UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY TO DEFENDANT CENTRAL INTELLIGENCE AGENCY'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PRODUCTION OF RESPONSIVE RECORDS IN ELECTRONIC FORMAT

Preliminary Statement

In response to plaintiffs' motion for partial summary judgment on the issue of whether the Central Intelligence Agency ("CIA") must provide records responsive to their request in word searchable electronic format, the CIA initially throws up some meritless procedural defenses, then spends the remainder of its brief avoiding obvious questions raised by its position on the merits of the issue, such as: if the U.S. Attorneys Office can provide the records in digital form, why can't the CIA do so directly? And, if the CIA

can post copies of declassified POW records at issue in this case on its website, how can the same records not be directly and quickly produced to plaintiffs in this case in electronic format?

For the reasons set forth below, defendants' arguments must be rejected and summary judgment awarded to plaintiffs. Alternatively, the submission of a counter-affidavit by plaintiffs' computer expert, Paul Dell ("Dell"), creates a disputed issue of material fact which requires further proceedings in this matter in the form of discovery, an evidentiary hearing, or a trial.

ARGUMENT

The CIA begins by arguing that plaintiffs Roger Hall, et al., (collectively referred to hereafter as "Hall") have filed a "motion to compel (styled as 'motion for partial summary judgment as [to] digitization of responsive records') . . . ." Defendant's Opposition to Plaintiff's "Motion for Partial Summary Judgment" ("CIA's Opp.") at 1. The CIA notes that Rule 56(a) of the Federal Rules of Civil Procedure provides that "[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Id. at 2, citing rule 56(a). The CIA then proceeds to argue that "[p]laintiffs'

complaint presents a *claim* for Agency records under the FOIA, and makes no mention of the format in which he (sic) wishes to receive the documents." Id. at 3 (emphasis in original), citing Complaint [DK 1]. According to the CIA, which format Hall receives the documents in is "irrelevant to the ultimate substantive questions as to which records they may be entitled." Id. Summary judgment is not proper because that involves the determination of substantive rights, and the CIA cites Students Against Genocide v. Dept. of State, 257 F.3d 828, 833 (D.C.Cir.2001) to support its argument that the determination of substantive rights under the FOIA is limited to issues of the production of documents and exemption claims. But however correct this ruling may have been in the contest of what was at issue in that case, it is unduly limited. There is also a substantive right to a public interest fee waiver and to attorney's fees in appropriate cases, and both have been the subject of many summary judgment motions. The right to obtain the production of records in the form or format desired by the requester is also a substantive right properly the subject of a motion for summary judgment. Relevant to this point is the fact that in National Security Counselors v. Central Intelligence Agency, et. al., Civil Nos. 11-443(BAH), 11-444 (BAH), and 11-445 (BAH), this Court denied the CIA summary judgment "regarding the CIA'S refusal to produce responsive records in an electronic

format." Memorandum Opinion at 151 (D.D.C. Aug. 15, 2013)(footnote omitted). Similarly, Judge Howell also denied summary judgment to the Department of State "regarding the agency's decision not to produce responsive records to the plaintiff in an electronic format." Id. Thus, the CIA's argument that summary judgment is improper as to Hall's claim that responsive records must be produced in the format requested by him is without foundation and contrary to this Court's rulings.

In another line of attack, the CIA argues that in CREW v. U.S. Dept. of Educ., 905 F.Supp.2d 161(D.D.C.2012), the court cited CREW's failure to include in its request "an indication that it wished for the government to *produce* documents in electronic format as one of the reasons it granted the government's motion when it dismissed the case." CIA's Opp. at 3 (emphasis in original), The CIA goes on to say that "[s]pecifically, the court noted that while CREW had requested that the Department of Education search for records regardless of form or format, 'it did not *request* that DoEd produce its records in electronic format.'" Id., citing CREW at 171 (emphasis in original). The CIA then notes that in this case Hall did not request the records in electronic format either in his original FOIA request or in his complaint, and he never amended his request or filings. Id.

But this case is distinguishable from CREW. Here, Hall did request that the CIA produce the requested records in electronic format. Second, CREW did apply the D.C. Circuit precedent set by Sample v. BOP, 466 F.3d 1086, 1087 (D.C.Cir.2006), holding that "the statutory language unambiguously requires the records to be provided in electronic format. . .."

The CIA argues that the requester must specify the format he wishes the records to be produced in at the time he files his request. However, the plain language of 5 U.S.C. § 552(a)(3)(B) does not specify this. . . ." And as with other statutes, the plain meaning of the provision applies where there is no ambiguity or contrary legislative history. See Milner v. Department of Navy, 131 S.Ct. 2359, 2371, 562 U.S. ____ (2011)(which employs plain meaning rule to interpret FOIA Exemption 2's "personnel rules and practices" phraseology).

In 1996 Congress amended FOIA to modify the definition of "record" so that it includes electronic records. See The Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231,110 Stat. 3048, 3049 (codified as amended at 5U.S.C. §552(f)(2)). As a result of these amendments, 5 U.S.C.§ 552(a)(3)(A) and (B) now provide:

> (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in sub-paragraph (E), each agency, upon any request

> for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person
>
> (B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

The CIA reads subparagraphs (A) and (B) as requiring that a FOIA requester specify at the time he makes his original request the format in which he wants the records produced. But nothing in the plain meaning of these provisions warrants this interpretation. Subparagraph (A) requires that the requester reasonably describe the records sought and follow certain regulations. Hall reasonably described the records sought and complied with the applicable regulations. The CIA either accepted Hall's request or has subsequently been ordered by this Court to comply with it. There is nothing in the language of Subparagraph (A) which requires the specification of the form or format in which records are to be produced to be made in the original request; rather, they simply provide that they be made in any form or format.

Unlike Subparagraph (A), which relates to the making of the request, Subparagraph (B) relates to making the records available in specific forms. The language used does not specify that they be made available at the time of the original FOIA request. Rather, it directs that they be provided as desired by the requester in any form or format in which they are "readily reproducible" by the agency.

The point of the CIA's erection of these procedural issues is to erect roadblocks to disclosure in the same way agencies created obstacles to disclosure under § 3 of the old Administrative Procedure Act. It should not be countenanced here.

Another flaw in the CIA's argument is that if Hall was required to specify the form or format in which he wanted the records produced in his original request, then the CIA was required to advise him of this within twenty working days of its receipt of his request so he could exercise his appeal rights. This it did not do.

II. THE CIA'S CONTENTION THAT THE RECORDS SOUGHT BY HALL ARE NOT "READILY REPRODUCIBLE" IN ELECONTROIC FORMAT BY "REASONABLE EFFORTS" IS NOT SUPPORTED BY THE EVIDENCE

A. The Responsive Records are "Readily Reproducible" in Electronic Format

There is no dispute that if the records sought by Hall are "readily reproducible" in electronic form, the CIA must make them available to Hall in that format. This is what the express wording of 552 U.S.C.§ 52(a)(3)(B) states, and the CIA acknowledges that Justice Department guidelines require this: "[u]nder the provisions of subsection (a)(3)(B), a requester may ask to have a record reproduced in a new form or format and an agency must do so if the record is 'readily reproducible' in that form or format with 'reasonable efforts.'" CIA Opp. at 4, quoting Department of Justice Office of Information Policy Guide to the Freedom of Information Act (2009 ed.) at 92 (citations omitted).

On the face of it, it seems most implausible that records sought by Hall are not "readily reproducible" in word searchable electronic format. To begin with, the AUSA representing the CIA has done it in this case. In addition, records on POWs that are responsive to Hall's request have been posted on the CIA's website. See Exhibit 1 for some examples of formerly classified POW records that have been declassified and posted on the CIA's website where they can be downloaded and printed out by anyone with access to the internet.

The CIA contends otherwise, relying on the Declaration of Martha M. Lutz ("Lutz Decl."). However, the Lutz Declaration does not comply with

Rule 56 of the Federal Rules of Civil Procedure, which requires that supporting or opposing affidavits must be made on personal knowledge. Rule 56(c), Fed.R.Civ.Pro. Lutz does not state that her declaration is made on personal knowledge. Instead, Lutz, addressing the critical issue of whether the records sought by Hall are "readily reproducible," right off the bat makes the statement that: "The CIA has indicated that it cannot readily generate those articles in an electronic format, and that it will only produce paper copies of any non-exempt materials." Lutz Decl., ¶ 4, This is not a statement of fact made by Lutz on the basis of her own personal knowledge but a policy statement made by anonymous officials who speak for the CIA. There is no showing in the Lutz declaration that she has any special education, training or experience which qualifies her to address the factual issue of whether the CIA can readily reproduce the requested records in electronic form. There is no reason to believe, based on the statements in her declaration, that she has any personal knowledge of the factual state of the CIA's ability to "readily reproduce" the electronic records requested by Hall.

By contrast, Hall submits herewith the Declaration of Paul Dell ("Dell Decl..") which is based on his personal knowledge and expertise acquired

through a lifetime of education, training and practical, hands-on experience in computer signage. See Dell Decl., ¶ 1.

Upon his review of the Lutz Declaration, Dell "was surprised by her depiction of Agency's CADRE system as being a costly, man hour intensive system." Id., ¶ 3. He states, "[t]his is at odds with my understanding that CADRE is the cutting edge solution adopted by the Agency in its endless quest to eliminate the handling and reprocessing of hard copy documentation. Ms. Lutz would have us believe it could take months and countless man-hours to provide declassified documents which had been previously released in hard copy form. This is not the case." Id., ¶ 3.

Lutz claims that "the Agency does not have the capability or capacity to readily produce records requested under the FOIA, the Privacy Act, and the Mandatory Declassification Review Program in an unclassified electronic format." Lutz Decl., ¶ 5. To which Dell responds:

> However, any document released via the CADRE system must be initially converted from hard copy (if indeed stored in that fashion) to a digital form in order to accommodate both the review and printing process prior to release. The conversion of any electronic format to a suitable word searchable platform would be swift and much less expensive than reproducing the information in the form of hard copy documents. Thus, Ms. Lutz's claim that the information sought by plaintiff Roger Hall in this case is not "readily reproducible" is either disingenuous or based on ignorance of computer signage capabilities. It is not

based on fact.

Dell Decl., ¶ 4.

Lutz also claims that the risk to security posed by metadata makes the information sought by Hall not "readily reproducible". But Dell asserts that:

> The idea of the Agency's secure METADATA being at risk due to release of documents in an electronic format is anathema to the concept of CADRE itself. Such METADATA could only be available in a given release if left intact purposely by those agents responsible for vetting the documents.

Dell Decl., ¶ 5.

In short, Dell has placed in dispute the critical factual issue of whether the records requested by Hall are "readily reproducible" in electronic format that takes into account security concerns. Dell is not alone in disputing the CIA's factual representations on this point. The CIA's position on this issue is also the subject of a pending motion for summary judgment in Jeffrey Scudder v. Central Intelligence Agency, Civil Action No. 12-807 (D.D.C.). The plaintiff in that case, Jeffrey Scudder ("Scudder"), a computer programmer, headed the CIA's Chief Information Officer's Architecture and System Engineering staff for the National Clandestine Service ("NCS"). Declaration of Jeffrey Scudder ("Scudder Decl."), ¶ 2. See Exhibit 2 hereto. He worked in Information Security for the Counter Intelligence Center, and was a senior Information Technology ("IT") project manager at both the

Federal Bureau of Investigation and CIA. He spent two years working in Information Management Systems ("IMS"). He has "a deep knowledge of the CIA's Automated Declassification and Release Environment ("CADRE") system, which is what the CIA's FOIA office uses." Id.

Using his inside knowledge as a CIA officer, Scudder explained the CIA's CADRE system in detail:

> CADRE sits on the Agency's Common Work Environment ("CWE"), which is a classified system used by the entire organization. In CIA's day-to-day work there are numerous processes and activities that require moving material from the high-side (or CWE) to the low-side (unclassified system). For example, every week CIA Contract Officers have to correspond with the myriad of companies the Agency deals with, technical rep and project managers need to discuss work product with vendors, CIA Public Affairs e-mails material to the media as well as the public, and the list goes on and on.
>
> To accommodate this everyday reality CIO and Office of Security developed a process and technology to make the transfer from the high to low side secure and efficient. Each CIA office can identify an officer to be a Data Transfer Officer ("DTO"). These individuals are trained on how to operate software to transfer files. In addition a software program was developed to transfer and write data without spilling data, changing files, or adding or deleting anything from the transferred data. In fact, and quite importantly, the DTO is allowed to have a working DVD drive in which he/she can burn files onto a DVD for passage to the requester or to upload on CIA's unclassified system. The process that we utilized is very similar to how an external FOIA request is processed

by the CIA.

Id., ¶¶ 15-16.

In contrast to the ease, rapidity and security of the process used to transmit unclassified information to a FOIA requester that is painted by Dell and echoed by Scudder, Lutz persistently pounds a diametrically opposite theme. She states early on in her declaration that the CIA "has indicated that it cannot readily generate" the requested records in an electronic format and that it will only produce paper copies any non-exempt materials." Lutz Decl., ¶ 4. Indeed, she asserts that rather than supporting "broad transfer of records to unclassified media[,]" "the ability to transfer such information outside the Agency is restricted and is only performed on a case-by-case basis." Id., ¶ 5. Thus, Lutz contends, "the Agency does not have the capability or the capacity to readily produce records requested under the FOIA, the Privacy Act, or the Mandatory Declassification Review Program in an unclassified electronic form." In other words, if it involves the disclosure of information requested by the public pursuant to law, it just can't be done, the reason--because this "would be prohibitively time-consuming and costly—so much so that those records are not 'readily available' electronically." Id.

In stark contrast to Luz's contentions are the statements of Scudder, who does possess computer expertise and first-hand experience with his work at CIA, there are at least "three methods that the CIA can and does utilize today that can easily be implemented to allow for the release of electronic media to FOIA requesters. See Scudder Decl., ¶ 19.

The first involves scanning records at the CIA's scanning center. That CIA office, Scudder says, maintains high-quality scanners that can scan approximately 100 pages per minute. Using this option would actually save the CIA time and money. Id., ¶ 20. It would also protect any classified information from even inadvertent disclosure. Id., ¶ 21.

The second method pointed out by Scudder allows CIA to print a document utilizing the CADRE system directly to a PDF file that can then be provided to requesters on DVDs as they have requested. This system is already "in place throughout the rest of the Agency". Id. at ¶ 23. This method addresses any concerns CIA has with respect to any potential security risk.

The third method noted by Scudder is already available; it is CADRE's existing system, which was set up under the defense contractor CACI. Scudder states that he has verified that CADRE has the current capability to coalesce one or more TIFF images (which is how documents

are stored in CADRE) to generate a PDF file. No security concerns would exist. Id., ¶ 26. The CIA's refusal to produce electronic records is particularly problematic given that other U.S. Government agencies that use CACI's technology to redact classified material are already using this capability to generate PDF files for release to the public through FOIA. Id. ¶ 27.

Lutz herself basically confirms this account of CADRE'S capabilities:

> CADRE contains two features for extracting data--one for use on the Agency's website and the other for use at the National Archives and Records Administration. These utilities export data in a specific format that is designed for import into the receiving systems, not for dissemination in a PDF or other user accessible format.

Lutz Decl., ¶ 12, n. 5. As noted above an assistant to the undersigned attorney James H. Lesar went on to CADRE's website and was able to download POW documents there that are the subject of Roger Hall's request. They are word searchable. See Exhibit 1. It would appear the CIA could simply put the documents Hall has requested on its website and then its FOIA staff can download them to CDs or DVDs without any demonstrable security risk.

B. The CIA's Determination that the Records Are Not "Readily Reproducible" Is Not Entitled to "Substantial Weight"

The CIA, relying on $ 552(a)(4)(B), contends that its claim that the records sought by Hall are not "readily reproducible in electronic form is entitled to "substantial weight." This provision directs reviewing the withholding of records to "'accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility . . . and reproducibility.'" Sample. supra. 466 F.3d at 1008, quoting S 552(a)(4)(B). Following this, Sample held that "[u]nder any reading of the statute, . . ., 'readily reproducible' simply refers to an agency's technical capability to create the records in a particular format." Id. The CIA disregards this holding, arguing that the records requested by Hall "are not 'readily reproducible' in an electronic format due to the burdens imposed by the Agency's required security procedures and policies." CIA Opp. at 5.

Not only does this contravene the holding in Sample, but there is no question in this case that the CIA has the technical capacity to provide Hall the records he has requested in electronic format. Late in her declaration Lutz admits the CIA does have this capability. See Lutz Decl., ¶ 12, n. 5, noting that the CIA can make information available in electronic format on the CIA's website and to the National archives and Records Administration.

Moreover, it should also be noted that if the information is "readily reproducible" in a particular format it can be reproduced in that format by

the "agency." There is no basis for suggesting, as the CIA does, that an agency can wall off its obligations to reproduce information in a particular format by setting up a situation where one component of the agency determines it cannot produce the records in that format while other units can do so.

C. The CIA Has Not Made "Reasonable Efforts" to Maintain Its Records in Forms that Are Reproducible For Purposes of 5 U.S.C. § 552(a)(3)

5 U.S.C. provides that "[e]ach agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section." After describing the Data Transfer Officer ("DTO") process which the CIA has designed to hamstring ability of requesters to promptly receive the information they have requested in a manner which maximizes the capacity of requesters to disseminate it, Lutz attempts to justify the *Bleak House* mechanisms the CIA has devised, saying:

> The DTO process is designed for transfer of discrete sets of data files for mission critical purposes and does not have the resources to support massive information review and release projects. Enlarging the DTO program would increase the risk of unauthorized disclosure of classified national security information. Accordingly, any changes to the existing DTO program would require security and budgetary approvals from the highest levels of the agency.

Lutz Decl., ¶10. This is in effect a confession that the CIA has not made "reasonable efforts" to maintain records in forms or formats that are reproducible for requesters seeking the disclosure of information. By this account, it has not even asked Agency heads to provide more funds and resources to support the laws passed by Congress. This is not due to lack of funds on the part of the CIA, which is extremely well-funded. Rather, "by design[,] the system does not have a function to transfer or convert records contained in the system directly into the form of a PDF." Lutz Decl., ¶ 12 (footnote omitted)(emphasis added). The attitude expressed by the CIA is not only contrary to the FOIA, it also violates national policy as laid down by President Barack Obama in hcis January 21, 2009, Memorandum to Heads of Agencies on the Freedom of Information emphasizing the importance of FOIA requesters having prompt access to government information. See Exhibit 3.

CONCLUSION

For the reasons set forth above, this Court should grant plaintiffs' motion tor partial summary judgment and order the CIA to provide copies of the records requested by Hall in word searchable electronic format. Alternatively, because a disputed issue of material fact exists, the Court

should either permit plaintiffs to engage in discovery on this issue or set the matter down for an evidentiary hearing or trial.

Respectfully submitted,

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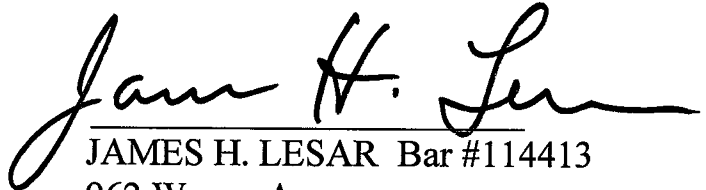

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