IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Harold Weisberg,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CA No. 75-1996
	)	
Department of Justice,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR PROTECTIVE ORDER

Defendant, by its undersigned attorneys, hereby moves the Court, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, for a protective order barring plaintiff from taking the depositions of Federal Bureau of Investigation Special Agents John Hartingh, Thomas Wiseman, and Horace Beckwith, and of Quinlan J. Shea and Douglas Mitchell, Office of Information and Privacy Appeals, Department of Justice. In addition, defendant seeks an order barring all discovery in this litigation absent further order of this Court. Furthermore, plaintiff has also noticed his own deposition which, defendant contends, should not be allowed.

In support of this motion, the Court is respectfully referred to the memorandum of points and authorities filed herewith, and to the entire record herein.

Respectfully submitted,

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Defendant.	)	
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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER

Statement

The facts surrounding this Freedom of Information Act (FOIA) lawsuit are fully set forth in the Memorandum of Points and Authorities accompanying defendant's Motion For Partial Summary Judgment, filed with this Court on May 11, 1979. After defendant filed its motion, plaintiff noticed the depositions[1/] of six individuals: Messrs. John Hartingh, Thomas Wiseman, and Horace Beckwith, Special Agents of the Federal Bureau of Investigation (FBI), and Messrs. Quinlan J. Shea and Douglas Mitchell, Director and Attorney-Advisor, respectively, Office of Information and Privacy Appeals, Department of Justice. The sixth individual whose deposition was noticed is the plaintiff, Mr. Harold Weisberg. The subject matter of the depositions is to be "all issues raised by this . . . lawsuit." Plaintiff's Notice To Take Depositions, page 2.

1/ The depositions are currently set to commence on June 12, 1979, and are to "continue from day to day until completed." Plaintiff's Notice to Take Depositions, pages 1-2.

Defendant submits that it is entirely unnecessary and inappropriate for plaintiffs to take the depositions of the named individuals, and therefore that the Court should grant defendant's Motion for Protective Order.

Argument

Discovery Is Unnecessary And Inappropriate At This Time

The discovery rules vest broad discretion in the federal district courts with respect to control of the discovery process, and, in the proper case, the courts may grant appropriate orders to deny, limit, or qualify discovery in order to protect a party from undue burden or expense, or to promote the ends of justice. Rule 26(c), Federal Rules of Civil Procedure. See, for example, General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); Galella v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973); Chemical and Industrial Corp. v. Druffel, 301 F.2d 126 (6th Cir. 1962); Bowman v. General Motors Corp., 64 F.R.D. 62 (E.D. Pa. 1974). Defendant submits that the circumstances of this case clearly warrant the exercise of such authority.

A. Discovery Should Await This Court's Ruling On Defendant's Dispositive Motion

A frequent and logical basis for the issuance of a protective order staying discovery is where, as here, a dispositive motion may make all discovery moot. See e.g., Brennan v. Local Union No. 639, 494 F.2d 1092, 1100 (D.C. Cir. 1974); Simons-Eastern Co. v. United States, 55 F.R.D. 88 (N.D. Ga. 1972); Dunn v. Printing Corp. of America, 245 F.Supp. 875, 882 (E.D. Pa. 1965); Klein v. Lionel Corp., 18 F.R.D. 184 and 186 (D. Del. 1955) (two opinions, staying depositions and answers to interrogatories pending the disposition of motions by all parties for summary judgment).

FOIA disputes are particularly amenable to disposition upon motions for summary judgment. The legislative history of the FOIA demonstrates that Congress contemplated that the agencies may appropriately discharge their statutory burden of proof through affidavits by agency officials. See S.Rep. No. 93-854, 93d Cong., 2d Sess., page 14; S.Rep. No. 93-1200 (Conference Report), 93d Cong., 2d Sess., page 9. Indeed, the courts have emphasized the central role of government affidavits in the resolution of FOIA disputes. See, e.g., Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973); cert. denied, 415 U.S. 977 (1974). Government affidavits should be accorded substantial weight where the issue is the appropriateness of the exemption claimed as well as in those cases, as here, where the scope of the agency's search is the central question. Goland v. CIA, Civil No. 76-1800 (D.C. Cir. May 23, 1978) (attached to defendant's Memorandum In Support of Its Motion for Partial Summary Judgment as Appendix D); Goland v. CIA, Civil No. 76-1000 (D.C. Cir. March 28, 1979) (attached to defendant's Memorandum In Support of Its Motion For Partial Summary Judgment as Appendix E); Piccolo v. Department of Justice, Civil No. 78-1518 (D. D.C. January 9, 1979) (attached to defendant's Memorandum In Support of Its Motion for Partial Summary Judgment as Appendix G); Weisberg v. CIA, Civil No. 77-1977 (D. D.C. January 4, 1979) (attached to defendant's Memorandum In Support of Its Motion for Partial Summary Judgment as Appendix F).

Defendant has filed its Motion for Partial Summary Judgment. Accompanying that motion were the affidavits of eleven agency officials, knowledgeable as to the administrative response to plaintiff's FOIA request, including the

affidavits of Messrs. Shea and Mitchell. In addition, at the last status call, held on January 12, 1979, Mr. Shea testified under oath as to the results of the extraordinary review of certain of the records herein at issue conducted by his office of Privacy and Information Appeals. Plaintiff's counsel was, of course, given the opportunity to cross-examine Mr. Shea. Furthermore, plaintiff has received from Mr. Shea several letters which detail the progress and discuss particular aspects of Mr. Shea's review of the FBI's methodology and processing of records within the scope of plaintiff's request. Thus, plaintiff has before him a wealth of factual information pertaining to the thoroughness and scope of the FBI's search for records responsive to plaintiff's FOIA request which he can use to oppose defendant's motion.

To allow plaintiff to pursue discovery before the Court has considered defendant's dispositive motion and affidavits, the papers filed in support of and in opposition to, and the entire record herein would place a substantial burden on defendant. Inasmuch as no discovery may be necessary to dispose of this portion of the litigation, it would be manifestly unfair to require the government and the prospective deponents to submit to plaintiff's broad discovery demands at this time.

Moreover, no prejudice will result to plaintiff should this motion be granted. A short postponement of discovery pending the disposition of defendant's motion on the merits will not injure the plaintiff in any way. Should defendant's motion be denied, the need for discovery by plaintiff may be considered at that time. See Taylor v. Breed, 58 F.R.D. 101, 108 (N.D. Cal. 1973) (vacating protective order after

summary judgment motions had been denied). See also Schaffer v. Kissinger, 505 F.2d 389 (D.C. Cir. 1974) (FOIA complainants may, upon proper circumstances, pursue relevant discovery where agency fails to establish by affidavit the claimed exemptions from mandatory disclosure). Indeed, protective orders denying discovery during the pendency of dispositive motions in FOIA litigation have been granted by this Court. See, e.g., Consumers' Union v. Bloom, Civil Action No. 76-1529 (D. D.C. February 22, 1977). In short, both sound legal principles and the present posture of this case confirm the conclusion that discovery should be stayed pending the Court's resolution of defendant's dispositive motion.

B. Discovery By Deposition Is Inappropriate

While defendant submits that all discovery should await the Court's disposition of its forthcoming motion on the merits, defendant further asserts as an independent ground for a protective order the inappropriateness of the depositions now sought by plaintiff. Nowhere has plaintiff suggested circumstances demonstrating the need for discovery by deposition, or why, to the extent that any discovery is necessary and appropriate in this matter, proceeding by way of written interrogatories directed to the agency defendant would prove inadequate.

Beyond the possibility that any discovery may be rendered totally unnecessary by the resolution of defendant's motion on the merits, the inappropriateness of taking the testimony of agency officials and employees is suggested by the FOIA itself. In the first instance, the Act is directed at "agencies" and not individuals. 5 U.S.C. §552(a)(4)(B). Congress clearly intended the statutory obligations to run to the agency, and not the components thereof or individuals.

See H. Rep. No. 93-1380, 93d Cong., 2d Sess., pages 14-15. It would be manifestly unreasonable, both from the perspective of the target individuals and the governmental units which rely upon their uninterrupted services, to permit a FOIA complainant to select at will those agency officers or employees which it desires to personally examine. See Capitol Vending Co. v. Baker, 36 F.R.D. 45 (D. D.C. 1964).

Second, it must be remembered that the remedial focus of the FOIA is information, and relief under the Act is confined to the production of those agency records found to be improperly withheld. 5 U.S.C. §552(a)(4)(B). Civil discovery, of course, is a procedural device for obtaining information, and care must be taken lest the use of such device conflict with the clear limits of the underlying substantive rights. This Court has explained:

> While it is true that discovery procedures are sometimes appropriate in actions under the Freedom of Information Act, every case under the Act is not susceptible to the use of discovery techniques. Specifically, interrogatories and other discovery devices should not be employed in a Freedom of Information suit to give the party seeking discovery more information than that to which he is entitled under the Act.

Grolier, Inc. v. FTC, Civil Action No. 76-1559 (D. D.C. December 13, 1976) (attached hereto as Appendix A).

Depositions are particularly ill-suited to FOIA litigation inasmuch as, in contrast to discovery by written interrogatories, there is little meaningful control on the information which might be obtained through the taking of oral testimony. See Rule 30(c), F.R. Civ.P. Depositions present the very real danger that the FOIA complainant might obtain information which is either the subject matter of the underlying action (and hence the ultimate relief sought), or which lies beyond the contents of the disputed documents themselves

(and hence constitutes relief beyond that to which the complainant would be entitled should it ultimately prevail upon the merits).[2/] See Theriault v. United States, 503 F.2d 390 (9th Cir. 1974). Clearly the peculiar nature of FOIA disputes renders written interrogatories the more appropriate vehicle for any permissible discovery efforts.

Quite apart from the special consideration presented by the FOIA, there is a further concern which strongly militates against the depositions sought by plaintiff. It is well settled that a litigant is not entitled to probe the mental processes of agency officials. United States v. Morgan, 313 U.S. 409, 422 (1941); DeCambra v. Rogers, 189 U.S. 119, 122 (1903); Norris & Hirshberg, Inc. v. SEC, 163 F.2d 689 (D.C. Cir. 1947). The Supreme Court has explained:

> [I]nquiry into the mental processes of administrative decisionmakers is usually to be avoided. United States v. Morgan, 313 U.S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). In the context of an FOIA dispute, the D.C. Circuit has observed,

> [D]elving into predecisional policy deliberations impairs the integrity of decisionmakers; officials should be judged by what they decide, not for the matters they properly considered before making up their minds.

2/ It is significant that the original draft of the FOIA providing for access to "information" was amended to limit access to agency "records". S.Rep. No. 813, 89th Cong., 1st Sess. 2 (1967). The Supreme Court has explained that the Act "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975).

Grumann Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710, 718 (D.C. Cir. 1973), rev'd on other grounds, 421 U.S. 168 (1975). Finally, in KFC National Management Corp. v. NLRB, 497 F.2d 298 (2nd Cir. 1974), the court explained:

> Thus what emerges from [Morgan] is the principle that those legally responsible for a decision must in fact make it but their method of doing so -- their thought processes, their reliance on their staffs -- is largely beyond judicial scrutiny.

497 F.2d at 304-05. See also Kent Corp. v. NLRB, 530 F.2d 612, 620-21 (5th Cir. 1976).

To the extent that plaintiff seeks by deposition to probe the process by which agency officials reached their conclusion that the records at issue are exempt from mandatory disclosure pursuant to 5 U.S.C. §§552(b) [3/] it runs afoul of the clear rule of Morgan and its progeny. To the extent that any discovery is appropriate on the facts of this case, there is no reason why any such fact finding may not be adequately had by written interrogatories, without subjecting officers and employees of the defendant agency to the burden of depositions.

C. Plaintiff Should Be Barred From Taking His Own Deposition

Although Rule 30(a) of the Federal Rules of Civil Procedure allows "any party to take the deposition of any person," the Courts do not look favorably upon a plaintiff who attempts to establish his case through his own deposition or interrogatories absent exceptional circumstances.

3/ Defendant's Motion for Partial Summary Judgment deals only with the scope of the agency's search for responsive records. Plaintiff's Notice of Deposition, however, states that the subject matter of the depositions will be "all issues" related to this lawsuit. The primary issue in the lawsuit is of course, the propriety of the exemptions claimed by defendant.

See Smith v. Morrison-Knudsen Co., Inc., 22 F.R.D. 108 (S.D.N.Y. 1958); Reynolds v. Reynolds, 123 S.E. 2d 115 (Ga. 1961). As the Georgia Supreme Court stated in Reynolds, supra, at 128: "The discovery procedure of the Federal Rules (26 through 37). . . is primarily for discovery of each party from the other" (emphasis added).

Since plaintiff adduces no reason why his testimony cannot be taken in affidavit form, and since there has been no showing by plaintiff of the existence of exceptional circumstances, plaintiff should not be allowed to take his own deposition.

CONCLUSION

For the foregoing reasons, defendant's Motion For Protective Order should be granted and all discovery in this action should be stayed absent further Order of this Court.

Respectfully submitted,

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Civil Division

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Department of Justice,	)	
	)	
Defendant.	)	
	)	

O R D E R

This cause having come before the Court on defendant's Motion for Protective Order, the papers filed in support thereof and in opposition thereto, and the entire record herein, it is this ____ day of _____, 1979,

ORDERED, that defendant's Motion for Protective Order be, and it hereby is, granted; and it is

FURTHER ORDERED that no depositions shall be taken in his litigation and that no discovery whatsoever shall be taken absent further Order of the Court.

_____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

DEC 13 1976

JAMES F. DAVEY, Clerk

GROLIER, INC., et al.,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants.

Civil Action No. 76-1559

ORDER

This matter came before the court on defendants' motion for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. After consideration of the motion, memoranda submitted in support thereof, opposition thereto, and the entire record herein, the court is of the opinion that defendants have demonstrated good cause for the issuance of a protective order and that such an order should issue forthwith. Defendants have provided a detailed justification and index for documents withheld, as is required by Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), and a supporting affidavit from Charles A. Tobin, Secretary of the Federal Trade Commission, attests to the fact that the index lists all of the documents responsive to plaintiffs' request under the Freedom of Information Act. If the above materials are sufficient to show that the remaining withheld documents are exempt from disclosure under the Act, 5 U.S.C. § 522(b)(5), then the court will no longer have jurisdiction over plaintiff's complaint.

While it is true that discovery procedures are sometimes appropriate in actions under the Freedom of Information Act, every case under the Act is not susceptible to the use of discovery techniques. Specifically, interrogatories and other discovery devices should not be employed in a Freedom of Information Act suit to give the party seeking discovery more

APPENDIX A
CIVIL NO. 75-1996

information than that to which he is entitled under the Act. Because plaintiffs' interrogatories may intrude into areas protected from disclosure by the terms of the Act, the court will grant the motion for a protective order pending decision on defendants' motion to dismiss or, in the alternative, for a summary judgment.

Accordingly, it is, by the court, this 13th day of December, 1976,

ORDERED that defendants' motion for a protective order be, and the same hereby is, granted; and it is further

ORDERED that answers to plaintiffs' interrogatories, or to any other discovery procedure, are hereby stayed pending further order of the court.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant's Motion for Protective Order; Memorandum of Points and Authorities in Support; and Order was mailed, postage prepaid, this 29th day of May, 1979, to:

James H. Lesar, Esquire
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Betsy Ginsberg
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