

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.	)	
_____	)	

PLAINTIFF ACCURACY IN MEDIA'S MOTION FOR STAY

COMES NOW plaintiff Accuracy in Media, Inc., by counsel, and respectfully move this Court to Stay this matter, to afford defendant CIA the opportunity to respond to plaintiffs' discovery request. Defendant opposes this relief, and anticipates seeking relief from discovery by protective order.

Preliminary Statement

The North Vietnamese insisted that reparations be included in any peace settlement. The U.S. eventually agreed, but, in lieu of including that aspect of the bargain in the Paris Peace Accords, reduced that portion of the bargain in writing in a side letter. The Communists agreed to release all POWs, but declined to reveal the number of men held, until after the Accords had been signed. Given the historic Communist policy of holding back POWs upon the cessation of hostilities, the result was, or should have been, expected. The Vietnamese released roughly half of the 1,205 American POWs, and kept the other half as collateral for the promised \$3.5 billion. The money was not paid, and around 600 POWs remained imprisoned.

The last day of Operation Homecoming, March 29, 1973, President Nixon announced that "all our boys are on the way home." Since then, for over 45 years now, the government's *policy* has been to deny the existence of records contradicting this position. These are the records at issue. They were the subject of President Bush's 1992 Executive Order 12812, and President Clinton's 1993 Presidential Decision Directive NSC 8, both of which included the obligation to search operational files.<sup>1</sup> The CIA's 2015 decennial reviews also require that operational files be searched.<sup>2</sup>

The information sought concerns events which have been the subject of official congressional investigations, and extensive news, book, and film publicity, for decades. Even now, into the fifth decade since Operation Homecoming, the POW question remains the most emotional wartime issue, and still remains unresolved.

#### Memorandum of Points and Authorities

1. Here, the issue is whether the Court should accept the CIA's designation of up to 45-year-old records as operational, even after the Court ordered the CIA to address the issue. Defendant did not. Rather, the CIA simply declared that, "[i]n 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

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<sup>1</sup> See CIA Director James Woolsey Nov. 9, 1993 letter to President Clinton re E.O. 12812, "Our review included a thorough, exhaustive search of operational files, finished intelligence reports, memoranda, background studies, and open source files...." *Hall Aff.* ECF 260-1 at 1.

<sup>2</sup> See May 11, 1995, CIA letter to US Senate Select Committee on Intelligence, "Re Decennial Review of CIA Operational File Exemptions, "This is to notify you that CIA has completed its decennial review of operational file designations as required by the CIA Information Act of 1984, 50 U.S.C. section 432."

designation." *CIA Memorandum*, ECF 295-1 at 6. Plaintiffs' discovery seeks some specificity. This case cannot be decided until defendant provides this information.

2. The Central Intelligence Agency Information Act of 1984, 50 U.S.C 3141 *et seq.* ("CIA Act"), provides an exemption for certain CIA "operational files" from the requirements of the Freedom of Information Act. "Operational files" primarily are those concerning operations, intelligence collection systems and security files—records at issue here. The CIA Act requires decennial reviews, to "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.*

3. The intent of the operational files exemption was to forego review of particular categories of sensitive records that would not have been released in any case, and to lead to a more productive FOIA process. Here, the CIA operational files exemption is applied to broad categories of information, and the plaintiffs' discovery will resolve whether the CIA's "operational file" designations in aged records was proper.

4. On a number of occasions, federal courts have found that the CIA improperly invoked the operational files exemption, *e.g. Morley v. CIA*, 508 F.3d 1108 (2007); *ACLU v. DoD*, 351 F.Supp.2d 265 (2005). The CIA Act authorizes the DCIA to exempt operational files from the FOIA, but it does not require him to do so, and the DCIA has the authority to rescind prior operational files designations.

5. At the 25-year mark, the historical interest in permanent CIA records arguably becomes dominant, while operational security considerations recede in significance. Post Operation Homecoming records are 25 to 45 years old. Attached hereto

as Exhibit A are plaintiffs' Interrogatories to the CIA. (Exhibit B is Requests for Admissions, and Exhibit C is Request for Production of Documents). The Interrogatories seek the CIA's explanation of its consideration of statutory criteria in the performance of its 2015 decennial review, the very information that the Court ordered the CIA to disclose:

Interrogatory No. 2. Regarding the CIA's 2015 decennial review of otherwise responsive records that remain designated as operational (responsive and withheld):

- (1) Explain the government's assessment of the historical or other public interest value in the records, or portions of those records;
- (2) Explain each factor, and the weight assigned to it, for the decision to continue withholding the information, including especially the impact of the passage of time; and
- (3) State the government's position on the potential for declassifying a significant part of the information contained in those records. Include in your Answer an explanation of each factor, and the weight assigned to it, for the decision to continue operational categorization of
  - (a) 1,400 live sighting reports;
  - (b) Suspected prison camps; and
  - (c) Named reconnaissance and rescue operations.

6. Here, there is a genuine issue of material fact as to whether the CIA is justified in continuing to classify these records as operational, or whether defendant "still keeps numerous documents classified under the guise of national security." *Smith Aff.*, ECF 258-4 ¶ 19. Thus, the case is not ripe for adjudication by Summary Judgment.

7. The Court also ordered defendant to identify with some particularity the authority upon which it is said to have relied in destroying 114 files. "The Court therefore directs the CIA to provide further specificity as to the regulations and schedules applied to its decision to destroy the files." *Mem Op.*, ECF 291 at 14. The government responded at the September 26, 2017 Status Hearing (ECF 293 at 4) that it would file a motion for the Court's *in camera* review of the schedules that authorized the destruction of these files. It

did not move the Court for in *camera review*, or otherwise produce the regulations or schedules, so plaintiffs' discovery also seeks that disclosure.

8. Yet another indication of the CIA's over-classification is apparent from a review of the CIA's production in this case upon its completion of its 2015 decennial review. It produced 33 records that were dated 1974 to 1990, from 28 to 45 years after Operation Homecoming. These records are attached to plaintiff's Interrogatories, Exhibit A. Plaintiffs ask defendant its position on the historical value or public interest in these records during its 1985, 1995, and 2005 decennial reviews.

9. Additional impetus for the instant motion is set forth in plaintiff's January 15, 2018, *Unopposed Motion for Enlargement of Time to File Cross-Motions for Summary Judgement*, ECF 296, seeking an enlargement to January 31. There, plaintiffs recited Mr. Lesar's issues beginning the week of January 1, 2018, regarding a power outage and two Internet connection failures, followed by the "complete corruption" of his Windows 7 operating system, followed by technicians scrubbing his hard drive, followed by a restoration of his data, after two such attempts. These difficulties, spanning approximately three weeks, resulted in numerous complications to his extremely crowded schedule, and he is still suffering the consequences of that down time.

#### CONCLUSION

The Court ordered the CIA to explain why it still classifies the aged records at issue as "operational," but defendant failed to do so. Plaintiffs' discovery asks the CIA to explain its reasoning, and the case cannot proceed until after defendant provides the information sought. This will take 30 or more days, so, at this juncture, plaintiffs seek an order for a brief stay.

WHEREFORE, plaintiff Accuracy in Media, Inc., respectfully move this Court to Stay this matter, until after defendant CIA responds to plaintiffs' discovery requests.

DATE: January 31, 2018.

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/s/

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