

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

MICHAEL DRIGGS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil No. 1:23-cv-1124 (DJN)
)	
CENTRAL INTELLIGENCE AGENCY)	
)	
Defendant.)	
)	

**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT OF ORDER FOR
DEFENDANT TO SEARCH ITS OPERATIONAL FILES UNDER 50 U.S.C. § 3141**

Pursuant to the Court’s January 30 Order, and the Court’s direction during the March 13, 2024 status conference, granting Plaintiffs leave to state their grounds for ordering Defendant to search its operational files, Plaintiffs respectfully submit this Memorandum.

Previously Disclosed Records. In its March 13 *Order Setting Case Deadlines and Granting Motion for Clarification*, ECF No. 18, the Court ordered Plaintiffs to “provide to Defendant a list of all documents produced to Plaintiffs... in *Moore v. CIA*, No. 1:20-cv-1027,” by March 24. Plaintiffs have provided Defendant that list, together with online access to the productions.¹

¹ [CIA Production - January 8, 2021](#) (2 pages)
[CIA Production - April 20, 2021](#) (42 pages)
[CIA Production - June 25, 2021](#) (185 pages)
[CIA Production - September 16, 2021](#) (157 pages)
[CIA Production - October 13, 2021](#) (14 pages)
[CIA Production - November 16, 2021](#) (6 pages)
[CIA Production - October 7, 2020](#) (13 pages)
[CIA Production - October 23, 2020](#) (4 pages)

Plaintiffs also memorialize which items in their FOIA request are not duplicative of those that were the subject of the *Moore* litigation. There are ten such requests. Seven seek information on individual Korean War POWs² and two seek Information on Vietnam War

² Request 5

All records concerning Major Samuel Porter Logan Jr., shot down while piloting a B-29 Super Fortress over North Korea on September 9, 1950, declared missing-in-action and presumed dead by the Air Force on March 31, 1954. Major Logan served in the 92nd Bomb Wing, Spokane AFB, 325th Bomb Squadron, 92nd Bomb Group, APO 328.

Request 6

All records concerning Ensign Dwight Clark Angell, USNR service number 552173, born August 17, 1928, who was serving aboard a Navy P2V-5, Squadron VP-22, when it was downed on January 18, 1953.

Request 7

All records concerning Aviation Machinist Mate 1st Class Lloyd Smith Jr., USN service number 6306390, born August 21, 1922. He served aboard a Navy P2V-5, Aviation Squadron VP-22, when the aircraft was downed on January 18, 1953.

Request 8

All records concerning Air Force 1st Lieutenant John Henry Zimmerlee, Jr., service number AO1998932, born on December 6, 1911. Lieutenant Zimmerlee served as navigator aboard a B26C (No. 44-34417) in the Air Force 730th Bomb Squadron, when it was downed on March 21, 1952.

Request 9

All records regarding Master Sergeant Robert Bibb, Army Company C, 3rd Engineer Combat Battalion, 24th Infantry Division, service number RA-19076631, born December 6, 1911, captured on July 20, 1950 in Tuejon, South Korea.

Request 20:

All records relating to any of the POW/MIAs named in the attached list. (The only names not appearing on that list in the *Moore* case are Harry Cecil Moore and Dwight Clark Angell.) (The FOIA request regarding Harry Moore warrants explanation: The CIA asserted a *Glomar* response to Plaintiffs' request for information on Harry Moore, but not on any of the 135 names on the list, which the Court accepted because "plaintiffs' requests 5 and 6 are considerably more specific and ask for records upon which specific statements and documents were based. Pls.' Mot. 31 n. 18. Plaintiffs' request 15 is far broader and asks merely for documents relating to any of the 135 names on the list." *Mem. Op.* ECF No. 40 n. 2 at 14. Plaintiffs' proposed Amended Complaint (ECF No. 40) sought to narrow the request "to strike all references to records upon which specific statements and documents were based" (*Motion for Leave to Amend* ECF No. 42-1 ¶ 9), but the Court declined to proceed on the Amended Complaint. ECF No. 46 at 5.)

POWs.³ The other two FOIA requests regard the CIA's April 1998 National Intelligence Estimate ("NIE") *Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*. One FOIA request seeks disclosure of redacted portions of Senator Smith's 1998 critique of that NIE.⁴ The other seeks full release of the CIA's February 2000 reply to Senator Smith's charges, *Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by a Critical Assessment of the Estimate*.⁵

Moore litigation. The balance of Plaintiffs' FOIA requests seek information sought in the *Moore* case. Of the 12 Plaintiffs in this case, four were Plaintiffs in *Moore*.⁶

By Motion filed August 25, 2022, Plaintiffs sought to amend their Complaint to, *inter alia*, include a count for *Improper Withholding of Operational Files under 50 U.S.C. § 3141(f)*.

³ Request 10

All records regarding David Louis Hrdlicka, shot down and captured over Laos on May 18, 1965 while piloting an F-105, initially incarcerated in Sam Neua, Laos, at the Pathet Lao Headquarters, and held in Laos at least as late as 1989.

Request 11

All records regarding James Kelly Patterson, shot down and captured over North Vietnam on May 19, 1967, while serving as navigator of the American F-51 piloted by Captain Eugene McDaniel, including Patterson's incarceration, interrogation, and transportation from North Vietnam to the Soviet Union, where he was held as late as 1991.

⁴ Request 28

The redacted portions of the November 1998 *Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*, by Senator Bob Smith.

⁵ Request 27

The withheld-in-full version of the CIA's February 2000 *Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by A Critical Assessment of the Estimate*.

⁶ Four individuals, Robert Moore, Jana Orear, Christine Omalley, and Mark Sauter, are plaintiffs in both cases. There are 12 plaintiffs in the instant matter. The new eight plaintiffs are David Logan, Megan Marx, John Zimmerlee, Terri Mumley, Michael Driggs, Carol Hrdlicka, Thomas Michael Logan, and the POW Investigative Project, Inc.

ECF No. 42-1. On March 30, 2023, the Court denied plaintiffs' motion. "In the specific context of FOIA cases," the Court held, "courts in this District have recognized the significant time and resources required to prepare for summary judgment in such cases and the prejudice that results from putting all that effort to waste, and have accordingly denied motions for leave to amend when summary judgment briefing was underway." *Moore v. CIA*, No. 1:20-cv-1027, ECF No. 46 at 2. (Citations omitted). The Court held that proceeding on an amended Complaint would prejudice defendant, and that it would be futile. On April 24, plaintiffs dismissed their cause.

On August 24, 2023, the Plaintiffs filed the instant action.

Collateral Estoppel. Plaintiffs do not dispute the Court's observations that "[t]he voluntary dismissal of the *Moore* case does not prevent the application of issue preclusion" (Order ECF No. 18), and that the CIA "need not produce the items on the *Moore* Document List in this Litigation." *Id.*

Plaintiffs are not, however, *collaterally estopped* from raising the issue of a search of the CIA's operational files. "The doctrine of *collateral estoppel* precludes parties to a prior action and their privies from litigating in a subsequent action any factual issue that actually was litigated and essential to a valid, final judgment in the prior action." *United States v. Fiel*, 35 F.3d 997, 1005 (4th Cir. 1994). The issue was not litigated, notwithstanding Plaintiffs' request that the Court do so.

Operational files. Count III of Plaintiffs' Complaint, *Improper Withholding of Operational Files under 50 U.S.C. § 3141(f)*, states:

26. Plaintiffs' FOIA Request include their request to "kindly include the operational files repositories in the search, pursuant to the exception provided by 50 U.S.C. § 3141."
27. 50 U.S.C. § 3141(f)(3) states that "when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a

- sworn written submission, based upon personal knowledge or otherwise admissible evidence."
28. Attached hereto as Exhibit B is the Affidavit of the former Vice-Chairman of the Senate Select Committee on POW/MIA Affairs, 1989 to 1993, Senator Bob Smith. Mr. Smith wrote that he "personally [has] seen hundreds of classified documents that could and should be released as they pose no national security risk."
 29. Attached hereto as Exhibit C is the Affidavit former CIA official Kevin Shipp, whose expertise includes classification authority. Mr. Shipp wrote that "[d]ocuments relating to the fate of POWs, including those transferred to Russia or China, can clearly be released, at least in part, without revealing the identity of any confidential source." Release would "cause no harm to international relations or ongoing diplomatic activities. Given the age of these records, there is no longer any justification for continuing to treat them as 'operational records' under 50 U.S.C. § 3141."
 30. The CIA has "improperly withheld [responsive records] because of improper placement solely in exempted operational files." 50 U.S.C. § 3141(f)(3).
 31. 50 U.S.C. § 3141(f)(5) provides plaintiffs the opportunity to propound Request for Admissions.

In the analogous case of *Hall v. CIA*, CA 04-814 ECF No. 340 at 2-3, USDC DC, Aug. 2, 2019, seeking disclosure of Vietnam era POW records, the Court ordered the CIA to search its operational files, "given the age of these alleged records, and the Court's corresponding difficulty imagining why they would still be operational." Citing Senator Smith's affidavit in that case, the Court held:

When a FOIA requester "disputes" the adequacy of CIA's search "with a sworn written submission based on personal knowledge or otherwise admissible evidence" suggesting "improper exemption of operational files," a court can order CIA "to review the content of any exempted operational file or files" and to submit a "sworn written submission" supporting the claimed exemption. § 3141(f)(2), (f)(4)(A)-(B); *accord, e.g., Judicial Watch, Inc. v. Cent. Intelligence Agency*, 310 F. Supp. 3d 34, 41-42 (D.D.C. 2018) (Jackson, K.B., J.). Plaintiffs do so here with—among other things—an affidavit by former Congressman Bob Smith swearing "without any equivocation that [CIA is] still holding documents that should be declassified"; and that "could and should be released as they pose no national security risk."

The *Hall* case involved POW records that were up to 50 years old, whereas this case seeks records that are up to 75 years old. The plaintiffs here rely on the personal knowledge of

that same affiant as the *Hall* case,⁷ as well an expert's affidavit—both of which are “based on personal knowledge or otherwise admissible evidence” under § 3141(f)(2).

CONCLUSION

Defendant is required to conduct a search of its operational files under 50 U.S.C. § 3141.

Date: March 22, 2024.

Respectfully submitted,

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⁷ Senator Smith's November 10, 1992 Report, *Chronology of the Policy Intelligence Matters Concerning Unaccounted For U.S. Military Personnel at End of the Korean Conflict and During the Cold War*, is reprinted in its entirety in his Affidavit submitted with the Complaint.