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	:	

OPPOSITION OF PLAINTIFFS ROGER HALL AND STUDIES SOLUTIONS RESULTS, INC TO DEFENDANT'S MOTION TO STRIKE PARTS OF DECLARATION OF ROGER HALL

Preliminary Statement

Defendant Central Intelligence Agency ("CIA") has moved pursuant to Federal Rules of Civil Procedure 12(f) and 56(e) to strike specific portions of the Declaration of Roger Hall which plaintiffs submitted in support of the cross-motion for summary judgment filed by plaintiffs Roger Hall and Studies Solutions Results, Inc. (SSRI) (hereafter collectively referred to as "Hall").

For the reasons set forth below, the CIA's motion should be denied. Alternatively, should the CIA's motion not be denied, plaintiffs should be permitted to take discovery pursuant to Fed.R. Civ.Pro. 56(f) to establish those facts which cannot be established through his declaration.

ARGUMENT

I. THE CIA HAS WAIVED ITS RIGHT TO FILE A MOTION TO STRIKE THE CITED PORTIONS OF HALL'S DECLARATION

At the outset of its argument, the CIA quotes a case in which the court stated that "[a]s is true of other material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged. The objection must be made timely or it will be deemed waived. Cattrett v. Johns-Manville Sales Corporation, 826 F.2d 33, 38 (D.C.Cir.1987).

The CIA's motion is not timely filed. The Hall Declaration which is presently before this Court in is drawn largely from the declaration that Hall put before this Court in Hall v. Central Intelligence Agency, Civil Action No. 98-1319 ("Hall I"). The CIA failed to object to the same materials in the Hall I affidavit that it now objects to in this case. In Hall I, District Judge Paul Friedman relied on those materials in rejecting the CIA's claim that it had conducted an adequate search and ordered it to conduct further searches.

The motion made by the CIA could be made in almost every FOIA case. In the experience of the undersigned counsel, who has litigated at least 210 FOIA cases (130 in district court and 80 in the Court of Appeals) over the past thirty-five years, he believes he has encountered it only only one other occasion. The CIA's use of this tactic in this case suggest that the CIA's strategy is to drive up the costs of litigation, thereby discouraging requesters and the lawyers who represent them from undertaking such efforts in the future.

The FOIA was intended to make access to public records relatively easy in order to maximize the dissemination of information importanta to public study and debate. Granting the CIA's belated motion would undercut this policy.

II. HALL'S DECLARATION MAY BE PROPERLY CONSIDERED BY THE DISTRICT COURT AND THEREFORE SHOULD NOT BE STRICKEN

A. An Affidavit Submitted by a Nonmoving Party May Be Considered Even Though it Does Not Strictly Conform to Rule 56's Requirements

The CIA contends that parts of Hall's declaration are inadmissible in evidence primarily because they are not based on personal knowledge and contain hearsay. While these objections will be dealt with below, it is important to note at the outset what the CIA does not take into account, that Hall's declaration performs a dual function. That is, it is submitted both in support of Hall's cross-motion for summary judgment and in opposition to the CIA's motion for summary judgment. This is significant because, as the CIA fails to acknowledge, the strictness with which Rule 56(e)'s formal requirements are observed varies markedly based on whether the affidavit is submitted in support of a moving party's motion for summary judgment or in support of the nonmoving party's opposition thereto.

The D.C. Circuit addressed this issue in Corley v. Life and Casualty Insurance Co., 296 F.2d 449, 450 (D.C.Cir.1961), saying, of Rule 56(e)'s requirements that "[w]e think the rule does not require an unequivocal ruling that the evidence suggested in this particular affidavit would be admissible at the trial as a condi-

tion precedent to holding the affidavit raises a genuine issue." It went on to note that it was not possible in the case before it to say without qualification whether the evidence would or would not be admissible because "[a]dmissibility of testimony sometimes depends on the form in which it is offered, the background which is laid for it, and perhaps on other factors as well." Id.

Authorities have noted that "an overly strict adherence to the demands of Rule 56(e) could lead to an undue amount of energy being devoted to 'qualifying' affidavits or to the precipitous granting of summary judgment when opposing affidavits are found to be unacceptable under the rule." Wright and Miller, Federal Practice and Procedure (1998), § 2738.

Thus, "[t]he cases seem to indicate that judges will be quite demanding in their examination of the moving party's papers, but will treat the papers of the party opposing the motion indulgently." Wright and Miller, loc cit. (citations omitted). The D.C. Circuit follows this distinction. As it has stated, "[t]he courts are quite critical of the papers presented by the moving party, but not of the opposing papers." Underwater Storage, Inc. v. United States Rubber Co., 371 F.2d 950, 953 (D.C.Cir.1966), quoting Wittlin v. Giacalone, 154 F.2d 20, 21 (1946).

B. Hall Is a Expert on the Subjects of Missing POWs, the Efforts to Locate Them, and What Records May Have Been Created Concerning Missing POWs and Efforts to Locate Them

1. Hall Is an Expert

The CIA challenges Hall's claim to be an expert witness on the

subject of missing POWs. See Mot. to Strike at 2.[1] An expert has been defined as a person who possesses special skills or knowledge beyond that of the average layman. Ashley S. Lipson, Is It Admissible? (James Publishing, 1999), citing Byrne v. SCM Corp., 538 N.E.2d 796 (Ill.App. 4th Dist. 1989). With regard to expert testimony, Fed.R.Evid. 702 says:

> If scientific, technical, or other specialized knowledge will assists the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Hall clearly qualifies as an expert on the subject of POW/MIAs, including whether or not the available evidence indicates that the CIA has performed an adequate search for the records he has requested. Hall's expertise is attested to by Dr. Joseph S. Douglas, Ph.D., an author of many published articles and over 12 books on various national security issues, including the POW/MIA

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[1]The CIA also asserts that Hall "has not attempted to make an expert report disclosure, as required by Rule 26(a)(2) of the Federal Rules of Civil Procedure." Id. However, Rule 26(a)(2)(C) makes clear that this report shall be made "at the times and in the sequence directred by the court." There has been no directions by the court regarding an expert report disclosure in this case.

Ruler 26(a)(2)(C) further provides that "[i]n the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), a party must provide to other parties, within 30 days after the disclosure made by the other party." In short, the disclosures spoken of by Rule 26(a)(2), including the expert report disclosure, are tied to a trial date. No trial date has been set in this case, so the CIA's point is utterly without merit.

problem. Declaration of Joseph S. Douglas, ¶ 1. He was formerly an adjunct professor at the Naval Post Graduate School and Johns Hopkins School of Advanced International Studies. Id. Douglas has known Hall for over 15 years and met with him many times. He has reviewed his work and has always been impressed with it. Id., ¶ 2.

Douglas has "the highest regard for Mr. Hall's abilities, research and accomplishments on the MIA/POW issue." Id., ¶ 3. He finds him a "determined, objective, and careful researcher." Id., ¶ 4. He states that "[o]ver the years [Hall] has become one of the few continuing experts on America's MIA/POWs, including operations to locate them and where relevant documents might have been created or be located. Id.

By virtue of education, knowledge and experience, Hall qualifies as an expert witness. As he points out, in 1993, when working on a Master's degree, he conducted a nationwide survey of 480 of 591 returned POWs, and he has been involved in this subject ever since then. Suppl. Hall Decl., ¶ 1. He is thoroughly familiar with the public record on MIA/POWs and has read over 90% of the voluminous records compiled by the Senate Select Committee on MIA/POW Affairs. Id., ¶ 2. He has conducted extensive interviews of former government officials who were knowledgeable about or even participated in operations concerning missing POWs. Id., ¶ 3. Many of these interviews were of persons who had held very high rank in government agencies, such as Admiral Thomas Moorer, former Chairman of the Joint Chiefs of Staff, and former Secretary of

Defense Melvin Laird. Id., ¶ 3. He has also personally interviewed more than 80 returned POWs. Id., ¶ 6.

A person with knowledge or skill born of practical experience qualifies as an expert. United States v. Johnson, 575 F.2d 1347, 1360-1361 (5th Cir.1978)(witness who had smoked marijuana more than a thousand times, dealt with it more than twenty times, correctly identified it more than one hundred times on basis of physical inspection qualified as expert to testify, on basis of inspection, that certain marijuana had come from Columbia); Cunningham v. Gans, 507 F.2d 496, 500 (2d Cir. 1974)(reversible error to exclude testimony by witness who had been a pipefitter for 33 years, had made thousands of pipe hangers over 16 years, and had spent 17 years working exclusively as a pipefitter, on question whether a particular clamp should have been used t support a pipe).

Under the second sentence of Rule 703, "an expert may testify on the basis of facts or data learned before the hearing regardless whether admissible in evidence, so long as they are of the sort upon which similar experts would reasonably rely." David W. Louisell and Charles B. Mueller, Federal Evidence, § 389. The facts and data to which Hall refers in support of his opinion that there is evidence contradicting the CIA's claim that it has conducted an adequate search is exactly the same as those which similar experts would reasonably rely. That is, Hall has relied upon testimony by, and interviews of, former government officials who were involved in or who occupied a position where they could reliably be expected to know, information concerning missing POWs,

POW operations, and the creation or location of POW documents, as well as on government documents.

Under Fed.R.Evid. 602, experts are exempt from the "personal knowledge" requirement. This, plus the broadening of Rule 703 from its former more narrow scope, enables expert witnesses to place in evidence hearsay that is related to the subject of their expertise. Before Rule 703 was changed, "sometimes courts spoke ... about necessity as the justification for receiving expert testimony resting on hearsay; occasionally they took the approach which Rule 703 has now endorsed." Federal Evidence, § 389 (citations omitted. Thus, in Standard Oil Co. v. Moore, 251 F.2d 222 (9th Cir. 1957), the court explained:

> It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay insofar as the trier of fact is concerned. This, however, does not necessarily stand in the way of receiving such expert opinion in evidence. It is for the trial court to determine, in the exercise of its discretion, whether the expert's sources of information are sufficiently reliable to warrant reception of the opinion. If the court so finds, the opinion may be expressed.

Here, Hall's sources appear to be reliable persons who were in positions where they were able to obtain knowledge of the facts they stated to Hall. Many of them are distinguished former public officials, and some of them testified under oath before Congress, and thus were subject to perjury or other charges had they misled that body. In addition, it must be noted that much of the information contained in the Hall declaration which the CIA has moved to

strike in this case, was also in the Hall declaration in Hall I, which the CIA didn't move to strike. Significantly, Judge Paul Friedman relied on Hall's declaration in ordering the CIA to conduct further searches in that case. Moreover, the searches which were then performed in Hall I yielded additional records.

In view of these considerations, both Hall's opinion that there is evidence indicating that the CIA has not conducted an adequate search and the facts he has cited in support of that opinion are admissible in evidence and should not be stricken.

2. Even If Hall Were Not an Expert Witness, his Opinions As to Information Indicating that an Adequate Search Has Not Been Conducted by the CIA Are Admissible

If Hall is not deemed an expert witness, his opinions as to information indicating that the CIA has not conducted an adequate search are still admissible. Fed.R.Evid. 701 provides:

> If the witness is not as an expert, the witnesses' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Hall's declaration sets forth his opinions that the many instances he cites provide evidence relevant to the creation and/or possession of records pertaining to POWs which the CIA has not searched for or located. His opinions on these matters are rationally based on his perceptions of what he was told by the persons he interviewed or his interpretation of what persons have testified to or what is contained in government documents.

His opinions on these matters are quite helpful to a clear understanding of his testimony and to the determination of whether the CIA has conducted an adequate search, a fact in issue.

C. The Statements Contained in the Hall Declaration Are Admissible Pursuant to Federal Rule of Evidence 807

Federal Rule of Evidence 807 provides:

> A statement not covered by any of the foregoing exceptions, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent makes known to the adverse party sufficient in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including, including the name and address of the declarant.

If the statements in Hall's declaration are not admissible under any of the evidentiary principles set forth above, then they are admissible under Fed.R.Evid. 807. Rule 807 provides a three-prong test. As will be seen below, Hall qualifies under each of the three prongs.

1. The statements Are Offered as Evidence of a Material Material Fact

The first part of the tripartite test erected by Rule 807 is whether the statements in the Hall declaration are offered as evidence of material fact. It is pellucidly clear that they are.

They all bear on the issues of the adequacy of the search by providing evidence that documents and statements of persons knowledgeable about MIA/POW affairs, including rescue operations, document creation and document location indicate that there may be responsive records which the CIA has not located in the searches that it has so far done. The adequacy of the search is a material fact in a FOIA lawsuit because "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).

2. The Statements Are More Probative on the Search Issue Than Any Other Evidence Which Hall Can Procure Through Reasonable Efforts

The second test under Rule 807 is whether the statements are "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Again, this test is easily met by Hall. The statements in the Hall Declaration are more probative than any other evidence because they are the only way of presenting the evidence on the search issue given the fact that Hall has to date not been allowed to take discovery on this issue.

3. The General Purposes of the Federal Rules of Evidence and The Interests of Justice Will Best Be Served by Admitting the Hall Declaration Statements in Evidence

The third part of the Rule 807 test is whether "the general purposes of these rules and the interests of justice will best be

served by admission of the statement into evidence." Again, the answer is clearly yes.

Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure, Ltd., 86 F.Supp.2d 244 (S.D.N.Y. 2000), concerned an action which alleged that the defendant had defaulted on an indenture agreement. Under the residual hearsay rule (Rule 807), the court admitted into evidence a newspaper article disclosing an official change in policy regarding remittance of guaranteed funds to foreign investors. This fact was critical to defendant's contention that the policy change rendered its performance under the agreement impossible. The policy change was set forth in a confidential Chinese government document, a "Notice," that defendant did not possess and could not produce a copy of. Although the newspaper article was hearsay, it was offered as evidence of a material fact and was the most probative evidence of the policy change which defendant could reasonably procure in light of the fact that the fact that the Notice had not been publicly released by the Chinese government. The court held that the interests of justice would best be served by admitting the article in evidence. A large sum of money was at stake and defendant's sole defense was based on the change in policy. To bar the article would preclude defendant from ever trying to prove the defense of impossibility. Additionally, the newspaper article had sufficient guarantees of reliability because it was the official newspaper of the Chinese government, thus there was little risk that it would not accurately reflect the Chinese government position.

The same considerations which favored admitting the hearsay newspaper article in Chase Manhattan Bank also favor admitting the statements in Hall's declarations regarding the details of his interviews and the documents he has adduced pertaining to MIA/POWs. The facts set forth in Hall's declaration are critical to a proper resolution of the search issue. Without them, Hall's contentions regarding the adequacy of the search will be greatly emasculated. This evidence is the most probative evidence which plaintiffs can reasonably produce in light of the fact that all other relevant evidence in this case, as it was in Chase Manhattan Bank, is under the control of the government and no discovery against it has been autheorized.

Here, too, there are sufficient guarantees of the reliability of the information. First, Roger Hall is a person seeking the truth about a subject of great concern to him and the families of missing POWs who he represents. Second, the persons he interviewed or upon whose testimony he relies are people who were in a position to know the facts they related to him and had no motive for lying or fabricating such facts. Third, in some cases the facts relied upon by Hall in his declaration are taken from sworn testimony before congressional committees either at committee hearings or in depositions taken by committee staff. Such testimony may generally be expected to be reliable as to what such persons knew, and the risk of lying or inaccuracy is minimalized both by the fact that the testimony is given under oath and by the fact that when such testimony is given by former employees of an agency, it is care-

fully monitored by the agency. Fourth, because the factual information imparted by Hall in his declaration of statements about actions taken by government agencies, those agencies, particularly the CIA, have the capacity to rebut baseless or inaccurate statements, further reducing the risk of unreliability.

4. Notice Require

The notice requirement set forth in the last sentence of Rule 807 has been met. No trial date has been set, but the CIA already has been given a fair opportunity to prepare to meet the evidence set forth in Hall's declaration and is aware of plaintiffs' intention to offer it in evidence. The particulars are set forth in Hall's declaration. His name and address are set forth in the complaint.

D. The Statements in the Hall Declaration Which the CIA Objects to Are Admissible in Evidence

1. Statements Not Offered to Prove the Truth Thereof Are Not Inadmissible Hearsay

Many of the objections made by the CIA relate to statements Hall made in his affidavit regarding what persons he interviewed told him about POW operations or records. Others related to statements made in affidavits, depositions, testimony given before congress or in litigation, and government documents. Hall clearly has personal knowledge of what such persons told him.[2]

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[2]As evidence that Hall lacks personal knowledge, the CIA quotes his statement that "'[w]hile the identity of the agency ... which created these documents is not apparent, I believe they were either created by the CIA or based in substantial part on information provided by the CIA...'" Mot. to Strike at 3, quoting Hall Decl., ¶ 32.

As an alternative basis for admissibility, plaintiffs offer these statements not to prove the truth of the statements but simply to show that the statements were made to him and are the basis of his expert opinion.

It is well-established that "extra-judicial statements, offered not to prove the truth of the statement but merely to prove that the statement was made, are not inadmissible as hearsay." Prairie State Bank v. Hoefgen, 777 P.2d 811 (Kan.1989).

E. Additional Documentary Support for Claims Provided

The CIA faults plaintiffs for not having provided sufficient documentation for some of the claims set forth in his declaration. Accordingly, plaintiffs provide additional documentation in the form of 26 attachments to this opposition.

In particular, at pages 4-5 of its motion to strike, the CIA singled out several paragraphs where it thought the documentation was deficient. These paragraphs and the attachments which provide the additional documentation are as follows:

¶ 7. Attachment 3--Deposition of William Sullivan;

¶ 8. Attachment 5--Duck Soup;

Hall stated this because all logos and iden-tifying markings had been removed from these documents. However, in format, they looked exactly like CIA records. Hall was told by Ed Sprague and Lt. Col. Bud Matthews of the Central Declassification Office, an inter-agency unit which de-classified POW documents, that the CIA and NSA had ordered them to remove identifying logos and markings in violation of Executive Order 12812, and that they had protested this. Supplemental Hall Decl., ¶¶ 8-9.

Hall's opinion that these records were either created by the CIA or based on informa-tion provided by the CIA reflects his personal knowledge of the differnet kinds of formats which the CIA and other agencies use to reproduce information. Id., ¶ 10.

¶ 17. Attachment 30--Beck interview

¶ 19. Attachment 27--Red McDani

¶ 22. Attachment 23--Secord Deposition;

¶ 26. Attachment 26--Hendon Affidavt;

¶ 27. Attachment 15--LeBoutillier Affidavit;

Attachment 26--Hendon Affidavit;

¶ 34. Attachment 19--Deposition of Terry Rreed;

With respect to ¶ 10, which refers to Admiral Zumwalt, plaintiffs have so far been unavle to locate anything.

F. If Facts Set Forth in Hall's Declaration Are Stricken, Hall Must Be Permitted to Take Discovery Pursuant to Rule 56(f)

If this court were to grant the CIA's motion to strike, then the case for permitting plaintiffs to take discovery pursuant to Rule 56(f) is greatly enhanced. Long ago the D.C. Circuit noted that "[t]here is ... an inherent danger of injustice in granting summary judgment to the moving party on his own version of facts within his exclusive control as set out only in ex parte affidavits." Donofrio v. Camp, 470 F.2d 428, 431 (D.C.Cir.1972). "To avoid such unfairness," Rule 56(f) "vests the trial judge with discretion to grant the nonmoving party a continuance, permitting him to use discovery to obtain the information necessary to show an issue of fact in dispute." Id. "The rules governing discovery, including [Rule 56(f)], are to be construed liberally to prevent injustice. . . ." Id.

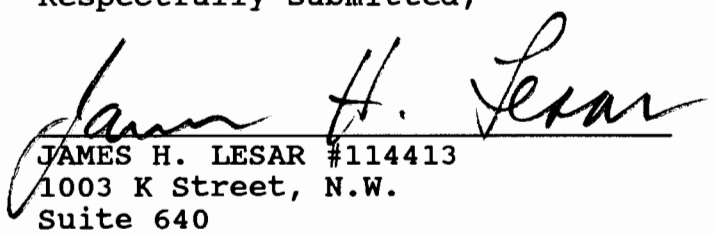
The policy underlying this provision is "to provide an additional safeguard against an improvident or premature grant of sum-

mary judgment...." Federal Practice and Procedure (2d Ed.)(1998), ¶ 2740(footnotes omitted). Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality. Id.

So strong is this policy that courts sometimes enforce it even in circumstances where Rule 56(f) had not been formally complied with. See Miller v. Beneficial Management Corp., 977 F.2d 834 (3d Cir.1992)(district court abused its discretion in denying motion for postponement of ruling on defendant's motion for summary judgment pending completion of essential discovery, even though plaintiff had failed to file the required affidavit but had repeatedly argued in briefs that consideration of the motion for summary judgment should be postponed until crucial depositions had been taken). The District of Columbia Circuit has endorsed this position. See, e.g., First Chicago Int'l v. United Exchange Co., 836 F.2d 1375 (D.C.Cir.1988)(grant of summary judgment without allowing any substantial merits discovery was not justified by plaintiff's failure to file an affidavit showing the need for further discovery, considering that district court had erred in assuming that plaintiff had waived merits discovery, that plaintiff was not at fault in failing to conduct discovery on the merits, and that the outstanding interrogatories, document requests and deposition subpoenas were sufficient to inform the district court that further discovery was needed).

In this case, if plaintiffs cannot present facts showing the existence of a genuine issue of material fact in dispute on the search issue, then they must be afforded the opportunity to take discovery to establish the facts which cannot be presented through Hall's affidavit. To hold otherwise is to reduce the Freedom of Information Act to a shambles, permitting government agencies to succeed on the important issue of the adequacy of their searches by default.

Respectfully submitted,



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