

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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|-----------------------------|---|--------------------------------|
| ROGER HALL, et al., | : | |
| | : | |
| Plaintiffs, | : | |
| | : | |
| v. | : | Civil Action No. 04-0814 (HHK) |
| | : | |
| CENTRAL INTELLIGENCE AGENCY | : | |
| | : | |
| Defendant | : | |

**PLAINTIFF’S MOTION FOR ORDER REQUIRING
DEFENDANT TO FILE A STATUS REPORT INDICATING
STEPS TAKEN TO COMPLY WITH THE JANUARY 21, 2009
MEMORANDUM BY PRESIDENT OBAMA AND THE MARCH
19, 2009 FOIA GUIDELINES OF ATTORNEY GENERAL ERIC HOLDER**

Come now the plaintiffs, Roger Hall, Studies Solutions Results, Inc., and Accuracy in Media, and jointly move this Court to issue an order requiring defendant to file a status report detailing what steps have been take to comply with the new Freedom of Information Act policy of openness set forth in President Barack Obama’s January 21, 2009 FOIA Memorandum and in Attorney General Eric Holder’s March 19, 2009 FOIA Guidelines.

Defendant opposes (does not oppose) this motion.

ARGUMENT

On April 8, 2009, this Court issued an order staying the proceedings in this case for a period of 90 days in order for defendant to evaluate the impact upon President Obama’s new FOIA openness policy of the issues pending in this case. On

May 7, 2009, the Office of Information Policy (“OIP”) issued a memorandum entitled “OIP Guidance: President Obama’s FOIA Memorandum and Attorney General’Holder’s FOIA Guidelines.” A copy of this memorandum, hereafter referred to as “OIP Guidance” or “Guidance,” is attached hereto as Attachment A.

The OIP’s Guidance further explicates how President Obama’s openness policy is to be construed and implemented. Of particular importance to this case is the fact that the OIP stresses that the best case for discretionary release of materials under this new policy arises with respect to Exemption 5 claims. Exemption 5 claims are important to this case because plaintiffs have argued that the many Exemption 5 claims asserted are designed to cover up the CIA’s improper attempt to use fees as method of obstructing plaintiffs’ search for responsive records.

As OIP’s Guidance notes, “[w]hen a FOIA request is denied, agencies will now be defended `only if . . . the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions. . . .’” Guidance at 2, quoting Attorney General Wilder’s FOIA Memorandum (emphasis added). This means that “FOIA professionals should examine individual records with an eye toward determining whether there is foreseeable harm from release of that particular record or portion thereof.” *Id.* at 3. According to OIP, “[e]ach record should be reviewed by agencies for its content, and the actual impact of disclosure for that particular record, rather than simply looking at the type of document or the type of file the record is located in.” *Id.*

OIP spelled out in detail the kind of evaluation that a FOIA officer reviewing an Exemption 5 claim in accordance with President Obama's policy is called upon to make. For example, with respect to a pre-decisional Exemption 5 claim, in considering a draft or a memorandum making a policy recommendation,

the content of that particular draft and that particular memorandum should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and character, would harm an interest protected by Exemption 5. In making these determinations, agencies should keep in mind that mere "speculative or abstract fears" are not a sufficient basis for withholding. Instead, the agency must reasonably foresee that disclosure would cause harm. Moreover, agencies must be mindful of the President's directive that in the face of doubt, openness prevails>

Id.

Further on in its Guidance, OIP also noted that

[t]here is no doubt that records protected by Exemption 5 hold the greatest promise for increased discretionary release under the Attorney General's Guidelines. Such releases will be fully consistent with The purpose of the FOIA to make available to the Public records which reflect the operations and activities of the government. Records covered by the deliberative process privilege in particular have significant Release potential. In addition to the age of the records And the sensitivity of its content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether discretionary release is appropriate.

Id. at 7. OIP's Guidance also noted that "[d]ocuments protected by other Exemption 5 privileges can also be subject of discretionary disclosure." Id. \

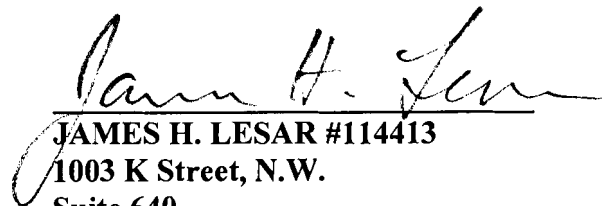
Exemption 5 is, of course, not the only exemption claim which should be re-evaluated by defendant to determine whether its application is in accordance with

President Obama's FOIA policy. OIP's Guidance also mentions Exemptions 2, 6 and 7(C), (D) and (E) as possibly appropriate for discretionary release. The OIP Guidance also repeated stresses the need for prompt action by FOIA officials, repeating that word seven times in its memorandum and stating in its "Summary" on page ten that "Agencies should work cooperatively with requesters and and respond promptly." In light of the fact that the CIA years ago made referrals of documents which have still not been acted upon, this issue should be addressed when the CIA files a status report on its compliance with the new openness guidelines.

In addition, plaintiffs believe that CIA's efforts to throw up evidentiary objections under Rule 56 are not in accord with President Obama's policy.

The CIA should be required to file a report with the Court detailing the steps it has taken to address and resolve these issue in light of the Attorney Generals FOIA Memorandum and the OIP's Guidance. Accordingly, this Court should require the CIA to file such a report within the next 90 days, or such other period as the Court thinks advisable and proceedings in this case should be stayed until the CIA files its report.

Respectfully submitted,


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_____/s/_____
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Counsel for Plaintiff AIM

Dated: July 7, 2009

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ORDER

Upon consideration of plaintiffs’ motion for an order requiring defendant Central Intelligence Agency to file a status report regarding the steps it has taken to comply with President Obama’s Openness Policy, defendant’s opposition thereto, and the entire record herein, it is by this Court this _____ day of _____, 2009, hereby

ORDERED, that within 90 days of the date of this order, defendant shall file a status report detailing the steps it has taken to comply with President Barack Obama’s Openness Policy; and it is further

ORDERED, that all other proceedings in this case are stayed pending submission of said status report.

UNITED STATES DISTRICT COURT