UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C. A. No. 04-0814 (RL)
	:	
CENTRAL INTELLIGENCE AGENCY	:	
	:	
	:	
Defendant		

REPLY OF PLAINTIFFS ROGER HALL AND STUDIES SUTIONS RESULTS, INC. (COLLECTIVELY "HALL") TO DEFENDANTS' OPPOSITION TO HALL'S SECOND RENEWED CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant's Opposition, Doc. 330 to plaintiffs' Second Renewed Cross-Motion for Partial Summary Judgment ("Pls' Opp.") begins by conceding that its Renewed Motion for Summary Judgment ("CIA 2d RMSJ"), Doc. 248, addressed "the few remaining issues of dispute in the case." CIA's Reply at 1. The CIA's skimpy reply simply repeats what it already said before. Its language and points are predominantly taken verbatim from its earlier filings. The CIA argues that what Hall has asserted is speculative or 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 CIA Reply at 2, citing 2d Shiner Decl. ¶¶ 17-19. Thus, the thrust of the CIA's overall argument is that the issues before this Court should be resolved on the basis of the CIA's say-so. Nothing else really counts. This applies to both search and exemption issues.

On the omnipresent issue of decennial review and the status of operation files, the CIA is compelled to concede that this Court did not endorse the CIA's view that summary judgment is warranted based on the status of the record at the present time in light of the relevant legal issues that have been raised. Nevertheless, the CIA once more makes a valiant attempt to avoid the Court's holding. It asserts:

> 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.

Doc. 329 at 2.

According to the CIA, Shiner's supplemental declaration filed in support of CIA's renewed motion "provides additional details regarding the process for conducting this review. " *Id*. citing 3d Shiner Decl. ¶¶ 10-11. Shiner, it says, explained that "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*. citing 3d Shiner Decl., ¶ 11.

The CIA argues that "[c]ontrary to the views expressed in Plaintiffs'" (and by this Court), "the age of—and public interest in—the documents contained within exempt operational files is not dispositive here." *Id*. It then cites Shiner's July 13, 2016 Decl. ECF No. 248-2 ("Shiner Decl."), and a Supplemental Shiner Decl., filed on January 30, 2017, ECF No. 271-1 ("2d Shiner Decl."), in which Shiner explains that in what was set forth in the 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 and 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.

The CIA then asserts that

> 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*. <u>In light of the Court's holding that operational files are exempt from FOIA and need not</u>

> be searched, summary judgment is warranted with respect to Item 5 notwithstanding Plaintiffs' insistence that other records must exist.

Id. at 3 (emphasis added)(citation omitted).

Thus, having begun its Reply by conceding that this Court had previously ruled that the CIA had not met the standard for withholding operational records subject to decennial review, the CIA now blatantly asserts that the Court ruled just the opposite.

Significantly, however, the CIA's boilerplate claim to have conducted adequate searchers for records evincing evidence of imagery or events that provide evidence of the sighting of living POW/MIAs founders careful examination of that claim. Plaintiff Roger Hall has detailed that evidence in a new affidavit which rebuts the speculation and conclusory claims of the CIA to have conducted adequate searches reasonably calculated to have located all relevant records responsive to his request.

Hall begins by noting that several years ago he reviewed documents that he had received from the Central Intelligence Agency ("CIA") pertaining to three American POWs that had recently died in Laos. Their names were redacted from the documents. It was stated in these documents that one of these POWs had been married to a village chief's daughter. March 18, 2019 Roger Hall Affidavit ("2019 Hall Aff."), ¶ 1.

Hall made copies of the documents to take to a meeting of the National Alliance of POW/MIA families. The documents were released by the CIA as a result of an order by this Court several years ago. Hall is no longer able to find these documents among his possession. His recollection is that he made several copies of them. He took two with him to the meeting, left one in the printer tray and another on his bed, two stuck behind his seat cushion on his wheelchair, and he put two in a carrying case he had with him. *Id*. ¶ 2.

Three or four years ago the documents disappeared and Hall has not been able to locate them since. Those that he took with him to the Memorial Day meeting of the National Alliance of Families disappeared and those that he left behind in his apartment, he has been unable to locate. *Id*. ¶ 3.

In 2018 Hall made a new FOIA request to the State Department for these documents. The State Department acknowledge the request and assigned it FOIA Request No. F-2018-04868, but has never provided the documents requested although the time for making a determination of the request has long since passed. *Id*., ¶ 4

The three documents previously mentioned were released by the country of Laos and there are still other survivors that could be identified. When did Laos first identify that these three Americans were alive? Laos was not a part of the Paris Peace Accords. There is a public interest in knowing whether they could

have been negotiated for or their relatives could have been allowed to visit them; but the fear of being held accountable has prevented the CIA and other agencies/departments from being forthcoming. *Id*., ¶ 5.

The documents which Hall requested the State Department to provide were made public to the world by Laos, which was not part of the 1973 Paris Peace talks. The State Department had an obligation to track and preserve such communications, as did the CIA, National Security Agency and other national security and law enforcement agencies. *Did too.* *Id*. ¶ 6.

These facts establish beyond peradventure that there is evidence of the existence of several documents which indicate three live American POWs in Laos. Given that ineluctable fact, it follows logically that intelligence and law enforcement agencies which had possession or became aware of these documents had an obligation to preserve and maintain copies of such documents and any other communications pertaining to them. Once the existence or awareness of any such records arose, the Department of State, the CIA, and other such institutions or their components had an obligation to conduct a logical and rational search for such records. If the records were located, they then had an obligation to retrieve them and evaluate them according to appropriate legal standards.

The 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… .” Given the fact that the FOIA law holds that “disclosure, not secrecy,” is the predominant goal of the Act, Dept. Of Air Force v. Rose, the CIA’s cavalier dismissal of its “failure to turn up a particular document” or its dismissal of the evidence in this case“ as mere speculation is risible. Shiner says she has had unnamed organizations evaluate the historical value of the documents. Which ones? The Army? ICE? The Department of Defense appeals office which assigns blind people to process appeals involving requests for searches?

Contrary to the CIA’s assertions, the automatic declassification provisions of the E.O. 13526 take effect immediately after the passage of 25 years and any extension of time after that date must meet a much more daunting showing of damage. The CIA misapplies the standard requiring a greatly heightened showing of damage in order to overcome automatic disclosure. It erroneously minimizes the passage of time when the Act itself put a 70-year limit on all withholding under the FOIA and has multiple provisions emphasizing that the passage of time is required to be taken into account in evaluating threats to national security.

The Court should be aware that on March 1, 2019, Judge Rudolph Contreras issued a significant decision rejecting the applicability of a “Glomar” defense refusing to confirm or deny the existence of responsive records by citing Exemption 7E. Judge Contreras ruled that because the investigatory technique involved, using documentary film makers and film crew members as an

undercover investigatory technique against cattle ranchers seeking to protect their property from being seized by federal agents. While it was conceded that the records had been compiled for law enforcement purposes, the Court ruled that if they existed they would not be protected because the technique was publicly known. This may be applied to the withholding of imagery in this case, and there is abundant reason based on the existing Vaughn index to question the use of the exemption and segregability concerns. *See Reporters Committee for Freedom of the Press, et al. v. Federal Bureau of Investigation, et al. ("RCFP"),* C.A. No. 17-1701 (D.D.C. Mar. 1, 2019).

CONCLUSION

For the reasons set forth above, summary judgment should be awarded to plaintiffs and the Court should hold a conference call to deal with issues pertaining to discovery, an oral Vaughn index or appointment of a magistrate.

/s/ +
JAMES HIRAM LESAR #114413
930 WAYNE AVENUE, #1111
SILVER SPRING, MD 20910

Ph: (301)328-5920
jhlesar@gmail.com

Dated: March 18, 2019