

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, <u>et al.</u> ,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C. A. No. 04-0814 HHK
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:	:	
CENTRAL INTELLIGENCE AGENCY,	:	
	:	
Defendant	:	

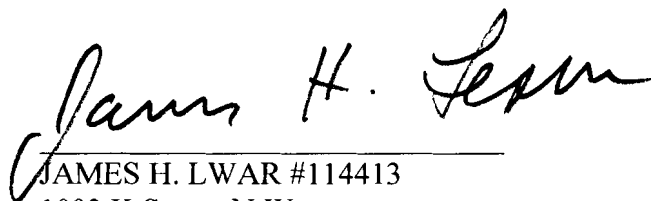
PLAINTIFF’S MOTION FOR RECONSIDERATION
OF MAGISTRATE FACCIOLA’S RULING ON MOTION TO STRIKE

Come now the plaintiffs, Mr. Roger Hall and Studies Solutions Results, Inc., and move this Court to reconsider the March 10, 2008 Memorandum Opinion of Magistrate Judge John M. Facciola partially granting defendant’s motion to strike the Declaration of Roger Hall.

In support of this motion, plaintiffs submit a Revised Declaration of Roger Hall which substantially, if not entirely, corrects the flaws cited by the Magistrate Judge in his decision. Also submitted in support of this motions are the Second Affidavit of Congressman Bill Hendon, Affidavit of Larry J. O’Daniels, Affidavit of Joseph S. Douglas, and the Affidavit of Mrs. Carol Hrdlicka. A Memorandum of Points and Authorities and a proposed Order are also submitted herewith.

The legal issues addressed below were extensively addressed in plaintiffs’ Opposition to Defendant’s Motion to Strike, which is incorporated herein by reference.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James H. Lwar". The signature is written in a cursive style with a large initial "J".

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June 4, 2008

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION
OF MAGISTRATE JUDGE FACCIOLA'S MEMORANDUM OPINION

Preliminary Statement

Plaintiffs Roger Hall and Studies Solutions Results, Inc. have moved this Court to reconsider Magistrate Judge Facciola's decision granting the motion of the Central Intelligence Agency to strike the Declaration of Roger Hall which plaintiffs submitted in support of his cross-motion for summary judgment. Paying heed to the Magistrate Judge's decision, Hall has substantially revised his declaration to remedying as many of the perceived flaws in the original declaration as possible. If the Revised Hall Declaration passes muster, it will then be possible to get the issues between the parties before the Court on the merits.

In this regard, it should be noted that whatever this Court's disposition of this motion is, it will be necessary for plaintiffs to revise their Statement of Material Facts and their Cross-Motion for Summary Judgment. Plaintiffs suggest they be given two weeks after the Court's disposition of this motion in which to do so. In addition to the fact that these two documents must adhere to whatever amount of Hall's Revised Declaration is found to comply with Rule 56, there new legal developments which potentially affect the legal issues raised in the cross-motion for summary judgment and should be addressed in a revised cross-motion for summary judgment.

With respect to the materials submitted in support of plaintiffs' motion to reconsider, a brief description of them may help to eliminate confusion. The Revised Hall Declaration refers to three kinds of documents, Attachments, Exhibits, and Affidavits or Declarations. The Attachments are reproductions of the attachments that were annexed to the Declaration of Roger Hall that was filed in support of Plaintiffs' original Cross-Motion for Summary Judgment. Not all of those attachments are reproduced here, but those that are bear the same number as they originally did. The same is true with respect to the exhibits. Not all of the original exhibits have been reproduced here, but those that have bear the same exhibit number as did the originals, except that sometimes for clarification purposes the exhibits have been broken down into subparts, such as 7-A, 7-B, and 7-C. In addition, there are some new exhibits have been added to shore up deficiencies in the original Hall Declaration cited by Magistrate Judge Facciola. The Revised Hall Declaration generally follows the paragraph structure of the original Hall Declaration, although a couple of paragraphs have been deleted and some new paragraphs or subparagraph have been added.

The Revised Declaration of Roger Hall and the Attachments and Exhibits are all Bates Stamp numbered in order to facilitate specificity in identifying the pertinent parts of the record referred to. Additionally, the volume of the exhibit materials initially submitted by Hall in support of his motion for summary judgment has been enormously reduced so as to lessen everyone's burden in ascertaining what in particular is relevant to the points being made.

Also submitted in support of plaintiffs motion are the Hrdlicka, O'Daniels and Second Hendon Affidavits. The Second Hendon Affidavit has been separately Bates stamped, which is indicated by the notation "Second Hendon Bates" followed by the page number. The other new affidavits are relatively short and are not Bates stamped.

ARGUMENT

A. Referenced Documents

A major point made by the CIA in its motion to strike the Hall Declaration was that "plaintiffs, in violation of Rule 56(e), have failed to provide copies of the documents referenced in the Declaration, and have misrepresented certain documents that were provided." Magistrate Judge Facciola's Memorandum Opinion ("Mem. Op.") at 11-12, citing Motion to Strike at 4-5 (citing ¶¶ 5-9, 11, 13-16, 18-19, 22, 26-27, 32-34, and 36). Initially, the Magistrate Judge found that ¶¶ 11, 32-33,¹ and 36 should be stricken because plaintiffs had failed to respond to the CIA allegations that they were deficient. Id. at 12.

With respect to the other paragraphs, plaintiffs did attempt to remedy the deficiencies by attaching documents. However, the Magistrate Judge found that plaintiffs' submissions

¹ As plaintiffs have deleted Paragraph 33 from the Revised Hall Declaration, it is no longer at issue.

with regard to ¶¶ 7, 22, 26, 27, and 34 was “plainly inadequate” either because they failed to provide a referenced document or failed to pinpoint specific references in voluminous materials. Id.

With respect to these paragraphs, plaintiffs have now remedied these deficiencies. For example, the Magistrate Judge noted that with respect to Hall ¶ 7, plaintiffs had submitted 278-page deposition of William Sullivan to support the statement that former Ambassador to Laos Sullivan had revealed in his deposition that an Air Force and CIA employee had submitted requests to rescue prisoners of war in Laos, but had failed to provide the exact page references to support this statement. Id. That exhibit, which was formerly 278 pages, has now been reduced to seven pages, and references are given to the specific pages which support the statements made in Hall’s revised declaration. See Revised Hall Declarataion, Exh. 3 [Bates 000084]. Similarly, with respect to Hall Decl., ¶ 22, the Magistrate noted that it referenced the Report of the Senate Select Committee on POW/MIA Affairs (“the Senate Report”) but did not provide it. The appropriate pages of the Senate Report have now been provided. See Exh. 32. [Bates 000195]. With respect to Exhibit 23, the Magistrate noted that it was a 132 page deposition of Richard Secord taken before the Senate Committee without citation to the relevant pages, and he made the same criticism of Exhibit 19, the Deposition of Terry Reed, referenced in Hall Decl., ¶ 34, which is 101 pages in length. Mem. Op. at 12. The Secord Deposition now consists of just five pages, See Exh. 32-A, and the Reed Deposition is six. References to the material cited is to the particular page or pages on which it appears.

In view of the foregoing, the striking of the paragraphs referencing these exhibits should be rescinded.

B. Personal Knowledge

The Magistrate also struck paragraphs of the Hall Declaration because they were not based on Hall's personal knowledge. Mem. Op. at 4-5. He cited, for example, Paragraph 13, which he said "contain[ed] a conclusory statement concerning an alleged historical event"; namely, that "POWs were taken from Vietnam, Laos and possibly Cambodia to the Soviet Union" and that Hall had not been provided any records regarding such transfers. *Id.* at 5. Hall's Revised Declaration eliminates this objection. See Revised Hall Decl., ¶ 13, citing Exhs. 9 (testimony of Jan Sejna before Senate Subcommittee on Personnel of the Committee on National Security) [Bates 000117] and Exh. 24 (Deposition of Jan Sejna before the Senate Committee) [Bates 000179]. Hall's statement that he has not been provided with records pertaining to this is, of course, based on personal knowledge. Where Hall's statements is based on what is contained in exhibits that are official records, as is now almost always the case, they should not be stricken.

C. Hearsay

Paragraphs of the Hall Declaration were also stricken because they contained hearsay or double hearsay. For example, the Magistrate struck Paragraph 26 because it contained statements that Hall had been told by former Cong. Bill Hendon that aerial photographs pertaining to POWs were shown to him by the director of the CIA, but he did not strike Exh. 26, the Declaration of the Hon. Cong. Bill Hendon, to which it referred. Mem. Op. at 10. The Revised Hall Declaration¶ 26, eliminates this problem by referring only to what Cong. Hendon states in a new, more detailed affidavit submitted by

him (“Second Hendon Declaration”) and another congressman. Hall also states that the CIA has not released the records referred to by Cong. Hendon. This statement is based on personal knowledge as is needed to establish that there is an issue of material fact as to the adequacy of the search. As the hearsay cited by the Magistrate has been eliminated, the striking of Paragraph 26 should be rescinded.

Similarly, the Magistrate struck Paragraph 20 of the Hall Declaration which “purports to describe a conversation between President Ronald Reagan and CIA Director William Casey as overheard by ‘Secret Service employee John Syphrit,’” saying that it was “double hearsay” and “lack[ed] the “required circumstantial guarantees of trustworthiness’.” Mem. Op. at 10, quoting “F. R. Crim. P. 807 (sic). (One assumes this should be a reference to F. R. Evid. 807). In so ruling, the Magistrate noted that this paragraph and paragraphs 12 and 17 “fail to include any reference to corroborating documentation.” *Id.* The Revised Hall Declaration, ¶ 20-A [Bates 000012] sets forth some corroborating documentation. In it, Hall sets forth that he obtained from the Collection on POW/MIAs at the National Archives, which contains the records of the Senate Select Committee on POW/MIA Affairs, two documents which pertain to this incident. One, Exh. 11-A [Bates 000123], is a two-page typed memorandum regarding the referenced conversation/ meeting. The other, Exh. 11-B, [Bates 000125] consists of handwritten notes by someone who appears to have been present at the meeting, and who records an offer made by the North Vietnamese concerning POWs in exchange \$ 4.5 billion. As Hall notes, this meeting is also mentioned in the Senate Report, Exh. 32 at 32 [Bates 000214]. This documentation fully meets the “corroboration” requirement mentioned by the Magistrate. Both Paragraph 20(A) and 20(B) of the Revised Hall

Declaration should be allowed, notwithstanding the fact that 20(B) continues to set forth Hall's account of his personal interview of former Secret Service employee John Syphrit. Hall's statements regarding what he was told by Syphrit are corroborated by former Congressman Hendon, who was involved in an official congressional investigation of the POW/MIA matter. While admittedly hearsay, there is sufficient other reliable corroborating information that this should not be disregarded in a Freedom of Information Act lawsuit.

D. Rule 56(e)

The Magistrate rejected plaintiffs' contention that Rule 56(e)'s formal requirements are more strictly adhered to when an affidavit is submitted in support of a motion for summary judgment than in opposition to it. In addition to citing a noted legal treatise, plaintiffs also cited two cases from the United States Court of Appeals for the District of Columbia Circuit, Corley v. Life & Cas. Ins. Co., 296 F.2d 449, 450 (D.C.Cir. 1961), and Underwater Storage, Inc. v. United States Rubber Co., 371 F.2d 950, 953 (D.C.Cir.1966). The Magistrate noted that both cases "are over forty years old" and asserted that "at best [they] blandly state that courts are less critical of the papers opposing summary judgment than as to those of the movant." Mem. Op. at 7.

Plaintiffs are unaware of any law supporting the proposition that decisions of the DC. Circuit more than 40 years old are not to be considered precedents, nor did the Magistrate cite any. Nor are they aware of any authority that "blandly state[d]" legal rulings also lack precedential value, nor did the Magistrate cite any.

The Magistrate relies instead on the literal language of Rule 56(e), notwithstanding the fact that what courts construe language to mean is what governs. He also relies on Londrigan v. Federal Bureau of Investigation, 670 F.2d 1164, 1174 (D.C.Cir.1981).

However, Londrigan is inapposite. It found the FBI agent affiant there did not have personal knowledge of was “any assumptions made by persons interviewed by other FBI agents....” Id. at 1175. And it stated he did have personal knowledge of “his personal experiences as an agent to the extent they bore relevance to the case.” Id. (emphasis added). Hall interviewed Syphrit himself and has personal knowledge of what Syphrit told him. His experience in interviewing officials regarding POW issues is relevant to the case.

E. Hall As Expert Witness

Hall contends he is an expert witness to the extent that he has special knowledge of the events concerning POW/MIAs and the extensive public record concerning them. The Magistrate states that he need not address this issue, then spends several pages doing just that. Initially, he says that expert status does not permit testimony to be introduced *carte blanche*, and that the deficiencies in Hall's declaration were “simply too great for the Declaration to be considered helpful or reliable.” Mem. Op. at 13.

Hall never suggest that expert witness status meant that testimony could be introduced *carte blanche*. And while there were deficiencies in the original Hall Declaration, those have been cured, where possible, by the Revised Hall Declaration. The amount and quality of the documentation Hall has now produced in his revised declaration supports his claim of expertise and eliminates the basis of the Magistrate's supposition that what he has to offer as an expert is not helpful or reliable.

The Magistrate declares that Hall “cannot speak to the truth of the events he alleges to have occurred, to which he has no personal knowledge.” Mem. Op. at 14. But Hall does have extensive personal knowledge of what the official public record says about these “alleged events,” and the inferences he draws therefrom, and his opinion about whether this documentation or the fruits of his own personal investigation means that the CIA has not conducted an adequate search for responsive documents may be quite helpful to the Court in determining whether there is a triable issue of material fact as to the adequacy of the CIA’s search.

The Magistrate asserts that because Hall is a plaintiff, the probative value of his testimony is “outweighed by its hopelessly partisan nature.” *Id.* at 15. But he cites no evidence from the Hall declaration that any of his asseverations are anything less than truthful and objective statements. He cites no cases to support his supposition that one generally cannot be both a party and an expert in the subject matter of a Freedom of Information Act case, and indeed suggests it may be possible to “conjure up where “a party could be both party and expert in the same case....” *Id.*

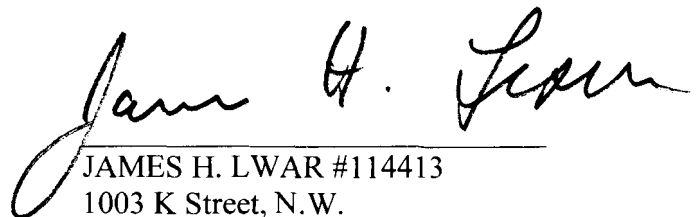
In ultimately concluding that Hall’s Declaration would not be admitted as expert testimony, the Magistrate disregarded the evidence put before the Court that Hall is an objective, unbiased expert on the matters he testified to. For example, the Magistrate completely ignored the Declaration of Joseph S. Douglass, formerly an adjunct Professor at the Naval Post Graduate School and the John Hopkins School of Advanced International Studies. Douglas Decl., ¶ 1. He has know Hall for 15 years, has reviewed his work and always been impressed with it. *Id.*, ¶ 2. Douglas has “the highest regard for Mr. Hall’s abilities, research, and accomplishments on the POW/MIA issue.” He finds

him a “a determined, objective, and careful researcher.” Id., ¶ 4. He states that “[o]ver the years [Hall] has become one of the few continuing experts on America’s MIA/POWs, including operations to locate them and where relevant documents might have been created or located.” Id.

It was clearly error for the Magistrate to disregard Prof. Douglass’ affidavit and make findings directly contradicting it without evidentiary basis for doing so.

CONCLUSION

For the reasons set forth above, the Magistrate Judge’s order partially striking portions of Hall’s declaration should be vacated. To the extent that the Revised Hall declaration now passes muster, either because of the corrections of deficiencies made by Hall or because of the Magistrate’s errors in applying the law, plaintiffs should be allowed to introduce it with their renewed Cross-Motion for Summary Judgment.



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ORDER

Upon plaintiffs' motion to reconder the Memorandum Opinion of Magistrate Judge John Facciola, defendant's opposition thereto, and the entire record herein, it is by this Court this _____ day of _____, 2008, hereby

ORDERED, that the March 10, 2008 Memorandum Opinon ordering that the Declaration of Plaintiff Roger Hall partially be stricken is hereby vacated; and it is further

ORDERED, that plaintiffs may introduce the Revised Declaration of Roger Hall in support of their renewed cross-motion for summary judgment, which shall be filed on or before _____.

UNITED STATES DISTRICT COURT

Judge