

Law Office
John H. Clarke
1717 K Street, NW
Suite 600
Washington, DC 20036

(202) 332-3030

JohnHClarke@earthlink.net

June 29, 2005

Also admitted in
Virginia and Maryland

FAX (202) 331-3759

ADMINISTRATIVE APPEAL
FREEDOM OF INFORMATION ACT

By certified mail – return receipt requested
Article No. 7099 3220 0009 2976 5109

Mr. Scott Koch
Freedom of Information and Privacy Coordinator
CENTRAL INTELLIGENCE AGENCY
Washington, DC 20505

Executive Secretary of the Agency Release Panel
CENTRAL INTELLIGENCE AGENCY
Washington, DC 20505

Re: FOIA Requester: Accuracy in Media, Inc.
Your reference No.: F-2005-01217 (Civil Action No. 00814)
(1) Supplement to February 2003 FOIA Request: April 22, 2005
CIA Response: May 26, 2005
(2) FOIA Request: April 26, 2005
CIA Response: June 1, 2005

Dear Gentlemen:

May 26, 2005 CIA denial. Your May 26 denial of Accuracy in Media's ("AIM") request for fee waivers recites that AIM seeks a public interest fee waiver or "alternatively AIM seeks placement in the 'news media' fee category." This is incorrect. AIM seeks both public interest fee waiver of copying costs under 5 U.S.C. § 552 (a)(4)(a)(iii), as well as a waiver of search fees as a member of the news media under 5 U.S.C. § 552 (a)(4)(A)(ii)(II).

The CIA claimed that the information that AIM provided in support of its request for a public interest fee waiver did not meet the standards under 32 C.F.R. Part 1900.13. Page 2 of AIM's letter includes information that release is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the United States Government and is not primarily in the commercial interest of the requester:

Disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Disclosure will help create a greater understanding of the inner workings of government as shedding light on the extent, nature, intensity, and duration of the government's efforts to locate POW/MIAs, and will show the degree to which the CIA has complied in good faith with relevant Executive Orders and whether it has accurately informed Congress and the public about its search efforts and the information it possesses. Thus, disclosure to AIM will meaningfully enhance public understanding of the POW/MIA issue. It will also show how the CIA cooperated and coordinated its search efforts with other agencies, and show how the CIA controlled the documentation that other agencies possessed regarding POW/MIAs and detainees.

AIM's April 22 letter, as well as its April 26 FOIA request, meet the standards under 32 C.F.R. Part 1900.13.

The CIA relied on its own regulations in denying AIM's request for a public interest fee waiver. But its reliance on the court's decision that ("AIM had failed to demonstrate its eligibility for fee limitations based on news media status.") in denying AIM's request for a news media status is contrary to law. See D.C. Technical Assist. Org. v. U.S. Dept. Housing, 85 F. Supp.2d at 48 (D.D.C. 2000):

The decision of an agency to grant or deny a fee waiver request is reviewed *de novo* looking only to the administrative record before the agency at the time of the decision. 5 U.S.C. (a)4(vii). (The additional supporting documents submitted with plaintiff's motion for summary judgment were not considered in the disposition of this case).

AIM submits what it could not in the district court. The CIA is not free to exclude it from the administrative record. "In 1986, Congress amended the statute governing fee waivers for FOIA requests... The amendment also changed the standard of review to *de novo*, but limited the court's review to the record before the agency." Larson v. CIA, 843 F.2d at 1481-82 (D.C. Cir. 1988). "The court must limit its review to the administrative record established before the agency." Judicial Watch, Inc. v. US Dept. of Justice, 122 F.Supp. 2d 13 (D.D.C. 2000), Kennedy, J. The court in Oglesby v. US Dept. of Army, 920 F.2d 57 (D.D.C. 1990) remanded in part "to grant petitioner the right, if he chooses, to pursue administrative appeals from the initial agency denials" (at 71).

As the CIA cannot restrict the administrative record to the initial FOIA request, kindly include AIM's 1971 articles of incorporation, as well as its April 26 FOIA request, in the record of this administrative appeal under 32 C.F.R. 1900.13(c)). Copies are enclosed.

Additional support for AIM's fee waiver requests is its 1971 articles of incorporation's purpose clause:

The purpose or purposes of the corporation is organized is to promote, encourage, sponsor, support, finance and facilitate communication, education and cooperation among individuals and organizations working in the mass communications media and to conduct, promote, encourage, sponsor, support, finance, and facilitate research, education and information activities and public discussion groups, forums, panels, lectures, and other educational and informational processes in connection with the mass communication media and public understanding thereof with the aim of improving the accuracy of news media reporting in the mass communication media and to work for the adoption by editors and publishers of codes setting forth good journalistic practice relating to accuracy in reporting and the correction of errors.

The CIA's May 26, 2005 response conditioned the acceptance of this appeal on AIM's agreement to be bound by fees incurred. ("In accordance with agency regulations, because the Agency has started to process your FOIA request, the Agency will only accept your appeal of the fee waiver denial if you agree to be responsible for the costs in the event of an adverse administrative or judicial decision.")

Because AIM's FOIA request is duplicative of Roger Hall's and SSRI's (see Civil Action No. 00814), and Roger Hall has tendered payment for these FOIA requests (see Docket No. 12), AIM contests the CIA's refusal to accept this appeal absent agreement to be bound to pay fees. AIM appeals the fee waiver denial but does not agree to be responsible for any costs in the event of an adverse decision.

Moreover, the CIA's regulation that it will not accept AIM's appeal unless it agrees to pay fees in the event of an adverse position is invalid because it violates and is inconsistent with the FOIA. The FOIA gives any request a right of appeal and does not authorize any agency to abrogate it. The right of appeal is provided for in 5 U.S.C. 552(a)(6)(A) and is critical to (1) exhaustion of administrative remedies, (2) when a court has jurisdiction to entertain a FOIA case, (3) when the statute of limitations begins to run, and (4) the composition of the nature of the administrative record on which a Court determines eligibility for a fee waiver. In sum, the CIA regulation abrogates the right of appeal provided by Congress.

Alternatively, should the agency decline to accept this appeal absent agreement to pay fees, please provide a fee estimate under 32 C.F.R. §1900.14, at your earliest convenience. This estimate should be for those fees attributable only to AIM, not fees attributable to Roger Hall or SSRI, who requested the exact same information. Under the CIA regulations, it must be notify AIM if the search will cost more than \$100.

I have no authority to bind AIM to pay an unspecified amount of fees. As the reason given for agreement to pay fees is that "the Agency has started to process your FOIA request," please cease incurring any fees on AIM's behalf until the issue has been administratively or judicially decided.

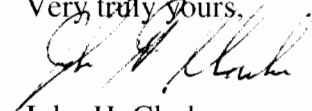
June 1, 2005 CIA denial. The CIA declined to "accept" this Request claiming the absence of the right to an administrative appeal under 32 C.F.R. Part 1900.42(c) because the information sought is the subject of pending litigation in the federal courts. Specifically, you recite that "items 1 through 7" of the "April 26, 2005 request are identical to items 1 through 7 of your 7 February 2003 request," and item 8, requesting "fee estimates related to your 7 February 2003 request," is also "the subject of pending litigation (04-0814)."

Items 1 through 7 of the April 26 Request are identical to items 1 through 7 of the February 7, 2003 Request, but the CIA's reliance on 32 C.F.R. Part 1900.42(c) does not apply to AIM's requests for fee waiver, as explained above. The CIA's June 1 letter refusing to accept the April 26 Request ignores AIM's fee waiver requests.

And 32 C.F.R. Part 1900.42(c) does not bar item 8 from administrative appeal. The information sought, regarding the CIA's fee estimates related to the February 7, 2003 FOIA Request is not the subject of any previous FOIA Request. Roger Hall's pending motion for an accounting does not exclude item 8 from the purview of the FOIA. While not authorizing CIA to incur search fees absent a fee waiver, AIM requests two hours of free search time applied to item 8.

AIM's April 26 letter is a separate FOIA request, the denial of which AIM hereby appeals.

Very truly yours,



John H. Clarke

Enclosures: Articles of Incorporation
April 26, 2005 FOIA Request

OFFICE OF RECORDER OF DEEDS, D. C.

Corporation Division
Sixth and D Streets, N. W.
Washington, D. C. 20001

CERTIFICATE

THIS IS TO CERTIFY that all provisions of the District of Columbia
Non-profit Corporation Act have been complied with and ACCORD-
INGLY this Certificate of Incorporation

is hereby issued to the ACCURACY IN MEDIA

as of the date hereinafter mentioned.

Date June 17, 1971



PETER S. RIDLEY,
Recorder of Deeds, D. C.

Alfred Goldstein
Alfred Goldstein
Superintendent of Corporations

OFFICE OF RECORDER OF DEEDS, D. C.
CORPORATION DIVISION
SIXTH AND D STREETS, N. W.
WASHINGTON, D. C. 20001

FEES DUE

Filing Fee \$10.00
Indexing Fee 2.00

Total \$12.00

MAKE CHECK PAYABLE
TO
RECORDER OF DEEDS, D. C.

NON-PROFIT CORPORATION
ARTICLES
OF
INCORPORATION

We, the undersigned natural persons of the age of twenty-one years or more, acting as incorporators of a corporation adopt the following Articles of Incorporation for such corporation pursuant to the District of Columbia Non-profit Corporation Act:

FIRST: The name of the corporation is
ACCURACY IN MEDIA

SECOND: The period of duration is Perpetual

THIRD: The purpose or purposes for which the corporation is organized is/~~are~~ To promote, encourage, sponsor, support, finance and facilitate communication, education and cooperation among individuals and organizations working in the mass communications media and to conduct, promote, encourage, sponsor, support, finance, and facilitate research, education and information activities and public discussion groups, forums, panels, lectures and other educational and informational processes in connection with the mass communication media and public understanding thereof with the aim of improving the accuracy of news reporting in the mass communication media and to work for the adoption by editors and publishers of codes setting forth good journalistic practice relating to accuracy in reporting and the correction of errors.

FILED

JUN 17 1971

BY: _____
[Signature]

FOURTH: * (A) The corporation will not have members.

~~(B) The corporation is to be divided into _____
classes of members. The designation of each class of members, the
qualifications and rights of the members of each class and the confer-
ring, admitting, suspending the right to be admitted, and providing
thereby laws.~~

FIFTH: The directors shall be elected or appointed as shall be provided in the bylaws.

SIXTH: Provisions for the regulation of the internal affairs of the corporation, including provisions for distribution of assets on dissolution or final liquidation shall be provided in the bylaws.

SEVENTH: The address, including street and number, of its initial registered office is Suite 1012, 501-13th St. N.W., Washington, D.C.
~~Suite 1012, 501 - 13th Street, N.W., Washington, D.C.~~

and the name of its initial registered agent at such address is A.H.K. Robert S. McBlellan
~~ABRAHAM H. KALISH, Executive Secretary~~

EIGHTH: The number of directors constituting the initial board of directors is 3 and the names and addresses, including street and number of the persons who are to serve as the initial directors until the first annual meeting or until their successors be elected and qualified are:

NAME	ADDRESS
<u>Red [unclear]</u>	<u>11120 Nicholas Dr. Silver Spring, Md.</u>
<u>John W. McLean</u>	<u>317 Manassas Dr Alexandria, Va</u>
<u>Abraham H. Kalish</u>	<u>10807 E Nolcrest Dr Silver Spring, Md.</u>

*Execute only (A) or (B) and strike other provision.

NINTH: The names and addresses, including street and number, of each incorporator is:

NAME	ADDRESS
<u>Reed J. Irvine</u>	<u>11120 Nichols Dr., Silver Spring, Md.</u>
<u>John K. McLean</u>	<u>317 Mansion Dr Alexandria, Va.</u>
<u>Abraham H. Kalish</u>	<u>10807 E. Nolens Dr. Silver Spring, Md.</u>

Date June 15, 19 71

DISTRICT OF COLUMBIA
WASHINGTON

} ss:

I, Hilda Kalish, a Notary Public, hereby certify that on the 15th day of June, 1971, personally appeared before me REED J. IRVINE, JOHN K. McLEAN, and ABRAHAM H. KALISH, who declared that they signed the foregoing document as incorporators, and that the statements therein contained are true.



Hilda Kalish
Notary Public, D.C.

My commission expires
July 14, 1974