

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**REPLY OF PLAINTIFFS ROGER HALL
AND STUDIES SOLUTIONS RESULTS, INC. TO
DEFENDANT’S OPPOSITION TO PLAINTIFFS’
RENEWED MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Roger Hall (“Hall”) and Studies Solutions Results, Inc. (“SSRI”), collectively referred to hereafter as “Hall,” respond seriatim to the issues raised by Defendant’s Reply In Support of Its Motion for Partial Summary Judgment and Opposition to Plaintiffs’ Cross Motion for Summary Judgment (“CIA”S Reply”).

1. Referrals

In McGehee v. C.I.A., 697 F.2d 1095, 1109(D.C.Cir.1983), the Court of Appeals made the following observation regarding the referral of documents from an agency which was the subject of a FOIA request to another agency:

If records obtained from other agencies could not be reached by a FOIA request, an agency seeking to shield documents from the public could transfer the documents for safekeeping to another government department. It would thereafter decline to afford requesters access to the materials on the ground that it lacked “custody” of or “control” over the records and had no duty to retrieve them.” The agency holding the documents could likewise resist disclosure on the theory

that, from its perspective, the documents were not “agency records.” The net effect would be wholly to frustrate the purpose of the Act.

Id. (emphasis added)(footnote omitted).

Because of these and other considerations, the CIA lost its “rather implausible” argument in McGehee that “[r]ecords that are in the possession of the agency to which a FOIA request is submitted but that were originally compiled by another agency, . . . are not “agency records” within the meaning of the Act.” Id. at 1105. After determining that records in the possession or control of an originating agency that have been referred to a third agency are “agency records, the Court of Appeals then went on to address the issue of whether the CIA had “improperly withheld” the agency records at issue. With respect to “withholding, the Court of Appeals defined these terms as follows:

“Withholding”: Certainly a categorical refusal to release documents that are in the agency’s “custody” or “control” [for any reason other than those set forth in the Act’s enumerated exemptions] would constitute “withholding.” Interpretative problems arise only in the context of processing or referral procedures that are likely to result eventually, but not immediately, in the release of documents. The legal status of such procedures seems to us to be best determined on the basis of their consequences. We conclude, in other words, that a system adopted by an agency for dealing with documents of a particular kind, constitutes “withholding” of those documents if its net effect is significantly to impair the requester’s ability to obtain the records or to increase the amount of time he must take to obtain them.

“Improper”: We are persuaded by Justice Stevens’ opinion in Kissinger that sensible explication of the term “improper” in this context requires incorporation of a standard of reasonableness. Thus, “withholding” of the sort just described will be deemed “improper” unless the

agency can offer a reasonable explanation for its procedure. The form such an explanation would be most likely to take would be a showing that the procedure significantly improves the quality of the process whereby the government determines whether all or portions of responsive documents are exempt from disclosure.

McGehee at 1110 (footnotes omitted).

Under these definitions, the documents at issue in this case are clearly being improperly withheld. The “net effect” of the CIA’s actions is “significantly to impair the requester’s ability to obtain the records or to increase the amount of time he must take to obtain them.” The records at issue were most recently requested more than six years ago. Obviously, the process involved here has significantly impaired both Hall’s ability to obtain the records and increased the time taken to do so.

The CIA has not offered a reasonable explanation for its procedure. All it has done is to dump the referrals on third party agencies to await unendingly their compliance with Hall’s request. Under the test prescribed by the Court of Appeals for withholding that is “improper,” the “withholding” in this case is clearly improper” as the CIA has not offered any reasonable explanation for its procedure.

The present record reflects a procedure that is patently unreasonable. Basically, it is a variant of the scenario outlined by the Court of Appeals when it described the way in which an agency receiving a FOIA request and a third agency which had originated records in the possession of the former could combine together to defeat access to agency records under the FOIA if records which originated with a third agency were held to be non-agency records. Here, the CIA has combined with the originating agencies to obstruct FOIA’s goal of prompt disclosure by not

providing any deadline for such agencies to make their determinations on the referred records. Thus, its procedure is not at all reasonable.¹

The CIA does have reasonable alternatives to the dilatory process it is currently engaged in. As the Court of Appeals stated in McGehee, if, in a given case, the “intent to control” test were satisfied but the agency to which the request was submitted had not followed the procedure McGehee suggested “by the time litigation commenced, the district court would still have some options at its disposal that would enable it to ensure that the petitioner’s request was processed expeditiously without sacrificing the benefits accruing from a substantive review by the originating agency.” McGehee at 1112. Under these circumstances, the district court “might allow the defendant agency to submit affidavits or present witnesses from the originating agency, explaining which documents are exempt and why.” Id. Or the court “could require the originating agency to appear as a party to the suit pursuant to Fed.R.Civ.P. 19(a).” Id.

The CIA has had ample opportunity to do the former but has not done so despite the passage of a great deal of time. Given this, it is preferable that this court order the CIA to file a motion under Federal Rule of Civil Procedure 19(a) to join

¹ The CIA contends that because it is not seeking summary judgment on the referred documents, summary judgment in its favor will not prejudice plaintiffs with respect to any future litigation over withholdings taken in the referred records. Def’s Reply at 1-2. This is simply not true. First, requiring that its summary judgment motion be litigated before the referrals are dealt with means that plaintiffs are deprived of whatever light may be shed on the merits of the CIA’s current motion were the referred materials released before the CIA’s motion for summary judgment is acted upon. For example, the referral materials may, when they are released, show that the CIA’s search efforts are insufficient. Secondly, the policy of piecemeal litigation of issues which the CIA is espousing is against well-settled principles of judicial economy and frustrates the goal of prompt access to all requested records.

the originating parties as additional defendants in this lawsuit. If the CIA and/or the originating agencies comply with this, then the latter can make such defense of their withholding as is legally permissible. If the CIA or the originating agencies do not comply with this order, then they will have waived their rights to withhold the information at issue.

2. The Failure to Produce Specific Documents

Hall has adduced a considerable volume of evidence indicating the creation of responsive records which the CIA has not produced. The CIA argues that the failure to locate specific records is not an indication that its searches were inadequate. Def's Opp. at 2, citing Steinberg Ford v. Dep't of Justice, 2008 WL 2248267 (D.D.C. May 29, 2008) and other cases. The Court of Appeals has, however, recently and more accurately stated the point when it said that failure of an agency to turn up one specific document in its search does not alone render a search inadequate. Iturralde v. Comptroller of the Currency, 315 F.3d 311 (D.C.Cir.2003)(emphasis added). Obviously, when a requester can point to a number of specific documents which are reasonably thought to be responsive records but which cannot be located, doubts about the adequacy of the search will grow. That is the case here.

3. Regarding Evidence Previously Stricken

The CIA briefly alludes to the fact that evidence set forth in an earlier declaration by Hall was stricken as not qualifying under Rule 56(e). From its footnote on this issue, it is clear it regards this as the end of the matter. See Def's Reply at 3, n.1. It is not.

First, the Magistrate's ruling did not strike all of Hall's prior declaration in support of his prior motion for summary judgment. Second, Hall's current motion is supported by a revised declaration which corrects errors in the earlier one. The CIA has neither acknowledged any of the corrections nor moved to strike any errors which it believes are still contained in the revised declaration. This is required. See, e.g. Perma Research 7 Dev. Co. v. Singer Co., 429 F.2d 598 (2d Cir.1969); Southern Concrete Co. v. United States Steel Corp. (N.D.Ga. 1975). In Ernst Seidelman Corp. v. Mollison, 10 F.R.D. 426, 428 (S.D.Ohio 1950), the court stated:

[D]efendants' motion asking the Court to order stricken "certain portions" of the . . . affidavit and all attachments is too general. Defendants must point out in their motion specifically just what language or statements in the . . . affidavit they seek to have stricken. The Court cannot and should not be expected to go through the . . . affidavit with a 'fine-tooth-comb' and pick out the 'certain portions' which defendants (from their viewpoint) feel should be stricken. That duty and responsibility rests upon the defendants.

The CIA has not done this, even though Hall made considerable changes to his previous declaration.²

At this point in its brief, Def's Reply at 3, the CIA does address Hall's evidence regarding briefing boards, records on a DIA meeting, and the testimony before the Senate Select Committee on POW/MIA Affairs (the "Senate Committee" or the "Senate Select Committee" of Ambassador William Sullivan, Maj. General Richard V. Secord and Jan Sejna. Rather than moving to strike this material, the CIA argues that this material does not indicate that "these are records originated or

² In this connection, it should be noted that "[a]n error of the lower court in admitting or disregarding an affidavit does not require a reversal by the appellate court where the error is harmless." Moore's, Federal Practice and Procedure, ¶ 56.22[1].

maintained by the CIA” (in the case of the briefing boards and the DIA memorandum) and that the testimony of Sullivan, Secord and Sejna “does not reference records maintained by CIA, responsive to Plaintiff’s FOIA request.” Def’s Reply at 3.

The CIA’s attempt to separate the events, activities and documents referenced by Hall from the CIA flies in the face of reality. As an article on the CIA’s own official website recently noted:

The CIA was largely responsible for conducting military operations in Laos, but the U.S. Ambassador was in charge. The secret war in Laos, author Charles Stevenson has emphasized, “was William Sullivan’s war.” Ambassador from December 1964 to March 1969, Sullivan insisted on an efficient, closely controlled country team. “There wasn’t a bag of rice dropped in Laos that he didn’t know about,” observed Assistant Secretary of State William Bundy.

“CIA Air Operations in Laos, 1955-1974 Supporting the Secret War,” by William M. Leary, published on the CIA’s official website at [http:// www.cia.gov/library/center-for-the-study-of-intelligence/csi-publication/csistudies/ studies/winter99-00/art7.html](http://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publication/csistudies/studies/winter99-00/art7.html). (Copy reproduced as Attachment 1 hereto)

The court may take judicial knowledge of this material on the CIA’s official website. This may also be considered as the admission of a party against interest.

4. Operational Files

a. E.O. 12812; PDD 8

The CIA contends that it is not obligated to search its operational files for records responsive to the Hall’s FOIA requests, either pursuant to Executive Order 12812 (E.O. 12812) and Presidential Decision Directive 8 (PDD 8), or pursuant to

the CIA's operational files exception. Def's Reply at 4-5. The CIA does not deny that on June 10, 1993, President William Jefferson Clinton, acting pursuant to E. O. 12812, issued PDD 8, which required "all executive agencies and departments to complete a "review, declassification and release of all relevant documents, files pertaining to American POW's and MIA's missing in Southeast Asia in accordance with Executive Order 12812." PDD 8 (emphasis added).

The CIA's operational files are necessarily within the scope of this language. The CIA tries to overcome this by arguing that the National Security Act, as amended by the CIA Information Act of 1992, does not Act as a waiver of the CIA's operational files exemption in this case because it "does not enumerate the subject matter of an executive order as a basis for waiving the ops file exemption." Def's Opp. at 5 (footnote omitted). But the CIA's statute applies only to FOIA and Privacy Act requests. Executive Order 12812 and PDD 8 apply across the board to all federal agency records without regard to FOIA and Privacy Act requests. There is thus no basis for the CIA's contention that E.O. 12812 and PDD 8 do not apply to its operational files.

In effect, the CIA's argues that its statute supercedes an executive order issued by the President of the United States. By law, however, the classification of all government information is defined and controlled by an executive order issued by the President of the United States. The CIA has cited no case law or other legal authority supporting its contention that it can disregard an executive order issued by the President of the United States that applies to all government information on a particular subject.

B. The CIA's Operational Files Exception

Section 431(c) of the Central Intelligence Agency Information Act of 1992 (the "CIA Act") provides certain exceptions to its general provision that the Agency's operational files are not subject to search under the FOIA. Originally, the CIA Act provided that the Agency's operational files should be searched when a FOIA request concerned "the specific subject matter of an investigation by the intelligence committees of the Congress." Pub.L. No. 98-477, § 701(c)(3), 98 Stat. 2209 (1984). However, as the Court of Appeals noted in Morley v. C.I.A., 508 F.3d 1108, 1116-1117 n.1 (D.C.Cir.2007) ("Morley II", the Intelligence Authorization Act of 2003, Pub. L. No. 107-306, § 353(b), 116 Stat. 2383, 2402, struck the term "intelligence committees of the Congress" and substituted "congressional intelligence committees," defining this phrase as "(A) the Senate Select Committee on Intelligence of the Senate; and (B) the Permanent Select Committee on Intelligence of the House of Representatives." Id., n.1, quoting 50 U.S.C. § 401a(7).

In Morley II, the FOIA plaintiff contended that both the Select Committee on Government Operations with Respect to Intelligence Activities ("the Church Committee") and the House Select Committee on Assassinations ("HSCA") qualified as "intelligence committees" that were covered by the operational files exception. The Court of Appeals found it unnecessary to address the issue of whether the HSCA was covered, since it concluded that the Church Committee was. Morley II at 1117.

The CIA claims that this provision applies only to Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the

House of Representatives because they are the only ones mentioned in the law as amended. But this new language does not reflect the intent of Congress to eliminate the protections contained in the CIA Act as originally enacted. Rather, it reflects that in the wake of September 11th, Congress sought to consolidate investigations pertaining to intelligence in one committee in each house of Congress.

The legislative history of the CIA Information Act makes clear what Congress intended to accomplish by setting forth exceptions to the rule that operational records are not subject to search under the FOIA and Privacy Act. A committee report states that H. R. 5164

Leaves the Central Intelligence Agency subject to the FOIA. It confirms that the CIA maintains information about which the public may legitimately inquire. It recognizes that the FOIA plays a vital part in maintaining the public's faith in government agencies, including agencies like the CIA which must necessarily operate substantially in secret. The continued availability of information under the FOIA helps to foster public confidence that the powers of the CIA are not being misused and that the CIA is serving the national interest.

H.Rept. No. 98-726, 98th Cong., 2d Sess. 6 (1984).

The House Report noted that H.R. 5164 was “consistent with the purposes of the FOIA because it will not interfere in any way with the processing of FOIA requests for major categories of CIA information.” The examples of “types of information [which] will be subject to FOIA search and review requirements to the same extent that they are today,” included “[i]nformation concerning any agency intelligence activity that was improper or illegal or that was the subject of an investigation for alleged illegality or impropriety.” Id.

This indicates an intention to apply this principle generally to the “intelligence committees” of Congress, not just to a single such committee in each house. The CIA has not produced any evidence that the Intelligence Authorization Act of 2003 intended to abrogate the application of this principle as regards intelligence committees which were active prior to its passage.

The CIA also argues that the operational files exception does not apply because “Hall does not even allege that there has been any investigation into alleged wrongdoing by CIA regarding POW/MIA matters in the conduct of its intelligence activities. Def’s Opp. at 5. Notably, the CIA does not itself assert that the investigation of the Senate Select Committee on POW/MIA Affairs does not qualify. The Senate Select Committee was created to meet a national commitment to account for POWs that were missing and unaccounted for. The Committee noted in its Report that:

Although we know that the circumstances of war make it impossible for us to learn what happened to all the missing, we have been haunted, as well, by our knowledge that there are some answers from Southeast Asia we could have had long ago, but have been denied.

Because our wartime adversaries in Vietnam and Laos have been so slow to provide the answers, the American people turned to the U.S. Government for help, but events over the past 20 years have undermined the public’s trust. The Indochina war itself, was partly a secret war and records were falsified at the time to maintain that secrecy. * The official penchant for secrecy left many families, activists and even Members of Congress unable to share fully in their own government’s knowledge about the fate of fellow citizens and loved ones and this, more than anything, contributed to atmosphere of suspicion and doubt.**

Report, Senate Select Committee on POW/MIA Affairs, at 2-3. (Reproduced as Attachment 2 hereto)

The investigation of the Senate Select Committee on POW/MIA Affairs was, then, an investigation into the wrongful withholding by government agencies, including the CIA, of information which the American people are entitled to know about their loved ones. This is an allegation of impropriety or wrongdoing which qualifies under the exception for operational files provided by Section 401(c)(3) of the CIA Information Act.

5. Items 1-3 of the Request

The CIA argues that Hall cannot challenge the adequacy of the search for Items 1 and 2 and a portion of Item 3 of the request because they were part of the complaint dismissed in Hall I. Def's Reply at 6-7. However, case made no finding that there had been an adequate search, thus neither collateral estoppel nor res judicata bar Hall from raising that issue here.

The CIA also objects that Hall has called attention to terms referring to POW/MIAs that are used in the Senate Report but were not employed in the CIA's search, saying he altered or amended his search terms. Def's Opp. at 7. This is irrelevant. The reasonableness of the CIA's search depends on its knowledge of the subject matter on which records are requested and the reasonableness of its efforts in respect thereto, not on plaintiff's having supplied the terms to be searched.

6. Item 4 of the Request—Senate Records

The CIA argues that this Court's order of April 13, 2005, precludes Hall from contending that the CIA must still review the records of the Senate Select

Committee to determine whether they contained CIA-originated records among them. Def's Reply at 7. That order made no such ruling. Rather, it endorsed Judge Friedman's distinction between particular documents which were not "agency records" because they belonged to the Senate and those which are agency records because they are CIA originated. See Plaintiffs' Renewed Cross-Motion for Summary Judgment ("Renewed CMSJ") at 44.

7. Item 6 of the Request

Hall challenged the adequacy of the CIA's search because it searched only one system of records. The CIA relies on its affiant, who declared that this was the system of records "most likely" to contain responsive records. Declaration of Scott A. Koch ("Koch Decl."), ¶ 32. The CIA also cites Oglesby v. U.S. Dept. of the Army, 920 F.2d 57, 68 (D.C.Cir.1990) in support of this. But the CIA misapplies Oglesby, which held instead that "the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." Id.

8. Item 7 of the Request

Item 7 of Hall's February 7, 2004 request sought:

All records on or pertaining to any search conducted regarding any other requests for records pertaining to Vietnam War POW/MIAs, including any search for such records conducted in response to any request by Congressional Committee or executive branch agency.

By letter dated June 15, 2004, the CIA advised Hall that it considered portions of his request, particularly Item 7, as "imposing overly burdensome search requirements. While not denying the request—or Item 7—the CIA said it did not "waive its right

to make that determination once you have clarified the scope of your client's request and evidenced a willingness to pay fees." Subsequently, by letter dated May 11, 2005, it made the determination that Item 7 "imposes an unreasonably burdensome search requirement on the Agency and requires research that the FOIA does not mandate." In light of this, it said it would not adopt the request.

The CIA tries to counter Hall's point that the CIA did not explain why the searches generated by the request would be overly burdensome by citing an example given in the Koch Declaration alleging that when, at some unspecified point, a search was attempted the automated system "time out" before generating a response. Def's Opp. at 10, citing Koch Decl., ¶¶ 37-39.

There are several problems with this. First, if this occurred, it occurred after the administrative record was closed by the CIA's letter of May 11, 2005. In that record there is no evidence of any effort by the CIA to explain why the request would be overly burdensome, and it is worthy of note that that claim is tied to the extortionate demand for search fees which has since been withdrawn. Secondly, the example provided by Koch, in addition to being offered after the fact, is meaningless without some description of the nature of the search said to have been attempted. The request clearly identified two easily segregable portions of the omnibus request; the request specifically asked for a search of requests that had been submitted by congressional committees and executive agencies for information on POW/MIAs. No explanation has been offered as to why a search of this portion of the request would be overburdensome. It therefore should have been done. Instead, the CIA

designed an unnecessarily broad search which which resulted in a Chicken Little “timed out” response by one of its computers.

9. Plaintiff Is Entitled to Discovery

Relying on a case from another circuit, the CIA argues that plaintiffs must make a showing of bad faith on the part of the CIA sufficient to impugn its affidavits in order to justify discovery. Def’s Reply at 10. While Hall does allege that the CIA has acted in bad faith in this case, bad faith is not required to show that a search has been inadequate. Where the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order[.] Founding Church of Scientology, Wash. D.C. v. Smith, 721 F.2d 828, 836, n.4 (D.C.Cir.1983), and the plaintiff is entitled to take discovery on the adequacy of the search. Weisberg v. United States Dept. of Justice, 627 F.2d 365, 371 (D.C.Cir.1980). That is the case here, where plaintiff has put forth a plethora of evidence indicating the likelihood that the CIA may have responsive documents it has not located or even looked for.

But the case against the adequacy of the CIA’s search and for discovery does not rely simply on its failure to produce documents. It also has failed adequately to describe its procedures for locating and retrieving records. To cite but one example, as noted above, in misapplying the Oglesby case, the CIA has used the wrong standard in determining which records systems to search, using the criterion of “most likely” rather than “likely.” Hall noted in his opposition to the CIA’s Motion for Partial Summary Judgment that the CIA had failed to take a logical step with regard to identifying and locating for Item 6 records: he didn’t ask those who

created what records regarding the searches, where they are, and to whom they were transferred. Hall's Opp. to Def's Renewed PMSJ AT 18. The CIA does not address this point at all in its reply.

Hall's argument that the CIA has not conducted an adequate search is not based simply on the fact that Hall has adduced many incidents and documents which the CIA has not located; it is also based on evident inadequacies in the CIA's search procedures.

That the CIA's statements regarding its searches cannot be trusted is becoming notorious. David Kaiser is a noted historian, the author of six books, and a professor at the Naval War College. His books, several of which deal with relatively recent American history, have been written with the help of requests, including some to the CIA. In a declaration he recently filed in Morley v. Central Intelligence Agency, Civil Action No. 03-2545 (D.D.C.), he states: "New information has just come to my attention establishing quite clearly that the CIA, during the 1990s, handled one of my requests in a very incomplete and highly deceptive manner." Declaration of Prof. David Kaiser, ¶ 1 (annexed as Attachment 3 hereto). Kaiser states that in 1990 he submitted a request to the CIA. At the time he was working on a book on the origins of the Vietnam War, *American Tragedy: Kennedy, Johnson, and the Origins of the Vietnam War*, which was published in 2000 by Harvard University Press. The first part of this request listed 320 specific documents, taken from withdrawal sheets at the President John F. Kennedy Library, whose release he requested. Secondly, Prof. Kaiser asked for "documents relating to conversations between [Ngo Dinh] Nhu and [William] Colby and between

Nhu and [John Richardson] during the period June 1960 and October 1962." Ngo Dinh Nhu was the brother of South Vietnamese President Ngo Dinh Diem.

Colby and Richardson had been the CIA Station Chiefs in Saigon during that period, and Kaiser "knew such documents must exist because in his memoirs Colby had referred to meeting Nhu once or twice weekly." Id., ¶ 2. It took six years for the CIA to act on Kaiser's request. In the end he received 13 of the 320 specific documents that he had requested, with some redactions. With respect to the second item of his request, regarding Nhu's talks with Colby and Richardson, Lee Strickland, then the CIA'S Information and Privacy Coordinator informed him that "the Agency components involved in the processing of your request have determined that their record systems are not constituted in such a manner to search for the records you have requested based on the information provided in line 2 of your request." Id., ¶ 3, quoting Exhibit 1.

Now, Kaiser says, "the CIA has just published six internal histories of its involvement in Vietnam on its website. One of the recently released studies--which was published internally in 2000, coincidentally at the same time as American Tragedy--is 'CIA and the House of Ngo: Covert Action in South Vietnam, 1954-63.'" According to Prof. Kaiser, "[ilt draws extensively on exactly the documents which I requested and which I was denied--Colby and Richardson's accounts of their talks with Ngo Dinh Nhu. Apparently, the Agency had no trouble providing them to their own contract historian." ¶ 4.

Finally, on the need for discovery, the CIA attempts to undercut it by referring to Hall's evidence as having been stricken. This disregards the fact that

even if the Magistrate's ruling on the CIA's motion to strike governs, there was still some evidence not stricken that defeats the CIA's motion for summary judgment. Additionally, the CIA ignores the fact that Hall has rehabilitated much of the evidence stricken by the Magistrate, and the CIA has not properly addressed the specific items of evidence as reformulated. And the CIA has made no response at all to Hall's point that to the extent his evidence might again be stricken, that would increase his need to take discovery.

10. Adequacy of the Vaughn Index and Segregability

The CIA claims that its Vaughn Index is "ADAQUATE (sic) UNDER THE LAW." Def.'s Reply. at 11, quoting part of the caption to Point IV. First, the CIA once again claims that Hall is barred by collateral estoppel from challenging documents responsive to Items 1-2 and part of Item 3. But it fails to address the points made by Hall that the facts and the law have changed since the decision in Hall I. Pls' Opp. to CIA Renewed MSJ at 20-21.

The CIA takes issue with Hall's statement that the 2006 Vaughn Index pertaining to Item 6 is inadequate because there is no accompanying affidavit and the documents are not adequately described. Def's Opp. at 12. It refers to the October 30, 2006 Koch Declaration. But the Koch Declaration makes no mention of the Vaughn index. Nor does it attest that the statements in the index were made under oath by Koch.

The CIA contends that the 2006 and 2008 Vaughn indices need to be read in pari material, but the D.C. Circuit has held that a Vaughn index should be contained in one document Paisley v. CIA, 712 F.2d.686.690 n. 12 (1983) ("[t]he index

consists of one document that adequately describes each withholding record or deletion and sets forth the exemption claimed and why that exemption is relevant").

This serves to facilitate economic review and to minimize confusion.

The CIA claims that Hall's contention that it has not met its burden of showing no segregable nonexempt portions is "patently incorrect." Def's Opp. at 13. However, the neither 2006 Koch Declaration nor the 2006 Vaughn index even makes the claim that there are no segregable portions. The CIA does not address the specific examples which Hall gave of documents where the CIA made no segregability claim.

11. In Camera Inspection

The CIA denounces Hall's modest proposal for in camera inspection of a limited sum of documents as "an imposition on the Court and wholly unnecessary." Def's Reply at 13. It quotes Allen v. CIA, 636 F.2d 1287, 1298-1299 (D.C.Cir.1980) as saying that "a trial court should first offer the agency the opportunity to demonstrate, through detailed affidavits or oral testimony, that the withheld information is clearly exempt and contains no segregable, nonexemption portions." However, the Court has provided the CIA with that opportunity. The CIA just hasn't met the test.

The CIA makes no response to Hall's discussion of the six factors that Allen prescribes as relevant to a decision to examine materials in camera except to claim that its affidavits are nonclutory. This claim, however, cannot be sustained.

12. The Fee Waiver Issue

The CIA confines its discussion of the fee waiver issue to its contention that the issue is moot because Items 5 and 7 of the request were administratively closed. Def's Reply. at 14. It cites no authority that the administrative closing of a request bars a court from ruling that fees should be waived.

13. Exemption 1

The CIA makes a number of misrepresentations regarding the Exemption 1 issue. It begins by stating that Hall contends "there is no indication that the information is properly classified and that information classified `must certainly relate to matters of the Cold War period.'" Def's Reply at 14, quoting Hall Opp. at 26.

What Hall said was that the CIA had made no showing that its Exemption 1 material is "properly classified procedurally." Id. (emphasis added). It hasn't. DeMaio does stated that the documents are classified "Top Secret," "Secret" or "Confidential," but this does not address the issue of whether they have the other required classification markings. So far as has been shown, they do not.

With respect to the Cold War, the CIA claims that its Vaughn indices show the information is not "antediluvian" as Hall says, but "is actually dated . . . less than 25 years" ago. Def's Reply at 14. But a review of the 2008 Vaughn index reveals that 69 out of 101 documents are more than 25 years old.³ Some of the date back more than 40 years.

14. Exemption 2

³ This excludes 8 documents which were either undated or from which the date had been withheld. It also excludes 42 documents from Part IV of the 2008 index and all of the dated documents in the 2006 index because they deal not with Hall's request for information on POWMIAs, but with Item 6's request for records documenting searches, fees, and costs. Hall also notes that the date of some of the more recent records may not accurately reflect the age of the information contained in them.

The CIA tries to overcome Hall's citation of Fitzgibbon v. U.S. Secret Service, 747 F.Supp. 51, 56 (D.D.C.1990), which held that Exemption 2 did not apply to the administrative markings in that case, by noting that Schwaner v. Dept. of the Air Force, 898 F.2d 793, 796 (D.C.Cir.1990) stated that "an agency can delete sensitive notations on distribution." Def's Reply at 15, quoting Schwaner (citations omitted). It notes that Morley v. CIA, 453 F.Supp. 2d 137, 148 n. 2 (D.D.C.2006) ("Morley I"), as being in accord with this. Unfortunately, the CIA fails to mention that Morley I was overturned on appeal on precisely this point. See Morley II at 1125 (quoting Fitzgibbon's holding that the CIA "has failed to suggest any reason or need to keep secret' the administrative routing information and internal data.").

The point is, then, that the CIA may withhold such information only if it meets its burden of showing that "the information is too trivial to warrant disclosure." Morley II at 1125, citing 5 U.S.C. 552(a)(4)(B); U. S. Dep't of Justice v. Tax Analystst, 492 U.S. 136, 142 N.3 (1989). The CIA has not done that here.

15. Exemption 5

Hall's opposition put forth a detailed discussion of the CIA's Exemption 5 claims. Hall's Opp. at 30-34. The CIA's response, with one minor exception, does not address the specific documents discussed by the CIA, and consists only of a very general discussion of the case law, none of which is dispositive. It does not attempt to address Hall's points regarding the business records and crime-fraud exceptions to the case law on the attorney-client and attorney work product privileges.

16. Exemption 6

The CIA's terse treatment of the Exemption 6 issue relies on the statement in U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749, 780 (1989) that "when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest . . . is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir." Def's Reply at 17. The problem is that the CIA misapplies Reporters Committee to the facts in this case, where the information is not a "compilation" in the sense that term was used in that case, where it referred to a computerized database of information about an individual who was the subject of various organized crime investigations. Here the information withheld under Exemption 6 is not a computerized compilation but consists of reports detailing what government agencies have learned about the whereabouts or life and death status of particular POW/MIAs. Rather, its information shows precisely what the Government "was up to."

The Senate Report makes this abundantly clear:

But U.S. officials cannot produce evidence that all of the missing are dead; and because they have been so careful not to raise false hopes, they have left themselves open to the charge that they have given up hope. This, too, has contributed to public and family mistrust.

* * *

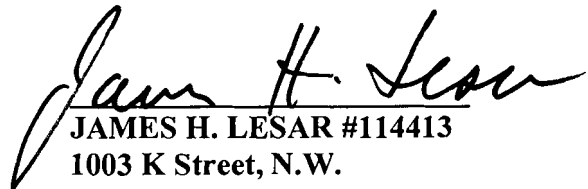
It [the Senate Select Committee] was created to ensure that accounting for missing Americans will be a matter of highest national priority, not only in word but in practice.

Senate Report at 2-3 (Attachment 2). In short, the Congress of the United States found that accounting for the POW/MIAs was a matter of “highest national priority.” That can only be accomplished by releasing the names the CIA seeks to withhold.

CONCLUSION

For the reasons set forth above, the CIA’s Motion to Dismiss or for Partial Summary Judgment should be denied. Plaintiff’s Motion for Partial Summary Judgment should be granted, and the Court should also permit plaintiff to take limited discovery on the adequacy of the search and Item 6 of the request issues. The Court should further order that plaintiffs be permitted to submit a limited number of documents for in camera inspection.

Respectfully submitted,



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