

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.	)	
_____	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

COME NOW plaintiffs Roger Hall, Studies Solutions Results, Inc., and Accuracy in Media, Inc., by counsel, and respectfully submit their opposition to Defendant Central Intelligence Agency's motion seeking reconsideration of the Court's August 2, 2019, Order.

By Memorandum and Order entered August 2, 2019, ECF 340 at 3, this Court held that defendant had failed to "explain with specificity" why the aged records at issue remain classified as "operational" under the CIA Act:

But § 3141 does not categorically absolve CIA from searching its operational records. When a FOIA requester "disputes" the adequacy of CIA's search "with a sworn written submission based on personal knowledge or otherwise admissible evidence" suggesting "improper exemption of operational files," a court can order CIA "to review the content of any exempted operational file or files" and to submit a "sworn written submission" supporting the claimed exemption. § 3141(f)(2), (f)(4)(A)--(B); accord, e.g., *Judicial Watch, Inc. v. Cent. Intelligence Agency*, 310 F. Supp. 3d 34, 41-42 (D.D.C. 2018) (Jackson, K.B., J.). Plaintiffs do so here with—among other things—an affidavit by former Congressman Bob Smith swearing "without any equivocation that [CIA is] still holding documents that should be declassified;" and that "could and should be released as they pose no national security risk." Aff. Bob Smith ¶¶ 8, 20, ECF No. 258-4. Yet CIA never comes close to explaining why the files remain operational, offering only generalized explanations of § 3141 and its mandatory decennial review. See, e.g., Decl. Antoinette B. Shiner, ECF No. 335-1. That's not enough. To satisfy §

3141, CIA must review its operational files and explain with specificity whether any additional responsive records exist and, if so, why they must be exempt from FOIA.

Defendant would appear to agree with the Court's view of the law: "As explained below, the operational files exemption permits judicial review in the instance where a complainant alleges that the CIA 'improperly withheld records because of failure to comply with any provision of this section.'" *Defendant's Motion for Reconsideration of the Order Dated August 2, 2019, and Supporting Authorities*, ECF 342 at 1 (hereinafter "*Motion*").

The CIA advances no theory that would justify reconsideration.

Defendant now asserts that plaintiffs' affidavits—relating reviews of records at issue—are "speculative," and that these accounts are "not based on personal knowledge."<sup>1</sup> Of course the affidavits are based on personal knowledge. And they relate mostly facts, not opinions, as defendant seems to posit.<sup>2</sup>

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<sup>1</sup> *Motion* at 4:

This limited demonstration is all that is required of the Agency unless the complainant offers "sworn written submission based on personal knowledge or otherwise admissible evidence" to rebut that showing. *Id.* § 3141(f)(4)(A). In this case, Plaintiffs have submitted affidavits based on speculation and supposition that allege the existence of additional undisclosed intelligence documents, but they do not demonstrate through personal knowledge, or other admissible evidence...

<sup>2</sup> *See, e.g., id.* at 6, 8:

Although Plaintiffs have filed a number of affidavits throughout the course of this litigation (the relevant of which predate the CIA's submission), none of them are written by classification authorities or individuals with personal knowledge of the CIA's operational files...

[A]ssertions that he "believes" that CIA is in possession of certain satellite imagery are not only entirely speculative and conclusory but also beside the point as it provides no details as to the CIA's improper exemption of its operational files...

Referring to a single briefing at CIA headquarters, defendant avers that "Plaintiffs' submissions focus on references to documents, of unknown provenance, that were reportedly displayed at briefings where, in some cases, CIA employees were in attendance." *Id.* at 7. However, plaintiff seek disclosure of the 1,400 live sighting reports that were provided to the Select Committee, as well as, among other things, records of imagery, and reconnaissance and rescue operations. For example, in Laos, all live sighting reports went directly to the CIA Station Chief, but defendant has yet to respond to plaintiffs' requests that CIA's search address these records. *See Plaintiffs' Statement of Facts to Which there is No Genuine Issue*, ECF 312-2.

Defendant observes that the age of the record is not necessarily dispositive,<sup>3</sup> implies that there are probably no responsive records,<sup>4</sup> and speculates that if there are response records they are probably not releasable<sup>5</sup> because disclosure would "endanger national security." *Id.* n. 3 at 5. It also baldly claims that "justice requires" the relief sought. *Id.* at 2.

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<sup>3</sup> *Id.* at 5:

[I]n a supplemental declaration, the CIA provided further detail about the CIA Director's review process, explaining that there "is not an age limit on how long files may be held in operational files" and noting that certain operational files, even old ones, "may still contain detailed, still viable sources and methods...

<sup>4</sup> *Id.* at 8:

Indeed, given the subject matter of these inquiries, it is plausible (and perhaps even likely) that to the extent that such records exist they could have originated with, or are presently held by, the Department of Defense, the Defense Intelligence Agency, or the National Archives.

<sup>5</sup> *Id.* at 3:

Compliance with the Order will directly contradict the purpose of the exemption, which was "to relieve the [CIA] from an unproductive [FOIA] requirement to search and review certain CIA operational files ... records which, after line-by-line security review, almost invariably prove not to be releasable under the FOIA." S. Rep. No. 98-305, at 1 (1983).

And the CIA claims, again, that it already has reviewed the operational records in its "rigorous" decennial reviews, and that the "file series are carefully and tightly defined to ensure that they serve specific operational purposes." *Id.* at 5.

In sum, defendant advances nothing new.

The CIA does not explain with any specificity why the aged records at issue remain classified as "operational" under the CIA Act, because it cannot do so. Defendant has made no argument that would justify the Court's reconsideration of its Order.

The CIA must conduct the search.

Date: August 13, 2019.

Respectfully submitted,

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