

NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. CIRCUIT NO. 22-5235
(C.A. No. 04-814)

ACCURACY IN MEDIA, INC., *Plaintiff-Appellant*,)
)
 v.)
)
CENTRAL INTELLIGENCE AGENCY, *Defendant-Appellee*.)
)
)
)

PAGE PROOF BRIEF FOR APPELLANT

On Appeal from the United States District Court for the
District of Columbia, Hon. Royce C. Lambert, District Judge

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**APPELLANT'S CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rules 15(c)(3), 26.1 and 28(a)(1), counsel for Appellant certifies as follows:

I. Parties

The Appellant is Accuracy in Media, Inc. ("AIM"), a Plaintiff in the District Court. The Appellee is the Central Intelligence Agency, which was named as the Defendant in the District Court. There are no amicus curiae.

II. Ruling Under Review

At issue in this appeal is the Honorable Judge Royce C. Lamberth's July 7, 2022 Memorandum Opinion and Order (a) granting the Defendant's Motion for Summary Judgment against the Plaintiffs; and (b) denying Plaintiff AIM's Motion for Summary Judgment.

III. Related Cases

Undersigned counsel is not aware of any pending related cases.

Respectfully submitted,

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APPELLANT'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Accuracy in Media, Inc. ("AIM") states that it is a not-for-profit corporation duly organized and existing under the laws of the District of Columbia. AIM is not a publicly held corporation, has no parent companies, and no companies have a 10% or greater ownership interest in AIM.

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APPELLANT'S OPENING BRIEF

BACKGROUND AND STATEMENT OF THE CASE

On January 23, 1973, the government's position, or policy, on the issue of unrepatriated American POWs in Vietnam and Laos was established, and announced. "All our boys are on the way home,"¹ President Nixon announced on national television, as the Paris Peace Accords had brought a close to the Vietnam War. But it was not true. Communists withheld 678 POWs² as collateral for the

¹ The President stated that "[w]ithin 60 days, all American prisoners of war throughout Indochina will be released. There will be the fullest possible accounting of all those missing in action..."

² *1,205 Document*. In December of 1992, Harvard University's Dr. Stephen Morris discovered in the Soviet Union archives the most illuminating record on the issue of the number of POWs remaining in communist hands at war's end—the transcript of the Soviet's surreptitiously taped debriefing by a top Vietnamese Army General to Vietnam's Politburo reporting that the total number of communist-held American POWs in Southeast Asia was 1,205—just months before Operation Homecoming returned 591 POWs.

Eight months after the CIA issued its *1998 National Intelligence Estimate* (NIE), which contended that the 1,205 Document was unreliable, Senator Bob Smith issued his 160-page Critical Assessment of the NIE supporting the reliability of the 1205. Eighteen years later, in 2016, the CIA released Senator Smith's assessment, redacted.

In February of 2000, the CIA responded in a Report to Senator Smith's critique. Twenty-one years later, in June of 2021, the CIA released this Review, but withholds, in full, a classified version of this Review.

approximately \$3.5 billion³ in war reparations that President Nixon had promised.

The money never came, and the Prisoners-of-War (“POWs”) never came home.

Efforts at repatriation began immediately upon the North Vietnamese’s release of their list of returnees, in February of 1973.⁴ Calls for public disclosure of information on these unrepatriated POWs has been ongoing for decades. Public interest spiked in the 1980s⁵ and 1990s; more so in the latter, primarily due to the

³ See, e.g., *Sanders Aff.* ECF No. 258-2 ¶ 6 quoting *Examination of U.S. Policy*: In fact, U.S. reparations to North Vietnam were being discussed in Paris, France from April through June of 1973. The negotiations were extensive and detailed. A list of specific items was drawn up for the first year of U.S. aid. Among some of the items on the list: 700,000 square meters of prefabricated housing and warehouses; 200,000 metric tons of steel building supplies; 50,000 cubic meters of timber; 40 million meters of cloth; 2,000 metric tons of Rayon fibers; between 2,650 and 2,900 tractors, bulldozers and excavators...”

⁴ See, e.g., *Wash Post* Sept. 22, 1992, *Nixon Knew of POWs, Aids Say*: “Admiral Thomas Moorer, chairman of the Joint Chiefs of Staff, had ordered a halt to the U.S. troop withdrawal because North Vietnam had not given a full accounting of the prisoners. But the order was rescinded overnight.”

⁵ See, e.g., *McDaniel Aff.* ECF No. 258-1 ¶¶ 6, 8-10, 13: I was able to survive almost six years (2,117 days) of brutal and barbaric torture by clinging to a false belief that the United States government would never abandon living Americans...

In 1978, I was interviewed and selected to become Director of Navy/Marine Corps Liaison to the U.S. House of Representatives. During my tour of duty on Capitol Hill, after seeing multiple aerial photographs and hearing of Vietnamese “boat people” who had seen Caucasians in a captive environment long after the war’s end, I became convinced that our country had abandoned some of our POWs.

hearings before the *Senate Select Committee on POW/MIA Affairs*,⁶ August 2, 1991 to January 2, 1993.

Those hearings revealed the consensus that men had been abandoned. *See, e.g., Wash Post* Sept. 22, 1992, *Nixon Knew of POWs, Aids Say*, reporting on the testimony of Secretary of Defense James Schlesinger, and Secretary of Defense Melvin Laird, both of whom confirmed that Nixon “had strong evidence that some Americans were left behind, probably in Laos, when the war ended.” It also related:

In 1986, four years after retiring from the U.S. Navy, I began to speak out publicly about our missing men. Almost immediately, the power brokers on the POW issue began to attempt to attack my character. Up until this time, I had received accelerated promotions twice, selected to command two Navy ships (USS Niagara Falls and aircraft carrier USS Lexington). These two command assignments indicated that I was on a “fast track” to flag rank.

It was not long after I began to “speak out” in 1986 that I received a late-night phone call from a National Security Council official confirming that we did indeed still have living American POWs in Southeast Asia. I was admonished to “be patient” and advised that we would have them home “in two or three years, plus.”

⁶ *See Smith Aff.*, ECF No. 258-4 ¶ 1:
The Senate Select Committee on POW/MIA Affairs was a special committee convened by the United States Senate during the George H. W. Bush administration (1989 to 1993) to investigate the Vietnam War POW/MIA issue, that is, the fate of United States service personnel listed as missing in action during the Vietnam War. I wrote, and introduced, the Senate Resolution establishing that Committee, to attempt to get the documents and the truth released to the public. I served as the Committee's Vice Chairman. It was in existence from August 2, 1991 to January 2, 1993.

For most of a long day of testimony before the Senate Select Committee on POW-MIA Affairs, no Nixon administration official challenged an idea that once seemed almost unthinkable but is rapidly becoming the accepted view: Some Americans known to have been alive in Vietnamese or Laotian custody did not come home with their comrades in the spring of 1973...

* * *

"Had I been Secretary of Defense at the time" of the prisoner release in March 1973, said Laird, who left his post two months earlier, "I would have gone public."⁷

* * *

According to several documents recently declassified as part of a government decision to release formerly secret papers about the POW/MIA issue, North Vietnam committed itself to deliver prisoners held by the Pathet Lao communists in Laos, but did not or could not deliver.

In May of 1991, just before the *Select Committee* hearings commenced, the Senate Foreign Relations Committee issued its Report, *An Examination of U.S. Policy Toward POW/MIAs* (hereinafter "*Examination of U.S. Policy*"). It summarized the communist policy of holding back POWs at the end of hostilities with the U.S., as well as the Executive's full knowledge that the communists had not deviated from this practice in Vietnam and Laos.

Thus, by the time the 1991 *Select Committee* hearings began, the government's steadfast position—that "all our boys" were on their way home—was under attack.

⁷ See also *Smith Aff.*, ECF No. 258-4 ¶ 5: "Secretary Laird went into even more detail saying that the Pentagon had solid information, such as letters or direct contacts, with about 20 airmen who survived in Laos after their planes were shot down."

The government's position was further undermined in February of 1991 with the publication of the resignation letter of Colonel Millard Peck, the DOD's Chief of *Special Office for Prisoners of War and Missing in Action*.⁸ The *Examination of U.S. Policy* Report recounted that the resignation letter "confirms that a 'cover-up' has been in progress," and that "these are serious charges put forth by... one of the few who have intimate knowledge of the way the U.S. Government's POW/MIA policy operates." *Sanders Aff.* ECF No. 258-2 ¶ 16.

Another embarrassment occurred in 1992 when *US News & World Report* published satellite imagery of a POW distress symbol in Laos. *NBC Dateline* followed up with a segment featuring the view that the symbol "absolutely" "can only be a US pilot." The segment included the use of a "list of distress signals American flyers were told to display on the ground if shot down."⁹

⁸ See *Hrdlicka Aff.*, ECF 261-1 ¶ 51, quoting the 1992 resignation letter of Colonel Millard Peck, Chief, Special Office for Prisoners of War and Missing in Action (ECF 261-6 at 19-20): "I feel strongly that this issue is being manipulated and controlled at a higher level, not with the goal of resolving it, but more to obfuscate the question of live prisoners, and give the illusion of progress through hyperactivity. From what I have witnessed, it appears that any soldier left in Vietnam, even inadvertently, was, in fact, abandoned years ago, and that the farce that is being played is no more than political legerdemain done with 'smoke and mirrors,' to stall the issue until it dies a natural death."

⁹ In his book, *An Enormous Crime: The Definitive Account of American POWs Abandoned in Southeast Asia*, former U.S. Rep. Billy Hendon (R-NC) recounts the October 6, 1992, NBC Dateline segment, at 452-53:

Governmental efforts to obtain records disclosure include the McCain Bill (1991 NDAA § 1082 *et seq.*¹⁰) and three Presidential directives; by President Bush in 1992 (Executive Order (“E.O.”) 12812—*Declassification and Release of*

SCOTT: (Voiceover) DATELINE has obtained this computer-enhanced photograph, taken by an American spy satellite in January, 1988, in a rice paddy in Northern Laos...

MR. HENDON: And I have talked to the people in charge of the compartmented program, that—that deals with the escape and evasion symbol that was in the satellite photography. And they say, "Hey, no question. That's an American flier."

SCOTT: This is list of distress signals American flyers were told to display on the ground if shot down...

MR. HENDON: That can only be a US pilot telling you, "Get me out of here." That's all it can mean.

SCOTT: And he's saying that in January of 1988?

MR. HENDON: Absolutely.

* * *

SCOTT: You were given the same kinds of distress codes.

SENATOR McCAIN: Yes, we were.

SCOTT: When you see this K, the walking K, doesn't that catch in your throat a little bit?

SENATOR McCAIN: Oh, it caught in my throat enormously. I would say [though] that my experience and knowledge of prison camp is that the guards do not generally allow prisoners to go out and stamp out U-S-A in large letters so that it can be photographed [by] satellite or by airplane.

That's not their habit.

See generally Hendon Aff., ECF 95-45.

¹⁰ The McCain Bill also struck new amendments to Missing Service Personnel Act. *See Hrdlicka Aff.* ECF ¶¶ 65-66: “In 1996, the POW/MIA families... worked for 6 months, at our own expense, to get this legislation passed and into law. There were provisions... require[ing] evidence of death before the government could declare a person dead.... Another provision [] penalized [as a misdemeanor, DOD employees for intentionally] lying to service family members about their loved ones. Later, our amendments were repealed, at the behest of Senator John McCain.”

Materials Pertaining to Prisoners of War and Missing in Action), by President Clinton in 1993 (Presidential Decision Directive NSC-8, directing all agencies to complete review and release by Veterans Day, 1993), and by President Obama in 2009 (E.O. 13526, mandating automatic declassification of aged records and prohibiting continued classification to prevent embarrassment).

Thus, this lawsuit, now 20 years old, is part of a much larger advocacy, spanning 50 years, by family members, journalists, authors, organizations, Congressional Committees, at least three Administrations, and an Act of Congress—all seeking to prompt the government to reveal what it knows of the fates of these Americans.

In May 2004, plaintiffs Roger Hall, Accuracy in Media, Inc., and Studies Solutions Group, Inc., initiated this Freedom of Information Act (“FOIA”) action under 5 U.S.C. § 552, challenging the Central Intelligence Agency’s (“CIA” or “Agency”) response to FOIA requests for records related to prisoners-of-war (“POWs”) captured in Vietnam and Laos.¹¹

¹¹ ECF No. 114-1 at 10-11, FOIA Request includes:

1. Southeast Asia POW/MIAs (civilian or military) and detainees, who have not returned...
2. POW/MIAs sent out of Southeast Asia (for example, to China, Cuba, North Korea, or Russia)...
3. Prepared by and/or assembled by the CIA between January 1, 1960, and December 31, 2002, relating to the status of any United States POWs or MIAs in Laos...

Ultimately, on October 30, 2020, the CIA reported to the District Court that its search of its operational files located no responsive records. On November 30, 2020, the District Court entered final judgment in favor of the Agency. This appeal, by plaintiff Accuracy in Media, Inc., followed.

JURISDICTION

The District Court had subject-matter jurisdiction over this action under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* This Court has jurisdiction under 28 U.S.C. § 1291.

By Memorandum Opinion and Order entered on July 7, 2022, the District Court granted the CIA's Motion for Summary Judgment against the Plaintiffs and denied Plaintiffs' Motion for Summary Judgment. On September 6, 2022, Plaintiff Accuracy in Media, Inc., timely filed its Notice of Appeal.

ISSUES PRESENTED

Plaintiffs enumerate six issues, which raise three overall Complaints: (1) the enormous absence of responsive records, (2) the adequacy of the search terms used by the CIA in its search of its operational records, as well as the CIA's description

-
4. Records of the Senate Select Committee on POW/MIA Affairs... and returned to the CIA for processing.
 5. Records relating to... those persons who are named on attachment 2, the Prisoner of War/Missing Personnel Office's list of persons whose primary next-of-kin (PNOK) have authorized the release of information concerning them.”

of that search of its otherwise exempt operational records, and (3) the weight to be afforded to the CIA's motive for withholding records on unrepatriated POWs held in Vietnam and Laos after Operation Homecoming in 1973, as well as the CIA's history of unjustified nondisclosure.

The six issues set forth in their December 9, 2022, *Appellant's Statement of Issues*, are:

1. Whether the absence of responsive records is so enormous and wide-ranging as to raise substantial doubts regarding the CIA's search, rendering summary judgment inappropriate.
2. Whether the quantity of positive indications of overlooked materials raises substantial doubts regarding the CIA's search.
3. Whether the CIA's public explanation of its search of its operational records was made to the greatest extent possible.
4. Whether the CIA's explanation of its search must include whether it searched its repositories of operational records concerning POWs held in Laos.
5. Whether the search terms that the CIA employed were adequate and reasonably likely to yield the records sought.
6. Whether the District Court gave due weight to the CIA's motives to withhold its records that were generated after Operation Homecoming in 1973.

SUMMARY OF ARGUMENT

The absence of responsive records is so wide-ranging as to be highly probative of the inadequacy of the Agency's search. The CIA failed to employ numerous search terms that would have been likely to yield responsive records.

The CIA's *Vaughn* index is insufficient on several grounds, notwithstanding the Agency's position that it need not disclose the details of its search of classified operational files, exempt from the FOIA, to the same extent as its search of non-operational files. The District Court did not adequately consider the CIA's motives to withhold its records that were generated after Operation Homecoming in 1973.

STANDARD OF REVIEW

This Court reviews the action of the district court in a Freedom of Information Act case *de novo*. *Summers v. Dep't of Justice*, 140 F.3d 1077, 1079 (D.C. Cir. 1998). In a “review of decisions granting summary judgment we must decide the same question that was before the district court: ‘[t]hat is, we must determine whether there is on the record ‘no genuine issue as to any material fact,’” quoting Fed.R.Civ.P. 56(c). A *de novo* review is appropriate for all issues raised in this Appeal

ARGUMENT

I. ABSENCE OF RESPONSIVE RECORDS

The first two issues raised are treated together. They are:

1. Whether the absence of responsive records is so enormous and wide-ranging as to raise substantial doubts regarding the CIA's search, rendering summary judgment inappropriate.
2. Whether the quantity of positive indications of overlooked materials raises substantial doubts regarding the CIA's search.

A. Legal Standards

Notwithstanding the fundamental question being not "whether there might exist any other documents responsive to the request, but rather whether the search for those documents was adequate," *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994), the absence of identification and production of responsive records is so wide-ranging as to be highly probative of the inadequacy of the government's search.

If a review of the record "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. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Founding Church of Scientology v. Nat'l. Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979).

In its August 2017 opinion, the District Court held that the CIA failed to address specific allegations of the inadequacy of its productions:

The CIA has thus far failed to address specific allegations of inadequacy with any particularity, except to reiterate that it has produced the non-exempt material in the places it has searched. For example, in addition to the CIA's failure to turn-up files on 1,700 of the names of reported missing persons that it searched for, plaintiffs present evidence of imagery of suspected prison camps, up to 1,400 live-sighting reports, and named reconnaissance and rescue operations alleged to have taken place.

Mem. Op. ECF No. 291 at 15.

B. Discussion

In August of 2019, the Court ruled that, “given these ‘positive indications of overlooked materials,’” the Court needs more from CIA to feel confident the search was ‘reasonably calculated to uncover all relevant documents.’” *Mem. Op.* ECF No. 340 at 2. The Court distinguished that earlier holding:

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.

Mem. Op. ECF No. 385 at 6-7:

But the issue of overlooked materials is irrelevant to a “neither confirm nor deny” *Glomar* response: The issue under *Glomar* is whether the existence or non-existence of responsive records is itself protected information. Here, the issue is the search, plaintiffs met their burden under *Aguiar (infra)* and *Valencia-Lucena*, 180 F.3d at 326 (D.C. Cir. 1999), and nothing has changed.¹²

¹² See, e.g., *Plaintiffs’ Statement of Material Facts*, ECF No. 258-5.

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The CIA withholds records on (1) over a dozen reconnaissance/rescue operations, (2) inter-agency collaboration, (3) ransom offers, (4) intelligence provided by mercenaries, (5) the two-tier prison system, and (6) thousands of live-sighting reports.

"The total number of first-hand and hearsay live-sighting reports and other related reports is more than 15,000 since 1975" (*Senate Select Committee 1993 Report*, at 178), and they extend at least "into the 1990s." *Smith Aff.* ECF No. 258-4 ¶ 9.¹³ Pilots and navigators were particularly targeted never to be repatriated, some of whom were transferred to Russia.¹⁴ The CIA has records of at least a

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¹³ See also *Sanders Aff.* ECF No. 258-3 ¶ 13, quoting the 1991 *Examination of U.S. Policy*: "For Vietnam, the U.S. Government has at least 1,400 such reports, including reports that have been received up until the publication of this report in May, 1991...."

¹⁴ See *Sanders Aff.*, ECF No. 258-3 ¶ 20-21: "POW-related information from

dozen reconnaissance or rescue operations. It has imagery,¹⁵ including distress signals known only to the POWs.¹⁶ Its intelligence includes information on the

CIA debriefings of various Soviet defectors... [and] Dmitri Volkogonov, Russian head of the U.S. Joint Commission on POW/MIAs, whose widely-publicized comments on... [a] plan to ‘transfer knowledgeable Americans (POWs in Vietnam) to the USSR.’”

See also McDaniel Aff., ECF No. 258-1 ¶ 10-11, relating his belief that his navigator was the subject of a 1991 *Commercant* article recounting that a “U.S. second pilot shot down over North Vietnam on May 19, 1967, was taken overland through a ‘window’ in the China-Soviet border...” and onto Kazakhstan.

¹⁵ *Toll Aff.* ECF No. 83-1 at 6: The government had “vast studies of these camps in Laos, derived from SOG operations, Imagery Intelligence (IMINT, satellite, low and high-altitude aircraft), and much agent reporting from... operations and CIA operatives reporting on the Americans held in these camps in Laos;” *Hall Aff.* ECF No. 260 ¶ 72: “A DIA document dated December 30, 1980 refers to a meeting held that same day at which representatives of the DIA, the CIA, and the NSA were present.... It also related that a Vietnamese source had informed the CIA of a North Vietnamese POW camp, with coordinates, photography, and Americans, in August 1980.” According to the Senate *Select Committee's* 1993 Report, at p. 200, “These possible distress symbols, several of which match pilot distress symbols used during the war, span a period from 1973 to 1988, and as late as June 1992.”

¹⁶ *Hall Aff.* ECF No. 260 ¶ 81: “Richard V. Allen... testified to the Senate Committee about seeing in 1981 a photograph of escape and evasion codes stamped in the grass at what was understood to be a Vietnamese prison.... President Reagan launched an operation to investigate the site.... Despite Mr. Allen's testimony about CIA involvement in the preparation for and conduct of this mission, the CIA has failed to release any records pertaining to it.” *See also Hendon Aff.*, ECF No. 95-45 ¶¶ 13, 16: “Dussault testified that while studying recent (June 5, 1992) satellite imagery of the Dong Vai (Dong Mang) Prison north of Hon Gai, he and one of his associates discovered a valid escape and evasion code in a field just west of the

communist's two-tier prison system.¹⁷ The CIA tracked POWs.¹⁸ It used mercenaries to gather intelligence.¹⁹ It collaborated with other agencies.²⁰ It has records of communist offers to sell POWs back to America.²¹ And it has a wealth

prison... 72/TA/88... Satellite imagery imaged in 1975 and analyzed in mid-1976 had shown what CIA and DOD photo interpreters believed at the time was a valid USAF/USN Escape and Evasion code at this same Dong Vai (Dong Mang) prison.... a half dozen postwar HUMINT (human intelligence) reports had told of US POWs being detained at the prison” in 1976, 1979, and 1982.

¹⁷ *Toll Aff.* ECF No. 83-1 at 2-6: *Military Assistance Command Vietnam, Studies and Observations Group* routinely used CIA-trained mercenaries to insert into Laos for reconnaissance on the "second-tier POW camp system."

¹⁸ *See, e.g., Hrdlicka Aff.* ECF No. 261-1 ¶ 41, citing Exhibits 32 and 45: “[I]n the Library of Congress, I found a report that the government had been tracking 23 POWs in 1984... 'Number of persons in custody: 23 American Prisoners of War.' Another 1984 report... reflects that the CIA believed the number to be 20.”

¹⁹ *Hall Aff.* ECF No. 260 ¶ 152: “The CIA has a large volume of records on its mercenaries, in its ‘indigenous personnel’ files, also known as ‘Controlled American Source’ files, so a sufficient *Vaughn* index would address its search of those records.”

²⁰ *Hrdlicka Aff.* ECF No. 261-1 ¶ 60: “MACVSOG was the Military Assistance Command, Vietnam-Special Operations Group... provided intelligence information... The government denied for years the existence of MACVSOG.... Yet, another family member received a letter from DPMO stating that MACVSOG daily summaries are being reviewed for declassification. There was information on POWs in the daily summaries.”

²¹ *See Sauter Aff.*, ECF No. 258-3 ¶ 23, regarding the 1984-85 CIA analysis of a “Vietnamese offer to sell American POW/MIA remains and, potentially, living POWs to the United States... Assistant Secretary of State Paul Wolfowitz informed Secretary of State George Shultz of a plan to pay for

of responsive records on POWs held in Laos, the CIA's secret war.²²

Congressional members who have personally seen the records are among those who opine that there is no legitimate reason for continued nondisclosure.²³

remains and 'possible live POWs.' NSC staffer Richard Childress, with the concurrence of the National Security Advisor, traveled to Vietnam and 'intended to fund the initiative with either CIA or private funds.'"

²² See *O'Shea Affidavit* ECF No. 182-6 ¶¶ 1, 3, 5: [In] 1981, the CIA gathered intelligence, including human intelligence reporting, and imagery of a prison camp located in... Laos [where] 18-30 American Prisoner of War were held... from September 1980-May 1981 and perhaps beyond.... [T]he CIA dispatched a least one reconnaissance team to the camp location to photograph the inmates and gather intelligence. The CIA continues to withhold information on the preparation for the mission, team progress reports, photographs taken at the camp and the debriefing of reconnaissance team members ... [Attached is] a document confirming CIA holds at minimum 20 documents relating to their effort to confirm the presence of American POWs at the Nhom Marrott camp." See also *Sanders Aff.*, ECF 258-2 ¶ 12 quoting *Examination of U.S. Policy* at 64.: "The United States did not receive the list of Americans POWs whom North Vietnamese admitted they were holding in captivity until after the peace accords were signed... "[I]t was widely known that the Pathet Lao were holding many other U.S. POWs. "...U.S. defense and intelligence officials hoped that 40 servicemen captured in Laos would be released at operation homecoming, instead of the less than a dozen who were actually repatriated."

²³ *Smith Aff.* ECF No. 258-4 ¶ 8: "As Vice Chairman of the Senate Select Committee on POW/MIA Affairs wrote, he has "personally seen hundreds of classified documents that could and should be released as they pose no national security risk. What is really at risk are the reputations and careers of the intelligence officials who participated in and perpetrated this sorry chapter in American history;" *Hendon Aff.* ECF No. 95-45 ¶ 4: "I have personal knowledge of several incidents where the CIA has had intelligence on living POWs that has not been publicly acknowledged and/or released."

II. SEARCH TERMS INADEQUATE

Plaintiffs' fifth listed issue is "[w]hether the search terms that the CIA employed were adequate and reasonably likely to yield the records sought." The District Court recited the search terms with approval:

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.

Mem. Op. ECF 385 at 9.

These search terms are almost the same as the CIA had employed for its search of non-operational files.²⁴ Plaintiffs had objected to the search terms at the time. The Court ruled in the CIA's favor, holding that "the search terms used were reasonably calculated to discover the information in plaintiffs' request."²⁵

²⁴ *See Shiner Decl.* ECF No. 248-2 ¶ 26: "The CIA reports that it... used the search terms 'Missing in Action,' 'MIA,' 'Missing,' 'POW/MIA,' 'POW-MIA,' 'Prisoner(s) of War,' 'POW,' 'Prisoners,' 'War,' 'Vietnam War,' and 'Vietnam.'"

²⁵ *Mem. Op.* ECF No. 291 at 16:
As an initial matter, to the extent the plaintiffs now wish to expand the search terms used, *see* AIM MSJ [258] at **15-16; [286] at **7-8, the Court denies their request. First, the search terms used were reasonably calculated to discover the information in plaintiffs' request. Second, the paucity of responsive records itself does not determine whether the search was adequate. Third, the Court is skeptical of plaintiffs' argument that additional searches for the names of specific POW camps or the codenames of reconnaissance operations is likely to yield further responsive records...

A. Omitted Records Regarding Laos

While plaintiffs' fourth issue reads "[w]hether the CIA's explanation of its search must include whether it searched its repositories of operational records concerning POWs held in Laos," the Agency conducted no such search, so the issue is more accurately stated is whether the CIA is required to search for records concerning POWs held in Laos.

Here, the CIA left the entire country out of its search. It saw fit to use "Vietnam" as a search term, but not Laos, even while around half of the evidence submitted by plaintiffs concerned Laos.²⁶ Moreover, "all live sighting reports that came into the [US] embassy [in Laos] went directly to the CIA Station Chief."

LeBoutillier Aff. ECF No. 83-15 ¶ 12.

²⁶ See, e.g., *Hrdlicka Aff.* ECF No. 261-1 ¶¶ 46, 48: "There are numerous intelligence reports showing live POWs all over Laos after Homecoming 1973. Before operation homecoming, in 1971, there were at least 50 POWs in Laos.... The Laotians themselves admitted that they were holding American POWs." See also *Hall Aff.* ECF No. 260 ¶ 84: "Exhibit 124 (2015) is a Memorandum re six POWs held in Laos, undated, at Bates 381-83: 'Circa March 1983, [redacted] a militia chief claimed that there is a Prisoner of War (POW) camp located at the foot of Ngoua Mountain (NCA), approximately 25 kilometers south of Kadon Village. According to [redacted] there were 23 American prisoners of war (POW's) detained in the camp. The CIA has failed to provide any information regarding these 23 live POWs held in Laos;" *Id.* ¶ 85: Exhibit 38(b) at Bates 178 is an undated CIA Cable, which states, in part, 'Identification of Possible U.S. Prisoner of War camp in Saravanc Province, Lao People's Democratic Republic;" *Id.* ¶ 89: "Exhibit 127 (2015) is a CIA Intelligence Report regarding a 1986 sighting of POW in Laos, December 23, 1986... The CIA has failed to provide any further information on this POW;" *Id.* ¶ 110: "Exhibit 141 (2015) is a

The CIA ran the War in Laos, as Major General Richard Secord, who had been detailed to the CIA for duty in the War in Laos, testified. Asked whether the CIA or the DOD was the “dominant collector” of information on Laos, he responded, “CIA, clearly, because of the resources they had on the ground.” He explained:

The CIA was in charge of the war [in Laos], not the military. The military helped out a little bit on the side, particularly through the provisions of air assets, but the military had very few people on the ground except for forward air controllers, which were very good, and some air attaches, whereas the Central Intelligence Agency had several hundred people on the ground in Laos.

Hall Aff. ECF No. 260 ¶ 119, quoting Exhibit 8 at Bates 32.

"CIA station chiefs testified before the Senate Committee that the CIA had primary responsibility for interviewing all human sources of such intelligence, including refugees during this period. *See* Exhibit 26, October 1991 Select Committee Deposition COS, Vientiane (1970-1973) Bates 111-19." *Hall Aff.* ECF No. 260 ¶ 151. "Witnesses before the Select Committee testified repeatedly to the involvement of CIA field stations in Vietnam, Laos, Cambodia, and Thailand, in the gathering of information about POW/MIAs." *Id.* ¶ 122.

Memorandum regarding ten POWs held, February 1989, at Bates 412-14. It states, in part: "[Redacted] worked at the prison where ten Americans were reportedly being held. *** [Redacted] learned that the American had been in [unintelligible] Dang prison since about March 1984."

“There was a ‘raft of cables’ in the CIA on the rescue attempts” on David Hrdlicka. *Hrdlicka Aff.*, ECF 261-1 ¶ 17, quoting testimony of General Richard Secord.

The CIA’s extensive record on unrepatriated POWs in Laos includes imagery. *See, e.g., Hendon Aff.*, ECF No. 95-45 ¶ 21:

During the closed briefings, held on October 2 and 5 1992, Dussault explained to the senators what the CIA personnel had said about the June 5, 1992, "SEREX" imagery, offered JSSA's analysis of the other imagery relating to live POWs, and then stunned those present by declaring that, while recently reviewing 1988 imagery of Laos, he and his associates had discovered nineteen four-digit numbers that matched the four-digit authenticators of known MIAs, each laid out or constructed on the ground in remote areas along Lao National Route southeast of the Plain of Jars, and had discovered the name of a missing USAF pilot and an accompanying four-digit number laid out or constructed beside a road east of the Sam Neua Valley. (The name of the missing pilot was Wrye, along with the four-digit number 1104. RF-101 pilot Maj. Blair C. Wrye, USAF, was lost over North Vietnam on August 12, 1966.)

The satellite imagery of a POW distress symbol in Laos published in 1992 by *US News & World Report* and *NBC Dateline* (*infra*) was taken in 1988 in the Sam Neua area of Laos, where David Hrdlicka was being held. "The government should have notified me," writes his wife, Carol, "But I had to read about it in the magazine." *Hrdlicka Aff.*, ECF 261-1 ¶ 17. Carol followed up. "In 1992, I then called Lorenzo Burroughs, a government satellite imagery expert, about this imagery. I asked him whether any authenticator codes were picked up with it. He responded that there were around ten." *Id.* ¶ 19.

CIA intelligence gathering after Operation homecoming was robust. *See, e.g., id.* ¶ 67: “The CIA's intelligence gathering regarding POWs in Laos was ongoing. *See* June 1973 Joint Chief Memorandum re CIA's Intelligence on POWs in Laos, Exhibit 47 at Bates 141-47, with the subject, ‘US prisoners of war in Laos.’ It states:

[R]eference is made to your memorandum... dated 18 May 1973, which discussed the US PW/MIA situation allows and recommended that a CIA briefing on the subject we provided to the JCS.... The following are the facts as they relate to CIA involvement in the current Laotian MIA situation. CIA continue to conduct an active program to acquire intelligence relative to the status of US MIA personnel.

The agency accords PW/MIA matters one of the highest priorities in its overall intelligence collection efforts in SE Asia... CNO indicated that CIA is pursuing a priority effort to determine what happened to US POWs in Laos and suggested a brief... DIA and J-3 (DOCSA) discussions with CIA points of contact and records of DOCSA a monitoring of Laos activities indicate that CIA has had, and currently conducts, an active program to acquire intelligence related to the status of POW/MIA personnel. This program is among the highest priority PW/MIA intelligence objectives within the overall intelligence collection efforts in SE Asia. It is carried out by assets, and winds in the organizational structure of CIA station in Laos... DIA is collaborating closely where appropriate with CIA in regard to the current situation in Laos... At present there are proximately 350 US military and civilians listed as missing in action in Laos. Of this total, approximately 215 were lost under such circumstances that the Patriotic Laotian Front (PLP) probably has information regarding their fate...

An example of a more recent record would be the CIA's brief to President Obama before he addressed the Lao National Cultural Hall, in Vientiane, in 2016.

He told Laotian people that he was "pleased that, as a result of this visit, we will increase our efforts and bring more of our missing home to their families in America."²⁷

B. Failed to Search Names on POW/MIA Next-of-Kin list

On December 5, 1991, Congress enacted 50 USC 435 Note, commonly referred to as the McCain Bill. In deference to the privacy of the families of MIAs or POWs, it provided that consent for release of information was conditioned on the primary-next-of-kin's consent. Out of 2,268 families, 1,711 consented. The FOIA Request at issue includes "records relating to those persons who are named on attachment 2, the Prisoner of War/Missing Personnel Office's list of persons

²⁷ The only visit to Laos from an American president was Barack Obama, on September 6, 2016, at the Lao National Cultural Hall, Vientiane. His remarks included:

I realize that having a U.S. president in Laos would have once been unimaginable. Six decades ago... the U.S. government did not acknowledge America's role. It was a secret war, and for years, the American people did not know. Even now, many Americans are not fully aware of this chapter in our history, and it's important that we remember today. Over nine years—from 1964 to 1973—the United States dropped more than two million tons of bombs here in Laos—more than we dropped on Germany and Japan combined during all of World War II. It made Laos, per person, the most heavily bombed country in history.*** I thank the government and the people of Laos for your humanitarian cooperation as we've worked together to account for Americans missing in action. And I'm pleased that, as a result of this visit, we will increase our efforts and bring more of our missing home to their families in America.

whose primary next-of-kin (PNOK) have authorized the release of information concerning them.” ECF No. 114-1 at 11.

The CIA declined to conduct that search, positing that it was “unduly burdensome.” By order entered on November 12, 2009, The District Court disagreed, holding that the CIA “must search for and disclose any non-exempt records which, based on the information Hall and AIM have provided and the details contained in the records themselves, it can verify pertain to an individual on plaintiffs’ lists.” *Mem. Op.* ECF No. 137 at 11-12.

Thereafter, the CIA produced records on 11 individuals.

Ten years later, in August 2, 2019, the Court ordered the CIA to search its operational records. *Mem. Order* ECF 340 at 3:

But § 3141 does not categorically absolve CIA from searching its operational records... a court can order CIA "to review the content of any exempted operational file or files" and to submit a "sworn written submission" supporting the claimed exemption. § 3141(f)(2), (f)(4)(A)—(B)... Plaintiffs do so here with—among other things—an affidavit by former Congressman Bob Smith swearing "without any equivocation that [CIA is] still holding documents that should be declassified;" and that "could and should be released as they pose no national security risk." *Aff. Bob Smith* ¶¶ 8, 20, ECF No. 258-4... CIA must review its operational files...

Thus, the Court mandated that the CIA use the names in conducting its search of repositories of non-operational records, but later relieved the CIA of its obligation to conduct the same search of its operational file repositories. The

Court seems to have accepted the “unduly burdensome” defense that it had earlier rejected:

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.

Mem. Order ECF 385 at 9.

C. Failure to Use Names of POW Prisons in Search Terms

The CIA should include the names of facilities known to house American POWs,²⁸ including Nhom Marrott—the subject of Lynn O’Shea’s book, “Abandoned in Place.”²⁹

²⁸ *Tran Phu* prison in Haiphong, North Vietnam *Hendon Aff.* ECF No. 95-45 ¶ 8; *Dong Vai* (Dong Mang) prison (*id.*), camp in Sam Neua Laos; *Hall Aff.* ECF No. 260 ¶¶ 52,106; or *Tan Lap* Prison, Vinh Phu Province, North Vietnam (*Sauter Aff.* ECF No. 258-3 ¶ 14); facilities in the towns of Mahaxy, Pha Kateom, Laos (*Hall Aff.* ECF No. 260 ¶ 149), or in *Son Tay*, Vietnam (*O’Daniel Aff.* ECF No. 95-44 ¶ 17).

²⁹ *O’Shea Affidavit* ECF No. 182-6 ¶¶ 1-2: The CIA holds never released documents relating to American servicemen Prisoners of War and Missing in Action in Southeast Asia, and at least one camp believed to hold these servicemen after March 1973. During the period March 1979- June 1981, the CIA gathered intelligence, including human intelligence reporting, and imagery of a prison camp located in the Nhom Marrott District of Khammouane Province Laos. According to intelligence reports approximately 18-30 American Prisoner of War were held at this camp from September 1980-May 1981 and perhaps beyond. Between January and May 1981 the CIA dispatched a least one reconnaissance team to the camp location to photograph the inmates and gather intelligence. The CIA continues to withhold information...” *O’Shea Aff.* ECF No. 182-6 ¶¶ 1-2.

D. Code Names of Reconnaissance/Rescue Operations Omitted from Search

Any reasonable search for records of the CIA's rescue or reconnaissance operations would, of course, include their code names,³⁰ as the District Court had recognized in 2017. *Mem. Order* ECF 291 at 15:

The CIA has thus far failed to address specific allegations of inadequacy with any particularity, except to reiterate that it has produced the non-exempt material in the places it has searched. For example, in addition to the CIA's failure to turn-up files on 1,700 of the names of reported missing persons that it searched for, plaintiffs present evidence of imagery of suspected prison camps, up to 1,400

³⁰ It withholds records concerning *Operation Pocket Change*, the planned rescue of POWs held in Laos, and the 1972 *Son Tay Raid*, a plan to try to rescue up to 60 POWs held in Laos, but cancelled because of the then pending Peace Agreement. *Hall Aff.* ECF No. 260 ¶ 152. Disclosure would reveal a wealth of information on David Hrdlicka. *Duck Soup* was a CIA run attempt to rescue him. *Hrdlicka Aff.* ECF No. 261-1 ¶¶ 19-20. *See also* *McDaniel Aff.* ECF No. 258-1 ¶ 7: "Defendant withholds records on *Operation Thunderhead*, a 1972 White House-approved escape plan from the 'Hanoi Hilton;'" *O'Daniel Aff.* ECF No. 95-44 ¶¶ 2, 15: "For examples, the CIA withholds records on *Sage Brush I* and *Sage Brush II*, code names for rescue attempts using CIA paid and trained Provincial Reconnaissance Units... Nor has the CIA disclosed any information on *Operation Blackbeard*, *Oak*, *Nantucket*, *Vesuvius One*, *Sunstone Park*, *Gunboat*, *Bright Light*, *Project Alpha*, or *Project Corona*;" *Hall Aff.* ECF No. 260 ¶¶ 74-75: "A December 5, 1991 DIA memorandum states that JSOC (Joint Special Operations Command) was involved in planning the 1981 operation for the reconnaissance in support of a rescue of POWs at Nhom Marrot.... Later on, an inter-agency meeting was held to discuss what actions to take. JSOC, JCS, CIA, and NSA attended.... There is a great deal of intelligence regarding multiple reconnaissance and rescue attempts at a POW camp near Nhom Marrot, Laos, including a 1981 attempt, preceded by an inter-agency meeting that included the CIA. *Hall Aff.* ECF No. 260 ¶¶ 107.

live-sighting reports, and named reconnaissance and rescue operations alleged to have taken place.

E. Failure to Search for Records of POWs Transferred to Russia, North Korea, or China

Nor did the CIA use any search terms likely to locate its records of POWs transferred to Russia, North Korea, or China.³¹

³¹ After his May 19, 1967, shoot down and capture, James Kelly Patterson, "an expert in the use of his aircraft's state-of-the-art electronics system being used to defeat Vietnam's Russian-made missile defense system" was shipped to a closed Russian military region dedicated to missile research and testing." *McDaniel Aff.* ECF No. 258-1 ¶ 12. "Exhibit 99 is a CIA Report to the White House Situation Room regarding alleged location of live American POWs in Luang Prabang province Laos mid-1985, 1986, at Bates 303. It relates: 'There had been 12 American POWs at the site but in 1985 five of the Americans POWs were moved to the Soviet Union....' *Hall Aff.* ECF No. 260 ¶ 88. "Exhibit 43, Bates 206, is a March 12, 1982, Foreign Intelligence Information Report from the CIA's Domestic Collection Division, claiming Soviet incarceration of U.S. Vietnam era POWs..." *Hall Aff.* ECF No. 260 ¶ 38. "Exhibit 44 is a March 9, 1988 CIA Memorandum regarding "alleged Sightings of American POWs in North Korea from 1975 to 1982." It refers to three reports. One is of "two Americans [observed] in August 1986," and the other is regarding "about 10 military pilots captured in North Vietnam [that] were brought to North Korea." The third report concerns a sighting of 11 "Caucasians," in 1988. The CIA has produced no records regarding any POWs brought to Korea during the Vietnam War." *Hall Aff.* ECF No. 260 ¶ 35. "Exhibit 38(h), at Bates 189, is a June 1992 Memo to Select Committee re 'President's Daily [CIA] Intel Briefings,' seeking copies of those briefings 'given to the President regarding the possibility of POWs being transferred to the East Bloc after Homecoming.' The author has 'a source who claims to have seen them.' The memo said the CIA had responded that they "are not available to anyone." *Hall Aff.* ECF No. 260 ¶ 137.

III. INADEQUATE EXPLANATION OF SEARCH

1. Legal Standards

When the adequacy of the agency's search is in dispute, summary judgment for an agency is inappropriate as to that issue.

Agency affidavits regarding the search for responsive records are inadequate to support summary judgment where they “do not note which files were searched or by whom, do not reflect any systematic document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized.” *Weisberg v. United States Dept. of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980).

The Court in *Founding Church of Scientology, Inc. v. Nat. Sec. Agency* 610 F.2d 824, 836-37 (D.C. Cir. 1979) cautioned that an agency could use search techniques to circumvent the FOIA:

To accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the [FOIA] . . . and if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory.

At the summary judgment stage, the agency bears the burden of showing that it complied with FOIA and it may meet this burden “by providing 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... were searched.”

Iturralde v. Comptroller of Currency, 315 F.3d 311, 313-14 (D.C. Cir. 2003).

See, e.g., the District Court’s earlier holding, *Hall v. C.I.A.*, 668 F.Supp.2d 172, 179 (D. D.C. 2009):

The DiMaio Declaration includes no information regarding how the search used to locate the records produced in September 2007 occurred. *DiMaio Aff.* ¶ 6. The Court therefore denies the CIA's request for summary judgment as to the adequacy of its search for additional item 3 records. The CIA must provide a supplemental declaration describing its search method, including search terms, databases searched, and other relevant information that will allow the Court to evaluate whether the Agency's search was adequate.

The affidavits or declarations submitted to meet the CIA's burden must "explain in reasonable detail the scope and method of the agency's search." *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 91 (D. D.C. 2009) (citing *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 63 (D. D.C. 2002)).³²

³² See also *Morley v. CIA*, 508 F. 3d 1108, 1121 (D.C. Cir. 2007) (holding that the CIA's description of a search was inadequate where the declaration "provide[d] no information about the search strategies of the components charged with responding to [plaintiff]'s FOIA request" and did not "provide any indication of what each directorate's search specifically yielded"); *Steinberg*, 23 F. 3d at 551-52 (finding a "serious doubt" as to whether an agency's search was reasonable when the accompanying affidavit "fails to describe what records were searched, by whom, and through what processes").

2. Discussion

Plaintiffs' third-listed issue is "[w]hether the CIA's public explanation of its search of its operational records was made to the greatest extent possible."

The CIA provided the Declaration of Vanna Blaine, ECF No. 376-3 ("*Blaine Decl.*"). "The purpose of this declaration," writes the CIA, "is to explain and justify, to the greatest extent possible on the public record, the CIA's search of its operational records." *Blaine Decl.* ¶ 5.

The District Court summarizes its analysis of the CIA's *Vaughn* index as follows:

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.

Mem. Op. EDC No. 385 at 10-11.

But the Court's analysis was erroneous. First, specifying the search terms used does not tell the plaintiffs, or the Court, what files were searched. There is almost no information on what files were searched. Second, as to who searched them, the CIA tells us that an unspecified number of personnel searched, for an unspecified number of hours. Third, a declaration that "both electronic and hard-copy files were searched" using "broad search terms" is not a description of the systematic approach used.

Aside from giving its perfunctory word that it searched an unknown number of relevant databases, and hard copy repositories, the only information that the CIA provides, aside from the search terms, is that the electronic search yielded an unknown number of hits ("a few"), and that it located no responsive records whatsoever. In sum, the CIA has declared that it conducted a proper search. This is not enough. While the CIA's *Vaughn* index reveals almost no details to enable plaintiffs to challenge the procedures utilized, the Court accepted the CIA's declaration:

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.

Mem. Op. ECF No. 385 at 5.

The CIA avers that it "cannot provide additional detail about the designated file series in an unclassified setting, [but] I can assure the Court that they are

carefully and tightly defined to ensure that they serve the specific operational purposes." *Shiner Decl.*, ECF 271-1 ¶ 17. The Court accepted that explanation, holding that "[t]he CIA rightfully points out the sensitive national security nature of its operational files. *Supp. Vanna Blaine Decl.* Thus, requiring an even more detailed description would be delicate matter." *Mem. Op.* ECF No. 385 at 11-12.³³

Plaintiffs have located no authority for the proposition that a *Vaughn* index regarding the search of operational records need not include the same information as required for a search in its non-exempt file repositories. The CIA may seek leave to submit its Declaration *in camera*, but it cannot ignore its obligations under the FOIA.

Additionally, plaintiffs do not accept the CIA's claim that it searched all repositories of all its operational records using the search term "Vietnam" for the period of the last 70 years and the search generated only "a few records." *Blaine*

³³ *Mem. Op.* ECF No. 385 at 11-12:
[T]his 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 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.* Thus, requiring an even more detailed description would be delicate matter.

Decl. ECF No. ECF 271-1 ¶ 13. In response to the plaintiffs' argument that this circumstance impugns the veracity of the CIA's Affidavits, the Court held that "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."³⁴ While this is so, the CIA's claim that the term "Vietnam" yielded only "a few" records would seem to raise an issue of the Affidavit's reliability.

IV. MOTIVE FOR WITHHOLDING RECORDS

A. Motive for Continued Nondisclosure

The sixth issue that plaintiffs raise here is "[w]hether the District Court gave due weight to the CIA's motives to withhold its records that were generated after Operation Homecoming in 1973."

Former U.S. Rep. Billy Hendon (R-NC)'s book, subtitled *The Definitive Account of American POWs Abandoned in Southeast Asia*, is aptly named, *An*

³⁴ *Mem. Op.* ECF No. 385 n. 5 at 12: 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 Deel*, ¶ 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.

Enormous Crime. See generally Hendon Aff., ECF No. 95-45. Here, all disclosures of post-Operation Homecoming POW records inculcate the government in knowingly abandoning its citizens.

“I personally have seen hundreds of classified documents that could and should be released as they pose no national security risk,” writes Senator Smith, “What is really at risk are the reputations and careers of the intelligence officials who participated in and perpetrated this sorry chapter in American history.” *Smith Aff.* ECF No. 258-4 ¶ 8.

Further, disclosure could have a significantly demoralizing effect on the armed forces. Mr. Hendon explains this bureaucratic hostility to the notion that the military had knowingly abandoned its own by quoting a speech by a Deputy Assistant Secretary of Defense, to troops:

The basic lie is that the U.S. Government knowingly left Americans behind and is now covering up. If this lie lives, then it will tear at the guts of our military. If future Americans become convinced that their county won't stand behind them when the chips are down, then they won't stand on the front lines for their county.

Hendon Aff., ECF No. 95-45 ¶ 18.

Other considerations, endemic to bureaucracies, including a reduced workload, also contribute to the government's policy.³⁵

³⁵ See *Sanders Aff.*, ECF No. 258-2 ¶ 11, quoting *Examination of U.S. Policy: Off the record, this priority vanishes. Instead, other considerations emerge: Grand visions of a foreign policy of peace and reconciliation; desire for a*

The analysis of the veracity of CIA's declarations should be viewed in this greater context. The District Court recognized that plaintiffs “argue[] that the CIA has a motive to overclassify information”(Mem. Op. ECF 375 at 3), but, as far as plaintiffs know, did not take it into consideration in ruling on the CIA’s good faith.

B. History of Unjustified Nondisclosures

The Court should consider the CIA’s history of nondisclosures in its evaluation of the veracity and thoroughness of the CIA's declarations. The Agency asserts that it had adhered to various legislative and Executive directives mandating disclosure. This is not so.

1. Executive Order 12812

In July of 1992, after *Select Committee* issued its Report, it wrote to President Bush that its "investigation has convinced us that the vast majority of materials related to the POW/MIA issue now protected by the National Security Classification System could be released to the public in full with absolutely no harm or risk to national security." The Senate followed with Resolution 324, which passed by unanimous a vote. President Bush then issued Executive Order

new economic order of trade and investment; ideological imperatives to downplay the hostility of antagonistic systems; and the natural tendency of the bureaucracy to eliminate its workload by filing cases marked 'closed' instead of finding the people.

(“E.O.”) 12812—*Declassification and Release of Materials Pertaining to Prisoners of War and Missing in Action*.

2. Presidential Directive NSC-8

As the government failed to comply with E.O. 12812, a year later, on June 10, 1993, President Clinton issued Presidential Directive NSC-8, *Declassification Of POW/MIA Records* directing all executive agencies to complete its review, and release, by Veterans Day, November 11, 1993, “their review, declassification and release of all relevant documents, files pertaining to American POW's and MIA's missing in Southeast Asia in accordance with Executive Order 12812.”

3. Executive Order 13526

In December of 2009 President Obama issued E.O. 13526, mandating automatic declassification of 25-year-old, and 50-year-old, records, with a higher standard for withholding the latter. And it prohibits continued classification “in order to,” *inter alia*, “prevent embarrassment to a person, organization, or agency.” *Id.* § 1.7 (2).

4. 2015 Decennial Review Released Previously Over-Classified Records

Under 50 U.S. Code § 3141, *Operational files of the Central Intelligence Agency*, not less than once every ten years, the CIA must review the exemptions in force to determine whether to remove them. This review “shall include consideration of the historical value or other public interest in the subject matter of

the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein.” *Id.* § (g)(2).

The Agency conducted these reviews in 1985, 1995, 2005 and 2015. Upon its release of 33 records of POW/MIA intelligence in 2015 (*see Hall Aff.* ECF No. 260), it became apparent that the CIA had not, ten years earlier, properly considered the "historical value or other public interest in the subject matter of the particular category of files" in its 2005 Decennial Review, as records are dated 1974 to 1990, from 28 to 45 years after Operation Homecoming and up to 36 years after the CIA obtained the intelligence.

Half of these 33 records regard POWs held in Laos. They include records on, variously, aerial photography, six POWs held in 1983, at least four instances of 1986 intelligence, 1988 intelligence on 20 American prisoners, and at least four 1989 reports of sightings of up to 14 POWs.

Over the course of this case, the Agency has produced around 8,000 pages of records, the vast majority of which should have been disclosed upon the four Decennial reviews, beginning in 1985.

“In this particular litigation,” as the District Court held in 2017, “that the CIA conducted a decennial review of its operational files in 2015, *2d Shiner decl.* at ¶¶ 17-20, is a threshold matter; it is not the end of the inquiry before the Court.” *Mem. Op.* ECF No. 291 at 15.

5. Important 1998 Record not Released until 2016

As plaintiffs discussed *infra* note 2, the CIA withheld an important 1998 document for eighteen years, until 2016.

1,205 Document. On December 14, 1992, Harvard University's Dr. Stephen Morris discovered in the Soviet Union archives a transcript of the September 15, 1972, debriefing by a top Vietnamese Army General to Vietnam's Politburo. The General reported that the total number of communist-held American POWs in Southeast Asia was 1,205. Months later, Operation Homecoming returned 591 American POWs. This transcript, the so-called "1,205 Document," is regarded as the most illuminating record on the issue of the number of POWs remaining in communist hands at war's end. (Discussed *infra* note 2.).

National Intelligence Estimate. In April of 1998 the CIA issued its 33-page National Intelligence Estimate ("NIE"), *Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*. The NIE contended that the 1,205 Document was unreliable.

Critical Assessment. Eight months later, in November of 1998, Senator Bob Smith issued his *Critical Assessment of the 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue*. Senator Smith 160-page assessment quotes evidence supporting the reliability of the 1,205 Document's statements, and described the NIE as

"replete with inaccurate and misleading statements." Eighteen years later, in 2016, the CIA released Senator Smith's assessment, redacted.

Response to Critical Assessment. In February of 2000, the CIA replied to Senator Smith's charges in its 124-page *Review of the 1998 National Intelligence Estimate on POW/MIA Issues and the Charges Levied by A Critical Assessment of the Estimate*. Twenty-one years later, in June of 2021, the CIA released this Review.

It withholds, in full, a classified version of this Review.

6. 2019 Production Released Previously Over-Classified Records

In August of 2019, the CIA produced 392 documents, totaling 2,012 pages, 152 records are from the sixties, and 149 are from the seventies. *See Hendershot Aff.* ECF No. 364-1 at 46. These records should have been released upon the CIA's Decennial reviews of its operational records.

CONCLUSION

The CIA has a long history of obdurate behavior regarding its intelligence on American POWs held by the communists. Its intelligence-gathering on POWs held in North Vietnam and Laos did not end in 1973 with Operation Homecoming.

The older the records, the higher the justification needed to withhold from public view. But the more recent the intelligence on these abandoned Americans, the keener the public's interest, also mandating a heightened justification for non-

disclosure. Here, responsive records include those generated during the 1990s, and well into this century.

The Agency now claims that its search of its operational records reveals that it has obtained scant intelligence on the 678 unrepatriated American POWs over the last fifty years, and none whatsoever since 1992 when *US News and World Report* published the leaked imagery that so embarrassed it, 32 years ago.

That year, in hearings before the *Select Committee*, Vice Chairman Smith quoted a government official as having testified "there is no evidence to suggest that any U.S. personnel were not released from captivity." Exasperated, he continued:

Now that's just, I mean, I just don't understand people in responsible positions coming up here to the Hill and saying that, that kind of thing, and I, I don't want to dispute it because I've been through that for eight years with you people, I don't have the desire to dispute it, as I said in my opening statement the facts speak for themselves, the evidence speak for themselves, for itself, and it's time for you people to come up here to accept that evidence and begin to move to the next step, which is to find out what happened to these people and where they are. That's what we gotta start doing. So why don't you just admit that you've got the evidence.

Here, there is no question that plaintiffs have met their burden of positive indications of overlooked materials to defeat summary judgment.

For the reasons set forth above, the Court should reverse the District Court's rulings and award judgment in favor of Plaintiffs. This Court should remand the record to the District Court with instructions for the CIA to:

- I. Conduct additional searches of both its operational and non-operational file repositories, employing search terms that include:
 - A. Laos.
 - B. The 1,711 names appearing on the POW/MIA List of Primary Next-of-Kin whose family had authorized release of Information (operational files only).
 - C. Code Names of Reconnaissance or Rescue Operations:
 - Project Alpha*
 - Operation Bright Light*
 - Project Corona*
 - Operation Duck Soup*
 - Operation Gunboat*
 - Operation Nantucket*
 - Operation Blackbeard*
 - Operation Oak*
 - Operation Pocket Change*
 - Son Tay Raid*
 - Operation Sage Brush I*
 - Operation Sage Brush II*
 - Operation Sunstune Park,*
 - Operation Thunderhead*
 - Operation Vesuvius One*
 - D. Prisons known to house POWs:
 - Nhom Marrott*
 - Tran Phu*
 - Dong Vai (Dong Mang)*
 - Sam Neua*
 - Tan Lap*

- II. Submit a declaration to include whether it searched for responsive records in repositories likely to contain communications with the:
 - National Security Agency
 - Defense Intelligence Agency
 - JSOC (Joint Special Operations Command)
 - Military Assistance Command Vietnam-Special Operations Group, a/k/a MACVSOG and MACSOG
 - National Security Council
 - Joint Chiefs of Staff
 - State Department

- III. Submit a declaration to include whether it searched records accessioned to the National Archives as well as repositories of records of the:
- (1) President's Daily Briefs;
 - (2) Office of Congressional Affairs
 - (3) Executive Registry Files of CIA;
 - (4) National Clandestine Service;
 - (5) Directorate of Science and Technology; and
 - (6) Office of Personnel Security.
- IV. A description of its search to include:
- (1) The combinations of search terms employed;
 - (2) The numbers of potentially responsive records reviewed;
 - (3) The number of man hours devoted to the search;
 - (4) Whether any responsive records are withheld; and
 - (5) The names and descriptions of relevant record systems, including indices or sub-indices utilized.

Date: January 29, 2024.

Respectfully submitted,

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ADDENDUM

The Freedom of Information Act
5 U.S.C. § 552. *Public information; agency rules, opinions, orders, records, and Proceedings*
Excerpts. 2

50 U.S. Code § 3141—*Operational files of the Central Intelligence Agency.* 3

Executive Order 12812—*Declassification and Release of Materials Pertaining to Prisoners of War and Missing in Action*
July 22, 1992, George Bush. 7

Presidential Decision Directive NSC-8—*Declassification Of POW/MIA Records*
June 10, 1993, Bill Clinton. 8

Executive Order 13526—*Classified National Security Information*
December 29, 2009, Barak Obama. Excerpts. 8

McCain Bill (National Defense Authorization Act for Fiscal Years 1992 and 1993) December 5, 1991, Amended by FY95 National Defense Authorization Act to add Korean and Cold War
February 10, 1996. 11

The Freedom of Information Act**5 U.S.C. § 552. *Public information; agency rules, opinions, orders, records, and Proceedings***

Excerpts

(a) Each agency shall make available to the public information as follows:

* * *

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

* * *

50 U.S. Code § 3141—Operational files of the Central Intelligence Agency**(a) EXEMPTION BY DIRECTOR OF CENTRAL INTELLIGENCE AGENCY**

The Director of the Central Intelligence Agency, with the coordination of the Director of National Intelligence, may exempt operational files of the Central Int Sec. 1.4. Classification Categories. Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction. Intelligence Agency from the provisions of section 552 of title 5 (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith.

(b) “OPERATIONAL FILES” DEFINED

In this section, the term “operational files” means—

- (1) files of the National Clandestine Service 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 for 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 that files which are the sole repository of disseminated intelligence are not operational files.

(c) SEARCH AND REVIEW FOR INFORMATION

Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning—

- (1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of title 5 (Freedom of Information Act) or section 552a of title 5 (Privacy Act of 1974);
 - (2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5 (Freedom of Information Act); or
 - (3) the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of National Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.
- (d) INFORMATION DERIVED OR DISSEMINATED FROM EXEMPTED OPERATIONAL FILES
- (1) Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.
 - (2) The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.
 - (3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.
- (e) SUPERSEDURE OF PRIOR LAW
- The provisions of subsection (a) of this section shall not be superseded except by a provision of law which is enacted after October 15, 1984, and which specifically cites and repeals or modifies its provisions.
- (f) ALLEGATION; IMPROPER WITHHOLDING OF RECORDS; JUDICIAL REVIEW
- Whenever any person who has requested agency records under section 552 of title 5 (Freedom of Information Act), alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with

any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, except that—

- (1) in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations which is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined ex parte, in camera by the court;
- (2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;
- (3) when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;
- (4)
 - (A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of title 5 by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and
 - (B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;
- (5) in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure, except that requests for admission may be made pursuant to rules 26 and 36;
- (6) if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make

such records, or portions thereof, available in accordance with the provisions of section 552 of title 5 (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

- (7) if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.
- (g) DECENNIAL REVIEW OF EXEMPTED OPERATIONAL FILES
- (1) Not less than once every ten years, the Director of the Central Intelligence Agency and the Director of National Intelligence shall review the exemptions in force under subsection (a) to determine whether such exemptions may be removed from any category of exempted files or any portion thereof.
 - (2) The review required by paragraph (1) shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein.
 - (3) A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this subsection may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court's review shall be limited to determining the following:
 - (A) Whether the Central Intelligence Agency has conducted the review required by paragraph (1) before October 15, 1994, or before the expiration of the 10-year period beginning on the date of the most recent review.
 - (B) Whether the Central Intelligence Agency, in fact, considered the criteria set forth in paragraph (2) in conducting the required review.

Executive Order 12812—Declassification and Release of Materials Pertaining to Prisoners of War and Missing in Action

July 22, 1992, George Bush.

WHEREAS, the Senate, by S. Res. 324 of July 2, 1992, has asked that I "expeditiously issue an Executive order requiring all executive branch departments and agencies to declassify and publicly release without compromising United States national security all documents, files, and other materials pertaining to POWs and MIAs;" and

WHEREAS, indiscriminate release of classified material could jeopardize continuing United States Government efforts to achieve the fullest possible accounting of Vietnam-era POWs and MIAs; and

WHEREAS, I have concluded that the public interest would be served by the declassification and public release of materials pertaining to Vietnam-era POWs and MIAs as provided below;

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby order as follows:

- Section 1. All executive departments and agencies shall expeditiously review all documents, files, and other materials pertaining to American POWs and MIAs lost in Southeast Asia for the purposes of declassification in accordance with the standards and procedures of Executive Order No. 12356.
- Section 2. All executive departments and agencies shall make publicly available documents, files, and other materials declassified pursuant to section 1, except for those the disclosure of which would constitute a clearly unwarranted invasion of personal privacy of returnees, family members of POWs and MIAs, or other persons, or would impair the deliberative processes of the executive branch.
- Section 3. This order is not intended to create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Presidential Decision Directive NSC-8—Declassification Of POW/MIA Records
June 10, 1993, Bill Clinton.

In accordance with my Memorial Day Announcement of May 31, 1993, all executive agencies and departments are directed to complete by Veterans Day, November 11, 1993, their review, declassification and release of all relevant documents, files pertaining to American POW's and MIA's missing in Southeast Asia in accordance with Executive Order 12812.

Executive Order 13526—Classified National Security Information
December 29, 2009, Barak Obama. Excerpts.

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism....

* * *

Sec. 3.3(h), *Automatic Declassification*:

- (h) Not later than 3 years from the effective date of this order, all records exempted from automatic declassification under paragraphs (b) and (c) of this section shall be automatically declassified on December 31 of a year that is no more than 50 years from the date of origin, subject to the following:
- (1) Records that contain information the release of which should clearly and demonstrably be expected to reveal the following are exempt from automatic declassification at 50 years:
 - (A) the identity of a confidential human source or a human intelligence source; or
 - (B) key design concepts of weapons of mass destruction.

Sec. 3.3 *Automatic Declassification*.

- (a) Subject to paragraphs (b)–(d) and (g)–(j) of this section, all classified records that
- (1) are more than 25 years old and
 - (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. All classified records shall be automatically declassified on December 31 of the year that is

25 years from the date of origin, except as provided in paragraphs (b)–(d) and (g)–(j) of this section. If the date of origin of an individual record cannot be readily determined, the date of original classification shall be used instead.

- (b) An agency head may exempt from automatic declassification under paragraph (a) of this section specific information, the release of which should clearly and demonstrably be expected to:
- * * *
- (1) reveal the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign government or international organization, or a nonhuman intelligence source; or impair the effectiveness of an intelligence method currently in use, available for use, or under development;
- * * *
- (6) reveal information, including foreign government information, that would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States...

Sec. 1.4. *Classification Categories.*

Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following:

- (a) military plans, weapons systems, or operations;
- (b) foreign government information;
- (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
- (d) foreign relations or foreign activities of the United States, including confidential sources;
- (e) scientific, technological, or economic matters relating to the national security;
- (f) United States Government programs for safeguarding nuclear materials or facilities;
- (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
- (h) the development, production, or use of weapons of mass destruction.

Sec. 3.1. *Authority for Declassification.*

- (a) Information shall be declassified as soon as it no longer meets the standards for classification under this order.
- (b) Information shall be declassified or downgraded by:
 - (1) the official who authorized the original classification, if that official is still serving in the same position and has original classification authority;
 - (2) the originator's current successor in function, if that individual has original classification authority;
 - (3) a supervisory official of either the originator or his or her successor in function, if the supervisory official has original classification authority; or
 - (4) officials delegated declassification authority in writing by the agency head or the senior agency official of the originating agency.
- (c) The Director of National Intelligence (or, if delegated by the Director of National Intelligence, the Principal Deputy Director of National Intelligence) may, with respect to the Intelligence Community, after consultation with the head of the originating Intelligence Community element or department, declassify, downgrade, or direct the declassification or downgrading of information or intelligence relating to intelligence sources, methods, or activities.
- (d) It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure...

McCain Bill (National Defense Authorization Act for Fiscal Years 1992 and 1993) December 5, 1991, Amended by FY95 National Defense Authorization Act, to add Korean and Cold War
February 10, 1996.

Sec. 1082. *Disclosure of information concerning United States personnel classified as prisoner of war or missing in action during Vietnam conflict.*

- (a) PUBLIC AVAILABILITY OF INFORMATION.—(1) Except as provided in subsection (b), the Secretary of Defense shall, with respect to any information referred to in paragraph (2), place the information in a suitable library-like location within a facility within the National Capital region for public review and photocopying.
- (2)
- (A) Paragraph (1) applies to any record, live-sighting report, or other information in the custody of the Department of Defense that relates to the location, treatment, or condition of any Vietnam-era POW/MIA on or after the date on which the Vietnam-era POW/ MIA passed from United States control into a status classified as a prisoner of war or missing in action, as the case may be, until that individual is returned to United States control.
- (B) For purposes of this section, a Vietnam-era POW/MIA is any member of the Armed Forces or civilian employee of the United States who was at any time classified as a prisoner of war or missing in action during the Vietnam era and whose person or remains have not been returned to United States control.
- (b) EXCEPTIONS.—(1) The Secretary of Defense may not make a record or other information available to the public pursuant to subsection
- (a) if—
- (A) the record or other information is exempt from the disclosure requirements of section 552 of title 5, United States Code, by reason of subsection (b) of that section; or
- (B) the record or other information is in a system of records exempt from the requirements of subsection (d) of section 552a of such title pursuant to subsection (j) or (k) of that section.
- (2) The Secretary of Defense may not make a record or other information available to the public pursuant to subsection (a) if the record or other information specifically mentions a person by name unless—
- (A) in the case of a person who is alive (and not incapacitated) and whose whereabouts are known, that person expressly

consents in writing to the disclosure of the record or other information; or (B) in the case of a person who is dead or incapacitated or whose whereabouts are unknown, a family member or family members of that person determined by the Secretary of Defense to be appropriate for such purpose expressly consent in writing to the disclosure of the record or other information.

- (3)(A) The limitation on disclosure in paragraph (2) does not apply in the case of a person who is dead or incapacitated or whose whereabouts are unknown if the family member or members of that person determined pursuant to subparagraph (B) of that paragraph cannot be located after a reasonable effort.
- (B) Paragraph (2) does not apply to the access of an adult member of the family of a person to any record or information to the extent that the record or other information relates to that person.
- (C) The authority of a person to consent to disclosure of a record or other information for the purposes of paragraph (2) may be delegated to another person or an organization only by means of an express legal power of attorney granted by the person authorized by that paragraph to consent to the disclosure.
- (c) DEADLINES.—
- (1) In the case of records or other information that are required by subsection (a) to be made available to the public and that are in the custody of the Department of Defense on the date of the enactment of this Act, the Secretary shall make such records and other information available to the public pursuant to this section not later than three years after that date. Such records or other information shall be made available as soon as a review carried out for the purposes of subsection (b) is completed.
- (2) Whenever after March 1, 1992, a department or agency of the Federal Government receives any record or other information referred to in subsection (a) that is required by this section to be made available to the public, the head of that department or agency shall ensure that such record or other information is provided to the Secretary of Defense, and the Secretary shall make such record or other information available in accordance with subsection (a) as soon as possible and, in any event, not later than one year after the date on

which the record or information is received by the department or agency of the Federal Government.

- (3) If the Secretary of Defense determines that the disclosure of any record or other information referred to in subsection (a) by the date required by paragraph (1) or (2) may compromise the safety of a Vietnam-era POW/MIA who may still be alive in Southeast Asia, then the Secretary may withhold that record or other information from the disclosure otherwise required by this section. Whenever the Secretary makes a determination under the preceding sentence, the Secretary shall immediately notify the President and the Congress of that determination.

- (d) DEFINITION.—For purposes of this section, the term "Vietnam era" has the meaning given that term in section 101 of title 38, United States Code.

Sec. 1085. Disclosure of information concerning unaccounted for United States personnel from the Korean Conflict, the Vietnam era, and the Cold War

Section 1082 of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Public Law 102–190; 50 U.S.C. 401 note) is amended—

- (1) in subsection (b)(3)(A), by striking out “cannot be located after a reasonable effort.” and inserting in lieu thereof “cannot be located by the Secretary of Defense—
- “(i) in the case of a person missing from the Vietnam era, after a reasonable effort; and
 - “(ii) in the case of a person missing from the Korean Conflict or Cold War, after a period of 90 days from the date on which any record or other information referred to in paragraph (2) is received by the Department of Defense for disclosure review from the Archivist of the United States, the Library of Congress, or the Joint United States-Russian Commission on POW/MIAs.”;
- and (2) in subsection (c)(1), by striking out “not later than September 30, 1995” and inserting in lieu thereof “not later than January 2, 1996”.