UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C. A. No. 04-814(RCL)
	:	
CENTRAL INTELLIGENCE AGENCY	:	
	:	
Defendant	:	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF SECOND RENEWED CROSS-MOTION FOR SUMMARY JUDGMENT AND OTHER RELIEF BY PLAINTIFFS ROGER HALL ("Hall") AND STUDIES SOLUTIONS INC. ("SSRI") AND IN OPPOSITION TO DEFENDANT'S SECOND RENEWED MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Preliminary Statement

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

Suffice it to say that defendant Central Intelligence Agency ("CIA") has filed a renewed motion to dismiss or for summary

judgment. Plaintiffs Roger Hall ("Hall") and Studies Solutions Results, Inc. ("SSRI"), collectively referred to hereafter as "Hall," now file their Second Renewed Cross-Motion for Summary Judgment and Other Relief, ("Hall's 2d RMSJ"). Hall seeks to have the Court set up a "meet and confer" conference to plan a schedule for taking additional discovery, including depositions of still-living witnesses knowledgeable about sightings of live POWs and MIAs and satellite imagery.

ARGUMENT

I. THE CIA DID NOT MEET ITS BURDEN OF PROOF REGARDING ITS NATIONAL SECURITY CLAIMS UNDER THE FREEDOM OF INFORMATION ACT

A. Summary of CIA's Allegations

The CIA alleges that our national security requires that national security information is being properly withheld under exemptions (b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E). It also refuses to confirm or deny the existence of operational files and information, alleging that such materials are not subject to an exception to the CIA Information Act of 1984, 50 U.S.C. § 5131.

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In order to support its Exemption 1 claims, an agency must show that any withholding is (A) specifically authorized under criteria stablished by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order*. See* § 5 U.S.C. 552(b)(1). The plain meaning of this language indicates that each requirement must be met separately. Neither was.

The Executive order which applies to the information withheld in this case is E.O. 13526. It provides that records more than 25 years old are automatically declassified if they are historically valuable. The information at issue meets that description. It is more than 25 years old. It concerns the Viet Nam war, one of the major events of the 20th century which had the longest and most traumatizing impact on the American people and the world. The impacts are still forcefully manifested today with the agreement by North Korea this year to return the remains of POWs and MIAs back to the United States. Moreover, the U.S. re-positioned its warships away from the North Korean coastline and this was accompanied by the ever-lengthening cessation of North Korea's firing of nuclear missiles. And over the

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decades, there have been numerous U.S. government and international investigations attended by pervasive publicity.

The CIA has submitted declarations which are largely boilerplate, that fail to specify which portions are based on personal knowledge as required by Rule 56 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), and which are undermined by contrary evidence.

E.O. 13526 is markedly different from earlier executive orders. It makes the passage of time a strong factor favoring release of classified information.

The CIA declares that its affiant, Antoinette B. Shiner ("Shiner"), has properly classified information despite its advanced age. She claims that it is exempt from automatic declassification pursuant to § 3.3(b) of E.O. 13526, which provides that an "agency head may exempt from automatic declassification . . . specific information, the release of which should clearly and demonstrably be expected to" reveal certain kinds of information. *Id*. ¶ *53.* Shiner makes no showing that any disclosure that has or might be made. She simply presumes it. With respect to the many entirely withheld documents she has not provided the specificity required to make the

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extraordinary burden which the E.O. places on records subject to automatic declassification.

Shiner also gets into trouble when she falsely claims that the CIA "did not intend to erroneously suggest that it had excluded other record systems or databases that are also 'likely' to contain responsive cords" when it had repeatedly used the phrase "most likely" instead of the legally prescribed standard. *Id*. ¶ 21. She then goes on to assert:

> Nonetheless, given the historical nature of the requested documents, CIA has reconsidered the matter and determined that CADRE and archived records are in fact the only systems likely to contain responsive records. Thus, as described below, the CIA searches.

Id. (emphasis added). This concedes that the withheld materials were historically important. As this Court noted in its JW v. DOS opinion this raises questions regarding the transfer of such records and their alleged destruction.

Shiner invokes the same kinds of arguments for records more than 50 years old. Her arguments are even more speculative, presumptive, and less worthy than her already discredited claims for records more than 25 years old. Plaintiffs have dealt with them in previous briefs and relies on those briefs.

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. II. THE CIA FAILED TO MEET ITS BURDEN OF PROOF REGARDING ITS EXEMPTION ONE AND EXEMPTION THREE CLAIMS

The CIA invokes two Exemption 3 statutes based on national security concerns to justify redactions in withheld materials: (1) the National Security Act of 1947 ("NSA Act"), 50 U.S.C. § 3024, as amended; and, (2) the Central Intelligence Agency Act of 1949 ("CIA Act"), 50 U.S.C. § 3507, as amended.

A. The CIA Act Exemption 3 Statute, 50 U.S.C. § 3507

The CIA Act exempts the agency from publishing or disclosing "the organization, names, official titles, salaries, or numbers of personnel employed by the [CIA]." 50 U.S.C. § 3507. Shiner and her colleagues misapply this provision.

In *Phillippi v. CIA*, 546 F.2d 1009,1015 n.l4 (D.C. Cir. 1976), the D.C. Circuit "cautioned that the CIA Act does not permit the agency "to refuse to provide any information at all about anything it does." Similarly, in *Baker v. CIA,* 580 F.2d 664, 669 (D. C. Cir. 1978), the court held that the CIA Act applies to "personnel information." As Judge Cooper recently noted, "[d]espite these admonitions, the agency has recently asserted the CIA Act in a bevy of cases, including this one, to exclude information regarding the organization

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and functions of the agency generally, on the theory that the CIA only functions through the acts of its employees." *Sack v. CIA*, C.A. No. 12-0537 (CRC), Opinion and Order (D.D.C. Sept. 16, 2014) at 3-4, citing *Sack v. CIA* ("*Sack*"), No. 12-244, 2014 WL 3375568, at *9 (D.D.C. July 10,2014); *Whitaker v. CIA ("Whitaker"),* No. 12-316, 2014 WL 914603, at *6-7 (D.D.C. Mar. 10, 2014); *Nat'l Sec. Counselors v. CIA*, 960 F.Supp. 2d 101, 176 (D.D.C. 2013).

Judge Cooper ruled that "[t]he phrase 'of personnel employed by the Agency* applies to each item in the list 'organization, functions, names, official titles, salaries, or numbers* and thus the CIA Act only applies to personnel information." *Sack* at 4 (emphasis added). The Shiner Declaration does not state that the documents she addresses are personnel documents, and a review of the records indicates that they are <u>not</u> personnel records but the kind of records normally generated in gathering and disseminating intelligence information.

To the extent that any of the information withheld by Shiner does constitute personnel information, there is a further hurdle. § 3507 specifies that the information it protects must relate to "personnel employed by the [CIA]." Even assuming that some of the

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withheld information is personnel material, no showing has been made that these persons are still employed by the CIA. Given the passage of more than five decades, the chances that they are still employed by the CIA are slim.

The Government's response to CIA Act Exemption 3 claims is minimal. It does not analyze or dispute the authorities cited. It is axiomatic, that FOIA requires all exemption claims to be narrowly construed.

B. National Security Act of 1947 (“NSA Act"), 50 U.S.C. § 3024

The CIA also relies upon the National Security Act of 1947 ("NSA Act"), 50 U.S.C. § 3024, which protects against the unauthorized disclosure of intelligence sources and methods. But this Exemption 3 statute is subject to the same kinds of concern pointed out in *King* and Allen set forth in the previous section. Is the source still living? Has the source or method been disclosed? Is the source or method really unknown to foreign governments and institutions and the press? Does the CIA consider disclosures made by Congress or institutions other than the CIA "unauthorized"?

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A district court should have considerable skepticism about claims of exemption for intelligence sources and methods compiled during the time period the documents in this case were compiled. The 2007 report to Congress of the International Working Group ("IWG") was severely critical of the CIA's protection of intelligence sources and methods as flimsy and even pretextual, and because it protected Nazis and former Nazis from exposure, even though this allowed Nazis and KGB agents and assets to infiltrate American and European counterintelligence services.

The IWG Report is filled with scathing criticisms of the conduct of executive agencies in this regard, particularly the CIA. Some examples:

> —In responding to calls by members of Congress, including Elizabeth Holtzman, to release information about Kurt Waldheim and his employment by the CIA after the war,the CIA "was not forthcoming, and withheld records, purportedly to protect 'foreign intelligence information' and 'sources and methods.' The agency "generally treated Congressional requests on this matter, as one CIA staff historian phrased it, with 'a cavalier attitude.'" *IWG Report* at 34.
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> —The CIA told Congressman Steve Solarz to file a FOIA request "to obtain information on Waldheim he requested." Id.

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> --files released by the CIA are not intact, original files, but instead comprise pages gathered from various CIA files. The CIA removed all CIA file numbers on the released pages, rendering it difficult to ascertain the location of the original files at the agency. Id. at 56.

The Final Report concludes, the lessons learned are not reflected in the way government official treat dubious claims of the need to protect intelligence sources and methods today.

III. THE GOVERNMENT HAS REPEATEDLY FAILED TO CONDUCT ADEQUATE SEARCHES

A. The CIA's Resistance to Discovery

Plaintiffs in this case have repeatedly sought various forms of discovery—*Vaughn* indices describing and justifying claims that adequate searches that have been conducted; depositions; requests for admissions and production of documents; interrogatories; *in camera* inspection; appointment of a magistrate, master or special master. These discovery mechanisms, plus the possible use of the so-called "Oral *Vaughn* index," are the focus of Hall's contention that the CIA has acted in bad faith which requires additional forms of discovery beyond the repetitive submission of *Vaughn* declarations and indices.

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The CIA has repeatedly conceded the necessity of some form of *Vaughn* inventories and indices. It has said it would not object to *in camera* inspection based on a small random sample of selected documents. It has refused to concede that appointment of a magistrate, master or special master. It opposes depositions.

In its August 3, 2017 Memorandum Opinion ("Aug. 3 Mem. Op."), ECF #291, this Court once again dealt with these discovery issues. While formally denying plaintiffs' request for discovery, ECF No. 290, this Court ordered the CIA to submit additional declarations and indices to address four specific issues concerning adequacy of the CIA's searches.

B. New Developments and *Judicial Watch v. DOS*

Since this Court's Aug 3, 2017 Mem. Op., there have been several new developments which impact on the adequacy of the searches both previously conducted and presently contemplated by the CIA. For example, this Court recently issued its decision in *Judicial Watch v. U.S. Department of State ("JW v. DOS"),* Dec. 6, 2018 Memorandum Opinion *(Dec. 6 2018 Mem. Op.")*, C.A. No. 14-1242 D.D.C. For example, the *JW v. DOS* opinion strengthens the need for discovery on the issues in at least two ways. First, the Court

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relies on the pattern it observed in the *JW v. DOS* case the CIA repeatedly making the same errors in spite of the fact that it knew or could readily learn that they were in fact errors.

Second, the pattern which this Court observed in *JW v. DOS* is the same patterns he found repetitiously prevalent in his Aug. 3, 2017 Mem. Op. in *Hall*. In a lengthy footnote to that opinion, this Court noted that

> In various filings and supporting declarations, the CIA and its affiants frequently repeat the Court's earlier holdings about the CIA's searches being inadequate are "because . . . the CIA had erroneously stated that it had searched the system 'most likely' to contain responsive documents rather than 'all systems that are likely to produce responsive records." To the extent that the CIA is implying that the Court in its 2012 Order accepted the CIA's subsequent assertion that the CIA had "erroneously" stated where it searched, the Court rejects such a characterization. Giving the CIA the benefit of the doubt, its repeated invocation of erroneousness refers to its own legally significant error; the Court did not then and does not now treat the CIA's prior representations as merely its repeated invocation of erroneousness refers to its own legally significant error; the Court did not then and does not now treat the CIA's prior representations as merely (repeated) rhetorical slips. In fact, the word "erroneous" appears nowhere in the Court's 2012 opinion. The CIA's decision to "reconsider the matter" of where responsive records are likely to be found, *see* [248-1] at *8; [248-2] at *9, implicitly acknowledges this to be so.

ECF No. 291 at 4, n.1.

This finding by itself—and there are others in the Court's Aug. 3, 2017 Mem. Op.—makes clear that this pattern of (mis)conduct is

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not confined to the *JW v. DOS* case but applies to *Hall* as well. Neither *Hall* nor *JW v. DOS* is an isolated case. This point is driven home more sharply by this Court's opinion in *JW v. DOS* "one of those cases" where the Government's conduct was so egregious that it raised doubts about its good faith sufficient to warrant further discovery." *Judicial Watch v. Dep't of State,* USDC CA No. 14-1242, Dec. 6, 2018, at 5.

C. Judicial *Watch v. DOS*--Examples of CIA Misconduct

In addressing these concerns, this Court noted that in July 2014, six months after Hillary Clinton resigned as Secretary of State, Judicial Watch filed its FOIA suit seeking

> emails from Clinton and her aides concerning the talking points former U.N. Ambassador Susan Rice used to defend the Obama Administration's response to the attack on the U.S. Embassy in Benghazzi, Libya. *Id*. (citation omitted).

Then the Court noted,

> [a]nd although it would take more than than six months for the public to learn Clinton exclusively used a private email account as Secretary, . . . department officials already knew Clinton's emails were missing from the records. *Id*. (internal and following citations omitted).

The Court continued,

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> State played this card close to its chest In November 2014, State told Judicial Watch it performed a legally adequate search and concluded settlement was appropriate, despite knowing Clinton's emails were missing and unsearched.

Id. at 2-3. (citation to 10/12/18 transcript omitted).

> In December 2014—the same day Clinton quietly turned over 55,000 pages of missing emails—State gave Judicial Watch a draft *Vaughn* index, making no mention of the unsearched emails. *See* 5/1/15 Status Report, ¶ 3, ECF No. 16. Judicial Watch declined to take State's word for it, requesting a search declaration.

Id. Proceeding with another example, this Court further recounted that:

> A few weeks later, State filed a status report . . . that failed to acknowledge the unsearched emails but suggested it was "possible to . . . settle this case." 12/31/15 Status Report, ¶ 3, ECF No. 10. After another month of radio silence—by then, at least three months after State realized it never searched Clinton's emails, and two months after Clinton gave the Department 30,490 emails of the 62,320 emails recovered from her private server (she deleted the rest)—State filed another status report admitting that "additional searches for documents potentially responsive to the FOIA" must be conducted and asking for two months to conduct these searches. 2/2/15 Status Report, ECF No. 11. A month later Judicial Watch read the *New York Times* and realized what State was talking about. *See* Pls' Mot. Conf., ¶ 3, ECF No. 13. That story, along with reporting that Clinton's former Chief of Staff Cheryl Mills and former Deputy Chiefs of Staff Huma Abedin and Jake Sullivan, used personal emails to conduct government business," [citing *id*.; and stories in New York Times which expose State's deceit in this case.

JW v. DOS at 3.

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This Court's August 3, 2017 Memorandum Opinion Strengthens the arguments favoring additional discovery on behalf of Hall and AIM.

D. This Court's Summary of D.C. Circuit Law

In its Aug. 3 2017 Mem. Op. this Court canvassed what it considered to be the prevailing D.C. Circuit law on the issues in this case. Regarding the discovery issue, it stated:

> Although "[d]iscovery in FOIA cases is rare," *Baker & Hostetler LLP v. Dep't of Commerce,* 473 F.3d 312, 318 (D.C. Cir 2006), "[t]he major exception . . . is when Plaintiff raises a sufficient question as to the agency's good faith in producing documents." *Land-mark Legal Services Found. V. E.P.A.* 959 F.Supp. 2d 175, 184 (D.D.C. 2013)(Quoting U.S. Dep't of Justice, Guide to the Freedom of Information Act 812 (2009). In these cases, discovery verifies the government adequately searched for responsive records. *See Weis-berg v. Webster,* 749 F.2de 864,868 (D.C. Cir. 1984).
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> But in an even rarer subset of these cases, the government's response to a FOIA request smacks of outrageous misconduct. And these cases merit additional discovery into the government's motives. E.g., *Judicial Watch, Inc. v. Dep't of Commerce*, 34 F.Supp. 2d 28,41 (D.D.C. 1998). *See Dibacco v. U.S. Army*, 795 F.3d 178, 192-3 (D. C. Cir. 2015); *cf. Flowers v. I.R.S.*, 307 F.Supp. 2d 60, 71 (D.D.C. 2004).

Mem. Op. at 5.

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This Court has already held that on the basis of the record before it, "additional discovery" is warranted in this case. It's August 3, 2017 order singled out four separate issues that "remain outstanding":

> 1, The inadequate search for Item 5, with respect to why certain files were destroyed and a reasonable explanation for the CIA's failure to produce items the existence of which plaintiffs have made a *prima facie*
> Showing;
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> 2. The inadequate search for Item 7, with respect to information regarding prior searches for information responsive to congressional request;
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> 3. The production of names of non-CIA personnel;
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> 4. The production of a denied-in-full *Vaughn* index that includes a sufficient indication of the dates of creation documents 2, 3, and 15 on the index.

ECF No. 290 at 3-4.

In response to the Court's Order, the CIA submitted *Vaughn* declarations and indices and conducted further searches which produced a considerable number of additional documents. For the reasons set forth plaintiff AIM's Renewed Motion for Summary Judgment and Other Relief, the CIA's submissions have failed to adequately substantiate their searches for responsive records.

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The fact that additional discovery is needed is a given, but it does not address how best to accomplish that discovery. This will be discussed in the section which follows.

E. The Nature of the Discovery Needed at this Juncture in This Case

The various modes of discovery have various pluses and minuses. In *Weisberg v. U.S. Department of Justice,* 543 F.2d 308, 311 (D.C. Cir. 1976), the Court of Appeals endorsed the use of interrogatories by a FOIA plaintiff who was attempting to gain access to the results of spectrographic and neutron activation tests allegedly performed on items of evidence related to the assassination of President John F. Kennedy. The Court of Appeals observed that his "attempt to secure information . . . by using interrogatories, was not the most efficient means, if used alone, of gaining access to the whole story, but it was chosen as a preliminary first step to outline parameters of discovery and as being the most economical means available to plaintiff. However, the Court "chastised" Weisberg for using this method alone, but used that as a springboard to order the taking of the depositions of FBI Laboratory agents because it deemed this in the national interest. In the process, it observed:

Decades ago Dean Wigmore said

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> that "cross-examination is beyond
> any doubt the greatest legal engine
> ever invented for the discovery of truth.

Id. at 311.

In this case, interrogatories, admissions, and requests for production of documents as an economical means of gaining access to the whole story and to drive home the point that the CIA is intentionally obstructing very basic discovery information sought by these tools. Because the CIA has neither responded to these discovery requests nor moved for a protective order, they are, of course, deemed admitted. But this only emphasizes the willfulness of the CIA's obduracy; it does not by itself lead to what is needed to get access to "the whole story."

Interrogatories and requests for production of documents may still play a role—Rule 36 interrogatories, for example, may be needed to compel the CIA to identify Agency personnel who have the requisite personal knowledge as to how the CIA conducts its searches, but more will be required.

Additional *Vaughn* indices will still be useful, but that usefulness is limited. Although the *Vaughn* index was designed to bring a form of adversarial testing of the government's evidence within the purview

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of the FOIA, the *Vaughn* process lacks the creativity and spontaneity of depositions, where cross-examination remains a hallmark. It becomes a very expensive process involving many successive rounds that last years if not decades and are characterized by the government's ability to exercise a high degree of control over access to the information needed.

What is most useful but is generally overlooked in the process of doing either "random" or "representative sample *Vaughn* indices is the right to a complete inventory of all potentially responsive documents. This is a right that Hall must insist upon.

Although this Court has previously rejected *in camera* inspection, that ruling does not preclude its being performed in connection with a new *Vaughn* index. *In camera* inspection is the most efficient and quickest way for the Court to resolve some of the exemption claims, particularly with regard to the deferred-in-full ("DIF") documents. The Vaughn indices put forward by the CIA are deficient in that they contain overlapping claim, inadequate demonstration of segregability, and claims which are legally invalid because they do not fall within the scope of the exemption or are improperly applied. The usefulness of *in camera* inspection is,

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however, not limited to the Court's examination of exemption claims. First, disclosure of materials improperly covered by an exemption claim may also reveal evidence that there are previously unidentified potentially responsive records. Second, examination of the withheld documents may make clear to the Court that there are previously unaccounted for missing attachments or enclosures and distribution lists, unsearched files, etc.

The Court's rejection of *in camera* is also inconsistent with D.C. Circuit precedent set forth in *Allen v. Central Intelligence Agency,* 636 F.2d 1287, 1295-1300 (D.C. Cir. Cir. 1980). *Allen* sets forth an exceptionally detailed and cogent explanation of what *de novo* review requires in a FOIA case which makes *in camera* inspection virtually obligatory under most circumstances other than cases where the volume and length of the records involves "herculean" efforts. That is not what Hall has proposed in this case as an initial step.

Allen sets forth six guidelines under which a district court should determine whether or not to conduct an *in camera* inspection. With respect to the fifth point, which concerns whether the agency itself proposes *in camera* inspection, *Allen* begins by noting that

> *The reluctance of the courts to conduct* in camera inspection is often attributable to the concern that such

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> inspection will involve judicial intrusion into the activities of the Executive Branch through examination of information it refuses to disclose to the public. But little basis for such concern exists when the agency itself proposes that the court conduct *in camera* examination of the document. In such instances, therefore, the use of *in camera* inspection is more appropriate than in cases where the agency expresses its opposition to the technique.

Id. at 1298-1299. By stating that it would submit documents for *in camera* inspection if ordered to do so by the Court, the CIA has conceded this point which strongly favors such inspection in this case.

Throughout this case Hall has sought to take depositions of certain persons who he alleges have relevant knowledge bearing on Hall's quest to obtain the information he requested. Although a number of those he wished to depose are deceased, there are several who are still alive. Their advanced age indicates that their depositions should be taken as soon as it becomes practicable. The deposition testimony to be offered includes testimony regarding imagery which is a matter of prime concern to plaintiffs and to this Court. In *JW v. DOS*, the Court issued an Order instructing the parties to meet and confer to plan a discovery schedule. It seems certain that Judicial Watch would seek to take depositions as part of

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their discovery. This Court should also enter an order in this case instructing the parties to meet and confer in order to plan for discovery, including the taking of depositions. If the parties can agree on whose depositions can be taken and when and for how long, this should speed up the normal cumbersome process of getting depositions actually taken.

Other discovery tools which might be discussed at a meet and confer conference are the use of a so-called "*Oral Vaughn*. Index," and the appointment of a magistrate or master/special master to relieve the Court of the burden of reviewing voluminous records and evaluating the exemption claims asserted and the presence of nonexempt, reasonable segregable portions.

The appointment of a Special Master was used successfully in *In Re U.S. Department of Defense,* 848 F.2d 332 (1988) to review a massive amount of sensitive documents pertaining to the Iranian hostage crisis and compile a representative *Vaughn* index sample for review by the district judge. It proved highly successful but has been rarely used. The rule setting forth the standards governing appointment of a special master, now referred to simply as a master,

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has been liberalized to permit a much broader range of duties of services that can be performed by the master.

CONCLUSION

For the reasons set forth above, this Court should grant Hall's Second Renewed Cross-Motion for Summary Judgment and Other Relief. The Court should order that defendant Central Intelligence Agency shall release all materials not covered by a valid exemption claim; and the Court should further order that within ten days after the issuance of this order the parties shall hold a Meet and Confer Conference at which they will discuss a plan to schedule the taking of depositions, the compilation of an inventory of all potentially responsive records withheld in full or in part, *Vaugh* indices of all potentially responsive materials withheld in full or in part in a sample agreed upon by the parties, and such other discovery mechanisms as may be agreed upon by the parties.

Respectfully submitted,

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