

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.)	
_____)	

REPLY OF PLAINTIFF ACCURACY IN MEDIA, INC.
TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S
RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Accuracy in Media, Inc. ("AIM"), respectfully submits this memorandum in Reply to the Central Intelligence Agency's ("CIA") opposition to AIM's Motion for entry of partial Summary Judgment.

Fed.R.Civ.P.56(e) mandates the conclusion that AIM seeks. *Celotex Corp. v.*

Catrett, 477 U.S. at 322, 106 S.Ct. 2548:

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P.56(e). Summary judgment will be entered against the non-moving party if that party does not present such facts.

* * *

The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)... The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial.

Attached hereto as Exhibit A is Plaintiff's "Statement of Material Fact" (docket # 114) combined with defendant's response thereto (docket # 120), verbatim. Defendant's

pleading ignores the mandate of Fed.R.Civ.P.56(e). For example, the CIA recites that the cited document "speaks for itself" 34 times.

Defendant ignores that plaintiffs are collaterally estopped only from challenging the withholding of certain records that Hall had sought in his May 28, 1998 FOIA request, and from litigating whether particular records are exempt from the definition of agency records under the FOIA. (SMF 3)

Item 1 seeks disclosure of all records of unaccounted for Southeast Asia POW/MIAs,¹ Item 2 asks for records of POWs sent out of Southeast Asia,² and Item 3 seeks all records generated between January 1, 1960 and December 31, 2002, relating to POWs in Laos.³

The CIA ignores that plaintiffs are not estopped from challenging the adequacy of the search. (SMF 4) This Court's order "speaks for itself," observes the CIA. The government 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 five of the 42 years of Item 3. (SMF 21) And the CIA claims it used the same search terms it used in *Hall I* to

¹ Docket # 114-2 at 9: "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 *Id.*: "2. POW/MIAs sent out of Southeast Asia (for example, to China, Cuba, North Korea, or Russia)."

³ *Id.*: "3. Prepared by and/or assembled by the CIA between January 1, 1960, and December 31, 2002, relating to the status of any United States paws or MIAs in Laos, including but not limited to any reports, memoranda, letters, notes or other documents prepared by Mr. Hogan or any other officer, agent or employee of the CIA for the Joint Chiefs of Staff, the President, or any federal agency."

conduct a search for records responsive to Item 3. (SMF 22) Its *Vaughn* index describes its *Hall I* search (SMF 23), and it relies on *Hall I* for its position that it produced responsive records in *this* case. (SMF 24)

Additionally, the CIA withholds all records containing any cryptonym, or pseudonym, or codeword. (SMF 52). That fact alone is reason enough to deny it summary judgment.

The CIA recites that the documents cited in support of AIM's entitlement to fee waivers "speak for themselves." Yes, they do. They contain a factual basis for entitlement to both news media status and a public interest photocopy fee waiver. (SMF 5-6, 9.)

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 absent payment of search fees, notwithstanding the new administrative record in this case. The CIA initially attempted to limit the administrative record by conditioning acceptance of AIM's April 22 letter on AIM's agreement to be bound to pay an unspecified amount in search fees. (SMF 7) It declined to conduct any search for records responsive to Items 5, 6, or 7 absent, *inter alia*, plaintiffs' production of a \$50,000 deposit and liability for another half million dollars (SMF 38, 41, 45), but, apparently, at the last minute, waived search fees. Defendant's history of using the fee provisions of the FOIA to refuse searches pervades this action.

Regarding Item 3, seeking records of POWs in Laos assembled over a 42-year period, the CIA identified only eighty-three records. (SMF 30) The CIA's *Vaughn* index's only other claim here is that it referred an undisclosed number of nondescript

records responsive to Item 3 to unnamed agencies "for their review and response directly to plaintiffs." (SMF 25)

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 Archives and returned to the CIA for processing,"⁴ alleging that none of the subject records originated with the CIA. (SMF 33) But the CIA undertook no search or review of records responsive to Item 4 (SMF 34), notwithstanding that 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." (SMF 35) The CIA's *Vaughn* index is devoid of information concerning records responsive to Item 4.

Regarding Item 5, the CIA declined to conduct any search for records of the POW/MIAs identified in the 44 authorizations executed by next-of-kin, nor the 1700 POW/MIAs identified in the PNOK list.⁵ (SMF 36, 40) The CIA's claim that it would be "impossible" to search for these records 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 records identified in both the 44

⁴ *Id.*: "4. Records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing."

⁵ *Id.* at 10: "5. Records relating to 44 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, attachment 1, and records relating to those persons who are named on attachment 2, the Prisoner of War/Missing Personnel Office's list of persons whose primary next-of-kin (PNOK) have authorized the release of information concerning them."

authorizations as well as the 1,700 PNOK **should include the name** of the POW/MIA, obviously.

Regarding Item 6,⁶ for records of searches conducted in *Hall I*, the CIA's *Vaughn* index identified twenty records (SMF 42), and asserts *collateral estoppel* regarding most of its records responsive to this Item. (SMF 44)

Item 7 seeks records of searches requested by any Congressional Committee or executive branch agency.⁷ The CIA first posited that AIM did not "respond to CIA's invitation to narrow the Item 7 request..." and claimed it was "unreasonably burdensome." (SMF 46) After AIM pointed out that it did narrow the request to exclude all FOIA requests (SMF 48), the CIA responded that "[t]he request continued to be overly burdensome and was therefore not accepted." (SMF 47) 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.

⁶ *Id.*: "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, April 23, 1998, and May 28, 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, etc."

⁷ *Id.*: 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."

The CIA refused to accept Item 8, for search fee estimates made in connection with plaintiffs' February 2003 FOIA Request,⁸ claiming it was the subject of pending litigation (SMF 50), and its *Vaughn* index is silent regarding any search for records responsive to this Item. (SMF 49) Plaintiff Hall's then-pending motion for an accounting does not exclude Item 8 from the purview of the FOIA, as defendant is well aware. Moreover, the Court has long since ruled on that motion.

The government's law of the case argument⁹ does not specify which issues it claims have been adjudicated in this case.

The Affidavits of Roger Hall contain numerous examples of operations, events and activities that surely generated relevant records that have not been provided or identified. The paucity of the CIA's production as compared to the records clearly in its possession is uncontroverted. (SMF 59, 61, 63-67, 69-72, 75-76, 78-82, 87-88) Plaintiffs have pointed to a number of specific documents which are reasonably thought to be responsive records, but which remain unidentified.

CONCLUSION

The Court in its April 13, 2005 Memorandum Order (Docket # 30), *inter alia*, adjudicated *collateral estoppel* issues, which the CIA ignores.

⁸ *Id.*: "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 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.)..."

The CIA acted in bad faith by initially trying to deny AIM the right to supplement the administrative record on the issue of fee waiver by conditioning acceptance of AIM's fee appeal on AIM's agreement to be bound to pay an unspecified sum in search fees. After years of litigating this issue, the CIA now claims to have waived search fees, sometime after July 18, 2007, the publication date of its "new regulations on FOIA processing fees."¹⁰ The CIA disclosed records on September 28, 2007,¹¹ 70 days after it waived search fees. Having now claimed a waiver of search fees, the CIA should not be allowed to treat that representation as illusory.

WHEREFORE, plaintiffs respectfully pray that the Court enter partial summary judgment in favor of plaintiff Accuracy in Media, Inc., and against defendant Central Intelligence Agency, as there is no genuine issue as to any material fact and plaintiffs are entitled to entry of partial summary judgment as a matter of law.

DATE: September 16, 2009.

¹⁰ 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."

¹¹ *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."

Respectfully submitted,

/s/

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