UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 82-3600

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR A PROTECTIVE ORDER STAYING DISCOVERY; IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DECLARATION OF SPECIAL AGENT JOHN N. PHILLIPS; AND IN REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this action, defendant has filed affidavits explaining the nature of the search that has been undertaken to ascertain whether there are records responsive to plaintiff's request under the Freedom of Information Act (FOIA).

In the first instance, defendant filed the affidavit of John N. Phillips who explained that a search had uncovered no responsive records. Because plaintiff has complained of the adequacy of the Phillips affidavit, the defendant has now filed affidavits of the two FBI employees referred to in Mr. Phillips's affidavit. Those employees (Willis A. Newton and Brian Scott Kinsey), further show that there are no records responsive to plaintiff's request.

The Newton and Kinsey affidavits explain that the two sets of documents that were disposed of by the FBI were excess release copies of documents currently maintained in the Freedom of

Information-Privacy Act (FOIPA) reading room at FBI Headquarters. Several copies have been released to the public (Newton affidavit, ¶ 5; Kinsey affidavit, ¶ 3). Because storage space is short in the FOIPA section and in FBI Headquarters in general, unneeded extra copies of documents released to FOIPA requesters are disposed of (Newton affidavit ¶ 4, 6).

Because their actions involved disposal of excess copies of material already available to the public, Mr. Newton and Mr. Kinsey made no record of any kind, and to their knowledge neither did anyone else (Newton affidavit, ¶ 7; Kinsey affidavit, ¶ 4). Therefore, there are no records responsive to plaintiff's request.

DISCUSSION

In defendant's original memorandum, we pointed out that, when an agency conducts a search of its indices which results in a no record response to any FOIA requester, an affidavit/declaration to that effect submitted to the Court by the agency, absent a showing of bad faith is sufficient grounds for granting summary judgment. See page 3, memorandum of points and authorities in support of motion of defendant U.S. Department of Justice for summary judgment, previously filed, citing cases.

In the present case, the defendant originally filed the affidavit of John N. Phillips, which satisfied the standard set

in the cases we previously cited.[1/] Nevertheless, defendant has gone a step further in order to buttress its showing even more. Here, plaintiff seeks records pertaining to the disposal of two excess, unneeded sets of records. Defendant has gone to the persons who actually disposed of those sets of records, and those persons have filed sworn declarations that no record of any kind was prepared by them, or to their knowledge by anyone else.

On the decided case law, then, there is no basis for the taking of any of the depositions noticed by plaintiff. Nor is there any basis for striking the declaration of John N. Phillips, which complies with the requirements of the decided cases dealing with documentation of an agency search.

In this case, the defendant's showing is particularly compelling, because plaintiff is traversing the same ground he previously covered in discovery (as plaintiff's counsel) in Blakey v. Department of Justice, C.A. No. 81-2174,[2/] discussed at page 4 of the memorandum of points and authorities in support

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[1/] For a recent case so holding, see Gary Shaw v. U.S. Department of State, et al., C.A. 80-1056, 80-0942, February 28, 1983, appeal pending, copy filed herewith as Attachment A. Affidavits filed by Mr. Phillips are dealt with at pages 16 and 17 of the slip opinion; see generally pages 13-17.

[2/] Blakey has now been reported at 549 F. Supp. 362 (D.D.C. 1982), appeal pending.

of motion of defendant U.S. Department of Justice for summary judgment, previously filed herein.[3/]

3/ With his papers, plaintiff attaches a "Declaration of James H. Lesar," which contains statements that have no relationship to the facts of the instant case. We respectfully submit that plaintiff's effort to litigate facts concerning affidavits filed by Mr. Phillips in other litigation is inappropriate and not germane to the disposition of the very specific and finite issue in this case. We do note, however, that courts have rejected efforts to permit a plaintiff to seek to undermine the presentation of an agency's position, by submitting affidavits that are immaterial or not germane. Cf. Gardels v. C.I.A., 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982).

While we do not wish to follow plaintiff down his irrelevant avenue, one of the examples given by plaintiff in his affidavit will suffice to highlight the lack of germaneness of his submission. At paragraph 6, he refers to a decision in J. Gary Shaw v. Federal Bureau of Investigation, C.A. No. 72-0756. There the Court ruled (Exhibit 3 to plaintiff's declaration) that Mr. Phillips's affidavit had not specified a criminal investigation extant at the relevant time period in order to support invocation of Exemption 7(D) of FOIA. The decision has absolutely nothing to do with the issue presented here: whether the defendant has adequately shown that it does not have responsive records in accordance with the standard set down in applicable case law. In addition, plaintiff failed to mention that Shaw, C.A. 72-0756, is pending on a motion for partial reconsideration.

As in Ground Saucer Watch v. Central Intelligence Agency, 692 F.2d 770, 772 (D.C. Cir. 1981), plaintiff's "unadorned speculation will not compel further discovery or resist a motion for summary judgment." In Military Audit Project v. Casey, 656 F.2d 724, 751-752 (D.C. Cir. 1981), the Court held:

> . . .[W]e cannot find that the trial court abused its discretion in denying discovery to the appellants, when it appears that discovery would only have afforded an opportunity to pursue a "bare hope of falling upon something that might impugn the affidavits."4/

See also Blakey v. Department of Justice, 549 F. Supp. 362, 366-367 (D.D.C. 1982), appeal pending.

It is submitted that plaintiff's challinge to the defendant's presentation that there are no records responsive to his request must fail in the face of the authorities discussed above. Plaintiff's reliance upon an asserted need that Mr. Phillips have personal knowledge of every detail of the search is unavailing in the face of the extensive body of case law that we have cited. In addition, similar contentions were rejected in analogous circumstances in Ramo v. Department of Navy and Department of Justice, 487 F. Supp. 127, 130 (D. Calif. 1979), affirmed by memorandum, 692 F.2d 765 (9th Cir. 1982), and Pacheco v. Federal Bureau of Investigation, 470 F. Supp. 1091, 1102 (D.P.R. 1979). Moreover, in the instant case, defendant has filed sworn

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4/ [This footnote, by the Court, has been renumbered.] "Founding Church of Scientology v. NSA, 610 F.2d 824, 836-37 n. 101 (D.C. Cir. 1979).

declarations from the two employees who personally disposed of the two excess, unneeded sets of records, who state that no record of the disposal of the records was made by them or to their knowledge by anyone else.

CONCLUSION

For these reasons, it is respectfully submitted that the Court should grant defendant's motion for a protective order, deny plaintiff's motion to strike declaration of John N. Phillips and grant defendant's motion for summary judgment.

Respectfully submitted,

STANLEY S. HARRIS
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

Nathan Dodell

NATHAN DODELL
Assistant United States Attorney