

**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.)	
_____)	

**REPLY IN SUPPORT OF DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO PLAINTIFFS’ CROSS-MOTIONS**

Defendant, the Central Intelligence Agency (“CIA”), respectfully submits this reply in support of CIA’s renewed motion for summary judgment, *see* ECF No. 295, and opposition to cross-motions for summary judgment filed by Plaintiff Accuracy in Media (“AIM”), *see* ECF No. 312, and Plaintiff Roger Hall, *see* ECF No. 319, regarding CIA’s response to Plaintiffs’ Freedom of Information Act (“FOIA”) request seeking seven categories of records, or “Items,” related to Vietnam Prisoners of War (“POWs”) and persons declared Missing in Action (“MIAs”).

ARGUMENT

CIA’s renewed motion for summary judgment addressed the few remaining issues of dispute in the case, including: (i) with respect to Item 5, explanations of the schedules pursuant to which records were destroyed and why certain documents were considered to be operational and hence exempt from search; and (ii) with respect to Item 7, an explanation of why there might have been documents provided to Congress but not produced in this litigation. This discussion included a thorough explanation of the CIA’s decennial review process and why even relatively old documents might be considered operational. The arguments advanced in Plaintiffs’ cross-

motions fail to undercut CIA's explanation of its search efforts and decennial review explained in the second supplemental declaration of Antoinette B. Shiner ("3d Shiner Decl."), *see* ECF No. 295-2.¹ Further, to the extent Plaintiffs seek to re-litigate aspects of this long-running case, the Court has already ruled in CIA's favor on certain withholdings and denied Plaintiffs' numerous discovery requests.

I. CIA Adequately Explained its Decennial Review of Operational Files

Both AIM and Hall argue that CIA failed to search operational files—mostly because of alleged flaws with CIA's decennial review. CIA has previously explained the decennial review in detail. In Shiner's supplemental declaration filed in January 2017, she described generally the decennial review process required under 50 U.S.C. § 3141, including the efforts of a validation team to ensure, among other things, that categories and subcategories of designated files series fall within the boundaries of the CIA Information Act of 1984 and the information in those records cannot be declassified and released. *See* 2d Shiner Decl. ¶¶ 17-19. While the Court's recent opinion found that CIA's decennial review "is not the end of the inquiry," *see* Mem. Op., ECF No. 291, at 15, Shiner's supplemental declaration filed in support of CIA's renewed motion provides additional details regarding the process for conducting this review. *See* 3d Shiner Decl. ¶¶ 10-11. As explained by Shiner, during CIA's most recent decennial review, the validation team determined which records, including those containing imagery, held in designated operational files should continue to be designated as operational. *Id.* ¶ 11.

Contrary to the views expressed in Plaintiffs' opposition, the age of—and public interest in—the documents contained within exempt operational files is not dispositive here. As

¹ Ms. Shiner also submitted an initial declaration on July 13, 2016, *see* ECF No. 248-2 ("Shiner Decl."), and supplemental declaration on January 30, 2017, *see* ECF No. 271-1 ("2d Shiner Decl.").

explained in CIA's renewed motion, age is but a single consideration and does not undercut the fact that documents contained in operational files may still contain detailed, viable sources and highly sensitive methods information. Further, CIA is not required to automatically declassify documents merely because of public interest. Indeed, as explained by Shiner, CIA solicits the views of organizations and individuals and the public regarding historical interests. *Id.* ¶ 10. And CIA's motion also noted that the CIA Information Act *requires* historical value and public interest to be taken into consideration during the decennial review. *Id.*

Moreover, CIA concededly searched for and released to Plaintiffs any records that had been removed from operational files and therefore had lost that designation. *Id.* ¶ 12. To be sure, even though most of CIA's documents on POWs/MIAs have been permanently accessioned to NARA in association with mandated declassification, CIA has also searched its records to ensure Plaintiffs received all responsive, non-exempt material in CIA's possession. *Id.* 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 Plaintiffs' insistence that other records must exist. *See Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) ("the agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records"); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991).

II. CIA Adequately Explained the Scheduled Destruction of Files

Plaintiffs argue that CIA failed to describe "with particularity" how 114 folders regarding CIA's search for Item 5 documents in the Archives and Records Center were destroyed in accordance with CIA's records control schedule. This is not the case. In Shiner's 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.” CIA’s renewed motion describes, in detail, the requirements for the management and retention of the Agency’s records. *See* 3d Shiner Decl. ¶ 6. Further, CIA explains that part of its search for “Item 5” records consisted of a search of temporary records files in the Agency archives, which indicated that potentially responsive records *may* have been held in the 114 files that had been destroyed. CIA explained that these documents were designated as “temporary” and only required to be kept for a designated period of time and had been properly destroyed by the time CIA conducted its search. Therefore, there is no indication that these records were truly responsive to Plaintiffs’ request. *Id.* ¶ 7. Summary judgment is therefore warranted with respect to the adequacy of the search for these files. *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 failure to locate records destroyed in accordance with an agency’s normal retention policy”).

III. Re-litigating Resolved Claims is Unnecessary

Plaintiff Hall repeats his prior arguments challenging CIA’s application of FOIA Exemptions 1 and 3 to certain information. While these arguments appear to complement Hall’s dissatisfaction with the decennial review process, Hall ignores the fact that Court has already addressed many of these issues. In its Order dated August 3, 2017, the Court awarded summary judgment to CIA regarding its application of Exemption 1 and 3 on all but one issue. *See* ECF No. 290 at 2. The remaining issue had to do with CIA’s failure to provide the latest date it could discern for three entries on the denied-in-full *Vaughn* index as to which CIA invoked Exemption

1, which CIA's renewed motion duly provided. Therefore, this issue should no longer preclude summary judgment here.

Finally, Plaintiffs reiterate their desire to take discovery in this case as requested in pending motions before the Court. "Discovery is not favored in lawsuits under the FOIA. Instead, when an agency's affidavits or declarations are deficient regarding the adequacy of its search . . . the courts generally will request that the agency supplement its supporting declarations." *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 65 (D.D.C. 2002) (citing *Nation Magazine, Wash. Bureau v. U.S. Customs Service*, 71 F.3d 885, 892 (D.C. Cir. 1995)). The Court has repeatedly denied Plaintiffs' request for discovery in this long-running case. For the reasons already expressed in CIA's opposition to Plaintiffs' motion for a stay and discovery, *see* ECF No. 300, discovery is unnecessary to resolve the remaining claims in this case. Instead, the Court should review CIA's supplemental declaration to resolve the remaining issues and nothing more should be required here as VIA has not satisfied its burden for its searches and withholdings.

CONCLUSION

For the reasons set forth above, as well as the reasons contained in its motion, CIA respectfully requests that this Court grant summary judgment its favor and to deny Plaintiffs' cross-motions for summary judgment.

Respectfully submitted,

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**DEFENDANT’S RESPONSE TO PLAINTIFF’S STATEMENT
OF MATERIAL FACTS NOT IN GENUINE DISPUTE**

Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h), Defendant, the Central Intelligence Agency (“CIA”), respectfully submits its Response to Plaintiff Accuracy in Media’s Statement of Material Facts.

1. Deny: Defendant stated that Main Justice would consider any appeal in this case and that Defendant would comply with the result of any decision made with respect to a potential appeal.
2. Admit; Defendant did not seek an interlocutory appeal of the Court’s Order dated August 3, 2017, which was not a final appealable order.
3. Admit.
4. Admit.
5. Deny.
6. Deny; while Defendant informed the Court during the September 26, 2017, status hearing that any submission of classified information regarding CIA’s destruction schedules would need to be submitted *in camera* (see ECF No. 293 at 4), Defendant did not concede that doing so was necessary to resolve the remaining issues in this litigation.

7. Admit.
8. Deny.
9. Deny.
10. Deny.
11. Deny.
12. Deny.

Respectfully submitted,

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