UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RENEWED CROSS-MOTION OF PLAINTIFFS ROGER HALL AND STUDIES SOLUTIONS RESULTS, INC. FOR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, AN ORDER AUTHORIZING PLAINTIFFS TO TAKE DISCOVERY, AN ORDER INSTRUCTING DEFENDANT TO CONDUCT ADDITIONAL SEARCHES, AND ORDERS FOR CERTAIN OTHER RELIEF

Come now the plaintiffs, Roger Hall and Studies Solutions Results, Inc., and moves this Court for partial summary judgment and other relief pursuant to Rule 56 of the Federal Rules of Civil Procedure. Hall and the SSRI also move the Court for a waiver of search fees and copying costs, and for orders (1) permitting them to take disccovey on the search issue; (2) requiring defendant to conduct additional searches; and (3) declaring that they should be accorded status as representatives of the news media.

A Memorandum of Points and Authorities in support of these motions and in opposition to defendant's motion for partial summary judgment, a proposed order, a statement of material facts not in dispute, the Second Revised Declaration of Roger Hall, the Second Declarations of Congress Bill Hendon, he Affidavit of Carol

Hrdlicka, the Affidavit of Layy J. O'Daniel, and the Affidavit of Joseph Douglas., are submitted in support of these motions and in opposition to defendant's motion.

Respectfully submitted,

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and SSRI, Inc.

December 18, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Preliminary Statement

This is a Freedom of Information Act ("FOIA") lawsuit for records pertaining to missing Prisoners of War (POWs") and persons Missing in Action ("MIAs") as a result of the war in Vietnam. Because the basic facts of the case have repeatedly been set forth in court opinions and briefs by the parties, there is no need to repeat this history here.

Suffice it to say that defendant Central Intelligence Agency ("CIA") has filed a renewed motion to dismiss or for summary judgment. Plaintiffs Roger Hall ("Hall") and Studies Solutions Results, Inc. ("SSRI"), collectively referred to hereafter as "Hall," now file their renewed cross-motion for partial summary judgment, as well as for other relief, including orders that the CIA conduct further searches for responsive documents, granting them status as representatives of the news media, and permission to take discovery on the issue of the adequacy of the CIA's search.

ARGUMENT

I. DEFENDANT HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT ITS EFFORTS TO SEARCH FOR, LOCATE, RETRIEVE AND PRODUCE RESPONSIVE RECORDS HAVE BEEN ADEQUATE

A. Legal Standard Governing Searches

To prevail in a FOIA case, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable or is wholly exempt from the Act's inspection requirements." National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C.Cir.1973). Agency affidavits regarding the search for responsive records are inadequate to support summary judgment where they "do not note which files were searched or by whom, do not reflect any systematic document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized." Weisberg v. United States Dept. of Justice, 627 F.2d 365, 371 (D.C.Cir.1980).

When the adequacy of the agency's search is in dispute, summary judgment is inappropriate as to that issue. See Founding Church of Scientology, Inc. v. Nat. Sec. Agency, 610 F.2d 834, 836-37 (D.C.Cir.1979)("To accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the [FOIA] . . . and if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory.").

It is a truism that the issue is not whether the documents might exist that are responsive to the request, but rather whether the search conducted by the agency was "adequate." Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C.Cir.1984)(emphasis in the original); Meeropol v. Meese, 790 F.2d 942, 956 (D.C.Cir.1986)("[a] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.") In Truitt v. Department of

State, 897 F.2d 540 (D.C.Cir.1990), the Court of Appeals expatiated on this standard, stating that:

> It is elementary that an agency responding to a FOIA request must conduct a search reasonably calculated to uncover all relevant documents,' and, if challenged, must demonstrate `beyond a material doubt' that the search was reasonable. "`The issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate.' The adequacy of an agency's search is measured by a standard of reasonableness,' and is dependant upon the circumstances of the case.'"

Id. at 642 (footnotes omitted)(emphasis added). If such doubt exists as to the adequacy of the search, Truitt counsels, "summary judgment for the agency is not proper." Id. (footnote omitted). Where the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order[,] Founding Churach, supra, 610 F.2d at 836, and the plaintiff is entitled to take discovery on the adequacy of the search. Weisberg, supra, 627 F.2d at 371.

Here, the CIA has not demonstrated "beyond a material doubt," that the search that it conducted was reasonable. Accordingly, Hall should be allowed to pursue discovery and this Court should order the CIA to conduct further searches.

As Hall shows below, it is clear that the CIA has failed to conduct an ade-quate search. Indeed, a plethora of evidence indicates that the CIA has failed to meet its obligation to search for, locate, retrieve and produce responsive records.

B. THE CIA HAS NOT PRODUCED REFERRALS

The Declaration of Ralph S. Dimaio ("Dimaio Decl.") submitted with the CIA's renewed motion makes clear that the CIA has not produced an unspecified quantity of records it has referred to unidentified other government agencies. In some cases these referrals were for consultation purposes, and some cases they were referred for direct response by other government agencies to Hall. The CIA asserts that it "does not have the

authority to require other federal agencies to respond to its requests for coordination within a specified period of time." Dimaio Decl., ¶ 7. Dimaio also asserts that he "cannot state with any reliability or authority when the other agencies will respond to the plaintiff." Id.

The fact that the CIA has made referrals to other agencies does not relieve it of its obligation to justify their withholding in this litigation. As McGehee v. C.I.A., 697 f.2D 1095, 1110 (D.C.Cir.1983) stated, "when an agency receives a FOIA request for `agency records' in its possession it must take responsibility for processing the request. It cannot simply refuse to act on the grounds that the documents originated elsewhere." Accord, Paisley v. C.I.A., 712 F.2d 686, 691 (D.C.Cir.1983).

And contrary to the impression given by Dimaio, the CIA does have a means of ensuring that an agency will act upon the referral in a timely fashion. All it has to do is inform the agency that if its response is not received by a certain date it will waived its exemption claims and disclose the information.

Since this lawsuit has been pending for over four years, Hall takes the position that the right to claim exemptions for these materials has been waived. Alternatively, the Court should establish a date by which the CIA must produce all nonexempt referral materials and justify any withholdings.

C. The CIA Has Not Searched Operational Files

The Declaration of Scott A. Koch ("Koch Decl.") submitted in support of the CIA's prior motion for partial summary judgment states in the fine print that "[t]he Directorate of Operations did not conduct an additional search, because it determined that any responsive records it had would be contained in properly designated operational files, which are exempt from the search, review, and release provisions of the FOIA." Koch Decl., ¶ 22, n.6. It is true that under the Central Intelligence Agency Freedom of Information Act of 1984 ("the CIA Act"), its designated operational files are generally

immune from search and review. However, there are exceptions. Thus, 50 U.S.C. § 431(c) states as follows:

> **(c) Search and Review for information. Notwithstanding subsection (a) of this subsection, exempted operational files shall continue to be subject to search and review for information concerning—**
>
> *** * ***
>
> **(3) the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of Central Intelligence, for any impropriety, or violation of law, Executive order or Presidential directive, in the conduct of an intelligence activity.**

This case clearly qualifies under the exception for "investigations by the Intelligence committees of the Congress." The Government's handling of the MIA/POW issue was the subject of investigations by the Senate Select Committee on Intelligence Activities with Respect to MIA/POW Affairs, the Senate Foreign Relations Committee, the Senate Armed Services Committee, and a House Task Force. Second Revised Delaration of Roger Hall ("2d Revised Hall Decl."), ¶ 3.

This Court has dealt with this issue in the context of a FOIA request for records concerning the CIA's MK/ULTRA project. While the CIA maintained that it did not have to search its operational files, this Court held that "[t]he MK/ULTRA program has been the subject of numerous investigations. * Therefore, the court finds that 50 U.S.C. § 431(c) requires the CIA to search and review its operational files for information concerning the MKULTRA project and will accordingly order the CIA to conduct such a search and review, making all releasable information available [to the plaintiff]." John Kelly v. Central Intelligence Agency, C. A. No. 00-2498 (TFH), Mem. Op. at 30-31 (D.D.C. Aug. 8, 2002).**

The POW/MIA issue clearly qualifies under § 431(c)(3).

There is also a second basis for requiring the CIA to search its operational files. On June 10, 1993, President William Jefferson Clinton issued a Presidential Decision Directive ("PDD/NSC 8), which stated as follows:

> **In accordance with my Memorial Day Announcement of May 31, 1993, all executive agencies and departments are directed to complete by Veterans Day, November 11, 1993, their review, declassification and release of all relevant documents, files pertaining to American POW's and MIA's missing in Southeast Asia in accordance with Executive Order 12812.**

Notably, this directive is all-encompassing in its sweep. It requires the "review, de-classification and release" of "all relevant documents, files" pertaining to American POWs and MIAs. Obviously, the scope of the directive includes all CIA records, including those maintained in designated operational files.

D. The Inadequacy of the CIA's Search Is Evidenced by the Absence of Records Pertaining to Known Operations, Events and Activities

The CIA claims to have produced all nonexempt records responsive to items 1-3 of Halls request for the years 1971-1975. This claim does not square with the available evidence. Some examples of operations, events, and activities which raise search issues are listed below.

1. CIA Director Woolsey's 2,340 Documents

In his November 9, 1993 letter to the President, CIA Director James Woolsey stated that the CIA, in compliance with Executive Order 12812, had forwarded 1,766 documents to the Library of Congress's repository for POW/MIA data, and was withholding 574 documents. These records have not been provided to Hall, nor their withholding justified. 2d Revised Hall Decl., ¶ 32.

2. Briefing Boards and Related Documents

Hall has obtained from the Library of Congress Microfilm Reading

Room ("LOC Microfilm RR"), POW/MIA Reel 462, documents which are "Briefing Board" reports. See 2d Revised Hall Decl., Exhibit 4 [Bates 000091-000099]. The text of these reports indicates that the information contained therein comes from human sources, photographic surveillance, etc. Id, ¶ 5. The CIA did not provide copies of Briefing Board reports or sourcing materials to Hall. Id.

Attachment 8 to the 2d Revised Hall Decl. [Bates 000113-000118] consists of Briefing Board notes and a map that Hall obtained from the LOC Collection on POW/MIA records, including one note about the Son Tay camp. The CIA has not provided Hall with these notes.

3. Documents Concerning POW Prisons in Laos

Hall obtained from various POW family members documents which related to POW prisons in Laos. Id., Exhibit 12 [Bates 00128-000145]. The CIA has not released copies of these records. Nor has Hall received any of this kind of record relating to Burma, Cambodia, China, Russia or South Vietnam. Exhibit 12-E [Bates 000145] states "Document Removed," and that it was "BEING REVIEWED BY THE CIA." Hall has not been provided with a copy of this document.

4. Records Referenced in Testimony of Ambassador Sullivan

Ambassador to Laos William Sullivan ("Sullivan") testified before the Senate Select Committee on POW/MIA affairs ("Senate Select Committee" or "Senate Committee"), 103d Congress. Hall obtained a copy of his deposition from the files of the Senate Committee which are maintained at the National Archives and Records Administration ("NARA"). Sullivan testified that he had direct oversight over the CIA. See Exhibit 3, Sullivan Deposition at 28 [Bates 000085]. According to the transcript, Sullivan testified that there were occasions when they were able to get information on POWs and MIAs, and that where they obtained information regarding those who had been captured, they "were fed into the POW system and that person was carried on the list as

being a POW rather than MIA or dead." Id. Hall has not been provided with records containing such information. Id., ¶ 6. In particular, he has not been provided with the "list" referred to by Ambassador Sullivan. Sullivan also testified that the Pathet Lao and North Vietnamese would broadcast information identifying POWs that had been captured. Id. at 54-55 [Bates 000086-000087]. Hall has not been provided records relating to such broadcasts. Id., ¶ 6. When questioning Ambassador Sullivan, the Senate Committee referred to information it had about a plan to conduct an operation regarding POWs at San Nuea in 1967 or 1968. Id. at 75-77 [Bates 000088-000090]. Hall has received no records regarding any such plan. Id., ¶ 6.

5. Reports of POWs at Mahaxy

General Richard Secord gave the Senate Committee a deposition. In his deposition, Secord stated that the CIA had reliable reports concerning Americans kept at a camp at Mahaxy, Laos and indicates that photography taken in that area. See Exhibit 23-A at 59. [Bates 000169-000173]. He has not been provided with any records pertaining to this, neither reports nor photography.

6. American POWs from Southeast Asia Transferred to Soviet Union

The Senate Committed to the deposition of Jan Sejna, a Czechoslovakian communist who served as Chief of Staff to the Minister of /Defense, as First Secretary to the Communist Party, and as Chief of Staff of the Minister of Defense. See Exhibit 24 at 19, November 1992 Deposition of Jan Sejna [Bates 000180]. In testifying before the Subcomittee on Personnel of the Committee on National Security, Sejna stated that on three or four occasions he saw American POWs in Prague, and that after staying there for about a week they were transferred to the Soviet Union. See Exhibit 9, October 1, 1996 Hearings, testimony of Jan Sejna, at 24-26 [Bates 000118-000120] According to Sejna, these groups of POWs numbered about 20 to 25 each of U.S. POWs taken from Vietnam to Czechoslovakia and then to the Soviet Union. See Exhibit 24 at 65-66 [Bates 000187-000188]. At the time

he saw these POWs, Sejna was First Secretary of the Communist Party to the Minster of Defense. Id. at 66 [Bates 000188]. After he was hired by the DIA in 1981, Sejna was interrogated by it about his knowledge of U.S. POWs being moved through Czechoslovakia to the Soviet Union. Id. at 91 [Bates 000189]. The CIA was tasked by the Air Force to search archived intelligence reports as well as current sources and defectors. See Exhibit 40 at 1-3 [Bates 000266-268]. Hall has not been provided records relating to the transfer of POWs from Vietnam through Czechoslovakia to the Soviet Union. 2d Revised Hall Decl., ¶ 10.

7. December 30, 1980 Meeting

A DIA document dated December 30, 1980 refers to a meeting held that same day at which representatives of the DIA, the CIA, and the NSA are reported as being present. Rear Admiral J. O. Tuttle, Assistant Deputy Director for DIA reviewed a chronological report regarding POW facilities and sighting in Laos. See Exhibit 7-A [Bates 000106]. Hall has not received CIA records regarding this meeting. Hall Decl., ¶ 11.

8. January 28, 1981 DIA Report

A January 28, 1981 DIA memorandum on POWs states that in November 1980 the CIA provided information which corroborated a refugee's account and that overhead imagery had confirmed the location of the detention cite. See Exhibit 7-B, ¶ 2 [Bates 000107]. Hall has not been provided with any CIA records which corroborate the refugee's report, nor has he received any overhead imagery. 2d Hall Decl., ¶ 11. The same document also states that on January 17, 1981, the DIA requested that the CIA "attempt to confirm the presence of U.S. POWs in Laos." It further stated that the "details of the CIA's intentions are contained in the enclosure." Exhibit 7-B , ¶ 3 [Bates 000107]. Hall has not been provided with a copy of the DIA's January 17, 1981 request to the CIA.

9. Records Pertaining to Nhom Marrot

A December 5, 1991 DIA memorandum states that JSOC ("Joint Special Operations Command") was involved in planning a 1981 operation to rescue POWs at Nhom Marrot. See Exhibit 7-C, ¶ 1 [Bates000110]. "JSOC was . . . the joint (interservice) command authority for special operations units such as Delta (Army) and Seal Team Six (Navy)." Id. In early 1981, JSOC had been "alerted to a possible rescue attempt in Laos for American POWs and had formed a small team to begin planning. Later on, an inter-agency meeting was held to discuss what actions to take. "JSOC, JCS, CIA, and NSA attended." When JSOC argued that Delta should perform the reconnaissance for this mission, the CIA insisted that it had jurisdiction over the reconnaissance. Id., ¶ 5 [Bates 000111]. Hall has not been provided with any CIA surveillance or other records related to the planning of the Nhom Marrot operation. The existence of this operation and the fact that photographs were taken is corroborated by an "MFR" (Memorandum for the Record) by Bob Taylor. See Exhibit 7-D [Bates 000112].

A March 20, 1981 document which Hall obtained from the Library of Congress discusses an operation at Nhom Marrot. The CIA has not provided him with a copy of this document, nor has it provided him with any other documents related to this particular Nhom Marrot operation. See Exhibit 8-A [Bates 000113].

Another document which Hall obtained from the Library of Congress POW/MIA records reports that on December 30, 1980, CIA, NSA, and DIA representatives met with someone who showed them photos of "Lao and Viet sites reportedly containing U.S. POWs." See Exhibit 8-B at 2 [Bates 000115]. The CIA has not provided Hall with this document or any other documents related to the referenced meeting or the referenced photographs. 2d Hall Decl., ¶ 13. This document also refers to a "[s]eries of exchanges between CIA, DIA, NSA [REDACTED] seeking to assure that all possible measures to collect any [REDACTED] of POWs in Nhom Marrot facility,and on 16 March 1981, "a team will go into Laos . . . when another team comes out.". The CIA has not provided Hall

with a copy of this document or the "[s]eries of exchanges"] it refers to. 2d Hall Revised Decl., ¶ 13.

10. Vinh Phu Province

An Intelligence Information Report from the CIA's Directorate for Plans has the subject "Preliminary Debriefing Site for Captured U.S. Pilots in Vinh Phu Province." It reports on the location of a debriefing facility for U.S. pilots shot down over Vinh Phu Province. The site was located at the Lam Thao Superphosphate Plant. See Exhibit 10 at 1-2 [Bates 000121-000122]. The CIA did not provide Hall with this record nor any other documents pertaining to this debriefing facility. 2d Hall Decl., ¶ 14.

11. President Reagan, William Casey, Vice President Bush Meeting

Exhibit 11 consists of two documents Hall obtained from NARA's Collection on POW/MIAs. Exhibit 11-A]Bates 000123] is a typed memorandum which reports that President Reagan, William Casey and Vice President George Herbert Walker Bush came into the Roosevelt Room of the White House from the Oval Office and joined other Reagan administration officials there. The document indicates that a meeting and a conversation which occurred just prior to it concerning an offer the North Vietnamese made concerning U.S. POWs which involved payment of $4.5 billion. President Reagan is reported as having told CIA Director William Casey to do something about it [this offer]." This typed report is supported by Exhibit 11-B [Bates 000124], the handwritten notes of someone who appears to have been present at the meeting. This meeting is mentioned in the Senate Select Committee Report at 282-284 [Bates 000219A-C]. The CIA has not provided him with this 1981 memorandum or the North Vietnamese offer or what the CIA (Casey) did in response to it as directed by President Reagan.

12. Task Force Alpha

Air Force intelligence officer Terry Reed gave a deposition in John Cummings v. Department of Defense, Civil Action No. 91-1736 (D.D.C.). He testified that when he was

stationed at a unit called Task Force Alpha I, Nekhon Phenom, Thailand, he was involved in an extremely classified project which was called "The Project." See Exhibit 19, Deposition of Terry Reed at 9 [Bates 000160]. "`The Project' . . . was a codename for Task Force Alpha." Id. Mr. Reed was a targeter and he supervised and directed targeting strikes. His unit became aware that POWs were being placed in "a very hostile, threatening environment . . . in an effort to prevent American targeting efforts in Laos and North Vietnam." Id. Thus, small POW sites were being placed at targets such as gasoline pumping stations. Id. at 10-11 [Bates 000161-000162]. When Reed arrived at his unit, he was briefed as to "the habit pattern that was developing of the Khmer Rouge or North Vietnamese tending to co-locate prisoners in certain target elements, and that we had gone so far as to establish safeguards within the computer to prevent inadvertent bombing there." Id. at 12-13 [Bates 000162-000163]. According to Reed, the targeting safeguard system was very simple. "If you listed a target as a POW/MIA possible complex or if you listed it as a hospital, for example, it would be automatically rejected by our computer." Id. However, later, Reed was informed, ". . . at a unit level . . . that the safeguards would be removed from the computer system. In other words, the computer would accept the target request from the other unit without alerting that unit that it was, in fact, . . . a potential POW location." Id. at 14 [Bates 000164]. Hall has not been provided with any records related to the activities described by Reed. 2d Hall Decl., ¶ 18.

13. Richard Allen Testimony

Richard V. Allen, deputy national security adviser under President Nixon (1968-69), and senior foreign policy and national security adviser to President Reagan, testified to the Senate Select Committee about seeing, in 1981, a photograph of escape and evasion codes stamped in the grass at what was understood to be a Vietnamese prison. See 2d Hall Decl., Attachment 6, Deposition of Richard v. Allen at 41-45 [Bates 000053-000057]. He testified that President Reagan launched an operation to investigate the site. Id. at 43

[Bates 000055]. However, when the mission arrived at the site, the camp was found to be abandoned. Id. at 44 [Bates 000056]. The CIA has not produced any records pertaining to this mission.

14. Maps the CIA Provided to the NSA

Admiral Bobby Ray Inman, who served as Deputy Director of Central Intelligence from early 1981 through 1982, testified in a deposition given to the Senate Select Committee that maps of activities going on in northeast Laos appeared to flow from the CIA to the NSA. See 2d Revised Hall Decl., Attachment 7 at 45 Hall has not been provided with copies of such maps. 2d Revised Hall Decl., ¶ 21.

15. Models of Prison Camps

A DIA memorandum dated January 23, 1981, specifically requests that the CIA prepare a model of a camp. While the Library of Congress has a collection of some of these reports for Vietnam prior to the end of the war, nothing has been acknowledged or released about camps in Laos or Cambodia or other countries. 2d Revised Hall Decl., ¶ 23.

16. Post Vietnam War CIA Cables

Attachment 9 to the 2d Revised Hall Decl. [Bates 000067-000083] consists of several CIA Intelligence Cables documenting that it collected the kind of detailed information on POW/MIA movements and suspected camps set forth in Attachment 8. However, all of the documents acknowledged and released by the CIA predate 1972 and the end of the war. The CIA has not provided Hall with any such post-war cables.

17. CIA Memorandum Regarding Interagncy POW Committee

A May 5, 1972 CIA Memorandum proposes the transfer of information to the DIA member of the Interagency Prisoner of War Committee (IPWIC). See Exhibit 18-A [Bates 000150]. The CIA has not provided Hall with a copy of this document, nor has it provided him with copies of CIA records involving its input and receipt of information from IPWIC. A document obtained from NARA states that IPWIC "is the only intelligence committee

responsible for matters relating to missing and unaccounted for American personnel in Southeast Asia. See Exhibit 18-C, ¶ 5 [Bates 000153]. It also notes that "CIA is the only non-DoD member to IPWIC." Id, ¶ 4. This document also states that a draft dispatch refers to a "data bank of intelligence on PW camps in Laos and adjacent areas." See Exhibit 18-B, ¶ 1 [Bates 000151]. The CIA has not provided Hall with any materials relating to this data bank. This document further states that a recent "working level interagency review" supported the view that "if any American PWs are in Laos, they are in the Sam Neua Ban Tong complex in northeastern Laos. . . ." Id., ¶ 2. Hall has not been provided with any records pertaining to this review. This document also refers to a model made of a certain camp site in Laos and to photographs of it which are said to be enclosed. Id., ¶ 4. Finally, this document refers to an indices search which revealed "several reports on American PWs in Laos. . . ." Id., ¶ 6 [Bates 000152]. Hall has not received these reports. 2d Revised Hall Decl., ¶ 25.

18. CIA Office of Current Operations Documents and DCI

Exhibit 38 contains eight documents prepared for the White House Situation Room and circulated to CIA units such as the Office of Current Operations or the Director of Central Intelligence ("DCI"). See Exhibit 38-A through Exhibit 38-k [Bates000244-000258]. These documents are all from the 1980s and concern live POWs. Hall has not been provided such records for other periods of time.

19. Documents Regarding Nhom Marrot Detention Facility

At NARA Hall located a document reporting on the Nhom Marrot Detention Facility. It reports on a suspected prison camp in Laos where 30 POWs were said to be held. It refers to a CIA report. In addition, it ends with a DIA request for the CIA to conduct an operation to verify information about the suspected prison camp, which CIA agreed to undertake. See Exhibit 7-B [Bates 000107-000109]. The CIA has never

acknowledged or released any information on the Nhom Marrot facility. 2d Hall Decl., ¶ 27.

20. CIA Field Station Records

Item 3 of Hall's request seeks documents that on POW/MIAs in Laos from 1971-1975. CIA station chiefs testified before the Senate Committee that the CIA had primary responsibility for reviewing all human sources of intelligence on them during this period, including refugees. See Attachments 1 and 3 [Bates 000026 and 000036]. 2d Revised Hall Decl., ¶ 28.

21. North Korean Sightings

A March 9, 1988 CIA memorandum pertains to alleged sightings of American POWs in North Korea 1975-1982. It specifically references 10 military pilots captured in North Vietnam who were taken to North Korea. Hall has been provided with no documents pertaining to these POWs. See Exhibit 35 [Bates 000242-000243].

22. Suppressed Senate Select Committee Documents

A number of depositions taken before the Senate Select Committee have been withdrawn in full according to the April 22, 2008 letter from Kristin Welhelm of the National Archives to him attaches a list of depositions taken before the Senate Select Committee on POW/MIA Affairs that have been "withdrawn in full" from public access. See Exhibit 36-A [Bates 000237-000238]. Hall has not been provided with the depositions referenced in Exhibits 36-A, B and C [Bates 000237-000242] nor accounted for their withholding.

23. CIA'S Domestic Collection Division

Exhibit 41 is a March 12, 1982 Foreign Intelligence Information Report from the CIA's Domestic Collection Division. It reveals alleged Soviet incarceration of U.S. Vietnam era POWs. Hall has not been provided with any records regarding this from the CIA.

24. CIA Field Stations

The testimony of the Chief of Station, Vientiane, Laos 70-1973) indicates the involvement of CIA field stations in POW/MIA matters. Hall has not been provided such records. Hall Decl., ¶ Attachment 1-B [Bates 000026-000034]. Such records have not been provided to Hall.

E. The CIA's Search Terms Were Deficient

In a footnote, declarant Scot A Koch lists the search terms employed by the DO Division. Significantly, although he gives both the singular and plural form for the acronyms POW and MI, he lists only the singular form for "Prisoner of War," thus failing to indicate that any search was conducted under "Prisoners of War." It also fails to use "PW" or "detainees" or to use any of the words and phrases in conjunction with "Southeast Asia" rather than just specific countries. The Senate Select Committee Report a number of other terms used to refer to POWs and MIAs.

Examples include "war criminals," see Exhibit 32, Senate Report at 244 [Bates 000217]; "pirates," id. at 228, 244 [Bates 000215, 000217] "air pirates," id. at 244, 770 [Bates 0002217, 000223]; "criminals," id. at 80, 244, 255 [Bates 000213, 000217, , 000219], "common criminals," id. at 68 [Bates 000212], "political criminals," id.; "breathers," id. at 255 [Bates 000219]; and "defectors," id. at 960 [Bates 000225]; "international bandits," id. at 242 [Bates 000211]. Additionally, Koch lists all the terms searched in capitol letters. If this indicates the actual form used in computer searches, it could mean that terms such as "Prisoners of War" and "Missing in Action" would not receive any hits even if these terms appeared in the database because they were not typed in lower case.

The search terms used by the CIA also do not reflect any use of codenames or cryptonyms, despite the fact that there are a number of known clandestine operations regarding POW/MIAs. For Example, Army Intelligence/Counterintelligence officer Larry J. O'Danield states there were seven projects having to do with POW/MIAs which had to do with trees. See Affidavit of Larry J. Daniels, ¶ 21(B). He names Program/Projects

Blackbeard and three others: Cherry, id. at ¶ 13, Oak, and Pine. Id., ¶ 15. Terry Reed testified to an operation known as "The Project" or "Task Force Alpha." These and other cryptonyms and codenames have not been searched.

CIA document 94-0036 shows that the CIA kept lists of suspected prison sites by name and grid coordinates. Attachment 2 [Bates 000035A] contains one such list. Hall has not been provided with others. The CIA did not use the names of such prisons as search terms in conducting its search. 2d Hall Decl., ¶ 19.

F. The CIA's Search for Item 6 Records

The second part of Item six of Hall's request seeks "all records pertaining to the assessment of fees in connection" with those requests, "including but not limited to any itemization 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." This focused on getting the CIA to provide plaintiffs with documents which show the basis for three different statements the CIA had made as to the costs incurred by Hall in Hall v. Central Intelligence Agency, Civil Action No. 98-1319 (D.D.C.)("Hall I"). Item six requests documents showing the basis for such fees.[1] The CIA has produced no documents showing the basis for the search fees it says Hall incurred in Hall I. Initially, the only two documents produced responsive to the costs portion of Item 6 were copies of two letters it wrote to Hall in 1994 and 1995. These letters did not document the basis for any search fees but simply asserted that he owed certain minor amounts of copying charges. On October 17, 2006, the CIA made a subsequent release which included documents responsive to Item 6. However, this release lacked any records which documented the time spent searching and the rates being charged by the clerical personnel who conducted the searches.

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[1] **The CIA's response to Item 6 contains one document which refers to a "cost sheet." This would appear to be the kind of underlying documentation of fees that Hall seeks. But he has been provided with no records of this character.**

It is obvious that the agency cannot assess FOIA search fees without the persons who perform the searches recording their time and transmitting it to the persons who calculate the fee assessment. The CIA has now produced a new Vaughn index which has withheld in their entireties a number of documents which relate to "fee estimates." However, these records remain fully withheld at this point. Because of this withholding, the extent to which the CIA's search for records responsive to Item 6 is adequate remains muddy. On the present record, it is not an adequate response.

First, Koch confines himself to one records system. He fails to state whether there are any other records systems which are likely to contain such records. For example, might the various components which actually performed the searches have retained copies?

Second, Koch fails to indicate that he took a most logical step in trying to located records which might have been created but were not found in the file system examined: he does not state that he talked with the persons who actually conducted the searches to learn what records they created, where and when and to whom they were sent.

Finally, it should be noted that it would be especially appropriate to permit Hall to take discovery on this issue. The circumstances suggest that in Hall I the CIA deliberately misled him and the Court regarding the amount of search fees allegedly incurred. This possibility is greatly enhanced by a recent decision by this Court regarding the CIA's handling of requests by the National Security Archives or representative of the news media status. In that case, National Security Archive v. Central Intelligence Agency, et al., C.A. No. 06-1080 (D.D.C. Nov. 5, 2008) this Court found that the CIA had engaged in "extraordinary misbehavior" regarding the National Security Archives' applications for representative of the news media status, including "twice mak[ing] highly misleading representations to the Archive, as well as to this Court." Id., slip op. at 5. Like this case, the effect of the CIA's misbehavior was to use the fee issue to block public access to records.

G. Rule 56(f) Discovery

Plaintiff Roger Hall submits a Rule 56(f) declaration because for several reasons he is unable to fully oppose defendant's motion for partial summary judgment without discovery. First, to a considerable degree, information pertinent to whether certain responsive records were created, and where they might be located, is exclusively within the possession of the CIA. Hall needs discovery to establish that certain important operations and activities created records or categories of records pertaining to POW/MIAs which are likely still maintained by the CIA. Hall Rule 56(f) Decl, ¶ 2.

Second, the existence and content of many records which may be pertinent to this case are allegedly properly classified. Again, without discovery, Hall has no means of establishing this evidence. Id., ¶ 3.

Third, this Court has stricken evidence known which impugns the adequacy of the CIA's search on the grounds that it is inadmissible in evidence under Rule 56(e). The only way Hall has of rehabilitating that evidence and making potent use of it is through discovery. Id., ¶ 4.

Hall has also been hampered in presenting evidence by the death of some witnesses and the unwillingness of others with significant information about CIA operations and activities regarding POW/MIAs to provide such information without what they regard as the protection of a court subpoena. Id., ¶¶ 5-6.

II. THE CIA'S VAUGHN INDEX IS INADEQUATE

A. Vaughn Index

In Vaughn v. Rosen, 484 F.2d 820, 826 (D.C.Cir.1973), the Court held that an agency must provide a "relatively detailed analysis" to support its claimed FOIA exemptions. "A key objective of this analysis, commonly known as a Vaughn index, is to provide a reviewing court with sufficient information to determine . . . whether information

withheld by an agency falls within the claimed FOIA exemption." Voinche v. F.B.I., 412 F.Supp. 2d 60, 65 (D.D.C.2006). This index "must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information." King v. Department of Justice, 830 F.2d 210, 233-224 (D.C.Cir.1987)(emphasis in original).

As King also notes:

> Specificity is the defining requirement of the Vaughn index and affidavit; affidavits cannot support summary judgment if they are "conclusory, merely reciting statutory standards or sweeping." To accept an inadequately supported exemption claim "would constituted an abandonment of the trial court's obligation under the FOIA to conduct a de novo review."

Id. at 319 (citations omitted).

Here, the CIA initially submitted no Vaughn index for the records responsive to Items 1, 2, and 3 of the Hall I request which it states it voluntarily disclosed to him on November 7, 2005 in connection with the Hall I litigation. Koch Decl., ¶ 18. Instead, the CIA provided what it refers to as a chart of these documents and the exemption claims asserted for each document, but this does not even pretend to be a Vaughn index. The CIA has filed no affidavit supporting those claims and it has not moved for summary judgment with respect to those withholdings.

The CIA contends that plaintiffs are barred from contesting those claims by collateral estoppel. However, collateral estoppel is inappropriate as to Hall and SSRI for two reasons. First, there was never any court decision sustaining the withholdings made in the "voluntary disclosure." Second, a change in controlling facts erodes the justification for collateral estoppel. Here, at least with respect to Exemption 1 claims, the facts have changed substantially because a provision in Executive Order 12958 which had not come in effect at the time of Hall I became effective at the end of 2006. It provides for automatic

declassification of records more than 25 years old. These records qualify for automatic declassification.

With respect to the Vaughn index submitted in 2006 to justify withholdings made with respect to the records responsive to Item 6 of the request, the index is woefully inadequate. To start with, no affidavit was even submitted attesting to the facts set forth in the so-called "index." Without such an affidavit, the facts and opinions set forth therein are meaningless.

That Vaughn index contains numerous and pervasive flaws. It does not adequately describe the documents at issue. Case law establishes that this is a basic requirement of a Vaughn index. The 2006 Vaughn index here is akin to that in Carl Oglesby v. United States Department of Justsice, et al., Civil Action No. 02-0603, where this Court found that "[t]he FBI does not describe the contents either of whole documents or portions withheld, as the FOIA requires." February 27, 2007 slip op. at 11, citing King, 830 F.2d at 224. (Attachment B hereto).

Thirdly, like the 2006 Vaughn index, the 2008 index cites multiple exemption claims for the same document without any indication as to which part(s) of the document each applies to. This flaw makes it impossible for the plaintiffs to contest and the court to review the basis for the alleged exemption claims. See the Court's finding of fault with this practice in Oglesby, supra, at 9-10.

All kinds of other flaws appear in the CIA Vaughn indices. A Vaughn index form strangely numbered 6.001 indicates that a 35-page document has been withheld in full. The description of the document indicates, however, that 21 of the 35 pages have been withheld. The index form has checked a box indicating that Exemption 5 has been invoked, but there is not a word in the contents of the index form which relates to Exemption 5.

The same is true of MORI 898127, which also has the Exemption 5 box checked but has no content relating to this exemption.

MORI 1100667 and MORI 1320430 have the Exemption 4 box checked but nothing relevant to an Exemption 4 claim appears.

These examples make it clear that the CIA's Vaughn indices are simply not a reliable basis for evaluating exemption claims or awarding summary judgment.

B. The CIA Has Not Complied with the Segregability Requirement

The FOIA requires disclosure of any reasonably segregable nonexempt portions. 552 U.S.C § 552(b). The D.C. Circuit has held that a district court "has an affirmative duty to consider the segregability issue sua sponte. Transpacific Policies Agreement v. U.S. Customs, 177 F.3d 1022, 1028 (D.C.Cir. 1999). It is not sufficient for an agency to just assert that there are no nonexempt segregable portions. An agency must reasonably describe the exempt material, correlating the claimed exemption to particular passages in the document." Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C.Cir.1992). Here, the CIA's Vaughn index fails to do this Here, the CIA has used a dicellate stratagem to avoid the segregability requirement. Frequently, even where substantial portions of a record have been withheld, it makes no segregability claim at all. This is the case, for example, with Vaughn index documents MORI 1442322, which describes a large portion of its 35 pages as having been withheld, including the document's date; MORI 1442328, a four-page document dated June 4, 1974; and MORI 1442327, a nine-page report dated October 1, 1971.

With regard to a plenitude of other records, which appear almost invariably to be entirely withheld, the CIA avoids a finding that there are no segregable nonexempt portions by stating that "[n]o meaningful nonexempt information is reasonably segregable for release." See, e.g., MORI 1479584, two-page cable dated December 30, 1991, entirely withheld; MORI 1479581, one-page cable dated September 4, 1986, entirely withheld; MORI 1479582, four-page cable dated February 20, 1984. Thus, it is clear that these records contain nonexempt information. The CIA has not defined what qualifies as

"meaningful" or "reasonably segregable" nonexempt information, and its exemption claims cannot be upheld until it does so.

More importantly, however, it is apparent that these records do contain reasonably segregable nonexempt information. First, many of the documents respond to the "From/To" line of the Vaughn index form by stating "CIA/Multiple U.S. Government Agencies." This indicates that both the CIA and other federal government agencies are identified in the entirely withheld document. This information is both "meaningful" and "reasonably segregable."

There are other indicia of the existence of meaningful nonexempt segregable portions in the "subject" line of the Vaughn index forms. For example, MORI 1579584 gives the subject as "Remarks of foreign government official on MOW/ MIA matters"; MORI 1479582 gives the subject as "Comments by former government official on factors affecting country's access by US OW/MIA investigators"; MORI 1479592 has as its subject "Comments by a foreign government official regarding a conference of foreign government ministers." Each of these subject lines provides meaning, reasonably segregable information which must be released in the form in which it appears in the actual documents.

C. The Court Should Inspect Some Records In Camera

In Allen v. Central Intelligence Agency, 636 F.2d 1287, 1298-99 (D.C.Cir. D.C.Cir.1980), the Court of Appeals laid down guidelines for in camera inspection of records. It listed six factors for a district court to consider: (1) judicial economy; (2) the conclusory nature of the agency's affidavits; (3) bad faith on the part of the agency; 4) disputes concerning the contents of the document; (5) the agency proposes in camera inspection; and (6) strong public interest in disclosure.

With respect to the first factor, judicial economy, there are many documents at issue in this lawsuit. However, plaintiffs suggest that they be permitted to select a small number

of documents for in camara review as a means of checking the accuracy of the CIA's Vaughn declarations and the validity of its claims regarding the absence of segregable nonexempt portions. Plaintiffs would propose to limit this sample to 20 documents, thus greatly limited the burden placed on the court. The documents selected would include representatives of all of the exemptions claimed.

The conclusory nature of the CIA's affidavits is very clear. With respect to Exemption 1 claims, for example, the CIA does little if anything more than assert that disclosure will harm the national security. Thus, this factor obviously weighs in favor of in camara inspection.

The third factor, bad faith, is also present, particularly with respect to the issue regarding the fees allegedly incurred in the Hall I litigation and the search for records responsive to Item 6. Thus, this factor, too, favors in camara inspection.

The fourth factor also favors in camara inspection. There are disputes over the extent to which multiple different exemption claims cover the same, or different, information, disputes over whether Exemption 2 information is "trivial" administrative data, and whether Exemption 5 material is properly exempt under a privilege or the privilege either does not apply or has been waived.

While the fifth factor does not apply, the sixth, public interest is very strong given the congressional and news media interest in the records and the massive withholding of information that is three or four decades old and no longer appears to present the national security risks involved at the time of the Vietnam War.

In view of these considerations, the Court should permit plaintiffs to select a small number of documents for further testing through in camara inspection.

III. THE CIA HAS FAILED TO MEET ITS BURDEN OF PROOF WITH RESPECT TO ITS EXEMPTION 1 CLAIMS

The CIA has claimed Exemption 1, 5 U.S.C. § 552(b)(1) for two documents in the intial Scott Koch Vaughn index, Documents 14 and 31. Many more Exemption 1 claims have been asserted for its new Vaughn index.

Exemption 1 provides that the mandatory disclosure provisions of the Act do not apply to matters that are:

> **(A) specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such executive order.**

Thus, under Exemption 1, an agency must demonstrate that information is in fact properly classified pursuant to both procedural and substantive criteria contained in the Executive order.

The CIA has made no showing that the information it seeks to protect under Exemption 1 is properly classified procedurally. It has submitted no affidavit that said documents have all of the markings required by Executive Order 12958 (E.O. 12958), as amended by E.O. 13292. Section 1.6 of the amended order provides that each classified document shall have certain required markings indicating the classification level and the identity of the original classification authority, the agent and office of origin, certain declassification instructions, and a concise reason for classification. No such showing has been made.

The current Executive order is intended to take account of the end of the Cold War, and thus to bring about broadscale declassification of anticipated secrets. As the D.C. Circuit has stated, E.O. 12958 "differs considerably from its predecessors. . . ." Summers v. Department of Justice, 140 F.3d 1077, 1082 (D.C.C.ir.1998). It added.

> **Significantly, the newer order is less restrictive, reflecting what it refers to as "dramatic changes" in national security concerns in the late 1980s following the United States' victory in the Cold War.**

Id. While the two documents said to have classified information bear recent dates, the allegedly classified material in them must certainly relate to historical matters of the Cold War period.

Under E.O. 12958, the minimum test for classifying information is whether the unauthorized disclosure "reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe." E.O. § 1.2(3).

Here the CIA makes only conclusory assertions "disclosure could reasonably be expected to cause serious damage to U.S. national security." This Circuit requires that the agency "explain how disclosure of the material in question would cause the requisite degree of harm to the national security." King v. U.S. Dept. of Justice, 830 F.2d 210, 234 (D.C.Cir.1987)(emphasis added).

This requirement is especially pertinent here because of the antediluvian nature of the materials at issue. Many records date to the 1960s and 1970s. As Judge Kessler has noted in the context of a case arising under the predecessor order, "[t]his Circuit holds a strong presumption against prolonged withholding of information whose sensitivity may have diminished with age." Keenan v. Dept. of Justice, Civil Action No. 94-1909 (D.D.C. March 24, 1997), Mem. Op. at 11, citing King at 227-28 (reproduced at Attachment A).

The passage of time, although a factor clearly made relevant under E.O. 12958, which places time limits on the duration of classification, see E.O. 12958, § 1.6, is not the only circumstance, or even the most important one undercutting the credibility of the CIA's classification claims. The War in Vietnam has long been over, except in the minds of the CIA bureaucrats that continue to fight it long after any significant national security risk is posed by disclosure.

IV. THE CIA HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF

WITH RESPECT TO ITS EXEMPTION 2 CLAIMS

Exemption 2 of the FOIA, 5 U.S.C. § 552(b)(2), excepts from disclosure matters that are "related solely to internal personnel rules and practices of an agency." In Schwaner v. Department of Air Force, 898 F.2d 793 (D.C.Cir.1990), the Court of Appeals set forth a two-step test for determining whether materials are exempt under this rubric: "`First, the material withheld should fall within the terms of the statutory language.'" Id., quoting Founding Church of Scientology, Wash. D.C. v. Smith, 721 F.2d 828, 830 n.4 (D.C.Cir.1983). If it does, then the agency may defeat disclosure by proving: (a) that "disclosure may risk circumventtion of agency regulation," Department of the Air Force v. Rose, 425 U.S. 352, 369 (1976); or (b) that "the material relates to trivial administrative matters of no genuine public interest." Founding Church, 721 F.2d at 830 n.4.

To determine whether the requested information is related sufficiently to the internal concerns of the agency to fall within the statutory language ("solely related to"), the D.C. Circuit employs a test of "predominant internality." Schwaner, 898 F.2d at 795, citing Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1074 (D.C.Cir.1981)(en banc). In Schwaner, the Court held that materials relating to the practice of collecting data did not pass muster under the test. 898 F.2d at 795-798. Thus, such information cannot be considered "predominantly internal" under Schwaner and must be disclosed.

The information at issue here is not "predominantly internal." First, "Congress intended the exemption to be read as a composite clause, covering only internal personnel matters." Jordan v. United States Dept. of Justice, 591 F.2d 753, 764 (D.C.Cir. 1978)(en banc)(emphasis added). As the Court of Appeals explained, for reasons of grammar, legislative history, and common sense, the phrase "personnel" modifies both nouns in the dyad "rules and practices."

> **It is basic grammar that both nouns bracketed by the word "internal" and the phrase "of an agency" are modified by "internal." Moreover,**

> **while it is conceivable that "personnel" applies only to "rules", the preferred construction is that it modifies both nouns in the dyad "rules and practices.**

Id.

As Jordan stated, "it is clear . . . that Congress intended to limit the word " "practices" to "internal personnel" matters. The recognized purpose of the Act is to assure the broadest possible access to government records. At 766 (emphasis added). Indeed, if Justice Department's reading of Exemption 2 had been accepted, "the [FOIA] would not apply to `matters that are . . . related solely to the . . . practices of an agency [and] [t]his would be an unlimited exemption, so broad that it would effectively swallow the rest of the Act. What is not an agency practice? What agency documents are there which do not relate to agency practices?" Id. at 766-767 (emphasis in original).

Under Exemption 2, the CIA is withholding information such as administrative markings, routing information, file locations or numbers, etc. This kind of information is of interest to the public because it provides knowledge of where records are located, who was aware of what, when, who did what, etc. The CIA's removal of the administrative information on documents and routing sheets prevents Hall from knowing where he should seek additional information under the FOIA and thus defeats the public's right to know. 2d Hall Decl., ¶ 28.

Exemption 2 "does not shield information on the sole basis that it is designed for internal agency use." Fitzgibbon v. U.S. Secret Serive, 747 F.Supp. 51, 56 (D.D.C.1990), citing Schwaner, 898 F.2d at 794, 796. Fitzgibbon held Exemption 2 inapplicable to "pages bearing Secret Service administrative markings, numbers which classify information based on a Secret Service data collection system," noting that "[t]he numbers are used to index, store, located, retrieve, and identify information." Id.

The CIA claims that many of the documents in this case contain information solely related to its internal rules and practices. The evidence it adduces belies its claim.

Its cites as an example a five-page document located in a CIA Attorney's litigation file consisting 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 typewritten description of search time and fee calculations; and c) two one-page emails dated 18 December 2003 and 27 March 2003. The 18 December 2003 email 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 email from a CIA officer to CIA attorney discusses the same subject.**

The claim that this document has been properly withheld under Exemption 2 because "it contains information related solely to the internal rules and practices of the CIA" is an extraordinary claim, and one that is baseless. Rather than being "solely related to internal personnel rules and practices, the information is substantially related to a matter of great public interest; viz., whether the CIA was properly assessing search fees and copying costs against plaintiff Roger Hall in Hall I. The Supreme Court took note in Rose, 425 U.S. at 365, of the Senate Report's distinction between "minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest." The records described by the CIA are clearly in the latter category and thus not protected under Exemption 2.

V, THE CIA HAS FAILED TO SUSTAIN ITS EXEMPTION 5 CLAIMS

Exemption 5, 5 U.S.C. § 552(b)(5), provides that the FOIA does not apply to matters that are:

> **Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.**

Exemption 5 was intended to incorporate the government's common law privilege from discovery in litigation. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 29 (1965); S. Rep. No. 1219, 88th Cong., 2d Sess. 607, 13-14 (1964). However, the Supreme Court has cautioned that discovery rules be applied to FOIA cases only "by way of rough analogies." EPA v. Mink, 410 U.S. 75, 86 (1973).

The CIA invokes three of Exemption 5's privileges: (1) deliberative process, (2) attorney-client, and (3) work product. The Vaughn index's description of the documents fails to indicate which privilege applies to which parts of a document, and there is no showing made, or even an assertion, that there are no segregable nonexempt parts.

Deliberative Process Privilege

The ultimate burden which an agency must carry under this privilege is to show that "the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 9D.C.Cir. 1980). Congress intended to confine Exemption 5 "as narrowly as [is] consistent with efficient Government operation." Id. at 868, quoting S. Rep. No. 813, 89th Cong., 1st Sess. At 9 (1965). The agency must show "`by specific and detailed proof that disclosure would defeat, rather than further, the purpose of the FOIA.'" Senate of Puerto Rico v. U.S. Dept. of Justice, 823 F.2d 574, 585 (D.C.Cir.1987).

To be protected by Exemption 5's deliberative process privilege, documents must meet two requirements. "First, the documents must be `predecisional,' i.e., they must be generated `antecedent to the adoption of agency policy." Jordan, 591 F,.2d at 774. "If there is no definable decision making process that results in a final agency decision, then, the documents are not predecisional." Paisley v. C.I.A., 712 F. 2d 686, 698 (D.C.Cir.1983), citing Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C.Cir.1975). Second, "the documents must be `deliberative' in nature, reflecting the `give-and-take' of the deliberative process and

containing opinions, recommendations, or advice about agency policies." Id. "Predecisional communiations `are not exempt merely because they are predecisional; they must also be part of the agency give-and-take . . . by which the decision itself is made.'" Senate of Puerto Rico at 585, quoting Vaughn.

Finally, where an agency in making a final decision chooses expressly to adopt or incorporate by reference" a predecisional recommendation, that document loses its protection under Exemption 5. NLRB v. Sears, 421 U.S. 132 at 161 (1975). This principle applies to a wide range of agency recommendations, and to "formal or informal adoption." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C.Cir.1980).

The CIA's Vaughn index fails to comply with the standards which govern application of the deliberative process privilege. The CIA's attempt to justify the claim is purely conclusory. Thus, MORI 1100665 seeks to justify the withholding of 28 pages in their entirety on the ground that "they reflect "internal predecisional deliberations of agency officials on records related to POW/MIA and fee estimates on conducting searches." No facts are set forth documenting the nature of any decision, the policy advice allegedly involved, or the give-and-take role in deliberations.

The same litany is repeated in MORI 1100667-MORI 1100671, five pages of documents withheld in their entirety because "they reflect internal predecisional deliberations of agency officials on records relating to the POW/MIA (sic) and fee estimates on conducting searches."

MORI 1479603, a three-page memo dated June 4, 1981, and entirely withheld, presents a couple of additional problems. First, it is over 27 years old. Thus, after passage of this much time, it is hardly reasonable that the information remains "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency." Coastal States Gas , 617 F.2d at 866. Thus, it should be disclosed.

This and all the other deliberative process Exemeption 5 claims are also exempt for another reason. The possibility that disclosure will be "likely in the future to stifle honest and frank communications within the agency" depends on the identities of the author and recipient of the communication being disclosed. With these documents, however, such damage cannot occur because the identities of the author and recipient of these communications have been deleted pursuant to Exemptions 1 and/or 3 reasons, Thus, there is no basis for withholding the substantive information. See, Hoch v. C.I.A., 593 F.Supp. 675, 689 (d.d.c.1984) (*given the anonymity of [blond memorandum], [the CIA] has failed to show by specific and detailed proof that disclosure of this document would defeat rather than further the purposes of FOIA.")

Attorney-Client Privilege

The attorney-client privilege applies to confidential communications from a client seeking legal advice from a lawyer. The communications must be in confidence. Henry v. Champlain Enterprises, Inc.., 212 F.R.D. 73, 83 (N.D.N.Y.2003), citing United States v. Bhd. Of Teamsters, 119 F.2d 210, 214 (2d Cir.1997), and see also 8 Wigmore, Evidence, § 2292.

Here, the CIA has not shown that the communications were made in confidence. Indeed, there is some evidence that they were not, as the CIA has apparently invoked Exemption 2 to redact the list of distributes of these comunications.

Ordinary business records are not protected by the privilege. In re Grand Jury Proceedings (Malone), 655 F.2d 862 (8th Cir. 1981). In order to assess fees, CIA search personnel must record costs on some documents. Plaintiffs have not been provided with any such documents, although one of the records provided refers at the bottom of three attachments, one of which is "CCS search response and costs sheet." See Exhibit 2. This "cost sheet" is clearly an ordinary business record and not subject to the attorney-client privilege. Whether the CIA is claiming Exemption 5 for it or simply did not locate it in its

search for Item 6 records is unclear. But whatever the case, it must be produced because it is responsive to Item 6 and is not subject to the attorney-client privilege.

There is also an exception to the attorney-client privilege where a fiduciary relationship is involved. Thus, "in a derivative action, the courts have permitted the piercing of the corporation's attorney-client privilege at the behest of the corporation's shareholders." Henry, supra, at 83. For example, the "Fifth Circuit has held that a corporation's right to assert the attorney-client privilege against its shareholders is not sacrosanct and especially `where the corporation is in suit against stockholders on charges of acting inimically to stockholders.'" Id., quoting Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir.1970).

Here, the CIA officials who administer the FOIA, including their lawyers, are in a fiduciary relationship with the citizens who seek access to records under this law. Here, the CIA stands charged with having violated that trust by greatly inflating or misrepresenting the amount of search fees to be charged.

As the D.C. Circuit noted in In Re Sealed Case, 676 F.2d 793, 807 (D.C.Cir.1982), "two common law doctrines give courts a limited ability to make sure that privileges do not serve ends for which they were not intended. These are exception and implied waiver. Excepton comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct." Here the evidence indicates that the privilege is being used to further misconduct which occurred in Hall I when the CIA sent Hall greatly inflated demands for payment of fees.

Implied waiver is founded upon "the objective consideration that when [the] conduct [of a privileged person] touches a certain point of disclosure, fairness requires that the privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder." Id. Here, the CIA on several occasions made representations to the Court as to how much Hall owed in fees. Those

representations must have been based on the communications now being withheld. Having made such disclosures to the Court about the amount of fees owed by Hall, fairness now requires that the basis for such figures now be revealed.

Work Product Privilege

The work product privilege protects documents prepared by an attorney which reveal the theory of his case or litigation strategy. Fed. Trade Comm'n v. Grolier, 421 U.S. 19 (1983). In Martin` v. Office of Special Couonsel, 819 F.2d 1181 (D.C.Cir.1987), the Court of Appeals held that the work product privilege "does not distinguish between factual and deliberative materials." Some courts in other circuits recognize a fact/opinion dichotomy and require facts to be disclosed while opinions can be protected. See, e.g., Fine v. Dep't of Energy, No. 88-1033, No. 89-0031 (D.N.M. June 23, 1991). This case is distinguishable from Martin, which involved witness statements, because here the documents contain figures which, unless they were wholly concocted, must have been derived from ordinary business records.

It must be emphasized that the work product privilege is subject to the crime-fraud exception as the attorney-client privilege. See, In Re Sealed Case, 676 F.2d at 812, n.64. And the principle may also be waived by disclosure.

VI. THE CIA HAS FAILED TO MEET ITS BURDEN OF PROOF TO SHOW THAT ITS EXEMPTION 6 CLAIMS ARE VALID

A. General Legal Standard

Exemption 6, 5 U.S.C. § 552(b)(6), permits nondisclosure of matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The language "clearly unwarranted invasion of personal privacy," it has been held, "instructs the court to tilt the balance in favor of disclosure." Getman v. NLRB, 450 F.2d 670, 674 (D.C.Cir.1971). The privacy invasion must be tangible and substantial: ". . . Exemption 6

was directed at threats to privacy interests more palpable than mere possibilities." Rose, supra, 425 U.S. at 380 n.19. Moreover, it is the "production" of the records, not the resultant speculation to which they may give rise, by which the invasion of privacy must be measured. Arieff v. Department of Navy, 712 F.2d 1462, 1469 (D.C.Cir.1983).

In view of these constraints upon the scope and application of Exemption 6, the agency normally faces a difficult task in overcoming the statutory presumption in favor of disclosure. As the First Circuit has said, the Exemption 6 case to which "the calculus unequivocally supports withholding [is] a rare case because congress has weighted the balance so heavily in favor of disclosure. . . ." Kurzon v. Department of HHS, 649 F.2d 65, 67 (1st Cir.1981). Accord: Local 598 v. Department of Army Corps of Engineers, 841 F.2d 1459, 1463 (9th Cir.1988)("particularly under Exemption [6], there is a strong presumption in favor of disclosure"); Washington Post Co. v. U.S. Dept. of Health, Etc., 690 F.2d 252, 261 (D.C.Cir.1982)(". . . under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act").

If a privacy interest exists, the court must balance the privacy interests against the public interest in disclosure. However, for Exemption 6 to support withholding, the privacy invasion must be very strong. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C.Cir.1989)(privacy interest at stake must be significant or substantial). Rose, supra, at 372; Washington Post Co., 690 F.2d at 258. The legislative history indicates that in order for a cognizable privacy invasion to exist under Exemption 6, the withheld material must concern the "personal" or "intimate" details of a person's life. S. Rep. No. 813, supra, at 9; H.R. Rep. No. 1497, supra, at 11, such that disclosure of the facts might "subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." Brown v. Federal Bureau of Investigation, 658 F.21d 71, 75 (2d Cir.1981). .

B. The CIA's Failure to Meet Exemption 6 Standards

The Court of Appeals has held that for Exemption 6 to apply, disclosure must "compromise a substantive as opposed to a de mimimis privacy interest." National Association of Retired Federal Employees v. Horner, 879 F.2d 673, 875 (D.C.Cir.1989)("NARFE"). The privacy interest is balanced against the public interest only if there is a substantial privacy interest at stake. Otherwise, the information must be disclosed because of the inherent public interest in disclosure.

The CIA has failed to meet the Exemption 6 standard. Thus, MORI 1479578, an entirely withheld two-page cable simply asserts with respect to its Exemption 6 claim that "[t]his cable contains information that applies to a particular, identified individual." It adds the conclusory assertion that the disclosure of this information "would constitute an unwarranted invasion of personal privacy." This is simply not sufficient to meet the NARFE test of a substantial as opposed to a di minimis invasion of personal privacy. Nor does the CIA make any finding as to, or balancing of, a public interest in disclosure.

This totally inadequate showing is simply repeated again and again in the CIA's alleged Vaughn index. Thus, MORI 1479603 cable memo dated June 4, 1981 states "[t]his cable contains information that applies to a particular, identifiable individual." MOR 1479604 repeats the mantra, "[t]his memo contains information that pertains to a particular, identifiable individual," as does MORI 1442331.

C. List of 1700 Reutrned POWMIAs; 47 Primary Next of Kin

The CIA also invokes Exemption 6 for the approximately 1700 unreturned POW/MIAs which are listed in a document captioned "Defense Prisoner of War/Missing in Action Office Reference Document—U.S. Personnel Missing in Southeast Asia and Selected Foreign Nationals." In this document the POW/MIAs are listed in alphabetical order preceded by a 4-digit identification number. Information pertaining to the persons listed includes date of capture, branch of service, rank, a reference number, country of capture,

time of capture, release date if released, and aircraft or vehicle or ground location. See 2d Hall Decl., ¶ 35.

Demanding more information, See Koch Decl., ¶ 25, the CIA seeks blanket protection under Exemption 6, speculating that without additional data, "the information that emerged from the search might relate to someone other than the individual whose next of kin had authorized release." Defendant's Renewed Motion for Summary Judgment at 21. It may be that in some instances there is insufficient information to identify the person in question. But the CIA is putting the cart before the horse, asserting conclusions before it had endeavored to even make an identification.

Item 5 of the request also involves 47 Primary Next of Kin ('PNOK") privacy waivers. Hall submitted authorizations by PHOK members of POW/MIA families. Hall has compiled a chart of these authorizations which sets forth, as follows, the number of PNOK authorizations contained the following categories of information:

(1) 31 have the POW/MIA's social security number;
(2) 39 include the POW/MIA's branch of service;
(3) 20 include the POW/MIA's service number;
(4) 11 include another case or reference number;
(5) 37 include the POW/MIA's date of incident;
(6) 15 include the POW/MIA's place of incident;
(7) 13 contain additional information.

Clearly, there is abundant information provided here both to discredit the CIA's claim that it cannot search for the POW/MIAs covered by these authorizations and to release without any Exemption 6 claims those of their relatives who are identifiable.

VII. PLAINTIFFS HALL AND SSRI ARE ENTITLED TO STATUS AS REPRESENTATIVES OF THE NEWS MEDIA AND TO A PUBLIC INTEREST FEE WAIVER

A. The Administrative Record

By its order dated April 13, 2005, this Court denied Hall and SSRI news media status based on the application submitted with their February 7, 2003 FOIA request. The

Court also denied their request for a public interest fee waiver. The CIA contends that Hall's claim to representative of the news media status is barred by collateral estoppel and mootness. Both claims are without merit.

Collateral estoppel does not apply for two reasons. First, Hall is proceeding on a new request which has created a new administrative record and a new amended complaint. Second, subsequent to this Court's April 13, 2005 decision, Congress passed the Open Government Act which amended the FOIA's provision governing representative of the news media status.

The issue of representative of the news media status is not moot because Hall and SSRI have not been granted such status.

By letter dated May 23, 2005, Hall and SSRI supplemented their original applications for news media status and a waiver of copying costs. They set forth the basis for their application in much greater detail than before. They submitted a letter from Pulitzer prize-winning journalist Sidney Shanburg confirming an agreement with Hall "to write a story or stories both jointly with him and separately as a reporter under his byline about the documents he hopes to obtain through his FOIA request and lawsuit for POW/MIA files." Mr . Shanberg won the Pulitzer for his memoir The Life and Death of Dith Pran, which reported his experience covering the war in Cambodia for the New York Times, and was the basis for the movie "The Killing Field," which won several Academy awards. His letter to Mr. Lesar also stated that "[m]y research to date has shown that in the Vietnam War alone, a significant number of prisoners were not returned by the Hanoi government, but were held back as bargaining chips for war reparations that never came."

Mr. Shanberg also added that "the POW/MIA story is clearly of national importance since men and women will continue to be called to war by our nation's leaders—as they have been presently in Iraq. The history of what happened to those

captured in other wars is therefore obviously of interest to [them] and to the nation at large." See Attachment B.

By letter dated July 1, 2005, the CIA responded to Lesar's May 23, 2005 letter. Citing this Court's April 23, 2005 order denying news media status and a fee waiver, the CIA stated that it had considered the information provided by Hall and SSRI but denied both the fee waiver and news media status as not meeting the requirements set forth in 37 C.F.R. § 1900.13 and 37 C.F.R. § 1900.02, respectively. The CIA advised that plaintiffs they had a right to appeal these determinations, but asserted that their appeal would be accepted only if they agreed to be responsible for the costs in the event of an adverse administrative or judicial decision.

By letter dated August 14, 2005, Hall and SSRI appealed the CIA's July 1, 2005 determination to deny their requests for news media status and a fee waiver. In their appeal, they refused to make the commitment demanded by the CIA as a prerequisite to the appeal, pointed out that the FOIA statute did not authorize any agency to abrogate the right of appeal, and that the right of appeal is critical to (1) exhaustion of administrative remedies, (2) determining when a court has jurisdiction to hear a case, (3) the accrual of the statute of limitations, and (4) the composition of the administrative record on which a district court determines whether or not a fee waiver or news media status is appropriate.

The remainder of the appeal letter made a detailed showing that Hall and SSRI fulfilled the requirements set forth in the CIA's regulations. To avoid unnecessary duplication, this showing will be set forth in ensuing sections which argue that Hall and SSRI are entitled to a waiver of fees and news media status.

B. Plaintiffs Are Representatives of the News Media

The OPEN Government Act of 2007 ("OGA'), Pub. L. 110-175 (2007), 121 Stat. 2524, amended the provision regarding representatives of the news media so that 5 U.S.C. § 552(a)(4)(A)ii now reads as follows:

> **In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news media" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase or subscription or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunication services), such alternative media shall be considered to be news media entities. A freelance journalist shall be regarded as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.**

This amendment incorporates and expands upon the definition of "representative of the news media" which the Court of Appeals had previously defined as "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." National Security Archive v. Department of Defense, 880 F.2d 1381, 1387 (D.C.Cir.1989), cert. denied, 494 U.S. 1029 (1990).

In its April 13, 2005 Memorandum Opinion and Order, this Court held that the activities cited by Hall and SSRI "do not meet the definition articulated in Nat'l Sec. Archive, most notably the requirement that the requester `use its editorial skills to turn the raw materials into a distinct work.'" Mem. Op. at 14, quoting Nat'l Sec. Archive, 880 F.2d at 1387.

The current administrative record differs from that before the Court at the time of its April 13, 2005 ruling. In their supplemental request, Hall and SSRI set forth more

details showing they meet the definition of "representative of the news media." The supplemental application stated that Hall obtains information on POWs and MIAs from a variety of sources, including veterans, family members of POW/MIAs, and government documents. He disseminates this information through SSRI, a nonprofit corporation, in several ways.

First, when he obtains documents which contain new information of interest to the segment of the public that is concerned with POW/MIA issues, he sends copies to those on his SSRI email list together with his expert commentary on the significance of the information. This email list contains approximately 3,000 names, including many veterans organizations, news organizations, and so forth. The persons on his email list in turn redisseminate the information to others.

To give examples of the broadscale dissemination which is achieved through Web links and emails, Hall notes the number of subscribers who are reached when his emails are redistributed by just three of the 3,000 persons and organizations on his email list:[2]

Vietnam Veterans of Brevard, Florida	**30,000-60,000**
Rolling Thunder National, Incorporated	**100,000**
National Alliance of POW/MIA Families	**40,000 plus**

In disseminating this information, Hall uses his editorial skills to make a distinct product. He uses those skills to select which documents are important and to provide an appropriate commentary pointing out what is significant about the documents.

Secondly, Hall disseminates information by authoring articles which contain this information and his commentary on it which are published in magazines, newspapers, newsletters and web sites.

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[2] When Hall and SSRI submitted their new request, the subscribers included Task Force Omega of Kentucky, with 50,000 subsribers. This organization has now been replaced with Rolling Thunder National, Indorporated, with 100,000 subscribers.

Third, as noted above, Hall has a commitment from Pulitzer prize-winning journalist Sidney Shanberg that they will jointly author an article or series of articles pertaining to the records released in this case which will be published in the Village Voice and other journals. Quite clearly, this will require that editorial skills be used to transform raw data into a finished product suitable for dissemination.

In employing each of the above-cited means of dissemination, Hall and SSRI use their editorial skills to turn the raw materials into a distinct product, whether it be a magazine article, an email, a web posting, a speech, or a congressional briefing. Accordingly, they are entitled to status as representatives of the news media.

The Open Government Act amendment strengthens the argument that Hall and SSRI are representatives of the news media. As the OGA notes, "as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunication services), such alternative media shall be considered to be news media entities." Hall and SSRI qualify as representatives of the news media under the standards enacted by Congress.

C. Hall Is Entitled to a Public Interest Fee Waiver

The courts have held that 5 U.S.C. § 552(a)(4)(A)(iii) sets forth a two-part test for determining whether documents shall be furnished without charge (or at a reduced charge). Under this test, the request must establish that the information sought (1) "in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government," and (2) "is not primarily in the commercial interest of the requester." Project on Military Procurement v. Department of the Navy, 710 F.Supp. 362, 367 (D.D.C.1989), quoting 5 U.S.C. 552(a)(4)(A)(iii). Although the requester has the initial burden of producing evidence of public benefit, "[o]nce the . . . requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden . . . is on the agency to justify the denial of a requested fee waiver." Ettlinger v. F.BI.I, 596

F.Supp. 867, 874 (D.Mass.1984. "There is a clear message from Congress that "[t]his public-interest standard should be liberally construed by the agenies." Id., at 872, quoting S.Rep. No. 854, 93d Cong., 2d Sess. 12 (1974).

Hall's application fully meets the standards set forth in the CIA's regulations at 32 C.F.R. 1900.13. The request are clearly directed at finding out what information the government had acquired about the POW/MIAs through its operations and activities. Secondly, the disclosure of the requested records is likely to contributed to the understanding of government operations or activities. As Sidney Shanberg stated in his letter to Mr. Lesar,

> **a significant number of prisoners were not returned by the Hanoi government, but were held back as bargaining chips for war reparations that never came. The POW/MIA story is clearly of national importance since men and women will continue to be called to war by our nation's leaders—as they have been presently in Iraq. The history of what has happened to those captured in other wars is therefore obviously of interest to the nation at large.**

See Attachment B. Mr. Shanberg further states that nearly 600 prisoners were released after the U.S. signed a peace agreement with North Vietnam, but that "[o]ur history in Vietnam will never be complete until we learn what happened to the hundreds of others who were alive and returned." Hall's showing that the Village Voice has committed to publish stoes on information released as a result of this lawsuit further strengthens the case for a fee waiver.

The disclosure of the records sought by Hall will enable an evaluation of what is known about the circumstances of the missing POWs, what was done to find them, and whether all relevant information concerning this issue was made available to conressional investigators.

Neither Hall nor SSRI has a commercial interest that would be furthered by the requested disclosure.

VIII. ITEMS 4, 5, and 7 OF PLAINTIFFS' REQUEST WERE NOT IMPROPER AND REMAIN VIABLE

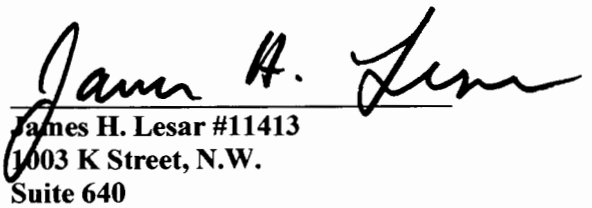
The CIA claims that the Items 4, 5, and of plaintiffs' requests are improper and should be dismissed. The CIA's claims are without merit.

The CIA claims that plaintiffs are precluded from litigating Item 4 because Judge Frieman ruled in Hal I that the Senate Select Committee ecords Hall sought were "agency records." This does not accurately depict Judge Friedman's ruling. While he did rule that the Senate records were not agency records, Judge Friedman did not unreservedly endorse the CIA's argument that particular set of CIA documents attached to the Senate Committee's documents "are exempt because they have been incorporated into the record as a whole." Rather, he ruled that "in preparing its supplemental declaration in this matter, the CIA should confirm that it has independently reviewed all documents of its own creation that were included with the Senate Select Committee docuements." August 13, 2000 Memorandum Opinion at 14, n.4. This left open the possibility that the CIA had not "searched for, located and evaluated under the FOIA the identical copies of all docuents of its own creation when it searched its own files." Id. A resolution of this issue requires the CIA to file the supplemental declaration that it was ordered to, but never did.

Item 5 of Hall's 2003 request seeks records pertaining to Primary Next of Kin ("PNOK") persons requesting information about their missing relatives. The CIA claims that without additional identifying information the request was "vague." CIA's Motion, at 21. There is nothing vague about the Item 5 request. Either the CIA can find records that identify a missing POW/MIA or it can't. In those instances where the information provided is insufficient to be able to make an identification, that is the endd of the matter. In those cases where identification is possible, disclosure of the requested records is the result because proper authorizations have been obtained by the PNOK.

Item 7 of the 2003 request seeks records pertaining to searches conducted for regarding requests for POW/MIA records, including searches conducted by congressional committees or executive branch agencies. The CIA attempts to paint this as an unreasonably burdensome request requiring independent research. There is simply no reason to believe that, reasonably construed, this request will prove unreasonably burdensome. It seems common-sense that congressional committees such as the Senate Select Committee on POW/MIA Affairs, and Executive Branch agencies such as the CIA and the Department of Defense, have made some searches for records on POW/MIAs, and that it doesn't require a gargantuan effort to locate some responsive records. Noticeably, the CIA has adopted a Chicken Little approach to this issue. Where the request poses the prospect of uncovering requested records through reasonable searches, the CIA can escape its search obligations by poosing a worst case scenario.

Respectfully submitted,



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December 18, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of the parties cross-motions for summary judgment, the responses thereto, and the entire record herein, it is by this Court this _____ day of _____, 2009, hereby

ORDERED, that plaintiff's motion for partial summary judgment be, and hereby is, GRANED.

_____
UNITED STATES DISTRICT COURT