

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al., :  
 :  
 Plaintiffs, :  
 :  
 v. : Civil Action No. 04-0814 (HHK)  
 :  
 CENTRAL INTELLIGENCE AGENCY, :  
 :  
 Defendant :

**MOTION OF PLAINTIFF ROGER HALL FOR PARTIAL RECONSIDERATION  
OF THIS COURT'S APRIL 13, 2005 MEMORANDUM OPINION AND  
ORDER AND MOTION FOR AN ACCOUNTING OF TIME AND COSTS OF SEARCHES**

Comes now the plaintiff, Roger Hall, and moves this Court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to partially reconsider its Memorandum Opinion and order entered April 13, 2005.

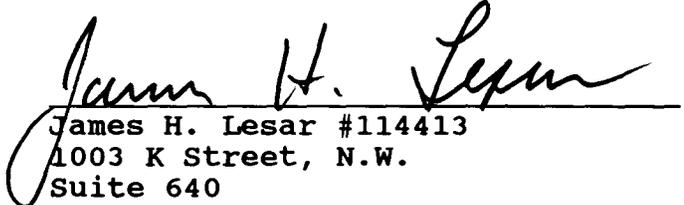
Plaintiff Hall further moves the court for an accounting of (1) all time and costs incurred by defendant Central Intelligence Agency in conducting searches for records at issue in Roger Hall v. Central Intelligence Agency, Civil Action No. 98-1319, and (2) an accounting of the time and costs which the CIA estimates it will incur in searching for records responsive to Hall's February 7, 2003 request which is at issue in this lawsuit.

A Memorandum of Points and Authorities and a proposed order are submitted herewith.

Counsel for defendant has advised that defendant will oppose these motions.

Respectfully submitted,

May 2, 2005

  
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for future searches and copying." Apparently considering the administrative record closed, Hall's then-attorney did not appeal this prospective denial.

Six weeks after it was ordered to conduct further searches, the CIA filed a motion to require Hall to commit to pay processing fees. It did not specify the amount of such fees, nor did it reveal that the searches already had been done. On October 27, 2000, Hall opposed the CIA's motion and cross-moved for a waiver of fees. Twenty-one months later Judge Friedman denied Hall's motion and ordered that he "must provide the defendant with a commitment to pay such fees up to a specified amount." July 22, 2002 Memorandum Opinion and Order (emphasis added).

Advised of Judge Friedman's order, Hall wrote out a check in the amount of \$10,000 to his attorney Mark Zaid for deposit in his trust account, intending this to be used to pay any fees demanded by the CIA. See Attachment 1. It is unclear why this sum was selected, since Judge Friedman's order neither mentioned any specific sum nor required that any payment be made. Nor had the CIA mentioned any particular sum up to then.<sup>1</sup>

What is clear is that Hall was prepared to pay the fees. However, he was advised by his attorney James H. Lesar only to commit to and to pay \$1,000 in search fees. This advice was based on the fact that the CIA had, contrary to its own regulations,

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<sup>1</sup>Hall's recollection is that his attorney Mark Zaid contacted AUSA Rudolph Contreras and may have been informed by him of the amount of fees. However, attorney Zaid has no recollection of this, and the \$10,000 amount is inconsistent with the \$29,000 amount which the CIA later claimed it had incurred.

failed to provide Hall with even an estimate of the search fees at issue. Given this circumstance, making a blanket commitment to pay fees would run the risk that the CIA would charge an unjustifiably high amount of search fees which Hall would then be obligated to pay. Payment of any very substantial amount of fees without qualifications as to which searches the funds were to be expended on would run the risk that the CIA would apply the fees to searches less likely to be productive, rather than to those which were less expensive and had better prospects of locating responsive, non-exempt records. Therefore, on advice of his attorneys, Hall, through Zaid's letter of October 15, 2002, made a payment of \$1,000 and specified the priority of the searches to be undertaken, listing in descending order those he thought would be most likely to produce releasable information at minimum cost.

Prior to this, in a Joint Status Report filed August 23, 2002, the District Court had been informed that Hall would commit to pay and actually pay \$1,000 in search fees, and that he intended to specify the priority in which the searches should be undertaken.

By order dated January 16, 2003, the District Court noted that in their August 23rd report the parties had agreed that after Hall had specified the priority of the searches he wanted made, the parties would file either the CIA's objections to Hall's search specifications or a proposed schedule. Since no such report had been filed, the Court directed the parties to file one by January 31, 2003. See Attachment 2.

In the January 31 report, the CIA informed the Court for the first time that "searching and processing conducted after August 2000 amounts to at least \$29,000." See Attachment 3. These fees were incurred without notice to Hall in violation of CIA regulations. See 31 C.F.R. 1900.13(e). which states in pertinent part that "[i]n order to protect requesters from large and/or unanticipated charges, the Agency will request specific commitment when it estimates that fees will exceed \$100.00."

Hall took the position that the CIA had waived its right to collect such fees, and that records located as a result of such searches should be provided to him without charge. He also demanded that the CIA provide an accounting to justify the \$29,000 figure. Finally, he pointed out that the Court's order of August 3, 2000 required the CIA to provide a supplemental declaration regarding its efforts to search for copies of its own records provided to a Senate committee. No such declaration had been, or ever was, provided.

By letter dated February 7, 2003, Hall submitted a new FOIA request to the CIA. It re-requested, in slightly different terms, the same records which Hall had originally requested. It also added requests for records pertaining to the searches that the CIA had conducted and the time and costs associated with such searches, information which he had been unable to obtain from the CIA in the Hall 1 lawsuit.

On April 2, 2003, the CIA filed a Notice of Corrected Calculation of Search Fees, lowering its previous figure of \$29,000 to

\$10,906. See Attachment 4. But it failed to explain the basis for this figure or why it differed so drastically from the \$29,000 figure it had given just two months earlier.

The CIA did not respond to Hall and SSRI's new FOIA request before they filed this action, Roger Hall, et al. v. Central Intelligence Agency, Civil Action No. 04-0814 ("Hall II") on May 19, 2004. When the CIA returned the two checks totaling \$10,906.33 which had been submitted to the CIA by letter dated November 26, 2003, see Attachment 5, new checks in the same amount were issued by attorney Mark Zaid and sent to the CIA by letter dated July 29, 2004. See Attachment 6. Mr. Zaid's July 29th letter clearly referenced Mr. Hall's new, February 7, 2003 request. To this date those checks have neither been cashed nor returned.

#### ARGUMENT

**I. THIS COURT SHOULD RECONSIDER ITS RULING DENYING HALL'S MOTION TO REQUIRE THE CIA TO RELEASE ALL NONEXEMPT MATERIALS LOCATED AS A RESULT OF THE SEARCHES ORDERED BY JUDGE PAUL L. FRIEDMAN AND ALL RECORDS RESPONSIVE TO ITEM 6 OF HIS FEBRUARY 7 REQUEST**

In response to Hall's motion for immediate production of the records that the CIA had previously searched for and sought payment of \$10,906.33 in fees, this Court denied it on the grounds that "[t]he problem for Hall is that he attempted to make this payment ten days after the court had dismissed his previous lawsuit." April 13, 2005 Memorandum Opinion and Order at 11. This Court further stated that "Hall's rationale for not paying the fees that the CIA assessed is immaterial; his explanation . . . does not

entitle him to resuscitate his previously filed, now dismissed action." Id.

At the same time, this Court ruled that "[t]he CIA, on the other hand, cannot exclude from plaintiffs' February 7, 2003 request any non-exempt documents on the grounds that they are coterminous with Hall's May 28, 1998 request." Id., at 12. Given this ruling, it seems clear that there is no basis for denying Hall's motion for immediate production of documents if he has made a payment of the relevant fees in connection with the request at issue in this action. He has done this. When the CIA returned the two checks totaling \$10,906.33 which originally were submitted to it, two new checks in the same total amount were issued by attorney Mark Zaid and sent to the CIA by letter dated July 29, 2004. Mr. Zaid's letter clearly referenced Mr. Hall's new, February 7, 2003 request, the one at issue in this lawsuit. See Attachment 6.

To this date those checks have neither been cashed nor returned. But since the fees have been tendered, there is no basis for withholding any responsive nonexempt records that were located as a result of the \$10,906.33 worth of searches that have already been conducted by the CIA. The records sought by Hall's February 7, 2003 request are coterminous with those sought in the prior litigation, but to the extent they are nonexempt, they must be produced, as this Court has itself said.

The FOIA specifies that records must be released "promptly." See 5 U.S.C. § 552(b). This request was submitted over two years ago and this case has been pending for nearly a year. It has been

more than nine months since Hall, in connection with the request that is the subject of this action, submitted payment for the searches ordered by Judge Friedman. The CIA has made no showing under Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (1976) which entitles it to a stay of proceedings. Accordingly, this Court should order it to release in the relatively near future the records releasable because Hall has paid for their search costs

There is also an additional consideration which must be taken into account even if Hall had not tendered payment for search fees in connection with the request currently in litigation. That is that the FOIA's fee schedule, 5 U.S.C. § 552(a)(4)(A)(iv), provides that "[n]o fee may be charged by any agency under this provision . . . (II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication." Hall's request comes under this provision as he is not a commercial requester.

The CIA has not provided Hall or SSRI with two hours of free search time or 100 pages of free documents. The records responsive to Item 6 of Hall's February 7 request might all be made available to him at no charge under this provision, or at least at a very minimal charge.

Rule 54(b) makes a district court's "interlocutory orders 'subject to revision at any time before the entry of judgment indicating all the claims . . . of the parties.'" Childers v. Slater, 197 F.R.D. 185, 190 (D.D.C.2000), quoting Fed.R.Civ.Pro.

54(b). The Advisory Committee's Notes on Rule 60(b) suggest the standard of review for motions to reconsider interlocutory judgments: "As the Notes explain, 'interlocutory judgments are not brought within the restrictions of [Rule 60(b)], but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.'" Id., quoting Fed.R.Civ.Pro. 60(b) Advisory Committee Notes. This is supported by the opinion of the D.C. Circuit in Schoen v. Washington Post, 246 F.2d 670, 673 (D.C.Cir.1967), that so long as a district court has jurisdiction over an action, it has complete power over interlocutory orders therein, and may revise them when consonant with equity.

Here, justice and equity strongly favor revision of this Court's ruling on Hall's motion for production of nonexempt records that he has paid the search fees for. There appears to be no legal reason why he should not have such records once he has paid for them, since this Court ruled that the CIA "cannot exclude from plaintiffs' February 7, 2003 request any non-exempt documents on the grounds that they are coterminous with Hall's May 28, 1998 request." April 13, 2005 Memorandum Opinion and Order at 12. If there was any basis for further delay in the release of these records, it would have to be based on some showing by the CIA that it needs further time to process these records in addition to the time that has elapsed since hall paid for their search costs last July. No such showing has been made.

The release of these records is of immediate interest to the families of POWs and MIAs who seek to discover what is known about the efforts made to learn the whereabouts of, and what happened to, their loved ones. The issue is of sufficient public importance that congressional hearings on the issue have been held and an Executive order was issued which required disclosure of records pertaining to them. The records now sought may be, as previously disclosed records were, of interest to congress. There is presently pending before congress a resolution, H.R. 123, which would authorize the creation of a select committee on POW/MIAs once again.

As Hall has made clear above, he has been ready and willing to pay costs of the CIA's searches conducted pursuant to Judge Friedman's order ever since Judge Friedman issued his order nearly three years ago that he must commit to make payment. He has now for the second time, this time in connection with his request at issue in this lawsuit, tendered the amount of money the CIA claims in its revised calculation of fees is due. The FOIA was intended to create a national policy of disclosure of all government information to citizens where some governmental interest would not be harmed. Vaughn v. Rosen, 523 F.2d 1136 (1974). The FOIA requires that nonexempt information be disclosed "promptly." 5 U.S.C. § 552 (b). Justice, equity and national policy strongly favor the fostering of these objectives by revision of the Court's April 13th decision so that Hall may had long last obtain what he is entitled to.

**II. THIS COURT SHOULD ORDER THE CIA TO SUBMIT A DETAILED ACCOUNTING OF (1) THE FEES INCURRED IN SEARCHING HALL'S PRIOR REQUESTS, AND (2) THE BASIS FOR ITS ESTIMATE OF THE SEARCH FEES FOR HIS FEBRUARY 7, 2003 REQUEST**

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In National Treasury Employees Union v. Griffin ("NTEU v. Griffin"), 811 F.2d 644, 650 (D.C.Cir.1987), the D.C. Circuit noted that a practice of inflating fees to discourage FOIA requests "would . . . be highly improper[,] asserting that "the 1974 amendments to FOIA adding the language on fee waivers and reasonable standard charges were clearly aimed at preventing agencies from using high fees to discourage requests." Id., citing S.Rep. No. 864, 93d Cong., 2d Sess. 11-12 (1974).

In that case the Court of Appeals found that the plaintiff had "failed to offer any affidavits or other evidence in support of its allegations of impropriety in setting fees." Id. It also stated that the agency had explained, both in its original administrative letters and in affidavits filed in court, how it arrived at the estimated fees.

The circumstances of this case present a far different picture. Here the CIA has presented vastly different and conflicting figures for the searches it says it has conducted in the Hall I litigation. After initially providing no estimate of costs, contrary to its own regulations, the CIA then claimed, as part of an effort to get Hall's case dismissed, that it already had done \$29,000 worth of searches. When Hall challenged that figure in court and submitted a new FOIA request seeking documentation concerning the search charges, the CIA filed a corrected statement

of the charges in court, claiming that the actual amount was only \$10,906.33.

On its face, the CIA's actions raise suspicions. Normally, if the CIA thought search fees might exceed \$100.00, it would first notify a requester of its estimate of the fees he might incur if the searches were done. Here, it did not. Instead, it did \$29,000 or \$10,906.33 worth of searches, depending on which of its claims, if any, can be believed, without notifying Hall of their cost at all. Not telling Hall or the Court that the searches already had been done and were extraordinarily expensive, the CIA then sought to get the Court to order him to pay the fees without telling him that it had conducted the searches or how expensive they were. When Hall sought to find out how much the fees actually were, it resisted providing the information. When he filed a new FOIA to procure documentation of what the searches had cost, the CIA then came forward with a new and drastically different figure.

In response to plaintiffs' current request, the CIA's estimate has soared to \$600,000. In response to plaintiff's characterization of this estimate as "ludicrous," this Court suggested that "[w]hile the CIA's fee estimate may be subject to challenge, it seems self-evident that the fees would increase dramatically from Hall's May 28, 1998 request, since plaintiffs 'have greatly expanded the chronological scope' of one category of records 'from a five year period to a 42-year period.'" April 13, 2005 Memorandum Opinion and Order, at 12, n.9, quoting Def's Reply in Supp. of Mot. to Stay/Dismiss at 5.

There are several problems which prohibit Hall and the SSRI from placing the same degree of confidence in the Agency's estimate as this Court does, even excluding the general lack of credibility the CIA's representations have given its past history of grossly exaggerating the amount of fees incurred. First, the CIA's \$607,950 estimate is only for Items 5, 6 and 7 of the request. Of these three items, Item 6 is for the records pertaining to the searches that the CIA conducted on these requests and the costs of conducting those searches. It cannot plausibly be maintained that there are any appreciable search costs to be incurred in looking for either the records documenting the searches or their costs. Records pertaining to the searches would have to be kept readily at hand by FOIA personnel in case questions about the searches conducted arose in litigation. The same applies to records pertaining to the cost of the searches. The volume of records responsive to either of these categories would be quite small, and the cost of looking for them could not begin to comprise more than a tiny fraction of the \$606,950 the CIA estimates would be the cost of identifying and retrieving the documents in Items 5-7. Similarly, Item 7 seeks search records for other requests for records on Vietnam War POW/MIAs, including requests made by any Congressional Committee or Executive Branch agency. While more costly than Item 6, it seems unlikely that these searches would run up costs in the tens of thousands of dollars.

This leaves only Item 5 to account for the overwhelming part of the \$606,950 in estimated search fees. Item 5 requires searches

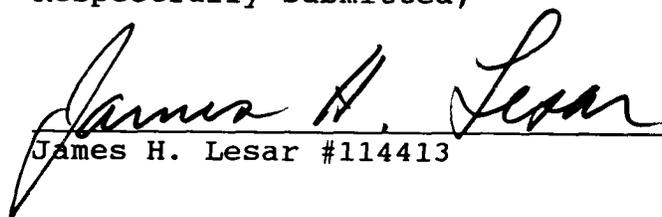
for 47 persons whose names have been provided. Being very generous to the CIA and assuming that the searches for the Item 6 records would amount to \$6,950, and that searches for the Item 7 records would come to \$100,000, this leaves \$500,000 for the search of records responsive to Item 5. This amounts to a cost of \$10,637 for each of the 47 persons.

The CIA, as befits an intelligence agency where immediate access to masses of personal information is at a premium, has long been in the forefront of computerized retrieval of information. According to its published regulations, the cost of an on-line computer search is a flat \$10.00, that for an off-line search a flat \$30.00. See 32 C.F.R. § 1900.13(g)(1). These figures suggest that the cost of conducting these searches may at best be in the thousands, not in the half-million dollars range.

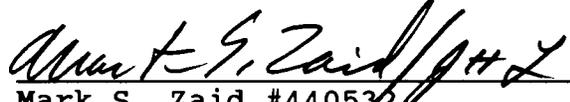
It should also be noted that it is questionable whether the chronological expansion of Item 3 would really aid much the search burden unless the records responsive to that item are filed chronologically, rather than by subject matter, which seems unlikely.

In any event, it seems to plaintiff that sufficient questions exist about the credibility of the \$606,950 estimate to warrant an order that the CIA be compelled to file a declaration supporting it in detail.

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regard to the February 7, 2003 request by Hall and SSRI be, and hereby is, GRANTED; and it is further

ORDERED, that in accounting for the searches it conducted with respect to Hall's prior requests, defendant shall provide a declaration under penalty of perjury detailing the number of searches conducted, the number of components searched, the amount of time spent by each unit on each search, the number of employees involved in each search, the kind of personnel conducting the search (managerial, clerical, etc.), and the costs for the services of each said employee; and it is further

ORDERED, that with respect to the estimate of the costs of conducting a search for records responsive to the February 7, 2003, request, defendant shall provide a declaration under oath stating in detail how this estimate was arrived at.

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UNITED STATES DISTRICT COURT