**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**REPLY TO OPPOSITION TO PLAINTIFFS' JOINT MOTION FOR TO STAY CERTAIN PROCEEDINGS AND MOTION TO COMPEL ACTION ON REFERRALS**

**A. Motion to Stay**

**Defendant CIA has opposed plaintiffs' joint motion to stay proceedings and for an order to compel the CIA to take certain actions on records it concedes have very belatedly been referred to other agencies. Plaintiffs based their motion in part on a memorandum regarding the Freedom of Information Act ("FOIA" issued by President Barack Obama on his first day in office. Among other things, the President's memorandum instructed the Attorney General to issue new guidelines implementing his call for greater openness under the FOIA. Responding to plaintiffs' motion for a stay, the CIA says that "the new regulations, when promulgated, would be wholly irrelevant because most exemptions the CIA has claimed were pursuant to" Exemptions 1 and 3, and "[t]hese are not discretionary." It asserts that "[u]nless there are changes to the FOIA, the National Security Act or**

**the CIA Act, the withholdings will not change." This contention is not supportable, and the new guidelines just issued by Attorney General Holder lend further support to plaintiffs' motion.**

**The CIA's position is flawed for several reasons. First, Exemptions 1 and 3 are not the only exemptions at issue. Exemptions 5 and 6 are also substantially at issue, and a major part of the litigation also concerns the adequacy of the search. Secondly, at the same time that the CIA is asserting that nothing can be done about the referrals except wait, it ignores the fact that each of the agencies to which documents have been referred will be making their own decisions under all exemption claims, in accordance with the new guidelines, as to what to release. Yet in asserting that its claims under Exemptions 1 and 3 bar further disclosures, the CIA presumes to speak for those agencies that materials have been referred to. The CIA is simply not in a position to do this.**

**In his Memorandum for Heads of Executive Departments and Agencies dated March 19, 2009, Attorney General Holder officially rescinded Attorney General John Ashcroft's FOIA Memorandum of October 12, 2001. As Attorney General Holder notes, the Ashcroft Memorandum stated that "the Department of Justice would defend decisions to withhold records unless they lack a sound legal basis or present an unwarranted risk of adverse impact upon the ability of other agencies to protect other important records.'" See Attorney General Holder's Memorandum, affixed hereto as Attachment 1. Instead, AG Holder asserted that**

**the Department of Justice "will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law." Id.**

**From the time this lawsuit was instituted until the issuance of President Obaba's January 21, 2009, Memorandum, the Ashcroft Memorandum was in effect. The contrast between the Ashcroft and Holder policies could not be greater. Under these circumstances, it if difficult to imagine that in this case there is not a "substantial likelihood that application of the guidance would result in a material disclosure of additional information." Id.**

**It is presumptuous at best for the CIA to argue that any new regulations will be "wholly irrelevant" to the application of the FOIA after they have been issued. Exemption 1, for example, depends for its substantive content on the provisions in the Executive order currently governing national security classification. Thus, the President, not he CIA, is ultimately responsible for the substantive content of Exemption 1.**

**Executive orders frequently change when a new administration comes to power, as do the guidelines issued under them. These changes can effect the scope of Exemption 1 and 3 exemption claims and how they are applied. For example, in the past, Executive orders have sometimes provided that a presumption of harm prevents the the disclosure of the names of deceased sources. Executive Order 15928 does not contain this presumption, but under the Ashcroft memorandum it was applied anyway. Under the guidelines issued by Attorney General Holder,**

**application of such a presumption would contravene the presumption of openness endorsed by the Obama administration.**

**Or, to cite another example, it was quite plausible under the Ashcroft memorandum to withhold intelligence source and methods even though they were so well-known to foreign intelligence agencies that the only practical effect of withholding the information was to keep it secret from the American public. That kind of Exemption 1 and 3 withholding would not seem to be defensible under Attorney General Holder's new guidelines.**

**With respect to the search issue, agencies manifest a wide latitude in how they interpret and apply their search obligations. What information is made available to a requester depends very much on the agency's attitude and intent regarding how it carries out its search obligations. The Attorney General Holder Memorandum sets forth the prospect of greater disclosure because of improved searches than was the case under the Ashcroft Memorandum.**

**This is illustrated in this case by the extent the CIA has gone to during the period when the Ashcroft memorandum was in effect, to play hardball and demand the strictest possible compliance with Rule 56(e)'s requirements on the admissibility of evidence in order to defeat public interest in learning about responsive documents that have not been located as a result of an agency's searches. That this is not a matter of hard and fast law not subject to differing applications is indicated by the fact that an agency may waive Rule 56(e) requirements if it chooses to do so. Indeed, this is precisely what the CIA did during Hall I, with respect to many of the very same materials that it raised objections on in Hall II. In Hall II, however, the**

**Achcroft memorandum was in effect until Attorney General Holder rescinded it, and the CIA insisted in erecting evidentiary defenses it had not applied during Hall I.**

**With respect to plaintiffs' motion to compel the CIA to identify and act upon the materials it has referred to other agencies, the CIA says it cannot provide a list of referrals, the names of the third party agencies they were referred to along with the dates of referral. It says it cannot do this because "at this nuncture it remains unclear which of the documents may be classified and whether the third agencies may ask for non-attribution." "At this juncture" is five years after this litigation began and 11 years since Hall I was filed. The CIA does say in which century it proposed to finally act on these referrals.**

**B. Referrals**

**Plaintiffs have also moved the Court to provide within 90 days of the Court's order a list of documents referred to other agencies. They also ask that all nonexempt materials referred to other agencies be disclosed. In response to this motion, the CIA admits that "documents have been referred to third agencies for processing and coordination in this case." Opp. at 2. It asserts, however, that the CIA cannot produce a list of the referrals "because at this juncture it remains unclear which of the documents may be classified and whether the third agencies may ask for non-attribution." Id. It further states that such a list "would be ir-relevant as the Agency is only asking for partial summary judgment" so plaintiffs may litigate any withholdings as to these documents at a future date of the CIA's choosing.**

**The list sought by plaintiffs is not irrelevant. In conjunction with the other relief requested—that the Court order the CIA to release any nonexempt materials in the referrals at the time it provides the list—plaintiffs would be able to ascertain what referral materials remain at issue, thus enabling them to litigate any remaining claims sooner rather than in conformity with the CIA's geological time scale. The CIA's proposal to litigate the status of the referrals through some future motion for summary judgment flies in the face of well-established policies against piecemeal litigation and in favor of judicial economy.**

**Respectfully submitted,**

**_____/s/_____**
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**March 24, 2009**

**_____/s/_____**
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