

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

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

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**DEFENDANT’S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS’  
REQUEST FOR A SEARCH OF THE CIA’S OPERATIONAL FILES**

Pursuant to the Court’s Order of March 13, 2024 (Dkt. 18) and accompanying remarks from the Bench, Defendant Central Intelligence Agency (“CIA”), through its undersigned counsel, respectfully submits this memorandum of law in opposition to Plaintiffs’ request for a search of the CIA’s operational files.

**INTRODUCTION & BACKGROUND**

As the Court is aware, this is a Freedom of Information Act (“FOIA”) action involving a request for records regarding prisoners of war from the Korean and Vietnam Wars – one that substantially overlaps with a FOIA request and litigation in *Moore v. CIA*, 1:20-cv-1027 (D.D.C.).<sup>1</sup> On March 13, 2024, the Court held a status conference in this action. In addition to addressing the merits of the CIA’s then pending motion for clarification, the Court authorized Plaintiffs, to the extent they believed it useful, to submit a preliminary brief on legal issues they believed to be in dispute. Defendant’s Exhibit (“DEX”) 1 at 6:6-22. In their recently-filed memorandum, Plaintiffs

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<sup>1</sup> In addition to *Moore*, as noted further below, some of Plaintiffs’ requests overlap with requests made in at least one other civil action. *See generally Hall v. CIA*, 1:04-cv-814 (D.D.C.).

suggest that their request in this case raises 10 new requests not at issue in *Moore*, and without any accompanying formal motion seeking relief from this Court (as required by Local Civil Rule 7), ask this Court to order CIA to search its operational files. *See generally* Dkt. 19 (hereinafter “Mem.”).

*First*, of the 10 requests that Plaintiffs identify as “novel” here, at least 7 were at issue in *Moore* or one at least other action.

*Second*, Plaintiffs have not come close to meeting their evidentiary burden to justify a search of the CIA’s operational files under the governing statute, 50 U.S.C. § 3141. Through the CIA Information Act, Congress exempted the CIA from having to search for, and then review, any record falling within the statutory definition of “operational files” unless a FOIA requestor makes a substantial evidentiary showing; namely, pursuant to 50 U.S.C. § 3141(f), that the CIA either improperly misplaced otherwise non-exempted records within its “operational files” or improperly withheld non-exempted records as “operational files.” Despite this clear statutory language, Plaintiffs assert that the CIA must search its “operational files” simply because of the age of the requested records. Setting aside that Plaintiffs previously (and unsuccessfully) raised this very issue in *Moore*, merely contending that the records are old does not discharge Plaintiffs of their obligation to show, with admissible evidence, that the CIA improperly misplaced responsive records in its operational files or improperly withheld records as operational files. Indeed, the statutory definition of “operational files” has nothing whatsoever to do with a file’s age, classification status, or ability to affect national security. Accordingly, Plaintiffs have not met their burden to justify a search of the CIA’s operational records, and their request for such a search should be denied.

## ARGUMENT

### **I. Several of the Requests Plaintiffs Identify Overlap with the Requests in *Moore* and at Least One Other Previous Action**

Plaintiffs first represent that there are “ten” requests in this case that “are not duplicative of those that were the subject of the *Moore* litigation.” Mem. at 2 n.2. At the outset, it bears mentioning that some perfunctory differences between the specific FOIA requests here and those that were the subject of *Moore* do not change the fact that many of the *legal issues* litigated and ultimately adjudicated in *Moore* are identical to those presented here. But, in any event, Plaintiffs’ representations are not accurate. At least five of Plaintiffs’ identified requests were at issue in *Moore*. Specifically, Requests numbers 5, 7, 8, 9, and 20 overlap with and are identical to *Moore* Request 15.<sup>2</sup>

*Moore* Request 15 sought “[a]ll records relating to any of the POW/MIAs named in the attached list.” DEX 2 at 7. The “attached list” referenced in *Moore* Request 15, DEX 2 at 30-32, includes the names of the POW/MIAs identified in Requests 5 (Samual Porter Logan Jr.), 7 (Lloyd Smith Jr.), 8 (John Henry Zimerlee, Jr.), and 9 (Robert Bibb) here. Compare Compl. ¶ 16 (Dkt. 1 at 7-8), with DEX 2 at 30, 31, 32 (identifying each of individuals at issues in Requests 5, 7, 8, and 9). Accordingly, a search for records of persons listed on the *Moore* list would capture the records identified for Requests 5, 7, 8, and 9 here. That Plaintiffs here elected to write separate requests for these POWs, even though those names were present on the *Moore* list, does not change this basic fact.

Similarly, there is substantial overlap between *Moore* Request 15 and Request 20 in this case. Request 20 here, like *Moore* Request 15, seeks “[a]ll records relating to any of the

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<sup>2</sup> The FOIA request from *Moore* has been submitted as DEX 2. See also *Moore v. CIA*, Dkt. 9-1, 1:20-cv-1027 (D.D.C. July 6, 2020).

POW/MIAs named in the attached list.” Compl. ¶ 16 (Dkt. 1 at 9); *see also* Dkt. 1-1 at 34-36 (the “attached list” referred to in Request 20 for this case). As Plaintiffs’ state, “[t]he only names not appearing” on Request 20’s list for this case is Harry Cecil Moore and Dwight Clark Angell. Mem at 2 n.2. Although this is true, the CIA notes that in *Moore*, specifically *Moore* Request 4, Plaintiffs’ previously sought records regarding Harry Cecil Moore. DEX 2 at 4. In addition, the *Moore* requestors later amended *Moore* Request 15 by specifically requesting that Henry Cecil Moore be listed as one of the names in *Moore* Request 15. *See generally* DEX 8. In effect then, the only name that does not appear on the *Moore* list, but does appear on the list here, is Dwight Clark Angell.<sup>3</sup> That is why the CIA agrees that Request 6 in this case, a request for records for Dwight Clark Angell, was not at issue in *Moore*; however, this request would have been encompassed by requests and searches in another case previously brought by some of the Plaintiffs. *See generally Sauter v. Dep’t of State*, 1:17-cv-1596-RCL (D.D.C.) (FOIA case regarding fates of American POW/MIA airman in Korean War). In all other respects, however, *Moore* Request 15 is identical to Request 20 here.

In short, Requests 5, 7, 8, 9, and 20 in this case seek records previously sought in *Moore* and thus do not present novel questions for this Court to consider should challenges to the CIA’s searches or withholdings be raised.

Separate and apart from *Moore*, there is yet another civil action that litigated the propriety of the CIA’s response to two requests for records that are identical to those presented here. *See generally Hall v. CIA*, 1:04-cv-814 (D.D.C.). In *Hall*, requestors sought records “relating to 44

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<sup>3</sup> As Plaintiffs state in their complaint, both Dwight Angell and Lloyd Smith (among others) were aboard a Navy P2-V Neptune airplane on January 18, 1953 when it was downed. Neither individual was rescued but Plaintiffs indicate that they believe the survivors of this crash were turned over to communist custody. Dkt. 1-1 at 3; *see also* Dkt. 1-2, ¶ 63.

individuals who allegedly are Vietnam era POW/MIAs . . . named on attachment 2.” Administrative Record, Dkt. 114-1, *Hall v. CIA*, 1:04-cv-814 (D.D.C. Dec. 17, 2009), DEX 5 at 11. On that list included the names David Lous Hrdlicka and James Kelly Patterson, DEX 5 at 68-69, which are the same individuals at issue in Requests 10 and 11 in this case. Thus, while Plaintiffs are correct that Requests 10 and 11 were not at issue in *Moore*, Mem. at 3 n.3, those requests were previously litigated in *Hall*.

## **II. Plaintiffs’ Request to Search Operational Files was Addressed in *Moore*, and the CIA is Statutorily Exempt from Searching Such Files**

Plaintiffs request that this Court order a search of the CIA’s operational files. Relevant to this threshold question of whether the CIA must search its operational files is 50 U.S.C. § 3141. That provision establishes the types of CIA records that constitute “operational files” and the CIA’s FOIA obligations regarding these records. 50 U.S.C. § 3141(b), (c)-(d). At a general level, operational files “memorialize the conduct and means of the government’s foreign intelligence and counterintelligence efforts,” and are thus “the most sensitive of the CIA’s records . . . need[ing] an extra measure of protection.” *Sullivan v. CIA*, 992 F.2d 1249, 1251 (1st Cir. 1993). For two independent reasons, the Court should deny Plaintiffs’ request to search its operational files.

A. First, as the Court indicated during the March 13 status conference, “we’re not relitigating something that’s already been done” because “[a]nything that Judge Lamberth ruled on that was at issue in [*Moore*] is gone.” DEX 1 at 3:23-24, 4:16-17. And yet, Plaintiffs’ request for a search of CIA’s operational files does just that—using the same argument and evidence Plaintiffs used to seek review of withheld records in *Moore*. As Judge Lamberth ruled when addressing this issue any request to search and review the CIA’s operational files was “futile.” *See generally*, Mem. Oder, Dkt. 46, *Moore v. CIA*, 1:20-cv-1027 (D.D.C. Mar. 30, 2023), DEX 3.

More specifically, in *Moore*, just after Judge Lamberth there ruled on the parties' cross motions for summary judgment, Plaintiffs—using the exact same affidavit (executed by Kevin Michael Shipp in August 2022) that they use here—sought leave to amend their Complaint to include a count for relief of “improper classifications and withholdings of operational files under 50 U.S.C. § 3141” (*i.e.*, the same as Count II of Plaintiffs' complaint here). DEX 3 at 1. Judge Lamberth rejected Plaintiffs' position, holding that any such amendment “would also be futile.” DEX 3 at 4. Judge Lamberth reasoned that the Shipp affidavit's assertion “that the records sought are so old that they can no longer be considered operational records, an opinion that he bases entirely on a section of an Executive Order that applies to records in the possession of the National Archives, not the CIA” could not support Plaintiffs' request for a search of the CIA's operational files. DEX 3 at 4.

The exact same Shipp affidavit that Judge Lamberth cast aside in *Moore* serves as the principal support for Plaintiffs' renewed request for the CIA to search and review its operational files here. *See* Mem. at 5. *Compare* DEX 4 (Shipp affidavit submitted in *Moore*), with Dkt. 1-3 at 1-3 (Shipp affidavit submitted in this action). In effect, Plaintiffs are thus seeking a new opinion from this Court on the identical argument that Judge Lamberth rejected. This Court should therefore decline the Plaintiffs' invitation to again consider this issue involving the CIA's operational files.

B. Second, even if this Court elects to revisit Judge Lamberth's ruling on this issue, Plaintiffs have not come close to meeting their burden to justify a search of the CIA's operational records. Importantly, § 3141 authorizes the CIA to *exclude* these files from its search, review, and release obligations under FOIA. 50 U.S.C. § 3141(a), (c); *accord Morley v. CIA*, 508 F.3d 1108, 1116 (D.C. Cir. 2007) (“Operational files are exempt from FOIA disclosure under the CIA Act.”);

*Sullivan*, 992 F.2d at 1251 (“The Information Act addressed the problem by excusing the CIA from searching its operational files in response to most FOIA requests.”). Stated succinctly, the “CIA Information Act makes clear that the agency need not even *search* its exempted operational files for requested information.” *Judicial Watch, Inc. v. CIA*, 310 F. Supp. 3d 34, 38 (D.D.C. 2018). There are only three very limited circumstances in which a search of operational files is required—none of which are present here (as Plaintiffs concede through their silence on this issue). 50 U.S.C. § 3141(c); *Talbot v. U.S. Dep’t of State*, 315 F. Supp. 3d 355 (D.D.C. 2018); *Smith v. CIA*, 246 F. Supp. 3d 117, 123 (D.D.C. 2017). Because none of those circumstances requiring a search under § 3141(c) are present here, the general rule applies—the CIA is not required to search its operational files for this FOIA request.

Despite the clear statutory exemption of operational files from the CIA’s search and review obligations under FOIA, the statute nevertheless provides an avenue, albeit an extremely narrow one, for a FOIA requestor to challenge the CIA’s determination with respect to operational files. *See generally* 50 U.S.C. § 3141(f). As a preliminary matter, because Plaintiffs’ filed their Complaint before any documents were produced or withheld, and because the release of responsive records currently continues such that all withholding determinations have not been made, Plaintiffs’ assertion of 50 U.S.C. § 3141(f)(3) is premature.<sup>4</sup> But perhaps more importantly, the avenue of relief authorized through § 3141(f) requires a FOIA requestor to meet an exacting standard before obtaining any judicial relief; namely, a FOIA requestor must allege that the “requested records were improperly withheld because of improper placement solely in exempted operational files” and must support that “allegation with a sworn written submission, based upon

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<sup>4</sup> The statute’s other avenue may only be properly asserted *after* the CIA decides to withhold a responsive record based on its status as an operational file. *See* 50 U.S.C. § 3141(f)(4)(A). As of this filing, the CIA has not withheld responsive records based on this reasoning.

personal knowledge or otherwise admissible evidence.” *Id.*; *see also Judicial Watch*, 310 F. Supp. 3d at 41 (explaining the minimal pathways a requestor can seek judicial intervention in operational files matters).

Plaintiffs have not met their burden under the statute to merit a search of the CIA’s operational files. Indeed, Plaintiffs have provided neither allegations nor written affidavits with admissible evidence that the CIA has improperly placed responsive records within the operational files. First, consider Plaintiffs’ allegations. When Plaintiffs initiated this lawsuit, they alleged that “CIA has failed to respond to plaintiffs’ request for information.” Compl. ¶ 19. Accordingly, there was (and still is) no factual basis for Plaintiffs to allege that the CIA “improperly withheld” records as operational files under statutory provision. *See* 50 U.S.C. § 3141(f)(4)(A). Moreover, an allegation that records were “improperly withheld” is *not* the equivalent of arguing that the records were “improperly placed.” *See* 50 U.S.C. § 3141(f)(3). Those are separate avenues for obtaining relief concerning the CIA’s search and withholding of operational files. *Judicial Watch*, 310 F. Supp. 3d at 41. To be sure, Plaintiffs’ Complaint references the applicable statutory provision, Compl. ¶¶ 26-27, but those allegations merely parrot the statutory language. Those type of threadbare legal conclusions are hardly appropriate to satisfy the burden the statute places on a FOIA requestor. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Second, as Judge Lamberth previously recognized, Plaintiffs’ affidavits do not come close to meeting their burden to establish, with admissible evidence, that the CIA improperly withheld or improperly placed non-exempt records in its operational files.<sup>5</sup> As Plaintiffs openly

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<sup>5</sup> In support, Plaintiffs submitted affidavits from Bob Smith (Dkt. 1-2) and Kevin Shipp (Dkt. 1-3). It is unclear whether each affiant separately executed his respective affidavit contemporaneously with the timing of Plaintiffs’ Complaint with knowledge of this lawsuit. Indeed, the case caption is missing from each affidavit, Dkt. 1-2 at 1; Dkt. 1-3 at 1; the Smith signature, which likely is the same declaration that was in *Moore*, 20-cv-1027, Dkt. 25-1 (D.D.C.),

acknowledge, these affidavits only establish that the requested records are old, and – in Plaintiffs’ subjective view – are thus unlikely to be “operational files.” *See* Mem. at 5-6. But this “evidence” hardly suffices to meet Plaintiffs’ evidentiary burden to show that records were improperly misplaced in operational files or that records were improperly withheld as operational files. The statutory definition of “operational files” confirms this—clearly providing that a record’s status as an operational file is wholly unconnected from its age and classification. *See* 50 U.S.C. § 3141(b). To that end, Plaintiffs’ assertions regarding the age of the records or whether the records (again in their subjective view) should remain classified have *no* bearing whatsoever as to whether the underlying record is in fact an exempt operational record under § 3141. *See* Mem. at 5. Stated differently, whether a document is properly classified is a different question from whether a document is properly categorized as operational.

A record’s status as an operational file is keyed to the information it contains—usually information about “foreign intelligence or counterintelligence.” *Id.* Time—or the age of a particular record—is only relevant to the CIA’s decennial review under 50 U.S.C. § 3141(g). But that provision, § 3141(g), only permits the Court to ensure that the CIA has *examined* whether a record should remain as an exempt operational file. It does not provide an independent basis to mandate a search of records that meet the statutory definition of an operational file. *Cf. Hunt v. CIA*, 981 F.2d 1116, 1121 (9th Cir. 1992) (“Congress recognized that CIA operational files rarely contain documents disclosable under FOIA, and that FOIA search and review requirements created a risk of ‘accidental or unintended disclosure of sensitive material from operational files in the FOIA process.’” (quoting H.R. Rep. No. 726, 98th Cong., 2d Sess. Pt. 1, 10 (1984))).

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appears to be pasted from another document under a new date, suggesting that former Senator Smith has not seen or signed this specific filing, Dkt. 1-2 at 51; and the Shipp affidavit appears identical to the one filed in *Moore*, *see supra* at 5-6.

While Plaintiff’s point to *Hall* as decisional authority to support their contention that age is a relevant factor for consideration, Mem. at 5-6, Plaintiffs misrepresent the holding in *Hall*. See generally Mem. Op. Dkt. 340, *Hall v. CIA*, 1:04-cv-814 (D.D.C. Aug. 2, 2019), DEX 6. *Hall* is inapposite given the significant differences in the evidentiary record that merited a search in *Hall*.<sup>6</sup> In 2019, Judge Lamberth ordered the CIA in *Hall* to search its operational files based on *multiple* affidavits—to include an affidavit by former Senator Bob Smith speaking generally about the Intelligence Community—that attested to the existence of specific, potentially responsive documents.<sup>7</sup> DEX 6 at 2. For example, former Congressmen John LeBoutillier and Bill Hendon declared that the CIA showed them images in the early 1980s of POWs in southeast Asia. DEX 6 at 2. However, following CIA’s court-ordered search of its operational files (which revealed *no responsive records*), Judge Lamberth refined his position. See generally Mem. Op., Dkt. 385, *Hall v. CIA*, 1:04-cv-814, (D.D.C. July 7, 2022), DEX 7. The *Hall* court, despite having “previously credited” the affidavits as “positive indications of overlooked materials”, subsequently recognized that because:

a document [might have] once existed does not mean that it now exists ... This logic applies to the statements of Toll, the statements of Sanders and Senator Smith, as well as additional statements tending to establish the existence of records shown to Congress in the past. Files once displayed to plaintiffs’ declarants need not exist thirty to fifty years later. In like fashion, plaintiffs’ varied and voluminous references to documents and exhibits, some of which the CIA has previously released, do not demonstrate that the CIA possesses related files. ‘Mere reference to other files does not establish the existence of [relevant] documents.’

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<sup>6</sup> At one point in the case, Judge Lamberth suggested that given the “age of these alleged records” the court had difficulty “imagining why they would still be operational.” DEX 6 at 2-3. But again, a record’s age or its classification status does not make it an operational file—something that Judge Lamberth later concluded when denying the FOIA requestors leave to amend in *Moore*. DEX 3 at 4; see also 50 U.S.C. § 3141(b) (defining “operational file”).

<sup>7</sup> By contrast, the Smith declaration in this matter is far less specific than the Smith declaration that Judge Lamberth initially “credited” in *Hall*.

DEX 7 at 8 (citing *Morley v. CIA*, 508 F.3d 1108, 1121 (D.C. Cir. 2007)). Plaintiffs' evidence must demonstrate the CIA improperly withheld or improperly placed non-exempt records in its operational files, not that they are entitled to files because of their age and that they may exist among CIA's records.

In sum, the CIA is right to decline searching its operational files here. Those files are exempt from the FOIA's search and review provisions, it was an issue previously addressed in *Moore*, and Plaintiffs have not come close to meeting their evidentiary burden to require such a search under the statutory provisions. This Court should therefore deny Plaintiffs' request for a search of the CIA's operational files.

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Notwithstanding any impasse that exists between the parties on the matter of operational files, the CIA continues to work through Plaintiffs' FOIA request. Consistent with the Court's March 13, 2024 Order (Dkt. 18), the CIA is set to meet and confer with Plaintiffs regarding a production schedule and then address the outstanding issues that may later arise in this case that cannot be resolved now. Of course, it is the CIA's goal to minimize or eliminate the need for judicial intervention. The CIA will thus work with Plaintiffs regarding any challenge that they may raise, assuming it was not previously raised in *Moore*, regarding the search, redactions, and withholdings of responsive records to their request in this case.

### **CONCLUSION**

Defendant therefore respectfully requests that the Court deny Plaintiffs' request for a search of the operational files.

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