

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.)	
_____)	

PLAINTIFFS' RESPONSE TO THE CIA'S LOCAL RULE STATEMENT

Under Rule 56 of the Federal Rules of Civil Procedure, and Local Rule 7(h), plaintiffs Roger Hall, Accuracy in Media, Inc., and Study Solutions Results, Inc., respectfully submit Plaintiffs' Response to the CIA's Local Rule Statement.

CIA statement:

1. By letter dated 7 February 2003, plaintiffs submitted a FOIA request seeking seven categories of records pertaining to POWs and MIAs from the Vietnam War era. *See* Declaration of Antoinette B. Shiner at ¶ 7 & Ex. A thereto. In light the Court's previous decisions, two categories of records remain at issue.

Plaintiffs' Response: Denied. Plaintiffs aver that the Court's August 3, 2012 Order, Docket No. 186, specified that still remaining were (1) The inadequate search for Item 5 documents, (2) The inadequate search for Item 7 documents, (3) The inadequate disposition of Item 5 referral documents and (4) Production of the names (and photographs) where defendants' Exemption 3 and 6 claims had been rejected.

CIA Statement:

2. For Item 5, plaintiffs requested: “All records relating to 47 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, and those persons who are on the Prisoner of War/Missing Personnel Office’s List of persons whose primary next-of-kin (PNOK) have authorized the release of information concerning them.” *Id.* at ¶ 9 & Ex. A thereto.

Plaintiffs’ Response: Admitted.

CIA Statement:

3. For Item 7, plaintiffs requested: “All records on or pertaining to any search conducted regarding any other requests for records pertaining to Vietnam War POW/MIAs, including any search for such records conducted in response to any request by a Congressional Committee or executive branch agency.” *Id.* at ¶ 13 & Ex. A thereto.

Plaintiffs’ Response: Admitted.

CIA Statement:

Item 5 Referral Documents

4. In 2011, in response to Item 5, the Agency located seven responsive documents originating with other agencies, specifically the Department of Defense (DOD) and the National Security Agency (NSA). CIA sent referral letters to those two agencies in September 2011 for direct response to plaintiffs, and the Court’s 2012 Order instructed the Agency to ensure that the referrals were being processed. Consistent with the Order, CIA followed up with both agencies, notifying the Court in its November 2012 Status Report that NSA had sent an update to Plaintiffs on October 5, 2012 and DOD planned to have its review completed no later than December 2012. Based on subsequent interactions with

Plaintiffs and the agencies, it is CIA's understanding that this issue has been resolved. *Id.* at ¶ 16.

Plaintiffs' Response: Denied. Plaintiffs agree that this represents the CIA's point of view. It is not plaintiffs' view. Plaintiffs dispute that they resolved the issue of the redaction of information in the NSA's inventory.

CIA Statement:

Exemption 3 Names

5. On August 23, 2012, Roland D. Tisdale submitted a supplemental declaration clarifying and confirming that he had consulted the PNOK list prior to redacting the missing persons' names, and he only redacted names for which written consent had not been provided. *See* Response to Order of the Court (ECF No. 188).

Plaintiffs' Response: Plaintiffs admit, but dispute that this constituted an adequate search, and dispute the redactions in the NSA's *Vaughn* index.

CIA Statement:

Exemption 6 Names

6. By letter dated November 20, 2012, the Agency informed plaintiffs that it had lifted the redaction of non-CIA names from the three CIA documents that plaintiffs were challenging (C00465780, C00472096, and C00492526), and released new versions of those documents to plaintiffs. *See* Shiner Decl. ¶ 19.

Plaintiffs' Response: Admitted.

CIA Statement:

Item 5 Search

7. In its 2012 Order, the Court held that the Agency's Item 5 search was inadequate because: (a) CIA searched its CADRE system for only 31 of the 1,711 names provided by Plaintiffs; (b) the CIA did not search its archived records; and (c) the CIA had erroneously stated that it had searched the systems "most likely" to contain responsive documents rather than "all systems that are likely to produce responsive records." *See* Shiner Decl. ¶ 20.

Plaintiffs' Response: Plaintiffs dispute the adequacy of the search and the redactions. An adequate search must include a search of all file locations likely to have or control responsive records, not just all "file systems."

CIA Statement:

8. The Agency has determined that CADRE and archived records are the only systems likely to contain responsive records. *See* Shiner Decl. ¶ 21.

Plaintiffs' Response: Denied. Plaintiffs dispute the adequacy of the search. They contend that all file locations likely to hold responsive records must be searched.

CIA Statement:

9. AARC Search: As outlined in the 28 June 2013 Status Report, the Agency queried an electronic database which contains an automated inventory of records retired to the AARC. Personnel from the Agency's records management and technology group conducted Boolean searches for each of the names provided by Plaintiffs. An expansion character was used to ensure all variations of the names were retrieved (*e.g.*, for "Roger Hall" the searches "roger%hall%" and "hall%, roger%" were conducted). These broad

searches yielded approximately 16,500 hits. Personnel reviewed these search results for any false hits that did not match the names provided (*e.g.*, excluding “Roger Hallman” or “Hallan Rogers”) and did not search operational files which are exempt from search and review pursuant to the CIA Information Act of 1984, 50 U.S.C. § 431(a). From this initial search, the response was narrowed to 569 hard copy folders associated with 204 individuals. It was later determined that 114 of those folders had been properly destroyed in accordance with the CIA’s records control schedule. At the AARC, designated search staff located and retrieved the boxes containing the remaining folders and “hits” compiled from the electronic search. The search team manually reviewed each folder, page-by-page, to determine responsiveness. Files were found responsive if the names matched those provided by Plaintiffs and contained information indicating the individual was a POW/MIA or possessed a connection to Southeast Asia. As a result, the search team located 46 responsive folders, representing eleven names on Plaintiffs’ list, six of whom are Air America employees. The 46 responsive folders contained approximately 10,000 pages. *See* Shiner Decl. ¶ 22.

Plaintiffs’ Response: Denied. Plaintiffs dispute the adequacy of the search. Discovery is needed to resolve allegations about the alleged searches and the manner in which they were conducted.

CIA Statement:

10. After the AARC search team completed its search, information review specialists in the LIRO reviewed each document contained in the 46 responsive folders. LIRO identified material Plaintiffs previously agreed to exclude from production. The

remaining responsive documents were processed for possible public release. *See* Shiner Decl. ¶ 23.

Plaintiffs' Response: Plaintiffs admit that, at the status conference held on 2 July 2013, plaintiffs agreed to exclude from the search personnel records.

CIA Statement:

11. CADRE Search. Pursuant to the Court's 2012 Order, the CIA searched CADRE for responsive records on all 1,711 names provided by Plaintiffs, not just the 34 names that included additional information such as birthdate and/or social security numbers. Due to the volume of hits, the LIRO staff conducted an initial review of the document title (*e.g.*, looking for key words such as "POW/MIA," "Prisoner," "Vietnam," "Laos," "Southeast Asia," "Cambodia," and "VietCong") and date (documents dated before 1959 were deemed non-responsive as U.S. involvement in the war began that year) to help rule out false hits. If there was uncertainty as to the whether a document was potentially responsive, it was reviewed in its entirety. After this initial review, the LIRO team then reviewed each of the remaining documents, page-by-page, to determine responsiveness. Ultimately, LIRO identified 283 responsive documents, although some of them had already been previously released to Plaintiffs in this case. *See* Shiner Decl. ¶ 24.

Plaintiffs' Response: Plaintiffs agree that documents dated before 1959 are not responsive. To the extent that the key words identified are search terms, plaintiffs aver that these search terms are insufficient.

CIA Statement:

12. After completing both the AARC and CADRE searches outlined above, CIA released over 500 documents to Plaintiffs. *See* Shiner Decl. ¶ 25.

Plaintiffs' Response: Admitted.

Item 7 Search

13. Regarding Item 7, in its 2012 Order, the Court stated that the CIA's search of CADRE was insufficient and, "summary judgment cannot be granted until it searches for all records on or pertaining to any search conducted regarding any congressional committee requests pertaining to Vietnam War POW/MIAs, in all systems likely to contain responsive documents, and provides plaintiffs with all non-exempt records and photographs." Because these documents specifically relate to responses to congressional requests, the Agency determined that the Office of Congressional Affairs and the Office of the Director of the CIA were the two offices likely to contain responsive records. Accordingly, the Agency searched both of these offices using the following search terms with no date parameters: "Missing in Action", "MIA", "Missing", "POW/MIA", "POW-MIA", "Prisoner(s) of War," "POW", "Prisoners", "War", "Vietnam War," and "Vietnam." As a result of this search, the CIA identified 260 responsive documents. In 2013 and 2014, the Agency released over 200 documents to Plaintiffs. *See* Shiner Decl. ¶ 26.

Plaintiffs' Response: Admitted.

CIA Statement:

14. In connection with Item 7, the Court also noted in its 2012 Order that the CIA previously provided Plaintiffs with documents that reference other specific responsive records that had not been produced. The Court ordered the CIA to show that it has conducted a reasonable good-faith search for the missing attachments, enclosures, photographs, and reports mentioned in the following 14 documents: C00482286; C00465737; C00482286; C00492378; C00492397; C00492546; C00478688; C00492526;

C00471978; C00478651; C00492461; C00492546; C00472096; and C00483710. *See* Shiner Decl. ¶ 27.

Plaintiffs' Response: Admitted.

CIA Statement:

15. In the fall of 2012, the Agency conducted a thorough search of its records repository and located attachments referenced in the documents noted above. In a letter dated 20 November 2012, the Agency informed Plaintiffs about the additional searches and released all of the attachments found, redacting portions based on exemptions (b)(1), (b)(3) and (b)(6) (redacting intelligence sources and methods, names of CIA employees and military personnel and signatures). The Agency also removed the SECRET stamp from C00492526, which was an incorrect classification and released an updated version of the document with fewer redactions. An updated version of document C00465780 was also found and sent to Plaintiffs, with its accompanying attachment. *See* Shiner Decl. ¶ 28.

Plaintiffs' Response: Plaintiffs are without knowledge or information to determine the thoroughness of the referenced search and therefore it is denied. Plaintiffs dispute the nature and effect of the referenced redactions.

CIA Statement:

Withholdings

16. As a result of the Item 5 and Item 7 searches conducted in response to the Court's 2012 Order and described above, the Agency has processed and released – either in-full or in-part – over 750 additional responsive documents to Plaintiffs. In 2014, the parties agreed that the Agency would provide a sample *Vaughn* index of the newly located release-in-part documents. Given the opportunity to identify up to 100 documents, Plaintiff

ultimately selected 86 of the documents released-in-part since the 2012 Order for inclusion in the sample *Vaughn* index. Because two of the 86 documents are duplicates, the CIA's sample *Vaughn* index, which is attached as Exhibit B to the Shiner Declaration, covers only 84 documents, with the duplications noted in the index. In addition, in February 2016, the CIA provided Plaintiffs with a separate *Vaughn* index of all documents that have been denied-in-full throughout the duration of this case. A copy of the denied-in-full *Vaughn* index is attached as Exhibit C to the Shiner Decl. *See* Shiner Decl. ¶ 29.

Plaintiffs' Response: Plaintiffs admit only that the CIA provided the two referenced *Vaughn* indices.

CIA Statement:

Denied-in-Full *Vaughn* Index.

17. The attached *Vaughn* index for the denied-in-full documents describes what the documents are and the information withheld under applicable FOIA exemptions 1, 3, 5, and 6. Exemptions 1 and 3 were asserted for almost all of the DIF documents to protect the names of Agency employees and their signatures, office locations, and phone numbers (entry numbers 1-3, 5-22, 24-34, 36-45) as well as to prevent disclosure that would reveal intelligence sources, methods and activities and/or would harm foreign relations and activities of the United States (entry numbers 2-12, 15-45). Documents denied-in-full were classified as SECRET because releasing the information could reasonably be expected to cause serious damage to national security. *See* Shiner Decl. ¶ 30.

Plaintiffs' Response: Denied as argumentative and conclusory. Plaintiffs dispute the legal conclusions set forth by the CIA.

CIA Statement:

18. Exemption 5 was also asserted for many of the DIF documents to protect pre-decisional intra-agency analysis and recommendations (entry numbers 1, 2, 5, 6, 7, 9, 11, 12, 13, 14, 20, 21, 23, 25, 32, 34, 35). *See* Shiner Decl. ¶ 31.

Plaintiffs' Response: Plaintiffs only admit that Exemption 5 was asserted for the denied-in-full documents identified, but deny that the assertion of that exemption was proper.

CIA Statement:

19. Exemption 6 was applied to several of the denied-in-full documents to protect the names, signatures, and identifying information of third parties not employed by the Agency, members of Congress, and military personnel (entry numbers 18, 19, 22, 31, 33). *See* Shiner Decl. ¶ 32.

Plaintiffs' Response: Plaintiffs only admit that Exemption 6 was asserted for the denied-in-full documents identified, but deny that the assertion of that exemption was proper.

CIA Statement:

Released-in-Part (Sample) *Vaughn* Index.

20. As referenced above, 84 of the newly released-in-part documents are contained in a sample *Vaughn* index. Like the denied-in-full documents, information was withheld from these released-in-part documents based on exemptions 1, 3, 5, and 6. The Agency made minimal redactions, only withholding information which would reveal names and personal information of CIA employees, intelligence sources, methods and activities and/or harm foreign relations and activities of the United States (entry numbers 2-35, 37-

68, 70-86), disclose internal, deliberative agency processes (entry numbers 26, 62, 79), or disclose personal information of third party individuals whose privacy interest outweighs the interest of public disclosure (entry numbers 1-3, 7, 9-10, 13-14, 18-19, 22-24, 26-27, 31-32, 35-37, 43, 45-46, 48-50, 53-57, 62-63, 66, 68-77, 79-80, 83, 86). *See* Shiner Decl. ¶¶ 33.

Plaintiffs' Response:

Denied as argumentative and conclusory. Plaintiffs dispute the legal conclusion that this information has been properly withheld and the factual description of the material withheld.

CIA Statement:

Segregation

21. With regard to the denied-in-full documents, the CIA determined that the documents did not contain any non-exempt, reasonably segregable material. This determination was based on a careful review of the documents, following a line-by-line review of each. *See* Shiner Decl. ¶¶ 67.

Plaintiffs' Response: Denied as argumentative and conclusory. Plaintiffs dispute the legal conclusion that the 282 Denied-in-Full pages in this index contain no segregable non-exempt information.

CIA Statement:

22. With respect to documents denied-in-full under exemption 5, the nature of the exemption and the nature and content of the documents, comprised of internal pre-decisional deliberations, are such that there exists no information that is nonexempt which can be reasonably segregated. The documents were reviewed line-by-line and in all

instances the character of the statements are an integral part of CIA's internal deliberative process. Any nonexempt information in these documents is either non-responsive to Plaintiff's requests or is so inextricably intertwined that no portions can be reasonably segregated and released. *See* Shiner Decl. ¶ 68.

Plaintiffs' Response: Denied as argumentative and conclusory. Plaintiffs dispute the legal conclusions that the withheld information is exempt from disclosure or non-responsive.

CIA Statement:

23. In the instances where documents have been denied-in-full based on exemptions other than 5, the contents of the documents are such that any nonexempt information is either non-responsive to the Plaintiff's requests or is so inextricably intertwined with exempt information that release of the nonexempt information would produce only incomplete, fragmented, unintelligible phrases composed of isolated, meaningless words. Thus, no nonexempt information remains that reasonably could be segregated for release, and as a result, these documents must be withheld-in-full. *See* Shiner Decl. ¶ 69.

Plaintiffs' Response: Denied as argumentative and conclusory. Plaintiffs dispute the legal conclusions that the withheld information is exempt from disclosure and/or non-responsive and inextricably intertwined with exempt information that its release would be unintelligible bits or fragments.

DATE: October 21, 2016.

Respectfully submitted,

_____/s/_____
James H. Lesar # 114413
930 Wayne Avenue
Suite 1111
Silver Spring, MD 20910
(301) 328-5920
jhlesar@gmail.com

Counsel for Plaintiffs
Roger Hall and SSRI, Inc.

_____/s/_____
John H. Clarke # 388599
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 344-0776
Fax: (202) 332-3030
johnhclarke@earthlink.net

Counsel for plaintiff
Accuracy in Media, Inc.