UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS MOTIONS FOR SUMMARY JUDGMENT

Defendant Central Intelligence Agency ("CIA") hereby submits this reply in support of its motion for partial summary judgment and in opposition to Plaintiffs' Cross Motions for Partial Summary Judgment. The administrative record is fully summarized in CIA's Motion and in the accompanying Declarations of Scott Koch ("Koch Decl.") and Ralph DiMaio ("DiMaio Decl.").

ARGUMENT

I. CIA IS LEGALLY OBLIGATED TO REFER THIRD AGENCY RECORDS AND INFORMATION TO THE RELEVANT AGENCIES PRIOR TO RELEASE.

Plaintiffs Mr. Hall and SSRI ("Hall") object that CIA has not produced documents it has referred to third agencies for review and/or release directly to the requestors and proposes that CIA simply advise those agencies that they have waived any FOIA exemptions, should they not reply by a date certain. Hall Cross Motion and Opposition ("Opp.") (Dkt. Nos. 116 and 117), at 3-4. This suggestion displays a complete misunderstanding of the FOIA referral process. CIA is, in fact, obligated by Executive Order to coordinate with the appropriate agencies when it

locates third agency records or information responsive to a FOIA request. E.O. 13292 3.6(b). This requirement ensures the best agency makes release decisions . (There is a presumption that the agency originating the record at issue is best able to determine whether to disclose it) 28 C.F.R. 16.4(c)(2). Furthermore, it potentially prevents the unauthorized disclosure of classified information that may be contained in those records.

While Mr. Hall is correct when he states that an agency may not refuse to act when it finds third agency documents (Hall Opp. at 4), CIA has not done so here. CIA has, in fact, referred those documents to the appropriate agency with the caveat that this case was in litigation. CIA, however, does not have the legal authority to declassify information or records originating from another agency, to waive FOIA exemptions on another agency's behalf, or to compel another agency to act under any specific deadlines.

Moreover, CIA is not seeking summary judgment in this case on those referred records. Granting partial summary judgment in this case, therefore, would not prejudice the plaintiffs with respect to any future attempts to litigate any withholdings that may be taken on the referred documents.

II. CIA SEARCHES WERE ADEQUATE.

A. The failure to produce specific records does not undermine the adequacy of CIA searches.

Plaintiffs attempt to challenge the adequacy of CIA record searches by alleging that CIA did not produce specific records that Hall either obtained from other sources, or otherwise believes exist. (Hall Opp. at 6-16, AIM Opp. at 5-21). This argument fails for several reasons. First, as more fully briefed in CIA's Motion for Partial Summary Judgment ("Opening Brief", Dkt. No. 109, Section III.A.), the failure to locate specific records is not an indication that agency searches were inadequate. Steinberg Ford v. Dep't of Justice, 2008 WL 2248267

(D.D.C. May 29, 2008); Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1352 (D.C. Cir. 1983)(the reasonableness standard focuses on the search, not its results); Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 892 n.7 (D.C. Cir. 1995)(agency does not have to prove it located all responsive documents).

Second, the evidence Mr. Hall offers that responsive records are maintained by CIA that he did not receive in response to his FOIA request is not only inadmissible,[1] but also does not support his argument that these records now exist at CIA. For example, Mr. Hall argues that CIA did not provide him with records described as "briefing boards", "documents Hall obtained from various POW family members", or records regarding a DIA meeting dated December 30, 1980. (Hall Opp. at 8-11). Nothing about how Mr. Hall characterizes these documents indicates these are records originated or maintained by CIA. Similarly, Hall cites to the testimony of various individuals (e.g. "Ambassador Sullivan", "General Secord", "Jan Sejna" and "Richard Allen"), arguing that CIA did not provide records referenced therein. Again, the testimony as described by Mr. Hall does not reference records maintained by CIA, responsive to Plaintiff's FOIA request. (Hall Opp. at 7, 8, and 12).

However, assuming admissibility arguendo, even reading this evidence in the light most favorable to the plaintiffs, the law is clear that when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document so long as the search was diligent. Nation Magazine, 71 F.3d at 892, n. 7. Further, the mere fact that a document once existed does not mean that it now exists, or does the fact that an agency created a document necessarily imply that the agency retained it. Maynard v. CIA, 982

[1] This Court has already stricken this same evidence from the record when it was submitted via declaration by Plaintiff Hall in his Cross Motion for Partial Summary Judgment dated May 10, 2007 , Dkt. No. 73. See, Order of Magistrate Judge Facciola, 10 March 2008, Dkt No. 87; and Memorandum Opinion and Order, August 29, 2008, Dkt. No. 106. CIA continues to object to this evidence as inadmissible and refers the Court to its arguments set out in its Motion to Strike (Dkt. No. 77).

F.2d 546, 564 (1st Cir. 1993). Accordingly, plaintiff's allegations of an inadequate search are unavailing.

B. The CIA Need Not Search its Operational Files.

Plaintiff Hall also argues that CIA searches were inadequate because the operational files ("ops files") of CIA's Directorate of Operations were not searched. (Hall Opp. at 4-5). He acknowledges that the law[2] provides for an ops file exemption where the CIA is not required to search its operational files for records responsive to a FOIA request, but that it was waived in this instance because POW/MIAs were the specific subject of various congressional investigations and an Executive Order mandatory release. However, plaintiffs misunderstand the operational files exemption and this argument should be rejected.

While the National Security Act of 1947 exempts from the FOIA the operational files of the CIA, the ops file exemption does not apply to information that was the subject matter of investigation by specifically enumerated congressional committees including, in relevant part, the "congressional intelligence committees", (i.e. the House Intelligence Permanent Select Committee on Intelligence ("HIPSCI") or the Senate Select Committee on Intelligence ("SSCI")) for any "impropriety or violation of law, executive order, Presidential directive, in the conduct of an intelligence activity". 50 U.S.C. 431(3).

The committees that Mr. Hall alleges considered POW/MIA matters are not enumerated in the statute. Additionally, Mr. Hall does not allege that the HIPSCI or SSCI investigated the matter. (Hall Opp. at 5). Mr. Hall relies on Kelly v. CIA, Civ. Action No. 00-2498 (TFH) (D.D.C. Aug. 8, 2002) Mem. Op. at Kelly Dkt. No. 31., for the proposition that the Court should

[2] The law that applies is actually The National Security Act of 1947, as amended by the CIA Information Act of 1984. This Act exempts from the provisions of the FOIA the operational files of the CIA's Directorate of Operations (now called the National Clandestine Service or NCS). 50 U.S.C. 431(a).

order operational files to be searched in this case. (Hall Opp. at 5). However, Mr. Hall fails to point out the critical fact that distinguishes Kelly from the instant matter: the underlying subject matter of the FOIA request in Kelly, the MKULTRA program, was the subject of an SSCI investigation and as such, the operational files exemption did not apply by the clear language of the National Security Act. See, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 2d. Sess. (Apr. 26, 1967) ("Church Committee Report"). The Church Committee was the precursor to the Senate Intelligence Committee. Morely V. CIA, 508 F.3d. 1108; 207 U.S. App. Lexis 28428, at 12-13, n. 1 (D.C. Cir. 2007). Furthermore, Hall does not even allege that there has been any investigation into alleged wrongdoing by CIA regarding POW/MIA matters in the conduct of its intelligence activities as also required by the National Security Act. (Hall Opp. at 5). As such, the ops exemption still applies to this FOIA request and CIA is not required to search its operational files.

Similarly, Executive Order 12812, which required the search and review of government records regarding POWs and MIAs by November 11, 1993, does not in any way act as a waiver of the ops file exemption in this case. The National Security Act simply does not enumerate the subject matter of an executive order as a basis for waiving the ops file exemption. [3] Furthermore, the Executive Order 12812 does not create a private right of action so, Mr. Hall, on his own, cannot challenge CIA's release of records under the Executive Order. E.O. 12812 §3.

[3] Hall appears to misapprehend the provisions of the ops file exemption that relate to executive orders. Investigations into violations of an executive order may waive the ops file exemption. However, there has been no such allegation relevant to this case. Therefore, CIA is not required to search its ops files in this matter.

C. CIA searches for records responsive to Plaintiffs' FOIA request were adequate.

1. Items 1-3: CIA was not required to search for records responsive to Items 1, 2 and a five year period of Item 3 as these were duplicative of Hall's FOIA request in Hall I.

Mr. Hall cannot argue against the adequacy of CIA's searches for Items 1 and 2 and a portion of 3 (1971-75) simply because, as the record in this case reflects, these items were part of a previous FOIA request submitted by Mr. Hall and ultimately dismissed by the Court in CIA's favor ("Hall I") and therefore not accepted by CIA as part of the underlying FOIA request. See CIA letter June 15, 2004. (Exhibit 2, Koch Decl.). Mr. Hall had an ample opportunity to litigate this issue in Hall I, but the case was dismissed for constructive abandonment. Hall I, Memorandum Opinion, November 31, 2003. As the Court and the parties are well aware, the dismissal was upheld by the Court of Appeals, and this case is merely an attempt to re-litigate issues raised in the previous litigation.

With regard to that portion of Item 3 which was accepted for search in this FOIA case (years 1960-70, 1976 - 2002), the search terms employed by the CIA were the same terms that were approved by the Court in Hall I and never objected to by the Plaintiff. Koch Decl. ¶ 21. In fact, these search terms were also the same terms used by the CIA when it searched, reviewed and released Agency records on POW/MIAs pursuant to it obligations under Executive Order 12812.[4] Koch Decl. ¶ 21. It should be noted that the search results in response to the E.O. 12812 (including search terms, the actual searches conducted and the results), were provided to the Court in detail in Hall I. As was attested to in that case, this was a unique and exhaustive

[4] The searches conducted in response to E.O. 12812 were provided to the Court, in detail, in Hall I. As CIA attested to in that case, this was a unique and exhaustive search and the Agency released documents found as a result of a broader and more thorough search plaintiffs would have received if the search was conducted pursuant to FOIA. McNair Decl. of Oct. 15, 1998, attached to the Agency's Motion for Summary Judgment in Hall I.

search and the plaintiffs, as a result, were the recipients of documents from a broader and more thorough search then they would have received under FOIA. McNair Decl., attached to CIA's Motion for Summary Judgment of Oct. 15, 1998, Hall I.

In sum, the plaintiffs have known for years (since the Hall I case, and certainly by no later than October 30, 2006), what search terms were employed in this case. Koch Decl., ¶ 21. At no time since then have plaintiffs requested that CIA alter or amend its search terms in any way.

2. Item 4: Senate records are not Agency records.

Senate records are not Agency records for FOIA purposes and, therefore, no records responsive to Item 4 is required under FOIA. Despite Plaintiff AIM's representations to the contrary, (AIM Opp. at 8), Item 4 was requested by Plaintiffs during the Hall I litigation, fully briefed by the parties, and dismissed by the Court on these very grounds. Hall I Mem. Op., August 10 , 2000, at 14-16. More importantly, this very Court has already precluded plaintiffs from re-litigating this matter by Order dated April 13, 2005 ("In this case, the plaintiffs may not challenge . . . the finding that particular records are exempt from the definition of "agency records" under FOIA"), Dkt. No. 30, at 7). Any attempt by plaintiffs to object to CIA's failure to search for Senate records in this case is simply a flagrant disregard of this Court's previous order.

3. Items 5: The Agency could not conduct searches for responsive records because Plaintiff failed to provide further indentifying information.

CIA has fully briefed the issue as to why it could not conduct the searches requested by plaintiffs without additional identifying information (full name, date and place of birth) and that the item was administratively closed by letter dated May 11 , 2005, after Plaintiff failed to provide such information. Koch Decl. ¶ 27. Rather than provide the missing information,

plaintiffs simply continue to insist the searches can be done without this information. (AIM Opp. at 8-11). However, the case law is clear, agencies are not required to take extraordinary measures to conduct searches (Garcia v. Dep't of Justice, 181 F. Supp. 2d 356 S.D.N.Y. 2002), go on a fishing expedition (Freeman v. Dep't of Justice, Civ. Action No.90-2754, slip op. at 3, (D.D.C. Oct .16 ,1991)), or go beyond the four corners of the request to search for leads (Kowalczyk, 73 F.3d at 389) to answer a FOIA request.

4. Item 6: CIA conducted reasonable searches for records pertaining to searches done for Hall's 1994 and 1998 FOIA requests.

Plaintiff AIM argues that CIA did not search for records responsive to Item 6. (AIM Opp. at 23). This is obviously incorrect because as the CIA Vaughn Indices make clear not only that the CIA did conduct searches, but it provided documents that were indexed on both the 2006 and 2008 Vaughn Indices attached to the Koch and DiMaio Declarations.

Plaintiff Hall acknowledges CIA conducted searches for records responsive to Item 6, but makes the novel argument that because certain documents were withheld in full, the adequacy of CIA searches on Item 6 should be called into question. (Hall Opp. at 18). The logical extension of this argument would be that federal agencies could never withhold any information from any FOIA requestor without calling into question the adequacy of their searches, thus eviscerating the very purpose of the FOIA exemptions.

Plaintiff Hall also argues that the searches were inadequate because the CIA only searched one record system when looking for records responsive to Item 6. (Hall Opp. at 18) . This argument has been rejected by courts that have held that for a reasonable search, an agency need not search every record system, but only those it deems likely to contain responsive records. Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). In this case, the appropriate CIA official has attested that the record system that was searched for

documents responsive to Item 6 was in fact determined to be the most likely to have responsive records. Koch Decl. ¶ 32. The declarant further explained what system was searched, why that system was searched, what records were located and provided to the Plaintiff and what records were withheld. Koch Decl. ¶¶ 30-36. Accordingly, plaintiffs' claim that the search here was inadequate is misplaced. McLaughlin v. Dep't of Justice, No. 08-5142, 2009 U.S. App. LEXIS 187 (D.C. Cir. Jan. 7, 2009) (per curiam) (upholding the District Court's finding that the DOJ's search was adequate).

5. Item 7: CIA properly refused to conduct searches for records responsive to Item 7, as the request was overly burdensome.

Item 7 requests "all records pertaining to any search ever conducted by the Agency, at any time and for any reason, for records concerning Vietnam War POW/MIAs." Plaintiff AIM contends that CIA refused to search for records in response to Item 7 because of a fee dispute. (AIM Opp. at 18-19). However, this is another mischaracterization of the record. By letter dated June 15, 2004, CIA explained that the request was overly burdensome, and later invited plaintiffs to narrow the request. Plaintiffs did not respond to this invitation, and by letter dated May 11, 2005, CIA administratively closed this matter. Over two years later, and after this case had been briefed for partial summary judgment, Plaintiff AIM suggested the parties enter into a stipulation narrowing Item 7, by letter dated June 13 2007. However, the CIA could not agree to the stipulation because plaintiffs did not narrow their requests sufficiently. [5] Instead, AIM only extracted previous FOIA requests from its request, and the request was still overly burdensome.

Plaintiff Hall alleges CIA did not explain why such searches were overly burdensome. Hall Opp. at 45. To the contrary, CIA set out in some detail the reasons it reached this

[5]. In its opening brief (Dkt. No. 109), CIA had stated that the Plaintiff had not narrowed their request. However, the word "sufficiently" should have been inserted after the word narrowed.

determination, including that when a search was attempted the automated system "timed out" before generating a response. Koch Decl. ¶¶ 37-39. The law is clear on this issue: agencies are not required to conduct searches that would be overly burdensome. (See e.g., Garcia, 181 F.Supp. 2d, 356, and Freeman, Civ. Action No.90-2754, slip op. at 3. Hence, CIA properly denied Plaintiff's request on this item.

III. PLAINTIFF IS NOT ENTITLED TO DISCOVERY.

Plaintiff Hall has sought and was denied discovery in this case on multiple occasions. See e.g., Dkt. No. 73. Nonetheless, he demands discovery yet again in his Opposition. Hall Opp. at 18-19. Ordinarily, in FOIA cases, discovery, if deemed appropriate by the Court, is limited to the scope of the agency searches and its indexing and classification procedures. Weisberg, 627 F.2d 365, 371 (D.C. Cir. 1980); Judicial Watch. Furthermore, discovery is not permitted if the agency's affidavits are sufficiently detailed concerning the adequacy of the agency's search and the bases for claimed exemptions. SafeCard Servs. v. SEC, 926 F.2d 1197, 1200-02 (D.C. Cir. 1991). The CIA has presented two separate declarations and two specific Vaughn Indices that detail the adequacy of the CIA's search and the basis for the FOIA withholdings claimed. See Dkt. Nos. 54 and 109. Moreover, given this Court's previous ruling that the plaintiffs may not even challenge the withholding of certain records (Items 1,2, and part of 3), Hall's alleged need for discovery is even further questionable. Mem. Op. and Order, April 13, 2005, Dkt. No. 30, at 7.

In order to justify discovery at this point, plaintiffs must make a showing of bad faith on the part of CIA sufficient to impugn CIA's affidavits. Carney v Dep't of Justice, 19 F.3d 807, 812, (2d Cir. 1994). Plaintiff Hall only makes this allegation in passing—indicating that the Agency's initial fee assessment constitutes bad faith. Hall Opp. at 24. He argues he needs

discovery to prove that certain documents exist at CIA, that other documents are not properly classified, and to rehabilitate evidence presented in Mr. Hall's declarations stricken as inadmissible (Hall Opp. at 19), none of which pertain to agency bad faith or are the basis for getting discovery.

Plaintiff AIM makes no specific request for discovery but does allege Agency "bad faith". AIM Opp. 21-29. Interestingly, AIM charges the agency with bad faith in its initial refusal to provide records responsive to Item 8 of the FOIA request and then subsequent decision to search and provide records. Id. at 22. Courts have consistently held that such reconsiderations by government agencies to release records are actually evidence of agency good faith, not bad. Western Center for Journalism v. IRS, 116 F. Supp. 2d 1, 10 (D.D.C. 2000) (holding that the agency conducted a reasonable search and acted in good faith by locating and releasing additional responsive records mistakenly omitted from its initial response because "it is unreasonable to expect even the most exhaustive search to uncover every responsive file; what is expected of a law-abiding agency is that the agency admit and correct error when error is revealed.") (citation omitted), aff'd, 22 Fed. Appx. 14 (D.C. Cir. 2001). AIM also attempts to state that the CIA's overestimation, by six months to review and release records in response to Item 3, i.e., is evidence of bad faith. Id. at 27-28. CIA is aware of no legal argument to support AIM's novel position that an agency is acting in bad faith by releasing records six months earlier than originally estimated. In sum, plaintiffs have still not met their legal burden for showing a need to obtain discovery.

IV. CIA'S VAUGHN INDEX IS ADAQUATE UNDER THE LAW.

Plaintiff Hall faults CIA's Vaughn index on several grounds. First, Hall argues that the Vaughn is inadequate because it does not include the documents that were responsive to his

FOIA request items 1, 2 and part of 3. As Mr. Hall is aware, the reason why these documents are not included is because these very same items were part of the Hall I litigation. The Court held in that case that CIA exemptions were properly taken. Hall I, Mem. OP., August 10, 2000. Furthermore, this Court has already held that "[i]n this case, plaintiffs may not challenge the CIA's withholding of certain records Hall sought in his May 28, 1998 FOIA request." Mem. Op. and Order, April 13, 2005, Dkt. No. 30, at 7. Therefore, plaintiffs are foreclosed from challenging withholdings on these documents.

Second, Plaintiff Hall challenges the 2006 Vaughn, which pertains to documents released in response to Item 6 of plaintiffs' FOIA request, as being inadequate because there is no accompanying affidavit and the documents are not adequately described. This is patently incorrect. The accompanying affidavit is by Scott A. Koch, the CIA Information and Privacy Coordinator, dated and filed October 30, 2006. (Attached to Brief, Dkt. No. 54-2). Furthermore, even a cursory glance at the Vaughn Index indicates that the documents at issue are described by date, page number, title, and content to the fullest extent possible without revealing the very information that is exempt.

Third, Mr. Hall makes similar conclusory statements about the 2008 Supplemental Vaughn index that pertains to records responsive to Items 3, 6, and 8 of plaintiffs' FOIA request. Mr. Hall does not seem to understand this is a supplemental Vaughn which adds to the information already provided in 2006. As such, his complaints that certain exemptions are not explained (Hall Opp. at 21-22) are simply a misunderstanding on his part because those exemptions are addressed in the 2006 Vaughn. In sum, these two Vaughn Indices need to be read in pari materia.

Fourth, with regards to plaintiffs' assertion that CIA has not complied with the

segregability requirement, this is also patently incorrect. AIM Opp. at 15, Hall Opp. at 22. A review of the 2006 and 2008 Vaughn Indices show that when documents are withheld in part, the exempt portions are explained to the fullest extent possible without disclosing the information that is protected. Similarly, documents that are withheld in full are similarly described by title, page number and content, even though it is more difficult to describe these on the public record, without disclosing the very information that should be protected. Finally, the CIA Information Review officer who is authorized to make classification decisions for the information at issue in this case stated in detail that no further information could be segregated from release in this case. DiMaio Decl. ¶¶ 35-37.

V. IN CAMERA INSPECTION IS NOT CALLED FOR IN THIS MATTER.

Plaintiff Hall suggests that "plaintiffs be permitted to select a small number of documents for in camera review as a means of checking the accuracy of the CIA's Vaughn Declarations and the validity of the Agency's claims regarding the absence of segregable nonexempt portions." Hall Opp. at 23-24. Such an imposition on the Court would be wholly unnecessary. This is because prior to engaging in the six-prong examination provided in Allen v. CIA, 636 F.2d 1287, 1298-99 (D.C. Cir. 1980)(overruled on other grounds by Founding Church of Scientology of Washington, D.C. v. Smith, 721 F.2d 828 (D.C. Cir. 1983)), for determining whether in camera examination of documents is necessary, "a trial court should first offer the agency the opportunity t o demonstrate, through detailed affidavits or oral testimony, that the withheld information is clearly exempt and contains no segregable, nonexempt portions." Allen, 636 F.2d at 1298 (citing EPA v. Mink,410 U.S. 73 (1973).

Here, the Vaughn Indices attached to the affidavits of the two CIA officials, Messers. Koch and DiMaio, are detailed and contain no conclusory assertions. Dkt. Nos. 54 and 109.

Indeed, Mr. Hall fails to point to a single instance where the foregoing may be true. Hall Opp. at 23. Pursuant to Allen, only if the Court finds that the Vaughn Indices attached to Messrs. Koch and DiMaio's declarations contain inadequate or conclusory statement, prior to granting should Plaintiff's request for an in camera review be granted.

VI. FEE WAIVER

Any arguments by plaintiffs regarding fee waivers are moot. CIA waived all applicable fees for the searches it conducted in response to items 3,6, and 8 in this case. Any request for fee waivers regarding items 5 or 7 simply does not apply. This is so because items 5 and 7 were administratively closed by letter dated May 11, 2005 after plaintiffs simply failed to provide the additional information the CIA had requested to conduct the searches.

VII. CIA EXEMPTIONS WERE PROPERLY TAKEN

A. Exemption 1

Plaintiffs challenge the CIA's assertion of Exemption 1, contending that there is no indication that the information is properly classified and that the information classified "must certainly relate to matters of the Cold War period." Hall Opp. at 26. In fact, the appropriate agency official with authority to make classification determinations for the CIA declared, under oath, that the information withheld pursuant to Exemption 1 is properly classified. DiMaio Decl., ¶¶ 3 and 14. The Vaughn Indices also describe to the greatest degree possible the information that was withheld pursuant to b(1). As for Hall's assertions that the information at issue is "antediluvian", in fact, the Vaughn Indices clearly state the date of the Exemption 1 information at issue, the information is actually dated relatively recently and is less than 25 years old.

B. Exemption 2

All of CIA's Exemption 2 withholdings were made on the basis of "low 2" or material that "relates to trivial administrative matters of no genuine public interest." DiMaio Decl. ¶¶ 27-28. "Low 2" material consists of "trivial administrative data such as file numbers, mail routing stamps, initials, data processing notations, and other administrative markings." Coleman v. FBI, 13 F. Supp. 2d 75, 78 (D.D.C. 1998) (citing Lesar v. Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980)). That is exactly what was withheld from CIA documents: internal CIA identification numbers, addresses, and file numbers, administrative practices, phone numbers and routing information. DiMaio Decl. ¶ 29. The D.C. Circuit has upheld application of Exemption 2 to material "used for predominantly internal purposes." Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992). As set forth above, all of the information withheld from the CIA documents on the basis of Exemption 2 is internal to CIA, and meets the first test of Exemption 2.

Plaintiff Hall cites Fitzgibben v. U.S. Secret Service, 747 F. Supp. 51, 56 (D.D.C. 1990) to contend that Exemption 2 does not apply to administrative markings. Hall Opp. at 28. However, the D.C. Circuit has expressly held that "an agency can delete sensitive notations on documents where they indicate an agency's practices as to their internal routing and distribution." Schwaner v. Dep't of the Air Force, 898 F.2d 793, 796 (D.C. Cir. 1990) (citing Lesar, 636 F.2d 472; Founding Church of Scientology, supra , 721 F.2d, 831). Accord, Morley v. CIA, 453 F.Supp. 2d 137, 148 n. 2 (D.D.C. 2006). Here, the Exemption 2 withholdings fit squarely within the D.C. Circuit's application of Exemption 2, and should be upheld by this Court.

C. Exemption 5 was properly invoked by the Agency.

The Supreme Court has held that FOIA exemption (b)(5) incorporates the government's

deliberative process privilege, the ultimate purpose of which is to prevent injury to the quality of agency decision-making. NLRB v. Sears Roebuck & Co., 421 U.S. 132, 149 (1975); Rockwell Internat'l Corp. v. U.S. Dep't of Justice, 235 F.3d 598, 601 (D.C. Cir. 2001); Goodrich Corp. v. EPA, Civ. Action No. 08-1625, 2009 WL 1177539 (D.D.C. Jan. 16, 2009). The existence of this privilege ensures that "'persons in an advisory role [are] able to express their opinions freely to agency decision-makers without fear of publicity [that might] ... inhibit frank discussion of policy matters and likely impair the quality of decisions.'" Bureau of Nat'l Affairs, Inc. v. Dep't of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (internal quotations omitted). For this reason, the deliberative process privilege protects the consultative functions of the government by preserving the confidentiality of opinions, recommendations, and deliberations. Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

The CIA has properly invoked FOIA exemption (b)(5) in this case. The Agency withheld documents that contained the recommendations or opinions of the Agency and its personnel on matters preceding final Agency action. Id. This material represents the give-and-take of the government's deliberative process. It is well settled that release of such deliberative material would have a chilling effect on the free and open internal discussions of the agency by inhibiting Agency personnel from candidly recording their thoughts or making inter-Agency recommendations. See Wolfe, 839 F.2d at 774-76; Russell v. Dep't of Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

It is similarly well settled that the attorney work product and attorney-client privileges are included in FOIA exemption (b)(5). The attorney work product privilege protects documents and other memoranda prepared by an attorney in contemplation of litigation. See Hickman v.

Taylor, 329 U.S. 495, 509-510 (1947). The attorney - client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." Mead Data Cent., Inc. v. Dept. of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).

CIA has demonstrated that certain withheld information is protected by these privileges. Koch Decl., Vaughn Index §§ 1-18. Accordingly, the Agency has properly invoked FOIA exemption (b)(5) to protect attorney work product and attorney-client communications. For example, a three-page document located in a CIA attorney's litigation file, consists of a string of e-mail communications between attorneys and other CIA officers discussing the status of searches being conducted by various CIA components in the first Hall Litigation matter. This document is withheld in its entirety on the basis of FOIA exemption (b)(5) because it contains legal analysis and opinion prepared by a CIA attorney and confidential communications between the CIA attorneys and officials that are protected from disclosure by the attorney-client communications privilege along with legal analysis and opinion prepared by a CIA attorney in contemplation of civil litigation that are protected by the attorney work-product privilege. The document is also withheld on the basis of FOIA exemption (b)(5) because it contains intra-agency pre-decisional preliminary evaluations and recommendations of Agency officials that are protected from disclosure by the deliberative process privilege. Koch Decl., Vaughn Index § 2.

D. Exemption 6

When the subject of the information requested under the FOIA is a private citizen and "when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest . . . is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir." Dep't of Justice v. Reporters Comm. For

Freedom of the Press, 489 U.S. 749, 780 (1989). If a document invades a third party's privacy, and does not contain official information shedding light on government functions, it may be withheld under Exemption 6.

In this case, the CIA has withheld the names and identifying information of specific individuals, including CIA employees, in which the information sheds no light on government functions, and there is no public interest in knowing who these individuals are. Disclosure of this information would constitute a clearly unwarranted invasion of personal privacy, and the CIA's assertion of Exemption 6 is appropriate. DiMaio Decl., ¶¶ 32-34. Thus, the Agency is entitled to judgment as a matter of law on the exemptions claimed.

CONCLUSION

For all the foregoing reasons and those offered in the Agency's opening brief, the Court should grant this motion and dismiss this matter with prejudice as to Counts I, II (with the exception of the Agency's Item 3-related records), III, IV and V.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2009, I caused the foregoing *Defendant's Reply in Support of Its Motion for Partial Summary Judgment and Opposition to Plaintiffs' Cross Motions* and all documents attached thereto to be served on parties of record via ECF.

/s/ *Mercedeh Momeni*

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