

**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,)	ECF
)	
Defendant.)	
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**DEFENDANT’S OPPOSITION TO
MOTION OF PLAINTIFF ROGER HALL
FOR AN ACCOUNTING OF TIME AND COSTS OF SEARCHES**

Defendant, the Central Intelligence Agency (CIA), respectfully files this memorandum in Opposition to the Motion of Plaintiff Roger Hall For an Accounting of Time and Costs of Searches. Docket # 32.¹

Plaintiff’s instant motion seeks the Court’s Order for an accounting of (1) the fees incurred in searching Plaintiff Hall’s 1998 request,² and (2) the basis for its estimate of the search fees for his February 7, 2003 request. Pl. Memo. at 10.

For the reasons set forth below, Plaintiff is not entitled to either accounting and his motion should be denied.

BACKGROUND

At the time of Plaintiff’s February 7, 2003 FOIA request, Roger Hall and the CIA were involved in protracted litigation in this Court concerning a previous FOIA request that Roger

¹ Plaintiff’s filing at Docket # 32 includes as well a Motion of Plaintiff Roger Hall for Partial Reconsideration of this Court’s April 13, 2005 Memorandum Opinion and Order, in response to which Defendant will file a separate opposition.

² Plaintiff’s May 28, 1998 FOIA request related to Plaintiff’s prior litigation in C.A. No. 98-1319 (PLF).

Hall had filed on May 28, 1998. *See Hall v. CIA*, C.A. No. 98-1319 (PLF). In C.A. 98-1319, the Court denied Plaintiff Hall's request for records, dismissing the case citing Plaintiff's failure to commit to pay search costs. *See* C.A. 98-1319 at Docket # 95 and 97.³ C.A. 98-1319 involved requests for records that were similar to four of the seven categories of records ("items") sought in the instant request.⁴ *See* C.A. 98-1319 at Docket # 1. On May 19, 2004, Plaintiffs filed the instant civil action, based upon his February 7, 2003 FOIA request. *See* Compl.

On June 15, 2004,⁵ the CIA responded to Plaintiff's FOIA request, declining to accept portions of items 1 – 3 that were coextensive with records at issue in C.A. 98-1319, and declining to accept item 4, which had been deemed not "agency records" in C.A. 98-1319. Def. Exh. 1 at 2. The CIA also requested additional identity information (date and place of birth and full name) on the over 1700 persons on whom records were sought in item 5, and expressed the CIA's concerns for the burdensome nature of item 7. *Id.* at 3. The CIA's letter estimated search fees totaling \$606,950.00 and requested a deposit of \$50,000.00. *Id.*

³ Plaintiff moved for reconsideration (C.A. 98-1319, Docket # 98), which the Court denied on April 22, 2004. *See* C.A. 98-1319 at Docket # 103.

⁴ "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." Pl. Memo. at 4.

⁵ Plaintiff's February 2003 request was not processed "promptly" due to its encompassing the same requests as those underlying Plaintiff's then pending litigation, which was not resolved until the Court's April 22, 2004 denial of Plaintiff's motion for reconsideration in that action, which also included denial of Plaintiff's motion to reconsider the Court's denial of his attempt to amend his complaint to include the February 7, 2003 request. *See* C.A. 98-1319, Docket # 103. Defendant acknowledges that the Court has not accepted that as a sufficient basis to defeat Plaintiff's arguments for constructive exhaustion of administrative remedies on the 2003 request; however, the fact remains that the CIA did not process the 2003 request due to the pending related litigation.

Due to the passage of time, Defendant also had offered Plaintiffs the opportunity to return this action to the administrative process in June 2004, prior to and through Defendant's motion to dismiss without prejudice or to stay the action. *See* Docket # 5. Plaintiffs elected to oppose that motion, which with other pending motions, was resolved by the Court on April 13, 2005.

Following the Court's April 13, 2005 Memorandum Opinion and Order (Docket # 30), the CIA reviewed Plaintiff's February 2003 request in light of the Court's decision and Plaintiff's failure to provide the requested identity information, and has advised Plaintiff by letter dated May 7, 2005, that the fee estimate⁶ has been reduced to \$40,466.00 and the required deposit has been reduced to \$20,000.00. Def. Exh. 2 at 3.⁷ The fee estimate is reduced primarily by the CIA's determination not to accept item 5 because of Plaintiff's failure to provide the necessary identification information, now well beyond the 45 day period set out in the CIA's June 15, 2004 letter. Def. Exh. 1 at 3. The estimate for the search for records on over 1700 individuals had been \$518,220.00. Def. Exh. 2 at 3.⁸

⁶ Fee estimate on items 1-3 and 6. Item 4 had been determined not to be agency records in C.A. 98-1319. Item 5 was not accepted due to Plaintiff's failure to provide necessary information, and item 7 was not accepted as unreasonably burdensome. *See* Def. Exh. 2 at 2-3.

⁷ That correspondence also returned the two checks totaling \$10,906.33, because they are insufficient to satisfy the \$20,000 deposit required, Plaintiffs have not requested that they be applied toward that purpose, and in any event because they are "stale" (dated July 2004) and neither Party needs to have this matter further complicated by a bank's determination not to honor them due to their age.

⁸ The estimate for item 7 was \$83, 520. Def. Exh. 2 at 2-3.

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO AN ACCOUNTING FOR CIA ESTIMATES OR ACTIONS IN C.A. 98-1319.

This Court also has determined that Plaintiff cannot “resuscitate his previously filed, now-dismissed action,” ruling that the documents at issue in C.A. 98-1319 “are simply no longer in play.” April 13, 2005 Mem. Op. at 11. *A fortiori*, issues related to fee estimates or searches conducted by the CIA related to Plaintiff’s May 1998 FOIA request or C.A. 98-1319 “are simply no longer in play.” Plaintiff’s dwelling on issues and arguments from his prior litigation is therefore immaterial to the resolution of the instant civil action or this motion.

II. PLAINTIFF IS NOT ENTITLED TO AN ACCOUNTING FOR CIA ESTIMATES IN THIS CIVIL ACTION.

Plaintiff’s motion for an accounting in the instant civil action is factually erroneous and in any event premature. Plaintiff has made no commitment to pay, nor otherwise expressed willingness to pay (other than for searches related to his prior litigation, which “are simply no longer in play”). Moreover, Plaintiff’s motion relies on an outdated fee estimate.

Plaintiff argues, not incorrectly, that “Item 5 [] account[s] for the overwhelming part of the \$606,950 in estimated search fees.” Pl. Memo. at 12-13. Indeed, the CIA estimate for item 5 is \$518,220.00. Def. Exh. 2 at 3. Plaintiff, however, is misleading in his mathematical argument based on his misrepresentation to the Court that item 5 involves only 47 individuals:

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 5 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.

Pl. Memo. at 12-13.

Item 5 of Plaintiff's February 7, 2003 FOIA request involved two attachments:

Records relating to 47 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, see Attachment 1 hereto, and those persons who are on 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 (Attachment 2).

See Docket # 5, Def. Exh. 1 (Pl. Feb. 7, 2003 FOIA Request) at 2. Attachment 1 included information about 47 individuals; however, Attachment 2 listed approximately 1700 individuals.⁹

See Def. Exh. 3. Using Plaintiff's math, \$518,000 to search for records on 1700 individuals, works out to approximately \$300 per individual name to be searched, as opposed to Plaintiff's "\$10,637 for each of the 47 persons." Pl. Memo. at 13.

Accordingly, if there is a "general lack of credibility" involved in this motion it is in Plaintiff's representations, not the CIA's estimates. The circumstances of this case in no way approximate those of National Treasury Employees Union v. Griffin, 811 F. 2d 644 (D.C. Cir.1987). There is no basis for Plaintiff's implication that the CIA is inflating fees or for the Court to so find. As Plaintiff stated, "The circumstances of this case present a far different picture." Pl. Memo. at 10. The CIA presented Plaintiff an estimate in June of 2004 based on its understanding of Plaintiff's request and the implications of the prior litigation. *See* Def. Exh. 1. In June 2004, the CIA estimated the fee amount for the 2003 request to be over \$600,000 and requested a deposit of \$50,000. Def. Exh. 1 at 3. Since that time, Plaintiff has made no effort to narrow his request or provide any priority among the various categories for its processing. Nor has Plaintiff provided the requested information (date and place of birth and the full name)

⁹ Attachment 1 contained some personal identification data for the 47 individuals, but most were without dates or places of birth. Attachment 2 contained no personal identification data other than a list of names.

required to process item 5, which sought records on over 1700 persons. The CIA advised Plaintiff in its June 15, 2004 letter that

In order to conduct the searches requested in item 5, we require, at a minimum, the date and place of birth and the full name of all individuals listed in attachments 1 and 2 included in item 5. We cannot accept this item until we receive this additional information. In accordance with CIA policy, we will hold this aspect of your request in abeyance for forty-five (45) days pending receipt of this additional information and will thereafter deem this aspect of your request closed.

Def. Exh. 1 at 3.

Following this Court's April 13, 2005 decision, the CIA re-examined the FOIA request and re-cast the estimate, taking into account the Court's decisions on fee waivers and "coterminous" documents, and Plaintiff's failure to provide necessary personal identification data. *See* Def. Exh. 2. By letter dated May 7, 2005, the CIA has advised Plaintiff that the fee estimate has been reduced to \$40,466.00 and the required deposit has been reduced to \$20,000.00. Def. Exh. 2 at 3. The fee estimate is reduced primarily by the CIA's determination not to accept item 5 because of Plaintiff's failure to provide the necessary identification information, now well beyond the 45 day period set out in the CIA's June 15, 2004 letter.

Plaintiff's prior litigation in C.A. 98-1319 was dismissed because Plaintiff's efforts to circumvent the requirement to pay FOIA fees was recognized as such by the Court. In the instant litigation, Plaintiff is continuing that pattern.

CONCLUSION

Wherefore, Defendant respectfully requests that the Court deny Plaintiff's motion for an accounting.

Respectfully submitted,

/ s /

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