

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.)	
_____)	

RESPONSE OF PLAINTIFF ACCURACY IN MEDIA, INC., TO
DEFENDANT’S SUPPLEMENTAL RESPONSE PURSUANT
TO THE COURT’S MEMORANDUM OPINION & ORDER

Plaintiff Accuracy in Media, Inc. ("AIM"), respectfully submits this memorandum in response to the Defendant Central Intelligence Agency's ("CIA" or "Defendant") Supplemental Response Pursuant to the Court’s Memorandum Opinion & Order.

Preliminary Statement

In accordance with the Court’s November 12, 2009, Memorandum Opinion and Order ("Order"), the CIA has undertaken a number of new searches, released several thousand pages of records it had not previously located or produced, together with corresponding *Vaughn* indices, and has submitted its Supplemental Response Pursuant to the Court’s Memorandum Opinion & Order ("CIA Supp. Resp."). While AIM continues to rely on its previously filed cross-motion for summary judgment, together with the statement of material facts submitted in support thereof, and joins in the points in authorities submitted by plaintiffs Roger Hall and Studies Solutions Results, Inc., in their *Response to Defendant’s Supplemental Response to Court’s November 12, 2009 Order*,

AIM also submits this memorandum in support of its position that the CIA has not yet complied with its obligation to disclose responsive records under the FOIA.

I. DEFENDANT HAS FAILED TO CONDUCT AN ADEQUATE SEARCH IN RESPONSE TO PLAINTIFFS' REQUEST NUMBER FIVE

Plaintiffs' FOIA request number 5:

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.¹

The *Prisoner of War/Missing Personnel Office's* contains a list of 1700 POW/MIAs, by full name, whose primary next-of-kin have authorized the release of information concerning them.² The Court in its November 12, 2009, Order "held that the Agency must explain why it requires biographical information to verify the identity of individuals whose names appear in its records and to otherwise search for and disclose any non-exempt records concerning the individuals that the Agency can verify as responsive to Item 5." CIA Supp. Resp. at 12.

Defendant asserts that it "generally requires" the "date of birth, place of birth, or Social Security number [] in order to identify records pertaining to named individuals. Cole Decl. ¶ 69; Koch Decl. ¶¶ 25-27" to allow it to "make proper responsiveness determinations." CIA Supp. Resp. at 13. "Put otherwise," the Agency explains, "it is extremely difficult, and often impossible, to determine responsiveness based on a name alone. *Id.*; Koch Decl. ¶ 25." *Id.*

¹ AIM's FOIA Request is located at Docket 114-2 at 10-13

² The PNOK list is attached to AIM's FOIA Request, *id.* at 58-87.

This reasoning should be rejected. A cursory inspection of the record would reveal whether it is responsive. If a record containing a name on the PNOK list is regarding that individual as a POW or MIA from the Vietnam War or Korean War, it is responsive. The Agency is not being asked to determine responsiveness on the "name alone." As the Court observed, "based on the... details contained in the records themselves, it can verify [whether the record] pertain[s] to an individual on plaintiffs' lists." Oder at 11-12.

The other justification of defendant for refusing to conduct the search for the 1,700 names on the PNOK list is that "[p]erforming such a search would be unduly burdensome." CIA Supp. Resp. at 14. "By way of illustration," defendant explains, it "attempted a search in the electronic index of the archived records for the 1,711 individuals using names provided by Plaintiffs as search terms.... [which] indicated that 16,423 hard-copy file folders may contain responsive records to Item 5." *Id.* A responsiveness determination would necessarily require the CIA "to manually review every document in each file folder merely to determine whether each archived document would be responsive to Item 5." *Id.* at 15. However, regarding this "unduly burdensome" defense, the Court has already observed that "[t]he CIA does not identify the legal authority on which its argument is based, but it seems to contend that item 5 does not fulfill the requirement that a FOIA request 'reasonably describe[]' the records sought. 5 U.S.C. § 552(a)(3)(A)." Order at 11. Clearly, plaintiffs' item 5 request reasonably describes the records sought.

Nor does the FOIA recognize any "unduly burdensome" defense. Had plaintiffs made 1,700 separate FOIA requests, to make the same argument, defendant would have

to assert that the requests are unduly burdensome when viewed cumulatively. Similarly, defendant's argument would be even less persuasive if there were 170 plaintiffs each seeking the records of 10 POWs or MIAs. The absence of an unduly burdensome defense under the FOIA is commonsensical. The fact that a search may be burdensome does not entitle an agency to relief from the FOIA's mandate of disclosure.

The same reasoning applies to defendants' refusal to search for many of the records corresponding to the 44 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers³ to plaintiff Roger Hall. Most⁴ of those individuals whose records defendant refuses to search for⁵ appear in the chart below.

³ The privacy waivers are attached to AIM's FOIA Request, *id.* at 14-57.

⁴ Excluded are the five waivers that provide only the POW/MIA's name: Robert E. Simmons, Humber Rogue Versace, Charles Duke, Dean Pogrebra, John L. Robertson.

⁵ Defendant identifies those individuals whose corresponding records are searched for in the Cole Decl. (Docket 148-7) n. 27 at 39: "The names of these individuals as follows: Daniel V. Borah, Jr.; Thomas T. Hart, III; George Duncan Macdonald; Thomas Moore; Jerry M. Shriver; Frances W. Townsend; Carl Richard Ussery; Robert D. Beutel; Russell P. Bott; Robert Franklin Coady; James E. Dooley; Jerry W. Elliot; Patrick Martin Fallon; Gary H. Fors; Frank A. Gould; James W. Grace; Andre R. Guillet; James Wayne Herrick, Jr.; Earl P. Hopper, Jr.; David L. Hrdlicka; James Alan Ketterer; Albro L. Lundy, Jr.; Michael J. Masterson; William Patrick Milliner; Robert D. Morrissey; Larry Warren Robinson; Leo Earl Seymour; Ronald Dean Stafford; Larry J. Stevens; Francis W. Townsend; and Michael Lora Bouchard."

<u>Name / Waiver on page of Docket # 114-2</u>	<u>Branch of Service</u>	<u>Service Number</u>	<u>Case or Reference Number</u>	<u>Place / Date of Incident</u>	<u>Additional Information</u>
Alan L. Boyer 18	Army		1108	March 28, 1968	
Morgan Jefferson Donahue 20	Air Force	FR 319558		Laos Dec 13, 1968	Lt
Gregory John Harris 29	Marine Corps	2077294/2481	0358	June 12 1966	Sgt/Sgt
Melvin G. Holland 32	Air Force	AF 19495705		Site 85 Phou Pha Ti, Laos March 11, 1968	
Robert D. Johnson 35	Navy	USN 626423		Bassac River South Vietnam Sept 1, 1968	LcCr
Oscar Mauterer 41	Air Force	0000 283 27		Feb 15, 1966	
Homer I. May 40	Army	RA 37 590 089		Sept 2 1951	Sgt 7th Infantry Div. 17th Infantry DSC awarded action Sep 1, 1950, Hill 851

Henry M. Serex 48	Air Force	1811-05	North Vietnam April 2, 1992	BAT 21 crew, aerial imagery taken June revealing "SEREX" in a rice paddy in North Vietnam
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Should a CIA search its records using these names as search terms, "based on the... details contained in the records themselves, it can verify [whether the record] pertain[s] to an individual on plaintiffs' lists." Order at 11-12.

In addition to mistakenly excluding two individuals whose social security number appeared on the subject waivers,⁶ the record in this case belies the CIA's position regarding its inability to discern whether any "hits" on the names in the releases would be responsive. For example, as chart above reflects, Jennifer V. Serex-Helwig's release (Docket # 14-2 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." *See also* Affidavit of Hon. Bill Hendon (Docket # 116-46) ¶ 12 at 4:

- "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."

⁶ *See* Docket # 114-2 at 15 Robert D. Buetel, SS # 325-40-1943; Russell P. Bott, SS # 114-28-84**, *id* at 17.

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

A search using Lieutenant Colonel Serex's name would surely yield the satellite image of the Lieutenant Colonel Henry M. Serex's 1992 plea for help, and any claim that the CIA could not "make [a] proper responsiveness determination[]" (CIA Supp. Resp. at 13) is not credible.

II. DEFENDANT HAS FAILED TO CONDUCT AN ADEQUATE SEARCH IN RESPONSE TO PLAINTIFFS' REQUEST NUMBER SEVEN

Plaintiffs' FOIA request number 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.

The CIA misinterpreted the Court's Order regarding its obligations to search for records responsive to item 7. Noting that ¶ 38 of the Koch Declaration "indicates that the Agency's electronic database system tracks 'searches recently conducted for other federal agencies'" (Order at 13), the Court rejected defendant's claim that it could "only retrieve records of FOIA searches." *Id.* But the Court's reasoning did not relieve defendant of the

obligation to include a search for "records conducted in response to any request by any congressional committee," contrary to defendant's interpretation.⁷ Defendant's declarations are silent on its ability to conduct such a search.

III. DEFENDANT HAS FAILED TO CONDUCT AN ADEQUATE SEARCH IN RESPONSE TO PLAINTIFFS' REQUEST NUMBERS SIX AND EIGHT, AND HAS WITHHELD RECORDS IN THEIR ENTIRETY WITHOUT PROPER JUSTIFICATION

Plaintiffs' FOIA request number 6 and 8⁸ (emphasis added):

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.
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. 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

⁷ CIA Supp. Resp. at 16: "In response to Plaintiffs' request for 'all records pertaining to any search ever conducted by the Agency, at any time and for any reason, for records concerning Vietnam War POW/MIAs,' the Court ordered CIA to conduct a search for any searches recently undertaken on behalf of other federal agencies. *Hall*, 668 F. Supp. 2d at 181." *See also id.* at 17: "Pursuant to the Court's Order, the CIA searched CADRE for all searches conducted for other federal agencies concerning Vietnam War POW/MIAs."

⁸ AIM's FOIA Request is located at Docket 114-2 at 10-13.

Hall's Complaint, holding, *inter alia*, that he had constructively abandoned his Request by failure to commit to pay search fees.

Two years after having refused to accept the request, on July 13, 2007,⁹ 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).¹⁰

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.

DATE: April 18, 2011.

⁹ CIA Motion for Summary Judgment (Docket # 109) 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)."

¹⁰ *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."

Respectfully submitted,

/s/

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