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	:	

REPLY TO DEFENDANT'S OPPOSITIONS TO (1) MOTION OF ROGER HALL TO REQUIRE DEFENDANT TO PRODUCE CERTAIN CATEGORIES OF RECORDS, AND (2) MOTION OF ROGER HALL AND STUDIES RESULTS SOLUTIONS, INC. FOR A WAIVER OF SEARCH FEES AND COPYING COSTS

Preliminary Statement

Because the CIA has elected to oppose plaintiffs' motions on grounds of res judicata and collateral estoppel, a brief review of the proceedings in Roger Hall v. Central Intelligence Agency, Civil Action No. 98-1319 ("Hall I") is advisable.

In that case, plaintiff Roger Hall ("Hall") sued on Freedom of Information Act requests he made pro se beginning in 1994 and on a request made in 1998 by an attorney who then represented him. After motions were filed by Hall and the CIA, the only parties to the lawsuit, Judge Paul Friedman ruled in the CIA's favor as to exemption claims but ordered the CIA to conduct a further search. August 10, 2000 Opinion. [R. 55]

After suit was filed but before Judge Friedman's ruling on the search issue, the CIA acted upon a request for a fee waiver submitted by his then-attorney. It denied the fee waiver but stated

that it had chosen to "utilize its administrative discre-tion" and not charge him for unspecified "processing" fees in the amount of $4,550.00. See Attachment 1, May 24, 1999 letter from Lee Strickland to Elaine P. English.[1] The letter cautioned that in the future it would begin charging Hall "the applicable processing fees for future searches and copying."

On September 18, 2000, a month and a half after Judge Friedman ordered the CIA to conduct further searches, the CIA filed a motion to require Hall to commit to pay an unspecified amount of processing fees. On October 27, 2000, Hall opposed the CIA's motion and cross-moved for a waiver of fees. Judge Friedman denied Hall a public interest fee waiver and specified that he "must provide the defendant with a commitment to pay such fees up to a specified amount." See Attachment 2. July 22, 2002 Memorandum Opinion and Order (emphasis added). Not wishing to buy a pig in a poke, Hall responded by committing to pay $ 1,000 but stated that he would specify the priority in which the various searches would be undertaken.. This was reported to the Court in a Joint Status Report filed August 23, 2002. See Attachment 3. Subsequently, by letter dated October 15, 2002, Hall's counsel sent the CIA a check for $1,000.00 and specified the priority of the searches. See Attachment 4, October 15, 2002, letter from James H. Lesar to Ms. Katherine Dyer.

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[1]Although Strickland's name and title appear in the signature block, the actual signature is not his name.

By order dated January 16, 2003, Judge Friedman noted that on August 23rd Hall had agreed to pay search and copying fees up to $1,000, and to inform the CIA which remaining issues he would like the CIA to focus on in its search. He further noted that the parties had agreed that after Hall had provided his search specification to the CIA, they would file with the Court either the CIA's objections to Hall's search specifications or a proposed schedule. Not having received any further filing from the parties, the Court directed them to file a joint status report on or before January 31, 2003. See Attachmwent 5, January 16, 2003 Orsdwer.

In the Joint Status Report submitted January 31, 2003, the CIA informed the Court for the first time that "searching and processing conducted after August 2000 amounts to at least $29,000." See Attachment 6, ¶ 3. Since these fees had been incurred without notification to plaintiff as required by CIA regulations, Hall took the position in the Joint Status Report that the CIA had waived its right to collect such fees, and that records located as a result of such searches should be provided to him without charge. He also took the position that he CIA should provide an accounting to justify the $29,000 figure for the searches that the CIA said it had conducted. He further contended that the Court's order of August 3, 2000 required the CIA to provide a supplemental declaration regarding its efforts to search for copies of its own records provided to a Senate com-mittee. January 31, 2003 Joint Status Report, ¶¶ 9-11.

By letter dated February 7, 2003, Hall, through counsel, submitted the new FOIA request which is the subject of this case. Unable to obtain an accounting from the CIA of the basis for its claim that it had conducted searches costing $29,000, Hall sought in Item 6 of his new request to obtain records which would show, inter alia, the amount of time the CIA spent conducting the search.

On April 2, 2003, the CIA filed a Notice of Corrected Calculation of Search Fees, lowering its previousd figure of $29,000 to $10,906.33.

On November 13, 2003, District Judge Paul Friedman, issued a Memorandum Opinion and a Memorandum Opinion and Order. The latter denied Hall's Motion for Leave to File an Amended and Supplemental Complaint. The former was highly unique in that there was no motion pending before the Court and the Court heard no argument and received no briefs regarding the matters addressed in the Memorandum Opinion. Rather, the Court's ruling closing the case was based on brief statements contained in the January 31 Joint Status Report and what the Court perceived Hall's position on the fees issue to we. to be. Contrary to the factual record before him, Judge Friedman concluded that "plaintiff continues to refuse to pay for prior searches already conducted on his behalf." Then, in a concluding sentence which bears special attention in light of the CIA's attempt to bar litigation of the present case, he asserted: "There is no prejudice to plaintiff . . . in awaiting defendant's administrative response to plaintiff's February 2003 FOIA request

and, if he is dissatisfied, filing a separate lawsuit at that time." See Attachment 7.

Hall subsequently filed a motion for reconsideration, which was denied. An appeal is pending.

ARGUMENT

Nearly eighteen months after he submitted the Freedom of Information Act (FOIA) request at issue in this case, plaintiff Roger Hall ("Hall") moved this Court to require the release of certain categories of records he had asked for in that letter. Specifically, he requested (1) the records which the CIA previously had searched for and for which it had demanded payment of $10,906.33 in search fees,[2] and (2) records responsive to Item 6 of his request.

Hall and co-plaintiff Studies Solutions Results, Inc. (SSRI) also moved for a waiver of copying costs and for a ruling that they are entitled to status as representatives of the news media and thus not subject to search fees.

As regards Hall's motion to require the CIA to produce all nonexempt records in the two categories cited above, the CIA argues that his motion should be denied on grounds of "res judicata and/or collateral estoppel, failure to exhaust administrative remedies, and on the basis that interim relief on the ultimate issue is not warranted."

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[2]This figure was reduced from a sum nearly three times as great which the CIA had originally tried to extract from Hall as the cost of its search.

With respect to the motion of Hall and SSRI for a waiver of fees, the CIA advances all of the same arguments save for the last. Because the CIA's arguments regarding both motions are essentially the same, plaintiffs respond to both in this reply brief.

The CIA's arguments lack merit.

A. Res Judicata

Res judicata, also known as "claim preclusion," bars a claim "if . . . three conditions exist: (1) there is identity of parties or their privies; (2) there has been an earlier valid, final judgment on the merits of the claim; and (3) the second claim for relief is based on the same set of transactional facts as the first claim for relief." Moore, Federal Practice Manual, Res Judicata and Related Doctrines, § 30.51.

Res judicata or claim preclusion is an affirmative defense. "Consequently, the burden is on the party asserting claim preclusion to establish all three elements necessary for its application." Id., citing Allahar v. Zahora, 59 F.3d 693, 696 (7th Cir. 1994).

Moreover, "[t]he Supreme Court has cautioned against the mechanical application of [res judicata] because it may govern grounds and defenses not previously litigated and on occasion it may block uninvestigated paths that may lead to truth. The Court noted that for the sake of finality and repose, claim preclusion may shield the fraud and the cheat as well as the honest person; therefore, the doctrine must be invoked only after careful

inquiry." Id., § 30.50[3], citing Brown v. Felsen, 442 U.S. 127 (1979).

The Supreme Court's cautionary note is particularly appropriate in Freedom of Information Act [FOIA] cases where the requester acts as a private attorney general enforcing a national policy of full disclosure and the legislative and case law history of the FOIA are replete with examples of efforts of federal agencies to undermine the FOIA.[3] This concern is necessarily buttressed by the facts of the prior lawsuit, Roger Hall v. Central Intelligence Agency, C.A. No. 98-1319 (Hall I), where the CIA initially demanded payment of some $29,000 in search and copying costs only to reduce it to $10,906.33 after Hall sought proof that the search actually cost this much.

Indeed, given FOIA's unique nature and its role as the enforcement mechanism for implementing a stated national policy of maximizing access to, and dissemination of, nonexempt government information, it would seem to be a very rare case in which res judicata is appropriately applied. Assume, for example, that a writer sues and obtains partial access to documents on the assassination of Dr. Martin Luther King, Jr. but the government is ultimately awarded summary judgment. Twenty years later the controversy over Dr. King's assassination flares up again but the documents he obtained earlier have been lost, stolen, or destroyed.

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[3]To cite but one example, the repeated efforts of agencies to thwart the public right of access to information by exacting unreasonable search and copying fees led to the amendment of the FOIA in 1974 to include a fee waiver provision, and in 1986 to a further amendment intended to strengthen it once again.

He seeks to obtain the same documents once again, but when he sues the government invokes res judicata and collateral estoppel. Is the FOIA's goal of maximizing disclosure to be thwarted because the same party is asking for the same documents from the same agency once again?

Such hypotheticals are not at issue in this case, however. Here, res judicata simply does not apply under the traditional boundaries of the doctrine. It does not apply because neither the first nor the third factor is present, and the second factor, a judgment on the merits, is present only as to one of the claims at issue.

The parties in this suit are not the same as the party involved in Hall v. Central Intelligence Agency, C.A. No. 98-1319 ("the Hall case"). Indeed, only one of the plaintiffs, Roger Hall, is the same. The CIA's contention that the parties are the same because both Hall and the CIA are involved in the two suits, id. at 5, is put forward without any citation to legal authority and mis-undrstands the identity of the parties requirement of res judicata.

The third factor is also absent. Although the CIA asserts that the same cause of action is involved, it fails to properly analyze the issue. Moreover, while citing Judge Friedman's orders in the Hall case as the basis for this claim, it ignores his ruling that Hall's February 7, 2003 request--the one that is at issue in this case--"is a new claim that is separate in time and substance from [his] earlier requests. . . ." See Attachment 7, November 13, 2003 Memorandum Opinion and Order in Hall. Indeed, Judge Friedman

specifically asserted that Hall could "file[] a separate lawsuit" once he exhausted administrative remedies with respect to that request. Id.

The predominant test now applied for determining claim preclusion is the "transactional" test. This test "requires the court to determine in a pragmatic manner whether there is a common set of transactional facts," with "transaction" defined as "the core of operative facts, the same operative facts, or the same nucleus of operative facts." Moore, Federal Practice Manual, Res Judicata and Related Doctrines, § 30.54. While there are other tests to measure whether one cause of action is identical to another, "[the crucial element underlying all of these standards is the factual predicate of the several claims asserted. For it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action. . . ." Export Electric, Inc. v. Levine, 554 F.2d 1227 (2d Cir.1977). The FOIA cause of action begins with the FOIA request itself. Here there are two different requests, each maturing into separate causes of action once administrative remedies had been exhausted. The administrative record with respect to each of these two transactions was far different, with Hall alleging not only a different claim with respect to his right to obtain a waiver of search fees but additional and far more probative facts in support of a waiver of copying fees than were contained in his initial pro se request. He also sought records that were not sought in the original requests.

The second factor--a judgment "on the merits"--is present in this case only with respect to Judge Friedman's ruling that Hall was not entitled to public interest fee waiver. Hall's claim that he was entitled to status as a representative of the news media was not determined on the merits because Judge Friedman refused to allow him to include it in his complaint.[4] Nor was there any decision on the merits as to Hall's claim that he is entitled to the records responsive to Item 6 of his February 7, 2003 request. In fact, Items 4-7 of his new request do not duplicate any of the requests that were before the Court in Hall I. Thus, there was no decision on the merits with respect to them. Additionally, Items 1-3 of his new request, while similar, are not coextensive with the requests in Hall I, as the June 15, 2004 letter of Acting Information and Privacy Coordinator Alan W. Tate to James H. Lesar notes, at page 4. (Tate's letter is reproduced as Exhibit 1 to Hall's Motion for Production of Certain Categories of Records.)

Two decisions of the Court of Appeals have implied that there is no bar to relitigating prior FOIA requests which previously had foundered on procedural grounds. In Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 67 (D.C.Cir.1990), the Court of Appeals stated that

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[4]Initially, Judge Friedman denied Hall's motion for leave to amend his complaint to include his February 7, 2003 request. On motion for reconsideration he conceded that this ruling was in error because Hall had an absolute right to amend his complaint as a matter of course since no responsive pleading had been filed. However, he went on to rule that amendment would be futile because Hall had not exhausted his administrative remedies. See Attachment 5, April 22, 2004 Opinion in Hall 1, at 8-9. Thus, there was no decision on the merits as to Hall's claim that he is entitled to status as a representative of the news media.

the requester could bring suit on the exact same request as to which he had failed to exhaust administrative remedies. In Spannaus v. U.S. Dept. of Justice, 824 F.2d 52, 61 (D.C.Cir.1987), the Court of Appeals noted that its affirmance of a order dismissing the plaintiff's lawsuit on statute of limitations grounds did not preclude him from filing a new lawsuit for the same records: "Appellant can simply refile his FOIA request tomorrow and restart the process."

In Wolfe v. Froehlke, 358 F.Supp. 1318, 1319 (D.D.C.1973), aff'd, 510 F.2d 654 (D.C.Cir.1974), this Court refused to apply res judicata in circumstances where one of three plaintiffs in a FOIA action had previously sued for the same documents but "changed circumstances" had "altered the legal issues involved."

As in Wolfe, circumstances have changed the legal issues. First, Hall's new request sets forth a claim that he is entitled to status as a representative of the news media, a claim not put forth in the re-quests at issue in the Hall case. Secondly, while Hall's prior lawsuit was dismissed because he had allegedly not paid search fees, here the full amount previously demanded by the CIA was paid some seven months before this lawsuit was filed. When, after this suit was filed, the CIA returned this payment to plaintiff's counsel under a pretext, Hall promptly submitted a new check in the full amount. See Attachments 9-10. Thus, the legal issue presented in Hall I, whether plaintiff had complied with the demand of the CIA for payment of search fees and was thus entitled to copies of the records located by its searches, is not present

here. He has complied with that demand insofar as his new request pertains to the searches which Judge Friedman ordered conducted in Hall I.

Finally, with respect to his request for a public interest fee waiver, Hall's first request is materially distinct from the request that was decided against him in Hall I because he has provided additional substantiation for the fee waiver request that were not contained in his pro se request for a fee waiver. Judge Friedman denied Hall a public interest fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) because he had failed to "describe with specifi-city how the particular infor-mation requested will further the public interest and not just that the information sought relates in some way to the operations and activities of govern-ment." He also faulted Hall for failing to "explain how the public's understanding will be appreciably enhanced by the disclosure of these specific records." See Attachment 4, July 22, 2002 Memorandum Opinion and Order in Hall I, at 4-5. Judge Friedman also found that Hall had "failed to demonstrate his ability and intent to distribute the information to a broad audience of interested persons. Id. at 5. These defects in Hall's pro sdew efforts to obtain a waiver and the fee waiver request submited by a prior attorney were corrected in Hall's February 7 request.[5] Hall's request that is at issue in this lawsuit

[5]In other requests which were not part of the Hall I suit, Hall had provided more detail, but Judge Friedman ruled that those requests were not part of the administrative record before him and thus could not be considered. Id., at 4.

provides far more detail than was contained in his pro se requests. These additional facts demonstrate that Hall's current request is a separate and distinct claim from that at issue in Hall I. "[I]f the new facts establish a new claim separate and distinct from the previous claim, then claim preclusion is not applicable." Moore, op. cit, § 30.54[2], citing Havercombe v. Department of Educ., 350 F.3d 1, 4-9 (1st Cir.2001).

B. Collateral Estoppel

The CIA also invokes the doctrine of collateral estoppel which provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction that determination is conclusive in subsequent actions based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). Since Hall was a party to the prior lawsuit, the only question is "whether the issue presented in the two proceedings is substantially the same." Cutler v. Hayes, 549 F.Supp. 1341, 1343 (D.D.C.1982). citing Schneider v. Lockheed Aircraft Corp., 658 F.2d 835, 852 (D.C.Cir.1981).

The issues are not substantially the same. The issue in the Hall lawsuit was whether Hall was entitled to receive some of the records located as a result of some of the searches conducted by the CIA in circumstances where he paid only part of the search fees demanded by the CIA and specified the searches he wanted his payment applied to. No such issue is present here. Here the issue is whether a requester who has fully complied with the Agency's demand for search fees for specific searches is entitled to receive

whatever nonexempt documents were located as a result of the searches it conducted.

Another issue that is substantially different is the question of a public interest fee waiver. The issue in Hall I was whether the record before the Court was adequate to support a waiver. Judge Friedman found it was not. Here, that issue is substanially different because the evidence in the administrative record is quite different. Hall has butressed his showing that he is entitled to a public interest fee waiver under 552 U.S.C. § 552(a)(4)(A)(iii) considerably. In Oglesby, the Court of Appeals allowed the plaintiff to supplement his original fee waiver showing and then, upon exhaustion of administrative remedies, bring a new action.

Moreover, in Hall I there was no issue as to his status as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II). Here, there is.

Finally, in Montana the Supreme Court indicated that the doctrine of collateral estoppel might not be applicable where "controlling facts or legal principles" have changed since the first judgment. 440 U.S. al 155. As noted above, the facts here are different than in the prior lawsuit. Furthermore, the law regarding fee waivers also changed when, subsequent to Judge Friedman's decision denying Hall a public interest fee waiver the Court of Appeals handed down its decision in Judicial Watch, Inc. v. U.S. Dept. of Justice, 326 F.3d 1309 (D.C.Cir. 2003) minimizing the

evidentiary showing which a requester must make in order to qualify for such a waiver.

Because the policy of the FOIA strongly favors maximizing the dissemination of information, collateral estoppel should not be applied to bar a requester from filing suit on a new request which makes an enhanced showing of his entitlement to a fee waiver. It is not just the requester but the general public which benefits from such a policy.

3. Failure to Exhaust Administrative Remedies.

The CIA also claims that Hall failed to exhaust administrative remedies with respect to his request. It cites no law in support of this proposition, and there is none. The basis for the CIA's claim is otherwise unclear. At one point, it complains that "Plaintiff [has] submitted two checks totaling $10.906.33 and requested that amount be applied to search and copying fees without the specificity of the instant motion." Opp. at 7. This makes it sound as if its cavil is that it is unable to understand what the check was for. However, the letter of Hall's attorney Mark S. Zaid sending the two checks referenced the new request enclosed the exact sum of money, to the penny, demanded by the CIA for conducting the searches ordered by Judge Friedman in Hall I. Thus, the CIA should have had no doubt as to what it was intended to cover. Moreover, if it had any doubt as to what the checks were intended to pay for, it could have called either of Hall's attorneys to find out. Indeed, Mr. Zaid's letter invited the CIA to call if it had

any questions, and it provided the telephone numbers for both attorneys.

The CIA also says that "while Plaintiff has engaged the administrative process by submitting a partial payment, Plaintiff filed the instant motion before that process could be completed and hence has not exhausted administrative remedies." Opp. at 5. Again, the CIA cites no authority for the proposition that no matter how long a FOIA requester waits for an agency to act, he has not exhausted administrative remedies until it has acted upon his request. The framers of the FOIA anticipated that recalcitrant agencies would use delay to thwart information requests, so they built a constructive exhaustion feature into the Act. See 5 U.S.C. § 552(a)(6)(A), (C). The D.C. Circuit has interpreted this provision as requiring actual exhaustion of a requester's right to an administrative appeal in those circumstances where an agency makes a determination of the request before the requester files suit. See Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 65 (D.C. Cir.1990). But here, the CIA's letter regarding his fee waiver request came after suit was filed. Under these circumstances, Hall has clearly exhausted his administrative remedies.

Additionally, insofar as the CIA's failure to exhaust administrative remedies argument rests on the proposition that a requester has not exhausted administrative remedies until he has committed to pay or has paid the applicable fees, Hall long ago paid the fees relevant to that part of his request that is at issue in his current motion to require the CIA to produce certain

categories of records. There is no justification for further delay in doing so.

4. Hall's Request for Immediate Relief Is Entirely Appropriate under a Law that Specifies a Requester Has a Right to Prompt Access to Nonexempt Information

In a two-sentence paragraph at the end of its brief the CIA asserts that Hall's request that the CIA be required to produce certain categories of records is "premature at best, there having been no determination of the Court as to the merits of the action." Opp. at 7. As the proposed order which accompanied Hall's motion makes clear, what he seeks is "all nonexempt records or portions thereof" (emphasis added) of the specified categories of records. No ruling on the merits is contemplated by Hall's motion. It is simply intended to force out, at long last, those recorded which the CIA itself concedes cannot be withheld.

The FOIA provisdes that requesters shall have "prompt" access to requested records. Hall has now weaited some 19 months for these reocds.

CONCLUSION

For the reasons set forth above, Hall's motion to require the CIA to produce certain categories of records and the motion of Hall and SSRI for a waiver of search fees and copying costs should be granted.

Respectfully submitted,

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