UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CARETOLIVE,
a not-for-profit corp.,
Plaintiff,

v.

U.S. FOOD AND DRUG ADMINISTRATION,
Defendant.

Case No. 2:08-cv-005
JUDGE GREGORY L. FROST
Magistrate Judge Norah McCann King

OPINION AND ORDER

This matter is before the Court on Defendant Food and Drug Administration's ("Defendant" or "the FDA") Motion for Summary Judgment (Doc. # 29) and on Plaintiff's Motion for Leave to Conduct Complete Discovery Under Civil Rule 56(f) and Partial Memorandum Contra to Defendant FDA's Motion for Summary Judgment ("Plaintiff's Motion for Discovery") (Doc. # 34). For the reasons that follow, the Court **GRANTS** Defendant's motion and **DENIES** Plaintiff's motion.

I. Background

CareToLive ("Plaintiff") is an association of cancer patients, patient families, doctors, investors, and advocates which has requested information from the United States FDA administration pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq*. On September 11, 2007, the FDA's Division of Freedom of Information ("DFOI") received a FOIA request from Plaintiff dated August 15, 2007. The request sought the following:

> A copy of all letters written to the FDA (or prepared by the FDA) and purported to be from Dr. Scher, Dr. Hussain and Doctor (*sic*) Fleming in between March 29th 2007 and April 30th of 2007, regarding the [Biologics License Application] submitted for Provenge also known as Sipuleucel-T including the envelope or

> other means of communication whereby the FDA received such letters and a copy of any record of those letters then being disclosed to any media or other persons or specifically a publication called "The Cancer Letter," including the means of communication to the Cancer Letter of the Scher, Hussain and Fleming letters from the FDA or its employees to outside persons, publications or companies.

The FOIA request was the 8,316th FOIA request the FDA received in 2007. DFOI advised Plaintiff by letter dated the same day that the FOIA request had been received.

DFOI initially forwarded the request to the Center for Biologics Evaluation and Research ("CBER") because the FOIA request sought records relating to an unapproved biological product regulated by that Center and to the Office of the Commissioner ("OC"), Office of the Executive Secretariat because the FOIA request sought records relating to agency correspondence. CBER responded with documents on November 6, 2007. OC's Office of the Executive Secretariat responded to the request through DFOI on January 24, 2008, stating that it had not located any responsive records.

DFOI also transmitted the FOIA request to the Division of Information Disclosure Policy ("DIDP") in the FDA's Center for Drug Evaluation and Research ("CDER"). DFOI did so because, after consultation with CBER, it appeared that CDER might also have records responsive to the request.

DIDP received Plaintiff's FOIA request on October 15, 2007. DIDP assigned it to the "Complex Track" because DIDP determined that Plaintiff's request sought documents not readily available and would require DIDP to search for and possibly redact documents. By way of explanation, once at DIDP, FOIA requests that can be answered quickly with readily available documents, and which do not require any searching or redaction, are considered "simple" and generally are processed on a faster track (known as the "Simple Track"), as opposed to

"complex" requests that follow a slower processing track (known as the "Complex Track"). Requests assigned to the Simple Track do not require DIDP personnel to search for or redact documents, generally because DIDP has previously reviewed and redacted the responsive documents (*e.g.*, because they were responsive to a prior FOIA request), the requested documents are publicly available, or it is clear from the face of the request that CDER has no responsive documents. DIDP then either makes copies of previously processed documents and provides them to the requester, directs the requester to documents publicly available, or notifies the requester that CDER has no responsive documents.

DIDP attempted to contact Plaintiff's counsel on December 4, 2007, leaving a telephone message stating that DIDP follows a first-in/first-out, two track process for responding to FOIA requests, and that Plaintiff's FOIA request would be processed accordingly. DIDP left this message again on December 31, 2007.

On January 2, 2008, Plaintiff filed this action seeking immediate production of all documents responsive to its request. In response, Defendant filed a Motion to Stay Proceedings. (Doc. # 10.) On May 22, 2008, this Court granted Defendant's Motion to Stay Proceedings (Doc. # 23), ordering CDER to provide responsive documents to plaintiff's request no later than May 18, 2009. On May 18, 2009, following a search of all relevant CDER offices, DIDP produced to Plaintiff one additional responsive document, without any redactions.

Also on May 18, 2009, Defendant filed Defendant's Motion for Summary Judgment (Doc. # 29). On June 6, 2009, Plaintiff filed Plaintiff's Motion for Discovery. (Doc. # 34.) This motion for discovery was also titled as a partial memorandum in opposition to Defendant's Motion for Summary Judgment. Pursuant to this Court's scheduling order, Defendant responded

in opposition to Plaintiff's Motion for Discovery on June 12, 2009 (Doc. # 38) and Plaintiff filed its reply memorandum in support of its motion on July 16, 2009 ("Plaintiff's Reply") (Doc. # 39). The Court will address each motion below.

II. Defendant's Motion for Summary Judgment

A. Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if "there is no genuine issue as to any material fact[.]" Fed. R. Civ. P. 56(c). In making this determination, the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in favor of that party. *Id.* at 255. However, summary judgment is appropriate if the opposing party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court The Court, however, may not make credibility determinations or weigh the evidence. *Anderson*, 477 U.S. at 255. may not make credibility determinations or weigh the evidence. *Anderson*, 477 U.S. at 255.

"FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.C. Cir. 2009) (citing *Miscavige v. IRS*, 2 F.3d 366, 368 (11th Cir. 1993) and *Rushford v. Civiletti*, 485 F. Supp. 477, 481 n.13 (D. D.C. 1980)). *See also*

Rugiero v. DOJ, 257 F.3d 534, 544 (6th Cir. 2001) (" Procedurally, district courts typically dispose of FOIA cases on summary judgment before a plaintiff can conduct discovery."). In a FOIA case, a court may award summary judgment solely on the basis of information provided by the department or agency in affidavits or declarations when the affidavits or declarations demonstrate that "each document that falls within the class requested either has been produced," or describes the "justifications for nondisclosure with reasonably specific detail." *West v. Spellings*, 539 F. Supp. 2d 55, 60-61 (D. D.C. 2008) (citing *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) and *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). The affidavits or declarations must not be "controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Id.* at 60 (citing *Casey*, 656 F.2d at 738). A court must accord an agency's declarations "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Services v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal citation and quotation omitted); *see also Carney v. DOJ*, 19 F.3d 807, 813 (2d Cir. 1994).

B. Analysis

FOIA requires agencies of the federal government to release records to the public upon request, unless one of nine statutory exemptions applies. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975); 5 U.S.C. § 552(b). "To prevail in a FOIA case, a plaintiff must show that an agency has (1) improperly (2) withheld (3) agency records." *Spellings*, 539 F. Supp. 2d at 61 (citing *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989) and *United We Stand America, Inc. v. IRS*, 359 F.3d 595, 598 (D.C. Cir. 2004)). However, "[o]nce the requested records have been produced there is no longer a case or controversy and the FOIA action becomes moot." *Id.*

(citing *Armstrong v. Executive Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1996) and *Trueblood v. U.S. Dep't of the Treasury*, 943 F. Supp. 64, 67 (D. D.C. 1996)).

In the instant action, Defendant has submitted the declarations of three supervisors which state with particularity that both DFOI and the FOIA offices located in CDER and CBER strictly followed detailed procedures in processing Plaintiff's request, and forwarded the request to every office that would likely have a copy of the requested correspondences. *See* Defendant's Motion for Summary Judgment Exs. A-C. The declarations specifically indicate that Defendant has produced the all of the documents that were found pursuant to that search except for a copy of one of the documents already produced. That is, in the declaration of Dr. Richard Pazdur, a Supervisory Medical Officer in the Office of Oncology, CDER, he avers that he was sent a letter from Dr. Maha Hussain on April 27, 2007 and a letter dated April 5, 2007 from Dr. Howard Scher to Dr. Janet Woodcock, Director of CDER, to Dr. Celia Witten, Director of CBER, and to Andrew von Eschenbach, Commissioner of the FDA, upon which Dr. Pazdur was listed as a "cc" (the "April 2007 correspondences"). However, copies of those documents had already been produced to Plaintiff.

The Court concludes that the declarations describe "the documents and the justifications for nondisclosure with reasonably specific detail" and the declarations "are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Spellings*, 539 F. Supp. 2d at 60-61. Consequently, the documents requested by Plaintiff have been produced, which renders Plaintiff's FOIA action moot.

However, Plaintiff now argues that Defendant's search for the documents he requested was not adequate. The United States Court of Appeals for the Sixth Circuit explains the standard

used to measure the adequacy of a FOIA search:

> In response to a FOIA request, an agency must make a good faith effort to conduct a search for the requested records using methods reasonably expected to produce the requested information. *Campbell v. DOJ*, 64 F.3d 20, 27 (D.C. Cir. 1998). The FOIA requires a reasonable search tailored to the nature of the request. *Id.* at 28. At all times the burden is on the agency to establish the adequacy of its search. *Patterson v. IRS*, 56 F.3d 832, 840 (7th Cir. 1995); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). In discharging this burden, the agency may rely on affidavits or declarations that provide reasonable detail of the scope of the search. *Bennett v. DEA*, 55 F. Supp. 2d 36, 39 (D.D.C. 1999) (citing *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982)). "In the absence of countervailing evidence or apparent inconsistency of proof, [such affidavits] will suffice to demonstrate compliance with the obligations imposed by the FOIA." *Id.* The question focuses on the agency's search, not on whether additional documents exist that might satisfy the request. *Steinberg*, 23 F.3d at 551 (quoting *Weisberg*, 745 F.2d at 1485).

Rugiero, 257 F.3d at 547.

Here, Plaintiff argues that the search was not adequate because it produced only one additional document and because Defendant failed to use an "IT" expert to search Dr. Pazdur's computer to find the electronic copies of the 2007 correspondences. Dr. Pazdur avers:

> I recall receiving both hard copies and electronic copies of these letters in April 2007. However, as these letters related to a specific regulatory application conducted by a different FDA Center (CBER), did not fall under my direct regulatory supervision, and did not require a response from me, I shredded my hard copies of these letters and deleted any electronic copies. The documents were shredded and deleted within a month of receipt.

The Court finds that the reasonableness of the search in this instance is not diminished because it uncovered only one additional document to produce. Defendant had already produced other documents before the search was categorized as a Complex Track search. Moreover, Plaintiff does not dispute that the correspondences that Dr. Pazdur admits were destroyed are duplicates of documents already produced to Plaintiff by the FDA. "FOIA 'does

not require [Defendant] to account for [the documents], so long as it reasonably attempted to locate them." *Spellings*, 539 F. Supp. 2d at 62 (citing *Miller v. Dep't of State*, 779 F.2d 1378, 1385 (8th Cir. 1985), which explained that the search was not unreasonable because four files were missing because the agency reasonably attempted to locate them)). Defendant simply is not required to hire an IT expert to search for a copy of a document that has already been produced.

The Court concludes that Plaintiff's arguments do not establish "countervailing evidence" nor do they indicate an "apparent inconsistency of proof" provided by Defendant in its declarations. *See Rugiero*, 257 F.3d at 547. Consequently, the Court may rely on Defendant's declarations to "demonstrate compliance with the obligations imposed by the FOIA." *Id.* Therefore, the Court accepts the declarations Defendant submitted. These declarations unquestionably establish that Defendant met its burden by making a "good faith effort to conduct a search for the requested records using methods reasonably expected to produce the requested information." *Id.* The declarations submitted by Defendant provide more than adequate detail of the scope of the FDA's search, which was clearly tailored to Plaintiff's request. *See id.*

Accordingly, even when viewing the evidence in the light most favorable to Plaintiff, there is no genuine issue of material fact requiring submission to a jury and Defendant is entitled to judgment as a matter of law.

III. Plaintiff's Motion for Discovery

In opposition to Defendant's Motion for Summary Judgment, Plaintiff has filed his combined "partial" response to the motion and a motion for discovery. Plaintiff designates its opposition memorandum as "partial" because it believes that it needs further discovery in order to sufficiently oppose Defendant's Motion for Summary Judgment. Plaintiff moves under Rule

56(f) which provides a vehicle to obtain discovery to support an opposition to a motion for summary judgment if the "party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition[.]" Fed. R. Civ. P. 56(f). Plaintiff requests additional discovery, arguing throughout its motion that Dr. Pazdur "must" have additional documents responsive to its FOIA request. Plaintiff's request for discovery is not well taken.

A. Plaintiff's Rule 56(f) "Affidavit" is Improper and Insufficient.

First, the Court concludes that Plaintiff's affidavit in support of his Rule 56(f) motion is insufficient to provide Plaintiff with the relief it requests. The "Affidavit" is one paragraph long, and states only that Plaintiff is "unable by affidavit to provide proof to this Court of the existence of the requested FOIA correspondence on the computer of FDA employee Richard Pazdur at this time without the relief and/or discovery requested herein." Plaintiff's Motion for Discovery at 22. The affidavit is not sworn to under penalty of perjury before a notary public nor is it signed under penalty of perjury pursuant to 28 U.S.C. § 1746.

Further, the affidavit utterly fails to set forth facts sufficient to support a Rule 56(f) motion. " 'A Rule 56(f) motion must be supported by an affidavit which sets forth with particularity the facts the moving party expects to discover and how those facts would create a genuine issue of material fact precluding summary judgment.' " *Sharkey v. FDA*, 250 Fed. Appx. 284, 291 (11th Cir. 2007) (affirming the district court's grant of the FDA's motion for summary judgment and denial of the plaintiff's motion for discovery under Rule 56(f) and quoting from *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1280 (11th Cir. 1998)). *See also Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994) (the plaintiff failed to file a

proper Rule 56(f) affidavit and such failure "is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate").

Thus, Plaintiff's Motion for Discovery is properly denied on this basis alone. However, even if the Court were to accept Plaintiff's affidavit as sufficient to support its Motion for Discovery, that motion would still be denied because discovery is not necessary in this action.

B. Discovery is Not Necessary.

"To obtain a Rule 56(f) continuance, a plaintiff must present specific facts explaining how postponement of ruling on the motion will enable him to rebut Defendant's showing of absence of genuine issue of fact." *Cormier v Pennzoil Exploration & Production Co.*, 969 F.2d 1559, 1561 (5th Cir. 1992). Discovery rulings are left to the sound discretion of the district court. *Elvis Presley Enter., Inc. v Elvisly Yours, Inc.*, 936 F.2d 889, 893 (6th Cir. 1991) (explaining need to allow adequate discovery is not without limits, and trial court has wide discretion in balancing needs and rights of both plaintiff and defendant). In a FOIA action, "discovery relating to the agency's search . . . generally is unnecessary if the agency's submissions are adequate on their face. When this is the case, the district court may 'forego discovery and award summary judgment on the basis of affidavits.' " *Carney*, 19 F.3d at 813 (quoting *Goland*, 607 F.2d at 352).

Plaintiff requests that this Court grant it limited discovery to gather communications or correspondence that accompanied the April 2007 correspondences that were sent to or courtesy copied to Dr. Pazdur. Requests for these correspondences are encompassed in Plaintiff's FOIA request. Defendant's declarations, however, unequivocally state that it has produced all documents responsive to Plaintiff's FOIA request. In response, Plaintiff argues that other

correspondences must exist "[b]ecause by all appearances there would have had to have been correspondence" and "because it would make sense" that the correspondence was made. Plaintiff's Motion for Discovery at 7.

Plaintiff's unfounded assertions are not enough to defeat Defendant's Motion for Summary Judgment. *See Dinsio v. FBI*, 05-CV-6159L, 2007 U.S. Dist. LEXIS 60269, at *5 (W.D. N.Y. 2007) (denying motion for discovery under Fed. R. Civ. P. 56(f) and granting the defendants' motion for summary judgment). "First, as a general rule, 'FOIA actions are typically resolved without discovery.' " *Id.* (citing *Voinche v. FBI*, 412 F. Supp. 2d 60, 2006 WL 177399, at *9 (2006), *aff'd*, 2007 U.S. App. LEXIS 6685, 2007 WL 1234984 (D.C. Cir. 2007). *See also Wheeler v. CIA*, 271 F. Supp.2d. 132, 139 (D. D.C. 2003) ("Discovery is generally unavailable in FOIA actions"). "In particular, discovery is not to be granted when it 'is sought for the bare hope of falling upon something that might impugn the affidavits' submitted by the government." *Id.* at *5-6 (citing *Citizens for Responsibility and Ethics in Washington v. DOJ*, No. CIV. 05-2078, 2006 U.S. Dist. LEXIS 34857, 2006 WL 1518964, at *3 (D. D.C. June 1, 2006) which quoted *Founding Church of Scientology v. NSA*, 610 F.2d 824, 836-37 n. 101 (D.C. Cir. 1979)). Rather, "[i]n order to justify discovery . . . the plaintiff must make a showing of bad faith on the part of the agency." *Carney*, 19 F.3d at 812.

With regard to bad faith, Plaintiff offers several factually inaccurate statements and conspiracy theories which completely ignore the evidence. *See e.g.*, Plaintiff's Motion for Discovery at 6 ("It is suspected that the entire [search], and Plaintiff exaggerates only minimally, was to ask Dr. Pazdur if he had any responsive documents to which he said "no" and then they asked him to supply an affidavit to that effect."); Plaintiff's Reply at 5 ("it is in bad faith that

now, we learn the Agency simply does nothing but ask [Dr. Pazdur] if he has any responsive documents"). Plaintiff concludes that Dr. Pazdur lied about the April 2007 correspondences that he possessed and destroyed because the correspondences could not have been "sent without some kind of email introduction and comments and/or an acknowledgment." Plaintiff's Reply at 11. Again, Plaintiff returns to his arguments that there are documents that "must" exist. Plaintiff's arguments fall woefully short of showing bad faith and, indeed, are completely at odds with the evidence before this Court.

"Conclusory allegations that other, undisclosed records 'must' exist somewhere, that they are within defendants' control, and that defendants must therefore have conducted an inadequate search, or that they are deliberately concealing the records, are not enough to make such a showing [of bad faith]." *Dinsio*, 2007 U.S. Dist. LEXIS 60269, at *6. That is all that Plaintiff has done here. Indeed, Defendants are therefore entitled to summary judgment.

IV. Conclusion

Based on the foregoing, the Court **GRANTS** Defendant's Motion for Summary Judgment (Doc. # 29) and **DENIES** Plaintiff's Motion for Discovery (Doc. # 34). The Clerk is **DIRECTED** to **ENTER JUDGMENT** in accordance with this Opinion and Order.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE