

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 04-0814 (HHK)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

PLAINTIFF ACCURACY IN MEDIA'S OPPOSITION TO DEFENDANT'S MOTIONS
TO DISMISS AND FOR PARTIAL SUMMARY JUDGMENT,
AND CROSS-MOTION FOR SUMMARY JUDGMENT AND FOR OTHER RELIEF

Plaintiff Accuracy in Media ("AIM") moves this Court for entry of partial summary judgment in its favor, and discovery, under Rule 56 of the Federal Rules of Civil Procedure. AIM respectfully seeks an Order:

- (1) Denying defendant's dispositive motion and ordering it to conduct an adequate search for records responsive to each of plaintiffs' eight FOIA Requests;
- (2) Declaring that AIM be accorded status as representatives of the news media and granting it a public interest fee waiver of copying costs;
- (3) Permitting plaintiffs to take discovery on the search issue; and
- (4) That defendant submit certain records to the Court for its inspection *in camera*.

In support of this relief, plaintiff submits the accompanying Statement of Material Facts Not in Genuine Dispute, Memorandum of Points and Authorities, and Statement of Genuine Issues. Additionally, AIM incorporates the Points and Authorities submitted by co-plaintiffs Roger Hall and Studies Solutions Results, Inc., in support of their dispositive

motions, and the affidavits and exhibits thereto, as well as co-plaintiffs' prayers for leave to take discovery and for *in camera* inspections.

Summary

Eight FOIA Requests are at issue. Defendant incorrectly relies on *collateral estoppel* in limiting its search for records responsive to Requests 1, 2, and 3, and in refusing to search at all for records responsive to Request 4. Regarding Requests 5, 6, and 7, defendant refuses to conduct any search, incorrectly relying on the Court's April 2005 Memorandum Order denying fee waivers under plaintiffs' initial Complaint; whereas plaintiffs' Amended Complaint is before the Court. (Moreover, defendant has now claimed to have waived search fees.) Also regarding Requests 5 and 7, defendants assert that a search would be "overly burdensome," notwithstanding the absence of any authority for this argument, and notwithstanding that AIM has narrowed Request 7. Defendant's production under Request 8, requesting search fee estimates made in connection with plaintiffs' February 2003 FOIA Request, is patently inadequate.

DATE: December 17, 2008.

Respectfully submitted,

/s/

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PLAINTIFF ACCURACY IN MEDIA'S STATEMENT
OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Under Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h), plaintiff Accuracy in Media, Inc. (AIM) respectfully submits this Statement of Material Fact to which there is no Genuine Issue.

1. On February 7, 2003, AIM submitted a Freedom of Information Act ("FOIA") request to the Central Intelligence Agency ("CIA"). The Request sought waiver of search and review fees as being a representative of the news media and public interest waiver of copying costs under 5 U.S.C. § 552 (a)(4)(a)(iii) and 5 U.S.C. § 552 (a)(4)(A)(ii)(II). The Request sought the following seven items of information:

Item 1: Records and information pertaining to 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.

Item 2: Records or information pertaining to POW/MIAs sent out of Southeast Asia (for example, to China, Cuban [sic], North Korea, Russia).

Item 3: Records or information prepared and/or assembled by the CIA between January 1, 1960 and December 31, 2002 relating to the status of any United States POW/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;

Item 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;

Item 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, and persons on the Prisoner of War / Missing Personnel Office's list of persons whose primary next-of-kin have authorized the release of information concerning them.

Item 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.

Item 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.

2. On May 19, 2005, plaintiffs filed their Complaint based on the foregoing February 2003 request (Docket # 1).

3. The Court in its April 13, 2005 Memorandum Order held that "plaintiffs may not challenge the CIA's withholding of certain records Hall sought in his May 28, 1998, FOIA request, and the finding that particular records are exempt from the definition of 'agency records' under FOIA. *See Hall v. CIA*, Civil Action No. 98-1319, slip op. at 1, 14-21 (D.D.C. Aug. 10, 2000)." Docket # 30 at 7.

4. The Court's April 13 Memorandum Order (*id.* at 6) specifically noted that the CIA in the *Hall I* decision "failed to establish the adequacy of its search."¹

5. On April 22, 2005, AIM wrote the CIA (Ex A Bates 3-5): "This letter supplements the captioned February 7, 2003, FOIA request made by AIM..." (*id.* at 3), and that "[t]herefore, I am now setting forth a separate showing for AIM's being a member of the news media in light of Judge Kennedy's April 13, 2005, memorandum opinion." (*Id.* at 4)

6. AIM's April 22, 2005 letter (Ex A) also states that "[a]dditionally, AIM intends to disseminate information derived from this request to the public, and, accordingly, seeks waiver of copying costs under 5 U.S.C. 552 (a)(4)(a)(iii)." (*Id.* at 5)

7. On May 26, 2005, the CIA denied AIM's request for a public interest fee waiver² and conditioned acceptance of AIM's fee appeal on AIM's agreement to be bound

¹ April 13 Memorandum Order Docket # 30 at 7:

B. Effect of Previous Litigation

Hall's previous FOIA request, first submitted on May 28, 1998 and later supplemented, sought six categories of records pertaining to POW/MIAs. In the litigation that followed, the court (Friedman, J.) found that the CIA had properly invoked various exemptions to FOIA to justify its withholding and redaction of certain documents, but that the agency failed to establish the adequacy of its search. *Hall v. CIA*, Civil Action No. 98-1319, slip op. (D.D.C. Aug. 10, 2000). Subsequently... the court found that Hall "constructively abandoned his request for documents by refusing to commit to pay for the searches he requested," and dismissed the complaint. *Id.*, slip op. at 5 (D.D.C. Nov. 13, 2003).

² Ex B May 26, 2005 CIA letter Bates 7: "We have determined that the standards for a public interest fee waiver set forth in subpart 1900.13 of title 32 of the Code of Federal Regulations have not been met. Therefore, we deny AIM's request for a fee waiver."

to pay unspecified search fees.³ (Ex B Bates 7-8)

8. On April 26, 2005 AIM made another FOIA Request. (Ext C Bates 10-13, plus attachments) This Request has eight items, the first seven of which are set forth in paragraph one above. The added, eighth Request (*id.* at 7), states:

8. All records of whatever nature pertaining to the estimates of fees made in response to the February 7, 2003 Freedom of Information Act request of Mr. Roger Hall and Studies Solutions Research, Inc., and how each estimate was made.

9. AIM's April 26, 2005 FOIA Request, (Ex C) includes its factual basis for entitlement to both news media and public interest photocopy fee waivers.⁴

³ Ex B CIA May 26, 2005 re exclusion of AIM April 22 letter in administrative record Bates 7-9: "Please note that, in accordance with Agency regulations, because the Agency has started to process your FOIA request, the Agency will only accept your appeal of the fee waiver denial if you agree to be responsible for the costs in the event of an adverse administrative or judicial decision."

⁴ Ex C, AIM's April 26, 2005 FOIA Request Bates 12-13: "AIM is an entity that is organized and operated to publish and broadcast news to the American public. It has been disseminating its analysis of news media reporting for more than 35 years. It disseminates information in several ways *The AIM Report... columns, Briefings...Special Reports... Guest Columns... books... documentaries... website... speaker's bureau... daily radio....* Due to its many efforts, AIM enjoys the ability to convey information to a broad public audience. It is thus clear that AIM gathers information of potential interest to the general public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to its audience. *** Upon disclosure of the records sought, AIM has concrete plans to make the information public... [which] will enhance public understanding of the POW/MIA issue as compared with awareness prior to the disclosure. *** Materials on POW/MIAs will necessarily shed light on the operations or activities of the government. Among other things, they will reveal the extent, nature, intensity, and duration of the Government's efforts to locate POW/MIAs, a subject that has long been of intense interest to the public. Records disclosed to AIM is likely to contribute significantly to public understanding of such operations or activities by disclosing records that have remained secret despite congressional inquiries and Presidential directives to disclose them..."

10. Item 5 of AIM's April 26, 2005 FOIA Request references its attached 44 authorizations executed by next-of-kin of POW/MIAs. (Ex C 44 PNOK Waivers Bates 14-57)

11. The 44 authorizations executed by next-of-kin of POW/MIAs (Ex A at 11-54) contain the following information:

- (1) 31 have the POW/MIA's social security number;
- (2) 39 include his branch of service;
- (3) 20 include the his service number;
- (4) 11 include the another case or reference number;
- (5) 37 include the POW/MIA's date of incident;
- (6) 15 include the POW/MIA's place of incident; and
- (7) 13 contain additional information.

12. Jennifer V. Serex-Helwig's release (*Id.* at 48) identified her then husband "Lt. Colonel Henry M. Serex," POW/MIA incident date "4/2/72." Under "Other information," she wrote: "BATF 21 crew, case # 11811-05, Aerial imagery taken June 1992 revealing 'SEREX' in a rice paddy in North Vietnam."

13. Attached to AIM's April 26, 2005 FOIA Request is Prisoner of War/Missing Personnel Office's list of 1700 POW/MIAs, by full name, whose primary next-of-kin (PNOK) have authorized the release of information concerning them. The alphabetical list includes branch of service and seven digit reference number. *Id.* at 55-

83. Its title page:

Office of the Assistant Secretary of Defense
Defense Prisoner of War/Missing Personnel Office
Declassification/FOIA Division
Vietnam War PNOK "YES" Casualty List
Current as of October 4, 2000

AIM believes that the records it will obtain as a result of this request will shed light on the CIA's operations and activities by revealing that it has withheld information regarding missing POWs from congress and the public..."

14. On June 1, 2005 CIA wrote AIM (Ex D Bates 88-90) regarding AIM's April 26 FOIA Request, refusing to accept both the first seven⁵ as well as the new eighth item,⁶ and claiming that AIM had "no right of administrative appeal."⁷

15. On June 29, 2005, AIM administratively appealed both (1) the CIA's May 26 refusal to accept his April 22 letter without the precondition that AIM agree to liability for search fees, as well as (2) the CIA's June 1 refusal to accept AIM's April 26 FOIA Request. (Ex E Bates 92-95) AIM wrote that it "appeals the fee waiver denial but does not agree to be responsible for any costs in the event of an adverse decision." *Id.* at 94.

⁵ Ex D CIA June 1, 2005 rejecting April 26 FOIA Request no right of Administrative Appeal Bates 88-90: "On 7 February 2003, James Lesar and Joe Jablonski submitted a FOIA request on behalf of their clients, Roger Hall and AIM respectively, in which Mr. Hall and AIM requested records pertaining to seven different items. Items 1 through 7 of your April 26, 2005 request are identical to items 1 through 7 of your 7 February 2003 request. The seven items contained in the 7 February 2003 request are the subject of current litigation (04-0814). For that reason, we will not accept these items as part of this request."

⁶ Ex D CIA June 1, 2005 rejecting April 26 FOIA Request no right of administrative Appeal Bates 88-90: "With regard to item 8, which requests information on fee estimates related to your 7 February 2003 request, this issue is also before the Court in the pending litigation, and we will therefore not accept it as part of this request."

⁷ Ex D CIA June 1, 2005 rejecting April 26 FOIA Request no right of Administrative Appeal Bates 88-90: "[N]o right of administrative appeal exists from our decision not to accept items 1 through 8 of this request."

16. AIM's June 29 administrative appeal (Ex E) observes that the CIA's position that AIM may appeal only if it agrees to be bound to pay unspecified fees violates the FOIA.⁸

17. AIM wrote that "Roger Hall's pending motion for an accounting does not exclude item 8 from the purview of the FOIA." *Id.*

18. AIM submitted its 1971 Articles of Incorporation with its June 29 Administrative Appeal. The Articles state that its purpose is to, *inter alia*, "improve[e]

⁸ Ex E AIM June 29 Administrative Appeal Bates 92-95, at 93: "*See D.C. Technical Assist. Org. v. U.S. Dept. Housing*, 85 F Supp.2d at 48 (D.D.C. 2000): 'The decision of an agency to grant or deny a fee waiver request is reviewed *de novo* looking only to the administrative record before the agency at the time of the decision. 5 U.S.c. (a)4(vii). (The additional supporting documents submitted with plaintiffs motion for summary judgment were not considered in the disposition of this case).'"

AIM submits what it could not in the district court. The CIA is not free to exclude it from the administrative record. "In 1986, Congress amended the statute governing fee waivers for FOIA requests ... The amendment also changed the standard of review to *de novo*, but limited the court's review to the record before the agency." *Larson v. CIA*, 843 F2d at 1481-82 (D.C. Cir. 1988). "The court must limit its review to the administrative record established before the agency." *Judicial Watch, Inc. v. US Dept. of Justice*, 122 F Supp. 2d 13 (D.D.C. 2000), Kennedy, J. The court in *Oglesby v. US Dept. of Army*, 920 F.2d 57 (D.D.C. 1990) remanded in part "to grant petitioner the right, if he chooses, to pursue administrative appeals from the initial agency denials" (at 71).

Moreover, the CIA's regulation that it will not accept AIM's appeal unless it agrees to pay fees in the event of an adverse position is invalid because it violates and is inconsistent with the FOIA. The FOIA gives any request a right of appeal and does not authorize any agency to abrogate it. The right of appeal is provided for in 5 U.S.C. 552(a)(6)(A) and is critical to (1) exhaustion of administrative remedies, (2) when a court has jurisdiction to entertain a FOIA case, (3) when the statute or limitations begins to run, and (4) the composition of the nature of the administrative record on which a Court determines eligibility for a fee waiver.

the accuracy of news media reporting in the mass communication media." *Id.* at 96-99.⁹

19. By July 19, 2005 letter, the CIA changed its position regarding acceptance of AIM's Administrative Appeal (Ex F Bates 101), limited to fee issue(s), writing, "[t]herefore, we are limiting our acceptance of your appeal to the issue of the denial of the fee waiver request."

20. The Court in *Hall I* held, *inter alia*, that "the Agency was not able to produce reliable records of the terms the other directorates had used in their searches." Docket 54-2 Koch Decl. ¶ 21.

21. The CIA relies on the search it conducted under *Hall I* to assert *collateral estoppel* regarding its search for records responsive to Items 1 and 2 and a five of the 42 years of Item 3.¹⁰

⁹ Ex E AIM June 29 Administrative Appeal, AIM 1971 Articles of Incorporation (Bates 96-99, at 97): "The purpose or purposes of the corporation is organized is to promote, encourage, sponsor, support, finance and facilitate communication, education and cooperation among individuals and organizations working in the mass communications media and to conduct, promote, encourage, sponsor, support, finance, and facilitate research, education and information activities and public discussion groups, forums, panels, lectures, and other educational and informational processes in connection with the mass communication media and public understanding thereof with the aim of improving the accuracy of news media reporting in the mass communication media and to work for the adoption by editors and publishers of codes setting forth good journalistic practice relating to accuracy in reporting and the correction of errors."

¹⁰ Docket 54-2 Koch Decl. ¶ 18: "Items 1, 2, and a five-year span of item 3 of Plaintiffs 7 February 2003 request (January 1, 1971 through December 31, 1975) are duplicates of items Hall requested in 1994 and 1998. These items were the subject of prior litigation in *Hall v Central Intelligence Agency* Civil Action No. 98-1319 (D.D.C) (PLF) (Hall I). In connection with the Hall I lawsuit CIA performed numerous searches produced responsive documents, and withheld other documents on the basis of various FOIA exemptions."

22. The CIA allegedly used the same search terms it used in *Hall I* to conduct a search for records responsive to Item 3.¹¹

23. The CIA's October 17, 2008 Vaughn index further describes the *Hall I* search.¹²

24. The CIA relies on *Hall I* for its position that it produced responsive records herein, under *Hall I*.¹³

25. The CIA's *Vaughn* index states that it referred an undisclosed number of nondescript records, responsive to Item 3, to unnamed agencies "for their review and

¹¹ Docket 54-2 Koch Decl. ¶ 23: "CIA has agreed to search and review any responsive documents and to make available to Plaintiffs any non-exempt documents responsive to item 3 that have not already been produced. In other words, CIA will search, review and produce non-exempt documents responsive to Item 3 for the date ranges 1960 to 1970 and 1976 to 2002. CIA has apprised Plaintiffs that the same search terms will be used as were used in connection with the searches conducted during the Hall I..."

¹² DiMaio Decl. ¶ 5: "In addition, this declaration describes the search and review of over 700 documents from one database that the CIA undertook in the *Hall I* case." *See also id.* ¶ 6: "CIA has completed its search for, and its review of records responsive to portions of Item 3 of plaintiffs February 7, 2003 request that do not duplicate plaintiff Hall's previous request and litigation.

¹³ Docket 54-2 Koch Decl. ¶ 19: In connection with Hall I, on 7 November 2005, the Agency made a voluntary disclosure of the 122 documents at issue in that litigation." *See also id.* ¶ 20: "Collectively, the documents voluntarily disclosed to Plaintiffs on 7 November 2005 represent all non-exempt documents that are responsive to items 1, 2, and the 1971 to 1975 portion of item 3 of the 7 February 2003 request at issue here. Therefore, items 1, 2, and the 1971 to 1975 portion of item 3 are administratively closed."

response directly to plaintiffs."¹⁴ DiMaio Decl. ¶ 7.

26. The CIA estimated its search for records responsive to Item 3 would take eighteen months.¹⁵

27. CIA's employs a "need to know" policy,¹⁶ which decentralizes and compartmentalizes its records systems, requiring searches within its "many components,"¹⁷ resulting in "inherent inefficiencies created in the records search and retrieval processes... [and] the process of responding to FOIA/Privacy Act requests." *Id.* ¶ 9.

¹⁴ DiMaio Decl. ¶ 7: "CIA has located information within CIA records responsive to Item 3 that originated from a third agency... Accordingly, I cannot reliably estimate when CIA can complete its processing of documents that are subject to coordination with other agencies. Similarly, CIA also has located records responsive to Item 3 that originated in other federal agencies, which we must refer to those agencies for their review and response directly to plaintiffs."

¹⁵ Docket 54-2 Koch Decl. ¶ 23: "CIA has agreed to search and review any responsive documents and to make available to Plaintiffs any non-exempt documents responsive to item 3 that have not already been produced. In other words, CIA will search, review and produce non-exempt documents responsive to Item 3 for the date ranges 1960 to 1970 and 1976 to 2002. CIA has apprised Plaintiffs that the same search terms will be used as were used in connection with the searches conducted during the *Hall I* and that the search time was estimated to be approximately 18 months."

¹⁶ DiMaio Decl. ¶ 7: "[T]o minimize the potential damage to national security that could result from a spy in the Agency midst [the CIA] limit[s] the amount of information to which any particular employee has access." *Id.* ¶ 8: "CIA limits employee access to information by employing a 'need-to-know' policy... through decentralizing and compartmenting its records systems."

¹⁷ DiMaio Decl. ¶ 10: The CIA has "many components."

28. Regarding the CIA's removal of non-responsive records, applying exemptions, and segregation, "[t]his process is laborious and time-consuming."¹⁸ Regarding responsive records of other CIA components and other agencies, the CIA stated that "[t]his coordination and referral process itself can be quite time-consuming."¹⁹

29. On October 30, 2006, the CIA stated that it must undertake multiple reviews before responding to plaintiffs,²⁰ and that no records would be released until completion of the process.²¹ On October 17, 2008, the CIA stated that "in this case" it need not "review the entire body of material subject to release prior to releasing any of

¹⁸ Docket 54-2 Koch Decl. ¶ 12: "After officers remove the non-responsive documents... determine which, if any, FOIA and Privacy Act exemptions apply, and whether they can reasonably segregate... This process is laborious and time-consuming."

¹⁹ Docket 54-2 Koch Decl. ¶ 13: "In the course of reviewing documents for exempt information and segregability, a component frequently identifies information that it must coordinate with or refer to another CIA component or another agency... This coordination and referral process itself can be quite time-consuming..."

²⁰ Docket 54-2 Koch Decl. ¶ 14: "When all of the components and agencies complete their respective reviews, IMS professionals... incorporate all of their recommendations regarding exemption, segregation, redaction, and release... then conduct a review from a corporate perspective... [to] ensure that the release or withholding determinations comply with law and published CIA regulations, identify additional exempt information that reflects overall CIA equities, ultimately produce the integrated final record copy of each document, and respond to the requestor."

²¹ Docket 54-2 Koch Decl. ¶ 15: "In response to a broad FOIA request, the searches may locate many documents in many components.... reviewers consider all responsive documents in total..."

it..." Docket 109-2 DiMaio Decl. ¶ 8.²²

30. The CIA identified eighty-three records responsive to Item 3 on September 28, 2007.²³

31. The CIA claims to have decided to waive search fees sometime after July 18, 2007.²⁴

32. The CIA disclosed records on September 28, 2007,²⁵ 70 or less days after it waived search fees.

33. The CIA closed Item 4, seeking "[r]ecords of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National

²² Docket 109-2 DiMaio Decl. ¶ 8: "As was explained in the Koch Declaration, CIA cannot normally provide piecemeal responses to FOIA requests, but must review the entire body of material subject to release prior to releasing any of it. However, in this case, CIA determined that, once it had completed its own review, it was appropriate to release any nonexempt records, or portions thereof, that did not require coordination with other agencies, rather than await the other agencies' responses before making a release to the Plaintiff."

²³ Docket 109-2 DiMaio Decl. ¶ 11: "This Supplemental *Vaughn* Index... provides the Court with descriptions of the withholdings on the Item 3 documents which were provided to the Plaintiff on 28 September 2007."

²⁴ See Docket 109-2 DiMaio Decl. ¶¶ 5, 10: "sets forth the decision of the CIA to waive search fees for plaintiffs... On 18 July 2007, the CIA published new regulations on FOIA processing fees. FOIA Processing Fees, 72 Fed. Reg. 39315, 39316 (to be codified at 32 C.F.R. § 1900.02). The CIA does not concede that any of the plaintiffs are news media organizations under either the old or new regulations. As a matter of administrative discretion, however, the Agency will waive search fees in this case."

²⁵ Docket 109-2 DiMaio Decl. ¶ 11: "This Supplemental *Vaughn* Index... provides the Court with descriptions of the withholdings on the Item 3 documents which were provided to the Plaintiff on 28 September 2007."

Archives and returned to the CIA for processing," alleging that none of the subject records originated with the CIA.²⁶

34. CIA undertook no search for records responsive to Item 4. The CIA's *Vaughn* index contains no information concerning records responsive to this Item.

35. The opinion in *Hall I* states that "[i]n preparing its supplemental declarations in this matter, the CIA should confirm that it has independently reviewed all documents of its own creation that were included with the Senate Select Committee documents." [CIA Ex 5 n. 4 at 14]

36. The CIA declined to conduct any search for records of the 44 POW/MIAs identified in the 44 authorizations executed by next-of-kin, nor the 1700 POW/MIAs identified in the PNOK list because, *inter alia*, such a search "would be impossible" without "date and place of birth... because... there would be no way to know whether information... was in fact about the individual listed in the request...."²⁷

37. Broad FOIA searches oftentimes identify "many documents that are not responsive to the request." Docket 54-2 Koch Decl. ¶ 11.

²⁶ Docket 54-2 Koch Decl. ¶ 24: "Item 4 sought 'records of the Senate Select Committee on POW/MIA affairs which were withdrawn from the collection at the National Archives and returned to CIA for processing.' In *Hall I*, the court held that the records sought by item 4 are not 'agency records' subject to FOIA. In light of the court's ruling that these documents are not subject to FOIA, item 4 is closed."

²⁷ Docket 54-2 Koch Decl. ¶ 25: " CIA required the date and place of birth and the full names of the roughly 1700 individuals included in item 5 because, in many cases, individuals might share a similar name. Without a identical identifying information, there would be no way to know whether information discovered through a search for a name, was in fact about the individual listed in the request. Accordingly, without some information to verify the individuals' identities, a search for ascertainably responsive information would be impossible."

38. The CIA's October 30, 2006 Koch Decl. relies on the Court's April 13, 2005 Memorandum Order (Docket # 30), in refusing to search for records responsive to Item 5 absent payment of search fees.²⁸

39. The CIA declined to conduct any search for Item 5 records absent, *inter alia*, plaintiffs' production of a \$50,000 deposit and liability for another half million dollars.²⁹

40. The CIA declined to conduct any search for records of the 1700 POW/MIAs identified in the PNOK list because, *inter alia*, the search names of the POWs whose primary next-of-kin did authorize release may yield the name a POW whose PNOK did not authorize release.³⁰

²⁸ Docket 54-2 Koch Decl. ¶ 29: "In a memorandum opinion dated April 13, 2005, the Court denied Plaintiffs' motions, holding that they did not qualify for fee limitations or a fee waiver...."

²⁹ Docket 54-2 Koch Decl. ¶ 28: "Even if Plaintiffs had provided the additional biographical information... Plaintiffs has failed to submit an advance deposit as required by CIA FOIA regulations. In the 15 June 2004 letter, CIA estimated that the costs of conducting searches for all of the documents requested in items 5, 6 and 7 would amount to \$606,595.00 for the searches alone... CIA required an advance deposit in the amount of \$50,000.00 before processing the request. In response, Plaintiffs chose not to provide the additional biographical information, but to instead seek fee limitations and a fee waiver."

³⁰ Docket 54-2 Koch Decl. ¶ 26: "If the CIA searched for the 1700 names anyway... it still could not release such information to Plaintiff [because] if the information that emerged from the search might relate to someone other than the individual whose next of kin had authorized its release, then the CIA would be obliged to protect that information from disclosure under FOIA exemption (b)(6)."

41. The CIA declined to conduct any search for Item 6 records absent, *inter alia*, plaintiffs' production of a \$50,000 deposit and liability for another half million dollars.³¹

42. Regarding Item 6, the CIA's *Vaughn* index identified two records it produced in August of 2006³² and 18 records it had identified in October 2006.³³

43. CIA asserts exemptions (b)(1), (b)(2), (b)(3), (b)(5), and (b)(6) in these records.³⁴

44. CIA asserts *collateral estoppel* regarding most of its records responsive to Item 6.³⁵

³¹ Docket 54-2 Koch Decl. ¶ 28: "Even if Plaintiffs had provided the additional biographical information... Plaintiffs has failed to submit an advance deposit as required by CIA FOIA regulations. In the 15 June 2004 letter, CIA estimated that the costs of conducting searches for all of the documents requested in items 5, 6 and 7 would amount to \$606,595.00 for the searches alone... CIA required an advance deposit in the amount of \$50,000.00 before processing the request. In response, Plaintiffs chose not to provide the additional biographical information, but to instead seek fee limitations and a fee waiver."

³² Docket 54-2 Koch Decl. ¶ 33: "By letter dated 15 August 2006, CIA provided Plaintiffs copies of the two responsive documents."

³³ Docket 54-2 Koch Decl. ¶ 36: "The non-exempt, responsive documents were provided to both counsel of record for Plaintiffs on 17 October 2006... eighteen documents were produced ... and [a]dditional materials were withheld in their entirety..."

³⁴ Docket 54-2 Koch Decl. 36: "The non-exempt, responsive documents were provided to both counsel of record for Plaintiffs on 17 October 2006.... eighteen documents were produced. Five documents were released in their entirety and thirteen documents contained redactions on the basis of FOIA exemptions (b)(2) (b)(3), (b)(5), and (b)(6). Additional materials were withheld in their entirety on the basis of FOIA exemptions (b)(1), (b)(2), (b)(3) (b)(5), and (b)(6)."

³⁵ Docket 54-2 Koch Decl. ¶ 34: "With respect to the remainder of Item 6... requests, the Agency [filed in]... district court and to Plaintiff Hall in the previous litigation."

45. As of October 2006, Item 7 remained closed because plaintiffs had "failed to submit an advance deposit" to be applied toward search fees. Docket 54-2 Koch Decl. ¶ 39.³⁶ The CIA declined to conduct any search for Item 7 records absent, *inter alia*, plaintiffs' production of a \$50,000 deposit and liability for another half million dollars.³⁷

46. As of October 2006 Item 7 remained closed as the CIA claimed it to be "unreasonably burdensome," and would "require research."³⁸

47. The CIA posits that AIM did not "respond to CIA's invitation to narrow the Item 7 request..." Docket 54-2 Koch Decl. ¶ 39.

48. The CIA is mistaken. By June 13, 2007 letter (Ex G), AIM narrowed Request 7, writing, "AIM hereby narrows that request to exclude all FOIA requests."³⁹

³⁶ Docket 54-2 Koch Decl. ¶ 39: "Rather than pay the required deposit or respond to CIA's invitation to narrow the Item 7 request, Plaintiffs chose to repeatedly renew their requests for fee limitations and fee waivers, in spite of the Court's ruling against them on that very issue.... As such, Item 7 remains closed."

³⁷ Docket 54-2 Koch Decl. ¶ 28: "Even if Plaintiffs had provided the additional biographical information... Plaintiffs has failed to submit an advance deposit as required by CIA FOIA regulations. In the 15 June 2004 letter, CIA estimated that the costs of conducting searches for all of the documents requested in items 5, 6 and 7 would amount to \$606,595.00 for the searches alone... CIA required an advance deposit in the amount of \$50,000.00 before processing the request. In response, Plaintiffs chose not to provide the additional biographical information, but to instead seek fee limitations and a fee waiver."

³⁸ Docket 54-2 Koch Decl. ¶ 37: "imposed such an unreasonably burdensome search requirement... would require... research, going far beyond what the FOIA requires of federal agencies."

³⁹ By June 13, 2007 letter (Ex G at 96) AIM narrowed Request 7: "AIM accepts the CIA's invitation to narrow Request 7, which now states... narrows that request to exclude all FOIA requests, so the request should read 'excluding requests made solely under the Freedom of Information Act.'"

49. The CIA's *Vaughn* index is silent regarding any search for records responsive to Item 8. *See* Docket 54-2 Koch Decl. and Docket 109-2 DiMaio Decl.

50. CIA's refused to accept Item 8, claiming it was the subject of pending litigation. (Ex D CIA June 1, 2005 letter)

51. The CIA was granted a protective order from plaintiff Hall's and SSRI's discovery of the records identified in Item 8. (Docket # 68)

52. The CIA's *Vaughn* index does not state that the CIA properly classified Exemption 1 information under Executive Order 12958. (*See* Docket 54-2 Koch Decl. and Docket 109-2 DiMaio Decl.)

53. CIA withholds all records containing any cryptonym, or pseudonym, or codewords.⁴⁰

54. The purpose of Barry Allen Toll's Affidavit is to recount his knowledge of the location specific Top Secret archives pertaining to American POWs during and after the Vietnam War. (Toll Aff. p. 3⁴¹)

55. Mr. George Carver of the Central Intelligence Agency served as Special Assistant to three different Directors of the CIA on Vietnam matters, and was on loan

⁴⁰ Docket 109-2 DiMaio Decl. ¶ 25: "And by knowing a cryptonym or pseudonym's meaning, a reader may be able to identify the CIA intelligence source or covert employee." Docket 109-2 DiMaio Decl. ¶ 26: "Since these codewords are themselves intelligence methods that also protect other intelligence sources and methods, information that would disclose cryptonyms or pseudonyms is appropriately classified..."

⁴¹ Toll Aff. p. 3: "The limited purpose of this Affidavit, is to recount and attest to my knowledge of the last known locations of specific Top Secret archives, derived from some of the nation's most covert operations and intelligence gathering methods and techniques, pertaining to American Prisoners of War and Missing In Action, both armed service and Central Intelligence Agency personnel during the Third Indochina Conflict, commonly known as the Vietnam War..."

from CIA to the Nixon White House serving as Chairman for the Indochina Subcommittee on Intelligence during the critical Nixon years of the Indochina conflict.

(*Id.* at 12)

56. "[T]he nation's most covert, extensive, and productive strategic intelligence operations... directly flowed their product into the Nixon White House, to George's Indochina Committee on Intelligence.... As such, George was the most informed man in the United States on intelligence in Indochina. His knowledge and awareness was virtually unique. (*Id.*)

57. Toll and Carver were "direct witnesses" to facts recounted in the foregoing two paragraphs. (*Id.* at 14)

58. Toll "delivered intelligence materials in our possession... [including] satellite photos depicting explosive intelligence...", the "satellite imagery show[s] secret symbols..." (*Id.*)

59. At a meeting in the White House in 1993, "George [Carver] proffered CIA documents he'd authored, as late as 1975, going to the Director himself, about Americans still held captive in Indochina in the hundreds. I [Toll] provided CIA documents going to the Director himself, in 1967 and 1969, detailing our certain knowledge of the second tier prison system in Laos, and the numbers of American POWs being held there at the time. Their exact coordinates were noted." (*Id.*)

60. At a meeting in the White House in 1993 Toll asked Carver "all of those intelligence materials and product flowed directly to you in the Nixon White House, did they not?" and George said "Yes" again. (*Id.*)

61. Regarding records referenced in the foregoing paragraph, "George [Carver] said, 'I sent them back to Langley for storage, through the DO,' meaning the Directorate for Operations in the CIA. 'That was the arrangement I had,' he continued, 'usually by courier.'" (*Id.* at 18)

62. Carver stated that [i]f they moved them out of Operations, historically, they would probably be moved to the Director's files... to the Executive Registry Files of CIA..." (*Id.*)

63. If the records have been destroyed, there will be a record of it. (*Id.* at 19)

64. CIA has failed to search the archive of records referenced in the foregoing paragraphs 58 through 61, stored at its Langley facility.

65. Former Congressman John LeBoutillier has "personal knowledge of several POW-related incidents where the CIA has had documents that have not been publicly acknowledged or released." (LeBoutillier Decl. ¶ 7)

66. "From October, 1980 through February, 1981 [LeBoutillier] was briefed, as a member of the House Special POW/MIA Task Force, on the construction in Laos at Nhom Marrott of a prison camp. We were shown aerial reconnaissance photographs showing the month-by-month progress of this construction project... also confirmed by radio traffic intercepts." (*Id.* ¶ 8)

67. "[T]he photographs and intercepts we were shown were CIA documents." "To my knowledge, these documents have never been released by the agency." (*Id.* ¶ 9)

68. "[O]fficials of US AID met with Ed Meese and CIA Director Casey and a shipment of \$200,000 of medical supplies was approved as good faith evidence of our

intent to work with the Laotian government... I know the CIA was involved in both the decision to approve and stop these shipments." (*Id.* ¶ 11)

69. "[A]ll live sighting reports that came into the [US] embassy [in Laos] went directly to the CIA Station Chief." (*Id.* ¶ 12)

70. "A United Nations Official in Laos in 1981... saw Caucasian men working on a road under armed guards... [who were identified as] American prisoners left over from the War." (*Id.* ¶ 13)

71. "To my knowledge, no reports have ever been made public by the CIA." (*Id.* ¶ 13)

72. CIA's productions are devoid of records referred to in paragraphs 65 through 71. *See* Hall Decl.

73. Honorable Bill Hendon authored "*An Enormous Crime, The Definitive Account of American POWs Abandoned in Southeast Asia*. The book, ten years in the writing... is the history of living American POWs left behind in Vietnam and Laos at war's end; an account of the circumstances that left them there and what the intelligence indicates they have endured in the years since." (Hendon Aff. ¶ 1)

74. "When the American government withdrew its forces from Vietnam in 1973, it knowingly left hundreds of U.S. POWs in Communist captivity. (See *An Enormous Crime*, Chapter 9)." (*Id.*)

75. "Since Operation Homecoming in 1973, there have been hundreds of postwar sightings and intelligence reports of Americans being held captive throughout Vietnam and Laos, and numerous secret military signals and codes and messages sent from desperate POWs." (*Id.* ¶ 3)

76. Hendon has "personal knowledge of several incidents where the CIA has had intelligence on living POWs that has not been publicly acknowledged and/or released." (*Id.* ¶ 4)

77. CIA Director Casey shared with Hendon and the Hon. John LeBoutillier "either satellite imagery or aerial photography which showed laundry arranged in the form of escape and evasion codes on the roof of the Tran Phu prison in Haiphong, North Vietnam... and Directory Casey stated that only an imprisoned u.s. flyer could have made the codes on the prison roof." (*Id.* ¶ 8)

78. Hendon is "certain the CIA was in possession of this imagery in 1981 and I believe it is still in possession of this imagery." (*Id.* ¶ 9)

79. In early 1981, Hendon was briefed as a member of the House POW/MIA Task Force by officials regarding a prison camp near Nhom Marrott, Laos, and was "shown aerial/satellite photographs... also confirmed by radio traffic intercepts. American POWs were reliably reported to be in the camp... In addition, an escape and evasion code was imaged inside the camp," which Hendon saw. (*Id.* ¶ 9)

80. Hendon "believes that the CIA is in possession of both the above described satellite imagery and hand held photography." (*Id.*)

81. "Air Force Lt. Col. (then-Major) Henry M. "Mick" Serex, an electronic warfare officer, went missing on April 2, 1972, when his EB-66, code-named "Bat 21," was shot down over the Demilitarized Zone while accompanying a B-52 strike during the Easter invasion.... Air Force records indicate Bat 21 was hit by a surface-to-air missile while flying at an altitude of approximately twenty-six thousand feet. An intercepted

PAVN radio communication reported the shutdown and stated that PAVN personnel had "sighted orange parachutes in the area." (*Id.* ¶ 12)

82. Before the Senate Select Committee, twenty-six-year veteran Robert G. Dussault testified that "while studying recent (June 5, 1992) satellite imagery of the Dong Val (Dong Mang) Prison north of Hon Gai, he and one of his associates discovered a valid escape and evasion code in a field just west of the prison and above it the name of a missing USAF flight officer. The deputy director would later testify formally what he and his associate had seen:

A. I saw up at the CIA, very clearly to me there was the name S-E-R-E-X.

Q. Capital letters?

A. Yes, and it was in a field just outside the...[Dong Vai Prison], and there was a number above it and there was the name SEREX, and below it, as I remember now, 72//TA/88."

(*Id.* ¶ 12)

83. "Satellite imagery imaged in 1975 and analyzed in mid-1976 had shown what CIA and DOD photo interpreters believed at the time was a valid USAF/USN Escape and Evasion code at this same Dong Vai (Dong Mang) prison.... In addition, approximately a half dozen postwar HUMINT (human intelligence) reports had told of US POWs being detained at the prison both during and after the war...." in 1976, 1979, and 1982. [footnotes omitted] (*Id.* ¶ 16)

84. Hendon "believes that the CIA is in possession of the original unadulterated satellite imagery described above. (*Id.*)

85. "During the closed briefings, held on October 2 and 5 1992, Dussault... stunned those [Senators] present by declaring that, while recently reviewing 1988 imagery of Laos, he and his associates had discovered nineteen four-digit numbers that matched the four-digit authenticators of known MIAs..." (*Id.* ¶ 21)

86. Hendon "believes that the CIA is in possession of this imagery." *Id.* ¶ 22)

87. In 1986, White House US Secret Service Agent John Syphrit told Hendon "that, while stationed in the hallway just outside the Oval Office in late January 1981, he observed and heard the following: President Reagan, Vice-President Bush, Director-designate of the CIA William Casey, and National Security Advisor Richard Allen emerged from the Oval Office and, pausing in the hallway, en route to the Cabinet Room, briefly discussed an offer made by the Vietnamese government to the Reagan Administration to trade the American POWs they were holding in return for payment of some four billion dollars." (*Id.* ¶ 25)

88. CIA's productions are devoid of records referred to in paragraphs 65 through 87. *See* Hall Decl.

DATE: December 17, 2008.

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 04-0814 (HHK)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF
ACCURACY IN MEDIA'S CROSS-MOTION FOR SUMMARY JUDGMENT
AND
OPPOSITION TO CIA DISPOSITIVE MOTIONS

Plaintiff Accuracy in Media, Inc. ("AIM"), respectfully submits this memorandum in support of entry of summary judgment in its favor.

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I. FACTS

A. Predecessor Complaint

On May 19, 2005, plaintiffs filed their Complaint based on their February 2003 FOIA request (Docket # 1).

The Court in its April 13, 2005 Memorandum Order (Docket # 30), *inter alia*, denied plaintiffs' motions for fee waivers and held that "plaintiffs may not challenge the CIA's withholding of certain records Hall sought in his May 28, 1998, FOIA request, and the finding that particular records are exempt from the definition of 'agency records' under FOIA. *See Hall v. CIA*, Civil Action No. 98-1319, slip op. at 1, 14-21 (D.D.C. Aug. 10, 2000)." Docket # 30 at 7.

The Court also held that the CIA had "failed to establish the adequacy of its search." *Id.*

B. Administrative Record¹

1. CIA denial of right to supplement administrative record

On April 22, 2005, AIM wrote the CIA (Ex A Bates 3-5), "supplement[ing] the captioned February 7, 2003, FOIA request [and fee waivers] made by AIM..." (*id.* at 3), "now setting forth a separate showing for AIM's being a member of the news media in light of Judge Kennedy's April 13, 2005, memorandum opinion." *Id.* at 4.

On May 26, 2005, the CIA denied AIM's request for a public interest fee waiver (Ex B CIA May 26, 2005 letter at Bates 7) and conditioned acceptance of AIM's fee appeal on AIM's agreement to be bound to pay an unspecified sum in search fees. *Id.* at 7-8.

2. CIA refusal to accept FOIA Request and denial of right to administrative appeal

On April 26, 2005 AIM made another FOIA Request. (Ext C Bates 10-13, plus attachments) This Request seeks records of eight items, summarized below.

- (1) Southeast Asia POW/MIAs who have not returned or whose remains have not been returned regardless of whether they were sent out of Southeast Asia.

¹ Filed herewith as Attachment 1, Administrative Record:

Ex A AIM April 22, 2005 letter for inclusion in administrative record

Ex B CIA May 26, 2005 re exclusion of AIM April 22 letter in administrative record

Ex C AIM April 26, 2005 FOIA Request, attached 44 PNOK Waivers, attached PNOK authorized list

Ex D CIA June 1, 2005 rejecting April 26 FOIA Request – with no right of administrative Appeal

Ex E AIM June 29 Administrative Appeal, attached AIM Articles of Incorporation

Ex F CIA July 19, 2005 re acceptance for inclusion in administrative record limited to search fee waivers

Ex G AIM June 13, 2007 letter narrowing Request 7

- (2) POW/MIAs sent out of Southeast Asia.
- (3) Information obtained between January 1, 1960 and December 31, 2002 relating to the status of any United States POW/MIAs in Laos.
- (4) Senate Select Committee's on POW/MIA Affairs' archive that was returned to the CIA for processing.
- (5) 47 Vietnam POW/MIAs whose next-of-kin (PNOK) have provided attached privacy waivers, and the 1,700 listed on the attached POW/Missing-Personnel-Office list of POW/MIAs whose PNOK have also authorized release.
- (6) Searches conducted in *Hall I*.
- (7) Any search conducted regarding any other requests for records pertaining to Vietnam War POW/MIAs, including in response to any request by any Congressional Committee or executive branch agency.
- (8) Search fee estimates made in connection with plaintiffs' February 2003 FOIA Request.

On June 1, 2005 CIA wrote AIM (Ex D Bates 88-90) regarding AIM's April 26 FOIA Request, refusing to accept both the first seven as well as the new eighth item, writing that "no right of administrative appeal exists from our decision not to accept items 1 through 8 of this request." *Id.* at 90.

3. AIM's administrative appeal

On June 29, 2005, AIM administratively appealed both (1) the CIA's May 26 refusal to accept his April 22 letter without the precondition that AIM agree to liability for search fees, as well as (2) the CIA's June 1 refusal to accept AIM's April 26 FOIA Request. Ex E Bates 92-95. AIM wrote that it "appeals the fee waiver denial but does not agree to be responsible for any costs in the event of an adverse decision." *Id.* at 94.

4. CIA limits appeal to fee waiver issues

By July 19, 2005 letter, the CIA changed its position regarding acceptance of AIM's Administrative Appeal, limited to fee issue(s), writing, "[t]herefore, we are limiting our acceptance of your appeal to the issue of the denial of the fee waiver request." Ex F Bates 101.

II. ARGUMENT

A. Items 1, 2, and 3

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. Records or information pertaining to POW/MIAs sent out of Southeast Asia (for example, to China, Cuban [sic], North Korea, Russia).
3. Records or information prepared and/or assembled by the CIA between January 1, 1960 and December 31, 2002 relating to the status of any United States POW/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;

The CIA claims to have waived search fees and satisfied its obligations to adequately search for, and disclose, all responsive records,² except for an undisclosed number that have been referred to other federal agencies for their review and response.

As noted above, the Court's Memorandum Order (Docket # 30) limited the application of *collateral estoppel* to finding that, after *Hall I*, "plaintiffs may not challenge the CIA's withholding of certain records Hall sought in his May 28, 1998,

² CIA MSJ at 26: "The initial production and the second set of documents voluntarily released, collectively represent all non-exempt, responsive documents at issue here, as outlined in items 1, 2 and a five-year portion of item 3."

FOIA request, and the finding that particular records are exempt from the definition of 'agency records' under FOIA," and that the CIA had "failed to establish the adequacy of its search." Docket # 30 at 7. The CIA itself acknowledges one reason for the *Hall I* holding was that "the Agency was not able to produce reliable records of the terms the other directorates had used in their searches." October 30, 2006, Koch Decl. ¶ 21.

Moreover, AIM was not a party in *Hall I*.

Contrary to the government's claims about Judge Friedman's August 10, 2000 Order (CIA Ex 4), the court there held that "the CIA has not satisfied its burden of establishing that the search was adequate" (at 8), that it "cannot judge in either case whether the CIA's searches conducted after November 11, 1993 were adequate" (at 11), and that "plaintiff's request should have been read to include photographs" (at 12).

Notwithstanding this Court's and Judge Friedman's holdings, the CIA relies on the searches it conducted under *Hall I*,³ including the search terms employed,⁴ and the

³ Koch Decl. ¶ 18: "Items 1, 2, and a five-year span of item 3 of Plaintiffs 7 February 2003 request (January 1, 1971 through December 31, 1975) are duplicates of items Hall requested in 1994 and 1998. These items were the subject of prior litigation in *Hall v Central Intelligence Agency* Civil Action No. 98-1319 (D.D.C) (PLF) (Hall I). In connection with the Hall I lawsuit CIA performed numerous searches produced responsive documents, and withheld other documents on the basis of various FOIA exemptions."

⁴ *Id.* ¶ 23: "CIA has agreed to search and review any responsive documents and to make available to Plaintiffs any non-exempt documents responsive to item 3 that have not already been produced. In other words, CIA will search, review and produce non-exempt documents responsive to Item 3 for the date ranges 1960 to 1970 and 1976 to 2002. CIA has apprised Plaintiffs that the same search terms will be used as were used in connection with the searches conducted during the Hall I..."

productions of records made in that case.⁵ The government's *Vaughn* index is largely an expanded version of its *Vaughn* index of the records it provided in *Hall I*.

The government's law of the case argument⁶ ignores that the Court's April 2005 Memorandum Order was based on plaintiffs' initial Complaint, not their Amended Complaint. Where a court rules based on the administrative record in a FOIA case, a plaintiff may re-file his request, and lawsuit, to include a new administrative record, because each FOIA request creates a cause of action. Indeed, the Court's review is limited "only to the administrative record before the agency at the time of the decision."⁷ The government is aware of this feature of the FOIA.

⁵ *Id.* ¶ 19: In connection with *Hall I*, on 7 November 2005, the Agency made a voluntary disclosure of the 122 documents at issue in that litigation." *See also id.* ¶ 20: "Collectively, the documents voluntarily disclosed to Plaintiffs on 7 November 2005 represent all non-exempt documents that are responsive to items 1, 2, and the 1971 to 1975 portion of item 3 of the 7 February 2003 request at issue here. Therefore, items 1, 2, and the 1971 to 1975 portion of item 3 are administratively closed."

⁶ CIA MSJ at 12: "[Under doctrine of law of the case] a court should not reopen issues decided in earlier stages of the same litigation.... *See also LaShawn A. V. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en bane) (holding that the *same* issue presented a second time in the *same* case in the *same* court should lead to the *same* result.)..."

⁷ *See D.C. Technical Assist. Org. v. U.S. Dept. Housing*, 85 F. Supp.2d at 48 (D.D.C. 2000): "The decision of an agency to grant or deny a fee waiver request is reviewed *de novo* looking only to the administrative record before the agency at the time of the decision. 5 U.S.C. (a)4(vii). (The additional supporting documents submitted with plaintiff's motion for summary judgment were not considered in the disposition of this case)."

B. Item 4

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.

The CIA claims that "[i]n *Hall I*, the court held that the records sought by item 4 are not 'agency records' subject to FOIA." Koch Decl. ¶ 24. This is not so. The opinion in *Hall I* states that "[i]n preparing its supplemental declarations in this matter, the CIA should confirm that it has independently reviewed all documents of its own creation that were included with the Senate Select Committee documents." CIA Ex 5 n. 4 at 14.

The CIA's *Vaughn* index is devoid of information concerning records responsive to Item 4, and it undertook no search for them.

An adequate search would include its office that handles liaison with the Senate.

C. Item 5

5. Records relating to 47 [sic] individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, and persons on the Prisoner of War / Missing Personnel Office's list of persons whose primary next-of-kin have authorized the release of information concerning them.

1. 44 POW/MIAs identified in PNOK authorizations

Conspicuously absent from the CIA's *Vaughn* index is any specific reference to these 44⁸ Primary-next-of-kin (PNOK) waivers. (The government did specifically address the list of the 1,700 PNOK releases, discussed below.) The CIA declined to conduct any search for records of the 44 POW/MIAs identified in the 44 authorizations executed by next-of-kin because such a search "would be impossible" without "date and

⁸ Plaintiffs' FOIA Request mistakenly stated the number of PNOK releases as 47, not 44.

place of birth... because... there would be no way to know whether information... was in fact about the individual listed in the request...."⁹

Lieutenant Colonel Henry M. Serex is one of these 44 POWs. The CIA's position is belied by the record:

- Jennifer V. Serex-Helwig's release (Ex C at 48) identified her then husband "Lt. Colonel Henry M. Serex," POW/MIA incident date "4/2/72." Under "Other information," she wrote: "BATF 21 crew, case # 11811-05, Aerial imagery taken June 1992 revealing 'SEREX' in a rice paddy in North Vietnam."
- Affidavit of Hon. Bill Hendon ¶ 12: "Air Force Lt. Col. (then-Major) Henry M. "Mick" Serex, an electronic warfare officer, went missing on April 2, 1972, when his EB-66, code-named "Bat 21," was shot down over the Demilitarized Zone while accompanying a B-52 strike during the Easter invasion.... Air Force records indicate Bat 21 was hit by a surface-to-air missile while flying at an altitude of approximately twenty-six thousand feet. An intercepted PAVN radio communication reported the shootdown and stated that PAVN personnel had "sighted orange parachutes in the area."
- *Id.* ¶ 12: Before the Senate Select Committee, twenty-six-year veteran Robert G. Dussault testified that "while studying recent (June 5, 1992) satellite imagery of the Dong Val (Dong Mang) Prison north of Hon Gai, he and one of his associates discovered a valid escape and evasion code in a field just west of the prison and above it the name of a missing USAF flight officer. The deputy director would later testify formally what he and his associate had seen:
 - A. I saw up at the CIA, very clearly to me there was the name S-E-R-E-X.
 - Q. Capital letters?
 - A. Yes, and it was in a field just outside the...[Dong Vai Prison], and there was a number above it and there was the

⁹ Koch Decl. ¶ 25: "CIA required the date and place of birth and the full names of the roughly 1700 individuals included in item 5 because, in many cases, individuals might share a similar name. Without a identical identifying information, there would be no way to know whether information discovered through a search for a name, was in fact about the individual listed in the request. Accordingly, without some information to verify the individuals' identities, a search for ascertainably responsive information would be impossible."

name SEREX, and below it, as I remember now,
72//TA/88.

The CIA's claim of the impossibility of searching for the satellite image of the Lieutenant Colonel Henry M. Serex's 1992 plea for help defies common sense.

The chart below demonstrates that the 44 authorizations (Ex A at 11-54) contain the following information:

- (1) 31 have the POW/MIA's social security number;
- (2) 39 include his branch of service;
- (3) 20 include the his service number;
- (4) 11 include the another case or reference number;
- (5) 37 include the POW/MIA's date of incident;
- (6) 15 include the POW/MIA's place of incident; and
- (7) 13 contain additional information.

See Hall Aff. ¶ 34.

The CIA's claim that it would be "impossible" to conduct searches for the records of the other 43 POW/MIAs is also not made in good faith.

2. **PNOK authorized list**

The *Prisoner of War/Missing Personnel Office's* list of 1700 POW/MIAs, by full name, whose PNOK have authorized the release of information concerning them, is attached to AIM's FOIA Request. Ex C at 55-83. That alphabetical list includes branch of service and seven digit reference number. *Id.* at 55-83. Its title page:

Office of the Assistant Secretary of Defense
Defense Prisoner of War/Missing Personnel Office
Declassification/FOIA Division
Vietnam War PNOK "YES" Casualty List
Current as of October 4, 2000

The record herein also contains the date and country and location of the POW's capture, as well the identification of any aircraft or vehicle. *See* Second Revised Hall Decl. ¶ 35.

Here too the CIA declined to conduct any search for records of these POW/MIAs because such a search "would be impossible" without "date and place of birth... because... there would be no way to know whether information... was in fact about the individual listed in the request...." Koch Decl. ¶ 25. Again, the CIA's claim of the impossibility of searching for records of these POW/MIAs is not made in good faith.

And the CIA refused an Item 5 search reasoning, as it were, that a search of the names of the POWs whose primary next-of-kin did authorize release may yield the name a POW whose PNOK did not authorize release.¹⁰ (The CIA acknowledges that FOIA searches oftentimes identify "many documents that are not responsive to the request." Koch Decl. ¶ 11.)

3. Search fees

The CIA's October 30, 2006 Koch Decl. relies on the Court's April 13, 2005 Memorandum Order (Docket # 30), in refusing to search for records responsive to Item 5 (6, and 7) absent payment of search fees,¹¹ requesting, *inter alia*, plaintiffs' production of a \$50,000 deposit and liability for another half million dollars.¹²

¹⁰ Koch Decl. ¶ 26: "If the CIA searched for the 1700 names anyway... it still could not release such information to Plaintiff [because] if the information that emerged from the search might relate to someone other than the individual whose next of kin had authorized its release, then the CIA would be obliged to protect that information from disclosure under FOIA exemption (b)(6)."

¹¹ *Id.* ¶ 29: "In a memorandum opinion dated April 13, 2005, the Court denied Plaintiffs' motions, holding that they did not qualify for fee limitations or a fee waiver...."

¹² *Id.* ¶ 28: "Even if Plaintiffs had provided the additional biographical information... failed to submit an advance deposit... CIA estimated that the costs of conducting searches for all of the documents requested in items 5, 6 and 7 would amount to \$606,595.00 for the searches alone... CIA required an advance deposit in the amount of \$50,000.00 before processing the request."

Significantly, the CIA now claims to have decided to waive search fees in this case. The CIA's entire discussion of its recent decision to waive search fees is in the CIA's DiMaio Declaration, as follows, ¶¶ 5, 10:

[This Declaration] sets forth the decision of the CIA to waive search fees for plaintiffs... On 18 July 2007, the CIA published new regulations on FOIA processing fees. FOIA Processing Fees, 72 Fed. Reg. 39315, 39316 (to be codified at 32 C.F.R. § 1900.02). The CIA does not concede that any of the plaintiffs are news media organizations under either the old or new regulations. As a matter of administrative discretion, however, the Agency will waive search fees in this case.

D. Item 6

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.

1. Search fees

The CIA's October 30, 2006 Koch Decl. relies on the Court's April 13, 2005 Memorandum Order (Docket # 30),¹³ in refusing to search for records responsive to Item 6 (and 5 and 7) absent payment of \$50,000 as a deposit on search fees and liability for another half million dollars. Koch Decl. ¶ 28. But here too the CIA waived search fees. DiMaio Decl. ¶¶ 5, 10.

¹³ Decl. ¶ 29: "In a memorandum opinion dated April 13, 2005, the Court denied Plaintiffs' motions, holding that they did not qualify for fee limitations or a fee waiver...."

2. Exemptions

The CIA's "*Vaughn* Index for Documents Responsive to Item 6 is deficient as having failed to provide a single estimate or hourly rate. *See* Hall's dispositive motion.

Regarding Item 6, the CIA's *Vaughn* index incorporates by reference *Hall I* records,¹⁴ identified two records it produced in August of 2006,¹⁵ and 18 records it had identified in October 2006.¹⁶

It asserts Exemptions (b)(1), (b)(2), (b)(3), (b)(5), and (b)(6) in these records.¹⁷

Exemption 1. The CIA has claimed Exemption 1 for two documents, *Vaughn* index Nos. 14, and 31. Exemption 1 provides that the mandatory disclosure provisions of the Act do not apply to matters that are:

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.

Thus, under Exemption 1, an agency must demonstrate that the information is in fact properly classified pursuant to both procedural and substantive criteria contained in the Executive Order.

¹⁴ Koch Decl. ¶ 34: "With respect to the remainder of Item 6... requests, the Agency [filed in]... district court and to Plaintiff Hall in the previous litigation."

¹⁵ *Id.* ¶ 33: "By letter dated 15 August 2006, CIA provided Plaintiffs copies of the two responsive documents."

¹⁶ *Id.* ¶ 36: The non-exempt, responsive documents were provided to both counsel of record for Plaintiffs on 17 October 2006... eighteen documents were produced ... and [a]dditional materials were withheld in their entirety..."

¹⁷ *Id.* ¶ 36: "The non-exempt, responsive documents were provided to both counsel of record for Plaintiffs on 17 October 2006.... eighteen documents were produced. Five documents were released in their entirety and thirteen documents contained redactions on the basis of FOIA exemptions (b)(2) (b)(3), (b)(5), and (b)(6). Additional materials were withheld in their entirety on the basis of FOIA exemptions (b)(1), (b)(2), (b)(3) (b)(5), and (b)(6)."

The CIA has made no showing that the information it seeks to protect under Exemption 1 is properly classified procedurally. It has submitted no affidavit that said documents have all of the markings required by Executive Order 12958. This Executive order is intended to take account of the end of the Cold War, and thus to bring about broad scale declassification of antiquated secrets. *See Summers v. Department of Justice*, 140 P.3d 1077, 1082 (D.C.Cir. 1998) (Significantly, the newer order is less restrictive, reflecting what it refers to as "dramatic changes" in national security concerns in the late 1980s following the United States' victory in the Cold War.)

While the two documents said to have classified information bear recent dates, the allegedly classified material in them must certainly relate to historical matters of the Cold War period.

"This circuit holds a strong presumption against prolonged withholding of information whose sensitivity may have diminished with age." *Keenan v. Dept. of Justice*, civil Action No. 94-1909 (D.D.C. March 24, 1997). (Exhibit 5 to plaintiff Hall and SSRI's motions for partial summary judgment.

The War in Vietnam has long been over.

Exemption 2. The CIA has invoked Exemption 2 for 12 documents, *Vaughn* index Nos. 1, 17, 20, 22, 23, 24.26, 27, 28, 29, 30, and 32, but it has provided no description of the materials withheld.

Exemption 2 exempts disclosure of matters that are "related solely to the internal personnel rules and practices of an agency" from mandatory disclosure. 5 U.S.C. § 552 (b)(2). As disclosure would confirm plaintiffs' contention that the CIA acted in bad faith in generating the three estimates in *Hall I*, it can hardly be said to relate to trivial

administrative matters of no genuine public interest.

Exemption 3. The CIA asserts that "names of CIA officers, components, and telephone extensions, that is protected by section 6 of the Central Intelligence Agency Act of 1949, 50 U.S.C.A. § 403(g), and thus is withheld on the basis of FOIA exemption (b)(3)... This type of information pertaining to names of CIA officials and their particulars has been properly withheld... [under] exemption (b)(3)." (CIA MSJ at 27).

Plaintiffs agree, and, thus, do not challenge the CIA's redactions of names and identifying information under Exemption (b)(3).

Exemption 5. Exemption 5, 5 U.S.C. § 552(b)(5), provides that the FOIA does not apply to matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than the agency in litigation with the agency."

The CIA invokes three of Exemption 5's privileges: (1) deliberative process, (2) attorney-client, and (3) attorney work product. The deliberative process privilege is invoked for *Vaughn* index Nos. 2, 3, 5, 30(a), 30(b), 30(c), 30(e), 30(f), 30(g), 30(h), 32, and 33. In Nos. 2, 3, 6, and 31, it is invoked for the attorney-client and work product privileges, and in Nos. 30, 32, and 33, it is the only privilege invoked. With regard to all other Exemption 5 claims, attorney-client privilege and the work product privilege are asserted.

But its *Vaughn* index fails to indicate which privilege applies to which parts of a document, and the CIA does not even assert that there are no segregable nonexempt portions of the records.

To qualify under the deliberative process privilege, a record must be "so candid or

personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency." *Coastal States Gas Corp. v. Department of the Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Here, the identities of the author and recipient have been deleted, and so disclosure could not stifle communications within the agency, as the court held in *Hoch v. C.I.A.*, 593 F. Supp. 675, 689 (D.D.C. 1984); "given the anonymity of [the blind memorandum], [the CIA] has failed to show by specific and detailed proof that disclosure of this document would defeat rather than further the purposes of FOIA."

Where an agency is making a final decision "chooses to adopt or incorporate by reference a predecisional recommendation, that document loses its protection under Exemption 5. *NLRB v. Sears*, 421 U.S. at 161. This principle applies to a wide range of Agency recommendations, and to "formal or informal adoption." *Coastal States (supra)* 617 F.2d at 866.

For the attorney-client privilege to apply, the communications must have been made in confidence. *See Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 83 (N.D.N.Y. 2003). Here, the CIA makes no such showing.

To assess a fee, CIA search personnel must record costs on some document. (The CIA's records refer to a "cost sheet.") The CIA asserted on three different occasions that Hall had incurred specific amounts of costs in connection with his request. Plaintiffs have not been provided *any* such records. Here, the CIA stands charged of bad faith by greatly inflating or misrepresenting the amount of search fees to be charged, and, thus, these records should be disclosed first.

Moreover, as the D.C. Circuit noted in *In Re Sealed Case*, 678 F.2d 793, 907,

(D.C. Cir 1982), "two common law doctrines gave courts a limited ability to make sure privileges do not serve ends to which they were not intended are (1) exception and (2) implied waiver. Exception is applicable where a privileged relationship is used to further a crime, fraud, or other misconduct. Here, the evidence indicates that the privilege is being used to further misconduct which occurred in *Hall I* when the CIA sent Hall greatly inflated demands for payment of fees. Implied waiver is present when the conduct "touches a certain point of disclosure" and "fairness requires" that there is no privilege. That circumstance is present – the CIA asserted in court proceedings on three different occasions that Hall would incur a specific amount to search the same request.

Exemption 6. The CIA has invoked Exemption 6 for *Vaughn* index document No. 1. Exemption 6, 5 U.S.C. § 552(b) (6), permits nondisclosure of matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The language "clearly unwarranted" "instructs the court to tilt the balance in favor of disclosure." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir.1971).

The CIA's only showing with regard to its Exemption 6 claim is that the withheld information "relates to particular identifiable individuals, the disclosure of which could constitute an invasion of privacy." *Vaughn* index at 2. Such a sweeping observation clearly does not meet the statutory standard of disclosure "constitut[ing] a clearly unwarranted invasion of personal privacy." As with all exemptions, the burden is on the government to show its applicability.

E. Item 7

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.

1. **Search fees**

Here too the CIA refused to conduct any search because, *inter alia*, plaintiff had not submitted a \$50,000 (Koch Decl. ¶ 28), yet, now, has (allegedly) waived search fees. DiMaio Decl. ¶¶ 5, 10.

2. **Claims of burdensome and requiring research**

The CIA closed Item 7 as being "unreasonably burdensome" and "requir[ing] research."¹⁸ In 1989 the Supreme Court recited that the FOIA is intended to "shed light on an agency's performance of its statutory duties" and that its "central purpose is to ensure that the government's activities be opened to the sharp eye of public scrutiny." *United States Department of Justice v. Reporters Committee For Freedom Of The Press*, 489 U.S. 749, 772-74 (1989). Plaintiffs' request for history of the CIA's searches for POW/MIA records falls squarely within the FOIA's statutory purpose of shedding light on the inner workings of government. The fact that a search may be burdensome does not entitle an agency to relief from the FOIA's mandate of disclosure.

There is no exemption for a search being unduly burdensome, and the CIA cites no authority in support of its position.

¹⁸ *Id.* ¶ 37: "[I]mposed such an unreasonably burdensome search requirement... would require... research, going far beyond what the FOIA requires of federal agencies."

3. Request narrowed

Moreover, Item 7 is no longer burdensome.

The CIA posits that AIM did not "respond to CIA's invitation to narrow the Item 7 request..." Koch Decl. ¶ 39. The CIA is mistaken. By June 13, 2007 letter (Ex G at Bates 103-104), AIM narrowed Request 7, writing, "AIM hereby narrows that request to exclude all FOIA requests."¹⁹

The CIA failed to search for records responsive to Item 7.

Because Item 7 no longer includes FOIA requests, an adequate search would include its office that handles liaison with the Senate, as under Item 4.

F. Item 8

8. All records of whatever nature pertaining to the estimates of fees made in response to the February 7, 2003 Freedom of Information Act request of Mr. Roger Hall and Studies Solutions Research, Inc., and how each estimate was made.

Defendant's history of using the fee provisions of the FOIA to refuse searches pervades this action, including litigation of plaintiffs' May 2004 Complaint (Docket #1), which was adjudicated by the Court in its April 13, 2005 Memorandum Order (Docket # 30). Moreover, the CIA's refusal to conduct searches for some of the records sought herein, absent payment of search fees, predates this action, by years. The court in *Hall I* dismissed Hall's Complaint, holding, *inter alia*, that he had constructively abandoned his Request by failure to commit to pay search fees.

¹⁹ By June 13, 2007 letter (Ex G at 96) AIM narrowed Request 7: "AIM accepts the CIA's invitation to narrow Request 7... to exclude all FOIA requests, so the request should read 'excluding requests made solely under the Freedom of Information Act.... I suggest we enter a stipulation.'"

On June 1, 2005, the CIA declined to accept FOIA Request 8, claiming it was the subject of pending litigation (Ex D at 89), referring to Hall's then-pending motion for an accounting, discussed *supra*. (Neither of the CIA's Declarations even refers to Item 8.) Two years after having refused to accept the request, on July 13, 2007,²⁰ the CIA released four documents, and withheld another 18 in their entirety under Exemptions (b)(1), (b)(2), (b)(3), (b)(4) and (b)(5).²¹

Plaintiffs believe that the CIA's production of records responsive to Item 8, as well as to Item 6, will demonstrate the CIA's pattern and practice of abusing the FOIA's search fee provisions, to avoid disclosing the records at issue.

²⁰ CIA MSJ at 17: "On or about July 13, 2007, the Agency... released four documents, three of which were provided to Plaintiffs' in segregable form, and the other was released in its entirety. The Agency claimed exemptions (b)(2) and (3) for withholding certain portions of the three segregable documents. Additional materials were withheld in their entirety pursuant to FOIA exemptions (b)(1), (2), (3), (4) and (5)."

²¹ *Id.* at 42-43: "Under cover of the foregoing letter, the CIA released four documents, three of which were provided to Plaintiffs in segregable form, and the other was released in its entirety. The Agency claimed exemptions (b)(2) and (3) for withholding certain portions of the three segregable documents. *Id.* Additional materials, totaling 14 pages, were withheld in their entirety pursuant to FOIA exemptions (b)(1), (2), (3), (4) and (5). *Id.* and *Vaughn* Index attached to DiMalo Decl. For example, documents number MORI 1100673 and 110675 were withheld in full pursuant to exemptions (b)(3) and (5). Specifically, the record supports that these documents contain internal predecisional deliberations of agency official on records relating to POW/MIA questions. Further, these documents contain attorney-client confidential communications. Because no additional records exist and the exemptions invoked are proper, Item 8-related claims should be dismissed."

Item 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.

Item 8: All **records** of whatever nature pertaining to the **estimates of fees** made in response to the **February 7, 2003 Freedom of Information Act request** of Mr. Roger Hall and Studies Solutions Research, Inc., and how each estimate was made.

Plaintiffs have not received the documents relating to the calculation of fees. *See* Hall's dispositive motion.

G. Agency Bad Faith

In a FOIA case, the 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 "are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *see also Vaughn*, 484 F.2d at 826-28.

1. Administrative Record

The administrative record underlying plaintiffs' Amended Complaint (Docket # 45) demonstrates Agency bad faith.

On April 22, 2005, AIM wrote the CIA the AIM "setting forth a separate showing for AIM's being a member of the news media in light of Judge Kennedy's April 13, 2005, memorandum opinion." Ex A at 4.

The CIA conditioned acceptance of AIM's fee appeal on AIM's agreement to be bound to pay an unspecified sum in search fees:

Please note that, in accordance with Agency regulations, because the Agency has started to process your FOIA request, the Agency will only accept your appeal of the fee waiver denial if you agree to be responsible for the costs in the event of an adverse administrative or judicial decision.

Ex B at 7-8.

As AIM observed in its administrative appeal (Ex E at 94):

[T]he CIA's regulation that it will not accept AIM's appeal unless it agrees to pay fees in the event of an adverse position is invalid because it violates and is inconsistent with the FOIA. The FOIA gives any request a right of appeal and does not authorize any agency to abrogate it. The right of appeal is provided for in 5 U.S.C. 552(a)(6)(A) and is critical to (1) exhaustion of administrative remedies, (2) when a court has jurisdiction to entertain a FOIA case, (3) when the statute or limitations begins to run, and (4) the composition of the nature of the administrative record on which a Court determines eligibility for a fee waiver. In sum, the CIA regulation abrogates the right of appeal provided by Congress.

As the CIA was aware that AIM had the right to supplement the administrative record without agreeing to accept liability for unspecified search fees, its response was not made in good faith.

On April 26, 2005 AIM made another FOIA Request. Ex C Bates 10-87. It too set forth AIM's factual basis for fee waivers, and added an eighth Item, "[s]earch fee estimates made in connection with plaintiffs' February 2003 FOIA Request." On June 1, 2005 CIA responded (Ex D Bates 88-90), this time refusing to accept the FOIA Requests at all (both the first seven as well as the new eighth item), and claimed that "no right of administrative appeal exists from our decision not to accept items 1 through 8 of this request." *Id.* at 90.

Notwithstanding the CIA's "no right to appeal" position, on June 29, 2005, AIM administratively appealed both the CIA's May 26 refusal to accept his April 22 letter (without precondition of AIM's liability for fees), as well as the CIA's June 1 refusal to accept AIM's April 26 FOIA Request. Ex E Bates 92-95. Regarding Request 8, AIM observed (Ex E at 95):

And 32 C.F.R. Part 1900.42(c) does not bar item 8 from administrative appeal. The information sought, regarding the CIA's fee estimates related to the February 7, 2003 FOIA Request is not the subject of any previous FOIA Request. Roger Hall's pending motion for an accounting does not exclude item 8 from the purview of the FOIA.

The CIA's response (Ex F Bates 101) was to change its position regarding acceptance of AIM's Administrative Appeal, limited to fee issues; it would not accept Request 8, writing "[w]ith regard to item 8, which requests information on fee estimates related to your 7 February 2003 request, this issue is also before the Court in the pending litigation, and we will therefore not accept it as part of this request." *Id.*

Because the CIA was aware that "Roger Hall's pending motion for an accounting does not exclude item 8 from the purview of the FOIA" (Ex E at 95), its response, here too, was not made in good faith.

2. Search

The CIA feigned ignorance of the limited nature of the Court's *collateral estoppel* ruling.

Its search for Items 1, 2, and 3 were limited by the holding in *Hall I*. It did not search at all for records responsive to Requests 5, 6, and 7, and its production of records in response to Request 8 is patently inadequate.

The CIA's claim that it would be "impossible" to search for the satellite image of the Lieutenant Colonel Henry M. Serex's 1992 plea for help is absurd. The 44 authorizations have social security numbers, branch of service, service numbers, date and place of incident, and additional information. The CIA's searches for both the 44 authorizations as well as the 1,700 PNOK should include the name of the POW/MIA, obviously.

The fact that a search may be burdensome does not entitle an agency to relief from the FOIA's mandate of disclosure. There is no burdensome exemption and the CIA cites no authority for its position.

The CIA having withheld all records containing any cryptonym, or pseudonym, or codeword²² is reason enough to deny it summary judgment. Operation Tailwind is among the numerous codenames cryptonym, and pseudonyms in the record. *See* Hall Affidavit ¶ 9.

The Affidavits of Roger Hall contain numerous examples of operations, events and activities which surely generated relevant records that have not been provided.

More are included in accompanying Affidavits. *See, inter alia:*

- Mr. George Carver of the Central Intelligence Agency served as Special Assistant to three different Directors of the CIA on Vietnam matters, and was on loan from CIA to the Nixon White House. Affidavit of Barry Allen Toll at 16. In 1993, Carver provided to the Clinton White House CIA documents going to its Director, that Carver had authored as late as 1975, about hundreds of POWs "still held captive." Toll also provided

²² DiMaio Decl. ¶ 25: "And by knowing a cryptonym or pseudonym's meaning, a reader may be able to identify the CIA intelligence source or covert employee." Docket 109-2 DiMaio Decl. ¶ 26: "Since these codewords are themselves intelligence methods that also protect other intelligence sources and methods, information that would disclose cryptonyms or pseudonyms is appropriately classified..."

CIA documents going to the Director in 1967 and 1969 detailing the second tier prison system in Laos and numbers of American POWs being held there at the time, including exact coordinates. *Id.*

- Carver sent these records "back to Langley for storage, through the 'DO,' meaning the Directorate for Operations in the CIA by courier." *Id.* at 18. If the CIA moved these records out of Operations they would probably be moved to the Director's files... to the CIA's Executive Registry Files. *Id.* If these records were destroyed there is a record of it. *Id.* at 19.
- CIA Director Casey was a party to a shipment of \$200,000 of medical supplies in furtherance of a POW release from the Laotian government, and "the CIA was involved in both the decision to approve and stop these shipments." Affidavit of John LeBoutillier ¶ 11.
- "[A]ll live sighting reports [in Laos] that came into the [US] embassy went directly to the CIA Station Chief." *Id.* ¶ 12.
- "[I]n Laos in 1981... Caucasian men working on a road under armed guards... [were] American prisoners left over from the War." *Id.* ¶ 13.
- "Since Operation Homecoming in 1973, there have been hundreds of postwar sightings and intelligence reports of Americans being held captive throughout Vietnam and Laos, and numerous secret military signals and codes and messages sent from desperate POWs." Affidavit Honorable Bill Hendon ¶ 3.
- Hendon has "personal knowledge of several incidents where the CIA has had intelligence on living POWs that has not been publicly acknowledged and/or released." *Id.* ¶ 4.
- CIA Director Casey showed two Congressman "either satellite imagery or aerial photography which showed laundry arranged in the form of escape and evasion codes on the roof of" a prison camp in North Vietnam. "Casey stated that only an imprisoned U.S. flyer could have made the codes on the prison roof." *Id.* ¶ 8.
- Hendon is "certain the CIA was in possession of this imagery in 1981..." *Id.* ¶ 9.

- In early 1981, Hendon was briefed as a member of the House POW/MIA Task Force, regarding a Laotian prison camp, and was "shown aerial/satellite photographs... [which was] confirmed by radio traffic intercepts. American POWs were reliably reported to be in the camp... In addition, an escape and evasion code was imaged inside the camp." *Id.* ¶ 9.
- "[O]n October 2 and 5 1992, Dussault... stunned those [Senators] present by declaring that, while recently reviewing 1988 imagery of Laos, he and his associates had discovered nineteen four-digit numbers that matched the four-digit authenticators of known MIAs..." *Id.* ¶ 21. Hendon "believes that the CIA is in possession of this imagery." *Id.* ¶ 22.
- In 1986, White House US Secret Service Agent John Syphrit told Hendon that he "observed and heard" President Reagan, Vice-President Bush, Director-designate of the CIA William Casey, and National Security Advisor Richard Allen discussing an offer made by the Vietnamese government to "trade the American POWs they were holding in return for payment of some four billion dollars." (*Id.* ¶ 25)

The paucity of the CIA's production as compared to the records clearly in its possession is uncontroverted.

Moreover, an overview of the record impugns the CIA's affidavits. The CIA explains that its searches are very inefficient. For security reasons, it employs a "need to know" policy, which decentralizes and compartmentalizes its records systems,²³ requiring searches within its "many components,"²⁴ resulting in "inherent inefficiencies created in the records search and retrieval processes... [and] the process of responding to

²³ DiMaio Decl. ¶ 7: "[T]o minimize the potential damage to national security that could result from a spy in the Agency midst [the CIA] limit[s] the amount of information to which any particular employee has access." *Id.* ¶ 8: "CIA limits employee access to information by employing a 'need-to-know' policy... through decentralizing and compartmenting its records systems."

²⁴ *Id.* ¶ 10.

FOIA/Privacy Act requests."²⁵ The CIA estimated its search for records responsive to Item 3 alone would take eighteen months.²⁶

After the completion of its searches of "many components," the CIA must remove non-responsive records, apply exemptions, and segregate. "This process is laborious and time-consuming."²⁷ Regarding the "coordination," of responsive records of multiple CIA components, as well as coordination with other agencies, "[t]his coordination and referral process itself can be quite time-consuming."²⁸ The CIA asserted that it would conduct multiple reviews before responding to plaintiffs,²⁹ and no records were to be released

²⁵ *Id.* ¶ 9.

²⁶ Koch Decl. ¶ 23: "In other words, CIA will search, review and produce non-exempt documents responsive to Item 3 for the date ranges 1960 to 1970 and 1976 to 2002. CIA has apprised Plaintiffs that the same search terms will be used as were used in connection with the searches conducted during the *Hall I* and that the search time was estimated to be approximately 18 months."

²⁷ *Id.* ¶ 12: "After officers remove the non-responsive documents... determine which, if any, FOIA and Privacy Act exemptions apply, and whether they can reasonably segregate... This process is laborious and time-consuming."

²⁸ *Id.* ¶ 13: "In the course of reviewing documents for exempt information and segregability, a component frequently identifies information that it must coordinate with or refer to another CIA component or another agency... This coordination and referral process itself can be quite time-consuming..."

²⁹ *Id.* ¶ 14: "When all of the components and agencies complete their respective reviews, IMS professionals... incorporate all of their recommendations regarding exemption, segregation, redaction, and release.... then conduct a review from a corporate perspective... [to] ensure that the release or withholding determinations comply with law and published CIA regulations, identify additional exempt information that reflects overall CIA equities, ultimately produce the integrated final record copy of each document, and respond to the requestor." *Id.* ¶ 15: "[W]e cannot make final release determinations with respect to any particular document until we review all responsive documents."

until the completion of the process.³⁰ Thus, the Agency contemplated a number of laborious searches, followed by multiple reviews, and, lastly, one disclosure, presumably a significant one given the breadth of the FOIA requests. That did not happen.

The CIA recently changed its position regarding interim releases. "[I]n this case," explains the CIA, it need not "review the entire body of material subject to release prior to releasing any of it..."³¹ This is because, contrary to a significant disclosure, the CIA produced only eighty-three records responsive to Item 3 on September 28, 2007,³² less than a year after having explained what a laborious and "quite time-consuming" process it would be.

The reasonable inference to be drawn from the CIA's representations and disclosures is that it conducted an inadequate search.

Plaintiffs have not received documents relating to the calculation of fees. *See* Hall's dispositive motion. As noted above, the CIA's production of records responsive to Items 6 and 8 will demonstrate the CIA's pattern and practice of abusing the FOIA's search fee provisions.

³⁰ *Id.* ¶ 15: "In response to a broad FOIA request, the searches may locate many documents in many components.... reviewers consider all responsive documents in total..."

³¹ *Id.* ¶ 8: "As was explained in the Koch Declaration, CIA cannot normally provide piecemeal responses to FOIA requests, but must review the entire body of material subject to release prior to releasing any of it. However, in this case, CIA determined that, once it had completed its own review, it was appropriate to release any nonexempt records, or portions thereof, that did not require coordination with other agencies, rather than await the other agencies' responses before making a release to the Plaintiff."

³² DiMaio Decl. ¶ 11: "This Supplemental *Vaughn* Index... provides the Court with descriptions of the withholdings on the Item 3 documents which were provided to the Plaintiff on 28 September 2007."

3. Search fees

After years of litigating this issue, the CIA claims to have decided to waive search fees, sometime after July 18, 2007, the publication date of its "new regulations on FOIA processing fees."³³ The CIA disclosed records on September 28, 2007,³⁴ 70 days after it waived search fees.

CIA conduct impugns the credibility of its affidavits, again.

Moreover, the DiMaio Declaration incorporates the earlier Koch Declaration. As discussed *infra*, the Koch Declaration relies on the Court's Order (Docket # 30) in its adjudication of plaintiffs' original complaint, not their Amended Complaint; the Koch Declaration refuses searches for records Requests 5, 6, and 7, claiming that and that plaintiffs had not committed to pay search fees (and that 5 and 7 were "overly burdensome").

Having now claimed a waiver of search fees, the CIA should not be allowed to treat that representation as illusory, as it did before the Hon. Gladys Kessler in *National Security Archive v. Central Intelligence Agency*, CA 06-1080, Nov. 4, 2008, where the court wrote (at 2-3), "[d]uring the course of this litigation, the CIA indicated that it had acted in error, and voluntarily granted the Archive 'news media' status," and so "the

³³ See *Id.* ¶¶ 5, 10: "[Declaration] sets forth the decision of the CIA to waive search fees for plaintiffs... On 18 July 2007, the CIA published new regulations on FOIA processing fees. FOIA Processing Fees, 72 Fed. Reg. 39315, 39316 (to be codified at 32 C.F.R. § 1900.02). The CIA does not concede that any of the plaintiffs are news media organizations under either the old or new regulations. As a matter of administrative discretion, however, the Agency will waive search fees in this case."

³⁴ *Id.* ¶ 11: "This Supplemental *Vaughn* Index... provides the Court with descriptions of the withholdings on the Item 3 documents which were provided to the Plaintiff on 28 September 2007."

Archive's claims... were mooted," but then the CIA "immediately resumed its practice of denying the Archive 'news media' status."

H. Vaughn Index

The DiMaio Declaration states, "I am able to describe, based on my experience, the damage to the national security that reasonably could be expected to result from the unauthorized disclosure of specific classified information." DiMaio Decl. ¶ 3. But DiMaio's Declaration is devoid of any description of any damage to any national security interest in any record at issue. "Without a proper *Vaughn* index, a requester cannot argue effectively for disclosure and this court cannot rule effectively." *Campaign for Effective Transplantation v. U.S. Food and Drug Admin.*, 219 F. Supp. 2d 106, 116 (D.D.C. 2002). "All that is required, and the least that is required, is that the requester and the trial judge be able to derive a clear explanation of why each document or portion thereof is putatively exempt from disclosure." *Hinton v. Dept. of Justice*, 844 F.2d 126, 129 (3d Cir. 1988).

"Agency affidavits regarding the search for responsive records are inadequate to support summary judgment where they do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized." 627 F.2d 365, 371 (D.C.Cir. 1980) ("*Weisberg II*"). Here, that would include the names of the POW/MIAs.

When the adequacy of an agency's search is in dispute, summary judgment is inappropriate as to that issue. See *Founding Church of Scientology, Etc. v. Nat. Sec. Agency*, 610 F.2d 834, 836-37 (D.C. Cir.1979).

III. AIM IS ENTITLED TO FEE WAIVERS

As noted above, the CIA claims to have waived search fees, sometime after July 18, 2007,³⁵ but still relies on the absence of plaintiffs' agreement to be bound to pay such fees in declining to search for Requests 5, 6, and 7.

The Administrative Record, Attachment 1:

Ex A AIM April 22, 2005 letter for inclusion in administrative record

Ex B CIA May 26, 2005 re exclusion of AIM April 22 letter in administrative record

Ex C AIM April 26, 2005 FOIA Request, attached 44 PNOK Waivers, attached PNOK authorized list

Ex D CIA June 1, 2005 rejecting April 26 FOIA Request – with no right of administrative Appeal

Ex E AIM June 29 Administrative Appeal, attached AIM Articles of Incorporation

Ex F CIA July 19, 2005 re acceptance for inclusion in administrative record limited to search fee waivers

Ex G AIM June 13, 2007 letter narrowing Request 7

³⁵ See Docket 109-2 DiMaio Decl. ¶¶ 5, 10: "sets forth the decision of the CIA to waive search fees for plaintiffs... On 18 July 2007, the CIA published new regulations on FOIA processing fees. FOIA Processing Fees, 72 Fed. Reg. 39315, 39316 (to be codified at 32 C.F.R. § 1900.02). The CIA does not concede that any of the plaintiffs are news media organizations under either the old or new regulations. As a matter of administrative discretion, however, the Agency will waive search fees in this case."

A. AIM meets FOIA's "Member of the News Media" Status³⁶

The adjudication of AIM's "Member of the News Media" status will not be ripe until the CIA clarifies, or changes, its position, again.

Congress revisited the issue of "News Media status" in its 2007 FOIA Amendments. The new language of 5 U.S.C. § 552(a)(4)(A)(ii)(III) is italicized below (emphasis added):

- (ii) Such agency regulations shall provide that —
 - (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
 - (III)... *In this clause, the term “a representative of the news media” means any person or **entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.** In this clause, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription or by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through*

³⁶ The FOIA provides for three categories of fees that may assessed in processing records requests. *Id.* § 552(a)(4)(A)(ii). Commercial users pay "reasonable standard charges" for document search, duplication, and review, *id.* § 552(a)(4)(A)(ii)(I), while non-commercial requests made by "an educational or noncommercial scientific institution" or a "representative of the news media" are only subject to duplication fees. *Id.* § 552(a)(4)(A)(ii)(II). Requests which do not fall into either of the preceding categories are subject to charges for search and duplication (but not review). *Id.* § 552(a)(4)(A)(ii)(III).

*telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a **solid basis for expecting publication through that entity**, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; **the Government may also consider the past publication record of the requester in making such a determination.***

In response to this Amendment, the CIA in July 2007 adopted new regulations.

32 C.F.R. § 1900.02, *Definitions*, states in part:

- (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;

Here, AIM clearly meets the standard of "representative of the news media" status, limiting its fees to duplication costs.

A "representative of the news media" is "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

"AIM's 1971 articles of incorporation's purpose clause [states that it is]... to promote... the mass communication media and public understanding thereof with the aim of

improving the accuracy of news media reporting... and the correction of errors." Ex E June 29, 2005, AIM Administrative Appeal, at 94.

AIM's April 26, 2005, FOIA Request states that "AIM is an entity that is organized and operated to publish and broadcast news to the American public. It has been disseminating its analysis of news media reporting for more than 35 years." Ex C at 12.

It disseminates information in several ways. Its semi-monthly newsletter, *The AIM Report*, has gone out without fail for 32 years. *The AIM Report* now has about 3,300 subscribers. AIM's other publications include AIM columns, *Briefings* (opinions), *Special Reports*, and *Guest Columns*. AIM's principals have published three books on the subject of the news media: Media Mischief and Misdeeds 1984; Profiles in Deception 1990; and News Manipulators 1993. AIM has also produced several nationally distributed documentaries, including Television's Vietnam, The Clinton Legacy, TWA 800: The Search for the Truth, and Confronting Iraq. More than 100,000 people visit AIM 's website nearly every month. AIM has an active speaker's bureau, providing speakers on relevant topics to various groups around the country. Additionally, AIM delivers a daily radio commentary, *Media Monitor*, carried across the country. Oftentimes newspapers and websites around the country have picked up *The AIM Report's* stories. Due to its many efforts, AIM enjoys the ability to convey information to a broad public audience.

"It is thus clear that AIM gathers information of potential interest to the general public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to its audience." *Nat'l Sec. Archive Id.*

Requesters who are "middleman or vendor[s] of information that representatives of the news media can utilize when appropriate" do not qualify. *Judicial Watch, Inc. v. Dep't of Justice*, 185 F. Supp. 2d 54, 59 (D.D.C. 2002). "AIM posts most of the docket sheet of its POW/MIA litigation on its website (see http://www.aim.org/special_report/1763_0_8_0_C/), but it will do more than just making the information available as a library would: AIM will actively disseminate the information." Ex C: AIM April 26, 2005, FOIA Request at 12.

To meet FOIA's "member of the news media" status, a requestor must "use[] its editorial skills to turn the raw materials into a distinct work." *Nat'l Sec. Archive*, 880 F.2d at 1387.

To be considered a representative of the news media for fee purposes, "a requester must establish that it has a firm intent to disseminate, rather than merely make available, the requested information." *Judicial Watch*, 185 F. Supp. 2d at 60 (citation and internal quotation marks omitted). As the record demonstrates, "[u]pon disclosure of the records sought, AIM has concrete plans to make the information public in a *Special Report*, and perhaps also in the *AIM Report*, all in accordance with AIM's news dissemination function. All of its work on the POW/MIA issue will appear on AIM's website, AIM.org. Moreover, a number of AIM's publications in the past have referred John Kerry's record on the POW issue, and AIM has a concrete intention to do so in the future." Ex C AIM April 26, 2005, FOIA Request at 12.

Here, the administrative record confirms AIM's contention that it is entitled to a fee limitation on the basis its being a member of the news media.

B. Plaintiff's Request meets the FOIA's Public Interest Fee Waiver Standard

5 U.S.C. § 552(a)(4)(A)(iii) provides that "[d]ocuments shall be furnished without any charge or at a charge reduced... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *See Judicial Watch*, 185 F. Supp. 2d at 60.

Although the requester has the initial burden of producing evidence of public benefit (*see Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)), "[o]nce the requester

has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver." *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 874 (D.Mass.1984). "There was a clear message from congress that... [t]his public-interest standard should be liberally construed by the agencies." *Id.*, at 872, quoting S.Rep. No. 854, 93d Cong., 2d Sess. 12 (1974).

Here, AIM does not have a commercial interest in the disclosure. Its purpose is to inform the public.

The record in this case demonstrates that the "subject of the requested records concerns the operations or activities of the United States Government." The information sought is directed at finding out what information the government had acquired about the POW/MIAs through its operations and activities. These FOIA Requests also concern another aspect of the CIA's activities: They will show to what extent the CIA did not provide all the information it had on these POW/MIAs to their relatives or to congressional investigators.

The information sought would be "likely to contribute to an understanding of United States Government operations or activities" as AIM wrote the CIA. Ex C at 12.

AIM also pointed out that "[t]here is a pending House Resolution which would establish a new POW/MIA committee. This indicates that this issue is still of current interest to the American public." *Id.*

As plaintiff wrote, "[d]isclosure of the information will enhance public understanding of the POW/MIA issue as compared with awareness prior to the disclosure." (*Id.*) Moreover, wrote AIM, "[m]aterials on POW/MIAs will necessarily shed light on

the operations or activities of the government. Among other things, they will reveal the extent, nature, intensity, and duration of the Government's efforts to locate POW/MIAs, a subject that has long been of intense interest to the public." *Id.*

Ex C, AIM's April 26, 2005, FOIA Request, states (at 13):

Records disclosed to AIM is likely to contribute significantly to public understanding of such operations or activities by disclosing records that have remained secret despite congressional inquiries and Presidential directives to disclose them. The records will provide information regarding the thoroughness, scope, intensity, dedication and creativity of the search for missing POW/MIAs, and whether or not it was conducted in good faith. This information will show the degree to which the CIA has complied with Executive Order 12812 and Presidential Decision Directive NSC 8 and whether it has accurately informed Congress and the public about its search efforts and the information it possesses. It will also show how the CIA cooperated and coordinated its search efforts with other agencies and how and the CIA controlled the documentation other agencies possessed regarding POW/MIAs and detainees.

Disclosure here will enable an evaluation of what is known about the circumstances of the missing POWs, what was done to find them, and whether all relevant information concerning this issue was made available to congressional investigators. The significance of the disclosures will be disseminated to the public.

Because "conclusory statements about contributions to public understanding are not enough" to satisfy these factors, *Judicial Watch, Inc. v. Dep't of Justice*, 122 F. Supp. 2d 13, 18 (D.D.C. 2000), a requester seeking a public interest fee waiver must make a specific showing that disclosure of the information will be of significance to the public; "the ability to convey information" to others is insufficient without some details of how the requester will actually do so. *McClellan Ecological Seepage Situation v. Carlucci*,

835 F.2d 1282, 1286 (9th Cir. 1987).³⁷ As noted above, "[u]pon disclosure of the records sought, AIM has concrete plans to make the information public in a *Special Report*, and perhaps also in the *AIM Report*, all in accordance with AIM's news dissemination function." Ex C AIM April 26, 2005, FOIA Request at 12.

"AIM believes that the records it will obtain as a result of this request will shed light on the CIA's operations and activities by revealing that it has withheld information regarding missing POWs from congress and the public. This will show that the CIA has not done what it should have done to locate missing POWs and MIAs. The interest of enhancing the public's understanding of the operations or activities of the U.S. Government is clear, and the records' connection to these government activities is direct." *Id.* at 13. Importantly, "[r]elease of the information will contribute to an understanding of government operations or activities regarding the POW/MIA issue, as compared with awareness prior to the disclosure." Here too AIM has met its burden. *See Judicial Watch*, 185 F. Supp. 2d at 62.

Thus, the record provides an adequate showing of AIM's "concrete plans to disseminate the requested information" (*Judicial Watch*, 122 F. Supp. 2d at 10), and adequately demonstrates how disclosure of the requested documents meets the requirements for a public interest fee waiver.

The CIA's dispositive motion is silent on AIM's request for a public interest fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii). The burden has shifted to defendant to show the inapplicability of a public interest fee waiver. It has not, and cannot, meet its burden.

³⁷ *See also Oglesby*, 920 F.2d at 66, n.11 (finding conclusory and insufficient plaintiff's statement that "the information requested is beneficial to the public interest[,] I am a writer and lecturer who has disseminated such information in the past, and I intend to do so in the future.")

CONCLUSION

For the foregoing reasons, and for all the reasons set forth by plaintiffs Roger Hall and Studies Solutions Results, Inc. in their dispositive motions, plaintiff Accuracy in Media, Inc., should be granted News Media status as well as a public interest fee waiver, plaintiffs should be granted leave to take discovery, the CIA should be required to submit selected records for this Court's inspection *in camera*, as well as to conduct an adequate search and disclose all non-exempt records or portions thereof responsive to each of plaintiffs' eight enumerated FOIA Requests.

DATE: December 17, 2008.

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 04-0814 (HHK)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

PLAINTIFF ACCURACY IN MEDIA'S STATEMENT OF GENUINE ISSUES

Under Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h), plaintiff Accuracy in Media, Inc., (AIM), respectfully submits this Statement of Genuine Issues.

CIA statement:

1. On February 7, 2003, Plaintiffs submitted a Freedom of Information Act (“FOIA”) request to the Central Intelligence Agency (“CIA”). 7 February 2003 Request, Exhibit 1 to Declaration of Scott A. Koch (“Koch Decl.”).

AIM response: Admit.

CIA statement:

2. The request sought the following seven items of information:

Item 1: Records and information pertaining to 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.

Item 2: Records or information pertaining to POW/MIAs sent out of Southeast Asia (for example, to China, Cuban [sic], North Korea, Russia).

Item 3: Records or information prepared and/or assembled by the CIA between January 1, 1960 and December 31, 2002 relating to the status of

any United States POW/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;

Item 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;

Item 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, and persons on the Prisoner of War / Missing Personnel Office's list of persons whose primary next-of-kin have authorized the release of information concerning them.

Item 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.

Item 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. See Exhibit 1.

AIM response: Admit.

CIA statement:

3. Plaintiffs Hall and SSRI previously requested the information in item 1 in a FOIA request dated January 5, 1994. January 5, 1994 Request, Koch Declaration, Exhibit 13.

AIM response: Irrelevant and admitted. AIM had not previously made this Request, and, in any event, this Court's April 13 Memorandum Order specifically noted that the CIA in the *Hall I* decision "failed to establish the adequacy of its search." [Docket # 30 at 6]

CIA statement:

4. Plaintiffs Hall and SSRI previously requested the information in item 2 in a FOIA request dated January 5, 1994. *Id.*

AIM response: Irrelevant and admitted. This Court's April 13 Memorandum Order specifically noted that the CIA in the *Hall I* decision "failed to establish the adequacy of its search." [Docket # 30 at 6]

CIA statement:

5. Plaintiffs Hall and SSRI previously requested the information in item 4 in FOIA requests dated April 23, 1998. April 23, 1998 Request, Koch Declaration, Exhibit 14.

AIM response: Irrelevant and admitted. The opinion in *Hall I* states that "[i]n preparing its supplemental declarations in this matter, the CIA should confirm that it has independently reviewed all documents of its own creation that were included with the Senate Select Committee documents." [Docket 54-6, CIA Ex 5 n. 4 at 14]

CIA statement:

6. Plaintiffs Hall and SSRI previously requested the information for a five-year span of item 3 (1971-1975) in a FOIA request dated April 23, 1998. *Id.*

AIM response: Irrelevant and admitted. The Court's April 13 Memorandum Order specifically noted that the CIA in the *Hall I* decision "failed to establish the adequacy of its search." [Docket # 30 at 6]

CIA statement:

7. The 1994 and 1998 FOIA requests became the subject of litigation in *Roger Hall v. Central Intelligence Agency*, Civil Action No. 98-1319 (PLF) ("*Hall I*").

AIM response: Irrelevant and admitted. AIM was not a party in *Hall I*. The Court's April 13 Memorandum Order specifically noted that the CIA in the *Hall I* decision "failed to establish the adequacy of its search." [Docket # 30 at 6]

CIA statement:

8. In *Hall I*, CIA produced certain responsive documents, and withheld other documents on the basis of various FOIA exemptions. In its August 10, 2000 opinion, the Court specifically held that CIA properly invoked certain exemptions under FOIA. Opinion dated August 10, 2000, Koch Declaration, Exhibit 4.

AIM response: Admit. This is the only issue precluded herein.

CIA statement:

9. In *Hall I*, the Court granted CIA's Motion for Summary Judgment with respect to the "Senate Documents" specifically holding that those documents were not "agency records" subject to the FOIA and found that CIA properly invoked certain exemptions. *Id.* at 16 (agency records) and 17 through 21 (exemptions).

AIM response: Denied. *See Hall I* Order: "In preparing its supplemental declarations in this matter, the CIA should confirm that it has independently reviewed all documents of its own creation that were included with the Senate Select Committee documents."
[Docket 54-6, CIA Ex 5 n. 4 at 14]

CIA statement:

10. The Court ultimately dismissed *Hall I* with prejudice on November 13, 2003, reasoning that Hall had "constructively abandoned" his requests for any more documents. Order dated November 13, 2003, Koch Declaration, Exhibit 8.

AIM response: Irrelevant and admitted. AIM was not a party in *Hall I*.

CIA statement:

11. Hall and AIM thereafter submitted the February 7, 2003 FOIA request at issue and ultimately filed the instant claim on May 19, 2004.

AIM response: Denied. The "instant claim" is plaintiffs' September 26, 2005 Amended Complaint, which includes a new administrative record upon which the Court will determine plaintiffs' entitlement to fee waivers, as well as an eighth FOIA request. [Docket # 45]

CIA statement:

12. By letter dated June 15, 2004, CIA responded to the February 2003 FOIA request, setting forth CIA's position regarding the seven items. June 15, 2004 letter, Koch Declaration, Exhibit 2.

AIM response: Admitted and irrelevant. AIM's September 2005 Amended Complaint is based on its April 26, 2005, FOIA Request.

CIA statement:

13. The June 15, 2004 letter indicated that CIA could not process item 5, and that, pursuant to agency policy, the request for this item would be closed if the requisite additional identifying information was not received within 45 days. *Id.*

AIM response: Admitted, and contested. The "additional identifying information" was the POW/MIA's birthdays. The Primary Next of Kin releases provide a plethora of information enabling the CIA to conduct a search. [Hall Aff. ¶¶ 34-35] CIA also refused to search absent plaintiffs' payment of search fees. [Docket 54-2 Koch Decl. ¶ 25]

CIA statement:

14. CIA never received the additional identifying information. Koch Declaration at 26; May 11, 2005 letter, Koch Declaration, Exhibit 5.

AIM response: Admitted. Plaintiffs did not provide the birthdays of the POW/MIAs identified in the PNOK releases.

CIA statement:

15. The June 15, 2004 letter also notified Plaintiffs that item 7 would not be accepted as drafted, because such a search would impose an unreasonable burden on the agency. June 15, 2004 letter, Koch Declaration, Exhibit 2.

AIM response: Irrelevant and admitted. AIM admits that the CIA claimed that Item 7 is burdensome.

CIA statement:

16. CIA has not received any correspondence from Plaintiffs narrowing the request in item 7. Koch Declaration at 35, 37; May 11, 2005 letter, Koch Declaration, Exhibit 5.

AIM response: Denied. By June 13, 2007 letter AIM narrowed Request 7, writing, "AIM hereby narrows that request to exclude all FOIA requests." [Attachment 1 Ex G Bates 103-04]

CIA statement:

17. In the June 15, 2004 letter, CIA estimated that searches for all of the documents requested in items 5, 6, and 7 would amount to \$606,595.00 and required an advance deposit of \$50,000.00 before processing the request for these items. *See* Koch Declaration, Exhibit 2.

AIM response: Moot and admitted. The CIA waived search fees. [Docket 109-2 DiMaio Decl. ¶ 11]

CIA statement:

18. On April 13, 2005, the Court denied all Plaintiffs' various requests for fee limitations. *See* USDC Pacer Dkt. No. 30.

AIM response: Irrelevant and admitted. AIM's September 2005 Amended Complaint is based on its April 26, 2005, FOIA Request.

CIA statement:

19. On April 26, 2005, AIM submitted a new FOIA request to CIA. The April request sought eight items of information. The first seven items exactly duplicated those in the February 2003 request; the eighth item requested records pertaining to fee estimates made in connection with the 7 February 2003 request. April 26, 2005 letter, Koch Declaration, Exhibit 9.

AIM response: Admit. This FOIA Request is the subject of this action.

CIA statement:

20. With this "new" request, AIM renewed its requests for a fee waiver. *Id.*

AIM response: Admit.

CIA statement:

21. CIA denied this request by letter dated June 1, 2005 on the grounds that the requested information was the subject of pending litigation. June 1, 2005 letter, Koch Declaration, Exhibit 10.

AIM response: Denied. CIA did not deny these FOIA Requests – it refused to accept the FOIA letter for inclusion in its administrative record, and claimed that AIM had "no right of administrative appeal exists from our decision not to accept items 1 through 8 of this request." [Attachment 1 Ex D Bates 88-90]

CIA statement:

22. On May 26, 2005, Hall filed a Notice of Filing attaching letters to CIA dated May 23, 2005 and May 24, 2005. May 26, 2005 Notice of Filing, Koch Declaration, Exhibit 11.

AIM response: Admitted.

CIA statement:

23. The 23 May 2005 letter again requested a fee waiver. *Id.* CIA responded by letter dated July 1, 2005, rejecting Plaintiff's request, citing the Court's April 13, 2005 Order. July 1, 2005 Letter, Koch Declaration, Exhibit 12.

AIM response: Denied. CIA did not deny this request – it refused to accept it into its administrative record.

CIA statement:

24. The May 24, 2005 letter was a "new" FOIA request identical to the February 2003 request but adding one additional item identical to the eighth item AIM had added to its request dated April 26, 2005. *See* Koch Declaration, Exhibit 11.

AIM response: Denied. The May 24, 2005 letter also asserted "new" grounds for Hall and SSRI's fee waivers. CIA did not deny these FOIA Requests – it refused to accept the FOIA letter into its administrative record.

CIA statement:

25. To date, CIA has never received the deposit necessary to process Items 5 and 7. Koch Declaration, ¶¶ 29, 39.

AIM response: Moot and admitted. The CIA waived search fees. [Docket 109-2 DiMaio Decl. ¶ 11]

CIA statement:

26. Despite the dismissal of the previous claim, CIA voluntarily provided Plaintiffs with documents responsive to the 1994 and 1998 requests on November 7, 2005. November 7, 2005 Letter, Koch Declaration, Exhibit 3.

AIM response: Irrelevant and admitted. CIA refers to *Hall I* records. AIM was not a party in *Hall I*. The Court's April 13 Memorandum Order specifically noted that the CIA in the *Hall I* decision "failed to establish the adequacy of its search." [Docket # 30 at 6]

CIA statement:

27. The November 7, 2005 response contained identified, non-exempt documents that would respond to item 1 of the instant request. Koch Declaration at ¶ 20.

AIM response: Irrelevant and admitted. A genuine issue exists as to whether the agency's search was adequate.

CIA statement:

28. The November 7, 2005 response contained identified, non exempt documents that would respond to item 2 of the instant request. *Id.*

AIM response: Irrelevant and admitted. A genuine issue exists as to whether the agency's search was adequate.

CIA statement:

29. The November 7, 2005 response contained identified, non exempt documents that would respond to the 1971-1975 portion of item 3 of the instant request. *Id.*

AIM response: Admit and irrelevant. The genuine issue is the adequacy of the CIA's search.

CIA statement:

30. CIA has agreed to perform a search for documents responsive to item 3 created during the years not covered by the prior request (1960-1971 and 1976-2002). Koch Declaration at ¶ 23.

AIM response: Admitted and irrelevant. The genuine issue is adequacy of CIA search.

CIA statement:

31. The same search terms will be used as were used in the prior litigation, and the search was estimated to take at least 18 months. *Id.* That search is now complete and all responsive, non-exempt documents found have been released to Plaintiffs. Declaration of Ralph DiMaio (“DiMaio Decl.”) at ¶ 6.

AIM response: Irrelevant and admitted. This Court's April 13 Memorandum Order specifically noted that the CIA in the *Hall I* decision "failed to establish the adequacy of its search" – that includes search terms. [Docket # 30 at 6] The genuine issue is adequacy of CIA search.

CIA statement:

32. CIA's initial search in response to Item 6 identified two responsive documents, which were transmitted to Plaintiffs by letter dated August 15, 2006, with three redactions made on the basis of FOIA exemption (b)(3). August 15, 2006 letter, Koch Declaration, Exhibit 6 and Supplemental DiMaio Vaughn Index ¶ 11.

AIM response: Irrelevant and admitted. The genuine issues here are whether the agency's searches were adequate and whether the exemptions were properly applied and the records properly segregated.

CIA statement:

33. By letter dated October 17, 2006, CIA provided Plaintiffs with eighteen additional documents responsive to Item 6. Five of these documents were released in their entirety. Thirteen documents were released on the basis of FOIA exemptions (b)(2), (b)(3), (b)(5), and (b)(6) and additional material was withheld in its entirety on the basis of FOIA exemptions (b)(1), (b)(2), (b)(3), (b)(5), and (b)(6). October 17, 2006 letter, Koch Declaration, Exhibit 7.

AIM response: Irrelevant and admitted. The genuine issues here are whether the agency's searches were adequate and whether the exemptions were properly applied and the records properly segregated.

34. In response to Plaintiff AIM's Item 8-related request, by letter dated July 13, 2007, the CIA released four documents, three of which were provided in segregable form. Additional materials were withheld. See Koch July 13, 2007 Letter, attached hereto as Exhibit A.

AIM response: Irrelevant and admitted. The genuine issues here are whether the agency's searches were adequate and whether the exemptions were properly applied and the records properly segregated.

DATE: December 17, 2008.

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 04-0814 (HHK)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

ORDER

Upon consideration of the motion of defendant Central Intelligence Agency to dismiss and for partial summary judgment, the motions of plaintiffs Accuracy in Media, Inc., Roger Hall, and Studies Solutions Results, Inc., for partial summary judgment, the parties' responses to said motions, and the entire record herein, it is by this Court this day of _____, 2009, hereby

ORDERED, that plaintiff's motion for partial summary judgment is hereby GRANTED, and the motion of defendant to dismiss or for partial summary judgment is DENIED; and it is further

ORDERED, that defendant shall grant plaintiff status as a representative of the news media and not charge it search fees; and it is further

ORDERED, that defendant shall waive all copying costs for plaintiff; and it is further

ORDERED, that with respect to each of the eight Items in plaintiffs' FOIA Request, defendant shall conduct further searches commensurate with the record herein; and it is further

ORDERED, that plaintiffs shall have until September 30, 2009, to take discovery on the adequacy of defendant's search for responsive documents; and it is further

ORDERED, that, plaintiffs may submit a list of records for *in camera* inspection for consideration of further Order of the Court.

UNITED STATES DISTRICT COURT