

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

_____)	
JAMES LUTCHER NEGLEY,)	
)	
Plaintiff,)	Civil Action No. 15-1004 (GK)
v.)	
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

DEFENDANT’S RESPONSE PLAINTIFF’S REQUEST FOR RELIEF

In this Freedom of Information Act (“FOIA”) case, plaintiff has moved the Court for an order that certain search terms and geographic locations be searched against the counsel of the agency’s record custodians and subject matter experts and prior to any declaration being submitted on the agency’s behalf. Plaintiff’s motion should be denied for at least two reasons.

First, attempting to direct the search of the defendant agency while the agency is still collecting, processing and producing documents is a rare exception and certainly not the rule, in actions brought pursuant to the FOIA, 5 U.S.C. § 552. Second, plaintiff’s request is premature. Defendant has not completed its search for responsive records, see ECF No. 33, and has not moved for summary judgment and filed a *Vaughn* declaration explaining the search that was performed in response to plaintiff’s requests. Thus, plaintiff should not be heard to argue now that the search performed has been inadequate.

For these reasons, and those set forth below, plaintiff’s motion for relief should be denied.

BACKGROUND

Plaintiff filed this FOIA action on June 25, 2015, seeking an Order of the Court for the following: 1) for DOJ to conduct a reasonable search for agency records responsive to Plaintiff's April 7, 2014 FOIA request; and 2) for DOJ to fully and properly respond to Plaintiff's April 7, 2014, FOIA request and produce responsive records.

Separate and apart from this litigation, on July 13, 2015, Plaintiff, through counsel, submitted a FOIA request to the Mail Referral Unit of DOJ, in which Plaintiff requested the following "[w]e respectfully request that you provide us with a copy of all records, files, and documents referencing, mentioning, or related to James Lutchner Negley, or any name that Mr. Negley may be referred by including, but not limited to, 'James Negley,' [']James L. Negley,' and 'Jim Negley.' Mr. Negley's Certification of Identity is attached hereto, which provides relevant identifying details of Mr. Negley, including his date of birth, social security number, and home address." *See* Attachment A (FOIA Request of July 13, 2015).

On or about September 30, 2016, Defendant learned of Plaintiff's July 2015 FOIA, which Plaintiff mailed to DOJ's Mail Referral Unit. Defendant commenced with processing Plaintiff's July 2015 request which was assigned FOIA Request No. 2016-00039, and submitted to the U.S. Attorney's Office for the Western District of Texas (WDTX) for processing. A search at the WDTX uncovered approximately 4,335 pages of potentially responsive records.

In an effort to resolve the instant litigation and address Plaintiff's separate July 2015 FOIA request, the parties agreed to temporarily stay the litigation in the instant matter until April 30, 2016, and agree to the following: 1) that EOUSA would provide Plaintiff with responsive records by March 15, 2016; and 2) if the parties agreed to expand the search records beyond the search that was conducted at the Western District of Texas, Plaintiff would agree to a reasonable

extension of the March 15, 2016 deadline to a new deadline that was mutually agreeable to the parties. On February 4, 2016, on the date that the parties filed a status report before this Court, Plaintiff's counsel, by way of letter to the assigned AUSA, requested that EOUSA conduct an additional search for records pursuant to the July 2015 FOIA request in the following jurisdictions:

- a. All USAOs in Texas;
- b. All USAOs in California;
- c. All USAOs in Colorado;
- d. All USAOs in Louisiana;
- e. All USAOs in Michigan;
- f. All USAOs in the District of Columbia
- g. All USAOs in the State of New York;
- h. Main Justice; and
- i. The wire-tapping subsection of the Department of Justice or Main Justice.

See ECF No. 23 at 3, §5; *see also* Attachment B (Letter of February 4, 2016).

Pursuant to Plaintiff's request of February 4, 2016, Defendant submitted Plaintiff's July 2015 FOIA request to the following U.S. Attorney's Offices ("districts" or "USAO") for a search for records to be conducted, as Plaintiff requested in his letter:

- | | | |
|----|---------------------------------|--------------------------|
| a. | Eastern District of Texas | FOIA Req. No. 2016-01512 |
| b. | Southern District of Texas | FOIA Req. No. 2016-01513 |
| c. | Northern District of Texas | FOIA Req. No. 2016-01514 |
| d. | Eastern District of California | FOIA Req. No. 2016-01515 |
| e. | Southern District of California | FOIA Req. No. 2016-01517 |

- f. Northern District of California FOIA Req. No. 2016-01516
- g. Central District of California FOIA Req. No. 2016-01525
- h. District of Colorado FOIA Req. No. 2016-01518
- i. District of Columbia FOIA Req. No. 2016-01519
- j. Eastern District of Michigan FOIA Req. No. 2016-01520
- k. Western District of Michigan FOIA Req. No. 2016-01521
- l. Eastern District of New York FOIA Req. No. 2016-01522
- m. Western District of New York FOIA Req. No. 2016-01524
- n. Southern District of New York FOIA Req. No. 2016-01523

See ECF No. 27 at 3.

EOUSA conducted a search for records at these districts with the search terms that Plaintiff had recommended in his letter of February 4, 2016. See Attachment B.

Regarding Plaintiff's request to have EOUSA search "Main Justice," and the "wiretapping section of DOJ or Main Justice," Plaintiff was informed that Defendant EOUSA was not able to do so, and advised Plaintiff on the manner in which he could identify which component within DOJ to submit a FOIA request, and where to submit such a request. See ECF No. 31, Exhibit 2 at 1-2.

ARGUMENT

Per this Court's September 20, 2016 Order, Defendant anticipates completing its response to the FOIA request by February 2017. Given that Defendant has yet to submit any declaration or Vaughn index regarding its response to the FOIA request and Plaintiff's review of the Defendant's response likewise remains ongoing, Plaintiff's request to mandate certain searched and search terms is manifestly premature. There is, therefore, no reason to deviate from the "general rule" precluding such interference in a FOIA case, at least until consideration of Defendant's summary judgment motion. *Shrecker v. United States Dep't of Justice*, 217 F. Supp. 2d 29, 35-36 (D.D.C. 2002). Indeed, undersigned counsel is not aware of a single case, and Plaintiff cites to none, in which such inference in a FOIA case has been permitted before the agency has completed its response to the FOIA response and submitted a declaration explaining its search efforts in support of its summary judgment motion.

The inappropriateness of a mandate to use search terms and specific geographical locations is underscored by the fact that Plaintiff's suggestions have been given proper consideration by the agency's subject matter experts. *See*, ECF No. 33 (exhibit C). While Plaintiff continues to assert his belief that USAOs in California and other locations should have responsive records, he has no factual basis for this and his assertions are likely based, in part, on a fundamental misunderstanding of the federal government's functioning. As explained to Plaintiff previously, simply because the FBI within a federal district conducts an investigation, it does not indicate that the USAO within that district would receive materials related to the investigation, or even be informed that an investigation was conducted.

Plaintiff in his motion contends that no evidence exists of reasonable search in certain districts within Texas, Colorado and California as a rationale to direct the searches of the agency

at this stage. Pl. Mot 8-10.¹ On the contrary, the evidence to substantiate the search decisions will be presented to the Court via declaration. There are no facts currently before the Court concerning Defendant's actual search for responsive records because the agency has not completed production. Plaintiff's request relief to dictate the Defendant's search for responsive records, therefore, is premature.

Plaintiff cites no authority for the proposition that he is entitled to control the agency's search efforts, while that search is still underway, and also prior to the agency moving for summary judgment or even submitting a *Vaughn* declaration describing the agency's efforts to locate records responsive to plaintiff's request. Indeed, most, if not all, of the cases cited Plaintiff explicitly indicate that the defendant in that has had an opportunity to submit a declaration prior to the Court's determination of the adequacy of the search.

Finally, Plaintiff has pointed to no evidence of agency bad faith in connection with processing plaintiff's FOIA requests. *See Wolf v. CIA*, 569 F. Supp. 2d 1, 10 (D.D.C. 2008) (concluding that mere assertions of an agency's bad faith do not provide sufficient basis to question the factual assertions of the agency). Plaintiff's unhappiness with the agency's resource allocation and search decisions before the agency's full explanation are not evidence of bad faith. *See Defenders of Wildlife*, 314 F. Supp.2d at 8 ("An adequate affidavit can be rebutted only 'with evidence that the agency's search was not made in good faith'") (internal citations omitted). Accordingly, the agency's sworn declaration, once it has been filed, should be afforded some

¹ It should be noted, that to the extent Plaintiff has an issue with the search methodology in response to a FOIA request that is not before this Court, the Plaintiff should not be allowed to ignore the administrative appeal process before seeking recourse with the Court. *See Kessler v. United States*, 899 F. Supp. 644, 645 (D.D.C. 1995) (failure to follow agency regulations constitutes failure to exhaust administrative remedies). "Courts have consistently confirmed that the FOIA requires exhaustion of this appeals process before an individual may seek relief in the courts."

deference. *See Krikorian v. Dep't of State*, 984 F.2d 461, 464 (D.C. Cir. 1993) (noting deference to expertise of agencies engaged in national security and foreign policy).

For the foregoing reasons, plaintiff has failed to demonstrate that the unusual and unprecedented remedy of controlling the direction of an agency's search prior to the submission of a declaration should be ordered here.

CONCLUSION

Accordingly, Defendant submits that the Court should deny Plaintiff's "Motion for Relief". A proposed order is attached.

Respectfully submitted,

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ORDER

UPON CONSIDERATION of plaintiff’s “motion for relief”, defendant Department of Justice responding opposition, and the entire record in this case, it is hereby

ORDERED that plaintiff’s motion for relief is hereby denied.

UNITED STATES DISTRICT JUDGE