

EXHIBIT A

AIM's Statement of Material Fact (docket # 114) combined with CIA's response thereto (docket # 120)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 04-0814 (HHK)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

Statement of Fact:

1. On February 7, 2003, AIM submitted a Freedom of Information Act ("FOIA") request to the Central Intelligence Agency ("CIA"). The Request sought waiver of search and review fees as being a representative of the news media and public interest waiver of copying costs under 5 U.S.C. § 552 (a)(4)(a)(iii) and 5 U.S.C. § 552 (a)(4)(A)(ii)(II). The Request sought the following seven items of information:

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

Item 2: Records or information pertaining to POW/MIAs sent out of Southeast Asia (for example, to China, Cuban [sic], North Korea, Russia).

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

Item 4: Records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing;

Item 5: Records relating to 47 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, and persons on the Prisoner of War / Missing Personnel Office's list of persons whose primary next-of-kin have authorized the release of information concerning them.

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

Item 7: All records on or pertaining to any search conducted regarding any other requests for records pertaining to Vietnam War POW/MIAs, including any search for such records conducted in response to any request by any Congressional Committee or executive branch agency.

CIA Response:

1. Admit that on February 7, 2003, AIM joined in the FOIA request of Roger Hall and Studies Solution Results that was submitted to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. Koch Decl., Ex. 1.

Statement of Fact:

2. On May 19, 2005, plaintiffs filed their Complaint based on the foregoing February 2003 request (Docket # 1).

CIA Response:

2. Admit that Plaintiffs filed the instant complaint, which speaks for itself, in May 2004 and not 2005. Dkt. No. 1.

Statement of Fact:

3. The Court in its April 13, 2005 Memorandum Order held that "plaintiffs may not challenge the CIA's withholding of certain records Hall sought in his May 28, 1998, FOIA request, and the finding that particular records are exempt from the definition of 'agency records' under FOIA. *See Hall v. CIA*, Civil Action No. 98-1319, slip op. at 1, 14-21 (D.D.C. Aug. 10, 2000)." Docket # 30 at 7.

CIA Response:

3. The Court's April 13, 2005 Order speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 30.

Statement of Fact:

4. The Court's April 13 Memorandum Order (*id.* at 6) specifically noted that the CIA in the *Hall I* decision "failed to establish the adequacy of its search."¹

CIA Response:

4. The Court's April 13, 2005 Order speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 30.

Statement of Fact:

5. On April 22, 2005, AIM wrote the CIA (Ex A Bates 3-5): "This letter supplements the captioned February 7, 2003, FOIA request made by AIM..." (*id.* at 3), and that "[t]herefore, I am now setting forth a separate showing for AIM's being a member of the news media in light of Judge Kennedy's April 13, 2005, memorandum opinion." (*Id.* at 4)

CIA Response:

5 and 6. Admit that on or about April 22, 2005 AIM wrote the agency a letter. The document speaks for itself. AIM's Statement of Material Facts ("SMF"), Ex. A. Plaintiff's characterization is denied to the extent inconsistent with that document.

Statement of Fact:

6. AIM's April 22, 2005 letter (Ex A) also states that "[a]dditionally, AIM intends to disseminate information derived from this request to the

¹ April 13 Memorandum Order Docket # 30 at 7:

B. Effect of Previous Litigation

Hall's previous FOIA request, first submitted on May 28, 1998 and later supplemented, sought six categories of records pertaining to POW/MIAs. In the litigation that followed, the court (Friedman, J.) found that the CIA had properly invoked various exemptions to FOIA to justify its withholding and redaction of certain documents, but that the agency failed to establish the adequacy of its search. *Hall v. CIA*, Civil Action No. 98-1319, slip op. (D.D.C. Aug. 10, 2000). Subsequently... the court found that Hall "constructively abandoned his request for documents by refusing to commit to pay for the searches he requested," and dismissed the complaint. *Id.*, slip op. at 5 (D.D.C. Nov. 13, 2003).

public, and, accordingly, seeks waiver of copying costs under 5 U.S.C. 552 (a)(4)(a)(iii)." (*Id.* at 5)

CIA Response:

5 and 6. Admit that on or about April 22, 2005 AIM wrote the agency a letter. The document speaks for itself. AIM's Statement of Material Facts ("SMF"), Ex. A. Plaintiff's characterization is denied to the extent inconsistent with that document.

Statement of Fact:

7. On May 26, 2005, the CIA denied AIM's request for a public interest fee waiver² and conditioned acceptance of AIM's fee appeal on AIM's agreement to be bound to pay unspecified search fees.³ (Ex B Bates 7-8)

CIA Response:

7. Admit that the CIA sent plaintiff a letter dated May 26, 2005. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. B.

Statement of Fact:

8. On April 26, 2005 AIM made another FOIA Request. (Ext C Bates 10-13, plus attachments) This Request has eight items, the first seven of which are set forth in paragraph one above. The added, eighth Request (*id.* at 7), states:

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

² Ex B May 26, 2005 CIA letter Bates 7: "We have determined that the standards for a public interest fee waiver set forth in subpart 1900.13 of title 32 of the Code of Federal Regulations have not been met. Therefore, we deny AIM's request for a fee waiver."

³ Ex B CIA May 26, 2005 re exclusion of AIM April 22 letter in administrative record Bates 7-9: "Please note that, in accordance with Agency regulations, because the Agency has started to process your FOIA request, the Agency will only accept your appeal of the fee waiver denial if you agree to be responsible for the costs in the event of an adverse administrative or judicial decision."

CIA Response:

8 - 13. Admit that on April 26, 2005, AIM submitted a FOIA request to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. C.

Statement of Fact:

9. AIM's April 26, 2005 FOIA Request, (Ex C) includes its factual basis for entitlement to both news media and public interest photocopy fee waivers.⁴

CIA Response:

8 - 13. Admit that on April 26, 2005, AIM submitted a FOIA request to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. C.

Statement of Fact:

10. Item 5 of AIM's April 26, 2005 FOIA Request references its attached 44 authorizations executed by next-of-kin of POW/MIAs. (Ex C 44 PNOK Waivers Bates 14-57)

⁴ Ex C, AIM's April 26, 2005 FOIA Request Bates 12-13: "AIM is an entity that is organized and operated to publish and broadcast news to the American public. It has been disseminating its analysis of news media reporting for more than 35 years. It disseminates information in several ways *The AIM Report... columns, Briefings...Special Reports... Guest Columns... books... documentaries... website... speaker's bureau... daily radio....* Due to its many efforts, AIM enjoys the ability to convey information to a broad public audience. It is thus clear that AIM gathers information of potential interest to the general public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to its audience. *** Upon disclosure of the records sought, AIM has concrete plans to make the information public... [which] will enhance public understanding of the POW/MIA issue as compared with awareness prior to the disclosure. *** Materials on POW/MIAs will necessarily shed light on the operations or activities of the government. Among other things, they will reveal the extent, nature, intensity, and duration of the Government's efforts to locate POW/MIAs, a subject that has long been of intense interest to the public. Records disclosed to AIM is likely to contribute significantly to public understanding of such operations or activities by disclosing records that have remained secret despite congressional inquiries and Presidential directives to disclose them... AIM believes that the records it will obtain as a result of this request will shed light on the CIA's operations and activities by revealing that it has withheld information regarding missing POWs from congress and the public..."

CIA Response:

8 - 13. Admit that on April 26, 2005, AIM submitted a FOIA request to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. C.

Statement of Fact:

11. The 44 authorizations executed by next-of-kin of POW/MIAs (Ex A at 11-54) contain the following information:

- (1) 31 have the POW/MIA's social security number;
- (2) 39 include his branch of service;
- (3) 20 include the his service number;
- (4) 11 include the another case or reference number;
- (5) 37 include the POW/MIA's date of incident;
- (6) 15 include the POW/MIA's place of incident; and
- (7) 13 contain additional information.

CIA Response:

8 - 13. Admit that on April 26, 2005, AIM submitted a FOIA request to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. C.

Statement of Fact:

12. Jennifer V. Serex-Helwig's release (*Id.* at 48) identified her then husband "Lt. Colonel Henry M. Serex," POW/MIA incident date "4/2/72." Under "Other information," she wrote: "BATF 21 crew, case # 11811-05, Aerial imagery taken June 1992 revealing 'SEREX' in a rice paddy in North Vietnam."

CIA Response:

8 - 13. Admit that on April 26, 2005, AIM submitted a FOIA request to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. C.

Statement of Fact:

13. Attached to AIM's April 26, 2005 FOIA Request is Prisoner of War/Missing Personnel Office's list of 1700 POW/MIAs, by full name, whose primary next-of-kin (PNOK) have authorized the release of information concerning them. The alphabetical list includes branch of service and seven digit reference number. *Id.* at 55-83. Its title page:

Office of the Assistant Secretary of Defense
Defense Prisoner of War/Missing Personnel Office
Declassification/FOIA Division
Vietnam War PNOK "YES" Casualty List
Current as of October 4, 2000

CIA Response:

8 - 13. Admit that on April 26, 2005, AIM submitted a FOIA request to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. C.

Statement of Fact:

14. On June 1, 2005 CIA wrote AIM (Ex D Bates 88-90) regarding AIM's April 26 FOIA Request, refusing to accept both the first seven⁵ as well as the new eighth item,⁶ and claiming that AIM had "no right of administrative appeal."⁷

CIA Response:

14. Admit that the CIA sent plaintiff a letter dated June 1, 2005. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. D.

Statement of Fact:

15. On June 29, 2005, AIM administratively appealed both (1) the CIA's May 26 refusal to accept his April 22 letter without the precondition that AIM agree to liability for search fees, as well as (2) the CIA's June 1 refusal to accept AIM's April 26 FOIA Request. (Ex E Bates 92-95) AIM wrote that it "appeals the fee waiver denial but does not agree to be responsible for any costs in the event of an adverse decision." *Id.* at 94.

⁵ Ex D CIA June 1, 2005 rejecting April 26 FOIA Request no right of Administrative Appeal Bates 88-90: "On 7 February 2003, James Lesar and Joe Jablonski submitted a FOIA request on behalf of their clients, Roger Hall and AIM respectively, in which Mr. Hall and AIM requested records pertaining to seven different items. Items 1 through 7 of your April 26, 2005 request are identical to items 1 through 7 of your 7 February 2003 request. The seven items contained in the 7 February 2003 request are the subject of current litigation (04-0814). For that reason, we will not accept these items as part of this request."

⁶ Ex D CIA June 1, 2005 rejecting April 26 FOIA Request no right of administrative Appeal Bates 88-90: "With regard to item 8, which requests information on fee estimates related to your 7 February 2003 request, this issue is also before the Court in the pending litigation, and we will therefore not accept it as part of this request."

⁷ Ex D CIA June 1, 2005 rejecting April 26 FOIA Request no right of Administrative Appeal Bates 88-90: "[N]o right of administrative appeal exists from our decision not to accept items 1 through 8 of this request."

CIA Response:

15 - 18. Admit that on or about June 29, 2005, AIM sent a letter to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. E.

Statement of Fact:

16. AIM's June 29 administrative appeal (Ex E) observes that the CIA's position that AIM may appeal only if it agrees to be bound to pay unspecified fees violates the FOIA.⁸

CIA Response:

15 - 18. Admit that on or about June 29, 2005, AIM sent a letter to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. E.

⁸ Ex E AIM June 29 Administrative Appeal Bates 92-95, at 93: "*See D.C. Technical Assist. Org. v. U.S. Dept. Housing*, 85 F Supp.2d at 48 (D.D.C. 2000): 'The decision of an agency to grant or deny a fee waiver request is reviewed *de novo* looking only to the administrative record before the agency at the time of the decision. 5 U.S.c. (a)4(vii). (The additional supporting documents submitted with plaintiffs motion for summary judgment were not considered in the disposition of this case).'"

AIM submits what it could not in the district court. The CIA is not free to exclude it from the administrative record. "In 1986, Congress amended the statute governing fee waivers for FOIA requests ... The amendment also changed the standard of review to *de novo*, but limited the court's review to the record before the agency." *Larson v. CIA*, 843 F2d at 1481-82 (D.C. Cir. 1988). "The court must limit its review to the administrative record established before the agency." *Judicial Watch, Inc. v. US Dept. of Justice*, 122 F Supp. 2d 13 (D.D.C. 2000), Kennedy, J. The court in *Oglesby v. US Dept. of Army*, 920 F.2d 57 (D.D.C. 1990) remanded in part "to grant petitioner the right, if he chooses, to pursue administrative appeals from the initial agency denials" (at 71).

Moreover, the CIA's regulation that it will not accept AIM's appeal unless it agrees to pay fees in the event of an adverse position is invalid because it violates and is inconsistent with the FOIA. The FOIA gives any request a right of appeal and does not authorize any agency to abrogate it. The right of appeal is provided for in 5 U.S.C. 552(a)(6)(A) and is critical to (1) exhaustion of administrative remedies, (2) when a court has jurisdiction to entertain a FOIA case, (3) when the statute or limitations begins to run, and (4) the composition of the nature of the administrative record on which a Court determines eligibility for a fee waiver.

Statement of Fact:

17. AIM wrote that "Roger Hall's pending motion for an accounting does not exclude item 8 from the purview of the FOIA." *Id.*

CIA Response:

15 - 18. Admit that on or about June 29, 2005, AIM sent a letter to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. E.

Statement of Fact:

18. AIM submitted its 1971 Articles of Incorporation with its June 29 Administrative Appeal. The Articles state that its purpose is to, *inter alia*, "improve[e] the accuracy of news media reporting in the mass communication media." *Id.* at 96-99.⁹

CIA Response:

15 - 18. Admit that on or about June 29, 2005, AIM sent a letter to the CIA. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. E.

Statement of Fact:

19. By July 19, 2005 letter, the CIA changed its position regarding acceptance of AIM's Administrative Appeal (Ex F Bates 101), limited to fee issue(s), writing, "[t]herefore, we are limiting our acceptance of your appeal to the issue of the denial of the fee waiver request."

CIA Response:

19. Admit that on or about July 19, 2005 CIA sent plaintiff a letter. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with that document. AIM's SMF, Exh. F.

⁹ Ex E AIM June 29 Administrative Appeal, AIM 1971 Articles of Incorporation (Bates 96-99, at 97): "The purpose or purposes of the corporation is organized is to promote, encourage, sponsor, support, finance and facilitate communication, education and cooperation among individuals and organizations working in the mass communications media and to conduct, promote, encourage, sponsor, support, finance, and facilitate research, education and information activities and public discussion groups, forums, panels, lectures, and other educational and informational processes in connection with the mass communication media and public understanding thereof with the aim of improving the accuracy of news media reporting in the mass communication media and to work for the adoption by editors and publishers of codes setting forth good journalistic practice relating to accuracy in reporting and the correction of errors."

Statement of Fact:

20. The Court in *Hall I* held, *inter alia*, that "the Agency was not able to produce reliable records of the terms the other directorates had used in their searches." Docket 54-2 Koch Decl. ¶ 21.

CIA Response:

20. The Court's Memorandum and Opinion speaks for itself. Plaintiff's characterizations are denied to the extent inconsistent with that document. Dkt. No. 30.

Statement of Fact:

21. The CIA relies on the search it conducted under *Hall I* to assert *collateral estoppel* regarding its search for records responsive to Items 1 and 2 and a five of the 42 years of Item 3.¹⁰

CIA Response:

21. The Koch Declaration speaks for itself and, to the extent it is mischaracterized, plaintiff's assertions in this paragraph and its footnote are denied.

Statement of Fact:

22. The CIA allegedly used the same search terms it used in *Hall I* to conduct a search for records responsive to Item 3.¹¹

CIA Response:

22. Admit. The Koch Declaration speaks for itself and, to the extent it is mischaracterized, plaintiff's assertions in this paragraph and its footnote are denied.

¹⁰ Docket 54-2 Koch Decl. ¶ 18: "Items 1, 2, and a five-year span of item 3 of Plaintiffs 7 February 2003 request (January 1, 1971 through December 31, 1975) are duplicates of items Hall requested in 1994 and 1998. These items were the subject of prior litigation in *Hall v Central Intelligence Agency* Civil Action No. 98-1319 (D.D.C) (PLF) (Hall I). In connection with the Hall I lawsuit CIA performed numerous searches produced responsive documents, and withheld other documents on the basis of various FOIA exemptions."

¹¹ Docket 54-2 Koch Decl. ¶ 23: "CIA has agreed to search and review any responsive documents and to make available to Plaintiffs any non-exempt documents responsive to item 3 that have not already been produced. In other words, CIA will search, review and produce non-exempt documents responsive to Item 3 for the date ranges 1960 to 1970 and 1976 to 2002. CIA has apprised Plaintiffs that the same search terms will be used as were used in connection with the searches conducted during the Hall I..."

Statement of Fact:

23. The CIA's October 17, 2008 *Vaughn* index further describes the *Hall I* search.¹²

CIA Response:

23. The *Vaughn* Indices submitted by the Agency speak for themselves, and plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. Nos. 54 and 109.

Statement of Fact:

24. The CIA relies on *Hall I* for its position that it produced responsive records herein, under *Hall I*.¹³

CIA Response:

24. Immaterial and denied.

Statement of Fact:

25. The CIA's *Vaughn* index states that it referred an undisclosed number of nondescript records, responsive to Item 3, to unnamed agencies "for their review and response directly to plaintiffs."¹⁴ DiMaio Decl. ¶ 7.

¹² DiMaio Decl. ¶ 5: "In addition, this declaration describes the search and review of over 700 documents from one database that the CIA undertook in the *Hall I* case." *See also id.* ¶ 6: "CIA has completed its search for, and its review of records responsive to portions of Item 3 of plaintiffs February 7, 2003 request that do not duplicate plaintiff Hall's previous request and litigation.

¹³ Docket 54-2 Koch Decl. ¶ 19: In connection with *Hall I*, on 7 November 2005, the Agency made a voluntary disclosure of the 122 documents at issue in that litigation." *See also id.* ¶ 20: "Collectively, the documents voluntarily disclosed to Plaintiffs on 7 November 2005 represent all non-exempt documents that are responsive to items 1, 2, and the 1971 to 1975 portion of item 3 of the 7 February 2003 request at issue here. Therefore, items 1, 2, and the 1971 to 1975 portion of item 3 are administratively closed."

¹⁴ DiMaio Decl. ¶ 7: "CIA has located information within CIA records responsive to Item 3 that originated from a third agency... Accordingly, I cannot reliably estimate when CIA can complete its processing of documents that are subject to coordination with other agencies. Similarly, CIA also has located records responsive to Item 3 that originated in other federal agencies, which we must refer to those agencies for their review and response directly to plaintiffs."

CIA Response:

25. Mr. DiMaio's Declaration speaks for itself and, to the extent it is mischaracterized, plaintiff's assertions in this paragraph are denied. Dkt. No. 109.

Statement of Fact:

26. The CIA estimated its search for records responsive to Item 3 would take eighteen months.¹⁵

CIA Response:

26. Admit.

Statement of Fact:

27. CIA's employs a "need to know" policy,¹⁶ which decentralizes and compartmentalizes its records systems, requiring searches within its "many components,"¹⁷ resulting in "inherent inefficiencies created in the records search and retrieval processes... [and] the process of responding to FOIA/Privacy Act requests." *Id.* ¶ 9.

CIA Response:

27. Mr. DiMaio's Declaration speaks for itself and, to the extent it is mischaracterized, plaintiff's assertions in this paragraph are denied. Dkt. No. 109.

Statement of Fact:

28. Regarding the CIA's removal of non-responsive records, applying exemptions, and segregation, "[t]his process is laborious and time-

¹⁵ Docket 54-2 Koch Decl. ¶ 23: "CIA has agreed to search and review any responsive documents and to make available to Plaintiffs any non-exempt documents responsive to item 3 that have not already been produced. In other words, CIA will search, review and produce non-exempt documents responsive to Item 3 for the date ranges 1960 to 1970 and 1976 to 2002. CIA has apprised Plaintiffs that the same search terms will be used as were used in connection with the searches conducted during the *Hall I* and that the search time was estimated to be approximately 18 months."

¹⁶ DiMaio Decl. ¶ 7: "[T]o minimize the potential damage to national security that could result from a spy in the Agency midst [the CIA] limit[s] the amount of information to which any particular employee has access." *Id.* ¶ 8: "CIA limits employee access to information by employing a 'need-to-know' policy... through decentralizing and compartmenting its records systems."

¹⁷ DiMaio Decl. ¶ 10: The CIA has "many components."

consuming."¹⁸ Regarding responsive records of other CIA components and other agencies, the CIA stated that "[t]his coordination and referral process itself can be quite time-consuming."¹⁹

CIA Response:

28. Mr. Koch Declaration speaks for itself and, to the extent it is mischaracterized, plaintiff's assertions in this paragraph and its footnote are denied. Dkt. No. 54.

Statement of Fact:

29. On October 30, 2006, the CIA stated that it must undertake multiple reviews before responding to plaintiffs,²⁰ and that no records would be released until completion of the process.²¹ On October 17, 2008, the CIA stated that "in this case" it need not "review the entire body

¹⁸ Docket 54-2 Koch Decl. ¶ 12: "After officers remove the non-responsive documents... determine which, if any, FOIA and Privacy Act exemptions apply, and whether they can reasonably segregate... This process is laborious and time-consuming."

¹⁹ Docket 54-2 Koch Decl. ¶ 13: "In the course of reviewing documents for exempt information and segregability, a component frequently identifies information that it must coordinate with or refer to another CIA component or another agency... This coordination and referral process itself can be quite time-consuming..."

²⁰ Docket 54-2 Koch Decl. ¶ 14: "When all of the components and agencies complete their respective reviews, IMS professionals... incorporate all of their recommendations regarding exemption, segregation, redaction, and release.... then conduct a review from a corporate perspective... [to] ensure that the release or withholding determinations comply with law and published CIA regulations, identify additional exempt information that reflects overall CIA equities, ultimately produce the integrated final record copy of each document, and respond to the requestor."

²¹ Docket 54-2 Koch Decl. ¶ 15: "In response to a broad FOIA request, the searches may locate many documents in many components.... reviewers consider all responsive documents in total..."

of material subject to release prior to releasing any of it..." Docket 109-2 DiMaio Decl. ¶ 8.²²

CIA Response:

29. The Declarations of Messrs. Koch and DiMaio speak for themselves and, to the extent they may be mischaracterized, the Agency denies. Dkt. Nos. 54 and 109.

Statement of Fact:

30. The CIA identified eighty-three records responsive to Item 3 on September 28, 2007.²³

CIA Response:

30 - 32. Mr. DiMaio's Declaration speaks for itself and, to the extent it may be mischaracterized, plaintiff's assertions in this paragraph are denied. Dkt. No. 109.

Statement of Fact:

31. The CIA claims to have decided to waive search fees sometime after July 18, 2007.²⁴

²² Docket 109-2 DiMaio Decl. ¶ 8: "As was explained in the Koch Declaration, CIA cannot normally provide piecemeal responses to FOIA requests, but must review the entire body of material subject to release prior to releasing any of it. However, in this case, CIA determined that, once it had completed its own review, it was appropriate to release any nonexempt records, or portions thereof, that did not require coordination with other agencies, rather than await the other agencies' responses before making a release to the Plaintiff."

²³ Docket 109-2 DiMaio Decl. ¶ 11: "This Supplemental *Vaughn* Index... provides the Court with descriptions of the withholdings on the Item 3 documents which were provided to the Plaintiff on 28 September 2007."

²⁴ See Docket 109-2 DiMaio Decl. ¶¶ 5, 10: "sets forth the decision of the CIA to waive search fees for plaintiffs... On 18 July 2007, the CIA published new regulations on FOIA processing fees. FOIA Processing Fees, 72 Fed. Reg. 39315, 39316 (to be codified at 32 C.F.R. § 1900.02). The CIA does not concede that any of the plaintiffs are news media organizations under either the old or new regulations. As a matter of administrative discretion, however, the Agency will waive search fees in this case."

CIA Response:

30 - 32. Mr. DiMaio's Declaration speaks for itself and, to the extent it may be mischaracterized, plaintiff's assertions in this paragraph are denied. Dkt. No. 109.

Statement of Fact:

32. The CIA disclosed records on September 28, 2007,²⁵ 70 or less days after it waived search fees.

CIA Response:

30 - 32. Mr. DiMaio's Declaration speaks for itself and, to the extent it may be mischaracterized, plaintiff's assertions in this paragraph are denied. Dkt. No. 109.

Statement of Fact:

33. The CIA closed Item 4, seeking "[r]ecords of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing," alleging that none of the subject records originated with the CIA.²⁶

CIA Response:

33 - 34. Mr. Koch's Declaration speaks for itself and, to the extent it may be mischaracterized, plaintiff's assertions in this paragraph and its footnote are denied. Dkt. No. 54.

Statement of Fact:

34. CIA undertook no search for records responsive to Item 4. The CIA's *Vaughn* index contains no information concerning records responsive to this Item.

²⁵ Docket 109-2 DiMaio Decl. ¶ 11: "This Supplemental *Vaughn* Index... provides the Court with descriptions of the withholdings on the Item 3 documents which were provided to the Plaintiff on 28 September 2007."

²⁶ Docket 54-2 Koch Decl. ¶ 24: "Item 4 sought 'records of the Senate Select Committee on POW/MIA affairs which were withdrawn from the collection at the National Archives and returned to CIA for processing.' In *Hall I*, the court held that the records sought by item 4 are not 'agency records' subject to FOIA. In light of the court's ruling that these documents are not subject to FOIA, item 4 is closed."

CIA Response:

33 - 34. Mr. Koch's Declaration speaks for itself and, to the extent it may be mischaracterized, plaintiff's assertions in this paragraph and its footnote are denied. Dkt. No. 54.

Statement of Fact:

35. The opinion in *Hall I* states that "[i]n preparing its supplemental declarations in this matter, the CIA should confirm that it has independently reviewed all documents of its own creation that were included with the Senate Select Committee documents." [CIA Ex 5 n. 4 at 14]

CIA Response:

35. The Memorandum and Opinion speaks for itself and to the extent that it may be mischaracterized, it is denied.

Statement of Fact:

36. The CIA declined to conduct any search for records of the 44 POW/MIAs identified in the 44 authorizations executed by next-of-kin, nor the 1700 POW/MIAs identified in the PNOK list because, *inter alia*, such a search "would be impossible" without "date and place of birth... because... there would be no way to know whether information... was in fact about the individual listed in the request...."²⁷

CIA Response:

36. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Deny that the birthdates were the sole reason for the CIA's declining to search for records of the roughly 1700 individuals included in Item 5. Dkt. No. 54 (Koch Decl. ¶¶ 24 - 25).

Statement of Fact:

37. Broad FOIA searches oftentimes identify "many documents that are not responsive to the request." Docket 54-2 Koch Decl. ¶ 11.

²⁷ Docket 54-2 Koch Decl. ¶ 25: " CIA required the date and place of birth and the full names of the roughly 1700 individuals included in item 5 because, in many cases, individuals might share a similar name. Without a identical identifying information, there would be no way to know whether information discovered through a search for a name, was in fact about the individual listed in the request. Accordingly, without some information to verify the individuals' identities, a search for ascertainably responsive information would be impossible."

CIA Response:

37. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 54.

Statement of Fact:

38. The CIA's October 30, 2006 Koch Decl. relies on the Court's April 13, 2005 Memorandum Order (Docket # 30), in refusing to search for records responsive to Item 5 absent payment of search fees.²⁸

CIA Response:

38. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 54.

Statement of Fact:

39. The CIA declined to conduct any search for Item 5 records absent, *inter alia*, plaintiffs' production of a \$50,000 deposit and liability for another half million dollars.²⁹

CIA Response:

39. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 54 (Koch Decl. ¶ 28).

Statement of Fact:

40. The CIA declined to conduct any search for records of the 1700 POW/MIAs identified in the PNOK list because, *inter alia*, the search

²⁸ Docket 54-2 Koch Decl. ¶ 29: "In a memorandum opinion dated April 13, 2005, the Court denied Plaintiffs' motions, holding that they did not qualify for fee limitations or a fee waiver...."

²⁹ Docket 54-2 Koch Decl. ¶ 28: "Even if Plaintiffs had provided the additional biographical information... Plaintiffs has failed to submit an advance deposit as required by CIA FOIA regulations. In the 15 June 2004 letter, CIA estimated that the costs of conducting searches for all of the documents requested in items 5, 6 and 7 would amount to \$606,595.00 for the searches alone... CIA required an advance deposit in the amount of \$50,000.00 before processing the request. In response, Plaintiffs chose not to provide the additional biographical information, but to instead seek fee limitations and a fee waiver."

names of the POWs whose primary next-of-kin did authorize release may yield the name a POW whose PNOK did not authorize release.³⁰

CIA Response:

40. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 54 (Koch Decl. ¶ 26).

Statement of Fact:

41. The CIA declined to conduct any search for Item 6 records absent, *inter alia*, plaintiffs' production of a \$50,000 deposit and liability for another half million dollars.³¹

CIA Response:

41. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 54 (Koch Decl. ¶ 28).

Statement of Fact:

42. Regarding Item 6, the CIA's *Vaughn* index identified two records it produced in August of 2006³² and 18 records it had identified in October 2006.³³

³⁰ Docket 54-2 Koch Decl. ¶ 26: "If the CIA searched for the 1700 names anyway... it still could not release such information to Plaintiff [because] if the information that emerged from the search might relate to someone other than the individual whose next of kin had authorized its release, then the CIA would be obliged to protect that information from disclosure under FOIA exemption (b)(6)."

³¹ Docket 54-2 Koch Decl. ¶ 28: "Even if Plaintiffs had provided the additional biographical information... Plaintiffs has failed to submit an advance deposit as required by CIA FOIA regulations. In the 15 June 2004 letter, CIA estimated that the costs of conducting searches for all of the documents requested in items 5, 6 and 7 would amount to \$606,595.00 for the searches alone... CIA required an advance deposit in the amount of \$50,000.00 before processing the request. In response, Plaintiffs chose not to provide the additional biographical information, but to instead seek fee limitations and a fee waiver."

³² Docket 54-2 Koch Decl. ¶ 33: "By letter dated 15 August 2006, CIA provided Plaintiffs copies of the two responsive documents."

³³ Docket 54-2 Koch Decl. ¶ 36: The non-exempt, responsive documents were provided to both counsel of record for Plaintiffs on 17 October 2006... eighteen documents were produced ... and [a]dditional materials were withheld in their entirety..."

CIA Response:

42. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 54 (Koch Decl. ¶¶ 33 and 36).

Statement of Fact:

43. CIA asserts exemptions (b)(1), (b)(2), (b)(3), (b)(5), and (b)(6) in these records.³⁴

CIA Response:

43. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 54 (Koch Decl. ¶ 36).

Statement of Fact:

44. CIA asserts *collateral estoppel* regarding most of its records responsive to Item 6.³⁵

CIA Response:

44. Plaintiff's assertions regarding "most of its records" in this paragraph are vague. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 54 (Koch Decl. ¶ 36).

Statement of Fact:

45. As of October 2006, Item 7 remained closed because plaintiffs had "failed to submit an advance deposit" to be applied toward search fees. Docket 54-2 Koch Decl. ¶ 39.³⁶ The CIA declined to conduct any search

³⁴ Docket 54-2 Koch Decl. 36: "The non-exempt, responsive documents were provided to both counsel of record for Plaintiffs on 17 October 2006.... eighteen documents were produced. Five documents were released in their entirety and thirteen documents contained redactions on the basis of FOIA exemptions (b)(2) (b)(3), (b)(5), and (b)(6). Additional materials were withheld in their entirety on the basis of FOIA exemptions (b)(1), (b)(2), (b)(3) (b)(5), and (b)(6)."

³⁵ Docket 54-2 Koch Decl. ¶ 34: "With respect to the remainder of Item 6... requests, the Agency [filed in]... district court and to Plaintiff Hall in the previous litigation."

³⁶ Docket 54-2 Koch Decl. ¶ 39: "Rather than pay the required deposit or respond to CIA's invitation to narrow the Item 7 request, Plaintiffs chose to repeatedly renew their requests for fee limitations and fee waivers, in spite of the Court's ruling against them on that very issue.... As such, Item 7 remains closed."

for Item 7 records absent, *inter alia*, plaintiffs' production of a \$50,000 deposit and liability for another half million dollars.³⁷

CIA Response:

45. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. The issue of non-payment of fees was not the only reason Items 5 and 7 were administratively closed. Dkt. No. 54 (Koch Decl. ¶ 38).

Statement of Fact:

46. As of October 2006 Item 7 remained closed as the CIA claimed it to be "unreasonably burdensome," and would "require research."³⁸

CIA Response:

46. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. The issue of non-payment of fees was not the only reason Items 5 and 7 were administratively closed. Dkt. No. 54 (Koch Decl. ¶ 37).

Statement of Fact:

47. The CIA posits that AIM did not "respond to CIA's invitation to narrow the Item 7 request..." Docket 54-2 Koch Decl. ¶ 39.

CIA Response:

47. Mr. Koch's Declaration speaks for itself. Plaintiff's characterization is denied to the extent inconsistent with that document. Dkt. No. 54 (Koch Decl. ¶ 39). It is admitted that two years after this matter had been administratively closed for plaintiff's failure to narrow the request, AIM did ultimately remove "previous FOIA" requests from Item 7, the CIA did not construe that a sufficient or a proper narrowing of Item

³⁷ Docket 54-2 Koch Decl. ¶ 28: "Even if Plaintiffs had provided the additional biographical information... Plaintiffs has failed to submit an advance deposit as required by CIA FOIA regulations. In the 15 June 2004 letter, CIA estimated that the costs of conducting searches for all of the documents requested in items 5, 6 and 7 would amount to \$606,595.00 for the searches alone... CIA required an advance deposit in the amount of \$50,000.00 before processing the request. In response, Plaintiffs chose not to provide the additional biographical information, but to instead seek fee limitations and a fee waiver."

³⁸ Docket 54-2 Koch Decl. ¶ 37: "imposed such an unreasonably burdensome search requirement... would require... research, going far beyond what the FOIA requires of federal agencies."

7. The request continued to be overly burdensome and was therefore not accepted.

Statement of Fact:

48. The CIA is mistaken. By June 13, 2007 letter (Ex G), AIM narrowed Request 7, writing, "AIM hereby narrows that request to exclude all FOIA requests."³⁹

CIA Response:

48. The letter speaks for itself. See response to paragraph 47, supra.

Statement of Fact:

49. The CIA's *Vaughn* index is silent regarding any search for records responsive to Item 8. See Docket 54-2 Koch Decl. and Docket 109-2 DiMaio Decl.

CIA Response:

49. The *Vaughn* Indices speak for themselves. Dkt. Nos. 54 and 109. Insofar as AIM may be implying that the CIA did not respond to its Item 8-related request the Agency states as follows. In response to Plaintiff AIM's Item 8-related request, by letter dated July 13, 2007, the CIA released four documents, three of which were provided in segregable form. Additional materials were withheld. See Koch July 13, 2007 Letter, attached to opening brief as Exh. A.

Statement of Fact:

50. CIA's refused to accept Item 8, claiming it was the subject of pending litigation. (Ex D CIA June 1, 2005 letter)

CIA Response:

50. Admit that the CIA sent a letter dated 1 June 2005 to plaintiff. That document speaks for itself, and plaintiff's characterization is denied to the extent inconsistent with this document. Dkt. No. 54 (Koch Decl. Exh. 12).

Statement of Fact:

51. The CIA was granted a protective order from plaintiff Hall's and SSRI's discovery of the records identified in Item 8. (Docket # 68)

CIA Response:

51. Immaterial. The Protective Order speaks for itself. Dkt. No. 68.

³⁹ By June 13, 2007 letter (Ex G at 96) AIM narrowed Request 7: "AIM accepts the CIA's invitation to narrow Request 7, which now states... narrows that request to exclude all FOIA requests, so the request should read 'excluding requests made solely under the Freedom of Information Act.'"

Statement of Fact:

52. The CIA's *Vaughn* index does not state that the CIA properly classified Exemption 1 information under Executive Order 12958. (*See* Docket 54-2 Koch Decl. and Docket 109-2 DiMaio Decl.)

CIA Response:

52. Mr. Dimaio's Declaration speaks for itself and does contain a discussion of Exemption 1 information. Dkt. 109 (DiMaio Decl. ¶¶ 11-14).

Statement of Fact:

53. CIA withholds all records containing any cryptonym, or pseudonym, or codewords.⁴⁰

CIA Response:

53. Mr. Dimaio's Declaration speaks for itself and plaintiff's characterizations are denied to the extent inconsistent with this document. Dkt. 109 (DiMaio Decl. ¶ 25).

Statement of Fact:

54. The purpose of Barry Allen Toll's Affidavit is to recount his knowledge of the location specific Top Secret archives pertaining to American POWs during and after the Vietnam War. (Toll Aff. p. 3⁴¹)

CIA Response:

54. Immaterial. Mr. Toll's Affidavit speaks for itself and plaintiff's characterizations are denied to the extent inconsistent with this document. Dkt. 114.

⁴⁰ Docket 109-2 DiMaio Decl. ¶ 25: "And by knowing a cryptonym or pseudonym's meaning, a reader may be able to identify the CIA intelligence source or covert employee." Docket 109-2 DiMaio Decl. ¶ 26: "Since these codewords are themselves intelligence methods that also protect other intelligence sources and methods, information that would disclose cryptonyms or pseudonyms is appropriately classified..."

⁴¹ Toll Aff. p. 3: "The limited purpose of this Affidavit, is to recount and attest to my knowledge of the last known locations of specific Top Secret archives, derived from some of the nation's most covert operations and intelligence gathering methods and techniques, pertaining to American Prisoners of War and Missing In Action, both armed service and Central Intelligence Agency personnel during the Third Indochina Conflict, commonly known as the Vietnam War..."

Statement of Fact:

55. Mr. George Carver of the Central Intelligence Agency served as Special Assistant to three different Directors of the CIA on Vietnam matters, and was on loan from CIA to the Nixon White House serving as Chairman for the Indochina Subcommittee on Intelligence during the critical Nixon years of the Indochina conflict. (*Id.* at 12)

CIA Response:

55 - 63. Immaterial.

Statement of Fact:

56. "[T]he nation's most covert, extensive, and productive strategic intelligence operations... directly flowed their product into the Nixon White House, to George's Indochina Committee on Intelligence.... As such, George was the most informed man in the United States on intelligence in Indochina. His knowledge and awareness was virtually unique. (*Id.*)

CIA Response:

55 - 63. Immaterial.

Statement of Fact:

57. Toll and Carver were "direct witnesses" to facts recounted in the foregoing two paragraphs. (*Id.* at 14)

CIA Response:

55 - 63. Immaterial.

Statement of Fact:

58. Toll "delivered intelligence materials in our possession... [including] satellite photos depicting explosive intelligence...", the "satellite imagery show[s] secret symbols..." (*Id.*)

CIA Response:

55 - 63. Immaterial.

Statement of Fact:

59. At a meeting in the White House in 1993, "George [Carver] proffered CIA documents he'd authored, as late as 1975, going to the Director himself, about Americans still held captive in Indochina in the hundreds. I [Toll] provided CIA documents going to the Director himself, in 1967 and 1969, detailing our certain knowledge of the second tier prison system in Laos, and the numbers of American POWs being held there at the time. Their exact coordinates were noted." (*Id.*)

CIA Response:

55 - 63. Immaterial.

Statement of Fact:

60. At a meeting in the White House in 1993 Toll asked Carver "all of those intelligence materials and product flowed directly to you in the Nixon White House, did they not?" and George said "Yes" again. (*Id.*)

CIA Response:

55 - 63. Immaterial.

Statement of Fact:

61. Regarding records referenced in the foregoing paragraph, "George [Carver] said, 'I sent them back to Langley for storage, through the DO,' meaning the Directorate for Operations in the CIA. 'That was the arrangement I had,' he continued, 'usually by courier.'" (*Id.* at 18)

CIA Response:

55 - 63. Immaterial.

Statement of Fact:

62. Carver stated that [i]f they moved them out of Operations, historically, they would probably be moved to the Director's files... to the Executive Registry Files of CIA..." (*Id.*)

CIA Response:

55 - 63. Immaterial.

Statement of Fact:

63. If the records have been destroyed, there will be a record of it. (*Id.* at 19)

CIA Response:

55 - 63. Immaterial.

Statement of Fact:

64. CIA has failed to search the archive of records referenced in the foregoing paragraphs 58 through 61, stored at its Langley facility.

CIA Response:

64. Immaterial. Additionally, this paragraph appears to challenge the adequacy of the CIA's search. In demonstrating that a FOIA search is adequate, "the agency must demonstrate that it has conducted a 'search reasonably calculated to uncover all relevant documents. . . The question

is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (internal citation omitted) (emphasis in original). Thus, whether additional documents on a topic might exist is immaterial to whether an adequate search was conducted.

Statement of Fact:

65. Former Congressman John LeBoutillier has "personal knowledge of several POW-related incidents where the CIA has had documents that have not been publicly acknowledged or released." (LeBoutillier Decl. ¶ 7)

CIA Response:

65 - 71. Immaterial.

Statement of Fact:

66. "From October, 1980 through February, 1981 [LeBoutillier] was briefed, as a member of the House Special POW/MIA Task Force, on the construction in Laos at Nhom Marrott of a prison camp. We were shown aerial reconnaissance photographs showing the month-by-month progress of this construction project... also confirmed by radio traffic intercepts." (*Id.* ¶ 8)

CIA Response:

65 - 71. Immaterial.

Statement of Fact:

67. "[T]he photographs and intercepts we were shown were CIA documents." "To my knowledge, these documents have never been released by the agency." (*Id.* ¶ 9)

CIA Response:

65 - 71. Immaterial.

Statement of Fact:

68. "[O]fficials of US AID met with Ed Meese and CIA Director Casey and a shipment of \$200,000 of medical supplies was approved as good faith evidence of our intent to work with the Laotian government... I know the CIA was involved in both the decision to approve and stop these shipments." (*Id.* ¶ 11)

CIA Response:

65 - 71. Immaterial.

Statement of Fact:

69. "[A]ll live sighting reports that came into the [US] embassy [in Laos] went directly to the CIA Station Chief." (*Id.* ¶ 12)

CIA Response:

65 - 71. Immaterial.

Statement of Fact:

70. "A United Nations Official in Laos in 1981... saw Caucasian men working on a road under armed guards... [who were identified as] American prisoners left over from the War." (*Id.* ¶ 13)

CIA Response:

65 - 71. Immaterial.

Statement of Fact:

71. "To my knowledge, no reports have ever been made public by the CIA." (*Id.* ¶ 13)

CIA Response:

65 - 71. Immaterial.

Statement of Fact:

72. CIA's productions are devoid of records referred to in paragraphs 65 through 71. *See* Hall Decl.

CIA Response:

72. Immaterial. This paragraph appears to challenge the adequacy of the CIA's search. In demonstrating that a FOIA search is adequate, "the agency must demonstrate that it has conducted a 'search reasonably calculated to uncover all relevant documents . . . The question is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'" *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (internal citation omitted) (emphasis in original). Thus, whether additional documents on a topic might exist is immaterial to whether an adequate search was conducted.

Statement of Fact:

73. Honorable Bill Hendon authored "*An Enormous Crime, The Definitive Account of American POWs Abandoned in Southeast Asia*. The book, ten years in the writing... is the history of living American POWs left behind in Vietnam and Laos at war's end; an account of the

circumstances that left them there and what the intelligence indicates they have endured in the years since." (Hendon Aff. ¶ 1)

CIA Response:

73 -79. Immaterial.

Statement of Fact:

74. "When the American government withdrew its forces from Vietnam in 1973, it knowingly left hundreds of U.S. POWs in Communist captivity. (See *An Enormous Crime*, Chapter 9)." (*Id.*)

CIA Response:

73 -79. Immaterial.

Statement of Fact:

75. "Since Operation Homecoming in 1973, there have been hundreds of postwar sightings and intelligence reports of Americans being held captive throughout Vietnam and Laos, and numerous secret military signals and codes and messages sent from desperate POWs." (*Id.* ¶ 3)

CIA Response:

73 -79. Immaterial.

Statement of Fact:

76. Hendon has "personal knowledge of several incidents where the CIA has had intelligence on living POWs that has not been publicly acknowledged and/or released." (*Id.* ¶ 4)

CIA Response:

73 -79. Immaterial.

Statement of Fact:

77. CIA Director Casey shared with Hendon and the Hon. John LeBoutillier "either satellite imagery or aerial photography which showed laundry arranged in the form of escape and evasion codes on the roof of the Tran Phu prison in Haiphong, North Vietnam... and Directory Casey stated that only an imprisoned U.S. flyer could have made the codes on the prison roof." (*Id.* ¶ 8)

CIA Response:

73 -79. Immaterial.

Statement of Fact:

78. Hendon is "certain the CIA was in possession of this imagery in 1981 and I believe it is still in possession of this imagery." (*Id.* ¶ 9)

CIA Response:

73 -79. Immaterial.

Statement of Fact:

79. In early 1981, Hendon was briefed as a member of the House POW/MIA Task Force by officials regarding a prison camp near Nhom Marrott, Laos, and was "shown aerial/satellite photographs... also confirmed by radio traffic intercepts. American POWs were reliably reported to be in the camp... In addition, an escape and evasion code was imaged inside the camp," which Hendon saw. (*Id.* ¶ 9)

CIA Response:

73 -79. Immaterial.

Statement of Fact:

80. Hendon "believes that the CIA is in possession of both the above described satellite imagery and hand held photography." (*Id.*)

CIA Response:

80. Immaterial. This paragraph appears to challenge the adequacy of the CIA's search. In demonstrating that a FOIA search is adequate, "the agency must demonstrate that it has conducted a 'search reasonably calculated to uncover all relevant documents. . . The question is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'" *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (internal citation omitted) (emphasis in original). Thus, whether additional documents on a topic might exist is immaterial to whether an adequate search was conducted.

Statement of Fact:

81. "Air Force Lt. Col. (then-Major) Henry M. "Mick" Serex, an electronic warfare officer, went missing on April 2, 1972, when his EB-66, code-named "Bat 21," was shot down over the Demilitarized Zone while accompanying a B-52 strike during the Easter invasion.... Air Force records indicate Bat 21 was hit by a surface-to-air missile while flying at an altitude of approximately twenty-six thousand feet. An intercepted PAVN radio communication reported the shootdown and stated that PAVN personnel had "sighted orange parachutes in the area." (*Id.* ¶ 12)

CIA Response:

81 – 83. Immaterial.

Statement of Fact:

82. Before the Senate Select Committee, twenty-six-year veteran Robert G. Dussault testified that "while studying recent (June 5, 1992) satellite imagery of the Dong Val (Dong Mang) Prison north of Hon Gai, he and one of his associates discovered a valid escape and evasion code in a field just west of the prison and above it the name of a missing USAF flight officer. The deputy director would later testify formally what he and his associate had seen:

A. I saw up at the CIA, very clearly to me there was the name S-E-R-E-X.

Q. Capital letters?

A. Yes, and it was in a field just outside the...[Dong Vai Prison], and there was a number above it and there was the name SEREX, and below it, as I remember now, 72//TA/88."

(*Id.* ¶ 12)

CIA Response:

81 – 83. Immaterial.

Statement of Fact:

83. "Satellite imagery imaged in 1975 and analyzed in mid-1976 had shown what CIA and DOD photo interpreters believed at the time was a valid USAF/USN Escape and Evasion code at this same Dong Vai (Dong Mang) prison.... In addition, approximately a half dozen postwar HUMINT (human intelligence) reports had told of US POWs being detained at the prison both during and after the war...." in 1976, 1979, and 1982. [footnotes omitted] (*Id.* ¶ 16)

CIA Response:

81 – 83. Immaterial.

Statement of Fact:

84. Hendon "believes that the CIA is in possession of the original unadulterated satellite imagery described above. (*Id.*)

CIA Response:

81 – 83. Immaterial.

CIA Response:

84. Immaterial. Additionally, this paragraph appears to challenge the adequacy of the CIA's search. In demonstrating that a FOIA search is adequate, "the agency must demonstrate that it has conducted a 'search reasonably calculated to uncover all relevant documents. . . The question is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'" *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (internal citation omitted) (emphasis in original). Thus, whether additional

documents on a topic might exist is immaterial to whether an adequate search was conducted.

Statement of Fact:

85. "During the closed briefings, held on October 2 and 5 1992, Dussault... stunned those [Senators] present by declaring that, while recently reviewing 1988 imagery of Laos, he and his associates had discovered nineteen four-digit numbers that matched the four-digit authenticators of known MIAs..." (*Id.* ¶ 21)

CIA Response:

85. Immaterial.

Statement of Fact:

86. Hendon "believes that the CIA is in possession of this imagery." (*Id.* ¶ 22)

CIA Response:

86. Immaterial. This paragraph appears to challenge the adequacy of the CIA's search. In demonstrating that a FOIA search is adequate, "the agency must demonstrate that it has conducted a 'search reasonably calculated to uncover all relevant documents. . . The question is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'" *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (internal citation omitted) (emphasis in original). Thus, whether additional documents on a topic might exist is immaterial to whether an adequate search was conducted.

Statement of Fact:

87. In 1986, White House US Secret Service Agent John Syphrit told Hendon "that, while stationed in the hallway just outside the Oval Office in late January 1981, he observed and heard the following: President Reagan, Vice-President Bush, Director-designate of the CIA William Casey, and National Security Advisor Richard Allen emerged from the Oval Office and, pausing in the hallway, en route to the Cabinet Room, briefly discussed an offer made by the Vietnamese government to the Reagan Administration to trade the American POWs they were holding in return for payment of some four billion dollars." (*Id.* ¶ 25)

CIA Response:

87. Immaterial.

Statement of Fact:

88. CIA's productions are devoid of records referred to in paragraphs 65 through 87. *See* Hall Decl.

CIA Response:

88. Immaterial. This paragraph appears to challenge the adequacy of the CIA's search. In demonstrating that a FOIA search is adequate, "the agency must demonstrate that it has conducted a 'search reasonably calculated to uncover all relevant documents. . . The question is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'" *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (internal citation omitted) (emphasis in original). Thus, whether additional documents on a topic might exist is immaterial to whether an adequate search was conducted.