

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF ACCURACY IN MEDIA'S SUR-REPLY TO
DEFENDANT'S REPLY TO OPPOSITION TO MOTION TO DISMISS

Plaintiff Accuracy in Media ("AIM") respectfully submits this Reply to *Defendant's Reply to AIM's Opposition to Defendant's Motion to Dismiss* (Docket # 23), wherein defendant argues lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Plaintiff responds to defendant's argument that the FOIA letter at issue evidences no authority for AIM to make the FOIA Request, and so AIM should be dismissed.

Under LCvR 7(m), undersigned counsel conferred with counsel for defendant, who does not oppose AIM's filing this sur-reply to the CIA's dispositive motion.

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Background

Complaint. The complaint's caption lists AIM as a plaintiff and the complaint identifies AIM as a party at ¶ 4. Count I is "February 7, 2003 Request for Records," Count II is "News Media Status," and Count III is "Public Interest Fee Waiver." Three lawyers' signatures appear on behalf of three plaintiffs.

Administrative record. By June 15, 2004 letter, the CIA mailed a response to the February 7, 2003 FOIA Request at issue. (The CIA wrongly avers that the administrative record (FOIA letter) does not include AIM's assertion of news media status or its request for an associated fee waiver.¹) Because plaintiffs filed this action on May 19, 2004, before the CIA's June 15, 2004 response, plaintiffs have constructively exhausted their

¹ Docket # 16: *Defendant's opposition to Plaintiff Accuracy in Media's Motion for a Statutory Fee Waiver* (at 5): Claiming failure to deny AIM's news media status "because there was no request from AIM to be denied. To the extent that 'there is an administrative record for the Court to review,' (*Id.*) it is devoid of AIM."

Cf. FOIA Request at issue (Docket # 5 Ex 1): "Reed Irvine is a media critic who is Chairman of the Board of Accuracy in Media, Inc. ("AIM"). He is editor of [the] AIM Report, a biweekly publication which has an interest in the POW/MIA issue. AIM has approximately 3,300 subscribers. Mr. Irvine is editor of [the] AIM Report. He is author of Media Mischief and Misdeeds, 1984; and co-author (with Cliff Kinkaid) of Profiles in Deception, 1990, and the News Manipulators (with Joseph C. Goulden and Kliff Kinkaid.)" (¶ 2 at 2). "Our clients are entitled to status as 'representatives of the news media' and thus cannot be charged search fees. 5 U.S.C. 552 (a)(4)(A)(ii)(II)." (¶ 2 at 3). "Indeed, one of the stated purposes of Studies Solutions Results, Inc. is to obtain and disseminate information concerning missing POW/MIAs to the public. Reed Irvine and AIM similarly intend to disseminate information on this issue derived from this request to the public. Accordingly, our clients are entitled to a waiver of copying costs, and they request that such waiver be granted pursuant to 5 U.S.C. 552 (a)(4)(a)(iii)." (¶ 4-5 at 3).

administrative remedies.² Thus, the administrative record consists of only plaintiffs' FOIA letter.

FOIA Request. Plaintiffs' February 7, 2003 FOIA letter is written on plaintiff Roger Hall's counsel's letterhead, James H. Lesar, is sent by certified mail return receipt requested, and begins and ends:

Re: Requests for Records on Missing POWS

Dear Ms. Dyer:

I represent Mr. Roger Hall and Studies Solutions, Inc., trading as POW/MIA Litigation Account. Mr. Hall is joined in this request by Mr. Reed Irvine and Accuracy in Media, Inc., who are represented by Mr. Joe Jablonski. As further described below, our clients seek records pertaining...

* * *

Accordingly, our clients are entitled to a waiver of copying costs, and they request that such a waiver be granted pursuant to 5 U.S.C. (a)(4)(iii).

Sincerely yours,

James H. Lesar
Joe Jablonski

The FOIA Request is signed, "James H. Lesar."

² 5 U.S.C. § 552 (6) (C)(i): "Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph." See Oglesby v. US Dept. of Army 920 F.2d 57, 65 (D.C. Cir. 1990).

MEMORANDUM OF POINTS AND AUTHORITIES

The CIA seeks to stay of the proceedings, or alternatively to dismiss the action,³ arguing dismissal on the grounds (1) that plaintiffs did not exhaust their administrative remedies, (2) *res judicata* and collateral estoppel (and that AIM and Studies Solutions Results, Inc. ("SSRI"), are both privies of Mr. Hall), and (3) that AIM is not a FOIA requester because the FOIA letter evidenced no authority to bind AIM to pay fees.

When a defendant challenges subject matter jurisdiction, the plaintiff (as the party asserting the existence of jurisdiction) must bear the burden of establishing jurisdiction, by a preponderance of the evidence.⁴ The burden, however, is generally not a heavy one.⁵

³ Docket # 5: *Defendant's Motion to Stay Proceedings, or in the Alternative , to Dismiss Without Prejudice, and Memorandum in Support*;
Docket # 13: *Response of Plaintiffs Roger Hall and Studies Solutions Results, Inc. to Defendant's Motion to Stay Proceedings, or in the alternative, to Dismiss without prejudice*;
Docket # 18: *Defendant's Reply in Support of its Motion to Stay Proceedings, or in the Alternative, to Dismiss Without Prejudice*;
Docket # 20: *Plaintiff Accuracy in Media, Inc.'s Opposition to Motion to Dismiss*;
Docket # 23: *Defendant's Reply to Plaintiff Accuracy in Media's Opposition to Defendant's Motion to Dismiss.*

⁴ See Toxgon Corp. v. BNFL, Inc., 312 F. 3d 1379, 1383, (Fed. Cir. 2002); APWU v. Potter, 343 F.3d 619, 623 (2d Cir. 2003).

⁵ Garcia v. Copenhaver, Bell & Assocs., 104 F.3rd 156, 1260-61 (11th Cir. 1997) (commenting that it is "extremely difficult" to dismiss a claim for lacking subject matter jurisdiction); Michigan So. R.R. Co. v. Branch and St. Joseph Counties Rail User's Ass'n, 287 F. 3d 568, 673 (6th Cir. 2002) (commenting that claim will generally survive motion to dismiss if plaintiff shows "any arguable basis in law" for claims alleged.)

Defendant belatedly⁶ claimed that Mr. Lesar's representations as to his authority regarding Mr. Jablonski and AIM were insufficient because "there is nowhere in or accompanying the request any authority for such representation."⁷

The government's theory is that Mr. Lesar's representations as to Roger Hall, and Studies Solutions, Inc., accurately reflect those plaintiffs being FOIA requestors – however, Attorney Lesar misrepresented his authority to submit the request on behalf of (presumably) both AIM and Attorney Jablonski. Mr. Jablonski's name appears immediately beneath Mr. Lesar's name.

The CIA argues that the FOIA letter did not bind AIM to pay fees associated with production of the FOIA requests. But Mr. Lesar would be liable for any fees associated with the FOIA Request if he were acting with apparent but no actual authority. (AIM would not be a party herein if Mr. Lesar had no actual authority.) Additionally, because

⁶ Although "[d]efendant's motion [to dismiss]... included the proceedings as to [p]laintiff AIM" (CIA Reply Docket # 23 p. 3), the CIA made no principal-agency argument that first motion to dismiss (Docket # 5), nor did the CIA's June 15, 2004 response to plaintiffs' FOIA request (Docket # 5 Ex 2) mention any authority issue.

⁷ Docket # 23: *Defendant's Reply to Plaintiff Accuracy in Media's Opposition to Defendant's Motion to Dismiss* (at 2):

The February 7, 2003 FOIA request bears only the signature of plaintiff Hall's counsel, Attorney James H. Lesar. While the typewritten "Joe Jablonski" appears below Attorney Lesar's typewritten name and signature, there is no signature of Attorney Jablonski, there is no signature "for" Attorney Jablonski, and there are no initials. Moreover, while the FOIA request states that Plaintiff Hall was "joined in" the request by AIM and that AIM "was represented by Mr. Joe Jablonski," there is nowhere in or accompanying the request any authority for such representation... Incorporation by reference in another's FOIA request is insufficient because it is not signed by anyone with authority to bind AIM to the request and the obligation to pay associated fees.

the CIA's regulations require it to notify the FOIA requestor if the estimate of fees exceeds \$100,⁸ the CIA's argument that the request "is not signed by anyone with authority to bind AIM to the request and the obligation to pay associated fees" (Docket # 23 at 2) is hollow.

The letter sufficiently evidences Mr. Lesar's authority to act as agent of Mr. Jablonski and to make the FOIA request on behalf and AIM, just as it sufficiently evidences Mr. Lesar's authority to make the FOIA Request on behalf of Mr. Hall and SSRI. Defendant has offered no grounds for the Court to treat Mr. Lesar's representations regarding AIM and its counsel any differently than Mr. Lesar's representations regarding Roger Hall and SSRI.

Moreover, the CIA's grievance that AIM joined in the FOIA request and lawsuit to bolster plaintiff Hall's fee waiver position⁹ should be given no weight. The identity of the requester is irrelevant under the FOIA; bearing only on certain procedural areas, such

⁸ CIA FOIA regulations: 32 CFR § 1900.13(e) AGREEMENT TO PAY FEES, (appearing in Docket # 11 Ex 1 p. 6: *Motion of Plaintiff Roger Hall to Produce Certain Categories of Records Forthwith*): "In order to protect requestors from large and/or unanticipated charges, the Agency will request specified commitment when it estimates that fees will exceed \$100.00...."

⁹ Docket # 16: *Defendant's opposition to Plaintiff Accuracy in Media's Motion for a Statutory Fee Waiver and Defendant's Motion to Dismiss* (at 8): "AIM is a convenience plaintiff that clearly was added to this FOIA request to bolster Plaintiff Hall's renewed pursuit of documents denied and fee waivers related to the requested documents that were denied in the prior litigation." And see id.: "AIM... displays transparency its reasoning for being in this litigation with its bare argument that 'Defendant CIA has not, and cannot, deny that plaintiff Accuracy in Media, Inc, is a member of the News Media,' and, as such, that it is entitled to a waiver of all fees except for duplication... What is beyond dispute is that AIM is the stalking horse for Roger Hall... AIM is in constructive privity with Roger Hall... to circumvent the FOIA process, FOIA fee waiver scheme..." And see Docket # 18: *Defendant's Reply in Support of its Motion to Stay Proceedings, or in the Alternative, to Dismiss Without Prejudice* (at 3) (same).

as assessment or waiver of fees. The instant pleading goes to AIM's status as a plaintiff, not its status as a member of the news media. Nor is AIM any less of a plaintiff because it joined in plaintiff Hall's and SSRI's opposition to defendant's motion to dismiss or alternatively for a stay (Docket # 5) using a one-page filing.¹⁰ Counsel for Hall & SSRI write succinctly, and the undersigned strives to do so too.

Against the backdrop of defendant's history of requesting incompatible amounts in payment of fees, culminating in a 60-fold increase to over \$600,000 (see note 16 *supra*), the CIA's instant motion to dismiss the *clearly-media-member-AIM*, on principal-agency grounds, appears to be another attempt to delay adjudication of disclosure, consistent with the CIA's history in this matter of abusing the FOIA's fee-waiver provisions.

Conclusion

Defendant's authority analysis has no merit because the FOIA request clearly identifies AIM as a requestor and the CIA cannot disregard Mr. Lesar's representations at its pleasure. The CIA's other arguments are simply grievances, irrelevant as a matter of law. Wherefore, for the foregoing reasons, Accuracy in Media, Inc., respectfully prays that the Court deny the Central Intelligence Agency's motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

¹⁰ Id. at 8, reprinting AIM's pleading joining oppositions to Docket # 5 *CIA's motion to dismiss or alternatively for stay*. See also *Defendant's Reply in Support of its Motion to Stay Proceedings, or in the Alternative, to Dismiss Without Prejudice*; (Docket # 18 n. 1 at 1.) (same). See also id at 3: "Neither has AIM pursued this litigation as an independent party... AIM's motion for fee waiver similarly relies heavily on this motion..."

Motions for fee waivers and forthwith production

Motions for fee waivers. Plaintiffs have filed motions for fee waivers¹¹ (tracking the FOIA request) citing, inter alia, the FOIA's news media provision,¹² its public interest provision,¹³ and the CIA's regulations.¹⁴ And plaintiffs cite an Executive Order and

¹¹ Docket # 7: *Accuracy In Media's Motion for Statutory Fee Waiver*;
Docket # 12: *Motion of Roger Hall, Studies Solutions Results, Inc. for a Waiver of Search Fees and Copying Costs*;
Docket # 14: *Defendant's Opposition to Motion of Roger Hall, Studies Solutions Results, Inc. for a Waiver of Search Fees and Copying Costs*;
Docket # 16: *Defendant's opposition to Plaintiff Accuracy in Media's Motion for a Statutory Fee Waiver and Defendant's Motion to Dismiss*;
Docket # 19: *Defendant's Opposition to Motion of Roger Hall and Studies Solutions Results, Inc. for a Waiver of Fees and Copying Costs*;
Docket # 20: *Plaintiff Accuracy in Media, Inc.'s Reply to Defendant's Opposition to Motion for Statutory Fee Waiver*;
Docket # 25: *Reply to (1) Defendant's Oppositions to Motion of Roger Hall to require Defendant to Produce certain categories of Records and (2) Motion of Roger Hall and Studies Solutions, Inc. for a Waiver of Search Fees and Copying Costs*

¹² 5 U.S.C. § 552 (a)(4)(A)(ii)(II): fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media;

¹³ 5 U.S.C. § 552 (a)(4)(A)(iii): "Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

¹⁴ CIA FOIA regulations: 32 CFR § 1900.02 (h)(3) DEFINITIONS REPRESENTATIVE OF THE NEWS MEDIA reprinted Docket # 16 at 11-12: *Defendant's opposition to Plaintiff Accuracy in Media's Motion for a Statutory Fee Waiver and Defendant's Motion to Dismiss*. And see 32 CFR § 1900.13(b) FEE WAIVER REQUESTS, appearing in Docket # 11 Ex 1 p. 5: *Motion of Plaintiff Roger Hall to Produce Certain Categories of Records Forthwith*.

subsequent President's Directive mandating compliance with the Executive Order, requiring disclosure by 1993 – of the very records at issue here.¹⁵

Motion for immediate production. Plaintiff Hall filed a motion for immediate production of records already searched and for which he has twice submitted payment,¹⁶ and for records of three Hall-requested searches for POW/MIA records including fees incurred,¹⁷ which the CIA opposed.¹⁸

¹⁵ Docket # 12: *Motion of Roger Hall, Studies Solutions Results, Inc. for a Waiver of Search Fees and Copying Costs* (at 1-2): "[I]n 1991, the United States Senate... Select Committee to Investigate prisoners of war (POWs) and those missing in action (MIA)... directed the President... to issue an executive order commanding... release [of]... materials pertaining to POWs and MIAs.... President George Bush issued Executive Order 12,812, which directed the release of all non-sensitive materials "pertaining to American POWs and MIAs lost in Southeast Asia." President Clinton... issu[ed] Presidential Decision Directive... agencies to complete their review... under Executive Order 12,812, by Veterans Day, 1993.... [R]elevant materials on the POW/MIAs remain unlocated."

¹⁶ Docket # 11: *Motion of Plaintiff Roger Hall to Produce Certain Categories of Records Forthwith*: In Hall I, on January 31, 2004, in court-ordered report, CIA estimated "at least \$29,000." (Hall had sent a check of \$1,000.) "Hall requested copies of records showing the time spent and fees incurred, the CIA filed a Notice of Corrected Calculation of Search Fees lowering the amount of such fees [from \$29,000] to \$10,906.33." (at 3) "On November 26, 2003, Hall sent the CIA two checks totaling \$10,906.33," and, after the CIA returned these checks, resubmitted them on July 29 2004, referencing the request at issue herein. (at 3-4) "[A]fter this suit was filed," the CIA claimed that "three items of the request alone would amount to \$600,000" (at 2). And see Docket # 25 (1) *Hall's Reply to opposition to produce certain Records forthwith and (2) Motion of Roger Hall and Studies Solutions, Inc. for a Waiver of Search Fees and Copying Costs* (at 2), noting the CIA's September 2000 filing motion for payment of fees in an unspecified amount.

¹⁷ Docket # 11: *Motion of Plaintiff Roger Hall to Produce Certain Categories of Records Forthwith*: Records of searches and associated fees of three previous FOIA requests "should require minimal amount of time." (at 4).

¹⁸ Docket # 15: *Defendant's Opposition to Motion of Plaintiff Roger Hall to Produce Certain Categories of Records Forthwith*.

Respectfully submitted,

/s/

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