UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RESPONSE TO DEFENDANT'S SUPPLEMENTAL
RESPONSE TO COURT'S NOVEMBER 12, 2009 ORDER

Preliminary Statement

Pursuant to a number of new searches it has undertaken, the CIA has now released several thousand pages of records it had not previously located or produced despite the great length of this lawsuit. While this is a welcome development, serious problems remain, both with the adequacy of the searches and the extensive withholding of records that are for the most part 40-50 years old and pertain to matters that are of considerable national interest. While Hall continues to rely on his pending motions for summary judgment, and incorporates them herein by reference, he makes the

submission in response to the CIA's supplemental response to this Court's November 12, 2009 Memorandum Opinion and Order.

ARGUMENT

I. THE CIA HAS FAILED TO SHOW THAT IT CONDUCTED AN ADEQUATE SEARCH

A. Plaintiffs' Request Is Not Unduly Burdensome

Hall provided the CIA with forty-four privacy authorizations from next-of-kin who requested records on their deceased or missing relative relatives. He also provided an official list of approximately 1,700 persons who had given PNOK ("Primary Next-of-Kin") authorizations. The CIA initially claimed that Item 5 of Hall's request seeking these records was "too vague to process and that Hall . . . did not produce additional information—the date of birth, place of birth, and full name of each person-- . . . it required to conduct a proper search." Hall v. C.IA., 688 F.Supp.2d 172, 180 (D.D.C. 2009)("Hall"). The CIA argued that without this information the CIA's search might turn up records pertaining to persons whose names were similar but whose private information Hall was not authorized to see. Id.

In response to these contentions, this Court noted that the CIA had not identified the legal authority on which its argument was based but that it

seemed to content that request did not "reasonably describe" the records sought. The Court observed that the CIA had not alleged that it could not discern what records were sought. Rather, it had argued that if it conducted the search, it would turn up some records that were not responsive to the request. Thus, as the Court remarked, the CIA "concede[d] that a search is possible" and "ha[d] not explained why it could verify the identity of individuals whose names appear in records by date and place of birth but not by, for example, social security number." Id. In light of this, the Court ordered: "If such an explanation exists, the CIA must provide it in a supplementary declaration. Otherwise, it must search for and disclose any non-exempt records which, based on the information Hall and AIM (Accuracy In Media) have provided and the details contained in the records themselves, it can verify pertain to an individual on plaintiffs' list." Id. at 80-81.

The CIA has not complied with the Court's directive. Instead, it has raised a new issue. As the CIA notes, Item 5 of Hall's request concerned approximately 1,700 persons who are listed on an official PNOK list drawn up by the Defense Department. In addition, Hall submitted forty-four privacy authorizations from 44 next-of-kin. See Declaration of Mary Ellen Cole, ¶ 72 n. 29. The CIA states that the total of these two groups comes to

1,711, including 31 persons for which Hall provided additional identifying information, such as social security numbers or dates of birth. Id. ¶ 73. Apparently, although the CIA does expressly so state, it excluded 13 of the privacy authorizations submitted by Hall because they did not contain such additional information.[1]

The CIA says that it conducted an electronic search of its archived records under the 1,711 names.[2] This indicated that there were 16,423 hardcopy file folders that could contain responsive records. Id., ¶ 73. The CIA argues that it would be "unduly burdensome "for the CIA to review and process the documents contained in each of the 16,423 hardcopy file folders." Id., ¶ 74. It rests this claim on the fact that CIA officials would be required "to retrieve each specific file folder from the remote location where the archived records are stored." Id. Upon retrieval of the files, The CIA

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[1] The CIA's 44 authorizations is fewer than the number Hall actually submitted. He recently submitted another 3 authorizations.

[2] The CIA's search of the names of persons whose authorizations by the PNOK was confined to two systems of records, the CIA's "Archival" records and those in its CADRE system. It says that these two systems were the ones "most likely" to contain responsive records. This is not only the wrong standard, it is exactly the same standard it was rejected in Oglesby v. Dept. of the Army, 920 F.2d 57, 67-68 (D.C.Cir.1990). The same error is repeated in the CIA's description of its search for records in the Director's Area that would be responsive to Item 3 of the request. See CIA's Supplemental Response to Courts Memorandum Opinion and Order at 23, citing Cole Decl., ¶ 9.

would then have to search relevant file folders for responsive documents. Id.

However, "[t]he sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe records within the meaning of 5 U.S.C. § 552(a)(3)(A)." FOIA Update, Vol. IV, No. 3 at 5, quoted in the Office of Information Policy's Guide to the Freedom of Information Act (2009 ed.), at 49, n. 120. Those cases which have ruled a request to be unduly burdensome are readily distinguishable from this one. For example, in Nation Magazine v. U.S. Customs Service, , 71 F.3d 885, 892 (D.C.C Cir.1995), the Court of Appeals held that a search through 23 years of un-indexed files would be unreasonably burdensome but that a search of chronologically indexed agency files for dated memoranda would not be. Here, potentially responsive records are identifiable through a name search conducted electronically by the CIA.

The CIA's complaint is not really with the primary search effort itself, but with the tasks associated with the review of the records identified as potentially responsive. Thus, it argues that "[r]eview of [the potentially responsive 16,423 file folders located by the search] would be unduly burdensome because the process to review each document would require

Agency officials to manually retrieve each specific file folder from the remote location where the particular archived record is stored." Defendant's Supplemental Response to the Court's Memorandum Opinion & Order at 15, citing Cole Decl., ¶ 74. The CIA contends that "[t]hat massive task would impose an inordinate and unreasonable burden on Agency resources." Id.

The CIA cites no legal authority for its position. The word "inordinate" means "not within proper or reasonable limits." The statutory text of the FOIA places no limits on the number of records which may be properly be considered within the scope of the request. The goal of the FOIA is to provide access to records by "each person" who requests them. Its sweep is global. With the exception of a judicially-created for fugitives from justice, it applies to everyone in the world. The President of the United States has indicated that all records pertaining to all POWs are of interest to the public by ordering that a center for them be set up at the Library of Congress, and the Senate Select Committee issued a report aimed at securing such records. While the CIA claims that review of 16,243 file folders is unduly burdensome, it does not say what the maximum number of persons is or whose folders it considers not to be burdensome. If, for example it considers that any number exceeding 50 persons is unreasonable, then 34 persons could be recruited to each submit a request on 50 names, and each of

these 34 requesters could then file a separate lawsuit. This would, of course, greatly increase the costs both to the Government and to requesters, results which are contrary to the FOIA's nature and goals.

In addition to its archived records, the CIA also identifies its CADRE system as having responsive records. It describes CADRE as being "full text searchable" and including records from its "information release programs, such as the FOIA, Privacy Act, and Mandatory Declassification Review programs. Even though the CADRE search is "entirely electronic," the CIA asserts that it would be "unreasonable" to conduct a search of all 1,711 names. Cole Decl. ¶ 75. The CIA asserts that a search of these names indicated that "almost 140,000 documents [are] potentially responsive to the named individuals." Id.

The CIA cites no authority to support its contention that a review of 140,000 folders would be unreasonable. Nor does it supply any supporting facts regarding the actual burden that would be imposed. It does not state, for example, how many actual man hours it estimates it would take to review the almost 140,000 folders. It has a basis for such an estimate, since it has reviewed the "almost 1,400" folders potentially responsive to the 31 names it did search. The description of the kinds of records maintained in the CADRE system seems to indicate that they are records which have

previously been released under the FOIA, the Privacy Act, or Mandatory Declassification Review. In light of this, the speed with which review of the records can be conducted would seem to be much greater than normal.

In any event, there is nothing unreasonable about a review of 140,000 documents. For example, in connection with Allen v. Department of Defense, et al., Civil Action No. 81-2543 (D.D.C.), the CIA had reviewed approximately 300,000 pages of records.[3] There is nothing in the record in this case which suggests that the burden of reviewing records in this case is any greater than it was in that case.

B. The Records that the CIA Has Now Released Refer to Many Other Records Which the CIA Has Not Searched for Or Located or Produced

A great many of the documents the CIA has now released clearly refer to many records responsive to Hall's request without any evidence that they have been searched for, located, or provided. The Court of Appeals has noted that an agency must revise its assessment of what constitutes an adequate search when "to account for leads that emerge during its inquiry. Thus, in Campbell v. U.S. Dept. of Justice, 164 F.3d 20, 28 (D.C.Cir.1998), the Court held that the FBI's assumption it had conducted a reasonable search "became untenable once the FBI discovered information suggesting

[3]This representation is made on the basis of counsel's personal knowledge as he handled the Allen referred to.

the existence of documents that it could not located without expanding the scope of its search." ("Cf. citation omitted.)

Here, the CIA failed to take notice of information which required it to expand the nature of its searches.

1. Obvious Search Terms Not Used

The recently released documents reveal obvious search terms which could help pinpoint the location of records that are very much at the center of Hall's quest for responsive records. The newly released records employ the following potential search terms:

C00478876 refers to "fifty LPW/MIA." "LPW" appears to stand for "Laotian Prisoner of War." This is a significant search term which the CIA did not employ. Id., ¶ 20, Att. 22.

C00479111 is a November 2, 1985 handwritten note which refers to a "telephonic evaluation to [redacted] at CIA" and indicates that a "circle search" should be performed. This suggests that the CIA should have used this term in this case to locate responsive documents. Id.,¶ 22, Att. 24.

C00492397 reports on the presence of what is known as the "Walking Kilo" or "Walking K" on the ground west of Sam Neua, Laos. These terms refer to a symbol used to signal the presence of POWs. They are useful search terms not employed by the CIA in its searches. Id., ¶ 25, Att. 28.

C00493325 states that [d]escriptive details provided to date by [redacted] may match missing U.S. personnel described by [redacted] as in a stay behind status. "Stay behind status" is a useful search term which the CIA did not provide. Id., ¶ 50, Att. 54.

2. References to Records Not Provided

Many documents released to Hall contain references to documents or activities which suggest the existence of responsive documents that have not been provided. A few examples provided by Hall follow:

C00482286, from the CIA's National Foreign Assessment Center, Office of Imagery Analysis, pertains to imagery regarding a Detention Center East of Takhet, Laos. Although it states that "[e]nclosed are graphics showing details of the camp and the apparent numerals" that were displayed there, no graphics, imagery or other relevant records have been provided, and there is no indication that a search was conducted. 2011 Declaration of Roger Hall ("2011 Hall Decl.," ¶ 17, Attachment ("Att.") 19.

C00465439 concerns Air America pilots who were POWs at Sam Neua. It states that "it is possible that there are three Americans being held in Sam Neua, however, there is only one Air American crewman unaccounted for." This indicates that there must be other documents which reported this information but which have not been provided. Id., ¶ 5, Att. 4.

C00465737 refers to imagery and photography of POW camps which have not been provided.

C00472095 refers to "troops of American military personnel," p. 2, ¶ 1, and refers to negotiations between the LPF and the Royal Laotian government and U.S. representatives concerning negotiations about lists of POW/MIAs, and military and other civilian personnel who died during the time they were detained. Id., ¶ 11, Att. 13. The CIA has not shown that it searched for other documents related to these negotiations and lists.

C00482214 is a November 14, 1980 memorandum from the Director of the CIA regarding a group of American pilots constructing a road. It refers to the need to be given to "positively confirming the existence of POWs with [redacted], a list of names, and the exact location. This indicates the intention to create additional documents regarding these requirements. The CIA has not shown that it conducted a search for these records. Id., ¶ 13, Att. 15.

C00482286 is from the CIA's National Foreign Assessment Center's Office of Imagery Analysis and concerns a Detention Center East of Takhet, Laos. This document states that the number "52" appears at the site on the ground. Paragraph 9 states that "[e]nclosed are graphics showing details of

the camp and the apparent numerals." The CIA has not provided Hall with the graphics or imagery associated with this site.[4] Id., ¶ 17, Att. 19.

C00493228 reports on a refugee who was given a camera and substantial sum of money to travel overland to Vietnam to take photographs of POWs. There is no evidence the CIA has searched for any photographs or other documents related to this trip.

Other documents which indicate the existence of imagery which has not been searched for, located or produced include those reproduced at 2011 Hall Decl., Atts. 31 (¶ 28), 32 (¶ 29) 34 (¶ 31), 46 (¶ 42).

C00479111 is a handwritten note concerning a "telephone evaluation to [redated] at CIA" and indicates that a "circle search" should be performed. There is no indication that the CIA searched for or located any records related to the "telephone evaluation" or the "circle search".

C00492378 states at the bottom that there is an attachment but none has been provided.

C00492397 reports that "several unusual markings—the letters 'USA' and what resembled a 'Walking Kilo'—was observed on the ground west of Sam Neua, Laos." The CIA has not provided the imagery referenced in this document. Id., ¶ 25, Att. 28.

Hall requests actual images or photographs, not Xerox copies.

C00492546 refers to two specific classified documents which the CIA does not indicated that it has searched for. Id., ¶ 32, Att. 35.

C00 478688 references a document or documents that have not been provided. Id., 33, Att. 36.

C00493325 states that "[d]escriptive details provided to date by [redacted] may match missing U.S. personnel described by [redacted] as in a stay status." This refers to documents which the CIA has not indicated it has searched or produced. Paragraph 3 directs a CIA component (redacted) to "develop expeditious means to identity and photograph this Caucasian individual." This indicates an intent to create additional records, including photographs, which have not been provided. Id., ¶ 50, Att. 54.

C00478741 is a handwritten note regarding information to be placed in apparently unprovided records on POWs (names redacted), including obtaining or creating a "case file" on one of them and the placement of information on another in a "dog tag background file."

C00492526, a letter to the Chief Counsel of the Senate Select Committee, is about the crash of an Air America C-123 plane in Laos in March 1973. The CIA encloses material on two crewmen who were apparently killed in the crash. The enclosures referred to have not been provided. Id., ¶ 40, Att. 44.

C00471978 indicates there is a prior report which has not been provided. Id., ¶ 41, Att. 45.

C00478651 refers to a report which it says is attached but is in fact missing. Id., ¶ 56, Att. 64.

C00480204 is about changes made regarding foreign intelligence requirements. It refers to other records regarding intelligence requirements which have not been provided. An "automated data base" is referred to, but it is not identified and there is no indication that it has been searched. Id., ¶ 59, Att. 67.

C00483710 refers to a memorandum on POWs in Cambodia which is said to be attached but is not.

3. File Locations Not Searched

The newly released documents show many file locations which appear not to have been searched. For example:

C00465411 concerns the transfer of two American pilots who were being held captive in Laos to Vietnam. Dated June 25, 1968, it refers to a pilot killing three North Vietnamese. A note in the margin refers to "Hrdlicka," a known POW, and gives a file number, 0084-1-01/2 OF 4. The CIA has not indicated that it performed any search of this file or the referenced POWs. 2011 Hall Decl., ¶ 2, Att. 1.

C00465737 concerns "IAS Work Related to American POW Camps in North Vietnam." Whatever is meant by "IAS," it is clear that it contains records potentially responsive to Hall's request. There is no indication that a search of IAS records has been done. Id., ¶ 6, Att. 8.

C00472095 concerns a "JCIA Draft Agreement on Exchange of Soldiers, Military Personnel Captured, and Detained during the War, and on Acquiring Information on Those Missing." It is dated July 12, 1974. The CIA has not identified what "JCIA" stands for, but whatever it stands for it is a repository of potentially responsive records and that CIA has not indicated that it was the subject of a search directed at locating its potentially responsive records. Id., ¶ 11, Att. 13.

C00482222, like Att. 15 above, refers to the location of a work crew. Handwritten page numbers at the bottom of the page suggest that these documents were part of a superset of records pertaining to this subject kept in reverse chronological order. The pages numbers on these records (Attachments 15, 17, indicate this file was quite large, comprising at least 800 pages. This raises a question as to why other records in the file were not provided.) Id., ¶¶ 13, 15-16, Atts. 15, 17-18.

C00492546 is a letter from the CIA's Deputy Director for Senate Affairs (name redacted) to the Senate Select Committee. It refers to a

location at the CIA (identity redacted) where the senate thought that files regarding POWs might be located. The CIA has not indicated that it has searched this unidentified location for responsive records.

B. Referrals Not Yet Produced

Cole declares that she determined that there were 1,452 CIA-originated documents responsive to this Court's November 12, 2009 order regarding Item 4 of Hall's request. She further states that of these, 167 contained information that required consultation with other agencies. She asserted that the CIA was "currently coordinating with each appropriate agency[,] " and that "[a]fter completion of this coordinating process, the CIA will release the remaining non-exempt records to Plaintiffs." Cole Decl., ¶¶ 54-55. This has still not occurred.

With respect to Item 5 of Hall's request, Cole states that on January 21, 2011, the CIA sent to appropriate agencies the "non-CIA-originated documents for referral and direct response to Plaintiffs, as well as nineteen . . . CIA-originated documents for coordination." Supplemental Cole Declaration ("Supp. Cole Decl."), ¶ 5. She also referred to document C00495762, which is responsive to Item 5 and was sent to another government agency on January 21, 2011 for coordination. It is also responsive to Item 4. Although initially withheld in full, the CIA has now

concluded that it can be released in part and promises to do so "once consultation with the appropriate third agency is completed." None of these materials has yet been provided.

C. The CIA Has Not made a Proper Determination that Operational Files Are Exempt, Nor Has It Indicated that It Made a Required Decennial Review of Such Files

The CIA Information Act of 1984 ("CIA Act"), 50 U.S.C. § 431, et seq., , provides that under certain conditions the CIA's operational files are exempt from the search and review provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. "The CIA Information Act authorizes the head of the Agency to exempt operational from the purview of the FOIA." ACLU v. DOD, 351 F.Supp.2d 265 (S.D.N.Y. 2005). "The Director of the Central Intelligence Agency, with the coordination of the Director of National Intelligence, may exempt operational files of the Central Intelligence Agency from the provisions of section 552 of title 5, United States Code . . ., which require publication or disclosure, or search or review in connection therewith." 50 U.S.C. § 431(A).

The Director of the CIA has not stated that the files sought by Hall in this case have been exempted from the FOIA's search and review requirements. "The CIA Information Act does not grant the CIA an automatic exemption of its operational files from the records it must search

in response to a FOIA demand. Rather, the statute requires the Director of the CIA explicitly to claim an exemption with respect to specifically categorized files in order for the Agency to take advantage of the protections afforded by section 431(a)." ACLU v. DOD, 04Civ 4151 S.D.N.Y. (2011) at 9.

The CIA has not provided any declaration by its Director declaring that any of the materials sought by Hall are exempt operational files.

Hall notes that the CIA Information Act also requires decennial review of operational files. Specifically, 50 U.S.C. § 431(g)(1) provides that: "Not less than once every ten years, the Director of Central Intelligence shall review the exemptions in force under subsection (a) to determine whether such sections exemptions may be removed from any category of exempted files or any portion thereof." This review is to "include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information therein." Id., § 431(g)(2). The Act also provides for judicial review of a complaint that the CIA "has improperly withheld records because of a failure to comply with this [provision]." Id., § 431(g)(3).

D. The CIA Has Not Provided All Senate Documents

The Cole Declaration represents that the CIA determined that 1,472 CIA-originated documents were responsive to the Court's Order concerning Item 4. However, this figure is considerably at variance with a November 9, 1993 letter from CIA Director R. James Woolsey to the President, which represents that as of that date 1,766 documents had been forwarded to the Library of Congress and 574 documents had been denied in their entirety. See Exhibit B.

II. THE CIA'S VAUGHN INDICES ARE INADEQUATE

Plaintiff's Renewed Cross-Motion for Summary Judgment, filed in December 2008, set forth a number of inadequacies in the Vaughn indices under review in that motion. See Memorandum of Points and in Support of Plaintiffs Renewed Motion for Partial Summary Judgment, Etc. (Renewed MPSJ) at 19-24. The CIA's current Vaughn indices repeat the previous problems and add to them.

Given the age of these records and the fact that they concern events which have both been the subject of official congressional investigations and extensive newspaper publicity and book publications for decades, what is

amazing is the large amount of material that has been withheld. Indeed, even the number of documents which withheld in their entirety is quite large.

Segregability

These circumstances immediately raise questions about whether or not there is segregable nonexempt information. Exhibit 1 hereto consists of four documents (C00492423, 492422, 492419, 492418) which together comprise 52 pages withheld in their entirety. They are all undated. Although the CIA provides what it calls a "Document description," there is in fact no description of the kind required by a bona fide Vaughn index. There is only an intelligence-speak recitation of the kinds of information sought to be protected, not even a bare description of what the contents of the documents really concern. Do they involve reports of sightings of POWs? Do they involve reports of crashes in which military personnel were killed? Do they concern POW camps? Do they involve negotiations over the release of POWs or planned operations to resume them? If these documents are undated, when did the events recorded in them occur? None of this kind of information is provided. The CIA not infrequently deletes the dates of partially redacted documents, apparently on the strained theory that even the ancient dates at issue here could reasonably be expected to lead to the identification of intelligence sources and methods. But these documents are

undated, making it even less likely that the release of some of the other withheld information could reasonably be expected to identify intelligence sources and methods.

The CIA's claim to have determined that there are no segregable nonexempt portions is further undercut by the fact that it is routinely qualified by the statement that "there is no meaningful non-exempt information that can reasonable be segregated from any exempt information." See Exhibit A, in which this statement is made for each of the four documents reproduced there. The CIA has failed to indicate where the material that is allegedly-non-meaningful nonexempt material is in each document, and how much of it there is. Its segregability claim cannot be endorsed without such information being provided. Additionally, the CIA makes no attempt to describe what kinds of nonexempt material it considers not to be meaningful. A date is meaningful, a code is meaningful; "Walking K" or "Walking Kilo" the name of a country, a report number, a file reference, the name of an agency, the name of a POW, these are all meaningful and all have been withheld by the CIA in documents at issue in this case.

The reason for believing that segregability has not been adhered to is further increased by the fact that the CIA has not asserted exemption claims

for each passage in a document or even for many pages in a row, only asserting Exemptions 1 and 3 at the top of a document and no exemption claims for the pages that follow. This is no doubt convenient, but it facilities an evasion of the responsibility of the agency to make a determination with regard to each portion and commit it to paper. For example, C00478689, contains redactions but no exemption claims for seven of its eight pages. Hall Decl., ¶35, Att. 38.

The CIA's Vaughn indices also contain instances where the CIA have blank areas which do not indicate that an exemption has been claimed, even though it is clear that there was once material there. C00471978, id. ¶ 41. C00493258 (Att. 52) has some kind of label placed over at least some of the content in the upper right-hand corner. Id.,¶ 48. In C00493228, much of numbered paragraph 1 is redacted without any indication that it has been excised and without any claim of exemption for that part of the withheld material.

Attachments 39 and 40 are C00483014 and C00492507. These are two different copies of the same document contained in the same batch of documents provided to Hall in 2010. They are inconsistent to the point of even suggesting alteration. The CIA has blanked out the heading of the Attachment 40 version of the document and several lines of information at

the top of the document without indicating that any exemption is being claimed. It is impossible to tell from this version of the document that any information has been withheld. Yet comparison with Attachment 39 makes it clear that this information was whited out or removed in some fashion. Not only was it withheld, but a crossed out "SECRET" stamp was then placed on it. Attachment 39 indicates that this report is classified "CONFIDENTIAL" followed by a redaction, but that information is deleted from the Attachment 40 version without any indication of an exemption claim. Similarly, Attachment 39 indicates a redaction next to "References," but Attachment 40 does not. And Attachment 39 indicates that several lines have been deleted after "Source:", whereas Attachment 40 does not. In paragraph number 1 at the bottom of the first page, Attachment 40 deletes "Headquarters" from "Headquarters Comment" that appears in Attachment 39. Also missing from Attachment 40 is a "CONFIDENTIAL" stamp which appears at the bottom, partially obscured by what appears to be the equivalent of a "post-it" note paperclipped to the bottom of the first page. Attachment 40 does not indicate the existence of the note, and the largely illegible note that was affixed to Attachment 39 is only partially reproduced, so the note is in effect a missing document not provided by the CIA. In addition, it is noted that the CONFIDENTIAL stamp at the bottom of page

one of Attachment 39 is not only not reproduced at the bottom of page one of Attachment 40 but is contradicted by the "Secret" stamp which appears at the top of the blanked out portion at the top of Attachment 40. Id., ¶ 36, Atts. 39-40.

C00471978 has a blank space which does not indicate that any material has been withheld, although it is immediately followed by a blanked out box which shows that material has been withheld. Id., ¶ 41, Att. 45.

Much of numbered paragraph 1of C00493228 has been blanked out in a manner which conceals this. There is no obvious indication that material has been excised, and no claim of exemption has been asserted. Id., ¶ 49, Att. 53.

Paragraph 4 of C00495030 contains several lines of blank space which have been whited out without any indication that the material is being withheld pursuant to exemption claim(s), and no exemption claim has been asserted for the one block at the bottom of page two that is obviously being withheld. Id., ¶ 52m Att. 56.

C00492493 relates to the testimony of William J. Graver, who was the CIA's station chief in Laos at the time of the Vietnam war. Nearly four complete pages have been deleted without any indication as to what exemptions are being

claimed. The extent of the withholding raises obvious questions about whether there are segregable nonexempt portions. Id., ¶ 53, Att. 57.

C00465306 (Attachment 58) contains a list on pages 1 and 2 of United States military personnel who were identified as alive in North Vietnam POW camps in July 1966. The names have all been deleted. This is inconsistent with Attachment 59 (C00028081), which contains two lists of POWs, discloses their names, rank, serial number and service branch. Similarly, Attachment 60 (C0003671) lists forty POW/MIAs who were capture or missing I Asia. Id., ¶ 54. Attachment 68 is C00483720. This is a September 28, 1982 routing slip followed by three pages of almost entirely withheld information, the first two of which concern information which dates to 1962. These three pages bear no exemption claim or classification markings. The only classification marking is a crossed-out "Confidential," which gives no indication of having been applied by a proper classification authority. Given the passage of nearly 50 years since the 1962 events involved, the extensiveness of the withholding, the lack of authorized classification markings and the failure to assert exemption claims, a question arises as to whether reasonably segregable nonexempt information has been withheld.

C00483720 is a September 28, 1982 routing slip followed by three pages of almost entirely withheld information, the first two of which concern information which dates to 1962. These three pages bear no exemption claim or

classification markings. The only classification marking is a crossed-out "Confidential," which gives no indication of having been applied by a proper classification authority. Given the passage of nearly 50 years since the 1962 events involved, the extensiveness of the withholding, the lack of authorized classification markings and the failure to assert exemption claims, a question arises as to whether reasonably segregable nonexempt information has been withheld. Id., ¶ 60, Att. 68.

Inconsistent Redactions

Another form of segregability is evinced by inconsistent redactions. The CIA's processing is marked by inconsistencies. Attachment 9 (C00465996) is similar to a document which Hall provided with a previous declaration. It appears to withhold information, including source information, that was not redacted in the original document. June 2, 2008 Revised Hall Declaration, ¶ 19.

Attachments 15 (C00482214) and Attachment 17 (C00482222) both relate to POWs working on road construction. While Attachment 15 refers to the location of the work crew, Attachment 17 inconsistently redacts it. 2011 Hall Decl., ¶ 15, Atts. 15, 17.

C00482286 is a report on a Detention Center which reports on imagery of the number "52" appearing on the ground at this site. While releasing that number, the document appears to delete either that number or

another number also appearing at the site. This is inconsistent. Id., ¶ 17, Att. 19.

In Camera Inspection

In his Revised Motion for Summary Judgment, Hall sought to have the Court examine a small number of documents in camera. That motion remains pending, and the justification for it has increased given the nature of the CIA's current Vaughn indices. The Court and plaintiff are confronted with a massive, complicated record in this case, including several different massive but unenlightening Vaughn indices. The costs to all concerned are quite large. A relatively small of documents selected by plaintiffs might enable to the Court to cut the heart of some of the major issues presented in a way that would greatly facilitate its resolution.

Many of the documents which have been released in part raise segregability issues. A few examples follow.

Paragraphs 3 and 4 of C00493146 have several lines withheld following "Comment." It seems unlikely that these passages do not include some information that cannot reasonably be expected to disclose protected source and methods.

C00472095 is a 13-page document. Its first two pages delete a substantial passage under the heading "Summary." Almost all of the rest of

the document has been deleted. Since a summary is by nature an extract of a larger body of material, it does not stand to reason that there are no nonsegregable nonexempt portions of the summary when the content of the document has been entirely released. Id., ¶ 11, Att. 13.

III. THE CIA HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF UNDER ITS EXEMPTIONS 1 AND 3 CLAIMS

A. Exemption 1

Under Exemption 1, documents must be properly classified both procedurally and substantively. 5 U.S.C. § 552(b)(a). Executive Order 13256 sets forth detailed requirements as to the classification markings to be applied to classified information by an official possessing original classification authority. See E.O. 13256, § 1.6. The documents released to Hall do not contain the required classification markings of this or any predecessor Executive orders. See 2011 Hall Declaration and the attachments thereto. All that appears on the released documents is a stamp which gives a crossed-out classification level, but there is no indication of who had the authority to place the stamp or when it was put on the document.

Executive Order 13256, §1.5(a), requires that in order for documents to be properly classified procedurally, they must contain certain markings which indicate "in a manner that is immediately apparent," including

> (2) the identity, by name and position, or by personal identifier, of the original classification authority;
>
> (4) declassification instructions which shall indicate one of the following
>
> **(A)** the date or event for declassification, as prescribed in section 1.5(a);
>
> (B) the date that is 10 years from the date of original classification, as prescribed in section 1.5(b);
>
> (C) the date that is up to 25 years from the date of original classification, as prescribed in section 1.5(b); or
>
> (D) in the case of information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source . . ., the marking prescribed in implementing directives issued pursuant to this order[.]

No such markings have been placed on the documents at issue in this case. Such markings are critical to determining whether the CIA has been following the law. They are essential to Hall's ability to determine if and when such classification validly occurred, and how long it is supposed to last.

Given the fact that some of the Vaughn index examples attached to the 2011 Hall Declaration evince signs that information was whited-out

without any exemption be claimed, it is possible that the same has been done with classification markings. If this has been done, there is, of course, no justification for it. The Court of Appeals addressed this issue long ago, stating:

> Although appellant's request for these markings and stamps strikes the CIA as trivial and frivolous . . ., it is quite clear that matters are exempt from disclosure under the FOIA only when one or more of the nine exemptions is applicable. * * * Here, since no exemption has been cited by the CIA, we are compelled to hold that the Agency must release the classification markings and stamps pertaining to the portions of the documents that have been de-classified and released.

Alllen v. Central Intelligence Agency, 636 F.2d 1287, 1289 n.11, (D.C. Cir. 1980).

In light of this, the CIA must restore any classification markings and stamps that have been excised from the released documents. Beyond that, this Court should hold that the CIA has failed to support its Exemption 1 claims and all materials withheld under on the basis of the Exemption 1 claim should be released.

Substantively, E. O. 13256 requires that unauthorized disclosure of the information "reasonably could be expected to cause damage to the national security that the original classification authority is able to identify

or describe." E. O. 13256, § 1.2(d)(3). The CIA fails to meet this standard for several reasons.

First, the CIA's showing of entitlement to Exemption 1 rests upon the declaration of Mary Ellen Cole. Cole's assertion that her statements are based on her personal knowledge is qualified; she only affirms that they are "based upon my personal knowledge and information made available to me in my official capacity." Cole Decl., ¶ 4 (emphasis added). This raises the question of which of her statements are based on personal knowledge and which are based on information provided by others. Did she actually read all these documents herself?

Cole relates at length the mantra routinely espoused by the secrecy priesthood. In terms of the FOIA's goals and objectives, there are several problems with this litany. First, it is highly speculative. Second, it takes extreme positions which are contrary to what the law provides, with the result that any analysis of the classified status of a document which is based on it is too skewered to reliably determine what damage to national defense or foreign policy reasonably may be expected to ensure the disclosure of the information at issue. Third, the deference normally given to agency affidavits in national security cases is not warranted under the circumstances of this case.

The first point is obvious and does not require much elaboration. Cole's declaration is essentially a series of predictions about some damage she says can reasonably be expected to result by disclosure to unspecified hostile entities of information that concerns a long-ago war in distant lands which have not been at war with the United States for more than three decades. These predictions are not reasonably to be expected give these circumstances and others, including the fact that vast disclosures of the kinds of information and sources now sought to be protected have been the subject of vast publicity for decades.

Second, the positions taken by the CIA are at odds with what the law requires. For example, as noted above, even the CIA Information Act, which concerns operational records, the Agency's most sensitive records, provides that they are subject to decennial review to determine whether denial to access is still warranted under classification standards.

With respect to those who serve as sources for the CIA, Cole declares that "the CIA must often depend upon information that can only be gathered from knowledgeable clandestine human intelligence sources under an arrangement of absolute lasting secrecy." Cole Decl., ¶ 22 (emphasis added). But E. O. 13526 explicitly states: "No information may remain classified indefinitely." Id., § 1.5(d)(emphasis added). Yet despite this,

Cole argues for absolute secrecy forever for human intelligence sources. Given that mindset, the classification determinations which have been made in this case are invariably flawed. They are not entitled to the credibility necessary to granting an award of summary judgment.

An agency may meet its summary judgment burden "by filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed; and the court owes substantial weight to detailed agency explanations in the national security context." King v. U.S. Dept. of Justice, 830 F.2d 210, 217 (D.C.Cir.1987)(footnotes omitted).

> However, a district court may award summary judgment to an agency invoking Exemption 1 only if (1) the agency affidavits describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed, and (2) the affidavits are neither controverted by contrary record evidence nor impugned by bad faith on the part of the agency.

Id. (citations omitted).

While an agency's affidavits on national security matters merit a substantial degree of deference, this does not mean that they are entitled to "dispositive weight." As the Court of Appeals noted in Campbell, "deference is not equivalent to acquiescence: the declaration may justify summary judgment only if it is sufficient "to afford the FOIA requester

a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." Campbell, supra, 164 F.3d at 30, citing King, 830 F.2d at 218.

In 1974 Congress amended the FOIA's Exemption 1 to overturn the Supreme Court's decision in EPA v. Mink, 410 U.S. 73 (1973). The amendments to Exemption 1 "reflect legislative intent to authorize the courts to engage in "`a full review of agency action' with respect to information classified under an executive order." Roffman, "Freedom of Information: Judicial Review of Executive Security Classifications," XVIII University of Florida Law Review 551, 554 (1976), citing H.R. Rep. No. 1380, 93d Cong., 2d Sess. (974), reprinted in 5 U.S. Code Cong. & Ad. News at 6273 (1974)("Legislative History"). The House Report recommending passage of the amendments "states that under the (b)(1) exemption. a district court 'may look at the reasonableness and propriety of the determination to classify the records under the terms of the Executive order.'" Id.

While the FOIA places the burden of proof on an agency to sustain its action, 5 U.S.C. § 552(a)(B), it is "silent . . . as to the evidential weight to be accorded executive determinations pursuant to established national defense and foreign relations criteria." Id. at 557. In response to a specific objection by President Ford, the Conference Report which accompanied the amended

Act noted that "Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record." As a result, the conferees stated their expectation that "Federal courts, in making de novo determinations (under the executive order exemption) . . . will accord substantial weight to an agency's affidavait concerning the details of the classified status of the disputed record." Id. a5 558, quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. (1974), Reprinted in Legislative History at 6290.

As Roffman explains in his University of Florida Law Review note:

> This suggestion by the conferees is merely a reminder that those within the executive branch authorized to make security classifications will often be in a better position to evaluate the need for classification than the party seeking disclosure. The conferees have not suggested that the evidence of the party seeking disclosure should be afforded any less "substantial weight." In fact, the legislative history indicates that it was Congress' intent that the evidence of both parties be accorded equal weight, commensurate with the degree of expertise, credibility, and persuasiveness underlying it. More fundamentally, the "substantial weight" suggestion of the conferees should in no way be taken to suggest the imposition of a presumption; Congress in its initial consideration of the
>
> 1974 amendments, specifically rejected a similar presumption Contained in the Senate draft of the bill.

Id. at 558-559 (footnotes omitted).

Here, as noted above, the circumstances suggest that the affidavits

submitted by the CIA lack sufficient credibility to warrant deference. The Cole affidavits are largely speculative. The degree to which they are based on personal knowledge is dubious. They ignore obvious circumstances which must be taken into account in evaluating the expectation of damage to national security, such as age of the documents, lack of any information suggesting that hostile entities are even remotely interested in the records at stake, the lack of classification markings, the withholding of a substantial number of documents in their entirety, the almost invariable application of both Exemption 1 and Exemption 3 to all redactions, and the fact that these records and the events associated with them have been the subject of voluminous disclosures, immense publicity, and congressional hearings.

In Vaughn v. Rose, 484 F.2d 820, 823 (D.C.Cir.1973), the Court of Appeals noted in FOIA cases "the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of concealed information." "Without access to the documents in dispute, the party seeking disclosure is 'comparatively helpless' when attempting to controvert executive characterizations of the information that might well be inaccurate." Rofman at 557, quoting Vaughn at 823.

This anomaly can be rectified either by permitting Hall to take discovery or by in camera inspection or conjoint utilization of both. Hall has

long sought discovery in this case, and while many of his hoped-for witnesses have died. De novo review can also be accomplished through in Camera, perhaps accompanied by a form of discovery.

The CIA invokes Exemption 3 in tandem with Exemption 1 for virtually every document at issue. The primary focus of this exemption claim is 50 U.S.C. § 403(d)(3), which instructs the Director of Central Intelligence to protect against the unauthorized disclosure of intelligence sources and methods.[5] There is doubt that the phrase "intelligence sources and methods was broadly defined in CIA v. Sims, 471 U.S.159 (1985), but that does not mean that it is without limitation. Sims states that "Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information that the Agency needs to perform its statutory duties." Id. at 169-170. Sims also notes, however, that "Congress did not mandate the withholding of information that may reveal the identity of an intelligence source; it made the Director of Central Intelligence responsible only for protecting against unauthorized disclosure." Id. at 180.

[5] The CIA also invokes 50 U.S.C. 403(g) as an Exemption 3 statute. Hall does not challenge the assertion of this claim except to the extent that it applies to deceased officers and employees and those who have been publicly identified as such. He notes that the names of deceased CIA officers and employees appear almost daily in the Washington Post and other newspapers, and that the Court may judicially notice this fact.

Indeed, Sims asserted that "[t]he national interest sometimes makes it advisable,or even imperative, to disclose information that may lead to the identity of intelligence sources." Id.

Ultimately, Sims held that "the Director does not require the Director to disclose the institutional affiliations of the exempt researchers in light of the record which supports the Agency's determination that such disclosure would lead to an unacceptable risk of disclosing the sources' identities." Id. at 181. Here, the circumstances are far different than those presented by Sims. Here, the CIA has presented insufficient evidence of the need to protect the sources and methods at issue and that there is an unacceptable risk of their disclosure.

In Sims, the CIA was seeking to protect the identities of persons who had performed mind-control research as part of the CIA's notorious MKULTRA project. According to Sims, the record shows that "MKULTRA research was related to the Agency's intelligence-gathering function in part because it revealed information about the ability of foreign governments to use drugs and other biological, chemical, or physical agents in warfare or intelligence operations against adversaries." Id. at 173. This is a far cry from the circumstances presented by this case at this point in time.

The sweep of "intelligence sources and methods" is broad, but it needs to be related to a real need to protect such sources and methods, not one that is simply abstract. "One if by land, two if by sea," was a classic intelligence method, but it would be absurd if the CIA were to apply it to conceal British maneuvers in April 1775. Admittedly, the circumstances here are not preposterous, but they do give rise to a legitimate concern that the CIA is abusing the intelligence sources and methods proviso in violations of its FOIA obligations, including the obligation, recently emphasized by the Supreme Court, to construe FOIA exemptions narrowly. "FOIA mandates that an agency disclose records on request, unless they fall within one of nine exemptions. These exemptions are 'explicitly made exclusive,' . . . and must be narrowly construed." Milner v. Dept. of the Navy, 562 U.S. ____ (2011), quoting FBI v. Abrahamson, 456 U.S. 615, 630 (1982). The CIA's construction of the term in this case is anything but narrow.

IV. THE CIA HAS NOT PROVED ITS EXEMPTION 2 CLAIMS

This Court's November 12, 2009 Memorandum & Order rejected The CIA's Exemption 2 claims, stating that "[a]s in other cases requiring an agency to provide more justification for reliance on exemption 2, the CIA

'has failed even to suggest any . . . reason or need to keep secret the administrative routing information and internal data.'" Hall, supra, 688 F.Supp.2d at 190, citing U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136, 142 n. 3 (1989). In light of this, this Court directed that the CIA's supplemental filing "shall include further detail regarding its invocation of exemption 2 or the CIA shall disclose . . . information previously withheld pursuant to this exemption." Id.

The CIA has not done this. With respect to two of its November 2005 withholdings, C00465476 and C00520816, Cole describes the Exemption 2 withholdings as "consist[ing] of internal organizational data, administrative codes, and routing information, including the names of Agency employees." Def's Suppl. Resp. at 33, citing Cole Decl., ¶ 85. With respect to another category, which it describes as the "non-Hall I Item 3 documents and . . . the Item 6 & Item 8 documents," the CIA says that these 25 documents "consist of CIA file numbers, document numbers, distribution and routing codes, handling information, filing identifiers, original markings, CIA telephone numbers, organizational abbreviations, and various other administrative codes." Def's Suppl. Resp. at 37-38, citing Cole Decl., ¶ 100. With respect to the category of two documents, Cole makes the unsupported conclusory assertion that "this information is not subject to any genuine or significant

public interest." Cole Decl., ¶ 86. With respect to the second category of 25 documents, Cole makes the conclusory statement that "such internal information would not meaningfully contribute to the public understanding of the mission or operations of the government. . . ." Id.

In view of the CIA's failure to comply with this Court's order, there already is sufficient ground to grant summary judgment to Hall on the Exemption 2 claim. However, the basis for doing so has been further strengthened by the Supreme Court's decision in Milner v. Department of Navy, 562 U.S. _____ (2011). Which holds that "Exemption 2, consistent with the plain meaning of the term 'personnel rules and practices,' encompasses only records relating to issues of employee relations and human resources." Slip op. at 19. It emphatically rejects the "High 2" branch of Exemption 2 which previously had been endorsed by the D.C. Circuit, asserting that "[o]ur construction of the statutory language simply makes clear that Low 2 is all of 2 (and that High 2 is not 2 at all. . . ."). Slip. Op. at 8.

The information to which the CIA has applied Exemption 2 does not meet the test of "encompass[ing] only records relating to issues of employment relations and human resources."

IV. THE CIA HAS FAILED TO JUSTIFY ITS EXEMPTION 7 CLAMS

Concerned in particular about the CIA's Exemption 5 claims involving the deliberative process privilege, Hall's counsel and AIM's counsel conducted a search to find the Vaughn indices for the seven documents cited in the Cole Decl., ¶ 103. Neither was able to locate the referenced numbers in any of the Vaughn indices searched. The numbers given differ from those in the indices which counsel are familiar with, which have either a MORI or a C00 preceding the number. Here, Cole has just given numbers without any prefixes.

In light of this, Hall will defer briefing this issue until such time as identifiable Vaughn indices pertaining to them have been provided.

V. THE CIA HAS FAILED TO SUSTAIN ITS BURDEN OF SHOWING ENTITLEMENT TO EXEMPTION 6

In advancing Exemption 6 claims, Cole cites a number of documents with Exemption 6 claims without any indication that this list is less than exhaustive. See Def's Suppl. Resp. at 11, 40-41. It is not. And as Hall's 2011 declaration indicates, there is both a minimal privacy interest and a substantial public interest in the kinds of withheld Exemption material he is interested in.

C00942526 is a letter to the Chief Counsel of the Senate Select Committee from the CIA's Deputy Director for Senate Affairs, whose name is redacted, as are the names of a couple of Air America pilots whose plane crashed in March 1977. 2011 Hall Decl., ¶ 40, Att. 44. Cole declares with respect to some Item 4 withholdings that: "[u]nlike information concerning decisions made or actions taken by CIA employees, the data withheld pursuant to Exemption 6 do not shed light upon the operations or activities of the United States Government." Def's Suppl. Resp. at 11, citing Cole Decl., ¶ 64. But the CIA's liaison with the Senate Select Committee is obviously involved in government operations. The withheld names of the two Air America pilots were working for a CIA proprietary, which makes their identities of great public interest, and the CIA's invocation of Exemption 3 to withhold their names makes clear that they were, quite literally, involved in CIA operations.

C00472096 is a document which invokes Exemption 6 to redact the name of a photographer who took crash scene photographs. Those who take crash scene photographs are normally identified in news stories. Rather than shielding their identities from the public, they are more likely to be interested in selling copyrighted photographs for publication. In case the photographer is working for or assisting the government, the public interest

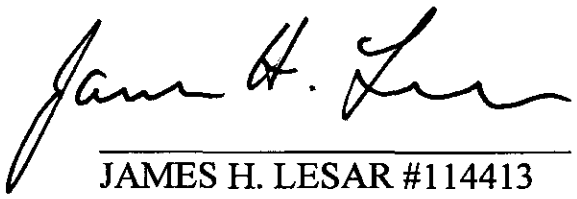
is again quite substantial. Whether or not this is the case, the fact that the name of the photographer is in a government document regarding the crash shows how the government functions. Id., ¶ 42, Att. 46.

C00465780 is a May 4, 1971 CIA Intelligence Information Report. It invokes Exemption 6 for a list of 58 POWs and their "CIA accession numbers." Id., ¶ 46, Att. 50. The CIA had frequently, although inconsistently, redacted the names of POWs and MIAs in the documents it has released. The surrounding circumstances, not taken into account by the CIA, show both that the privacy interest is minimal or nonexistent and the public interest in disclosure substantial. "First, the names of POWs are commonly publicized in newspapers. If not published in prominent national papers, they will be published in their local hometown or bases newspapers." Id., ¶ 46. See, for example, Attachment 62 (C00112965), a 1967 newspaper clipping which discloses the names of 24 officers who were POWs captured in Laos. Second, the Government maintains that there are no longer any living POWs or MIAs from the Vietnam era. The fact of death greatly diminishes any privacy invasion. Thus, newspapers frequently publish the names and photographs of all soldiers who have died in current wars, and the names of more than 50,000 who died in connection with the Vietnam War have been etched in granite at the Vietnam War Memorial in D.C.

CONCLUSION

For the reasons set forth above, this Court should grant summary judgment to plaintiffs. Alternatively, the Court should deny defendant's motion for summary judgment, permit plaintiffs to engage in limited discovery, and examine a certain number of documents in camera.

Respectfully submitted,



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