UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, *et al*.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 04-00814 (RCL)
CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

PLAINTIFF ACCURACY IN MEDIA'S RESPONSE
TO DEFENDANT'S SUPPLEMENTAL RESPONSES
TO THE COURT'S MEMORANDUM OPINION AND ORDER

Plaintiff Accuracy in Media, Inc. ("AIM"), respectfully submits this memorandum in response to the *Defendant's Supplemental Items 4 and 5 Response Pursuant to the Court's November 12, 2009 Memorandum Opinion & Order*, Docket No. 177.

Preliminary Statement

Since November of 2009, the CIA has undertaken new searches, released over a thousand pages of records it had not previously located or produced, together with corresponding *Vaughn* indices, and, most recently, submitted its *Supplemental Items 4 and 5 Response.*.. Docket No. 177, supplementing its *Reply to Plaintiffs' Responses to Defendant's Supplemental Response.*.. Docket 169. Relying on its dispositive motions and responses to the Court's November 12, 2009, Memorandum Opinion and Order, the CIA claims that it is now entitled to entry of summary judgment in its favor.

While AIM continues to rely on its previously submitted dispositive filings,[1] and joins in the points in authorities submitted by co-plaintiffs Roger Hall and Studies Solutions Results, Inc., in support of their dispositive motions, and as well as co-plaintiffs' prayers for leave to take discovery and for *in camera* inspections, AIM also submits this memorandum in further support of its position that the CIA has not completed all tasks mandated by the Court's November 12, 2009 Order, nor is it otherwise entitled to entry of summary judgment in its favor.

I. The CIA refuses to conduct a search for records responsive to plaintiffs' FOIA Request 5

Plaintiffs' FOIA Request number 5:

> Records relating to 44 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, attachment 1, and records relating to those persons who are named on attachment 2, the Prisoner of War/Missing Personnel Office's list of persons whose primary next-of-kin (PNOK) have authorized the release of information concerning them.

Docket No. 114-1 at 11.

The CIA claimed that Item 5 of plaintiffs' request was "too vague to process and that [plaintiffs]… did not produce additional information—the date of birth, place of birth, and full name of each person… it required to conduct a proper search." *Hall v. C.I.A.*, 688 F.Supp.2d 172, 180 (D.D.C. 2009). The CIA argued that without this

[1] AIM's pleadings re dispositive motions: *Opposition to Defendant's Motions… and Cross-Motion for Partial Summary Judgment*, Docket 72; *Cross Motion for Partial Summary Judgment and for Other Relief*, Docket No.114; *Reply to Opposition to Plaintiff's Renewed Motion for Partial Summary Judgment*, Docket No. 135; Response *to Defendant's Supplemental Response to Memorandum Opinion*, Docket No. 163.

information its search might turn up records pertaining to persons whose names were similar but whose private information plaintiffs are not authorized to see. *Id*. In response to these contentions, the Court noted that the CIA had not identified the legal authority on which its argument was based but seemed to contend that the request did not "reasonably describe" the records sought. But defendant did "concede that a search is possible." *Id*.

The Court observed that the CIA "ha[d] not explained why it could verify the identity of individuals whose names appear in records by date and place of birth but not by, for example, social security number," and ordered defendant to either explain why it needed additional information or "search for and disclose any non-exempt records which, based on the information Hall and AIM (Accuracy In Media) have provided and the details contained in the records themselves, it can verify pertain to an individual on plaintiffs' list." *Id*. at 180-81.

Defendant has not offered a meritorious explanation of why it needs additional information to conduct the search, nor has it begun to search for responsive records. Instead, it argues that a search for records concerning the POW/MIAs whose primary-next-of-kin have authorized disclosure would be “unduly burdensome.” Implicit in this argument – that acting in accordance with the direction of 1,700 families would be too time-consuming – is the position that defendant would, however, agree to undertake such a search if a smaller number of families had authorized disclosure. That position is indefensible.

The CIA's complaint is not with the primary search effort itself, which it has completed, but with the tasks associated with the review of the records it identified as potentially responsive. Defendant relates that its electronic search of its archived records

identified 16,423 hard-copy file folders as potentially responsive, all of which would have to be reviewed for responsiveness. (*See, e.g., Defendant's Supplemental Response Pursuant to the Court's Memorandum Opinion & Order* ("*Supplemental Response*") Docket No. 148 at 14). This "massive task would impose an inordinate and unreasonable burden on Agency resources" (*id*. citing Cole Decl.) without the POW/MIA's place and date of birth, social security number, as well as the individual's full name.

But the record in the case belies defendant's position. CIA initially agreed to conduct the search if plaintiffs would agree to be bound to pay as much as $550,000 in search fees.[2] Later, after AIM had supplemented the administrative record and fully briefed its argument for a waiver of search fees based upon its status as a representative of the news media, the CIA waived the fees and offered a different justification for refusing to conduct the search: It would be unduly burdensome.

The CIA argues that the requested "identifying information allows the Agency to make proper responsiveness determinations… because individuals often have the same or similar names," and "it is extremely difficult, and often impossible, to determine responsiveness based on a name alone." *Id*.; Koch Decl. ¶ 25." *Supplemental Response* Docket 169 at 13. But plaintiffs do not seek release of records regarding all individuals with the same or similar names as those identified on the PNOK list. Plaintiffs seek records regarding the named POWs and MIAs. This Court's Order:

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[2] *See* AIM's dispositive motion Docket No. 114 at 36:

> 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 (6, and 7) absent payment of search fees, requesting, *inter alia*, plaintiffs' production of a $50,000 deposit and liability for another half million dollars. [Footnotes omitted] *See also* AIM's *Statement Material Fact*… (*id*.) ¶ 39 at 16.

> [CIA] must search for and disclose any non-exempt records which, based on the information Hall and AIM (Accuracy In Media) have provided *and the details contained in the records themselves*, it can verify pertain to an individual on plaintiffs' list.

Hall at 180-81 (emphasis added).

"[T]he details contained in the records themselves" includes whether the record is regarding a POW/MIA, which a cursory review of the record would reveal. Defendant is not being asked to determine responsiveness "on a name alone."[3]

Moreover, because all but a small fraction of the 1,700 individuals on the PNOK list are identified by full name (*see* PNOK authorized list, Docket 114-1 at 58-87), taken to its logical conclusion, the CIA's difficulty in determining responsiveness is necessarily premised on its theory that two POW/MIAs may have the exact same full name. Further, the CIA would be aware of such a coincidence, unless, per chance, it has records on only one of the two POWs with the identical full name. And even further, one must conclude, unauthorized release could only occur if the CIA's records concern the POW whose

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[3] Defendant also refused to search records relating to 13 Vietnam era POW/MIAs whose next-of-kin have provided privacy waivers because these next-of-kin did not include social security numbers, dates and places of birth – CIA ignores other identifying information in the waivers. *See* AIM's *Cross Motion for Partial Summary Judgment and for Other Relief*, Docket No.114 at 34-35.

And see, e.g., AIM's *Statement of Material Fact*… Docket 114 p. 7 ¶ 12: "Jennifer V. Serex-Helwig's release [privacy waiver] (Ex C 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.'"

PNOK did not authorize release. Defendant's argument[4] is extremely speculative.

In addition to its archived records, the CIA also identifies its CADRE system, which is "full text searchable," as having responsive records. Here too the CIA has completed its primary search, and here too its complaint is regarding the tasks associated with the review of the records it identified as potentially responsive. It argues that it that it would be "unreasonable" to review the hits associated with a search of all 1,711 names, recounting that its search indicated that "almost 140,000 documents [are] potentially responsive to the named individuals." *Supplemental Response…*, Docket 148 at 15-16.

But the CIA did search CADRE for "the 31 individuals for whom Plaintiffs have provided supplemental biographical information," and its review of "approximately 1,400 records identified by the CADRE search" (*id*.) is now, according to its *Supplemental Items 4 and 5 Response…* Docket No. 177, complete. So, the CIA reviewed an average of 45 documents for each individual – 1,400 documents for records concerning 31 POW/MIAs. A review of the 140,000 documents it identified as potentially responsive to

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[4] *See Defendant's Reply to Plaintiffs' Responses to Defendant's Supplemental Response to the Court's November 12, 2009, Order* , Docket No. 169 at 5, n. 3:

> Without additional identifying information, the CIA might not be able to confirm whether records discovered through a name search actually pertain to the individual listed in Plaintiffs' FOIA request, rather than to a different individual with an identical or similar name.[fn 3]
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> [fn 3] Consider, for example, how Plaintiffs' FOIA request requires CIA to locate records on numerous individuals with very common surnames *(e.g.*, Anderson, Bell, Collins, Smith, and Wilson). Pls.' February 7, 2003, FOIA request, Attachment 2; *see Hall*, 668 F. Supp. 2d at 176. Additionally, some individuals about whom Plaintiffs have requested records share similar names (*e.g.*, "John Edward Bailey" and "John Howard Bailey;" "Walter Louis Hall" and "Walter Ray Hall"). Pls.' February 7, 2003, FOIA request, Attachment 2.

the PNOK list of 1,711 names would be an average of 82 documents for each individual. Thus, the review that the CIA refuses to conduct is, on a per POW/MIA basis, only twice as burdensome as the one the CIA already conducted – not "unduly burdensome."

The catalyst for the Vietnam War POW/MIA PNOK list was the *Disclosure of Information Concerning Unaccounted for United States Personnel of The Cold War, The Korean Conflict, and the Vietnam era*, 50 U.S.C. § 435 Note, the "McCain Bill," which decreed three categories of information may be released to the public, *i.e.*, that "may pertain to the location, treatment, or condition of United States personnel who are unaccounted-for…" *Id.* ¶ (a)(2). But, before such information can be released to the public, permission must be granted by the primary next-of-kin, or PNOK.[5] The Department of Defense sent letters to 2,266 PNOK. Over 1,700 authorized disclosure. *See* PNOK List Docket 114-1 at 58-87; title page at 58:

Office of the
Assistant Secretary of Defense
Defense Prisoner of War/Missing Personnel Office
Declassification/FOIA Division
Vietnam War
PNOK "YES"
Casualty List

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[5] The "McCain Bill," 50 U.S.C. § 435 Note, in part:

> (2) The Secretary of Defense may not make a record or other information available to the public pursuant to subsection (a) if the record or other information specifically mentions a person by name unless –
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> * * *
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> (B) in the case of a person who is dead or incapacitated or whose whereabouts are unknown, a family member or family members of that person determined by the Secretary of Defense to be appropriate for such purpose expressly consent in writing to the disclosure of the record or other information.

Here, "[f]amily members… expressly consent[ed] in writing to the disclosure of the record or other information" (McCain Bill *id*.), but, because the Department of Defense did not supply social security numbers on the PNOK list (which, of course, it could not do on the publicly available list), the CIA refuses to act in accordance with the families' wishes. Additionally, the CIA's position that the list does not contain sufficient specificity to identify the individual is also undermined by the fact that the PNOK "lists are provided to all offices of the federal government that deal with the issue"[6] to facilitate agencies' implementation of the McCain Bill.

If plaintiffs were seeking to have defendant ordered to conduct a burdensome search for records of marginal value in opening up the inner workings of government to public scrutiny, the Court could be more sympathetic towards its argument. But here, the subject records concern events which have both been the subject of official congressional investigations and extensive news, book, and film publicity for decades – and the CIA withholds much of what it knows about the demise of many of these 1,700 Americans.

Moreover, although the identity of the requestor is irrelevant under the FOIA, the CIA's defense on this issue has additional public policy implications. It is responding to the 1,700 affected families that will not act in accordance with their wishes because there are too many of them, or, alternatively, because the family member who authorized release did not supply information (already known to the government) that DOD did not request at the time the primary-next-of-kin authorized disclosure.

In this case, potentially responsive records have already been identified through a name search conducted electronically by the CIA, and it has provided no authority for its

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[6] *See* DOD Defense Prisoner of War/Missing Personnel Office publication. (11/97) "The McCain Bill" A Brief History

claim that it may be relieved of its obligations under the FOIA if a request is too burdensome. The 1996 FOIA House Report counsels against CIA's position:

> The persons requesting records must provide a reasonable description enabling Government employees to locate the requested material, but the identification requirement must not be used as a method for withholding.

H.R. Rep. No. 1497, p. 9

As Hall has pointed out, "[t]he sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe records within the meaning of 5 U.S.C. § 552(a)(3)(A)." *FOIA Update*, Vol. IV, No. 3 at 5, quoted in the *Office of Information Policy's Guide to the Freedom of Information Act* (2009 ed.), at 49, n. 120.

II. CIA's affidavits are not entitled to the credibility necessary to granting summary judgment

The CIA's conduct in this litigation, as well as its conduct in the underlying activities that generated the records at issue, warrant the Court's finding that its affidavits are not entitled to the credibility necessary to granting it summary judgment.

Agency bad faith in the litigation is relevant because it undermines the credibility of the agency's statements in its affidavits. *Allen v. CIA*, 636 F.2d 1287 (D.C.Cir.1980). The same result is warranted where the agency engaged in bad faith in the activities that generated the records at issue. "[W]here it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency or that a so-called 'cover up' is presented, government affidavits lose credibility." *Rugiero v. U.S. Dept. of Justice*, 257 F.3d 534 (6th Cir. 2001).

In this action, the CIA's bad faith is manifest by its abuse of the FOIA's fee waiver provisions. Defendant's history of using the fee provisions of the FOIA to refuse searches pervades this action, and, in fact, predates this action, by years. The court in *Hall I* dismissed his complaint, holding that he had constructively abandoned his request by failure to commit to pay search fees. Two of the eight FOIA Requests in the instant action seek disclosure of records of the CIA's exorbitant fee estimates that changed over time. Plaintiffs believe that the CIA's production of records responsive to Items 6 and 8[7] would demonstrate the CIA's pattern and practice of abuse of the FOIA's search fee provisions to avoid disclosing the records at issue.

As to AIM, defendant abused the FOIA's search fee provisions by seeking to avoid a news media fee waiver by excluding from the administrative record AIM's proof of entitlement to news media status – while simultaneously wrongfully refusing to accept FOIA request 8, seeking records disclosing its basis for its half-million-dollar fee estimate (note 2 *infra*) in this case. Defendant's justifications for trying to limit the administrative record, and in refusing to accept Item 8 of plaintiffs' FOIA request, were

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[7] Docket 114-1 at 11:

> 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.
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> * * *
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> Item 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.

not made in good faith. *See* AIM's *Memorandum of Points and Authorities* in support of its dispositive motions, Docket 114 at 28-30, and accompanying *Statement of Material Fact* ¶¶ 14, 16 at 8-9. *And see* AIM's *Reply* to dispositive motion, Docket No. 135 at 3, 6.

The CIA's conduct in the underlying activities that generated the records at issue also impugns the credibility of its affidavits. Plaintiffs aver that the CIA is covering up its participation in knowingly leaving POWs in Southeast Asia[8] post-1973 Operation Homecoming,[9] explaining the government's opposition to releasing documents and

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[8] Only nine of the 591 returnees came out of Laos, though experts in U.S. military intelligence listed 311 men as missing in that Hanoi-run country alone, and their field reports indicated that many of those men were probably still alive. U.S. intelligence list of men believed to be alive at that time in captivity in Vietnam, Laos, possibly across the border in southern China, and in the Soviet Union, was based on radio intercepts, live sightings, satellite photos, CIA reports, defector information, recovered enemy documents, and reports of ransom demands.

[9] On March 29, 1973 President Nixon told the nation on television: "All of our American POWs are on their way home." *Cf.* AIM's *Statement Material Fact*… Docket 114 ¶¶ 73-76, 85 at 22-23, 31:

> 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.. 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)." (Hendon Aff. ¶ 1)
> "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)
> 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)
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> * * *
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> "During the closed [Senate] 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)

information about American prisoners of war in Vietnam, and similarly concealed that thousands of Korean War veterans remained POWs after the 1953 Korean War Armistice agreement. In support of their allegations, plaintiffs have proffered affidavits and testimony from indisputably qualified experts,[10] as well as dozens of examples in the record of operations, events and activities which surely generated relevant CIA records

[10] *See, e.g.*, Deposition of Admiral Thomas Moorer (authorized joint CIA/military operation to rescue of 60 POWs in Laos) , Docket 83-6; Declaration of John LeBoutillier, (personal knowledge POW CIA records not "publicly acknowledged or released," Task Force briefing and photos of Laotian POW camp 1980-81, CIA approved shipments of medical supplies to Laotian government to show "good faith" in negotiations for POW release, "all live sighting reports" in Laos went directly to CIA) Docket 83-15; Deposition excerpt Thomas E. Muerer (re CIA Laos station chief briefing re locations of POW camps) , Docket 83-16; Deposition excerpt Murphy Martin (same), Docket 83-17; Deposition excerpts Ambassador to Laos William Sullivan re CIA's cancellation of POW rescue attempt, Docket 116-9; Deposition excerpts Jan Sejna re POWs transported to Czechoslovakia, Korea, USSR, Docket 116-17; Deposition excerpts of Terry Reed re order to disregard Laotian use of POWs as human shields to ward off bombing raids, Docket 116-27; Deposition excerpts Richard Secord re POWs in Laos not repatriated in Operation Homecoming, Docket 116-28; US Senate testimony excerpts Richard Secord that CIA was dominant intelligence collector in Laos, confirmed POWs in Laos, Docket 116-29; Affidavit of Larry J. O'Daniel, "informed position that the CIA will hide good intelligence that goes against their institutional bias… cause[d] prisoners not to be released... Agency has used authorized methods (compartmentalization) to achieve unauthorized goals of… resolving the POW/MIA program… hidden behind 'national security' and 'classification' to keep their results from being discovered..." Docket 116-45 at 7; Declaration of Bill Hendon, CIA Director's statement that only US POW could have made escape and evasion codes shown in 1981 CIA photos of POW camp roof in North Vietnam; 1981 briefing re Nhom Marrott Laos POW camp "American POWs were reliably reported… [and] escape and evasion code was imaged inside" camp; 1976, 1979, and 1982 intelligence reports of US prisoners at Dong Vai POW camp and 1975 satellite imagery imaged POW escape and evasion code; closed door Senate testimony of analyst of 1988 imagery of Laos showing "nineteen four-digit numbers that matched the four-digit authenticators of known MIAs," Docket 83-46. *See also* Hall's *Plaintiff's Local Rule 7.1(h) Statement* Docket 75-1 ¶ 29: "Ray Innman, who served as Deputy Director of Central Intelligence from early 1981 through 1982, testified… confirm[ing] the CIA's involvement in the preparation of maps and gathering human source reports of live sightings."

that have not been provided.[11] All of plaintiffs' allegations are uncontroverted.[12]

III. **CIA's misconduct vitiates its privilege assertions**

Exemption 5 has been interpreted as preserving to the agencies such recognized evidentiary privileges as the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" privilege. *Parke, Davis & Co. v. Califano,* 623 F.2d 1, 5 (6th Cir.1980). Defendant withholds records under all these privileges.

Plaintiffs allege serious misconduct. *See* notes 8-10 *infra*. These unchallenged allegations must be taken as true. *See* note 12 *infra*. Government misconduct vitiates the deliberative process privilege, mandating disclosure of what otherwise may be exempt

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[11] *See generally Brief In Support of Plaintiff Accuracy In Media's Cross-Motion For Partial Summary Judgment*… Docket 72 at 3-7; *Cross-Motion of Plaintiffs Roger Hall*… Docket 73 at 7-11, § 3, THE INADEQUACY OF THE CIA'S SEARCH IS EVIDENCED BY THE ABSENCE OF RECORDS PERTAINING TO KNOWN OPERATIONS, EVENTS AND ACTIVITIES; *Hall Affidavit*, Docket 73-2. *And see* contemporaneously filed *Hall Affidavit*.

[12] *Reply to Opposition to Plaintiff's Renewed Motion for Partial Summary Judgment*, Docket No. 135 at 1-2:

> Fed.R.Civ.P.56(e) mandates the conclusion that AIM seeks… When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."…
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> Attached hereto as Exhibit A is Plaintiff's "Statement of Material Fact" (docket # 114) combined with defendant's response thereto (docket # 120), verbatim. Defendant's pleading ignores the mandate of Fed.R.Civ.P.56(e). For example, the CIA recites that the cited document "speaks for itself" 34 times.

And see Docket 135-1, Exhibit A, ¶¶ 54-63 re *Barry Allan Toll Aff*.; ¶¶ 65-71 re *Cong. John LeBoutillier Aff*., ¶¶ 73-87 re *Cong. Billy Hendon Aff*. *See also* Hall's *Plaintiff's Local Rule 7.1(h) Statement* Docket 75-1.

deliberative materials. *See Tri-State Hosp. Supply Corp. v. U.S.*, 226 F.R.D. 118, D.D.C., 2005:

> The deliberative process privilege yields, however, when government misconduct is the focus of the lawsuit. In such instances, the government may not use the deliberative process privilege to shield its communications from disclosure. Thus, "if either the Constitution or a statute makes the nature of governmental officials' deliberations *the* issue, the privilege is a nonsequitur." *In re Subpoena Duces Tecum Served on Office of the Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C.Cir.1998) (citations omitted). Simply put, when there is reason to believe that government misconduct has occurred, the deliberative process privilege disappears. *Id.; In re Sealed Case*, 121 F.3d 729, 746 (D.C.Cir.1997). *See also In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 634 (D.C.Cir.1992); *Alexander v. FBI*, 186 F.R.D. 170, 177 (D.D.C.1999) (citations omitted).

This Court discussed the application of this principle to the (b)(5) exemption in *ICM Registry, LLC v. U.S. Department of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008):

> The so-called misconduct exception to the deliberative process privilege is a less well-settled doctrine. Circuit courts have acknowledged, in dicta, that the deliberative process privilege does not apply where there is reason to suspect government misconduct, but this exception to the (b)(5) exemption has never been applied in a holding at the Circuit level, nor has the scope of "misconduct" been clearly defined. *See, e.g, Enviro Tech Int'l, Inc. v. EPA*, 371 F.3d 370 (7th Cir. 2004); *Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 330 U.S. App. D.C. 352, 145 F.3d 1422 (D.C. Cir. 1998); *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997). In this court, the deliberative process privilege has been disregarded in circumstances of extreme government wrongdoing. *See, e.g., Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999) (no privilege where documents related to misuse of a government personnel file to discredit a witness in an ongoing investigation of Clinton administration); *Tax Reform Research Group v. Internal Revenue Service*, 419 F. Supp. 415, 426 (D.D.C. 1976) (no privilege where documents concerned recommendation to use the powers of the IRS in a discriminatory fashion against "enemies" of the Nixon administration).

The privilege does not apply where the plaintiff's allegations "place the deliberative process itself directly in issue." *Dominion Cogen D.C., Inc. v. District of*

Columbia, 878 F.Supp. 258, 268 (D.D.C. 1995). "[W]here there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997).

In addition to the deliberative process privilege, the CIA withholds records under the attorney-client and work product privileges. Here too disclosure would shed light on government misconduct. The evidence indicates that the privilege is being used to further misconduct which began in *Hall I* when the CIA sent Hall greatly inflated demands for payment of fees, asserting in court proceedings on three different occasions that Hall would incur a specific amount to search the same request. This continued misconduct was the impetus for plaintiffs' FOIA Request 8, seeking records "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."

IV. Limiting adjudication of deliberative process assertions to whether the privilege is properly asserted erroneously transforms a qualified privilege into an absolute one

Freedom of Information Act, 5 U.S.C. § 552 (b)(5) exempts from mandatory disclosure "inter-agency 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." It permits withholding documents which a private party could not discover in litigation with the agency." *United States v. Weber Aircraft Corp*., 465 U.S. 792, 801 (1984). Exemption 5

incorporates all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA.

The deliberative process privilege is commonly understood to "cover documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. . . ." *NLRB v. Sears,* 421 U.S. 132, 150 (1975). Because it is a qualified privilege, its assertions in civil discovery disputes require courts to balance the relative needs of the parties and the kind of litigation involved. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250, D.D.C., 2003:

> Because the deliberative-process privilege is a qualified privilege, it may be overcome by a sufficient showing of need by the party seeking discovery. *Id.* Once the government has asserted the privilege, the court must balance the party's need against the harm that may result from disclosure, taking into account the relevance of the evidence, the availability of other evidence, the seriousness of the litigation and the issues involved, the role of the government in the litigation, and the possibility of future timidity by government employees."

(citation omitted)

In the FOIA context, the deliberative process privilege is still a qualified, as opposed to an absolute, privilege. Thus, the Court should not limit its analysis of Exemption 5 withholdings to adjudication of whether the privilege is properly asserted: Such an approach would erroneously transform a qualified privilege into an absolute one.

The government would rely on *NLRB v. Sears,* 95 S. Ct. 1504 (1975) for the proposition that, in the FOIA context, the standard to be employed is whether the documents would "routinely be disclosed" in civil litigation. Under the government's analysis, records for which a party would have to make a showing of need are not

"routinely" disclosed, and, thus, are categorically exempt from disclosure. *NLRB* at 1516, n. 15:

> The ability of a private litigant to override a privilege claim set up by the Government, with respect to an otherwise disclosable document, may itself turn on the extent of the litigant's need in the context of the facts of his particular case, or on the nature of the case. However it is not sensible to construe the Act to require disclosure of any document which would be disclosed in a hypothetical litigation in which the private party's claim is the most compelling. Indeed the House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would "routinely be disclosed" in private litigation and we accept this as the law. H.R. Rep. No. 1497, p. 10.

The language, "routinely be disclosed," as it appears in *NLRB*'s excerpt of House Report No. 1497, does not mean that withholding is justified if the record would usually, or more often than not, be disclosed in private litigation. Such a reading of *NLRB*, as well as cited excerpt of H.R. Rep. No. 1497, is ill-founded. Congress could not have intended a blanket rule of nondisclosure for deliberative materials because Congress had never heard of the deliberative process privilege. *See Wright and Graham, Fed. Prac. & Proc.* Chap. 6 *Privileges* § 5680 OFFICIAL INFORMATION – DELIBERATIVE PROCESS PRIVILEGE:

> It is relatively clear from the legislative history that Congress, like most people in 1966, had never heard of the "deliberative process privilege." The only privileges specifically mentioned in the legislative history are the attorney-client and work product privileges. If Congress was thinking of any other privilege, it was most likely the executive privilege that the Justice Department had been asserting against Congress for years.… Congress was willing to allow courts to recognize a very limited sort of executive privilege in F.O.I.A. cases if courts were also willing to allow non-disclosure of similar evidence in civil litigation...
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> * * *
>
> The Senate report explained that this "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." Elsewhere the report justified the exemption as a whole by simply repeating the passage from its prior report that echoed the "executive privilege" rationale… But

> the House report stated the rationale in more expansive terms and suggested that the exemption should apply unless the documents in question "would routinely be disclosed to a private party through the discovery process in litigation with the agency." Not surprisingly, in his memo interpreting the Freedom of Information Act for the agencies, the Attorney General chose to quote the House report… In support of this expansive interpretation of the language of the exemption, the Attorney General cites for the first time anywhere in the legislative history a decision of a lower court recognizing the deliberative process privilege. (footnotes omitted)

Under the FOIA, where the sole factor favoring disclosure is the extent to which it would open up the inner workings of government to the light of public scrutiny, disclosure turns on the nature of the document and what it reveals about the operation of government – not on the identity or purpose of the requestor. So, in lieu of a weighing a party's need for the documents in ruling on a privilege's applicability, as the Court would in civil discovery disputes, under the FOIA, the Court should consider what the document reveals about the operation of government.

The government's analysis of the privilege renders deliberative materials absolutely immune from mandatory disclosure, while such immunity is qualified under common-law principles. "FOIA neither expands nor contracts existing privileges, nor does it create any new privileges." *Forest Prods. Nw., Inc. v. United States*, 62 Fed.Cl. 109, 113–14 (Fed.Cl.2004). Under the government's interpretation, under the FOIA – and only under the FOIA – the deliberative process privilege is an absolute privilege. "Accordingly, not all information exempt from disclosure under the FOIA exceptions will necessarily be protected by privilege if sought by discovery processes for purposes of litigation." *McCormick On Evid.* (6th ed**.)** Title 5 Chap. 12 § 108. *Qualified privileges for government information*.

Not only is the government's interpretation based on a misreading of the legislative history, it also violates the well-settled principle that FOIA exemptions are to be construed narrowly, and, indeed, is contrary to the purpose of the statute. Categorical exemption upon making a *prima facie* showing of the qualified deliberative process privilege is a broad construction, whereas, under the broad disclosure provisions of FOIA, the enumerated exemptions are narrowly construed. *See, e.g., John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989), *reh'g denied*, 493 U.S. 1064 (1990); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). "[W]e examine first the language of the governing statute, guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Ins. Co. v. Harris Trust & Savings Bank, 114 S. Ct.* 517, 523 (1993) (internal quotations, brackets, and citations omitted).

CONCLUSION

For the reasons set forth above, in plaintiff AIM's other dispositive filings, and for all reasons set forth by plaintiffs Roger Hall and Studies Solutions Results, Inc., this Court should:

(1) Deny defendant's motion for summary judgment;

(2) Permit plaintiffs to engage in limited discovery; and

(3) Examine a certain number of documents *in camera*.

DATE: June 20, 2012.

Respectfully submitted,

/s/

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