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.	)	
	)	

PLAINTIFF ACCURACY IN MEDIA'S OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS AND FOR PARTIAL SUMMARY JUDGMENT, AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Accuracy in Media, Inc. ("AIM") cross-moves for entry of partial summary judgment in its favor, and for a waiver of search fees and copying costs, and to set a schedule for the prompt processing of the records, under Fed. R. Civ. P, 12(b)(6) and 56, on the grounds that no genuine issue of fact exists and AIM is entitled to entry of judgment as a mater of law.

AIM respectfully submits its Memorandum of Points and Authorities with its attached exhibits in support of its motion, and in opposition to defendant's dispositive motions, AIM's Statement of Material Facts Not in Dispute, its Statement of Genuine Issues, and a proposed Order.

DATE: May 8, 2007

Respectfully submitted,
/s/

John H. Clarke # 388599
Counsel for plaintiff
Accuracy in Media, Inc.
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 344-0776
Fax: (202) 332-3030

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BRIEF IN SUPPORT OF PLAINTIFF ACCURACY IN MEDIA'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, AND IN OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS AND FOR PARTIAL SUMMARY JUDGMENT

Under Rules 12(b)(6) and 56 and of Federal Rules of Civil Procedure, plaintiff Accuracy in Media, Inc., respectfully submits this Memorandum of Points and Authorities in support of its Motion for entry of Partial Summary Judgment, and in opposition to the dispositive motions of defendant Central Intelligence Agency.

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I. ARGUMENT

Item 1

1. Southeast Asia POW/MIAs (civilian or military) and detainees, who have not returned, or whose remains have not been returned to the United States, regardless of whether they are currently held in prisoner status, and regardless of whether they were sent out of Southeast Asia.

> *CIA:* These requests are duplicates of *Hall I* and 122 documents have been produced (in total in response to requests 1, 2, and 3). Koch Decl. ¶¶ 18, 20, 22. *See also* Motion to Dismiss and for Summary Judgment (MSJ) at 3 (same). The CIA does not accept AIM's April 2005 FOIA Request because it is "the subject of the current litigation." MSJ Ex. 12, June 2005 Koch letter, cited MSJ at 6.

In its first dispositive motion, the CIA argued *collateral estoppel* and *res judicata*. The Court rejected these arguments in its September 13, 2005 Order (Docket # 30), holding (at p. 7[1]) that the "the 'issues presented' are not 'in substance the same' as the

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[1] September 13, 2005 Order (Docket # 30) at 6-7:

> Under this doctrine, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986)… To determine whether collateral estoppel operates to preclude the relitigation of an issue a court must determine "whether the issues presented are in substance the same," "whether controlling facts or legal principles have changed significantly" since the previous judgment, and "whether other special circumstances warrant an exception to the normal rules of preclusion." *Allen*, 449 U.S. at 113 (citation and internal quotation marks omitted). While Hall previously sought records which overlap substantially with plaintiffs' request here, the "issues presented" are not "in substance the same" as the court addressed in the previous litigation. Before, Hall challenged the adequacy of CIA's search and the validity of the exemptions it cited in withholding or redacting specific documents; here, plaintiffs seek immediate production of documents and reductions or waivers of associated fees. The prior litigation, however, does close several doors. In this case, plaintiffs may not challenge the CIA's withholding of certain records Hall sought in his May 28, 1998, FOIA request, and the finding that particular records are exempt from the definition of "agency records" under FOIA. *See Hall v. CIA*, Civil Action No. 98-1319, slip op. at 1, 14-21 (D.D.C. Aug. 10, 2000).

court addressed in the previous litigation;" that issue preclusion may only apply to "certain records Hall sought in his May 28, 1998, FOIA request" and "particular records are exempt from the definition of 'agency records' under FOIA."

The CIA cannot now rely on *Hall I* except to the extent that the Court has ruled that *collateral estoppel* applies in the government's favor. The Court referred the parties to the pages of the *Hall I* opinion regarding Senate records and exemptions asserted in the records it *did* identify,[2] and, thus, has little to do with the issues herein. The Court need not revisit this issue.

Contrary to the government's claim that Judge Friedman's August 10, 2000 Order (CIA Ex 4) held that all responsive records to Requests 1, 2, and part of 3 have been produced (*see* CIA MSJ at 17), that court's opinion stated that "the CIA has not satisfied its burden of establishing that the search was adequate" (at p. 8), that it "cannot judge in either case whether the CIA's searches conducted after November 11, 1993 were adequate" (at p. 11), and that "plaintiff's request should have been read to include photographs" (at 12). Thus, plaintiff is not precluded from challenging the adequacy of the government's search under *collateral estoppel* principles. Judge Friedman's holding that exemptions were properly applied does not effect this Court's ruling on the adequacy of the CIA's search.

The CIA's other position is new: The records were produced in *Hall I*.

This is not so. There are many examples in the record of operations, events and activities which surely generated relevant records that have not been provided:

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[2] *Id.*: "*See Hall v. CIA*, Civil Action No. 98-1319, slip op. at 1, 14-21."

- CIA Political Adviser at the Commander in Chief Pacific originated or participated in MIA/POW operations, including the transfer of POWs in captivity from one Southeast Asian country to other communist countries. (Hall Decl. ¶ 5)

- CIA created and maintained briefing boards on camps throughout Southeast Asia where American POWs were held, including reports and analysis. (*Id.* ¶ 6)

- CIA employee Richard Secord submitted requests to the CIA to rescue American POWs in Laos. (*Id.* ¶ 7)

- The 1965 attempt to rescue Captain David Hardlicka and Captain Charles B. Shelton in Laos. (*Id.* ¶ 8)

- The 1971 or 1972 planning of a second rescue of the same POWs – whose location had again been learned (*Id.* ¶ 9)

- In 1973 then Chief of Naval operations Admiral Elmo Zumwalt told Hall that the CIA wanted to present him information on ongoing MIA/POW operations in Laos. (*Id.* ¶ 10)

- Operation Tailwind, an operation aimed at a particular POW camp in Laos, approved and tasked by the CIA. (*Id.* ¶ 11)

- In 1994 or 1995, Admiral Thomas Moorer, former Chairman of the Joint Chiefs of Staff, told Hall that in 1972 he had authorized a rescue of 60 POWs in Laos, having POWs' names and locations and other information, and that the CIA had this information. (*Id.* ¶ 12)

- POWs were taken from Vietnam, Laos and possibly Cambodia to the Soviet Union. (*Id.* ¶ 13)

- CIA electronic surveillance of the North Vietnamese and Laotian embassies gathering information regarding POWs. (*Id.* ¶ 14)

- Reagan administration CIA reconnaissance into Laos based on satellite imagery of a POW camp, based on NSA intercepts and satellite imagery and other intelligence, where photographs and voice recordings were taken. (*Id.* ¶ 15)

- MIA/POW satellite imagery given to the Senate Committee on POW/MIA Affairs in 1993, given to Mr. Kent Weiderman who accepted it for Mr. Anthony Lake of the National security Council. (*Id.* ¶ 16)

- CIA records of POWs in China between 1993-1995. (*Id.* ¶ 17)

- An operation in Czechoslovakia which received over 100 American POWs who were transferred from Vietnam, then in turn to the Soviet Union in the 1960s. (*Id.* ¶ 18)

- Information provided by POW camp guards in Laos and North Vietnam who were on the CIA payroll. (¶ 65, *Id.* ¶ 19)

- The Vietnamese offer to exchange live Americans for cash, relayed by CIA Director Casey to President Reagan, who instructed Casey to bring the confirming documentation to the White House for the President. (*Id.* ¶ 20)

- CIA generated records concerning POW/MIAs in CIA overseas field stations in Vietnam, Laos, Cambodia, and Thailand. (*Id.* ¶ 21)

- Reports of records originating in Far East Asia countries using the search terms "war criminals," "Criminals," "pirates," "air pirates," "sea pirates," "Caucasian." (*Id.* ¶ 22)

- Records retrieved by using the terms "unaccounted for" and "last known living." (*Id.* ¶ 22)

- Records retrieved by using the terms Bright Light, Trail Watch, Project Alpha, Operation Pocket Change, Project Corona, and Duck Soup. (*Id.* ¶ 23)

- Records retrieved by using the CIA's list of suspected prison sites by name and grid-coordinates. (*Id.* ¶ 24)

- Collaboration with the Department of Defense, each of the military branches, NSA, and other agencies, both in gathering and analyzing information about POW/MIAs. (*d.* ¶ 25)

- Aerial reconnaissance photographs of escape and evasion codes and photographs of the construction of a POW prison in Laos. (*Id.* ¶ 26)

- CIA Director Casey's involvement in the government's agreement to supply medical supplies in exchange for information and possibly the release of POWs held in Laos. (*Id.* ¶ 27)

- CIA photographing in its files of the National Photographic and Interpretative Center. (*Id.* ¶ 28)

- A 1981 meeting with the President, Vice-president, CIA Director Casey, and others, in which a North Vietnamese proposal to trade information about POW/MIAs for money (specifically 4 billion dollars) was discussed. (*Id.* ¶ 29)

- A 1981 a photograph of escape and evasion codes stamped in the grass at a Vietnamese POW prison, and President Reagan's launching an operation to investigate the site and an ensuing rescue attempt. (*Id.* ¶ 30)

- The CIA's involvement in monitoring POW/MIA movements in 1981, including CIA preparation of maps and gathering human source reports of live sightings. (*Id.* ¶ 31)

- Apparently CIA originated or based on CIA supplied information notes and maps of various prison camps in Vietnam, updated regularly, including the Son Tay camp, where an unsuccessful raid to rescue POWs was conducted, as well as post-war information on POW/MIA movements and suspected camps. (*Id.* ¶ 32)

- Various trips, starting in 1969, to deliver supplies to POW/MIAs, and to visit prison camps in South Vietnam and Laos, and corresponding meetings with CIA station chiefs in Laos, which used maps and documents detailing precise locations of POW/MIAs. (*Id.* ¶ 33)

- "The Project," a special mission carried out by Task Force Alpha in Thailand in 1970 to gather information and targeting strikes in Laos – to prevent inadvertent U.S. bombings of locations of likely POWs prison camps. (*Id.* ¶ 35)

- Cooperation between the DOD and the CIA with respect to covert operations in Vietnam and Laos prior to 1964, including several references to acronyms for CIA/DOD efforts, including the rescue of POWs. (*Id.* ¶ 36)

- A CIA report on the Nhom Marrott Detention Facility, a suspected prison camp in Laos where 30 POWs were said to be held. (*Id.* ¶ 37)

Notwithstanding the fundamental question being not "whether there might exist any other documents responsive to the request, but rather whether the search for those documents was adequate," *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551

(D.C. Cir. 1994) (internal citation omitted), the absence of identifications and productions of responsive records is so wide-ranging as to be highly probative of the inadequacy of the government's search.

In addition to the paucity of the CIA's production as compared to the records clearly in its possession, the CIA's search is also demonstrably inadequate on other grounds, as plaintiffs Hall and SSRI specifically set for in their motions for partial summary judgment. The CIA has not searched its operational files, as it must. The search must include the 700 potentially responsive records that the CIA chose to abandon because that search exceeded what the CIA normally considered "reasonable" by FOIA standards. The search must include "Prisoner of War" and "Missing in Action" in both lowercase and uppercase, as well as use numerous additional search terms, including but not limited to the names of the operations, events and activities listed above. When the adequacy of an agency's search is in dispute, summary judgment is inappropriate as to that issue. *See Founding Church of Scientology, Etc. v. Nat. Sec. Agency*, 610 F.2d 834, 836-37 (D.C. Cir.1979).

The CIA's *Vaughn* index does not address the *Hall I* records to which it refers, and it has not identified these records. (The CIA should inform AIM whether the CIA's production appearing at AIM's website constitutes the CIA's entire production of *Hall I* records. *See* http://www.aim.org/static/5407_0_7_0_C).

The CIA must meet *Vaughn*'s requirements in describing its search, productions, and exemptions asserted in *this* case. "The *Vaughn* index serves a threefold purpose: (1) it identifies each document withheld; (2) it states the statutory exemptions claimed, and (3) it explains how disclosure would damage the interests protected by the claimed

exemption." (emphasis supplied) *Citizens Commission on Human Rights v. FDA*, 45 F.3d 1325, 1326 (9th Cir. 1995.)

"Without a proper *Vaughn* index, a requester cannot argue effectively for disclosure and this court cannot rule effectively." *Campaign for Effective Transplantation v. U.S. Food and Drug Admin*., 219 F. Supp. 2d 106, 116 (D.D.C. 2002). "All that is required, and the least that is required, is that the requester and the trial judge be able to derive a clear explanation of why each document or portion thereof us putatively exempt from disclosure." *Hinton v. Dept. of Justice*, 844 F.2d 126, 129 (3d Cir. 1988).

Nor does the Koch Declaration relate that he even talked to personnel who conducted the search.[3]

The CIA refuses to consider AIM's eight FOIA Requests made on April 26, 2005 because they are "the subject of the current litigation." Correct. They are the subject of the plaintiffs' September 26, 2005, Amended Complaint (Docket # 45).

The CIA must respond to the Amended Complaint in its dispositive motions. It has not. Defendant offers no meritorious reasons for its nondisclosures of records responsive to each of plaintiffs' eight FOIA Requests.

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[3] Agency affidavits regarding the search for responsive records are inadequate to support summary judgment where they do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized." 627 F.2d 365, 371 (D.C.Cir. 1980) ("*Weisberg II*").

Item 2

2. POW/MIAs sent out of Southeast Asia (for example, to China, Cuban, North Korea, Russia).

> *CIA:* These requests are duplicates of *Hall I* and 122 documents have been produced (in total in response to requests 1, 2, and 3). Koch Decl. ¶¶ 18, 20, 22. *See also* MSJ at 3 (same).

As set forth above:

- AIM was not a party to *Hall I* and the Court has already ruled on issue preclusion.
- The CIA's search is inadequate.
- The CIA's *Vaughn* index is inadequate.
- "All responsive records" have not been produced.

Item 3

3. Prepared by and/or assembled by the CIA between January 1, 1960 and December 31, 2002, relating to the status of any United States POWs or MIAs in Laos, including but not limited to any reports, memoranda, letters, notes or other documents prepared by Mr. Horgan or any other officer, agent or employee of the CIA for the Joint Chiefs of Staff, the President, or any federal agency.

> *CIA:* Five years of the forty-two year period (1971-1975) are duplicates of *Hall I* and 122 documents have been produced (in total in response to requests 1, 2, and 3). Koch Decl. ¶¶ 16, 18, 20, 22. It will take the CIA 18 months to conduct the search for the years 1960-1970 and 1976-2002. *id.* ¶ 23.

AIM was not a party to *Hall I*.

Defendant asserts that it has produced records responsive to the period 1971-1975. It has not, as demonstrated above.

This FOIA Request was first made in February 2003. The CIA let 15 months pass before it even acknowledged the request, after plaintiffs had filed this action, whereupon

the CIA sought to intimidate plaintiffs by asking for a commitment to pay over $600,000 in fees for three items of the Request. In June of 2004, the CIA moved for a stay of this action (Docket # 5), which the Court denied in April, 2005 (Docket # 30 p. 10). Now, four-and-a-half years after the request was made, the CIA asserts that it will *begin* the search – and it will take a year-and-a-half. Additionally, asserts the CIA, it will make no interim releases.[4] Plaintiffs propose a different disclosure schedule.

Item 4

4. Records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing.

> *CIA:* The court in *Hall I* ruled that these are not "agency records." Koch Decl. ¶ 24. *See also* MSJ at 4 (same). The CIA does not accept the request as being "the subject of the current litigation." MSJ Ex. 12, June 2005 Koch letter, cited MSJ at 6.

Contrary to the CIA's argument that *Hall I* precludes this request, the opinion in *Hall I* actually states:

> In preparing its supplemental declarations in this matter, the CIA should confirm that it has independently reviewed all documents of its own creation that were included with the Senate Select Committee documents. (Ex. 5 to MSJ, n. 4 at 14).

Thus, at a minimum, the CIA's *Vaughn* index must identify all CIA records responsive to this request.

[4] Koch Decl. ¶¶ 14-15.

Item 5

5. Records relating to 47 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, see Attachment 1 hereto, 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 (Attachment 2).

> *CIA:* "Without additional identifying information, there would be no way to know whether information discovered through a search fore a name was in fact about the [47] individual[s] listed in the request…" and thus "a search would be impossible." Koch Decl. ¶ 25.
>
> To search the 1700 PNOK names will cost over $600,000, and defendant demands a deposit of $50,000. *Id.* ¶ 28. The Court already ruled that plaintiffs were not entitled to fee waivers. *Id.* ¶ 29. Defendant's June 1, 2005 letter "did not specifically mention the fee waiver and fee limitation issue… it rejected the requests in their entirety on the grounds that they were the subject of current litigation." *Id.* p. 11 n. 9.
>
> "By Order dated April 13, 2005, the Court denied these motions, holding that Plaintiffs did not qualify
> or fee limitations or a fee waiver." MSJ at 5.

With few exceptions, the 47 privacy waivers, each signed by the primary next-of-kin, contains the following identifying information: Full Name, POW/MIA incident date, Social Security or Service Number, and Branch of service or civilian (*See* Ex. 2: 47 Releases signed by the Primary Next of Kin.)

Defendant refuses to conduct a search without the 47 POW/MIA's birthdates. Without those, the CIA asserts, it may come across the wrong individual with the same name, a non-responsive record. From this circumstance the CIA concludes that any such search would be "impossible." But the fact that agency FOIA searches sometimes yield some non-responsive records does not by any stretch make the search impossible.

Because the Court's April 13, 2005 Order denied plaintiffs' fee waiver motions, on April 26, 2005, AIM again filed the FOIA Requests with the CIA (adding one item), and included in the administrative record evidence of its entitlement to fee waivers. It is *this* administrative record that is before the Court on the issue of fee waivers – as alleged in plaintiffs' Amended Complaint (Docket # 45).

Where a court rules based on the administrative record in a FOIA case, a plaintiff may re-file his request, and lawsuit, to include in the new administrative record, because each FOIA request creates a cause of action. Defendant is aware of this feature of the FOIA, and, thus, is aware that its reliance on the Court's April 2005 Order in denying fee waivers is misplaced. The new administrative record, entitling AIM's to fee waivers, is discussed below.

Item 6

6. All records on or pertaining to any search conducted for documents responsive to Roger Hall's requests dated January 5, 1994, February 7, 1994, and April 23, 1998, including but not limited to all instructions and descriptions of searches to be undertaken by any component of the CIA and all responses thereto, and all records pertaining to the assessment of fees in connection therewith, including but not limited to any itemizations or other records reflecting the time spent on each search, the rate charged for the search, the date and duration and kind of search performed, etc.

CIA: Defendant provided plaintiffs with two responsive documents. Koch Decl. ¶ 33. *Hall I* precludes plaintiffs' raising this issue, as defendant produced records regarding Hall's "January 1994, February 1995, and April 1998 requests," and the CIA produced records to plaintiff in November of 2005. *Id.* ¶ 34. Eighteen responsive documents were identified, and, on October 27, 2006, provided to plaintiffs, redacted under FOIA redactions (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), and (b)(6). *Id.* ¶¶ 35-36.

Hall I does not preclude plaintiffs' from raising this issue. This Court stated that preclusion applies to "certain records Hall sought in his May 28, 1998 FOIA request" (April 13, 2005 Order at 7), which has nothing to do with this Request.

During *Hall I*, the CIA asserted on three different occasions that Hall had incurred specific amounts of costs in connection with his request, but it has produced *no documents which provide a basis for any of these figures*. It could not have conducted a reasonable search. An agency "cannot limit its search to only one records system if there are others that are likely to turn up the information requested." *Oglesby v. U.S. Dept. of Army*, 920 U.S. 57, 65, (D.C.Cir.1990). The burden rests with the agency to establish that it has "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Id.* at 68.

Item 6 – Exemptions asserted

The CIA asserts exemptions for only one of the eight Requests.

For Request 6, the CIA claims Exemption 1, protecting national defense information; Exemption 2, relating solely to the agency's internal personnel rules and practices; Exemption 5, protecting privileged records under the deliberative process; and Exemption 6, providing protection from clearly unwarranted invasions of personal privacy.

Exemption 1. The CIA has claimed Exemption 1 for two documents, *Vaughn* index Nos. 14, and 31. Exemption 1 provides that the mandatory disclosure provisions of the Act do not apply to matters that are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.

Thus, under Exemption 1, an agency must demonstrate that the information is in fact properly classified pursuant to both procedural and substantive criteria contained in the Executive Order.

The CIA has made no showing that the information it seeks to protect under Exemption 1 is properly classified procedurally. It has submitted no affidavit that said documents have all of the markings required by Executive Order 12958. This Executive order is intended to take account of the end of the Cold War, and thus to bring about broad scale declassification of antiquated secrets. *See Summers v. Department of Justice*, 140 P.3d 1077, 1082 (D.C.Cir. 1998) (Significantly, the newer order is less restrictive, reflecting what it refers to as "dramatic changes" in national security concerns in the late 1980s following the United States' victory in the Cold War.)

While the two documents said to have classified information bear recent dates, the allegedly classified material in them must certainly relate to historical matters of the Cold War period.

"This circuit holds a strong presumption against prolonged withholding of information whose sensitivity may have diminished with age." *Keenan v. Dept. of Justice*, civil Action No. 94-1909 (D.D.C. March 24, 1997). (Exhibit 5 to plaintiff Hall and SSRI's motions for partial summary judgment.

The War in Vietnam has long been over.

Exemption 2. The CIA has invoked Exemption 2 for 12 documents, *Vaughn* index Nos. 1, 17, 20, 22, 23, 24.26, 27, 28, 29, 30, and 32, but it has provided no description of the materials withheld.

Exemption 2 exempts disclosure of matters that are "related solely to the internal personnel rules and practices of an agency" from mandatory disclosure. 5 U.S.C. § 552 (b)(2). As disclosure would confirm plaintiffs' contention that the CIA acted in bad faith in generating the three estimates in *Hall I*, it can hardly be said to relate to trivial administrative matters of no genuine public interest.

Exemption 3. The CIA asserts that "names of CIA officers, components, and telephone extensions, that is protected by section 6 of the Central Intelligence Agency Act of 1949, 50 U.S.C.A. § 403(g), and thus is withheld on the basis of FOIA exemption (b)(3)… This type of information pertaining to names of CIA officials and their particulars has been properly withheld… [under] exemption (b)(3)." (CIA MSJ at 27).

Plaintiffs agree, and, thus, do not challenge the CIA's redactions of names and identifying information under Exemption (b)(3).

Exemption 5. Exemption 5, 5 U.S.C. § 552(b)(5), provides that the FOIA does not apply to matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than the agency in litigation with the agency."

The CIA invokes three of Exemption 5's privileges: (1) deliberative process, (2) attorney-client, and (3) attorney work product. The deliberative process privilege is invoked for *Vaughn* index Nos. 2, 3, 5, 30(a), 30(b), 30(c), 30(e), 30(f), 30(g), 30(h), 32, and 33. In Nos. 2, 3, 6, and 31, it is invoked in under attorney-client and work product

privileges, and in Nos. 30, 32, and 33, it is the only privilege invoked. With regard to all other Exemption 5 claims, attorney-client privilege and the work product privilege are asserted.

But its *Vaughn* index fails to indicate which privilege applies to which parts of a document, and the CIA does not even assert that there are no segregable nonexempt portions of the records.

To qualify under the deliberative process privilege, a record must be "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency." *Coastal States Gas Corp. v. Department of the Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Here, the identities of the author and recipient have been deleted, and so disclosure could not stifle communications within the agency, as the court held in *Hoch v. C.I.A.*, 593 F. Supp. 675, 689 (D.D.C. 1984); "given the anonymity of [the blind memorandum], [the CIA] has failed to show by specific and detailed proof that disclosure of this document would defeat rather than further the purposes of FOlA."

Where an agency is making a final decision "chooses to adopt or incorporate by reference a predecisional recommendation, that document loses its protection under Exemption 5. *NLRB v. Sears*, 421 U.S. at 161. This principle applies to a wide range or Agency recommendations, and to "formal or informal adoption." *Coastal States* (*supra*) 617 F.2d at 866.

For the attorney-client privilege to apply, the communications must have been made in confidence. *See Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 83 (N.D.N.Y. 2003). Here, the CIA makes no such showing.

To assess a fee, CIA search personnel must record costs on some document. (The CIA's records refer to a "cost sheet.") The CIA asserted on three different occasions that Hall had incurred specific amounts of costs in connection with his request. Plaintiffs have not been provided *any* such records. Here, the CIA stands charged of bad faith by greatly inflating or misrepresenting the amount of search fees to be charged, and, thus, these records should be disclosed first.

Moreover, as the D.C. Circuit noted in *In Re Sealed Case*, 678 F.2d 793, 907, (D.C. Cir 1982), "two common law doctrines gave courts a limited ability to make sure privileges do not serve ends to which they were not intended are (1) exception and (2) implied waiver. Exception is applicable where a privileged relationship is used to further a crime, fraud, or other misconduct. Here, the evidence indicates that the privilege is being used to further misconduct which occurred in *Hall I* when the CIA sent Hall greatly inflated demands for payment of fees. Implied waiver is present when the conduct "touches a certain point of disclosure" and "fairness requires" that there is no privilege. That circumstance is present – the CIA asserted in court proceedings on three different occasions that Hall would incur a specific amount to search the same request.

Exemption 6. The CIA has invoked Exemption 6 for *Vaughn* index document No. 1. Exemption 6, 5 U.S.C. § 552(b) (6), permits nondisclosure of matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The language "clearly unwarranted" "instructs the court to tilt the balance in favor of disclosure." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir.1971).

The CIA's only showing with regard to its Exemption 6 claim is that the withheld information "relates to particular identifiable individuals, the disclosure of which could

constitute an invasion of privacy." *Vaughn* index at 2. Such a sweeping observation clearly does not meet the statutory standard of disclosure "constitut[ing] a clearly unwarranted invasion of personal privacy." As with all exemptions, the burden is on the government to show its applicability.

Item 7

7. 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 any Congressional Committee or executive branch agency.

> *CIA:* This request is unreasonably burdensome. Koch Decl. ¶ 37. When such a search was conducted, "the computer database… was unable to complete" the task and "'timed out' before ever generating the response to the request for such records." The system did report 3,517 cases, each of which has a separate electronic file. "The records for many requests would no longer exist." *Id.* ¶ 38. The request would require research and the compilation of new sets of records Koch Decl. ¶ 37. Plaintiffs have failed to submit the requested deposit, and, "[b]y Order dated April 13, 2005, the Court denied these motions, holding that Plaintiffs did not qualify for fee limitations or a fee waiver." MSJ at 5.

In 1989 the Supreme Court recited that the FOIA is intended to "shed light on an agency's performance of its statutory duties" and that its "central purpose is to ensure that the government's activities be opened to the sharp eye of public scrutiny." *United Sates Department of Justice v. Reporters Committee For Freedom Of The Press*, 489 U.S. 749, 772-74 (1989). Plaintiffs' request for history of the CIA's searches for POW/MIA records falls squarely within the FOIA's statutory purpose of shedding light on the inner workings of government. The fact that a search may be burdensome does not entitle an agency to relief from the FOIA's mandate of disclosure.

Moreover, contrary to the CIA's claim, this request for would not require research and the compilation of new sets of records.

Defendant appears to argue that it tried to conduct a search for this item, but then gave up. The computer program is said to have "timed out before ever generating the response to the request," but the CIA's defense is a claim of an unduly burdensome task – not its impossibility. There is no exemption for a search being unduly burdensome, and the CIA cites no case law in support of its contention.

And AIM is entitled to fee waivers, as set forth below. Additionally, plaintiff has written CIA counsel to explore ways to limit this request, to be less burdensome.

Item 8

8. All records of whatever nature pertaining to the estimates of fees made in response to the February 7, 2003 Freedom of Information Act request of Mr. Roger Hall and Studies Solutions Research, Inc., and how each estimate was made.

> *CIA:* The CIA does not accept the request as being "the subject of the current litigation." MSJ Ex. 12, June 2005 Koch letter, cited MSJ at 6.

The circumstance of the CIA's having been granted its protective order (Docket # 68) from discovery of these very records (*see* Docket # 53, Ex. 1 Discovery Requests) moots defendant's "subject of current litigation" argument. (The government's argument had no merit even before plaintiff was denied discovery.[5])

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[5] *See* Ex. 5: June 29, 2005, AIM's Administrative Appeal at 3:

> And 32 C.F.R. Part 1900.42(c) does not bar item 8 from administrative appeal. The information sought, regarding the CIA's fee estimates related to the February 7, 2003 FOIA Request, is not the subject of any previous FOIA Request. Roger Hall's pending motion for an accounting does not exclude item 8 from the purview of the FOIA. While not authorizing CIA to incur search fees absent a fee waiver, AIM requests two hours of free search time applied to item 8.

II. AIM IS ENTITLED TO FEE WAIVERS

A. The Record includes AIM's Administrative Appeal

The CIA omitted AIM's Administrative Appeal in its dispositive motions. The administrative record includes:

Ex. 1: AIM April 26, 2005, FOIA Request

Ex. 2: 47 Releases signed by the Primary Next of Kin (PNOK)

Ex. 3: 1700 PNOK names

Ex. 4: May 26, 2005, CIA's response to plaintiff's FOIA Request

Ex. 5: June 29, 2005, AIM Administrative Appeal

Ex. 6: July 19, 2005, CIA acknowledgment of receipt of Administrative Appeal

On April 26, 2005, AIM made the FOIA request that is the subject of this action (Ex. 1), including the enclosure of 47 Releases signed by the Primary Next of Kin (PNOK) (Ex. 2) and list of 1700 PNOK names (Ex. 3).

By May 26, 2005 letter (Ex. 4), the CIA responded to plaintiff's Request, ending with, "the agency will only accept your appeal of the fee waiver denial if you agree to be responsible for costs in the event of an adverse administrative or judicial decision."

Notwithstanding the CIA's attempt to limit the administrative record, on June 29, 2005, AIM submitted its Administrative Appeal (Ex. 5[6]), and, on July 19, 2005, the CIA agreed to include AIM's Appeal letter, along with its 1971 Articles of Incorporation, into the administrative record on the fee waiver issues (Ex. 6).

The CIA failed to further respond, and, on September 26, 2005, plaintiffs filed their Amended Complaint (Docket # 45).

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[6] Ex. 5: June 29, 2005, AIM's Administrative Appeal at 2:

> The CIA relied on its own regulations in denying AIM's request for a public interest fee waiver. But its reliance on the court's decision that ("AIM had failed to demonstrate its eligibility for fee limitations based on news media status.'") in denying AIM's request for a news media status is contrary to law. *See D.C. Technical Assist. Org. v. U.S. Dept. Housing*, 85 F. Supp.2d at 48 (D.D.C. 2000):
>
> > The decision of an agency to grant or deny a fee waiver request is reviewed *de novo* looking only to the administrative record before the agency at the time of the decision. 5 U.S.C. (a)4(vii). (The additional supporting documents submitted with plaintiff's motion for summary judgment were not considered in the disposition of this case).
>
> AIM submits what it could not in the district court. The CIA is not free to exclude it from the administrative record. "In 1986, Congress amended the statute governing fee waivers for FOIA requests… The amendment also changed the standard of review to *de novo*, but limited the court's review to the record before the agency." *Larson v. CIA,* 843 F.2d at 1481-82 (D.C. Cir. 1988). "The court must limit its review to the administrative record established before the agency." *Judicial Watch, Inc. v. US Dept. of Justice*, 122 F.Supp. 2d 13 (D.D.C. 2000), Kennedy, J. The court in *Oglesby v. US Dept. of Army*, 920 F.2d 57 (D.D.C. 1990) remanded in part "to grant petitioner the right, if he chooses, to pursue administrative appeals from the initial agency denials" (at 71).
>
> As the CIA cannot restrict the administrative record to the initial FOIA request, kindly include AIM's 1971 articles of incorporation, as well as its April 26 FOIA request, in the record of this administrative appeal under 32 C.F.R. 1900.13(c)). Copies are enclosed.

B. Plaintiff meets FOIA's "Member of the News Media" Status

5 U.S.C. § 552(a)(4)(A)(ii)(II) provides that "fees shall be limited to reasonable standard charges for document duplication when… the request is made by… a representative of the news media…"

Here, AIM seeks "representative of the news media" status, limiting its fees to duplication costs.[7]

A "representative of the news media" is "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). In its regulations, the CIA defines a "representative of the news media" as "an individual actively gathering news for an entity that is organized and operated to publish and broadcast news to the American public . . . ." 32 C.F.R. § 1900.02(h)(3).

Under these standards, AIM demonstrates its eligibility for fee limitations based on news media status. "AIM's 1971 articles of incorporation's purpose clause [states that it is]… to promote… the mass communication media and public understanding thereof with the aim of improving the accuracy of news media reporting… and the correction of errors. " (Ex. 5: June 29, 2005, AIM Administrative Appeal).

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[7] The FOIA provides for three categories of fees that may assessed in processing records requests. *Id*. § 552(a)(4)(A)(ii). Commercial users pay "reasonable standard charges" for document search, duplication, and review, *id*. § 552(a)(4)(A)(ii)(I), while non-commercial requests made by "an educational or noncommercial scientific institution" or a "representative of the news media" are only subject to duplication fees. *Id*. § 552(a)(4)(A)(ii)(II). Requests which do not fall into either of the preceding categories are subject to charges for search and duplication (but not review). *Id*. § 552(a)(4)(A)(ii)(III).

AIM's April 26, 2005, FOIA Request states that "AIM is an entity that is organized and operated to publish and broadcast news to the American public. It has been disseminating its analysis of news media reporting for more than 35 years." (Ex 1 ¶ 3).

> It disseminates information in several ways. Its semi-monthly newsletter, *The AIM Report,* has gone out without fail for 32 years. *The AIM Report* now has about 3,300 subscribers. AIM's other publications include AIM columns, *Briefings* (opinions), *Special Reports*, and *Guest Columns*. AIM's principals have published three books on the subject of the news media: Media Mischief and Misdeeds 1984; Profiles in Deception 1990; and News Manipulators 1993. AIM has also produced several nationally distributed documentaries, including Television's Vietnam, The Clinton Legacy, TWA 800: The Search for the Truth, and Confronting Iraq. More than 100,000 people visit AIM 's website nearly every month. AIM has an active speaker's bureau, providing speakers on relevant topics to various groups around the country. Additionally, AIM delivers a daily radio commentary, *Media Monito*r, carried across the country. Oftentimes newspapers and websites around the country have picked up *The AIM Report*'s stories. Due to its many efforts, AIM enjoys the ability to convey information to a broad public audience.
> (*Id.*)

"It is thus clear that AIM gathers information of potential interest to the general public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to its audience." (*Id.*)

Requesters who are "middleman or vendor[s] of information that representatives of the news media can utilize when appropriate" do not qualify. *Judicial Watch, Inc. v. Dep't of Justice*, 185 F. Supp. 2d 54, 59 (D.D.C. 2002). "AIM posts most of the docket sheet of its POW/MIA litigation on its website (see http://www.aim.org/special_report/1763_0_8_0_C/), but it will do more than just making the information available as a library would: AIM will actively disseminate the information." (Ex. 1: AIM April 26, 2005, FOIA Request ¶ 4).

To meet FOIA's "member of the news media" status, a requestor must "use[] its editorial skills to turn the raw materials into a distinct work." *Nat'l Sec. Archive*, 880 F.2d at 1387.

To be considered a representative of the news media for fee purposes, "a requester must establish that it has a firm intent to disseminate, rather than merely make available, the requested information." *Judicial Watch*, 185 F. Supp. 2d at 60 (citation and internal quotation marks omitted). As the record demonstrates, "[u]pon disclosure of the records sought, AIM has concrete plans to make the information public in a *Special Report*, and perhaps also in the *AIM Report*, all in accordance with AIM's news dissemination function. All of its work on the POW/MIA issue will appear on AIM's website, AIM.org. Moreover, a number of AIM's publications in the past have referred John Kerry's record on the POW issue, and AIM has a concrete intention to do so in the future." (Ex. 1: AIM April 26, 2005, FOIA Request ¶ 4).

Here, the administrative record confirms AIM's contention that it is entitled to a fee limitation on the basis its being a member of the news media.

C. Plaintiff's Request meets the FOIA's Public Interest Fee Waiver Standard

5 U.S.C. § 552(a)(4)(A)(iii) provides that "[d]ocuments shall be furnished without any charge or at a charge reduced… 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." 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 1900.13(b)(2). *See Judicial Watch*, 185 F. Supp. 2d at 60.

Although the requester has the initial burden of producing evidence of public benefit (*see Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)), "[o]nce the requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver." *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 874 (D.Mass.1984). "There was a clear message from congress that... [t]his public-interest standard should be liberally construed by the agencies." *Id.*, at 872, quoting S.Rep. No. 854, 93d Cong., 2d Sess. 12 (1974).

The CIA's regulations provide four factors the agency uses to consider whether releasing documents "is in the public interest." 32 C.F.R. § 1900.13(b)(2)(i)-(iv).

The first factor mandates that the "subject of the requested records concerns the operations or activities of the United States Government." *Id.* § 1900.13(b)(2)(i). The requester "bears the initial burden of identifying, with reasonable specificity, the public interest to be served." *Nat'l Treasury Employees Union v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987).

"Whether the requester has a commercial interest that would be furthered by the requested disclosure" 32 C.P.R. 1900.13(B)(2)(v) is also a relevant inquiry under the first factor. Here, AIM does not have a commercial interest in the disclosure. Its purpose is to inform the public.

The second and third factors require that the requested information be "likely to contribute to an understanding of United States Government operations or activities," 32 C.F.R. § 1900.13(b)(2)(ii), and that the information will in fact "contribute to public understanding." *Id*. § 1900.13(b)(2)(iii).

The fourth factor of the public interest fee waiver analysis requires that the information sought will contribute "significantly" to public understanding of government operations. 32 C.F.R. § 1900.13(b)(2)(iv).

The record clearly shows that the "subject of the requested records concerns the operations or activities of the United States Government," the first criterion. Since the Requests seek records which relate to missing prisoners of war (POWs) and persons missing in action (MIAs), the requests are clearly directed at finding out, first, what information the government had acquired about the POW/MIAs through its operations and activities. Secondly, the Requests also concern another aspect of the CIA's activities: They will show to what extent the CIA did not provide all the information it had on these POW/MIAs to their relatives or to congressional investigators.

The record demonstrates compliance with the second and third factors – that the requested information be "likely to contribute to an understanding of United States Government operations or activities" and that the information will in fact "contribute to public understanding." "There is a pending House Resolution which would establish a new POW/MIA committee. This indicates that this issue is still of current interest to the American public." (Ex. 1: AIM's April 26, 2005, FOIA Request ¶ 5). As plaintiff wrote defendant, "[d]isclosure of the information will enhance public understanding of the POW/MIA issue as compared with awareness prior to the disclosure." (*Id.*) Moreover, wrote AIM, "[m]aterials on POW/MIAs will necessarily shed light on the operations or activities of the government. Among other things, they will reveal the extent, nature, intensity, and duration of the Government's efforts to locate POW/MIAs, a subject that has long been of intense interest to the public." (*Id.*).

Ex. 1, AIM's April 26, 2005, FOIA Request, states:

> Records disclosed to AIM is likely to contribute significantly to public understanding of such operations or activities by disclosing records that have remained secret despite congressional inquiries and Presidential directives to disclose them. The records will provide information regarding the thoroughness, scope, intensity, dedication and creativity of the search for missing POW/MIAs, and whether or not it was conducted in good faith. This information will show the degree to which the CIA has complied with Executive Order 12812 and Presidential Decision Directive NSC 8 and whether it has accurately informed Congress and the public about its search efforts and the information it possesses. It will also show how the CIA cooperated and coordinated its search efforts with other agencies and how and the CIA controlled the documentation other agencies possessed regarding POW/MIAs and detainees.
> (*id*.)

Clearly, the disclosure of these documents will enable an evaluation of what is known about the circumstances of the missing POWs, what was done to find them, and whether all relevant information concerning this issue was made available to congressional investigators. The significance of the disclosures will be disseminated to the public.

Because "conclusory statements about contributions to public understanding are not enough" to satisfy these factors, *Judicial Watch, Inc. v. Dep't of Justice*, 122 F. Supp. 2d 13, 18 (D.D.C. 2000), a requester seeking a public interest fee waiver must make a specific showing that disclosure of the information will be of significance to the public; "the ability to convey information" to others is insufficient without some details of how the requester will actually do so. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987).[8] As noted above, "[u]pon disclosure of the records

[8] *See also Oglesby*, 920 F.2d at 66, n.11 (finding conclusory and insufficient plaintiff's statement that "the information requested is beneficial to the public interest[,] I am a writer and lecturer who has disseminated such information in the past, and I intend to do so in the future."

sought, AIM has concrete plans to make the information public in a *Special Report*, and perhaps also in the *AIM Report*, all in accordance with AIM's news dissemination function." (Ex. 1: AIM April 26, 2005, FOIA Request ¶ 4).

And the fourth factor is met – discloser will contribute "significantly" to public understanding of government operations. Disclosure of the information should enhance public understanding of the subject in question as compared with awareness prior to the disclosure. *See Judicial Watch*, 185 F. Supp. 2d at 62. Here too plaintiff has met his burden. "AIM believes that the records it will obtain as a result of this request will shed light on the CIA's operations and activities by revealing that it has withheld information regarding missing POWs from congress and the public. This will show that the CIA has not done what it should have done to locate missing POWs and MIAs. The interest of enhancing the public's understanding of the operations or activities of the U.S. Government is clear, and the records' connection to these government activities is direct." (Ex. 1: AIM's April 26, 2005, FOIA Request ¶ 7). Importantly, "[r]elease of the information will contribute to an understanding of government operations or activities regarding the POW/MIA issue, as compared with awareness prior to the disclosure." *Id.*

Thus, the record provides an adequate showing of AIM's "concrete plans to disseminate the requested information" (*Judicial Watch*, 122 F. Supp. 2d at 10), and adequately demonstrates how disclosure of the requested documents meets the requirements for a public interest fee waiver.

The CIA's dispositive motions simply ignore AIM's fee waiver requests. The burden has now shifted to the defendant. It cannot meet its burden.

Conclusion

The Court need not revisit the collateral estoppel effect of *Hall I*, as that case held that the CIA failed in its burden to show an adequate search. AIM is entitled to entry of partial summary judgment on each of AIM's eight requests.

The record demonstrates:

- AIM is an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience;
- AIM is not a middleman or vendor of information, but rather actively gathers news and is an entity that is organized and operated to publish and broadcast news to the American public;
- AIM has firm, concrete plans to disseminate the requested information, rather than merely making it available; and
- The subject of the requested records concerns the operations or activities of the United States Government, and the information will in fact contribute significantly to public understanding of the operations or activities of the government, as compared with awareness prior to the disclosure.

For the foregoing reasons, and for all the reasons set forth by plaintiffs Roger Hall and Studies Solutions Results, Inc. in their motion for partial summary judgment, plaintiff AIM should be granted News Media status as well as a public interest fee waiver, and the CIA should be required to disclose its records responsive to each of plaintiffs' eight enumerated requests. Plaintiffs submit a proposed Order consistent with the foregoing.

DATE: May 10, 2007.

Respectfully submitted,

/s/

John H. Clarke # 388599
Counsel for plaintiff
Accuracy in Media, Inc.
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 344-0776
Fax: (202) 332-3030