UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL	:
	:
Plaintiff,	:
	:
v.	:
	:
CENTRAL INTELLIGENCE AGENCY,	:
	:
Defendant	:

RESPONSE OF PLAINTIFFS ROGER HALL AND STUDIES RESULTS SOLUTIONS, INC. TO DEFENDANT'S MOTION TO STAY PROCEEDINGS OR, IN THE ALTERNATIVE, TO DISMISS WITHOUT PREJUDICE

Defendant Central Intelligence Agency ("CIA") has moved to stay proceedings in this case indefinitely. In the alternative, it has moved to dismiss this case without prejudice to its reinstitution later. There is no merit to either motion. Indeed, with respect to the latter motion the CIA alleges no facts and makes no argument in support of it. It merely throws it out there as a conclusory suggestion of what the Court "could" do.

The arguments advanced by the CIA in support of its motion to stay proceedings clearly lack merit. The CIA first asserts that it interrupted the processing of plaintiffs' request due to the fact that the request at issue in a lawsuit brought by one of the plaintiffs, Roger Hall ("Hall"), "overlap[ed] both in scope and legal issues" those presented by this lawsuit. It argues, therefore, that "the administrative process has not been concluded and there is no administrative record on the issues that will ultimately be central to this litigation."

There was, however, no justification for "interrupting" the administrative process. Another person, Reed Irvine[1], and two corporations, Accuracy in Media ("AIM") and Studies Solutions Results, Inc. ("SSR"), who were not parties to that litigation, joined in the new request. Whatever the outcome of the Hall litigation, they were independently entitled to have their request routinely processed administratively, just as any other request would be processed. Yet despite the passage of nearly 18 months since their request was submitted, neither AIM, SSR, nor Reed Irvine have received any response to their request.

One of the issues which "will ultimately be central to this litigation" is whether the plaintiffs are entitled to status as representatives of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and therefore cannot be charged search fees. The CIA's claim that there is "no administrative record on the issues that will ultimately be central to this litigation" is in error. The administrative record consists of plaintiffs' FOIA request, and that record is entirely adequate for determining the threshold issue of whether plaintiffs are entitled to be accorded status as representatives of the news media. The June 15, 2004 letter from

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[1]The CIA notes that Mr. Irvine, although a party to the request, is not a party to this lawsuit. For personal reasons, he was not included. Grasping for every straw within its reach, the CIA also notes that Mr. Joe Jablonski "whose name also appears below the signature and name of Attorney Lesar on the [request] letter. . . did not sign the request. . . ." CIA's Motion, at 1, n.2. On this basis, the CIA asserts that it does not waive the right to dispute AIM's being a proper FOIA requester." Attorney Lesar was authorized by Mr. Jablonski to place his name on the request as attorney for AIM.

the CIA, which sort of half-denies Hall status as a representative of the news media, is not part of the administrative record because it was issued nearly two months after plaintiffs filed this lawsuit, and more than sixteen months after the time within which the statute requires it to make a determination. Because the CIA failed to comply with its statutory time deadline, Hall is under no obligation to appeal the CIA's belated quasi-denial of his status as a representative of the news media. Oglesby v. U.S. Dept. of Army, 920 F.2d 57 (D.C.Cir.1990). Moreover, since the FOIA provides that a district court shall review a fee waiver request de novo and also specifies that the court's review "shall be limited to the record before the agency," 5 U.S.C. § 552(a)(4)(A)(vii), the agency cannot rely on its June 15, 2004 letter as a basis for denying news media status to Hall. This is also true as a general principle of administrative law. See AT & T Information Systems v. Gen. Services Admin., 810 F.2d 1233 (D.C.Cir.1997)(agency not allowed "to offer post-hoc rationalizations where no rationalization exists").

The administrative record here is complete for purposes of this Court's review of the fee waiver issue. All that remains is for plaintiffs to file motions regarding this issue, and that they will due shortly. There is no reason for any further delay in considering this threshold issue.

The CIA argues that a stay "to permit the Parties to conclude the administrative process is in the interests of judicial economy

and will not prejudice Plaintiffs." CIA Motion, at 4. As Hall has pointed out above, the administrative process is already concluded.

Hall has been trying to obtain these records since 1994. The CIA has thrown one obstacle after another in his face. He initially filed suit for most of the same records that are at issue in this lawsuit in 1998. By his order of August 10, 2000, the judge in that case, Roger Hall v. Central Intelligence Agency, Civil Action No. 98-1319, ordered the CIA to conduct additional searches. Up to that point, the CIA had not charged Hall any search or duplication fees. However, in light of the new searches ordered by the judge, the CIA withdrew its fee waiver and, on September 18, 2000, moved to require Hall to commit to pay an unspecified amount of fees. Hall opposed this motion and countered with a motion for a fee waiver. The district court denied the fee waiver motion and ordered the parties to file a joint report "indicating whether or not plaintiff has committed to paying search and copying fees up to a specific amount. July 22, 2002 Mem. Op. & Ord., at 7 (emphasis added). Having been furnished no information as to how large the fees might be, Hall not only committed to pay $1,000 if search fees, he also tendered a check in that amount and specified the priority of the various searches. The CIA, however, did conduct the searches Hall had paid for. In a Joint Report filed January 31, 2003, it stated that plaintiff's commitment (actually, payment of) $1,000 if fees would have purchased so little search time that, at that point, no responsive documents would have been identified and ready for release."

The CIA also informed the Court, for the first time, that it had already done the searches ordered by the Court and that "the searching and processing conducted after August 2000 amounts to at least $29,000." Id. In light of the outlandishness of this claim, Hall pressed the CIA to provide him with an accounting of the time spent and nature of the searches conducted so as to justify its $29,000 figure. When the CIA refused to do so, Hall filed a new FOIA request for the records documents the costs it had incurred in allegedly conducted these searches. The CIA did not directly respond to that request, the February 7, 2003 request that is at issue in this lawsuit, but on April 2, 2003, it filed a Notice of Corrected Calculation of Search Fees, in which it cut its previously sworn to figure of $29,000 by almost two-thirds, to $10,906.33.

The CIA now claims that the new request will cost over $600,000, even though (1) it has previously declared that it had already done the searches, and (2) it has excluded four of the seven items of the new request from consideration, three on the ground that they are largely coextensive with Hall's prior request at issue in his previous lawsuit, and one because the court in that case ruled that the documents sought by that category are exempt from disclosure. It is impossible to reconcile the current estimate of $600,000 with its last representation of $10,000. Either the CIA is once again misrepresenting the facts or it has been concealing a large number of previously unexamined search loca-

tions. Nothing else can explain a 60-fold increase in the costs of the search.

A little simple math makes it clear just how ludicrous the CIA's claims are. The CIA's regulations provide a chart of the different kinds of searches and the rates for each kind of service. The top rate is $40.00 per hour. If all the searches making up the CIA's $600,000 estimate were performed at the top rate, itself an absurd predicate, the searches would take 15,000 hours, or the equivalent of more than 7 man-years of work.

The outrageous of the CIA's behavior is enhanced when considered against the backdrop of national policy and the fervent wish of the relatives of unaccounted for POWs and MIAs to learn all they can about the information the CIA has concerning their loved ones. President George H. W. Bush issued Executive Order 12812 requiring that all Vietnam era POW/MIA information be declassified. President Clinton issued Presidential Decision Directive NSC 8, which required that all POW/MIA documentation be declassified in accordance with E.O. 12812 by Veterans Day, 1993. The CIA chose not to declassify tens of thousands of these documents until compelled to do so by court action.

The CIA has no legal basis for seeking a stay, and given the evident bad faith in which it has and is proceeding, the equities are solidly arrayed against it. The Court should deny the CIA's motion.

Respectfully submitted,

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