

THE FRATERNAL ORDER OF POLICE,
METROPOLITAN POLICE
LABOR COMMITTEE,

Plaintiff,

v.

THE DISTRICT OF COLUMBIA,

Defendant.

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IN THE

SUPERIOR COURT OF

THE DISTRICT OF COLUMBIA

Case No.: 4866-08

Judge Odessa Vincent

Next Event: ADR

Date: TBD (4/8/09-5/8/09)

* * * * *

**PLAINTIFF'S AND THIRD-PARTY KRISTOPHER BAUMANN'S
RESPONSE TO THE DISTRICT'S WITHDRAWAL OF ITS DISCOVERY REQUESTS**

The plaintiff, the Fraternal Order of Police, Metropolitan Police Labor Committee (the "Plaintiff" or the "FOP"), and Plaintiff's Chairman and third-party witness, Kristopher Baumann ("Mr. Baumann"), (collectively, the "Moving Parties"), by their attorneys, hereby submit this Response to The District of Columbia's (the "District" or the "Defendant") filing styled as a "Supplement to its Opposition to Plaintiff's Motion for Protective Order and Withdrawal of Discovery to Plaintiff" (the "Withdrawal of Discovery").¹ In support of this Response, the Moving Parties state the following:

1. This case is, and always has been, a straight forward dispute arising under the District of Columbia's Freedom of Information Act (the "DCFOIA"). This fact is easily determined by a cursory review of the Complaint filed in this action by the FOP.

¹ Although not specifically referenced by the District in its Withdrawal of Discovery, the FOP assumes for purposes of this Response that the District is withdrawing its discovery issued to Plaintiff *and* Mr. Baumann. If this assumption is incorrect, Mr. Baumann reserves all of his rights with respect to the discovery served on him by the District, including, but not limited to, the rights set forth in the Moving Parties' Motion for Protective Order.

2. Notwithstanding the limited nature of the pending dispute, the District served upon the FOP and Mr. Baumann the type of discovery normally reserved for complicated civil disputes. In order to justify the scope of its discovery in the face of the Moving Parties' Motion for Protective Order, the District argued in its Opposition to the Motion for Protective Order that limiting discovery in this action would naturally lead the District to "face a trial by ambush". Opposition at p. 1. In short, this argument was without basis and ignored the scope of the disputes explicitly set forth in the Complaint. See generally Motion for Protective Order.

3. The District also asserted at least four (4) additional arguments in its Opposition to the Motion for Protective Order in an attempt to support its overbroad and unnecessary discovery requests. Significantly, only one (1) of these arguments was based upon what the District has now represented to the Court is the *entire* basis for withdrawing its discovery requests – the District's conclusion that the FOP is no longer attempting to litigate a "pattern and practice" of the District with respect to other FOIA requests not described in the Complaint. Compare Opposition to Motion for Protective Order at ¶¶ 1 and 2 with Withdrawal of Discovery at p. 1. As a result, it appears that the District would now like the Court to believe that the purported resolution of only one (1) of its at least five (5) arguments against limiting discovery has caused it to withdrawal all discovery in this action. As set forth more fully below, the Moving Parties' respectfully assert that the District's withdrawal of all of its discovery is nothing more than an acknowledgement by the District that the issuance of the discovery in this action was improper in the first instance.

4. In interpreting the actions of the District with respect to this discovery dispute, it is important to note that the District originally attempted to support its argument that the FOP

was attempting to litigate a “pattern and practice” pertaining to FOIA requests not described in the Complaint by selectively quoting from the FOP’s Complaint:

The District’s Selective Quoting of the Complaint in its Opposition to the Motion for Protective Order: “As to document request (6), Defendant is entitled to transcripts of hearings and depositions of other cases as they may contain information probative of Plaintiff’s allegation that ‘Defendant has established a pattern and practice of delaying its response beyond the time defined in the D.C. FOIA . . .’”. Opposition to Motion for Protective Order at ¶ 2.

The Actual Allegation from the Complaint: “**In response to the FOIA Request**, Defendant has established a pattern and practice of delaying its response beyond the time defined in the D.C. FOIA . . .”. Complaint at ¶ 5 (emphasis added).

As is patently obvious from this comparison of the allegations in the Complaint and the selective quoting of these allegations by the District, the Complaint described the District’s “pattern and practice” related to the one FOIA request set forth in the Complaint. Indeed, the terms “FOIA Request” are defined terms in the Complaint that represent the “formal request for documents and information” submitted by the FOP to the District “[o]n or about March 21, 2007.”² Complaint at ¶ 4.

5. Notwithstanding its multi-pronged attack against the Moving Parties’ attempt to limit discovery in this FOIA action, and the District’s selective quoting of the FOP’s Complaint in support of its attack, the District now represents to the Court that the FOP’s counsel stated in a telephone conversation on or about January 27, 2009 “that the only relevant issue in this litigation is whether Plaintiff’s rights were violated under the Freedom of Information Action ***in this instance.***” Withdrawal of Discovery at p. 1 (emphasis in original). This statement is inaccurate. In particular, as reflected in the written correspondence attached hereto as Exhibit 1,

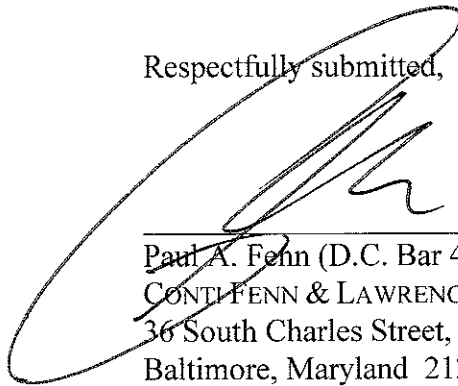
² Whether the FOP will be entitled to present “pattern and practice” evidence at trial related to other FOIA disputes is strictly an evidentiary issue that properly can be resolved at trial.

the District itself confirmed in writing *following the telephone conversation* referenced by the District in its Withdrawal of Discovery that it *still needed* “to hear back on the deal as we discussed . . . this morning,” and that it *still wanted* “to get the stipulation done as soon as possible.” 1/27/09 e-mail from Jacques Lerner time-stamped 6:42 p.m., attached as part of Exhibit 1. Furthermore, the attached e-mail correspondence, and in particular, Mr. Fenn’s 1/28/09 e-mail date-stamped at 12:49 p.m., demonstrates that the FOP did “not agree to any stipulation at this time.” *Id.* No other oral or written communications transpired between the two parties’ counsel after this e-mail was sent by Mr. Fenn prior to the District filing its Withdrawal of Discovery. Accordingly, the record should properly reflect that no agreement or stipulation has been made at this time by the FOP or Mr. Baumann with respect to their Motion for Protective Order or the proposed stipulation that the District asserts in its Withdrawal of Discovery has been agreed to by the parties.

6. In sum, what appears to have happened in this case is that the District finally realized that it had severely overreached by serving overly broad discovery requests on the FOP and Mr. Baumann in this FOIA dispute, but it still does not want to admit this fact. Even though the FOP and Mr. Baumann have no objection to the District’s withdrawal of its discovery requests at this time, the record should properly reflect that no agreements or stipulations have been reached between the parties on any substantive, procedural or evidentiary issues. Furthermore, based upon the District’s actions, it is still appropriate for the Court to enter the requested Protective Order at this time to protect the FOP and Mr. Baumann from further annoyance, undue burden, and expense.

WHEREFORE, the FOP and Mr. Baumann respectfully request that the Court grant the Motion for Protective Order. The FOP and Mr. Baumann also respectfully request that the Court order the District to reimburse them for all of their attorneys' fees and costs arising out of the Motion for Protective Order and the District's Withdrawal of Discovery. This request is bolstered by the fact that the FOP sought the withdrawal of the subject discovery by the District *prior to* filing the Motion for Protective Order. See Exhibit 2. Lastly, the FOP and Mr. Baumann request any other and further relief as may be appropriate under the circumstances.

Respectfully submitted,



Paul A. Fenn (D.C. Bar 494581)
CONTI FENN & LAWRENCE, LLC
36 South Charles Street, Suite 2501
Baltimore, Maryland 21201
(410) 837-6999
(410) 510-1647 (facsimile)

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 29th day of January 2009 that I caused the forgoing document to be served upon the following individual via the Court's electronic filing system and via first-class, regular mail:

Jacques P. Lerner
Assistant Attorney General
441 Fourth Street, N.W.
Washington, D.C. 20001



Paul A. Fenn (D.C. Bar 494581)

THE FRATERNAL ORDER OF POLICE,
METROPOLITAN POLICE
LABOR COMMITTEE,

Plaintiff,

v.

THE DISTRICT OF COLUMBIA,

Defendant.

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IN THE

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THE DISTRICT OF COLUMBIA

Case No.: 4866-08

Judge Odessa Vincent

Next Event: ADR

Date: TBD (4/8/09-5/8/09)

* * * * *

ORDER

Upon consideration of Plaintiff's and Mr. Baumann's Motion for Protective Order, the District's Opposition thereto, the District's Supplement to its Opposition and Withdrawal of Discovery, and Plaintiff's and Mr. Baumann's Response to the District's Supplement and Withdrawal of Discovery, it is this _____ day of _____ 2009 ORDERED that:

1. The Motion for Protective Order is GRANTED;
2. Any and all discovery proffered by the District in this case shall not be had; and
3. The District shall reimburse the FOP and Mr. Baumann for their attorneys' fees and costs arising out of them being compelled to file their Motion for Protective Order and to respond to the District's Supplement to its Opposition and Withdrawal of Discovery within ___ calendar days of this Order.

Judge Odessa Vincent

Exhibit 1

Fenn, Paul

From: Fenn, Paul
Sent: Wednesday, January 28, 2009 12:49 PM
To: 'Lerner, Jacques (OAG)'
Subject: RE: FOP v. DC 4866 and 4867

Jacques-

My client will not agree to any stipulation at this time.

Paul

Paul A. Fenn
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From: Lerner, Jacques (OAG) [<mailto:jacques.lerner@dc.gov>]
Sent: Wednesday, January 28, 2009 11:35 AM
To: Fenn, Paul
Subject: RE: FOP v. DC 4866 and 4867

Hi Paul,

Okay, thanks.

One last question: Defendant will withdraw all of its discovery requests. Will Plaintiff enter into a short stipulation that the only issue in the case (for liability) is whether Plaintiff received the records to which it was entitled under FOIA (or something similar)?

As I said when we spoke yesterday, my client's primary concern is the "pattern and practice" allegations in the complaint and Plaintiff's apparent intention to offer testimony on those allegations through witnesses we believe should not be called.

Please let me know.

Thanks,
Jacques

From: Fenn, Paul [<mailto:paul@lawcfl.com>]

1/28/2009

Sent: Wednesday, January 28, 2009 11:15 AM
To: Lerner, Jacques (OAG)
Subject: RE: FOP v. DC 4866 and 4867

Jacques-

I do not agree with your client's assessment of our position, and do not agree that the Motions will be moot if all discovery is withdrawn. In any event, as far as I know, all discovery is still outstanding pending the Court's ruling on my client's Motions. Thanks.

Paul

Paul A. Fenn
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From: Lerner, Jacques (OAG) [mailto:jacques.lerner@dc.gov]
Sent: Wednesday, January 28, 2009 11:15 AM
To: Fenn, Paul
Subject: Re: FOP v. DC 4866 and 4867

Hi Paul,
Just to clarify- Your client is unwilling to withdraw its motions even if all discovery is withdrawn (which would render them moot anyway)?
Thanks,
Jacques
Jacques P. Lerner

----- Original Message -----
From: Fenn, Paul <paul@lawcfl.com>
To: Lerner, Jacques (OAG)
Sent: Wed Jan 28 11:01:25 2009
Subject: RE: FOP v. DC 4866 and 4867

Jacques-

My client is not willing to withdraw its Motions for Protective Orders at this time. Thanks.

Paul

1/28/2009

Paul A. Fenn
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From: Lerner, Jacques (OAG) [<mailto:jacques.lerner@dc.gov>]
Sent: Tuesday, January 27, 2009 6:42 PM
To: Fenn, Paul
Subject: FOP v. DC 4866 and 4867

Hi Paul,

Upon further reflection, there's no need for the five interrogatories. But we do need to hear back on the deal as we discussed it this morning. We'd like to get the stipulation done as soon as possible.

Thanks,

Jacques

Jacques P. Lerner
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Fax (202) 741-5908

1/28/2009

Please call before faxing

jacques.lerner@dc.gov

www.oag.dc.gov

Exhibit 2

Fenn, Paul

From: Lerner, Jacques (OAG) [jacques.lerner@dc.gov]
Sent: Tuesday, December 30, 2008 3:18 PM
To: Fenn, Paul
Subject: RE: FOIA Case Nos. 4866 and 4867

Hi Paul,

Yes, had and still having a good holiday. I hope you are having a good one as well.

No, we would not consent to such a motion or withdraw the discovery at this time.

I am curious, however – is your client of the opinion that no discovery in these two cases is appropriate?

Thanks,
Jacques

From: Fenn, Paul [mailto:paul@lawcfl.com]
Sent: Tuesday, December 30, 2008 2:54 PM
To: Lerner, Jacques (OAG)
Cc: Paul A. Fenn (Fenn, Paul)
Subject: FOIA Case Nos. 4866 and 4867

Jacques-

I hope you had a nice Holiday. As you know, I have received your discovery requests in the above-referenced matters. I have now had an opportunity to speak with my client regarding same. Please advise if your client will consent to a Motion for Protective Order in both matters, or, alternatively, if your client will withdraw the subject discovery (including all interrogatories, document requests, and notices of deposition). In short, in these straight-forward FOIA matters, my client believes that the subject discovery is, among other things, improper, unnecessary, overly burdensome, and harassing. The bottom line is that the FOP is either entitled to the material requested, or it is not, and my client does not believe that the proposed discovery will change this fact or shed any relevant light on the core issues in dispute.

Thank you in advance for your time and consideration.

Paul

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HAPPY HOLIDAYS!

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1/28/2009