UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5235
(C.A. No. 04-0814)

ACCURACY IN MEDIA, INC., Appellant,

v.

CENTRAL INTELLIGENCE AGENCY, Appellee.

MOTION FOR SUMMARY AFFIRMANCE

Appellee Central Intelligence Agency ("Agency"), by and through undersigned counsel, respectfully moves for summary affirmance of the Honorable Royce C. Lamberth's July 7, 2022, Memorandum Opinion and Order (R.385, R.386), granting the Agency's motion for summary judgment on its search of operational records and denying plaintiff Accuracy in Media's cross-motion for summary judgment. A copy of the decision accompanies this motion. Appellant Accuracy in Media ("Accuracy in Media" or "Appellant") challenges the adequacy of the Agency's search for operational records responsive to its Freedom of Information Act request, 5 U.S.C. § 552 ("FOIA"), for information about American prisoners of war from the Vietnam War era, as well as whether more of the Agency's

information about its sensitive operational files should have been placed on the public docket in the case below. *See* Smt. of Issues (Doc. #1977119).[1]

Summary disposition is appropriate in this case because the "merits of this appeal are so clear as to make summary affirmance proper." *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980); *accord Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982). "[N]o benefit will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987).

The District Court correctly granted summary judgment as the two Agency declarations establish that the Agency conducted a thorough and reasonable search of its operational files likely to contain relevant information requested by Appellant.

BACKGROUND

Appellant and two other parties[2] initiated this FOIA litigation in May 2004, challenging the Agency's response to FOIA requests for records related to prisoners of war ("POWs") from the Vietnam War. *See* R.1 (Compl.). The last remaining

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[1] Appellant's Statement of Issues on appeal (Doc. #1977119) raises issues that deal exclusively with the sufficiency of the Agency's search of its operational records, which the District Court found to be sufficient in its July 7, 2022, Memorandum Opinion and Order (R.385, R.386).

[2] Plaintiffs Roger Hall and Studies Solutions Results, Inc. have not filed notices of appeal of the District Court's July 7, 2022, decision, nor did they oppose the Agency's motion for summary judgment on the search of the operational records in the District Court.

issue in this case and the only issue on appeal is the adequacy of the Agency's search of its operational records. R.385 at 1, R.375 at 5, R.387.

After protracted litigation and four summary judgment motions, the case was narrowed to the Plaintiffs' request for purported information regarding "1,400 live sighting reports that were reportedly displayed at Congressional briefings attended by [Agency] employees, as well as records of imagery and reconnaissance and rescue operations." R.340, R.345. When it ordered the search of the Agency's operational records, the District Court noted that whether the records exist, can be located, or are exempt from release are different questions. But the District Court nonetheless ordered that the search should be undertaken. R.345. The Agency conducted the supplemental search of its operational files and reported to the District Court on October 30, 2020, that it had located no responsive records. R.352.

On November 30, 2020, the District Court entered final judgment in favor of the Agency and set a deadline for any post-judgment petition for attorneys' fees and costs to be filed. *See* R.353 (Order and Judgment). The Order and Judgment specifically stated that the Agency "has reported (ECF No. 352) on October 30, 2020, that it has completed its search of operational files as ordered by this Court and that it has located no responsive records . . . After sixteen years, the Court is now willing to grant the government's motion for summary judgment and order this case dismissed with prejudice." R.353.

After postponing the attorneys' fees petition and moving several times to extend the time for moving for partial reconsideration (R.354, R.359, R.363), Accuracy in Media filed a motion, on April 20, 2021, for partial reconsideration of the District Court's November 30, 2020, order (R.364). The Agency opposed (R.369), and Accuracy in Media filed a reply (R.372), asking that the District Court "reconsider its November 30, 2020, Order and Judgment, and order Defendant [Agency] to submit declarations regarding its search of operational records." *Id.* at 4. On November 23, 2021, the District Court granted reconsideration in part under Federal Rule of Civil Procedure ("Rule") 60(b) and reopened the proceedings "for one singular, limited purpose—to consider the adequacy of the [Agency's] most recent search" of its operational records. *See* R.375 (Mem. & Order) at 1, 5. The District Court ordered the Agency to file a dispositive motion and provide a declaration regarding the search of its operational records. *Id.* at 5. The District Court rejected all other grounds for reconsideration. *Id.*

As ordered by the District Court, the Agency provided an agency declaration (R.376-3) together with a fifth motion for summary judgment regarding its search of operational records. R.376. Accuracy in Media opposed and cross-moved for summary judgment (R.377, R.378), after which the Agency filed a reply and opposition to Accuracy in Media's cross-motion (R.383, R.384), which included a supplemental declaration (R.383-2). Accuracy in Media's cross-motion consisted

of three arguments. First, Accuracy in Media argued that there were documents that should have been located but were not. R.377 at 2-3. Second, it argued that the Agency used inadequate search terms. *Id*. at 5-6. Finally, it claimed that the Agency did not adequately describe its operational records search. *Id*. at 2-3.

On July 7, 2022, the District Court granted the Agency's motion for summary judgment and denied Accuracy in Media's cross-motion. The District Court found the evidence in the Agency's declarations sufficient to explain the searches of the Agency's operational files and rejected Accuracy in Media's contentions that, (a) finding no responsive records was implausible based on reports of POW sightings provided to Congress, (b) the search terms the Agency used were inadequate, and (c) the declarations were inadequate to satisfy the legal standard ordinarily applied at summary judgment. *See* R.385 (Memo. Op. at 4-12). Rather, the District Court correctly found that the search was reasonable, proper search terms were used, and that the Agency adequately described its search. *Id.*

This appeal of the District Court's July 7, 2022, Memorandum Opinion (R.385) and Order (R.386) followed. In its Statement of Issues, Accuracy in Media repeats the same three arguments noted above, claiming the Agency's search of its operational records and search parameters were inadequate. Doc. #1977119.

ARGUMENT

I. <u>The District Court Properly Awarded the Agency Summary Judgment.</u>

Summary judgment is warranted when the pleadings and evidence "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 247 (1986). This Circuit has held that "the vast majority of FOIA cases can be resolved on summary judgment." *Brayton v. Off. of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011). Indeed, "[i]n a FOIA action, 'summary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.'" *Eddington v. Dep't of Def.*, 35 F.4th 833, 837 (D.C. Cir. 2022) (cleaned up; quoting *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 584 (D.C. Cir. 2020)). Here, the Agency met its summary judgment burden. Accordingly, the District Court correctly granted summary judgment in favor of the Agency on its search of operational records and the judgment should be summarily affirmed.

The District Court reviewed the Agency's declarations describing its search of its operational records and correctly found that the Agency's search was adequate, proper search terms were used, and that the Agency fully described the search. In its opposition to the Agency's motion for summary judgment, Accuracy in Media

claimed that there are documents that should have been located but were not, indicating an inadequate search; that the Agency's search terms were inadequate; and that the Agency did not fully describe its search. R.385 at 5. Appellant continues these arguments on appeal, asserting: (1) that the absence of responsive records raises substantial doubts as to the Agency's search; (2) positive indications of overlooked materials raises similar doubts regarding the Agency's search; (3) the Agency's explanation of its search of its operational records was not made "to the greatest extent possible"; (4) whether the Agency's explanation should include a search of all repositories of operational records; (5) whether the search terms were adequate and likely to yield the requested records; and (6) whether the District Court gave due weight to the Agency's motive in withholding records. Doc. No. 1977119.

The District Court considered all the foregoing arguments and correctly awarded summary judgment in favor of the Agency. The District Court's decision should be summarily affirmed as discussed in detail below.

A. The Agency's Search was Proper

This Circuit applies a reasonableness standard to determine whether an agency performed an adequate search. *Mobley v. CIA*, 806 F. 3d. 568, 580 (D.C. Cir. 2015). An agency is not required to search every record system; it need only search those systems in which it believes responsive records are likely to be located. *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Moreover, a search

only has to be reasonable, it does not have to be exhaustive. *Nat'l Cable Television Ass'n v. FCC*, 479 F. 2d 183, 186 (D.C. Cir. 1973).

Importantly, the Court's inquiry turns on methods used to perform the search, not the results. *Iturralde v. Comptroller of Currency*, 315 F. 3d 311, 315 (D.C. Cir. 2003) ("[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search."). Summary judgment is not defeated by an unsuccessful search for documents so long as the search was diligent and reasonable. *Nation Magazine, Wash. Bureau v. U.S. Customs Service*, 71 F. 3d 885, 895, 892 n.7 (D.C. Cir. 1995).

An agency is entitled to summary judgment on the adequacy of its search if it shows "that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68. An agency may prove the adequacy of its search through a reasonably detailed declaration. *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982); *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978). The declaration must set forth the search performed and "aver[ ] that all records likely to contain responsive materials (if such records exist) were searched." *Oglesby*, 920 F.2d at 57. While an agency has the burden of proof on the adequacy of its search, affidavits submitted by the agency are accorded a presumption of good faith "which cannot be rebutted by purely speculative claims about the existence and

discoverability of other documents." *Mobley*, 806 F.3d at 581 (D.C. Cir. 2015) (internal quotation marks omitted) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

It is well settled in this Circuit that "[a] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request." *DiBacco v. U.S. Army*, 795 F.3d 178, 194 (D.C. Cir. 2015) (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). The factual question relevant to a FOIA summary judgment motion is not the existence of any particular document, but rather the reasonableness of the agency's search. *SafeCard Servs.*, 926 F.2d at 1201. To meet its burden to conduct an adequate search, it must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (quoting *Weisberg v. Dep't of Just.*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

In light of these authorities, Appellant's contention that the Agency's search of its operational files must have been "made to the greatest extent possible" (Stmt. of Issues ¶ 3) fails at the threshold. That is not the law in this Circuit, and the Agency's search satisfied the controlling legal standards set forth above. Indeed, as correctly found by the District Court, the two declarations submitted by the Agency refute Appellant's claims and they clearly satisfy the standards necessary for summary judgment in this FOIA matter.

The Agency began the search of its operational records on March 31, 2020, following the District Court's denial of the Agency's motion to reconsider the order to search its operational files.[3] R.376-3 at 3. On October 30, 2020, the Agency reported to the Court that the search of its operational records was complete, and no responsive records were located. R.352. The two Agency declarations submitted in support of summary judgment demonstrate the reasonableness and completeness of that search. R.376-3, R.383-2.

Agency information management professionals searched Agency records in the operational file systems. R.376-3 at 4. The Agency states that this was "an exhaustive electronic and hard copy search of Agency records." *Id.* The Agency searched "all relevant office databases likely to contain responsive records." *Id.* The Agency, in its search, "cast a deliberately wide net for the requested records by employing broad search terms" in various combinations, including: "POW's", "prisoners of war", "MIA", "missing in action", "Vietnam", "task force", "House Special POW", and "image". *Id.* The search was not limited in time and was conducted to include records through the date of the search. *Id.*

This exhaustive search located a few records. Each record was retrieved from the database and reviewed by the Agency for responsiveness to the District Court's

[3] Operational files are typically exempt from disclosure pursuant to the CIA Information Act of 1984, 50 U.S.C. § 3141.

order that the Agency search for "1,400 live sighting reports that were reportedly displayed at Congressional briefings attended by [Agency] employees, as well as records of imagery and reconnaissance operations." *Id*. at 4-5. After this second level of review, the Agency determined that no documents were responsive. *Id.* at 5. Significantly, the Agency "used a plain reading of the request" to perform the search and conduct its review. *Id.* at 5. The Agency summarized its search as follows: "[Agency] personnel conducted a thorough search of all relevant records systems that were reasonably calculated to uncover responsive records. The Agency did not locate records responsive to the request, despite the Agency's exhaustive search." R.376-3 at 5.

After Accuracy in Media opposed the Agency's motion for summary judgment, the Agency filed a reply which included the supplemental declaration. R.383-2. This supplement was submitted "to further clarify the [Agency's] search of its operational records." *Id.* at 2. It was stated that given the Agency's national security mandate, it could not provide specific detail on the public record as to how the Agency's databases are structured and searched. *Id*. That said, the declarant noted: "I can say that the [Agency] searched centralized internal databases containing Agency-wide operational files, including cables, intelligence reports and other records. Aged operational files, originally maintained in hard copy form, were digitized and made a part of these databases." *Id*. at 2-3. As a final summary of the

search, the agency's declarant stated: "[a]ny database where operational files related to Plaintiff's request could reasonably have been located were searched in the course of this review." *Id*. at 3.

The District Court noted that it had specifically ordered a search of the Agency's operational files and that it was only addressing the adequacy of that search. R.385 at 8. The above efforts as outlined in the Agency's two declarations clearly demonstrate that the Agency discharged its FOIA duties to undertake reasonable search efforts of its operational files.

The District Court also correctly dispensed with the Appellant's argument that documents exist that should have been located. Below, Accuracy in Media cited to their statement of material facts and supporting affidavits filed in 2016 and argued that these demonstrate the existence of records that have not been provided or identified by the Agency. ECF No. 377 at 3-4. Accuracy in Media particularly relied on two affidavits, one from former United States Senator Bob Smith and another from James Sanders, which it claimed demonstrate the existence of records shown to Congress, including live sighting reports. ECF Nos. 258-2, 258-4.

As the District Court noted, it gave some credit to these statements as possible "positive indications of overlooked materials" because the Agency initially did not confirm nor deny the existence of these materials and stated that if they existed, they would be in operational files exempt from disclosure. (ECF No. 340 at 2). The

District Court therefore requested more from the Agency in order "to feel confident the search 'was reasonably calculated to uncover all relevant documents.'" *Id.* (quoting *Aguiar v. DEA,* 865 F.3d 730, 738 (D.C. Cir. 2017)). In response, the Agency provided its declarations, demonstrating an adequate search of those files.

Based on those declarations, the District Court properly concluded that the Agency's search was adequate. Indeed, "[a] search is not unreasonable because it fails to produce all relevant material." *Meeropol*, 790 F.2d. at 952-53. In other words, the inquiry is not what the search turned up or failed to turn up, but rather whether the methods used during the search were appropriate. *Iturralde*, 314 F.3d at 315. Here, the Agency searched high and low for responsive records in its operational files. It found none. That Accuracy in Media has referred to other alleged responsive materials does nothing to undermine the Agency's search of its operational files.

B. The Agency Used Proper Search Terms

With respect to the search terms used, the Agency explained that "[o]ut of an abundance of caution, a broad search method was employed to properly capture all documents potentially responsive to Plaintiffs' request." R.383-2 at 3. In this Circuit, a reasonably detailed affidavit which sets forth the search terms used is sufficient for summary judgment. *Oglesby*, 920 F.2d at 68.

A search for records under FOIA is adequate if it is "reasonably calculated to uncover all relevant documents," and an agency may demonstrate the adequacy of its search by submitting a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Chambers v. Dep't of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009). The District Court correctly concluded that the declarations submitted by the Agency were sufficient to satisfy this burden. Accuracy in Media has not shown that the declarations are insufficient or the product of bad faith. *SafeCard Servs.*, 926 F.2d at 1200 (agency declarations are "accorded a presumption of good faith").

The Agency satisfied the above standards and fulfilled its obligation to search for operational records by using proper search terms in response to the District Court's order. R.375. The Agency's declarations set forth the details of the search, including the search terms used. Agency information management professionals searched Agency records in operational file systems using broad terms. R.376-3 at 4-5. As noted above, the Agency cast a deliberately wide net for the requested records by employing broad search terms such as "POWs," "prisoners of war," "MIA," "missing in action," "Vietnam," "task force," "House Special POW," "image," and different combinations and variations of those search terms. *Id.*

The expansive search terms used generated a few records. Each of these records was retrieved from the database and Agency personnel reviewed them to determine whether the records were responsive to the Court-ordered search with respect to "1,400 live sighting reports that were reportedly displayed at Congressional briefings attended by CIA employees, as well as records of imagery and reconnaissance and rescue operations." The Agency used a plain reading of the request to inform its responsiveness calls. *Id*. at 4-5. Following this second-level review, the Agency determined none of the potentially responsive documents retrieved using the electronic search protocols were responsive. In each instance, the documents retrieved contained at most a mere mention of one or more of the terms but did not address the actual request. *Id*.

The District Court reviewed the declarations and the controlling case law and correctly determined that the Agency's search was adequate (R.385 at 5-9), the search terms the Agency used were appropriate and reasonably likely to locate the records if they were in the operational files (*Id*. at 9), and that the Agency's description of its search was proper, particularly given the sensitive nature of operational records (*Id*. at 10-12). This Court should affirm.

C. The Agency Adequately Described its Search

The Agency searched its operational files as ordered by the District Court and provided sufficient detail regarding the search it performed.

Under this Court's holdings, an adequate search description must set forth "in reasonable detail the scope and method of the search conducted by the agency." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). This does not require an agency to describe "with meticulous documentation the details of an epic search for the requested records." *Id.* A satisfactory search description will contain what files were searched, who performed the search, and a description of the approach used in performing the search. *Weisberg*, 627 F.2d at 371; *Mobley*, 806 F.3d at 581. The Agency complied with these requirements.

The Agency declarations describe who conducted the search and the two-level method used to review records that "hit" a search term. R.376-3 at 4. Moreover, the declarations describe the search terms used and why they were selected. *Id.*; R.383-2 at 3. Both electronic and hard copy files were searched across Agency wide operational file systems. R.376-3 at 4-5, R.383-2 at 2-3. The declarations provide a description of the broad, systematic approach that the Agency used to comply with the directive that it search its operational files. *Id*. Finally, for records "hit" by the search, the Agency individually reviewed them for responsiveness. R.376-3 at 4-5.

It is also no mystery what systems the Agency searched. It searched "[a]ny database where operational files related to Plaintiffs' request could reasonably have been located were searched in the course of this review." R.383-2 at 3. Indeed, the Agency "searched centralized internal databases containing Agency-wide

operational files, including cables, intelligence reports and other records. Aged operational files, originally maintained in hard copy form, were digitized and made a part of these databases. Any database where operational files related to Plaintiff's request could reasonably have been located were searched[.]" *Id*. at 2-3.

The District Court correctly determined that the Agency adequately described its search given the information provided in the two Agency declarations. Pursuant to the FOIA law in this Circuit, that decision should not be disturbed on appeal.

* * *

CONCLUSION

For the foregoing reasons, the Court should summarily affirm the District Court's entry of summary judgment in favor of the Agency on the last remaining issue in this litigation because it performed a reasonable search of its operational records and located no responsive documents. The Agency has met its obligations under FOIA, and the Court should put an end to this 19-year-old case.

Dated: May 8, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of May, 2023, I caused a true and correct copy of the foregoing Appellee's Motion for Summary Affirmance to be served on Appellant's counsel through the Court's ECF system.

/s/ Thomas W. Duffey
THOMAS W. DUFFEY
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE
(Circuit Rule 27)

I HEREBY CERTIFY that the foregoing Appellee's Motion for Summary Affirmance was prepared using a 14-point Times New Roman font and contains 4048 words as counted by counsel's word processing software (Microsoft Word 2016).

/s/ Thomas W. Duffey
THOMAS W. DUFFEY
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, *et al.*, *Plaintiffs,* **v.** **CENTRAL INTELLIGENCE AGENCY**, *Defendant*.	**Case No. 1:04-cv-814-RCL**

MEMORANDUM OPINION

This Freedom of Information Act ("FOIA") action has been running for over eighteen years. What began as a drawn-out contest has narrowed to one final issue which the Court will put to rest today. The Court ordered the Central Intelligence Agency ("CIA") to conduct a search of its operational files, which are typically exempt from a FOIA search. ECF No. 340 at 3. The CIA conducted that search and found no responsive records. ECF No. 353. The case was then closed, after which plaintiffs moved to reconsider so that this Court could evaluate the adequacy of the CIA's operational file search. ECF No. 364. The Court reopened the case for that single "limited purpose." ECF No. 375 at 5.

In December of 2021, the CIA filed a motion for summary judgment alongside a declaration that described the CIA's search of its operational files. CIA Mot., ECF No. 376; Vanna Blaine Decl., ECF No. 376-3. Plaintiffs timely filed a cross-motion for summary judgment and opposition to the CIA's motion, ECF No. 377, as well as a Memorandum in Support ("Pls. Mem."), ECF No. 377.

After considering the briefing, the Court will **GRANT** the CIA's motion for summary judgment and **DENY** plaintiffs' motion for summary judgment.

I. BACKGROUND

The Court has previously explained at length the factual background of this case. Plaintiffs filed a FOIA request with the CIA in February of 2003 seeking records related to prisoners of war ("POW") from the Vietnam War. ECF No. 1 at 2. This action was commenced in May of 2004. *Id.* at 1. The procedural history in this case between 2004 and 2009 is set out in Judge Kennedy's 2009 opinion. *Hall v. Cent. Intel. Agency*, 668 F. Supp. 2d 172 (D.D.C. 2009), ECF No. 137. Procedural history from 2009 to 2012 is set out in this Court's 2012 opinion. *Hall v. Cent. Intel. Agency*, 881 F. Supp. 2d 38 (D.D.C. 2012), ECF No. 187. History from 2012 to 2017 is set out in the 2017 opinion. *Hall v. Cent. Intel. Agency*, 268 F. Supp. 3d 148 (D.D.C. 2017), ECF No. 291. This Court will now briefly describe the main points leading to this opinion.

In 2019, this Court ordered the CIA to search its operational files for "additional records allegedly shown to Congress." ECF No. 340 at 1. Operational files are typically exempt from search and disclosure, but this Court ordered their search under an exception. *Id.* at 3; 50 U.S.C. § 3141(a).[1] The CIA conducted a search of operational files, but found no results satisfying the plaintiffs' request. Vanna Blaine Decl. ¶ 15; *see id.* at ¶ 13 (explaining that the CIA searched for "1,400 live sighting reports that were reportedly displayed at Congressional briefings attended by CIA employees, as well as records of imagery and reconnaissance and rescue operations"). As a result, the case was terminated in summary judgment for the CIA. ECF No. 353. Then in late 2021,

[1] Operational files are defined as:

(1) files of the National Clandestine Service [now known as the Directorate of Operations] which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;

(2) files of the Directorate of Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and

(3) files of the Office of Personnel Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources;

except the files which are the sole repository of disseminated intelligence are not operational files.
50 U.S.C. § 3141(b).

the Court reopened the case for the sole and limited purpose of considering the adequacy of the CIA's search of its operational files. ECF No. 375.

II. LEGAL STANDARDS

FOIA allows the general public to request release of records from government agencies. 5 U.S.C. § 552. It contains a "strong presumption in favor disclosure." *A.C.L.U. v. U.S. Dep't of Justice*, 655 F.3d 1, 5 (D.C. Cir. 2011) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)).

Courts routinely settle FOIA disputes in the summary judgment stage. *See Def. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Therefore, summary judgment is only appropriate "where 'the evidence is such that a reasonable jury could not return a verdict for the nonmoving party.'" *Wash. Post Co. v. U.S. Dep't of Health and Hum. Serv.*, 865 F.2d 320, 325 (D.C. Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must evaluate the record "in the light most favorable to the nonmoving party." *Id.*

In order for the CIA to succeed on summary judgment, it must "demonstrate[] that 1) no material facts are in dispute, 2) it has conducted an adequate search for responsive records, and 3) each responsive record that it has located has either been produced to the plaintiff or is exempt from disclosure." *Hall*, 268 F. Supp. 3d at 154 (citing *Miller v. Dep't of Justice*, 872 F. Supp. 2d 12, 18 (D.D.C. 2012)). "The 'genuine issue of fact' relevant to a FOIA summary judgment motion is not the existence of any particular document, but rather the reasonableness of the agency's search." *Id.* at 159 (citing *SafeCard Serv., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991)).

III. DISCUSSION

To satisfy its burden to conduct an adequate search for documents, an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (quoting *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). Adequacy does not depend on whether other responsive documents may exist. *Id.* Rather, an agency "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). An agency may meet its burden of showing that it complied with the requirements of FOIA by providing "[a] reasonably detailed affidavit, setting forth the search terms and type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Id.* The requirement exists as a matter of common sense: its purpose is to "afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment." *Id.* In response to this affidavit, a FOIA requestor may then present "countervailing evidence." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003) (citing *Founding Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979)).

If the totality of the circumstances "raises substantial doubt, as to a search's adequacy, particularly in view of well-defined requests and positive indications of overlooked materials[,] summary judgment would not be appropriate." *Hall*, 268 F. Supp. 3d at 154 (internal quotation marks omitted) (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999)). When considering the credibility of the agency affidavits, courts must "accord[] a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the

existence and discoverability of other documents.'" *SafeCard Serv.*, 926 F.2d at 1200 (quoting *Ground Saucer Watch, Inc. v. Cent. Intel. Agency*, 692 F.2d 770, 771 (D.C. Cir. 1981)).

The CIA submitted an initial and supplemental affidavit here. Vanna Blaine Decl.; Supp. Vanna Blaine Decl., ECF No. 383-2. The CIA describes the search conducted in reasonable detail including what it searched for, Vanna Blaine Decl. ¶10, who searched, *id.* at ¶ 11, the types of documents searched and the terms used, *id.* at ¶ 12, the process by which initially responsive results were reviewed, *id.* at ¶ 13–14, and the final results, *id.* at ¶ 14. The CIA further explained that it "included all relevant office databases likely to contain responsive records." *Id.* at ¶ 12. And later supplemented its initial declaration by explaining that "[a]ny database where operational files related to Plaintiff's request could reasonably have been located were searched in the course of this review." Supp. Vanna Blaine Decl. ¶ III.1. These affidavits are accorded a presumption of good faith. *See SafeCard Serv.*, 926 F.2d at 1200.

In response, plaintiffs make three primary arguments. First, that there are documents that should have turned up in the search but did not, thus indicating an inadequate search. Second, that the search terms used by the CIA were inadequate. Third, that the CIA has not adequately described its search. After evaluating the arguments that plaintiffs raise, the CIA's own briefing, and the relevant affidavits, the Court concludes that the CIA has met its burden and established that it has conducted an adequate search. Accordingly, summary judgment is warranted.

A. Plaintiffs' Contention That Alleged Missing Records Indicate An Inadequate Search Fails

"In order to obtain summary judgment the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can reasonably be expected to produce the information requested." *Oglesby*, 920 F.2d at 68. Sometimes, failure to

uncover a particular document in a search will be given "significant weight" by a court analyzing adequacy. *Iturralde*, 315 F.3d at 315. However, unsubstantiated allegations of unreleased files hold little merit. *Meeropol v. Meese*, 790 F.2d 942, 952–53 (D.C. Cir. 1986) ("[A] search is not unreasonable simply because it fails to produce all relevant material."). And failure to turn up a document is not alone enough—the inquiry is "the appropriateness of the methods used to carry out the search" rather than "the fruits of the search." *Iturralde*, 315 F.3d at 315 (citing *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994)).

Plaintiffs contend that their evidence demonstrates that the CIA has not released records "clearly in its possession." Pls. Mem. 3. Plaintiffs cite generally to their 2016 statement of material facts, and to several affidavits, to support their contention that "affidavits contain numerous examples of operations, events and activities that surely generated relevant records that have not been provided or otherwise identified." *Id.* at 3–4 & n.1. After reviewing the specific portions of the 2016 statement of material facts cited to by plaintiffs, as well as the affidavits referenced, this Court has identified several that form a substantial basis for plaintiffs' contention. For example, the affidavits of Former United States Senator Bob Smith and James Sanders are statements tending to establish the prior existence of records shown to Congress.

Senator Smith stated that the Senate Select Committee on Prisoners of War found, "thousands of live-sighting reports over the years from the end of the [Vietnam] war into the 1990s." ECF No. 258-4 ¶ 8. James Sanders quotes a Senate report from the 1990s that, "the U.S. government has at least 1,400 such [live-sighting] reports." ECF No. 258-2 at ¶ 13.[2]

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[2] Other examples include declarations previously credited by the Court, such as those of former Congressmen Bill Hendon and John LeBoutillier. ECF No. 340 at 2; *see* ECF No. 95-45; ECF No. 83-15.

Plaintiffs also point to the 1994 affidavit of Barry Toll, who served in the Army in Southeast Asia in the 1960s and 70s. ECF No. 83-1. His statements are of a different kind, pointing not to evidence of Congressional review of records, but rather to how the purported files were kept internal to the Executive Branch. In the late 1960s and 70s Toll worked in a Department of Defense group that organized, coordinated, and collected intelligence and operations regarding POWs in Southeast Asia during the Vietnam War. *Id.* at 3. According to Toll, that group, termed the Studies Observation Group ("SOG"), was the "central bottleneck" through which all POW related intelligence from any agency "flowed to the White House." *Id.* at 4.

Years after his work for SOG, and following extensive Congressional testimony about his experiences, Toll formed a group of experts on POWs to apprise the newly inaugurated President Clinton about "what he was not being told [about POWs]." *Id.* at 12. One member of this group was George Carver, a former CIA employee who worked in the Nixon White House during the years when SOG would send information to Washington. *Id.* Carver and Toll met with Anthony Lake, President Clinton's National Security Advisor in 1993. *Id.* at 15. Toll recounts this meeting in his affidavit. *Id.* Carver told Toll that the SOG archives were routinely ferried from the White House to CIA headquarters at Langley where he said they would likely remain, either in the "Director of Operations files" or the "Executive Registry Files of CIA." *Id.* at 16–18. Furthermore, Carver also stated that, even if the files had been destroyed, there would be a record of them. *Id.* at 18. Toll admits in his affidavit, however, that the Senate Select Committee was never able to "locate the SOG archives." *Id.* at 11.

These kinds of statements were previously credited by the Court as "positive indications of overlooked materials." ECF No. 340 at 2 (quoting *Aguiar v. Drug Enf't Admin.*, 865 F.3d 730, 738 (D.C. Cir. 2017)). The Court came to that conclusion, in part, because the CIA specifically

refused to "confirm nor deny" the existence of the records. *Id.* Back then, the CIA stated that, if the records existed, they would be in operational files. *Id.* That ominous non-answer has been rendered moot by the search at issue here, which turned up no responsive records in the CIA's operational files. Thus, the plaintiffs' affidavits and other evidence must now stand alone. But, just because "a document [might have] once existed does not mean that it now exists." *Miller v. Dep't of State*, 779 F.2d 1378, 1385 (8th Cir. 1986). 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. "[M]ere reference to other files does not establish the existence of [relevant] documents." *Morley v. Cent. Intel. Agency*, 508 F.3d 1108, 1121 (D.C. Cir. 2007) (internal quotation marks omitted) (quoting *Steinberg*, 23 F.3d at 552).

But more fundamentally, plaintiffs' evidence fails given the limited purpose here. Agencies normally have discretion when determining which systems they believe are going to be responsive to a plaintiff's request. *See Oglseby*, 920 F.2d at 68. But here, the Court specifically ordered a search of operational files. ECF No. 340 at 3. The Court is only addressing the adequacy of that operational files search. ECF No. 375 at 5. And the plaintiffs' evidence does not establish, or even significantly suggest, that the files referenced are in the CIA's current operational files.[3]

In sum, plaintiffs' evidence is simply too attenuated to sufficiently overcome the CIA's adequate affidavit. *See Iturralde*, 315 F.3d at 315. Plaintiffs' affidavits, even considered alongside

[3] Plaintiffs' assertion that "the Agency declined to search" the systems mentioned by Mr. Toll for responsive records that they believe to be within the SOG archives is thus even further off base. Pls. Mem. 7–8. The CIA was only required to search its operational files.

the other parts of the eighteen-year record, fail to bind together in a manner that overcomes the CIA's showing of an adequate operational files search. Thus, the fact that these referenced records did not appear does not counsel a finding of inadequacy. *See id.*

B. Plaintiffs' Contention That Search Terms Were Insufficient Fails

Plaintiffs' next argument is that a litany of search terms should have been used by the CIA. Pls. Mem. 4–7. This is no small request, especially since plaintiffs argue that the CIA should search its operational files for over 1700 individual names and terms related specifically to Laos. *Id.* at 4–5. Furthermore, such a request runs directly into FOIA precedent advising that "agencies generally have 'discretion in crafting a list of search terms' as long as they are 'reasonably tailored to uncover documents responsive to the FOIA request.'" *Heffernan v. Azar*, 317 F. Supp. 3d 94, 108 (D.D.C. 2018) (quoting *Tushnet v. U.S. Immigr. & Customs Enf't*, 246 F. Supp. 3d 422, 434 (D.D.C. 2017)); *see Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 140–41 (D.D.C. 2015); *Liberation Newspaper v. U.S. Dep't of State*, 80 F. Supp. 3d 137, 146 (D.D.C. 2015).

Here the CIA lists the following search terms: "POWs, prisoners of war, MIA, missing in action, Vietnam, task force, House Special POW, image, and different combinations and variations of those search terms." Vanna Blaine Decl. ¶ 12. The CIA also explains that it used broad search terms because the use of more specific terms may have omitted documents potentially responsive to plaintiff. Supp. Vanna Blaine Decl. ¶ III.2. The Court finds these terms sufficient because "it . . . appears more than likely that the terms utilized would identify" documents responsive to plaintiffs' request. *See Bigwood*, 132 F. Supp. 3d at 141. The terms used by the CIA appear to be reasonably likely to have yielded the files sought by plaintiffs if they were indeed present in the CIA's operational files.

C. Plaintiffs' Contention That The CIA Failed To Describe Its Search in Adequate Detail Fails

Plaintiffs' last argument is that the CIA's description of its search is insufficient to warrant summary judgment. Pls. Mem. 2–3. The Court holds the CIA's description is adequate, especially considering the circumstances of this case, wherein the Court has ordered the CIA to search its operational files.

When describing its search an agency must provide affidavits that are "'relatively detailed' and nonconclusory and must be submitted in good faith." *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) (quoting *Goland v. Cent. Intel. Agency*, 607 F.2d 339, 352 (D.C. Cir. 1978)). Moreover, affidavits must "explain in reasonable detail the scope and method of the search conducted by the agency." *Id.* at 127. However, an agency need not "in every FOIA case . . . set forth with meticulous documentation the details of an epic search for the requested records." *Id.*

The D.C. Circuit's cases lay out general criteria for determining adequate description. *See, e.g.*, *Weisberg* 627 F.2d at 371; *Mobley v. Cent. Intel. Agency*, 806 F.3d 568, 581 (D.C. Cir. 2015); *Morley*, 508 F.3d at 1122. Broadly, an adequate description will include (1) an explanation of what files were searched, (2) who searched them, and (3) a description of the systematic approach used to locate responsive documents. The Court will take each of these in turn.

First, the CIA denotes what files were searched. It does so by specifying (1) the search terms used, (2) why they were selected, (3) that the search was not limited by date range, (4) and that both electronic and hard-copy files were searched across "Agency-wide operational file systems." Vanna Blaine Decl. ¶¶ 10, 12; Supp. Vanna Blaine Decl. ¶ III.1–2. Second, for who, the CIA explains that "CIA information management professionals" searched through the file systems and conducted a two-tiered review. Vanna Blaine Decl. ¶ 11. Finally, the CIA describes its

systematic approach. The CIA describes the "broad search terms" used to find initially responsive documents. *Id.* at ¶ 12. Then, for files identified by the search, the CIA explains how it proceeded to individually review any responsive records for information relating to the plaintiffs' request. *Id.* at ¶¶ 13–14.

Nevertheless, Plaintiffs argue that the CIA must provide more information such as, the names of offices and records systems searched, how many databases were searched, if there were indices used, and how many hours were devoted to the search. Pls. Mem. 3. Plaintiffs cite to an earlier opinion in this case, *Hall*, 668 F. Supp. 2d at 172, which held that a different CIA search was inadequately described. *Id.* at 184; Pls. Mem. 2. There, the CIA provided "no information regarding how the search used to locate the records produced . . . occurred." *Hall*, 668 F. Supp. 2d at 184. But, unlike then, the affidavit here contains detailed information about how this search was conducted.

Plaintiffs cite no other cases to support their proposition that the CIA must be more detailed. And, in fact, cases suggest that the CIA is not obligated to, "disclose the specific offices searched or other search methodologies with such granularity." *Looks Filmproduktionen GmbH v. Cent. Intel. Agency*, 199 F. Supp. 3d 153, 167 (D.D.C. 2016); *see DiBacco v. Dep't of the Army*, 795 F.3d 178, 194–95 (D.C. Cir. 2015). The CIA's description is therefore sufficient on its own merits.[4]

But even beyond the affidavit's independent sufficiency, this case involves unique circumstances that further counsel ruling in favor of the CIA. The Court ordered the CIA to search its operational files. ECF No. 340. Operational files are typically exempt from search, review, or

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[4] The CIA's declaration certifies that, "[a]ny database where operational files related to plaintiffs' request could reasonably have been located were searched in the course of this review." Supp. Vanna Blaine Decl. ¶ III.1.

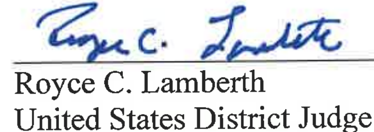
disclosure under the National Security Act of 1947. 50 U.S.C. § 3141(a); *Morley*, 508 F.3d at 1116. It is only because this Court applied one of the Act's limited exceptions that the CIA needed to search its operational files here. ECF No. 340 at 3; 50 U.S.C. § 3141 (f)(4). The CIA rightfully points out the sensitive national security nature of its operational files. Supp. Vanna Blaine Decl. ¶ III.1. Thus, requiring an even more detailed description would be delicate matter.

Particularly given that the CIA's affidavits already make a strong showing of sufficiency, this Court finds that the description is adequate.[5]

IV. CONCLUSION

For the foregoing reasons, the Court will **GRANT** the CIA's motion for summary judgment and **DENY** plaintiffs' motion for summary judgment by separate order.

Date: July 7, 2022



Royce C. Lamberth
United States District Judge

[5] Given the aforementioned analysis, the plaintiffs' other argument, that the CIA's description fails because the search "generated a few [initially responsive] records," Vanna Blaine Decl. ¶ 13, but did not detail the exact number, cannot win the day. Plaintiffs cite no case wherein a court has found a search inadequate based on a lack of specificity regarding the initial number of responsive records. And cases in this Circuit suggest that without more missing information, a court will not hold a search inadequate on such a basis. *See Morley*, 508 F.3d at 1122; *Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 891 (D.C. Cir. 1995). Thus, plaintiffs cannot impugn the adequacy of the CIA's search by demanding the specific numbers of initially responsive records.