IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL SECURITY ARCHIVE, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, *et al.*, Defendants.	)	No. 06-CV-1080 (GK)

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S JULY 14, 2008 ORDER DISMISSING THE CASE, OR, IN THE ALTERNATIVE, FOR RELIEF FROM OR TO ALTER OR AMEND JUDGMENT

Two years ago, on September 8, 2006, the due date for the CIA's answer or response to the National Security Archive's ("Archive") Complaint, and the same day the Archive moved for summary judgment, the CIA—having nothing of merit to say in response to that motion—faxed a letter to the Archive at close of business on a Friday afternoon, purporting to reverse all of its unlawful denials of the Archive's status as a "representative of the news media" and promising not to do it again. The CIA then repeated those representations to this Court as its primary basis for insulating its illegal policy and practice from judicial review, and the Court, taking the CIA at its word, found that the Archive's policy and practice claim was not ripe for review.

Now, it is deja vu all over again. As the Archive demonstrated in its brief in support of its motion for reconsideration, the CIA—flouting its promises to the Archive and representations to this Court—has recently resumed its practice of denying the Archive's news-media fee status, in violation of the FOIA. What is the CIA's response this time? At the close of business on Friday, September 5, 2008, the revised deadline for its response to the motion for

reconsideration, the CIA proffered a letter addressed to the Archive purporting to "sincerely apologize" for its "administrative mistakes" in failing to classify the Archive as a news-media requester and promising that such "mistakes" will not happen again. *See* Defs.' Opp. to Pl.'s Mot. for Reconsideration (Dkt. No. 37) ("Opp.") Ex. A.[1] Then, having nothing of merit to say in response to the motion, the CIA asserts that its last-minute about-face should once again insulate its recurrent unlawful conduct from judicial scrutiny. *See* Opp. at 2-3.

The parallels are striking, and the CIA's latest assurances are no more reliable than its promises two years ago. Were there any doubt on that score, that doubt vanished when, on September 8, 2008—the *very next business day* after the CIA sent its latest mea culpa promising once again that it would treat the Archive as a "representative of the news media" for all the Archive's future FOIA requests—the CIA *again* refused to recognize the Archive's status as a "representative of the news media" for one of the Archive's FOIA requests. *See* Suppl. Adair Decl. ¶ 4 & Ex. K.[2] As it has done on some, but not all, recent occasions, the CIA invoked its unpredictable and undefined "administrative discretion" as grounds to "waive" the fees that the CIA asserts the Archive owes for this request. *Id.*

Since the dispute underlying this lawsuit first began, the CIA has thus established a pattern of persisting in illegal action until the eleventh hour, purporting to abandon its unlawful

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[1] In its haste to put its "apology" before the Court, the CIA apparently forgot to transmit this letter to the Archive. While the Archive's counsel received a copy of the CIA's September 5, 2008 letter in the form of an exhibit to the CIA's opposition memorandum, the Archive did not receive the letter through any mail or other direct communication from the CIA. *See* Supplemental Declaration of Kristin Adair ("Suppl. Adair Decl.") ¶¶ 2-3.

[2] After filing of the present motion but before receiving the September 8, 2008 letter, the Archive received from the CIA responses to sixteen other FOIA requests. Each of these responses purported to administratively waive the fees associated with the requests, while failing to acknowledge the Archive's proper fee status as a "representative of the news media." *See* Suppl. Adair Decl. ¶5.

practices when the prospect of judicial review seems most imminent, and then resuming the illegal conduct once that prospect diminishes. These tactics cannot eliminate the case or controversy that exists here, and the Archive is entitled to an enforceable decision from this Court declaring its right to be treated as a "representative of the news media" so that it no longer has to rely on the dubious prospect that the CIA will voluntarily comply with the law.

ARGUMENT

As explained in its motion for reconsideration, although the Archive recognizes that relief under either Rule 59(e) or 60(b)(3) is an extraordinary remedy, this is precisely the type of case that warrants such relief. The "newly discovered" evidence that the Archive has presented regarding the CIA's renewed practice of denying the Archive news-media fee status, the manifest injustice that would result from allowing the CIA repeatedly to promise to stop its illegal conduct and then resume that conduct at will, and the fact that the CIA made misrepresentations or undertook "other misconduct" by failing to fulfill its promises to the Archive and the Court all warrant reconsideration under these rules. *See* Pl.'s Mot. for Reconsideration (Dkt. No. 32) at 11-15.

In its opposition to the Archive's motion for reconsideration, the CIA does not explain why its pattern of violating the law and then attempting to insulate itself from judicial review by making hollow promises at the eleventh hour does not constitute a "manifest injustice" warranting reconsideration of the Court's July 14 order dismissing the case. *See* Fed. R. Civ. P. 59(e). Nor does the CIA explain how the many assurances it gave this Court regarding its future treatment of the Archive—which it failed completely to honor—can be viewed as anything other than "misrepresentation[s]" or other "misconduct" warranting the exercise of the Court's discretion to reconsider its conclusion that the Archive's challenge to the CIA's illegal policy

and practice is not ripe for judicial review. *See* Fed. R. Civ. P. 60(b)(3). Instead, the CIA argues that all of its recent actions should be excused as an innocent "mistake." Opp. at 2, 3 & Ex. A.

But no showing of malicious intent is required to prevail on a motion for reconsideration. *See, e.g.*, *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988). Rule 60(b)(3) "applies to both intentional and unintentional misrepresentations." *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995); *see also United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372, 1374 & n.6 (11th Cir. 1981); *DiPirro v. United States*, 189 F.R.D. 60, 65-66 (W.D.N.Y. 1999). As the Archive has demonstrated, *see* Pl. Mot. for Reconsideration at 11-19, the unreliability of the CIA's assurances removes the principal basis for the Court's order dismissing the Archive's challenge to the CIA's ongoing policy and practice and demonstrates both that that challenge is ripe for review and that judicial relief is the only thing that will guarantee the CIA's future compliance with the law. This is true regardless of whether the CIA's failure to live up to those assurances was the result of bad intent or simply bureaucratic ineptness—either way, those assurances and the ones the CIA now offers are not reliable.

Moreover, if the CIA's actions were the result of a simple "mistake," that "mistake" should have been corrected immediately when the Archive filed its most recent administrative appeals with the agency. *See* Pl. Mot. for Reconsideration at 9, 12. Those appeals reminded the CIA of the Archive's clear entitlement to news-media status under governing law and of the CIA's previous assurances to the Court and to the Archive that it would treat the Archive as a "representative of the news media" for all future non-commercial FOIA requests. Nielsen Decl. Ex. E. If those administrative appeals referencing the CIA's representations to the Archive and to the Court were not sufficient, the Archive's pending motion for reconsideration, which was filed eight weeks ago, surely should have been sufficient to alert the agency counsel and their

Department of Justice counsel of the breach of their prior promise to treat the Archive in accordance with the law. Yet rather than rectify that mistake as soon as it came to their attention, the defendants stubbornly persisted in their illegal conduct, capitulating (just as they did two years earlier) only at the last minute when necessary to improve their prospects in court (and even then, breaching their promise yet again on the next business day). These acts of gamesmanship do not deprive the Court of jurisdiction over this case, and they should not prevent the Court from exercising that jurisdiction.

The CIA further argues that relief under Rule 59(e) is not warranted because the letters it sent beginning in February of this year do not constitute "newly discovered" evidence, and that the Archive should have brought the CIA's latest pattern of wrongdoing to the Court's attention sooner. Opp. at 2. As an initial matter, the CIA's argument obscures the timeline of recent events. While the first of the CIA's letters forming the basis of the Archive's Motion for Reconsideration was sent in February 2008, the CIA did not rule on the Archive's administrative appeal of those letters until June 2008. Nielsen Decl. ¶ 11 & Ex. F. Moreover, it was just seven days before the Court's July 14, 2008 decision when the Archive learned that the CIA had escalated its misconduct by not only denying news-media status, but also failing to waive fees. *See* Nielsen Decl. ¶ 2 & Ex. H; Adair Decl. ¶ 5. Two other letters denying news-media fee status were received after that July 14, 2008 decision, *see* Adair Decl. ¶¶ 2-4, and one more letter failing to treat the Archive as a "representative of the news media" was received after the CIA's response to this very motion, *see* Suppl. Adair Decl. ¶ 4. In contrast, in *Savers Federal Savings & Loan Association v. Reetz*, 888 F.2d 1497 (5th Cir. 1989), on which the CIA principally relies, the motion for reconsideration presented an entirely new legal theory that rested on facts that had been known to the moving party months before the underlying matter had been fully briefed and

submitted to the court—indeed, almost all the supposedly "new" facts had been known to the moving party even before the suit was filed. *Id.* at 1499-1500, 1508.[3]

Furthermore, there was nothing unreasonable about the timing of the Archive's actions. Thinking the CIA could be taken at its word when it promised to follow the law and treat the Archive as a "representative of the news media," and thinking that the CIA's failure to live up to that pledge might have reflected a simple mistake, the Archive tried to sort out the improper fee determinations directly with the agency. Nielsen Decl. ¶¶ 9-11 & Exh. E, F. But, just as it did in early 2006 when the Archive tried to work with the defendants to avoid having to file this lawsuit in the first place, the CIA refused to alter its conduct until it faced the prospect of judicial scrutiny. *See* Nielsen Decl. ¶11 & Ex. F.[4] The Archive's good-faith attempts to exhaust its administrative remedies before seeking judicial relief should not give the CIA a free pass on its illegal policy and practice.

The CIA finally resorts to the claim that reconsideration is not warranted because the Archive has not paid any fees for the FOIA requests that the CIA improperly refused to assign to the "news media" category and, therefore, the Archive supposedly has suffered no prejudice as a

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[3] *New York v. United States*, 880 F. Supp. 37 (D.D.C. 1995), which CIA also cites, says nothing about a party's delay in bringing facts to the court's attention. Rather, the Rule 59(e) motion was denied there because the court found the motion to be "essentially a rehash of the arguments presented to and previously rejected by [the] court," based on facts that were already in the record when the court issued the decision being challenged. *Id.* at 39.

[4] After the Archive received the CIA's June 3, 2008 letters denying its administrative appeals and subsequent letters continuing the improper determination of the Archive's fee status, the Archive's counsel began preparing to bring these matters to the Court's attention by means of a supplemental submission in support of its September 2006 summary judgment motion. The Court's decision issued on July 14 pretermitted those plans and required the Archive instead to make this submission in the form of a motion for reconsideration.

result of the CIA's fee determinations.[5] But the standard for relief under Rule 59(e) contains no prejudice requirement. *See, e.g.*, *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996); *Sieverding v. American Bar Ass'n*, 239 F.R.D. 288, 290 (D.D.C. 2006). As for Rule 60(b)(3), the CIA misapprehends the nature of the prejudice inquiry in that context. The relevant question is not whether the Archive was prejudiced by the CIA's underlying illegal conduct in denying its appropriate fee status under the FOIA (though it undoubtedly was), but rather whether the "misrepresentation[s]" and other "misconduct" that form the basis of the Archive's Rule 60(b)(3) motion—i.e., the CIA's repeated misrepresentations to the Court concerning its future treatment of the Archive—prejudiced the Archive. *See, e.g.*, *Summers v. Howard Univ.*, 374 F.3d 1188, (D.C. Cir. 2004) (explaining that the misconduct, fraud, or misrepresentation that forms the basis of the 60(b)(3) motion must have affected the substantial rights of the moving party); *Anderson*, 862 F.2d at 924 (same). The prejudice here on that score is clear: the CIA's false assurances were the primary basis of the Court's decision dismissing the Archive's otherwise ironclad claims against the CIA and denying its requested relief for a declaration and injunction assuring the defendants' compliance with the Archive's statutory right to be treated as a "representative of the news media." *See* Memorandum Opinion (Dkt. No. 30) at 11-15; Pl. Mot. for Reconsideration at 15-19.

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[5] This argument mirrors the argument CIA has made throughout this litigation that the Archive's claims are moot due to its voluntary cessation of the challenged policy and practice. As explained more fully in the Archive's reconsideration motion, far from making it "'*absolutely* clear that the wrongful behavior could not reasonably be expected to recur,'" *Adarand Constructors, Inc. v. Slater*, 28 U.S. 216, 222 (2000), the CIA's renewal of its illegal practice demonstrates that the activity has recurred and will likely recur in the future. *See* Pl.'s Mot. for Reconsideration at 19-21; *see also Mbakpuo v. Ekeany Anwu*, 738 A.2d 776, 783 (D.C. 1999) ("[A] defendant's past conduct is important evidence—perhaps the most important—in predicting his probable future conduct.").

Even if the Archive were required to demonstrate prejudice resulting from the CIA's persistent erroneous fee determinations, that requirement would be met as well. The CIA's ongoing policy and practice of refusing to treat the Archive as a "representative of the news media" creates significant burdens, delay, and uncertainty for the Archive, which relies heavily on the FOIA as a vehicle for obtaining the raw materials that it later analyzes and disseminates to the public. *See* Compl. ¶¶ 19-25; *see also Payne Enters. Inc. v. United States*, 837 F.2d 486, 493-494 (D.C. Cir. 1988); *Better Gov't Ass'n v. Dep't of State* , 780 F.2d 86, 93-94 (D.C. Cir. 1986). Every time the Archive submits a FOIA request, it must demonstrate that its request qualifies for preferred fee status. That showing should be easy for the Archive, which the CIA is legally required to treat as a "representative of the news media." Instead, the Archive faces great uncertainty with each request over whether the CIA will recognize its proper fee status, and if not, whether the CIA will find it appropriate to exercise its "administrative discretion" to "waive" the Archive's fees. The CIA has not offered that administrative grace in every case, and the Archive has no way to know what factors the CIA will consider in determining whether to exercise its "discretion" or not. Moreover, if the CIA makes an improper fee determination, the Archive must undertake the burden of attempting to correct that determination either by appealing directly to the agency—invariably a futile exercise, as the torturous history of this case reflects—or by seeking relief from the Court. The CIA's actions have thus burdened the Archive in ways that run directly contrary to Congress's intent in adopting the FOIA's fee provisions: As the D.C. Circuit has explained, those fee provisions are "not [to] be utilized to discourage requests or to place obstacles in the way" of public access to government information. *Better Gov't Ass'n*, 780 F.2d at 94.[6]

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[6] Additionally, while the CIA cites *Summers v. Howard University* for the proposition that

CONCLUSION

In these circumstances, the Archive's challenge to the CIA's illegal policy and practice is ripe for judicial review. The Court's contrary determination rested largely on assurances by the CIA that have proven false and unreliable. The Court has ample discretion to reconsider its July 14 decision, and the newest evidence of the CIA's actions reveals a pattern of unjust conduct that strongly warrants the exercise of that discretion.

Respectfully submitted,

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litigation expenses cannot constitute prejudice for the purposes of a Rule 60(b)(3) motion, *see* Opp. at 3 n.1, that case merely found that the limited time spent preparing a simple, unopposed motion to dismiss did not constitute prejudice sufficient to warrant Rule 60(b)(3) relief in the particular circumstances of that case. *See* 374 F.3d at 1194-95. Here, the prejudice suffered by the Archive is much more substantial. Due to the CIA's intransigence, the Archive was forced to file this suit aimed at ending the CIA's practice of refusing to assign it the proper fee status, only to have the suit dismissed as unripe on the basis of the CIA's false representations, thus leaving the Archive in the same position it was in before this litigation of having to administratively appeal individual adverse fee determinations and potentially bring additional suits to vindicate its rights, despite having already spent considerable time and resources on that effort.