UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 04-814 (RCL)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF ACCURACY IN MEDIA'S MEMORANDUM IN REPLY TO CIA OPPOSITION TO MOTION FOR INTERIM AWARD OF ATTORNEY'S FEES

Plaintiff Accuracy in Media, Inc. ("AIM") submits this memorandum in reply to the CIA's Opposition ("Opp.") to plaintiffs' motions for an award for an interim award of attorney fees.

The CIA concedes that plaintiffs are "eligible" for an award of fees, having "substantially prevailed" on one or more claims; that plaintiffs are "entitled to" an award of fees; and that circumstances warrant an interim award. Defendant disputes only the amount of fees that should be separately paid to AIM and to Hall. The CIA seeks a reduction in the fees claimed, by 80 percent or more.

But the CIA's arguments seriously misconstrue the record in this case, and its analysis the value of the services is deeply flawed.

Defendant posits that the greater part of the services performed were undertaken in support of issues on which the CIA's legal position remained unchanged, or were otherwise unrelated to issues on which plaintiffs did prevail. And the CIA avers that its positions were reasonable, mostly because the requests were burdensome.

Further, according to defendant, plaintiffs have made no effort to segregate time spent on unsuccessful claims, plaintiffs' billing rates are said to be unjustified, and the use of two counsel is alleged to have resulted in duplication of efforts in pleadings, as well as expenditure of otherwise unnecessary time spent communicating with one another.

Defendant opines that the amount claimed is largely due to the length of the litigation, which, according to the CIA, was mostly the result of plaintiffs' dilatory conduct. And the CIA opines that AIM is not interested in the records, but, rather, was brought aboard simply due to its entitlement to a news media fee waiver under the FOIA.

Moreover, defendant posits, the action served the public interest only marginally, because government-initiated programs had already released most of the information sought, and, thus, the results obtained by the lawsuit were negligible—even while it agrees that plaintiffs have demonstrated that the public interest warrants a fee award.

1. Government-initiated Releases, AIM's Interest in the Records

Defendant avers that "[b]efore this lawsuit was filed, the government initiated several programs to gather and release information regarding POW/MIAs," including the Senate Select "Committee on POW/MIA affairs, which issued a lengthy report after conducting an extensive investigation," and the 1992 Executive Order 12,812, ordering "all executive branch agencies to review, declassify to the extent possible, and release 'all documents, files, and other materials pertaining to American POWs and MIAs lost in Southeast Asia.'" Opp. at 2-3. This argument fails.

First, the Report of the Select Committee on POW/MIA Affairs, S. Rep. 103-1, does not help CIA. The Vice-Chairman of that Select Committee, Senator Bob Smith (R-NH), served as Special Contributor to plaintiff AIM from January of 2011 into 2012. His piece,

"*CIA Continues to Hide Evidence on Vietnam Era MIAs*," published on AIM's website in November of 2011, would appear to undermine the CIA's argument. "Senator Bob," as he is known, wrote:

> The [1973 Paris Peace Accords] agreement did not, however, end the war and restore the peace for the hundreds of POWs and MIAs (Missing in Action) who were not returned from the war… Soon thereafter, 527 men returned alive from the war to a well-deserved heroes' welcome ***
>
> One of the most intriguing of these unreleased documents is the one [reflecting]... that North Vietnam was holding 1205 prisoners of war. This, of course, is critical since only a few months later the Vietnamese released less than half of that number (527).*** The investigators on the Senate Select Committee found literally thousands of live-sighting reports over the years from the end of the war into the 1990s. There was also ample evidence of pilot-identifier codes on the ground and seen from the air. ***
>
> Let's state the facts as honestly as possible: the American government wrote off all pending POW/MIA cases at war's end to close the books on this ugly foreign policy disaster. And close them they did! After 40 years of FOIA requests, emotional appeals from family members, senators and congressmen, and House and Senate Committee investigations, the intelligence agencies still keep numerous documents classified under the guise of national security.
>
> I wrote legislation to create the Senate Select Committee on POWs and MIAs in the early 1990s to attempt to get the documents and the truth released to the public. Despite the release of thousands of documents and the testimony of dozens of witnesses, I could not complete the job. Senator John Kerry, the chairman of the Select Committee, and Senator John McCain were more interested in establishing diplomatic relations and putting the war behind them, than they were about finding the truth about our missing. I fought them constantly to the point of exhaustion. It was a very sad chapter in American history.
>
> Two former Secretaries of Defense testified under oath before the Select Committee, that men were left behind. Schlesinger, when asked directly if we left men, said, "I can come to no other conclusion." Secretary Laird went into even more detail saying that the Pentagon had "solid information, such as letters or direct contacts, with about 20 airmen who survived in Laos after their planes were shot down."… I personally have seen hundreds of classified documents that could and should be released as there is no national security risk. What is really at risk are the reputations and careers of the intelligence

> officials who participated in and perpetrated this sorry chapter in American history.

The CIA's argument that this matter was mooted by the government's "programs to gather and release information regarding POW/MIA," is, of course, belied by the record of significant productions by the CIA in this case.

The CIA complains that "it appears that AIM was added as a party in order to strengthen the plaintiffs' argument for a waiver of fees." *Id*. at 16. Since AIM first wrote about the POW/MIA issue, in 1993, it has published over a dozen pieces on the subject. Indeed, AIM's commitment to publicizing the truth of the matter would appear to be a factor in former Vice-Chairman of the Select Committee Senator Bob Smith's decision to join AIM as a "Special Contributor." AIM has, and will continue, to publish the records produced on its website, as a public service. *See* http://www.aim.org/special-report/records-produced-by-the-cia/. Defendant's view that "taxpayers should not have to bear the cost of that strategic choice" for AIM to seek disclosure (*id*. at 16) reflects a less than objective view of the FOIA's intent.

2. Public Benefit

The CIA observed that, between the period between the Court's 2009 opinion, but before its August 2012 opinion, the CIA released "over 400 documents" in response to Item 3 (characterized as "a handful" *id*. at 9), "over 1,000 documents" in response to Item 4, "over 200 documents" in response to Item 7, and "22 documents" after following up with other agencies. Opp. at 6-7. Additionally, defendant observes, "[s]ince August 2012, the CIA has searched for, processed, and produced additional documents." *Id*.

According to defendant, "although those three searches [for Items 4, 5, and 7] led to the production of a large volume of documents, the great majority of the documents

produced are either publicly available at the National Archives or of questionable public value." Opp. at 9. "Indeed," posits the CIA, "the whole point of plaintiffs' Item 4 request—which led to the production of the vast majority of the documents in this case—was to obtain documents that had already been turned over to the National Archives and *temporarily* returned to the CIA for declassification." *Id*. at 10 (emphasis supplied). In support of this proposition, the CIA recites that some documents produced in response to Item 4 have "numbers at the bottom… indicat[ing that] that they were part of a National Archives declassification project" (*id*. n. 2 at 10), and cites a 1999 letter reciting that the "CIA was conducting a '[l]abor intensive' declassification review of 'more than 40,000 documents (22 cartons)' from the records of the Senate Select Committee on POW/MIA Affairs." *Id*. at 10.

In the CIA's view, because these records had been the subject of "government initiated… programs to gather and release information" (*id*. at 2), one of which began "nearly four years before plaintiffs' FOIA request" (*id*. at 10), "the release of otherwise publicly available documents is not the sort of victory that can justify a large fee award." *Id*. at 11. The CIA had already begun its "declassification review" in 1999, years before plaintiffs even filed suit, and, thus, defendant asserts, the public interest in these records is marginal. Plaintiffs draw different inferences.

Had the CIA in good faith begun its declassification review in 1999, it would not have needed years to process the records here, and would not have required an order to do so by this Court, entered over a decade after the CIA claims to have begun the process. Had the CIA complied with Congressional and DOD initiated declassification efforts, its "limited success" argument might have some validity. But the CIA's recalcitrance in disclosing

records on the POW/MIA issue pervades this case, and, in fact, is a continuation of its recalcitrance since at least the "early 1990s," as recounted by Senator Bob Smith. *See infra*, "*CIA Continues to Hide Evidence on Vietnam Era MIAs.*"

Government-initiated programs "to gather and release information regarding POW/MIAs" (*id*. at 2) does not detract from the public interest in disclosure. Quite the opposite—the probe conducted by the Senate Select Committee on POW/MIA Affairs, and Executive Order 12,812, mandating review and declassification of records of American POWs and MIAs lost in Southeast Asia—is a testament to enormous public interest in disclosure.

Omitted from the CIA's recitation of government-initiated disclosure programs is President Clinton's June 10, 1993, Presidential Directive No. 8, mandating that the executive branch was to have completed their releases under E.O. 12,812, over two decades ago:

> 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.
> (Emphasis supplied)

Both the timing and circumstances of the CIA's release of documents in this case indicate that this FOIA lawsuit was the root of what actually triggered the documents' release, not government-initiated release programs. Plaintiffs sought, and received, the documents for public purposes, "the quintessential requestor of government information envisioned by FOIA." *Davy,* 550 F.3d at 1157.

3. Fees Sought Correspond to Successful Claims, Changed Legal Positions

Defendant argues that plaintiffs may not recover fees for work done on only the unsuccessful claims, unrelated to successful ones. According to the CIA, the plaintiffs achieved only limited success, and its fees must be reduced accordingly. In reality, however, this Court's orders reflect that the CIA changed its legal positions regarding most of the disputes between the parties, contrary to defendant's view that "the plaintiffs ultimately lost on most issues." *Id*. at 6.

The Court's November 2009 opinion, *Hall v. CIA*, 668 F. Supp. 2d 172 (D.D.C. 2009), reflects the CIA's changed legal positions regarding collateral estoppel and *res judicata* issues, the contents of the administrative record and resultant rights to news media and public interest fee waivers, the CIA's refusal to search for five of plaintiffs' eight items, its responsibly regarding referrals, and its defenses of vagueness, burdensomeness, privacy, age of records, and segregability. The Court ordered defendant to undertake additional searches, to supplement its *Vaughn* indices, and disallowed or required further information to uphold withholdings under FOIA Exemptions 1, 2, 3, 5, and 6.

The CIA "ultimately" won on issues only after it demonstrated that it had followed this Court's remedial orders. This Court's August 2012 opinion itemizes thirteen instances of the CIA's changed legal positon in that 2009 opinion. *Hall v. CIA*, 881 F. Supp. 2d 38 (D.D.C. 2012) at 51-52:

> Judge Kennedy's 2009 Order held that the CIA must complete the following to be awarded summary judgment: (1) provide plaintiffs with all non-exempt records created by the CIA which were provided to the Senate Select Committee, *id*. at 179–80; (2) search for the approximately 1,700 names in the Item 5 request and turn over all non-exempt documents, or explain why it cannot complete the search without additional biographical information, *id*. at 180–81; (3) search its system for responsive documents relating to

> searches recently conducted for other federal agencies, as requested in Item 7, or explain to the Court why it cannot do so, *id*. at 181; (4) take affirmative steps to ensure that its referrals and coordination documents are being processed by the other agencies, *id*. at 182; (5) provide supplemental declarations describing its search methods, including terms, databases, and other relevant information that will allow the Court to evaluate whether the searches were adequate, *id*. at 184; (6) either search other divisions for the requested records, in relation to Item 6, or explain to the Court why those divisions are unlikely to have responsive documents, *id*. at 186; (7) submit an adequate *Vaughn* index for the withholdings it disclosed in November 2005; *id*. at 187, (8) show an exemption for the withheld documents claimed under exception 1 that are under 25 years old, *id*. at 188–89; (9) provide further detail to the Court regarding the documents withheld under exception 2, or provide the documents to Hall, *id*. at 190; (10) provide Hall with the seven June 2004 documents claimed exempt by the CIA under deliberative process, or provide the Court with more details on the reasons for non-disclosure, *id*. at 192; (11) disclose records withheld pursuant to the attorney-client privilege, or indicate why withholding is proper as to each document for which it relies on the privilege; *id*., (12) disclose the information withheld under exception 6, or provide the Court with more detail on why the exception applies; *id*. at 193; and (13) specify in detail which portions of the documents are disclosable and which are allegedly exempt in regard to the segregability of withheld documents, *id* at 194.

This is not limited success.

After almost eight years, the CIA finally began its search for the 1,711 names on the PNOK list, only after the Court rejected its final response—it would be too burdensome. The Court agreed with plaintiffs (*id*. at 53); one of several instances of the Court's changing the CIA's legal position in the Court's August 2012 opinion. *See* AIM's Motion for an Award of Fees, ECF No. 224 at 3-10, 14-16.

Defendant's declaration that the fee award should be reduced due to "limited success" is patently incorrect. Its position that "two aspects of its handling of this case may not meet that test of reasonableness in hindsight" (*id*. at 14) is myopic. Both the timing and circumstances of the CIA's release of over 4,000 documents in this case indicate that this FOIA lawsuit was the root of what actually triggered the documents' release.

In *Hensley v. Eckerhart,* 461 U.S. 424, 431 (1983), the Supreme Court "recognized the relevance of the results obtained to the amount of a fee award" under 42 U.S.C. § 1988. The "lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id*. at 435. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole" (*id*. at 440), and "[a] plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Id*.

The CIA's argument for reduction in the lodestar based on plaintiffs' having prevailed on some claims but not others, and for time spent litigating claims unrelated to the successful claims, is undermined by the record: Plaintiffs substantially prevailed on most issues.

"Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley,* 461 U.S. at 434, 103 S.Ct. 1933. "The applicant should exercise 'billing judgment' with respect to hours worked ..." *Id.* at 437, 103 S.Ct. 1933. Here, AIM has done just that.

Counsel's declaration accompanying his motion, ECF No. 224-1, reflects several instances of billing judgment. The undersigned recites that he has "reduced the time charged preparing various pleadings in the case, where the amount of time spent was under-productive, or when the matter at hand seemed to take too long, in my view, to justify the total amount recorded." *Id*. ¶ 5. AIM seeks no "compensation for the period of

May 19, 2004, when this action was first filed, through April 13, 2005, when Judge Kennedy denied AIM's motion to be treated as a 'representative of the news media.'" AIM has submitted no "time associated with any of plaintiffs' motions for enlargement of time," or in Hall's motions from May of 2006 through August of 2008, which, according to the CIA, was "laden with plaintiffs' unsuccessful motions" including for "discovery and *in camera* inspection." *Id*. at 6-7.

Defendant's observation that "[t]he plaintiffs have made no effort to segregate the time they spent litigating the claims on which they prevailed from time spent on other issues" (*id.* at 19) is plainly incorrect. Its argument that "the Court has rejected many of the plaintiffs' efforts to litigate ancillary matters" (Opp. at 8), even if it were accurate, is not applicable to AIM.

In this case, the CIA observes that it was only the "arguments [made] at the summary judgment stage led to the production of documents" (Opp. at 8). But there is virtually no time submitted by AIM, and, indeed, all plaintiffs, which was not spent in furtherance of movants' positions on Summary Judgment—and the Court vindicated most of plaintiffs' positions.

4. Minimal Duplicative Time

A major theme advanced by defendant is that counsel "largely duplicated one another's efforts," and, thus, they seek an "award[] of double fees." *Id*. at 15. Defendant's view is that the two counsel "fil[ed] virtually identical motions" (*id*.), and "duplicated each other's efforts throughout this case." *Id*. Defendant cites five examples. But its argument is not well-founded. Even if these submissions were "identical," which they were not, the

instances of duplication entailed summarizing co-plaintiffs' positions, consumed little time, and made the briefs more cohesive.

Defendant's argument hinges on the existence of compensation sought for time spent by two lawyers, working independently, performing the same tasks. That circumstance is quite limited here. While some duplication of time was necessary, such as review of this Court's orders and defendants' motions and accompanying submissions, counsel have made a concerted effort not to duplicate efforts, and the parties' pleadings largely reflect different approaches.

Defendant refers, only generally, to plaintiffs' pleadings, in support of its theory of overlapping work. But a comparison of plaintiffs' submissions in the second round of dispositive motions (AIM seeks no compensation for the first), ECF Nos. 114 (AIM) and 117 (Hall), reflects independent, divergent, approaches, and arguments. In this round of briefing, AIM pled that it was "incorporate[ing] the Points and Authorities submitted by co-plaintiffs Roger Hall and Studies Solutions Results, Inc., in support of their dispositive motions, and the affidavits and exhibits thereto, as well as co-plaintiffs' prayers for leave to take discovery and for *in camera* inspections." ECF 114 at 1-2.

Two pages of AIM's dispositive motion (*id*. at 24-25) summarize 11 pages of Hall's motion (ECF No. 117 at 6-17), which Hall had proffered as "some examples of operations, events, and activities which raise search issues," and AIM had advanced to show that the "Affidavits of Roger Hall contain numerous examples of operations, events and activities which surely generated relevant records that have not been provided." ECF No. 114 at 24.

In these dispositive motions, there are two instances of nearly "identical" language—three-and-a-half pages of AIM's "Exemptions" section (ECF No. 114 at 13-17),

which was excerpted from Hall's arguments (ECF 117 at 29-36), and Hall's recitation of information appearing in the primary next-of-kin releases (ECF No. 117 at 37), taken from AIM's work-product (ECF No. 114 at 10). AIM's 23-page *Statement of Material Fact Not in Genuine Dispute* cites 88 uncontested facts, while Halls' corresponding five-page Statement cites 13 uncontested matters. A review of the arguments appearing in plaintiffs' Reply memoranda (ECF Nos. 135 and 136) also reveals that the parties' arguments, and approaches, were, for the most part, disparate.

To the extent that plaintiffs' motions are duplicative, this duplication is the result of one counsel's efforts, not of both. AIM's February 9, 2015 motion for an attorney fee award (ECF No. 124), for example, is largely taken from AIM's October 20, 2015 submission to the CIA seeking informal resolution of the fee matter. Counsel had collaborated on that effort, submitted largely duplicative demand letters, and, so, much of their corresponding pleadings contain the same language. The existence of the same or similar language in pleadings reveals little, if anything, about duplication of time.

Over the course of this litigation, a number of AIM's arguments were made by incorporating by reference, or summarizing, arguments advanced by Hall in his dispositive motions. In this pleading too AIM has summarized, and incorporated, arguments and authorities submitted by Hall in support of his corresponding reply memorandum.

This circumstance sheds no light on the extent to which repetition in pleadings reflect duplication of time spent in drafting these pleadings. One co-plaintiff including another's arguments are simple matters, requires little time, and here, the total time for which compensation is sought is judicious. Counsel could not have adequately represented AIM's interest by spending less than 259 hours over a ten year period—an average of 26

hours per year. *See* Clarke Decl., ECF No. 223-1 at ¶ 6. In the absence of the collaboration in pleadings, AIM's time would have been comparable to Hall's, not one third of it. Plaintiffs do not seek an "award of double fees"(Opp. at 15).

In any event, the CIA cites no specifics. The court in *Rosenfeld v. U.S. Dep't of Justice*, 903 F.Supp.2d 859, 879 (E.D. Cal., 2012) reduced a multiple counsel fee award for fees associated with only the "fees on fees" litigation, reducing these items by 30%, because plaintiff was seeking fees in two overlapping FOIA actions. The court declined further reductions for duplicative work, under the same circumstances as here: Defendant's allegations were "general," and "fail[ed] to quantify how much duplicative time" had been submitted, at 880:

> Regarding the inclusion of duplicative or unnecessary billed time, the FBI advances only general allegations… While it is not uncommon to have co-counsel in litigation, and fees are commonly awarded to multiple attorneys, counsel seeking fee awards bear the risk that the lodestar will be subject to scrutiny and possible reduction due to unreasonable inefficiencies and duplicative efforts engendered by multiple counsel… There is no indication beyond the FBI's general allegations that the work of Plaintiff's attorneys was in fact duplicative. Furthermore, Defendant fails to quantify how much duplicative time has been submitted in Plaintiff's time records.

"Not surprisingly," defendant remarks, "the billing records disclosed with those fee motions reveal, throughout the case, plaintiffs' counsel have dedicated many hours to conversing with one another by email and telephone." *Id*. Defendant qualifies this argument by observing that it "does not mean to suggest that FOIA precludes any possibility of attorneys cooperating on a representation, as commonly occurs with attorneys at the same firm. Instead, the government objects to multiple plaintiffs, represented by multiple firms, litigating identical FOIA requests by filing virtually identical

motions throughout a case and then independently seeking attorney's fees." *Id*. This is a tortured view. The fact that counsel are not "at the same firm" is meaningless.

Here, counsels' communications was infrequent. AIM seeks compensation for two telephone reviews with Hall's counsel in 2005, whereas, for the same period, Hall's counsel billed for one such call. In a decade, AIM seeks compensation for a total of 49 calls with Hall's counsel, while Hall's counsel seeks compensation for 59. That is an average of five to six telephone communications a year, a number of which were for six to 12 minutes. The frequency and duration of counsels' communications with one another was eminently reasonable, and necessary. Many of these communications resulted in the absence of the very duplicative time that the CIA alleges.

This matter is one of four FOIA lawsuits prosecuted by the undersigned on AIM's behalf. The fact that plaintiffs' counsel represent two different parties means that each counsel must represent the perspective of the party he represents independently, thus making some degree of overlap inevitable. Defendant's view is that separate parties are not entitled to separate representation.

This view would appear inconsistent with the CIA's complaint in 2004 that AIM had not "pursued this litigation as an independent party" (ECF No. 16 at 8), which the CIA had advanced in support of one of its *collateral estoppel* arguments[1] that the Court rejected.

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[1] *See* CIA Opposition to AIM's Motion for Fee Waivers, ECF No. 16 at 9:

> What is beyond dispute is that AIM is a stalking horse surrogate for Roger Hall, the real party in interest. AIM is in constructive privity with Roger Hall and should be deemed to be in privity with him in this motion and civil action. To hold otherwise would allow Roger Hall and other like-minded plaintiffs to circumvent the FOIA process, FOIA fee waiver scheme, and the Court's prior decisions, merely by associating an additional requestor/plaintiff in a repetitive request/civil action.

5. Reasonable Hourly Rate, Reasonable Lodestar Amount

Plaintiffs believe they have a strong case that the *Salazar* Matrix is the more appropriate guide for "reasonable attorney fees" in the Washington, DC, market. But their need for prompt payment of interim fees takes precedent. They agree to payment at the rate specified in the United States Attorneys' Office *Laffey* Matrix, and suggest an upward adjustments for delay and obdurate behavior.

"[A]an enhancement for delay in payment is, where appropriate, part of a reasonable attorney's fee." *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989). "[P]ayment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable." *Copeland v. Marshall*, 641 F.2d 880, 893 (DC Cir. 1980)(*en banc).*

In this case, plaintiffs suggest that a "reasonable fee" adjustment would be accomplished by applying the current USAO *Laffey* rate to the total hours claimed. AIM's counsel seeks compensation for 259 hours of services. Using the current USAO hourly rate $520, the total amount sought is $134,680.

As Hall's counsel painstakingly demonstrated in his reply memorandum to the CIA's Opposition, defendant's argument that plaintiffs seek "fees many times higher than any awarded in recent years in cases where plaintiffs achieved far greater degrees of success" (Opp. at 13), is undermined by a review of the cases it cites, as well as by other authority in this Circuit.

As the undersigned has observed, he could not have adequately represented AIM's interest by spending less than 259 hours over a ten year period.

6. Obdurate Behavior, Length of Litigation

Just as it did in its pleadings, the CIA cites the Court's April 13, 2005 Order for the proposition that "the court had ruled that the plaintiffs were not entitled to a fee waiver," but that, later, "the CIA exercised its discretion to waive fees anyway, in an effort to move the litigation along." Opp. at 15. In fact, after the entry of this Court's 2005 order holding that AIM's administrative record was insufficient to prove its entitlement to fee waivers, AIM sought to supplement that record—whereupon the CIA wrongfully sought to prevent AIM from doing so. *See e.g.*, plaintiff's Reply, ECF No. 135 at 3:

> The CIA's October 30, 2006 Koch Decl. relies on the Court's April 13, 2005 Memorandum Order (Docket # 30) in refusing to search for records absent payment of search fees, notwithstanding the new administrative record in this case.
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> The CIA initially attempted to limit the administrative record by conditioning acceptance of AIM's April 22 letter on AIM's agreement to be bound to pay an unspecified amount in search fees. (SMF 7) It declined to conduct any search for records responsive to Items 5, 6, or 7 absent, *inter alia*, plaintiffs' production of a $50,000 deposit and liability for another half million dollars (SMF 38, 41, 45), but, apparently, at the last minute, waived search fees. Defendant's history of using the fee provisions of the FOIA to refuse searches pervades this action.

See also AIM's Statement of Material Fact, ECF 114 ¶ 5, recounting that AIM had written to the CIA, "in light of Judge Kennedy's April 13, 2005, memorandum opinion," but that the CIA refused to accept plaintiff's submission and advised AIM that it had "no right of administrative appeal." *Id*. ¶ 14. But plaintiff appealed anyway, and that record entitled it to news media status, as the CIA belatedly conceded. Defendant's attempt to limit the administrative record had no colorable basis in law, but was merely an unreasonable, and obdurate, attempt to frustrate the requester.

The same can be said of the CIA's argument, advanced in its June 2004 dispositive motion (ECF No. 6 at 1), that AIM was not even a proper party to the action. The Court also rejected that contention.[2]

The Court declined to hold that the CIA's conduct rose to the level of bad faith, but did recount that the CIA had denied plaintiffs "news media" fee waivers (*Hall v. CIA*, 668 F. Supp. 2d 172, 177 (D.D.C. 2009)), that the CIA had requested a $50,000 deposit and acceptance of liability for over $600,000 (*id.*), and that, here too, defendant had changed its legal position on news media fee waivers review fees (*id.* at 195), and duplication fees. *Id.* at 196.

Where "developments made it apparent that the judge was about to rule for the complainant," a defendant cannot ameliorate the burden of the attorney's fee by making eleventh-hour concessions. *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1362, 1364 (D.C. Cir. 1977).

The record of the CIA's behavior on the search and review fees issue is endemic of their approach to the mandates of the FOIA in this case, and such conduct toward members

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[2] See April 30 Memorandum Order, ECF No. 30, at 8-9:

> Despite the absence of a signature for AIM's attorney, the request provides clear notice to the CIA that AIM intends to join Hall as a requester… Because AIM has requested a fee waiver, the Agency cannot plausibly argue that AIM's participation in the FOIA request is somehow defective…. The CIA also seeks AIM's dismissal on the grounds that AIM "has not exhausted its administrative remedies in its own right." Def.'s Reply at 3. This argument is singularly unconvincing because *all* plaintiffs constructively exhausted their administrative remedies…

of the news media, in 2007 and 2008, was not isolated to this matter.[3]

Among the more egregious examples here is the CIA's various responses to Item 5. Over 1,700 families signed authorizations permitting the government to release information concerning their unaccounted for loved ones, but the CIA steadfastly refused to cooperate with that effort, on various grounds, over an eight-year period, all of which the Court rejected. Yet, defendant's assertion of its "burdensome" argument is as vigorous as ever. *See, e.g*. Opp. at 1, characterizing plaintiffs' FOIA request as having sought "eight staggeringly broad categories of information;" FOIA request sought "broad range of documents" (*id*. at 2); "extremely broad categories" (*id*. at 4); "plaintiffs sought eight extraordinarily broad categories of records" (*id.* at 9); "the requests were so broad" (*id*. at 9); "three requests… were extremely broad" (*id*. at 15). Here, the CIA would appear to still be arguing that, given "the breadth of those requests and the burden they imposed, the CIA arguably was not obligated to process them at all…" *Id*.

The CIA should have voiced its "burdensome" objections to this search fifteen years ago, in October of 2000, when the Office of the Secretary of Defense Declassification/FOIA

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[3] In *National Security Archive v. Central Intelligence Agency,* (D.D.C. Nov. 4, 2008), (Kessler, J.) 584 F. Supp. 2d 144, where the CIA admitted that it had misclassified plaintiff by not recognizing it as a member of the news media, and agreed that it would discontinue the practice, the court found that "the CIA had resumed its practice of misclassifying the Archive… often accompanied by discretionary fee waivers." *Id*. at 146. The CIA acknowledge that its "conduct was in error, issued an apology for the mistake, and reiterated their promise to categorize the Archive as a representative of the news media… [but] immediately resumed its practice of denying the Archive 'news Media' status… Despite admissions that it had not complied with FOIA, and despite assurances that it would in the future comply with the law… the CIA has continued the very conduct which it has admitted was illegal." *Id*. at 147. "The CIA's request that the Court not enter a formal order to this effect—after twice making misrepresentations about its intentions—is truly hard to take seriously." *Id*. n. 5.

Division completed, and distributed, its "Vietnam War PNOK 'YES' Casualty List." *See* administrative record ECF No. 114-1 at 58-87. Instead, the CIA began its search almost eight years after the request had been made to begin its search for the names on the PNOK list. Presumably, defendant would not have asserted this defense had plaintiffs been in a position to accept the CIA's $600,000 demand precedent to beginning the search.

Most of the time over the last decade, the plaintiffs and the Court were waiting for the CIA to conduct court-ordered searches in accordance with the mandates of the FOIA. By contrast, plaintiffs' advancement of arguments for the inclusion of Hall's entire affidavit, for an accounting, for discovery, and for an *in camera* inspection, resulted in comparatively little delay. The same is true regarding plaintiffs' various motions for enlargements of time.

In any event, the amount of time reasonably expended in the prosecution of the lawsuit is the relevant inquiry.

CONCLUSION

For the foregoing reasons, and for the further reasons advanced by co-plaintiff Roger Hall in his reply to the CIA's opposition to an award of fees, plaintiff Accuracy in Media, Inc., prays that Court grant its Motion for an Interim Award of Attorneys' Fees, in the amount of $134,680.

DATE: March 30, 2015.

Respectfully submitted,

/ s/

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