UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C. A. No. 04-0814 (RCL)
	:	
CENTRAL INTELLIGENCE AGENCY,	:	
	:	
Defendant	:	

REPLY TO DEFENDANT CENTRAL INTELLIGENCE AGENCY'S OPPOSITION TO THE MOTION OF PLAINTIFFS ROGER HALL AND STUDIES SOLUTIONS RESULTS, INC. FOR AN INTERIM AWARD OF ATTORNEYS' FEES AND COSTS

Preliminary Statement

This is a Freedom of Information Act ("FOIA") case in which, as a result of concessions made by both defendant Central Intelligence Agency ("CIA") and plaintiffs Roger Hall and Studies Solutions Results, Inc. ("Hall"), and plaintiff Accuracy in Media ("AIM"), the only issue currently pending before the Court is the amount of interim fees that should be separately paid to Hall and to AIM or their attorneys. As set forth in more detail below, the CIA has conceded all essential elements to an award of interim fees and even endorsed an extremely limited payment of interim fees. In the process of replying to the CIA's Opposition ("Opp.") to the Motion for Interim Fees ("Motion" or "Mot."), plaintiffs have concluded that while they have a very strong case that the Salazar Matrix is the far better guide to what constitutes "reasonable attorney fees" in the Washington, D.C. market, their need to have the payment of interim fees issue promptly and finally resolve must override other considerations. Accordingly, they withdraw the claim to

payment under the Salazar matrix. They will agree to payment at the rate specified in the United States Attorneys Office Laffey Matrix, subject to upward adjustments for delay and obdurate behavior.

In respect to the upward adjustment for delay, plaintiffs note that in Missouri v. Jenkins, 491 U.S. 274, 282 (1989), the Supreme Court held that "an enhancement for delay in payment is, where appropriate, part of a reasonable attorney's fee." Compensation received years after services are rendered are less valuable than the same dollar amount received promptly." Copeland v. Marshall, 641 F.2d 880, 893 (D.C. Cir.1980)(*en banc).* "[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." Id. Thus, to achieve a "reasonable fee" in this case, the lodestar amount should be adjusted upwards to account for delay. This can be done simply by applying the current USAO Laffey rate. Hall's attorney has performed 750 hours of services. 750 times the current USAO rate of $520/hour yields a lodestar of $390,000. In an exercise of billing judgment, Hall will reduce this amount by approximately 15% to $330,000. This figure may—and should be—adjusted upward because of the admitted obstructive actions engaged in by the CIA during the course of this lawsuit.

Unfortunately, the elimination of the Salazar rate as an issue does not end the need to make a detailed response to the CIA's multifarious attempts to discredit Hall's case. An award of attorney fees requires a detailed response, if only to set the record straight. The CIA's cascade of sharp adjectives and adverbs can be ignored, but there is a plethora of arguments and assertions which must be addressed in some fashion.

ARGUMENT

I. THE CIA CONCEDES THAT PLAINTIFFS' MOTIONS FOR INTERIM AWARD OF ATTORNEYS FEES SHOULD BE GRANTED

A. The CIA Concedes That Plaintiffs Are Both Eligible for and Entitled to an Award Of Attorneys' Fees

The CIA's Opposition to plaintiffs' motion for an interim award of attorney's fees and costs addresses the motion in a unique manner. By conceding all of the essential elements of the motion, the CIA seeks to snatch victory from the jaws of defeat, severely limiting the amount of attorneys' fees due plaintiffs. Thus, the CIA's Opposition [ECF 227] stands in stark contrast with the prior history of this case, which was marked by the CIA's recalcitrant litigation and re-litigation of issues it now concedes it was wrong on, and it seeks to portray itself as largely the victim of plaintiffs' assiduous efforts to spring loose the records it repeatedly tried to suppress.

The extent of the CIA's concessions is surprising. A motion for an award of attorney's fees made under FOIA requires that the requesters show (1) that they are "eligible for" an award of fees because they have "substantially prevailed" within the meaning of that phrase as set forth in 5 U.S.C. § 552(a)(4)(E); and that (2) they are "entitled to" an award of fees under the "four factors" test which was set forth in the legislative history to the 1974 amendments to the FOIA which established the original attorney's fees provision. If a balancing of these four factors (and other equitable considerations) favors the plaintiffs, then they are entitled to an award of fees. If these requirements are conceded, the only significant matters left to be decided are (A) whether an interim award of fees is appropriate, (B) the number of hours that are reimbursable, and (C) what is the market rate at which the fees are to be calculated.

As to eligibility for fees, the CIA concedes that it "does not dispute that the plaintiffs have substantially prevailed on several matters and are therefore eligible for fees." Opp. at 8. As to entitlement, the CIA concedes that "[t]o the extent plaintiffs shared the burden of prosecuting

this case successfully, they are entitled to a single reasonable award of attorney's fees." Id. at 17. Of the four factors which guide analysis of whether plaintiffs are entitled to fees, the CIA concedes that the first or "public benefit" factor favors an award of fees, asserting, misguidingly, that "the release of otherwise publicly available documents is not the sort of victory that can justify a large fee award." Id. at 8. In another sentence also filled with distractions, the CIA again concedes that the public benefit factor favors an award of fees, saying "[p]laintiffs' success has not been commensurate with a 10-year (and counting) litigation campaign, and the public significance of the information they obtained cannot support a fee award approaching $700,000."

The CIA simply ignores the second ("commercial benefit") and third ("nature of plaintiffs' interest in the records") factors. Thus, it conceded they, too, favor the award of fees. With respect to the fourth factor ("the reasonableness of the agency's conduct"), the CIA notes that in evaluating this factor, "Courts consider whether "the agency's opposition to disclosure had a reasonable basis in law" and whether "the agency had been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." Id. at 14, citing McKinley v. FHA, 739 dF.3d 707, 712 (D.C. Cir. 2014). The CIA then "concedes that at least two aspects of its handling of this case may not meet that test of reasonableness in hindsight." Id. (emphasis added). The "at least two" instances include "[f]irst, the CIA did not send the plaintiffs a substantive response to their FOIA request for more than a year." And, second, the CIA also admitted that "the Court criticized the CIA's failure to adequately follow up on documents referred to other agencies for processing." Id., citing Judge Kennedy's opinion in Hall v. C.I.A., 668 F. Supp. 2d, 172, 182 (D.D.C. 2009)("Hall II"); Judge Lamberth's opinion in Hall v. C.IA., 881 F. Supp. 2d 38, 55-57 (D.D.C. 2012)("Hall III"). These two examples, concededly non-

exhaustive, are more than sufficient to tilt the fourth factor in Plaintiffs' favor. Since all four factors favor an award of fees, so must a balancing of them.

B. The CIA Concedes Interim Fees Should Be Awarded

Hall has moved for an interim award of attorneys' fees. He set forth a statement of the law governing payment of interim fees in FOIA cases and facts which supported his right to obtain fees on an interim basis in this case. The CIA does not claim that Hall failed to make out a case supporting an interim award of fees. While it does not directly address the issue, the CIA implicitly concedes that it has no grounds to oppose plaintiffs' application simply because Hall seeks fees on an interim basis. It does not even mention, much less discuss the law regarding interim fees, nor does it refer to any relevant facts bearing on the issue of an interim award of fees.

II. THE CIA'S ANALYSIS OF THE EXTENT TO WHICH PLAINTIFFS PREVAILED IS DEEPLY FLAWED

In summing up its case at the end of its brief, the CIA urges the Court to, among other things, " reduce [an award under the USAO Laffey Matrix] to an amount commensurate with [plaintiffs'] moderate degree of success. . . ." Opp. at 30. The CIA sets its calculation of the amount that should be paid at "approximately $75,000." Id. Since the CIA has not disputed the number of hours actually worked by plaintiffs' counsel, this calculation is completely out of whack with its admission that plaintiffs achieved at least a "moderate" degree of success.

More importantly, the CIA's analysis of how the value of the services rendered is deeply flawed. The CIA spends a great deal of time and effort trying to specify and minimize the legal issues on which plaintiffs prevailed. But the CIA has confused the legal issues or arguments on which a party has prevailed with the overall results obtained on their FOIA claim.

Hensley v. Eckerhart, 461 U.S. 424, 440 (1983), held

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, 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. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

An action brought exclusively under the FOIA involves only one claim, the release of non-exempt information. When this lawsuit was filed, the CIA had released no records; indeed, it did not even respond to plaintiffs' request for more than a year. It took several rounds of litigation before substantial releases began to be made, but now the CIA admits to having released more than 4,000 documents.[1] Thus, in plaintiffs view, the results in this case have been quite substantial, not just "moderate."

Hensley also asserted that "[t]he congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." Id. at 435 (citation omitted). Further clarifying the meaning of "claim," it stated: "It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim." Id. (emphasis added). That is, of course, generally true of FOIA cases, and it is true of this case.

[1] The CIA always describes its releases as being comprised of more than a certain number of "documents". Since a single "document" may consist of hundreds of pages, it is uncertain just how many thousands of pages have been released so far.

Moreover, the Supreme Court went on to explain that even cases involving more than a single claim

> the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a 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. Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.

Id. These guidelines were echoed by Justice Brennan. Id. at 448 (Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, concurring in part and dissenting in part).

The Supreme Court agreed with "the District Court's rejection of 'a mathematical approach comparing the total number of issues in the case with those actually prevailed upon.'" Id. at 435 n.11, citing Record 220. In this case, the CIA employed this "mathematical approach," seeking to count up legal arguments and contentions on which it claims plaintiffs did not prevail, and use this as a basis for reducing the award. While "[a] request for attorney's fees should not result in a second major litigation[,]" id. at 435, plaintiffs have no real alternative but to respond in some detail to the CIA's many contentions. Hall does so in the section which follows.

III. THE CIA ATTEMPTS TO ERODE THE VALUE OF AN AWARD FEES THROUGH A PLETHORA OF FACTUAL ERRORS AND OMISSIONS AND DUBIUS ALLEGATIONS

A. The CIA Misrepresents the Total Amount Sought by Plaintiffs Throughout its Opposition, the CIA blatantly misrepresents the amount of fees sought by plaintiffs as being either $685,000 or "almost $700,000. This figure is derived by adding together the lodestar amounts for AIM ($173,949) and Hall ($511,775) under the Salazar Laffey matrix. But the $685,000 figure is grossly misleading since Hall, in an exercise of billing judgment, reduced his Salazar lodestar amount by 15%, from $511,775 to $435,009. See Plaintiffs' Motion at 29. The lodestar amount as calculated under the USAO Laffey Matrix at historic billing rates is $346,523. A 15% billing judgment reduction yields a figure of $294,544. As noted above, Hall has decided to forego litigation of his right to the Salazar rate. He believes that the contemporary rather than the historic USAO Laffey rate should apply. As noted above, this would produce a figure of $390,000, which with a 15% billing judgment reduction would amount to approximately $330,000.

The figure cited by the CIA throughout its Opposition was objectionable not only because it greatly inflated the amount sought by Hall and by Hall and AIM jointly. It was also sought to compel Hall and AIM to accept a single award and split it between them. But Hall and AIM are separate parties with separate claims.

B. The CIA Claim to Have Shown that the Payment Sought by Hall Is Not Commensurate with Awards in Other Cases Is Not Supported by Even a Cursory Review of the Cases It Cites as Examples and Is Contradicted by Others It Doesn't

The CIA asserts that "several recent cases illustrate that plaintiffs' demand for two-thirds of a million dollars in fees is out of line with recent awards in this Circuit. Opp. at 12. Strangely, the CIA does not mention, National Security Archive v. Central Intelligence Agency, Civil Action No. 06-01080 (GK)("NSA"). In that case, on December 11, 2008, the CIA, through counsel, stipulated to the payment of $350,000 in attorney's fees and costs to the firm of Wilmer

Cutler Pickering Hale and Dorr, LLP on or before December 31, 2008. See Attachment A, Stipulation and Settlement Agreement for Attorneys' Fees and Costs. The docket entries for this case indicate it was filed on June 14, 2006 and ended, except for the attorneys' fees issue, when Judge Kessler issued a Memorandum Opinion (Attachment B) granting the National SeFcurity Archives' motion for reconsideration. The case involved essentially a single issue--whether the CIA had reneged upon its prior grant of "representative of the news media" status to NSA. The NSA moved for summary judgment and the CIA moved to dismiss the complaint for lack of subject matter jurisdiction. The District Court granted the CIA's motion to dismiss, but NSA obtained new evidence that the CIA had resumed the denial of NSA's FOIA requests and moved for reconsideration, which the Court granted. Ironically, news media status is only one of a dozen or more legal issues litigated by Hall and AIM. Obviously, the CIA has relevant information about the amount of work performed and billing rate charged by Wilmer Cutler Pickering Hale and Dorr which is relevant to the issue of the prevailing market rate for attorneys in the Washington, D.C. area. The CIA has **not provided such** information to this Court in this case.

The NSA case is not an isolated example of large fees awarded in recent FOIA cases. In Seth Rosenfeld v. U.S. Department of Justice, No. C-07-3240 EMC, the plaintiffs submitted a lodestar amount of approximately $ 439,000 for litigating the merits of the case for four and three-quarters years. The Court awarded $363,217.60 in fees and costs. Order Granting Plaintiff's Motion for an Award of attorneys' Fees and Cost at 1 (N.D.Cal. Nov. 11, 2012). See Attachment C. The fee application sought payment for approximately 205 hours of work by two attorneys who worked for Rosenfeld on Rosenfeld's second cross-motion for summary judgment. The Court applied a 10% deduction (roughly 20.5 hours) for duplicate time. Id. at

20-21. Here, Hall, in an exercise of billing judgment, has deducted 15% across the board for all work done in the case. The roughly 180 hours of time that was compensated for in Rosenfeld, far outstrips what Hall spent on any one of his cross-motions.

In addition, in the Rosenfeld case, the Court ruled that Rosenfeld had prevailed on some issues and lost on some issues. Basically, Judge Chen found that Rosenfeld had lost on search issues based on the "extreme scope of his arguments . . . regarding adequacy of the FBI's search, but won on challenges regarding . . . improperly claimed exemptions[.]" Id. at 23, n.5. Hall won many more issues than Rosenfeld did, compelling several searches which caused the release of thousands of pages of previously withheld records, and the suit also resulted in the release of classified information and information withheld under other exemptions.

In seeking to portray the recompense sought by plaintiffs as inappropriate, the CIA asserts that "several recent cases illustrate that plaintiffs' demand for two-thirds of a million dollars in fees is out of line with recent awards in this Circuit." Opp. at 12. Aside from grossly misrepresenting the amount of fees sought by plaintiffs, the CIA has failed to make any analysis of these cases to determine why they may have incurred or sought these relatively small awards. The first of three cases cited for this proposition is Citizens for Responsibility and Ethics in Washington v. Dept. of Justice, Civil Action No. 14-0374 (D.D.C. 2015)("CREW v. DOJ"). The CIA says that in that case "[f]or plaintiff's five years of successful litigation, the court awarded attorney's fees of $35,018, approximately one-twentieth of what plaintiffs seek" Id. Aside from the fact that the case was dismissed on its merits a little over three and a half years after suit was filed, not five years, and was studded with some 15 extensions of time, the pertinent issue is not how long the case lasted but what amount of compensable work was done.

This CREW case was over fairly soon because, unlike Hall, it presented a single major issue—whether the FBI's categorical assertion of privacy exemptions barred disclosure of the documents at issue in their entirety or only in part—which did not require nearly as much labor. Resolving this issue partly in CREW's favor through the use of a Vaughn index took relatively little time. This case, by contrast, involved at least five vexatious search issues, at least six different exemption claims,[2] issues regarding copying costs, news media status, collateral estoppels and res judicata, among other things. In addition, Hall had to overcome "at least two" episodes of obstructive conduct on the part of the CIA. Under these circumstances, the amount of fees awarded in the referenced CREW case is a far cry from what should be awarded here.

The CIA invokes EPIC v. F.B.I., C. A. No. 12-667, ___ F.Supp.3d ____ (D.D.C. 2015), 2015 WL 737101 (D.D.C. 2015) for having engaged in "four years of successful litigation on a matter implicating broad privacy concerns," with "the court award[ing] $29,635 in attorney's fees, less than one-twentieth of what plaintiffs seek here." Opp. at 12. EPIC won a significant victory in this case, but essentially its request was narrowly focused and it prevailed simply because the FBI conceded during the Vaughn index processing that its exemption claims were not all sustainable. The actual litigation of the merits of the case lasted not four years but less than two. Id. Docket entries (Motion for Attorney fees filed Dec. 19, 2013). The low size of the award was due to its limited scope and the fact that the great bulk of the services were provided by attorneys with two to four years of experience. They commanded very low rates under the USAO's Laffey matrix, ranging from $240 to $290 per hour. While its lead attorney, Marc Rotenberg sought $495 to $505 per hour for 13.9 hours of work, the low-rate attorneys claimed

[2] Exemptions 1, 2, 3, 5, 6 and N/R (for "non-responsive"). The Exemption 3 claims actually involved several different alleged Exemption 3 statutes, thus further increasing the complexity of the claims confronting Hall.

108.7 hours. See Declarations of Marc Rotenberg, Ginger McCall, Julia Horwitz and Alan Butler attached as Exhibits 2-5 to Motion for Attorneys' Fees [ECF 28], C.A. No. 12-0667.

The FBI objected to EPIC's having sought to charge for 18.4 hours spent on the Complaint for a "straightforward nine-page FOIA complaint." The Court found this excessive and reduced it by 9.5 hours to 8.9 hours. See Feb. 20, 2015 Memorandum Opinion [ECF 48] at 10-11. By contrast, Hall's counsel took a total of only 6.4 hours to do both a six-page complaint (2.9 hours) and a twelve-page amended complaint (3.5 hours). This indicates that the work performed by Hall's attorney was accomplished efficiently and economically.

The CIA acknowledges that the CREW and EPIC cases are "only a sample of recent attorney's fee awards in FOIA cases in this Circuit. There have been isolated cases with higher awards" Opp. at 13, citing as an example CREW v. FEC, F.Supp.2d __, 2014 WL 4380292 (D.D.C. 2014), which awarded $153,258 in attorney's fees under the USAO Laffey Matrix. Another "isolated example" which the CIA overlooks even though it is well aware of the case, is CREW v. Dept. of Veterans Affairs, Civil Action No. 08-1481 (PLF). In that case, in which there has not yet been an award, the amount of fees and costs at issue using the Salazar Laffey matrix is $260,484.43, even without whatever supplemental fees may have been incurred in connection with the reply brief. This case was in litigation less than half as long as the Hall case has been and did not involve nearly as many legal issues.

Another "isolated example," is the agreement to pay attorney fees in the amount of $186,000 to the plaintiffs' lawyers in Memphis Publishing Co., et al v. F.B.I., Civil Action No. 10-1878 (ABJ). See Attachment D, a public relations announcement by Holland & Knight.

The CIA asserts: "Plaintiffs' motions fail to explain why they should be awarded fees many times higher than any awarded in recent years in cases where plaintiffs achieved far greater

degrees of success." Opp. at 13. But as the above examples put forward by Hall show, the CIA's representations as to the lack of high fee awards in the same range as those sought by Hall does not have a firm basis in reality. Nor do the CIA's attempts to derogate the public benefit achieved past muster. All of the thousands of documents released were released only because of this suit. The public interest in them was made evident by the establishment of a Senate Select Committee which investigated the matter, by the issuance of President Clinton's order directing their release, and by the continuing controversy over missing POWs that is manifested in countless news stories, magazine articles, books, and websites. It is also undeniably established by the CIA's retrenchment on the fee waiver issue and the issue of entitlement to representative of the news media status.

C. The CIA's Attempt to Use the Scope of the Requests as a Ground for Reducing Attorneys' Fees Is an Argument It Has Made Before and Remains Without Basis

Throughout its brief the CIA persistently argues that plaintiff submitted overly broad FOIA requests and this diminishes the value of the services rendered because, given "the breadth of those requests and the burden they imposed, the CIA arguably was not obligated to process them at all." Opp. at 15. This argument has no merit. This Court repeatedly rejected the CIA's claim that Hall and AIM's FOIA requests were overly broad and unduly burdensome. The CIA said it would comply with the Court's instructions and conducted the searches ordered by it. As a result, plaintiffs obtained records that otherwise never would have been obtained.

D. The CIA's Arguments for Reducing Attorneys' Fees Are Severely Undercut by its Admission to "At Least Two" Episodes of Self-Admitted Obstructive Conduct

FOIA attorneys' fees "are intended to deter the government from unreasonably denying documents with the knowledge that few plaintiffs will have the resources to sue under FOIA."

Opp. at 14, citing Citizens for Responsibility and Ethics in Washington v. DOJ, 820 F. Supp. 2d 39, 45 (D.D.C. 2011) (citing S.REP. NO. 93-854 at 17 (1974)." Thus, "one of the most important factors undergirding an award of attorney's fees is whether the government acted unreasonably." Id., citing Negley v. FBI, 818 F. Supp. 2d 69, 76-77 (D.D.C. 2011). To its credit, the CIA does admit to "at least two" instances in which it acted unreasonably and thus obstructed plaintiff's right to promptly access the information he requested. The two instances it admits are: "First, the CIA did not send the plaintiffs a substantive response to their FOIA request for more than a year." Id. Second, the CIA failed to adequately follow up on documents referred to other agencies for processing." Id.

This is a devastating admission in view of the FOIA's objective of prompt and unfettered access to information and in the judiciary's interest in economical administration of the Act. However, despite the "at least" modifier, the CIA proceeds to assert: "In all other important respects, however, the CIA acted reasonably." Id. at 15. In this and in other cases the CIA fought against disclosure of the records in digitized pdf format. In this case it litigated the issue even though it was itself posting missing POW records in pdf format on its own website. See Reply to Defendant Central Intelligence agency's Opposition to Plaintiffs' Motion for Partial Summary Judgment as to Production of Responsive Records in Electronic Form at 8 and Exhibit 1 thereto). In Scudder v. C.I.A., Civil Action No. 12-0807 (BAH), the CIA litigated the issue full-out until the District Court denied its motion for summary judgment and instructed the parties to confer about a schedule for taking discovery or holding an evidentiary hearing. Confronted with prospect of being subjected to adversarial examination of evidentiary matters under oath, the CIA caved. In a Status Report [ECF 47] it announced that it had agreed to make the documents available to Scudder "by putting PDF copies of the requested records on its

website." Id. at 2. The CIA tries to diminish the significance of Hall's effort to get a ruling on an issue of practical importance to him and other requesters. It quotes the Court's opinion on the controversy as involving "'much ado about nothing' because the U.S. Attorney's Office already agreed to scan the documents for the plaintiffs" Opp. at 18. But the Court's September 30, 2013 Memorandum and Order [ECF 205] granted partial summary judgment to plaintiffs on this issue. In doing so it noted that the CIA agreed to do this when it filed its Opposition to Plaintiffs' Motion, and it ordered CIA's counsel to make in the requested electronic format the documents produced since May 20, 2013. Sept. 30, 2013 Mem. and Order at 2. Thus, Hall did receive some relief that he had requested in his motion.

Moreover, the Court noted the issue might arise again: "Perhaps in some future case there will need to be litigation over this issue, and with conflicting expert affidavits an evidentiary hearing might be required. Clearly this is not this case, in light of the cooperation extended by the United States Attorney." It may be very unlikely that this or a similar issue will arise again in the course of this case, but it is not necessarily impossible. Hall has won a victory in part in this case and he has preserved his rights.

Another instance in which the CIA acted unreasonably is its re-litigation of the fee waiver and representative of the news media issue after plaintiffs had supplied a fuller administrative record. After the fee waiver motion had been fully briefed, the CIA announced that it would not charge fees as a matter of its administrative discretion. But under the FOIA and the CIA's regulations governing the fee waiver issue, there is no basis for providing free copies of records unless the Agency has determined that it is in the public interest for it to do so. Furthermore, if administrative discretion was appropriate, it was appropriate to exercise it when the administrative record was complete, not after costly litigation of the issue.

E. The CIA's Claims That Plaintiffs' "Doubled" Their Fees Is Unsubstantiated and Unwarranted

The CIA begins its section on "duplicative and dilatory" conduct by asserting that "there is no justification for awarding double fees[3] for the work of two separate attorneys in this case." Opp. at 16 (emphasis added). After hyberbolic claims, the CIA speculates that AIM was made a party to the lawsuit "in order to strengthen the plaintiffs' argument for a waiver of fees". The CIA asserts that "the taxpayers should not have to bear the cost of that strategic choice." Id. The CIA concedes that AIM had the right to do this, so it appears to be arguing that some FOIA requesters should not be allowed to exercise the right FOIA gives them to further the public interest by obtaining a public interest fee waiver. Additionally, since the CIA "voluntarily" decided not to charge fees, it is clearly the party guilty of saddling the taxpayers with these costs, not AIM or Hall.

As to the CIA's opinion that "it is hard to see what benefit was gained by having two attorneys litigate the same issues." Id. Well, not really, particularly where the two attorneys represent different clients with different capabilities for making an argument on a particular issue—the facts supporting AIM's fee waiver and news media status are not, for example, exactly the same as those put forward by Hall—and even different attorneys for the same party may have reasons for presenting arguments on the same issue differently, and even where they decide to adopt the same position on a particular matter, an exchange of their different views may result in a better product. Certainly, Hall does not believe that Government agencies such as the CIA have only one attorney working on a particular case.

[3]Obviously, the CIA cannot literally mean that counsel "doubled" their fees, since it states in a note that the fees for AIM's attorney are only one-third of the fees sought by Lesar. See Opp. at 17 n.4.

The CIA states somewhat tentatively that "[i[t appears that plaintiffs and their respective counsel have duplicated each other's efforts throughout this case." It then refers to several motions and responses filed by plaintiffs but does not specify where and to what extent the alleged duplication appears in these pleadings.

Another general objection made by the CIA is that "the first several years of this litigation largely were consumed with litigating a series of plaintiffs' unsuccessful motions." Id. at 17. There are several problems with this sweeping claim. First, several of plaintiffs motions labeled as "unsuccessful" by the CIA were partly successful. Second, the CIA filed motions during this period which were unsuccessful but delayed the case.

Plaintiffs were confronted at the outset by delays on the part of the CIA. The CIA delayed the filing of an answer to the complaint. This was followed by a motion on June 18, 2004, to stay proceedings or, in the alternative, to dismiss the complaint [ECF 5] without prejudice to its being re-filed later. To claim that litigating the motion to stay the proceedings or dismiss case was not productive is illusory. In either event, access to the records plaintiffs sought would be delayed. The Court denied the motion. In doing so, it made clear that the CIA's motion was without legal basis: "The agency's statement that "the administrative process was interrupted and has not been concluded" does not provide a legal justification for a stay or dismissal, but rather confirms that plaintiffs properly sought judicial review." April 13, 2005 Memorandum Opinion and Order at 10 [ECF 30]. Plaintiffs defeated the CIA's motion but it took nearly a year before the Court ruled. The only beneficiary of this delay was the CIA.

As one example of the "unsuccessful motions" during this period the CIA cites the fee waiver motions. However, the CIA ultimately caved on the fee waiver issue. Having once sought $500,000 in search fees, the CIA ultimately waived fees. It did so in the context of

renewed cross-motions for summary judgment. The context thus makes clear that the litigation was successful in causing the CIA to abandon its resistance to a waiver.

The CIA argues that what it terms as the second phase of the litigation, from May 2006 to August 2008, was " similarly laden with plaintiffs' unsuccessful motions." Opp. at 5. To the contrary, the motions the CIA refers to were partly successful and moved the litigation forward notwithstanding the CIA's resistance. In May 2007, Hall cross-moved for partial summary judgment and other relief. [ECF 73]. In support of his motion, Hall submitted a declaration and exhibits. The CIA, which had not objected to a similar declaration filed in Hall I, moved to strike it, alleging it did not comply with the requirements of Rule 56, F.R.Civ.Pro. The matter was referred to a Magistrate Judge, who struck "substantial portions." Id. at 6. But significant portions were not stricken. And while the Court upheld the Magistrate's ruling, he permitted Hall to file a revised declaration which corrected some of the errors in the original declaration. Thus, once again, the CIA's statement that "]n]one of plaintiffs' efforts in this two-year period materially advanced the resolution of the case" is simply inaccurate.

F. Telephone Calls and emails

The CIA asserts that time itemizations submitted in support of Hall and AIM's attorney fee motions "reveal, throughout the case, plaintiffs' counsel have dedicated many hours to conversing with one another by email and telephone. Yet these overlapping and duplicative efforts have not resulted in any greater degree

of success or public benefit: in this FOIA case. . . ." Id. at 16. The telephone calls and emails almost always involve minor amounts of time, generally between 1/10th and 2/10ths of an hour. If the CIA took a careful look at these records, it would realize that most of the calls and emails occur in conjunction with non-dispositive motions, status conferences, etc. Counsel are required

to confer with adversary counsel when filing a non-dispositive motion or consulting about scheduling status conferences, and approving status reports. Obviously, actions which counsel are required by court rules and procedures to undertake are compensable.

G. The Personal Attack on Hall's Lawyer for Handling Long Cases

The CIA launches an attack on Hall's lawyer for handling a large number of long-term cases. There seem to be two themes to this attack. First, such cases result from the requester's failure to focus on particularized records that will result in a nice and tidy, short-lived litigation. Second, Lesar is dilatory; he is the culprit for long-running FOIA cases.

It goes without saying that long-running FOIA cases are unpopular on all sides—agencies, counsel for the parties, and judges. But the FOIA does not recognize such a distinction and long cases have resulted in the most significant disclosures of greatest interest to the public. A good example is the recent award –winning, best-selling book Subversives: The FBI's War on Student Radicals by Seth Rosenfeld, which is the product of decades-long FOIA litigation for records on the Berkley Free Speech Movement.

Lesar pleads guilty to having been involved in a number of such cases. One that the CIA singles out as pending for more than twenty-five years is DiBacco v. Dep't of the Army, et al, 983 F.Supp.2d 44 (D.D.C. 2013), which was originally brought as Carl Oglesby v. Dept. of the Army, et al., Civil Action No. 87-3349 (D.D.C.). The suit sought records pertaining to Nazi German General Reinhard Gehlen and post-World War II Nazi underground organizations. Now in its 28th year, DiBacco was recently argued in the Court of Appeals on December 12, 2014. Among the issues at stake in the case is whether the Army violated the FOIA by illegally transferring to the National Archives ("NARA") records which were responsive to Oglesby's request and subject to the fee waiver the Army had granted him, but which NARA would not

release absent submission of a new FOIA request by DiBacco and payment of $2,856 in copying costs (per the $1.00 per page fee imposed by NARA). As a result of developments which occurred at oral argument of the most recent appeal, DiBacco, et al. v. Dept. of the Army, et. al., D.C. Cir. No. 13-5353, the 2,856 pages have now been released to DiBacco free of charge after 27 years of litigation, and despite the District Court's categorical rejection that there might have been anything improper about the Army's transfer of these records to NARA.

In short, one of the virtues of the FOIA is that it permits attorneys in private practice unfettered by institutional biases to persevere over long periods of time against the formidable opposition of powerful government agencies until at last the public interest in disclosure has been fully vindicated. It is worth noting that the fact that the Oglesby has taken so long is due to (1) the fact that it has taken three trips to the Court of Appeals, each partially successful, to reach the point where approximately 130,000 pages of have been released to the public free of charge, whereas in the year 1999, after only 12 years of litigation and two trips to the Court of Appeals, only around 10,000 pages had been made available to the public; (2) the District Court rejected the recommendation of Magistrate Facciola that Oglesby be paid $96,000 in interim attorney's fees, thus depriving Oglesby and the Court of the only potent enforcement mechanism for moving the case forward; and (3) as a result of the denial of interim attorney's fees and other factors, the defendants, principally the CIA and Army, did nothing to move the case forward for a period of eleven years, at which point Oglesby died and Lesar succeeded in getting his daughter Aron DiBacco substituted as a plaintiff.

The CIA also cites another of Lesar's cases which lasted over two decades, which was originally filed in 1988 as John Davis v. Department of Justice, C. A. No. 88-0130. This case involved a straightforward request for copies of tapes and transcripts that had been introduced in

evidence at the BRILAB trial of Carlos Marcello, the New Orleans Mafia kingpin who was thought by some, including Prof. G. Robert Blakey, the Chief Counsel of the House Select Committee on Assassinations, to have likely been involved in the assassination of President Kennedy. Based on the representations of Government counsel, Lesar thought the tapes would soon be provided, ending the litigation. After first claiming that it could not locate the tapes, the Justice Department then claimed that the 163 tapes identified as responsive to the request could not be released because the FBI was unable to determine which of them had been released publicly at trial. The District Court ruled that the FBI had failed to meet its burden of proof to show the tapes were exempt from disclosure, but the FBI appealed. On appeal, the District Court was reversed. The Court of Appeals upheld the FBI position on the burden of proof issue but remanded the cases with instructions that in order for plaintiff to carry the burden of showing the requested materials were exempt, Davis would have to show that "a specifically described portion of an identified conversation on a particular date between named individuals was played publicly at the Marcello trial." Davis v. U.S. Dept. of Justice, 968 F.2d 1276, 1282 (D.C.Cir. 1992). On remand, Judge Thomas Penfield Jackson initially told Lesar: "I think your client is just going to have to give up or take it to the Supreme Court." July19, 1993 Status Call, Transcript at 2. See Attachment E. Stating that "you've got an almost impossible burden to carry," Judge Jackson said he would issue an order to show cause why the case should not be dismissed. Id. Further proceedings before the Court were held on August 24, 1993. Prior to that hearing, Lesar produced a lengthy, detailed response to the order to show cause. At the hearing, Judge Jackson leafed through the papers submitted by Lesar, turned to AUSA Susan Nellor and said: "Miss Nellow, I have to view what Mr. Lesar has filed as nothing short of heroic." August 24, 1993 tr. at 2 (reproduced as Attachment F. AUSA Nellow replied, "That's one way to

describe it, Your Honor." As a result of these proceedings and subsequent appeals, ultimately all but three or four of the 163 tapes were released to the public. Once again, this shows the need for perseverance and creativity in enforcing the public's right to have access to nonexempt government information.

Giving more examples to drive home these points would be gilding the lilly, so Hall will end with these two.

H. Some Miscellanous Issues

The CIA criticizes Hall's counsel because he "has not submitted any contemporaneous documentation to support, and only the barest description of, how he spent his time." Opp. at 19. The times reflected on Lesar's itemization were recorded contemporaneously. They included information which described the date, the amount of time (in tenths of an hour) expended, and the general subject of the service performed. This is all that is required. See Hensley at 437 n.12 ("plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended.")

Hall's counsel has exceeded this standard. Producing the underlying entries from some eight to ten spiral notebooks would be burdensome and unnecessary in the absence of a particularized allegation of fraud or error. The CIA appears to be simply engaging in a fishing expedition or trying to drive up the cost of litigating this case.

Having reviewed Lesar's time sheets, the CIA objects to three entries. First, it objects to 1.0 hours spent on February 9, 2015 for proof reading his motion for an award of attorney fees, suggesting that it was clerical work rather than work by a lawyer. Id. However, this is not the case. Counsel performed that proof reading. His wife also performs a very valuable clerical service in proofing counsel's briefs, but she does not charge for her services, so her time is not

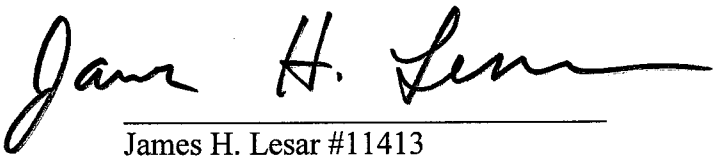
recorded. Counsel must himself also proof briefs before submission because he alone has the detailed knowledge of the case and how to find out whether a particular statement is correct or not. This is lawyer's time, not clerical time.

The CIA also objects to 0.2 hours spent on April 2, 2014 for attempts to upload a CD ROM, and 0.6 hours spent on April 2, 2014 on his time sheets. Although counsel himself performed these tasks, he will agree that he did so in the function of a clerk. Accordingly, this 0.8 of an hour should be charged at the USAO's Laffey rate for clerical work rather than attorney services.

CONCLUSUION

For the reasons set forth in the Preliminary Statement above, Hall should be awarded $330,000 in attorney's fees. This amount should then be adjusted upward by the Court because of the CIA's admitted recalcitrant behavior in this case. The Court should add to this $1,044.00 for the services of Attorney Julia Greenberg, who assisted Lesar.

After the Court has ruled on this motion Hall will submit a supplemental request for fees incurred as a result of this reply and for certain costs that have been incurred.



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