

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' CROSS-MOTION FOR SUMMARY JUDGMENT,
AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW plaintiff Accuracy in Media, Inc. ("AIM"), under Rule 56 of the Federal Rules of Civil Procedure, and respectfully move this Court for entry of Summary Judgment in its favor, and opposes defendant CIA's motion for summary judgment. Counsel for plaintiffs Roger Hall and Studies Solutions Results, Inc., will be submitting their dispositive pleadings separately, if given leave to do so late.

In support of this relief, plaintiff submits its attached *Memorandum of Points and Authorities*, together with Plaintiff's *Statement of Facts*, and its *Response to Defendant's Statement of Facts*.

Date: January 25, 2022.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF ACCURACY IN MEDIA'S OPPOSITION TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT, AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Legal Standard

Required Description of Search. The affidavits or declarations submitted to meet the CIA's burden must "explain in reasonable detail the scope and method of the agency's search." *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 91 (D. D.C. 2009) (citing *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 63 (D. D.C. 2002)); see also *Morley v. CIA*, 508 F. 3d 1108, 1121 (D.C. Cir. 2007) (holding that the CIA's description of a search was inadequate where the declaration "provide[d] no information about the search strategies of the components charged with responding to [plaintiff]'s FOIA request" and did not "provide any indication of what each directorate's search specifically yielded"); *Steinberg*, 23 F. 3d at 551-52 (finding a "serious doubt" as to whether an agency's search was reasonable when the accompanying affidavit "fails to describe what records were searched, by whom, and through what processes").

At the summary judgment stage, the agency bears the burden of showing that it complied with FOIA and it may meet this burden "by providing a reasonably detailed

affidavit, setting forth the search terms and the type of search performed," and "averring that all files likely to contain responsive materials... were searched." *Iturralde v.*

Comptroller of Currency, 315 F.3d 311, 313-14 (D.C. Cir. 2003). *See, e.g., Hall v. C.I.A.*, 668 F.Supp.2d 172, 179 (D. D.C. 2009):

The DiMaio Declaration includes no information regarding how the search used to locate the records produced in September 2007 occurred. DiMaio Aff. ¶ 6. The Court therefore denies the CIA's request for summary judgment as to the adequacy of its search for additional item 3 records. The CIA must provide a supplemental declaration describing its search method, including search terms, databases searched, and other relevant information that will allow the Court to evaluate whether the Agency's search was adequate.

Indications of Overlooked Materials. If a review of the record created by these affidavits "raises substantial doubt," as to a search's adequacy, "particularly in view of 'well defined requests and positive indications of overlooked materials,'" summary judgment would not be appropriate. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Founding Church of Scientology v. Nat'l. Sec. Agency*, 610 F.2d 824, 837 (D.C. Cir. 1979).

Argument

Absence of Information Regarding Search. In support of its Summary Judgment Motion, ECF No. 376 (*Motion*), the CIA provided the Declaration of Vanna Blaine, ECF No. 376-3 (*Blaine Decl.*). "The purpose of this declaration," writes the CIA, "is to explain and justify, to the greatest extent possible on the public record, the CIA's search of its operational records." *Blaine Decl.* ¶ 5.

The CIA's explanation, and justification, is that it "conducted thorough and diligent searches of relevant systems of operational records" (*id.* ¶ 10), it used eight search terms, ("POWs," "prisoners of war," "MIA," "missing in action," "Vietnam," "task force," "House

Special POW," and "image") (*id.* ¶ 12), the search "generated a few records," (*id.* ¶ 13), none of which were responsive. *Id.* ¶ 14.

That is the sum total of the CIA's description of its search.

What are the relevant record systems? How many are there? What are the names of those systems? The systems are repositories for what components or offices? Did CIA search the records of the National Clandestine Service, or the Directorate for Science and Technology, or the Office of Personnel Security, or the Office of Congressional Affairs, or the National Archives?

Were the searches electronic, or hard copies, or both? Do the systems have indices, or sub-indices? If so, how many indices were searched? Did any index refer to a potentially relevant series? How many hours were devoted to the search?

Positive Indications of Overlooked Materials. Notwithstanding the fundamental question being not "whether there might exist any other documents responsive to the request, but rather whether the search for those documents was adequate," *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) the absence of identification and production of responsive records is so wide-ranging as to be highly probative of the inadequacy of the government's search.

Plaintiffs' affidavits contain numerous examples of operations, events and activities that surely generated relevant records that have not been provided or otherwise identified. The paucity of the CIA's production, compared to the records clearly in its possession, is uncontroverted. Plaintiffs have pointed to a number of specific documents which are

reasonably thought to be responsive records—but which remain unidentified.¹

Defendant's Declaration is suspect on its face. Plaintiffs are hard-pressed to imagine that the CIA searched all repositories of all its operational records using the search term, "Vietnam," and the search generated only "a few records" *Blaine Decl.* ¶ 13.

Moreover, such a search should have contained the search term, "Laos."

Laos. Although the CIA was joined by the DOD in tracking POWs in Southeast Asia—both before and after Operation Homecoming—the CIA played a major, if not the dominant, role in those efforts. "Asked who was the dominant collector of information in Laos, the CIA or the Department of Defense (DOD), [Major General Richard] Secord replied, 'CIA, clearly, because of the resources they had on the ground.' Asked who had the best information, the Defense Intelligence Agency or the CIA, Secord replied:

The CIA was in charge of the war [in Laos], not the military. The military helped out a little bit on the side, particularly through the provisions of air assets, but the military had very few people on the ground except for forward air controllers, which were very good, and some air attaches, whereas the

¹ See, e.g., *Plaintiffs' Statement of Material Facts*, ECF No. 258-5, Contents at 2-3:

Thousands of live sighting reports.	16-18
Policy of withholding records.	19-22
Criminal misconduct, cover-up.	23-26
Secret military signals and codes and messages sent from POWs.	27-31
Other satellite imagery and photographs	32-50
Offer to repatriate POWs for reward.	51-56
Rescue operations.	57-65
Military Assistance Command, Vietnam— Special Operations Group.	66-69
Nhom Marrott.	70-74
David Hrdlicka.	75-79
Other records not produced.	80-109
Other records of POWs in Laos.	110-114
Other records of specific operations and locations.	115-125
Lists of prison sites.	126-127
Additional records of POWs into the 1980s and 1990s.	128-153
POWs transferred to Russia, North Korea, China.	154-159

Central Intelligence Agency had several hundred people on the ground in Laos.

Hall Aff. ¶ 119, quoting Exhibit 8 at Bates 32.

"CIA station chiefs testified before the Senate Committee that the CIA had primary responsibility for interviewing all human sources of such intelligence, including refugees during this period. See Exhibit 26, October 1991 Select Committee Deposition COS, Vientiane (1970-1973) Bates 111-19." *Hall Aff.* ¶ 151.

"[A]ll live sighting reports that came into the [US] embassy [in Laos] went directly to the CIA Station Chief." *LeBoutillier Aff.* Docket 83-15 ¶ 12. "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." *Hall Aff.* ¶ 122.

"The government had over 1,400 first-hand live-sighting reports, and several thousand second hand reports, of Americans being held captive throughout Vietnam and Laos" (*Sanders Aff.* ¶ 13), and "investigators on the Senate Select Committee found literally thousands of live-sighting reports over the years from the end of the war into the 1990s." *Smith Aff.* ¶ 9. These accounts of live sighting occasioned an initial interview, and an interview report, accompanied, presumably, by hand-written notes. Of the several thousand raw initial interview reports, the CIA has produced exactly *zero*. It has produced a few hundred summaries—a far cry from the *thousands* available to the Senate Select Committee looking into the matter.

Search Terms. After being order to search the 1,711 names on the Primary Next-of-Kin list, the CIA produced records on only 11 of those names. But that was before defendant was ordered to search its operational records. So, the CIA should conduct that search of its operational records.

Moreover, the Agency is well aware that other search terms are appropriate. For example, it could search using the names of facilities known to house American POWs,² including Nhom Marrott—the subject of Lynn O'Shea's book, "Abandoned in Place,"³ or the code names of known operations of rescue reconnaissance,⁴ for which it has provided *no* responsive records. Nor has the CIA provided any records of POWs transferred to Russia, North Korea, or China.⁵

² See *Plaintiffs' Statement of Material Facts* ECF No. 258-5; Tran Phu prison in Haiphong, North Vietnam (¶¶ 29, 39, Dong Vai (Dong Mang) prison (*id.*), camp in Sam Neua Laos (¶¶ 50,103), or Tan Lap Prison, Vinh Phu Province, North Vietnam (¶ 92), facilities in the towns of Mahaxy, Pha Kateom, Laos (*id.* ¶ 114), or in Son Tay, Vietnam (*id.* ¶ 119).

³ *Id.* ¶ 71:

The Central Intelligence Agency (CIA) holds never released documents relating to American servicemen Prisoners of War and Missing in Action in Southeast Asia, and at least one camp believed to hold these servicemen after March 1973. During the period March 1979- June 1981, the CIA gathered intelligence, including human intelligence reporting, and imagery of a prison camp located in the Nhom Marrott District of Khammouane Province Laos. According to intelligence reports approximately 18- 30 American Prisoner of War were held at this camp from September 1980-May 1981 and perhaps beyond. Between January and May 1981 the CIA dispatched a least one reconnaissance team to the camp location to photograph the inmates and gather intelligence. The CIA continues to withhold information on the preparation for the mission, team progress reports, photographs taken at the camp and the debriefing of reconnaissance team members. *O'Shea Aff.* Docket 182-6 ¶¶ 1-2.

⁴ *E.g.*, code names Duck Soup (*id.* ¶ 57), Operation Thunderhead (*id.* ¶ 62), Operation Blackbeard, Oak, Nantucket, Vesuvius One, Sunstune Park, Gunboat, Bright Light, Project Alpha, Operation Pocket Change, Project Corona (*id.* ¶ 115).

⁵ See *e.g.*, *id.* ¶¶ 154-158:

After his May 19, 1967, shoot down and capture, James Kelly Patterson, "an expert in the use of his aircraft's state-of-the-art electronics system being used to defeat Vietnam's Russian-made missile defense system" was shipped

Additionally, plaintiffs' affidavits include proof that the Director of Operations maintained files "detailing our certain knowledge of the second tier prison system in Laos, and the numbers of American POWs being held there," and that these files may have

to a closed Russian military region dedicated to missile research and testing. *McDaniel Aff.* ¶ 12.

"Exhibit 99 is a CIA Report to the White House Situation Room regarding alleged location of live American POWs in Luang Prabang province Laos mid-1985, 1986, at Bates 303. It relates: 'There had been 12 American POWs at the site but in 1985 five of the Americans POWs were moved to the Soviet Union....' The CIA has not provided any... information regarding the POWs mentioned in this document." *Hall Aff.* ECF No. 260 ¶ 88.

"Exhibit 43, Bates 206, is a March 12, 1982, Foreign Intelligence Information Report from the CIA's Domestic Collection Division, claiming Soviet incarceration of U.S. Vietnam era POWs.... I have not received any records regarding this from the CIA." *Id.* ¶ 38.

"Exhibit 44 is a March 9, 1988 CIA Memorandum regarding "alleged Sightings of American POWs in North Korea from 1975 to 1982." It refers to three reports. One is of "two Americans [observed] in August 1986," and the other is regarding "about 10 military pilots captured in North Vietnam [that] were brought to North Korea." The third report concerns a sighting of 11 "Caucasians," in 1988. The CIA has produced no records regarding any POWs brought to Korea during the Vietnam War." *Id.* ¶ 99.

"Exhibit 38(h), at Bates 189, is a June 1992 Memo to Select Committee re 'President's Daily [CIA] Intel Briefings,' seeking copies of those briefings 'given to the President regarding the possibility of POWs being transferred to the East Bloc after Homecoming.' The author has 'a source who claims to have seen them.' The memo said the CIA had responded that they "are not available to anyone." The CIA has provided few President's Daily Intel Briefings. The CIA should produce all such briefings that address the POW issue. *Id.* ¶ 121.

thereafter been relocated to the "Executive Registry Files of CIA."⁶ But, as far as plaintiffs know, the Agency declined to search those records.

CONCLUSION

There is no genuine issue of material fact regarding defendant's failures to conduct, and describe, meaningful searches.

WHEREFORE, Plaintiff Accuracy in Media, Inc., respectfully asks that the Court enter Summary Judgment in its favor.

DATE: January 25, 2022.

⁶ *Plaintiffs' Statement of Material Fact* ¶¶ 163-65:

At a meeting in the White House in 1993, "George [Carver] proffered CIA documents he'd authored, as late as 1975, going to the Director himself, about Americans still held captive in Indochina in the hundreds. I [Toll] provided CIA documents going to the Director himself, in 1967 and 1969, detailing our certain knowledge of the second tier prison system in Laos, and the numbers of American POWs being held there at the time. Their exact coordinates were noted." *Toll Aff.* Docket 83-1 at p. 12.

At a meeting in the White House in 1993 Toll asked Carver "'all of those intelligence materials and product flowed directly to you in the Nixon White House, did they not?' and George said 'Yes,'" again. *Toll Aff.* Docket 83-1 at p. 12.

Regarding records referenced in the foregoing paragraph, "George [Carver] said, 'I sent them back to Langley for storage, through the DO,' meaning the Directorate for Operations in the CIA. 'That was the arrangement I had,' he continued, 'usually by courier.'" *Toll Aff.* Docket 83-1 at p. 18.

Carver stated that [i]f they moved them out of Operations, historically, they would probably be moved to the Director's files... to the Executive Registry Files of CIA..." *Toll Aff.* Docket 83-1 at p. 18.

Respectfully submitted,

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