UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff,

v.

DEPARTMENT OF JUSTICE, et. al.,
Defendants.

MOTION TO STAY PROCEEDINGS PENDING DISCOVERY

written by

GARY SCHNEIDER
in July of 2001 while working at the Electronic Privacy Information Center.

PLAINTIFF'S MOTION TO STAY PROCEEDINGS PENDING DISCOVERY

Pursuant to Fed. R. Civ P. 56(f), plaintiff moves to stay further proceedings on defendant's motion for summary judgment, pending discovery as to the adequacy of defendant FBI's search for documents responsive to plaintiff's Freedom of Information Act ("FOIA") request. In support of this motion, the court is respectfully referred to the following statement of points and authorities.

INTRODUCTION AND BACKGROUND

Plaintiff, the Electronic Privacy Information Center ("EPIC") initiated this action on August 2, 2000, seeking a temporary restraining order to enjoin the Department of Justice ("DOJ") and Federal Bureau of Investigation ("FBI") from denying plaintiff's request for expedited processing of its FOIA request, which sought all records relating to the FBI's "Carnivore" surveillance system.[1] On the day the court heard argument on plaintiff's TRO motion, the FBI agreed to expedite the processing of plaintiff's request. Plaintiff then amended its complaint, seeking the full disclosure of all records sought in

[1] Plaintiff requested all FBI records "concerning the system known as 'Carnivore' and a device known as 'EtherPeek' for the interception and/or review of electronic mail (e-mail) messages." Exhibit A (attached to Declaration of Scott A. Hodes).

its FOIA request. Subsequently, defendant released certain documents to plaintiff and, on August 1, 2001, moved for summary judgment. Plaintiff's response to defendants' motion currently is due on September 5, 2001.[2]

As plaintiff demonstrates below, the record raises substantial doubt as to the adequacy of the FBI's search. This doubt can only be resolved through the discovery authorized by Fed. R. Civ. P. 56(f), as is set forth in the accompanying Declaration of David L. Sobel ("Sobel Decl."). Therefore, plaintiff respectfully moves that further proceedings on defendants' motion for summary judgment be stayed pending discovery as to the adequacy of the FBI's search.

ARGUMENT

I. THE FBI'S SEARCH WAS NOT ADEQUATE IN RESPONSE TO PLAINTIFF'S FOIA REQUEST

"The adequacy of an agency's search is governed by a standard of reasonableness, and is dependent on the circumstances of each case." Spannaus v. CIA., 841 F. Supp. 14, 16 (D.D.C 1993); citing Weisberg v. Department of Justice, 705 F.2d 1344, 1351 (D.C. Cir.1983). "[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). The court's examination of this process must assure the agency's compliance with FOIA, "consistent with the congressional intent tilting the scale in favor of disclosure." Campbell v. Department of Justice, 164 F.3d 20, 27 (D.C. Cir. 1998). "[I]f the sufficiency of its search is challenged, the government must demonstrate beyond

[2] See Electronic mail message from the Court, dated July 11, 2001, approving defendants' request to revise briefing schedule (attached to Declaration of David L. Sobel as Exhibit A).

material doubt that the search was reasonable." Kronberg v. Department of Justice, 875 F. Supp. 861, 869 (D.D.C 1995); citing Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990).

In support of its motion for summary judgment, the FBI has proffered the declaration of Scott A. Hodes, an attorney employed by the FBI, who is "familiar with the procedures followed by the FBI in responding to requests for information" under the FOIA, and the FBI's handling of the request at issue here. Declaration of Scott A. Hodes ("Hodes Decl."), ¶2.

A. The FBI's Search

In response to plaintiff's FOIA request, the FBI conducted an automated search of its Central Records System ("CRS"), an index of "administrative, applicant, criminal, personnel, and other files compiled for law enforcement." Hodes Decl., ¶15. In an automated search of the CRS using the search terms "Carnivore," "EtherPeek" and "Omnivore" (a surveillance system that preceded Carnivore), the FBI "determined that there existed a) no responsive 'main' file records concerning Carnivore and EtherPeek; and b) one 'main' file record responsive to Omnivore." Hodes Decl., ¶18. CRS searches using four additional search terms located two other files. Id. A very small number of responsive documents were located through these searches; as reflected in the "sample" Vaughn index attached as Exhibit K to Mr. Hodes's declaration, the automated CRS searches located only 12 of the 155 sample pages described in the Vaughn index, or less than eight percent of the processed material.[3]

[3] The remaining 143 pages of material covered in the Vaughn index bear the notation, "This document does not have a file number assigned to it since it was located as loose documentation maintained at the FBI's Electronic Surveillance Technology Section, Quantico, VA." Exhibit K (attached to Hodes Decl.).

Apparently aware of the inadequacy of a CRS search for records concerning Carnivore, FBI FOIA staff conducting the search contacted "personnel familiar with the research, development and implementation of the Carnivore, Omnivore and EtherPeek projects at the FBI Laboratory Division's Electronic Surveillance Technology Section (ESTS) at the Engineering Research Facility located at Quantico, Virginia." Hodes Decl., ¶19. "These individuals . . . located numerous documents not indexed into the CRS, which they identified as responsive to plaintiff's requests. These documents consisted of Electronic Communications, e-mails, performance reports, source codes, contractual Statement of Work reports and other miscellaneous documentation concerning the Requested projects." Id. (emphasis added).

Having learned from ESTS personnel that a contractor was involved in the relevant projects, FOIA staff contacted the Contracts Unit at Bureau Headquarters. As a result of that contact, "a total of 92 pages were identified as responsive." Id., ¶20.[4]

Despite the obvious shortcomings of the CRS for purposes of locating material responsive to plaintiff's request, defendant FBI inexplicably chose to contact only two offices: ESTS and the Contracts Unit. Notwithstanding that those two offices located a substantial number of documents that were not indexed in the CRS, no other offices were queried. As plaintiff demonstrates below, that failure does not meet the "standard of reasonableness" an agency must satisfy. Spannaus, 841 F.Supp. at 16.[5]

[4] While Mr. Hodes provides an exact number of pages (92) located through the inquiry to the Contracts Unit, he merely states that "numerous" unindexed documents were located at the ESTS.

[5] The failure of the CRS searches likely resulted from the relatively recent vintage of the responsive documents. While the FBI typically processes FOIA requests several years after they are submitted, the agency's statutory obligation to expedite the processing of this request required the retrieval of more recently created records. As such, the reasonableness of the FBI's search methodology also implicates its obligation to expedite the processing of plaintiff's request.

B. The Likelihood of Additional Responsive Material

The inadequacy of the FBI's search has been apparent to plaintiff since it received Mr. Hodes's initial declaration dated May 7, 2001. Plaintiff's counsel conveyed these concerns to defendants' counsel, specifically noting the absence of material located at the FBI's Office of General Counsel and/or Office of Congressional and Public Affairs, or material created by entities outside of the FBI.[6] Declaration of David L. Sobel ("Sobel Decl."), ¶ 3(a). Defendants note these communications in their pending motion for summary judgment:

> Pursuant to discussions between plaintiff's counsel and defendant's counsel during the preparation of the parties' Joint Status Report that was filed with the Court on May 23, 2001, plaintiff's counsel conveyed some comments and concerns to defendant's counsel concerning the adequacy of the description of the search contained in the preliminary Vaughn Declaration served on plaintiff by defendant on May 7, 2001. Defendant took the initiative to expand the description of the search in the Vaughn Declaration filed with the Court in support of this dispositive motion, and thereby address and resolve plaintiff's comments and concerns.

Memorandum of Points and Authorities in Support of Defendants' Motions to Substitute the United States Department of Justice as the Proper Defendant and for Summary Judgment at 10 n.2.

Defendants apparently misapprehend plaintiff's "comments and concerns." It is not the description of the search that plaintiff finds inadequate; it is the search itself. Defendants' effort to "address and resolve" the issues plaintiff raised is limited to the inclusion of the following language in the revised Hodes Declaration: "records from all divisions of the FBI, including the Office of General Counsel (OGC) and the Office of Congressional and Public Affairs (OPCA), are indexed to the CRS." Hodes Decl., ¶15.

[6] Plaintiff specifically cited the absence of records that might have been created by components of defendant DOJ, copies of which might reside within FBI offices. Plaintiff noted that the FBI had located "[t]hree pages of Army material," but had not identified any other non-FBI records. Hodes Decl. at 11 n.3.

If the circumstances of the search in this case demonstrate anything, it is that the vast majority of documents concerning Carnivore are not retrievable through the CRS. As such, a mere recitation that OGC and OPCA records "are indexed to the CRS" adds nothing to the resolution of the issue. Indeed, there are powerful indications that responsive records do reside at those two offices, indications that should come as no surprise to defendant FBI.

Carnivore has been the subject of great controversy since its existence came to light, with significant questions raised as to the legality and policy implications of the technique. Defendants effectively acknowledged this when they granted plaintiff's request for expedited processing under defendant DOJ's regulations, 28 CFR 16.5(d)(1)(iv), as involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."[7] It is thus apparent that Carnivore implicates legal and policy issues, not just the technical aspects that are reflected in the documents located at the ESTS and the Contracts Unit. The involvement of the OGC and the OPCA (the FBI components that deal with legal and policy matters), as well as other Bureau and Department of Justice offices, is not speculative; the statements of FBI and DOJ officials establish such involvement.

At its July 24, 2000, hearing on "Fourth Amendment Issues Raised by the FBI's 'Carnivore' Program," the House Judiciary Committee questioned FBI Assistant Director

[7] In support of its request, plaintiff noted the extensive media coverage of the Carnivore system that had appeared since plaintiff submitted its FOIA request, and cited public questions that had been raised about the potential abuse of the Carnivore system. Plaintiff submitted to defendants, inter alia, a transcript of a hearing held on July 24, 2000, by the House Judiciary Subcommittee on the Constitution titled, "Fourth Amendment Issues Raised by the FBI's 'Carnivore' Program." That transcript, as well as other material supporting plaintiff's expedition request, was filed with the court in support of plaintiff's motion for a temporary restraining order, and is part of the record.

Donald M. Kerr, FBI General Counsel Larry R. Parkinson, and Deputy Associate Attorney General Kevin DiGregory. The following testimony demonstrates the involvement of the OPCA, the OGC and the Justice Department in matters concerning Carnivore:

> REP. NADLER: Okay. Now let me ask you a different question. You installed -- you started using this Carnivore system about two years ago, and no one ever bothered telling Congress about it; we just found out about it because Earthlink complained about it?
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> MR. DIGREGORY: Well, no one ever bothered telling Congress, in the sense of all of Congress. There certainly have been members and staff briefed on it over the last year. It's been –
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> REP. NADLER: Judiciary Committee staff?
>
> MR. DIGREGORY: Excuse me?
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> REP. NADLER: Judiciary Committee staff?
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> MR. DIGREGORY: Yes. It's been rather widely discussed with industry, Internet service providers, other companies that provide software and hardware to the network. It's been fairly substantially briefed within the Department of Justice, including at the training center in Columbia, South Carolina, where the U.S. attorneys and AUSAs go for training. All of the major investigative programs have been briefed.
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> REP. NADLER: All right. What institutional safeguards have you set up to make sure that the assurances that you've given us that information gathered by Carnivore on subjects not under investigation is not used?
>
> MR. KERR: Every time that it has been used, it's gone through the internal review of the FBI that all such uses require. My colleague, Larry Parkinson, can speak to more detail on that. Second, it goes to the Office of Enforcement Operations in the Department of Justice, where it's, in fact, reviewed prior to ever going to a court to get a court order. So there's a very substantial level of review internal to the FBI, internal to the department, as well as the subsequent review of the court before an order is issued.

Fourth Amendment Issues Raised by the FBI's "Carnivore" Program: Hearing Before the House Judiciary Committee, 106th Cong. (July 24, 2000) (relevant excerpt attached to Sobel Decl. as Exhibit B).

Congressional briefings are clearly the province of the Office of Public and Congressional Affairs; the "very substantial level of review internal to the FBI" involved Mr. Parkinson, the FBI's General Counsel; and Carnivore was "substantially briefed within the Department of Justice."[8]

The role of the OGC and DOJ in matters concerning Carnivore, and the broad internal "review" process, was also documented in the independent technical review report commissioned by the Justice Department:

> Multiple approvals are currently required by FBI and DOJ policy (but not currently by statute) before a court order that might involve a Carnivore deployment is requested . . .[T]he application for a court order in either context [Title III or pen-trap] is authored by FBI attorneys in conjunction with those at DOJ (or the U.S. Attorney's Office if the objective is a pen-trap) based on information furnished by the case agent. Advice on the language in the application is widely sought and received from each level in the review process.

Independent Technical Review of the Carnivore System, Final Report, IIT Research Institute (December 8, 2000) (available at the Department of Justice website: http://www.usdoj.gov:80/jmd/publications/carniv_final.pdf) at xii, 3-4.

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[8] These facts were reiterated by Mr. Kerr in his testimony before the Senate Judiciary Committee on September 6, 2001:

> Two points that I'd like to make very briefly, Mr. Chairman. First, the suggestion that in any way information about Carnivore was leaked to the press and has led to hearings and press coverage is absolutely wrong. We've been briefing on Carnivore for about 18 months. It's been reviewed substantially within the Department of Justice. . . .[W]e've briefed many members of the Congressional staff as well.

The "Carnivore" Controversy: Electronic Surveillance and Privacy in the Digital Age: Hearing Before the Senate Judiciary Committee, 106th Cong. (September 6, 2001) (relevant excerpt attached to Sobel Decl. as Exhibit C).

The record demonstrates that no documents addressing the legal or policy implications of Carnivore were sought or located by defendant FBI. Remarkably, given the controversial policy questions surrounding the technique, defendant FBI has not invoked FOIA Exemption 5 with respect to any document at issue in this case. See Hodes Decl. Exemption 5 encompasses, inter alia, the deliberative process privilege (including "recommendations or . . . opinions on legal or policy matters"), Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975); attorney work-product privilege, Jordan v. Department of Justice, 591 F.2d 753 (D.C. Cir. 1978) (en banc); and attorney-client privilege, Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977). Defendant FBI's failure to invoke Exemption 5 strongly suggests that a significant body of responsive material has not been retrieved.[9]

II. THE FBI HAS FAILED DEMONSTRATE THAT ITS SEARCH WAS REASONABLE

As the D.C. Circuit has long held, when an agency's search for records is challenged, it must show "beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." Weisberg v. Department of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). See also Campbell v. Department of Justice, 164 F.3d 20, 27 (D.C. Cir. 1998); Kronberg v. Department of Justice, 875 F.Supp. 861, 869 (D.D.C 1995); Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990).

The inadequacy of the FBI's search in Campbell was remarkably similar to the deficiency in this case:

[9] While plaintiff is not in the habit of complaining that an agency has failed to invoke a FOIA exemption, the circumstances of this case require plaintiff to bring this fact before the court.

> [T]he court evaluates the reasonableness of an agency's search based on what the agency knew at its conclusion rather that what the agency speculated at its inception. Here, the FBI started with the reasonable assumption that only a CRS review would be necessary, but that assumption became untenable once the FBI discovered information suggesting the existence of documents that it could not locate without expanding the scope of its search.

Campbell, 64 F.3d at 28 (citation omitted). Here, the FBI's "assumption that only a CRS review would be necessary" became "untenable" when it located a substantial number of unindexed documents at the ESTS. Rather than query other FBI components that were likely to have knowledge of Carnivore (such as OGC and OPCA), and whose records were also likely not to be included in the CRS, the agency inexplicably limited its further efforts to the Contracts Unit.

Given the nature of Carnivore and the issues surrounding it, defendant FBI's failure to make inquiries at components other than ESTS and the Contracts Unit was clearly unreasonable. An "agency cannot limit its search to only one or more places if there are additional sources 'that are likely to turn up the information requested.'" Valencia-Lucas v. United States Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999); citing Oglesby, 920 F.2d at 68. Here, there were obvious sources that were likely to locate responsive records, but defendant FBI chose not to conduct that inquiry.

III. DISCOVERY IS APPROPRIATE AS TO THE ADEQUACY OF THE FBI'S SEARCH

Courts have long recognized the appropriateness of discovery where, as here, the adequacy of an agency's document search has been called into question. As the D.C. Circuit has emphasized, if "the record leaves substantial doubt as to the sufficiency of the search, summary judgment for the agency is not proper." Truitt v. Department of State,

97 F.2d 540, 542 (D.C. Cir. 1990) (footnote omitted). See also Assassination Archives & Research Center v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989) ("if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order").

While agency affidavits are frequently held sufficient to establish the adequacy of a search, the facts of a particular case may render reliance on such declarations inappropriate. The court of appeals has noted that

> 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. . . . Reliance on affidavits to demonstrate agency compliance with the mandate of the FOIA does not, however, require courts to accept glib government assertions of complete disclosure or retrieval.

Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (emphasis added).

In Founding Church of Scientology v. NSA, 610 F.2d 824 (D.C. Cir. 1979), the court found the agency's affidavit insufficient to establish the adequacy of the search. In so doing, the court noted that "the competence of any records-search is a matter dependent upon the circumstances of the case, and those appearing here give rise to substantial doubts about the caliber of NSA's search endeavors." Id. at 834. The court concluded that the case "warranted a more exhaustive account of NSA's search procedures than it advanced. That reckoning is now due, and to the extent practicable it should be made on the public record." Id. at 837-838 (footnote omitted).

Where the "circumstances of the case" raise substantial doubts as to the adequacy of an agency search, discovery is clearly appropriate. As this court has held:

> Being especially mindful of the disadvantage faced by the plaintiff in attempting to test the claims raised by the agency in a FOIA action, where the plaintiff has

> pointed to some countervailing factor calling into question the completeness of the agency's search or otherwise questioning the satisfactory nature of the agency's response, an issue of material fact, precluding the denial of discovery and award of summary judgment, may be recognized. Thus, under Rule 56(f), the district court may defer ruling on a motion for summary judgment and permit discovery so that the non-moving party may obtain the information necessary to show an issue of fact in dispute.

Shurberg Broadcasting v. FCC, 617 F. Supp. 825, 831 (D.D.C. 1985) (emphasis added; citations omitted). See also Exxon Corp. v. Federal Trade Comm'n, 466 F. Supp. 1088, 1094 (D.D.C. 1978), aff'd, 663 F.2d 120 (D.C. Cir. 1980).

The importance of discovery in a case such as this – where defendant is in sole possession of relevant information -- cannot be gainsaid. The D.C. Circuit has long recognized that:

> [i]f the agency can lightly avoid its responsibilities by laxity in identification or retrieval of desired materials, the majestic goals of the [FOIA] will soon pass beyond reach. And if, in the face of well-defined requests and positive indications of over-looked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory.

Founding Church of Scientology, 610 F.2d at 837.

Without further inquiry into the methodology of defendant FBI's search, the case is not in a posture for summary judgment. As is set forth in the accompanying declaration of plaintiff's counsel, the current state of the record renders plaintiff unable to present "facts essential to justify [its] opposition" to defendants' motion. Fed. R. Civ. P. 56(f). That disability extends not only to issues involving the adequacy of the FBI's search, but also to the merits of the exemption claims invoked with respect to those documents that the agency located and withheld.[10]

[10] For example, discussions of the sensitivity (or lack thereof) of technical details concerning Carnivore, which might be contained in legal and/or policy documents that have not yet been located, would bear directly upon several of defendants' exemption claims.

The discovery plaintiff seeks to obtain will be limited to facts concerning the scope and adequacy of defendant's search for responsive documents. Such discovery would be consistent with the scope of discovery authorized by the court in similar FOIA cases. See, e.g., Computer Professionals for Social Responsibility v. Federal Bureau of Investigation, Civil Action No. 90-2096 (D.D.C. July 9, 1990) (order permitting discovery concerning "scope and adequacy" of FOIA search) (attached to Sobel Decl. as Exhibit D).

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that this court grant plaintiff's motion to stay any further proceedings on this matter pending an opportunity for discovery to take place.

Written by ***Gary Schneider*** – July 2001
while working at the Electronic Privacy Information Center.