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FREEDOM OF INFORMATION ACT APPEAL

August 14, 2005

Executive Secretary
Agency Release Panel
Central Intelligence Agency
Washington, D.C. 20505

BY CERTIFIED MAIL NO.
7002 2410 0006 2154 7339

Re: F-2003-00449

Dear Mr. Koch:

By letter dated July 1, 2005, Mr. Scott Hodes, Information and Privacy Coordinator, responded to my May 23, 2005 letter which supplemented the application which my clients, Mr. Roger Hall and Studies Solutions Results, Inc. (SSRI), had made for status as representatives of the news media and a public interest fee waiver. He denies my clients' request for a fee waiver. On their behalf, I hereby appeal this denial.

I note, first, that while advising that my clients may appeal his determination, Mr. Koch also asserted that because the CIA already had started to process this request, you would accept an appeal only if my clients agree to be responsible for the costs in the event of an adverse administrative or judicial decision.

My clients cannot agree to this. The Freedom of Information Act gives any request a right to appeal an adverse determination and does not authorize any agency to abrogate it. See 5 U.S.C. § 552(a)(6)(A). The right of appeal is critical to (1) exhaustion of administrative remedies, (2) determining when a court has jurisdiction to hear a case, (3) the accrual of the statute of limitations, and (4) the composition of the administrative record on which a district court determines eligibility for a fee waiver.

Additionally, it should be pointed out that my clients have on three occasions tendered the sum of \$10,806.33 to pay for records located as a result of searches ordered by Judge Paul Friedman in Hall v. CIA, Civil Action No. 98-1319. Since that sum was most recently tendered to you by letter dated July 18, 2005, and has not been returned, I assume that this time you are going to apply it to the searches you already conducted pursuant to Judge Friedman's order. In making that payment my clients have not, however, waived their right to obtain a fee waiver which will entitle them to a refund of these funds.

Furthermore, I also note that in my July 18th letter I specified that the two hours of free search time and 100 free pages of documents which my clients are entitled to should be applied to specific items of the February 7, 2003 request, and that they would pay for any additional costs incurred regarding these two items of the request.

Now, as to Mr. Koch's denial of my clients fee waiver request. Mr. Koch wrote that the CIA had denied my clients' request for a fee waiver because they "have not met the standards for a public interest fee waiver as set forth in subpart 1900.13 of title 32 of the Code of Federal Regulations." He did not in any way specify which of the six criteria listed as providing the standards for evaluating eligibility for a fee waiver my clients failed to meet. Therefore, it is necessary for me to review each of them.

The first criterion is "[w]hether the subject of the request concerns the operations or activities of the United States government." 32 C.F.R. 1900.13(B)(2)(i). Since the requests seek records which relate to missing prisoners of war (POWs) and persons missing in action (MIAs), the requests are clearly directed at finding out, first, what information the government had acquired about the POW/MIAs through its operations and activities. Secondly, the requests also concern another aspect of the CIA's activities: they will show to what extent the CIA did not provide all the information it had on these POW/MIAs to their relatives or to congressional investigators.

If the subject of the request concerns the operations and activities of the government, then the second criterion is "[w]hether the disclosure of the requested records is likely to contribute to an understanding of United States government operations or activities." 32 C.F.R. 1900.13(B)(2)(ii). In my July 18, 2005 letter to Mr. Koch supplementing my clients fee waiver request, I enclosed a letter to me from Mr. Sydney H. Schanberg, a Pulitzer Prize winning journalist who has an interest in the POW/MIA issue and plans to write about the documents made available as a result of my clients' lawsuit. In that letter he states:

My research to date has shown that in the Vietnam War alone, a significant number of prisoners were not returned by the Hanoi government, but were held back as bargaining chips for war reparations that never came. The POW/MIA story is clearly of national importance since men and women will continue to be called to war by our nation's leaders--as they have been presently in Iraq. The history of what has happened to those captured in other wars is therefore obviously of interest to the nation at large.

Mr. Schanberg further notes that nearly 600 prisoners were released after the U.S. signed a peace agreement with North Vietnam, but that "[o]ur history in Vietnam will never be complete until we learn what happened to the hundreds of others who were alive and not returned." In view of Mr. Schanberg's comments, it is evident that the disclosure of the records sought is likely to contribute to an understanding of United States government operations or activities.

That being the case, the CIA's third criterion is "[w]hether the disclosure of the requested records will contribute to public understanding of United States government operations or activities." 32 C.F.R. 1900.13(B)(2)(iii). Once again, the answer is clearly yes. The disclosure of these documents will enable an evaluation of what is known about the circumstances of the missing POWs, what was done to find them, and whether all relevant information concerning this issue was made available to congressional investigators. The significance of the disclosures will be disseminated to the public. As Mr. Schanberg, who has written extensively on the POW/MIA issue for the past two decades says, "[t]he editor of the Village Voice, which has a national audience through its website, and editors at other widely circulated publications have given me commitments to publish the articles that would undoubtedly be generated from the documents Mr. Hall is seeking."

This being so, the CIA's fourth criterion is "[w]hether the disclosure of the requested documents is likely to contribute significantly to public understanding of United States government operations and activities." 32 C.F.R. 1900.13(B)(2)(iv). Once again, my clients' request clearly meets this standard. The debate over the POW/MIAs issue has been going on for decades and has been the subject of congressional investigations and Presidential decrees. As Mr. Schanberg notes, he has written on it for the past two decades. Any records which are now disclosed after this history are very likely to contribute significantly to public understanding of this issue, and are particularly likely to enlighten the public as to the degree which the CIA did or did not cooperate with prior congressional investigations or presidential orders.

The CIA's fifth criteria is "[w]hether the requester has a commercial interest that would be furthered by the requested disclosure." 32 C.F.R. 1900.13(B)(2)(v). Neither Mr. Hall or SSRI have a commercial interest in the disclosure as that term is used in the FOIA.

Because the answer to the CIA's fifth inquiry is negative, its sixth query, "[w]hether the disclosure is primarily in the interest of the requester" is irrelevant. It also appears to be redundant of your fifth criterion, since your definition of "commercial" states that it "means a request in which the disclo-

sure sought is primarily in the commercial interest of the requester and which furthers such commercial, trade, income or profit interests." See 32 C.F.R. 1900.02(h)(2). The answer in any case is no. Mr. Hall and SSRI are not in the business of disseminating information about the POW/MIA issue to make money. Rather, their purpose is to inform the public.

Mr. Koch also denied the request of my clients to be accorded status as representatives of the news media, saying that they do not meet the definition of a "representative of the news media" set forth in 32 C.F.R. 1900.02(h)(3). That provision defines this term as follows:

(3) **Representative of the news media** means a request from an individual actively gathering news for an entity that is organized and operated to publish and broadcast news to the American public and pursuant to their news dissemination function and not their commercial interests; the term **news** means information which concerns current events, would be of current interest to the general public, would enhance the public understanding of the operations or activities of the U.S. government, and is in fact disseminated to a significant element of the public at minimal cost; freelance journalists are included in this definition if they can demonstrate a solid basis for expecting publication through such an organization, even though not actually employed by it; a publication contract or prior publication record is relevant to such status.

My clients clearly qualify under this definition of "representative of the news media." Mr. Hall is actively engaged in gathering news for SSRI and other entities that publish information to the American public pursuant to their news dissemination function and not their commercial interests. That this news is of current interest to the general public is evidence, among other things, by the fact that a Pulitzer Prize winning journalist, Sydney Schanberg, has been writing about this subject for the past two decades and plans to write further articles with Mr. Hall based on the records released as a result of this lawsuit. It is further shown by the commitment of the Village Voice to publish such articles. The information will be distributed to a significant element of the public by the Village Voice, Roger Hall and SSRI. Dissemination will occur in print, over internet services and through emails. This will ensure widespread dissemination of the information at minimal cost.

Mr. Koch's letter also noted in his letter that the Court had determined that "plaintiffs fail to demonstrate their eligibility

for fee limitation based on news media status." The Court's decision on that issue was based on its conclusion that plaintiffs did not meet "the definition articulated in Nat'l Sec. Archive, most notably the requirement that the requester "uses its editorial skills to turn the raw materials into a distinct work." April 13, 2005 Memorandum Opinion and Order at 14, citing 880 F.2d at 1387.

In my May 23, 2005 letter to Mr. Koch, I addressed this issue in some detail, saying:

Mr. Hall obtains information on POWs and MIAs from a variety of sources, including veterans, family members of POW/MIAs, and government documents. He disseminates this information through SSRI, a non-profit corporation, in several ways. First, when he obtains documents which contain new information of interest to the segment of the public that is concerned with POW/MIA issues, he sends copies of such records to those on his SSRI email list together with his expert commentary on the significance of the information. This email list contains approximately 3,000 names, including many veterans organizations, news organizations, and so forth. The persons on his email list in turn re-disseminate the information to others.

To give examples of the broadscale dissemination which is achieved through Web links and emails, Hall notes the number of subscribers who are reached when his emails are redistributed by just three of the 3,000 persons and organizations on his email list:

Vietnam Veterans of Brevard, Florida
30,000-40,000

Task Force Omega of Kentucky 50,000

National Alliance of POW/MIA Families
40,000+

In disseminating this information, Mr. Hall uses his editorial skills to make a distinct product. He uses those skills to select which documents are important and to provide an appropriate commentary pointing out what is significant about the documents.

Secondly, Mr. Hall disseminates information by authoring articles which

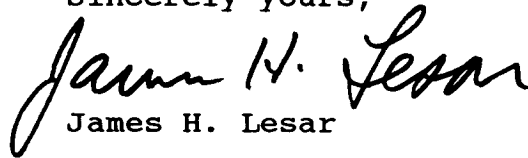
contain this information and his commentary on it which are published in magazines, newspapers, newsletters and web sites.

Third, Mr. Hall disseminates the information to veterans groups, congressional staffers and others in the form of public speeches, radio appearances, and private briefings.

In employing each of these means of dissemination my clients use their editorial skills to turn the raw materials into a distinct product, whether it be a magazine article, an email, a web posting, a speech, or a congressional briefing.

Accordingly, the entitlement of my clients to status as representatives of the news media is clear.

Sincerely yours,

A handwritten signature in cursive script that reads "James H. Lesar". The signature is written in dark ink and is positioned above the typed name.

James H. Lesar