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.	:	

REPLY TO DEFENDANT'S MOTION FOR LEAVE TO
FILE EX PARTE DECLARATION AND OPPOSITION TO
DEFENDANT'S RESPONSE TO THIS COURT'S ORDER TO SHOW CAUSE

By order dated May 23, 2019, ECF No. 333, this Court issued an order to show cause why the pending summary judgment motions of plaintiffs Roger Hall ("Hall"), Studies Solutions Results, Inc. ("SSRI") (collectively "Hall") and Accuracy in Media ("AIM") should not be granted in certain respects because the record before Court indicated that defendant Central Intelligence Agency ("CIA") repeated engaged in bad faith conduct over a period of a decade and a half. The CIA initially responded to the Court's order by filing, on June 7, 2019, a Motion for Leave to File Documents for *Ex Parte In Camera* Review. ECF No. 334. Hall immediately objected.

The Court not having acted on the CIA's motion for leave ("MFL"), on June 7, 2019, the CIA filed a supplemental memorandum of points and authorities in

support of its pending Renewed Motion for Summary Judgment ("2d RMSJ"), ECF No. 335.

The CIA cites Jifry v. FAA, 370 F.3d 1174, where the court held:

> After in camera review of the classified intelligence reports, we hold that there was substantial evidence to support the TSA's determination that the pilots were security risks. While we reject the pilots' contention that the court apply a de novo standard of review, we have carefully reviewed the classified intelligence reports on which TSA relied.

Thus, the absence of a de novo review in Jifry makes it inopposite to this case.

Hall has also addressed these arguments in the many previous briefs, motions status reports, notice of filings, etc. that he has filed over the years. This Court has listed many of these filings in its footnote one to its order to show cause. Hall hereby incorporates these by reference in this reply brief.

The CIA's motions require the Court to make two separate determinations: (1) Is in camera inspection appropriate? (2) I s ex parte examination appropriate? Although the CIA argues that *ex parte* examination routinely follows from a determination to inspect documents *in camera*, this is not true.

The CIA cites Jerry Vogel Music Co. v. Warner Bros. Inc., 535 F. Supp. 172 (1982 (SD.N.Y 1982). On its face, Jerry is woefully weak support for the CIA's arguments. It is not a D.C. Circuit case. It was handed down in 1982, long before Milner made it clear that de novo review under FOIA requires that its provisions

must be construed narrowly in accordance with theplain meaning of the statutory language.

More devastating to the CIA's credibility is its failure to cite the D.C. Circuit's decision in subsequent Jery case. The opinion by Judge Rogers said in pertinent part :

> Viewing as a whole the record evidence before the TSA, including ex parte in camera review of the classified intelligence reports, we hold that there was substantial ence to support the TSA's determination that the pilots were security risks. While we reject the pilots' contention that the court apply a de novo standard of review, we have carefully reviewed the classified intelligence reports on which TSA relied. The record is not lengthy and the basis for the TSA's conclusion is obvious. The court's review is limited, moreover, to the administrative record that was before the TSA when it determined that the pilots were security risks. See 5 U.S.C. § 706; cf. United States v. Carlo Bianchi & Co., 373 U.S. 709, 715, 83 S.Ct. 1409 1413, 10 L.Ed.2d 652 (1963). Hence, the pilots' post-argument submission of May 3, 2004 is not properly before the court although we note that the information it contains was known to the pilots in –[Page 1182| 2001 and could have, and still can be, submitted.

The CIA's conduct in not calling this case to this Court's attention is shameful. Since the Rogers panel actually exercised ex parte review in favor of the Government, this decision would seek to favor the CIA's arguments in this case. But it doesn't because the decision was expressly based on a rejection of the

applicability of the de novo review standard. Particularly after *Milner*, which this Court has endorsed in this case, application of this standard is required.

The determination of both search and exemption issues hinges on the ability of the CIA to carry its burden of proof on the CIA's highly speculative allegations that disclosure of ancient information would endanger national security concerns. Despite repeated attempts, it has failed to make that case convincingly. The CIA argues that privacy right dominate over the public interest/public benefits of disclosure.

But the CIA misapplies the facts and misconstrues the law. For example, although national defense and privacy concerns have a basi in the law, the CIA tries to undermine the public interest factor in many ways. But interpretation of a statute is at its core a matter of determining its purposes. Dept. of Air Force v. Rose, 425 U.S. and a plethora of other cases, unequivocally hold that "disclosure, not secrecy," is the dominant goal of the Act. Interpretation of the applicable Executive orders in this case requires de novo review of withheld information using a much higher showing of harm because of the automatic declassification procedures prescribed by E.O. 12346. The CIA has not come close to meeting that standard.

The CIA tries to use the "public benefits" analysis set forth by its veteran declarant, Shine, to its advantage. But standing the automatic declassification on

its head, it uses the passage of time to argue the public interest/public benefit has decline with the passage of time while the national security/privacy concerns have either remained the same. But the public interest in the subject of plaintiffs' requests has, if anything, increased over the years, as evidence by the Viet Nam Wall memorials, countless news article, the agreement with North Korea to return remains to the U.S., etc. Whether privacy information should be disclosed is determined not by what the government thinks is a privacy act violation but by what the subject of the disclosure wants. See War Baby review. The central focus of Roger Hall's FOIA requests has always been the status of living POWs. This remains true today. It is evidence in the affidavit of Lt. Col. Hrdlika, who is still seeking to learn information known to exist but which the CIA is still ignoring. See Hrdlick Declaration submitted herewith.

CONCLUSION

For the reasons set forth above and in prior filings in this case, the CIA's motions must be denied. The Court should set the case down for a status report and status hearing as promptly as possible. (Note, counsel for Hall will be out-of the country from July 10 to July 23, 2019). This will afford the parties to advise the Court how to proceed with the issues that the Court will have to address if the CIA does not comply with the show cause order or claims that it is unable to do, or decides to appeal the Court's order.

Date: June 24, 2019.

Respectfully submitted,

/s/

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