UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES

The background to this long-running FOIA case is familiar to the Court, which previously has ruled on a series of dispositive motions. *See* Nov. 9, 2009, Mem. Op. (ECF No. 137); Aug. 3, 2012, Mem. Op. (ECF No. 187); Aug. 3, 2017, Mem. Op. (ECF No. 291). CIA incorporates by reference the Statements of Undisputed Fact filed with its 2016 MSJ (ECF No. 248). Briefly, plaintiffs sought seven categories of records, or "Items," relating to Vietnam Prisoners of War ("POWs") and persons declared Missing in Action ("MIAs"). The Court has granted summary judgment in defendant's favor regarding five of the seven Items, and this motion addresses those Items as to which the Court denied summary judgment in its opinion dated Aug. 3, 2017. *See* ECF No. 291. As explained in the order issued the same date (ECF No. 290), the following issues remain in dispute:

1. The inadequate search for Item 5, with respect to why certain files were destroyed and a reasonable explanation for the CIA's failure to produce items the existence of which plaintiffs have made a *prima facie* showing;

2. The inadequate search for Item 7, with respect to information regarding prior searches for information responsive to congressional requests;

3. The production of names of non-CIA personnel;

4. The production of a denied-in-full *Vaughn* index that includes a sufficient indication of the dates of creation of documents 2, 3, and 15 on the index.

CIA is conferring with Main Justice regarding whether to appeal the third issue, *i.e.*, the production of names of non-CIA personnel; it has no intention of litigating that issue further in this Court. Consequently, CIA now renews its motion for summary judgment regarding the remaining three issues.

LEGAL STANDARD

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 248. A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

The "vast majority" of FOIA cases are decided on motions for summary judgment. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) ("FOIA cases typically and appropriately are decided on motions for summary judgment."); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) ("*CREW*"). An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and

each responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *See Weisberg v. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See McGehee v. C.I.A.*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert denied*, 415 U.S. 977 (1974); *Media Research Ctr.*, 818 F. Supp. 2d at 137. "[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *CREW*, 478 F. Supp. 2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Media Research Ctr.*, 818 F. Supp. 2d at 137 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

ARGUMENT

After fourteen years, multiple rounds of dispositive motions practice, and interim fee litigation, only three discrete issues remain unresolved. As explained below, summary judgment is warranted in CIA's favor on each.

I. CIA'S DENIED-IN-FULL *VAUGHN* INDEX

In its recent Order, the Court directed CIA to provide the latest date it can discern for three entries on the denied-in-full *Vaughn* index as to which CIA invoked Exemption 1: documents 2, 3 and 15. CIA has ascertained approximate dates from the content, recipients, and dates noted within the text. Document 2, C05999027, is dated 2000; Document 3, C05999550, is

dated 2003; and Document 15, C06002421, is dated 1991. *See* Declaration of Antoinette B. Shiner at ¶ 3 (filed herewith).

With this information provided, CIA reasserts its argument that these documents fall within Exemption 1. In its recent Memorandum Opinion (at 19), the Court held that "the CIA has sufficiently detailed its classification analysis concerning its applications of Exemption 1. It has described in great detail the conditions under which information is properly classified, and how it has determined the continued applicability of those conditions to the relevant responsive documents in this case. It also has articulated the standards by which classification determinations are reviewed for the downgrading and eventual public release of information, and why certain information in the documents now at issue cannot be released." CIA has, in other words, sufficiently defended its application of Exemption 1 to the Documents 2, 3, and 15 now that their dates are known, and summary judgment is warranted thereon.

II. ADEQUACY OF CIA'S SEARCHES

A. Item 5

For Item 5, Plaintiffs requested:

> All records relating to 47 individuals who allegedly are Vietnam era POW/MIAs, and whose next-of-kin have provided privacy waivers to Roger Hall, and those persons who are on 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.

The Court found inadequate CIA's search for documents responsive to Item 5 for two reasons. First, it agreed with Plaintiffs that CIA must provide additional details regarding the destruction of 114 folders originally identified as potentially responsive. Second, it required additional explanation as to why certain records that Plaintiffs allege exist – including live-sighting reports and imagery of suspected prison camps – continue to be exempt from FOIA pursuant to the operational files exemption.

1. Destroyed Records

In Shiner's 13 July 2016 declaration, she described the search for Item 5 documents in the Archives and Records Center (AARC): "From this initial search, the response was narrowed to 569 hard copy folders associated with 204 individuals. It was later determined that 114 of those folders had been properly destroyed in accordance with CIA's records control schedule." Chapter 33 of United States Code Title 44 provides the framework for federal records management. The National Archives and Records Administration (NARA), through the Code of Federal Regulations, promulgates detailed guidance for records and information management for all federal agencies. The Agency has promulgated internal policies and regulations in accordance with NARA's framework to govern the management and retention of the Agency's records. The CIA's retention rules are captured in its Records Control Schedules, which were coordinated in conjunction with NARA, and formally approved by the Archivist of the United States. These schedules control the disposition of all records under that schedule, including their destruction. Each records control schedule sets forth required retention dates, based on the nature and contents of the record. *See* Shiner Decl. at ¶ 6.

Here, part of the CIA's search for "Item 5" records consisted of a search of temporary records files in the Agency archives. Specifically, the Agency conducted searches for the 1700 names of POW/MIAs provided by Plaintiffs. As a result of these searches, the Agency uncovered a number of "hits," which indicated that potentially responsive records may have been held in 114 files that had been destroyed. Those files were largely administrative in nature and contained document related to routine administrative support, working papers, films of no intelligence value, and the correspondence and reference documents associated with certain FOIA/Privacy Act and declassification files. Based on the nature of the records contained in the files, these documents were designated as "temporary" and only required to be kept for a

designated period of time (from one to 10 years depending on the file type). By the time the searches were conducted, these files had been properly destroyed in connection with the relevant record control schedule. Separately, Shiner notes that given the volume and the commonness of the names requested, although the Agency encountered "hits" during its searches, there is no indication that these records were truly responsive to Plaintiffs' request. *See* Shiner Decl. ¶ 7. What is clear,is that the 114 potentially responsive folders that remain at issue with respect to the Item 5 search have been destroyed, and therefore cannot be released. *See Anderson v. U.S. Dep't of Justice*, 518 F. Supp. 2d 1, 9-10 (D.D.C. 2007) ("An agency does not violate the FOIA for its failure to locate records destroyed in accordance with an agency's normal retention policy. The Court's authority is limited to the release of non-exempt agency records in existence at the time the agency receives the FOIA request."). Summary judgment therefore is warranted with respect to the adequacy of the search for these files.

2. Operational Files

In its recent opinion (ECF No. 291 at 15), the Court held that CIA failed to demonstrate, specifically, how dated records about American prisoners of war can "reasonably be considered operational under the statute." It further stated that the fact that a mandatory decennial review of the designated operational files was conducted is a "threshold matter," and that additional explanation is required. *Id.* In Shiner's supplemental declaration filed in January 2017, she described generally the decennial review process required under 50 U.S.C. § 3141. Additional details about the review may assist the Court with its question about dated records kept within the operational files.

During a decennial review, a validation team ensures that: (i) categories and subcategories of designated files series fall within the boundaries of the CIA Information Act of 1984; (ii) the actual records in the file categories are appropriately filed; and (iii) the information

in those records cannot be declassified and released if subject to the FOIA line-by-line review and release process. Public comment is solicited through a Federal Register notice. In addition, CIA sends letters to organizations and individuals known to have views about historical and other public interest disclosures requesting their input. Indeed, the CIA Information Act requires that the decennial review "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." *See* Shiner Decl. at ¶ 10.

While the age of documents designated as exempt operational files is a factor considered during a decennial review, it is but one factor, and there is not a specific age limit on how long files may be held in operational files. Some records, although over 60 years old in some cases, may nevertheless contain detailed, viable sources and methods information which remains highly sensitive today. For example, certain operational files, even old ones, may reveal a particular collection technique that remains viable or which has never been detected. Disclosure would reveal not only the technique, but also CIA's use of the technique and the particular target against whom it was deployed. In its most recent decennial review, the validation team determined which records, including those containing imagery, held in designated operational files should continue to have that designation. *Id.* at ¶ 11.

In addition to the thorough decennial review, in this case, CIA searched for and released to Plaintiffs any records that had been removed from operational files and therefore had lost that designation. Moreover, as explained in further detail addressing the search for Item 7 responsive documents, *supra*, most of CIA's documents on POWs/MIAs have been permanently accessioned to NARA in association with mandated declassification, although CIA has also searched its records to ensure Plaintiffs received all responsive, non-exempt material in CIA's

possession.[1] *Id.* at ¶ 12. In light of the Court's holding that operational files are exempt from FOIA and need not be searched, summary judgment is warranted with respect to Item 5 notwithstanding Plaintiff's insistence that other records must exist. *See SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991).

B. Item 7

For Item 7, Plaintiffs requested:

> All records on or pertaining to any search conducted regarding any other requests for records pertaining to Vietnam War POW/MIAs, including any search for such records conducted in response to any request by a Congressional Committee or executive branch agency.

In its recent opinion (ECF No. 291 at 17), the Court found inadequate the search in response to Item 7, holding that CIA had not directly addressed Plaintiffs' claim that there are responsive documents that were shared with congressional committees but not produced in this litigation. It expressly stated that CIA is not required to search its operational files even if underlying records were shared with other government agencies or with Congress.

CIA concededly has provided Congress with documents concerning American POWs and MIAs, and searches done in response to Item 7 have included those records. In the early 1990s, the Senate created a select committee on the POW/MIA issue with then-Senators Kerry and Smith – the latter of whom submitted a declaration on Plaintiffs' behalf – as leads. As part of this effort, CIA and several other government agencies sent thousands of documents to Congress, including some classified records. The committee also conducted closed hearings in which classified testimony was presented. In early 1993, the committee's records were sent to NARA

[1] Plaintiffs have been referred to NARA several times throughout this litigation. It should also be noted that the Defense Intelligence Agency (DIA) has been the lead agency on resolution of POW/MIA issues since 1985 (noted in document C06002422 released-in-full to Plaintiffs).

for declassification. In turn, NARA sent to CIA for review both original CIA records and records from other government agencies containing CIA equities.[2] *See* Shiner Decl. at ¶ 14.

The select committee's records were exempt from FOIA search and release. When Item 4[3] of Plaintiffs' request was being litigated, the Court determined that CIA was not required to re-review the documents sent from NARA in response to the committee's declassification directive because CIA had held the documents in a read, review, and return status.[4] Nevertheless, in the interest of resolving the litigation, CIA searched for these documents in response to Item 4 of Plaintiffs' request and released over 1,000 records during the 2010-2011 timeframe. *Id.* at ¶ 15. The Court upheld the search for Item 4 in its 2012 opinion. *See* Mem. Op., ECF No. 187 at 12.

For the documents, including imagery, photographs, and the like, shared with Congress that were not part of the NARA project, CIA has treated all responsive documents in its possession and produced them to Plaintiffs throughout this litigation (with the exception of exempt operational files, a search of which the Court has consistently held is not required). There are documents that remain currently and properly classified as their release could reveal intelligence sources, methods and activities, as described in the denied-in-full *Vaughn* index. *See* Shiner Decl. at ¶ 17. If the Court would find useful a sample of such documents, CIA will provide one for *in camera* review. As to the adequacy of CIA's search in response to Item 7, however, summary judgment is warranted.

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[2] Separately, Executive Order 12812 also directed Executive Branch agencies to review and declassify records on POWs/MIAs. Pursuant to the E.O., declassified versions of all classified records in the committee's possession were made.

[3] "Item 4" of Plaintiffs' request asked for: All records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to CIA for processing.

[4] These documents have been permanently accessioned to NARA.

CONCLUSION

For the reasons set forth above, summary judgment should be granted in favor of the CIA.

Respectfully Submitted,

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