UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Roger Hall, et al.,	)	
	)	
Plaintiffs,	)	Status Conference Scheduled for Dec. 21, 2006
	)	
v.	)	Civil Action 04-00814 (HHK)
Central Intelligence Agency,	)	ECF
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION TO DISMISS AND FOR PARTIAL SUMMARY JUDGMENT

Defendant, Central Intelligence Agency ("CIA" or "the Agency"), through and by undersigned counsel, hereby submits this Motion for Partial Summary Judgment pursuant to Fed. R. Civ. P. 56 on the grounds that no genuine issue of material fact exists and Defendant is entitled to judgment as a matter of law, with regard to Plaintiffs' claims based on requests for items 1, 2, 5, 6, 7 and parts of item 3.[1] The Court should dismiss item 4-related claims of Plaintiffs' Amended Complaint, pursuant to the doctrine of collateral estoppel. Finally, Plaintiffs' claims based on their requests for news media status and public interest fee waivers should be dismissed pursuant to the doctrine of res judicata. Fed. R. Civ. P. 12(b)(6).

In support of this motion, Defendant respectfully refers the Court to the accompanying

[1] Plaintiffs' Amended Complaint, now before the Court, consists of the following: Count I addresses items 1through 7; Count II, addresses item 8, Count III addresses items 1 through 8, Count IV requests news media status and Count V requests a public interest fee waiver. The CIA has agreed to produce non-exempt documents responsive to Item 3 that have not been previously disclosed, during Hall v. Central Intelligence Agency, Civ. Action No. 98-1319 (PLF) ("Hall I"). Accordingly, this Motion does not address the extended temporal portions of item 3. Likewise, item 8 (Count II of the Amended Complaint–requesting February 2003 fee assessment-related documents) is not included in the instant Motion.

Memorandum of Points and Authorities and accompanying Statement of Material Facts Not In Dispute, attached exhibits and Vaughn Index. A proposed Order consistent with this Motion is attached hereto.

Dated: October 30, 2006.

Respectfully submitted,

/s/
_____
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STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Rule 7(h), Defendant submits this statement of material facts to which there is no genuine issue.

1. On February 7, 2003, Plaintiffs submitted a Freedom of Information Act ("FOIA") request to the Central Intelligence Agency ("CIA"). See 7 February 2003 Request, Exhibit 1 to Declaration of Scott A. Koch ("Koch Declaration").

2. The request sought the following seven items of information:

> Item 1: Records and information pertaining to Southeast Asia POW/MIAs (civilian or military) and detainees who have not returned or whose remains have not been returned to the United States, regardless of whether they are currently held in prisoner status, and regardless of whether they were sent out of Southeast Asia.
>
> Item 2: Records or information pertaining to POW/MIAs sent out of Southeast Asia (for example, to China, Cuban [sic], North Korea, Russia).
>
> Item 3: Records or information prepared and/or assembled by the CIA between January 1, 1960 and December 31, 2002 relating to the status of any United States POW/MIAs in Laos, including but not limited to any reports, memoranda, letters, notes or other documents prepared by Mr. Horgan or any other officer, agent or employee of the CIA for the Joint Chiefs of Staff, the President, or any federal agency;
>
> Item 4: Records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing;

> Item 5: Records relating to 47 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, and persons on the Prisoner of War / Missing Personnel Office's list of persons whose primary next-of-kin have authorized the release of information concerning them.
>
> Item 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.
>
> Item 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.

See Exhibit 1.

3. Plaintiffs Hall and SSRI previously requested the information in item 1 in a FOIA request dated January 5, 1994. January 5, 1994 Request, Koch Declaration, Exhibit 13.

4. Plaintiffs Hall and SSRI previously requested the information in item 2 in a FOIA request dated January 5, 1994. Id.

5. Plaintiffs Hall and SSRI previously requested the information in item 4 in FOIA requests dated April 23, 1998. April 23, 1998 Request, Koch Declaration, Exhibit 14.

6. Plaintiffs Hall and SSRI previously requested the information for a five-year span of item 3 (1971-1975) in a FOIA request dated April 23, 1998. Id.

7. The 1994 and 1998 FOIA requests became the subject of litigation in Roger Hall v. Central Intelligence Agency, Civil Action No. 98-1319 (PLF)("Hall I").

8. In Hall I, CIA produced certain responsive documents, and withheld other documents on the basis of various FOIA exemptions. In its August 10, 2000 opinion, the Court specifically

held that CIA properly invoked certain exemptions under FOIA. Opinion dated August 10, 2000, Koch Declaration, Exhibit 4.

9. In Hall I, the Court granted CIA's Motion for Summary Judgment with respect to the "Senate Documents" specifically holding that those documents were not "agency records" subject to the FOIA and found that CIA properly invoked certain exemptions. Id. at 16 (agency records) and 17 through 21 (exemptions).

10. The Court ultimately dismissed Hall I with prejudice on November 13, 2003, reasoning that Hall had "constructively abandoned" his requests for any more documents. Order dated November 13, 2003, Koch Declaration, Exhibit 8.

11. Hall and AIM thereafter submitted the February 7, 2003 FOIA request at issue and ultimately filed the instant claim on May 19, 2004.

12. By letter dated June 15, 2004, CIA responded to the February 2003 FOIA request, setting forth CIA's position regarding the seven items. June 15, 2004 letter, Koch Declaration, Exhibit 2.

13. The June 15, 2004 letter indicated that CIA could not process item 5, and that, pursuant to agency policy, the request for this item would be closed if the requisite additional identifying information was not received within 45 days. Id.

14. CIA never received the additional identifying information. Koch Declaration at 26; May 11, 2005 letter, Koch Declaration, Exhibit 5.

15. The June 15, 2004 letter also notified Plaintiffs that item 7 would not be accepted as drafted, because such a search would impose an unreasonable burden on the agency. June 15, 2004 letter, Koch Declaration, Exhibit 2.

16. CIA has not received any correspondence from Plaintiffs narrowing the request in item 7. Koch Declaration at 35, 37; May 11, 2005 letter, Koch Declaration, Exhibit 5 .

17. In the June 15, 2004 letter, CIA estimated that searches for all of the documents requested in items 5, 6, and 7 would amount to $606,595.00 and required an advance deposit of $50,000.00 before processing the request for these items. See Koch Declaration, Exhibit 2.

18. On April 13, 2005, the Court denied all Plaintiffs' various requests for fee limitations. See USDC Pacer Dkt. No. 30.

19. On April 26, 2005, AIM submitted a new FOIA request to CIA. The April request sought eight items of information. The first seven items exactly duplicated those in the February 2003 request; the eighth item requested records pertaining to fee estimates made in connection with the 7 February 2003 request. April 26, 2005 letter, Koch Declaration, Exhibit 9.

20. With this "new" request, AIM renewed its requests for a fee waiver. Id.

21. CIA denied this request by letter dated June 1, 2005 on the grounds that the requested information was the subject of pending litigation. June 1, 2005 letter, Koch Declaration, Exhibit 10.

22. On May 26, 2005, Hall filed a Notice of Filing attaching letters to CIA dated May 23, 2005 and May 24, 2005. May 26, 2005 Notice of Filing, Koch Declaration, Exhibit 11.

23. The 23 May 2005 letter again requested a fee waiver. Id. CIA responded by letter dated July 1, 2005, rejecting Plaintiff's request, citing the Court's April 13, 2005 Order. July 1, 2005 Letter, Koch Declaration, Exhibit 12.

24. The May 24, 2005 letter was a "new" FOIA request identical to the February 2003 request but adding one additional item identical to the eighth item AIM had added to its request

dated April 26, 2005. See Koch Declaration, Exhibit 11.

25. To date, CIA has never received the deposit necessary to process Items 5 and 7. Koch Declaration, ¶¶ 29, 39.

26. Despite the dismissal of the previous claim, CIA voluntarily provided Plaintiffs with documents responsive to the 1994 and 1998 requests on November 7, 2005. November 7, 2005 Letter, Koch Declaration, Exhibit 3.

27. The November 7, 2005 response contained identified, non-exempt documents that would respond to item 1 of the instant request. Koch Declaration at ¶ 20.

28. The November 7, 2005 response contained identified, non exempt documents that would respond to item 2 of the instant request. Id.

29. The November 7, 2005 response contained identified, non exempt documents that would respond to the 1971-1975 portion of item 3 of the instant request. Id.

30. CIA has agreed to perform a search for documents responsive to item 3 created during the years not covered by the prior request (1960-1971 and 1976-2002). Koch Declaration at ¶ 23.

31. The same search terms will be used as were used in the prior litigation, and the search was estimated to take at least 18 months. Id.

32. CIA's initial search in response to Item 6 identified two responsive documents, which were transmitted to Plaintiffs by letter dated August 15, 2006, with three redactions made on the basis of FOIA exemption (b)(3). August 15, 2006 letter, Koch Declaration, Exhibit 6.

33. By letter dated October 17, 2006, CIA provided Plaintiffs with eighteen additional documents responsive to Item 6. Five of these documents were released in their entirety.

Thirteen documents were released on the basis of FOIA exemptions (b)(2), (b)(3), (b)(5), and (b)(6) and additional material was withheld in its entirety on the basis of FOIA exemptions (b)(1), (b)(2), (b)(3), (b)(5), and (b)(6). October 17, 2006 letter, Koch Declaration, Exhibit 7.

Respectfully submitted,

/s/

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/s/

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND FOR PARTIAL SUMMARY JUDGMENT

FACTUAL AND PROCEDURAL BACKGROUND

By letter dated February 7, 2003, Roger Hall and his company, Studies Solution Results, Inc. ("Hall") submitted a Freedom of Information Act ("FOIA") request to the Central Intelligence Agency ("CIA") seeking documents relating to prisoners of war and those missing in action ("POW/MIA's") from the Vietnam War era. February 7, 2003 Request, Exhibit 1 to Declaration of Scott A. Koch (Koch Declaration). Reed Irvine and Accuracy in Media, Inc., ("AIM") joined in the request. Mr. Irvine is now deceased.

Specifically, the February 7, 2003 FOIA request sought information regarding the following seven items:

> Item 1: Records and information pertaining to Southeast Asia POW/MIAs (civilian or military) and detainees who have not returned or whose remains have not been returned to the United States, regardless of whether they are currently held in prisoner status, and regardless of whether they were sent out of Southeast Asia.
>
> Item 2: Records or information pertaining to POW/MIAs sent out of Southeast Asia (for example, to China, Cuban [sic], North Korea, Russia).
>
> Item 3: Records or information prepared and/or assembled by the CIA between January 1, 1960 and December 31, 2002 relating to the status of any United States POW/MIAs in

> Laos, including but not limited to any reports, memoranda, letters, notes or other documents prepared by Mr. Horgan or any other officer, agent or employee of the CIA for the Joint Chiefs of Staff, the President, or any federal agency;
>
> Item 4: Records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing;
>
> Item 5: Records relating to 47 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, and persons on the Prisoner of War / Missing Personnel Office's list of persons whose primary next-of-kin have authorized the release of information concerning them.
>
> Item 6: 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.
>
> Item 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.

See Koch Declaration, Exhibit 1.

Hall has a long history of making FOIA requests for documents regarding Vietnam era POW/MIA's. In 1994 and 1998, Hall submitted five FOIA requests that became the subject of litigation in Roger Hall v. Central Intelligence Agency, Civil Action No. 98-1319 (PLF) ("Hall I"). In Hall I, Judge Friedman granted, in part, CIA's Motion for Summary Judgment, finding that CIA produced certain responsive documents and properly withheld other documents on the basis of various FOIA exemptions. See August 10, 2000 Opinion, Koch Declaration, Exhibit 4 at 17-21. Judge Friedman also held that the Senate Documents were not "agency records" subject to the FOIA. Id. at 16. The Court ultimately dismissed Hall I with prejudice on

November 13, 2003, reasoning that Hall had "constructively abandoned" his requests for any more documents by failing to agree to pay fees. See November 13, 2003 Memorandum Opinion, Koch Declaration, Exhibit 8. Plaintiff filed a motion for reconsideration, which extended the litigation until April 22, 2004, when Plaintiff's motion was denied. CIA delayed its response to Plaintiff's February 7, 2003 FOIA request while Hall's prior lawsuit was pending because the requests sought overlapping records and contained common legal issues. Plaintiff filed the instant action on May 19, 2004. See Caption USDC Pacer Dkt. No. 1.

While the instant complaint was pending, Plaintiffs sent three more letters dated April 26, May 23 and 24, 2005 to the CIA. See Koch Declaration, Exhibits 9 and 11. Although items 1 through 7 of their February 7, 2003 FOIA request were duplicated in these letters, an eighth item was added (request for fee estimate-related documents) and requests for news media status and fee waivers were renewed in the April and May 2005 requests. Id. The Court had previously ruled on Plaintiffs' request for a news media status as well as for fee waiver. See USDC Pacer Dkt. No. 30 at 12-15 and 15-17.[2]

A. CIA's Response regarding Items 1 through 5 and Item 7.

Less than a month later, by letter dated June 15, 2004, CIA responded to the February 7, 2003 FOIA request, setting forth its position regarding the seven items. June 15, 2004 Letter, Koch Declaration, Exhibit 2. First, other than extending the date range in item 3, items 1 through 4 were coextensive of items sought in Hall's prior litigation, Hall v. Central Intelligence Agency, Civ. Action No. 98-1319 (PLF)(("Hall I"). Therefore, CIA's June 15, 2004 letter notified Plaintiffs that items 1 through 3 were not accepted to the extent that the date ranges

[2] See fn 1, supra, regarding Count II (fee estimate documents).

overlapped because the Court ruled in Hall I that FOIA exemptions were properly invoked for those items. See Exhibit 4 at 17-21. Similarly, item 4 was not accepted because the Court found in the prior litigation that Senate documents were not "agency records" subject to FOIA. Id. at 16. The Court noted that Judge Friedman's decisions in Hall I, regarding those particular issues, could not be re-litigated. See USDC Pacer Dkt. No. 30 at 7 and fn 8.

The June 15, 2004 response letter further stated that CIA could not process item 5 without additional identifying information regarding each named individual, including, at a minimum, the date and place of birth and the full name of each of the roughly 1700 individuals included in item 5. See Koch Declaration, Exhibit 2. Given that many people share the same or similar names, without the additional identifying information, it would be impossible to ascertain whether information discovered through a search, would, in fact, relate to the actual individual listed in the request. Koch Declaration ¶ 25. Accordingly, without some information to verify the individuals' identities, a search for ascertainably responsive information would be impossible. Id. The June 15, 2004 letter indicated that, pursuant to agency policy, the request for this item would be closed if the requisite additional information was not received within 45 days. See Koch Declaration, Exhibit 2.

The June 15, 2004 letter also set forth objections to item 7 because it imposed such unreasonably burdensome search requirements that CIA did not have to conduct a search under FOIA. Item 7 requests "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." See Koch Declaration, Exhibit 1 (emphasis added). While CIA maintains records related to FOIA requests, the Agency's record systems are not configured to search for records regarding other

types of searches. Therefore, the Item 7 request would require the Agency to conduct research to even identify non-FOIA searches for information on POW/MIA's that may have occurred. Koch Declaration ¶ 37. The June 15, 2004 letter invited Plaintiff to narrow the request for Item 7. See Koch Declaration, Exhibit 2. CIA never received the additional information necessary to process Item 5, nor did it receive any indication that Plaintiff would narrow item 7 so as not to impose an unreasonably burdensome search requirement on the Agency. Koch Declaration ¶ 39.

B. Plaintiffs' Repeated Requests for Fee Limitations and the Closure of Items 5 and 7

In addition to asserting objections to Items 5 and 7, the CIA set forth a preliminary fee estimate of $606,595.00 to conduct searches for documents requested in Items 5, 6 and 7. In accordance with 32 C.F.R. § 1900.13(f), CIA required an advance deposit in the amount of $50,000.00, before processing the request. In response, Plaintiffs filed a motion to compel production of certain documents and motions for fee limitations and a fee waiver. By Order dated April 13, 2005, the Court denied these motions, holding that Plaintiffs did not qualify for fee limitations or a fee waiver. See USDC Pacer Dkt. No. 30 at 12-17.

Following the Court's Order, Plaintiffs could have initiated processing of Items 5 and 7 by providing the additional biographical data necessary for item 5, narrowing item 7, and submitting the required deposit. They did not. Koch Declaration ¶¶ 29 and 39. Therefore, by letter dated May 11, 2005, the CIA stated that Items 5 and 7 were administratively closed and would not be accepted as part of the 7 February 2003 FOIA request. 11 May 2005 Letter, Koch Declaration, Exhibit 5.

During the weeks immediately following the Court's ruling, rather than providing additional information and submitting the deposit necessary to process Items 5 and 7, Plaintiffs

chose to instead repeatedly renew their requests for fee limitations or a fee waiver. On April 26, 2005, AIM submitted a new FOIA request to CIA that sought eight items of information and renewed its requests for a fee waiver. April 26, 2005 Request, Koch Declaration, Exhibit 9. The first seven items exactly duplicated those in the February 2003 request; the eighth item requested records pertaining to fee estimates made in connection with the February 2003 request. CIA responded by letter dated June 1, 2005 rejecting the request on the grounds that the requested information was the subject of pending litigation. June 1, 2005 letter, Koch Declaration, Exhibit 10.

On May 26, 2005, Hall filed a Notice of Filing, attaching letters dated May 23, 2005 and May 24, 2005, to CIA. May 26**,** 2005 Notice of Filing, Koch Declaration, Exhibit 11. The May 23, 2005 letter again requested a fee waiver. Id. The May 24, 2005 letter was a "new" FOIA request identical to the February 7, 2003 request but adding one additional item identical to the eighth item AIM had added to its request in April. CIA did not receive this letter except as an attachment to the Notice of Filing. CIA responded by letter dated July 1, 2005, specifically citing the Court's April 13, 2005 decision denying Plaintiffs' motions for fee limitations and a fee waiver and again rejected Plaintiff's request. July 1, 2005 letter, Koch Declaration, Exhibit 12. On September 26, 2005, Plaintiffs amended their complaint to add a count challenging CIA's denial of the April and May requests.

To date, Plaintiffs have not provided the Item 5 biographical data, narrowed item 7, nor submitted the required deposit necessary for processing of Items 5 and 7. Koch Declaration ¶¶ 29 and 39. Therefore, CIA has not conducted searches for documents responsive to those items and they remain administratively closed.

C. CIA's Voluntary Disclosure of Documents Responsive to Items 1, 2, and Part of Item 3 (1971 -1975)

Despite the dismissal of the previous claim, CIA voluntarily provided documents responsive to the 1994 and 1998 FOIA requests on November 7, 2005. In conducting the searches that led to the November 7, 2005 disclosure of documents to Plaintiffs, CIA used the very search terms that were directed by the district court in the prior litigation. The terms included eleven terms that the Directorate of Operations ("DO") had a record of using for records searches under Executive Order 12812, 57 F.R. 32879 (July 24, 1992). In addition, the searches included two additional search terms, "PW" and "PWS", which the District Court's opinion indicated they should have used along with additional country names in southeast Asia and names of individuals about whom Plaintiffs requested records. Koch Declaration, Exhibit 4 at 9. Using these search terms, CIA officers searched databases reasonably likely to contain responsive records in the DCI Area, the Directorate of Intelligence, the Directorate of Support, and the Directorate of Science and Technology.

The response to Plaintiffs resulting from these searches contained identified, nonexempt documents that respond to items 1 and 2 of the instant request, as well as documents responsive to the 1971 to 1975 portion of item 3. See Koch Declaration, Exhibit 3. A total of 122 documents were released. Id. Twenty documents were released in their entirety and 102 were released in segregable form with redactions on the basis of FOIA exemptions (b)(1), (b)(2), (b)(3) and (b)(5). Id. Twenty-six records were withheld in their entirety on the basis of FOIA exemptions (b)(1), (b)(2), (b)(3) and (b)(5). Id. CIA provided these documents to both Hall and AIM, who was not a party to the prior claim. Id.

D. The Remainder of Item 3 (1960 - 1971 and 1976 to 2002)

CIA has agreed to search and make available to Plaintiffs any non-exempt documents responsive to item 3 that were created during the years not covered by the prior request (1960-1971 and 1976-2002). See Koch Declaration ¶ 23. CIA also agreed to perform one round of searches for these documents at no cost to Plaintiffs. Id. The same search terms will be used as were used in the prior litigation, and the search is expected to take a minimum of 18 months. Id.

E. Item 6 Disclosures

Item 6 seeks records pertaining to any search in connection with Hall's requests dated January 5, 1994, February 7, 1994, and April 23, 1998 and records pertaining to the assessment of fees in connection therewith. See Koch Declaration, Exhibit 1.

By letter dated August 15, 2006, CIA notified Plaintiffs that two responsive records had been located. See Koch Declaration, Exhibit 6. Other than three minor redactions made on the basis of FOIA exemption (b)(3), these two documents were provided to Plaintiffs. Id.

On September 26, 2006, CIA notified Plaintiffs by e-mail that it had located additional documents responsive to the remainder of Item 6. See Koch Declaration, Exhibit 6. By letter dated October 17, 2006, CIA provided Plaintiffs with eighteen additional responsive documents, five of which were released in their entirety, and thirteen of which contained redactions on the basis of FOIA exemptions (b)(2), (b)(3), (b)(5), and (b)(6). In the same letter, CIA notified Plaintiffs that additional material was withheld in its entirety on the basis of FOIA exemptions (b)(1), (b)(2), (b)(3), (b)(5), and (b)(6). Id.

STATEMENT OF FACTS

Defendant hereby incorporates the Statement of Material Facts Not In Genuine Dispute, filed contemporaneously with this Memorandum.

ARGUMENT

I. Summary Judgment Standard

Where no genuine dispute exists as to any material fact, summary judgment is required. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A genuine issue of material fact is one that would change the outcome of the litigation. Id. at 247. "The burden on the moving party may be discharged by 'showing' -- that is, pointing out to the [Court] -- that there is an absence of evidence to support the non-moving party's case." Sweats Fashions, Inc. v. Pannill Knitting Co., Inc., 833 F.2d 1560, 1563 (Fed. Cir. 1987).

Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Thus, to avoid summary judgment here, the Plaintiff (as the non-moving party) must present some objective evidence that would enable the Court to find he is entitled to relief. In Celotex Corp. v. Catrett, the Supreme Court held that, in responding to a proper motion for summary judgment, the party who bears the burden of proof on an issue at trial must "make a sufficient showing on an essential element of [his] case" to establish a genuine dispute. 477 U.S. 317, 322-23 (1986). In Anderson the Supreme Court further explained that "the mere existence of a scintilla of evidence in support of the Plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the Plaintiff." Anderson, 477 U.S. at 252; see also Laningham v.

Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (the non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor).

In Celotex, the Supreme Court further instructed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327 (quoting Fed. R. Civ. Pro. 1).

The summary judgment standards set forth above also apply to FOIA cases, which are typically decided on motions for summary judgment. See Cappabianca v. Commissioner, U.S. Customs Serv., 847 F. Supp. 1558, 1562 (M.D. Fla. 1994) ("once documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment") (citing Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993)). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, not withheld, is unidentifiable, or is exempt from disclosure. Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001); Weisberg v. U.S. Dep't of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980).

An agency satisfies the summary judgment requirements in a FOIA case by providing the court and the plaintiff with affidavits or declarations and other evidence which show that the documents are exempt from disclosure. Hayden v. NSA, 608 F.2d 1381, 1384, 1386 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); Church of Scientology v. U.S. Dep't of Army, 611 F.2d 738, 742 (9th Cir. 1980); Trans Union LLC v. FTC, 141 F. Supp. 2d 62, 67 (D.D.C. 2001) (summary judgment in FOIA cases may be awarded solely on the basis of agency affidavits

"when the affidavits describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'") (quoting Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981)). See also McGehee v. CIA, 697 F.2d 1095, 1102 (D.C. Cir. 1983), modified on other grounds, 711 F.3d 1076 (D.C. Cir. 1983); Citizens Commission on Human Rights v. FDA, 45 F.3d 1325, 1329 (9th Cir. 1995); Bowen v. FDA, 925 F.2d 1225, 1227 (9th Cir. 1991); Public Citizen, Inc. v. Dep't of State, 100 F. Supp. 2d 10, 16 (D.D.C. 2000), aff'd in part, rev'd in part, 276 F.3d 634 (D.C. Cir. 2002).

II. Standard for Dismissal

When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court must determine whether the plaintiff has alleged sufficient facts in its complaint to state a cause of action. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court must accept all well-pleaded facts as true. Doe v. United States Dep't of Justice, 753 F.2d 1092, 1102 (D.C. Cir. 1985). "However, the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). If, after reviewing the complaint, the Court finds "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the Court must dismiss the complaint. Conley, 355 U.S. 45-46. Generally Speaking, the Court should not consider matters beyond the pleadings without converting the motion to a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6).

III. Standards for Locating Responsive Records

A. Adequate Search

In responding to a FOIA request, an agency must conduct a reasonable search for responsive records. Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health, et al., 844 F. Supp. 770, 776 (D.D.C. 1993); Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1352 (D.C. Cir. 1983). This "reasonableness" standard focuses on the method of the search, not its results, so that a search is not unreasonable simply because it fails to produce responsive information. Id. at 777 n.4. An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. Oglesby, 920 F.2d at 68. Consistent with the reasonableness standard, the adequacy of the search is "dependent upon the circumstances of the case." Truitt v. Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990). The fundamental question is not "whether there might exist any other documents responsive to the request, but rather whether the search for those documents was adequate." Steinberg v. Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting Weisberg v. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

Thus, the reasonableness standard does not require the agency to prove that it located all responsive documents. See Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 892 n.7 (D.C. Cir. 1995); Miller v. Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) ("'the search need only be reasonable; it does not have to be exhaustive.'") (citing Nat'l Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)).

Even when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document so long as the search

was diligent and reasonable. Nation Magazine, 71 F.3d at 892 n.7. Additionally, the mere fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. Maynard v. CIA, 986 F.2d 547, 564 (1st Cir. 1993).

The burden rests with the agency to establish that it has "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby, 920 F.2d at 68; see SafeCard Servs. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991). "An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, non-conclusory and submitted in good faith." Miller, 779 F.2d at 1383; Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980). Although the agency has the burden of proof on the adequacy of its search, the "affidavits submitted by an agency are 'accorded a presumption of good faith,'" Carney v. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (quoting SafeCard Servs., 926 F.2d at 1200). Thus, once the agency has met its burden regarding adequacy of its search, the burden shifts to the requester to rebut the evidence by a showing of bad faith on the part of the agency. Miller, 779 F.2d at 1383. A requester may not rebut agency affidavits with purely speculative allegations. See Carney, 19 F.3d at 813; SafeCard, 926 F.2d at 1200; Maynard v. CIA, 986 F.2d 547, 559-560 (1st Cir. 1993).

B. Segregability

The Court of Appeals for the District of Columbia Circuit has held that a District Court considering a FOIA action has "an affirmative duty to consider the segregability issue sua

sponte." Trans-Pacific Policing Agreement v. United States Customs Service, 177 F.3d 1022, 1028 (D.C. Cir. 1999). The FOIA requires that, if a record contains information that is exempt from disclosure, any "reasonably segregable" information must be disclosed after deletion of the exempt information unless the non-exempt portions are "inextricably intertwined with exempt portions." 5 U.S.C. § 552(b); Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977).

In order to demonstrate that all reasonably segregable material has been released, the agency must provide a "detailed justification" rather than "conclusory statements." Mead Data, 566 F.2d at 261. The agency is not, however, required "to provide such a detailed justification" that the exempt material would effectively be disclosed. Id. All that is required is that the government show "with 'reasonable specificity'" why a document cannot be further segregated. Armstrong v. Executive Office of the President, 97 F.3d 575, 578-79 (D.C. Cir. 1996). Moreover, the agency is not required to "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." Mead Data, 566 F.2d at 261, n.55.

C. Standards for A Proper Vaughn Index

In moving for summary judgment in a FOIA case, agencies must establish a proper basis for their withholding of responsive documents. "In response to this special aspect of summary judgment in the FOIA context, agencies regularly submit affidavits . . . in support of their motions for summary judgment against FOIA Plaintiffs." Judicial Watch v. U.S. Dep't of Health and Human Services, 27 F. Supp. 2d 240, 242 (D.D.C. 1998). These declarations or affidavits (singly or collectively) are often referred to as a Vaughn index, after the case of

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. C. 1564 (1974). There is no set formula for a Vaughn index. "[I]t is well established that the critical elements of the Vaughn index lie in its function, and not in its form." Kay v. FCC, 976 F. Supp. 23, 35 (D.D.C. 1997). "The materials provided by the agency may take any form so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege." Delaney, Midgail & Young, Chartered v. IRS, 826 F.2d 124, 128 (D.C. Cir. 1987). See also Keys v. U.S. Dep't of Justice, 830 F.2d 337, 349 (D.C. Cir. 1987); Hinton v. Dep't of Justice, 844 F.2d 126, 129 (3d Cir. 1988). "All that is required, and that is the least that is required, is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." Id. "The degree of specificity of itemization, justification, and correlation required in a particular case will, however, depend on the nature of the document at issue and the particular exemption asserted." Information Acquisition Corp. v. Dep't of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978).

The Vaughn Index serves a threefold purpose: (1) it identifies each document withheld; (2) it states the statutory exemption claimed; and (3) it explains how disclosure would damage the interests protected by the claimed exemption. See Citizens Commission on Human Rights v. FDA, 45 F.3d 1325, 1326 (9th Cir. 1995). "Of course the explanation of the exemption claim and the descriptions of withheld material need not be so detailed as to reveal that which the agency wishes to conceal, but they must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979).

IV. The Agency is Entitled to Judgment as a Matter of Law on Count I of Plaintiff's Complaint as it is Without Merit.

A. Claims Involving Items 1, 2 and a Five-Year Span of Item 3 (1971-75)[3] Were Resolved as a Result of Hall I Litigation.

Hall's current requests, outlined as items 1, 2 and a five-year span of item 3, are duplicates of items he had sought in Hall I. That action culminated in the production of numerous documents and the Honorable Judge Paul Friedman's orders granting partial summary judgment and dismissal with prejudice of the Hall I complaint. Judge Friedman held that exemptions (b)(1), (3), and (6) invoked to withhold certain documents in that case, were proper. See Koch Declaration, Exhibit 4, at 17-21. This Court later noted that Judge Friedman's decisions regarding the exemptions could not be re-litigated. See USDC Pacer, Dkt. 30, fn 8.

The Agency then produced another set of responsive documents to Plaintiffs on November 7, 2005. CIA invoked exemptions (b)(1), (b)(2), (b)(3), (b)(5), with explanation for the redactions in its Vaughn Index. See Koch Declaration, Exhibit 3 with attached Vaughn Index. In conducting the search for items 1, 2 and 3, the Agency conducted a reasonable search and indeed complied with Judge Friedman's order of August 10, 2000, mandating the inclusion of additional search terms. See Koch Declaration, ¶¶ 19-21. The initial production and the second set of documents voluntarily released, collectively represent all non-exempt, responsive documents at issue here, as outlined in items 1, 2 and a five-year portion of item 3. See Koch Declaration ¶ 20. All FOIA exemptions invoked are appropriate as a matter of law, as fully explained in the Vaughn index attached to Koch Declaration, Exhibit 3. Accordingly, the

[3]As noted supra, the CIA intends to file a dispositive motion, if necessary, for documents which will be produced in response to Plaintiff's request in item 3 for the 1960-1971 and 1975-2002.

Agency is entitled to judgment as a matter of law on Plaintiffs' claims based on these three items.

B. Plaintiffs are Estopped from Asserting Claims Related to Item 4.

Once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." McLaughlin v. Bradlee, 803 F.2d 1197, 1201 (D.C. Cir. 1986) (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)).

The Agency is at a loss why Plaintiffs included item 4, again, in their Amended Complaint filed on September 26, 2005. See USDC Pacer Dkt. No. 45. In 2000, Judge Friedman held that the Records of the Senate Select Committee on POW/MIA Affairs were not "agency records." See Exhibit 4 at 14-16. Later, in 2004, this Court pronounced that Plaintiffs "may not challenge . . . [Judge Friedman's] finding that particular records are exempt from the definition of "agency records" under FOIA, Plaintiffs, (see USDC Pacer Dkt. No. 30 at 7 and fn 8) (citing LaRouche v. Dep't of Treasury, F.Supp. 2d. 48, 55 (D.D.C. 2000). It is curious that Plaintiffs, at least one of which was a party in Hall I, wish to take yet another bite at the proverbial apple. Accordingly, item 4-related claims fail to state a claim upon which relief can be granted and should be dismissed. Fed. R. Civ. P. 12(b)(6).

C. Plaintiffs' Items 5 and 7 Requests were Improper and the Related Claims Must Fail.

Items 5 and 7 requested categories of documents that were unreasonably broad; and that would require the Agency to conduct independent research or compile new sets of documents, in a system of records not configured or maintained in a way that would enable a search for records.

i. Plaintiffs Have Failed to Comply with Agency FOIA Regulations.

Pursuant to 32 C.F.R. §1900.12(a),

> A request need only reasonably describe the records of interest. This means that documents must be described sufficiently to enable a professional employee familiar with the subject to locate the documents with a reasonable effort. Commonly this equates to a requirement that the documents must be locatable through the indexing of our various systems. Extremely broad or vague requests or requests requiring research do not satisfy this requirement.

See also 5 U.S.C. § 552(a)(3) (requests must be made "in accordance with [the agency's] published rules stating the time, place, fees (if any), and procedures to be followed . . . .").

A requester must comply with the administrative procedures set forth under FOIA, including: (1) providing a request to the particular office identified in the agency's FOIA regulations, Kessler v. United States, 899 F. Supp. 644, 645 (D.D.C. 1995); (2) providing the agency the required proof of identity, Summers v. United States Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993); (3) reasonably describing the records sought, Dale v. IRS, 238 F.Supp.2d 99, 102-03 (D.D.C. 2002); (4) complying with fee requirements, Trueblood v. United States Dep't of Treasury, 943 F. Supp. 64, 68 (D.D.C. 1996); and (5) administratively appealing a denial of records, Oglesby v. United States Dep't of the Army, 920 F.2d 57, 61 (D.C. Cir. 1990). A proper FOIA request must be made "in accordance with [the agency's] published rules." Wicks v. Coffrey, 2002 WL 1000975, *2 (E.D. La. 2002).

Here, Plaintiffs' item 5 request demanded records regarding approximately 1700 individuals without sufficient identifying information. By letter dated June 15, 2004, the Agency advised the Plaintiffs that their item 5 request was vague and in order to process the request, at a minimum, the Agency required the date, place of birth and full name of all individuals about whom the information was sought. See Koch Declaration ¶ 25. Without the additional data, the

information that emerged from the search might relate to someone other than the individual whose next of kin had authorized its release. Under such circumstance the CIA would be obliged to protect that information from disclosure under FOIA exemption (b)(6). Id. at 26.

Item 7 requests "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." See Koch Declaration, Exhibit 1 (emphasis added). On its face this request is clearly unreasonable. Nonetheless, the CIA advised Plaintiffs that item 7 of their requests was also unreasonably burdensome. Koch Declaration ¶ 37. When the Agency attempted to conduct the search the automated system "timed out" and did not generate a response.[4] Id. at 36. Pursuant to the Agency's FOIA-related regulations, codified at 32 C.F.R. § 1900.12(a), Plaintiffs were invited to narrow the issues or further clarify which records they sought. Id. To date they have not done so. Id. at 26 and 35. Accordingly, the Agency has not "improperly" withheld any records related to items 5 and 7.

ii. The Agency is not Obliged to Compile New Sets of Records in Order to Respond to FOIA Requests.

Agencies are not required to create or compile new records in response to FOIA requests, nor are they required to answer questions posed as FOIA requests. See, e.g., Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985); Flowers v. IRS, 307 F.Supp. 2d 60, 71 (D.D.C. 2004). Plaintiffs' item 7 request would require research and the compilation of new sets of records . Koch Declaration ¶ 37. To the extent that Plaintiffs' request would require the Agency to conduct research to identify non-FOIA searches, or to explore more than 3500 FOIA requests in

[4] Other technical difficulties in searching for the documents that would result because of Plaintiff's truly unreasonable demand, such as the configuration of the system of records, are outlined in Koch Declaration ¶¶ 37-39.

which Vietnam War POW/MIAs may have been mentioned, no such action by the Agency is required under the FOIA. Id. Therefore, the CIA has not improperly withheld documents and it is entitled to judgment as a matter of law on item 7-related claims.

D. Defendant Is Entitled to Judgment as a Matter of Law for Item 6-Related Claims.

Plaintiffs' item 6 request read as follows:

> [a] 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 [b] 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.

See Koch Declaration, Exhibit 1.

The Agency has conducted an adequate search, segregated certain portions of documents and produced all records responsive to item 6 of Plaintiffs' request and properly claimed exemptions pursuant to FOIA. See Koch Declaration ¶¶30-36. Specifically, the disclosure was made in two sets. In the first set the Agency provided responsive documents related to that portion of item 6 addressing fee assessments only. See Koch Declaration, Exhibit 6. The second set of documents was responsive to the remainder of item 6. See Koch Declaration, Exhibit 7. Adequate searches were conducted (see id. at ¶¶ 32 and 35); and segregable materials were redacted pursuant to FOIA (b)(1) exemptions (b)(2), (b)(3), (b)(5) and (b)(6). Id. at 36. See also, Koch Declaration Vaughn Index.

i. The CIA Correctly Applied Exemption (b)(1).

Classified information that has been properly designated as secret is exempt from disclosure under FOIA Exemption 1, 5 U.S.C. § 552(b)(1). This exemption protects information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and ... [is] in fact properly classified pursuant to such Executive order[.]" Id.

Executive Order 12,958, as amended, Sections 1.5(c) and 1.5(d) authorize the classification of information that concerns intelligence activities, sources, methods, or foreign relations. See Exec. Order No. 12,958, 60 Fed.Reg. 19, 825 (April 17, 1995). Pursuant to Section 1.2(a)(4) of the Executive Order, information in these categories may be classified when the appropriate original classification authority determines that unauthorized disclosure reasonably could be expected to cause damage to national security in a manner that the classification authority is able to identify and describe.

The CIA marks information that could be expected to cause damage to national security "Confidential" Koch Declaration, Vaughn Index §§ 14 and 31. Pursuant to Executive Order 12,958, as amended,§§ 3.3(b)(1) and (6) documents are

> exempt from automatic declassification, because release of such pages could be expected to: (1) reveal the identity of a confidential human source, or a human intelligence source, or reveal information about the application of an intelligence source or method; . . . and (6) reveal information, including foreign government information, that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States. . . ..

The revelation of source information will have a negative impact on the CIA's ability to continue to conduct its operations in the future.

Here, for example, the CIA withheld a memorandum dated March 10, 1999, from a CIA Attorney to a CIA Officer addressing additional searches and the identification of additional responsive documents in the Hall litigation, along with the preparation of a supplemental McNair declaration regarding the same. The withholding was based on the fact that this memorandum contained confidential communications classified CONFIDENTIAL because it contains information relating to intelligence activities, sources, and methods that is protected from disclosure by Executive Order 12,958, as amended, and thus is withheld under exemption (b)(1). The (b)(1) exemption claimed, is thus proper. Wheeler v. U.S. Dept. Of Justice, 2005 WL 3274530 *4 (D.D.C.). Therefore, the CIA is entitled to summary judgment pursuant to FOIA exemption (b)(1).

ii. The CIA Correctly Applied Exemption (b)(2).

FOIA Exemption (b)(2) exempts, from mandatory disclosure, records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Not long after FOIA was passed, the Supreme Court declared that Exemption 2 was intended to relieve agencies of the burden of assembling and providing access to any "matter in which the public could not reasonably be expected to have an interest" and matters of public interest "where disclosure may risk circumvention of agency regulation." Dep't of Air Force v. Rose, 425 U.S. 352, 369-70 (1976). See also, Odle v. Dep't of Justice, No. 05-2771, 2006 WL 1344813 (N.D. Cal. May 17, 2006). Subsequently, courts have approved two general categories of withholdings under Exemption 2: (1) internal matters of a relatively trivial nature (sometimes referred to as "low-2"); and (2) more substantial internal matters for which disclosure would risk circumvention of a legal requirement (sometimes called "high-2"). Schiller v. NLRB, 964 F.2d

1205, 1207 (D.C. Cir. 1992); see Crooker v. ATF, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (setting forth a two part test for high-2 material).

"Low (b)(2)" information refers to internal procedures and practices of an agency the disclosure of which would constitute an administrative burden unjustified by any genuine and significant public benefit. Martin v. Lauer, 686 F.2d 24, 34 (D.C. Cir. 1982). "Low b(2)" information can be protected only if the information qualifies as a personnel rule or internal practice of an agency or is sufficiently related to such a rule or practice. See Schwaner v. Dep't of the Air Force, 898 F.2d 793, 795 (D.C. Cir. 1990). Thus, trivial administrative data, such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and similar administrative markings are exempt from disclosure. The reason is that administrative agencies should not be burdened by responding to requests for trivial information unlikely to be the subject of public interest. Martin v. Lauer, 686 F.2d at 34.

Exemption "high (b)(2)" exempts from mandatory disclosure documents relating to more substantive internal matters. See Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992). Withholding is permitted in this category to the extent that disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, id., would disclose guidelines for law enforcement investigations, or would risk circumvention of an agency statute or impede the effectiveness of an agency's law enforcement activities. See Crooker, 670 F.2d 1051 (D.C. Cir. 1981) (en banc); Hardy v. AT, 631 F.2d 653, 656 (9th Cir. 1980).

In this case many of the documents in question contain information related solely to CIA's internal rules and practices. See Koch Declaration, Vaughn Index, §§ 1, 4, 17-18, 20, 22-30. For example, five-page document located in a CIA Attorney's litigation file consists of the

following pages stapled together: a) one-page of attorney handwritten-notes regarding a change in the calculation of fees; b) a two-page attorney type-written description of search time and fee calculations; and c) two one-page e-mails dated 18 December 2003 and 27 March 2003. The 18 December 2003 e-mail is between two CIA officers with attorney handwritten notes and discusses a correction in the calculation of fees in the first Hall litigation matter. The 27 March 2003 e-mail from a CIA officer to CIA attorneys discusses the same subject.

This document is withheld in its entirety on the basis of FOIA exemption (b)(2), inter alia, because it contains information related solely to the internal rules and practices of the CIA. See Koch Declaration, Vaughn Index, § 4. All the redactions, as explained, therefore were properly made and the Agency is entitled to judgment as a matter of law with regard to related claims.

iii. The CIA's Assertion of FOIA Exemption (b)(3) Was Justified as a Matter of Law.

Exemption (b)(3) of the FOIA exempts from mandatory disclosure matters that are:

> [s]pecifically exempted from disclosure by statute provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. . . .

5 U.S.C. §552 (b)(3). The only issues presented in an exemption (b)(3) claim are the existence of a qualifying disclosure-prohibiting statute, and the logical inclusion of the withheld information within the scope and coverage of that statute. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1284 (D.C. Cir. 1983). Courts evaluating exemption (b)(3) claims must accord substantial weight to the CIA's judgment with respect to the national security considerations at issue. CIA v. Sims, 471 U.S. 159, 179 (1985) ("The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great

deference given the magnitude of the national security interests and potential risks at stake.”); Gardels v. CIA, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982)(“substantial weight” must be accorded to an Agency’s determinations on exemption (b)(3) claims); Phillippi v. CIA, 655 F.2d 1325, 1332 (D.C. Cir. 1981) (CIA affidavits on exemption (b)(3) claims are to be accorded "substantial weight"). Accord Ferry v. CIA, 458 F. Supp. 644 (S.D.N.Y. 1978) ("The CIA has greater expertise as to what kind of intelligence-gathering disclosures would reveal intelligence sources and methods.”).

In the instant case, the CIA’s reliance on FOIA Exemption (b)(3) emanates from section 6 of the Central Intelligence Act of 1949, which requires the Director of Central Intelligence to protect from publication or disclosure “the organization, functions, names official titles, salaries or numbers of personnel employed by the CIA.” 50 U.S.C.A. § 403(g) (“Section 403-(g)”). Courts have expressly found that Section 403(g) qualifies as a FOIA exemption (b)(3) statute. See Davy v. CIA, 357 F.Supp. 2d 76, 85-86 (D.D.C. 2004)(Section 403(g) applies as an exemption (b)(3) statute); Snyder v. CIA, 230 F.Supp. 2d 17, 22 (D.D.C. 2002)(same).

Because Section 403(g) is a statute within FOIA exemption (b)(3), the only remaining question is whether the information withheld falls within the scope of the statute. With reference to Section 403(g), the relevant inquiry is whether the information withheld would "reasonably be expected to lead to unauthorized disclosure of intelligence methods and sources.” Gardels v. CIA, 689 F.2d at 1103; Military Audit Project v. Casey, 656 F.2d at 736-37 n.39.

In this matter, as discussed in detail in the Koch Declaration, disclosure of the document at issue would reveal intelligence sources and methods protected under 50 U.S.C. § 403-3(c)(7). See Koch Declaration, Vaughn Index §§ 1-5 and 7-30. Specifically, the document would reveal

personnel related information, in contravention of the code. Id. For example, an eighteen-page document consisting of a fax cover page dated April 23,1998 from Elaine P. English to CIA Information and Privacy Coordinator and four FOIA requests on behalf of Roger Hall with attachments was released with the exception of information, including the names of CIA officers, components, and telephone extensions, that is protected by section 6 of the Central Intelligence Agency Act of 1949, 50 U.S.C.A. § 403(g), and thus is withheld on the basis of FOIA exemption (b)(3). See Koch Declaration, Vaughn Index § 19. This type of information pertaining to names of CIA officials and their particulars has been properly withheld from Plaintiffs under 50 U.S.C.§ 403(g) and, therefore, falls within the ambit of FOIA exemption (b)(3). Accordingly, the CIA is entitled to summary judgment pursuant to FOIA exemption (b)(3).

iv. FOIA exemption (b)(5) Was Properly Invoked in This Matter.

FOIA exemption (b)(5), 5 U.S.C. §552(b)(5), exempts from mandatory disclosure materials consisting of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." Although the precise contours of this exemption are not readily apparent from the language of the statute, it has been construed to authorize the withholding of documents that are normally privileged in the context of civil discovery. NLRB v. Sears Roebuck & Co., 421 U.S. 132, 149 (1975); Rockwell Internat'l Corp. v. U.S. Dep't of Justice, 235 F.3d 598, 601 (D.C. Cir. 2001).

The threshold issue under exemption (b)(5) is whether the records in question qualify as "inter-agency or intra-agency memorandums." Records created by the CIA or other executive agencies and circulated within the CIA clearly meet this threshold requirement. See Koch Declaration, Vaughn Index § 30.

The Supreme Court has held that FOIA exemption (b)(5) incorporates the government's deliberative process privilege, the ultimate purpose of which is to prevent injury to the quality of agency decision-making. NLRB v. Sears Roebuck & Co.,421 U.S. at 150-51. The existence of this privilege ensures that "`persons in an advisory role [are] able to express their opinions freely to agency decision-makers without fear of publicity [that might] ... inhibit frank discussion of policy matters and likely impair the quality of decisions.'" Bureau of Nat'l Affairs, Inc. v. Department of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (quoting Ryan v. Dep't of Justice, 617 F.2d 781, 789-90 (D.C. Cir. 1980)). For this reason, the deliberative process privilege protects the consultative functions of the government by preserving the confidentiality of opinions, recommendations, and deliberations. These deliberations comprise an important part of the process by which government decisions are made and government policies are formulated and protecting government agencies from being "forced to operate in a fishbowl." Wolfe v. Dep't of Health and Human Services, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc); Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

For this privilege to be properly invoked, it must first be shown that the document is pre-decisional, i.e., that it preceded any final agency action on the matter it addresses, and second, that the document contains deliberative information, i.e., that it makes recommendations or expresses opinions on matters facing the agency. Mapother, 3 F.3d at 1537; Petroleum Info. Corp. v. Department of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992); Paisley v. CIA, 712 F.2d 686, 698 (D.C. Cir. 1983), vacated in part on other grounds, 724 F.2d 201 (D.C. Cir. 1984).

The CIA has properly invoked FOIA exemption (b)(5) in this case. The Agency withheld documents that contained the recommendations or opinions of the Agency and its personnel on

matters preceding final Agency action. Id. This material clearly represents the give-and-take of the government's deliberative process. It is well settled that release of such deliberative material would have a chilling effect on the free and open internal discussions of the agency by inhibiting Agency personnel from candidly recording their thoughts or making inter-Agency recommendations. See Wolfe, 839 F.2d at 774-76; Russell v. Department of Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

It is similarly well settled that the attorney work product and attorney-client privileges are included in FOIA exemption (b)(5). The attorney work product privilege protects documents and other memoranda prepared by an attorney in contemplation of litigation. See Hickman v. Taylor, 329 U.S. 495, 509-510 (1947). The attorney client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). CIA has demonstrated that certain withheld information is protected by these privileges. See Koch Declaration, Vaughn Index §§ 1-18. Accordingly, the Agency has properly invoked FOIA exemption (b)(5) to protect attorney work product and attorney-client communications.

Here for example, a three-page document located in a CIA attorney's litigation file, consists of a string of e-mail communications between attorneys and other CIA officers discussing the status of searches being conducted by various CIA components in the first Hall Litigation matter. This document is withheld in its entirety on the basis of FOIA exemption (b)(5) because it contains legal analysis and opinion prepared by a CIA attorney and confidential

communications between the CIA attorneys and officials that are protected from disclosure by the attorney-client communications privilege along with legal analysis and opinion prepared by a CIA attorney in contemplation of civil litigation that are protected by the attorney work-product privilege. The document is also withheld on the basis of FOIA exemption (b)(5) because it contains intra-agency pre-decisional preliminary evaluations and recommendations of Agency officials that are protected from disclosure by the deliberative process privilege. See Koch Declaration, Vaughn Index § 2.

v. FOIA Exemption (b)(6) was Properly Invoked by the Agency.

Exemption 6 of the FOIA protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). "The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual." Lepelletier v. FDIC, 164 F.3d 37, 46 (D.C. Cir. 1999) (quoting Department of State v. Washington Post Co., 456 U.S. 595, 602 (1982)) (emphasis added). The Court has also emphasized that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 763 (1989).

To determine whether there would be a "clearly unwarranted invasion of personal privacy," the court must balance the interests of protecting "an individual's private affairs from unnecessary public scrutiny," and "the public's right to governmental information." Lepelletier, 164 F.3d at 46 (citing United States Dep't of Defense, Dep't of Military Affairs v. FLRA, 964 F.2d 26, 29 (D.C. Cir. 1992) and quoting Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976))

(internal quotation marks omitted). In determining how to balance the private and public interests involved, the Supreme Court has sharply limited the notion of "public interest" under the FOIA: "[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" Lepelletier, 164 F.3d at 46 (quoting United States Dep't of Defense v. FLRA, 510 U.S. 487, 497 (1994)) (emphasis added and internal quotation marks omitted) . See also Reporters Committee, 489 U.S. at 773. Information that does not directly reveal the operation or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." Id. at 775. Further, "something, even a modest privacy interest, outweighs nothing every time." Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989); but see Lepelletier, 164 F.3d at 48 (in extraordinary circumstance where the individuals whose privacy the government seeks to protect have a "clear interest" in release of the requested information, the balancing under Exemption 6 must include consideration of that interest).

Pursuant to FOIA Exemption (b)(6), the CIA evaluated the information contained in the documents responsive to plaintiffs' FOIA request and properly redacted information relating to particular, identifiable individuals, the disclosure of which would constitute an invasion of privacy. See Koch Declaration, Vaughn Index §§ 1, 7, and 29.

V. Counts III, VI and V of the Amended Complaint Must be Dismissed Pursuant to the Doctrine of Res Judicata.

Res judicata, also known as claim preclusion, holds that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979)(internal quotations

omitted). Because they asserted the same claims in their Amended Complaint, the Plaintiffs are precluded by the doctrine of res judicata from litigating those claims again via their Amended Complaint. The doctrine of res judicata is designed to "'preclude parties from contesting matters that they have had a full opportunity to litigate.'" Montana v. United States, 440 U.S. 147, 153-154 (1999). By shielding parties from the expense and burdens associated with multiple lawsuits, these doctrines "conserve judicial resources, and reduce the possibility of inconsistent decisions." Id. at 158-159.

Four factors must exist for res judicata to apply. They are (1) an identity of parties in both suits; (2) a judgment rendered by a court of competent jurisdiction; (3) a final judgment on the merits; and (4) an identity of the cause of action in both suits. See American Forest Res. Council v. Shea, 172 F. Supp. 2d 24, 29 (D.D.C. 2001), (citing Paley v. Estate of Ogus, 20 F. Supp. 2d 83, 96 (D.D.C. 1998)). Each of these factors is present in the instant matter.

Count III of Plaintiffs' Amended Complaint asserts that they are entitled to records requested in their May 24, 2005 FOIA letter. That letter duplicates the request made via the April 26, 2005 request and insists on recognition as members of the media for Plaintiffs. See Koch Declaration, Exhibit 11. It also sought public interest fee waivers. Id. CIA, incorporates by reference its discussion on items 1-7 in Section IV, supra. With regard to the issues of news media status and public interest fee waivers, this Court disposed of these claims in its Order dated April 13, 2005.

Plaintiffs' Hall, SSRI and AIM's initial Complaint requested relief seeking news media status and a public interest fee waiver. See USDC Pacer, Dkt. No. 1. By Order dated April 13, 2005, this Court dismissed these same Plaintiffs' claims on both issues. See USDC Pacer Dkt.

No. 30 at 12-15 and 15-17, respectively. Nonetheless, Plaintiffs' Amended Complaint, Count IV, again seeks news media status and in Count V, they seek a public interest fee waiver. See USDC Pacer Dkt. No. 45. All four prongs of the tests are met as the same parties are involved; jurisdiction of this Court, over these types of FOIA matters is undisputed; the Court's April 13, 2005 Order was a final decision on the merits of the issues, and; the cause of action remains the same in the Amended Complaint. Accordingly, Plaintiff's claims must fail.

CONCLUSION

WHEREFORE, Defendant's Motion to Dismiss and for Partial Summary Judgment for Counts I,[5] III,[6] IV and V should be granted as a matter of law.

Dated: October 30, 2006.

Respectfully submitted,

_____/s/_____
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[5] With the exception of the extended temporal portion of item 3-related claims.

[6] With the exception of item 8-related allegations.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Roger Hall, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action 04-00814 (HHK)
Central Intelligence Agency,	)	ECF
	)	
Defendant.	)	
	)	

ORDER

Upon consideration of Defendant's Motion to Dismiss and for Partial Summary Judgment and the entire record herein, the Court is of the opinion and finds that, for the reasons set forth by Defendant, Defendant's Motion to Dismiss and for Partial Summary Judgment should be granted as to Counts I (with the exception of the temporally expanded item 3-related claims), III (with the exception of item 8-related allegations), IV and V. Accordingly, it is this ____ day of _____, 2006,

ORDERED that Defendant's Motion to Dismiss and for Partial Summary Judgment be and is hereby GRANTED; and it is

FURTHER ORDERED that judgment be and is hereby rendered in favor of Defendant; and the above-referenced Counts are DISMISSED with prejudice.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2006, I caused the foregoing *Motion to Dismiss and for Partial Summary Judgment* to be served on counsel of record via the Court's ECF system.

/s/

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