

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 MEMORANDUM IN REPLY TO DEFENDANT
CENTRAL INTELLIGENCE AGENCY'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

COMES NOW Accuracy in Media, Inc., by counsel, under Rule 47(d) of the Local Rules of US District Court for the District of Columbia, and respectfully submits this Memorandum in Reply to Defendant Central Intelligence Agency's Opposition to Plaintiffs' Motion for Summary Judgment.

The Court ordered the CIA to justify nondisclosure of aged records of 1,400 live sighting reports, imagery, and reconnaissance and rescue operations. *See generally Accuracy in Media Cross Motion for Summary Judgment at 2-7.* The CIA claims that it had already done so:

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.

CIA Opposition to Motion for Summary Judgment ("*CIA Opposition*"), ECF 329 at 2.

However, the referenced declaration only concludes that "the DCIA and his advisers carefully consider whether files falling within each proposed series would perform the

functions set forth in the statute."¹ Thus, "the present record [still] fails to demonstrate how such dated records can reasonably be considered operational under the statute."

August 3, 2017, *Memorandum Order*, ECF 291 at 15.

On the one hand, the CIA appears to claim that it search records for live sighting reports, imagery, and reconnaissance and rescue operations (ECF 329, *CIA Response to Statement of Facts* at 7-8), while, on the other hand, it asserts that "operational files are exempt from FOIA and need not be searched, [so] summary judgment is warranted..." *CIA Opposition*, ECF 329 at 3.

¹ *2d Shiner Decl.*, ECF 271-1 ¶¶ 17-19:

Plaintiffs question whether the decennial review of operational files, required by the National Security Act, has been conducted. The Agency undertook a decennial review of the exempt operational files designations in 2015 and has completed the review in accordance with the process described below.

Under 50 U.S.C. § 3141(a), the Director of the Central Intelligence Agency (DCIA) "may exempt operational files of the CIA" from the search and review requirements of the FOIA. Operational files are defined, in turn, to include certain files of the Directorate of Operations, the Directorate of Science & Technology, and the Office of Personnel Security that contain sensitive information about CIA sources and methods.

The DCIA implements his authority under 50 U.S.C. § 3141(a) by designating specific file series as exempt. In identifying the exempt file series, the DCIA and his advisers carefully consider whether files falling within each proposed series would perform the functions set forth in the statute. If a proposed file series would not perform one of the statutory functions, it would not be designated as exempt. The scope of each designated file series is defined in classified internal regulations and policies. Although I cannot provide additional detail about the designated file series in an unclassified setting, I can assure the Court that they are carefully and tightly defined to ensure that they serve the specific operational purposes.

Defendant also cites a Shiner declaration in support of its conclusion that it has adequately explained the destruction of 114 files: "CIA's renewed motion describes, in detail, the requirements for the management and retention of the Agency's records. See 3d Shiner Decl. ¶ 6." *CIA Opposition*, ECF 329 at 3-4.

But the referenced declaration provides no description, or detail, whatsoever. Rather, it relates only that there are unidentified regulations, and schedules, governing the destruction.² This too ignores the Court's order that "direct[ed] the CIA to provide further specificity as to the regulations and schedules applied to its decision to destroy the files." *Memorandum Order*, ECF 291 at 17. Further, the Court instructed that "[i]f the agency cannot confirm or deny the existence of that information in a public filing, so be it, but its inadequate responses thus far makes it impossible for the Court to grant the CIA's motion for summary judgment as to its searches." *Id.*

"The [only] remaining issue," according to defendant, "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

² *3d Shiner Decl.*, ECF 295-2 ¶ 6:

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, provides 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.

as to which CIA invoked Exemption 1, which CIA's renewed motion duly provided." *CIA Opposition*, ECF 329 at 4-5. This reasoning is flawed. Under this approach, aged records that were produced to Congress could be withheld if it is accompanied by a more recent cover letter. Additionally, such a method ignores the government's duty to segregate. Defendant should provide the earliest date of these denied-in-full records, not the latest.

WHEREFORE, Plaintiff Accuracy in Media, Inc., respectfully prays that this Court deny Defendant's Motion for Summary Judgment, and grant Plaintiffs' Motions for Summary Judgment.

DATE: March 18, 2019.

Respectfully submitted,

_____/s/_____
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