4/13/05

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,
Plaintiffs,
v.
CENTRAL INTELLIGENCE AGENCY,
Defendant.

Civil Action 04-00814 (HHK)

MEMORANDUM OPINION AND ORDER

Plaintiffs Roger Hall, Studies Solutions Results, Inc. ("SSRI"), and Accuracy in Media ("AIM") bring this action against the Central Intelligence Agency ("CIA" or "Agency") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq*. Plaintiffs seek documents relating to Prisoners of War or Missing in Action ("POW/MIAs") from the Vietnam War era. Before the court are the CIA's motion to stay proceedings or dismiss without prejudice [#5], the CIA's motion to dismiss AIM [#17], Hall's[1] motion to compel production of certain documents [#11], and plaintiffs' motions for fee limitations and a fee waiver [#7, 12]. Upon consideration of these motions, the respective oppositions thereto, and the record of the case, the court finds that each motion should be denied.

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[1] In this opinion, references to "Hall" include SSRI. There does not seem to be any dispute between the parties that SSRI is under Hall's exclusive control. *See* Request Letter at 1; Def.'s Reply to Mot. to Stay/Dismiss at 3.

I. BACKGROUND

By letter dated February 7, 2003, Hall's attorney, James Lesar, made a FOIA request of the CIA on behalf of his client.[2] The letter indicated that "Mr. Hall is joined in this request by Mr. Reed Irvine and Accuracy in Media, Inc., who are represented by Mr. Joe Jablonski," Request Letter at 1,[3] and the letter's signature block included both attorney's typewritten names but only Lesar's signature. *Id.* at 3. The request sought seven categories of records pertaining to: (1) Southeast Asia POW/MIAs who have not returned to the United States; (2) POW/MIAs sent out of Southeast Asia; (3) Documents prepared by and/or assembled by the CIA between January 1, 1960 and December 31, 2002 relating to any United States POW/MIAs in Laos; (4) Records of the Senate Select Committee on POW/MIA Affairs that were withdrawn from the National Archives; (5) Records relating to 47 particular individuals who are POW/MIAs; (6) All records on or pertaining to searches conducted for three previous FOIA requests Hall submitted in 1994 and 1998; and (7) All records on or pertaining to "any search conducted regarding any other requests for records pertaining to Vietnam War POW/MIAs." *Id.* at 2-3.

On March 13, 2003, the CIA acknowledged receipt of plaintiffs' request, Def.'s Mot. to Stay/Dismiss, Ex. 2, but over fourteen months later still had not provided a substantive response, leading plaintiffs to file suit on May 19, 2004. On June 15, 2004, the CIA belatedly responded

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[2] At the time of this FOIA request, Hall and the CIA were involved in litigation concerning a previous FOIA request Hall made on May 28, 1998. In the prior case, the court (Friedman, J.) entered judgment for the CIA and dismissed all of Hall's claims with prejudice on November 11, 2003. *See Hall v. CIA*, Civil Action No. 98-1319, slip op. at 5 (D.D.C. Nov. 13, 2003). Hall's appeal of the district court's judgment is pending.

[3] Plaintiffs' February 7, 2003 FOIA request is attached as an exhibit to multiple filings in this case, including Def.'s Mot. to Stay/Dismiss, Ex. 1; Hall's Mot. for Waiver of Search Fees, Ex. A. For ease of reference the letter is cited directly.

to plaintiffs' February 7, 2003, request and indicated that it "could not accept" items (1), (2), and (3) "as part of this new request" because Hall had asked for the same documents in a previous FOIA request and the court had already ruled that those items were exempted from disclosure. Response Letter at 2.[4] The CIA also indicated that it could not accept item (4) because the documents sought therein "are not 'agency records' subject to FOIA." *Id.* As to items (5), (6), and (7), the CIA indicated that these requests imposed "overly burdensome" search requirements and estimated that searches for these items alone would cost $606,950.00. *Id.* at 3. The agency also stated that it would require more information to process item (5), which sought records on specific individuals. Plaintiffs now seek a "public interest" fee waiver, fee limitations based on their asserted status as "representatives of the news media," and the immediate production of documents that the CIA located during searches conducted for Hall's May 28, 1998 FOIA request. The CIA, in turn, seeks to dismiss AIM as a party and to stay or dismiss the proceedings generally.

II. ANALYSIS

At the outset, the court addresses two arguments the CIA makes with respect to each of the pending motions: first, that plaintiffs have failed to exhaust their administrative remedies, and second, that plaintiffs' motions should be denied because of claim preclusion principles.

A. Exhaustion of Administrative Remedies

In FOIA cases, a party may seek judicial review only after she has exhausted her administrative remedies. *See Wilbur v. CIA*, 355 F.3d 675, 676 (D.C. Cir. 2004) (per curiam)

[4] The CIA's June 15, 2004 letter is attached as an exhibit to multiple filings, including Def.'s Mot. to Stay/Dismiss, Ex. 3; Hall's Mot. to Produce, Ex. 1. For ease of reference the letter is cited directly.

(citing *Oglesby v. Dep't of the Army*, 920 F.2d 57, 61-64, 65 n.9 (D.C. Cir. 1990)). "Exhaustion does not occur until the required fees are paid or an appeal is taken from the refusal to waive fees." *Oglesby*, 920 F.2d at 66. After receiving a FOIA request an agency is required to "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether or not to comply with such request," and shall "make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal." 5 U.S.C. § 552(a)(6)(A)(i)-(ii). If the agency does not make a determination on the FOIA request within the specified period, the requester is considered to have "constructively exhausted administrative remedies" and may file an action in district court. *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Oglesby*, 920 F.2d at 62; 5 U.S.C. § 552(a)(6)(C). However, if the agency responds after the statutory deadline but before the requester files suit, the requester may no longer invoke constructive exhaustion. *See Pollack v. Dep't. of Justice*, 49 F.3d 115, 118 (4th Cir. 1995); *Oglesby*, 920 F.2d at 64.

As noted, plaintiffs did not receive a response to their FOIA request until June 15, 2004 – considerably beyond the 20 working-day limit.[5] While an agency may extend the statutory response period in "unusual circumstances," to do so it must notify the requester why it needs

[5]An agency's general acknowledgment of a records request does not constitute a "determination" under FOIA. *See Peck v. CIA*, 787 F. Supp. 63, 65 (S.D.N.Y. 1992).

the extension and when it will render a decision. 5 U.S.C. § 552(a)(6)(B)(i). The CIA has not done so here. Consequently, plaintiffs have constructively exhausted their administrative remedies.[6]

B. Effect of Previous Litigation

Hall's previous FOIA request, first submitted on May 28, 1998 and later supplemented, sought six categories of records pertaining to POW/MIAs. In the litigation that followed, the court (Friedman, J.) found that the CIA had properly invoked various exemptions to FOIA to justify its withholding and redaction of certain documents, but that the agency failed to establish the adequacy of its search. *Hall v. CIA*, Civil Action No. 98-1319, slip op. (D.D.C. Aug. 10, 2000). Subsequently, the court denied Hall's motion for a "public interest" fee waiver and granted the CIA's motion to require Hall to commit to payment of search and copying fees before it conducted additional searches. *Id.*, slip op. at 1, 4-7 (D.D.C. July 22, 2002). Finally,

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[6] The CIA offers two explanations for its position that plaintiffs have failed to exhaust their administrative remedies. Neither has any merit. First, the Agency states that its "response and administrative processing of the instant request was delayed pending final guidance" on Hall's *previous* FOIA request. The CIA offers no authority to support this novel proposition, in clear contravention of the statutory language of FOIA, that an agency may unilaterally and without any notice decide to hold a records request in abeyance pending the outcome of *another* request.

Second, the CIA attempts to shore up its "failure to exhaust" argument by mentioning that plaintiffs have "engaged the administrative process by submitting a partial payment." Def.'s Opp'n to Hall's Mot. to Produce at 7. After the court dismissed Hall's previous FOIA action against the CIA upon his refusal to pay the assessed fees, Hall twice attempted (through counsel) to pay such fees. *See* Hall's Mot. to Produce at 4, Exs. 5, 6. The fees in question relate to the previous, now-dismissed action, not to the present one. Even if Hall attempted to "engage the administrative process" with respect to his current FOIA request, such efforts would not nullify his exhaustion of administrative remedies; "the fact that further agency action was taking place on [plaintiff's] FOIA request while his enforcement action was pending in court" does not deprive the court of jurisdiction. *Pollack*, 49 F.3d at 118-19.

the court found that Hall "constructively abandoned his request for documents by refusing to commit to pay for the searches he requested," and dismissed the complaint. *Id.*, slip op. at 5 (D.D.C. Nov. 13, 2003).

"A final judgment on the merits in a prior suit involving the same parties or their privies bars subsequent suits based on the same cause of action." *I.A.M. Nat'l Pension Fund v. Industrial Gear Mfg. Co.*, 723 F.2d 944, 946-47 (D.C. Cir. 1983). This principle, *res judicata*, operates to preclude a subsequent action when there is : "(1) an identity of parties in both suits; (2) a judgment rendered by a court of competent jurisdiction; (3) a final judgment on the merits; and (4) the same cause of action in both suits." *Primorac v. CIA*, 277 F. Supp. 2d 117, 119 (D.D.C. 2003) (quoting *Polsby v. Thompson*, 201 F. Supp. 2d 45, 48 (D.D.C. 2002)). *Res judicata* does not bar this action because there is not a complete identity of parties between the first action and this one. While the CIA was a defendant, and Hall a plaintiff, in both cases, AIM did not appear as a party in the first suit. Here, AIM has retained separate counsel from Hall and has filed motions independently. Although the CIA alleges that "AIM is a stalking horse surrogate for Roger Hall, the real party in interest," Def.'s Opp'n to AIM's Mot. for Fee Waiver/Mot. to Dismiss AIM at 9, this unsupported allegation cannot defeat AIM's claims.

A related doctrine, collateral estoppel, also fails to defeat plaintiffs' claims. Under this doctrine, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)) (internal quotation marks omitted). To determine whether collateral estoppel operates to preclude the relitigation of an issue a court must

determine "whether the issues presented are in substance the same," "whether controlling facts or legal principles have changed significantly" since the previous judgment, and "whether other special circumstances warrant an exception to the normal rules of preclusion." *Allen*, 449 U.S. at 113 (citation and internal quotation marks omitted).

While Hall previously sought records which overlap substantially with plaintiffs' request here, the "issues presented" are not "in substance the same" as the court addressed in the previous litigation. Before, Hall challenged the adequacy of CIA's search and the validity of the exemptions it cited in withholding or redacting specific documents; here, plaintiffs seek immediate production of documents and reductions or waivers of associated fees. The prior litigation, however, does close several doors. In this case, plaintiffs may not challenge the CIA's withholding of certain records Hall sought in his May 28, 1998, FOIA request, and the finding that particular records are exempt from the definition of "agency records" under FOIA. *See Hall v. CIA*, Civil Action No. 98-1319, slip op. at 1, 14-21 (D.D.C. Aug. 10, 2000).

The court now turns to the individual motions presently under consideration.

C. The CIA's Motion to Dismiss AIM

The CIA moves to dismiss AIM from this suit for lack of jurisdiction, arguing that the organization "has not submitted a proper FOIA request in this matter," Def.'s Opp'n to AIM's Mot. for Fee Waiver/Mot. to Dismiss at 4, because AIM's counsel did not sign the request letter, and because "incorporation by reference in another's FOIA request is insufficient because it is not signed by anyone who has authority to bind AIM to the request and obligation to pay associated fees." Def.'s Reply at 2.

A FOIA request may be made by "any person," 5 U.S.C. § 552(a)(3), a term that includes corporations as well as individuals. *Judicial Watch of Fla. v. Dep't of Justice*, 102 F. Supp. 2d 6, 10 (D.D.C. 2000). A "person," in turn, can make a records request through an attorney or other representative. *See Constangy, Brooks & Smith v. NLRB*, 851 F.2d 839, 840 n.2 (6th Cir. 1988) (citing *Rushforth v. Council of Econ. Advisors*, 762 F.2d 1038, 1039 n.3 (D.C. Cir. 1985) (other citations omitted)). "An attorney," however, "must adequately identify that he is making the FOIA request for his client in order for the client to have standing to pursue a FOIA action." *Three Forks Ranch Corp. v. BLM*, __ F. Supp. 2d __, 2005 WL 526521 at *1 (citing *McDonnell v. United States,* 4 F.3d 1227, 1238 n.6 (3d Cir. 1993) (other citation omitted)). Furthermore, a person "whose name does not appear on a request for records has not made a formal request for documents within the meaning of the statute." *McDonnell*, 4 F.3d at 1236-37.

Here, plaintiffs' letter clearly states that AIM joins in the request, and that it is represented by Joe Jablonski. Jablonski's name, although not his signature, appears below the letter. *See* Request Letter at 1, 3. Despite the absence of a signature for AIM's attorney, the request provides clear notice to the CIA that AIM intends to join Hall as a requester. The letter further indicates that all plaintiffs seek fee waivers based on their intention to "obtain and disseminate information" that the CIA releases to them. *Id.* at 3. In support of its motion to dismiss AIM's claims, the CIA argues that AIM has not made a "binding commitment to pay fees associated with a FOIA request or made a fee waiver request." Def.'s Reply at 2. The second part of this statement is clearly contradicted by the request letter itself. The first part of the statement, while true, does nothing to affect AIM's standing in the present case. As an initial matter, the CIA regulations require only that a requester "provide an agreement to pay all

applicable fees or fees not to exceed a certain amount or request a fee waiver." 32 C.F.R. § 1900.12(b). Because AIM has requested a fee waiver, the Agency cannot plausibly argue that AIM's participation in the FOIA request is somehow defective. Further, while CIA regulations also state that the agency "will request specific commitment [to pay fees] when it estimates that fees will exceed $100.00," *id.* § 1900.13(e), the agency made no such request of plaintiffs in this case.[7]

The CIA also seeks AIM's dismissal on the grounds that AIM "has not exhausted its administrative remedies in its own right." Def.'s Reply at 3. This argument is singularly unconvincing because *all* plaintiffs constructively exhausted their administrative remedies upon CIA's failure to respond to the FOIA request within 20 working days as required by statute. 5 U.S.C. § 552(a)(6)(A)(i); *Pollack*, 49 F.3d at 118. Accordingly, the court denies CIA's motion to dismiss AIM.

D. The CIA's Motion to Stay or Dismiss Without Prejudice

The CIA also seeks to stay all proceedings in this case because "[d]efendant has not had sufficient opportunity to process administratively the FOIA request underlying this civil action," or in the alternative to dismiss the action without prejudice to its refiling. Def.'s Mot. to Stay/Dismiss at 4. The agency claims that because of overlapping records and legal issues, it delayed its response to plaintiffs' February 7, 2003, FOIA request pending resolution of Hall's May 28, 1998 FOIA request.

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[7] While CIA's response letter of June 15, 2004 directs Hall to make a deposit of $50,000 before the agency will begin processing his request, this determination – offered almost a month after plaintiffs filed suit and more than a year after they constructively exhausted their administrative remedies – does not provide a proper foundation for dismissal.

FOIA provides that "if the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." 5 U.S.C. § 552(a)(6)(C)(i). A stay under this provision is appropriate "where (1) the volume of FOIA requests to the agency vastly exceeded that anticipated by Congress, (2) the agency's resources were inadequate to deal with the deluge within the time limits set by the Act, and (3) the agency . . . was exercising due diligence in processing requests on a first in, first out basis." *Summers v. Dep't of Justice*, 952 F.2d 450, 452 n.2 (D.C. Cir. 1991) (citing *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976)). Here, the CIA offers no declarations or affidavits that might provide such support for its motion. Rather, the Agency simply claims that it "delayed its response and administrative processing of the instant request" because it lacked "final guidance from the Court" regarding Hall's prior FOIA request. Def.'s Mot. to Stay/Dismiss at 3. The agency's statement that "the administrative process was interrupted and has not been concluded" does not provide a legal justification for a stay or dismissal, but rather confirms that plaintiffs properly sought judicial review. Consequently, the CIA's motion must be denied.

E. Hall's Motion to Require CIA to Produce Certain Records

Hall asks the court to order the CIA to produce two categories of records: (1) "the records which the CIA previously searched for and requested payment of $10,906.33 in search fees from Roger Hall;" and (2) "the records responsive to Item 6 of Hall's February 7, 2003 request," which sought all records pertaining to any searches the CIA undertook for prior FOIA requests Hall made on January 5, 1994, February 7, 1994, and April 23, 1998. Hall's Mot. to Produce at

1. In support of his motion, Hall states that since he has tendered payment for $10,906.33, "the full amount previously demanded by the CIA was paid some seven months before this lawsuit was filed," Hall's Reply at 11, and argues that "there can be no justification for not immediately producing the records surfaced [sic] as a result of that search." Hall's Mot. to Produce at 3, Ex. 3. The problem for Hall is that he first attempted to make this payment ten days *after* the court had dismissed his previous lawsuit. Hall has no basis for demanding immediate production, in this action, of documents he requested (and which the CIA was prepared to disclose to him) in the *previous* action. As the CIA correctly points out, "[w]hether or not [d]efendant has performed the searches related to the items in the prior litigation is neither relevant nor material." Def.'s Reply in Supp. of Mot. to Stay/Dismiss at 5. In the prior action, the court denied Hall's request for a public interest fee waiver, *Hall v. CIA*, Civil Action No. 98-1319, slip op. at 1, 4-7 (D.D.C. July 22, 2002), and after Hall failed to commit to advance payment of search fees, found that he had "constructively abandoned his request." *Id.*, slip op. at 5 (D.D.C. Nov. 13, 2003). Hall's rationale for not paying the fees that the CIA assessed is immaterial; his explanation that he did not "wish[] to buy a pig in a poke," Reply to Mot. to Produce/Mot. for Fee Waiver at 2, does not entitle him to resuscitate his previously filed, now-dismissed action. The documents Hall seeks to have produced "forthwith" are simply no longer in play, and his motion to produce must be denied. The CIA, on the other hand, cannot exclude

from plaintiffs' February 7, 2003 request any non-exempt documents[8] on the grounds that they are coterminous with Hall's May 28, 1998 request. Plaintiffs should then anticipate even higher search fees than the CIA has already estimated.[9]

F. Fee Limitation

FOIA requesters must ordinarily pay reasonable charges associated with processing their requests. 5 U.S.C. § 552(a)(4)(A). FOIA provides for three categories of fees that may assessed in processing records requests. *Id.* § 552(a)(4)(A)(ii). Commercial users pay "reasonable standard charges" for document search, duplication, and review, *id.* § 552(a)(4)(A)(ii)(I), while non-commercial requests made by "an educational or noncommercial scientific institution" or a "representative of the news media" are only subject to duplication fees. *Id.* § 552(a)(4)(A)(ii)(II). Requests which do not fall into either of the preceding categories are subject to charges for search and duplication (but not review). *Id.* § 552(a)(4)(A)(ii)(III). Both Hall and AIM ask the court to order the CIA to limit their fees to duplication costs on the basis of their claimed status as "representatives of the news media," a claim they stated plainly in their

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[8] Plaintiffs, of course, cannot re-litigate the exemptions the CIA invoked to withhold certain documents from disclosure in the prior case, or the determination that certain records Hall sought earlier are not "agency records" for purposes of FOIA. *See LaRouche v. Dep't of Treasury*, 112 F. Supp. 2d 48, 55 (D.D.C. 2000).

[9] While Hall attacks the CIA's fee estimate of $606,590 as "ludicrous" in his opposition to the agency's motion to stay, he does not move the court for an accounting of the CIA's fee estimate or seek relief for allegedly improper fees. *See Nat'l Treasury Employees Union v. Griffin*, 811 F.2d 644, 650 (D.C. Cir. 1987). While the CIA's fee estimate may be subject to challenge, it seems self-evident that the fees would increase dramatically from Hall's May 28, 1998 request, since plaintiffs "have greatly expanded the chronological scope" of one category of records "from a five year period to a 42-year period." Def.'s Reply in Supp. of Mot. to Stay/Dismiss at 5.

initial FOIA request. Request Letter at 3. Because the agency did not respond, for purposes of the administrative record, to the news media claim, the court must determine the fee limitation issue *de novo*.[10]

A "representative of the news media" is "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). In its regulations, the CIA defines a "representative of the news media" as "an individual actively gathering news for an entity that is organized and operated to publish and broadcast news to the American public . . . ." 32 C.F.R. § 1900.02(h)(3). Applying these standards, plaintiffs fail to demonstrate their eligibility for fee limitations based on news media status.

Hall asserts that he and SSRI "clearly qualify for 'representative of the news media' status." Hall's Mot. for Waiver of Search Fees at 5. In plaintiffs' FOIA request, Hall attempted to establish such qualifications by citing "research contributions" which were reprinted in several newsletters and magazines; an appearance on a talk radio program; unspecified "public

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[10] Most administrative decisions regarding FOIA requests are reviewed under a *de novo* standard. *See McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (disclosure exemptions); *Nation Magazine, Wash. Bureau v. United States Customs Service*, 71 F.3d 885, 891 (D.C. Cir. 1995) (adequacy of search); *Al-Fayed v. CIA*, 254 F.3d 300, 311 (D.C. Cir. 2001) (expedited review); *VoteHemp, Inc. v. Drug Enforcement Admin.*, 237 F. Supp. 2d 55, 58 (D.D.C. 2002) ("public interest" fee waivers). There is some dispute whether fee reductions based on "news media" status are an exception to this general rule and are instead reviewed under the "arbitrary and capricious" standard. *Compare Judicial Watch*,122 F. Supp. 2d 5, 11-12 (D.D.C. 2000) (noting that legislative history of FOIA amendment supported application of "arbitrary and capricious" standard) *with Judicial Watch v. Dep't of Justice*, 133 F. Supp. 2d 52, 53 (D.D.C. 2000) (applying *de novo* review where agency offered no support for its contention that "arbitrary and capricious" standard should apply). Here, however, because there the agency made no decision at all within the statutory time period, there is no agency action to "review."

presentations" and briefings conducted for veterans' groups; "email newsletters on POW matters" sent to "various organizations"; and a single magazine or newsletter article Hall authored "*in toto*." Request Letter at 1. These endeavors may establish that Hall acts as a "middleman or vendor of information that representatives of the news media can utilize when appropriate," *Judicial Watch, Inc. v. Dep't of Justice*, 185 F. Supp. 2d 54, 59 (D.D.C. 2002), but they do 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." 880 F.2d at 1387.

As for AIM, it offers only the conclusory assertion that the "CIA has not, and cannot, deny that plaintiff Accuracy in Media, Inc., is a 'representative of the news media' . . . ." AIM's Mot. for Fee Waiver at 2. The request letter, however, mentioned no specific activities AIM conducts which would entitle it to representative of the news media status.[11] AIM's argument that "all allegations must be construed favorably to the plaintiff, and news media status is pled," AIM's Reply to Mot. for Fee Waiver/Opp'n Mot. to Dismiss at 2, misstates the burden that a party seeking a fee limitation or waiver must carry. To be considered a representative of the news media for fee purposes, "a requester must establish that it has a firm intent to disseminate, rather than merely make available, the requested information." *Judicial Watch*, 185 F. Supp. 2d at 60 (citation and internal quotation marks omitted). Otherwise, every conceivable FOIA

[11] The request letter does mention that Reed Irvine, identified as "a media critic who is Chairman of the Board" of AIM, has authored or co-authored three books and is editor of AIM's weekly newsletter. Request Letter at 2. Irvine, however, is not a party to the present action, and AIM cannot simply borrow his credentials for purposes of proving its own entitlement to a "representative of the news media" fee limitation.

requester could simply declare itself a "representative of the news media" to circumvent applicable fees. In the absence of any evidence that might confirm AIM's contention, the court must deny its request for a fee limitation on the basis of news media status.

G. Fee Waiver

FOIA also directs that properly disclosed documents will be provided to a requester without charge or at reduced rates "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 1900.13(b)(2); *Judicial Watch*, 185 F. Supp. 2d at 60. The requester bears the burden of making this showing. *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988). Since there is no dispute that Hall lacks a commercial interest in the requested records, the court will focus solely on the public interest issue.[12]

The CIA's regulations provide four factors the agency uses to consider whether releasing documents "is in the public interest." 32 C.F.R. § 1900.13(b)(2)(i)-(iv). The first factor mandates that the "subject of the requested records concerns the operations or activities of the United States Government." *Id.* § 1900.13(b)(2)(i). The requester "bears the initial burden of identifying, with reasonable specificity, the public interest to be served." *Nat'l Treasury Employees Union v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987). The second and third factors

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[12] In the adjudication of Hall's May 28, 1998 FOIA request, the court determined him ineligible for a public interest fee waiver. *Hall v. CIA*, Civil Action No. 98-1319, slip op. at 1, 4-7 (D.D.C. July 22, 2002). Hall argues that the court's ruling in the previous case should not apply here because Hall has "provided additional substantiation for the fee waiver request." Reply in Supp. of Mot. for Waiver of Search Fees at 11. The court assumes *arguendo* that Hall is not estopped from pursuing a public interest fee waiver in this case for purposes of reaching the merits of the issue.

are noticeably similar, requiring that the requested information be "likely to contribute to an understanding of United States Government operations or activities," 32 C.F.R. § 1900.13(b)(2)(ii), and that the information will in fact "contribute to public understanding." *Id.* § 1900.13(b)(2)(iii). Because "conclusory statements about contributions to public understanding are not enough" to satisfy these factors, *Judicial Watch, Inc. v. Dep't of Justice*, 122 F. Supp. 2d 13, 18 (D.D.C. 2000), a requester seeking a public interest fee waiver must make a specific showing that disclosure of the information will be of significance to the public; "the ability to convey information" to others is insufficient without some details of how the requester will actually do so. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987). *See also Oglesby*, 920 F.2d at 66, n.11 (finding conclusory and insufficient plaintiff's statement that "the information requested is beneficial to the public interest[,] I am a writer and lecturer who has disseminated such information in the past, and I intend to do so in the future."). Finally, the fourth factor of the public interest fee waiver analysis requires that the information sought will contribute "significantly" to public understanding of government operations. 32 C.F.R. § 1900.13(b)(2)(iv). Disclosure of the information should enhance public understanding of the subject in question as compared with awareness prior to the disclosure. *See Judicial Watch*, 185 F. Supp. 2d at 62.

Plaintiffs' request letter states that the documents they seek will contribute to public understanding by revealing "the extent, nature, intensity, and duration of the Government's efforts to locate POW/MIAs," and "will show the degree to which the CIA has complied" with relevant Executive Orders and "whether it has accurately informed Congress and the public about its search efforts and the information it possesses." Request Letter at 3. The request letter,

accordingly, provides sufficient detail to meet the first criterion of the four-part test. Hall, however, otherwise fails to establish his entitlement to a public interest fee waiver.[13] He makes no showing whatsoever that the documents he seeks are likely to meaningfully enhance public understanding of the POW/MIA issue. Furthermore, his statements that he "culls through government documents and makes pertinent information available to newspapers and magazines," and that therefore "there is simply not the slightest reason to call into question his ability to disseminate" the documents sought, Hall's Mot. for Waiver of Search Fees at 6, does not provide an adequate showing of Hall's specific intentions to do so; rather, it is exactly the kind of vague statement that will preclude a fee waiver. *See Oglesby*, 920 F.2d at 66, n.11; *Griffin*, 811 F.2d at 637. Absent any "*concrete plans* to disseminate the requested information," *Judicial Watch*, 122 F. Supp. 2d at 10 (emphasis added), Hall is unable to adequately demonstrate how disclosure of the requested documents would meet the requirements for a public interest fee waiver, and accordingly his motion must be denied.

III. ORDER

For the foregoing reasons, it is this 13th day of April, 2005, hereby

ORDERED, that defendant's motions to dismiss AIM, and to stay, or in the alternative to dismiss, are **DENIED**; and it is further

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[13] In its motion titled "Motion for Statutory Fee Waiver," AIM mentions only its claim to media status, not how disclosure advances the public interest. Even if AIM did qualify for "representative of the news media" status and an accompanying fee limitation, it would not be automatically entitled to a public interest fee waiver, although it would presumptively be able to meet the third factor of the relevant test by showing its ability to understand and disseminate the information it obtained from the agency. *See Judicial Watch,* 122 F. Supp. 2d at 10 n.9.

ORDERED, that Hall's motion to produce specified documents is **DENIED**; and it is further

ORDERED, that plaintiffs' motions for fee limitations and a fee waiver are **DENIED**.

Henry H. Kennedy, Jr.
United States District Judge