

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL,)

Plaintiff,)

v.)

CENTRAL INTELLIGENCE AGENCY,)

Defendant.)

Civil Action No. 98-1319 (PLF)

FILED

JUL 22 2002

NANCY MAVER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION AND ORDER

Before the Court are defendant's motion to require plaintiff to commit to payment of search and copying fees before conducting additional searches, and plaintiff's motion for a public interest fee waiver. Plaintiff's suit concerns five requests for records under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, pertaining to prisoners of war and American soldiers missing in action from the Vietnam War. Upon consideration of the arguments of the parties and the record herein, the Court grants defendant's motion and denies plaintiff's motion.

The Court previously issued an opinion and order granting defendant's motion for summary judgment in part and denying it in part. See Hall v. CIA, Civil Action No. 98-1319, Opinion and Order (D.D.C. Aug. 10, 2000). The Court directed defendant to "provide the Court with supplemental affidavits or declarations demonstrating the adequacy of its search for records responsive to plaintiff's FOIA request and justifying the nondisclosure of any additional records that were discovered." Hall v. CIA, August 10 Order at 1-2. Before

Civil Action No. 04-0814
(HHK)

attachment 2

85

submitting supplemental affidavits or declarations, defendant filed its motion to require plaintiff to commit to payment of search and copying fees. Plaintiff opposes defendant's motion and argues that he is entitled to a public interest fee waiver.

Individuals requesting records under the FOIA generally are required to pay search and copying fees incurred by the agency. See 5 U.S.C. § 552(a)(4)(A)(v); 32 C.F.R. § 1900.13(f); see also Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988); Putnam v. United States Dep't of Justice, 880 F. Supp. 40, 42 (D.D.C. 1995). Under the regulations promulgated by the CIA, it may seek a "specific commitment [from a requester] when it estimates that fees will exceed \$100.00." 32 C.F.R. § 1900.13(e). Defendant represents that the agency already has incurred search and copying fees of about \$4,550 in responding to Mr. Hall's request, but that it will not seek payment of these already incurred charges. Defendant, however, refuses to conduct further searches or make additional copies unless plaintiff commits to payment of fees up to a specified amount. Plaintiff argues that he should not be required to commit to paying search and copying fees because he is entitled to a public interest fee waiver under the FOIA and under the CIA's own regulations. See 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 1900.13(b)(2).¹

The FOIA sets forth a two-prong test to determine whether the records sought by a requester are "likely to contribute significantly to public understanding of the operations

¹ When he initially made his FOIA requests, plaintiff asked the CIA for a public interest fee waiver, which defendant denied in a letter dated May 24, 1999. See Plaintiff's Motion for Waiver of Search and Copying Fees and Opposition to Defendant's Motion to Require Plaintiff to Commit to Payment of Fees Before Any Additional Searches Are Made ("Pl.'s Mot."), Attachment 11 at 2-3.

or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); see also 32 C.F.R. § 1900.13(b)(2). Defendant concedes that the documents sought by plaintiff are not primarily in his commercial interest. The Court therefore need only consider the first prong: Are the records likely to contribute significantly to the public's understanding of the operations or activities of government?

The CIA has enumerated a list of four factors to assist the agency in determining whether a requester meets this first prong of the public interest fee waiver test. See 32 C.F.R. § 1900.13(b)(2)(i)-(iv).² The Court recently has considered the same issue in the context of a FOIA request made to the Department of Justice. See Judicial Watch v. United States Dep't of Justice, 185 F. Supp.2d 54, 60-62 (D.D.C. 2002). Although the language of the CIA's

² Under the first prong of the test, the agency (and the Court) should consider the following four factors:

- (i) Whether the subject of the request concerns the operations or activities of the United States Government; and, if so,
- (ii) Whether the disclosure of the requested documents is likely to contribute to an understanding of United States Government operations or activities; and, if so,
- (iii) Whether the disclosure of the requested documents will contribute to public understanding of United States Government operations or activities; and, if so,
- (iv) Whether the disclosure of the requested documents is likely to contribute significantly to public understanding of United States Government operations and activities.

32 C.F.R. § 1900.13(b)(2)(i)-(iv). This section of the regulation also lists two additional factors, both of which concern the commercial interest prong, and therefore do not need to be considered here. See 32 C.F.R. § 1900.13(b)(2)(v)-(vi).

regulation and the Justice Department's regulation is not identical, word for word, the differences in the language are so minor that the regulations essentially are identical. Compare 32 C.F.R. § 1900.13(b)(2)(i)-(iv), with 28 C.F.R. § 16.11(k)(2)(i)-(iv). The Court therefore incorporates the analysis set forth in its Judicial Watch opinion.

Before reaching the merits of the fee waiver request, the Court first must decide whether letters that plaintiff submitted to defendant to initiate separate FOIA requests that are not part of this case now should be considered in connection with his motion for a fee waiver. Although the Court decides *de novo* whether to grant plaintiff's request for a public interest fee waiver, its consideration of the matter is limited to the administrative record before the agency at the time of its decision. See 5 U.S.C. § 552(a)(4)(A)(vii); see also Larson v. CIA, 843 F.2d at 1483; District of Columbia Technical Assistance Organization, Inc. v. HUD, 85 F. Supp.2d 46, 48 (D.D.C. 2000). The subject matter of this litigation has been *only* the five specific FOIA requests listed in plaintiff's complaint. See Hall v. CIA, August 10 Opinion at 3-4. Plaintiff's other requests to the agency for records are not part of this case and were not considered by the CIA when it denied plaintiff's request for a public interest fee waiver for the FOIA requests enumerated in the complaint. The Court therefore will consider only those documents that relate to the five specific FOIA requests then before the CIA and now before the Court. See Pl.'s Mot., Attachments 1, 4 & 7-11.

The Court concludes that plaintiff is not entitled to a public interest fee waiver. While it is true that many people are interested in the status of POWs and MIAs from the Vietnam War, this general assertion is insufficient to demonstrate that plaintiff is entitled to a public interest fee waiver. Plaintiff must describe with specificity how the particular

information requested will further the public interest and not just that the information sought relates in some way to the operations and activities of government. He also must explain how the public's understanding will be appreciably enhanced by the disclosure of these specific records. See Larson v. CIA, 843 F.2d at 1483; McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987); Judicial Watch v. United States Dep't of Justice, 185 F. Supp.2d at 61-62. Plaintiff has failed to do so.

Plaintiff's other arguments also fail. In some of his requests to defendant, plaintiff merely restates the statutory fee waiver provision as a reason why he is entitled to the public interest fee waiver. See Pl.'s Mot., Attachments 7-10. This is clearly insufficient. See Sloman v. United States Dep't of Justice, 832 F. Supp. 63, 68 (S.D.N.Y. 1993) (merely quoting the statutory language insufficient). Plaintiff's assertion that he is entitled to a public interest fee waiver on the grounds of his indigence or financial hardship also is an insufficient basis, standing alone, for granting a fee waiver. See Ely v. United States Postal Service, 753 F.2d 163, 165 (D.C. Cir. 1985) (Congress rejected a fee waiver on grounds of indigency); District of Columbia Technical Assistance Organization, Inc. v. HUD, 85 F. Supp.2d at 48 (same).

Plaintiff also has failed to demonstrate his ability and intent to distribute the information to a broad audience of interested persons. In his requests to the CIA for a public interest fee waiver, he either fails to address entirely his ability and intent to disseminate the requested information, or else he asserts only that he has disseminated information in the past and intends to do so in the future. These assertions are too vague and conclusory to meet plaintiff's burden of showing that he is entitled to a fee waiver. See Oglesby v. United States

Dep't of the Army, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990); Judicial Watch, Inc. v. United States Dep't of Justice, 122 F. Supp.2d 13, 18-19 (D.D.C. 2000) (Kennedy, J.). Based on the four-factor test set forth in the regulations and the analysis in this Court's Judicial Watch opinion, the Court concludes that plaintiff has not demonstrated his entitlement to a public interest fee waiver, and it therefore denies his motion.

Because plaintiff is not entitled to a public interest fee waiver, defendant is not obligated to conduct further searches until plaintiff expresses his willingness to pay search and copying fees up to a specified amount. If plaintiff does not wish to commit to paying search and copying fees, the case effectively is over because defendant will not be obligated to provide plaintiff with additional documents beyond what it already has given to him. If plaintiff does wish to pay the additional fees, he must provide the defendant with a commitment to pay such fees up to a specified amount. Defendant then will be required, first, to file the supplemental affidavits or declarations required by this Court's Order of August 10, 2002, and, then, to conduct further searches and make additional copies provided that the Court ultimately concludes that the original searches were inadequate after reviewing the supplemental filings.


Accordingly, it is hereby

ORDERED that defendant's motion to require plaintiff to commit to payment of search and copying fees before any additional searches are conducted [57-1] is GRANTED; it is

FURTHER ORDERED that plaintiff's motion for a public interest fee waiver [66-1] is DENIED; and it is

FURTHER ORDERED that on or before August 26, 2002, the parties should file a joint report indicating whether or not plaintiff has committed to paying search and copying fees up to a specific amount. If he has not, the case will be dismissed. If he has, the joint report shall set forth a briefing schedule for compliance with this Court's August 10, 2000 order.

SO ORDERED.


PAUL L. FRIEDMAN
United States District Judge

DATE: 7/22/02