

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 RESPONSE TO
DEFENDANT'S SUPPLEMENT TO ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW Accuracy in Media, Inc., by counsel, and respectfully submits this Response to Defendant Central Intelligence Agency's Supplement to its motion for Summary Judgment.

I. Failure to Justify Continued Operational Record Designations

The Court has unequivocally asked defendant "to explain why any files would still be deemed operational sixty years after-the-fact." *Memorandum Order ("Mem. Order")*, ECF No. 335 at 4. "Are they operational? And if so, why? Do they contain detailed information about still-viable intelligence sources? A method of intelligence gathering? Something else?" *Id.* at 6.

But defendant *still* fails to respond to the Court's inquiry. Instead, it merely states that operational files need not be searched. It baldly claims that it reviewed these files during its Decennial Reviews. "If the file series no longer contains viable sources and methods information, it is pulled from the operational files category and placed in non-operational file systems, which were searched by the CIA in response to Plaintiffs' FOIA request." *Defendant's Supplement to its Motion for Summary Judgment ("CIA Supplement")*

ECF No. 335 at 6. The Court has repeatedly ordered the CIA to explain why aged records of, *inter alia*, the 1,400 live sighting reports,¹ imagery of suspected camps, and reconnaissance and rescue operations, are still operational, or conduct the search. Its most recent pleading does not even broach the subject.

Moreover, plaintiffs have demonstrated that the CIA did not properly consider the "historical value or other public interest in the subject matter of the particular category of files" in its Decennial Reviews, as required under 50 U.S.C. § 3141(g)(2). As plaintiffs observed in their *Motion for Stay*, ECF 278 at 2, the CIA's over-classification is evidenced by the 33 records that were released only upon its completion of its 2015 Decennial Review. The records are dated 1974 to 1990, released from 28 to 45 years after Operation Homecoming. Plaintiffs' proposed Interrogatories sought the CIA's justification for failing to declassify these 33 records during the three Decennial Reviews in 1985, 1995, and 2005.²

Additionally, the 2015 decennial review was unreliable, as evidenced by its 2016 release of a 1998 60-page report, plus its 140 pages of attachments. This record, the

¹ Regarding the search, *see also Plaintiffs' Statement of Material Facts*, Oct. 21, 2016, ECF 258-5 ¶ 122:

The CIA has not stated that it searched any overseas field stations for responsive records. Witnesses before the Select Committee testified repeatedly to the involvement of CIA field stations in Vietnam, Laos, Cambodia, and Thailand, in the gathering of information about POW/MIAs...

² *See Plaintiffs' Interrogatories to Defendant*, ECF No. 297-1:

Interrogatory No. 4. Regarding the CIA's disclosures of the attached Exhibits 115-48, at Bates 359-419 (Exhibit A), released upon completion of the CIA's 2015 decennial review, explain each factor, and the weight assigned to it, upon which the decision to continue the operational designation was made, for the decennial reviews, in 1985, 1995, and 2005.

Critical Assessment of 1998 National Intelligence Estimate (NIE) on Vietnamese Intentions, Capabilities, and Performance Concerning the POW/MIA Issue, is the most illuminating record ever released on the issue of the number of POWs remaining in communist hands at war's end. See (aim.org/pdf/Hall-CIA/CIA-Production-2016-209-pages.pdf). It unequivocally establishes the reliability of the so-called "1205 Document," which exposed that, just months before War's end, the Vietnamese reported that the number of communist-held American POWs in Southeast Asia was 1,205, while the Vietnamese government released 527, and held back over 600 Americans.

II. Failure to Provide More Specificity on Document Destruction

The CIA initially claimed that the destroyed files were "largely administrative in nature and contained documents 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." *Mem. Order*, ECF No. 335 at 4, citing 2017 Shiner declaration. Now, however, defendant is not so sure. It is "unable to reproduce with certainty the information that connected the specific record control schedules to any of the destroyed files" (*CIA Supplement*, ECF No. 335 at 3), and "cannot provide any additional information about the contents of the destroyed files or the CIA's decision to place any of those files in a particular record control schedule category." *Id.* at 4. It now believes that, since some records may be lawfully disposed, the records at issue were "likely" destroyed in accordance with the record control schedule. *Id.* In sum, defendant claims to have no record whatsoever of what category of records were destroyed.

Nor does the CIA reveal when the records were destroyed. Were they destroyed after plaintiffs made their FOIA requests in 2003, in violation of General Records Schedule 14 and CIA Records Schedule NC1-263-85-1, Item 5(d), regarding *Records relating to actual or impending litigation*?

It would seem incongruous to possess records of when and why it destroyed 114 file folders, while at the same time have no record whatsoever of the content, or even category, of these records.

The CIA also reports that the applicable control schedules currently in use are not classified, but that the corresponding schedules in existence at the (undisclosed) time that the records were destroyed are, and remain, classified.³ This begs the question, why the change in classification? And why, in any event, would such control schedules, regarding "administrative files, public relations files, working papers, and FOIA/Privacy Act requests" (*CIA Supplement*, ECF No. 335 at 4), be classified?

³ September 26, 2017 Status Hearing (ECF 293 at 4),

MR. TAAFFE: In terms of the destruction of files, there were questions about the destruction schedules, and we have the destruction schedules and the regulations setting those forth. The trick is that although those schedules, as they exist today, are not classified, the ones that were in existence at the time in the '80s are and were and remain classified. So we'll need to file a motion to file those for the Court's *in camera* review. There were 114 documents destroyed pursuant to that schedule. Of course, we can't know what those documents say because they were destroyed, but parenthetically we'd note we're not even sure they would've been responsive. But, regardless, the document destruction schedule and the explanation that we'll provide will explain what happened there.

Additionally, the record in this case includes an account of the CIA's illegal destruction of relevant records. *See, e.g., Hrdlicka Aff.*, ECF 261-1, ¶ 26: "Exhibit 50 is the 1992 DIA Memoranda re Destruction of POW Records by the CIA, written by Investigator John McCreary, at Bates 151-56."

III. Defendant should provide the earliest Dates for Undated, Fully Withheld Records

The CIA's having provided the latest date it could discern for the three entries on the denied-in-full *Vaughn* index is a flawed approach. Under this method, aged records that were produced to Congress could be withheld if they were 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: June 24, 2019.

Respectfully submitted,

_____/s/_____
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