

8/20/04

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.)	
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**DEFENDANT’S REPLY IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS,
OR IN THE ALTERNATIVE, TO DISMISS WITHOUT PREJUDICE**

Defendant, the Central Intelligence Agency (CIA), respectfully files this reply memorandum in support of its motion to stay these proceedings pending completion of administrative processing of Plaintiffs’ request for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*, or in the alternative, to dismiss this civil action without prejudice to its being re-filed following completion of administrative processing of Plaintiff’s request for records under the FOIA (Docket # 5).

Plaintiffs’ respective oppositions to Defendant’s motion to stay have been filed.¹ Plaintiffs’ opposition essentially disputes Defendant’s basis for having delayed the administrative process during the pendency of the prior related litigation in Hall v. CIA, Civil Action No. 98-

¹ Plaintiff 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.

Accordingly, this Reply will address the opposition of Plaintiffs Hall and SSRI (hereafter “Opposition” or “Pl. Opp.”). Docket # 10.

1319 (PLF) (hereafter “C.A. 98-1319”), due to the inclusion of additional persons or entities on the February 2003 FOIA request, asserts that the record is adequate for the Court to determine the fee waiver issues that “will ultimately be central to this litigation,”² and argues that the CIA’s fee estimates are unreasonable.

ARGUMENT

I. DEFENDANT WAS JUSTIFIED IN DELAYING ADMINISTRATIVE PROCESSING DURING THE PENDENCY OF C.A. 98-1319.

Defendant delayed its response to Plaintiffs’ February 2003 FOIA request during the pendency of C.A. 98-1319 due to the overlapping records requests and common legal issues, including fee waivers and Plaintiff Hall’s effort to amend the complaint in C.A. 98-1319 to include the February 2003 FOIA request in that litigation. On November 13, 2003, this Court denied Plaintiff Hall’s motion for leave to amend the 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 and the potential involvement of the February 2003 FOIA request in that 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. It is disingenuous for Plaintiffs to argue that Defendant was not justified in delaying the processing of a FOIA request that Plaintiffs had involved directly in then pending litigation, especially a request seeking common records and fee waivers.

² Plaintiffs Hall and SSRI separately have filed a motion for fee waiver (Docket # 12), which Defendant has opposed (Docket # 14), and Plaintiff AIM has separately filed a motion for fee waiver (Docket # 7), which Defendant has opposed (Docket # 16). Defendant also has moved to dismiss the complaint as to Plaintiff AIM for lack of jurisdiction and failure to exhaust administrative remedies (Docket # 17). Plaintiffs Hall and SSRI also have filed a motion to require Defendant to produce certain records immediately (Docket # 11), which Defendant has opposed (Docket # 15).

Nor is Plaintiff's argument that the February 2003 request was purportedly made by persons or entities in addition to Plaintiff Hall dispositive. The other persons and entities are not independent requestors, but are privies or surrogates of Roger Hall. It is undisputed that SSRI is "his company." Def. Exh. 1 at 3. AIM is a surrogate for Roger Hall and also should be deemed to be in privity, as should Mr. Irvine, AIM's principal and "Chairman of the Board." *Id.* at 2.

AIM did not sign or otherwise indicate that it was a requestor in its own right, but was incorporated by reference in Roger Hall and SSRI's FOIA request.³ Nor has AIM directly 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 this motion is one terse sentence. *See* n. 1, *supra*. AIM's motion for fee waiver similarly relies heavily on Plaintiffs' opposition to this motion, 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.

Docket # 8 at 2.

What is beyond dispute is that AIM is a stalking horse surrogate for Roger Hall, the real party in interest. AIM is a convenience-plaintiff that clearly was added to this FOIA request to

³ Plaintiffs assert that "Attorney Lesar was authorized by Mr. Jablonski to place his name on the request as attorney for AIM." Pl. Opp. at 2, n. 1. There is no such assertion in the February 2003 FOIA request (see Def. Exh. 1), and in any event, such an assertion would not be held to bind AIM as it does not emanate directly from AIM or its counsel.

bolster Plaintiff Hall's renewed pursuit of documents and fee waivers related to the requested documents that were denied in the prior litigation. AIM should be deemed to be in privity with Roger Hall 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 scheme, and the Court's prior decisions, merely by associating an additional requestor/plaintiff in a repetitive request/lawsuit.

Accordingly, Defendant's delay in processing the February 2003 FOIA request was warranted.

II. ON THE EXISTING RECORD, PLAINTIFFS' REQUESTS FOR FEE WAIVERS MUST BE DENIED.

Plaintiffs argue that the administrative record should consist only of the February 2003 FOIA request, and that such a sparse record is adequate for the Court to determine the "central" issue relating to fee waivers. That record, however, must include at a minimum as well the decisions of the prior litigation in C.A. 98-1319 and the regulations under which the CIA assesses fees and evaluates requests for fee waivers (32 C.F.R. § 1900 *et seq.*).

This Court already has determined the threshold issue of public interest in its denial of Plaintiff Hall's public interest fee waiver in C.A.98-1319. Plaintiffs now seek media fee waivers, which include as a threshold requirement that the public interest be satisfied. Moreover, Plaintiffs acknowledged in their motion for fee waiver that the public interest as a threshold criteria applies as well to a media fee waiver request. *See* Docket # 12 at 5-6.

Accordingly, if the administrative record is deemed adequate for fee waiver determinations, then they must be denied. *See also*, Docket # 12 and # 16 (Defendant's opposition memoranda to the respective motions of the Plaintiffs for Court ordered fee waivers).

Moreover, 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. In this case, Plaintiffs have not exhausted their administrative remedies, and Defendant’s motion merely seeks to afford them that opportunity.

III. DEFENDANT’S FEE ESTIMATES ARE REASONABLE.

Plaintiffs’ challenges to the accuracy of Defendant’s fee estimates are internally inconsistent. Plaintiff disputes the present estimate in comparison to the fee estimate for the FOIA request that was at issue in the prior litigation, and then disputes the estimate because Defendant “had already done the searches” and in view of Defendant having excluded the common items denied in the prior litigation.

Defendant’s fee estimates are based on the February 2003 FOIA request, after exclusion of common items from the prior litigation. Therefore, whether or not Defendant had performed the searches related to the items in the prior litigation is neither relevant nor material. The February 2003 FOIA request not only includes three additional categories of records that were not part of the request at issue in the prior litigation, but in repeating the requests for categories of records that were denied in the prior litigation, Plaintiffs also have greatly expanded the chronological scope of one of those categories from a five year period to a 42-year period. *Compare* Def. Exh 1 at 2 ¶ 3 (records prepared or assembled between January 1, 1960 and December 31, 2002) with C.A. 98-1319, Docket # 1, Attachment H (records prepared or assembled between January 1, 1971 and December 13, 1975). Plaintiffs are less than credible if

they dispute that the additional categories and the greatly expanded chronological scope of the repeated category leads to a significantly increased fee estimate.

Nevertheless, in this as well as the request for fee waivers, Plaintiffs have not exhausted their administrative remedies by challenging the fee estimates before the agency. Defendant's motion merely seeks to afford them that opportunity as well.

CONCLUSION

Since the filing of this civil action, Defendant has responded to Plaintiffs' FOIA request. Def. Exh. 3. Plaintiffs have not availed themselves of the administrative appeal process; however, on July 29, 2004, Plaintiff Hall submitted to the Agency checks totaling \$10,906.33, and requested that Defendant apply those funds "to the search and copying fees assessed by your Agency in the processing of the [February 2003] FOIA request." *See* Docket # 11, Pl. Exh. 6.⁴ This amount is short of the deposit requested by the Agency, but evidences the participation of Plaintiff in the incomplete administrative process notwithstanding Plaintiffs opposition to this motion, and the need for that process to be completed.

Moreover, since the filing of the instant motion to stay or dismiss without prejudice, Plaintiffs collectively have filed three motions on matters that should be determined in the first instance in the administrative process: two motions for fee waivers that have not been appealed administratively, and the motion for immediate production of certain records. It is more than appropriate for the Court to return these matters to the administrative process until remedies available there are exhausted.

⁴ In the motion of Plaintiffs Hall and SSRI to require Defendant to produce certain records immediately, Plaintiffs tie this payment to specific records requests for the first time.

Wherefore, Defendant respectfully requests that the Court stay this civil action pending conclusion of the administrative processing of Plaintiffs' FOIA request, or in the alternative, to dismiss this action without prejudice to re-filing following exhaustion of administrative remedies.

Respectfully submitted,

/ s /

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