

8/20/04

16

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No.: 04-0814 (HHK)
)	
CENTRAL INTELLIGENCE AGENCY,)	ECF
)	
Defendant.)	
<hr/>		

**DEFENDANT’S OPPOSITION TO
PLAINTIFF ACCURACY IN MEDIA’S MOTION FOR STATUTORY FEE WAIVER
AND
DEFENDANT’S MOTION TO DISMISS**

Defendant, the Central Intelligence Agency (CIA), respectfully files this memorandum in Opposition to Plaintiff Accuracy in Media’s Motion for a Statutory Fee Waiver (Docket # 7). Plaintiff Accuracy in Media, Inc. (AIM) requests this Court to direct the CIA to waive all search and copying costs for records responsive to the February 7, 2003 request of Plaintiffs Roger Hall and Studies Solutions Results, Inc. (SSRI) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.* Plaintiff’s motion should be denied because Plaintiff AIM is not a proper requestor in this matter and has not exhausted administrative remedies, or in the alternative on grounds of *res judicata* / collateral estoppel and Plaintiff’s failure to qualify as a “representative of the news media.”

Defendant also moves to dismiss the complaint as to Accuracy in Media, Inc. for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to exhaust administrative remedies under Fed. R. Civ. P. 12(b)(6).

BACKGROUND

On February 7, 2003, Attorney James H. Lesar filed a FOIA request with the CIA on behalf of Roger Hall and SSRI. In that request, Attorney Lesar represented that a Mr. Reed Irvine¹ and AIM “joined in” the FOIA request, and stated that Mr. Irvine and AIM were “represented by Mr. Joe Jablonski,” whose name also appears below the signature and name of Attorney Lesar on the letter. Attorney Jablonski, however, did not sign the February 7, 2004 request.² See Exhibit 1 to Defendant’s Motion to Stay (hereafter “Def. Exh. ___”) (Docket # 5).

Defendant acknowledged receipt of the FOIA request by letter dated March 13, 2003. Def. Exh. 2. At the time of the February 7, 2003 FOIA request, Roger Hall and Defendant 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). C.A.98-1319 involved requests for records that were similar to four of the seven categories of records sought in the instant request and involved as well a common issue as to fee waivers on the basis of public interest and Plaintiff Hall’s effort to amend the complaint to include the February 2003 FOIA request at issue in this action. See C.A.98-1319 at Docket # 1, 85, 95, 97 and 103.

On July 22, 2003, the Court in C.A.98-1319 denied Plaintiff Hall’s request for a public interest fee waiver. See C.A.98-1319 at Docket # 85. On October 8, 2003, Plaintiff Hall filed a motion for leave to file an amended and supplemental complaint in C.A.98-1319, in which Plaintiff Hall claimed status as a representative of the news media and included a new cause of action based on the same February 7, 2003 FOIA request that is the basis for the instant lawsuit. See C.A.98-1319 at Docket # 93. On November 13, 2003, the Court denied leave to amend the

¹ Mr. Irvine is not named as a party to this litigation.

² Attorney Jablonski is not the attorney of record for AIM in this litigation.

complaint and dismissed the case based on Plaintiff Hall's failure to commit to pay search costs. See C.A.98-1319 at Docket # 95 and 97.

Plaintiff Hall, however, filed a motion for reconsideration, which extended the litigation. See C.A.98-1319 at Docket # 98. The Court ultimately denied his motion for reconsideration on April 22, 2004. See C.A.98-1319 at Docket # 103. The Court did not squarely address Plaintiff Hall's media status claim, ruling that Plaintiff had failed to exhaust that request administratively. See C.A.98-1319 at Docket # 103 at 9.

On May 19, 2004, Plaintiffs Hall, SSRI and AIM³ filed the instant action, seeking seven categories of records, including records coextensive with those requested and dismissed in C.A. 98-1319, status as representatives of the news media, and entitlement to a public interest fee waiver. See Compl. ¶¶ 6, 12 and 15. Plaintiffs assert that they have exhausted administrative remedies (Compl. ¶ 9); and that they have received no determination on their February 7, 2003 request for records, media status and fee waivers (Compl. ¶¶ 8, 13 and 16).

Defendant delayed its response to Plaintiffs' February 2003 FOIA request during the pendency of C.A. 98-1319 due to the overlapping records requests, Plaintiff Hall's effort to amend the complaint in C.A. 98-1319 to include his February 2003 FOIA request, and common legal issues relating to fee waivers. Defendant now has responded to Plaintiffs' request, by letter dated June 15, 2004. Def. Exh. 3. Defendant's response, *inter alia*, addresses the overlapping requests that were resolved by C.A. 98-1319, questions the scope of Plaintiffs' requests, disputes Plaintiffs' qualifications as representatives of the news media, and denies Plaintiffs' request for

³ Plaintiffs Hall and SSRI are not parties to Plaintiff AIM's motion for fee waiver, but filed a separate motion for fee waiver (Docket # 12), which Defendant opposed (Docket # 14).

public interest and media fee waivers. The June 15, 2004 CIA letter advises Plaintiffs that they may consider the response a denial and appeal to the Agency Release Panel.

Defendant moved to stay these proceedings pending completion of administrative processing of Plaintiffs' FOIA request, or in the alternative, for dismissal without prejudice to its being re-filed following completion of administrative processing of Plaintiffs' FOIA request.

See Docket # 5.⁴

ARGUMENT

I. PLAINTIFF AIM IS NOT A PROPER FOIA REQUESTOR AND FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

Plaintiff AIM has not submitted a proper FOIA request in this matter, made a binding commitment to pay associated fees, or made a fee waiver request to Defendant CIA. The February 7, 2003 FOIA request was filed on behalf of Roger Hall and SSRI. It represented that AIM "joined in" the FOIA request; however, AIM did not sign or otherwise indicate that it was a requestor in its own right. The incorporation by reference of AIM in the request of Roger Hall and SSRI is insufficient because it is not signed by anyone with authority to bind AIM to the request and obligation to pay associated fees. Nor has AIM corresponded with Defendant as to the subject FOIA request, evidenced a willingness to pay fees that would be binding upon it, or requested a fee waiver in its own right. *See* Def. Exh. 1 .

Accordingly, Plaintiff AIM is not a proper FOIA requestor in this matter and its complaint should be dismissed for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1).

⁴ This motion encompassed as well the stay of Defendant's responsive pleading due June 18, 2004 pending completion of the administrative process. Plaintiffs' respective oppositions have been filed (Docket # 8 and # 10).

Moreover, because of the overlap both in scope and legal issues between the instant FOIA request and the FOIA request under litigation in C.A. 98-1319, Defendant's response and administrative processing of the instant request was delayed pending final guidance from the Court. Consequently, the administrative process was delayed and has not been concluded by the time of filing of this civil action. Since then, Defendant has responded to Plaintiffs Hall and SSRI, including denying their request for fee waivers, inviting them to supplement their justifications for fee waivers and advising those Plaintiffs of their administrative appeal avenue. Def. Exh. 3.

Ironically, Plaintiff AIM's motion is accurate in one respect – "CIA has not . . . den[ie]d that Plaintiff Accuracy in Media, Inc. is a 'representative of the news media'..." (Pl. Motion at 2) in the administrative process because there was no request from AIM to be denied. To the extent "there is an administrative record for the Court to review," (*Id.*) it is devoid as to AIM. See Def. Exh 1 and 3 (Docket # 5). In any event, Plaintiff AIM has not exhausted its administrative remedies. As this Court said in the prior litigation –

The FOIA does not allow for direct application for the waiver of fees in federal court. See 5 U.S.C. § 552(a). Rather, the statute first requires the appeal of an adverse decision of an agency after petitioner has exhausted administrative remedies, see 5 U.S.C. § 552(a)(4)(A)(vii), which does not occur until "the required fees are paid or an [administrative] appeal is taken from the refusal to waive fees." Oglesby v. United States Dep't of Army, 920 F.2d. 57, 66 (D.C.Cir. 1990).

C.A. 98-1319, Docket # 103 at 9.

Accordingly, even if Plaintiff AIM were a proper requestor, Plaintiff AIM has not exhausted its administrative remedies and its complaint should be dismissed for lack of jurisdiction under Fed. R. Civ. P. 12(b)(6).

II. PLAINTIFF AIM'S MOTION FOR FEE WAIVER SHOULD BE BARRED BY *RES JUDICATA* / COLLATERAL ESTOPPEL.

Even if the Court were to determine that Plaintiff AIM is a proper FOIA requestor in this matter, Plaintiff AIM is in privity with Plaintiff Roger Hall, the real party in interest in the FOIA request and this civil action.⁵ Consequently, Plaintiff AIM's motion for fee waiver is barred by *res judicata* / collateral estoppel.

Plaintiff Hall previously filed suit against the United States to obtain records that were similar to four of the seven categories of records sought in the instant request and involved as well a common issue as to fee waivers on the basis of public interest. *See* C.A.98-1319 at Docket # 1. In his prior lawsuit, the Court specifically denied Plaintiff Hall's request for public interest fee waiver. *See* C.A.98-1319 at Docket # 85. The Court also denied Plaintiff Hall's request for records, dismissing the case citing Plaintiff Hall's failure to commit to pay search costs. *See* C.A.98-1319 at Docket # 95 and 97.

Res judicata bars a claim when there has been a final judgment on the merits in a prior suit involving the same parties or their privies and the same cause of action. *See I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 946-47 (D.C. Cir. 1983). "The doctrines of *res judicata* and collateral estoppel are designed to 'preclude parties from contesting matters that they have had a full and fair opportunity to litigate.'" *Carter v. Rubin*, 14 F. Supp.2d 22, 33 (D.D.C. 1998) (*citing* *Montana v. United States*, 440 U.S. 147, 153 - 54 (1979)). "These doctrines protect parties from the expense and burdens associated with multiple lawsuits, conserve judicial resources, and reduce the possibility of inconsistent decisions." *Id.* at 33-34 (*citing* *United States v. Mendoza*, 464 U.S. 154, 158-59 (1984)).

⁵ SSRI is a privy of Roger Hall.

The doctrine of *res judicata* also acts to “conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and to prevent serial forum-shopping and piecemeal litigation.” Hardison v. Alexander, 655 F.2d 1281, 1288 (D.C. Cir. 1981)). Under the doctrine of *res judicata*, “the parties to a suit and their privies are bound by a final judgment and may not relitigate any ground for relief which they already have had an opportunity to litigate – even if they chose not to exploit that opportunity – whether the initial judgment was erroneous or not.” Charles T. Sherwin v. Dept of the Air Force, 955 F. Supp. 140, 142 (D.D.C. 1997) (quoting Hardison, 655 F.2d at 1288); Drake v. FAA, 291 F.3d 59, 66 (D.C. Cir. 2002) (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)).

Under the related doctrine of collateral estoppel, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been finally decided; and 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 action. Allen, 449 U.S. at 94; Mendoza, 464 U.S. at 158; Montana, 440 U.S. at 153; American Employers Insurance Company v. American Security Bank, 747 F.2d 1493, 1498 (D.C. Cir. 1984); I.A.M. Nat’l Pension Fund, 723 F.2d at 947; Jack Faucett Associates, Inc. v. American Telephone and Telegraph Company, 566 F. Supp. 296, 299 (D.D.C. 1983); *see also* Cutler v. Hayes, 549 F. Supp. 1341, 1343 (D.D.C. 1983), *aff’d in part, rev’d in part* 818 F.2d 879, 888 (D.C. Cir. 1987).

Application of the doctrine of collateral estoppel “represents a decision that the needs of judicial finality and efficiency outweigh the possible gains of fairness or accuracy from continued litigation of an issue that previously has been considered by a competent tribunal.” Nasem v. Brown, 595 F.2d 801, 806 (D.C. Cir. 1979). Similarly, application of the doctrine thereby serves

to relieve parties of the burdens attending multiple lawsuits; conserves judicial resources; minimizes the risk of forum-shopping, piecemeal litigation, and inconsistent decisions; and provides finality in the resolution of disputes. Mendoza, 464 U.S. at 158; Cutler, 549 F. Supp. at 1343; *see* Hardison, 655 F.2d at 1288.

The four factors that must exist for *res judicata*/collateral estoppel to apply are (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. *See* Brannock Assocs., Inc. v. Capitol 801 Corp., 807 F. Supp. 127, 134 (D. D.C. 1992) (*citing* U.S. Industries, Inc. v. Blake Constr. Co., 765 F.2d 195, 205 n. 21 (D.C. Cir.1985)); Polsby v. Thompson, 201 F. Supp. 2d 45, 48 (D.D.C. 2002). All four of these factors are met in the instant motion and therefore the doctrine of *res judicata* bars re-litigation of the issue of public interest in Plaintiff AIMS' instant motion for media fee waiver.

AIM is a convenience-plaintiff that clearly was added to this FOIA request to bolster Plaintiff Hall's renewed pursuit of documents denied and fee waivers related to the requested documents that were denied in the prior litigation. AIM did not sign or otherwise indicate that it was a requestor in its own right, but was identified by allusion, or incorporated by reference, in Roger Hall and SSRI's FOIA request. AIM has not corresponded with Defendant as to the subject FOIA request, evidenced a willingness to pay fees that would be binding upon AIM, or requested a fee waiver in its own right.

Neither has AIM pursued this litigation as an independent party. AIM's opposition to Defendant's Motion to Stay (Docket # 8) states succinctly, and in its entirety –

Plaintiff Accuracy in Media, Inc., joins in the arguments and authorities set forth by Plaintiff Roger Hall in his Response to Defendant's Motion to Stay, or Alternatively, to Dismiss.

The Court should deny the CIA's motion.

AIM's instant motion similarly relies heavily on Roger Hall's response to Defendant's Motion to Stay, providing a 15-line quotation in footnote 1, and displays transparently its reason for being in this litigation with its bare argument that –

Defendant CIA has not, and cannot, deny [sic] that plaintiff Accuracy in Media, Inc., is a “representative of the news media,” and, as such, that it is entitled to a waiver of all fees except for duplication.

Pl. Motion at 2. Plaintiff's argument amounts to “AIM has ‘media’ in its name, therefore it is beyond dispute that AIM is a representative of the media.” To the contrary, however, Defendant can and does deny that AIM is a representative of the news media. *See* Section III., *infra*.

What is beyond dispute is that AIM is a stalking horse surrogate for Roger Hall, the real party in interest. AIM is in constructive privity with Roger Hall and should be deemed to be in privity with him in this motion and civil action. To hold otherwise would allow Roger Hall and other like-minded plaintiffs to circumvent the FOIA process, FOIA fee waiver scheme, and the Court's prior decisions, merely by associating an additional requestor/plaintiff in a repetitive request/civil action.

Therefore, this motion, like this civil action involves the same parties, or their surrogate in the case of AIM, that were the subject of the prior litigation. *See* C.A.98-1319. Accordingly, the first prong of the *res judicata* test is satisfied. The second and third factor for the doctrine of *res judicata* are satisfied because this Court, a court of competent jurisdiction, issued a final judgment on the merits on the issue of public interest in the requested information. *See* C.A.98-1319 at Docket # 95, 97 and 103.

Finally, the fourth factor – requiring that the suit involve the same cause of action – also is satisfied. A final decision on the merits prohibits any future case arising from “the same ‘nucleus of facts,’ for ‘it is the facts surrounding the transaction or occurrence which operate to

constitute the cause of action, not the legal theory upon which a litigant relies.” Page v. United States, 729 F.2d 818, 820 (D.C. Cir. 1984) (quoting Expert Elec., Inc. v. Levine, 554 F.2d 1227,1234 (2d Cir. 1977)).

Both the prior lawsuit and this motion require adjudication of the same issue: public interest. This Court already has determined that issue in its denial of Plaintiff Hall’s public interest fee waiver in C.A.98-1319 which required that inquiry and determination. Plaintiff AIM now seeks a media fee waiver, which includes as a threshold requirement that the public interest be satisfied. Plaintiffs Hall and SSRI acknowledged in their motion for fee waiver that the public interest as a threshold criteria applies as well to a media fee waiver. Docket # 12 at 5-6.⁶

Plaintiff Hall had a “full and fair opportunity to litigate” his original claim to a public interest waiver and the District Court entertained his claim, as evidenced by the decisions issued in C.A.98-1319. Under the doctrine of *res judicata*, Plaintiff Hall and his privies and surrogate should be precluded from raising the issue of public interest anew in this litigation.

The doctrine of *res judicata* bars claims that were litigated in the prior civil action. Plaintiff AIMs’ claim for a media fee waiver in the instant motion necessarily raises the issue of public interest determined against Plaintiff Hall in C.A.98-1319. Therefore, the four prongs to determine the applicability of *res judicata* are satisfied and this Court should conclude that Plaintiff AIM is simply attempting, as a surrogate of Roger Hall, to re-litigate an issue that was fully and fairly litigated in C.A.98-1319. Accordingly, even if the Court were to find that Plaintiff AIM is a proper requestor, the Court should deny Plaintiff’s motion for a media fee waiver based upon the doctrine of *res judicata*.

⁶ Plaintiff AIM’s willingness to rely on the pleadings of Plaintiffs Hall and SSRI presumably extends to the instant motion.

III. PLAINTIFF AIM DOES NOT QUALIFY FOR A FEE WAIVER AS A “REPRESENTATIVE OF THE NEWS MEDIA.”

Even if Plaintiff AIM’s motion for fee waiver is not barred by *res judicata* / collateral estoppel, Plaintiff AIM is not qualified for a media fee waiver. AIM argues that it is entitled to a media fee waiver as a matter of birthright – that AIM has “media” in its name and therefore it is beyond dispute that AIM is a “representative of the news media.” *See* Pl Motion at 2. While this notion fits nicely if one looks only to the statute, which uses, but does not define the term “representative of the news media,” waivers are only available to “an entity that **qualifies**...as a representative of the news media.” National Security Archive v. Department of Defense, 880 F. 2d. 1381, 1382 (D.C.Cir. 1989) (emphasis added).

This Circuit has approved as a definition that “representative of the news media” refers to a person or entity that actively gathers information of current interest to the public for an organization that is organized and operated to publish or broadcast news to the general public.” *Id.* at 1383-85. That Court further elaborated that a “representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work and distribute that work to an audience.” *Id.* at 1387.

Defendant CIA has published regulations which define “representative of the news media” as follows:

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;

32 C.F.R. §§ 1900.02(h)(3).

AIM fails to qualify merely by claiming a fee waiver as a matter of its name. Nor does the incorporation by reference in Plaintiff's Hall and SSRI's February FOIA request provide sufficient information to satisfy this standard:

Reed Irvine is a media critic who is Chairman of the Board of Accuracy in Media, Inc. ("AIM"). He is Editor of the AIM Report, a bi-weekly publication which has an interest in the POW/MIA issue. AIM has approximately 3,300 subscribers.... He is author of Media Mischief and Misdeeds, 1984; and co-author...of Profiles in Deception, 1990, and The News Manipulators...."

In reality, AIM is a media critic, not its representative. It's mission statement is –

Accuracy In Media is a non-profit, grassroots citizens watchdog of the news media that critiques botched and bungled news stories and sets the record straight on important issues that have received slanted coverage.

See <http://www.aim.org>. And AIM's "interest in the POW/MIA issue" relating to the time period covered by the information sought in the instant FOIA request, and as a disseminator of such government information, is belied by a simple search for "POW/MIA" through its website. *Id.*

Moreover, AIM fails to satisfy the "public interest" standard, even if the Court declines to apply collateral estoppel to AIM's instant request. AIM simply does not gather "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." 32 CFR § 1900.02(h)(3). See also C.A.98-1319 at Docket # 85 (Court's denial of waiver to Roger Hall based on public interest analysis in regard to the records requested in that request, which in relevant substance mirror the records at issue in the instant request).

Therefore, Plaintiff AIM is not a "representative of the news media."

CONCLUSION

Wherefore, Defendant respectfully requests that the Court deny Plaintiff AIM's motion, and that the Court dismiss Plaintiff AIM's complaint for lack of jurisdiction and for failure to exhaust administrative remedies.

Respectfully submitted,

/ s /

KENNETH L. WAINSTEIN, D.C. Bar # 451058
United States Attorney

/ s /

R. CRAIG LAWRENCE, D.C. Bar # 171538
Assistant United States Attorney

/ s /

ULDRIC L. FIORE, JR., D.C. Bar # 386152
Assistant United States Attorney
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
202-307-0299 / FAX 202-514-8780