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

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

PLAINTIFFS' MEMORANDUM IN REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' PRAYER THAT DEFENDANT BE ORDERED TO SEARCH ITS OPERATIONAL FILES UNDER 50 U.S.C. § 3141

COME NOW Plaintiffs, by counsel, and respectfully submit their reply to *Defendant's Opposition to Plaintiff's Request for a Search of the CIA's Operational Files*, ECF No. 21 (hereinafter "*Def. Op.*").

Defendant advances two arguments in opposition to Plaintiffs' request that the Court order the CIA to search its operational records. It posits that the issue has already been adjudicated, and that Plaintiffs have not met their burden under 50 U.S.C. § 3141.

Collateral estoppel and Operational files. Either the matter is barred by *collateral estoppel*, or it is not. Defendant cites *no* authority in support of its position—because the issue of the search of operational files is properly before this Court.

"Specifically," the court in *Weinberger v. Tucker*, 510 F.3d 486, 491 (4th Cir. 2007) stated, "the proponent of issue preclusion must demonstrate that:

(1) the parties to the two proceedings, or their privies, be the same;
(2) the factual issue sought to be litigated must have been actually litigated in the prior action and must have been essential to the prior judgment; and
(3) the prior action must have resulted in a valid, final judgment against the party sought to be precluded in the present action.

Here, the CIA implies that the issue was actually litigated. It was not, contrary to the Plaintiffs' request that the Court do so. Defendant would seek to rely on the *Moore* court's reasoning in denying Plaintiffs' motion for leave to amend their Complaint to, *inter alia*, include a count under 50 U.S.C. § 3141. The *Moore* court held that proceeding on an amended Complaint would unduly prejudice the CIA[1] and that it would be futile because the plaintiffs had not met their burden under 50 U.S.C. § 3141. The court held that plaintiffs could not litigate under 50 U.S.C. § 3141. It was not a ruling on the statute's applicability.

But even if the ruling in *Moore*—that plaintiffs could not amend their Complaint—is construed as a ruling on the viability of the proposed § 3141 count, the law is clear that there is no preclusive effect here. The court's holding in *Hately v. Watts*, 917 F.3d 770, 779 (4th Cir. 2019) reversed the district court's application of *collateral estoppel* under the same circumstances:

> When, as here, a prior court's explanation for its grounds for dismissing a prior action is amenable to multiple interpretations, courts decline to hold that the prior court disposition has preclusive effect in subsequent litigation. For example, in *Mitchell v. Humana Hospital-Shoals…* the Eleventh Circuit held that the district court erred in holding that the doctrine of issue preclusion barred the plaintiff from relitigating whether she had just cause to resign. *Id*. at 1583–84. In reaching this conclusion, the court emphasized that there were at least two reasons the prior court may have dismissed the earlier worker's compensation action…

In denying the plaintiffs' motion for leave to amend their complaint, the *Moore* court held that "allegations of improper withholdings of operational files" would not have been met

---

1 *See Plaintiffs' Memorandum of Law in Support of Order for Defendant to Search its Operation Files under 50 U.S.C. § 314*, ECF No. 19 at 4: "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.

solely by Mr. Shipp's affidavit.[2] *Mem. Order* at 4. In defendant's view, because plaintiffs in both cases rely on Mr. Shipp's affidavit, the issue was litigated, and decided.

But here the Plaintiffs here do not rely solely on Mr. Shipp's affidavit. Senator Bob 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. *Complaint* ECF No. 1-2. He relates that he "personally [has] seen hundreds of classified documents that could and should be released as they pose no national security risk." *Id*. ¶ 5. (Defendant characterized Senator Smith's 51-page affidavit as "far less specific than the Smith declaration that Judge Lamberth initially 'credited' in *Hall*." *Def Op*. Note 7 at 10.)

And it was this very same affiant that Judge Lamberth had relied on in *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

---

[2] The Court in *Moore* was unaware that the record included Senator Smith's Affidavit (ECF No. 25-1). Plaintiffs chose not to point this out in a motion to reconsider because Judge Lamberth would not have allowed the amendment in any event. Plaintiffs approach is consistent with the rationale for disallowing *collateral estoppel* when a court's decision can be based on more than one reason under *Hately* (*infra*). Defendant incorrectly states that the Court in *Moore* relied on Plaintiffs affidavit***s***—plural. *Def Op*. at 8.

> 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."

Defendant seeks to distinguish *Hall* by claiming that "Judge Lamberth ordered the CIA in *Hall* to search its operational files based on *multiple* affidavits…" because two Congressmen "declared that the CIA showed them images in the early 1980s of POWs in southeast Asia." *Def. Op*. at 10. Actually, the Court in *Hall* recounted that the "CIA showed them aerial images of prisoner-of-war camps." *Mem. Op.* at 3. In any event, the court in *Hall* relied primarily, if not exclusively, on Senator Smith's affidavit. Moreover, here too Plaintiffs seek relief under 50 U.S.C. § 3141 based on multiple affidavits.

Collateral estoppel and requests for information on two Vietnam War POWs. Defendants fare no better in their argument that items 10 and 11 for records on two Vietnam War POWs, David Hrdlicka[3] and Kelly Patterson,[4] are barred here. Defendants argue that "the propriety of the CIA's response to [these] two requests for records" was litigated in *Hall v. CIA*, 1:04-cv-814 (D.D.C.). *Def. Op*. at 4. Here too defendant ignores the law of *collateral estoppel*. "The doctrine of *collateral estoppel* precludes parties to a prior action and their privies from

---

[3] *Complaint* ECF No. 1 ¶ 16:
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.

[4] *Id*:
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.

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). Caselaw is clear that there is no "final judgment" while a case is on appeal. *See Accuracy in Media, Inc. v. CIA*, D.C. Circuit No. 22-5235. (The CIA did not appeal the district court's holding that the CIA must search its operational files—even while it admits that it did not search its operational files for information on Hrdlicka or Patterson.)

Moreover, Plaintiff Carol Hrdlicka, David's wife, and Plaintiff George Patterson, Kelly's brother, were not parties in the *Hall* case.

50 U.S.C. § 3141. Defendant posits that Plaintiffs have not met their burden under 50 U.S.C. § 3141. "To be sure," Defendant states, "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." *Def. Op*. at 8, citation omitted. Defendant's assertion is bald, without any analysis whatsoever. Other than incorrectly reciting that Plaintiffs rely solely on the age of the records,[5] Defendant fails to state why, exactly, the following paragraphs of plaintiffs' Complaint are insufficient under 50 U.S.C. § 3141.

---

[5] *Def. Op*. at 2, 9:
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. *** As Plaintiffs openly 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).

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."

Collateral estoppel bars litigating the search of four Korean War POWs. The CIA notes, correctly, that, in the *Moore* case, it searched its non-operational files for four Korean War POWs that Plaintiffs had mistakenly identified as new requests; Air Force Major Sam Logan, Navy Machinist Lloyd Smith, Air Force Lieutenant John Zimmerlee, and Army Sergeant Robert Bibb. But the CIA is required to search its operational files for information on these four individuals, as well as for Harry Moore.

Conclusion

The CIA seeks to bar an issue that was not actually litigated in the prior action, and was not essential to the prior judgment.

Date: April 10, 2024.

Respectfully submitted,

/ s/ John H Clarke
John H. Clarke (VSB No. 023842)
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 344-0776
john@johnhclarkelaw.com
Attorney for Plaintiffs