UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 04-0814 (RCL)
CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE ORDER DATED AUGUST 2, 2019

Defendant, the Central Intelligence Agency ("CIA" or "Agency"), respectfully submits this reply in further support of the CIA's motion for reconsideration of the Court's memorandum and order dated August 2, 2019. *See* ECF No. 342. The Court's August 2, 2019, Order requires the CIA to search its operational files and "explain whether any additional responsive records exist and, if so, why they remain operational." *Id.* at 3. In doing so, the Court concluded that Plaintiffs provided sufficient "personal knowledge or otherwise admissible evidence" regarding the improper designation of the CIA's operational files. *Id.* The CIA has moved for reconsideration regarding the Court's conclusion that Plaintiffs' affidavits sufficiently establish the requisite personal knowledge. *See* ECF No. 342 at 6. Plaintiffs' opposition makes the unsupported assertion that these affidavits were based on "mostly facts, not opinions" and fails to meaningfully address any of the bases for the CIA's reconsideration motion. *See* ECF No. 343 at 2. Accordingly, the Court should grant the CIA's motion and dispense with the requirement to conduct a search of the CIA's operational files.

As discussed in the CIA's motion, under the National Security Act "if a complainant alleges that requested records were improperly withheld because of the improper exemption of operational files," the CIA must "demonstrat[e] to the court by sworn written submission that exempted operation[al] files likely to contain responsive records currently perform the function[s] set forth in [50 U.S.C. § 3141(b)]." 50 U.S.C. § 3141(f)(4)(A). The CIA made this demonstration via the declarations of Antoinette B. Shiner, submitted on January 1, 2017 (ECF No. 271-1) and November 29, 2017 (ECF No. 295-2), respectively. Ms. Shiner's declarations described the procedures and circumstances regarding the CIA's decennial review of the exempt operational file designations and how the CIA identifies the exempt file series and evaluates whether the files perform the functions set forth in the statute. *See* ECF No. 342 at 5-6.

As this Court has already noted, Ms. Shiner's declarations do not necessarily end the inquiry. *See* ECF No. 340 at 3 (noting that section 3141 "does not categorically absolve CIA from searching its operational records"). Indeed, the CIA's demonstration, made through Ms. Shiner's declarations, may be rebutted by a "sworn written submission based on personal knowledge or otherwise admissible evidence." *Id*. § 3141(f)(4)(A). In ordering the CIA to search its operational files, this Court credited Plaintiffs with having sufficiently made such a rebuttal. ECF No. 340 at 3 (citing to the affidavit of Bob Smith, ECF No. 258-4). In addition to the affidavit by former Senator Smith filed on October 21, 2016, Plaintiffs have also relied upon affidavits by former Congressmen John LeBoutillier (ECF No. 83-15) and Bill Hendon (ECF No. 95-45), filed on September 6, 2007, and June 4, 2008, respectively, primarily to establish that potentially responsive records must exist. As discussed in the CIA's reconsideration motion, however, these affidavits—when closely scrutinized with respect to the "personal knowledge" requirement in Section 3141(f)(4)(A)—fall short of the relevant standard.

In their opposition, Plaintiffs note that the affidavits filed in this case relate to "reviews of records at issue" and are based on "mostly facts, not opinions." ECF No. 343 at 2. The CIA takes no position as to whether these former lawmakers have actually seen the documents that they describe. *See e.g.*, Hendon Decl. (ECF No. 95-45) ¶ 9 ("I believe that the CIA is in possession of [certain] imagery"). Nor does the CIA doubt the sincerity of Senator Smith's belief that some element of the Intelligence Community has documents that should be declassified. *See e.g.*, Smith Aff. (258-4) ¶ 8 ("I personally have seen hundreds of classified documents that could and should be released"). However, even taking these affidavits at face value, as noted in the CIA's motion for reconsideration, the affiants' statements are entirely bedside the point in this case. The statutory language in the National Security Act makes clear that the CIA's obligation to demonstrate that its operational files perform the statutorily enumerated functions is only triggered when a plaintiff contends "that requested records were improperly withheld *because of improper exemption of operational files*." 50 U.S.C. § 3141(f)(4)(A) (emphasis added); *see Judicial Watch v. CIA*, 310 F. Supp. 3d 34, 42 (D.D.C. 2018) (the "personal knowledge" requirement pertains to "the improper classification on the part of the CIA"). Critically, none of the affidavits submitted by Plaintiffs claim to have any personal knowledge or indeed present any evidence of the improper exemption of operational files on the part of the CIA. Nor were the affidavits submitted in rebuttal of the CIA's demonstration that the operational files currently perform their functions, as they were submitted prior to Ms. Shiner's relevant declarations in this case. This showing completely fails to establish the requisite "personal knowledge" under Section 3141(f)(4)(A) regarding the CIA's exemption of operational files. Accordingly, Plaintiffs' showing is also insufficient to compel a search of

those files under the National Security Act, which was intended to "relieve the CIA of an undue burden of searching and reviewing operational files." H.R. Rep. No. 98-726 at 35 (1984).

CONCLUSION

For the foregoing reasons, the Court should grant Defendant's motion for reconsideration, remove the requirement for the CIA to search its operational files, and issue summary judgment in favor of the CIA.

Dated: September 20, 2019

Respectfully submitted,

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