

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD ANTI-TRUST ACTION)	
COMMITTEE, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 09-2436 (ESH)
)	
BOARD OF GOVERNORS)	
OF THE FEDERAL RESERVE SYSTEM,)	
)	
Defendant.)	

PLAINTIFF’S MOTION FOR *IN CAMERA* REVIEW AND LIMITED DISCOVERY

Plaintiff, Gold Anti-Trust Action Committee (“GATA”), through its undersigned attorneys, hereby moves, pursuant to Federal Rules of Civil Procedure 7(b) and 56(f), and Local Rule 7, for an Order:

1. Requiring defendant to furnish to the Court for *in camera* review the documents responsive to plaintiff’s request under the Freedom of Information Act (“FOIA”) that defendant refuses to disclose to plaintiff;
2. Permitting plaintiff to propound no more than 25 interrogatories to defendant, which are to be served on defendant within 30 days, and requiring defendant to respond to those interrogatories within 30 days after service unless an enlargement of that time is granted; and
3. Requiring the parties to report to the Court, in writing, with respect to the need for additional discovery and a proposed schedule for the filing of dispositive motions or the need for a trial.

For reasons therefor, plaintiff avers (i) that there are significant factual issues in this case concerning the substance of most of the documents withheld by defendant, and an *in camera* review of those documents by this Court would be the most efficient and fair way to resolve those issues, and (ii) there is a significant issue in this case concerning the adequacy of the search conducted by defendant in response to plaintiff's FOIA request, and allowing plaintiff to conduct limited discovery of defendant concerning the presence or absence of additional responsive records would be in the interest of justice. A Memorandum of Points and Authorities in support of this motion is attached, as well as a proposed form of Order.

Counsel for defendant was contacted regarding the possibility of consent to this motion, and represented to counsel for plaintiff that defendant (i) opposes this motion for limited discovery, and (ii) believes that *in camera* review should not be necessary, but would defer to the Court on that issue.

WHEREFORE, plaintiff requests that its motion be granted, and that this Court enter an Order:

(1) Requiring defendant to furnish to the Court for *in camera* review the documents responsive to plaintiff's FOIA request that defendant refuses to disclose to plaintiff;

(2) Permitting plaintiff to propound no more than 25 interrogatories to defendant, which are to be served on defendant within 30 days from the date of this Order, and requiring defendant to respond to those interrogatories within 30 days after service unless an enlargement of that time is granted; and

(3) Requiring the parties to report to the Court, in writing, with respect to the need for additional discovery and a proposed schedule for the filing of dispositive motions or the need for a trial.

Respectfully submitted,

/s/ William J. Olson

WILLIAM J. OLSON
(D.C. Bar No. 233833)
JOHN S. MILES
(D.C. Bar No. 166751)

HERBERT W. TITUS
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
703-356-5070 (telephone)
703-356-5085 (fax)
wjo@mindspring.com

Counsel for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF’S
MOTION FOR IN CAMERA REVIEW AND LIMITED DISCOVERY

STATEMENT OF FACTS

Plaintiff, Gold Anti-Trust Action Committee (“GATA”), filed this action on December 30, 2009, pursuant to the Freedom of Information Act (hereinafter “FOIA”) against defendant, the Board of Governors of the Federal Reserve System, also known as the Federal Reserve Board (“FRB”). The action arose in connection with GATA’s FOIA requests, one in 2007 and one in 2009, to FRB seeking records regarding “gold swaps,” including, but not limited to, records of gold swaps involving the United States since 1990.

In response to GATA’s FOIA requests, FRB provided certain responsive records, some of which were redacted, and withheld others in their entirety, claiming exemption under 5 U.S.C. sections 552(b)(4) and (b)(5) (“FOIA Exemptions 4 and 5”). See Exhibit B to Plaintiff’s Complaint. GATA challenged FRB’s responses and requested, *inter alia*, the production of a Vaughn Index or specific identification of the withheld records. FRB refused, and denied GATA’s administrative appeal. This suit followed. After suit was filed, and

immediately prior to filing its Motion for Summary Judgment, FRB released additional records, which had been withheld previously.

FRB filed a motion for summary judgment and accompanying memorandum (“FRB Mem. S.J.”) on June 21, 2010, together with three declarations, a Vaughn Index, and a statement of material facts as to which there is no genuine issue.

GATA has now filed a motion requesting this Court to issue an Order:

1. Requiring FRB to furnish to the Court for *in camera* review the documents responsive to GATA’s request that FRB refuses to disclose to GATA;

2. Permitting GATA to propound no more than 25 interrogatories to FRB, which are to be served on FRB within 30 days of the requested Order, and requiring FRB to respond to those interrogatories within 30 days after service unless an enlargement of that time is granted; and

3. Requiring the parties to report to the Court, in writing, with respect to the need for additional discovery and a proposed schedule for the filing of dispositive motions or the need for a trial.

Filed with GATA’s motion is the Declaration of William J. Olson, GATA’s attorney of record herein. GATA has, simultaneously with the filing of its motion, filed its Memorandum of Points and Authorities in Opposition to Defendant’s Motion for Summary Judgment (“GATA Mem. Opp.”) herein, together with its Statement of Material Facts as to Which a Genuine Issue Exists (“GATA SOMF”), and the declarations of: Chris Powell, Adrian Douglas, and James Turk. As revealed in those documents, there are significant factual issues in this case concerning (i) the substance of most of the documents withheld by defendant, and

an *in camera* review of those documents by this Court would be the most efficient and fair way to resolve those issues, and (ii) the adequacy of the search conducted by defendant in response to plaintiff's FOIA request. As stated in the Declaration of William J. Olson ("Olson Decl."), submitted pursuant to Rule 56(f), Federal Rules of Civil Procedure, GATA is in need of limited discovery to pursue the issue of the FRB search.

ARGUMENT

I. THERE ARE SIGNIFICANT FACTUAL ISSUES IN THIS CASE CONCERNING THE SUBSTANCE OF MOST OF THE DOCUMENTS WITHHELD BY DEFENDANT, AND AN *IN CAMERA* REVIEW IS WARRANTED.

FRB contends that all of the documents responsive to GATA's FOIA requests that it refuses to disclose are exempt under FOIA Exemptions 4 and 5. Much of the parties' legal memoranda addressing these issues discusses the nature of the documents, whether they are pre-decisional or deliberative, whether they are confidential, and like issues. *See, e.g.*, FRB Mem. S.J., pp. 11-29; GATA Mem. Opp., pp. 25-45. GATA believes that most of the withheld documents are not exempt from disclosure under FOIA Exemptions 4 or 5, and that FRB has not demonstrated that they are. However, as in many FOIA cases, the most critical problem could be one of communication between the parties, rather than one of substance. GATA obviously has not had a chance to view the documents, and many of the representations in the Vaughn Index furnished by one of FRB's declarants are essentially conclusory statements that cannot fairly be relied upon by either GATA or the Court. *See* Thro Declaration, Exh. 8. Thus, there are disputed factual issues, as detailed in GATA's SOMF, filed contemporaneously herewith. *See, e.g.*, GATA SOMF, pp. 5-7. For example, GATA submits that the mere assertion of FOIA Exemption 5, coupled with an assertion that the

document is a “draft,” is often not enough to warrant a privilege under that FOIA exemption. *See, e.g., Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980); *Fox News Network, LLC v. United States Dep’t of the Treasury*, 678 F. Supp. 2d 162, 166-67 (S.D.N.Y. 2009).

GATA submits that the factual issues involved in resolving FRB’s contentions about whether the withheld documents are privileged under FOIA Exemptions 4 and 5 could most fairly be resolved by this Court after an *in camera* review of the documents themselves, which GATA requests. GATA recognizes, of course, that an *in camera* review is not mandatory, but is asking this Court to shoulder that burden in conducting such a review, particularly in view of the relatively small number of documents involved. We would hope that this Court would conclude, as did the district court in *Lee v. Federal Deposit Insurance Corp.*, 923 F. Supp. 451 (S.D.N.Y. 1996), that “the documents that were withheld are not so numerous as to make *in camera* review unduly burdensome.” *Id.* at 454.

II. PLAINTIFF SHOULD BE ALLOWED TO CONDUCT LIMITED DISCOVERY CONCERNING THE ADEQUACY OF THE FRB SEARCH

GATA believes that FRB’s search in response to GATA’s FOIA request was inadequate, and has articulated its reasons in its memorandum opposing FRB’s motion for summary judgment. *See* GATA Mem Opp., pp. 13-24. There are issues concerning whether FRB sought records from all sources reasonably likely to have responsive documents, for example, and there are issues about how the search was conducted (*e.g.*, which search terms were used). *See* GATA Mem Opp., pp. 13-17. In addition, there is a significant issue concerning the dearth of documentation at the FRB concerning “gold swaps.” These concerns

are substantiated by the declarations of Chris Powell, Adrian Douglas, and James Turk, submitted in support of GATA's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment herein.

Messrs. Powell, Douglas, and Turk are unanimous in their conclusion that FRB should have identified a significant number of records concerning "gold swaps" for the period 1990 through 2009 — the period covered by GATA's FOIA request. For example, after describing a series of events in the efforts by central banks to control gold prices over the past two decades, Mr. Powell stated:

I believe that FRB, in refusing to furnish substantial records reflecting gold swap transactions, actual and/or proposed, during the period 1990 through 2009, as GATA requested, either (i) has not conducted an adequate search for these records, or (ii) is not being forthcoming with this Court. It is inconceivable, for example, that the FRB would not have records reflective of the various specific incidents described above which occurred during the nearly 20-year period (January 1, 1990 — April 14, 2009) for which records were requested. [Powell Decl. ¶ 28.]

See also Douglas Decl. ¶ 16; Turk Decl. ¶ 13. GATA recognizes that the ultimate issue concerning the adequacy of the FRB search does not necessarily turn on the results achieved by that search, but submits that, in light of the circumstances described by Messrs. Powell, Douglas, and Turk, FRB should be required to provide further evidence regarding the lack of documentation at that agency regarding "gold swaps."

Accordingly, GATA has requested the Court to permit initial, limited discovery, in the form of no more than 25 interrogatories, to be served upon FRB within 30 days (or whatever period the Court specifies). The interrogatories would concern the issues of the extent of the FRB search identified by GATA in this litigation, including the documents identified by

Messrs. Powell, Douglas, and Turk. GATA submits that such limited discovery in a FOIA case is appropriate, particularly where the government has moved for summary judgment and the FOIA requester needs more information than it has been given, either to oppose the government's motion for summary judgment or to inquire in more depth about the records search that was conducted. *See, e.g., Exxon Corp. v. FTC*, 384 F. Supp. 755, 758-59 (D.D.C.1974) (discovery concerning completeness of search). *See also Schaffer v. Kissinger*, 505 F.2d 389 (D.C. Cir. 1974); *American Broadcasting Cos. v. United States Information Agency*, 599 F. Supp. 765 (D.D.C. 1984). Whether further discovery would be sought or deemed appropriate at a later time would depend upon FRB's response to the discovery. *See, e.g., Weisberg v. U. S. Dep't of Justice*, 543 F.2d 308 (1976).

CONCLUSION

For the foregoing reasons, plaintiff prays that its motion be granted, and that this Court enter an Order: (1) requiring FRB to furnish to the Court for *in camera* review the documents responsive to GATA's request that FRB refuses to disclose to GATA; (2) permitting GATA to propound no more than 25 interrogatories to FRB, which are to be served on FRB within 30 days of the requested Order, and requiring FRB to respond to those interrogatories within 30 days after service unless an enlargement of that time is granted; and (3) requiring the parties to report to the Court, in writing, with respect to the need for additional discovery and a proposed schedule for the filing of dispositive motions or the need for a trial.

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WILLIAM J. OLSON
(D.C. Bar No. 233833)
JOHN S. MILES
(D.C. Bar No. 166751)

HERBERT W. TITUS
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
703-356-5070 (telephone)
703-356-5085 (fax)
wjo@mindspring.com

Counsel for Plaintiff