court's Discovery Order has the impermissible effect of allowing Plaintiff to depose Nichols and Hammer regarding 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.

Plaintiff, however, claims that discovery is available under FOIA on a broader basis and in particular, to disclose government malfeasance. *See* Dkt. No. 123 at 6. Plaintiff's claim is true only to the extent that the government malfeasance occurs in connection with an agency's response to a FOIA request, and in particular, the adequacy of the agency's search. For example, in the case cited by Plaintiff, *Judicial Watch, Inc. v. United States Dep't of Commerce*, 127 F. Supp. 2d 228, 231 (D.D.C. 2001), the court allowed depositions of agency officials because these officials were reasonably thought to have information relevant to the frustration of the agency's first FOIA search. Plaintiff has not cited and the FBI has not located any legal authority to support Plaintiff's claim that discovery under FOIA is available on a broader basis to explore investigatory action taken by an agency or other issues unrelated to the FOIA lawsuit.

Nor has Plaintiff cited any authority which permits the depositions of non-agency personnel in a FOIA case. As the FBI previously explained, 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). Plaintiff attempts to distinguish the *Kurz-Kasch* case on the basis that the witness there sought to quash the subpoena compelling his attendance at

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relevant to the FBI's disclosure obligations under FOIA. The FBI also previously asserted that discovery was not available *here* because once the FBI released the documents responsive to Plaintiff's FOIA request, Plaintiff's claims were moot and this Court lacked jurisdiction to order discovery. *See* Dkt. No. 107 at 7.

a deposition, while the prospective witnesses here desire to have their depositions taken. *See* Dkt. No. 123 at 6. Plaintiff's claim, however, misses the mark. The issue here is not whether the prospective witnesses are willing to have their depositions taken, but whether the prospective witnesses have any knowledge about the underlying FOIA issues. Since Nichols and Hammer are not employees of the FBI, they lack any knowledge of the FBI's search for records responsive to Plaintiff's FOIA request or of the FBI's decisions concerning the disclosure of the requested records. Even Plaintiff has not demonstrated that the proposed discovery would or could provide information about the adequacy of the FBI's search for records. *See* Dkt. No. 98 at 4 (claiming that Nichols and Hammer could provide "valuable information" pertaining to the Oklahoma City bombing).

Further, the notion that Nichols and Hammer might somehow be able to identify FBI records which are responsive to the original FOIA request, but have not been released, also misses the mark. As the FBI previously explained, FOIA requires a "complete response" only in the sense that an adequate search must be conducted. *See* Dkt. Nos. 107 at 12; 115 at 13-14. It does not require a perfect response that locates every single responsive record. *See Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) ("[T]he factual question . . . is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." (internal quotation omitted)); *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (recognizing that the issue is not "'whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate'" (quoting *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)); *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1246 (4th Cir. 1994) ("In judging the adequacy of an agency search for documents the relevant question is not whether every single potentially responsive document has been unearthed

. . . ."); *In re Wade*, 969 F.2d 241, 249 n.11 (7th Cir. 1992) ("The issue is *not* whether other documents may exist, but rather whether the search for undisclosed documents was adequate."). Accordingly, even if Nichols or Hammer had concrete knowledge about the existence of particular FBI records, that knowledge would not reveal anything about the adequacy of the FBI's search. Nor is there any reason to think that Nichols or Hammer would know where such records are located, or could provide information to suggest how the FBI might have conducted its previous searches in a way that would have located these records. Furthermore, based on this Court's conclusion that the FBI's previous searches were adequate, even if Nichols or Hammer were somehow familiar enough with the FBI's recordkeeping methods to identify the location of these records, that endeavor would amount to an entirely new FOIA request, which would not be a part of this case. FOIA discovery is not permitted as a fishing expedition for agency records claimed by nonagency personnel to exist, but which have not been previously found, despite an adequate search. *See Assassination Archives & Research Ctr. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989) (FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters).

Accordingly, because discovery under FOIA is limited to the underlying FOIA issues in the case – and in particular, the adequacy of the agency's search – and because the prospective witnesses here have no information about the underlying FOIA issues in this case, this Court should reconsider its Discovery Order and deny Plaintiff's motion.

II. THE 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.

As the FBI previously explained, this Court should reconsider its Discovery Order and deny Plaintiff's motion for the additional reason that there is no case and controversy here. *See* Dkt. No. 115 at 10-12. Once the FBI disclosed to Plaintiff, in full or in part, all the responsive records which it located, and this Court upheld the adequacy of the FBI's searches and the validity of its asserted exemptions, there was no remaining case or controversy and no further judicial function for this Court to perform. *See Bloom v. Soc. Sec. Admin*., 72 Fed. Appx. 733, 735 (10th Cir. July 3, 2003).

Plaintiff, however, asserts that even after an agency claims it has substantially complied with its FOIA obligations, discovery is available to test the veracity of that claim. *See* Dkt. No. 123 at 7. Plaintiff's assertion is correct only to the extent that an agency's compliance with FOIA is tested before, rather than after, a court's determination that the agency has satisfied its FOIA obligations. In this case, Plaintiff had ample opportunity to and did, in fact, test the veracity of the FBI's claims by opposing the FBI's motions with legal memoranda, exhibits, and declarations from a wide variety of sources. This Court, however, has since determined that the FBI satisfied its FOIA obligations, Dkt. Nos. 88 and 95, and, therefore, the time for testing the veracity of the FBI's claim through additional discovery has passed. Indeed, Plaintiff does not dispute the finality of this Court's previous rulings under Rules 59(e) and 60(b), upholding the adequacy of the FBI's searches and the validity of its asserted exemptions. *See* Dkt. No. 123 at 6-7.

Furthermore, Plaintiff's reliance on *Weisberg v. Dep't of Justice*, 627 F.2d 365 (D.C. Cir. 1980) is inapposite here. The *Weisberg* court did not consider, let alone decide, the question of whether a court has jurisdiction to order discovery *after* issuing a final order in a FOIA case. Rather, the plaintiff in *Weisberg* sought discovery *prior* to the court's ruling on the government's motion for summary judgment. Furthermore, unlike the FBI's affidavits here, the agency's affidavits in

Weisberg did "not denote which files were searched or by whom, [did] not reflect any systematic approach to document location, and [did] not provide information specific enough to enable Weisberg to challenge the procedures utilized." *Id*. at 371. By contrast here, the FBI's six separate affidavits in this case thoroughly detailed the FBI's multiple searches, including the names of the specific files and databases which were searched and the methods by which they were searched. *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.

Accordingly, because this Court previously determined that the FBI satisfied its search and disclosure obligations under FOIA, there is no remaining case or controversy here and this Court lacks jurisdiction to order further discovery.

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

As the FBI previously explained, this Court should also reconsider its Discovery Order and deny Plaintiff's motion because Plaintiff has not raised a question as to the FBI's good faith sufficient to justify discovery. *See* Dkt. No. 115 at 12-15. 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.

Although Plaintiff disputes the FBI's claim that this Court never found bad faith on the FBI's part, Plaintiff has not identified any findings by this Court to support his claim. *See* Dkt. No. 123 at 7-8. To the contrary, the language cited by Plaintiff expressly states that the FBI's failure to discover certain documents "is *not* necessarily an indication of bad faith." Dkt. No. 113 at 3

(emphasis added). Similarly, the language which Plaintiff quotes from this Court's Discovery Order does not contain a finding of bad faith on the part of the FBI. *Id.*

Further, there is no basis in the record to support a finding of bad faith and Plaintiff has not cited this Court to any such evidence. Neither Nichols's 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. Conversely, the FBI's affidavits demonstrate that 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 based upon the adequacy 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.").

Accordingly, because Plaintiff has not demonstrated and this Court has not found that the FBI acted in bad faith, discovery is not available here.

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

Finally, as the FBI previously explained, 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 BOP has determined that a video recording poses a potential threat to the security of the institutions where these individuals are confined.

Plaintiff opposes the FBI's motion claiming that the regulations cited by the FBI do not preclude an attorney from making an audio or video recording in connection with a legal proceeding, and, therefore, this Court should permit Plaintiff to videotape Nichols's and Hammer's depositions. *See* Dkt. No. 123 at 4. Plaintiff's interpretation of the applicable regulations is simply incorrect. The regulation cited by Plaintiff provides only that the warden "*may* permit tape recordings to be used by an attorney during the course of a visit ..." 28 C.F.R. § 543.13(e) (emphasis added). The regulation does not entitle either the inmate or the visiting attorney to make such a recording. *See Sturm v. Clark*, 838 F.2d 1009, 1011 fn.5 (3rd Cir. 1987) (noting that this section "generally empowers the warden to establish the terms and conditions of an attorney's visiting privileges and restrict those privileges should an attorney threaten institutional security.").

In this case, the BOP has determined that allowing video recording equipment into its facilities is detrimental to their order and security and may violate the privacy rights of other individuals. *See* Declaration of Captain Harvey Church ("Church Decl.") at ¶ 12; Declaration of Captain Tom Smith ("Smith Decl.") at ¶ 12 . Specifically, video recording equipment could be used to photograph the paths of entry into these facilities; the perimeter security of the institutions; the number and types of grills and locking mechanisms inside the facilities; the types of security devices utilized inside and outside the facilities; the location of equipment storage areas and offices; and staff and inmates. Such video recordings would enable an individual to create a basic blueprint of the complex and institution to develop a plan to assault and/or escape the facility. *Id*.

Based upon these concerns, the BOP determined that the introduction of video recording equipment into its facilities poses a threat to the security of its institutions, and therefore, may

properly restrict Plaintiff's visitation privileges by prohibiting the use of such equipment. *See* 28 C.F.R. Section 543.13(e); *Sturm*, 838 F.2d at 1011 fn.5.

Plaintiff, however, claims that the BOP facilities at issue here have video conferencing capabilities to allow inmates to participate in legal proceedings and that both Nichols and Hammer, along with other inmates, have used this system. *See* Dkt. No. 123 at 4. The BOP does not dispute that it has video conferencing equipment available or that such equipment is available for use in this case. *See* Church Decl. at ¶¶ 8, 10-11, 13; Smith Decl. at ¶¶ 8, 10-11, 13. Neither Plaintiff's motion nor this Court's Discovery Order, however, address the use of video conferencing equipment. To the contrary, Plaintiff's motion sought and this Court's Discovery Order grants Plaintiff permission to take videotaped depositions of Nichols and Hammer. *See* Dkt. Nos. 97 at 4; 113 at 3-4.

There is an important distinction between a video recorded deposition and a deposition taken with video conferencing equipment. Video conferencing uses a set of interactive telecommunication technologies which allow two or more locations to interact via two-way video and audio transmissions simultaneously. *See* Church Decl. at ¶ 9; Smith Decl. at ¶ 9. The use of such equipment would enable Nichols and Hammer to be deposed from the BOP facilities where they are incarcerated and enable Plaintiff to depose these witnesses from a remote location, eliminating the need for Plaintiff, opposing counsel, or a court reporter to be physically present at the institution or the introduction of recording equipment. *Id*. at ¶¶ 13.

Video recording equipment, however, uses a recording device which captures video and records it for playback at another time. *Id*. at ¶ 9. The use of video recording equipment would necessitate the presence of the Plaintiff, opposing counsel, and a court reporter at the BOP facility,

along with the operator of the necessary recording equipment. It is this portion of the Discovery Order which the BOP opposes for the stated security reasons.

Accordingly, because the governing regulations permit the BOP to restrict an attorney's visitation privileges when there is a threat to the security of a correctional institution; and because the BOP has properly determined that the introduction of video recording equipment into its facilities poses a threat, this Court should reconsider its Discovery Order and deny Plaintiff's request to take videotaped depositions of Nichols and Hammer.

V. THE FBI'S MOTION WAS TIMELY FILED AND IS PROCEDURALLY PROPER.

Finally, Plaintiff errs in asserting that the FBI did not timely file its motion. A court retains jurisdiction to modify or rescind an interlocutory order until a final decree has been entered in the action. *Primas v. City of Oklahoma City*, 958 F.2d 1506, 1513 (10th Cir. 1992); *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1121 (10th Cir.), cert. denied, 444 U.S. 856 (1979). Requests for reconsideration of an interlocutory decision rely on "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). In this case, the Court has jurisdiction to reconsider and vacate its Discovery Order at any time 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).

Plaintiff, however, claims that Defendant's motion is untimely because Fed. R. Civ. P. 59(e) requires that motions to reconsider be filed no later than 10 days after the entry of judgment. *See* Dkt. No. 123 at 2, n1. Plaintiff's reliance on Rule 59(e), however is inapposite here because this Court's Discovery Order does not constitute a final judgment and Rule 59(e) does not apply to

motions for reconsideration of interlocutory orders from which no immediate appeal may be taken. *See United States v. Martin*, 226 F.3d 1042, 1048 (9th Cir.2000).

Further, the FBI's motion does not improperly reargue matters previously presented to the Court, but properly challenges the legal correctness of the Court's Order. *See* Dkt. No. 123 at 2, n. 2. The FBI filed its Motion for Reconsideration for the stated purpose of challenging the legal correctness of the Court's Discovery Order. By asking this Court to reconsider the correctness of its Order, the FBI has asked the Court to reconsider those matters encompassed in its decision. Consequently, the motion is properly before this Court.

CONCLUSION

Based upon the foregoing, the FBI requests that its Motion for Reconsideration be granted and Plaintiff's Motion for Discovery be denied.

DATED this 30th day of January, 2008.

BRETT L. TOLMAN
United States Attorney

/s/Carlie Christensen
CARLIE CHRISTENSEN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2008, true and correct copies of the FBI's Reply Memorandum in Further Support of Its Motion to Reconsider was mailed, postage prepaid and/or electronically to all parties named below:

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