UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C. A. No. 04-0814 HHK/JMF
	:	
CENTRAL INTELLIGENCE AGENCY,	:	
	:	
Defendant	:	

PLAINTIFFS ROGER HALL AND STUDIES RESULTS *SOLUTIONS, INC.'S RESPONSE TO DEFENDANT'S REPLY* IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER

A. The CIA Has Misrepresented the Nature of Plaintiffs' Statements Regarding The Inadequacy of Its Search for Records Responsive to Item Six

Presently at issue before this Court is whether defendant Central Intelligence Agency ("CIA") should be granted a protective order against discovery sought by Plaintiffs Roger Hall ("Hall") and Studies Solutions Results, Inc. ("SSR") on the issue of whether the CIA has conducted an adequate search for records responsive to Item 6 of their February 7, 2003 request. In its reply to plaintiff's opposition to its motion for a protective order, the CIA asserts that "[p]laintiffs base their entire argument on their assertion that the CIA has accounted for only two documents in response to Item 6." Reply at 1 (emphasis added). The CIA then argues as follows: "This assertion is incorrect. . . . Because their entire argument that discovery is necessary rests upon the assertion that accounting for only two documents in its response to Item 6 is

dispositive of the CIA's inadequate search, and that assertion is wholly misplaced, plaintiffs' argument fails on its face." Id. (emphasis added).

It appears to be a very damning indictment of plaintiffs' argument, particularly when the CIA later refers to passages in its Vaughn index which describe other documents, which although entirely withheld, are responsive to Item 6 and were located as a result of a belated search.

But the language which the CIA uses to characterize this issue is not the language employed by plaintiffs and is highly misleading. The CIA provided no citation to plaintiffs' opposition for its claim that plaintiffs had said that the it had "accounted for" only two documents responsive to Item 6. It provided no citation because plaintiffs did not use the "account for" language.

What plantiffs did say is—

> "The CIA has produced no documents showing the basis for the search fees it represented to the Hall I court had been incurred by Hall"

and

> The only two documents [the CIA] has produced . . . in response to the costs portion of Item six are two letters it wrote to Hall in 1994 and 1995. These letters do not document the basis for any search fees but simply that he owed certain minor amounts of copying fees.

Plaintiffs' Opposition to Defendant's Motion for a Protective Order at 2 ("Opp.)" (emphasis added).

It is clear from these passages that what plaintiffs were talking about was not what the CIA had "accounted for," put what it had "produced." The documents which the CIA has pointed to so it could be in a position of accusing plaintiffs of making

untrue statements have been entirely withheld, and thus not "produced." Secondly, and more importantly, plaintiffs carefully qualified their description of the kinds of documents they were referring to as not having been produced by the CIA. They said that those records were "the basis for" the fee assessments levied or they indicated that what was absent were records "document[ing]" the fees. That is, they were pointing to the absence of any records from or by the persons actually conducting the searches which state how much time they spent, what kind of search they performed, the date of the search, and charged for the services.

There is no apparent reason why the CIA should be confused about the nature of plaintiffs' request for records which document the basis for the fees sought from Hall. First, by its terms Item 6 itself makes this clear. The part of it which relates to costs seeks all records pertaining to the assessment of fees in Hall I, "including but not limited to any itemization or other records reflecting the the time spent on each search, the rate charged for the search, the date and duration and kind of search performed, etc." Item 6 of the February 7, 2003 request emphasis added). Thus, the request clearly indicates that what was sought included the underlying data which documented the alleged charges. Plaintiffs also quoted this provision in their opposition to the CIA's motion for a protective order, and in discussing the two documents which the CIA did provide with their August 15, 2006 letter, plaintiffs noted that these two documents "simply mentioned copying fees" and contrasted them with the kinds of records called for by the request but not provided, stating: "No documents were provided which documented the basis for fees which Hall was claimed to owe. . . ." Opp. at 3 (emphasis added) This point was

reemphasized in the lead sentence of the following paragraph, in which plaintiffs referred to the "complete lack of documentation" for fees which Hall was claimed to owe. . . ." Id. (emphasis added)

In addition, plaintiffs' focus on records documenting the search costs allegedly incurred is plain from the text and thrust of plaintiffs' discovery requests from which the CIA seeks protection. For example, the first item of plaintiffs' request for production of documents seeks sample copies of all forms "utilized by the CIA in calculating the search and copying fees incurred" by FOIA requesters And the first item of plaintiffs' set of interrogatories ask the CIA to identify who participated in the the searchs for Hall I documents. Obviously, the point is that these are the people who had to document the amount of time and type of search for each search performed.

Again, plaintiffs' opposition mad clear that the CIA had not produced these kinds of records, hence the question as to the adequacy of its search. It asserted: No records showing how much time was searching by whom on what date at what rate have been made available." Opp. at 4.

B. The CIA's Vaughn Index Fails to Show That It Has Conducted an Adequate Search

The CIA makes a stab at trying to show that it has searched for, but not produced, the records sought by plaintiffs, claiming that its Vaughn index refers to such materials. It cites, first, Vaughn Document No. 4, which it says is a an entirely withheld five-page document located in the CIA Attorney's litiagation file. But neither the location of this document nor the description of it comes close to describing the kinds of clerical or staff

records documenting fees which plaintiffs contend have not be located and provided. Document No. 4 actually consists of four documents, some of which are said to be attorney records rather than clerical or staff records. Moreover, the dates assigned assigned to the two emails which are part of the document come long after the dates on which the CIA announced initially that it had waived $4,550 in fees and subsequently stated that Hall had incurred more than $29,000 in such fees. This renders it impossible that they could be the underlying documentation of such fees. The CIA also cites Vaughn Document No. 8.. It, too, is entirely withheld under Exemption 5. It is describes as consisting of CIA attorney handwritten notes dated 25 March 2003 regarding a correction to fee calculations." Reply at 3, citing CIA's Vaughn index. Again, by its own description this is not a clerical but an attorney document, and the date is long past the date when any fees to be charged would have been documented for the initial $4,550.00 figure or the subsequent "more than $29,000" figure.

The CIA's Vaughn index does describe other documents responsive to Item 6, i including others which are responsive to the request's demand for records relating to the fee assessments levied against Hall. Insofar as can be determined from the minimal descriptions provided by the CIA, none of these documents consist of records compiled by the persons who did the searches and recorded what kind of searches they performed, how long the searches lasted, or the rate charged for the services.

C. The Record Does Suggest Bad Faith on the Part of the CIA

The CIA argues that plaintiffs have made no showing of bad faith. A showing of Bad faith is not essential to demonstrating the need for discovery. Here, plaintiffs have

have shown that there is a factual dispute as to whether the CIA's search has located records that should have been located and produced. That is all that is required.

However, the record also suggests that the CIA has indeed engaged in bad faith Conduct. The request at issue was made nearly four years ago. The item at issue was relatively straightforward and should not have required extensive work. Obviously, the Freedom of Information Act has been rendered inoperable if an agency can assert that large fees must be paid and the requester cannot learn the basis on which that claim was made. But after nearly four years, plaintiffs have not been provided the documents that would document the basis for the fees the CIA levied. Absent some showing which has not been made, this suggests bad faith.

After initially producing only two documents, which really were not at all germane, since they merely consisted of correspondence with Hall, the CIA belatedly came forward with additional records, nearly all of which were withheld in their entireties, mainly under Exemption 5. The documents withheld do not appear to involve the kind of records which consists of clerical and staff employees' documentation of search charges. Nonetheless, they are responsive to Item six of plaintiffs' request. Even if protected under Exemption 5, a question that will have to be resolved later, the Agency could, in an act of good faith, have attempted to resolve this controversy by wiaiving the Exemption 5 claims and making them available. It hasn't.

In addition, the sequence of events in Hall I suggests bad faith. After initially waiving fees, after the trial judge in that case ordered further searches, the CIA asserted that Hall would have to come up with more than $29,000 in fees. When

challenged on this figure, the CIA then went into court and declared that the correct figure was actually $10,956.33. Its statement to the Court to this effect, in a departure from normal practice, was not made under oath by an Agency declarant.

Finally, in response plaintiffs' February 7, 2003 request, which was somewhat broader than Hall's earlier requests, the CIA drastically estimated its fee estimates for searches to several hundred thousands of dollars. The entire course of conduct seems fraught with implications of bad faith.

CONCLUSION

For the reasons set forth above, the CIA has failed to meet its burden of showing that there is good cause to grant a protective order.

Respectfully submitted,

_____/s/_____
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