



Washington, D.C. 20505

15 June 2004

James H. Lesar, Esquire
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Reference: No. F-2003-00449

Dear Mr. Lesar:

This is in response to your 7 February 2003 letter, which was received on 14 February 2003, requesting records under the provisions of the Freedom of Information Act (FOIA). We delayed responding to this request because it concerned subject matter and issues presented in the litigation, Roger Hall v. Central Intelligence Agency, Civil Action No. 98-1319.

Specifically, your 7 February 2003 request is for records pertaining to:

1. **Southeast Asia POW/MIAs (civilian or military) and detainees, who have not returned, or whose remains have not been returned, to the United States, regardless of whether they are currently held in prisoner status, and regardless of whether they were sent out of Southeast Asia.**
2. **POW/MIAs sent out of Southeast Asia (for example, to China, Cuba, North Korea, Russia).**
3. **Prepared by and/or assembled by the CIA between January 1, 1960 and December 31, 2002, relating to the status of any United States POWs or MIAs in Laos, including but not limited to any reports, memoranda, letters, notes or other documents prepared by Mr. Horgan or any other officer, agent or employee of the CIA for the Joint Chiefs of Staff, the President, or any federal agency.**
4. **Records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing.**

5. **Records relating to 47 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, provided by you as (Attachment 1), and those persons who are on the Prisoner of War/Missing Personnel Office's list of persons whose primary next-of-kin (PNOK) have authorized the release of information concerning them, provided by you as (Attachment 2).**
6. **All records on or pertaining to any search conducted for documents responsive to Roger Hall's requests dated January 5, 1994, February 7, 1994, and April 23, 1998, including but not limited to all instructions and descriptions of searches to be undertaken by any component of the CIA and all responses thereto, and all records pertaining to the assessment of fees in connection therewith, including but not limited to any itemizations or other records reflecting the time spent on each search, the rate charged for the search, the date and duration and kind of search performed, etc.**
7. **All records on or pertaining to any search conducted regarding any other requests for records pertaining to Vietnam War POW/MIAs, including any search for such records conducted in response to any request by any Congressional Committee or executive branch agency.**

For identification purposes we have assigned your request the number referenced above. Please refer to this number in future correspondence.

With respect to items 1, 2, and item 3 to the extent the dates requested are coextensive with the dates for which this information was requested in the prior litigation, the court in that case, Roger Hall v. Central Intelligence Agency, Civil Action No. 98-1319, ruled that the Central Intelligence Agency had properly invoked the relevant FOIA exemptions in response to Mr. Hall's requests for the same or similar information. For that reason, we cannot accept those items as part of this new request.

With respect to item 4, the court in the cited litigation concluded that the Senate documents are not "agency records" subject to the FOIA. For that reason, we cannot accept this item.

In order to conduct the searches requested in item 5, we require, at a minimum, the date and place of birth and the full name of all individuals listed in attachments 1 and 2 included in item 5. We cannot accept this item until we receive this additional information. In accordance with CIA policy, we will hold this aspect of your request in abeyance for forty-five (45) days pending receipt of this additional information and will thereafter deem this aspect of your request closed.

Based on information available to the CIA at this time, your client has failed to demonstrate that he meets the criteria for the “representative of the news media” fee category outlined in the CIA’s FOIA regulations found at part 1900 of title 32 of the Code of Federal Regulations, specifically subsection 1900.02(h)(3) (copy enclosed). Therefore, your client’s request to be considered a “representative of the news media” for FOIA fee category purposes is denied. We will reconsider his request, however, upon the submission of additional information sufficient to demonstrate that he meets the criteria of a “representative of the news media,” as defined in the CIA’s FOIA regulations. We note that courts have ruled that the “representatives of the news media” category excludes private libraries or private repositories of government records, or middlemen such as information vendors or data brokers that request records for use by others.

Pending receipt of information sufficient to demonstrate that your client qualifies as a “representative of the news media,” we have made a preliminary and partial calculation, based on the placement of your client in the “all other” fee category, we have estimated costs of conducting searches for all the documents you have requested in items 5, 6 and 7 above, would amount to \$606,950.00 for the searches alone. This estimate does not include either copying fees or that part of item 3 not requested in prior litigation.

The CIA views portions of the request—particularly item 7—as imposing such overly burdensome search requirements as not to require a search under the Freedom of Information Act. This letter does not waive the CIA’s right to make that determination once you have clarified the scope of your client’s request and evidenced a willingness to pay fees.

Please feel free to contact me if you would like to discuss narrowing your search to reduce this fee estimate. In any event, because there is evidence from the prior litigation that your client may refuse to pay the fees associated with the processing of this request, we are requiring, in accordance with the CIA’s FOIA regulations, that you submit an advance deposit in the amount of \$50,000.00 before we would begin to process this request, as presently drafted by you. See 32 C.F.R. § 1900.13(f) (copy enclosed). Furthermore, should we proceed with the searches, we may require you to make additional advance

payments as the actual costs associated with processing this request become known.

You have the right to consider this a denial and may appeal to the Agency Release Panel, in my care. Should you choose to do this, please explain the basis for your appeal.

Sincerely,

A handwritten signature in black ink that reads "Alan W. Tate". The signature is written in a cursive style with a large initial "A" and "T".

Alan W. Tate
Acting Information and Privacy Coordinator

Enclosure

CENTRAL INTELLIGENCE AGENCY

32 CFR Parts 1900, 1901, 1907, 1908, and 1909

Freedom of Information Act; Privacy Act; and Executive Order 12958; Implementation Agency: Central Intelligence Agency.

ACTION: Interim rule.

§1900.02 Definitions

For purposes of this part, the following terms have the meanings indicated:

- (a) Agency or CIA means the United States Central Intelligence Agency acting through the CIA Information and Privacy Coordinator;
- (b) Days means calendar days when the Agency is operating and specifically excludes Saturdays, Sundays, and legal public holidays. Three (3) days may be added to any time limit imposed on a requester by this part if responding by U.S. domestic mail; ten (10) days may be added if responding by international mail;
- (c) Control means ownership or the authority of the CIA pursuant to federal statute or privilege to regulate official or public access to records,
- (d) Coordinator means the CIA Information and Privacy Coordinator who serves as the Agency manager of the information review and release program instituted under the Freedom of Information Act;
- (e) Direct costs means those expenditures which an agency actually incurs in the processing of a FOIA request; it does not include overhead factors such as space, it does include:
- (1) Pages means paper copies of standard office size or the dollar-value equivalent in other media;
- (2) Reproduction means generation of a copy of a requested record in a form appropriate for release;
- (3) Review means all time expended in examining a record to determine whether any portion must be withheld pursuant to law and in effecting any required deletions, but excludes personnel hours expended in resolving general legal or policy issues; it also means personnel hours of professional time;
- (4) Search means all time expended in looking for and retrieving material that may be responsive to a request utilizing available paper and electronic indices and finding aids; it also means personnel hours of professional time or the dollar-value equivalent in computer searches;
- (f) Expression of interest means a written communication submitted by a member of the public requesting information on or concerning

the FOIA program and/or the availability of documents from the CIA;

(g) Federal agency means any executive department, military department, or other establishment or entity included in the definition of agency in 5 U.S.C 552(f);

(h) Fees means those direct costs which may be assessed a requester considering the categories established by the FOIA; requesters should submit information to assist the Agency in determining the proper fee category and the Agency may draw reasonable inferences from the identity and activities of the requester in making such determinations; the fee categories include:

(1) Commercial means a request in which the disclosure sought is primarily in the commercial interest of the requester and which furthers such commercial, trade, income, or profit interests;

(2) Non-commercial educational or scientific institution means a request from an accredited United States educational institution at any academic level or institution engaged in research concerning the social, biological, or physical sciences or an instructor or researcher or member of such institutions; it also means that the information will be used in a specific scholarly or analytical work, will contribute to the advancement of public knowledge, and will be disseminated to the general public;

(3) Representative of the news media means a request from an individual actively gathering news for an entity that is organized and operated to publish and broadcast news to the American public and pursuant to their news dissemination function and not their commercial interests; the term news means information which concerns current events, would be of current interest to the general public, would enhance the public understanding of the operations or activities of the U.S. Government, and is in fact disseminated to a significant element of the public at minimal cost; freelance journalists are included in this definition if they can demonstrate a solid basis for expecting publication through such an organization, even though not actually employed by it; a publication contract or prior publication record is relevant to such status;

(4) All other means a request from an individual not within paragraph (h)(1), (2), or (3) of this section;

(i) Freedom of Information Act or "FOIA" means the statutes as codified at 5 U.S.C 552;

(j) Interested party means any official in the executive, military, congressional, or judicial branches of government, United States or foreign, or U.S. Government contractor who, in the sole discretion of the CIA, has a subject matter or physical interest in the documents or information at issue;

(k) Originator means the U.S. Government official who originated the document at issue

or successor in office, or such official who has been delegated release or declassification authority pursuant to law;

(l) Potential requester means a person, organization, or other entity who submits an expression of interest;

(m) Reasonably described records means a description of a document (record) by unique identification number or descriptive terms which permit an Agency employee to locate documents with reasonable effort given existing indices and finding aids;

(n) Records or agency records means all documents, irrespective of physical or electronic form, made or received by the CIA in pursuance of federal law or in connection with the transaction of public business and appropriate for preservation by the CIA as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the CIA or because of the informational value of the data contained therein; it does not include:

(1) Books, newspapers, magazines, journals, magnetic or printed transcripts of electronic broadcasts, or similar public sector materials acquired generally and/or maintained for library or reference purposes; to the extent that such materials are incorporated into any form of analysis or otherwise distributed or published by the Agency, they are fully subject to the disclosure provisions of the FOIA;

(2) Index, filing, or museum documents made or acquired and preserved solely for reference, indexing, filing, or exhibition purposes; and

(3) Routing and transmittal sheets and notes and filing or destruction notes which do not also include information, comment, or statements of substance;

(o) Responsive records means those documents (i.e., records) which the Agency has determined to be within the scope of a FOIA request.

§1900.13 Fees for Record Services

(a) In general. Search, review, and reproduction fees will be charged in accordance with the provisions below relating to schedule, limitations, and category of requester. Applicable fees will be due even if our search locates no responsive records or if some or all of the responsive records must be denied under one or more of the exemptions of the Freedom of Information Act.

(b) Fee waiver requests. Records will be furnished without charge or at a reduced rate whenever the Agency determines:

(1) That, as a matter of administrative discretion, the interest of the United States Government would be served, or

(2) That it is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the United States Government and

is not primarily in the commercial interest of the requester; the Agency shall consider the following factors when making this determination:

- (i) Whether the subject of the request concerns the operations or activities of the United States Government; and, if so,
- (ii) Whether the disclosure of the requested documents is likely to contribute to an understanding of United States Government operations or activities; and, if so,
- (iii) Whether the disclosure of the requested documents will contribute to public understanding of United States Government operations or activities; and, if so.
- (iv) Whether the disclosure of the requested documents is likely to contribute significantly to public understanding of United States Government operations and activities; and

(v) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so.

(vi) Whether the disclosure is primarily in the commercial interest of the requester.

(c) *Fee waiver appeals.* Denials of requests for fee waivers or reductions may be appealed to the Chair of the Agency Release Panel via the Coordinator. A requester is encouraged to provide any explanation or argument as to how his or her request satisfies the statutory requirement set forth above.

(d) *Time for fee waiver requests and appeals.* It is suggested that such requests and appeals be made and resolved prior to the initiation of processing and the incurring of costs. However, fee waiver requests will be accepted at any time prior to the release of documents or the completion of a case, and fee waiver appeals within forty-five (45) days of our initial decision subject to the following condition: If processing has been initiated, then the requester must agree to be responsible for costs in the event of an adverse administrative or judicial decision.

(e) *Agreement to pay fees.* In order to protect requesters from large and/or unanticipated charges, the Agency will request specific commitment when it estimates that fees will exceed \$100.00. The Agency will hold in abeyance for forty-five (45) days requests requiring such agreement and will thereafter deem the request closed. This action, of course, would not prevent an individual from refiling his or her FOIA request with a fee commitment at a subsequent date.

(f) *Deposits.* The Agency may require an advance deposit of up to 100 percent of the estimated fees when fees may exceed \$250.00 and the requester has no history of payment, or when, for fees of any amount, there is evidence

that the requester may not pay the fees which would be accrued by processing the request. The Agency will hold in abeyance for forty-five (45) days those requests where deposits have been requested.

(g) *Schedule of fees - 1) In general.* The schedule of fees for services performed in responding to requests for records is established as follows:

Personnel Search and Review

Clerical/Technical	Quarter hour	\$5.00
Professional /Supervisory	Quarter hour	10.00
Manager/Senior Professional	Quarter hour	18.00

Computer Search and Production

Search (on-line)	Flat rate	10.00
Search (off-line)	Flat rate	30.00
Other activity	Per minute	10.00
Tapes (mainframe cassette)	Each	9.00
Tapes (mainframe cartridge)	Each	9.00
Tapes (mainframe reel)	Each	20.00
Tapes (PC 9mm)	Each	25.00
Diskette (3.5")	Each	4.00
CD (bulk recorded)	Each	10.00
CD (recordable)	Each	20.00
Telecommunications	Per minute	.50
Paper (mainframe printer)	Per page	.10
Paper (PC b/w laser printer)	Per Page	.10
Paper PC color printer	Per page	1.00

Paper Production

Photocopy (standard or legal)	Per page	.10
Microfiche	Per frame	.20
Pre-printed (if available)	Per 100 pages	5.00
Published (if available)	Per item	NTIS

(2) *Application of schedule.* Personnel search time includes time expended in either manual paper records searches, indices searches, review of computer search results for relevance, personal computer system searches, and various reproduction services. In any event where the actual cost to the Agency of a particular item is less than the above schedule (e.g., a large production or run of a document resulted in a cost of less than \$5.00 per hundred pages), then the actual lesser cost will be charged. Items published and available at the National Technical Information Service (NTIS) are also available from CIA pursuant

to this part at the NTIS price as authorized by statute.

(3) *Other services.* For all other types of output, production, or reproduction (e.g., photographs, maps, or published reports), actual cost or amounts authorized by statute. Determinations of actual cost shall include the commercial cost of the media, the personnel time expended in making the item to be released, and an allocated cost of the equipment used in making the item, or, if the production is effected by a commercial service, then that charge shall be deemed the actual cost for purposes of this part.

(h) *Limitations on collection of fees.* -- (1) *In general.* No fees will be charged if the cost of collecting the fee is equal to or greater than the fee itself. That cost includes the administrative costs to the Agency of billing, receiving, recording, and processing the fee for deposit to the Treasury Department and, as of the date of these regulations, is deemed to be \$10.00.

(2) *Requests for personal information.* No fees will be charged for requesters seeking records about themselves under the FOIA; such requests are processed in accordance with both the FOIA and the Privacy Act in order to ensure the maximum disclosure without charge.

(i) *Fee categories.* There are four categories of FOIA requesters for fee purposes: "Commercial use" requesters, "educational and non-commercial scientific institution" requesters, "representatives of the news media" requesters, and "all other" requesters. The categories are defined in §1900.02, and applicable fees, which are the same in two of the categories, will be assessed as follows:

(1) "Commercial use" requesters: Charges which recover the full direct costs of searching for, reviewing, and duplicating responsive records (if any);

(2) "Educational and non-commercial scientific institution" requesters as well as "representatives of the news media" requesters: Only charges for reproduction beyond the first 100 pages;

(3) "All other" requesters: Charges which recover the full direct cost of searching for and reproducing responsive records (if any) beyond the first 100 pages of reproduction and the first two (2) hours of search time, which will be furnished without charge.

(j) *Associated requests.* A requester or associated requesters may not file a series of multiple requests, which are merely discrete subdivisions of the information actually sought for the purpose of avoiding or reducing applicable fees. In such instances, the Agency may aggregate the requests and charge the applicable fees.