

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,
Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY,
Defendant

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Civil Action No. 04-0814 (HHK)

MOTION OF PLAINTIFFS ROGER HALL AND STUDIES SOLUTIONS RESULTS, INC. FOR A WAIVER OF SEARCH FEES AND COPYING COSTS

Comes now plaintiffs Mr. Roger Hall and Studies Solutions Results, Inc., and move this Court for an order directing defendant Central Intelligence Agency to waive all search and copying fees for records responsive to plaintiffs February 7, 2003 request. Memorandum of Points and Authorities and a proposed Order are submitted in support of this motion.

Defendant opposes this motion.

Respectfully submitted,

August 3, 2004

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 Plaintiffs, :
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 CENTRAL INTELLIGENCE AGENCY, :
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION
OF PLAINTIFFS ROGER HALL AND STUDIES SOLUTIONS RESULTS, INC
FOR WAIVERS OF SEARCH FEES AND COPYING COSTS**

Background

As a result of a profound public interest in the fate of American soldiers who fought in Vietnam but who did not return home and are not known to have died there, in 1991 the United States Senate appointed a Select Committee to investigate the missing prisoners of war (POWs) and those missing in action (MIAs). Ultimately, the Senate directed the President of the United States to issue an executive order commanding all federal agencies to "declassify and publicly release without compromising U.S. national security all documents, files and other materials pertaining to POWs and MIAs." S.Res. 103d Cong. (1992). President George Bush issued Executive Order 12,812, which directed the release of all non-sensitive materials "pertaining to American POWs and MIAs lost in Southeast Asia." President Clinton reaffirmed this policy by issuing Presidential Decision Directive No. 8, which required all

executive branch agencies to complete their review of documents and files under Executive Order 12,812 by Veterans Day, 1993.

Despite the disclosures resulting from these actions, relevant materials on the POW/MIAs remain unlocated. By letter dated February 7, 2003, Roger Hall, Studies Solutions Results, Inc. ("SSR"), Reed Irvine,¹ and Accuracy in Media ("AIM") submitted a Freedom of Information Act ("FOIA") request for such records in the possession of the Central Intelligence Agency ("CIA"). See Exhibit A. Both Hall and SSR sought a waiver of search fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) as "representatives of the news media." They also sought a public interest waiver of copying costs pursuant to 5 U.S.C. § 552 (a)(4)(a)(iii).

Roger Hall has for many years conducted research into the POW/MIA question for the National Alliance of Families, a service he provides without charge. He distributes the information he obtains in newspapers, research papers, and documents he provides to members of Congress, veterans and POW/MIA groups. His research contributions on this issue have been reprinted in newsletters and magazines, including the National Vietnam Veterans Coalition Magazine. The Marine Corps League POW/MIA Affairs News Letter and Information Report has on numerous occasions carried documentation he has made available to them. One of his contributions was reprinted in toto in an article in the Conservative Review. He has made public presentations to the National Alliance of Families and the

¹Although a requester, Reed Irvine is not a party to this lawsuit.

Sarah McClendon Study Group, and appeared on the Zoe Hieronimus talk radio show. He has also briefed veterans groups, including the POW/MIA Ad Hoc Committee, the Disabled American Veterans, and the Veterans of Foreign Wars, among many other groups, as well as members of Congress and their staffs. Mr. Hall sends out email newsletters on POW matters to various organizations such as Rolling Pride, Vietnow, and Pride of Illinois, which have a combined membership in excess of 100,000. The frequency of these newsletters varies from twice daily to twice a month.

The American Legion has manifested an interest in the missing POW/MIAs issue, and in Mr. Hall's work on it, carrying an interview of him in its December 2002 issue which dealt with his FOIA case to obtain records from your agency. The American Legion magazine reaches an audience of over 100,000.

SSR, Inc. regularly disseminates information concerning missing POW/MIAs to organizations which further disseminate said information. Indeed, one of the stated purposes of SSR is to obtain and disseminate information concerning missing POW/MIAs to the public.

After a delay of fifteen months, the CIA responded to Hall's request for a waiver by neither granting nor denying it. This letter was sent after Hall filed suit, so it is not part of the administrative record in this case.

ARGUMENT

Judicial review in any action regarding the waiver of fees is de novo, but is limited to the record before the agency. Campbell v. U.S. Dept. of Justice, 164 F.3d 20, 35 (D.C.Cir.1999); 5 U.S.C. § 552(a)(4)(A)(vii). In this case that means that the CIA's June 15, 2004 is not part of the administrative record because it issued after--long after--this suit was filed. Nor are plaintiffs required to appeal the CIA's June 15, 2004 letter, even assuming it could be considered a determination of anything. The FOIA includes a provision for constructive exhaustion of administrative remedies. See 5 U.S.C. § 552(a)(6)(A), (C). The D.C. Circuit has interpreted this provision as requiring actual exhaustion of a requester's right to an administrative appeal only in those circumstances where an agency makes a determination of the request before the requester files suit. See Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 65 (D.C. Cir.1990)

The FOIA fee waiver provision provides in pertinent part:

fees shall be limited to reasonable standard charges for document duplication when documents 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. . . .

5 U.S.C. § 552(a)(4)(A)(ii)(II). In a landmark decision the Court of Appeals held that 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 material into a distinct work, and distributes that work to an

audience." National Security Archive v. Department of Defense, 880 F.2d 1381, 1387 (D.C.Cir.1989), cert den., 494 U.S. 1029 (1990) ("NSA"). Based on the definition of "a representative of the news media" set forth in National Security Archive definition, both Hall and SSR clearly qualify for "representative of the news media" status.

The FOIA fee waiver provision also provides that:

Documents shall be furnished without charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or actions of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552 (a)(4)(a)(iii). The courts have held that this provision sets forth a two-part test for determining whether documents shall be furnished without charge (or at a reduced charge).

Under this test, the requester must establish that the information sought (1) "is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government," and (2) "is not primarily in the commercial interest of the requester." Project on Military Procurement v. Department of the Navy, 710 F.Supp. 362, 367 (D.D.C. 1989), quoting 5 U.S.C. § 552(a)(4)(A)(iii); Schrecker v. Department of Justice, 970 F.Supp. 49, 30 (D.D.C.1997); Larsen v. CIA, 843 F.2d 1481, 1482-1483 (D.C.Cir.1988). Although the requester has the initial burden of producing evidence of public benefit, "[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).

Plaintiffs quite clearly meet the first prong of the fee-waiver test. The public's interest in the subject has resulted in the Senate's appointment of a Select Committee to investigate the missing POW/MIAs, which in turn provoked the issuance of Executive Order 12,812 and Presidential Decision Directive NSC 8 by two different presidents.

Hall and SSR are also quite able to disseminate the materials he obtains. He culls through government documents and makes pertinent information available to newspapers and magazines, to veterans organizations and their newsletters, through SSR. He has briefed congresspersons and their staffs, appeared on radio talk shows, and presented evidence to a hearing of the House Subcommittee on Foreign Affairs. There is simply not the slightest reason to call into question his ability to disseminate the information he obtains through his FOIA requests.

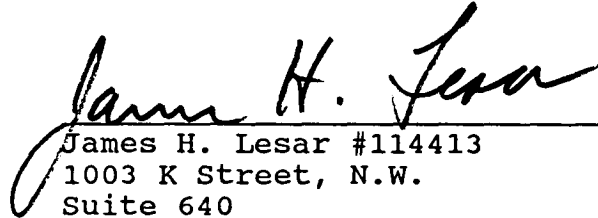
As to the second test for a fee waiver--whether the information sought is primarily in the commercial interest of the requester, there is no commercial benefit to Hall from the work he does on behalf of POW/MIA families.

CONCLUSION

For the reasons set forth above, this Court should order the CIA to grant Hall and SSR status as representatives of the news media and waive all search fees and copying costs.

Respectfully submitted,

August 3, 2004



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O R D E R

Upon consideration os the motion of plaintiffs Roger Hall and Studies Solutions Results, Inc. for a waiver of search fees and copying costs, defendant's opposition thereto, and the entire record herein, it is by this Court this _____ day of _____, 2004, hereby

ORDERED, that the CIA shall grant plaintiffs Hall and SSR status as representatives of the news media and waive all search fees and copying costs incurred in connection with this action.

UNITED STATES DISTRICT COURT