UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 04-814 (RCL)
	)	ECF
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S
"MOTION FOR PARTIAL SUMMARY JUDGMENT"

Defendant, Central Intelligence Agency ("CIA" or "the Agency"), by and through the United States Attorney for the District of Columbia, hereby responds to Plaintiffs' motion to compel, (styled as "motion for partial summary judgment as digitization of responsive records") [sic] ("Plt.'s Motion") (D.I. 197). Specifically, Plaintiffs request that the Court order the CIA to "provide its releases of documents in May and June of 2013 and all future releases to plaintiffs in word searchable pdf format." *Id*. at p. 12[1] (Proposed Order). Plaintiffs' motion, under any title, should not be granted because, as the Agency's declaration fully describes, the records Plaintiffs seek in electronic format are not readily reproducible in that format by the Agency's Freedom of Information Act ("FOIA") office. Martha M. Lutz's July 24, 2013 Declaration, attached hereto as Exh. A ("Lutz Decl.").

BACKGROUND

In February 2003, Plaintiffs submitted a FOIA request for CIA records regarding prisoners of war and persons missing in action in Southeast Asia. Plt. Mot. at p. 1; Complaint (D.I. 1 ¶ 6). On May 19, 2004, they filed the instant complaint. [D.I. 1]. As the Court is aware, through the

[1] For ease of reference, page numbers cited are those stamped on Plaintiffs' filing, by the Court's ECF system, on the upper right hand side of docket item 197.

stream of status updates, *inter alia*, the Agency, and other executive branch entities,[2] have been releasing non-exempt records in hard copy form to Plaintiffs, over the past several years. *E.g.*, D.Is. 172, 175, 176, 177, 185, 188, 190, 194, 196. Indeed, Plaintiffs acknowledge that "over the past nine years thousands of pages of records have been released in hard copy form."[3] Plt. Mot. at p. 6. Recently, Plaintiff's counsel informally "requested that releases be made in word searchable pdf format." *Id*. The Agency has explained that it could not do so,[4] prompting Plaintiffs to file the instant motion. *Id*.

ARGUMENT

Preliminarily, Plaintiffs' motion, brought pursuant to Rule 56 of the Federal Rules of Civil Procedure, is more akin to a motion to compel, that would be brought under Rule 37(a), if this were not a FOIA matter. The summary judgment-related Rule states that, "[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). Plaintiffs' complaint presents a *claim* for Agency records under the FOIA, and makes no mention of the format in which he wishes

[2] *E.g.*, Department of Defense and the National Security Agency declarations submitted with previous filings. D.Is. 177-12 and 177-13.

[3] Yet, Plaintiff also claims that the CIA has engaged in delaying the matter, without providing the Court with any citations to the record. Pl. Mot. at p. 5. As noted in footnote 4, *supra*, the "delay" issue is a red herring.

[4] Given Mr. Hall's recent disability, the undersigned has offered to facilitate the flow of information by having support staff in her office convert the documents to electronic format, but Plaintiffs have refused the offer. In response, Plaintiffs contend that digital reproduction by this Office would create "another layer of complexity and delay that is unwarranted." Plt. Mot. at p. 7, n. 1. But, it is unclear what "complexity" Plaintiffs speak of, and there is no doubt that they would have had the records in the format they seek by now, if not sooner, had they agreed to accept counsel's offer instead of imposing on the Court's limited resources by engaging in unnecessary motions practice. Interestingly, Plaintiffs admit that the "background facts [related to Mr. Hall's disability] [] do not affect this right." *Id*. at p. 7.

to receive the documents. Complaint, D.I. 1. Thus, in which format Plaintiffs receive records is irrelevant to the ultimate, substantive question as to which records they may be entitled, whether the search for the records was adequate, and whether the Agency's claimed exemptions are properly asserted. *E.g.*, *Students Against Genocide v. Dept. of State*, 257 F.3d 828, 833 (D.C. Cir. 2001) (In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, not withheld, is unidentifiable, or is exempt from disclosure). Instead, they seek an order to compel the Agency to release documents recently provided, and all future releases, in an electronic format, which is not a part of their FOIA claim. *See generally*, Plt. Mot. Accordingly, a review of this matter may be inappropriate under the summary judgment standard, but in any case, Plaintiffs are not entitled an electronic version of the records at issue.

Additionally, in *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Educ.*, 905 F. Supp. 2d 161 (D.D.C 2012), the court cited CREW's failure to include in its FOIA request an indication that it wished for the government to *produce* documents in electronic format as one of the reasons it granted the government's motion when it dismissed the case. Specifically, the court noted that while CREW had requested that the Department of Education search for records regardless of form or format, it "did not *request* that DoEd produce its records in electronic format." *Id*. at 171. Here too, Plaintiffs, neither in the initial FOIA request to the Agency nor in the complaint, asked that the Agency provide the records in electronic format, and they never amended their request or filings. *See generally*, Docket. Indeed, they admit that it was only "over the past couple of years" that they raised this issue. Pl. Mot. at 6. Throughout the course of this litigation, the Agency has processed and Plaintiffs have accepted tens of thousands of documents in hard copy. Therefore, Plaintiffs should not be permitted to make additional

demands of the Agency that were not set forth in either their FOIA request or even their complaint, nine years after the suit was filed.

The Records Plaintiffs Seek in Electronic Format Are not Readily Reproducible in That Format by the Agency's FOIA Office.

Plaintiffs' assertion that they are entitled to the documents in electronic format lacks merit. In 1996, the FOIA was amended to allow requesters to seek a specific format for the records to be released:

> In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

5 U.S.C. § 552(a)(3)(B). The government has interpreted the foregoing provision to mean that a requester may choose among the formats in which the record already exists. *See Dept. of Justice Office ("DOJ") of Information Policy, Guide to the Freedom of Information Act* (2009 ed.) at 92 (agencies must "honor a requester's choice of format among existing formats of a record (assuming there is no exceptional difficulty in its reproduction)"); DOJ, FOIA Update, Vol. XVII I, No. 1, at 3, available at http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_1/page3.htm (Winter 1997) (last visited on July 26, 2013). The DOJ guidance further states,

> Under the provisions of [] subsection (a)(3)(B), a requester may ask to have a record disclosed in a new form or format and an agency must do so if the record is "readily reproducible" in that form or format with "reasonable efforts." 5 U.S.C. § 552(a)(3)(B); *see* H.R. Rep. No. 104-795, at 18 (1996) ("Agencies must make a 'reasonable effort' to comply with requests to furnish records in other formats."); *see also* FOIA Update, Fall 1996, at 2. In some situations, such as where the record already exists in one electronic format and an agency is readily able to convert it to a different electronic format upon request, the agency will be obligated to comply with that request. In other situations, such as where *records exist only in paper form and the requester seeks to have them converted to an electronic form, an agency may determine that it cannot readily do so with a reasonable amount of effort.* In all situations, an agency is obligated to consider the particular set of circumstances involved before determining whether it can reasonably

> comply with what a particular requester seeks. *See also* 5 U.S.C. § 552(a)(4)(B) (as amended, effective Mar. 31, 1997) (providing special deference to agency determinations made under this subsection).

Id. (emphasis added). *See also Landmark Legal Found. v EPA*, 272 F. Supp. 2d 59, 63 (D.D.C. 2003) (holding that the paper copies of emails maintained by agency were "readily reproducible" to the extent they could "be easily duplicated on a copy machine"); *Carlson v. U.S. Postal Serv*., No. 02-5471, 2005 WL 756573, at *7 (N.D. Cal. Mar. 31, 2005) (holding that "readily reproducible" in a requested format means "readily accessible" by the agency in that format).

Whether the requester seeks a format in which the records already exist or a format not in existence, the "readily reproducible" analysis involves the significance of the burden the requested format would impose on the agency. *See, e.g., TPS, Inc. v. U.S. Dep't of Defense*, 330 F.3d 1191, 1195 (9th Cir. 2003) (acknowledging that, even "[w]hen an agency already creates or converts documents in a certain format," the agency could show that the records were not reasonably reproducible in that format by "specific, compelling evidence as to significant interference or burden"). The statute emphasizes that courts must "accord substantial weight to an affidavit of an agency concerning the agency's determination as to . . . reproducibility under paragraph (3)(B)." 5 U.S.C. § 552(a)(4)(B); *see also Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C. Cir. 2006) (holding that an agency's "determination as to reproducibility . . . must be accorded 'substantial weight' by the reviewing court").

Here, the records requested by Plaintiffs are not "readily reproducible" in an electronic format due to the burdens imposed by the Agency's required security procedures and policies. Specifically, the CIA operates in a unique security environment whereby the "vast majority of the Agency's operations are conducted on a secure system that is walled off from access to the outside." Lutz Decl. ¶ 15. Agency employees conduct their day-to-day work on CIA's

classified or "high-side" work environment and are not able to make work available in unclassified medium without the use of certain prescribed security procedures. *Id*. ¶¶ 7-8. In an effort to protect national security information, the CIA Director "has mandated stringent security controls regarding the access, processing, storage, and transfer of information." *Id*. ¶ 8. Indeed, CIA employees do not even possess access to the CD-Rom drives or USB ports on their computers. *Id*.

The process of transferring records from the high-side environment to the low-side system requires the use of a data transfer officer ("DTO"), an employee who is specifically authorized to conduct "high-side" to "low-side" transfers of unclassified records. *Id*. ¶¶ 9-10. The number of persons with such DTO privileges is severely limited and that access has been further restricted in the past several years in response to security concerns. *Id*. ¶ 10. DTOs, in addition to their other job responsibilities, "perform a series of checks to determine whether classified content or metadata are embedded in the record." *Id*. The DTO reviews must be conducted for all record transfers occurring from the high-side system. *Id*. However, due to the limited nature of the program, the DTO process is used for transferring "discrete sets of data files for *mission critical* purposes and does not have the resources to support massive information review and release projects." *Id*. Furthermore, although DTOs provide an important safeguard against the release of unauthorized information, "they do not ensure the content of the data, determine the classification of the information, or take responsibility for errors made by the employee requesting the [DTO] transfer." *Id*. ¶ 14. For these reasons, after the DTO has completed his or her review, "Agency personnel are required to conduct [yet] additional security screening of content and metadata to ensure that no classified information had been inadvertently transferred in the DTO process," *Id*.

In the instant case, the documents located in the Agency's classified work environment – specifically, on the CIA's Classified Automated Declassification Review Environment ("CADRE"). *Id*. ¶¶ 6, 11. CADRE serves as the repository for documents processed under the FOIA – such as those at issue here, and is used for treating each records and applying redactions (based on FOIA exemptions). *Id*. ¶ 11. In the course of responding to FOIA requests, the Agency searches its directorates and offices for responsive records and uploads those documents into CADRE in preparation for processing. *Id.* As the Agency explained in a recent status report (D.I. 196), some of the documents at issue here – those that were located at the Agency Archives and Records Center – are fragile and require special treatment in order for personnel to scan them into CADRE for processing. Lutz Decl. at p. 8, n. 4. Plaintiffs take this statement to mean that the Agency possesses the capability to scan documents into an electronic format, but as discussed below, this scanning takes place on the classified system and does not produce records in an unclassified format. *Id*.

CADRE access is restricted to authorized users and, by design, the system does not have a function to transfer or convert records contained in the system directly into the form of a PDF. *Id.* ¶ 12 This type of restriction helps to ensure that dissemination within the Agency of compartmented information, Privacy Act protected records, and other sensitive material is properly controlled. *Id*. CADRE's inability to directly convert records into a PDF format does not present a problem where records are produced in a paper format –- as those records can be printed directly from CADRE for release to the FOIA requester. *Id.* ¶ 13. However, the absence of this function presents a significant challenge when producing records in an electronic format. *Id*. Production of records in an unclassified PDF format would require Agency personnel to print the documents from the CADRE system and then scan and upload them back into the classified

work environment for DTO review. *Id.* As described above, the DTO process is intended to bridge the divide between the classified work environment and low-side networks to support essential Agency operations. *Id.* It is not designed to accommodate the volume of records involved in responding to information access requests, which require the production of hundreds of thousands of pages per year. *Id.*

In this case, the DTO would be required to conduct security scans for each of the thousands of pages of remaining responsive records in order to check for classified metadata and content before transferring the record to a CD-Rom or other form of electronic media. *Id.* ¶ 14. Although DTOs provide an important backstop for the inadvertent release of information, they do not verify the content of the data, determine the classification of the information, or take responsibility for errors made by the employee requesting the transfer. *Id.* Because the scanned documents reside on the high-side, the agency cannot simply assume that the only information transferred onto a CD or other removable media is the information that appears on the paper copies of records. *Id.* Accordingly, after the DTO review is complete, Agency personnel would be required to conduct an additional security screening of content and metadata to ensure that no classified information had been inadvertently transmitted in the DTO process. *Id*. Given the high volume of records involved in this request and the necessity of the security screening procedures designed to protect against the unauthorized release of classified information, it would take multiple Agency employees months to complete the transfers of the remaining records that are responsive to plaintiffs' request to an unclassified PDF format, which would not necessarily be word searchable. *Id*. This type of production would require extensive utilization of CIA personnel and resources and would severely disrupt the normal business processes of the Agency. *Id*.

Because of the Agency's unique security environment and its extensive work with classified national security information, "these safeguards are necessary to ensure that classified information is not, either unwittingly or intentionally released into the public domain." *Id.* ¶ 15. It should be noted that the CIA differs from other federal agencies subject to the FOIA in that the vast majority of the Agency's work is conducted on a secure system to which the outside entities simply could not have access to ensure that sensitive national security information is not compromised. *Id.* The recent leak of classified information related to the foreign surveillance program demonstrates how critical it is for agencies dealing with sensitive national security information to restrict the unmonitored flow of material from a classified environment to the public domain. *Id.*

The CIA's determination that it cannot "readily" reproduce electronic versions of the records is entitled to substantial weight. 5 U.S.C. § 552(a)(4)(B). The term "readily" as commonly defined means "promptly, quickly, easily" and its inclusion in 5 U.S.C. § 552(a)(3)(B) represents a decision by Congress that agencies, like the CIA, should not have to dedicate their finite FOIA resources to undertaking time-consuming and labor-intensive processes to convert documents into requested formats. As Ms. Lutz explains – due to the substantial security measures designed to restrict the flow of information from the classified system to an unclassified medium, the records are not readily reproducible in the format that Plaintiff proposes. *Id.* ¶ 15. Moreover, according such weight to the Agency's judgment is particularly appropriate in this case, where security measures figure so heavily in the Agency's determination. *See, e.g., Ctr. for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926-27 (D.C. Cir. 2003) ("It is well-established that the judiciary owes some measure of deference to the executive in cases implicating national security."); *id.* at 927 ("[W]e have consistently deferred to executive

affidavits predicting harm to national security, and have found it unwise to undertake searching judicial review.").

Plaintiff's reliance on *Sample v. Bureau of Prisons*, 466 F.3d 1086, is misplaced. Pl. Mot. at 5. Sample does not establish a blanket rule that agencies always must release records in electronic format. Instead, the Court held that BOP erroneously conflated its statutory duty to provide "readily reproducible" electronic copies of records to a prisoner with that prisoner's ability to receive and use records in an electronic format. *See Sample*, 466 F.3d at 1088. To be sure, when describing Section 552(a)(3) of FOIA, the D.C. Circuit stated that "'readily reproducible simply refers to an agency's technical capability to create the records in a particular format." Id. But BOP did not argue – as the CIA does here – that the disputed records were not "readily reproducible" electronically due to the burdensomeness of such a production, and Sample did not involve the classification and national security concerns that this case implicates. Consequently, the D.C. Circuit did not have to address the finer statutory interpretation question that Plaintiff's partial summary judgment motion presents --- whether the mere fact that an agency has the physical capability of scanning records means that records subject to the security and classification constraints that govern the CIA records at issue here should be deemed "readily reproducible" in electronic format.

To the extent that the quoted excerpt from *Sample* may appear to announce a broadly applicable interpretation of Section 552(a)(3) as requiring only that an agency be 'technically capable' of producing records in a certain format, the CIA respectfully submits that it is dicta. Indeed, defining 552(a)(3) in that manner would read the word "readily" out of the statute, by making the analysis turn on whether an agency *can* reproduce records in a certain form, as opposed to how *readily* the agency can do so. That contravenes well settled principles of statutory

construction. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). Accordingly, this Court can, consistent with *Sample*, defer to the CIA's judgment about the burdensomeness of generating releasable electronic versions of these documents.

TPS, Inc. v. Department of Defense, a Ninth Circuit case which Plaintiff also cites, does not bind this Court, and is distinguishable. TPS interpreted "readily reproducible" in the context of a Department of Defense regulation governing production of electronic data under FOIA dictated "a standard of reasonableness" and "business as usual" as guiding principles. *See TPS*, 330 F.3d at 1192; 32 C.F.R. § 286.4(g)(2). Therefore, the Court noted that "[t]he focus of this controversy is interpretation of 'business as usual' in the context of records that are requested in a particular electronic format." *TPS*, 330 F.3d at 1192. The Court's analysis, likewise, centered on interpreting the reasonableness of the agency's position in light of the binding regulations defining DOD's obligation to release records in the requested form. *See id*. at 1194 ("The question before us is interpretation and application of the 'business as usual' standard in the regulations related to electronic data."). That DOD regulation does not apply to the CIA, nor does the CIA have a similar regulation.

In sum, the records that Plaintiff seeks are not "readily reproducible" in electronic format. The ordinary meaning of the word "readily" indicates that § 552(a)(3) requires only that agencies provide records in the requested format when doing so can be done "without much difficulty." *See Merriam Webster Dictionary* ("readily"). The Lutz declaration provides compelling evidence that, due to the additional security measures required of CIA personnel to produce the information in an unclassified, electronic format, giving Plaintiff electronic copies of records would cause significant interference and burden to the CIA. Plaintiff's motion for partial summary judgment on this issue should, therefore, be denied.

CONCLUSION

For all the foregoing reasons, Plaintiffs are not entitled to release of records in electronic format.

Respectfully submitted,

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Date: July 29, 2013

IN THE UNITED STATES DISTRICT COURT
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	)	ECF
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS'
STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 7(h), Defendant, the Central Intelligence Agency, ("CIA" or "the Agency") hereby submits the following statement of material facts as to which there is no genuine dispute.

1. Not in dispute.

2. Not in dispute.

Respectfully submitted,

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	)	
Defendant.	)	
_____	)	

[PROPOSED] ORDER

Upon considered Plaintiffs' Motion for Partial Summary Judgment as Production of Digitization of Responsive Records, the Agency's Opposition brief, and the entire record herein, it is hereby ORDERED that Plaintiffs' motion be DENIED.

_____ _____

DATE United States District Judge

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