

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF ACCURACY IN MEDIA, INC.'S:
(1) REPLY TO DEFENDANT'S OPPOSITION
MOTION FOR STATUTORY FEE WAIVER; &
(2) OPPOSITION TO MOTION TO DISMISS

Plaintiff Accuracy in Media, Inc., respectfully submits that it is entitled to a statutory fee waiver under 5 U.S.C. (a)(4)(A)(ii)(II), and that plaintiffs' complaint cannot be dismissed under Rule 12(b)(1) or Rule 12(b)(6) of the Federal Rule of Civil Procedure.

Memorandum of Points & Authorities

Defendant argues that Accuracy in Media, Inc. (AIM), does not qualify as a "representative of the news media" under the FOIA.

As grounds for dismissal, the government asserts three grounds under Rule 12 (b). The CIA contends that plaintiffs' cause fails for their failure to exhaust administrative remedies. Second, the CIA simply denies that AIM is a FOIA requester. Third, AIM is collaterally estopped from litigating the issue of whether it is a member of the news media, by a prior action between Roger Hall and the CIA.

REPLY TO CIA'S OPPOSITION FOR STATUTORY FEE WAIVER

1. Representative of the news media

As to CIA's claim that does not qualify as a "representative of the news media"¹ under the FOIA, the CIA's only recourse here is summary judgment. Under Rule 12(b) of the Federal Rule of Civil Procedure, all allegations must be construed favorably to the plaintiff,² and news media status is pled.³ The CIA invites the Court to go outside the pleadings by its assertion that AIM's website does not report the MIA POW issue.⁴ Yet, one need only click on "special reports" to view the docket sheet in this case.⁵ The CIA cites its FOIA regulations for members of the media,⁶ under which AIM qualifies – the CIA does not relate its theory of how AIM does not qualify, except to observe that Reed Irvine, the former Chairman of AIM, was a media critic (MTD p. 12).

¹ 5 U.S.C. (a)(4)(A)(ii)(II): "**fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media;**"

² See Fludd v. United States Secret Service, 102 F.R.D. 803, (D.D.C. 1984), "On a motion to dismiss for failure to state a claim on which relief may be granted, the pleadings must be construed favorably to the plaintiff. See also Schueur v. Rhodes, 416 U.S. 232, 236 (1974). Furthermore, "[I]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that plaintiff can prove no set of facts in support of his claim...'"

³ Complaint ¶¶ 11-13.

⁴ CIA Motion to Dismiss AIM and Reply to Fee Waiver ("MTD") at 12: "And AIM's 'interest in the POW / MIA issue' relating to the time period covered by information sought in the instant request, and as a disseminator of such government information, is belied by a simple search for 'POW / MIA' through its website."

⁵ http://www.aim.org/special_report_archive

⁶ MTD at 12-13.

But Mr. Irvine is not a party to this suit. Moreover, CIA has no basis, and cites no authority, which could exclude a news critic from being "representative of the news media." The CIA seems to assert that news media representatives, who can be labeled as being a news critic, do not qualify as a media members. Under the CIA's reasoning, the *Washington Post's* Howard Kurtz is not a member of the news media.

OPPOSITION TO CIA MOTION TO DISMISS

2. Exhaustion of administrative remedies

Defendant filed its first Motion to Dismiss against Roger Hall & Studies Solutions, Inc., but, curiously, not against AIM. In it, the CIA asserted the same exhaustion of administrative remedies defense.

But, as plaintiff's Hall & Studies Solutions, Inc., make clear in their opposition to the CIA's motion against them (Docket # 13 p. 2-3), the plaintiffs constructively exhausted their administrative remedies before this suit was filed, and thus, the defense is simply unavailable to defendant. This Court does have subject matter jurisdiction here. The CIA ignores this reality, again.

3. AIM is a FOIA requester

The CIA argues that because counsel for plaintiff Hall signed (& initialed) AIM's counsel's name, AIM cannot be a plaintiff in this case (MTD p. 4). This reasoning is in error. Mr. Lesar, counsel for Mr. Hall, signed the name of Mr. Joe Jablonski, AIM's in-house counsel at the time. The FOIA request clearly identifies AIM as a requestor and Mr. Jablonski as AIM's counsel. Mr. Lesar clearly had both apparent and actual authority to act as agent in signing Mr. Jablonski's name.

4. Collateral estoppel

The CIA asserts that AIM is collaterally estopped from litigating the issue of whether it is a member of the news media, by a prior action between Roger Hall and the CIA (MTD p. 6-10).

A fundamental tenant of collateral estoppel is that the issue to be precluded must have been necessary to a final determination of the prior action, on the merits. Even if there was a final determination on the issue of whether or not Roger Hall is a member of the news media, that adjudication has nothing to do with whether AIM qualifies as a member of the news media under the FOIA.

Conclusion

Each of the CIA's four arguments clearly lacks merit. Plainly, plaintiff adequately pled news media status and AIM cannot be collaterally estopped from claiming this status by a prior lawsuit to which it was not a party. AIM exhausted its administrative remedies, and the FOIA request was signed by AIM's duly authorized representative.

Defendant cannot prevail under Rule 12(b)(1) of the Federal Rules of Civil Procedure, lack of subject matter jurisdiction, nor under Rule 12(b)(6), failure to state a claim upon which relief can be granted.

Respectfully submitted,

/s/

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