

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT HALL, et al., :
 :
 Plaintiffs, : Docket No.: 04-CV-814
 :
 vs. : Washington, DC
 : 10:49 a.m., Tuesday
 CENTRAL INTELLIGENCE : July 2, 2013
 AGENCY, :
 :
 Defendant. :
 :
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REPORTER'S OFFICIAL TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE CHIEF JUDGE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs JAMES H. LESAR, ESQ.
Mr. Hall and 930 Wayne Avenue, Unit 1111
Studies Solutions: Silver Spring, Maryland 20910
(301) 328-5920

For the Plaintiff JOHN HARRISON CLARKE, ESQ.
Accuracy in Media: Law Office John H. Clarke
1629 K Street, NW
Suite 300
Washington, DC 20006-1631
(202) 332-3030

For the Defendant: MERCEDEH MOMENI, ESQ.
U.S. Attorney's Office
555 4th Street, NW
Washington, DC 20530
(202) 307-0821

The Court Reporter: CHANTAL M. GENEUS, RPR, CRR
Certified Realtime Reporter
Registered Professional Reporter
United States District Court
333 Constitution Avenue, NW
Washington, DC 20001

Proceedings reported by machine shorthand. Transcript
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1 P R O C E E D I N G S

2 (Whereupon, at 10:49 a.m. the proceedings
3 commenced and the following ensued:)

4 THE COURTROOM DEPUTY: The Court calls the
5 matter of *Roger Hall, et al., versus Central*
6 *Intelligence Agency*, Civil Matter 04-814.

7 Mr. Lesar and Mr. Clarke representing the
8 plaintiffs. Miss Momeni representing the defendant.

9 THE COURT: Can the defendant give me a
10 current update on the status, and then I'll see or
11 suggest what I'll do.

12 MS. MOMENI: Good morning, Your Honor.
13 We -- in anticipation of the status today, we did file
14 a five-page status report. But just to reiterate,
15 Your Honor, since the last status conference, the
16 agency has accomplished a great deal moving this
17 matter forward.

18 First of all, we have shared with the
19 plaintiffs 2,000 pages in what we call the Ritter file
20 as a sample of what is to be found for the remaining
21 names that they had sought in the Item 5 records.

22 We turned those over to the plaintiffs back
23 in -- I believe it was April -- or May.

24 We provided that to them as a sample in
25 order to facilitate in our discussions about narrowing

1 down the searches.

2 This morning the plaintiffs have advised us
3 that they're willing to narrow down the searches.
4 They are not necessarily interested in all the
5 personnel records, but we would like on the record
6 what it is that they're willing to forgo to better
7 understand their request or the narrowing of the
8 searches.

9 Additionally, we've turned over 463 pages
10 from CADRE, which is the CIA's Automated
11 Declassification and Release Environment System. And,
12 finally, we've turned over 2,500 pages under Item 7,
13 which related to all records on or pertaining to any
14 search conducted regarding any congressional committee
15 request pertaining to the Vietnam War POW/MIAs.

16 So that's where we are right now, Your
17 Honor.

18 THE COURT: What's remaining to be done?

19 MS. MOMENI: So we have -- under the CADRE
20 searches, we have identified files that are -- well,
21 I'm sorry -- a search was conducted that have turned
22 up 8,000 hits for responsiveness and processing of the
23 documents for release to the plaintiffs, and that
24 would take approximately nine months unless plaintiffs
25 agree to narrow it, which they have done. So we have

1 to work out a timeline from here.

2 I believe that's it. Oh, I'm sorry, Your
3 Honor. Finally, there's these twelve documents that
4 the agency has referred -- or is in the process of
5 referring to other government agencies, and we'll
6 advise plaintiff as to their status as we go along in
7 this month.

8 THE COURT: And what's the status of your
9 *Vaughns*?

10 MS. MOMENI: Well, we haven't been working
11 on those, Your Honor, because we understood that the
12 production is still ongoing.

13 So if we're narrowing issues, it wouldn't
14 necessarily make sense to be working on the *Vaughns*,
15 but we'll be ready to roll when the Court orders.

16 MR. LESAR: Good morning, Your Honor.
17 James H. Lesar representing the plaintiffs, Roger Hall
18 and the Studies Solutions Results, Inc.

19 We have agreed to narrow the request. We
20 will exclude certain categories such as leave records,
21 medical records, pay records, personal correspondence,
22 the schooling of children, and benefits of survivors.
23 And I can work that out with counsel for the CIA later
24 as to the exact terms, but that, in general, is what
25 we've agreed to exclude.

1 There are several issues that we're going to
2 need to deal with. There are profound problems with
3 the search that has been conducted -- the searches
4 that have been conducted. And I'm going to leave most
5 of that issue to Mr. Clarke, who will speak after me.

6 I will mention that, first, there is --
7 excluded from the search were operational files. And
8 the CIA has failed to make any indication that it has
9 conducted the decennial review of operational files
10 that is required under the CIA Information Act of
11 1992. That's an issue that must be addressed.

12 Secondly, their report states that 114 hard
13 copy file folders were destroyed of records responsive
14 to the request.

15 We need to find out when that destruction
16 occurred, what it consisted of, and who did it. These
17 records are matters of historical interests and they
18 are protected under the statute. The National
19 Archives has to sign off on destruction of records,
20 and we don't know at this point whether that was done
21 and why these records were destroyed.

22 Apart from the search issues, which are
23 going to have to be dealt with down the pike, there
24 are two imminent issues that must be addressed.

25 One is the CIA has refused to provide the

1 records to my client, Roger Hall, in Word
2 searchable .pdf format; instead, insisting that he
3 receive them in hard copy form.

4 First, we have noted -- and this is an
5 ongoing dispute that has taken place over the past
6 couple of years. We have noted that the statute
7 requires them to be provided in the format requested
8 by the plaintiff.

9 The CIA has declined to do that. They
10 eventually, two or three weeks ago, wanted to know
11 what we were relying on. We provided a copy of the
12 EFOIA amendments which provide that, and we were later
13 informed that they were not relying on the statute;
14 they were relying on case law.

15 I've asked for the cases that they were
16 relying on, haven't received that so far. We would
17 ask that this -- that the Court require the CIA to
18 submit a motion setting forth the reasons why the
19 EFOIA statute does not apply to this case.

20 It's notable that in addition to the
21 provision of the statute, which is plain on its face,
22 Mr. Hall has -- suffers from a grave physical
23 disability which greatly impedes his ability to handle
24 paper copies.

25 His left arm is paralyzed. He cannot move

1 it much above the waist. He cannot grip with his
2 fingers. So he's reduced in his ability to handle
3 paper copies. He needs to have the material so he can
4 view it on a computer screen, and that requires it
5 being provided in digital form.

6 The CIA has urged that -- at various times
7 we've been told that this cannot be done, but, in
8 fact, the report they have submitted to the Court says
9 that because of the fragility of the copies at issue,
10 special preparations had to be taken in order for them
11 to be scanned. So they've been scanning them. They
12 can be provided in digital format.

13 The next issue that's got to be decided
14 before we can move forward in this case is the
15 question of an interim award of attorney's fees. It's
16 now been nearly a decade that we've waited patiently,
17 and there have now been very substantial disclosures
18 that we think entitles us to attorney fees.

19 Mr. Clarke, I think, has already begun work
20 on a motion for interim attorney fees for his client.
21 I have tallied up my client. I haven't yet done the
22 work that needs to be done to make an application, but
23 I would expect to do so within the next month and
24 submit that to the CIA for consideration prior to an
25 interim award of attorney's fees.

1 But the need is critical and that needs to
2 be taken care of before we can really address the
3 profound issue about the search, among other things.

4 Thank you, Your Honor.

5 THE COURT: Did you want to add something?

6 MR. CLARKE: I did, Your Honor. John Clarke
7 on behalf of Accuracy in Media, Your Honor.

8 Just to add briefly to what Mr. Lesar said.
9 Regarding the electronic records, we've already
10 received, thankfully, approximately 5,000 pages. I'm
11 going to ask the Court to consider whether or not you
12 want to order the defendant to produce those records
13 in electronic form.

14 My client posts virtually all of the
15 productions online, and we think that in light of the
16 statute providing for records to be produced as the
17 plaintiff asks, that they consider those -- consider
18 that.

19 Also, Your Honor, to the extent that the
20 Court does order a schedule for production, the
21 plaintiffs would like to have rolling releases. And
22 then, lastly, Your Honor, regarding the search, I did
23 not -- my client did not file anything in response to
24 the status report that the defendant filed, but I do
25 think it would be helpful to bring to the Court's

1 attention at this juncture, the defendant's claimed
2 six months ago that they needed, respectively, 4.7
3 years and 5.7 years, and now six months later, they
4 claim to have produced -- or, excuse me, reviewed all
5 of the records that they asked for. And that, by my
6 calculation, would mean they would have to have put
7 twenty employees full time on their review in the past
8 six months.

9 So the reason that I bring it up now, as I
10 said, I don't think it's ripe for the Court to rule on
11 that, but there is going to be an issue, and we would
12 hope that the defendant would bring those statistics
13 to bear when they file their *Vaughn* index.

14 Particularly when they asked many years to
15 conduct what they have now apparently completed, and
16 they were asserting in their defense that it was
17 unduly burdensome for them to have to review those
18 records. And years ago, they asked for, I believe,
19 \$600,000 in order to conduct the search that they now
20 said they have conducted.

21 So, in any event, those are issues that I
22 think may be apparent and within the summary judgment
23 motions when the next round are filed. Thank you.

24 MS. MOMENI: Your Honor, the plaintiffs
25 addressed five separate issues. I will address them

1 in turn.

2 First of all, Mr. Lesar raised the issue of
3 the CIA Information Act, which is part of the National
4 Security Act. And that should really be addressed in
5 the motion for summary judgment. Now is not the time,
6 and I think Mr. Lesar would agree with me. He said
7 that's not a primary issue that he needs to address
8 right now.

9 Second of all, the records that were
10 destroyed. Mr. Lesar raised the issue of these 114
11 files that were destroyed. Docket Item 196 that we
12 filed on 6/28 states that "Those files had been
13 destroyed in proper course and in accordance with the
14 CIA records control schedule. Again, those records
15 were destroyed pursuant to agency retention schedules
16 and approved by NARA."

17 Again, that's something that we can address
18 in the motion for summary judgment.

19 Mr. Lesar also raised the issue of the
20 electronic records, and that requires a twofold
21 response. First of all, Your Honor, the plaintiffs
22 did not ask for electronic records in their initial
23 request with the CIA, nor did they put anything like
24 that in their complaint. There's case law that
25 supports our position that the agency does not have to

1 produce electronic records when the request did not
2 ask for them.

3 Now, that having been said, Your Honor, I --
4 there's also operational needs or operational -- very,
5 very serious operational issues that the CIA faces in
6 dealing with electronic records that we'll address
7 properly if and when. But I would like to put on the
8 record that my office has repeatedly offered to the
9 plaintiffs, especially because of Mr. Hall's
10 condition, to take the records from the CIA and scan
11 them and put them on a disk and provide them to
12 Mr. Hall. Plaintiffs have told me -- they told me
13 this morning that's not what they're after; that's
14 not what they seek.

15 So that having been said, the plaintiffs
16 have asked the Court for the defendant to file a
17 motion where we're not requesting anything. It's the
18 plaintiffs that want something from the Court, Your
19 Honor, so I don't know what it is that I'm supposed to
20 file here.

21 I'm happy to respond to any request that
22 they have, but, first of all, I have to know what
23 their position is. And for us to have to file would
24 be completely counterintuitive.

25 So I would suggest that it's the plaintiffs'

1 burden to file their motion and for the CIA to
2 respond.

3 Your Honor, Mr. Clarke asks for rolling
4 releases. We've already been doing that. As I
5 mentioned, there's been thousands of pages released
6 recently, and we'll continue to do so, so that's not
7 an issue.

8 As far as the timing is concerned about how
9 we've been able to produce the documents, the CIA just
10 informed me that the way that this has been able to
11 take place is because they've been able to move
12 resources around to complete.

13 Some of these records were also found to be
14 destroyed, that's why we've been able to do things in
15 a shorter period of time.

16 So those are the five issues, Your Honor,
17 unless there are any questions.

18 THE COURT: No. What do you see is the next
19 step, then?

20 MS. MOMENI: The next step is for the
21 plaintiffs -- I guess they've told us specifically
22 what it is that they're willing to forgo, so that
23 helps with the production. Instead of taking several
24 months to do it, we can narrow that time down.

25 I believe we said it would take nine months

1 to complete it. I think that would be much less. If
2 the plaintiffs need to file something for their fees
3 and/or for production of electronic documents, then
4 obviously they have a right to do so.

5 THE COURT: All right. Mr. Lesar.

6 MR. LESAR: Yes. Just briefly, Your Honor,
7 on the question of .pdf format, the government has
8 taken the position that we needed to make that demand
9 with the initial request back in 2004. There's
10 nothing in the statute that says that the request must
11 be made at the time the FOIA request is submitted.

12 And, in fact, that's impractical,
13 particularly in Mr. Hall's circumstances, but it's
14 also impractical in general because many clients do
15 not know in what format the records they've requested
16 exist until after the lawsuit is filed.

17 The plain wording of the statute simply
18 requires the government to comply with the plaintiffs'
19 request. It doesn't specify with the request that
20 that request must be submitted with the original
21 request.

22 The Supreme Court has recently emphasized
23 the -- in the *Milner* case that the plain wording of
24 the statute prevails, and the plain wording here is
25 quite clear.

1 We have asked for them. We haven't done so
2 formally. We've done so because it seems apparent to
3 us that the suit is very clear and there's no reason
4 why the burden -- the government should foist the
5 burden on us having to go forward with that.

6 If the government thinks it has a
7 justification for it, for withholding them, then it
8 should reject our request and file a brief stating
9 that and citing any cases they can to support that
10 proposition. But they've advised us that they're not
11 relying on the statute, and it's the statute that I
12 think controls here. So that is the issue with
13 respect to the digital question.

14 As to -- in respect to the search issue and
15 the *Vaughn* index, all of that will be addressed once
16 we get a disposition on the motion and award of
17 attorney's fees, the application. We will first apply
18 and hope that it can be worked out with the CIA and
19 the U.S. Attorney's Office. But if that fails, we
20 will be filing a motion.

21 I have nothing further, Your Honor.

22 THE COURT: The waiting-of-the-ball-going-in
23 is for me to order the government to file a memo in
24 ten days on why they don't simply give you the .pdf
25 version, that's what your request is?

1 MR. LESAR: Yes, that would do. Yes, Your
2 Honor.

3 THE COURT: Now, she said at one point they
4 will give you the media version.

5 MR. LESAR: Yes. Our position on that is we
6 have a right under the statute to have it. We don't
7 think that it's appropriate for the U.S. Attorney's
8 Office to be, in effect, acting as a foot servant of
9 the CIA. The U.S. Attorney, Department of Justice, is
10 an independent agency and it needs to be controlling
11 the relationship, not the reverse.

12 MS. MOMENI: Your Honor, given the recent
13 events, WikiLeaks issues and the Snowden affair, the
14 CIA faces significant operational issues in producing
15 documents from the high side, as they call it,
16 classified section to the low side.

17 We are not prepared to discuss all of that
18 today. But as you can imagine, getting disks in and
19 out of the CIA from information that was initially
20 classified is gonna be problematic.

21 THE COURT: Mr. Snowden didn't have any
22 trouble.

23 MS. MOMENI: Precisely, Your Honor, and we
24 don't want to make it any easier for other folks who
25 have certain ideas to act in certain ways to make it

1 easier for them. We really don't.

2 That's all I had to say, Your Honor. We
3 think it makes no sense for us to go forward with this
4 motion, or I'm not making a request of the Court. I
5 have no reason to clutter the Court's docket.

6 If Mr. Lesar and Mr. Clarke would like to
7 file something on behalf of their clients, we'd be
8 happy to respond. But at this point, all we know is
9 they believe the statute requires us to produce.
10 There's a case called *CREW versus U.S. Department of*
11 *Education*, 905 F. Supp.2d 161 that supports our
12 position.

13 Again, Your Honor, we'd be happy to respond
14 to any filings by the plaintiffs, but we don't think
15 it's in any way, form, or shape appropriate for us to
16 go first. If there's nothing further...

17 THE COURT: File something in ten days.
18 I'll look at it and order a response.

19 MS. MOMENI: Thank you, Your Honor.

20 MR. CLARKE: Your Honor?

21 THE COURT: Yes.

22 MR. CLARKE: Were you addressing the
23 plaintiffs when you said, "File something in ten
24 days"?

25 THE COURT: Both of y'all. Whatever it is

1 you think that I can assist you in ordering, give me
2 your specific request, I'll let them comment on it and
3 then I'll enter an order.

4 MR. CLARKE: Thank you, Your Honor.

5 THE COURT: My only desire is to get this
6 over with. It's painful enough. It's time to get it
7 to an end.

8 MS. MOMENI: Yes, Your Honor. We agree
9 completely.

10 THE COURT: Good.

11 I have another case. It's under seal.

12 MS. MOMENI: Thank you, Your Honor. May I
13 be excused.

14 THE COURT: Yes.

15 MR. CLARKE: Thank you, Your Honor.

16 MR. LESAR: Thank you, Your Honor.

17 (Whereupon, at 11:14 a.m. the proceedings
18 concluded.)

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