

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF
(Freedom of Information Act, 5 U.S.C. § 552, as amended)

Jurisdiction

1. Plaintiffs brings this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended.

Parties

2. Plaintiff Roger Hall ("Hall") is a freelance researcher who has been working on his own and with families of American Prisoners of War and Missing in Action ("POWs/MIAs") and other interested organizations to locate information concerning their whereabouts and status. After obtaining information on missing POWs/MIAs, Hall reviews the information and selects significant items which he disseminates to a variety of news media, including publications such as National Vietnam Veterans Coalition Magazine, and the Marine Corps League POW/MIA Affairs Newsletter and Information Report. His email newsletters on POW matters are distributed to various organizations such as Rolling Pride, Vietnow, and Pride of Illinois. Hall has an agreement with Sydney H. Schanberg, a Pulitzer Prize-winning journalist to

write a story or stories with him, as well as separately, about the documents he hopes to obtain as a result of his Freedom of Information Act requests. Mr. Schanberg has written extensively on the POW/MIA issue for the past two decades. The editor of the Village Voice has given him a commitment to publish the articles which would result from such disclosures, as have the editors of other widely-circulated publications.

3. Plaintiff Accuracy in Media, Inc. ("AIM") is a District of Columbia non-profit corporation, operating as a section 501(c)(3) corporation under the Internal Revenue Code. AIM is an entity organized and operated to publish and broadcast news to the American public. AIM disseminates analysis of news media reporting, in several ways. AIM has done so for more than 35 years.

4. Plaintiff Studies Solutions Results, Inc. ("SSRI") is a non-profit private company incorporated in Maryland which regularly disseminates information concerning POWs and MIAs to other organizations which further disseminate such information.

5. Defendant Central Intelligence Agency ("CIA") is an agency of the United States and has possession and control of records requested by plaintiffs which are the subject of this action.

February 7, 2003 FOIA Request by all plaintiffs

6. By letter dated February 7, 2003, plaintiffs requested the following categories of records:

- (1) 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.
- (2) POW/MIAs sent out of Southeast Asia (for example, to China, Cuba, North Korea, or Russia).

- (3) Prepared by and/or assembled by the CIA between January 1, 1960 and December 31, 2002, relating to the status of any United States POWs or 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.
- (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.
- (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.
- (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, April 23, 1998, and May 28, 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.
- (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.

7. Attached to plaintiffs' request were copies of 44 next-of-kin releases to Roger Hall and a 30-page Defense Department FOIA division declassification Casualty List of Primary Next of Kin (PNOK) Authorizations.

8. Plaintiffs' February 7, 2003 FOIA Request represented that they are each entitled to:

- (a) A waiver of search as being a representative of the news media under 5 U.S.C. § 552 (a)(4)(A)(ii)(II); as well as
- (b) A public interest waiver of copying costs under 5 U.S.C. § 552 (a)(4)(a)(iii).

9. The CIA received plaintiffs' February 7, 2003 request on February 15, 2003.

10. On March 13, 2003, the CIA acknowledged receipt of plaintiffs' request, but over fourteen months later still had not provided a substantive response. So, on May 19, 2004, plaintiffs filed this action, seeking, inter alia, disclosure of the records enumerated in the forgoing paragraph six, as well as for a determination of their entitlement to waiver of fees associated with the search and copying of the records, as set forth in paragraph eight above.

April 13, 2005 Court Order Denying
AIM's News Media Status and Public Interest Fee Waiver

11. By Memorandum Opinion and Order dated April 13, 2005 (Docket # 30), this Court denied AIM's application for status as representatives of the news media and for a public interest fee waiver; based upon the administrative record.

April 26, 2005 FOIA Request by AIM

12. On April 26, 2005, plaintiff AIM filed a second FOIA request, in which it requested:

- (a) Disclosure of the records enumerated in its February 7, 2003 FOIA request;
- (b) 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.

13. In addition to the records requested, AIM's April 26, 2005 FOIA request set forth its entitlement to:

- (a) A waiver of search fees as being a representative of the news media under 5 U.S.C. § 552 (a)(4)(A)(ii)(II); as well as
- (b) A public interest waiver of copying costs under 5 U.S.C. § 552 (a)(4)(a)(iii).

14. AIM's April 26 2005 FOIA Request stated, inter alia:

- (a) Specific activities that AIM conducts entitling it to treatment as a representative of the news media;
- (b) That AIM has the ability to convey the information to others;
- (c) The details of AIM's concrete plans to convey the information to others; and
- (d) How disclosure of the information sought is in the public interest and how it is likely to contribute significantly to public understanding of the operations of activities of the government – meaningfully enhancing the public's understanding of the POW/MIA issue.

15. By letter of June 1, 2005, the CIA denied AIM's FOIA Request, and, citing 32 C.F.R. Part 1900.42(c), stated that "because the information you are seeking is the subject of pending litigation in the federal courts, no right of administrative appeal exists from our decision not to accept items 1 through 8 of this request."

AIM's Exhaustion of its Administrative Remedies

16. Notwithstanding the CIA's June 1, 2005 claim that "no right of administrative appeal exists from [its] decision not to accept" AIM's FOIA Request, on June 29, 2005, AIM administratively appealed the CIA's denial of its FOIA Requests. That administrative appeal reiterated AIM's grounds for its entitlement, under 5 U.S.C. § 552 (a)(4)(a)(iii) and 5 U.S.C. § 552 (a)(4)(A)(ii)(II), to a waiver of the fees associated

search fees and copying costs. Additionally, AIM submitted a copy of its 1971 Articles of Incorporation, for inclusion in the record in the administrative appeal.

17. On July 8, 2005, the CIA received AIM's June 1, 2005, FOIA administrative appeal. By July 19, 2005, letter, the CIA acknowledged receipt of AIM's administrative appeal but limited its acceptance of the FOIA appeal "to the issue of the denial of the fee waiver request."

18. Under 5 U.S.C. § 552(a)(6)(A)(ii), the CIA is required to make a determination on the merits of AIM's FOIA administrative appeal within 20 working days of the CIA's receipt of the appeal. The CIA has, to date, failed to make a determination on the merits of AIM's FOIA administrative appeal.

April 13, 2005 Court Order Denying Hall and
SSRI News Media Status and Public Interest Fee Waiver

19. By Memorandum Opinion and Order dated April 13, 2005, this Court denied Hall's and SSRI's applications for status as representatives of the news media and a public interest fee waiver; based upon the administrative record.

Hall's and SSRI's Correspondence Supplementing
the Administrative Record, and Exhaustion of Administrative Remedies

20. By letter dated May 11, 2005, Scott A. Koch ("Koch"), Information and Privacy Coordinator, Central intelligence Agency, wrote plaintiffs Hall's and SSRI's counsel a letter following up on the Agency's prior letter of June 15, 2004 regarding his February 7, 2003 request. Mr. Koch stated, inter alia, that the CIA could not accept Item 4 of the request because Judge Paul Friedman had concluded in Hall v. CIA, Civil Action No. 98-1319, that the Senate records requested therein were not "agency records;" that it could not accept Item 5 of the request because Hall had not provided the full name and

date and place of birth of all of the individuals listed in attachments 1 and 2 to Item 5 of the request; and that is could not accept Item 7 of the request because it imposed an unreasonably burdensome search requirement on the Agency.

21. Mr. Koch's May 11, 2005 letter further advised that the CIA had determined that Mr. Hall's request fell in the "all other" fee category, and that this meant that he would be required to pay search fees and copying costs beyond the first 100 pages of documents and two hours of search time. He estimated that the search charges for items 1-3 and 6 of the February 7, 2005 request to be \$40,466. He noted that this figure differed from the CIA's June 15, 2004 estimate because that included an estimate of approximately \$518,220 for Item 5 of the request and \$83,520.00 for Item 7. Given the fact that the CIA was not accepting Items 5 and 7 of the request, it now requested an advance deposit of \$20,000.

22. By his May 11, 2005 letter, Mr. Koch also returned two checks totaling \$10,906.33 which had been submitted to pay for the searches conducted by the CIA in response to Judge Paul Friedman's order in *Hall v. CIA*, Civil Action No. 98-1319.

23. By letter dated May 23, 2005, plaintiffs Hall and SSRI supplemented their requests for news media status and a public interest fee waiver.

24. By letter dated July 18, 2005, Mr. James H. Lesar, counsel for Hall and SSRI, responded to Mr. Koch's May 11, 2005 letter. Accompanying it was as new check in the amount of \$10,906.33, which he specified was to be used to pay for the searches ordered by Judge Friedman in Hall v. CIA, Civil Action No. 98-1319.

25. With respect to the CIA refusal to accept Item 5 of the request because the full name and date and place of birth of the persons listed in Attachments 1 and 2 had not

been provided, Mr. Lesar pointed out that there was a reference number next to each of the names that had been assigned by the Defense Intelligence Agency to each POW/MIA case. He stated that this reference number would allow the CIA to obtain all information it needed to ascertain the identities of the persons listed.

26. With respect to the CIA's contention that Item 7 of the request imposed an unreasonably burdensome search requirement on it, Mr. Lesar noted that the Agency had not explained what it was about this item that made it unreasonably burdensome to search it, nor had it elucidated what it was about this item that entailed research that the FOIA does not require.

27. Finally, Mr. Lesar noted that Koch's May 11th letter had stated that the CIA would provide two free hours of search time and 100 pages of responsive records free of charge. He stated that Hall wanted the two hours of free search time to be applied first to Item 6 of the request, then to Item 7. With respect to Item 7, he requested some description of the various searches which might be undertaken so he could select those Hall wished to have his allotment of two free hours of search time applied to. He also stated that Hall committed to pay for copies responsive to Item 6 and 7 of the request which exceeded his 100 free pages.

28. By letter dated July 1, 2005, Koch responded to Lesar's May 23, 2005 letter and denied Hall's and SSRI's application for status as representatives of the news media as a public interest fee waiver. He also asserted that because the CIA already had started processing their request, the CIA would accept an appeal only if they agreed to be responsible for the costs in the event of an adverse administrative or judicial determination.

29. By letter dated August 14, 2005, which the CIA received on August 22, 2005, Hall and SSRI appealed their denial of their requests for media status and a public interest fee waiver. They also asserted that they could not accept the CIA's attempt to condition their right of appeal on their agreement to pay search and copying costs in the event of an adverse determination because they had a statutory right of appeal which was critical to (1) the exhaustion of administrative remedies, (2) determining whether a court had jurisdiction over the case, (3) the accrual of a statute of limitations, and (4) the composition of the administrative record on which a district court determines the eligibility for fee waivers.

30. Mr. Lesar's August 14, 2005, letter also addressed at length each of the five criteria set forth in CIA regulations for determining eligibility for a fee waiver. With respect to the issue of news media status, it gave a detailed explanation as to why Hall and SSRI qualified for this status based on the facts set forth and the existing case law.

May 24, 2005 Request of Roger Hall and SSRI

31. By letter dated May 24, 2005, plaintiffs Hall and SSRI submitted a new FOIA request for records of POWs/MIAs. The new request incorporated the seven items of the February 7, 2003 request and added an eighth item, a request for "all records which related in any way to your estimate of the fees which will be incurred with regard to the February 7, 2003 request."

32. Hall's and SSRI's May 24, 2005 request also sought status as representatives of the news media and a public interest fee waiver. The request incorporated by reference the May 23, 2005 letter to the CIA which supplied a great deal of additional information in support of these applications.

Hall & SSRI's Exhaustion of Administrative Remedies

33. As noted above, by letter dated July 1, 2005, the CIA responded to Hall and SSRI's May 23rd supplementation of their request for a fee waiver and news media status, a request which was also incorporated in their new May 24, 2005 FOIA request. By letter dated August 14, 2005, which was received by the CIA on August 22, 2005, Hall and SSRI appealed the denial.

33. No response to their appeal having been received by this date, plaintiffs Hall and SSRI have exhausted their administrative remedies with respect to their May 24, 2005 FOIA request, under 5 U.S.C. § 552(a)(6)(A)(ii).

COUNT I

February 7, 2005 FOIA Request – all plaintiffs

35. Plaintiffs reallege the allegations in paragraphs 1 through 34 above.

36. Plaintiffs have a statutory right to the records they seek by their February 7, 2005 FOIA request, and there is no legal basis for the CIA's refusal to disclose them.

COUNT II

April 26, 2005 FOIA Request – plaintiff AIM

37. Plaintiff realleges the allegations in paragraphs 1 through 36 above.

38. Plaintiff AIM has a statutory right to the additional records it seeks by its April 26, 2005, FOIA request, and there is no legal basis for the CIA's refusal to disclose them.

COUNT III

May 24, 2005 FOIA Request – plaintiffs Hall & SSRI

39. Plaintiffs reallege the allegations in paragraphs 1 through 38 above.

40. Plaintiffs Hall and SSRI have a statutory right to the additional records they seek by their May 24, 2005, FOIA Request, and there is no legal basis for the CIA's refusal to disclose them.

COUNT IV
News Media Status – all plaintiffs

41. Plaintiffs reallege the allegations in paragraphs 1 through 40 above.

42. Plaintiffs' February 7, 2005, April 26, 2005, and May 24, 2005 letters requested status as representatives of the news media, and the administrative record demonstrates that all plaintiffs are entitled to a waiver of search fees under 5 U.S.C. § 552 (a)(4)(A)(ii)(II).

COUNT V
Public Interest Fee Waiver – all plaintiffs

43. Plaintiffs reallege the allegations in paragraphs 1 through 42 above.

44. Plaintiffs' February 7, 2005, April 26, 2005, and May 24, 2005 letters sought a public interest fee waiver, and the administrative record demonstrates that plaintiffs are entitled to a waiver of copying fees under 5 U.S.C. § 552(a)(4)(A)(iii).

WHEREFORE, plaintiffs pray that this Court:

- (1) Order defendant to make the requested information promptly available to plaintiffs;
- (2) Order defendant to grant plaintiffs status as representatives of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II);
- (3) Order defendant to grant plaintiffs a complete waiver of copying fees under 5 U.S.C. § 552(a)(4)(A)(iii);
- (4) Order defendant to conduct a thorough search for all responsive records;
- (5) Order defendant to provide a Vaughn index inventorying all responsive records and itemizing and justifying all withholdings from plaintiffs;

- (6) Order defendant to promptly provide all nonexempt documents or portions of documents which were referred to other government agencies;
- (7) Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and
- (8) Award plaintiffs reasonable costs and attorneys' fees as provided in 5 U.S.C. § 552 (a)(4)(E) and 28 U.S.C. § 2412(d).

DATE: September 26, 2005

Respectfully submitted,

/s/

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