

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CARETOLIVE,)	
a not-for-profit corp.,)	
)	Case No. 2:08-cv-0005
Plaintiff,)	
)	JUDGE FROST
v.)	
)	MAGISTRATE JUDGE KING
U.S. FOOD and DRUG)	
ADMINISTRATION,)	
)	
Defendant.)	

**DEFENDANT’S MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION
FOR LEAVE TO SUBMIT TWENTY REQUESTS FOR ADMISSION**

On January 8, 2008, Plaintiff CareToLive (“CTL”) filed this action against the Food and Drug Administration (“FDA”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Complaint (Doc. 2). On February 18, 2008, FDA moved the Court to stay proceedings for twenty months, pursuant to 5 U.S.C. § 552(a)(6)(C), to permit it additional time to process CTL’s FOIA request pursuant to its first-in/first-out, multi-track processing system. Motion to Stay Proceedings (Doc. 10). Given the motion to stay proceedings, on February 19, 2008, the FDA filed a motion to continue the Rule 16(b) preliminary pretrial conference, Motion to Continue Preliminary Pretrial Conference (Doc. 11), which the Court granted. Order Granting Motion to Continue (Doc. 14). On March 11 and March 25, respectively, CTL filed its memorandum in opposition to the FDA’s motion to stay proceedings, and FDA filed its reply. (Docs. 18 & 19). The non-oral hearing on the motion to stay proceedings is scheduled for April 4, 2008. Order (Doc. 12).

On March 25, 2008—despite the pending motion to stay proceedings and despite the

Court continuing the preliminary pretrial conference—CTL moved this Court for leave to file twenty requests for admission. First Motion for Leave to File Twenty Requests for Admissions (Doc. 20). CTL argues that “[i]f this Court does not allow a few simple depositions then the Court should at least allow the Plaintiff the right to test the assertions made by the FDA by submitting twenty (20) simple requests for admission.” Motion for Leave (Doc. 20) at p. 3.¹ CTL does not identify the requests for admission, but simply states that this discovery device “will allow the Plaintiff to demonstrate that the documents requested have already been identified, their whereabouts are known and/or that they are being withheld by individuals within the FDA as intentional legal strategy.” Id. CTL states that “[a]s long as the Courts will never allow any discovery and the FDA (CDER division) will not respond to the FOIA request then they are correct that they may never have to be held accountable for their actions.” Id. p. 2.

This Court should reject CTL’s request to conduct discovery. Courts generally do not permit discovery in FOIA actions. See e.g., Rugiero v. U.S. Dep’t of Justice, 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.”) (citing Jones v. FBI, 41 F.3d 238, 242 (6th Cir.1994)); Wheeler v. C.I.A., 271 F.Supp.2d 132, 139 (D.D.C. 2003) (“Discovery is generally unavailable in FOIA actions.”) (citing Judicial Watch, Inc. v. Export-Import Bank, 108 F.Supp.2d 19, 25 (D.D.C. 2000)). This general rule applies where, as here, the government has filed a motion to stay the proceedings pursuant to 5 U.S.C. § 552(a)(6)(C). See Cecola v. F.B.I., 1995 WL 143548 *5 (N.D. Ill. 1995) (“This court’s review of cases under § 552(a)(6)(C)

¹ CTL failed to include page numbers in the memorandum in support of its motion for leave. The page numbers cited by the FDA are the CM/ECF electronic page numbers in the document header.

indicates that, as in the case of other issues under FOIA, questions of an agency's diligence are generally resolved on the basis of affidavits, without the taking of formal discovery."); Summers v. U.S. Dept. of Justice, 733 F.Supp. 443, 443-444 (D.D.C. 1990) (examining agency's declaration, denying discovery requests, and granting stay pursuant to 5 U.S.C. § 552(a)(6)(C)), aff'd 925 F.2d 450 (D.C. Cir. 1991).

Here, FDA has submitted detailed declarations to support its motion to stay proceedings. CTL fails to challenge these declarations or to cite any legal or factual support for discovery in this case. It simply makes speculative, self-serving assertions of governmental wrongdoing. Such assertions are insufficient to justify the rare action of permitting discovery in a FOIA case. See Becker v. I.R.S., 34 F.3d 398, 405 (7th Cir. 1994) (stating, in context of plaintiff seeking discovery regarding the adequacy or good faith of the government's record search, that "[s]elf-serving assertions of government wrongdoing and coverup do not rise to the level justifying disclosure.") (quoting Matter of Wade, 969 F.2d 241, 246 (7th Cir. 1992)). Thus, this Court should deny Plaintiff's request for leave to submit twenty requests for admission to FDA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 3, 2008, I electronically filed the foregoing **DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO SUBMIT TWENTY REQUESTS FOR ADMISSION** with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to Kerry M. Donahue by operation of the Court's CM/ECF system.

s/John J. Stark
John J. Stark
Assistant United States Attorney