UNITED STATES DISTRICsheetT COURT
FOR THE DISTRICT OF COLUMBIA

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

CROSS-MOTION OF PLAINTIFFS ROGER HALL AND STUDIES SOLUTIONS RESULTS, INC. FOR PARTIAL SUMMARY JUDGMENT, AND OTHER RELIEF

Come now the plaintiffs, Roger Hall ("Hall") and Studies Solutions Results, Inc. ("SSRI") and cross-move for partial summary judgment in their favor, and for other relief. Hall and SSRI also move the Court for a waiver of search fees and copying costs, and for orders (1) permitting them to take discovery on the search issue, (2) setting a schedule for the prompt processing of the records which defendants have agreed to process without charging search fees and copying costs, and (3) declaring that they are accorded status as representatives of the news media.

A Memorandum of Points and Authorities in Support of these motions and in opposition to defendants motion for partial summary judgment, a proposed order, a Statement of Material Facts Not in Dispute, and the Declaration of Roger Hall are submitted in support of these motions.

Respectfully submitted,

/s/

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DATED: May 10, 2007

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTIONS FOR OTHER RELIEF AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

This is a Freedom of Information Act ("FOIA') lawsuit for records pertaining to missing Prisoners of War (POWs) and persons Missing in Action ("MIA") as a result of the war in Vietnam. Because the basic facts of the case have repeatedly been set forth repeatedly in Court opinions and briefs by the parties, there is no need to repeat this history here.

Suffice it to say that defendant Centrral Intelligence Agency ("the CIA") has filed a motion to dismiss or for partial summary judgment. Plaintiffs Roger Hall and Studies Solutions Results, Inic. ("SSRI") now cross-move for partial summary judgment, as well as for other relief, notably status as representatives of the news media, a public interest fee waiver, discovery, and and order compelling defendant to adhere to a specific and prompt schedule for the review and release of additonal nonexempt records responsive to Item 3 of their request.

ARGUMENT

I. DEFENDANT HAS FAILED TO MEET ITS BURDEN OF DEMONSTRATING THAT IT HAS CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE DOCUMENTS

A. Search Standard in FOIA Cases

To prevail in a FOIA case, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable or is wholly exempt from the Act's inspection requirements." National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C.Cir.1973). 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").

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).

It is a truism that the issue is not whether documents might exist that are responsive to the request but rather whether the search conducted by the agency was "adequate'." Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C.Cir.1984)(Weisberg III")(emphasis in original); McGehee v. CIA, 697 F.2d 1076, 1101 (D.C.Cir.1983). The test governing the adequacy of an agency's search under the FOIA is one of "reasonableness." Oglesby v. Department of the Army, 920 F.2d 57, 67 n.13 (D.C.Cir. 1990).

Meeropol v. Meese, 790 F.2d 942, 956 (D.C.Cir.1986)("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request"). In Truitt v. Department of State, 897 F.2d 540 (D.C. Cir. 1990), the D.C. Circuit expatiated on this standard, stating that:

> It is elementary that an agency responding to a FOIA request must 'conduct[] a search reasonably calculated to uncover all relevant documents,' and, if challenged, must demonstrate 'beyond material doubt' that the search was reasonable. "'The issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate.' The adequacy of an agency's search is measured by a 'standard of reasonableness,' and is 'dependent upon the circumstances of the case.'"

Id., at 542 (footnotes omitted)(emphasis added). If such "doubt" exists as to the adequacy of the search, Truitt counsels, "summary judgment for the agency is not proper." Id. (footnote omitted). Where "the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order[,]" Founding Church, supra, 610 F.2d at 836, and the plaintiff is entitled to take discovery on the adequacy of the search; Weisberg II, supra, 627 F.2d at 371.

Here, the CIA has not demonstrated "beyond material doubt," that the search that it conducted was reasonable. Accordingly, plaintiffs should be allowed to pursue discovery as to the search for materials responsive to items 1-3 and 6 of their request.

B. The CIA Has Not Shown that it Conducted Adequate Searches

As plaintiffs Hall and SSRI show below, it is clear that the CIA has failed to conduct an adequate search in response to their

February 7, 2003 FOIA request.

1. The CIA Has Not Searched Its Operational Files; It Is Required to Do So

The CIA's declarant states in the fine print of his affidavit that "[t]he DO [Directorate of Operations] did not conduct an additional search, because it determined that any responsive records it had would be contained in properly designated operational files, which are exempt from the search, review, and release provisions of the FOIA." Declaration of Scott A. Koch ("Koch Decl."), ¶ 22, n.6. There are, however, exceptions to the rule that under the Central Intelligence Agency Information Act of 1984 ("the CIA Act"), the CIA's operational files are exempt from the FOIA's requirements. Thus, the CIA Act states as follows:

> Provided further, That the designation of any operational files shall not prevent the search and review of such files for . . . intion reviewed and relied upon in an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, the Office of the General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central intelligence Agency, or the Director of the Office of Central Intelligence for any impropriety or violation of law, Executive Order, or Presidential directive in the conduct of an intelligence activity.

50 U.S.C. § 431(c).

This case clearly qualifies under the exception for "investigations by the intelligence committees of the Congress." The Government's handling of the MIA/POW issue was the subject of investigations by the Senate Select Committee on Intelligence Activities with Respect to MIA/POW Affairs, the Senate Foreign Relations Com-

mittee, the Senate Armed Services Committee, and a House Task Force Declaration of Roger Hall ("Hall Decl."), ¶ 3.

This Court has dealt with this issue in the context of a FOIA request for records concerning the CIA's MK/ULTRA project. While the CIA maintained that it did not have to search its operational files, this Court held that "[t]he MK/ULTRA program has been the subject of numerous investigations. * * * Therefore, the court finds that 50 U.S.C. § 431(c) requires the CIA to search and review its operational files for information concerning the MKULTRA project and will accordingly order the CIA to conduct such a search and review, making all releasable information available [to the plaintiff]." John Kelly v. Central Intelligence Agency, Civil Action No. 00-2498 (TFH), Memorandum Opinion at 30-31 (D.D.C. August 8, 2002). This Court should to likewise in this case.

2. The CIA's Directorate of Science and Technology Improperly Limited Its Search for Responsive Documents

One of the documents released pursuant to Item 6 of the February 7, 2003 request supplies a startling revelation that the CIA's Directorate of Science and Technology ("DS&T") improperly limited its search for responsive records. In a memorandum dated October 25, 2000, from DS&T's Information Review Office ("IRO"), DS&T describes the searches it conducted for records responsive to Hall's requests for records pertaining to POW/MIAs sent out of Southeast Asia to other countries. The DS&T memorandum then goes on to state that "[deleted's] searches of its [deleted] database alone yielded over 700 potentially responsive hits; because this number

exceeds what is normally considered "reasonable" by FOIA standards, processing was suspended." See Exhibit 1 (emphasis added).

There is no basis for limiting an agency's search on the ground that about 700 potentially responsive documents had been located. Some FOIA lawsuits have involved tens of thousands of documents, a few even hundreds of thousands of documents. This Court has asserted an "agency must be careful not to read the request so strictly that the requester is denied information the agency well knows exists in its files. . . . To conclude otherwise would frustrate the central purpose of the Act." Hemenway v. Hughes, 601 F.Supp. 1002, 1005 (D.D.C.1985).

This issue is not precluded by the doctrine of collateral estoppel. In Montana v. United States, 440 U.S. 147, 155 (1979), the Supreme Court identified three factors to be considered in determining whether collateral estoppel serves as a barrier in federal court:

> [W]hether the issues presented . . . are in substance the same . . .; whether controlling facts or legal principles have changed significantly since the state-court judgment; and finally, whether other special circumstances warrant an exception to the normal rules of preclusion.

Additionally, the Supreme Court has stated that "one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the issue in the earlier case." Allen v. McCurry, 449 U.S. 90, 96 (1980), citing Montana, supra; Blonder

Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-329.

Here the doctrine of collateral estoppel should not be applied. First, controlling facts have changed since Hall v. Central Intelligence Agency, Civil Action No. 98-1319 ("Hall I"), It is now known that the CIA suspended processing of a significant body of potentially responsive documents identified in a search of one database. Second, the CIA did not inform Hall that it was placing this limitation upon his request in Hall I, so he had no opportunity to contest it there. Given the fact that Hall was not aware of the limitation the CIA placed on its search in Hall I, he cannot be said to have had a "full and fair opportunity" to litigate the adequacy of the CIA's search. Thus, collateral estoppel should not be held to impose an inequitable bar to his challenging the search in this case.

Third, there is no order in the Hall I litigation that rules that the search conducted in that case was adequate. Indeed, the only search ruling was to the contary. Additionally,

3. The Inadequacy of the CIA's Search Is Evidenced by the Absence of Records Pertaining to Known Operations, Events and Activities

The CIA claims to have produced all nonexempt records responsive to items 1-3 of Hall's request for the years 1971-1975. This claim does not square with the available evidence. There are many examples which can be given of operations, events and activities which surely generated relevant records that have not been provided. Several examples are set forth below.

a. During the Vietnam War, the CIA Political Adviser ("POLAD") at the Commander in Chief Pacific ("CINCPAC") was the originator and/or party to MIA/POW operations. Additionally, the POLAD played a role in, and generated records concerning, the transfer of POWs in captivity from one Southeast Asian country, and to other communist countries. Such records have not been provided. Hall Decl., ¶ 5.

b. The CIA created and maintained briefing boards on camps throughout Southeast Asia where POWs were held. The information on the briefing boards had to be backed up by reports and analysis. Hall has not been provided with any such materials. Id., ¶ 6.

c. Former Ambassador to Laos William Sullivan revealed in a deposition that Air Force and CIA employee Richard Secord, when a Major, had submitted requests to the CIA to rescue American POWs in Laos. Hall has not been provided with these records. ¶ 7.

d. In 1965 there was an attempt to rescue then Captain David Hrdlicka and Captain Charles E. Shelton in the Sam Nuea area of Laos. These two POWs held by the Pathet Lao were rescued using CIA assets, including Air America, a CIA proprietary, and American military assets, and indigenous Controlled American Source ("CAS") personnel from the H'mong tribe of northern Laos, Thai forces, and others. One American participant was General Clifford Reesel. These POWs were then recaptured. While Hall found a limited release of information concerning this in State Department records at the President Lyndon Baines Johnson Library, the CIA has not provided him with any such records. Id., ¶ 8.

e. A later rescue attempt was planned for and may have occurred in Laos in 1971 or 1972. Special Forces Sgt. John Cavaiani was involved in the rescue or planned rescue. Such an attempt would not even have reached the planning stage unless the identities and locations of the POWs had been confirmed. Hall has not been given any records related to this. ¶ 9.

f.. Admiral Elmo Zumwalt revealed to Hall in a conversation he had with him that the CIA wanted to present information on their ongoing MIA/POW operations in Laos to him in 1973 when he was Chief of Naval Operations. Hall has not been provided with any records pertinent to this. ¶ 10.

g. Operation Tailwind, an operation aimed at a particular POW camp in Laos was approved and tasked by the CIA. Journalist April Oliver revealed this on CNN. Ten foot lockers of documents were removed from this POW interrogation site. No records pertaining to this have been supplied. Id., ¶ 11.

h. In 1994/1995, Hall interviewed Admiral Thomas Moorer, former Chairman of the Joint Chiefs of Staff. He told Hall that in 1972 he had authorized a rescue of 60 POWs in Laos. Admiral Moorer told Hall that, as planned, this raid was second in complexity only to Son Tay. They knew the names, locations and other information on the POWs. The rescue attempt was cancelled because of the pending Peace Agreement of January 1973. Admiral Moorer stated that the CIA and the Department of Defense had information on this operation, and that Hall should check with the indigenous personnel files known as Controlled American Source. He said this was a

joint CIA/military operation. Hall has not received records regarding this planned rescue operation. Id., ¶ 12.

i. POWs were taken from Vietnam, Laos and possibly Cambodia to the Soviet Union. Hall has not been provided records regarding such transfers. Id., ¶ 13.

j. The North Vietnamese and other communist embassies in Laos were the subject of electronic surveillance by the CIA, whose employees, advised by the National Security Agency ("NSA"), were gathering information regarding POWs. Hall has not been provided with any records which reflect this. Id., ¶ 14.

k. During the Reagan administration, the CIA ran a reconnaissance into Laos based on satellite imagery of a camp where POWs were reportedly being held. There were also NSA intercepts related to this satellite imagery and other intelligence. This operation was originally set to be run by Special Forces members from the Delta Compound at Fort Bragg, North Carolina. The CIA took over control of this operation, informing the military that Laos was their domain and they would run it. On the insistence of the Special Forces, a Marine Corps Captain was assigned to the operation. Photographs and voice recordings were taken. Hall has not been provided with any satellite imagery, photographs, voice recordings, or other records related to this operation. Id., ¶ 15.

l. MIA/POW satellite imagery was given to the Senate Committee on POW/MIA Affairs, but was not included in the Committee's 1993 Report, perhaps because it was received too late. The imagery was given to Barry Toll in the presence of Carol Hrdlicka, a POW's

wife. It was then given to Mr. Kent Weiderman, who accepted it for Mr. Anthony Lake of the National Security Council. This and all other satellite imagery has not been provided to Hall. Id., ¶ 16.

m. Hall spoke with Mr. Harry Pugh, a CIA employee about American POWs in China between 1993-1995. He told me over the telephone that all that documentation was in the basement of the CIA, and he did not have time to go through it all. Id., ¶ 17.

n. Former communist Czechoslovakia General Major Sejna has stated that he ran an operation in Czechoslovakia which received over 100 American POWs who were transferred from Vietnam, then in turn to he Soviet Union in the 1960s. Hall has been supplied with no records related to this. Id., ¶ 18.

o. It is known that the CIA had certain guards on the payroll at POW camps in Laos and North Vietnam. Hall has not obtained any records regarding information reported by them. ID., ¶ 19.

Many additional examples are set forth in Hall's declaration. See, e.g., ¶¶ 20-37. Such examples as these make it abundantly clear that the CIA's search to date has been inadequate.

4. The CIA Search Terms Were Deficient

In a footnote, declarant Koch lists the search terms employed by the DO Division. Significantly, although it gives both the singular and plural forms of the acronyms MIA and POW, it lists only the singular form for "Prisoner of War"; it fails to indicate any search was conducted under "Prisoners of War." It also fails to use "PW" or "detainees" or to use any of the words and phrases in conjunction with "Southeast Asia" rather than just specific

countries. Hall notes other terms used to describe POW/MIAs, such as "pirates," "criminals," and "Caucasians." Id., ¶ 22. Additionally, it lists all of the terms searched in capitol letters. If this indicates the actual form of computer searches, it could mean that terms such as "Prisoners of War" and "Missing in Action" would receive any hits even if the terms appeared in the database because they were not typed in lower case.

The search terms also do not reflect the fact that the CIA was heavily involved in operations involving MIAs/POWs. Thus, it seems logical that searching under the name of specific operations such as Operation Tailwind, and the CIA's equivalent of this military codeword, would be likely to turn up responsive records.

5. The CIA's Search for Records Responsive to Item Six of the Request Was Inadequate

In order to evaluate the adequacy of the CIA's search for records responsive to Item six of plaintiffs' request, it is necessary to provide some background.

The second part of Item six asks for "all records pertaining to the assessment of fees in connection" with those requests, "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." Thus, the focus of this part of the Item six request was to get the CIA to provide plaintiffs with documents which show the basis for three different statements the CIA had made as to the costs incurred by Hall in Hall I. Item six requests documents

showing the basis for such fees.[1] 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. Initially, the only two documents produced responsive to the costs portion of Item six are two letters it wrote Hall in 1994 and 1995. These letters do not document the basis for any search fees but simply assert that he owed certain minor amounts of copying charges. On October 17, 2006, the CIA made a subsequent release which included documents responsive to Item six. However, this release, too, lacked any records which documented the time spent searching and the rates being charged by the clerical personnel who conducted the searches.

It is obvious that an agency cannot assess FOIA search fees without the persons who perform the searches recording their time and transmitting it to the persons who calculate the fee assessment. The failure of the CIA to produce any such records raises the possibility that the fees assessed for the Hall I requests were concocted out of whole cloth or greatly inflated to obstruct his access to the records he sought. If this is the case, it has implications not only for this case but for enforcement of the FOIA's mandate generally. First, however, it must be ascertained whether the CIA conducted an adequate search.

The complete lack of any documentation for fees which Hall was claimed to owe comes against this background. First, in Hall I, by

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[1]IThe CIA's response to Item 6 contains one document which refers to a "cost sheet." This would appear to be the kind of underlying documentataion of fees that Hall seeks. But he has been provided with no records of this character.

letter dated May 24, 1999, the CIA asserted that its searches of the Hall I request had taken over 115 hours to locate approximately 400 pages of records or less than 4 pages per hour. Excluding Hall's two hours of free search time and 100 pages of free copies, it said the fees he owed as of that date came to $4,550.00. However, while it denied his request for a fee waiver, it said that in an exercise of administrative discretion it would not charge him the fees he had incurred in as a result of its processing of these records.

The CIA's response to the costs portion of item six produced no ecords showing how much time was spent searching by whom on what date at what rate have been made available.

A little over a year later, United States District Judge Paul L. Friedman, the Hall I judge, issued an order which, inter alia, required the CIA to submit a supplemental affidavit by October 16, 2000 demonstrating the adequacy of the CIA's search and justified the nondisclosure of any additional records that were discovered. Exhibit 2. On September 18, 2000, the CIA filed a motion to compel Hall to commit to payment of fees "before any additional searches are made."

By order filed July 22, 2002, Judge Friedman entered an order granting the CIA's motion to require Hall to commit to payment of an unspecified amount of search fees and copying costs. The parties were ordered to file a joint report on or before August 26, 2002, "indicating whether or not plaintiff has committed to paying search and copying fees up to a specific amount."

On August 23, 2002, the parties filed their Joint Report. The report stated that Hall "is committed to paying search and copying fees up to $1,000.00. However, he wishes to specify on which of the remaining issues he wants the CIA to focus its searches." The Parties' Joint Report In Response To The Court's Order of July 22, 2002 at 1. The Joint Report further stated that because the CIA had not yet received Hall's search specifications, "it is impossible at this point to set a briefing schedule because it cannot now determine: whether the plaintiff's search specification is appropriate (e.g., within the scope of this Court's August 10, 2000 order); how long the yet-to-be requested search will take, and, how many possibly responsive documents the search may produce." Id. at 1-2.

On January 16, 2003, Judge Friedman issued an order in which he noted that in their Joint Status Report the parties had indicated that Hall had agreed to pay fees up to $1,000, and to inform the CIA "which remaining issues [he] would like [the CIA] to focus on in its search." January 16, 2003 Order. He also noted that although the parties had agreed they would provide the Court with either the CIA's objections to Hall's search specifica-tions or a proposed schedule, the Court had not received any subsequent filings. Accordingly, Judge Friedman ordered the parties to file a joint status report on or before January 31, 2003. Id.

In the parties' Second Joint Report, the CIA claimed that because the Court's August 10, 2000 order had given it a short time frame to provide the additional information, "in an abundance of

caution, in order to well position itself in case the agency lost the fee waiver issue, the agency voluntarily completed most of the searching and processing required by the Court's order . . . ." The Parties Joint Report in Response to the Court's Order of January 16, 2003. at 2. The Agency further asserted that the searching and processing conducted after August 2000 "amounts to at least $29,000." Second Joint Status Report, ¶ 3.

In responding to Item 6 of Plaintiffs' February 7, 2003 request, the CIA has produced no records documenting fees and costs of "at least $29,000" or anything close to it. In fact, it has produced no records at all showing how or when or in what amount any fees or costs were incurred.

Subsequently, on February 7, 2003, he submitted a new FOIA request, Item 6 of which requested the documents which served as the basis for the fees allegedly incurred by Hall in his Hall I requests.

On March 31, 2003, the CIA moved for leave to file a "Notice of Corrected Calculation of Search Fees." In it, the CIA asserted that "some of the fees initially attributed to plaintiff's FOIA request have been mistakenly included in the Government's fee calculation." Although stating that the overall number of hours expended in processing Hall's request remained unchanged, "the Government has determined that the portion of these fees that are attributable to the search for responsive records should be reduced.." Id. As a result, the CIA advised the court and Hall

that "the correct amount of fees incurred by the CIA since August 2000 . . . is $10,906.33." See

In responding to Item 6 of plaintiffs' February 7, 2003 request, the CIA has produced no records which document the basis for the reduction in fees from "at least $29,000 to $10,906.33." Not a single document has been produced which reflects the basis for this startling change in the amount of fees allegedly incurred.

In summary, during the pendency of 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. Because of that, plaintiffs initiated discovery to ascertain the nature and adequacy of the CIA's search for materials pertaining to that part of Item six relating to costs.

The CIA contends that it has conducted an adequate search for records responsive to Item 6 of plaintiffs' request. But the Koch Declaration fails to establish this. To begin with, it fails to comply with the requirement of Rule 56(e) that affidavits submitted in support of a motion for summary judgment be made on personal knowledge. That is, there is no indication that he has personal knowledge of what records, if any, were created which set forth the basis for the fees Hall was told he had to pay, which CIA components created them, whether those units transmitted and/or retained them, or which personnel created, transmitted and/or retained them. It is critical that someone with personal knowledge of such matters set forth the details of the search.

As the D.C. Circuit noted in Weisberg I regarding that plaintiff's request for scientific data on tests performed on items of evidence in the assassination of President John F. Kennedy,

> Surely their existence or nonexistence should be determined speedily on the basis of the best available evidence, i.e., the witnesses who had personal knowledge of events at the time the investigation was made.

Weisberg I, 543 F.2d at 311.

Second, while Koch states that "my office" conducted a manual search of Hall's administrative file in the PIPD, which he says is the division which manages the processing of FOIA requests, including any assessment of fees associated with FOIA requests, Koch Decl., ¶ 32, he also states that "PIPD's administrative files are the systems of records that are most likely to contain documents or information pertaining to the assessment of fees associated with Hall's requests." Id. However, the D.C. Circuit has held that 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).

Koch fails to state whether there are any other records systems which are likely to contain such records. For example, might the various components which actually performed the searches have retained copies? Or could they be in the files of an attorney who worked on the case in litigation?

Third, Koch fails to indicate that he took a most logical step in trying to locate records which must have created but were not found in the file examined: he does not state that he talked with

the persons who actually conducted the searches to learn what records they created, where and when and to whom they sent them.

II. PLAINTIFFS HALL AND SSRI ARE ENTITLED TO STATUS AS REPRESENTATIVES OF THE NEWS MEDIA AND TO A PUBLIC INTEREST FEE WAIVER

A. The Administrative Record

By its order dated April 13, 2005, this Court denied Hall and SSRI news media status based on the application submitted with their February 7, 2003 FOIA request. The Court also denied their request for a public interest fee waiver.

Subsequently, by letter dated May 23, 2005, Hall and SSRI supplemented their original applications for news media status and a public interest fee waiver. This supplemental application set forth the basis for news media status and a public interest fee waiver in much great detail than had previously been done. Among other things, the supplemental request submitted a letter from Pulitzer prize-winning journalist Sidney Shanberg to James H. Lesar confirming an agreement with Hall "to write a story or stories both jointly with him and separately as a reporter under my byline about the documents he hopes to obtain through his FOIA request and lawsuit for POW/MIA files." Mr. Shanberg won the Pulitzer prize for his memoir The Life and Death of Dith Pran, which reported his experience covering the war in Cambodia for the New York Times, and was the basis for the movie "The Killing Fields," which won several Academy awards. His letter to Mr. Lesar also stated that [m]y research to date has shown that in the Vietnam War alone, a

significant number of prisoners were not returned by the Hanoi government, but were held back as bargaining chips for war reparations that never came."

Mr. Shanberg also added that "the POW/MIA story is clearly of national importance since men and women will continue to be called to war by our nation's leaders--as they have been presently in Iraq. The history of what happened to those captured in other wars is therefore obviously of interest to [them] and to the nation at large." Id.

By letter dated July 1, 2005, the CIA responded to Lesar's May 23, 2005 letter. Citing this Court's April 23, 2005 order denying both a 0public interest fee waiver and media status, the CIA stated that it had considered the information provided by Hall and SSRI but denied both the fee waiver and news media status on the grounds that they failed to meet the requirements set forth in 37 C.F.R. § 1900.13 and 37 C.F.R. § 1900.02, respectively. The CIA advised that Hall and SSRI had a right to appeal these determinations, but asserted that their appeal would be accepted only if they agreed to be responsible for the costs in the event of an adverse administrative or judicial decision.

By letter dated August 14, 2005, Hall and SSRI appealed the CIA's July 1, 2005 determination to deny their requests for a public interest fee waiver and news media status. In their appeal, they refused to make the commitment demanded by the CIA as a prerequisite to the appeal, pointed out that the FOIA statute did not authorize any agency to abrogate the right of appeal, and that the

right of appeal is critical to (1) exhaustion of administrative remedies, (2) determining when a court has jurisdiction to hear a case, (3) the accrual of the statute of limitations, and (4) the compositions of the administrative record on which a district court determines whether or not a fee waiver or news media status is appropriate.

The remainder of the appeal letter made a detailed showing that Hall and SSRI fulfilled the requirements set forth in the CIA's regulations. To avoid unnecessary duplication, this showing will be set forth in the two ensuing sections which argue that Hall and SSRI are entitled to a public interest fee waiver and news media status.

B. Plaintiffs Hall and SSRI Are Entitled to Status as Representatives of the News Media

The FOIA provision governing fees and fee waivers provides in pertinent part that:

> fees shall be limited to reasonable standard charges for document duplication when documents 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. . . .

5 U.S.C. § 552(a)(4)(A)(ii)(II).

In a landmark decision the Court of Appeals held that 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 material into a distinct work, and distributes that work to an audience." National

Security Archive v. Department of Defense, 880 F.2d 1381, 1387 (D.C.Cir.1989), cert den., 494 U.S. 1029 (1990) ("NSA").

In its April 13, 2005 Memorandum Opinion and Order, this Court held that the activities cited by Hall and SSRI "do not meet the definition articulated in Nat'l Sec. Archive, most notably the requirement that the requester 'use its editorial skills to turn the raw materials into a distinct work.'" April 13, 2005 Mem. Op. at 14, quoting Nat'l Sec. Archive, 880 F.2d at 1387.

The administrative record which is part of the Amended Complaint which is before the Court is different from the record which was before it at the time of its April 13, 2005 ruling. In their supplemental application, Hall and SSRI set forth more details to show that they do meet the definition of "representative of the news media." In their supplemental application, they stated that Hall obtains information on POWs and MIAs from a variety of sources, including veterans, family members of POW/MIAs, and government documents. He disseminates this information through SSRI, a nonprofit corporation, in several ways.

First, when he obtains documents which contain new information of interest to the segment of the public that is concerned with POW/MIA issues, he sends copies of such records to those on his SSRI email list together with his expert commentary on the significance of the information. This email list contains approximately 3,000 names, including many veterans organizations, news organizations, and so forth. The persons on his email list in turn redisseminate the information to others.

To give examples of the broadscale dissemination which is achieves through Web links and emails, Hall notes the number of subscribers who are reached when his emails are redistributed by just three of the 3,000 persons and organizations on his email list:

Vietnam Veterans of Brevard, Florida	30,000-40,000
Task Force Omega of Kentucky	50,000
National Alliance of POW/MIA Families	40,000+

In disseminating this information, Hall uses his editorial skills to make a distinct product. He uses those skills to select which documents are important and to provide an appropriate commentary pointing out what is significant about the documents.

Secondly, Hall disseminates information by authoring articles which contain this information and his commentary on it which are published in magazines, newspapers, newsletters and web sites.

Third, Mr. Hall disseminates the information to veterans groups, congressional staffers and others in the form of public speeches, radio appearances, and private briefings.

Additionally, as noted above, Hall has a commitment from Pulitzer prize-winning journalist Sidney Shanherg that they will jointly author an article or series of articles pertaining to the records released in this case which will be published in the Village Voice and other journals. Quite clearly, this will require that editorial skills be used to transform raw data into a finished product suitable for dissemination.

In employing each of the above-cited means of dissemination, Hall and SSRI use their editorial skills to turn the raw materials into a distinct product, whether it be a magazine article, an email, a web posting, a speech, or a congressional briefing. Accordingly, they are entitled to status as representatives of the news media.y

C. Hall and SSRI Are Entitled to a Public Interest Fee Waiver

The FOIA fee waiver provision also provides that:

> Documents shall be furnished without 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 actions of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552 (a)(4)(a)(iii). The courts have held that this provision sets forth a two-part test for determining whether documents shall be furnished without charge (or at a reduced charge).

Under this test, the requester must establish that the information sought (1) "is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government," and (2) "is not primarily in the commercial interest of the requester." Project on Military Procurement v. Department of the Navy, 710 F.Supp. 362, 367 (D.D.C. 1989), quoting 5 U.S.C. § 552(a)(4)(A)(iii); Schrecker v. Department of Justice, 970 F.Supp. 49, 30 (D.D.C.1997); Larsen v. CIA, 843 F.2d 1481, 1482-1483 (D.C.Cir.1988). Although the requester has the initial burden of producing evidence of public

benefit, "[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).

In denying Hall and SSRI's supplemental application for a public interest fee waiver, the CIA cited its regulations as set forth at 32 C.F.R. § 1900.13. They provide six criteria for evaluating fee waiver requests. Because the CIA failed to identify any problem with any of these criteria, they are each addressed below.

The first criterion is "[w]hether the subject of the request concerns the operations or activities of the United States government." 32 C.F.R. 1900.13(B)(2)(i). 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/MISs 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.

ff the subject of the request concerns the operations and activities of the government, then the second criterion is "[w]he-

ther the disclosure of the requested records is likely to contribute to an understanding of United States government operations or activities." 32 C.F.R. 1900.13(B)(2)(ii). As Sydney Shanberg stated in his letter to Mr. Lesar,

> My research to date has shown that in the Vietnam War alone, a significant number of prisoners were not returned by the Hanoi government, but were held back as bargaining chips for war reparations that never came. The POW/MIA story is clearly of national importance since men and women will continue to be called to war by our nation's leaders--as they have been presently in Iraq. The history of what has happened to those captured in other wars is therefore obviously of interest to the nation at large.

Mr. Schanberg further notes that nearly 600 prisoners were released after the U.S. signed a peace agreement with North Vietnam, but that "[o]ur history in Vietnam will never be complete until we learn what happened to the hundreds of others who were alive and not returned." In view of Mr. Schanberg's comments, it is evident that the disclosure of the records sought is likely to contribute to an understanding of United States government operations or activities. This is further strengthened by the fact that publications like the Village Voice have committed to publish stories on information released as a result of this lawsuit.

The CIA's third criterion is "[w]hether the disclosure of the requested records will contribute to public understanding of United States government operations or activities." 32 C.F.R. 1900.13(B)(2)(iii). Clearly, the disclosure of these documents will do so by enabling 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. As Mr. Schanberg, who has written extensively on the POW/MIA issue for the past two decades says, the Village Voice and other journals have committed to publish stories on the release of such information.

The CIA's fourth criterion is "[w]hether the disclosure of the requested documents is likely to contribute significantly to public understanding of United States government operations and activities." 32 C.F.R. 1900.13(B)(2)(iv). The debate over the POW/MIAs issue has been going on for decades and has been the subject of congressional investigations and Presidential decrees. Indeed, the topic is still the subject of pending congressional legislation. As Mr. Schanberg notes, he has written on it for the past two decades. Any records which are now disclosed after this history are very likely to contribute significantly to public understanding of this issue, and are particularly likely to enlighten the public as to the degree which the CIA did or did not cooperate with prior congressional investigations or presidential orders.

The CIA's fifth criterion is "[w]hether the requester has a commercial interest that would be furthered by the requested disclosure." 32 C.F.R. 1900.13(B)(2)(v). Neither Hall or SSRI have a commercial interest in the disclosure. Neither is in the business of disseminating information about the POW/MIA issue to make money. Rather, their purpose is to inform the public. In

view of this, the CIA sixth criterion is redundant of the fifth and irrelevant.

In light of the foregoing, Hall and SSRI are clearly entitled to a public interest fee waiver

III. THE COURT SHOULD ORDER THE CIA TO MAKE INTERIM RELEASES OF RECORDS RESPONSIVE TO ITEM 3 OF THE REQUEST COMMENCING

The CIA has agreed to search for and review records responsive to Item 3 of the request which have not already been produced. However, it estimated that the "search time" for this task would be "approximately 18 months." Declaration of Scott A. Koch ("Koch Decl."), ¶ 23. More than half a year has passed since that promise was made, and no documents responsive to plaintiffs' request have been released in the interim.

The CIA's estimate is apparently for "search time" only. It is way beyond what is required, is inconsistent with the "prompt access" provision of the FOIA and with what the CIA's own records show is the relatively little time needed to search records. The searches which have been carried out in response to Hall's requests are nearly all database searches which are performed electronically. The speed of such searches is reflected in a September 6, 2000 "Note" for a person and/or office which has been deleted from the CCS ( ). Written at 7:30 a.m. that day, it states that "[p]er our secure telephone conversation earlier this morning" about conducting a further search, the writer had done so and found no "hits."

Plaintiffs have moved the Court to order that nonexempt records responsive to item 3 should be released in interim installments commencing no later than September 30, 2007 and continuing monthly or bimonthly thereafter.

IV. THE CIA HAS FAILED TO MEET ITS BURDEN OF PROVING THAT WITHHELD INFORMATION IS EXEMPT FROM DISCLOSURE

A. The CIA's Vaughn Index is Inadequate to Support Summary Judgment

In Vaughn v. Rosen, 484 F.2d 820, 826 (D.C.Cir.1973) the Court of Appeals held that an agency must provide a "relatively detailed analysis" to support its claimed FOIA exemptions. "A key objective of this analysis, commonly known as a Vaughn index, is to provide a reviewing court with sufficient information to determine . . . whether information withheld by an agency falls within the claimed FOIA exemption." Voinche v. F.B.I., 412 F.Supp.2d 60, 65 (D.D.C. 2006). This index "must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information." King v. United States Department of Justice, 830 F.2d 210, 233-224 (D.C. Cir.1987)(emphasis in original).

As King also notes:

> Specificity is the defining requirement of the Vaughn index and affidavit; affidavits cannot support summary judgment if they are "conclusory, merely reciting statutory standards or sweeping." To accept an inadequately supported exemption claim "would constitute an abandonment of the trial court's obligation under the FOIA to conduct a de novo review."

Id., at 219 (citations omitted).

Here, the CIA has submitted no Vaughn index for the records responsive to Items 1, 2 and 3 of the Hall I request which it states it voluntarily disclosed to him on November 7, 2005 in connection with the Hall I litigation. Koch Decl., ¶ 18. The CIA has provided what it refers to as a chart of those documents and the exemption claims asserted for each document, but this not even pretend to be a Vaughn index. The CIA has filed no affidavit supporting those claims and it has not moved for summary judgment with respect to those withholdings.

Presumably, the CIA plans to contend that plaintiffs are barred from contesting those claims by collateral estoppel. However, collateral estoppel is inappropriate as to Hall and SSRI for two reasons. First, there was never any court decision sustaining those withholdings. Second, as noted above, a change in controlling facts erodes the justification for collateral estoppel. Here, at least with respect to Exemption 1 claims, the facts have changed substantially because a provision in Executive Order 12958 which had not come in effect at the time of Hall I, became effective at the end of 2006. That provision provides for the automatic declassification of records more than 25 years old. These records qualify.

With respect to the Vaughn index submitted to justify withholdings made with respect to the records responsive to Item 6 of the request, the index is woefully inadequate. To start with, no affidavit has been submitted attesting to the facts set forth in the so-called "index." Without such an affidavit, the facts and

opinions set forth therein are meaningless.

Secondly, the Vaughn index contains numerous and pervasive flaws. First, it does not adequately describe the documents at issue. As noted above, the case law hold this is a basic requirement of a Vaughn index. The Vaughn index here is akin to that this Court recently confronted in Carl Oglesby v. United States Department of Justice, et al., Civil Action No. 02-0603, where this Court found that "[t]he FBI does not describe the contents either of whole documents or portions withheld, as the FOIA requires." February 27, 2007 slip. op. at 11, citing King, 830 F.2d at 224. (Annexed hereto as Attachment)

Secondly, multiple exemption claims are cited for the same document without any indication as to which part(s) of the document each applies to. This flaw makes it impossible for the plaintiffs to contest and the Court to review the basis for the alleged exemption claims. See the Court's finding of fault with this practice in Oglesby supra, at 9-10.

Third, the FOIA requires disclosure of any reasonably segregable nonexempt portions. 552 U.S.C. § 552(b). The D.C. Circuit has held that a district court "has an affirmative duty to consider the segregability issue sua sponte." Transpacific Policing Agreement v. U.S. Customs, 177 F.3d 1022, 1028 (D.C.Cir.1999). It is not sufficient for agency to just assert that there are no nonexempt segregable portions. An agency must reasonably describe the exempt material, correlating the claimed exemption to particular passages in the document." Schiller v. NLRB, 964 F.2d 1205, 1209

(D.C.Cir. 1992). Here, the CIA's Vaughn index not only fails to do this, but the CIA does not even assert that there are no segregable nonexempt portions.

B. The CIA's Exemption Claims

1. 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 ("E.O. 12958"), as amended by E.O. 13292. Section 1.6 of the amendment provides that each classified document shall have certain required markings indicating the classification level and the identity of the original classification authority, the agent and office of origin, certain declassification instructions, and a concise reason for classification. No such showing has been made.

The current Executive order is intended to take account of the end of the Cold War, and thus to bring about broadscale declassification of antiquated secrets. As the D.C. Circuit has stated, E.O. 12958 "differs considerably from its predecessor. . . ." Summers v. Department of Justice, 140 F.3d 1077, 1082 (D.C.Cir.1998, 1998), It added:

> 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.

Id. 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.

Under the current executive order, the minimum test for classifying information is whether its unauthorized disclosure "reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe." E. O. § 1.2(3).

Here, the CIA makes only a conclusory assertion that the information relates to intelligence sources and methods. No classification authority states under oath that he or she has determined that the information meets the substantive standard set forth in E.O. 12958. No assertion is made that "disclosure could reasonably be expected to cause serious damage to U.S. national security." 48. This Circuit also requires that the agency "explain how disclosure of the material in question would cause the requisite degree of harm to the national security." King, supra, at 224 (em-

phasis added). This requirement is especially pertinent here because of the antediluvian nature of the materials at issue. They range from 27-44 years old. As Judge Kessler has noted, in the context of a case arising under the predecessor order, "[t]his 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), Mem. Op. at 11, citing King, at 227-28.

But the passage of time, although a factor clearly made relevant under the current Executive order, which places time limits on the duration of classification, see E.O. 12958, § 1.6, is not the only circumstance, or even the most important circumstance, undercutting the credibility of the CIA's claims that this information is properly classified. The War in Vietnam has long been over.

2. 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 it has withheld under this rubric.

Exemption 2 excepts 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). In Schwaner v. Department of Air Force, 898 F.2d 793, (D.C.Cir.1990), the Court of Appeals set forth a two-step test for determining whether materials are exempt under this rubric: "'First, the material withheld should fall

within the terms of the statutory language.'" Id., quoting Founding Church of Scientology, Wash. D.C. v. Smith, 721 F.2d 828, 830 n.4 (D.C. Cir.1983). If it does, then the agency may defeat disclosure by proving: (a) that "disclosure may risk circumvention of agency regulation," Department of the Air Force v. Rose, 425 U.S. 352, 369 (1976); or (b) that "the material relates to trivial administrative matters of no genuine public interest." Founding Church, 721 F.2d at 830 n.4.

To determine whether the requested information is related sufficiently to the internal concerns of the agency to fall within the statutory language ("solely related to"), the D.C. Circuit employs a test of "predominant internality." Schwaner, 898 F.2d at 795, citing Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1074 (D.C.Cir.1981)(en banc). In Schwaner, the Court of Appeals held that materials relating to the practice of collecting data did not pass muster under this test. 898 F.2d at 795-798.

Exemption 2 "does not shield information on the sole basis that it is designed for internal agency use." Fitzgibbon v. U.S. Secret Service, 747 F.Supp. 51, 56 (D.D.C.1990). citing Schwaner, 898 F.2d at 794, 796. Fitzgibbon held Exemption 2 inapplicable to "pages bearing Secret Service administrative markings, numbers which classify information based on a Secret Service data collection system," noting that "[t]he numbers are used to index, store, locate, retrieve, and identify information." Id.

While the CIA has not described the information that it is withholding under Exemption 2, it seems likely that it includes ad-

ministrative routing information, file numbers, and distribution lists, exactly the kind of information which Fitzgibbon held were not protected by Exemption 2.

Even should the CIA be able to show that the information meets the "predominant internality" test, it has made no claim that disclosure may risk circumvention of law or that the material relates to trivial administrative matters of no genuine public interest. There certainly is a genuine public interest in distribution lists, file numbers and the like because "they show who did what, who knew what, and indicate locations where additional information may be stored and located.

Because the CIA has failed to meet its burden of proof with regard to its Exemption 2 claims, summary judgment should be denied it and awarded to plaintiffs.

3. Exemption 5

Exemption 5, 5 U.S.C. § 552(b)(5), provides that the FOIA does not apply to matters that are:

> interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Exemption 5 was intended to incorporate the government's common law privilege from discovery in litigation. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 29 (1965); S. Rep. No. 1219, 88th Cong., 2d Sess. 607, 13-14 (1964). However, the Supreme Court has cautioned that discovery rules be applied to FOIA cases only "by way of rough analogies." EPA v. Mink, 410 U.S. 73, 86 (1973).

The CIA invokes three of Exemption 5's privileges: (1) deliberative process, (2) attorney-client, and (3) work product. The Vaughn index's description of the documents fails to indicate which privilege applies to which parts of a document, and there is no showing made, or even an assertion, that there are no segregable nonexempt parts.

The deliberative process privilege is invoked for Vaughn index Nos. 2, 3, 6; 30(a), 30(b), 30(c), 30(e), 30(f), 30(g), and 30(h); 32, and 33. With respect to Nos. 2, 3, and 6, and 31, it is invoked in conjunction with the attorney-client and work product privileges. With respect to 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.

Deliberative Process Privilege

The ultimate burden which an agency must carry under this privilege is to show that "the document is 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 Energy, 617 F.2d 854, 866 (D.C.Cir. 1980). Congress intended to confine Exemption 5 "as narrowly as [is] consistent with efficient Government operation." Id. at 868, quoting S. Rep.No. 813, 89th Cong., 1st Sess. at 9 (1965). The agency must show "'by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA.'" Senate of Puerto Rico v. U.S. Dept. of Justice, 823 F.2d 574, 585

(D.C.Cir.1987), quoting Mead Data Central, Inc. v. Dep't of the Air Force, 566 F.2d 242, 258 (D.C.Cir. 1977).

The possibility that disclosure will be "likely in the future to stifle honest and frank communications within the agency" depends on the identities of the author and recipient of the communication being disclosed. Here, such damage cannot occur because the identities of the author and recipient of these communicatons have been deleted. See Hoch v. C.I.A., 593 F. Supp. 675, 689 (D.D.C. 1984)("given the anonymity of [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 FOIA").

An agency invoking Exemption 5's deliberative process privilege bears the burden of demonstrating that the material at issue is predecisional and deliberative. Schlefer v. United States, 702 F.2d 233, 237 (D.C.Cir.1983); Paisley v. C.I.A., 712 F.2d 687, 698 (D.C.Cir.1983)("The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process.").

In order to uphold an Exemption 5 claim on grounds that the document is predecisional, "a court must be able 'to pinpoint an agency decision or policy to which the document contributed.'" Senate of Puerto Rico, 823 F.2d at 585, quoting Paisley v. CIA, 712 F.2d 686, 698 (D.C. Cir.1983), vacated in part on other grounds, 724 F.2d 201 (D.C.Cir. 1984). "If there is no definable decision-making process that results in a final agency decision, then the

documents are not predecisional." Paisley v. C.I.A., 712 F.2d 686, 698 (D.C.Cir.1983), citing Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C.Cir.1975).

Moreover, "[p]redecisional communications 'are not exempt merely because they are predecisional; they must also be part of the agency give-and-take . . . by which the decision itself is made.'" Senate of Puerto Rico, 823 F.2d at 585, quoting Vaughn v. Rosen, 523 F.2d at 1144.

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

Attorney-Client Privilege

The attorney-client privilege applies to confidential communications from a client seeking legal advice from a lawyer. The communications must be in confidence. Henry v. Champlain Enterprises, Inc., 212 F.R.D. 73, 83 (N.D.N.Y.2003), citing United States v. Bhd. of Teamsters, 119 F.3d 210, 214 (2d Cir.1997).and see also 8 Wigmore, Evidence, § 2292.

Here, the CIA has not shown that the communications were made in confidence. Indeed, there is some evidence that they were not, as the CIA has apparently invoked Exemption 2 to redact the list of distributees of these communications.

Ordinary business records are not protected by the privilege. In re Grand Jury Proceedings (Malone), 655 F.2d 882 (8th Cir.1981). In order to assess fees, CIA search personnel must record costs on some document. Plaintiffs have not been provided any such records, although the one of the provided refers at the bottom to three attachments, one of which is "CCS search response and cost sheet." See Exhibit 2. This "cost sheet" is clearly an ordinary business record and not subject to the attorney-client privilege. Whether the CIA is claiming Exemption 5 for it or simply did not locate it in its search for Item 6 records is unclear. But whatever the case, it must be produced because it is responsive to Item 6 and is not subject to the attorney-client privilege.

There is also an exception to the attorney-client privilege where a fiduciary relationship is involved. Thus, "in a derivative action, the courts have permitted the piercing of the corporation's attorney-client privilege at the behest of the corporation's shareholders." Henry, supra, at 83. For example, the "Fifth Circuit has held that a corporation's right to assert the attorney-client privilege against its shareholders is not sacrosanct and especially 'where the corporation is in suit against its stockholders on charges of acting inimically to stockholders.'" Id, quoting Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir.1970).

Here, the CIA officials who administer the FOIA, including their lawyers, are in a fiducial relationship with the citizens who seek access to records under this law. Here, the CIA stands

charged with having violated their trust by greatly inflating or misrepresenting the amount of search fees to be charged.

As the D.C. Circuit noted in In Re Sealed Case, 676 F.2d 793, 807 (D.C.Cir.1982), "two common law doctrines giave courts a limited ability to make sure that privileges do not serve ends for which they were not intended. These are exception and implied waiver. Exception comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental 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 founded upon "the objective consideration that when [the] conduct [of a privileged person] touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosures as much as he pleases, to withhold the remainder." Id. Here, the CIA on several occasions made representations to the Court as to how much Hall owed in fees. Those representations must have been based on the communications now being withheld. Having made to disclosures to the Court about the amount of fees owed by Hall, fairness now requires that the basis for such figures now be disclosed.

Work Product Privilege

The work product privilege protects documents prepared by an attorney which reveal the theory of his case or litigation strategy. Fed. Trade Comm'n v. Grolier, 421 U.S. 19 (1983). In Martin

v. Office of Special Counsel, 819 F.2d 1181 (D.C.Cir.1987), the Court of Appeals held that the work product privilege did not "does not distinguish between factual and deliberative materials." Some courts in other circuits recognize a fact/opinion dichotomy and require facts to be disclosed while opinions can be protected. See e.g., Fine v. Dep't of Energy, No. 88-1033, No. 89-0031 (D.N.M. June 23, 1991). This case is distinguishable from Martin, which involved witness statements, because here the documents contain figures which, unless they were wholly concocted, must have been derived from ordinary business records.

It should also be noted that the work product privilege is subject to the same crime-fraud exception as the attorney-client privilege. See, In Re Sealed Case, 676 F.2d at 812, n.74. And the principle may also be waived by disclosure.

4. 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," it has been held, "instructs the court to tilt the balance in favor of disclosure." Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir.1971). The privacy invasion must be tangible and substantial: ". . . Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." Rose, supra, 5 U.S. at 380 n.19. Moreover, it is the "production" of the records, not the resultant speculation to which they may give rise, by which the

invasion of privacy must be measured. Arieff v. Department of Navy, 712 F.2d 1462, 1469 (D.C.Cir.1983).

In view of these constraints upon the scope and application of Exemption 6, the agency normally faces a difficult task in overcoming the statutory presumption in favor of disclosure. As the First Circuit has said, the Exemption 6 case in which "the calculus unequivocally supports withholding [is] a rare case because Congress has weighted the balance so heavily in favor of disclosure. . . ." Kurzon v. Department of HHS, 649 F. 2d 65, 67 (1st Cir.1981). Accord: Local 598 v. Department of Army Corps of Engineers, 841 F.2d 1459, 1463 (9th Cir.1988)("particularly under Exemption [6], there is a strong presumption in favor of disclosure"); Washington Post Co. v. U.S. Dept. of Health, Etc., 690 F.2d 252, 261 (D.C.Cir.1982)(". . . under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act").

If a privacy interest exists, the court must balance the privacy interests against the public interest in disclosure. Rose, supra, at 372; Washington Post Co., 690 F.2d at 258 (D.C.Cir.1982). In order for a cognizable privacy invasion to exist under Exemption 6, the withheld material must concern the "personal" or "intimate" details of a person's life, S.Rep. 813, supra, at 9; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), such that disclosure of the facts might "subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends. Brown v. Federal Bureau of Investigation, 658 F.2d 71, 75 (2d Cir. 1981).

The Court of Appeals has held that for Exemption 6 to apply disclosure must "compromise a substantial as opposed to a de minimis privacy interest." National Association of Retired Federal Employees v. Horner, 879 F.2d 873, 875 (D.C.Cir.1989) ("NARFE"). The privacy interest is balanced against the public interest only if there is a substantial privacy interest at stake. Otherwise, the information must be disclosed because of the inherent public interest in disclosure.

The CIA's only showing with regard to its Exemption 6 claim is its unattested to statement that the withheld information "relates to particular identifiable individuals , the disclosure of which could constitute an invasion of privacy." Vaughn index at 2 (emphasis added) This conclusory assertion does not even meet the statutory standard, which is that disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6)(emphasis added).

Nor has the CIA made any showing of a any privacy interest sufficiently strong that a balancing of the public interest is required. Inasmuch as the CIA has failed to meet its burden of proof, plaintiffs should be awarded summary judgment with respect to the CIA's Exemption 6 claim.

CONCLUSION

For the reasons set forth above, this court should deny defendant's motion to dismiss or for partial summaray judgment. The Court should grant plaintiffs Hall's and SSRI's motion for partial

summary judgment and other relief. The Court should order the CIA to grant Hall and SSRI status as representatives of the news media and a public interest fee waiver. Additoinally, the Court should adopt their proposal for a s prompt schedule for the review and release of additional records responsive to Item 3 of their request. Finally, the Court should also permit plaintiffs to take discovery on the issue of the adequacy of the search.

Respectfully submitted,

/s/

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