

**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,)	ECF
)	
Defendant.)	
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**DEFENDANT’S OPPOSITION TO
MOTION OF PLAINTIFF ROGER HALL FOR PARTIAL RECONSIDERATION OF
THIS COURT’S APRIL 13, 2005 MEMORANDUM OPINION AND ORDER**

Defendant, the Central Intelligence Agency (CIA), respectfully files this memorandum in Opposition to the Motion of Plaintiff Roger Hall for Partial Reconsideration of this Court’s April 13, 2005 Memorandum Opinion and Order. Docket # 32.¹

In his prior motion, Plaintiff Hall requested that this Court order the CIA to produce “(1) all records which the CIA located for which it sought payment from plaintiff Hall in the amount of \$10,906.33; and (2) all records responsive to Item 6 of Hall’s February 7, 2003 request which is at issue in this litigation.” Docket # 11. *Inter alia*, this Court’s April 13, 2005 Memorandum Opinion and Order denied that motion. Docket # 30.

Neither reconsideration of this Court’s decision nor revision of its Order is warranted. Accordingly, Plaintiff’s motion should be denied.

¹ Plaintiff’s filing at Docket # 32 includes as well a Motion for an Accounting of Time and Costs of Searches, in response to which Defendant will file a separate opposition.

BACKGROUND²

At the time of Plaintiff's February 7, 2003 FOIA request, Roger Hall and the CIA were involved in protracted litigation in this Court concerning a previous FOIA request that Roger Hall had filed on May 28, 1998. *See* Hall v. CIA, Civil Action No. 98-1319 (PLF).³ On May 19, 2004, Plaintiffs filed the instant civil action, seeking seven categories of records ("items"), including records coextensive with those requested in the dismissed C.A. 98-1319. *See* Compl. The common records included those in the first category Plaintiff seeks in the instant motion (Items 1-3), related to the \$10,906.33, but not the records in the second category (Item 6).

In this civil action, Plaintiff Hall not only seeks the same records that he was denied in C.A. 98-1319 merely by attributing the request to a later FOIA request that seeks *inter alia* the same records, but by way of the previously denied motion and this motion for reconsideration, Plaintiff seeks their immediate production. This Court already has determined that Plaintiff Hall was not entitled to these records in its initial decision and on reconsideration in C.A. 98-1319. In this action, this Court also has determined that Plaintiff is not entitled to "resuscitate his previously filed, now-dismissed action." April 13, 2005 Mem. Op. at 11. Ruling that the documents at issue in C.A. 98-1319 "are simply no longer in play," this Court denied Plaintiff's motion to have them produced "forthwith." *Id.* Plaintiff Hall seeks reconsideration of this ruling.

² The "Background" section of Plaintiff's memorandum in support of his motion (hereafter "Pl. Memo.") appears to argue more for reconsideration of the Court's dismissal in C.A. 98-1319. In its April 13, 2005 decision, this Court stated that "Hall's rationale for not paying the fees that the CIA assessed is immaterial . . . does not entitle him to resuscitate his previously filed, now-dismissed action." April 13, 2005 Mem. Op. at 11.

³ C.A. 98-1319 involved requests for records that were similar to four of the seven categories of records sought in the 2003 request. *See* C.A. 98-1319 at Docket # 1. On November 13, 2003, the Court in C.A. 98-1319 dismissed the case, citing Plaintiff's failure to commit to pay search costs. *See* C.A. 98-1319 at Docket # 95 and 97. Plaintiff moved for reconsideration (C.A. 98-1319 at Docket # 98) and the Court ultimately denied the motion for reconsideration on April 22, 2004. *See* C.A. 98-1319 at Docket # 103.

ARGUMENT

PLAINTIFF HALL'S REQUEST FOR IMMEDIATE RELIEF IS AN INAPPROPRIATE REQUEST FOR THE ULTIMATE RELIEF SOUGHT IN THIS CIVIL ACTION PRIOR TO ADDRESSING ITS MERITS.

The basis for the Court's ruling is clarified by the Court's also stating that: "The CIA, on the other hand, cannot exclude from plaintiffs' February 7, 2003 request any non-exempt documents on the grounds that they are coterminous with Hall's May 28, 1998 request." *Id.* at 12. It is clear that the Court did not preclude production of the "coterminous" documents under the February 7, 2003 request, but would not order their immediate production based on any searches that may have been conducted in Plaintiff's 1998 request and prior litigation. Plaintiff simply has no entitlement to documents based on his 1998 request or C.A. 98-1319, or as the Court put it – they "are simply no longer in play" as regards that request and civil action. Plaintiff's argument merely attempts to avoid this Court's rulings.

Plaintiff argues that his submission of duplicate checks totaling \$10,906.33 in July 2004 and referencing the 1998 lawsuit constitutes "payment of the relevant fees in connection with the request at issue in this action." Pl. Memo. at 6. In fact, however, the cover letter for the checks Plaintiff relies upon makes no mention of the records at issue. The entire text reads as follows:

On behalf of my client, Roger Hall, please again find enclosed two checks payable to the U.S. Treasurer totaling \$10,906.33, which should be applied to the search and copying fees assessed by your Agency in the processing of the above referenced FOIA request.

If you have any questions, please do not hesitate to contact either myself at the number above or Jim Lesar, Esq . at (202) 393-1921.

See Pl. Attachment 6.

Plaintiff admits that the amount and the items sought “forthwith” relate to the 1998 request and action: “It has been more than nine months since Hall, in connection with the request that is the subject of this action, submitted payment for the searches ordered by Judge Friedman.” *Id.* at 6-7. As to the February 2003 request and the instant civil action, however, immediate production would be premature, Plaintiff not having established entitlement on the merits in this action.

In June 2004, the CIA estimated the fee amount for the 2003 request to be over \$600,000 and requested a deposit of \$50,000. Def. Exh. 1 at 3. Since that time, Plaintiff has made no effort to narrow his request or provide any priority among the various items for its processing. Nor has Plaintiff provided the requested information (date and place of birth and full name) required to process item 5, which sought records on over 1700 persons:

Records relating to 47 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, see Attachment 1 hereto, and those persons who are on 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 (Attachment 2).⁴

See Docket # 5, Def. Exh. 1 (Pl. Feb. 7, 2003 FOIA Request) at 2. The CIA advised Plaintiff in its June 15, 2004 letter that:

In order to conduct the searches requested in item 5, we require, at a minimum, the date and place of birth and the full name of all individuals listed in attachments 1 and 2 included in item 5. We cannot accept this item until we receive this additional information. In accordance with CIA policy, we will hold this aspect of your request in abeyance for forty-five (45) days pending receipt of this additional information and will thereafter deem this aspect of your request closed.

Def. Ex. 1 at 3.

⁴ Attachment 2 to the request included approximately 1700 names. *See* Def. Exh. 3.

Following the Court's April 13, 2005 decision, the CIA reviewed Plaintiff's February 2003 request in light of the Court's decision and Plaintiff's failure to provide the requested information, and has advised Plaintiff, by letter dated May 7, 2005, that the fee estimate has been reduced to \$40,466.00⁵ and the required deposit has been reduced to \$20,000.00. Def. Exh. 2 at 3.⁶ The fee estimate is reduced primarily by the CIA's determination not to accept item 5 because of Plaintiff's failure to provide the necessary identification information, now well beyond the 45-day period set out in the CIA's June 15, 2004 letter. Def. Exh. 1 at 3. The estimate to search for records on over 1700 individuals in item 5 had been \$518,220.00.⁷

Accordingly, Plaintiff Hall has not established entitlement to the documents at issue, again not having committed to paying the related fees or the requested deposit, and Plaintiff's attempts to divert the Court's attention from the merits of this civil action back to the earlier litigation and an earlier fee amount is a woefully insufficient commitment to pay fees herein.

Nor are Plaintiff's complaints about the passage of time more than false posturing. Plaintiff's February 2003 request was not processed "promptly" due to its encompassing the same requests as those underlying Plaintiff's then pending litigation, which was not resolved until the Court's April 22, 2004 denial of Plaintiff's motion for reconsideration in that action,

⁵ Fee estimate on items 1-3 and 6. Item 4 had been determined not to be agency records in C.A. 98-1319. Item 5 was not accepted due to Plaintiff's failure to provide necessary information, and item 7 was not accepted as unreasonably burdensome. See Def. Exh. 2 at 2-3.

⁶ That correspondence also returned the two checks totaling \$10,906.33, because they are insufficient to satisfy the \$20,000 deposit required, Plaintiffs have not requested that they be applied toward that purpose, and in any event because they are "stale" (dated July 2004) and neither Party needs to have this matter further complicated by a bank's determination not to honor them due to their age.

⁷ The estimate for item 7 was \$83,520. Def. Exh. 2 at 2-3.

which also included denial of Plaintiff's motion to reconsider the Court's denial of his attempt to amend his complaint to include the February 7, 2003 request. *See* C.A. 98-1319, Docket # 103. Defendant acknowledges that the Court has not accepted that as a sufficient basis to defeat Plaintiff's arguments for constructive exhaustion of administrative remedies on the 2003 request; however, the fact remains that the CIA did not process the 2003 request due to the pending related litigation.

Moreover, the passage of time in this action also is the responsibility of Plaintiff. Defendant offered Plaintiffs the opportunity to return this action to the administrative process in June 2004, prior to and through Defendant's motion to dismiss without prejudice or to stay the action. *See* Docket # 5. Plaintiffs elected to oppose that motion and to litigate fee waiver issues as well as the issue underlying the instant motion. Consequently, Plaintiff has elected to bypass administrative processing and he should not be heard to complain about the delay that has been occasioned by his election to engage in litigation. Having again moved for reconsideration of a decision of this Court, Plaintiff hardly can lay any blame for further passage of time at Defendant's feet.⁸

Contrary to Plaintiff's conclusion, there is abundant legal reason why he should not have the records associated with any searches under his 1998 request. This Court ruled in the earlier litigation that Plaintiff failed to commit to the payment of fees and dismissed the case. In this litigation, this Court has correctly ruled that Plaintiff cannot establish an entitlement to

⁸ Nor is Plaintiff's argument that "The CIA has not provided Hall or SSRI with two hours of free search time or 100 pages of free documents," of moment. *See* Pl. Memo. at 6. As the CIA's recent correspondence confirms to Plaintiff, the CIA indeed will provide these benefits at the appropriate time. *See* Def. Exh. 2 at 3.

immediate production of records by bootstrapping on the prior unsuccessful litigation. While “the CIA ‘cannot exclude from plaintiffs’ February 7, 2003 request any non-exempt documents on the grounds that they are coterminous with Hall’s May 28, 1998 request” (Pl. memo. at 8 (*quoting* April 13, 2005 Mem. Op. at 12)), that basis alone does not establish entitlement to the records in the instant action, let alone entitlement to their immediate production.

Moreover, clearly, Judge Friedman found that Plaintiff Hall was not “ready and willing to pay costs of the CIA’s searches conducted pursuant to Judge Friedman’s order ever since Judge Friedman issued his order nearly three years ago that he must commit to make payment” (Pl. Memo. at 9), otherwise Judge Friedman would not have dismissed that litigation on that basis. Similarly, Plaintiff Hall has made no commitment to pay costs associated with his 2003 request (other than in relation to the dismissed case and the 1998 request) and hence he has not established any improper withholding of documents or entitlement to documents.

Plaintiff’s motion sought the Court’s order for the production of records “forthwith.” That relief, although only as to certain “categories” of the records or items sought in this civil action, is nevertheless the ultimate relief sought by a FOIA action, and remains premature at best, there having been no determination of the Court as to the merits of this action.

Accordingly, Plaintiff’s arguments do not warrant reconsideration or revision of the Court’s decision on Plaintiff’s motion.

CONCLUSION

Wherefore, Defendant respectfully requests that the Court deny Plaintiff's motion for reconsideration.

Respectfully submitted,

/ s /

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