

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

PUBLIC RECORD MEDIA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 12-1225- MJD
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

**Joint 26(f) Conference Report**

Pursuant to Federal Rule of Civil Procedure 26(f), Local Rule 26.1, and the Order dated July 3, 2012 (Docket No. 9), Plaintiff Public Record Media and Defendant the United States Department of Justice (“DOJ”), hereinafter collectively “the parties”, hereby jointly submit a written report of the Rule 26(f) Conference:

**1. Meeting and Parties.**

a. Settlement Meeting. Counsel for the parties began discussing the Rule 26(f) report and potential resolution of this matter by telephone on July 12, 2012, and continued discussing the matter by telephone and email thereafter. Pursuant to the order of the Court, counsel also met in person. Although the Court originally ordered the meeting to take place by July 24, 2012, counsel for the Defendant was hospitalized the week prior and all counsel agreed to move the meeting back after discussing the deadline with the judge’s clerk. Counsel met on August 6, 2012 at noon in Minneapolis to discuss resolution of this matter.

b. Plaintiff. Plaintiff Public Record Media is a limited liability company organized under the laws of Minnesota, and has its principal place of business at 2375 University Avenue W., Suite 200, Saint Paul, Minnesota 55114. Counsel for Plaintiff at the meeting was:

JT Haines  
MN Attorney Number #303379  
2375 University Avenue West  
Suite 120  
Saint Paul, MN 55114  
Tel: [REDACTED]  
Email: [REDACTED]

c. Defendant DOJ is an agency of the federal government, located at 950 Pennsylvania Avenue NW, Washington, D.C. 20530. Counsel for DOJ at the meeting was:

Amy Powell  
U.S. Department of Justice, Civil Division  
Federal Programs Branch  
20 Massachusetts Ave., N.W., Room 5377  
Washington, D.C. 20530  
Tel.: [REDACTED]  
Fax.: (202) 616-8470  
Email: [REDACTED]

d. Insurance. No damages are sought for which insurance carriers that may be liable.

2. **Description of the Case.**

a. Jurisdiction. Plaintiffs assert that the Court has jurisdiction over this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. § 1331.

b. Narrative. The parties each submit separate narratives.

Plaintiff's Narrative: This case concerns requests made by Plaintiff under FOIA relating to the projection of lethal force by the United States Government via the use of unmanned aerial vehicles ("UAVs") against persons located within United States jurisdictions, and Defendant's response thereto.

On October 11, 2011, Plaintiff sent a FOIA request to the Office of Legal Counsel, a component of Defendant agency, seeking three categories of records related to the projection of

lethal force via the use of UAVs against US persons. Item 3 of the request sought “legal opinions and/or memoranda produced...between January 1, 2001, and October 1, 2011, that deal with the use of lethal force by the United States via the use of UAVs, against any person physically located within any region under the jurisdiction of the government of the United States...”

Defendant responded via letter on November 3, issuing a “Glomar” response with respect to Item 1. With respect to Items 2 and 3, Defendant’s letter stated the following: “We have identified several documents that are responsive to the remaining items in your request.”

Defendant invoked FOIA Exemptions 1, 3 and 5.

Plaintiff filed an Administrative Appeal with Defendant on December 30, 2011. Plaintiff’s appeal narrowed the scope of the inquiry to material responsive solely to Item 3 of Plaintiff’s original FOIA request. Defendant did not respond to the Administrative Appeal in the time period proscribed by statute.

Having exhausted administrative remedies, Plaintiff filed this lawsuit on May 22, 2012, seeking the withheld Item 3 records.

Following initiation of the lawsuit, counsel at OIP telephoned counsel for Plaintiff and advised that counsel had completed its recommendations in response to the Administrative Appeal, but that due to the initiation of the lawsuit, the recommendations would be turned over to trial counsel.

Following an initial conversation on July 12, counsel for Defendant advised Plaintiff via teleconference of Defendant’s intent to change the position set forth in its initial FOIA response of November 3 to “no records”. On August 6, 2012, Defendant’s counsel delivered a letter dated August 3, signed by Special Counsel Colborn, stating that “none of the responsive records we identified are responsive to [Item 3].”

The issues presented are the reasons for Defendant's change in position, and the propriety of Defendant's search and response under FOIA. Because Defendant has now changed its position with respect to its initial FOIA response, Plaintiff is entitled to detailed information about Defendant's change in position, and litigation costs under 5 U.S.C. § 552(a)(4)(E)(i).

Defendant's Narrative: This case concerns Defendant's response to FOIA requests submitted by Plaintiff seeking information about the use of lethal force via unmanned aerial vehicle ("UAV") against U.S. citizens. By letter dated October 11, 2011, Plaintiff submitted a FOIA request to the DOJ Office of Legal Counsel ("OLC") seeking three categories of documents, including Item 3: "legal opinions [produced since 2001] . . . that deal with the use of lethal force by the United States via the use of UAVs against any person physically located within . . . the United States." Defendant responded by letter dated November 3, 2011 by refusing to confirm or deny the existence of documents responsive to Item 1 (also known as a "Glomar" response), pursuant to FOIA Exemptions 1, 3, and 5. With respect to the remaining items in the request, Defendant indicated that there were responsive documents, and that such documents were subject to FOIA Exemptions 1, 3, and 5. Plaintiff filed an administrative appeal that challenged only the response with respect to Item 3. No decision was issued before Plaintiff filed suit, challenging only the response to Item 3. Defendant has since informed Plaintiff, through counsel, that there are no responsive legal opinions regarding the use of UAVs to conduct strikes within the United States, and that all responsive records were responsive to Item 2, construed broadly. Now that Plaintiff has been informed that the documents sought do not exist, there seem to be no remaining issues to be decided and no possible relief available.

- c. Damages. No damages are sought.

3. **Pleadings.** The Complaint and Answer have both been filed. *See* Docket Nos. 1 & 8.

The parties do not currently anticipate any motions to amend the pleadings. The parties agree that no jury trial is available.

4. **Discovery and Initial Disclosures.** Plaintiff requests a deadline of August 14, 2012 for initial disclosures, a limit of 10 depositions for each party, a limit of 25 interrogatories for each party, and appropriate document production. Given the nature of this FOIA matter, Defendants do not believe that discovery or initial disclosures would be appropriate. *See, e.g., Mace v. EEOC*, 197 F.3d 329 (8<sup>th</sup> Cir. 1999) (finding that district court properly relied only on agency declarations); *see also SafeCard Servs. v. SEC*, 926 F.2d 1197, 1200-02 (D.C. Cir. 1978) (affirming decision to deny discovery on ground that agency's affidavits were sufficient); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA cases."). The parties do not request alternative dispute resolution.

5. **Motions.** Defendant anticipates that this matter will be resolved on cross-motions for summary judgment. Depending on the content of Defendant's filings, Plaintiff anticipates the possibility of filing a motion to compel discovery and for needed amendments to the schedule in connection thereto. The parties jointly propose the following schedule for briefing summary judgment:

September 21, 2012 – Defendant files Motion for Summary Judgment

October 19, 2012 – Plaintiff files Opposition and Cross-Motion for Summary Judgment

November 2, 2012 – Defendant files Reply and Opposition

November 16, 2012 – Plaintiff files Reply

6. **Magistrate Judge Jurisdiction.** Defendant does not consent to the jurisdiction of a U.S. Magistrate Judge for disposition of this matter.

Dated: August 7, 2012

Respectfully Submitted,

STUART F. DELERY  
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO  
Deputy Director, Federal Programs Branch

*/s/Amy E. Powell*

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